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**Item No. 6 on the agenda: Update on other projects and exploratory work
concerning the 2023-2025 Work Programme**

**(c) Conclusion of the exploratory work conducted on the HCCH-UNIDROIT Project
on Law Applicable to Cross-Border Holdings and Transfers of Digital Assets and
Tokens**

(prepared by the Secretariat)

<i>Summary</i>	<i>Update on exploratory and preparatory work concerning the HCCH-UNIDROIT Project on the Law Applicable to Cross-Border Holdings and Transfers of Digital Assets and Tokens</i>
<i>Action to be taken</i>	<i>The Governing Council is invited to take note of the conclusion of joint preparatory and exploratory work.</i>
<i>Mandate</i>	<i>Work Programme 2023-2025</i>
<i>Priority level</i>	<i>Not applicable</i>

I. BACKGROUND

1. The UNIDROIT Secretariat and the Hague Conference on Private International Law (HCCH) Permanent Bureau (PB) worked together to prepare a proposal of joint exploratory work on topics related to digital assets and applicable law in the context of the finalisation of UNIDROIT's project on Digital Assets and Private Law, and consistent with the conclusions of the HCCH Conference on Commercial, Digital and Financial Law Across Borders (CODIFI). In 2023, the HCCH PB submitted [Prel. Doc. No 3C of January 2023: proposal for Joint Work: HCCH-UNIDROIT Project on Law Applicable to Cross-Border Holdings and Transfers of Digital Assets and Tokens](#) to its Council on General Affairs and Policy (CGAP). In March 2023 the plenary of the HCCH CGAP welcomed the proposed cooperation and mandated the HCCH PB to jointly examine with the UNIDROIT Secretariat the feasibility and desirability of developing coordinated guidance on the law applicable to cross-border holdings and transfers of digital assets and tokens, through the HCCH-UNIDROIT Digital Assets and Tokens Project, reporting on the results in the next session of GCAP (see [HCCH's Conclusions and Decisions of CGAP 2023](#)).

2. In May 2023, the UNIDROIT Secretariat submitted a Proposal for Joint Work on the same topic at the 102nd session of its Governing Council ([C.D. \(102\) 12](#)). The Governing Council welcomed the proposal to conduct joint work with HCCH on a project related to the Law Applicable to Cross-Border Holdings and Transfers of Digital Assets and Tokens and approved the commencement of joint

preparatory and exploratory work in this area, with a view to present, if deemed feasible and desirable, a full proposal at the Governing Council's 2024 session (see [C.D. \(102\) Misc. 2](#)).

3. The Governing Council and the Secretariat conceived the project as a continuation and completion of the UNIDROIT Principles on Digital Assets and Private Law (PDAPL), approved by the Governing Council in 2023 (see [C.D. \(102\) 6](#)). The PDAPL seek to provide legal certainty concerning transactions and proprietary matters involving the digital assets most frequently used in commercial exchanges by clarifying key private law concepts and offering a set of rules which could be deemed the fundamental legal framework in the transactional area of digital assets. Because of the cross-border nature of digital assets and of the markets where they are exchanged, the PDAPL included a Principle on applicable law (Principle 5). The Joint HCCH-UNIDROIT Project was to build upon Principle 5 focusing on, among other matters, the areas the PDAPL did not purport to cover.

II. JOINT EXPLORATORY AND PREPARATORY WORK OF BOTH SECRETARIATS

4. In accordance with the mandates received by the HCCH and UNIDROIT, two preparatory meetings were held under the HCCH-UNIDROIT Joint Project. The first meeting took place on 12 June 2023 at the premises of the HCCH in the Hague (Netherlands) and brought together experts from the UNIDROIT Working Group on Digital Assets and Private Law as well as experts identified for participation in the HCCH-UNIDROIT Joint Project by the HCCH PB. This first meeting was mostly introductory, focused both on general matters concerning applicable law of digital assets as included in a first iteration of a "scope paper" and mostly discussed the solution proposed by the PDAPL ¹.

5. The second preparatory meeting took place in Rome, at UNIDROIT's Seat, on 2-4 October 2023. As a result of an intense and lengthy discussion, experts identified the following as main areas for potential future work: definitional issues concerning linked assets and appropriate connecting factors to identify the law applicable to the determination of whether a valid link exists; certain contractual aspects having special regard to specific types of transactions; whether custody rules as provided for in PDAPL Principle 5(3) may apply to non-custody situations; mapping of connecting factors with a view to assessing applicability to digital assets (e.g. location of control, including in decentralised systems); more granular definitions of digital assets so to encompass new entities that may arise due to technological change; and limited consideration of the applicable law to proprietary torts and torts subject to a contractual action. The group of experts further examined different options regarding the desirability and feasibility of a soft law instrument as opposed to a hard law instrument. In light of remarks made by experts from one delegation, it was clarified that neither the existing Principle 5 nor a future instrument could displace the regulatory framework and other directly relevant mandatory rules of the forum State. Regulatory matters were for each State to determine and were outside the scope of both the PDAPL and a potential new instrument. These findings were incorporated into the summary conclusions of the second meeting which were jointly circulated to the group of experts by the HCCH and the UNIDROIT Secretariat on 16 October 2023 ².

III. THE HCCH DECISION TO DISCONTINUE THE PROJECT

6. On 8 November 2023 experts from the French Ministry of Justice, the French Ministry of Finance and the French Authority of Financial Markets who participated in the second preparatory meeting submitted a position paper on the feasibility and desirability of the joint project, with a focus on the applicable law principle of the PDAPL, addressed to the Secretary-Generals of the HCCH and UNIDROIT. The position paper objected to pursuing joint work on the proposed subject matter to the extent it had to build upon PDAPL Principle 5, whose waterfall structure with a primacy of party autonomy (i) presented, allegedly, potential problems of regulatory arbitrage by digital assets issuers and intermediaries holding digital assets for their clients, (ii) did not discriminate sufficiently between

¹ For a report of the discussion see Annexe I to [HCCH-UNIDROIT Digital Assets and Tokens Joint Project: Report, Prel. Doc. No 3, HCCH CGAP, March 2024](#).

² See [HCCH/UNIDROIT Study LXXXIIA – P.M.2 – Doc. 3, November 2023](#).

the different types of digital assets, and (iii) proposed solutions which departed from the standard approach of French and European law on these matters ³.

7. On 12 December 2023, the UNIDROIT Secretary-General sent a letter in response to the position paper ⁴. The letter, in short, purported to convey the following:

(i) The PDAPL is a soft law instrument, not a hard law one, with the main objective of serving as a complement to a country's own legal framework. Unlike other soft law instruments, designed to offer a fully-fledged regulation of a subject matter, the PDAPL adopt a more modest approach, seeking only to mesh with national legislation and offering basic rules concerning those areas where the special nature of digital assets might create difficulties in case of direct application of the general legislation. This applies also to the conflict of laws principle.

(ii) The PDAPL only purport to cover proprietary law matters concerning digital assets and are completely agnostic as to any regulatory provisions that a country may desire to implement. In fact, the PDAPL state several times, expressly, that nothing in the Principles should prevent an implementing State from approving regulation where a need to pursue regulatory objectives is perceived. This applies also to the conflict of laws principle. By way of example, it is perfectly possible to fully implement the PDAPL while subjecting to domestic regulatory law transactions on digital assets which are traded in a given platform or exchange in the domestic jurisdiction or which concern users located in the said jurisdiction.

(iii) The result of the experts' meeting in the context of the exploratory work conducted by HCCH and UNIDROIT was that it would be feasible and desirable to conduct work on a number of items which were not addressed in any way by the conflicts of law principle of PDAPL.

8. Notwithstanding these explanations, the HCCH PB publicly stated, firstly in a letter and, subsequently, in a document submitted to the HCCH CGAP, that the HCCH-UNIDROIT Joint Project could not find consensus among the HCCH constituency in light of the HCCH's consultations with its Member States. The HCCH PB thus proposed to the HCCH CGAP that the exploratory and preparatory work be concluded. On this basis, the HCCH CGAP, on occasion of its session from 5 to 8 March 2024, decided to conclude the HCCH-UNIDROIT Joint Project.

9. At the same time, the HCCH PB presented a proposal requesting CGAP to start a new project to continue to study applicable law issues of digital tokens (see [Proposal for a Normative Project: Private International Law Issues Relating to Digital Tokens, Prel. Doc. No 5B Rev., HCCH CGAP, March 2024](#)), with a potential overlap in content with both the topics identified by the experts of the joint exploratory work as recorded in the summary report of the second preparatory meeting ([HCCH/UNIDROIT Study LXXXIIA – P.M.2 – Doc. 3, November 2023](#)) and Principle 5 of the PDAPL, on the following basis:

"Recognising the importance of avoiding fragmentation among legal instruments developed by different intergovernmental organisations on related subject matters, including the UNIDROIT Principles on Digital Assets and Private Law, CGAP mandated the PB, in partnership with relevant subject-matters experts and Observers, to study the PIL issues relating to digital tokens. The PB will report to CGAP 2025 on the outcomes of this study, including proposals for next steps."

³ See [HCCH-UNIDROIT Digital Assets and Tokens Joint Project: Report, Prel. Doc. No 3, HCCH CGAP, March 2024](#) (a summary of the position paper is included in section C).

⁴ This letter is included as an Annexe to this document for the information of Governing Council Members only.

10. In light of the foregoing, the Secretariat has no option but to inform the Governing Council that the joint project with the HCCH has come to an end. Given that, based on the prospective future joint work, the applicable law principle of the PDAPL left certain areas uncovered (as later identified by the joint expert group), the Secretariat will continue its consultations to explore the best way to proceed and will inform the Governing Council when these consultations are concluded.

IV. ACTION TO BE TAKEN

11. *The Governing Council is invited to take note of the conclusion of the joint preparatory and exploratory work concerning the HCCH-UNIDROIT Joint Project on the Law Applicable to Cross-Border Holdings and Transfers of Digital Assets and Tokens.*