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**Item No. 4 on the agenda: Proposals for the New Work Programme
for the triennial period 2023-2025**

(memorandum prepared by the UNIDROIT Secretariat)

<i>Summary</i>	<i>Consideration of the draft Work Programme for the 2023-2025 triennium</i>
<i>Action to be taken</i>	<i>To take note of the proposed activities to carry out the current Work Programme and to make recommendations for the future Work Programme, including the relative priority to be assigned to each activity</i>
<i>Related documents</i>	<i>Work Programme for the 2020-2022 triennium (UNIDROIT 2019 - A.G. (78) 3; C.D. (98) 14 rev. 2)</i>

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Introduction

1. UNIDROIT's current Work Programme for the 2020-2022 triennium will expire at the end of the year. At its 101st session (Rome, 8-10 June 2022), the Governing Council will be called upon to make recommendations regarding the new Work Programme for the 2023-2025 triennium, in particular the proposed activities and their respective priorities, for the General Assembly's consideration and approval at its 81st session (Rome, December 2022).¹ Moreover, this document includes a detailed account of the activities on the 2020-2022 Work Programme that the Secretariat considers should be carried over to the new Programme as well as a description and consideration of the proposals received regarding new activities.

2. The 2020-2022 Work Programme is comprised of topics that the Governing Council considered at its 98th session in 2019 ([C.D. \(98\) 14 rev. 2](#)) and recommended for approval by the General Assembly at its 78th session ([A.G. \(78\) 3](#)). The assignment of the relative level of priority of each activity under the Work Programme follows the criteria developed for that purpose by the Governing Council at its 89th session (Rome, 10-12 May 2010):

- (a) Priority for allocation of meeting costs:
 - (i) "high priority" – projects that should take precedence over others
 - (ii) "medium priority" – projects eligible for being advanced in the event that the costs of high priority projects turn out to be lower than anticipated (e.g., because extra-budgetary funding is obtained), thus freeing resources under the regular budget; and
 - (iii) "low priority" – projects that should only be advanced after completion of other projects or on the basis of full extra-budgetary funding.
- (b) Priority for allocation of human resources:
 - (i) "high priority" – at least 70% of the time of the officers responsible;
 - (ii) "medium priority" – not more than 50% of the time of the officers responsible; and
 - (iii) "low priority" – not more than 25% of the time of the officers responsible.
- (c) Indispensable functions. Indispensable functions are those that are either imposed by the Statute of UNIDROIT or are otherwise necessary for its operation (e.g., management and administration). These functions, including the promotion of UNIDROIT Instruments, the Library, Publications, as well as the Internships and Scholarship Programme are "high priority" by their very nature, which is why they are supported by a pool of human and financial resources especially designated for that purpose. These will not be discussed in this document given that they remain unchanged from Triennium to Triennium.

3. **Section A** of this document contains a list of ongoing projects approved with high priority under the 2020-2022 Work Programme which are still work-in-progress and which will continue temporarily until finalisation during the 2023-2025 Work Programme. **Section B** sets out proposals for new legislative activities, which are organised in tentative hierarchical order to indicate the Secretariat's suggested levels of priority for consideration by the Governing Council. **Section C** provides information on low priority projects approved under the 2020-2022 Work Programme. Finally, **Section D** sets out the Institute's proposed non-legislative activities for the 2023-2025

¹ UNIDROIT Statute, art. 5(3) ("Every three years, [the General Assembly] shall approve the Work Programme of the Institute on the basis of a proposal by the Governing Council and, in appropriate cases pursuant to paragraph 4 of Article 16, revise by a majority of two thirds of the Members present and voting the resolutions adopted in accordance with paragraph 3 of the said Article 16.").

triennium. The Secretariat remains available to elaborate on any of the activities envisaged in the different sections of this document.

A. Ongoing legislative activities carried over from the 2020-2022 Work Programme

1. Preparation of a Model Law on Factoring

4. At its 98th session in May 2019, the UNIDROIT Governing Council approved the development of a Model Law on Factoring (MLF) as a high priority project for the Institute's 2020-2022 Work Programme, on the basis of a proposal submitted by the World Bank. It is suggested that Governing Council consider retaining the MLF as a high priority project on the Institute's 2023-2025 Work Programme, in order to (i) finalise and publicise the MLF, and (ii) develop a complementary document to assist States in its implementation.

5. As consistent with the Institute's established working methodology, the MLF is being developed by a Working Group composed of international legal experts representing different legal systems and chaired by Governing Council Member Professor Henry Gabriel. The MLF Working Group has held five meetings during 2020-2022 and will submit the draft MLF for consideration by the Governing Council at this 101st session.

6. To finalise the MLF itself, the following steps are required:

- (i) Circulation of the draft MLF for comment and public consultations with interested stakeholders (July 2022 – October 2022)
- (ii) MLF Working Group fifth session to consider comments submitted (November – December 2022)
- (iii) MLF Working Group sixth session to finalise the draft text (if necessary) (January – April 2023)
- (iv) Governing Council approval of the final text at its 102nd session (May 2023)
- (v) Editing, translation and publication (June 2023 – December 2023)

7. Once the MLF has been published, the Secretariat proposes that there be a limited promotion campaign in partnership with private sector stakeholders and regional fora. It is suggested that a comprehensive implementation campaign should not be undertaken until a complementary guidance document has been prepared.

8. Over the past two years, the Working Group has identified a number of matters that would be difficult to address in the MLF itself, but would be of significant importance for implementing States. The Working Group has identified over 60 such matters, including terminology issues, the treatment of digital currencies, the relationship between the MLF and other domestic laws, and further explanation of a range of substantive issues. To address the identified issues and to ensure that States have sufficient guidance in implementing the MLF, the Working Group has suggested that a complementary guidance document be developed to accompany the MLF. The guidance document could either take the form of an article-by-article commentary, or a guide to enactment. Without the development of a complementary guidance document, there is a risk that the MLF will not be implemented properly by enacting States, which will reduce its utility as a harmonising instrument for domestic regulation of factoring at a global level. Therefore, it is suggested that the commentary guidance document could be developed by the same experts that currently comprise the MLF Working Group, with the involvement of the international, regional and intergovernmental organisations currently observing the Working Group. It is anticipated that the guidance document could be

developed more expeditiously than the MLF itself, over a period of two or maximum three meetings, during 2024.

9. *The Secretariat invites the Governing Council to consider assigning the finalisation and publication of the Model Law on Factoring and the development of a complementary guidance document as a high priority project on the Institute's 2023-2025 Work Programme.*

2. Best Practices for Effective Enforcement

10. The project on Best Practices for Effective Enforcement (BPEE) was included in the 2020-2022 Work Programme by the General Assembly ([A.G. \(78\) 12](#), paras. 41 and 51, and [A.G. \(78\) 3](#)), confirming the recommendation of the Governing Council ([C.D. \(98\) 17](#), para. 245). At the second meeting of its 99th session on 23-25 September 2020, the Governing Council approved the proposed guidelines regarding the scope of the project, confirmed the high priority status assigned to it and authorised the establishment of a Working Group ([C.D. \(99\) B.21](#), paras 57-58).

11. Following the decision of the Governing Council, the UNIDROIT Secretariat set up a Working Group chaired by Governing Council Member Ms Kathryn Sabo and composed of international experts in civil procedure, secured transactions and technology as applied to the law, as well as several observer organisations and institutions. The Working Group was invited to consider the current challenges for effective enforcement, and the most suitable solutions (procedures, mechanisms) to overcome them. It was agreed that the goal of the project would be to draft best practices designed to improve the effectiveness of enforcement combating excessive length, complexity, costs, and lack of transparency, while at the same time ensuring a sufficient protection of all parties involved. Such best practices should consider the impact of modern technology on enforcement, both as an enabler of suitable solutions and as a potential source of additional challenges to be addressed.

12. Since the beginning of its activity, the Working Group has met for three sessions, facilitated by an intense intersessional activity conducted virtually and supported by the Secretariat. The first session, held on 30 November–2 December 2020, focused on the more precise determination of the scope of the project, as well as on methodology and organisational issues, and discussed a specific document on the impact of technology in enforcement. The second session took place on 20–22 April 2021, and its deliberations focused on the detailed Reports prepared by Subgroup 1 on “post-adjudication” enforcement; Subgroup 2 on enforcement of security rights (with inclusion of draft best practices); and Subgroup 3 on the impact of technology on enforcement. The third session of the Working Group, held on 29-30 November and 1 December 2021, addressed specific issues including enforcement of monetary claims by third party debt orders and tentative best practices regarding the impact of automation, charging orders on land, revised draft best practices on security rights over receivables, on the disposition of collateral and on variation by parties of the rules regarding realisation of the collateral, and a first discussion on enforcement on digital assets.

13. At the second meeting of the Governing Council's 100th session, held on 22-24 September 2021, it was recognised that notwithstanding the intense working schedule of the Working Group, additional time would be needed to ensure its completion. Two Working Group sessions are planned for 2022: the fourth session, which will be held on April 26-28, has been preceded by two consultation Workshops dedicated to the impact of technology on enforcement proceedings (one on “Enforcement on Digital Assets” (19 January 2022) and one on “Technology in Enforcement: recent developments and opportunities” (8 March 2022), and will discuss additional draft best practices on enforcement by way of authority, online auctions and enforcement on digital assets, as well as issues of structure and coordination and the setting up of a Drafting Committee. The fifth session is scheduled for 12-14 December and is expected to discuss an advanced set of best practices accompanied by explanatory comments. It is anticipated that a sixth session of the Working Group be held in Spring 2023, and that work be continued throughout 2023 with a view of presenting a finalised draft to the Governing Council in 2024.

14. *The Governing Council is invited to recommend retaining the formulation of Best Practices for Effective Enforcement in the 2023-2025 Work Programme as a high priority activity until its final completion.*

3. Law and Technology: Digital Assets and Private Law

15. At its 99th session in September 2020, the UNIDROIT Governing Council approved the Digital Assets and Private Law project for the 2020-2022 Triennial Work Programme at a high priority.² The Governing Council also agreed upon an “enhanced” structure for the project which would entail the setting up of a Steering Committee on Digital Assets and Private Law (“Committee”) in addition to the establishment of a Working Group.³

16. Carrying out the mandate received from the Governing Council, the Secretariat set up a Working Group, chaired by Professor Hideki Kanda, Member of the UNIDROIT Governing Council, which held five formal sessions between November 2020 and March 2022. In working towards the preparation of a guidance document in this area, the Working Group adopted the decision to establish four Sub-Groups to consider issues relating to the following: Sub-Group 1 on control and custody, which met on seven occasions in 2021; Sub-Group 2 on control and transfer, which met on seven occasions in 2021; Sub-Group 3 on secured transactions, which met on six occasions in 2021, and Sub-Group 4 which had two separate work streams, one dealing with taxonomy and another dealing with private international law related matters, which collectively met on four occasions in 2021.

17. Also as per the Governing Council’s mandate, a Steering Committee was formed under the leadership of Professor Monika Pauknerová, Member of the UNIDROIT Governing Council appointed as Chair. This body is comprised of experts from different fields (both technical and legal), and acts in a consultative capacity to allow for wider participation, ensuring all sensitivities and domestic realities are considered, increase transparency, and provide invaluable context specific feedback to the Working Group. The first distribution of documents to the Committee to solicit feedback on the current draft Principles took place in 2022 and a brief report of the results will be presented to the Governing Council.

18. Additionally, a series of special workshops were organised to examine specific matters, including: a Special Workshop held on 31 May 2021 (hybrid format) to closely examine issues relating to the issue of “Digital Twins” (i.e. a digital asset which is linked or connected to another asset); a Special Workshop held on 13 September 2021 (hybrid format) to examine issues relating to Custody and Control; and a Special Workshop held on 15 October 2021 (hybrid format) to examine issues relating to the notion of Digital Assets and Control. To further facilitate the drafting of the guidance document, the Working Group established a Drafting Committee composed of Working Group members, chaired by Professor Louise Gullifer, which held seven sessions from January to April 2022.

19. *Following a further update by the Secretariat, the Governing Council is respectfully requested to consider extending the Project as High Priority into the 2023-2025 Work Programme, with the aim to undertake broader consultations and continue to carry out intensive discussion within the Working Group and the Steering Committee on the guidance document with explanatory notes, before the instrument is finalised and proposed for adoption by the Governing Council in 2023.*

4. Preparation of a Model Law on Warehouse Receipts

20. Following a request for joint work from the United Nations Commission on International Trade Law (UNCITRAL), and upon the Secretariat’s proposal to the Governing Council at its 99th session in

² See Report of the 99th Session of the Governing Council ([C.D. \(99\) B.21](#)).

³ See Summary Conclusions of the 99th Session of the Governing Council ([C.D. \(99\) B Misc. 2](#)), paras. 7 and 8.

April/May 2020, the Council unanimously agreed to recommend that the General Assembly include the drafting, jointly with UNCITRAL, of a Model Law on Warehouse Receipts as a new project with high priority status in the 2020-2022 Work Programme, subject to approval of a parallel mandate by UNCITRAL's Commission ([C.D. \(99\) A.8](#), para. 21). UNCITRAL's Commission approved the project at its 53rd session in September 2020 ([UN Doc. A/75/17](#)). The General Assembly of UNIDROIT approved the recommended inclusion of the proposed project with high priority status in the current Work Programme at its 79th session in December 2020 ([A.G. \(79\) 10](#), paras. 39 et seq. in conjunction with para. 47).

21. The project is designed as a joint UNIDROIT/UNCITRAL project consisting of two phases. First, UNIDROIT leads the joint preparatory work through a UNIDROIT Working Group that develops a first comprehensive draft model law text. Once the UNIDROIT Working Group has completed the Model Law, the instrument will be submitted for intergovernmental negotiations through an UNCITRAL Working Group.

22. Following the approval of the project, the UNIDROIT Secretariat set up a Working Group chaired by Professor Eugenia Dacoronia, Member of the UNIDROIT Governing Council, and composed of international experts as well as several observer organisations and institutions. The Working Group has held four sessions over the 2020-2022 period. In parallel, intense intersessional work is being carried out by thematic subgroups, as well as the Drafting Committee, which has been preparing several suggested draft chapters for the future Model Law.

23. At the 100th session of the Governing Council held on 22-24 September 2021, it was recognised that notwithstanding the intense working schedule of the Working Group, additional time would be needed to ensure its completion, considering the additional theoretical complexity of the project. Therefore, upon the Secretariat's proposal, the Council authorised the extension of the project for one more calendar year, with the presentation of the first complete draft at its 102nd session, in May/June 2023 ([C.D. \(100\) B.24](#), para. 101).

24. Based on the Governing Council's authorisation of the extension, two additional Working Group sessions are planned during the 2023-2025 Work Programme, respectively in the last quarter of 2022 and the first quarter of 2023. Furthermore, two in-person meetings of the Drafting Committee following the Working Group sessions are envisaged, in addition to a continuation of the regular remote meetings of the Committee to advance with the redaction and revision of the provisions.

25. Moreover, as the Secretariat has prospected in its proposal to the Governing Council at its 100th session in September 2021 ([C.D. \(100\) B.7](#), para. 3), the Working Group deems the drafting of a commentary or a Guide to Enactment instrumental to the adequate implementation and use of the Model Law. Such a complementary text would not only be necessary to explain the provisions included in the Model Law text to legislators seeking domestic implementation, but also to provide guidance on the preparation of subsidiary legislation required to implement the law. The latter aspect is of particular importance with regard to electronic warehouse receipts, for which the technical aspects involving technological changes might be more appropriately addressed in subsidiary legislation in order to ensure flexibility for the legislator to adapt to new developments. Should the Governing Council agree to this, the project would be extended further. Specifically, the Model Law would be sent to UNCITRAL in May 2023, after approval by the UNIDROIT Governing Council, to proceed with two more sessions of the Working Group dedicated to the preparation of the Guide to Enactment, which would be submitted to the Governing Council in May 2024, and subsequently submitted to UNCITRAL for separate approval. This mechanism would allow the two institutions to work in parallel.

26. *In view of the above, the Governing Council is invited to recommend retaining the formulation of the Model Law on Warehouse Receipts and developing a complementary guidance document as a high priority project on the Institute's 2023-2025 Work Programme.*

5. Bank Insolvency

27. The project on Bank Insolvency aims to develop international guidance on how to effectively address the failure of small and medium-sized banks. It is undertaken in cooperation with and with the support of the Financial Stability Institute of the Bank for International Settlements (BIS). The project was included in the 2020-2022 Work Programme in December 2019 ([A.G. \(78\) 12](#), paras. 44 and 51). Upon recommendation of the Governing Council, the General Assembly allocated a high priority status to the project at its 80th session in December 2021 ([A.G. \(80\) 10](#), paras. 44 and 46). Accordingly, a Working Group was established at the end of 2021, composed of ten members and more than thirty observers, including the IMF, the World Bank, and central banks, banking supervisors, resolution authorities and deposit insurers from all over the world.

28. The first session of the Working Group was held on 13-14 December 2021. On that occasion, among others, the Working Group decided to establish three thematic Subgroups to advance the work on the project during the intersessional period. Subgroup 1 addresses matters relating to the scope of the future instrument and definitions, objectives of the liquidation process, institutional arrangements and operational aspects. Subgroup 2 focuses on grounds for opening insolvency proceedings, preparatory actions, tools and funding. Subgroup 3 examines aspects of creditor hierarchy, the treatment of financial contracts, group and cross-border issues as well as safeguards for stakeholders of the failing bank. The second session of the Working Group took place on 11-13 April 2022, and its deliberations mainly focused on the Reports prepared by the three Subgroups.

29. The third session of the Working Group is scheduled to take place on 17-19 October 2022, and will be hosted by the Single Resolution Board in Brussels. In the meantime, the Secretariat continues to provide support to the Working Group participants for the organisation of intersessional meetings and coordination meetings between the Co-Chairs of the Subgroups to ensure consistency of outputs. In addition, the Secretariat will provide support in the development of a cross-jurisdictional survey to be conducted within the Working Group in order to collect information and data on relevant aspects of, and experiences with, bank liquidation regimes worldwide. The fourth session of the Working Group is expected to take place around March 2023 and the fifth (and final) session in autumn 2023. It is anticipated that intense intersessional work will continue to take place throughout the duration of the project. Consultations are envisaged to be held before submitting the final draft to the Governing Council for adoption in 2024.

30. *Considering the envisaged timeline, the Secretariat proposes to carry over the activities concerning this project to the new Work Programme (2023-2025), maintaining its high priority status.*

6. Preparation of an international guidance document on Legal Structure of Agricultural Enterprises

31. Supported by both the Food and Agriculture Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD), the project regarding the preparation of an international guidance document on Legal Structure of Agricultural Enterprises (hereinafter the "LSAE project") was proposed for inclusion in the 2020-2022 Work Programme by the Governing Council, at its 98th session, and was approved by the General Assembly at its 78th session, with a medium priority level. The LSAE project is a natural follow-up from the [Legal Guide on Contract Farming](#) (finalised in 2015) and the [Legal Guide on Agricultural Land Investment Contracts](#) (finalised in 2020).

32. In 2020, pursuant to the Governing Council's mandate, the Secretariat conducted a stocktaking exercise and feasibility analysis to ascertain whether UNIDROIT could make a useful contribution in this field without overlapping with other international initiatives ([C.D. \(99\) B.5](#)). A [Consultation Webinar](#) was further co-organised with FAO and IFAD, on 15 and 16 April 2021, to outline the topics that could be covered in the prospective Guidance Document. Following those activities the Governing Council agreed, during its 100th session, to upgrade the level of priority of the LSAE project in order to allow the Secretariat to establish a Working Group to continue delineating the scope and content of the project ([C.D. \(100\) B Misc. 2](#)).

33. Accordingly, the LSAE Working Group was set up, and its first session was held from 23 to 25 February 2022. Ten Working Group members, eight representatives from FAO and IFAD, as well as 15 Observers, including representatives from international and regional intergovernmental organisations, farmers associations, non-governmental organisations and private sector representatives attended the first session. The LSAE Working Group is chaired by the Hon. Justice Ricardo Lorenzetti (Supreme Court of Argentina and Member of the UNIDROIT Governing Council) and coordinated by Professor Fabrizio Cafaggi (State Council, Italy). The second session of the Working Group is planned for October 2022 (dates to be confirmed). It is envisaged that the LSAE Guidance Document be developed over five sessions of the Working Group and intersessional subgroups meetings carried over the period 2022-2023, followed by the presentation of the final draft for approval by the Governing Council in 2024, at its 103rd session.

34. *On the basis of the consultations jointly undertaken by the Secretariat, FAO and IFAD, as well as on the Working Group's initial deliberations, the Governing Council is invited to recommend maintaining the preparation of an international guidance document on Legal Structure of Agricultural Enterprises in the 2023-2025 Work Programme at its current high priority level.*

7. Implementation of the Rail and Space Protocols to the Cape Town Convention

35. During the 2023-2025 triennium, the Secretariat intends to continue its activity to promote and implement both the 2007 Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock ("Rail Protocol"), and the 2012 Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets ("Space Protocol"), pursuant to its institutional mandate.

36. In relation to the Luxembourg Rail Protocol, Spain and South Africa have both formally signed the treaty as a preliminary step towards ratification, the process of which is currently underway. During the 2023-2025 Triennium, the Secretariat will concentrate its efforts on enabling the entry into force and successful implementation of the Protocol upon the achievement of the fourth ratification. To this end, it will continue to cooperate with OTIF, the Chairs of the Preparatory Commission and the RWG to complete the setting up of the institutional framework (including the Supervisory Authority) and to engage with the Registrar. It will also continue to actively promote the Protocol through various means (governmental meetings, conferences, lectures, etc.) and to strengthen cooperation with other interested global and regional organisations.

37. In relation to the Space Protocol, during the 2023-2025 triennium, the Secretariat intends to continue to promote the Protocol through the activity of the Preparatory Commission and its Sub-Group, as well as through participation at institutional events, seminars and conferences, in order to enhance awareness of the instrument and its potential benefits. The Secretariat also intends to continue working bilaterally with governments to further their understanding of asset-based financing in the space sector and to aid them in their domestic considerations of the Space Protocol.

38. *The Governing Council is invited to recommend maintaining the implementation of the Rail and Space Protocols in the 2023-2025 Work Programme at its current high priority level.*

8. Implementation of the Protocol to the Cape Town Convention on Matters Specific to Mining, Agricultural and Construction Equipment

39. The Protocol to the Cape Town Convention on Matters Specific to Mining, Agricultural and Construction Equipment (MAC Protocol) was adopted at a Diplomatic Conference in Pretoria, South Africa, in November 2019. The Governing Council included implementation of the MAC Protocol as a high priority project in the 2020-2022 Work Programme of the Institute. It is proposed that implementation of the MAC Protocol be retained as a high priority project on the Institute's Work Programme for the 2023-2025 triennium.

40. Article XXIV of the MAC Protocol provides that two elements are required for its entry into force: (i) confirmation that the International Registry is fully operational; and (ii) five ratifications by States. Achieving these two elements will be UNIDROIT's focus between 2023-2025.

41. A Preparatory Commission for the Establishment of the International Registry for MAC Equipment pursuant to the MAC Protocol (MAC Preparatory Commission) has been created to undertake the activities required for the MAC Protocol to enter into force. The MAC Preparatory Commission has met on four occasions between 2020-2022 and has three key objectives: (a) selection of a Registrar to operate the MAC Protocol International Registry; (b) establishment of a Supervisory Authority; and (c) preparation of the first edition of the International Registry Regulations. The work of the MAC Preparatory Commission has been assisted by two sub-groups, the MAC Regulations Working Group, and the MAC Registrar Working Group.

42. During the 2023-2025 triennium, it is proposed that the Secretariat continue to support the activities of the MAC Preparatory Commission in achieving its objectives in an efficient and effective manner. It is anticipated that the Registrar will be selected in early 2023 (as the tender process is already underway), a Supervisory Authority will be established in 2023, and the first edition of the Regulations will also be finalised in 2023. It is further anticipated that the Registry will be operational by 2024.

43. Additionally, the Secretariat, in coordination with the MAC Working Group, will continue to promote the MAC Protocol and support governments in their efforts to sign and ratify the treaty. The Secretariat will focus on assisting those States who have demonstrated a strong interest and commitment to expeditiously ratifying the Protocol, in order for the treaty to receive the five ratifications required for its entry into force. The Secretariat will continue to undertake this promotional work in collaboration with partner organisations such as the World Bank and UNCITRAL, liaising with established regional organisations such as the EU and the OAS, and utilising relevant fora such as APEC to maximise effectiveness.

44. *The Governing Council is invited to recommend maintaining the implementation of the MAC Protocol in the 2023-2025 Work Programme as a high priority activity.*

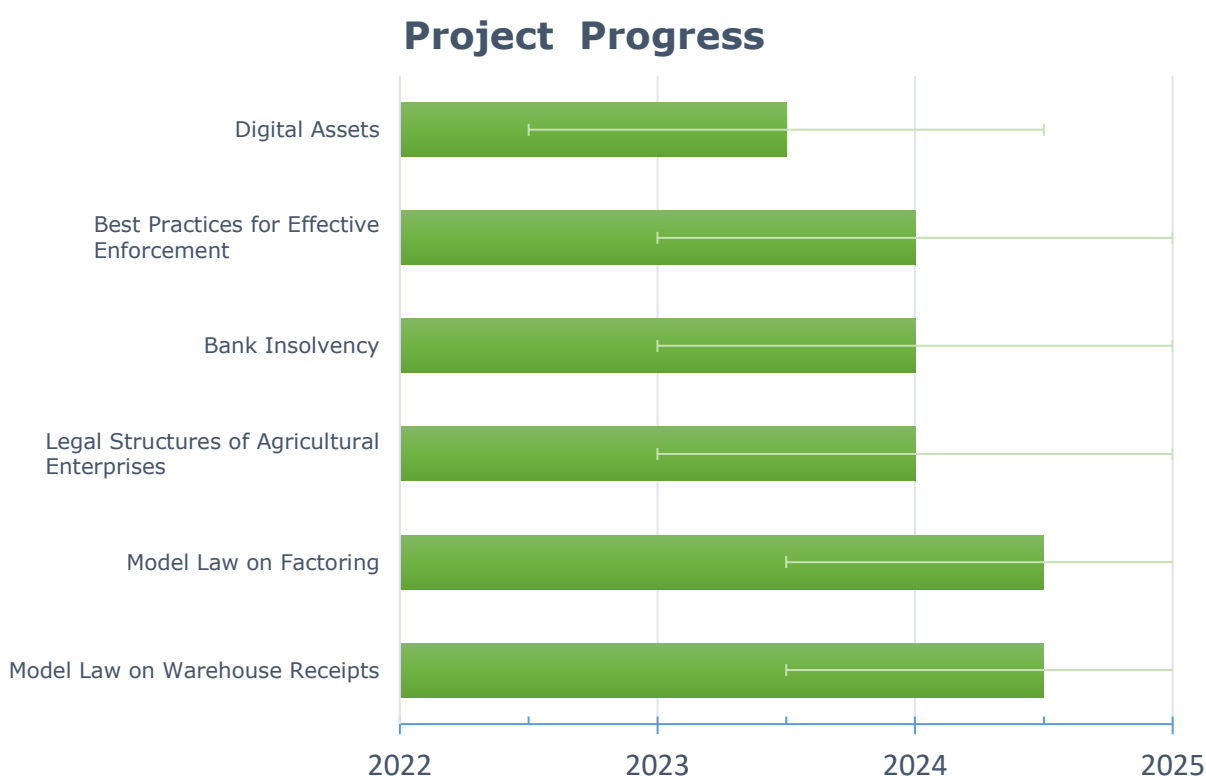
B. New proposals for legislative activities for the 2023-2025 Work Programme

45. By Note Verbale dated 21 July 2021, the Secretariat invited the Governments of Member States to submit proposals for inclusion in the 2023-2025 Work Programme by 30 November 2021. The Secretariat extended that invitation for submissions to various inter-governmental Organisations with which UNIDROIT has established ties of cooperation. In response to those invitations, the Secretariat received nine full proposals for topics for inclusion in the Work Programme. Proponents were the International Swaps and Derivatives Association (ISDA), the World Intellectual Property Organization (WIPO), the Institute of World Business Law of the International Chamber of Commerce (ICC), the European Bank for Reconstruction and Development (EBRD), the International Development Law Organization (IDLO), the U.S Mission to the U.N. Agencies in Rome (USUN), the

Italian Universities of Roma Tre and of Macerata (UNIMC), the European University of Rome, and the European Law Institute (ELI)⁴.

46. Beyond the general classification in terms of priority following the methodology described in paragraph 2 of the Introduction to this document, the sub-sections below reflect the Secretariat's view of the relative priority between the different proposals received: i.e., projects whose suggested level of priority is "high" or "Medium" are themselves hierarchically ranked by the order below. As stated in Section A above and illustrated in the figure below, work on as many as six projects will be carried over from the 2020-2022 triennium to the new Work Programme, but will likely be finalised in the initial stages of the next triennium:

- (i) Three are to be presented for approval at the Governing Council's 102nd session in 2023 (Model Law on Factoring, Model Law on Warehouse Receipts, Digital Assets and Private Law), although the first two would require follow-up work (i.e., Guide to Enactment) which would make both projects running until the following Governing Council session in mid-2024;
- (ii) Three ought to be finalised within 2024 (Best Practices for Effective Enforcement, Bank Insolvency, Legal Structure of Agricultural Enterprises).



⁴ The Secretariat has also received general proposals aimed at pursuing a certain line of work or to strengthen the collaboration with other organisations, but which do not constitute full proposals to undertake new work. In particular, general proposals of this kind have been received from IDLO and from the UNIDROIT Correspondent Ms Cecilia Fresnedo de Aguirre. UNIDROIT is most grateful for these expressions of interest, which are duly noted.

47. Given the current level of resources available, the Secretariat considers six to be the maximum number of full legislative projects that can be simultaneously underway. Hence, as a general rule, new projects would begin only upon completion of the projects carried over from the previous Programme. If, however, the Secretariat is able to secure additional resources, new projects may begin earlier, even if only with limited expenditure. The Secretariat may soon be in a position to secure two new full time senior legal officers seconded from the Governments of two different Member States, one for a three-year period, and another for up to two years. Governing Council Members will be informed as soon as this is confirmed. These possible additions would imply an important resource which could justify an earlier start of at least one of the new projects (if included in the Work Programme).

48. It is noteworthy that several possible projects below are in need of more concrete definition and/or depend on other organisations. It is thus neither possible nor convenient to regard their current hierarchical status as firm.

49. *The Secretariat would like to invite the Governing Council to take note of the expected timeline as defined above and allow some flexibility to alter the order proposed below depending on further consultations as well as on the coordination with the other organisations involved.*

1. Legal nature of Voluntary Carbon Credits

50. On 24 January 2022, UNIDROIT received a proposal from the International Swaps and Derivatives Association (ISDA) for a project to determine the legal nature of voluntary carbon credits. This proposal has been expressly supported by the Government of Paraguay in a letter received by the Secretariat on 9 May 2022.

Background

51. The concept of carbon credit was introduced in the Kyoto Protocol (1997) with the purpose of reducing the emission of greenhouse gases into the atmosphere. Since then, a number of international treaties and domestic laws have regulated the matter seeking to fight against global warming. Special reference is due to the Paris Agreement of 2015⁵, which includes carbon trading as one of the cornerstones to reduce carbon emissions at every level of economic activity across domestic and international supply chains. Many international actors have highlighted the need to create a global market in carbon credits over the years. Legislative action, however, has only been implemented at domestic and regional level. A number of mandatory carbon markets exist already, created by statute or other formal mechanism: e.g., at national level, Switzerland, UK, China, Japan, Mexico, South Korea, or USA; at regional level, the most salient example is the EU Emission Trading System carbon reduction regime.

52. There seems to be consensus, confirmed by existing practice, that there is an important demand for carbon credits from entities that are not required to participate in mandatory carbon markets, as well as from market players originated in countries where no mandatory scheme exists.⁶ Projects for the trading of non-mandatory credits began to develop in parallel with the mandatory carbon markets, and almost simultaneously. Participation in mandatory and voluntary carbon markets is not mutually exclusive, and experience shows that many market participants are active in both. In contrast to the highly regulated mandatory carbon market, voluntary carbon markets currently do not involve government regulatory authorities, are often unsupervised, and legal requirements are far from consistent. The *Voluntary Carbon Credits* (VCCs) being traded in such

⁵ Vid. http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf

⁶ The Task Force for Scaling Voluntary Carbon Credits, led by the Institute of International Finance, has calculated that the size of markets for trading VCCs is expected to be multiplied by 15 by 2030. Vid. <https://www.mckinsey.com/business-functions/sustainability/our-insights/a-blueprint-for-scaling-voluntary-carbon-markets-to-meet-the-climate-challenge>.

parallel markets are defined as a certification stating that the holder, either directly or indirectly, has reduced or removed from the atmosphere one metric ton of carbon dioxide equivalent in line with the applicable rules and requirements. Participants, especially large organisations and companies, may need to purchase VCCs to offset their emissions and help meet their net-zero goals. Given that a significant share of the projects that generate VCCs are located in developing economies, the voluntary carbon market also provides an opportunity to increase capital flow to emerging market economies and provide funding to projects that may not otherwise receive it.

53. Investment and transactions on this type of complex asset requires legal certainty, something which cannot be taken for granted in unregulated/unsupervised markets. Well-functioning voluntary carbon markets can only be based in strong legal foundations. As these markets grow in size and complexity, markets trading in fungible VCCs would be significantly enhanced if steps were taken, both nationally and internationally, to better understand the legal nature of VCCs. There seems to be a pressing need for legal standard setters to create a global standard for the legal treatment of VCCs. UNIDROIT, because of its current projects, its previous expertise and its nimble work methodology is an obvious fit for this task. The Secretariat, hence, welcomes the proposal received from ISDA.

Possible content

54. The need to analyse the legal nature of VCCs in detail and the private law consequences deriving therefrom would be likely to start, as happened with the project on Digital Assets and Private Law, with the question whether, as it seems, VCCs constitute a form of property. In some countries, VCCs are viewed as intangible property evidenced by the register entries and established in accordance with the relevant carbon standard and registry rules. In other systems, VCCs could be characterised as a bundle of contractual rights, documented under the relevant service contracts with the verifier and registry rules to which participants are required to adhere. Under such a characterisation, VCCs would amount to a bundle of private law contractual rights (and potentially tortious rights) against the project developer, verifier, carbon standard and registrar; and this would materially impact their transferability.

55. The following are legal aspects that depend on the legal nature of VCCs, which, by way of example, would need to be covered by the analysis: (i) how ownership rights in VCCs as fungible instruments can be created and transferred; (ii) what type of security may be taken and enforced and how that can be achieved; (iii) how VCCs would be treated following an insolvency (including concerning netting); (iv) when there is a cross-border element, conflicts-of-laws rules need to be coordinated, including jurisdiction and applicable law in case of insolvency; (v) clarification of legal positions when intermediaries are involved (e.g., when an investor transacts in VCCs but is not a direct counterparty to the relevant registry rules and has an intermediary acting on its behalf); (vi) creation and enforcement of security arrangements over VCCs (e.g., where the efficacy of security arrangements relies on a particular statutory regime, the scope of that regime could be assessed to determine whether it extends to VCCs and requires amendment).

UNIDROIT and the project

56. The analysis of these -and several other- relevant matters would be paramount to achieving legal certainty concerning voluntary carbon credits, and hence to the orderly functioning and adequate development of said markets, to the benefit, mostly, of developing jurisdictions. Its alignment with the Kyoto Protocol, the Paris Agreement and several other international norms in the ambit of sustainable development would be fully consistent with UNIDROIT's past and current efforts to provide best practices on the private-law side of market infrastructures to ensure that an equitable, sustainable growth is achieved, where environmental elements are factored-in and all rightful interests are considered.

57. From a technical standpoint, the proposal is fully aligned with the previous work done by UNIDROIT in the area of Capital Markets, in particular the Geneva Securities Convention and the Principles on Close Out Netting. This would be an extraordinary opportunity to revive a part of the Institute's portfolio that has seen limited activity in the past years.

58. Moreover, the topic and the type of analysis required is similar and complementary to the current ongoing project on digital assets and private law. In fact, a number of the key legal aspects already identified in the context of UNIDROIT's project on Digital Assets and Private Law would seem most relevant to the analysis of VCCs, so that certain conclusions reached in the digital assets project might be helpful to the legal analysis of VCCs as well. The synergy of both projects is evident. Many of the experts already participating in the Digital Assets project could be participants in this new topic, allowing for seamless continuity and avoiding many of the most costly -in terms both of time and funds- investments required to set up a new project. We would propose that this project be included as a natural follow-up of the Digital Assets project, with the addition of experts on the specific field of carbon credit and environmental law as well as with the incorporation of the most relevant stakeholders involved in practice. A possibility would be to form a subgroup with the experts of the Digital Assets project which could start to work in parallel as early as the first half of 2023.

59. In light of the lack of definition of ISDA's proposal in this regard, the Secretariat would invite Governing Council Members to consider the type of instrument best suited to the project. Perhaps a possibility would be to produce an analytical best-practices instrument which is an Annex of the Digital Assets instrument.

60. *The Secretariat would invite the Governing Council to recommend that the General Assembly include the proposal on the private law aspects of Voluntary Carbon Credits in the 2023-2025 Work Programme, as a follow-up from the Digital Assets and Private Law project, or as a stand-alone project, with high priority, to begin work as soon as existing resources allow in 2023.*

2. Private Law and Contemporary Health Research: Intellectual Property issues in the field of Personalised Medicine

61. Following an extension in the time for formalisation of proposals, UNIDROIT received a proposal from the World Intellectual Property Organization (WIPO) concerning the development of a Legal Guide on Intellectual Property (IP) issues in the field of personalised medicine. This proposal is based on the rapid technological and research developments in the health sector, enabling and accelerating a shift towards 'personalised medicine', which, in short, could be defined for these purposes as the bespoke medical treatment and disease prevention based on individuals' characteristics such as DNA⁷. There seems to be consensus by experts at international level in that such tailor-made medical treatment is the certain -near- future of medicine. It is not only a way to improve chances of prevention and patient care, but a mechanism to save a substantial amount of resources.

62. This emerging medical model has great potential, but also raises important legal questions, especially given the use of sensitive human materials, new technologies, and the wide range of actors involved in the development of personalised medicine (patients, hospitals, laboratories, research institutions, pharmaceutical companies, healthcare informatics experts, data banks) which are often based in different jurisdictions, in disparate contexts and with diverging levels of sophistication.

63. In its proposal, WIPO provides examples of legal issues specifically in the field of intellectual property (IP), for instance regarding IP rights management and licensing, trade secrets and patents.

⁷ For a technical definition of personalised medicine, see European Council Conclusion on personalised medicine for patients (2015/C 421/03), available here: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015XG1217\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015XG1217(01)&from=EN). Further, see the information provided by the International Consortium on Personalised Medicine, which includes over 30 counties and regional entities (available here: <https://www.icpermed.eu/en/icpermed-about.php>).

WIPO's expertise and involvement in a future project would allow for a detailed consideration of such IP aspects.

64. Many of the legal issues arising in the field of personalised medicine are closely intertwined and would merit a detailed analysis from several legal perspectives. For instance, contract law is relevant given that the relationship between the actors involved is generally governed by contracts. A general question that arises is how to most efficiently govern the chain of relationships between the various actors and the consequences of this complex chain on matters such as performance, enforcement and liability. Furthermore, there would be merit in exploring jurisdictions' approaches to the qualification of human materials from a property law perspective and possible implications for the use of such resources in the development of personalised medicine.

65. In addition, the subject matter of contractual arrangements in the field of personalised medicine – for instance, the transfer of genetic materials – gives rise to important questions relating to data protection. While there is a growing international agreement on the need to provide greater access to health and genetic research data as well as to human biological samples collected for scientific purposes (even more so following the COVID-19 pandemic), the diverse legal frameworks across the world remain obstacles to the effective sharing of such data while ensuring that the rights of individuals are safeguarded. One of the issues is the different role that the 'consent' of the individual providing his/her personal data (such as blood samples or other genetic materials) plays in legal bases for processing sensitive health data. The differences in legal regimes prove challenging in international research collaborations, involving the processing of data deriving from different jurisdictions.

66. The use of digital technology for the electronic sharing of sensitive health data and the involvement of Big Tech companies (for instance, due to the provision of cloud services to research institutions for the storage of their research data) add an additional layer of complexity. Data protection standards tend to date back to the pre-digital world and therefore generally do not address the sharing of sensitive health data via electronic means and with digital technology companies specifically. Other questions that could be explored include how to account for the use of health data from social media platforms or other publicly available databases for research purposes and how to account for technological means for the de-identification of data (e.g. tools to 'anonymise' data).

67. A collaboration between WIPO and UNIDROIT would allow for a comprehensive identification and consideration of key IP issues, on the one hand, and broader private law issues, on the other, arising in this emerging field within the health sector – which could play a crucial role in the advancement of personalised medicine on a global scale. This proposal constitutes an important opportunity to begin a new line of work for the Institute, and to do it (i) with a topic of theoretical complexity and extraordinary potential practical relevance; and (ii) together with the world's leading organisation in the field of IP. The possible synergies of joint work between both institutions is evident. If UNIDROIT does not work on this matter now, another organisation will do so soon, and the Institute will have lost an important opportunity to fulfil its mandate to its fullest extent.

68. Although it is still subject to final confirmation, it seems probable that UNIDROIT will be receiving in secondment, for a period of three years, a lawyer from a Member State who is specialised in intellectual property. Should this materialise, the Secretariat's technical capacity on the subject matter would be substantially enhanced. Further, costs for the working group would likely be shared. Because of the abovementioned reasons, the Secretariat would propose to start work early/mid 2023.

69. *The Governing Council is invited to consider recommending the inclusion of a project on personalised medicine in the 2023-2025 Work Programme at medium or high priority, and to allow the Secretariat, as an initial step, to consult with WIPO on the conduct of a preliminary study and the possible organisation of an exploratory workshop.*

3. UNIDROIT Principles of International Commercial Contracts and investment contracts

70. The Secretariat received a proposal of a joint project between the International Chamber of Commerce's Institute of World Business Law and UNIDROIT on investment contracts for inclusion in the 2023-2025 Work Programme. The proposal seeks to explore how investment contracts (i.e., contracts executed between sovereign States, or their controlled entities) and private investors can be modernized, harmonized, and standardized, particularly in light of the UNIDROIT Principles of International Commercial Contracts and ICCs standards.

71. In 2013, the Governing Council considered conducting work on the UNIDROIT Principles of International Commercial Contracts (UPICC) and investment contracts as a category of long term-contracts (see [C.D. \(92\) 4 \(b\)](#) and [C.D. \(93\) 3](#)). Ultimately, however, the revision of the UPICC – leading to the current 2016 version – was limited to several key issues concerning long-term contracts in general, leaving aside specific considerations for investment contracts ([C.D. \(95\) 3](#))⁸. The Secretariat invites the Governing Council to consider conducting work on the UPICC and investment contracts, in light of the developments described in the next paragraphs.

72. Over the last years international investment law has undergone deep reforms. Many States have adopted a 'new generation' of International Investment Agreements (IIAs) that impose conditions on foreign investors regarding corporate social responsibility and sustainability standards. More generally, there is a trend of integrating or reflecting new policy developments in investment treaties, thereby expanding their scope beyond the traditional focus on investment protection.

73. This trend is expected to continue going forward. Investment treaties are anticipated to have a potential growing role in contributing to sustainable development and responsible business conduct, the protection of human rights, the fight against climate change, inequalities and other topical matters such as digitalisation. These developments make the question of how to strike a balance between principles regarding the promotion and protection of investment, on the one hand, and principles regarding the protection of general (societal and environmental) interests, on the other hand, more pertinent than ever. Traditional provisions in investment treaties on Fair and Equitable Treatment and the right to regulate of host States on matters of general interest nowadays often have a much more articulated formulation than in the past.

74. There is also increased public attention to investment policies and disputes, a call for greater transparency and a push for stronger involvement of the local community in certain areas. At the same time, the case law resulting from the growing amount of legal claims in the area of investment law is by no means uniform, since treaty and contract provisions are interpreted on a case-by-case basis by domestic courts and arbitral tribunals. The circumstance that arbitral decisions are often confidential further reduces the predictability of the outcome of disputes.

75. Possible new approaches to the drafting of IIAs are assessed by other international organisations, and UNCITRAL is conducting work on a reform of investor-State dispute settlement. However, the above-mentioned developments strongly affect not only investment treaties but also investment contracts, since these are generally negotiated and agreed with treaties as background rules. The provisions in investment treaties typically apply to a wide range of investments and are often formulated in the form of broad standards rather than precise obligations, which makes it crucial to be more specific in the investment contract. In addition to domestic legislation and investment treaties, investment contracts could also be seen as an instrument to address developments in policy trends. However, no systematic work has been undertaken so far on issues

⁸ It is worthy of note that the Governing Council never rejected work on the topic. Since there were limited resources -and limited time to finish the work on long term contracts- the decision was to concentrate on the general matters. Adopting this project, hence, would not entail a revision of a previous decision.

to be addressed at contractual level to cope with the new requirements of international investment law.

76. In the meantime, the COVID-19 pandemic has bluntly demonstrated the impact that worldwide, unforeseen events can have on economies, making the performance of contracts in extreme circumstances highly uncertain if not altogether impossible. Global flows of foreign direct investment have been severely hit. The pandemic has challenged current thinking on investment policies and, at the same time, may lead to increased competition between States trying to strengthen their national economies post-COVID. In light of this, Governing Council Members might want to consider whether there is now momentum to conduct work on the UPICC and investment contracts. The UPICC may be used in investment contracts as in any other type of international commercial contract, i.e. as rules of law governing the contract, as a means of interpreting or supplementing international uniform law instruments, and as a means to interpret and supplement domestic law. In fact, the case of using the UPICC for investment contracts may be even stronger than for other contracts, since foreign investors may prefer the application of the UPICC over the law of the host State. Indeed, arbitral tribunals have referred to the UPICC in investment dispute cases on numerous occasions throughout the years.

77. Work by UNIDROIT on the UPICC and investment contracts could help to strengthen the contractual framework for international investments and to account for newly developed investment treaty policies at the contractual level in a uniform manner. For instance, there may be merit in assessing and clarifying the ability of the host State to invoke hardship or the force majeure exception in case regulatory change is spurred by public interest considerations. The potential relevance of the principle of legitimate expectations and investor due diligence in such cases may also be assessed, as well as the link with the obligation to act in good faith and the relationship with contractual safeguards in investment agreements, such as 'stabilisation' or 'adaptation' clauses. Further clarifying the UPICC in the specific context of investment contracts would contribute to transparency and standardisation, which is becoming even more relevant in light of the increased focus on investments by small and medium-sized enterprises, and may further promote the application of the UPICC in investment contracts and disputes. Work in this area would moreover be in line with UNIDROIT's objective to contribute to the achievement of the UN Sustainable Development Goals.

78. Should the Governing Council agree to include future work in this area, various approaches might be considered. One option would be to consider preparing a "Legal Guide to the Use of the UNIDROIT Principles of International Commercial Contracts in Investment Contracts", which would provide guidance to parties on how they might adapt or supplement the UPICC to meet the special needs of investment contracts. As an alternative, or in addition to the Legal Guide, the project could seek to prepare *model clauses* reflecting the provisions most commonly used in practice, and in accordance with the UPICC. For this exercise, the experience of the ICC in drafting model clauses would be paramount. Other, more far-reaching options would be a revision of the UPICC or the preparation of a supplement to the current edition of the UPICC, containing black letter rules and comments specifically addressing issues of relevance in the context of investment contracts.

79. It is the Secretariat's view that this proposal constitutes a unique opportunity to join forces with the ICC and put together the theoretical and practical expertise of both organisations for the analysis of a topic which could substantially benefit from the knowledge of UPICC and ICC instruments, as well as of international customary law. Moreover, the partnership could allow access to ICC awards on disputes arising out of investment disputes, an extraordinary resource -for years beyond the reach of UNIDROIT - that may prove of particular interest for this project and for UPICC more generally. Further, the Secretariat, together with the Institute of World Business Law of the ICC, is exploring the possibility of sharing the costs of a working group.

80. *The Governing Council is invited to consider recommending the inclusion of a project on UPICC and investment contracts, to be undertaken jointly with the Institute of World Business Law of the ICC, in the 2023-2025 Work Programme with medium priority.*

4. Corporate Sustainability Due Diligence in Global Value Chains

81. During the extended period of organisations to propose topics for inclusion in the 2023-2025 Work Programme, the Secretariat received a proposal from the International Development Law Organisation (IDLO) and from the European Bank of Reconstruction and Development (EBRD) on the topic of Corporate Sustainability Due Diligence in Global Value Chains.

Background

82. While the growth of international value chains has brought enormous economic benefits to developing countries, experience has shown that it may also lead to negative impacts on human rights and the environment. These negative impacts have been wide-reaching and severe, including environmental and health damage, and, in extreme cases, forced and child labour.

83. Addressing the responsibility of governments and multinational companies for their value chains, the United Nations Guiding Principles for Business and Human Rights⁹, adopted in 2011, offered the first global standard to ensure respect for human rights in the business context. Recognising the only partial implementation of this non-mandatory framework by multinational enterprises,¹⁰ governments have been looking more towards converting these soft law principles into binding law.¹¹ In recent years, efforts turned to national legislation requiring corporate sustainability due diligence by companies headquartered and/or operating within the relevant jurisdiction.¹² The scope, requirements, extent of liability, and enforcement of due diligence laws have evolved considerably over the last decade, but most of these legislations have a core set of elements in common: size of covered companies, type of liability, extent of harm, scope of control, type of enforcement, and choice of law. Questions remain around how courts will enforce these laws, since they include novel legal definitions of accountability. Governments¹³, bar associations¹⁴, and law firms have started to provide guidance and model clauses for contracts with suppliers of goods and services to support compliance. However, to date most of this guidance has been focused on compliance in one to two jurisdictions. Most recently, on 23 February 2022, the European Commission adopted a proposal for a Directive on corporate sustainability due diligence which aims

⁹ United Nations Guiding Principles for Business and Human Rights (2011), available at https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf.

¹⁰ See, e.g., the findings of the World Benchmarking Alliance, measuring global companies on their human rights performance, at <http://www.worldbenchmarkingalliance.org/publication/chrh>.

¹¹ See National Action Plans on Business and Human Rights, <https://globalnaps.org> (map of countries that have not passed a NAP, have other non-state initiatives, are developing one, or published one).

¹² See, e.g., European Coalition for Corporate Justice's comparative analysis of mandatory human rights and environmental due diligence laws (France, Germany, Norway) and legislative proposals (Netherlands, Austria, Belgium) in Europe, <https://corporatejustice.org/wp-content/uploads/2022/03/Corporate-due-diligence-laws-and-legislative-proposals-in-Europe-March-2022.pdf>.

¹³ E.g., U.K. Government Civil Service issued the guide "Tackling Modern Slavery in Government Supply Chains" (September 2019) to support the 2015 Modern Slavery Act. Guide available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/830150/September_2019_Modern_Slavery_Guidance.pdf.

¹⁴ E.g., the American Bar Association's "Contractual Clauses Project" has published two versions of the Model Contract Clauses (MCC 1.0 / MCC 2.0) for Human Rights, see Snyder and Maslow, Balancing Buyer and Supplier Responsibilities: Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0, American Bar Association (2021), pp. 4-6, available at https://www.americanbar.org/content/dam/aba/administrative/human_rights/contractual-clauses-project/mccs-full-report.pdf. Another example is the Japanese Bar Association, which published a guide to compliance with corporate social responsibility provisions in Japan, citing international standards that may apply to Japanese corporations. See, for example, Japan Federation of Bar Associations, Guidance on Human Rights Due Diligence (2016), available at https://www.nichibenren.or.jp/library/en/document/data/150107_guidance.pdf.

to foster sustainable and responsible corporate behaviour throughout global value chains.¹⁵ The new rules are aimed at advancing the green transition and protect human rights in Europe and beyond.

The need for an instrument

84. However, the legal landscape remains scattered. Most jurisdictions do not have value chain due diligence legislation in place, while those that do have laws that diverge considerably in scope and approach. Gaps and ambiguity obfuscate how companies may ensure adequate and effective due diligence.

85. In view of this situation, UNIDROIT's assistance in harmonisation may prove extremely impactful and timely. On a general level, deviations across countries curtail corporate compliance and increase operational costs for all parties. These deviations include legal definitions (e.g. scope of control, type of enforcement) but also extend to coverage by sector (e.g. extractives or textiles) or human rights issues. This may be especially pertinent as countries with value chain due diligence requirements consider how to address climate change and, in particular how to achieve the Paris Agreement goals of mitigation of Greenhouse Gas emissions in the immediate future.

86. Commercial contracts have become an essential vehicle to comply with corporate sustainability due diligence in global value chains and changes to contract law have raised many legal questions, which may benefit from UNIDROIT's expertise in legal harmonisation in particular in the fields of contract and commercial law. These include but are not limited to the following: how to define "control" in the value chain, the question of whether liability covers reporting obligations or extends to quality, and what should be considered industry "standards" for due diligence efforts. As companies begin to adapt and comply with these legislations, greater clarity and uniformity across approaches in different countries is needed to assist in the fulfilment of the laws' goals. Accordingly, three forms in which UNIDROIT could contribute to harmonisation in this field are presented for consideration below.

Possible instruments

87. *UPICC related commentary:* One option could be for UNIDROIT to issue commentary showing how the UPICC and the UPICC model clauses relate to value chain due diligence. In addition, in light of the novelty and importance of these issues, it might be considered whether this could be addressed as a separate part of the UPICC, in the form of an Annex. This possibility could be linked with the type of instruments that results from the project on investment contracts (see 3 above).

88. *Compliance Guide and set of Model Clauses:* UNIDROIT may contribute to the harmonisation of this field through a guide to compliance and a set of model clauses. A global guide to compliance could address the differences across national legislative approaches and could provide a harmonised solution for companies with global reach. Such a guide could also target supply partners in countries trading with parent companies covered by these laws. Such an effort could take the form of a guide or commentary together with model clauses for value chain due diligence. To illustrate, specific guidance could be provided for the incorporation of climate- and net zero-related clauses into commercial agreements to help companies limit environmental risks and deliver climate solutions by ensuring that business partners adhere to environmental regulations and emission standards. The Secretariat sees this option as more complex but also potentially more useful for the relevant stakeholders than merely a UPICC related commentary.

¹⁵ See European Commission, Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains (2022), at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145.

89. *Legislative Guidance, possibly in the form of a Model Law:* Much of the legislative work has been developed in Europe. Domestic legislative efforts in Latin America and the Caribbean are in the early advocacy or drafting stages. Ultimately, UNIDROIT's assistance in providing legislative guidance for due diligence legislation may be useful in preventing a scenario where European countries are seen as imposing human rights, social and environmental laws on their trading partners, as opposed to a shared effort toward common goals. Proposed core elements may include the following: scope of control; corporate risk management; extent of harm; type of liability; enforcement; choice of law.

90. UNIDROIT is well suited to undertake this project because of its experience with the UPICC and other previous contract law-based instruments in the area of agriculture (Legal Guide on Contract Farming and Legal Guide on Agricultural Land Investment Contracts). Moreover, the topic is in line with the current ongoing work on the Legal Guide on Agricultural Enterprises, which is focused on the value chain, and has potential synergies with other proposals for the new Work Programme, with particular regard to those concerning the UPICC.

91. *The Governing Council is invited to take note of the above proposal, and recommend that the General Assembly include work on Corporate Sustainability Due Diligence in Global Value Chains in the 2023-2025 Work Programme with medium priority, and to discuss the most suitable legal instrument for the subject matter.*

5. Development of an Agricultural Financing Legal Guide

92. On 10 December 2021, The Government of the United States submitted a proposal for inclusion in the 2023-2025 Work Programme of a Legal Guide on Agricultural Financing. The idea behind the proposal is to take stock of existing best practices on agricultural lending and financing and to offer, in one instrument, a coherent, full framework to promote the development of the agricultural sector. While existing guides concentrate on specific transactions, the value-added of this project would be to include in one instrument all legal elements required to comprehensively regulate the various transactions throughout the entire supply chain in agriculture. Further, this type of Guide would shed light on the less sophisticated stakeholders as to which of the existing best practices should be used for which type of transaction.

93. The proposal suggests that the future Guide: (i) provides a comprehensive description of the transactions more often used to access finance, with especial reference to asset-based financing and leases, a stock-taking exercise which could be useful especially in less developed jurisdictions; (ii) offers a list of existing best practices and standards ordered following current practices in the distribution of agricultural commodities; (iii) identifies the relevant standards for each transaction/part of the chain and presents an explanation on how the different standards can work together along the supply chain; and (iv) spots gaps in existing instruments and creates the foundation for possible future standards where needed.

94. An important value of this proposal is its presentation of the broader picture of the agriculture supply-chain, allowing the direct linkage of the project with existing UNIDROIT projects, such as the one on Legal Structure of Agricultural Enterprises (LSAE). In that sense, this proposal is a natural follow-up or complementary work of LSAE. Moreover, this type of guide could enhance and complement the use of other UNIDROIT instruments, such as the Model Law on Leasing (2008), the Model Laws on Factoring and Warehouse Receipts, whose finalisation is expected in 2023, or even the use of the MAC Protocol to the Cape Town Convention. Further, the instrument would offer guidance in the joint use and interpretation of other key international instruments concerning access to finance, such as UNICTRAL's Model Law on Secured Transactions.

95. The Secretariat considers the project to be potentially very valuable for stakeholders of the agricultural sector, both legislators/government officials and private sector. But the project is especially relevant as a "users' guide" of international standards in access to finance. As such, it can

help enhance the understanding and the use of previous instruments of UNIDROIT and improve consistency with other relevant standards. Further, it can help identify areas where additional work may be required, allowing UNIDROIT's line of work on private law and agriculture to continue its development. In light of the content of the instrument to be drafted, and consistent with the proposal, a possibility would be to partner up with relevant organisations in the sector: either a fourth joint project with FAO and IFAD, or another project with the World Bank Group. Should the Governing Council agree to support this project, the Secretariat would in due course start contacts to identify a possible partner.

96. *The Governing Council is invited to consider recommending the inclusion of a project on an Agricultural Financing Legal in the 2023-2025 Work Programme with medium priority.*

6. Global Value Chains: Governance issues and Digital challenges

97. On 27 January 2022, UNIDROIT received a proposal from the European Law Institute (ELI) to explore the possibility of conducting a joint project on global value/supply chains (GVCs). The scope of the project proposal is broad, and includes both human rights issues (and, in general, non-commercial issues) within the supply chain as well as governance and contractual aspects related to the variety and growing complexity of structures that GVCs adopt.

98. GVCs play a crucial role in international trade, economic development and sustainable growth. GVCs organise production, distribution of products and services, and circulation of value. As international trade and global economies become more complex and interdependent, GVC structures evolve to incorporate new market practices, financial needs, and technological innovation. Transformation and evolution of GVCs entail the adaptation of their structure design and their governance models and practices.

99. Contracts are the essential building blocks of supply chain contracting, but also of the different governance models and practices. GVCs rely on contracts as governance devices. This governing role challenges the most traditional conception of contracts and goes beyond the idea of the privity of contracts. Contracting techniques in GVCs organise cooperation. Such an approach on contractual structures as a form of private governance requires to revisit the body of international principles and harmonized rules for international commercial contracts. GVCs are not built as a mere chain of inter-firm contractual relationships, but they emerge as networks, ecosystems or increasingly complex organizational models.

100. Under a diversity of governance models (networks, platforms, multi-party contracts, collaborative or associative schemes), one party may be entrusted with certain supervisory and governance powers (the operator of the platform, the leading supplier, the manager of the network). Exploring the legal issues of these governance rules and models, and assessing whether the principles and rules for international commercial contracts are suitable for networked contractual structures and to accommodate governance objectives will be key for enhancing legal certainty, promoting innovative structures and facilitating international trade. For instance, a commitment to comply with human rights standards imposed by a chain leader (who could either be the buyer or the final seller) and transferred along the chain of contracts might only be legally enforceable by the contracting parties to each link of the chain, leaving the chain leader with no direct right of action. Practically speaking, the expectation of compliance rests with the buyer or final seller as a result of their corporate social responsibility commitments/obligations. There are various work-arounds provided in national laws, but each operating on their own terms (e.g., exceptions to the privity principle). There is usually no direct right of action by the chain leader against chain members, unless the contracts along the chain provide for such a right and that right is recognised by the applicable law and not affected by mandatory rules.

101. Contractual remedies pose a further complication. Whose interests determine the remedy that should be awarded, and how would any loss be quantified? Insofar as breaches affect third parties (e.g., employees), how can they enforce a contractual commitment to respect human rights and labour standards? As a wider and most interesting perspective the utilisation of contractual structures as a form of private governance can be considered. Such contracts are not merely transactional, but effectively create a form of constitutional structure for a global supply chain (whether arranged as a network, web, multi-party contract or chain of bilateral contracts). Under such arrangements, one party (the chain leader, platform operator, etc.) often has strong governance powers over the entire ecosystem established by such contracts. GVCs might be a good area to consider exploring the legal issues of these governance rules.

102. Furthermore, digital technology has provided new organizational and governance architectures that are conducive to and innovate and build on GVC. Centralized platforms, decentralized models, and distributed ledger technologies (DLT) offer promising opportunities for devising and governing GVCs. A number of legal issues are worth exploring from the perspective of the principles and rules for international commercial contracts, while they may reveal certain limitations in classic contract principles. In centralized platforms, the platform operator is entrusted with regulator, supervisory, governance and even enforcement powers. Allocation of risks and liability within the platform and among the multiple participating actors in the platform-based GVC are now policy questions at the core of the regulatory debate on the regulation of digital platforms for trade (and other purposes). Decentralised models invite a discussion on multi-party contracts and contractual networks. DLT-based structures raise questions on applicable law and jurisdictions, among the other legal challenges that have been already faced in relation to other applications (DAO, digital assets, etc.).

103. All the governance models briefly identified above provide different solutions to the challenges of compliance, liability and enforcement. Contracts may articulate certain solutions to ensure the compliance of commitments/obligations throughout the chain, as well as provide for enforcement beyond inter-firm relationships. National or regional legislation may also provide for specific actions or exceptions to the privity principles. International standards would harmonise governance structures and minimise arbitrage.

104. GVCs as governance structures however do also need to implement dispute resolution mechanisms internally. The contractual governance framework sets out the rules and procedures. Online dispute resolution (ODR) plays a primary, albeit not exclusive, role in settling disputes in GVCs under platform, network or DLT-based models. International standards on the development and the functioning of ODR will be instrumental in facilitating dispute resolution in complex GVCs.

105. UNIDROIT has already developed a number of instruments on contract law, particularly, the UPICC, which provide legal guidance in the design and the operation of GVCs. UPICC provide for solutions that effectively balance parties' interests, and contain rules that address the relevant issues to be tackled in GVCs (cooperation between the parties, hardship rule, contracts in favour of third parties, etc.). Aspects of specific concern to GVCs might regard the governance aspects, which might need special attention and require an assessment on the adequacy of these contract law instruments to the new structures of GVCs. Albeit with a sectoral scope, the Legal Guide on Contract Farming, finalised in 2015 and the related instruments and projects (e.g., the prospective guidance document on Legal Structure of Agricultural Enterprises), explicitly address issues related to and arising from supply-chain models.

106. Furthermore, GVCs organise and govern complex flows of goods, services, information, and finance. Dematerialisation of most paper-based documents and instruments is fundamental. Several international legal harmonisation instruments have laid the foundations and paved the way towards the progressive and definitive digitalisation of trade flows (electronic transferable records, digital identity, electronic documents, single windows for customs, etc.). Nowadays, the data economy is

profoundly transforming trade and GVCs alike. The development of data-driven GVCs changes the focus and the structure of relationships and the system as a whole. Legal solutions need to be revisited to ensure that they enable and promote data-driven GVCs. Data governance becomes crucial for finance, optimising processes, personalising services, implementing real-time distribution and production, monitoring compliance, tracking and tracing goods, services, or payment, and applying effective remedies within the supply network.

107. Data transactions (transactions on data) currently play a primary more than merely ancillary role in supply chain contracting. More importantly, data are key inputs in a multitude of automated decision-making systems and processing. Data and automation are triggers of a profound transformation of GVCs. International rules and principles suited to the prominent role of data, which are prepared to embrace automation (artificial intelligence and algorithm) are instrumental to provide certainty in this second stage.

108. UNIDROIT is working on different initiatives that will contribute to such a goal and might be integrated as components of a future project on this topic. The Project on Digital Assets and Private Law provide principles for digital assets that will circulate throughout the GVC. The Model Law on Warehouse Receipts, jointly with UNCITRAL, aims to provide for rules for electronic warehouse receipts. UNIDROIT Best Practices for Electronic Collateral Registries contribute to establish interconnected ecosystems and enhance data-based secured finance.

109. The broad scope of the project proposal, as it was received, and the interplay with other ongoing projects and UNIDROIT instruments suggests that it would be appropriate to conduct exploratory work and consider the approach of a possible project, in order to define the scope and the expected outcomes. As a result of the exploratory work, the following proposals might be brought forward for consideration of the Governing Council:

- (i) A guidance document to apply UPICC to GVC stressing those solutions that work for GVC and providing guidance to effectively use contract law in network, platform and other complex organizational structures would be a valuable first step. That could also lead to a Legal guide.
- (ii) In a second stage, modified Principles or a set of new principles for GVC added or incorporated to the UPICC may be expected (addendum to UPICC or a free-standing set of new Principles).
- (iii) Additionally, model clauses for the contracts underpinning the governance structure of data-based/-driven GVC.

110. *The Governing Council is invited to consider recommending the inclusion of a project on "Global Value Chains: Governance issues and Digital challenges" in the 2023-2025 Work Programme with low priority, but with the possibility of conducting exploratory work, jointly with the European Law Institute, to further define the project. If agreed, a more defined proposal would be presented for reconsideration in the 102nd session of the Governing Council.*

7. Standard-essential patents (SEPs)

111. In addition to its proposal on IP issues in the field of personalised medicine, the WIPO has expressed interest in conducting exploratory work together with UNIDROIT in the area of standard-essential patents (SEPs), that is, patents that protect technology essential for a standard.

112. Many standards rest on cutting-edge technologies. For example, in the mobile communications sector, 5G and WiFi networks rely on an array of technologies to work. Many standard-setting bodies allow companies and individuals to patent their technical contributions to a standard, leading to the creation of SEPs. Patent owners, in turn, must commit to license the

protected technology to others that may wish to use the standard. In other words, companies implementing the standard need to obtain a license from the patent owner to make use of the protected technology. Such licensing needs to take place on fair, reasonable and non-discriminatory (FRAND) terms.

113. The rapid development and increasing importance of technology leads to a continuously growing number of SEPs. At the same time, in the absence of an applicable international framework, many legal questions surrounding SEPs have not yet been answered. Questions arise in the field of IP, but also touch upon other fields of law, including contract law, property law, competition law and private international law. Apart from the different interpretations of the concept of FRAND, relevant open issues concern, for instance, the legal nature of the declaration of the patent owner vis-à-vis the standard-setting organisation and the consequences of a transfer of a patent on existing licensing agreements (e.g., whether this would lead to a transfer of the licenses or require new licenses). Given that standards and technologies are used globally while patents and enforcement are territorial, issues of jurisdiction and applicable law are key as well.

114. *The Governing Council is invited to allow the Secretariat to explore, together with the WIPO and with limited resources, potential work in the SEPs area. The Governing Council is asked for authorisation to present a full proposal for inclusion in the 2023-2025 Work Programme at a later date, but within the period of the new Work Programme, should exploratory work result in a positive assessment concerning the drafting of an international instrument on the subject matter.*

8. Digital transformation, data governance and artificial intelligence

115. On 12 May 2022, UNIDROIT received a proposal from the European University of Rome to include work on 'Digital transformation, data governance and artificial intelligence' in the 2023-2025 Work Programme. As with other projects, this proposal presents direct links with current -and prospective- projects of the Institute.

116. The proposal highlights the ever-increasing role of new technologies, artificial intelligence (AI) and big data in practically all areas of society, making express reference to the legal debate concerning civil liability for damages caused by AI-based technologies that are able to self-train and operate without human intervention. The proposal identifies an area where the application of AI tools and big data has received less attention so far: the organisation and management of corporations. It is argued that AI systems and cloud computing services may facilitate the collection, analysis and storage of business information, and insights gained through data analysis and predictive technologies can help businesses define their corporate strategies. Furthermore, the proposal underscores how business intelligence technologies may be useful for corporate reporting and compliance purposes.

117. The European University of Rome proposes to investigate the opportunities and implications of new technologies in the corporate context, and to develop global standards that would address the legal issues through a combination of corporate law, data law and information technology law. The proposal argues that standards at international level would help foster a common understanding of CorpTech and Algo-governance, enhance trust and enable companies to exploit the full potential of digital tools and processes, no matter where they are located. In order to achieve such a purpose, the proposal sets out a tentative work plan in stages: first, a thorough analysis of various preliminary matters ought to be conducted (e.g., a mapping of relevant existing rules and an impact analysis of the extensive application of AI in corporations); second, the results of the preliminary work would inform the contours of the project and the choice of instrument (e.g., a set of Principles, Legislative Guide or Model Law). The European University of Rome proposes to integrate the work in UNIDROIT's ongoing project on Digital Assets and Private Law.

118. UNIDROIT is well-placed to undertake work in this area considering that aspects of private law and digital technology are already being considered in various ongoing projects (Digital Assets and Private Law, Best Practices for Effective Enforcement, Model Law on Warehouse Receipts). Moreover, the Secretariat considers the topic of AI and Big data as topical and highly relevant in the legislative scene (e.g., the EU is currently focused on adopting rules on these areas -Data Act, AI Act, Data Governance Act, liability rules on AI-, and UNCITRAL is conducting exploratory work on Data transactions and automated contracting). Concerning the proposal (the title of which is misleading, since its content is actually limited to AI and corporation management), the Secretariat would like to note the following: (i) several of the specific issues to be included in the analysis have a predominantly regulatory nature (i.e., RegTech), such as those concerning reporting and auditing; (ii) there are already a number of international/regional instruments on regulating some of the items proposed for consideration; and (iii) the scope is relatively vague, and requires further definition. In light of this considerations, the Governing Council may want to consider including the project with low priority, allowing for the conduction of exploratory work to further refine the scope, subject to the availability of resources.

119. *The Governing Council is invited to consider recommending the inclusion of work on 'Digital transformation, data governance and artificial intelligence', with a different title that reflects its proposed content, in the 2023-2025 Work Programme, and with low priority, allowing for the possibility to conduct preliminary work and exploring synergies with other projects.*

9. Access to Justice in Environmental Matters

120. The University of Macerata (Italy) submitted a proposal for inclusion of a project on 'Access to Justice in Environmental Matters' in the 2023-2025 Work Programme. The past years have seen an increased public attention on sustainability and environmental protection, due to the expanding knowledge on the effects of global warming and spurred by international initiatives such as the United Nations Sustainable Development Goals and the Paris Agreement. As might be apparent to Governing Council Members, this type of content is present in several of the proposals received by UNIDROIT for inclusion in the 2023-2025 Work Programme.

121. A preliminary study by the University of Macerata shows that it is currently challenging for individuals and relevant stakeholders to get access to justice concerning environmental matters. While some countries allow legal actions by individuals, other jurisdictions limit standing to sue to competent national authorities. Furthermore, class actions may or may not be possible, and non-governmental organisations (NGOs) may or may not have legal standing. Even within the European Union, the requirements for NGOs to bring legal actions based on environmental damage are not harmonised. The significant differences in legal regimes across the world make access to justice even more complex in cross-border cases, while environmental damage may well reach beyond the boundaries of a single country.

122. The proposal underlines that the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) – which concedes several rights to individuals with regard to the environment – is a step in the right direction. However, it is argued that more granular, concrete rules would be needed to move towards a desirable harmonisation of the approach adopted by jurisdictions in this area. It is therefore proposed to develop a Model Law on Access to Justice in Environmental Matters. In addition to legal standing and collective redress mechanisms, key issues proposed to be addressed in the proposed Model Law (or comparable instrument) would include the following: jurisdiction in cross-border cases; jurisdiction at the domestic level and judicial models (e.g., civil versus administrative courts, specialised chambers); substantive aspects; and types of damages (e.g., compensation or *restitutio ad integrum*).

123. The Secretariat considers the proposal topical, and recognises the potential value of the project in remedying environmental damage through effective judicial mechanisms. It further considers that UNIDROIT's expertise in the area of civil procedure and enforcement may be particularly helpful in designing a global framework on access to justice in environmental matters. The Secretariat, however, is aware of the complexities inherent to transnational legislation in the area of procedural law, especially in sensitive areas such as environmental liability. It is also the Secretariat's view that consultations with other organisations and relevant stakeholders might need to be conducted in order to understand the degree of interest in such a project. Moreover, in light of the subject-matter, should the Governing Council consider the topic fit for inclusion in the next Work Programme, consideration could be given to exploring partnership with other relevant organisations in the field of environmental law.

124. *The Governing Council is invited to take note of the above proposal and to consider recommending that the General Assembly includes a project on 'Access to Justice in Environmental Matters' in the 2023-2025 Work Programme with low priority.*

C. Ongoing Low Priority Legislative Activities

125. The following sections include an account of project proposals that have been accepted in the existing Work Programme, with low priority. Please note that, in light of the new context and developments in the area, the Secretariat is proposing an increase in the level of priority of one of these existing projects.

1. Cultural Property: Private Art Collections

126. Consistent with this project's inclusion in the Work Programme as a low priority activity, the Secretariat continued to seek to identify the private law aspects that fall within its mandate. The activities undertaken under this study were recently summarized in a note by the Secretariat for the 100th session of the Governing Council in September 2021 ([C.D. \(100\) B.15](#)).

127. The most recent developments in connection with this study relate to orphan objects, which can be defined as cultural objects which do not have an identified - or a fully identified - provenance. Such objects can be the result of displacements following theft or illicit excavation (for antiquities), but also wars, colonial domination, ethnic persecution, etc.

128. The close connection of orphan objects in cultural property law with orphan objects in intellectual property law should be noted. However, in intellectual property law – and more specifically copyright law –, orphan works are those for which the author is unknown. In cultural property law, the question is more one of history of ownership.

129. If orphan cultural objects are often to be found in private collections, it should be noted that they also frequently appear in public collections, be it because the owner of an object deposited with a museum can no longer be identified or that the standard of diligence was not respected upon the acquisition of the object by purchase, loan or bequest.

Selected issues

130. Several important themes were selected for further development following the relevant meetings in which the UNIDROIT Secretariat has participated in the past few years, such as: a working definition of orphan objects; the role of provenance research; the legal status of orphan objects in art collections; defining due diligence in acquiring an orphan object; the issue of proof; the role of databases; the time-limitation of claims on orphan objects; the return and restitution of an orphan object. For more information on the activities undertaken see document [C.D. \(101\) 12](#).

Future activities

131. To develop such themes, the Secretariat considers that time is ripe to establish and convene a study group / expert meeting whose purpose would be to answer the above questions and create a set of principles/guidelines to support national legislators who intend to address the matter of orphan cultural objects. The same study group/expert meeting could make proposals on the best possible practical tools to be promoted to help private or public collections when they deal with orphan cultural objects: either a specialised database, a 'clearing house' where orphan objects could be brought in order for their provenance to be cleared, or other tools.

132. In order to develop such a project, the Secretariat would propose to focus the project on "Art collections and orphan cultural objects" in order to show the priority given to the study of orphan objects and their connection with collections, as well as to enlarge the scope of the study to encompass not only private collections, but also public collections (as defined in art. 3.7 of the 1995 UNIDROIT Convention). In order to achieve this aim, the Secretariat would ask that consideration be given to a reallocation of the priority given to such project, bringing it to medium so that funds can be allocated to the project.

133. *The Governing Council is invited to consider enhancing the level of priority given to the project on Private Art Collections during the 2023-2025 Work Programme and bring it to a medium priority activity.*

2. Guide for enactment of the UNIDROIT Model Law on Leasing

134. At its 98th session in May 2019, the UNIDROIT Governing Council approved the development of a guide to enactment to the UNIDROIT Model Law on Leasing as a low priority project for the Institute's 2020-2022 Work Programme, on the basis of a proposal submitted by the World Bank. As consistent with the low priority assigned to the project and due to competing priorities, no substantive work was undertaken on this project between 2020 and 2022.

135. The practical need for the development of a guide to enactment for the Model Law on Leasing remains. In particular, implementing States require further guidance regarding how the Model Law on Leasing aligns with other, more recent secured transactions instruments that have been adopted, including the UNCITRAL Model Law on Secured Transactions and the MAC Protocol.

136. *The Secretariat suggests that this project be retained on the Institute's 2023-2025 Work Programme as a low priority. Should the Governing Council recommend retaining this project in the 2023-2025 Work Programme, the Secretariat would be pleased to consult further with the World Bank with a view to clarifying the scope of the proposal and conducting a preliminary study.*

3. International Civil Procedure in Latin America

137. In 2019, the Department of International Law of the Organisation of American States (OAS) formally expressed its interest in exploring joint work with UNIDROIT concerning international civil procedure. Drawing from informal exchanges and conversations, and consistently with the specific geographical mandate of the proponent, the work was meant to focus on the Latin American jurisdictions and would be similar to previous work conducted by UNIDROIT together with the American Law Institute (2004 ALI-UNIDROIT Principles of Transnational Civil Procedure) and particularly the joint work with the European Law Institute (now published as the 2020 ELI-UNIDROIT Model European Rules of Civil Procedure) that adapted the ALI-UNIDROIT Principles to the European regional dimension.

138. The Governing Council, at its 98th session (Rome, 8-10 May 2019) recommended the introduction of the project in the Work Programme with a low priority status, pending conclusion of

the ELI-UNIDROIT project, in view of the higher priority awarded to the project on Principles of Effective Enforcement and considering the generality of the proposal that needed further consultation. The recommendation was adopted by the General Assembly at its 78th session (12 December 2019).

139. During the 2020-2022 Work Programme period, the Secretariat received further expressions of interest on this project, in particular in a letter dated 8 November 2021 Correspondent Professor Cecilia Fresnedo de Aguirre. Possible synergies with the Italian-Latin American International Organisation (IILA) were also discussed during meetings between the UNIDROIT President and Secretariat and the IILA Secretary General.

140. *In view of the above, the Secretariat would ask the Governing Council to consider recommending that the General Assembly keep the project within the Work Programme 2023-2025 with a low priority status, and authorise the Secretariat to continue to conduct further consultations subject to availability of resources.*

4. International Commercial Contracts: Formulation of Principles of Reinsurance Contracts

141. The project on the “Formulation of Principles of Reinsurance Contracts” (PRICL) was included in the 2017-2019 Work Programme of UNIDROIT, upon a proposal of a group of scholars of the Universities of Zurich, Frankfurt and Vienna, supported by an international team of experts and advised by representatives of the global insurance and reinsurance markets. The project’s purpose is to formulate a “restatement” of existing global reinsurance law. The project leaders expressed the view that the proposed principles presupposed the existence of adequate rules of general contract law, which could be found in the UPICC and, as a result, UNIDROIT was invited to participate. As the project was financially self-sufficient, it was classified among the low priority activities of the Work Programme.

142. Consistent with the announced timeline for the project, the PRICL – First Part (black-letter rules and comments) were presented to the Governing Council at its 98th session (Rome, 8-10 May 2019) and subsequently published. In 2018, the project leaders received funding for a second triennium to address the remaining topics (Back-to-back-cover; Non-contractual liability clauses; Termination and recapture; Limitation periods). Due to the connections between a number of these topics and the UPICC, and the desirability of this second part of the PRICL to continue referring to the UPICC both in the general choice-of-law clause and in the specific black-letter rules and comments, the PRICL Working Group asked UNIDROIT to continue its involvement under the same conditions as before (i.e., in-kind contribution through participation in the biannual Working Group meetings). The continuation of the project for the Work Programme 2020-2022 was approved by the UNIDROIT Governing Council at its 98th session in 2019, and adopted by the General Assembly at its 78th session in the same year.

143. Due to the suspension of the in-person activity of the PRICL Working Group in the pandemic period, however, the project could not be finalised within the projected timeframe. The PRICL Working Group has been authorised to use the funding for one additional year, with the likelihood of a further extension of another year in order to conclude the project within 2024. Work has meanwhile resumed with the next meeting planned for July 2022.

144. *The Governing Council is invited to consider the continuation of UNIDROIT’s participation in the project during the 2023-2025 Work Programme until its completion in 2024, as a low priority activity and under the same conditions as before.*

5. Secured transactions: Preparation of Other Protocols to the Cape Town Convention

(a) Ships and maritime transport equipment

145. Since the early stages of its development, there has been a longstanding view that there would be merit in extending the application of the Cape Town Convention through a protocol specific to ships and maritime transport equipment (Maritime Protocol).¹⁶ However, due to concerns expressed by some parts of the maritime law community, the development of a Maritime Protocol has not progressed.

146. The Governing Council has continuously expressed support for the development of a Maritime Protocol, but only on the basis that there was sufficient industry support for the instrument to be successful. As such, the Maritime Protocol has been designated as a low priority project since 2013. In recent years and as consistent with the project's low priority status, the Secretariat has undertaken a range of activities to determine whether there may be increasing industry support for the development of a Maritime Protocol, including; (i) participation in events organised by the African Shipowners Association; (ii) engagement with peak bodies such as the Comité Maritime International (CMI) and the Bureau of International Containers (BIC); and (iii) monitoring of developments in other fora, such as the CMI's International Working Groups on Ship Financing Security Practices and Financing of Shipping Containers, and UNCITRAL project on the preparation of an instrument on the judicial sale of ships, currently being undertaken by Working Group VI.

147. While there has not been a significant change in parts of the maritime law community opposing a Maritime Protocol to the Cape Town Convention, there have been some recent legal and economic developments that may increase the attractiveness of a Maritime Protocol. Specifically, (i) increasing use of leasing arrangements for ships, (ii) increasing need for finance to refit ships to meet environmental regulations or acquire low-carbon emission ships, and (iii) uncertainties in the legal regime governing legal rights in shipping containers might provide an opportunity for UNIDROIT to further engage with relevant stakeholders to determine whether there may renewed interest in the development of a Maritime Protocol.

148. Should the possible Maritime Protocol be retained in the 2023-2025 Work Programme as a low priority project, the Secretariat would continue to monitor the developments described above, and renew consultations with the IMO, CMI, BIC and other stakeholders in order to study further the Protocol's feasibility.

149. At the end of the 2023-2025 Work Programme, it is anticipated that the Rail Protocol, and possibly also the MAC Protocol, will have entered into force. As such, if the Maritime Protocol is retained as a low priority project for the 2023-2025 Work Programme, there may be an opportunity to increase the priority of the Maritime Protocol in the future, should the circumstances warrant such a decision.

150. *The Governing Council is invited to recommend maintaining the preparation of a Protocol to the Cape Town Convention on matters specific to ships and maritime transport equipment in the 2023-2025 Work Programme as a low priority activity.*

(b) Renewable Energy Equipment

151. At its 95th session (Rome, May 2016), the Governing Council agreed to include the preparation of a Protocol to the Cape Town Convention on matters specific to renewable energy

¹⁶ See Article 2(1)(c) of the first set of draft articles of a future UNIDROIT Convention on Interests in Mobile Equipment, March 1996, Study LXXII – Doc. 24).

equipment (Renewable Energy Protocol) in the 2017-2019 Work Programme as a low priority project (C.D. (95) 15). At its 98th session (Rome, May 2018), the Governing Council retained the Renewable Energy Equipment Protocol as a low priority project for the Institute's 2020-2022 Work Programme.

152. Consistent with its low priority status, throughout 2020–2022 the Secretariat has conducted research and monitored developments to further determine the viability of a future Protocol on renewable energy equipment. UNIDROIT has engaged an Australian law firm (Auxlaw) to provide *pro bono* assistance on this project.

153. Recent international developments have only increased the potential importance of a future Renewable Energy Protocol. The 2021 United Nations Climate Change Conference (COP 26) sought to build upon commitments made under the Paris Agreement in transitioning to 'net zero' by 2050. A stated goal of COP 26 was to 'mobilise finance' and engage with private and public sector financial institutions to deliver USD \$100 billion in annual funding to assist developing countries in their transition to renewable energy sources and greener economies. Several additional agreements and initiatives brokered by various countries and private sector entities were also negotiated during COP26, including the *Glasgow Financial Alliance for Net Zero* (GFANZ), under which 450 financial institutions undertook to set targets to reach net-zero by 2050, in accordance with the United Nations 'Race to Zero' Campaign.

154. Notwithstanding the significant international momentum behind combatting climate change, the challenge remains great. In 2021, the International Energy Agency reported that existing emission reduction targets would achieve only 20% of the reductions required to achieve 'net zero' by 2050. Rather, investments in clean energy will need to more than triple over the coming decade if 'net zero' is to be achieved. A commitment to achieving 'net zero' will expand the market for wind turbines, solar panels, lithium-ion batteries and fuel cells to over \$US1 trillion each year by 2050.

155. It appears that the Cape Town Convention could provide a potential international solution to address some of the legal issues constraining the availability of finance for renewable energy projects. However, further consultations are required to determine whether the Cape Town Convention's international asset-based secured financing framework is the most appropriate vehicle to address these issues.

156. Should the Governing Council agree to retain the Renewable Energy Protocol as project in the 2023-2025 Work Programme, the Secretariat would (i) engage with peak international bodies regarding the financing initiatives negotiated at COP26 (including GFANZ), and (ii) undertake consultations with the renewable energy industry, financiers and manufacturers of renewable energy equipment. To obtain further information on the viability of a Renewable Energy Protocol, the Secretariat would develop and distribute a private sector questionnaire. It is anticipated that the proposed activities could be achieved while retaining the low priority status assigned to the project. However, the Secretariat, in light of the current favourable context, would also ask the Governing Council to also give adequate consideration to scale the project up the priority ladder.

157. *The Governing Council is invited to retain the preparation of a Protocol to the Cape Town Convention on matters specific to Renewable Energy Equipment on the Triennial Work Programme 2023-2025, perhaps as a low priority.*

D. Proposed new non-legislative activities

1. International research project on the legal remedies applicable to contractual change of circumstances and the UPICC

158. On 12 December 2021, the Secretariat received a proposal from the Department of Private Law of the University of Roma Tre to participate in a joint international research project on contractual

change of circumstances. The revised and updated version of the proposal, sent to the Secretariat on 4 April 2022, is attached to this document.

159. The regulation of supervening circumstances is a classic topic in contract law, the practical and economic relevance of which has increased dramatically in the past few years as a consequence of a number of events (exemplified, but not limited to, the COVID-19 pandemics) that have affected – on an unprecedented global scale – contractual performance at domestic level, in international trade and along the global supply chains.

160. The proposed project, which would be conducted within the framework of the Memorandum of Understanding with Roma Tre of 15 November 2021, is aimed at drafting a map of the legal remedies applicable to contractual change of circumstances in selected jurisdictions (paying particular attention to geographic, legal, and economic diversity). It is designed to adopt an empirical, bottom-up approach and to focus on the practice of specific contracts rather than being limited to a comparative analysis of general contract laws. It would look, on the one hand, at “contract clauses typically used in the most relevant industrial and commercial sectors”, on the other hand, at “their practical application pursuant to the municipal laws of ten selected legal systems”. The final objective of the research would be to evaluate the effectiveness of such legal remedies and to compare the results of this assessment with the legal framework of the UPICC.

161. Regarding methodology, the project would require a phase of collecting relevant empirical data in the form of reports, written by industry specific leading experts, on the most commonly used model clauses at a transnational level for each industrial or commercial sector considered, and reports on the general principles governing change of circumstances in the selected legal systems. This would be followed by contract-specific national reports for each sector and legal system. Coherence would be ensured by the preparation in advance of a model report. The second stage in the research would consist in the elaboration of the collected data and the comparison of such empirical results with the UNIDROIT Principles. The expected timeframe of the project in view of the proposed architecture is of two and a half years (2022-2024).

162. Concerning the practical organisation of the project, it is envisaged that it would be financially and administratively supported by Roma Tre University Law Department, and thus, would require neither administrative support nor the setting aside of specific budgetary resources by UNIDROIT. UNIDROIT would be asked to appoint a Co-Director who would cooperate with the Co-Director nominated by Roma Tre Law Department, with qualified research assistance provided by the same Department. This would ensure UNIDROIT’s involvement in the project with a maximum degree of flexibility to guarantee the viability of the project on UNIDROIT’s side.

163. The proposed project is relevant and could be beneficial for UNIDROIT from various perspectives. First of all, it is closely related to UNIDROIT’s work on international contracts, particularly the UPICC and the most recent evaluation by the Secretariat of the role of the UNIDROIT Principles in solving contractual disruptions caused by the COVID-19 pandemic. As noted in the Project Proposal, a contract-specific approach would be helpful in identifying the commercial sectors, including domestic ones, in which to “target the promotion and raise the profile” of the Principles. Moreover, as the final step in the project would be the comparison of the outcome of the research with the legal framework of the UNIDROIT Principles, there is a range of possibilities in the way UNIDROIT can be associated with the final output of the project, which could be directly connected to the UNIDROIT Principles in the form of a co-published study or Note to support the various application of the Principles (e.g., by adjudicators, as model for contractual drafting, or as a model for legislators). Furthermore, the project shows connections and potential synergies with other UNIDROIT contractual projects where different facets of contractual response to supervening circumstances were considered, such as the UNIDROIT-FAO-IFAD Legal Guide on Contract Farming and the UNIDROIT-IFAD Legal Guide on Agricultural Land Investment Contracts, as well as with the proposed projects focusing on the regulation of the supply chain.

164. *The Governing Council is invited to consider recommending this topic for inclusion in the UNIDROIT Work Programme, as non-legislative activity with low priority, for the triennium 2023-2025. The Secretariat would be pleased to cooperate in this initiative and contribute to it at the conditions detailed above.*

165. *The Secretariat would invite the Council to consider the information provided in this document, its Annexes, as well as in the related documents, and to make recommendations to the General Assembly on the topics and activities to be included in the 2023-2025 Work Programme, including their relative level of priority.*

ANNEXE 1 (A) – PROPOSAL FROM THE INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION (ISDA)



Professor Dr Ignacio Tirado, Secretary-General,
UNIDROIT International Institute for the Unification of Private Law,
Rome

i.tirado@unidroit.org

24 January 2022

Proposal for a project to determine the legal nature of voluntary carbon credits

Dear Professor Tirado,

This is to suggest on behalf of ISDA¹ the topic of the legal nature of voluntary carbon credits (VCCs) for discussion at UNIDROIT in preparation of the next triennial work programme. The proposed topic includes a number of aspects which relate closely to topics discussed in the ongoing UNIDROIT project on digital assets and private law and certain existing UNIDROIT instruments; eg, the Geneva Securities Convention and the UNIDROIT Global Netting Principles.

As part of the universal drive to reduce carbon emissions at every level of economic activity, especially across supply chains, manufacturing, transport etc the trading of carbon credits is meant to increase significantly across the globe. A number of global treaties related to climate, including the 1997 Kyoto Protocol and, in particular, the 2015 Paris Agreement mention carbon trading as a key element. Over the years a number of meetings of states party as conducted under the aegis of UNFCCC (incl. the recently held 26th edition of the Conference of Parties (“COP26”) in Glasgow in November 2021) have highlighted the need to create a global market in carbon credits.

The transition to a low carbon economy globally includes different types of carbon markets. A number of mandatory (or compliance) carbon markets exist already, largely as a result of individual national commitments under the aforementioned global climate agreements. These markets are created by statute or other formal mechanism and are regulated by mandatory international, national or regional carbon reduction regimes. For example, the EU Emission Trading System (EU ETS) was established in 2005. It is currently the largest mandatory carbon market in the world and has influenced the design of other mandatory carbon markets, especially the Swiss and UK Emissions Trading Scheme. There are similar schemes in China,

¹ Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 960 member institutions from 78 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association’s website: www.isda.org. Follow us on Twitter, LinkedIn, Facebook and YouTube.

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Japan, Mexico, South Africa, South Korea, the US and nearly 70 other jurisdictions around the world.

Voluntary programs started to develop around the same time and in parallel with the mandatory carbon markets. It became clear that there was a demand for carbon credits from entities not required to participate in mandatory carbon markets, including in countries where no mandatory scheme exists. Participation in mandatory and voluntary carbon markets is not mutually exclusive, and many companies participate in both. In contrast to the highly regulated mandatory carbon market, voluntary carbon markets currently do not involve any specific government authority oversight. Organizations can elect to purchase VCCs to offset their emissions and help meet their net-zero goals. As a significant share of the projects that generate VCCs are located in the Global South, the voluntary carbon market also provides an opportunity to increase capital flow to emerging market economies and provide funding to projects that may not otherwise receive it.

A robust voluntary carbon market must be grounded in a strong legal foundation. Much of the process of creating, verifying and transferring the benefit of project activities that reduce emissions already exists within robust legal frameworks. As the market grows in size and complexity, however, markets trading in fungible VCCs would be significantly enhanced by steps being taken both nationally and internationally to better understand the legal nature of VCCs.

Therefore it may be desirable for steps to be taken to clarify the legal nature of VCCs through legislative guidance. Global legal standard setters, such as UNIDROIT, could create a global standard for the legal treatment of VCCs.

The possible legal nature of VCCs currently differs across jurisdictions. In many countries, they can be viewed as some form of intangible property; in others, they could be characterized as a bundle of contractual rights. As with any intangible asset, much depends on the legal treatment: different rules could apply on how VCCs as a fungible instrument can be created, bought, sold and retired, how security is taken, and how they are treated on insolvency (including with regard to netting). There are parallels with other types of asset, including carbon emissions allowances in the mandatory carbon markets. However, VCCs differ from those types of carbon credits in certain key respects. In particular, VCCs are constituted outside any statutory framework.

Whether VCCs constitute a form of property under some legal systems must be established by reference to whether they are definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability (eg, in England & Wales).

VCCs can be seen as representing exclusive access to a finite resource – namely, certification that the holder either directly or indirectly has reduced or removed from the atmosphere one metric ton of carbon dioxide equivalent (tCO₂e) in line with relevant rules and requirements. This view is consistent with the perceived market value of VCCs, which is associated with the holder's ability to claim some level of responsibility (through the retirement or cancellation of the credit) for a finite quantity of tCO₂e reduction or removal arising from a finite set of certified projects. Value ultimately derives from the finite nature of the resources represented by VCCs, which includes the independent verification of such claims, as set out in the relevant carbon standards framework. In that sense, VCCs can be viewed as an intangible asset, evidenced by the register entries and established in accordance with the relevant carbon standard and registry rules. Whether VCCs are capable of being recognized as a form of intangible property, however, is a jurisdiction-specific question and so, pending the development of a global standard, will be answered by reference to national laws.

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Alternatively, VCCs could be seen as a bundle of legal rights. A project is able to generate VCCs once it is assessed and certified as meeting the relevant carbon standard rules by a third-party verifier. A further verification by a third party is then carried out on the performance of the project to confirm the activities have resulted in the emissions reductions claimed. The verifier's findings are set out in a public verification report, which includes the number of VCCs that can be issued as a consequence. It may be possible to characterize these claimed reductions as a contractual right to benefit from the verification process performed by the project developer. If issued, VCCs are recorded by a registry administrator and are also subject to the contractual framework of the relevant registry (including any terms of use or registry rules). For example, in circumstances where a VCC has been issued and transferred into the account of a project developer, but it is subsequently found the project was not in compliance with the registry rules (for instance, due to fraudulent activity), the project developer may be required to return the affected VCCs for cancellation by the registry. On this alternative view, VCCs represent a bundle of contractual rights, documented under the relevant service contracts with the verifier and registry rules to which participants are required to adhere. Under such a characterization, VCCs would amount to a bundle of private law contractual rights (and potentially tortious rights) against the project developer, verifier, carbon standard and registrar. While it is certainly the case that VCCs generally arise in the context of a contractual framework, analyzing the rights and obligations that arise under the various contracts and rules places the onus for the legal treatment of VCCs on the terms of those contracts and rules. In other words, variances in the express (and implied) terms of the various service contracts and registry rules would give rise to differences in the legal characteristics of VCCs. Absent sufficient standardization, that means a higher risk of fragmentation across the market.

If VCCs are considered a bundle of contractual rights, it will materially impact their transferability. Both the governing law and the terms of a contract will determine how the contract can be transferred. In several legal systems, a contractual right can only be transferred by assignment or novation, both of which require certain formalities to be complied with. For example, all three parties must agree to a novation and a legal assignment requires notice to be given to the obligor. On that basis, characterizing VCCs as a bundle of contractual rights may give rise to certain complications that would not emerge if it is clear in a particular jurisdiction that VCCs are a different type of property (such as a form of intangible property).

A preliminary legal analysis for VCCs under English, US and German law in more detail in a paper entitled *Legal Implications of Voluntary Carbon Credits* (attached hereto).

A number of key legal issues have been identified:

1. The legal nature determines how ownership rights in VCCs as a fungible instrument can be created and transferred. It also affects what type of security may be taken and enforced and how that can be achieved, as well as how VCCs would be treated following an insolvency (including with regard to netting).
2. Market participants want to ensure they obtain good title to assets upon a transfer and the assets will not be subject to claw back in certain circumstances, such as the insolvency of their counterparty. To avoid parties needing to establish a good chain of transfer, market infrastructures have evolved to provide assurance on these issues. Specific statutory rules exist in some jurisdictions that ensure the purchaser of goods can rely on certain presumptions based on the apparent state of affairs (such as their counterparty's possession of the goods) to obtain good title without having to further investigate the chain of ownership. Specific rules also exist for the transfer of negotiable instruments (such as bearer securities), which make clear that the transferee obtains good title even in circumstances when the party transferring the instrument doesn't have good title itself. Rules of this type help foster confidence and liquidity in

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the markets by ensuring settled transactions are not subject to unexpected challenge. Clarity over the legal nature of VCCs will bring greater certainty on security of transfer.

3. If participants are from different jurisdictions, multiple laws may need to be considered. One solution is to coordinate conflicts-of-laws rules so the treatment of the asset is determined by reference to the location of a feature of the asset. In the case of VCCs, the jurisdiction or the location of the register would be one possible candidate. Absent a multi-jurisdictional coordinated approach, targeted legislative amendments could be considered on a jurisdiction-by-jurisdiction basis to clarify the position of VCCs, particularly if:

- (i) the relevant register is located in that jurisdiction; or
- (ii) the insolvency laws of that jurisdiction apply upon the insolvency of a party to a transaction involving VCCs.

4. Greater certainty on intermediated relationships would also be helpful. For example, when an investor transacts in VCCs but is not a direct counterparty to the relevant registry rules and has an intermediary acting on its behalf. Uncertainties relating to the legal nature of VCCs give rise to questions over the nature of the interest of any investor, including whether it has a proprietary entitlement to an asset that is insolvency remote from the intermediary.

5. The treatment of netting and security arrangements following an insolvency is another area that would benefit from greater certainty over the legal nature of VCCs. The legal nature of VCCs may determine the law applicable following an insolvency. In some jurisdictions, certain matters are exempt from the overriding provision that the applicable law will be that of the jurisdiction where insolvency proceedings are opened, eg, rights in rem. Whether a right is a right in rem is determined in accordance with the national law of the jurisdiction where the asset is situated. Not only, therefore, is the characterization of VCCs as personal or in rem uncertain, but that uncertainty is currently compounded by difficulties in identifying the law that appropriately determines that question. In theory, there are several potential different jurisdictions that could apply:

- i) The jurisdiction of the register on which the VCCs are recorded;
- ii) The jurisdiction of incorporation of the registrar;
- iii) The governing law of the carbon standard rules and/or registry rules; and
- iv) The law of the location of the project from which the VCCs are generated.

If the jurisdictions were the same, particularly in relation to points (i), (ii) and (iii), greater legal certainty would be achieved which could encourage the market to ensure other aspects are subject to the laws of the same jurisdiction. This would create greater legal certainty overall regarding the law applicable following an insolvency. But while a specific jurisdiction-by-jurisdiction approach would improve legal comfort, it can risk fragmentation. Additional complex considerations may also arise when there are chains of intermediaries involved.

6. An obligation to transfer a VCC is likely to be characterized as a delivery or performance obligation. In jurisdictions where the enforceability of set-off and netting arrangements following insolvency relies on the obligations being monetary in nature, it will be necessary to provide for an effective close-out mechanism. For those

ANNEXE 1 (B) – SUPPORT OF THE GOVERNMENT OF PARAGUAY

EP/IT/4/N.º 42/2022

La **Embajada de la República del Paraguay en Italia** presenta sus atentos saludos al **Instituto Internacional para la Unificación del Derecho Privado (UNIDROIT)** – con ocasión de hacer referencia al Proyecto sobre Créditos Voluntarios de Carbono (CVC) en el que trabajan conjuntamente ese Instituto e ISDA.

En tal sentido, esta Representación Diplomática tiene a bien transmitir el apoyo del Paraguay al citado proyecto, luego de haber recibido el parecer técnico de las instituciones correspondientes, el cual es favorable a la iniciativa mencionada.

La **Embajada de la República del Paraguay en Italia** - hace propicia la oportunidad para reiterar al **Instituto Internacional para la Unificación del Derecho Privado (UNIDROIT)** - la seguridad de su más distinguida consideración.

Roma, 9 de mayo de 2022

Al Honorable
Instituto Internacional para la Unificación del Derecho Privado (UNIDROIT)
Roma – República Italiana
RM/mdb

ANNEXE 2 – PROPOSAL OF THE WORLD INTELLECTUAL PROPERTY ORGANISATION (WIPO)



Mr. Ignacio Tirado
Secretary-General
International Institute for the
Unification of Private Law (UNIDROIT)
Via Panisperna, 28
Rome 00184
Italy

April 12, 2022

Dear Secretary-General Tirado,

I am pleased to refer to your letter addressed to the Director General dated October 26, 2021 (Ref: WP/1138), regarding the preparation of the next triennial Work Program of the International Institute for the Unification of Private Law (UNIDROIT).

Following several meetings between our colleagues to consider possible areas of convergence where our organizations can work together, please find attached a proposal concerning the possible development of a *Legal Guide on Intellectual Property (IP) issues in the field of Personalized Medicine*.

We look forward to fruitful collaboration on this and other important topics.

Yours sincerely,

Edward Kwakwa
Assistant Director General
Global Challenges and Partnerships
Sector



Legal Guide on IP Issues in the field of Personalized Medicine

Background

Technological developments have spurred the advancement of innovative approaches in health care, paving the way to a system optimized for each individual. Digital therapeutics, healthcare tech, big data, genomic-based diagnostic tests and personalized medicine are attracting great interest among innovators.

Data reported in the Global Innovation Index 2019 shows that medical technologies are among the top five fastest-growing technologies for the period 2016-2019. Similarly, data of filings in the Patent Cooperation Treaty system show a sustained trend towards technology, and mostly computer technology.

In general terms, personalized medicine entails a medical model whereby disease prevention, diagnoses and treatment is tailor-made to individuals or groups of individuals, based on their characterisations (e.g., genotypes and phenotypes¹). The concept of personalized medicine is not new, but novel approaches such as whole genome sequencing, wearable technology and big data analytics, and the growing understanding of genetics and genomics create the opportunity to bring personalized medicine to a highly individualized level.

With the expansion of the role of digital technologies in human life, the trend of 'individualization' and 'digitalization' in the health sector is expected to continue. Personalized medicine is encouraged also at policy level because individualization offers the following benefits: (i) it reduces toxicity; (ii) it helps to reduce adverse reactions to medicinal products; (iii) healthcare providers may be able to offer better-targeted treatment and prevention.

This relatively new and fast-developing field carries a great potential for future healthcare applications, but it raises some challenges as well. Relationships between patients, medical professionals, and other actors are getting more complex. Personalized medicine involves cross-disciplinary interaction between specialists in genetics, statistics, physics, healthcare informatics, pharmacology, and health professionals. Furthermore, it has an important cross-border component due to the global relevance of medical treatments/products and the involvement of actors from different jurisdictions (e.g., patients, hospitals, research institutions, universities, biobanks, pharmaceutical companies, service providers).

From a legal perspective, questions may arise for instance with regard to the collection and sharing of human materials and research products, the use of new technologies and the development of new diagnostic or treatment methods and medicines. The number of legal questions increases with the number of jurisdictions involved, which may be many.

¹ Genotypes refer to an individual's collection of genes. Phenotypes refer to an individual's observable traits (i.e., physical or physiological features).

Areas of Private Law within the scope of collaboration

In light of WIPO's mandate, this document is meant to illustrate the suggested topic mainly from an Intellectual Property (IP) perspective. However, there are links with areas of private law that would be worthwhile to explore as well. Collaboration between WIPO and UNIDROIT would allow for a comprehensive consideration of the key IP issues in personalized medicine, both from an IP and a broader, private law perspective. Considering WIPO's expertise, its involvement will not include legal aspects of data in personalized medicine, particularly data protection law and data exclusivity. It would include IP and private law aspects concerning the relation between genetic material (e.g., samples, specimens) and innovation in personalized medicine.

Some of these other areas of private law relate to:

Property law: Jurisdictions may have different approaches to the qualification of human tissue from a property rights perspective.

Contract law: As the various actors involved in personalized medicine are generally connected through contractual arrangements (for instance, material transfer agreements²), questions of general contract law may arise, e.g., regarding validity, performance, enforcement and remedies (injunctions, damages and other remedies). While several standardized MTAs have been developed in the past, these may be limited in scope, may not yet take into account the latest digital technologies and/or may be limited to specific organizations.

The need for and importance of future work

A wide range of actors is involved in the development of personalized medicine. Legal challenges may arise in the entire 'chain', that is, in the relationships between:

4. an individual whose material (e.g., DNA) is taken and a hospital.
5. a hospital and a healthcare/pharmaceutical company.
6. a pharmaceutical company and its service providers (e.g., for genetic testing).
7. any research institutions and databanks (e.g., biobanks³) involved.

From an IP perspective, legal questions may relate to:

IP rights management and licensing issues: One of the features of personalized medicine is the involvement of a wide range of actors, multiparty collaborations and new types of materials. This leads to enhanced models for IP rights management through customized approaches to the management of samples, characterisation information and patents. For instance, in case of multiparty collaborations involving academic institutions, healthcare providers and others, one question may be how IP should be managed in such collaborations (e.g., ownership, rights of use and liability). Trade secrets: In the area of personalized medicine, a shift may be noticed in the type of know-how that is being developed, used and licensed (such as specific methodology or algorithms). This requires consideration of how to apply trade secret protection and enforce it in order to prevent the misappropriation of undisclosed information in the context of personalized medicine.

Patents: The application of patent eligibility criteria to inventions in the area of personalized medicine. For instance, digital platforms or computer systems used in personalized medicine,

² A material transfer agreement (MTA) is a written agreement between two research institutions, one being the provider of tangible research materials and the other the recipient that intends to use this material for research purposes.

³ Biobanks are repositories that store (human) biological samples (e.g. blood samples) for use in research.

diagnostics/treatment methods and medical products (which typically combine numerous inputs and innovations, some of which may be protected by IP rights held by different parties).

Answers to legal questions must be found in different domestic and regional IP laws. International Investment Agreements and Free Trade Agreements are of relevance as well.

Despite regional and international cooperation, national IP laws and practices differ, leading to potentially diverging outcomes when e.g., patent applications are filed for the same medical invention in different national or regional patent offices. Moreover, a patent could be invalidated by a court in one country but confirmed by a court in another country.⁴ Differences in legislation and practices may also provide obstacles for international research and development (R&D) and cross-border investments in the field of personalized medicine.

A collaboration with UNIDROIT would allow a holistic examination of IP and private law issues. Developing a Legal Guide addressing the key IP law questions in the field of personalized medicine could play a crucial role in facilitating and promoting health innovation, and personalized medicine specifically, on a global scale.

⁴ Promoting Access to Medical Technologies and Innovation. WIPO-WTO-WHO 2020, p. 67.

ANNEXE 3 – PROPOSAL FROM THE ICC INSTITUTE OF WORLD BUSINESS LAW (ICC)



Paris, 15 April 2022

BY E-MAIL

**The Secretariat of the International
Institute for the Unification of Private Law**

– **UNIDROIT** Via Panisperna, 28

00184, Rome, Italy

A/C: Secretary-General – Prof. Ignacio

TiradoE-mail: i.tirado@unidroit.org

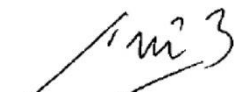
Re.: Proposal of a joint project between the ICC Institute of World Business Law and the
International Institute for the Unification of Private Law (UNIDROIT) on investment contracts

Dear Secretary-General Prof. Ignacio Tirado:

- (i) On behalf of the ICC Institute of World Business Law ("**ICC Institute**") and, in light of the recent agreement executed between the International Institute for the Unification of Private Law ("**UNIDROIT**") and the ICC Institute, I am pleased to invite UNIDROIT to undertake, together with the ICC Institute, a project aiming to promote the study of investment contracts (the "**Project**").
- (ii) The Project, which is explained in more detail in the attached document (**Annex I**), would focus on creating a forum for the debate on how investment contracts, *i.e.*, contracts executed between sovereign States (or its controlled entities) and private investors, can be modernized, harmonized, and standardized. Particularly, the Project would explore the interaction between the UNIDROIT Principles of International Commercial Contracts ("**UPICC**") and some of the most common provisions and issues involving investment contracts, such as hardship, force majeure, termination, and damages, for instance.
- (iii) The ICC Institute understands that the Project is aligned with the values and objectives of both institutions, especially considering that:

- a. it will revisit investment contracts to analyze how such instruments can be updated to reflect the new policies involving investments and businesses in general, such as the promotion of corporate social responsibility, sustainability, and human rights protections;
 - b. it intends to take a closer look in the provisions of different investment contracts to identify common ground between them and debate whether suggestions can be made to foster their harmonization; an analysis of ICC awards on disputes arising out of investment contracts may be of particular interest for this project;
 - c. it will assess whether (i) the UPICC already meet all needs of investment contracts or (ii) there may be matters that the UPICC do not yet – or not completely – address. If the latter is identified, the Project may discuss whether guidelines, clarifications or even a supplement to the current edition of the UPICC is advised (containing black letter rules and/or comments specifically taking into consideration the context of investment contracts); and
 - d. it may also evaluate how the dispute resolution clauses usually contained in investment contracts can be updated, especially considering the alternative dispute resolution methods provided by the ICC, in order to address some of the concerns and criticisms currently directed to Investor-State Dispute Settlement (“**ISDS**”) mechanisms.
- a.
- (iv) Please bear in mind that the Project (**Annex I**) is just an initial draft, and the ICC Institute would very much appreciate any input or contribution from the UNIDROIT on the matter.
 - (v) The ICC Institute looks forward to working with UNIDROIT on the Project and waits for any suggestions and/or modification to the Project that UNIDROIT may deem appropriate.

Yours sincerely,


Eduardo Silva Romero
President

INTERNATIONAL CHAMBER OF COMMERCE

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Annex I

Proposed Project: International Commercial Contracts – Investment Contracts

1. **Scope of the Project.** The study of investment contracts executed between a State (or a controlled entity) and a private investor to assess (i) what are their common provisions; (ii) whether and, if so, how such provisions are in line and consistent with the UNIDROIT Principles of International Commercial Contracts (“UPICC”); and (iii) whether international guidance could be provided to properly address the current demands of international contracts, investment law and expected business conducts. The analysis of ICC awards on disputes arising out of investment disputes may be of particular interest for this project.
2. **Reasoning and justification for the Project.** Transactions conducted under international commercial contracts are considered the backbone of international trade, taking into account that international contracts are considered still to be a mysterious and difficult subject, mutually combining the long-standing expertise of both *id est* UNIDROIT and International Chamber of Commerce (“ICC”) in investment arbitration agreements, the main purpose of the Project is to jointly analyze, in light of UPICC and ICC instruments, international commercial contracts – investment contracts, focusing on international customary law.
3. In the last decade, (i) international investment law has undergone deep reforms with a new generation of International Investment Agreements (“IIAs”, *i.e.*, treaties between States) in place; (ii) case law about IIAs and investment practices has evolved; (iii) the demand for corporate social responsibility and sustainability has substantially increased; and (iv) the Investor-State Dispute Settlement’s (“ISDS”) current mechanisms have suffered intense scrutiny and criticism.
4. In particular, IIAs and ISDS have been on the spotlight and are repeatedly the object of debates and studies in different international forums about how to update and modernize them¹. In the meantime, investment contracts have been neglected – so far, there is no systematic work on matters that can be addressed at the contractual level to cope with the new requirements of international investment law.
5. However, investment contracts are a suitable instrument to address these new policies and relevant concerns. They are negotiated on a case-by-case basis, they can replicate some of the protections generally available in the IIAs with the advantage of allowing a more articulated and precise formulation, expectations of the parties can be aligned and put in writing, additional obligations may be created, and dispute resolution clauses can be adjusted to allow a faster tailor-made settlement mechanism (*e.g.*, dispute boards, agreement on the publication of the awards and decisions, reduced jurisdictional barriers to file a claim, etc.). The ICC’s long-standing expertise and experience in the area of alternative dispute settlement could facilitate a thorough analysis of how contractual dispute resolution clauses could best be adapted in the investment context. Its pioneering work in the

¹ See, for example, (i) UNCTAD 2015; UNCTAD 2021; OECD 2021, regarding possible approaches to the drafting of IIAs; and (ii) UNCITRAL WG III for a reform in the ISDS system.

development of modern international commercial arbitration could play an important role in helping to understand how contractual dispute resolution clauses could be adopted in investment contracts and implement a relevant legislative change. Thus, a deeper study on how investment contracts can advance and promote these new policies is opportune.

6. In addition to the favourable momentum in setting up a working group to study and discuss whether international guidance could contribute to the updating of investment contracts to reflect the demands indicated above, it should be noted that arbitral tribunals have referred to the UPICC in investment dispute cases on numerous occasions throughout the years.
7. In fact, in most investment disputes, the UPICC are used as a means of interpreting and supplementing the applicable domestic law, often to add weight to the tribunal's interpretation of the relevant national law². On occasion, the UPICC was also mentioned to corroborate, to interpret and as a source of principles of international law³.
8. More than an useful tool for the arbitral tribunal, the UPICC are also very valuable to the contracting parties, since they can (i) wholly or partially incorporate the UPICC in their investment contract; (ii) elect the UPICC as the rule of law governing the contract; and (iii) refer in their investment contract to "general principles of law" or "lex mercatoria" as the governing law, in which case the UPICC may eventually be seen as a manifestation of such principles. Additionally, in the absence of any choice of law by the contracting parties, arbitral tribunals may decide (if allowed by the rules of arbitration) to apply the UPICC, either alone or in conjunction with domestic law.
9. In this context, given the relevance of the UPICC for investment contracts, a working group to better address the interaction between the UPICC and the most common provisions (and breaches) in investment contracts seems appropriate.
10. Just to illustrate some issues that may be taken on by the working group, there may be merit in assessing and clarifying the ability of the host State to invoke hardship or force majeure exceptions in cases where regulatory change is driven by public interest considerations (e.g., environmental, or public health). The

² *AIG Capital Partner & CJSC Tema Real Estate v Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003, ¶ 10; *African Holding Company of America Inc and Société Africaine de Construction du Congo SARL v La République Démocratique du Congo*, ICSID Case No. ARB/05/21, Sentence sur les déclinatoires de compétence et la recevabilité, 29 July 2008, ¶ 35; *Chevron Corporation and Texaco Petroleum Company v Ecuador*, UNCITRAL PCA Case No. 34877, Partial Award, 30 March 2010, ¶ 382; *Suez, Sociedad General de Aguas de Barcelona & Vivendi Universal v Argentina & AWG Group v The Argentine Republic*, ICSID Case No. ARB/03/19 and Ad Hoc UNCITRAL Arbitration, Decision on Liability (Separate Opinion), 30 July 2010, ¶ 48; *Sax v City of Saint Petersburg*, Ad Hoc UNCITRAL Arbitration, Award, 30 March 2012, ¶ 809; *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/11/19, Award, 30 October 2017; and *Mohamed Abdulmohsen Al-Kharafi & Sons v Libya*, Ad Hoc Arbitration, Award, 22 March 2013, ¶ 15.

³ *Petrobart v Kyrgyz Republic*, SCC Arbitration No. 126/2003, Award, 29 March 2005, ¶ 2; *Eureko BV v Poland*, Ad Hoc UNCITRAL Arbitration, Partial Award, 19 August 2005, ¶ 178; *Gemplus SA, SLP SA, Gemplus Industrial SA de CV v The United Mexican States and Talsud SA v The United Mexican States*, ICSID Cases ARB(AF)/04/3 and ARB(AF)/04/4 (cojoined proceedings), Award, 16 June 2010, ¶¶ 13-88; *El Paso Energy International Company v Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 623; and *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Damages (concurring opinion), 10 January 2019, ¶ 12 of the concurring opinion.

potential relevance of the principle of legitimate expectations and investor due diligence in such cases may also be assessed, as well as the link with the obligation to act in good faith and the relationship with contractual safeguards that may have been included in investment contracts, such as ‘*stabilisation*’ or ‘*adaptation*’ clauses. Moreover, it could be evaluated how dispute resolution clauses could be adapted to address some of the concerns currently directed to ISDS mechanisms, and the possibility of allowing contract renegotiation and adaptation through arbitration in case of hardship could be explored. There may also be merit in evaluating the possibility of introducing mechanisms to reflect that environmental (or other) risks may have to be assessed on a regular basis. Furthermore, it may be helpful to evaluate to what extent overriding host State interests and the financial effect on the State’s budget might be relevant when assessing damages.

11. Additionally, guidance on investment contracts may be considered to account for the specific nature of one of the contracting parties in investment contracts, *i.e.*, a State and/or its controlled entity. For instance, it may be assessed whether to take into account that the contracting freedom of a State may be limited (*e.g.*, due to procurement procedures), that investment contracts may be implemented by different contracts (*e.g.*, a framework contract to be implemented by other specific contracts), or how to deal with matters such as gross disparity and contracts concluded as a result of corruption. These are just examples, and many other issues may arise during the study and discussions.
12. In conclusion, the ICC Institute proposes to join forces and undertake a Project aiming at strengthening the contractual framework for international investments and to account for newly developed investment treaty policies at the contractual level in a uniform manner. Further clarifying the UPICC, if necessary, in the specific context of investment contracts would also contribute to transparency and standardisation and may advance the application of the UPICC in investment contracts and disputes.
13. **Results and format.** The Project may be pursued through different approaches; for instance, (*i*) it can result in a “*guideline*” on how to interpret and approach international investment contracts based on the UPICC, or (*ii*) the working group may conclude that it can be useful to prepare “*model clauses*” reflecting the provisions most commonly used and in accordance with the UPICC, or, instead, (*iii*) if it is the case, the group may prepare a supplement to the current edition of the UPICC to specifically address the relevant issues that might appear in the context of investment contracts.

ANNEXE 4 – PROPOSAL FROM THE EUROPEAN BANK OF RECONSTRUCTION AND DEVELOPMENT (EBRD)



Secretariat of the International Institute for the Unification of Private Law - UNIDROIT
Via Panisperna, 28
00184, Rome, Italy
Attn: Secretary-General Prof. Ignacio Tirado

25 April 2022

Re.: Proposal for collaboration between the EBRD and UNIDROIT on developing an international guide and model contractual clauses for corporate sustainability due diligence requirements, including climate-related clauses.

Dear Secretary-General Prof. Ignacio Tirado,

On behalf of the European Bank for Reconstruction and Development (“**EBRD**”), I am pleased to express EBRD’s interest in collaborating with UNIDROIT on developing an international legal guide and a set of model contractual clauses regarding corporate sustainability due diligence and climate-related due diligence requirements for businesses and their global value chains (the “**Project**”).

Most jurisdictions to date do not have value chain corporate sustainability due diligence legislation in place, while, those that do, have laws that diverge considerably in scope and approach. While some of the countries with sustainability due diligence requirements further consider how to address the challenges of climate change, there is a lack of standardisation and guidance in respect of climate- and net zero-related clauses for contracts. Following the commitments made under the Paris Agreement, countries are increasingly considering how to:

- 1) address climate change through value chain due diligence requirements and, in particular, how to achieve mitigation of greenhouse gas emissions in the immediate future; and
- 2) incorporate climate- and net zero-related clauses into commercial agreements to help limit environmental risks and deliver climate solutions by ensuring that business partners adhere to environmental regulations and emission standards.

In this context, EBRD considers that joint work with UNIDROIT in this field will prove extremely impactful and timely to foster sustainable and responsible corporate behaviour for businesses and throughout their global value chains. The development of an international legal guide and model clauses for contracts with suppliers of goods and services may support compliance with corporate sustainability due diligence legislations and provide a benchmark for prospective legislation. The UNIDROIT Principles of International Commercial Contracts (UPICC) may also be reviewed and updated to contribute to international harmonisation of corporate sustainability due diligence requirements by addressing the differences across national legislative approaches.



EBRD looks forward to working with UNIDROIT as co-leaders of the Project and awaits guidance from UNIDROIT on the next steps to commence the Project.

Yours sincerely,

Michel Nussbaumer
Director, Legal Transition Programme
European Bank for Reconstruction and Development

ANNEXE 5 – PROPOSAL FROM THE INTERNATIONAL DEVELOPMENT LAW ORGANIZATION (IDLO)



Rome, 26 April 2022

Professor Ignacio Tirado
Secretary-General, UNIDROIT
Via Panisperna 28
00184 Rome

Dear Secretary-General,

I am following up on the letter sent by Director-General Jan Beagle on 17 February 2022, outlining three collaborative proposals to be explored between IDLO and UNIDROIT. As you may be aware, during the last programmatic meeting of 7 April 2022, the delegations identified one additional area for cooperation in the field of Corporate Sustainability Due Diligence, building on current trends in the field of Business and Human Rights and in the adoption of mandatory human rights due diligence laws.

I would like to express IDLO's support to UNIDROIT's initiative in this area. Current developments at the international and national level have demonstrated how urgent action is required to ensure that economic activities by multinational corporations throughout global value chains take place in full compliance with human rights, labor rights, and environmental protection.

UNIDROIT's guidance will be especially beneficial for the development of tools and instruments that can guide implementation and compliance of Corporate Sustainability Due Diligence initiatives, tackling in particular issues relating to:

- The harmonization of mandatory Corporate Sustainability Due Diligence laws, with a view to reducing regulatory gaps at the domestic level and creating a shared global framework for the operationalization of due diligence;
- The strengthening of compliance by corporate actors with standards of corporate due diligence, including with respect to their implementation throughout global value chains; and
- The definition of adequate enforcement mechanisms for Corporate Sustainability Due Diligence laws and non-binding standards, with a view to guaranteeing access to justice for victims of corporate abuses.

From our side, IDLO stands ready to assist UNIDROIT's efforts in these area, through provision of expertise and active participation in the process for the development of relevant legal tools and instruments.

Yours sincerely,

Roland Friedrich
Director of Programmes

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ANNEXE 6 – PROPOSAL FROM THE U.S. MISSION TO UNITED NATIONS AGENCIES IN ROME (USUN)



United States Department of State

Washington, D.C. 20520

The United States of America appreciates the opportunity to submit a proposal for the UNIDROIT work program for 2023-2025. We expect that, during this three-year period, much of the Secretariat's work will be focused on projects already in progress, primarily implementation of the Fourth Protocol to the Cape Town Convention on Matters Specific to Mining, Agricultural and Construction Equipment; development of a Model Law on Factoring, preparation of a guidance document on Digital Assets and Private Law, and finalization of a Model Law on Warehouse Receipts. We understand that the work related to bank insolvency will also move forward, and we will monitor that work to ensure that its focus remains on private law aspects of that topic and does not impinge on the scope of regulatory authority or administrative law, which is the jurisdiction of each State's regulatory agencies.

In terms of new projects that UNIDROIT could begin developing, the United States would like to suggest work to synthesize the various instruments related to agricultural lending, in order to provide government officials and the private sector a coherent framework for promoting agricultural development.

Development of Comprehensive Agricultural Financing Guide

In recent years, UNIDROIT has been instrumental in developing and promoting tools to facilitate agricultural financing, both through its own projects and in conjunction with other Rome-based organizations working in these areas.¹ The work done on agricultural investment contracts builds further on the initial success on this topic by finding additional ways to apply private law expertise to global efforts on food security and agricultural development. For example, multilaterally-developed instruments, such as the Principles for Responsible Investment in Agriculture and Food Systems (RAI), and the Voluntary Guidelines on the Responsible Governance of Tenure (VGGT) provide a critical framework for agricultural lending and UNIDROIT's recently concluded Legal Guide on Agricultural Land Investment Contracts furthers this multilateral work.

While international organizations have produced important guidance on agricultural lending, none has focused on identifying the necessary elements to establish a coherent legal framework to govern the various types of credit transactions that facilitate agricultural development. To fill this gap, the United States proposes that UNIDROIT develop a comprehensive "Guide to Agricultural Financing," with the goal of identifying the following: (i) the credit transactions common to agriculture that require an asset for collateral (e.g. a crop) or are the subject of a lease (e.g. equipment); (ii) the relevant international legal standards that exist for how to structure these transactions; (iii) how to select the appropriate standard from these existing international legal standards; (iv) how to combine these standards to create a coherent framework; and (v) gaps that may exist within this network of standards that could serve as a foundation for developing future standards. The attached concept paper outlines this proposal in further detail.

In pursuing this work, UNIDROIT could work on its own or in collaboration with other institutions, such as FAO, IFAD or the World Bank. If successful, the guide format could become a template for similar guides on other topics, such as supply chain (*i.e.*, receivables) finance.

¹ Work on agricultural financing was one of the five main topics originally proposed for consideration as part of the study on "Private Law and Agricultural Development." See <https://www.unidroit.org/english/governments/councildocuments/2012session/cd91-08-e.pdf>.

* * * * *

We look forward to reviewing the full list of proposed areas of work and to participating in the discussions of which areas should be included in the work program for the upcoming triennium.

Proposal for an Agricultural Financing Legal Guide

Several international organizations have produced guides on agricultural lending and financing, but none of the guides focuses on the elements necessary to provide a comprehensive legal framework that governs the various transactions throughout the entire supply chain in agriculture.² The existing guides tend to focus on a single transaction within the entire supply chain, but today commerce is made up of multiple commercial transactions connected to a chain. The proposed Legal Guide on Agricultural Financing would aim to accomplish the following:

- 1) Describe the credit and other finance³ transactions typical for agriculture where some asset is used as collateral (e.g., a crop) or acquired under a lease (e.g., equipment);
- 2) Weave in the various existing and emerging instruments and standards as a guide through the steps of commodities distribution;
- 3) Highlight which of the existing standards States should implement and how they fit together to create a coherent framework; and
- 4) Provide the foundation for any future standard-making where gaps may exist in the existing instruments.

A wave of general secured transactions reforms has responded to the question “how do we modernize the legal framework?” by implementing generally applicable international standards. These instruments, whether conventions, model laws or principles, recommend changes to the laws of a jurisdiction to facilitate access to credit. The need now is shifting toward specific credit products (e.g., factoring, supply chain finance, crop loans, etc.), which fit within the broader secured transactions framework. This new focus requires answers to a different question: does our legal framework adequately support all relevant relationships within a specific transaction? Addressing these two questions yields yet a third question: do these instruments together identify the relevant relationships, rights and duties of the parties to all of the transactions throughout the supply chain? It may not be clear which of and how the existing international standards respond to these questions.

Increasingly, it is rare for a single transaction in agricultural finance to occur in isolation; rather, it is “connected” (e.g., through a supply or value chain) to a broader network of relationships. Many of these relationships along the supply chain entail an extension of credit. They may be simple and relate to low value assets, but they also may be more sophisticated transactions that involve packages of assets. This proposed Guide will explain the start to finish elements of the agricultural supply or value chain and how each transaction may require a different type of financing. Different international standards enable these individual transactions and facilitate the growth of businesses.

Tracing a typical agricultural supply chain, we can outline some possible topics and existing instruments. For instance, a group of smallholders may need to acquire low-value farming machinery. Both the 2008 UNIDROIT Model Law on Leasing facilitates leases and the 2016 UNCITRAL Model Law on Secured Transactions might be applicable to a lease transaction for this

² See, for instance, the World Bank’s 2015 Guide on Agricultural Lending that addresses practical aspects of agricultural lending at <https://www.ifc.org/wps/wcm/connect/2c6304b6-b061-420e-a54f-7d56eccb2695/Agricultural+Lending-A+How+To+Guide.pdf?MOD=AJPERES&CVID=11-jZp> and the joint EBRD-FAO Guide on designing warehouse receipts legislation that focuses on warehouse receipts at <https://www.fao.org/support-to-investment/news/detail/en/c/287518/>.

³ In many developing agricultural economies, for example, equipment may be purchased by cooperatives within the community.

acquisition. The local policymaker may not be entirely certain which of these instruments would be the more appropriate one for this transaction or how the UNCITRAL Model Law on Secured Transactions applies to leases that function as security rights. As these leases are excluded from the Model Law on Leasing, the same policymaker may also wonder whether it should ratify the Pretoria Protocol to the Cape Town Convention, which covers the financing and leasing of some types of agricultural equipment.

If these smallholders wish to expand their business operations and obtain a crop loan, there is some question of which international instruments provide the standards to enable the collateralization of grown, growing and future crops. The UNCITRAL Model Law on Secured Transactions may be the most relevant standard, but a policymaker may wonder whether the generality of its rules is sufficient to enable crop loans. If the growing crop is considered an immovable under the State's property law, there is the further concern of the interrelationship between personal and real property that may not be clear from these international instruments.

A crop loan may be extended in conjunction with a mortgage of the land on which it is growing. No existing international standard sets out harmonized rules enabling collateralization of agricultural land. The Guide could take the stock of existing and emerging standards, including UNCITRAL's work on micro, small and medium size enterprises to provide general guidance but without providing specific recommendations that would interfere with domestic immovables regimes.

If the crop is harvested and deposited into a warehouse against a receipt, the farmer may want to use the crop as collateral or sell it in a commodity exchange. The Guide will explain how the UNCITRAL Model Law on Secured Transactions, the future Model Law on Warehouse Receipts and the UNCITRAL Model Law on Electronic Transferable Records, which all in some fashion affect lending against warehouse receipts, fit together. In many States, electronic warehouse receipts are traded on exchanges. The Guide could take into account the International Organization of Securities Commissioners (IOSCO) set of standards for storage infrastructures associated with commodity exchanges.

Finally, if the crop is sold generating a receivable several international instruments enable a transfer of that receivable to finance the farmer. The Guide could explain how these instruments, such as the UNCITRAL Model Law on Secured Transactions, the United Nations Convention on the Assignment of Receivables in International Trade and the future Model Law on Factoring fit together.

A modern and coherent legal framework is not only critical for transactions in the primary agricultural market, but also for those in the secondary market. For instance, many States have established agricultural lending programs administered through public guarantee schemes or central bank refinancing programs. While the Guide need not explain the functioning of these programs nor formulate any specific recommendations on their use, the Guide can highlight how a coherent legal framework facilitates these transactions.

This project could be undertaken by UNIDROIT itself or in partnership with other organizations, such as FAO or the World Bank. It may become a template for similar guides in the future, such as supply chain (receivables)

ANNEXE 7 – PROPOSAL OF THE EUROPEAN LAW INSTITUTE (ELI)**ELI President**

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Vienna, 27 January 2022

Dear President, dear Maria Chiara
Dear Secretary General, dear Ignacio

First of all, I wish to extend my very best wishes to you for 2022, which will hopefully turn the tide for the better and continue that way.

I write in response to your letter of last year to propose two possible projects that the International Institute for the Unification of Private Law (UNIDROIT) could embark on, possibly in collaboration with the European Law Institute (ELI). The proposals below are the outcome of discussions in the ELI Council and Executive Committee. Both proposals complement our mutual work programmes and would undoubtedly assist the development of law.

As to the signing ceremony of the Memorandum of Association, I am happy to fix a date whenever you consider we could do so 'safely'.

I wish you the very best as you embark on the difficult task of whittling down the proposals to the Institute's Triennial Work Programme and look forward to hearing from you in due course.

Sincerely

Prof Dr Pascal Pichonnaz, Pascal
ELI President

Proposal 1

A joint project that expands on ELI's Business and Human Rights: Access to Justice and Effective Remedies (with input from the European Union Agency for Fundamental Rights, FRA) project that would focus the use of governments of contracts to push non-commercial interests along global supply chains and the implications this would have on contract law.

The nature of global supply/value chains requires investigation. Such GSCs can take a variety of structures. But all of these share common features about the nature of contractual obligations and questions of enforceability. For instance, a commitment to adhere to human rights standards imposed by a chain leader (who could be the buyer or the final seller) and transferred along the chain of contracts might only be legally enforceable by the contracting parties to each link of the chain, leaving the chain leader with no direct right of action.

Practically speaking, though, the expectation of compliance rests with the buyer or final seller as a result of their corporate social responsibility commitments/obligations. There are various work-arounds provided in national laws, but each operating on their own terms (eg, exceptions to the privity principle). There is usually no direct right of action by the chain leader against chain members, unless the contracts along the chain provide for such a right and that right is recognised by the applicable law and not affected by mandatory rules. (The ALI-ELI Data Economy Principles contain an elegantly simple solution for data value chains, for instance).

A further complication is contractual remedies. Whose interest determine the remedy that should be awarded, and how would any loss be quantified? Insofar as breaches affect third parties (eg, employees), how can a contractual commitment to respect human rights and labour standards be enforced by them?

As a wider, and really very interesting perspective, there is the utilisation of contractual structures as a form of private governance. This is not specific to GSCs, but applies elsewhere, eg, online platforms. Such contracts are not merely transactional, but effectively create a form of constitutional structure for a global supply chain (whether arranged as a network, web, multi-party contract or chain of bilateral contracts). Under such arrangements, one party (the chain leader, platform operator, etc) often has strong governance powers over the entire ecosystem established by such contracts. GVCs might be a good area to consider exploring the legal issues of these governance rules.

In the first instance, a **guidance document** of some kind would be helpful. This might set out to what extent the UNIDROIT Principles already offer solutions, but also where modification is needed. It could also lead to a **legislative guide**. Secondly, modified **Principles** would probably be needed to clarify some of the more innovative elements particularly for contract law.

Proposal 2

In all jurisdictions across the world, there is a recurrent difficulty in determining the extent to which a civil or commercial judge may be bound by a decision taken on the same facts by an administrative or criminal court.

One could envisage many examples, but it suffices to imagine that there an administrative proceeding to sanction a company for infringing anti-trust/anti-competition rules or unfair competition rules. The question that arises is whether the decision taken by the administrative court can bind the civil judge, when the latter would need to decide whether competitors can claim damages from the enterprise or other legal entity? Are some aspects affected by the *res iudicata* rule, or not at all? Should the civil procedure be stayed until the administrative decision is taken (or the other way round)? Can enforcement of the administrative decision be imposed independently from the civil decision? Similar concerns also apply to criminal decisions.

One could imagine similar issues with tort law and criminal liability, with product liability and administrative sanctions or criminal fraud procedures, and many other examples.

It could therefore be useful to determine the most adequate rules for the above and how harmonisation can be driven given that different decisions might be taken in different countries impacting the competitiveness of domestic companies towards other companies in other countries.

The potential outcome could be: **model laws, model rules, or at least statements of principles.**

ANNEXE 8 – PROPOSAL OF THE WORLD INTELLECTUAL PROPERTY ORGANISATION (WIPO)



Mr. Ignacio Tirado
Secretary-General
UNIDROIT
Via Panisperna, 28
Rome 00184
Italy

April 7, 2002

Dear Secretary General Tirado,

Thank you very much for the ongoing conversations between UNIDROIT and the World Intellectual Property Organization (WIPO) regarding common areas of interest. This letter is an expression of interest to explore together potential areas of collaboration between our organizations in the area of standard-essential patents (SEPs) – a field that is highly relevant in a world where standards play a pivotal role in deploying technology in certain sectors, and the implementation of such standards requires the use of multiple patented inventions. A continued dialogue on this matter will serve the purpose of making each other aware of the specific issues where a collaborative effort promises synergies.

In accordance with the biennial work program 2022-2023 of WIPO's Patent and Technology Law Division, we will renew our efforts to clarify various legal questions relating to SEPs through bringing stakeholders together, and delivering evidence-based empirical information.

Many unresolved questions relating to fair, reasonable and non-discriminatory (FRAND) licensing terms of SEPs touch upon matters of civil law, in particular contract law, competition law, and IP law. For example, the legal nature of the FRAND declaration of a SEP holder made to the relevant standard-setting organization, and, in case of the transfer of the IP asset, its impact on the assignee's licensing obligations, are issues that have long been debated in various fora without being fully answered. The additional market power enjoyed by SEP holders inherently raises concerns relating to competition law as well. Furthermore, especially in the

field of telecommunication, the international nature of technical standards on the one hand, and territorial nature of the laws mentioned above on the other, also add complexity to these questions.

Therefore, WIPO as the global forum for IP services, policy, information and cooperation and UNIDROIT with its mission of modernizing, harmonizing and coordinating private and in particular commercial law, may be well placed to carry out valuable cooperation in this field.

In the hope of a fruitful collaboration.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Lisa K. Jorgenson". The signature is fluid and cursive, with the first name "Lisa" and last name "Jorgenson" clearly distinguishable.

Lisa Jorgenson
Deputy Director General
Patents and Technology Sector

ANNEXE 9 – PROPOSAL FROM THE EUROPEAN UNIVERSITY OF ROME

PROPOSAL ON DIGITAL TRANSFORMATION, DATA GOVERNANCE AND ARTIFICIAL INTELLIGENCE¹

Introduction

This Proposal on **Digital Transformation, Data governance and Artificial Intelligence** aims at fostering at international level a **common understanding of CorpTech and Algo-governance** enabling undertakings, organizations and activities to better exploit the opportunities and benefits of digital tools and processes as well as the new technologies².

This is a time of **epochal changes**. Disruptive technologies, AI and big data profoundly affect today's social and economic context and, thus, the way in which businesses and markets are organized, managed and functioning³. And it is evident how the potential of these tools, which are now ubiquitous, can only grow in our day-to-day life, permeating almost every aspect of this hyper-connected and techno-dependent world that lies ahead.

Digital transformation, however, faces a **dual velocity**. Whereas sectors, activities, markets and business models respond to the digital disruption heavily relying on new technologies and AI and big data⁴, **AI awareness, trustworthy, transparency and accountability** are still to be achieved within and outside the corporate governance culture.

The Proposal intends to fill the gap, spearheading the development of **new global standards** to make sure black boxes are neutralized and **AI can be trusted in the organization and management of corporations**, in turn strengthening **AI uptake, investment and innovation at international level**.

The AI debate

AI systems have increasingly spread into civil society, ranging from the most strategic sectors (e.g., healthcare, law enforcement and international human rights), to

¹ The Proposal has been originated by Prof. Valeria Falce (valeria.falce@unier.it), Jean Monnet Professor in EU Innovation Policy, Full Professor of Economic Law and Legal Advisor to the Italian Ministry for technological innovation and digital transition. Prof. Falce wishes to thank Prof. Giusella Finocchiaro, Full Professor of Law at University of Bologna, who authored the Work Plan section, and Avv. Emilio Tucci, Adjunct Professor of ITC and Legal Advisor to the Italian Department of technological innovation and digital transition, for comments and suggestions on the first draft of the Proposal.

² Girasa, *Artificial Intelligence as a Disruptive Technology: Economic Transformation and Government Regulation*, 2020, 253-255; Barfield, Pagallo, *Advanced Introduction to Law and Artificial Intelligence*, 2020; Abbott, *The reasonable robot: artificial intelligence and the law*. Cambridge University Press, 2020, i-iv; Enriques-D. Zetsche, *Corporate technologies and the Tech Nirvana Fallacy*, in *Hastings Law Journal*, 2020, 72, 55 ss., 59 s.

³ Falce, Ghidini, Olivieri, *Informazione e Big Data tra Innovazione e Mercato*, Quaderni Romani di Diritto Commerciale, Giuffrè Ed., 2018.

⁴ Falce, Cannataci, Pollicino, *Legal Challenges of Big data*, *EE Int.*, 2020.

the most contingent for everyday people's life (e.g., search engines, self-driven cars).⁵ It is straightforward to consider that AI and AI-based solutions (e.g., those embodied in robotics and other techniques, like machine learning) are hence capable to process numerous activities through the systemic analysis of a great deal of data, enhancing efficiency and fostering simplicity. Equally, negative externalities resulting from the large-scale use of AI may occur, insofar as such a technology might be misused by either human developer or operators. Even worse, it may behave in unpredicted and potentially harmful ways, beyond any human control, ending up to causing damages to third parties.

Understandably, legal and ethical questions about AI systems have become hence more significant than ever before.⁶ Especially under the legal perspective, a great deal of issues has arisen out from the use of AI-based technologies and, above all, **the question of civil liability for damages caused by AI, encompassing both the legal and economic dimension**. To such extent, the capacity to gather huge amount of data, the ability to learn from data itself and, consequently, to act without human inputs by making individual decisions represent eventual preconditions for damage, insofar as AI may create issues of compensation by acting solely on the base of data gathered.⁷

Although there are few legal texts and works on artificial intelligence and AI-based robots, examples of robots damages caused by both AI-based solutions and robots have recently been increased.⁸ Indeed, a great deal of private and public institutions (e.g., universities, public, private companies, national and multinational firms) have been adopting AI-based solutions and implementing the use of robots in their facilities, which have seldomly caused harm or damages to workers and third parties in general.⁹ Moreover, some scholars has recently underlying the importance of defining a new regulatory framework intended to involve all sectors of that market which is currently

⁵ Livingston, Risse, The future impact of artificial intelligence on humans and human rights, in *Ethics & international affairs* 33.2 (2019): 141-158. See also Nadimpalli, Artificial intelligence—consumers and industry impact, in *International Journal of Economics & Management Sciences* 6.03 (2017); see also Proposal for a regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence and Amending Certain Union Legislative Acts, COM(2021) 206, Recital no. 37, whereby it is remarked that artificial intelligence might help people to access and enjoy essential private and public services, being also necessary to enhance common living standards.

⁶ See Falce, *Fairness e innovazione nel mercato digitale* Torino, 2020.

⁷ Vladeck, *Machines without principals: liability rules and artificial intelligence*, in *Wash. L. Rev.* 89 (2014): 117.

⁸ Yünlü, *Current Developments on Artificial Intelligence and Liability for Robot Caused Damages*, *Yeditepe Üniversitesi Hukuk Fakültesi Dergisi*, C. XVI, S 1 (2019): 189-213.

⁹ A recent case of robots causing harms to Amazon workers in New Jersey (USA) raised alarm on the matter and helps to focus the attention on the numerous situations where either automatic or autonomous robots and AI-based solutions have, or may have, caused damages to third parties. (<https://www.independent.co.uk/news/business/robots-amazon-delivery-artificial-intelligence-technology-a9264036.html>). The use of robots by both public and private institutions is an emerging phenomenon, which is constituted by an increasing number of robots being introduced for multi-layered purposes, ranging from assisting clientele and helping customers, to providing quick and efficient response over administrative or bureaucratic issues. A significant experiment thereof has been undertaken in the United kingdom, whereby the automatic bot called “donotpay” (<https://donotpay.com/>, Accessed 20.03.2018) assists people in solving traffic fine issues, resulting in being known as the the world's first automatic AI-based software able to solve legal problems or administrative issues. For a better comprehension of the topic, see Park, Joshua, YOUR HONOR, AI, in *Harvard International Review* 41.2 (2020): 46-48.

affected by AI,¹⁰ hence not limited to the legal sector, insofar as the disruption originated by AI has led to a reduction in the distance between products and services in several fields, as in the case of the financial technology phenomenon, causing disintermediation and a disaggregation of services and markets on a global scale.¹¹

Recently, the presence of AI solutions in the legal field has produced significant consequences, especially in civil liability law, insofar as the more use of AI solutions is made by consumers, the greater the likelihood that either damages or violations of law occur. AI technological development and the expanding use of AI-based solutions are facing numerous challenges (e.g., regulatory issues) and posing critical threats (e.g., on privacy and tort law). Therefore, the need for any legal systems of being caught up with AI development seems to be crucial, insofar as it is now clear that the legal systems need to be revised for encompassing the roles of AI in society.¹²

The increasing use of AI in the field of civil product liability has led to a great deal of debates amongst legal scholars, hence resulting in new challenges for the existing legislation, both on the European and international level. AI-based solutions, indeed, are based on different principles than those ruling civil liability law, which essentially require a person being held accountable for harm or tort caused to any third party. Conversely, within the AI domain the main issue seems to determine whether the responsibility for damages caused by AI-based solutions should be attributable to either the developer or the human operator. Therefore, the more common, universal solution international community would find for ruling such a widespread phenomenon, the more safeguarded consumers would be, hence making both the AI technology more reliable and legal system more flexible to dealing with legal issues stemming out from liability product of AI solutions.¹³

The Proposal

Whereas the **data era accelerates the shift from a "digital society" to an "algorithmic society" and from here to an "algo-governance society"**, with a strong debate on civil liability issues, the specific **applications and implications of the algo-governance model** in relation to the **organization and management of corporations are still almost unexplored**.

To this end, attention shall be drawn to the link between AI tools, corporate organization, data processing and protection, and sustainability objectives, as well as to the specific novelties and opportunities related to the employment of such tools in the dynamics of corporate governance.

Data processing plays a renewed role for defining automated corporate strategies. This depends on the **interconnection between data laws, rights and safeguards**

¹⁰ Falce, Finocchiaro, *Fintech: diritti, concorrenza, regole. Le operazioni di finanziamento tecnologico* Bologna, 2019.

¹¹ See Falce, Finocchiaro, *La Digital Revolution nel settore finanziario. Una nota di metodo*, in *Analisi Giuridica dell'Economia*, 1/2019, 313-326.

¹² Cath, *Governing artificial intelligence: ethical, legal and technical opportunities and challenges*, in *Phil. Trans. R. Soc. A* 376: 20180080, 2-3, available at <http://dx.doi.org/10.1098/rsta.2018.0080>.

¹³ *Ibidem*, 4.

structuring new technologies and corporate law safeguards. In this respect, the positive applications of AI and cloud computing services and infrastructures as enabling a secure storage, processing and elaboration of data and big data shall be analysed together with the predictive applications entailed by Behavioural Biometrics and Intelligence Business Management systems¹⁴. In light of this new **interdependence between corporate law and information technology law**, the Proposal shall investigate the opportunities and limits of new technologies for the achievement of the corporate interest and of broader corporate social responsibility goals.

The **predictive uses of artificial intelligence for management purposes**, either as a mere support to the board, as a component of the board, or in the form of an outright Robo-board¹⁵ entirely managed by Robo-companies¹⁶, is also to be further analysed. These scenarios trigger a reconsideration of the competences required to “machine-driven” boards, as well as a redefinition of the taxonomy of liabilities, which is conducted on the basis of the principles of good corporate governance and business best practice. In this respect, the benefits arising from a top-down approach where algorithms serve an advisory function and those deriving from a bottom-up and integrated approach, where corporate governance roles and functions are assigned directly to algorithms deserve specific attention. Also, attention shall be devoted to the implications of a disruptive shift from the **silos approach to a decentralized system** in connection to the decision-making processes and from a platform governance to a **community-driven and democratic governance**¹⁷.

Other areas where one could appreciate the intersection with corporate law and AI can be listed as following: a) the integration of the investigative activity, requiring a series of operations instrumental to the assumption of more informed and efficient decisions; b) support to the strategic direction and management choices, which the board is called upon to make; c) corporate reporting activity, since the added value that the new technologies bring consists precisely in the agility with which AI systems collect, analyze and aggregate data and in the speed with which they generate reports from them.¹⁸ d) compliance and internal auditing, thanks to the system's ability to monitor the regulatory panorama with the possibility of notifying individual legislative changes in real time; e) production and management of internal information flows: for example, pre-advisory information and, more generally, data protection, since the information supplied in the corporate sphere often contains particularly important information (this is the case, above all, of confidential information); f) self-assessment of the board; g) search for the “best candidates” in case of appointment and drawing up of the list by the former Board of Directors; h) management of the dialogue with the

¹⁴ V. Falce, J. Cannataci, O. Pollicino, Legal Challenges of Big data, EE Int., 2020.

¹⁵ Inter alia, Burridge, Artificial intelligence gets a seat in the boardroom, Nikkei Asian Review, May 10 2017, available at <http://asia.nikkei.com/Business/Companies/Artificial-intelligence-gets-a-seat-in-the-boardroom>.

¹⁶ Ex multis, Moslein, Robots in the boardroom: artificial intelligence and corporate law, in Research Handbook on the Law of Artificial Intelligence, Barfield – Pagallo (eds.), Cheltenham, 2018, page 650 ff., at 663 ff.

¹⁷ Passdor, Il consiglio di amministrazione nell'era dell'intelligenza artificiale: l'importanza della motivazione rafforzata, in *Giurisprudenza italiana*, 2022 (forthcoming).

¹⁸ In particular, this possibility was the subject of a comprehensive analysis conducted in 2019 by the Financial Reporting Council (FRC), the results of which are collected in document titled “Artificial Intelligence and Corporate Reporting”.

shareholders and the participation of the latter in the life of the company, which is today increasingly central.

The Working Plan

Although this is open to discussion and to be finally decided by the working group itself, it is proposed that the work to achieve the objectives set by this Proposal on Digital Transformation, Data governance and Artificial Intelligence, be structured according to the following steps.

- i) As the scope of the Proposal has already been identified, as explained in the previous paragraphs, **THE FIRST STEP** could be to clearly identify the content of the Proposal, through a discussion aiming at the individuation of a **common definition for artificial intelligence**, starting from the analysis of which AI systems could be useful for our purposes. In fact, as AI systems are not uniform, it is important to clarify what can be considered as such with reference to the Algo-governance model in corporations and CorpTech in general, fields which are still almost unexplored. This definition will only include those aspects which can be useful for our specific aim, and which do not fall within the sphere of competence of other international organisations, such as UNCITRAL. This means that, for example, smart contracts and electronic data interchange are excluded from the Proposal's field, ensuring anyway the necessary coordination between the two Organisations.

The first step will be completed by an **impact analysis**, to verify the consequences that this project could have on corporations and their workers. For example, it could be investigated how the implementation of AI systems for management purposes could affect the structure of the Board of Directors, or which consequences could be caused by the use of AI for compliance and internal auditing purposes on employment in big corporations, and so on. This step is fundamental to understand potential "social" side effects and to try to neutralise them in the next steps.

- ii) **THE SECOND STEP** could be that of verifying if, at global level, there are some **already-existing regulations** dealing with this specific theme, to better understand the global scenario within which we would be working, in order to create an appropriate system potentially for all countries. This will also imply a study of the different **levels of AI innovation** around the globe, to elaborate a project allowing coordination at a cross-border level.
- iii) **AS THIRD STEP**, it will be necessary to verify the existence of **normative and judicial limitations and obstacles** to the realisation of the project. They shall be investigated not only with regard to the use of AI systems and big data in general, but also with specific reference to the corporative field. The understanding of limitations is necessary in order to better define the borders within which the work can be conducted, while obstacles have to be studied to be overcome. In general, the last two steps are necessary to be ready to deal with the different characteristics and issues in legal systems, in order to create an international system.

- iv) Once the preliminary “verification steps” are accomplished, it will be possible to start working on the structure of the project itself. First of all, the **instrument/s** to address this complex theme has/have to be identified. It/they shall be appropriate not only to its addressees but also to the kind of topic concerned. **THE FOURTH STEP** would be the **identification and discussion of specific aspects** of this item. For each of them, discussions will be conducted and participants in the working group will be encouraged to share their relevant expertise on the topic. As usual in the Unidroit working methods, to these meetings will be invited external experts from all over the world, so they can give their opinions/suggestions and share their own expertise. In this phase, common positions will be defined with regard to the main issues and more meetings will be fixed when necessary.
- v) The last step, is to define the **logical organisation** of the project, defining a schematic “index” to start working on, in order to begin to spread a common understanding on AI AlgoCorpGovernance.

A **Legislative Guide** might be produced, or a **Model Law** if sufficient agreement is reached. However, also **principles for companies** could be established, possibly for large companies, as well as small and medium-size entities, according to the needs and the different scope of action.

Since Unidroit is already working on digital assets, and this Proposal is consequential to works underway in a working group composed of several sub-groups, it is proposed that a new sub-group is constituted to deal with the described matter. All international organizations or bodies that are directly interested in the topic may be invited to take part into the sub-group.

CONCLUSION

AI systems and big data are the twin complementary pillars of the data era¹⁹, whose legal implications on the organization and management of corporations are still to be fully investigated.

The Proposal is intended to fill the gap. The analysis of the benefits, limits and risks of CorTech and Algogovernance in corporate governance processes, in fact, is essential to build the **AI awareness, trustworthy, transparency and accountability, and in turn to define an AI AlgoCorpGovernance common culture** leading to best practices and uniform guidelines. **The outcomes of the Proposal**, in conclusion, will favour the unification of private (in particular, commercial and corporate) law and the coordination at a cross-border level, resulting in efficient outcomes and in a response to a global phenomenon that cannot any longer be addressed only at domestic, or even regional level.

¹⁹ Of course, AI systems are not uniform: they comprise systems built on logic and knowledge-based techniques, those using statistical techniques and those based on machine and deep-learning systems. These last ones, not being logic and knowledge-based, are very often unable to provide information on the mechanism of data selection and on the reason - or to be more precise on the rationale - of the generated output. Also in terms of functionalities, AI systems vary a lot on the basis of the degree of autonomy and can be categorized as “assisted”, “augmented” and “autonomous”.

ANNEXE 10 – PROPOSAL FROM THE UNIVERSITY OF MACERATA LAW DEPARTMENT (UNIMC)



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For the Attention
Professor Maria Chiara Malaguti
President
International Institute for the Unification of Private Law (UNIDROIT)
Via Panisperna, 28
00184 Rome

Access to Justice in Environmental Matters

Proposal for the elaboration and future adoption of a model law

A preliminary study carried out by a team of scholars at the Department of Law of the University of Macerata¹ and shared by the Legislative Office the Italian Ministry for the Ecological Transition in a note dated 28 March 2022, has pointed out the existence of marked differences between national legal systems, making access to justice by individuals in environmental matters more complex, especially in cross-border cases.

The differences detected pertain both to standing (various legal systems confer standing in respect of actions based on environmental damage as such only to competent national authorities, whereas just a few countries admit actions also by individuals, including, in some cases, in the form of a class action), and to the available remedies (*restitutio in integrum* rather than pure compensation).

Furthermore, frequently no standing is conferred to NGOs concerned with environmental protection, and even in those cases where such organizations have standing, the relevant criteria to be satisfied tend to vary sensibly. Even within the EU, where Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage finds those organizations as vested with a “sufficient interest” to act, still the requirements to be satisfied for these purposes are a matter for national law².

The Aarhus Convention of 25 June 1998 on access to information, public participation in decision-making and access to justice in environmental matters, adopted under the auspices of the United Nations Economic Commission for Europe (UNECE), could not achieve a true harmonization of the subject. The Convention stands in fact as an instrument setting out some basic principles, while at the same time leaving a broad margin for discretion on the part of contracting States. In relation to the position of the EU as a party to the Convention itself, this shortcoming has been noted recurrently by the Court of Justice of the European Union (CJEU) in its case law. The Court, in fact, has constantly denied the ability of the rules in the Convention concerning access to justice to produce direct effects, due to the absence of clearly and precisely identified obligations for the Parties in this respect³. This inevitably presupposes an identification at national level of the relevant criteria as concerns standing⁴. Nor a particularly groundbreaking role is likely to be discharged in terms of providing a clear and consistent guidance to the Parties

¹ Members of the research team: Gianluca Contaldi, Francesco Gambino and Fabrizio Marongiu Buonaiuti.

² Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJ, L 143/56 of 30 April 2004), Article 12, paragraph 1, third sentence.

³ See, particularly, *Lesoochránárske zoskupenie VLK*, Case C-240/09, Judgment of 8 March 2011, para. 45; *Council and Commission v Stichting Natuur en Milieu and Others*, Joined Cases C-404/12 P and C-405/12 P, para. 47.

⁴ See *Council and Others v Vereniging Milieudefensie and Others*, Joined Cases C-401/12 P to C-403/12 P, Judgment of 13 January 2015, para. 60; *Council and Commission v Stichting Natuur en Milieu and Others*, Joined Cases C-404/12 P and C-405/12 P, para. 52. See generally I. Hadjianni, ‘The CJEU as the Gatekeeper of International Law: The Cases of WTO Law and the Aarhus Convention’, 70 (2021) ICLQ 895, 903-904.



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in harmonizing standards governing access to justice by the Compliance Committee established pursuant to the Convention. The said Committee, in fact, just like other comparable bodies established for the purposes of reviewing compliance with multilateral agreements, is solely competent to issue non-binding communications, which, so far, seem to have addressed only the most egregious cases of restriction of standing on the part of NGOs concerned with environmental protection⁵.

Hence the need for drafting an instrument, which would be likely to take the form of a model law, or of other sort of instrument as deemed more appropriate in view of the specific features of the subject concerned, providing solutions to the various unsettled issues mentioned above (with particular regard to: standing as well as the admissibility of collective actions; the allocation of jurisdiction, both in a cross-border scenario and, for those countries possessing distinct civil and administrative court systems, in a domestic setting; the establishment of specialized chambers within national courts; the subject-matter of claims; the availability and scope of *restitutio in integrum* rather than compensation). The choice in favour of a model law or of a comparable instrument would appear advisable, in consideration of the difficulty, evidenced by the Aarhus Convention itself, to achieve consent on a binding instrument reaching truly beyond the threshold of setting out general principles on the subject.

The involvement of the International Institute for the Unification of Private Law (UNIDROIT) in this project appears appropriate, in view of its broad expertise in developing both international conventions and non-binding instruments, such as, most notably, the UNIDROIT Principles of International Commercial Contracts, aimed at promoting legal unification on a worldwide scale. It shall also be noted that while UNIDROIT has so far not had the opportunity of venturing into topics specifically concerning the environment, still issues related to sustainability and corporate social responsibility which are inherent in the subject have already been faced by the Institute, most notably in the adoption of the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming. Furthermore, the presence within the proposed topic of public law aspects alongside more strictly private law ones would be no novelty for the Institute, considering its notable contribution to another domain lying at the border between the two areas of the law, such as cultural property. In the domain just mentioned, the Institute has already followed the path of drafting, alongside a binding convention such as the UNIDROIT Convention on stolen or illegally exported cultural objects, a set of non-binding provisions offered as a model for States to adopt (the UNESCO-UNIDROIT Model Legislative Provisions on State ownership of undiscovered cultural objects). The examples provided by some of the latest developments in the Institute's activities also suggest that the choice to take charge of the proposed topic would offer UNIDROIT an interesting opportunity of broadening its scope of action even further, as well as of developing fruitful relationships with other international organizations or entities concerned with environmental protection.

Macerata, 29 April 2022

Prof. Gianluca Contaldi

Prof. Francesco Gambino

Prof. Fabrizio Marongiu Buonaiuti

⁵ See, as specifically concerns standing pursuant to Article 9, para. 3, of the Convention, on the right of access to justice in respect of acts or omissions by private persons and public authorities contravening national provisions relating to the environment, particularly, *Communication ACCC/C/2005/11 concerning compliance by the Kingdom of Belgium*, of 16 June 2006; *Communication ACCC/C/2006/18 concerning compliance by Denmark*, of 5-7 March 2008; *Communication ACCC/C/2011/58 concerning compliance by Bulgaria*, of 28 September 2012. See generally United Nations Economic Commission for Europe, *The Aarhus Convention. An Implementation Guide*, 2nd ed., 2014, UN Publ. E. 13.II.E.3, 198.

ANNEXE 11 – PROPOSAL FROM INDIVIDUAL CORRESPONDENTS

Cecilia Fresnedo de Aguirre

Doctora en Derecho y Ciencias Sociales
Consultora en Derecho Internacional Privado
Profesora de Derecho Internacional Privado
Directora del Instituto Uruguayo de DIPr – UdelAR

Montevideo, November 8, 2021

Dear Professor Ignacio Tirado,

In response to your kind email from October 28, 2021, I would like to share with you the following comments and proposals on new topics and on the priority of items on the current Work Programme.

These ideas are probably not new for the working groups and experts, but just in case I mention them.

1. Regarding ELI-UNIDROIT European Rules on Transnational Civil Procedure: I would suggest to take into account the ASADIP Principles on Transnational Access to Justice (TRANSJUS). The English version can be found at: <http://www.asadip.org/v2/wp-content/uploads/2018/08/ASADIP-TRANSJUS-EN-FINAL18.pdf> This may help to get a more comprehensive final product, that consider not only European and North American principles on transnational civil procedure but also Latin American.
2. Regarding Digital Assets, I think transboundary issues should be included in the future legal instrument containing principles and legislative guidance in this area. These issues are mainly international jurisdiction and applicable law, which may be faced either through substantive rules or through conflict-of-laws rules.
3. Regarding international commercial contracts, I would like to inform that I am the rapporteur of the topic “Contracts between merchants with a contractual weak party”, which was included in the current agenda of the Inter-American Juridical Committee (http://www.oas.org/en/sla/iajc/current_agenda.asp). The idea is to work in coordination with other codification fora like UNIDROIT, UNCITRAL and the Hague Conference of Private International Law.
4. Regarding the priority of items, I do not have any suggestions, I consider it is OK as it is.

I remain at your disposal for what may be useful to you.

Yours sincerely,

Cecilia Fresnedo de Aguirre
Correspondent, Uruguay

ANNEXE 12 – PROPOSAL FROM THE INTERNATIONAL DEVELOPMENT LAW ORGANIZATION (IDLO)



DG/OC/4/2022
Rome, 17 February 2022

Professor Ignacio Tirado
Secretary-General, UNIDROIT
Via Panisperna, 28
00184 Rome

Dear Secretary-General Tirado,

I write in response to your letter of 26 October 2021, in which you sought submissions for UNIDROIT's triennial work programme (2023-2025). With apologies for the delay, I am pleased to forward some ideas for your consideration.

As you may be aware, our Director of Programmes, Mr. Roland Friedrich, and our Food Security Programme Lead, Ms. Inmaculada del Pino, met with UNIDROIT Legal Officer, Ms. Philine Wehling, on 17 November 2021 to explore areas of potential partnership between our respective organisations. Following this useful discussion, it was agreed that there were several areas of potential synergy between our mandates and areas of work, particularly in light of UNIDROIT's expertise and experience in legal drafting, coupled with IDLO's field experience in implementing projects on the ground, as well as our policy advocacy work.


To this end, three collaborative proposals were settled upon for further exploration:

- A pilot intervention in the Sahel region on the application of the IFAD-UNIDROIT Legal Guide on Contract Farming and its adaptation to the specific legal, economic, and social circumstances in that region, to leverage IDLO's programmatic experience in the region.
- Adaptation of national legislation and contracts to WTO/international standards and local contexts to enhance market integration for smallhold farmers, primarily in the area of food safety regulations.
- Links to ongoing work which IDLO and UNIDROIT are currently developing with FAO on the Covid-19 response, exploring ways to address obstacles in the food supply chain from a commercial law perspective.

In this connection, I am grateful for your recent invitation to IDLO to collaborate on the UNIDROIT-FAO-IFAD project on the Legal Structure of Agricultural Enterprises. We welcome this partnership opportunity and look forward to developing the above proposals further.

Please do not hesitate to contact my office should you require any further information or assistance on this matter.

Yours sincerely,


Jan Beagle
Director-General

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ANNEXE 13 – PROPOSAL FROM THE ROMA TRE UNIVERSITY LAW DEPARTMENT



UNIVERSITÀ DEGLI STUDI ROMA TRE
Dipartimento di Giurisprudenza
Via Ostiense, 163
00154, Roma

Rome, April 4, 2022

Research Project: Revised Proposal

1. Introduction

In the past few years, we have witnessed a number of events (including the Covid-19 pandemic, the Ever Given accident, and the rise of armed conflicts) that have brought about a systemic interference with contractual performance.

The consequences of these events have affected – at the same moment in time and on a global scale – all the various contracts that nurture national economies, international trade and global supply chains.

The simultaneous and global nature of the impact produced by the recent global crises on contractual performance thus offers a unique opportunity to observe the dynamics of contractual relationships.

At the same time, due to the growing interconnections in the global market, it can be expected that events of such nature might occur more and more often, which makes it compelling to take stock of these experiences and study the different contractual remedies available under different domestic laws and the UNIDROIT Principles.

The international research project that according to this proposal would be conducted by Roma Tre University Law Department, in partnership with UNIDROIT, aims at drafting a map of the legal remedies applicable to change of circumstances in ten jurisdictions, with the help of prominent national reporters. Such map would be drafted by analyzing these legal remedies in relation to:

- (i) On one hand, the contract clauses typically used in the most relevant industrial and commercial sectors;
- (ii) On the other hand, their practical application pursuant to the municipal laws of selected legal systems.

The objective of this research is to evaluate the effectiveness of such legal remedies and to compare the results of this assessment with the legal rules adopted by the UNIDROIT Principles.

2. Research methodology

The methodological assumption of this project is that it would not be possible to achieve a thorough understanding of the complexity and of the multiple facets of its subject matter if, following the traditional approach, one limited itself to comparing how contractual remedies are regulated in different legal systems and how these regulations differ from the UNIDROIT Principles.

Following the inescapable premise that each contract is underpinned by a distinct economic rationale, it is necessary to adopt a microsurgery approach, which allows to



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observe the regulation of change of circumstances not through the limited prism of contract law's general principles, but rather through the multifaceted prism of the law in action.

In other words, it is necessary to conduct an analysis that, by adopting an empirical, “bottom-up” approach and by putting the different types of contracts under the microscope, aims at verifying:

- (i) For each type of contract, which clauses are most commonly adopted to regulate change of circumstances at a transnational level;
- (ii) For each type of contract and in selected jurisdictions, which clauses are most commonly adopted to regulate change of circumstances at the domestic level and how they interact with the legal rules set out for that type of contract;
- (iii) For each type of contract and in selected jurisdictions, what is the concrete application of the legal remedies (resulting from both contract clauses and municipal contract law) by both State courts and arbitral tribunals⁴.

3. Why is this research fruitful for UNIDROIT

Looking at this research project from UNIDROIT's perspective, the proposed methodology would make it possible to better identify the types of contracts (and, consequently, the commercial sectors, including domestic ones) in relation to which UNIDROIT could target the promotion and raise the profile of its Principles.

The following two examples, emerging from the case law dealing with the allocation of the Covid-19 risk, can be used to illustrate the potential room for action for UNIDROIT that could be unveiled by this research project.

The first example emerges from a preliminary compilation of State court opinions dealing with lease agreements of nonresidential property. Although these agreements generally do not include an express regulation of supervening events and mostly rely on the rules provided by the applicable law, the decisions prompted by the pandemic signal a univocal push towards those legal remedies that allow for contract adjustment. This is evident if one considers that there is a robust line of decisions in which the judges, through a systematic interpretation of the governing law, apply the remedy of contract adaptation (including in Italy and, through a different interpretative pathway, in the United States). Actually, where this interpretation fails (such as in Ireland), some courts have openly expressed their regret for lacking the power to restore the contract's equilibrium.

To sum up, lease agreements of nonresidential property seem to hold significant potential for the application of the UNIDROIT Principles.

The second example relates to construction contracts. In this field, recourse is vastly made to model contracts promoted by business organizations (e.g., the International

⁴ A similar work, though limited to the Spanish legal system, has been recently conducted and culminated in the publication of a volume: I. Agúndez Lería, J.M. Alonso Puig *et al.*, *La Rebus Sic Stantibus en Tiempos de Pandemia: Análisis General e Impacto por Sectores Económicos*, S. Izaguirre Gómez, P. Perales Viscasillas (directed by), Valencia, Tirant, 2021.



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Federation of Consulting Engineers – FIDIC) that generally do include a force majeure clause and do not include a hardship one. Consistently with a strict *ex ante* risk allocation approach, these agreements often make recourse to English law as governing law. In the context of the pandemic, while the force majeure clauses included in these agreements allowed to escape the application of liquidated damages in relation to work interruptions imposed to limit the spread of the virus, they did not offer any remedy to the additional costs incurred by the Contractors in order to extend compliance with their health and safety obligations. Although not being an available remedy under the contractual regulation, the very same business organizations that promoted the most common model contracts have encouraged parties to share these costs in a fair way.

Such empirical observation may indicate that the UNIDROIT Principles could be effectively promoted even in this industrial sector, whose actors have been traditionally reluctant to adopt legal remedies providing for contract adaptation.

4. Research organization and timing

The architecture of this research project leads to considering it possible to carry it out over a time span of two years and a half.

The proposed methodology requires, first, collecting the relevant empirical data in the form of: (i) a report on the most commonly used model clauses at a transnational level for each industrial or commercial sector considered (totaling 5 reports); (ii) a report on the general principles governing change of circumstances in each legal system that will be investigated (totaling 10 reports); (iii) a contract-specific national report for each sector and each legal system considered (totaling 50 reports). Such data will be collected by recourse to industry-specific leading experts, leading scholars, and one or more national reporters who, with the guidance of previously compiled model reports (e.g., those from Italy), will be requested to convey the relevant information from their legal system.

The second stage in the research will be the elaboration of the data collected and the comparison of such empirical results with the UNIDROIT Principles.

The steps in this research can be summarized as follows:

- (i) June – July 2022: selecting 5 industry-specific leading experts and 10 jurisdiction-specific leading scholars;
- (ii) July 2022 – December 2022: compiling and editing 5 reports on transnational model clauses and 10 reports on domestic general principles; drafting 5 contract-specific questionnaires;
- (iii) January 2023 -March 2023: selecting 50 contract-specific national reporters; compiling and editing 5 model contract-specific national reports;
- (iv) April 2023 – June 2023: compiling the remaining 45 contract-specific national reports;
- (v) July 2023 – December 2023: editing and publishing the contract-specific national reports in batches;
- (vi) January 2024 – June 2024: elaboration of the data and comparison with the UNIDROIT Principles.



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The project would be conducted within the framework of the Memorandum of Understanding undersigned by UNIDROIT and Roma Tre University Law Department on November 15, 2021. It would be supported by Roma Tre University Law Department, and it would be directed by two Co-Directors, one appointed by UNIDROIT, and one by Roma Tre University Law Department (the latter already designated Prof. Giacomo Rojas Elgueta). The Project Directors would be assisted by a Ph.D. student from the same Law Department (Ms. Benedetta Mauro). This arrangement would not require any administrative or financial support by UNIDROIT, which, beside appointing a Co-Director, would benefit from the maximum flexibility to assume any role as it deems most appropriate.

A handwritten signature in black ink, appearing to read 'Antonio Carratta'.

Antonio Carratta

Direttore Dipartimento di Giurisprudenza