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**Item No. 5 on the agenda: International Interests in Mobile Equipment –**

**(c) Preparation of other Protocols to the Cape Town Convention**

**(i) Ships and maritime transport equipment**

**(ii) Renewable energy equipment**

(prepared by the Secretariat)

<i>Summary</i>	<i>A brief update of the Secretariat's actions regarding the possible preparation of other Protocols to the Cape Town Convention, in particular with respect to (i) ships and maritime transport equipment and (ii) renewable energy equipment</i>
<i>Action to be taken</i>	<i>To take note of the update</i>
<i>Related documents</i>	<i>UNIDROIT 2018 – C.D. (97) 2, at pp. 14-15; UNIDROIT 2016 – C.D. (95) 13 Add. 4 rev. (regarding ships and maritime transport equipment); UNIDROIT 2016 – C.D. (95) 13 Add. 5 (regarding renewable energy equipment); UNIDROIT 2013 – C. D. (92) 5 (c)/(d); UNIDROIT 2016 – C.D. (95) 13 rev. (Part B(2))</i>

## **INTRODUCTION**

1. The *Convention on International Interests in Mobile Equipment* was opened for signature on 16 November 2001. Article 2(3) of the Convention provides that the initial three protocols, adopted respectively in 2001, 2007 and 2012, cover aircraft, railway rolling stock and space assets. Article 51(2) of the Convention, moreover, specifically contemplates the possibility of adopting additional protocols, which cover other categories of equipment.

2. As recommended by the Governing Council at its 95<sup>th</sup> session (Rome, 18-20 May 2016) and adopted by the General Assembly at its 75<sup>th</sup> session (Rome, 1 December 2016), the UNIDROIT Work Programme includes the possible preparation of other Protocols to the Cape Town Convention – with respect to (i) ships and maritime transport equipment and (ii) renewable energy equipment – as low priority items. Consistent with that level of priority, this document provides a brief update of the Secretariat's actions regarding these items.

3. The memorandum is structured in three Parts. Part I addresses ships and maritime transport equipment. Part II addresses renewable energy equipment. Lastly, Part III invites the Governing Council to take note of the update.

## **I. SHIPS AND MARITIME TRANSPORT EQUIPMENT**

4. Pursuant to the low level of priority, the Secretariat has continued to monitor developments relating to the possible preparation of a Protocol to the Cape Town Convention on matters specific to ships and maritime transport equipment (hereinafter “possible Maritime Protocol”). This Part provides (a) some background on the possible work and (b) a brief update on recent developments.

### **A. Background**

5. In the early stages of the project that was later to become the Cape Town Convention, it had been envisaged that security over ships and maritime transport equipment might be covered.<sup>1</sup> These expectations, however, subsequently failed to materialise, as strong reservations emerged in the early stages regarding the possibility of extending the system of the future Convention to ships.

6. A Secretariat memorandum of August 1996 summarised the two main reasons brought forward against the inclusion of security over ships.<sup>2</sup> First, the preparation of international rules governing ships and shipping was described as an issue that was traditionally the preserve of specific international organisations with full participation of shipping circles. Second, it was feared that there might be conflicts with the then newly drafted International Convention on Maritime Liens and Mortgages adopted by the United Nations.<sup>3</sup> The memorandum further noted, however, that the merits of the inclusion or exclusion of ships under UNIDROIT’s envisioned system could best be assessed only once the rules of the Convention were finalised.

7. Following the Cape Town Convention’s success, a preliminary study was prepared and submitted to the Governing Council for its 92<sup>nd</sup> session (Rome, 8-10 May 2013) regarding whether it would be feasible to extend the Cape Town system to ships and maritime transport equipment.<sup>4</sup> The 2013 Study identified the main issues concerning proprietary security over ships and existing international instruments in this area and concluded that additional harmonisation efforts were needed.<sup>5</sup> That study also concluded that a possible Maritime Protocol, with a narrow scope and adaptation to the peculiarities of maritime law, could avoid the pitfalls that had befallen prior international instruments, particularly regarding maritime liens.<sup>6</sup> It recommended further study to identify the areas of the law of proprietary security over ships in which there was sufficient demand for an extension of the Cape Town system.<sup>7</sup>

8. Within the Governing Council, there appeared to be a majority in favour of work on the subject, but concerns were expressed regarding whether there was sufficient industry support. It was agreed that such support must first be ascertained before moving forward, and the Governing Council requested the Secretariat to study whether satisfactory conditions existed for such an

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<sup>1</sup> See Article 2(1)(c) of the first set of draft articles of a future UNIDROIT Convention on Interests in Mobile Equipment, March 1996, Study LXXII – Doc. 24.

<sup>2</sup> UNIDROIT 1996 - Study LXXII – Doc. 29.

<sup>3</sup> Adopted on 6 May 1993 at Geneva by the United Nations/International Maritime Organisation Conference of Plenipotentiaries held at Geneva from 19 April to 7 May 1993 (United Nations, Treaty Series, vol. 2276, p. 39).

<sup>4</sup> UNIDROIT 2013 – C.D. (92) 5(c)/(d) (hereinafter “2013 Study”).

<sup>5</sup> *Id.* para. 70.

<sup>6</sup> *Id.* paras. 71, 102.

<sup>7</sup> *Id.* para. 103.

extension.<sup>8</sup> At its 72<sup>nd</sup> session (Rome, 5 December 2013), the General Assembly, upon discussion of a request for a reduction in the work's priority status, decided to lower its priority from medium to low.<sup>9</sup>

9. Subsequently, the Secretariat, upon an invitation from the African Shipowners Association, was represented at an African Maritime Conference in Lagos, Nigeria (28-30 September 2015), at which interest was expressed in a possible Maritime Protocol. It was expressed that such a Protocol could enhance African shipowners' access to foreign capital and reduce transactional costs. The Secretariat, moreover, requested any information that the African Shipowners Association and other stakeholders could provide going forward with respect to the questions of "whether market practice has found or could find alternative solutions in the absence of internationally harmonised rules and whether the extension of the Cape Town Convention system to ships could be a suitable response to the legal challenges in this respect."<sup>10</sup> On 5 May 2016, the former Secretary-General of UNIDROIT, Mr José Angelo Estrella Faria received a letter from the Secretary-General of the African Shipowners Association, Ms Funmi Folorunso, which briefly expressed the African Shipowners Association's belief that the possible Protocol would be supportive of efforts to expand the African shipping fleet.<sup>11</sup>

10. For the Governing Council's 95<sup>th</sup> session (Rome, 18-20 May 2016), the Secretariat submitted a memorandum providing an update regarding (a) recent developments and (b) the 2013 Study.<sup>12</sup> Regarding recent developments, in addition to describing the interest from the African Shipowners Association, the memorandum described developments at the *Comité Maritime International*, in particular the establishment of an International Working Group ('CMI/IWG') on the topic of "Ship Financing Security Practices"<sup>13</sup> in order to ascertain, *inter alia*, whether there is a need for a possible Maritime Protocol to the Cape Town Convention.<sup>14</sup> Regarding the 2013 Study, the memorandum briefly examined particular aspects, including: (a) the economic significance of consensual security over ships; (b) existing and projected international instruments regarding proprietary security over ships; (c) the proposal for an international instrument for the recognition of judicial sales of ships; (d) ships and maritime equipment as registrable assets; and (e) avoiding conflicts with other international instruments concerning enforcement issues (i.e. arrest and judicial sales).<sup>15</sup>

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<sup>8</sup> UNIDROIT 2013 - C.D. (92) 17, paras. 52-57.

<sup>9</sup> UNIDROIT 2013 - A.G. (72) 9, paras. 27-29.

<sup>10</sup> See UNIDROIT 2013 - A.G. (72) 4, paras. 22-23.

<sup>11</sup> UNIDROIT 2016 - C.D. (95) 13, Add. 4 rev., Annex 1.

<sup>12</sup> UNIDROIT 2016 - C.D. (95) 13, Add. 4 rev.

<sup>13</sup> The CMI/IWG is chaired by Ann Fenech (Malta) and includes Allen Black (USA), Andrea Berlingieri (Italy), Camilla Mendes Vianna Cardoso (Brazil), Sheng Chen (China), David Osborne (United Kingdom), Souichirou Kozuka (Japan), Stefan Rindfleisch (Germany), and Andrew Tetley (France). See CMI, Ship Financing Security Practices, <http://www.comitemaritime.org/Ship-Financing-Security-Practices/0,27150,115032,00.html> (last visited 20 March 2018).

<sup>14</sup> The CMI/IWG is intended "to go beyond the strict information gathering on the actual financing practices of the maritime industry as requested by UNIDROIT" and to "seek to assess what the views of the various national [Maritime Law Associations] are with regard to the extension of Cape Town to Shipping." See Report for the CMI Assembly (9 June 2015), available at <http://comitemaritime.org/Uploads/Work%20In%20Progress/Assembly%20attachment%2015.pdf> (last visited 13 April 2016). In April 2016, the CMI/IWG made available a questionnaire concerning the current situation regarding maritime security interests and the needs of the industry. The questionnaire – as well as replies from the Maritime Law Associations of Argentina, Brazil, Croatia, Germany, Italy, Panama and the United Kingdom – are available on the CMI/IWG's webpage. See CMI, Ship Financing Security Practices, <http://www.comitemaritime.org/Ship-Financing-Security-Practices/0,27150,115032,00.html> (last visited 20 March 2018). The CMI/IWG also held a meeting jointly with the US Maritime Law Association's Marine Financing Committee in a session entitled "Maritime security and the degree of comfort being offered by flag states and international conventions" as part of the CMI's 42<sup>nd</sup> International Conference (New York, 4 May 2016). See CMI 42<sup>nd</sup> International Conference 2016, New York, Programme, available at <http://www.cmi2016newyork.org/s/CMI-New-York-Programme-Ver-32-m832.pdf> (last visited 20 March 2018).

<sup>15</sup> See, *id.*, Part II.

11. The Governing Council, after considering the memorandum, recommended that the preparation of a possible Maritime Protocol be retained on UNIDROIT's Work Programme for the triennial period 2017-2019 as a low priority item.<sup>16</sup> The General Assembly, at its 75<sup>th</sup> session (Rome, 1 December 2016), confirmed that recommendation with its adoption of the Work Programme.<sup>17</sup>

## **B. Recent developments**

12. In continuing to monitor developments in this field, the Secretariat notes CMI's proposal for possible future work on cross-border issues related to the judicial sale of ships, as well as a draft international instrument on that topic, which has been submitted to the International Maritime Organization (IMO), the Hague Conference on Private International Law (HCCH) and the United Nations Commission on International Trade Law (UNCITRAL).<sup>18</sup> As of this writing, those Organisations have not accepted the proposal, though at the UNCITRAL Commission's 50<sup>th</sup> session (Vienna, 3-21 July 2017), it was "agreed that UNCITRAL, through its secretariat, and States would support and participate in a colloquium to be initiated by CMI to discuss and advance the proposal."<sup>19</sup>

13. Pursuant to that agreement, a high level technical colloquium on a draft international instrument on foreign judicial sales of ships and their recognition was held in Malta (Valetta, 27 February 2018).<sup>20</sup> It is anticipated that a report of the colloquium will be prepared for presentation to UNCITRAL.<sup>21</sup>

14. The Secretariat, as part of its ongoing monitoring, intends to continue following developments with respect to the draft international instrument on foreign judicial sales of ships and their recognition, in particular to seek to ensure that any potential friction between that possible instrument and a possible Maritime Protocol is avoided.<sup>22</sup>

## **II. RENEWABLE ENERGY EQUIPMENT**

### **A. Background**

15. On 10 September 2011, the Secretariat received a proposal by the German Federal Ministry of Justice to consider the preparation of an additional protocol to the Cape Town Convention on matters specific to off-shore power generation and similar equipment. It was explained that in Germany, the industry had expressed an interest in the possibility of arranging for registered security rights in particular for wind-energy equipment. The growth of the market for renewable

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<sup>16</sup> C.D. (95) 15, para. 309.

<sup>17</sup> A.G. (75) 8, para. 44.

<sup>18</sup> See, e.g. UNCITRAL, Proposal of the Comité Maritime International (CMI) for possible future work on cross-border issues related to the Judicial sale of ships, A/CN.9/923, 50<sup>th</sup> session (Vienna, 3-21 July 2017), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V17/023/36/PDF/V1702336.pdf?OpenElement> (last visited 20 March 2018).

<sup>19</sup> UN, Report of the United Nations Commission on International Trade Law, A/72/17, 50<sup>th</sup> session (3-21 July 2017), para. 465, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V17/058/89/PDF/V1705889.pdf?OpenElement> (last visited 20 March 2018). The Commission further "agreed to revisit the matter at a future session." *Id.*

<sup>20</sup> More information about the colloquium is available at <http://www.mmla.org.mt/cmi-colloquium/>.

<sup>21</sup> Ann Fenech, Malta Colloquium on the international recognition of judicial ship sales, Times of Malta (4 March 2018), <https://www.timesofmalta.com/articles/view/20180304/business-news/Malta-Colloquium-on-the-international-recognition-of-judicial-ship-sal.672300> (authored by the chairperson of the CMI/IWG).

<sup>22</sup> For more information regarding potential areas of friction between the two possible instruments, see UNIDROIT 2016 – C.D. (95) 13 Add. 4, paras. 12-14.

energies was said to create a significant need for investment, which could be facilitated through the availability of effective proprietary security rights. The German Federal Ministry of Justice expressed its interest in the preparation of an international instrument with harmonised rules on proprietary security for such equipment.<sup>23</sup>

16. At its 92<sup>nd</sup> session (Rome, 8-10 May 2013), the Governing Council was presented with initial research conducted by the Secretariat which indicated that the Cape Town Convention system would be a suitable mechanism for regulating secured interests in off-shore power generation and similar equipment. The Governing Council subsequently agreed to include this project in the Work Programme for the triennium 2014–2016 as a low priority and instructed the Secretariat to prepare a further study to determine whether an additional protocol on off-shore power generation and similar equipment would be feasible.

17. Consistent with its assigned low priority and the limited resources of the Secretariat, further work on the project between 2014-2016 was limited. Initial research on the off-shore power generation industry indicated that a protocol exclusively regulating interests in off-shore power generation equipment would be unlikely to have the economic viability to attract widespread ratification. However, given the significant increases in the cross-border mobility of international renewable energy generation equipment and stronger international action on climate change, the Secretariat conducted research on whether a broader protocol covering interests in renewable energy equipment (which also covered off-shore power generation equipment) might be a viable alternative project.

18. The Secretariat's initial research indicated that a broader protocol regulating interests in renewable energy equipment would likely have better economic viability than a protocol limited to interests in offshore power generation equipment. On the basis of this research, at its 95<sup>th</sup> session (Rome, 18-20 May 2016) the Governing Council decided to recommend retaining the project on the Institute's triennial work programme 2017-2019 as a low priority item. Given the new broader scope of the potential instrument, the project was renamed "Possible preparation of other Protocols to the Cape Town Convention – Renewable energy equipment".

## **B. Recent Updates**

19. The Secretariat has continued to undertake research to determine the feasibility of extending the Cape Town Convention to cover renewable energy equipment. This research has focused on addressing several key issues:

- (i) Whether the Cape Town Convention is an appropriate instrument for addressing issues in the availability of international finance available for renewable energy projects;
- (ii) Current international and regional arrangements regulating the financing of renewable energy projects;
- (iii) How financing is currently structured in the renewable energy generation industry;
- (iv) Whether there is support from the renewable energy sector for extending the Cape Town Convention to cover renewable energy equipment; and
- (v) Types of renewable energy generation equipment which could be covered by the Protocol.

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<sup>23</sup> UNIDROIT 2013 - C.D. (92) 5 (c)/(d).

20. In 2017, research was additionally carried out in relation to European regional arrangements, where cross-border financing for renewable energy projects is particularly prevalent. In 2018, the Secretariat intends to undertake additional research to address the key issues identified above in order to report back more substantively to the Governing Council at its 98<sup>th</sup> session in 2019.

### **III. ACTION TO BE TAKEN**

21. *The Secretariat requests that the Governing Council take note of this update regarding the possible preparation of other Protocols to the Cape Town Convention regarding ships and maritime transport equipment and renewable energy equipment respectively.*