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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

Comments by the Government of the Polish People's Republic
on the text of the preliminary draft uniform rules on
international financial leasing as this emerged from the
second session of governmental experts

Rome, April 1987

Re the Preamble

The specific nature of the financial leasing transaction lies in a triangular relationship between three parties that is created by two separate but interrelated contracts concluded by the lessor with the lessee and the supplier. The existence of interrelated contracts and the legal implications arising out of such a relationship has received some attention, at least in the European doctrine of the law of obligations, but it has focused on contracts concluded between the same parties.

Financial leasing transactions pose additional problems of interrelated contracts between different parties and of the invocation by the lessee of contractual rights flowing from a contract concluded by the lessor with the supplier against the latter. The traditional rules of law are directed at each individual contract and thus fail to reflect the specific nature of the contractual nexus created by financial leasing transactions. Therefore, we put forward a suggestion that the bracketed paragraph of the preamble be redrafted as follows:

"Conscious of the fact that the rules of law governing the traditional contract of hire do not reflect the specific nature of the distinctive triangular relationships created by the financial leasing transaction".

Re Article 7(1)(c)

With regard to Article 7, we are of the view that subparagraph 1(c) would benefit, from the point of view of clarity, if it were supplemented by further examples of the lessor's potential liability, like in the sphere of product liability.

Re Article 7(2)

As far as Article 7(2) is concerned, Alternative II is preferable owing to the fact that quite often it is only through legal proceedings that a superior title or right can be established and the lessor's intervention in such proceedings might be crucial.

Re Article 10(3)

Alternative II of Article 10(3) is also preferable, as being more flexible and offering a wider choice of remedies.

Re Article 13

The issue that calls for particularly thorough consideration is the one dealt with in Article 13. The question whether the parties ought to be given the right to opt out of the whole Convention or certain of its articles should be approached both from the theoretical and the practical point of view. If the basic presumption contained in the preamble and stating that the present rules of law governing the traditional contract of hire are "ill-suited", "need to be adapted" or "do not reflect the nature of the distinctive triangular relationships created by the financial leasing transaction" is true, and the Convention establishes rules that are "well-suited", then what reasons can be invoked by States adhering to the Convention in granting the parties full opting-out rights. The same question is valid vis-à-vis the parties exercising such rights. The only logical answer seems to be the fear that the new "well-suited" rules might be perceived by the business community as dealing with financial leasing transactions less adequately than the present "ill-suited" ones.

Should this line of reasoning prove to be true, where does it leave the whole idea of the need to prepare and adopt a Convention on international financial leasing? Conversely, if it is false, then the Convention should become applicable to all international financial leasing transactions coming within its scope of application and special care should be devoted to identifying provisions from which the parties may derogate. In this context it is surprising to note that Article 9, reflecting the very core of the specific nature of financial leasing, is among these provisions.

Re Article 14

Assuming that the view that prevails is that the Convention might create more adequate rules for financial leasing transactions and therefore facilitate their operation in international economic relations, as is the view of this Government, then a certain widening of matters dealt with in the Convention should be considered in order to improve its practical value. One such addition would be to embody in Article 14 a conflict of law rule applicable to financial leasing transactions. This would remove the present uncertainty of the reference to the rules of private international law of the forum. These rules not only differ from one State to another but are also designed to show the proper law of an individual contract and not of a nexus of contracts as is the case with financial leasing transactions. The practical result is not only the total unpredictability of the law that is to be applied to a particular aspect of the financial leasing transaction but also the "partitioning" of this transaction between different legal systems.