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U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF "PRIVATE LAW"  
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DRAFT FINAL PROVISIONS

capable of embodiment in the draft Convention on  
international financial leasing drawn up by a  
Unidroit committee of governmental experts

with

EXPLANATORY NOTES

(drawn up by the Unidroit Secretariat)

Rome, July 1987

## I. INTRODUCTION

1.- In accordance with a request made by the Unidroit committee of governmental experts for the preparation of a draft Convention on international financial leasing (hereinafter referred to as "the committee") at its first session, held in Rome from 15 to 19 April 1985<sup>(1)</sup>, the Unidroit Secretariat drew up a set of draft final provisions designed to be capable of embodiment in the text of the future Convention on international financial leasing.

2. - These draft final provisions were to a large extent modelled on the corresponding provisions of the 1983 Geneva Convention on Agency in the International Sale of Goods (hereinafter the "Geneva Agency Convention"), the most recent example of an international Convention to be adopted at a diplomatic Conference convened under the auspices of Unidroit. It should however be borne in mind that the close relationship between the subject-matter of that Convention and that of the 1980 United Nations Convention on Contracts for the International Sale of Goods (hereinafter the "Vienna Sale Convention") led to the adoption in Geneva of a number of solutions designed to ensure exact concordance between the two Conventions (cf. Article B, *infra*), which might not however necessarily be considered appropriate for other Conventions, notably the one under preparation on international financial leasing.

3. - Inspiration in the drawing up of these draft final provisions was accordingly also, where appropriate, sought in other recent models, notably the Protocol of 1984 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969 (hereinafter the "1984 Protocol") (cf. Articles J and K, *infra*) and the 1985 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods (hereinafter the "1985 Hague Convention") (cf. Article D, *infra*).

4. - In the event the committee did not find time to consider these draft final provisions, moreover taking the view that such deliberations were normally reserved exclusively for the diplomatic Conference.<sup>(2)</sup> The Unidroit Secretariat, in drawing up this revised set of draft final provisions, has however taken account of the comments and suggestions made by representatives attending the Unidroit committee of governmental experts

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(1) cf. Study LIX - Doc. 24, § 4.

(2) cf. Study LIX - Doc. 46, § 5.

for the preparation of a draft Convention on certain aspects of international factoring (hereinafter "the factoring committee")<sup>(3)</sup> with regard to the draft final provisions submitted to that committee by the Unidroit Secretariat.<sup>(4)</sup> The decision by the Canadian Government to host the diplomatic Conference for the adoption of the Unidroit draft Conventions on international factoring and international financial leasing in Ottawa in May 1988 has also enabled the Unidroit Secretariat to complete certain clauses of the draft final provisions, notably Articles A (1) and K (1) and the chapeau of Article K (2), as well as the drafting of the authentic text and witness clause.

5. - Bearing in mind that the committee<sup>(5)</sup> expected the present contents of Chapter III of the draft Convention on international financial leasing to be moved forward at the diplomatic Conference to an enlarged Chapter I entitled "Sphere of application and general provisions", these draft final provisions would probably then become the subject of a new Chapter III entitled "Final provisions".

II. SECRETARIAT PROPOSALS FOR THE FINAL PROVISIONS TO BE EMBODIED IN THE PROPOSED CONVENTION ON INTERNATIONAL FINANCIAL LEASING

*Article A*

1.- This Convention is open for signature at the concluding meeting of the Diplomatic Conference for the adoption of the Unidroit draft Conventions on international factoring and international financial leasing and will remain open for signature by all States at Ottawa until.....

2. - This Convention is subject to ratification, acceptance or approval by States which have signed it.

3. - This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

4. - Ratification, acceptance, approval or accession is effected by the deposit of a formal instrument to that effect with the depositary.

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(3) cf. Study LVIII - Doc. 32, §§30-32.

(4) cf. Study LVIII - Doc. 21.

(5) cf. Study LIX - Doc. 46, § 9.

*Commentary*

The provisions of this article are essentially based on those of Article 22 of the Geneva Agency Convention, which were themselves based on precedents to be found in recent United Nations Conventions, such as the Vienna Sale Convention. In view of what is considered to be the desirability of incorporating an article on the functions of the depositary of the future Convention, on the lines of Article 17 of the 1984 Protocol (cf. Article K, *infra*), the drafting of paragraph 4 departs from that of the Geneva Agency Convention in favour of that of the corresponding provision, Article 12 (3), of the 1984 Protocol.

*Article B*

1. - This Convention enters into force on the first day of the month following the expiration of six months after the date of deposit of the third instrument of ratification, acceptance, approval or accession.

2. - For each State that ratifies, accepts, approves, or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State on the first day of the month following the expiration of six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

*Commentary*

This article is essentially modelled on Article 33 of the Geneva Agency Convention. In line with Article 99 of the Vienna Sale Convention, this requires the deposit of ten instruments of ratification, acceptance, approval or accession for the entry into force of the Convention and furthermore stipulates that such entry into force should only take effect twelve months after the date of deposit of the tenth such instrument.

Article B as originally drafted by the Secretariat, on the other hand, proposed a return to previous Unidroit practice as exemplified by the 1973 Washington Convention providing a Uniform Law on the Form of an International Will, Article XI of which provides for the entry into force of that Convention six months after the date of deposit of the fifth instrument of ratification or accession.

The factoring committee, however, forwarded a recommendation to the diplomatic Conference that the number of instruments be reduced still further, to three. This recommendation was felt to be justified by the limited, technical nature of the subject - matter of the prospective Convention. As this is an argument that would seem to be equally valid for the future Convention on international financial leasing, effect has also been given to it in the present draft final provisions.

*Article C*

This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning matters governed by this Convention, provided that the supplier, the lessor and the lessee have their places of business in States parties to such agreement.<sup>7</sup>

*Commentary*

The effect of this provision, based on Article 90 of the Vienna Sale Convention and Article 23 of the Geneva Agency Convention, would be, in certain cases, to displace the application of the prospective Convention, entirely or in part, in favour of existing or future international agreements, whether universal or regional in character, containing provisions concerning matters governed by it. This might, for example, be the case, as regards Article 5, with the 1948 Geneva Convention on the International Recognition of Rights in Aircraft.

This provision would also cover the case of any future Convention that might supersede that now under preparation unless, that is, it were to be deemed opportune to include in the present final clauses provisions establishing a revision procedure.

To the extent that one effect of Article C would be to weaken, to a certain extent, the universal character of the future Convention and thus to create a potential element of uncertainty for the parties, it is proposed that Article C would only apply when all three parties have their places of business in States parties to the other agreement containing provisions concerning matters governed by the prospective Convention.

There was a call for the deletion of the proviso to the corresponding clause of the draft final provisions drawn up for potential inclusion in the draft Convention on international factoring during the

discussion thereof by the factoring committee. This proviso was considered to represent an intolerable degree of interference in the autonomous sphere of application provisions of other quite distinct international agreements, in so far as, its effect could be, for instance, to displace the application of such an international agreement for the sole reason that one of the parties to the factoring transaction did not happen to have its place of business in a State party to that other agreement. (6)

A case was even made out for the wholesale deletion of Article C at the last session of the factoring committee. This was founded on the argument that the prospective Unidroit Convention differed from other international instruments like the Vienna Sale Convention in so far as its terms of reference were drawn far more narrowly: the subject-matter of the future Convention was a very particular type of transaction, moreover only a limited number of aspects of which had been singled out for coverage therein. Another argument adduced in favour of the deletion of Article C was that it would avoid the danger of the "negative conflict of Conventions", meaning the situation where two or more international instruments contain provisions yielding precedence to another instrument.

There was nevertheless reluctance on the part of a number of representatives to agree to the deletion of Article C without first giving the matter further thought. Just as the factoring committee accordingly came to the conclusion that the most appropriate solution in the circumstances was to place the provision in square brackets for decision at the diplomatic Conference, so this corresponding provision in the draft final provisions for the prospective Convention on international financial leasing is also submitted in square brackets.

#### *Article D*

1. - If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

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(6) cf. Study LVIII - Doc. 32, § 31 and Study LVIII - Doc. 34.

2. - These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. - If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

4. - If a Contracting State makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

#### *Commentary*

In recent years a number of formulae have been employed in international private law Conventions to meet the difficulties sometimes experienced by States with federal systems of government involving a constitutionally guaranteed division of powers among the constituent units of the federation.

The drafting of Article D follows that of Article 24 of the Geneva Agency Convention and also corresponds closely to the most recent expression of the inclination of States in this regard, namely Article 26 of the 1985 Hague Convention.

#### *Article E*

1. - Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply where the supplier, the lessor and the lessee have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

2. - A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply where the supplier, the lessor and the lessee have their places of business in those States.

3. - If a State which is the object of a declaration under the previous paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph 1 of this article, provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

*Commentary*

With minor adaptations, this article is based on Article 26 of the Geneva Agency Convention which was itself heavily influenced by the drafting of Article 94 of the Vienna Sale Convention. As with Article C above, the opportunity that this article, which in effect amounts to a reservation clause, opens up for Contracting States to restrict the application of the prospective Convention could prove to be a source of uncertainty for the parties to international financial leasing transactions as to which law would be applicable in a given case, and it is for this reason proposed that paragraphs 1 and 2 of Article E should only operate when all three parties, supplier, lessor and lessee, have their places of business in States concerned by the declaration or declarations.

*Article F*

A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Article 2 (1) (b).

*Commentary*

Both the Vienna Sale Convention (Article 1 (1) (b)) and the Geneva Agency Convention (Article 2 (1) (b)) make provision for the application of the Convention not only when the specific objective connecting factors have been satisfied but also when the rules of private international law lead to the application of the law of a Contracting State. These models have been followed, albeit in amended form so as to take account of the tripartite nature and pluricontractual basis of the financial leasing transaction, in Article 2 (1) (b) of the uniform rules which provides for the application of the prospective Convention when "both the supply agreement and the leasing agreement are governed by the law of a Contracting State".



At both the Vienna and Geneva diplomatic Conferences, however, a number of States, especially Socialist States which have special legislation regulating foreign trade relations, called for the possibility to enter a reservation in respect of the application of the two Conventions in accordance with the rules of private international law in cases where they would not otherwise be applicable. The drafting of Article F is based on that of the reservation clauses contained in Article 95 of the Vienna Sale Convention and Article 28 of the Geneva Agency Convention.

*Article G*

1. - Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.
2. - Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.
3. - A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary. Reciprocal unilateral declarations under Article E take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.
4. - Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.
5. - A withdrawal of a declaration made under Article E renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that article.

*Commentary*

Precedents for the provisions of Article G are to be found in many international Conventions, the drafting of this article itself reproducing word for word Article 31 of the Geneva Agency Convention.

*Article H*

No reservations are permitted except those expressly authorised in this Convention.

*Commentary*

The wording of Article H follows that of Article 32 of the Geneva Agency Convention and is intended to prevent States making reservations other than those presently contemplated by Articles D, E and F or any other reservations which may be permitted under the prospective Convention.

*Article I*

This Convention applies when the leasing agreement and the supply agreement are both concluded on or after the date on which the Convention enters into force in respect of all the Contracting States referred to in Article 2 (1)(a), or of the Contracting State referred to in paragraph 1 (b) of that article.

*Commentary*

One of the most difficult problems to be solved in the context of private law Conventions involving tripartite relations is that of determining the time starting from which transactions will be subject to the provisions of the Convention once the requirements for its entry into force have been met. The position is complicated in this instance by the fact that Article 2 provides that the Convention will, subject to the introductory wording of the article, apply either when the supplier, the lessor and the lessee have their places of business in Contracting States (Article 2 (1)(a)) or when both the supply agreement and the leasing agreement are governed by the law of a Contracting State (Article 2 (1)(b)).

However, even when one or other of these requirements has been satisfied, it will still be necessary to ascertain at which point the application of the Convention will be triggered off in respect of a given transaction. Neither the corresponding provision of the Vienna Sale Convention (Article 100) nor that of the Geneva Agency Convention (Article 34) are, alas, of more than indirect persuasiveness in this context, the

former being concerned with a bipartite transaction and the connecting factor for the application of the latter being that only one of the three parties, that is the agent, should have its place of business in a Contracting State.

Whereas the fundamental legal relationship contained within the tripartite financial leasing transaction was recognised by the authors of the draft Convention to be the leasing agreement <sup>(7)</sup>, they at the same time acknowledged the need to take due account in the provisions determining the application of the future Convention of the impact of certain of its provisions on the position of the supplier and on the supply agreement. Hence the original draft final provisions drawn up by the Unidroit Secretariat proposed alternative solutions to this problem. One of these proposed taking the fact that the leasing agreement was concluded on or after the date when the Convention entered into force as the trigger for the application of the future Convention. The other required both leasing agreement and supply agreement to have been concluded on or after the date of the Convention's entry into force. Prior to the second session of governmental experts Governments were asked for their opinion on these alternatives. Only one reply in fact materialised, from the Austrian Government, and this favoured the second alternative.

In view of the importance the authors of the draft Convention attached to ensuring that sufficient account be taken of the role of the supplier and the supply agreement in the provisions determining the application of the future Convention, the Unidroit Secretariat, in laying these draft final provisions before Governments for the diplomatic Conference, has followed the suggestion of the Austrian Government in this regard and accordingly eliminated the first alternative, thus proposing that the Convention's application should be triggered in respect of a given international financial leasing transaction only where both the leasing agreement and the supply agreement have been concluded on or after the date of the Convention's entry into force. This proposal would moreover appear to acquire additional force from the specifically pluricontractual basis of the type of leasing transaction addressed by the draft Convention: it has to be remembered that one of the principal objectives of the draft Convention has all along been to move away from the unsatisfactory situation in which the type of leasing transaction addressed therein has been treated as two separate contracts and towards recognition of a new, single, complex, atypical transaction involving the interaction of these two contracts.

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(7) cf. also El Mokhtar BEY and Christian GAVALDA, *Problématique juridique du leasing international* in *Gazette du Palais* 1979, 1<sup>er</sup> sem., 143 at 144.

*Article J*

1. - This Convention may be denounced by any Contracting State at any time after the date on which it enters into force for that State.
2. - Denunciation is effected by the deposit of an instrument to that effect with the depositary.
3. - A denunciation takes effect on the first day of the month following the expiration of twelve months after the deposit of the instrument of denunciation with the depositary. Where a longer period for the denunciation to take effect is specified in the instrument of denunciation it takes effect upon the expiration of such longer period after its deposit with the depositary.

*Commentary*

The provisions of Article J are essentially based on Article 16 of the 1984 Protocol, although in the wording of paragraph 3 inspiration was also sought in the corresponding provision of the Geneva Agency Convention (Article 35 (2)).

*Article K*

1. - This Convention shall be deposited with the Government of Canada.
2. - The Government of Canada shall:
  - (a) inform all States which have signed or acceded to this Convention and the President of the International Institute for the Unification of Private Law (Unidroit) of:
    - (i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;
    - (ii) each declaration made under Articles D, E, F;
    - (iii) the withdrawal of any declaration made under Article G (4);

(iv) the date of entry into force of this Convention;

(v) the deposit of an instrument of denunciation of this Convention together with the date of its deposit and the date on which it takes effect;

b) transmit certified true copies of this Convention to all signatory States, to all States acceding to the Convention and to the President of the International Institute for the Unification of Private Law (Unidroit).

*Commentary*

The functions of depositary of Unidroit Conventions are traditionally exercised by the Government of the State on the territory of which the diplomatic Conference for the adoption of the Convention in question is held. Unlike earlier Unidroit Conventions, the Geneva Agency Convention followed the Vienna Sale Convention in containing no specific article setting out the functions of the depositary. The Unidroit Secretariat however believes that such an article would be useful and has taken as a model for Article K the corresponding provisions of Article 17 of the 1984 Protocol.

*Authentic text and witness clause*

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorised by their respective Governments, have signed this Convention.

DONE at Ottawa, this..... day of May, one thousand nine hundred and eighty-eight, in a single original, of which the English and French texts are equally authentic.

*Commentary*

The general language of this provision follows many precedents, in particular the Geneva Agency Convention. The reference to English and French as the authentic texts of the future Convention reflects the fact that the working languages of Unidroit are English and French and that the authentic texts of Unidroit Conventions have accordingly hitherto traditionally been drawn up in these two languages.