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Digital Assets and Private Law Working Group

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

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SUMMARY REPORT
OF THE FIFTH SESSION

(Hybrid, 7 – 9 March 2022)

TABLE OF CONTENTS

1. The fifth session of the Digital Assets and Private Law (DAPL) Working Group ("Working Group" or "WG") to prepare the Principles and Legislative Guidance on Digital Assets and Private Law ("Principles") took place in a hybrid manner both 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, and (iii) 11 members of the UNIDROIT Secretariat (the list of participants is available at Annex II).

Item 1: Opening of the session and welcome by the Chair of the Working Group and the UNIDROIT Secretary-General

2. The *Chair* of the Working Group and Member of the UNIDROIT Governing Council *Hideki Kanda* ("Chair") welcomed all participants to the fifth session.

3. The *Chair* declared the session open.

4. The *Secretary-General* highlighted the intense intersessional work carried out by the Drafting Committee ("DC") under the leadership of the Drafting Committee Chair ("DC Chair") Louise Gullifer and thanked the members for their commitment. He remarked that the result of the discussions at the Working Group's fifth session would be to present the first rough draft of the Principles to the Governing Council at its upcoming session in June 2022, after which it was envisaged that the Drafting Committee would continue its work.

5. The *Secretary-General* further noted that the Steering Committee on Digital Assets and Private Law ("Steering Committee" or "SC") – composed of representatives nominated by almost 30 States – was also expected to provide feedback on the draft of the Principles to the experts of this Working Group.

Item 2: Adoption of the agenda of the meeting and organisation of the session

6. The Working Group adopted the draft Agenda as proposed (*UNIDROIT 2022 – Study LXXXII – W.G.5 – Doc. 1*, available at Annex I).

Item 3: Consideration of substantive issues

a) Master Copy of the Black Letter Principles (Comparison) (Study LXXXII – W.G.5 – Doc. 2)

b) Master Copy of the Introduction, Principles, and Commentary (with Questions) (Study LXXXII – W.G.5 – Doc. 3)

7. The *Chair* expressed thanks to the Drafting Committee members and to the *DC Chair Louise Gullifer* and invited her to present the DC's work which was carried out over four sessions held in January and February 2022.

8. The *DC Chair Louise Gullifer* provided a general overview of the DC's work. In terms of changes to the structure of the Principles, she noted that the conflict of laws section had been moved up to the beginning (now Section II), and that several principles had been split into new principles.

9. In addition, a number of principles considered to be of a broader relevance were shifted to Principle 3, now called General Principles. She also noted the addition of two entirely new principles: Principle 4 on "linked assets" and Principle 5 on conflict of laws.

10. With regard to existing principles, she noted that a number of them were redrafted in order to reflect the decisions made by the Working Group at the previous session, and also to achieve a more consistent style overall.

11. In terms of the commentary, she noted there were few changes made to what was already drafted by the time of the last Working Group session, with the major exceptions of new commentary to Principle 1 and Principle 3, and an entirely new Principle 4. She noted the addition of cross-referencing in the Commentary to bring it in line with the structure and references in the new document.

12. The *DC Chair* noted that this version of the Master Copy of the Principles and Commentary was still a work in progress, and she suggested that it would be more productive for the Working Group to focus on a discussion of substantive points, rather than editorial and formatting aspects of the document.

INTRODUCTION

13. The *DC Chair Louise Gullifer* presented the draft Introduction, emphasising that it was still in draft form and may be extended upon, subject to any objections from the WG. Comments from the WG were invited, in particular, regarding whether any additional key points ought to be included, or whether any points included ought to be left out.

14. The *DC member and representative of the ALI* who drafted the Introduction noted that it was designed to be a guiding overview to contextualise the document, provide a rationale behind the Principles, and the scope thereof.

15. The *Chair* noted that there was a consensus in the Working Group regarding the inclusion of the Introduction.

16. *Sub-Group 3 Chair Marek Dubovec* suggested that a sentence could be included in the Introduction regarding the relationship between law covering these Principles and regulation, but not about the relationship between the Principles and general law, as that was complicated.

Section I: SCOPE AND DEFINITIONS

PRINCIPLE 1: SCOPE

17. The *representative of the ALI* commented that the words in square brackets, namely Scope "of the principles" and "transactions in" should remain, as the use of "transactions in" emphasised that the guide was focused on core transactions in commerce and not a general law on digital assets for all purposes.

18. *Sub-Group Co-Chair Matthias Haentjens* pointed out that the Principles also covered static situations (e.g. custody).

19. The *Drafting Committee Chair* emphasised that the most important words were "private law relating to" and to that end, it did not matter whether the scope was placed after Principle 2 or not.

20. The *Chair* remarked that while it may be logical that Principle 2 should come first from a readability perspective, the current formulation made sense from a drafting perspective.

PRINCIPLE 2: DEFINITIONS

21. The *Drafting Committee Chair Louise Gullifer* presented Principle 2 and invited feedback on whether the defined term "digital asset" should be amended to "controllable digital asset". She further specified that while the latter may be a clearer definition (i.e. that these Principles do not relate to anything that could be described as a digital asset but to a digital asset which is capable of being subject to control), it may undermine the overall readability of the document.

22. The *DC Chair* then invited comments as to whether any other terms should be defined in the document (**Question 6 –** What other key terms ought to be defined in this principle, e.g. custody, transfer, fungibility, etc.?)

23. *Sub-Group 2 Co-Chair Chuck Mooney* raised the idea of whether the term "digital asset" should be changed to one of the following: "covered asset", "relevant asset", "qualifying asset" or "modifiable asset" in order to better signal the type of assets covered by the Principles.

24. Several *WG members* argued against any drafting deviation from the term "digital asset" on the basis of the following points: first, the average reader was likely to understand what was meant by a "digital asset", a term which has largely overtaken the previously used term "crypto assets"; and second, retaining the term "digital asset" would facilitate UNIDROIT's ability to market the Principles to jurisdictions and increase the likelihood of States adopting the Principles.

25. A *member of the Secretariat* further commented that the concept of control was already included in the definition of "digital asset", and it was therefore redundant to amend the definition to "controllable digital assets".

26. The *Chair* concluded that the Working Group members were in favour of removing the word "controllable".

27. A *representative of the ELI* remarked that Principle 2(3) regarding the definition of "Digital Assets Law" as meaning "any part of a State's law relating to digital assets which fell within the scope of these principles" may overlap with other Principles such as Principle 4(1) which specified that the legal effect of digital assets 'linked' to other assets was a matter for "the law".

28. The *DC Chair* clarified that the goal was to delineate between the State's law that came from the Principles and the State's law that did not as a technique of definition to delineate the scope of the Principles.

29. Several *WG members* remarked that the commentary should further explain the relationship between Principles 2(3) and 4(1) to show there is no overlap nor contradiction. *Sub-Group 2 Co-Chair Chuck Mooney* suggested that concrete examples could be provided in the commentary to illustrate the delineation.

30. The *DC Chair* remarked that Principle 2(3) and (4) referred to the scope of the Principles within a State's law. She welcomed the WG's views on whether the Principles needed to define "the law other than digital assets law" (i.e. the part of the State's law that was not digital assets law). She noted that the phrase was used within some of the Principles, for example, in Principle 3(3).

31. The Working Group discussed the necessity for further elaborating on the terms "digital assets law", "other law", and "law other than digital assets law".

32. The *representative of the ALI* encouraged the Working Group to consider whether the term "digital assets law" could be changed to "Principles law". Both the *DC Chair* and *other WG members* expressed an interest in further exploring the mechanics of the proposed amendment.

33. The *Chair* thanked the WG for their comments, concluding that the Drafting Committee would consider them when considering any further changes to Principle 2.

34. The *Chair* invited comments with regard to **Question 6** in the Master Copy as to what other key terms need to be defined (e.g. custody, transfer).

35. The *DC Chair* invited the Working Group to provide feedback regarding any terms which they deemed to be imprecise or lacking clarity, and whether they thought the term ought to be defined or further explained in the commentary, perhaps with illustrations. In particular, she encouraged feedback from the technology experts with regard to technological terms or terms that concerned a factual situation rather than being legal terms.

36. The Working Group discussed the key concept of control and whether it merited its own definition in Principle 2, in addition to Principle 6: Definition of Control.

37. The *representative of the ALI* suggested that Principle 2 could include a short section containing cross-references to other Principles that contained definitions. There could be a sub-para (5) indicating "other terms are defined as follows", with appropriate cross-references (e.g. control is defined in Principle 6). In this manner, Principle 2 would operate as an intermediary to point out where other key terms were defined. The *DC Chair* welcomed this proposal.

38. The WG agreed to add cross-referencing from Principle 2 to other parts of the draft Principles containing definitions (e.g. Principle 6 on Control, Section V: Custody, etc.)

PRINCIPLE 3: GENERAL PRINCIPLES

39. The *Drafting Committee Chair Louise Gullifer* presented Principle 3. She specified that 3(1) was very important as it underpinned all other Principles. Principle 3(2) was aimed at making it clear that proprietary rights meant whatever equivalent definitions of the same meaning existed in other various legal cultures. Principle 3(3) aimed at clarifying that these Principles did not deal with every single proprietary aspect of control and transfer, and noted that the list from (a) to (g) was not an exclusive list, but was merely indicative.

40. The *DC Chair* remarked that Principle 3(3) concerned the interaction between digital assets law and Principles law and the rest of the legal system, and she queried whether more was required in the commentary. She further noted this was also mentioned in section two of the introduction. The *DC Chair* queried whether more commentary and guidance were required for this Principle.

41. *Sub-Group 2 Co-Chair Matthias Haentjens* drew attention to **Question 9** which queried to what extent jurisdictions should specify which of the general principles or to what extent general principles would apply to digital assets as defined in the Principles. *(Does the Working Group agree with the commentary to Principle 2(4) and Principle 3(1) indicating that the law should specify which, if any, of the existing rules or standards of general application govern proprietary rights relating to digital assets?)*

42. *The representative of the ALI* proposed a concise generic statement that dealt with the interaction between the Principles and digital assets law in different jurisdictions. It was further suggested that this generic statement should be expressed as an operative Principle (perhaps using words similar to those used in the US Uniform Laws such as "to the extent displaced by this law"), which would then be supplemented with supporting commentary.

43. *The WG agreed it should be made explicit where the "Principles Law" took precedence over the "other Law" and where that "other Law" derogated from these Principles.*

44. *Sub-Group 4 Co-Chair Elisabeth Noble* queried whether Principle 4 ought to become Principle 3(4) to retain consistency in terms of overall structure. The *DC Chair* acknowledged this point and noted that the reason for potentially retaining Principle 4 as a separate Principle was because it contained a considerable amount of commentary providing examples of linked assets.

45. A *representative of UNCITRAL* queried whether Principle 3(3) was not also touching upon the question of scope, which would ordinarily say something along the lines of "these Principles do not do this", or "nothing in these Principles affects", etc. The Working Group discussed a possible rearrangement of Principle 3(3) into Principle 1 to reflect it being a scope provision.

46. The WG discussed the list provided at Principle 3(3) and whether the list was exhaustive or not. It was clarified that the list of not covered issues in Principle 3(3) was non-exhaustive but gave guidance to the audience on the matters not covered by these Principles.

47. *Sub-Group 3 Chair Marek Dubovec* remarked that the commentary could be amended to suggest a State might want to specify which general rules did not apply to DAs (rather than list all the rules which did).

PRINCIPLE 4: DIGITAL ASSETS 'LINKED' TO OTHER ASSETS

48. *Sub-Group 4 Co-Chair Elisabeth Noble* presented the newly drafted Principle 4. She noted that it referred to "digital assets linked to other assets", instead of the shorter "linked digital assets" or similar. The reason was because what were promoted as "linked assets" may in fact for all purposes under the law not be a linked asset. Hence the longer formulation to achieve greater neutrality.

49. Principle 4(1) provided that a legal effect will depend from case to case, and the issue of proprietary rights in the other assets was a matter to be determined in accordance with the law applicable to that asset, being the State's law. Principle 4(1) confirmed that the Principles cannot determine whether or not there was a proprietary effect achieved in practice because this varied from case to case and had to be determined in accordance with the law applicable to that asset.

50. Regarding the language to reflect the fact that the link may be encoded in the digital asset itself or may be established via other means such as system protocols or other supporting documentation, such as white papers, she welcomed the WG's views on how to describe potential sources of the link.

51. Regarding the language "appear to confer a right to another asset", she explained that whether or not there was indeed a right to another asset had to be determined, taking account of the facts and, ultimately, the law of the State. She welcomed the WG's input regarding how best to formulate the tail end of para. 1 to enhance clarity while also taking account of the definitions in Principle 2.

52. Regarding Principle 4(2), the State's law specified the requirements to be met, including as regards the form and content of the information to be provided for any legal effect to occur. She also noted the alternative formulation for discussion.

53. She further explained that the reason for including Principle 4(2) was to address a very real problem in the market that in many cases there was an insufficient evidentiary basis to determine the intentions of the parties. Accordingly, it was deemed to be helpful to include an express signal in the Principle that it would be helpful for States to include something in the law to specify what requirements were to be met in order for a legal effect to occur.

54. The *Chair* invited comments on how the Principle dealt with potential sources of the link, system protocol and other documentation.

55. A *member of the Secretariat* queried whether the following phrase ought to be included: "contractual right against the issuer", and if so, whether a distinction should be drawn between deposits and digital assets. He pointed to the examples of Tether and stablecoins which were not linked to the other asset but which gave the holder contractual rights and therefore it could be considered that these assets were not covered by Principle 4(1).

56. *Working Group Members* were broadly in agreement that the underlying policy intention of the Principle had merit. *The representative of the UCC* queried whether the current formulation of Principle 4 may be overly complicated. He proposed a simpler formulation, along the lines of: "a digital asset cannot give a right to another asset unless".

57. *Sub-Group 2 Co-Chair Chuck Mooney, Jr.* noted that the commentary could indicate that a State might want to include a regulatory requirement about information to be disclosed regarding the source of the link but discouraged including any additional specification of what the State's law ought to do to provide a legal effect.

58. *Sub-Group 4 Co-Chair Philipp Paech* suggested that the Principle should retain its current structure, emphasising the importance of retaining the substance of sub-paragraph 2.

59. The *DC Chair* confirmed that the Principle was intended to deal with tangible and intangible assets in response to a query from a *member of the Secretariat*.

60. An *expert observer* drew a distinction between two kinds of linked assets (those on the blockchain versus those off the blockchain) He cited the example where the initial purchase of the digital asset also confirmed the right to an underlying asset, but the purchaser can transfer the token independently of the underlying right, versus those tokens where whoever owned the token or held a token had a link to the underlying off-chain right. He queried whether illustration 4 captured that distinction.

61. *Sub-Group 4 Co-Chair Philipp Paech* remarked that this was reminiscent of the discussion underlying the Geneva Securities Convention, which was why the initial language used in paragraph 1 was "purports" to link to something.

62. The *Chair* captured the Working Group's consensus, noting that there were no substantive disagreements, and that it was a matter for further drafting to clearly reflect the underlying policy intention behind the Principle.

Section II: PRIVATE INTERNATIONAL LAW

PRINCIPLE 5: CONFLICT OF LAWS

63. *Sub-Group 4 Co-Chair Philipp Paech* gave a general overview of Principle 5, emphasising its applicability to cross-jurisdictional disputes.

64. The *Chair* invited the WG to provide their comments on Principle 5(1)(a). The WG discussed whether proprietary questions in respect of DAs, in particular their acquisition and disposition, should always be determined as a matter of the law [of a State].

65. *Sub-Group 2 Co-Chair Chuck Mooney, Jr* invited the WG to consider removing the brackets "[of a State]". *Other WG members* expressed concern that changes to the drafting of this section

could reinforce the perception that the DA community did not believe that the law applied to digital assets.

66. Further, the experts discussed the scope of Principle 5 and the possibility that it went beyond the reach of the Principles.

67. *Working Group Members* also raised queries regarding the following points:

(a) the expression in Principle 5(2)(a) "all digital assets of the same description";

(b) the timing of choice of applicable law referred to in Principle 5(2)(b); and

(c) persons making a choice of law.

68. In particular, the experts queried how to address those situations where there was no clear issuer of a DA in question or a network operator, or the location of the network was impossible to identify.

69. *Working Group Members* expressed concern that the second sentence in 5(2)(b) "should take measures incentivising such choice" was too vague, adding that there was no sanction if the issuer had not taken measures.

70. *Sub-Group 2 Co-Chair Matthias Haentjens* suggested that this could be moved to the commentary.

71. The WG had an extensive discussion on the waterfall structure of Principle 5(2). *WG members* made comments as to the following:

(a) The diverse types of DAs falling within the scope of the choice of law provisions, particularly NFTs and decentralised platforms;

(b) Interoperability issues re: Ethereum, Solana, wrapped Bitcoin and others;

(c) Connecting factors relevant for DAs, particularly, the network's operator, the issuer, the custodian; and

(d) The final fall-back provision if the previous sequence did not suffice for the choice of law.

72. *Sub-Group 4 Co-Chair Philipp Paech* presented Principle 5(3).

73. The *Chair* invited any further comments or queries in relation to Principle 5(3) to be forwarded to the *DC Chair* and the Secretariat.

74. The *Chair* suggested that an ad-hoc Zoom based workshop be organised and held before the next Working Group session to finalise Principle 5 on Conflict of Laws.

Redrafting of Principle 5

75. A *member of the Drafting Committee* presented the latest amendments to Principle 5, which were redrafted by the Drafting Committee after the first day of the Working Group's fifth session.

76. *WG members* presented their concerns on the re-drafted waterfall's connecting factors, commenting that they may not reflect current market practices.

77. The *Secretary-General* commented that Principle 5(10) read like commentary rather than a Principle and invited the Working Group to express its views on whether this sub-section should be included as commentary.

78. The *Chair* invited comments from the Working Group in relation to Principle 5 amendments.

79. An *expert* queried why this hierarchy had been chosen as it may not reflect current market practices.

80. A *member of the Drafting Committee* referred the WG to the ultimate fall-back rule.

81. A *number of experts* cautioned against making any Principles that were pegged to any specific network or location.

82. The *Chair* suggested that the WG should review basic concepts relating to Principle 5 in order to reach consensus as to the redrafting of the Principle.

83. A presentation was given on Principle 5 by *Sub-Group 4 Co-Chair Philipp Paech* 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) keep one law applicable to all aspects of the property of digital assets of the same issue.

84. The Working Group agreed on the overall waterfall structure of the Principle but raised concerns regarding the following:

(a) Connecting factors as relating to location, and any possible alternatives to location in the context of DLT operation;

(b) Scoping of the Conflict of Laws Principle, particularly its interaction with other law governing insolvency;

(c) The coverage of different types of digital assets by these Principles (i.e. would certain assets be excluded by these Principles);

(d) How issuers could be incentivised to make a choice of law for digital assets of the same issue;

(e) The inclusion of the choice of applicable law in the code of the digital assets as was mentioned in paragraph 5(2)(c) of the previous draft; and

(f) Whether the sequence of the waterfall structure should be reversed or rearranged.

85. Using the example of MakerDAO, a *WG expert* remarked that 50-75% of DAs would reach the bottom of the waterfall without clear guidance as to the applicable law. Further, many industry participants would not understand what was meant by the terminology of 'system' and 'operator'.

86. In response, *another expert* clarified that many digital assets such as CDC (Crypto.com) included an issuer and would therefore be able to find an applicable law using the waterfall structure.

87. The Working Group discussed potential solutions to the bottom of the waterfall structure such as the Principles themselves or some other law of a State based on those Principles.

88. Several *Working Group* members agreed that while there was no perfect solution, they encouraged the Drafting Committee to be more ambitious when exploring creative solutions to address the various issues raised.

89. A *member of the Drafting Committee* sought clarification on whether the concept behind an 'issuer' could be explored to replace the problematic term 'issuer'.

90. The *Chair* proposed that the commentary include two cases of CBDC (central bank digital currency) with lex monetae and digital assets held in custody where a different approach may be optimal. The *Chair* proposed that any other exceptions could also be added to the commentary.

Section III: CONTROL

PRINCIPLE 6: DEFINITION OF CONTROL

91. The *DC Chair* presented Principle 6, noting that the only changes made related to drafting and not substance. She invited the Working Group to contact her directly with any feedback regarding the drafting changes. In particular, she noted that it would be helpful to know whether further illustrations in the Commentary would be beneficial.

92. The *Working Group* discussed the interaction between the scope of Principle 6(3)(a) and 6(1)(a), remarking that the current drafting of the former was narrowing the latter.

93. The *representative of the UCC* queried whether some of the technical nuances regarding the ability to effectuate the change of control should be reflected in the text of the Principle itself or whether these matters should be expanded upon in the commentary. *Sub-Group 2 Co-Chair Chuck Mooney, Jr.* expressed support for broadening the drafting.

94. *The Working Group supported the broadening of the scope in the text, suggesting that any changes should be reflected in the text or expanded in the commentary, with a preference for it being in the text.*

95. *A representative of UNCITRAL* observed that an electronic transferable record within the meaning of the UNCITRAL Model Law on Electronic Transferable Records (MLETR) was a type of digital asset and that Principle 6 took a different approach to control to that taken in Article 11 of the MLETR. The Working Group was urged to ensure compatibility between the Principles and the MLETR.

96. A *Working Group observer* queried what the threshold would be between having exclusive control and non-exclusive control with regard to the exclusive ability to enjoy substantially the whole benefit. In particular, he pointed to the matter of the technical layers because there were cases where certain functions could be programmed for there to be certain conditions under which certain people might have to cooperate before burning an asset. In that case, what would be the threshold between having exclusive control and not having exclusive control.

97. The *DC Chair* agreed that the Drafting Committee required more assistance with the drafting of this Principle. In particular, she welcomed illustrations in writing which could help identity scenarios where it was thought the text did not work.

98. A *number of WG members* agreed that they would coordinate with the Drafting Committee in the following weeks to further refine this section.

PRINCIPLE 7: IDENTIFICATION OF A PERSON IN CONTROL OF A DIGITAL ASSET

99. The *DC Chair* presented Principle 7, noting again that, similar to Principle 6, the changes pertained to drafting and not substance. She further noted that Principle 7 was not a new principle, but rather the result of the splitting into two principles what was previously a single principle.

100. The *DC Chair* queried why Principle 7(1)(a) included square brackets surrounding the reference to Principle 6, paragraph 1(a)[(i) and (ii)].

101. *Sub-Group 2 Co-Chair Chuck Mooney, Jr.* explained that the next draft of the Principle should reflect that the ability to control did not need to be exclusive so long as the power to prevent others from benefiting from a digital asset remained exclusive.

102. A *representative of UNCITRAL* suggested that the Working Group refer to the UNCITRAL Model Law on Identity Management and Trust Services as it may be of assistance with the drafting of Principle 7.

Section IV: TRANSFER

PRINCIPLE 8: ACQUISITION AND DISPOSITION OF DIGITAL ASSETS

103. The *DC Chair* presented Principle 8, flagging that most of the Principle's previous substance had been moved to Principle 3.

104. The *Working Group* discussed the use of terms 'transferee' and 'acquirer' and whether a transfer was only relevant for innocent acquisition which required change of control.

105. A *Working Group member* emphasised the importance of the distinction between on and off chain, explaining that there are off-chain ways to transfer control in the manner that concerned the *Working Group* that would not necessarily show up on-chain.

106. The *representative of the UCC* offered to provide assistance to delineate the off-chain and on-chain transfers and layer one and layer two issues.

107. *The Working Group agreed that more commentary was needed on Principles 8 and 9 and welcomed any suggestions for a better term for 'derivative' digital assets.*

PRINCIPLE 9: INNOCENT ACQUIRER RULE

108. The *DC Chair* presented Principle 9, commenting that some of the Principle had been incorporated into Principle 3 and some of the wording has been re-drafted to improve clarity.

109. A *representative of the Law Commission of England and Wales* sought clarification regarding whether the innocent acquirer rule was intended to work with respect to off-chain transfers (i.e. one physically hands over control of the hardware wallet, but there has been no change to the state of the relevant protocol or the ledger).

110. The *representative of the UCC* noted that change of control was a factual question, so it would indeed be deemed a transfer of control. He further noted that the definition of control did not indicate that a transfer of control required a change in the state of the ledger. The *DC Chair* concurred, noting that it ultimately came down to an evidential / factual problem.

PRINCIPLE 10: SHELTER PRINCIPLE

111. The *DC Chair Louise Gullifer* presented Principle 10, confirming it was exactly the same as it had been in previous iterations of the document.

112. She noted that from a drafting perspective, the Drafting Committee was considering whether to use the word "acquirer" rather than transferee.

113. She further flagged that as a matter of drafting, the DC was considering whether the phrasing "the law should provide that" should be included at the beginning of each Principle. She invited WG members to contact her with their preference as to whether to add this phrase to the beginning of each Principle.

PRINCIPLE 11: APPLICATION OF INNOCENT ACQUIRER RULES TO A CUSTODY RELATIONSHIP

114. The *DC Chair Louise Gullifer* presented Principle 11, commenting that the changes were very minor.

115. *Sub-Group 2 Co-Chair Chuck Mooney, Jr.* queried to what extent the rights of the client depended on the rights of the custodian.

116. The *representative of the ALI* queried whether Principle 11 should specifically mention that the custodian had to have control, particularly given how 'custodian' was defined in the custody Principle ('holds' on behalf of a client, when 'holds' was defined as controls).

117. The *DC Chair* noted that this required further discussion before the DC reconsidered the drafting of this section.

118. The *Chair* proposed the commentary be revised to reflect the discussion of various custody situations including sub-custody.

Section V: CUSTODY

PRINCIPLES 12 – 15

119. *Sub-Group 1 Co-Chair Louise Gullifer* presented the draft Principles in Section V relating to custody. She noted that the Principles have not been reworked since the previous Working Group Session.

120. The Working Group was encouraged to provide Sub-Group 1 with their views on what other areas of custody should and should not be addressed by the Principles.

121. *Sub-Group 2 Co-Chair* raised a query regarding whether a Conflicts of Laws issues should be addressed in relation to Principles dealing with custody.

122. *The Working Group agreed that the phrasing and use of terms should be refined.*

123. The *representative of the ALI* agreed to assist Sub-Group 1 with adding further commentary for the sub-custody principle.

124. *Sub-Group 1 Co-Chair Louise Gullifer* emphasised the prescriptive nature of paragraphs (1) and (2) of Principles 13, whereas paragraph (3) was descriptive.

125. *Sub-Group 1 Co-Chair Louise Gullifer* requested that the Working Group provide examples of custody, referring to **Question 21** of the Master Copy – (Does the Working Group agree that all the various entities and technical arrangements present in the provision of custodian services for digital assets ought to be considered as custodians under these Principles?), and **Question 22** (Furthermore, are they all able to comply technologically with all the duties?).

126. A *member of the Secretariat* proposed that the word 'benefit' in Principle 13(1)(a) could be amended to 'account', as the term 'benefit' may cover situations where a security interest was created.

127. Regarding **Question 23** *(*How would the Working Group recommend addressing those situations where the mandatory duties cannot be performed by some DeFi structures, for example, Maker DAO?*)* the *Sir Roy Goode Scholar Teresa Rodriguez de las Heras Ballell* highlighted the legal effect of smart contracts and the issues of identification of a contracting party.

128. A *Working Group Member* sought clarification on whether the ultimate purpose of the custody principle was to ensure that the client was protected in cases of custodian bankruptcy. She further queried whether a DAO can be a custodian, given that if the DAO is not a person they cannot become insolvent, so the insolvency point may not be applicable.

129. The *representative of the ALI* emphasised the importance of client protection when a client can be an innocent acquirer or secured creditor.

130. The *DC Chair Louise Gullifer* encouraged the Working Group to consider whether the custodian part of the innocent acquirer principle and the secure transactions principle concerning control via a custodian should be located in Section V on Custody or somewhere else in the Principles.

Section VI: SECURED TRANSACTIONS

Section VII: ENFORCEMENT

131. *Sub-Group 3 Chair Marek Dubovec* provided an update concerning enforcement, noting that the Digital Assets Project was coordinating with the Enforcement Project in this regard. So far, there were preliminary discussions as to what the respective projects were seeking to cover in terms of enforcement, to avoid any overlap and what the projects might usefully cover.

132. He noted that the draft Digital Assets Principles covered some aspects of enforcement already (e.g. Principle 20(2)(c) referred to the insolvency law of the forum with respect to enforcement of any remedies). This was one aspect that can be elaborated further in the next Working Group meeting.

133. The other aspect of enforcement covered was in the secured transactions Principle 19 which concerned the enforcement of security rights only, which did not concern enforcement of rights of holders or persons in digital assets, which was potentially the subject matter for a new Principle to be drafted in coordination with the Enforcement Working Group.

134. He noted that the Digital Assets Project did not currently cover any aspects of judicial enforcement outside of the secured transactions context. He drew attention to the question to the Working Group which was an open invitation to provide suggestions with respect to what the principle should cover.

135. The *Deputy Secretary-General, Anna Veneziano,* presented the progress of the project on the Best Practices for Effective Enforcement. She highlighted that work had begun to develop a paper highlighting specific enforcement issues in relation to digital assets, and that an information gathering exercise was underway to collect examples of different types of digital assets and within the types of digital assets, different structures, as regards the parties involved. They have also been examining useful examples of judicial decisions referring specifically to execution and enforcement. This paper was due to be presented by the end of April.

136. The *Chair* noted that a joint workshop between the Digital Assets Project and the Best Practices for Effective Enforcement Project was planned to take place before the next Digital Assets Project Working Group session.

Section VIII: INSOLVENCY

Item 4: Organisation of future work

137. The *Secretary-General* noted that the document for the Governing Council should be prepared by the beginning of May as the Governing Council's 101st session would be held on 8 – 10 June 2022.

138. *The Working Group agreed that its sixth session would be held from 31 August – 2 September 2022.*

139. The *Drafting Committee Chair Louise Gullifer* outlined two different approaches to dealing with examples: (1) providing general examples in the Commentary; and (2) citing real examples in an appendix. Alternatively, both approaches could be combined.

140. *Sub-Group 4 Co-Chair Elisabeth Noble* supported the use of general examples but cautioned against referring to specific assets for two reasons: (1) it is advisable that the document avoids promoting specific tokens over others; and (2) commitments to regularly update may be problematic, perhaps refer to categories of digital assets as new assets are being created every day.

141. The *Chair* requested assistance from the Working Group to assist the Drafting Committee to come up with these examples.

142. *The Working Group agreed to keep collecting the real examples and developing abstract examples for the Commentary with the help of the sub-groups.*

143. Regarding the organisation of inter-sessional work leading up to the next session of the Working Group, the Drafting Committee confirmed that they would hold at least two additional meetings prior to the next Working Group session, one at the end of March and the other at the beginning of April.

144. The *Chair* noted that a joint workshop between the Digital Assets Project and the Best Practices for Effective Enforcement Project was planned to take place before the next Working Group session.

Item 5: Any other business

145. No further items for discussion were noted.

Item 6: Closing of the session

146. The *Chair* thanked all participants for their contributions to the fifth session.

147. The *Chair* declared the session closed.

ANNEX I

AGENDA

1. Opening of the session and welcome by the Chair of the Working Group and the UNIDROIT Secretary-General

2. Adoption of the agenda of the meeting and organisation of the session

3. Consideration of substantive issues: update regarding the intersessional work of the Drafting Committee

   (a) Master Copy of the Black Letter Principles (Comparison) (Study LXXXII – W.G.5 – Doc. 2)

   (b) Master Copy of the Introduction, Principles, and Commentary (with Questions) (Study LXXXII – W.G.5 – Doc. 3)

4. Organisation of future work

5. Any other business

6. Closing of the session

ANNEX II

LIST OF PARTICIPANTS

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EXPERTS

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