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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
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COMMITTEE OF GOVERNMENTAL EXPERTS FOR THE PREPARATION OF A DRAFT
CONVENTION ON INTERNATIONAL FINANCIAL LEASING

Comments and proposals by the Colombian Leasing Federation
(Fedeleasing) on the text of the preliminary draft uniform
rules on international financial leasing as this emerged
from the second session of governmental experts

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CORRIGENDUM

At page 4, § 18, line 4: for the words "sanctioned hardly at all" read "severely sanctioned".

1. - The Colombian Leasing Federation proposes the following amendments to the text of the preliminary draft uniform rules on international financial leasing as this emerged from the second session of governmental experts:

Re Article 1 (1)(a)

2. - Delete the phrase: "... and on terms approved by ..." contained in the definition, to make it clear that the lessee must approve and decide only the specifications, but not the terms, because the lessor must be free to negotiate the terms of the supply agreement with the supplier, i.e. especially the form of payment. The lessee should not intervene in such aspects which will not in most cases fall within his competence.

Re Article 1 (2)(c)

3. - This provision should be amended as follows:

"The rentals payable under the leasing agreement are fixed so as to take into account the depreciation, risk of obsolescence and other factors related to the cost of the equipment, wholly or partially".

4. - Our concern in this respect arises from the fact that in Civil law countries, and even in Anglo-Saxon legal systems, the present provision can lead to the judges or other authorities called upon to apply the rules confusing the legal nature of the leasing contract with conditional sale or instalment sale. Amortisation is a financial concept related to the money involved in the transaction. In comparison, depreciation and obsolescence are physical and economic concepts closely related to the equipment and better able to bring out the sui generis nature of financial leasing.

Re a proposed new Article 1 (3)

5. - We would propose incorporating the text of Article 3 in the definition, because in financial leasing the purchase option becomes an essential element of the transaction.

Re Article 4 (1)

6. - Article 4 (1) should be redrafted to read as follows:

"The goods provided under the supply agreement may not be varied without the consent of the lessee".

7. - We think that the supply agreement should be susceptible to variation without the consent of the lessee in all those aspects concerning the lessor's (purchaser's) duties vis-à-vis the supplier, specially the form of payment. The lessee should not be able to interfere in the supply agreement in any aspect not directly related to the leasing contract.

Re Article 5

8. - We would suggest a complete redrafting of Article 5, which would as a result read as follows:

"1. - In the case of the lessee's bankruptcy, liquidation or reorganisation, its creditors may not claim against those assets leased by it, because those assets are not part of the lessee's assets, being legally owned by the lessor or the person on whose behalf the lessor is acting.

2. - The lessee shall disclose in the footnotes of its balance sheet the leased assets used in its business or professional activities.

3. - If the lessee fails to make the above-mentioned disclosures, it shall be liable to its creditors for fraud.

4. - The leased assets may not be subjected to any right, chattel mortgage, mortgage or similar limitation established by the lessee, because the latter does not have any right to mortgage, affect or limit someone else's ownership".

9. - We realise that the above text might not be readily understood by those countries who have adopted FAS 12, SSAP 21 or IAS 17 accounting provisions, but we are confident of its general acceptance because it contains principles adopted by Leaseurope, Asialease and Felalease, and also because at the last World Leasing Council held in Tokyo in July 1986, the AAEL and the ELA accepted as possible the extension of the provisions of the "Declaration of Seville" by common law or statute law.

Re Article 6

10. - We would suggest the following new text for Article 6:

"1. - All the leased assets or the equipment subject to a leasing

transaction which can be incorporated in or affixed to real estate or land belonging either to the lessee or third parties, or which owing to the nature of the lessee's business, can, according to the law of the State where the land is located, be considered as real estate by destination, shall not become a fixture of the land or the real estate by any means.

2. - The lessee accepts and recognizes that the equipment subject to a leasing agreement does not belong to it in any way, and that only by means of an explicit and spontaneous act by the lessor may it become owner of the equipment.
3. - If, for any legal and justifiable reason, the lessor does not transfer the ownership of the equipment to the lessee at the end of the leasing agreement, and the lessor exercises its sovereign right to remove the equipment from the lessee's land or real estate, the lessee shall be solely liable for any expenditure incurred in such removal".

11. - All the rules of the Code Napoléon, currently in force in a certain number of member States of Unidroit, can accommodate the above-mentioned exception to the rule which at present is obsolete, even under French law.

Re Article 7 (2)

12. - Of the alternative versions of Article 7 (2) we favour Alternative II and would propose adding a new Article 7 (3) to read as follows:

- "3. - In the above-mentioned case, the lessor shall ensure the lessee's quiet possession by using the legal remedies provided by the law of the State of the lessee".

Re Article 8 (1)

13. - We would suggest that Article 8 (1) should be amended as follows (our proposed amendment being underscored):

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

14. - We think, for example, that the normal use of a car will vary depending on whether it is leased to a family or to a factory, or to a mine or to a movie studio. Thus the fair use of a leased asset must in some way be measured in terms of the activity for which it is leased.

Re Article 10 (1)(a)

15. - We would suggest that Article 10 (1)(a) should be amended as follows:

"1. - The lessee shall have the right, as against the lessor, to reject the equipment: (a) If the equipment fails to conform to the specifications provided by the lessee for the supply agreement".

16. - There are some aspects of the remainder of the provisions of this article that we judge unfair to the lessor and contrary to the general principle "nemo ex altera culpa praegravari debet".

Re Article 11 (1)

17. - We would suggest that the concept of interest should be replaced by that of a penalty agreed between the parties.

18. - The reason is that some countries enforce legal ceilings on interest, which are generally even lower than the cost of funds to the lessor. In some countries to charge interest over the legal limit can even be a felony and is sanctioned hardly at all. In our country we do not charge the lessee interest. We charge rentals and penalties in the event of default.

Re Article 11 (3) and (4)

19. - We object to Article 11 (3) in so far as it is not possible to establish the manner in which the lessor's compensation is to be computed a priori on the basis of what would have happened had the leasing agreement been duly performed, owing to the fact that the manner and the degree of the lessee's default will vary, and we also object to the rigid formula embodied in Article 11 (4) prohibiting use of the acceleration clause which in many cases will represent the lessor's only remedy in the event of the lessee's default; for example, where the lessee decides to return the equipment to the lessor who finds that the equipment has suffered a huge loss in value, then the lessor should be able to accelerate payment of the rentals due.

20. - The acceleration clause serves an important purpose, that of stimulating a responsible attitude in the lessee towards its duties under the leasing agreement.

Re a proposed new Article 13

21. - We would propose the insertion of a new Article 13, which would read as follows:

- "1. - If unforeseen macroeconomic events, such as a drastic increase in interest rates or some governmental provision, alter the economic and financial burdens of any party under the leasing agreement in such a manner that the affected party stands to make significant losses, this party may call for the relevant provisions of the agreement to be reviewed with a view to their adjustment.
2. - Any decision regarding the assessment of the economic events relied upon by the party affected for the purposes of the application of this article and regarding the adjustment to be made shall be made by three experts, whose decision shall be final.
3. - The three experts shall be appointed as follows:
If the parties belong to two different continents, one expert shall be appointed by the board of directors of the continental association or federation of either party and the third shall be appointed by the International Chamber of Commerce.
If the parties belong to the same continent, the board of directors of the relevant continental association or federation shall appoint two experts and the third shall be appointed by the International Chamber of Commerce.
4. - For the purposes of this article, the following shall be understood to be continental associations or federations:
 - Asialease
 - American Association of Equipment Lessors (AAEL)
 - African Association or Federation of Equipment Lessors (if established)
 - Australian Leasing Association
 - Leaseurope
 - Felalease."

22. - This is the "rebus sic stantibus" clause proposed by Dr Rafael Castillo Triana, the Colombian Leasing Federation's delegate to the Legal Council of the Latin American Leasing Federation (Felalease), at the Fourth World Leasing Convention held in Tokyo in July 1986 with a view to guaranteeing that flow of lease finance to developing countries necessary to achieve the economic goals of these countries, notwithstanding supervening serious events or drastic measures (such as those recently taken by Brazil) which might well otherwise deter lessors in industrialized countries from investing in developing countries.