

UNIDROIT's Preparation of a Model Law on Leasing : the Crossing of New Frontiers in the Making of Uniform Law

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"Between 1948 and spring 2008, the world has grown more than in the previous 2,000 years. So it's a time to feel good, but at the same time we know through the figures we have been obtaining at the Commission for the Legal Empowerment of the Poor that about four billion people have been left behind. In other words, it's not that they are not doing well, it's just that they're not doing as well as the rest. Wealth is a very comparative phenomenon. And so the idea was, you've got to empower them."

(from the speech by Hernando de Soto, President of the Institute for Liberty and Democracy, Lima, delivered at the opening ceremony of the Annual Conference of the International Bar Association, La Rural, Buenos Aires, 12 October 2008)

I. – REASONS FOR A NEW APPROACH TO THE MAKING OF UNIFORM LAW

The statutory objectives of UNIDROIT are to examine ways of harmonising and co-ordinating the private law of States and groups of States and to prepare gradually for the adoption by the various States of uniform rules of private law.¹ Increasingly, though, the leading characteristic of the international instruments that it prepares, as witnessed 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*), is their role in procuring modernisation of the law.

Moreover, the primary market for UNIDROIT's international uniform law products is, in effect, not so much the developed world as the developing world and those economies in transition to a market economy: it is these countries that stand to gain most from modern legal rules, especially when, as with the subject-matter of so many of UNIDROIT's products, they are concerned with affording such countries greater access to the international capital markets.

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¹ Cf. Article 1 of the UNIDROIT Statute.

It is a fact, though, that the majority of the members of UNIDROIT are developed countries, not least because of the manpower difficulties that the Governments of developing countries and economies in transition come up against when looking for the resources necessary to follow UNIDROIT projects.

In practical terms, therefore, the international uniform laws promoted by UNIDROIT tend, traditionally, to be negotiated essentially by representatives of the developed countries, with little or no input from developing countries and economies in transition.

Yet, as mentioned above, it is just these countries whose vital interests are most at issue in the work being accomplished by UNIDROIT. Advice from some of its developing member States, accordingly, convinced UNIDROIT of the timeliness and, indeed, the necessity of taking its projects and their negotiation to those parts of the world for which they are primarily intended, as also of the need to leaven the UNIDROIT Work Programme with projects of greater interest and usefulness for developing countries and transition economies.

II. – TAKING THE DRAWING UP OF A MODEL LAW ON LEASING AS A LAUNCHING PAD FOR THIS APPROACH

A number of reasons seemed to point to the appropriateness of UNIDROIT launching this new approach with the drawing up of a model law on leasing specifically designed for use in developing countries and transition economies.

First, there was UNIDROIT's own pioneering work in the field of leasing, whether through its sponsoring of the *UNIDROIT Convention on International Financial Leasing*, opened to signature in Ottawa on 28 May 1988 (hereinafter referred to as the 1988 UNIDROIT Convention) – an instrument that had, moreover, been much used by developing countries and transition economies when developing their leasing legislation – or in its joint sponsorship, with the International Civil Aviation Organization, of the follow-up Cape Town Convention, not to mention the technical expertise that it had acquired in the process, which had, *inter alia*, led to its being invited to assist individual countries in the preparation of their domestic legislation on leasing.

Then there was the well-proven aptness of leasing as a means of developing the private sector in the developing world and amongst economies in transition, as exemplified by the successful work in this field carried out over the last three decades by the International Finance Corporation (I.F.C.),

work that acknowledges the fact that there are still whole parts of the world where the message of leasing and its potential as an engine of growth have not yet got through. The development of a basic legislative framework had proven crucial in the I.F.C.'s work in this field.

Whilst it is clear that a legislative framework alone will not create a leasing industry in a given country, it is equally clear that the establishment of a modern legal framework for leasing is absolutely necessary if foreign investors are to feel sufficiently protected to invest lease finance in such a country. By providing a modern legislative model, UNIDROIT would be not only providing such legal certainty for foreign investors but also avoiding the wheel having to be reinvented each time a country set out on the path toward the development of a national leasing industry.

III. – THE PROCESS FOLLOWED IN DEVELOPING THE UNIDROIT MODEL LAW ON LEASING

In April 2005, at its 84th session, the UNIDROIT Governing Council, therefore, authorised the Secretariat's development of a model law on leasing designed, in particular, to make leasing more widely available to developing countries and transition economies. The UNIDROIT Secretariat was instructed to do this with minimum impact on the UNIDROIT budget.

When considering the need for, and feasibility of this project, UNIDROIT consulted a number of major economic stakeholders, in particular the World Bank, the I.F.C., the European Federation of Leasing Company Associations (Leaseurope) and the American Equipment Leasing and Finance Association (E.L.F.A.). These consultations bore out not only the usefulness of this initiative but also its feasibility. The World Bank, in particular, noted that there was a very serious shortfall in infrastructure financing in Africa that leasing would be particularly well suited to help with.

UNIDROIT, accordingly, organised an Advisory Board, made up, virtually entirely, of UNIDROIT correspondents, all of whom kindly agreed to participate at their own expense. Serving on the Advisory Board were representatives from North Africa and the Middle East, sub-Saharan Africa, Asia and the Pacific region, Europe, the former Soviet Union countries, Latin America and North America. The Advisory Board was chaired by Chief Mrs Tinuade Oyekunle, a former senior Government official from Nigeria who is currently a legal practitioner in Lagos and Honorary Vice-President of the International

Council for Commercial Arbitration. Mr Ronald DeKoven, Reporter on Article 2A (Leases) of the Uniform Commercial Code, which is, in effect, the leasing law of the United States of America, acted as Reporter.

After three sessions, held in Rome in October 2005, February 2006 and April 2006, the Advisory Board was already in May 2006 able to transmit a preliminary draft model law to the UNIDROIT Governing Council for advice as to the most appropriate follow-up action. The Governing Council authorised its transmission to a Committee of governmental experts, for the preparation of a draft model law. But first a consultation exercise was conducted with Governments and Organisations. Comments came in from all over the world, in particular from the Governments of Austria, Bolivia, Bulgaria, Cameroon, the People's Republic of China, Germany, Japan, Latvia, Mongolia, Morocco, the Russian Federation, Tunisia, the United Kingdom and the United States of America and from the International Civil Aviation Organization, E.L.F.A., Leaseurope, the International Chamber of Commerce (I.C.C.) and the Latin American Leasing Federation (Felalease).

From the outset, a key element of the new approach being seen as recognising the need for a more active involvement of the prospective beneficiary countries in the negotiating process, logic demanded that the intergovernmental stage of this process in respect of the preliminary draft model law be taken to the world of the developing and transition economies.

Africa being one of the primary focuses of the project, it was decided, following a kind invitation from the Ministry of Justice and Constitutional Development of South Africa, that the first session of the UNIDROIT Committee of governmental experts should be held in Johannesburg in May 2007. Representing Ms Bridget Mabandla, the Minister of Justice and Constitutional Development, at the opening ceremony, Mr Johnny de Lange, Deputy Minister of Justice and Constitutional Development, indicated that his country considered it a great honour to be the first country outside Italy, the host State of UNIDROIT, to host a session of a UNIDROIT Committee of governmental experts and went on to state that

“We in Africa have adopted what is called NEPAD.² It is our version of a renaissance which Europe had a few centuries ago. Under NEPAD we have set the goal of making the 21st century in Africa the African Century. And it is a very

² For the New Partnership for Africa's Development see <www.nepad.org>.

large objective that we have set ourselves but that is what we have done. To do so, of course, we shall in the coming years have drastically to change developing practices and patterns in Africa and for that we shall need many mechanisms. It is very important for us that we are able to network, meet and discuss with countries that are much more developed than ours in Africa and to discuss that which has worked in your countries. You have obviously gone through many of these development processes to get to the level of sophistication and development where you are now. Although there are positive signs in Africa, we are just at the beginning of achieving that African renaissance and the African century that we seek. Obviously, to do so development and particularly growth is very vital. And, therefore, the development, the promotion of mechanisms – and in particular legal mechanisms – which will make it possible for us in Africa to be able to make use of mechanisms like leasing and make investors in other countries willing to invest their money comfortable in entering into such agreements is something that, speaking also on behalf of all countries from the developing world, we are very grateful to the Institute for ... It is very evident from discussions and interactions so far that developing countries and countries engaged in the transition to a market economy are ever more needful of model legal rules governing the financing of various goods but also equipment at every level of value in order to develop their economic infrastructure. In this regard, the preliminary draft model law on leasing ... is considered to be a most efficient way of developing basic leasing laws in developing countries and countries in transition.”³

Experts from the Governments of Angola, Australia, Brazil, Bulgaria, Burkina Faso, Burundi, Cameroon, Chile, the People’s Republic of China, Gambia, Germany, India, Ireland, Japan, Latvia, Oman, Poland, Portugal, Qatar, Rwanda, South Africa, Sudan, Tanzania and the United States of America, assisted by observers from the Commonwealth Secretariat, the I.F.C., the I.C.C. and the United Nations Commission on International Trade Law, came together at the first session of the Committee of governmental experts, which appointed its chairman in the person of Mr Isaac Thindisa (South Africa), with Mr DeKoven again being appointed Reporter. Particularly mindful of Mr de Lange’s words, the Committee sought at all times to ensure the establishment of a balanced instrument. The fact that excellent progress was able to be made right across the board in the achievement of this all-important objective owed not a little to the unprecedentedly leading participation in the negotiations of the representatives of developing and

³ UNIDROIT 2007 - Study LIXA - Doc. 12 – Appendix IV, p. ii.

transition economies, especially when it was a question of those points that were crucial for countries at their level of development.

A second session of the Committee of governmental experts was held, at the kind invitation of the Ministry of Commerce and Industry of Oman, in Muscat in April 2008. Interestingly enough, it was through contacts made at the first session of governmental experts, in South Africa, that it was possible to hold the second session in Oman, not only a non-member State but, what is more, from that Arabic-speaking world in which UNIDROIT's membership is particularly deficient. In his opening address, H.E. Maqbool Bin Ali Sultan, Minister of Commerce and Industry, explaining why leasing played a key role in economic development and how in Oman the Central Bank had actively encouraged the development of leasing, stated that in his country

“we are accustomed to looking to banking as a primary source of finance; however, this is not without its limitations. Banking, by its very nature, depends on collateral security, comprehensive documentation, financial analysis and covenants, and all of this will, I believe, increase manifold with the increasing emphasis on risk imposed by Basle II. On the other hand, at my Ministry, we have observed that these are the kind of conditions that small and medium enterprises find difficult to fulfill. Yet, these are the industries that need the most financial support, and are the very industries that we seek to encourage, given their critical importance in employment creation and wealth distribution. It is here, that leasing plays a key role. I have observed that the leasing industry adopts a much more S.M.B. friendly approach and looks to the security of the asset financed and their own ability to get close to and understand the needs of their clients, for their recoveries.”⁴

In addition to experts from the States that had been represented in Johannesburg, the Muscat session was also attended by experts from Colombia, Indonesia, the Islamic Republic of Iran, Kuwait, the Islamic Republic of Pakistan and the Russian Federation, as well as observers from E.L.F.A. and Felalease. In the absence of Mr Thindisa, the session was chaired by Mr John Makhubele (South Africa).

The preliminary draft model law as reviewed by the Committee of governmental experts at the Johannesburg and Muscat sessions was laid before the UNIDROIT Governing Council at its 87th session, held in April 2008, for advice as to the most appropriate follow-up action. Subject to the making of a number of amendments, principally to the French-language version, the

⁴ UNIDROIT 2008 – Study LIXA – Doc. 13 – Appendix III, p. i.

Governing Council authorised the transmission of a draft model law on leasing to Governments and Organisations for finalisation and adoption, at a joint session of the General Assembly of UNIDROIT member States and the Committee of governmental experts. In recommending such a novel procedure for adoption of the draft model law, the Governing Council showed its desire, on the one hand, to ensure maximum transparency vis-à-vis the entirety of UNIDROIT's membership and, on the other, to reflect the key role played in the development of the draft model law by a significant number of non-member States, from those parts of the world for which it was principally intended.

IV. – ADOPTION OF THE UNIDROIT MODEL LAW ON LEASING

The Joint Session was held in Rome in November 2008. In addition to representatives of most of the States, Organisations and professional associations having participated in the Johannesburg and Muscat sessions of governmental experts, representatives of Argentina, Canada, Croatia, Egypt, France, Greece, Hungary, Italy, Lithuania, Mexico, Nicaragua, the Republic of Korea, Turkey and Uruguay and observers representing the Aviation Working Group, the International Bar Association and Leaseurope participated in the finalisation of the draft model law and witnessed adoption of the *UNIDROIT Model Law on Leasing* on 13 November 2008. Ms Amanda Vanstone, Ambassador of Australia in Italy, chaired the opening meeting of the Joint Session as well as its final meeting, at which the Model Law was adopted, as the sitting President of the UNIDROIT General Assembly. Mr Makhubele (South Africa) chaired the other meetings, during which the Joint Session reviewed the draft model law prepared by the Committee of governmental experts, as amended by the UNIDROIT Governing Council, as Chairman of the Committee of governmental experts. A copy of the Model Law adopted at the Joint Session is reproduced in this issue at pp. 648.

The Model Law focusses on the private law aspects of leasing, thus steering clear of its fiscal, accounting and supervision aspects. It applies only to commercial leases and, therefore, does not extend to consumer leases, thus focussing on the transactions judged to be most critical to economic development. It applies to an extended range of assets, in short encompassing all those categories of asset used in the craft, trade or business of the lessee (and, in particular, immovables, capital assets, equipment, future assets, specially manufactured assets, plants and living and unborn animals). It covers

a broader range of leasing transactions than the 1988 UNIDROIT Convention, the idea being, while recognising that financial leasing is the most powerful engine of growth in this field, to avoid channelling the development of the industry into any particular category of transaction: it, therefore, applies to both financial leases and non-financial leases.

A detailed analysis of the new Model Law follows in the pages of this issue of the *Uniform Law Review*, in the shape of articles prepared by four of the leading participants in its development. First, Mr Ronald DeKoven has kindly contributed his thoughts on the overall conceptual approach followed in the designing of the Model Law. Secondly, Mr Brian Hauck, who was kindly seconded by the law firm by which he was employed at the time, *Jenner & Block*, to assist UNIDROIT in the development of this project and who served as Secretary, first, to the Advisory Board, secondly, to the Committee of governmental experts and, finally, to the Joint Session, has kindly contributed a piece on the scope of the Model Law. Thirdly, Mr El Mokhtar Bey, who participated in the work of the Advisory Board and represented the Government of France at the Joint Session, has kindly contributed an analysis of the rights and duties of the parties under the Model Law. Finally, Mr Murat Sultanov, who participated in the work of the Advisory Board, the Committee of governmental experts and the Joint Session on behalf of the I.F.C., has kindly contributed his insights into the role of the Model Law in supporting leasing markets in developing countries.

V. – PREPARATION OF AN OFFICIAL COMMENTARY ON THE MODEL LAW

The Joint Session passed a Resolution calling upon the UNIDROIT Secretariat to draw up an official commentary on the Model Law, in close co-operation with the Reporter to the Joint Session, the Secretary to the Joint Session, the Chairman of the Committee of governmental experts and members of the Drafting Committee. The Official Commentary in question had been envisaged throughout the intergovernmental negotiations, essentially as a means of clarifying certain provisions of the Model Law.

Considerable progress has been made with development of the planned Official Commentary. A first draft was prepared by the Reporter and a meeting was held in Rome in June 2009 with a view to finalisation of this first draft, on the basis of comments and proposals submitted by the Chairman of the Committee of governmental experts and members of the Drafting Committee.

The meeting was attended by Mr DeKoven, Mr Makhubele and representatives of the Governments of Canada, France and the United States of America, as members of the Drafting Committee.

The Secretariat is in the process of finalising the Official Commentary on the basis of the prescriptions decided upon at that meeting.

VI. –FUTURE OF THE MODEL LAW ON LEASING

Looking to the future of the Model Law, it looks as though one of the main problems normally affecting the implementation of uniform law will not arise: the I.F.C. has already indicated that it will be using the Model Law in its work to assist the growth of leasing industries in States with developing economies and economies in transition and will, in particular, be recommending its use in its countries of operations as a best practice reference. Thus, Jordan, Tanzania and Yemen have already all adopted leasing legislation incorporating portions of the Model Law and the I.F.C. has put forward legislation in Afghanistan and the West Bank based in its entirety on the Model Law. The Commonwealth Secretariat too is looking at ways to work with the UNIDROIT Secretariat on implementation of the Model Law in Commonwealth jurisdictions, in the light of the decision taken at the Commonwealth Law Ministers Conference in July 2008.

For the time being, the Secretariat will be putting off promotion exercises. It is true that a number of countries have indicated their interest in UNIDROIT organising seminars to promote the Model Law, including Indonesia and Pakistan. However, the Institute is particularly stretched at the moment. Moreover, in organising such seminars, it will doubtless help to have unofficial versions of the Model Law available in other languages than just the official English and French versions. The Secretariat has, accordingly, launched the preparation of unofficial Arabic, Chinese, Russian and Spanish versions of the Model Law. The unofficial Russian version, prepared under the auspices of the Ministry of Economic Development of the Russian Federation, is already ready and will be used at a conference being organised in Baku, Azerbaijan in November 2009.

Indeed, the fact that the Institute itself is unable, for the time being, to launch promotion exercises does not appear to be discouraging others from including coverage of the Model Law at conferences of their own. Thus, a representative of the Institute will be addressing the Model Law at a

conference being held, under the auspices of the American Association of Private International Law, in November 2009 on Isla Margarita, Venezuela.

VII. – CONCLUSIONS

There can be no hiding the satisfaction of seeing distinguished legal draftsmen of developing countries and transition economies playing, for once, the leading role in the shaping of an international instrument, all the more so in the case of one specifically designed to enhance the access of such countries to such an invaluable source of finance for the development of their economies.

The experience of taking the major part of the intergovernmental negotiating process for the development of the Model Law to those parts of the world for which it was primarily intended and which are, all too often, either unrepresented or inadequately represented at similar meetings held in Rome provided overwhelming confirmation of the case for the Secretariat's belief in the timeliness of such an initiative.

Given the particular aptness of uniform law to assist development in developing countries and transition economies but the limited resources that such countries have to follow the preparation of such laws according to the traditional procedure, it is to be hoped that further use will be made of the novel procedure employed in the development of the Model Law, especially as a means of reaching out to those countries.

UNIDROIT has always been a fervent advocate of the values of team-work amongst international Organisations. Indeed, this was one of the special themes treated at the Vth Meeting of the Organizations concerned with the Unification of Law hosted by UNIDROIT in Rome in 1973.⁵ There can be no doubt that the preparation of a model law responding to the particular needs and requirements of developing countries and transition economies was greatly facilitated and assisted by the invaluable co-operation that UNIDROIT has received from the I.F.C. At the same time, UNIDROIT dares to believe that its technical expertise in the drafting of such an instrument will assist realisation of the I.F.C.'s own objectives in this field. Moreover, whereas it is, unfortunately, par for the course for international instruments – with a few exceptions, of course – to languish unimplemented for years and, indeed, decades, the particular beauty of the team-work established between

⁵ Cf. in particular Paolo CONTINI: "Methods of co-ordinating the activities of the different international Organizations and team-work among them", *Unif. L. Rev. / Rev. dr. unif* (1973), II, 39 et seq.

UNIDROIT and the I.F.C. on this project lies in the fact that the Model Law was already being used as the basis of national legislation even before its adoption and looks set fair to be added to the statute book of many more countries in the future.

Lastly, but not least, it is a pleasure to acknowledge the unprecedented contribution made to the development of the Model Law by so many faithful correspondents of UNIDROIT, particularly at the Advisory Board stage, when they came to Rome from all parts of the world, generously donating their time and expertise and taking care of all their own expenses. One correspondent was particularly lavish in his contribution to the project and it was, therefore, appropriate that the UNIDROIT Governing Council, at its 88th session, held in April 2009, saw fit to pass a resolution, in particular expressing its deep gratitude to Mr DeKoven for the way in which he had given so generously of his time and expertise to the development of the Model Law. Here again, one would hope that the felicitous outcome of UNIDROIT's call on the altruism of its correspondents in this case might provide food for thought for future projects, in areas where UNIDROIT is equally rich in expertise.

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