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Joint proposal on cooperation in the area of international commercial contract law (with a focus on sales)

Note by the Secretariat

1. At its forty-third session in 2010, the Commission encouraged the Secretariat to explore ways of collaborating further with other organizations, such as the Hague Conference on Private International Law (the “Hague Conference”) and the International Institute for the Unification of Private Law (“Unidroit”), to jointly promote related texts.¹
2. In 2012, the Commission, the Hague Conference and Unidroit jointly published an explanatory text in the area of security interests.²
3. At its forty-eighth session in 2015, the Commission expressed support for increasing, within available resources, the number of promotional and capacity-building activities aimed at supporting the adoption and effective implementation of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980).³
4. In furtherance of that mandate, the Secretariat has discussed with the Permanent Bureau of the Hague Conference and the secretariat of Unidroit the possibility of cooperating in preparing an explanatory text in the area of international commercial contract law (with a focus on sales).

¹ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 287.

² UNCITRAL, Hague Conference and Unidroit Texts on Security Interests: Comparison and analysis of major features of international instruments relating to secured transactions, available from www.uncitral.org/uncitral/texts/security.html.

³ *Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17)*, para. 333.



5. The annex to this note contains a joint proposal on the preparation of an explanatory text in the area of international commercial contract law (with a focus on sales). The Council on General Affairs and Policy of the Hague Conference welcomed the proposal at its meeting from 15 to 17 March 2016.⁴ On 19 May 2016, the Unidroit Governing Council recommended to the Unidroit General Assembly that work emanating from the proposal be included in the Work Programme for the triennium 2017-2019.

⁴ Conclusions and recommendations adopted by the Council of March 2016, para. 333, available from www.hcch.net/en/governance/council-on-general-affairs.

Annex

Joint proposal on cooperation in the area of international commercial contract law (with a focus on sales)

The Hague Conference on Private International Law (the “Hague Conference”), the International Institute for the Unification of Private Law (“Unidroit”), and the United Nations Commission on International Trade Law (“UNCITRAL”) regularly coordinate their activities in order to ensure a concerted approach to common issues.

Recently, that coordination has led to jointly publishing an explanatory text in the field of security interests, which lists and summarizes the work of the three organizations in that area. In particular, that explanatory text illustrates how the various instruments produced by the three organizations interact and provides a comparative understanding of the coverage and basic themes of each instrument.¹

Similar cooperation is suggested in the area of international commercial contract law with a focus on sales in light of the renewed interest for further promoting the adoption, application and uniform interpretation of texts in that area.

Over the decades, the Hague Conference, Unidroit and UNCITRAL have prepared legislative and non-legislative instruments related to international commercial contract law. Often, those efforts have been conducted in close cooperation. One example of such cooperation may be found in the legislative history of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)² (the “CISG”). In particular, the influence on the CISG of pre-existing uniform law texts developed by other organizations is well known.³

The CISG is one of the most successful uniform law texts in light of State participation, application by courts and arbitral tribunals and influence on sales law reform. That success highlighted the desirability of further supporting its implementation in line with its goals and guiding principles.⁴

UNCITRAL has already developed tools providing support to CISG implementation. Those tools include cases reported in the Case Law on UNCITRAL Texts (CLOUT) information system as well as the CISG Digest. However, experience demonstrates that a number of challenges to the use, application and

¹ UNCITRAL, Hague Conference and Unidroit Texts on Security Interests: Comparison and analysis of major features of international instruments relating to secured transactions, available from www.uncitral.org/uncitral/uncitral_texts/security.html.

² United Nations, *Treaty Series*, vol. 1489, No. 25567.

³ See, inter alia, as to Unidroit instruments: Convention Relating to a Uniform Law on the International Sale of Goods (The Hague, 1964), available from www.unidroit.org/instruments/international-sales/international-sales-ulis-1964; Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (The Hague, 1964), available from www.unidroit.org/instruments/international-sales/international-sales-ulfc-1964-en; or the Hague Conference: Convention of 15 June 1955 on the Law Applicable to International Sales of Goods, available from www.hcch.net/en/instruments/conventions/full-text/?cid=31.

⁴ *Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17)*, para. 334.

interpretation of the CISG arise from insufficient awareness of the relation between the CISG and other uniform law texts, including those prepared by the Hague Conference and Unidroit. It is submitted that a joint effort aimed at providing guidance on how those texts relate would be beneficial for all texts concerned.

Examples of texts closely related to the CISG include the Principles on Choice of Law in International Commercial Contracts (the “Hague Principles”)⁵ and the Unidroit Principles of International Commercial Contracts (the “Unidroit Principles”),⁶ both of which have been endorsed by UNCITRAL. Moreover, UNCITRAL has prepared treaties that are closely related to the CISG such as the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) (the “Electronic Communications Convention”)⁷ and the Convention on the Limitation Period in the International Sale of Goods⁸ (the “Limitation Convention”) as well as other instruments of legislative and non-legislative nature.

The substantive overlap and cross-fertilization of those and other texts prepared by the Hague Conference, Unidroit and UNCITRAL⁹ has highlighted the desirability for greater clarification of the relationship among those instruments with a view to jointly promoting their adoption and use. It is important to recall that the primary texts in this field are of an optional nature. With this in mind, coordinated presentation and guidance as to the content and consequences of the available options would be of clear value in further developing the understanding and appropriate use of these texts.

Accordingly, the goal of the suggested document on international contracts law with a focus on sales would be to guide across a range of relevant issues, from choice of law to identification, among existing texts, of those most suitable for each type of transaction. That document would reference relevant uniform texts of legislative, contractual or other nature. It could also examine how existing texts and standards relate to emerging issues such as the legal treatment of global supply chains.

If desirable and feasible, the document could address specifically issues relevant for various legal actors, including legislators, judges and arbitrators, legal counsels and commercial operators. It could also provide a solid teaching reference.

It should be stressed that the suggested document would not require new legislative work. It would analyse existing texts, coordinate them by highlighting mutual

⁵ Available from www.hcch.net/en/instruments/conventions/full-text/?cid=135.

⁶ In their most recent iteration: Unidroit Principles of International Commercial Contracts 2010, available from www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010.

⁷ General Assembly resolution 60/21, annex.

⁸ Convention on the Limitation Period in the International Sale of Goods (New York, 1974), United Nations, *Treaty Series*, vol. 1511, No. 26119; as amended by the Protocol of 11 April 1980 (Vienna), United Nations, *Treaty Series*, vol. 1511, No. 26121.

⁹ Consider, for example, Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance (1983), *Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 17 (A/38/17)*, annex I; UNCITRAL texts on electronic commerce, available from www.uncitral.org/uncitral/uncitral_texts/electronic_commerce.html; or the Hague Conference Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods (not in force), available from www.hcch.net/en/instruments/conventions/full-text/?cid=61.

relationships and consolidate them, including by clarifying whether texts have had limited success or have been replaced by more recent ones.

One important dimension of the suggested work would be to refer, as appropriate, to relevant texts developed by other intergovernmental organizations, including at the regional level, and by the private sector. Those references would be prepared in consultation with the relevant institutions, in line with the usual inclusive approach of the Hague Conference, Unidroit and UNCITRAL.

The outcome of the suggested project could provide an important contribution to establishing clarity in the field by taking stock of the many achievements made in the past. It could also offer a clearer picture of lessons learned and best practices for the pursuit of greater legal uniformity and broader contractual freedom.

Mindful of increasing constraints on existing resources and of concurring priorities in each organization's intense work programme, it is suggested that a significant amount of the preparatory work in drafting the guidance document be carried out in an agile yet fully inclusive manner. To this end, a small joint panel of experts could be set up to provide further details on suggested scope and methodology. One possible first step could consist of mapping the most relevant texts and arranging them according to their scope. At a second stage, the panel could provide a short description of the content and relevance of those texts and assess their interaction.

The composition of the expert panel should reflect representation from different legal traditions and levels of economic development as well as, where appropriate, from other organizations active in the field. The Hague Conference, Unidroit and UNCITRAL would oversee the work of that panel through their Secretariats and provide guidance and coordination as appropriate.

The final product of the expert panel's work would be determined by the Hague Conference, Unidroit and UNCITRAL in light of the findings of that panel and of its recommendations. Appropriate venues for finalizing and adopting the project's outcome could also be considered at a later stage.