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Where is my Container?

The Protection of Container Leasing Companies' Proprietary Rights

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Contents

Summary

Containers are constantly crossing borders, making it almost impossible for a container leasing company to predict which jurisdictions containers on lease may enter – a question, however, of great importance. The protection of the lessor's proprietary rights is dependent on that countries respect and uphold the protection. Nonetheless does the protection as of today vary widely and it occurs that lessors in the case of, for example, a lessee's bankruptcy, are forced to bail out their containers from depots, otherwise refusing to give out the containers.

The problem partly depends on differences in national legislation, and partly on the fact that the protection, although formally existing, is not upheld in all parts of the world. Without efficient protection financiers may become reluctant to grant credit for movable equipment, in its turn being an obstacle to world trade. Such thoughts lie behind the Cape Town Convention 2001, providing protection for proprietary rights to certain categories of movable equipment by having them registered in an international register. As of today, containers are not comprised under the Convention, although it was discussed during the drafting work. The possibility remains, however, to add further categories of equipment in the future. Such a solution would undeniably strengthen the protection of the proprietary rights and lead to uniform substantive provisions in the area. On the other hand, the capital tied up in container fleets does not lie in the separate objects but rather in the fleet's quantity, making it less appropriate to adopt an international register for containers in comparison to other types of movable equipment such as aircrafts and ships. To register each and every single container would be costly in comparison to the rather low value of each single container. The container leasing companies, in addition, have developed a number of preventative methods, which as of today seem to be efficient.

Sammanfattning

Containrar är i ständig rörelse över landsgränser, vilket gör det näst intill omöjligt för en containerleasegivare att förutse i vilka jurisdiktioner uthyrda containrar kommer att befinna sig under leaseperioden – en fråga som dock är av stor betydelse. Leasegivarens äganderättsliga skydd är avhängigt av att de länder i vilka containrarna befinner sig respekterar och upprätthåller det. Inte desto mindre är skyddet idag varierande och det händer att leasegivare vid händelse av till exempel en leasetagares konkurs tvingas lösa ut sina containrar ur depåer som annars vägrar utge utrustningen.

Problemet är dels relaterat till olikheter i nationell lagstiftning, dels till det faktum att skyddet inte ovillkorligen upprätthålls på alla håll i världen. Utan effektivt skydd blir finansiärer ovilliga att finansiera internationellt använd utrustning, vilket i sin tur är ett hinder för världshandeln i stort. Sådana tankar låg bakom Cape Town konventionen från 2001, som erbjuder sakrättsligt skydd till vissa typer av internationellt använd utrustning genom att låta sak- och äganderätter införas i ett internationellt register. Av dags datum är containrar inte omfattade av konventionen även om det diskuterades vid dess utformande. Möjligheten kvarstår dock att framöver lägga ytterligare kategorier av utrustning under konventionen. En sådan lösning hade onekligen stärkt skyddet av äganderätten och lett till enhetliga substantiella bestämmelser på området. Å andra sidan finns kapitalet i containerflottor inte i värdet av de enskilda containrarna utan i flottans kvantitet, vilket gör det mindre lämpligt att införa ett internationell register för containrar jämfört med andra typer av utrustning som används internationellt, så som flygplan och skepp. Att registrera var och varje enskild container hade varit dyrt i förhållande till det relativt ringa värde som en container betingar. Härtill har containerleasegivarna utarbetat ett flertal förebyggande metoder som av dags datum förefaller effektiva.

Preface

This paper has been as great of a challenge to write as it has been interesting, because little has been written on container leasing out of a legal perspective to this date. In addition to this, it must first be taken into consideration that leasing has much developed outside of the traditional legal sphere as a response to the need for efficient financing of industrial equipment and second, that the intrinsic features of the container differs in numerous ways from much other equipment traditionally financed by leasing. Simultaneously, with a continuously growing sea transportation and containerisation, however, there is the increasing need to observe the protection of the lessors' proprietary rights in the leased equipment.

Three special thanks go out to Lars-Göran Malmberg, for awakening my interest in the topic and for contributing interesting ideas along the way, to Adrian Wiedenbach for providing a well needed industry perspective and to Amy Knibbs for reading the paper in proof.

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Lina Lumetzberger

Abbreviations

AGB	Allgemeine Geschäftsbedingungen
Art.	Article
BIMCO	Baltic and International Maritime Council
BGB	Bürgerliches Gesetzbuch
BGH	Bundesgerichtshof
c	chapter
Doc.	document
EA 2002	Enterprise Act 2002
e.g.	for example
EU	European Union
Ger.	German
HGB	Handelsgesetzbuch
IA 1986	Insolvency Act 1986
IA	Insolvency Act 2000
ICHCA	International Cargo Handling Co-Ordination Association
i.e.	that is
InsO	Insolvenzordnung
ISO	International Organization for Standardisation
para	paragraph
RCIRC	Refrigerated Container Inspection and Repair Criteria
s	section
Sch	Schedule
SOU	Statens offentliga utredningar
StGB	Strafgesetzbuch
Triton	Triton Container International
TEU	Twenty Foot Equivalent Units
UCIRC	Unified Container Inspection and Repair Criteria
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USA	United States of America
Vol.	Volume
ZPO	Zivilprozessordnung

1 Introduction

1.1 Problem Background

The container was a groundbreaking invention for global trade as it emerged in the mid 1950s, enabling door-to-door freight and increased utilisation of cargo space. As financial leasing developed as a financing form some 20 years later, the container leasing market boosted and soon became one of the most common ways to acquire containers. Beyond being a means to acquire equipment without having to contribute high initial capital (thus enabling a lessee to invest its free capital elsewhere) leasing offers flexibility and taxation advantages.

As such, a distinguishing feature of the container is how frequently it crosses borders. Together with aircrafts, ships and other objects with similar features, it belongs to a group of equipment commonly gathered under the term “movable equipment”. Financiers of such objects often take great financial risks – for not only are the objects commonly of high value, but just as often as the objects cross borders do they enter new jurisdictions. Indeed, the lessor retains ownership in the equipment but he often faces problems safeguarding his proprietary rights. It is, for example, not possible to know in advance, which jurisdiction a lessor will have to approach in order to enforce a judgement or in which country a lessee may become subject to bankruptcy proceedings. The lessor commonly tries to anticipate threats by including comprehensive default provisions and remedies in the leasing contract. However, a company can only protect itself to a limited extent, as it is not capable of controlling national mandatory law. It is further dependent on assistance from local authorities.

The shortcomings of the creditor’s financial protection in connection with movable equipment have been repeatedly illustrated and, in principle, there have been two attempts to deal with the legal problems internationally – most recent, the UNIDROIT Convention on International Interests in Movable Equipment (the Cape Town Convention). During the drafting work it was much debated which movable equipment should be included under the scope of the Convention. Finally, only three categories were encompassed, containers not being one of them. Thus, the legal rules applicable to container leasing are still mainly governed by national rules.

The national rules vary widely, however, with regard to everything from how leasing is looked upon in the area of private law to how insolvency proceedings with international elements are dealt with and whether foreign judgements are enforced or not. In addition, containers possess features different from many other types of movable equipment in that the value under the agreement does typically not lie in the separate objects but rather in the number of leased pieces of equipment. Simultaneously, the leased fleet is dispersed in various directions throughout the world, making the protection of the equipment an even harder task.

1.2 Purpose and Question Formulation

The aim of this work is to emphasise proprietary problems within the container leasing industry as of today and, in the light of the container's intrinsic certain features, examine whether any improvements could facilitate the container leasing business by enhancing the lessor's proprietary rights. An interim target is to give account of the peculiarities of container leasing and to untangle elements of its legal complexity.

1.3 Method and Material

I apply a commercial method, examining how the container leasing contract is construed and how the industry has created its own solutions to various problems, largely in the absence of efficient legal instruments to protect lessors' interests in international movable equipment. Moreover, I consider to what extent additional legal provisions could protect the lessor's proprietary rights and whether this would effectively benefit the container leasing market.

The information is collected from legal sources, doctrine and specialist writings. In order to add a practice-focused view to the thesis and to underpin the conclusions drawn, information from an interview with Adrian Wiedenbach, marketing manager at Triton Container International, held at the company's Hamburg office is mentioned in conjunction with each main chapter.

1.4 Delimitation

As indicated by its title, this paper particularly adopts the perspective of the container lessor, considering how he can effectively protect his proprietary rights in the leased equipment against the lessee and other stakeholders on the international container transport market. Thus, questions of sales, fiscal and accounting law which are commonly also associated with leasing but of less significance for the subject matter are only briefly dealt with where relevant. Instead, the focus is on proprietary law as dealt with internationally in various national legal systems.

In order to keep the length of the paper within given proportions I shall focus on what I believe to be the lessor's two main problem areas: enforcement of default remedies and the case of a lessee's bankruptcy. I do not intend to perform a thorough examination of national law but rather to consider the main differences. The focus will be on Europe, although much of this paper applies worldwide.

1.5 Disposition

The initial chapter deals with the specific features of containerisation and the container itself. It aims to give the reader a basic understanding of the peculiarities of the industry as well as the trends in recent years.

The second chapter concerns leasing, and financial leasing in particular, giving account of its legal structure, its advantages and disadvantages, as well as its divergence from other forms of asset-based financing.

The third chapter is dedicated to container leasing in particular and its peculiarities. It deals with the three main, rather different forms of container leases and with how these are managed in practice.

The fourth chapter presents the legal framework in the area of protection of proprietary rights in movable equipment, which as of today is considerably broad. Suggestions on possible unification are also presented, mainly through a study of the Cape Town Convention.

Each of the four main chapters are followed by an industry report from a container leasing company's perspective, originating from an interview with a representative for Triton's Hamburg office.

In conclusion, on the basis of what has emerged throughout the study, I return to the purpose of this paper, discussing the proprietary problems that a container lessor faces, how these problems are currently dealt with and what, if any, improvement could be made in the area.

2 The Container and Containerisation

2.1 The Phenomenon of Containerisation

> "Containerization has transformed global trade in manufactured goods as dramatically as jet planes have changed the way we travel and the Internet has changed the way we communicate."
>
> *Joseph Bonney, editor of the Journal of Commerce*

The phenomenon of using standard intermodal containers to be loaded on and off different means of transportation, hence enabling door-to-door service, is commonly referred to as containerisation.[1] The first containers were introduced on the North American market in the mid 1950s and entered the European market about a decade later.[2] The first container shipping companies acquired containers with their new containerships. As the container transportation market expanded and as the equipment moved into more ports and further inland, the demand for containers increased.[3]

Transporting goods in containers not only keeps the goods better protected but also significantly facilitates handling at terminals, making much intermediate handling unnecessary. In addition, space is utilised to its full potential. Ultimately, both money and time are saved.[4] In this way, the container has had a revolutionary impact on the supply chain management.[5] It has brought enormous economic and social changes to many countries – not least the less developed and newly industrialised – and will continue to play a dominant part in the ongoing development of world trade.[6]

As of today, there are over 140 trading nations in the container business and some 360 ports generating over 100 000 possible routes. Along with expanding use of containers, container vessels have considerably increased in size for the purpose of achieving greater productivity. In containerisation's infancy, containers were almost exclusively used for the transportation of finished goods and parts. This market today is essentially full but the container revolution is continuing to develop in the area of commodity transportation.[7] A serious and costly problem for the ocean carriers is trade imbalances between production and consumption areas, resulting in empty containers.[8] The empty containers need to be

[1] Branch, 2007, p. 346
[2] http://www.containerhandbuch.de/chb_e/stra/index.html (2010-07-04), 1.1
[3] Tan, 1983, p. 13
[4] Branch, 2007, p. 376 ff
[5] Notteboom, Rodrigue, 2008, p. 1 f
[6] Branch, 2007, p. 379
[7] Notteboom, Rodrigue, 2008, p. 1 f
[8] Branch, 2007, p. 346

repositioned, an unproductive, costly activity, which ties up terminal capacity.[9] A more environmental problem deriving from containerisation is the huge amounts of containers dropped in the ocean each year. Within the European Union alone over 2000 containers are estimated to fall into the ocean each year. This has grown to a major problem because it constitutes a risk for other vessels as well as the environment. In addition, goods of great value are lost.[10]

2.2 The Container Leasing Market – an Overview

Containerisation is a capital intense business and as such beyond the financial ability of many ship owners. Not only does the ocean carrier have to acquire specialised designed container vessels but also at least three sets of containers to go with each ship.[11] Following the mothership, containers are the second largest capital expenditure.[12] Leasing as from the 1970s has become a common way to avoid the heavy initial expenses connected to purchase.[13] From an operational standpoint, leasing is approximately 60 to 70% more expensive compared to owning equipment, but the physical as well as the financial flexibility offered are commonly deemed to outweigh the additional expenditure. An ocean carrier in some arrangements, for example, is able to return the container to the leasing company at its destination.[14] Other more general motives for choosing leasing over other means of financing are dealt with in chapter 3. Next to ocean carriers or consortiums of ocean carriers, leasing companies constitute the second greatest owner groups of marine containers.[15]

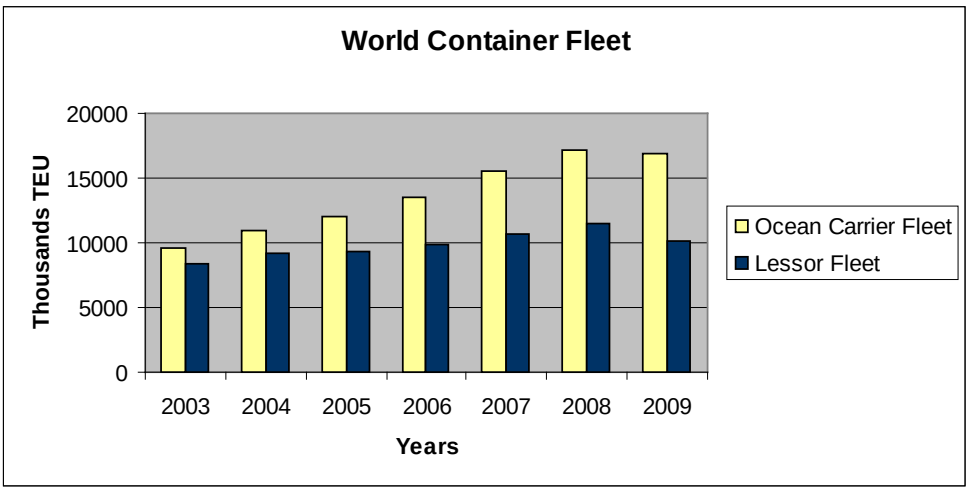
Traditionally, ocean carriers utilised the flexibility of container leasing, off hiring containers in surplus areas and on hiring them in areas of high demand. At present, the trend is to lease equipment for longer periods in so-called long term leases, further dealt with in 4.2.[16] For this reason, the container leasing market is characterised by a high usage level, with over 90% of the containers in operational use.[17] Another characteristic feature of the container leasing market is the strong market concentration, with almost 60% of the leasing fleet owned by five leasing companies. Larger container leasing companies operate globally, providing a worldwide availability, whereas smaller container leasing companies rather capitalise in areas where

[9] Notteboom, Rodrigue, 2009, p. 5
[10] Göteborgsposten, 2010-10-11, p. 38
[11] Branch, 2007, p. 377 f
[12] Tan, 1983, p. 2
[13] Tan, 1983, p. 2
[14] Rodrigue et al
http://people.hofstra.edu/geotrans/eng/ch3en/conc3en/table_leasingarrangements.html
(2010-10-21)
[15] Boile, Theofanis, 2009, p. 54
[16] Boile, Theofanis, 2009, p. 55
[17] Boile, Theofanis, 2009, p. 56

they can provide proximate, dedicated service to selected customers.[18] Moreover, the leasing companies almost exclusively deal with standard box containers. Only a small share of tailor-made containers are held by them. The containers on lease are overwhelmingly standardised 20' or 40' boxes with even the fleet of refrigerated containers constituting less than 5% (15% in asset value) of all TEU on lease.[19] Thus, the value of the leased containers lies in the quantity rather than in the value of each container. The average standard box container as of today costs about $2000 and has an amortisation period of some nine years, whereas the container's useful life is considered to be about 12 years.[20]

The share of containers held by the leasing industry has fluctuated throughout the years, with its peak in 1998 with a share of 53.6% of the total market. Throughout the last decade, as the world container fleet has substantially increased, the proportion owned by the leasing industry has decreased. According to Boile and Theofanis, this change is mainly explained by the ocean carriers taking on more activities outside of their core competence at the same time as they are able to put pressure on lease prices due to their dominant position on the market, thus making the container leasing business less attractive.[21] Yet the leasing business remains substantial. In 2009, excluding the very small share of containers owned by other parties, container leasing companies owned approximately 41% of the global container fleet and ocean carriers and other transport operators the remaining 59%.[22]

[23]



As the diagram shows, the world container fleet grew continuously until 2009 – the year of the "Financial Crisis". During 2009, the world rental fleet

[18] Boile, Theofanis, 2009, p. 54
[19] Foxcroft, 2008, p. 38
[20] Boile, Theofanis, 2009, p. 57
[21] Boile, Theofanis, 2009, p. 56
[22] Boile, Theofanis, 2009, p. 54
[23] Based on UNCTAD, Review of Marine Transport, 2008, 2009 and Containerisation International, Vol. 43, Issue 5, 2010, p. 8

declined in size by 5.4%, ending the year at just 10.2 million TEU[24], compared to the ocean carriers and other transport firms, who lost only 2.7% in fleet size, thus ending the year at 16.9 million TEU. The container leasing companies, however, accounted for more than 60% of all TEU purchased in 2009 and appear set to take an even greater share in 2010, accounting for the majority of annual investment of the first time in eight years.[25]

2.3 Characteristics of the Container

The term mobile equipment[26] is commonly used to designate objects which by their very nature are used internationally. Aircrafts, satellites, ships, oil rigs and containers are some examples. These objects are inherently movable – containers are used to transport goods to destinations all over the world.[27]

The ISO container standards were created in connection with the containers entering the European market in the 1960s, with the aim of creating worldwide uniformity in container measurements.[28] Through the ISO[29] standardisation of containers, the container became the intermodal method of transporting goods.[30] The dominating ISO standards are 20' or 40' long, 8' wide and 8' or 8.6' high.[31] Container capacity is measured in TEU, one TEU being equivalent to the volume of one 20' container. Thus, the capacity of a 40' container equals two TEU.[32] There is a rising demand for containers to be larger in all three dimensions. Larger containers in the last years have also emerged on some markets, notably the North American.[33]

Two stakeholders in the leasing arrangement can be identified with potentially conflicting goals. Ocean carriers merely consider the container to be an auxiliary means, used for the safe and efficient transportation of goods. It is of little value in comparison to its high utility value and freight earning potential.[34] Thus, for the ocean carrier, usership is more important than ownership and it may not make economic sense to purchase the containers.[35] For the container lessor however, the container is the company's core asset, from the leasing of which it seeks to cover

[24] Twenty Foot Equivalent Units, for the definition of – see chapter 2.3
[25] Containerisation International, Vol. 43, Issue 5, 2010, p. 8
[26] To be distinguished from movable assets, which is a general term for tangible property
[27] Tan, 1983, p. iv and 13
[28] http://www.containerhandbuch.de/chb_e/stra/index.html (2010-09-30), 1.1
[29] International Organization for Standardisation
[30] Tan, 1983, p. 10
[31] http://www.containerhandbuch.de/chb_e/stra/index.html (2010-09-30), 1.1
[32] The unit however is not exact as a 20' container diversing from the standard measurements in width and/or height would still be referred to as having a capacity of one TEU
[33] http://www.containerhandbuch.de/chb_e/stra/index.html (2010-09-30), 1.1
[34] Boile, Theofanis, 2009, p. 54 f
[35] Tan, 1983, p. iv

depreciation and make sustainable profit. The relationship between the lessee and lessor is very complex and not easily conceptually described.[36]

2.4 Triton Interview

Adrian Wiedenbach, marketing manager at Triton's Hamburg office recounts how the container leasing business abruptly ended in October 2008, as the "Financial Crisis" began to take hold: "It was a major problem for us. Containers were left standing at the manufacturers in China, which was of course an even greater problem for them." The market turned again as early as September 2009, when the first and most aggressive ocean carriers started to ask for equipment again. This can be contrasted with the perception that the "Financial Crisis" did not improve until sometime around mid summer 2010. By that time, Triton's business was already almost fully recovered. The first new constructions, an important part of leasing companies' business in terms of growth, recommenced in October 2009. The ocean carriers, who approached the container leasing company at an early stage for natural commercial reasons tried to negotiate especially favourable terms. Their upper hand did not last long, however, as the market quickly recovered. In November 2009, a 20' container could be acquired for $1800. This should be compared with the situation only ¾ year later in July/August 2010, when the price for the same equipment peaked at $2850. The leasing rates, reflecting the purchase price, also rose approximately 50% during this time. "Lately we have actually managed to get higher rates for containers leased out a second time compared to the rate charged during their first lease period." Since the peak in the summer of 2010, however, the prices have started to slump. Wiedenbach gives an account of how this puts the container lessor in a difficult position as clients try to delay the time of contract, hoping to obtain more favourable rates. At the same time, distributors want to know when they are expected to have equipment ready for delivery in order to make an offer.

On the other hand, the financial downturn also resulted in reduced competition on the container leasing market. Some two to three years ago, start-up companies were able to loan almost unlimited amounts of money to purchase equipment. The equipment was then leased for an initial period of about five years at very low rates, to be sold off at the end of the lease period. Established companies like Triton could not offer rates as low, having a whole surrounding organisation to finance. As banks as from 2008 squeezed the credits, firms such as the ones described above are currently not on the market, to Triton's advantage.

Triton essentially deals with containers easily positioned all over the world. Thus, containers other than the standardised 20', 40' foot and high cube[37] containers are rare. There are some "specials" like the 20' and 40' foot flat racks and open tops and a few "exotics" such as the 45' high cube

[36] Boile, Theofanis, 2009, p. 55
[37] Taller than a standard container with a height of 9,6'

and the 20' half height container. The more specific a piece of equipment, the harder it is to re-lease. Triton only engages in non-standardised equipment transactions where the client leases the equipment for a long period of time, often around 10 years. When it comes to refrigerated containers, the 40' high cube reefer has come to outrival smaller alternatives. In the last couple of years Triton has had about 10 000 40' high cube reefers built. Wiedenbach points out that even though the number may sound insignificant; one should not forget the capital involved in such equipment. A refrigerated 40' high cube container in comparison with a standard 20' container costs about ten times more, amounting to around $20000.

3 Leasing as a Means of Financing

According to a definition given by ICHCA[38] a lease is: "A contract between lessor and lessee for the hire of a specific asset selected from a manufacturer or vendor of such assets by the lessee. The lessor retains full ownership of the asset. The lessee has possession and use of the asset on payment of specified rentals over a period. The asset does not become the property of the lessee or any related third party, either during or at the end of the lease."[39]

3.1 The Background of Security Rights and Retention of Ownership Devices in Europe

With the industrial revolution came a need to make use of security rights, which were not restricted to possession in the security. The assets needed to remain with the debtor or other security providers in order for the industry to be able to utilise use them. At the end of the 19th century and during the 20th century, each European country developed separate solutions to the problem, leading to diversification in the legal field of security and retention of ownership. Outside the legislation, additional solutions such as leasing and sale and lease back developed as private contractual or proprietary institutions, making the picture even more complex. This is essentially still the case today, although there is a slow trend towards unification in the area.[40]

Retention of ownership in comparison to security rights has the advantage of granting considerably stronger protection to the seller in the case of the debtor's insolvency. Whereas a seller with retention of ownership recovers his assets from the bankruptcy estate, a seller with a mere security right does not.[41] The method of retaining ownership while possession is transferred to the buyer is widely accepted and practised in Europe. This is, however, not the case all over the world.[42]

Compared to other forms of retention of ownership agreements, leasing may in some situations be even more advantageous to the seller by way of allowing the lessor to repossess the leased equipment without having

[38] International Cargo Handling Co-Ordination Association
[39] Tan, 1983, p. 5
[40] Draft Common Frame of Reference, 2009, p. 5391 f
[41] Draft Common Frame of Reference, 2009, p. 5396 d
[42] Draft Common Frame of Reference, 2009, p. 5396 d

to pay back what he has so far obtained, as compared to a secured credit sale.[43]

3.2 Leasing in Comparison with Other Means of Financing

As of today, there are numerous ways for a company to finance new assets. The table below shows various methods with outright purchase at the one end and rental as the other. The main difference between these two extremes is how the acquirer's ownership decreases in strength towards the dotted line until it is merely usership.[44]

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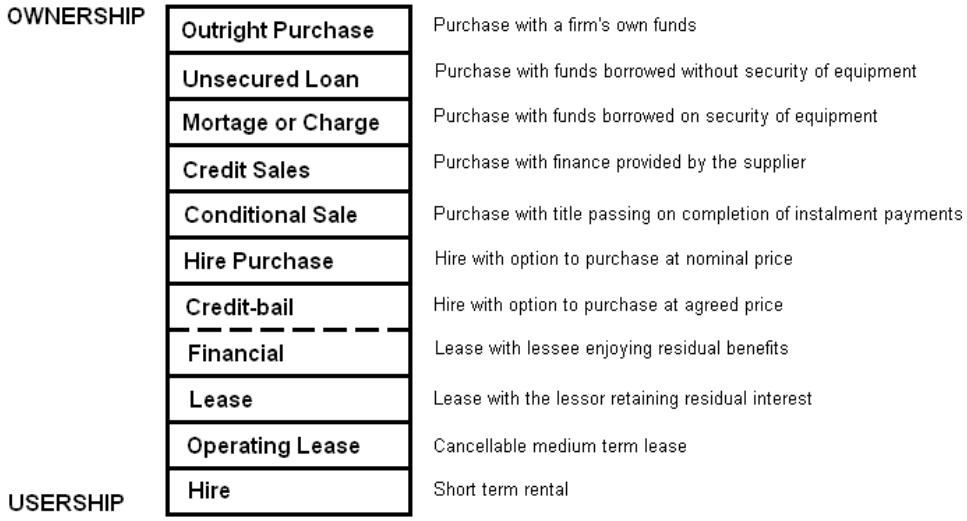

As in the table above, leasing is frequently divided into two subgroups: financial and operational leasing. Whereas financial leasing is carried out by specialised companies with the purpose of financing industrial equipment, operational leasing is commonly used as a generic term for other types of leases, i.e. the ones not attributable to financial leasing. Where nothing else is specified in this work, financial leasing[46] is intended.[47]

In respect of function and risk-distribution, financial leasing lies close to credit sales with security in the equipment. The leasing conditions can be compared to credit and security conditions.[48]

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[43] Millqvist, 1987, p. 260
[44] Tan, 1983, p. 2
[45] Tan, 1983, p. 3
[46] Although container leasing cannot be strictly divided into financial and operational lease, as the arrangements on the market widely differ and often contain elements of both types.
[47] Möller, 1996, p. 19
[48] Möller, 1996, p. 20

As the leasing agreement includes features from various legal areas, analogies are frequently drawn, e.g. from the rules applicable to hire, purchase, pawnbroking and/or security transfer.[49] The extent to which analogies can be drawn varies from country to country, depending among other things on the extent to which contractual freedom is upheld.[50]

3.2.1 Advantages

As already mentioned, leasing is in principle always more expensive than purchasing equipment, whether the company uses its own capital or a loan in any form. So why do companies nevertheless frequently choose to lease equipment? The advantages of leasing can be divided into three main groups:

First, leasing in effect grants credit. It provides total financing at the same time as the lessee's initial cash flow is reduced. The lessee pays only part of the full purchase price at the time he begins to use the equipment and the subsequent costs are spread over a long period, often nearly equal to the equipment's lifespan. This should be compared with equipment loans in general, usually granted for a significantly shorter period. Consequently, costs become more closely correlated with revenue and a discounted cash flow analysis will usually indicate higher return on investment when cash payments are spread out over the asset's entire life. In addition, the lessee is free to use its existing resources elsewhere without limitation. Again, this should be compared to loan agreements, which possibly restrict additional borrowing and limit compensation to managers and/or owners.

Second, leasing may be characterised as insurance against technical or market obsolescence. This pertains in particular to industries with equipment which undergoes rapid technological changes. A company may either wait too long to purchase new equipment, hoping that an upgrade is soon to arrive, or acquire equipment too soon only to find that it quickly becomes obsolete. Thus, the uncertainty concerns the question: How long is a continued use more advantageous than replacement? By leasing equipment, the lessor shoulders part or all of the risk of that the equipment becomes obsolete.

Third, leasing efficiently packages a series of costs. Besides the mere acquisition costs, leasing also includes the costs related to the lease, e.g. legal, administrative and fiscal expenses. These too are spread over the lease period. The packaging of costs may even offer potential savings compared to purchase. This is mainly due to two causes: 1) Not every company is able to enjoy the tax advantages resulting from accelerated depreciation since they do not make sufficient earnings before tax. The same goes for the enjoyment of tax allowances, which requires a company to pay taxes of a certain size. Many smaller companies and some larger, capital-intensive companies (e.g. airliners) would therefore not be able to make full use of such an advantage in the case of a purchase. The leasing company can,

[49] Millqvist, 1987, p. 77
[50] Millqvist, 1987, p. 63

however, which commonly benefits the lessee too in terms of lower leasing rates. 2) Leasing companies have lower risk profiles than most operating companies, which lowers the costs for funds. In addition, many leasing companies are subsidiaries of banks, consequently granting access to low credit rates, potentially also leading to lower leasing rates.

Finally, leasing is a fast and flexible means to finance equipment.[51] A feature specific to cross-border leases is how parties may utilise contractual freedom to take advantage of various national rules on leasing. locating the lease in strategic jurisdictions. Cross-border leasing is further discussed in 3.2.3.[52]

3.2.2 Disadvantages

As already stated, leasing is expensive. Over the whole leasing period, leasing is normally 60 to 70% more expensive than purchasing the same equipment.[53] Despite the fact that a lessor may acquire investment capital from banks to lower costs, such savings will never be fully passed on to the lessee. Thus, a lessee, which itself has sufficient capital to, for example,make use of 100% of a first year capital allowance, sacrifices a major portion of this investment incentive by leasing.

Leased equipment further does not show in the lessee's balance sheet, conferring merely a right of usage. Hence, a lessee with much leased equipment may undervalue its business and so may banks and trade creditors. For the same reasons, leased equipment cannot be included with other assets nor used as collateral in order to secure loans.[54]

Finally, certain statutory responsibilities limit contractual freedom. First, the lessor cannot transfer liability for damage caused by the equipment to any person or object.[55] This is commonly solved contractually by the lessee's warranty to hold the lessor harmless in case of any such claims.[56] Second, whereas the proprietary rights in a lease arrangement are exclusively with the lessor in his capacity of legal owner, economic ownership is connected to fiscal and accounting law.[57] National fiscal legislation commonly constrains the lessor from handing all economic benefits over to the lessee, although to what extent varies between jurisdictions. However, in connection with leasing, one must keep the concept of legal ownership separated from the concept of economic ownership.[58]

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[51] Tan, 1983, p. 6 ff
[52] Millqvist, 1987, p. 42
[53] http://people.hofstra.edu/geotrans/eng/ch3en/conc3en/table_leasingarrangements.html (2010-10-21)
[54] Tan, 1983, p. 9
[55] Tan, 1983, p. 10
[56] Möller, 1996, p. 30 f
[57] Diederiks-Verschoor, 2001, p. 207
[58] Tan, 1983, p. 10

3.2.3 Financial Leasing – A Background

Financial leasing developed in North America in 1952. It quickly grew in the capital-demanding industrial market in the aftermath of World War II, for which neither companies' internal funds nor loans available at banks were sufficient. Financial leasing travelled to Europe in 1960.[59] As a new legal phenomenon it was rather unconstrained from governmental credit restrictions and controlling rules, a fact which made leasing particularly popular.[60] As financial leasing spread from the USA to other legal systems, adjustments were made, but the basic elements of leasing are the same in most countries.[61]

A few countries, such as France and Portugal, provide certain private legal laws on financial leasing.[62] Most other jurisdictions do not. Instead, general rules and legal principles of private law are applied and analogies from adjacent legal areas drawn, e.g. from the rules of purchase, credit sales, etc.[63] The three party structure, which is characteristic of financial leasing, is where the lessor plays a solely financial part. Because of this structure, the rules on rental of movables have been deemed less suitable to form rules for leasing in all situations. The numerous standard agreements on leasing have become solutions to the problem by including provisions adjusted to the certain situation.[64] Nearly every leasing company has its own standard agreement, but the content is similar with regards to the basic features.[65]

3.2.3.1 The Economic Arrangement

Although there is no universal definition, some things are true for financial leasing in general. As already mentioned, its most distinctive characteristic is the three-party relationship under which the lessor – generally a specialised financing company without corporate attachments to the distributor – enables the lessee to obtain and use equipment without having to contribute any contributed capital or particular security. The lessor's protection instead is in the retained ownership in the leased equipment.[66]

The lessee pays fees throughout the leasing period. The period is mandatory and often adjusted to the equipment's economic lifespan. Where the fees are not adjusted to the lifespan, a residual value is left at the end of the lease. Where the equipment is not intended to be re-leased, the lessee in advance has guaranteed to pay the residual value by way of set-off or a ransom at the end of the lease. This type of leasing is called "residual value leasing" and is commonly used in connection with leasing of vehicles or expensive equipment which are stable in value (e.g. aircrafts and ships).[67]

[59] Millqvist, 1987, p. 28 f
[60] Millqvist, 1987, p. 40
[61] Millqvist, 1987, p. 29
[62] SOU 1994:120, p. 317 and 324
[63] Millqvist, 1987, p. 63
[64] Adlercreutz, 2010, p. 176
[65] Adlercreutz, 2010, p. 178
[66] Möller, 1996, p. 20
[67] Möller, 1996, p. 20 ff

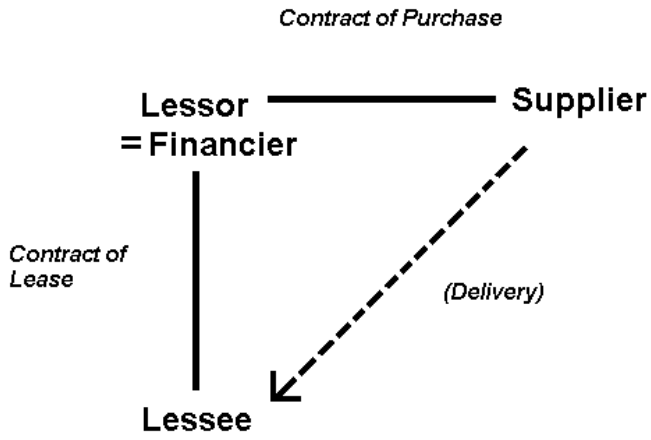
The fees paid by the lessee throughout the leasing period, possibly in combination with any additional residual value at the end of the lease, cover not only the lessor's initial costs but administration, interest rate, risk and profit too.[68] Consequently, the total fees paid exceed the amount that would be required to purchase the same equipment. The lease structure, however, offers the lessee the opportunity to invest its free capital elsewhere, and the profit that thus can be made may by far outweigh the additional leasing expenses.[69] Moreover, the fee paid by the lessee has the advantage of being directly tax-deductable. The equipment is a part of the lessor's capital assets, on which he claims depreciation.[70]

After the leasing period, the object is normally fully depreciated but may very well be serviceable for yet some time. The lessee may then either wish to acquire new modern equipment or continue to lease the object, at a considerably lowered fee, traditionally 1/12 of the original leasing fee. The lessor usually has no interest in recovering the equipment. In case the object has a second hand value, the distributor may have committed to re-purchase or exchange the object. Where the same distributor is chosen to provide new equipment, the lessor may acquire new equipment at a lower price.[71]

3.2.3.2 Three Parties – Two Contractual Relationships

The lessor as buyer and thenceforth owner formally concludes a contract of purchase with the distributor. In reality however, he generally plays a solely economical part. Although the lessor finally approves the contract of purchase, it is the lessee who selects the distributor as well as the equipment and who either negotiates or at least approves the contractual conditions. Moreover, the equipment is commonly delivered straight to the lessee, who – in case of any objections – files any complaint straight to the distributor on behalf of the lessor. The lessor as a rule disclaims liability for the distributor's default or delay.[72] Any maintenance and/or repair beyond what has been granted by the distributor in the contract of purchase, that is required during the lease, shall be paid by the lessee. Thus, even though the lease is formally a two-party relationship, due to the lessor's solely financial part and the purchase agreement's importance in the arrangement, it is for practical reasons commonly illustrated as a three-party relationship.[73]

[68] Möller, 1996, p. 19 ff
[69] Tan, 1983, p. iv
[70] Adlercreutz, 2010, p. 175
[71] Adlercreutz, 2010, p. 176
[72] Möller, 1996, p. 20 f
[73] Adlercreutz, 2010, p. 175



An alternative course of events to that described above, however with a similar outcome, is that the distributor initially assumes the role as both distributor and lessor. In order to be able to talk about financial leasing and not merely a contract of hire, it is then however required that he assigns or pawns his rights as lessor to a third party, who becomes financier. Only then do the features characteristic for the financial lease arise and, with it, the private law issues connected to it.[74]

3.2.3.3 Rights under the Leasing Agreement

Two sets of rights exist under the actual leasing agreement, i.e. the contract between the lessor and the lessee. These are the lessor's proprietary rights and the lessee's usufruct rights.

The lessee's usufruct rights may very well be of high economic value, but they cannot be assigned without the lessor's approval, and even then it has no realisable value. The usufruct right can neither be used as security for debt of the lessee nor be distrained.[75]

The lessor's proprietary right is protected contractually by way of prohibiting the lessee from assigning, pawning or subleasing the equipment or the usufruct right itself. Moreover, the contract commonly states that the lessee shall not change, insert nor use the object where it is not intended to be used, and that the lessee shall inform any third parties of the lessor's proprietary rights in case of bankruptcy or distraint. As a rule, the leased equipment is provided with a sign, identifying the lessor as owner.[76]

3.2.3.4 Risks, Insurance and Third Party Damages

The lessee exclusively carries the risk for damage to or loss of the leased equipment, irrespective of whether he is liable or not, thus differentiating leasing from standard rental agreements. Consequently, not even a total loss of the equipment frees the lessee from his duties, such as. paying leasing

[74] Möller, 1996, p. 21
[75] Adlercreutz, 2010, p. 175 f
[76] Möller, 1996, p. 30

fees. Where the equipment is totally lost, however, i.e. physically missing or so damaged that repair is considered unviable, it is generally agreed that the lease shall cease upon the payment of the depreciated value by the lessee.[77]

The lessee is generally required to use the equipment in a safe way and ensure its conformity with present laws and regulations. In addition, most leasing agreements state that the lessee shall be solely liable for any third party damage arising out of the usage or delivery of the equipment. Where the lessor is held liable in tort for third party damages, the lessee is generally obliged to indemnify the lessor.[78]

The lessor, either himself or at the expense of the lessee, takes out the insurance necessary or decides which insurances the lessee shall acquire. The lessee may take out additional insurance cover. Where equipment that is damaged is repaired by the lessee, he obtains the insurance cover. Where there is a total loss of equipment, however, the cover is paid out to the lessor.[79] Any differences between the insurance cover and the actual damage costs is paid by the lessee, as well as the insurance deductibles.[80]

3.2.3.5 Sale and Lease Back

Sufficiently recognised as a particular form of financial leasing to be separately but briefly dealt with is the "sale and lease back" arrangement, which can be described as a two party financial leasing.[81] A company owing and using an object sells it to a financier. The financier then immediately leases the equipment back to the user in return for leasing fees. In other words, the user becomes both lessee and financier lessor. With the transaction, capital in the lessee's company is freed.[82] Commonly, an option for the user to repurchase the equipment is included in the agreement.[83] The equipment normally never leaves the user's possession, which may cause problems in jurisdictions requiring transfer of the equipment in order for the lessor to obtain proprietary protection.[84]

3.2.4 Operational Leasing

An operational lease agreement is more or less construed as a classic rental relationship, including, among other things, maintenance of the equipment. As in all forms of leasing, the lessor is owner but in this case, the lessor's part is not merely financial but he also provides services and various guarantees to the lessee.[85]

Like financial leasing, operational leasing may fulfill a financial purpose for companies preferring to lease equipment before buying it.

[77] Möller, 1996, p. 30
[78] Möller, 1996, p. 31
[79] Millqvist, 1987, p. 48
[80] Möller, 1996, p. 30 f
[81] Möller, 1996, p. 259
[82] Adlercreutz, 2010, p. 186
[83] Millqvist, 1987, p. 33
[84] Millqvist, 1987, p. 256
[85] Millqvist, 1987, p. 34

Operational leasing may thus be offered by producing companies as an alternative form of distribution in order to attract customers who wish to acquire equipment without having to put in high initial investments. In addition and especially concerning technically advanced equipment, service and maintenance are frequently seen as important parts of the agreement.[86]

Operational leasing agreements are designed to be frequently renewed, allowing the lessee to upgrade to new equipment on a regular basis.[87] For this reason, operational leases are generally short-term contracts, which the lessee may cancel at short notice. The lessor does not aim to recover all expenses from a single lessee but expects to conclude more than one lease transaction throughout the equipment's economic lifetime.[88] Consequently, the lessor bears the economic risk of technical advanced equipment becoming obsolete.[89]

3.2.5 Cross-Border Leasing

The international character of leasing has encouraged many leasing companies to extend their business overseas, opening up for transboundary cooperation.[90] A cross-border lease commonly refers to a lease, in which at least one of the three parties under the lease structure has its place of business abroad and perform its obligations there.[91]

Cross-border leasing may offer advantages connected to the lease arrangement's division of ownership and usership. The lease may be "placed" so as to allow the lessee to make payment under a jurisdiction of its choice, even if the equipment is destined to be used at another location. Likewise, leasing can be used to circumvent import and export restrictions.[92] Differences under various national legislation may further open up possibilities for the lessor and lessee to make depreciations in two different countries (so called "double dip") in their capacity of economic owner.[93] Some countries (e.g. UK, France and Sweden) base their fiscal and accounting regulations on the proprietary rules of the private law, whereas others (Germany, the USA and Holland) base such regulations on financial aspects. Countries applying the latter approach, i.e. the financial approach, generally consider the lessor to be economic owner in operational leasing but the lessee economic owner in financial leasing, as the lessee rather than the lessor is considered to enjoy the equipment's economic usage. Overall decisive factors are the distribution of risks and advantages against the background of the length, leasing object, residual value and options.[94]

Leasing agreements involving particularly capital-intensive equipment, such as aircrafts, railway rolling stock and industrial plants, are

[86] Adlercreutz, 2010, p. 173
[87] Millqvist, 1987, p. 34
[88] Tan, 1983, p. 6
[89] Verschoor, 2001, p. 207
[90] Millqvist, 1987, p. 41
[91] Möller, 1996, p. 24
[92] Millqvist, 1987, p. 41
[93] Möller, 1996, p. 24
[94] SOU, 1994:120, p. 246

commonly referred to as “big ticket leases”. These are often of cross-border character due to the fact that only few financiers are able to borrow and tie up capital of sufficient size. Thus, the lessor of such equipment frequently turns to additional financiers, often located in more than one country.[95] In order to acquire capital, the lessor may use the equipment as collateral (so-called leveraged leasing) or assign it to the financiers, only then to a) immediately lease it back or b) act as an agent for the financier (so called investor or partner leasing).[96] Aside from these, here rather simplified descriptions of how large amounts of capital may be generated, the regular three-party structure still constitutes the basis for “big ticket leasing”. Two other characteristics of “big ticket leasing” are that it is normally of residual value character and that the leasing period commonly extends over a long period of time.[97]

3.3 Triton Interview

Triton does not take part in partner leasing. It does however cooperate with a number of banks in order to be able to conclude major leasing transactions. To take this year’s new investments as an example of the considerable funds required in container leasing, Triton at the end of the year will have purchased at least 300 000 TEU, each of which is valued at approximately $2000.

Wiedenbach affirms that “sale and lease back” transactions do take place on the container leasing market. Triton itself just recently started to take steps in that direction and Wiedenbach states that such transactions are interesting for Triton. The company has held discussions with ocean carriers with fleets around 12-15 years old and soon to be replaced. Triton’s company structure has traditionally impeded “sale and lease back” transactions. In addition, not all ocean carriers have the appropriate background (i.e. creditworthiness) to make a good contractual “sale and lease back” partner. Small companies, for example,. are not in a position to take part in such transactions.

A strong incentive for ocean carriers to engage in “sale and lease back” transactions is the high amounts of capital, which is immediately freed as whole container fleets are sold. The lowered container prices throughout the “Financial crisis” made the ocean carriers particularly interested in “sale and lease back” arrangements. However, with the “Financial crisis” attenuation, ocean carriers yet again find the prices for new equipment high and show less of an interest in such business.

[95] Möller, 1996, p. 44 f
[96] Möller, 1996, p. 22 f
[97] Möller, 1996, p. 44 f

4 Various Types of Container Leases

The features of leasing in general discussed above apply to container leasing as well. Due to the container's movable character, there are also certain characteristics specific to this form of leasing. Availability is one factor of great importance, due to the global trade imbalances. Ocean carriers may want to lease containers in areas where there is a shortage of equipment, only then to return it at the goods' destination. Thus, leasing may be a practical way for the ocean carrier to avoid repositioning and organisational problems. Indeed, there are long term leases too, allowing the lessee to avoid capital commitments as with financial leasing in general. The container leasing companies have developed a broad spectra of various options for its clients, based on the needs of worldwide containerisation.[98]

Most container leasing companies have computer operated systems where information about the lessee is registered, as is the date on which the equipment will be off hire, container "depot out" and container "depot in" dates, and the billing and interchange arrangements. The computer also logs whether containers are available for immediate lease and keeps track of damaged equipment. The extent of possible damages is registered, as is data on the billing for repair. The equipment may be supplied with a recess so that a tag can be fitted for automatic container control. When a container leaves the depot, control (i.e. risk) is transferred to the lessee.[99]

The lessee's duty to pay leasing fees starts on the pick-up date and ceases on the day after redelivery into any of the lessor's depots.[100] Where equipment is returned after the stipulated time, the lessee is generally obliged to pay demurrage, a form of liquidated damages.[101] It is common to include a "build down period" clause, referring to a period after the actual lease during which the containers may be kept at the initial rate. The reason for including such a provision is that timely redelivery may be a logistical problem with the equipment spread out all over the world. In order to induce redelivery within the extra period given, the rates commonly rises sharply after the period has elapsed.[102]

The various types of leasing arrangements on the container leasing market are commonly divided into three main groups.

4.1 Master Lease

Master leases (sometimes also referred to as full service leases or container pool management plans) are complex and comprehensive container leases.

[98] Tan, 1983, p. 13 ff
[99] Branch, 2007, p. 358
[100] BIMCO, Boxlease, Part II, Art. 7
[101] Schmitthoff, 2007, p. 355
[102] BIMCO, A Comparison between Conlease and Boxlease, Comments to Art. 10

The master lease agreement is a well packaged agreement, where the lessee on the one hand is provided maximum flexibility and the lessor at the other is assured of a minimum container rental commitment in return for assuming the costs and problems of administration and repositioning.[103] In addition, the lessor undertakes to hold containers available at the times and locations requested by the lessee. In many ways, the lessor works as a logistics service provider as it must allocate the distribution of its container assets in view of the lessee's transport strategies.[104] In addition, the lessor continuously keeps in contact with the lessee in order to be able to adjust requirements to changing market conditions.[105]

The master lease agreement entails a large set of provisions, regarding, among other things, the availability of containers and an accounting system including debits/credits between the parties, which is connected to the condition of the containers at the time of interchange. The agreement is normally entered into for a short to medium term period.[106]

4.2 Long Term Lease

As the name suggests, long term leases (sometimes also referred to as dry leases), are executed for longer periods of time. Unlike master leases, they do not involve management service by the lessor. A long term lease is often followed by purchase of new equipment as the lessor expects to fully amortise the investment throughout the leasing period.[107] In order to secure that the equipment will be depreciated according to the plan, long term leasing comprises a fixed number of containers and has a predetermined redelivery schedule. The lessee is responsible for repositioning as well as for maintenance and repair.[108] The leasing period commonly varies between five to eight years, which is equal to about half of the useful life of a container.[109]

4.3 Short Term Lease

Short term leases (also sometimes referred to as ad hoc, spot or trip leases) are commonly associated with the lessee's temporary need for equipment. It provides a one way or round trip service. Due to the container leasing

[103] Tan, 1983, p. 16
[104] http://people.hofstra.edu/geotrans/eng/ch3en/conc3en/table_leasingarrangements.html (2010-10-19)
[105] Tan, 1983, p. 16
[106] http://people.hofstra.edu/geotrans/eng/ch3en/conc3en/table_leasingarrangements.html (2010-10-19)
[107] Boile, Theofanis, 2009, p. 55
[108] Boile, Theofanis, 2009, p. 55
[109] http://people.hofstra.edu/geotrans/eng/ch3en/conc3en/table_leasingarrangements.html (2010-10-19)

companies' large fleets and computerised control systems, the right container can be made available for the lessee in the right place at the right time.[110] The arrangement commonly takes place where there is a temporarily increase in demand, which may be cyclical or unforeseen. The container leasing companies, however, try to avoid to have too great a percentage of their equipment on the short term leasing market, as leasing fees are volatile and strongly influenced by the current market conditions.[111] During low demand periods, the risk exposure to unused equipment is high. The lessee is responsible for repositioning or repair of the equipment where such needs arise during the lease period.[112]

4.4 Trends in Recent Years

Long term leases at the expense of master leases have become very popular during the last few years.[113] The development is connected to a rise in prices for new equipment. By way of long term leasing, ocean carriers avoid purchases and can lease equipment on low per diem rates at the same time as it can be treated as owned with regards to maintenance and repositioning. It should however be underlined that the business fluctuates rather quickly, depending on the prices. Only less than ten years ago, in the early 2000s, the situation was the opposite. Purchase prices as well as the demand were low, making ocean carries prefer to off lease containers in surplus areas through master lease arrangements, in order to avoid repositioning costs. The lessor's empty containers were gathered in the depots in such areas for long periods of time.[114]

4.5 Triton Interview

Wiedenbach estimates that long term leases constitute about 70% of the company's business whereas master leases constitute over 25%. In the 70% a hybrid between long term lease and master lease is included. This so called "long term lease marketing" offers some of the master lease's flexibility but at lower leasing rates. Short term leases constitute only a small portion of Triton's leasing business. Wiedenbach underlines, however, that this is not really because short term leases are unusual, but rather to that they do not last for very long. Ocean carriers often request containers for a "one way journey" lasting some 60-90 days. A common problem in connection with such leases is that with ocean carriers operating all over the

[110] Tan, 1983, p. 15
[111] http://people.hofstra.edu/geotrans/eng/ch3en/conc3en/table_leasingarrangements.html (2010-10-19)
[112] Boile, Theofanis, 2009, p. 55
[113] Boile, Theofanis, 2009, p. 55
[114] Boile, Theofanis, 2009, p. 57

world, containers often disperse against the original plan, and thus are not ready to be returned on time at the contractual destination. In such situations, it is common to conclude a new agreement,for example, a master lease in order to accommodate both parties.

The length of a leasing period depends on the clients' wishes. Some wish to lease equipment throughout its entire lifespan. In the "drive-in" area, with equipment leased out more than once, Triton's ambition is to lease out the equipment for a total of 13 years. Ideally, an initial long term leasing period for such equipment extends to five years. Where new containers are leased out for longer periods it may be hard to re-lease the equipment in a long term lease. If possible, Triton after an initial leasing period tries to extend the leasing agreement with the same client. The minimum period for a long term lease as well as for the hybrid form "long term lease marketing" in Triton's agreement is three years.

Next to the leasing rates, Triton draws on another contractual provision, namely the redelivery schedules. "For us redelivery schedules are of significant importance," Wiedenbach states. "The better we can control the place of redelivery, the more advantageously we can re-lease or sell the equipment." The containers are divided into two age categories. The containers up to tens year old are to be redelivered to one location, suitable for re-leasing but not for selling, whereas the equipment over 10 years old is to be re-delivered at another location as more suitable for selling.

5 The Law and Legal Instruments

Conflict of law rules regarding proprietary rights are generally governed by the principle of lex rei sitae, i.e. the law of the location where the object in dispute is situated. For movable equipment however, such a principle is less fitting as the movable equipment continuously moves from one jurisdiction to another. Thus, in many jurisdictions, with regard to such objects, the traditional principle of lex rei sitae is set aside and left to other national solutions. These solutions vary between different countries, which in itself creates uncertainty; but even if a uniform conflict of law rule could be applied throughout the world, this would not overcome the disadvantage of dependence on national laws, which vary widely from one country to another. Some countries provide high protection to security interests and retention of ownership devices whereas others are more restrictive. This may discourage financiers from providing funds or have them provide it at substantially increased costs only.[115]

5.1 An Overview of International Insolvency Proceedings and the Enforcement of Foreign Judgements

Various jurisdictions treat international elements in bankruptcy very differently, applying national rules of private international law to determine jurisdiction, choice of law and international recognition. The diversity in the area is unusually pronounced, even by the standards for private law.[116] Indeed, the principle of respect for pre-bankruptcy rights is widely accepted all over the world, and proprietary interest, broadly speaking, takes precedence over personal and contractual claims, but the nature of such rights and the condition attaching to their creation are by no means uniform.[117] Pursuant to most lease agreements, the lessor in the case of the lessee's bankruptcy is entitled to terminate the lease and collect damages. However, where national rules on insolvency proceedings (lex concursus) conflict with the contractual provisions of the parties' agreement, the former, for natural reasons, prevail. In most countries with English heritage, as in most Roman – Germanic countries, the nationality and residence of the creditor are irrelevant.[118]

[115] Goode, 2002, p. 5 f
[116] Fletcher, 1999, p. 10 f
[117] Fletcher, 1999, p. 8 f
[118] Wood, 2007, 27-042

Various attempts have been made to facilitate cross-border insolvency. The Cross-Border Insolvency Model Law[119] of 1997 provides a legislative framework for cross-border insolvency. It focuses on the facilitation of administration and does not address issues of substantive law.[120] The law is unilateral and does not require reciprocity from other states. It does not set out an applicable law. In its capacity as a model law, states can change it, making the law more likely to be accepted than, for example, a convention. Important states such as the UK, USA and Japan have adopted the model law.[121] In Europe, the Regulation on Insolvency Proceedings (EC 1346/2000) applies to collective insolvency proceedings. None of the regulations provide substantive law; thus there are no common European insolvency proceedings. The member states however undertake to recognise each other's bankruptcy proceedings and only one main proceeding shall be held. It shall take place where the debtor has its centre of main interests and in accordance with the national law of that jurisdiction. Creditors in all member states are to be notified.[122]

Also, the enforcement of foreign judgments and awards are state matters. The leasing agreement commonly prescribes arbitration. Arbitration awards have the advantage of being subject to their own set of rules. According to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, arbitral awards shall be recognised worldwide.[123] Thus, at least in theory, should there be less of a problem.

Judgements, on the other hand, may be far easier to obtain than to enforce, especially where the defendant has assets abroad. Far from all countries enforce foreign judgments although they might be recognised in one way or another.[124] Within the EU, "Brussels I"[125] applies. It is designed to allow judgements given in one member state to be recognised in the whole of the EU. The enforcement procedure applies to all judgements within the Regulation's scope, independent of whether they are against a person domiciled in the EU or not. Where the regulation does not apply because a judgement was given outside of the EU, the recognition and enforcement of foreign judgements in Europe rest on various national laws.[126]

[119] A *suggested* pattern for law-makers to adopt as part of their domestic legislation
[120] Clift, 2008, The UNCITRAL Model Law on Cross-Border Insolvency 1997, A Brief Introduction
[121] Wood, 2007, 31-001 ff
[122] Moss et al, 2010, p. 41 ff
[123] Morris et al, 2005, p. 175 f
[124] Morris et al, 2005, p. 147 f
[125], Council Regulation No. 454/2001 of 22 December 2000 of the Recognition and Enforcement of Judgements in Civil and Commercial Matters
[126] Morris et al, 2005, p. 153 f

5.2 The Convention on International Financial Leasing

In 1988 the UNIDROIT Convention on International Financial Leasing was signed in Ottawa with the aim of unifying the rules on international leasing and forming a model for national leasing legislation. The Convention is limited to questions of private law, thus excluding taxation law issues, among other things.[127]

In the drafting of the Convention, leasing was recognised as a sui generis arrangement, which was not to be equated with other types of contracts. Leasing was stated to be differentiated from instalment purchase, by way of not being aimed at purchase but at utilisation. Simultaneously, leasing was also stated to differ from standard rental agreements, by way of having the utilisation realised through a third party's – the lessor's – assets.[128]

The Convention applies to leasing arrangements with at least three parties. Its applicability presupposes that both parts of the leasing arrangement, i.e. the contract for lease and the contract for purchase, depend on each other in accordance with the typical financial leasing arrangement described in chapter 3.2.1.[129] The Convention applies to leasing arrangements where lessor and lessee have their places of business in separate states, and those states as well as the state in which the distributor has his place of business are members to the Convention. Alternatively, the Convention also applies to arrangements where both the supply agreement and the leasing agreement are governed by the law of a contracting state.[130]

The Convention provides protection for the lessor's proprietary rights in relation to the lessee's bankruptcy estate as well as in relation to creditors, given that the procedures of the applicable law have been complied with regarding rules as to public notice. The applicable law for movable equipment such as containers is the law of the state in which the lessee has its principal place of business.[131]

The Convention entered into force in 1995 but has not been particularly successful in that only ten states, including France, Italy, Panama and the Russian Federation, have ratified it.[132]

5.3 The Cape Town Convention

The Cape Town Convention of 2001 was designed to facilitate the effective financing of movable equipment by providing a legal framework for the creation, enforcement, registration and priority of security interests and

[127] Millqvist, 1987, p. 54 ff
[128] Millqvist, 1987, p. 54 ff
[129] Vischer et al, 2000, p. 293
[130] Art. 3 Convention on International Financial Leasing
[131] Art. 7 Convention on International Financial Leasing
[132] http://www.unidroit.org/english/implement/i-88-l.pdf (2010-10-25)

interests held by chargees, conditional sellers and lessors of high-value uniquely identifiable mobile equipment.[133] Its preamble highlights the need for mobile equipment of high value and the need to facilitate the financing of the acquisition and use of such equipment in an efficient manner. Asset-based financing and leasing have advantages with respect to this need, and the Convention is aimed at facilitating these forms of financing by establishing clear rules, which shall ensure that interests in equipment are to be recognised and protected universally. In the official commentary to the Convention, Goode expresses that instruments used for the financing of movable equipment need to be underpinned by a sound legal regime in order to function efficiently. Creditors need to know that the relevant legal regime will respect their contractual and proprietary rights and provide efficient means to enforce those rights. Thus, with the aim of encouraging creditors to grant credit, improve the rating of the equipment receivables and reduce credit costs to the advantage to all parties involved, the Convention establishes a system with an international register for international interests in the assets. It gives notice to third parties of the interests' existence and enables creditors to preserve their priority rights against subsequently registered interests, unregistered interests and debtors' insolvency administrators.[134]

The Convention, however, has specific objectives and does not seek to cover the whole field of asset based secured financing, much of which will continue to be governed by national laws and party autonomy.[135] It only applies to three categories of movable equipment, and only if an additional protocol with for that category equipment specific regulations is adopted. The Convention itself is not equipment specific.[136] Of the three categories listed under Art. 2(3) in the Convention today, (a) airframes, aircraft engines and helicopters; (b) railway rolling stock; and (c) space assets, the only protocol in force is the Aircraft Equipment Protocol, and therefore the Convention today only applies to category (a). The Convention and the Aircraft Protocol entered into force on the 1st of March 2006 and as of today, has 40 member states.[137]

5.3.1 The Convention's Limited Definition of Movable Equipment

The term mobile equipment in the Convention is given a narrower meaning than it has traditionally, because the Convention is not merely limited to objects which by their very nature are used internationally, but is also limited to the three particular categories of such equipment above. Consequently, containers are not within the Convention's scope. Indeed, the Study Group developing the Cape Town Convention did include, throughout its drafting work, containers as a category of mobile equipment.

[133] Goode, 2002, p. 2
[134] Goode, 2002, p. 5 f
[135] Goode, 2002, p. 6
[136] Goode, 2002, p. 7
[137] http://www.unidroit.org/english/implement/i-2001-convention.pdf (2010-11-01)

In the end, however, the Diplomatic Conference decided to narrow the definition.[138]

Nevertheless, the Convention it is of interest for this work first, because containers were long discussed as a groups of equipment to be included under the scope of the Convention as it is modelled today, and second, as it is not inconceivable that containers in the future will be added to the Convention[139]. The consideration preceding the decision on which equipment to add under the Convention is discussed below. It is followed by a report on how the Convention applies to international interests in movable equipment but is restricted to matters of interest for this work. It should be kept in mind that the general rules under the Convention may very well be modified by the equipment specific protocol for each category under it, whereupon the regulation in the protocols would prevail.[140]

5.3.2 Deliberations Precceding the Limitation on Movable Equipment in the Convention

The Study Group had to make some initial decisions on how to limit the objects to be the subject of the Convention. First, there was the question of whether to include an exhaustive list or in some way allow for additional objects. Second, there was the question of whether the Convention should expressively state that the equipment ought to be mobile. Third, there was the question of whether the Convention should be restricted to high value equipment only, thus excluding objects like lorries and vans.[141]

The first draft Convention contained a list enumerating aircraft, aircraft engines, registered ships (however this matter was subject to further expert consideration), oil rigs not intended to be permanently immobilised, containers (possibly to be limited through a certain capacity), railway rolling stock, satellites and possibly other objects not yet contemplated. The following statement was given by the Chairman at a subsequent meeting in 1996:

"*Finding a suitable definition for "mobile equipment" had caused more than a few difficulties. A solution was found in the nature of the equipment to be covered, that is high-value equipment lending itself to unique identification. The decision was therefore taken to concentrate on an exhaustive list of specific assets that would not be mobile equipment generally. It was agreed that this list might perhaps be added to from time to time, should the need arise. […] Such a listing of specific high-unit assets had the merit of avoiding the problems that would arise in any attempt to define the term "mobile equipment". It would further avoid the problems of potentially large numbers of small transactions being filed in the international register*."[142]

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[138] Art. 2(3) Cape Town Convention

[139] Pursuant to Art. 51, additional categories of high-value mobile equipment may be added to the Convention through further Protocols, should the need arise.

[140] Goode, 2002, p. 7

[141] UNIDROIT 1995, LXXII (Doc. 21), p. 4

[142] UNIDROIT 1996, Study LXXII (Doc. 27), p. 6

In 1999, as the Committee of Governmental Experts gathered for its First Joint Session, it was decided that the list should be abolished in favour of a concept requiring the equipment to be uniquely identifiable.[143] At the Second Joint Session it was further determined that the notion of "high value" was to be included as a limiting factor for determining the application of the Convention.[144] Nevertheless, at the third and last Joint Session, on initiative by the UNIDROIT Secretariat, the list was reinstated. The reasoning behind the Secretariat's recommendations for a list was the concern that the provision would otherwise be too open ended, particularly with regards to its relationship to the UNCITRAL Convention on the Assignment of Receivables in International Trade, which was drafted simultaneously and touched on certain issues.

The ultimate list agreed upon by the Committee of Governmental Experts comprised fewer objects than the list previously removed and was limited to: (a) airframes, aircraft engines and helicopters; (b) railway rolling stock; and (c) space assets. Thus, neither registered ships, oil rigs nor containers were included in the final list of categories subject to the Convention. A "catch up clause" under Art. 2, referring to "objects of any other category of high value capital infrastructure equipment of each member which is uniquely identifiable", was under consideration but ultimately not included. Instead, a provision allowing for adoption of additional categories through the drafting of a protocol was inserted into the Convention. That provision is found in Art. 51.[145]

In 2001, the Diplomatic Conference still vigorously debated if and how it should be possible to include in the draft Convention additional categories of movable equipment, but ultimately, no amendments as to Art. 2(3) and Art. 51 were made. As the USA pointed out, the draft outcome reflected two main equilibriums. Firstly, the UNCITRAL had recently completed its work on a related convention on financing of receivables on the assumption that the scope of the draft Convention would not be materially altered. Secondly, states had asserted that they thought it would be easier to achieve extensive ratification if the scope of the Convention was clearly specified. In light of the latter argument, the Chairman identified the co-existence between Art. 2(3) and Art. 51 as a compromise. On the one hand, they facilitated the adoption of the Convention by avoiding the concern in some jurisdictions that the scope of the Convention was very broad and would require fundamental changes in the law; on the other hand, it signalled the possibility of future protocols being developed.[146]

[143] UNIDROIT 1999, CGE/Int.Int./1-Report, First Joint Session, p. 7
[144] UNIDROIT 1999, CGE/Int.Int./2-Report, Second Joint Session, p. 5-2
[145] UNIDROIT 2000, CGE/Int.Int./3-Report, Third Joint Session, p. 8
[146] Diplomatic Conference to Adopt a Mobile Equipment Convention and an Aircraft Protocol, 2001, p. 752 f

5.3.3 Applicability and Workings of the Convention

An international interest under the Convention is an interest which fulfils the formal requirements in Art. 7 and which is granted by a chargor under a security agreement, vested in a person who is conditional seller under a title reservation agreement or vested in a person who is the lessor under a leasing agreement. Due to considerable differences between various national legal systems, the Convention does not provide for definitions for the three types of transactions.[147] Most legal systems outside North America draw a sharp line between security agreements on the one hand and title-retention and lease agreements on the other, whereas the USA, most Canadian jurisdictions and New Zealand apply a more functional economic approach by treating title reservation agreements and certain types of leasing agreements as forms of security. Consequently, the latter do not treat conditional sellers and certain lessors as full owners but merely consider them holders of security interests. It was found implausible that consensus on the issue would be reached between the representatives for the various systems, and so the matter was left to the applicable law in each case.[148]

An interest must further be in equipment falling within one out of the three categories under Art. 2(3). Somewhat surprisingly, the interest does not have to be international per se. Interests in the types of equipment covered by the Convention are assumed to be mobile and international. This should always be true for space assets and in most cases for aircraft objects. With regards to railway rolling stock, however, it is possible that an interest is purely domestic. For this reason, a contracting state under Art. 50 may declare that the Convention shall not apply to certain transactions internal to that state.[149]

Finally, in order for the Convention to apply, the debtor at the time of conclusion of the agreement must be situated in a contracting state.[150] The debtor is deemed situated in a contracting state in a wide variety of situations listed in Art. 4, with the aim of maximising the Convention's applicability.[151] It is of no significance if the debtor later moves to a non-contractual state.[152]

Registration is key for protection. It gives public notice of an interest and enables the creditor to preserve its priority and the effectiveness of the interest in insolvency proceedings against a debtor. Registration does not as such make an interest valid, but where it has been validly created, registration determines priority on an objective first-to-register basis. Registration is against the individual object as such and not against the debtor. Thus, an object needs to be uniquely identifiable. The international register shall be electronic and available on-line. It will be administrated by

[147] Art. 2(4) Cape Town Convention
[148] Goode, 2002, p. 10 f and 60
[149] Goode, 2002, p. 154
[150] Art. 3 Cape Town Convention
[151] Goode, 2002, p. 62
[152] Goode, 2002, p. 61

a registrar, strictly liable for compensatory damages resulting from errors, omissions or system malfunctions on its part.[153]

Art. 42 to 45 control questions of jurisdiction. As a rule, the contracting state chosen by the parties has exclusive jurisdiction. Exception is obviously made for cases of insolvency, which are matters for the relevant insolvency jurisdiction, but also for applications for interim relief, where the chosen contracting state as well as the state in which the equipment is located have simultaneous jurisdiction. Likewise does a contracting state chosen by the parties have simultaneous jurisdiction with the state in which the debtor is located where an order is made for the lease or management of a disputed object. Claims against the Registrar are exclusively handled by the place in which the Registrar has its centre of administration.[154]

The Convention does not exclude the creation of security interests under national law, which will commonly co-exist. International interests however enjoy stronger protection as they have priority over domestic interests.[155] Where the Convention and the principles on which it is based are silent on a matter, the applicable law shall be the domestic rules of the law of the forum state applicable by virtue of the rules of private international law.[156] The relationship to the 1988 UNIDROIT Convention on financial leasing, is left to decide upon in each of the equipment specific Protocols.[157]

5.3.4 Lessor's Default Remedies

The rules on the lessor's default remedy are largely dispositive. The parties may at any time, by agreement in writing, derogate from or vary their effect.[158]

In case of lessee's default, the lessor may terminate the agreement and take possession or control of any object to which the agreement relates or apply for a court order authorising or directing either of such acts.[159] In the rather unusual situation that debtor and creditor have not agreed contractually on what is to be deemed a default, Art. 11(2) states that it shall be a default which substantially deprives the creditor of what it is entitled to expect under the agreement, based on the circumstances at the time of conclusion of the agreement.[160] Possible additional remedies permitted by the applicable law, including remedies agreed by the parties, may be exercised, except in the case where they are inconsistent with the mandatory provisions in Art. 15.[161] Additional national remedies would typically include the payment of accrued sums, specific performance of non-monetary

[153] Goode, 2002, p. 15 f
[154] Goode, 2002, p. 23 ff
[155] Goode, 2002, p. 13
[156] Art. 5(2) and (3) Cape Town Convention
[157] Art. 46 Cape Town Convention
[158] Art. 15 Cape Town Convention
[159] Art. 10 Cape Town Convention
[160] Goode, 2002, p. 76
[161] Art. 12 Cape Town Convention

obligations and rights to damages for breach of agreement including liquidated damages where such are recoverable under the national law.[162]

A creditor presenting evidence of debtor's default may, pending final determination of the claim (and to the extent that the debtor has at any time so agreed) obtain from a court speedy relief in the form of such one or more of the following orders as the creditor requires.[163] If the court is satisfied by the evidence provided by the creditor, it must grant one or more of the orders required. The court may impose such terms as it considers necessary to protect the debtor and other interested persons from risks connected with granting interim relief. In addition, it may require notice of the request to be given to any of the interested persons as defined in Art. 1(m). It is possible for a contracting state to make a reservation, wholly or partly, that it will not apply the Convention's provisions on interim relief[164]. The possibility of making such a reservation was the outcome of discussions with EU representatives, expressing that if there were to be deviations from the Brussels Regulation, the EU member states should adopt a common position. Where a reservation is made, a member state shall declare which alternative interim reliefs are instead available.[165]

The remedies mentioned above shall be exercised in conformity with the procedure prescribed by the law of the place where the remedy is to be exercised.[166]

5.3.5 Effects of Lessee's Insolvency

Pursuant to Art. 30(1), the international interest is protected in insolvency proceedings against the debtor, provided that it was registered in accordance with the Convention prior to the commencement of the proceedings.[167] This is so even if the international interest would otherwise be void for want of compliance with local perfection requirements. Where a member state in accordance with Art. 40 has made use of its ability to declare additional national rights to be treated as international rights, Art. 30 extends to such rights as well. Paragraph 2 enunciates that the Article is a rule of validation, not invalidation. Thus, an international interest not so registered under the Convention but recognised by the applicable law may be deemed effective in the proceedings. This means that the interest will be recognised as proprietary in nature and rank ahead of claims of unsecured creditors. Art. 30(3) preserves the effect of certain rules of national insolvency law, namely a) those relating to the avoidance of preferences and transfers in fraud of creditors and b) those rules of insolvency procedure designed to limit the

[162] Goode, 2002, p. 77
[163] Art. 13 Cape Town Convention
[164] and the therewith connected Art. 43
[165] Goode, 2002, p. 160
[166] Art. 14 Cape Town Convention
[167] The commencement of proceedings according to Art. 1(d) means the time at which those proceedings are deemed to commence under the applicable insolvency law

enforcement of security or other property rights in the interest of the general body of creditors.[168]

5.4 United Kingdom

Like the majority of countries, the United Kingdom does not provide rules specifically applicable to leasing. The arrangement is thus situated within the general sphere of commercial contracts. Contract law is central to its function. This law is mainly judge made but rules are found, for example,in the Unfair Contract Terms Act of 1977.[169] Although there are no formal requirements for lease agreements, the term 'leasing' is restricted to contracts where the lessee has no option to purchase the asset. Where such an option exists, the contract is formally not a contract of lease but – depending on the precise terms – a hire purchase[170] or a conditional sale agreement, affecting mainly economic ownership.[171]

A lessor from a civil law system should bear some characteristics of the common law system in mind. First, a provision prescribing termination payment of such size that it appears to be a penalty rather than compensation may be found unenforceable.[172] Moreover, common law divides a leasing company's liability in tort into its roles as lessor and owner. Whereas the company can be held liable as lessor only where it has influenced a lessee's choice of distributor or equipment, full liability can be claimed from the company in its capacity as owner where it is found be in breach of its duty to care.[173] As seen, the lessor commonly includes a "hold-harmless" provision in the leasing agreement, with the aim of being indemnified in all cases by the lessee for any third party damages arising in connection with the leased equipment. The enforceability of such a clause however is subject to the provisions of the Unfair Contract Terms Act of 1977.[174]

5.4.1 Enforcement of Judgements

Under the legal system of England and Wales a creditor may seek distraint/execution[175], i.e. the legal control of goods, which can be granted where a debtor has failed to pay an amount ordered or has fallen behind with

[168] Goode, 2002, p. 114 f
[169] PricewaterhouseCoopers' Leasing Teams, 2000, p. 202
[170] A type of instalment purchase agreement
[171] PricewaterhouseCoopers' Leasing Teams, 2000, p. 202
[172] MacRae, 2003, http://www.leasingworld.co.uk/subpages/problem_areas.php#PA1.1 (2010-10-15)
[173] Millqvist, 1987, p. 55 f
[174] http://www.leasingworld.co.uk/subpages/problem_areas.php#PA1.3 (2010-11-02)
[175] Being practically the same actions, i.e. seizure of goods, with the difference that the former is an extra-judicial enforcement and the latter a an enforcement of civil judge judgement

at least one payment. An alternative to execution is to apply for a charging order. Such an order prevents the debtor from selling his assets without paying what he owes the creditor. The proceedings may also include an order for sale, forcing the sale of items of immovable property under a charging order or a stop order, preventing the debtor from disposing of items of immovable property with the aim of avoiding charging order proceedings being instigated against him. A third option is to apply for a third party debt order, freezing the debtor's bank accounts, whereupon an amount corresponding to the debt can be transferred to the creditor. Finally, although not in itself a method of enforcement, the creditor may have the debtor questioned for information in order to find out which enforcement measures would be successful collecting the debt.[176]

The UK legal system provides for five types of interim and precautionary measures, for all of which application is to be made in court. These are: interim injunction, search order, freezing injunction, interim payment and security for costs. The High Court has power to grant interim relief in support of another jurisdiction where it finds it meaningful. It also has the power to grant a worldwide freezing injunction regarding assets in other jurisdictions.[177]

In the case "*River Rima"*, arrest of a ship was sought on the basis of a claim arising from a container leasing agreement between a container leasing company and a vessel. The issue of law was whether the leased containers were to be seen as "goods supplied to the ship for her operation or maintenance" within the meaning of s 20(2)(m) Supreme Court Act 1981, in which case the defendant's ship could be arrested for the claims deriving out of the container lease agreement. The House of Lords held that the containers were without doubt "goods" within the meaning of paragraph (m) and that the word "supplied" included supply by way of hire as well as by sale. As containers were unlikely to be supplied for a ship for her maintenance, the question was narrowed down to whether the containers fell within the meaning of being "supplied to a ship for her operation". Ultimately, it was found that the contract under dispute was not a contract for the supply of goods to the ship but a contract for the supply of goods to the shipowner. As the plaintiffs did not know on what ships, whether owned by the defendant or another shipowner, the containers would ultimately be carried, the claim was not a claim under s 20(2)(m) and the High Court consequently unable to exercise admiralty jurisdiction in rem (arrest of the ship). The claimant's appeal was dismissed. [178]

5.4.2 Effects of Lessee's Insolvency

The lessor in his capacity of owner of the equipment naturally has title to it in the case of the lessee's insolvency, in which case it shall not be used to

[176] http://ec.europa.eu/civiljustice/enforce_judgement/enforce_judgement_eng_en.htm (2010-10-16)
[177] http://ec.europa.eu/civiljustice/interim_measures/interim_measures_eng_en.htm (2010-10-17)
[178] The River Rima [1988] 2 Lloyd's Rep. 193 ff

satisfy claims of the lessee's creditors. The leasing agreement will invariably deem insolvency a default, which allows the lessor to repossess the equipment.[179] Nevertheless, pursuant to the Insolvency Act of 1986 (IA 1986) s 167, a liquidator may carry on the company's business with the sanction of the court or a liquidation committee (usually consisting of the major creditors) and may need the use of the leased assets to do so. Where a lease agreement prohibits the lessee from assigning its rights to a third party, the succeeding liquidator is also prohibited from doing so.[180]

It may be the case that a liquidator wrongly mistakes the leased equipment as belonging to the lessee. Pursuant to IA s 144, a liquidator shall take into his custody or under his control, all the property and things in action to which the company is or appears to be entitled. Thus, even though the leased equipment does not constitute such property, it may well be that a lessee appears to be entitled to it. The liquidator cannot be held liable in respect of loss or damage resulting from wrongful seizure or disposal of assets when the liquidator had reasonable ground for believing that the assets were property of the company, save for the case where the damage was caused by the liquidator's own negligence.[181][182]

An alternative to appointment of a liquidator is for the company or its creditors to apply for an administrative order in court. Where such administrative order is approved, the administrator takes over the operations of the company as an attempt to save it from going into liquidation. In recent years, there has been a growing tendency among insolvent companies to make use of the option to apply for administration orders in the UK.[183] Where a company is placed under administration, no steps may be taken to repossess goods in the company's possession under a hire purchase agreement nor to commence any legal process against the company without the consent of the administrator or court.[184] Conditional sale agreements, chattel leasing agreements and retention of title agreements are included in the definition "hire purchase agreement".[185] The definition "in the company's possession" has been held by the courts to include assets subleased to a third party.[186]

5.5 Germany

No specific definition of leasing nor any certain formal requirements as to the content of the lease contract are given by German law. The two main

[179] PricewaterhouseCoopers' Leasing Team, 2000, p. 204 f
[180] PricewaterhouseCoopers' Leasing Teams, 2000, p. 205
[181] IA 1986 s 234
[182] PricewaterhouseCoopers' Leasing Teams, 2000, p. 205
[183] MacRae, 2003, http://www.leasingworld.co.uk/subpages/problem_areas.php#PA1.3 (2010-09-17)
[184] EA 2002 c 40 Sch 16 Para 1 Sch B1 Para 43
[185] EA 2002 c 40 Sch 16 Para 1 Sch B1 Para 111
[186] MacRae, 2003, http://www.leasingworld.co.uk/subpages/problem_areas.php#PA1.1 (2010-10-15)

sources of law applicable to leasing are the Civil Code (BGB) and the Commercial Code (HGB).[187] Where nothing else is agreed upon, the general rules for rental transactions in § 535 BGB apply. In the absence of mandatory regulations on instalment purchases (with an exception for consumer relationships), the delimitation between leasing and purchase is the same as that of a contract of hire. Thus, an option to purchase (and for that part a sale) does not deprive a contract of its status as a leasing agreement. Inversely, the presence of such an option does not necessarily mean that a leasing agreement is at hand.[188]

The General Terms of Trade (AGB) have had substantial impact on the development of leasing agreements as the Bundesgerichtshof (BGH) has scrutinised leasing companies' standard clauses under the AGB rules in numerous cases throughout the years. This way, it has indirectly formed what can be characterised as in principle mandatory regulations on many important contractual issues.[189] Among other things, the lessor is allowed to disclaim his liability for defects in the object, given that he assigns his rights to make contractual claims towards the distributor on the lessee, or alternatively gives the lessee a mandate to submit claims on behalf of the lessor. Moreover, clauses forbidding the lessee to sublease the equipment have been found valid.[190] As from 2001, the AGB rules are to be found in the 2nd book of BGB.

5.5.1 Enforcements of Judgements

Where the lessee defaults in payment, the lessor can apply for a so called "Mahnverfahren" – a simplified procedure, which if undisputed provides the lessor with an order of enforcement for monetary claims.[191] Where the lessee challenges the claim, however, the lessor needs to resort to traditional civil proceedings in order to obtain an award.[192]

Monetary claims are met either by way of distraint on the lessee's movable assets or in his debt receivables or other monetary assets.[193] Where the process is not likely to satisfy the lessor's claims, the bailiff, upon the lessor's initiative may force the lessee to submit an affidavit[194], i.e. force the lessor (or its representatives) to give account of all assets under oath.[195] To give false information is deemed a criminal offence.[196]

All assets that can be subject to compulsory distraint can also be subject to precautionary measures. The main precautionary measures are seizure of assets, or, where seizure of assets is not sufficient, arrest of the

[187] PricewaterhouseCoopers' Leasing Teams, 2000, p. 100
[188] Möller, 1996, p. 193 f
[189] Möller, 1996, p. 192 f
[190] Möller, 1996, p. 199 ff
[191] §§ 692, 694, 699 and 794(1)(4) ZPO
[192] § 704 ZPO
[193] §§ 803-882 ZPO
[194] Ger. "eidesstattlichen Versicherung"
[195] §§ 807 and 900 ZPO
[196] § 156 StGB

debtor.[197] The creditor must convince the court that swift action is the only means to safeguard his interests.[198] A creditor may also seek interim injunction in order to define and to maintain a legal situation.[199] The court may order the claimant to provide security by paying a sum into court before granting a measure, in order to protect the debtor.[200]

5.5.2 Effects of Lessee's Insolvency

The Insovenzordnung (InsO) of 1994, does not provide certain rules for leasing in case of bankruptcy, but the provisions for rental agreements as well as general provisions apply. As a rule, the lessor as owner of the equipment has the right to recover it in accordance with § 47 InsO. Any unpaid leasing fees become regular claims in the bankruptcy. The bankruptcy estate shall hold the equipment accessible for the lessor but does not have to return it to him. Any costs that the lessor may have collecting its equipment become general claims in the bankruptcy.[201]

The bankruptcy trustee however, has an option (Ger. Wahlrecht) to accede the lease agreement. Whether the equipment has been delivered or not is of no significance for the option to accede the agreement. Where the trustee chooses to carry on the relationship, he takes on the bankrupt party's rights and duties. Where he does not, the lessor may separate the equipment and has a claim in the bankruptcy for the unfulfilled part of the contract. The lessor may call for the trustee to exercise his "Wahlrecht", in which case the latter must promptly make a decision. If the trustee omits to do so, he cannot later insist on performance.[202] If the lease is carried on, the leasing fees attributable to the insolvency period will be claims against the bankruptcy estate itself.[203] In the case *"BGH, 21.12.2006 – IX ZR 66/05"* BGH stated that utilisation damages originating from a lease relationship, which expired before the bankruptcy but which were not due until after, were not to be treated as prioritised claims against the bankruptcy estate itself but merely as regular insolvency claims.

After an application for insolvency proceedings has been made, the lessor can no longer cancel the lease agreement by invoking 1) delay of payment of leasing fees originating in the time before the application, or 2) the lessee's economic deterioration as such.[204] The rules are mandatory.[205] Thus, clauses allowing the lessor to independently withdraw from the contractual relationship in the case of lessee's insolvency are invalid, as are clauses allowing the lessor to withdraw from the agreement due to the

[197] §§ 917 respectively 918 ZPO
[198] § 917 ZPO
[199] §§ 935, 938, 940 ZPO
[200] http://ec.europa.eu/civiljustice/interim_measures/interim_measures_ger_de.htm (2010-10-16)
[201] SOU 1994:120, p. 314
[202] § 103 InsO
[203] § 55(1)(2) InsO
[204] § 112 InsO
[205] § 119 InsO

lessee's economic deterioration after the application for insolvency proceedings.[206]

5.6 Boxlease Standard Container Lease Agreement

Boxlease is a standard form published by the non-governmental Danish based shipping organisation BIMCO. Its members are stakeholders with various interests in the shipping industry, located all over the world. The organisation works to promote higher standards and greater harmony in regulatory matters.[207] An important cornerstone in the organisation's work to facilitate trade activities in the shipping industry is the development of standard forms.

Boxlease stems from 2006. It is a revised and, in accordance with commercial practice, updated version of Conlease, which is nearly 10 years older. Like its predecessor, Boxlease is designed to provide a balanced and clearly worded standard form without too much legal ballast, as opposed to many of the major leasing companies' contracts, which are so extensive and detailed that they are often almost unreadable even to the companies' own sales staff.[208] BIMCO emphasises that the parties should carefully deliberate before making any potential changes to the second standard part of the contracts as this could upset the whole balance of the legal and contractual aspects of the standard terms.[209]

The form consists of two parts, the first being a box layout, where the parties fill in variable information on the certain lease. Each box contains a cross reference to related clauses in the second part, which contains a number of standard terms and conditions. In case of conflict between a condition in the first and the second part, the first part will prevail to the extent of the conflict but not further.[210] Where the parties have not chosen applicable law and/or jurisdiction, Art. 14 prescribes for English law and London arbitration.

5.6.1 Sublease and Direct Interchange

Art. 4 states that the equipment at all times remains the property of the lessor and that the lessee shall not, without the lessor's prior written consent, which shall not be unreasonably withheld, assign any rights or

[206] SOU 1994:120, p. 315
[207] https://www.bimco.org/Corporate/About/About_BIMCO.aspx, (2010-07-19)
[208] https://www.bimco.org/Corporate/Documents/BIMCO_Documents/Sundry_Other_Forms/BOXLEASE.aspx (2010-08-13)
[209] https://www.bimco.org/en/Corporate/Documents/BIMCO_Documents/Sundry_Other_Forms/BOXLEASE/Explanatory_Notes_BOXLEASE.aspx (2010-08-27)
[210] BIMCO, Boxlease, Part I

interests in or to the agreement. The equipment shall at all times be identifiable as the lessor's by serial numbers and other affixed identifying marks. The lessee is allowed to have its own company logo applied on the equipment so long as it is removed upon redelivery.[211]

The lessee is free to sublease or interchange to a company which is directly or indirectly associated with him. The lessee in such a case remains responsible for the container and for its eventual redelivery.[212] Direct interchange, where the duties under the agreement are transferred to a third party, is however only allowed with the lessor's prior written consent as it discharges the original lessee from its contractual obligations. The lessor's consent shall however not be unreasonably withheld. Direct interchange is used to correct container imbalances.[213]

5.6.2 Liability and indemnity

The lessee pursuant to Art. 12(a) is liable for damages for total loss of the equipment. Containers may vanish, by way of going overboard, being stolen, or in some other way becoming untraceable. The lessee shall immediately inform the lessor of any loss, but most losses are not determined until after redelivery.[214] The lessee shall pay to the lessor the depreciated value of any actual or constructive total lost equipment. Where lost equipment is recovered within twelve months, the lessor at the lessee's request shall reimburse the depreciated value.

Pursuant to Art.12(b) the parties agree to defend, indemnify and hold the other party harmless for any and all claims, loss or damage arising out of their respective responsibilities. The lessee is responsible for events connected to the possession, leasing, operation, control or use of the equipment whereas the lessor answers for events connected to the ownership, manufacture, design or supply.

5.6.3 Termination of Agreement

The lessor is entitled to terminate the agreement before the "Earliest termination date" specified in Part I in two situations. Firstly, the lessor may terminate the agreement where the lessee fails to pay any invoice for rental for 60 days after it has become due or, in the event of disputed items, 60 days after the lessor has reconciled the lessee's objection against the invoice. Thus, where the item is disputed, the 60 days termination clock is not triggered until the invoice has been reconciled by the lessor.[215] The time bar for claims is left to the law applicable to the agreement.[216]

[211] BIMCO, Boxlease, Part. II, Art. 4(d)
[212] BIMCO, Boxlease, Part II, Art. 4(b)
[213] BIMCO, A Comparison between Conlease and Boxlease, Comments to Art. 4
[214] BIMCO, A Comparison between Conlease and Boxlease, Comments to Art. 12(a)
[215] BIMCO, A Comparison between Conlease and Boxlease, Comments to Art. 9(d)
[216] BIMCO, A Comparison between Conlease and Boxlease, Comments to Art. 7(d)

Secondly, the lessor is entitled to terminate the agreement in the event of: an order being made or resolution passed for the winding up, dissolution, liquidation or bankruptcy of the other party (otherwise than for the purpose of reconstruction or amalgamation); if a receiver is appointed; or if the other party suspends payment, ceases to carry on business, or makes any special arrangement with its creditors.[217] Where the lessor terminates the agreement, he is entitled to immediate repossession[218] of the equipment. The lessee shall, upon receipt of the notice from the lessor, immediately so far as he is able to, notify the lessor of the exact location of all equipment and redeliver all empty equipment to the nearest lessor's depot within the number of days agreed upon in Part I. Thus, the lessor only has immediate right to repossession of the equipment provided it is empty. The latter provision shall be seen against the background that the lessee has two, in this aspect opposite, contractual duties towards the lessor and the cargo owner. The provision constitutes protection for the cargo owner against becoming hostage to the situation.[219]

5.7 Triton Interview

Boxlease provides lessees with greater benefits than the leasing companies are generally prepared to accept. Triton, like most major leasing companies, is reluctant to use standard forms other than their own. Wiedenbach deems Triton to be rather conservative on the issue. This is not to say that even a container leasing company the size of Triton sometimes has to yield to a strong contractual party: "Not too long ago, after years of negotiations, we finally managed to conclude an agreement with a major ocean carrier, who persistently insisted on an agreement based on Boxlease." Wiedenbach says. "In the end, we really wanted to work with this client, who in capacity of a blue chip company provides the kind of security we do not get from other companies. This is why we finally agreed upon the use of a Boxlease based contract. On the other hand, this is our one and only agreement, which is based on Boxlease and it should be added that it is rather modified from the original version. Normally we tell clients, who insist on the usage of other agreements than ours to "take it or leave it". And the fact that we did not do business with this major blue ship company for some six years gives a rather good picture of how it works."

Triton in general prohibits all types of subleasing and interchange without the prior written consent of the company. Exception is made for the one Boxlease-based agreement outlined above, in which subleasing is limited to some 30 companies specifically listed in advance. Compared to Boxlease, the Triton standard form is considerably more comprehensive. The following abstract on lessee's default and lessor's default remedies may be taken as an example.

[217] BIMCO, Boxlease, Art. 9(e)
[218] Provided he has in beforehand given the days of notice agreed upon in Part I
[219] BIMCO, A Comparison between Conlease and Boxlease, Comments to Art. 9(e)

> Should Lessee (i) fail to pay any sum due under this Agreement within fifteen (15) days of the date of Lessor's invoice, (ii) fail to perform any other obligations under this Agreement, (iii) cease doing business as a going concern, become insolvent, commit an act of bankruptcy or become the subject of any proceeding under any bankruptcy act, or its counterpart under the law of any nation or territory outside the United States of America, (iv) fail to pay or perform any obligation in any other agreement with, instrument in favour of, or note payable to Lessor, (v) transfer substantially all of its assets or merge or consolidate with or be acquired by any other person or legal entity, without Lessor's prior written consent, (vi) during any calendar year without Lessor's prior written consent, sell, retire or issue new shares in a sufficient number that more than fifty (50%) percent of Lessee's shareholders have not held their shares for at least one year, (vii) without Lessor's prior written consent, change its chief executive officer or chief financial officer, (viii) without Lessor's prior written consent, change its board of directors so that a majority of the directors have not held their directorships for at least on year, or (ix) be named on the list of Specially Designated Nationals and Blocked Persons maintained by the U.S. Department of the Treasury's Office of Foreign Assets Control available at http://www.treas.gov/offices/enforcement/ofac/sdn/index.html, or as otherwise published from time to time, or otherwise become the subject of U.S. sanctions laws, orders or regulations, or (x) provide to Lessor any financial statement that is not true and correct in any material respect, then Lessor may without notice and without releasing Lessee of its obligations to Lessor, terminate this Agreement, declare the balance of the rental to be due and payable, and retake possession of the containers free of any claims of Lessee.[…]

Although reading the abstract one easily forms the impression of a company running its business with a rod of iron, in reality the strict provisions are rarely used. Wiedenbach reports on how Triton generally tries to approach contractual partners in order to solve a problem, rather than taking legal action. And even though Triton obviously tries to anticipate possible problems by including comprehensive contractual provisions like the one above, substantial preventative measures seem to be of least as great, if not greater, importance.

Triton runs thorough financial background checks on potential clients. Through rating agents, information is gathered on the potential client's financial results, whether it pays bills on time, which problems it may have etc. Smaller companies are often rejected, as these are too much of a credit risk. Clients passing the background check receive a TEU limit adjusted to their creditworthiness. If a lessee approaches around 85% of the set limit, the company is scrutinised anew and possibly granted additional TEU. This way, Triton anticipates potential financial threats. In addition, clients' payment behaviours are continuously followed up. "When something changes – let's say the bills are paid 25% later than usual – an automatic notification goes out to our account manager. This way we identify clients in financial problems at an early stage." Wiedenbach says. Another notification goes out to the credit risk management when bills have not been paid within 90 days. "If we establish that there are problems, we try to carefully approach the lessee, something which is obviously a very delicate matter. We may take early repossession of some containers in order

to reduce our risk exposure. Many times a lessee in financial difficulties does not make use of all equipment and is only glad to be able to return some of it. Obviously we try to get some drop off charges as compensation in as far as possible but this flexibility helps us as well as the lessee."

Yet sometimes preventative measures are not enough. Especially during the recent "Financial Crisis", concerns were raised that that any of Triton's major lessees could go bankrupt. "Bankruptcy is our major concern." Wiedenbach states. "When a lessee goes bankrupt, it may get really difficult and expensive. Everybody wants their money and we often encounter problems with terminals and depots, which may refuse to release our containers unless we bail them out. Of course we were anxious last year that bankruptcy would strike one of our major lessees. The average recovery cost per container is appreciated to be $500. Assume a company with 50 000 TEU would go bankrupt and we would have to pay $500 per container. That would hurt!" The last one and a half years Triton has run an internal structure with a team consisting of co-workers worldwide, ready to act quickly in case of any insolvency issue. The faster and the more skilled the team works the less it will cost the company. Main decisions, such as the setting of potential maximum bailment limits are taken at the head office in San Francisco.

Containers are lost in other ways too by way of going overboard, getting stolen or simply disappearing but such losses at the latest will be discovered as the equipment is or was supposed to be returned to the depot. As the lessee is liable for the equipment during the lease, he will pay the replacement value. If a piece of equipment is later found, it can be reinstated into the computer system. Substituted containers constitute somewhat of a bigger problem. Triton's containers are all painted in the same colour and carry the company's logo. Nonetheless, it happens that another container than the one leased out comes back due to the fact that the lessee or one of its sublessees has swapped it. As already mentioned Triton does generally not allow subleasing but is aware of the fact that it still frequently happens. "A container may have our logo as well as our CSC-plate on it but then turns out to be an older piece of equipment than the one leased out. The client is obviously liable, provided we can prove that the right container was leased out. This we must however presume, as the depots are responsible to thoroughly check the containers while in the depots. The container number is not only found on the CSC-plate on the outside and on plates inside of the container. It is also scratched into the container (the corner post). "The depots are familiar with our containers and if they upon redelivery catch suspicion, the returned equipment may e.g. have another colour or floor, they give us a call, whereupon the container is lifted and the corner post scrutinised. Still, it happens that such swaps pass unnoticed" Wiedenbach says.

6 Analysis

Returning to the purpose as formulated in the beginning of this paper:

"The aim of this work is to emphasize proprietary problems within the container leasing market as of today and in the light of the container's intrinsic features examined if any improvements could possibly facilitate the container leasing business by way of enhancing the lessor's proprietary rights. As an interim target, the peculiarities of container leasing shall be explained, and parts of its legal complexity untangled."

6.1 The Problem

The typical leased container as seen is a standardised box. Thus, differentiating from other categories of movable equipment, a single piece of equipment is not particularly valuable. On the other hand, container leases do not comprise merely one or a few containers but a large number of objects, which by their quantity represent a high value. Taking also into consideration that these objects move independently from each other, by sea, air, rail and road, I would claim that containers among the various groups of movable equipment represent the most movable category there is. This makes it hard for the leasing companies to keep track on their equipment, but on the other hand, to them it does not really matter if a certain piece of equipment is returned as long as the residual value is paid for. Containers are "wear and tear objects", which are easily replaced.

As bad as it is when an entire container fleet is lost, it is even worse when one cannot expect the lessee to reimburse the loss. In short, the container lessor's nightmare is a major lessee's bankruptcy. In theory, the lessor's legal rights in the lessee's insolvency are clear. The lessor is owner and therefore has the legitimate right to recover the equipment, save for the case where an administrator or bankruptcy trustee chooses to carry on the contract, in which case the lessor is instead protected through payment out of the bankruptcy estate itself. In reality, however, as reflected in the interview with Triton, the equipment may not be recoverable or recovered only after considerable expense. Thus, from the container lessor's perspective, the problem does not so much seem to lie in a lack of legal provisions as it does in the difficulties encountering a lessor, who tries to safeguard his rights.

6.2 The Consequences

From a legal economic perspective, the lack of efficient proprietary protection in general inflicts a negative impact in the international trade and transport sector. The consequences were clearly articulated in the drafting work of the Cape Town Convention. If financiers of movable equipment are not given sufficient proprietary protection, they become reluctant to grant credit, which ultimately frustrates world trade. The issue is a problem particular to the area of movable equipment, as the dispersed way in which such objects frequently move from one country to another gives rise to a similarly dispersed legal structure, creating uncertainty about applicable laws.

At an individual level, container leasing companies risk losing equipment of high value in the case of a lessee's bankruptcy. It may be wrongly taken into the bankruptcy estate or detained by terminals in the hope that what the lessee owes can be obtained from the equipment. Where authorities in such a case do not assistance the leasing company, equipment may have to be bailed out, often with sums amounting to a significant part of the equipment's value.

What can consequently be seen is how leasing companies, rather than simply relying on the current rather unpredictable legal protection, take preventive measures against risks threatening their proprietary interests. By establishing an efficient in-house risk management, scrutinising clients before as well as during the lease, problems can be largely anticipated. And in case of a bankruptcy, Wiedenbach in the interview gives an account of how Triton has established a team, ready to act in case of bankruptcy in order to localise and retrieve the equipment.

The lessor naturally also tries to protect himself with contractual provisions. Each leasing company in principle has its own standard leasing form, slanting the provisions to the lessor's advantage in comparison to more balanced standard forms such as Boxlease. The effect is an industry with comprehensive, very detailed leasing agreements. Simultaneously, however, many of the provisions seem to exist as back-up provisions rather being intended in all cases to be strictly upheld. Subleasing, to take an example, occurs against explicit contractual prohibitions. Lessors are aware that it occurs but do not take action where they have not compelling reasons for doing so. The background to these kinds of omissions in my understanding is twofold. First, it would be hard and very costly to supervise the equipment at all times. Second, the lessor is more of a business person than a lawyer and it is important for the leasing company to stay on good terms with the lessee. Overall, adaptability seems to be a keyword for the container leasing company, which prefers to adjust its actions to the certain situation rather than strictly enforce contractual default remedies.

6.3 The Solution

Indeed, the current situation from a legal point of view is not satisfactory. Where proprietary rights cannot be efficiently enforced, their existence as such is of little help to the lessor. Simultaneously, however, ocean carriers as a matter of fact seem to be rather content with how the leasing market function as of today. Especially in cases of default, the industry has developed its own ways to deal with problems by means of re-negotiations and changes of contractual provisions. Thus, it only rarely happens that a lessor actually turns to contractual default remedies. In addition, where such remedies are invoked, most agreements prescribe for arbitration, and such awards are easier to enforce due to the New York Convention.

Indeed, also in the area of lessee's bankruptcy, the container companies established market-orientated ways to anticipate and to diminish losses. Nevertheless, such measures, as shown, cannot prevent the reality that lessees at times do go bankrupt. By choosing applicable law and place of jurisdiction, some of the uncertainties connected to the various conflict-of-law rules in the area of movable equipment can be anticipated. The dependence of national law however is still a problem. The lessor is unable to foresee or influence in which country insolvency proceeding may be commenced.

The Cape Town Convention as a solution to the problem provides substantive law as well as an international register, both with the aim of promoting legal predictability and uniformity. The question of whether to add containers under the Cape Town Convention was, as explained, debated during the drafting work. The fact that they were ultimately not included appears to be the outcome of a compromise, resulting in the decision not to include too many categories of equipment under the Convention, but at the same time keep the door for additional categories open. Thus, there is the possibility by way of Art. 51 and further protocols to include containers as a group of movable equipment later.

In fact, it was never stated that containers as such were not suitable objects to be included under the Convention. Certain statements in the drafting work, however, indicate that containers were deemed to be of too little value to be included. The question of whether to expressively limit the Convention's scope to equipment of a certain value was discussed, as well as the question of whether to stipulate a minimum value for containers to be included, when these were still under discussion. Indeed, the Convention in its final form contains no express rules regarding values, but the preamble expresses that the state parties to the convention were "aware of the need to acquire and use mobile equipment of high value or particular economic significance […]". In either case, containers without a doubt are of considerably lower value than other categories of movable equipment, although there are some containers that are technically more advanced and more expensive too.

This is not to say, however, that there are not huge amounts of capital tied up in leased container fleets. The value however lies in the quantity of containers rather than in the value of each single piece. At the same time, to consider all containers in a single lease agreement as a unity

would not solve the low value problem, as the equipment does not travel together but is sent to various destinations all over the world. Thus, a registration system such as the one in the Cape Town Convention would require registration of each and every container. Taking into consideration that there are at the moment some 10.2 million TEU on lease and that the number is growing, and that each piece of equipment would have to be replaced every 10-15 years, a registration system would presuppose a massive administration. I am of the opinion that this would cost more than it would be worth, figuratively speaking but possibly also literally. The low value of each piece of equipment in addition with the high number of objects would lead to great costs for the incessant registration, de-registration, assignment and re-registration of equipment, following the Cape Town Convention.

In addition, the incitements behind short term leases, and to a certain extent also master leases, do not correspond to the background of the Cape Town Convention – to facilitate the financing of the acquisition and usage of moveable equipment in an efficient manner[220]. Instead of being alternative methods to acquire equipment, such as the typical financial lease described in chapter 3, these two types of leases rather provide temporary solutions in a fluctuating market. In addition, the concerns articulated in the drafting work of the Cape Town Convention seem to be less of a problem in the container leasing market due to the containers' intrinsic features. Comparing containers with, for example, an aircraft, in which enormous amounts of capital are tied up, the latter when retained, cannot easily be replaced like containers. Thus, despite the fact that containers share that feature of other categories of movable equipment that they frequently enter and exit national borders, they are different in many other aspects.

A compromise would be – as mentioned in the drafting work to the Cape Town Convention – to limit the Convention's scope to containers of a minimum capacity, or preferably, in my opinion, a certain value. Although the majority of containers are standardised boxes of lower value, a refrigerated container, for example, costs about ten times as much as a standardised box, and so the capital tied up in such containers comprises a significantly bigger part of the value of the entire leased fleet than what they compose in numbers. In addition, the more expensive and unique a piece of equipment is, the longer is the lease period. Thus, a lease of more expensive containers better corresponds to the typical financial lease agreement, which seems to have been the template for the Cape Town Convention. Nevertheless, to protect the proprietary rights in more expensive containers would only provide a partial solution, as leasing companies to an overwhelming majority engage in the leasing of standard box containers.

Returning to the earlier observation that container leasing companies in fact do not seem to find the current situation particularly troublesome, I cannot help but question whether a bureaucratic registration system such as the one in the Cape Town Convention would in reality be criticised by the container leasing companies. These too would have to undertake a rather extensive administrative work. Where the Convention in addition would not

[220] As stated in its preamble

become universally successful, it would mean a lot of work for little effect. Considering the fact that the area of leasing has traditionally been unusually independent from legal regulations, I fear that too much bureaucracy could in fact have the opposite effect on the container lease industry than intended, by way of hampering it.

Ultimately, it seems as if the container leasing industry works its way around many problems on its own. Initially, the intrinsic features of container transportation already appear to contain a built in risk allocation as the fact that the containers do not travel as an invariant fleet ought to spread the risk. It is unlikely that all equipment under a lease agreement, spread over various jurisdictions, would simultaneously go lost. In addition, the leasing companies have developed various market-orientated ways according to their needs. Many of the container leasing companies' measures have the effect of preventing incidents in the first place. By scrutinising new clients, putting up TEU limits and establishing an efficient in-house risk management practice, many problems can be anticipated. In addition, when faced with avoidable legal problems, as seen in the interview, lessors do not hesitate to approach the lessee and deal with the problem in a non-legal way. In fact, the only unavoidable problem in principle seems to be that lessees do sometimes go bankrupt, but even in this area has the lessor established ways to avoid superfluous legal actions and costs by taking quick actions. Indeed, it may be unfair that container leasing companies occasionally have to bail out containers. On the other hand, it leads to prompt – albeit not free – release. Overall, the industry seems to deal with the current problems in a faster and more efficient way than the legislator presently can and probably will be able to for a long time. This is, however, not to say that the legal community should sit back. On the contrary, it needs to catch up and keep pace with the continuously globalised world community. Although a uniform solution such as the Cape Town Convention does not seem fitting with regard to general container leasing, there are other ways for states to promote a lessor's proprietary rights, not least of which are diplomatic means. With regard to the legal area, considering the great extent to which various national insolvency laws differ, increased administrative co-operation in cross-border insolvencies at present seems to be the most efficient solution. By way of facilitating the cross-border administration, for example, by adapting guidelines such as the UNCITRAL Model Law on Cross-Border Insolvency, states are induced to mutually superintend and recognise each other's insolvency proceedings, consequently strengthening the protection of leasing companies' rights.

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