



INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW  
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

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**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  
Rome, 10/13 November 2008**

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### **DRAFT MODEL LAW ON LEASING**

**as reviewed and authorised for transmission to Governments and Organisations, for  
finalisation and adoption, by the UNIDROIT Governing Council, at its 87<sup>th</sup> session, held in  
Rome from 21 to 23 April 2008:**

### **COMMENTS**

*submitted by Governments and Organisations*

### **INTRODUCTION**

Pursuant to the decision taken by the UNIDROIT Governing Council at its 87<sup>th</sup> session, held in Rome from 21 to 23 April 2008, to authorise transmission of the draft model law on leasing to Governments and Organisations for finalisation and adoption, the UNIDROIT Secretariat on 8 July 2008 transmitted, under cover of invitations to Governments, Organisations and members of the UNIDROIT Advisory Board to attend a Joint Session of the UNIDROIT General Assembly and the UNIDROIT Committee of governmental experts for the finalisation and adoption of the draft model law, the text of this draft model law as reviewed and authorised for such transmission by the Governing Council, at its 87<sup>th</sup> session (hereinafter referred to as *the draft model law*), with an invitation to formulate comments thereon for consideration by the Joint Session.

As of 20 October 2008 the UNIDROIT Secretariat had received comments from the Governments of Burkina Faso, Canada, the People's Republic of China, Germany, Latvia, Rwanda and Turkey. These comments are reproduced hereunder.

### **COMMENTS SUBMITTED BY GOVERNMENTS**

#### ***Burkina Faso***

Developing countries are bursting with small- and medium-size enterprises which are frequently short of means of production or have means of production which are obsolete and inadequate. This explains the high cost of equipment and the shortage of resources to acquire them. Such resources often have to be sought by recourse to the classic forms of foreign investment (long- and short-term financing granted by banks). This technique is not always to the advantage of these enterprises, obliged as they are in most cases to pay a down-payment. Leasing could offer an important solution for these enterprises in the development of their activities. In

fact, it involves a mechanism in which all the contracting parties may find benefit. Thus, a leasing transaction is profitable for the lessor. By reason of his ownership rights over the equipment, his losses in the event of the lessee's default will be less than those of the banker who provided him with financing. Moreover, in the event of the lessee's non-payment of rentals, the proceeds of resale or re-leasing will enable the lessor to recuperate all or part of the money still owing to him at the moment of default. This element of certainty which leasing transactions represent for lessors means that the lessor is all the more predisposed to finance leasing transactions and to be more flexible in the calculation of the rentals. For the lessee, leasing provides a solution for his shortage of resources, since it offers a way of paying for 100% of the cost of the equipment so that the lessee will not need to put down a down-payment. Moreover, it provides a mean of fighting against obsolescence and accelerating the process for the replacement of the means of production, with, as a primary consequence, an improvement in the production and the productivity of the enterprise. For the supplier, it may be a means of promoting sales. Moreover, the supplier, through leasing, may encourage his customers to be faithful by proposing, through the precise follow-up he provides in relation to the equipment, offers which respond perfectly to their expectations.

When used discerningly, leasing transactions are a certain factor in economic growth.

The development of a legal and regulatory framework is absolutely necessary if one is to take advantage of the economic benefits of leasing.

Thus, the initiative of the International Institute for the Unification of Private Law (UNIDROIT) is to be welcomed, as the demonstration of its serious intention to promote investment by leasing through adoption of the UNIDROIT Convention on International Financial Leasing, which provides uniform substantive rules governing, in particular, the civil and commercial law aspects of international financial leasing transactions, and now the preparation of the draft model law.

This legal framework must necessarily:

- define the technical terms through which leasing may be identified;
- guarantee a sufficient degree of freedom of contract, with a clear legislative framework recognising the ownership of the lessor and the rights of the lessee;
- provide solutions for the case of default;
- recognise the triangular structure of the leasing transaction.

The draft model law as at present drafted takes due account of all these aspects.

The draft model law has, in particular, the merit of:

- defining certain terms which are not evident to those uninitiated in the mysteries of law and which might lead to confusion;
- giving guidelines for its interpretation, the effect of which will be to harmonise interpretation;
- recognising the freedom of contract of the parties;
- making Articles 7(3), 16(1)(a), 16(2) and 22(3) mandatory provisions, with the intention of protecting the weaker party, namely the lessee.

However, certain aspects are still ambiguous and would benefit from being clarified. This is the case for:

*Re: Article 2 - Definitions*

"Asset": "... No asset shall cease to be an asset for the sole reason that the asset has become a fixture to or incorporated in real property". This sentence seems both ambiguous and redundant, given that the draft model law encompasses both movables and immovables.

"Supplier": "... means a person *from whom* a lessor acquires ...". In the French-language version, the words "from whom" are rendered by "à laquelle"; it is proposed that these last words should be replaced by "auprès de laquelle".

As regards the question whether aircraft, aircraft engines, helicopters, railway rolling stock, ships and space assets should be excluded from the sphere of application of the proposed model law, we agree with those who are of the opinion that these classes of asset should not be excluded. In effect, these types of infrastructure concern the transport sector and are extremely expensive for our economies; however, they are indispensable for the development of our countries (above all for land-locked countries like Burkina Faso). Leasing must, therefore, be seen as a necessary means of remedying this situation.

*Re: Article 11 - Risk of loss*

Sub-paragraph (1)(a) reads "In a financial lease, risk of loss passes to the lessee. If the time of passage is not stated, the risk of loss passes to the lessee when the leasing agreement has been entered into".

This provision creates contractual uncertainty and is unfavourable to the weaker party. In fact, it is for the lessor and the supplier to place the equipment at the disposal of the lessee. Thus, receipt of the asset by the lessee, in principle, indicates due performance of the duty incumbent on these parties to deliver the asset and authorises the lessor's payment of the price of the equipment to the supplier. How then is it conceivable that the lessee should bear the risk of loss in cases when he has not yet received the asset. It would be both more logical and more objective to fix the time for the passage of the risk of loss to the lessee at the moment when the asset is delivered and to exclude, in sub-paragraph (1)(b), the case of non-delivery.

*Re: Article 12 – Damage to the asset*

Sub-paragraph (2)(b) reads "if the loss is partial, the lessee may demand inspection and at the option of the lessee either treat the leasing agreement as terminated or accept the asset with due allowance from the rentals payable for the balance of the lease term for the loss in value but *without further right against the lessor*".

First, in the French-language version, the words "il est sans aucun recours" could be replaced by the words "il ne dispose d'aucun recours".

Then, this last phrase seems ambiguous to us and contradicts the preceding part of the provision, since the draft model law recognises that the lessee has the option to treat the leasing agreement as terminated or to accept the asset with due allowance from the rentals payable for the balance of the lease term for the loss in value. What will happen if a dispute arose in this regard? Is this phrase hinting at an action for damages? Clarification, in any case, is necessary.

*Re: Article 14 - Remedies*

Paragraph (1) reads "In a financial lease, when an asset is not delivered, is partially delivered, is delivered late or fails to conform to the leasing agreement, the lessee may demand a conforming asset from the supplier and seek such other remedies as are provided by law".

We would propose adding at the end of this sentence the words "for this purpose", which means with a view to that. Thus, the provision would read "and seek such other remedies as are provided by law for this purpose".

Sub-paragraph (2)(a) reads "... Rejection or termination must be within a reasonable time after the non-conforming delivery".

It would be preferable to lay down a clear time-limit so as to avoid either an over-restrictive or unduly extensive interpretation of the concept of "reasonable time".

*Re: Article 15 – Transfer of rights and duties*

Sub-sub-paragraph (1)(a)(ii) reads "The leasing agreement may provide that the lessee shall not raise against a transferee any of its defences or rights of set-off against the lessor [other than those arising from the incapacity of the lessee]".

This provision is unfavourable to the lessee, who is the weaker party. He ought to be able to raise against the transferee any defences or rights of set-off which it has against the lessor. Moreover, the incapacity of the lessee in this context requires clarification.

*Re: Article 20 – Notices*

Article 20 reads in English: "An aggrieved party shall give a defaulting party notice of default, notice of enforcement, notice of termination and a reasonable opportunity to cure".

[*Note by the UNIDROIT Secretariat:* given the comments formulated by the Government of Burkina Faso and the differing drafting of this provision in English and French, it would seem appropriate also to reproduce the French-language version of Article 20, which reads: "Notification est faite par le créancier à son cocontractant de son inexécution et de l'exercice éventuel contre lui de tout recours s'il ne remédie pas à sa situation dans un délai raisonnable. Il ne pourra résilier son contrat qu'après avoir notifié à son cocontractant son inexécution et lui avoir accordé un délai raisonnable lui permettant de remédier à sa situation".]

The concept of "reasonable opportunity" needs to be clarified for the reasons given above. Besides, it results from this provision that the person owing the duty has to make known to the person to whom he owes that same duty that, if he does not cure his default, he will make use of the legal procedures available to him. We think that the title of this Article in French might be replaced by the term "Mise en demeure", which covers the two concepts of notice (bringing something to the notice of somebody) and warning envisaged in the thinking behind this Article.

*Re: Article 23 – Termination*

Under sub-paragraph (1)(a), a leasing agreement may be terminated "by an aggrieved party upon fundamental default by the lessee or lessor". However, this provision does not give any definition of the word "fundamental" or the criteria to be employed for the purpose of determining what is to be understood by this term. This omission could well be the source of many

interpretations and much litigation. It would, therefore, be advisable to qualify what is meant by "fundamental default", at least in the commentary that is to be prepared on the future model law.

Sub-paragraph (1)(b) reads: "... but is entitled to such other remedies as are provided by the agreement of the parties and by law". The French-language version of this part of sub-paragraph (1)(b) refers to "mesures convenues autres"; it is suggested that the words "autres mesures convenues" would be better.

*The purchase option exercisable by the lessee at the end of the leasing agreement* is one of the fundamental ingredients of leasing, distinguishing it from neighbouring legal concepts; this ingredient, however, is not dealt with by the draft model law. It is, nevertheless, a very important issue, since it enables the lessee to acquire the equipment. It would be interesting to regulate it, in particular from the points of view of the means by which it may, and the time within which it may be exercised.

Finally, the draft model law is silent on the consequences of termination of the supply agreement or, in other words, the contract of sale. What would be the *fate of the leasing agreement if the sale was avoided and restitution made in the customary manner*? This raises the question of the degree of supposed interdependence between the initial sale and the leasing agreement, in its lease segment. Certainly, the two contracts are legally distinct but they have a common characteristic in that the asset, sold under one contract, is placed at the disposal of the lessee under the other contract. This difficulty has given rise to a difference of opinion in case-law, in France, at the level of the Court of Cassation even. The first Civil Chamber took the view that the avoidance of the sale which leads to the disappearance of any right of ownership of the financial lessor meant that the latter had not been able to lease the asset and that the financial leasing agreement was void, for absence of *cause* (or rather for absence of subject-matter), so that the lessee was freed from the duty to pay his rentals (Civ. 1ère 3 March 1982, J.C.P. 1983, II, 20115, note BEY). On the contrary, the Commercial Chamber recognised the lessee's continuing duty to pay his rentals (Com. 15 March 1983, J.C.P. 1983, II, 20115). However, the Court of Cassation dealt with the problem definitively in three judgments given in *chambre mixte*<sup>1</sup> on 23 November 1990, by stating that "*avoidance of the contract of sale necessarily means termination of the financial leasing agreement, subject to application of the clauses concerned with regulating the consequences of such termination*" (Ch. Mixte, 23 November 1990, D. 1991, P 121, note LARROUMET). Ever since then, termination seems to be established, those rentals paid are not reimbursed and those due are no longer due. This is, to our mind, a sound solution, since, selection of the equipment having been made by the lessee, without any involvement by the lessor, who is nothing more than a financial intermediary in the transaction, it would be unjust for the lessee to be injured in the event of the contract of sale being avoided. Thus, if, for example, in the leasing agreement it is provided that the lessee will pay the lessor compensation in the event of the contract of sale being avoided, the lessee will be bound to pay such compensation, subject to the judge's power to reduce such compensation. We believe that this is an important question, which should be looked at.

### **Canada**

As a general comment, the draft model law, in its April 2008 version, seems to address three types of lease, i.e. financial leases, leasing agreements and operating leases. In other words,

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<sup>1</sup> *Note by the UNIDROIT Secretariat:* the *chambre mixte* is made up of judges belonging to two or more chambers of the Court. It is presided over by the First President, who convenes it by a ruling. The *chambre mixte* meets when a case normally deals with matters falling within the remit of one or more chambers, if the question has received or is likely to receive different solutions from different chambers or if an equal number of votes have been cast for and against.

the definition of "lease" seems to cover both two-party leasing agreements that serve functionally as acquisition financing devices and two-party lease agreements that are simply operating leases.

The two first types of lease, i.e. three-party financial leases and two-party non-operating leasing agreements are of the same nature as acquisition security rights under the UNCITRAL Legislative Guide on Secured Transactions (hereinafter referred to as *the Legislative Guide*), Chapter IX. Therefore, if the treatment given to them in the draft model law and in the Legislative Guide is different, this may give rise to implementation difficulties of both instruments in one given State.

The following comments identify some of the differences between the draft model law and the Legislative Guide that may cause difficulties and provide suggestions to address them.

### 1. Third party effectiveness of security rights

- The Legislative Guide purports to cover security rights (including acquisition security rights in the form of leases and financial leases) and has rather specific requirements for achieving third party effectiveness of such rights (for example, a requirement that a notice be filed in the general security rights registry). Although the thrust of the draft model law seems to cover leasing arrangements that are similar to acquisition security rights, it appears to be silent on these issues.

- To address third party effectiveness of security rights arising from leasing agreements and financial leases, the Government of Canada suggests clarifying Article 3(2) in the following manner:

"A leasing agreement subject to this Law is also subject to any law of [this State] applicable to real property or ~~public notice~~ setting out requirements for achieving effectiveness against third parties with respect to a leasing agreement or an asset subject to a leasing agreement."

### 2. Rights of the lessor against the rights of other parties

- Article 8(1) of the draft model law seems to suggest that the lessor has an ownership right that prevents a creditor of the lessee from attaching any interest of the lessee in the leased asset.

- This rule goes directly contrary to the rule in the Legislative Guide that contemplates that the lessee under a security lease or financial lease may grant security in relation to its rights in the asset that is being leased, that is the lessee has an *in rem* right in the asset. The Legislative Guide provides, however, that the right of the lessor (if made effective against third parties as an acquisition security right) will always have priority over the rights of another secured creditor that may have rights in the asset being leased.

To address this issue, the Government of Canada suggests clarifying Article 8(1) in the following manner:

"1. A creditor of the lessee and the holder of any interest in land or personal property to which the asset becomes affixed take subject to ~~the rights and remedies of the parties to the leasing agreement and cannot attach any interest arising under the leasing agreement~~ the rights of a lessor under a leasing agreement that has been made effective against third parties under any law of [this State]."

### 3. Procedure for enforcement

- The Legislative Guide provides a detailed set of procedures governing the enforcement of the lessor's rights. These procedures consist of the formalities applicable when an ordinary secured creditor seeks to enforce a security right.

- In contrast, the draft model law, apart from a general statement about notice in Article 20 (including a right to cure and reinstate which the Legislative Guide does not contemplate), does not mention how the rights of the lessor are to be enforced.

- The Government of Canada suggests including in the draft model law provisions similar to the ones in the Legislative Guide regarding enforcement.

#### ***China (People's Republic of)***

*Re: Article 2 - Definitions*

(a) The definition of *asset* is too broad, which may not be a good idea as an introduction to the new market of what a lease is. We suggest excluding "consumer goods" from the definition, rearranging the enumeration to avoid overlapping of the enumerated terms and defining an asset under a lease and an asset under a financial lease separately (e.g. whether real estate is fit for financial leasing or not is still debatable).

(b) Since *the registered office of the person* is sometimes different from *the principal place of business*, it is suggested that *the principal place of business* be listed as a factor of the "centre of main interests".

(c) Sub-paragraph (c) of the definition of *financial lease* is not a characteristic to constitute a financial lease. We suggest deleting it or rephrasing it in the generic description.

(d) It is noticed that, in some Articles, the word *lease* also includes *financial lease*. To avoid confusion, we suggest clarification be made here, that is, "unless the context indicates otherwise, the word *lease* includes *financial lease*".

*Re: Article 19 - Definition of default*

Theoretically, the parties may agree on what constitutes a default at any time; there is no need to emphasise it here and we think agreement in advance should be encouraged. Therefore, we suggest the phrase "at any time" be deleted.

It is also suggested the draft model law gives the necessary instructions on what events constitute a *default* and *fundamental default*. Although the terms may be defined in some other legal documents, it is still important to make them clear either by making reference to relevant documents or enumerating the typical situations in leasing practice as examples, because default is really crucial to both parties.

*Re: Article 23(1)(b) - Termination*

It is improper that the lessee is not entitled to terminate the contract even for the fundamental default of the lessor or the supplier. The draft model law, while protecting the rights of the lessor, should also maintain a balance between the three parties. We suggest sub- paragraph (b) be deleted.

*Re: Article 24 - Possession and disposition*

It is suggested that a condition be added, that is “*Unless otherwise agreed, the lessor has the right to.....*”

*Re: Contents needing to be added:*

(a) It is suggested provisions on such special forms of financial lease as sub-lease, sale and lease back, etc. be added.

(b) In the definition of *asset*, it is mentioned that “No asset shall cease to be an asset for the sole reason that the asset has become a fixture to or incorporated in real property”. In these circumstances, the lessor’s right to repossess the asset of the upon the lessee’s default may be hindered or influenced. We suggest the draft model law give instructions on this issue in order to protect the lessor’s rights properly.

(c) It is suggested provisions on the lessor’s self-repossession of the asset upon the lessee’s default (not repossession under a court order) be added.

(d) According to Article 6(b), the rights of the lessor may challenge a *bona fide* third party. We agree on this point. However, this must be supported by a registration system of ownership for movables as leased assets. We suggest the draft model law give some overall instructions on registration.

### **Germany**

The Federal Republic of Germany thanks UNIDROIT for preparing the joint session of the General Assembly and of the Committee of governmental experts concerning the draft model law. Germany would like to take the opportunity to make another statement and in particular to discuss the commentaries contained in the Secretariat’s “explanatory note” of 30 June 2008 (Sub-section V).

*Re: Article 2*

As a result of the amendment of the definition of “financial lease”, there are now two diverging definitions in UNIDROIT’s legal corpus (the 1988 UNIDROIT Convention on International Financial Leasing and the draft model law). It should be reconsidered whether it would not be preferable to have one standard definition of leasing in UNIDROIT law.

*Re: Article 3(3)*

Article 3(3) of the draft model law should be discussed intensively once again. According to this Article, the draft model law is not to be applicable if assets are leased that fall under the Cape Town Convention. This regulation is based on the view that the draft model law’s provisions are incompatible with the provisions of the Convention on International Interests in Mobile Equipment (hereinafter referred to as *the Cape Town Convention*).

This view is not shared by the Federal Republic of Germany. Germany opposes in principle the exclusion of large-volume leasing agreements from the scope of the draft model law. This would call the entire undertaking into serious question. Many of the law’s provisions are also not appropriate for leasing agreements with a small investment risk. Rather, many provisions were even explicitly substantiated at meetings of the Committee of governmental experts by pointing to



the needs of large-volume agreements. In this context, the Federal Republic of Germany rejects a general clause according to which the draft model law is not applicable to agreements that are also subject to the Cape Town Convention.

In the view of the Government of the Federal Republic of Germany, there are in any case only two points where there may be overlaps between the Cape Town Convention and the draft model law. These relate to Article 8 and Article 16 of the draft model law.

In so far as the Aviation Working Group specifies in its statement further provisions of the draft model law that supposedly contradict the Cape Town Convention, this is not comprehensible. At most, the draft model law may contradict contractual legal practice. Such a contradiction can arise from any legal amendment, however. In such case as the legislator should decide in favour of new provisions, he changes the existing legal situation in principle, thereby also influencing contractual legal practice.

(a) Cape Town Convention and Article 8(1) of the draft model law

There is a genuine collision between Article 8(1) of the draft model law and Article 29(1) of the Cape Town Convention. Under Article 8(1) of the draft model law, creditors of the lessee are subordinate to the parties to the leasing agreement. Under the Cape Town Convention, in contrast, subject to a declaration by the Contracting States under Article 39 of the Cape Town Convention, those creditors that have a registered interest in keeping with the Cape Town Convention have priority over any interests that are registered later or that are not registered at all.

In the view of the Federal Republic of Germany, this conflict should be resolved within the framework of Article 8 of the draft model law and not by a general exclusion of application in Article 3 as the problem may lie in the text of Article 8(1). This Article establishes a priority of rights deriving from the leasing agreement that binds only the contracting parties, also vis-à-vis third persons who are not even parties to the leasing agreement. At the same time, this interferes with the regulation of priority under Article 29 of the Cape Town Convention, for which the chronology of entries in the International Registry is decisive. However, the Federal Republic of Germany has no objections to Article 8(2), because this paragraph explicitly allows deviating statutory provisions. In Contracting States, these also include the Cape Town Convention. In this context, it would be desirable to exclude a collision with the Cape Town Convention by making a correction to Article 8 of the draft model law, approximating paragraph 1 with paragraph 2 and to reformulate it as follows:

“Article 8 – Priority of liens

Except as otherwise provided by the law of [this State],

1. a creditor of the lessee and the holder of any interest in land or personal property to which the asset becomes affixed take subject to the rights and remedies of the parties to the leasing agreement and cannot attach any interest arising under the leasing agreement;
2. a creditor of the lessor takes subject to the rights and remedies of the parties to the leasing agreement.”

(b) Cape Town Convention and Article 16 of the draft model law

Article 16 of the draft model law obliges the lessor to guarantee the lessee's use of the asset. In contrast, the Cape Town Convention allows the holder of an international interest to take possession of the asset in the case of default.

In the view of the Federal Republic of Germany, this leads to a genuine contradiction of standards if one understands Article 16 of the draft model law to mean that the lessor guarantees the lessee unlimited possession of the asset. Then, there would be a collision with the Cape Town Convention if an international interest in the asset has been created and registered by another creditor (for example, the financier of the asset). In such a case, namely, the lessor from the outset cannot guarantee the lessee unlimited possession of the asset in the case of default in the relationship between the lessor and the financier. Rather, in this case a guarantee of unlimited possession of the asset deriving from Article 16 of the draft model law would come to nothing.

However, Article 16 of the draft model law may also be understood to mean that the lessor only has the obligation towards his lessee to give the latter possession of the asset and to guarantee the use thereof. It is possible for him to do so in principle even if the asset is encumbered with an international interest under the Cape Town Convention. However, in such case as a secured party that is in competition with the lessee uses his international interest under the Cape Town Convention, it will be impossible for the lessor in his relationship with the lessee to guarantee the latter use of the asset. Instead of the obligation to guarantee use, Article 16 (3) of the draft model law allows the possibility for the lessee to take action for damages against the lessor, however. If the lessor exceptionally cannot fulfil his obligation deriving from the draft model law to guarantee use of the asset because a creditor secured under the Cape Town Convention seizes it, the lessee thus – as a kind of substitute – should be able to take action for damages against his lessor. On the basis of such an understanding, a conflict between the Cape Town Convention and the draft model law can be avoided.

The Federal Republic of Germany proposes that it be clarified which of the alternative interpretations of Article 16 of the draft model law is to be preferred.

*Re: second sentence of Articles 12(1) and second sentence of Article 13(2)(a)*

The word "compensation" should be replaced by the word "remedy".

*Re: Article 13*

Germany proposes adding the following sentence to Article 13(1):

"The first leasing instalment shall be due upon *acceptance*."

Motivation:

Article 13(1) introduces the legal institution of "acceptance" but no binding legal consequences are attached to it. In so far as Article 13(2) provides for the lessee to have claims for damages on the supplier upon "acceptance" on account of the supply agreement not being properly fulfilled, these claims already derive from Article 7(1). The concept of "acceptance" is not required for the provision made by Article 13(2).

It is unsatisfactory for the draft model law to provide for a regulation and a legal institution to which no legal consequences are attached.

The discussion in Muscat showed, however, that in the practice of leasing agreements "acceptance" plays a significant role. Upon "acceptance", the lessor pays the supplier the purchase price and the lessee's obligation to pay instalments is due.

It is therefore logical to include the effects of "acceptance" in the draft model law. It is only by so doing that the legal institution gains substance.

It is also necessary to regulate the due date of the obligation to pay leasing instalments. This is because under Article 10 of the draft model law the contractual duties in principle become independent, irrevocable and due when the agreement is entered into. Thus, the lessor can demand payment of the leasing instalments even before acceptance. There may be a need for this in individual cases, for example if the asset still has to be manufactured and the lessee is to contribute to the cost of manufacture.

This should not be the dominant principle of the draft model law, however. According to the current legal situation, the lessor can even demand payment of the instalments if the asset is defective even before supply. Article 12 does not exclude claims in such cases.

*Re: Article 15(1)(a)(ii)*

The sentence in brackets should read as follows:

"as long as the lessee can assert these rights vis-à-vis the lessor"

Motivation:

Article 15(1)(a)(ii) is intended to enable refinancing by the lessor. This usually takes place by the lessor transferring his rights deriving from the leasing agreement to refinancing companies without the lessee noticing this ("quiet transfer"). All risks deriving from the agreement are to remain with the lessor and not to be passed on to the transferee. This is also appropriate.

However, the present text makes it possible for the lessor to transfer rights deriving from the agreement and thereby to prevent the lessee from raising any objections. It is unlikely that this was intended by the amendment included by the Committee of governmental experts in Muscat. The proposed text ensures that the lessee's rights are not affected by the transfer. As long as the lessee can assert his rights vis-à-vis the lessor, he is sufficiently protected. However, if this is not possible because the lessor withdraws from the business and is replaced by the transferee, the lessee must also be able to assert his objections vis-à-vis the transferee.

*Re: Article 23*

Germany proposes the following amendment:

that Article 23(1)(b) be deleted; and

that in Article 23(1)(a), the "(a)" and the words "Subject to sub-paragraph (b)" be deleted.

Motivation:

Under Article 23(1)(b), the lessee may not terminate the leasing agreement upon fundamental default by another party.

In Germany's view, however, fundamental default always constitutes a breach of confidence, with the result that it may no longer be reasonable for the contracting parties to adhere to a longer-term agreement.

Germany is of the opinion that for such cases the national laws regulate the reasons for termination in a differentiated way and the lessee has to be able to disengage from the leasing agreement by appeal to national law pursuant to Article 23(1).

This applies all the more since the lessor is granted the right of termination. After the first Committee of government experts in Johannesburg, Article 23(1)(b) was formulated in such a way that no contracting party should have such a right of termination. This provision would have been acceptable from the point of view of contractual justice in any case. However, a majority decision was taken in Muscat not to retain the Johannesburg text.

The present text contradicts the general concept that any party may terminate the agreement for an important reason, however. This provision is not just because it one-sidedly disadvantages the lessee.

### ***Latvia***

The Republic of Latvia approves the draft model law in general but keeps its opinion that it has to return to the initial formulation of Article 10 that provided that the financial leasing agreement comes into force at the moment of reaching the agreement on the essential elements of the transaction. At the same time, the Republic of Latvia draws attention to the formulation of Article 10 of the draft model law that has been changed at the first session of the Committee of governmental experts reaching the agreement of all States and that Article 10 now provides that a financial leasing agreement comes into force at the moment of reaching the agreement between the parties, because it corresponds to the nature of financial leasing.

### ***Rwanda***

*Re: Article 2 – Definitions*

Reading certain definitions (such as lessee, lessor and person), one notes that the draft model law does not draw any distinction between natural persons and legal persons for the purpose of the acquisition of the capacity of lessor. That said, even a natural person may act as a lessor in a lease. The law of Rwanda on financial leasing is restrictive in this regard, expressly requiring that only legal persons be able to act as lessor (Articles 1 and 15(2) of Law No. 06/2005 of 3 June 2005 regulating financial leasing and the conditions for the exercise of such activities).

*Re: Article 5*

This Article refers to the "law of [this State]", whereas it is clear that the Articles enumerated are provisions of a model law.

We would propose that it be redrafted as follows:

"Except as provided in Article 7(3), 16(1)(a), 16(2) and 22(3) of **this Law**, the lessor ..."

*Re: Article 9*

The term "death" in this Article lends itself to confusion, as it appears that it concerns ordinary death not resulting from damage caused to persons by the asset. As the death concerned here is part of the damage to persons, it would be better to speak simply about damage to persons; death and other forms of incapacity, whether total or partial, whether permanent or temporary, would, accordingly, be understood to be covered.

*Re: Article 14(2)(a) in fine*

The term "reasonable time" may be prejudicial to the lessee, who is the weaker party to the lease agreement. He may find himself short of arguments, in the event of litigation, to justify the delay in his rejection, as a result of the vague character of the expression "reasonable time".

We would propose that this time-limit for rejection or termination be made relatively clear in temporal terms, for example by redrafting the second sentence of sub-paragraph (2)(a) as follows:

"... Rejection or termination must be within a time not longer than that provided for payment of the first rental, except in a case of *force majeure*".

### ***Turkey***

The draft model law has been found in substance positive and contributing by the relevant Turkish institutions.

Nevertheless, we should like to convey some views of the Turkish Financial Leasing Association (FİDER) regarding the draft model law (J.S. Leasing/W.P.3). In fact, our experts could provide more information and wording suggestions during the meetings.

1. Article 2 (Definitions): it needs to be clarified whether the word "equipment" in the definition of "asset" includes "rights". If not, it is deemed important and necessary to make an addition so that the definition in question explicitly includes "rights".
2. In the same part it is deemed necessary to make a reference to "style leasing".