



**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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SUMMARY REPORT

(prepared by the UNIDROIT Secretariat)

I. INTRODUCTION

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 (hereinafter referred to as the *Joint Session*) met at the Headquarters of the Food and Agriculture Organization of the United Nations in Rome from 10 to 13 November 2008 to finalise and adopt the draft model law on leasing as reviewed and authorised for transmission to Governments, for finalisation and adoption, by the UNIDROIT Governing Council, at its 87th session, held in Rome from 21 to 23 April 2008, following the second session of the Committee of governmental experts, held in Muscat from 6 to 9 April 2008 (reproduced in Appendix I to this summary report and hereinafter referred to as the *draft model law*).

The session was opened at 9.30 a.m. on 10 November 2008 by H.E. Mrs Amanda Vanstone, Ambassador of Australia in Italy, as President of the UNIDROIT General Assembly. 33 States, two intergovernmental Organisations, two international non-governmental Organisations and three professional associations (see List of participants reproduced in Appendix II to this summary report) were represented at the Joint Session.

Mrs Vanstone and the Secretary-General of UNIDROIT, Mr J.A. Estrella Faria, thanked the States and observers represented for their support of the draft model law and reminded them of its purpose and the urgent need for it as expressed by the States for which it was primarily designed, namely developing countries and transition economies, and by those Organisations seeking to encourage and facilitate leasing in those States. The Chairman of the Committee of governmental experts, Mr N.J. Makhubele (South Africa), urged participants to work in a co-operative spirit, inviting them to ensure that the future model law be balanced in nature so that it would be both implemented by countries with developing and transition economies and embraced by countries with developed economies.

II. BUSINESS OF THE JOINT SESSION

The Joint Session was seized of the following papers:

- Draft agenda (J.S. Leasing/W.P. 1);
- Draft agenda: explanatory note (prepared by the UNIDROIT Secretariat) (J.S. Leasing/W.P. 2);
- Draft model law on leasing (as reviewed and authorised for transmission to Governments, for finalisation and adoption, by the UNIDROIT Governing Council, at its 87th session, held in Rome from 21 to 23 April 2008, following the second session of the Committee of governmental experts, held in Muscat from 6 to 9 April 2008) (J.S. Leasing/W.P. 3);
- Draft model law on leasing (as reviewed and authorised for transmission to Governments, for finalisation and adoption, by the UNIDROIT Governing Council, at its 87th session, held in Rome from 21 to 23 April 2008, following the second session of the Committee of governmental experts, held in Muscat from 6 to 9 April 2008): commentary (prepared by the UNIDROIT Secretariat) (J.S. Leasing/W.P. 4);
- Draft model law on leasing (as reviewed and authorised for transmission to Governments, for finalisation and adoption, by the UNIDROIT Governing Council, at its 87th session, held in Rome from 21 to 23 April 2008, following the second session of the Committee of governmental experts, held in Muscat from 6 to 9 April 2008): comments submitted by Governments and Organisations (J.S. Leasing/W.P. 5 and Addenda 1 and 2); and
- Joint proposal regarding the application of the draft model law on leasing to aircraft transactions (submitted by the UNIDROIT Secretariat and the Aviation Working Group (A.W.G.)) (J.S. Leasing/W.P. 6).

The Joint Session adopted the agenda, the text of which is reproduced in Appendix III to this summary report.

The organisation of the Joint Session's work was introduced by Mr M.J. Stanford, Deputy Secretary-General of UNIDROIT. He proposed, in particular, that, in the absence of Rwanda and Tanzania, which, together with Oman and the United States of America, were members of the Drafting Committee, Canada and France be added to the Drafting Committee for the Joint Session. The Joint Session agreed to this proposal. It was further decided that, just as during the first two sessions of the Committee of governmental experts, the Joint Session would carry out a further reading of the draft model law on an Article-by-Article basis with a view to permitting the Drafting Committee to implement any amendments decided upon by the Joint Session during such reading and the Joint Session itself then to review the work accomplished by the Drafting Committee prior to the text of the draft model law as so reviewed being laid before the Joint Session for adoption.

Mr R.M. DeKoven, a UNIDROIT correspondent, who had acted as Reporter to the Committee of governmental experts, acted also as Reporter to the Joint Session. Mr B. Hauck, who had acted as Secretary to the Committee of governmental experts, acted also as Secretary to the Joint Session.

III. REVIEW OF THE PROVISIONS OF THE DRAFT MODEL LAW BY THE JOINT SESSION

With the exception of the title of, and preamble to the draft model law – which were left to be reviewed by the Joint Session at a second stage, once both the Joint Session and the Drafting Committee had completed a first review of the entirety of the substantive provisions of the draft model law – over the course of 10 and 11 November 2008 the Joint session, with Mr Makhubele in the chair, proceeded to review the draft model law. In the course of this review the Joint Session reached the following conclusions:

Re: Article 1 - Sphere of application

One State, echoing a concern that had been addressed at the second session of the Committee of governmental experts, questioned how Article 1 would interact with choice of law rules. It was agreed that, consistent with the clarification given on this issue in Muscat, the planned Commentary should make it clear that Article 1 would not displace the role of traditional rules governing choice of law.

Re: Article 2 - Definitions

(a) “Asset”

In response to one State’s observation that the definition of “asset” could be interpreted not to include the work of artisans and craftsmen, it was agreed that the Drafting Committee should ensure that the work of artisans and craftsmen be encompassed by that definition.

Several States sought clarification as to how assets that became fixtures or incorporated in real property were to be handled at the end of a lease. It was ultimately decided, as had been discussed at previous sessions of the Committee of governmental experts, that issues of repossession should be left to local law. One State suggested that the planned Commentary could describe the remedies mentioned in the Legislative Guide on Secured Transactions prepared by the United Nations Commission on International Trade Law (UNCITRAL) (hereinafter referred to as the *Legislative Guide*). This suggestion was referred to the Secretariat.

The question of whether the definition encompassed intangible property was also raised. One State noted that the issue might be resolved by reference to local law’s interpretation of the term “possession”, inasmuch as local law might determine whether an intangible asset could be possessed. Some States agreed. Other States questioned whether the definition of “asset” encompassed leases of software, films and other forms of intellectual property; it was noted that the definition of “asset” was broad but the Joint Session did not modify the definition contained in the text.

Finally, some States raised the question whether the limitation on property that was “used in the trade or business of the lessee” was sufficient to make it clear that the future model law did not apply to consumer leases. One State noted that the deletion of the word “commercial” from the title of the preliminary draft law as it emerged from the second session of the Committee of governmental experts was unfortunate in that respect. However, on assurance that the deletion of the term was necessary in the French version, it was decided not to reinstate that term.

(b) “Centre of main interests”

Some States questioned whether the definition adequately focussed on a person’s principal place of business, as they considered desirable, but were assured that the reference to the place where the person “conducts the administration of its interests on a regular basis” would be interpreted in the same manner. Another State proposed deleting the definition entirely, noting that the definition employed was an amalgamation of the definition employed by European Union Council Regulation 1346/2000 and the UNCITRAL Model Law on Cross-Border Insolvency and that a sufficient body of law had developed to interpret the term such that, were it not defined here, a reference in the planned Commentary to those other laws would be sufficient.

(c) “Financial lease”

One State suggested that it be made clear that a re-lease of the same asset could qualify as a financial lease. One State questioned whether a definition of financial lease that broad would be appropriate, inasmuch as the draft model law also limited the lessor’s liability in a financial lease. However, it was noted that the lessor’s liability was not limited to the extent that such liability was based on any of its actions in its capacity of manufacturer or supplier. Some States questioned whether permitting a re-lease of the same asset would eliminate the distinction between a financial lease and a lease other than a financial lease but others noted that the other requirements of a financial lease could still be met even with a re-lease. It was, therefore, agreed that the planned Commentary should reflect the fact that a re-lease could qualify as a financial lease.

One State also proposed that paragraph (c) of the definition be deleted, inasmuch as its requirement that the rentals or other funds payable “take into account or do not take into account” the amortisation of the lessor’s investment was so uncertain as no longer really to be enunciating a definitional ingredient. Several States and one observer, however, reminded the Joint Session that in many States that element of the definition was critical for the lease’s financial nature and had, therefore, to be retained.

One State proposed that the definition be modified to note that the option to purchase might be an option to purchase “all or part of” the leased asset. Supported by another State, the proposal was adopted.

To alleviate UNCITRAL’s concern that the definition of financial lease could be interpreted to cover a lease that created a security right, such leases being expressly excluded from the sphere of application of the draft model law by Article 3(1), it was agreed that the planned Commentary should refer to Article 3(1)’s exclusion of leases that created security rights.

(d) “Lease”

One State proposed that the phrase “Unless the context indicates otherwise”, appearing in both the definition of “lease” and other definitions, was unnecessary in the light of the other provisions of the draft model law and could, therefore, be deleted. Supported by another State, the proposal was referred to the Drafting Committee.

One State suggested that it be made clear that operating leases were covered by the draft model law, either by including a definition of that term or otherwise making it clear in the planned Commentary. The issue was referred to the Drafting Committee.

It was also noted that the reference to a lease as an “agreement” could make the subsequent references to the “leasing agreement” unnecessary, particularly in the English version, and that the Drafting Committee should consider that issue.

(e) “Lessee”

The Joint Session agreed that the present definition of lessee was satisfactory.

(f) “Lessor”

The Joint Session agreed that the present definition of lessor was satisfactory.

(g) “Person”

The Joint Session agreed that the present definition of person was satisfactory.

(h) “Supplier”

The Joint Session agreed that the present definition of supplier was satisfactory.

(i) “Supply Agreement”

The Joint Session agreed that the present definition of supply agreement was satisfactory.

Re: Article 3 - Other laws

A number of States recognised that the express reference in paragraph 1 to the Legislative Guide was anomalous and that a State would not be able to incorporate such a mere reference to the Legislative Guide in its implementing legislation. The observer of UNCITRAL proposed that, inasmuch as the principles of the Legislative Guide were also adopted by States implementing the future model law on leasing, the text could be amended to refer to “other law” or something similar.

It was also agreed that the Drafting Committee consider whether, subject to appropriate clarification in the planned Commentary, paragraph 2 could be deleted.

The Deputy Secretary-General introduced the joint proposal of the UNIDROIT Secretariat and the Aviation Working Group (A.W.G.) for paragraph 3. He recalled that, on the last day of the second session of the Committee of governmental experts, a proposal had been adopted that would exclude from the future model law many leases of aircraft, aircraft engines, helicopters, railway rolling stock, ships and space assets but that the proposal had been placed in square brackets to signal the need for further consideration of such an exclusion, in view in particular of the desire previously expressed by the Committee of governmental experts that the future model law should cover as broad a range of assets as possible in order to facilitate economic growth in the countries for which it was intended. In line with the invitation issued to the Secretariat by the Governing Council at its 87th session to deploy the necessary efforts to find an amicable solution to the concerns that had been brought to the Council’s attention regarding the sphere of application of the draft model law in relation to that of the regimen installed by the Convention on International Interests in Mobile Equipment, opened to signature in Cape Town on 16 November 2001 (hereinafter referred to as the *Cape Town Convention*), and in particular the Protocol thereto on Matters specific to Aircraft Equipment, also opened to signature in Cape Town on 16 November 2001 (hereinafter referred to as the *Aircraft Protocol*), the Secretariat had been engaged in

discussion with the A.W.G. to consider the most appropriate means of responding to such concerns. Under the Secretariat and the A.W.G.'s joint proposal, which was the outcome of those discussions, the idea was for paragraph 3 to be amended to exclude, subject to freedom of contract, leases of large aircraft equipment as that term was defined in the Aircraft Protocol and for a definition of such equipment to be added to Article 2.

Several States and one observer supported the joint proposal. One State, though, raised the question as to whether, if large aircraft were to be excluded, other assets covered by the Cape Town Convention should not also be excluded. In particular, with a view to ensuring that the future model law and the Cape Town Convention and the Protocols thereto did not end up treating certain transactions differently, this State suggested that, perhaps, the most effective solution would be to amend the draft model law in such a way as to eliminate potential inconsistencies, pointing to Articles 8(1) and 16 of the draft model law as sources of such potential inconsistency.

It was ultimately agreed that, in order to permit the future model law as broad a sphere of application as possible, to ensure that it did not interfere with the operation of the Cape Town Convention and the Aircraft Protocol in respect of large aircraft equipment, stakeholders in which had raised a particular concern, and also to ensure that the future model law not be an obstacle to operation of the Cape Town Convention in respect of other types of asset, paragraph 3 should be amended along the lines of the joint proposal and that the Joint Session would take a close look at Articles 8(1) and 16 to see whether and, if so, how they should be amended to bring them into line with the Cape Town Convention.

It was also agreed that, for the sake of stylistic consistency, the word "shall" in the joint proposal should be replaced by the word "does".

Re: Article 4 - Interpretation

The Joint Session agreed that Article 4 was satisfactory.

Re: Article 5 - Freedom of contract

It was agreed that the Joint Session should consider the question whether particular Articles should be treated as mandatory under Article 5 when it came to discuss each individual Article.

Re: Article 6 - Enforceability

One State observed that the heading of Article 6 in the French version of the draft model law was more specific than that of the English version. This State also having questioned whether it was necessary, in paragraph (b), to refer to purchasers and creditors of both parties, the Reporter reminded the Joint Session of the previous decision taken by the Committee of governmental experts to ensure that the provisions of Article 6 be balanced with respect to the lessee and lessor.

The same State and one observer proposed that the planned Commentary could clarify that the terms of Article 6 could be limited by other law, such as law governing secured transactions or insolvency.

Re: Article 7 - Lessee under financial lease as beneficiary of supply agreement

Some States raised the issue as to whether sub-paragraph 1(c) served any useful purpose. Noting that to the extent that sub-paragraph 1(c) provided a remedy for the situation in which

there was no direct link between the lessee and the supplier, sub-paragraphs 1(a) and 1(b) had already created the direct link required so that, they suggested, there were no circumstances in which sub-paragraph 1(c) would be required. Another State, however, observed, that, whereas sub-paragraphs 1(a) and 1(b) laid out a right, sub-paragraph 1(c) laid out a way to enforce the right. It was agreed that the English and French versions of the text should be reviewed to ensure that its structure was correctly reflected in both. One State suggested that perhaps the reference in sub-paragraph 1(c) to circumstances in which “the absence of a contract between the lessee and supplier prevents the lessee from enforcing the duties of the supplier” was the source of the problem.

To the extent that in certain States, sub-paragraph 1(c) would provide a useful remedy for lessees, several States suggested that, if the sub-paragraph was retained, it should be modified to require something other than that the lessor take “commercially reasonable steps” to assist the lessee. A number of States agreed that the lessor’s transfer of documents or an assignment of its right to enforce the supply agreement would be adequate.

It was also suggested that, for the purpose of the future model law’s translation into other languages, it would be useful for it to be clarified that the reference in sub-paragraph 1(a) to duties being “owed” to the lessee meant that those duties could be “invoked” by the lessee.

Re: Article 8 - Priority of liens

In order to ensure that paragraph 1 did not impose any rule inconsistent with the rules provided for under the Cape Town Convention, one State proposed that this paragraph be made subject to other provisions of the enacting State’s law. This amendment, having received support from other States, was agreed to.

One State questioned whether use of the term “attach” suggested that the provision applied only where there had been judgment or enforcement proceedings.

Re: Article 9 - Limitation of liability of the lessor

Several States observed that the reference in the title to “limitation” of the lessor’s liability was inaccurate, inasmuch as, when Article 9 applied, it in fact excluded or precluded the lessor’s liability.

One State proposed that, because the lessor in a financial lease was a mere financier, the lessor should be relieved not only from liability based on its capacity of lessor but also liability based on its capacity of owner. Several States supported this proposed amendment, which was, therefore, agreed to. On the question as to whether such an exclusion of the lessor’s liability should be subject to other law, it was generally agreed that it should override general liability as between the parties but that it should not override, for example, liability based on the lessor’s fraudulent acts or fault, liability to the State or liability arising under the State’s international obligations. The Drafting Committee was, accordingly, invited to review Article 9 in such a way as to ensure that liability based on the lessor’s status as lessor and owner was excluded but that the lessor’s liability on such other grounds was preserved and, in particular, to consider whether the language of Article 9 as drafted was sufficient to alleviate the last-mentioned concern and whether this concern could be addressed in the planned Commentary.

It was also suggested that the planned Commentary should note that the exclusion of liability based on the lessor’s capacity of owner differed from the rule provided in Article 8 of the

UNIDROIT Convention on International Financial Leasing, opened to signature in Ottawa on 28 May 1988.

Re: Article 10 - Irrevocability

Several States invited the Drafting Committee to consider whether the title of Article 10, which referred only to irrevocability, sufficiently reflected the text's treatment of both irrevocability and independence.

Several States raised the question whether the duties of the lessee should not become irrevocable at some later point in time, so as to ensure that the lessee had adequate recourse if, for example, it ended up never receiving the asset promised. It was agreed that this point should be treated in the planned Commentary and should be discussed further in the context of Article 23.

Re: Article 11 - Risk of loss

In response to the question raised by one State as to whether the risk of loss ought not to pass at some later point in time than that provided for, another State recalled that the early passage of the risk of loss was important in order to enable lessees to obtain insurance in respect of the transaction.

One State observed that the reference in Article 11 to the parties' ability to provide otherwise in their agreement was unnecessary, in view of Article 5's guarantee of the principle of freedom of contract, and that the reference to the risk of loss remaining with the supplier "from the beginning" was similarly unnecessary.

Re: Article 12 - Damage to the asset

One State noted a potential inconsistency between the reference in the first sentence of paragraph 1 to "due compensation ... or ... other remedies" and the reference to "compensation" in the second sentence of that paragraph. It was agreed that, if the Drafting Committee considered that the second sentence was necessary and should be retained, it should consider whether the terminology was appropriate.

It was also clarified that the reference to other remedies provided by law encompassed remedies provided by the draft model law.

Re: Article 13 - Acceptance

One State expressed concern over the fact that, while the draft model law identified the time when acceptance occurred, it placed no consequences on that occurrence. The State in question, accordingly, proposed that the draft model law provide a default rule, making the payment of rentals begin upon acceptance unless otherwise agreed. A number of States, however, expressed concern at the idea of such a rule.

One State also suggested that the English- and French-language versions be brought more closely into line with one another.

Re: Article 14 - Remedies

On a drafting point, some States invited the Drafting Committee to consider, particularly with regard to the French text, whether the reference to acceptance "without knowledge of the

non-conformity” was appropriate or whether acceptance “in ignorance of” the non-conformity would be better.

One State, supported by others, suggested that a lessee should be able to terminate the lease when the asset subject to the lease was not or could not be delivered, as when the lessor failed to enter a supply agreement or when the supplier became insolvent. It was agreed, at the suggestion of another State, that this concern should be addressed in connection with the concerns raised under Article 10 which were to be addressed further in the context of Article 23.

There was agreement among some States that the title of the Article should be reviewed with a view to ensuring that it did not solely imply judicial remedies.

Re: Article 15 - Transfer of rights and duties

There was agreement that the brackets contained in sub-sub-paragraph 1(a)(ii) should be removed. At the request of one State, it was agreed that the reference to the lessee’s incapacity should be explained in the planned Commentary as a reference to the lessee’s lack of legal capacity.

It was also agreed that the references in sub-sub-paragraph 1(a)(i), sub-paragraph 1(b) and paragraph 2 to the leasing agreement were restrictive and, consistent with the other concerns expressed regarding the use of that term, should be amended.

One State suggested that the lessor should not need the lessee’s consent to transfer its duties. However, it was observed that, particularly when a lessor agreed to service the leased asset, the lessee’s consent would be necessary to ensure that the lessee’s rights were not impaired by the transfer.

Finally, it was agreed that Article 15 should be clarified to note that nothing in the Article limited the lessee’s ability to enforce its rights against the lessor.

Re: Article 16 - Warranty of quiet possession

One State argued that parties should be free to limit the lessor’s warranty of quiet possession beyond the warranty contained in Article 16, noting the situation in which a lessor leased large volumes of assets and the parties agreed that a transfer of risk was important in those circumstances. It was, accordingly, agreed that Article 16 should be made subject to the principle of freedom of contract.

In order to ensure that there was no inconsistency between the draft model law and the Cape Town Convention, one State proposed that it be clarified, perhaps in the planned Commentary, that, to the extent that an asset was covered by the Cape Town Convention, the owner’s ability to retrieve a particular asset was not undermined by the lessor’s warranty of quiet possession under this Article.

Re: Article 17 - Warranty of acceptability and fitness for purpose

The Joint Session agreed that Article 17 was satisfactory.

Re: Article 18 - Duties of the lessee to maintain and return the asset

The Joint Session agreed that Article 18 was satisfactory.

Re: Article 19 - Definition of default

One State suggested that the reference to the parties' ability to agree "at any time" was unnecessary, given the parties' general freedom of contract. That issue, along with the question raised by another State as to whether the definition of default should be moved to Article 2, was referred to the Drafting Committee.

On one State's observation that the draft model law did not define the term "fundamental default", the Secretary-General suggested that the Drafting Committee consider whether that definition, along with other provisions contained in Chapter IV, could be fully treated in the planned Commentary and, therefore, not need to appear in the text. This suggestion was supported by one State.

Re: Article 20 - Notices

Several States suggested that the English- and French-language versions of this Article be brought more closely into line with one another. One State also invited the Drafting Committee to consider whether the heading of this Article should be amended.

Re: Article 21 - Damages

Re: Article 22 - Liquidated damages

One State proposed that Article 21 be made mandatory in order to ensure that liquidated damages and other remedies not be used to put an aggrieved party in a better position than it would have been in had the agreement been fully performed. Several other States, however, urged that the Articles be kept as they were and not be made mandatory, in order to permit the parties to contract for a different measure of damages and to avoid litigation over damages by providing liquidated damages where they deemed it beneficial. It was, accordingly, agreed that the two Articles should be retained as they were.

Re: Article 23 - Termination

One State, supported by a number of others, suggested that a lessee must be able to terminate a lease upon a fundamental default. Several other States and one observer, however, urged that the draft model law must retain that irrevocability to some extent in order to preserve the nature of the financial lease and the lessor's role as a mere financier, recalling that other remedies would be available to the lessee besides termination. Following a description by the Reporter of usual practice in the leasing industry, it was agreed that the Drafting Committee should consider ways to ensure that the lessee would be protected and that the lessor would retain the protections it needed to operate as a financier.

Re: Article 24 - Possession and disposition

The Joint Session agreed that Article 24 was satisfactory.

IV. REVIEW BY THE JOINT SESSION OF THE DRAFT MODEL LAW AS AMENDED BY THE DRAFTING COMMITTEE

Following completion of the Joint Session's reading of the draft model law, with the exception of the title thereof and the preamble thereto, on 11 November 2008, the Drafting Committee met in the evening of 11 November and on 12 November 2008 to implement the amendments agreed upon and the points referred to it during that reading. The draft model law as

thus amended (the text of which, in marked-up form, is reproduced in Appendix IV to this summary report) was reviewed by the Joint Session, with Mr Makhubele in the chair, in the morning and early afternoon of 13 November 2008, with the Reporter introducing the amendments made.

In the course of its review of the Drafting Committee's proposals, the Joint Session reached the following conclusions:

Re: Article 2 - Definitions

On the proposed definition of "security right", which had been taken from the Legislative Guide, several States noted that implementing States would need to take special care to ensure that they had drawn the line between the financial lease and the security right appropriately in their existing legal systems. Accordingly, at the suggestion of the Secretary-General, it was agreed that the proposed definition be deleted from Article 2 and that guidance should be provided in the planned Commentary regarding the meaning of the term.

Re: Article 3 - Other laws

A number of States noted that the decision to eliminate the definition of "security right" from Article 2 could have an effect on the interpretation of paragraph 1, which excluded leases that created a security right from the draft model law. After consideration had been given to express incorporation in paragraph 1 of the definition of "security right" from the Legislative Guide, it was ultimately decided that the draft model law should refer only to the term "security right" and that the planned Commentary should advise implementing States that the term was meant to incorporate existing law and to draw those States' attention to the Legislative Guide.

One State observed that it might be helpful in the planned Commentary also to advise implementing States that, because laws that governed security rights might not address the internal civil relationships between the lessee and the lessor, States might wish to consider modifying Article 3(1) so that the draft model law would defer to the law governing security rights only to the extent that such other law covered a particular issue.

It was also made clear that the exclusion provided for by Article 3(1) was meant to exclude security rights as covered by the Legislative Guide and was not intended to exclude international interests in mobile equipment constituted under the Cape Town Convention.

With regard to Article 3, it was also suggested that the planned Commentary should make clear the relevance of rules governing choice of law.

Re: Article 7 - Lessee under financial lease as beneficiary of supply agreement

At the suggestion of an observer, it was agreed that paragraph 2 should be amended to make it clear that the lessor's duty to assign its rights under the supply agreement required only that the lessor assign its rights "to enforce" the supply agreement and that other rights that the lessor might have would not be affected.

On paragraph 5, one State proposed that, because a lessee might have, for example under the terms of the supply agreement or through enforcement proceedings, a right to modify, terminate or rescind the supply agreement, that paragraph should be amended to make it clear that Article 7 did not entitle the lessee "to negotiate" such changes to the supply agreement without the lessor's consent.

Re: Article 9 - Exclusion of liability of the lessor

Although there was substantial agreement that a lessor should be liable for actions but not liable on the basis of its status of lessor or owner, there was disagreement as to whether the additional language proposed by the Drafting Committee - excluding liability based on the lessor's status of lessor or owner "unless the lessor contributed to the death, personal injury or damage" - was appropriate. A number of States and one observer expressed the view that the principle was adequately expressed without that additional language and that any additional clarification could be supplied by the planned Commentary; other States, however, expressed the view that the supplying of such clarification in the planned Commentary was not sufficient.

It was, therefore, ultimately agreed that Article 9 should be replaced in its entirety by the sentence "In a financial lease, the lessor when acting in its capacity of lessor and as owner within the limits of the transaction, as documented under the supply agreement and the lease, shall not be liable to the lessee or third parties for death, personal injury or damage to property caused by the asset or the use of the asset". It was noted that this amendment would, moreover, necessitate a consequential modification of the definition in Article 2 of the term "lease": the decision taken during the Joint Session to replace the term "transaction" by "agreement" would need to be reversed.

Re: Article 10 - Irrevocability and independence

It was noted that the cross-reference in paragraph 2 should be amended to refer specifically to Article 23(1)(c) and not just Article 23.

Re: Article 14 - Remedies

One State suggested that, in order to avoid confusion, the reference in sub-paragraph 2(d) to "this paragraph" should be modified to refer to "paragraph 2".

Re: Article 15 - Transfer of rights and duties

One State observed that the Drafting Committee had neglected to implement the decision taken by the Joint Session to make it clear that nothing in sub-paragraph 1(a) affected the lessee's ability to assert its rights against the lessor.

Re: Article 16 - Warranty of quiet possession

Attention was drawn to a difference between the English- and French-language versions of sub-paragraph 1(b) on the question of the treatment of claims similar to claims of infringement, it being agreed that the phrase "or the like" should be removed from the English-language version.

Re: Article 19 - Definition of default

Re: Article 20 - Notices

The Drafting Committee had suggested that the Joint Session consider deleting Articles 19 and 20. It was, however, in the event, decided that both Articles should be retained. On the question of the differences between the English- and French-language versions of Article 20, it was decided that the French-language version should be revised to bring it into line with the simpler English-language version.

Re: Article 24 - Possession and disposition

On one State observing that the lessor's right to take possession and dispose of the leased asset did not arise when the lessee exercised an option to purchase, it was agreed that the planned Commentary should note that the lessor's right under this Article was subject to the parties' freedom of contract.

Re: title

At the suggestion of some States, it was agreed that the title be revised to reflect the fact that the future model law would be a product of UNIDROIT.

Re: preamble

It was agreed that the reference to "non-existent" leasing industries was unnecessary and that the text should be reviewed generally to make certain that the decision taken by the Governing Council to remove the word "commercial" from the title of the draft model law had been given complete effect in the preamble.

V. ADOPTION OF THE MODEL LAW BY THE JOINT SESSION

With Mrs Vanstone in the chair, in the late afternoon of 13 November 2008, the Joint Session proceeded to a final reading of the draft model law as amended by the Secretariat to reflect the decisions taken by the Joint Session during its review of the text as amended by the Drafting Committee (the text of which, in marked-up form, is reproduced in Appendix V to this summary report) and, at the conclusion of that reading, adopted the UNIDROIT Model Law on Leasing (the text of which is reproduced in Appendix VI to this summary report and is hereinafter referred to as the *Model Law*) unanimously.

VI. PLANS FOR IMPLEMENTATION OF THE MODEL LAW

In the absence of the Commonwealth Secretariat, which had had to withdraw from the Joint Session at the last minute, the Deputy Secretary-General informed the Joint Session of the interest of that Organisation in working with the UNIDROIT Secretariat towards implementation of the Model Law and that representatives of the two Secretariats would be meeting shortly after the Joint Session for that purpose.

The observer representing the International Finance Corporation (I.F.C.) reported that the I.F.C. would use the Model Law in its work to assist the growth of leasing industries in States with developing economies and economies in transition, and would in particular recommend its use in its countries of operations as a best practice reference. He observed that Jordan, Tanzania and Yemen had already all adopted leasing legislation that incorporated portions of what was at the time either the preliminary draft or the draft model law and that the I.F.C. had put forward legislation in Afghanistan and the West Bank that was based in its entirety on the draft model law. The I.F.C. would, furthermore, incorporate all the key principles of the Model Law in its new edition of *Leasing Guidelines*.

VII. PASSING OF A RESOLUTION FOR THE PREPARATION OF A COMMENTARY

Observing the importance of a commentary to accompany the Model Law, one State proposed the passing of a resolution that would both thank the Reporter for the invaluable role he had played in the development and completion of the Model Law and call on the Secretariat to prepare such a commentary, in close co-operation with the Reporter, the Secretary to the Joint Session, the Chairman of the Committee of governmental experts and members of the Drafting Committee. A Resolution along these lines (the text of which is reproduced in Appendix VII to this summary report) was passed by the Joint Session.

VIII. CLOSING OF THE JOINT SESSION

The session was closed by Mrs Vanstone, who thanked all participants in the Joint Session for their hard work and observed the importance of this work in the life of the Institute, at 4.55 p.m. on 13 November 2008.

DRAFT MODEL LAW ON LEASING

(as reviewed and authorised for transmission to Governments for finalisation and adoption by the UNIDROIT Governing Council, at its 87th session, held in Rome from 21 to 23 April 2008, following the second session of the Committee of governmental experts, held in Muscat from 6 to 9 April 2008)

[PREAMBLE

THE GENERAL ASSEMBLY OF THE INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), IN JOINT SESSION WITH THE UNIDROIT COMMITTEE OF GOVERNMENTAL EXPERTS FOR THE PREPARATION OF A DRAFT MODEL LAW ON LEASING, IN ROME ON...

Recognising that leasing provides developing countries and countries in transition in particular with an important source of capital for the development of infrastructure and small- and medium-sized enterprises;

Aware that many States, and in particular those with developing economies and economies in transition, require a legal framework that will foster the growth of a nascent or non-existent leasing industry and that other States, whilst already having a well-developed leasing industry, may nevertheless be interested in adopting this Law;

Convinced accordingly as to the usefulness of proposing a model law on leasing for consideration by national legislators, which may adapt it to meet their specific needs;

Committed to the purpose of harmonising legal regulations of leasing on a global basis in order to facilitate trade in capital goods;

Finding that the UNIDROIT Convention on International Financial Leasing (Ottawa, 28 May 1988) has not only removed certain legal impediments to the international financial leasing of equipment while maintaining a fair balance of interests between the different parties to the transaction for States Parties thereto, but has also frequently served as an important reference for States drafting their first leasing laws;

Considering the legal regimen enshrined in the aforementioned Convention as a useful starting point for the development of a comprehensive model law governing such transactions;

Being of the view that in the preparation of such a model law priority must be given to the establishment of rules governing aspects of leasing other than its fiscal and accounting aspects;

Mindful of the proven usefulness of the UNIDROIT Principles of International Commercial Contracts as a model for legislators in the general context of contract law as opposed to the specific area of that law reserved to leasing;

Taking account of the important contribution made by developing countries and countries in transition which, though not members of UNIDROIT, served on the Committee of governmental experts in the preparation of this Law;

HAS APPROVED THE FOLLOWING TEXT OF THE UNIDROIT MODEL LAW ON LEASING:]

CHAPTER I: GENERAL PROVISIONS

Article 1 – Sphere of application

This Law applies to any lease of an asset, if the asset is within [the State], the centre of main interests of the lessee is within [the State] or the leasing agreement provides that [the State's] law governs the transaction.

Article 2 – Definitions

In this Law:

Asset means all property used in the trade or business of the lessee, including real property, capital goods, equipment, future assets, specially manufactured assets, plants and living and unborn animals. The term does not include money or investment securities. 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.

Centre of main interests means the place where a person conducts the administration of its interests on a regular basis. In the absence of proof to the contrary, the registered office of the person, or habitual residence in the case of an individual, is presumed to be the centre of main interests of the person.

Financial lease means a lease, with or without an option to purchase, that includes the following characteristics:

- (a) the lessee specifies the asset and selects the supplier;
- (b) the lessor acquires the asset or the right to possession and use of the asset in connection with a lease and the supplier has knowledge of that fact; and
- (c) the rentals or other funds payable under the leasing agreement take into account or do not take into account the amortisation of the whole or a substantial part of the investment of the lessor.

Lease means a transaction in which a person grants a right to possession and use of the asset to another person for a specific term in return for rentals. Unless the context indicates otherwise, the term includes a sub-lease.

Lessee means a person who acquires the right to possession and use of the asset under a lease. Unless the context indicates otherwise, the term includes a sub-lessee.

Lessor means a person who grants the right to possession and use of the asset under a lease. Unless the context indicates otherwise, the term includes a sub-lessor.

Person means any legal, private or public entity or an individual.

Supplier means a person from whom a lessor acquires the asset or the right to possession and use of the asset for lease under a financial lease.

Supply agreement means an agreement under which a lessor acquires the asset or the right to possession and use of the asset for lease under a financial lease.

Article 3 – Other laws

1. This Law does not apply to a leasing agreement that creates a security right or an acquisition security right, as defined in the UNCITRAL Legislative Guide on Secured Transactions.
2. A leasing agreement subject to this Law is also subject to any law of [this State] applicable to real property or public notice with respect to a leasing agreement or an asset subject to a leasing agreement.
- [3. This Law does not apply to a lease of aircraft, aircraft engines, helicopters, railway rolling stock, ships or space assets if the lease is governed by another law of [the State] or an international agreement to which [the State] is a party.]

Article 4 – Interpretation

1. In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.
2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Article 5 – Freedom of contract

Except as provided in Articles 7(3), 16(1)(a), 16(2) and 22(3) and the law of [this State], the lessor and the lessee may derogate from or vary the effect of this Law and are free to determine the content of a leasing agreement.

CHAPTER II: EFFECTS OF LEASING AGREEMENT

Article 6 – Enforceability

Except as otherwise provided in this Law:

- (a) a leasing agreement is effective and enforceable according to its terms between the parties; and
- (b) the rights and remedies of such parties are enforceable against purchasers of the asset and against creditors of the parties, including an insolvency administrator.

Article 7 – Lessee under financial lease as beneficiary of supply agreement

1. (a) In a financial lease, the duties of the supplier under the supply agreement shall also be owed to the lessee as if the lessee were a party to that agreement and as if the asset were to be supplied directly to the lessee. The supplier shall not be liable to both the lessor and the lessee in respect of the same damage.

(b) The extension of the duties of the supplier to the lessee under the preceding subparagraph does not modify the rights and duties of the parties to the supply agreement, whether arising therefrom or otherwise, or impose any duty or liability under the supply agreement on the lessee.

(c) Where the absence of a contract between the lessee and supplier prevents the lessee from enforcing the duties of the supplier under the supply agreement, the lessor shall be bound to take commercially reasonable steps to assist the lessee. If the lessor does not take such steps, the lessor is deemed to have assumed the duties of the supplier.

2. The rights of the lessee under this Article with respect to a supply agreement that was approved by the lessee shall not be affected by a variation of any term of such agreement unless consented to by the lessee. If the lessee did not consent to such variation, the lessor is deemed to have assumed the duties of the supplier to the lessee that were so varied to the extent of the variation.

3. The parties may not derogate from or vary the effect of the provisions of paragraphs 1 and 2.

4. Nothing in this Article shall entitle the lessee to modify, terminate or rescind the supply agreement without the consent of the lessor.

Article 8 – Priority of liens

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. Except as otherwise provided by the law of [this State], a creditor of the lessor takes subject to the rights and remedies of the parties to the leasing agreement.

Article 9 – Limitation of liability of the lessor

In a financial lease, the lessor shall not, in its capacity of lessor, be liable to the lessee or third parties for death, personal injury or damage to property caused by the asset or the use of the asset.

CHAPTER III: PERFORMANCE

Article 10 – Irrevocability

1. (a) In a financial lease, the duties of the parties become irrevocable and independent when the leasing agreement has been entered into.

(b) In a lease other than a financial lease, the parties may agree to make any of their duties irrevocable and independent by specifically identifying each duty that is irrevocable and independent.

2. A duty that is irrevocable and independent must be performed, regardless of the performance or non-performance of any other party, unless the party to whom the duty is owed terminates the leasing agreement or otherwise explicitly agrees.

Article 11 – Risk of loss

1. (a) 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.

(b) In a financial lease, when an asset is not delivered, is partially delivered, is delivered late or fails to conform to the leasing agreement and the lessee invokes its remedies under Article 14, the lessee, subject to paragraph 1 of Article 18, may treat the risk of loss as having remained with the supplier from the beginning.

2. In a lease other than a financial lease, risk of loss is retained by the lessor and does not pass to the lessee.

Article 12 – Damage to the asset

1. In a financial lease, when an asset subject to a leasing agreement is damaged without fault of the lessee or lessor before the asset is delivered to the lessee, the lessee may demand inspection and at the option of the lessee either accept the asset with due compensation from the supplier for the loss in value or, subject to Article 10, seek such other remedies as are provided by law. The parties may agree that such compensation shall be remitted to the lessor and applied to reduce the rentals owed by the lessee.

2. In a lease other than a financial lease, when an asset subject to a leasing agreement is damaged without fault of the lessee or lessor before the asset is delivered to the lessee,

(a) if the loss is total, the leasing agreement is terminated; and

(b) 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.

Article 13 – Acceptance

1. Acceptance of an asset occurs when the lessee signifies to the lessor or supplier that the asset conforms to the agreement, fails to reject the asset after a reasonable opportunity to inspect it or uses the asset.

2. (a) Once a lessee in a financial lease has accepted an asset, the lessee is entitled to damages from the supplier if the asset does not conform to the supply agreement. The parties may agree that such compensation shall be remitted to the lessor and applied to reduce the rentals owed by the lessee.

(b) Once a lessee in a lease other than a financial lease has accepted an asset, the lessee is entitled to damages from the lessor if the asset does not conform to the leasing agreement.

Article 14 – Remedies

1. 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.

2. (a) In a lease other than 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 has the right to accept the asset, to reject the asset or, subject to this paragraph and Article 23, to terminate the leasing agreement. Rejection or termination must be within a reasonable time after the non-conforming delivery.

(b) In a lease other than a financial lease, once a lessee has accepted the asset, the lessee may reject the asset under the preceding sub-paragraph only if the non-conformity substantially impairs the value of the asset and either

(i) the lessee accepted the asset without knowledge of the non-conformity, owing to the difficulty of discovering it, or

(ii) the acceptance by the lessee was induced by the assurances of the lessor.

(c) In a lease other than a financial lease, when the lessee rejects an asset in accordance with this Law or the leasing agreement, the lessee is entitled to withhold rentals until the non-conforming delivery has been remedied and to recover any rentals and other funds paid in advance, less a reasonable sum corresponding to any benefit the lessee has derived from the asset.

3. If the lessee rejects an asset in accordance with this Article and the time for performance has not expired, the lessor or supplier has the right to remedy its failure within the agreed time.

Article 15 – Transfer of rights and duties

1. (a) (i) The rights of the lessor under the leasing agreement may be transferred without the consent of the lessee.

(ii) 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].

(b) The duties of the lessor under the leasing agreement may be transferred only with the consent of the lessee, which may not be unreasonably withheld.

2. The rights and duties of the lessee under the leasing agreement may be transferred only with the consent of the lessor, which may not be unreasonably withheld, and subject to the rights of third parties.

3. The lessee, lessor and third parties may consent to such transfers in advance.

Article 16 – Warranty of quiet possession

1. (a) In a financial lease, the lessor warrants that the quiet possession of the lessee will not be disturbed by a person who has a superior title or right or who claims a superior title or right and acts under the authority of a court, where such title, right or claim derives from a negligent or intentional act or omission of the lessor. The parties may not derogate from or vary the effect of the provisions of this sub-paragraph.

(b) In a financial lease, a lessee that furnishes specifications to a lessor or a supplier shall hold the lessor and the supplier harmless against any claim of infringement or the like that arises out of compliance with the specifications.

2. In a lease other than a financial lease, the lessor warrants that the quiet possession of the lessee will not be disturbed by a person who has a superior title or right, who claims a superior title or right and acts under the authority of a court or who makes a claim by way of infringement. The parties may not derogate from or vary the effect of the provisions of this paragraph.

3. The sole remedy for a disturbance of the quiet possession of the lessee under sub-paragraph (a) of paragraph 1 and under paragraph 2 is an action for damages against the lessor.

Article 17 – Warranty of acceptability and fitness for purpose

1. In a financial lease, the supplier warrants that the asset will be at least such as is accepted in the trade under the description in the leasing agreement and is fit for the ordinary purposes for which an asset of that description is used. Subject to sub-paragraph (c) of paragraph 1 of Article 7, the warranty is enforceable only against the supplier.

2. In a lease other than a financial lease, the lessor warrants that the asset will be at least such as is accepted in the trade under the description in the leasing agreement and is fit for the ordinary purposes for which an asset of that description is used if the lessor regularly deals in assets of that kind.

Article 18 – Duties of the lessee to maintain and return the asset

1. (a) The lessee shall take proper care of the asset, use the asset reasonably in the light of the manner in which such assets are ordinarily used and keep the asset in the condition in which it was delivered, subject to fair wear and tear.

(b) When a leasing agreement sets forth a duty to maintain the asset or the manufacturer or supplier of the asset issues technical instructions for the use of the asset, the compliance by the lessee with such agreement or instructions shall satisfy the requirements of the preceding sub-paragraph.

2. When the leasing agreement comes to an end or is terminated, the lessee, unless exercising a right to buy the asset or to hold the asset on lease for a further period, shall return the asset to the lessor in the condition specified in the preceding paragraph.

CHAPTER IV: DEFAULT

Article 19 – Definition of default

1. The parties may at any time agree as to the events that constitute a default or otherwise give rise to the rights and remedies specified in this Chapter.
2. In the absence of agreement, default for the purposes of this Law occurs when one party fails to perform a duty arising under the leasing agreement or this Law.

Article 20 – Notices

An aggrieved party shall give a defaulting party notice of default, notice of enforcement, notice of termination and a reasonable opportunity to cure.

Article 21 – Damages

Upon default, the aggrieved party is entitled to recover such damages as will, exclusively or in combination with other remedies provided by this Law or the leasing agreement, place the aggrieved party in the position in which it would have been had the agreement been performed in accordance with its terms.

Article 22 – Liquidated damages

1. When the leasing agreement provides that a defaulting party is to pay to the aggrieved party a specified sum or a sum computed in a specified manner for such default, the aggrieved party is entitled to such sum.
2. Such sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the default.
3. The parties may not derogate from or vary the effect of the provisions of this Article.

Article 23 – Termination

1. (a) Subject to sub-paragraph (b), a leasing agreement may be terminated by operation of law, by operation of Article 12, by agreement of the parties or by an aggrieved party upon fundamental default by the lessee or lessor.
(b) The lessee in a financial lease may not terminate the leasing agreement upon fundamental default by the lessor or the supplier but is entitled to such other remedies as are provided by the agreement of the parties and by law.
2. Subject to Article 10, on termination all duties under the leasing agreement that are executory on both sides, except for duties intended to take effect upon termination, are discharged but any right based on prior default or performance survives.

Article 24 – Possession and disposition

After the leasing agreement comes to an end or is terminated, the lessor has the right to take possession of the asset and the right to dispose of the asset.

LIST OF PARTICIPANTS

STATES

ARGENTINA	Mr Marcelo MASSONI Counsellor Embassy of Argentina in Italy <i>Rome</i>
AUSTRALIA	H.E. Mrs Amanda E. VANSTONE Ambassador of Australia in Italy; <i>President of the UNIDROIT General Assembly</i> <i>Rome</i>
	Mr Michael JOHNSON Senior Legal Officer Office of International Law Attorney-General's Department <i>Barton</i>
	Ms Lee HOLLOWAY Third Secretary Embassy of Australia in Italy <i>Rome</i>
BURKINA FASO	Mme Sétou COMPAORE Magistrat Tribunal de Grande Instance <i>Ouagadougou</i>
BURUNDI	M. Frédéric BIZIMANA Conseiller Ministère des Transports, Postes et Télécommunications <i>Bujumbura</i>
CAMEROON	H.E. Mr Michael TABONG KIMA Ambassador of Cameroon in Italy <i>Rome</i>
	Mr Charles A. ETUNYI Minister Counsellor Embassy of Cameroon in Italy <i>Rome</i>
	Mr Medi MOUGUI Second Counsellor Embassy of Cameroon in Italy <i>Rome</i>

CANADA	Ms Mounia ALLOUCH Legal Counsel International Private Law Section Department of Justice <i>Ottawa</i>
	Ms Catherine WALSH Professor Faculty of Law McGill University <i>Montreal</i>
CHILE	Mr Julio FIOL Counsellor Embassy of Chile in Italy <i>Rome</i>
CHINA (PEOPLE'S REPUBLIC OF)	Ms ZHANG Huiling Chief Assistant Market Distribution Section Department of Law and Treaties Ministry of Commerce <i>Beijing</i>
	Mr SHI Baofeng Chief Assistant Financial and Economic Committee National People's Congress <i>Beijing</i>
COLOMBIA	Ms Beatriz H. CALVO VILLEGAS First Secretary Embassy of Colombia in Italy <i>Rome</i>
CROATIA	Ms Maja BARBERIĆ Head of Department Financial System Directorate Ministry of Finance <i>Zagreb</i>
	Ms Branka VUJANOVIĆ Head of Unit Financial System Directorate Ministry of Finance <i>Zagreb</i>
EGYPT	Mr Alaa ROUSHDY Counsellor Embassy of Egypt in Italy <i>Rome</i>

FRANCE	M. El Mokhtar BEY Docteur en Droit Docteur en Science Politique <i>Paris</i>
GERMANY	Mr Hans-Georg BOLLWEG Head of Division Federal Ministry of Justice; <i>member of the UNIDROIT Governing Council</i> <i>Berlin</i> Mr Johannes ADY Division Desk Officer Federal Ministry of Justice <i>Berlin</i> Mr Peter ADAMEK Head of Consular and Legal Department Embassy of Germany in Italy <i>Rome</i>
GREECE	M. Ioannis VOULGARIS Professeur émérite de droit international privé et de droit comparé Université Demokritos de Thrace; Avocat; <i>membre du Conseil de direction d'UNIDROIT</i> <i>Athènes</i>
HUNGARY	Mr Mark Aurel ERSZEGI Second Secretary Embassy of Hungary in Italy <i>Rome</i>
INDIA	Mr G.B. SINGH Deputy Secretary Department of Financial Services Ministry of Finance <i>New Delhi</i> Mr M.R. UMARJI Chief Adviser - Legal Indian Banks' Association <i>Mumbai</i>
INDONESIA	Ms Sahadatun DONATIRIN Head of Section Directorate for Economic, Social and Cultural Treaties Affairs Ministry of Foreign Affairs <i>Jakarta</i>

	Mr Purnomo Ahmad CHANDRA Counsellor for Multilateral and Legal Affairs Embassy of the Republic of Indonesia in Italy <i>Rome</i>
IRELAND	Mr Christopher DOYLE Legal Adviser Office of the Attorney-General <i>Dublin</i>
ITALY	Mr Giorgio DE NOVA Professor of Law University of Milan <i>Milan</i>
JAPAN	Mr Atsushi KOIDE Associate Professor of Law Faculty of Law Gakushuin University <i>Tokyo</i>
LATVIA	Mrs Baiba BROKA Parliamentary Secretary Ministry of Justice <i>Riga</i>
LITHUANIA	Ms Laura TILŪNAITĖ Third Secretary Embassy of the Republic of Lithuania in Italy <i>Rome</i>
MEXICO	Mr Diego SIMANCAS GUTIERREZ Alternate Permanent Representative of Mexico to the Food and Agriculture Organization of the United Nations <i>Rome</i>
NICARAGUA	Mrs Monica ROBELO Representative of Nicaragua to the Food and Agriculture Organization of the United Nations <i>Rome</i>
OMAN	Mr Saleem Q. AL-ZAWAWI Adviser to the Minister for Economic Affairs Ministry of Commerce and Industry <i>Muscat</i>
POLAND	Mr Artur KOPIJKOWSKI-GOZUCH Head of the Financial Law Unit Department of Economic Regulations Ministry of Economy <i>Warsaw</i>

REPUBLIC OF KOREA

Mr PARK Dong-sil
Minister
Embassy of the Republic of Korea in Italy
Rome

Mr KANG Young-shin
First Secretary
Embassy of the Republic of Korea in Italy
Rome

Mr KIM Cheon-su
Presiding Judge
Seoul Western District Court
Seoul

Mr CHUNG Chang-ho
Minister Counsellor (Judicial Affairs)
Embassy of the Republic of Korea in Austria
Vienna

RUSSIAN FEDERATION

Mr Pavel VOLKOV
Director of the Legal Department
Ministry of Economic Development
Moscow

Mr Roman KURASHOV
Expert of the Section of International Economic
Law of the Legal Department
Ministry of Economic Development
Moscow

Ms Anna NORMANTOVICH
Head of the Legal Department
JSC Europlan
Moscow

Mr Evgeny TYUSIN
Head of the Analytical Department
Trade Representation of the Russian Federation
in Italy
Rome

Mr Valery FEDCHUK
Legal Adviser
Trade Representation of the Russian Federation
in Italy
Rome

SOUTH AFRICA

Mr Ndaba John MAKHUBELE
Chief Director
Chief Directorate: International Legal Relations
Department of Justice and Constitutional
Development;
*Chairman of the UNIDROIT Committee of
governmental experts
Pretoria*

Mr Isaac S. THINDISA
Senior State Law Adviser
Chief Directorate: International Legal Relations
Department of Justice and Constitutional
Development
Pretoria

Ms Thanisa NAIDU
Assistant State Law Adviser
(International Law)
Department of Foreign Affairs
Pretoria

SUDAN

Mr D. Hamad OMAR
General Consultant
Contract Department
Ministry of Justice
Khartoum

TURKEY

Mrs Canan BUMIN
Head of Implementation II Department
Banking Regulation and Supervision Agency
Ankara

Mrs Perihan ŞENSES
Legal Counsel
Ak Financial Leasing A.Ş.
Istanbul

Mr Necati KARABAYIR
Corporate Legal Counsel
Siemens Financial Leasing A.Ş.
Istanbul

UNITED STATES OF AMERICA

Mr Michael J. DENNIS
Attorney-Adviser
Office of the Legal Adviser
Department of State
Washington, D.C.

Mr William HENNING
Distinguished Professor of Law
School of Law
University of Alabama
Tuscaloosa

Mr Henry GABRIEL
Visiting Professor of Law
School of Law
Elon University;
*member of the UNIDROIT Governing Council
Greensboro*

Mr Steven WEISE
Proskauer Rose LLP
Los Angeles

URUGUAY

Mr Carlos BENTANCOUR
Minister Counsellor
Embassy of Uruguay in Italy
Rome

OBSERVERS

INTERGOVERNMENTAL ORGANISATIONS

INTERNATIONAL FINANCE CORPORATION

Mr Murat SULTANOV
Leasing Specialist
PEP-MENA Leasing Program
Resident Mission in Jordan
Amman

UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW

Mr Spiros BAZINAS
Senior Legal Officer
Vienna

INTERNATIONAL NON-GOVERNMENTAL ORGANISATIONS

AVIATION WORKING GROUP

Mr Jeffrey WOOL
Secretary
London

INTERNATIONAL BAR ASSOCIATION

Mr Fabio LIGUORI
Ughi & Nunziante
Rome

PROFESSIONAL ASSOCIATIONS

EQUIPMENT LEASING AND FINANCE
ASSOCIATION OF AMERICA (E.L.F.A.)

Mr Ralph PETTA
Vice-President
Research & Industry Services
Washington, D.C.

EUROPEAN FEDERATION OF LEASING COMPANY
ASSOCIATIONS

Mr Andrea ALBENSI
Legal Department
Italian Leasing Association
Rome

Mr Renato CLARIZIA
Professor of Law
University of Rome III
Rome

LATIN AMERICAN LEASING FEDERATION
(FELALEASE)

Mr Rafael CASTILLO-TRIANA
Principal
The AltaGroup
Fort Lauderdale

Mr Manuel LEAL ANGARITA
Lawyer
Leal Angarita & Asociados
Bogotá

UNIDROIT

Mr José Angelo ESTRELLA FARIA, *Secretary-General*

Mr Martin STANFORD, *Deputy Secretary-General*

Ms Frédérique MESTRE, *Senior Officer*

Ms Marina SCHNEIDER, *Senior Officer*

Mr Ronald DeKOVEN, *Reporter to the Joint Session*

Mr Brian HAUCK, *Secretary to the Joint Session*

Mr Fritz PETER, *Member of the Advisory Board*

Mr Daniel PORRAS, *Associate Officer*

AGENDA

1. Opening of the joint session
2. Adoption of the agenda
3. Organisation of work
4. Finalisation and adoption of the draft model law on leasing as reviewed by the UNIDROIT Governing Council at its 87th session, held in Rome from 21 to 23 April 2008 (J.S. Leasing/W.P. 3), in particular in the light of the commentary thereon (J.S. Leasing/W.P. 4), the Explanatory note hereto (J.S. Leasing/W.P. 2) - and in particular Resolution (87)1 passed by the UNIDROIT Governing Council at its 87th session (reproduced in Appendix II thereto) - and the comments on the draft model law to be submitted by Governments and Organisations (J.S. Leasing/W.P. 5)
5. Plans for implementation of the draft model law once adopted
6. Any other business.

DRAFT MODEL LAW ON LEASING

*(as prepared by the Drafting Committee to reflect the decisions taken by the Joint Session on 10 and 11 November 2008)**

[PREAMBLE

THE GENERAL ASSEMBLY OF THE INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), IN JOINT SESSION WITH THE UNIDROIT COMMITTEE OF GOVERNMENTAL EXPERTS FOR THE PREPARATION OF A DRAFT MODEL LAW ON LEASING, IN ROME ON...

Recognising that leasing provides developing countries and countries in transition in particular with an important source of capital for the development of infrastructure and small- and medium-sized enterprises;

Aware that many States, and in particular those with developing economies and economies in transition, require a legal framework that will foster the growth of a nascent or non-existent leasing industry and that other States, whilst already having a well-developed leasing industry, may nevertheless be interested in adopting this Law;

Convinced accordingly as to the usefulness of proposing a model law on commercial leasing for consideration by national legislators, which may adapt it to meet their specific needs;

Committed to the purpose of harmonising legal regulations of leasing on a global basis in order to facilitate trade in capital goods;

Finding that the UNIDROIT Convention on International Financial Leasing (Ottawa, 28 May 1988) has not only removed certain legal impediments to the international financial leasing of equipment while maintaining a fair balance of interests between the different parties to the transaction for States Parties thereto, but has also frequently served as an important reference for States drafting their first leasing laws;

Considering the legal regimen enshrined in the aforementioned Convention as a useful starting point for the development of a comprehensive model law governing such transactions;

Being of the view that in the preparation of such a model law priority must be given to the establishment of rules governing aspects of commercial leasing other than its fiscal and accounting aspects;

Mindful of the proven usefulness of the UNIDROIT Principles of International Commercial Contracts as a model for legislators in the general context of contract law as opposed to the specific area of that law reserved to leasing;

* The Joint Session not having discussed the draft title and the draft preamble on 11 November 2008, the Drafting Committee refrained from discussing them pending their discussion by the Joint Session on 13 November 2008. This text is marked up against the text reproduced in Appendix I with proposed deletions being highlighted by the language in question being crossed out and proposed additions being highlighted by the language in question being underlined.

Taking account of the important contribution made by developing countries and countries in transition which, though not members of UNIDROIT, served on the Committee of governmental experts in the preparation of this Law;

HAS APPROVED THE FOLLOWING TEXT OF THE MODEL LAW ON COMMERCIAL LEASING:]

CHAPTER I: GENERAL PROVISIONS

Article 1 – Sphere of application

This Law applies to any lease of an asset, if the asset is within [the State], the centre of main interests of the lessee is within [the State] or the leasing agreement provides that [the State's] law governs the transaction.

Article 2 – Definitions

In this Law:

Asset means all property used in the craft, trade or business of the lessee, including ~~real property~~immovables, capital ~~goods~~assets, equipment, future assets, specially manufactured assets, plants and living and unborn animals. The term does not include money or investment securities. No movable asset shall cease to be an asset for the sole reason that ~~the asset~~it has become a fixture to or incorporated in ~~real property~~an immovable.

~~**Centre of main interests** means the place where a person conducts the administration of its interests on a regular basis. In the absence of proof to the contrary, the registered office of the person, or habitual residence in the case of an individual, is presumed to be the centre of main interests of the person.~~

Financial lease means a lease, with or without an option to purchase all or part of the asset, that includes the following characteristics:

- (a) the lessee specifies the asset and selects the supplier;
- (b) the lessor acquires the asset ~~or the right to possession and use of the asset~~ in connection with a lease and the supplier has knowledge of that fact; and
- (c) the rentals or other funds payable under the leasing agreement take into account or do not take into account the amortisation of the whole or a substantial part of the investment of the lessor.

Large aircraft equipment means all "aircraft objects" as defined in the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment, signed in Cape Town on 16 November 2001.

Lease means ~~[an agreement transaction]~~ in which one person provides another person with the grants a right to possession and use of the an asset to another person for a specific term in return for rentals. ~~Unless the context indicates otherwise, t~~The term includes a sub-lease.

Lessee means a person who acquires the right to possession and use of the an asset under a lease. ~~Unless the context indicates otherwise, t~~The term includes a sub-lessee.

Lessor means a person who ~~grants~~ provides another person with the right to possession and use of the asset under a lease. ~~Unless the context indicates otherwise, t~~The term includes a sub-lessor.

Person means any legal, private or public entity or an individual.

Security right means a property right in an asset that is created by agreement and secures payment or other performance of an obligation.

Supplier means a person from whom a lessor acquires the asset ~~or the right to possession and use of the asset~~ for lease under a financial lease.

Supply agreement means an agreement under which a lessor acquires the asset ~~or the right to possession and use of the asset~~ for lease under a financial lease.

Article 3 – Other laws

1. This Law does not apply to a ~~leasing agreement~~ lease that functions as a security right ~~creates a security right or an acquisition security right, as defined in the UNCITRAL Legislative Guide on Secured Transactions.~~

2. ~~— A leasing agreement subject to this Law is also subject to any law of [this State] applicable to real property or public notice with respect to a leasing agreement or an asset subject to a leasing agreement.~~

~~[3]. This Law does not apply to a lease of aircraft, aircraft engines, helicopters, railway rolling stock, ships or space assets if the lease is governed by another law of [the State] or an international agreement to which [the State] is a party.] This law shall not apply to a lease or a supply agreement for large aircraft equipment unless the lessor, the lessee and the supplier have otherwise agreed in writing.~~

Article 4 – Interpretation

1. In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Article 5 – Freedom of contract

Except as provided in Articles ~~7(43), 16(1)(a), 16(2)~~ and 22(3) and the law of [this State], the lessor and the lessee may derogate from or vary the effect of this Law and are free to determine the content of a ~~leasing agreement~~.

CHAPTER II: EFFECTS OF A LEASING AGREEMENT

Article 6 – ~~Enforceability~~Effectiveness

Except as otherwise provided in this Law:

- (a) a leasing agreement is effective and enforceable according to its terms between the parties; and
- (b) the rights and remedies of such parties are enforceable against purchasers of the asset and against creditors of the parties, including an insolvency administrator.

Article 7 – Lessee under financial lease as beneficiary of supply agreement

1. ~~(a)~~—In a financial lease, the duties of the supplier under the supply agreement shall also be owed to the lessee as if the lessee were a party to that agreement and as if the asset were to be supplied directly to the lessee. The supplier shall not be liable to both the lessor and the lessee in respect of the same damage.

~~—(b)—The extension of the duties of the supplier to the lessee under the preceding subparagraph does not modify the rights and duties of the parties to the supply agreement, whether arising therefrom or otherwise, or impose any duty or liability under the supply agreement on the lessee.~~

~~2. (c) Where the absence of a contract between the lessee and supplier prevents the lessee from enforcing the duties of the supplier under the supply agreement, At the request of the lessee, the lessor shall assign its rights under the supply agreement to the lessee be bound to take commercially reasonable steps to assist the lessee. If the lessor does not take such steps, the lessor is deemed to have assumed the duties of the supplier.~~

~~3.~~ 23. The rights of the lessee under this Article with respect to a supply agreement that was approved by the lessee shall not be affected by a variation of any term of such agreement unless consented to by the lessee. If the lessee did not consent to such variation, the lessor is deemed to have assumed the duties of the supplier to the lessee that were so varied to the extent of the variation.

~~4.~~ 34. The parties may not derogate from or vary the effect of the provisions of paragraphs 1, 2 and ~~3~~ 2.

~~5.~~ 45. Nothing in this Article shall entitle the lessee to modify, terminate or rescind the supply agreement without the consent of the lessor.

Article 8 – Priority of liens

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

~~1.~~ 1. (a) 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~~lease and cannot ~~attach~~impair any interest arising under the ~~leasing agreement~~lease; and

2. ~~(b) Except as otherwise provided by the law of [this State],~~ a creditor of the lessor takes subject to the rights and remedies of the parties to the ~~leasing agreement~~lease.

Article 9 – ~~Limitation~~Exclusion of liability of the lessor

In a financial lease, the lessor shall not, in its capacity of lessor or owner, be liable to the lessee or third parties for death, personal injury or damage to property caused by the asset or the use of the asset [, unless the lessor contributed to the death, personal injury or damage, in which case it shall be liable to the extent of its contribution].

CHAPTER III: PERFORMANCE

Article 10 – Irrevocability and independence

1. (a) In a financial lease, the duties of the ~~parties~~lessor and lessee become irrevocable and independent when the asset subject to the lease has been delivered to and accepted by the lessee~~the leasing agreement has been entered into~~.

(b) In a lease other than a financial lease, the ~~parties~~lessor and lessee may agree to make any of their duties irrevocable and independent by specifically identifying each duty that is irrevocable and independent.

2. Except as otherwise provided in Article 23, Aa duty that is irrevocable and independent must be performed, regardless of the performance or non-performance of any other party, unless the party to whom the duty is owed terminates the ~~leasing agreement~~lease ~~or otherwise explicitly agrees~~.

Article 11 – Risk of loss

1. In a financial lease:

~~(a) 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; and~~

~~(b) In a financial lease, when an asset is not delivered, is partially delivered, is delivered late or fails to conform to the leasing agreement and the lessee invokes enforces its remedies under Article 14, the lessee, subject to ~~paragraph 1 of Article 18(1)~~, may treat the risk of loss as having remained with the supplier ~~from the beginning~~.~~

2. In a lease other than a financial lease, risk of loss is retained by the lessor and does not pass to the lessee.

Article 12 – Damage to the asset

1. In a financial lease, when an asset subject to a ~~leasing agreement~~lease is damaged without fault of the lessee or lessor before the asset is delivered to the lessee, the lessee may demand inspection and ~~at the option of the lessee either accept the asset with due compensation from the supplier for the loss in value or, subject to Article 10, seek such other remedies as are provided by law. The parties may agree that such compensation shall be remitted to the lessor and applied to reduce the rentals owed by the lessee.~~

2. In a lease other than a financial lease, when an asset subject to a ~~leasing agreement~~lease is damaged without fault of the lessee or lessor before the asset is delivered to the lessee,

(a) if the loss is total, the ~~leasing agreement~~lease is terminated; and

(b) if the loss is partial, the lessee may demand inspection and ~~at the option of the lessee either treat the leasing agreement~~lease 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.

Article 13 – Acceptance

1. Acceptance of an asset occurs when the lessee signifies to the lessor or supplier that the asset conforms to the agreement, fails to reject the asset after a reasonable opportunity to inspect it or uses the asset.

2. After a lessee has accepted an asset,

~~_____~~(a) ~~Once a lessee i~~In a financial lease has accepted an asset, the lessee is entitled to damages from the supplier if the asset does not conform to the supply agreement.~~The parties may agree that such compensation shall be remitted to the lessor and applied to reduce the rentals owed by the lessee.; and~~

(b) ~~Once a lessee i~~In a lease other than a financial lease has accepted an asset, the lessee is entitled to damages from the lessor if the asset does not conform to the leasing agreement.

Article 14 – Remedies

1. 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.

2. (a) In a lease other than 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 has the right to accept the asset, to reject the asset or, subject to this paragraph and Article 23, to terminate the ~~leasing agreement~~lease. Notice of Rrejection or termination must be given by the lessee within a reasonable time after the non-conforming delivery.

(b) In a lease other than a financial lease, once a lessee has accepted the asset, the lessee may reject the asset under the preceding sub-paragraph only if the non-conformity substantially impairs the value of the asset and either

(i) the lessee accepted the asset without knowledge of the non-conformity, owing to the difficulty of discovering it, or

(ii) the acceptance by the lessee was induced by the assurances of the lessor.

(c) In a lease other than a financial lease, when the lessee rejects an asset in accordance with this Law or the leasing agreement, the lessee is entitled to withhold rentals until the non-conforming delivery has been remedied and to recover any rentals and other funds paid in advance, less a reasonable sum corresponding to any benefit the lessee has derived from the asset.

~~3. (d) If the lessee rejects an asset in accordance with this paragraph ~~Article~~ and the time for performance has not expired, the lessor or supplier has the right to remedy its failure within the agreed time.~~

Article 15 – Transfer of rights and duties

1. (a) (i) The rights of the lessor under the leasing agreement may be transferred without the consent of the lessee.

(ii) The ~~lessor and lessee leasing agreement may provide agree~~ 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}~~.

(b) The duties of the lessor under the leasing agreement may be transferred only with the consent of the lessee, which may not be unreasonably withheld.

2. The rights and duties of the lessee under the leasing agreement may be transferred only with the consent of the lessor, which may not be unreasonably withheld, and subject to the rights of third parties.

3. The lessee, lessor and third parties may consent to such transfers in advance.

Article 16 – Warranty of quiet possession

1. In a financial lease:

~~_____ (a) In a financial lease, the lessor warrants that the quiet possession of the lessee will not be disturbed by a person who has a superior title or right or who claims a superior title or right and acts under the authority of a court, where such title, right or claim derives from a negligent or intentional act or omission of the lessor; and. The parties may not derogate from or vary the effect of the provisions of this sub-paragraph.~~

(b) ~~In a financial lease,~~ a lessee that furnishes specifications to a lessor or a supplier shall hold the lessor and the supplier harmless against any claim of infringement or the like that arises out of compliance with the specifications.

2. In a lease other than a financial lease, the lessor warrants that the quiet possession of the lessee will not be disturbed by a person who has a superior title or right, who claims a superior title or right and acts under the authority of a court or who makes a claim by way of infringement. ~~The parties may not derogate from or vary the effect of the provisions of this paragraph.~~

3. Except as otherwise provided in Article 23(1)(c), ~~¶~~ the sole remedy for a disturbance of the quiet possession of the lessee under sub-paragraph (a) of paragraph 1 and under paragraph 2 is an action for damages against the lessor.

Article 17 – Warranty of acceptability and fitness for purpose

1. In a financial lease, the supplier warrants that the asset will be at least such as is accepted in the trade under the description in the leasing agreement and is fit for the ordinary purposes for which an asset of that description is used. Subject to ~~sub-paragraph (c) of paragraph 1 of Article 7(2)~~, the warranty is enforceable only against the supplier.
2. In a lease other than a financial lease, the lessor warrants that the asset will be at least such as is accepted in the trade under the description in the leasing agreement and is fit for the ordinary purposes for which an asset of that description is used if the lessor regularly deals in assets of that kind.

Article 18 – Duties of the lessee to maintain and return the asset

1. (a) The lessee shall take proper care of the asset, use the asset reasonably in the light of the manner in which such assets are ordinarily used and keep the asset in the condition in which it was delivered, subject to fair wear and tear.
(b) When a leasing agreement sets forth a duty to maintain the asset or the manufacturer or supplier of the asset issues technical instructions for the use of the asset, the compliance by the lessee with such agreement or instructions shall satisfy the requirements of the preceding sub-paragraph.
2. When the ~~leasing agreement~~ lease comes to an end or is terminated, the lessee, unless exercising a right to buy the asset or to hold the asset on lease for a further period, shall return the asset to the lessor in the condition specified in the preceding paragraph.

CHAPTER IV: DEFAULT AND TERMINATION

[Article 19 – Definition of default

1. The parties may ~~at any time agree as to~~ the events that constitute a default or otherwise give rise to the rights and remedies specified in this Chapter.
2. In the absence of agreement, default for the purposes of this Law occurs when one party fails to perform a duty arising under the leasing agreement or this Law.

Article 20 – [Notices]

[An aggrieved party shall give a defaulting party notice of default, notice of enforcement, notice of termination and a reasonable opportunity to cure.] [An aggrieved party shall give a defaulting party notice of default and of its intention to seek a remedy if that default is not cured within a reasonable time. An aggrieved party who is entitled to terminate a lease shall terminate only after having given the defaulting party notice of default and a reasonable opportunity to cure.]]

Article 21 – Damages

Upon default, the aggrieved party is entitled to recover such damages as will, exclusively or in combination with other remedies provided by this Law or the leasing agreement, place the aggrieved party in the position in which it would have been had the agreement been performed in accordance with its terms.

Article 22 – Liquidated damages

1. When the leasing agreement provides that a defaulting party is to pay to the aggrieved party a specified sum or a sum computed in a specified manner for such default, the aggrieved party is entitled to such sum.
2. Such sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the default.
3. The parties may not derogate from or vary the effect of the provisions of this Article.

Article 23 – Termination

1. (a) Subject to sub-paragraph (b), a ~~leasing agreement~~lease may be terminated by operation of law, by operation of Article 12, by agreement of the parties or by an aggrieved party upon fundamental default by the lessee or lessor.
(b) Except as otherwise provided in sub-paragraph (c), after the asset subject to the lease has been delivered to and accepted by the lessee, ~~the~~ lessee in a financial lease may not terminate the ~~leasing agreement~~lease upon fundamental default by the lessor or the supplier but is entitled to such other remedies as are provided by the agreement of the parties and by law.
(c) In the event of a fundamental default by the lessor in respect of the warranty of quiet possession referred to in Article 16, the lessee in a financial lease may terminate the lease.
2. Subject to Article 10, on termination all duties under the leasing agreement that are executory on both sides, except for duties intended to take effect upon termination, are discharged but any right based on prior default or performance survives.

Article 24 – Possession and disposition

After the ~~leasing agreement~~lease comes to an end or is terminated, the lessor has the right to take possession of the asset and the right to dispose of the asset.

DRAFT UNIDROIT MODEL LAW ON LEASING

*(as submitted for adoption by the Joint Session on the afternoon of 13 November 2008)*¹

PREAMBLE

~~THE JOINT SESSION OF THE UNIDROIT GENERAL ASSEMBLY OF THE INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), IN JOINT SESSION WITH AND THE UNIDROIT COMMITTEE OF GOVERNMENTAL EXPERTS FOR THE PREPARATION-FINALISATION AND ADOPTION OF A DRAFT MODEL LAW ON LEASING, MEETING IN ROME ON 13 NOVEMBER 2008,....~~

Recognising that leasing provides developing countries and countries in transition in particular with an important source of capital for the development of infrastructure and small- and medium-sized enterprises;

Aware that many States, and in particular those with developing economies and economies in transition, require a legal framework that will foster the growth of a nascent ~~or non-existent~~ leasing industry and that other States, whilst already having a well-developed leasing industry, may nevertheless be interested in adopting this Law;

Convinced accordingly as to the usefulness of proposing a model law on commercial leasing for consideration by national legislators, which may adapt it to meet their specific needs;

Committed to the purpose of harmonising legal regulations of leasing on a global basis in order to facilitate trade in capital goods;

Finding that the UNIDROIT Convention on International Financial Leasing (Ottawa, 28 May 1988) has not only removed certain legal impediments to the international financial leasing of equipment while maintaining a fair balance of interests between the different parties to the transaction for States Parties thereto, but has also frequently served as an important reference for States drafting their first leasing laws;

Considering the legal regimen enshrined in the aforementioned Convention as a useful starting point for the development of a comprehensive model law governing such transactions;

Being of the view that in the preparation of such a model law priority must be given to the establishment of rules governing aspects of commercial leasing other than its fiscal and accounting aspects;

Mindful of the proven usefulness of the UNIDROIT Principles of International Commercial Contracts as a model for legislators in the general context of contract law as opposed to the specific area of that law reserved to leasing;

¹ This text is marked up against the text reproduced in Appendix IV with proposed deletions being highlighted by the language in question being crossed out and proposed additions being highlighted by the language in question being underlined.

Taking account of the important contribution made by developing countries and countries in transition which, though not members of UNIDROIT, served on the Committee of governmental experts in the preparation of this Law;

HAS APPROVED THE FOLLOWING TEXT OF THE UNIDROIT MODEL LAW ON LEASING:

CHAPTER I: GENERAL PROVISIONS

Article 1 – Sphere of application

This Law applies to any lease of an asset, if the asset is within [the State], the centre of main interests of the lessee is within [the State] or the ~~leasing agreement~~lease provides that [the State's] law governs the transaction.

Article 2 – Definitions

In this Law:

Asset means all property used in the craft, trade or business of the lessee, including immovables, capital assets, equipment, future assets, specially manufactured assets, plants and living and unborn animals. The term does not include money or investment securities. No movable shall cease to be an asset for the sole reason that it has become a fixture to or incorporated in an immovable.

Financial lease means a lease, with or without an option to purchase all or part of the asset, that includes the following characteristics:

- (a) the lessee specifies the asset and selects the supplier;
- (b) the lessor acquires the asset in connection with a lease and the supplier has knowledge of that fact; and
- (c) the rentals or other funds payable under the ~~leasing agreement~~lease take into account or do not take into account the amortisation of the whole or a substantial part of the investment of the lessor.

Large aircraft equipment means all "aircraft objects" as defined in the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment, signed in Cape Town on 16 November 2001.

Lease means [~~a transaction agreement~~] in which one person provides another person with the right to possess and use an asset for a specific term in return for rentals. The term includes a sub-lease.

Lessee means a person who acquires the right to possess and use an asset under a lease. The term includes a sub-lessee.

Lessor means a person who provides another person with the right to possess and use ~~the an~~ asset under a lease. The term includes a sub-lessor.

Person means any legal, private or public entity or an individual.

~~**Security right** means a property right in an asset that is created by agreement and secures payment or other performance of an obligation.~~

Supplier means a person from whom a lessor acquires the asset for lease under a financial lease.

Supply agreement means an agreement under which a lessor acquires the asset for lease under a financial lease.

Article 3 – Other laws

1. This Law does not apply to a lease that functions as a security right.
2. This law shall not apply to a lease or a supply agreement for large aircraft equipment unless the lessor, the lessee and the supplier have otherwise agreed in writing.

Article 4 – Interpretation

1. In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.
2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Article 5 – Freedom of contract

Except as provided in Articles 7(4) and 22(3) and the law of [this State], the lessor and the lessee may derogate from or vary the effect of this Law and are free to determine the content of a lease.

CHAPTER II: EFFECTS OF A LEASE

Article 6 – Effectiveness between the parties and as against third parties

Except as otherwise provided in this Law:

- (a) a ~~leasing agreement~~lease is effective and enforceable according to its terms between the parties; and
- (b) the rights and remedies of such parties are enforceable against purchasers of the asset and against creditors of the parties, including an insolvency administrator.

Article 7 – Lessee under financial lease as beneficiary of supply agreement

1. In a financial lease, the duties of the supplier under the supply agreement shall also be owed to the lessee as if the lessee were a party to that agreement and as if the asset were to be supplied directly to the lessee. The supplier shall not be liable to both the lessor and the lessee in respect of the same damage.
2. At the request of the lessee, the lessor shall assign its rights ~~to enforce~~under the supply agreement to the lessee. If the lessor does not, the lessor is deemed to have assumed the duties of the supplier.
3. The rights of the lessee under this Article with respect to a supply agreement that was approved by the lessee shall not be affected by a variation of any term of such agreement unless consented to by the lessee. If the lessee did not consent to such variation, the lessor is deemed to have assumed the duties of the supplier to the lessee that were so varied to the extent of the variation.
4. The parties may not derogate from or vary the effect of the provisions of paragraphs 1, 2 and 3.
5. Nothing in this Article shall entitle the lessee to negotiate a modification, termination or rescission ~~of~~ the supply agreement without the consent of the lessor.

Article 8 – Priority of liens

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

- (a) 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 lease and cannot impair any interest arising under the lease; and
- (b) a creditor of the lessor takes subject to the rights and remedies of the parties to the lease.

Article 9 – Exclusion of liability of the lessor

~~In a financial lease, the lessor shall not, in its capacity of lessor or owner, be liable~~In a financial lease, the lessor when acting in its capacity of lessor and as owner within the limits of the transaction, as documented under the supply agreement and the lease, shall not be liable to the lessee or third parties for death, personal injury or damage to property caused by the asset or the use of the asset~~[, unless the lessor contributed to the death, personal injury or damage, in which case it shall be liable to the extent of its contribution].~~

CHAPTER III: PERFORMANCE

Article 10 – Irrevocability and independence

1. (a) In a financial lease, the duties of the lessor and lessee become irrevocable and independent when the asset subject to the lease has been delivered to and accepted by the lessee.
(b) In a lease other than a financial lease, the lessor and lessee may agree to make any of their duties irrevocable and independent by specifically identifying each duty that is irrevocable and independent.
2. Except as otherwise provided in Article 23(1)(c), a duty that is irrevocable and independent must be performed, regardless of the performance or non-performance of any other party, unless the party to whom the duty is owed terminates the lease.

Article 11 – Risk of loss

1. In a financial lease:
 - (a) risk of loss passes to the lessee when the ~~leasing agreement~~lease is entered into; and
 - (b) when an asset is not delivered, is partially delivered, is delivered late or fails to conform to the ~~leasing agreement~~lease and the lessee enforces its remedies under Article 14, the lessee, subject to Article 18(1), may treat the risk of loss as having remained with the supplier.
2. In a lease other than a financial lease, risk of loss is retained by the lessor and does not pass to the lessee.

Article 12 – Damage to the asset

1. In a financial lease, when an asset subject to a lease is damaged without fault of the lessee or lessor before the asset is delivered to the lessee, the lessee may demand inspection and either accept the asset with due compensation from the supplier for the loss in value or seek such other remedies as are provided by law.
2. In a lease other than a financial lease, when an asset subject to a lease is damaged without fault of the lessee or lessor before the asset is delivered to the lessee,
 - (a) if the loss is total, the lease is terminated; and
 - (b) if the loss is partial, the lessee may demand inspection and either treat the lease 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.

Article 13 – Acceptance

1. Acceptance of an asset occurs when the lessee signifies to the lessor or supplier that the asset conforms to the agreement, fails to reject the asset after a reasonable opportunity to inspect it or uses the asset.

2. After a lessee has accepted an asset,
- (a) In a financial lease, the lessee is entitled to damages from the supplier if the asset does not conform to the supply agreement; and
- (b) In a lease other than a financial lease, the lessee is entitled to damages from the lessor if the asset does not conform to the ~~leasing agreement~~lease.

Article 14 – Remedies

1. In a financial lease, when an asset is not delivered, is partially delivered, is delivered late or fails to conform to the ~~leasing agreement~~lease, the lessee may demand a conforming asset from the supplier and seek such other remedies as are provided by law.
2. (a) In a lease other than a financial lease, when an asset is not delivered, is partially delivered, is delivered late or fails to conform to the ~~leasing agreement~~lease, the lessee has the right to accept the asset, to reject the asset or, subject to this paragraph and Article 23, to terminate the lease. Notice of rejection or termination must be given by the lessee within a reasonable time after the non-conforming delivery.
- (b) In a lease other than a financial lease, once a lessee has accepted the asset, the lessee may reject the asset under the preceding sub-paragraph only if the non-conformity substantially impairs the value of the asset and either
- (i) the lessee accepted the asset without knowledge of the non-conformity, owing to the difficulty of discovering it, or
- (ii) the acceptance by the lessee was induced by the assurances of the lessor.
- (c) In a lease other than a financial lease, when the lessee rejects an asset in accordance with this Law or the ~~leasing agreement~~lease, the lessee is entitled to withhold rentals until the non-conforming delivery has been remedied and to recover any rentals and other funds paid in advance, less a reasonable sum corresponding to any benefit the lessee has derived from the asset.
- (d) If the lessee rejects an asset in accordance with ~~this paragraph 2~~ and the time for performance has not expired, the lessor or supplier has the right to remedy its failure within the agreed time.

Article 15 – Transfer of rights and duties

1. (a) (i) The rights of the lessor under the ~~leasing agreement~~lease may be transferred without the consent of the lessee.
- (ii) The lessor and lessee may agree 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.
- (iii) Nothing in this sub-paragraph shall affect the lessee's ability to assert its rights against the lessor.
- (b) The duties of the lessor under the ~~leasing agreement~~lease may be transferred only with the consent of the lessee, which may not be unreasonably withheld.

2. The rights and duties of the lessee under the ~~leasing agreement~~lease may be transferred only with the consent of the lessor, which may not be unreasonably withheld, and subject to the rights of third parties.

3. The lessee, lessor and third parties may consent to such transfers in advance.

Article 16 – Warranty of quiet possession

1. In a financial lease:

(a) the lessor warrants that the quiet possession of the lessee will not be disturbed by a person who has a superior title or right or who claims a superior title or right and acts under the authority of a court, where such title, right or claim derives from a negligent or intentional act or omission of the lessor; and

(b) a lessee that furnishes specifications to a lessor or a supplier shall hold the lessor and the supplier harmless against any claim of infringement ~~or the like~~ that arises out of compliance with the specifications.

2. In a lease other than a financial lease, the lessor warrants that the quiet possession of the lessee will not be disturbed by a person who has a superior title or right, who claims a superior title or right and acts under the authority of a court or who makes a claim by way of infringement.

3. Except as otherwise provided ~~in~~by Article 23(1)(c), the sole remedy for a disturbance of the quiet possession of the lessee under sub-paragraph (a) of paragraph 1 and under paragraph 2 is an action for damages against the lessor.

Article 17 – Warranty of acceptability and fitness for purpose

1. In a financial lease, the supplier warrants that the asset will be at least such as is accepted in the trade under the description in the ~~leasing agreement~~lease and is fit for the ordinary purposes for which an asset of that description is used. Subject to Article 7(2), the warranty is enforceable only against the supplier.

2. In a lease other than a financial lease, the lessor warrants that the asset will be at least such as is accepted in the trade under the description in the ~~leasing agreement~~lease and is fit for the ordinary purposes for which an asset of that description is used if the lessor regularly deals in assets of that kind.

Article 18 – Duties of the lessee to maintain and return the asset

1. (a) The lessee shall take proper care of the asset, use the asset reasonably in the light of the manner in which such assets are ordinarily used and keep the asset in the condition in which it was delivered, subject to fair wear and tear.

(b) When a ~~leasing agreement~~lease sets forth a duty to maintain the asset or the manufacturer or supplier of the asset issues technical instructions for the use of the asset, the compliance by the lessee with such agreement or instructions shall satisfy the requirements of the preceding sub-paragraph.

2. When the lease comes to an end or is terminated, the lessee, unless exercising a right to buy the asset or to hold the asset on lease for a further period, shall return the asset to the lessor in the condition specified in the preceding paragraph.

CHAPTER IV: DEFAULT AND TERMINATION

~~Article 19~~ – Definition of default

1. The parties may agree to the events that constitute a default or otherwise give rise to the rights and remedies specified in this Chapter.

2. In the absence of agreement, default for the purposes of this Law occurs when one party fails to perform a duty arising under the ~~leasing agreement~~lease or this Law.

Article 20 – ~~Notices~~

~~{An aggrieved party shall give a defaulting party notice of default, notice of enforcement, notice of termination and a reasonable opportunity to cure.} {An aggrieved party shall give a defaulting party notice of default and of its intention to seek a remedy if that default is not cured within a reasonable time. An aggrieved party who is entitled to terminate a lease shall terminate only after having given the defaulting party notice of default and a reasonable opportunity to cure.}}~~

Article 21 – Damages

Upon default, the aggrieved party is entitled to recover such damages as will, exclusively or in combination with other remedies provided by this Law or the ~~leasing agreement~~lease, place the aggrieved party in the position in which it would have been had the agreement been performed in accordance with its terms.

Article 22 – Liquidated damages

1. When the ~~leasing agreement~~lease provides that a defaulting party is to pay to the aggrieved party a specified sum or a sum computed in a specified manner for such default, the aggrieved party is entitled to such sum.

2. Such sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the default.

3. The parties may not derogate from or vary the effect of the provisions of this Article.

Article 23 – Termination

1. (a) Subject to sub-paragraph (b), a lease may be terminated by operation of law, by operation of Article 12, by agreement of the parties or by an aggrieved party upon fundamental default by the lessee or lessor.

(b) Except as otherwise provided in sub-paragraph (c), after the asset subject to the lease has been delivered to and accepted by the lessee, the lessee in a financial lease may not terminate the lease upon fundamental default by the lessor or the supplier but is entitled to such other remedies as are provided by the agreement of the parties and by law.

(c) In the event of a fundamental default by the lessor in respect of the warranty of quiet possession referred to in Article 16, the lessee in a financial lease may terminate the lease.

2. Subject to Article 10, on termination all duties under the ~~leasing agreement~~lease that are executory on both sides, except for duties intended to take effect upon termination, are discharged but any right based on prior default or performance survives.

Article 24 – Possession and disposition

After the lease comes to an end or is terminated, the lessor has the right to take possession of the asset and the right to dispose of the asset.

UNIDROIT MODEL LAW ON LEASING

(as adopted by the Joint Session on 13 November 2008)

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, MEETING IN ROME ON 13 NOVEMBER 2008,

Recognising that leasing provides developing countries and countries in transition in particular with an important source of capital for the development of infrastructure and small- and medium-sized enterprises;

Aware that many States, and in particular those with developing economies and economies in transition, require a legal framework that will foster the growth of a nascent leasing industry and that other States, whilst already having a well-developed leasing industry, may nevertheless be interested in adopting this Law;

Convinced accordingly as to the usefulness of proposing a model law on leasing for consideration by national legislators, which may adapt it to meet their specific needs;

Committed to the purpose of harmonising legal regulations of leasing on a global basis in order to facilitate trade in capital goods;

Finding that the UNIDROIT Convention on International Financial Leasing, signed in Ottawa on 28 May 1988, has not only removed certain legal impediments to the international financial leasing of equipment, while maintaining a fair balance of interests between the different parties to the transaction for States Parties thereto, but has also frequently served as an important reference for States drafting their first leasing laws;

Considering the legal regimen enshrined in the aforementioned Convention as a useful starting point for the development of a comprehensive model law governing such transactions;

Being of the view that in the preparation of such a model law priority must be given to the establishment of rules governing aspects of leasing other than its fiscal and accounting aspects;

Mindful of the proven usefulness of the UNIDROIT Principles of International Commercial Contracts as a model for legislators in the general context of contract law as opposed to the specific area of that law reserved to leasing;

Taking account of the important contribution made by developing countries and countries in transition which, though not members of UNIDROIT, served on the Committee of governmental experts in the preparation of this Law;

HAS APPROVED THE FOLLOWING TEXT OF THE UNIDROIT MODEL LAW ON LEASING:

CHAPTER I: GENERAL PROVISIONS

Article 1 – Sphere of application

This Law applies to any lease of an asset, if the asset is within [the State], the centre of main interests of the lessee is within [the State] or the lease provides that [the State's] law governs the transaction.

Article 2 – Definitions

In this Law:

Asset means all property used in the craft, trade or business of the lessee, including immovables, capital assets, equipment, future assets, specially manufactured assets, plants and living and unborn animals. The term does not include money or investment securities. No movable shall cease to be an asset for the sole reason that it has become a fixture to or incorporated in an immovable.

Financial lease means a lease, with or without an option to purchase all or part of the asset, that includes the following characteristics:

- (a) the lessee specifies the asset and selects the supplier;
- (b) the lessor acquires the asset in connection with a lease and the supplier has knowledge of that fact; and
- (c) the rentals or other funds payable under the lease take into account or do not take into account the amortisation of the whole or a substantial part of the investment of the lessor.

Large aircraft equipment means all "aircraft objects" as defined in the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment, signed in Cape Town on 16 November 2001.

Lease means a transaction in which one person provides another person with the right to possess and use an asset for a specific term in return for rentals. The term includes a sub-lease.

Lessee means a person who acquires the right to possess and use an asset under a lease. The term includes a sub-lessee.

Lessor means a person who provides another person with the right to possess and use an asset under a lease. The term includes a sub-lessor.

Person means any legal, private or public entity or an individual.

Supplier means a person from whom a lessor acquires the asset for lease under a financial lease.

Supply agreement means an agreement under which a lessor acquires the asset for lease under a financial lease.

Article 3 – Other laws

1. This Law does not apply to a lease that functions as a security right.
2. This law shall not apply to a lease or a supply agreement for large aircraft equipment unless the lessor, the lessee and the supplier have otherwise agreed in writing.

Article 4 – Interpretation

1. In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.
2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Article 5 – Freedom of contract

Except as provided in Articles 7(4) and 22(3) and the law of [this State], the lessor and the lessee may derogate from or vary the effect of this Law and are free to determine the content of a lease.

CHAPTER II: EFFECTS OF A LEASE

Article 6 – Effectiveness between the parties and as against third parties

Except as otherwise provided in this Law:

- (a) a lease is effective and enforceable according to its terms between the parties; and
- (b) the rights and remedies of such parties are enforceable against purchasers of the asset and against creditors of the parties, including an insolvency administrator.

Article 7 – Lessee under financial lease as beneficiary of supply agreement

1. In a financial lease, the duties of the supplier under the supply agreement shall also be owed to the lessee as if the lessee were a party to that agreement and as if the asset were to be supplied directly to the lessee. The supplier shall not be liable to both the lessor and the lessee in respect of the same damage.
2. At the request of the lessee, the lessor shall assign its rights to enforce the supply agreement to the lessee. If the lessor does not, the lessor is deemed to have assumed the duties of the supplier.

3. The rights of the lessee under this Article with respect to a supply agreement that was approved by the lessee shall not be affected by a variation of any term of such agreement unless consented to by the lessee. If the lessee did not consent to such variation, the lessor is deemed to have assumed the duties of the supplier to the lessee that were so varied to the extent of the variation.
4. The parties may not derogate from or vary the effect of the provisions of paragraphs 1, 2 and 3.
5. Nothing in this Article shall entitle the lessee to negotiate a modification, termination or rescission of the supply agreement without the consent of the lessor.

Article 8 – Priority of liens

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

- (a) 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 lease and cannot impair any interest arising under the lease; and
- (b) a creditor of the lessor takes subject to the rights and remedies of the parties to the lease.

Article 9 – Exclusion of liability of the lessor

In a financial lease, the lessor when acting in its capacity of lessor and as owner within the limits of the transaction, as documented under the supply agreement and the lease, shall not be liable to the lessee or third parties for death, personal injury or damage to property caused by the asset or the use of the asset.

CHAPTER III: PERFORMANCE

Article 10 – Irrevocability and independence

1.
 - (a) In a financial lease, the duties of the lessor and lessee become irrevocable and independent when the asset subject to the lease has been delivered to and accepted by the lessee.
 - (b) In a lease other than a financial lease, the lessor and lessee may agree to make any of their duties irrevocable and independent by specifically identifying each duty that is irrevocable and independent.
2. Except as otherwise provided in Article 23(1)(c), a duty that is irrevocable and independent must be performed, regardless of the performance or non-performance of any other party, unless the party to whom the duty is owed terminates the lease.

Article 11 – Risk of loss

1. In a financial lease:
 - (a) risk of loss passes to the lessee when the lease is entered into; and
 - (b) when an asset is not delivered, is partially delivered, is delivered late or fails to conform to the lease and the lessee enforces its remedies under Article 14, the lessee, subject to Article 18(1), may treat the risk of loss as having remained with the supplier.
2. In a lease other than a financial lease, risk of loss is retained by the lessor and does not pass to the lessee.

Article 12 – Damage to the asset

1. In a financial lease, when an asset subject to a lease is damaged without fault of the lessee or lessor before the asset is delivered to the lessee, the lessee may demand inspection and either accept the asset with due compensation from the supplier for the loss in value or seek such other remedies as are provided by law.
2. In a lease other than a financial lease, when an asset subject to a lease is damaged without fault of the lessee or lessor before the asset is delivered to the lessee,
 - (a) if the loss is total, the lease is terminated; and
 - (b) if the loss is partial, the lessee may demand inspection and either treat the lease 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.

Article 13 – Acceptance

1. Acceptance of an asset occurs when the lessee signifies to the lessor or supplier that the asset conforms to the agreement, fails to reject the asset after a reasonable opportunity to inspect it or uses the asset.
2. After a lessee has accepted an asset,
 - (a) in a financial lease, the lessee is entitled to damages from the supplier if the asset does not conform to the supply agreement; and
 - (b) in a lease other than a financial lease, the lessee is entitled to damages from the lessor if the asset does not conform to the lease.

Article 14 – Remedies

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

2. (a) In a lease other than a financial lease, when an asset is not delivered, is partially delivered, is delivered late or fails to conform to the lease, the lessee has the right to accept the asset, to reject the asset or, subject to this paragraph and Article 23, to terminate the lease. Notice of rejection or termination must be given by the lessee within a reasonable time after the non-conforming delivery.

(b) In a lease other than a financial lease, once a lessee has accepted the asset, the lessee may reject the asset under the preceding sub-paragraph only if the non-conformity substantially impairs the value of the asset and either

(i) the lessee accepted the asset without knowledge of the non-conformity, owing to the difficulty of discovering it, or

(ii) the acceptance by the lessee was induced by the assurances of the lessor.

(c) In a lease other than a financial lease, when the lessee rejects an asset in accordance with this Law or the lease, the lessee is entitled to withhold rentals until the non-conforming delivery has been remedied and to recover any rentals and other funds paid in advance, less a reasonable sum corresponding to any benefit the lessee has derived from the asset.

(d) If the lessee rejects an asset in accordance with paragraph 2 and the time for performance has not expired, the lessor or supplier has the right to remedy its failure within the agreed time.

Article 15 – Transfer of rights and duties

1. (a) (i) The rights of the lessor under the lease may be transferred without the consent of the lessee.

(ii) The lessor and lessee may agree 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.

(iii) Nothing in this sub-paragraph shall affect the lessee's ability to assert its rights against the lessor.

(b) The duties of the lessor under the lease may be transferred only with the consent of the lessee, which may not be unreasonably withheld.

2. The rights and duties of the lessee under the lease may be transferred only with the consent of the lessor, which may not be unreasonably withheld, and subject to the rights of third parties.

3. The lessee, lessor and third parties may consent to such transfers in advance.

Article 16 – Warranty of quiet possession

1. In a financial lease:

(a) the lessor warrants that the quiet possession of the lessee will not be disturbed by a person who has a superior title or right or who claims a superior title or right and acts under the authority of a court, where such title, right or claim derives from a negligent or intentional act or omission of the lessor; and

(b) a lessee that furnishes specifications to a lessor or a supplier shall hold the lessor and the supplier harmless against any claim of infringement that arises out of compliance with the specifications.

2. In a lease other than a financial lease, the lessor warrants that the quiet possession of the lessee will not be disturbed by a person who has a superior title or right, who claims a superior title or right and acts under the authority of a court or who makes a claim by way of infringement.

3. Except as otherwise provided by Article 23(1)(c), the sole remedy for a disturbance of the quiet possession of the lessee under sub-paragraph (a) of paragraph 1 and under paragraph 2 is an action for damages against the lessor.

Article 17 – Warranty of acceptability and fitness for purpose

1. In a financial lease, the supplier warrants that the asset will be at least such as is accepted in the trade under the description in the lease and is fit for the ordinary purposes for which an asset of that description is used. Subject to Article 7(2), the warranty is enforceable only against the supplier.

2. In a lease other than a financial lease, the lessor warrants that the asset will be at least such as is accepted in the trade under the description in the lease and is fit for the ordinary purposes for which an asset of that description is used if the lessor regularly deals in assets of that kind.

Article 18 – Duties of the lessee to maintain and return the asset

1. (a) The lessee shall take proper care of the asset, use the asset reasonably in the light of the manner in which such assets are ordinarily used and keep the asset in the condition in which it was delivered, subject to fair wear and tear.

(b) When a lease sets forth a duty to maintain the asset or the manufacturer or supplier of the asset issues technical instructions for the use of the asset, the compliance by the lessee with such agreement or instructions shall satisfy the requirements of the preceding sub-paragraph.

2. When the lease comes to an end or is terminated, the lessee, unless exercising a right to buy the asset or to hold the asset on lease for a further period, shall return the asset to the lessor in the condition specified in the preceding paragraph.

CHAPTER IV: DEFAULT AND TERMINATION

Article 19 – Definition of default

1. The parties may agree to the events that constitute a default or otherwise give rise to the rights and remedies specified in this Chapter.

2. In the absence of agreement, default for the purposes of this Law occurs when one party fails to perform a duty arising under the lease or this Law.

Article 20 – Notices

An aggrieved party shall give a defaulting party notice of default, notice of enforcement, notice of termination and a reasonable opportunity to cure.

Article 21 – Damages

Upon default, the aggrieved party is entitled to recover such damages as will, exclusively or in combination with other remedies provided by this Law or the lease, place the aggrieved party in the position in which it would have been had the agreement been performed in accordance with its terms.

Article 22 – Liquidated damages

1. When the lease provides that a defaulting party is to pay to the aggrieved party a specified sum or a sum computed in a specified manner for such default, the aggrieved party is entitled to such sum.
2. Such sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the default.
3. The parties may not derogate from or vary the effect of the provisions of this Article.

Article 23 – Termination

1. (a) Subject to sub-paragraph (b), a lease may be terminated by operation of law, by operation of Article 12, by agreement of the parties or by an aggrieved party upon fundamental default by the lessee or lessor.
(b) Except as otherwise provided in sub-paragraph (c), after the asset subject to the lease has been delivered to and accepted by the lessee, the lessee in a financial lease may not terminate the lease upon fundamental default by the lessor or the supplier but is entitled to such other remedies as are provided by the agreement of the parties and by law.
(c) In the event of a fundamental default by the lessor in respect of the warranty of quiet possession referred to in Article 16, the lessee in a financial lease may terminate the lease.
2. Subject to Article 10, on termination all duties under the lease that are executory on both sides, except for duties intended to take effect upon termination, are discharged but any right based on prior default or performance survives.

Article 24 – Possession and disposition

After the lease comes to an end or is terminated, the lessor has the right to take possession of the asset and the right to dispose of the asset.

RESOLUTION

passed by the Joint Session

THE JOINT SESSION,

HAVING ADOPTED the *Model Law on Leasing*;

CONSCIOUS of the need for an official commentary on this text as an aid for those called upon to interpret and apply the Model Law;

RECOGNISING the increasing use of commentaries of this type in the context of modern, technical commercial law instruments;

EXPRESSING its gratitude to Mr Ronald M. DeKoven for the invaluable role played by him as Reporter to the Joint Session, as also to the UNIDROIT Advisory Board and the UNIDROIT Committee of governmental experts for the preparation of a draft model law on leasing; and

MINDFUL that the Commentary on the draft model law on leasing prepared by the UNIDROIT Secretariat for the Joint Session (J.S. Leasing/W.P. 4) provides a sound starting point for the further development of such an official commentary, together with statements made, and decisions taken at the Joint Session,

RESOLVES:

TO REQUEST the preparation of an official commentary on the Model Law by the UNIDROIT Secretariat, in close co-operation with the Reporter to the Joint Session, the Secretary to the Joint Session, the Chairman of the UNIDROIT Committee of governmental experts and members of the Drafting Committee;

TO EXPRESS THE FIRM WISH that UNIDROIT provide sufficient resources effectively to support the drawing up on a timely basis of such an official commentary;

TO REQUEST that such an official commentary be circulated by the UNIDROIT Secretariat to all negotiating States and participating observers as soon as practicable after the conclusion of the Joint Session.