



INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

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**Digital Assets and Private Law
Working Group**

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SUMMARY REPORT
OF THE SIXTH SESSION
(Hybrid, 31 August – 2 September 2022)

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1. The sixth session of the Digital Assets and Private Law Working Group (the ‘Working Group’) to prepare the Principles and legislative guidance on Digital Assets and Private Law (the Principles) took place in a hybrid manner between 31 August – 2 September 2022. The Working Group was attended by 70 participants, comprising of Working Group Members, observers from international, regional, and intergovernmental organisations, industry, government, and academia, and members of the UNIDROIT Secretariat (the list of participants is available at Annexe II).

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

2. *The Secretary-General* opened the 6th Session and welcomed all the participants. The Secretary-General thanked the members of the Working Group, Drafting Committee, and the Steering Committee for all their intersessional efforts to update the Draft Principles.

3. *The Chair of the Working Group and Member of the UNIDROIT Governing Council, Hideki Kanda (‘Chair’)*, welcomed all the participants and also expressed gratitude for all the intersessional work which had been conducted by the Drafting Committee, Steering Committee, and Members of the Working Group. *The Chair declared the session open.*

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

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

Item 3: Update on intersessional activities

5. *The Chair* invited the Chair of the Drafting Committee, Louise Gullifer (‘DC Chair’), to summarise the work which the Drafting Committee had undertaken in intersessional meetings.

6. The DC Chair thanked all the Members of the Drafting Committee for their intersessional efforts to update the draft Principles. It was noted that the Working Group had two documents before it: Study LXXXII – W.G.6 – Doc. 2: Master Copy of the Draft Principles and Comments, and Study LXXXII – W.G.6 – Doc. 3: Tracked Principles and Issues. The Drafting Committee had met 5 times since the last session of the Working Group, and a summary of its work could be found in Doc 3. It was noted that there were some parts of the draft which were still under development and would be explored further at the present meeting. It was also noted that further efforts needed to be undertaken in harmonising the style of the Principles, which would be made when the content was finalised.

7. The Chair invited the Chair of the Steering Committee, Ms Monika Pauknerova, a Member of the UNIDROIT Governing Council, to give an update on the work of the Steering Committee. It was noted that all the comments of the Steering Committee could be found in the Annexe of Document 3, and that specific comments had also been included in the relevant parts of Document 3. Additionally, it was also noted that the comments submitted by the Steering Committee related to an older draft of the Principles than what had been shared with the Working Group in Document 2.

8. The Chair of the Steering Committee thanked all the Members of the Steering Committee and summarised the input which had been received. It was noted that 15 countries, including the European Commission had shared their input on the draft Principles. A summary of these comments was first shared at the 101st session of the UNIDROIT Governing Council. It was noted that the Drafting Committee had already incorporated most of the comments provided by the

Steering Committee. One area which was particularly commented on by several members was the distinction between the notions of ownership, control, and possession, which required some additional clarification in the Commentary. Additionally, comments had also been received on the proprietary nature of digital assets, which was differently treated in many jurisdictions. Furthermore, there were comments on the language used in the Principles and how an effort needed to be made to balance civil law and common law traditions in drafting the Principles. It was also noted that the Principles should ensure definitional consistency with other documents, including those developed by UNCITRAL (and in particular the Model Law on Electronic Transferrable Records). The Members of the Steering Committee had also stressed on the importance of technological neutrality in the Principles and to ensure that the Principles remained technology agnostic. However, it was noted by the Steering Committee that more examples of real-world application of the Principles should be included in the Commentary.

9. *The Chair thanked the Chair of the Drafting Committee and the Chair of the Steering Committee for their updates. It was noted that the substance of the comments mentioned would be discussed in Agenda Item 4.*

Item 4: Consideration of substantive issues on a Section-by-Section basis

Introduction of the Principles

10. *The Chair opened the floor for discussion on the Introduction of the Principle. The Members of the Drafting Committee noted that the introduction had been expanded to provide readers a good understanding of what the Principles were designed to cover. Additionally, input from the Steering Committee had also been reflected and additional clarity had been added. It was noted that more work would be undertaken on the Introduction as the Principles moved more towards finalisation.*

11. *An observer from NatLaw noted that the Introduction should also reference the role the Principles play in responding to new technologies, particularly their treatment with regard to private law. Additionally, it was added that the Introduction should reference the relationship between the Principles and other instruments, particularly the UNIDROIT Principles on International Commercial Contracts, as well as instruments developed by other international organisations, including UNCITRAL. Finally, it was also important for the Introduction to explain how States might consider using and/or implementing the Principles within their domestic jurisdictions.*

12. *The Working Group expressed support for the present draft of the Introduction and encouraged the Drafting Committee to continue its work on the draft as the Principles progressed towards finalisation.*

Principle 1

13. *The Chair opened the floor for discussion on Principle 1. The DC Chair noted that the changes which the Drafting Committee had made to Principle 1 were mostly for purposes of adding more clarity and elaboration. The Commentary had also been expanded for the same purpose. It was noted that all the changes were explained in the Issues Paper.*

14. *The Working Group supported the present draft of Principle 1.*

Principle 2

15. *The Chair opened the floor for discussion on Principle 2.*

16. *An Observer* raised a question on the scope of the project, querying why the project was not only restricted to distributed ledgers and crypto assets, but rather covered digital assets more broadly. It was noted that the scope of the project was much broader than those undertaken by other institutions such as FATF and FSD. It was noted that the definition of digital asset in the project might not be in line with the expectation of regulators in this area. *A Member of the Working Group* noted that she shared the concerns that the Principles had a much broader application than necessary – this was particularly due to the manner in which the Principles defined a digital asset in terms of an electronic record and databases, rather than focussing on distributed ledgers.

17. *Several members of the Working Group* clarified that the UNIDROIT Project was not intended to produce regulation, which was what the other quoted initiatives were working towards. Regulatory projects were structured in ways to deal with systemic risk and public policy, and also dealt with issues such as licensing, sanctioning, and other regulatory matter. As such, these projects referenced specific technologies and types of transactions as they were designed particularly to regulate those industries. The UNIDROIT project was designed to draft legal principles for private law issues in digital assets, and for this, a technology neutral and agnostic approach was considered most favourable. *A Member of the Working Group* added that the broad nature of the definition in the project was caveated by the notion of control, which was explained in Principle 6. As such, the scope of assets covered under the project should always be examined in light of Principle on Control.

18. *An observer from NatLaw* suggested reconsidering the placement of the definition of control, as the draft Principles did not flow nicely with most definitions being in Principle 2, but the definition of control appearing in Principle 6. This was especially significant noting the importance of control to the definition of a digital asset.

19. *An Observer from ALI* and the DC Chair highlighted that the definition of control was a practical one, rather than a legal one. In the definition of a digital asset, it was important to emphasise that it related to an electronic record capable of being subject to control, rather than only subject to control.

20. *An Observer* noted the importance of the definition of control to the definition of digital asset and noted the importance of keeping those two definitions close to each other. He also queried the process or relevance of transfer of digital assets, in cases where a digital asset was a non-negotiable instrument. The relationship, and the relevance of the relationship of an off-chain asset and a digital asset was also queried. *The Chair, the DC Chair, and Several Members of the Working Group* noted that the concept of linked assets was dealt with under Principle 4. The transfer of a digital asset was not necessarily related to a transfer of any other item associated to the digital asset – the effect was a matter for other law to decide. Furthermore, Principle 3 also clearly outlined other items which were not within the scope of the Principles. Additionally, the scope of the project had been designed to cover all digital assets which were capable of being subject to control, in a technology neutral manner, as was the mandate given to the Working Group. An Observer from UCC also highlighted the importance of being technologically agnostic, and refraining from focussing only on assets which were mainstream and very clearly transferable.

21. An Observer from EBA noted that part of the Commentary of Principle 2, particularly paragraphs 7-9, were not easy to understand and could be made more reader friendly. Additionally, it was noted that for the illustrations, items such as NFTs, stable coins, and others, which were high in the agenda for lawmakers should also be covered. Additionally, it was suggested that the word 'would' in the heading for Illustration 4 should be replaced with 'may', as the illustration explained situations where the opposite might be true. The Chair and the DC Chair noted that additional illustrations could be found in the Commentary for Principle 4. However, both these Principles could be cross referenced.

Principle 3

22. *The Chair* opened the floor for discussion on Principle 3. *An Observer from NatLaw* queried whether Principle 3(2) was consistent with Paragraph 14 of the introduction. It was also noted that a cross reference between Principle 3(1) and 3(3) might be necessary.

23. A Member of the Working Group noted that Principle 3(2), when read alongside Principle 2(3), did not appear to be consistent. This should be reconsidered. Several participants agreed and it was noted that the Drafting Committee would examine this matter further.

24. *A Member of the Working Group* noted that with regard to Principle 3(1) and Principle 3 in general, it was important to recognise that one overarching objective of the Principles was to provide protection to holders, or secured creditors, or those who dealt with digital assets more generally, and give them some kind of a proprietary protection. Principle 3(1) stated that digital assets could be the subject of proprietary rights, which was one technique of achieving the kind of protection envisaged. It was noted that there were two ways in which protection could be offered in civil law jurisdictions: one was to legislate that digital assets were neither tangible nor intangible property, but rather a in a third category somewhere in the middle of those two categories. The second would be to say that digital assets could be subject to property rights – which was the case in Principle 3(1). Both these solutions achieved the same outcome, which was to offer additional protection to parties. As such, it was important to explain the type of proprietary protections created as part of the Commentary for Principle 3(1), and that States may implement these protections however they decide, given the different nature of jurisdictions around the world. *Several participants* agreed and noted that the Drafting Committee would examine this matter further.

25. *A Member of the Working Group* noted that the notion of property was tricky and further clarity should be provided in the Commentary as to how digital assets would fit within it. In particular, many jurisdictions took a strict view to having two categories of property (tangible and intangible), and guidance should be provided as to how digital assets would fit within existing systems, rather than proposing the creation of a third type of property, which might not be feasible in many jurisdictions. *Another Member of the Working Group* highlighted the difference between using the term 'property', and the concept of 'proprietary rights', adding that the draft Principles did a good job at using language which dealt with rights with proprietary effects, rather than property, which differed from state to state. The DC Chair and a Member of the Working Group agreed with this, noting that Paragraph 20 of the Commentary of Principle 3 could be clarified further. However, the word 'property' should still be avoided.

26. The Chair summarised noting that the black letter text of Principles 1, 2, and 3 was approved by the Working Group, with amendments for clarity and adding additional examples to be made in the Commentary.

Principle 5

27. *The Chair* opened the floor for comments on Principle 5, noting that this had been redrafted based on comments received at the fifth meeting of the Working Group and intersessional work undertaken based.

28. *The DC Chair, a Member of the Working Group, and an Observer from UCC* noted that a waterfall structure, based on the feedback received at the fifth meeting of the Working Group, had been developed. This entailed starting by looking at the law, if any, specified in the asset, then by looking at the law, if any, specified in the network/platform, and then at the bottom of the waterfall, the Principles themselves, to the extent they could be applied, should be chosen, and for items not addressed in the Principles, it would be the law applicable by virtue of the rules of

the private international law of the forum. It was added that the purpose of this structure was to empower the parties, and therefore give prominence to what was their choice for the applicable law. Additionally, for the bottom of the waterfall, it was noted that States would eventually adopt their own private law rules, which would hopefully be consistent with the Principles, and hence this would create more predictable outcomes. It was added that Principle 9(4) had also been adapted to be able to be applied in the case where a bottom of the waterfall type situation arises.

29. *A Member of the Working Group* raised three points relating to 5(1), 5(2)(e), 5(3), and 5(4). It was queried: (1) With regard to 5(1)(c), in a situation where a country had already domesticated the Principles, but the question of choice of law could not be answered in 5(1)(a) or 5(1)(b), there would be confusion as to whether the courts where the dispute had been brought should apply the Principles as domesticated in that jurisdiction, or as they had been adopted by UNIDROIT. It was acknowledged that the Drafting Committee would address this matter and provide additional clarity on it. (2) With regard to 5(2)(e), it seemed to be a material grandfather clause, which might not have been the intention of the drafters. (3) With regard to 5(3) and 5(4), it was noted that these clauses had been taken from other instruments and had a certain degree of legal uncertainty attached to them. However, it was acknowledged that no other better solution was available in this case.

30. *A Member of the Working Group* recalled that a separate conflicts of law rule would need to be drafted for the custody relationship. It was also added that the waterfall structure, as presently drafted worked well, and that 5(1)(c)(i) and (iii) was clear in pointing to the Principles, to the extent possible, in cases where no other choice of law could be identified.

31. *An Observer from HCCH* noted that HCCH would use Principle 5 as a starting point for additional work they intended to conduct in the area of the digital economy and conflicts of law. The importance of ensuring the technologically agnostic nature of the project was reemphasised, and it was noted that a broad definition to digital assets was helpful. Additionally, it was recognised that Principle 5 was aspirational in nature, which was commendable. It was noted that HCCH presently had a general mandate to monitor developments in this area, and that the HCCH Council was in the process of determining its specific mandate for work in the near future and would keep UNIDROIT apprised on this accordingly. It was noted that there would be scope for UNIDROIT and HCCH to collaborate in this area, possibly in the form of a joint project. It was also added that details on how this collaboration could be structured would become clearer in the future.

32. *The Secretary-General* expressed appreciation for the updates shared by HCCH, noting that a joint project between the two organisations would need to be approved by the UNIDROIT Governing Council, which would likely take a favourable view of this, given the excellent history of cooperation and collaboration between the two organisations.

33. *A Member of the Working Group* agreed with the approach Principle 5 had taken, especially given the difficulties associated with determining the identities and locations of parties involved in transactions involving digital assets. With regard to 5(1), it was noted that the application was quite broad as it only referred to proprietary issues. It was recognised that while this was explained in the Commentary, it could also be considered for clarification in the text. It was noted that in 5(1)(a), there was bracketed text regarding excluding a State's own conflict of law rules. A similar discussion had taken place at the UNIDROIT Model Law on Factoring Working Group and it was decided to retain the language. Additionally, with regard to 5(2)(c), it was queried if the sort of consent referenced was necessary, and could be considered for deletion, or should at least be explained in the Commentary. Finally, with regard to 5(2)(e), it was noted that one of the underlying intentions of Principle 5 as a whole was to encourage designers of systems to select applicable law within their projects. 5(2)(e) sought to explain how a choice of law would operate should it be selected by the system designers after already having issued the asset. However, this

matter could also possibly be dealt with in a different part of the Principles, which would be more concerned with transitional provisions.

34. *A Member of the Working Group* noted that the Principles being placed at the bottom of the waterfall was a model designed to encourage adoption of the Principles by States, as a move to improve their domestic private law relating to digital assets. At the same time, it was noted that only those Principles that were specific enough to be applicable, would apply. Where a State has adopted the Principles, they would add the specificity necessary. Additionally, the structure of Principle 5 also meant that if a State had incorporated a part of the Principles into their domestic law, nothing would stop other parts of the Principles from serving as the applicable law to a particular dispute.

35. *An Observer from NatLaw* appreciated the text found in footnote 7, which explained that the result of Principle 5 was not perfect, but functionally adequate. It was noted that there were several different approaches which could have been followed, all of which promoted party autonomy to different levels. Among the possibilities included the model found in Article 102 of the UNCITRAL Model Law on Secured Transactions. With regard to Principle 5(3) and 5(4), it was noted that the deference to party autonomy should be justified more in the Commentary, possibly with references to Article 94 of the UNCITRAL Model Law on Secured Transactions.

36. *A Member of the Working Group* shared concerns about the use of the terms 'proprietary issues' in 5(1) and 5(2)(a). It was queried if this term could be defined as part of the Principles. It was noted that this terminology was too broad in some circumstances, and too narrow in others, particularly where issues, such as custody, might not fall within the scope of 'proprietary issues'. An option which could be considered in lieu of defining the term could be to refer to 'issues addressed in these Principles', rather than using the word 'proprietary'. A Member of the Working Group noted that the broad nature of the term had been retained on purpose, and the application of the term could be explained further in the Commentary.

37. *An Observer from EBI* supported the approach of starting with party autonomy. In practice, it was noted that not many systems clearly stated applicable law in the asset or as part of the platform or system. It was noted that the concept of decentralised technology had lack of location embedded within it. As such, identifying the legal system applicable could often be very difficult. It was added that for the final stage, where reference was made to the law applicable by virtue of the rules of private international law of the forum, additional clarity could be considered by possibly referencing connecting factors related to the assets and/or systems, particularly for permission blockchains, where identifying a State was easier.

38. *An Observer from UCC* noted that the industry was increasingly moving towards identifying applicable law in their projects, and the focus on party autonomy from the Principles could further advance this trend. With regard to connecting factors, it was noted that this might create additional complications, rather than offer a solution. *A Member of the Working Group* noted that Principle 5(1)(c)(i) could potentially deter States from adopting the Principles, as it took away from their own domestic laws that may cover similar issues. It was noted that additional clarity should be provided on this point, and the extent to which it was being suggested that Principles Law would be applicable in cases where no choice of law was apparent.

39. *A Member of the Working Group* queried if additional guidance needed to be given in the Commentary about how the choice of law would pass when a digital asset was transferred to additional parties on the same network, or on a different network. With regard to examining related documents such as terms of service agreements for platforms etc, it was noted that those governed particular parts of an agreement (licenses), and not the proprietary issues. As such, those documents might sometimes not offer the guidance being sought. Additionally, further clarity needed to be provided to the terms 'in the system'.

40. *A Member of the Working Group* noted that when two parties to a digital asset transaction selected a particular applicable law, this did not bind third parties and would only be limited to the relationship between those two parties. With regard to including connecting factors at the bottom of the proposed waterfall – this was not considered useful as uniformity would be very difficult to achieve in this process. Finally, it was noted that for States who adopt the Principles to their domestic law, this choice of law clause would not dissuade them, as they would build in choice of law guidance within their domestic law based on the Principles.

41. *An Observer from the Law Commission of England and Wales* noted that most protocols and systems did not include guidance on choice of law, which might be an industry trend that changes in the future. It was added that States could ascribe property rights to assets within their own laws, and this was not dependent upon the rules set by any system, and vice versa. It was noted that party autonomy was the most important element of Principle 5. It was also queried why no provisions had been included for overriding rules of the forum, such as those found in the Rome I and Rome II Regulations. Additionally, it was queried if any consideration had been given to putative law to determine if a choice of law had been made properly.

42. *The Chair* summarised that the structure of the Principle was supported by the Working Group. However, it was important to give some consideration to issues relating to security rights and proprietary issues. Additionally, issues relating to connecting factors should also be given further consideration. Furthermore, the comments from the Steering Committee on this Principle should also be considered.

43. *A Member of the Working Group* queried about the application of Principle 5 to issues concerning the creation and perfection of security rights in digital assets. It was also queried whether the law which applied to the creation of the digital asset had to be the same as the law which applied to the digital asset generally (perhaps as noted in the asset or in the platform). *A Member of the Working Group* noted that creation, perfection, and priority of security rights could be governed by different laws, depending on the circumstances. Principle 5 covered proprietary issues, and as such, whatever law applied by means of Principle 5, would also apply to the perfection of a security right by control over a digital asset. This would be in line with the rest of the Principles. Regarding priority, this was also addressed in other Principles. However, the choice of law rules as explained in Principle 5 would apply to this issue. However, it was noted that the application of Principle 5 to proprietary issues was a difficult concept and could benefit from additional explanation in the text or in the Commentary.

44. The DC Chair noted that the Principles provided rules relating to perfection and priority, and in the case where the bottom of the waterfall had to be relied upon, the Principles had answers to the types of questions raised. In the case that the issue at hand related to an item not covered by the Principles, then the rules of private international law of the forum would become applicable to determine choice of law. It was noted that additional guidance could be added for situations where the law chosen by parties in 5(1)(a) or 5(1)(b) did not address the issue at hand, such as perfection by registration.

45. *An Observer from ALI* noted that parties were free to select the applicable law between them, and as such party autonomy for creation of a security right was a good solution. The issue relating to the law applicable to perfection and priority was important for third parties. It was added that a strict rule needed to be in place for perfection and priority, so that parties could find guidance on this matter. With regard to the law governing perfection by registration, it should be the location of the grantor.

46. *A Member of the Working Group* noted that general secured transactions law principles were reinforced in these Principle, and would not be challenged or changed. It was noted the under the UNCITRAL Model Law on Secured Transactions, creation of a security right was a proprietary

issue as well. With regard to whether or not this was covered by Principle 5, it was noted that the Article could be interpreted broadly and narrowly, and the interpretation would give different results.

47. *The Chair* noted that this issue needed to be addressed clearly in the Commentary. It was recognised that should a broad approach be taken, Principle 5 would cover matters not addressed in the rest of the Principles, and this should be carefully considered.

48. *An Observer from ALI* noted that the meaning of proprietary issues in Principle 5 should be clarified in the Commentary. It was noted that Principle 16 related to creation of a security right in a digital asset, and if it was decided to carve out creation from Principle 5, alignment would be necessary with Principle 16. *The DC Chair* noted that Principle 16 was the equivalent of Principle 3(1), whereby it simply indicated that digital assets could be the subject of security rights. It was not intended to detail how creating a security right in a digital asset would operate. It was noted that the matter of what a proprietary right was remained an issue of for the forum, and the Principles had originally not dealt with this. It was added that the Commentary could explain what the meaning of proprietary right was, should the Working Group decide this would be useful. An Observer from NatLaw agreed with these comments.

49. *An Observer from NatLaw* noted that both, creation of a security right, and custody, contained contractual and proprietary aspects. It was proposed that Principle 5 should take a broad approach as to what it covered. It was also added some guidance on this matter, either in the Principle itself or the Commentary was important to include.

50. *The Chair* noted that the comments raised by the Steering Committee were in line with the discussion which had taken place. It was summarised that the Principle would be retained in its current form. However, additional consideration would be given to carve outs, custody related situations, and more generally the bottom of the waterfall, particularly with regard to connecting factors, as well as the situation where a State had already adopted the Principles, and a digital asset did not reference any applicable law. Additionally, the Principles needed to draw a distinction between contractual issues and proprietary issues, to the extent possible. It was noted that the Drafting Committee would conduct additional work on this Principle and revert back to the Working Group at its next session.

Principle 4

51. *The Chair* opened the discussion for Principle 4. *The DC Chair* noted that Principle 4 must be read in conjunction with Principle 3(3). It was recalled that the substance of Principle 4 related to a conclusion which the Working Group had reached in its earlier sessions, which was that the Principles did not apply to how a digital asset was/could be linked to another asset, or any of the legal characteristics or rights related to that link. The Commentary for this Principle clearly explained how/why this was the case, as well as guidance on this matter for all readers.

52. *A Member of the Working Group* noted that Principle 16(2) and (3) also dealt with aspects related to linked assets. These dealt with creation and perfection of a security interest. It was recalled that linked assets referred to a digital asset that creates or attempts to create, or extend a right by a contractual or proprietary manner to some other asset. It was noted that Principle 4 was clear in highlighting that the legal effect and the existence of the link between a digital asset and some other asset was determined by other law. It was noted that the final sentence of the second paragraph of the Commentary created some confusion with regard to the importance of the value of an asset to the link – this should be reconsidered. It was also noted that this did not have much correlation to the 'linked' nature of an asset. Additionally, it was noted that the second sentence of Paragraph 8 also created confusion, and that additional explanations in the

Commentary should be added to explain it. It was agreed that the Drafting Committee would examine these matters accordingly.

53. *An Observer from NatLaw* queried the reasoning behind Principle 4. *Several Members of the Working Group and Observers* clarified that a large number of market participants understood that the law governing, or related to a digital asset, would also have an impact on any linked assets. As such, the confusion needed to be addressed. *The DC Chair* noted that additional guidance behind the reasoning for Principle 4 could be added to the Commentary. *Other Members of the Working Group* also confirmed that it was important to clearly indicate that other law applied to the existence of, requirements for, and legal effect of any link between a digital asset and another asset, whether the other asset was tangible or intangible. It was also added that the illustrations were an important factor in explaining the need for the Principle.

54. *The Chair* noted that the comments of the Steering Committee were similar to those that the Working Group had raised, and that many of them had already been addressed in the draft.

55. *The Deputy Secretary-General and an Observer from NatLaw* proposed considering expressing the Principle in a positive tone, rather than a negative one. It was noted that the Drafting Committee would explore this option. *A Member of the Working Group* noted that there were some references to sales law, particularly in Paragraphs 12 and 25 – it would be better if these references only talked about law in general.

56. *The Chair* noted that the Drafting Committee would take account of the discussion and may propose amendments accordingly for the Working Group to consider at its next session.

Principle 6

57. *The Chair* opened the discussion on Principle 6. *The Working Group* took note of a set of written comments submitted by the Observer from the XR Safety Initiative. It was noted that many of the issues raised had already been addressed, and that additional guidance would be provided in the Commentary to provide more clarity on some of the aspects mentioned.

58. *An Observer from NatLaw* noted that having control as the functional equivalent of possession posed a risk whereby many States had very specific rules relating to 'possession', which they would need to consider revising should they decide to adopt the Principles. As such, additional consideration could be given to how this was treated in the Principles. It was also noted that possession had a publicity related function, which was not true for the notion of control in most jurisdictions.

59. *A Member of the Working Group* noted that additional clarity should be given on the matter of 'possession' in the Commentary, keeping in mind that many States used 'possession' differently already in their domestic laws. As such, this would not be helpful for harmonisation purposes and might create more ambiguity. Additionally, it was noted that control also had a publicity related purpose, which was recognised in many jurisdictions. *One Observer* recognised the importance of control for public notice related purposes, however, other Observers added that possession was not always used in the context of publicity.

60. *A Member of the Working Group* emphasised that control was the functional equivalent of possession. This was an important distinction to actually being equivalent to possession. *An Observer from UCC* noted that the commentary made the functional nature of the equivalence clear and noted that the legal concepts were not being referenced. It was added that additional clarity could be included in paragraph 2 of the Commentary to dissuade States from trying to incorporate the idea of control over a digital asset into the meaning of possession within their domestic legal system.

61. *The DC Chair* noted that additional guidance could be added to the Commentary about the use of the term possession in domestic legal systems, and that it was not being suggested that the same meaning be derived from the Principles.

62. *An Observer from the Law Commission of England and Wales* queried the reasoning behind the carve out found in Principle 3(a). *Several Members and Observers of the Working Group* noted that this ensured that tokens which were minted with options for upgradability or degradability (including a kill switch) would not be deemed uncontrollable. It was noted that the carve out particularly related to when an asset ceased to exist due to some external entity, which was built into the assets preprogramming.

63. *The Chair* noted that the Steering Committee, as well as the UNIDROIT Governing Council, had raised similar questions as to those about the use of the term possession, and the importance of clearly outlining the functional nature of this term in the Principles. These points had already been addressed by the Working Group. It was noted that all other comments by the Steering Committee, including ones relating to agency, had been addressed by the Working Group.

Principle 7, 8, 9, 10

64. Regarding Principles 7, 8, 9, and 10, it was noted that additional work, particularly on the Commentary would be undertaken ahead of the next session of the Working Group.

65. *A Member of the Working Group* queried if Principle 9(4), in its deference to the law of the forum State, was consistent with Principle 9(1),(2), and (3). Additionally, it was queried as to what was meant by 'fact' in Principle 9(4)(b). *Another Member of the Working Group* noted that consistency was intended, and that the Drafting Committee would conduct additional work on this to ensure readability. It was agreed that the Drafting Committee would undertake additional work to ensure that a court could use Principle 9(4) without confusion, and that the draft was in line with Principle 5.

66. *The DC Chair* clarified that the scope of application of Principle 9(4) was clarified in Paragraph 4 for the Commentary, which included its relationship with Principle 5. It was noted that the Steering Committee had also noted the importance of adding more clarity to this provision, and that the Drafting Committee would action this accordingly.

67. *A Member of the Working Group* recalled that there was some bracketed text in Principle 9(4)(d) – it was suggested that this language be deleted. Additionally, with regard to Principle 9(5), it was queried if this would be subject to the Shelter Principle. *Another Member of the Working Group* confirmed that the Shelter Principle would apply and that this would be clarified in the Commentary. *Several Members of the Working Group* noted that the bracketed text in Principle 9(4)(d) had been taken from the Geneva Securities Convention. Its applicability in the Principles was not confirmed at this stage.

68. *An Observer from ALI* noted that Principle 9 used the word transfer, whereas Principle 10 used acquirer. It was important make clear that an acquirer was someone to whom a transfer was made, and to also include the secured creditor concept into this. It was also noted that the Shelter Principle was drafted to protect a transferee from an innocent acquirer, when the transferee itself was not an innocent acquirer. However, it did not address the circumstance where a non-innocent acquirer, was an acquirer from somebody who was not an innocent acquirer. It was noted that Shelter Principle appeared as a predicate to many Innocent Acquirer rules, however, the Principle did this in the reverse order. It was noted that this was something the Drafting Committee could examine further. *A Member of the Working Group* noted that the Principles did not have a nemo dat rule, but rather that a transferee from an non-innocent acquirer got an asset, plus a better title. *The DC Chair* noted that the Shelter Principle still needed to be adapted, and these comments

would be considered by the Drafting Committee in its revision accordingly. It was noted that one solution to the issue could be if the Shelter Rule did not refer to the innocent acquirer.

69. *The Chair* noted that the Steering Committee had provided feedback on the application of the notion of transfer in civil law jurisdictions. *The Secretary-General* noted that this section of the Principles required additional commentary and development, as in its present form, for example, the word 'transfer' in these Principles included the grant of a security right in favour of a secured creditor, and the word 'transferee' included a secured creditor, both of which were common law concepts which needed further elaboration and discussion. Additionally, various concepts presently mentioned in Principle 9 and Principle 10 were also difficult for civil law jurisdictions to adapt. It was also noted that the mechanism through which digital assets were transferred, as described in the Principles, was a different concept in civil law jurisdictions than that of a transfer.

70. *An Observer from the Law Commission of England and Wales* noted that the Principles should make clear their applicability to NFTs, as this was a major market at the moment.

71. *The Chair* noted that the Drafting Committee would conduct additional work on this matter and revert back to the Working Group with a more advanced draft at its next session, which would also be more inclusive and provide guidance to civil law jurisdictions. It was noted that the main issues were in principles 8, 9, and 10. *The Deputy Secretary-General* suggested that some work should already be started towards translating the Principles into French, so that consistency with other languages and systems could be ensured.

72. *The DC Chair* noted that the Drafting Committee would undertake additional work to add more clarity to these Principles. It was noted that the Commentary clearly noted that a change of control from one person to another person must be distinguished from a transfer of proprietary rights. A change of control may or may not be associated with a transfer of proprietary rights. And a transfer of proprietary rights may or may not be accompanied by a change of control. These points needed to be emphasised further.

73. *An Observer from the Czech Republic* noted that industry should be consulted in furthering the development of the Principles. It was confirmed that an industry consultation would take place for the Principles ahead of their finalisation.

74. *A Member of the Working Group* noted that for clarity, it should be noted that for off-chain transactions, very often the change of control and transfer of proprietary rights took place collectively.

75. *An Observer from NatLaw* suggested refraining from dividing jurisdictions solely on the basis of common law and civil law in the Commentary, as this did not include jurisdictions which had different systems than these two. With regard to Paragraph 2, it was suggested that it could be added that the transfer included a transfer for security interest, the fiduciary transfer, and the grounds of a security interest. This would cover both possible types of transfer and equated them to security interest. It was added that this was the approach followed in the UN Receivables Convention. It was concluded that the Drafting Committee would examine these matters accordingly.

Principle 21

76. With regard to Principle 21 on Insolvency, *The DC Chair* noted that two drafting versions were presently being considered. One related to a Principle which was originally focused on secured transactions, but would be adapted, whereas the other was a text similar to that of the Geneva Securities Convention. It was noted that the Steering Committee also provided feedback on the draft and preferred the approach of using the Geneva Securities Convention as a starting point.

As such, the Commentary of the draft Principle needed to be adapted accordingly, as presently it mostly focused on security rights.

77. It was noted that the Drafting Committee would conduct additional work on the draft to discuss at the Working Group's next session. Two important points were: (i) the scope of this principle and whether it applied to all proprietary and security rights and digital assets, or only the ones that came out of the innocent acquisition rule and Principle 17, which noted control a method of third-party effectiveness. And (2) whether the analysis on valuation, which had already been drafted, should be retained.

78. *A Member of the Working Group* noted that the comments of the Steering Committee preferred a broader approach to the Principle, rather than a narrower one. As such, it should not be limited to interests that had become effective as a result of innocent acquisition, or control having been obtained in the context of the security interest. It was added that on substance, the purpose of the principle was a negative one, whereby it said that insolvency should not infringe upon the proprietary rights that have come about prior to the insolvency. It was added that there were important exceptions to this, some of which were listed in paragraph (2). Other important Principles with which there was a link included the conflict of laws Principle, which should be kept in mind when considering these issues. Additionally, the Principles relating to custody and the obligations of a custodian were also important to consider.

79. *The Secretary-General* noted that several other Principles included provisions relating to insolvency, and in particular the Principle on custody. As such, additional consideration should be given to keeping Principle 21 separate. Additionally, if it was decided to have it as a separate Principle, proper cross references would need to be added to the Commentary. It was added that terminological consistency with other internal texts was important. As such, the term 'insolvency administrator' should be replaced with 'insolvency representative'. Furthermore, the section presently mostly only related to secured transactions, and not other insolvency related matters, which was something that needed to be explained in the Commentary. Finally, it was also noted that issues related to enforcement in the context of insolvency were also important to consider and mention in the Commentary.

80. *A Member of the Working Group* noted that there were three basic scenarios to consider, the first one being someone owning and controlling a digital asset then becoming insolvent, and then having to deal with the situation whereby the insolvency representative wanted to get hold of the assets, and maybe sell for the benefit of the creditors. The second one whereby a debtor, having created a security interest in a digital asset for the benefit of a secured creditor, and then becoming insolvent, and then there being issues. And the third, whereby a custodian or exchange became insolvent and then, when an investor, wished to retrieve their assets. It was noted that the third scenario was dealt with in the Custody Principle, whereas the other two needed to be addressed in Principle 21.

81. *The DC Chair* noted that issues relating to whether or not the asset was part of a custodian's estate needed to be addressed in the Custody Principle. However, cross references should be made for this in Principle 21 and additional details of what happens when a custodian becomes insolvent could also be explained in Principle 21. It was noted that one member of the Steering Committee had noted giving consideration to including Commentary on the issue of shortfall, which was a matter for further consideration.

82. *An Observer from NatLaw* agreed with the proposal to either bring together all insolvency related provisions into this section, or to ensure extensive cross references were included. It was noted that an extensive list of examples of rights the provisions applied to would be a better solution rather than simply trying to capture them through a title. Regarding drafting – it was noted that the Principle seemed like a legislative recommendation, and that it should not start

with the word 'should'. It was added that the Principle should also try to accommodate the issue of priority. With regard to valuation, one possible solution was to use valuation to determine the liquidation value of assets, as had been done in the UNCITRAL Secured Transactions Guide.

83. *A Member of the Working Group* noted that more basic rules that might be assumed should be clearly highlighted in this Principle, as this would offer additional guidance to the industry. *A Member of the Working Group* noted that additional explanations could be included in the Commentary of the Principle.

84. With regard to the scope of the Principle, it was agreed that Principle 21(1) would state that proprietary rights in digital assets were effective against any insolvency representative. After this, depending upon the nature of the rights in question, whether they would become part of the insolvency estate or not could be decided. It was recognised that should it be decided that the Principle related to all proprietary rights, regardless of whether they arose through a change in control or the acquisition of the asset by an innocent acquirer, then this should be stated clearly. Several participants noted that the Principle was already broad enough and covered the necessary rights it needed to address.

85. *The Working Group* agreed to adopt a broader view on the notion of proprietary rights which were being referenced in this Principle. It was noted that the Drafting Committee would adjust the draft accordingly and revert back to the Group at its next session. In particular, guidance needed to be provided on what formed part of the insolvency estate and what did not, and the effect of a third party having control over a particular asset. It was noted that guidance on these issues could be found in other international instruments, which could be referenced in the Commentary. Regarding the issue of valuation, the Working Group agreed to insert some additional Commentary on the matter, but not include an additional text in the Principle.

Principle 20 – Enforcement

86. *The Chair* opened the discussion on Principle 20. It was noted that the enforcement of security rights was dealt with in Principle 19. It was also noted that for this Principle, coordination was ongoing with the UNIDROIT Project on Effective Enforcement. The conclusion on several issues was that most enforcement law applied normally to digital assets, but simply had to be adapted for the technologies involved. It was noted that the draft Principle would be given additional commentary to explain some of the issues associated to enforcement in the case of digital assets.

87. *The Secretary-General* noted that the possibility of removing this Principle could be explored, as it did not provide much additional value. Moreover, the main issue of enforcement of security rights in digital assets was already dealt with in Principle 19. *The Deputy Secretary-General* noted that several issues were being considered on this topic in the Working Group on Effective Enforcement. This included consideration of extra judicial enforcement versus judicial enforcement. Secondly, the group had been working on basic principles or directions that could be followed. For the group, there was not a clear distinction with regard to digital assets, and the project was generally broader than that being presently discussed. It was noted that the best approach would be to offer guidance in the Commentary for judges and enforcement agents on issues which they might have to deal with when examining enforcement in digital assets.

88. *A Member of the Working Group* queried how the Digital Assets Principles addressed the issue of what was necessary for a creditor seeking to prove a debtor had an asset. It was noted that this point was extensively discussed in the Effective Enforcement Working Group and should also be explained here. It was noted that another issue which could be explained further in the Commentary related to the process of valuing an asset at liquidation. *Another member of the Working Group* noted that several issues relating to asset tracing, freezing/injunction orders, and recovery were unique to digital assets and should be explained further in the Commentary.

89. *An Observer from NatLaw* noted that most of the rights which could be referenced by this Principle were already addressed in other parts of the Principles. As such, the Principle should clearly identify the types of rights it was referencing. With regard to procedural law, it should also be clarified the types of rights that were being referenced.

90. *The DC Chair and a Member of the Working Group* summarised that the Principle would be brief with extensive Commentary, as agreed upon by the Working Group. Examples could be included about how regular enforcement laws could be applied to sets of facts which involved digital assets. It was added that the Drafting Committee would welcome support from other Members of the Working Group in preparing the Commentary for this Principle. The Commentary would make clear the types of rights and situations the Principle did not apply to, and the rights and situations where it did.

Principle 16

91. *The Chair* opened the floor for discussion on Principle 16. *A Member of the Working Group* noted that efforts were still ongoing to further develop the Principle and this section in general. It was noted that Principle 16(1) was a reflection of other parts of the document but was important to highlight again at the start of the Secured Transactions section. It was noted that the Commentary would be revised further, including for adding suggestions provided by the Steering Committee, particularly for Principle 16(2), where Japan, for instance, had noted that most transfers of digital assets in the context of secured transactions would be outright transfers. It was noted that the Principle was designed to provide clarity, and was in line with other international instruments related to secured transactions.

92. *An Observer from NatLaw* noted that the references to the Geneva Securities Convention and the UNCITRAL Model Law on Secured Transactions should be retained in Paragraph 2 of the Commentary. It was added that the Commentary should mostly explain the Principle, rather than serve as a comparative law discussion. Regarding Paragraph 6, it was suggested that the example provided should be reconsidered. With regard to Paragraph 10 of the Commentary, it was queried if the approach taken should note that there were two assets (the digital asset and the linked asset).

93. *A Member of the Working Group* noted that the Commentary would be revised to reflect several of the points mentioned. It was added that some of language of Paragraph 3 would be adjusted to focus on proprietary rights, rather than property, as had been agreed by the Working Group. It was noted that Principle 16 and its Commentary would be adjusted to provide additional clarity to the text.

94. *The DC Chair* added that the guidance in the Secured Transactions section was dependent upon domestic secured transactions law in any implementing State. It was added that the Principles did not try to cut across the different secured transactions law systems of different countries, and recognised that if a State had specific rules for a particular type of asset, those would apply, to the extent possible. Specific rules on digital assets were meant to fit into the existing systems, rather than replace them.

95. *An Observer from UNCITRAL* suggested that Principle 16(1) could recognise that it was possible that other laws already provided for the creation of a security right over the two assets, and that it might not be the Principles themselves, but other law, which provided for the existence of a security right in a digital asset. With regard to paragraphs (2) and (3), it was suggested to clarify the meaning of "another asset", as the intention was that this was not a digital asset. Furthermore, it was noted that references to Article 17 of the Model Law on Secured Transactions should be examined closely, particularly in the context of linked assets.

96. *The DC Chair* noted that guidance on linked assets was provided across the Principles and this needed to be properly cross referenced in the Secured Transactions section. *A Member of the Working Group* noted that the scope of the Principles was limited to digital assets, however, additional guidance on linked assets could be included in the Commentary to cover some of the points raised, including where a digital asset was linked to another digital asset.

Principle 17

97. With regard to Principle 17, *the DC Chair* explained that this was an important substantive Principle as it explained that control was a way to make a security right in a digital asset effective against third parties. The Commentary noted that domestic laws may also have other ways to make security rights in digital assets effective against third parties. It was noted that two situations were envisaged, one where the secured creditor controls the digital asset, and one where a custodian controls the digital asset on behalf of the secured creditor. The word 'hold' had been used for the second situation and was defined in the Principle on Custody. However, the use of this word was presently not agreed upon by the Working Group. In the context of custody, the word 'hold' was primarily for situations involving a sub custodian. It was noted that the word appeared in square brackets presently. Additionally, it was noted that Principle 17 also had square brackets around text which related to shared control over a digital asset between the secured creditor and a grantor. In these situations, where the grantor had the power to dispose of the asset, the nature of the rights held might be different in some jurisdictions. It was noted that additional Commentary would be drafted for Principle 17 before the next session of the Working Group.

98. With regard to the bracketed text in Principle 17(2), *an Observer from ALI and a Member of the Working Group* suggested not including it as this was a policy choice which States would make on their own. Some guidance could be offered in the Commentary on this matter. It was noted that for the situation where a secured creditor could not exercise its right without consent, or participation of the debtor or the grantor, it should not be treated as control. This could be mentioned in the Commentary.

99. *An Observer from UNCITRAL* agreed with the proposal to delete the bracketed text in (2). With regard to 17(3), it was queried as to what would happen if other law already provided for a digital asset to be the subject of a security right. It was noted that some guidance on this should be added to the Commentary. *The DC Chair* noted that the reason for 17(3) was to set up for Principle 18. However, it was correct to note that it did not add any substantive value other than noting that other mechanisms of third-party effectiveness may exist in domestic legal systems. This could be explained in the Commentary instead.

100. *A Member of the Working Group* queried why only Principle 17(3) referred to third-party effectiveness, whereas the others referred to 'effective against third parties'. Regarding 17(2), it was noted that this should be retained. *The DC Chair* noted that this would be looked upon differently in different jurisdictions – many jurisdictions had a requirement for negative control, rather than positive control, which meant that one could not have a situation where the security provider could dispose of the asset without being consented, or without the input of the secured creditor.

101. *An Observer from NatLaw* suggested that an outright statement, similar to that found in Paragraph 4 of the Commentary, could be added in Paragraph 1 which stated that control was a method of achieving third party effectiveness which was foreseen in secured transactions law, which also foresaw other methods of achieving third party effectiveness.

102. *The Deputy Secretary-General* noted that there was a discrepancy between Principle 17(2) and 17(3), whereby the limit noted in 17(2) was seemingly not applicable to 17(3). It was also

queried as to what type of assets Principle 17(3) was referencing. *The DC Chair* clarified that the intention was simply to make clear that other methods of achieving third-party effectiveness prescribed in domestic secured transactions law would continue to stand, and that need not be based on the notion of control. It was suggested that this be clarified further in the Commentary.

103. With regard to Principle 17(2), the Working Group deliberated and agreed that there was too much fragmentation in practice around the world on this matter. As such, it was agreed that it would be better to address the issue in the Commentary. It was noted that the Commentary should be kept reader friendly and not give rise to any confusions.

Principle 18

104. With regard to Principle 18, *a Member of the Working Group* explained that it dealt with the issue of priority, highlighting that a security right made effective by control would take priority over a security right in the digital asset of a secured creditor that did not have control. Principle 18(2) followed other international instruments whereby it addressed the question of priority where more than one security right had been made effective against third parties by control. The solution was a first in time solution, consistent with other international instruments in this area.

105. *The DC Chair* noted that the Steering Committee had pointed out that it would be factually impossible to have a situation similar to that described in Principle 18(2). Wherever two secured creditors with control existed, it would always be that they have an agreement amongst themselves. The Working Group was invited to give consideration to this matter.

106. *An Observer from UCC* supported the draft of Principle 18(1). With regard to Principle 18(2), it was noted that practically, if one party had perfected its security right in a digital asset by control, another party would not be able to assert control over the same digital asset without an agreement with the first party. In case such an agreement was reached, control would be shared and priority would likely be determined between the parties. It was noted that issues with regard to Principle 18(2) could arise when a digital asset was controlled by a third party on behalf of someone else. As such, some additional discussion needed to take place on this point.

107. *A Member of the Working Group* noted that there were inconsistencies in the drafting of Principle 17 and 18, which needed to be addressed. In particular, situations where custodians controlled assets on behalf of secured creditors were not addressed clearly in Principle 18. It was noted that in terms of drafting, Principle 17(1) should be clarified to note that a security right in a digital asset made effective against third parties in accordance with Principle 17 would have priority over a competing security right – this could include situations where a secured creditor did not have control, but control was with a custodian. It was queried if a situation could exist where the two conditions in 17(1) were met at the same time, whereby one secured creditor controlled a digital asset, and another custodian actually controlled the asset on behalf of another secured creditor, and whether the priority conflict between these parties could be addressed by the Principles.

108. *An Observer from ALI* agreed that where a custodian controlled an asset on behalf of a secured creditor, this would likely always be on the basis of an agreement between the parties. In the case there was no agreement between the parties, the rules found within the Principles would apply whereby the first in time would have priority. It was noted that the reconciliation of this Principle with the take-free rule could be done by noting that while take-free operated as it should for outright transfers – however, for security transfers, the right of a prior party does not disappear. These matters could be explained further in the Commentary.

109. *A Member of the Working Group* noted the Principle presently created a last in time rule, whereby any secured creditor that took control over an asset as an innocent acquirer in good faith,

would take free of the prior security interest in the asset. It was noted that in situations where parties had a shared agreement between each other, these problems were negated. It was suggested that Principle 18(2) could be removed, with Commentary explaining how various situations would look at the perfection by control rule and situations involving a qualified purchaser. It was noted that this Principle needed extensive Commentary. It was added that the Principle referred to a secured creditor perfecting or having its interest over third parties, rather than a secured creditor necessarily having control over the asset. *An Observer from UCC* agreed that these matters were complex and needed to be addressed, with particular reference to the issue regarding the last-in-time rule.

110. *The Chair* noted that rules regarding possession of tangible goods in different jurisdictions could be examined further in preparing the Commentary for this Principle. *The DC Chair* added that the outcome of this Principle would also need to be reflected in the Commentary for other Principles. Among the substantive issues needing to be addressed included whether the client had to be innocent for the application of the innocent acquirer rule, or the custodian. It was noted that the outcome of this issue would determine what happens in a situation where there was a custodian who promised not to create an additional security interest on an asset but did so anyways.

111. *An Observer from NatLaw* suggested retaining Principle 18(2) with additional Commentary and explanation on how more than one security right could be made effective by control against parties. Explanation could also be included to indicate how security rights ranked among themselves. For this, it would be based on the agreement if there was an agreement, and based on time in the absence of an agreement. Regarding Paragraph 4 of the Commentary, it was suggested that the language used was not consistent with the rest of the Principles, and should be reconsidered.

112. *The Secretary-General* noted that the rule in Principle 18(1) was broad and should be discussed further, including having detailed explanations in the Commentary. *The Chair* noted that there were differences between Principle 18(1) and the corresponding rule in the European Law Institute's (ELI) Principles on the Use of Digital Assets as Security. These differences were not necessarily problematic, but should be examined.

113. *A Member of the Working Group* noted that there were several differences between the approach adopted in the ELI Principles than that compared to the UNIDROIT Project, including the relevance of the notion of control. As such, it would be more helpful to draw comparisons between the UNIDROIT Project and international instruments such as the Geneva Securities Convention and the UNCITRAL Model Law on Secured Transactions. It was recalled that the Working Group had agreed on using control as a means of achieving priority over registration, or other means. It was noted that the Drafting Committee could give additional attention to the types of scenarios discussed where a second secured creditor qualified for protection as an innocent acquirer. Additional Commentary could also be included to address the relationship between the innocent acquirer rule and Principle 18. It was noted that it would be easier to explain these situations in the Commentary and consideration could be given towards deleting Principle 18(2).

114. *An Observer from ALI* noted that the Principles were designed to give guidance to legislators on matters related to secured transactions and digital assets, with the goal to accrue some sort of a negotiable nature to some kinds of digital assets. With regard to the relevant rules, it was clarified that in the case of an innocent acquirer, an element of good faith was necessary in order to acquire an asset free of all other property rights – this was clarified in other parts of the Principles. With regard to a subsequent creditor, an innocent subsequent secured creditor would not be required to have good faith as a valid transfer would likely only take place on the basis of an agreement between the parties. The Commentary could explain these issues further.

115. *A Member of the Working Group* noted that Principle 18(1) was fundamental and that a secured creditor taking control of an asset should not have to search a registry of any sort to figure out its priority in that asset. *An Observer from NatLaw* noted that similar rules could be found in security rights related to bank accounts and securities, which could be referenced in the Commentary. *It was agreed that a clarification would be included in the Commentary regarding the situation where a custodian controlled a digital asset on behalf of a secured creditor.*

116. *An Observer from EBA* noted that Principle 18(1) was fairly strong and would not be compatible with procedures in various EU Member States with regard to conditions for the effectiveness of a security right. This concern was shared by a Working Group Member. *The DC Chair* noted that the Drafting Committee would consider these concerns and propose an updated draft to the Working Group at its next session.

Principle 19

117. Regarding Principle 19, it was noted that the Principle would be subject to some additional stylistic changes before the Working Group's next session. It was further added that Principle related to the enforcement of security rights with respect to digital assets and emphasised on simple and quick enforcement. It also explained some of the formalities related to the same, with additional details included in the Commentary, which also explained how the Principle aligned with the UNCITRAL Model Law on Secured Transactions. It was noted that practical elements of enforcement, such as control of the digital asset by the secured creditor, were also detailed in the Commentary.

118. *The Deputy Secretary-General* noted that there may be situations where the boundary between creating a security right and transferring a security right might not be clear. It was queried if the Principle would provide any guidance on this matter. *The DC Chair* noted that the Principles related to secured transactions. However, what counted as a secured transaction was a matter of national law. *A Member of the Working Group* noted that enforcement in this context was generally on default. In the case of an outright transfer, Principle 20, which dealt with enforcement more generally, should be examined.

119. With regard to the Commentary, *an Observer from NatLaw* noted that Paragraph 1, should provide additional clarity on the issue of debtor protection where a secured creditor did not comply with the extrajudicial provisions on enforcement provided by the relevant law. Regarding Paragraph 3, it was noted that a reference to other international instruments in this area should be included when mentioning the general standards and rules applicable. Regarding Paragraph 5, it was noted that a link should be included with Paragraph 4, as well as a reference to the UNICTRAL Model Law on Secured Transactions Article 78, particularly on the issue of debtor consent, which needed additional clarification. Regarding Paragraph 6, additional guidance could be provided on the meaning of control, with a possible reference to Article 82 of the UNCITRAL Model Law on Secured Transactions. Regarding the last paragraph, it was queried if some guidance on pre-default remedies should also be provided. Additionally, it was also suggested that a reference to 'automatic enforcement' should not be made, as this might confuse readers and was subject to general notions of public policy, maintenance of public peace, and others.

120. *A Member of the Working Group* noted that the Commentary had been drafted from the perspective of a secured creditor and the remedies available to them. General rules of debtor protection continued to apply and including them in the text could confuse readers. It was noted that several references to other international instruments already existed in the Commentary and could be repeated in other paragraphs. It was further added that references relating to notice requirements and cooperation by the debtor were a matter of domestic law, and only limited comparative guidance on this could be included in the Principles and Commentary.

121. *An Observer from UNCITRAL* queried the usefulness of the word 'effective' in this Principle, and also in Principle 20. It was noted that this could be avoided if appropriate. It was added that additional clarity should be provided saying that the law should not impose any formalities or requirements. It was also added that consistency and cross referencing between Principles 19 and 20 was important and should be carefully considered.

122. *A Member of the Working Group* noted that the Principle was of a very general nature and might not be necessary, as it decreased the overall impact of the Principles. It was added that 19(3) was vague and might not be acceptable to policymakers. *Another Member of the Working Group* noted that while 19(1) was general, this was not an unusual practice in the context of the Principles. It was designed as a placeholder for the rest of the provisions. Retaining Principle 19(1) would be useful for the purpose of explaining how enforcement operated in the context of a security right in a digital asset. With regard to 19(2), it was noted that additional work could be conducted to making the provisions more specific. With regard to 19(3), it was noted that the Drafting Committee would consider the comments received, as well as the input collected at the joint workshop with the UNIDROIT Working Group on Effective Enforcement and improve the draft accordingly to reflect the points made. It was added that the word 'effective' could be deleted as it did not make much of a difference as to the substance. *The DC Chair* agreed that Principle 19(1) was drafted to allow for the rest of the provision to have more cohesion, but this would be considered again by the Drafting Committee based on the comments received.

123. *A Member of the Working Group* noted that additional consideration needed to be given to the policy choices put forward in this Principle, particularly with regard to protection of the rights of the custodian. It was noted that provisions which were designed to be explained in the Commentary needed to still follow the policy decisions which were in line with the rest of the Principles. Regarding Principle 19(2), *a Member of the Working Group* explained that it sought to highlight issues that existed in the implementation process of enforcement related provisions for security rights in digital assets. It was noted that the Principle was generally well explained in the Commentary, and this would be developed further. The policy choices implemented were similar to those taken in the context of bank accounts or intermediated securities. *A Member of the Working Group* noted that Principle 19(2) continued to be too broad and should be reconsidered, despite the Working Group being in a position to develop Principles that were aspiratory. It was concluded that the Drafting Committee would examine these points accordingly.

124. With regard to Principle 19(3), *a Member of the Working Group* noted that it covered situations relating to some sort of automatic enforcement, particularly in the case of system designs that may automatically liquidate portions of collateral as some defaulting situations occurred. Some examples had been provided for this and additional examples from the Working Group would be welcome. It was noted that this matter was discussed at the joint workshop between the Digital Assets Working Group and the Working Group on Effective Enforcement. *The DC Chair* added that the Principle noted that the law should recognise that automatic enforcement could take place in the context of digital assets, as described in the Commentary.

125. *The Secretary-General* noted that Principle 19(3) and Principle 20 should be aligned, and it should be ensured that both have consistent references to the utility of domestic procedural law for enforcement concerning digital assets. It was also added consideration could be given to making this rule more substantive. *The DC Chair* noted that Principle 19 related to out of court enforcement, whereas 20 related to enforcement through the courts. Consideration could be given to mentioning automatic enforcement in Principle 20 context as well. It was added that the relevance of procedural law to automatic enforcement also needed to be considered in the Principles or mentioned in the Commentary.

126. *A Member of the Working Group* noted that some guidance should be provided for ensuring that automatic enforcement should, alongside being commercially reasonable, be conducted in a

legally correct manner, particularly with respect to priority of competing security interests. *Another Member of the Working Group* noted that it should be ensured that there was cohesion between Principle 19 and 20, in order not to confuse readers. Additionally, it was queried if automatic liquidation of collateral should be characterised the same as automatic enforcement. It was noted that mentioning commercially reasonable in the context of enforcement of security rights could suggest that commercial reasonableness was not relevant for other types of enforcement, which was not the case.

127. *The Deputy Secretary-General* suggested that some Commentary should be included on the ex-post nature of automatic enforcement. It was added that some confusion was created in the mention of 'as a matter of Principles law', and that this should be clarified.

128. *An Observer from IMF* queried if Principle 19(3) covered situations where automatic enforcement by smart contract took place as a result of a data error or mistake in the code. *A Member of the Working Group* noted that it was important to be careful when talking about automatic enforcement by smart contract, as it mostly referred to automatic performance of contractual obligations rather than automatic enforcement.

129. *A Member of the Working Group* queried if additional guidance should be included in the Principles relating to notification requirements relating to security rights in digital assets. This was particularly relevant when digital assets subject to security rights were enforced against automatically without a particular creditor being notified. *An Observer from UCC* noted that this sort of liquidation of collateral in case value dropped below a certain amount was already taking place in the industry, and that the Working Group should consider taking a position on the matter. *A Member of the Working Group* noted that the Principles did not intend to remove a notification related requirement. However, it was challenging to address all the issues which could exist in a simple Principle and Commentary. It was added that the notification requirement, as well as exceptions to the same, of a secured transaction would also apply to digital assets. The Principles were not meant to be a repetition of general secured transactions law, as that was already part of the 'other law' being referenced. *The DC Chair and a Member of the Working Group* noted that the Drafting Committee would seek to address many of the issues raised, and that the Principles did not intend to negate the rights of any secured creditors, but rather offer further clarity.

130. *A Member of the Working Group* noted that technologically, it was relatively easily possible to ensure that where automatic enforcement took place, or was about to take place, a creditor received notice of this. It was added that this should be kept in mind when considering whether or not to give any guidance on the notification matter. *Several Members of the Working Group and Observers* noted that the Principles may consider giving guidance on this matter, and how general secured transactions law, particularly with the requirement to give notice of enforcement to all parties, would apply to security rights in digital assets. It was noted that the Drafting Committee would consider this matter accordingly and insert references either into the Principles or in the Commentary. It was noted that automatic enforcement should not be estopped, but encouraged under the Principles, as long as the applicable law was followed. *The DC Chair* noted that the Principles and Commentary would clarify these matters, both in the context of the requirement for commercial reasonableness and the notice requirement.

131. *A Member of the Working Group* noted that the MakerDAO example did not fit well in this Principle, given that it was difficult to categorise transactions and liquidations on MakerDAO as secured transactions and automatic enforcement. In the situations where the type of enforcement under discussion took place, it always took place on the basis of pre-existing agreements between the parties. *A Member of the Working Group* noted that in the case of a secured transactions agreement, several requirements, including those related to notice, needed to be followed. A lack of compliance would not be allowed in many jurisdictions and would make the agreement invalid in court. This should be kept in mind when considering the types of agreements being examined.

132. *An Observer from NatLaw* queried if the Principles would give any guidance for situations where in the case of automatic enforcement, the interest of a secured creditor who was not the priority secured creditor was enforced first. *A Member of the Working Group* noted that general secured transactions law should be followed under automatic enforcement, and this was already addressed with the reference to 'other law'. It was added that enforcement in this context was a broader disposition of a digital asset, which was something that could be clarified further in the Commentary.

133. It was concluded that the Principle would continue to reference the applicability of existing general secured transactions law to digital assets, and that this would be made clear in the Commentary. Additionally, it would be difficult to point to the secured transactions law of one jurisdiction as an example, and so this would be avoided. It was noted that the discussion also already addressed the points raised by the Steering Committee on Principle 19.

Principle 7

134. *The Chair* opened the floor for discussion relating to Principle 7. *A Member of the Working Group* explained that this Principle highlighted how a person in control of a digital asset might need to demonstrate they are in control, and that in such situations, the exclusivity of this control would be presumed unless proven otherwise. Additionally, identification need not be by name only.

135. *An Observer* suggested that additional clarity be included in the Principle regarding situations where proving a parties control over a digital asset might become relevant. Additionally, for Principle 7(2), a lot of additional discussion could take place regarding the means with which such identification could be ascertained. *Several Members of the Working Group* noted that the non-exhaustive list in Principle 7(2) was sufficient to identify a party in control over a digital asset. It was added that the option to give these examples in the Commentary could be explored by the Drafting Committee. It was also noted that various issues could occur where a party would need to demonstrate its control over a digital asset. It was added that this Principle was not only about custodians, but rather about parties who held digital assets in non-custodial wallets. It was suggested that these points should be clarified in the Commentary.

136. *An Observer* noted that for certain multi-party computation cryptography, proving exclusivity would not be possible, as multiple parties could hold the private key. *Several Members of the Working Group and Observers* noted that situations such as this were covered under the part related to shared control in Principle 6. It was reemphasised that the Principles needed to be technology neutral. Additional guidance on this matter could be considered to be provided in the Commentary.

137. *A Member of the Working Group* noted that the conceptual point in this situation was that the group who shared control, did so exclusively. *An Observer* noted that situations where a single party could not clearly be identified as being control of an asset should be given additional attention and described in the Commentary, as this was a particularly important regulatory issue.

Principle 9

138. *The Chair* opened the floor for additional comments on Principle 9 on innocent acquisition. In particular, it was noted that the requirement that for a transferee to be an innocent acquirer, an element of good faith was necessary. It was noted that the innocent acquirer rule varied from jurisdiction to jurisdiction and this should be elaborated further.

139. *The DC Chair* noted that an attempt had been made to making this Principle clearer. Additional consideration needed to be given to the use of the words 'proprietary claim' in this

Principle. It was noted that the Principle recognised that different States had different rules on this, and that this could be further clarified in the Commentary.

140. *The Secretary-General* queried the use of the term 'purchase', as this created confusion, particularly in civil law jurisdictions. It was agreed that this would be considered by the Drafting Committee.

141. With regard to the notion of control, *an Observer* noted that there were several similarities between the Principles and the revised text of Article 12 of the Uniform Commercial Code (UCC) of the US. It was suggested that this may cause some difficulties in the acceptability of the Principles in civil law countries. Additionally, an element of circularity was noted in the definition of control, and it was suggested that it was unclear to readers. The circularity was in reference to how in order to have control, a party needed to have the exclusive ability to change the control. It was queried if control was the ability to transfer, and if so, why this was not clearly said in the Principles.

142. *An Observer from UCC* noted that the concept of control, given its factual equivalence to possession, aligned with civil law approaches. This included references to exclusivity. It was noted that the points relating to control related to the exclusive ability to change control and did not create circularity, but rather corresponded to being able to enjoy the full benefit of a digital asset with the exclusion of others. Additionally, it was noted that Principle 6(2) took account of UTXO-related methods of controlling digital assets, and Principle 6(3) provided sufficient guidance for issues concerning shared control. *A Member of the Working Group* agreed and added that Principle 6 sought to make an intangible asset possessable, which was a novel concept. *The DC Chair* added that control in this situation was a factual concept, rather than a legal one, and so the word ability had been used rather than power.

143. *An Observer* queried why the concept of a private key was not included in the definitional or functional aspects of the notion of control. It was added that this was a very commonly referred concept in European regulation of digital assets and was part of the functionality of every digital asset. *An Observer from UCC* clarified that while regulation was designed to address particular types of assets, and so it made sense to refer to particular types of technologies, the Principles were designed to be technology neutral, and so captured concepts at a higher level. It was added that several permissioned blockchains already existed which did not rely on public-private key cryptography, and that technology was already being deployed for other types of digital assets. *A Member of the Working Group* agreed with the points made, emphasising on the need for technological neutrality in the Principles. *An Observer* suggested that some reference to private keys could be included as illustrations in the Commentary. It was noted that the Drafting Committee would consider this matter accordingly.

144. *An Observer from NatLaw* suggested reconsidering the order in which the sub-points in the definition of control had been presented in Principle 6 in an effort to make them flow better. It was agreed that the Drafting Committee would examine this matter accordingly.

145. *The Secretary-General* noted that Mr Carlo Di Nicola, who had worked on the Digital Assets Project since its beginning would be leaving the Secretariat in the coming months. *The Working Group expressed its gratitude to Mr Di Nicola for his efforts.*

Principle 12

146. *The Chair* opened the floor for discussion on Principle 12 relating to Custody. *The DC Chair* introduced the draft noting that the property aspects of custody were the subject of this Principle, as the document only considered private law issues. It was noted that the remedies discussed in the Principle also only related to private law remedies, rather than regulatory ones. It was noted

that the Commentary provided various examples of what type of situation comprised a custody situation based on the different technological and business models that presently existed in the industry. At the same time, the text of the Principle itself was meant to be business model neutral. It was explained that the Commentary tried to distinguish the various situations which would comprise custody with those that would not. This also considered items such as an agreement for a deposit account in the context of digital assets. Principle 12 sought to define custody and give set the groundwork for the next few Principles, which outlined the obligations of a custodian and explained other private law issues related to the custody situation, including insolvency. It was noted that Principle 12(1) was not a definition, but rather a description. It was noted that the Principle explained the concept of custody and what comprised a custody agreement. The Principle also talked about self-custody, sub-custody, and other related concepts, as well as parties which might offer services that looked like custody, but were not the same.

147. *An Observer* noted that he would revert back to the Drafting Committee with an alternative definition of control. Regarding Principle 12(1), it was noted that a distinction needed to be drawn between a custodian holding money, a security, or another asset on behalf of a client, and a custodian involved in the digital assets realm, as digital assets were held on the distributed ledger, rather than by any one person. The use of the word 'hold' was noted to be problematic and should be reconsidered. It was added that the Principle contained text which was definitional, as well as text which conveyed a legal effect, and that this could confuse readers and should be considered for redrafting. *Several Members of the Working Group* agreed that the word 'hold' had the potential to confuse readers. *An Observer from NatLaw* supported reconsidering the drafting of the Principle particularly after the text 'on behalf of'.

148. *The DC Chair* noted that these matters would be considered by the Drafting Committee accordingly. It was added that the word 'hold' had been the subject of extensive discussions and was hard to replace. However, the Drafting Committee would make an effort accordingly. It was noted that 'control' had also been considered but was likely not a good fit. The word 'maintain' could be considered, which also what was used in the Geneva Securities Convention. *An Observer from the IMF* supported the idea of replacing 'hold' with another term, as digital assets were not technically held anywhere.

149. *An Observer from NatLaw* suggested that additional clarity be provided in the Commentary relating to the impact of an insolvency of a custodian on the assets held by that custodian on behalf of a client, and the various outcomes which could occur, given that a client held a proprietary right in its asset.

150. *A Member of the Working Group* noted that the concept of control for a digital asset related to access, and it was understandable that nothing was being held in the purest sense, as the asset was not tangible. Holding was seen as a functional equivalent of possession through control, and a reference to access with exclusivity, as noted in Principle 6 already. It was added that the Principle only addressed issues related to proprietary rights, as contractual issues would be addressed by contract law. Finally, a correlation was drawn to money, which was also not physically held by bank in amounts equivalent to what bank account holders had.

151. *A Member of the Working Group* clarified that 'hold' had been used to address the situation with regard to a sub-custodian, whereby the custodian of the client did not have control over the digital asset in question. As such, either 'control' could have been repeated in the Principle, or 'hold' could have been used. It was added that cash was not necessarily held by banks, but rather customers had a claim against the bank for cash. It was the same concept with digital assets. The same could be said for securities, which had all been digitalised in the modern economy, thereby no longer creating physical connotations to the use of the word 'hold'. With regard to the drafting suggestions on Principle 12(1), it was noted that the purpose of the current draft was to address the differences between custodians and exchanges, which was often not very obvious.

152. *A Member of the Working Group* noted that from a technical perspective, digital assets were simply data entries. It was agreed that as intangibles, the concept of hold was never meant to have a physical connotation. *An Observer from ALI* agreed with this and added that Principle 11 and 12 were complimentary and should be read together. It was added that insolvency related aspects of a custodian holding assets on behalf of clients were an important consideration and needed to be clearly addressed.

153. *An Observer* noted that guidance needed to be provided for situations where there was a chain of sub-custodians. It was reemphasised that the word 'hold' should be reconsidered. *The DC Chair* noted that the Drafting Committee would examine this matter as well as the suggestions related to redrafting the Principle. It was noted that the Principle needed to cover custody holistically, while at the same time recognising situations which were not custody. It was also noted that agency law was not the subject of this Principle, and the relationships indicated did not encompass agency law related issues. It was added that consideration would be given by the Drafting Committee on how to properly separate custody from other similar looking situations.

154. *A Member of the Working Group* noted some circularity between Principle 12 and 15, and queried which one should be treated as the material rule. It was noted that the main focus of Principle 12 was the custody agreement, and this should be retained. *Several Members and Observers* clarified that the term 'hold' was not entirely incorrect, as private keys were generally held by parties and were mostly the tools through which certain types of assets were accessed. It was also noted that the industry regularly used this word and it could be found in the terms of service of most providers of custodial services. It was added that the important point here related to assets held by a custodian being outside the insolvency estate of the custodian, rather than the terminology used.

155. *An Observer* noted that holding a private key was not the same as holding a digital asset. It was also added that most custody agreements in Europe did not refer to the term 'hold'. It was added that the legal effect of custody and the technical means to access a digital asset should not be confused or merged together in drafting this Principle. Additionally, the regulatory effect of custody should also be kept separate. *An Observer from UCC* clarified that several large cryptocurrency exchanges, including WhiteBit, BitStamp, and LiteBit in the EU used 'hold' in their terms of service.

156. *An Observer from the IMF* noted that consideration should be given to whether or not an asset for a custodian appeared on their balance sheet. It was widely recognised that they did not. As such, they would be kept out of the insolvency estate of that custodian. This was agreed.

157. *A Member of the Working Group* noted that Principle 12(1) had several definitional aspects. While it was not a definition of custody, it defined what a custody agreement was. It was noted that if additional situations were meant to be captured by the definition, additional drafting needed to be undertaken accordingly. It was noted that it was important to only apply this Principle to what was considered to be a custody agreement, rather than every situation where one party held digital assets on behalf of another.

158. *The DC Chair and a Member of the Working Group* noted that there were no disagreements with regard to the policy matters at hand and the approach taken. The issues discussed were more with regard to ensuring that the Principle addressed relationships which had a custody-type impact, rather than those that explicitly inculcated a promise of some sort, as this was not regularly practiced in the industry. It was added that the Drafting Committee would examine this matter accordingly and propose a draft to address the concerns raised by the Working Group. Consideration would also be given to producing a draft which did not include the word 'hold'.

159. *An Observer* noted the importance of considering the mechanisms through which these types of services were provided in the industry. It was added that service providers often included a custody agreement, a service agreement, as well as a disclaimer that all assets were held on the blockchain, rather than by the service provider. The technicalities needed to be acknowledged and recognised duly in the Principles and the Commentary. The sub-custody arrangement also needed to be considered based on industry practices. *An Observer from the Law Commission of England and Wales* agreed that the industry and the types of services provided had to be recognised and reflected accurately. Additionally, there were also several examples of borrowing of crypto assets, as well as crypto assets being held on trust type relationship, which also needed to be considered. *A Member of the Working Group* noted that various different types of arrangements were described as examples in Principle 15, and that these examples would be moved to the Commentary for Principle 12. *An Observer from ALI* and others also noted that technical services also needed to be differentiated from custodial services, and the Commentary could address this. *An Observer from IMF* queried if a bank relying on a contractor for the provision of technical services could be considered a sub-custodian.

160. It was concluded that the Drafting Committee would give additional consideration to Principle 12 (1) and (2) and revert back to the Working Group with a draft that takes into account all the issues raised.

Principle 15(2)(a)

161. With regard to Principle 15, an *Observer* noted that the term 'identical type' could cause confusion, particularly in situations where a hard fork had taken place. It was added that the rights of parties in the case of a hard fork needed to given further attention, keeping in mind that they took away from the fungibility of a digital asset.

162. *The Chair* noted that the issues relating to a hard fork had been discussed by the Working Group at earlier sessions. *A Member and an Observer* noted that the Principles addressed these issues already and additional guidance could possibly be included in the Commentary.

163. *An Observer from NatLaw* noted that since definitions of terms were in various different places within the Principles, rather than only in Principle 2, this point should be highlighted in the text to assist the readers. *The DC Chair* noted that the placement of the definitions in Principle 15(2)(a) would be considered by the Drafting Committee. *An Observer* noted that cross referencing and hyperlinking text in the final publication would help readers to navigate the document.

Principle 12(3)

164. With regard to Principle 12(3), *the DC Chair* noted that the substance of the Principle was drafted as a presumption to encourage industry participants to include provisions relating to this matter in their agreements. It was added that additional Commentary would be prepared for this Principle accordingly.

165. With regard to Principle 12(2)(a), *a Member of the Working Group* queried if the word 'considered' should be retained when referring to the trait of fungibility of a digital asset. *An Observer* suggested to delete the term.

166. *The DC Chair* noted that a representative of Luxembourg from the Steering Committee, as well as practitioners from other jurisdictions had noted that fungibility was not an absolute matter, and depended upon how markets and contracts relating to that asset were operating. It was added that deleting the word 'considered' would be acceptable as long as the matter was explained properly in the Commentary. *The Working Group agreed with this conclusion.*

167. Regarding Principle 12(3), the Working Group deliberated the use of the term 'agreement', noting that it had a contractual undertone, and that consideration could be given by the Drafting Committee to change it to 'arrangement'. *A Member of the Working Group* noted that the reference to agreement and/or arrangement was in the context of custody, and as such generally referred to an agreement between the parties. However, either term was acceptable if the meaning was explained in the Commentary.

168. *An Observer* noted that in places where the Principle meant to refer to a custodian, it should not refer to a service provider instead, as that would create confusion. It was suggested that this matter be considered by the Drafting Committee.

169. *An Observer from the Law Commission of England and Wales* noted giving consideration to drafting which led to the creation of a presumption of a trust in a custody relationship, noting that this would not be consistent with English law. *The DC Chair* noted that this point could be elaborated in the Commentary.

Principle 13

170. Regarding Principle 13, *the DC Chair* noted that this set out the private law related duties which a custodian owed to its client and the elements that composed a custody agreement. Principle 13(1) outlined three duties which a custodian would have; 13(2), 13(3) and 13(4) continued along the same vein with some additional duties a custodian might owe to its clients and/or rules for the custodian with regard to client assets. It was noted that there were certain parts of the Principle which were presently in square brackets and should be considered by the Working Group for inclusion or exclusion accordingly. It was added that Principle 13 did not take away the parties abilities to agree upon any terms and duties as they considered appropriate.

171. *An Observer* queried why 'or by law' was placed in square brackets in 13(2), but included in the text in 13(1). The use of the word 'safekeeping' was also queried as to its appropriateness in 13(1)(c). Additionally, it was suggested that guidance should be provided on the impact of a hard fork on a custody situation. Finally, it was also noted that the requirement for an authorisation by the client for the custodian to engage in sub-custody was not normatively practiced and should be considered further. *An Observer from ALI* noted that it was possible for 'safekeeping' to have implications relating to tangible goods. As such, consideration could be given to replacing it. It was also noted that the authorisation aspect to sub-custody was always a desirable item. It was noted that an important element of Principle 13 was the prohibition on custodians to use the digital asset for their own benefit, except to the extent permitted by the client. In this regard, it was noted that it should be pointed out that if the permissions by the client to the custodian go beyond a certain point, this may no longer be a custody agreement, and this line should be explained in the Commentary.

172. *A Member of the Working Group* noted that it would be difficult for the Principles to draw the type of line being suggested as to when client permission made a custodian no longer a custodian. With regard to the use of the 'the law' in 13(1)(a), it was noted that this was important and should be done consistently in other parts of the Principle. With regard to the use of safekeeping, it was noted that alternatives could be considered and that there was general agreement on the substance. It was suggested that the three words in square brackets in 13(2) could be removed and some additional guidance inserted in the Commentary. Finally, it was noted that having an authorisation requirement for sub-custody was useful and should be retained, particularly keeping in mind bad practices which custodians presently in the market often used. Regarding the issue of including text on a client giving the right of use to a custodian under a 'custody agreement, *several Working Group Members* noted that there would likely exist regulation against this matter, and that some guidance regarding the same could be provided in the Commentary.

173. *An Observer* noted that the issue in Principle 13(4) mostly related to the liability, and how a sub-custodian could not offer the same protections and guarantees to a client which a custodian generally could. As such, consideration should be given to whether this provision was actually protecting the client in any way or not. *An Observer from ALI* noted that authorisation of the custodian for sub-custody provided added certainty, which was important in these types of transactions. *Several Observers* noted that this may be superseded by a regulation that allows licensed custody provided to offer sub-custody services, which might be able to do so without authorisation.

174. *It was concluded that the Drafting Committee would revisit Principle 13 and present an updated draft to the Working Group accordingly.*

Principle 14

175. *The Chair* opened the floor for discussion of Principle 14 which related to other aspects of custodianship. *The DC Chair* introduced the draft text and noted that the Drafting Committee would continue to develop the present version and present an updated text for consideration by the Working Group at its next session.

176. *An Observer from NatLaw* suggested that the title of the Principle should be reconsidered as the text dealt with items that were not purely related to custody agreements or relationships. Additionally, it was noted that the use of the term 'right or interest' should be reconsidered by the Drafting Committee as these could have different meanings in different jurisdictions. *A Member of the Working Group* noted that 'rights' had been used across the Principles and could also be used here, rather than the double term.

177. *A Member of the Working Group* noted that there were connotations of an English law trust in this Principle, which could confuse readers as a custody relationship was not the same as a trust relationship. *Another Member of the Working Group* noted that individuals who acted as custodians not in their primary business capacity would potentially be excluded from the application of the custody related rules in the Principles, and Principle 14 sought to improve that situation. *Another Member of the Working Group* noted that while these situations occurred, it was important to develop a Principle for them which was not misleading for the reader. *It was agreed that this Principle would be reconsidered by the Drafting Committee along these lines accordingly.*

Principle 15

178. *The Chair* opened the floor for discussion on Principle 15 relating to the insolvency of a custodian. *The DC Chair* introduced the draft and explained that the Drafting Committee would give additional consideration to where this Principle could be located. *An Observer from NatLaw* suggested that all insolvency related Principles could be placed in a similar section.

179. *A Member of the Working Group* noted that there were two issues which could be considered for addition to the substantive rules for the insolvency of a custodian. The first one would be to have a substantive rule saying that the insolvency representative should cooperate to have the digital asset distributed or returned to the clients on insolvency; and the second point would be what happened if a shortfall occurred, and how to deal with it. *Other Members and Observers of the Working Group* suggested that the approach to these two matters should be consistent with the Geneva Securities Convention and it was agreed that the Drafting Committee would propose a draft along these lines. It was also added that the provisions on these two issues for the insolvency of a custodian would need to be aligned with rules on insolvency in general also found in the Principles.

180. With regard to Principle 15(2), *an Observer* queried the use of the term hold, as it was confusing for readers. Some additional drafting points were also suggested and it was noted that these would be submitted directly to the Drafting Committee. *A Member of the Working Group* added that the duties of a custodian and sub-custodian were not the same. The client would not have a general right to exercise on the insolvency of a sub-custodian, but rather that would be a right for a custodian to exercise on behalf of a client. *An Observer from NatLaw* noted that the provisions relating to insolvency were a repeat of items already mentioned in Principle 12, and a streamlining of the text could be considered.

181. *It was agreed that the Drafting Committee would reconsider the Principle based on the feedback received and revert back to the Working Group accordingly.*

Principle 11

182. *The Chair* opened the floor for a discussion on Principle 11 relating to the application of the innocent acquisition rule to a custody relationship. *The DC Chair* introduced the present draft and noted that the Drafting Committee needed to undertake additional work on this Principle to improve its presentation. Substantively, feedback was sought on the question of which party should be innocent for this rule to apply, and some guidance on the meaning of the word 'innocent'.

183. *A Member of the Working Group* noted that the present drafting seemed to imply a blanket last in time rule, which should be given some additional attention. It was noted that a client's right should exist only against a custodian, and not against third parties with which the custodian might be transacting. It was added that for sub-custody, the same rule should apply on all tiers. It was noted that the Principle needed to give greater consideration to the rights of a client who is an innocent acquirer, and that such a client would acquire free of any other rights.

184. *An Observer* queried the types of clients and custodians being referred to in this Principle. *The DC Chair* clarified that the Principle was designed to apply to all sorts of clients and custodians, including all types of relationships they may have. It was added that this Principle would be clarified further by the Drafting Committee. It was noted that the reason this rule was independent of a general innocent acquisition rule was because in a custody situation, the client who was an innocent acquirer might not have control as control would be with the client's custodian.

185. *An Observer from ALI* noted that in the case of a custodian being an innocent acquirer, it was important to also consider the situation where this custodian was acting on the instructions of a client who is not innocent. *A Member of the Working Group* noted that the Working Group needed to make a substantive policy choice on the types of transactions this Principle would cover, and whether those would only be on-chain transactions or also include off-chain transactions. It was noted that clients in several of these types of transactions would be protected by the shelter principle. It was noted that several of the issues on this matter were related to similar issues in the area of intermediated securities, and several levels of guidance, particularly related to sub-custody, needed to be given in the Principles.

186. *It was agreed that the Drafting Committee would give additional consideration to this Principle and propose an updated draft for the consideration of the Working group at its next session.*

Principle 19(2)

187. With regard to Principle 19(2), a Member of the Working Group noted that the Drafting Committee would revert back to the Working Group with a more precise draft which clarified the rule in terms of the general protection of intermediaries, and where a third party has not perfect an interest in the asset other by way of control.

Principle 17(1)(b)

188. With regard to Principle 17, *the DC Chair* noted that the Drafting Committee would present a draft to the Working Group at its next session which excluded the word 'hold'. Additionally, *several Members and Observers* noted the importance of sub-custody in the industry, and that guidance on the same needed to be included in the Commentary for Principles.

Item 5: Organisation of future work

189. The Chair opened the floor for Agenda Item 5.

190. *An Observer from HCCH* noted that it would welcome receiving an updated draft of Principle 5 as soon as possible, as it would share the same with its governing organs, which were conducting a process so as to determine the future work of the HCCH in this area. It was noted that following the present session, the UNIDROIT Secretariat would follow with interest the work of the HCCH in the area of law and technology, particularly with a focus on issues related to conflicts of law in digital assets. It would report back to the Working Group on this accordingly.

191. The Working Group deliberated if two additional meetings were required to finalise the draft Principles. It was agreed that the 7th Session of the Working Group would take place on 19-21 December 2022, with the 8th Session taking place on 8-10 March 2023. Meetings of the Drafting Committee would be organised in between sessions, as well as a joint meeting with the Working Group on Best Practices for Effective Enforcement. The Steering Committee would be consulted with an updated draft of the Principles in November 2022, and an Industry Consultation would be undertaken in January-February 2023, with the goal to publish the final instrument in May 2023 at the 102nd Session of the UNIDROIT Governing Council.

Item 6: Any other business

192. No further items for discussion were noted.

Item 7: Closing of the session

193. The *Chair* thanked all participants for their contributions to the sixth session.

194. *The Chair declared the session closed.*

ANNEXE 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. Update on intersessional activities
 - (a) Activities of the Drafting Committee
 - (b) Updates from the Steering Committee
 - (c) Input from the UNIDROIT Governing Council
 - (d) Intersessional Workshops
4. Consideration of substantive issues on a Section-by-Section basis
5. Organisation of future work
6. Any other business
7. Closing of the session

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