

UNIDROIT News

➤ **83rd Session of the Governing Council** ◀
Rome, 19 – 21 May 2004

INSTITUTIONAL ASPECTS

The Governing Council appointed Mr Arthur HARTKAMP and Mr Jorge SANCHEZ CORDERO as first and second vice-presidents, respectively, until its 84th session.

As is the tradition, the Council appointed as *ad honorem* members of the Governing Council the following former members whose membership had just ceased: Mr Maher ABDEL WAHED, Mr Ömer I. AKIPEK, Mr Anthoni BLUNN, Sir Royston M. GOODE, Mr Roland LOEWE, Mr Ferenc MÁDL, Ms Isabel DE MAGALHÃES COLLAÇO, Mr Luiz OLAVO BAPTISTA, Mr Mr Jacques PUTZEYS and Mr Ronald THANDABANTU NHLAPO.

The Council then appointed the following new correspondents: Ms Frédérique C. FERRAND (France), Professor of Law, Faculty of Law, University of Lyon III and Mr Sergio MARCHISIO (Italy), Professor of Law, Faculty of Law, University of Rome "La Sapienza".

The Governing Council took note with satisfaction of the arrival at the UNIDROIT Secretariat of Ms Perrine Daubas (Ph.D. candidate, University of Paris I). Ms Daubas was placed at the Secretariat's disposal as a *volontaire international* by the French Government for a twelve-month period. The Council expressed its gratitude to the French Government for this form of support, which has been available to the Secretariat since 1995.

The Governing Council expressed its gratitude to those States and private partners which had offered voluntary support of the UNIDROIT Research Scholarships Programme for the first time in 2003 as well as to those which had renewed their support: the Republic of Korea (since 1997), the People's Republic of China (since 2002), and the Aviation Working Group. It also thanked the *Deutsche Forschungsgemeinschaft* (Germany), the Max Planck Institute for Private and International Law in Hamburg (Germany) and the Italian Ministry of Culture for their donations to and support of the UNIDROIT Library.

STRATEGIC PLAN – HORIZON 2016 (Document of the Secretariat, Rome, 28 November 2003)

The Governing Council expressed its satisfaction with the structure of the document and the analysis it provided of the status quo as well as the Organisation's objectives and the resources at its disposal. The Council engaged in an exchange of views with respect to the issues dealt with in the document. It is envisaged to review and, where necessary, adjust the objectives on a regular basis.

SCIENTIFIC ACTIVITY

UNIDROIT Principles of International Commercial Contracts – The Governing Council unanimously adopted the new edition of the *UNIDROIT Principles of International Commercial Contracts*. Compared to the current 1994 edition, UNIDROIT Principles 2004 contains five new chapters (*Authority of Agents; Third Party Rights; Set-off; Assignment of Rights, Transfer of Obligations and Assignment of Contracts; Limitation Periods*) as well as an expanded *Preamble* and new provisions on *Inconsistent Behaviour* and on *Release by Agreement*. Moreover, wherever appropriate the 1994 edition was adapted to meet the needs of electronic contracting. UNIDROIT Principles 2004 will be published by the end of May (see the article by Professor M.J. BONELL in this issue, p. 5, as well as the black letter rules reproduced on p. 124).

Principles and Rules of Transnational Civil Procedure – Following a presentation by Mr G.C. HAZARD Jr (United States of America; Co-Rapporteur on behalf of the *American Law Institute* (ALI) and Professor R. STÜRNER (Germany; Co-Rapporteur on behalf of UNIDROIT), the Council expressed its satisfaction with the work accomplished by the Joint ALI/UNIDROIT Working Group for the preparation of Principles and Rules of Transnational Civil Procedure. After discussing some of its provisions, the Governing Council approved the text of the *Principles of Transnational Civil Procedure*. The *Principles* have also been approved by the *American Law Institute* at its 81st annual session in Washington, D.C. (United States of America) from 17 to 19 May 2004. The *Rules of Transnational Civil Procedure* will not be subject to formal adoption on the part of the Organisations that produced them.

International Interests in Mobile Equipment – The Governing Council took note with satisfaction of the continuing good progress being made with the implementation of the Cape Town instruments, that is to say, the *Convention on International Interests in Mobile Equipment* – which had just entered into force – and its *Protocol on Matters specific to Aircraft Equipment*, which was due to enter into force shortly. The Council examined some of the questions submitted by the Secretariat in connection with the Institute's new obligations deriving from its depositary functions under the Cape Town instruments, for example the setting up of an International Registry for aircraft objects as provided by the Aircraft Protocol. The Council noted that the International Civil Aviation Organisation (ICAO) had, in January 2004, initiated the selection procedure in view of setting up the International Registry so that it might become operational in the course of 2004.

The Governing Council took note with satisfaction of the holding, in Warsaw (Poland) on 15 and 1 April 2004, of a Regional Seminar¹ on the *preliminary draft Protocol on matters specific to railway rolling stock* adopted at the close of the third session of the Joint UNIDROIT/OTIF committee of governmental experts held in Berne (Switzerland) from 5-13 May 2003. It was informed that several further seminars were planned in 2004, including one in Mexico for the Americas and possibly another one in Africa; furthermore, the Rail Registry Task Force was proceeding with its work for the preparation of an international registry system and related aspects. If sufficient publicity could be given to the project to confirm the consensus reached by

¹ "The Preliminary Draft Rail Protocol to the Cape Town Convention on International Interests in Mobile Equipment: An Opportunity for Government and Industry to Compare Notes in the Run-up to the Diplomatic Conference" organised by UNIDROIT, the Intergovernmental Organisation for International Carriage by Rail (OTIF) and the Rail Working Group, in co-operation with the Polish Government, and held at the headquarters of the Organisation for the Collaboration between Railways (OSSHD OSJD).

the Committee of governmental experts in Berne, the draft Protocol might be submitted for adoption to a diplomatic Conference by the Spring of 2005.

The Governing Council took note with satisfaction of progress made in respect of the work for the preparation of a *preliminary draft Protocol on matters specific to space assets*. It was informed of the holding of the first session of the committee of governmental experts for the preparation of such a draft Protocol (Rome, 15-19 Dec. 2003), of the imminent holding of a Regional Seminar² in Kuala Lumpur (Malaysia) on 22-23 April 2004 and of the consultations being held by the Secretariat with a view to identifying an Organisation to act as the Supervisory Authority.

Uniform rules applicable to transport – The Governing Council took note of developments in relation to the preparation of a Protocol to the CMR on electronic consignment notes. This work was being carried out at the United Nations Economic Commission for Europe, and UNIDROIT was participating in the person of Mr J. PUTZEYS. The Council expressed the view that this work was important and that co-operation between interested Organisations was desirable.

Transactions on transnational and connected capital markets – The Council took note with satisfaction of the information provided by Mr B. SEN, Member of the Governing Council and Chairman of the restricted Study Group, and by the Secretariat on the progress of the project and the keen international attention it was attracting. It took note of the proposed timetable, specifically that the Study Group was hoping to finish drafting the preliminary text of a substantive law Convention on securities held with an intermediary by end-2004, and that the intergovernmental negotiations that were to follow should be speeded up with a view to adopting the Convention in the course of 2006 or in early 2007.

Non-Legislative Activities – *Status of implementation and promotion of UNIDROIT Conventions, Legal co-operation programme, Uniform Law Review / Revue de droit uniforme and other publications, UNIDROIT Internet site and depository libraries for UNIDROIT documentation, the Uniform Law Data Base, the Situation of the Library.* The Council took note of and expressed its satisfaction at the development of these activities.

Uniform Law Foundation – The Governing Council took note of the report by Professor Sir Roy Goode, President of the Board of Governors of the Foundation, on the 5th session of the Governing Board which took place on 17 April 2004.

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

HARMONISED SUBSTANTIVE RULES REGARDING SECURITIES HELD WITH AN INTERMEDIARY

Report on the 4th session of the UNIDROIT Restricted Study Group on Harmonised Substantive Rules regarding Securities Held with an Intermediary, 24-27 March 2004

The Restricted Study Group for the Preparation of *Harmonised Substantive Rules Regarding Securities Held with an Intermediary* met in Gerzensee near Bern (Switzerland), at the invitation of the Swiss National Bank, for its fourth session from 24-27 March 2004. The session

² "The Preliminary Draft Protocol to the Cape Town Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets: An Opportunity for Representatives of Governments and Industry to Compare Notes", organised by UNIDROIT in co-operation with the Malaysian National Space Agency and the Space Working Group.

was opened by Mr Herbert KRONKE, Secretary-General of UNIDROIT, on behalf of Mr Bernardino LIBONATI, President of UNIDROIT and Mr B. SEN, member of the UNIDROIT Governing Council and Chairman of the Study Group. Mr Hans KUHN welcomed the participants on behalf of the Swiss National Bank, sponsor of the session.

The focus of the fourth session of the Study Group was the discussion and revision of a preliminary draft of an envisaged UNIDROIT instrument regarding securities held with an intermediary. This draft evolved out of discussions and feedback arising from the UNIDROIT *Position Paper on indirectly held securities*³ (August 2003) and from a broadly attended seminar entitled "Legal Risk and Market Efficiency" held at the seat of UNIDROIT in Rome (November 2003). These consultations had stressed the urgent need to develop a consistent legal framework for modern securities holding and transfer where securities were often dematerialised and where there was usually no direct relationship between the intermediary and the account holders. While some countries had developed sophisticated systems that addressed the context of indirectly held securities, others relied on established legal practice or on outdated models designed only for direct holding systems. In a cross-border context, this often led to legal uncertainty and inefficiencies for all market participants. The new UNIDROIT instrument is being designed to address these issues by enhancing investor protection within existing frameworks as well as by ensuring the compatibility of different systems of securities transfer and holding.

At the fourth session, the Study Group took the view that this future UNIDROIT instrument should take the form of a convention, as this would be more effective than a model law. While many of the substantive concerns raised by the draft were addressed at this meeting, it was determined that certain unresolved issues and policy concerns might require the development of alternative proposals to be addressed by the Committee of Governmental Experts at a later stage of the project.

As for the scope of the future UNIDROIT Convention, given that legal uncertainty arises most often in the context of cross-border holding and transaction of securities, the Study Group discussed whether the future instrument should apply only in an international or also in a purely domestic context. The view that the text needed to apply to both prevailed, since the distinction between domestic and international transactions in this area was often blurred and it would be difficult to have provisions applying to international transactions that were different from provisions applying to domestic ones.

It is envisaged that the future UNIDROIT Convention will be harmonised with the 2002 *Hague Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary*. For countries lacking a consolidated legal system regarding securities holding and transfer through intermediaries, the UNIDROIT Secretariat is at present considering the need for and feasibility of an additional instrument with specifically-targeted benchmark provisions for emerging capital markets which could serve as guidelines to improve the functioning and legal certainty of their systems.

As to the substantive provisions of the proposed Convention, the Study Group confirmed the need to address all the issues that had been raised at previous sessions within a single text. These issues include specific provisions to address investor protection in the event of an intermediary's insolvency and simplified rules for the creation and realisation of collateral. Other topics addressed in the current draft and discussed at the meeting include good faith

³ UNIDROIT 2003 Study LXXVIII Doc. 8, available at < <http://www.unidroit.org/english/workprogramme/study078/item1/studygroup/positionpaper-2003-08.pdf> > .

acquisition, netting, finality and irrevocability, provisional credits, loss allocation, the prevention of “upper tier attachment” and the right of an intermediary to use its clients’ assets for its own purposes.

It is accepted by all members of the Study Group that the overarching element of the text is the recognition of book entries in securities accounts. This would, in countries where the book-entry is merely regarded as evidence of an acquisition or transfer such as, for example, in the transfer of ownership of chattel –, require a fundamental amendment to existing national laws in this area. In general, there is concern over the interplay of provisions contained in the draft with existing national law, especially as regards the extensive use of opt-out options in many of the draft provisions.

After reviewing each article of the current draft, the Study Group discussed specific topics raising important policy issues. As regards the topic of collateral, the Study Group declined to determine the steps required for the collateral taker to enforce its securities. It was stressed that the priorities rules needed to be set out very clearly. There was concern over the use of the word “perfection” which had different connotations in different jurisdictions, and it was agreed that the functional result of effective transfers should be described instead.

With respect to provisional credits, the Study Group agreed that there should be enough flexibility allowed for ordinary requirements of settlement processing and that the Convention should not be so drafted as to be more restrictive than current regulations. In order to avoid encroaching upon regulatory matters, it was suggested that the Convention make reference to existing market practices that might govern the availability of excess credits.

The Study Group has not yet found a solution as to how to address the issue of reversibility of credits and revocation of instructions under the future Convention. The Group did agree, however, that set-off by an investor in bonds against the issuer should be provided for but only in the event of an insolvency. As regards the liability of intermediaries to each other, the Group decided that on balance, the allocation of risk should be that the intermediary is liable to its customer for the loss of assets it was holding for its customer with an upper-tier intermediary. However, they agreed that there might be a need to limit liability or exempt it in some circumstances, such as in respect of central securities depositories.

After the thematic discussions and in closing, Mr Sen set out the timeline for future work on the project. The Study Group recently released the current draft ⁴ for public discussion at meetings in Frankfurt, Paris and New York in May and June 2004 and will continue to revise the text over the summer. The Study Group will meet again for a final session in Budapest (Hungary) in the autumn of 2004 to discuss final amendments to the draft before it is submitted to the UNIDROIT Governing Council for approval with a view to proceeding with the intergovernmental negotiation stage. It is hoped that, after three sessions of the Committee of Governmental Experts, a finalised Convention may be ready for ratification by member States by end-2006 or early 2007.

⁴ Study LXXVIII – Doc. 13 prov. 2 – *Draft Convention on Substantive Rules regarding Securities Held with an Intermediary (Preliminary Discussion Draft)*, see: www.unidroit.org/english/workprogramme/study078/item1/draft/s-78-13prov2-e.pdf.

➤ **IMPLEMENTATION OF UNIDROIT INSTRUMENTS**⁵ ◀

**(2001) CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT
AND PROTOCOL ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT**

On 31 March 2004, there were 28 Signatory States to both these instruments (Ukraine and Canada signed the Convention and the Aircraft Protocol on 3 March and 31 March 2004 respectively).

Following ratification by Panama (with declarations under Articles 39, 50, 53 and 54(2)) on 28 July 2003, Ethiopia (with declarations under Articles 39(1)(a), 40 and 54(2)) on 21 November 2003 and by Nigeria (with a declaration under Article 54(2)) on 16 December 2003, the Cape Convention entered into force on 1 April 2004, but only in respect of a category of equipment to which the Protocol applies (Article 49 (1)). Pakistan acceded to the two instruments (with declarations under Articles 39(1)(a), 39(1)(b), 39(4), 40, 52, 53 and 54(2)) on 22 January 2004.

➤ **UNIDROIT RESEARCH SCHOLARSHIPS PROGRAMME** ◀

Under a special co-operation programme financed by the Ministry of Commerce (MOFCOM) of the People's Republic of China, the following Chinese scholars conducted research at UNIDROIT between 1 January and 31 March 2004:

Mr Cui Shufeng, Official, Department of Treaty and Law, MOFCOM (Beijing); Research Period: Feb/April; Research Topic: "Competition Law: Overview of International and Comparative Law Aspects under a Chinese Perspective".

Mr ZHANG Gu, Associate Professor, Beijing University; Research Period: 4 Feb. – 30 April; Research Topic : "Assignment of Rights: Overview of International and Comparative Law Aspects under a Chinese perspective".

Mr HAN Liyu, Associate Professor, Renmin University, Beijing; Research Period: 4 Feb – 30 April; Research Topic: "Franchising: Overview of International and Comparative Law Aspects under a Chinese Perspective".

With partial funding by UNIDROIT, Mr Yuriy TUKTAROV (Russian Federation), Ph.D. Researcher, Institute for Legislation and Comparative Law under the Government of the Russian Federation (Moscow) performed a research period at UNIDROIT from 26 Feb – 26 April on the subject "Transfer of Ownership on Moveable: Comparative Law Aspects".

⁵ For the status of UNIDROIT instruments, please consult www.unidroit.org.