



General Assembly

Distr.: General
14 May 2007

Original: English

**United Nations Commission
on International Trade Law**
Fortieth session
Vienna, 25 June-12 July 2007

Current activities of international organizations related to the harmonization and unification of international trade law

Note by the Secretariat*

Contents

	<i>Page</i>
I. Corporate governance	2
J. Procurement	2
K. Security Interests	10

* This document was submitted late because of the need to undertake consultations on the content with relevant organizations.



I. Corporate governance

EBRD¹

1. In 2006, EBRD published the Transition Report 2006, devoted to an analysis of the financial sector in transition countries. The Report looked at how financial systems have been restructured over the past 15 years, their impact on the economy and private sector development and the introduction of new financial services.² As well, the EBRD published, “Law in transition online 2006 – Focus on central Europe”.³ This edition of the Bank’s legal journal, Law in transition online, charts and evaluates eight countries’ remarkable progress since their accession to the European Union and critically assesses the challenges they now face as part of an enlarged EU.

OECD

2. From 29-30 March 2007 in Shanghai, China, the OECD and the Shanghai Stock Exchange in partnership with the Japanese Government, the Global Corporate Governance Forum (GCGF) and the Yale School of Management convened a high level meeting to exchange experience on corporate governance.⁴

3. The OECD also recently published a report entitled “Intellectual Assets and Value Creation: Implications for Corporate Reporting”⁵ which found that companies can boost their stock market valuations and lower their cost of capital through improved reporting of intellectual assets and value creation strategies that overcome the limits of accounting standards.

J. Procurement

WTO

4. The WTO working party on GATS rules is continuing negotiations on government procurement in services under GATS article XIII. Discussions in 2006 evolved around communications from the European Communities (S/WPGR/W/52 and S/WPGR/W/54), which touched upon such issues as technical specification, qualification of suppliers, procurement methods, time periods, tender documentation, and contract award (S/WPGR/W/52), and proposed a legal text for an annex to the GATS on government procurement (S/WPGR/W/54). Other questions raised included the relationship to the plurilateral WTO Government Procurement Agreement (the “GPA”).⁶

¹ www.ebrd.com/.

² For more information, see <http://www.ebrd.com/pubs/econo/6813.htm>.

³ For more information, see <http://www.ebrd.com/pubs/legal/lit062.htm>.

⁴ For more information, see

http://www.oecd.org/document/61/0,2340,en_2649_37439_34970813_1_1_1_37439,00.html.

⁵ <http://www.oecd.org/dataoecd/2/40/37811196.pdf>.

⁶ See “Annual report of the Working Party on GATS rules to the Council for Trade in Services”, 2006, document S/WPGR/16, 23 November 2006, paras. 5 and 6, available, as of 26 February 2007, at http://www.wto.org/english/tratop_e/gproc_e/gpserv_e.htm.

5. Within the WTO Committee on Government Procurement that administers the GPA (“the Committee”), the negotiations that focused on the simplification and improvement of the non market access related provisions of the GPA resulted in an understanding on the revision of the 1994 text.⁷ Apart from editorial changes to the 1994 text, including relocation of a number of provisions, significant substantive revisions have been made, including to the provisions addressing the needs of developing countries, the content of notices of intended procurement and tender documentation, qualification of suppliers, and modifications and rectifications to coverage.⁸ New articles have been introduced,⁹ and the text has been amended to accommodate and regulate the use of electronic means of communication and techniques.¹⁰

6. According to article XXII (Final provisions) of the revised text of the GPA, negotiations are expected to continue on some revised provisions, including on the rules of origin in the light of the outcome of the ongoing work in the WTO in that area. It is also envisaged that, not later than the end of the third year from the date of entry into force of the revised GPA, the Committee will undertake further work to consider the advantages and disadvantages of developing common nomenclature for goods and services and standardized notices. Within the Committee, agreement was also reached on arrangements for conclusion of the market access aspect of the negotiations under Article XXIV:7 of the 1994 GPA. The overall goal was to complete the market access negotiations (and therefore all aspects of the negotiations) in spring 2007.¹¹

Multilateral development banks (MDBs)

Joint working group on Harmonization of Electronic Government Procurement

7. During the period under review, the MDBs’ joint Working Group on Harmonization of Electronic Government Procurement (e-GP) (the “joint Working Group”),¹² has been revising its E-Tendering Requirements and the E-reverse

⁷ The revised text of the GPA has been circulated among all WTO members as document GPA/W/297. The footnotes in the revised text mark provisions that are still under negotiation. The revised text of the GPA is intended for use as basis for consultations and other ongoing work relating to the accession of new parties. See also “Report of the Committee on Government Procurement (November 2005-December 2006)”, document GPA/89, 11 December 2006, paras. 18-21. The report and the revised text of the GPA are available, as of 26 February 2007, at http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

⁸ See articles IV, VII, X, IX and XIX of the revised text.

⁹ On definitions (article I), general principles (article V that consolidates some of the provisions of the 1994 text, such as on national treatment and non-discrimination, rules of origin and offsets, and adds new provisions, such as on use of electronic means and conduct of procurement), conditions for participation (article VIII), electronic reverse auctions (article XIV), transparency of procurement information and disclosure of information (articles XVI and XVII, which are based on the provisions of articles XVIII and XIX of the 1994 text), and modifications and rectifications to coverage (article XIX).

¹⁰ See, for instance, articles I, II, V-VII, IX- XI and XVI of the revised text.

¹¹ See supra, endnote 6, “Report of the Committee on Government Procurement (November 2005-December 2006)”, document GPA/89, 11 December 2006, paras. 22-23.

¹² The Working Group was set up at the beginning of 2003 by the ADB, the IADB, and the World Bank, and subsequently joined by the AfDB, EBRD and Nordic Development Fund. The UNCITRAL secretariat has participated as observer in the Working Group’s meetings since 2005.

Auction Guidelines,¹³ to reflect experience with their implementation in practice. Revisions intend to address, in particular, criteria for charging fees for the use of electronic procurement systems, conditions for the use of exclusively electronic or paper system in procurement proceedings or allowing both, and encryption requirements in technology neutral terms and provide for more flexible regulation of electronic reverse auctions.

8. The joint Working Group has also sponsored (i) the preparation of new guidelines and papers, such as a note on electronic purchasing and a working paper on corruption in the context of the use of new technologies in public procurement, (ii) the development of interactive standard bidding documents for IT products, expected to be piloted in May 2007, (iii) an online e-GP training tool, expected to be operative in July 2007, (iv) international e-GP survey, expected to be published by June 2007, that covers e-GP systems from a total of fifteen countries and intends to identify the strategic approaches of the surveyed countries to e-GP programs, including system functionalities, issues that they faced in the transition to e-GP, costs and benefits, success factors, and lessons learned, and (v) an international e-GP conference, to be held in Washington DC in November 2007.

Revisions of MDBs' policies

9. In October 2006, the World Bank revised its Procurement and Consultant Guidelines and updated standard bidding and consulting documents¹⁴ and it published the Consulting Services Manual.¹⁵ It is in the process of updating a manual on procurement of goods or works, to reflect recent policy changes. The ADB issued new Procurement Guidelines in April 2006 and, effective 8 September 2006, revised definitions therein of corrupt, fraudulent, coercive and collusive practices.¹⁶ The AfDB reported that its revised procurement policies were due for approval in 2007.

10. In August 2006, a new set of standard documents was prepared within the auspices of the regular meetings of the Heads of Procurement for the MDBs and International Financial Institutions for adoption and use by their respective institutions. The Standard Prequalification Document and user's guide are intended primarily for use in prequalifying applicants who express an interest in bidding on large building and civil engineering contracts under international competitive bidding procedures. The principles may also be applied if prequalification is needed under national competitive bidding.¹⁷

APEC

11. In September 2006, the APEC Committee on Trade and Investment endorsed the revised non-binding Principles on Government Procurement (the "NBPs").^{18, 19}

¹³ Available at the joint e-GP portal <http://www.mdb-egp.org/>.

¹⁴ The revised versions (as of 1 October 2006) are available at the World Bank web site.

¹⁵ Available as of 9 February 2007 at

<http://siteresources.worldbank.org/INTPROCUREMENT/Resources/2006ConsultantManual.pdf>.

¹⁶ Both the new Guidelines and amendments thereto are available as of 8 February 2007 at

<http://adb.org/Documents/Guidelines/Procurement/>.

¹⁷ Available at the World Bank website.

¹⁸ See the summary of the third meeting for 2006 (Da Nang, Viet Nam, 12-13 September 2006), paragraph 56, available as of 8 February 2007 at

The revised text builds on the 1999 version of the NBPs. Apart from structural and editorial changes,²⁰ substantive amendments have been made to the 1999 text. The revised NBPs strengthen some elements of the principles, especially in the cross-border context, and address some issues arising from the use of modern means of communication in public procurement. Unlike the 1999 version, the revised NBPs do not contain provisions related to suppliers' registers and to charging fees in the context of access to procurement-related information. In addition, the transparency principle included in the 1999 version has been subsumed into the area-specific APEC Transparency Standards on Government Procurement,²¹ which are included in the revised NBPs by cross-reference.²²

EC

Revision of the remedies directives

12. In May 2006, the European Commission put forward a proposal for a directive seeking to amend the two European Union remedies directives in the area of public procurement.²³ The proposal intends to clarify and improve the effectiveness of the current review provisions in the formal award procedures or in the case of illegal direct awards of contracts. It introduces, among other amendments, a "standstill period", during which awarding authorities would be obliged to suspend the conclusion of a public contract, in order to allow bidders to bring review procedures, and specifies the details of the standstill obligation, such as its scope, consequences and enforcement, the time span and permissible exceptions.

Procurement of defence contracts

13. At the end of 2006, the European Commission adopted an "Interpretative Communication on the application of article 296 of the Treaty in the field of defence procurement".²⁴ The communication is a non-legislative measure and does not

http://www.apec.org/content/apec/documents_reports/committee_trade_investment/2006.html.

¹⁹ The revised September 2006 version of the NBPs can be found in document 2006/SOM3/GPEG/005, "Review of the APEC Non-Binding Principles (NBPs) on Government Procurement", available as of 13 February 2007 at http://aimp.apec.org/Documents/2006/GPEG/GPEG2/06_gpeg2_005.pdf.

²⁰ As regards the structural changes, the revised text sets out the main elements of each principle and requirements under it upfront in the text, with more detailed commentary to each principle in annexes. This structure is different from the one followed in the 1999 version.

²¹ APEC Leaders' Transparency Standards, Santiago, Chile – 21 November 2004, document number 028.

²² See annex 6 in document 2006/SOM3/GPEG/005, *supra*, endnote 14.

²³ Document COM(2006) 195 final/2, 2006/0066 (COD), of 14 June 2006. The directives in question are (i) Directive 89/665/EEC that applies, in principle, to contracts for works, services and supplies awarded by contracting authorities, now coming under Directive 2004/18/EC; and (ii) Directive 92/13/EEC that applies to contracts awarded by contracting entities operating in the water, energy, transport and postal services sectors, now coming under Directive 2004/17/EC.

²⁴ Document COM (2006) 779 final, of 7 December 2006. The preparation of the interpretative communication was preceded by the assessment of the defence procurement market (see Commission Staff Working Document SEC (2006) 1554 of 7 December 2006). Its findings have indicated that the defence sector has been kept out of the application of the public procurement directive 2004/18/EC by virtue of the extensive use by the EU member States of the exemption provided by article 296 with the result that a majority of defence contracts have been awarded

modify but clarifies the existing legal framework. It aims to prevent possible misinterpretation and misuse of article 296 of the Treaty of Rome establishing the European Community (the “Treaty”), which gives the States members of the European Community the possibility of derogating from the Community public procurement rules when this is necessary for protection of their “essential security interests”.²⁵ The communication explains the principles of the exemption, and clarifies the conditions for its use in the light of the case law of the European Court of Justice (the “ECJ”).

14. In parallel, the European Commission has carried out an impact assessment in order to determine whether a possible directive on the procurement of defence equipment would be useful, by introducing more flexible rules, which are better suited to the specific nature of defence markets, than those contained in the current public procurement directive 2004/18/EC. The European Commission’s Legislative and Work Programme 2007 (the “2007 Work Programme”)²⁶ envisages elaboration by the European Commission of a proposal for a directive on the coordination of procedures for award of public contracts in the defence sector as well as other legislative and non-legislative actions in the area of defence sector procurement.²⁷

Award of low-value contracts

15. In July 2006, the European Commission published²⁸ an interpretative communication on the Community law applicable to contract awards not, or not fully, subject to the provisions of the public procurement directives.²⁹ The communication explains and clarifies how the principles of EU law should be applied to two types of contracts: (i) low-value contracts to which the directives do not apply as their contract values are below the thresholds for application of these directives, but which nevertheless may have cross-border interest; and (ii) service contracts (so called Annex B services) that, although covered by the directives, are subject to only a limited number of rules. The communication does not create any new legislative rules but provides the European Commission’s understanding of the existing ECJ case law applicable to these types of contracts and suggests best practices to assist member States to comply with the internal market requirements confirmed by the ECJ case law.³⁰

on the basis of national procurement rules, which differ widely throughout the EU. It was observed that this could limit market access for non-national suppliers, creating extra costs and inefficiencies that had a negative impact on the competitiveness of Europe’s defence industry. See IP/06/1703 of 7 December 2006.

²⁵ See also article 10 of the European Union public procurement directive 2004/18/EC, according to which, the directive applies to “contracts awarded by contracting authorities in the field of defence, subject to Article 296 of the Treaty”.

²⁶ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Brussels, 24 October 2006, document COM(2006) 629 final; available, as of 26 February 2007, at http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0629en01.pdf.

²⁷ Such as a communication on defence industries and markets, and a proposal for a regulation on the transfer of defence products.

²⁸ Document 2006/C 179/02.

²⁹ The directives in question are the European Union (EU) procurement directives 2004/17/EC and 2004/18/EC.

³⁰ In addition on the same subject, the European Parliament, in its resolution 2006/2043(INI) of

Public Private Partnerships (PPPs)

16. On 26 October 2006, the European Parliament adopted a resolution on public-private partnerships and Community law on public contracts and concessions (2006/2043(INI)).³¹ In its resolution, the Parliament confirmed application of the Community public procurement law to PPPs, including institutionalised public-private partnerships (“IPPPs”) (paragraphs 2, 6, 7 and 37). The Parliament considered that it was premature to assess the effects of the public procurement directives and therefore opposed a review of these directives (paragraph 2). It also opposed the establishment of a European agency for PPPs (paragraph 18).

17. The Parliament requested the European Commission to undertake a number of actions under the resolution, such as to make recommendations as to an appropriate procurement procedure in the field of concessions (paragraph 32) and to provide clarifications about the application of procurement law to the creation of public-private undertakings in connection with the award of a contract or concession (paragraph 35).³² It supported the European Commission in its efforts to ascertain whether standard procurement rules should be created for all PPPs on a contractual basis, irrespective of whether the PPPs concerned qualify as a public contract or a concession, and to take action in the field of IPPPs in view of the clear signs of existing legal uncertainty (paragraphs 33 and 34).

18. The 2007 Work Programme, acknowledging the demand for a stable, consistent legal environment for the award of concessions at the European Union level, envisages the European Commission’s action in the form of drafting a proposal for a directive on the coordination of procedures for the award of concessions.³³

Other procurement-related initiatives under the 2007 European Commission’s Legislative and Work Programme

19. The 2007 Work Programme envisages actions in the field of green public procurement. They include: (i) submission of proposals for EU-wide green public procurement target and for regular benchmarking and monitoring by the European Commission and the member States; (ii) giving guidance to member States for the adoption of national action plans on green public procurement; and (iii) revisions to regulations (EC) No 1980/2000 on a revised Community eco-label award scheme and (EC) 761/2001 allowing voluntary participation by organizations in a Community eco-management and audit scheme (EMAS), with a view, inter alia, of creating the links with the EU green public procurement instruments.³⁴

26 October 2006, opposed the creation of rules on the award of public procurement contracts beneath the threshold values at the EU level, underlining the responsibility of the Member States to implement in an efficient way the Treaty principles of transparency, non-discrimination and the freedom to provide services in relation to public procurement contracts beneath the threshold values (paragraph 21 of the resolution).

³¹ As of 26 February 2007, available at

http://ec.europa.eu/internal_market/publicprocurement/ppp_en.htm#conclusions.

³² See also paragraphs 38 and 43 of the resolution.

³³ See *supra*, endnote 25.

³⁴ *Ibid.*

20. The 2007 Work Programme also envisages revision of regulation (EC) No. 2195/2002 on the Common Procurement Vocabulary (CPV), necessary to maintain an efficient and simple procurement system that is easily applied for both suppliers and bidders.³⁵

United Nations Office on Drugs and Crime³⁶: United Nations Convention against Corruption³⁷

21. The first Conference of States Parties to the United Nations Convention against Corruption was held in December 2006.³⁸ Around the same time, the Conference secretariat – the United Nations Office on Drugs and Crime (“UNODC”) published the Legislative Guide for the Implementation of the United Nations Convention against Corruption.³⁹ The objective of the Guide is to assist States seeking to ratify and implement the Convention by identifying legislative requirements, issues arising from those requirements and various options available to States as they develop and draft the necessary legislation.⁴⁰ Some paragraphs of the Guide relate to the provisions of the Convention dealing with public procurement⁴¹ and management of conflict of interest in public administration.⁴²

OECD

OECD DAC Joint Venture on Procurement

22. On 17 July 2006, the OECD DAC Joint Venture on Procurement, set up to oversee the implementation of the Paris Declaration on Aid Effectiveness of 2 March 2005⁴³ as it relates to procurement, and to instigate activities to ensure progress towards the procurement-related targets, approved the Methodology for Assessment of National Procurement Systems (Version 4) for testing and application.⁴⁴ The methodology is intended to provide a common tool that developing countries and donors can use to assess the quality and effectiveness of national procurement systems. Such assessment will provide a basis upon which a country can formulate a capacity development plan to improve its procurement system while donors can develop strategies for assisting the capacity to develop, plan and mitigate risks in the individual operations that they decide to fund. The long-term goal is that countries will improve their national procurement systems to

³⁵ Ibid.

³⁶ www.unodc.org.

³⁷ General Assembly resolution 58/4, annex.

³⁸ Documents of the Conference are available as of 8 February 2007 at http://www.unodc.org/unodc/caccosp_2006.html.

³⁹ United Nations publication, Sales No E.06.IV.16. Available in electronic format, as of 8 February 2007, at http://www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf.

⁴⁰ Ibid. Foreword, the first paragraph.

⁴¹ See paragraphs 73, 78-82 and 87 of the Legislative Guide.

⁴² See e.g., paragraphs 70, 71, 89, 96, 110, 123 and 125 of the Legislative Guide.

⁴³ See <http://www.aidharmonization.org/>.

⁴⁴ The document consists of the User’s Guide, Baseline Indicators (on legislative and regulatory framework, institutional framework and management capacity, procurement operations and market practices, and integrity and transparency of the public procurement system), Compliance and Performance Indicators and Sheet, and International Good Practice Information. Available in English, French, Portuguese and Spanish, as of 8 February 2007, at http://www.oecd.org/document/40/0,2340,en_2649_19101395_37130152_1_1_1_1,00.html.

meet internationally recognized standards enabling greater effectiveness in the use of funds to meet country obligations. The methodology will be tested at a country level during the coming years until the next High-Level Forum on Aid Effectiveness expected to be held in 2008.⁴⁵ The results of these field tests and the lessons learned from these experiences will be used to improve and refine the tool and the methodology.⁴⁶

OECD Good Practices for Integrity and Corruption Resistance in Procurement

23. At the 2004 OECD Global Forum on Governance “Fighting Corruption and Promoting Integrity in Public Procurement”, focused on steps to enhance integrity and corruption resistance in public procurement, in particular in relation to ensuring that: public procurement procedures are transparent, that there is reliable and fair and equal treatment for bidders; that public resources linked to public procurement are used in accordance with intended purposes; that procurement officials’ behaviour and professionalism is in line with the public purposes of their organization; and that systems are in place to challenge public procurement decisions, ensure accountability, and promote public scrutiny.

24. The OECD approach is to consider public procurement from a good governance perspective, and focuses on the role of transparency and accountability. Its activity is complementary to multidisciplinary efforts in the OECD to improve public procurement systems in OECD and other countries, including the development of a Common Benchmarking and Assessment Tool for Public Procurement Systems for developing countries by the Aid Effectiveness and Donor Practices Working Party of the Development Assistance Committee,⁴⁷ and surveys in the European Union member states of central public procurement organization and capacity, performance and efficiency as well as review and remedies systems by the SIGMA (Support for Improvement in Governance and Management) Programme.⁴⁸

25. Further to these activities, the OECD held a symposium entitled “Mapping out Good Practices for Integrity and Corruption Resistance in Procurement”, and a forum entitled “Forum for Policy Dialogue with Non-Members: Sharing Lessons on Promoting Good Governance and Integrity in Procurement” from 29 November to 1 December 2006, as a result of which the OECD will publish a Good Practice Report in the near future, which will map out good practices, and particular

⁴⁵ The process and criteria to be used for the selection of pilot countries can be found in the summary of the meeting of the Joint Venture (New York, 13-14 September 2006), paragraph (e), at http://www.oecd.org/document/23/0,2340,en_2649_19101395_37589271_1_1_1_1,00.html (as of 8 February 2007). The list of twenty-two countries selected for the pilot exercise can be found at http://www.oecd.org/document/36/0,2340,en_2649_19101395_37849828_1_1_1_1,00.html (as of 8 February 2007).

⁴⁶ For further information on the activities of the Joint Venture and documents issues within its auspices, see http://www.oecd.org/departement/0,2688,en_2649_19101395_1_1_1_1,00.html.

⁴⁷ See http://www.oecd.org/document/40/0,2340,en_2649_19101395_37130152_1_1_1_1,00.html.

⁴⁸ SIGMA is a joint initiative of the OECD and the European Union, principally financed by the EU. See http://www.oecd.org/LongAbstract/0,2546,en_2649_34121_2345021_119817_1_1_1,00.html.

approaches, measures and tools that have proved successful in promoting integrity in public procurement in countries across the world.⁴⁹

K. Security Interests

Hague Conference

26. A commercial edition of the Explanatory Report on the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary (Hague Securities Convention) was published in 2005. The Report provides the most authoritative and comprehensive explanations of the Convention and is available on the website of the Hague Conference. On 5 July 2006, the USA and Switzerland both signed the Securities Convention. The consultation process within the EC regarding the ratification of the Convention by its Member States and the accession by the EC continues. The Hague Conference also continued to offer some guidance on the conflict-of-laws chapter of the draft Legislative Guide on Secured Transactions prepared by UNCITRAL.

Unidroit

Draft convention on substantive rules regarding intermediated securities

27. At its third meeting, held in Rome from 6 to 15 November 2006, the Unidroit committee of governmental experts considered the Preliminary draft Convention on Substantive Rules regarding Intermediated Securities, as adopted by the Committee at its second session, held in Rome, from 6 to 14 March 2006 (Unidroit 2006 Study LXXVIII Doc. 42; hereinafter the “draft Convention”). The fourth session of the committee is expected to take place in Rome from 21 to 25 May 2007.

28. At its thirty-ninth session in 2006, UNCITRAL considered and approved in principle the recommendations of the UNCITRAL draft Legislative Guide on Secured Transactions (hereinafter “the draft Guide”). At its eleventh and twelfth sessions held in December 2006 and February 2007, Working Group VI (Security Interests) completed its work on the draft Guide and submitted it for adoption by the Commission at its current session (for the reports of Working Group VI, see A/CN.9/617 and A/CN.620; for the draft Guide see A/CN.9/631 and Addenda).

29. At its eleventh session, Working Group IV (Security Interests) agreed that the draft Guide should cover security rights in directly held securities (see A/CN.9/617, paras. 14-16). At the twelfth meeting of Working Group VI (Security Interests), the Working Group considered the matter again. Various views were expressed as to whether the draft Guide should address security rights in certain directly held securities (see A/CN.9/620, paras. 99-107). At that session, the Working Group agreed that the exclusion of directly-held securities from the scope of the draft Guide should be retained in square brackets for the Commission to consider the matter (see A/CN.9/631, recommendation 4, subparagraph (c), in which the term “intermediated” is retained in square brackets and in which reference is made to the definitions of the Unidroit draft Convention).

⁴⁹ Further information and documents from the forum and symposium are available at www.oecd.org/gov/ethics.

Principles and rules on trading in securities in emerging markets

30. Unidroit is preparing an instrument on principles and rules capable of enhancing trading in securities on emerging markets. The Secretariat has commenced preparatory work. The setting up of one or more (regional) Study Group has been authorized by the Governing Council. However, no meeting is expected to be convened before the Committee of governmental experts on intermediated securities will have finalised its work.

Other work relating to capital-markets

31. Studies have been announced on Standardized “global shares”, the legal framework regarding “delocalized” transactions and worldwide take-over bids.

Preliminary draft model law on leasing

32. To further coordination efforts, the Secretariat of Unidroit and UNCITRAL agreed to make a joint proposal to the Unidroit Committee of governmental experts for the preparation of a draft model law on leasing, which will hold its first session in Johannesburg from 7 to 10 May 2007.

33. The purpose of this proposal is to avoid overlap and conflict between the draft Guide and the draft Model Law on leasing. According to this proposal, the terms “security right” (a term used in the context of the unitary approach to acquisition financing) and “acquisition financing right” (a term used in the context of the non-unitary approach to acquisition financing) are defined in the draft Guide in such a way as to include only those leases that are the functional equivalent of a secured transaction and the preliminary draft model law will not apply to a leasing agreement that creates a security right or an acquisition financing right, as defined in the draft Guide.

Protocols to the Cape Town Convention

34. The Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock (the Rail Protocol) was adopted and opened to signature on 23 February 2007 by a diplomatic Conference held in Luxembourg, under the joint auspices of Unidroit and the Intergovernmental Organisation for International Carriage by Rail (OTIF), at the invitation of the Government of Luxembourg.

35. Intersessional work continues in respect of the preliminary draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets. This intersessional work, which includes a Government/industry forum, hosted by the Royal Bank of Scotland in London on 24 April 2006, is designed to permit the reconvening of the Unidroit Committee of governmental experts for the preparation of a draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets and the timely completion of said draft Protocol. It is hoped that a further joint Government/industry meeting, to be held in New York on 19 and 20 June 2007, will pave the way for reconvening the Committee of governmental experts in Autumn 2007.

36. An additional Protocol to the Cape Town Convention on Matters specific to Agriculture, Mining and Construction Equipment is also under consideration.

EC

The proposal for a regulation on the law applicable to contractual obligations (Rome I)

37. On 15 December 2005, the European Commission published its proposal (COM (2005) 650 final, 2005/0261) for a regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I).⁵⁰ Article 13 (3) adopts the law of the assignor's habitual residence for third-party effects of assignment. According to the comment to article 13 (3), the approach adopted is the approach of the United Nations Assignment Convention. Article 18, however, defines habitual residence by reference to the principal place of business (the term "establishment" is used) and, if there is a branch office, the location of the branch office. There is no comment to article 18 pointing out the difference with the location rule in the United Nations Assignment Convention (referring to the place of the assignor's central administration), as a result of which the law applicable under the proposed regulation article 13 (3) may be different from the law applicable under article 22 of the United Nations Assignment Convention.

38. On 13 September 2006, the European Economic and Social Committee issued an opinion (INT/307, Contractual obligations (Rome I)) on the Proposal for a Regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I).⁵¹ The Committee welcomed the Commission's plan for a regulation on conflict-of-law rules in the field of contractual obligations and expressed its belief that the regulation will develop European conflict-of-law rules in a logical way and close a loophole in the current system of Community law. According to the Committee, the regulation is useful and necessary for the development of a single European area of justice, since the 1980 Rome Convention that currently regulates this field is in need of modernization but, as a multilateral agreement, the prospects of that happening are doubtful and would in any case involve time-consuming negotiations. The Committee urged the Community legislative bodies to incorporate certain amendments.⁵²

39. With respect to the law applicable to the proprietary effects of assignments of receivables, the Committee noted that: "Voluntary assignment and contractual subrogation of the creditor's rights from the creditor to a third party discharging the debt, which is a feature of many systems of law, serve the same purpose in economic terms. The proposed text does well to deal with both in Article 13. Article 13 (3) introduces a new conflict-of-law rule on the question of which law should determine whether the assignment may be relied on against third parties. This rule rightly follows the solution adopted by the United Nations Convention on the assignment of receivables in international trade of 12 December 2001".⁵³

⁵⁰ http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0650en01.pdf.

⁵¹ <http://eescopinions.eesc.europa.eu/eescopiniondocument.aspx?language=en&docnr=1153&year=2006>.

⁵² <http://europa.eu/bulletin/en/200609/p119008.htm>.

⁵³ See endnote 5.

OAS⁵⁴

40. The OAS, through its sixth Inter-American Specialized Conference on Private International Law (CIDIP VI), continued its work on the development of uniform Inter-American registration forms as well as regulatory guidelines for secured transactions registries, and the electronic operation thereof, for implementation in conjunction with the Model Law.⁵⁵

WIPO

41. WIPO cooperated with the Secretariat in the organization of a Colloquium on Security Interests in Intellectual Property, which was held in Vienna on 18 and 19 January 2007. The Commission will have before it a report on the Colloquium with suggestions for future work by the Commission (see A/CN.9/632).

⁵⁴ <http://www.oas.org>.

⁵⁵ <http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/dil/>.