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COMMITTEE OF GOVERNMENTAL EXPERTS FOR THE PREPARATION OF A DRAFT

CONVENTION ON INTERNATIONAL FINANCIAL LEASING

NOTE

by the Unidroit Secretariat for the attention of the  
committee of governmental experts at its third session

Rome, April 1987

1. - The points addressed in this paper are fundamentally in the nature of observations on the drafting of the present text of the preliminary draft uniform rules. Two of these concern the title of the prospective international instrument and seek to show why the Unidroit Secretariat is inclined to consider that amendments might be appropriate to this title. The other points in the main seek to reflect suggestions for the improvement of the French text of the preliminary draft designed to ensure greater concordance between this and the English text. These proposals are the result of consultation between the French delegation to the second session of governmental experts and the Unidroit Secretariat. Finally this paper makes a suggestion for the amendment of the English text designed both to ensure its concordance with the French text and thereby to make it clearer.

2. - The first point that is felt to require attention in the title of the preliminary draft is the term employed therein to denote the subject-matter of the prospective Convention. At present this refers specifically to "international financial leasing". Prior to the last session of the Unidroit study group that conducted the preparatory work on this draft, this title referred rather to "the sui generis type of leasing transaction". This title reflected the fundamental reason for Unidroit's decision to draw up uniform rules on this subject, namely the inappropriateness and inadequacy of the remedies guaranteed under the traditional contractual schemata, such as bailment and conditional sale, from which this new genus had, however loosely, evolved. At the fourth session of the aforementioned study group it was decided to delimit the substantive sphere of application more precisely by reference to that specific type of sui generis lease commonly referred to as financial leasing. The drafters of the uniform rules have, however, at all times proceeded on the basis and in the knowledge that the object of its attention was an animal constantly in evolution at the hands of that financial community responsible for its appearance in the first place.

3. - Observing recent trends in the leasing industry, notably in international aviation leasing, it would seem, for example, that the lines of demarcation between financial leases and other forms of leasing are becoming ever more blurred. For economic reasons, leases entered into with airlines in developing countries now frequently take the form of what are termed operating leases. This new derivation of leasing would seem, however, to remain within the sui generis contours reflected in the Unidroit uniform rules. The aircraft is purchased from the manufacturer by a financial intermediary who, in turn, leases the aircraft to the national airline. Ownership of the asset is kept in the hands of a lessor/trustee.<sup>(1)</sup> It is clearly desirable that such an important sector

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(1) cf. J.B.L. Pierce: "The manufacturer's view: Boeing" in the February 1987 "Financing aircraft" supplement to Trade Finance Report and Corporate Finance, 21.

of the potential international leasing market should not be excluded from the scope of the uniform rules, all the more so by reason of a typological classification, namely financial leasing. The initial reason for the drawing up of the uniform rules was, as we have expounded above, to promote the opportunities for cross-border leasing by getting away from the nefarious consequences of over-rigid contractual classification. Moreover, it is highly likely and desirable that, if leasing is to continue to meet the needs of the international financial community with the same degree of success as it has over the past two decades, it maintain its inherent flexibility and evolutionary impetus. For all these reasons it is suggested that both in the title of the uniform rules and in the preamble thereto and Article 1 thereof consideration might usefully be given to deleting the reference to that specific transaction referred to as financial leasing in favour of a formula, such as the former "sui generis type of leasing transaction", better able to correspond to the evolutionary probabilities of the subject-matter of the uniform rules.

4. - Another reason why the Unidroit Secretariat can see a case for an amendment to the title of the uniform rules arises out of the fact that the authors of this text have never contemplated the end-product of their labours as being in any way designed to be exhaustive. The uniform rules have all along been conceived as a basic, minimal legal infrastructure designed to bring out the atypical characteristics of the type of leasing addressed therein. Whole aspects of the legal regulation of this transaction are therefore being consciously left unregulated, the idea here being that these are in any event matters that can safely be left to the freedom of contract of the parties. This nevertheless highlights the importance of the rule set forth in Article 14(2) of the uniform rules enjoining those called upon to judge "questions concerning matters governed by this Convention which are not expressly settled in it" to settle these questions "in conformity with the general principles on which it is based." The preamble to the uniform rules already alludes to the non-exhaustive character of the uniform rules when it refers to "the desirability of formulating certain uniform rules relating ... to ... international financial leasing". In the light of the foregoing it is suggested that consideration might perhaps be given to adding a similar reference to the non-exhaustive character of the uniform rules in the title thereof. One solution might be to entitle the prospective draft Convention the draft Convention for the unification of certain rules on the sui generis type of leasing transaction. Such a change would moreover bring the prospective draft Convention into line with a long list of existing international instruments, such as the International Convention for the unification of certain rules relating to bills of lading (Brussels, 1924), the International Convention for the unification of certain rules relating to the carriage of passengers by sea (Brussels, 1961), the Convention for the unification of certain rules relating to international carriage by air (Warsaw, 1929).

5. - One of the provisions where the intention that lay behind the original English draft has perhaps not been rendered entirely happily in its French counterpart is Article 10(2). The aforementioned consultations between the French delegation to the second session of governmental experts and the Unidroit Secretariat produced agreement that the words "la livraison d'un matériel nouveau ou similaire en conformité avec le contrat" were not an accurate translation of the English original: "a fresh tender of the same equipment or a tender of other equipment in conformity with that agreement".

6. - A linguistic inconsistency that emerged from the consultations between the French delegation and the Unidroit Secretariat concerned the fact that, where the English text employs solely the verb "terminate" in Articles 10 and 11, the French text uses both the verb "résilier" and the verb "mettre fin." The solution suggested by the French delegation was that the French text should in all these places employ the verb "mettre fin." This would entail amending Article 11(2), (4) and (5). It remains true of course that the French text of Article 9(2) speaks of "résilier" where its English counterpart again employs the verb "terminate". This is perhaps another provision the drafting of which will accordingly probably require attention.

7. - Two omissions in the French text when viewed in relation to the English text emerged from the consultations between the French delegation and the Unidroit Secretariat. One is the absence of the words "au crédit-bailleur" in Alternatives I and II of Article 10(3) after the words "[t]outefois, le crédit-preneur est tenu de payer". The other was the absence in the French text of any translation of the words "or otherwise deal with" coming in Article 12(1) after the words "[t]he lessor may transfer." The French delegation proposed that this omission could be remedied by inserting the words "consentir des sûretés ou" after the opening words of this provision, namely "[l]e crédit-bailleur peut".

8. - Another provision where greater concordance between the English and French text might perhaps be opportune is Article 11(3) where the final words of the English text "such compensation is disproportionate to the compensation provided for under paragraph 2(b)" come out in their French counterpart as "elle n'aboutisse à une indemnité disproportionnée".

9. - The final point which this paper seeks to draw to the attention of the committee rather concerns a discrepancy in the English text when viewed in relation to its French counterpart, a discrepancy of which the drafting committee was admittedly aware at the last session of governmental experts but which might, it is suggested, be remedied in the interest of ensuring the maximum degree of concordance between the two versions of the

prospective draft Convention. This discrepancy is to be found in Article 3 and is already highlighted by a proposal made by the Hong Kong Equipment Leasing Association submitted to this session. This proposal is set out at §7 on p. 2 of Study LIX - Doc. 34. There is no direct counterpart in the English text of the words "à l'origine ou par la suite" which appear in the French text of Article 3. True, the idea contained in these French words is conveyed by the use of the two verbs "has" and "acquires" in the corresponding English text. Consideration might however perhaps be given to aligning the English text more exactly on the French text on this point.