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Item No. 5 on the agenda: Update on certain high-priority projects on the 2023-2025 Work Programme

(a) Model Laws and Guides to Enactment:

i. UNIDROIT Model Law on Factoring and Guide to Enactment

(prepared by the Secretariat)

<i>Summary</i>	<i>Summary of initial work undertaken in the preparation of the Guide to Enactment for the UNIDROIT Model Law on Factoring</i>
<i>Action to be taken</i>	<i>The Governing Council is invited to note the initial work undertaken by the MLF Guide to Enactment Working Group</i>
<i>Mandate</i>	<i>Work Programme 2023-2025</i>
<i>Priority level</i>	<i>High</i>

I. INTRODUCTION

1. The purpose of this document is to provide the Governing Council with (i) a summary of the initial work undertaken to prepare the Guide to Enactment (GtE) for the UNIDROIT Model Law on Factoring (MLF), and (ii) an overview of the proposed structure and content of the GtE.

II. BACKGROUND

2. At its 101st session (Rome, May 2022), the UNIDROIT Governing Council recommended retaining the Model Law on Factoring as a high-priority project in the Institute's 2023-2025 Work Programme, in order to allow for the finalisation and adoption of the Model Law, and for the preparation of a Guide to Enactment for the Model Law. The UNIDROIT General Assembly subsequently approved the development of the GtE as a high priority project at its 81st session (Rome, December 2022).

3. At its 102nd session (Rome, May 2023), the UNIDROIT Governing Council adopted the UNIDROIT Model Law on Factoring and requested that the Secretariat undertake final proofing in order for both

English and French language versions to be published within 2023.¹ The Council also requested that the Model Law on Factoring Working Group begin work on the UNIDROIT Model Law on Factoring Guide to Enactment.²

III. DEVELOPMENT OF THE GUIDE TO ENACTMENT

4. Purpose: The purpose of the GtE is to assist States in understanding, implementing, and interpreting the provisions of the UNIDROIT Model Law on Factoring. As such, the GtE seeks to explain the purpose of the Model Law, and the operation of the provisions, including detailed technical explanations where implementation of the Model Law to the domestic legislation can have a higher degree of complexity.

5. Audience: The primary audience for the GtE is government officials or legislative bodies in States considering implementing the Model Law on Factoring. Experience shows that often these will be officials from the Central Bank, the Finance Ministry, Treasury, Justice Ministry, or the Legislative Drafting Department.

6. Approach: The GtE is being prepared in adherence with four guiding concepts:

- i. *Targeted* – The MLF GtE will focus on providing information targeted to Government officials required for the implementation of the instrument.
- ii. *Accessible* – The MLF GtE will be drafted to be accessible as possible for non-experts, given that the target audience for the document may lack deep expertise in factoring and receivables finance.
- iii. *Concise* – The GtE will be as concise as possible, to encourage government officials to utilise its content, although it will be sufficiently discursive where needed, including through the provision of examples.
- iv. *Principles-based* – The MLF GtE will identify a set of core principles that are essential for the successful implementation of the MLF and represent international best practice. Highlighting a set of core principles and connecting the content of the GtE to these core principles should minimise the risk of the instrument being improperly implemented.

IV. WORKING GROUP AND METHODOLOGY

7. The Guide to Enactment is being developed by an expert Working Group composed of the same members that developed the Model Law on Factoring itself, under the Chairmanship of UNIDROIT Governing Council Member *ad honorem* Professor Henry Gabriel, who also chaired the Working Group that drafted the MLF. Intergovernmental organisations with expertise in the field of factoring participating as observers in the Working Group on the MLF have been invited to continue to participate as observers in the Model Law on Factoring Guide to Enactment Working Group. The

¹ The Model Law on Factoring is available on a dedicate webpage on the UNIDROIT website: <https://www.unidroit.org/instruments/factoring/model-law-on-factoring/>.

² See Governing Council 102nd session Summary Conclusions, [UNIDROIT 2023 - C.D. \(102\) Misc. 2](#), paragraph 6.

members of the Working Group and invited observing organisations are set out in the Annexe to this document.

8. **Drafting approach:** Rather than asking Working Group members to each draft a section of the GtE, the Working Group has created small “review teams” for each section. Each review team is responsible for deciding on the content and structure of each section, and works with a primary drafter, who will prepare the actual draft chapter to be reviewed by the Working Group. Each review team also provides feedback on their assigned sections. Under this model, each Working Group member is responsible for providing advice on several different parts of the GtE, however only three Working Group members “hold the pen”.³ Observing organisations will have the opportunity to provide feedback on each section during Working Group meetings, and may request or be invited to participate in the drafting of certain sections. Drafters will also take into account recommendations in relation to the GtE content made by the Working Group during the negotiation of the MLF itself.

9. This drafting approach will make it easier to prepare a document with a consistent style and voice, while ensuring that all Working Group members remain actively involved in the drafting of the instrument.

V. INITIAL WORK

10. The ten Working Group members held two initial planning discussions regarding the purpose, content and structure of the GtE. The first planning meeting was held at the International Law Institute Headquarters in Washington DC on 18 January 2024, in the margins of the Secured Transaction Coordination Conference. The second planning meeting was held online on 19 February 2024.

11. The first full Working Group session was held as a hybrid meeting between 8 – 10 April 2024 at UNIDROIT Headquarters in Rome.⁴ The first session was attended by 36 participants (10 Working Group members, 17 observers from intergovernmental organisations, non-governmental organisations, industry representatives and academic experts, and nine members of the Secretariat).

12. During the first session, the Working Group agreed upon the working methodology, structure and general content of the GtE. The Working Group also reviewed and provided feedback on the content outlines for the different sections. The Working Group was able to resolve several important policy issues at its first session:

- i. The Working Group decided that the GtE should identify five core policy objectives: (i) facilitation of receivables finance, (ii) transparency and predictability for commercial transactions, (iii) fair and balanced rules for parties, (iv) simplification of legal requirements, and (v) complementarity with general law. The Working Group further

³ Professor Louise Gullifer and Professor Neil Cohen are the primary drafters, with some drafting assistance from Bruce Whittaker and the Secretariat on certain sections.

⁴ The documents from the first Working Group session are available on the UNIDROIT website at: <https://www.unidroit.org/work-in-progress/model-law-on-factoring-guide-to-enactment/#1701079938149-95840a9b-0d82>. The first session report will be available in May 2024.

decided that the GtE should further identify a set of principles that achieve the core policy objectives.

- ii. The Working Group decided that the GtE would need to provide detailed guidance on several implementation issues: (i) how the MLF should be implemented in relation to other secured transactions reforms, (ii) how the MLF should be implemented by States with different legal traditions, and (iii) how the MLF supplements the general private law with more specific rules for the types of transactions within its scope, but does not purport to change other general law (e.g. consumer protection, insolvency law, negotiable instruments, etc).
- iii. The Working Group decided that the GtE should avoid providing detailed guidance on digital economy issues that is likely to quickly become out of date (such as the use of electronic platforms and digital assets), and that such content should instead be provided in an accompanying “Model Law on Factoring Digital Economy Supplement” to be produced simultaneously with the GtE itself. The Digital Economy Supplement will be designed as a more flexible document that can be updated to reflect technology and practice changes.

VI. OVERVIEW OF CONTENT AND STRUCTURE

13. At its first session, the Working Group decided that the GtE should have the following structure:

PART I – PURPOSE AND OVERVIEW	
1.	Introduction to the MLF Guide to Enactment
2.	Factoring and receivables finance
3.	Introduction to the MLF
4.	Overview of the MLF
5.	Coordination of the MLF with other international instruments
PART II – IMPLEMENTATION OF THE MODEL LAW ON FACTORING	
1.	Implementation of the Model Law on Factoring within the existing legal framework
2.	Implementation of the Model Law on Factoring in different legal systems
PART III – COORDINATION OF THE MODEL LAW ON FACTORING WITH GENERAL LAW, REGULATION AND OTHER MATTERS	
1.	Coordination of the MLF with domestic law
2.	The Model Law on Factoring and the digital economy
3.	The Model Law on Factoring and Regulatory Matters
4.	Other Matters
PART IV – ARTICLE-BY-ARTICLE GUIDE	
1.	General instructions on reading the MLF
2.	Chapter I – Scope and General Provisions
3.	Chapter II – Transfer of a Receivable

4.	Chapter III – Effectiveness against third parties of a transfer of a receivable
5.	Chapter IV – The Registry System
6.	Chapter V – Priority of a Transfer
7.	Chapter VI – Rights and Obligations of the Transferor, Transferee, and the Debtor
8.	Chapter VII – Collection and Enforcement
9.	Chapter VIII – Conflict of Laws
10.	Chapter IX – Transition
11.	Annexe A – Registry Provisions
ANNEXES	
1.	Model Law on Factoring

VII. NEXT STEPS

14. The Working Group is now preparing a first draft of the GtE for consideration at its second session in December 2024. The draft will be further refined at the Working Group's third session in March 2025, with an intention of submitting a full draft of the GtE to the Governing Council for approval at its 104th session in May 2025. The GtE would then be proofread, finalised, translated and published by the end of 2025.

VIII. ACTION TO BE TAKEN

15. *The Governing Council is invited to note the initial work undertaken in the preparation of the Guide to Enactment for the UNIDROIT Model Law on Factoring.*

ANNEXE**MEMBERS OF THE UNIDROIT MLF GUIDE TO ENACTMENT WORKING GROUP**

1. Henry GABRIEL — Professor of Law, Elon University, United States of America
2. Giuliano CASTELLANO — Associate Professor, Asian Institute of International Finance Law (AIIFL), Hong Kong
3. Neil COHEN — Professor of Law, 'Jeffrey D Forchelli' Brooklyn Law School, United States of America
4. Michel DESCHAMPS — Université de Montréal, McCarthy Tetrault, Canada
5. Marek DUBOVEC — Director of Law Reform Programs, International Law Institute, United States of America
6. Alejandro GARRO — Adjunct Professor of Law, Colombia Law School, United States of America
7. Louise GULLIFER — Rouse Ball Professor of English Law, University of Cambridge, United Kingdom
8. Megumi HARA — Professor of Law, Chuo University, Japan
9. Catherine WALSH — Professor of Law, McGill University, Canada
10. Bruce WHITTAKER — Senior Fellow, University of Melbourne, Australia

In addition, several international, regional and private organisations which participated in the negotiation of the UNIDROIT MLF have been invited to also participate in the development of the Guide to Enactment:

1. The World Bank Group (WBG)
2. The United Nations Commission for International Trade Law (UNCITRAL)
3. The European Bank for Reconstruction and Development (EBRD)
4. The Organization of American States (OAS)
5. The African Export-Import Bank (AFREXIMBANK)
6. Organisation for the Harmonisation of Business Law in Africa (OHADA)
7. Industry Groups
 - i. Factors Chain International (FCI)
 - ii. International Chamber of Commerce Banking Commission (ICC)
 - iii. Secured Finance Network (SFN)
 - iv. World of Open Account (WOA)