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**Item No. 4 on the agenda: Update and determination of scope of certain projects  
on the 2020-2022 Work Programme**

**(b) Work on Artificial Intelligence, Smart Contracts and DLT**

(prepared by the Secretariat)

<i>Summary</i>	<i>Update on the preparatory work for a Digital Assets Project and refining the project scope</i>
<i>Action to be taken</i>	<i>Note the preparatory work undertaken since the remote meeting of the 99<sup>th</sup> Governing Council session in April/May 2020; approve the proposed scope of the project and confirm the high priority status given to the project, allowing the Secretariat to establish a Working Group</i>
<i>Mandate</i>	<i>Implementation of the decision of the General Assembly in relation to the Work Programme 2020-2022</i>
<i>Priority</i>	<i>Confirmation of High priority</i>
<i>Related documents</i>	<a href="#"><u>UNIDROIT 2017 – C.D. (96) 5, Appendix II</u></a> ; <a href="#"><u>UNIDROIT 2017 – C.D. (96) 15</u></a> ; <a href="#"><u>UNIDROIT 2018 – C.D. (97) 17</u></a> ; <a href="#"><u>UNIDROIT 2018 – C.D. (97) 19</u></a> ; <a href="#"><u>UNIDROIT 2019 – C.D. (98) 17</u></a> ; <a href="#"><u>UNIDROIT 2019 – A.G. (78) 12</u></a> ; <a href="#"><u>UNIDROIT 2019 – A.G. (78) 3</u></a> ; <a href="#"><u>UNIDROIT 2020 – C.D. (99) A.8.</u></a>
<i>Note:</i>	<i>This is an updated version of the document following the initial version circulated earlier in August</i>

## **I. INTRODUCTION**

1. The main purpose of this document is to update the members of the Governing Council on the preparatory work undertaken by the Secretariat in relation to the project that was initially-labelled Artificial Intelligence, Smart Contracts and Distributed Ledger Technology (DLT), since the 99<sup>th</sup> Governing Council remote meeting in April/May 2020. Following the mandate resulting from the above-mentioned first part of the 99<sup>th</sup> Session, work has concentrated on digital assets, and, more precisely, on refining the project scope.

## II. BACKGROUND

2. In 2015, the Secretariat received a proposal from the Ministry of Justice of Hungary to consider the development of model laws in the domain of “business informatics”.<sup>1</sup> In November 2016, the Ministry of Industry and Trade of the Czech Republic sent the UNIDROIT Secretariat a proposal to include two main topics in the Work Programme: distributed ledger (or blockchain) technology and inheritance of digital properties ([UNIDROIT 2017 – C.D. \(96\) 5, Appendix II](#)). The Czech Republic submitted a second proposal to UNIDROIT’S Governing Council at its 97<sup>th</sup> session (Rome, 2-4 May 2018), during which the Council concluded that the Secretariat should continue to monitor developments in this area with a view to its possible inclusion in the future Work Programme ([UNIDROIT 2018 – C.D. \(97\) 19](#), para. 245).

3. Similarly, the Czech Republic presented a proposal to the UNCITRAL Secretariat requesting that UNCITRAL closely monitor developments relating to legal aspects of smart contracts and artificial intelligence. At its 51<sup>st</sup> session (New York, 25 June-13 July 2018), the Commission decided that “[t]he Secretariat should compile information on legal issues related to the digital economy, including by organizing, within existing resources and *in cooperation with other organizations*, symposiums, colloquiums and other expert meetings, and to report that information for its consideration at a future session.”<sup>2</sup>

4. In line with the joint proposal of the Czech Republic, and as they had received similar mandates from their governing bodies, UNIDROIT and UNCITRAL agreed to explore the possibility of future joint work in this area. Both organizations agreed that it would be necessary first to identify the most adequate areas of possible work and later to narrow down the scope of the work as well as to define its nature. In light of this, it was decided that two workshops would be held, convening international experts on the different subject matters encompassed by the initial proposal of the Czech Republic.

5. A first joint, invitation-only, workshop was convened at UNIDROIT’S seat (Rome, 6-7 May 2019). The workshop gathered leading experts, particularly in the fields of DLT, smart contracts and areas of artificial intelligence possibly linked with private law.<sup>3</sup> The Governing Council, at its 98<sup>th</sup> session (Rome, 8-10 May 2019), was informed that the joint workshop had revealed great interest in the area, with particular reference to a general project on digital assets. It was further noted that this project “would require work on categories and conceptualisations, in order to develop a set of definitions for terminologies and concepts used within this area”, which in turn “would entail establishing a taxonomy of terms used as part of the digital economy” ([UNIDROIT 2019 – C.D. \(98\) 17](#), para. 267).

6. The Governing Council asked the Secretariat to “conduct further research to narrow down the scope of the project”, which, based on the conclusions of the joint workshop, “would be initially confined to digital assets”, with a decision on final scope to be taken by the Council at its 99<sup>th</sup> session. The Council also recommended that the Secretariat “conduct additional research on the impact of Smart Contracts/DLT/AI on existing UNIDROIT instruments” ([UNIDROIT 2019 – C.D. \(98\) 17](#), para. 275).

7. The Governing Council recommended to the General Assembly that it include this item at medium priority on the 2020-2022 Work Programme ([UNIDROIT 2019 – C.D. \(98\) 17](#), para. 275). The General Assembly, at its 78<sup>th</sup> session, approved the inclusion of the project in the Work Programme of the organisation for the 2020-2022 triennium as recommended by the Governing Council ([UNIDROIT 2019 – A.G. \(78\) 12](#), paras. 43 and 51, and [UNIDROIT 2019 – A.G. \(78\) 3](#) paras. 69-71). The General

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<sup>1</sup> [UNIDROIT 2016 – C.D. \(95\) 13 rev, Annex II.](#)

<sup>2</sup> See Report of the United Nations Commission on International Trade Law, UNGA Doc. A/73/17 (51<sup>st</sup> session, 25 June – 13 July 2018), para. 253, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V18/052/21/PDF/V1805221.pdf?OpenElement> (emphasis added).

<sup>3</sup> For further information, the Summary of the Discussion and Conclusions from that workshop can be found here: <https://www.unidroit.org/english/news/2019/190506-unidroit-uncitral-workshop/conclusions-e.pdf>.

Assembly asked the Secretariat to more precisely determine the scope of the project and present it for reconsideration at the next session of the Governing Council.

8. To carry out the mandate received from the General Assembly, a second joint UNIDROIT and UNCITRAL workshop was convened at the UNCITRAL Secretariat in Vienna on 10-11 March 2020. As the previous meeting, this event was an invitation-only meeting of experts, many of whom had also taken part in the first workshop. The invitation was extended with the aim of developing “a legal taxonomy of key emerging technologies and their applications”. This second event focused exclusively on the drafting of a taxonomy as well as on the potential relevance of new technologies to existing instruments.

9. On the basis of the discussions during the first and second workshops (Rome, 6-7 May 2019, and Vienna, 10-11 March 2020, respectively), a document was submitted to the Governing Council at its 99<sup>th</sup> session (A) ([UNIDROIT 2020 – C.D. \(99\) A.4](#), paras. 23-33) which set out the Secretariat’s proposal on the most appropriate scope for this project, considering that further refinements should be entrusted to the experts who would be selected as members of the Working Group for the project.

10. In broad contours, the proposal described a project that would aim to do the following:

- “The project would develop principles relating to the legal nature, transfer and use of tokens. It would focus on private law, and not regulation. It would consist of a legal taxonomy, and consideration of issues arising in various important contexts, such as insolvency, secured transactions, identification of the applicable law in cross-border transactions, and the legal position of intermediaries involved in the token markets, such as exchanges and custodians.
- It would take a functional approach, neutral as to legal culture. It would therefore seek to identify the rights and obligations arising, without giving bundles of rights and obligations labels, such as ‘property’, which vary among jurisdictions.
- It would be necessary to consider how far the principles developed by the project are consistent with existing law. Despite the fact that tokens are a ‘new’ type of asset, consistency with legal treatment of other types of asset could be seen as important, and consideration will need to be given to what extent existing legal principles can apply by analogy, and what modifications are required.
- The project would also take a neutral approach, as far as possible, in relation to technology, so as to ‘future proof’ the principles. In other words, it would seek to develop principles that could apply to any system in which data could constitute a token (that is, an asset which could only be spent once), rather than being specifically applicable to systems based on DLT or blockchain. In this way, the danger that the work would be overtaken by technological or market developments would be minimised.”

11. On the basis of feedback received from the Governing Council at its 99<sup>th</sup> session (A) the Secretariat prepared an amended proposed action, namely:

- “to begin work on the project (i) remotely, in order to avoid costs, and (ii) limited to further refining the scope of the project.
- In order to conduct this limited work until the second meeting of this session of the Governing Council in September, the Secretariat requested authorization to select a limited group of experts, which would naturally evolve into the core of the future Working Group. This core group would assist the Secretariat in the preparation of a more developed document for the September meeting. In addition to incorporating comments and analysing topics arisen as a consequence of this discussion, said document would include (i) details of the full Working

Group, (ii) a detailed time-line of a proposed action plan, and (iii) an explanation as to how this project would feed into – and hence create synergies – with other projects of the current Work Programme.”

- To change the name of the project to one that better represents the content of the work.

12. The Governing Council agreed to approve the scope and upgrade the level of priority, as well as to follow the amended proposed action by the Secretariat ([UNIDROIT 2020 – C.D. \(99\) A.8](#), paras. 57-58).

### **III. PREPARATORY WORK**

13. In accordance with the amended proposed action submitted to and approved by the Governing Council at its 99<sup>th</sup> session in April/May 2020, the Secretariat has been conducting purely preparatory work, at no financial cost, identifying experts who could be invited to participate in a future Working Group and planning the preparation prior to the first Working Group meeting.

14. In July, the Secretariat set up an initial core group of experts to help refine the scope of the project and start preparing the necessary background documentation for the first Working Group meeting. Timely preparation of the necessary background documentation will facilitate holding the first Working Group meeting in autumn this year, which, in turn, would facilitate completing the work led by UNIDROIT as planned during the current Work Programme.

15. These core experts, acting under the leadership of Professor Hideki Kanda, member of the Governing Council, formed an Exploratory Working Group (EWG), which held a number of online sessions to develop a document for the September session of the Governing Council:

- i. 1<sup>st</sup> session (09 July 2020) (see Annex – Report of 1<sup>st</sup> session of EWG)
- ii. 2<sup>nd</sup> session (22 July 2020) (see Annex – Report of 2<sup>nd</sup> session of EWG)
- iii. 3<sup>rd</sup> session (10 August 2020) (see Annex – Report of 3<sup>rd</sup> session of EWG)
- iv. 4<sup>th</sup> session (24 August 2020) (see Annex – Report of 4<sup>th</sup> session of EWG)
- v. 5<sup>th</sup> session (2 September 2020) (see Annex – Report of 5<sup>th</sup> session of EWG)

16. The outcome of these sessions of the EWG is a refined scope for the project which is provided to the Governing Council members as an Annex to this document.

17. An Exploratory Workshop has been scheduled for 17-18 September 2020. This Workshop will examine various issues identified by the EWG and its outcomes will contribute towards the final Issues Paper to be prepared for the first meeting of the full Working Group for this project. Members of the Governing Council are invited to attend and will receive a formal invitation upon the finalisation of the agenda for the Workshop.

18. Concerning the change of name, and in light of the development of the discussion on scope, the Secretariat would propose “Digital assets and Private Law Project”. The name might need to be adjusted once there is certainty as to the exact type of instrument drafted. Moreover, the name is purely informal and refers to the project, not necessarily to the instrument that will result from the work. The final name of the instrument will be decided by the Governing Council in due time.

#### **A. DETAILS OF THE FULL WORKING GROUP**

19. As consistent with the Institute’s established working methodology, the document would be developed by a Working Group composed of international legal experts representing different legal systems and geographical regions, chaired by a member of the Governing Council.

20. The following experts have participated in the aforementioned EWG and may be potential members of a future Working Group:

- (i) Hideki Kanda, Professor, Gakushuin University (Japan) (Chair)
- (ii) Jason Grant Allen, Senior Research Fellow, Humboldt University of Berlin (Australia)
- (iii) Marek Dubovec, Executive Director, Kozolchyk National Law Center (NatLaw) (United States)
- (iv) David Fox, Professor, University of Edinburgh (United Kingdom)
- (v) Louise Gullifer, Professor, University of Cambridge (United Kingdom)
- (vi) Charles Mooney, Professor, University of Pennsylvania (United States)
- (vii) Carla Reyes, Assistant Professor, Southern Methodist University (United States)
- (viii) Jeffrey Wool, Senior Research Fellow, Harris Manchester College, University of Oxford (United States)
- (ix) Nina-Luisa Siedler, Partner at DWF (Germany)

21. Alongside these experts, two possible models may be considered in developing the Working Group for this project:

- i. *Ordinary structure:* In line with normal practice, a feasible number of selected experts would be invited to take part as Members of the Working Group, with an additional number of institutions and experts invited to participate as Observers.
- ii. *Enhanced structure:* A small number of additional experts and observers could be invited to take part in the Working Group, including a limited amount of selected institutions and experts as observers. Alongside this “reduced” Working Group, we would propose the establishment of a Steering Committee with a much larger membership to assist the activities of the Working Group. It is customary for UNIDROIT not to convene a Group of Governmental Experts unless the project concerns a treaty or a convention. However, given the enormous interest and the complexity of the topic, this Secretariat is persuaded that the creation of an informal forum that allows the Secretariat and the Working Group to reach out to a wider community of experts would prove beneficial. With a view to involving UNIDROIT’s constituency in the project, Member States could be invited to propose names for participation in the Steering Committee, so the Steering Committee would be an informal version of a Committee of Governmental Experts. The Steering Committee would hold its meetings remotely, or, if in person or hybrid, the Institute would not cover any costs of travel or stay. In other words, Steering Committee members would be regarded, financially, as observers in an ordinary working group.

22. In light of the highly technical nature of the project and of its considerable potential variation for the disparate sectors of technological reality, both in (i) and (ii) the Secretariat would propose to invite selected experts from different areas to attend specific meetings of the Working Groups, depending on the topics discussed in each meeting.

23. *The Secretariat invites the Governing Council to provide input on the structure and composition of the Working Group to be established for this project.*

## **B. DETAILED TIME-LINE OF A PROPOSED ACTION PLAN**

24. Under the guidance of the prospective Working Group Chair Professor Hideki Kanda, the Working Group will undertake its work in an open, inclusive and collaborative manner.

25. The work should – to the extent possible – be completed during the current Work Programme, although it cannot be excluded that only a first full draft can be completed by that time, and final

approval might need to be postponed to the next Governing Council session. The following would be a tentative calendar, the effective execution of which may be affected by the evolution of the current extraordinary international context:

- (a) Preparation of a guidance document (e.g. Principles and/or Legislative Guidance) on Digital Assets and Private Law over four in-person sessions 2020-2021
  - i. First session: Fall 2020
  - ii. Second session: First quarter of 2021
  - iii. Third session: Before the summer of 2021
  - iv. Fourth session: Second half of 2021
  - v. It is envisaged that, in between in-person sessions, remote meetings may be conducted when deemed necessary. Given the extraordinary circumstances, one or more of the in-person meetings may be substituted by remote webinars.
- (b) Consultations and finalisation: Early 2022
- (c) Adoption by the Governing Council of the complete draft at its 101<sup>st</sup> session in May 2022

### **C. SYNERGIES WITH OTHER UNIDROIT PROJECTS OF THE WORK PROGRAMME 2020-2022**

26. This section briefly introduces how this project would benefit from existing instruments and feed into – and hence create synergies – with other projects of the current Work Programme.

27. In terms of the relationship with existing UNIDROIT instruments, one of the important aspects envisaged in the Digital Assets and Private Law project concerns the legal analysis of the taking of security over digital assets, issues relating to the provision of digital asset custody services, and issues relating to the insolvency of the custodian of digital assets, which naturally links with the Institute's work in capital markets and, more precisely, in the area of intermediated securities, providing connections with existing instruments such as the UNIDROIT Convention on Substantive Rules for Intermediated Securities (2013) and the UNIDROIT Legislative Guide on Intermediated Securities (2017).

28. Regarding synergies with other projects of the current Work Programme, there is a natural fit with the Best Practices of Effective Enforcement Project, which has the analysis of the impact of new technologies, and, in particular, digital assets, on enforcement, as one of its main objectives. This constitutes a natural opportunity for cross-fertilization between the two projects, and, to this end, a number of experts involved in the Exploratory Working Group on the Digital Assets Project have already been contacted to help identify concrete examples of the application of new technologies in the context of enforcement. Additionally, a workshop being organised on September 21 on Enforcement will feature a panel on the impact of new technologies on enforcement.

29. Another area which presents a clear opportunity for cross-cutting work is the project concerning a Model Law on Warehouse Receipts. There is a direct relationship between the projects in light of the electronic and IT component of the project which touches upon both the design of electronic warehouse receipts and their negotiability. In this connection, one of the categories of digital assets to be examined in the Digital Assets project concerns digital tokens which are linked to an external asset or a legal right (i.e. a digital representation of a right to receive goods for instance).

By fostering exchanges between the two Working Groups, the legal analysis undertaken in the context of both projects would be greatly enriched. Moreover, should the work in the project to draft a Model Law on factoring cover electronic platforms, the cross-fertilisation between both projects would also bring about an important benefit.

#### **IV. ACTION TO BE TAKEN**

30. *The Governing Council is invited to note the Secretariat's preparatory work for the proposed Digital Assets Project undertaken since the 99<sup>th</sup> Governing Council remote meeting in April/May 2020. It is also invited to confirm the high priority status given to the project, allowing the Secretariat to establish a Working Group.*

31. *The Governing Council is also invited to consider the temporary change of name of the project as well as to provide input, if applicable, on the structure and composition of the future Working Group.*