



# UNIDROIT Principles on Digital Assets and Private Law

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# Digital Assets and Private Law: the Project

- 2020-2022 Work Programme, a UNIDROIT Working Group established to develop legal instrument containing principles and legislative guidance in the area of private law and digital assets.
- Project to provide legislative guidance and develop best practices and international standards, enabling jurisdictions to take common approach to legal issues relating to the legal nature, transfer and use of digital assets.
- Variety of digital assets covered: cryptocurrencies (Bitcoin, Ethereum) digital tokens linked to real world (gold), or real estate.
- The principle of technological neutrality is key to ensure relevance (i.e., not just DLT). Areas of key commercial importance such as:
  - legal position of intermediaries (exchanges and custodians)
  - secured transactions
  - insolvency,
  - and the identification of the applicable law in cross-border transactions



- Experts represent different legal systems with expertise in a number of relevant fields such as property law or secured transactions.
- Several international, regional, and private organisations in the Working Group:
  - Uniform Law Commission (US)
  - The World Bank Group
  - UNCITRALThe International Monetary Fund (IMF)
  - The Hague Conference on Private International Law (HCCH)
  - The European Central Bank (ECB)
  - The European Banking Authority (EBA)
  - The American Law Institute (ALI)
  - The Central Bank of Italy (Banca d'Italia)
  - Kozolchyk National Law Center (NatLaw)
  - The Law Commission of England and Wales
  - Asociación Americana de Derecho Internacional Privado (ASADIP)





## Principles on digital assets and private law

- To provide **commercial certainty** and **clarity**
- Soft law: Principles plus commentary
- Guidance to States

### **Methodology:**

- Working group - 9 meetings
- Drafting Committee (25 meetings)
- Steering Committee
- Public Consultation

# Principles on digital assets and private law



- **Principles**

- Technologically neutral
- Jurisdictionally neutral

- **Private law**

- Private law only
- Principles cover specific areas of law where we considered the nature of digital assets meant clarification/ special rules were needed.
- Other law governs everything else

- **Other law (non-exhaustive)**

- Regulation
- Procedural/enforcement law
- Rules relating to an insolvency-related proceeding
- Private law on:
  - Existence of a proprietary right in a DA
  - Validity and third-party effectiveness of a transfer of a proprietary right (including a security right) in a DA
  - Inter-party rights
- Existence, requirements for and legal effect of a link between a DA and another asset



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## Features of a digital asset

### Intangible

- Not a right against specific persons
- Does not depend on the legal system for its existence

### Capable of factual control

- Can have a change of control
- If can be the subject of a proprietary right, this can be separate from control

### No obvious situs

- Distributed ledger
- Cross-border transactions



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## Substantive

- DAs can be the subject of proprietary rights, security rights, survive insolvency
- Conflict of laws principle
- Innocent acquisition principles
- Custody: insolvency, duties, sub-custody
- Security: control for third party effectiveness and priority

## Guidance

- Possible links and legal effectiveness
- Examples of custody and non-custody
- Possible challenges for procedural law/enforcement
- Insolvency of owner, grantor and secured creditor

## Analysis

- Definition of DA
- Definition of control
- Definition of custody agreement
- Concept of 'linked asset'

## Other law (non-exhaustive)

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- Private law on:
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  - Existence, requirements for and legal effect of a link between a DA and another asset
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## Definition of DA

- Electronic record capable of being the subject of control
- Definition of control:
  - 3 factual abilities
  - Exclusivity



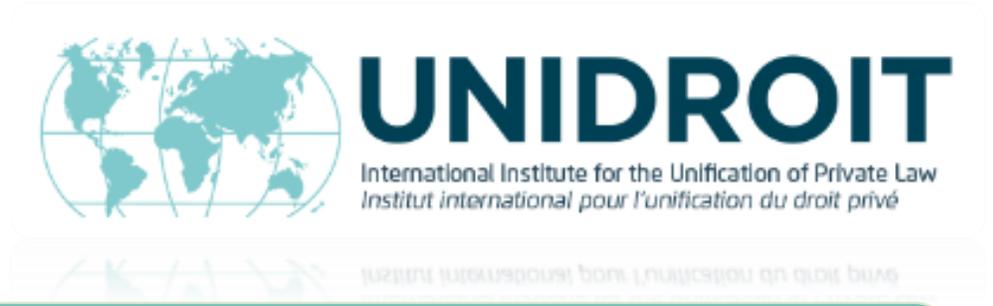
DAs can be the subject of proprietary rights

- DAs can be the subject of security rights
- Proprietary rights in DAs survive insolvency

*Nemo dat* rule applies to transfer with innocent acquirer exception/shelter principle

- Other aspects of transfer governed by 'other law'

# An electronic record that is capable of being subject to control



ONLY a person with specific means can change the system

- a person in control can 'transfer' the digital asset to the control of another person

ONLY such a person can change the system

- a person in control can prevent others 'transferring' the digital asset

Benefits of digital asset

- A person in control can obtain substantially all the benefit from the digital asset

Once the system is changed it cannot be changed in the same way again

- Once digital asset is transferred from A's control to B's control it cannot be transferred again by A (no 'double spend')

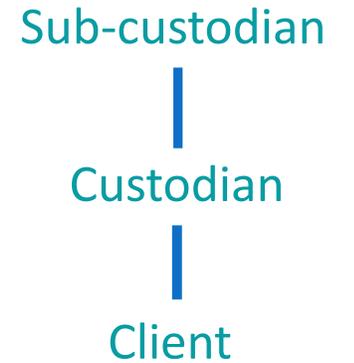
# Security

- A digital asset can be the subject of a security right
- Making a security right effective against third parties
  - In addition to other methods, a security right should be able to be made effective against third parties by control.
  - A security right made effective against third parties by control has priority over a security right made effective by other means.

# Custody



- Functional definition
- DA ‘maintained’ by custodian for client is not available for custodian’s creditors on the custodian’s insolvency
- Custody agreement/agreement for delivery of DA
- An agreement is a custody agreement if the custodian obliged to ‘maintain’ DA for client UNLESS it made clear that the DA is available for custodian’s creditors on the custodian’s insolvency
- ‘Maintained’: custodian has control of DA or sub-custodian had control of DA for custodian
- Duties of custodian
- Insolvency of custodian



## Insolvency of custodian

- DA 'maintained' by custodian for client is not available for custodian's creditors on the custodian's insolvency
- Rights against sub-custodian in respect of DAs do not form part of custodian's assets available for custodian's creditors on the custodian's insolvency
- Reasonable steps to be taken by insolvency representative so client can obtain control of DA
- Similar provision if sub-custodian is insolvent
- *Pari passu* distribution of assets maintained as an undivided pool

# Private International Law



1. Express specification in DA
2. Express specification in system
3. IF 'issuer', where issuer has statutory seat (restricted definition of 'issuer')
4. Those of the Principles or provisions of law of forum state as specified by that state (if any)
5. Law applicable by virtue of forum state's conflict of laws rules.

## Limits

- Proprietary issues
- Issues covered by custody section governed by law specific in custody agreement (including whether it is a custody agreement)
- Some carve-outs in relation to registration of security rights.

# Linked assets



As defined



Examples:

- Contractual right
- Debt security
- Equity security
- Digital asset
- IP
- Gold

- Existence, requirements for and legal effect of the link is a matter of other law
- Commentary gives examples and guidance



Thank you

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