

UNIDROIT News

➤ *Institutional Aspects* ◀

Secretary-General commences second mandate

Professor Herbert KRONKE (Director of the Institute for Foreign and International Private and Economic Law, University of Heidelberg, Germany), who was appointed to the post of Secretary-General of UNIDROIT by the UNIDROIT Governing Council at its 77th session (16-20 February 1998) and who took office on 1 September 1998, commenced his second mandate on 1 September 2003 pursuant to its renewal by the Governing Council at its 82nd session (26-28 May 2003).

57th Session of the UNIDROIT General Assembly (Rome, 28 November 2003)

- *Election of the members of the UNIDROIT Governing Council for 2004-2008:*

The following were elected members of the Governing Council for the period running from 1 January 2004 until 31 December 2008:

Mr Martin ADENSAMER (Austria); Mr Tugrul ARAT (Turkey); Mr Antonio BOGGIANO (Argentina); Mr Hans-Georg BOLLWEG (Germany); Mr Sergio CARBONE (Italy); Mr Michael ELMER (Denmark); Mr Henry DEEB GABRIEL (United States of America); Mr Ian GOVEY (Australia); Mr Attila HARMATHY (Hungary); Mr Arthur HARTKAMP (Netherlands); Mr Gerard HOGAN (Ireland); Mr Kiyoshi (HOSOKAWA (Japan); Mr Anthony INGLESE (United Kingdom); Mr Alexander KOMAROV (Russian Federation); Mr LYOU Byung-Hwa (Korea); Mr Didier OPERTTI BADÁN (Uruguay); Mr Jorge SÁNCHEZ CORDERO (Mexico); Mr Biswanath SEN (India); Mr Stanislaw SOLTYSINSKI (Poland); Mr Bruno STURLESE (France); Mme Anne-Marie TRAHAN (Canada); Mr Evelio VERDERA Y TUELLS (Spain); Mr Ioannis VOULGARIS (Greece); Mr Pierre WIDMER (Switzerland); Mr ZHANG Yuqing (China).

➤ *Implementation of the 2002-2004 Work Programme* ◀

INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

Significant progress was made during 2003 right across the spectrum of the Institute's activities under this heading. As the year drew to a close, the conditions for the entry into force of the *Convention on International Interests in Mobile Equipment*, opened to signature in Cape Town on 16 November 2001 were satisfied, with the deposit of the third instrument of ratification, and

the funding needed to permit the reconvening of the Preparatory Commission for the establishment of the International Registry for aircraft objects and the launching of the tendering process leading to the establishment of the International Registry was secured. The year also saw the holding of both the third session of the Joint UNIDROIT / OTIF Committee of governmental experts for the preparation of a draft *Protocol to the Cape Town Convention on Matters specific to Railway Rolling Stock* and the first session of the UNIDROIT Committee of governmental experts for the preparation of a draft *Protocol to the Cape Town Convention on Matters specific to Space Assets*.

1. Cape Town Convention / Aircraft Protocol

The principal landmark reached during the year in respect of the Cape Town Convention and the Protocol thereto on Matters specific to Aircraft Equipment (the "Aircraft Protocol") was, as mentioned above, the satisfaction of the conditions for the entry into force of the former¹ in accordance with Article 49(1) of its terms, on 1 April 2004, albeit only as regards a category of objects to which a Protocol applies and as from the entry into force of that Protocol. In effect, this means that, since the Aircraft Protocol is the only Protocol opened to signature to date, the Convention will in all likelihood enter into force first in respect of aircraft objects. The Aircraft Protocol also has three Contracting States to date, which means that, according to Article XXVIII(1) of its terms, it requires a further five ratifications – or acceptances, approvals or accessions – to enter into force and thus to bring the Convention into force for aircraft objects. Reliable information reaching the Secretariat would lead it to expect the depositing of these additional five instruments of ratification in the course of 2004 in such a way as to bring the Cape Town Convention into force for aircraft objects in the second half of that year.

In the meantime, the additional start-up funding required for the reconvening by the International Civil Aviation Organization (I.C.A.O.) – invited by the Cape Town Diplomatic Conference to accept the functions of Supervisory Authority upon the entry into force of the Cape Town Convention and the Aircraft Protocol – of the Preparatory Commission set up by that Diplomatic Conference to act as Provisional Supervisory Authority for the establishment of the International Registry for aircraft objects pending the entry into force of the Convention and the Aircraft Protocol, and thus for the launching of the tendering process leading to the establishment of that International Registry has been secured. The significance of the securing of the shortfall in the start-up funding required by I.C.A.O. to reconvene the Preparatory Commission and to launch the tendering process is that it should permit the completion of all the stages necessary for the establishment of the International Registry for aircraft objects in time for the entry into force of the Convention and the Aircraft Protocol, a matter of not indifferent concern to the Institute in its capacity of depositary of the two instruments, since it has the duty to provide the Supervisory Authority and the International Registry with a copy of each instrument of ratification in respect of the Convention and the Aircraft Protocol, together with the date of deposit thereof, and of each declaration under both instruments (cf. Article 62(2)(c) of the Cape Town Convention and Article XXXVII(2)(c) of the Aircraft Protocol).

¹ In 2003, the Convention and the Protocol were signed by Saudi Arabia on 12 March and the United States of America on 9 May). Three States ratified both instruments: Panama on 28 July (with Declarations under Articles 13(1), 39, 50, 53 and 54(2) of the Convention and Article XXX(1), (2) and (3) of the Protocol), Ethiopia on 21 November (with Declarations under Articles 39(1)(a), 40 and 54(2) of the Convention and Article XXX(1), (2) and (3) of the Protocol) and Nigeria on 16 December (with Declaration under Article 54(2) of the Convention).

2. Preliminary Draft Protocol on Matters specific to Railway Rolling Stock

The Rail Registry Task Force set up by the Joint Committee of governmental experts at its first session held a second meeting in Washington, D.C. on 19 and 20 March 2003. This meeting was chaired by Mr P. Bloch (United States of America). The purpose of the meeting was, *inter alia*, to consider those provisions of the preliminary draft Protocol to the Cape Town Convention on Matters specific to Railway Rolling Stock (the "preliminary draft Rail Protocol") referred to it by the Joint Committee of governmental experts. In accordance with its terms of reference as established by the latter, the Task Force first looked at the replies to the Questionnaire that had been sent out in particular among African, Asian and Latin American countries with a view to obtaining information on existing registries for railway rolling stock. It subsequently looked at the three different options for the setting up of a regional registry under the Cape Town Convention and the preliminary draft Rail Protocol, the criteria for the unique identification of railway rolling stock and the maintenance of such uniqueness, the implications of the movement of railway rolling stock towards and away from regional systems, the question of consistency with the Cape Town Convention and the international registration system provided thereunder and, finally, the role of the Supervisory Authority and its relationship with regional systems. The Task Force forwarded a number of proposals to the Joint Committee of governmental experts, reproduced in UNIDROIT 2003 Study LXXIIIH – Doc. 10, which were looked at by the Committee at its third session.

The third session of the Joint UNIDROIT / O.T.I.F. Committee of governmental experts for the preparation of a draft Protocol to the Cape Town Convention on Matters specific to Railway Rolling Stock was held in Berne from 5 to 13 May 2003. It was attended by representatives of 26 States,² one intergovernmental Organisation,³ two international non-governmental Organisations⁴ and one national Organisation.⁵ Ms I. WEINBERG DE ROCA (Argentina) was Chairman for the first week of the session and Mr A. LEINONEN (Finland), Deputy Chairman, acted as Chairman for the last two days of the session. Sir Roy GOODE (United Kingdom) was Rapporteur.

The unusual length of the session enabled the Rail Registry Task Force, over several meetings, to work out a compromise on the registration provisions of the preliminary draft Rail Protocol. For the first time the Joint Committee of governmental experts found itself with sufficient time to consider the entirety of the preliminary draft Rail Protocol during a session (however, the first two sessions of the Committee only lasted for two and three days respectively) and the Drafting Committee was able, over three meetings, to finalise the text adopted by the Joint Committee of governmental experts (UNIDROIT 2003 Study LXXIIIH Doc. 14).

Notwithstanding the clear and urgent need for foreign private investment in rail infrastructure in particular in developing countries and countries in transition, there can be no doubt that the preliminary draft Rail Protocol and the benefits accruing thereunder are, with

² Argentina, Austria, Belgium, Bosnia and Herzegovina, Brazil, Canada, Croatia, Czech Republic, Finland, Germany, Hungary, Japan, Great Socialist People's Libyan Arab Jamahiriya, Luxembourg, Mexico, Netherlands, Republic of Korea, Slovakia, South Africa, Spain, Sweden, Switzerland, Thailand, Tunisia, United Kingdom and United States of America.

³ European Commission.

⁴ International Rail Transport Committee and Rail Working Group.

⁵ Association of American Railroads.

rare exceptions, all too little known precisely in those countries. The Joint Committee of governmental experts at its third session accordingly decided to follow the recommendation made to it by the Secretariat for the organisation of regional seminars in Africa, Asia and Latin America prior to the holding of a possible fourth session of the Joint Committee, should that prove to be necessary, with a view to the building of consensus around the text of the preliminary draft Rail Protocol. A first regional seminar will be held in Warsaw (Poland) on 15-16 April 2004,⁶ and another seminar is scheduled to be held in Mexico in June.

3. Preliminary Draft Protocol on Matters specific to Space Assets

The highlight of the year in respect of the preliminary draft Protocol to the Cape Town Convention on Matters specific to Space Assets (the "preliminary draft Space Protocol") was the holding of the first session of a UNIDROIT Committee of governmental experts in Rome from 15 to 19 December 2003. 111 representatives of 39 Governments,⁷ four intergovernmental Organisations⁸ and six international non-governmental Organisations⁹ participated in the session. Prof. S. MARCHISIO (Italy) was elected Chairman of the Committee. Mr J. SANCHEZ CORDERO DAVILA (Mexico), member of the UNIDROIT Governing Council, was elected First Deputy Chairman and Ms Lyndall SHOPE-MAFOLE (South Africa) Second Deputy Chairperson. Mr J.-M. DESCHAMPS (Canada) and Mr B.J. WELCH (United Kingdom) were elected Co-chairmen of the Drafting Committee.

The Committee completed a first reading of the substantive provisions of the preliminary draft Space Protocol. It was agreed, with the exception of the provision dealing with the Supervisory Authority of the future international registration system for space assets, not to deal with the registration provisions for the time being. The same was true of the final provisions. The principal innovations made by the Committee concerned, on the one hand, the sphere of application provisions and, on the other hand, the provisions concerning default remedies. Regarding the former, it was agreed to replace the term "associated rights" with two new terms "debtor's rights" and "related rights", so as to distinguish them from the term employed in the Cape Town Convention.¹⁰ The Space Working Group, moreover, put forward a detailed set of proposals dealing with the application of the Cape Town Convention and the preliminary draft

⁶ See programme reproduced in this issue, p. 879.

⁷ Algeria, Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, China, Czech Republic, France, Germany, Greece, India, Indonesia, Ireland, Italy, Japan, Kenya, Luxembourg, Malaysia, Mexico, Morocco, Nicaragua, Nigeria, Pakistan, Republic of Korea, Russian Federation, Slovakia, South Africa, Spain, Sweden, Syrian Arab Republic, Thailand, Tunisia, Turkey, Ukraine, United Kingdom and United States of America.

⁸ European Commission, European Space Agency, International Mobile Satellite Organization and United Nations Office for Outer Space Affairs.

⁹ Aviation Working Group, International Institute of Space Law, International Law Association, Rail Working Group and Space Working Group.

¹⁰ "Debtor's rights" were defined as meaning all rights to performance or payment due to the debtor by any person with respect to a space asset, while "related rights" were defined as meaning any permit, licence, authorisation, concession or equivalent instrument that is granted or issued by, or pursuant to the authority of a national, intergovernmental or other international body or authority to manufacture, launch, control, use or operate a space asset, relating to the use of orbits and the transmission of emission or reception of electromagnetic signals to and from a space asset.

Space Protocol to both “debtor’s rights” and “related rights”. Regarding default remedies, the Committee agreed as to the need, first, to provide for a new remedy, the placing of data and materials with another person in order to afford the creditor the opportunity to take possession of, establish control over or operate the space asset – in place of the former provision which permitted the placement of access and command codes into escrow with the International Registry or any other agreed escrow agent – and, secondly, to introduce a limitation on the exercise of remedies under certain circumstances in relation to public services. In addition, it was decided to introduce a provision indicating that the Cape Town Convention as applied to space assets shall not affect States Parties’ rights and obligations under the existing United Nations Outer Space Treaties or instruments of the International Telecommunication Union.

By the way of preparation for the session, the Institute, in co-operation with the European Centre for Space Law, organised a colloquium held, at the kind invitation of Mr J.-J. DORDAIN, Director-General of the European Space Agency, in Paris (France) on 5 September 2003, which was addressed to representatives of Government and industry in the Western Hemisphere.¹¹ A colloquium for representatives of Government and industry in the Eastern Hemisphere will likewise take place on 22 and 23 April 2004 in Kuala Lumpur, at the kind invitation of Prof. M. OTHMAN, Director-General of the Malaysian National Space Agency.¹²

The Supervisory Authority of the international registration system for space assets has yet to be identified. The first Organisation identified by the Institute and the Space Working Group as a potential Supervisory Authority was the United Nations. A working group of the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space (U.N. / COPUOS) made considerable progress regarding the question as to whether the United Nations should act as Supervisory Authority during the 42nd session of the Legal Subcommittee, held in Vienna from 24 March to 4 April 2003, at which the Institute was represented by Mr M.J. STANFORD. The tendency within the working group was to recognise the appropriateness of the United Nations acting as Supervisory Authority, however with reservations being expressed by certain countries. It was agreed that further information was required before any decision could be reached regarding, first, where the start-up funding for the future International Registry would be found, secondly, the compatibility of the United Nations’ exercise of such functions with the United Nations Charter and, thirdly, the finding of a satisfactory solution to the question of any residual liability that might attach to the United Nations as Supervisory Authority.

While discussions on this subject continue within U.N. / COPUOS, it was recognised that it would be useful at the same time to commence looking to see whether other international Organisations might be interested in seeing their names considered as potential Supervisory Authorities. To date the matter has thus been considered, following a letter from the Secretariat, by the International Relations Committee of the European Space Agency and the Advisory Committee of the International Mobile Satellite Organization. In addition, the Secretary-General of the International Telecommunication Union has indicated that the Union is studying the possibility of assuming a role or functions in relation to the future international registration system for space assets.

¹¹ See the report on this colloquium reproduced in *Unif. L. Rev. / Rev. dr. unif.*, 2003, 664.

¹² See programme of this colloquium reproduced in this issue, p. 880.

HARMONISED SUBSTANTIVE RULES REGARDING SECURITIES HELD WITH AN INTERMEDIARY

1. Work of the Study Group

On the basis of its *Position Paper*,¹³ the UNIDROIT Study Group on this project refined its approach on the occasion of its third session held in Rome from 13 to 15 November 2003. The work addressed the more technical issues regarding the content of the future instrument and focused primarily on two concerns.

First, the scope of the future instrument was reassessed, taking into consideration the numerous and largely substantive comments that had been received from interested governmental and private bodies.¹⁴ However, the scope as it was set out in the *Position Paper* remained unchanged, albeit with a renewed emphasis on issues of corporate law such as the exertion of voting rights and the payment of dividends. Furthermore, there was a strong feeling that, however difficult this was, it might be unavoidable to encroach upon domestic insolvency procedure rules.

Second, in further regard to the comments it received on the *Position Paper*, the Study Group shaped terms of reference as to each area within the scope to serve as basis for the upcoming drafting process. In consultation with other members of the group, a reporter was given the task of preparing a first preliminary draft instrument to be discussed at the Study Group's next session, to be held in Gerzensee (Switzerland) from 24 to 27 March 2004, at the invitation of the Swiss National Bank.

2. Promotion of the project

Since its launch in mid-2002, the project has continued to raise interest from public and private bodies all around the globe. Apart from the relevant ministries of the UNIDROIT Member States, central banks and regulatory authorities, as well as central securities depositories, stock and derivative exchanges, banks with global custodian branches, brokers and other capital market participants have also been actively involved in the UNIDROIT consultation process with regard to the legal framework of securities holding. The UNIDROIT Secretariat continuously seeks the collaboration of these correspondents so as to benefit from their expertise and pursue the project in a climate of mutual trust.

Other international and non-governmental organisations have also played an increasingly important role in the discussion on harmonisation in this area of law. As a matter of course, UNIDROIT co-ordinates with the Hague Conference on Private International Law which adopted the *Convention on the Law applicable to certain rights with respect to securities held with an intermediary* in December 2002. The measures that will be taken by the European Union to establish a single market for securities clearing and settlement will be a determining factor as regards global harmonisation in this area. As the EU Directives on Settlement Finality and Financial Collateral Arrangements already address certain issues of substantive law in this area,

¹³ The UNIDROIT Study Group on Harmonised Substantive Rules regarding Indirectly Held Securities – Position Paper, UNIDROIT 2003 Study LXXVIII – Doc. 8; see summary in *Unif. L. Rev. / Rev. dr. unif.*, 2003, 686 *et seq.*

¹⁴ UNIDROIT 2003 Study LXXVIII – Doc. 10 and Doc. 10 add.

future legislative action as promoted by the second *Giovannini Report* in the context of the *Securities Account Certainty Project* will for the most part coincide with the UNIDROIT project. One of the primary objectives for the year 2004 is to co-ordinate with the EU Commission in this respect so as to avoid substantially conflicting legislative action.

An important event with regard to international co-operation was the UNIDROIT Seminar on Legal Risk and Market Efficiency, held in Rome on 12 November 2003 (*cf.* separate report in this issue, p. 867).

The Secretariat also on numerous occasions had an opportunity to introduce the project to the interested public. At a conference organised by the *Association européenne de droit bancaire et financier* (AEDBF) at the headquarters of Deutsche Börse AG in Frankfurt (Germany), the UNIDROIT project was presented to representatives of the German public and private sector organisations. It was preceded by a presentation outlining the positions of the European Central Bank and followed by an explanation of the EU Commission's point of view in this regard.

3. Missions

The Secretariat, along with one or two Study Group members in some cases, has also begun a process of so-called "Fact Finding Missions". These missions serve as an important promotional tool with a dual purpose. On the one hand, they help experts from the competent national authorities and from the private financial sector to gain insight into the importance of global harmonisation of the applicable laws for securities held with an intermediary. On the other hand, the Secretariat seeks input from national experts to broaden its understanding of the relevant legal and factual issues and to learn from the peculiarities of each system. Missions typically last two or three days, starting with an open seminar on the first day and then proceeding with smaller expert meetings on the following days.

To date, such missions to the United Kingdom, Switzerland, France, the United States and Canada have been accomplished with great success. The Secretariat is at present preparing further missions to Argentina, Belgium, Brazil, China, Denmark, Egypt, Greece, India, Japan, Malaysia (a non-member State), Mexico, South Africa, Sweden, Tunisia and Uruguay.

Missions in what have been termed "emerging capital markets" have also been scheduled to assess the need for an instrument providing broader assistance to countries seeking to establish a reliable basic legal framework in this area. This is to support a Secretariat Study on the next item on the list of capital market projects, entitled *Enhancing Trading on Emerging Capital Markets*.

➤ **IMPLEMENTATION OF UNIDROIT INSTRUMENTS**¹⁵ ◀

CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND PROTOCOL ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT

On 31 December 2003, there were 26 Signatory States to both these instruments. Ethiopia and Nigeria ratified the Convention and the Aircraft Protocol on 21 September and 16 December 2003 respectively. Pakistan for its part acceded to the two instruments on 22 January 2004. The

¹⁵ For the status of UNIDROIT instruments, please consult the UNIDROIT Internet website: < www.unidroit.org > .

Cape Convention will accordingly enter into force on 1 April 2004, but only in respect of a category of equipment to which the Protocol applies.

➤ **UNIDROIT RESEARCH SCHOLARSHIPS PROGRAMME** ◀

The following scholars conducted research at UNIDROIT between 1 October 2003 and 20 December 2003:

- Ms Hong Nhung DOAN (Vietnam), Lecturer, Law Faculty, University of Hanoi – Research period: October-November – Research topic: “Some legal aspects of financial leasing, international experiences and the Vietnamese perspective” – Funding: Government of the Republic of Korea
- Ms Khandsuren KHUU (Mongolia), Officer, Legal Policy Dep., Ministry of Justice and Home Affairs of Mongolia – Research period: October-November – Research topic: “Protection of Cultural Property under Copyright Legislation – International Law Aspects” – Funding : Government of the People’s Republic of China / UNIDROIT.
- Ms Lawan THANADSILLAPAKUL (Thailand), Head of Dep. Int. Law, Sukhothai Thammathirat Open University – Research period: October-November – Research topic: “Harmonisation/Unification of ASEAN Competition Laws & Policy & Economic Integration in ASEAN” – Funding: Government of the Republic of Korea
- Ms Magdalena PETRIC (Slovenia), Legal Adviser, Cultural Heritage Administration, Ministry of Culture, Ljubljana – Research period: October-November – Research topic: “Restitution of cultural property from public & private international law aspects” – Funding: UNIDROIT
- Ms Judit SCHNABEL (Hungary), Etvös Lorand University, Budapest; Research period: October-December – Research topic: “The UNIDROIT Principles and the United Nations Convention on Contracts for the International Sale of Goods” – Funding: *ad personam* Government of Italy.