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**Item No. 8 on the agenda: Digital Assets and Private Law**

(prepared by the Secretariat)

<i>Summary</i>	<i>Report on the Digital Assets and Private Law Project</i>
<i>Action to be taken</i>	<i>Note the progress made by the Digital Assets and Private Law Working Group</i>
<i>Mandate</i>	<i>Work Programme 2020-2022</i>
<i>Priority</i>	<i>High</i>
<i>Related documents</i>	<a href="#"><u>UNIDROIT 2021 - Study LXXXII – W.G.1 – Doc. 4</u></a> <a href="#"><u>UNIDROIT 2021 - Study LXXXII – W.G.2 – Doc. 3</u></a> <a href="#"><u>UNIDROIT 2021 - Study LXXXII – W.G.3 – Doc. 2</u></a> <a href="#"><u>UNIDROIT 2021 - Study LXXXII – W.G.3 – Doc. 3</u></a>

**I. INTRODUCTION**

1. The purpose of this document is to update members of the Governing Council on the development of the project on Digital Assets and Private Law during the period of time elapsed from the 99<sup>th</sup> session of the Council. As will be apparent from this summary report, substantial progress has been made towards the preparation of a set of Principles and Legislative Guidance on Digital Assets and Private Law (DAPL). Detailed accounts of the current status of several Principles can be accessed through the links provided throughout the document.

**II. BACKGROUND**

2. In 2015, the Secretariat received a proposal from the Ministry of Justice of Hungary to consider the development of model laws in the domain of “business informatics”.<sup>1</sup> In November 2016, the Ministry of Industry and Trade of the Czech Republic sent a proposal to include two topics in the Work Programme: distributed ledger (or blockchain) technology and the inheritance of digital properties.<sup>2</sup> At its 97<sup>th</sup> session in 2018), the UNIDROIT Governing Council considered a second proposal from the Czech Republic and concluded that the Secretariat should continue to monitor developments in this area with a view to its possible inclusion in the future Work Programme.<sup>3</sup>

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

<sup>2</sup> [UNIDROIT 2017 – C.D. \(96\) 5, Appendix II.](#)

<sup>3</sup> [UNIDROIT 2018 – C.D. \(97\) 19](#), para. 245.

3. In line with the joint proposal of the Czech Republic, and as they had received similar mandates from their governing bodies, UNIDROIT and UNCITRAL agreed to explore the possibility of future joint work in this area. Both organizations agreed that it would be necessary first to identify the most adequate areas of possible work and later to narrow down the scope of the work as well as to define its nature. In light of this, it was decided to hold two joint, invitation-only, workshops, convening international experts on the different subject matters encompassed by the initial proposal of the Czech Republic: the first was held in Rome (6-7 May 2019<sup>4</sup>) and the second in Vienna (10-11 March 2020<sup>5</sup>). On the basis of the discussions during the first and second workshops, a document was submitted to the Governing Council at its 99<sup>th</sup> session (A) which set out the Secretariat's proposal on the most appropriate scope for this project.<sup>6</sup>

4. At its 99<sup>th</sup> (B) session in September 2020, the UNIDROIT Governing Council approved the preparation of a legal instrument containing principles and legislative guidance in the area of private law and digital assets for the 2020-2022 Triennial Work Programme at a high priority. The instrument will consist of a set of Principles to be accompanied by a text (in the form of a commentary following each article, or of a separate guide) offering guidance as to how the Principles are to be implemented and explaining some of the core concepts, their origin and context, as well as their possible use.

5. The Governing Council further decided in favour of an "enhanced" structure for the project which would entail the setting up of a Steering Committee on Digital Assets and Private Law in addition to the establishment of a Working Group<sup>7</sup> (see Section on Future Steps below).

### III. THE WORKING GROUP

#### 1. Composition of the Working Group

6. Consistent with UNIDROIT's established working methods, the Principles and Legislative Guidance on DAPL is being developed by a Working Group composed of international legal experts selected for their expertise in the fields of property law, secured transactions, and digital technology and the law. Experts participate in a personal capacity and represent the world's different systems and geographic regions. The Working Group is chaired by Governing Council Member Professor Hideki Kanda and is composed of the following experts:

- Hideki Kanda, (Chair), Professor, Gakushuin University (Japan)
- Jason Grant Allen, Senior Research Fellow, Humboldt University of Berlin (Australia)
- Reghard Brits, Professor, University of Pretoria (South Africa)
- Marek Dubovec, Executive Director, Kozolchyk National Law Center (NatLaw) (United States)
- David Fox, Professor, University of Edinburgh (United Kingdom)
- Louise Gullifer, Professor, University of Cambridge (United Kingdom)
- Matthias Haentjens, Professor, Leiden University (Netherlands)
- Hannah Yee-Fen Lim, Associate Professor, Nanyang Technological University, Singapore (Australia)
- Charles Mooney, Jr., Professor, University of Pennsylvania (United States)
- Philipp Paech, Associate Professor, LSE (Germany)

<sup>4</sup> For further information, the Summary of the Discussion and Conclusions from that workshop can be found here: <https://www.unidroit.org/english/news/2019/190506-unidroit-uncitral-workshop/conclusions-e.pdf>.

<sup>5</sup> For a summary of the discussion and conclusions of the Vienna workshop, see: UNCITRAL, *Exploratory work on legal issues related to the digital economy – report of events*, Fifty-third session, New York, 6-17 July 2020, available at: <https://undocs.org/A/CN.9/LIII/INF/2>.

<sup>6</sup> UNIDROIT 2020 – C.D. (99) A.4, paras. 23-33.

<sup>7</sup> C.D. (99) B Misc. 2, paras. 7 and 8.

- Carla Reyes, Assistant Professor, Southern Methodist University (United States)
- Nina-Luisa Siedler, Partner at DWF (Germany)
- Luc Thévenoz, Professor, Université de Genève (Switzerland)
- Jeffrey Wool, Senior Research Fellow, Harris Manchester College, University of Oxford (United States)
- Mimi Zou, Fellow, Oxford University (China)

7. UNIDROIT also invited a number of organisations with expertise in the field of digital assets and private law to participate as observers in the Working Group. Participation of these different organisations will ensure that different regional perspectives are considered in the development and adoption of the instrument. It is also anticipated that the cooperating organisations will assist in the regional promotion, dissemination, and implementation of the guidance document once it has been adopted. The following organisations are observing the DAPL Working Group:

- The World Bank Group
- The United Nations Commission for International Trade Law (UNCITRAL)
- The Hague Conference on Private International Law (HCCH)
- The International Monetary Fund (IMF)
- Association Internationale Des Sciences Juridiques / International Association of Legal Science (AISJ/IALS)
- International Union of Judicial Officers (UIHJ)
- The European Central Bank (ECB)
- The European Banking Authority (EBA)
- The European Banking Institute (EBI)
- Asociación Americana De Derecho Internacional Privado (ASADIP)
- The American Law Institute (ALI)
- The European Law Institute (ELI)
- The Kozolchyk National Law Center (NatLaw)
- Banca d'Italia (Central Bank of Italy)
- The Law Commission of England and Wales
- The Uniform Law Commission (ULC)
- Istituto per la vigilanza sulle assicurazioni (The Institute for the Supervision of Insurance) (IVASS)
- The Italian Financial Services Authority (CONSOB)

8. Finally, UNIDROIT may also invite a number of industry associations to participate as observers in the Working Group to ensure that the guidance document will address the private sector's needs. The latter will also assist in promoting the implementation and use of the guidance document. The following private sector association has been invited to participate as an observer to the DAPL Working Group, but more may be invited in future:

- The International Swaps and Derivatives Association (ISDA)

## **2. Meetings of the Working Group and Intersessional Work**

9. Carrying out the mandate received from the Governing Council at its 99<sup>th</sup> session (A), the Secretariat set up an Exploratory Working Group, chaired by Professor Hideki Kanda, which held five meetings between July and September 2020 and prepared a preliminary draft of the Issues Paper.

Additionally, the Exploratory Working Group facilitated the organisation of an [Exploratory Workshop on Digital Assets and Private Law](#) which was held on 17 and 18 September 2020 in a hybrid manner. The report from the Exploratory Workshop is available in document [Study LXXXII – W.G.1. – Doc. 3](#).

10. The first formal session of the full Working Group took place via videoconference between 17 and 19 November 2020. The Working Group was attended by 30 participants, comprising of (i) 12 Working Group Members, (ii) 12 observers from international, regional, and intergovernmental organisations, industry, government, and academia and (iii) 6 members of the UNIDROIT Secretariat.

11. The Working Group examined a range of matters identified in the Issues Paper (available in document [Study LXXXII – W.G.1 – Doc. 2](#)). Regarding the project's scope and subject matter, the Working Group decided that a descriptive, neutral approach to scope was preferable. With regard to the outcome in terms of the instrument, there was agreement that the approach should be to describe practical situations involving a digital asset and to provide guidance to States regarding what the outcome ought to be when a given problem arose, without necessarily specifying how that outcome ought to be achieved (although guidance can be provided to States in areas such as secured transactions where there is an existing package of model laws and legislative guidance).

12. The Working Group also adopted the decision to establish four Sub-Groups to consider issues relating to the following: Sub-Group 1 on control and custody; Sub-Group 2 on control and transfer; Sub-Group 3 on secured transactions, and Sub-Group 4 which has two separate workstreams, one dealing with taxonomy and another dealing with private international law related matters. The report from the Working Group's first session is available in document [Study LXXXII – W.G.1. – Doc. 4](#).

13. The second session of the Working Group took place via videoconference between 16 and 18 March 2021. The Working Group was attended by 48 participants, comprising of: (i) 15 Working Group Members, (ii) 25 observers from international, regional, and intergovernmental organisations, industry, government, and academia, and (iii) 8 members of the UNIDROIT Secretariat.

14. The meeting was dedicated to presentations given by the various Sub-Groups and discussions on the various preliminary draft principles and accompanying commentary prepared by the Sub-Groups. Sub-Group 1 on control and custody presented a preliminary draft principle on custody. In terms of additional work, the Working Group decided that, *inter alia*, there should be further consideration of the duties of the custodian. Sub-Group 2 on control and transfer presented preliminary draft principles on control and on the acquisition and disposition ("transfer") of digital assets. The Working Group agreed, *inter alia*, that there ought to be further consideration of the innocent acquisition rule and how it would apply to digital assets.

15. Sub-Group 3 on secured transactions presented a series of six illustrations, four preliminary draft principles on secured transactions and digital assets (A: Secured Transactions law applies to digital assets; B: Digital assets are eligible to be collateral; C: Security rights may be created in the grantor's rights and powers with respect to digital assets; D: Security rights may be effective against third parties by control), along with accompanying commentary. The Working Group decided that, *inter alia*, further consideration was to be given to digital assets which were tethered or twinned to other "real-world" assets. Sub-Group 4 featured two separate workstreams: one focused on Taxonomy which presented a note with a draft proposal for a definition of digital asset and a proposed sub-categorisation, and another focused on private international law which presented three preliminary draft principles for the Working Group's consideration. The report from the Working Group's second session is available in document [Study LXXXII – W.G.2 – Doc. 3](#).

16. On 31 May 2021, at the request of the Chair, a Special Workshop was held to examine more closely a range of issues relating to the issue of Digital Twins (i.e., digital assets tied to other assets). The report from the Special Workshop summarising the presentations and the ensuing discussion is available in document [Study LXXXII – W.G.3 – Doc. 3](#).

17. The third session of the Working Group took place in a hybrid format (in person and via videoconference) between 31 June and 2 July 2021. The Working Group was attended by 47 participants, comprising of: (i) 15 Working Group Members, (ii) 23 observers from international, regional, and intergovernmental organisations, industry, government, and academia, and (iii) 9 members of the UNIDROIT Secretariat.

18. The meeting was dedicated to presentations given by the various Sub-Groups and follow-up discussions. Sub-Group 1 presented a revised draft principle on custody. Sub-Group 2 presented revised draft principles on control and on the acquisition and disposition (“transfer”) of digital assets. The Working Group agreed on the need to maintain a functional approach and an exclusivity rule with degrees of relaxation. Sub-Group 3 presented an expanded paper on secured transactions featuring three new draft principles (E: effectiveness against third parties; F: insolvency implications; X: priority), a presentation which explored how existing paper documents representing possession and title for the purposes of executing secured transactions would be useful analogies to digital assets tethered to real-world assets, and a presentation on DeFi and the structure of liquidity pool tokens.

19. Sub-Group 4 (Taxonomy workstream) presented a revised taxonomy note which included a refined definition of digital asset, along with examples to illustrate the proposed sub-categorisation. The Working Group was also briefed on the outcome of the Special Workshop on Digital Twins and the decision was taken that further Special Workshops should be organised to examine in greater detail other topics, including custody and control.

20. The report from the Working Group’s third session is available in document Study LXXXII – W.G.3 – Doc. 4.

### **3. Structure of the Future Principles and Legislative Guidance on DAPL**

21. The Working Group is making progress in the preparation of a set of Principles and accompanying commentary on issues relating to digital assets and private law. At its third session, the Working Group considered the latest version of the Revised Issues Paper, which is available in document [Study LXXXII – W.G.3 – Doc. 2](#). The Revised Issues Paper contains a series of thirteen preliminary draft Principles accompanied by commentary and illustrations, the structure of which follows:

SG4 – NOTE ON TAXONOMY

SG2 – CONTROL AND TRANSFER

Principle X.1: “Control”

Principle X.2: Acquisition and Disposition (“Transfer”) of Digital Assets

SG1 – CONTROL AND CUSTODY

Principle C – Custody

SG3 – SECURED TRANSACTIONS

Principle A: Secured Transactions law applies to digital assets

Principle B: Digital assets are eligible to be collateral

Principle C: Security rights may be created in the grantor’s rights and powers with respect to digital assets

Principle D: Security rights may be effective against third parties by control

Principle E: Distinct rules for different categories of digital assets apply to some aspects of creation of a security right and effectiveness against third parties

Principle F: Insolvency law should recognize the third-party effectiveness and priority of security rights established prior to the opening of insolvency proceedings

Principle X: Priority of security rights in digital assets made effective by control

#### SG4 – PRIVATE INTERNATIONAL LAW

Principle A: Concerning the law governing acquisition and disposition (including collateralisation) of digital assets amongst adherents to the relevant digital-asset platform

Principle B: Concerning the different laws that can be relevant in an insolvency scenario

Principle C: Concerning the situation of non-native assets, where the asset has two representations, one as digital asset on the platform, and one as tangible or intangible asset outside that platform, underlying the digital asset

### 4. Progress on the Future Principles and Legislative Guidance

22. Sub-Group 1 examines a range of issues relating to control and custody of digital assets and has met six times between January and June 2021. The outcome is draft Principle C on custody which addresses situations where a person (usually a legal person, often a regulated entity) holds a digital asset on behalf of and for the benefit of another, typically a client, in a manner that gives the client special protection against unauthorised dispositions of the asset and against the insolvency of the custodian. At its third session, the Working Group discussed the definitional boundaries of custodianship in relation to insolvency and minimal custodial duties. It was explained that the notion of custody was one in which the custodian owed some duties to the client in relation to safeguarding assets, and that Sub-Group 1 had endeavoured to set out the custodial duties in the draft custody Principle.

23. Sub-Group 2 examines a range of issues relating to control and transfer of digital assets and has met five times between January and June 2021. The outcome is two draft Principles: Principle X.1: "Control" and Principle (X.2) on Acquisition and Disposition ("Transfer") of digital assets.

24. Regarding draft Principle (X.1) "Control", at its second session, the Working Group clarified that the definition of "control" was a factual instead of a legal definition. At its third session, a revised draft Principle on control was presented and it was emphasised that it referred to a general concept of control that was meant to function in the context of transfer (with implications for other aspects of the DAPL project such as custody and secured transactions). The Working Group agreed that further intersessional work was required on the issue of custodial transfer and the implications for control and the innocent acquisition rule, and that the inclusion of a degree of exclusivity was important to narrow down the assets with which the Project was concerned (e.g., to exclude photos and social media posts). The Working Group also agreed on the need to maintain a functional approach and an exclusivity rule with degrees of relaxation.

25. Regarding draft Principle (X.2) ("Transfer"), at its second session, the Working Group agreed to further consider: (i) the question of whether innocent acquisition rules ought to be recognised in the context of digital assets, as applied in different jurisdictions; and (ii) the types of digital assets to be covered by the Principles. The Working Group also reached a consensus to the effect that the States should adopt (or retain) a shelter principle in support of the innocent acquisition rule if the Principles adopt such a harmonized innocent acquisition rule. At its third session, further refinements were made to the draft Principle X.2, and the Working Group noted that the commentary might provide more explicit guidance on how different jurisdictions might implement innocent acquisition rules to reflect the best use of existing law and legal theories together with the relevant technological realities.

26. Sub-Group 3 examines a range of issues relating to secured transactions and digital assets and has met five times between January and June 2021. The outcome of these meetings was the preparation of a list of issues together with six illustrations, special sections on digital twins and secured transactions and on DeFi (decentralized finance), and a series of seven draft principles together with commentary. It is noted that the secured transactions draft Principles are agnostic as to the structure and nature of the secured transactions regime. It is envisaged that they should be implementable in States with a single comprehensive secured transactions law that covers all types of rights in movable assets that secure an obligation, similarly to the UNCITRAL Model Law, as well as in States that approach security rights differently. It is noted that the draft Principles do not take a position about the ideal structure and nature of the secured transactions regime but highlight some aspects of the regimes that may be more conducive to secured transactions involving digital assets, or amenable to amendments.

27. At the third session, Sub-Group 3 presented research which explored how existing paper documents representing possession and title for the purposes of executing secured transactions would be useful analogies to digital assets tethered to real-world assets. It also presented an exploration of DeFi (decentralised financed) and an expert observer presented the structure of liquidity pool tokens.

28. Sub-Group 4 features two separate workstreams, one dealing with taxonomy and another dealing with private international law related matters and has met twice times between January and June 2021.

29. Regarding the taxonomy workstream, at the third session of the Working Group, a proposal was made to define a digital asset as follows: "A digital asset is an electronic record which is capable of being subject to control." It is noted that this working definition may be subject to further refinement as the Project progresses. Sub-Group 4 also elaborated on a proposed sub-categorisation of digital assets for the purposes of taxonomy. Regarding co-ordination with UNCITRAL, the possibility of carrying out work on a taxonomy beyond the one done for the purposes of the Principles was noted.

30. Regarding the private international law workstream, three draft Principles were presented at the second session and the Working Group agreed on three issues to be addressed by the tentative Principles: (i) the law applicable inside the digital assets platform (network) and, in particular, the law covering acquisitions and dispositions (the same law should apply to transfers and collateralisation on a given network); (ii) conflict of laws in relation to "digital twins"; and (iii) conflict of laws in relation to insolvency-related issues.

#### **IV. FUTURE STEPS**

##### **1. Establishment of a Steering Committee**

31. In light of the very broad interest generated by the DAPL project and its inherently global and interdisciplinary nature, at its 99<sup>th</sup> session the Governing Council decided in favour of an "enhanced" structure for the project which would entail the setting up of a Steering Committee on Digital Assets and Private Law in addition to the establishment of a Working Group.<sup>8</sup>

32. The Steering Committee is chaired by Professor Monika Pauknerová, Member of the UNIDROIT Governing Council, and is comprised of experts from different fields (both technical and legal) acting 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

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<sup>8</sup> [C.D. \(99\) B Misc. 2, paras. 7 and 8.](#)

the Working Group. UNIDROIT has invited its Member States to nominate (an) expert(s) to the Steering Committee, and twenty-five have done so to date.

## **2. Intersessional Work and Working Group Sessions**

33. Intersessional work will continue in the form of additional meetings of the four Sub-Groups: Sub-Group 1 on Control and Custody; Sub-Group 2 on Control and Transfer; Sub-Group 3 on Secured Transactions; and Sub-Group 4 which features a workstream on Taxonomy, as well as a workstream on Private International Law.

34. Ahead of the 100<sup>th</sup> session of the Governing Council in September 2021, a Special Workshop will be held on 13 September 2021 to examine a range of issues relating to Custody and Control. It is envisaged that further Special Workshops will be organised on an ad hoc basis, according to the needs of the Working Group.

35. The Working Group will hold its fourth session between 2–4 November 2021.

36. It is anticipated that the Working Group will hold its fifth session in advance of the 101<sup>st</sup> session of the Governing Council in early 2022 to further revise the draft Principles and Legislative Guidance. The Governing Council will have an opportunity to review the draft Principles and Legislative Guidance at its 101<sup>st</sup> session in 2022. Broad consultations will be undertaken throughout 2022 before the instrument is finalised and proposed for adoption by the Governing Council in 2023.

37. Further information regarding the DAPL project and all documents from the Working Group meetings are available on the UNIDROIT website at: <https://www.unidroit.org/work-in-progress/digital-assets-and-private-law>.

## **V. ACTION TO BE TAKEN**

38. *The Governing Council is invited to take note of the progress made by the Digital Assets and Private Law Working Group.*