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Item No. 11 on the agenda: Model law on commercial leasing

(Memorandum prepared by the Secretariat)

<i>Summary</i>	<i>Status of the preliminary draft model law on commercial leasing under consideration by a UNIDROIT Committee of governmental experts</i>
<i>Action to be taken</i>	<i>Authorisation of the extraordinary procedure anticipated for the approval and promulgation of the future draft model law on commercial leasing</i>
<i>Related documents</i>	<i>UNIDROIT 2007 – Study LIXA –Doc. 12; UNIDROIT 2008 - C.G.E. Leasing/2/W.P. 4 (to be communicated in due course); Implementation of the Strategic Plan (C.D. (87) 6, p. 6)</i>

DISCUSSION LEADING PARAMETERS AS PROPOSED BY THE SECRETARIAT

Priority				
	high	medium	low	to be determined

I. Strategic Plan

Yes, because of (1) UNIDROIT's unique position to carry out work on specific areas of secured transactions (cf. Strategic Objective No. 1) and, (2) its potential benefits for developing countries and economies in transition (cf. Strategic Objective No. 7).

II. Work Programme 2006-2008

Yes.

III. Current assessment

- Recent feedback from member States

Great interest in certain member States (Chile, People's Republic of China, Latvia, Nigeria, Russian Federation, South Africa and United States of America) - as well as in certain non-member developing States (Burkina Faso, Gambia, Oman and Tanzania) - that have been involved through the participation of experts from their countries

- Recent feedback from intergovernmental stakeholder

Great interest in Commonwealth Secretariat (representing member States of the Commonwealth)

- Recent feedback from industry and other private stakeholders

Varied from **great interest** (International Finance Corporation and Equipment Leasing Association of the United States of America) to **moderate interest** (European Federation of Equipment Leasing Company Associations)

On time		slightly delayed	no
	yes		

Timeframe determined by C.G.E./Governing Council/General Assembly



Timeframe to be determined at this session



Potential benefits and beneficiaries	<p><i>Benefits:</i> through availability of a modern legal framework, an anticipated increase in the availability of lease financing for developing countries and countries in transition to a market economy</p> <p><i>Beneficiaries:</i> private sector in developing economies and economies in transition to a market economy</p>
Staffing implications	One officer with support from another officer for translation and a secretary (part-time)
Budget implications	Marginal
Recommendations/ Guidance sought/ Decisions to be taken/ Alternatives?	Authorisation of extraordinary procedure for approval and promulgation of preliminary draft model law.

BACKGROUND

(a) Status of project

1. At its 85th session, held in Rome from 8 to 10 May 2006, the Governing Council, subject to the making of certain amendments, authorised the Secretariat to transmit the text of the preliminary draft model law on leasing established by a UNIDROIT Advisory Board (hereinafter referred to as *the preliminary draft*) to Governments for finalisation.

2. Following the making of the amendments requested by members of the Council, the Secretariat, in late July 2006, transmitted the text of the preliminary draft to Governments and Organisations for information and comment. Given the special focus in the preliminary draft on the needs of developing countries and countries engaged in the transition to a market economy, the text was transmitted not only to member States but also to developing States and States in transition to a market economy in general.

3. In line with the decision taken by the Governing Council at its 84th session, held in Rome from 18 to 20 April 2005, as ratified by the General Assembly at its 59th session, held in Rome on 1 December 2005, the Secretariat in the meantime sought to organise the intergovernmental consultation process in respect of the preliminary draft in such a manner as not to impact on the Institute's Budget. Given the special focus of the preliminary draft as a means of legal assistance to developing economies and economies in transition, it was, moreover, decided to seek to organise this process in the developing world, not only with a view to ensuring that these countries played an appropriately active role in determining the final shape of an instrument primarily intended for their benefit but also so as to avoid the situation where intergovernmental negotiations in respect of UNIDROIT preliminary draft instruments were typically conducted in fora where the vast majority of developing States and States in transition, if represented at all, were only represented by diplomatic agents of the States in question accredited to Rome and these agents normally had neither expertise in the subject-matter nor authorisation to negotiate fully with the representatives of other Governments participating in the process.

4. In these efforts the Secretariat has found invaluable support from one member Government (South Africa) and one non-member Government (Oman) as well as from the International Finance Corporation (I.F.C.). The Secretariat having decided that, in the interest of ensuring maximum transparency, it was desirable to host the first session of the UNIDROIT Committee of governmental experts for the preparation of a draft model law on leasing (hereinafter referred to as *the* Committee) on the territory of a member State, it approached the Government of South Africa to ascertain whether it would be prepared to host the session on its territory. Meanwhile, Ms Rachel Freeman, one of the I.F.C. representatives who participated in the work of the UNIDROIT Advisory Board and who is Deputy General Manager and Sector Operations Manager for Financial Markets in respect of the Private Enterprise Partnership Africa (pepafrika), kindly agreed to fund both the renting of the premises and the simultaneous interpreters needed for the session, as also to provide the necessary back-up staff (such as secretaries and messengers).

5. Following the decision taken in January 2007 by the Minister of Justice and Constitutional Development of South Africa to approve the holding of the first session of the Committee in South Africa, it took place in Sandton, a suburb of Johannesburg, from 7 to 10 May 2007. It began with a half-day seminar designed to familiarise those representatives of Governments and Organisations attending with the overall objectives and basic features of the preliminary draft. This seminar was chaired by Adv. J.H. de Lange, South Africa's Deputy Minister of Justice and Constitutional Development. The session itself was attended by experts representing 24 States (Angola, Australia, Brazil, Bulgaria, Burkina Faso, Burundi, Cameroon, Chile, the People's Republic of China, Gambia, Germany, India, Ireland, Japan, Latvia, Oman, Poland, Portugal, Qatar, Rwanda, South Africa, Sudan, the United Republic of Tanzania and the United States of America) – almost half of which were non-member States - and four international Organisations (the Commonwealth Secretariat, the International Chamber of Commerce, the International Finance Corporation - which, moreover, brought to the session experts participating in three of its leasing programmes, namely those in Ghana, Rwanda and Tanzania - and the United Nations Commission on International Trade Law (UNCITRAL)). The Committee elected Mr I.S. Thindisa (South Africa) as its Chairman and Mr R.M. DeKoven, a UNIDROIT correspondent, was appointed Reporter to the Committee. A drafting committee was established made up of elements of the delegations of Oman, Rwanda, Tanzania and the United States of America, with the Reporter participating in its work on an *ex officio* basis.

6. The session may be judged a complete success in terms of both the substantive progress made on the preliminary draft and the lively participation of experts from developing countries in the work of both the Committee itself and the Drafting Committee. Inspired by the opening address given by Adv. de Lange, in which he stressed the importance of the preliminary draft as a means of permitting developing countries to catch up with the practices of the developed world, the Committee on first reading focussed in particular on achieving a fully balanced instrument. This concern underlay a significant number of the amendments agreed to, for instance, in Article 10(1)

making both the lessee's and the lessor's duties irrevocable and independent once the leasing agreement has been entered into, in the case of a financial lease, and allowing the lessor and the lessee to agree to make any of their duties irrevocable and independent (by specifically identifying each duty that is irrevocable and independent), in the case of a lease other than a financial lease. The Drafting Committee met to implement the amendments agreed by the Committee on first reading and the Committee at its final meeting was able to review the product of the Drafting Committee; in addition to amending the title of the preliminary draft, which now refers specifically, in line with its sphere of application, to *commercial* leasing (as opposed, that is, to consumer leasing), it flagged a number of points for further consideration at its second session. Particular importance attaches to the decision by the Committee to endorse the proposal tabled jointly by the Secretariats of UNIDROIT and UNCITRAL for dealing with the co-ordination of the preliminary draft and the then draft UNCITRAL legislative guide on secured transactions.

7. Quite apart from the realisation in Johannesburg of the Secretariat's aim of bringing the negotiations on the preliminary draft directly before the developing countries and transition economies for which it was specifically intended, the related decision to broaden participation in the Committee beyond UNIDROIT's membership had a significant effect on bringing UNIDROIT's work to the attention of a number of States previously largely unaware of its existence. It was thus that the Minister of Commerce and Industry of Oman, the representatives of which played a particularly active part in the negotiations in Johannesburg, kindly invited the second session of the Committee to be held in Muscat, from 6 to 9 April 2008, in particular as a means of permitting his Authorities to assess the value of becoming a member State of UNIDROIT. An unofficial Arabic version of the preliminary draft has been kindly prepared by the Kuwait International Leasing and Investment Company and the Secretariat, with the Government of Oman, is making every effort to ensure a good turn-out, in particular of States from the Middle East, a part of the world in which its membership is severely limited.

(b) Procedure for finalisation, approval and promulgation of future model law

8. The degree of consensus that it proved possible to build in Johannesburg makes the Secretariat quietly confident that the text of the preliminary draft to come out of the forthcoming Muscat session - which will be communicated to members of the Governing Council in due course as C.G.E. Leasing/2/W.P. 4 - will be ready for submission to the Governing Council at its 87th session for advice and consent as to the appropriate follow-up action.

9. As announced to the Governing Council at its 86th session (cf. UNIDROIT 2007 C.D. (86) 11, p. 3), the Secretariat's basic proposal in this regard would be for the text of the preliminary draft to come out of the Muscat session – provided, of course, that it reaches the anticipated level of consensus - to be forwarded for approval and promulgation to the General Assembly in extraordinary session as soon as possible after the Council session. It is true that, unlike a draft Convention, a draft model law does not need to be laid before a diplomatic Conference for adoption but it nevertheless remains desirable, in the Secretariat's view, for Governments to have an analogous final opportunity to vet what is to be offered to the international community as international legislation. Particularly in the light of the keenness expressed in the past by a number of Governments, notably at the two brainstorming sessions of the Governing Council and member Governments held in 2002 and 2003, to see more substantive business brought before the General Assembly, the Secretariat believes that the General Assembly in extraordinary session provides the perfect forum for member Governments to express their final opinion on the future draft model law. For practical reasons, it would seem wise not to mix such novel business with the regular business dealt with at an ordinary session of the Assembly. Moreover, given the success of the decision to involve non-member States in the work of the Committee, it would seem appropriate to find a solution permitting such of those States as have participated in the development of the preliminary draft also to participate in the conference at which it is finalised, in particular in view of the special vocation of the future model law to respond to the needs of developing countries and

transition economies and the shortage of such States among the Institute's membership. For that reason, the Secretariat would further propose that the conference to be convened for the approval and promulgation of the intended model law be structured as a joint session of the General Assembly, meeting in extraordinary session, and the Committee itself, meeting for a third session. In that way, the imperative of procedural transparency in relation to UNIDROIT member States could be married to the fundamental requirement of legitimacy in relation to a product to be offered to a specific part of the world largely unrepresented in the Institute's membership.

10. As indicated at both the 85th and the 86th sessions of the Council, one of the unique dynamic features of this project has been the active involvement and support of the I.F.C. Whereas one of the greatest handicaps common to UNIDROIT and other intergovernmental Organisations working in the field of the unification of law is the problem of how to get international instruments once adopted implemented by Governments, this is a project the end-product of which the I.F.C. has all along been anxious to be able to implement in its countries of operations at the earliest possible opportunity: the future model law is, therefore, assured of success in terms of implementation. Moreover, the Commonwealth Secretariat is also considering including the question of implementation of the future model law in Commonwealth jurisdictions at the forthcoming July 2008 Commonwealth Law Ministers Conference. However, the time-frame against which Organisations like the I.F.C. must operate is such that they find it difficult to accept the pace at which international instruments of the kind prepared by UNIDROIT are traditionally brought to adoption. They are, in short, extremely anxious to see this project completed well before the end of the year and it is likely that Ms Freeman, the importance of the role of whom in permitting this project to move forward so expeditiously over the last two and a quarter years with little or no impact on UNIDROIT'S Budget cannot be stressed sufficiently, will be moving to entirely new pastures as from Summer 2008. The Secretariat is, therefore, particularly conscious of the need to move forward to the adoption and promulgation of the proposed model law with the maximum expedition.

ACTION TO BE TAKEN

11. *The Secretariat would invite the Council to confirm the extraordinary procedure for the approval of the model law agreed upon at its 85th session, namely, on the understanding that the preliminary draft achieves the anticipated level of consensus among the Governments participating in the Committee at its forthcoming session and that the Secretariat is, accordingly, able to lay it before the Council at its 87th session for advice and consent as to the most appropriate follow-up action, to authorise its transmission for finalisation, approval and promulgation to the General Assembly meeting in extraordinary session jointly with the Committee as soon as possible.*