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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

(Second session, 14 - 18 April 1986)

Summary report

prepared by the Unidroit Secretariat

Rome, April 1986

1. - Pursuant to the decision of the Unidroit Governing Council, taken at its 63<sup>rd</sup> session held in Rome from 2 to 4 May 1984, to set up a committee of governmental experts to finalise the text of the preliminary draft uniform rules on international financial leasing adopted by a Unidroit study group, a first session of governmental experts was held in Rome at the seat of the Institute from 15 to 19 April 1985. On that occasion Mr László Réczei (Hungary) was appointed chairman of the committee. A second session of this committee was held in Rome at the seat of the Institute from 14 to 18 April 1986. Mr Royston Goode (United Kingdom) was appointed deputy chairman of the committee and chairman of the drafting committee.

2. - The following Governments, international organisations and professional associations delegated representatives to attend the session:

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- 3 -

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3. - The committee was seized of the following materials:

- Preliminary draft uniform rules on international financial leasing, as adopted by the Unidroit Study Group for the preparation of uniform rules on the leasing contract and approved by the Unidroit Governing Council on 3 May 1984 in the course of its 63<sup>rd</sup> session (Study LIX - Doc. 17) (English and French);
- Committee of governmental experts for the preparation of a Convention on international financial leasing (first session, 15-19 April 1985): summary report, prepared by the Unidroit Secretariat (Study LIX - Doc. 24) (English and French);
- Preliminary draft uniform rules on international financial leasing adopted by the Unidroit Study Group for the preparation of uniform rules on the leasing contract as revised by the drafting committee of the Unidroit committee of governmental experts for the preparation of a Convention on international financial leasing following and in the light of the committee of governmental experts' first reading thereof: explanatory report, prepared by the Unidroit Secretariat (Study LIX - Doc. 25) (English and French);
- 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 (Study LIX - Doc. 26) (English and French);
- 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 (Study LIX - Doc. 27) (English and French);
- 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) (Study LIX - Doc. 28) (English, French and German);
- 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 (Study LIX - Doc. 29) (English and French);

- Observations by the Government of Sweden on the text of the preliminary draft uniform rules on international financial leasing as this emerged from the first session of governmental experts (Study LIX - Doc. 30) (English and French);
- Proposals of the delegation of the People's Republic of China to the second session of the committee of governmental experts (Study LIX - Doc. 31) (English and French);
- Proposals of the delegation of Korea to the second session of the committee of governmental experts (Study LIX - Doc. 32) (English and French). (1)

4. - Guided notably by the aforementioned materials, the committee proceeded to a second reading of the text adopted by the Study Group as revised at its first session. (2) The various proposals for the amendment of this text put forward in the course of this reading were referred to a drafting committee manned by one representative each from the delegations of Belgium, China, Finland, France, Hungary, the United Kingdom and the United States of America. The revised text proposed by the drafting committee was laid before the committee of governmental experts at its final meeting on the afternoon of 18 April 1986. Without embarking on a third reading, a task which the committee felt should rather be left to a third and probably final session, the committee nevertheless expressed some interim comments on the exercise performed by the drafting committee, in the light of the account of this exercise rendered by the chairman of that committee. These comments generally addressed those provisions of the uniform rules where the changes proposed by the drafting committee were not felt to have produced concordance between the English - and French - language versions of the text. They also concerned points where members of the committee either contested the basis of a given change in agreement reached by the committee during its second reading or felt that a particular proposal for amendment which had not met opposition during that second reading had been overlooked by the drafting committee. These comments were

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- (1) These proposals were delivered orally during the session as it proved impossible to circulate them in written form in time.
  - (2) Immediately prior to the second session of the committee a co-ordination meeting of the Council of Ministers of the European Communities was held on the morning of 14 April 1986 at the seat of Unidroit with a view to co-ordinating the approach on certain aspects of the Unidroit text of delegations of Community member States attending the second session of the committee. This co-ordination meeting was itself prepared by an information meeting on the co-ordination of banking legislation on financial leasing convened by the Commission of the European Communities in Brussels on 11 March 1986.

referred to a small drafting group made up of the chairman of the drafting committee and the representative of France which met in the immediate aftermath of the session. This group gave effect to these comments and the resultant text is set out below in the form of an appendix to this report.

5. - It should be noted that there was not in the event time during the second session for the committee to discuss the draft final provisions drawn up by the Unidroit Secretariat for the committee's attention. It was understood that this examination was being deferred until the committee's third session.

6. - Whilst it is not the intention of this report to give a detailed account of the changes introduced at the second session of the committee, a task which will be reserved for the report on the session requested of the Unidroit Secretariat by the committee, it might be useful to summarise hereunder the more important amendments made.

7. - First of all, it was decided to divide the body of the text into three parts, Articles 1 - 3 being grouped under the heading of Chapter I dealing with the scope of application of the proposed Convention, Articles 4 - 12, embodying the substantive rules of the future international instrument, under the heading of Chapter II provisionally entitled "Uniform rules" to distinguish it from the other provisions of the prospective Convention, and finally Chapter III, entitled "Other provisions", covering Articles 13 and 14, although these might ultimately rather find their place, on the model of the corresponding provisions of the 1983 Unidroit Convention on Agency in the International Sale of Goods (Articles 5 and 6 respectively), in a revamped Chapter I, restyled, on the model of the said earlier Unidroit Convention, "Sphere of application and general provisions". The main reason underlying this division of the text into chapters was to facilitate identification of those provisions of the prospective Convention which might be considered to be reasonably amenable to exclusion, derogation or variation by the parties, some members of the committee having expressed the view that the sphere of application provisions should not be amenable to such contracting out.

8. - In the preamble the main change proposed by the drafting committee was to replace the words "are ill-suited" in the third paragraph by the words "need to be adapted". This change was made on the basis of a proposal tabled during second reading which met no opposition. However, at the committee's final meeting concern was expressed lest the impact of this change would be in any way to lessen the intention of the authors of the draft that the financial leasing transaction addressed in the uniform rules should be accorded a sui generis treatment, not only as regards those matters expressly regulated

in the uniform rules but also as regards all those other aspects of such transactions not specifically addressed in the uniform rules. As it proved impossible at this final meeting to decide as between the reinstatement of the former language and the adoption of the proposed new language, it was agreed to forward both formulae, placed in square brackets, to the next session of the committee for decision.

9. - In Article 1 the main amendments introduced had the effect of making it clear, first, that it was with regard to the lessor's entering into the supply agreement rather than with regard to its entering into the leasing agreement that it was material to draw attention to the fact that it did this on the specifications of the lessee (Article 1 (1) (a)); secondly, that the uniform rules were designed to apply only where the supply agreement was concluded on terms approved by the lessee, with a view to ensuring the necessary connection between the supply agreement and the leasing agreement (Article 1 (1) (a)); thirdly, that the leasing agreement granted the lessee the right to use the equipment rather than the mere use thereof (Article 1 (1) (b)); fourthly, that the main characteristics of financial leasing listed in Article 1 (2) are not merely characteristics that such transactions "typically" possess (Article 1 (2)); fifthly, that in specifying the equipment and in selecting the supplier the lessee does not so much rely on its own skill and judgment - it may in fact be relying on the skill and judgment of third party experts or advisers - as it does not rely primarily on the skill and judgment of the lessor, the word "primarily" being designed to cover the case addressed in Article 7 (1) (b) where the lessor may have played some part in the choice of the supplier or the choice or specifications of the equipment (Article 1 (2) (a)); sixthly, that the supplier had to know that the equipment was to be held on lease, in view of the provision in Article 9 whereby the supplier's duties under the supply agreement were stated to be owed also to the lessee (Article 1 (2) (b)); and, lastly, that the rentals payable under the leasing agreement were fixed so as to take into account the amortisation of the whole or part, and not just a "substantial" part, of the cost of the equipment (Article 1 (2) (c)).

10. - The amendment to the wording of Article 3 was designed to make it clear that this rule also covered the case where the right to buy the equipment was not given to the lessee in the leasing agreement itself but was conferred by a subsequent agreement or was given to the lessee at the end of the term of the leasing agreement.

11. - The introductory clauses in both Articles 4 (1) and 4 (2) as drafted prior to the second session were struck out at this session as being superfluous in that the uniform rules would only apply once both the supply agreement and the leasing agreement had been made.

12. - Article 5 was radically amended as a result of the discussions during second reading. By virtue of Article 5 (1) the lessor's real rights in the equipment - reference to the lessor's real rights in the equipment being preferred to the previous reference to its title on the ground that the lessor would not always be owner of the equipment - are now stated to be valid against the lessee's trustee in bankruptcy and unsecured creditors, including creditors who have obtained a judicial attachment or execution. The reason why it was deemed necessary to introduce a reference to creditors having obtained a judicial attachment or execution arose from the fact that simply to make the lessor's rights valid against unsecured creditors would by itself achieve nothing in so far as the point at which an unsecured creditor seeks to overreach the lessor's rights is when it seeks to obtain the leased asset by some judicial process. One of the points of the redrafting of the provision now contained in Article 5 (2) was to make it clear that the requirement of compliance with rules of public notice cut both ways, that is to say that not merely did compliance with such rules make the lessor's rights in the equipment valid but it was also essential to comply with such rules, the lessor's rights in the equipment otherwise being invalidated. Under the previous text, whereas it was clear that the lessor's rights in the equipment would be valid where it had complied with any public notice rules governing the question of such validity under the law of the State of the lessee's principal place of business, there was some doubt as to what happened to those rights where such rules were not complied with. It was considered important to eliminate any room for an inference that this would fall to be decided by the applicable law, which typically would not be the law of the State of the lessee's principal place of business. The other point which the redrafting of Article 5 (2) was designed to clarify was that the public notice rules laid down by the law of the State of the lessee's principal place of business were relevant only in so far as they bore on the question of the validity or invalidity of the lessor's real rights in the equipment: under the corresponding provision of the previous draft the lessor could forfeit its rights in the equipment by failing to comply with a public notice requirement that did no more than lay down a criminal sanction for non-compliance.

13. - The new provision introduced in Article 5 (3) seeks to give satisfaction to those delegations that expressed concern lest Article 5 might be implied as creating a double registration requirement for those leased assets such as aircraft and ships that were already subject to registration under existing international instruments. This provision caused the drafting committee some difficulty and the fact that its proposal on this point was placed inside square brackets testifies to the drafting committee's feeling that it required further careful consideration by the committee, notably from the point of view of determining its effectiveness.

14. - The provision embodied in the text adopted by the Unidroit Study Group dealing with the question of leased equipment that has become a fixture to land was deleted by the drafting committee at the conclusion of first reading. Whilst it was agreed that it would be unwise to attempt to reinstate any substantive rule on this subject, it was nevertheless considered that it would be helpful to lay down a conflict of law rule indicating that the whole question of fixtures in relation to leased equipment, that is whether leased equipment has become a fixture and, if so, the question of the rights of the equipment lessor and the real estate lessor inter se in relation to the equipment, was referred to the lex rei sitae. This is the purpose of the new Article 6.

15. - The distinction hitherto made in Article 7 between the lessor's capacity as bailor and as owner of the equipment had been criticised for what was alleged to be its over-subtlety. The solution proposed at the second session was the substitution in Article 7 (1) (a) of the phrase "merely by acting in its capacity of lessor of the equipment" for the words "that would otherwise flow from its position as bailor of the equipment" that appeared in the corresponding provision of the previous text (Article 7 (1)). Article 7 (1) (b) restored the word "intervened" employed in the text adopted by the Study Group to refer to the lessor's involvement in the area reserved to the lessee's autonomy of choice under Article 1 (2) (a), in preference to the word "influenced" used in the text that had emerged from the first session of governmental experts. This word was felt to bring out more sharply the degree of the lessor's involvement in this choice required before the general immunity in contract and tort conferred on the lessor under Article 7 (1) (a) could be defeated.

16. - During second reading concern was voiced that there might be a potential conflict between Article 7 (3) of the text as it had emerged from the first session of governmental experts and Article 3 (2) of the 1985 E.E.C. Directive on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, whereby any person importing a product into a Community country with a view to leasing it was to be deemed a producer for the purposes of the Directive and was to be liable to the same extent as if it were a producer. So as to allay this fear and the fact that there might well be other capacities in which the lessor would be liable in contract and tort, the new Article 7 (1) (c) speaks of the lessor's eventual liability "in any other capacity, for example as owner" rather than its liability "in its capacity of owner of the equipment".

17. - The setting out of Article 7 (2) in alternative versions, the first of which is the text as it had emerged from the first session of governmental

experts, was designed to highlight the case, covered in Alternative II, where a third party might not necessarily immediately be able to establish that it had a superior title to that of the lessor but nevertheless caused a great deal of trouble for the lessee by claiming to have such a superior title.

18. - The deletion at the second session of the introductory words of Article 9 (1) as it emerged from the first session of governmental experts reflected the amendment to Article 1 (2) (b) already adverted to (cf. § 9 supra), namely the fact that the future Convention is only intended to apply where the supplier knows that the equipment is acquired by the lessor for the purpose of being let on lease. The amendments to Article 9 (2) introduced at the second session were to make it clear that nothing in Article 9 (1) entitled the lessee to intervene directly in the supplier's contractual relations with the lessor so as to change the terms of the supply agreement. It is accordingly provided under Article 9 (2) that not only does Article 9 not entitle the lessee to terminate the supply agreement but it also does not entitle the lessee to rescind that agreement or to vary it, this last addition being placed in square brackets since it had not been the subject of discussion during second reading.

19. - Article 10 (2) was amended so as to make it clear that following rejection of the equipment by the lessee the supplier has the right to make a fresh tender either of the same equipment, that is after the necessary repairs, or of other equipment in conformity with the supply agreement. One amendment introduced to Article 10 (3) was designed to reflect the idea that it would be unfair to allow a lessee who had enjoyed possession and use, however imperfect, of the equipment for some time prior to rejection to avoid having to account to the lessor at all for such use. It is therefore now provided that the lessee's right to recover rentals and other sums paid in advance shall be subject to the lessor's right to recover from the lessee a reasonable sum for such beneficial use, if any, as it may have derived from the equipment.

20. - The idea behind another more far-reaching proposal for the amendment of Article 10 (3), designed to make it possible, where the equipment is not delivered in accordance with Article 10 (1) or Article 10 (2), for the lessee to withhold or recover any rentals and other sums payable or paid without necessarily having to terminate the leasing agreement at that stage, was that the lessee should not, by being forced to terminate the leasing agreement in order to obtain the benefit of the right to withhold or recover rentals and other sums payable or paid, be discouraged from allowing the lessor an opportunity to repair non-conforming equipment. This proposal did not however achieve general acceptance in the committee of governmental experts, some delegates considering that it smacked more of the traditional hire contract than the sui generis transaction announced in the preamble to the uniform rules,



and it was accordingly agreed to forward it as the basis of an alternative version (Alternative II) to the text of paragraph 3 as, subject to the amendment referred to in § 19 supra, it had emerged from the first session of governmental experts (Alternative I).

21. - Article 11 was restructured at the second session, although with only minor amendments of a substantive nature. The first aspect of this restructuring was to separate the lessor's right to recover unpaid rentals from its right to terminate the leasing agreement and rights associated with termination. Article 11 therefore starts out, in paragraph 1, by stating the lessor's right to unpaid rentals in the event of default. This right is conferred upon the lessor regardless of whether or not it has at this stage terminated the leasing agreement. The lessor's right of termination and rights associated with termination are now dealt with in paragraph 2. This paragraph incorporates some substantive amendments. The first of these, in line with a proposal made during second reading, was to limit the lessor's right to terminate to cases where the lessee's default was substantial. This is of course in no way intended to interfere with the parties' freedom to provide otherwise: it is purely a statement of what the lessor's remedies would be in the absence of provision to the contrary in the leasing agreement. Secondly, the term "recover possession" was substituted in the new Article 11 (2) (a) for the word "repossess" employed in the corresponding provision of the previous text (Article 12 (1) (b)), since the lessor will normally never previously have actually had possession of the equipment. Thirdly, the lessor's duty to mitigate its loss to which its right to compensation under the new Article 11 (2) (b) is subject has been reformulated in the English text <sup>(3)</sup> in the negative, so that instead of stating, as in the previous text, that the lessor is entitled to recover compensation "to the extent that /it/ has taken all reasonable steps to mitigate its loss" this clause now provides that it is entitled to recover such compensation "except in so far as the lessor has failed to take all ...." This negative formulation was considered to render more accurately the idea behind this provision. It was furthermore agreed on second reading to reinstate the provision now embodied in Article 11 (3), which had been placed in square brackets at the conclusion of the first session of governmental experts, with the replacement of the word "unreasonable" by the word "disproportionate" with reference to the compensation provided for in the leasing agreement.

22. - The right given the lessor under Article 12 (1) to assign its rights in the equipment or under the leasing agreement was balanced, as a re-

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(3) The French-speaking members of the drafting committee took the view that a corresponding change in the French text was not necessary.

sult of a proposal made during second reading, by recognition of the lessee's right to assign its right to use the equipment or any other rights it may possess under the leasing agreement, although the exercising of this right was made subject to the consent of the lessor and was stated to be without prejudice to the rights of third parties. A minor amendment made to the wording of Article 12 (1), namely the addition of the words "or otherwise deal with" after the word "transfer" in the first sentence of this provision, sought to reflect what was seen as the inadequacy of the term "transfer" to cover the case of the civil law "hypothec".

23. - An attempt was made during second reading to examine which provisions of the future Convention should be amenable to exclusion, derogation or variation by the parties. Some felt that the entire text should be amenable to exclusion, given the commercial nature of all the parties to the type of transaction addressed in the uniform rules and the obvious desirability of recognising the scope for likely further evolution of the leasing mechanism. Others felt that the application of some provisions needed to be guaranteed, notably those concerning the sphere of application of the future Convention. Article 13(1), placed inside square brackets to show that it addresses a matter that received only a general airing and regarding which no decision was taken on second reading and to which the committee would therefore have to return at its next session, provides for the possibility of the parties being left total freedom to exclude the terms of the uniform rules. It provides for such total exclusion by the terms of either one or other of the agreements making up the tripartite transaction addressed in the uniform rules, the theory being that it could produce strange results if one of these agreements were governed by the prospective Convention and the other not. Article 13(2), which allows for the possibility of certain at least of the provisions of the uniform rules being made mandatory, sets forth those provisions which the drafting committee proposed should be non-mandatory. The effect of this proposal would be to make non-mandatory all but the provisions relating to the sphere of application of the uniform rules (Articles 1 - 3), the provisions relating to the validity of the lessor's real rights in the equipment against the lessee's trustee in bankruptcy and unsecured creditors (Article 5) and those relating to leased equipment that has become a fixture (Article 6), in so far as these involve third party rights, the provisions of Article 11 (3) dealing with the enforceability of minimum payment clauses and Article 11 (4) precluding the lessor from both terminating the leasing agreement and seeking to take advantage of an acceleration clause, and, finally, the provisions of Article 14 dealing with the interpretation of the future Convention. The mixed reaction that greeted these proposals at the final meeting of the committee of governmental experts, however, showed that they would require much further careful consideration at the next session of the committee.

24. - The addition of the phrase "its object and purpose as set forth in the Preamble, to" in Article 14 proposed by the drafting committee at the second session was designed to give effect to a proposal made on second reading. It was placed inside square brackets to indicate that it would have to be decided upon at the next session of the committee, not having aroused any comment at the second session.

25. - The observer representing the Latin American Leasing Federation (Felalease) made a statement at the closing meeting of the second session in which he proposed that thought be given to the possibility of adding some provisions to the prospective Convention that, in his opinion, would enhance its usefulness for developing countries. First, the preamble to the uniform rules proclaimed their intention of achieving a balance between the interests of lessor, lessee and supplier. However, practical experience showed that there was another party that played a fundamental role in the type of financial leasing transaction addressed in the uniform rules. This was the investor, who was in many instances not the same party as the lessor. He suggested that some consideration might be given in the uniform rules to the type of protection that such an investor might legitimately expect as regards its rights. Secondly, he recalled the practical significance of lease-back transactions and, while recognising the difficulty that inevitably arose from attempting to fit a bipartite transaction into a scheme which addressed what was essentially a tripartite transaction and being aware that the Study Group had already considered this problem, he nevertheless recommended that an attempt be made to draft a provision that would extend the application of the uniform rules to this most important species of financial leasing. Thirdly, he noted that there were certain factors that practical experience had shown were essential to the creation of a market in which suppliers of funds could compete in providing investment through leasing to developing countries. One of these factors was the right to repossess the equipment leased. Whilst aware that it might be difficult to say more on this issue than was already stated in the prospective Convention, he wondered whether it might not be possible to envisage the diplomatic Conference of adoption issuing a set of recommendations, which the Contracting Parties could adopt or adapt in their own internal legal systems, dealing with procedural aspects, bankruptcy aspects, reexportation problems consequential upon repossession and tax problems. Again with a view to enhancing the usefulness of the future international instrument from the standpoint of developing countries, he thought it would be very helpful if representatives of the export insurance programmes of the various Governments could, within the context of the uniform rules, and perhaps in a recommendation to accompany the future Convention, seek to offer a solution to the legal problems arising out of such export insurance policies which at present loomed so large in the success or otherwise of the mounting

of cross-border financial leases.

26. - It was agreed that these were matters on which the opinion of Governments would be welcomed in advance of the next session of the committee. This session would, it was anticipated, be held in Spring 1987 in a period either immediately before or after the third session of the Unidroit committee of governmental experts for the preparation of a draft Convention on certain aspects of international factoring. It was, moreover, anticipated that such a third session would be the final session of the committee. It was thereafter the intention to organise a diplomatic Conference for the adoption of the end-product of that committee's work. The Unidroit Governing Council had, at its 65<sup>th</sup> session held in Rome from 9 to 11 April 1986, recommended that such a Conference be convened by the spring or early summer of 1988. Participants at the second session were urged, on an informal basis, to submit written comments to the Unidroit Secretariat on the new text of the preliminary draft as it had emerged from the second session with a view to such comments being incorporated in the full report on the session which would be sent out in due course. Official governmental comments with a view to the next session of the committee would be solicited at the time of despatch of this full report.

## APPENDIX

Preliminary draft uniform rules on international financial leasing as revised by the drafting committee at the conclusion of the committee of governmental experts' second reading

### PREAMBLE

THE STATES PARTIES TO THIS CONVENTION,

RECOGNIZING the importance of removing certain legal impediments to the international financial leasing of equipment, 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/ /need to be adapted/ 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 and commercial law aspects of international financial leasing,

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

### CHAPTER I - SCOPE OF APPLICATION

#### Article 1

1. - This Convention governs a financial leasing transaction in which one party (the lessor)

(a) enters into an agreement (the supply agreement), on the specifications of, and on terms approved by, another party (the lessee), under which the lessor acquires plant, capital goods or other equipment (the equipment) from a third party (the supplier) and

(b) enters into an agreement (the leasing agreement) granting to the lessee the right to use 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 possesses the following main characteristics:

(a) in specifying the equipment and in selecting the supplier the lessee does not rely primarily on the skill and judgment of the lessor;

(b) the equipment is acquired by the lessor in connection with a leasing agreement which, to the knowledge of the supplier, 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 part of the cost of the equipment.

#### Article 2

1. - This Convention applies when the lessor and the lessee have their places of business in different States and when:

(a) those States and the State in which the supplier has its place of business are Contracting States; or

(b) both the supply agreement and the leasing agreement are governed by the law of a Contracting State.

2. - For the purposes of this article, 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 that agreement.

#### Article 3

This Convention applies whether or not the lessee has or acquires the right to buy the equipment or to hold it on lease for a further period.

### CHAPTER II - UNIFORM RULES

#### Article 4

1. - The supply agreement may not be varied without the consent of the lessee.

2. - The specifications given by the lessee to the supplier may not be varied without the consent of the lessor.

Article 5

1. - The lessor's real rights in the equipment shall be valid against the lessee's trustee in bankruptcy and creditors, including creditors who have obtained an attachment or execution.

2. - Where by the law of the State of the lessee's principal place of business the lessor's real rights in the equipment are valid against the parties referred to in paragraph 1 only on compliance with rules as to public notice, the lessor's real rights shall be valid against these parties only where they are valid according to such rules.

3. - The preceding paragraphs shall not apply in relation to equipment such as ships and aircraft subject to registration pursuant to an international Convention./

4. - This article shall not affect the rights of any creditor of the lessee having a lien on or a security interest in the equipment.

Article 6

Any question whether or not the equipment has become a fixture to or incorporated in land, and if so the effect on the rights of the lessor and the owner of the land inter se shall be determined by the law of the State where the land is situated.

Article 7

1. - (a) Except as otherwise provided by this Convention, the lessor does not owe the lessee or third parties any duty in contract or tort merely by acting in its capacity of lessor of the equipment.

(b) The preceding sub-paragraph shall not apply to the extent that the lessor has intervened in the choice of the supplier or the choice or specifications of the equipment.

(c) The above provisions shall not affect any liability of the lessor in any other capacity, for example as owner.

/Alternative I/

2. - The lessor warrants that the lessee's quiet possession will not be disturbed by the lawful act of a person having a superior title or right not derived from any act or omission of the lessee.

/Alternative II

2. - The lessor warrants that the lessee's quiet possession will not be disturbed by the lawful act of a person having a claim to a superior title or right where such claim is not derived from any act or omission of the lessee./

Article 8

1. - The lessee shall take proper care of the equipment, use it in a manner consistent with that of a normal user and keep it in the condition in which it was delivered, subject to fair wear and tear.

2. - When the leasing agreement comes to an end the lessee, unless exercising its right to buy the equipment or to hold the equipment on lease for a further period, shall return the equipment to the lessor in the condition specified in the preceding paragraph.

Article 9

1. - The duties of the supplier under the supply agreement shall also be owed to the lessee as if it were a 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 [vary,] terminate or rescind the supply agreement.

Article 10

1. - The lessee shall have the right, as against the lessor, to reject the equipment:

(a) if the equipment fails to conform to the terms of the supply agreement; or



(b) if delivery is not tendered within a reasonable time after the delivery date stipulated in the leasing agreement or, if none, that stipulated in the supply agreement or, in the absence of any stipulation as to date, within a reasonable time after the making of the leasing agreement.

2. - The right to reject non-conforming equipment shall be exercised by notice to be given to the lessor within a reasonable time after the lessee has discovered the non-conformity or ought to have discovered it. Rejection for non-conformity of the equipment under the supply agreement shall not preclude a fresh tender of the same equipment or a tender of other equipment in conformity with that agreement if made within a reasonable time after notice to reject.

/Alternative I/

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 and to recover any rentals and other sums paid in advance. Nevertheless, the lessee shall be obliged to pay the lessor a reasonable sum for the benefit the lessee has derived from the equipment.

/Alternative II

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 exercise one or more of the following rights:

- (a) to withhold or recover any rentals and other sums payable or paid;
- (b) to terminate the leasing agreement.

Nevertheless, the lessee shall be obliged to pay the lessor a reasonable sum for the benefit the lessee has derived from the equipment.<sup>7</sup>

4. - The lessee shall have no other claim against the lessor **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.

Article 11

1. - In the event of default by the lessee, the lessor may recover accrued unpaid rentals, together with interest.

2. - Where the lessee's default is substantial, then subject to paragraph 4 of this article the lessor may also terminate the leasing agreement and after such termination may:

(a) recover possession of the equipment; and

(b) recover such compensation as will place the lessor in the position in which it would have been had the lessee performed the leasing agreement in accordance with its terms, except in so far as the lessor has failed to take all reasonable steps to mitigate its loss.

3. - The leasing agreement may provide for the manner in which the compensation referred to in paragraph 2 (b) of this article is to be computed and such provision shall be enforceable between the parties unless such compensation is disproportionate to the compensation provided for under paragraph 2 (b).

4. - Where the lessor has terminated the leasing agreement it shall not be entitled to enforce a term of the leasing agreement accelerating payment of the rentals.

5. - 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.

#### Article 12

1. - The lessor may transfer or otherwise deal with all or any of its rights in the equipment or under the leasing agreement. Such a transfer may not relieve the lessor of any of its duties under the leasing agreement or alter either the nature of the leasing agreement or its legal treatment as provided in this Convention.

2. - The lessee may transfer the right to the use of the equipment or any other rights under the leasing agreement, subject to the consent of the lessor and to the rights of third parties.

### CHAPTER III - OTHER PROVISIONS

#### Article 13

1. - This Convention shall not apply where it is excluded either by the terms of the supply agreement or by the terms of the leasing agreement.

2. - / The parties may, in their relations with each other, derogate from or vary the effect of the provisions of Articles 4, 7, 8, 9, 10, 11 (1), (2) and (5) and 12.

Article 14

1. - In the interpretation of this Convention, regard is to be had to /its object and purpose as set forth in the Preamble, to/ its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

2. - Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based and in conformity with the law applicable by virtue of the rules of private international law.