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Unidroit

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

STUDY GROUP FOR THE PREPARATION OF  
UNIFORM RULES ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

(Second session: Rome, 12 - 16 April 1996)

*REPORT*

(prepared by the Unidroit Secretariat):

*COMMENTS*

(by the European Federation of Equipment Leasing Company Associations)

Rome, December 1996



## INTRODUCTION

(by the Unidroit Secretariat)

On 17 December 1996 the Secretariat received a letter from Mr Marc Baert, Secretary-General of the European Federation of Equipment Leasing Company Associations (Leaseurope). This letter referred to the report prepared by the Unidroit Secretariat on the second session of the Study Group, held in Rome from 12 to 16 April 1996. Leaseurope was represented at that session by Professor R. Clarizia. The Secretary-General of Leaseurope asked for the Unidroit Secretariat's comments on the points raised in his letter. The Secretariat, before responding to Leaseurope, has judged that it would be appropriate for the matter first to be considered by the Study Group at its third session, in particular in the light of the amendment to Article 1(2)(c) proposed by the Drafting Group in Study LXXII - Doc. 30. This paper reproduces hereunder the text of the Secretary-General of Leaseurope's letter.



*Re:* Report on the second session of the Study Group, held in Rome from 12 to 16 April 1996 (Study LXXII - Doc. 27)

Already in its letter of 1 August 1995, the Federation had sought to highlight the distinction between the concept of "ownership rights" and "security interest".

The Federation was represented at the aforementioned session by Professor Renato Clarizia who did not fail to confirm this point of view.

Even though the attention of the drafters of the uniform rules has already been drawn to the need to distinguish clearly between "security interests" ("sûretés") and "real rights" ("droits réels") - whether these arise in the form of a "reservation of title" or in that of the "ownership rights" vested in the lessor under a leasing contract - we feel obliged to note (§ 10) that it is unfortunately still not intended to introduce these ideas into the title of the Convention itself.

This is disclosed by reading § 88 which states that the (ownership) rights of the lessor under a leasing agreement would be enforceable against all third parties.

However, the distinction between these concepts is still blurred in many place in the text.

- §§ 13 / 14:

- there would seem to be some doubt as to the possibility of an “international interest” (“*sûreté internationale*”) being *created* under the Convention in favour of a lessor or of a seller retaining title (Article 1(1) of the Convention). See the conceptual definitions transferred from Article 4 to an “Appendix” to the Convention.

- it is to be noted that § 45 records that it is the intention of the authors of the Convention to cover in its sphere of application a whole range of real rights (“rights *in rem*, ownership rights or more limited rights in a given asset ...”).

- § 15: we regret the continued use of the term “an interest ... retained by a lessor”. The Federation had proposed “an interest of the lessor” (*Article 1(2)*).

- § 26: “that it should not be possible for individuals to opt into the Convention regimen in respect of additional high-value mobile equipment, like Rolls-Royce motor cars ...”

The Federation is of the view that the words “it should not be possible” are not strong enough: they might be seen as opening up the possibility of a trend towards the inclusion of other “luxury” vehicles.

- § 35: the report records certain experts as favouring the inclusion in the Convention of all types of lease (“both finance leases and true leases”). In this sense, in particular see paragraph 106 of the report. At the end of paragraph 35, the authors of the Convention seem to come down in favour of requiring a minimum lease term. As such, a minimum term (three years) requirement would serve to indicate those leases the terms of which were not sufficiently long to merit coverage under the Convention.

LEASEUROPE supports this compromise:

- In the part containing comments on articles beginning at §46, the references to articles are one number out: for instance, the comments on Article 7(1) in fact relate to Article 8(1), and so on.

- § 68: an error has crept into the French translation. The relevant part of this paragraph should read: “le constituant ne puisse obtenir la libération du bien grevé ( ... ) avant la vente de ce bien ... au créancier garanti, qu’après avoir payé tous les frais ... ”

- § 88: LEASEUROPE fails to see how a lessor might be able “to file his rights as owner ... in the international register” or “also to file his lease interest” in the international register. Apart from his ownership rights, we fail to see what other interest the lessor could file in the register.

- § 91: the text of the Convention still contains no reference to the Convention of the European Union on Insolvency Proceedings. There might be cases where the Unidroit Convention would be at variance with the European Union Convention.
- § 100 *et seq.*: these paragraphs deal with transfers of international interests to subsequent holders. It was agreed to include this subject in a future Chapter VII of the Convention: §§ 103 and 104 in this respect draw a special distinction regarding the lessor's rights (infelicitously translated as "interests under leasing agreements" at page 45).
- § 106 *et seq.*: these paragraphs deal with the special provisions for aircraft property (the future Chapter VIII of the Convention). The representatives of the aviation industry want to be able to avail themselves of the regimen established by the Convention for all leases without any minimum term restriction (this should be compared with what is stated in § 35).
- § 121: for questions not settled by the Convention but which might end up being governed by the same, the report again draws a distinction between the "security interest" deriving from a seller's reservation of title and the "security interest" enuring to a lessor under a leasing agreement. The word "interest" is again employed here in a manner that is open to question.
- The Federation once more deplores the use in Appendix IV (the text of the Convention proper) of the idea of "garantie réelle" ("interest in an object") in respect of the lessor and leasing agreements. On many occasions LEASEUROPE has protested against this assimilation of ownership rights to a security interest; furthermore, the Federation asks itself the question whether the definition of "leasing agreement" given in paragraph (f) of Part I of the Appendix is in line with that given in the 1988 Unidroit Convention on International Financial Leasing.

We would request that the foregoing comments be actually taken into consideration by the authors of the Convention.

Failing which:

- either, if Unidroit fails to make the status of leasing clearer and fails to make it clearer that title as such is the prerogative of the lessor, the Federation would prefer that this transaction be excluded from the sphere of application of the Convention;
- or the Federation would avail itself of Article 8(1) of the Convention under which "the parties may agree in writing to exclude, wholly or in part, any right or remedy conferred ... by this Chapter"
- or, failing both of these solutions, the Unidroit Convention should only apply to leasing transactions concluded in respect of extremely high-value objects (aircraft, trains, drilling rigs ...).