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**Digital Assets and Private Law
Working Group**

UNIDROIT 2022
Study LXXXII – W.G.5 – Doc. 2

Fifth session (hybrid)
Rome, 7 – 9 March 2022

English only
February 2022

MASTER COPY OF BLACK LETTER PRINCIPLES

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SECTION 1: SCOPE AND DEFINITIONS

Principle 1: ~~scope~~ **Scope [of the principles]**

These Principles deal with the private law relating to [transactions in] digital assets.

Principle 2: ~~definitions~~ **Definitions**

(1) 'Electronic record' means information which is (i) stored in an electronic or other intangible medium and (ii) capable of being retrieved.

(2) '[Controllable] Digital asset' means an electronic record which is capable of being subject to control.

~~Principle 3: linked digital assets~~

~~A-~~(3) 'Digital assets law' means any part of a State's law relating to digital assets which falls within the scope of these principles.

(4) 'The law' means a State's law including its digital assets law.

Principle 3: General principles

(1) The law should provide that digital assets can be the subject of proprietary rights.

(2) In these Principles, references to proprietary rights include proprietary interests and rights with proprietary effects.

(3) The law other than digital assets law continues to apply to issues not dealt with in these Principles, including

(a) whether a person has a proprietary right in a digital asset ~~may be linked to~~;

(b) whether a person has validly transferred a proprietary right in a digital asset to another asset ~~person~~;

(c) whether a person has validly created a security right in a digital asset;

(d) the rights as between a transferor and transferee of a digital asset;

(e) the rights as between a grantor of a security right in a digital asset and the relevant secured creditor

(f) the legal consequences of third party effectiveness of a transfer of digital assets; and

(g) the requirements for, and legal consequences of, third party effectiveness of a security right.

Principle 4: Digital Assets 'linked' to Other Assets

(a) (1) Where a digital asset, or any related system protocols or documentation, appears to confer a right to another asset, which can be tangible or intangible ('the other asset').

~~(b) — The other asset may be a tangible asset or an intangible asset.~~

~~(c) — The nature of the link between the digital asset and the other asset will vary depending on the how the link is set up.~~

~~The), the legal effect of the link (if any) is a matter for the applicable law law, [other than the digital asset law,] [and is not addressed in these principles].~~

~~(2) — The law specifies the requirements to be met, including as regards the form and content of the information to be provided, for any legal effect to occur.~~

Alternative formulation for discussion:

~~The requirements to be met for any legal effect to occur (including as regards the form and content of the information to be provided) are a matter for the law to specify.~~

SECTION II: PRIVATE INTERNATIONAL LAW

Principle 5 – Conflict of Laws¹

1) General principle

a) Proprietary questions in respect of digital assets, in particular their acquisition and disposition, are always a matter of the law [of a State].

b) The digital assets law should include the following rule determining the law applicable to proprietary questions in respect of digital assets.

2) Determination of the applicable law

The law applicable to proprietary questions in digital assets

a) The law applicable to propriety questions in respect of digital assets is identical for all digital assets of the same description.

b) The applicable law is be chosen at the moment of the first issuance of assets being of a specific description. The digital asset law should take measures incentivising such choice.

c) The choice of the applicable law can be included in the code or can be manifested in accompanying documentation. The digital asset law determines the relevant requirements.

d) The digital asset law can restrict the choice of applicable law; in particular, regulated parties can be directed to transact in digital assets only to the extent that the proprietary aspects in respect of these assets are governed by a specific law or by a law to be chosen from a specific group of laws. A choice of law not compliant with the restriction is not valid.

e) If no valid choice has been made, the law applicable to proprietary aspects of digital assets is the law that generally applies to the relevant [network] [system] on which the relevant digital assets are created.

f) If no law has been chosen in respect of the relevant [network] [system] the law of the State to which the [network] [system] has the strongest factual

¹ We recognise that a conflict-of-laws rule will always be imperfect. These principles' aim is therefore to improve the clarity and legal certainty surrounding the issue of conflict-of-laws to the largest possible extent.

connection applies, in particular in cases in which the network operator is resident, incorporated or regulated or has otherwise a clear factual connection to a specific State.

3) Recognition in insolvency

Notwithstanding the opening of an insolvency proceeding, the law applicable in accordance with the previous rules governs all proprietary aspects in respect of digital assets with regard to any event that has occurred before the opening of that insolvency proceeding.

SECTION III: CONTROL

Principle 4+6: Definition of Control

(1) A person has 'control' of a digital asset if:

——(a) subject to paragraphs (2) and (3), the digital asset or the relevant protocol or system confers on ~~the~~that person:

——(i) the exclusive ability to change the control of the digital asset to another person (a "change of control");

——(ii) the exclusive ability to prevent others from obtaining substantially all of the benefit from the digital asset; and

——(iii) the ability to obtain substantially all the benefit from the digital asset; and

——(b) the digital asset or its associated records allows ~~the~~that person to identify itself as having the abilities ~~mentioned~~set out in paragraph (1)(a).

(2) A change of control includes ~~replacing, modifying, destroying, cancelling the replacement, modification, destruction, cancellation, or eliminating~~elimination of a digital asset and the resulting and corresponding derivative creation of a new digital asset (a "derivative digital asset") ~~and subjecting the derivative digital asset")~~ which is subject to the control of another person.

(3) An ability for purposes of paragraph (1)(a) need not be exclusive if and to the extent that:

——(a) the digital asset, or the relevant protocol or system, limits the use of, or is programmed to make a change of control of, the digital asset; or

——(b) the person in control has agreed ~~or~~ consented to or acquiesced in sharing ~~the~~that ability with one or more other persons.

Principle 7: Identification of a Person in Control of a Digital Asset

(1) In any proceeding in which a person's control of a digital asset is at issue,

(a) it is sufficient for that person to demonstrate that the identification requirement in Principle 6 paragraph (1)(b) is satisfied as to the abilities specified in Principle 6 paragraph 1(a)[(i) and (ii)];

(b) it is not necessary for ~~the~~that person to prove ~~the exclusivity of any ability specified in paragraph 1(a), i.e.,~~ that no person other than the person in

control and those permitted by paragraph (3) has ~~that ability~~ any of the abilities specified in Principle 6 paragraph 1(a).

(52) The identification mentioned in Principle 6 paragraph (1)(b) may be by a reasonable means ~~such as including~~ (but not limited to) an identifying number, a cryptographic key, an office, or an account number, even if the identification does not indicate the name or identity of the person to be identified.

SECTION ~~III~~IV: TRANSFER

Principle ~~58~~59: Acquisition and Disposition (~~'Transfer'~~) of Digital Assets

(1) ~~(a) The applicable law other than law governing digital assets contemplated by these principles (i.e., the digital assets law) should specify which (if any) of its existing rules or standards of general application govern the acquisition and disposition of proprietary rights in digital assets. (As used in these Principles references to proprietary rights include proprietary interests and rights with proprietary effects.)~~

~~(2) The law should provide that digital assets may be the subject of proprietary rights.~~

~~(3) The law should define the transfer of a digital asset as is the change of a proprietary right from one person to another person and provide that a~~

~~(b) A transfer of a digital asset includes the replacement, modification, destruction, cancellation, or elimination of a digital asset and the resulting and corresponding derivative creation and acquisition of a new digital asset (derivative digital asset).~~

~~(4) Except as otherwise provided in these Principles, the applicable law other than the digital assets law governs issues relating to proprietary rights, such as:~~

~~— (a) whether a person has a proprietary right in a digital asset;~~

~~— (b) whether a person has validly transferred a proprietary right in a digital asset to another person and the requirements for any such transfer;~~

~~— (c) the rights as between a transferor and transferee of digital assets and derivative digital assets *inter se*; and~~

~~— (d) the requirements for and legal consequences of a transfer of digital assets vis-à-vis third parties (i.e., "third-party effectiveness").~~

~~(5) Principle 9: Innocent Acquirer Rule~~

~~(1) The law should [address][specify] the following aspects of the transfer of digital assets as between the transferor and transferee *inter se*:~~

~~— (a) a "shelter" principle that would benefit (among other transferees) onward direct (i.e., from include an innocent acquirer to an initial transferee) and indirect (ie, from an initial transferee and onward) transferees from an acquirer protected by the innocent acquisition rule; and, specifying~~

~~— (b) requirements for the creation of security rights.~~

~~(6) The law should [address][specify] the following aspects of third-party effectiveness:~~

~~—— (a) an innocent acquisition rule (IAR) that protects the rights of an innocent acquirer (IA) of digital assets, addressed in paragraph (8); and~~

~~—— (b) third-party effectiveness (perfection) [and priority] of security rights, addressed in Principle 7 [or to relevant Principle(s)].~~

~~(7) The law should provide choice of law rules that address in general the law applicable to transfers of digital assets, including the rights of transferors and transferees *inter se* and third-party effectiveness.~~

~~(8) The law should specify (a) _____ the requirements for a transferee to qualify as an innocent acquirer (IA) of a digital assets asset and~~

~~(b) _____ the rights obtained by an IA (e.g., innocent acquirer of such an asset.~~

~~(2) In this principle, the term 'digital asset' includes a derivative digital asset.~~

~~(3) The requirements and rights akin referred to in paragraph (1) should be equivalent to those found in good faith purchase, finality, and take-free rules).~~

~~—— (a(4) The IAR innocent acquirer rule should provide for strong and robust protection for IAs of that~~

~~(a) an innocent acquirer takes a digital assets to the end that IAs take digital assets and derivative digital assets asset free of conflicting proprietary rights ("proprietary claims");~~

~~—— (b) The IAR also should provide that (b) _____ no rights based on a proprietary claim relating to a digital asset or derivative digital asset may be successfully asserted against an IA innocent acquirer of that digital asset.~~

~~—— (c) "Control" of a digital asset or derivative;~~

~~(c) Control of a digital asset should be an essential element for qualifying as an IA innocent acquirer; and~~

~~—— (d) As a corollary and necessary implication of subparagraph (c), an IA (d) An innocent acquirer may acquire a proprietary right in a digital asset or derivative digital asset even if control of the IA that digital asset is changed by a person that is acting wrongfully and has no proprietary right in the digital asset and that is acting wrongfully.~~

~~—— (e) Concerning the test or standard for an IA's protection under an IAR (5) In specifying who falls within the definition of an innocent acquirer, consideration should be given to (but not limited to) the following:~~

~~—— (i(a) an acquirer's possible notice or knowledge of any proprietary claim or of the specific proprietary claim at issue;~~

~~—— (ii) as (b) in relation to notice, an acquirer's reason to know of a proprietary claim or knowledge of suspicious circumstances and failure to investigate further;~~

~~—— (iii) as (c) in relation to knowledge, an acquirer's actual knowledge;~~

~~—— (iv(d) an acquirer's notice or knowledge that its acquisition [violates the rights of] [is wrongful as to] the holder of a proprietary claim;~~

_____ ~~(v)(e)~~ an acquirer’s “good faith” (or a similar standard), taking into account the variety of meanings and interpretations under different legal traditions;

_____ ~~(vi)(f)~~ an acquirer’s acquisition for value given by the acquirer or received by the transferor;

_____ ~~(vii)(g)~~ applicable tests or standards for the innocent acquisition protection for acquirers of movables and intangibles; and

_____ ~~(viii)(h)~~ the test adopted in the Geneva Securities Convention, Article 18(1), i.e., whether:

an acquirer actually knows or ought to know, at the relevant time, that another person has an interest in securities or intermediated securities and that the credit to the securities account of the acquirer, designating entry or interest granted to the acquirer violates the rights of that other person in relation to its interest.

~~(9) — In the case of 6) If an IAR providing innocent acquirer rule provides that qualification as an IA innocent acquirer requires the absence of notice or knowledge, the law should specify the effect of a transferee’s notice or knowledge, including its impact on the claims as to which a transferee does and does not take free (e.g., whether the notice or knowledge bars a transferee from IA status entirely or instead merely prevents an IA from taking free only of proprietary claims that are the subject of the notice or knowledge).~~

~~(Principle 10) – shelter principle~~

~~[The law should provide that] [A] [a person (Client)] n initial transferee from an innocent acquirer and any subsequent transferee should have the same protection as the innocent acquirer from conflicting proprietary rights and the successful assertion of proprietary claims.~~

Principle 11: Application of Innocent Acquirer Rules to a Custody Relationship

~~[The law should provide that] A client that acquires a proprietary right in a digital asset through a custody relationship with a Custodian would take custodian~~

~~(a) takes its right free of conflicting proprietary claims, or~~

~~(b) that no rights may be asserted against the Client client based on a conflicting proprietary claim, or~~

~~(c) both, (a) and (b),~~

subject to substantially the same conditions that apply under the IAR innocent acquirer rule (but without a requirement that the Client client obtain control over the digital asset).

~~(11) — The law should provide that that the digital assets law and the rights of an IA thereunder do not impair or affect the rights of any person under an adopting State's laws relating to intellectual property.²~~

~~(12) — The law may, consistent with these Principles, address other issues relating to proprietary rights in digital assets.~~

SECTION ~~IV~~**V**: CUSTODY

Principle ~~6~~**12**: Custody

(1) This Principle applies when, in the course of a business and pursuant to an agreement, a person (~~called a "custodian"~~) holds a digital asset on behalf of a client in a manner that the digital asset so held is not available to the creditors of the custodian if the custodian enters into any insolvency ~~proceedings, proceeding, [and that the custodian owes duties to the client]~~. The agreement between the custodian and the client is ~~called a "custody agreement."~~

~~-(2) In this Principle—Section~~

~~——(a) when/where a digital asset is [considered] fungible, a reference to "a digital asset" or "the digital asset ~~must be construed as~~" includes a reference to a certain quantity of digital assets of an identical type to that digital asset;~~

~~——(~~

~~[(b) a person (including a custodian) holds a digital asset if –~~

~~——(i) that person/custodian controls the digital asset, or~~

~~——(ii) another custodian provides custody services to that person/custodian in relation to the digital asset~~;~~]~~

(3) An agreement for services to a client in relation to a digital asset is a custody agreement if

~~——(a) the service is provided in the course of the service provider's business~~;~~~~

~~——(b) the service provider is obliged to obtain (if this is not yet the case) and to hold the digital asset on behalf of the client~~;~~ and~~

~~——(c) the client does not have the exclusive ability to change the control of the digital asset;~~

unless it is clear from the wording of the agreement that the client does not have the protection described in ~~(9~~Principle 14(3)~~)~~ below.

~~(4~~Principle 13: Duties owed by a Custodian to its Client

~~(1) A custodian owes the following duties to its client:~~

~~——(a) the custodian is not authorised to [dispose of] [transfer] ~~that~~the digital asset, or use it for its own benefit, except to the extent permitted by the client and the law;~~

²~~—— The substance of this provision may be relocated to a section of the Principles dealing with general provisions. The Working Group also may wish to consider whether the Principles should invite States to consider other potential conflicts between a digital assets law and other laws.~~

—(b) the custodian is obliged to comply with any instructions given by the client to [dispose of] [transfer] ~~that the digital~~ asset ~~on the client's instructions~~; and

—(c) the custodian owes duties to the client in relation to the safe-keeping of ~~that the digital~~ asset or of a pool of such digital assets ~~which includes it~~.

(52) Unless ~~disallowed~~prohibited by a provision in the custody agreement [or by law], a custodian may hold fungible digital assets of ~~several~~two or more of its clients in an undivided pool.

(63) The duties owed by a custodian to its client may include:

—(a) the duty to maintain a record of the digital assets it holds for each client;

—(b) the duty at all times to securely and effectively hold digital assets in accordance with the records it maintains for its clients;

—(c) the duty to acquire digital assets promptly if this is necessary to satisfy the duty under (b);

—(d) the duty to keep digital assets held for the account of clients separate from assets held for its own account;

—(e) subject to any right granted to the custodian or to another person, the duty to pass all the benefits ~~issuing~~arising from a digital asset to the client for whom it holds that asset.

(7) Principle 14: Other Aspects of Custodianship

(1) The relationship between the custodian and the client may exist notwithstanding that a third person has ~~rights~~any right against the client in relation to the digital asset.

(82) A digital asset held by a custodian for a client

—(a) may be subject to a security right granted to that custodian by the client;

—(b) may be subject to a security right in favour of that custodian arising by operation of law.

~~(9) — If a custodian enters insolvency proceedings, a digital asset that it holds for the account of a client does not form part of that custodian's assets for distribution to its creditors.~~

(10) — When Principle 15: Sub-Custody

(1) Where authorised by a client or by law, a custodian may hold a digital asset for that client through another custodian (a "sub-custodian") if the sub-custodian is bound by the duties ~~stated~~set out in ~~(4) and (6)~~Principle 13 above.

~~(11) — When~~2) Where a custodian holds a digital asset for a client through another custodian:

—(a) If the sub-custodian enters into any insolvency ~~proceedings~~proceeding, the custodian must seek to obtain control of the digital asset from the insolvency administrator ~~of the insolvency~~;

—(b) If the custodian enters into any insolvency ~~proceedings~~proceeding, the rights it has against the sub-custodian in respect of the digital assets held as custodian for its clients do not form part of the custodian's assets for distribution to its creditors.

SECTION V: SECURITY VI: COLLATERAL TRANSACTIONS

Principle 7: Security 16: Collateral Transactions: General

~~(1) Secured transaction law applies to digital assets~~

~~The law should establish simple and sound rules in relation to collateral transactions involving digital assets~~

~~(2)(1) Digital assets are eligible to be collateral~~the subject of security rights.

~~(a) The secured transactions law should make it possible to use any digital assets as collateral.~~

~~(b)(a)~~ References in secured transactions laws to movable assets, personal property or any similar notion should be understood to include digital assets..]

~~(3) Distinct~~(2) The law should provide distinct rules ~~for different categories of digital assets apply to some aspects of~~in relation to creation of a security right and effectiveness against third parties

~~(a) The law should provide for one or more types of~~ for digital assets where their individual features and characteristics are such that the application of specific rules, distinct from those applying to intangible assets generally, would be necessary. ~~If the functions and features of various digital assets are substantially the same, a single type may suffice.~~

~~(b)(3)~~ Separation of digital assets from the general category of intangible assets would enable the State to consider specific approaches, such as third-party effectiveness by control.

~~(4) Security rights may be~~ _____ If a digital asset is linked to another asset, the legal effect on that other asset of the creation of a security right in that digital asset is a matter for the law and is not covered in these principles.

~~(5) If a digital asset is linked to another asset, the legal effect on that other asset of a security right in that digital asset being~~ made effective against third parties ~~by control is a matter for the law and is not covered in these principles.~~

(a) Principle 17: Control as a Method of Achieving Third Party Effectiveness

~~(1)~~ The law should ~~recognize~~provide for control as a mechanism to achieve third-party effectiveness of a security right in a digital asset.

~~(b)(2)~~ The requirements to achieve third-party effectiveness of a security right by control ~~should reflect~~may be:

~~(i)~~ those set out in Principle ~~X-6~~ (1)(a)(i) and (iii) ("positive control") or

~~(c)(ii)~~ that set out in Principle 6 (1)(a)(ii) (“negative control”) or

~~(iii)~~ those set out in Principle 6(1)(a)(i), (ii) and (iii) (“negative and positive control”).

(3) It is sufficient to satisfy the requirement of control if

(a) a custodian holds a digital asset on behalf of the secured creditor or

(b) a custodian is itself the secured creditor.

(4) The law should specify which (if any) of its existing special rules govern the third-party effectiveness of security rights in digital assets~~-.]~~

~~(5)~~ **Principle 18: Priority of security rights**~~Security Rights in digital assets made effective against third parties by control~~**Digital Assets**

~~(a)(1)~~ [The law should provide that ~~where~~ [W][w]here a security right in a digital asset has ~~obtained~~been made effective against third-party effectiveness parties by through control, the security right should have priority over a security right in the digital asset of a person ~~whothat~~ does not have control.

~~(b)(2)~~ Where more than one security right in the same digital asset has been made effective against third parties by control, priority should be based on the temporal order of obtaining control.

~~(6)~~ **Principle 19: Effective Enforcement of Security Rights in Digital Assets**

~~(a)(1)~~ The law should allow secured creditors to enforce their security rights in digital assets in a simple and quick manner. To that end, the law should not impose undue formalities or requirements that would make the enforcement process cumbersome.

~~(b)(2)~~ The interests of third parties, particularly custodians should be protected.

~~(c)(3)~~ Given the nature of digital assets, the law should recognize that enforcement actions may be taken automatically and that some requirements for enforcement, such as to provide a notification of disposal, should not apply.

~~(7)~~ Insolvency law should recognize the third-party effectiveness and priority of security rights established prior to the opening of insolvency proceedings

SECTION VI: PRIVATE INTERNATIONAL LAW

Principle 8: Private International Law

~~(1)~~ Concerning the law governing acquisition and disposition (including collateralisation) of digital assets amongst adherents to the relevant digital asset platform:

~~(a)~~ This law can be chosen by participants.

~~————— (i) — If there is no explicit choice, it is possible to revert to principles of interpretation and implicit choice. This may be particularly likely in a scenario where there are no contractual 'by laws' to the platform code.~~

~~————— (ii) — If this does not yield a result, fallback rules (such as law of the transferor, law of the transferee, etc) can determine the applicable law.~~

~~————— (b) — It is irrelevant that participants may not intend to have their transactions governed by any law at all and prefer relying on the code alone. If it comes to proceedings the court can always determine the applicable law in any case. Whether decisions would be enforceable, in practice (relevant in particular where assets are held and transferred within an un-permissioned global network), is a different question.~~

~~(2) — Concerning the different laws that can be relevant in an insolvency scenario:~~

~~————— (a) — General principle: the law of the jurisdiction of the territory in which the insolvent is located (COMI and similar criteria; residence and similar criteria) applies to the proceedings.~~

~~————— (b) — Tensions arise where applicable insolvency law is not the same law as the law (code?) applicable to acquisitions and dispositions on the platform. In this scenario, there is a general risk that a given transaction is regarded as final under the law (code?) applicable to acquisition and disposition (see above, A.); while the transaction, following the rules of the applicable insolvency law of the forum, could be avoided and the relevant asset would be subject to a claw back (disregarding here any difficulties of enforcement).~~

~~————— (i) — Without clear understanding (principle? Rule?) determining whether one or the other prevails, there will be no legal certainty regarding this issue.~~

~~————— (ii) — A rule favouring the law of the insolvency and its avoidance powers may disrupt the integrity of the functioning of the digital asset platform, especially if there were participants located in different jurisdictions. Certainty of acquisition on the basis of the platform's code and rules, if any, would not be guaranteed if a claw back was possible (again, the de facto difficulty of enforcing such a claw back is disregarded here).~~

~~————— (iii) — A rule favouring the law/code applicable to acquisitions and dispositions on that platform leaves the internal functioning of the platform intact. However, it may hollow out insolvency principles of the law of the forum of any insolvency of a participant, and lead, as a consequence, to unequal treatment of creditors.~~

~~————— (iv) — This conflict could be removed or softened by~~

~~————— 1. — aligning the rules of acquisition and disposition within the digital asset platform with those principles underlying avoidance, i.e. making avoidance and claw back possible (that is a substantive question, not private international law);~~

~~————— 2. — ...~~

~~(3) — 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:~~

~~—— (a) The law applicable to the underlying asset is determined following standard rules (*lex rei sitae*, *lex societatis*, *lex contractus*, etc.)~~

~~—— (b) The law applicable to the digital representation of the asset is described under A. and B., above.~~

~~—— (c) Non-native digital assets require an interface, such as an intermediary organisation creating the digital token.~~

SECTION VII: ENFORCEMENT

SECTION VIII: INSOLVENCY

Principle [20]: Effect of Insolvency on Proprietary [and Security] Rights in Digital Assets

~~[(1) The law should provide that rights and interests that have become effective against third parties under Principle 9 (innocent acquirer rule) or Principle 17 (control as a method of third party effectiveness of security rights) are effective against the insolvency administrator and creditors in any insolvency proceeding.]~~

~~(2) Paragraph (1) does not affect the application of any substantive or procedural rule of law applicable by virtue of an insolvency proceeding, such as any rule relating to:~~

~~(a) the ranking of categories of claims;~~

~~(b) the avoidance of a transaction as a preference or a transfer in fraud of creditors; or~~

~~(c) the enforcement of rights to property that is under the control or supervision of the insolvency administrator.]~~

~~[(1) The law should specify that where a security right in a digital asset is effective against third parties under the applicable secured transactions law, it will be recognized as effective against the insolvency administrator and competing claimants in any insolvency proceeding]~~

~~(2) The priority of a security right in digital assets established under the applicable law should be the same, except if, pursuant to insolvency law, another claim is given priority.~~

~~(3) Secured creditors should be entitled to claim the value of encumbered digital assets.~~