



**ADVISORY BOARD FOR THE
PREPARATION OF A
MODEL LAW ON LEASING
Second session
Rome, 6-7 February 2006**

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SUMMARY REPORT

(prepared by the UNIDROIT Secretariat)

The second session of the Advisory Board for the preparation of a model law on leasing was held at the seat of UNIDROIT in Rome on 6-7 February 2006. The attending Advisory Board members were Mr Andrea Albensi (Leaseurope), Mr El Mokhtar Bey (France/Tunisia), Mr Rafael Castillo-Triana (Colombia), Mr Renato Clarizia (Leaseurope), Mr Ronald DeKoven (United Kingdom), Mr Robert Downey (Equipment Leasing Association of the United States of America), Ms Moyo Violet Ndonge, representing Ms Rachel Freeman (International Finance Corporation, hereinafter "I.F.C."), Ms Anna Normantovich, representing Mr Nikolai Zinoviev (Russian Federation), Chief Mrs Tinuade Oyekunle (Nigeria), Mr Fritz Peter (Switzerland), Ms Yanping Shi (People's Republic of China) and Mr Murat Sultanov (I.F.C.). Mr Carsten Dageförde (Germany) was unable to attend, but Mr Martin Stanford, Deputy Secretary-General of UNIDROIT, relayed comments that Mr Dageförde had submitted. Mr Renaud Sorieul represented the United Nations Commission on International Trade Law (UNCITRAL) as an observer.

Chief Mrs Oyekunle, the Chairman of the Advisory Board, called the meeting to order. The Deputy Secretary-General welcomed the members of the Advisory Board, thanking them for the time and expense they had taken to travel to Rome to advance the project and noting that since the Advisory Board's first session, the Governments of Ukraine and Kazakhstan have signalled their intention to accede to the UNIDROIT Convention on International Financial Leasing (hereinafter "the Ottawa Convention"), a fact he saw as a particularly interesting development for the future model law, in that the actions came as a direct result and in the context of I.F.C. projects for the development of leasing industries in those countries.

The main business of the session consisted in the Advisory Board's consideration of the preliminary draft model law (UNIDROIT 2005, Study LIX-A, Doc. 3) prepared by the Reporter, Mr DeKoven, especially in the light of comments raised on the draft by members of the Advisory Board (UNIDROIT 2006, Study LIX-A, Doc. 4 and 4 Add.). The Advisory Board instructed the Reporter to prepare a second preliminary draft on the basis of the following instructions:

- I. **Scope:** The body of the model law would not address issues of taxation, accounting, or regulation, but such issues could be addressed in the preamble.
- II. **Chapter I** (General provisions)

- A. **Article 1** (Sphere of application): Parties with no connection to the implementing State would be able to invoke the model law.
- B. **Article 2** (Definitions)
 - 1. Operating and financial leases: The model law would cover both operating and financial leases. The Reporter was instructed that the distinction between operating and financial leases should have due regard for the parties' need for certainty.
 - 2. Financial leases
 - a. The lessor in a financial lease may assist the lessee in selecting the equipment and supplier, but the lessee must make the final selections.
 - b. The supplier in a financial lease must have knowledge of the transaction's tripartite nature, but the law would not require the lessee or lessor to provide formal notice to that effect.
 - c. The rentals in a financial lease must take into account all or a significant part of the equipment's amortisation.
 - d. The law would not recognise two-party financial leases.
 - e. The lessee in a financial lease need not receive information regarding the supplier and the supply agreement, as subparagraph (d) of Article 2's definition of "financial lease" required.
 - f. The Reporter was instructed to make clear that parties would be free to include a purchase option in a financial lease, as under the Ottawa Convention.
 - 3. Equipment: The definition of equipment would be expanded to include real estate and software. The Reporter was instructed to minimise the model law's interference with other laws governing real estate and software.
- III. **Chapter II** (Formation and documentation of leasing agreement): Chapter II would be deleted.
- IV. **Chapter III** (Effect of leasing agreement)
 - A. **Article 8** (Enforceability): Article 8 would be retained.
 - B. **Article 9** (Transfer): The lessor's power to transfer would be subject to fewer restraints than the lessee's. The Reporter was instructed to consider the terms of the Ottawa Convention's Article 14.
 - C. **Article 10** (Lessee under financial lease as beneficiary of supply agreement): Article 10(1)(c)'s requirement that the lessor take "commercially reasonable steps" to assist the lessee in the identified circumstance would be retained. The Reporter was instructed to make clear that the lessor's remedies under the supply agreement would be transferred to the lessee.

- D. **Article 11** (Priority of liens): Article 11(3), providing for a “mechanic’s lien”, would be deleted.
 - E. **Article 12** (Registration): Article 12 would be retained. The Reporter was instructed to consider whether Article 12 should be clarified to include registration of other interests in addition to leasing agreements and to require compliance with laws requiring other forms of notice in addition to registration.
 - F. **Article 13** (Liability for death, personal injury, or property damage caused to third parties): The model law would adopt the substantive rules reflected in Article 8(1) of the Ottawa Convention, regarding the lessor’s liability for harm to the lessee and to third parties.
- V. **Chapter IV** (Performance of leasing agreement)
- A. **Article 14** (Risk of loss): When risk of loss is to pass to the lessee and the time of passage is not stated, the risk of loss would pass when title passes to the lessor.
 - B. **Article 15** (Damage to equipment): The Reporter was instructed to go beyond the scope of Article 15 and specifically to consider whether a separate rule for financial leases is necessary.
 - C. **Article 16** (Irrevocability): Article 16 would be retained. In addition, the Reporter was instructed to ensure that the Article 16 would not be overridden by rights under Articles 17 and 27 to reject equipment, revoke acceptance, and obtain damages for non-conforming equipment.
 - D. **Articles 17** (Acceptance) and 27 (Rejection of non-conforming delivery): The Reporter was instructed to consider whether Article 17(1)(c)’s reference to “in a manner inconsistent with the lessor’s or supplier’s rights” would be deleted and whether paragraph 2 should be divided into two paragraphs.
 - E. **Article 18** (Warranty of quiet possession): In a lease other than a financial lease, the warranty of quiet possession would be provided by the lessor or the supplier.
 - F. **Article 19** (Warranty of merchantability)
 - 1. The supplier in a financial lease would warrant merchantability whether or not the supplier is a merchant with respect to equipment of that kind.
 - 2. The Reporter was instructed to define the term “merchant”.
 - G. **Article 20** (Warranty of fitness for a particular purpose): The model law would not provide a warranty of fitness for a particular purpose.
 - H. **Article 21** (Lessee’s duty to maintain the equipment): The lessee’s duty to take proper care of the equipment would be retained, but the Reporter was instructed that the law should provide more specific guidance about what the duty requires.
- VI. **Chapter V** (Default)
- A. **Article 22** (Definition of default): The model law would contain a statutory definition of default.
 - B. **Article 23** (Notice): Article 23 would be deleted.

- C. **Articles 24** (Damages) **and 25** (Liquidated damages): Articles 24 and 25 would be retained.
- D. **Article 26** (Termination): The Reporter was instructed to revise Article 26, particularly with respect to termination in financial leases.
- E. **Article 28** (Lessor's right to the equipment)
 - 1. The lessor would have the right to take possession of and dispose of the equipment regardless of whether termination was by the lessor.
 - 2. The lessor would have the right to dispose of the equipment following termination regardless of whether the equipment is in the lessor's possession.
 - 3. The Reporter was instructed to revise Article 28 in the light of concerns that self-help may not be a viable remedy in some of the developing countries to which the future model law would be addressed.

The Reporter also advised that the next draft of the model law would include a preamble and would identify provisions of the law that should be designated as mandatory. Members of the Advisory Board were invited to submit suggestions for the preamble's contents and to identify provisions they believed should be mandatory before the revised draft was circulated.

The second preliminary draft, which the Advisory Board agreed to treat as confidential, would be distributed in English and French on 10 March 2006. Comments on the draft submitted in writing by 17 March 2006 would be translated and distributed to members of the Advisory Board and to UNCITRAL on 27 March 2006. These comments would provide the basis for discussion at the Advisory Board's third and final session, to be held from 3-5 April 2006 at the seat of UNIDROIT. This third session would consist both of plenary sessions to discuss the future model law's substantive provisions and sessions of a smaller Drafting Committee.

The Deputy Secretary-General advised the Advisory Board that following this third session, the model law would be submitted to the Governing Council for consideration as to the most appropriate follow-up to be given to the preliminary draft. The Deputy-Secretary General would be recommending that the preliminary draft be transmitted to Governments for finalisation and approval, first, through the holding of a special conference which it was hoped to convene in Rome in October 2006, with the financial support of the I.F.C., and, secondly, at an extraordinary session of the General Assembly of UNIDROIT member States, to be held in Rome in November 2006. The intention would be to present what would then be the draft model law at the proposed October 2006 conference not only to UNIDROIT member governments but also those non-member governments that might be interested in the subject-matter — especially developing countries and transitioning economies — and national and regional leasing associations.

Following additional discussion of a request for assistance in developing the Ukrainian leasing industry and a presentation by Professor Shi, the Chairman adjourned the meeting on 7 February 2006.