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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 Japanese Government 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

Draft Comments by the Japanese Government on the
Preliminary Draft of Uniform Rules
concerning International Financial Leasing
Transactions

1. Basic Stand

- (1) The preparation of these rules, in view of the increase in and enhanced importance of international financial leasing in recent years, is designed to establish rules suited to regulate the triangular relationship between the parties concerned, and we believed the establishment of uniform rules in this field, which are acceptable to a number of countries, should be of immense significance in promoting international transactions.

- (2) Nevertheless, we have found several provisions in the draft of these rules which cannot be understood solely on the basis of financial leasing transactions (i.e., leasing transactions with a strictly financial character), in other words, provisions which may be considered to include in their range of application rental transactions without a purely financial character. These provisions impede the comprehensive understanding of the entire draft of the rules. Thus prior to entering into an article-by-article discussion of each item, we believe it is necessary that full

discussion should be made regarding the type of transaction to which the uniform rules are to apply, so that the same understanding of these points may be formed among the countries concerned.

It would cause various problems regarding the interpretation and application of the rules if they were intended to regulate transactions differing in character. Thus the Japanese government adopts the view which supports the preparation of uniform regulations with a scope of application limited to financial leasing transactions only and believes that impure elements should be eliminated as much as possible from each article and clause.

- (3) Although this is the third examination by government experts of the draft of these rules, there may still be articles which have not been fully examined. Thus we believe there will be a need to continue further and full deliberations before agreement on their content can be reached by the various interested countries.

2. The Particulars

(1) Preamble

As financial leasing transactions have both financial and rental aspects, the traditional rental theory cannot be applied directly to them, neither can the matter be coped with through partial revision of such theory. It is necessary to establish a legal theory appropriate for regulating the triangular relationship of the parties which is formed in financial leasing transactions. Hence we consider that the right choice in respect of the third paragraph is "are ill-suited."

(2) Article 1

- a. In the second draft, the words "and on terms approved by" have been added to of Clause 1(a) of this Article. However, the interests of the lessee are absolutely unrelated to the payment terms for procurement of the equipment pursuant to the supply agreement, and thus we believe that the words "except terms of payments for procurement of equipment" should be added to this paragraph, after the words "on terms approved by", to clarify that the consent of the lessee is not required on this point. (Ref. Article 4)

- b. In Clause 2(a), the words "the lessee does not rely primarily on the skill and judgement of the lessor" is inappropriate because in financial leasing transactions, the lessee will be completely involved in the selection of the equipment and the suppliers and thus the lessee assumes responsibility for these things.

Thus the wording should be restored to that of the first draft, namely that "the lessee relies on its own skill and judgement." That is to say, from the present wording of Clauses 1 (a) and (b) of Article 2, these draft regulations seem to have been prepared on the assumption that the lessor may be involved in the selection of the equipment and the supplier. Furthermore this particular wording is problematical because it will include transactions other than financial leasing transactions in its scope of application.

- c. In the second draft, the word "substantial" has been eliminated from Clause 2 (c). However, leasing transactions in which only a minor part of the cost is to be amortized cannot be considered as financial Leasing transactions. Accordingly, the word "substantial" should be restored to these

draft regulations so that financial leasing transactions alone are included in their scope of application.

(3) Article 4

- a. In Clause 1, it is stated that the consent of the lessee is required to revise the entire supply agreement, but since the terms of payment for procurement of equipment are totally unrelated to the interests of the lessee, there is no need to secure the consent of the lessee at the time of any such revision. Thus as we mentioned in respect of Article 1, paragraph 1(a) (see above), the rules should state clearly that the requirement that the lessee's consent be obtained to vary the supply agreement should not apply to variations made of terms relating to the payment for the leased equipment pursuant to the supply agreement.

- b. The meaning of Clause 2, is not clear. The lessor is the contracting party to the supply agreement and thus it goes without saying that the lessor's consent is required when revising the specifications of the supply contract. In order

to give meaning to this clause, it is necessary to presuppose that change in the specifications can be made unilaterally by the lessee, who has the greatest interest in the supply agreement.

However, as the lessee is not the contracting party to the supply agreement, such a presupposition by itself cannot be made. Clause 1 should be sufficient in respect of any change to be made to the supply agreement and thus Clause 2 should be deleted.

(4) Article 5

Clause 2 concerns the question of public notice, which raised issues concerning the protection of lessee's creditors. Thus the proper law relating to this issue should not be a law based on the location of the Lessee's business but a law based on the location of the leased equipment. (Ref. Article 10 of Law concerning application of laws in general in Japan and Articles 4 and 5 of the Hague Convention - Convention sur la loi applicable au transfert de la propriété en case de vente à caractère international d'objets mobiliers corporels.) In financial leasing transactions, equipment is to be used by the lessee for a comparatively long period of time. Thus there is no need to assume circumstances in

which the location of equipment is changed from one place to another within short periods of time, as one would in the case of rental transactions.

(5) Article 7

a. Clause 1 (b) is a provision which cannot be understood unless transactions other than financial leasing transactions are assumed to be covered by these regulations (please see also paragraph (2) b. above). As the scope of application of these draft rules is intended to be limited to financial leasing activities, it is necessary to delete this paragraph in its entirety.

b. In Clause 2 - The lessor should not assume excessive guaranteed responsibility. Thus the wording "not derived from any act or omission of the lessee" should be revised to read "derived from any act or omission of the lessor."

Incidentally, in view of the strictly financial character of financial leasing transactions, we feel it would be reasonable to adopt Alternative 1.

(6) Article 10

a. Clauses 1 and 2 of this Article provides the lessee, as against the lessor, with a power to reject the leased equipment, while Clause 3 provides the lessee with a right to terminate the leasing contract. It is a matter of course that the lessee can reject equipment which does not conform with the terms of the leasing agreement. Also, it does not seem to be necessary to provide ~~for the lessee's right to reject the equipment.~~

without any reference to the lessee's right to terminate the lease contract. Thus the intention of this article is unclear.

b. Accordingly, we believe that this article should be re-drafted as follows:

1. If delivery of the leased equipment is not made on the date of delivery prescribed in the leasing agreement or, in the case of absence of a stated delivery date in the leasing agreement, if delivery is not made within a reasonable period of time after conclusion of the agreement, the lessee may (a) withhold ~~or recover~~ the rentals and

other sums payable ~~or paid~~ and/or (b) in the case where the lessee has made a demand to the lessor that equipment conforming to the terms of the supply agreement be delivered to the lessee within a reasonably stipulated time and the lessor fails to deliver such equipment within such time, may cancel the leasing agreement and recover all rentals and other sums paid to the lessor. This provision shall not apply if the lessor makes delivery of leased equipment within the reasonably stipulated time referred to herein.

2. The lessee shall inspect the leased equipment within the time stipulated in the leasing agreement for such inspection, or, if no such time limit is stipulated, within a reasonable time after delivery of such equipment. If the leased equipment is found not to conform to the terms of leasing agreement, the lessee may (a) withhold payment of rentals and other sums payable, and/or (b) in the case where the lessee has made a demand to the lessor that equipment conforming to the terms of the

supply agreement be delivered to the lessee within a reasonably stipulated time and the lessor fails to deliver such equipment within such time, cancell the leasing agreement and recover all rentals and other sums paid to the lessor. This provision shall not apply if the lessor makes delivery of equipment conforming to terms ^{of} ~~in~~ the leasing agreement within the reasonably stipulated time referred to herein. In this case, ^{the} lessee shall be obliged to pay the lessor a reasonable sum for the benefit the lessee has derived from the use of the equipment.

3. The lessee, in cases other than those referred to in Clause 1 and Clause 2, shall not withhold payment of rentals and other sums payable pursuant to the leasing agreement.
4. In the case of cancellation of the leasing agreement pursuant to Clause 1 or Clause 2 hereof, the lessee shall not be entitled to exercise any other right or rights against

the lessor other than those referred to in such clauses.

(7) Article 11

As this article does not reflect the actual state of financial leasing transactions in Japan, we believe it requires complete redrafting as follows:-

1. If the lessee is in default of its obligations under the leasing agreement, the lessor may, if after giving notice to the lessee to fulfill the defaulted obligation within a reasonably stipulated time and the lessee shall have failed so to do within such time, cancel the leasing agreement and accelerate payment of future rentals. However, this provision shall not apply if the lessee shall have fulfilled its obligation within the reasonably stipulated time referred to herein.

2. If the leasing agreement is cancelled in accordance with the provisions of Clause 1 of this article, the lessor, (a) may request the return of leased equipment and (b) claim compensation for

damages equivalent to the remainder of the rentals.

3. (Same as present Clause 3)

4. If the lessor has accelerated payment of future rentals pursuant to Clause 1 hereof, it may (a) demand immediate payment of the entire future lease rentals and the return of the leased equipment or (b) demand the immediate repayment of all future leased rentals and, in case such payment is not made within a reasonable time, cancel the leasing agreement and claim damages equivalent to the outstanding lease rentals.

(8) Article 12

Provisions to the same effect as those of the second sentence of Clause 1 should be added to Clause 2.

(9) Article 13

Clause 2 alone should suffice and we concur with the view to delete Clause 1.

(10) Article 14

Without the words "its object and purpose as set forth in the preambles", the wording of Clause 1 of this Article is usual in ~~many~~ other conventions ^{and} ~~existing~~ convention draft. As there appears to be no special reason to include such additional wording on this occasion, we suggest it be deleted.