

UNIDROIT 1987
Study LIX - Doc. 39
(Original: English)

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

Comments by the Federation of Latin American Leasing Companies (Felalease) on the text of the preliminary draft uniform rules on international financial leasing as this emerged from the second session of governmental experts

São Paulo, March 1987

The following comments on the "Preliminary draft of the Uniform Rules on International Financial Leasing" as revised by the drafting committee at the conclusion of the committee of governmental experts' second reading reflect the views and positions of the Federation of Latin American Leasing Companies (Felalease). Prior to discussing the specifics of the Uniform Rules, however, Felalease would like to offer a few general comments on the concept of cross-border leasing and its importance for developing countries.

The current debt crises most developing countries face has made acquisition of modern equipment extremely difficult. Leasing offers the best known structure for financing acquisition of equipment by companies located in developing countries. This is due to the unique protection leasing can offer to investors and lessors without infringing on the rights of lessees. Felalease believes that the Uniform Rules should strive to expressly protect and clarify the relative rights and obligations of the lessor, lessee, and investor (the party ultimately financing the lessor, which is not always the lessor itself). The investor's interest should be protected by allowing it to receive security interests over the leased assets and ensuring that, in the event of a default by lessee to lessor under the lease, and lessor to investor under the financing arrangements, the investor can expeditiously recover and sell or release the asset to minimize its losses. The lessor's interest in the leased equipment is similar to that of the investor. Such interest should be clearly recognized as superior to all creditors of the lessee, as well as bankruptcy trustees of the lessee. The lessor's interest in the leased assets should be inferior only to the investor's interest. Felalease would also like to see some attention to barriers that often indirectly affect lessors' rights in leased assets such as export licenses to transport goods or equipment to destinations beyond the borders of the country to which an asset is initially leased. Other elements that can adversely affect the climate for transnational leasing are judicial procedures (which should allow expeditious procedures for repossession of leased assets in the event of a default), accounting practices (which should not confuse the fact that title to leased assets is vested solely in the lessor), and tax laws (which should not favor other methods of financing over leasing). The lessee's rights to quiet enjoyment of leased assets should be guaranteed, even

in cases in which the lessor may have defaulted in its obligations to the investor, provided the lessee has not defaulted in its obligations. By covering these aspects, Felalease believes that leasing will become the most widely used financing structure for the acquisition of modern equipment by third world countries because it will offer a legal vehicle that sufficiently protects the relative interests of all parties involved.

It is also the opinion of Felalease that the Uniform Rules are an important first step toward unification of leasing laws for transnational leasing. The next step, to guarantee effective implementation of the concepts of the Uniform Rules, will have to be action by the various governments involved to adapt their internal legal systems in order to eliminate the barriers not contemplated in the text of the Uniform Rules.

Felalease's specific comments follow:

1. The suggestion of Felalease for the third preamble is:

"CONSCIOUS of the fact that the rules of law governing the traditional contract of hire are inadequate to reflect the distinctive triangular relationships created by financial leasing transactions."

2. Article 1 (2) excludes two important categories of international financial leasing transactions:

- a) sale-leaseback operations; and

- b) financial leases executed by lessors that order large quantities of capital equipment and lease them on a retail basis. It is Felalease's view that the truly distinctive characteristics of a financial lease lie in the contractual distribution of risks between lessor and lessee, and not in the collateral aspect of selecting and specifying the equipment.

Therefore Felalease suggests that a paragraph be included under Article 13 stating that:

"The rules established by this Convention may be applied, as applicable, to sale-leaseback and other leasing operations not expressly covered by article 2.1 of this Convention if the parties expressly indicate their intent to be so governed in their agreement."

3. Article 5.3 could be drafted as follows:

"Registration requirements set out in International Conventions relating to equipment such as ships and aircraft shall prevail when in conflict with the rules of the preceding paragraphs".

4. Article 5.4 seems to contradict Article 5.1 and would, in Felalease's view, completely undermine the usefulness of the Convention. Felalease would suggest the following alternative to Article 5.4, which is a first step toward recognizing the importance of protecting the financing party (investor) in an international leasing operation:

"This Article shall not affect the rights of any financing party or supplier of funds to the lease operation holding a lien or a security interest in the equipment."

5. Felalease suggests that the language of Article 5.1 be broadened to include liquidation and other forms of debt restructuring.

6. Article 7, Section 1 (c) should be made more explicit by adding the following:

"provided such liability stems from another International Convention binding on the contracting parties."

7. Article 7.1 (b) poses the following problem:

A lessor that repossesses a given asset and subsequently enters into another financial lease transaction would be unfairly burdened because the exception provided by article 7.1 (b) could impose a liability on such a lessor that would not otherwise exist. As stated above, Felalease considers that the financial characteristic of a leasing operation is determined by the contents of the contract itself, and not because the lessor has had a role in selecting the leased asset. Therefore, Felalease suggests deletion of Article 7.1 (b).

8. Article 7.2

Felalease suggests adding to the end of Alternative II the following:

"Should such a disturbance occur, lessor will assist lessee by using available legal remedies."

9. Article 10 discourages lessors from advancing any monies before equipment is delivered and accepted. Felalease's position is that lessors should be indemnified for all losses suffered because of the early termination of agreements since the question of conformity and timely delivery is a matter to be resolved between equipment suppliers and lessees, and not the lessor or financing party. Felalease tends to believe that the provision (in Alternatives I and II to Section 10.3), obliging the lessee to pay to the lessor a reasonable sum for the benefit the lessee has received from the equipment is ineffective, especially if the lessor has already advanced the payment of all or a substantial part of the equipment.
10. Felalease suggests that an article be included that would allow the parties to adjust the agreement should unforeseen and unforeseeable economic circumstances create any undue hardship for any party to comply with its obligations under the agreement. Felalease suggests that an arbitration mechanism be set up for this purpose so as to protect the parties under the "Rebus Sic Stantibus" doctrine. This is especially important for transactions in developing countries where economies are highly dynamic.
11. Finally, another important aspect to developing countries are the various export insurance programs offered by many of the governments of the developed world. Felalease believes that a recommendation could be included with the Uniform Rules that would seek to offer solutions to the problems that presently affect such programs, thus further enhancing the effectiveness of the Uniform Rules and of cross-border leasing.