



INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
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Working Group**

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SUMMARY REPORT
OF THE SEVENTH SESSION
(Hybrid, 19-21 December 2022)

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1. The seventh 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 19-21 December 2022. The Working Group was attended by 51 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 7th 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 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.7 – Doc. 1, available at Annexe I).*

Item 3: Approval of the report of the sixth session (Study LXXXII – W.G.6 – Doc. 4)

5. *The Working Group approved the report of the sixth session (UNIDROIT 2022 – Study LXXXII – W.G.6 – Doc. 4)*

Item 4: Update on intersessional activities

6. *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.

7. *The DC Chair* thanked all the all the Members of the Drafting Committee for their intersessional efforts to update the draft Principles. The Drafting Committee had met thrice during the intersessional period. Its main focus had been to address and incorporate the feedback received from the previous Working Group session and to restructure the Draft Principles accordingly. As a result of these efforts, the number of Principles had been reduced by two. It was noted that the Principles still had some inconsistencies regarding cross-referencing and formatting, which would be addressed. It was noted that each Principle would be discussed separately, and specific changes would be detailed later in the meeting.

8. *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.

9. *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 8 sets of comments had been received from 7 countries, all of which noted the usefulness of the Principles and the need for an instrument such as this. The comments were specific and directly addressed various issues, including suggestions relating to the structure of the Principles and feedback for specific parts of the instrument. One commentator proposed including additional language on enhanced transparency for investors in digital assets, particularly following recent industry bankruptcies. Another commentator suggested defining key terms such as “control” in the beginning, and to provide illustrations under a separate subheading. One commentator suggested changes to the definition of “transfer”, and another suggested adding additional clarity to the instrument regarding its link with regulation. Several commentators noted the need to ensure that Principle 5 on Conflicts of Law was applicable in civil law jurisdictions.

10. *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 5.

Item 5: Consideration of substantive issues on a Section-by-Section basis

Introduction of the Principles

11. *The Chair* invited comments on the style of the Principles, and particularly on whether the Commentary should appear after each sub-provision, or at the end of each Principle. *Several Members of the Working Group and Observers* agreed that the Commentary should follow each Principle, rather than each sub-provision.

12. *The Chair* queried whether cross references inside the same Principle should only refer to paragraph numbers or mention the whole Principle number again. It was agreed that past UNIDROIT practice would be examined to address this issue.

Principle 4

13. *The Chair* opened the floor for discussion on Principle 4. *The DC Chair* noted that the revisions made were to draft the Principle in a positive tone, rather than a negative one. Additionally, an example of legislation that created a digital equivalence of paper assets was inserted into the Commentary. A few sentences had been moved from the Principle to the Commentary, and the language had generally been improved. It was noted that additional work needed to be done regarding the cross references and the correction of minor typos in the Commentary. It was noted that the Steering Committee comments on this Principle had also already been addressed.

14. *The Working Group supported the draft of Principle 4 and requested the Drafting Committee to continue to further develop the Commentary.*

Principle 5

15. *The Chair* opened the floor for discussion on Principle 5. *The DC Chair* summarised all the changes which had been made during intersessional discussions. The waterfall structure had been maintained with the guidance provided in the beginning of the Principle kept the same as at the Working Group’s previous session. Additionally, two options had been drafted for States to pick when they would implement these Principles into their domestic law. These options (A and B) were explained in the Commentary. There were several items in square brackets in these options, with the proposal to retain these square brackets in the final draft as they were instructions for States to consider. This was a similar technique to that used by the United Nations in some of its

instruments. It was added Principle 5(5) still needed to be finalised. Additionally, it was noted that there were several changes proposed to the Commentary, and that the Working Group was invited to give its input on them accordingly. This included additional guidance on whether Principle 5 only addressed proprietary issues covered by the Principles, or all proprietary issues in general. It was added that some additional language could be included to cover the relationship between Principle 4 and Principle 5.

16. *An Observer from the Kozolchik National Law Center (NatLaw)* suggested that as the Commentary, specifically regarding the location of the parties to a transaction, should be made clearer. It was added that an effort could be made towards increasing the readability and clarity of the options provided to States, including providing additional explanations in the Commentary. A question was also raised regarding applicable law in case of insolvency proceedings, and whether additional guidance could be provided on this matter. It was additionally noted that the relationship between private law issues which were not covered under the Principles, and those that were, could be explained in more detail in the Commentary. Additional consideration should also be given to rules of private international law adopted by UNCITRAL and HCCH.

17. *The Chair* sought the Working Group's feedback on the issue of whether Principle 5 should address all proprietary issues, or only those proprietary issues addressed by the Principles. *Several Working Group Members and Observers* suggested taking a broader approach as rules in this area did not generally exist, and States would benefit from guidance on this matter. It was suggested that the meaning of 'proprietary rights' within the context of the Principles could be explained in some part of the instrument to provide additional guidance. However, for Principle 5, a generally broad approach was preferable. *The DC Chair* noted that mention had been made in the Commentary of not having specific rules in relation to conflicts of law for custody issues and linked asset issues. This was based on guidance from the Working Group and could be expanded further by the Drafting Committee.

18. *An Observer from the European Banking Institute (EBI)* noted that Option A, which pointed towards a 'law of the forum' type approach to conflicts of law was not generally found in other private international law instruments, as it could create a large amount of uncertainty in the law that would apply to a particular dispute. It was suggested that an effort should be made to try to identify other connecting factors in determining the applicable law, rather than opting for the law of the forum. *The Observer from EBI and an Observer from NatLaw* noted that the waterfall structure presented above Option A and Option B was not applicable to a majority of digital assets in circulation in the industry. It was suggested that some additional party autonomy should be prescribed in the Principles.

19. *Several Working Group Members and Observers* noted that the options in Principle 5 facilitated the use of these Principles as the relevant applicable law, to the extent possible, in both situations where a State had either implemented the Principles into their domestic law, or it had yet to adopt the Principles. It was further noted that traditional connecting factors for choice of law issues were not applicable in the case of digital assets and had been debated extensively at the Working Group and in the Drafting Committee. It was noted that digital assets were a novel area and the approach taken for conflicts of law in Principle 5 was adequate. Additionally, it was noted that the provisions at the top of the waterfall could encourage industry participants to insert a choice of law provision in the products they create. *Several participants* noted that as the industry continued to mature, more proactive choices of law were being made, and that jurisdictions could also make this a requirement for certain types of products.

20. *An Observer from EBI* noted that the use of these Principles ahead of otherwise applicable national law was a unique and unusual approach. It was noted that this could be problematic as the Principles were not all encompassing and did not cover many issues. As such, their application would need to be mixed with other laws of the forum and could cause friction. It was additionally

noted that connecting factors, including those related to a custodian should be explored further. Connecting factors related to the issuer of the digital asset, where applicable, could also be considered. The application of the law of the transferor could also be an option, as considered by an instrument developed by the European Law Institute.

21. *Several Working Group Members and Observers* noted that while the present draft would necessitate the mixing of the Principles on certain legal issues with legal issues that were addressed by domestic law, this provided certainty to the extent possible. It was noted that traditional connecting factors, such as the location of the parties, the location of the asset, etc., were not applicable to digital assets and could create uncertainty, and that the forum could be the only practical choice of law. Additionally, once enough States adopted the Principles, the amount of certainty would grow. It was also added that the party autonomy was not being taken away, such that the entirety of the top of the waterfall provided for this and allowed for issuers to include a choice of law related provision within the digital asset and/or platform.

22. *An Observer from the Hague Conference on Private International Law (HCCH)* noted that the disintermediated nature of digital assets made the application of connecting factors relevant to securities challenging. It was noted that HCCH had been considering a project on private international law issues related to digital assets for the types of reasons which had been discussed at the present meeting. It was noted that HCCH had examined several of their own instruments on choice of law in international contracts and found that digital assets could not be adequately addressed. Additionally, the connecting factors approach generally always did not apply, and only had relevance for certain types of digital assets (e.g., soulbound tokens), and for certain types of legal issues, particularly those that involved a custodian. It was noted that there were synergies between the approach taken by the HCCH 2015 Principles on Choice of Law in International Commercial Contracts, and the UNIDROIT Digital Assets Project, and that the approach taken by the 2015 Principles had been adopted in full by several States in different parts of the world. It was noted that the Commentary could include references to the way the 2015 Principles had been adopted, which could provide some guidance on the enactment of the Principles. It was also noted that the soft law nature of the Principles allowed for additional flexibility in terms of domestic implementation.

23. *An Observer from EBI* noted that there were several situations relating to digital assets in which connecting factors could be applied to determine the choice of law, such as those related to custody. It was suggested that the relevant connecting factors in different situations should be explained in the Principle, rather than directly applying the Principles. It was noted that by pointing to the private international law rules of the forum, uniformity was not being achieved.

24. *The Working Group concluded that the present approach would be retained and refined by the Drafting Committee based on the input received.*

Principle 6

25. *The Chair* opened the floor for discussion on Principle 6. *The DC Chair* noted that the order of the Principle had been changed based on the input received at the Working Group's last meeting. The present order was more logical and easy to follow. Additionally, greater emphasis had been placed on the factual nature of control, especially in the Commentary. It was added that following a comment from the Steering Committee, additional guidance could be added to the Commentary to cover situations where another party controlled the digital asset of behalf of the client, however, this control was not as a custodian, as an agent, or on trust.

26. *An Observer from NatLaw* proposed reconsidering the order in which the subparagraphs of Principle 6(1) appeared. It was noted that the Drafting Committee would consider this proposal

accordingly. It was added that the comments from the Steering Committee had already been addressed.

27. *The Working Group supported the draft of Principle 6 and requested the Drafting Committee to continue to further develop the Commentary.*

Principle 7

28. *The Chair opened the floor for discussion on Principle 7. Noting no requests for the floor, the Working Group approved Principle 7 as it appeared in the Draft Principles.*

Principle 8

29. *The Chair opened the floor for discussion on Principle 8. The DC Chair noted that this Principle had been moved. The original Principle 8 on Transfer had now mostly been included in Principle 2 on Definitions. As such, the Innocent Acquisition Rule now appeared in Principle 8. For this, the Geneva Securities Convention had been used as a model and the Principle provided for a State being able to stipulate the requirements for a transferee to be an innocent acquirer. The Principle had also been drafted in a manner whereby it was aligned with Principle 5. Further consideration could be given to the issue of the application of a shelter principle, and the application of the innocent acquirer rule in the case of non-fungible tokens. It was noted that these items could be elaborated upon in the Commentary.*

30. *A Member of the Working Group noted that the Principles already mentioned that a digital asset included a 'resulting digital asset'. As such, it was queried if the points on this in the Commentary to Principle 8 were sufficient and necessary. Additionally, it was suggested that the term good faith purchases should be changed to good faith acquisitions', as this would be accepted in more jurisdictions. Furthermore, it was suggested that the language of this Principle should be made consistent with other parts of the instrument. It was confirmed that the Drafting Committee would consider these matters accordingly.*

31. *The DC Chair noted that additional consideration needed to be given to the innocent acquisition rule with regard to non-fungible digital assets, such as NFTs. A Member of the Working Group and an Observer from the Uniform Law Commission (UCC) noted that the rule in Principle 8 should apply the same way for NFTs, however, additional explanation for this matter should be included in the Commentary, in order to reassure the readers that such a rule does not promote bad faith actors in the digital asset economy. It was agreed that this matter would be considered by the Drafting Committee accordingly.*

32. *The Working Group supported the draft of Principle 8 and requested the Drafting Committee to continue to further develop the Commentary.*

Principle 9

33. *The Chair opened the floor for discussion on Principle 9. The DC Chair noted that following the decision of the Working Group, the Principle had been made more general. The Principle was a nemo dat rule and meant that a person could only transfer the type of title they had to an asset, and nothing less or more.*

34. *Several Members and Observers of the Working Group agreed that the text of the Principle was suitable. It was noted that a clear reference to the power of the transferee should be included in Paragraph 1 of the Commentary, and it was agreed that the Drafting Committee would action this accordingly in order to provide clarity on the issue of what a transferee could actually transfer, and the type of title a transferor would acquire.*

35. *An Observer from EBI* noted that Paragraph 2 of the Commentary could be explained in a clearer manner with more of a focus on the rights that were excluded in the case of a transfer from a transferor that did not have a clean title. It was noted that the Drafting Committee would consider this paragraph accordingly.

36. *The Working Group supported the draft of Principle 9 and requested the Drafting Committee to continue to further develop the Commentary.*

Principle 10

37. *The Chair* opened the floor for discussion on Principle 10. *The DC Chair* summarised that this was an application of the innocent acquisition rule to the custody relationship. The updated draft reflected the input received previously at the Working Group and covered a limited number of situations where a custody relationship existed in the context of an innocent acquirer. Additionally, guidance was also provided for situations that included a sub-custodian. Illustrations had also been included in the Commentary to explain the types of situations where these rules would apply. It was noted that a comment from Japan from the Steering Committee on this Principle needed to be considered, particularly with regard to definitions of items mentioned in Principle 10. It was further added that consideration could be given to moving Principle 10 to a different part of the instrument, especially given its close association to custody.

38. *An Observer from NatLaw* suggested moving Principle 10 alongside the Principles on custody, and towards providing additional clarity on the use of the term 'resulting digital asset', which had to be made consistent throughout the Principles. It was agreed that the Drafting Committee would examine both these matters accordingly. It was noted that these changes would also address the points raised through the Steering Committee by Japan, and that additional guidance on the issues raised would be provided in the Commentary.

39. *An Observer from the American Law Institute (ALI)* suggested that in order to offer additional guidance, the Commentary should further specify situations where different layers of parties, such as custodians, sub-custodians, and clients existed. In particular, some guidance on a situation where a non-innocent custodian had acquired an asset on behalf of an innocent client. It was noted that the Drafting Committee would examine this matter accordingly.

40. *The Working Group supported the draft of Principle 10, noting that it would be relocated, and requested the Drafting Committee to continue to further develop the Commentary.*

Principle 11

41. *The Chair* opened the floor for discussion on Principle 11. Regarding Principle 11(1) and 11(2), *the DC Chair* noted that the recommendations received at the Working Group's previous session had been incorporated and consideration had also been given to the comments received from the Steering Committee. In this regard, the Principle now took a more definitional approach, and included definitions for custodian, sub-custodian, and client. The Principle also explained what a custody agreement was. All of the definitions were explained in detail in the Commentary. It was added that the word 'hold' had been replaced with the word 'maintained' throughout the Principles, which was consistent with the decision taken at the Working Group's last session.

42. It was suggested by *some Members of the Working Group* that additional clarity should be provided in the Commentary regarding the use of the word 'maintain', particularly given its colloquial context, and for the 'safeguarding' feature to be clearly outlined. The Principle explained when an arrangement was a custody agreement in situations where a digital asset was controlled by another party for someone, and the characteristics of these situations needed to be clearly explained. *The Chair* noted that the Drafting Committee would consider this matter accordingly.

43. *A Member of the Working Group* noted that the definitions found in the Custody section of the Principles had relevance to many other parts of the instrument. As such, adequate cross references should be inserted accordingly. Additionally, it was queried if it was a common industry practice for custody service providers to maintain fiat accounts for their clients. *The DC Chair* noted that a reference to custody service providers maintaining fiat accounts for its clients was designed to capture exchanges and platform which did not necessarily claim to provide custody-related services but did so anyways. The Drafting Committee could consider changing the language related to this matter to make it clearer.

44. *The DC Chair* summarised the updates made to Principle 11(3) and 11(4). It was noted that these explained what a custody agreement was. The Commentary then gave several examples of what constituted a custody agreement and included references to practices in the industry for digital assets. These examples had been drafted in a neutral way without references to actual cryptocurrencies/companies. Consideration could be given to the addition of an example related to crypto lending services. It was noted that the Commentary explained situations similar to deposit accounts, which needed additional consideration. It was also noted that the Commentary also gave examples of the types of regulation which a government could consider for dealing with certain aspects of custody. The Working Group was invited to comment on the appropriateness of this.

45. *Several Members and Observers of the Working Group* noted that the Principles were not designed to be regulatory in nature. However, the text of the Commentary in the Custody Principle was only exemplary and could be retained. It was noted that an effort should be made by the Drafting Committee to make the regulation-related examples more precise, rather than broad. Many States were seeking guidance on these issues and these paragraphs would support their consideration of issues related to custody of digital assets.

46. *The Chair* noted that the comments on Principle 11 by the Steering Committee had been addressed. *The Working Group supported the draft of Principle 11, noting that it would be relocated, and requested the Drafting Committee to continue to further develop the Commentary.*

Principle 12

47. *The Chair* opened the floor for discussion on Principle 12. *The DC Chair* summarised the changes which had been introduced, which mostly related to restructuring the Principle. It was noted that the different subsections of this Principle detailed different types of duties a custodian had, and their level of applicability. Principle 12(1) detailed mandatory duties, Principle 12(2) related to the use of an omnibus account, and Principle 12(3) related to additional duties of a custodian. It was noted that different States may decide to shift duties mentioned in Principle 12(3) into the mandatory duties specified in Principle 12(1). It was queried whether the bracketed text in Principle 12(2) should be retained. It was added that Principle 12(4) dealt with the custodian using a sub-custodian, and Principle 12(5) (which was originally in a different part of the Principles) related to the types of security rights which may exist in a digital asset maintained by a custodian for its client. The DC Chair invited the Working Group to provide comments, and in particular on the last sentence of Paragraph 2 of the Commentary, as well as other paragraphs which had been introduced as a result of intersessional work to implement the feedback of the Working Group and the Steering Committee.

48. With regard to the bracketed sentence on unrestricted rights in Paragraph 2 of the Commentary, *several Members and Observers of the Working Group* suggested deleting the sentence as it was unclear what it referred to in the context of digital assets. It was noted that these matters were for other law, and this was already indicated in the Principles. With regard to the use of the words 'by a provision', it was suggested that this should be deleted as this did not need to be specified, and that a reference to the custody agreement was sufficient.

49. With regard to the text 'or by other law', it was discussed whether the definition of 'other law' covered the types of law being referenced by this text. It was agreed that this text should be retained as a reference to other law was useful in this context. It was suggested that the Drafting Committee could consider further explaining the types of other law which were being referenced in the Commentary.

50. *An Observer* noted that the meaning of an undivided pool was unclear. It was clarified that this referred to an omnibus account and would be expressly stated in the Commentary.

51. *An Observer* suggested including additional references to regulation on the issue of a custodian's obligations in the Commentary. It was suggested that the existing points, such as that of having to maintain assets in a specific type of account were already regulatory in nature. As such, additional guidance on regulatory issues, such as the obligation to safeguard the assets of a client, could be included in the Commentary.

52. *Several Members and Observers of the Working Group* queried the relationship between safeguarding of assets and segregation of assets by a custodian, noting that this needed to be clarified further in the Commentary. *The DC Chair* noted that additional consistency had to be ensured in various paragraphs of the Commentary, and that the Drafting Committee would examine this matter accordingly. This could include providing additional clarity on the issue of safeguarding of assets and its relationship with segregation. It was also noted that additional clarity needed to be drafted into the Commentary regarding the issue of security rights in digital assets maintained by a custodian on behalf of a client.

53. With regard to the duty to segregate, as found in Principle 12(3)(d), *several Members and Observers of the Working Group* discussed whether it should be moved to Principle 12(1). It was agreed that given the different ways this was treated in different jurisdictions, the duty should be retained in Principle 12(3), with additional clarity and guidance provided in the Commentary regarding its importance as a best practice. It was also noted that the segregation referred to segregation of the digital assets of a particular client, from those of another client. This would also be clarified in the Commentary.

54. *An Observer* queried the meaning of the term 'benefits' as used in Principle 12(3) and how this would operate in the case of a fork. It was noted that the 'benefits' generally referred to the rights accrued by an asset and that this would be detailed in the Commentary, including providing additional guidance on the consequences of a fork.

55. *Several Members and Observers of the Working Group* deliberated the definition of 'other law' and whether it included regulation. It was agreed that this should be further clarified in the Commentary, and that different States had different practices with regard to passing domestic legislation. In some cases, regulatory frameworks could fall within the definition of 'other law', as set out by the Principles. The meaning of 'other law' could depend upon the context, and guidance needed to be provided on this matter in the Commentary, particularly in sections such as that on custody and that on linked assets. It was noted that the reference in the Geneva Securities Convention to 'non-convention law' was similar to the concept of 'other law' envisaged by the Working Group. As such, guidance could be sought there in explaining the same in the Commentary. At the same time, it was noted that 'regulation' should not be defined in the instrument, especially given the varying approaches to this taken in different jurisdictions and in different regions, including the European Union.

56. *The Working Group supported the draft of Principle 12, noting that it would be relocated, and requested the Drafting Committee to continue to further develop the Commentary.*

Principle 13

57. *The Chair* opened the floor for a discussion on Principle 13. *The DC Chair* noted that the word 'hold' had been replaced with 'maintain', as agreed upon by the Working Group at its last session. Additional explanations and clarifications had also been introduced to address the comments received from the Steering Committee and at the last meeting of the Working Group. The Working Group participants were invited to provide comments on the draft, including the types of duties an insolvency representative had. It was noted that several parts of this Principle were modelled off the Geneva Securities Convention.

58. *Two Members of the Working Group* discussed whether the content of provisions (2)-(5) should be retained in the text of the Principle or moved to the Commentary. It was noted that several States might have issues implementing these Principles, noting that crypto assets would fall under regular insolvency law, rather than having special rules.

59. *Several Members and Observers of the Working Group* noted that the guidance on shortfall, and other issues provided in these Principles specific to digital assets was important and should be retained in the main text, rather than in the Commentary, particularly because many States were looking for guidance on these issues and several cases related to these issues had come up in the industry.

60. *An Observer from NatLaw* suggested including additional clarity in Paragraph 1 of the Commentary with regard to evidence to showcase that an asset was maintained by a custodian. Additionally, a query was also raised with regard to the placement of this Principle, as it could also possibly appear in a section on insolvency. Additionally, some explanations could be included regarding the duties of an insolvency representative. It was noted that the Drafting Committee would examine these matters accordingly, while recognising that this Principle was particularly relevant to a custodian, rather than the issue of insolvency in general.

61. *A Member of the Working Group* queried the use of the terms "a custodian nominated by the client", and whether this was procedurally acceptable and/or important. It was noted that the Drafting Committee could examine this matter and explain it further if necessary in the Commentary.

62. *The Secretary-General* suggested to include a definition of 'Insolvency Proceedings' in the Principles, especially keeping in mind the different types of situations which could be treated, or not treated as an insolvency in different jurisdictions. It was also suggested that the reference to 'assets for distribution to creditors' should be replaced with a general reference to the insolvency estate, as it was not necessary that there would be a distribution of the assets. It was noted that the Drafting Committee would consider these matters accordingly.

63. *A Member of the Working Group* noted that Principle 13(4) was particularly problematic as it provided a special shortfall rule for digital assets, compared to that found for other assets, which would be difficult for States to adopt. It was also noted that the Principle created a hard rule for States to adopt, which may not be an acceptable approach to many States. It was clarified that Principle 13(4) was always meant to be optional for States, and this could be made more evident in the text and in the Commentary. The Drafting Committee would consider this matter accordingly.

64. *An Observer* queried the use of the word 'identical type' in this Principle. It was noted that this was a general reference to fungibility, rather than an asset being identical, which was generally not the case for digital assets such as cryptocurrencies. As such, the Drafting Committee would reconsider the use of the term 'identical'.

65. *A Member of the Working Group* noted that language related to ‘credited to the accounts’ should be reconsidered. While this was appropriate in the context of the Geneva Securities Convention, it did not necessarily apply to every mechanism of maintaining a digital asset. As such, more neutral language should be used. It was agreed that the Drafting Committee would consider this matter accordingly. Following other comments, it was noted that the Drafting Committee would also examine the use of the word ‘returned’ in Principle 13(2), as this may not always be the case for digital assets.

66. *A Member of the Working Group* noted that Principle 13(6) was particularly important, and that consideration could be given to including parts of this in Principle 13(1), whereas Principle 13(6)(b) could be made its own standalone provision, given its importance. It was noted that the Drafting Committee would consider this matter accordingly.

67. With regard to Principle 13(6), *A Member of the Working Group* queried whether the Principles should clearly specify who bore the risk for the insolvency of a sub-custodian, and the relationship between a client, its custodian, and the sub custodian. Several Working Group Members noted that this was an important consideration. *An Observer from ALI* suggested that unless there was an agreement between the parties, there would be strict liability for the custodian. *The DC Chair* noted that this was a contentious issue and that some guidance was found in the Commentary for Principle 12. It was noted that the Drafting Committee would consider this matter accordingly.

68. *The Working Group supported the draft of Principle 13 subject to the changes discussed and requested the Drafting Committee to continue to further develop the Commentary.*

Principle 14

69. *The Chair* opened the floor for a discussion on Principle 14. *The DC Chair* summarised that the Commentary for Principle 14 had been updated to reflect the input received at the Working Group’s last session. Some additional changes may be implemented in the drafting to increase consistency between this Principle and the rest of the instrument, with a specific reference to Principle 4 on Linked Assets. It was noted that consideration could be given to including some additional cross references, particularly to Principle 16, in the Commentary. Furthermore, several paragraphs in the Commentary would be improved for clarity and cross references.

70. *An Observer from NatLaw* noted that the illustrations mentioned in the Commentary related only to specific parts of the Principle. As such, where the Commentary appeared should be improved. Additionally, it was suggested that the Commentary should be made clearer with regard to the use of terms such as transfers of security, outright transfers, and assignments of receivables. It was suggested that the Commentary could also clarify the application of the UNCITRAL Model Law on Secured Transactions in a particular jurisdiction and seek to be more consistent with the same. Lastly, it was queried whether Principle 14(2) and 14(3) could be merged into one paragraph, rather than two separate subsections.

71. *A Member of the Working Group* noted that the Drafting Committee could consider the proposed changes to the structure and placement of the Commentary. Additionally, it was noted that the Principle considered the Geneva Securities Convention as well as the UNCITRAL Model Law on Secured Transactions in the language used. Regarding merging Principle 14(2) and 14(3), it was noted that these may be implemented separately by States in their domestic law. However, this point could be considered by the Drafting Committee. *An Observer from ALI* supported keeping Principle 14(2) and 14(3) separated.

72. *Several Members and Observers of the Working Group* noted that the references to the types of transfers was not meant to be an exhaustive list and was only used as an example.

Different States categorised transactions differently, and it would not be helpful to limit the same in the Principles.

73. *The Working Group supported the draft of Principle 14, and requested the Drafting Committee to continue to further develop the Commentary.*

Principle 15

74. *The Chair* opened the floor for a discussion on Principle 15. *The DC Chair* noted that the only change made to this Principle was to clarify its application in the case where an asset was maintained by a custodian. This drafting was initially unclear and was critiqued by the Steering Committee. The Drafting Committee had already addressed this point. It was noted that the Drafting Committee would make some additional changes to the Commentary to improve clarity and consistency with other parts of the instrument. It was noted that some additions had been made to the Commentary, particularly Paragraph 9. These reflected items which the Working Group had discussed at its earlier sessions.

75. *An Observer from NatLaw* noted that there was a suggestion in the Commentary that most States had security interest registries. This was not necessarily the case and should be redrafted. It was agreed that the Drafting Committee would examine this matter accordingly.

76. *The Working Group supported the draft of Principle 15 and requested the Drafting Committee to continue to further develop the Commentary.*

Principle 16

77. *The Chair* opened the floor for discussion on Principle 16. *The DC Chair* drew the Working Group's attention to all the changes which had been made to this Principle. It was noted that the changes made were to implement the recommendations of the Working Group's last session. The insertion of the word 'only' was noteworthy, and the Working Group participants were invited to consider the new drafting and provide comments. *Several Members and Observers of the Working Group* noted that the changes made reflected the view of the Working Group, and that some additional changes could be made to the Commentary to further enhance clarity and readability, including the correction of some typos.

78. *An Observer from NatLaw* noted that alignment with the UNCITRAL Model Law on Secured Transactions should be ensured throughout this Principle, and that the same should be given additional consideration, particularly with regard to temporal orders. It was noted that the Drafting Committee would examine this matter accordingly.

79. *The Chair* noted the need to discuss the relationship between Principle 5(5) and Principle 16. *The DC Chair* summarised that in the case of a registered security right, the location of the debtor was an important applicable law-related issue to consider, and that the general approach of Principle 5 would not necessarily be applicable to a secured transactions scenario. One solution could be to point to applicable law to determine third party effectiveness, priority, and enforcement of security rights in digital asset, and when these rights had been perfected by methods other than by control. *A Member of the Working Group* agreed that a reference to applicable law would be a good approach. Additionally, it was added that the Principles should specify that where a security right perfected by control and a security right perfected by another mechanism were competing, the applicable law would need to be examined. Furthermore, the perfection and priority of the person that perfected by registration would typically be governed by the law of the location of the grantor. This may need to be explained in Principle 5(5).

80. *Several Members and Observers of the Working Group* agreed that a rule on choice of law for perfection and priority security interests in digital assets should be included in Principle 5, especially since this was a matter on which the industry could benefit from guidance in these Principles. It was noted that Article 98 of the UNCITRAL Model Law on Secured Transactions could be used as a model to further improve Principle 5(5). The Working Group concluded that Principle 5(5) and its Commentary would be modified to address these matters and an updated draft would be presented to the Working Group at its next session.

81. *The Working Group supported the draft of Principle 16 subject to the changes discussed and requested the Drafting Committee to continue to further develop the Commentary.*

Principle 17 and Principle 18

82. *The Chair* opened the floor for a discussion on Principle 17. It was noted by several participants that Principle 17 and Principle 18 both addressed issues related to enforcement, and as such could be discussed together.

83. Regarding Principle 17, *the DC Chair* summarised the draft and the situations relating to court orders which were explained in the Commentary. It was noted that based on an agreement at the Working Group's previous session, references to automatic enforcement had been removed from the text and only mentioned in the Commentary. It was noted that the Commentary explained the significance of how a particular State characterised a transaction and the mechanisms for enforcement that could apply. It was queried if additional guidance, particularly on issues such as commercial reasonableness and notification requirements should be included.

84. Regarding Principle 18, *the DC Chair* pointed to Document 4 which contained an updated drafting proposal. It was noted that given how enforcement law differed in every State, a simple Principle had been drafted which referred to other law generally applying to procedural matters to do with digital assets. This was designed to reflect the consensus reached at various sessions of the Working Group which made it clear that general procedural laws would apply to digital assets. It was acknowledged that the law may need to be amended in certain situations because of the technologies involved, and that this had been clarified in the Commentary. It was noted that guidance on issues such as execution by way of authority had been included in the Commentary. The Commentary also gave other examples of what procedural law could relate to in any jurisdiction.

85. *Several Members and Observers of the Working Group* deliberated the structure of Principles 18 and 19, questioning if all Principles related to enforcement should be included in the same section in order to enhance usability. It was noted that the Commentary needed to be expanded regarding the discussion of special rules that could exist for enforcement of security interests in digital assets. In particular, issues such as requirements to proceed in a commercially reasonable manner could not be justified only for digital assets. It was noted that this requirement would be particularly difficult to apply in civil law countries.

86. It was noted that these Principles referred to the UNIDROIT Project on Best Practices for Effective Enforcement, which was likely to use a different concept of digital assets, and would be completed after the Digital Assets project. As such some clarifications regarding this should be included in the Commentary. However, it was also noted that given that the other project had not yet been finalised, a general reference was sufficient. It was agreed that the Drafting Committee could examine this matter accordingly.

87. Regarding the structure, *Several Members and Observers of the Working Group* noted that Principle 17 related only to situations where a party had a security right in a digital asset, whereas Principle 18 was more general. It was suggested that cross references could be used to create a

better link between the two Principles. It was noted that during implementation, it was likely that rules relating to secured transactions would be part of a State's secured transactions rules, and enforcement generally would be separate. As such, a preference was noted for keeping these Principles as they were presently found in the instrument. It was agreed that the Drafting Committee could examine this matter accordingly and that consideration could also be given towards including Principle 18 in Principle 3, or generally in Section I.

88. *Several participants* suggested providing additional clarity to the reference to a court order in Principle 17. It was agreed that extrajudicial enforcement could not be available in situations where a party had not perfected their interest by control.

89. It was noted that the Drafting Committee would work towards making the language of this Principle and Commentary consistent with other parts of the instrument. The Commentary also gave examples of the types of enforcement tools which could be deployed in the case of a digital asset.

90. It was noted that there was overlap between Principle 17 and 18, whereby if a security right needed to be enforced judicially, guidance would need to be sought in Principle 18. To resolve this situation, Principle 17 could explicitly be titled extrajudicial enforcement, or additional clarifications needed to be provided. It was recalled that paragraph 2 of the Commentary to Principle 17 related to judicial enforcement, and this could be further expanded or structured differently to provide more clarity. It was noted that the Drafting Committee would examine this matter accordingly in an effort to ensure that Principle 17 clearly addressed judicial and extrajudicial enforcement of security rights in digital assets, with adequate references to other law where necessary.

91. For Principle 18, it was suggested that additional guidance could be considered for matters related to remedies, such as freezing orders, in the Commentary. *Several participants* discussed the need for Principle 18 generally, noting that guidance regarding enforcement of security rights in digital assets was found in Principle 17, and could be considered sufficient. However, it was noted that the instrument would not be complete without a mention of enforcement in non-secured transaction type situations. It was noted that the text of Principle 18 was not necessarily focussed on enforcement, but rather on procedural law, which was appropriate and should be reflected in the title of the Principle.

92. *The Working Group supported the draft of Principles 17 and 18 and requested the Drafting Committee to continue to further develop the Commentary.*

Principle 19

93. *The Chair* opened the floor for discussion on Principle 19. *The DC Chair* summarised that the Principle had been amended based on the feedback received from the Working Group. The Principle had been adapted from the Geneva Securities Convention, but was more general in nature, as it related to all types of proprietary rights in a digital asset. It was explained that the terminologies used in the draft had been made consistent with the rest of the instrument and with international instruments in this area. The Commentary had also been expanded to include additional examples. Additionally, references to valuation had been removed based on the input from the Working Group.

94. It was queried whether the Principle should say 'proprietary rights and interests'. It was agreed that 'proprietary rights' should be used as no reference to 'proprietary interests' had been made in any other parts of the Principles. It was noted that additional efforts would be made by the Drafting Committee to ensure that the terminology used in this Principle was consistent with

the rest of the instrument. It was noted that the use of 'third party effectiveness' and 'effective against third parties' would be considered by the Drafting Committee.

95. It was queried whether the reference to creditors and the insolvency representative were adequate, as it was unclear if there could be creditors not represented by the insolvency representative. Additionally, the use of the terms 'under the supervision of the insolvency representative' was queried as the meaning was not clear. *A Member of the Working Group* explained that situations could exist in some jurisdictions where there were creditors which were not necessarily represented by the insolvency representative. It was noted that this could also be a reference to assets which were contested as being part of an insolvency estate. For the second question, it was noted that a similar expression had been used in the Geneva Securities Convention, but it also mentioned control, which was not appropriate for the Digital Assets Principles and was thus removed. It was noted that the Drafting Committee would examine both these matters in order to provide additional clarity in the text and in the Commentary. Clarity would also be introduced to ensure that an insolvency did not create any rights that did not exist prior to the same.

96. *The Working Group supported the draft of Principle 19 subject to the changes discussed and requested the Drafting Committee to continue to further develop the Commentary.*

Principle 1, 2, and 3

97. *The Chair* opened the floor for a discussion on Principles 1, 2, and 3. *Several Members and Observers of the Working Group* supported the updated drafts of these Principles. *A Member of the Working Group* noted that in the Commentary to Principle 1, there was a reference to the creation of a security interest. This may not be appropriate anymore keeping in mind the changes made to the secured transactions law parts of the Principles.

98. *The Working Group agreed that the Drafting Committee would examine these Principles with a view towards ensuring that the comments received from the Steering Committee were addressed, particularly in the Commentary.*

99. *The Chair closed the discussion on Agenda Item 5.*

Item 6: Organisation of future work

100. *The Chair opened the floor for Agenda Item 6.*

101. *The Working Group agreed that its eighth and final session would take place in Rome and on Zoom on 8-10 March 2023. The Secretary-General encouraged all of the participants to attend this session in person.*

Item 7: Any other business

102. No further items for discussion were noted.

Item 8: Closing of the session

103. *The Chair* thanked all participants for their contributions to the seventh session.

104. *The Chair declared the session closed.*

ANNEX I**AGENDA**

1. Opening of the session and welcome by the Chair of the Working Group and the UNIDROIT Secretary-General
2. Adoption of the agenda of the meeting and organisation of the session
3. Approval of the report of the sixth session (Study LXXXII – W.G.6 – Doc. 4)
4. Update on intersessional activities by the Drafting Committee and the Steering Committee.
5. Consideration of substantive issues on a Section-by-Section basis
6. Organisation of future work
7. Any other business
8. Closing of the session

ANNEX II**LIST OF PARTICIPANTS****CHAIR**

Mr Hideki KANDA
in person

Professor of Law
Gakushuin University
Japan

EXPERTS

Mr Reghard BRITS
remotely

BCom (Law), LLB, LLD (Stellenbosch University), Cert in Insolvency Law & Practice (SARIPA / University of Pretoria), Cert in International Insolvency Law (INSOL) Attorney
Brits Dreyer INC

Mr Marek DUBOVEC
remotely

Executive Director
Kozolchyk National Law Center (NatLaw)
United States of America

Ms Louise GULLIFER
in person

Rouse Ball Professor of English Law
University of Cambridge
United Kingdom

Mr Matthias HAENTJENS
remotely

Professor of Private Law
Leiden University
the Netherlands

Mr Charles MOONEY Jr.
remotely

Professor of Law
University of Pennsylvania
United States of America

Mr Philipp PAECH
in person

Associate Professor
London School of Economics & Political Science
Germany

Ms Carla REYES
remotely

Assistant Professor of Law
SMU Dedman School of Law
Dallas, United States of America

Ms ZOU Mimi
remotely

Fellow
University of Oxford
China

INSTITUTIONAL OBSERVERS
INTERGOVERNMENTAL AND GOVERNMENTAL ORGANISATIONS

BANCA D'ITALIA (CENTRAL BANK OF ITALY) <i>in person</i>	Mr Nicola DE GIORGI Senior Lawyer Italy
	Ms Vincenza PROFETA Senior Lawyer Italy
EUROPEAN BANKING AUTHORITY (EBA) <i>remotely</i>	Ms Elisabeth NOBLE Senior Policy Expert Banking Markets, Innovation and Products United Kingdom
EUROPEAN BANKING INSTITUTE (EBI) <i>remotely</i>	Mr Matthias LEHMANN Professor Universität Wien EBI Germany
EUROPEAN LAW INSTITUTE (ELI) <i>remotely</i>	Ms Christiane WENDEHORST Professor Dr. Academic Director
<i>remotely</i>	Mr Teemu JUUTILAINEN Associate Professor Private Law (Property and Financial Law) - University of Turku Co-Reporter ELI Digital Assets as Security Working Group of the Access to Digital Assets project
HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (HCCH) <i>in person</i>	Ms Gérardine GOH ESCOLAR First Secretary Permanent Bureau the Netherlands
INTERNATIONAL BAR ASSOCIATION - BANKING LAW COMMITTEE (BLC) <i>remotely</i>	Mr Fernando AZOFRA Vice Chair to the International Bar Association Spain
INTERNATIONAL MONETARY FUND (IMF) <i>in person</i>	Ms Marianne BECHARA Senior Counsel Legal Department United States of America
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) <i>remotely</i>	Mr Benjamin HERISSET Legal Officer International Trade Law Division Austria

Mr Alexander KUNZELMANN
 Legal Officer
 International Trade Law Division
 Austria

Ms Marion GIANNAKOU
 Legal Officer
 International Trade Law Division
 Austria

Ms Samira MUSAYEVA
 Legal Officer
 International Trade Law Division
 Austria

* * * *

NON-GOVERNMENTAL ORGANISATIONS

AMERICAN LAW INSTITUTE (ALI)
in person

Mr Steven WEISE
 Life Member
 ALI Council
 United States of America

COMMISSIONE NAZIONALE PER LE SOCIETÀ E
 LA BORSA - CONSOB / SECURITIES AND
 EXCHANGE COMMISSION
remotely

Mr Nicolò BRUGIOLO
 International Relations Office
 Italy

Ms Tecla RODI
 International Relations Office
 Italy

Ms Raffaella PANTANO
 International Relations Office
 Italy

ISTITUTO PER LA VIGILANZA SULLE
 ASSICURAZIONI – IVASS
remotely

Ms Antonella ALTOMONTE
 Lawyer
 Italy

INTERNATIONAL LAW INSTITUTE
remotely

Mr Bob TROJAN
 Senior Advisor
 United States of America

KOZOLCHYK NATIONAL LAW CENTER (NatLaw)
remotely

Mr Spyridon V. BAZINAS
 Lead Advisor
 United States of America

LAW COMMISSION OF ENGLAND AND WALES
remotely

Mr Luke BROADWAY
 Research Assistant

Mr Richard HINE (on behalf of Ms Daniella
 LUPINI)
 Research Assistant

UNIFORM LAW COMMISSION
remotely

Mr Matthew KIMBER
Lawyer
Commercial and Common Law

Ms Diana STOEAN
Research Assistant

Mr Andrea TOSATO
Associate Professor of Commercial Law
University of Nottingham (United Kingdom)
Visiting Associate Professor in Law
University of Pennsylvania (USA)

* * * *

INDIVIDUAL OBSERVERS

Mr Jeremy BACHARACH
remotely

Visiting Researcher
Harvard Law School
United States of America

Mr Hubert DE VAUPLANE
remotely

Lawyer at the Paris Bar
France

Mr Andrew (Drew) HINKES
remotely

Attorney at Law
K&L Gates
United States of America

Ms Zeynep Ülkü KAHVECI
remotely

Former UNIDROIT Scholar
Turkey

Ms Theodora KOSTOULA
remotely

PhD Candidate
European University Institute
Italy

Mr LIU Hin
remotely

Oxford DPhil student and tutor at Oxford and
Hong Kong University
Fusang

Mr Klaus LÖBER
in person

Chair
CCP Supervisory Committee
European Securities and Markets Authority

Mr Alejandro LUPPINO
in person

Counsellor
Embassy of the Argentine Republic in Italy

Member of the Steering Committee

Ms Shighadi MWAKIO
remotely

Deputy Registrar, MPSR
Business Registration Service
Office of the Attorney-General & Department
of Justice
Kenya

Ms Monika PAUKNEROVÁ
remotely

Professor
Department of Business Law
Charles University, Faculty of Law
Czech Republic

*Member of the Governing Council UNIDROIT
Chair of the Steering Committee*

Ms Camilla VILLARD DURAN
remotely

Associate professor
PhD International Economic Law
Paris 1 Panthéon-Sorbonne and Universidade
de São Paulo

Mr Vincent YESUE
remotely

Associate
Rusing Lopez & Lizardi, PLLC
United States of America

* * * *

UNIDROIT Secretariat

Mr Ignacio TIRADO

Secretary-General

Ms Anna VENEZIANO

Deputy Secretary-General

Mr Hamza HAMEED

Legal Consultant

Ms Michelle FUNG

Legal Officer

Mr Chen MIAO

Legal Officer