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**GOVERNING COUNCIL**  
**101<sup>st</sup> session**  
**Rome, 8 - 10 June 2022**

UNIDROIT 2022  
C.D. (101) 7  
Original: English  
May 2022

**Item No. 5 on the agenda: Ongoing legislative activities**

**(c) 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.4 - Doc. 3</u></a> <a href="#"><u>UNIDROIT 2022 - Study LXXXII - W.G.5 - Doc. 4</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 100<sup>th</sup> session of the Governing Council. As will be apparent from this summary report, substantial progress has been made towards the preparation of a set of Principles, Commentary 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 in this document.

**II. BACKGROUND**

2. The UNIDROIT Governing Council, at its 99<sup>th</sup> session in September 2020, approved the inclusion of a project on Digital Assets and Private Law in the UNIDROIT Work Programme for the 2020-2022 triennium at a high priority. 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>1</sup> (see Section on Future Steps below).

### **III. THE WORKING GROUP**

#### **A. Update regarding the Composition of the Working Group**

3. 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. For a full and updated list of the composition of the Working Group Members and Observers, the dedicated page on UNIDROIT's website may be consulted.<sup>2</sup>

4. 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.

5. Finally, UNIDROIT has also invited 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 associations have joined as observers of the DAPL Working Group since September 2021:

- Italian Association of Fintech & Insurtech (AssoFintech)
- X Reality Safety Initiative (XRSI)

#### **B. Update regarding Progress on the Future Principles and Legislative Guidance**

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

6. While intersessional work was carried out in the form of a series of Subgroup meetings up until the fourth session of the Working Group, in view of the development of the project and the state of advancement of the draft instrument, and in order to facilitate the co-ordination of the drafting and refinement of the various principles, it was decided by the Working Group at its fourth session to establish a Drafting Committee to carry out the intersessional work.<sup>3</sup> From December 2021 to April 2022, the Drafting Committee has met a total of seven times: 14 December 2021, 11 January 2022, 3 February 2022, 10 February 2022, 25 March 2022, 6 April 2022, and 25 April 2022.

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<sup>1</sup> [C.D. \(99\) B Misc. 2, paras. 7 and 8.](#)

<sup>2</sup> <https://www.unidroit.org/work-in-progress/digital-assets-and-private-law/>.

<sup>3</sup> Ms. Louise Gullifer serves as Chair of the Drafting Committee and the members are: Mr. Marek Dubovec, Mr. David Fox, Mr. Matthias Haentjens, Mr. Charles Mooney, Jr., Ms. Elisabeth Noble, Mr. Philipp Paech, and Mr. Steven Weise.

**Working Group Fourth Session (2-4 November 2021)**

7. The fourth session of the Working Group took place in a hybrid fashion between 2 and 4 November 2021. The Working Group was attended by 56 participants, comprising of (i) 15 Working Group Members, (ii) 32 observers from international, regional, and intergovernmental organisations, industry, government, and academia, including UNIDROIT Governing Council Members Mr José Antonio Moreno Rodríguez and Ms Monika Pauknerová, and (iii) 9 members of the UNIDROIT Secretariat. The Summary Report of the Working Group's fourth session is available in document Study [LXXXII – W.G.4 – Doc. 3](#). The meeting was dedicated to presentations given by the various Subgroups and follow-up discussions.

8. Subgroup 1 presented the revised draft principle on custody of digital assets. The Working Group discussed the issues of client protection, correlation with control and transfer principles, and the sub-custody regime. The members paid attention to the use of the term 'holding' as opposed to 'control' and discussed the proprietary rights involved in different models of custodial arrangements.

9. Subgroup 2 presented the redrafted principles on Scope, Definitions, and Control. The Working Group discussed the draft definition of "digital assets". Subgroup 2 further presented the revised principle on transfer, elaborating on proprietary rights, the shelter principle, good faith, and innocent acquirer rules related to it. It was noted that the principle highlighted that some issues were left to the applicable law and were not dealt with under these Principles. The Working Group agreed that the drafting style should be harmonised across all the various Principles as there was a considerable difference between the drafting style used by the different Subgroups.

10. Subgroup 3 presented the refined principles on secured transactions and third-party effectiveness, highlighting their essence being common with all three global instruments in the area of secured transactions law. The Working Group noted the importance of aligning the principles regarding transfer and secured transactions. Principle F on effective enforcement of security rights in digital assets was explained to the Group as a new principle developed in coordination with the UNIDROIT Best Practices on Enforcement Project. A presentation was given to the Working Group reporting on preliminary research on certain aspects pertaining to the valuation of digital assets.

11. Subgroup 4 presented their progress on the taxonomy of digital assets, particularly, the definition of a digital asset and two categories of digital assets. Subgroup 4 presented a series of four draft rules regarding applicable law and enforcement in the context of insolvency. It was agreed by the Working Group to expand the work on the mentioned matters. There was a consensus that further inter-sessional work would proceed with a number of Drafting Committee sessions.

**Meetings of the Drafting Committee (December 2021-February 2022)**

12. As noted earlier, upon the Working Group's fourth session, beginning in 2021 a series of Drafting Committee sessions took place:

13. Drafting Committee Session #1 took place on 14 December 2021. The session was dedicated to the organisation and allocation of work for the upcoming Drafting Committee sessions. The Committee agreed on the need to improve the consistency of the present Principles and the Commentary. The structure of the Principles was discussed together with the Scope and Definitions. It was agreed on the necessity to provide an Introduction to the Principles to better clarify them for a larger audience.

14. Drafting Committee #2 took place on 11 January 2022. The updated structure of the Principles was agreed on with a number of long principles being split into shorter ones. The Committee discussed the progress regarding the Introductory section, the newly drafted 'linked' assets principle and the Private International Law principle. The Committee agreed on keeping the Principles neutral in terms of technology and legal systems' differences.

15. Drafting Committee Session #3 took place on 3 February 2022. The session was dedicated to the discussion of the substance and structure of the principle on Private International Law and approved party autonomy as the main connecting factor. The Drafting Committee also agreed on the need to prepare a special set of questions for the Steering Committee Members, in particular, with a view to enriching the Commentary.

16. Drafting Committee Session #4 took place on 10 February 2022. The session was primarily dedicated to Principle 4 on the Assets 'Linked' to the Other Assets, such as its nature, scope and, especially, correlation with the 'other' law. The newly redrafted Principle 3 was presented for discussion by the Chair of the Drafting Committee. The Committee also agreed on the preparatory measures for the upcoming Working Group session.

#### ***Working Group Fifth Session (7-9 March 2022)***

17. The fifth session of the Working Group took place in a hybrid format (in person and via videoconference) between 7 and 9 March 2022. The Working Group was attended by 75 participants, comprising of (i) 15 Working Group Members, (ii) 49 observers from international, regional, and intergovernmental organisations, industry, government, and academia, including UNIDROIT Governing Council Members Mr Niklaus D. Meier, Mr Attila Menyhárd, Mr José Antonio Moreno Rodríguez, and Ms Monika Pauknerová, and (iii) 11 members of the UNIDROIT Secretariat. The draft Summary Report of the Working Group's fifth session is available in document [Study LXXXII – W.G.5 – Doc. 4](#). The meeting was dedicated to the discussion of the results of the intersessional work carried out by the Drafting Committee.

18. The Drafting Committee Chair presented the draft Introduction, emphasising that it was still in draft form and may be extended upon. There was broad consensus in the Working Group regarding the inclusion of the Introduction. In terms of changes to the structure of the Principles, several principles had been split into new principles, and a number of broader principles were shifted to the General Principles. Two entirely new principles were developed: Principle 4 on "linked assets" and Principle 5 on conflict of laws. A number of existing principles were redrafted in order to reflect the decisions made by the fourth session of the Working Group and to achieve a more consistent style.

19. A presentation was given on Principle 5, emphasising that the overriding policy goals of this Principle should be to: (1) provide legal certainty to parties involved in cross-jurisdictional transactions; and (2) keeping one law applicable to all aspects of the property of digital assets of the same issue. The Conflict of Laws principle received a substantial number of comments and suggestions for improvement and, thus, was redrafted and presented for discussion for further refinement of the waterfall structure and connecting factors.

20. The Working Group also discussed the progress of Principles 6-15, with particular focus on drafting, cross-referencing and issues relating to key terms and concepts. Subgroup 3 Chair provided an update concerning enforcement, noting that the Digital Assets Project was coordinating with the Enforcement Project in this regard.

21. The Working Group also discussed the approach for dealing with the examples provided in the Commentary to the Principles and agreed on the necessity of improving the consistency of the Commentary overall. A number of Drafting Committee sessions and a joint workshop between the Digital Assets Project and the Best Practices for Effective Enforcement Project were planned to take place before the next Working Group session.

#### ***Meetings of the Drafting Committee (March 2022 – April 2022)***

22. Drafting Committee Session #5 took place on 25 March 2022. The session was dedicated to the discussion of the outcomes of the fifth Working Group session and the allocation of future work before the Governing Council meeting and upcoming Drafting Committee sessions. The consistency

of the Principles was discussed together with redrafted Principle 5 on Conflict of Laws, its structure and, particularly, the bottom of the waterfall, and newly drafted Principle 5 (bis) and Principle 5 (quarter).

23. Drafting Committee Session #6 took place on 8 April 2022. The session was focused on the refinement of the following Principles: 1 on Scope, 2 on Definitions, 3 on General Principles, 6 on Definition of Control, 7 on Identification of a Person in Control of a Digital Asset and 9 on the Innocent Acquisition Rule. Future work was allocated among the Members of the Drafting Committee in relation to Principles 2, 3, 6 and 7 and revision of the accompanying Commentary.

24. Drafting Committee #7 took place on 25 April 2022 and focused on discussions of a newly revised draft of Principle 5, amendments to Principle 2, Principle 3, Principle 6 and Principle 7 and updates to the Commentary.

#### **IV. STRUCTURE OF THE FUTURE PRINCIPLES AND LEGISLATIVE GUIDANCE ON DAPL**

25. 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 fifth session, the Working Group considered the latest version of the Master Copy of the Principles and Comments (with Questions), which is in document Study LXXXII – W.G.5 – Doc. 3. The Master Copy of the Principles and Comments is structured as follows:

##### **INTRODUCTION**

##### **SECTION I: SCOPE AND DEFINITIONS**

- Principle 1: Scope
- Principle 2: Definitions
- Principle 3: General principles

##### **SECTION II: PRIVATE INTERNATIONAL LAW**

- Principle 4: Conflict of Laws

##### **SECTION III: CONTROL**

- Principle 5: Definition of Control
- Principle 6: Identification of a Person in Control of a Digital Asset

##### **SECTION IV: TRANSFER**

- Principle 7: Acquisition and Disposition of Digital Assets
- Principle 8: Innocent Acquisition Rule
- Principle 9: Shelter principle
- Principle 10: Application of Innocent Acquisition Rules to a Custody Relationship

##### **SECTION V: CUSTODY**

- Principle 11: Custody
- Principle 12: Duties owed by a Custodian to its Client
- Principle 13: Other Aspects of Custodianship
- Principle 14: Insolvency of custodian

##### **SECTION VI: COLLATERAL TRANSACTIONS**

- Principle 15: Secured Transactions: General
- Principle 16: Control as a Method of Achieving Third-Party Effectiveness
- Principle 17: Priority of Security Rights in Digital Assets

Principle 18: Effective Enforcement of Security Rights in Digital Assets

## **SECTION VII: ENFORCEMENT**

### **SECTION VIII: INSOLVENCY**

Principle [19]: Effect of Insolvency on Proprietary [and Security] Rights in Digital Assets

## **V. UPDATE REGARDING THE STEERING COMMITTEE**

26. 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.

27. 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. The Steering Committee aims to (i) ensure all sensitivities and domestic realities are considered, (ii) increase transparency, and (iii) provide valuable context-specific feedback to the Working Group. UNIDROIT has invited its Member States to nominate experts to the Steering Committee, and twenty-seven countries and one Regional Economic Integration Organisation have done so to date.

28. The first distribution of documents to the Steering Committee to solicit feedback on the current draft Principles has taken place. The Secretariat received responses from 24 experts from 14 countries and one Regional Economic Integration Organisation. Overall, feedback on the Commentary was positive, with experts providing constructive input on a number of aspects of the Principles, along with examples and illustrations of digital assets in their jurisdictions to which the Principles should apply.

29. Many Steering Committee members emphasised the importance of ensuring that the Principles maintain a technology and business model neutral approach to accommodate for future innovations. While most Steering Committee members expressed support for the definitions provided in the Principles, some provided constructive feedback on how key concepts could be better defined to accommodate the various types of digital assets currently being used in transactions in their respective jurisdictions. Steering Committee members further suggested a number of drafting changes to improve the overall readability of the Principles.

30. Further, the Working Group was provided with several examples of linked digital assets and practices of digital asset valuation in insolvency proceedings as well as their opinions on what should be included in the content and scope of the enforcement principle. Views were provided on the connecting factors set out in Principle 4: Conflict of Laws (previously known as Principle 5), with some expressing reservations that the residual rule that the applicable law governing the digital asset should be determined by assessing the jurisdiction with the ‘strongest factual connection’.

## **VI. FUTURE STEPS**

31. Following the fifth session of the Working Group held on 7-9 March 2022, and the several meetings of the Drafting Committee, the draft Principles were further amended. The Governing Council will have an opportunity to review the current status of the draft Principles and Legislative Guidance at its 101<sup>st</sup> session in 2022.

32. As a side event of the 101<sup>st</sup> session for the Governing Council in June 2022, a Special Workshop will be held on 10 June 2022, between the DADL project and the UNIDROIT Best Practice on

Effective Enforcement project. The Special Workshop aims to identify the key issues arising out of enforcement of digital assets that can be mitigated by means of private law, including the necessity of enforcing security rights in digital assets used as collateral and digital assets held in custody. It is envisaged that further Special Workshops will be organised on an ad hoc basis, according to the needs of the Working Group.

33. The sixth Working Group session is due to take place between 31 August to 2 September 2022. It is anticipated that intersessional work will continue in the form of additional meetings of the Drafting Committee, and possibly the Subgroups as well. Broad consultations will be undertaken throughout 2022 before the instrument is finalised and proposed for adoption by the Governing Council in 2023.

34. 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>.

## **VII. ACTION TO BE TAKEN**

35. *The Governing Council is respectfully requested to take note of the DAPL project's progress and consider the current draft Principles and Legislative Guidance and Commentary, and to provide further support for the extension of the Project as High Priority into the 2023-2025 Work Programme, with the aim to undertake broader consultations and continue to carry out intensive discussion within the Drafting Committee and the Working Group on the guidance document with explanatory notes, before the instrument is finalised and proposed for adoption by the Governing Council in 2023. The Secretariat would provide an update to the Governing Council regarding the project's progress at its next session.*