

UNIDROIT Principles on Digital Assets and Private Law: Essence and Updates

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Hideki Kanda

Emeritus Professor, University of Tokyo

My Presentation

1. Characteristics of the UNIDROIT Principles on Digital Assets and Private Law
2. Scope of the Principles
3. How Useful for Jurisdictions in Asia?
4. Updates -- Enforcement

What is the UNIDROIT?

The International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental organization with its seat in Rome. Its purpose is to study needs and methods for modernizing, harmonizing and coordinating private and, in particular, commercial law as between States and groups of States.

Set up in 1926 as an auxiliary organ of the League of Nations, the Institute was, following the demise of the League, re-established in 1940 on the basis of a multilateral agreement, the UNIDROIT Statute.

Membership of UNIDROIT is restricted to States acceding to the UNIDROIT Statute. UNIDROIT's 65 member States are drawn from the five continents and represent a variety of different legal, economic and political systems as well as different cultural backgrounds.

The Project on Digital Assets and Private Law

The project was launched in 2020.

The Working Group met 9 times.

The Drafting Committee (chaired by Professor Louise Gullifer of the University of Cambridge) met 25 times.

The Steering Committee (composed of those recommended by the member states) was consulted twice.

Public consultation took place in January-February in 2023.

The Principles and Commentary were adopted by the UNIDROIT Governing Council on May 10, 2023.

Characteristics of this Project

The UNIDROIT usually seeks the harmonization of private laws around the world in the areas where different laws and practices exist in most jurisdictions. In contrast, in this project, no established laws or practices exist in most jurisdictions, as they are developing. Thus, our project sought a new set of principles almost from scratch.

Indeed, in most jurisdictions, private law rules on digital assets are often unclear and have been producing legal uncertainty, preventing efficient commercial and financing transactions. The UNIDROIT focuses on core issues of private law and proposes a set of principles for States which are encouraged to implement them by legislation, case law, or the interpretation of existing law. By focusing only on core issues, our Principles permit States flexibility in developing private law rules in this area.

Regulation is quite important in this area. Certainty of private law rules is vital for the stability of financial system and markets. An optimal combination of private law rules and regulation should be explored.

UNIDROIT Principles on Digital Assets and Private Law (2023)

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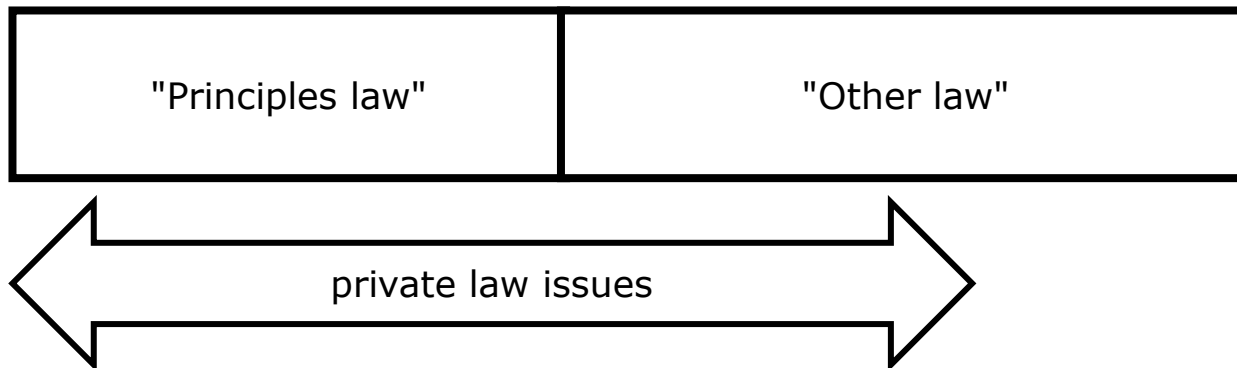
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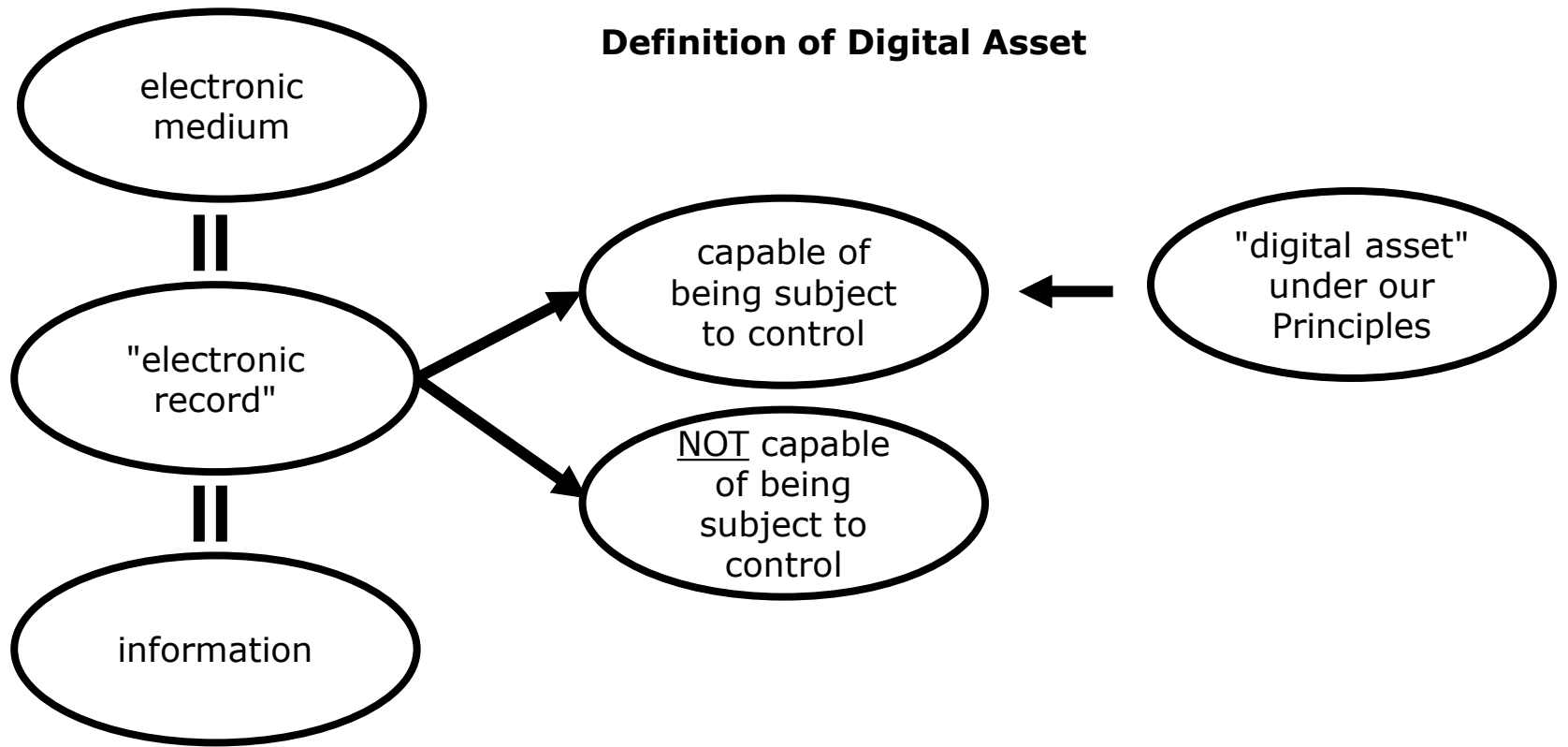
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The law of a State which implements our Principles

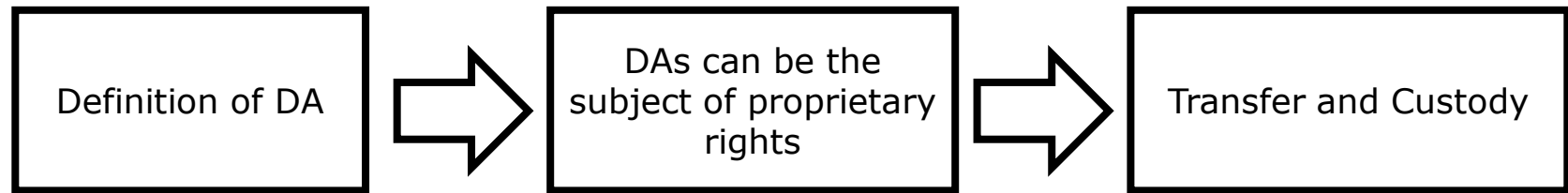


Note 1: "Principles law" deals with private law issues.

Note 2: "Other law" includes PIL (conflict of laws rule) and regulatory law.



OUR PRINCIPLES AT A GLANCE



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, including
security rights.

Proprietary rights in
DAs survive insolvency.

Outright Transfer:

- >Nemo Dat Rule
- >Innocent Acquisition
- >Shelter Rule

Grant of Security Rights:

- >Third-Pty Effectiveness
- >Priority

Custody:

- >DAs maintained for
clients do not form part
of the custodian's
insolvency estate.

Private International Law

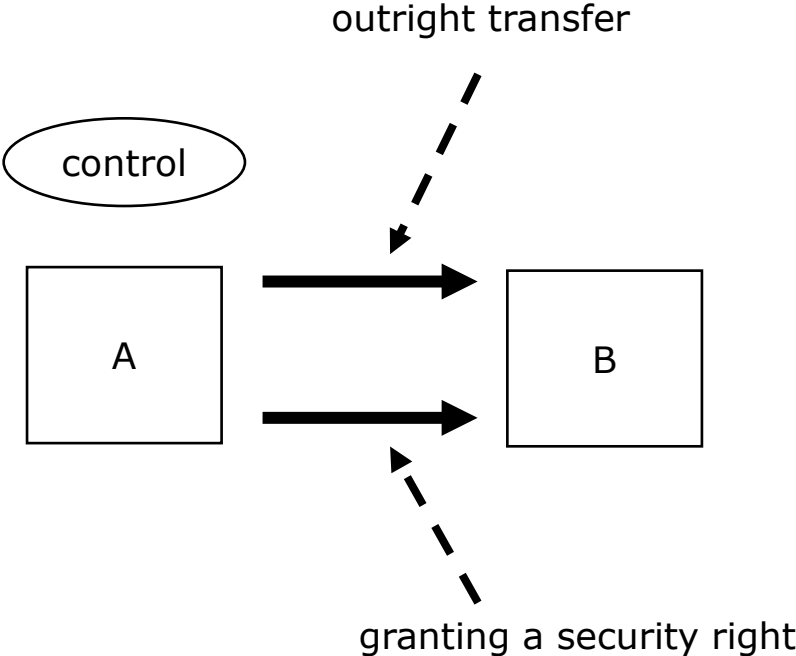
Enforcement

Neutrality on
Technology

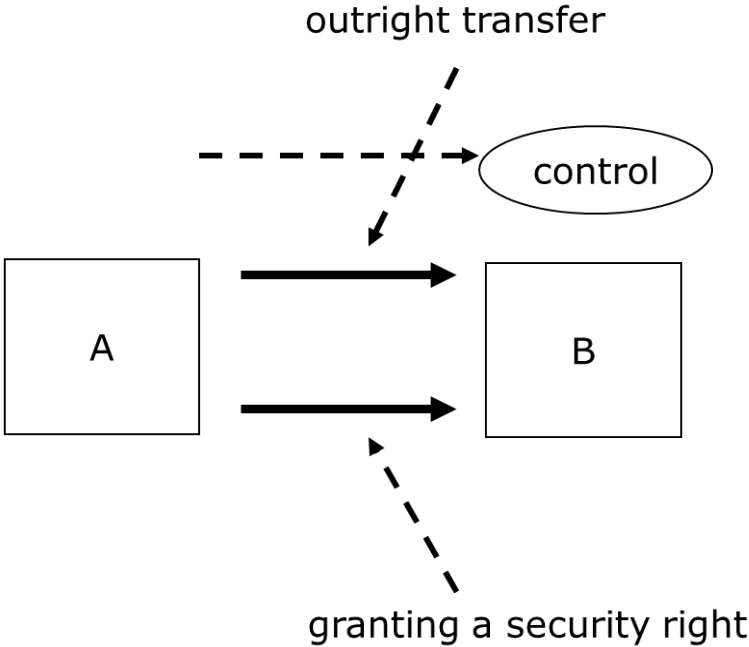
Neutrality on
Jurisdictions

TRANSFER

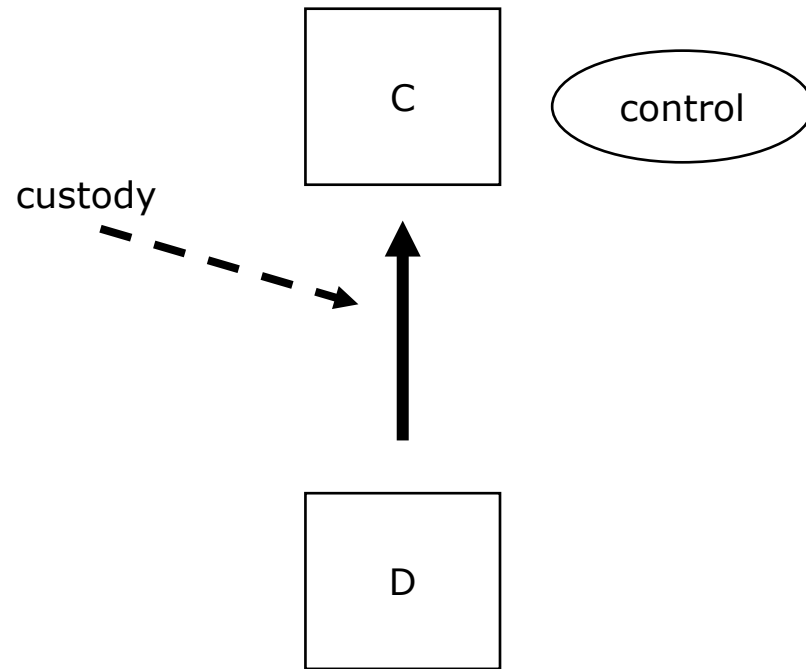
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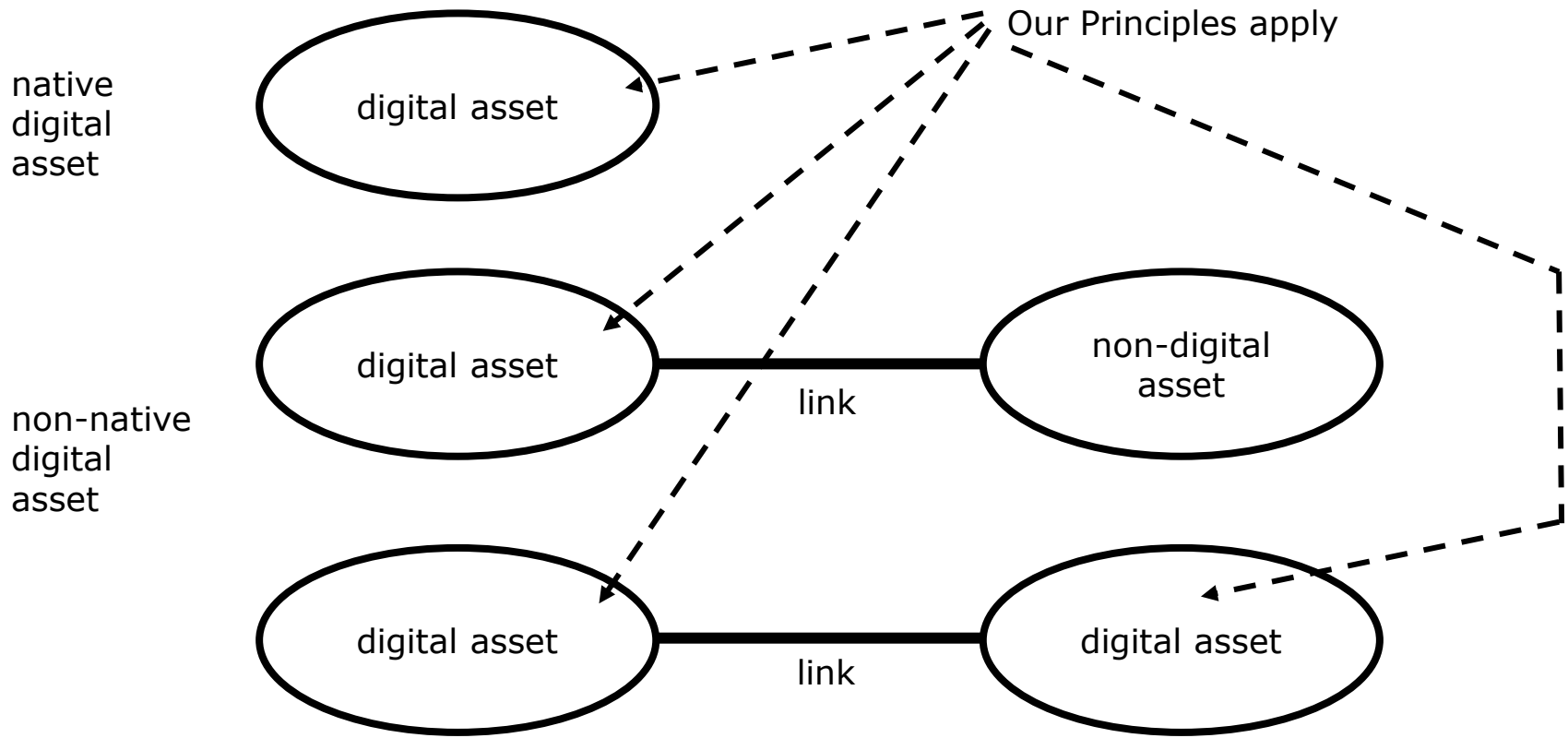
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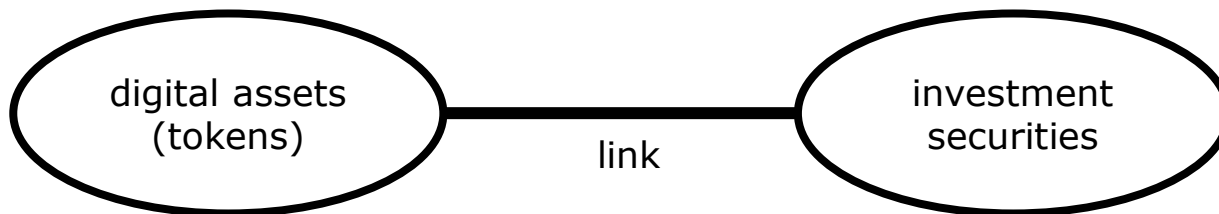
CUSTODY



Linked Asset



Securities Token



The basic legal rule seems to be that a transfer of a token (or non-native DA) does not automatically lead to a transfer of the target asset (or the linked asset), unless certain exceptions apply -- exceptions are where special legislation or a contract by the parties under the existing law creates such link legally. Similarly, a custody of a token does not automatically lead to a custody of the target asset, unless certain exceptions apply.

UPDATES -- ENFORCEMENT

Two Typical Situations involving Digital Assets:

A general creditor obtains a court judgement against the debtor, and attempts to seize the debtor's assets, which happen to include digital assets.

A creditor who took the debtor's digital assets as collateral attempts to realize its security right where the creditor tries to sell the digital assets so as to satisfy its claim.

The UNIDROIT Digital Assets Principles do not provide specific rules on this issue, and delegate the issue to each jurisdiction's national law (or "other law").

The UNIDROIT Project on "Best Practices for Effective Enforcement" is expected to propose some basic rules on this issue.

Duty to cooperate of the debtor for seizure and transfer

Cooperation from the debtor may be required in order to effectively and efficiently seize digital assets. Seizure of digital assets for the purposes of enforcement may require the cooperation by the debtor to disclose or make available relevant information for the enforcement agents or authorities to gain control over the digital assets - private key, recovery phrase, or access data to the device or system where it is stored - and/or to convey the control over the digital assets.

Sanctions

The law shall provide for effective, proportionate, and adequate sanctions in case that the debtor refuses to cooperate, without legitimate reasons or provide inaccurate, false, or partial information.

Conclusion

There are many interesting and sometimes difficult legal issues that are likely to arise in relation to digital assets in the coming years in Asia.

Legal certainty will be fulfilled by legislation, court decisions, or a combination of both.

The UNIDROIT Principles on Digital Assets and Private Law are helpful for all Asian jurisdictions to examine this area and think about the proper interpretations of their existing law and the need for new legislation.