

the importance for developing countries, to develop enterprise strategies. Taking into account the changing nature of enterprises and the importance of a coherent policy environment, the Commission felt that further analytical work was required in promoting effective inter-firm cooperation; roles of government and the private sector in creating a coherent policy framework; effective support measures for development of small and medium sized enterprises (SME); short and long-term impacts of macro economic reform on the development of enterprises.

As regards the item "Services infrastructure for development and trade efficiency" the Commission was of the view that the work of the UNCTAD Secretariat in the areas of telecommunications, transport, customs, banking and insurance trade facilitation, business information, transit, human resource development and legal issues should be pursued in an integrated fashion, so as to maximise the synergies and economies of scale which may be identified between these areas.

The Commission at its first session decided to convene expert level meetings to facilitate indepth study on specific issues. Accordingly, the following meetings were convened:

- (a) Expert Meeting on the Use of Information Technologies to Make Transit Arrangements More Effective, 5-7 May 1997;
- (b) Expert Meeting on Government and Private Sector Roles and Interactions for SME Development, 23-25 July 1997; and
- (c) Expert Meeting on Telecommunications, Business Facilitation and Trade Efficiency, 8-10 September, 1997.

The recommendations of the expert group meetings were forwarded to the second session of the Commission which met from 1 to 5 December 1997. Taking note of these recommendations the Commission called upon the international community to promote cooperation between firms in developed and developing countries. International financial institutions were urged to develop and support specific programmes to build private sector lending

capacities to small and medium sized enterprises.

On the item "Services Infrastructure for Development - and Trade Efficiency Assessment", the Commission acknowledged the significant impact of micro-finance in poverty alleviation. It recognised the importance of expanding financial services in the area of micro-enterprise development, as they contribute to providing the basic means for empowering individuals, especially women to launch micro enterprise activities. The Commission directed the UNCTAD Secretariat to continue to promote practitioners and governments, including among developing countries.

IV. REVIEW OF THE INTERNATIONAL CONVENTION FOR UNIFICATION OF CERTAIN RULES RELATING TO THE ARREST OF SEA-GOING SHIPS, 1952.

In May 1993, the UN/IMO Conference of Plenipotentiaries on Maritime Liens and Mortgages, having adopted the International Convention on Maritime Liens (MLM Convention) and Mortgages, recommended that, "the relevant bodies of the Conference, reconvene the -Joint Intergovernmental Group (JIG) with a view to examine the possible review of the International Convention for the Unification of Certain Rules relating to the Arrest of Sea-going Ships, 1952". Accordingly, the JIG of UNCTAD/IMO met from 1994 to 1996 to deliberate on a revised set of articles prepared by the Secretariats of UNCTAD and IMO. A Working Group was established with the task of ensuring that all claims with maritime lien status under the 1993 MLM Convention are included in the list of maritime claims.

The JIG completed consideration of the draft articles for a convention on arrest, of ships at its ninth session. It also recommended to the IMO Council and the Trade and Development Board of UNCTAD, that they consider favourably, on the basis of the useful work done so far, proposing to the General Assembly of the United Nations the convening of a diplomatic conference to consider and adopt a convention. The Trade and Development Board at its fifteenth executive session held in June 1997 endorsed this

Draft Articles for a Convention on Arrest of Ships - An Overview:

The draft Convention comprises of nine articles. Article 1 on 'Definitions' defines the terms: maritime claim, arrest, person, claimant and court. The term 'maritime claim' is defined comprehensively. But opinion was divided within the JIG as to whether the definition of 'maritime claim' should be based on providing an exhaustive, list or whether it should adopt a more flexible approach of retaining an open-ended list. The question was left to be decided at a later stage by a diplomatic conference.

Article 2 on "powers of Arrest" provides that a ship may be arrested only in respect of a maritime claim exclusively by or under the authority of a Court of the Contracting State in which the arrest is made. The procedure for the arrest or release of a ship shall be governed by the law of the State in which the arrest was made. Article 3 on 'Exercise of right of arrest' enumerates the pre-conditions for effecting the arrest of a ship in respect of which a maritime claim is arrested.

Article 4 on "Release from arrest" lays down the general rule that a ship which has been arrested shall be released when sufficient security has been furnished in a satisfactory form. Any request for the ship to be released upon security being provided shall not be construed as an acknowledgement of liability nor as a waiver of any defence or any right to limit liability. This provision also describes the effect of arrest effected in a non-party State, when security as regards the same claim has been given in a State, party to the Convention.

Article 5 on "Right of re-arrest and multiple arrest" lays down the general rule that where in any State a ship has already been arrested and released or security in respect of that ship has already been given to secure a maritime claim, that ship shall not thereafter be re-arrested or arrested in respect of the same maritime claim. Exceptions to this general rule are also enumerated therein.

Article 6 on "Protection of Owners and demise charterers of arrested ships" elaborates on the powers of the court to impose upon the claimant who seeks to arrest a ship the obligation to provide security. The imposition of such an obligation is to recompense any loss which may be incurred by the defendant as a result of the arrest, and for which the claimant may be found liable.

Article 7 titled "Jurisdiction on the merits of the Case" provides the general rule that the courts of the State in which an arrest is effected or security given shall have the jurisdiction to determine the case upon its merits. Nevertheless, a State may refuse to exercise that jurisdiction where refusal is permitted by the law of that State and a court of another State accepts jurisdiction. In such cases, the refusing court may upon request, order a period of time within which the claimant shall bring proceedings before a competent court or arbitral tribunal.

Article 8 on "Application" lays down the scope and coverage of the Convention. The Convention shall apply to any sea-going ship within the jurisdiction of any State party, but not to ships owned or operated by a State and used only on government non-commercial service. Article 9 on 'Reservations' entitles a State to reserve the right to refrain from applying the Convention to ships not flying the flag of a State party.

III. UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION (UNIDO)

Pursuant to resolution (2152-XXI) of the UN General Assembly, the United Nations Industrial Development Organization (UNIDO) was established as its subsidiary body in 1966. Subsequently in 1979, it became an autonomous organization and started functioning as a specialized agency from August 1985. The primary objective of UNIDO is the 'promotion and acceleration of the industrial development in the developing countries with a view to assisting in the establishment of a new international economic order.

The work programme of UNIDO in the area of international trade law appears to be focused on the preparation of guidelines, manuals and checklists of contractual clauses so as to assist parties from the developing

countries in concluding industrial contracts. These may be enumerated as below:

- (1) Guidelines on the purchase, maintenance and operation of basic insurance coverage for processing plants in developing countries;
- (2) UNIDO Model form of agreement for the licensing of patents and know-how in the petrochemical industry, including annexes, an integrated commentary and alternative texts of some clauses;
- (3) Items which could be included in contractual arrangements for the setting up of a turnkey plant for the production of bulk drugs (pharmaceutical chemicals) or intermediaries included in the UNIDO list;
- (4) UNIDO Model form of licensing and engineering services agreement for the construction of a fertilizer plant;
- (5) UNIDO Model form of turnkey lump-sum contract for the construction of a fertilizer plant;
- (6) UNIDO Model form of semi-turnkey contract for the construction of a fertilizer plant;
- (7) UNIDO Model form of cost-reimbursable contract for the construction of a fertilizer plant;
- (8) Guidelines for Infrastructure through Build-Operate-Transfer Projects: The BOT Guidelines prepared by UNIDO cover the entire spectrum of financial and legal issues faced by government authorities and project managers in the development of BOT projects, while offering developing countries the basic orientation needed to design effective BOT strategies. The Guidelines *inter alia* contain chapters on the following aspects: introduction to the BOT concept; the government's role in providing for successful BOT concept; transfer of technology and capability building; procurement issues and selection of sponsors; financial structuring of BOT projects; and standard forms of agreements relating to construction, operation and maintenance.

(9) The UNIDO Manual on Technology Transfer Negotiations: This Manual, is primarily intended to serve the purpose of a teaching tool for technology transfer negotiation courses for enhancing the negotiation skills of the developing countries.

IV. INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (.UNIDROIT)

The 76th session of the Governing Council of the UNIDROIT met at the seat Of the Institute in Rome from 7 to 12 April 1997. During the course of the session a number of important issues were discussed which *inter alia* include:

- (i) Study group for the preparation of uniform rules on international interests in mobile equipment;
- (ii) Study group on franchising;
- (iii) Principles of International Commercial Contracts;
- (iv) Civil liability connected with the carrying out of dangerous activities;
- (v) Legal issues associated with computer software; and
- (vi) Creation of a database on uniform law.

Some briefs comments on these agenda items are supplied below:

(i) Preparation of uniform rules on International interests in mobile equipment

The main effort of UNIDROIT in this direction is towards development of uniform international rules designed to address legal problems arising out of the everyday use of high value mobile equipment across frontiers. Following the Canadian proposal made at the 67th session, a study group was constituted under the Chairmanship of Dr. Roy. Goode which had undertaken a preliminary

examination of the subject. Consequently a Sub-committee of the Study Group and later, a Draft Committee of the Group were established. A draft was completed by the Drafting Group of the Study group on 5 December 1995.

The areas covered by the first draft included the sphere of application of the proposed Convention, the setting up of an international register and the conditions which should govern the recognition by the courts of contracting States of international interests in mobile equipment created in accordance with the proposed convention. Special rules were also proposed for aircraft industries by the Aviation Working Group. (AWG)

The Third session of the Study Group which met from 15 to 21 January 1997 considered the draft rules proposed by the Drafting Group. The Drafting Group had suggested revision of certain issues that would result in the text including inter alia, assignments of international interests and provisions for speedy interim relief. The AWG had also made representations pertaining to registration of national non-consensual interests under the future convention and another rule permitting States to declare as to which of their national non-consensual interests should have precedence over the international interest.

Other decisions of the Study Group included the acceptance of a proposal tabled jointly by the AWG and the International Air Transport Association (IATA) to split the future international instrument into a Convention containing general rules applicable to all different categories of mobile equipment failing within its sphere of application and one or more specific protocols containing such additional special rules as were judged to be necessary for the special requirements of a particular category of equipment.

Elaborating further on the future convention along with more equipment specific protocols (as regards aviation and rail transportation), the Chairman of the Study Group stated that much progress had been made. The basic approach followed, he said incorporated ideas from the civil law and common law systems. The provisional text of the future convention provided an indicative list of the items to be covered, the key features being: (i) equipment is of high value; (ii) of a kind normally moving from one State to another in the course of ordinary, business; and (iii) and is uniquely identifiable. Identifiability would

help an asset based future international registration system which would include equipments such as airframes, aircraft engines, satellites and ships.

The Chairman stated that the subject matter of the future convention would be mobile equipment. He added that three different types of international interest were provided for in the future convention which include: those granted under a security agreement, those granted under a title reservation agreement and those vested in a person who was a lessor under a leasing agreement.

Other specific aspects of the proposed convention are as provided. Chapter 111 sets out the basic default remedies. Chapters IV and V contain registration rules of various international interests. Chapter VI deals with the effects of an international interest as against third parties. Chapter VII contains a set of provisions on assignments and Chapter VIII provides for registrable national interests.

The Governing Council expressed satisfaction at the progress achieved by the Study Group and the Drafting Group and approved albeit provisionally the approach adopted in the preparation of the rules of the future Convention. Furthermore with a view to enable Members of the Council to have a full discussion of the text of the future convention, it decided to convene a special session if need arose in early 1998 to consider the preliminary text and the draft protocol on aircraft equipment established by the Aircraft Protocol Working Group.

(ii) Study Group on Franchising

This item has been on the agenda of the UNIDROIT since its 65th session (1986). It may be recalled that at its 72nd session the Governing Council of the Institute had decided to set up a Study Group on Franchising to examine the different aspects of franchising and in particular the disclosure of information between the parties before and after a franchise contract has been concluded and the effect of a master franchise agreement on sub-franchise agreements.

At its first session, held in Rome, from 16 to 18 May 1994 the Study

Group had considered both international and domestic franchising. As regards the former the Group had focussed its attention on master franchise agreements. Also examined were the nature of the relationship between such agreements and sub-franchise agreements, the applicable law and Jurisdiction; settlement of disputes and the problems associated with the tripartite nature of the relationship between franchisor, sub-franchisor and sub-franchisees, especially in connection with termination and disclosure.

With respect to domestic franchising the Study Group had concentrated its efforts on the question of disclosure, examining the experience of countries which had, or had attempted some form of regulation in this area, the role of franchising association and the importance of the codes of ethics adopted by these associations.

The Study Group furthermore had decided to prepare an elaborate guide to international franchising rather than work towards a convention. The recommendations of the Study Group on the need for a Legal Guide, especially with regard to master franchise agreements, was endorsed by the 74th Governing Council of the Institute held in March/April 1995.

At the 74th session of the Institute, the Study Group produced a first preliminary draft Guide to International Franchising Produced in a rudimentary way it consisted of three chapters and required further editing and recording.

At the 75th session of the Governing Council the Study Group presented the full English text of revised guide as an interim report. The complete guide along with a second draft was to be ready by May 1997. The staff of Secretariat of the Institute also added that copies of the draft guide had been sent to the International Bar Association (IBA) Committee on International Franchising which met in New Delhi in November 1997 and to national franchising associations and lawyers with particular interest in this field. The recommendations of the IBA Meeting along with modifications suggested by the Study Group would bring out a final text which was expected to be ready for submission to the Governing Council at its 1998 session.

The Governing Council took note of the work on the item and decided

to set up a Sub -Committee to undertake a detailed consideration of the English and French revision of the draft at its next session to enable publication.

On the work on the guide being finalized, the Secretariat expressed hope that the Study Group would examine the possibility of preparing a model law on the subject as it would lead to greater harmonization on the subject. The work of the UNIDROIT in the Secretariat's view had also influenced drawing up of domestic legislations on franchising in France (1989), Brazil (1994), Mexico (1994), Spain (1996) and Russia (1996).

(iii) Principles of International Contracts.

The work on this item was completed in 1994 with the adoption of the final text of the UNIDROIT Principles of International Commercial Contracts. The Principles consist of a preamble and 119 articles divided into seven chapters (General provisions; formation; validity; interpretation; content; performance; and non-performance). Each article is accompanied by a commentary including illustrations, which form an integral part of the principles. These Principles constitute a system of rules of contract law specifically adopted to meet the special requirement of modern commercial practice. The Principles, have been published in five official languages of UNIDROIT (English, French, German, Italian and Spanish). At the same time, the Institute has authorized the preparation by leading scholars of translations of the Principles into other language versions such as Arabic, Bulgarian, Chinese, Japanese, Dutch, Russian, Hungarian, Portuguese, Serbian and Slovakian.

To enable wider dissemination of these Principles, the Governing Council of the Institute requested the Secretariat to conduct an inquiry as to the use of the Principles in actual practice and prepare a paper containing proposals for new topics to be dealt in the second enlarged edition. As a follow-up to this request, the Secretariat prepared a questionnaire which was circulated to around 1000 individuals who had shown keen interest in the UNIDROIT Principles. The questionnaire met with an overwhelming response as 226 replies were received from, around forty countries of the world in a short period of time.

The questionnaire referred to the six different uses of the UNIDROIT Principles i.e. for study and/or teaching Purposes; as a model for national or international legislation; as a guide in contract negotiations; as the law governing the contract, in support of a particular argument developed in a statement of claim or defence; and in support of a particular solution adopted in an arbitral award or a court decision.

Appreciating the good response received from a number of countries as regards the Principles, the Governing Council called for further dissemination of the Principles by:

(i) requesting the President of the Institute to negotiate with leading arbitral centres enabling the Secretariat to have access to awards referring to the Principles, with a view to permitting publication by the Institute and identify any problem, in application;

(ii) having the feasibility Of supporting the publication within the UNILEX;

(iii) working towards the publication of second enlarged edition of the Principles on a priority basis; and

(iv) convening of a smaller drafting committee by the Working Group to prepare the preliminary draft, taking into account linguistic and terminological difficulties.

(iv) **Civil liability connected with the carrying out of dangerous activities**

This item was included in the work programme of the UNIDROIT upon a reference made by the Government of India in the wake of leakage of methyl iso-cyanate gas from a multinational power plant at Bhopal and the consequent disaster that claimed the life of thousands and leaving others permanently incapacitated. It may also be recalled that the Governing Council of the Institute at its 73rd session (1994) had asked the Secretariat to prepare

a study designed to identify issues that might serve as a basis for possible measures designed to ensure compensation for personal injury to the victims of industrial accidents.

The 74th session of the Institute had reviewed the mandate and asked the Secretariat to conduct the study within the following parameters:

- (i) It should be confined to the question of liability for personal injury;
- (ii) It should not cover nuclear accidents or accidents occurring in the transport of goods; and
- (iii) Any action that might be authorized in the light of such a study should be undertaken on a step by step basis.

At the 76th session of the Institute the subject was not debated as there was not much progress due to lack of funding. However the Secretariat is continuing to collect documentation on the subject. There was also a suggestion that the subject be deleted from the agenda of the next session, as the work programme for the 1999-2001 triennial period would expire at the 77th session. The President clarified however this topic could be taken up again in the framework of the new work programme.

(v) **Legal issues associated with computer software**

A study by the Secretariat of UNIDROIT had suggested an initiative in the area of specific commissioning of software programmes and the rights to use this programme, by the party commissioning the programme and the party developing it. Agreements concluded with a view to the preparation of such programmes are usually tailor-made from one agreement to another and their terms differ according to the experiences of the parties and their respective bargaining power. It had also been proposed by the Secretariat that the UNIDROIT might usefully consider the drawing up of guidelines regarding the negotiation of such agreements, their purpose being to make the parties more aware of the differing legal consequences flowing from their choice of

contractual provisions.

The Governing Council at its 72nd session (1993) had taken note of the Secretariat study but in view of the doubts expressed by certain members as to the usefulness of the exercise, deferred the taking up of the topic. Later at successive sessions of the Council i.e 73rd (1994), 74th (1995) and 75th (1996), on account of lack of financial and human resources no Progress has been made, on the subject.

(vi) Creation of a Database on Uniform Law

At its 75th Session (1996) the Governing Council had endorsed a project for setting up of an UNIDROIT Data base on Uniform Law. The main aim of this database would be providing information on diverse areas of uniform law and access of this information not only through common means of retrieval such as title and date but also through a concept key-word system elaborated after a thorough analysis of the materials.

This project would *inter alia* involve a three stage progression which would include :

- (i) The insertion of certain basic materials;
- (ii) the insertion of case law and bibliographic references; and
- (iii) analysis of the materials and extrapolation of the concept key words.

Besides this, other preparatory work would involve the identification of the instruments that the database should contain for each subject, the retrieval of the authoritative text of the instruments in English and French and memorizing of texts in computer form. Small databases containing addresses of various interest groups (international organizations, specialized research institutes, chambers of commerce and industry and law firms) were also being prepared.

A decision was also taken to pursue funding facilities for the software and the preparation of a draft database on uniform law to be placed before the next session.

V. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

On the basis of an earlier request made by the United States and the terms of reference assigned, the Secretary General of the Hague Conference on Private International Law convened a Special Commission, which met from 17 to 27 June 1997 at the Hague, Netherlands. The Meeting was attended by thirty five Member States, nine non-Members, five inter-governmental organization and six international non-governmental organizations.

The main item on the agenda of the Special Commission at its first session was the preparation of a preliminary draft Convention on international jurisdiction and the effects of foreign Judgements, to be submitted to the nineteenth Diplomatic Session of the Conference to be convened in 2000. The proposed Convention will apply to matters relating to international litigation. i.e. in cases between parties who are all subjects of private law, or who are acting for private activities. This would exclude all cases between a State or a State entity, or any other entity acting on behalf of the state in public service missions.

On the basis of the discussion and Preliminary Document No.7 of April 97, prepared by the Secretariat of Conference entitled "International Jurisdiction and Foreign Judgements in Civil and Commercial matters", the Chairman of Special Commission called upon the delegates to identify the objectives of future convention. Whereupon, the delegates reached a consensus that the proposed convention must be: (i) adapted to the technical economic, sociological and legal developments of the twenty-first century; (ii) simple, effective and pragmatically drafted to be understood by lawyers, judges and lay public; (iii) be able to identify and solve questions pertaining to international litigation without duplication; (iv) in the form of a mixed convention, although most delegates preferred to negotiate a double convention; (v) truly global in nature whereby elements of all legal and judicial systems are taken into consideration; and (vi) able to respect the balance between the plaintiff and the defendant.

The Special, Commission discussions on the Preliminary Doc. No.7 essentially focused on the rules of direct jurisdiction. However within the