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UNIDROIT MODEL LAW ON LEASING:

FIRST DRAFT OF AN OFFICIAL COMMENTARY

(prepared by Mr R.M. DeKoven, Reporter to the Joint Session of the UNIDROIT General Assembly and the UNIDROIT Committee of governmental experts for the finalisation and adoption of a draft model law on leasing)

Article 1

1. Article 1 provides for the Law to “appl[y] to any lease of an asset” so long as the asset or the lessee’s centre of main interests is within the State adopting the Law or so long as the leasing agreement provides that the law of that State will govern the transaction.
2. The Law applies if the asset is within the enacting State, the centre of main interests of the lessee is within the enacting State, or the parties agree that the enacting State’s law governs the transaction. There may be transactions that fall within the sphere of application of several States’ laws. In such cases, traditional choice of law rules will determine which law applies. This provision does not displace traditional choice of law rules.
3. The term “centre of main interests” derives from the UNCITRAL Model Law on Cross-Border Insolvency Art. 2(b) (UNCITRAL 1997) and European Union Council Regulation 1346/2000, Preamble § 13, 2000 O.J (L 160) 1, 2 (EU), and should be interpreted as it is under those laws.

Article 2

Asset

1. The definition of asset is sufficiently broad to include intellectual property, including software. Whether particular intellectual property qualifies as an asset will be determined on a case-by-case basis.

Financial Lease

1. The Law defines “financial lease” to include operating leases, that is leases that do not amortise the entire investment of the lessor.

2. A subsequent lease of an asset that has previously been leased may qualify as a financial lease if it satisfies the definition of financial lease. Sub-paragraph (b) requires that the asset be acquired in connection with a lease. This may include a previous lease. So long as the supplier has knowledge that the asset is being acquired in connection with a lease, there is a sufficient basis to extend the duties owed by the supplier to the lessee in Article 7.

Lessor

1. That a lessor is affiliated with a supplier or is also a vendor of the asset does not affect the lessor's status under the definition of "lessor" or the lease's status under the definitions of "lease" or "financial lease". A lessor that is also a vendor of the asset may have other duties that arise from other law.

Article 3

1. Article 3(1)'s reference to leases that function as security rights incorporates existing State law regarding the definition of "security right". Article 3(1) ensures that, when a transaction creates a security right as defined in other law, this Law does not apply to any aspect of the transaction.

Article 4

1. Because a uniform leasing law can encourage development not only within individual States but also across a region, Article 4 instructs domestic courts to interpret the Law with due regard for the interpretations of other States and the Law's purpose.

Article 5

1. Article 5 ensures that only those provisions that are essential for protecting the rights of the weaker party should be made mandatory.

Article 6

1. Article 6 provides for the enforceability of the leasing agreement and the parties' rights and remedies between the parties and against purchasers of the asset and against creditors.
2. Article 6 can be limited by other law, i.e. law governing insolvency or secured transactions.

Article 7

1. Article 7 provides that the lessee is able to enforce the rights of the lessor under the supply agreement. This provision recognises that the underlying substantive transaction is one in which the lessee acquires an asset or the use and possession of an asset from the supplier and that the lessor is a mere financier.

Article 8

1. Article 8 provides rules for the treatment of creditors of the lessee and lessor with respect to the lease.

Article 9

1. Article 9 limits the liability of the financial lessor for actions taken in the course of performing its duties as lessor and as owner.
2. Article 9, while limiting liability based on the lessor's capacity of lessor or of owner, does not exclude liability based on other grounds, i.e. fraudulent acts of the lessor.
3. The rule provided in Article 9 differs from the rule provided in Article 8(1) of the UNIDROIT Convention on International Financial Leasing (Ottawa, 28 May 1988), which bars liability of the lessor in its capacity as lessor but permits liability based on the lessor's capacity as owner.

Article 10

1. Recognising the financial lessor's role as a financier, Article 10 makes the parties' duties irrevocable and independent when the asset subject to the lease has been delivered to and accepted by the lessee.

Article 11

1. Article 11 gives the lessee the risk of loss, enabling the lessee to insure its interest in the asset and protect itself against any damage to the asset.

Article 12

1. Article 12 provides rules to govern the circumstance in which an asset is damaged without fault of the lessee or of the lessor.
2. Article 12 is subject to the freedom of contract provided in Article 5. When a lessee accepts a damaged asset with due compensation from the supplier for the loss in value, Article 12 does not prevent the lessee and the lessor from agreeing that such compensation is to be remitted to the lessor and applied to reduce the rentals owed.

Article 13

1. Article 13 seeks to identify the time at which acceptance occurs, as well as, in conjunction with Articles 10 and 14, certain consequences of acceptance. The lessee's acceptance of the asset may have consequences under other laws of an enacting State, such as the law of sales.

2. Article 13 is subject to the freedom of contract provided in Article 5. When a lessee is entitled to damages because the asset does not conform to the lease or the supply agreement, Article 13 does not prevent the lessee and the lessor from agreeing that such compensation is to be remitted to the lessor and applied to reduce the rentals owed.

Article 14

1. Article 14 provides further rules regarding the parties' rights and duties when an asset is not delivered, is partially delivered, is delivered late or fails to conform to the leasing agreement.

Article 15

1. To facilitate the growth of a leasing market, Article 15 provides for the transfer of the lessor's rights. Article 15 also provides for the transfer of the lessee's rights and the transfer of both parties' duties.
2. The reference in Article 15(1)(a)(ii) to the lessee's ability to assert defences or rights arising from the incapacity of the lessee is to a transfer that is invalid owing to the lessee's lack of legal capacity to contract.

Article 16

1. Article 16 requires a lessor to warrant that the lessee's quiet possession will not be disturbed and makes clear that, if such warranty is broken, the lessee may bring an action for damages against the lessor.
2. The lessor's warranty of quiet possession does not interfere with any right of an owner or any other holder of an interest to take possession of the asset subject to the lease. Article 16 creates a remedy for a lessee whose quiet possession is disturbed by such an action.

Article 17

1. Article 17 requires the lessor or, in a financial lease, the supplier to warrant that the asset being leased meets certain minimum requirements for such an asset in the trade.

Article 18

1. Article 18 specifies the duty of care required of the lessee in respect of the asset.

Article 19

1. Article 19 provides a definition of default but permits the parties to agree otherwise.

Article 20

1. Article 20 requires the other party to send a notification of any default, enforcement or termination and provide an opportunity for such non-compliance to be cured.
2. Whether notice is adequate shall be governed by existing law of the State or, where there is no such law, by reference to such other authorities as are permitted by law. Article 1.10(1) of the UNIDROIT Principles of International Commercial Contracts provides that, where notice is required, it may be given by any means appropriate under the circumstances. Article 1.10(2)-(3) of those Principles provide that a notice is effective when it reaches the person to whom it is given, whether by being given to that person orally or delivered at that person's place of business or mailing address.
3. Whether the opportunity to cure is reasonable shall be governed by existing law of the State or, where there is no such law, by reference to such other authorities as are permitted by law. Under Article 7.1.4 of the UNIDROIT Principles of International Commercial Contracts, the right to cure is not precluded by notice of termination. The cure must be permitted when the cure is accompanied by notice, given without undue delay, from the defaulting party indicating the proposed manner and timing of the cure; the cure is appropriate in the circumstances; the aggrieved party has no legitimate interest in refusing cure; and the cure is effected promptly.

Article 21

1. Article 21 provides a damages rule if the parties do not otherwise agree.

Article 22

1. Article 22 permits the parties to agree to a liquidated damages amount for any default, so long as the amount is reasonable.

Article 23

1. Article 23 permits a party to terminate the agreement, and discharge all the parties' future duties, only upon a fundamental default by the other party.
2. Under Article 7.3.1 of the UNIDROIT Principles of International Commercial Contracts, whether a default amounts to a fundamental default shall be determined with regard to whether (a) the default substantially deprives the aggrieved party of what it was entitled to expect under the agreement unless the other party did not foresee and could not reasonably have foreseen such result; (b) strict compliance with the duty that has not been performed is of essence under the agreement; (c) the default is intentional or reckless; (d) the default gives the aggrieved party reason to believe that it cannot rely on the other party's future performance; and (e) the defaulting party will suffer disproportionate loss as a result of the preparation or performance of the agreement is terminated.

Article 24

1. Article 24 provides that the lessor has the right to take possession of the leased asset at the end of the lease.
2. The means by which a lessor may take possession of an asset is left to be determined by other law of the State.
3. The lessor's right to take possession of and dispose of the asset is subject to the parties' freedom of contract.