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**Item No. 5 on the agenda: Ongoing legislative activities carried over from the
2020-2022 Work Programme**

(c) Legal Structure of Agricultural Enterprises

(prepared by the Secretariat)

<i>Summary</i>	<i>This document provides an update on the Legal Structure of Agricultural Enterprises project</i>
<i>Action to be taken</i>	<i>The Governing Council is invited to take note of the progress of the project</i>
<i>Mandate</i>	<i>Work Programmes 2020-2022 and 2023-2025</i>
<i>Priority level</i>	<i>High</i>
<i>Related documents</i>	UNIDROIT 2019 – C.D. (98) 14 rev. 2 ; UNIDROIT 2020 – C.D. (99) B.5 ; UNIDROIT 2021 – C.D. (100) B.5 ; UNIDROIT 2022 – C.D. (101) 21 ; UNIDROIT 2021 A.G. (80) 10 ; UNIDROIT 2022 – A.G. (81) 9

I. INTRODUCTION

1. The development of the Legal Structure of Agricultural Enterprises project (hereinafter the LSAE project), began during the 2020-2022 Work Programme and was extended at high-priority level to the 2023-2025 Work Programme by the UNIDROIT Governing Council ([C.D. \(101\) 21](#)) and General Assembly ([A.G. \(81\) 9](#)). This project constitutes the third joint project developed in partnership with the Food and Agriculture Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD), it is a follow-up from the [Legal Guide on Contract Farming](#) (finalised in 2015) and the [Legal Guide on Agricultural Land Investment Contracts](#) (finalised in 2020).

2. The purpose of this document is to update the Members of the Governing Council on the work conducted since the 101st session of the Council in June 2022. It briefly recalls the background of the project (Section II), provides information on the main outcomes of the first two Working Group sessions (Section III), and describes the future steps (Section IV).

II. BACKGROUND

3. In 2020, the Secretariat conducted a stocktaking exercise and [feasibility analysis](#) to ascertain whether UNIDROIT could make a useful contribution to best streamline supply chain relationships, without overlapping with other international initiatives.¹ On the basis of the preliminary research conducted, the Secretariat drew the Governing Council's attention, at its 99th session, to the strong interest identified, in particular from economists, to undertake work on the private law aspects of the way agricultural enterprises are structured, and, in particular, on the means to improve: (i) market access; (ii) forms of coordination of agricultural enterprises; (iii) access to critical resources and insurance; and (iv) to address unfair commercial practices.

4. In 2021, on 15 and 16 April, the Secretariat co-organised a [Consultation Webinar](#) with the partner organisations to gather further input on the topics that could be potentially covered in the Guidance Document. The conclusions and recommendations of the Webinar were presented at the 100th session of the Governing Council,² which agreed with the Secretariat's proposal to assign high priority status to the LSAE project.³ The General Assembly approved this recommendation, at its 80th session, in December 2021.⁴

5. In 2022, the Secretariat set up a Working Group chaired by Governing Council Member Justice Ricardo Lorenzetti (Supreme Court of Argentina) and coordinated by Professor Fabrizio Cafaggi (Judge at the Council of State Italy and Professor at the University of Trento and LUISS, Rome). As at 14 April 2023, the Working Group is composed of 9 members, selected for their legal expertise in contract law, corporate law, commercial law, and agricultural law, as well as for their experience in economics, finance, digitalisation, and sustainability with regard to the agricultural sector.

6. The Working Group also includes representatives of FAO and IFAD legal departments and technical experts from other departments, such as FAO's "Agrifood Economics Division" and "Food Systems and Food Safety Division", as well as IFAD's "Research and Impact Division" and "Inclusive Rural Finance, Markets and Value Chains Division". A significant number of observers, representing international and regional intergovernmental organisations, farmers associations, non-governmental organisations, and the private sector have also been invited to join the Working Group. The complete list of members and observers of the LSAE Working Group is available on the [LSAE project's dedicated website](#).

7. In addition, within the framework of a Chair Programme in the field of private law and sustainable agricultural development supported by the Directorate General for Development Cooperation (*Direzione Generale per la Cooperazione allo Sviluppo* - DGCS) of the Italian Ministry of Foreign Affairs and International Cooperation (*Ministero degli Affari Esteri e della Cooperazione Internazionale* - MAECI), a senior researcher joined the Secretariat in November 2022 to assist with the development of the LSAE project. For more information on the MAECI/DGCS/UNIDROIT Chair Programme see document [C.D. \(102\) 21](#), regarding the UNIDROIT Academy.

¹ For the initial feasibility study see: [UNIDROIT 2020 – C.D. \(99\) B.5](#).

² For more information see: [UNIDROIT 2021 – C.D. \(100\) B.5](#).

³ For the Report of the 100th session of the Governing Council see: UNIDROIT 2020 [C.D. \(100\) B.24](#). Paragraphs 65-80 summarise the discussion related to the LSAE project.

⁴ For the General Assembly's approval of the recommendation by the Governing Council to assign high-priority status to the LSAE project see: [UNIDROIT 2021 – A.G. \(80\) 10](#), paras. 43 and 46.

III. MEETINGS OF THE WORKING GROUP AND INTERSESSIONAL WORK

A. First session of the Working Group (23-25 February 2022) and intersessional work

8. The first session of the LSAE Working Group took place in a hybrid format, in Rome at the seat of UNIDROIT and via videoconference, from 23 to 25 February 2022. The Working Group was attended by 40 participants who were welcomed by opening remarks from the UNIDROIT Deputy Secretary-General Professor Anna Veneziano, the FAO's Legal Counsel Ms Donata Rugarabamu, and IFAD's General Counsel Ms Katherine Meighan. The discussions were guided by an Issues Paper ([Study LXXXC – W.G. 1 – Doc. 2](#)) prepared by the Secretariat in collaboration with the FAO, IFAD, and a number of members of the Working Group.

9. As further detailed in the summary Report of the Working Group's first session ([Study LXXXC – W.G. 1 – Doc. 3](#)), among other topics, participants discussed: (i) the issue of formality and informality of actors operating in the value chain; (ii) the realities and challenges faced by actors operating in the midstream segment of the agri-food supply chain, beyond the "production stage" and in low- and middle-income countries; (iii) issues relating to market structure and coordination; and (iv) the digital transformation underway in the agri-food sector and how it affects the internal and external functioning of agricultural enterprise.

10. The Working Group generally agreed that the relevant target audience of the Guide could be smallholders and agri-MSMEs that are working towards higher degrees of formality. Therefore, guidance would be developed for legal professionals representing smaller enterprises (including community-based enterprises and family farmers) and, to a certain extent, for legislators, and policymakers. The challenges faced by large agri-food supply chain leaders operating downstream would be analysed, if necessary, at a second stage. Participants discussed that the main focus of the LSAE project could be on "collaborative legal forms" that support smallholders and agri-MSMEs to do business with one another to increase efficiency; address unfair commercial practices; improve access to finance and to international markets; as well as to enhance sustainable agricultural development and to explore innovation opportunities.

11. Participants favored focusing the analysis of collaborative legal forms on three categories of legal forms aimed at promoting efficient commercial collaboration and greater inclusivity: (i) contracts, including bundle of contracts and multiparty contracts, (ii) corporations, with or without limited liability, and (iii) cooperatives. Other types of legal structures, beyond contracts, corporations and cooperatives would only be considered where relevant and practical.

12. The Working Group supported the idea that the content of the Guidance Document should be evidence-based and agreed to revisit the methodology for the empirical research as the work progressed. A general overview of the endogenous and exogenous factors influencing the choice between and within collaborative legal forms could be further described, according to the different needs of the addressees. For example, it was recognised that it would be worth considering the effects of digitalisation, sustainability and access to finance in the LSAE project as these variables may influence the choice between contractual, corporate, cooperative and other forms of collaboration.

13. Compared to the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming, which focused on the bilateral agricultural production contract between farmers/producers and buyers, the LSAE Guidance Document seeks to broaden the scope to cover cases of interdependence among other supply chain actors, for better allocation of risks and profits along agri-food chains. Therefore, particular focus would be given to the analysis of multiparty contracts that involve not only the farmer and the buyer,

but also financial and insurance institutions, concerning the coordination of diverse aspects such as input supply, credit, finance and offtaking in the production segment.

14. During the first intersessional period between March and November 2022, the Secretariat organised three online meetings. The first intersessional meeting took place on 16 June 2022 and focused on approaches to gather empirical evidence for the LSAE project; the second intersessional meeting took place on 22 September 2022 and focused on agricultural cooperatives; and the third intersessional meeting took place on 30 September 2022 and focused on corporations, digitalisation and access to credit and financing.

B. Second session of the Working Group (2-4 November 2022) and intersessional work

15. The second hybrid session of the Working Group was held between 2-4 November 2022. The Working Group was attended by a total of 44 participants and the discussions during this session were guided by a Revised Issues Paper ([Study LXXXC – W.G. 2 – Doc. 2](#)). The summary Report of the second session is available in [Study LXXXC – W.G. 2 – Doc. 3](#).

16. During the second session, participants further explored: (i) the notion of agricultural enterprises; (ii) the features of horizontal and vertical collaboration; (iii) multiparty contracts in agriculture; (iv) cooperative governance systems and internationally recognised cooperative principles and values; and (iv) the challenges of implementing sustainable practices across the supply chain.

17. It was clarified that the notion of agricultural enterprises in the LSAE project was to be considered mainly in the economic perspective to capture business activities of individual entrepreneurs and not only activities of legal entities, such as companies. The Working Group considered adopting a “functional approach” to compare the collaborative legal forms analysed in the LSAE project. This would require the identification of “functionally equivalent categories” (e.g., entry, governance, exist, dissolution, etc.) to ensure compatibility between different concepts developed in the respective fields of contracts, cooperatives and corporations (i.e., legal entities).

18. It was noted that the analysis of the three collaborative legal forms should be premised on complementarity rather than on there being an excluding choice between different legal forms; it was also decided that the Working Group would assess comparatively the strengths and weaknesses of the different models. It was suggested that instead of focusing on understanding when one of the three collaborative legal forms should be used, the Working Group could focus on analysing when a specific legal form is not suitable for a specific situation. By way of illustration, the prospective guidance instrument could describe how a cooperative may not be the most suitable legal structure for a group of farmers that are highly heterogeneous, unless they adopt an effective conflict of interest mechanism.

19. With regard to multiparty contracts in agriculture, the Working Group discussed a proposed structure for the analysis, composed of eleven key issues worth considering in the LSAE Guide, as follows:

- i. Taxonomy – to distinguish between several typologies of multiparty contracts from both a functional and a structural perspective.
- ii. Contract formation – to inform when a multiparty contract is formed and what are the boundaries between precontractual negotiations and contractual formation.
- iii. Entrance – to distinguish between the first phase when a multiparty contract is concluded and later stages where additional participants can be added.

- iv. Content definition – to inform what content should be included to ensure the contract is effective and functional, as well as the techniques that may be used to define the contents of the multiparty contracts, whether it be through negotiation of participants, framework contracts or standard terms.
- v. Governance – to clarify who should define the governance structure of multiparty contracts, considering its common long-term nature and whether the implementation should be entrusted to one manager or committees that bear the ultimate decision-making power.
- vi. Execution – to inform the main aspects of execution to be considered when implementing a horizontal and vertical multiparty contract given the strong interdependences among contractual performances.
- vii. Change of circumstances and supervening impossibility – to verify the extent to which well-established legal rules surrounding bilateral contracts are applicable and whether there are specific characteristics of force majeure and contractual impossibility in long-term multiparty contracts designed to establish collaboration.
- viii. Breach – to inform how breach should be defined and fundamental breach be distinguished from other forms of breach. In particular, consideration ought to be given to how the definition of breach correlates with contractual interdependencies.
- ix. Liability – to clarify how liability for breach of multiparty contracts should be defined and allocated internally and towards third parties.
- x. Remedies – to inform what are the available remedies for breach of multiparty contracts and how should remedies for the collaboration and remedies for individual harm suffered by each participant be distinguished.
- xi. Exit, dissolution, and post-contractual obligations – to inform whether parties can exit the contract before dissolution, and the differences between voluntary and forced exit.

20. The Working Group agreed to examine the modalities in which multiparty contracts may help producers and other businesses operating in agri-food markets to collaborate and implement strategic projects, with special regard to those that improve social and environmental sustainability in agriculture. Participants supported further distinguishing between exchange contracts and associative contracts. The Working Group decided to reassess the adaptability of the proposed structure of analysis for multiparty contracts with regard to the other legal forms considered in the project at its third session.

21. Following the second session of the Working Group, the Secretariat established three thematic Subgroups to advance the work during the second intersessional period: (i) Subgroup 1 on cooperatives; (ii) Subgroup 2 on corporations; and (iii) Subgroup 3 on multiparty contracts. Between January and April 2023, the Co-Chairs of the subgroups were invited to reconsider whether the topics proposed for the analysis of multiparty contracts were also a valid methodology, based on the functional and practical approach and through the lens of collaboration, to analyse cooperatives and corporations. The Secretariat informed the Co-Chairs that they could deviate from the structure proposed for the analysis of multiparty contracts if they considered it to be inconsistent with the logic of corporations and cooperatives. The Co-Chairs were also invited to highlight specific features of cooperatives and corporations that would need to be added to make the Guide more effective at addressing matters that potential stakeholders might require.

C. Third session of the Working Group (8-9 May 2023)

22. The third hybrid session of the Working Group will take place in Rome on 8-9 May 2023, during the same week of the 102nd session of UNIDROIT's Governing Council. It is expected that the

Working Group will further examine: (i) the informal and quasi-formal category of collaborative schemes employed, before formal legal structures are established; (ii) the outlines proposed by the subgroups for the analysis of cooperatives and corporations; (iii) the definition and examples of multiparty contracts; and (iv) a proposed structure of the entire guide.

23. The Working Group may consider agreeing upon a draft table of contents for the guidance instrument based on what was suggested at the second session, where it was proposed that, at least, three different sections could be developed: (i) collaborative schemes; (ii) comparative analysis of legal enterprises; and (iii) interlinkages and peculiarities of the enterprises. An alternative model may also be suggested.

IV. FUTURE STEPS

24. The fourth session of the Working Group will potentially take place on 8-10 November 2023. In the meantime, the Secretariat will organise intersessional meetings and will continue providing support to the Working Group.

25. The tentative calendar for the LSAE Project envisages the preparation of the draft instrument over six in-person sessions, followed by a period of consultations before submitting the complete draft for adoption by UNIDROIT, FAO and IFAD in 2025.

V. ACTION TO BE TAKEN

26. *The Governing Council is invited to take note of the progress made for the development of the project on Legal Structure of Agricultural Enterprises.*