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Item No. 11 on the agenda: Model law on commercial leasing

(Addendum to memorandum prepared by the Secretariat)

Summary	*Status of the preliminary draft model law on commercial leasing following its consideration by the UNIDROIT Committee of governmental experts at its second session (Muscat, 6/9 April 2008)*
Action to be taken	*Passing of a Resolution calling upon the States to be convened for the purpose of finalising and adopting the future draft model law on commercial leasing to ensure that it apply to as broad a range of assets as possible while safeguarding the application of the Cape Town regimen to the extent necessary*
Related documents	*UNIDROIT 2008 - C.G.E. Leasing/2/W.P. 4; Implementation of the Strategic Plan (C.D. (87) 6, p. 6)*

Further to its memorandum C.D.(87)11, the Secretariat is pleased to inform members of the Governing Council that the quality of the work and the progress accomplished by the UNIDROIT Committee of governmental experts for the preparation of a draft model law on leasing at its second session, held in Muscat, at the kind invitation of the Government of Oman, from 6 to 9 April 2008 are such as, in its opinion, to justify the transmission of the text of the preliminary draft model law on leasing that emerged from that session to a joint session of the UNIDROIT General Assembly, meeting in extraordinary session, and the Committee of governmental experts, for finalisation and adoption.

In the first place, the Muscat session amply confirmed the Secretariat's expectations regarding the benefits of conducting the negotiations for the preparation of a draft model law in those parts of the world for which it is specifically intended. In particular, a good number of the non-member States from Africa that participated in the first session of the Committee of governmental experts, held in Johannesburg from 7 to 10 May 2007, took the trouble to attend the Muscat session too. Moreover, a number of non-member States in the Middle East not normally known for their participation in the negotiations for the preparation of UNIDROIT instruments also attended the Muscat session. And the Minister of Commerce and Industry of Oman informed the Secretariat at the conclusion of the session that he would be proposing to Cabinet that the Government of Oman deposit its instrument of accession to the UNIDROIT Statute by October 2008.

What was most important, however, in both the Johannesburg and Muscat sessions was the way in which they permitted qualified experts from developing countries and countries in transition to a market economy to see how relevant and useful the work of UNIDROIT could be to their development opportunities and to have the possibility of taking a leading role in the negotiation of a model law designed, precisely, to permit them to obtain the funding necessary to develop their infrastructure. It will be recalled that the decision to embark on the preparation of a model law on leasing for developing economies and economies in transition was specifically taken as a response to the strictures of developing country representatives regarding the irrelevance of most, if not all of the Institute's work programme to their needs and aspirations and as a way of bringing its work to the attention of countries lacking the human resources necessary to enable them otherwise to participate in UNIDROIT's work.

The necessary institutional guarantees were provided at all times by the overall control of the negotiations maintained by the UNIDROIT Secretariat and the chairmanship of the Committee by, first, Mr I.S. Thindisa (South Africa) and, secondly, following a serious accident to Mr Thindisa in the interim, Mr N.J. Makhubele (South Africa), as well as the participation of a good number of UNIDROIT members. The necessary linguistic guarantees were at all times guaranteed by the proceedings being conducted in both English and French and the Drafting Committee working always in both languages, so as to ensure as perfect a concordance between the two linguistic versions as possible. It is important also to bear in mind the important savings for the Institute's budget made possible by all the expenditure for the holding of the two sessions of the Committee being met by the hosts, with the exception of the travel and accommodation expenses of the two representatives of the Secretariat; in this context it suffices simply to bear in mind that the cost of the simultaneous interpretation from English to French and vice-versa, generously assumed by the Government of Oman, amounted to no less than €11,000.

In line with the exhortation to the Committee issued by the Deputy Minister of Justice and Constitutional Development of South Africa at the commencement of its first session to produce a balanced instrument, the Committee was at all times at pains, in determining the final shape of individual provisions of the future model law, to ensuring that it not only provide the lessor with the comforts reasonably necessary to furnish developing and transition economies with the funding that they so sorely needed but also that it afford the necessary safeguards for the interests of the lessee in such countries. In general, this rule of thumb was adhered to throughout and the Secretariat is, accordingly, confident that the provisions of the preliminary draft model law that it has the honour of laying before the Governing Council represent precisely the sort of balance necessary to make lease finance more widely accessible to the countries for which it is intended. Evidence of this is implicit in the use already being made of the text of the preliminary draft as the basis of the efforts being conducted by the International Finance Corporation (I.F.C.) to develop leasing in two of the areas in which it is currently operating, namely Afghanistan and the West Bank.

It will be recalled by members of the Governing Council that, when the Secretariat conducted its preliminary inquiries with the relevant stakeholders, including the World Bank, as to the desirability and feasibility of the project, it was precisely the serious infrastructure financing needs of the developing world, and in particular African countries, that were felt to provide the principal merits of the undertaking of such an initiative. Suggestions to exclude from its sphere of application a potentially infinite number of categories of mobile equipment might, however, if generally accepted, deprive developing countries and economies in transition of the potential benefits of the proposed model law.

In recognition of the substantial contributions made to the negotiation of the Protocols to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment and Railway Rolling Stock made by the Aviation Working Group (A.W.G.) and the Rail

Working Group (R.W.G.) respectively, these groups were invited to formulate comments on the preliminary draft and to participate in the work of the Committee as observers. In the last days before the Muscat session, the Secretariat received a note from the Secretary to, and General Counsel of the A.W.G., in which he argued, *inter alia*, for the future model law not to apply to leasing agreements or supply agreements involving aircraft, helicopters, engines or other components installed on aircraft or helicopters, unless the lessor, the lessee and, in the case of Article 7, the supplier agree that it should apply and except as provided in Article 9. It was agreed that these comments would be included as a footnote to the comments submitted by Governments and Organisations, with an indication that they were submitted by the Secretary to, and General Counsel of the A.W.G as the principal representative of the aviation and aviation finance communities during the negotiations of the aforementioned Convention and the Aircraft Protocol. Neither the A.W.G nor the R.W.G. was represented at the Muscat session of the Committee and the R.W.G. did not submit comments on the preliminary draft model law on behalf of the rail industry.

In Muscat one delegation on the last day requested the exclusion from the sphere of application of the proposed model law of not only aircraft, aircraft engines and helicopters (thus those categories of equipment covered by the aforementioned Convention as applied to aircraft objects) but also railway rolling stock and other mobile equipment. This led other Governments to propose excluding ships and space objects as well. At this stage, it was impossible for the Committee, the second reading having been concluded and the Drafting Committee already having implemented the decisions agreed by the Committee on second reading, to do more than place the proposal in square brackets, as a proposed new Article 3(3), for decision by the anticipated joint session of the General Assembly and the Committee of governmental experts. These eleventh-hour developments caused considerable disarray among the representatives of developing countries and transition economies.

The proposed model law is not intended, in any way, to interfere with the freedom of contract of the parties, and therefore of financiers of aircraft, helicopters, engines, railway rolling stock or indeed any other category of mobile asset capable of coming under the Cape Town regimen, to derogate from its provisions. The proposed model law poses absolutely no threat to the Cape Town regimen and further consultation, in particular within industry, is needed before it can be said that there is indeed any conflict between its provisions and those of the Cape Town Convention and its Protocols, whether adopted, under preparation or merely hypothetical. In particular, as mentioned above, notwithstanding excellent relations between UNIDROIT and the R.W.G., the latter has at no time suggested the need for the exclusion of railway rolling stock from the sphere of application of the proposed model law. The fact that the Cape Town regimen and the proposed model law are both under the auspices of UNIDROIT constitutes the best guarantee of compatibility and consistency between the two.

Most of all, though, it would, in the considered opinion of the Secretariat, be most unfortunate if the Secretariat, after taking the initiative of reaching out to developing countries and economies in transition, with a policy endorsed by qualified representatives of such countries among the Institute's membership and in an area in which it possesses unrivalled expertise, were to find the results of the labours of these countries potentially rendered ineffective.

The proposed model law is intended to provide a blueprint for the development of leasing, and, thereby, the private sector in developing and transition economies. In this respect, it is in line with the policy of the World Bank and other international development banks. It is in no way going to interfere with the success of the Cape Town regimen. On the contrary, it is intended to expand the availability of the sort of benefits which that regimen is designed to bring, across a broader and less high-value range of assets. It would be a great pity if developing countries and economies in transition were, moreover, to find themselves deprived of the potential benefits of the proposed model law in respect of a given category of mobile asset, even more in respect of aspects of the

proposed model law which are not covered by the Cape Town regimen and where the chances of the Cape Town regimen applying to each and every category of asset covered at present by the Cape Town Convention, let alone all the different additional categories of mobile equipment that are capable of being brought under the scope of the Convention under Article 51 thereof, must be considered highly remote.

The Secretariat has already expended considerable efforts in ensuring the perfect compatibility of the operation of the proposed model law with the recently adopted UNCITRAL legislative guide on secured transactions. It may not be necessary to provide a lengthy list of exclusions for different classes of asset in the proposed model law: in particular, the only Protocol to the Cape Town Convention that is in force is that concerning aircraft equipment and the ample freedom of contract granted to contracting parties under the proposed model law will enable financiers preferring to exclude all or part of it to do so.

At the end of the day, it has to be recognised that this is a one-off opportunity for the Institute to reach out to the developing world, in a way in which its structure will never otherwise permit it to do. The developing world is the principal market for UNIDROIT products; these products are designed to inspire confidence in such countries and the upholding of the name and reputation of UNIDROIT for quality and technical expertise. The confidence reposed in it by the Government of South Africa in lending its name to the success of this project, on behalf of Africa and the developing world in general, whether through organising the initial session of the Committee or by accepting its chairmanship must be honoured. The Deputy Minister of Justice and Constitutional Development of South Africa, moreover, specifically requested the Committee to ensure that Africa and the developing world benefit, through the proposed model law, from the expertise in technical areas of the law acquired by the developed world.

The Secretariat sought, with great difficulty, to find an appropriate solution to this dilemma in Muscat. To be sure, the lateness of the proposal and the corresponding shortage of time in which to deal with it meant, in effect, that the issue will have to be resolved at the next session.

The Secretariat would submit that, if a broad exclusion, of the nature proposed by the industrialised member State mentioned above, is to carry the day, then it should, in the interest of ensuring the maximum coverage possible for the proposed model law in the countries for which it is intended, be drawn in such a way either as to limit the scope of such an exclusion to aspects of leasing agreements which create an international interest in mobile equipment that are in actual fact governed by the Cape Town Convention and a Protocol thereto, which is in force in the country in question, or as to provide a rule under which, in the event of a conflict arising between, on the one hand, the proposed model law and, on the other, such rules as have emerged or may emerge under the Cape Town regimen for high-value mobile equipment, such rules would prevail. Both these solutions would be very much in line with the way in which the proposed model law, on the basis of thorough-going negotiations between the UNCITRAL and the UNIDROIT Secretariats, now deals, in Article 3(1), with potential future conflicts between the proposed model law and legislation that may result from the UNCITRAL legislative guide on secured transactions.

This being the case, the Secretariat would, in confirming its belief that the preliminary draft model law as it has emerged from the Muscat session (a copy of which is reproduced in C.G.E. Leasing/2/W.P. 4) is ripe for transmission to Governments for finalisation and adoption, according to the procedure advocated in its memorandum on this subject, invite the Council not only to authorise the Secretariat to convene a joint session of the General Assembly and the Committee of governmental experts for finalisation and adoption of what would then become the draft model law on commercial leasing but also to pass a Resolution calling upon the States attending such a session to respect its particular purpose, namely to increase the availability of lease finance for developing and transition economies, and, therefore, to ensure that it apply to as broad a range of assets as possible while safeguarding the application of the Cape Town regimen to the extent necessary.