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Item No. 10 on the agenda: Principles of International Commercial Contracts

(memorandum prepared by the Secretariat)

<i>Summary</i>	<i>Preparation of a new edition of the UNIDROIT Principles of International Commercial Contracts with five additional topics</i>
<i>Action to be taken</i>	
<i>Related document</i>	<i>UNIDROIT 2006 – Study L – Misc. 26</i>

DISCUSSION LEADING PARAMETERS AS PROPOSED BY THE SECRETARIAT

Priority			
	High	medium	Low

I. Strategic Plan

UNIDROIT'S unique position to prepare a non-binding instrument of high technical quality (see Strategic Objective No.1) and establish a balanced set of rules relating to international commercial contracts in general for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied (see Strategic Objective No.7).

II. Work Programme 2006-2008

Yes.

III. Current assessment

Considered one of the Institute's most promising projects.

On time	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	yes	slightly delayed	no
	Timeframe determined by Working Group/Governing Council		<input type="checkbox"/>
	Timeframe to be determined at this session		<input checked="" type="checkbox"/>
Problems to be overcome	None		
Staffing implications	One consultant and one officer (50%).		
Budget implications	About €40,000 for a one week session per year, plus €15,000 for one inter-sessional meeting of the Drafting Group per year in the final stages of the project		
Recommendations/ Guidance sought/ Decisions to be taken/ Alternatives?			

BACKGROUND

1. The Working Group for the preparation of the Principles of International Commercial Contracts (3rd) held its first session in Rome from 29 May to 1 June 2006. For a detailed report on the session see UNIDROIT 2006 – Study L – Misc. 26.

2. The Working Group agreed to address the five issues indicated by the Governing Council as possible topics for inclusion in the third edition of the Principles, i.e. (a) unwinding of failed contracts; (b) illegality; (c) plurality of obligors and of obligees; (d) conditions; (e) termination of long-term contracts for just cause. As Rapporteurs have been appointed R. Zimmermann on unwinding of failed contracts, M. P. Furmston on illegality, M. Fontaine on plurality of obligors and of obligees, B. Fauvarque-Cosson on conditions and F. Dessemontet on termination of long-term contracts for cause. Each Rapporteur will prepare a preliminary study and possibly first draft provisions on his/her topic for discussion at the Group's next session in June 2007.

3. With respect to the five topics under consideration, the most controversial issues proved to be the following:

(a) Unwinding of failed contracts:

- whether there should be a separate chapter on unwinding of failed contracts containing a single set of rules dealing with the unwinding of failed contracts generally and possibly in a uniform manner, or whether the relevant provisions should be placed in the context of each single case of failed contracts covered by the Unidroit Principles (avoidance, breach, illegality, etc.). In support of the first approach it was pointed out that a number of issues, such as the distribution of risk of an accidental loss of the goods to be returned, the risk of loss of or damage to the goods on their way back, the cost of restitution, were common in all cases of failed contracts and could therefore be dealt with in a single set of rules

suitable for all cases. In support of the second approach it was argued that the consequences of the various cases of failure of contracts were far from identical and that also from a practical point of view it might be preferable to deal with them separately in each different context. Another view expressed was to combine the two approaches, i.e. to have a chapter dealing with the common issues of restitution and specific provisions placed in the context of each single case of failed contracts.

(b) Illegality:

- whether a distinction should be made between “immoral” and “illegal” contracts, i.e. between contracts which are contrary to basic ethical and socio-political principles and values, and contracts which violate specific statutes, and if so, how should immoral contracts be defined and which mandatory provisions should be taken into consideration in order to determine whether or not a given contract is illegal. While with respect to the first question there was general agreement that such a distinction should be made, different views were expressed as to how “immoral” contracts should be defined. On the one hand it was argued that it would be extremely difficult, if not impossible, to think of a definition that would meet consensus worldwide so that it would be preferable merely to use a rather generic formula such as “internationally recognized fundamental rights and values” in the black letter rules leaving it to the comments to provide further guidance by means of examples. On the other hand it was suggested taking as a starting point the definition of “international public policy” adopted in 2002 by the International Law Association which provides a number of more specific criteria. Another approach suggested was to adopt a notion of “connectedness”, i.e. to consider a contract immoral if it was against the values of the countries connected to the transaction. Yet another suggestion which met with considerable support was to define “immoral” and “illegal” contracts first of all, or even exclusively, by reference to the mandatory provisions expressly stated in the Principles as well as to the basic ideas and values underlying them.
- whether with respect to the effects a distinction should be made between the two types of illegality in the sense that “immoral” contracts always be null and void or that, like “illegal” contracts, they can have no effects, some effects or full effects, depending on the circumstances of the case. The prevailing view was the latter, and as to the factors to be taken into account in order to determine the effects in each given case it was held that both the European Principles (Art. 15:102 (3) and the U.S. Restatement on Contracts (§ 178) provided useful indications.

(c) Plurality of obligors and obligees:

- whether the rules on plurality of obligees should simply be a mirror image of those dealing with plurality of obligors or whether the two situations present very few if any analogies and should therefore be approached separately. While one voice strongly advocated this second approach, the majority felt that the traditional approach as reflected for instance in the European Principles was still valid.
- whether with respect to the two most important kinds of “plural” obligations one should adopt the terminology used in the European Principles and speak of “solidary”, “separate” and “communal” obligations or stick to the traditional terminology of “joint and several”, “separate” and “joint”. While there was support for the former solution, the prevailing view was that the latter should be adopted also in view of the fact that the European Principles’ terminology was absolutely unfamiliar to common lawyers.

(d) Conditions:

- whether in addition to “conditions”, i.e. future and uncertain events, the Principles should also deal with “terms”, i.e. future but certain events. While there was some support for the latter proposal, the prevailing view was against it not only because the very notion of “terms” in this sense was absolutely unknown in common law systems but also in view of the fact that most of the issues normally dealt with in continental codifications under the heading “terms” were already taken care of by the Principles (see in particular Arts. 6.1.1 et seq. and Art. 1.12). At most one might consider adding somewhere in the Principles a provision dealing with the cases where an obligor loses the benefit of the term, e.g. when it becomes insolvent or unilaterally reduces the security previously given to the obligee.

(e) Termination of long-term contracts for just cause:

- whether the Principles should provide for such a remedy or rather leave it to the parties to do so by including in their contract a term to that effect. While the view was expressed that the Principles should not provide for such a remedy also in view of the vagueness of its scope and the consequent risk that it might encourage frivolous litigation, the prevailing view was that the issue should be addressed in view of its great importance particularly in the context of so-called relational contracts. There was however total agreement that the conditions for termination for just cause should be very restrictive and clearly defined and that the relationship between this and similar remedies, such as hardship and termination for breach, need to be further clarified.