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Item No. 9 on the agenda: Preparation of a guidance document on existing texts in the area of international sales law in cooperation with UNCITRAL and the Hague Conference on Private International Law

(prepared by the Secretariat)

<i>Summary</i>	<i>Developments relating to the preparation of a guidance document on existing texts in the area of international sales law in cooperation with UNCITRAL and the Hague Conference on Private International Law</i>
<i>Action to be taken</i>	<i>The Governing Council is invited to take note of the progress made since its last session</i>
<i>Mandate</i>	Work Programme 2017-2019 <i>(UNIDROIT 2016 – A.G. (75) 3 corr.) p. 13.</i>
<i>Priority level</i>	<i>High</i>
<i>Related documents</i>	<i>UNIDROIT 2016 – C.D. (95) 8; UNIDROIT 2017 – C.D. (96) 2</i>

I. BACKGROUND

1. On 14 December 2015, the Secretariat received a communication from the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) inviting UNIDROIT and the Hague Conference on Private International Law to cooperate on a project for the “creation of a roadmap to the existing texts in the area of international sales law (sales contracts) prepared by each organisation, primarily the CISG, the UNIDROIT Principles, and the Hague Principles, and providing an assessment of interactions between the texts, their actual and potential use, application, and impact, all with the goal to facilitate promotion of their appropriate use, uniform interpretation, and adoption.” Such a project should “extend also, as relevant, to the other texts in the field prepared by the three organisations (including, for example, the Limitation Convention, the Electronic Communications Convention, the 1983 Uniform Rules, ULIS/ULFC 1964, and the 1955/1986 Hague Conventions), and make reference, as needed, to outside instruments (e.g. those of regional economic integration organisations such as the EU, OHADA, as well as those of the ICC, ITC).”

2. As regards the methodology, it is suggested that the work should be entrusted to “a small joint panel of experts, chosen by the three organisations and including, to the extent possible, representatives from differing legal traditions and from countries with differing levels of economic development, and also including, as possible, representatives from other particularly relevant organisations (e.g., regional economic integration organisations, ICC, ITC)”. The envisaged outcome would be a joint publication or online tool reflecting contribution of all organisations and keeping in mind the successfully completed “UNCITRAL, Hague Conference, and UNIDROIT Texts on Security Interests”¹ having “legislators, judges and arbitrators, and/or lawyers and commercial operators” as target audience.

3. At its 95th session (Rome, 18-20 May 2016), the Governing Council agreed to recommend this topic for inclusion in the UNIDROIT Work Programme for the triennium 2017-2019 by the General Assembly, and proposed to assign it a high level of priority. The General Assembly, at its 75th session (Rome, 1 December 2016) endorsed that recommendation.

II. CURRENT STATUS OF THE PROJECT

4. The governing bodies of both the Hague Conference on Private International Law (HCCH) and the United Nations Commission on International Trade Law (UNCITRAL) also approved the joint project in 2016. The secretariats of the three Organisations have since held a series of exchanges with a view to further refining both the proposed nature and scope of the projects, as well as devising the methodology and clarifying and timetable.

5. It was agreed that, with so many different legislative and non-legislative instruments in the area of international commercial contract law in place, it would be beneficial to provide guidance to stakeholders in order to identify the relevance and impact of each instrument and their relationship with other legal instruments. The goal of the suggested Legal Guide would therefore be to discuss pertinent issues and, in that context, assist the users in identifying, understanding and applying relevant uniform instruments. The Legal Guide would explain the relationship between different instruments and the fundamental features of each of them rather than focus on their details. However, the Legal Guide would not be of normative character and would refrain from interpreting relevant rules. Rather, the Legal Guide would provide basic information on existing instruments and include illustrations for the benefit of different legal actors, such as judges, legislators, arbitrators and legal counsels.

6. The secretariats have invited five renowned experts in private international law and international contracts law from different legal traditions and geographic regions to contribute, in a personal capacity, to the preparation of the Legal Guide. It was agreed that, as a first step, the various sections which are of relevance for each Organisation would be drafted separately and the resulting document be shared with concerned organisations and other stakeholders for approval.

7. The three secretariats have also agreed on a tentative outline (see Annexe hereto), which contains the attribution of the various sections of the Legal Guide to the relevant coordinating Organisation. However, the various sections should not be considered as an individual work product, but rather as an initial draft to be revised by the Secretariats in consultation with other organisations and subject-specific experts, as needed.

8. The three secretariats aim to have a first tentative draft by 4 September 2017. It is envisaged that the consolidated draft would then be presented to the experts for additional review and the resulting document would be finalised by the Secretariats in an inter-governmental process, which may include circulation to stakeholders. A formal approval by the governing bodies of the Organisations would follow.

¹ UNCITRAL, Hague Conference and UNIDROIT Texts on Security Interests: Comparison and analysis of major features of international instruments relating to secured transactions (New York, 2012).

III. ACTION TO BE TAKEN

9. *The Governing Council is invited to take note of the progress made since the last session and encourage the Secretariat to continue its collaboration with the Hague Conference and UNCITRAL in this regard.*

ANNEXE**Legal Guide to International Commercial Contracts (with a Focus on Sales)*****Draft Outline*****1. Introduction** (To be drafted directly by the three Organisations)

- a. Origin of the project
- b. Purpose
- c. Approach
 - i. international commercial contracts, with a focus on international sales
 - ii. uniform substantive law or private international law
 - iii. hard law or soft law

2. The interaction between international commercial contracts and sales contracts
(UNCITRAL)

- a. Sales contracts and other contracts relevant to international commercial transactions: carriage of goods, payments, financing, etc.
- b. Sales contracts and supply chain management (UNIDROIT)

3. Determination of the law applicable to international commercial contracts (HCCH)

- a. By direct application of a uniform law treaty (PIL provisions in substantive instruments)
- b. By parties' choice
 - i. Choice of State law or transnational (non-State) law
 - ii. Hague Principles on Choice of Law in International Commercial Contracts (HPCL)
- c. Absent parties' choice
 - i. National law
 - ii. Uniform private international law instruments
- d. Mandatory provisions

4. Substantive Law of Sales

- a. CISG (UNCITRAL)
 - i. Scope of application (including declarations) - Bases for applying the CISG (see above point 3.a)
 - ii. Sales contracts not covered under the CISG scope
 1. Choice of applicable sales law and the HPCL (see above point 3.b)
 2. Choice of the CISG as governing sales law, including the role of the UNIDROIT Principles
 - iii. General principles
 1. Incoterms: description, operation
 2. Non-uniformly defined terms
 - iv. Obligations of the parties
 - v. Remedies and exemption from liability

- b. Limitation Convention (UNCITRAL)
 - i. Scope of application
 - ii. Substantive provisions
 - iii. Relationship with CISG
- c. UNIDROIT Principles (UNIDROIT)
 - i. Scope of application
 - 1. Relationship with CISG and Limitation Convention
 - 2. Relationship with HPCL
 - ii. Overview
- d. UNCITRAL Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance (UNCITRAL)
- e. Regional texts
 - i. Brief general discussion (To be drafted directly by the three Organisations)
 - ii. Reference to specific texts (e.g. OHADA Uniform Act Relating to General Commercial Law, Model civil code of the Community of Independent States, PECL, DCFR, etc.) (To be inserted, when possible, in relevant sections. Contributions by concerned Organisations to be considered.)
- f. Model contracts based on uniform texts (UNIDROIT – text to be provided by each concerned Organisation)
 - i. ICC Model International Sale Contract and Developing Neutral Legal Standards for International Contracts
 - ii. ITC Model Contracts for Small Firms
- g. Other guidance texts
 - i. IBA Cross-Border Transactions: Drafting Guide for International Sales Contracts
 - ii. Others

5. Recurring Legal Issues Arising in connection with Sales Contracts (UNCITRAL)

- a. Use of electronic means
- b. Uniform law of electronic contracting: United Nations Convention on the Use of Electronic Communications in International Contracts, including in relation to CISG and Limitation Convention
- c. Distribution contracts
- d. Agency
- e. Software / Data / Intellectual Property issues
- f. Countertrade / Barter (including UNCITRAL Legal Guide on International Countertrade Transactions)

6. Guidance for specific business sectors (optional; content to be verified)