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Item No. 7 on the agenda: UNIDROIT Model Law on Leasing: follow-up and promotion

(Memorandum prepared by the Secretariat)

<i>Summary</i>	<i>Completion of Official Commentary on UNIDROIT Model Law on Leasing and proposal for programme of promotional seminars</i>
<i>Action to be taken</i>	<i>See paragraphs 34 and 35, below</i>
<i>Mandate</i>	<i>Work Programme 2006-2010</i>
<i>Priority level</i>	<i>High</i>
<i>Status</i>	<i>On target</i>
<i>Related documents</i>	<i>UNIDROIT 2010 – Study LIXA – Doc. 23; Annual Report 2009 (C.D. (89) 2), pp. 14 and 15.</i>

STATUS OF THE PROJECT

1. A summary of the Secretariat's progress during 2009 in implementing the Resolution passed by the Joint Session of the UNIDROIT General Assembly and the UNIDROIT Committee of governmental experts for finalisation and adoption of a draft Model Law on Leasing, held in Rome from 10 to 13 November 2008, inviting the UNIDROIT Secretariat to prepare an Official Commentary on the UNIDROIT Model Law on Leasing, adopted in Rome, at the conclusion of the Joint Session, on 13 November 2008, in close co-operation with the Reporter to the Joint Session, the Secretary to the Joint Session, the Chairman of the UNIDROIT Committee of governmental experts and members of the Drafting Committee of that Committee, is to be found in the *Annual Report 2009*.¹

2. This memorandum will, accordingly, focus on the work accomplished by the Secretariat in finalising the Official Commentary in the light of the prescriptions given to it by those participating in the meeting held in Rome on 23 and 24 June 2009 and the opportunity the completed Official Commentary affords for promotion of the Model Law itself.

¹ Cf. also M.J. STANFORD: "UNIDROIT's preparation of a model law on leasing: the crossing of new frontiers in the making of uniform law" in *Uniform Law Review* 2009-3, 578 *et seq.*

FINALISATION OF THE OFFICIAL COMMENTARY

3. Other pressing commitments meant that it was impossible for the Secretariat to dedicate the necessary amount of time to finalisation of the Official Commentary in the second half of 2009. It, however, prepared English- and French-language versions of the Official Commentary in January 2010. In accordance with the agreement reached at the June 2009 meeting, the Secretariat was in touch with Mr E.M. Bey (France) with a view to resolving the issue regarding the language to be employed in respect of that part of the Official Commentary dealing with liquidated damages. A solution was worked out in the process which was approved by the Reporter to the Joint Session.

4. The Secretariat in February 2010 submitted the Official Commentary to those having participated in the aforementioned meeting for comment, namely Mr John Makhubele (South Africa), as Chairman of the UNIDROIT Committee of governmental experts, Mr Ronald DeKoven (United Kingdom), as Reporter to the Joint Session, and Ms Mounia Allouch and Ms Catherine Walsh (Canada), Mr El Mokhtar Bey (France) and Messrs Michael Dennis, Henry Gabriel, William Henning and Steven Weise (United States of America).

5. The Official Commentary as finalised by the Secretariat in both English and French in the light of the comments received in response to this invitation is to be found in UNIDROIT 2010 – Study LIXA – Doc. 23.

PROMOTION OF THE MODEL LAW

(a) Case for organisation of a programme of promotional seminars

6. It will be recalled that, at its 88th session, held in Rome from 20 to 23 April 2009, the Governing Council endorsed the Secretariat's proposal that it would be better to hold off from organising promotional seminars for the time being, in particular whilst awaiting completion of the unofficial versions of the Model Law to be prepared in Arabic, Chinese, Russian and Spanish (cf. C.D.(88) 6, §§ 11 and 12(b)).

7. The Secretariat has in the meantime received unofficial Russian- and Spanish-language versions of the Model Law, both contributed on a complimentary basis. An unofficial Arabic version is awaited, on the same basis, for the end of March 2010. An unofficial Chinese version has also been promised.

8. This being the case, the Secretariat believes that, while the calls on its manpower resources remain what they were at the time of the 88th session of the Governing Council, it cannot put off launching the promotion of the Model Law much longer without seriously compromising its chances of success and that it is, therefore, advisable that the Secretariat be authorised to put in place, at the earliest possible opportunity, a programme for the promotion of the Model Law in different regions of the world, having regard to its essential purpose, namely the assistance of developing countries and countries in transition to a market economy.

9. Aware as it is of the limited resources available to the Institute and of the conflicting calls on use of its resources, the Secretariat would propose that such a programme be concentrated on the parts of the world most likely to be interested in, and, therefore, potentially to benefit from exposure to the Model Law.

10. In this context, the Secretariat was particularly impressed during formulation of the Model Law by the level of interest registered in certain parts of the world, first and foremost the countries of sub-Saharan Africa. It will be recalled that it was essentially as a means of responding to the strictures addressed to the Secretariat by the Ambassadors of African member States in Italy

regarding what was seen as an industrialised world bias in the Institute's work programme that the Governing Council and the General Assembly decided to authorise the Secretariat to go ahead with preparation of the Model Law, on the basis that it would be primarily directed toward developing and transition economies. And, indeed, the first State to implement the Model Law was Tanzania.

11. The Secretariat would, therefore, maintain that a priority in the envisaged programme should be sub-Saharan Africa. Given the way in which that continent tends to divide along linguistic lines, it would, further, maintain that it is appropriate to contemplate either, ideally, one seminar in a country that would be reasonably accessible to the representatives of Government and business of both English- and French-speaking countries or, should that raise too many difficulties, one seminar in an area of English-speaking Africa reasonably accessible to all and another in an area of French-speaking Africa of equal accessibility.

12. It was significant that, notwithstanding the fact that the Sultanate of Oman is not yet a member of the Institute, its participation in the first session of the UNIDROIT Committee of governmental experts for the preparation of a draft model law on leasing led it to invite the Institute to hold the second session on its territory. The Omani Authorities, moreover, have not only recently reiterated their intention to implement the Model Law but have also signalled their interest in becoming a member of the Institute. The Arabic-speaking world has never been particularly well-represented among the Institute's membership. It is also significant that a number of other Arabic-speaking countries not previously having been notable for their participation in the activities of UNIDROIT, including Kuwait, Qatar and the Sudan, took an active part in the negotiations that led to adoption of the Model Law. What is more, one of the leading figures in the development of the Model Law has all along been Mr Bey, the leading authority on leasing in the French-speaking world for decades and an Arabic speaker to boot; ² Mr Bey is one of the organizers of a half-day seminar, which will take in the Model Law, being organised by the Faculty of Economic Sciences of the University of Tunis on 3 April 2010 (Mr Stanford has been invited to speak on the Model Law at the seminar).

13. Moreover, the time has never been more ripe for the Institute to give exposure to its activities in the Arabic-speaking world, the Government of the Kingdom of Saudi Arabia having become a member of the Institute on 1 January 2009. What is more, nearly all the countries where the International Finance Corporation (I.F.C.) has to date found it appropriate to implement the Model Law, as part of its programme of developing the private sector, are in the Arabic-speaking world, viz. Jordan, the Palestinian National Authority and Yemen, and it would seem that Iraq is another candidate for regulatory reform in the leasing field by the I.F.C. in 2011.

14. An interesting possibility for covering, *inter alia*, both certain North African Arabic-speaking countries, certain Middle Eastern Arabic-speaking countries and certain Eastern European transition economies would be to contemplate a seminar under the auspices of the Union for the Mediterranean, the members of which include Algeria, Egypt, Mauritania, Morocco and Tunisia, Jordan, Lebanon, the Palestinian National Authority and Syria and Albania, Bosnia and Herzegovina and Montenegro respectively (Libya, moreover, has observer status with the Union in question). The Secretariat has raised this possibility with a member State, which is one of the leading members of that Union.

15. The Secretariat would, in any case, maintain that, from all points of view, the Arabic-speaking world should be one of the main targets for such a programme.

² Cf. E.M. BEY: "Les rapports des parties dans la Loi type d'UNIDROIT sur la location et la location-financement» in *Uniform Law Review* 2009-3, 601 *et seq.*

16. Given that one of the principal reasons for the Secretariat proposing the preparation of a model law in this field in the first place was the importance attaching to the People's Republic of China's drafting of national legislation on leasing, the Secretariat would submit that it would be highly politic to organise a seminar in China too. In this connection, it is worth recalling that the Secretariat hosted a member of the team working on the proposed Chinese leasing law, Mr. Zhang Xuesong, of the Financial and Economy Committee of the National People's Congress, in May/June 2008. There can be no doubt that the drafters of the proposed Chinese leasing law have given long and careful consideration to its shape and that a seminar in China would be extremely useful at a time when the Chinese leasing law is still under consideration.

17. It might, moreover, reasonably be expected that such a seminar might have a catchment area broader than just the People's Republic of China, given the likely interest of the countries of South Asia and South-East Asia. However, it might also be considered worthwhile to contemplate the possible organisation of a separate seminar in South/South-East Asia, all the more so given the interest expressed by the Authorities of both Indonesia and Pakistan in seeing such seminars organised.

18. Most of the experts sounded in this connection by the Secretariat would seem to be of the view that a seminar for the countries of the Former Soviet Union, whilst useful, might not be seen as being quite as vital as for the countries already mentioned. However, in this connection it is worth recalling that one of the first seminars where it was considered useful to discuss the Model Law was in Azerbaijan and that the first unofficial language version of the Model Law which the Secretariat received was, precisely, the Russian-language version.

19. A question-mark too must, necessarily, hang over the countries of Latin America and the Caribbean, some of which already have developed legal frameworks governing leasing. This is not, however, always the case and it is instructive to recall that some of the most comprehensive comments received on the Model Law when it was still in the drafting phase came from the Government of Bolivia, not normally conspicuous for its involvement in the activities of the Institute and a member State that the Secretariat has a particular need to reach out to. Moreover, one of the principal drafters of the Model Law, Mr Rafael Castillo-Triana (Colombia), who prepared the unofficial Spanish-language version of the Model Law, is an acclaimed leasing expert in the region.

20. Summing up, then, the Secretariat would submit that

(i) a programme of promotional seminars on the Model Law should be contemplated over what might, depending on the number of seminars to be envisaged, be either a longer or a shorter number of years;

(ii) in the likely event of a choice having to be made among the different regions mentioned above, priority should be given to a seminar in the People's Republic of China (in view of its ongoing preparation of a leasing law), one or more in the English- and French-speaking regions of Africa (with, if possible, a preference for a single seminar reaching out to both) and one in South/South-East Asia;

(iii) depending on the number of seminars to be envisaged, the seminars be organised either over the two and a half years commencing on 1 January 2011 (should it be decided to go for a more restricted programme) or over a longer period (should there be a feeling that the programme should cover as many parts of the world as possible).

(b) *Organisational and funding implications of programme of promotional seminars*

(i) Basic structure of proposed seminars

21. The Secretariat would propose that the seminars should be held over a day and should be structured in such a way as to permit key participants in the development of the Model Law to illustrate different aspects of the Model Law and to answer questions. It would, clearly, be desirable for a representative of the Secretariat be present too, not least in view of the opportunity that such events would afford for the giving of exposure to the Institute in parts of the world where its name might be little known. However, in considering this possibility, the financial implications would, clearly, have to be weighed in the balance.

(ii) Financial implications of proposed seminars

22. Indeed, in proposing such a programme, the Secretariat is only too aware of the constraints on the Institute's budget. However, against these constraints has to be weighed the inevitably negative consequences that would flow from the Secretariat failing to assume its responsibilities in this regard: the Secretariat still recalls the expressions of indignation voiced by the leading figures in the international leasing industry at the Secretariat's decision following adoption of the UNIDROIT Convention on International Financial Leasing to forego promotion exercises. And it is also more confident than it would otherwise be in this regard in the light of the unprecedented response of correspondents of the Institute, from all over the world, to the Governing Council's exhortation that the development of the Model Law impact as little as possible on the Institute's budget. It would, therefore, propose that those correspondents who provided the backbone of the Institute's efforts to develop the Model Law be once more invited to be the principal proselytisers on this occasion, at their own expense. It is encouraging to note that the Institute has already received a favourable response in this sense from Mr DeKoven.

23. A preliminary question to be dealt with, as always, on these occasions, concerns the conditions for participation in such seminars. The principal beneficiaries of the proposed exercise being developing and transition economies, the Secretariat would maintain that it would be egregious to contemplate the charging of a registration fee. The sort of funding that would be needed for the organisation of such seminars should rather be looked for, it is suggested, *in situ*: the Secretariat would hope that the Government and financial institutions of the countries where such seminars would be held would look favourably on the opportunity thus afforded them to gain expert insights into the new legislative framework being offered and thus consider providing themselves the venue and the facilities for such seminars. On that basis, the Secretariat would maintain that participants could then reasonably be expected to look after their own accommodation arrangements.

(iii) Mounting of team-effort with other Organisations

24. The Secretariat is, as ever, conscious of the benefits to be derived from inter-Organisational team-work in the prosecution of its work, not least from the angle of giving its members value for money.³ It has already been in touch regarding the proposed programme with two of the Organisations which took part in the development of the Model Law, namely the Commonwealth Secretariat and the I.F.C., with a view to ascertaining whether they would be interested in participating in, and, possibly, supporting the programme. The Secretariat's contacts have been limited, for the time being, to the representatives of the Commonwealth Secretariat and the I.F.C. who took part in development of the Model Law but both have kindly agreed to follow up on the matter with the competent organs of their Organisations.

³ Cf. P. CONTINI: "Methods of co-ordinating the activities of the different international Organizations and team-work among them" in *Uniform Law Review* 1973-II, 38 *et seq.*

(a) *Commonwealth Secretariat*

25. It will be recalled that the Commonwealth Secretariat has already indicated its interest in working with the Secretariat on implementation of the Model Law, a matter of some importance, given the fact that the Commonwealth counts 54 members and that the Commonwealth Secretariat is strongly encouraged, in the delivery of its programmes, to work in partnership with other Organisations having similar values and objectives.

26. Different means have been proposed by the Secretariat's contact in the Commonwealth Secretariat for carrying this forward. In view of the importance of concentrating on cost-effective programmes, it has been suggested that a starting point might be a half-day meeting to be organised by the Commonwealth Secretariat at its London Headquarters, at which "stakeholders" in the Commonwealth Secretariat (such as the person in charge of civil society organisation, the Commonwealth Foundation, those divisions working directly with small-, medium- and micro-enterprises and those sections responsible for gender and youth affairs) would hear a representative of the UNIDROIT Secretariat introduce the Model Law with a view to such stakeholders then taking the idea forward and promoting it within their own individual sectors.

27. This would also provide an opportunity for a joint interview with the Commonwealth Secretariat's Communication and Public Affairs Division, which would then be posted on the web site of the Commonwealth Secretariat.

28. It is anticipated that the proposed meeting would, through the interaction with different divisions of the Commonwealth Secretariat, permit promotion of the Model Law in different audiences in Commonwealth jurisdictions. Moreover, the idea would be to invite the Commonwealth Parliamentary Association to the meeting, thus opening the way for direct communication with Parliamentarians in the different Commonwealth jurisdictions and the possibility of bringing about implementation of the Model Law in such jurisdictions.

29. The Secretariat's contact in the Commonwealth Secretariat has also proposed that the Model Law be circulated to the relevant Ministers in Commonwealth jurisdictions, notably those responsible for legal, youth, gender and business matters, thus prompting a country to invite the Secretariat to provide technical assistance to national stakeholders.

(β) *International Finance Organization*

30. Council members will recall the strong support given to the Secretariat by the I.F.C. during development of the Model Law. As mentioned above, the Model Law has already served as the basis of leasing laws passed in Jordan, Tanzania and Yemen.⁴ Currently, the I.F.C.'s efforts to add Afghanistan and the Palestinian National Authority to that list have been held up, in the former by the paralysis of Parliamentary business during the Presidential elections in Autumn 2009 and Parliament's subsequent concentration on the composition of the Cabinet and in Palestine by the dimming of the prospects for reconciliation between Fatah and Hamas which might have led to reconvening of the Legislative Assembly; however, the Finance and Economic Committee of the Afghan Parliament has reviewed 13 Articles of the draft Law to date and it is hoped that its examination of the draft Law will resume in March 2010, with the end of the Parliamentary recess, and the draft Law is among the provisional Laws put down for direct enactment by the President of the Palestinian National Authority, probably by June 2010.

⁴ Cf. M. SULTANOV: "The UNIDROIT Model Law on Leasing: an effective new legal framework to support leasing markets in the developing countries" in *Uniform Law Review* 2009-3, 637 *et seq.*

31. At the present time, the next candidate for leasing regulatory reform by the Middle East and North African (M.E.N.A.) office of the I.F.C. is Iraq but work there is dependent on the lifting of travel restrictions and will not, in any case, happen before early in 2011. The Model Law has, meanwhile, been transmitted by the I.F.C. to the Government of Djibouti, which has asked the World Bank for information on leasing.

32. In general, the I.F.C. is not, at present, in a position to become directly involved or provide support for the organisation of the proposed programme - the primary focus of its leasing strategy having shifted, in the wake of the economic crisis, from regulatory reform to capacity building at the lessor level - although it has indicated that it would be happy to participate in, and speak at, and/or sponsor the participation of a number of invitees to such seminars, however, subject to the I.F.C.'s regional leasing strategies at the time. The situation may, however, change and the Secretariat's contact in the I.F.C. has indicated that he would hope that the I.F.C. will, ultimately, be able to play a greater role in the proposed programme, a matter which will be raised at the next I.F.C. annual meeting dealing with access to finance programmes (including leasing), due to be held in October 2010, and at the meeting at which the Organisation's overall advisory services three-year strategy will next be discussed, in Summer 2011.

33. In the meantime, the Secretariat's I.F.C. contact, who is based in the M.E.N.A. region, is sounding his colleagues in other regions regarding the proposed programme, as there may be some regions where regulatory reform activity is already underway or contemplated. Moreover, the I.F.C. may be organising a number of events to promote leasing in developing countries - for example, a leasing investment conference (at which lessors will be the primary targets but Governments will also be represented) is being planned for the M.E.N.A. and Africa regions by the end of 2010 in either Egypt or another North African country and, should this plan materialise, then the I.F.C. has indicated that it would be happy to invite UNIDROIT to speak about the Model Law and its usefulness for the development of leasing markets at such a conference.

ACTION TO BE TAKEN

34. *The Secretariat would, in the first place, invite the Governing Council to authorise publication of the Official Commentary in both English and French.*

35. *Secondly, the Secretariat would invite the Council to approve the general lines of its proposed programme of seminars, on the understanding that it should impact as little as possible on the Institute's budget and be organised, as much as possible, in co-ordination with other Organisations, such as the Commonwealth Secretariat, the I.F.C. and the Union for the Mediterranean.*