Law Commission
Reforming the law

Digital assets and ETDs in private international law: which court, which law?

Call for evidence

February 2024

This publication is available at https://lawcom.gov.uk/project/digital-assets-which-court-which-law/.

THE LAW COMMISSION – HOW WE CONSULT

About the Law Commission: The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Law Commissioners are: The Rt Hon Lord Justice Fraser, Chair, Professor Nicholas Hopkins, Professor Sarah Green, Professor Penney Lewis. Nicholas Paines KC was also a Commissioner when this paper was approved for publication. The Chief Executives are Stephanie Hack and Joanna Otterburn.

Topic of this call for evidence: Private international law in the context of digital assets and electronic trade documents. This call for evidence seeks stakeholders' views about, and evidence of, the ability of the current law to accommodate these developments, and the prevalence of certain issues in practice.

Team working on the project: The following members of the Commercial and Common Law team have contributed to this call for evidence: Laura Burgoyne (team manager); Amy Held (lawyer); Elsabé van der Sijde (lawyer); Tamara Goriely (consultant); Amelia-Rose Edwards (research assistant) and Tusmo Ismail (research assistant).

Geographical scope: This call for evidence considers the law of England and Wales.

Availability of materials: The call for evidence is available on our website at https://lawcom.gov.uk/project/digital-assets-which-court-which-law/.

Duration: We invite responses by 16 May 2024.

Comments may be sent:

Using an online form at https://consult.justice.gov.uk/law-commission/digital-assets-and-etds-in-pil (where possible, it would be helpful if this form was used).

Alternatively, comments may be sent:

By email to conflictoflaws@lawcommission.gov.uk

By post to Commercial and Common Law Team, Law Commission, 1st Floor, Tower, 52 Queen Anne's Gate, London, SW1H 9AG.

(If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically.)

After the call for evidence: We will use the views and evidence received during this call for evidence to assist us in planning our work in this area, including potentially formulating proposals for law reform. Any proposals for reform will be the subject of further consultation.

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Contents

Glossary

Term	Definition
Algorithm	A set of mathematical instructions that must be followed in a fixed order and, if given to a computer, will calculate an answer to a mathematical problem.
Asset-backed digital tokens	Digital assets that represent value owing to a link between the digital asset and some “real world” tangible or intangible asset, such as goods or digital products (or rights therein), receivables (that is, rights to payment), and other claims. These kinds of tokens are sometimes referred to as “exogenous tokens” as defined below.
Assignment	The transfer of a right from one person to another.
Attornment	A formal transfer of constructive possession from one person to another of a thing in the actual possession of a third party. The transfer occurs by means of an acknowledgement to the transferee, by the third party in actual possession of the thing, that they hold it for the transferee.
Bearer document	The obligation recorded on a bearer document is owed to whomever is in possession of the document. To transfer the right to claim performance of the obligation to another party, the current bearer simply delivers the document to that party.
Bill of exchange	An unconditional written order to pay a certain sum in money. It is addressed by one party to another and requires the party to whom it is addressed to pay the specified person, or to their order, or to the bearer of the bill. The term is defined in section 3(1) of the Bills of Exchange Act 1882, which we set out in Chapter 11, paragraph 11.10.

Bill of lading	A document used in the carriage of goods by sea. It is issued by the carrier to the shipper and serves three functions: as a receipt for the goods taken by the carrier; as evidence of the contract of carriage; and, under certain circumstances, as a document of title to the goods described in the bill. As a document of title to goods, a bill of lading embodies the right to possess the goods to which it relates.
Bitcoin	Bitcoin is the archetypal example of a public, permissionless crypto-token system and is a communications channel which creates a system for electronic transactions. The system allows individuals to communicate with one another without the need for a centralised intermediary to authenticate the integrity of any communication or message.
bitcoin	The native notional quantity unit which exists within, and as a result of, the Bitcoin system.
Blockchain	A method of recording data in a structured way. Data (which might be recorded on a distributed ledger or structured record) is usually grouped into timestamped “blocks” which are mathematically linked or “chained” to the preceding block, back to the original or “genesis” block.
Central bank digital currency (“CBDC”)	A digital fiat currency issued by a country’s central bank.
Central registry system	A system managed and maintained by a central service provider, which provides a record of transactions over an electronic platform, and determines or identifies the system user to whom a document has been issued or transferred.
Charge	A type of non-possessory security interest that can be taken over an asset. The owner of the asset creates a proprietary right in relation to that asset in favour of the person who takes the benefit of the charge.

Cheque	A bill of exchange drawn on a bank. Where a cheque is crossed “account payee” it is not negotiable (as defined below).
Code	A language used to give instructions to computers. Code might take various forms of abstraction depending on how the code is created by software developers, its usage (for example, in DLT systems), or whether it is intended for direct execution by a computer.
Conflict of laws	The traditional term used in England and Wales to refer the legal discipline concerned with what we call “the applicable law question”. It seeks to answer the question: by which country’s law should a private dispute be resolved? See further “private international law” below.
Constructive possession	Where a person does not have possession of a thing as a matter of fact, but the law nevertheless deems them to have legal possession of that thing.
Conversion	An action in tort for wrongful interference with possession of a thing.
Cryptoasset	In this paper, we prefer the term “crypto-token” but we use “cryptoasset" in certain circumstances, such as where this is the term used in case law or commentary. We do not distinguish between “crypto-token” and “cryptoasset” in the same way as we did in the Digital Assets Report (where we used “cryptoasset” to refer to a crypto-token which has been “linked” or “stapled” to a legal right or interest in another thing).
Crypto-token	A crypto-token exists as a notional quantity unit manifested by the combination of the active operation of software by a network of participants and network-instantiated data.

Custodial intermediated holding	An arrangement under which users of an exchange retain superior legal or equitable title to the assets, or entitlements to assets held on their behalf, or for their account. In the event of the custodial holding intermediary entering an insolvency process, these entitlements would ordinarily not form part of the holding intermediary's estate and would not be available to meet the claims of its general creditors.
Custody	See custodial intermediated holding, above.
Data structure	A format for organising, processing, retrieving and storing data.
Decentralised finance ("DeFi")	A general term for automated and/or deterministic and decentralised and/or disintermediated applications providing financial services on a (generally decentralised and often blockchain-based) settlement layer, including payments, lending, trading, investments, insurance and asset management. Disintermediated applications allow individuals to transact directly, without intermediaries.
Delict	A type of civil wrong derived from Roman law and which remains prevalent in Continental legal systems. It is a feature of the law of Scotland, but its exact meaning and scope differs across legal systems. In international contexts, torts and delicts are often treated together under a broader category distinct from contractual obligations.
Dicey Rules	Authoritative rules set out in the leading private international law textbook: Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022). These rules generally reflect the common law position on the law that applies to resolve particular kinds of disputes.

Digital asset	Any asset that is represented digitally or electronically. There are many different types of digital assets, not all of which will be capable of being things to which personal property rights can relate. In this Call for Evidence, we use the term in a broad sense.
Distributed ledger	A digital store of information or data. A distributed ledger is shared (that is, distributed) among a network of computers (known as nodes) and may be available to other participants. Participants approve and eventually synchronise additions to the ledger through an agreed consensus mechanism.
Distributed ledger technology (“DLT”)	Technology systems that enable the operation and use of a distributed ledger.
Document of title to goods	A document used in the ordinary course of business as evidence of the right to possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of the document to transfer or receive the goods identified in the document.
Documentary intangible	A document that entitles the holder to claim performance of the obligation recorded in the document and to transfer the right to claim performance of that obligation by transferring the document. The document is said to “embody” the obligation
Endogenous tokens	A category of crypto-tokens that are not linked to anything outside the blockchain.
Ether	The native notional quantity unit which exists within, and as a result of, the Ethereum system.
Ethereum	A public, permissionless blockchain-based software platform which serves as a foundation upon which decentralised applications can be built using smart contracts.

Exogenous tokens	A category of crypto-tokens that are linked to some real-world asset that exists off-chain (outside the blockchain), like a share in a company or a bond. These kinds of tokens are sometimes referred to as “asset-backed digital tokens”.
Fiat currency	Currency that is accepted to have a certain value in terms of its purchasing power which is unrelated to the value of the material from which the physical money is made or the value of any cover which the bank (often a central government bank) is required to hold.
Fixed charge	A security over an asset which expressly or impliedly inhibits the chargor’s ability to deal with the charged property without the chargee’s consent. On insolvency, a fixed charge will rank before a floating charge.
Floating charge	A security over a class of a company’s assets or, more usually, over all of a company’s assets, both present and future (for example, stock and money in bank accounts). On insolvency, the floating charge “crystallises” and becomes a fixed charge over the assets a company owns at that moment.
Forum conveniens	The Latin term for the proper place or most appropriate forum (court) to bring a claim. Reference may also be made to *forum non conveniens*, which means “inappropriate forum”. It is an acknowledgement that there exists a more appropriate court (in a different jurisdiction) to determine the dispute.
Forum loci rei sitae	The Latin term for the courts of the place in which an asset is situated. In Latin shorthand, *forum situs*.

Fungible	A subjective quality of things that parties are willing to accept as mutually interchangeable with other things of a similar kind, quality and grade. For example, pound coins are generally treated as a class of fungible things because one pound coin is generally accepted by counterparties as equivalent to and interchangeable with another pound coin. Other classes of things that are generally treated as fungible include gold, crude oil, shares in a company and goods stored in bulk.
Giuliano and Lagarde Report on the Convention on the law applicable to contractual obligations ("Giuliano-Lagarde Report")	The Giuliano-Lagarde Report was authored by Professors Mario Giuliano and Paul Lagarde of the Universities of Milan and Paris 1, respectively. It explains the rationale behind, and how to interpret, the provisions of the Rome Convention. The Giuliano-Lagarde Report remains relevant and authoritative in relation to the Rome I Regulation, which we define below.
Indorsement	An annotation in writing on the back of a document of title instructing that the obligation recorded therein be performed to the order of a named person or simply "to order" (called a "blank indorsement"). This instruction must be signed and is usually completed by delivery. If the indorsement is a blank indorsement, the possessor of the document, whoever they may be, may indorse it on in their turn. If the indorsement is to a named person, any subsequent indorsement must be by that person.
Intermediary	An individual or, more commonly, an organisation which holds an interest in securities or other assets held on the behalf of, or for the account of, another person.
Intermediated securities	Interests in investment securities which are held by participants through an intermediary or a chain of intermediaries.
Layer 1	A general term used to describe base-level blockchain, DLT or crypto-token architecture, systems, networks or protocols. Generally speaking, a protocol is a set of rules for formatting and processing data.

Layer 2	A general term used to describe a secondary protocol built on top of, or to interact with, an underlying ("Layer 1") DLT or crypto-token architecture, system, network or protocol. Layer 2 protocols generally use the underlying Layer 1 protocol for certain functions, including settlement of transactions and transaction security.
Le conflit mobile	The French term for conflicts in private international law that arise when the country to which a territorial connecting factor leads changes over time. Such conflicts often arise with movable property.
Lex causae	The Latin term for the law of the cause of action. It is the law that determines the substantive rights and liabilities of the parties to a dispute. The *lex causae* applied in any given case may be the law of the forum or the law of another jurisdiction.
Lex domicilii	The Latin term for the law of a person's domicile.
Lex fori	The Latin term for the law of the forum. It refers to the law of the country in which the dispute is being litigated.
Lex loci actus	The Latin term for the law of the country in which a legal act is performed.
Lex loci contractus	The Latin term for the law of the place where a contract was concluded.
Lex loci damni	The Latin term for the law of the place where damage occurred.
Lex loci delicti commissi	The Latin term for the law of the place where a civil wrong (delict) was committed. The word "delict" is defined above.

Lex loci solutionis	The Latin term for the law of the place where a contract is to be performed.
Lex mercatoria	The Latin term for the "law merchant", the name used in the Middle Ages to denote a body of customary law developed by the chief trading and port towns of Europe.
Lex loci rei sitae	The Latin term for the law of the place where the object of property rights (the asset) is situated. In Latin shorthand, *lex situs*.
Lien	A right to retain possession of a thing until a claim or debt has been satisfied.
Marine insurance policy	A document which embodies a marine insurance contract.
Multilateralist approach to the conflict of laws	The multilateralist approach resolves issues of applicable law by reference to a theoretically self-contained system of rules that is premised on certain self-evident principles that are deduced or inferred from the logic of the system itself. The most significant of these is that every legal issue that comes before a court has, objectively speaking, a natural "seat" in one national legal system or another. The system was developed by the prominent German jurist, Carl Friedrich von Savigny in the early 19th century. See Chapter 2 paragraph 2.20 onwards, and Chapter 6 paragraph 6.14 onwards, for further detail.
Multi-signature arrangement	Multi-signature arrangements are also referred to as M-of-N arrangements, with M being the required number of signatures or keys to authenticate an operation and N being the total number of signatures or keys involved in the arrangement.

Negotiable/Negotiability	Negotiability under the law of England and Wales means not only that an instrument is transferable but also that, in the hands of a holder in due course (broadly, a good faith purchaser for value without notice who has satisfied all relevant formalities), it is enforceable despite a defect in the title of any prior holder. A transferor who negotiates a bill to a holder may, therefore, pass a better title than they themselves possess.
Non-Fungible Token ("NFT")	A token, generally a crypto-token, that has a unique identification number (or mechanism) such that it is not replaceable or interchangeable with another identical token. For further description, see Digital Assets: Final Report (2023) Law Com No 412.
Non-custodial intermediated holding	An arrangement under which a holding intermediary acquires (or retains) superior legal title to the assets, or entitlements to assets, that they hold (or acquire) on behalf of, or for the account of, users. Under this model, users have primarily personal contractual claims to the return of assets equivalent to those held. In the event of a non-custodial holding intermediary entering insolvency proceedings, these claims would consequently rank as unsecured claims and would not give rise to priority right of recourse to any specific crypto-tokens or token entitlements.
Obligor	The person who owes the obligation.
Offchain/onchain	Offchain refers to actions or transactions that are external to (or are undertaken on a distinct secondary protocol such as a Layer 2 that operates on top of or interacts with) the distributed ledger, structured record, blockchain or crypto-token system. Onchain refers to actions or transactions where the data is recorded by the distributed ledger or blockchain.

Open-source software	Open-source software is software that is released under a licence in which the copyright holder grants users the rights to use, study, change, and distribute the software and its source code to anyone and for any purpose.
Order document	With an order document, the obligation is owed to a person named on the document. To transfer an order document, the person in possession of the document must indorse the document. On “indorsement”, see above.
Permissioned	Requiring authorisation to perform a particular activity.
Permissionless	Not requiring authorisation to perform a particular activity.
Pledge	A type of security interest involving a debtor transferring possession of a thing serving as security to a creditor. See Chapter 12 paragraph 12.89 for further detail.
Private international law	The term “private international law” has many meanings, depending on the context. We use the term in a broad way to refer to a body of domestic law that is engaged where parties to a private law dispute are based in different countries, or where the facts and issues giving rise to the claim cross national boundaries. Defined in this broad way, there are three principal questions with which private international law is concerned: (1) the jurisdiction question, (2) the applicable law question, and (3) the recognition and enforcement question. See Chapter 2 paragraph 2.3 for further detail. In many legal systems, the term “private international law” is often used to refer to the legal discipline that considers the “applicable law” question. The traditional term used for this legal discipline in England and Wales is “conflict of laws.” See “conflict of laws” above.

Private key	See “Public key cryptography” below.
Public key	See “Public key cryptography” below.
Public key cryptography	Public key cryptography, or asymmetric cryptography, is an encryption scheme that uses two mathematically related, but not identical, keys (normally structured as long strings of data) — a public key and a private key. The generation of such key pairs depends on cryptographic algorithms which are based on mathematical problems. Each key performs a unique function. The public key is used to encrypt, and the private key is used to decrypt. So, in a public key cryptography system, any person can encrypt a message using the intended receiver’s public key, but that encrypted message can only be decrypted with the receiver’s private key.
Rei vindicatio	A vindicatory claim asserting ownership that enables an owner to regain possession of an object. It derives from Roman law and remains prevalent in Continental systems of property law.
Rome Convention	Convention on the law applicable to contractual obligations (EC) No 934/1980, Official Journal L 266 of 09.10.1980.
Rome I Regulation	Regulation on the law applicable to contractual obligations (EC) No 593/2008, Official Journal L 177 of 04.07.2008. The Rome I Regulation is the successor to the Rome Convention.
Rome II Regulation	Regulation on the law applicable to non-contractual obligations (EC) No 864/2007, Official Journal L 199 of 31.07.2007
Seat	The term “seat” is often used in private international law. When used in relation to, for example, a company, it can mean the centre of its operations. In the multilateralist approach to the conflict of laws, the term takes on a specific meaning. In this context, it is the

	standard English translation for the German term originally used by Savigny to refer to the “natural home” of any legal issue that arises to be determined by a court in litigation. See definition of “Multilateralist approach to the conflict of laws”.
Shipper	A term used in contracts of carriage of goods by sea. It refers to the party who is initially in possession of goods and has entered into a contract of carriage for the purpose of having them transported by sea to a (usually) foreign destination.
Smart contract	Computer code that, upon the occurrence of a specified condition or conditions, is capable of running automatically or deterministically according to pre-specified functions.
Smart legal contract	A legally binding contract in which some or all of the contractual terms are defined in and/or performed automatically or deterministically by a computer program.
Stablecoin	Crypto-tokens with a value that is intended to be pegged, or tied, to that of another asset, currency, commodity or financial instrument. The peg might be based on assets held by the issuer, or on a mathematical algorithm and is generally intended to remain on a stable (often 1:1) basis over time.
Territoriality	The principle that sovereign authority is limited to geographically defined borders.
Transferable security	Those classes of securities which are negotiable on the capital market, except for instruments of payment, such as: shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares; bonds or other forms of securitised debt, including depositary receipts in respect of such securities; and any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash

	settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures.
Transferable/transferability	A transferable document is one which entitles the lawful holder to claim performance of the obligation recorded in the document. Where a document is transferable, the right to claim performance of the obligation recorded in the document can be transferred through transfer of the document itself, but the transferee generally acquires no better title to the goods than the transferor had, although some exceptions do exist.
Unilateralist approach to private international law	A unilateralist approach resolves issues of applicable law by: (i) determining which national laws could, on the facts, potentially apply to resolve the dispute; and then (ii) looking at the substance of each of the potentially applicable laws to determine whether the relevant legislature intended that such law would apply in the given circumstances. See Chapter 2 paragraph 2.12 onwards for further detail.

List of abbreviations

1882 Act	Bills of Exchange Act 1882
1906 Act	Marine Insurance Act 1906
2023 Act	Electronic Trade Documents Act 2023
BIS	Bank for International Settlements
Brussels I Regulation	Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (EC) No 44/2001, Official Journal L12 of 16.01.2001
Brussels I Regulation (recast)	Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (EU) No 1215/2012, Official Journal L 351 of 20.12.2012
CBDC	Central bank digital currency
CJEU	Court of Justice of the European Union
COGSA 1971 / 1992	Carriage of Goods by Sea Act 1971 / 1992
Conflicts rules	Conflict of laws rules
DAO	Decentralised autonomous organisation
DeFi	Decentralised finance
DLT	Distributed Ledger Technology

ETD	Electronic trade document
EU(W)A 2018	European Union (Withdrawal) Act 2018
FCA	Financial Conduct Authority
FMLC	Financial Markets Law Committee
Giuliano-Lagarde Report	Giuliano and Lagarde Report on the Convention on the law applicable to contractual obligations [1980] Official Journal C 282/1 of 31.10.1980
Hague-Visby Rules	The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed at Brussels on 25 August 1924 (the "Hague Rules"), as amended by the Protocol signed at Brussels on 23 February 1968 (the "Visby Rules") and by the Protocol signed at Brussels on 21 December 1979. The Hague-Visby Rules are reproduced in the Carriage of Goods by Sea Act 1971, sch 1.
HCCH	The Hague Conference on Private International Law
ICC	International Chamber of Commerce
ICO	Initial Coin Offering
MiCA	Regulation on markets in crypto-assets (EU) 2023/1114, Official Journal L150 of 09.06.2023
NFT	Non-fungible token
Rome Convention	Convention on the law applicable to contractual obligations (EC) No 934/1980, Official Journal L 266 of 09.10.1980

Rome I Regulation	Regulation on the law applicable to contractual obligations (EC) No 593/2008, Official Journal L 177 of 04.07.2008
Rome II Regulation	Regulation on the law applicable to non-contractual obligations (EC) No 864/2007, Official Journal L 199 of 31.07.2007
RWA	Real world asset
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNIDROIT	The International Institute for the Unification of Private Law

All websites last accessed on 20 February 2024.

Chapter 1: Introduction

1.1 In recent years, a significant aspect of the Law Commission's work has focused on emerging technologies, including smart legal contracts, electronic trade documents, and digital assets such as crypto-tokens. These technologies often rely on distributed ledger technology, which uses a network of computers – potentially located all over the world – to record and store data. They are versatile and increasingly prevalent; they are used to facilitate international trade, to hold or transfer assets, and as a substitute for traditional payment.

1.2 Our consideration of such technologies has raised issues of private international law. Private international law is engaged when the parties to a private law dispute are based in different countries, or where the facts and issues giving rise to the claim cross national boundaries. In these circumstances, questions arise as to which country's courts the parties should litigate the dispute in, which country's private law should be applied to resolve the claim, and how any resulting judgment can be enforced in other countries. Private international law is the body of domestic law that supplies the rules used to determine these questions.

1.3 Those who invest in or use emerging technologies desire certainty as to how these questions will be answered. Litigation is an expensive and time-consuming process, which can be further complicated by uncertainty as to whether the court chosen by one or both of the parties will accept jurisdiction to hear the claim. Parties who organise their affairs according to the laws of one country may find during litigation that their legitimate expectations that such law will apply are frustrated by a rule of private international law.

1.4 This project is intended to be complementary to our existing work. It seeks to examine and clarify the legal framework in which questions of private international law arising from the use of emerging technologies will be resolved.

1.5 In support of this objective, this Call for Evidence introduces the law in this area and asks stakeholders for input on the main challenges and priorities so that we can focus our future work appropriately.

1.6 We ask stakeholders for views and evidence on the extent to which the existing methods and approaches of private international law can be applied to the new digitalised and decentralised contexts in which digital assets and electronic trade documents are used. We also ask stakeholder for views and evidence that will help us understand the market and commercial contexts in which these legal issues arise, and the extent to which they are, or may become, prevalent in practice.

1.7 We welcome responses to this Call for Evidence by **16 May 2024**. We explain how to respond on page ii above.

ABOUT THIS PROJECT

Our other work on emerging technology in common law and commercial law

1.8 This project is the most recent instalment of the commercial and common law team's work on emerging technology. Our other work in this area has raised, without seeking to resolve, issues of private international law.

Smart legal contracts

1.9 In 2020, the Government asked us to undertake a scoping study on smart legal contracts, meaning legally binding contracts in which some or all of the contractual obligations are recorded in or performed automatically by a computer programme. We noted that smart legal contracts give rise to particularly novel issues if they are deployed on a distributed ledger.[1]

1.10 We published our final paper as an Advice to Government in November 2021.[2] Its purpose was not to offer formal recommendations for reform, but rather to analyse the current law as it applies to smart legal contracts, highlight areas of uncertainty or gaps, and identify areas where further work may be required.[3]

1.11 Our advice to Government concluded that the current legal framework and the common law of England and Wales is, for the most part, able to facilitate and support the use of smart legal contracts without the need for statutory law reform.

1.12 However, we identified private international law as an area which required further work to support the use of smart legal contracts.[4] Our review of the rules of jurisdiction indicated that the difficulty in ascribing real-world locations to digital actions and digital assets is a significant challenge which private international law will have to overcome.[5]

Electronic trade documents

1.13 In September 2020, the Department for Digital, Culture, Media and Sport asked the Law Commission to make recommendations to allow for the digitisation of certain documents used in international trade, such as bills of lading and bills of exchange.[6]

1.14 We published a final report and Bill (the "ETD Report") in March 2022. In the ETD Report we made recommendations to allow for legal recognition of electronic trade documents, and to enable them to be used in the same way, with the same legal status, as their paper counterparts. Those reforms were brought into effect by the Electronic Trade Documents Act 2023.

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1 Law Commission, "Smart Contracts: Call for Evidence" (2020) para 2.4.

2 Law Commissions Act 1965, s 3(1)(e).

3 Smart Legal Contracts: Advice to Government (2021) Law Com No 401, para 1.9.

4 Above para 7.3. We also identified deeds as an area requiring further work.

5 Above para 7.145.

6 Digital Assets: Electronic Trade Documents, A Consultation Paper (2021) Consultation Paper No 254, para 1.17.

1.15 The ETD Report did not examine in detail the private international law problems which arise in the context of electronic trade documents. It noted that there are private international law difficulties associated with electronic trade documents, in particular the inherent difficulties in determining the geographical location of the documents. There are also issues arising from the fact that other countries may not recognise the validity of electronic trade documents.[7]

1.16 However, we recognised that many of these issues arise in relation to digital assets more broadly, so it would not be productive to address these issues for electronic trade documents in isolation.[8] We therefore left them to be considered in a more general project on private international law and emerging technology.[9]

Digital assets

1.17 In March 2020, the Ministry of Justice asked the Law Commission to undertake a project to review the law and consider reform to ensure that it could accommodate digital assets, including crypto-tokens, in a way which allowed the technology to flourish. We published the "Digital Assets: Final Report" in June 2023.[10]

1.18 Our final report concluded that, for the most part, legislation was not necessary to ensure that the law could accommodate digital assets: the common law is sufficiently flexible to allow a coherent and effective legal regime to apply to existing and emerging digital assets. In particular, the common law rules are sufficiently flexible to allow for recognition of crypto-tokens and other digital assets as objects of property rights. Because of the unique features of such assets, they do not fit easily within the traditional categories of personal property: things in possession (tangible objects) and things in action (legal rights), and courts have started to recognise them as falling with a "third category". Our report recommended targeted statutory reform to confirm and support this common law position, as well as the creation of a panel of industry-specific technical experts to support the judiciary.

1.19 Our report did not look in detail at the private international law issues which can arise in crypto-token dealings. However, we did recognise the importance of considering how a conflict of laws analysis applies to crypto-token collateral arrangements, due to the "the global nature of crypto-token and cryptoasset markets".[11] We pointed to our forthcoming work on how private international law rules apply to emerging technology of this type, to include "proprietary questions concerning digital assets".[12]

1.20 In respect of our recommendation for legislation to recognise "third category" things, we did not recommend criteria that would delimit the boundaries of an exhaustive third category of things to which personal property rights can relate. Instead, we concluded

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7 Electronic Trade Documents: Report and Bill (2022) Law Com No 405, para 8.98.

8 Above para 8.107.

9 Above paras 1.20 and 8.107.

10 Digital Assets: Final Report (2023) Law Com No 412, para 1.9.

11 Above para 8.136.

12 Above para 8.137.

that the parameters of this category of things should continue to be developed by the common law, guided by the indicia we set out in the Report.[13]

1.21 This approach means that there is no closed list of what constitutes digital assets. This reflects international trends, where there is also no single definition of digital assets, nor a universally accepted approach to categorising different types of digital assets.

1.22 While this flexibility has many benefits, it can lead to some difficulties when discussing or analysing certain assets, since different terms might mean different things to different people. This is particularly challenging given the transnational nature of digital assets, where terms are often developed concurrently in different jurisdictions.

1.23 We hope that the responses to this Call for Evidence will help us identify whether specific terminology relating to digital assets is causing particular challenges in a private international context.

Decentralised autonomous organisations (DAOs)

1.24 The term decentralised autonomous organisation ("DAO") describes, very broadly, a new type of technology-mediated social structure or organisation. In particular, the label "DAO" was introduced to describe arrangements that depend for their governance/and or operational activities more on computer code than on human actors, employing decentralised ledger technology and smart contracts at their centre.

1.25 Some DeFi and crypto-token market participants describe their organisational structures as DAOs, and other arrangements using the label DAO have been set up for a wide range of purposes including social, charitable or investment. They also take many different forms in terms of legal structuring, or may seek to eschew formal legal structures entirely. The legal character of any individual DAO will depend on its own particular arrangements; there is no standard "DAO".

1.26 When it comes to identifying what an individual DAO is as a matter of law, what the status of its token holders is, or where liability sits for wrongdoing and answering a variety of other questions, private international law rules may have a bearing on how these issues are determined.

1.27 In September 2022, we were asked by the Department for Business and Trade (formerly BEIS) to undertake a scoping project on DAOs. We have not been asked at this stage to develop recommendations for reform, but we have been asked to explain what DAOs are, and to identify any areas of law in need of future work to ensure that the law of England and Wales can deal appropriately with DAOs. We published a call for evidence in November 2022 and intend to publish our scoping paper in the first part of 2024.[14]

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13 Above para 4.4.

14 For updates see https://lawcom.gov.uk/project/decentralised-autonomous-organisations-daos/.

Terms of reference

1.28 In 2022, the Ministry of Justice asked the Law Commission to conduct this project considering how private international law rules will apply in the digital context. In particular, the Law Commission is asked to consider the disputes which are likely to arise in the digital context (including contractual, tortious and property disputes), and make any reform recommendations it considers necessary to Government.

1.29 Our full terms of reference, including exclusions from scope, are included at Appendix 1.

Territorial extent

1.30 As the Law Commission of England and Wales, we can make law reform recommendations only for England and Wales,[15] and not for Scotland or Northern Ireland.

1.31 However, key sources of private international law apply to the whole of the UK, including the assimilated Rome I Regulation and assimilated Rome II Regulation.[16] The Electronic Trade Documents Act 2023 also applies to the whole of the UK.[17]

1.32 We would therefore be interested to hear from stakeholders in Scotland and Northern Ireland about the ways in which these issues are being dealt with by their judiciary, and any particular challenges under the laws of those jurisdictions.

Responses and next steps

1.33 We welcome responses to this Call for Evidence by **16 May 2024**.

1.34 Although this Call for Evidence is open to all, it is an information-gathering exercise and is primarily directed at stakeholders who have experience in private international law, or of, for example, digital assets or trade documents (whether paper or electronic). We recognise that the broad scope of this project means that certain respondents will have expertise in some topics covered but not others. Respondents are welcome to address whichever of the issues they are familiar with or interested in.

1.35 We will use the responses to this Call for Evidence, and further engagement with stakeholders, to inform our provisional views on the necessity of, and proposals for, law reform. We expect our next step to be publishing a consultation paper later in 2024.

OTHER WORK ON DIGITAL ASSETS AND PRIVATE INTERNATIONAL LAW

1.36 There are recent and concurrent international projects which are considering the viability and desirability of international harmonisation in this area of law. Although our

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15 Matters of private law are reserved in Wales: Wales Act 2006, sch 7B, para 3(1).

16 The term “assimilated” refers to EU law that remains a part of the law of the UK following the UK’s withdrawal from the EU. We explain this further from paragraph 2.47.

17 Other than section 3(4) which extends only to Scotland: s.8(1) Electronic Trade Documents Act 2023.

work necessarily focuses on the law of England and Wales, we recognise the need to be aware of international developments.

1.37 One example of existing work is the UNIDROIT Principles on Digital Assets and Private law. The Principles, adopted by UNIDROIT[18] in May 2023, are designed to encourage a common international approach to legal issues arising from the transfer and use of digital assets. Notably for the purposes of our project, they contain a "conflict of laws" provision; that is, a provision that addresses the question of applicable law for proprietary issues associated with digital assets.[19] We discuss this specific Principle in more detail in Chapters 11 and 12. The Law Commission sat as an observer on the working group for the Principles.

1.38 A further example is the Joint Project on Applicable Law to Cross-Border Holdings and Transfers of Digital Assets and Tokens between UNIDROIT and the Hague Conference on Private International Law (known as the "HCCH"). Professor Sarah Green (the Commissioner supervising this project) is participating as an expert panel member. This project is exploratory in nature: it will examine the desirability of developing "coordinated guidance" or a normative framework on the law in respect of cross-border holdings and transfers of digital assets. At present, our understanding is that there will be a recommendation by March 2024 on whether there should be continuing work on this topic.

1.39 International reform efforts may mean that domestic law reform is not the only way forward to address identified challenges. The types of challenges considered in this project potentially are well suited to being addressed through international reform and/or harmonisation efforts. We therefore see this Call for Evidence as an opportunity to understand better which challenges (if any) can be addressed through domestic law reform efforts and which challenges may require an alternative solution.

1.40 In addition, we note that issues pertaining to digital assets and private international law are on the minds of judges and practitioners. For example, a recent speech by His Honour Judge Pelling KC touched on the importance of jurisdiction, applicable law and enforcement of judgments in the context of litigation involving digital assets.[20] These are all issues that we are concerned with in this project.

1.41 In October 2023, HM Treasury published its Response to the consultation and call for evidence for its project "Future financial services regulatory regime for cryptoassets."[21] We welcome this work as providing much-needed certainty as to the future of the UK financial regulatory regime that will apply to cryptoassets. It is important to note that,

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18 UNIDROIT is the International Institute for the Unification of Private Law. Further details of the project are available at https://www.unidroit.org/work-in-progress/digital-assets-and-private-law/.

19 UNIDROIT, "UNIDROIT Principles on Digital Assets and Private law" (2023) Principle 5.

20 HHJ Pelling KC, "Issues in Crypto Currency Claims" DIFC Seminar (13 November 2023), available at https://www.judiciary.uk/speech-by-hhj-pelling-kc-issues-in-crypto-currency-claims/.

21 HM Treasury, "Future financial services regulatory regime for cryptoassets: Response to the consultation and call for evidence" (October 2023) available at https://assets.publishing.service.gov.uk/media/653bd1a180884d0013f71cca/Future_financial_services_regulatory_regime_for_cryptoassets_RESPONSE.pdf.

although we also consider crypto-tokens as a type of digital asset, the focus of our work is different. In particular, we are concerned with private law issues that arise from digital assets and electronic trade documents, rather than regulatory or public law. Our work on crypto-tokens in private international law therefore has no overlap with the existing regulatory regime or the regime for cryptoassets that HM Treasury is developing. In particular, where HM Treasury refers to the geographical scope of the future of UK financial regulation of cryptoassets, this refers to the regulatory regime and not the private law with which we are concerned. Our work has no bearing on regulatory permissions or obligations required under the regulatory regime.

STRUCTURE OF THIS CALL FOR EVIDENCE

1.42 This Call for Evidence is divided broadly into three overarching themes.

1.43 The first introduces this project and sets out background information on private international law and digital assets that will underpin the discussion of specific issues in other chapters.

(1) In Chapter 2, we provide an introduction to private international law.

(2) In Chapter 3, we set out our current understanding of the core problem that this project will address and provide an overview of the most important technology that is relevant to this project.

1.44 The second focuses on international jurisdiction over private law disputes, which is one of the key components of private international law.

(1) In Chapter 4, we offer an overview of the general rules and principles relating to international jurisdiction in private international law. We specifically consider the role and relevance of jurisdiction in private international law as it has developed in England and Wales, and the relevance of public international law considerations when national courts exercise jurisdiction over disputes with cross-border features.

(2) In Chapter 5, we focus on specific issues of international jurisdiction in the context of claims involving digital assets. We focus on cases involving crypto-tokens that have come before the courts of England and Wales. These cases have raised issues primarily relating to the tort and property jurisdictional gateways. We also set out the rules for jurisdiction over consumer contracts.

1.45 The third focuses on the other key component of private international law, namely applicable law. Applicable law refers to the body of law of a specific jurisdiction which a court will use to adjudicate the dispute once the court has accepted jurisdiction.

(1) In Chapter 6, we set out the rules and general principles of applicable law in cases that engage private international law. We set out the three-step process of determining the applicable law that currently prevails in the private international law rules of England and Wales, with particular reference to “connecting factors” and the process of characterising the legal issue in dispute. We also discuss more broadly the theoretical objectives of the prevailing

approach to applicable law, and proposed solutions to the challenges posed by modern technologies, such as the internet and distributed ledger technologies.

(2) In Chapter 7, we consider the applicable law rules set out in the Rome I Regulation for contractual obligations arising under non-consumer contracts. The discussion includes consideration of decentralised finance and transactions concluded within and with crypto exchanges. We ask whether the current rules are sufficiently clear and appropriate in the way they apply to contracts associated with crypto-tokens.

(3) In Chapter 8, we consider the applicable law rules set out in the Rome I Regulation for contractual obligations arising under consumer contracts. The discussion includes consideration of the meaning of a "consumer" and "professional" in the context of crypto-trading, and whether crypto-tokens will be classified as "financial instruments" or "transferable securities" for the purpose of certain exclusions in the relevant consumer contract rules.

(4) In Chapter 9, we consider the applicable law rules set out in the Rome II Regulation for non-contractual obligations. The discussion includes consideration of localising damage sustained in torts relating to crypto-tokens and the notion of pure economic loss. It also considers the circumstances in which the courts may have recourse to the "escape clause" exception to the general rule for torts in the Rome II Regulation.

(5) In Chapter 10, we consider the applicable law rules for contractual obligations arising under negotiable instruments and bills of lading. Obligations arising under these instruments are considered separately, because they generally fall within express exclusions in the Rome I Regulation and are generally governed by the common law rules. The discussion focuses on bills of lading, the various systems that facilitate electronic bills of lading, and the application of the Hague-Visby Rules.

(6) In Chapter 11, we consider the applicable law rules for contractual obligations arising under bills of exchange, cheques, and promissory notes. Such obligations are excluded from the Rome I Regulation and are presently governed by section 72 of the Bills of Exchange Act 1882. We take section 72 as the point of departure, and consider whether contractual disputes arising under electronic bills of exchange, cheques, and promissory notes might be accommodated within a new general rule for all electronic trade documents.

(7) In Chapter 12, we consider the applicable law rule for property disputes that broadly prevails in private international law: the law applicable to property issues is the law of the place where property is situated (the "*lex situs*" rule). We highlight some of the difficulties that arise or can arise with the application of this rule in the context of digital assets and electronic trade documents. We also consider security interests, such as pledge, fixed charges and floating charges to consider how the applicable law question is answered when a dispute involves a security right in a digital asset or electronic trade document.

1.46 All of our questions to stakeholders are listed in Chapter 13.

1.47 This report contains 2 appendices.

(1) Appendix 1 sets out our terms of reference for this work.

(2) Appendix 2 includes a list of our advisory panel members, and a list of stakeholders with whom we have met or corresponded in the development of this call for evidence.

ACKNOWLEDGEMENTS AND THANKS

1.48 In preparing this Call for Evidence, we have met or corresponded with the individuals and organisations listed in Appendix 2. We are very grateful to those who gave us their time, and allowed us to draw on their experience and expertise.

1.49 We have also received valuable feedback and direction from an advisory panel of experts, whose names are listed in Appendix 2. We are grateful to the advisory panel for commenting on earlier drafts of our work, and for generously sharing their knowledge and insight with us. The contents of this Call for Evidence and any provisional conclusions drawn are not intended to represent, and may not be reflective of, the personal views of advisory panel members.

THE TEAM WORKING ON THE PROJECT

1.50 The following members of the Commercial and Common Law team have worked on this Call for Evidence: Laura Burgoyne (team manager), Amy Held (lawyer), Elsabé van der Sijde (lawyer), Tamara Goriely (consultant), Tusmo Ismail (research assistant), and Amelia-Rose Edwards (research assistant). Additional support was provided by Síona Molony and Richard Hine.

1.51 Amy Held is an Affiliate Academic in the Common Law at the Department of European, International, and Comparative Law at the University of Vienna. She was a member of the panel of experts advising the team before joining the Law Commission in November 2023 to work specifically on this project as a law reform lawyer. Her academic work concerning private international law and digital assets is cited throughout this paper. She will be the sole lawyer working on this project going forward.

Chapter 2: Private international law – an overview

2.1 In this chapter we provide a broad overview of "private international law." It is intended as a functional introduction to set out the core issues with which this area of law is concerned, and the various ways legal systems have responded to these issues.

2.2 Questions of private international law arise where the parties to a civil or private law dispute are based in different countries, or where the events giving rise to the claim cross national boundaries. In functional terms, private international law is concerned with the question of "how to resolve the conflicts that may exist between different private law systems."[22] Issues of private international law arise because "law has become the prerogative of territorial sovereigns, whereas human affairs freely cross state and national boundaries."[23]

> Alice is an UK citizen who lives in England. Whilst on a holiday in Egypt, Alice is injured by a car driven by Bob. Bob is a US citizen who lives in Egypt. Bob was driving well over the speed limit. Alice wishes to sue Bob to compensate her for the injury.

2.3 Terminology in private international law is not always used consistently and therefore can be confusing.[24] However, for the purposes of our project, there are three main issues that must usually be resolved when questions of private international law arise.

(1) In which country's court should the parties litigate their dispute? Should Alice and Bob litigate in England, Egypt, or the US? This is the "jurisdiction" question, also known as the "*forum*" question.

(2) Which law or combination of laws should be applied to resolve their dispute? Should English law, Egyptian law, US law, or some other law be used to determine whether Bob must compensate Alice for the injury caused? This is

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22 R Michaels, "EU Law as Private International Law? Re-Conceptualising the Country-Of-Origin Principle as Vested Rights Theory" (2006) 2 *Journal of Private International Law* 211. See also F Juenger, *Choice of Law and Multistate Justice* (1993); and D McClean and V R Abou-Nigm, *Morris: The Conflict of Laws* (10th ed 2021) para 1-010.

23 F Juenger, *Choice of Law and Multistate Justice* (1993) p 3.

24 Continental legal systems generally use the term "private international law" to mean only the conflict of (applicable) laws or choice of law.

the "applicable law" question and is often also known as the "conflict of laws"[25] or "choice of law"[26] question.

(3) How can a judgment be recognised and enforced in another country? This third question is premised on the first two questions being answered and arises only if the litigation actually proceeds to judgment. If Bob obtains a judgment ruling that he does not have to compensate Alice, is that judgment only valid in the country where the litigation was conducted? Will the courts in other countries also recognise that Bob does not have to compensate Alice? Or can Alice litigate the dispute again in the courts of another country? This is the "recognition and enforcement" question.[27]

2.4 In this project we are concerned in particular with the first two questions: jurisdiction and applicable law, but also consider issues of recognition and enforcement where relevant. Jurisdiction is discussed in Chapters 4 and 5, while applicable law is discussed in detail in Chapters 6 to 12.

2.5 As we explain below and in Chapter 4, it may be more difficult in practice for us to make effective domestic reform proposals on the recognition and enforcement of judgments since much depends on the approach of courts in other jurisdictions. However, although the three questions are conceptually distinct, they often influence each other. In particular, enforcement can influence the claimant's choice of jurisdiction: there is little point in obtaining a judgment unless it can be enforced. Claimants may therefore decide where to bring a claim with one eye on enforcement. This project therefore has to bear in mind issues of remedies and enforcement.

APPROACHES AND METHODOLOGIES

2.6 Questions of private international law have been around for as long "as members of different societies whose legal systems had sufficiently matured began to deal with one another. Such conditions certainly existed as early as the fourth century BC, when the Greek city-states came into their prime and trade was active in the eastern

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25 Professor Briggs uses the term "conflict of laws" to refer to "the rules and principles which tell an English court hearing a case with a foreign element whether to apply English law or foreign law or a combination of laws to resolve the dispute". He explains, however, that the common lawyer's label for the entire collection of material used to determine what we call the jurisdiction, applicable law, and jurisdiction and enforcement questions, "was 'the conflict of laws'." He adds that because the term "conflict of laws" appears to neglect the jurisdiction and the recognition and enforcement questions, "some prefer to think of the subject as 'private international law', for it is concerned almost entirely with private law in cases and matters having international elements or points of contact." A Briggs, *The Conflict of Laws* (4th ed 2019) pp 4 to 5.

26 Professor Briggs explains that the common lawyer's label for "the technique by which a court determines which law to apply (the third category of material) [was] the 'choice of law'". He goes on to explain that the problem with using the nomenclature of 'choice of law' to describe the process undertaken by the court is that the court does not actually choose the applicable law, "if by that we mean to make a free and unconstrained selection of the law to apply". Rather, the law that applies is determined by the rules of the conflict of laws. Professor Briggs therefore prefers to refer to the relevant rules as "conflicts rules", rather than "choice of law rules". A Briggs, *The Conflict of Laws* (4th ed 2019) pp 4 to 5.

27 See also D McClean and V R Abou-Nigm, *Morris: The Conflict of Laws* (10th ed 2021) para 1-003: "The questions which the rules of the conflict of laws seek to answer are of three main types…", and A Briggs, *The Conflict of Laws* (4th ed 2019) p 4 on (1) "the conflict of jurisdictions" ("the jurisdiction question"), (2) "the conflict of judgments" ("the recognition and enforcement question") and (3) "the conflict of laws" ("the applicable law question").

Mediterranean".[28] A historical overview of private international law shows a plurality of approaches to resolving the core questions of private international law. These tend to reflect the specific political and legal conditions under which they were developed.[29]

2.7 Nevertheless, the historical record shows that there are three basic methods for resolving the conflicts that may exist between different private law systems.[30]

The first method: supranational law

2.8 The first approach resolves issues of private international law through special international rules that apply wherever there is an international element to a private law dispute. The approach can be used to answer the applicable law question and recourse to this method often means the jurisdiction question is less problematic.

> Under the supranational approach, it does not really matter whether Alice and Bob litigate their dispute in the courts of England and Wales, Egypt, or the US. This is because the courts in each of these countries will apply the same special body of international law that applies in international circumstances.
>
> The question of whether Bob must compensate Alice for the injury caused will not be resolved by reference to English, Egyptian, US, or any other system of national law. Instead, the issue will be decided using a special body of international law that applies in international circumstances.

2.9 The basic substance of the supranational approach can be seen in various forms throughout legal history.[31] The old law merchant (*lex mercatoria)*, which we discuss further below, is one example. Today, however, this approach to resolving questions of private international law is often formalised at the level of public international law through conventions and treaties.

2.10 Whilst public international law generally is defined as relations between sovereign states, some instruments of public international law address what would otherwise be private law issues left to individual states to regulate under their domestic laws.

2.11 Examples of the supranational approach include:

(1) International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, and its Protocols (usually known as the "Hague Rules" and the "Hague-Visby Rules").

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28 F Juenger, *Choice of Law and Multistate Justice* (1993) p 6.

29 F Juenger, *Choice of Law and Multistate Justice* (1993); A Mills, "The Private History of International Law" (2006) 55(1) *International and Comparative Law Quarterly* 1.

30 F Juenger, *Choice of Law and Multistate Justice* (1993) p 45.

31 H E Yntema, "The Historical Bases of Private International Law" (1953) 2(3) *The American Journal of Comparative Law* 297; S C Symeonides, *Choice of Law* (2016); F Juenger, *Choice of Law and Multistate Justice* (1993).

(2) UNIDROIT Cape Town Convention on International Interests in Mobile Goods.

(3) UN Convention on the International Sales of Goods.

The second method: the unilateralist approach

2.12 The "unilateralist" approach is also known as the "statutist" approach. It is concerned with the applicable law question only and involves two logically distinct steps.

(1) The first step is to look at the range of national laws that arise from the facts of the case that potentially could apply.

(2) The second step involves looking at the substance of these laws in depth to see whether the relevant legislature intended that such law would apply in the given circumstances.

> Applying the unilateralist approach, the court hearing Alice and Bob's dispute likely will identify the law of England and Wales and the law of Egypt as being the potential applicable laws.
>
> Assume that the relevant law of England and Wales states the conditions under which a driver will be liable for causing personal injury to pedestrians and the defences available.
>
> The relevant law of Egypt also states the conditions under which a driver is liable for causing personal injury to pedestrians and the defences available. It further states that these conditions and defences apply to all road traffic accidents occurring in Egypt, irrespective of the parties' nationalities and where they usually live.
>
> The court will then try to identify whether the relevant legislature intended that their respective legal provisions would apply in Alice and Bob's case.
>
> Given the clear scope of the law of Egypt, and the silence on the part of the law of England and Wales on its territorial application, the court would conclude that Bob's conduct will be judged against the conditions for liability and defences set out in the Egyptian legislation.

2.13 The unilateralist method was developed in what is now Italy during the 12th century. At this time, the remnants of the old Roman law co-existed alongside the newer laws of the emerging Italian city states. In these circumstances, where it was unclear whether Roman law or city-state law might apply, the unilateralist approach looked to the specific legislative acts in question and asked: "did the legislature intend that *this particular legislative act* would apply on the facts of this case?"

2.14 The unilateralist approach reflects its Continental origins in its premise that the substantive private law rights and obligations of persons are set out comprehensively in legislation. Only then can there be a legislature whose intent can be ascertained by the court.

2.15 This premise means that the unilateralist approach cannot be applied easily, if at all, to the common law system of rights and remedies. It can, however, be applied to UK statutes.

2.16 Most UK statutes are silent on their intended territorial scope of application.[32] There is, however, a general presumption that the UK Parliament does not design its statutes to operate beyond the territorial limits of the UK unless there is clear drafting to the contrary.[33]

2.17 Some UK statutes do, however, prescribe their territorial scope of application. For example, section 1(1) of the Inheritance (Provision for Family and Dependents) Act 1975 provides that certain classes of family and dependents may apply for an order under section 2 of that Act in circumstances where the deceased person died domiciled in England and Wales.

> The effect of section 1(1) is that the right to apply for an order for reasonable financial provision conferred by section 2 of the Inheritance (Provision for Family and Dependents) Act 1975 will be available whenever the deceased died domiciled in England and Wales. It will not matter whether the family member and dependent themselves are domiciled in England and Wales. This means that the Inheritance (Provision for Faily and Dependents) Act 1975 might apply to family members or dependents of the deceased who are based, say, in Australia.

2.18 Legislative instruments containing unilateral rules such as these are often used where the legislature has a strong interest in ensuring its laws apply beyond its territorial borders. Examples include financial regulations aimed at preserving the integrity of a domestic market.

2.19 Today, the approach can be seen in the "interest analysis" or "governmental interest" approaches that developed in the US during the 1950s and early 1960s.[34] These require consideration of the "interest" of each of the legislatures whose laws might apply.

The third method: the multilateralist approach

2.20 The term "multilateral" has many meanings, depending on the context. In public international law, it usually refers to coordination as between many sovereign states. A "multilateral convention" has many contracting states, whereas a "bilateral convention" has only two contracting states. Similarly, in the financial markets,

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32 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 1-037.

33 Above.

34 The approach was developed primarily by Brainerd Currie (1913-1965) and William F Baxter (1929-1998). See generally S Symeonides, *Choice of Law* (2016) pp 97-106; and A Mills "The Identities of Private International Law: Lessons from the US and the EU Revolutions", (2013) 43 *Duke Journal of Comparative & International Law* 445.

platforms that facilitate trading as amongst many different traders are often referred to as "multilateral trading facilities."

2.21 In this project, we predominantly use the terms "multilateral" and "multilateralist" in a different sense; one which often has a particular meaning in private international law. Here, it refers a particular method of "resolving conflicts that may exist between different private law systems" that was developed in the early 19th century by a prominent German jurist, Friedrich Carl von Savigny (1779-1861).

2.22 As with the unilateralist approach, the multilateralist approach also addresses only the question of applicable law. It is the most conceptually abstract of the three methods we set out here in that it resolves issues of applicable law by reference to a theoretically self-contained system of rules. These are premised on certain self-evident principles that are deduced or inferred from the logic of the system itself. The most significant of these is that every legal issue that comes before a court "naturally belongs" to one national legal system or another. This concept of legal issues having a "natural home" in one legal system or another is referred to in the literature as all legal issues having an objective "seat" in some legal system.

2.23 From this premise, multilateral systems prescribe a complete set of abstract rules that identify the objective seat of all legal issues that may come before the courts. These rules act as signposts that direct the facts and issues arising in a dispute to a location that is described in abstract terms. Having followed the relevant signpost, a court is able to identify which particular law should be applied in any given case.

2.24 By contrast to the unilateralist approach, the multilateralist approach asks: "which, *of many possible laws*, applies on the facts of this case?"[35] The multilateralist approach comprises a distinct three-stage process to answer this question and identify the applicable law. We set this out here in brief, before examining it in greater detail in Chapter 6.

[35] For further discussion, see Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022), para 1-042 onwards.

The court will apply a multilateralist approach to Alice and Bob's dispute as follows:

First, the court will ask: what kind of legal issue is in dispute between the parties? Is it an issue relating to, for instance, the administrative offence of driving over the speed limit? A criminal offence of dangerous driving? Is it an issue relating to the law of torts? An issue relating to the law of contract?

Assume the court has decided that the issue in dispute relates to torts.

Second, the court will then refer to the multilateral rule that applies to this particular kind of legal issue. As the court decided that the issue between Alice and Bob relates to the law of torts, the court will refer to the multilateral rule for torts.

This rule states that, for issues relating to liability for torts, the applicable law is the law of the place where the damage or injury occurs.

Third, the court will refer back to the facts to ascertain the place to which the relevant rule points. It will then apply the law of that place to the issue in dispute.

Assume the court has decided that Alice's personal injury occurred in Egypt. Egyptian law will therefore determine whether Bob must compensate Alice for her injuries.

2.25 Whilst the influence of the multilateralist approach remains highly pervasive in most systems of private international law around the world, its merits and validity came under an equally pervasive trend of criticism in the early 20th century. Since then, in some parts of the world, the multilateralist ideal is in decline or has otherwise been tempered. We return to this in Chapter 6.

PRIVATE INTERNATIONAL LAW IN ENGLAND AND WALES

2.26 Private international law is one of the few areas of law in common law jurisdictions that largely borrows from Continental legal traditions. In England and Wales, the supranational approach prevailed in commercial and admiralty matters until roughly the 19th century, when the multilateralist approach came more strongly to the fore.

2.27 Reflecting briefly on the history of the common law will help us explain the approaches taken in England and Wales to resolving conflicts that may exist between private law systems. In the following section, we begin by explaining that in the central and late Middle Ages, England and Wales was a mature trading nation and therefore had sufficient contact with other legal systems for issues of private international law to arise. These issues were resolved primarily using the supranational approach outlined above.

The law merchant

2.28 The term *lex mercatoria*, or "law merchant" as it was known in England, was the name used in the Middle Ages to denote a body of customary law developed by the chief

trading[36] and port[37] towns of Europe. These customs and practices were developed by merchants to govern their trading relations and agreements, which typically traversed different countries. For example, the prototypes of the modern bill of exchange developed in response to the commercial need to finance transactions that were not constrained by state boundaries or interests.[38] The law merchant was a truly international solution to determining the private law rights and obligations of parties engaged in commercial transactions across state borders.[39]

2.29 For our purposes in this chapter, the law merchant can be considered an "applicable law" with international, rather than national, origins that applied to international commercial and admiralty issues. These rules were "special" insofar as the rights and obligations recognised under the law merchant could be quite different to those recognised under national systems of private law. In England and Wales, for example, the common law and law merchant historically provided for radically different rights, obligations, and remedies as between a debtor and creditor.[40]

2.30 Given the importance of pleading, procedure, and remedies in the common law system, disputes arising under the law merchant were not heard before the common law courts or the courts of equity. Instead, such disputes were brought before special commercial[41] and admiralty courts[42] that were set up in key trading towns in England. These courts applied not the common law or equitable principles, but the law merchant. In this way, some early types of bills of exchange, negotiable instruments, and bills of lading could be enforced in England by the 16th century in what could be described as special "international commercial courts".

2.31 Over time, the law merchant became slowly integrated within the common law system of England. By the late 1600s, common law judges had begun to enforce the commercial aspects of the law merchant in the common law courts.[43]

2.32 The reception of law merchant as part of the general law of England and Wales was substantially completed by the late 19th century[44] when the common law authorities on the law merchant were codified and placed on statutory footing. We discuss, for example, the Bills of Exchange Act 1882 in greater depth in Chapter 11. These statutes, however, marked the demise in England and Wales of the supranational

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36 W S Holdsworth, "The Development of Law Merchant and its Courts" in Committee of the Association of American Law Schools (eds), *Select Essays in Anglo-American Legal History: Volume I* (1907) ch 9.

37 Above.

38 B Geva and S Peari, *International Negotiable Instruments* (2020) para 2.49.

39 W S Holdsworth, "The Development of Law Merchant and its Courts" in Committee of the Association of American Law Schools (eds), *Select Essays in Anglo-American Legal History: Volume I* (1907) ch 9. Sir William Holdsworth said that the law merchant was "in fact, the private international law of the period."

40 P S Atiyah, *The Rise and Fall of the Freedom of Contract* (1979) p 135 onwards.

41 T Plucknett, *A Concise History of the Common Law* (1956) pp 660 to 664, as cited in F Juenger, *Choice of Law and Multistate Justice (*1993) p 23, n 124.

42 Above.

43 P S Atiyah, *The Rise and Fall of the Freedom of Contract* (1979) p 137. See also J M Holden, *The History of Negotiable Instruments in English Law* (1955).

44 Evident from, for example, the Bills of Exchange Act 1882 and the Judicature Acts.

approach to resolving issues of private international law arising under the law merchant, such as international commercial contracts, international financing agreements, and international shipping and admiralty matters.[45]

2.33 The supranational approach to resolving issues of private international law nevertheless remains present in England and Wales today in its modern form of international conventions and treaties. As we discuss in more detail in Chapter 10, the Hague-Visby Rules, which prescribe uniform substantive rights and obligations arising from bills of lading, have been implemented in the UK via the Carriage of Goods by Sea Act 1971.

The influence of the multilateralist approach

2.34 The formal discipline of private international law, as understood by specialists in this field, has been heavily influenced by Continental legal traditions. In England and Wales, the impact of these Continental traditions can be seen in two core waves of influence.

2.35 The first wave occurred in the 19th century with the acceleration of cross-border exchange of ideas and commerce. During this time, the courts were increasingly called upon to determine issues of private international law, which had previously been heard before the special admiralty and commercial courts. To do so, they had recourse to the jurisprudence developed primarily in Continental Europe.

2.36 Prominent scholars of private international law in England and Wales during this period included Albert Venn Dicey (1835-1922). Dicey's original academic treatise on the conflict of laws has been continuously edited and updated since its publication in 1896. The most recent edition was published in 2022 and remains the leading authority for practitioners and academics today.[46]

2.37 The extent of Savigny's influence in private international law during this time is reflected in Dicey's text, which to this day sets out abstract legal propositions as core multilateralist "rules" in a manner more in line with the Continental legislative style than common law scholarly treatises or practitioner texts.

2.38 Unlike Continental legislative instruments, however, Dicey's clear and highly authoritative "rules" do not have the force of law. Whilst, therefore, *Dicey* remains an academic textbook, it is "indispensable to practitioners engaged in advising on matters appertaining to the conflict of laws. It provides an authoritative tone notwithstanding that English conflicts law has no … statute law in the continental style".[47]

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45 For a critical perspective on the "myth of the law merchant", see B Geva and S Peari, *International Negotiable Instruments* (2020) paras 2.60 to 2.95.

46 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022).

47 S D Sutton, "Ten years on, Dicey returns to the global stage", Law Society Gazette (10 March 2023) https://www.lawgazette.co.uk/reviews/ten-years-on-dicey-returns-to-the-global-stage/5115378.article. As we will see, some of the applicable law rules in England and Wales have a statutory basis, insofar as they derive from EU and international legal sources. The position is different for the rules of jurisdiction, all of which have a statutory basis.

2.39 The second wave of Continental influence on private international law in England and Wales came with the accession of the UK to the EU. All three of the core issues of private international law in civil and commercial matters are harmonised at EU level as primary EU legislation. As these instruments of EU law take the form of Regulations, the EU system of private international law in civil and commercial matters was directly applicable in England and Wales between 1973 and 31 January 2020 when the UK was a Member State of the EU (and during the transition period, which ended on 31 December 2020).[48]

2.40 The UK's withdrawal from the EU has affected the continued application of these regimes differently and we discuss this in more detail below. In sum: matters of jurisdiction and enforcement are now governed by domestic principles, whereas applicable law for issues arising in the law of obligations remain governed by assimilated law.

The present position

2.41 We consider the detailed rules for jurisdiction and for applicable law throughout Chapters 4 to 12. Here, we identify the sources of these laws which form the basis of our discussion from Chapter 4 onwards.

Jurisdiction

2.42 Before the accession of the UK to the EU, the rules governing jurisdiction in England and Wales were derived from a combination of UK legislation, common law, and procedural rules. Despite the varied range of sources, these rules are often referred to as the "common law rules of jurisdiction", as a convenient shorthand.[49]

2.43 After joining the EU, jurisdiction became subject to EU law. The EU rules on jurisdiction were first harmonised by the Brussels Convention in 1968. This Convention was succeeded by the Brussels I Regulation, which was then "recast" as the "Brussels I Regulation (recast)".[50]

2.44 The Brussels I Regulation (recast) extends to "civil and commercial" matters. It sets detailed rules for when the courts of an EU member state should take jurisdiction over defendants based in the EU. At its heart is the "domicile rule", which prescribes that defendants domiciled in an EU member state should be sued in the state of their domicile. However, special protections are provided for insured parties, consumers, and employees.

2.45 When the transition period ended on 31 December 2020, the EU rules on jurisdiction ceased to apply in the UK.[51] The protections for consumers and employees (but not

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48 For a detailed account of the effect of the UK's withdrawal from the EU on the development private international law in this jurisdiction, see M Ahmed, *Brexit and the Future of Private International Law in English Courts* (2022).

49 A Briggs, *Civil Jurisdictions and Judgments* (7th ed 2021) para 21.01.

50 Brussels I Regulation (recast) (EU) No 1215/2012, Official Journal L 351 of 20.12.2012 p 1.

51 See the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (SI 2019 No 479), which came into force at the end of the transition period. It is also worth noting that the jurisdictional provisions relating to consumer and employment matters in the Brussels I Regulation (recast) were incorporated into domestic law: see Civil Jurisdiction and Judgments Act 1982, ss 15A to 15E.

insured parties) were written into the Civil Jurisdiction and Judgments Act 1982.[52] Otherwise, for proceedings begun after this date, jurisdiction is again governed by the "the common law rules": that is the common law, as supplemented by statute, civil procedure rules and international conventions. The key source of law is Part 6 of the Civil Procedure Rules 1998, including Practice Direction 6B. Unlike the "rules" set out in *Dicey*, the Civil Procedure Rules 1998 have a statutory basis.[53] We discuss these in more detail in Chapters 4 and 5.

Applicable law

2.46 The EU also harmonised the rules governing applicable law in many areas of private law. The rules on applicable law for contractual obligations were harmonised in the Rome Convention 1980, which was succeeded by the Rome I Regulation.[54] In 2007, the EU adopted the Rome II Regulation,[55] which deals with non-contractual obligations such as torts,[56] product liability[57] and unjust enrichment claims.[58] Both Regulations follow the multilateralist approach to resolving the conflicts that may arise between the private law systems of the EU Member States.

2.47 The Rome I and Rome II Regulations continue to have effect in England and Wales as assimilated law.[59] They are therefore key sources of law for this project. However, it is open to the UK Government to revoke or change assimilated EU law.

2.48 The case law of the Court of Justice of the European Union (CJEU) remains relevant when interpreting the Rome I and Rome II Regulations. Any question on their validity, meaning or effect should be decided, as far as relevant, in accordance with case law of the CJEU handed down before the 31 December 2020 ("assimilated EU case law").[60] However, the principle of supremacy of EU law and the general principles of EU law no longer apply,[61] and courts acting in an appellate capacity and the Supreme Court are not bound by assimilated EU case law and are therefore entitled to depart

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52 Civil Jurisdiction and Judgments Act 1982, ss 15A to 15E.

53 SI 1998 No 3132.

54 Rome I Regulation (EU) No 593/2008 Official Journal L 177 of 04.07.2008 p 6; Rome Convention (EC) No 934/1980, Official Journal L 266 of 09.10.1980.

55 Rome II Regulation (EU) No 864/2007 Official Journal L 199 of 11.07.2007 p 6. The Rome I Regulation and Rome II Regulation are not included in the list of revoked EU instruments contained in Schedule 1 to the Retained EU Law (Revocation and Reform) Act 2023. They therefore continue to apply and should be referred to as "assimilated law": Retained EU Law (Revocation and Reform) Act 2023, s 5(1).

56 Above art 4.

57 Rome II Regulation (EU) No 864/2007 Official Journal L 199 of 11.07.2007 p 6, art 5.

58 Above art 10.

59 Subject to some minor amendments: see The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019 (SI 2019 No 834).

60 European Union (Withdrawal) Act 2018, section 6(3).

61 European Union (Withdrawal) Act 2018, s 5 (as modified by the Retained EU Law (Revocation and Reform) Act 2023).

from assimilated EU case law in certain circumstances.[62] The courts may also "have regard" to relevant case law handed down by the CJEU after 31 December 2020.[63]

Recognition and enforcement

2.49 Recognition and enforcement address two distinct considerations. From the perspective of England and Wales, these are: (i) the circumstances under which the courts of England and Wales will recognise and enforce a judgment of a foreign court; and (ii) the circumstances under which a foreign court will recognise and enforce a judgment of the courts of England and Wales.

2.50 The rules governing the approach that the courts of England and Wales take when faced with an application by a party to recognise and enforce a judgment of a foreign court are primarily set out in the Civil Jurisdiction and Judgments Act 1982. The UK is a party to the Hague Convention on Choice of Court Agreements 2005[64] which contains some provisions on the recognition and enforcement of judgments as between Contracting States. The UK is also a signatory to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters 2019.

2.51 The rules governing the question of when a judgment of the courts of England and Wales will be recognised and enforced in a foreign country will differ between legal systems. Unless the foreign country is a party to the Hague Conventions, the rules that will be applied will be those of the foreign court applying their own national rules.

2.52 Prior to the UK's withdrawal from the EU, the UK was bound by the Brussels I Regulation (recast), which provides for the mutual recognition of judgments between courts of the EU Member States with minimal bureaucratic hurdles. These rules no longer apply to England and Wales.

CONCLUSION

2.53 The formal discipline of private international law today, as understood by specialists, remains heavily under the influence of the multilateralist approach, which is the starting point for modern private international law in most legal systems. Introductions to private international law in many specialist contexts therefore often deal with the multilateralist approach only.

2.54 Nevertheless, as we have seen, each of the methods and approaches discussed in this chapter to the core question of "how to resolve conflicts that may exist between different private law systems" are present in some form or another in the modern law.

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62 Prior to the modification by the Retained EU Law (Revocation and Reform) Act 2023, the test to be applied for departing from assimilated EU case law was the same test applied by the court when deciding whether to depart from its own case law: s.6(6) European Union (Withdrawal) Act 2018. However, new tests, not yet in force, introduce a lower threshold for departure from assimilated EU (and domestic) case law: ss.6(3) and 6(4) Retained EU Law (Revocation and Reform) Act 2023. Most notably, the new test for departing from assimilated EU case law requires the court to have regard to "the fact that decisions of a foreign court are not usually binding".

63 European Union (Withdrawal) Act 2018, s 6(2).

64 It was given force of law on 1 Jan 2021 by the Private International Law (Implementation of Agreements) Act 2020.

They also each have their own merits and demerits in both theoretical and practical terms.

2.55 From this, we think this functional overview of different approaches to resolving issues of private international law is useful for several reasons. First, we consider that references to a wide range of approaches may be informative as we evaluate the particular challenges that we are tasked to consider in this project. Second, we wish to avoid limiting the scope of our project by taking what has been described as an "unduly narrow" view of private international law that "substitutes one approach for a whole discipline."[65] Finally, we consider that an overview in these functional terms provides a more accessible introduction to the issues with which private international law is concerned.

2.56 In the next chapter, we explain the unique challenges to private international law presented by modern digital, online, and decentralised environments.

[65] R Michaels, "EU Law as Private International Law? Re-Conceptualising the Country-Of-Origin Principle as Vested Rights Theory" (2006) 2 *Journal of Private International Law* 211.

Chapter 3: The core problem

INTRODUCTION

3.1 We saw in Chapter 2 that private international law is concerned essentially with the question of "how to resolve the conflicts that may exist between different private law systems."[66] We also saw that the conditions that give rise to problems of private international law date to at least the fourth century BC, when the Greek city-states came into their prime.

3.2 Problems of private international law are, therefore, by no means a recent phenomenon. They are, however, becoming increasingly difficult as the conditions that give rise to problems of private international law become increasingly pervasive. In this respect, the advent of information technology in the late 1980s has been a catalyst of socio-economic change that has had a significant impact on private international law.

3.3 Today, human affairs no longer merely cross state boundaries. The internet allows human affairs to be conducted in real time across such boundaries as a matter of everyday life. As a result, the traditional territorial constraints on the prerogative of sovereign states – and their laws – increasingly impede the effective governance of human affairs by individual sovereign states. This, in turn, increasingly strains the methods by which private international law resolves conflicts between the private law systems of sovereign states.

3.4 Against this backdrop, there has been disagreement for some decades in the academic literature as to whether the traditional methods of private international law can cope with challenges such as the internet.[67] Notwithstanding some views that the global nature of the internet is incompatible with these traditional methods, the legal framework of private international law has generally prevailed, albeit, in slightly varied forms.

3.5 More modern technologies, however, have added another layer of complexity to these established challenges. Phenomena like Bitcoin and distributed ledger technologies challenge the underlying territorial premise of the law to such extent that the existing law may arguably no longer work.

3.6 In this chapter we introduce the various technologies and explain how and to what extent they may challenge the existing methods of private international law.

The interaction of domestic private law with private international law

3.7 It is important to recognise at the outset that, although private international law is a body of domestic rules that apply where there is some international element to a

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66 R Michaels, "EU Law as Private International Law? Re-Conceptualising the Country-Of-Origin Principle as Vested Rights Theory" (2006) 2 *Journal of Private International Law* 211.

67 For an overview of the debate, see T Lutzi, *Private International Law Online* (2020).

private law dispute, private international law is a distinct legal discipline with its own terminology, objectives, and methods. As such, although private international law uses many terms also used in the substantive private law, such as "contract" and "property", it cannot be assumed that use of these terms in private international law reflect substantive definitions and concepts. From this, the challenges that digitisation pose for private international law differ to those that they pose for the substantive law.

3.8 For example, in our report on digital assets, we concluded that crypto-tokens and certain other digital assets are capable of being objects of property rights even though they do not fit neatly within the traditional categories of personal property: things in possession (comprising, broadly, tangible things) and things in action (broadly, legal rights).[68] Instead, we said they fall within a "third category" of personal property which recognises their uniqueness. Similarly, in our work on electronic trade documents, we recommended that trade documents not in paper form that satisfy certain criteria should be capable in law of being "possessed": a concept which has traditionally been associated only with tangible things.

3.9 In sum, in the substantive private law of England and Wales, whether a thing is tangible or intangible has, at least traditionally, been significant in determining the legal treatment of that thing. It is therefore significant that we have concluded in our previous work that certain digital assets are unique in not fitting into traditional categories.[69]

3.10 By contrast, in the private international law of England and Wales, the fact of tangibility, intangibility or otherwise does not, in itself, say very much. It gives no indication as to which rules of private international law will be applied, nor whether the application of these rules will be problematic. We consider the relationship between substantive law and private international law in greater detail from Chapter 6 onwards.

3.11 In this chapter, we focus on the unique problems that digitisation, the internet, and distributed ledger technology pose for private international law.

BACKGROUND TO THE PROBLEM

3.12 To understand these problems faced by modern private international law, it is necessary to understand some of the core premises upon which private international law is based. We therefore consider one of the foundational principles of both public international law and private international law: the principle that sovereign authority is limited to geographically defined territories. This is often known as the principle of "territoriality."

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68 Digital Assets: Final Report (2023) Law Com No 412, para 2.53. Although we recommend that the "third category" should be confirmed in legislation, we concluded that this category already exists at common law.

69 We considered the traditional significance of this distinction in our work on Digital Assets, in both the Digital Assets (2022) Law Commission Consultation Paper No 256, and Digital Assets: Final Report (2023) Law Com No 412.

The territorial premise of modern public and private international law

3.13 We are used to thinking about law-making as the prerogative of a sovereign state that exerts sovereign authority over a geographically defined territory. There are two core points in this proposition to note.

(1) The laws of a country apply strictly within its territorial borders. The laws of a country do not apply only to its citizens or those who take up residence there but apply to all persons physically within its territorial boundaries, irrespective of nationality or usual residence. Hence, the common warning to holidaymakers to respect the local laws of the countries to which they travel.

(2) The laws of a country do not (generally) apply outside its territorial borders; that is, they do not apply "extra-territorially". Holidaymakers need not continue to comply with the local laws of their holiday destinations once they have left those countries.

3.14 These propositions form two of the "main operating principles" of both modern public international law and private international law, which were set out by the Dutch scholar, Ulricus Huber (1624-1694), in 1689. [70]

3.15 In public international law, territoriality can be thought of in two core ways: the authority to prescribe and the authority to enforce. The authority to prescribe concerns when and why a sovereign state may assert that a person or event is subject to its laws. The authority to enforce concerns when a sovereign state may exercise coercive power over persons or their property. Authority to adjudicate is either proposed as a third category, or as a blend of the first two.[71]

3.16 These concepts of territoriality play out in private international law in slightly different ways.

3.17 In matters of international jurisdiction, the sovereign authority to adjudicate comes to the fore. We consider this further in Chapter 4.

3.18 In matters of applicable law, territoriality is significant in two core ways.

3.19 First, the unilateralist and multilateralist approaches to the conflict of laws operate on the basis that only the law of one sovereign state can prevail as the applicable law in any given dispute. In the terms of public international law, this is a conflict between the prescriptive authority of at least two sovereign states.

3.20 Second, the multilateralist approach to the conflict of laws proceeds on the theoretical premise that every legal issue has an objective seat in the territory of a single sovereign state. This objective seat is identified by a "connecting factor." As we will

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70 *De conflictu legum diversarum in diversis imperriis, in Praelectiones Juris Romani et hodierni* (1689). Professor Symeon Symeonidies summarises and translates the original Latin as: (1) The laws of each state have force within the state's territory, but not beyond; and (2) These laws bind all those who are found within the territory, whether permanently or temporarily. S C Symeonides, *Choice of Law* (2016) p 50.

71 A Mills, "Justifying and Challenging Territoriality in Private International Law" in R Banu, M S Green, and R Michaels (eds), *Philosophical Foundations of Private International Law* (forthcoming) ch 8.

see, the vast majority of connecting factors used today are expressed in territorial terms.

Connecting factors in more depth

3.21 Multilateralist conflict of laws rules serve the broader function of helping a court identify which particular sovereign state's law should determine the private law rights and obligations of parties to litigation. Multilateral rules do this by reference to "connecting factors" described in abstract terms that can be applied to any set of facts and legal issues arising in litigation. The aim is to narrow down the range of potential candidates to a single applicable law.

> In the dispute between Alice and Bob, the laws of Egypt, England, and the US all were possible contenders for the applicable law because each were somehow connected to the facts of the accident, or to Alice and Bob personally.
>
> The court had decided that the dispute was essentially one of tort.
>
> The relevant rule for torts was that they are governed by "the law of the place where the damage or injury occurs."
>
> The "place where the damage or injury occurred" is the connecting factor.
>
> Applying this rule to Alice and Bob's dispute, the court determined that the damage or injury occurred in Egypt.
>
> As a result, the dispute has its "objective seat" in Egypt. Egyptian law therefore applies to determine whether Bob must compensate Alice.

3.22 Different systems of private international law adopt different connecting factors in their multilateralist rules, but the vast majority of connecting factors used today are expressed in terms of territorial location. Some of the most relevant connecting factors and rules for our project are set out below. In particular, we look at:

(1) the location of an object of property rights;

(2) the location where an event occurred;

(3) the location of a person; and

(4) personal connecting factors.

3.23 It is conventional in private international law to express multilateralist rules and connecting factors in Latin. The Law Commission tries to avoid Latin in its publications for reasons of accessibility, but the Continental origins of our private international law mean that it is not always easy or even possible to avoid reliance on or reference to Latin terms, especially when quoting cases or the academic literature.

Location of an object of property rights

3.24 Most, if not all, systems of private international law use the location of an object of property rights as the connecting factor to identify the law applicable to disputes regarding property entitlements.

> Let us alter the facts of the dispute between Alice and Bob and assume that, rather than compensation in tort, their dispute concerns title to the car Bob was driving. If a court characterises the legal issue in dispute as one of property entitlements, the multilateralist rule will generally say that property disputes are governed by the law of the place where the property object (the car) is situated.

3.25 The notion of "the law of the place where the property object is situated" is usually expressed in Latin as *lex loci rei sitae* or just *lex situs*. We consider this rule in further detail in Chapter 12.

Location where an event occurred

3.26 By contrast, the place where a relevant act or event occurred is the connecting factor usually used to identify the law applicable to obligations.

3.27 We saw that Alice's road traffic accident claim against Bob was characterised as a tort, and that the relevant connecting factor was the place where the damage or injury occurred. Using this connecting factor, the court identified Egyptian law as the applicable law for determining whether Bob is liable to compensate Alice.

3.28 The Latin term for "the law of the place where the damage occurred" is *lex loci damni.*

3.29 An alternative conflict of laws rule for tort based on a different connecting factor is the law of the place where the tortious act was committed (*lex loci delicti commissi*).[72] Both "the law of the place where the damage occurred" (*lex loci damni*) and "the law of the place where the tort was committed" (*lex loci delicti commissi*) are alternative approaches to the broader concept of "the law of the place of the tort" (*lex loci delicti*). These remain three distinct approaches, but it is worth noting that the place of the damage tends to prevail in modern systems of private international law. We consider these rules in more detail in Chapter 9.

3.30 For disputes relating to contractual obligations, connecting factors commonly include the place where the contract was concluded and the place of performance. The corresponding multilateral rules for contractual disputes are *lex loci contractus* and *lex loci solutionis*. We consider these rules in more detail in Chapters 7 and 8.

Location of a person

3.31 Another prominent category of connecting factors relates to the location of a person. Here, domicile and habitual residence are the core concepts used, but they are

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[72] The Latin term reflects Roman and Continental systems of non-contractual obligations and their use of the term "delict". There is a rough correlation with the English concept of torts, but delicts are slightly different in that they often have a quasi-criminal nature.

applied differently, depending on both: (i) whether the person is a natural person (that is, a human being) or a legal person (such as a company); and (ii) the relevant legal framework.

3.32 Domicile has its origins in the traditional common law rules and has different meanings for common law,[73] statutory[74] and tax law[75] purposes. Habitual residence tends to prevail in the Continental systems of private international law.[76] The two concepts are closely related but remain distinct.[77]

3.33 For natural persons, the courts of England and Wales tend to think of domicile as a more permanent connection between a person and a place than habitual residence. Employees who are posted abroad, for example, may well have an established residence in the country of employment, but travel "back home" frequently and never lose the intention to "return home for good" eventually.[78]

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73 At common law, to acquire domicile in a country, an adult must normally reside in a country, with the intention to reside in that country permanently or indefinitely. This is a strenuous test. Under Dicey Rule 12, an independent person can acquire domicile in a country of their choosing "by the combination of residence and intention of permanent or indefinite residence, but not otherwise": see Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins*, *The Conflict of Laws* (16th ed 2022) para 6R-037. For a full discussion, see Dicey Rules 6 to 19.

74 The test of domicile under the Civil Jurisdiction and Judgments Act 1982 is significantly easier to meet than its common law counterpart. Under s 41(2), an individual is domiciled in the UK only if they are resident in the UK and "the nature and circumstances of this residence indicate that he has substantial connection" with the UK. Importantly, s 41(6) states that (unless the contrary is proved) a person is presumed to have a substantial connection with the UK if they have been resident here for the last three months or more. Under the 2022 amendments to Practice Direction 6B, there is a general gateway where "a claim is made for a remedy against a person domiciled within the jurisdiction within the meaning" of the 1982 Act.

75 See eg Inheritance Tax Act 1984, ss 267 to 267ZB.

76 Under the Rome Regulations, habitual residence has strong associations with a centre of interests, both personal or business. See *Tan v Choy* [2014] EWCA Civ 251, by Aikens LJ at [29]. See GP Calliess and M Renner, *Rome Regulations: Commentary* (3rd ed 2020), pp 422 to 423 and Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 6-140. The Hague Convention on Private International Law also widely uses habitual residence, however, as a matter of deliberate policy, no Hague Convention has ever defined the term in relation to private individuals. This is to avoid technical rules: instead, the term is best construed according to the ordinary and natural meaning of the two words it contains. See *Re J (A Minor)* (Abduction: Custody Rights) [1990] 2 AC 562; *Dickson v Dickson*, 1990 SCLR 692; *Findlay v Findlay (No.2),* 1995 SLT 492 (as cited in Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins*, *The Conflict of Laws* (16th ed 2022) para 6-137).

77 In *Re B (A Child)* [2014] UKSC 1, [2014] AC 1038, Lord Wilson described the identification of habitual residence as "overarchingly a question of fact", at [46] whilst Baroness Hale and Lord Toulson described habitual residence as a "mixed question of fact and law, because the concept is a matter of law but its application is a matter of fact," at [57] (as cited in Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins*, *The Conflict of Laws* (16th ed 2022) para 6-137).

78 The Court of Justice of the European Union (CJEU) has identified several criteria as relevant to determine whether residence is "habitual". These include the person's family situation; the reasons for the move; the length and continuity of the residence; and the stability of any employment. *Swaddling v Adjudication Officer* [1999] ECR I-1075, at [29] to [30], as cited in *Khalifeh v Blom Bank SAL* [2021] EXHC 3399 (QB), by Mr Justice Foxton at [111]. *Swaddling* is also cited in Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins*, *The Conflict of Laws* (16th ed 2022) para 6-143.

If Charlie works in Germany and lives there “most of the time” but considers his “home” to be Austria where his partner and children live, Charlie’s habitual residence would be in Germany and his domicile in Austria.

3.34 For legal persons, the test of domicile under the Civil Jurisdiction and Judgments Act 1982 refers to the corporate “seat”. This is further defined by reference to incorporation, registration, and the central management and control of the company. Habitual residence of a corporate body under the Rome Regulations is defined as “the place of central administration.”[79] This reflects the approach of most civilian jurisdictions, which is to look to “the real administrative seat” of the company.[80]

Personal connecting factors – the non-territorial outliers

3.35 Prior to the rise of territorialism in the 17th century, personal membership of a community was widely used to determine which laws applied to a person, object, or event. Prominent examples included the personal tie of civil allegiance to a sovereign authority (nationality) and the personal tie of religion.

3.36 The idea that laws apply on the basis of personal ties remains a feature of modern private international law insofar as nationality is still sometimes used as a connecting factor. The Latin term for "the law of a person’s nationality” is *lex patriae.*

3.37 Recourse to nationality as a connecting factor, however, has long been in decline in private international law, where habitual residence and domicile are now more commonly used. Nationality nevertheless remains prominent in public international law. The US system of taxation, for example, operates on the basis of nationality: all US citizens are liable to pay income tax to the US revenue authorities, irrespective of where the income was earned, and where the US citizen is domiciled or habitually resident.

3.38 There is a general consensus in private international law that nationality is not a territorial connecting factor, but rather a personal connecting factor.[81] The extent to which domicile and habitual residence are also personal rather than territorial

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79 Rome I Regulation (EC) No 593/2008, Official Journal L 177 of 04.07.2008 art 19; Rome II Regulation (EC) No 864/2007, Official Journal L 199 of 31.07.2007 art 23.

80 M McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (2015) para 5.10.

81 A Briggs, *Private International Law in English Courts* (2nd ed 2023) pp 60 and 66; D McClean and V R Abou-Nigm (eds), *Morris: The Conflict of Laws* (10th ed 2021) para 3-039.

connecting factors is more open to debate.[82] Often, domicile and habitual residence are referred to as "hybrid" connecting factors.[83]

Summary

3.39 This survey of connecting factors shows that, in the vast majority of cases, multilateral rules identify the applicable law on the basis of physical location. Application of these rules generally means that persons and objects physically located in a particular territory will be subject to the laws of that territory; and acts or events occurring in a particular territory will be subject to the laws of that territory.[84]

CHALLENGES TO TERRITORIALITY

3.40 The socio-economic changes precipitated by information technology, such as digitisation and the internet, pose challenges for private international law because they challenge the territorial basis upon which modern systems of private international law are premised. Professor Alex Mills has explained that:

> Territorial constraints on state authority function relatively discretely when the object of regulation is territorially constrained. But it is a feature of globalisation and indeed of the particular context of private international law, that this is increasingly not the case – that the object of regulation is in itself cross-border. Where the elements of that act, transaction, or relationship are themselves in different locations, the application of a territorial rule does not necessarily provide a clear answer to which [law] should apply.[85]

3.41 One of our core objectives in this project is to assess the extent to which the existing rules of private international law can be applied (or extended to apply) in the digital, online, and decentralised contexts without undue difficulty.

3.42 Our preliminary view is that the ease with which the existing rules can be applied in the digital or decentralised contexts will be a question of degree. We think that the spectrum can be illustrated by reference to three technological trends that have been increasingly posing problems for private international law over the past three decades: digitisation, the internet, and distributed ledger technology. We therefore discuss each in turn.

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82 Professor Briggs considers domicile and habitual residence to be personal connecting factors. In his scheme, connecting factors fall into two broad categories: personal connecting factors and causal connecting factors. Personal connecting factors include a person's domicile, residence, and nationality. Causal connecting factors include concepts based on "location" or "place": A Briggs, *The Conflict of Laws* (4th ed 2019) p 25.

83 A Mills, "Private Interests and Private Law Regulation in Public International Law Jurisdiction", in S Allen, D Costelloe, M Fitzmaurice, P Gragl, E Guntrip (eds), *Oxford Handbook on Jurisdiction in International Law* (2019) ch 14.

84 Territoriality is thus the premise of modern private international law. It feeds into jurisdiction and applicable law in slightly different ways. These we consider in more depth in Chs 4 and 5.

85 A Mills, "Justifying and Challenging Territoriality in Private International Law" in R Banu, M S Green and R Michaels (eds), *Philosophical Foundations of Private International Law* (forthcoming) ch 8.

Digitisation

3.43 We saw that most multilateralist rules for general property disputes identify the law of the place where an object is located (the *lex situs*) as the applicable law.

3.44 If, as in our altered example above, the dispute between Alice and Bob were about property entitlements to the car Bob was driving, the question of who has the better property entitlement would be resolved by the law of the place where the car is located at a particular time.[86]

3.45 The law of this place then applies as the applicable law, which will be used to adjudicate the legal question before the court.

3.46 Unlike cars and many other objects of property disputes, simple digital files are not constrained by concepts of physical location.[87] Given that their physical existence does not manifest in the same way as that of conventional objects of property rights, they cannot be said to be located in the territory of a particular sovereign state with the same ease as it can be said that a car is located in the territory of a particular sovereign state.[88]

3.47 Applying the *lex situs* rule to a digital file is therefore more complicated than applying the rule to tangible objects, such as cars. Nevertheless, this is not necessarily problematic for private international law.

3.48 We said above at paragraphs 3.9 and 3.10 that, although the fact that an object is intangible may have significant consequences for the substantive law, the fact that an object is intangible does not, in itself, say much as a matter of private international law. Here, we expand upon this proposition.

3.49 As we saw in Chapter 2, the multilateralist approach to private international law is premised on the notion that every legal issue has a (single) objective seat in one legal system, which is identified through a connecting factor. Connecting factors, however, need not necessarily reflect the physical features of the object itself (if indeed, the object has any). The aim is simply to find some objective feature that convincingly[89] points to one particular sovereign territory. This is then used as the connecting factor for the purpose of identifying the applicable law.

3.50 As a result, in private international law, the fact that the physical form of a digital file is different to the physical form of conventional assets simply means that physical

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86 For applicable law, the relevant time is the time of the disputed acquisition of the property object. This is usually the acquisition of the object by the defendant to the claim. We discuss this fully in Ch 12, from para 12.43.

87 Digital Assets: Final Report (2023) Law Com No 412.

88 In respect of cryptocurrencies and other digital assets underpinned by distributed ledger technology, Dr Burcu Yüksel Ripley explains that "since the ledger is distributed across system participants, it does not exist in one single space. This, in combination with the fact that DLT […] can give a system a truly international nature, can pose difficulties with the localisation [for private international law purposes] of a distributed ledger […] and an asset digitally recorded on it": B Y Ripley, "The Law Applicable to (Digital) Transfer of Digital Assets: The Transfer of Cryptocurrencies via Blockchains" in M M Fogt (ed), *Private International Law in an Era of Change* (forthcoming).

89 We further discuss what amounts to "convincingly" from para 3.53 below.

features are not as useful in the search for a connecting factor. This is not necessarily problematic, because private international law has its own methods for localising objects without reference to any physical criteria. It also means that private international law's treatment of objects that are classified together under the substantive law or seem similar in substantive terms can be very different.

3.51 For example, patents and debts are both personal property.[90] Private international law, however, localises these in very different ways. Patents are usually localised by reference to the register in which the relevant entitlements are maintained. Debts are usually localised by reference to the debtor. The underlying logic common to both is that these are the places where the object of personal property rights can be effectively dealt with.

3.52 Terminology can be confusing particularly in property matters because it is conventional to describe these connecting factors, whatever they happen to be, as an "artificial" or "juridical" *situs* comparable to the location of a tangible object. It is, thus, sometimes said that "the (artificial) *situs* of a patent is the place where the relevant register is kept" or "the (artificial) *situs* of a debt is the place where the debtor is domiciled." Such expressions have been criticised as misleading, and do not assist the present debate.[91]

3.53 From this, although the economic value of a digital file might technically be data or information rather than a legal right, or the digital file might technically exist in physical form as a series of zeroes and ones on a hard drive, neither of these features are, in themselves, relevant for private international law. The important point is that private international law seeks to find some connecting factor on the facts of the case that convincingly connects the legal issue in dispute to a single legal territory. In this search for a connecting factor, a wide range of features – both physical and legal – may be taken into account.

3.54 As a result, private international law benefits from a highly analytical approach to its objects. If, for example, the digital file in question were stored on a hard drive offline, this would not be problematic for private international law. Given that such files are readable only from the physical device(s) on which they are stored, there is a particularly close relationship between the file and the device. The connecting factor can therefore focus on the physical device, notwithstanding that the object in dispute is the content of the file itself. From this, it might be said that "the (artificial) *situs* of a pdf stored offline is the place where the relevant physical device is located."

3.55 Given that a physical device can easily be localised in one physical territory, multilateralist rules that refer to 'the place where the digital file is situated' will still be generally effective if there is only one copy of the file stored on a single, say, laptop. As the laptop can only be in one place at a time, the rule will be effective in narrowing

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90 Debts are personal property under the common law; patents are personal property under the Patents Act 1977, s 30.

91 P Rogerson, "The Situs of Debts in the Conflict of Laws: Illogical, Unnecessary, and Misleading" (1990) 49(3) *Cambridge Law Journal* 441 to 460.

down the range of potential applicable laws to identify one as being the most appropriate.

3.56 The problem is more complex if the same file is stored offline on the hard drives of more than one physical device. If, say, the same file is saved on five different laptops that are in different places in the world, recourse to the device on which the file is stored will point to potentially five different places. The problem then becomes which location should prevail.

3.57 Again, this is not necessarily problematic for private international law. If three devices are located in, say, France, one device is located in Germany, and one device is located in Switzerland, private international law might narrow down the potential laws on the basis of where the majority of copies are located. Using this method, there is a clear reason for favouring France over Germany or Switzerland.

3.58 If the five devices are located in five different sovereign states, some other process may be used to narrow down the potential laws. Focusing on temporal factors, such as choosing the device on which the file was first created, might still be effective in narrowing down a single applicable law from five potential candidates.

3.59 Again, the aim of private international law is simply to find some feature of the digital file on the facts of the case; one that convincingly connects the dispute to one single country in preference to all the others.

3.60 The location of a digital file has not attracted significant attention in private international law until relatively recently. This is primarily due to the fact that digital files and rights in relation to digital files have not in the past been of sufficient economic value to warrant the time and considerable expense of cross-border litigation. However, socio-economic changes such as the data-based economy, and technological innovations such as distributed ledger technology and cloud storage, have precipitated renewed interest in where a digital file might be localised for the purposes of private international law.

The internet

3.61 The internet, as a global, interconnected network, gives rise to more difficult problems for private international law. In the early years of its inception, some subject matter experts[92] argued that the internet could not be regulated using traditional legal techniques, including those of private international law, and that the vacuum left by them should be filled by a new "common law of cyberspace."[93] It was thus argued that

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92 Some commentators accept the online sphere is problematic, but that these difficulties are not necessary more difficult than in any other case. Professor Andrew Dickinson remarks that, for example, fraudulent misrepresentation inducing a transfer of a crypto-token or misappropriation of a confidential cryptographic key still concern the behaviour of a real person in the real world, and locating the event that gives rise to damage as well as the damage itself is not necessarily more difficult than in other cases. See A Dickinson "Cryptocurrencies and the Conflict of Laws" in D Fox and S Green (eds), *Cryptocurrencies in Public and Private Law* (2019) paras 5.11 to 5.12.

93 T Lutzi, *Private International Law Online: International Regulation and Civil Liability in the EU* (2022) para 1.11.

cyberspace should be governed by this law, rather than that of any national legal system:

> many of the jurisdictional and substantive quandaries raised by border-crossing electronic communications could be resolved by one simple principle: conceiving of Cyberspace as a distinct "place" for purposes of legal analysis by recognizing a legally significant border between Cyberspace and the 'real world'.[94]

3.62 Consequently, and fast-forwarding to the present day, Professor Tobias Lutzi has described the resulting problems for private international law as follows:

> This complete independence from geographic borders has two dimensions. First, it allows for legal relationships that are completely virtual and have no other physical element than the parties involved (and some negligible changes to the magnetization of a number of hard drives). A defamatory post on Instagram, a chat message on WhatsApp, an illegally copied e-book, or a music file sold on iTunes do not physically exist and cannot easily be tied to any particular physical place.[95]

3.63 In this section, we discuss two examples of the problems caused by cyberspace as potentially being a distinct "place" from the "real world": data stored online and torts committed online.

Data storage online

3.64 Digital files stored online pose more difficult problems than those that are stored offline on a hard drive. Although the basic technique of localising a digital object to some tangible medium may be largely the same as above, it is important to distinguish between various methods by which data and digital files are stored online.

3.65 Cloud storage is a mode of computer data storage in which digital data is stored on servers in off-site locations. The servers are maintained by a third-party provider who is responsible for hosting, managing, and securing data stored on its infrastructure.[96] Cloud storage service providers typically maintain large datacentres in multiple locations around the world, and users connect to data stored in these datacentres through the internet or a dedicated private connection.[97]

3.66 Where the whole of a relevant digital file is stored on the same datacentre or server, the reasoning that applied in respect of a digital file stored on a laptop largely applies unmodified. The digital file can be localised by reference to the server, rather than the laptop.

3.67 In this way, in *Ashton Investments v OJSC Russian Aluminium*, confidential information stored on a server physically located in London had allegedly been

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94 T Lutzi, *Private International Law Online: International Regulation and Civil Liability in the EU* (2022) para 2.15.

95 Above para 2.34.

96 For Google's definition of cloud storage as a mode of computer data storage, see: https://cloud.google.com/learn/what-is-cloud-storage#:~:text=Cloud%20Storage%20is%20a%20mode,data%20stored%20on%20its%20infrastructure.

97 For AWS' definition of cloud storage, see: https://aws.amazon.com/what-is/cloud-storage/.

accessed improperly, viewed and transmitted by someone using an internet address registered in Russia.[98] Deputy High Court Judge Jonathan Hirst QC held that the confidential information should be treated as being located where the server was located. Because the relevant server was located in London, this was also where the relevant confidential and privileged information was located.

3.68 Distributed servers have been more challenging to accommodate within the framework of the existing approach. Database "sharding" is the process of storing a large database across multiple database servers. A database server can store and process only a limited amount of data. Database sharding overcomes this limitation by splitting data into smaller portions called shards and storing them across several database servers. All database servers usually have the same underlying technologies, and they work together to store and process large volumes of data.[99]

3.69 The result is that where a user accesses what appears to be a single digital file, multiple servers from around the world will have relayed to the user the discrete data shards comprising the file. This raises significant problems for localising the "single digital file" within the territorial boundaries of a sovereign state.

3.70 *United States v Microsoft Corp*[100] (also referred to as the *Microsoft Ireland* case), concerned a warrant issued by a Magistrate Judge in a District Court in New York compelling Microsoft to seize and produce the content of an email account believed to have been used to traffic narcotics.

3.71 Microsoft had partially complied with the warrant by providing data associated with the specified email account that had been stored in the USA. It nevertheless stated that full compliance would require it to access data relating to the email account that was stored in a datacentre located in the Republic of Ireland, and then import that data into the USA for delivery to the federal authorities. Microsoft contended that this would breach EU data protection laws, which places limitations on the export of data outside of the EU.

3.72 We return to the *Microsoft Ireland* case below at paragraph 3.81. Here, we simply note that the question of where data stored as shards across multiple datacentres is located is particularly difficult for private international law. Nevertheless, as with the case of a digital file stored on the hard drives of five different laptops, there are methods by which private international law might still narrow down the range of connections to legal systems to identify a single territory.

3.73 One technique is simply to focus on another feature of the object itself as the connecting factor. It was noted above that cloud storage services are provided by a third-party provider that hosts, manages, and secures data stored on its infrastructure.

3.74 Given the prominent role fulfilled by the provider, it would be possible for private international law to focus, not on the data itself, but instead on the provider. A hybrid personal-territorial connecting factor, such as the domicile of the third-party provider,

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98 *Ashton Investments v OJSC Russian Aluminiu*m, [2006] EWHC 2545 (Comm), [2006] 2 CLC 739.

99 For AWS' definition of database sharding, see: https://aws.amazon.com/what-is/database-sharding/.

100 584 US ___ (2018).

could therefore be used as an alternative to the territorial connecting factor of the location of the data itself.

3.75 If such a connecting factor were to be used in the property context, it might be said that "the (artificial) *situs* of data stored as shards across multiple servers is the domicile of the cloud storage service provider."

Online torts

3.76 We saw above that the general rule for tort refers to the law of the place of the tort (*lex loci delicti*). The two alternative interpretations of this rule are the law of the place where the tortious act was committed (*lex loci delicti commissi*) or the law of the place where the damage was sustained (*lex loci damni*). The law of the place where the damage was sustained tends to prevail in modern systems of private international law.

3.77 In the case of Alice and Bob, the tort causing personal injury to Alice occurred within the territorial boundaries of Egypt. As such, the place where the tort was committed and the place where the damage was sustained coincide. As a result, both interpretations of the rule for torts point to the same territory and it is difficult to see why the broader concept of "the place of the tort" could be anywhere else.

3.78 These traditional rules have been identified by some authors as particularly difficult to reconcile with tortious conduct committed online. This is because such torts "take place within the normative environments of online platforms and similar ecosystems"[101] rather than in physical locations.

3.79 For example, applying the *lex loci delicti* rule to a defamatory post[102] on X, formerly known as Twitter, leads to various possibilities.[103] If the place where the tort was committed is taken as the connecting factor, this would be the place where the defamatory post was published. If the place where the damage was sustained is instead taken as the connecting factor, this would include any place where both (i) the defamatory post is made available and read, and (ii) the victim has a reputation that may be harmed by the post.

3.80 Given that content may be published or uploaded in one territory and made available to users of the internet worldwide, a single tortious act committed online may give rise to damage sustained in multiple places. Application of the *lex loci damni* rule that currently prevails in many systems of private international law to identify the applicable

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101 T Lutzi, "The Tort Law Applicable to the Protection of Crypto Assets" in A Bonomi, M Lehmann and S Lalani (eds), *Blockchain and Private International Law* (2023) n 71.

102 A Mills, "Justifying and Challenging Territoriality in Private International Law" in R Banu, M S Green and R Michaels (eds), *Philosophical Foundations of Private International Law* (forthcoming) ch 8. Professor Mills discusses the online regulation of defamation. He explains that "[w]here defamatory material is published online, it may be viewed as located at the place of the act of publication, or the place where damage is suffered" which can result in several courts exercising territorial jurisdiction and the application of multiple laws based on each place of damage. Due to the uncertainty that this can cause for parties, particularly in respect of their obligations, he concludes that "the legitimacy of territorial regulation can be questioned at least in certain contexts".

103 See A Mills, "The Law Applicable to Cross-Border Defamation on Social Media: Whose law governs free speech in 'Facebookistan'" (2015) 7 *Journal of Media Law* 1.

law would lead to courts applying different laws to arrive at potentially different conclusions as to whether the liability in tort is made out.

3.81 The result of potential conflicts between national laws was illustrated with the *Microsoft Ireland* case discussed above. If Microsoft had complied in full with the warrant of the US court by downloading the data held in Ireland and exporting it to the USA, this would have risked Microsoft breaching the data protection laws in force in Ireland. If Microsoft refused to download the data held in Ireland, on the basis that this was necessary to comply with the data protection laws in force in Ireland, it would be in breach of the warrant of the US court.

3.82 Similar difficulties arise with locating where online scams and frauds, such as a cyber-attack, occur. Where such frauds prevent access to an online account, application of the *lex loci damni* rule requires the court to identify where the damage occurred. However, if the victim could previously have accessed the account from anywhere in the world, simply by logging in from a device connected to the internet, where does the victim suffer damage when they are denied access to the account?

Summary

3.83 The modern use of the internet as an integral socio-economic feature of modern life challenges the prevailing approach to private international law. Given that application of the traditional connecting factors usually points to a multiplicity of places rather than a single place, this strains the territorial premise upon which our existing rules of private international law are based.

Distributed ledger technology

3.84 Professor Tobias Lutzi has told us that "distributed ledger technology ("DLT") gives rise to the same challenges for private international law arising with the internet, but on steroids."

3.85 DLT was invented in 2009 with the creation of Bitcoin as an alternative to traditional state-issued currencies. Of particular concern to the inventors of Bitcoin was reliance on a third-party central administrator or entity (that is, the central bank) to ensure the integrity of the banking ledger that records the transactions between participants of the central banking system. As we said in our Advice to Government on Smart Legal Contracts:[104]

> Under traditional account-based transactions overseen by [a third-party central administrator or entity], such as a bank, the authority to update the ledger is delegated to the bank. It is the bank who is responsible for updating the ledger by debiting the account of the payer, and crediting the account of the payee.[105]

3.86 Bitcoin aimed to decentralise the authority to update the ledger across the participants of the payments system itself. Within the Bitcoin DLT payments system:

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104 Smart Legal Contracts: Advice to Government (2021) Law Com No 401, para 2.23.

105 R Auer, C Monnet and H S Shin, "Permissioned Distributed Ledgers and the Governance of Money" (January 2021) *Bank for International Settlements (BIS) Working Papers* No 924.

(1) the notional currency is bitcoin;

(2) the ledger of transactions in bitcoin is often referred to as the "blockchain"; and

(3) participants in the Bitcoin DLT payments system are referred to as "nodes".

We consider these in more depth from paragraph 3.97 below.

3.87 Terminology in the context of DLT can be challenging because, over time, various use cases and commercial practices have developed from this original use of bitcoin as an alternative (crypto) currency to traditional currencies issued by central banks. There remains, for example, no universally accepted taxonomy of crypto-tokens.[106]

3.88 For present purposes, two general descriptions and definitions of DLT are sufficient to identify the problems that such technology potentially poses for private international law.

3.89 The United Nations Conference on Trade and Development has described DLT as:

> the practice that uses nodes…to record, share and synchronize transactions in their respective electronic ledgers (instead of keeping data centralized as in a traditional ledger). The participant at each node of the network can access the recordings shared across that network and can own an identical copy of it. Any changes or additions made to the ledger are reflected and copied to all participants in a matter of seconds or minutes.[107]

3.90 Similarly, in our consultation paper on digital assets, we described DLT as "the general term that refers to technologies designed to maintain digital records which are synchronised between participants in a computer network in such a way that identical digital records are (or are able to be) held locally by each participant".[108]

3.91 Professor Gérardine Goh Escolar identified four characteristics of DLT that are potentially significant for private international law.

(1) The decentralised nature of DLT.

(2) The partly automated nature of transactions within a DLT network.

(3) The immutability of transactions in DLT networks.

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106 There are international efforts to harmonise the use of specific terms. See for example: United Nations Commission on International Trade Law (UNCITRAL), "Taxonomy of legal issues related to the digital economy" (2023).

107 United Nations Conference on Trade and Development (UNCTAD), "Harnessing Blockchain for Sustainable Development: Prospects and Challenges" (2021) 50. See also the discussion by G Goh Escolar, "The role and prospects of private international law harmonisation in the area of DLT" in A Bonomi, M Lehmann and S Lalani (eds), *Blockchain and Private International Law* (2023) p 11.

108 Digital Assets (2022) Law Commission Consultation Paper No 256, Appendix 2.

(4) The pseudonymity of users and the decentralised nature of the ledger which make it difficult to determine the *situs* of a transaction.[109]

3.92 The decentralised nature of DLT is a direct challenge to the territorial premise on which modern systems of private international law is based. A key feature of DLT is that the register is stored across a network of computers ("nodes") that could be anywhere in the world. Decentralisation is therefore often a feature of the use cases that are most difficult to address within the existing legal framework.

3.93 Where a ledger is deliberately designed so that updates to the ledger require the participation of every node of the DLT network, and a master copy of the ledger is also stored on every node of the DLT network, the techniques we saw above in the context of digitisation and the internet are no longer as effective. This can be demonstrated in the following comparison between cloud storage services and DLT.

(1) In the context of the cloud storage services:

(a) the data shards constituting a digital file might be stored on different servers across the world; but

(b) the cloud storage service provider is a potential alternative connecting factor owing to the prominent position it holds in storing, managing, and securing the data shards comprising the file.

(2) In the context of decentralised applications of DLT:

(a) a complete and whole copy of the ledger is stored on every single node; and

(b) no single node holds a prominent position in storing, managing, or securing the ledger.

3.94 The fundamental nature of the challenges for private international law that arise in these circumstances is reflected in the term "omniterritoriality." This was coined by Professor Matthias Lehmann to describe "those phenomena that cannot be linked to a specific country because they have simultaneous and equally valid connections to jurisdictions all over the world."[110] Thus, the problem is not that the objects have no genuine connections to a single territory. Rather, the problem is that they exhibit too many genuine connections to too many territories, each in equal measure. [111]

3.95 As we explain below, the use of DLT does not in itself necessarily mean that a use case will be decentralised. It does not follow that every use of DLT will give rise to these problems of "omniterritoriality" in private international law. It is, therefore,

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[109] G Goh Escolar, "The role and prospects of private international law harmonisation in the area of DLT" in A Bonomi, M Lehmann and S Lalani (eds), *Blockchain and Private International Law* (2023) p 13.

[110] M Lehmann, "Extraterritoriality in Financial Law" in A Parrish and C Ryngaert (eds), *Research Handbook on Extraterritoriality in International Law* (2023) p 427.

[111] Above.

particularly important to identify why particular use cases of DLT are more problematic for private international law than others.

3.96 Since distributed ledger technology does not always pose the same challenge for private international law, we propose to classify individual use cases along a spectrum of decentralisation. We hope that this will help us identify the extent to which each use case challenges the territoriality principle underpinning the multilateral rules of private international law.

Bitcoin: the decentralised ideal

3.97 Bitcoin remains the starting point for understanding the challenges that DLT potentially poses for private international law because it represents the fully decentralised ideal that underpinned the development of this type of technology.

3.98 As noted above, Bitcoin was invented with the express intention of creating an alternative payments system that did not rely on any form of centralised third-party intermediary to ensure that the records of a payments ledger are accurate. Bitcoin aimed to decentralise the authority to update the ledger across the participants of the payments system itself.

3.99 A further aspect of the decentralised nature of Bitcoin lies in its status as a "permissionless" or "public" DLT network. This means that the network itself does not have rules as to who can or cannot join the Bitcoin DLT payments system: anyone can join the Bitcoin DLT network simply by downloading the relevant source code.[112]

3.100 Once the source code is downloaded and installed, the device on which the source code is stored becomes a "node" and participates in the DLT network. In accordance with the ideal of decentralised trust:

(1) All nodes may propose updates to the blockchain ledger of bitcoin transactions (that is, send bitcoin to another node). This process involves the "payer" node authenticating what is effectively a mandate to transfer some of its bitcoin to the "payee" node. Mandates are authenticated through use of a private key, which is one aspect of the private-public key encryption techniques that help ensure the integrity of the bitcoin ledger.

(2) All nodes contribute to the processing and validating of all proposed updates to the blockchain ledger of bitcoin transactions. The method for processing and validating proposed updates lies at the heart of DLT and involves a consensus mechanism based on solving complex mathematical algorithms that require considerable computer processing power.

(3) All nodes store a complete and up-to-date version of the blockchain ledger of bitcoin transactions. The blockchain ledger is updated every ten minutes and is propagated to all nodes simultaneously. There is no "master" copy of the

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[112] The Bitcoin source code is made available freely to download at https://bitcoin.org/en/download. The present territorial system of regulating access to content made available on the internet, however, means that national authorities may still block certain websites and prevent them from being made available within the territorial boundaries over which the relevant national authority is competent.

blockchain ledger. Each node stores a copy of the ledger that is equally as complete and authoritative as the copies stored by all other nodes.

Intermediated participation in a DLT network: exchange and wallet providers

3.101 Owing to the mathematical algorithms on which DLT is built, operating a node on a public DLT network requires considerable computer processing power and storage space – far more than most people could facilitate in their own homes. As a result, an eco-system soon developed around bitcoin and similar crypto-tokens. This ecosystem encompasses various third-party service providers who intermediate participation in a DLT network on behalf of participants or would-be participants. Most people who hold crypto-tokens rely on such intermediaries.[113]

3.102 There are various types of crypto-token intermediary.

3.103 Some intermediaries provide private key services only. These services can be useful to those who participate as a node on the DLT network, but do so primarily to send and receive crypto-tokens to and from other nodes. In these circumstances, intermediaries typically streamline the authentication of payment mandates through the private keys into a user-friendly interface. Such interfaces largely resemble a conventional banking app.[114]

3.104 Private key services can take the form of "custodial intermediated holdings" or "non-custodial intermediated holdings."[115] Under the custodial model, the intermediary is in control of the private keys, and the customer's mandates to transfer cryptocurrencies are communicated to the intermediary who then executes the mandate. Under the non-custodial model, the customer retains control of the private keys and may unilaterally effect transfers directly.[116] These different models of intermediation reflect different levels of decentralisation.

3.105 The most common type of intermediary, however, is the crypto exchange.[117] Exchanges offer a wide range of services to their users, such as acting as a "custodian" of their crypto-tokens[118] or executing transactions on their behalf.[119] In

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113 Digital Assets: Final Report (2023) Law Com No 412, para 7.2.

114 A Held, "Crypto-Financial Assets in a DLT Market Infrastructure: Legal Principles of Ownership and Obligation" (2019) p 30. Amy Held was a member of the Advisory Panel until she joined the Law Commission specifically to work on this project as a law reform lawyer in November 2023.

115 Digital Assets: Final Report (2023) Law Com No 412, para 7.17. In our Digital Assets Report, we also describe non-holding services, which refer to technology or operational safeguarding or administration of crypto-tokens or crypto-token entitlements that do not involve a service provider holding those crypto-tokens or crypto-token entitlements on behalf of or for the account of others.

116 B Y Ripley and F Heindler, "The Law Applicable to Crypto Assets: What Policy Choices Are Ahead of Us?" in A Bonomi, M Lehmann and S Lalani (eds), *Blockchain and Private International Law* (2023) pp 263 to 264. It should be noted that a hybrid model is also possible, which requires approval from both the service provider and the customer.

117 For details and statistics, see Ch 7 (on non-consumer contracts).

118 Coinbase User Agreement, cl 5.19. The Coinbase User Agreement is available at: https://www.coinbase.com/legal/user_agreement/payments_europe.

119 Above cl 5.8.

return, the user pays fees and/or a commission to the exchange. The relationship between the user and the exchange will be governed by a user agreement.[120]

3.106 Crypto exchanges differ considerably on the question of how, as a matter of the underlying code and technology, they intermediate participation in a DLT network.[121] Although exchanges often tend to suggest that they execute the payment mandates of their customers on the DLT network, most industry insiders assume that most exchange transactions occur "off-chain": exchanges maintain internal records of transactions between users, but these are not necessarily transmitted to the other nodes nor included on the blockchain.[122]

3.107 Two models of intermediation for exchanges have been proposed following an analysis of various user agreements:

(1) "partially intermediated" holdings, where "exchange users directly participate in a blockchain network with [a "payee" node in the DLT network] even if they are not conferred the private keys necessary to effect control over [the credits to that node];" and

(2) "wholly intermediated" holdings, where "exchange users do not directly participate in [and are not] recognised within the blockchain network either because they hold at a shared [payee node] maintained by the exchange and/or because the exchange executes all trades on behalf of users off-chain".[123]

3.108 Such methods of holding raise significant questions regarding what a user of an exchange "owns" and how to conceptualise this in a way that ensures consistency between the technology and the law.[124] We return to this issue in Chapter 12.

3.109 For present purposes, the important point to note is that crypto exchanges provide a significant degree of centralisation that often provides a useful connecting factor for the purposes of private international law. Whilst this is contrary to the original decentralised ideal of DLT, it has developed from a desire for greater convenience for customers and is prevalent in the market. Coinbase, for example, is reported as having 103 million users in 2022.[125]

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120 For example, the Binance Terms of Use are available at: https://www.binance.com/en-GB/terms. The Coinbase User Agreement is at: https://www.coinbase.com/legal/user_agreement/payments_europe.

121 For more information on intermediated holding arrangements, see Digital Assets: Final Report (2023) Law Com No 412, ch 7.

122 A Held, "Intermediated cryptos: what your exchange-hosted wallet *really* holds" (2020) 8 *Journal of International Banking and Financial Law* 541.

123 Above.

124 Digital Assets: Final Report (2023) Law Com No 412, paras 7.17 to 7.134.

125 Bankless Times, "Intriguing Coinbase Statistics and Facts for Crypto Enthusiasts" (March 2023): https://www.banklesstimes.com/coinbase-statistics/.

Ethereum, Smart Contracts, dApps, DeFi and DAOs

3.110 Ethereum was invented in 2011 and is widely recognised as the original "second generation" application of DLT. Ethereum shares many similarities with Bitcoin, but there are some significant differences.

3.111 Like Bitcoin, Ethereum is a public DLT network that anyone can join. It also uses mathematical algorithms to achieve decentralised consensus amongst nodes regarding updates to the Ethereum blockchain ledger.

3.112 Unlike Bitcoin, Ethereum was not intended as a payment system. Rather, the founders of Ethereum held the "ambitious objective of transforming the way in which the internet operated through decentralising all aspects of web applications using peer-to-peer networks rather than centralised servers." [126]

3.113 To enable such functions, Ethereum leverages the distributed ledger technology underpinning Bitcoin, and combines it with ordinary computer programming so that both transactions[127] and computer programs can be recorded on the ledger.[128] These are performed automatically by the computers on the Ethereum network when the conditions for their performance are satisfied.[129]

3.114 The core focus of Ethereum, and its original contribution to the development of DLT, is these computer programs. Decentralised web applications created using this technology are known as Decentralised Applications, or dApps, and consist, at the very least, of (i) a smart contract programmed onto a blockchain, which controls the back-end programming logic of the function; and (ii) a front-end web-based user interface.[130]

3.115 Other uses of DLT that operate on a permissionless network include what have been called "governed blockchains." These are permissionless networks for which a constitution is included in each update to the blockchain ledger through a hashed

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126 A Held, "Crypto-Financial Assets in a DLT Market Infrastructure: Legal Principles of Ownership and Obligation" (2019) pp 44 to 45.

127 A smart (legal) contract can be stored on-chain or off-chain. In relation to the former, the bytecode (an intermediate level of code) of the smart (legal) contract is stored in a transaction that takes place on-chain. In this way, immutability is guaranteed but it is possible for someone to use a decompiler to revert the bytecode back into the original programming language. In relation to the latter, the smart (legal) contract is stored off-chain, with only the hash being recorded on-chain. This ensures both immutability and secrecy of data, but could lead to difficulties in recovering the original smart (legal) contract if it is modified. See T Schrepel, European Commission, *Smart Contracts and the Digital Single Market Through the Lens of a "Law + Technology" Approach* (September 2021) p 25.

128 Smart Legal Contracts: Advice to Government (2021) Law Com No 401.

129 A couple of thousand smart contracts are created on the Ethereum network daily. In May 2021, for example, over 45 million transactions were conducted by the smart contracts deployed on the network. See T Schrepel, European Commission, *Smart Contracts and the Digital Single Market Through the Lens of a "Law + Technology" Approach* (September 2021) p 19.

130 A Held, "Crypto-Financial Assets in a DLT Market Infrastructure: Legal Principles of Ownership and Obligation" (2019) pp 44 to 45.

reference to the constitution.[131] It has been said that such applications of DLT still espouse some of the decentralised ideals of permissionless DLT, but the constitution (as a legally binding agreement) takes effect "as a series of private consensual arrangements involving different subsets of the community."[132]

Smart (legal) contracts

3.116 Terminology is again confusing. The computer programmes that lie at the heart of Ethereum are known in that context as "smart contracts." As we noted in our Advice to Government on Smart Legal Contracts, this is particularly confusing in the legal context because:

> smart contracts can also be used to define and perform the obligations of a legally binding contract. It is this specific type of smart contract – a "smart legal contract" – that is the object of our analysis. For the purposes of this paper, we define a smart legal contract as a legally binding contract in which some or all of the contractual obligations are defined in and/or performed automatically by a computer program. Smart contracts, including smart legal contracts, tend to follow a conditional logic with specific and objective inputs: if "X" occurs, then execute step "Y".

3.117 In our Call for Evidence, we adopt the same terminology.

3.118 Use of smart contracts has proliferated in the manner originally envisioned by the founders of Ethereum. We discuss two core applications as examples: decentralised finance ("DeFi") and decentralised autonomous organisations ("DAOs").

Decentralised finance

3.119 Decentralised finance ("DeFi") is an umbrella term used to cover platforms which use distributed ledger technology to offer a "range of financial services – including lending, exchange, asset management and insurance".[133] When offering these services, DeFi intends to serve the same functions as traditional finance.

3.120 The unique characteristic of DeFi is that it offers these services without relying on traditional financial intermediaries:[134] DeFi "aims at disintermediation".[135] Instead of interacting with an intermediary (such as an investment bank in traditional finance, or a centralised crypto exchange such as Binance or Coinbase), users interact with smart contracts. Therefore, whilst DeFi encompasses a broad array of services, in all

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131 A Sanitt, "Legal analysis of the governed blockchain" (2018) available at https://www.nortonrosefulbright.com/en/knowledge/publications/0d56a3a5/legal-analysis-of-the-governed-blockchain. For an explanation of how hash technology works, see S Green "Cryptocurrencies: The Underlying Technology" in D Fox and S Green (eds), *Cryptocurrencies in Public and Private law* (2019) p 3.

132 Above, A Sanitt.

133 HM Treasury, "Future Financial Services Regulatory Regime for Cryptoassets: Consultation and Call for Evidence" (February 2023) para 11.1.

134 Above.

135 R Auer, B Haslhofer, S Kitzler, Pietro Saggese and F Victor, "The Technology of Decentralised Finance (DeFi)" (January 2023) *Bank for International Settlements (BIS) Working Papers* No 1066, p 4.

cases the "centralised intermediary […] is removed and replaced by smart contracts".[136]

3.121 A common example is DeFi lending protocols, which are offered by platforms such as Aave.[137] Anonymous lenders deposit their crypto-tokens in a lending smart contract, which deposits them in a lending asset pool. In exchange for lending their tokens, the user will accumulate interest. Anonymous borrowers can then borrow from that asset pool. To be eligible to borrow, the borrower will pledge crypto-tokens as collateral.[138] Borrowers are usually required to provide collateral with a higher value than the crypto-tokens which they borrowed ("over-collateralisation"). If the crypto-tokens offered as collateral drop below a certain value, or the borrower defaults, then the collateral will liquidate in favour of the lender.

3.122 We discuss the potential challenges that DeFi poses for private international law in more detail in Chapters 7 and 9.

Decentralised autonomous organisations

3.123 The term decentralised autonomous organisation ("DAO") describes, very broadly, a new type of technology-mediated social structure or organisation. In particular, the label "DAO" was introduced to describe arrangements that depend for their governance/and or operational activities more on computer code than on human actors, employing DLT and smart contracts at their centre.

3.124 Some DeFi and crypto-token market participants describe their organisational structures as DAOs, and other arrangements using the label DAO have been set up for a wide range of purposes including social, charitable or investment.

3.125 Depending on how they are structured, DAOs may present challenges for private international law in a number of ways. Their use of DLT means they are decentralised at least to some extent, and they are often not associated with any particular jurisdiction.[139] Some DAO governance allows participants, often through the holding of "governance tokens", to vote on operational decisions and alter variants in the DAO's smart contracts, but those token holders may be spread all over the world. When it comes to identifying what a particular DAO is as a matter of law, what the status of its token holders is, or where liability sits for wrongdoing and answering a variety of other questions, private international law rules may have a bearing on how these issues are determined.[140]

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136 A-G Kleczewski, "The Good, the Bad and the Ugly: The Private International Law, the Crypto Transactions and the Pseudonyms" in A Bonomi, M Lehmann and S Lalani (eds), *Blockchain and Private International Law* (2023) p 141.

137 For Aave, see: https://aave.com/.

138 J Chiu, E Ozdenoren, K Yuan and S Zhang, "On the Fragility of DeFi Lending" (2023) p 3.

139 Many DAOs, at least as originally conceived, choose not to use recognised legal entities such as limited companies or trust models in their structures. Using such entities would involve being registered in or otherwise connected to a particular jurisdiction and subject to the laws associated with that legal form.

140 We are, at the time of writing, coming towards the end of a separate scoping project on DAOs. For more detail see https://lawcom.gov.uk/project/decentralised-autonomous-organisations-daos/.

Permissioned networks and centralised applications of DLT

3.126 Ethereum precipitated a further range of practical applications that use DLT, with many new DLT networks developed by private companies for use in specific commercial contexts. Such networks or blockchains are often described as "proprietary." This reflects the fact that use of the software underpinning these networks is governed by a commercial agreement between users and the private company that developed and owns intellectual property rights in the DLT application. Such networks are therefore permissioned.

DLT in the financial markets

3.127 Many of these practical applications of DLT were developed for use in the financial sector. In many cases, DLT is used to streamline existing processes and practices. For example, central banks around the world are exploring DLT solutions to issue "central bank digital currencies" as an electronic version of state-backed currencies.

3.128 In 2016, the first cohort of firms wishing to test innovative DLT solutions in the primary financial markets were admitted to the Financial Conduct Authority's Regulatory Sandbox.[141] The three firms wishing to test DLT solutions and their projects were:

(1) Issufy: a web-based software platform that streamlines the overall Initial Public Offering (IPO) distribution process for investors, issuing companies and their advisers.

(2) Nivaura: a platform that uses automation and blockchain for issuance and lifecycle management of private placement securities.

(3) Otonomos: a platform that represents private companies' shares electronically on the blockchain, enabling them to manage shareholdings, conduct book building online and facilitate transfers.

3.129 Since then, applications to test similar use cases of DLT have proliferated, both in the Financial Conduct Authority's Regulatory Sandbox and in market practice.

3.130 Critically, many of these applications depart wholly from the decentralised ideal and operate as "permissioned" or "private" DLT networks. This means that participation as a node is not open to the public. Rather, an application to join the DLT network must be made to the operator of the network.

3.131 In addition, many of these permissioned applications of DLT may further reserve the authority to commit updates to the ledger to a centralised authority. Usually, this is the operator of a particular application in question.

Electronic trade documents

3.132 Centralised applications of DLT are also seen in the context of electronic trade documents. Wave BL, for example, is a peer-to-peer DLT application, which allows users to issue, exchange and digitally sign bills of lading and other trade documents,

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[141] The FCA's Regulatory Sandbox allows firms to test innovative propositions with real consumers while receiving dedicated regulatory expertise. For a list of the first cohort of firms who conducted Sandbox tests, see https://www.fca.org.uk/firms/innovation/regulatory-sandbox/accepted-firms.

such as letters of credit.[142] The platform is based on a permissioned network operated and owned by Wave BL, and boasts an additional privacy layer to ensure that the exchange of documents cannot be tracked by third parties to a transaction.[143]

3.133 When assets that already exist "in real life" are moved onto DLT platforms in this way, the crypto-token that represents the right or asset within the platform is sometimes described as a "linked asset", "asset-backed digital token" or "exogenous token". This captures the fact that the crypto-token references an asset "off-chain" (outside of the blockchain) with the intention that dealings in the crypto-token within the DLT platform will represent dealings in the off-chain asset. In addition to bills of lading and trade documents, other off-chain assets commonly linked to a crypto-token for the purpose of trading include shares in a company and interests in gold.[144] Other terms frequently used in this context include "tokenised right" or "tokenised security" to the crypto-token.

3.134 Professor Koji Takahashi suggests that there might be significant benefits to a fully decentralised approach to DLT platforms for "tokenised" bills of lading, but he has acknowledged that centralisation still plays a key role. While the industry seems to favour the use of a central registry for now, the use of permissionless blockchain networks and crypto-tokens may become more widespread over time.[145]

3.135 It is worth noting that a DLT-based system may well be able to fulfil the functions of a "reliable system" under section 2(2) of the Electronic Trade Documents Act 2023. We discuss this in more depth in Chapters 10 and 11.

Summary

3.136 DLT is a difficult topic to assess in terms of challenges to private international law primarily because the technology is deployed in such a wide variety of ways. Not all of these will necessarily be decentralised.

3.137 In addition, the issues of private international law that will ultimately be considered by a court will be influenced by a vast range of factors. For example, we explain in Chapter 6 that determining the applicable law involves a three-stage process; and the first of these involves determining what kind of legal issue is in dispute between the parties. For now, it suffices to note that the features of the technology itself are only

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142 For further information on Wave BL, see: https://wavebl.com//. Wave BL is discussed in M Goldby, *Electronic Documents in Maritime Trade* (2nd ed 2019) para 6.46.

143 L Koskas (WaveBL), "White Paper: Understanding the Role of Blockchain in Digital Trade Documentation" (2023) p 7: https://wavebl.com/wp-content/uploads/2023/06/WhitePaper-WaveBL-Blockchain.pdf?utm_source=mailchimp&utm_campaign=03008770e1f0&utm_medium=page.

144 H Liu, "Digital assets: the mystery of the 'link'" (2022) 3 *Journal of International Banking and Financial Law* 161. The nature of the legal link may vary. For example, if a token purports to function like a share certificate, Liu notes that holding the token is only evidence that you own the share; share ownership is determined by the register of members. The token in this context cannot function like a bearer instrument.

145 See K Takahashi, "Blockchain Technology and Electronic Bills of Lading" (2016) 22 *Journal of International Maritime Law* 205; and K Takahashi, "Blockchain-based Negotiable Instruments: with Particular Reference to Bills of Lading and Investment Securities" in A Bonomi, M Lehmann and S Lalani (eds), *Blockchain and Private International Law* (2023).

one of many factors that will influence the type of private international law issues that a court will be tasked to determine.

EVALUATION

3.138 Our terms of reference potentially cover a wide range of use cases, including but not limited to:

(1) electronic trade documents;

(2) bitcoin and other "native" cryptocurrencies held directly;

(3) bitcoin and other "native" crypto-tokens held with an intermediary, such as an exchange;

(4) use of crypto-tokens in simple "real life" commercial transactions, for example, the use of bitcoin to buy goods, or the use of crypto-tokens as collateral;

(5) use of decentralised ledger technology in the financial markets and which, in substance, may fall within the regulatory perimeter, such as initial coin offerings ("ICOs"), tokenised securities/tokenised financial instruments, or blockchain bonds to raise traditional finance;[146]

(6) use of smart contracts in decentralised finance applications; and

(7) DAOs.

3.139 We consider however that our overall approach should reflect the specific area of law that we have been tasked to consider. Accordingly, whilst it would be possible for us to structure our project by reference to particular use-cases, we consider this may result in a fragmented discussion of the underlying issues insofar as they are relevant and problematic for private international law. We therefore structure our project by reference to the terms of private international law.

3.140 From this approach, we have identified two main and equally important priorities for this stage of our project.

3.141 Our first priority is to understand which issues arising from the various use cases can be accommodated satisfactorily within existing private international law rules in England and Wales.

3.142 Our preliminary views in this regard are that:

(1) truly decentralised applications of decentralised leger technology will pose particular problems for private international law, given the difficulty in identifying any one location or justifying the reliance on one location as opposed to another;

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[146] As we explained in Ch 1, we are concerned only with the private law aspects of these transactions and assets. The regulatory treatment of these transactions and assets, including the extraterritorial application of UK regulations, is a matter for regulatory law.

(2) centralised or private applications of decentralised ledger technology will be less problematic, and many of these will be easily accommodated within the existing law; and

(3) the online and digital contexts in general will be less problematic for the existing law. Nevertheless, individual use cases in the online and digital contexts will fall along a spectrum:

(a) some use cases might be easily accommodated within the existing law and pose no significant problem;

(b) some use cases might be accommodated within the existing law, but not without some difficulty; and

(c) some use cases might only be accommodated within the existing law with significant difficulty.

3.143 We recognise that issues that are problematic in theory are not necessarily issues that arise in practice. As a law reform body tasked to consider both the law and its application, we consider there would be limited practical value in focussing on areas that may be theoretically problematic but are highly unlikely to arise in practice.

3.144 Our second priority is, therefore, to classify the issues arising from various use cases according to the extent to which they are prevalent in market and legal practice; such that they do, or are likely to, present problems in practice.

3.145 We therefore propose to investigate in this Call for Evidence two core questions and further sub-questions in relation to each issue that arises from the use cases to help us identify our broad priorities for future work:

(1) To what extent can the issues identified in the subsequent chapters be accommodated by the existing law?

(a) If the issue cannot be accommodated, or only accommodated with significant difficulty, what are the possible solutions?

(b) If the issue can be accommodated easily or without undue difficulty, are there are any areas that would benefit from further clarification?

(2) To what extent does the issue cause problems in practice (or is likely to in future)? If the issue is prevalent, what would be the consequences if the issue is not adequately resolved as a matter of law?

3.146 We hope to be able to classify all issues on three broad levels of priority:

(1) Highest priority: the issue cannot be satisfactorily resolved under the existing law, and the issue is prevalent in practice.

(2) Medium priority: the issue cannot be satisfactorily resolved under the existing law, but the issue is not prevalent in practice.

(3) Medium priority: the issue can be satisfactorily resolved under the current law, but the use case is prevalent in practice.

(4) Lowest priority: the issue can be satisfactorily resolved under the existing law, and the issue is not prevalent in practice.

3.147 In this Call for Evidence, we give a broad description of the issues and factual contexts in which they will likely arise and ask questions to help us with this analysis.

3.148 Finally, although the conflict of laws is traditionally "blind" to the substantive outcomes of a case and concerned only to identify the applicable law, we also identify some areas where specific issues of substantive policy may be engaged.

Chapter 4: International jurisdiction – an overview

INTRODUCTION

4.1 The term "jurisdiction" has different meanings depending on context, but in the context of private international law, to say that a court has jurisdiction means that it has the power to hear and determine the private law dispute before it. This basic concept of jurisdiction raises questions of "international jurisdiction" when a private dispute has cross-border elements and there is more than one national court in which the parties could litigate the claim. In this context, the court is often referred to as the "forum".

4.2 As we saw in Chapter 2, the jurisdiction question in Alice and Bob's road traffic accident was whether Alice and Bob should litigate in the courts of England, Egypt, the US, or some other court.

4.3 Several significant practical and legal consequences follow from the determination of the forum. To understand these better, it is important to make a distinction between substantive law and procedural law.

4.4 When people think about "the law", they often think of the kinds of rights and obligations a person has and owes to others. This kind of law is known as "substantive law."

> In Alice's claim against Bob, the question of whether Bob is liable to compensate Alice or has a defence will be determined by reference to substantive law. The particular branch of substantive law in this case is the law of non-contractual obligations. The question of whether English, Egyptian, US, or some other country's substantive law of non-contractual obligations applies to determine whether Bob is liable to Anne is the applicable law question. The applicable law question is discussed in Chapter 6.

4.5 Procedural law, on the other hand, refers to the methods and processes the court will follow to determine whether liability is established. Such methods and processes will include, for example, how evidence should be gathered and tested to prove what exactly happened. One of the most significant legal consequences that flow from allocating international jurisdiction is that the forum in which the parties litigate will always apply its own domestic system of procedural law, even if it is applying foreign substantive law.

4.6 Although there are certain public international law standards aimed at ensuring that the methods and processes used by courts are fair,[147] national systems differ significantly in the details of their procedural laws. For example, in the adversarial

[147] Notably the European Convention on Human Rights (ECHR), art 6, which provides for the right to a fair trial in civil proceedings.

method of procedure found in common law systems, witnesses give their evidence in a process of examination and cross-examination by the parties' respective legal representatives. In the inquisitorial method of procedure that prevails on the Continent, witnesses give their evidence in an inquisition conducted by the judge.

4.7 A basic rule of private international law is that in matters of procedural law, the forum will always apply its own domestic law. The Latin term for the "domestic law of the forum" is *lex fori*. The general rule relating to matters of procedure is therefore that courts apply the *lex fori*.

> In Alice and Bob's case, assume that Alice has returned home and has issued proceedings in the courts of England and Wales, and that the courts have accepted jurisdiction. The procedural law of England and Wales will apply to the case.

4.8 Procedural law encompasses more than just matters of evidence. It usually includes, for example, how to issue proceedings and how to present one's case.[148] The procedural law of England and Wales for civil matters in the County Court, High Court of Justice, and Court of Appeal is set out in the Civil Procedure Rules 1998. These rules are underpinned by legislation.[149]

4.9 In this chapter, we set out the general principles underpinning international jurisdiction and the approach to international jurisdiction taken by the courts of England and Wales.

GENERAL PRINCIPLES OF INTERNATIONAL JURISDICTION

4.10 In private international law, questions of jurisdiction primarily concern the circumstances in which it is appropriate for the courts of one country to accept or decline jurisdiction to adjudicate a private law dispute with cross-border elements. Although the rules of civil procedure around the world differ and a wide variety of considerations are discussed in the literature, surveys of these international sources show that two key considerations emerge as underpinning the rules of international jurisdiction.[150]

4.11 The first consideration relates to the fairness and everyday practicalities of the litigation. It concerns a wide range of issues that relate to the conduct of litigation itself. Some are inherently practical, such as the languages that the parties speak and

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148 The distinction between substance and procedure is not always clear cut. Difficult questions arise, for example, where rules of foreign law limit the recoverability of damages in tort claims. See Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 2-035; *Cox v Ergo Versicherung AG* [2014] UKSC 22.

149 The Civil Procedure Rules 1998 (SI 1998 No 3132) and the Civil Procedure Act 1997.

150 T Hartley, "Basic Principles of Jurisdiction in Private International Law: The European Union, The United States and England" (2022) 71(1) *International and Comparative Law Quarterly* 213; A Held, "The modern property situationship" (2024) *Journal of Private International Law* (forthcoming). Amy Held was a member of the Advisory Panel until she joined the Law Commission specifically to work on this project as a law reform lawyer in November 2023.

whether litigating in a particular forum will entail considerable travel for all who will be required to be present in court. Other considerations are concerned with justice in a more abstract sense, such as access to the courts to obtain an effective legal remedy.

4.12 The second issue relates to considerations of public international law. Broadly, it reflects the need for national courts to justify the assertion of sovereign authority in accepting jurisdiction over a claim if the claim also has links to the territories of other sovereign states.

> These two considerations are illustrated by reference to our example, again assuming that the courts of England and Wales have accepted international jurisdiction over Alice and Bob's dispute. The following questions will arise if Alice is to be granted access to justice:
>
> The road traffic accident occurred in Egypt. The eyewitnesses who will give the best evidence of the accident will most likely be in Egypt, but they may also have been holidaymakers who, like Alice, have returned home. Should they be forced to come to England and Wales to give their evidence? In addition, they may not speak English or Welsh. Will they be able to give their evidence to a court in England and Wales without the need for translators and interpreters?
>
> Bob is a US citizen who usually lives (that is, is "habitually resident") in Egypt. Should Bob be forced to spend considerable time and expense going to England and staying there to defend Alice's case against him? On what basis do the courts of England and Wales have the authority to force Bob to do so?
>
> What if the Egyptian courts also assert jurisdiction over the claim on the basis that the road traffic accident occurred on Egyptian territory?

4.13 We consider both issues of international jurisdiction in more depth below. However, we focus particularly on the second because it is the more problematic of the two in the context of our project.

The fairness and everyday practicalities of litigation

4.14 Litigation is an inherently practical application of the law, which ought to operate with a view to achieving practical justice for the parties involved.

4.15 Accordingly, when courts are considering whether to accept or decline international jurisdiction over a claim, they will have some regard to practical factors such as: access to justice; the time and cost savings that the parties and the court may benefit from as a result of the consolidation of related claims; the risk of conflicting judgments if related claims are tried separately; the fairness as between the parties in their respective ties to the forum; and the bearing that the location and nature of the

evidence will have on the parties wishing to rely on that evidence and on the court's ability to make a fair, considered ruling.[151]

The assertion of sovereign authority

4.16 In Chapter 3, we said that territoriality is the foundation of both modern public international law and private international law. The territoriality principle means that the sovereign authority of a state is absolute within its territorial borders but does not generally extend beyond those borders.

4.17 In public international law, distinctions are made as to what kind of acts constitute an exercise of sovereign power. We said in Chapter 3 that there are three types of acts of sovereign power, that are constrained by territorial principles:[152]

(1) Prescriptive jurisdiction concerns the question of when a person or set of facts may be subjected to the laws of a particular sovereign state. The general rule is that the laws of a sovereign state apply within its territorial boundaries, but not generally outside them.[153]

(2) Enforcement jurisdiction concerns the exercise of coercive power or control over persons or property. The enforcement jurisdiction is strictly territorial: a sovereign state may only commit a person to custody or seize their assets when the person or assets are within the state's territorial boundaries.

(3) Adjudicatory jurisdiction concerns the exercise of judicial power. It engages prescriptive jurisdiction insofar as a court will be applying the substantive law of a sovereign state to determine the rights and obligations of the parties to the dispute. It also involves the enforcement jurisdiction insofar as litigation usually results in a judgment that parties wish to enforce. The coercive power of the court in the conduct of litigation, for example, to enforce its rules of procedure, is a grey area between the two.

4.18 International jurisdiction in private international law is primarily concerned with what public international law calls adjudicatory jurisdiction. In this Chapter, we are primarily concerned with the question of when national courts, which are usually subject to territorial constraints, may legitimately assert the adjudicatory jurisdiction in accepting jurisdiction over a claim that has links to more than one sovereign territory.

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151 See generally: A T von Mehren, "Adjudicatory Jurisdiction: General Theories compared and Evaluated" (1983) 63 *Boston University Law Review* 279.

152 On the principle of territoriality, see generally: A Mills, "Justifying and Challenging Territoriality in Private International Law" in R Banu, M S Green, and R Michaels (eds) *Philosophical Foundations of Private International Law* (forthcoming) ch 8.

153 As we will see at para 5.81 below, the question of what counts as law applying "within the territorial boundaries" is a complex question. Many sovereign states do commonly extend the application of their laws to events that might be considered to occur outside of the territorial borders, but which have significant effects within the territorial borders. This might include, for example, a price-fixing agreement made between companies outside of the territorial boundaries of a particular state, but which is aimed at harming the consumers within that state.

In Alice and Bob's case, the question of international jurisdiction concerns whether the courts of England and Wales may or should assert sovereign authority over Bob, Alice, and a road traffic accident that occurred in Egypt by accepting jurisdiction over Alice's claim.

Accepting jurisdiction involves an assertion of sovereign power in, for example: summoning Alice and Bob to appear in court; compelling them to tell the truth; imposing penalties for failing to comply with orders of the court; subjecting them to the substantive law of non-contractual obligations; and conclusively altering their legal rights and obligations in the form of a judgment.

4.19 We will see that, in practical terms, the question of international jurisdiction often means asking whether a court may legitimately assert authority over the defendant to a civil claim by summoning them to court and subjecting them to its processes. This is assessed by reference to the ties between the sovereign territory in question and either of (i) the defendant; or (ii) the facts and issues of the case.

4.20 By contrast, there is usually little need to justify this assertion of sovereign authority over a claimant. In issuing proceedings, the claimant has taken the active decision to invoke the authority of the court. The claimant is therefore taken to have voluntarily accepted the court's authority. Where a party to litigation voluntarily accepts the court's authority, it is usually referred to as that party's "voluntary submission to the jurisdiction."

4.21 Unlike the claimant, the defendant is not usually a voluntary party to the litigation. Rather, the defendant has been made a party by the claimant's decision to sue. If the defendant also voluntarily submits to the jurisdiction of the court, this will almost always establish the jurisdiction of that court. If, however, the defendant has not voluntarily submitted to the jurisdiction or challenges the court's jurisdiction, summoning the defendant to court to answer the claimant's case requires more justification.

4.22 It is for this reason that questions of jurisdiction frequently involve considerations of when and why a court may assert sovereign authority over the defendant. The general rule of international jurisdiction, which lies "at the root of all international, and of most domestic, jurisprudence on the matter,"[154] is that the claimant must go to the defendant and sue in the "home court" of the defendant. In terms of private international law, the defendant's "home court" is often referred to as "the court that exercises ordinary personal jurisdiction over the defendant."

4.23 Most domestic systems of civil procedure expressly set out the situations in which the sovereign state considers that a person is subject to the ordinary personal jurisdiction of its courts. These rules tend to differ between different countries only in the nature

[154] Sir R Phillimore, *Commentaries on International Law:* Volume 4 (London 1857), 549. This statement was approved by the Earl of Selborne in *Singh v The Rajah of Faridkote* [1894] AC 670, 683 to 684.

and strength of the personal tie to the territory of the sovereign state required. The rules include:

(1) Mere physical presence within the territorial borders, even for the most fleeting period of time; or (for legal persons) any fixed place of business within the territorial borders. This is the approach, in principle, taken in England and Wales.

(2) Domicile within the territorial borders. This is the approach predominantly taken in the EU rules of international jurisdiction.

4.24 Where the defendant does not have these kinds of territorial or hybrid territorial-personal[155] ties to the state in which the claimant issues proceedings, something else is required to justify summoning them to the courts of that state. In these circumstances, a clear connection between the facts, issue, or nature of the case and the territorial boundaries of that country is usually sufficient to justify a court accepting international jurisdiction over a claim and summoning a defendant not subject to its ordinary personal jurisdiction.

4.25 We consider from paragraph 4.41 below the circumstances in which the courts of England and Wales consider there to be a sufficiently strong tie between a case and the territorial boundaries of England and Wales to justify asserting the adjudicatory jurisdiction in this way.

The relationship between jurisdiction and enforcement

4.26 There are practical reasons why it is important that international jurisdiction is properly founded. We said in Chapter 2 that the recognition and enforcement of judgments in private international law addresses the circumstances under which the courts of one country will recognise and enforce a judgment of a court in another country.

4.27 Most courts, when faced with a request to recognise and/or enforce the judgment of a foreign court will consider the basis on which the foreign court accepted international jurisdiction before proceeding to determine the claim and render the judgment in question. This “review” of jurisdiction by the court in which recognition or enforcement is sought is sometimes known as “indirect jurisdiction” or “jurisdictional filters” in contrast to the ”direct jurisdiction” of the court that hears the case and renders the judgment.

4.28 Whilst the approaches to indirect jurisdiction will differ from one state to another, Articles 5 and 6 of the Hague Judgments Convention 2019 give a useful overview of some of the grounds on which a court should recognise and/or enforce a foreign judgment and the grounds on which a court may refuse to recognise and/or enforce a foreign judgment.

[155] We explained the territorial premise of modern public and private international law in Ch 3 from para 3.13.

JURISDICTION IN ENGLAND AND WALES

4.29 Broadly speaking, private international law in England and Wales has accorded a greater depth of consideration to issues of jurisdiction than Continental legal systems.

4.30 The importance afforded to resolving the jurisdiction question in the courts of England and Wales has been explained by the nature of the common law system itself. In Continental legal traditions, substantive rights, obligations, and remedies are comprehensively codified in a legislative act. Substantive rights and obligations therefore precede questions of procedure and enforcement. By contrast, in the common law system, substantive rights and obligations are determined and remedies are granted through the processes of the courts using their idiosyncratic rules of procedure.[156]

4.31 The significance of procedure in common law systems has important effects in the private international law of England and Wales. As the editors of *Dicey* explain:

> in the English conflict of laws, questions of jurisdiction frequently tend to overshadow questions of choice of law. Or, to put it differently, it frequently happens that if the question of jurisdiction (whether of the English or the foreign court) is answered satisfactorily, the question of choice of law does not arise.[157]

4.32 As we will see in Chapter 6, the centrality of the jurisdiction question in civil procedure and the common law system in England and Wales often contrasts with the approach generally taken in Continental legal systems.

The current rules of international jurisdiction

4.33 Under the common law rules, the general principle is that jurisdiction depends on service of process.[158] It is said that "where there is service, there is jurisdiction".[159]

4.34 In general, the courts of England and Wales take a highly territorial approach to jurisdiction. This means that a natural person physically present within the territory of England and Wales may be served with process and therefore brought under the jurisdiction of the courts of England and Wales.[160]

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156 Another early English scholar of private international law was John Westlake (1828-1913) who remarked: in "[Continental systems], the origin of rights naturally precedes the mode of enforcing them, or in other words, the civil code is prior to the code of procedure. This order was indeed long inverted in our law." John Westlake the English and other cognate systems of jurisprudence (W Maxwell, London 1858) pp 52 to 53.

157 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 1-005.

158 Above para 11R-001 and A Briggs, *Civil Jurisdictions and Judgments* (7th ed 2021) para 21.02.

159 A Briggs, *The Conflict of Laws* (4th ed 2019) p 46. Professor Briggs makes the point that it is for this reason that the rules which define jurisdiction are, in English law, framed as rules which specify whether and when it is lawful to serve process on the defendant.

160 Above p 99: "The common law takes the view that any person present in England is, or has chosen to put himself in the position of being, liable to be summoned to court by anyone else."

4.35 In principle, it does not matter how long the defendant was present in the territory[161] or the reason why they were there. Physical presence alone suffices. There are various rules on how service can be effected, including personally delivering the claim form to the defendant,[162] or by post to a specified address.[163]

4.36 Where jurisdiction over a natural person is established on this ground, proceedings may subsequently be stayed if the defendant persuades the court that there is another clearly more appropriate forum for the resolution of the dispute. We discuss the concept of "appropriate forum" further from paragraph 4.81 below. The discretion of courts to stay proceedings over which they have legitimately asserted adjudicatory jurisdiction, reflect the other principle of international jurisdiction, namely, the fairness and practicalities of litigation.

4.37 Special rules apply to service on partnerships and companies. If two or more individuals carry on a business in England and Wales as a partnership, a claim can be brought against that partnership even if the individual partners are abroad at the time. For companies, service may be made at a registered address,[164] or at a place within England and Wales where the company carries on business.

Service out of the jurisdiction

4.38 If the defendant is not physically within (or, as relevant, does not have a place of business in) the territory of England and Wales, the claimant must generally obtain permission from the court to serve the claim form on the defendant outside England and Wales.[165] In the nomenclature of the Civil Procedure Rules 1998, this is known as "service out of the jurisdiction" or more colloquially amongst practitioners as "service out," and an application must be made in accordance with Part 6 of the Civil Procedure Rules.[166] This is done without notice to the defendant.

4.39 Generally, the court will grant permission (and thereby accept international jurisdiction over the claim) if the claimant satisfies the court that the following three conditions are met.[167]

(1) There is a good arguable case that each pleaded claim falls within one or more of the "jurisdictional gateways" set out in Practice Direction 6B of the Civil Procedure Rules.

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161 *Colt Industries Inc v Sarlie* [1966] 1 WLR 440. For further discussion on this point, see Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins on the Conflict of Laws* (16th ed 2022) para 11-042.

162 Civil Procedure Rules, r 6.5(3)(a).

163 For example, the place of business is listed under Civil Procedure Rules, r 6.9(2).

164 Companies Act 2006, s 1139(1) sets out methods of service for companies incorporated in the UK. S 1139(2) deals with overseas companies with registered establishments in the UK. Part 6 of the Civil Procedure Rules also allows service by some other means.

165 There are certain exceptions including in the context of consumer contracts as discussed below from para 5.5. Other exceptions include where the defendant is in Scotland or Northern Ireland, or in some situations where the parties have agreed that the courts of England and Wales have exclusive jurisdiction.

166 In particular, Practice Direction 6B.

167 *FS Cairo (Nile Plaza) v Lady Brownlie* [2021] UKSC 45, [2021] 3 WLR 1011 at [25] by Lord Lloyd-Jones.

(2) There is a serious issue to be tried on the merits of the claim.[168]

(3) In all the circumstances, England and Wales is the proper place or appropriate forum to bring the claim.[169]

4.40 In terms of the two key principles of international jurisdiction set above, it has been said that the second two conditions relate to the fairness and practicalities of the litigation, whereas the first relates to the justifying, as a matter of public international law, of the assertion of adjudicatory jurisdiction.[170] As the latter two do not engage directly the issues arising from territorial constraints on the adjudicatory jurisdiction of national courts, our main focus is the jurisdictional gateways.

The jurisdictional gateways

4.41 The jurisdictional gateways identify the connections between the intended proceedings and the territory of England and Wales that are considered sufficient to justify summoning a foreign defendant to the courts of England and Wales to answer a claim.

4.42 The gateways have their origin in the mid-19th century General Orders, which were subsequently regulated by the Rules of Court promulgated under the Supreme Court of Judicature Act 1875 and its successors. The individual grounds on which service out of the jurisdiction may be granted have been extended over the years. Most recently, they were expanded in October 2022, following recommendations made by the Service Sub-Committee of the Civil Procedure Rule Committee.[171]

4.43 Today, 38 separate gateways are provided for in paragraph 3.1 of Practice Direction 6B in the Civil Procedure Rules 1998. We consider these below, and as we will see, the vast majority of these are expressed in terms of an act, person, or object within the territory of England and Wales. As such, they reflect the principle of territoriality.

4.44 Given that digitisation and decentralisation pose novel challenges to the territorial premise underpinning public and private international law, as we explained in Chapter 3, our primary focus in Chapters 4 and 5 is on the gateways expressed in territorial terms.

4.45 In the section below we provide an overview of the relevant jurisdictional gateways.

Contracts – gateways 6 and 7

4.46 Practice Direction 6B, paragraphs 3.1(6) reads as follows:

> A claim is made in respect of a contract where the contract -

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168 Civil Procedure Rules, r 6.37(1)(b) refers to a reasonable prospect of success.

169 Above r 6.37(3).

170 A Held, "The modern property situationship" (2024) *Journal of Private International Law* (forthcoming).

171 Implemented by the 149th Update – Practice Direction Amendments.

(a) was (i) made within the jurisdiction or (ii) concluded by the acceptance of an offer, which offer was received within the jurisdiction;

(b) was made by or through an agent trading or residing within the jurisdiction or

(c) is governed by the law of England and Wales.

4.47 Practice Direction 6B, paragraph 3.1(7) reads as follows:

> A claim is made in respect of a breach of contract committed, or likely to be committed within the jurisdiction.

4.48 There are also gateways applying the same rules to claims for a declaration that no contract exists[172] and to claims for unlawfully causing or assisting in a breach of contract.[173]

4.49 The gateways are designed to be relatively wide. A claimant needs only to show that one of these factors applies. Gateway 6 refers to a claim made "in respect of a contract". This is broader than claims arising under a contract and includes, for example, a restitution claim to recover overpayments made in performance of a contract.[174]

4.50 Prior to October 2022, gateway 6(a) was limited to contracts made within the jurisdiction. This was a difficult test to meet because this required one to look at how an offer is accepted, and generally[175] where that acceptance is communicated to the offeror. The test under the new gateway is easier because it no longer matters if the claimant is the offeror or the acceptor. A claimant seeking to bring a claim in England and Wales can do so on the basis *either* that they received the offer here, or that they received the acceptance in the UK.

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172 Civil Procedure Rules, Practice Direction 6B, para 3.1(8). This addresses the gap identified in *Finnish Marine Insurance Co v Protective National Insurance Co* [1990] 1 QB 1078, that such a declaration could not fall within the other contract gateways if no contract exists.

173 Civil Procedure Rules, Practice Direction 6B, para 3.1(8A). This gateway was introduced from 1 October 2022 by the 149th Update.

174 *Albon v Naza Motor Trading* [2007] EWHC 9 (Ch), [2007] 1 WLR 2489. See also *Cherney v Deripaska* [2009] EWCA Civ 849, [2010] 2 All ER (Comm) 456. However, there are limits to the breadth of the phrase "in respect of a contract". For example, it does not necessarily include a claim made in respect of another related contract, where the claim relies on a mere factual connection between two contracts: *Cecil v Bayat* [2010] EWHC 641 (Comm) at [49]. See also *Global 5000 Ltd v Wadhawan* [2012] EWCA Civ 13, [2012] 2 All ER (Comm) 18.

175 An approach which focusses on the communication of acceptance has not always been applied by the courts. See, for example, *Conductive Inkjet Technology Ltd v Uni-Pixel Displays Inc* [2013] EWHC 2968 (Ch), in which it was found that an agreement which was signed in both England and the United States, having been agreed by the parties by email exchange shortly beforehand, was made in both England and Texas. See at [72] – [73], where Mr Justice Roth recognised that "it is possible in principle for a contract to be made in two places at once, so that if one of those two places is England the jurisdictional requirement of what is now PD 6B para 3.1(6)(a) is made out […] it would in my view be wholly artificial to determine the place of the making of the contract by applying the traditional 'posting' rule, dependent upon which party happened to send the fully executed document. I therefore find that CIT has a good arguable case that the 2005 NDA was made in both England and Texas."

Torts – gateway 9

4.51 Paragraph 3.1(9) of Practice Direction 6B reads as follows:

> A claim is made in tort where:
>
> (a) damage was sustained, or will be sustained, within England and Wales;
>
> (b) damage which has been or will be sustained results from an act committed, or likely to be committed, within England and Wales; or
>
> (c) the claim is governed by the law of England and Wales.

4.52 Before 1987, this gateway was confined to "a tort committed within the jurisdiction".[176] It has been expanded over the years.

4.53 In January 1987, it was extended to include claims where "the damage was sustained" within the jurisdiction. This was to reflect the Brussels Convention, where Article 5(3) assigned jurisdiction in "matters relating to tort, delict or quasi-delict" to "the place where the harmful event occurred".[177] The European Court of Justice subsequently interpreted this to include both the place where damage occurred and the place where the event giving rise to the damage occurred.[178]

4.54 In 1998, when rules were transplanted from Rules of the Supreme Court to the Civil Procedure Rules, its wording was further amended: instead of requiring that "*the* damage was sustained" in the jurisdiction,[179] it simply required that "damage was sustained within the jurisdiction".[180]

4.55 Gateway 9(a) was recently considered by the Supreme Court in *Brownlie I and II.*[181] These cases concerned a tort claim arising from a road traffic accident in Egypt. The harmful act – the car crash – and the immediate damage – personal injury and death – both occurred in Egypt. However, the claimant alleged that she had suffered, among other things, financial damage in England and Wales resulting from the death of her husband in that crash. In *Brownlie II,* the Supreme Court held that to be sufficient to satisfy the first limb of the tort gateway.

4.56 Financial or economic loss is a difficult issue in both the substantive law of torts and in private international law. In *Brownlie II*, Lord Lloyd-Jones was careful to emphasise that, although financial damage was pleaded, the case was not one of pure economic loss because the financial damage resulted from personal injury. Lord Lloyd-Jones continued that, where a tort claim is made in respect of pure economic loss, the issue

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176 Rules of the Supreme Court, Ord 11, r 1(1)(h).

177 See Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 11-184 to 11-195 for further information and discussion on this point.

178 *Bier v Mines de Potasse d'Alsace SA*, Case 21/76 [1976] ECLI:EU:C:1976:166, [1978] QB 708.

179 Rules of the Supreme Court, Ord 11, r 1(1)(f).

180 Civil Procedure Rules, r 6.20(8) prior to the Civil Procedure (Amendment) Rules 2008/2178 coming into effect.

181 *Four Seasons Holdings v Brownlie* [2017] UKSC 80, [2018] 1 WLR 192 and *FS Cairo (Nile Plaza) v Brownlie* [2021] UKSC 45, [2022] AC 995, respectively.

of jurisdiction must be approached with care. In particular, "the more remote economic repercussions of the causative event will not found jurisdiction".[182]

4.57 Therefore, although the decisions in *Brownlie I and II* suggest that the tort gateway is capable of having a very broad application, the gateway should be interpreted more carefully and narrowly in relation to claims for pure economic loss. As we will see, this will often be an important consideration when dealing with claims in relation to interference with digital assets.

4.58 Finally, from 1 October 2022, a third limb was added to the tort gateway, which is satisfied where a tort claim is governed by the law of England and Wales.[183] This mirrors the equivalent limbs which already formed part of the contract[184] and trusts[185] gateways.

Property – gateway 11

4.59 Practice Direction 6B, paragraph 3.1(11) reads as follows:

> The subject matter of the claim relates wholly or principally to property within the jurisdiction, provided that nothing under this paragraph shall render justiciable the title to or the right to possession of immovable property outside England and Wales.[186]

4.60 As with the tort gateway, this gateway has been broadened over the years. Before 1998, various gateways applied to land and to debts "secured on immovable property". Following the implementation of the Civil Procedure Rules 1998, the land and moveable property gateways were amalgamated into a single gateway which has been refined over time.

4.61 In *Re Banco Nacional de Cuba*, Mr Justice Lightman observed that "the evident purpose of the new rule is to lay down a single rule, in place of the three earlier rules, which embraces and extends beyond the contents of those rules."[187] For example, the new rule enables the property gateway to cover situations where a claim is made in respect of a trust which principally includes property within England and Wales, but also includes some property outside England and Wales.

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182 *FS Cairo (Nile Plaza) v Brownlie* [2021] UKSC 45, [2022] AC 995 at [75] by Lord Lloyd-Jones.

183 Civil Procedure Rules, Practice Direction 6B, para 3.1(9)(c), added by the 149th Update – Practice Direction Amendments.

184 Above para 3.1(6)(c).

185 Above para 3.1(16)(c).

186 Above r 6.20(10). As described above, from 1 October 2008 the gateways were moved from r 6.20 to their current location in Practice Direction 6B.

187 *In re Banco Nacional de Cuba*, [2001] 1 WLR 2039 at [33] by Lightman J.

4.62 The caveat relating to immovable property that reflects the long-standing common law rule that the courts of England and Wales do not accept jurisdiction over claims whose substance depends on establishing the title to foreign land.[188]

Constructive or resulting trustees – gateway 15

4.63 Practice Direction 6B, paragraph 3.1(15) reads as follows:

> A claim is made against the defendant as constructive trustee, or as trustee of a resulting trust, and the claim -
>
> (a) arises out of acts committed or events occurring within England and Wales;
>
> (b) relates to assets within England and Wales; or
>
> (c) is governed by the law of England and Wales.

4.64 A constructive trust is a trust recognised by the law on the basis of certain circumstances, as opposed to being one expressly created by the parties. For example, a constructive trust may arise by operation of the law where there is a specifically enforceable contract for the sale of property.[189] The imposition of a constructive trust "anticipates the final outcomes of the sale."[190] The vendor thus holds the particular object promised to be sold on trust for the purchaser, whose beneficial interest in the object of sale subsists until legal title has passed to them, or legal title is acquired by a good faith purchaser without notice of the beneficial interest.

4.65 In slightly different circumstances, a person may be held personally liable as a so-called "constructive trustee" if they receive trust assets, knowing that they have been transferred in breach of trust. By knowingly dealing with such assets, that person is held liable as if they were a trustee by virtue of their participation in the breach of trust,[191] even if no constructive trust is actually imposed.

4.66 The 1990 case of *Metall und Rohstoff v Donaldson Lufkin & Jenrette* concerned claims relating to latter kind of personal liability as a "constructive trustee." The court held that the tort gateway could not apply to such claims.[192] The constructive or resulting trustee gateway was introduced to address this potential gap. The original

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188 *British South Africa Co v Companhia de Moçambique* [1893] AC 602; *Hesperides Hotels v Muftizade* [1979] AC 508).

189 See generally: W Swadling, "Property: General Principles" in A Burrows (ed), *English Private Law* (3rd ed 2013) para 4.32.

190 W Swadling, "Property: General Principles" in A Burrows (ed), *English Private Law* (3rd ed 2013) para 4.32.

191 *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189 at [9] by Lord Sumption. See Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins on the Conflict of Laws* (16th ed 2022) at para 11-222 for further information and discussion on this point.

192 [1990] 1 QB 391 at 473 to 474, by Gatehouse J.

version was narrower than the current version, but over time it has been amended and broadened into its current form.[193]

4.67 There is a separate gateway for claims for "unlawfully causing or assisting" a breach of a constructive or resulting trust, which applies similar rules.[194]

Fiduciary duty – gateway 15B

4.68 Practice Direction 6B, paragraph 3.1(15B) reads as follows:

> A claim is made for breach of fiduciary duty, where—
>
> (a) the breach is committed, or likely to be committed, within the jurisdiction;
>
> (b) the fiduciary duty arose in the jurisdiction; or
>
> (c) the fiduciary duty is governed by the law of England and Wales.

4.69 In addition, there are separate gateways for unlawfully causing or assisting in a breach of fiduciary duty,[195] or for a declaration that no fiduciary duty has arisen.[196]

4.70 In *Bristol and West Building Society v Mothew,* Lord Justice Millett (as he then was) defined a fiduciary as—

> someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal.[197]

4.71 Categories of fiduciaries include agents, trustees, partners, company directors and solicitors.[198]

4.72 These gateways were introduced on 1 October 2022. Before this date, claimants pleading fiduciary duty claims had to rely on another gateway.[199]

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193 See Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins on the Conflict of Laws* (16th ed 2022) at para 11-221 and Lord Justice Coulson (ed), *the White Book 2022*, para 6HJ.30 for further information and discussion regarding the development of this gateway over time.

194 Civil Procedure Rules, Practice Direction 6B, para 3.1(15A)(c). The causing or assisting gateway was introduced with effect from 1 October 2022.

195 Above para 3.1(15C).

196 Above para 3.1(15D).

197 [1998] Ch 1 at 18A-C. See also Digital assets: Final Report (2023) Law Com No 412, para 7.124.

198 Digital assets: Final report (2023) Law Com No 412, para 7.125 with reference to *Al Nehayan v Kent* [2018] EWHC 333 (Comm) at [157].

199 *Twin Benefits v Barker* [2017] EWHC 1412 (Ch) at [110] to [114] by Marcus Smith J.

Restitution – gateway 16

4.73 Practice Direction 6B, paragraph 3.1(16) reads as follows:

> A claim is made for restitution where:
>
> (a) the defendant's alleged liability arises out of acts committed within England and Wales; or
>
> (b) the enrichment is obtained within England and Wales; or
>
> (c) the claim is governed by the law of England and Wales.[200]

4.74 Restitution is a remedy "aimed at returning gains made by a defendant to the claimant."[201] Broadly speaking, a distinction is drawn between restitution for unjust enrichment and restitution for wrongdoing.[202]

4.75 The second and third limbs of this gateway were added in October 2015. Prior to this, it was necessary to show that the acts were committed in England and Wales. In that context, it was held that not all the acts complained of had to be committed in England and Wales, but that "substantial and efficacious" acts must be committed here.[203]

Breach of confidence – gateway 21

4.76 Practice Direction 6B, paragraph 3.1(21) reads as follows:

> a claim is made for breach of confidence or misuse of private information where:
>
> (a) detriment was suffered, or will be suffered, within England and Wales;
>
> (b) detriment which has been, or will be, suffered results from an act committed, or likely to be committed, within England and Wales;
>
> (c) the obligation of confidence or right to privacy arose in England and Wales; or
>
> (d) the obligation of confidence or right of privacy is governed by the law of England and Wales.[204]

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200 Civil Procedure Rules, Practice Direction 6B, para 3.1(16).

201 The Hon Sir William Blair; Lord Brennan, QC; The Right Hon Professor Sir Robin Jacob; The Hon Sir Brian Langstaff, *Bullen and Leake and Jacob's Precedents of Pleadings* (19th ed 2022) para 105-01. See also *Samsoondar v Capital Insurance Co Ltd* [2020] UKPC 33; [2021] 2 All E.R. 1105 at [18] by Lord Burrows as discussed in C Mitchell, P Mitchell and S Watterson, *Goff and Jones on Unjust Enrichment* (10th ed 2022) para 1-14.

202 The Hon Sir William Blair; Lord Brennan, QC; The Right Hon Professor Sir Robin Jacob; The Hon Sir Brian Langstaff, *Bullen and Leake and Jacob's Precedents of Pleadings* (19th ed 2022) para 105-01.

203 *Sharab v Al-Saud* [2012] EWHC 1798 (Ch), [2012] 2 CLC 612 at [69] by Sir William Blackburne, approving the reasoning of Hamblen J in *Cecil v Bayat* [2010] EWHC 641 (Comm).

204 Civil Procedure Rules, Practice Direction 6B, para 3.1(21).

4.77 Again, separate gateways exist for unlawfully causing or assisting in a breach of confidence or misuse of private information[205] and for a declaration that no duty has arisen.[206]

4.78 A separate gateway for breach of confidence or misuse of private information was introduced in 2015. This was shortly after the Court of Appeal decision in *Vidal-Hall v Google Inc*,[207] in which it was held that, whereas a claim for breach of confidence would not fall within the tort gateway, a claim for misuse of private information might. This gateway addresses this discrepancy and provides a single gateway for both breach of confidence and misuse of private information claims.

4.79 Initially, the gateway only included limbs (a) and (b), relating to where the detriment was suffered, or the acts took place. The last two limbs (relating to where the obligation arose, and the governing law) were introduced with effect from 1 October 2022.

Serious issue to be tried

4.80 The requirement that there is a "serious issue to be tried" is ultimately a question of fairness to the defendant. The idea is that the defendant should not be summoned to answer a claim in England if the claim has no reasonable prospect of success such that the defendant would be entitled to summary judgment or strike out of the claim (that is, the case would be dismissed without the need to have a full trial).[208]

> If Alice's claim against Bob had no reasonable prospect of success, for example because there is firm and reliable evidence that Alice had actually stepped into the ongoing traffic on a pedestrian red light, Bob should not be forced to come and defend the claim in England and Wales, only for the claim to be dismissed on a summary basis.

Proper place to bring the claim

4.81 The requirement that the claimant must prove that England and Wales is the proper place in which to bring the claim[209] involves satisfying the court that England and Wales is the appropriate forum for the trial, and that the court ought to exercise its discretion to permit service out of the jurisdiction.[210] The proper place to bring the claim is often referred to as the *forum conveniens* (the appropriate forum).

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205 Above para 3.1(23).

206 Above para 3.1(22).

207 [2015] EWCA Civ 311, [2015] 3 WLR 409.

208 Lord Justice Coulson, *White Book 2023*, 6.37.15.

209 Civil Procedure Rules, r 6.37(3).

210 *FS Cairo (Nile Plaza) v Lady Brownlie* [2021] UKSC 45, [2021] 3 WLR 1011 at [25] and [75] to [79] by Lord Lloyd-Jones. Some cases have formulated the test as requiring the claimant to satisfy the court that England and Wales is "clearly or distinctly the appropriate forum". See *Spiliada Maritime Corp v Cansulex*

4.82 This limb of the test for service out of the jurisdiction provides the court with considerable discretion to refuse permission. This is the subject of a very detailed line of common law authority.[211] Matters to be taken into account are wide and varied. These range from the everyday practicalities of litigation to the fairness as between the parties in relation to such practical matters.

Cases where permission to serve out of the jurisdiction is not required

4.83 Outside of the gateways, special dispensation of the formalities around the service requirement is afforded to certain parties coming before the court. Under section 15B of the Civil Jurisdiction and Judgments Act 1982, where a consumer domiciled in the UK concludes a contract with a trader who "pursues" or "directs" activities to the UK,[212] the consumer can bring a claim before the UK courts without seeking permission. Furthermore, proceedings may only be brought against the consumer in the courts of the part of the United Kingdom in which the consumer is domiciled.[213]

THE CORE PROBLEM FOR INTERNATIONAL JURISDICTION

4.84 The territorial premise of both public international law and private international law, as outlined in Chapter 3 above, has particular consequences in the context of international jurisdiction. These can be examined in both theoretical terms as well as by reference to cases that have come before the courts. We consider both in turn.

The problem in theory

4.85 As noted in Chapter 3, the core challenge that digitisation and decentralisation pose to private international law is ultimately rooted in a tension between the territorial premise of private international law and public international law, and objects and acts that are by their nature aterritorial or "omniterritorial".[214]

4.86 In the context of the rules of jurisdiction in England and Wales, this tension arises from the fact that most of the gateways are expressed in territorial terms. Where an act or object cannot be localised in any one territory or can be said to be localised in multiple territories each to an equal extent, to say that the act or object occurred or is "within the territory" of England and Wales for purposes of the gateways is not without significant difficulty.

4.87 It is important to note that in matters of international jurisdiction, it is not necessarily problematic if the facts and issues of the case disclose a range of territorial connections that point to different courts. Unlike with applicable law, there is no need to single out one connecting factor that points to a single legal system. In the context of international jurisdiction, use of a connecting factor as the basis for accepting

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Ltd ("The Spiliada") [1987] AC 460, 481, by Lord Goff: "The effect is, not merely that the burden of proof rests on the plaintiff to persuade the court that England is the appropriate forum for the trial of the action, but that he has to show that this is clearly so".

211 *Spiliada Maritime Corp v Cansulex Ltd ("The Spiliada")* [1987] AC 460, 478 to 483, by Lord Goff.

212 See the definition of a consumer contract in Civil Jurisdiction and Judgments Act 1982, s 15E and *Dooley v Castle Trust and Management Ltd* [2022] EWCA Civ 1569.

213 Civil Jurisdiction and Judgments Act 1982, s15B(3).

214 M Lehmann, "Extraterritoriality in Financial Law" in A Parrish and C Ryngaert (eds), *Research Handbook on Extraterritoriality in International Law* (2023) 427.

jurisdiction over the claim needs only to be sufficiently legitimate so as to justify an exercise of the adjudicatory jurisdiction.

4.88 Where more than one forum can satisfy this test, there are well-established doctrines that regulate such conflicts of international jurisdiction. Under EU law, the doctrine of *lis alibi pendens* ('dispute pending elsewhere') holds that the first court to accept jurisdiction over the claim will prevail, and all others will decline jurisdiction on the basis that the matter is being heard in another forum.[215]

4.89 In the law of England and Wales, the possibility of concurrent proceedings in other jurisdictions is considered under the *forum conveniens* limb of the test for service out of the jurisdiction. It is, therefore, worth the reminder that the gateways are only one of three limbs considered: as well as (1) satisfying the gateways limb, the claimant must also show that (2) there is a serious issue to be tried, and (3) England and Wales is the appropriate place for the trial. The gateways do not themselves typically engage questions of fairness between the parties or the practicalities and fairness of the litigation.[216]

4.90 In this context, the gateways have been increasingly the topic of controversy. For present purposes, such controversy can be said to have originated in the 2013 UK Supreme Court case of *Abela v Baadarani*.[217]

4.91 In that case, Lord Sumption (with whom the court agreed unanimously on this point), expressly rejected the traditional view that permission to serve outside the jurisdiction was an 'exorbitant' exercise of the power of the courts to be exercised with utmost caution. Lord Sumption said:

> in the overwhelming majority of cases where service out [of the jurisdiction] is authorised there will have been either a contractual submission to the jurisdiction of the English court or else a substantial connection between the dispute and this country … Litigation between residents of different states is a routine incident of modern commercial life. A jurisdiction similar to that exercised by the English court is now exercised by the courts of many other countries … It should no longer be necessary to resort to the kind of muscular presumptions against service out which are implicit in adjectives like 'exorbitant'. The decision is generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum.

4.92 Lord Sumption's view was taken by some practitioners and academic commentators as indicative of a broader move towards the abolition of the gateways requirement by subsuming it under the *forum conveniens* limb of the test for service out of the

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215 Brussels I Regulation (recast) (EU) No 1215/2012, Official Journal L 351 of 20.12.2012, art 33 and 34 address the doctrine.

216 Gateways (3) and (4) for example have been described as controversial foundations for the exercise of the adjudicatory jurisdiction; see the discussion in A Mills, "Exorbitant Jurisdiction and the Common Law" in J Harris and C McLachlan (eds) *Essays in International Litigation for Lord Collins* (2022) 256-260.

217 UKSC [2013] 44; [2013] 1 WLR 2043.

jurisdiction. This view precipitated a broader debate relating to the nature of the gateways.[218]

4.93 This suggestion, however, was expressly repudiated by Lord Sumption in the *Brownlie I* case we mentioned above:

> The jurisdictional gateways and the discretion as to *forum conveniens* serve completely different purposes. The gateways identify relevant connections with England, which define the maximum extent of the jurisdiction which the English court is permitted to exercise. Their ambit is a question of law. The discretion as to *forum conveniens* authorises the court to decline a jurisdiction which it possesses as a matter of law, because the dispute, although sufficiently connected with England to permit the exercise of jurisdiction, could be more appropriately resolved elsewhere. The main determining factor in the exercise of the discretion on *forum conveniens* grounds is not the relationship between the cause of action and England but the practicalities of litigation. The purpose of the discretion is to limit the exercise of the court's jurisdiction, not to enlarge it and certainly not to displace the criteria in the gateways. English law has never in the past and does not now accept jurisdiction simply on the basis that the English courts are a convenient or appropriate forum if the subject matter has no relevant jurisdictional connection with England. In *Abela v Baaderani*, I protested against the importation of an artificial presumption against service out as being inherently 'exorbitant', into what ought to be a neutral question of construction or discretion. I had not proposed to substitute an alternative, and equally objectionable, presumption in favour of the widest possible interpretation of the gateways simply because jurisdiction thus conferred by law could be declined as a matter of discretion.

4.94 Lord Sumption's view was not adopted by the majority in *Brownlie II* on the issue of whether the claimant's financial loss fell within limb (a) of the tort gateway. Nevertheless, it has been said that Lord Sumption's views in *Brownlie I* "reaffirmed what is an important statement of principle."[219]

4.95 As Professor Mills has explained, the Supreme Court had "directed lower courts not to approach the exercise of service out [of the] jurisdiction from a cautious or hesitant standpoint."[220] This is consistent with the underlying principle that, in some cases, a state may legitimately exercise its adjudicatory jurisdiction in a matter consistent with the principles of public international law, even if the defendant is not physically present in the territory at the time when proceedings are issued.[221]

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218 See, for example, the opposing views in A Briggs, *Civil Jurisdiction and Judgments* (7th edn 2021) para 24.06 and A Arzandeh, ""Gateways" within the Civil Procedure Rules and the Future of Service-Out Jurisdiction in England" (2019) 15(3) *Journal of Private International law* 516-540.

219 A Mills, "Exorbitant Jurisdiction and the Common Law" in Harris and McLachlan (eds), *Essays in International Litigation for Lord Collins* (2022) 252.

220 Above 251.

221 See generally A Mills, "Exorbitant Jurisdiction and the Common Law" in J Harris and C McLachlan (eds) *Essays in International Litigation for Lord Collins* (2022). Professor Mills explains, at pp 251 to 252. that the "general caution with which the English courts have traditionally approached the exercise of jurisdiction in service out cases is largely reflective of a historical conflation of adjudicative and enforcement jurisdiction in

4.96 The simplest of such cases would include, for example, where a foreign defendant has injured an English-domiciled claimant whilst on holiday in England and Wales and is summoned by the courts of England and Wales after returning home to answer a claim subsequently issued by the claimant. Given that there is a strong connection between the case and the territory of England, it is unproblematic as a matter of public international law for the courts of England and Wales to assert international jurisdiction over the claim; even if the claim is brought against a foreign defendant not physically present on the territory when the claim is served.

> Given that: (i) Alice and Bob's road traffic accident occurred in Egypt; (ii) Bob has no personal connections to England and Wales; and (iii) Bob is not physically present in England and Wales when Alice issues her claim in the courts of England and Wales, summoning Bob from Egypt to England and Wales to answer Alice's claim may be problematic.
>
> If, by contrast, Alice and Bob's road traffic accident had in fact occurred in England and Wales, there is less difficulty with Bob being summoned from Egypt *back* to England and Wales to answer Alice claim.

4.97 Mr Justice Foxton has further said that the fact Lord Sumption's view in *Brownlie I* on the scope of the tort gateway did not find favour with the majority in *Brownlie II* does not "expressly question the continuing utility of the gateway requirement."[222] Mr Justice Foxton continued:

> … the gateways serve the "important purpose of providing an objective, justifiable and to a significant extent internationally recognised nexus between a claim and this jurisdiction, and that they should not be replaced by a *forum conveniens* "free-for-all"…the rules, or the considerations which underpin them, enjoy a degree of international support, and this is valuable in a context in which states are naturally sensitive when another state casts its extraterritorial net too wide: not simply because of considerations of sovereignty and comity, but because of the competitive market which international commercial dispute resolution has become. Just as it mattered what foreign governments … thought of the gateways for service out of the jurisdiction in 1886, so it matters what those in Berlin, Paris, Singapore, and Sydney think now – particularly for a jurisdiction which remains desirous of joining the Lugano Convention or a similar multinational regime.[223]

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the context of private international law. It is difficult to see the justification for a 'muscular presumption' against the exercise of jurisdiction where, for example, proceedings are brought against a foreign party in relation to a car accident in England which has injured an English party, or in relation to a breach of a contractual obligation that was to be performed in England."

222 D Foxton, "The jurisdictional gateways – some (very) modest proposals" [2022] *Lloyd's Maritime and Commercial Law Quarterly* 82.

223 Above 83.

4.98 Reconsidering the function of gateways as a whole is beyond the terms of reference for this project. Nevertheless, we consider it is important for us to be aware of these debates. As Amy Held has said in the context of international jurisdiction over decentralised assets as "objects that exist nowhere and everywhere *at the same time*":

> In the absence of any clear link to one particular territory, it may be tempting to abandon the search for an adequate link between the forum with the facts of the case and issues in dispute; and to focus purely on the fairness and practicalities of litigation. Such approach, however, risks undermining the considerations of public international law that underpin the exercise of sovereign power in adjudicating a dispute when a court cannot assert ordinary personal jurisdiction over the defendant… [the cases show that] careful attention should be given to the 'everywhere' aspect when determining whether there really is an adequate link between the dispute and the forum in which the claimant has chosen to issue proceedings.[224]

4.99 Taking all these considerations into account, we proceed on the basis that the gateways requirement continues to reflect an important principle of public international law. We therefore think they should be treated in a principled way as we consider international jurisdiction in the context of private international law.

The problem in practice

4.100 The last few years have seen a series of reported judgments about whether the courts of England and Wales have jurisdiction to hear claims concerning crypto-tokens.

4.101 Many of these cases share a similar pattern of facts. A claimant based in England and Wales has suffered a cyber-attack, which has resulted in a loss of their crypto-tokens. With the help of a specialist investigator, the claimant has traced the missing tokens to an exchange based overseas. The claimant then brings an action against "persons unknown" who have caused the loss. However, the main target for the litigation is often not the unknown hacker but the exchange. This is because the exchange is often the only identifiable party and, moreover, has current control over the crypto-tokens in question. The hope is that the exchange will provide information about the account holder and freeze their account. If the claimant can prove entitlement to the asset, this may eventually result in the exchange returning the crypto-tokens to the claimant.

4.102 In asking for permission to serve the defendants in such cases, claimants have tended to plead several claims, and point to multiple gateways – in tort, property, constructive trust, restitution and breach of confidence.

4.103 The courts have tended to be sympathetic to such claims. Faced with a claimant based in England and Wales who has suffered a loss, the courts have an instinctive desire to provide a remedy. In these circumstances, they have generally accepted jurisdiction on the basis of several different gateways, including those concerned with

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[224] A Held, "The modern property situationship" (2024) *Journal of Private International Law* (forthcoming).

tort, constructive trustees and property. Some stakeholders we have talked to have welcomed the courts' flexibility in applying the existing legal rules to new challenges.

4.104 However, the basis of these decisions is not necessarily consistent or clear cut. Other stakeholders and some academic commentary suggest that the basis of some of these decisions might not withstand rigorous debate and analysis. In addition, most of these applications, having been made at an interim stage of proceedings without notice to the defendant, have not had the benefit of full argument on both sides.[225]

4.105 It has also been suggested that some decisions on jurisdiction may be difficult to explain to a foreign court when seeking to enforce a judgment.[226] As we set out above, there is a close relationship between the various grounds on which a court accepts jurisdiction, and the grounds on which a foreign court will recognise and enforce the resulting judgment. It is, therefore, useful to be able to point to a clear and internationally recognised basis upon which the courts of England and Wales accept jurisdiction.

4.106 These difficulties are unsurprising in the circumstances. Judges are often required to make decisions immediately, after hearing from only one party. Given the challenges involved with localising acts and objects in the digital and decentralised spheres, the task is far from easy. In addition, these difficulties are exacerbated in practice by two further factors.

4.107 The first is theoretical. There is no inherent logic underpinning the gateways as a coherent whole. As Mr Justice Foxton observed:[227]

> At first sight, the current set of gateways represents a rather rag-bag collection, added to in a piecemeal fashion over time…given the rather episodic nature of their creation, it might be thought a futile task to search for any underlying rationales in their selection.

4.108 As we said above, reconsidering the function of gateways as a whole is beyond the scope of our project. We nevertheless recognise that part of the difficulty in practice has been that the present framework of the gateways is not entirely clear.

4.109 The second is practical. Applications for service out of the jurisdiction invariably arise at an early stage of the proceedings. At this stage, they are inherently tied up with the practical concerns and litigation strategies of the parties in the case. Given that these applications are made by the claimant only without the presence of the defendant, the matters that are considered tend to be weighted in the claimant's favour,

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225 Amy Held has noted the express statement by Butcher J in *Ion Science* that his judgment should not be considered authority and concludes that "more attention should be paid to the judge's statement that his judgment should not be taken as authority for the proposition that Bitcoins are situate in the place where its owner is domiciled.": A Held, "Does Situs Actually Matter when Ownership to Bitcoin is In Dispute?" (2021) *4 Butterworths Journal of International Banking and Financial Law* 269.

226 A Held, "Cryptoassets as Property Under English Law Pt II: Ownership, Situs, and the Circular Question of Jurisdiction" (2023) 4 *Butterworths Journal of International Banking and Financial Law* 236.

227 D Foxton, "The Jurisdictional Gateways – some (very) modest proposals" [2022] *Lloyd's Maritime and Commercial Law Quarterly* 73.

notwithstanding the duty of full and frank disclosure that is imposed upon a claimant in such circumstances.

4.110 Nevertheless, as noted above, proceedings are often issued against an unknown defendant for tactical purposes to target an exchange intermediary. There may be little or no intention to pursue the underlying claim against the defendant "person unknown".

4.111 It has been also suggested that such tactical concerns of litigation have resulted in a distortion of the gateways insofar as they apply to types of claims and causes of action. Claims have passed through, for example, the constructive trustee gateway and breach of confidence gateway in circumstances where it was not clear such causes of action would actually arise on the facts pleaded.[228]

4.112 Such concerns relating to the causes of action technically should be addressed in the requirement that there be a serious issue to be tried. Nevertheless, we recognise that the circumstances in which decisions are made in applications for service out of the jurisdiction, especially when applied to novel facts and circumstances, are not always ideal for a clearer delineation of the issues.

[228] A Held, "Crypto Assets and Decentralised Ledgers: Does Situs Actually Matter?" in A Bonomi, M Lehmann and S Lalani (eds), *Blockchain and Private International Law* (2023) n 64, citing L Tucker, N Le Poidevin and J Brightwell, *Lewin on Trusts* (20th ed 2020) para 8-029 (trusts); A Held and M Lehmann, "Hacked Crypto-Accounts, the English Tort of Breach of Confidence, and Localising Financial Loss under Rome II" (2021) 10 *Butterworths Journal of International Banking and Financial Law* 708 (breach of confidence). We discuss this further in Ch 5 from para 5.121.

Chapter 5: International jurisdiction – specific issues

INTRODUCTION

5.1 In this chapter, we consider specific issues surrounding the international jurisdiction of the courts of England and Wales in respect of digital and decentralised phenomena. We consider the cases that have come before the courts, and scenarios that are either prevalent in market and legal practice, or which may cause some theoretical difficulty.

5.2 Here, we consider whether cases involving acts that arguably occur "everywhere and nowhere", or objects that arguably are located "everywhere and nowhere", have sufficient links to the territorial boundaries of England and Wales such that an exercise of jurisdiction is justified.

5.3 We organise this section slightly differently to how we set out the jurisdictional gateways in Chapter 4. As we saw in Chapter 4, the heads of jurisdiction in England and Wales are organised according to the type of claim in respect of which permission is sought. Only some of the sub-limbs express a territorial connecting factor. As we will see, many of these sub-limbs are expressed in materially similar terms across different heads of jurisdiction. We therefore consider these together.

CONSUMERS DOMICILED IN ENGLAND AND WALES

5.4 As discussed in Chapter 4, a claimant generally needs to seek permission from a court in England and Wales to serve a claim form outside England and Wales. However, we also said that special rules apply to consumers.

5.5 Under section 15B of the Civil Jurisdiction and Judgments Act 1982, where a consumer domiciled in the UK concludes a contract for consumer purposes with a trader who "pursues" or "directs" activities to the UK,[229] the consumer can bring a claim on the consumer contract in the UK courts without seeking permission.

5.6 When the UK was a member of the EU, this provision was set out in EU law, first in the Brussels Convention; then in the Brussels I Regulation; and finally in the Brussels I Regulation (recast). The Court of Justice of the European Union (CJEU) has considered the meaning of the words on several occasions. Although the CJEU's decisions are not binding on the UK courts where provisions have been modified, CJEU decisions may still be persuasive, and are an important aid to interpretation.

5.7 The definition of "pursuing" or "directing" activities to the territory of a particular Member State is the subject of detailed jurisprudence at the CJEU level.[230] For

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229 See the definition of a consumer contract in Civil Jurisdiction and Judgments Act 1982, s 15E and *Dooley v Castle Trust and Management Ltd* [2022] EWCA Civ 1569.

230 We discuss these cases in Ch 8.

example, say a UK consumer googles “buy bitcoin”, and then clicks on a sponsored website taking them to an exchange. By paying for sponsorship, the exchange has “directed activities” to the UK. This means that if the consumer subsequently enters into a contract with the exchange and a dispute arises, the consumer has the right to bring a claim before the UK courts without requiring permission from the courts to serve out of the jurisdiction.

5.8 The definition of a “consumer contract” makes it clear that such contracts fall within the special rules of jurisdiction where the trader has “pursued” or “directed” activities to the UK.[231] We explore this in further detail in Chapter 8.

5.9 We are of the preliminary view that the vast majority of consumer contracts in the digital and decentralised contexts do not pose any significant new difficulties compared to other cross-border consumer contracts that are well-established in the jurisprudence. We consider, in particular, the test for “directing” activities in more depth in Chapter 8.

5.10 In the present context of jurisdiction, we consider that the fact that the business is a crypto exchange rather than a shipping company or a hotel[232] would not necessarily change the analysis of whether the business has directed its services to consumers domiciled in the UK.

Question 1.

5.11 In this question, we seek views and evidence on jurisdiction over consumer contracts.

(1) To what extent can the issue of jurisdiction over consumer contracts in the digital and decentralised contexts be accommodated by section 15B of the Civil Jurisdiction and Judgments Act 1982?

(2) Does the fact that the business is a crypto-business, as opposed to any other business, change the analysis of whether a business has directed its services to consumers located in the UK?

(3) Are there any changes or clarifications that are needed in respect of the issue of jurisdiction over consumer contracts?

(4) To what extent does this issue cause problems in practice (or is likely to in future)?

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231 See n 229 above.

232 As were the businesses in the conjoined Case C-585/08 *Pammer v Reederei Karl Schlüter GmbH & Co KG* [2010] 12 WLUK 196.

CONTRACTS CONCLUDED WITHIN ENGLAND AND WALES

5.12 In our 2021 Advice to Government on Smart Legal Contracts, we highlighted some challenges in applying the gateways for contractual disputes to smart legal contracts.

5.13 One of these challenges was the difficulty of the gateway relating to a contract made in England and Wales. This required one to look at how an offer is accepted, and generally where that acceptance is communicated to the offeror.[233] This requirement often leads to technical and difficult disputes over which party made the offer, and which the acceptance. It also depends on whether the acceptance is communicated by instantaneous or non-instantaneous means. If, for example, acceptance is communicated by telephone or email, the contract is made where the offeror is when they receive the acceptance.[234] By contrast, if acceptance is communicated by post, the contract is "made" in the place where the acceptance is posted.[235] These distinctions were criticised for being impractical, artificial and arbitrary.[236]

5.14 We highlighted the difficulties of applying this rule to smart contracts, where the acceptance may come from a machine rather than a human being.[237] Furthermore, the acceptance may never be communicated to the offeror at all. We gave an example where A deploys a computer programme on a distributed ledger which makes an offer that is subsequently accepted by a computer programme deployed by B.[238] As we commented, consultees identified a range of potential difficulties and uncertainties in applying the rules over where the contract is made.[239]

5.15 As we explained in Chapter 4, the contract gateways were amended on 1 October 2022. Practice Direction 6B, paragraphs 3.1(6) now reads as follows:

> A claim is made in respect of a contract where the contract -
>
> (a) was (i) made within the jurisdiction or (ii) concluded by the acceptance of an offer, which offer was received within the jurisdiction;
>
> (b) was made by or through an agent trading or residing within the jurisdiction; or
>
> (c) is governed by the law of England and Wales.

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233 An approach which focusses on the communication of acceptance has not always been applied by the courts. See, for example, Conductive Inkjet Technology Ltd v Uni-Pixel Displays Inc [2013] EWHC 2968 (Ch), in which it was found that an agreement which was signed in both England and the United States, having been agreed by the parties by email exchange shortly beforehand, was made in both England and Texas. See at [72] – [73], by Mr Justice Roth.

234 *Entores Ltd v Miles Far East Corp* [1955] 2 QB 327.

235 Above.

236 See *Four Seasons Holdings Inc v Brownlie* [2017] UKSC 80, [2018] 1 WLR 192 at [16] by Lord Sumption

237 Smart Legal Contracts: Advice to Government (2021) Law Com No 401, paras 7.18 to 7.38.

238 Above para 7.21.

239 Above para 7.22. We said that we would consider the issue further in this project.

5.16 In light of the amendments to the contract gateway, we consider that this and many of the difficulties we had highlighted are now less problematic.[240]

5.17 One issue, however, that we identified in our Advice and which we consider remains outstanding, is how the gateways can be applied when the contract has been concluded by a machine or by the operation of smart contract code.

5.18 We note the views expressed in response to our Smart Contract Call for Evidence that one should look at the place of the real-world actor who is the contracting party, rather than the location of the participating computer.[241]

5.19 Our preliminary view is that there is some theoretical uncertainty despite the development of gateway 6(a). We also recognise that, although the question of where a smart contract is made has not yet come before the courts, the issue may have arisen in commercial and legal practice.

Question 2.

5.20 In this question, we seek views and evidence on jurisdiction founded on the basis that a contract was concluded in England and Wales.

(1) How should the courts apply gateway 6(a) to a smart contract? Should the relevant connecting factor be the participating computer, or the real-world actor?

(2) If gateway 6(a) should use a connecting factor based on the real-world actor, how should their location be determined? Should it be by their habitual residence, their domicile, or at the place where they happen to be at the time the contract was formed?

(3) Has the question of where a smart contract is made arisen in legal and commercial practice? If so, please provide details.

(4) To what extent is it likely that the question of where a smart contract is made will become prevalent in practice?

DAMAGE OR DETRIMENT SUSTAINED IN ENGLAND AND WALES

5.21 The location of damage or detriment is used as a connecting factor to found jurisdiction in a range of non-contractual claims. Under Practice Direction 6B paragraph 3.1, relevant provisions include:

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240 Eg, in *Soleymani v Nifty Gateway LLC* [2022] EWCA Civ 1297, Popplewell LJ explained at [93] to [95] that the amendment of the contract gateway to include those contracts concluded by acceptance of an offer received within the jurisdiction will address concerns for a "whole cohort of consumers seeking to reply on the consumer protections" in the Consumer Rights Act 2015 in relation to "goods and services bought on the internet from the UK".

241 Smart Legal Contracts: Advice to Government (2021) Law Com No 401, para 7.31.

(1) gateway 9(a): a claim made in tort where "damage was sustained, or will be sustained, within England and Wales."[242]

(2) gateway 21(a): a claim made in breach of confidence and misuse of private information where "detriment was suffered, or will be suffered within England and Wales."[243]

The theoretical challenge

5.22 As noted in Chapter 3, damage and detriment can be notoriously difficult to localise in the online and decentralised contexts. A single act may give rise to damage sustained in multiple places. Alternatively, where the damage consists of deprivation of access to an online account, damage might theoretically be sustained anywhere in the world from where the victim was able to access an online account by simply logging in via the internet.

5.23 This builds upon an existing issue in the substantive law of torts as to pure financial or economic loss and losses that are too remote. We said in Chapter 4 that the *Brownlie* litigation concerned financial losses the claimant alleged she had sustained as a result of her own personal injury and her husband's death that resulted from the car accident in Egypt. By a majority of four to one, the Supreme Court in *Brownlie II* held that this was sufficient for the purposes of the tort gateways in the courts of England and Wales.[244]

5.24 Nevertheless, in *Brownlie II*, Lord Lloyd-Jones was careful to emphasise that the claim concerned financial damage resulting from personal injury, and was not therefore a claim for pure economic loss. Where a tort claim is made in respect of pure economic loss, the issue of jurisdiction must be approached with care. In particular, "the more remote economic repercussions of the causative event will not found jurisdiction".[245]

5.25 Therefore, although the decisions in *Brownlie I and II* suggest that the tort gateway is capable of having a very broad application, the gateway may need to be interpreted more carefully and narrowly in relation to claims for pure economic loss.

5.26 Pure financial or economic damage is also the subject of a long line of CJEU jurisprudence, which applies to both the Rome II Regulation on the law applicable to non-contractual obligations and Brussels I Regulation on jurisdiction and enforcement in civil and commercial matters (recast). These two Regulations are to be interpreted in a harmonious manner.

5.27 As we discuss in Chapter 9, the courts of England and Wales are presently bound by the jurisprudence of the CJEU in matters relating to applicable law, when deciding the

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242 Civil Procedure Rules, Practice Direction 6B, para 3.1(9)(a).

243 Above para 3.1(21)(a).

244 *FS Cairo (Nile Plaza) v Brownlie* [2021] UKSC 45, [2022] AC 995

245 Above at [75] by Lord Lloyd-Jones.

matter at first instance.[246] The courts of England and Wales are not, however, bound by this jurisprudence in the interpretation and application of the gateways. As we will see, this raises questions as to a possible inconsistency in the private international law of England and Wales as between the rules for jurisdiction and the rules for applicable law for matters relating to tort.

The cases

5.28 We have identified six cases concerning jurisdiction relating to crypto-tokens that use the gateways concerning damage or detriment sustained within England and Wales. The courts have not approached the location of damage in a consistent way. We consider each of these cases in turn.

AA v Persons Unknown

5.29 The claimant was an English insurance company that had been induced to pay a ransom in bitcoin to a hacker who had installed malware on the computer systems of one of the claimant's policyholders. The insurer then brought various claims against the hackers (as "persons unknown").

5.30 Mr Justice Bryan held that limb (a) of the tort gateway was satisfied. This was because the insurance company had paid for the bitcoin comprising the ransom from an English bank account and was a company registered in England and Wales. Accordingly, Mr Justice Bryan held that the claimant suffered loss in the money that was used to buy the bitcoin, and that the loss was sustained within England and Wales.[247]

Ion Science v Persons Unknown

5.31 The claimants alleged that false representations relating to an initial coin offering had been made, inducing the second claimant to cede control over his computer for the purpose of transferring funds as an investment in the scheme. The claimants alleged that both the misrepresentation and the cession of control had occurred in England and Wales, because this is where both the second claimant and the computer had been when the representations were made and transfer of funds occurred.

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246 Any question on the validity, meaning or effect of assimilated law should be decided, as far as relevant, in accordance with assimilated case law (both EU and domestic): European Union (Withdrawal) Act 2018 ("EU(W)A 2018"), s 6(3). However, in light of modifications to the EU(W)A 2018 by the Retained EU Law (Revocation and Reform) Act 2023, the principle of supremacy and other general principles of EU law no longer apply: EU(W)A 2018, s 5.

Further, assimilated EU case law does not bind a court sitting in appellate capacity or the Supreme Court: EU(W)A 2018, s 6. New tests, not yet in force, will be inserted into the EU(W)A 2018 to be applied by these courts when deciding whether to depart from assimilated EU or domestic case law: Retained EU Law (Revocation and Reform) Act 2023, ss 6(3) and (4), which in turn replace the old subsection (5) of, and insert a new subsection (5A) into, EU(W)A 2018, s 6. These tests provide a lower threshold for departure than the one previously applied (though still in force for the time being), which is the usual test applied when a court is deciding whether to depart from its own case law: see EU(W)A 2018, s 6(5) pre Retained EU Law (Revocation and Reform) Act 2023 version. Most notably, the new test for departing from assimilated EU case law requires the court to have regard to "the fact that decisions of a foreign court are not usually binding".

247 [2019] EWHC 3556 (Comm) at [68] by Bryan J.

5.32 On this basis, Mr Justice Butcher held that there was a good arguable case that the claimant had sustained damage in England and Wales. Therefore the tort gateway would be satisfied in respect of the claimants' deceit and unlawful means conspiracy claims, or as a result of acts committed within England and Wales.[248]

Lubin Betancourt Reyes v Persons Unknown

5.33 The claimant was domiciled in England and Wales and alleged that he had fallen victim to a phishing scam whilst on holiday in Spain. As a result of the scam, the claimant alleged that he had been induced to transfer crypto-tokens from his laptop, which were then transferred away to various other crypto-token wallets.

5.34 His Honour Judge Pelling KC held that, notwithstanding the fact that the claimant had been in Spain when the phishing scam occurred and when he authorised release of the tokens from his laptop, which was also in Spain,[249] the claimant had sustained damage in England and Wales because this is where claimant was habitually resident and from where he conducted business.[250]

Tulip Trading v Bitcoin Association for BSV

5.35 The claimant company alleged that it had been deprived of its private key as a result of a hacking incident, with the result that the claimant could no longer access its crypto-tokens. The claimant argued that the defendants (bitcoin software developers) owed it fiduciary and/or tortious duties to assist it in regaining access to the tokens. At first instance, it was held that the claimant had not established that there was a serious issue to be tried on the merits of the claim, although this finding was subsequently reversed by the Court of Appeal.[251]

5.36 In the first instance decision, Mrs Justice Falk expressed the view that if there had been a serious issue to be tried, she would have found that there was a good arguable case that the tort gateway was satisfied. This was on the basis that the damage suffered was a failure to regain control of the assets, and this would have been "directly experienced in England".[252] Even though the claimant company was incorporated in the Seychelles, the company's agent resided in England and would have accessed and controlled the crypto-tokens using his computer in England.[253]

5.37 In reaching this conclusion, the judge explicitly rejected the defendant's argument that because the crypto-tokens could, in theory, have been accessed anywhere, the damage was *not* sustained in England and Wales.[254] This element of the first instance decision was not challenged by either party on appeal.

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248 Unreported, 21 December 2020 at [14]. This is discussed in further detail in relation to the property gateway, below.

249 [2021] EWHC 1938 (Comm) at [22] by HHJ Pelling KC.

250 Above at [21].

251 [2023] EWCA Civ 83, [2023] 4 WLR 16.

252 Above at [164].

253 Above at [159].

254 Above at [164].

D'Aloia v Persons Unknown

5.38 The claimant claimed to have been the victim of a scam in which fraudsters (persons unknown) had misrepresented their connection to a trusted website and thereby induced the claimant to transfer large quantities of crypto-tokens into digital wallets operated by the persons unknown.[255]

5.39 Mr Justice Trower granted permission to serve out of the jurisdiction under the tort gateway. The judge was satisfied that there was a good arguable case that the damage *would be* sustained in England and Wales because "[t]his is where the cryptocurrency was held immediately before the misrepresentations, and deceit was practised upon the claimant".[256]

Jones v Persons Unknown

5.40 The claimant alleged he had been induced to transfer crypto-tokens to a fraudulent online investment platform. Mr Nigel Cooper KC held that the damage was suffered in England and Wales because this was where the claimant was domiciled.[257]

Fetch.ai Ltd v Persons Unknown

5.41 His Honour Judge Pelling KC held that misappropriation of private keys gave rise to a "perfectly arguable cause of action" for breach of confidence[258] and that the detriment was suffered within England and Wales[259] because the corresponding crypto-tokens were within England and Wales.[260]

Evaluation

5.42 From these cases, several broad approaches to localising damage can be identified:

(1) The place where the claimant was deprived of access to the misappropriated crypto-token (*Ion Science*).

(2) The place where the claimant would experience the deprivation of access to the misappropriated crypto-token (*Tulip Trading*).

(3) The place of the claimant's habitual residence and/or where the claimant conducts business (*Lubin Betancourt Reyes*).

(4) The place of the claimant's domicile (*Jones*).

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255 [2022] EWHC 1723 (Ch) at [2] and [3].

256 Above at [20] by Trower J. Trower J's finding that the crypto assets were held in England and Wales followed from the finding at [10] that there was a good arguable case that the *lex situs* of a crypto asset is the place of domicile of its owner. This is discussed in further detail in relation to the property gateway from para 5.94 below.

257 [2022] EWHC 2543 at [30]. Mr Nigel Cooper KC cited *Ion Science v Persons Unknown* (Unreported, 21 December 2020) as authority for this proposition.

258 [2021] EWHC 2254 (Comm) at [10] by HHJ Pelling QC.

259 Above at [19].

260 Above.

(5) The location of the crypto-token when it was misappropriated (*Ion Science*, *D'Aloia*, *Fetch*).

(6) The place where the pure financial loss associated with the crypto-token was incurred (*AA*).

5.43 There is a considerable degree of difference between the approaches taken. This may raise questions as to whether *all* of these alleged torts can be said to have a sufficient connection to the territory of England and Wales such that it is appropriate for the courts to accept international jurisdiction over these types of claims.

5.44 There is furthermore a significant degree of contradiction between many of the approaches taken. Where the relevant damage consists of being deprived of access to a crypto-token through (usually) an online account or computer system, it seems contradictory to say that the damage is sustained both: (i) in the place where the claimant was first deprived of access (*Ion Science*); and (ii) in the place where the claimant would experience the deprivation of access (*Tulip Trading*).

5.45 The approach taken in *Ion Science*, that is, the place where the claimant was first deprived of access or induced to cede control over the misappropriated crypto-tokens, seems further contrary to the approach taken in *Lubin Betancourt Reyes.* If the approach of *Ion Science* were applied in *Lubin Betancourt Reyes*, the place where the claimant was first deprived of access or induced to cede control was Spain. However, the judge in *Lubin Betancourt Reyes* held that damage had been suffered in England and Wales, as the place of the claimant's habitual residence and/or where the claimant conducts business.

5.46 The approach taken in *Tulip Trading* warrants particular mention, given that it touches directly on the problem of localising a tort that takes place in the online sphere. The judge explicitly rejected the defendant's argument that because the crypto-tokens could, in theory, have been accessed anywhere, the damage was *not* sustained in England and Wales.[261] This was on the basis that the effects of that misappropriation would be experienced in England and Wales.

5.47 This further leads to the possible argument that all of these cases concern pure economic loss. *AA v Persons Unknown* most obviously refers to loss suffered in the form of money in the English bank account with which the claimant had bought the bitcoin that was paid as a ransom.

5.48 In this respect, there is a significant difference between (i) physical damage *to* an asset; and (ii) damage sustained *by reason of having been deprived of* an asset (as an entire object). Where there is a physical object that has been damaged, it does not seem problematic to localise the damage at the place where the object was located when the damage was sustained.

5.49 However, given the very particular physical nature of crypto-tokens, it is arguable that they are susceptible in the main only to tortious damage of the second type, that is, damage by reason of deprivation. We note that none of the cases allege damage *to* a physical device associated to the crypto-token, such as the computer on which the

[261] [2023] EWCA Civ 83 at [164].

crypto-token was stored. All of the cases allege losses sustained by reason of having been deprived of the crypto-tokens themselves or the financial consequences that follow from such deprivation.

5.50 Accordingly, in the absence of any physical damage upon which the deprivation of access to crypto-tokens is consequent, it is arguable that all of these cases fall within the scope of Lord Lloyd-Jones' words of caution in *Brownlie II* regarding international jurisdiction in cases of pure economic loss.

5.51 It is worth noting that academic commentary on these cases on jurisdiction has drawn attention to the failure to take into account the jurisprudence of the CJEU.[262] Whilst this jurisprudence does not, strictly speaking, bind the courts of England and Wales on the interpretation and application of the gateways, the fact that such jurisprudence does bind in cases of applicable law raises the issue of consistency as between jurisdiction and applicable law in England and Wales regarding the location of pure economic loss.

5.52 We recognise that part of the difficulty may be the fact that the object of the litigation in practical terms has been to recover crypto-tokens allegedly misappropriated by unlawful conduct. In practice, claimants are not seeking to recover damages in tort from the defendant. Claimants are well aware that the original hacker may never be found because they would likely have interacted on a pseudonymous basis – and even if they were found, the chances of enforcing a judgment against them are negligible to non-existent if they disappear or have no assets.

5.53 Rather, claimants wish to make a proprietary claim in relation to the crypto-token itself. The tort claim may be used as an anchor to allow other claims to be brought. We consider below whether such tactics could be seen as distorting the gateways.

5.54 Here we consider that the primary difficulty is a conflation between the damage pleaded in the claim in tort or other non-contractual obligation, and the objective of the litigation itself to recover the crypto-tokens. We return to this theme in Chapters 9 and 12.

5.55 Our tentative view at this stage is that the cases, insofar as they are pleaded as torts:

(1) are arguably not underpinned by consistent reasoning that clearly identifies a link between the tort as pleaded and the territory of England and Wales such that the assertion of the adjudicatory jurisdiction is clearly justifiable in all cases;

(2) are arguably cases of pure economic loss that refers neither to the caution sounded by Lord Lloyd-Jones in *Brownlie II* nor the jurisprudence of the CJEU;

(3) potentially give rise to inconsistency in England and Wales as between jurisdiction and applicable law in relation to pure economic loss; and

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[262] See eg A Held and M Lehmann, "Hacked Crypto-Accounts, the English Tort of Breach of Confidence, and Localising Financial Loss under Rome II" (2021) 10 *Butterworths Journal of International Banking and Financial Law* 708. We discuss the jurisprudence in more detail in Ch 9. Amy Held was a member of the Advisory Panel until she joined the Law Commission specifically to work on this project as a law reform lawyer in November 2023.

(4) give rise to uncertainties as to when the courts of England and Wales consider damage or detriment caused as a result of tortious conduct in the online context in relation to crypto-tokens to have been sustained in England and Wales.

Question 3.

5.56 In this question, we seek views and evidence on jurisdiction founded on the basis that damage or detriment was suffered in England and Wales.

(1) Do you consider the approach of the courts of England and Wales so far in the crypto litigation when localising damage or detriment for the purposes of jurisdiction to be theoretically sound?

(2) To what extent can it be said that the tortious damage pleaded in the crypto-token litigation are *not* cases of pure economic loss? How else could tortious damage in the crypto-token context be conceptualised?

(3) If the crypto-token cases *are* cases of pure economic loss, to what extent would it be desirable that a consistent approach is taken in England and Wales to localising pure economic loss as between jurisdiction and applicable law?

5.57 Unless a stakeholder indicates otherwise, we will take the responses to Question 3 above as equally applicable to localising tortious damage for the purposes of applicable law. We discuss this in further detail in Chapter 9.

AN UNLAWFUL ACT COMMITTED WITHIN ENGLAND AND WALES

5.58 The location where an unlawful act was committed is also used as a connecting factor to found jurisdiction in a range of non-contractual claims. Under paragraph 3.1 of Practice Direction 6B, relevant provisions include:

(1) gateway 9(b): a claim made in tort where "damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction".

(2) gateway 21(b): a claim made for breach of confidence or misuse of private information where the detriment, or detriment which will be suffered, "results from an act committed, or likely to be committed, within the jurisdiction".

(3) gateway 15(a): a claim made against the defendant as a constructive trustee or as trustee of a resulting trust, where the claim "arises out of acts committed or events occurring within the jurisdiction."

(4) gateway 16(a): a claim made for restitution where "the defendant's alleged liability arises out of acts committed within the jurisdiction".

(5) gateway 16(b): a claim made for restitution where "the enrichment is obtained within the jurisdiction".

The theoretical challenge

5.59 It is equally as difficult to locate where an unlawful act occurs as it is to determine the location of damage or detriment that the act causes.

5.60 In the 2006 case of *Ashton Investments v OJSC Russian Aluminium*, confidential information stored on a server in London had allegedly been improperly accessed, viewed and transmitted by someone using an internet address registered in Russia.[263] Deputy High Court Judge Jonathan Hirst QC held that, for the purposes of the tort gateway, the act was committed in England and Wales because that was where the server was located. For the same reason, damage had been sustained within England and Wales. Therefore, this alleged cyber-attack satisfied both limbs of the gateway, notwithstanding that the attack originated in Russia, and the information from the server was electronically transmitted to Russia.[264]

5.61 In 2006, it made sense to work on the basis that a cyber-attack occurred where the server was situated. However, as we saw in Chapter 3, localising acts and events within "cyberspace" where torts "happen" in more than one place has been a long-standing challenge. The reasoning of *Ashton Investments v OJSC Russian Aluminium* cannot be applied to distributed servers or decentralised ledgers as there is no single or specific server to identify. Furthermore, the location of the decentralised nodes in the system may have little or no substantive connection to the case.

5.62 By contrast, where a fraud is practised upon an individual through a fraudulent misstatement, the act is generally taken as having been committed where the misstatement was made. For remote communications or misstatements made by a person unknown, this may be difficult to locate and ultimately unhelpful to the case.[265]

The cases

5.63 We have identified three cases concerning jurisdiction relating to crypto-tokens that utilise the gateways expressed in terms of where the unlawful act was committed.

Ion Science v Persons Unknown

5.64 We noted above that *Ion Science* concerned allegedly false representations made to the second claimant that induced him, whilst he was in England and Wales, to cede control over his computer for the purpose of transferring funds to the defendant person unknown.

5.65 In addition to holding that the claimants had therefore sustained damage in England and Wales, Mr Justice Butcher held in the alternative that the claimants had sustained damage as a result of acts committed in England and Wales. The acts committed in the jurisdiction were said to be "the making of representations to [the second

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263 *Ashton Investments v OJSC Russian Aluminium* [2006] EWHC 2545 (Comm), [2006] 2 CLC 739.

264 Above at [62] to [64] by Jonathan Hirst QC.

265 This issue is not unique to digital assets; inventions such as the telephone already introduced a challenge in locating where fraudulent misstatements were made.

claimant], the transfer of funds, and the granting of remote access to [the second claimant's] computer in England." [266]

Jones v Persons Unknown

5.66 As noted above, *Jones* concerned the transfer of the claimant's crypto-assets to and from an allegedly fraudulent online trading platform.

5.67 The claimant initially responded to an online advertisement for a crypto investment company promising high returns. Clients were persuaded to set up cryptocurrency accounts and to transfer cryptocurrency to the fake online trading platform.[267] These transfers were actioned by an alleged representative of the platform whilst on a phone call with the claimant using remote desktop software. The platform showed that the claimant had made a significant profit through trades but, in reality, the unknown persons operating the platform had appropriated control of the claimant's crypto-assets.[268]

5.68 The judge described the relevant unlawful act as "a large-scale cyber fraud perpetrated by a group of online cyber criminals located overseas." It was suggested, however, that these criminals were based in Russia.[269]

5.69 Mr Nigel Cooper KC held that the acts giving rise to the constructive trust and unjust enrichment were committed in England and Wales because this is where the claimant was domiciled.[270]

D'Aloia v Persons Unknown

5.70 The claimant claimed to have been the victim of a scam in which the fraudsters (persons unknown) had misrepresented their connection to a trusted website and thereby induced the claimant to transfer large amounts of cryptocurrency into digital wallets operated by the persons unknown.[271]

5.71 Mr Justice Trower stated that the restitution gateway "gives rise to some slightly more complex considerations" and expressed the view that it was not entirely clear where the enrichment occurred. On this basis, Mr Justice Trower declined to give a view on whether the restitution gateway was satisfied.[272]

Evaluation

5.72 There are fewer cases that address the question of where an unlawful act is committed but, again, the cases take differing approaches.

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266 Unreported, 21 December 2020 at [14]. This is discussed in further detail in relation to the property gateway, below.

267 [2022] EWHC 2543 (Comm) at [6] by Mr Nigel Cooper KC.

268 Above at [8].

269 Above at [6].

270 Above at [31].

271 [2022] EWHC 1723 (Ch) at [2] and [3].

272 Above at [23].

(1) The place where the victim is domiciled (*Jones*).

(2) The place where the victim's computer through which the fraudulent inducement had effect is located (*Ion Science*).

5.73 We further observe that in *Jones v Persons Unknown,* there had been some suggestion that the fraudsters were located in Russia. It seems surprising that there was no real consideration of the argument that Russia might therefore be the place where the fraudulent acts were committed.

5.74 Although the courts of England and Wales are not strictly speaking bound by the jurisprudence of the CJEU when interpreting and applying the gateways, it is worth noting how the Brussels I Regulation (recast) has had some bearing on the gateways. Although the Brussels I Regulation (recast) localises torts for the purpose of jurisdiction solely at the "place where the harmful event occurred,"[273] the CJEU has ruled that this means either the place where the harmful event occurred, or the place where the damage was sustained.[274]

5.75 This dual approach is expressly drafted into the provisions of gateways 9 and 21, which provide for in limb (a) the place where damage was sustained; and in limb (b) the place where the unlawful act was committed. We therefore consider here only the place where the unlawful act was committed.

Question 4.

5.76 In this question, we seek views and evidence on jurisdiction founded on the basis that an unlawful act was committed in England and Wales.

(1) To what extent is the approach of the courts of England and Wales so far in the crypto litigation when localising where an unlawful act was committed for the purposes of jurisdiction theoretically sound?

(2) To what extent does the question of where an unlawful act is committed or event occurs for the purpose of jurisdiction arise in practice?

AN OBJECT WITHIN ENGLAND AND WALES

5.77 The location of an object is used as a connecting factor to found jurisdiction in claims relating to property. Under Practice Direction 6B paragraph 3.1, relevant provisions include:

(1) gateway 11: "the subject matter of the claim relates wholly or principally to property within the jurisdiction, provided that nothing under this paragraph shall

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273 Brussels I Regulation (recast) (EU) No 1215/2012, Official Journal L 351 of 20.12.2012 art 7(4) provides that, a defendant domiciled in a Member State may be sued in another Member State: in matters relating to tort, delict, or quasi-delict, in the courts of the place where the harmful event occurred or may occur.

274 Case 21/76 *Handelswekerij GJ Bier BV v Mines de Potasse d'Alsace SA* [1978] QB 708.

render justiciable the title to or the right to possession of immovable property outside England and Wales."[275]

(2) gateway 15(b): a claim made against the defendant as constructive trustee or as trustee of a resulting trust, where the claim "relates to assets within the jurisdiction".

5.78 There is a close relationship between these two gateways. Gateway 11 is not limited to any particular category of property.[276] It is not limited to proprietary claims, and the "whole subject matter" need not relate to property within the jurisdiction.

5.79 This would enable the property gateway to cover situations where a claim is made in respect of a trust which principally includes property within England and Wales, but also includes some property outside England and Wales.

5.80 It also means that a case may relate to property within the jurisdiction without itself raising a proprietary claim. In a recent case in the Commercial Court using the property gateway, the primary object of the claim was to levy execution of a foreign judgment over real property situated in England and Wales.[277]

5.81 Two core theoretical challenges arise in localising crypto-tokens as an object of property rights within the territorial boundaries of England and Wales.

(1) *Where* is a crypto-token located?

(2) *When* must the crypto-token be in England and Wales?

5.82 We consider each challenge separately below.

Where is a crypto-token located?

5.83 The question of where a crypto-token held in accordance with the original bitcoin ideal of decentralisation is one of the most challenging issues that DLT poses to private international law. Because the crypto-token technically exists "nowhere and everywhere at the same time,"[278] and there is no point of centralisation that may provide an alternative connecting factor, there is little justification for saying the crypto-token exists in one territorial location rather than another.[279]

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275 Civil Procedure Rules, Practice Direction 6B, para 3.1(11).

276 *In re Banco Nacional de Cuba* [2001] 1 WLR 2039 at [33] by Lightman J: "The evident purpose of the new rule is to lay down a single rule, in place of the three earlier rules, which embraces and extends beyond the contents of those rules […] In my view on its proper construction the rule cannot be construed as confined to claims relating to ownership or possession of property. It extends to any claim for relief, whether for damages or otherwise, so long as it is related to property located in the jurisdiction."

277 *Commercial Bank of Dubai PSC v Al Sari* [2023] EWHC 1797 (Comm).

278 A Held, "Crypto Assets and Decentralised Ledgers: Does Situs Actually Matter?" in A Bonomi, M Lehmann and S Lalani (eds), *Blockchain and Private International Law* (2023) p 250.

279 A Bonomi, M Lehmann and S Lalani (eds), *Blockchain and Private International Law* (2023) p 2: "The nature of a truly global register implies omnipresence in different countries, to which the block-chain is either completely unconnected or equally strongly connected. Finding the law applicable to the blockchain thus

5.84 There is no consensus in the literature or judicial approaches taken so far internationally. The existing literature is further limited by the fact that the location of a crypto-token such as bitcoin is generally considered in the context of determining the applicable law, which has been said to raise different considerations to those relevant for jurisdiction.[280]

5.85 Professor Dickinson conceptualises cryptocurrencies as intangible property arising from the participation of an individual or entity in a DLT system and therefore suggests that the law governing a particular "participation" should be that of the place of residence or business of the relevant participant with which that participation is most closely connected.[281] Professor Dickinson's analysis thus refers to applicable law, but as we will see, it has been highly influential in the approach taken by the courts to issues of jurisdiction.

The cases

5.86 Although the cases in England and Wales have all been brought primarily with the objective of recovering misappropriated crypto-tokens, relatively few have relied outright on the property or constructive trustee gateways. We have identified five cases where the location of crypto-tokens was considered for a claim under the property gateway.

Ion Science v Persons Unknown

5.87 Mr Justice Butcher noted that, at the time of his decision, there were no previously decided cases regarding the location of crypto-tokens that would assist with the determination of the property gateway.[282] In the absence of any such authority, Mr Justice Butcher cited Professor Dickinson's proposal above as supporting the proposition that the location of a cryptocurrency is the place where the person or company who owns it is domiciled.[283]

Fetch.ai v Persons Unknown

5.88 Applying *Ion Science*, His Honour Judge Pelling KC held that it was "at least realistically arguable" that crypto-tokens constitute property for the purposes of the property gateway, and that their location is the place where the person or company who owns them is domiciled.[284]

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seems like trying to nail jelly to a wall." See also M Lehmann, "Extraterritoriality in Financial Law" in A Parrish and C Ryngaert (eds), *Research Handbook on Extraterritoriality in International Law* (2023); S Hurst "Decrypting Conflict of Laws" (2023) *Butterworths Journal of International Banking and Finance Law* 158 to 161.

280 A Held, "The modern property situationship" (2024) *Journal of Private International Law* (forthcoming).

281 A Dickinson, "Cryptocurrencies and the Conflict of Laws" in D Fox and S Green (eds), *Cryptocurrencies in Public and Private Law* (2019) para 5.109.

282 Unreported, 21 December 2020 at [13] by Butcher J.

283 Above, citing A Dickinson, "Cryptocurrencies and the Conflict of Laws" in D Fox and S Green (eds), *Cryptocurrencies in Public and Private Law* (2019) para 5.108.

284 [2021] EWHC 2254 (Comm) at [20].

Tulip Trading v Bitcoin Association for BSV

5.89 As we said above, this application to serve out of the jurisdiction was dismissed at first instance on the basis that there was not a serious issue to be tried on the merits of the case, because there was no realistic prospect of establishing that the facts pleaded amounted to a breach of fiduciary duty.

5.90 Nevertheless, the claimant had sought to rely on, amongst others, the property gateway. At first instance, the parties were in dispute as to whether the bitcoin in dispute should be regarded as being located in the Seychelles, as the place of the first claimant's domicile; or in England, as the place of residence.[285]

5.91 Mrs Justice Falk referred back to *Ion Science* and Professor Dickinson's proposal and noted a discrepancy: that the courts had been proceeding on the basis of domicile, whereas Professor Dickinson's proposal had actually referred to place of residence or business.[286]

5.92 Mrs Justice Falk went on to observe that the distinction between domicile and residence or place of business appears not to have been material in *Ion Science*, a case where Mr Justice Butcher was considering both an individual and corporate claimant. Mrs Justice Falk further noted that Mr Justice Butcher gave strong indications that he was "not intending to say that domicile was the sole relevant test."[287]

5.93 Mrs Justice Falk concluded that, if necessary to the judgment, the residence or place of business was the appropriate test to apply. In reaching this conclusion, she took into account the discussion in the UK Jurisdiction Taskforce Statement.[288] In particular, she noted the suggestion that the location of control of a digital asset, including by the storage of a private key, may be relevant to determining whether the proprietary aspects of dealings in digital assets are governed by the law of England and Wales.[289]

D'Aloia v Persons Unknown

5.94 In *D'Aloia*, permission to serve out had been granted under the tort gateway, but Mr Justice Trower observed that "it is quite likely that gateway 11 [the property gateway] is also available".[290] Citing *Ion Science*, Mr Justice Trower held that there was a "good

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285 [2022] EWHC 667 (Ch) at [142] by Falk J.

286 Above at [143] to [144].

287 Above at [147].

288 The UK Jurisdiction Taskforce (UKJT) "is an industry-led initiative, tasked with promoting the use of English law and UK's jurisdictions for technology and digital innovation. The purpose of the UKJT is to clarify key questions regarding the legal status of, and basic legal principles applicable to, crypto assets, distributed ledger technology, smart contracts and associated technologies under English law". For further information, see: https://ukjt.lawtechuk.io/.

289 [2022] EWHC 667 (Ch) at [142] at [148].

290 [2022] EWHC 1723 (Ch) at [22].

arguable case" that the location of a crypto-token is the place where the person who owns it is domiciled.[291]

Osbourne v Persons Unknown

5.95 The claimant alleged that a constructive trust had arisen over non-fungible tokens ("NFTs") that had been stolen from her digital wallet by persons unknown.[292] The judge held that it was at least realistically arguable that the gateway for claims against the defendant as a constructive trustee would be satisfied on the basis that the crypto assets should be treated as located in England and Wales, because that is where the claimant was domiciled.

Evaluation of the location of a crypto-token

5.96 The question of where digital assets are located is central to this project. The approach of the courts of England and Wales to date looks overall to be reasonably consistent, but there is as yet no comprehensive judicial reasoning on this discrete issue.

5.97 Professor Dickinson's proposal has garnered considerable support in the courts. However, the approach taken in the courts is not necessarily consistent with that put forward by Professor Dickinson for the following two reasons.

(1) "Participant" does not necessarily mean the same as "owner". There may be reasons why, in law, the participant who actually made the transfer should not be treated as the "owner".

(2) As Mrs Justice Falk noted in *Tulip Trading*, the domicile of a person is not necessarily the same as that person's place of business or residence. Whereas the courts focus on the former, Professor Dickinson focuses on the latter.

5.98 Other problems have been identified in the academic literature. For example, it has been argued that the approach taken by the courts of England and Wales so far is inconsistent with the policies underpinning the modern approach, taken consistently across systems of private international law, to localising objects that lack meaningful corporeal form. [293] Furthermore, it has been suggested that some of the cases give rise to some doubt as to whether foreign courts will recognise and enforce any subsequent judgment handed down by the courts of England and Wales on the basis that direct jurisdiction was improperly founded. [294]

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291 Above at [10].

292 [2022] EWHC 1021 (Comm) at [25] to [29] by HHJ Pelling KC.

293 A Held "Cryptoassets as Property under English Law Pt II: Ownership, Situs, and the Circular Question of Jurisdiction" (2023) 4 *Butterworths Journal of international Banking and Financial Law* 236.

294 *Tulip Trading* (see n 57 above) was identified as particularly problematic. One, there had been rival claims to the crypto-tokens in question, so the claimant's assertion that it was the "owner" of the crypto-tokens was open to considerable doubt. Two, applying the prevailing approach taken to localising incorporeal objects for the purpose of property disputes by reference to control at the time of proceedings, it would have been for the claimant to sue the foreign defendants in the courts that exercise ordinary personal jurisdiction over them. The alternative: the foreign defendants being summoned to England and Wales on the basis that this was where the "owner" of the assets is based.

When must the assets be within England and Wales?

5.99 Property matters engage specific temporal issues that arise when the country to which a territorial connecting factor leads changes over time. This is a question often encountered with applicable law issues in respect of property and is known as *conflits mobile*.

5.100 The issue arises in relation to movable property because "the place where the object is located" can very easily change.

5.101 As the application of such connecting factors may point to different places depending on the relevant point in time, the question of when the location is to be assessed becomes important.

The cases

5.102 We have identified four cases where temporal factors have been considered. All four have concerned the constructive trustee gateway, and two considered the general property gateway in addition.

Fetch.ai v Persons Unknown

5.103 In respect of the constructive trustee gateway, [295] His Honour Judge Pelling KC held that "the test for whether assets are within the jurisdiction, for the purpose of deciding whether a claim relates to such assets, must focus on *where the assets were located before the justiciable act occurred*".[296] Applied to the facts of the case, he held that it was at least realistically arguable that the crypto-tokens were located within England and Wales (by reference to the domicile of the "owner") before the justiciable act occurred.[297]

Denisov v Delvecchio

5.104 Also in respect of the constructive trustee gateway, the same judge, His Honour Judge Pelling KC, appeared to suggest a slightly broader approach: the assets in question must be within England and Wales at the time the application to serve out is made.[298]

D'Aloia

5.105 Mr Justice Trower considered both the general property and constructive trustee gateways, albeit only briefly because he had held that there was a good arguable case that the tort gateway was satisfied. His views were consistent as between the property and constructive trustee gateways on the point, and favoured the view that the relevant time was the time of the misappropriation.

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295 [2021] EWHC 2254 (Comm) at [15] by HHJ Pelling KC.

296 Above at [23] (emphasis added). Similarly, in *D'Aloia v Persons Unknown* [2022] EWHC 1723 (Ch) at [22] Trower J held that there was a good arguable case that this gateway would be satisfied where assets were no longer within England and Wales but had been before an alleged misappropriation.

297 Above.

298 *Denisov v Delvecchio* [2022] EWHC 377 (Comm) at [19] by HHJ Pelling QC.

5.106 In respect of both gateways, his conclusion was therefore that, although the misappropriated property, the crypto-tokens, were allegedly no longer within England and Wales (at the time of the application to serve out), they had been within England and Wales when they had been misappropriated. On this basis, he concluded that both gateways were satisfied.[299]

Osbourne v Persons Unknown

5.107 Mr Justice Lavender also considered both the general property and constructive trustee gateways. He said that "there is room for doubt" about the proposition in *Fetch.ai* – namely that one must look at the location of the assets at the time of alleged act.[300]

5.108 In respect of both gateways, Mr Justice Lavender appeared to favour the view that they would only be satisfied where property was still located within England and Wales at the time of the application to serve out of the jurisdiction.[301] In other words, if assets are taken from England and transferred overseas, neither the general property gateway nor the second limb of the constructive trustee gateway will be satisfied.

5.109 Ultimately, however, he did not make a final determination on this matter, and instead held it to be "a matter which may arise for decision in due course in a contested and fully-argued case."[302]

Evaluation of the temporal factor

5.110 The property gateway is phrased in the current tense: the subject matter of the claim relates wholly or principally to property within the jurisdiction. This suggests that the property must be within the jurisdiction at the time of the application. It is far from certain that the property gateway applies to property which was in the jurisdiction at the time of the alleged wrongdoing.

5.111 Part of the difficulty with the temporal factor when localising assets seems to arise because the constructive trustee gateway has the alternative limb under gateway 15(a), which refers to claims arising out of unlawful acts committed or events occurring in England and Wales.

5.112 Although the limb (b) of the constructive trustee gateway and the property gateway are drafted in materially identical terms, gateway 15 as a whole provides different alternatives for the constructive trustee gateway that rely on different temporal factors.

5.113 Reading the constructive trustee gateway as a whole, it seems to us that the two limbs of gateway 15 are to be construed independently.

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299 [2022] EWHC 1723 (Ch) at [22] by Trower J.

300 *Osbourne v Persons Unknown* [2023] EWHC 39 (KB) at [36].

301 Above at [36].

302 Above at [37].

(1) Where gateway 15(a) is relied on, the appropriate time for localising the unlawful act or event giving rise to the claim is the time it was committed or occurred.

(2) Where gateway 15(b) is relied on, the appropriate time for localising the assets is the time when proceedings are issued.

5.114 Such a reading would be harmonious with gateway 11, which, as we noted at paragraph 4.61 above, was extended to trust assets.

5.115 More generally, it has been argued that in jurisdiction over property disputes, the relevant point in time is that at which proceedings are issued. This is said to reflect considerations regarding an effective remedy insofar as, in the paradigm property case, the sole reason the claimant has chosen to sue the defendant is because they happen to have the asset within their control or possession; and by issuing proceedings, the claimant seeks its return. Where the asset has a meaningful corporeal form, the rule that, for claims relating to property disputes, the courts of the place where the asset is situated makes sense, because only those courts have the necessary sovereign authority to order a change in property entitlements under the enforcement jurisdiction. Where the asset lacks meaningful corporeal form, the analysis shifts to where the asset can be effectively dealt with, such that a judgment *in rem* can be made effective.[303]

Question 5.

5.116 In this question, we seek views and evidence on jurisdiction founded on the basis that the claim relates to objects within England and Wales.

(1) To what extent is the approach so far of the courts of England and Wales in localising a crypto-token for the purposes of jurisdiction theoretically sound? What would be the relative merits and demerits of any alternatives?

(2) What point in time is relevant for gateways 11 and 15(b)? Do these gateways require that a crypto-token is within England and Wales: at the time of proceedings, at the time of misappropriation, or some other time?

(3) To what extent does the question of where a crypto-token is located for the purpose of jurisdiction raise issues in practice?

CAUSES OF ACTION AND THE GATEWAYS

5.117 We said in Chapter 4 that applications for service out of the jurisdiction invariably arise at an early stage of the proceedings. At this stage, they are inherently tied up with the practical concerns and litigation strategies of the parties in the case. Given that these are made by the claimant only without the presence of the defendant, the matters that

[303] A Held, "Cryptoassets as Property under English Law Pt II: Ownership, Situs, and the Circular Question of Jurisdiction" (2023) 4 *Butterworths Journal of international Banking and Financial Law* 236; A Held, "The modern property situationship" (2024) *Journal of Private International Law* (forthcoming).

are considered tend to be weighted in the claimant's favour, notwithstanding the duty of full and frank disclosure that is imposed upon a claimant in such circumstances.

5.118 We also said that, in the crypto-token cases, proceedings have typically been issued against an unknown defendant for tactical purposes to target an exchange intermediary. There may be little or no intention to pursue the underlying claim against the defendant "person unknown".

5.119 We noted that there had been suggestions that such tactical concerns of litigation have resulted in a distortion of the gateways insofar as they apply to types of claims and causes of action.

5.120 We nevertheless recognised that the circumstances in which decisions are granted in applications for service out of the jurisdiction, especially when applied to novel facts and circumstances, are not always ideal for a clearer delineation of the issues. We therefore consider these issues briefly here.

Are crypto exchanges constructive trustees?

5.121 We explained from paragraph 4.101 above that, following a cyber-attack, a claimant will often trace the misappropriated crypto-tokens to a crypto exchange. They will then allege that the crypto exchange holds those crypto-tokens as a constructive trustee in the hope that, if the claimant is able to prove their entitlement to the crypto-tokens, the exchange will facilitate their return. To this end, claimants seek to serve proceedings on foreign crypto exchanges out of the jurisdiction through the constructive trustee gateway.

5.122 Such litigation over misappropriated crypto-tokens often relies on co-operation from the exchange. We have been told that responsible exchanges are usually prepared to provide information about an account holder or to freeze the account. Following a final court order, they may give control of the account to the claimant. However, exchanges are much more sensitive to any suggestion that they themselves are constructive trustees, or that the exchange might be liable to recompense the claimant even if the crypto-tokens are no longer under their control.

5.123 We therefore consider that this is an issue where there may be a practical need for more certainty.

5.124 Our preliminary view is that it is not clear that, as a matter of law, an exchange could be held be liable as a constructive trustee.

5.125 Academic commentators have expressed the view that, on the facts typically pleaded in the crypto-token litigation, a trust does not arise.[304]

5.126 If, however, a trust potentially arises in the circumstances typically pleaded, a further issue that tends to militate against its recognition arose in *Piroozzadeh v Persons*

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[304] A Held, "Crypto Assets and Decentralised Ledgers: Does Situs Actually Matter?" in A Bonomi, M Lehmann and S Lalani (eds), *Blockchain and Private International Law* (2023) n 64, citing L Tucker, N Le Poidevin and J Brightwell, *Lewin on Trusts* (20th ed 2020) para 8-029.

Unknown.[305] Here, a claimant had obtained an interim proprietary injunction against a crypto exchange without notice. When the exchange was given the opportunity to present its case, the exchange submitted that it had intended to raise the equitable defence to the underlying claim based on a constructive trust. Although the crypto-tokens in issue had been traced to one of its customer's accounts, the nature of its holding structure was such that it had effectively been a good faith purchaser for value without notice of the claimant's alleged beneficial interest under the "constructive trust" that was alleged to have arisen on their misappropriation.

5.127 Accordingly, the court discharged the proprietary injunction on the basis that the claimant had failed to refer to this possible defence under their duty of full and frank disclosure.

5.128 *Piroozzadeh* concerns the discharge of an injunction and not the question of whether, as a matter of law, exchanges and other intermediaries are constructive trustees. Nevertheless, it casts some doubt over whether the prevailing use of the constructive trustee gateway is working in accordance with the litigation strategies typically employed by claimants.

5.129 Notably, the defendant in *Piroozzadeh* had said to the court that it intended to raise the same defence in other similar proceedings against it. It is therefore possible that exchanges or other intermediaries may seek to raise a similar defence about the constructive trustee gateway in future.[306]

Breach of confidence, misuse of private information, and private keys

5.130 To our knowledge, use of the gateway for breach of confidence or misuse of private information has arisen only in one case so far.

5.131 In *Fetch.ai Ltd v Persons Unknown,* His Honour Judge Pelling KC held that the private keys used by the claimants to access their crypto assets constituted confidential information. Therefore, where these private keys were allegedly used by the defendants to access and manipulate the claimant's crypto assets, this gave rise to a "perfectly arguable cause of action" for breach of confidence.[307]

5.132 Academic commentary has noted that the pleadings raised significant difficulty on the facts, which could not be said to give rise to any arguable claims for breach of confidence. Whilst apt on some level, it has been argued that the tort of breach of

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305 [2023] EWHC 1024 (Ch).

306 The defendant argued, amongst other things, that the claimant had failed to fairly present the defences likely to be available to it in respect of its alleged liability as a constructive trustee when obtaining an interim proprietary injunction, as part of the duty of full and frank disclosure: above at [9], [19] and [20]. As part of this argument, the defendant relied on defences that it had raised in unconnected proceedings and which the claimant would have been aware at the time of the injunction application: above at [28] to [29].

307 [2021] EWHC 2254 (Comm) at [10].

confidence is inapposite for private keys in vindication of the associated crypto-tokens.[308]

Question 6.

5.133 In this question, we seek views and evidence on the types of claims and causes of action relied upon in applications to serve proceedings relating to crypto-tokens out of the jurisdiction.

(1) To what extent can it be said that there is a serious issue to be tried where claimants allege that exchanges are constructive trustees in the circumstances pleaded in *Piroozzadeh v Persons Unknown* and comparable cases?

(2) Is there any further practical evidence we could consider in relation to the ways in which exchanges defend or intend to defend applications and/or claims alleging they are constructive trustees at the return date of these applications?

(3) Are there similar problems with causes of action under any of the other gateways?

(4) Are these cases indicative of a need to consider more carefully the "serious issue to be tried" limb of the three-stage test for service out of the jurisdiction?

[308] A Held and M Lehmann, "Hacked Crypto-Accounts, the English Tort of Breach of Confidence, and Localising Financial Loss under Rome II" (2021) 10 *Butterworths Journal of International Banking and Financial Law* 708.

Chapter 6: Applicable law – an overview

INTRODUCTION

6.1 As we explained above, the issue of applicable law goes to the question of which country's substantive law will apply to determine whether the claimant's claim against the defendant will succeed.

6.2 We said in Chapter 2 that this branch of private international law is traditionally known in England and Wales as the "conflict of laws". The multilateralist rules expressed in terms of an abstract location are often referred to as "choice of law", "conflict of laws", or "applicable law" rules.

6.3 In Chapter 4 we set out the rules relating to international jurisdiction, and explained that, in matters of procedure, courts will always apply the domestic procedural law of the forum (that is, the domestic procedural law of the court itself). Courts, however, take a different approach to matters of substantive law.

6.4 Generally, the basic starting point is that the court can apply its own law to the substantive aspects of the litigation, as well as the procedural aspects.

6.5 The multilateralist approach to the conflict of laws, however, is based on the premise that in a cross-border case, the court might, should, or even must, apply the substantive laws of another country to determine whether the claim against the defendant will succeed.

> If the court in England and Wales accepts jurisdiction in Alice's claim against Bob following their road traffic accident:
>
> The procedural law of England and Wales will apply to procedural matters of the dispute, such as the giving and testing of evidence.
>
> For the substantive matters, the basic starting point is that the court can also apply the substantive law of England and Wales to determine whether Bob is liable to Alice and must compensate her, or whether he has a defence.
>
> Nevertheless, the court might apply the substantive law of a different country to determine whether Bob is liable to Alice. It may well be that, according to the applicable law rules of England and Wales, it is Egyptian law, US law, or some other law that is to be applied to determine whether Bob is liable to Alice, or whether he has a defence.

6.6 The question of why the courts of England and Wales, or indeed the courts of any country, applies the substantive law of another country to the cause of action is a

contentious issue with a history that is almost as old as the discipline of private international law itself. We return to this below from paragraph 6.106.

6.7 For present purposes, it is sufficient to recall that in Chapter 2, we said that the multilateralist approach to the conflict of laws prevails in England and Wales, and in most legal systems around the world. We also said that the merits and validity of the multilateralist approach has come under a trend of criticism since the early 20th century. As a result, in many parts of the world, the multilateralist ideal is in decline or has otherwise been tempered.

6.8 In this chapter we set out the law and explain how the courts identify the applicable law for a specific dispute under the present rules in England and Wales.

6.9 We also consider the theories underpinning the multilateralist method in more depth as part of our assessment of whether, as set out in Chapter 3, the challenges posed by digitisation and decentralisation:

(1) can be accommodated by the current law;

(2) can be accommodated by the current law, but not without some difficulty;

(3) can only be accommodated by the current law with significant difficulty; or

(4) cannot be accommodated by the current law.

THE MULTILATERALIST APPROACH IN ENGLAND AND WALES

6.10 As we noted in Chapter 4, the law of England and Wales has, owing to its idiosyncratic common law method, generally accorded a greater depth of consideration to matters of jurisdiction than Continental systems. We also noted that one of the effects of this in the private international law of England and Wales is that questions of jurisdiction frequently overshadow questions of applicable law.

6.11 For applicable law, there is an especially strong presumption that courts of England and Wales will apply the law of England and Wales to both the procedural and substantive matters in a dispute. Unlike in some jurisdictions, the application of a foreign law to the substance of the dispute must be specifically pleaded and proved as a matter of evidence on the part of the party contesting the application of the substantive law of England and Wales.

6.12 In the commercial context, parties do not necessarily make this argument. Generally, parties will only go to the expense and difficulty of arguing for a different system of law if they consider that one legal system gives them a clear or significant advantage over another. In *Muduroglu Ltd v TC Ziraat Bankasi*, Lord Justice Mustill observed that “in so many practical respects there is insufficient difference between the commercial

laws of one trading nation and another to make it worthwhile asserting and proving a difference".[309]

6.13 In Continental systems, the emphasis is typically reversed: a greater depth of consideration has generally been accorded to matters of applicable law. This difference is well illustrated by a comparison with French civil procedure. Under the relevant provisions of the French legislative acts,[310] a judge must in certain circumstances examine the possibility on their own initiative that the case before them might be governed by a foreign law. In those circumstances, this is a legal duty imposed on the judge and any failure in this respect is an error of law justifying an appeal.[311] In other circumstances, the judge only need examine the possibility that a foreign law might apply if it is raised by the parties. In these circumstances, the parties may agree between themselves that the judge may apply French law, as the law of the forum, to the substance of the dispute.[312]

The multilateralist approach in practice

6.14 We explained in Chapter 2 that the multilateralist approach to resolving conflicts of laws utilises a three-stage process to identify the applicable law.

(1) **Step 1: characterisation**.

The court will first ask: what kind of legal issue is in dispute between the parties?

(2) **Step 2: identify the multilateralist rule and the abstract location**.

The court will then refer to the rule that applies to this particular kind of legal issue. Rules are expressed in abstract terms of a place where some act occurred or where some object is located.

(3) **Step 3: identify the relevant applicable law on the facts of the case.**

Finally, the court will refer back to the facts to ascertain the place where the relevant rule points. It will then apply the law of that place to the issue in dispute.

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309 *Muduroglu Ltd v TC Ziraat Bankasi* [1986] QB 1125, 1246. Similar sentiments are expressed in the common law jurisdictions of the USA, where it has been remarked that "[since] choice of law questions are relatively rare in litigations, judges and lawyers have little experience in dealing with them.": M Hancock, "Conceptual Devices for Avoiding the Land Taboo in Conflict of Laws: The Disadvantages of Disingenuousness" (1967) 20 *Stanford Law Review* 8.

310 Primarily the French Civil Code, art 3 and the French Code of Civil Procedure, art 12.

311 Modern leading cases: Cour de Cassation, civile, Chambre civile 1, 1 juin 2011, 09-71.99 and Cour de Cassation, civile, Chambre civile 1, 1 juin 2011, 10-16.482. These confirm: Cour de Cassation, Chambre civile 1, "Belaïd" du 26 mai 19999, 97-16.684 and Cour de Cassation, Chambre civile 1, "Mutuelles du Mans" du 26 mai 1999, 96-16.361.

312 The circumstances in which the judge is relieved of the duty are developed from the French Civil Code, art 3, and the French Code of Civil Procedure, art 12.

6.15 We look at each stage in more detail below. To illustrate the process in more depth, we return to Alice and Bob's road traffic accident in Egypt.

Step 1: characterise the issue in dispute

6.16 Characterisation requires a court to look at the issues and facts of the case to determine the nature of the dispute.

> Alice's claim arises out of a road traffic accident. Bob was driving well over the speed limit. Alice has sustained serious personal injury as a result.
>
> What is the real nature of Alice's claim against Bob? Is it a dispute about Bob posing a danger to the general public by driving dangerously? Is it a dispute about breach of a promise made by Bob to Alice that he will drive at or under the speed limit? Is it a dispute about compensation for breach of an obligation on Bob not to cause harm to people he can foresee will be affected by his driving?

6.17 Whilst characterisation may seem to be a relatively simple task, it can be a challenging and complex process.[313] It furthermore exerts considerable influence over the outcomes of the three-stage multilateralist process.

6.18 This challenge is demonstrated by *Macmillan Inc v Bishopsgate Investment Trust Plc*, a leading case on characterisation.[314] The claimant asserted a beneficial interest in shares transferred in breach of trust which were ultimately transferred to the defendant. The claimant sought various declarations that it was beneficially entitled to the shares and that the defendant held them on constructive trust. It also sought orders for restoring the shares to the claimant and compensation and/or damages for breach of constructive trust and/or conversion. The defence pleaded "the good faith purchaser without notice" defence.

6.19 In these circumstances, the parties made different submissions as to the issue of characterisation.

(1) The claimant contended that the claim was essentially one of restitution. If this were accepted as correct, the court would look to the multilateralist rule for restitution obligations. This usually refers to the law of the place where the benefit was received. On the facts of the case, this would have led to the application of the law of England and Wales.

(2) The defendant contended that the issue was one of priority between proprietary interests in the shares. If this were accepted as correct, the court would look to the multilateralist rule for property disputes. This characterisation would point to

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313 *Macmillan Inc v Bishopsgate Investment Trust Plc (No 3)* [1996] 1 WLR 387, 417, by Aldous LJ: "the problem of characterising which judicial concept or category is appropriate is not easy".

314 Above.

the law of the place where the object of property rights is situated. On the facts of the case, this would have led to the application of the law of New York.

6.20 The court ultimately found for the defendants on the issue of characterisation. Lord Justice Staughton explained that it did not really matter that the claim was pleaded as one of restitution. Instead "the proper approach is to look beyond the formulation of the claim and to identify […] the true issue or issues thrown up by the claim and the defence."[315]

6.21 Issues of characterisation are generally recognised across systems of private international law as being a procedural matter that is determined by the law of the forum (that is, the court's own domestic law).[316] Each jurisdiction therefore has its own approach to characterisation. However, it is generally accepted that characterisation should be approached in a broad internationalist way, without being unduly constrained by national classifications.[317]

6.22 Nevertheless, the multilateralist rules that are generally used in common across the world tend to reflect Continental categories of private law. As a result, many legal concepts unique to the law of England and Wales do not always fall neatly within any category of multilateralist rule.

6.23 The tort of conversion is a prime example. Conversion is an action in tort for wrongful interference with possession of a chattel. It is a personal action that gives rise to a right of damages only,[318] but is used to vindicate property rights. The extent to which a claim in conversion is a tort within the scope of the Rome II Regulation on the law applicable to non-contractual obligations is open to debate.[319] Other English legal concepts not readily accommodated within the Continental categories include trusts and equitable obligations such as fiduciary duties. These are generally accepted to fall within the Rome II Regulation as non-contractual obligations.

6.24 Going the other way, the concept of contract in the law of England and Wales is far narrower than it is in many Continental legal systems. A gratuitous agreement without any consideration will not be considered a contract by the law of England and Wales, but can constitute a contract in many Continental jurisdictions. A court in England and Wales may therefore need to consider a broader concept of contract when characterising issues for the purpose of identifying the relevant multilateralist rule.

6.25 The differences between Continental legal systems and common law systems are particularly acute in the area of property law. The traditional common law property taxonomy is divided between "real property rights" and "personal property rights."

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315 [1996] 1 WLR 387, 407, by Auld LJ.

316 D McClean and V R Abou-Nigm (eds), *Morris: The Conflict of Laws* (10th ed 2021) para 20-006; A Briggs, *Private International Law* (2nd ed 2023) p 44.

317 A Briggs, *Private International Law* (2nd ed 2023) p 44.

318 As opposed to specific restoration, which is the usual remedy for interference with a property right (in most other systems, where it's dealt with under the law of property). See H Liu, "Interference torts in the digital world" (Working Paper 2023) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4433956.

319 See Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) paras 34-016 and 34-021.

These are respectively defined as "rights for which there is a real remedy and which bind third parties to their creation;" and "rights for which there is only a personal remedy and which bind only a specific person." This division is not based on the nature of the underlying object to which the right relates, but rather to the remedy and the persons against whom the right can be enforced.

6.26 The category of personal property is divided between "things in possession" (chattels and other tangible objects) and "things in action" (legal rights or claims enforceable by action). In our report on digital assets, we took the position that the law also recognises a third category of thing, which are neither things in possession nor things in action, and which includes certain digital assets (which we called "digital objects").[320]

6.27 The traditional categories used in private international law, however, reflect the Continental property taxonomies, which ultimately have a common origin in Roman law. In contrast to the traditional common law position, the Continental schemes are expressly object-based. Thus, "immovables" is a category for land and rights relating to land; "corporeal movables" are tangible chattels and goods; "incorporeal movables" are rights, both personal and real rights, such as easements.

6.28 A major point of difference across all legal systems is the treatment of what is traditionally called a "thing in action" in common law systems, and what is generally translated into English as a "claim" in Continental systems. In economic terms, the paradigm example is a debt.

6.29 In England and Wales, things in action are considered to be personal property. In some Continental jurisdictions, "claims" do not fall within the law of property but are rather treated primarily a matter of contract. The conflict of laws rules, however, for the assignment of things in action in the common law system and the assignment of claims in the Continental law systems are in materially identical terms.[321]

6.30 The core difference in private international law, however, is how the multilateralist rule is classified in the broader scheme of conflict of laws. In England and Wales, the rule for the law applicable to the transfer of debts is, in *Dicey,* stated to be for "intangible things"[322] and is grouped together as part of the conflict of laws category of property.[323] By contrast, in the EU, the rule for the law applicable to the transfer of claims falls within the Rome I Regulation on the law applicable to contractual matters.[324]

6.31 We return to this in more depth below. For present purposes, it is sufficient to note that the differences in the treatment of debts at a domestic substantive level mean it is particularly important for the courts of England and Wales to characterise issues "with

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320 Digital Assets: Final Report (2023) Law Com No 412, para 3.64.

321 We set out art 14 of Rome I Regulation and the relevant Dicey Rule below, from para 6.78.

322 Going forward, we refer to "intangible things" as "debts".

323 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022): the title of s 2 of ch 25 on the "Particular Transfers of Movables" is "Assignment of Intangible Things". Here, Dicey Rule 143 provides the rule, which will be discussed in greater detail below at para 6.89.

324 Rome I Regulation (EC) No 593/2008, Official Journal L 177 of 04.07.2008 art 14.

one eye on English domestic law, but with the other on the need to undertake the exercise 'in a broad internationalist spirit'".[325] Nevertheless, characterisation is ultimately a task undertaken by the court according its own rules of procedure.

Characterisation of novel objects: crypto-tokens and distributed ledgers

6.32 Novel assets such as crypto-tokens and distributed ledgers give rise to distinct challenges in both the substantive law and private international law contexts. One of the core difficulties is the absence of any consensus as to how such objects are or should be conceptualised for legal purposes.

6.33 In many cases, the way the law conceptualises an object will reflect its physical form. Sometimes, legal form and definition are at odds with physical fact. Finally, many legal objects are purely abstract constructs that have legal form only.

> The interplay between legal form and physical fact is well illustrated by the 2022 case of *Almond Alliance of California v Fish & Game Commission*. In this case, the California Court of Appeal held that bumblebees are, for certain legal purposes, "fish."[326]
>
> The petitioners had argued that the legal definition of "fish" in question should be read as being limited to aquatic invertebrates. The Court rejected this argument and espoused a definition of "fish" that encompasses all terrestrial and aquatic species that fall within the categories of "molluscs, invertebrates, amphibians, and crustaceans".
>
> The finding that bumblebees, which as a matter of fact are terrestrial invertebrates, are treated in law as "fish" has a significant practical consequence: bumblebees are entitled to special protections as an endangered or threatened species of "fish" for the purposes of the California Endangered Species Act.

6.34 Reflecting this interplay between legal form and physical fact, there have been many proposed conceptualisations of how decentralised assets such as crypto-tokens should take legal form at the most basic level. These are often informed by empirical features, such as the underlying code and the protocols, and how they are transferred from one party to another as a simple matter of fact.[327]

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325 *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] EWCA Civ 68 at [26], by Mance LJ.

326 No. S275412 (Cal Sep 21 2022).

327 A Held, "Crypto Assets and Decentralised Ledgers: Does Situs Actually Matter" in A Bonomi, M Lehmann and S Lalani (eds), *Blockchain and Private International Law* (2023) p 216; A Held, "Finality, Rights in Rem, and the Blockchain: Can Transactions in Cryptoassets be Set Aside?" in M Lehmann and C Koller (eds), *Digital Assets in Enforcement and Insolvency* (forthcoming). Amy Held was a member of the Advisory Panel until she joined the Law Commission specifically to work on this project as a law reform lawyer in November 2023.

6.35 Specific conceptualisations usually focus on one particular aspect of the object as the starting point. This may ultimately lead to considerable differences in how the object is treated in law.

> The effect that conceptualisation may have on the law is, again, well demonstrated by the *Almond Alliance* case discussed above.
>
> On an everyday level, "fish" are usually thought of as an aquatic species. Nevertheless, as the *Almond Alliance* case shows, as a matter of law, "fish" may include terrestrial species if the focus of the legal definition of "fish" is "invertebrate" rather than "aquatic species."
>
> Focussing on the "invertebrate" aspect of "fish" led to the legal conclusion that some terrestrial species qualify for legal protections under the California Endangered Species Act.

6.36 In the context of digitisation and decentralisation with which we are concerned, crypto-tokens in a permissionless DLT network could be considered at the conceptual level in various different ways. Depending on the aspect on which the conceptualisation focuses, the conclusions in substantive law and private international law may differ considerably. Some examples follow.

(1) Emphasis on the network aspect of a crypto-token in a permissionless DLT network may lead to conceptualisation as a series of contracts between participants.[328] The result in a private international law is that disputes in relation to the crypto-tokens, as a species of intangible property arising by reason of participation in the network, would be characterised as a contractual matter within the scope of the Rome I Regulation.[329]

(2) Emphasis on the network aspect of a crypto-token in a permissionless DLT network may lead to conceptualisation as a series of multilateral contracts between participants within the legal concept of an unincorporated association. The result in private international law is that any dispute in relation to the crypto-

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328 A Dickinson, "Cryptocurrencies and the Conflict of Laws" in D Fox and S Green (eds), *Cryptocurrencies in Public and Private Law* (2019) para 5.109.

329 Above. It is important to emphasise, however, that this particular analysis applies only to the rights and obligations as between participants to the network. Professor Dickinson distinguishes such internal rights from those arising outside of the network. These transactions outside of the network would be characterised differently and would attract the application of other applicable law rules.

Dr Burcu Yüksel Ripley sets out a similar conceptualisation, albeit for transfers of cryptocurrencies taking place within permissioned networks only. Dr Yüksel Ripley concludes that the result in private international law is that any disputes would be characterised as a contractual matter within the general rule under the Rome I Regulation, and in the absence of a choice of law, within the scope of Article 4(1)(h): B Yüksel Ripley, "Cryptocurrencies Transfers in Distributed Ledger Technology-Based Systems and their Characterisation in Conflict of Laws" in J Borg-Barthet, K Trimmings, B Yüksel Ripley and P Zivkovic (eds), *From Theory to Practice in Private International Law: Gedächtnisschrift for Professor Jonathan Fitchen* (2024) pp 117 to 122.

tokens would be characterised as a contractual matter excluded from the scope of the Rome I Regulation under Article 1(2)(f).[330]

(3) Emphasis on the blockchain ledger aspect of a crypto-token in a permissionless DLT network may lead to a conceptualisation as a registered asset where the decentralised ledger functions as a register of entitlements.[331] The result in private international law is that any dispute in relation to the crypto-tokens would be characterised as a property matter to which the *lex situs* rule applies, with the register coming to the fore as a connecting factor.[332]

(4) Emphasis on the private key aspect of a crypto-token in a permissionless DLT network may lead to a conceptualisation as an asset functionally comparable to a corporeal movable where the private key functions in a manner akin to possession.[333] The result in private international law is that any dispute in relation to the crypto-tokens would be characterised as a property matter to which the *lex situs* rule applies, with the functional equivalent of control coming to the fore as a connecting factor.[334]

6.37 It has been said that, ideally, substantive conceptualisation should precede the issues that arise in private international law for two main reasons: a robust conceptualisation of legal form informs and opens up the range of potential connecting factors;[335] and it also informs the process of characterisation.[336] As we saw above, characterisation strongly influences the ultimate outcomes of the three-stage process.

6.38 Given the uncertainty regarding legal form at the substantive level, it remains open for courts to characterise novel phenomena for the purposes of private international law in novel ways. At present, it is enough to be aware that there are significant differences in opinion as to which of the multilateralist rules should apply. This is

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330 A Held, "Private Keys and Blockchains: what *is* a Cryptoasset in Law?" (2020) J*ournal of Banking and Financial Law* 250.

331 Hin Liu sets this conceptualisation in substance, albeit as one of two possibilities for a blockchain security where the crypto-token is linked to the payment obligation of the issuer: H Liu, "The Legal Nature of Blockchain Securities" [2021] *Lloyd's Maritime and Commercial Law Quarterly* 476 to 502 generally (490 to 494 in particular).

332 A Held, "Private Keys and Blockchains: what is a Cryptoasset in Law?" (2020) Journal of Banking and Financial Law; Amy Held, "Finality, Rights *in Rem*, and the Blockchain: Can Transactions in Cryptoassets be Set Aside?" in M Lehmann and C Koller (eds), *Digital Assets in Enforcement and Insolvency* (forthcoming).

333 See n 23 above, 476 to 502 generally (482 to 489 in particular). Hin Liu sets out this conceptualisation in substance, albeit as one of two possibilities for a blockchain security where the crypto-token is linked to the payment obligation of the issuer.

334 A Held, "Finality, Rights *in Rem*, and the Blockchain: Can Transactions in Cryptoassets be Set Aside?" in M Lehmann and C Koller (eds), *Digital Assets in Enforcement and Insolvency* (forthcoming).

335 A Held, HCCH Conference on Commercial, Digital, and Financial Law Across Borders (CODIFI), "Reflections on PIL & DLT" (15 September 2022); A Held, "Crypto Assets and Decentralised Ledgers: Does Situs Actually Matter?" in A Bonomi, M Lehmann and S Lalani (eds), *Blockchain and Private International Law* (2023) p 257.

336 A Held, "Crypto Assets and Decentralised Ledgers: Does Situs Actually Matter?" in A Bonomi, M Lehmann and S Lalani (eds), *Blockchain and Private International Law* (2023) p 216.

exacerbated by the fact that commentators take different starting points in relation to conceptualisation.[337]

6.39 It should, nevertheless, be remembered that conceptualisation of legal form is still distinct from the process of characterisation undertaken by the court as the first step in the multilateralist method of identifying the applicable law. It has been said that, notwithstanding the difficulty of determining the *situs* of crypto-tokens within a permissionless DLT network:

> determinations of the *lex causae* – and in appropriate cases, jurisdiction – will, in practice, be heavily influenced by the factual context within which a legal dispute arises as the premises informing both the pleadings and the exercise in legal characterisation undertaken by the court. Accordingly, the importance of maintaining a pragmatic approach can hardly be overstated. Relevant considerations in disputes involving crypto assets will include the typical ways in which end-users deal and transact in crypto assets; the commercial practices in effecting such dealings and transactions; and the ways in which crypto assets generate demand amongst the general public as a valued resource. … relationships between the parties and the nature of their commercial agreements can have significant bearing on the pleadings, characterisation, and, ultimately the relevance of *situs* as a connecting factor.[338]

6.40 Finally, it is worth noting that the courts of England and Wales can further establish new legal categories for characterisation if there is good reason to do so, with each category attracting its own conflict of laws rule.[339] Professor Adrian Briggs describes this process as follows: "English law designs the pigeonholes, and an English sorter decides which facts belong in which pigeonhole".[340]

6.41 There are relatively few decisions of the courts of England and Wales explaining characterisation, and each case depends on its facts. It is therefore difficult to draw wider conclusions from existing case law.[341]

Step 2: identify the relevant multilateralist rule and the abstract location

6.42 Once the issue in dispute has been characterised, the court will then refer to the rule for this type of legal issue.

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337 Above p 218.

338 Above.

339 A Briggs, *The Conflict of Laws* (4th ed 2019) p 13.

340 Above.

341 The editors of *Dicey* note that "the characterisation of a rule of law for any purpose other than that of the conflict of laws cannot be relied upon for conflicts purposes", and even previous characterisations for the purposes of conflicts will not be dispositive in subsequent cases: Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 2-0112.

The court has concluded that Alice's claim is not about Bob causing danger to the general public by driving dangerously. Nor is it about a breach of a promise made by Bob to Alice that he will drive at or under the speed limit. Rather, the dispute is about compensation for breach of an obligation on Bob not to cause harm to those he can foresee might be affected by his driving.

6.43 In the terms of the categories used by private international law, the issue is therefore one of non-contractual liability. The court will therefore look to the multilateralist rule for non-contractual liability.

6.44 The current conflict of laws rules in England and Wales are spread between two EU Regulations which are now assimilated law (the Rome I and Rome II Regulations) and the common law rules. The assimilated Rome I Regulation deals with contractual obligations in civil and commercial matters, while the assimilated Rome II Regulation deals with non-contractual obligations in civil and commercial matters. Contractual obligations arising under bills of exchange, cheques, promissory notes, and other negotiable instruments are expressly excluded from the scope of the Rome I and Rome II Regulations and are dealt with under the common law rules. Property matters have always been beyond the scope of the Rome Regulations and are governed under the common law rules.

6.45 The judicial approach to these two sources of law is different. Applying the Regulations is said to be a process of EU statutory interpretation,[342] in which the text should be given a uniform, autonomous meaning across Member States.[343] This approach continues, in modified form, after the UK's withdrawal from the EU. So long as the text of the Regulations has not been changed, decisions of the Court of Justice of the European Union (CJEU) handed down prior to 31 December 2020 continue to be binding on courts of first instance.[344] Furthermore, the courts of England and Wales may continue to have regard to CJEU case law developments after this date, even if it no longer has binding effect.[345]

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342 Above, para 2-042; A Briggs, *Private International Law in English Courts* (2nd ed 2023) p 44 (considering any analogy with common law characterisation "to be an illusion").

343 Sometimes the relevant instrument will contain explicit language to this effect. Eg, Recital (11) of the Rome II Regulation states that "the concept of a non-contractual obligation varies from one Member State to another. Therefore, for the purposes of this Regulation, non-contractual obligation should be understood as an autonomous concept": Rome II Regulation (EC) No 864/2007, Official Journal L 199 of 31.07.2007.

344 European Union (Withdrawal) Act 2018, s 6(3). However, decisions are not binding on a court acting in an appellate capacity, or the Supreme Court: European Union (Withdrawal) Act 2018, s 6(4). Modifications by the Retained EU Law (Revocation and Reform) Act 2023, not yet in force, have introduced new tests for departure from assimilated EU (and domestic) case law: ss 6(3) and 6(4), amending s 6(5) European Union (Withdrawal) Act 2018. These tests provide a lower threshold for courts considering departure from assimilated case law. Most notably, the test for departure from assimilated EU case law requires the court to have regard to "the fact that decisions of a foreign court are not (unless otherwise provided) binding".

345 European Union (Withdrawal) Act 2018, s 6(2): a court "may have regard to anything done on or after exit day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court". See generally, M Ahmed, *Brexit and the Future of Private International Law in English Courts* (2022) p 168.

6.46 By contrast, the common law rules are and remain a matter of the domestic law of England and Wales. As we noted in the context of jurisdiction in paragraph 2.45 above, "the common law rules" refers both to the common law authorities as well as UK statutes.

6.47 We now set out the relevant applicable law rules for contractual obligations under the Rome I Regulation; non-contractual obligations under the Rome II Regulation; contractual obligations arising under bills of exchange, cheques, and other negotiable instruments under the common law rules; and property matters under the common law rules.

Contractual obligations: Rome I Regulation

6.48 For matters relating to contractual obligations, the applicable law rules are set out in the Rome I Regulation. Various provisions are made for certain types of situations as well as specific types of contracts. Many of these follow a "waterfall" scheme setting out a clear hierarchy of provisions which begin with a general rule. This is followed by further provisions to be considered in a defined sequence if the general rule is not applicable or does not provide a clear answer.

6.49 We provide here an overview of the provisions that we consider are most likely to be relevant to our project below. We discuss applicable law and contractual obligations in more detail in Chapters 7 and 8.

Article 3: freedom of choice

6.50 The starting point is that the parties have freedom to choose a system of law. Article 3(1) provides:

> A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case.

6.51 A valid choice of law will determine the law which governs the private law relationship between the parties under the contract. This approach is in line with the prominent role that party autonomy plays in contractual matters.

Article 4: applicable law in the absence of choice

6.52 Article 4 then provides for the rules that apply in the absence of a choice of law.

6.53 Article 4(1) provides rules for specific types of contracts, such as contracts for the sale of goods, supply of services, tenancies of immovable property and franchise agreements.

6.54 If the contract in the dispute cannot be classified as one (and only one) of these specific contracts, Article 4(2) looks to the habitual residence of the party providing the "the characteristic performance" under the contract.[346] Usually, this means the non-money performance. For example, in a sale of goods, the "characteristic performance" is the provision of the goods being sold, rather than the payment of the purchase

[346] Rome I Regulation (EC) No 593/2008, Official Journal L 177 of 04.07.2008 art 4(2).

price. The applicable law is that of the country in which the party to perform the "characteristic" obligation has their habitual residence.

6.55 There is an exception to the rules in Articles 4(1) and 4(2). If the contract is "manifestly more closely connected" with a country other than the countries indicated by Articles 4(1) or 4(2), Article 4(3) allows the law of that country to be applied instead.[347]

6.56 Finally, there is a "catch all" provision for when the applicable law cannot be identified using any of the first three subsections. In such circumstances, the residual rule in Article 4(4) provides that the contract is governed by the law of the country with which it is "most closely connected".[348]

Article 6: special rules for consumer contracts

6.57 Special protections for consumer contracts are set out in Article 6 of the Rome I Regulation.

6.58 The special protections apply where a contract is concluded between a consumer and a professional, and the professional has pursued activities in or directed activities to the consumer's home country. Article 6(2) provides that a choice of law agreed between the parties will not be valid if it deprives the consumer of the benefit of mandatory consumer protection laws which would otherwise apply to them.

6.59 A "consumer" is defined as a natural person entering into a contract for a purpose which is outside of their trade or profession. A "professional" is a person acting in the exercise of a trade or profession.[349]

6.60 Some consumer contracts are excluded from the scope of Article 6. Most notable in the context of this project are the exclusions for contracts which constitute transferable securities (Article 6(4)(d)) and contracts concluded within multilateral systems which facilitate the trading of financial instruments (Articles 6(4)(e) and 4(1)(h)). We discuss these exclusions in depth in Chapter 8 on consumer contracts.

Article 14: assignment of claims

6.61 Article 14 sets out the rule for the law applicable to disputes concerning the voluntary assignment of a claim. We saw above that "claim" is the term used in Continental legal systems for what in the law of England and Wales is traditionally called a "chose in action."

6.62 Assignment, or transfers, of claims involve three parties and two contracts:

(1) Debtor is under a legal obligation to repay Creditor £10,000 under a contract of loan. Creditor therefore has a contractual right to be repaid £10,000 by Debtor.

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347 Above art 4(3).

348 Above art 4(4).

349 Above art 6(1).

(2) Creditor transfers or "assigns" the right to be repaid £10,000 by Debtor to a third party under a contract of assignment. In the context of this contractual relationship, Creditor is the assignor, and the third party is the assignee.

6.63 Article 14(1) provides that the relationship between assignee and assignor will be governed by the law that applies to the contract of assignment.

6.64 Article 14(2) provides that the law applicable to the assigned claim (that is, the contract of loan or contract under which the claim arises) will govern: the relationship between the assignee and the debtor; whether and under what conditions a right is capable of assignment; and how the debtor can obtain a good discharge.

6.65 Individual systems of law differ in the extent to which they consider claims to encompass elements of property law. Article 14(1) is applicable "to the property aspects of an assignment as between assignor and assignee in legal orders where such aspects are treated separately from aspects under the law of obligations".[350]

6.66 Care, therefore, needs to be taken with this statement because the Continental approach to property law differs in several fundamental ways from the common law approach to property. What is a "property aspect" of an assignment of a claim under Continental systems does not necessarily correspond to the "property aspect" of an assignment of a chose in action under common law. We return to this below from paragraph 6.90.

Article 1(2): exclusions from the scope of the Rome I Regulation

6.67 Article 1(2) sets out a list of contracts which are excluded from the Rome I Regulation. Below, we briefly consider the exclusions in Articles 1(2)(d) and (f).

Negotiable instruments

6.68 Article 1(2)(d) excludes from the scope of the Rome I Regulation:

> obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character.

6.69 Obligations arising under the named instruments (bills of exchange, cheques and promissory notes) fall outside of the Rome I Regulation entirely.[351] By contrast, obligations arising under - "other negotiable instruments" - are excluded "to the extent that the obligations under such other negotiable instruments arise out of their negotiable character."

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[351] Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 33-39; M McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (2015) para 7.105.

6.70 An obligation arises out of an instrument's negotiable character when it is "liable to affect substantive proprietary rights",[352] such that the following are excluded:

> disputes over obligations to pay under the instrument, such as a challenge to whether the person claiming payment is, in English terminology, a holder in due course, or that the party to an instrument has been discharged from liability under the rules governing the operation of such an instrument. The law governing such matters will be determined by the law of the forum court rather than that otherwise indicated under Rome I.[353]

6.71 We discuss these exclusions from the Rome I Regulation in more detail in Chapters 10 and 11.

Non-contractual obligations: Rome II Regulation

6.72 For matters relating to non-contractual obligations (tort), the applicable law rules are set out in the Rome II Regulation. Again, various provisions are made for certain types of situations and non-contractual obligations; and many of these follow a 'waterfall' scheme in a hierarchy of provisions to be applied.

6.73 We provide here an overview of the provisions that we consider are most likely to be relevant to our project. We discuss applicable law and non-contractual obligations in more detail in Chapter 9.

Article 4: general rule for torts

6.74 The starting point is Article 4(1) which provides that:

> the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the law of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

6.75 Article 4(1) provides that the rule is intended to be of general application; it is the "general rule" for torts.[354] Article 4(2) provides an exception to this general principle which applies where there is a "special connection" between the parties in the form of a shared habitual residence.[355] Article 4(2) provides:

> However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

6.76 Finally, Article 4(3) provides an "escape clause" intended to allow for a degree of judicial discretion in each case:

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352 R Plender and M Wilderspin (eds), *The European Private International Law of Obligations* (5th ed 2019) para 5-030.

353 M McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (2015) para 7.106.

354 This is confirmed by Recital (18) of the Rome II Regulation (EC) No 864/2007, Official Journal L 199 of 31.07.2007.

355 Defined in the Rome II Regulation (EC) No 864/2007, Official Journal L 199 of 31.07.2007 art 23.

> Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

6.77 Article 4(3) continues that such close connections with a country other than that indicated in paragraphs 1 or 2 might "in particular" be based on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort in question.

Article 14: freedom of choice

6.78 Unlike in contractual matters, the freedom to choose a system of law in tort is a derogation from the general rule. Under Article 14, parties can submit non-contractual obligations to the law of their choice under certain circumstances. Accordingly, they may either:

(1) make an agreement to that effect after the event giving rise to the damage has occurred (Article 14(1)(a)) or,

(2) where all parties are pursuing a commercial activity, by having freely negotiated and agreed to a governing law of choice before the damage occurred (Article 14(1)(d)).

6.79 The limited freedom of choice afforded to parties is explained in Recital (31), which expresses a desire to respect party autonomy and enhance legal certainty. Giving parties the freedom to choose which law will resolve their dispute, both before and after the offending incident, has been said to enhance legal certainty in two ways.

6.80 First, it gives parties a relatively quick way of resolving disputes, which is important in light of the flexibility afforded to courts to determine the applicable law by reference to the unique circumstances of each case.[356] Second, the freedom of choice enables parties to avoid drawn-out litigation, which is especially liable to arise in respect of issues of characterisation, owing to different conceptualisations of, and substantive law applicable to, tortious disputes across EU Member States.[357]

6.81 Whilst these considerations will undoubtedly be of benefit in Continental methods of procedure where the judge drives the litigation process, they are arguably far less relevant for the civil procedure of England and Wales. As we noted above, there is an especially strong presumption in the civil procedure of England and Wales that the substantive law of England and Wales will apply to the dispute; and that a judge need not investigate of their own initiative whether a foreign law applies. Unless the issue of applicable law is in dispute between the parties or the parties agree that a foreign law applies, the law of England and Wales will very likely be applied.

Property

6.82 Property matters fall outside of the scope of both the Rome I and Rome II Regulations, both of which concern the law applicable to obligations. The law

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356 G-P Calliess and M Renner, *Rome Regulations Commentary* (3rd ed 2020) p 750, para 2.

357 Above.

applicable to property disputes has always therefore been governed by the common law principles.

6.83 England and Wales, and almost all jurisdictions, use a rule based on the location of the object of property rights as the connecting factor for immovable and movable objects of property law alike. This is referred to as the *lex situs* rule or the *lex loci rei sitae* rule.

6.84 As we saw with jurisdiction in Chapters 4 and 5, property matters often engage the further consideration of time. The *lex situs* rule for the law applicable to property matters is thus usually refined with reference to the "relevant time". We discuss this principle in Chapter 12 where we discuss applicable law property matters in more detail.

6.85 We provide the choice of law rules for immovables and movables below.

Immovables

6.86 Dicey Rule 140 states:

> All rights over, or in relation to, an immovable (land) are (subject to the Exception hereinafter mentioned) governed by the law of the country where the immovable is situate (lex situs).[358]

Tangible movables

6.87 Dicey Rule 141 states:

> The validity of a transfer of a tangible movable and its effect on the proprietary rights of the parties thereto and of those claiming under them in respect thereof are governed by the law of the country where the movable is at the time of the transfer (lex situs).
>
> (1) A transfer of a tangible movable which is valid and effective by the law of the country where the movable is at the time of the transfer is valid and effective in England.
>
> (2) Subject to the Exception hereinafter mentioned, a transfer of a tangible movable which is invalid or ineffective by the law of the country where the movable is at the time of the transfer is invalid or ineffective in England.[359]

Debts and other intangible movables

6.88 We said above at paragraph 6.30 that *Dicey* includes the conflict of laws rules for the assignment of a debt within the property section of that text. We also said that the rule is in materially identical terms to the rule for the assignment of a claim under Article 14 of the Rome I Regulation.

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358 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 24R-068.

359 Above para 25R-001.

6.89 Dicey Rule 143 states:

> (1) As a general rule:
>
> > (a) the mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ("the debtor") are governed by the law which applies to the contract between the assignor and assignee; and
> >
> > (a) the law governing the right to which the assignment relates determines its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.
>
> (2) But in other cases (semble), the validity and effect of an assignment of an intangible may be governed by the law with which the right assigned has its most significant connection.[360]

6.90 As we explained above, according to the property law of England and Wales, a debt is a type of personal property, yet this classification under the domestic property taxonomy does not necessarily carry over into the context of private international law. This is demonstrated by the case of *Raiffeisen Zentralbank v Five Star General Trading.*[361]

6.91 *Raiffeisen* concerned a contractual assignment of a marine insurance policy. The parties were in dispute as to the proper characterisation of the claim:

(1) The Appellant contended that the issue in dispute should be characterised as a property matter governed by the law of the place where the debt under the insurance policy was located. Using the usual technique of private international law for localising claims, the Appellant contended that the debt was located in France and that French law should govern the dispute.

(2) The Respondent contended that the issue in dispute should be characterised as a contractual matter within the scope of what is now Article 14 of the Rome I Regulation.

6.92 Lord Justice Mance considered it unclear why, as the Appellants submitted, it was "necessary to talk of "title to the right", or to focus on its transfer from assignor to assignee, rather than upon the simple question: who was in the circumstances entitled to claim as against the debtor?".[362] Remarking that the "artificiality" in the Appellants' submission might be attributable to their desire to point to the *lex situs* as the applicable law, Lord Justice Mance ultimately did not characterise the issue in dispute "as being whether the title to the right of suit of cause of action which formerly vested in or was now owned by the assignee." Lord Justice Mance concluded that control

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360 Above para 25R-057.

361 [2001] EWCA CIV 68.

362 Above at [35].

over a debt by the courts in the jurisdiction where a debtor resides was not enough of a justification for characterising a debt as property in the matter before him.[363]

6.93 The editor of *Guest on the Law of Assignment* notes that:

> "[*Raiffeisen Zentralbank v Five Star General Trading*] suggests that conflict of law principles peculiar to property are not to be employed to displace the law governing the assigned claim applicable to the matters referred to in article 14(2)."[364]

6.94 In other words, the courts of England and Wales should not let a domestic distinction between contractual and proprietary disputes influence their interpretation of the scope of Article 14.[365]

Lex fori: the public policy and mandatory rules of the forum

6.95 There are some cases in which the forum will "decline to recognise or apply what would otherwise be the appropriate foreign rule of law".[366] There are two main circumstances in which this may occur.

6.96 First, cases where the application of the foreign rule would be against the public policy of the forum. If the courts in England and Wales have accepted jurisdiction over a case but the application of the foreign law indicated by the applicable law rule would offend the public policy of England and Wales, the courts will decline to apply that law.[367] This will be a rare occurrence: the result has to be "wholly alien to fundamental requirements of justice as administered by an English court".[368]

6.97 Second, cases where the application of foreign law is inconsistent with an overriding mandatory law of the forum. As we will see in Chapter 12, the domestic system of property law is in almost all jurisdictions a mandatory law applied by the forum as the law of the forum (*lex fori*).

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363 Above at [37].

364 YK Liew (ed), *Guest on the Law of Assignment* (4th ed 2021) paras 10 to 11; Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 25-066.

365 *Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68 at [48] by Lord Justice Mance.

366 *Vervaeke v Smith* [1983] 1 AC 145, 164, by Lord Simon of Glaisdale; Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 5R-001 (Rule 5). Public policy in this sense refers to the fundamental values of English law, which change over time: A Briggs, *The Conflict of Laws* (4th ed 2019) p 192.

367 Public policy has been invoked where a contract was entered into through coercion: *Kaufman v Gerson* [1904] 1 KB 591 (CA), 600, by Lord Justice Mathew. Serious international law or human rights violations may also be a reason to disapply foreign law: see generally, A Mills, "The Dimensions of Public Policy in Private International Law" (2008) 4(2) *Journal of Private International Law* 201 to 236.

368 *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883 at [16] by Lord Nicholls of Birkenhead.

6.98 Exceptions for the public policy[369] and mandatory law[370] of the forum feature in most systems of private international law.

Step 3: apply the applicable law rule to the facts of the case

6.99 Assuming that there is no issue of public policy or overriding mandatory rules, the final stage of the three-stage process is to apply the conflict of laws rule to the facts of the case.

6.100 Under the multilateralist theory, this should be a straightforward and obvious conclusion. This is because, as we said in Chapter 2, the rule is supposed to reflect the obvious and natural seat of the legal issue in dispute.

> The issue in dispute between Alice and Bob was characterised as one of non-contractual obligations. The court in England and Wales in which Alice has brought proceedings therefore would look to the Rome II Regulation. Article 4 is the default rule which provides that the law of the place where the damage occurred will be applied.
>
> Applied to the facts of the case, Article 4 points to Egypt. This is because Egypt is the place where Alice sustained damage in the form of personal injury. Egyptian law therefore applies to Alice's claim against Bob and will determine whether he is liable to her or has a defence.
>
> Under the multilateralist theory originally espoused by Savigny, the conclusion that Egyptian law applies to Alice and Bob's dispute is one that every court around the world will arrive at if they subscribe to the multilateralist approach to the conflict of laws. This is because the law of the place where the damage occurred (*lex loci damni*) is supposed to reflect a natural and objective connection between issues of non-contractual liability and the legal system in which they have their natural and objective seat.

6.101 In the next section, we examine this theoretical premise in greater detail as we set out the broader theoretical principles that underpin the multilateralist approach to applicable law.

6.102 As we said above at paragraph 6.103, we consider the objectives and justifications for the multilateralist approach to help us assess whether the current challenges posed by digitisation and decentralisation can be met using the current system of multilateralist applicable law rules in England and Wales.

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369 Eg, art 21 of the Rome I Regulation and art 26 of the Rome II Regulation provide in materially similar terms that "the application of a provision of the law in any country specified the Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum."

370 Eg, art 9 of the Rome I Convention and art 16 of the Rome II Regulation provide in materially similar terms that "nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable."

OBJECTIVES OF AND JUSTIFICATIONS FOR THE MULTILATERALIST APPROACH

6.103 We said that, in the usual course of events, the basic starting point for determining applicable law is that the forum can apply its own law to both the procedural aspects and substantive aspects of a case before it. The premise of the conflict of laws is that, in many cases, a court should apply the substantive law of another country to determine whether the claim should succeed or a defence is made out.

6.104 The fact that courts will apply the substantive law of another country is a characteristic feature of civil disputes.[371] In criminal, public, revenue, administrative, and even civil procedural law matters, courts will always apply their own domestic law. For example, as a matter of the conflict of laws in England and Wales, the courts of England and Wales will not apply the law of another country if doing so would enforce, directly or indirectly, a foreign penal law, a foreign revenue law, or other foreign public laws.[372]

6.105 By contrast, in private law matters, the entire discipline of conflict of laws is premised on the basis that courts will, in private law matters, often apply the substantive law of another country. The question of why courts do so is, however, has been an issue of serious contention for almost as long as the discipline itself has existed in its modern form.

Why do courts apply the substantive private law of another country?

6.106 It has been said "the outstanding characteristic of the conflict of laws is the astonishing lack of consensus on the discipline's goals and methods."[373] Here, we set out the main theories as to why courts apply the substantive private law of another sovereign state.

Comity

6.107 It is often said that courts apply the laws of another sovereign state out of comity.

6.108 Comity is a principle that was developed and defined by Dutch legal scholars in the 17th century as a core principle of international relations more broadly. We referred in Chapter 3 to two of the three foundational propositions of private international law that were set out by Ulricus Huber in 1689.

6.109 Here we refer to the third: "out of comity, foreign laws may be applied so that rights acquired under them can retain their force, provided that they do not prejudice the state's powers or rights".[374]

6.110 The term "comity" today is still frequently encountered, but its modern meaning is so protean that its utility has been questioned owing to the lack of any clear definition. Professor Adrian Briggs, who articulated a detailed and authoritative understanding of

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371 A Mills, "Justifying and Challenging Territoriality" in R Banu, M S Green and R Michaels (eds), *Philosophical Foundations of Private International* Law (forthcoming) ch 8.

372 *Re State of Norway's Application (Nos 1 and 2)* [1990] 1 AC 723, 807 to 808. For further discussion, see A Briggs, *Civil Jurisdiction and Judgments* (7th ed 2021) para 21.10.

373 F Juenger, *Choice of Law and Multistate Justice* (1993) p 1.

374 U Huber, *De conflictu legum diversarum in diversis imperriis*, in *Praelectiones Juris Romani et hodierni* (1689) as translated in S C Symeonidies, *Choice of Law* (2016) p 51.

the principle in a "ground-breaking" series of Hague Lectures on the topic,[375] explains that the principle may be "formulated by reference to the principles of sovereignty and territoriality":[376]

> If comity is understood as a rather woolly principle of judicial self-restraint, it would not be particularly useful. However, the principle may be formulated more precisely: as one which asserts positively that the exercises of sovereign power within the sovereign's own territory are entitled to be respected, but which also accepts passively that parties may assume obligations which either may ask a court to enforce against the other without regard to such territoriality.[377]

Vested rights

6.111 Another rationale for why courts apply the laws of another sovereign state is that they do so to give effect to or recognise private rights validly acquired in or granted by that sovereign state.

6.112 This proposition was developed by Albert Venn Dicey from an incidental aspect of Huber's comity proposition into a general principle underpinning the conflict of laws. In the first edition of the treatise still authoritative today in England and Wales, Dicey said "the Courts […] of England, never in strictness enforce foreign law; when they are said to do so, they enforce not foreign laws, but rights acquired under foreign laws."[378]

6.113 Vested rights theory was highly influential in England and Wales, as well as in the USA, but was generally rejected as the general basis of the conflict of laws by the early 20th century.[379] Nevertheless, the theory has been argued to have continued contemporary significance in a slightly refined form and in certain defined circumstances.[380] It has also been said that vested rights theory rationalises much of the approach taken to property issues in the conflict of laws.[381]

The legitimate expectations of the parties

6.114 A more contemporary rationale for why courts apply the laws of another sovereign state is that they do so to give effect to the legitimate expectations of the parties.

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375 James Edelman and Madeleine Salinger, "Comity in Private International Law and Fundamental Principles of Justice" in A Dickinson and E Peel (eds), *A Conflict of Laws Companion* (2021) p 325.

376 A Briggs, *Private International Law in English Courts* (2nd ed 2023) paras 3.139 and 6.137 to 6.138. See also: A Briggs, "The Principle of Comity in Private International Law" (2012) 354 *Recueil des Cours* 181 ("Hague Lectures") and A Briggs, "Recognition of Foreign Judgments: A Matter of Obligation" (2013) 129 *Law Quarterly Review* 91, as cited in J Edelman and M Salinger, "Comity in Private International Law and Fundamental Principles of Justice" in A Dickinson and E Peel (eds), *A Conflict of Laws Companion* (2021) p 334.

377 A Briggs, *The Conflict of Laws* (4th ed 2019) p 32.

378 A V Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (1896) p 10.

379 J Basedow, "Vested Rights Theory" in J Basedow, G Ruhl, F Ferrari and P de Miguel Asensio (eds), *Encyclopaedia of Private International Law (Vol 2): Entries I-Z* (2017) p 1815.

380 This revival of the theory is attributed to R Michaels, "EU Law as Private International Law: Reconceptualising the Country-of-Origin Principle as Vested-Rights Theory" (2006) 2 *Journal of Private International Law* 195. Also, see generally n 71 above.

381 A Held, "The modern property situationship" (2024) *Journal of Private International Law* (forthcoming).

6.115 Early parallels were drawn with the injustice of the retrospective application of new laws to arrangements made at a time when the law is not yet in force. Parties who had organised their affairs in accordance with the laws in force at the time they had made their arrangements would suffer injustice if more recent law was applied instead".[382] The expectations of the parties have since been said to be "one of the basic reasons why we have choice of law rules at all."[383]

6.116 The current edition of *Dicey* states at the outset that "[t]he main justification for the conflict of laws is that it implements the reasonable and legitimate expectations of the parties to a transaction or an occurrence".[384]

Party Autonomy

6.117 As we have seen, party autonomy is the basic starting point for the law applicable to contractual obligations. Freedom of choice has long been a general principle of the rules of private international law for contractual matters.[385]

6.118 The influence of party autonomy has slowly been extending beyond its traditional application in contract. As we saw for the rules for non-contractual obligations, the Rome II Regulation allows limited scope for the parties to choose the applicable law. We also said that the freedom of parties to choose the applicable law is, in essence, an inherent feature of the adversarial system of civil procedure in England and Wales.

6.119 Reflecting the increasingly pervasive trend of party autonomy, some commentators suggest that party autonomy is now, or is becoming, "close to universal and incontestable" as a "unifying principle"[386] of modern private international law, even amounting to a "rule of customary law".[387] However, this does not render the principle of party autonomy immune from critical analysis.[388]

6.120 In all cases, property remains an outlier in that it continues to resist the trend of party autonomy. Although there have been some calls for party autonomy to play a greater

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382 R Neuner, "Policy considerations in the Conflict of Laws" (1942) 20 *Canadian Bar Review* 482: "if the judge applies a rule, which is in fact new, as if it had been in force at the moment when the parties acted, the expectation of parties must necessarily be disappointed. Various remedies have been proposed to satisfy our sense of justice in this type of situation. It is the same consideration of justice, namely, to respect the expectations of the parties, which permeates the whole body of rules of conflict of laws".

383 E Cheatham and W L M Reese, "Choice of the Applicable Law" (1952) 52 *Columbia Law Review* 971.

384 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 1-006.

385 See generally, A Mills, *Party Autonomy in Private International Law* (2018). See also R Westrik and J van der Weide, "Introduction" in R Westrik and J van der Weide (eds), *Party Autonomy in International Property Law* (2011) p 1.

386 S C Symeonides, *Codifying Choice of Law Around the World: An International Comparative Analysis* (2014) p 346, as cited in A Mills, *Party Autonomy in Private International Law* (2018).

387 A F Lowenfeld, "International Litigation and the Quest for Reasonableness" (1994) 245 *Recueil des Cours* 256 ("support of party autonomy is by now so widespread that it can fairly be called a rule of customary law"), cited in A Mills, *Party Autonomy in Private International Law* (2018). See also P Nygh, *Autonomy in International Contracts* (1999) p 45.

388 See generally, A Mills, *Party Autonomy in Private International Law* (2018).

role in matters of property,[389] the general consensus internationally is that property law remains a mandatory form of law from which parties cannot derogate by agreement.[390]

Decisional harmony and certainty

6.121 One of the premises of the multilateralist method is that, in theory, it should not matter in which court a dispute is litigated because application of the multilateralist rule will mean the outcomes of the dispute will always be the same. This is often known as "decisional harmony" and was one of the core objectives pursued by the multilateralist ideal originally espoused by Savigny.

6.122 The significance of decisional harmony as a rationale for the conflict of laws is best seen by reference to its objective of reducing irreconcilable or contradictory rules with which persons must comply.

> In Chapter 3, we discussed the *Microsoft Ireland* case, which concerned the provision of data stored on one of Microsoft's servers located in the Republic of Ireland.
>
> If the act of downloading the data and exporting it to the USA were governed by the law of New York, the act would constitute compliance with the law in force in the New York (in the form of the court warrant ordering Microsoft to provide the data).
>
> If the act of downloading the data and exporting it to the USA were governed by the law of the Republic of Ireland, the act would constitute a breach of law in force in Ireland (in the form of the data protection laws derived from EU law).
>
> The multilateralist approach aims to reduce such conflicts by ensuring that an act is judged or governed by the law of only one sovereign state. We saw in Chapter 2 that the multilateralist approach proceeds on the premise that every legal issue that arises for determination by a court has a natural "home" or "seat" in the territory of one sovereign state. This is the reason why it is the law of this sovereign state that should be applied.

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389 This argument has been put forward especially in relation to movable property, where the justification for upholding the *lex situs* rule is deemed to be less convincing. For an overview of some of these arguments, see eg A Flessner, "Choice of Law in International Property Law – New Encouragement from Europe" in R Westrik and J van der Weide (eds), *Party Autonomy in International Property Law* (2011) pp 11 to 19. For a response to arguments in favour of party autonomy, see E-M Kienger, "Freedom of Choice of Law in the Law of Property?" (2018) 7(3) *European Property Law Journal* 221 to 245.

390 A Flessner, "Choice of Law in international Property Law – New Encouragement from Europe" in R Westrik and J van der Weide (eds), *Party Autonomy in International Property Law* (2011) p 26. In the domestic context, see R Goode, "Security in Cross-Border Transactions" (1998) 33 *Texas International Law Journal* 49; Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 2-132; M Bridge, "The Proprietary Aspects of Assignment and Choice of Law" (2009) 125 *Law Quarterly Review* 677.

6.123 It is also said that, by promoting decisional harmony, multilateralist applicable law rules enable parties to organise their legal affairs with certainty because they will know what law will be applied to their affairs and transactions.

Predictability

6.124 The Third Restatement of the Conflict of Laws in the USA is expected to bring "greater predictability to choice of law by providing more determinate rules, rather than open-ended balancing,"[391] but without the rigidity of strict multilateralist rules. We discuss the Third Restatement and the particular context in which it has been developed further below.

Challenges to the multilateralist approach

6.125 These basic propositions have found varying degrees of favour throughout the history of the discipline as a whole. All theories have been criticised at one time or another. Some general theories will be generally discredited, only to be revived convincingly in a new form applicable to only certain types of legal issues.[392]

6.126 A more significant and overarching criticism of the multilateralist approach, however, gained significant traction in the USA during the mid-20th century. Notably, this criticism manifested not only in academic circles but as a matter of positive law, as applied by the courts, and as a matter of law reform. We consider it worth therefore briefly setting out the development of the conflict of laws in the USA from the early 20th century to the present day.

6.127 The First Restatement of the Conflict of Laws (1933) adopted a highly rigid multilateralist approach, with absolute rules expressed in wholly territorial terms. The approach attracted significant criticism in academic circles, as summarised:

> The Restatement was a system of detailed, mechanical, and rigid rules that (a) completely sacrificed flexibility on the altar of ostensible certainty and predictability, which eventually proved illusory; (b) ignored the lessons of experience, in favour of the pursuit of an ill-conceived theoretical purity; and (c) completely eliminated judicial discretion, even as they purported to be a distillation of the courts' experience.[393]

6.128 Notwithstanding this criticism, the First Restatement was adopted in almost all states and the courts initially deferred to its rules. It was, however, recognised that individual judges were beginning to manipulate procedural matters, notably characterisation, to avoid the application of a particular applicable law rule. Such practice became prevalent, but it would not be until the seminal New York case of *Babcok v Jackson*[394] in 1963 that the courts openly departed from the First Restatement and declined to

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391 K Roosevelt III and B Jones, "What a Third Restatement of the Conflict of Laws Can Do" (2016) 110 *American Journal of International Law Unbound* 141.

392 Eg we discussed vested rights theory above from para 6.111.

393 S C Symeonidies, *Choice of Law* (2016) p 45.

394 191 NE 2d 279 (NY 1963).

apply its rules. This, for practical purposes, was the start of what has been called the "US conflicts revolution".[395]

6.129 Given this climate of hostility, work on a Second Restatement had begun in the 1950s before being promulgated in 1969. Its hallmark is a retreat from rigid multilateralist rules that "preselect" the applicable law for the court and replacing them with a more flexible "approach."

6.130 This involves a court consulting a list of prescribed factors to consider when choosing the applicable law. Section 6 has been said to be an important example that enunciates the underlying ideology,[396] and instructs the court to consider:

> (a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states and their interests in applying their law to the particular issue; (d) the protection of justified party expectations; (e) the basic policies underlying the particular field of law; (f) the objectives of certainty, predictability, and uniformity of result; and (g) the ease in determining and applying the governing law.[397]

6.131 Criticism of the Second Restatement has been milder if mixed:[398] It has "proven popular by judges but […] is generally dimly regarded by professors".[399] Nevertheless, it had been recognised even by its Reporter[400] that the reactionary environment in which the Second Restatement was drafted means that the US "conflicts revolution" is not yet complete.[401]

6.132 The American Law Institute began work on a Third Restatement some 40 years after the Second Restatement. It draws upon empirical data collated over forty-odd years since the Second Restatement was adopted relating to the factors that influence judicial decision-making when applying the list of factors the court is instructed to consider. As at the present date, more than fifty percent of the drafts for the Third Restatement have been approved.[402]

THE CORE PROBLEM FOR APPLICABLE LAW

6.133 We noted in Chapter 3 that the core challenges faced by private international law in the context of emerging technology arise due to the tension between transactions,

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395 S C Symeonidies, *Choice of Law* (2016) p 124.

396 Above p 111.

397 Restatement (Second), art 6(2).

398 K Roosevelt III, "Legal Realism and the Conflict of Laws" [2015] *University of Pennsylvania Law Review Online* 329. Kermit Roosevelt III is the Reporter for the Third Restatement.

399 K Roosevelt III and B Jones, "What a Third Restatement of the Conflict of Laws Can Do" (2016) 110 *American Journal of International Law Unbound* 141.

400 Reporter Willis Reese called the Second Restatement a "transitional document" and described the formulation of more definite rules as "the task of future Restatements": W L M Reese, "Conflict of Laws and the Restatement, Second" (1963) 28 *Law and Contemporary Problems* 699.

401 K Roosevelt III, "Legal Realism and the Conflict of Laws" [2015] *University of Pennsylvania Law Review Online* 329.

402 The status of the project may be found at https://www.ali.org/projects/show/conflict-laws/.

events, and objects transcending national borders, but law being limited to the territorial boundaries of sovereign states.

6.134 In Chapter 4, we saw that this challenge in the context of international jurisdiction arises essentially as one of public international law. Where a dispute has the same connections to multiple territories, it is difficult to say why any one of those territories can say they have a particularly significant connection to the dispute such that an exercise of the adjudicatory jurisdiction by its courts is justified.

6.135 In the context of applicable law, territoriality poses a different challenge. Here, it does not touch upon matters of public international law. Rather, the tension arises because (i) many of the multilateralist rules used today express territorial connecting factors; which are (ii) supposed to point to the law of a single sovereign state as the law applicable to the legal issue in dispute.

6.136 We have explained that the multilateralist approach begins from the theoretical premise that every legal issue for determination by a court has an objective seat in a single legal system. The relationship between the issue and its objective seat is the connecting factor that informs the applicable law rules that identify the law applicable to the legal issue in dispute.

6.137 For some legal issues, such as property entitlements to land, the premise functions very well as it was intended. Land by its nature does not change location, so a rule that points to the "law of the place where the land is situated" will always lead to the one state in which the land is located as a simple matter of fact. Even if the territorial borders of sovereign states change, the application of the rule will still point to one territory. Only in the very rare case where the territorial boundaries of the sovereign states change such that the same plot of land now is located within two different states will some difficulty arise.

6.138 Other legal issues do not, however, facilitate the same outcomes when a multilateralist rule expressed in territorial terms is applied. Rather than point to a single location, application of the rule may point to many places. For example, for property entitlements to a car, the "place where the car is located" can point to number of different places, depending on the point in time.

6.139 Similarly, for some legal issues arising from events and actions, the application of a territorial rule will easily point to a single location. In the case of a purely physical act or event in one physical territory that leads only to physical injury (such as Alice and Bob's road traffic accident) a rule that points to 'the place where the damage was sustained' will generally lead to a single territory.[403]

6.140 Other cases present more difficulty. As we saw in Chapter 3, the "place of the damage" is a "notoriously problematic connecting factor for online torts"; these "often

[403] We said, however, in Chapter 4 that damage in tort can be notoriously complex and that such complexities carry over into private international law. In matters of jurisdiction, we saw that a careful distinction was made in *Brownlie* between financial loss consequent to physical damage and pure financial loss. In the same vein, art 4(1) of the Rome II Regulation expressly states that the basic applicable law for tort refers to the direct damage, and not the consequential loss.

produce effects in many places at once while having virtually no connection to any physical place."[404]

6.141 We said in Chapter 3 that such difficulties are not necessarily problematic for private international law. Where the number of locations is relatively small, or there is some factor that tends to hold more weight than any of the others, private international law has various techniques for narrowing down the range of potential locations to a single territory for the purpose of identifying the applicable law. We saw that, for a digital file stored offline on the hard drives of five different laptops, narrowing down the copies of the file based on a temporal factor may be effective in identifying the applicable law. For data stored as shards on a distributed server, focusing on the service provider – as an entity exercising a prominent position within the factual and commercial matrix surrounding the file – yielded a convincing connecting factor.

6.142 Nevertheless, we saw in Chapter 3 that decentralised applications of DLT challenge the application of even these techniques. This was because decentralisation is often the express objective for the application in itself. As a result, they "cannot be linked to a specific country because they have simultaneous and equally valid connections to jurisdictions all over the world."[405]

6.143 In such cases, application of a multilateralist rule does not narrow down the options to a single legal system; and will instead point to several, each in equal measure. The application of the rule leaves a court "no closer to identifying the applicable law than it was before the rule was applied."[406]

Potential solutions to the problem

6.144 There have been various ways that private international law has met the challenges of human affairs being conducted across territorial boundaries in the digital, online, and decentralised spheres. We consider that these warrant careful consideration in relation to the first of our stated priorities set out in Chapter 3, that is, the extent to which the challenges posed by digitisation and decentralisation can be accommodated within the existing law.

6.145 We set these out below and will seek views on the merits, demerits, and limitations of these approaches where appropriate in later chapters of this call for evidence.

Combination of fixed and open-textured rules

6.146 As we noted above, some of the provisions in the Rome I and Rome II Regulations follow a common pattern:

(1) first, there is a general rule that applies as the default rule and points to a specific location;

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404 T Lutzi, "The Tort Law Applicable to the Protection of Crypto Assets" in A Bonomi, M Lehmann and S Lalani (eds), *Blockchain and Private International Law* (2023) p 408.

405 M Lehmann, "Extraterritoriality in Financial Law" in A Parrish and C Ryngaert (eds), *Research Handbook on Extraterritoriality in International Law* (2023) p 427.

406 A Held, "The modern property situationship" (2024) *Journal of Private International Law* (forthcoming).

(2) second, there are more specific rules that apply in specific circumstances that point to a specific location;

(3) third, there is an "escape clause" that applies if there is a country with which the particular issue is "manifestly more closely connected" than the places identified by the general and specific rules;

(4) finally, there may be a "catch-all" provision that applies when the applicable law cannot be determined using any of the other rules. In these circumstances, the approach taken by the rule mirrors the 'escape clause' and the rule points to the place with which the issue is most closely connected.

6.147 The "escape clause" and "catch all provision" are often described as "open-textured" rules that leaves courts discretion to decide whether another law might be more appropriate to apply that those to which the fixed rules point. Usually, this is described as the law of the place with which the issue has its "closest and most real connection."

6.148 Such approach is a "last resort" under EU rules, where the fixed rules are taken first and are presumed in most cases to be sufficient. As such, the "escape clause" in Article 4(3) of the Rome II Regulation has been described as a "high hurdle". [407] In the context of the Rome I Regulation, it has been said that recourse to the "escape clause" requires that:

> the cumulative weight of the factors connecting the contract to another country must clearly and decisively outweigh the desideratum of certainty in applying the relevant test in Article 4.1 or 4.2.[408]

6.149 In other legal systems, the emphasis is inverted: the open-textured rule is the general rule, and the fixed rules are merely indicative of the place that is, in specific circumstances, likely to be the place with which the case has its closest connection.

6.150 For example, Article 8(1) of the Japanese Act on the General Application of Law provides:

> In the absence of a choice of law under the preceding Article, the formation and effect of a juridical act are governed by the law of the place with which the act is most closely connected at the time of the act.[409]

6.151 Article 8(2) then provides for presumptions to be applied where the juridical act involves one party providing characteristic performance; and where the place of business is connected with the juridical act. Article 8(2) further provides for presumptions to be applied where the subject matter of the juridical act is real property.

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407 Rome I Regulation: *BNP Paribas SA v Anchorage Capital Europe LLP* [2013] EWHC 3073 (Comm) at [64]; Rome II Regulation: *Pan Oceanic Chartering Inc v UNIPEC UK Co Ltd* [2016] EWHC 2774 (Comm) at [206].

408 *Molton Street Capital LLP v Shooters Hill Capital Partners LLP* [2015] EWHC 3419 (Comm) at [94].

409 English translation provided by the Japanese Ministry of Justice at https://www.japaneselawtranslation.go.jp/en/laws/view/3783/en.

6.152 The technique of using a combination of fixed and open-textured rules was considered by the Law Commission jointly with the Scottish Law Commission in a project established in 1979 in response to proposals by what is now the EU for the predecessors to the Rome I and Rome II Regulations.

6.153 Although the European proposal subsequently proceeded to consider only conflict of laws rules for contractual obligations, the Law Commission and Scottish Law Commission continued with their work on reforming the conflict of laws rules for tort and delict in the United Kingdom.

6.154 The Consultation Paper, published in 1984, canvassed four main alternatives. Two of these made use of the same fixed and open-textured rules but which were to apply in a different order:

(1) Model 1: a fixed rule designating the law of the place of the wrong (*lex loci delicti);* with a "proper law" exception for the place of the "closest and the most real connection" to the dispute.

(2) Model 2: an open-textured "proper law" rule pointing to the law of the place with the closest and most real connection; with presumptions in favour of the place of the wrong.

6.155 Professor Janeen Carruthers, in the context of formulating an alternative conflict of laws rule in respect of property matters, has argued for a method that allows for "flexibility through the medium of the connecting factor…tempered by respect for simplicity."[410] Her proposed alternative conflict of laws rule similarly combines fixed and open-textured rules with alternating orders of application,[411] with two basic designs offered:[412]

(1) A *situs* rule, coupled with a "proper law" exception to the effect that, where appropriate, a law of closer and more real or significant connection should displace the *situs* rule.

(2) A general rule that the applicable law should be the law of the country with which the transaction and the parties had, at the relevant time, the closest and most real connection, coupled with a presumption in favour of the law of the *situs.*

6.156 Professor Carruthers developed these two basic designs into two proposals (Models 1 and 2) for a comprehensive conflict of laws regime, the scope of which extends to immovable, tangible movable and intangible movable property, and considers voluntary and involuntary dispossessions, and static and dynamic conflicts.[413]

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410 J Carruthers, *The Transfer of Property in the Conflict of Laws: Choice of Law Rules Concerning Inter Vivos Transfers of Property* (2005) para 9.08.

411 Above paras 9.11 to 9.46.

412 Above para 9.46.

413 Above. Model 1 ("Draft Convention on the Law Applicable to the Transfer of Property") pp 249 to 277; Model 2 ("The Transfer of Property (Applicable Law) Bill") pp 278 to 295. Appendices are also available thereafter.

Open-textured rules

6.157 Open-textured rules can be seen in the approach taken in the US Second Restatement. We saw above that the backlash against the rigid nature of the First Restatement saw a relaxation of the rules themselves. Rather than point to a specific location in absolute terms, the Second Restatement adopted a more flexible approach whereby the rule does not point to a place, but rather gives guidelines on *how* to identify the most appropriate law.

6.158 As we also noted, work on the Third Restatement takes into account empirical data on how collated over forty-odd years since the Second Restatement was adopted relating to the factors that influence judicial decision-making when applying the list of factors the court is instructed to consider.

6.159 The principle underpinning open-textured rules is recognised in the common law of England and Wales. In *Raiffeisen Zentralbank v Five Star Trading LLC*, Lord Justice Mance rejected a strict adherence to the rules set out in *Dicey* and expressed the view that:

> the overall aim is to identify the most appropriate law to govern a particular issue. The classes or categories of issue which the law recognises at the first stage [of characterisation] are man-made, not natural. They have no inherent value, beyond their purpose in assisting to select the most appropriate law. A mechanistic application, without regard to the consequences, would conflict with the purpose for which they were conceived. They may require redefinition or modification, or new categories may have to be recognised accompanied by new rules at stage 2 [that lay down a connecting factor for the relevant issue] if this is necessary to achieve the overall aim of identifying the most appropriate law.[414]

6.160 Lord Justice Mance cited support for this proposition in Lord Justice Auld's judgment in *Macmillan*[415] and commented that:

> the conflict of laws does not depend (like a game or even an election) upon the application of rigid rules, but upon a search for appropriate principles to meet particular situations.[416]

6.161 The extent to which it could be said that this represents the prevailing general approach of the common law of England and Wales where it is not bound by the Rome Regulations is unclear.

6.162 Another of the proposals canvassed by the Law Commission and Scottish Law Commission in the 1984 Consultation Paper was a "bare proper law" approach favouring the law of the place with the "closest and most real connection." The Law Commissions considered the approach of the US Second Restatement as a "particular manifestation" of this approach and noted that the approach had been

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414 *Raiffeisen Zentralbank v Five Star Trading LLC* [2001] EWCA Civ 68, [2001] QB 825, 840.

415 *Macmillan Inc v Bishopsgate Investment Trust Plc (No 3)* [1996] 1 WLR 387, 407.

416 See n 105 above, 841.

approved by with Lord Denning.[417] Ultimately, a bare proper law approach was rejected on the basis of uncertainty.

6.163 We note, however, that *Raiffeissen* was decided some 17 years after the Law Commission and Scottish Law Commission concluded that a bare proper law approach would be too uncertain. It may be, therefore, that *Raiffeisen* better reflects the present position.

Emphasis on a "special connection" between the parties

6.164 Article 4(2) of the Rome II Regulation is an example where another approach has been to retreat from the connecting factors expressed in territorial terms, and to use instead personal or hybrid personal-territorial connecting factors, such as domicile or habitual residence.

6.165 The usual rule for non-contractual obligations in Article 4(1) of the Rome II Regulation is a traditional territorial rule that focusses on locating the tort or delict within a particular territory. Article 4(1) focuses on the place where the tortious damage was sustained.

6.166 Article 4(2) nevertheless provides that where there is a "special connection" between the claimant and defendant in the form of a common habitual residence in the same country at the time of the damage, the law of that common habitual residence will apply.

Emphasis on the parties and their legitimate expectations

6.167 Given the problems of localising tortious damage in the online and decentralised contexts, Professor Tobias Lutzi considers it would be more pertinent to focus on the parties in a tort claim themselves.

6.168 Professor Lutzi observes that the escape clause in Article 4(3) of the Rome II Regulation makes it possible to take a pre-existing relationship between the parties (such as a contract) or between the parties and a third person (such as the host of a trading platform) into account.[418] Nevertheless, he considers that this is often difficult in tort, because the parties frequently do not have a pre-existing relationship.

6.169 Accordingly, in Professor Lutzi's view, the default rule should be to apply the law of the place where the party committing the (alleged) tort was based, tempered by considerations of the parties' legitimate expectations.[419]

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417 Private International Law: Choice of Law in Tort and Delict (Scot Law Com Consultative Memo No 62), (1984) Law Com No 87, from para 4.126.

418 T Lutzi, "The Tort Law Applicable to the Protection of Crypto Assets" in A Bonomi, M Lehmann and S Lalani (eds), *Blockchain and Private International Law* (2023) p 411 and n 73.

419 Above p 411.

Substantive justice

6.170 A common argument that runs throughout the history of the conflict of laws[420] is that a court should apply the law which provides for a more just substantive outcome.

6.171 This is contrary to the traditional multilateralist approach insofar as this method of the conflict of laws proceeds from the premise that all legal systems are equally just. As we said in paragraph 3.148 above, the multilateralist approach is traditionally said to be "blind" to the substantive outcomes of the application of multilateralist rule. The function of the multilateralist rule is simply to identify which of equally just legal systems should apply.

6.172 On the one hand, consideration of substantive justice has its obvious merits in any individual case. On the other hand, it has been doubted whether these approaches "genuinely offer more just outcomes for private parties who find themselves subject to unexpected or conflicting regulation."[421]

More detailed and precise fixed rules

6.173 On the other side of the spectrum lie approaches that suggest that the problem with fixed rules might rather stem from:

> the breadth of categories for which a single connecting factor may be deemed apposite: "the larger the category, the less rational the results are likely to be in cases somewhat removed from the category's core or central conception[422]"
> …various commentators have called expressly for narrower, more detailed, tailored rules, to replace over-inclusive (albeit time-honoured) single contact rules.[423]

6.174 The risks associated with rigid fixed rules could thus be minimised by "the careful and detailed formulation of a large number of choice of law rules, each tailored to cover a fairly precisely refined, and often relatively narrow, range of situations."[424]

6.175 The ultimate question has been said to be whether:

> [a] method is to be adopted which ensures justice in the individual case, but which will abandon to a greater or lesser degree the quest for predictable solutions? Or

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420 The early unilateralist scholars sometimes premised the choice between competing substantive rules on a comparison of their respective merits. See F Juenger, *Choice of Law and Multistate Justice* (1993) p 15.

421 A Mills, "Justifying and Challenging Territoriality in Private International Law" in R Banu, M S Green, and R Michaels (eds), *Philosophical Foundations of Private International Law* (forthcoming) ch 8.

422 A T von Mehren and D T Trautman, *The Law of Multistate Problems: Cases and Materials on Conflict of Laws* (1965) p 104. See also n 7 in J Carruthers, *The Transfer of Property in the Conflict of Laws: Choice of Law Rules Concerning Inter Vivos Transfers of Property* (2005) para 9.04.

423 J Carruthers, *The Transfer of Property in the Conflict of Laws: Choice of Law Rules Concerning Inter Vivos Transfers of Property* (2005) para 9.04.

424 P B Carter, "Rejection of Foreign Law: Some Private International Law Inhibitions" (1984) 55 *British Yearbook of International Law* 112, as cited in J Carruthers, *The Transfer of Property in the Conflict of Laws: Choice of Law Rules Concerning Inter Vivos Transfers of Property* (2005) para 9.07, n 14.

are rules to be introduced that pay regard to the need for foreseeability, but which, if applied consistently, will sometimes cause hardship in the individual case.[425]

6.176 Professor Janeen Carruthers has argued for a similar approach to be taken in the formulation of new conflict of laws rules concerning lifetime transfers of property. In addition to the well-established three-fold division of property categories (immovables, tangible movables, and intangible movables), Professor Carruthers proposed further sub-divisions that would take into account special characteristics which distinguish "static conflicts from dynamic conflicts, original-parties disputes from remote-parties disputes, and cases of voluntary dispossession from those of involuntary dispossession."[426]

Incentivise a choice of law

6.177 UNIDROIT's choice of law provision in the Principles on Digital Assets and Private Law eschews any attempt to apply the "usual connecting factors for choice-of-law rules (e.g., the location of persons, offices, activity, or assets)" in the context of "proprietary issues relating to digital assets."[427]

6.178 Given UNIDROIT's view that "adoption of such factors would be incoherent and futile (except in the limited case where there is an identified issuer)," UNIDROIT's applicable law provision circumvents the property issue by resorting to a contractual approach based on party-autonomy.

6.179 In this way, the approach underpinning UNIDROIT's choice of law rule is "to provide an incentive for those who create new digital assets or govern existing systems for digital assets to specify the applicable law in or in association with the digital asset itself or the relevant system.[428]

Abandon the multilateralist approach

6.180 Amy Held has argued that in the specific case of property disputes to wholly decentralised and omniterritorial objects, the multilateralist approach has very little prospects of affording a wholly satisfactory solution. Whilst it might be possible to formulate a connecting factor, "identification of a connecting factor only leads to a second and more intractable question of whether its application in a live dispute will actually prove effective."[429] In particular, the stark differences between national systems of property law in relation to incorporeal objects and problems of *conflit mobile* were identified as posing particular problems.

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425 O Lando, "Contract" in K Zweigert and U Drobnig (eds), *International Encyclopaedia of Comparative Law (Vol III)* (1976) p 78, as cited in J Carruthers, *The Transfer of Property in the Conflict of Laws: Choice of Law Rules Concerning Inter Vivos Transfers of Property* (2005) para 9.05.

426 J Carruthers, *The Transfer of Property in the Conflict of Laws: Choice of Law Rules Concerning Inter Vivos Transfers of Property* (2005) para 9.47.

427 UNIDROIT, "Principles on Digital Assets and Private Law" (2023) para 5.4. Full text available here: https://www.unidroit.org/wp-content/uploads/2023/04/C.D.-102-6-Principles-on-Digital-Assets-and-Private-Law.pdf.

428 Above Principle 5(1).

429 A Held, "The modern property situationship" (2024) *Journal of Private International Law* (forthcoming).

6.181 She considered that these problems, however, cannot be resolved within the multilateralist approach to the conflict of laws because of "the nature of property law as a system of rights granted to an individual by a sovereign authority that alone can guarantee its *erga omnes* effect by binding all persons personally within its sphere of sovereignty." As such, property law is premised on the same principle of territorial sovereignty that renders the multilateralist approach to the conflict of laws "diametrically opposed" to omniterritoriality. No sovereign state could therefore claim to regulate property matters in relation to omniterritorial phenomena.

6.182 Her view is that the only theoretically and practically viable solution for property matters can be to harmonise the substantive law; either through customary supranational principles akin to the old *lex mercatoria*, or an instrument of public international law.[430]

Evaluation

6.183 We observe that there are various possible ways to approach to the tension between the aterritorial and omniterritorial features of digitisation and decentralisation, and the territorial premise of the multilateralist approach to the conflict of laws. We further observe that the vast majority of proposed solutions surveyed above do not suggest that a radical departure from the basic multilateralist method and approach is required.

6.184 In assessing the merits and demerits of a particular approach, our current thinking is that where a proposed solution remains within the basic multilateralist method, it would be appropriate to consider the extent to which its application would achieve the broader objectives of and justifications for the multilateralist approach.

6.185 This is in line with the suggestion by Professor Alex Mills that, where territorial rules in private international law are adopted, "greater thought" should be given the utility of relying on territoriality as a means of achieving "the traditional objectives of private international law of legal certainty and reducing the risk of conflicting [laws]".[431]

6.186 We observe, however, that there is no consensus as to the overriding objective of the modern multilateralist approach to the conflict of laws. Some experts seem to favour the legitimate expectations of the parties,[432] while others emphasise predictability.[433] These share many similarities; at least, insofar as the legitimate expectations of the parties relate a certain and predictable legal framework.

6.187 We further observe that some objectives appear to apply only for certain categories in the conflict of laws. Party autonomy, for example, holds overarching weight in contractual matters, but less so for tort, and perhaps not at all for property. Vested rights theory has been said to be relevant for property, but not for the conflict of laws more broadly.

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430 Above. See also A Held, "Crypto Assets and Decentralised Ledgers: Does Situs Actually Matter?" in A Bonomi, M Lehmann and S Lalani (eds), *Blockchain and Private International Law* (2023) p 257.

431 A Mills, "Justifying and Challenging Territoriality in Private International Law" in R Banu, M S Green, and R Michaels (eds), *Philosophical Foundations of Private International Law* (forthcoming) ch 8.

432 See eg the editors of *Dicey* at para 6.116 above.

433 See eg the American Law Institute at para 6.132 above.

6.188 Should it be necessary for us in the course of this project to consider a new approach to the conflict of laws rules in England and Wales, we think we should bear the following considerations in mind:

(1) The broader overriding objective (or objectives) of the conflict of laws.

(2) The specific policy objectives pursued by the individual applicable law categories.

(3) Striking the appropriate balance between predictability and certainty on the one hand; and flexibility and individual justice in each case on the other.

(4) The merits and demerits of using:

(a) a combination of fixed and open-textured rules.

(b) one open-textured rule.

(c) many fixed but detailed rules.

(5) Where a combination of fixed and open-textured rules is preferable, the merits and demerits of:

(a) Starting with a fixed rule that leads to open-textured exceptional "escape clause" or "final resort";

(b) An open-textured rule general rule with presumptions for particular cases.

(6) The extent to which it can be said that *Raffeissen* is indicative of the modern common law approach to the applicable law.

(7) Judicial experience in applying applicable law rules.

6.189 These considerations have so far informed our understanding of the issues we have been tasked to consider. As such, they have also informed the questions we pose in subsequent chapters.

6.190 Finally, we note that, where the Rome Regulations apply, we are not in a position to propose different rules. We nevertheless think that consideration of broader issues relating to the approach and policy objectives of the multilateralist approach may be helpful for the courts of England and Wales when they interpret and apply the waterfall provisions contained in the Rome Regulations.

Chapter 7: Applicable law – non-consumer contracts

7.1 In this chapter and the next, we look at the applicable law rules for contractual disputes concerning crypto-tokens. Essentially, a contractual dispute arises between two parties who have agreed to deal with each other.

7.2 The applicable law rules for contract are well established, with detailed rules set out in the assimilated Rome I Regulation. These include general rules which regulate choice of law[434] and the law which applies in the absence of choice,[435] and special rules which apply to consumer contracts.[436] In this chapter, we examine the general rules which apply to non-consumer contracts. These are contracts where both parties act in the course of trade, or neither party does so.

7.3 We are concerned in these chapters with circumstances in which parties' agreements to deal with each other in some way relate to crypto-tokens. Before turning to the relevant applicable law rules, we introduce these transactions and the extent to which we consider them relevant to our work in this project.

7.4 It is worth noting up front that parties who contract in the context of crypto-tokens often act anonymously or pseudonymously. As Professor Andrew Dickinson observed:

> The pseudonymity of users … may make it difficult to locate not only the rights and acts in question but also the actors.[437]

7.5 This is a significant practical obstacle to bringing crypto-token contract disputes to court, irrespective of the legal rules. However, if the parties are aware of each other's identity, and wish to bring disputes to court, the rules on applicable law should not add to their problems. We ask if the current rules are sufficiently clear and appropriate in the way they apply to contracts relating to crypto-tokens. Alternatively, is reform needed?

CONTRACTS IN THE CONTEXT OF CRYPTO-TOKENS

7.6 There are a number of contexts in which contractual issues may arise involving crypto-tokens. Some are familiar; for example where crypto-tokens are provided as consideration instead of traditional fiat currency under an otherwise generic contract for the sale of goods or supply of services. Other contexts, such as transactions on centralised crypto exchanges or decentralised finance platforms, are more novel.

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434 Rome I Regulation (EC) No 593/2008, Official Journal L 177 of 04.07.2008, art 3.

435 Above art 4.

436 Above art 6.

437 A Dickinson, "Cryptocurrencies and the Conflict of Laws" in D Fox and S Green (eds), *Cryptocurrencies in Public and Private Law* (2019) para 7.4.

Familiar contractual situations, but involving crypto-tokens

7.7 We have identified three key situations in which crypto-tokens could feature in otherwise familiar contractual situations:

(1) fiat currency is exchanged for crypto-tokens - that is, there is a contract to purchase crypto-tokens in exchange for money; or

(2) crypto-tokens are exchanged for goods and services; or

(3) crypto-tokens are transferred for other crypto-tokens.

7.8 Despite the substantive familiarity of these contractual situations, the factual contexts in which they can arise may well give rise to novel contractual issues in centralised crypto exchanges and in decentralised finance arrangements respectively. We consider both in turn.

Centralised crypto exchanges

7.9 We explained in Chapter 3 that a particular problem for applying a conflict of laws analysis to crypto-tokens arises when people (often anonymous or pseudonymous) participate directly on the blockchain network and hold and control their own tokens directly, and when transfers take place on-chain.

7.10 However, direct participation on the blockchain network is not the most common way of holding or dealing with crypto-tokens. Most people rely on an intermediary: an individual or (more commonly) organisation which holds crypto-tokens or an interest in the crypto-tokens on their behalf. Intermediaries, as identifiable individuals or organisations, provide a point of centralisation and move these transactions away from the decentralised ideal.

7.11 Cryptocurrency exchange platforms, such as Binance and Coinbase, are intermediaries.[438] Users of these platforms may be individuals or institutions. The exchange offers services to its users, such as acting as a custodian of their crypto-tokens[439] or executing transactions on their behalf.[440] In return, the user pays fees and/or a commission to the exchange. The relationship between the user and the exchange will be governed by a user agreement.[441]

7.12 Users of these centralised crypto exchanges can use the platform to engage in transactions, such as trading crypto-tokens for fiat currency or for other crypto-tokens. Any of the three kinds of contracts that we refer to above could be facilitated through a

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438 For more information on intermediated holding arrangements, see Digital Assets: Final Report (2023) Law Com No 412, ch 7.

439 Coinbase User Agreement, cl 5.19, available at: https://www.coinbase.com/legal/user_agreement/payments_europe.

440 Above cl 5.8

441 Eg the Binance Terms of Use are available at: https://www.binance.com/en-GB/terms.

centralised crypto exchange. Furthermore, certain[442] users are permitted to enter into derivatives contracts.[443]

7.13 It is clear that centralised crypto exchanges of this type are extremely prevalent. Coinbase, for example, is reported as having 103 million users in 2022.[444] Of these users, Coinbase has suggested that around 14,500 are institutional investors.[445] Moreover, centralised crypto exchanges have nearly 80% of market share as compared with their decentralised finance counterparts (discussed below).[446]

7.14 The inclusion of an identifiable intermediary in transactions undertaken on centralised crypto exchanges increases the likelihood of litigation in this context, by removing the practical obstacle to bringing proceedings which arises from anonymity of participants. The prevalence of centralised crypto exchanges, combined with the practical workability of litigating contractual disputes arising in this context, means that transactions undertaken on or with centralised crypto exchanges warrant particular attention in this chapter and the next.

Decentralised finance

What is decentralised finance?

7.15 As we explained in Chapter 3, decentralised finance ("DeFi") is an umbrella term used to cover platforms which use distributed ledger technology to offer a "range of financial services – including lending, exchange, asset management and insurance".[447]

7.16 DeFi offers a platform on which users may agree to deal with one another. By doing so without an intermediary, DeFi offers these services while maintaining the decentralised ideal of DLT as set out in Chapter 3.[448] Due to its decentralised nature,

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442 Crypto-derivatives are not available to retail clients based in the UK: FCA Conduct of Business Sourcebook 22.6.5. See for example https://www.coinbase.com/derivatives. This is because the FCA has deemed them ill-suited for retail consumers due to the risk that consumers will suffer significant harm from sudden and unexpected losses if they invest in these products. See https://www.fca.org.uk/news/press-releases/fca-bans-sale-crypto-derivatives-retail-consumers.

443 Companies can use derivatives such as options, futures and swaps to mitigate or hedge commercial risks they face, for example as a result of changes in interest rates, foreign currency exchange rates, or commodity prices. Less often, companies may trade in derivatives, or be party to derivatives by way of investment or speculation. All of these activities are likely to generate profits or losses. In the context of crypto-tokens, examples include cryptocurrency futures, cryptocurrency contracts for differences, and cryptocurrency options. See https://www.gov.uk/hmrc-internal-manuals/corporate-finance-manual/cfm50020 (last updated 16 Feb 2024) and https://www.fca.org.uk/news/statements/cryptocurrency-derivatives.

444 Bankless Times, "Intriguing Coinbase Statistics and Facts for Crypto Enthusiasts" (March 2023) available at https://www.banklesstimes.com/coinbase-statistics/.

445 Coinbase, "Announcing Coinbase + Google Cloud" (Oct 2022) available at https://www.coinbase.com/blog/announcing-coinbase-google-cloud.

446 A Chone, Z Benetti and F Giuglini, "ESMA TRV Risk Analysis, Decentralised Finance in the EU: Developments and Risks" (2023) p 10.

447 HM Treasury, "Future Financial Services Regulatory Regime for Cryptoassets: Consultation and Call for Evidence" (Feb 2023) para 11.1.

448 We note that some argue that some level of centralisation is inevitable. See, for example, S Aramonte, W Huang, A Schrimpf, "DeFi risks and the decentralisation illusion" (2021) *Bank for International Settlements (BIS) Quarterly Review* 21; J Chiu, E Ozdenoren, K Yuan and S Zhang, "On the Fragility of DeFi Lending"

DeFi represents a possible example to assess how the existing private international law rules and principles work in contractual disputes in these novel contexts. However, for reasons we explain below, our tentative view is that any contractual disputes that may arise in this context are not likely to come before the courts, and therefore will not be resolved with reference to private international law and the question of applicable law. We seek views on whether this understanding is correct.

How DeFi works

7.17 DeFi is intended to mirror the functions of traditional finance, and therefore has a wide range of potential applications. However, the Bank of England has identified the following four key features as being common to all DeFi applications.

(1) They purport to have a decentralised ownership and governance structure.

(2) They operate through smart contracts that execute the terms and conditions of a transaction in an automated manner.

(3) DeFi relies on "open source" technology, where anyone can read the underlying source code that operates the applications and performs financial activities.

(4) Anyone can use the DeFi applications, so long as they fulfil the application's technical requirements for participation (such as ownership of a crypto wallet).[449]

7.18 DeFi applications record all contractual and transaction details on the blockchain ("on-chain").[450] Only "on-chain" transactions (meaning those executed and recorded directly on a distributed ledger) can be categorised as DeFi.[451] This sets DeFi apart from financial applications of DLT with some degree of centralisation, such as centralised crypto exchanges. Crypto exchanges such as Binance and Coinbase provide interfaces to buy and sell crypto-tokens using conventional IT systems, and when users input their decisions onto that interface it has no direct effect on the distributed ledger.[452] By contrast, DeFi records all contractual and transaction details directly on-chain.[453]

(2023), p 6; Anne-Grace Kleczewski, "The Good, the Bad and the Ugly: The Private International Law, the Crypto Transactions and the Pseudonyms" in A Bonomi, M Lehmann and S Lalani (eds), *Blockchain and Private International Law* (2023) p 141.

449 Bank of England, "Financial Stability in Focus: Cryptoassets and decentralised finance" (March 2022), Box A, available at: https://www.bankofengland.co.uk/financial-stability-in-focus/2022/march-2022.

450 S Aramonte, W Huang, A Schrimpf, "DeFi risks and the decentralisation illusion" (2021) *Bank for International Settlements (BIS) Quarterly Review* 23.

451 R Auer, B Haslhofer, S Kitzler, P Saggese and F Victor, "The Technology of Decentralized Finance (DeFi)" Bank for International Settlements (BIS) Working Papers No 1066 (Jan 2023) p 3.

452 R Auer, B Haslhofer, S Kitzler, P Saggese and F Victor, "The Technology of Decentralized Finance (DeFi)" Bank for International Settlements (BIS) Working Papers No 1066 (Jan 2023) p 3. See also S Aramonte, W Huang, A Schrimpf, "DeFi risks and the decentralisation illusion" (2021) Bank for International Settlements (BIS) Quarterly Review 26, which explains that centralised crypto-token exchanges will "maintain off-chain records of outstanding orders posted by traders".

453 S Aramonte, W Huang, A Schrimpf, "DeFi risks and the decentralisation illusion" (2021) *Bank for International Settlements (BIS) Quarterly Review* 23.

DeFi smart legal contracts

7.19 As we explained in our Advice to Government on Smart Legal Contracts, a smart contract is a "computer code that, upon the occurrence of a specified condition or conditions, is capable of running automatically according to pre-specified functions."[454] This can be contrasted with a smart *legal* contract, which is a "legally binding contract in which some or all of the contractual terms are defined in and/or performed automatically by a computer program."[455] In order for contractual disputes to arise between users of DeFi, there needs to be a smart legal contract between users.

7.20 If parties enter a transaction using a DeFi protocol and interact with a smart contract platform (rather than directly with their counterparty), they may still conclude an agreement. As we explained in our Smart Legal Contracts Advice:

> It is conceivable that parties may transact with one another on a DLT system or other smart contract platform by deploying and interacting with the code, without engaging in natural language communications. In principle, it is possible for parties to reach an agreement in this way.[456]

7.21 Users who transact on DeFi protocols may, therefore, enter into smart legal contracts. As we have noted previously, Herbert Smith Freehills gave Aave (a DeFi lending platform) as an example of a use case for "peer to peer" smart legal contracts (whilst also acknowledging that non-legal smart contracts could also be concluded on the platform).[457] We therefore assume that smart legal contracts may, at least in some instances, be concluded between DeFi participants.

7.22 These contracts may be non-consumer or consumer contracts. In our Smart Legal Contracts Advice to Government, consultee Florien Idelberger explained that "in the world of decentralised finance [smart legal contracts entered into between businesses and consumers] already are [common]".[458]

The prevalence of DeFi and DeFi contractual disputes

7.23 DeFi services currently form a "small proportion of the cryptoasset financial services market".[459] For example, it is clear that centralised crypto exchanges such as Binance and Coinbase have a far greater market share than decentralised crypto exchanges (DeFi exchanges, known as "DEXs") such as Uniswap.[460] Therefore, whilst the

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454 Smart Legal Contracts: Advice to Government (2021) Law Com No 401, glossary.

455 Above glossary.

456 Above para 3.8.

457 Above paras 2.89 to 2.90.

458 Above para 6.2.

459 HM Treasury, "Future Financial Services Regulatory Regime for Cryptoassets: Consultation and Call for Evidence" (Feb 2023) para 11.2.

460 A Chone, Z Benetti and F Giuglini, "ESMA TRV Risk Analysis: Decentralised Finance in the EU: Developments and Risks" (2023) 10: "Public sources list more than 650 crypto exchanges globally, including more than 400 that would qualify as DEXs and a sizeable number that appear accessible to EU investors. However, more than 80% of the reported spot trading volumes is attributable to the 10 largest exchanges, all being CEXs except one (Chart 3). Over the past year, Binance alone – the largest CEX – has represented a

prevalence of DeFi has grown in recent years,[461] and there is potential for future growth,[462] it is clear that DeFi is not as prevalent as centralised applications of DLT.

7.24 Moreover, we do not consider that contractual litigation will be prevalent in the DeFi context. This is for several reasons:

(1) The use of smart contracts means that breach of a smart legal contract is less likely. It has been recognised that counterparty risk, meaning the risk that a counterparty to a deal will default on their contractual obligations, is "in theory […] lower or even non-existent in DeFi thanks to the use of smart contracts".[463] As we explained in our Advice to Government on Smart Legal Contracts, because smart legal contracts are performed automatically without the need for human intervention, a repudiatory breach in the form of a refusal to perform the contract at all on or after the due date for performance may be unlikely to occur in practice.[464] However, we also noted that there may be instances where code does not perform as intended, or where it does not operate as one party expects. These and other scenarios may give rise to contractual disputes.

(2) In the potentially unlikely event of breach, a counterparty will often be protected by over-collateralisation. This means that, for example, a lender under a DeFi lending protocol will be able to obtain redress without the need for litigation. However, Dr Scott Farrell alerted us to the limits of this strategy: over-collaterisation may reduce risk, but it cannot eliminate it entirely.

(3) Even if a party wished to litigate, their counterparty may be anonymous. As we noted above, this is a significant practical obstacle to bringing a dispute to court, as the party wishing to litigate would not be able to identify a defendant. Further, whilst we noted in Chapter 4 that parties who litigate in the context of centralised crypto exchanges often hope ultimately to target the exchange rather than the anonymous party, this cannot be done in the DeFi context because there is no intermediary.

Conclusions on DeFi

7.25 We have decided not to give DeFi separate and detailed consideration in this Chapter or the next. Whilst it is an example of the decentralised ideal and therefore a use case which could demonstrate the core problem, we consider it unlikely that contractual disputes will come before the courts in this context for the reasons discussed above.

7.26 In the (rare) event that a party to a DeFi contract were able to litigate, we think that the relevant analysis would overlap with that given below for contracts which exchange

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share of the spot trading volumes in crypto- assets ranging from 40% (June 2022) to 60% (February 2023), although its dominance is now receding".

461 HM Treasury, "Future Financial Services Regulatory Regime for Cryptoassets, Consultation and Call for Evidence" (Feb 2023) para 11.2.

462 Bank of England, "Financial Stability in Focus: Cryptoassets and decentralised finance" (March 2022), Box A, at: https://www.bankofengland.co.uk/financial-stability-in-focus/2022/march-2022.

463 A Chone, Z Benetti and F Giuglini, "ESMA TRV Risk Analysis: Decentralised Finance in the EU: Developments and Risks" (2023) 7.

464 Smart Legal Contracts: Advice to Government (2021) Law Com No 401, para 5.109.

crypto-tokens for crypto-tokens. This is because any smart legal contract concluded between DeFi users would be a contract in which both parties' performance consists of the provision of crypto-tokens. This conclusion follows from the fact that only "on-chain" transactions can be categorised as DeFi;[465] as a result, and contrary to centralised finance, "DeFi cannot support fiat currencies (since fiat currencies are not available "on-chain")".[466]

7.27 This does not preclude, of course, a dispute arising in tort. For example, users of the DeFi platform may bring proceedings in tort against the DeFi platform provider. We consider the law applicable to non-contractual obligations in further detail in Chapter 9.

Question 7.

7.28 In this question, we seek views on applicable law and decentralised finance (DeFi).

(1) Do you agree that contractual disputes in the context of DeFi are not likely to come before the courts?

(2) Do you agree that, as a result, these disputes will not be resolved with reference to private international law and the question of applicable law?

(3) Would the law applicable to these kinds of disputes benefit from further clarification?

WHAT LAW GOVERNS A CONTRACT?

7.29 The law governing a non-consumer contract is a matter of statutory rules, as set out in Articles 3 and 4 of the Rome I Regulation.[467]

Freedom of choice

7.30 The starting point is that the parties have freedom to choose a system of law. As Article 3(1) states:

> A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case.

7.31 A valid choice of law will determine the law which governs the private law relationship between the parties under the contract. For example, in the context of Decentralised

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465 R Auer, B Haslhofer, S Kitzler, P Saggese and F Victor, "The Technology of Decentralized Finance (DeFi)" Bank for International Settlements (BIS) Working Papers No 1066 (Jan 2023) p 3.

466 A Chone, Z Benetti and F Giuglini, "ESMA TRV Risk Analysis: Decentralised Finance in the EU: Developments and Risks" (2023) p 5.

467 Rome I Regulation (EC) No 593/2008, Official Journal L177 of 04.07.2008.

Autonomous Organisations (DAOs), choice of law will not affect the regulatory regime that applies to the parties as a matter of public law, because parties cannot contract out of mandatory rules.[468]

7.32 In our Advice to Government on Smart Legal Contracts we explained that "law" in this context means the law of a country – not a platform protocol specifically designed to govern crypto-tokens.[469] A protocol might be incorporated within a contract, to form part of the contract's terms and conditions. However, a system of state law is still needed to fill the gaps. Most consultees thought that this was the right approach: a protocol would be an inadequate substitute for a comprehensive system of state law.[470]

7.33 We commented that it is relatively rare for those contracting through DLT to make a choice of law.[471] As Professor Giesela Rühl explained, at times state law has been "discarded as irrelevant or unnecessary": "code is law" is a frequently cited catchphrase among proponents of an idealised version of crypto.[472] However, we thought that contractual parties would be well advised to choose a law. This would provide parties with increased certainty as to the applicable law and the consequences of any wrongdoing.[473] As smart contracting and DLT become more mainstream, it is likely that more parties will include an express choice of law, as is common in traditional contracts.

Choice of law in multilateral systems

7.34 Article 4(1)(h) provides a special rule where parties buy and sell financial instruments in a multilateral system, such as a stock market. Where the trades are brought together "in accordance with non-discretionary rules and governed by a single law", contracts concluded within the system shall be governed in accordance with that law.[474]

7.35 Article 4(1)(h) applies to financial instruments that fall with the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001,[475] and are regulated as financial services. The provision would apply, for example, to a platform to facilitate trades in regulated crypto-token futures and other derivatives. If, for example, the platform's

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468 We intend to discuss this further in our forthcoming scoping paper on DAOs see https://lawcom.gov.uk/project/decentralised-autonomous-organisations-daos/ for further updates.

469 Smart Legal Contracts: Advice to Government (2021) Law Com No 401, para 7.55.

470 Above, paras 7.60 to 7.62.

471 Above, para 7.49.

472 G Rühl, "Smart (legal) contracts, or: Which (contract) law for smart contracts?" in B Cappiello and G Carullo (eds), *Blockchain, Law and Governance* (2021) p 159.

473 Smart Legal Contracts: Advice to Government (2021) Law Com No 401, para 7.77.

474 For the full text of art 4(1)(h), see para 8.54 below.

475 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, Sch 2, Part 1.

membership agreement stated that trades will be "governed by English law", English law would apply to all trades.[476]

7.36 This leads to questions about how far a law chosen by a multilateral system would apply to crypto-tokens that are not regulated as financial instruments. Could an exchange that facilitates peer-to-peer trading choose a law to govern all the trades on its platform? The answer is yes, but the choice of law would not necessarily apply automatically. Additional steps might need to be taken to incorporate the choice of law clause within each individual trade.

7.37 For example, this could be achieved through the addition of a "constitution" to a permissionless blockchain where each transaction on this blockchain would include a reference to the constitution. The constitution then takes legal effect as a "series of private consensual arrangements".[477] This constitution could include clauses that determine governing law and jurisdiction and would become binding on parties to every transaction which includes a hashed reference to the constitution. Professor Koji Takahashi, however, has doubted whether inserting the hash value of contractual terms in electronic signatures would be sufficient to render the terms binding on all users "since electronic signatures lack visibility to human eyes."[478]

7.38 Alternatively, as we explore below, a court might take account of a closely related membership agreement when applying the so-called "escape clause" or "catch-all" provisions under Articles 4(3) and 4(4).

Applicable law in the absence of choice

7.39 In the absence of a choice of law, the Rome I Regulation sets out detailed rules to determine which law applies. For our purposes, three provisions are particularly relevant:

(1) Under Article 4(1)(a), "a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence";

(2) Under Article 4(1)(b), "a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence"; and

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476 For an example, see the Crypto Facilities describes itself as "an FCA-regulated multi-lateral trading facility for trading Futures on Bitcoin, Ethereum and other cryptocurrencies". Their membership agreement provides at cl 16.7 that it will be "governed by and construed and interpreted in accordance with English law" available at https://www.cryptofacilities.com/membership-agreement.

477 A Sanitt, "Legal analysis of the governed blockchain" available at https://www.nortonrosefulbright.com/en/knowledge/publications/0d56a3a5/legal-analysis-of-the-governed-blockchain.

478 K Takahashi, "Law applicable to proprietary issues of crypto-assets" (2022) 18(3) *Journal of Private International Law* 353.

A "hash" is a unique identifier of specific input: it is fixed length string of characters that identify another piece of data or a file. In this case of a governed blockchain, each transaction would include the hashed reference to the constitution as part of the block of data that is stored on the blockchain.

(3) where specific rules do not apply, or where "elements of the contract" would be governed more than one rule, Article 4(2) provides that:

> the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.

7.40 Article 4(3) then provides an "escape clause".[479] Where "it is clear from all the circumstances of the case that the contract is manifestly more closely connected" with another country, "the law of that other country shall apply".

7.41 Finally, Article 4(4) is a catch-all provision. Where the law applicable cannot otherwise be determined, "the contract shall be governed by the law of the country with which it is most closely connected".

7.42 Here we discuss how these rules apply to three types of crypto contracts. These are where:

(1) fiat currency is exchanged for crypto-tokens;

(2) crypto-tokens are exchanged for goods and services; or

(3) crypto-tokens are transferred for other crypto-tokens.

Exchanging fiat currency for crypto-tokens

7.43 As we explore below, when crypto-tokens are exchanged for fiat currency, it is possible that the crypto-tokens might be considered to be goods; or might be considered to be services. If that were the case, the applicable law would be identified by reference to the habitual residence of the party providing crypto-tokens.[480] If crypto-tokens are neither goods nor services, the applicable law will be identified by reference to the habitual residence of the party effecting the contract's "characteristic performance".[481] In our view, when crypto-tokens are exchanged for fiat currency, the provision of crypto-tokens will be "the characteristic performance of the contract".[482]

7.44 We recognise that the exchange of crypto-tokens for fiat currency goes both ways in practice. For example, when a person signs up to an exchange account, they typically will provide fiat currency and obtain in exchange some crypto-tokens (customer provides the fiat currency) or when they close the account, they will exchange their crypto-tokens for fiat currency (exchange provides the fiat currency).

7.45 Nevertheless, the effect of Article 4(2) is that, in the context of the Rome I Regulation, we are primarily concerned with the obligation to provide the crypto-tokens because

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479 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 32-126.

480 Rome I Regulation (EC) No 593/2008, Official Journal L177 of 04.07.2008, art 4(1)(a) and (b).

481 Rome I Regulation (EC) No 593/2008, Official Journal L177 of 04.07.2008, art 4(2).

482 We discuss "characteristic performance" in more depth from para 7.53 below.

this is the characteristic performance of the contract (that is, the non-monetary or non-fiat currency obligation).

7.46 Drawing these strands together, it seems that irrespective of how a contract exchanging crypto-tokens for fiat currency is classified under Rome I, the result will be the same: the contract will be governed by the law of the crypto-token provider. Although there is some uncertainty over how the courts might reach this outcome, we think there is relative certainty over the outcome itself.

Are crypto-tokens goods?

7.47 Contracts for the sale of goods generally involve the transfer of property in goods, or an agreement to transfer property, from a seller to a buyer. In our work on digital assets, we said that crypto-tokens are probably not goods for the purposes of English law, even though we concluded that they can be the object of property rights.[483] However, for current purposes, what is relevant is whether they fall within the definition of "goods" for the purposes of the Rome I Regulation.

7.48 The Court of Justice of the European Union (CJEU) has found that computer software can be goods for some purposes. In *The Software Incubator* case, the CJEU was asked to interpret the concept of "sale of goods" in relation to another directive (Directive 86/653 on self-employed commercial agents). It held that for these purposes, "goods" extends beyond tangible movables. It includes:

> the supply, in return for payment of a fee, of computer software to a customer by electronic means where that supply is accompanied by the grant of a perpetual licence to use that software.[484]

7.49 In reaching that decision, the CJEU held "goods" to mean "products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions".[485]

7.50 However, in *Falco*, the CJEU cautioned using decisions concerning other EU secondary legislation or treaties to interpret the Rome I Regulation.[486] Therefore it is unclear how far the *Software Incubator* decision would extend to Article 4(1)(a). In *Molton Street Capital,* Mr Justice Popplewell noted that there was a dispute as to whether bonds amounted to "goods" within the meaning of Article 4(1)(a).[487] However,

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483 Digital Assets: Final Report (2023) Law Com No 412, paras 3.3, 3.9 and 3.25.

484 Case C-410/19 *The Software Incubator Ltd v Computer Associates (UK)* at [51].

485 Case C-410/19 *The Software Incubator Ltd v Computer Associates (UK)* at [34], citing Case C-65/05 *Commission v Greece* at [23] concerned with the implementation of Article 28 EC and the free movement of goods.

486 Case C-533/07 *Falco Privatstiftung,Thomas Rabitsch v Gisela Weller-Lindhorst* at [33] to [44]. In particular, at [33], the CJEU observed: "That analysis cannot be called into question by the arguments concerning the interpretation of the concept of 'services' within the meaning of Article 50 EC or secondary Community legislation other than Regulation No 44/2001 and the broad logic and scheme of Article 5(1) of that Regulation." Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins*, *The Conflict of Laws* (16th ed 2022) para 33-010. Footnote 38 also note the broader conception of "goods" as used in the EU Treaties "will not automatically be extended into this field."

487 *Molton Street Capital LLP v Shooters Hill Capital Partners LLP* [2015] EWHC 3419 (Comm) at [92].

the point did not need to be decided because the parties were in agreement as to the characteristic performance under Article 4(2).

Is the exchange of money for crypto-tokens a service?

7.51 There is CJEU authority that for some purposes, a transaction exchanging crypto-tokens for fiat currency will qualify as a contract for the "provision of services". In *Skatteverket v David Hedqvist,*[488] the CJEU considered the treatment, for VAT purposes, of the purchasing of bitcoin. The Court of Justice held that:

(1) bitcoin is a virtual currency with no purpose other than to be a means of payment;[489]

(2) transactions which consist of exchange of different means of payment constitute a "supply of services";[490] and

(3) the exchange of cryptocurrency for fiat currency therefore constitutes the supply of services.[491]

7.52 However, in *Falco* the CJEU held that decisions under secondary Community legislation cannot be read across to the Brussels I Regulation[492] (and therefore, by extension, to the Rome I Regulation). Instead, these regulations require a "narrow interpretation". In particular, the CJEU noted that the "provision of services" in Article 5(1)(b) of the Brussels I Regulation cannot be interpreted in light of the concept of "services" in EU directives on VAT.[493]

Is the provision of crypto-tokens the "characteristic performance"?

7.53 The characteristic performance in a contract is said to be its "centre of gravity"[494] or the "real meat" of the arrangement.[495] To identify the characteristic performance, a "global picture" of the obligations under the contract must be assessed,[496] and the contract must be considered in its commercial context and against the surrounding circumstances or factual matrix.[497]

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488 Case C-264/14 *Skatteverket v David Hedqvist.*

489 Above at [24].

490 Above at [26].

491 Above at [30].

492 Case C-533/07 *Falco Privatstiftung, Thomas Rabitsch v Gisela Weller-Lindhorst* at [33] to [40].

493 Above at [38] to [40]. This is because the definition of "supply of services" in the VAT context is a "negative definition which is, by its very nature, necessarily broad, since the concept of 'provision of services' is defined as any transaction which does not constitute a supply of goods" at [39].

494 Rome I Regulation (EC) No 593/2008, Official Journal L177 of 04.07.2008, Recital (19).

495 *Print Concept GmbH v GEW (EC) Ltd* [2001] EWCA Civ 352 at [34], *Iran Continental Shelf Oil Co v IRI International Corp* [2002] EWCA Civ 1024 at [62].

496 *Print Concept GmbH v GEW (EC) Ltd* [2001] EWCA Civ 352 at [34].

497 *Apple Corps Ltd v Apple Computer Inc* [2004] EWHC 768 (Ch) at [49], *Iran Continental Shelf Oil Co v IRI International Corp* [2002] EWCA Civ 1024 at [24].

7.54 The 1980 Giuliano-Lagarde Report[498] is a guide to the interpretation of the meaning and effect of the Rome Convention, and any similarly-worded provisions of the Rome I Regulation. It explains that the characteristic performance in a contract which exchanges money for something is usually "the performance for which payment is due".

> In bilateral (reciprocal) contracts whereby the parties undertake mutual reciprocal performance, the counter-performance by one of the parties in a modern economy usually takes the form of money. This is not, of course, the characteristic performance of the contract. It is the performance for which the payment is due […] which usually constitutes the centre of gravity and the socio-economic function of the contractual transaction.[499]

7.55 In other words, "characteristic performance" is the obligation which does not consist of the payment of money, but the thing for which payment is made.

7.56 Therefore, in a contract exchanging money for crypto-tokens, the result is the same, irrespective of whether crypto-tokens are considered goods, services, a combination of both, or neither. In the absence of choice, the applicable law is that of the habitual residence of the crypto-token provider.

The "escape clause"

7.57 As we explained in Chapter 6, Article 4(3) provides that "where it is clear from all the circumstances of the case that the contract is manifestly more closely connected" with another country, the law of that other country shall apply.

7.58 This is a "high hurdle".[500] The Rome I Regulation has a more stringent test than its predecessor, the Rome Convention. It requires that:

> the cumulative weight of the factors connecting the contract to another country must clearly and decisively outweigh the desideratum of certainty in applying the relevant test in Article 4.1 or 4.2.[501]

7.59 In contracts using DLT, the problem tends to be the lack of clear connections to any particular country.[502] We think that it will therefore be rare for the escape clause to be

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498 The Giuliano and Lagarde Report [1980] Official Journal C 282/1 of 31.10.1980

499 The Giuliano and Lagarde Report [1980] Official Journal C 282/1 of 31.10.1980 p 20, as cited in Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins*, *The Conflict of Laws* (16th ed 2022) para 32-125.

500 *BNP Paribas SA v Anchorage Capital Europe LLP* [2013] EWHC 3073 (Comm) at [64].

501 *Molton Street Capital LLP v Shooters Hill Capital Partners LLP* [2015] EWHC 3419 (Comm) at [94].

502 If the contract involves the use of a central bank digital currency as payment, this may be a factor indicating a connection with the country of currency (see, for example, *Molton Street Capital LLP v Shooters Hill Capital Partners LLP* [2015] EWHC 3419 (Comm), where payment currency was mentioned as a connecting factor). However, we still think that it would be rare for the existence of this factor, without more, to meet the high threshold of the test under Article 4(3) – just as use of a particular traditional currency would be unlikely on its own to show a manifestly closer connection with the country of payment currency.

used for any of the three types of contract we discuss here (exchanging crypto-tokens for currency, goods and services, or other crypto-tokens).[503]

7.60 The same conclusion applies to each of the three types of contracts we are considering. Therefore, in the following discussion, we do not look separately at how the escape clause applies to contracts exchanging crypto-tokens either for goods and services; or for other crypto-tokens.

Exchanging crypto-tokens for goods and services

7.61 Our second example is where crypto-tokens are exchanged for tangible goods or real-world services.

7.62 Under English law, a contract for the sale of goods is one in which the seller transfers or agrees to transfer property in the goods to the buyer for money consideration.[504] If a similar definition were applied under the Rome I Regulation, then a contract to exchange goods for crypto-tokens might be problematic, as there is no money consideration.

7.63 By contrast, the CJEU has said that a "contract which has as its characteristic obligation the supply of a good will be classified as a 'sale of goods'" under the Brussels I Regulation.[505] As Professor Dickinson has observed, this suggests a flexible approach, focusing on the characteristic performance (delivery of the goods) rather than the promised counter-performance (which may be wider than just money). However, Professor Dickinson concludes that there "remains some doubt" about the issue.[506]

7.64 If a transaction to exchange goods for crypto-tokens were found not to be "a contract for the sale of goods", the next question is to determine the "characteristic performance". Here the "centre of gravity" is likely to be the provision of goods and services, with crypto-tokens acting merely as payment. As the editors of *Dicey* note, "arguably, if one party delivers goods in return for a money substitute (for example, a token or a promise to transfer unspecified goods to a certain value in the future), that party's performance may be treated as the "characteristic performance".[507]

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503 One possible example where the escape clause might be used would be if the trade took place in a "multilateral system" to facilitate peer-to-peer trading, which set out a choice of law in its membership terms. Under Recital (20), the court is required to take account of whether the contract in question has a very close relationship with another contract or contracts. It would be possible for a court to find that there was a close relationship between the contract governing the use of the platform and the contract between the traders. If so, the choice of law set out in the membership agreement might apply to the individual trades, even if the trades were not regulated as financial instruments under Article 4(1)(h).

504 Sale of Goods Act 1979, s 2(1).

505 Case C-381/08 *Car Trim GmbH v KeySafety Systems Srl* at [32].

506 Andrew Dickinson, "Cryptocurrencies and the Conflict of Laws" in D Fox and S Green (eds), *Cryptocurrencies in Public and Private Law* (2019) para 5.10.

507 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins*, *The Conflict of Laws* (16th ed 2022) para 33-011, n 43.

7.65 In the context of services, the concept of remuneration has been interpreted broadly. Remuneration does not strictly require the payment of a sum of money,[508] and has been held to include things representing "economic value" such as a competitive advantage derived from exclusive (or semi-exclusive) rights of distribution, and assistance with advertising, training, and payment facilities.[509]

7.66 Again, the exact route is open to some doubt, but the outcome is relatively clear. In the absence of choice, the applicable law is likely to be that of the habitual residence of the supplier of goods or services.

Exchanging crypto-tokens for other crypto-tokens

7.67 Our third example is where crypto-tokens are exchanged for other crypto-tokens. In some cases, it will still be possible to differentiate between performance and counter-performance, so as to find the "centre of gravity" or "real meat" of the deal. In other cases, however, it may not be possible to differentiate in this way.

Non-identical performance - an analogy with loans

7.68 Seemingly identical performance and counter-performances can sometimes be differentiated. This has been done in the context of contracts of loan, despite both parties' obligations involving the payment of money. In *Kareda v Benkö,* the CJEU held that a transfer of money in exchange for repayment of money under a credit agreement constituted a "supply of services".[510] The loan was the service, while the repayment was the remuneration.

7.69 In the Scottish case of *Atlantic Telecom GmbH*, Lord Brodie provides the following reasoning:

> applying the model of production/supply as the characteristic performance as against consumption/payment as the non-characteristic counter-performance, to loan suggests to me that it is the lender as the provider of capital who effects the characteristic performance by making an advance or series of advances. On this view the socio-economic function of the contract of loan is the temporary making available of capital. Payment of interest and repayment of capital are mere counter-performance.[511]

7.70 This analysis could apply to a contract for exchange of crypto-tokens, where the contract effectively requires one party to provide collateral to borrow a particular type of token. A "crypto loan" of this type might also be considered "a contract for the provision of services". And even if it is not characterised in this way, the court is likely to find that the loan-equivalent is the "characteristic performance".

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508 C-9/12 *Corman-Collins SA v La Maison du Whisky SA* at [39].

509 Case C-9/12 *Corman-Collins SA v La Maison du Whisky SA* at [40]. See also Case C-196/15 *Granarolo SpA v Ambrosi Emmi France SA* at [41], and Case C-64/17 *Saey Home & Garden NV/SA v Lusavouga-Máquinas e Acessórios Industriais SA* at [40].

510 Case C-249/16 *Saale Kareda v Stefan Benkö*, particularly at [36].

511 *Atlantic Telecom GmbH*, Noter, 2004 SLT 1031 at [51] to [53]. The reasoning was endorsed by the High Court in *Winslet v Gisel* [2021] EWHC 1308 (Comm) at [27].

Other cases of non-identical performance

7.71 Another example would be where one party buys a complex decentralised finance product in return for a simple stablecoin denominated in US dollars. Again, the complex product is likely to be considered the characteristic performance, with the stablecoin acting as payment.

An analogy with barter

7.72 However, not all "crypto-token for crypto-token" transactions can be analysed in this way. In some cases, there may be little to distinguish one token from the other. Where this is the case, the contract may be more like a barter contract[512] rather than falling within the model of production/supply for consumption/payment.

7.73 The editors of *Dicey* state that "a contract of barter will not in most cases have a characteristic performance".[513] This view was endorsed in *Apple Corps Ltd v Apple Computer Inc*, in which Mr Justice Mann said that:

> Dicey & Morris … gives barter as an example of a contract where one cannot determine characteristic performance. That is doubtless because there are, in effect, matching obligations neither of which is more characteristic than the other.[514]

7.74 In such a case, the applicable law will have to be identified by applying Article 4(4) of the Rome I Regulation.

The catch-all: "a close connection"

7.75 Where characteristic performance cannot be identified, the "residual" conflict of laws rule[515] in Article 4(4) applies. The contract is governed "by the law of the country with which it is most closely connected".

7.76 Recital (21) states that in these circumstances "account should be taken, *inter alia*, of whether the contract in question has a very close relationship with another contract or contracts".[516] If, for example, the "barter-type" contract is closely connected to a "loan-type" contract between the same parties, this may be sufficient to resolve the issue. The law of the habitual residence of the lender may also govern the barter arrangement.

7.77 Similarly, if the trade took place in a "multilateral system" to facilitate peer-to-peer trading, there might be a close relationship between the contract governing the use of

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512 In a barter, the consideration given for the transfer of ownership of a thing from one person to another does not take the form of a money price, like in sale, but consists of other goods or some other valuable consideration which is not money. See *Halsbury's Laws of England* (5th ed 2019 vol 91(1)).

513 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins*, *The Conflict of Laws* (16th ed 2022) para 33-011.

514 *Apple Corps Ltd v Apple Computer Inc* [2004] EWHC 768 (Ch) at [54].

515 H Beale (ed), *Chitty on Contracts* (35th ed 2023) para 34-124.

516 This was applied in *BRG Noal GP Sarl v Kowski* [2022] EWHC 867 (Ch), where the relevant contract was found to have a very close relationship with two other contracts, both of which were governed by Luxembourg law. This contributed to the conclusion that there was a close connection with Luxembourg.

the platform and the contract between the traders. The choice of law governing the use of the platform might also apply to the trades.[517]

7.78 In other cases, the courts will need to look at all the connections between the contract and a country and find the country with the closest connections. The threshold for identifying that country will be lower under this residual test than under the "escape clause" in Article 4(3). Although it is difficult to identify the specific factors that will be decisive in any given case, we think the courts will be able to identify the country with the closest connection with the contract on a case-by-case basis.

Applicable law: conclusion and question

7.79 There are some complexities and uncertainties about the process of applying the Rome I Regulation rules to crypto-token contracts. However, there is much less uncertainty about the result.

7.80 A non-consumer crypto-token contract will be governed by the law chosen by the parties. Alternatively, in the absence of choice, it will be governed by the law of the habitual residence of the party whose contractual performance least resembles "payment", and most resembles the thing that is paid for. In exchanges of fiat currency for crypto-tokens, this will be the party that supplies crypto-tokens. In exchanges of crypto-tokens for goods or services, this will be the party that supplies the goods or services. In exchanges of crypto-tokens for other crypto-tokens, it will be the party that supplies either the loan-equivalent or the more sophisticated product.

7.81 This result is reached most clearly if crypto-tokens are not defined as either goods or services. It would be uncomfortable if, for example, crypto-tokens were defined as "goods" in a contract exchanging currency for crypto-tokens, but as "not goods" in a contract exchanging crypto-tokens for diamonds. Instead, the key test is "characteristic performance". The test set out in the Giuliano-Lagarde Report is particularly helpful. Characteristic performance is "the performance for which the payment is due", and which forms "the socio-economic function of the contractual transaction".[518]

7.82 It is true that in some "barter-like" contracts the obligations cannot be differentiated. Here the courts will need to examine all the connecting issues, on a case-by-case basis, and find the country with which the contract is most closely connected. Despite the lack of clear principle in these cases, we think that in practice the courts will be able to apply this test.

7.83 Our initial, tentative, view is that there are no particular problems in deciding the applicable law for non-consumer contracts involving crypto-tokens. We ask stakeholders if they agree.

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[517] See the discussion of art 4(1)(h) from para 8.54 below.

[518] The Giuliano and Lagarde Report [1980] Official Journal C 282/1 of 31.10.1980 p 20, as cited in Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 32-125.

Question 8.

7.84 This question concerns the applicable law for non-consumer contracts.

(1) Can the provisions of the Rome I Regulation for identifying the applicable law for non-consumer contracts be applied to contracts involving crypto-tokens without undue difficulty?

(2) If the provisions cannot be applied, or can only be applied with significant difficulty, what are the possible solutions?

(3) If the provisions can be applied easily or without undue difficulty, are there any areas that would benefit from further clarification?

(4) To what extent is the application of these provisions problematic in practice?

(5) If the issue is prevalent in practice, what would be the consequences if it were not resolved adequately as a matter of law?

Chapter 8: Applicable law – consumer contracts

8.1 In this chapter, we examine the rules which apply to consumer crypto-token contracts. Consumers[519] who enter into contracts with professionals[520] are given special protections which allow them to benefit from the mandatory laws of their home state. The policy is designed to protect the consumer, who is thought to be in a weaker bargaining position than the professional.[521]

8.2 The consumer contract rules may apply to contracts relating to crypto-tokens. For example, if an individual enters into a contract for the supply of goods or services with a trader and transfers bitcoin as payment, the special rules for consumer contracts are likely to apply. However, the most notable context in which the consumer contract rules may apply is for contracts concluded between individuals and centralised crypto exchanges.

8.3 As we explained in Chapter 7, most people who transact using crypto-tokens rely on an intermediary: an individual or (more commonly) organisation which holds an interest in the crypto-tokens on their behalf. Cryptocurrency exchange platforms, such as Binance and Coinbase, are intermediaries.[522] The majority of users on crypto exchange platforms are (potentially non-professional) individuals.[523]

8.4 The consumer contract rules may apply to disputes arising between these individuals and their crypto exchanges. If the consumer has a dispute with the exchange, it is likely that the applicable law rules will allow the consumer to take advantage of mandatory UK consumer protection law, as set out in the Consumer Rights Act 2015. However, the issue is not beyond doubt: as we discuss, there is some uncertainty over the exception for "financial instruments".

8.5 In this chapter, we seek views as to whether disputes which arise between individuals and professionals who transact using crypto-tokens, or between individuals and crypto exchanges, can be sufficiently addressed through the current private international law framework. Alternatively, is reform needed?

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519 Natural persons who contract for purposes outside their trade or profession: Article 6(1) Rome I Regulation (EC) No 593/2008. We consider the definition of a consumer contract in depth below, at paras 8.14 to 8.35.

520 A person acting in the exercise of their trade or profession: Article 6(1) Rome I Regulation on the law applicable to contractual obligations (EC) No 593/2008. We consider the definition of a consumer contract in depth below, at paras 8.14 to 8.35.

521 See for example Rome I Regulation (EC) No 593/2008, Official Journal L177 of 04.07.2008, Recital (23): "As regards contracts concluded with parties regarded as being weaker, those parties should be protected by conflict of laws rules that are more favourable to their interests than the general rules". See also Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins*, *The Conflict of Laws* (16th ed 2022) para 33-150.

522 For more information on intermediated holding arrangements, see Digital Assets: Final Report, Law Com No 412, ch 7.

523 See Ch 7, para 7.13.

8.6 We start with a brief summary of the consumer contract rules for jurisdiction and applicable law. We then consider the definition of "a consumer contract" in more detail, exploring how it applies to an individual who trades in crypto-tokens on a regular basis, and when an exchange directs activities to the UK. Finally, we consider the exclusions which apply to financial products.

APPLICABLE LAW AND CONSUMER CONTRACTS: ARTICLE 6 OF THE ROME I REGULATION

8.7 The special protection for consumer contracts is set out in Article 6 of the Rome I Regulation.

8.8 Under Article 6(1), the contract must be concluded between a consumer and a professional. The consumer must be "a natural person", concluding the contract "for a purpose outside their trade or profession". Meanwhile the professional must be "acting in the exercise of their trade or profession" and must:

(1) pursue "commercial or professional activities in the country where the consumer is habitually resident", or

(2) by any means, direct "such activities to that country or several countries including that country".

The contract must be within the scope of such activities.[524]

8.9 Where the contract meets these tests, the contract is governed by the law of the country where the consumer has their habitual residence.

8.10 The parties can still choose an applicable law under Article 3.[525] However, that choice of law may not deprive the consumer of the protection afforded by mandatory provisions of the law which would otherwise have applied.[526] This means that the consumer will still have all the protections set out in the Consumer Rights Act 2015 which cannot be excluded by agreement. For example, any digital content must be of satisfactory quality,[527] and contractual terms must be fair.[528]

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524 Brussels I Regulation (recast) (EU) No 1215/2012, Official Journal L 351 of 20.12.2012, art 17 has been held to apply to actions in tort by a consumer against other contracting parties, where that action is indissociably linked to a contract concluded between the parties: Case C-500/18 *AU v Reliantco Investments LTD* at [58] to [73].

525 We discuss art 3 in more detail in Ch 7, from para 7.30.

526 Rome I Regulation (EC) No 593/2008, Official Journal L177 of 04.07.2008, art 6(2). If that choice of law is included in a standard form agreement, such that it was not individually negotiated, the clause must inform the consumer that they still have the protection of mandatory provisions of the law of the country in which they have their habitual residence: Case C-821/21 *NM v Club La Costa (UK) PLC* at [76].

527 Consumer Rights Act 2015, s 34.

528 Under the Consumer Rights Act 2015, s 62, "an unfair term of a consumer contract is not binding on the consumer".

8.11 Some contracts are excluded from the scope of Article 6.[529] In particular, there are exclusions relating to "financial instruments", "transferable securities" and "collective investment undertakings",[530] which we discuss below.

WHAT IS A CONSUMER CONTRACT?

"Harmonious" interpretation

8.12 As we explain in Chapter 4, a claimant generally needs to seek permission from an English or Welsh court to serve a claim form outside England and Wales. However, special rules apply to consumers. Under section 15B of the Civil Jurisdiction and Judgments Act 1982, where a consumer domiciled in the UK concludes a contract for a purpose outside their trade or profession with a trader who "pursues" activities in or "directs" activities to the UK,[531] the consumer can bring a claim before the UK courts without seeking permission. Furthermore, proceedings may only be brought against the consumer in the courts where the consumer is domiciled.[532]

8.13 Before the UK's withdrawal from the EU, this provision was set out in EU law, first in the Brussels Convention; then in the Brussels I Regulation; and finally in the Brussels I Regulation (recast).[533] The Court of Justice of the European Union (CJEU) has considered the meaning of the words on several occasions.[534]

8.14 The language used in these two provisions (jurisdiction and applicable law) is not identical. Article 6, for example, explicitly states that a consumer must be a natural person. By contrast, the rules on jurisdiction (in both the Brussels I Regulation (recast)[535] and the English statute) do not mention "a natural person". The point is implicit rather than explicit. Similarly, Article 6 refers to the consumer's habitual residence, while the jurisdiction provisions refer to the consumer's domicile.

8.15 Despite these differences, however, the two provisions share much of the same wording. There is authority to say that where the language is identical, it should be interpreted consistently. Generally, the provisions of the Rome I Regulation are interpreted consistently with the Brussels I Regulation (and Brussels I Regulation

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529 Rome I Regulation (EC) No 593/2008, Official Journal L177 of 04.07.2008, art 6(4) excludes contracts for the supply of services to be supplied exclusively in another country; contracts for carriage; and contracts for immovable property (other than timeshares).

530 Rome I Regulation (EC) No 593/2008, Official Journal L177 of 04.07.2008, art 6(4)(d).

531 See the definition of a consumer contract in Civil Jurisdiction and Judgments Act 1982, s 15E and *Dooley v Castle Trust and Management Ltd* [2022] EWCA Civ 1569.

532 Civil Jurisdiction and Judgments Act 1982, s 15B(3).

533 Brussels I Regulation (recast) (EU) No 1215/2012, Official Journal L 351 of 20.12.2012.

534 For example: Case C-498/16 *Schrems v Facebook Ireland Ltd* (considering the Brussels I Regulation); Case C-208/18 *Petruchová v FIBO Group Holdings Ltd* (considering the Recast Brussels I Regulation (EU) No 1215/2012); C-630/17 *Milivojevic v Raiffeisenbank St. Stefan-Jagerberg-Wolfsberg eGen* (considering the Brussels I Regulation (recast) (EU) No 1215/2012); and Case C-774/19 *AB v Personal Exchange International Ltd* (considering the Brussels I Regulation).

535 Note that the Brussels I Regulation and Brussels I Regulation (recast) no longer apply to the UK since leaving the EU: see para 2.45 above.

(recast)).[536] It is clear that this applies to Article 6 specifically; for example, Recital (24) to the Rome I Regulation states that the concept of "directed activity" should be interpreted "harmoniously" in both the Rome I Regulation and Brussels I Regulation (recast).

One party is a "consumer" while the other is a "professional"

8.16 The essence of a consumer contract is that one party acts in the course of a trade or profession, while the other party does not. As the courts have put it, a consumer is defined in contrast to an "economic operator",[537] so that the categories of consumer and professional are best regarded as "reciprocal and mutually exclusive".[538] The contract will not be a consumer contract if both parties act in the course of trade; or if neither party does so. In both these cases, the rules set out in Chapter 7 apply.

8.17 In order for a person to be classified as a consumer, the contract must be "concluded outside and independently of any trade or professional activity or purpose, solely for the purpose of satisfying an individual's own needs in terms of private consumption".[539] The protection does not extend to "contracts made by traders, manufacturers or persons in the exercise of a profession (doctors, for example) who buy equipment or obtain services for that trade or profession".[540] This is so even if the trade or professional activity is only planned for the future.[541]

8.18 A person can be a consumer in certain transactions and an economic operator in relation to others. The CJEU has stressed that the court should have "regard to the nature and objective of that contract and not to the subjective situation of the person concerned".[542] The consumer may be sophisticated, while the trader may be naïve: this does not affect the definition of a consumer contract.

Relevant factors

8.19 Courts decide whether a person is acting for trade or professional purposes on a case-by-case basis, applying a range of factors.[543] Guidance in the case law suggests that the following factors are relevant:

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536 Rome I Regulation (EC) No 593/2008, Official Journal L177 of 04.07.2008, Recital (7).

537 Case C-498/16 *Schrems v Facebook Ireland Ltd* at [39] (considering the Brussels I Regulation (recast) (EU) No 1215/2012): "the notion of a 'consumer' is defined by contrast to that of an 'economic operator'".

538 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins*, *The Conflict of Laws* (16th ed 2022) para 33-154.

539 Case C-498/16 *Schrems v Facebook Ireland Ltd* at [30] (considering the Brussels I Regulation). For the Brussels I Regulation (recast), see Case C-208/18 *Petruchová v FIBO Group Holdings Ltd* at [42] to [43].

540 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins*, *The Conflict of Laws* (16th ed 2022) para 33-154.

541 Case C-208/18 *Petruchová v FIBO Group Holdings Ltd* at [43], C-630/17 *Milivojevic v Raiffeisenbank St. Stefan-Jagerberg-Wolfsberg eGen* at [89].

542 Case C-498/16 *Schrems v Facebook Ireland Ltd* at [29] (considering the Brussels I Regulation (recast) (EU) No 1215/2012).

543 Case C-105/17 *Komisia za zashtita na potrebitelite v Kamenova* at [37] – note, this is not a Rome I Regulation or Brussels I Regulation (recast) case, but it was cited in Case C-774/19 *AB v Personal Exchange International Ltd* at [45] and [47].

(1) Whether the party has declared that they are engaged in a trade or professional activity;[544]

(2) Whether the party offers the activity to third parties for remuneration;[545]

(3) Whether the party gave the impression to the other contracting party that they were acting for business purposes. This might include, for example, using business stationery or having goods delivered to a business address;[546]

(4) If activity is conducted regularly, this may suggest that a person is a "trader", though it will not be determinative.[547]

8.20 The courts have also held that where a natural person is closely associated with a company and guarantees the company's debts, they will be acting as a professional.[548]

8.21 It is said that the concept of "consumer" should be interpreted restrictively.[549] Therefore, where a contract is concluded for a purpose partly within the party's trade or profession and partly outside, the special protections will apply only if the link between the contract and trade or profession is "marginal".[550] The link must be "tenuous", so that it is clear that the contract was "essentially for private purposes".[551]

Irrelevant factors

8.22 So long as a person concludes the contract outside of the scope of trade or professional activity, the following considerations are irrelevant to whether a party is a consumer:

(1) The value of the contract;[552]

(2) The significant risk of financial loss for an investor;[553] and

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544 Case C-774/19 *AB v Personal Exchange International Ltd* at [50].

545 Above at [50].

546 Case C-177/22 *JA v Wurth Automotive GmbH* at [33]. Other conduct which could give such an impression includes: (i) lack of reaction by the person relying on their status as a consumer to terms designating them as a trader, (ii) concluding the contract through an intermediary who is a professional in the relevant field, (iii) inquiring about the possibility of stating VAT on the relevant invoice, and (iv) selling the goods covered by the contract shortly after its conclusion, potentially for profit. Case C-177/22 *JA v Wurth Automotive GmbH* at [33] and [36].

547 Case C-774/19 *AB v Personal Exchange International Ltd* at [45] to [46].

548 Case C-419/11 *Česká sporitelna, as v Feichter* EU 2013 165 at [37].

549 Case C-208/18 *Petruchová v FIBO Group Holdings Ltd* at [41].

550 Case C-498/16 *Schrems v Facebook Ireland Ltd* at [32] (considering the Brussels I Regulation (recast) (EU}) No 1215/2012).

551 Case C-630/17 *Anica Milivojević v Raiffeisenbank St. Stefan-Jagerberg-Wolfsberg eGen* at [94].

552 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins*, *The Conflict of Laws* (16th ed 2022) para 33-154; Case C-208/18 *Petruchová v FIBO Group Holdings Ltd* at [50] to [51]; Case C-774/19 *AB v Personal Exchange International Ltd* at [49].

553 Case C-208/18 *Petruchová v FIBO Group Holdings Ltd* at [53].

(3) The fact that the relevant party has acquired significant knowledge or expertise in relation to the transaction in question.[554]

8.23 In other words, the fact that someone is placing large and risky bets with apparent sophistication does not undermine their status as a consumer.

Identifying consumers in crypto-token transactions

8.24 It is relatively easy to identify an individual as a consumer if they are, for example, entering into a one-off traditional goods or services contract but are paying with crypto-tokens rather than fiat currency. It is also relatively easy to identify a user of an exchange as a consumer if they only engage in occasional crypto transactions for their own amusement (even they have some hope of making money). However, it may be more difficult to work out if a person is a consumer when they undertake "crypto-trading" on a regular basis and use it as a source of income.

8.25 Three cases, where the CJEU have considered the scope and meaning of "consumer", shed light on this issue. It should be noted that although the cases were decided with reference to the definition of "consumer" within the meaning of the Brussels I Regulation or Brussels I Regulation (recast), these cases are important because the reference to "consumer" in Article 6 of the Rome I Regulation should be interpreted consistently with these instruments.

AB v Personal Exchange

8.26 In *AB and BB v Personal Exchange,* it was alleged that an online poker player played for an average of 9 hours per working day and lived on the income from poker winnings for years.[555] The CJEU held that these factors did not necessarily make the player a "professional", if he had not declared the activity officially or offered it to third parties as a paid service.[556] In particular, the court emphasised the irrelevance of subjective knowledge or value.[557] Whilst regularity of an activity is a relevant factor, it is not determinative.[558]

Petruchova v FIBO Group Holdings Ltd

8.27 In *Petruchova v FIBO Group Holdings Ltd,* the claimant entered into a framework contract with a brokerage company (FIBO) to enable her to buy and sell currency on the international foreign exchange markets, using FIBO's online trading platform. [559] Ms Petruchova made sophisticated trades, including agreeing "financial contracts for

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554 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins*, *The Conflict of Laws* (16th ed 2022) para 33-154; Case C-498/16 *Schrems v Facebook Ireland Ltd* at [39]; Case C-774/19 *AB v Personal Exchange International Ltd* at [37] to [40]; Case C-208/18 *Petruchová v FIBO Group Holdings Ltd* at [55] to [56].

555 Case C-774/19 *AB v Personal Exchange International Ltd* at [20].

556 Above at [50].

557 Case C-774/19 *AB v Personal Exchange International Ltd* at [33] to [40]

558 Above at [45] to [46].

559 Case C-208/18 *Petruchová v FIBO Group Holdings Ltd* at [16].

differences"[560] between herself and FIBO.[561] Following a delay in executing one of her trades, she brought a claim in unjust enrichment against FIBO, on the basis that she would have obtained three times the profit she in fact obtained had her order been executed without delay.[562] She relied on her status as a consumer, which was disputed by FIBO.

8.28 Again, the CJEU held that, in deciding whether a natural person was a professional, several factors were irrelevant. These included the value of transactions, the risk of financial loss, their potential knowledge or expertise in the field of financial instruments, and their active behaviour in such transactions.[563]

8.29 This meant that Ms Petruchova could rely on the consumer protection provisions to bring a claim within her home state (Slovenia). This was so despite the fact that, as far as applicable law was concerned, she would not be entitled to claim the protection of Article 6 of the Rome I Regulation, because financial instruments (such as the financial contracts that Ms Petruchova had entered into) are specifically excluded.[564]

AU v Reliantco Investments LTD

8.30 In *AU v Reliantco Investments LTD,* the claimant (AU) opened a trading account with an online platform called UFX, owned by Reliantco Investments, to trade in financial contracts for differences. AU placed orders speculating on a fall in the price of petrol, following which he lost the sum in his trading account of nearly USD 2 million. He claimed that this was the result of manipulation, and brought an action against Reliantco Investments LTD in tort for non-compliance with consumer protection provisions.

8.31 Again, the CJEU held that a natural person who concludes contracts for differences with a financial company may be classified as a consumer if the activity does not fall within the scope of their professional activity. Factors such as the fact that the person carried out a high volume of transactions within a short period, or invested significant sums in those transactions, are irrelevant.[565]

8.32 This was so despite the fact that AU had, when creating their account with the online UFX platform, used a domain name of a trading company and had engaged in exchanges with Reliantco Investments as director for development of that company.[566]

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560 A contract for difference is a sophisticated financial agreement. In the UK, the FCA considers these to be high-risk products unsuitable for retail consumers. Regulated firms are expected to be comply with the FCA's rules to ensure that contracts for differences are marketed and sold appropriately to the right consumers.

561 Case C-208/18 *Petruchová v FIBO Group Holdings Ltd* at [17].

562 Above at [22] to [23].

563 Above at [78].

564 Above at [66] on the Rome I Regulation (EC) No 593/2008, Official Journal L177 of 04.07.2008, art 6(4)(d). This is discussed in more detail below.

565 Case C-500/18 *AU v Reliantco Investments LTD* at [57].

566 Above at [26].

Conclusion: when is a "crypto-trader" a consumer?

8.33 These cases suggest that so-called "crypto-traders" who regularly deal in crypto-tokens may still be classified as consumers. They will not lose this status simply because they make large trades; make a significant number of trades; risk significant financial loss; have expertise in the field; or make money from it for an extended period.

8.34 However, "crypto-traders" may lose their status as consumers if they incorporate as a company, deal on behalf of other people, or give the impression to the counterparty or to others that they are acting as professionals in the field.

WHEN DOES A PROFESSIONAL "PURSUE" OR "DIRECT" ACTIVITIES?

8.35 The consumer protection provisions do not apply to all consumer contracts. An individual can only take advantage of the protections if the professional:

(1) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or

(2) by any means, directs such activities to that country or to several countries including that country.

and the contract falls within the scope of such activities.[567]

Pursuing activities

8.36 The meaning of "pursuing activities" is relatively straightforward. The test would be met if the professional has some sort of physical presence in the consumer's home state, either through a permanent or temporary place of business, or by employing an agent or other representative to work in that country. [568]

Directing activities

8.37 By contrast, "directing activities" takes account of distance selling techniques.[569] The cases concern various forms of ecommerce, using the internet. Recital (24) of the Rome I Regulation quotes a joint declaration by the Council and the Commission which states that:

> the mere fact that an Internet site is accessible is not sufficient for [the concept of directed activity to be satisfied], although a factor will be that this Internet site solicits

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567 Rome I Regulation (EC) No 593/2008, Official Journal L177 of 04.07.2008, art 6(1). Similar wording is to be found in Civil Jurisdiction and Judgments Act 1982, s 15E(1)(c).

568 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 33-160.

569 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 33-161. We also discuss what constitutes "directing activities" in Ch 5. As we explained in para 5.7, the CJEU approach suggests a fact-specific exercise to determine whether a trader directed activities within the meaning of the provision.

the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means.[570]

8.38 CJEU case law provides guidance on what a trader needs to do to "direct" activities. It is insufficient if the trader simply sets up a website, which consumers can access from other countries.[571] However, the trader does not necessarily have to send out specific invitations or advertise in the consumer's home country. Instead, a trader must manifest an intention to establish commercial relations with consumers from one or more other countries, including the consumer's home country.[572]

8.39 If activities are directed to a country, the consumer does not need to have taken the necessary steps for concluding the contract whilst in their home country.[573] For example, if a consumer domiciled in the UK uses a website directed at the UK, it does not matter that they entered the contract while on holiday in Spain.

Relevant factors

8.40 The CJEU has provided a non-exhaustive list of factors which suggest that activity is directed at a country.[574] Clear expressions of intention include:

(1) a statement from the trader that it is offering its goods or services in one or more countries, designated by name; or

(2) disbursement of expenditure on an internet referencing service to the operator of a search engine to facilitate access to the trader's site by consumers domiciled various countries.[575]

8.41 Less patent evidence can still demonstrate "directing activities", especially if several factors exist at once. These include:

(1) the international nature of the activity at issue;

(2) mention of telephone numbers with an international code;

(3) a mention of international clientele;

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570 Joint Declaration by the Council and the Commission on Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (EC) No 44/2001, Official Journal L12 of 16.01.2001, art 15. Recital (24) also stresses that the Brussels and Rome regimes should be interpreted "harmoniously" on this point.

571 Paid advertising to ensure a top result on a Google search in a specific jurisdiction would be part of the facts considered to determine whether there was an intention to do business in a certain jurisdiction and would be particularly relevant insofar as it clearly goes beyond merely making a webpage available.

572 Case C-585/08 *Peter Pammer v Reederei Karl Schlüter GmbH & Co KG* at [75], Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 33-164.

573 Case C-585/08 *Peter Pammer v Reederei Karl Schlüter GmbH & Co KG* at [60] to [61].

574 Case C-218/12 *Lokman Emrek v Vlado Sabranovic* at [27].

575 Case C-585/08 *Peter Pammer v Reederei Karl Schlüter GmbH & Co KG* at [81].

(4) use of a top-level domain name other than that of the country in which the trader is established, or of a neutral top-level domain name; and

(5) the description of itineraries from one or more other countries to the place where the service is provided.[576]

8.42 Language and currency are not relevant if they correspond to the languages and currency generally used in the country from which the trader pursues the activity. However, they are relevant evidence if the website permits users to use different languages or currency.[577]

8.43 There does not need to be a causal link between the means employed to direct the activity to the country of the consumer's domicile, and the conclusion of the contract with the consumer.[578] However, such a causal link may constitute strong evidence that the activity is in fact directed to that country.[579]

The contract falls within the scope of the activities

8.44 The contract must fall within the scope of the activities which the professional has pursued in, or directed to, the consumer's country of domicile or habitual residence.

8.45 The CJEU has held that a contract which does not itself come within the scope of the directed activity may still satisfy this test if it is closely linked to a previous contract which does.[580] Such a link could be a shared economic objective of the two contracts, which results in the contract which is not within the scope of the directed activity nonetheless amounting to a "direct extension of that activity".[581]

The implication for crypto-token contracts

8.46 Crypto businesses which deal with UK consumers will clearly be caught by the special protections if they market their products in the UK. This would include paying for social media advertisements to UK consumers; obtaining endorsements from UK celebrities; or paying a search engine to prioritise their website following internet searches by consumers in the UK.

8.47 However, the protections go wider than this. A business will be considered to have directed activities to the UK if its website manifests an intention to establish commercial relations with UK consumers. Evidence pointing to such an intention would include testimonials from UK consumers; accepting payment in sterling (where

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576 Above at [83].

577 Above at [84].

578 Case C-218/12 *Lokman Emrek v Vlado Sabranovic* at [32].

579 Above at [26].

580 Case C-297/14 *Rüdiger Hobohm v Benedikt Kampik Ltd & Co* at [40]. In that case, a transaction-management contract viewed in isolation was not within the scope of the activity 'directed to' Germany, but the related brokerage contract was. The referring court considered there to be a link between those contracts as a result of their common economic objective, and therefore queried whether that link was sufficient to find that the transaction-management contract was within the scope of activity 'directed to' Germany.

581 Case C-297/14 *Rüdiger Hobohm v Benedikt Kampik Ltd & Co* at [34] to [40].

that differs from the currency in the business's home country); or other attempts to make it easy for people to access the service from the UK.

APPLICABLE LAW AND THE EXCLUSIONS FOR FINANCIAL PRODUCTS

8.48 Article 6(4) of the Rome I Regulation lists specific exclusions from its scope. These exclusions do not affect jurisdiction: where the contract falls within a listed exclusion, UK consumers can still bring a case before the UK courts.[582] However, consumers who fall within one of the exclusions will not automatically obtain the protection of mandatory UK law. Instead, the applicable law will depend on the general principles discussed in Chapter 4.

8.49 For our purposes, the most relevant exclusions relate to financial products.[583] The way in which these exclusions apply to crypto-tokens is complex and uncertain. Here we set out the wording of the Rome I Regulation; look briefly at the legislative background; and consider how the various terms should be interpreted.

8.50 It is important to note at this stage that not all crypto-tokens are the same, so the answer to whether crypto-tokens fall within the exclusions may differ depending on the particular token. Some may be "financial products" within the meaning of the relevant provisions, and some may not. This will depend on their nature and structuring. For example, certain types of token (sometimes called "security tokens") provide rights and obligations akin to specified investments, like shares or debt instruments. Others (such as "utility tokens" or "exchange tokens") cover a wide range, and may:

> be issued centrally or be decentralised, give access to a current or prospective good or service in one or multiple networks and ecosystems, or be used as a means of exchange. They can be fully transferable or have restricted transferability. [584]

The financial exclusions listed in Article 6(4)

"Financial instruments" and "transferable securities"

8.51 Article 6(4)(d) excludes:

(1) rights and obligations which constitute a financial instrument;

(2) rights and obligations constituting the terms and conditions governing the issuance or offer to the public and public take-over bids of transferable securities; and

(3) the subscription and redemption of units in collective investment undertakings in so far as these activities do not constitute provision of a financial service.

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582 See, for example, Case C-208/18 *Petruchová v FIBO Group Holdings Ltd* at [48] to [49] and [60] to [66].

583 Another potentially relevant exemption is contained in Rome I Regulation (EC) No 593/2008, Official Journal L177 of 04.07.2008, art 6(4)(a), which provides that art 6 does not apply to contracts for the supply of services where the services are to be supplied entirely outside of the consumer's home country.

584 Financial Conduct Authority (FCA), "Guidance on Cryptoassets, Feedback and Final Guidance to CP [Consultation Paper] 19/3, PS [Policy Statement] 19/22" (July 2019), p 14.

8.52 Recital (30) to the Rome I Regulation explains that:

> for the purposes of this Regulation, financial instruments and transferable securities are those instruments referred to in Article 4 of Directive 2004/39/EC.

8.53 Directive 2004/39/EC is better known as the Markets in Financial Instruments Directive (MiFID). It is no longer in force. It has been replaced by Directive 2014/65/EU ("MiFID II"), though the definitions in the two directives are similar.[585] Article 4 of MiFID II defines "financial instruments" by listing 11 types of instrument, including transferable securities and money-market instruments. Transferable securities are defined as "classes of securities which are negotiable on the capital markets with the exception of instruments of payment", and includes shares and bonds.

Contracts concluded within multilateral systems

8.54 Article 6(4)(e) also excludes "a contract concluded within the type of system falling within the scope of Article 4(1)(h)", which reads as follows:

> A contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined in Part 1 of Schedule 2 to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.

8.55 If the relevant crypto-tokens qualify as financial instruments, then crypto exchanges provide platforms for buying and selling those financial instruments. This suggests that an exchange such as Binance or Coinbase could be classified as a "multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments".[586]

8.56 Note that for multilateral systems, the relevant definition of "financial instrument" is to be found in UK domestic law – specifically, in the Regulated Activities Order 2001 (or the "RAO").[587]

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585 The main difference in this respect between MiFID I and MiFID II is that MiFID II includes emissions allowances: K Lieverse, "The Scope of MiFID II" in D Bush and G Ferrarini (eds), *Regulation of the EU Financial Markets: MiFID II and MiFIR* (2017) para 2.45.

586 Multilateral systems include both multilateral trading facilities and organised trading facilities: MiFID II, art 4(19), 4(22) and 4(23). As recognised by the FCA, if "the tokens also constitute Financial Instruments under MiFID, the firm may also need to have permission to operate a multi-lateral trading facility or, an organised trading facility (art 25D and 25DA of the RAO), depending on how the exchange operates."; Financial Conduct Authority (FCA), "Guidance on Cryptoassets, Feedback and Final Guidance to CP [Consultation Paper] 19/3, PS [Policy Statement] 19/22" (July 2019), para 79 . As multilateral trading facilities can admit only institutional investors, it is more likely that crypto exchanges are organised trading facilities: HM Treasury, "Future Financial Services Regulatory Regime for Cryptoassets: Response to the Consultation and Call for Evidence" (Oct 2023), para 6.3.

587 The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, Sch 2, Part 1: "financial instruments" include transferable securities, money-market instruments, units in collective investment undertakings, certain options, futures and swaps, derivative instruments for the transfer of credit risk, and financial contracts for difference.

8.57 It is not clear why Article 6(4)(d) appears to apply a European definition of "financial instrument", while Article 6(4)(e) explicitly applies a domestic definition. Until now, the definitions have been identical, so the issue has not had practical consequences. However, this may change, as different regulatory authorities publish guidance on how far initial coin offerings[588] are transferable securities, and generally which types of crypto-tokens are "financial instruments". We consider the implications in more detail below.

Background to the financial exclusions

8.58 While the Rome Convention only gave special protection to consumer contracts for the supply of goods or services, the initial Rome I Regulation proposal was that all consumer contracts should be protected.[589] During negotiations, the UK delegation expressed concern about how this would affect financial instruments, such as bonds: each bond in a single issue might be governed by a different law, depending on the status of the purchaser. The UK expressed concern that this might jeopardise the functioning of capital markets:

> The application of a law other than that of the country of the issuing company to the bond would result in different rights in relation to a single issue depending on the habitual residence of each consumer purchaser; a perverse outcome. We therefore propose that bonds and related instruments should be taken out of Article [6]. [590]

8.59 The EU Commission adopted this reasoning. It argued that a financial instruments exclusion was "absolutely necessary" because otherwise "the actual nature of a financial instrument – the rights and obligations that constitute its essence – could change by virtue of the application of" Article 6.[591]

Financial instruments

8.60 In his book on the Rome I Regulation, Michael McParland QC explains that there are two elements to a financial instrument, such as a bond. The first is a contract between the issuer and the customer (comprising, for example, the issuer's obligation to pay interest). The second is that "the bond itself can be traded as an asset, a distinct product like any other". Where financial instruments are traded, the "nature of the

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588 An initial coin offering is a "digital way of raising funds from the public using a virtual currency, also known as cryptocurrency. An ICO can also be known as 'token sale' or 'coin sale'." Whether an ICO is a regulated activity under the Financial Conduct Authority depends on how they are structured, but they may involve regulated investments. See FCA, "Initial Coin Offerings" (2019), available at https://www.fca.org.uk/news/statements/initial-coin-offerings#:~:text=The%20term%20ICO%20refers%20to,%27%20or%20%27coin%20sale%27.

589 M McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (2015) para 12.228.

590 United Kingdom delegation, "Proposal for a Regulation of the European Parliament and the Council of the law applicable to contractual obligations (Rome I) – Observations by the United Kingdom delegation" European Council Document 13035/06 ADD 4 (Sept 2006) p 5, available at: https://www.eumonitor.nl/9353000/1/j9vvik7m1c3gyxp/vi7jgt3y5wz5. See also M McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (2015) para 12.228.

591 Services of the Commission, "Proposal for a regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) – Certain financial aspects relating to the application of Articles 4 and 5" European Council Document 7418/07 (March 2007) p 5, available at: https://data.consilium.europa.eu/doc/document/ST-7418-2007-INIT/en/pdf; M McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (2015) para 12.239.

transferable product and the rights and obligations arising under it cannot depend on the consumer or non-consumer status of one of the parties."[592]

8.61 However, the exclusion is supposed to be "narrowly focused".[593] It is intended to cover only the rights and obligations constituting the financial instrument itself.[594] As put by the EU Commission:

> Contractual rights and obligations in relation to the subscription for or purchase of new issues of transferable securities will not necessarily be covered by the narrowly focussed exclusion discussed above for contracts which comprise financial instruments. For example, contractual terms about the allocation of shares, rights in the event of over-subscription, withdrawal rights, or pre-emption rights are not comprised in the financial instrument itself. Rather, they are the subject matter of contract for subscription. By way of further example, the contractual terms for the purchase of a bond would typically include the methods and time limits for the paying up and for the delivery of the securities. Again, such elements are not intrinsic to the bond itself, and would not therefore be covered by an exclusion for rights and obligations comprised in a financial instrument.[595]

Transferable securities

8.62 Where the financial instrument is also a transferable security, the exclusion is wider. As we set out above, transferable securities are classes of securities that are negotiable on the capital market, such as shares in companies, bonds, or other forms of securitized debt. The exclusion applies not only to the rights and obligations which constitute the instrument itself. It also applies to rights and obligations "governing the issuance or offer to the public" of the security.

8.63 Recital (29) explains that the purpose of the transferable securities exception is to ensure that "all relevant contractual aspects of an offer binding the issuer or the offeror to the consumer are governed by a single law".[596] This includes "the terms governing, inter alia, the allocation of securities or units, rights in the event of over-subscription, withdrawal rights and similar matters in the context of the offer". Michael McParland explains that this ensures that "investors participating in such public

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592 M McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (2015) para 12.238.

593 Services of the Commission, "Proposal for a regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) – Certain financial aspects relating to the application of Articles 4 and 5" European Council Document 7418/07 (March 2007) p 5, available at: https://data.consilium.europa.eu/doc/document/ST-7418-2007-INIT/en/pdf; M McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (2015) para 12.243.

594 M McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (2015) para 12.243.

595 Services of the Commission, "Proposal for a regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) – Certain financial aspects relating to the application of Articles 4 and 5" European Council Document 7418/07 (March 2007) p 5, available at: https://data.consilium.europa.eu/doc/document/ST-7418-2007-INIT/en/pdf.

596 See also M McParland, *The Rome I Regulation on the Law Applicable to Contractual* Obligations (2015) para 12.257.

issues, offers or takeover are treated equally by the operation of this single law, as well as simplifying the whole process."[597]

Multilateral systems

8.64 Articles 6(4)(e) and Article 4(1)(h) include a specific exemption for multilateral systems, which bring together buyers and sellers in financial instruments, and which are governed by a single law. This was thought necessarily to provide legal certainty for the market participants. As the background paper put it:

> The transactions in question are closely connected to the market concerned and it is appropriate and, indeed, necessary that the same law governs them irrespective of the nature of the parties to the transactions (consumer/professional) and the place where the parties have their habitual residence. Any other result would mean that the systems could not operate.[598]

8.65 The intention was to exclude "transactions concluded within such a trading system", such as "contracts of buying, selling, lending and other such dealings in financial instruments". However, it did not intend to exclude "contracts for the provision of services between a financial intermediary and a client".[599]

The reference to MiFID

8.66 In 2007, the decision was taken to define financial instruments and transferable securities by reference to MiFID. This was not thought to limit the provisions to an EU context "because the MiFID definitions are descriptive, and (unlike the concept of "regulated market") are not based on regulatory concepts that are exclusive to Community law".[600]

8.67 It was assumed that the categories of financial instrument in MiFID were wide and flexible enough to accommodate financial instruments developed in the future:

> The MiFID definitions are comprehensive, and cover the whole range of instruments that need to be caught - including those that might be developed in the future, since even the most arcane and ingenious innovations would in principle fall within one of the generic categories mentioned in the list of financial instruments in Annex I to MiFID.[601]

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597 Above.

598 Services of the Commission, "Proposal for a regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) – Certain financial aspects relating to the application of Articles 4 and 5" European Council Document 7418/07 (March 2007) p 2, available at: https://data.consilium.europa.eu/doc/document/ST-7418-2007-INIT/en/pdf; M McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (2015) para 12.274.

599 Services of the Commission, "Proposal for a regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) – Certain financial aspects relating to the application of Articles 4 and 5" European Council Document 7418/07 (March 2007) p 2, at: https://data.consilium.europa.eu/doc/document/ST-7418-2007-INIT/en/pdf.

600 Above at p 3.

601 Above.

8.68 However, aspects of the crypto-market appear to be more "arcane and ingenious" than the Commission anticipated. The MiFID list is not always easy to apply to the full range of crypto-tokens. As discussed below, there are international differences in how far crypto-tokens are, or are not, considered to be transferable securities, which cannot be fully resolved by applying the annexes to the MiFID directives.

8.69 In 2019, the UK version of the Rome I Regulation was amended by EU Exit Regulations to become part of the body of retained EU law, and is now assimilated law.[602] The EU Exit Regulations removed the reference to MiFID in Article 4(1)(h) – and by extension from the exclusion in Article 6(4)(e). It substituted a reference to the domestic Regulated Activities Order. However, the EU Exit Regulations did not change the reference to MiFID in Recital (30). It is not clear whether this was an oversight or whether it reflected a deliberate policy choice to retain a reference to MiFID (now, MiFID II).

8.70 There is relatively little case law on the financial exclusions. In *Petruchová v FIBO Group Holdings*, the CJEU found that the "contract for difference" between Ms Petruchová and FIBO "constituted" a financial instrument. Ms Petruchová traded in 'lots' (worth USD 100,000) to enable her to trade with more funds than she had available – this involved purchasing base currency using a loan from FIBO, which she repaid when re-selling the base currency.[603] The CJEU referred directly to MiFID in deciding the definition of a financial instrument, commenting:

> As is apparent from recital 30 of that regulation, financial instruments, for the purposes of the Rome I Regulation, are those referred to in Article 4 of Directive 2004/39, which include [contracts for difference], as provided for in point 9 of Section C of Annex I to that directive.[604]

Are crypto-tokens transferable securities?

The UK Government's 2023 consultation

8.71 In February 2023, the UK Government issued a consultation on future financial services regulation for cryptoassets. This discussed whether cryptoassets are transferable securities, explaining that "other jurisdictions are taking a range of approaches":

> In terms of public offers of cryptoassets (roughly equivalent to an Initial Public Offering (IPO)) some countries have developed bespoke frameworks to govern Initial Coin Offerings (ICOs), whilst others deliberately do not on the basis that most ICOs would meet the criteria for being a security offering, and therefore within existing laws. In terms of cryptoassets which are admitted to trading on an exchange or trading venue, some jurisdictions require approval by the relevant regulator to

602 Retained EU Law (Revocation and Reform) Act 2023, s 5; The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019 No 834) regs 1, 10(5); 2020 c 1, sch 5, para 1(1).

603 Case C-208/18 *Petruchová v FIBO Group Holdings Ltd* at [17] and [18].

604 Above at [62].

designate the cryptoasset as an "accepted asset" or to confirm that it does not represent a security.[605]

8.72 The US Securities and Exchange Commission is increasingly taking the view that certain cryptoassets are securities and is bringing enforcement action on that basis.[606]

8.73 The UK Government's approach is not to include all cryptoassets within the scope of Part 1, Schedule 2 to the RAO. Instead, the consultation proposed that a separate, bespoke regime for cryptoassets should produce similar regulatory outcomes.[607] In October 2023, the Government published a response to consultation, which confirmed that:

> The Government does not plan to expand the definition of 'financial instruments' in Part 1 of Schedule 2 of the RAO to include presently unregulated cryptoassets. Notwithstanding some limited feedback to the contrary, the government agrees with the majority of respondents that retrofitting the existing financial instruments regime to cryptoassets would likely result in unsuitable and potentially onerous regulation.[608]

8.74 However, the Government also recognised that certain cryptoassets already fall within existing regulated activities or financial instruments, products or investments, including those which are specified investments. This includes security tokens representing debt or equity securities,[609] which would constitute transferable securities.

The European Securities and Markets Authority (ESMA) 2019 Advice

8.75 There are also differences between EU member states. In 2019, the European Securities and Markets Authority (ESMA) published advice on Initial Coin Offerings and Crypto-Assets (the "ESMA 2019 Advice").[610] This included the results of a survey of member states, in which National Competent Authorities (NCAs) were given examples of initial cryptoasset offerings and asked whether the assets qualified as transferable securities under their respective national laws.[611]

8.76 One example involved a cryptoasset which seemed very like a share. It gave the holder the right to receive a portion of company profit in the form of dividends, the right to participate in management, and a right to a portion of company assets. Another gave holders the right to receive profits, but no decision-making powers. Most, but not

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605 HM Treasury, "Future Financial Services Regulatory Regime for Cryptoassets: Consultation and Call for Evidence" (Feb 2023) pp 34 to 35.

606 For a full list of enforcement actions taken by the US Securities and Exchange Commission, see https://www.sec.gov/spotlight/cybersecurity-enforcement-actions ("Crypto Assets and Cyber Enforcement Actions").

607 HM Treasury, "Future Financial Services Regulatory Regime for Cryptoassets: Consultation and Call for Evidence" (Feb 2023) pp 35 to 36.

608 HM Treasury, "Future Financial Services Regulatory Regime for Cryptoassets: Response to the Consultation and Call for Evidence" (Oct 2023) para 2.13.

609 Above para 2.12 and 2.17 to 2.18.

610 ESMA, "Advice: Initial Coin Offerings and Crypto-Assets" (2019) available at https://www.esma.europa.eu/sites/default/files/library/esma50-157-1391_crypto_advice.pdf.

611 More information on the tokens considered in the survey can be found in the "ESMA 2019 Advice", Annex 1, Appendix 1, available at https://www.esma.europa.eu/sites/default/files/library/esma50-157-1384_annex.pdf.

all, NCAs thought that these examples would qualify as transferable securities and/or other types of financial instruments as defined by MiFID II.[612]

8.77 ESMA emphasised that the classification of a cryptoasset as a financial instrument was the responsibility of an individual NCA and depends on the specific national implementation of EU law and the evidence provided to that NCA.[613] Where a NCA did not think that profit rights (without accompanying ownership or governance rights) would allow cryptoassets to qualify as transferable securities, ESMA noted that this may be "on the basis of a more restrictive transposition of MiFID, e.g. a restrictive list of examples of transferable securities".[614]

8.78 There was more consensus over other forms of crypto-token. ESMA gave an example of a "utility token" called "filecoin", which aimed to provide a market in cloud storage. Filecoins could be spent to get access to unused storage capacity on computers worldwide. In turn providers of the unused storage capacity earned filecoins, which could be sold for cryptocurrencies or fiat money.[615] All NCAs agreed that filecoins were not financial instruments.[616]

8.79 The definition of transferable securities in MiFID excludes "instruments of payment". Therefore, pure payment-type crypto-tokens (such as bitcoin or Tether) were omitted from the survey, as they were thought unlikely to qualify as financial instruments.[617]

Future developments

8.80 This is a fast-moving area, which is likely to be subject to new laws and guidance over the next few years. The UK Government has set out a phased approach to regulating cryptoassets, which involves further consultation and new rules and regulatory guidance.[618]

8.81 The EU recently agreed the Markets in Crypto-Assets Regulation (MiCA),[619] to come into effect from 30 December 2024. MiCA applies to crypto-assets which fall outside the scope of existing "Union legislative acts on financial services", such as MiFID II. [620] Given the importance of a "clear delineation between, on the one hand, crypto-assets covered by" MiCA and "on the other hand, financial instruments", ESMA is "mandated to issue guidelines on the criteria and conditions for the qualification of crypto-assets

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612 ESMA, "Advice: Initial Coin Offerings and Crypto-Assets" (2019) available at https://www.esma.europa.eu/sites/default/files/library/esma50-157-1391_crypto_advice.pdf at para 82.

613 Above at para 6.

614 Above at para 85.

615 ESMA 2019 Advice, Annex 1, p 24, available at https://www.esma.europa.eu/sites/default/files/library/esma50-157-1384_annex.pdf.

616 ESMA, "Advice: Initial Coin Offerings and Crypto-Assets" (2019) available at https://www.esma.europa.eu/sites/default/files/library/esma50-157-1391_crypto_advice.pdf para 86.

617 Above para 5.

618 HM Treasury, "Future Financial Services Regulatory Regime for Cryptoassets, Consultation and Call for Evidence" (Feb 2023), p 12.

619 Regulation on markets in crypto-assets (EU) 2023/1114, Official Journal L150 of 09.06.2023.

620 Above Recitals (4) and (9).

as financial instruments".[621] ESMA expects to publish these guidelines in the first quarter of 2024.[622]

Conclusion on the financial product exclusions

8.82 When a UK consumer purchases a crypto-token from an exchange as part of an initial coin offering, how far is the consumer entitled to the mandatory protections of UK consumer law (such as unfair terms protection)? This has proved a surprisingly difficult question to answer. It appears that each token would need to be assessed on a case-by-case basis.

8.83 As currently drafted, the text of the assimilated Rome I Regulation provides the courts with little guidance on this issue. Should a court aim to define "financial instrument" and "transferable security" in Article 6(4) in an internationalist spirit, or in accordance with the RAO? More specifically, how far should the court look to ESMA guidance, as suggested by Recital (30); or to FCA guidance, as suggested by Article 6(4)(e)? Recitals only "cast light" on the interpretation of legal rules.[623] Therefore, the court will need to weigh the issues in the round.

8.84 It is important to note that the exclusions are narrow. They relate mainly to "rights and obligations which constitute a financial instrument"; to initial offers; and to multilateral trading platforms. Many contracts between consumers and financial exchanges will not fall within these exclusions.

8.85 Our initial, tentative, view would be to favour a restrictive approach. If not, there is a risk that consumers could fall between two stools. Consumers could be deprived of the mandatory protections under the Consumer Rights Act 2015 on the grounds that crypto-tokens are considered to be financial instruments in EU law. At the same time, consumers could be deprived of the benefits of UK financial services regulation, because crypto-tokens do not necessarily fall within the RAO.

8.86 This is a difficult and fast-moving area, with no clear answers. We welcome views on how Articles 6(4)(d) and (e) should be interpreted. We are also interested in whether uncertainty over the law is causing problems in practice. If so, how should they be resolved?

CONCLUSION AND QUESTIONS

8.87 Centralised crypto exchanges support hundreds of millions of users worldwide. Whilst they are thought to be at a "relatively early stage of development when compared to

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621 Above Recital (14) and art 2(5).

622 See ESMA, "Markets in Crypto-Assets Regulation (MiCA)" available at https://www.esma.europa.eu/esmas-activities/digital-finance-and-innovation/markets-crypto-assets-regulation-mica#:~:text=The%20Markets%20in%20Crypto%2DAssets,by%20existing%20financial%20services%20legislation.

623 Eg the Explanatory Notes to the European Union (Withdrawal) Act 2018 provide at n 27 that "Recitals will continue to be interpreted as they were prior to the UK's exit from the EU. They will, as before, be capable of casting light on the interpretation to be given to a legal rule, but they will not themselves have the status of a legal rule".

traditional financial market infrastructures",[624] they are clearly prevalent and are often used by individuals. Some, perhaps many, of those individuals will be consumers acting outside of the scope of a trade or profession.

8.88 Where a consumer contracts with a trader who has directed activities to the UK, Article 6 of the Rome I Regulation offers important protections to the consumer. Our initial view is that consumer contract disputes concerned with crypto-tokens and crypto exchanges can broadly be resolved within the existing framework of Article 6. In most cases, the concepts are clear and can be read across to crypto-token litigation. For example, when deciding whether an individual who contracts with an exchange is a consumer or a professional, earlier cases of the CJEU concerned with online poker or foreign exchange derivatives can be applied to cases involving crypto exchanges without undue difficulty.

8.89 However, whilst we generally think that the existing framework can cope sufficiently in this context, we are interested in whether the current rules cause any particular problems for consumer crypto-token contracts.

8.90 We have identified a few areas of difficulty. In particular, it is not clear how exactly the exclusions relating to transferable securities and financial instruments as set out in Articles 6(1)(d) and (e) of the Rome I Regulation will apply in the context of crypto exchanges. When a consumer participates in an initial coin offering with a crypto exchange that directs activities to the UK, is the consumer entitled to UK consumer protections (over, for example, unfair terms)? If the relevant crypto-tokens are considered to be "transferable securities", then the consumer cannot apply the mandatory provisions of UK law to the terms and conditions under which the crypto-token is offered. However, if the crypto-tokens are not transferable securities, consumer protections apply.

8.91 We seek views on the correct interpretation of the current law, whether this is causing problems in practice, and whether reform is required.

[624] HM Treasury, "Future Financial Services Regulatory Regime for Cryptoassets: Consultation and Call for Evidence" (Feb 2023) para 6.1.

Question 9.

8.92 This question concerns the applicable law for consumer contracts.

(1) Can the provisions of the Rome I Regulation for identifying the applicable law for consumer contracts be applied to contracts involving crypto-tokens without undue difficulty?

(2) If the provisions cannot be applied, or can only be applied with significant difficulty, what are the possible solutions?

(3) If the provisions can be applied easily or without undue difficulty, are there any areas that would benefit from further clarification?

(4) To what extent is the application of these provisions problematic in practice?

(5) If the issue is prevalent in practice, what would be the consequences if it were not resolved adequately as a matter of law?

(6) We seek views on whether the provisions of the Rome I Regulation for identifying the applicable law for consumer contracts can be applied to contracts involving crypto-tokens without undue difficulty.

Question 10.

8.93 This question concerns the exclusions in Articles 6(4)(d) and (e) of the Rome I Regulation.

(1) Do the exclusions of financial instruments and transferable securities, as set out in Articles 6(4)(d) and (e) of the Rome I Regulation, apply to crypto-tokens?

(2) What would be the positives and negatives of interpreting these provisions in an international way, bearing in mind guidance from the European Securities and Markets Authority?

(3) Should the courts simply apply the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 in line with Financial Conduct Authority guidance?

(4) To what extent do these exclusions cause problems in practice (now or in the future)?

(5) If these exclusions are problematic in practice, what would be the consequences if they were not addressed as a matter of law?

(6) What kind of reform is needed?

Chapter 9: Applicable law – tort and delicts

INTRODUCTION

9.1 In the substantive law of England and Wales, there is an especially close relationship between property and tort. Many property rights are vindicated by tortious causes of action, such as trespass and conversion. In such claims, the standard remedy is damages. Notoriously, the personal property law of England and Wales does not have any action akin to *rei vindicatio,* a vindicatory claim derived from Roman law that asserts ownership and an entitlement to possession which remains prevalent in modern Continental systems of property law.[625] In England and Wales, the remedy of delivery up in a claim in conversion is not available as of right, but only in the discretion of the court.[626]

9.2 Specific difficulties arise in private international law where a case raises several substantive legal issues that are closely related to each other in this way. We said in Chapter 6 that characterisation of the issue in dispute is a complex task undertaken by the court as the first of three steps in the multilateralist approach to determining the applicable law. There we proceeded on the basis that a claim will raise only one discrete issue to be characterised by the court.

> In Alice's claim against Bob, the only issue for characterisation was whether the "real issue" in dispute was to do with a driving offence, tort, or contract. We said that, in this example, the real issue in dispute was to do with tort.

9.3 Often, however, it is the case that more than one issue arises for characterisation. This usually occurs when the pleaded claim and defence raise two or more closely related legal questions, each of which requires determination in order for the claim to proceed.

9.4 For example, trespass is a tortious cause of action arising from wrongful physical interference with goods that attracts a personal remedy of compensatory damages. Nevertheless, all claims in trespass proceed on the basis that the claimant holds title to the relevant goods. This is what gives the claimant standing to bring the claim in trespass.

9.5 In these circumstances, the defendant to a claim in trespass might plead that the claim has no reasonable prospect of success, because the claimant has no title to the goods. If this defence is raised, the issue of the claimant's title to the goods arises as

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625 See D Nolan and J Davies, "Torts and Equitable Wrongs" in A Burrows (ed), *Oxford Principles of English Law: Private Law* (3rd ed 2017) para 17.303. The *rei vindicatio* was also mentioned in *OBG Ltd v Allan* [2007] UKHL 21 at [308].

626 Torts (Interference with Goods) Act 1977, s 3(2).

an incidental issue that must be determined before the claim in trespass (relating to whether the defendant wrongfully interfered with the goods) can proceed.

9.6 In private international law, this situation is usually referred to as one where the court must determine both a "main issue" and an "incidental issue."[627] Critically, these two issues are distinct issues from a private international law perspective. As a result, they may be governed by different applicable laws.

> Assume that, in Alice's claim against Bob in tort, Bob has brought a counterclaim in trespass against Alice for direct physical interference with his car that caused damage to it. Alice then pleads in her defence to the counterclaim that Bob's title to the car is inferior to her own.[628]
>
> The question of whether Alice tortiously interfered with the car will be the "main" issue that arises in Bob's counterclaim. This will be characterised as an issue of non-contractual obligations. As we saw in Chapter 6, the conflict of laws rule for non-contractual issues refers to the law of the place where the damage was sustained.
>
> The question of whether Bob's title to the car is inferior to Alice's is the "incidental" question. This will be characterised as an issue of property law. The conflict of laws rule for property issues refers to the law of the place where the property object was situated at the relevant time.

9.7 This close relationship between property and tort is reflected in the crypto-token cases that have come before the courts so far. We saw in Chapter 4 that claims in tort are issued against persons unknown, usually for the purpose of targeting the exchange to which the claimant has traced their (allegedly) misappropriated crypto-tokens. The hope is that if the claimant can prove a property entitlement to the crypto-token, this may eventually result in the exchange returning the crypto-token to the claimant.

9.8 The issue of the incidental question is most apparent in the case of *Tulip Trading*.[629] There, the claim in the Court of Appeal proceeded on the basis that the defendants owed a fiduciary duty to the "true owner" of the misappropriated crypto-tokens. As Mrs Justice Falk (as she then was) noted at first instance, the claimant had not yet established that they were the "true owner" and that various third parties had made rival claims to the crypto-tokens in issue.[630] If the claim proceeds to trial, the question

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627 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 2-044.

628 For the relationship between the property torts and relative title to chattels and goods, see N Palmer "Bailment" in A Burrows (ed), *English Private Law* (3rd ed 2013) paras 16.25 to16.30 and the cases cited there.

629 *Tulip Trading Limited v Bitcoin Association for BSV* [2023] EWCA Civ 83, [2023] 4 WLR 16.

630 *Tulip Trading Limited v Bitcoin Association for BSV* [2022] EWHC 667 (Ch), [2022] 2 All ER (Comm) 624.

of whether the claimant was the "true owner" will be an incidental issue to the main issue of whether the defendants owe fiduciary duties to the claimant.

9.9 We also noted that localising damage for the purpose of the tort gateways had focused on the crypto-token itself and proceeded along the same line of analysis as that employed for localising the asset for the purpose of the property and constructive trustee gateways.

TORTS AND THE ROME II REGULATION

9.10 As we discussed in Chapter 6, non-contractual obligations in civil and commercial matters fall within the scope of the Rome II Regulation. The framework for torts under the Rome II Regulation broadly provides for a specific rule, followed by an exception where the parties have a common habitual residence, and an "escape clause".

9.11 In this way, the general rule for the law applicable to a tort in Article 4 provides as follows.

(1) The law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs, irrespective of the law of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

(2) Where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country will apply.

(3) Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

9.12 We focus here on the general rule under Article 4(1) and the "escape clause" in Article 4(3).

The general rule in Article 4(1): the place where the damage occurs

9.13 We saw in Chapter 6 that various connecting factors are used in the conflict of laws rules for torts and other non-contractual obligations. The Rome II Regulation adopts the place where the damage occurred, and also expressly excludes the place where the event giving rise to the damage occurred.

9.14 The reason for this choice is explained in Recital (15) to the Rome II Regulation:

> The [law of the place where the tort was committed] is the basic solution in almost all the Member States,[631] but the practical application of the principle where component factors of the case are spread over several countries varies. This situation engenders uncertainty as to the law applicable.

9.15 Article 4(1) further precludes consideration of the country or countries in which the indirect consequences of the event giving rise to the damage occurred.

9.16 Nevertheless, as we said in Chapters 3, 4 and 5, localising damage can be a notoriously difficult task, especially where the tort is committed online or when the damage sustained is pure economic or financial loss.

Pure economic loss

9.17 We said in Chapters 4 and 5 that localising pure economic loss is an issue on which there is considerable jurisprudence from the Court of Justice of the European Union (CJEU). Here we consider this jurisprudence further. In sum, there are three main cases of the CJEU that are authoritative in this context, which have been summarised as follows:

(1) In *Kronhofer*, the CJEU ruled that "place where the damage occurred" does not "refer to the place where the claimant is domiciled or where 'his assets are concentrated' by reason only of the fact that he has suffered financial damage there."[632] *Kronhofer* has become a leading case for localising any kind of economic or financial loss for the purposes of the Rome II Regulation. It clearly precludes the localisation of such loss at the place where the injured party is domiciled in circumstances where both the events giving rise to the loss and the loss itself occurred in another member state.

(2) In *Kolassa,* a case of prospectus liability, the CJEU distinguished *Kronhofer* on the basis that the loss in *Kolassa* was allegedly suffered directly in the injured party's bank account, which was held with a bank also established at the place of the party's domicile.[633] Localising financial loss at the place of the injured party's domicile, accordingly, was justified on the basis of a common domicile.

(3) In *Löber,* another case on prospectus liability, the CJEU held that damage was suffered by an Austrian investor at the place of their domicile, not only because this place coincided with the location of their relevant bank and clearing accounts, but also having considered all the circumstances of the case.[634] The investor had dealings only with Austrian banks; they had acquired the investments on the Austrian secondary market; the relevant prospectus had been notified to the Austrian supervisory authority; and the investor had signed

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631 This is the solution in the UK where the Rome II Regulation does not apply. Under the Private International Law (Miscellaneous Provision) Act 1995, s 11, the general rule is that the law applicable to a tort or delict is the law of the country in which the events constituting the tort or delict in question occur. Under section 15(A), this provision does not affect the determination of issues relating to tort which fall to be determined under the Rome II Regulation.

632 Case C-168/02 *Kronhofer v Maier* [2004] ECR I-6009 at [21].

633 Case C-375/13 *Kolassa v Barclays Bank Plc* [2015] 1 WLUK 615.

634 Case C-304/17 *Löber v Barclays Bank Plc* [2018] 9 WLUK 98.

> the contract which had resulted in a definitive reduction in her assets in Austria.[635]

9.18 The cumulative effect of these cases on localising pure economic loss has been said to be that:

> the case law of the CJEU clearly holds that localising pure economic loss, particularly in the investment context, entails a multifactorial approach, taking into account all the facts of the case. In particular, it is clear that, for the purpose of Rome II (and Brussels I (recast), for that matter), localising such loss at the place of the injured party's domicile, purely on the basis of that connecting factor and without more, cannot be justified.[636]

9.19 So long as the text of the Regulations has not been changed, these decisions of the CJEU, having been handed down prior to 31 December 2020, continue to be binding on courts of first instance.[637]

9.20 We said in Chapter 5 that academic commentary on the crypto-token cases on jurisdiction has drawn attention to the fact that these cases did not take account of the jurisprudence of the CJEU.[638] We, however, noted there that this jurisprudence does not, strictly speaking, bind the courts of England and Wales on the interpretation and application of the gateways. However, CJEU jurisprudence does bind in cases of applicable law. This raises the issue of consistency as between jurisdiction and applicable law in England and Wales regarding the location of pure economic loss. We therefore questioned whether it might be desirable that a consistent approach is taken in the private international law of England and Wales to localising pure economic loss as between jurisdiction and applicable law.

9.21 Here, we note that the relevant academic commentary was published before the Retained EU Law (Revocation and Reform) Act 2023, which makes various amendments to the European Union (Withdrawal) Act 2018. The Explanatory Notes to the Retained EU Law (Revocation and Reform) Act 2023 Act explain that its purpose is to "enable the amendment of retained [now, assimilated] EU law […] and to remove the special features it has in the UK legal system".[639] One of the ways that it achieves this is by "[facilitating] domestic courts departing from retained [now, assimilated] case

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635 A Held and M Lehmann, "Hacked Crypto-Accounts, the English Tort of Breach of Confidence, and Localising Financial Loss Under Rome II" (2021) 10 *Journal of International Banking and Financial* Law 708. Amy Held was a member of the Advisory Panel until she joined the Law Commission specifically to work on this project as a law reform lawyer in November 2023.

636 A Held and M Lehmann, "Hacked Crypto-Accounts, the English Tort of Breach of Confidence, and Localising Financial Loss Under Rome II" (2021) 10 *Journal of International Banking and Financial Law* 708.

637 European Union (Withdrawal) Act 2018, s 6(3). However, decisions are not binding on a court acting in an appellate capacity, or the Supreme Court: s 6(4) European Union (Withdrawal) Act 2018. See further discussion on this, and further changes to the position, below.

638 See from para 5.28.

639 Explanatory Notes to the Retained EU Law (Revocation and Reform) Act 2023, para 1.

law",[640] to ensure that they are not "unduly constrained by the continuing influence of previous EU case law".[641]

9.22 As before the Retained EU Law (Revocation and Reform) Act 2023, any question as to the validity, meaning or effect of assimilated law should be decided, so far as relevant, in accordance with assimilated case law.[642] However, courts sitting in an appellate capacity and the Supreme Court are not bound by any assimilated EU case law.[643] Moreover, no court is bound by any assimilated domestic case law that it would not otherwise be bound by.[644]

9.23 The Retained EU (Revocation and Reform) Act 2023 makes amendments (not yet in force) to the tests to be applied by the appellate and Supreme Courts when considering departing from assimilated case law. Whilst the European Union (Withdrawal) Act 2018 requires appellate courts and the Supreme Court to apply the same test it would apply in deciding whether to depart from its own case law,[645] the tests to be introduced by the Retained EU (Revocation and Reform) Act 2023 are as follows.

(1) When deciding to depart from any assimilated EU case law, the court must (among other things) have regard to:

(a) the fact that decisions of a foreign court are not (unless otherwise provided) binding;

(b) any changes of circumstances which are relevant to the assimilated EU case law; and

(c) the extent to which the assimilated EU case law restricts the proper development of domestic law.[646]

(2) The court may depart from its own assimilated domestic case law if it considers it right to do so having regard (among other things) to:

(a) the extent to which the assimilated domestic case law is determined or influenced by assimilated EU case law from which the court has departed or would depart;

(b) any changes of circumstances which are relevant to the assimilated domestic case law; and

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640 Above para 3.

641 Above para 37.

642 European Union (Withdrawal) Act 2018, s 6(3).

643 Above s 6(4).

644 Above s 6(4)(c).

645 European Union (Withdrawal) Act 2018, s 6(5) (unmodified by the Retained EU Law (Revocation and Reform) Act 2023).

646 Retained EU Law (Revocation and Reform) Act 2023, s 6(3).

(c) the extent to which the assimilated domestic case law restricts the proper development of domestic law.[647]

9.24 As noted above, these tests are not yet in force. As such, for the present time, the European Union (Withdrawal) Act 2018 directs the courts to interpret Article 4(1) of the Rome II Regulation in line with the CJEU jurisprudence on pure economic loss, with the option for appellate courts and the Supreme Court to depart where the current test for departing from their own case law is satisfied. We remain mindful that the position may change in the future.

Tortious damage and crypto-token litigation in the courts of England and Wales

9.25 Claims in tort may arise in a wide variety of circumstances. We saw in Chapter 5 that most applications for service out of the jurisdiction in crypto-token litigation before the courts of England and Wales have passed through the gateway requirement on the basis of a claim made in tort where damage was sustained in England and Wales. We also saw in Chapter 7 that claims in tort may well arise in the context of DeFi. We are also mindful that claims in tort may arise in the context of electronic trade documents.

9.26 In all tort contexts, the courts are required as a starting point to identify where damage occurs. In the crypto-token cases discussed in Chapter 5, we saw that the courts of England and Wales have generally localised the losses suffered by the claimants in tortious claims by reference to the underlying crypto-token itself.

9.27 We nevertheless noted that there is a significant difference between (i) physical damage *to* an asset; and (ii) damage sustained *by reason of having been deprived of* an asset (as an entire object). Where there is a physical object that has been damaged, it does not seem problematic to localise the damage at the place where the object was located when the damage was sustained.

9.28 However, given the very particular physical nature of crypto-tokens, it is arguable that they are susceptible in the main only to tortious damage of the second type, that is, damage by reason of deprivation. We noted that none of the cases allege damage *to* a physical device associated to the crypto-token, such as the computer on which the crypto-token was stored. Nor did the claimants seek damages as compensation for damage caused *to* some asset.

9.29 Rather, all of the cases alleged losses sustained by reason of having been deprived of the crypto-tokens themselves or the financial consequences that followed from such deprivation. Most obviously, *AA v Persons Unknown* referred to loss suffered in the form of money in the English bank account with which the claimant had bought the bitcoin that was paid as a ransom.[648]

9.30 We consider such analysis of loss would equally apply to tort claims arising in the DeFi context: claimants would not be pleading damage or interference *to* their crypto-tokens, but rather seeking compensation for losses arising from DeFi transactions.

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647 Above s 6(4).

648 [2019] EWHC 3556 (Comm).

9.31 In Chapter 5, we said that absent any physical damage upon which the deprivation of access to crypto-tokens is consequent, all these cases arguably fall within the scope of Lord Lloyd-Jones' words of caution in *Brownlie II* (regarding international jurisdiction in cases of pure economic loss).[649]

9.32 Here, we note that the relevant body of jurisprudence on localising pure economic loss is that of the CJEU, at least for courts of first instance. We further note that Article 4(1) is more limited than the approach taken in the *Brownlie* cases in relation to the tort gateway for service out of the jurisdiction, which we discussed in Chapter 4.[650] Article 4(1) of the Rome II Regulation expressly provides that the law applicable to a non-contractual obligation is the law of the country in which the damage occurs "irrespective of the country or countries in which the indirect consequences of that event occur."

9.33 We are not aware of any case before the courts of England and Wales that has raised the question of either (i) where damage sustained by reason of being deprived of a crypto-token occurs, or (ii) where damage *to* a crypto-token is sustained specifically for the purpose of identifying the applicable law. The courts of England and Wales have therefore not yet had occasion to apply the jurisprudence of the CJEU on pure economic loss for the purposes of the Rome II Regulation.

9.34 We also said that, often, the claim in tort against the defendant person unknown is issued for tactical litigation purposes rather than with any real intention to pursue the pleaded claim. Whilst, therefore, the question of localising damage has been a prevalent issue before the courts for the purpose of jurisdiction, it is unclear whether it will be equally prevalent for the purpose of applicable law.

9.35 We considered in Chapter 5 the theoretical problems surrounding tortious damage in the crypto-token context. This discussion focused on how we should conceptualise the losses pleaded. We said that, unless stakeholders indicated otherwise, responses given to Question 3 would be taken as equally relevant to the issue of applicable law that we consider here in Chapter 9.

9.36 In line with our general approach in this Call for Evidence, here, we focus on the likelihood that claims in tort relating to crypto-tokens will proceed to trial such that the question of applicable law may arise. Whilst the cases show that the issue of localising tortious damage in the crypto-token context is a prevalent question so far in the context of jurisdiction, this theoretical issue is only relevant to one of three limbs of the test for service out of the jurisdiction.

9.37 For applicable law, the location of tortious damage is the only factor under the general rule in Article 4(1) of the Rome II Regulation. The theoretical issue therefore arguably takes on a greater significance for applicable law. On the other hand, it is not yet clear whether the question will be as prevalent in the context of applicable law as it is for jurisdiction.

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649 *FS Cairo (Nile Plaza) v Brownlie* [2021] UKSC 45, [2022] AC 995 at [75].

650 *Four Seasons Holdings Incorporated v Brownlie* [2017] UKSC 80 ("*Brownlie I*"). For *Brownlie II,* see n 25 above.

Question 11.

9.38 We seek views and evidence on localising damage arising in tortious claims relating to crypto-tokens for the purposes of applicable law.

(1) To what extent is it likely that claims in tort, such as those pleaded in the crypto-token litigation for the purposes of service out of the jurisdiction, will proceed to trial before the courts of England and Wales? Is it likely that the question of applicable law will be in dispute between the parties?

(2) If it becomes necessary for the courts of England and Wales to determine the question of applicable law, how could the courts approach the question of localising tortious damage in the broader digital asset and electronic trade documents context? Please indicate whether your response should be considered in the context of the CJEU jurisprudence or in the context of a potential common law approach.

The escape clause: Article 4(3)

9.39 Article 4(3) of the Rome II Regulation is an "escape clause". It provides:

> Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

9.40 As we said in Chapter 6, the EU Regulations often use a combination of fixed and open-textured applicable law rules in a "waterfall" approach. The fixed rule at the top of the waterfall is intended to apply in the vast majority of cases. The application of escape clauses, such as Article 4(3), at the bottom of the waterfall is intended to be exceptional.

When is there a contractual relationship between parties to a tort claim?

9.41 The rationale for including an exception for a contractual relationship between the parties to a tort claim has been described as "strong" because many national systems of tort, including the law of England and Wales, allow for concurrent actions in both contract and tort. Thus, in domestic law, "the systems of contractual and extra-contractual liabilities are usually well-coordinated".[651]

9.42 We noted in Chapter 6 that Professor Tobias Lutzi has observed that, given the difficulties of locating tortious damage sustained in the online and crypto-token

[651] T K Graziano, "Torts" in J Basedow, G Rühl, F Ferrari, P De Miguel Asensio (eds), *Elgar Encyclopaedia of Private International Law* (2017) pp 1711 to 1712.

contexts, it may be more pertinent to focus on the parties themselves. He observed that the escape clause in Article 4(3) of the Rome II Regulation makes it possible to take into account a pre-existing relationship between the parties (such as a contract), or between the parties and a third person (such as the host of a trading platform).[652]

9.43 In the online contexts, hosts that provide an online platform to users typically do so pursuant to a user agreement. In this context, Professor Lutzi has suggested that for cases involving "the increasingly closed ecosystems of online platforms, it would be desirable if contractual and non-contractual claims were governed by the same (chosen) law, to provide greater legal certainty for both internet users and platform hosts."[653]

9.44 We said in Chapter 3 that mere use of DLT does not necessarily mean that the challenges of "omniterritoriality" arise. This is because many DLT applications feature contractual relationships or parties who have otherwise agreed to deal with one another. Permissioned DLT networks and crypto-token holdings through an intermediary, such as a crypto exchange, are usually premised on some type of contractual agreement. We considered in Chapters 7 and 8 the contractual background against which dealings in crypto-tokens commonly occur.

9.45 We also note that electronic trade documents, which we consider in more detail in Chapters 10 and 11, often embody contractual obligations.

9.46 We therefore seek views and evidence on the circumstances, in the online and DLT contexts, where it would be appropriate to have recourse to Article 4(3) of the Rome II Regulation on the basis of a contractual relationship between the parties.

When else could courts have recourse to the "escape clause"?

9.47 Where there is a pre-existing contractual relationship between the parties, it seems relatively clearer that courts may have recourse to the "escape clause". It is, however, less clear when courts may *otherwise* have recourse to the "escape clause".

9.48 The intention that recourse to the "escape clause" is exceptional has been reiterated a number of times by the courts of England and Wales.[654] In particular, it has been said that:

> Article 4(3) will act to displace the applicable law under Article 4(1) of Rome II only in exceptional circumstances […] For the law of an alternative country to be manifestly more closely connected to the relevant act, a "high hurdle" […] is to be overcome.[655]

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652 T Lutzi, "The Tort Law Applicable to the Protection of Crypto Assets" in A Bonomi, M Lehmann and S Lalani (eds), *Blockchain and Private International Law* (2023) p 411 and n 73.

653 T Lutzi, *Private International Law Online: International Regulation and Civil Liability in the EU* (2022) para 5.122.

654 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022), para 35-032, n 203; Stylianou v Toyoshima [2013] EWHC 2188 (QB) at [61].

655 *Pan Oceanic Chartering Inc v UNIPEC UK Co Ltd* [2016] EWHC 2774 (Comm) at [206]; *FM Capital Partners Ltd v Marino* [2018] EWHC 1768 (Comm) at [517]. See also *Committeri v Club Méditerranée* [2016] EWHC 1510 at [57] (obiter); and Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 35-032.

9.49 As the editors of *Dicey* explain, Article 4(3) is limited in certain ways.

(1) The provision does not permit assessment of whether a particular issue is more closely connected with another country – it must be the tort/delict which is manifestly more closely connected.[656]

(2) The requirement that the tort be *manifestly* more closely connected with another country (which must be "clear from the circumstances of the case") emphasises that the court must be satisfied that the threshold of closer connection has been clearly demonstrated.[657]

9.50 However, Article 4(3) is not limited to the degree sometimes suggested by parties.

(1) It is not necessary to demonstrate the absence of any "real" or "genuine" connection with the country whose law is otherwise applicable. Demonstrating that the tort is "manifestly more closely connected" to another country just requires clear demonstration that the threshold is satisfied.[658]

(2) Article 4(3) is not limited to direct damage. It is clear that Article 4(3) is only intended to be an escape clause, applied exceptionally to "preserve the intended application of the general rule to most cases". However, Article 4(3) is not "construed in the same manner as Article 4(1)" and therefore does not "only apply to direct damage."[659]

(3) It is not temporally limited in the ways that Article 4(1) and 4(2) are. Unlike Articles 4(1) and 4(2), Article 4(3) contains "no temporal limitation on the factors to be taken into account". For example, if "the claimant and the defendant were habitually resident in country A at the time of the accident but in country B at the time the issue of whether the exception provided by Article 4(3) applied", both circumstances may be relevant."[660]

9.51 To determine whether the tort/delict is manifestly more closely connected to a particular country, the court must have regard to "all the circumstances of the case".[661] As is recognised explicitly in Article 4(3), a pre-existing relationship between the parties might be a relevant factor. Other relevant factors may include: the event giving rise to the damage and the indirect consequences of that event; the location of the damage;[662] the habitual residences of the parties; the location of events preparatory to

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656 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 35-032.

657 Above para 35-032.

658 *Lakatamia Shipping Co Ltd v Su* [2021] EWHC 1907 (Comm) at [859(2)], endorsing the view of the editors of *Dicey* – as to which, see Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 35-032.

659 *Stylianou v Toyoshima* [2013] EWHC 2188 (QB) at [61].

660 *Winrow v Hemphill* [2014] EWHC 3164 (QB) at [51].

661 Rome II Regulation (EC) No 864/2007, Official Journal L 199 of 31.07.2007 art 4(3).

662 Note there is some disagreement as to the relevance of this. See, for example, *Lakatamia Shipping Co Ltd v Su* [2021] EWHC 1907 (Comm) at [859(4)]: "The location of the damage is an irrelevant consideration under

the event giving rise to damage; the parties' nationalities; and other relevant personal connections and surrounding circumstances (such as connections to other persons and things involved in the harmful event).[663]

9.52 In the case of *Verein für Konsumenteninformation v Amazon EU Sàrl,*[664] the CJEU noted that, where an undertaking's terms and conditions provide that the law of the country in which the undertaking is established should apply to contracts concluded by the undertaking, this is not sufficient to establish a manifestly closer connection to that country under Article 4(3).[665]

9.53 Professor Lutzi has noted, therefore, that the practical effects of the "escape clause" are limited by its unavailability for two of the most relevant online torts, as well as by the *Verein für Konsumenteninformation* case discussed above.[666] He has further noted that recourse to Article 4(3) may be more difficult in the decentralised crypto-token context where the parties involved might not be bound by a pre-existing contractual relationship.[667]

Article 4(3)". However, Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 35-033 prefers the view expressed in eg *Owen v Galgey* [2020] EWHC 3546 (QB) at [47] and Winrow v Hemphill [2014] EWHC 3164 (QB) at [43] that location of the direct damage is a relevant factor.

663 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 35-033.

664 Case C-191/15 *Verein für Konsumenteninformation v Amazon EU Sàrl* [2016] 7 WLUK 797.

665 Case C-191/15 *Verein für Konsumenteninformation v Amazon EU Sàrl* [2016] 7 WLUK 797 at [46].

666 T Lutzi, *Private International Law Online: International Regulation and Civil Liability in the EU* (2022) para 4.89.

667 T Lutzi, "The Tort Law Applicable to the Protection of Crypto Assets" in A Bonomi, M Lehmann and S Lalani (eds), *Blockchain and Private International Law* (2023) p 411.

Question 12.

9.54 We seek views and evidence on recourse to the "escape clause" in Article 4(3) of the Rome II Regulation.

(1) In what circumstances in the digital assets and electronic trade documents contexts would it be appropriate for the courts of England and Wales to have recourse to the escape clause on the basis of a pre-existing contractual relationship?

(2) To what extent would the parties in a tort claim involving digital assets and electronic trade documents have a pre-existing contractual relationship? Would these represent the vast majority of cases?

(3) If the parties to a tort claim do not have a pre-existing contractual relationship, when else would it be appropriate for the courts of England and Wales to have recourse to the escape clause? What factors should the courts consider when identifying the country "manifestly more closely connected" to the tort?

Chapter 10: Applicable law – negotiable instruments, bills of lading, and the exclusions from the Rome Regulations

ARTICLE 1(2)(D) OF THE ROME I REGULATION

10.1 As noted in Chapters 6 and 9, the Rome I and Rome II Regulations contain many express exclusions from their scope. In this chapter and the next, we consider Article 1(2)(d) of the Rome I Regulation. This excludes from the scope of that Regulation:

> contractual obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character.

10.2 Article 1(2)(c) of the Rome II Regulation is drafted in identical terms but to exclude non-contractual obligations. However, we focus on the Rome I Regulation because it is the starting point in a complex process of determining, not simply the law applicable to contractual obligations arising under these instruments, but the prior question of by which system of conflict of laws rules the applicable law should be determined.

10.3 For the purposes of our project, it is important that the courts of England and Wales can easily identify which conflict of laws rules apply. These are the rules that will determine the law applicable to contractual obligations arising under many instruments that may seek to benefit from the provisions of the Electronic Trade Documents Act 2023.

10.4 We therefore seek to clarify which applicable law rules apply to these instruments, and then examine whether any issues arise from the application of these applicable law rules to these instruments in electronic form.

What is a negotiable instrument?

10.5 Negotiable instruments have their origins in the law merchant. We said in Chapter 2 that the law merchant was an international body of customary law developed by medieval merchants in the chief trading and port towns of Europe to govern their trading relationships and agreements. These typically traversed national boundaries and therefore were a fertile ground for issues of private international law to arise. The law merchant, however, dealt with these issues by a uniform body of substantive rules that set out the rights and obligations of the parties. In England and Wales, these could be enforced in special commercial courts, until the commercial aspects of the law merchant started to be enforceable in the common law courts at the close of the 17th century.[668]

10.6 One of the practices that developed under the law merchant was use of a piece of paper to embody the right to claim performance of a contractual obligation. This might

[668] F Read, "Origin of Bills of Exchange" [1926] 4(10) *Canadian Bar Review* 451.

have been, for example, the right to claim payment of a sum of money from a debtor, or the right to claim delivery of goods on board a ship when it arrives at the port of destination.

10.7 These paper documents were called "documents of title" because they did not function merely as written evidence of the entitlement.[669] Rather, the document itself was key in identifying the person entitled to claim performance of the obligation. This was through a very simple rule borrowed from the law of tangible goods: possession of the document confers the entitlement to claim performance of the obligation. When a document of title is transferred from one person to another through delivery of the paper document, so is the right it embodies.[670] This is what makes the right to claim performance of the obligation "transferable."

10.8 Negotiable instruments are a specific type of document of title that have the additional feature of negotiability. As we will see, the term "negotiable" can mean different things, depending on the context and the legal system in question. Whether an obligation arising under a particular instrument is caught by the exclusion therefore requires a closer analysis.

10.9 Under the law of England and Wales, negotiability has two meanings. The first is general and simply reflects the fact that obligations embodied in the document title can be transferred through delivery of the paper. As we explain in more detail in our report on Electronic Trade Documents, we prefer not to refer to this quality as "negotiability"; it is better referred to in the law of England and Wales as "transferability".[671]

10.10 The second is more specific and refers specifically to what further rights a transferee obtains by taking possession of the document. At common law, a transferee of a chattel obtains no better title to the chattel than the transferor had themself. This is expressed in the rule that "no one can give rights that they themselves do not have."

10.11 The concept of negotiability is contrary to this common law principle in that a transferee of a negotiable instrument may acquire a better title to the document than the transferor. Negotiability means that the transferee's rights under the negotiable instrument will not be affected by any defects in the transferor's title to the instrument, or by the obligor's[672] ability to raise equities, defences, or set-off rights against the transferor. It is said that the transferee "takes free" of these encumbrances.[673] In such circumstances, the transferee is known as "a holder in due course".[674]

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669 See Electronic Trade Documents: Report and Bill (2022) Law Com No 405.

670 A document of title is transferable by mere delivery or by indorsement and delivery, depending on its type. See M Bridge, L Gullifer, G McMeel and KFK Low, *The Law of Personal Property* (3rd ed 2021) para 5-008.

671 See Electronic Trade Documents: Report and Bill (2022) Law Com No 405, from para 3.12. The terms are sometimes used interchangeably but legallythey generally mean different things.

672 The obligor owes the obligation under the instrument.

673 M Bridge, L Gullifer, G McMeel and KFK Low, *The Law of Personal Property* (3rd ed 2021) para 5-009.

674 The term is defined as follows in the Bills of Exchange Act 1882, s 29: "a holder who has taken a bill, complete and regular on the face of it, under the following conditions; namely, (a) That he became the

10.12 Under the law of England and Wales, it is this additional quality of "negotiability" that makes a document of title a "negotiable instrument" rather than merely "transferable."[675] Both negotiable instruments and transferable instruments fall within the concept of a trade document as used in the Electronic Trade Documents Act 2023.

10.13 This is illustrated by section 1(2) of the Electronic Trade Documents Act 2023,[676] which sets out some examples of documents currently used in the UK in relation to trade and transport of goods or the financing of such trade and transport. The non-exhaustive list includes: bills of exchange; promissory notes; bills of lading; a ship's delivery order; warehouse receipts; mate's receipts; marine insurance policies; and cargo insurance certificates.

10.14 Some, but not all, of these documents are negotiable instruments, both for the purposes of the Rome Regulations and under the law of England and Wales.

What do the exclusions in the Rome Regulations cover?

10.15 Article 1(2)(d) of the Rome I Regulation excludes contractual obligations arising under two broad classes of instruments: (i) bills of exchange, cheques, and promissory notes; and (ii) "other negotiable instruments." However, the exclusion applies only "to the extent that the obligations under such other negotiable instruments arise out of their negotiable character."[677]

10.16 Although there is some debate as to whether the qualification extends to both classes of instruments[678] or only the second,[679] the general consensus in England and Wales seems to be that the Giuliano-Lagarde Report to the Rome Convention itself[680] suggests that *all* obligations arising under bills of exchange, cheques, and promissory notes are caught by the exclusion.[681] Assuming that this is correct, all obligations,

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holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact; (b) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it."

675 Professor Koji Takahashi makes the point that which instruments fall under the description "negotiable instrument" depends on the applicable law. For example, bills of lading are not strictly negotiable instruments under English law, but they are under German and Japanese law: K Takahashi, "Blockchain-based Negotiable Instruments: with Particular Reference to Bills of Lading and Investment Securities" in A Bonomi, M Lehmann and S Lalani (eds), *Blockchain and Private International Law* (2023) p 494.

676 The 2023 Act allows for certain negotiable and other documents to be used in electronic form: s 2.

677 As set out in full at para 10.1 above.

678 See eg F Ferrari, *Concise Commentary on the Rome I Regulation* (2nd edition 2020) p 38, para 58. See also, G-P Calliess and M Renner, *Rome Regulations Commentary* (3rd ed 2020) p 65, para 30.

679 See eg Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 33-398 and M McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (2015) para 7.105.

680 The Giuliano and Lagarde Report on the Rome Convention [1980] Official Journal C 282/1 of 31.10.1980 explains the rationale behind, and how to interpret, the provisions of the Rome Convention, many of which have been replicated in the Rome I Regulation.

681 The editors of *Dicey* rely on the Giuliano-Lagarde Report in support of the distinction they draw as between the complete exclusion of the named instruments, and the circumstance-dependent exclusion of "other negotiable instruments": Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict*

negotiable or otherwise, arising under bills of exchange, cheques, and promissory notes are therefore governed by the common law conflict of laws rules. We consider these in more depth in Chapter 11.

10.17 Here we consider the obligations under the second class of instruments caught by the exclusion, and the question of how "other negotiable instruments" and "negotiable character" are to be defined.

10.18 The Giuliano-Lagarde Report states that "[w]hether a document is characterized as a negotiable instrument is not governed by this Convention and is a matter for the law of the forum (including its rules of private international law)".[682]

10.19 From this, there is disagreement as to whether the forum should adopt a domestic interpretation of "negotiable instrument" and "negotiable character",[683] or an autonomous EU interpretation of the concepts.[684]

10.20 Irrespective of whether the definition should be domestic or autonomous, there is some consensus that "negotiable character" has some relation to "proprietary rights" insofar as the exclusions relate to "obligations arising under negotiable instruments which are liable to affect substantive proprietary rights."[685] These are independent of contractual rights[686] and could arise in:

> disputes over obligations to pay under the instrument, such as a challenge to whether the person claiming payment is, in English terminology, a holder in due course, or that the party to an instrument has been discharged from liability under the rules governing the operation of such an instrument.[687]

10.21 There is further consensus that, as with any property matter, these are beyond the scope of the Rome Regulations entirely. As such, the law applicable to obligations arising out of the negotiable character of an instrument are determined by the common law rules. We consider these in depth in Chapter 12.

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of Laws (16th ed 2022) para 33-398, n 1838. Similarly, McParland relies on the Giuliano-Lagarde Report when explaining the difference in treatment as between the named and unnamed instruments in the Rome Convention and the Rome Regulations: M McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (2015) para 7.105, n 169.

682 The Giuliano and Lagarde Report on the Rome Convention [1980] Official Journal C 282/1 of 31.10.1980, p 11, at 4.

683 R Plender and M Wilderspin, *The European Private International Law of Obligations* (6th ed 2023) para 5-030. See also Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 33-398.

684 G-P Calliess and M Renner, *Rome Regulations Commentary* (3rd ed 2020) p 66, para 32. See also F Ferrari, *Concise Commentary on the Rome I Regulation* (2nd edition 2020) p 38, para 58.

685 R Plender and M Wilderspin, *The European Private International Law of Obligations* (5th ed 2019) para 5-030. The editors also note (para 5-032) that: "obligations specific to the character of one of the instruments listed in art.1(2)(d), such as the bearer's right to sue the drawer thereon, irrespective of contractual obligation, fall outside the scope of the Regulation".

686 F Ferrari, *Concise Commentary on the Rome I Regulation* (2nd ed 2020) p 39, para 60. See also R Plender and M Wilderspin, *The European Private International Law of Obligations* (5th ed 2019) para 5-032.

687 M McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (2015) para 7.106.

10.22 In this chapter, we consider the law applicable to the remaining (contractual) obligations arising under "other negotiable instruments." This is a broad category that may cover a wide range of instruments used in commercial practice. Many of these, furthermore, are increasingly moving towards being issued or used in electronic and tokenised forms.

10.23 For example, in Chapter 3 we mentioned "linked assets". These are crypto-tokens that reference an asset "off-chain" (outside of the blockchain) with the intention that dealings in the crypto-token within the DLT platform will represent dealings in the off-chain asset. We also mentioned that bills of lading, trade documents, shares in companies, and interests in gold are "real life assets" that are currently being "tokenised" in DLT systems, or for which the possibility of tokenisation is being considered. The underlying idea is that, much like the way that the transfer of a paper document of title will transfer the right to claim performance of the obligation it embodies, transfers of the "tokenised security" or "tokenised right" within the DLT system will transfer the right to claim entitlements to the off-chain assets. Whether this is viable will depend on the nature of the "link" between the token and the off-chain asset.[688]

10.24 We have chosen to focus in this chapter on bills of lading for several reasons. First, the question of whether bills of lading are negotiable instruments within the meaning of the Rome Regulations is problematic from the perspective of the law of England and Wales.

10.25 Second, the 2023 Act establishes a legal link between any underlying digital asset and the legal obligation in the form of a bill of lading (where a DLT or similar system is used) such that possession of an electronic bill of lading gives the holder the associated legal rights.[689] Electronic bills of lading are therefore a real-life test for the existing law.

10.26 Further, we are aware that, even prior to the passage of the Electronic Trade Documents Act 2023, parties involved in the shipping industry relied on contractual frameworks as a solution to the law not (yet) recognising electronic bills of lading as possessable. We therefore consider that these practices may be indicative of the private international law issues that may arise from the use of electronic trade documents that qualify under the Electronic Trade Documents Act 2023.

10.27 Finally, we committed during the passage of the 2023 Act to look at the private international law issues raised by the Act, including in relation to questions raised on bills of lading.[690]

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688 Eg holding a token purporting to represent a company share or share certificate could only be evidence of that status and cannot constitute or endow that status. Share ownership is determined by the register of members. See Hin Liu, "Digital assets: the mystery of the 'link'" (2022) 3 *Journal of International Banking and Financial Law* 161 and UKJT, "Legal statement on the issuance and transfer of digital securities under English private law" (2023).

689 Electronic Trade Documents Act 2023, s 2(2).

690 We also consider pledges and other security interests in respect of bills of lading in Ch 12.

BILLS OF LADING AND APPLICABLE LAW

10.28 The history and development of bills of lading stretches back to the law merchant.[691] They are used in the carriage of goods by sea. The arrangement typically involves at least three core parties: (i) the person wishing to ship the goods (the "shipper"); (ii) the person who will execute the voyage (the "carrier"); and (iii) the person to whom the goods should be delivered when the ship arrives at the relevant destination port.

10.29 There is a complex legal matrix in which the goods are transported from port to port around the world. There will be a contract of carriage between the shipper and carrier, which will often include terms such as reasonable care of the cargo during the voyage. Most importantly for our purposes, the contractual obligations on the carrier will include delivery of the goods at the destination port to a person entitled to give good discharge to the carrier's obligation to deliver the goods under the contract of carriage with the shipper.

10.30 The bill of lading is issued by the carrier when they have received goods onboard the ship. The bill of lading is issued to the shipper of the goods, who may then deliver the bill of lading to other persons. This is important because a person who presents the bill of lading to the carrier at the port of destination is entitled to claim the goods.

10.31 A modern bill of lading thus serves three functions: as a receipt for the goods taken by the carrier;[692] as evidence of the contract of carriage;[693] and, under certain circumstances, as a document of title to the goods described in the bill.[694] We are primarily concerned with the third function.

10.32 As a document of title, a bill of lading entitles the holder to claim delivery of the goods. It is often used as a proxy for the goods themselves, in that it is often used by the holder to transfer the goods by way of sale or pledge.[695]

10.33 Modern bills of lading remain faithful to their origins in the law merchant insofar as the private law obligations as between shippers and carriers arising under international shipping contracts are determined by reference to the supranational approach to private international law. Today, these are set out in instruments of public international law.

10.34 Of these, the UK is a party to the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed at Brussels on 25 August 1924 (the "Hague Rules"), as amended by the Protocol signed at Brussels on 23 February

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691 See the discussion of the law merchant in Ch 2.

692 M Bridge (ed), *Benjamin's Sale of Goods* (12th ed 2023) para 18-089; *Smith v Bedouin Steam Navigation Co* [1896] AC 70,77, by Lord Watson.

693 *Crooks & Co v Allan* (1879) 5 QBD 38,40, by Lush J; *Hansson v Hamel and Horley Ltd* [1922] 2 AC 36, 47, by Lord Sumner. As cited in M Bridge (ed), *Benjamin's Sale of Goods* (12th ed 2023) para 18-137, n 625. See also, Electronic Trade Documents: Report and Bill (2022) Law Com No 405, para 3.360.

694 *Lickbarrow v Mason* (1787) 2 TR 63, 100 ER 35. See also F Rose & FMB Reynolds (eds), *Carver on Bills of Lading* (5th ed 2022) para 6-001, and M Bridge (ed), *Benjamin's Sale of Goods* (12th ed 2023) para 18-166.

695 M Goldby, *Electronic Documents in Maritime Trade* (2nd ed 2019) para 1.04. We discuss the pledging of electronic trade documents in more detail in Ch 12.

1968 (the "Visby Rules") and by the Protocol signed at Brussels on 21 December 1979. The Hague-Visby Rules are implemented in the UK by the Carriage of Goods by Sea Act 1971 and are reproduced in Schedule 1 to that Act. We discuss the Hague-Visby Rules in more detail below.

Are UK bills of lading excluded from the Rome I Regulation?

10.35 We said above that the term "negotiable" has different meanings, depending on the context and legal system in question. We also saw that the Giuliano-Lagarde Report states that the question of whether a document is a negotiable instrument is governed by the law of the forum,[696] but that there is some debate as to whether "negotiable instrument" should be interpreted by domestic courts as having an autonomous EU meaning.

10.36 These debates are particularly relevant for bills of lading because Recital (9) of the Rome I Regulation makes it clear that bills of lading may fall under the "other negotiable instruments" limb of the exclusion, such that obligations arising under bills of lading are excluded to the extent that the obligations in dispute are linked to the bill's negotiable character.[697] The Giuliano-Lagarde Report similarly makes express reference to bills of lading as a type of "other negotiable instrument". This is consistent with the substantive laws of some jurisdictions, such as Germany or Japan, where bills of lading are negotiable instruments.[698]

10.37 In the domestic law of England and Wales, however, bills of lading are transferable but are not strictly negotiable instruments. This is because a good faith purchaser for value is not fully protected: they take subject to the transferor's defects in title.[699] Furthermore, although the common law recognised the transfer of property rights in the *goods* represented by the bill of lading through the process of indorsement and delivery, it did not recognise the transferee of a bill of lading as having contractual rights under the original bill of lading contract. As such, the transfer of rights of action under the bill of lading has required a statutory mechanism. Today, this is found in section 2 of the Carriage of Goods by Sea Act 1992.

10.38 Writing specifically on whether obligations arising under bills of lading fall within Article 1(2)(d) of the Rome I Regulation, Sir Richard Aikens rejects the proposition that

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696 The Giuliano and Lagarde Report on the Rome Convention [1980] Official Journal C 282/1 of 31.10.1980, p 11, at 4.

697 To appease the concerns of Member States who wanted to exclude bills of lading from the scope of the Rome I Regulation, it was agreed that the guidance on bills of lading previously given in the Giuliano-Lagarde Report on the Rome Convention would be incorporated in the form of a recital – that is, Recital (9). See M McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (2015) para 7.102.

698 K Takahashi, "Blockchain-based Negotiable Instruments: with Particular Reference to Bills of Lading and Investment Securities" in A Bonomi, M Lehmann and S Lalani (eds), *Blockchain and Private International Law* (2023) p 494. Note, however, that this author favours the word "negotiable" within the meaning of the Rome I Regulation to be interpreted in a sense broader than that which describes the character of an instrument allowing a holder in due course to acquire a better title than what the transferor had (p. 514).

699 *Enichem Anic SpA v Ampelos Shipping Co Ltd (The Delfini)* [1990] Lloyd's Rep 252, 268, by Purchas LJ; *Picker v London and County Banking Co* (1887) 18 QBD 515. See exceptions in the Sale of Goods Act 1979, ss 24 and 25.

obligations under a bill of lading arise from its negotiable character "at least when a bill of lading is transferred to a lawful holder." He suggests instead that:

> In English law […] the existence of 'contractual obligations' as between a carrier and a transferee of a bill of lading depends not upon the negotiable character of the bill, but upon the fact that [sections 2(1), (2) and (5) of the Carriage of Goods by Sea Act 1992] transfers contractual rights and obligations to a subsequent holder of a bill in certain defined circumstances.[700]

10.39 Noting the position taken in the Giuliano-Lagarde Report,[701] and the position taken by the editors of *Dicey*, Sir Richard therefore concludes that the courts of England and Wales will regard obligations arising under bills of lading as falling within the scope of the Rome I Regulation.[702]

10.40 This, however, reflects a domestic approach. There has been no CJEU decision on the correctness of this position. The alternative is that the relevant concepts should be interpreted in accordance with the meaning intended by the Regulation, rather than in accordance with domestic law. Whether or not obligations arising under bills of lading are caught by the exclusion is therefore an unresolved question.

10.41 This is further complicated by the application of the Hague-Visby Rules in the UK. As we will see, the question of whether obligations arising under bills of lading fall within the Rome I Regulation exclusion is only the first step in determining whether the law governing such obligations falls to be determined by the applicable law rules set out in the Rome I Regulation.

The interaction between the Rome I Regulation and the Hague-Visby Rules

10.42 The Hague-Visby Rules set out the rights and obligations as between shippers and carriers in international shipping contracts and are given effect in the UK by the Carriage of Goods by Sea Act 1971.

10.43 As an example of the supranational approach to conflicts of private law, the Hague-Visby Rules bypass the fundamental issue with which unilateral and multilateral systems of conflict of laws are concerned: the applicable law question. Rather than seeking to identify which of the competing systems of private law should determine the private law rights and obligations of shippers and carriers arising from international contracts of carriage, the Hague-Visby Rules themselves prescribe those rights and will apply in the appropriate international circumstances.

10.44 These international circumstances are set out in Article X of the Hague-Visby Rules, which provides:

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700 R Aikens, "Rome I Repatriated: Post-Brexit, How Will the 'Retained' Rome I Determine the Applicable Law of Bill of Lading Contracts?" referring to ss 2(1) and (2) and 5(2) of the Carriage of Goods by Sea Act 1992, in J Harris and C McLachlan, *Essays in International Litigation for Lord Collins* (2022) p184.

701 Above, at para 10.18.

702 R Aikens, "Rome I Repatriated: Post-Brexit, How Will the 'Retained' Rome I Determine the Applicable Law of Bill of Lading Contracts?" in J Harris and C McLachlan, *Essays in International Litigation for Lord Collins* (2022) p185.

> The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if:
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> (a) the bill of lading is issued in a contracting State, or
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> (b) the carriage is from a port in a contracting State, or
>
> (c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract,
>
> whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

10.45 Our understanding is that, in the vast majority of international cases, the Hague-Visby Rules are incorporated by way of a clause on the reverse side of the bill.

10.46 As such, the question of whether obligations arising under bills of lading are caught by Article 1(2)(d) of the Rome I Regulation is largely immaterial insofar as the application of the Hague-Visby Rules in the UK bypasses the need to identify the applicable law; whether under the Rome I Regulation or the common law conflict of laws rules.

10.47 Although there is provision in Article 5 of the Rome I Regulation for contracts of carriage, as the editors of *Dicey* explain, the significance of the applicable law rules set out in Article 5 are "much reduced" due to the application of the overriding mandatory provisions of the law of the forum, as envisaged in Article 9.[703]

10.48 Article 9(1) explains that "[o]verriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests […] to such an extent that they are applicable to any situation falling within their scope". Article 9(2) provides that "[n]othing in this Regulation shall restrict the application of the mandatory provisions of the law of the forum", and is reflected in Dicey Rule 230(5):

> A contract of carriage that is within the scope of application of an international convention on transport is governed by the provisions of that convention so far as they have been given effect to in the law of the United Kingdom.[704]

10.49 With respect to the Hague-Visby Rules, the editors of *Dicey* explain that Article 9 has the following effect:

> The Hague-Visby Rules, as implemented in the 1971 Act, should be viewed as overriding mandatory provisions of the law of the forum which apply irrespective of the law applicable to the relevant contract of carriage in accordance with Art 9(2) of the Rome I Regulation. In consequence, parties cannot contract out of the Hague-

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703 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 33-136.

704 Above para 33R-112.

Visby Rules by choosing as the law applicable to the contract the law of a country which has not enacted the Rules.[705]

10.50 Accordingly, although obligations arising under bills of lading may well not fall within the Article 1(2)(d) exclusion, they will nevertheless be "excluded" from the Rome I Regulation insofar as the framework of the Rome I Regulation will be overridden by the mandatory application of the Hague-Visby Rules.

ELECTRONIC BILLS OF LADING AND THE HAGUE-VISBY RULES

10.51 In this section we consider how the Hague-Visby Rules would apply to bills of lading issued solely in electronic form. We also consider where an electronic bill of lading is "issued" for the purposes of Article X(a).

10.52 First we offer a brief description of the kinds of arrangements in which these questions may arise: (i) when closed systems (reliant on contractual arrangements between members of the system) are used to replicate the conventional features of paper bills of lading, and (ii) when electronic bills of lading are issued using distributed ledger technology. Use of the former was prevalent before the coming into force of the Electronic Trade Documents Act 2023 as a means of circumventing the possession problem; use of the latter may or may not become more prevalent going forward.

Contractual arrangements to facilitate the use of electronic bills of lading

10.53 Prior to the enactment of the Electronic Trade Documents Act 2023, parties involved in international trade relied on contractual frameworks as a solution to the law not (yet) recognising electronic trade documents as possessable.

10.54 Professor Miriam Goldby explains that the first and best-known example of such a contractual framework is the rulebook that applies to all users of the Bill of Lading Electronic Registry Organization ("Bolero").[706] The Bolero Rulebook is governed by English law, and market participants agree to various terms and conditions that are intended to facilitate trade using electronic versions of documents such as bills of lading in the absence of formal legal recognition that such documents are possessable.[707]

10.55 Another example includes Databridge Services and Users Agreements ("DSUA"), applicable to users of the essDOCS CargoDocs platform, which is used for the electronic issuance and transfer of electronic equivalents of bills of lading.[708] Here, the governing law is the law of England and Wales, but if the contract of carriage entered into over CargoDocs is governed by US law, then transfer of title (and all rights under the electronic record which substitutes the paper trade document) is governed by New York law.

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705 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 33-137.

706 M Goldby, *Electronic Documents in Maritime Trade* (2nd ed 2019) para 6.02.

707 Above para 6.03. These systems can also incorporate an undertaking by all parties to not challenge the validity of any transactions facilitated by the system.

708 Above para 6.02.

10.56 The applicable law question is thus more easily determined, at least in respect of contractual matters, where there is such a multipartite user agreement, since all parties in the contractual framework have agreed what the governing law will be.[709]

10.57 The receipt function and the contract-of-carriage function of paper bills of lading can be facilitated within a multi-party closed contractual system such as Bolero and DSUA.[710] However, the document-of-title function posed additional challenges for these contractual arrangements, since it was not possible, in the absence of legislative intervention, for an electronic record to be deemed a document of title.[711] The introduction of the Electronic Trade Documents Act 2023 means this is now possible.

10.58 Given the requirement in the Electronic Trade Documents Act 2023 that a "reliable system" be used,[712] it is our tentative view that these closed contractual systems will remain prevalent, albeit without the need for additional steps (such as attornment)[713] to achieve the document-of-title function of bills of lading.

Question 13.

10.59 We seek evidence, particularly from market participants, on how market practice in respect of bills of lading has been affected, or how it is likely to be affected, by the introduction of the Electronic Trade Documents Act 2023.

Distributed ledger technology and bills of lading

10.60 The use of distributed ledger technology can have a significant effect on the use of electronic bills of lading.

10.61 Professor Miriam Goldby describes Wave BL as a "business-to-business distributed ledger application", which allows users to issue, exchange and digitally sign electronic

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709 As we explain in from para 10.20 above and in greater detail in Ch 12, this choice only pertains to contractual arrangements; parties are not at liberty to choose the applicable law that will govern property disputes.

710 As noted at para 10.31 above, a bill of lading has three functions: (1) receipt for the goods taken by the carrier; (2) evidence of the contract of carriage; (3) and a document of title to the goods described in it. A bill of lading plays a receipt function insofar as it evidences the facts stated in it, such that "a shipped bill is evidence that the goods described in it have been shipped, and of the date of shipments as stated in the bill": M Bridge (ed), *Benjamin's Sale of Goods* (12th ed 2023) para 18-089. A bill evidences the relevant contract of carriage, which is to say that it evidences the terms of that contract. A bill can, in certain circumstances, constitute the contract of carriage rather than playing an evidentiary function. However, judicial statements confirming this position generally arise "in the context of the relationship which is said to spring up, on the indorsement of the bill of lading, between the carrier and the indorsee of the bill": M Bridge (ed), *Benjamin's Sale of Goods* (12th ed 2023) para 18-137 and 18-138.

711 M Goldby, *Electronic Documents in Maritime Trade* (2nd ed 2019) para 6.33.

712 We discuss the "reliable system" under the 2023 Act at para 10.58 and from 11.39 below.

713 Where goods are carried by sea, attornment "consists of an undertaking by the bailee (the carrier) to a third party (the holder of the bill of lading) that he will deliver the goods to that third party, thus giving the latter constructive possession of the goods": M Goldby, *Electronic Documents in Maritime Trade* (2nd ed 2019) para 5.43.

trade documents such as bills of lading.[714] Similarly, Professor Koji Takahashi has suggested that "blockchain-based negotiable instruments", such as electronic or tokenised bills of lading held via permissionless DLT platforms, may have some role to play in the future.[715]

10.62 For the reasons set out in Chapter 3, fully decentralised DLT systems pose particular challenges for private international law. Nevertheless, we are not yet in a position to assess whether such DLT systems used for bills of lading rely on or are likely to in the future move to wholly decentralised systems.

10.63 Our understanding from the Electronic Trade Documents project and consultees' views on the reliable system requirement is that market participants are unlikely to join any platform that does not have robust governance systems.[716] We therefore think that this means, by extension, that market participants may be reluctant to join wholly decentralised DLT systems. Furthermore, as we noted at paragraph 7.27 above, we understand that any specialised bills of lading application on DLT will likely be hosted by a specialist platform provider, which may develop and implement the bills of lading application. This seems consistent with, for example, our understanding of how Wave BL operates, which we discussed at paragraph 3.132 above.

10.64 All of this suggests to us that a wholly decentralised DLT system is unlikely for the market; and that even for business-to-business models, contractual user agreements are likely to be in place. We nevertheless do not think that we are yet able to state the position with certainty, and therefore seek evidence from market participants as to use of DLT systems for digital bills of lading.

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714 M Goldby, *Electronic Documents in Maritime Trade* (2nd ed 2019) para 6.46.

715 Central registries based on contractual arrangements only bind parties who have become registered members of a specific systems. Permissionless DLT platforms have an advantage as they require no prior subscription to membership. See K Takahashi, "Blockchain Technology and Electronic Bills of Lading" (2016) 22 *Journal of International Maritime Law* 205.

716 Eg Phillips 66 Ltd said that "parties will not [use] electronic trade documents unless they consider the underlying system to have integrity" and "is reliable": Electronic Trade Documents: Responses to Consultation, p 325.

Question 14.

10.65 We seek evidence on market sentiment relating to use of DLT platforms for electronic bills of lading.

(1) Is it likely that market participants will move towards a wholly decentralised DLT platform for bills of lading?

(2) To what extent can we assume that market participants will be reluctant to join a DLT platform that does not at least offer a user agreement setting out the terms on which the DLT platform will operate, and the rights and obligations of all users of the platform?

(3) Other than wholly decentralised DLT platforms, how else might DLT be used to issue and transact with electronic bills of lading (under the 2023 Act or otherwise)?

Can the Hague-Visby Rules be incorporated by an electronic bill of lading?

10.66 We said above that our understanding is that, in the vast majority of international cases, the Hague-Visby Rules apply because the parties insert a clause on the reverse side of the bill of lading stating that the Hague-Visby Rules apply. This falls within Article X(c) of the Hague-Visby Rules, which provides that the Rules apply if "the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract."

10.67 Since neither the Hague-Visby Rules nor the Carriage of Goods by Sea Act 1992 limit the application of the Rules to paper bills of lading, it appears, at first glance, that there is no reason why the Rules would not apply to electronic or tokenised bills of lading. The Hague-Visby Rules seem to apply equally to paper, electronic, and tokenised bills of lading.

10.68 However, the question may not be so straightforward. Article I(b) of the Hague-Visby Rules limits their scope to "contracts of carriage covered by a bill of lading or any similar document of title, in so far as such a document relates to the carriage of goods by sea" (as is reinforced by section 1(4) of the Carriage of Goods by Sea Act 1971).[717] The question that arises is therefore whether an electronic bill of lading is "a bill of lading" or a "similar document of title" for the purpose of the Hague-Visby Rules.

10.69 We referred above to the practice of using contractual frameworks to ensure that electronic bills of lading serve as functional equivalents to paper bills of lading. Even before the enactment of the Electronic Trade Documents Act 2023, the practice was sufficiently widespread and mature that the International Group of P&I (protection and indemnity) Clubs (IGP&I) provided cover for typical property and casualty (P&C) liabilities arising from any electronic bill of lading. This, however, was limited to the extent that these liabilities would also have arisen had a paper bill been used. If the

[717] See F Rose and FMB Reynolds (eds), *Carver on Bills of Lading* (5th ed 2022) para 9-107.

liability would not have arisen off the back of a paper bill, and a system approved by the IGP&I was not used to issue the bill, whether the liability was covered was a matter of the discretion of the relevant P&I Club.[718]

10.70 Writing before the passage of the Electronic Trade Documents Act 2023, Professor Miriam Goldby highlighted that, even when an "approved system" was used, there remained two kinds of core liabilities that might may be left without cover - liability arising from: (i) a successful legal challenge to the system's ability to transfer rights over the goods as intended; or (ii) from the ineffective incorporation of the Hague or Hague-Visby Rules, which may not necessarily apply automatically where an electronic bill of lading (in the sense of a contractual workaround) is used.[719]

10.71 The first kind of liability will not arise where the Electronic Trade Documents Act 2023 applies; UK law now recognises that electronic trade documents can be possessed.

10.72 On the second kind of liability, Professor Miriam Goldby expressed the view that, although an electronic bill of lading within a contractual system might not meet the definition of a document of title at common law, it would fall within the scope of the Carriage of Goods by Sea Act 1971 and the Hague-Visby Rules.[720] Professor Goldby highlighted that the terms "bill of lading" and "document of title" are not defined in the Hague-Visby Rules,[721] and submitted that they should be interpreted more widely than under the common law of England and Wales (as it was pre-2023 Act), to cover electronic equivalents to paper bills of lading.[722] Given that the Rules were drafted at a time when paper documents prevailed, she suggested that there is a "need to adopt an interpretive approach that is apt to address grey areas in regulation".[723] In particular, there should be a purposive interpretation, under which the Rules would be interpreted in light of the purpose for which they were adopted: to regulate all bill of lading contracts.[724]

10.73 This approach was taken in *The Hollandia*, in which the House of Lords held that the Hague-Visby Rules "should be given a purposive rather than a narrow literalistic

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718 M Goldby, "The Impact of New Commercial Practices on Liner Contracts of Carriage: New Wine in Old Skins?" in J Chuah (ed), Research Handbook on Maritime Law and Regulation (2019) p 223, as cited in M Goldby, Electronic Documents in Maritime Trade (2nd ed 2019) para 6.02.

719 M Goldby, *Electronic Documents in Maritime Trade* (2nd ed 2019) para 6.02.

720 Above para 6.15.

721 Above.

722 Above para 6.16.

723 M Goldby, "The Impact of New Commercial Practices on Liner Contracts of Carriage: New Wine in Old Skins?" in J Chuah (ed), *Research Handbook on Maritime Law and Regulation* (2019) p 231.

724 Above.

construction",[725] and in *The Rafaela* S, in which the House of Lords "was emphatic about the wide application of the Hague-Visby Rules".[726]

10.74 In light of the general view that the Hague-Visby Rules should be interpreted broadly, we are of the preliminary view that it would not be controversial for an electronic bill of lading under the Electronic Trade Documents Act 2023 to be a bill of lading for the purposes of the Hague-Visby Rules.

10.75 On the other hand, we note that IP&A Clubs have reserved the discretion to cover liabilities arising from the ineffective incorporation of the Hague or Hague-Visby Rules to electronic bills of lading used within "approved systems" that facilitate contractual workarounds.[727]

10.76 We therefore think that we are not yet in a position to draw a firm conclusion on the application of the Hague-Visby Rules to electronic bills of lading and other documents that fall within their scope. Accordingly, we seek evidence on this issue.

Question 15.

10.77 We seek evidence on the difficulties, if any, of incorporating the Hague-Visby Rules where an electronic bill of lading has been used.

(1) How often do disputes arise as to incorporation of the Hague-Visby Rules, specifically because an electronic bill of lading has been used, and how likely are they to in future?

(2) Are there concerns in the market, both in the marine insurance and shipping sectors, regarding the incorporation of the Hague-Visby Rules in electronic bills of lading? Please provide detailed examples in your answer and, where possible, distinguish between electronic bills under the Electronic Trade Documents Act 2023 and electronic bills held within contractual "approved systems."

Where is an electronic bill of lading issued for the purpose of Article X(a) of the Hague-Visby Rules?

10.78 We noted above that Article X of the Hague-Visby Rules provides various circumstances in which the Rules will apply. Article X(a) provides that the Rules will apply to bills of lading issued in a contracting State.

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[725] *The Hollandia* [1983] 1 AC 565, 572, as cited in M Goldby, "The Impact of New Commercial Practices on Liner Contracts of Carriage: New Wine in Old Skins?" in J Chuah (ed), *Research Handbook on Maritime Law and Regulation* (2019) p 231.

[726] M Goldby, *Electronic Documents in Maritime Trade* (2nd ed 2019) para 6.16. See also F Rose and FMB Reynolds (eds), *Carver on Bills of Lading* (5th ed 2022) para 9-109 where the editors similarly take the view that the terms "bill of lading" and "document of title" in the Hague-Visby Rules should be interpreted more broadly than under the common law.

[727] M Goldby, *Electronic Documents in Maritime Trade* (2nd ed 2019) para 6.02.

10.79 As far as paper documents are concerned, there does not appear to be any case law on where a bill of lading is issued for the purposes of the Hague-Visby Rules. Instead, normal commercial practice appears to be to regard, and to record, the place of issue as the port of loading. This reflects the obligation in Article 3(3) and (7) of the Rules that a bill of lading must be issued by the carrier after the goods have been loaded.

10.80 Electronic and tokenised bills of lading give rise to the possibility that the documents may be taken to have been issued in a place other than the port of loading. For example, the carrier's head office in Country A might issue documents to the shipper's head office in Country B, using a registry in Country C. In these circumstances a party might argue that the relevance to the transaction of the Hague-Visby Rules had expanded beyond what was contemplated at the time of contracting if any one of countries A, B or C were contracting states. Given the reliance on third party registries and platforms who operate the system of electronic documents, it could also be said that the electronic bill of lading is issued once it has been accepted into the system of one of those third parties.

10.81 We also said in Chapter 3 that private international law is generally concerned only to find some objective feature of an object, relationship, or event that convincingly points to a particular territory to localise the dispute within a legal system. In this process, it is not necessarily bound to the empirical features of an object or an event, but may look to a wide range of connecting factors. We therefore think that it is open to us to consider the particular features of the electronic or DLT systems used to identify where an electronic or tokenised bill of lading is used for the purposes of the Hague-Visby Rules.

10.82 We anticipate that evidence on these matters may also guide the debate in Chapter 11 on bills of exchange and other trade documents that may qualify under the Electronic Trade Documents Act 2023.

Question 16.

10.83 We seek evidence on market practice to help us identify where it could be said that an electronic bill of lading is "issued" for the purpose of the Hague-Visby Rules, as implemented in the UK by the Carriage of Goods Act 1971.

(1) How, in practical terms, does a carrier wishing to issue an electronic or tokenised bill of lading do so within the respective electronic "approved" system or DLT system? What steps must a carrier take within the system?

(2) How, in practical terms, does a shipper "receive" an electronic or tokenised bill of lading within an "approved" system or DLT system? What steps must a shipper take within the system?

(3) Does the issue of an electronic or tokenised bill of lading between carrier and shipper involve the platform provider, or do the systems allow for electronic or tokenised bills to be sent directly from carrier to shipper?

(4) What are the market standards or best practices relating to existing electronic or DLT systems on the "issue" of a bill of lading?

Chapter 11: Applicable law – section 72 of the Bills of Exchange Act 1882

WHAT ARE BILLS OF EXCHANGE, CHEQUES, AND PROMISSORY NOTES?

11.1 We saw in Chapter 10 that all obligations arising from bills of exchange, cheques, and promissory notes are excluded from the Rome I Regulation under Article 1(2)(d). In this chapter, we consider the conflict of laws rules applicable to disputes relating to contractual obligations under these instruments, as set out in section 72 of the Bills of Exchange Act 1882 ("1882 Act") (under the heading "Rules where laws conflict"). In light of the Electronic Trade Documents Act 2023 ("2023 Act"), we also consider the effect of the conflict of laws rules in the 1882 Act on electronic trade documents.

11.2 The reason for the exclusion of bills of exchange, cheques, and promissory notes from the scope of the Rome Regulations can be seen in the view of the Drafting Group that the provisions of the Rome Convention "were not suited to the regulation of obligations of this kind. Their inclusion would have involved rather complicated special rules."[728] These "rather complicated special rules" would have been required owing to some of the additional features of bills of exchange, cheques, and promissory notes as a class of negotiable instruments.

11.3 Bills of exchange, cheques and promissory notes are documents of title embodying a claim to the payment of a sum of money. They were introduced to England from Europe in the 13th century.[729]

11.4 As we saw in Chapter 3, the early forms of bills of exchange could be enforced in special law merchant courts until the close of the 17th century, when common law judges began to give them effect in the common law courts.[730] Finally, as part of the drive to place the law merchant on a statutory footing, common law authorities on bills of exchange, cheques, and promissory notes were codified in the 1882 Act. We consider this in more detail below.

11.5 Bills of exchange, cheques, and promissory notes are document of titles in that the right to claim payment of a sum of money can be transferred from one person to another simply by delivering possession of the document in which that right is embodied. The sole objective of these instruments is "to secure to the holder the payment in due course of the sum for which the bill is drawn or the note is made."[731]

11.6 Bills of exchange, cheques, and promissory notes are also negotiable instruments. Under the law of England and Wales, they are negotiable in the specific sense

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728 The Giuliano and Lagarde Report on the Rome Convention [1980] Official Journal C 282 of 31.10.1980 p 11, para 4.

729 F Read, "Origin of Bills of Exchange" [1926] 4(10) *Canadian Bar Review* 447.

730 Above.

731 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 33-355.

mentioned in Chapter 10; that is, a good faith transferee for value acquires title to the document free of any defects in the transferor's title. Where a transferee acquires title to the document free of any defects, they are known as "a holder in due course".[732]

11.7 Obligations arising under negotiable instruments are "special" in that each transfer of the instrument gives rise to an autonomous contractual relationship. This is helpfully explained by Professors Geva and Peari:

> There is a distinction between the assignment of a simple debt and the negotiation of a negotiable instrument. Each indorsement is tantamount to the issue of a new bill which generates an autonomous relationship between each party liable and the holder at that time. At the same time, the assignment of a simple debt transfers to the assignee the original creditor's claim against the debtor. For his or her part, the debtor remains a primary party towards an assignee who steps into the shoes of the original creditor, rather than a secondary party in an independent relationship with a new holder of the negotiable instrument.[733]

11.8 As such, whilst as a matter of fact there is only one paper bill of exchange that passes from hand to hand and one ultimate obligation to pay, the issue of a negotiable instrument to the first holder and each subsequent transfer embodies a new contract. These negotiable instruments therefore embody a "congeries of contracts dependent on one original contract, which always has a certain effect on the others."[734]

11.9 From this, the editors of *Dicey* state that:

> Many difficulties in reference to the conflict of laws relating to bills and notes have arisen from the habit of regarding the instrument as a single contract, instead of regarding it as what it really is – a document embodying several distinct contracts.[735]

THE BILLS OF EXCHANGE ACT 1882

11.10 The 1882 Act defines a bill of exchange as:

> an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer.[736]

11.11 The 1882 Act also contains, in section 72, a multilateralist conflict of laws rule for certain contractual matters, which we consider in more detail below. It sets out various

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732 The term is defined as follows in the Bills of Exchange Act 1882, s 29: "a holder who has taken a bill, complete and regular on the face of it, under the following conditions; namely, (a) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact; (b) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it."

733 B Geva and S Peari, *International Negotiable Instruments* (2020) para 6.107.

734 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 33-355.

735 Above.

736 Bills of Exchange Act 1882, s 3.

connecting factors to determine the relevant applicable law in cases where a bill drawn by a trader in one country is negotiated, accepted, or payable in another.[737] Section 72 therefore sets out how the rights, duties and liabilities of the parties will be determined.

11.12 Although section 72 is drafted in respect of bills of exchange, it applies also to cheques and to promissory notes.[738] We concentrate our discussion in this chapter on bills of exchange as representative of the legal position, whilst recognising that these three instruments have slightly different commercial features.

11.13 Bills of exchange are particularly useful in international trade because they can be endorsed and transferred from holder to holder. When the last holder presents the bill to the acceptor for payment, the claim is usually straightforward and unconditional. A holder operating in good faith will usually take free from any previous defects in title.[739]

11.14 Alexander Hewitt[740] helpfully explained to us why bill and note discounting[741] generally is regarded as a simple, efficient and "document-light" form of cross-border trade finance. He wrote to us to explain:

> As a form of receivables financing, bill and note discounting tends to protect bill or note purchasers from many of the problems they face when purchasing ordinary trade receivables by assignment – for example, they are much less likely to find their claim under a bill or note has been wiped out by a set-off or other "dilution", or to find that their claim does not have first priority. And enforcement of a claim on a bill or note before the English courts tends to be much more rapid than enforcing a claim under an assigned trade receivable – this is partly because of the "cheque rule" that applies to bills or note in summary judgment claims before the English courts, and the protection section 29 of the Bills of Exchange Act 1882 gives to "holders in due course."

11.15 Although bills of exchange are still prevalent in certain industries such as oil sales, we are not aware of any market practices that are developing in response to bills of exchange in electronic form.

11.16 We nevertheless think there may be renewed interest in the 1882 Act as a result of the 2023 Act. Accordingly, we consider in this chapter the private international law implications that flow from the 2023 Act; section 72 of the 1882 Act; and the relationship between the 1882 Act and the 2023 Act as part of a wider discussion on

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737 Note on terminology: "The person who draws the bill and gives the order to pay in called the "drawer". The person upon whom the bill is drawn and who is therefore ordered to pay is called the "drawee". When the drawee signifies his assent to the order of the drawer in due form ("acceptance"), he is then called the "acceptor"": S J Gleeson (ed), *Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes* (18th ed 2017) para 2-004.

738 Bills of Exchange Act 1882, ss 73 and 89(1).

739 Above ss 29 and 30.

740 Alexander Hewitt is a Senior Practice Development Lawyer in Banking and Finance practice in Dentons.

741 "Discounting" is when the holder of a bill of exchange or a promissory note sells the instrument to a bank at a discounted rate before the debt it embodies is due, as a means of acquiring an advance in payment. As such, discounting can be a useful means of addressing cash flow issues. When the bill or note reaches maturity, the bank presents the instrument for payment in full.

the law applicable to contractual obligations arising under electronic bills of exchange, cheques and promissory notes, and other electronic trade documents.

THE ELECTRONIC TRADE DOCUMENTS ACT 2023 AND PRIVATE INTERNATIONAL LAW

11.17 The 2023 Act emphasises equivalence between paper trade documents and electronic trade documents. Sections 3(2) and (3) provide:

(1) an electronic trade document has the same effect as an equivalent paper trade document; and

(2) anything done in relation to an electronic trade document has the same effect (if any) in relation to the document as it would have in relation to an equivalent paper trade document.

11.18 During the course of our project on electronic trade documents, consultees raised issues relating to private international law, and we recognised that the conventional private international law rules might not work well in the digital context. However, we said that the question of what rules would be better could not be answered satisfactorily in the context of that project.[742] This was informed by the view that the issues of private international law arising from electronic trade documents are not unique to these instruments, but equally arise across a wide range of digital assets. These were identified as complex issues requiring dedicated consideration in their own right.

11.19 We said that, in the meantime, the courts would be able to deal with issues of private international law and electronic trade documents on a case-by-case basis, applying the existing rules.[743] We suggested that, for the time being, electronic trade documents would be governed by the rules that govern paper trade documents.[744]

11.20 UNCITRAL took a similar approach in relation to the Model Law on Electronic Transferable Records. Article 19(2) provides that, "nothing in this Law affects the application to electronic transferable records of rules of private international law governing a transferable document or instrument". The Explanatory Text explains that this reflects the understanding that the Model Law should not displace existing private international law applicable to transferable documents or instruments.[745] The Explanatory Text, however, goes further in continuing that:

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742 Electronic Trade Documents: Report and Bill (2022) Law Com No 405, para 8.107.

This view was also expressed by Professor Alex Mills in his oral evidence, delivered to the Electronic Trade Documents Bill House of Lords Special Public Bill Committee on 26 January 2023, available here: https://committees.parliament.uk/oralevidence/12591/html/.

743 Electronic Trade Documents: Report and Bill (2022) Law Com No 405, para 8.109.

744 Above paras 8.97 and 8.109.

745 UNCITRAL Model Law on Electronic Transferable Records (2017) para 180.

the introduction of a special set of private international law provisions for electronic transferable records would lead to a dual private international law regime, which is not desirable.[746]

11.21 As our project has developed, we have come to the preliminary view that the creation of equivalence between paper and electronic trade documents as a matter of substantive law does not necessarily mean there is, or need be, equivalence between them for the purposes of private international law.

11.22 As we noted in Chapter 3, private international law and substantive private law pursue different objectives and have different methodologies.[747] Private international law, when looking at the factual features of an object, is generally concerned only to find some feature that can be used as a connecting factor in a multilateral rule that identifies the applicable law. In this, private international law is primarily concerned with finding a connecting factor that points to a single location. Unlike the substantive law, private international law is not concerned with the implications of those factual features for substantive legal rights.

11.23 In substantive law, the factual differences between paper trade documents and electronic trade documents had, prior to the 2023 Act, meant that an electronic trade document could not be possessed. As a result, whereas a paper trade document could be made the object of a pledge, an electronic trade document could not. Equivalence under the 2023 Act has therefore had a significant effect on substantive legal rights in that an electronic trade document may now also be the object of a pledge.

11.24 By contrast, for private international law, the factual differences between a paper trade document and an electronic trade document mean that the range of connecting factors on offer are different. It is with this question of connecting factors that we are concerned in this project, rather than substantive legal questions such as whether an electronic trade document can be the subject of a pledge. As we noted in Chapter 3, private international law is traditionally "blind" to whether the application of a multilateral rule will lead to a particular substantive outcome.[748]

11.25 From this, we do not think that equivalence in the substantive law under the 2023 Act means we must ignore the factual features of an electronic trade document when finding the most appropriate connecting factor. To the contrary, an examination of how other rules of private international law are applied shows that even if paper trade documents and electronic trade documents were subjected to the same rules of private international law, these rules would not be applied in exactly the same way. This is due to the fact that paper trade documents and electronic trade documents offer private international law a different range of potential connecting factors.

11.26 A key example in this respect is the *lex situs* rule. As we saw in Chapter 6, this is a single rule of private international law that applies to a wide range of objects of

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746 UNCITRAL Model Law on Electronic Transferable Records (2017) para 187.

747 See para 3.7 onwards above.

748 See para 3.148 above.

property rights.[749] These objects differ considerably as a matter of factual and legal form. This has meant that the application of the *lex situs* rule involves recourse to a wide range of connecting factors, many of which do not really reflect the notion of "physical location." Although these are, in line with the *lex situs* rule, often described as an "artificial" *situs*, we also noted that recourse to fictions such as these have been criticised.[750] It has also been said that such applications of the *lex situs* rule might be better recognised for "what they really are", as applications of a different "rule" based on a different connecting factor. [751]

11.27 Drawing these strands together, we think that the position has been well-summarised by Professor Henry D Gabriel in relation to the UNCITRAL Model Law. Commenting that it was correct to assume private international law was outside the scope of the Model Law, and that electronic transferable records "should be understood to be governed by existing rules of private international law," Professor Gabriel continues:

> What is left open, though, is what existing rules of private international law should govern electronic transferable records. What might have been useful in the comments is not the answer, which is beyond the scope of the Model Law but, instead, some indication that parties should not assume that the conflicts rules that govern paper transferable instruments and documents will govern electronic transferable records.[752]

11.28 As this project has developed, we would tend to agree with the underlying thrust of this statement. We do not think it can be assumed that the conflicts rules that govern paper trade documents will or must necessarily govern electronic trade documents; not, at least, without considerable modification in light of their particular factual features. We are open, therefore, to the possibility that it might be preferable to develop a rule openly based on these features, rather than to extend the rules tailored to paper documents to such extent that those rules are arguably distorted.

11.29 Notable amongst the particular features of electronic trade documents is the requirement in section 2(2) of the 2023 Act that an electronic trade document must be held in a "reliable system" in order to qualify for equivalent substantive treatment to paper documents.

11.30 As seen in Chapter 10, such system providers often occupy a central position in the factual and commercial matrix in which modern bills of lading are used, imposing rules on their participants via a user agreement and specifying a governing law. As we said in earlier chapters, such central position is often sufficient in private international law to justify recourse to the central registry or platform provider as the connecting factor.

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749 See para 6.83 above.

750 P Rogerson, "The Situs of Debts in the Conflict of Laws: Illogical, Unnecessary, and Misleading" (1990) 49(3) *Cambridge Law Journal* 441-460.

751 A Held "Cryptoassets as Property under English Law Pt II: Ownership, Situs, and the Circular Question of Jurisdiction" (2023) 4 *Butterworths Journal of international Banking and Financial Law* 236. Amy Held was a member of the Advisory Panel until she joined the Law Commission specifically to work on this project as a law reform lawyer in November 2023.

752 H D Gabriel, "The UNCITRAL Model Law on Electronic Transferable Records" (2019) 24(2) *Uniform Law Review* 278 to 279.

We return to this again in Chapter 12 in the context of the law applicable to property issues.

11.31 As a result of all of these considerations, in the next section we consider whether section 72 of the 1882 Act can be extended to apply to electronic bills of exchange without undue difficulty or distortion. We also consider alternatives to section 72 that openly recognise the factual features of electronic bills of exchange and other electronic trade documents that fall within the scope of the 2023 Act.

SECTION 72 OF THE BILLS OF EXCHANGE ACT 1882: HOW FAR CAN IT BE EXTENDED TO APPLY TO ELECTRONIC DOCUMENTS?

11.32 Section 72 is a conflict of laws law rule designed for paper bills of exchange.[753] It applies where "a bill drawn in one country is negotiated, accepted, or payable in another" and provides four conflict of laws rules to identify the law governing the "rights, duties, and liabilities of the parties."[754] It provides rules for certain contractual issues that may arise under the various contracts embodied a bill of exchange: formal validity;[755] interpretation;[756] the duties of a holder in relation to presentment for acceptance or payment;[757] and the due date for payment.[758]

11.33 Notably, section 72 is in line with Article 1(2)(d) of the Rome I Regulation in that it does not does not deal with the proprietary, as distinguished from the contractual, aspects of bills of exchange.[759] As we explain further in Chapter 12, this means that the law applicable to, for example, the validity of a pledge over a bill of exchange falls to be determined, not by section 72, but the conflict of laws rules for property.

11.34 As the editors of *Dicey* make plain:

> The Act is thus by no means an exhaustive codification of the conflict of laws with regard to bills and notes. Its provisions relating to the conflict of laws do not settle all the questions of the choice of law in regard to a bill or note which might be raised in an English court.[760]

11.35 For contractual obligations arising under bills of exchange, section 72 uses four connecting factors:

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753 It also applies to cheques and promissory notes: Bills of Exchange Act 1882, s 73 on cheques, and s 89(1) on promissory notes.

754 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 33-358.

755 Bills of Exchange Act 1882, s 72(1).

756 Above s 72(2).

757 Above s 72(3).

758 Above s 72(5).

759 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) Rule 236(9), para 33-357. We discuss the applicable law rules for property in Ch 12.

760 Above para 33-357.

(1) The first limb of section 72(1) refers to the place where the bill of exchange was issued.

(2) The second limb of section 72(1) and section 72(2) both refer to the law of place where the contract was made.

(3) Section 72(3) refers to the law of the place where an act relating to presentment is done or the bill is dishonoured.

(4) Section 72(5) refers to the law of the place where the bill is payable.

11.36 As the place where a bill is payable, where an act relating to presentment is done, or where the bill is dishonoured do not seem to relate directly to the location of the bill of exchange itself, we are of the preliminary view that it will not make a difference whether the bill of exchange takes electronic or paper form. We have already discussed in Chapter 5 from paragraph 5.12 the questions surrounding where a contract and smart contract "is made". We therefore focus on the first limb of section 72(1) and "the place where the bill of exchange was issued."

Section 72(1) – formal validity and the law of the place where a bill is delivered

11.37 The first limb of section 72(1) of the 1882 Act provides that "the validity of a bill as regards requisites in form is determined by the law of the place of issue." It then provides two exceptions to the rule relating to: validity notwithstanding any failure to pay tax; and validity as between parties in the United Kingdom.[761]

11.38 Section 2 of the 1882 Act defines "issue" as "the first delivery of a bill or note, complete in form to a person who takes it as a holder". In turn "delivery" is defined as "transfer of possession, actual or constructive, from one person to another". Therefore, to determine the place of issue one needs to consider the place of delivery to the first holder.

11.39 These concepts, designed to apply to paper documents, are less easy to apply to the transfer of electronic documents. For electronic bills of exchange that qualify under the 2023 Act, but which have not previously been issued in paper form, the requirement of the reliable system adds a further dimension to the search for a connecting factor to determine where the electronic bill is used.[762] Furthermore, the reliable system holds a central role in the scheme of the 2023 Act. Under section 2(2)(e), one of the functions of the reliable system is to "secure that a transfer of the document has effect to deprive any person who was able to exercise control of the document immediately before the transfer of the ability to do so".

11.40 As Professor Andrew Dickinson has helpfully explained:

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761 Bills of Exchange Act 1882, ss 72(1)(a) and (b).

762 For the criteria that a document in electronic form must satisfy in order to qualify as an electronic trade document for the purposes of the 2023 Act, see s 2. Broadly, to qualify, an electronic document must contain the same information as would be required to be contained in its paper equivalent, and a reliable system must be used to achieve certain functionality in relation to the document: Explanatory Notes, paras 26 and 28.

> The principal challenge here is to specify a suitable method to locate the country where the 'transferor' (who may be the drawer or acceptor or indorser of a bill or maker or indorser of a note) yields up, and the transferee (who may be the first holder of a bill or note or the person in whose favour an acceptance or indorsement is made) assumes, control over the electronic trade document. Unlike the case of a paper trade document, there is no physical object by reference to which that location may be fixed. Instead, the relevant transactions take place within the system to which s 2(2) of the 2023 Act refers.[763]

11.41 Although Professor Dickinson considers that it is "highly unlikely" that the infrastructure supporting such a system will be within a single country, he concludes that the reliable system may be an appropriate connecting factor, at least for "transactions within a system that uses a central registry."[764]

11.42 Professor Dickinson is, however, of the view that the same method cannot be used for a system using DLT because "the ledger will be distributed across every node in the system and transactions will be verified by a consensus mechanism involving some or all of those nodes (whose location will likely not readily be identifiable)."[765]

11.43 In such cases, Professor Dickinson considers it may be necessary to resort to the location of one of the parties. In those circumstances, a choice then needs to be made between the transferor and transferee. Whilst recognising that there is "no self-evidently correct answer to this question", he suggests that the location of the transferor would be the more just and convenient solution. This is due to the fact that it is the transferor who assumes an obligation, and because the transferee's location may not be foreseeable or known to the transferor.[766] If this position is accepted, Professor Dickinson recommends for reasons of "proximity and certainty" that a location should be ascribed to the transferor for this purpose by reference to their residence or place of business, rather than their actual physical location, at the relevant time.[767]

11.44 Professor Dickinson further notes that the Law Commission's written response to the House of Lords Special Public Bill Committee favours the location of the transferee. In the context of delivery of a document for the purpose of a pledge, we said the following:

> In the electronic context and applying the existing law, we think that the applicable law to determine whether a valid pledge of the electronic bill of lading has been created in favour of Bank Z will also be determined with reference to the *lex situs* of the document at the time of delivery.

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763 A Dickinson, "Electronic Trade Documents and the Conflict of Laws in the United Kingdom" [2024] *Lloyd's Maritime and Commercial Law Quarterly* 65.

764 Above 65: "it does seem (relatively) straightforward to specify an appropriate method to fix the location of transactions within a system that uses a central registry, as being the country in which the central management and control of the registry function is located".

765 Above 65.

766 Above 66.

767 Above 66.

[…]

As stated above, the *situs* (or location) of a paper bill of lading that is pledged to a creditor will generally be where the creditor is located at the time of transfer - that is, where they take control and possession of the document. We see no reason why the position should be any different for an electronic trade document that is the subject of a pledge. Applying this to the facts, the applicable law in the electronic context would, similarly, be English and Welsh law, as Bank Z obtains control and possession of the bill of lading there.[768]

11.45 Professor Dickinson rejects this analysis on the basis that it rests "on an imperfect analogy with the case of delivery of a bill or note in paper form, where both parties (or their representatives) and the instrument are physically in the same location at the time of delivery."[769]

Evaluation

11.46 We would tend to agree with Professor Dickinson that the requirements of section 2(2) of the 2023 Act are relevant to determining where an electronic bill of exchange is delivered to a holder. Given the statutory requirements for the reliable system, the reliable system seems to be a strong candidate for the connecting factor used to localise the place where an electronic bill of exchange is "delivered to a first holder" for the purposes of section 72(1) of the Bills of Exchange Act 1882.

11.47 However, we are not yet in a position to know whether these reliable systems can be easily located in a single country, and whether the use of DLT necessarily precludes localisation by reference to the reliable system. We note that for bills of lading, whilst DLT systems are being used, they are not wholly decentralised.[770]

11.48 We therefore seek evidence on market practice, or in the absence of an established market practice, market sentiment as to what types of reliable systems are or may be used to support electronic bills of exchange, promissory notes, and cheques such that they meet the requirements of section 2 of the 2023 Act.

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768 Law Commission written response to the Electronic Trade Documents Bill [HL] Special Public Bill Committee (24 January 2023), paras 5 to 6. Available here: https://committees.parliament.uk/committee/636/electronic-trade-documents-bill-hl-special-public-bill-committee/.

769 A Dickinson, "Electronic Trade Documents and the Conflict of Laws in the United Kingdom" [2024] *Lloyd's Maritime and Commercial Law Quarterly* 66.

770 We are seeking views from stakeholders whether there is market appetite for developing / moving towards wholly decentralised systems for bills of lading, but our understanding at present is that even where systems do make use of DLT, there are still user agreements in place. See the discussion in Ch 10.

Question 17.

11.49 We seek views on the most appropriate connecting factor for determining where an electronic bill of exchange is "delivered to a first holder" for the purposes of section 72(1) of the Bills of Exchange Act 1882.

(1) As the connecting factor for determining where an electronic bill of exchange is "delivered to a first holder", what are the relative merits and demerits of recourse to: (i) the reliable system, and (ii) a relevant person?

(2) If the reliable system were used as the connecting factor, should it make a difference whether the reliable system is a central registry or a DLT system? Is it desirable for a single connecting factor to be used for all types of reliable systems?

(3) Can we assume that the "reliable systems" that are or will be used in the context of bills of exchange will largely be comparable to those used in the context of bills of lading?

(4) If a relevant person were used as the connecting factor, what are the relative merits and demerits of recourse to (i) the transferor; and (ii) the transferee?

(5) To what extent does the question of the formal validity of a paper bill of exchange arise in practice? How likely is it that the question of the formal validity of an electronic bill of exchange will arise in practice?

(6) Do electronic bills of exchange pose any other issues for section 72 of the Bills of Exchange Act 1882 that we have not considered here?

A NEW RULE FOR ELECTRONIC TRADE DOCUMENTS MORE BROADLY?

11.50 Given the significant difference between a delivery of a paper document from "hand to hand" and a "delivery" of an electronic bill of exchange that takes place within a reliable system, adapting the "place of issue" rule in section 72 of the Bills of Exchange Act 1882 to extend to electronic bills of exchange is not necessarily the only, or most appropriate, solution.

11.51 We are further mindful that the statutory requirements for a reliable system under the Electronic Trade Documents Act 2023 apply to a vast range of electronic trade documents, and not merely to those instruments that fall within the scope of the Bills of Exchange Act 1882. As such, even if section 72 of the 1882 Act could be extended to cover "delivery" within a reliable system, this will not obviate the need for us to consider a conflict of laws rule for electronic trade documents more generally.

11.52 It may be preferable to have a single rule for all electronic trade documents under the Electronic Trade Documents Act 2023, rather than to deal with electronic bills of exchange, cheques, and promissory notes separately through an extension of section 72 for those three instruments alone.

11.53 If a new rule is preferable, it will be necessary to determine its scope. Any such new rule would not necessarily need to be limited to contractual issues, as is section 72.

11.54 In this respect, it is particularly worth noting that the requirement of a “reliable system” may mean electronic trade documents under the 2023 Act could fall within the choice of law provision in the UNIDROIT Principles on Digital Assets and Private Law. UNIDROIT adopts a wide definition of digital assets: “‘Digital asset’ means an electronic record which is capable of being subject to control” (Principle 2(2)).

11.55 Principle 5(1) provides that proprietary issues in respect of a digital asset are governed by:

> (a) the domestic law of the State expressly specified in the digital asset, and those Principles (if any) expressly specified in the digital asset; or, failing that,
>
> (b) the domestic law of the State expressly specified in the system on which the digital asset is recorded, and those Principles (if any) expressly specified in the system on which the digital asset is recorded; or, failing that,
>
> (c) in relation to a digital asset of which there is an issuer, including digital assets of the same description of which there is an issuer, the domestic law of the State where the issuer has its statutory seat, provided that its statutory seat is readily ascertainable by the public.

11.56 Failing these, Principle 5(1)(d) provides for the law of forum and the Principles themselves.

11.57 The reference to the “system” in subsection 5(1)(b) is of particular interest as it could encompass the “reliable systems” that are required under the 2023 Act.

11.58 A new conflict of laws rule for electronic trade documents could, therefore, encompass both contractual obligations, as well as proprietary obligations arising within the reliable system using the approach set out by UNIDROIT.

Question 18.

11.59 We seek views on whether it would be desirable to have a single conflict of laws regime to cover all types of electronic trade documents that fall within the scope of the Electronic Trade Documents Act 2023.

(1) Would it be preferable for electronic bills of exchange, cheques, and promissory notes to continue to be governed by the Bills of Exchange Act 1882 through an extended application of section 72; or for them to fall within new rule for all electronic trade documents under the 2023 Act?

(2) If a single conflict of laws regime for all electronic trade documents under the 2023 Act is preferable, what should be its scope? Should it cover contractual obligations only, or both contractual and proprietary obligations arising within the reliable system?

(3) If a single conflict of laws regime for all electronic trade documents under the 2023 Act is preferable, what approach should we take to any new regime and what broader objectives of the conflict of laws should we keep in mind? Stakeholders may wish to refer back to Chapter 6 from paragraph 6.103.

Chapter 12: Applicable law – property

THE *LEX SITUS* RULE

12.1 As we saw in Chapters 7 to 11, property issues are outside the scope of the Rome I and II Regulations. In Chapter 10, we discussed the exclusions in the Rome I and II Regulations relating to "other negotiable instruments", focusing on the concept of "negotiability" which is understood to relate to proprietary matters. As we saw in Chapter 11, property matters are also excluded under the common law rules that apply to obligations arising under bills of exchange, cheques, and negotiable instruments. We will see that such exclusions reflect the distinct issues that property matters raise in private international law.

12.2 The general rule for the law applicable to property issues is simple to state. The rule, consistent across legal systems, is that issues relating to property rights, known also as rights *in rem,*[771] are determined according to the law of the place where the property object is situated (*lex situs*). This is expressed in the following Dicey Rules:

> Immovables (Rule 140)
>
> All rights over, or in relation to, an immovable … are [subject to some exceptions] governed by the law of the country where the immovable is situate (*lex situs*).[772]
>
> Tangible movables (Rule 141)
>
> The validity of a transfer of a tangible movable and its effect on the proprietary rights of the parties thereto and of those claiming under them in respect thereof are governed by the law of the country where the movable is at the time of the transfer … (*lex situs*).
>
> (1) A transfer of a tangible movable which is valid and effective by the law of the country where the movable is at the time of the transfer is valid and effective in England.
>
> (2) Subject to [some exceptions], a transfer of a tangible movable which is invalid or ineffective by the law of the country where the movable is at the time of the transfer is invalid or ineffective in England.[773]

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771 These terms again reflect the Continental origins of the conflict of laws as a distinct legal discipline. The term "rights *in rem*" derives from Roman property law, where it literally means "against a thing", as opposed to "rights *in personam"* ("against a person"). Rights *in rem* are enforceable against the whole world; rights *in personam* are enforceable only against a particular party. Although these terms are often used in English, they do not strictly align with common law concepts of property law, such as "real rights" and "personal rights." We discuss some of these differences in Ch 3.

772 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 24R-068.

773 Above para 25R-001.

12.3 In this project, we are not concerned with immovables which, for our purposes, can be thought of as generally concerning rights in land. Our focus is, therefore, primarily the rules for movables.

12.4 We said in Chapter 6 that *Dicey* also includes in the property section of that text a rule for debts and things in action as types of intangible movables:

> Debts and other intangible movables (Rule 143)
>
> (1) As a general rule:
>
> (a) the mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ("the debtor") are governed by the law which applies to the contract between the assignor and assignee; and
>
> (b) the law governing the right to which the assignment relates determines its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.
>
> (2) But in other cases, the validity and effect of an assignment of an intangible may be governed by the law with which the right assigned has its most significant connection.[774]

12.5 We also explained in Chapter 6 that the inclusion of a rule for the assignment of debts in the property section in *Dicey* mirrors the substantive English property taxonomy.[775] In the domestic context, debts and things in action are classified as a type of personal property.

12.6 We further saw in Chapter 6 that such classification according to national substantive approaches can be misleading in the context of private international law.[776] As we saw in the *Raiffeissen* case discussed above from paragraph 6.90, the "transfer" of things in action has been characterised by the courts of England and Wales as a contractual issue relating to the assignment of a claim within the scope of the Rome I Regulation.

12.7 These matters are complicated by the fact that the Commentary in *Dicey* expresses the view that Rule 143 appears to be a uniform rule for all "intangible things."[777] This is so, notwithstanding the conceptual difficulty of applying a rule with contractual origins to a wide category of rights, not all of which are contractual in origin. Nevertheless, the Commentary observes that many of these rights, such as intellectual property, are created and defined by a particular law in a manner "analogous [to] contractual rights."

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774 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 25R-057.

775 See from para 6.88 above.

776 See from para 6.90 above.

777 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 25-059.

Accordingly, the Commentary concludes that the category of "intangible things" remains coherent.[778]

12.8 These propositions have, however, been doubted in the academic literature. It has been questioned whether what is now Rule 143 can indeed be considered a uniform rule for all "intangible things."[779] It has been pointed out that there is a significant difference between the types of objects mentioned in the Commentary and crypto-tokens, insofar as crypto-tokens are not premised on any obligation or legal right such that they can be considered "analogous to contractual rights."[780]

12.9 First, many academic commentators have pointed out that crypto-tokens cannot be conceptualised as a debt or thing in action.[781] Professor Koji Takahashi has observed that crypto-assets can be handled "much in the same way as tangible assets as they may be held without the involvement of intermediaries and traded on a peer-to-peer basis."[782] According to Professor Takahashi, crypto-assets are not debts as they do not "come with a debtor" and therefore cannot be localised (that is, ascribed a fictional situs or location) in the same way as debts.[783]

12.10 The Law Commission also reached the same conclusion that crypto-tokens should not be regarded as mere things in action.[784] In our report on Digital Assets, we recognised that, at the substantive level, some digital assets are neither things in action nor things in possession. In particular, we noted, in line with the views of consultees, that intangible things such as crypto-tokens cannot be viewed as things in action in the traditional, narrow sense – they cannot be conceived of as rights or claims in themselves, and can be used and enjoyed independently of whether any rights or claims in relation to them are enforceable by action.[785] Nonetheless, they should be things to which personal property rights can relate, and we recommended that (in line with the position already being taken at common law) a third category of personal property should be recognised.[786]

12.11 Second, it has been said that a conceptualisation focusing on participation in the network might result in a "law creating the asset" comparable to those seen in the law

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778 Above para 25-058.

779 A Held, "Crypto Assets and Decentralised Ledgers: Does Situs Actually Matter?" in A Bonomi, M Lehmann and S Lalani (eds), *Blockchain and Private International Law* (2023) p 242. Amy Held was a member of the Advisory Panel until she joined the Law Commission specifically to work on this project as a law reform lawyer in November 2023.

780 Above.

781 See eg M Ng, "Choice of law for property issues regarding Bitcoin under English law" (2019) 15 *Journal of Private International Law* 326.

782 K Takahashi, "Law applicable to proprietary issues of crypto-assets" (2022) *Journal of Private International Law* 347.

783 Above, where the author explains that crypto-assets are not debts, they do not "come with a debtor" and therefore cannot be localised (ascribed a fictional situs or location) in the same way as debts. See also, Digital Assets: Final Report (2023) Law Com No 412, para 3.32.

784 Digital Assets: Final Report (2023) Law Com No 412, para 3.32

785 Above.

786 Above ch 3 (para 3.9 in particular).

of associations (such as the Companies Act 2006) or intellectual property (such as the Patents Act 1977). Such statutes do indeed create and define rights in a manner "analogous [to] contractual rights" such that they may still fall under what is now Dicey Rule 143.[787] However, it has been pointed out that there is yet no comparable "law creating the right" for digital assets.[788] Nor can there be any "law creating the asset" for crypto-tokens since they are not creatures of the law, but a product of information technology.[789]

12.12 These differences in the underlying object have implications in private international law. It has been argued that the core differences in the method of alienation render recourse to the conflict of laws rules for assignment problematic. Whereas things in action require special legal techniques such as assignment to facilitate transfers (if the rights are indeed alienable at all), crypto-tokens move from one node to another freely without any legal intervention as a simple matter of fact. As such, crypto-tokens have no need for special substantive "property law" rules that facilitate the assignment of things in action.[790] It has therefore been argued that the rules of private international law relating to the assignment of claims have no logical application.[791]

12.13 From this, it has been argued that:

> crypto assets are the prime example of a type of intangible asset to which [what is now Dicey Rule 143] cannot apply. The primary difficulty is, however, that there are presently no other rules for 'intangible property' that are not properly choses in action; as noted above, the academic authorities consider that that [what is now Rule 143] represents a 'uniform rule' governing the transfer of all intangible things. Accordingly, it is submitted that reform to both the English law of property and the rules of [private international law] applicable to intangible property is required to accommodate modern digital assets.[792]

12.14 These considerations are mirrored in the Continental debates on the classification of crypto-tokens under the substantive private law categories and for the purposes of private international law. There is a degree of consensus that crypto-tokens do not easily fall within the substantive private law provisions relating to claims because crypto-tokens do not involve any corresponding "relative" obligation that constitutes

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787 A Held, "Crypto Assets and Decentralised Ledgers: Does Situs Actually Matter?" in A Bonomi, M Lehmann and S Lalani (eds), *Blockchain and Private International Law* (2023) p 242.

788 Above.

789 K Takahashi, "Law applicable to proprietary issues of crypto-assets" (2022) *Journal of Private International Law* 347.

790 A Held, "Finality, Rights in Rem, and the Blockchain: Can Transactions in Cryptoassets be Set Aside?" in M Lehmann and C Koller (eds), *Digital Assets in Enforcement and Insolvency* (forthcoming).

A similar point about alienation was one of the means by which the Law Commission distinguished, in our Digital Assets Report, between things in action and third category objects, such as crypto-tokens. There, we identified third category objects as, among other things, being susceptible to involuntary alienation. This sets them apart from things in action, which cannot be alienated without the consent or participation of the holder (given that such alienation requires a legal process): Digital Assets: Final Report (2023) Law Com No 412, para 3.54.

791 Above, A Held p 242.

792 See generally, above.

the claim itself. In other words, there is no obligation that is to be enforced against some obliged person.[793] As a result, many have proceeded to identify the same problem of applying a conflict of laws rule designed for assigning contractual claims to transfers of crypto-tokens. They therefore conclude that Article 14 of the Rome I Regulation cannot apply to crypto-tokens and argue that a rule aligned with the traditional *lex situs* approach will be required.[794]

12.15 It has, however, been equally noted that, despite their similarity to tangible movable assets, the "direct application of the *lex situs* rule to crypto-assets is not possible because they have no physical situs."[795]

12.16 With these considerations in mind, the remainder of this chapter focusses on the *lex situs* rule.

GENERAL CONSIDERATIONS RELATING TO PROPERTY DISPUTES IN PRIVATE INTERNATIONAL LAW

12.17 Whilst the *lex situs* rule is relatively simple to state, its application in practice is significantly complicated by various other factors. We therefore consider some of the particular challenges that property issues pose for the conflict of laws.

Close relationship with contract

12.18 We saw in Chapter 9 that the close relationship between the law of property and the law of tort means that, often, incidental property issues arise where the main issue is one of tort. This adds a layer of complexity to the private international law analysis because these two issues will undergo independent treatment for the purpose of identifying the applicable law.

12.19 Property law also has a very close relationship with the law of contract. It is often the case, and invariably so in the commercial context, that property rights are transferred and acquired pursuant to a contractual agreement.

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793 See eg K Henkel, "Cryptovaluta in het conflictenrecht: een verkenning" (2022) 1 *The Netherlands Journal of Private International Law* (Netherlands); Oliver Voelkel, "Vertrauen in die Blockchain und das Sachenrecht" (2020) 218 *ZFR*, section 3 (Austria); M. Miernicki, Kryptowerte im Privatrecht – Zur Einordnung von Werteinheiten und Tokens im österreichischen Sachen-, Schuld- und Wertpapierrecht (2022) pp 123 (Austria); D Skauadszun, "Kryptowerte in Buergerlichen Recht" (2021) Archiv für die civilisticshce Praxis 221 (353 at pp 365-66 (Germany).

794 Above, K Henkel.

795 K Takahashi, "Law applicable to proprietary issues of crypto-assets" (2022) *Journal of Private International* Law 347.

Bob agrees to sell to Daniella a Ferrari that is and will remain in a showroom in Austria until the contract of sale is discharged by performance.

Daniella is a UK citizen who usually lives in Wales. At the time of contracting, Daniella is in Wales and Bob is still in Egypt.

The contract sets out matters such as: who is the buyer and who is the seller; the exact model of the Ferrari being sold; the price; the method and dates for payment of the purchase price; and the method, place, and date of delivery.

The contract includes a jurisdiction clause and governing law clause which provide that, in the event of a dispute, the courts of England and Wales will have exclusive jurisdiction to hear the claim, and the law of England and Wales applies to the dispute.

12.20 All of these issues are contractual in nature. The substantive contract law of England and Wales, like most other systems of substantive contract law, recognises the principle of freedom of contract. This means that, subject to some limitations such as public policy, most domestic systems of substantive contract law will recognise that Bob and Daniella can freely agree between themselves the content of these contractual obligations.

Daniella and Bob subsequently have a dispute as to whether Bob is entitled to repudiate the contract because Daniella has not paid the purchase price. The matter proceeds to court, and the issue of characterisation arises to determine the applicable law.

12.21 The question of whether Bob may repudiate the contract will be characterised as a contractual issue. As we saw in Chapter 7, the general rule for the law applicable to contractual obligations is that they are governed by the law chosen by the parties.[796]

12.22 Courts will therefore apply the law of England and Wales to determine whether Daniella is in default of her obligation to pay the purchase price and the consequences that follow.

12.23 It is critical to note that none of these issues touch upon the questions of whether (and if so, when) Daniella obtained title to the Ferrari and whether Bob is entitled to the money paid as the purchase price. These are not contractual issues; they are property issues.

12.24 Conflict of laws in property matters is often a very complex matter due to the differences between legal systems at the substantive level. The question of when title

[796] See para 7.30 above.

to the Ferrari passes to Daniella will be answered differently in different domestic settings:

> German property law: Daniella obtains title to the Ferrari upon delivery.[797]
>
> Austrian property law: Daniella can only obtain title to the Ferrari if there is a valid contract of sale. If the contract of sale between Daniella and Bob is valid, then Daniella obtains title to the Ferrari when it is subsequently delivered to her.[798]
>
> French property law: Daniella obtains title to the Ferrari when the contract for sale is concluded.[799]
>
> UK Sale of Goods Act 1979: Daniella and Bob may agree between themselves when Daniella obtains title to the Ferrari; otherwise, title passes when the contract is made.[800]

12.25 If Daniella and Bob have a dispute as to who has title to the Ferrari, this will be characterised as a property issue. As we saw, the multilateralist rule for property issues points to the law of the place where the object of property rights is situated.[801]

12.26 Since the Ferrari is in Austria at all material times, Austrian law applies to the question of whether title has passed to Daniella.

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797 German Civil Code (*Bürgerliches Gesetzbuch*) s 929.

798 Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) para 280 (validity of legal cause for transfer); para 426 (delivery); para 1053 (sales contracts).

799 French Civil Code (*Code Civil*) Articles 1138 and 711 (general terms); art 1583 (sales); art 938 (gifts); art 1703 (barter).

800 Sale of Goods Act 1979, ss 17 and 18.

801 See para 12.2 above.

Given that under Austrian property law, passing of title is conditional on the valid conclusion of a contract of sale, in any property dispute applying Austrian law, the question of whether title has passed will be the main question, and the question of whether there was a valid contract of sale will be the incidental question.

As with the tort example in Chapter 9, different laws will apply to the contractual and property issues arising from Daniella and Bob's dispute relating to the sale of the Ferrari.

Austrian law will apply to the main question of whether title has passed as the law of the place where the Ferrari is situated.

The law of England and Wales will apply to the incidental question of whether a valid contract of sale was concluded as the law chosen by the parties to govern their contract.

12.27 Property and contract also elide closely in the context of security interests. Security interests (granted under, for example, mortgages, pledges, and charges) are also property rights. Security interests are usually granted pursuant to a contract of loan. However, they also engage property issues, such as whether a security interest was validly created, and the order of priority between security interests over a single asset (in circumstances where the creditor seeks to enforce its security interest and makes a claim to the underlying object). Such questions are of prime importance in the context of insolvency.

Daniella is financing her purchase of the Ferrari using a loan extended by G Bank which is secured on the Ferrari. The contract of loan is governed by the law of England and Wales.

Contractual matters arising from the transaction will include: the principal amount of credit; the rate of repayment; and the interest rate.

Property matters arising from the transaction will include: whether G Bank has validly acquired a security interest over the Ferrari; and its priority relative to the claims of Daniella's other secured creditors. These matters are governed by Austrian law, in line with the *lex situs* rule.

If Daniella becomes insolvent before paying off the loan, G Bank will wish to exercise its rights as a secured creditor and assert a claim to the Ferrari.

The questions of whether the security interest was validly created and takes priority, such that G Bank's claim to the Ferrari will succeed, will be answered by reference to the law of the place where the Ferrari was situated at the time the security interest was purportedly granted.

12.28 Security interests granted in tangible objects, such as cars, often raise difficulties in private international law because: (i) such objects frequently move across territorial borders; and (ii) the differences between the national systems of substantive property laws may be considerable.[802] These difficulties are compounded in the digital sphere, particularly in relation to electronic trade documents.

12.29 As we will discuss below from paragraph 12.85, there is a widespread commercial practice of granting security interests, such as pledges and charges, in traditional paper trade documents. The analysis in private international law for any property disputes arising from the security interest is the same as it is in relation to the car. Property entitlements, such as validity of the security interest or priority of the secured creditor, are determined by the law of the place where the paper trade document was situated when the security interest was purportedly created. As we will see, however, these same commercial arrangements raise more complex questions where the trade document takes paper (rather than electronic) form.

Property law as mandatory law

12.30 We noted in Chapter 6 that private international law is increasingly recognising the principle of party autonomy. Whilst traditionally confined to the sphere of contract, its influence has slowly been extended across private international law more broadly. Accordingly, some commentators suggest that party autonomy is becoming "close to universal and incontestable" as a "unifying principle" of modern private international law,[803] even amounting to a "rule of customary law".[804]

12.31 We said, nevertheless, that property law is a notable exception to this broader trend. Although there have been some calls for party autonomy to play a greater role in matters of property,[805] the general consensus internationally is that property law remains a mandatory form of law from which parties cannot derogate by agreement.[806] In the domestic context, Professor Michael Briggs comments that

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802 In 2003, the EU Commission noted that "some security interests for movable goods are simply not known in other Member States and vanish if the secured goods are transferred across borders.": Communication from the Commission to the European Parliament and the Council, "A More Coherent European Contract Law: An Action Plan" [2003] Official Journal C 63 of 15.03.2003 para 45. See also Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 25-029.

803 S C Symeonides, *Codifying Choice of Law Around the World: An International Comparative Analysis* (2014) 346, cited in A Mills, *Party Autonomy in Private International Law* (2018).

804 A F Lowenfeld, "International Litigation and the Quest for Reasonableness" (1994) 245 *Recueil des Cours* 256 ("support of party autonomy is by now so widespread that it can fairly be called a rule of customary law"), cited in A Mills, *Party Autonomy in Private International Law* (2018). See also P Nygh, *Autonomy in International Contracts* (1999) p 45.

805 This argument has been put forth especially in relation to movable property, where the justification for upholding the *lex situs* rule is deemed to be less convincing. For an overview of some of these arguments, see A Flessner, "Choice of Law in International Property Law – New Encouragement from Europe" in R Westrik and J van der Weide (eds), *Party Autonomy in International Property Law* (2011) pp 11 to 19. For a response to some of these arguments in favour of party autonomy, see E-M Kienger, "Freedom of Choice of Law in the Law of Property?" (2018) 7(3) *European Property Law Journal* 221 to 245.

806 Above, A Flessner p 26. In the domestic context, see R Goode, "Security in Cross-Border Transactions" (1998) 33 *Texas International Law Journal* 49.

"English courts have not conceded to proprietary transactions, or the proprietary aspects of transactions, the same autonomy as they have in the case of contracts".[807]

12.32 There is a general consensus that the main reason for the continued resistance of property law to the principle of party autonomy stems from the very nature of property rights as valid and enforceable "*erga omnes*" (against everyone). In the property law of England and Wales, it is conventional to express this principle as property rights being binding against "strangers to their creation"[808] or "against all the word".

12.33 The fact that property rights may affect third parties to a transaction stands in stark contrast to contractual rights, which are only valid and enforceable against a particular person.[809] This is the contractual counterparty, who has voluntary assumed the corresponding obligation to the right. Accordingly, it has been said that parties to a transaction creating and transferring property rights should not be allowed "to shift aside the provisions of the *lex situs* and thereby impose at their will legal effects on third parties" who have not consented to the choice.[810]

12.34 It has been further said that the very notion of rights being valid against "all the world" in itself means that the private international law implications of the relationship between property law and traditional concepts of sovereignty "go well beyond the simple fact of situation within the territorial boundaries of one sovereign state or another."[811] The nature of property law has been described as "a system of rights granted to an individual by a sovereign authority that alone can guarantee its *erga omnes* effect by binding all persons personally within its sphere of sovereignty".[812] These inherent traits mean that parties to a property transaction cannot, by themselves, ensure the validity of their arrangements against third parties to their transactions. To bind such third parties, they have no choice but to invoke the authority of the sovereign.

12.35 As such, there is a general consensus that property law remains a mandatory form of law from which parties cannot derogate using the principle of party autonomy and the freedom of contract.

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807 M Bridge, L Gullifer, G McMeel and K Low (eds), *The Law of Personal Property* (3rd ed 2021) p 1243.

808 W Swadling, "Property" in A Burrows (ed), *Oxford Principles of English Law: Private Law* (3rd ed 2017) para 4.07.

809 The Contracts (Rights of Third Parties) Act 1999 provides that the benefit of a contract may, in some circumstances be transferred to a third party. In general, however, the burdens of performance cannot be transferred.

810 A Flessner, "Choice of Law in international Property Law – New Encouragement from Europe" in R Westrik and J van der Weide (eds), *Party Autonomy in International Property Law* (2011) p 26.

811 A Held, "The modern property situationship" (2024) *Journal of Private International Law* (forthcoming).

812 Above.

In Bob and Daniella's case, the Ferrari was located in Austria at all material times.

Austrian law will apply as mandatory law to property issues relating to the Ferrari.

Bob and Daniella cannot agree between themselves as a matter of contract that the law of England and Wales will apply to the question of when title passes to Daniella.

12.36 More broadly, applying the *lex situs* as a form of mandatory law is understood to be necessary to protect the interests of society, because "society at large has an interest in determining under what conditions property can be transferred; these rules should not be able to be circumvented".[813]

Characterisation: what is a property claim?

12.37 We said in Chapter 6 that characterisation is an important process in private international law generally.[814] We also explained above that characterisation is especially important in matters of property law because of the close proximity with other issues arising in tort law and contract law.[815] We further said in Chapter 6 that characterisation may be significantly affected by the more basic question of how an object is conceptualised for the purposes of the law.[816]

12.38 These issues are important to keep in mind, particularly when property issues are pleaded in the intermediated and permissioned contexts of DLT. These contexts will usually involve some contractual relationships or at least prior and voluntary dealings between the parties to litigation.[817]

12.39 In contrast to cases involving voluntary relationships and dealings between the parties to litigation, the quintessential example of a property dispute more broadly is one in which the claimant and defendant are strangers who have had no prior dealings with one another. Usually, the only reason that the defendant is being sued is because they happen to have in their current possession or control something that the claimant asserts belongs to them.[818]

12.40 This is well illustrated by *Piroozzadeh v Persons Unknown*.[819] As we saw in Chapter 5, in this case, the claimant alleged that they had been unlawfully deprived of crypto-tokens, which had been traced to an account held at the defendant exchange.[820] The claimant then brought proceedings against the exchange on the basis that it was a

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813 M Moshinsky, "The assignment of debts in the conflict of laws" (1992) 108 *Law Quarterly Review* 603.

814 See from para 6.16 above.

815 See from para 9.1 and para 12.18 above.

816 See from para 6.32 above.

817 See from para 3.103 above.

818 A Held, "The modern property situationship" (2024) *Journal of Private International Law* (forthcoming).

819 [2023] EWHC 1024 (Ch), [2023] 3 WLUK 723.

820 See from para 5.126 above.

constructive trustee of the crypto-tokens that rightfully belonged to the claimant. The claimant had no prior dealings with the exchange and was not an accountholder. The defendant was sued simply on the basis that the claimant had traced the misappropriated crypto-tokens to the exchange.

12.41 Property disputes are further distinct from disputes arising in contract and in tort because, although the parties to the dispute remain the claimant and defendant, the dispute typically involves at least two competing *claims*:

> At the very minimum, both the claimant and defendant will be asserting entitlements to the object. There is, furthermore, no reason why the claimant side need be limited to a single party: there may well be multiple claimants each asserting a different claim against the defendant, who has been sued simply because the object is currently within his possession or control.[821]

12.42 As we will see, the nature of a paradigm property dispute has some implications when recourse is made to personal or hybrid territorial-personal connecting factors.

The temporal factor

12.43 We saw in Chapter 5 that property issues are resolved by reference to the law of the place where property is situated *at a specific time*. There we said that, for jurisdiction, the relevant time is often the point in time when proceedings are issued.[822]

12.44 In matters of applicable law, the temporal considerations are engaged in a slightly different way. This was illustrated in the 1860 case, *Cammell v Sewell,*[823] which concerned lumber that was being transported by ship. The ship was insured, and under the policy, the underwriters had title to the lumber. When the ship was wrecked, the lumber was recovered off the coast of Norway and then sold at auction in Norway. The purchaser ultimately brought the lumber back to England, where the underwriters claimed title to it. The question was, therefore, whether the purchaser had acquired a good title to the lumber at the auction in Norway such that the underwriter's prior title was defeated.

12.45 The question of which law applied to determine whether the purchaser had acquired a valid title to the lumber was held to be the law of the place where the lumber was located *at the time when the purchaser acquired it*.[824] This was Norway. Under Norwegian law, the purchaser had validly acquired the goods. As a result, the courts of England and Wales held that the underwriter's claim failed.[825]

12.46 In 1980, this approach was applied in *Winkworth v Christie, Manson and Woods Ltd.*[826] Paintings were stolen from Mr Winkworth in England and taken out of England.

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821 A Held, "The modern property situationship" (2024) *Journal of Private International Law* (forthcoming).

822 See para 5.115 above.

823 (1860) 5 H & N 728.

824 *Cammell v Sewell* (1860) 5 H & N 728, 742, by Crompton J.

825 Above 742 to 743. Even this seminal case is somewhat unhelpful in terms of setting out a definitive approach to conflict of laws rules, as the court took a slightly circular approach: 743.

826 *Winkworth v Christie, Manson and Woods Ltd* [1980] Ch 496, 501 and 510, by Slade J.

Eventually, the paintings were sold in Italy. The purchaser who bought the paintings in Italy later decided to sell the paintings, which were then taken to England to be auctioned. Mr Winkworth brought proceedings against the auction house, claiming conversion.[827]

12.47 Mr Justice Slade held that the question of whether the purchaser had acquired a title to the paintings that would defeat Mr Winkworth's claim should be determined by the law of the place where the property was located at the time when the purchaser acquired it. This was Italy. Under Italian law, the purchaser had acquired good title to the paintings. As a result, the English court held that Mr Winkworth's prior title to the goods had been defeated.

12.48 The general rule regarding property matters stated above should, therefore, be read in a slightly qualified way. It is more accurate to say that the law applicable to property issues is the law of the place where the object of property rights was situated *at the time of the disputed acquisition*. In most cases, the disputed acquisition is the acquisition by which the object has come into the control or possession of the defendant.

WHEN IS THE *LEX SITUS* RULE ENGAGED?

12.49 Drawing together the issues discussed above, in this section, we consider two situations often thought to engage a property issue, but which may well, upon closer consideration, be characterised in alternative ways.

UNIDROIT's Principle 5 – contract or property?

12.50 We referred to the UNIDROIT Principles on Digital Assets and Private Law in Chapter 11. There, we said that the "reliable system" requirement in the Electronic Trade Documents Act 2023 may mean that such use cases could be resolved with reference to UNIDROIT Principle 5.

12.51 We consider Principle 5 again here because it is expressed to be a conflict of laws rule for property issues relating to digital assets. Here, we examine the extent to which property issues arising within these systems are of the same type and nature as those under consideration in this chapter.

12.52 UNIDROIT's approach to the law applicable to property issues relating to digital assets is to recognise at the outset that any conflict of laws rule in this context will be imperfect:

> Principle 5 recognises that the usual connecting factors for choice-of-law rules (eg the location of persons, offices, activity, or assets) usually have no useful role to play in the context of the law applicable to proprietary issues relating to digital assets.

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827 The tort of conversion occurs when one person unlawfully interferes with the personal property of another person. For a detailed discussion of conversion with reference to digital assets, see: H Liu, "Interference torts in the digital asset world" (Working Paper 2023) available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4433956.

Indeed, adoption of such factors would be incoherent and futile (except in the limited case where there is an identified issuer.[828]

12.53 Principle 5 therefore seeks to avoid these issues by "provid[ing] an incentive for those who create new digital assets[829] or govern existing systems for digital assets to specify the applicable law in or in association with the digital asset itself or the relevant system."[830] UNIDROIT further considers this to be justified on the grounds of party autonomy, because by "transferring, acquiring, or otherwise dealing with a digital asset" a person consents to the choice of law.[831] UNIDROIT emphasises that "such persons will know about the specification of the applicable law", since it will be in records readily available for their review.[832] Recourse to party autonomy is also "consistent with Article 3 of the Hague Conference Principles on Choice of Law in International Commercial Contracts.[833]

12.54 There are therefore two sub-principles based on party autonomy at the top of the Principle 5 "waterfall".[834] Principle 5(1)(a) provides that proprietary issues will be governed by the domestic law of the State (and Principles, if any) expressly specified in the digital asset.[835] Failing that, Principle 5(1)(b) provides that they will be governed by the domestic law of the State (and Principles, if any) expressly specified in the system on which the digital asset is recorded.[836]

12.55 We note that there has been further support for the proposition that participants in a system of digital assets should be encouraged to choose an applicable law to govern ownership, transfer and use of the assets. Professor Koji Takahashi, having analysed and rejected various alternatives, has supported the principle of party autonomy, albeit in a slightly qualified form.[837] The Financial Markets Law Committee has also supported party autonomy by an analogy to the Geneva Securities Convention, which recognises that parties to an intermediated securities account may choose the law.[838]

12.56 We are of the preliminary view that recourse to party autonomy may be justified in cases where a contractual characterisation is valid. We think this would be most

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828 UNIDROIT, "UNIDROIT Principles on Digital Assets and Private Law" (2023) para 5.4.

829 Above Principle 5(1)(a).

830 Above paras 5.4 and 5.5.

831 Above Principle 5(2)(c) p 38 and para 5.5.

832 Above para 5.5.

833 Above.

834 Above: "The choice-of-law rules in Principles 5(1)(a) and 5(1)(b) are based on party autonomy".

835 Above Principle 5(1)(a).

836 Above Principle 5(1)(b).

837 K Takahashi, "Law applicable to proprietary issues of crypto-assets" (2022) 18(3) *Journal of Private International Law* 339 to 362. The qualification or condition for the acceptance of party autonomy is that a uniform choice of law be made for the crypto-asset in question or for the blockchain network on which the crypto-asset is traded: 351. Professor Takahashi explains that by a uniform choice of law he means that "the choice is common to all the persons engaged in the trading of the crypto-asset in question through the use of the blockchain network": 351.

838 FMLC, "Distributed Ledger Technology and Governing Law: Issues of Legal Uncertainty" (March 2018) para 6.4.

justified where, for example, access to the digital asset is premised on some degree of permission or consent to a user agreement, or the asset is issued for value.

12.57 Although Professor Takahashi supports a qualified principle of party autonomy, he nevertheless notes the difficulties that arise with permissionless networks where there is no "gatekeeper" who can impose the choice of law on its participants. Whilst it might be possible for a developer to publicise a choice of law for a public blockchain, it would be difficult to secure the consent of all its users.

12.58 Professor Takahashi further refers to EOS, once dubbed a "governed blockchain", whose developers included a Constitution in its terms of use. This specified both a choice of law term and dispute resolution term. Notably, the Constitution further contained a provision stating that it was "a multi-party contract entered into by the Members by virtue of their use of this blockchain."[839]

12.59 Dr Adam Sanitt similarly explored the use of governed blockchains, which rely on a permissionless network to which a constitution is included in each update to the blockchain ledger through a hashed reference to the constitution.[840] The constitution (as a legally binding agreement) takes effect "as a series of private consensual arrangements involving different subsets of the community." [841] It could therefore also be an effective means of ensuring a uniform choice of law,[842] though we note this proposition has been questioned. Professor Koji Takahashi has doubted whether inserting the hash value of contractual terms in electronic signatures would be sufficient to render the terms binding on all users "since electronic signatures lack visibility to human eyes."[843]

12.60 The key point for present purposes is that, where the voluntary submission by users or holders to a choice of law is relied upon to justify a choice of law, recourse to a kind of multilateral contract encompassing, say, a system governor with all other participants, obviates the need to consider the *lex situs* rule if disputes as to entitlement subsequently arise *as between participants*. This is because the issue no longer falls to be characterised as one of property, but rather of contract. We think the approach here may be comparable to multilateral systems that facilitate the third-party trading of financial instruments, which we discuss from paragraph 8.54 above. The approach

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839 K Takahashi, "Law applicable to proprietary issues of crypto-assets" (2022) 18(3) *Journal of Private International Law* 353.

840 A Sanitt, "Legal analysis of the governed blockchain" (2018) available at https://www.nortonrosefulbright.com/en/knowledge/publications/0d56a3a5/legal-analysis-of-the-governed-blockchain. For an explanation of how hash technology works, see S Green "Cryptocurrencies: The Underlying Technology" in D Fox and S Green (eds), *Cryptocurrencies in Public and Private law* (2019) p 3.

841 Above.

842 Above.

843 K Takahashi, "Law applicable to proprietary issues of crypto-assets" (2022) 18(3) *Journal of Private International Law* 353.

taken in the rule for such multilateral systems in the Rome I Regulation could provide the basis for a new, similar rule which would apply in this context.[844]

12.61 Where there is less justification for such recourse to a contractual analysis, UNIDROIT suggests that a traditional connecting factor could be arrived at by focussing on the issuer of a digital asset. UNIDROIT Principle 5(1)(c) uses, as a connecting factor, the law of the country in which an issuer of a digital asset has its statutory seat. An issuer is defined as a legal person who has put the digital asset "in the stream of commerce for value" and has a continuing commercial interest in it. The issuer must identify itself as such, ensuring that both its name and statutory seat are readily ascertainable by the public.[845] UNIDROIT takes the view that by transferring, acquiring or dealing with a digital asset for which there is an issuer, a person consents to applying the law of the issuer's statutory seat.[846]

12.62 Irrespective of the question of consent, we are of the preliminary view that where a digital asset has an issuer, this will provide a strong point of centralisation owing to their prominent position in the overall factual and commercial matrix in which dealings in the digital asset occur. As we saw at paragraph 3.93 in relation to cloud storage service providers, for the purposes of private international law, such parties usually provide a compelling connecting factor.

12.63 We therefore consider that, whilst recourse to the principle of party autonomy will provide welcome certainty in particular cases, these limitations in scope will mean that other solutions will still be required where recourse to contractual principles is not available.

Intermediated holdings: a case of characterisation

12.64 It has been said to be that, alternatively, a more central role could be given to the exchange or custodian when identifying the law applicable to crypto-tokens.[847] On this basis, the proprietary effects of all transactions into an exchange, out of an exchange, or while crypto-tokens were held on an exchange would be subject to the law of the place most closely associated with the exchange.

12.65 This proposal raises several questions. In our view, it is necessary to distinguish (i) property disputes between participants in the exchange as between themselves; and

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844 Art 4(1)(h) provides that, in the absence of a choice: "a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Art 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.

Dr Burcu Yüksel Ripley endorses this conceptualisation for transfers of cryptocurrencies within a permissioned network, and concludes that they would, in the absence of a choice of law, fall within the scope of Art 4(1)(h): see n 329 above.

845 UNIDROIT, "UNIDROIT Principles on Digital Assets and Private Law" (2023) Principle 5(2)(f) p 40.

846 Above Principle 5(2)(c).

847 This is similar to the "PRIMA" principle applied in for intermediated securities, which states that certain issues governing intermediated securities should be governed by the "place of the relevant intermediated account". Its main attraction is the reduction in transaction costs. An exchange would not have to enquire where its customers are habitually resident. Instead, it could be assured that one system of law governed all its dealings. For further information, see P Paech, "Securities, Intermediation and the Blockchain: an inevitable choice between liquidity and legal certainty?" (2016) 21(4) *Uniform Law Review* 23.

(ii) property disputes between the exchange (or exchange participants) and persons who are not participants of the exchange.

12.66 In property disputes between participants of the exchange, it is important to determine what is the object of property rights in dispute. Our understanding is that, often, it will be the case that user entitlements to crypto-tokens are actually contractual claims against the exchange in relation to an unsegregated pooled public address in the control of the exchange.[848] As such, these disputes would not necessarily raise a property issue but rather engage the law of contract. Our preliminary view is, therefore, that many of these disputes will take place within the contractual framework of the exchange's user agreement.

12.67 Nevertheless, in this context of exchange transactions, where the contractual arrangements do not provide for the type of dispute that has arisen, focusing on the intermediary as a connecting factor should still be an appropriate solution given its central role in the transactions concluded on its exchange platform. The same analysis given above at paragraph 12.60 in relation to multilateral trading systems would apply.

12.68 In property disputes between the exchange and persons who are not exchange participants, these persons will not be bound by the exchange's user agreements. This was the situation that arose in *Piroozzadeh v Persons Unknown*, which we discussed above. In this case, the claimant alleged they had been unlawfully deprived of crypto-tokens, which it had traced to an account held at the defendant exchange. The claimant then alleged that the defendant was a constructive trustee of the crypto-tokens.

12.69 In these circumstances, the question of whether the exchange could raise the good faith purchaser for value without notice defence cannot be answered by reference to the exchange's user agreement, which seeks to regulate the rights and obligations of those who voluntarily sign up to the exchange's platform in relation to trading on that platform. As we saw, the claimant was never a customer of the exchange, but a person with whom the exchange had no prior dealings.

12.70 We said above that this is the paradigm property dispute, and it is this kind of property dispute with which we are primarily concerned in this chapter. Here, the conflict of laws rule for the law applicable to determining which of two or more competing claims to the same asset will prevail is one on which there is almost universal consensus: in nearly every system of conflict of laws, the law of the place where the object was situated (at the time of the disputed acquisition) applies to the substance of the dispute.

THE APPLICATION OF THE *LEX SITUS* RULE TO OMNITERRITORIAL ASSETS

12.71 Applying the *lex situs* rule to decentralised crypto-tokens is one of the most difficult problems raised by DLT. We said in Chapter 3 that the fact that crypto-tokens have no

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[848] See eg N Yeo, "Crypto Exchanges: The Basics" (2023) 7 *Journal of International Banking and Financial Law* 459; A Held, "Intermediated cryptos: what your exchange-hosted wallet *really* holds" (2020) 8 *Journal of International Banking and Financial Law* 541. We discuss intermediated holdings in Ch 3 from para 3.101 above.

discrete and singular physical location is not necessarily the problem. Rather, the problem is that crypto-tokens that accord with the original Bitcoin ideal of decentralisation are the paradigm example of what Professor Lehmann called "omniterritoriality:"[849] "the problem is not that the object technically exists "nowhere"; the problem is that the object exists "nowhere" *and* "everywhere" *at the same time*."[850] As such, the usual techniques employed by private international law to arrive at a connecting factor, such as recourse to a temporal factor or some person who holds a prominent position in the factual matrix, are no longer as effective.

Potential solutions to the *lex situs* rule

12.72 There have, nevertheless, been proposals as to what connecting factor could be used to identify the applicable law to property disputes in respect of crypto-tokens.

The relevant participant

12.73 As we saw in Chapter 5, Professor Dickinson characterises cryptocurrencies as a species of intangible property arising from the participation of an individual or entity in a cryptocurrency system. He therefore suggests that the law governing a particular "participation" in an "internal" dispute as between participants of the system should be that of the place of residence or business of the relevant participant with which that participation is most closely connected.[851]

The closest and most real connection – the law of Massachusetts

12.74 Michael Ng similarly adopts the underlying analysis based on voluntary relationships with other members of the network and recourse to contract. Given the absence of a choice of law, however, Michael Ng proposes that courts should look to the place that has the closest and most real connection to the DLT network. In the case of Bitcoin, he suggests that a detailed examination of the facts surrounding the network leads to the conclusion that the Bitcoin network is most closely connected to the State of Massachusetts.[852]

12.75 Michael Ng reaches this conclusion by relying on certain facts, including (i) the second lead developer of the Bitcoin network, Gavin Andresen, being resident in Massachusetts, (ii) funding for Andresen and his successor being obtained from MIT (the Massachusetts Institute of Technology), and (iii) the fact that the network participants are all connected through an MIT open-source licence which provides rights to use the software. Whilst the author accepts that these factors do not suggest that the Bitcoin network is "particularly closely connected" to Massachusetts in "absolute terms", they do suggest that Bitcoin, which is by design disconnected from

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849 M Lehmann, "Extraterritoriality in Financial Law" in A Parrish and C Ryngaert (eds), *Research Handbook on Extraterritoriality in International Law* (2023) 427.

850 A Held, "Crypto Assets and Decentralised Ledgers: Does Situs Actually Matter?" in A Bonomi, M Lehmann and S Lalani (eds), *Blockchain and Private International Law* (2023) 250.

851 A Dickinson, "Cryptocurrencies and the Conflict of Laws" in D Fox and S Green (eds) *Cryptocurrencies in Public and Private Law* (2019) para 5.109.

852 M Ng, Choice of Law for Property Issues Regarding Bitcoin under English Law (2019) *Journal of Private International Law* 15:2, 315-338 at 337-338.

any legal system, is "more closely connected" to Massachusetts than any other system.[853]

The original coder

12.76 The Financial Markets Law Committee has suggested that, by referring to the code underpinning the DLT protocol, the law applicable to a crypto-token could be the law of the place where the original coder has their primary residence.[854] Nevertheless, the Financial Markets Law Committee considered that it would be "difficult to explain why the original coder should impact the ongoing life of the distributed ledger where s/he is not also the system administrator."[855]

The owner

12.77 We saw in Chapter 5 that some of the cases before the courts of England and Wales have addressed the same problem in the context of jurisdiction. In *Ion Science v Persons Unknown*,[856] the court held that there was a serious issue to be tried that the location of cryptocurrency would be the "domicile" of its owner.[857] Mr Justice Butcher accepted the proposition that the *lex situs* of a crypto-token is linked to the domicile of the person or company who owns it.[858] The applicable law was therefore that of England and Wales.[859]

The transferor

12.78 The editors of *Dicey* also propose a connecting factor based on the "owner" but elaborate upon this proposal by suggesting that the "owner" should generally be understood to refer to the party in possession of the private encryption key giving access to the cryptocurrency at the time of the relevant transaction.[860] If an encryption key is known to multiple people, the "owner" should generally be understood as the party who *in fact* exercises control over the cryptocurrency, for example, through effecting a sale to a third party.[861]

12.79 The Commentary in *Dicey* states that the benefit of the proposal is that it is "reasonably objectively identifiable."[862] Although "direct control over a cryptocurrency

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853 Above.

854 FMLC, "Distributed Ledger Technology and Governing Law: Issues of Uncertainty" (March 2018), para 6.28.

855 Above.

856 (21 December 2020) EWHC (Comm) (unreported).

857 Above at [13] by Mr Justice Butcher.

858 Above at [13].

859 Above at [15] and [16].

860 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 23-050 (citations omitted). Where the transaction involves a cross-border change in the location of the owner, the question arises at what point in time the connecting factor should be triggered to determine the applicable law. For a view that favours the application of the rules for *conflict mobile* (Statutenwechsel) for tangible movables by analogy, see K Takahashi, "Law applicable to proprietary issues of crypto-assets" (2022) *Journal of Private International Law* 357.

861 Above.

862 The Commentary further expresses the view that given the uncertainties around identification of domicile in difficult cases, a habitual residence or place of business test would be preferable.

might be beyond any individual state," the owner's control over the property means that the state where the owner is located has the strongest indirect control over the property.[863]

Identifying the *situs* by reference to the underlying policy of the *lex situs* rule

12.80 In her academic capacity, Amy Held has suggested an alternative approach that eschews emphasis on the object or a relevant person, and instead focuses on the specific policy considerations underpinning the *lex situs* rule for property matters relating to movables. Noting the long-established problems of identifying the "owner" or "transferor" in the paradigm property dispute, she suggested looking instead to the reasons why the *lex situs* rule had come to prevail over other alternatives. Tracing the history of the development of the *lex situs* rule from the 19th century, she noted that the modern policy considerations in the common law authorities underpinning the *lex situs* rule for movables tend to relate to the security of transactions and the protection of vested rights.[864]

12.81 From this, she suggested that applying this policy consideration to the crypto context could lead to two possible answers to the applicable law question: (i) the law of the place where the defendant happened to be when they acquired the crypto-token in dispute; or (ii) the law that the defendant reasonably believed would apply to the acquisition under challenge.[865]

Abandoning the *lex situs* rule and multilateralist approach altogether

12.82 Amy Held nevertheless suggested that even if an appropriate connecting factor could be identified, its application would be ineffective in practice to secure the modern policies pursued by the *lex situs* rule owing to differences in national substantive property laws and the problems arising from *conflit mobile*. Furthermore, the *erga omnes* nature of property rights themselves, as premised on traditional concepts of sovereign authority, have significant implications for private international law. One of these is that "no national property law, howsoever chosen, can be the applicable law" for disputes relating to omniterritorial objects.

12.83 She therefore suggests that the only plausible solution is a supranational approach to resolving the conflicts that may exist between different systems of private law.[866] In the absence of any forthcoming international convention that addresses detailed issues of property law, she suggests national courts should, in the meantime, avoid automatic recourse to the *lex fori* and adopt an internationalist approach that reflects

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863 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 23-050.

864 A Held, "The modern property situationship" (2024) *Journal of Private International Law* (forthcoming). She refers to *Macmillan Inc v Bishopsgate Investment Trust Plc* (No 3) [1996] 1 WLR 387 and *Glencore International AG v Metro Trading International Inc* [2001] 1 All ER Comm) 103; the principle of adaption seen in the EU Matrimonial Property and Succession Regulations; and temporal qualification for the *lex situs* rule for movables.

865 A Held, "The modern property situationship" (2024) *Journal of Private International Law* (forthcoming).

866 Above.

the commercial practices that surround omniterritorial assets as a global phenomenon that transcends national borders.[867]

DO PLEDGES, CHARGES, AND OTHER SECURED TRANSACTIONS RAISE PARTICULAR CONSIDERATIONS?

Security interests in practice and the *lex situs* rule

12.84 Security interests play a significant role in modern commercial transactions and financing agreements. They may be granted over a wide range of underlying assets, ranging from rolling stock, to financial instruments, to trade documents.

12.85 There is a notable degree of substantive harmonisation in relation to the substantive requirements to create a valid security interest. This is so, particularly in respect of assets that are of significant value and/or are commonly used in commercial practice. In Chapter 2,[868] we referred to the Cape Town Convention on International Interests in Mobile Equipment, 2001. This Convention provides rules that allow parties to create and enforce security interests in aircraft objects, railway rolling stock and space assets. Another example of substantive harmonisation is the EU Financial Collateral Directive, which harmonises the rules relating the creation of a valid security interest in money, derivatives, and other financial instruments as between banks and other large financial institutions.

12.86 Broadly, the substantive requirements for the creation of a security interest are either delivery of possession, or registration. There seems to be is a trend away from techniques based on possession, towards registration models of security interests at the comparative substantive level.[869] The implication for private international law often is recourse to the register as the connecting factor.

12.87 As we will see, delivery of possession, however, still plays a significant role for security in respect of certain trade documents.

Pledge of bills of lading

12.88 A pledge is a security interest that is created by delivering possession of the underlying object over which the pledge is granted. Pledges can be taken in respect of bills of lading and other documents of title to goods, and of negotiable instruments.[870] As Richard Calnan explains, pledges of bills of lading are common. In particular, "the

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867 Above. The author suggests that courts should do this in a way that "recognises the differences between national systems of property law; does justice in the immediate case; gives effect to the parties legitimate expectations, especially those relating to market practice and conventions; takes into account the decisions of other national courts and international developments; and most, importantly, anticipates that such approach will eventually lead to global principles that may inform a future convention." See also A Held, "Crypto Assets and Decentralised Ledgers: Does Situs Actually Matter?" in A Bonomi, M Lehmann and S Lalani (eds), *Blockchain and Private International Law* (2023) p 257.

868 See para 2.11 above.

869 E M Kieninger, "Evaluation: A Common Core?" in Eva Maria Kieninger (ed), *Security interests in Movable Property in European Private Law* (2004).

870 But not of ordinary written contracts: L Gullifer and R Goode, *Legal Problems of Credit and Security* (7th ed 2022) para 1-45.

short-term nature of many of these financings means that the absence of a requirement to register is useful".[871]

12.89 Before the Electronic Trade Documents Act 2023, it was not possible to pledge electronic documents under UK law because they could not be possessed. Now, where the 2023 Act applies, pledges of certain electronic trade documents are recognised as valid security interests.

12.90 Pledges give rise to property rights. Therefore, to determine whether a pledge of an electronic trade document is valid, it is necessary to apply the *lex situs* rule, qualified by the time at which the bill of lading was first delivered to the pledgee. Thus, Dicey Rule 237(2) states:

> The rights of the holder of a negotiable instrument to which this Rule applies are determined both by the law governing the instrument and by the law of the place where the instrument was situated at the time it was delivered to him or her.[872]

12.91 Identifying, however, the place where an electronic trade document was delivered is less straightforward than the question in respect of a paper trade document because, as we discussed above, it is unclear where a digital asset exists at all. For truly decentralised assets, such as crypto-tokens in a permissionless network, the question has been considered to be one of the most theoretically challenging questions. We saw, however, in Chapter 3 that centralised or permissioned DLT networks may prove less problematic. We have also considered comparable issues[873] in the contractual context of "issuing" electronic trade documents to a first holder. This question arose both in the context of the "approved systems" seen in the shipping industry for bills of exchange, and in the context of "reliable systems" for the purposes of the Electronic Trade Documents Act 2023.

Charges over electronic trade documents

12.92 Charges are agreements between a creditor and corporate debtor that create a security interest in favour of the creditor.[874] Unlike a pledge, however, the creditor does not take possession of the asset. Instead, the asset remains with the debtor. There are two types of charges, fixed charges and floating charges. These provide for slightly different rights in respect of the assets charged and operate differently as a matter of law. Where security interests are granted over trade documents, it is much more common for creditors to take a pledge than to register a charge. Pledges can be taken quickly and informally, while charges require formality, registration and expense. Trade documents are usually used in the course of trade, often to buy and sell goods over a few weeks or months.

12.93 However, charges are sometimes taken over trade documents. In our consultation paper on Electronic Trade Documents, we asked consultees "what security interests

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871 R Calnan, *Taking Security* (4th ed 2018) para 2.89.

872 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 33R-396.

873 See Ch 10 and 11.

874 L Gullifer and R Goode, *Goode and Gullifer on Legal Problems of Credit and Security* (7th ed 2022) para 1-53.

are typically taken over trade documents at the moment?"[875] Several consultees said that both fixed and floating charges can be taken over trade documents.[876] We therefore consider both.

Fixed charges

12.94 We have said that a charge differs from a pledge in that the asset remains with the debtor. Under a fixed charge, the debtor cannot dispose of the asset free from the charge without the lender's consent, except by paying the debt.[877] The debtor company does not have the right to deal with the asset in the ordinary course of business.[878]

12.95 The enforceability of a fixed charge is different as between the creditor and debtor; and the creditor and third parties. As between creditor and debtor, a charge can be enforced against the debtor when the following requirements have been met: (1) there is agreement for security conforming to any statutory formalities; (2) the asset is identifiable; (3) the debtor has an interest in the asset (or a power to give it in security); (4) the debtor has an obligation to the chargee (or maybe to another person) which the charge is designed to secure; and (5) any contractual conditions for attachment are fulfilled.[879]

12.96 As against third parties to the security agreement, the charge can only be enforced if it is "perfected" by registration.[880] Section 859H of the Companies Act 2006 states that a charge which has not been registered with Companies House within the relevant period is void against a liquidator, administrator, or creditor of a company.

12.97 As with all security interests, there are two aspects of a fixed charge: the relationship between the creditor and debtor, which is governed by the law of the contract; and the rights of the charge holder against third parties (such as other creditors), which is a property matter governed by the *lex situs*.[881]

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875 Digital Assets: Electronic Trade Documents, A Consultation Paper (2021) Consultation Paper 254, Question 32.

876 This included the Institute of International Shipping and Trade Law (IISTL), Sullivan & Worcester LLP, Norton Rose Fulbright, Robert Parson, and LMAA.

877 E McKendrick, *Goode and McKendrick on Commercial Law* (6th ed 2020) para 22.25.

878 L Gullifer and R Goode, *Goode and Gullifer on Legal Problems of Credit and* Security (7th ed 2022) para 4-11.

879 Above para 2-03.

880 Companies Act 2006, s 859A. There are exclusions from the requirement under the Financial Collateral Arrangements (No.2) Regulations 2003.

881 Wood explains that "traditionally, the law of the location of the collateral is fundamental in determining the proprietary aspects of a security": P R Wood, *Conflict of Laws and International Finance* (2nd ed 2019) para 31-001. Similarly, Firth explains that assessing whether any proprietary interest has been transferred in collateral, and if so the nature of that interest, "is a matter for the lex situs of the relevant assets": S First, Firth on Derivatives Law and Practice (2022) para 6.054, and for charges see para 6.074. See also *Blue Sky One Ltd v Mahan Air* [2010] EWHC 631 (Comm).

Floating charges

12.98 A floating charge is like a fixed charge in that it allows a corporate debtor to use assets in its possession to provide security to a creditor. As with a fixed charge, it is created by an agreement between the parties, and is then "perfected" against third parties by registration. Unlike a fixed charge, however, a floating charge does not prevent the debtor from disposing of the assets. It is therefore a particularly useful way for a business to use its inventory as security.

12.99 The floating charge is said to hover (or float) over a designated class of assets in which the debtor has or will in the future acquire an interest.[882] The debtor can deal with the assets in the ordinary course of business, up to the point where the charge "crystallises". The charge "crystallises" on default or insolvency: it then attaches as a fixed security to all the assets comprised in the fund and to any assets of the specified description subsequently acquired by the debtor.[883] In insolvency proceedings governed by the law of England and Wales, a floating charge holder will generally rank below a fixed charge holder, but above unsecured creditors.

12.100 A floating charge can be taken over any property or class of property, tangible or intangible, present or future - including negotiable instruments and documents of title.[884] As floating charges tend to be taken over a widely defined class of present and future assets, trade documents are likely to be caught within their net.

12.101 Floating charges are equitable interests, which has a significant effect on their treatment in private international law. Prior to crystallisation, they operate personally against the chargor and, as such, they will not be subject to the *lex situs* rule.[885] Once the charge has crystallised and becomes a fixed charge over specific assets, the effect of the charge and its priority will be determined by the *lex situs*.

The ELI Principles

12.102 We saw above that there are many difficulties in applying the *lex situs* rule to digital assets.[886] In recognition of these difficulties, the European Law Institute ("ELI") issued the ELI Principles on the Use of Digital Assets as Security in 2022. These principles are intended to address the "use, by private parties, whether natural or legal persons, of digital assets as security for credit." These Principles provide a new framework to

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882 E McKendrick, *Goode and McKendrick on Commercial Law* (6th ed 2020) para 22.25.

883 Above.

884 L Gullifer and R Goode, *Goode and Gullifer on Legal Problems of Credit and Security* (7th ed 2022) para 1-57. See also the discussion of digital assets at para 1-58 onwards.

885 M Bridge, L Gullifer, G McMeel and KFK Low, *The Law of Personal Property* (3rd ed 2021) para 38-011, citing *Re Anchor Line (Henderson Brothers) Ltd* [1937] Ch 483. See also G Lightman, G Moss, IF Fletcher, R Snowden and H Anderson, *Lightman & Moss on The Law of Administrators and Receivers of Companies* (6th ed 2017) para 30-005. This has been described as an "exception" to the *lex situs* rule: R Goode and K van Zwieten, *Goode on Principles of Corporate Insolvency Law* (5th ed 2018) para 3-02, n 1 (an exception with "unusual effect"); and, M Bridge, L Gullifer, G McMeel and KFK Low, *The Law of Personal Property* (3rd ed 2021) para 38-011 (an exception which "significantly impairs the grip of the *lex situs*"). See also G Moss and F Toube, "Cross-border enforcement of security: Part 1" (1997) 16(1) *International Banking and Financial Law* 1 to 4; G Lightman, G Moss, IF Fletcher, R Snowden and H Anderson, *Lightman & Moss on The Law of Administrators and Receivers of Companies* (6th ed 2017) para 30-005.

886 We discuss the problems more generally from para 12.71; and in relation to pledges from para 12.89.

determine how the applicable law question will be answered, even in relation to proprietary issues.[887]

12.103 As we saw above, the contractual aspects of a secured transaction will be covered by the Rome I Regulation as a contractual matter. The property aspects of a secured transaction will be a property matter that falls within the scope of the *lex situs* rule.

12.104 Instead of adapting or developing the *lex situs* rule to somehow localise a digital asset in a particular jurisdiction, the ELI Principles propose an alternative solution.

12.105 Principle 3(2) states that the "applicable law" for the creation of a security interest is the law of the jurisdiction in which the security provider has its place of business; or, where it has a place of business in more than one jurisdiction, its central administration; or, absent a place of business, the law of the jurisdiction in which the security provider has its habitual residence.

12.106 By derogation from Principle 3(2), where the digital asset is clearly connected with one particular jurisdiction, the law of that jurisdiction is deemed to be the applicable law.[888]

12.107 According to the ELI, this approach recognises the inherent difficulties associated with the notional localisation of digital assets, which may depend on a number of factors such as whether the asset is held through an online wallet or directly on a distributed ledger. Insofar as various holding options could affect how a digital asset is localised, ELI is of the opinion that it is not advisable to "build conflict rules around the idea of the 'location' of the digital asset itself."[889]

EVALUATION OF THE PROPOSALS SURROUNDING THE *LEX SITUS* RULE

12.108 This survey of potential solutions to the problems surrounding the *lex situs* rule illustrates the extent to which the application of what seems like a very simple rule is significantly complicated by various other factors. It is, perhaps, for this reason that Professor Janeen Carruthers has previously argued that a conflict of laws rule for transfers of property should utilise sub-divisions:

> specifically to take account of the special characteristics which distinguish static conflicts from dynamic conflicts, original-parties disputes from remote-parties disputes, and cases of voluntary dispossession from those of involuntary dispossession.[890]

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887 The ELI Principles are available here: https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_on_the_Use_of_Digital_Assets_as_Security.pdf.

888 European Law Institute, "ELI Principles on the Use of Digital Assets as Security" (2022) Principle 3(3).

889 Above p 26.

890 J Carruthers, *The Transfer of Property in the Conflict of Laws: Choice of Law Rules Concerning Inter Vivos Transfers of Property* (2005) para 9.47. Professor Carruthers uses the term "static conflicts" to refer to disputes over tangible movable property in which there does not exist a "temporal conflict of laws". A temporal conflict arises when there is a change in: the conflict rule of the forum; the domestic rule of the

12.109 For tangible movable property in particular, Professor Carruthers has suggested that a conflict of laws division should deal separately with: (i) cases that concern only the parties to a particular transfer of property, as opposed to cases that concern one of those original parties and a third party to the transfer (which she refers to as "original-parties disputes" and "remote-parties disputes" respectively); and (ii) cases where an owner is voluntarily dispossessed as opposed to cases were they have been involuntarily dispossessed.

12.110 We think these distinctions are useful to keep in mind as we evaluate these proposals.

12.111 We explained above at paragraph 12.70 that we are primarily concerned with the "paradigm" property dispute described at 12.39, that is, one where the claimant and defendant are strangers and the sole reason why the defendant is being sued is because they happen to have something within their possession or control that the claimant asserts belongs to them. This is what Professor Carruthers calls "remote-parties disputes," that is, those disputes which arise between parties who are not (or have not been) parties to a transfer of property rights, whether by contract or some other voluntary agreement.

12.112 Our decision to focus on this type of dispute arises from the preliminary view that, in the vast majority of disputes in which the property issue arises in the context of a prior voluntary dealing, or what Professor Carruthers calls "original-parties disputes," it may not be necessary for courts to resort to a property characterisation. We ask to what extent the problem will be likely to arise in practice.

12.113 In this respect, we observe that there seems to be some consensus surrounding a connecting factor referring to the "owner" or "transferor". Whilst there has been some scepticism as to its utility, such scepticism has been expressed specifically in relation to cases where parties have had no prior dealings with one another.[891] In cases where the parties have dealt with one another and there is what Professor Carruthers calls a "voluntary disposition", we consider that the identities of the "owner" and "transferor" are typically not in dispute between the parties.

12.114 For the grant of security interests in particular, we note that the grantor often is obliged under contract to warrant their entitlement to create the interest.[892]

12.115 We are therefore interested to hear from stakeholders on the circumstances in which recourse to the "owner" or "transferor" could be satisfactorily used for property disputes involving digital assets and ETDs

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applicable law; or the connecting factor. When there is a change in the connecting factor, the temporal problem that arises because of the conflict between the two or more potentially applicable laws pointed to by the alternate connecting factors is known as "*le conflit mobile*": para 1.25. "Original-parties disputes" occur between the actual parties to the transfer of the object in question, whereas "remote-parties disputes" occur between one of those original parties and a third-party claiming otherwise to have acquired or derived title to the property in question: para 3.61 to 3.77 and 9.49.

891 A Held, "Does Situs Actually Matter when Ownership to Bitcoin is In Dispute?" (2021) 4 *Butterworths Journal of International Banking and Financial Law* 269; A Held, "The modern property situationship" (2024) *Journal of Private International Law* (forthcoming).

892 See eg the position for charges from para 12.93.

12.116 Here, we note that the cases that have come before the courts so far are primarily cases where the parties to the dispute are strangers and, in Professor Carruthers' terminology, the dispossession is involuntary. We saw in Chapters 4 and 5 that, in the typical case, the claimant alleges an unlawful misappropriation of their crypto-tokens through some fraud or online scam. They then trace the crypto-token to a crypto exchange and ultimately seek restitution of the crypto-tokens. Whilst these cases have passed predominantly through the tort gateways, some have used the constructive trustee gateway. We questioned in Chapter 5 whether such claims were more appropriately claims in property, not tort.

12.117 We are, therefore, of the preliminary view that we cannot dismiss entirely the future practical relevance of what is a highly theoretical question: what is the location of a crypto-token for the purposes of identifying the *lex situs*?

Question 19.

12.118 We seek views on the law applicable to property disputes in relation to digital assets and ETDs. Where possible, we ask that stakeholders contextualise their responses, for example, give details as to whether it relates to a pledge over an ETD or property entitlements in crypto-token litigation.

(1) To what extent would recourse to contractual principles obviate the need for us to consider the *lex situs* rule?

(2) Do permissioned networks and/or cases where there is clearly a contractual or hierarchical relationship between the parties represent the vast majority of DLT applications for digital assets and ETDs?

(3) Should we need to consider a new conflict of laws regime for property rights in digital assets and ETDs, what approach should we take to any new regime and what broader objectives of the conflict of laws should we keep in mind? Stakeholders may wish to refer back to Chapter 6 from paragraph 6.103.

(4) To what extent would recourse to a distinct rule based on the connecting factor of the "owner" or "transferor" for cases where parties have voluntarily dealt with one another obviate the need for us to consider further the application of the *lex situs* rule to cases where the parties to the dispute are strangers?

(5) In what circumstances could a rule based on the "owner" or "transferor" be satisfactorily used? Do creditors taking security over ETDs typically require, as a matter of contract, that the debtor warrants their title to grant the security interest?

(6) To what extent is it likely that the courts will be asked to determine disputes relating to wholly decentralised digital assets held in permissionless DLT networks where the parties have not dealt with one another and there has been an "involuntary dispossession"?

(7) How should courts approach the question of applicable law in such disputes relating to decentralised digital assets held in permissionless DLT networks where the parties have not dealt with one another and there has been an "involuntary dispossession"?

Chapter 13: Questions

Question 1.

13.1 In this question, we seek views and evidence on jurisdiction over consumer contracts.

(1) To what extent can the issue of jurisdiction over consumer contracts in the digital and decentralised contexts be accommodated by section 15B of the Civil Jurisdiction and Judgments Act 1982?

(2) Does the fact that the business is a crypto-business, as opposed to any other business, change the analysis of whether a business has directed its services to consumers located in the UK?

(3) Are there any changes or clarifications that are needed in respect of the issue of jurisdiction over consumer contracts?

(4) To what extent does this issue cause problems in practice (or is likely to in future)?

Paragraph 5.11

Question 2.

13.2 In this question, we seek views and evidence on jurisdiction founded on the basis that a contract was concluded in England and Wales.

(1) How should the courts apply gateway 6(a) to a smart contract? Should the relevant connecting factor be the participating computer, or the real-world actor?

(2) If gateway 6(a) should use a connecting factor based on the real-world actor, how should their location be determined? Should it be by their habitual residence, their domicile, or at the place where they happen to be at the time the contract was formed?

(3) Has the question of where a smart contract is made arisen in legal and commercial practice? If so, please provide details.

(4) To what extent is it likely that the question of where a smart contract is made will become prevalent in practice?

Paragraph 5.20

Question 3.

13.3 In this question, we seek views and evidence on jurisdiction founded on the basis that damage or detriment was suffered in England and Wales.

(1) Do you consider the approach of the courts of England and Wales so far in the crypto litigation when localising damage or detriment for the purposes of jurisdiction to be theoretically sound?

(2) To what extent can it be said that the tortious damage pleaded in the crypto-token litigation are not cases of pure economic loss? How else could tortious damage in the crypto-token context be conceptualised?

(3) If the crypto-token cases are cases of pure economic loss, to what extent would it be desirable that a consistent approach is taken in England and Wales to localising pure economic loss as between jurisdiction and applicable law?

Paragraph 5.56

Question 4.

13.4 In this question, we seek views and evidence on jurisdiction founded on the basis that an unlawful act was committed in England and Wales.

(1) To what extent is the approach of the courts of England and Wales so far in the crypto litigation when localising where an unlawful act was committed for the purposes of jurisdiction theoretically sound?

(2) To what extent does the question of where an unlawful act is committed or event occurs for the purpose of jurisdiction arise in practice?

Paragraph 5.76

Question 5.

13.5 In this question, we seek views and evidence on jurisdiction founded on the basis that the claim relates to objects within England and Wales.

(1) To what extent is the approach so far of the courts of England and Wales in localising a crypto-token for the purposes of jurisdiction theoretically sound? What would be the relative merits and demerits of any alternatives?

(2) What point in time is relevant for gateways 11 and 15(b)? Do these gateways require that a crypto-token is within England and Wales: at the time of proceedings, at the time of misappropriation, or some other time?

(3) To what extent does the question of where a crypto-token is located for the purpose of jurisdiction raise issues in practice?

Paragraph 5.116

Question 6.

13.6 In this question, we seek views and evidence on the types of claims and causes of action relied upon in applications to serve proceedings relating to crypto-tokens out of the jurisdiction.

(1) To what extent can it be said that there is a serious issue to be tried where claimants allege that exchanges are constructive trustees in the circumstances pleaded in *Piroozzadeh v Persons Unknown* and comparable cases?

(2) Is there any further practical evidence we could consider in relation to the ways in which exchanges defend or intend to defend applications and/or claims alleging they are constructive trustees at the return date of these applications?

(3) Are there similar problems with causes of action under any of the other gateways?

(4) Are these cases indicative of a need to consider more carefully the "serious issue to be tried" limb of the three-stage test for service out of the jurisdiction?

Paragraph 5.133

Question 7.

13.7 In this question, we seek views on applicable law and decentralised finance (DeFi).

(1) Do you agree that contractual disputes in the context of DeFi are not likely to come before the courts?

(2) Do you agree that, as a result, these disputes will not be resolved with reference to private international law and the question of applicable law?

(3) Would the law applicable to these kinds of disputes benefit from further clarification?

Paragraph 7.28

Question 8.

13.8 This question concerns the applicable law for non-consumer contracts.

(1) Can the provisions of the Rome I Regulation for identifying the applicable law for non-consumer contracts be applied to contracts involving crypto-tokens without undue difficulty?

(2) If the provisions cannot be applied, or can only be applied with significant difficulty, what are the possible solutions?

(3) If the provisions can be applied easily or without undue difficulty, are there any areas that would benefit from further clarification?

(4) To what extent is the application of these provisions problematic in practice?

(5) If the issue is prevalent in practice, what would be the consequences if it were not resolved adequately as a matter of law?

Paragraph 7.84

Question 9.

13.9 This question concerns the applicable law for consumer contracts.

(1) Can the provisions of the Rome I Regulation for identifying the applicable law for consumer contracts be applied to contracts involving crypto-tokens without undue difficulty?

(2) If the provisions cannot be applied, or can only be applied with significant difficulty, what are the possible solutions?

(3) If the provisions can be applied easily or without undue difficulty, are there any areas that would benefit from further clarification?

(4) To what extent is the application of these provisions problematic in practice?

(5) If the issue is prevalent in practice, what would be the consequences if it were not resolved adequately as a matter of law?

(6) We seek views on whether the provisions of the Rome I Regulation for identifying the applicable law for consumer contracts can be applied to contracts involving crypto-tokens without undue difficulty.

Paragraph 8.92

Question 10.

13.10 This question concerns the exclusions in Articles 6(4)(d) and (e) of the Rome I Regulation.

(1) Do the exclusions of financial instruments and transferable securities, as set out in Articles 6(4)(d) and (e) of the Rome I Regulation, apply to crypto-tokens?

(2) What would be the positives and negatives of interpreting these provisions in an international way, bearing in mind guidance from the European Securities and Markets Authority?

(3) Should the courts simply apply the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 in line with Financial Conduct Authority guidance?

(4) To what extent do these exclusions cause problems in practice (now or in the future)?

(5) If these exclusions are problematic in practice, what would be the consequences if they were not addressed as a matter of law?

(6) What kind of reform is needed?

Paragraph 8.93

Question 11.

13.11 We seek views and evidence on localising damage arising in tortious claims relating to crypto-tokens for the purposes of applicable law.

(1) To what extent is it likely that claims in tort, such as those pleaded in the crypto-token litigation for the purposes of service out of the jurisdiction, will proceed to trial before the courts of England and Wales? Is it likely that the question of applicable law will be in dispute between the parties?

(2) If it becomes necessary for the courts of England and Wales to determine the question of applicable law, how could the courts approach the question of localising tortious damage in the broader digital asset and electronic trade documents context? Please indicate whether your response should be considered in the context of the CJEU jurisprudence or in the context of a potential common law approach.

Paragraph 9.38

Question 12.

13.12 We seek views and evidence on recourse to the "escape clause" in Article 4(3) of the Rome II Regulation.

(1) In what circumstances in the digital assets and electronic trade documents contexts would it be appropriate for the courts of England and Wales to have recourse to the escape clause on the basis of a pre-existing contractual relationship?

(2) To what extent would the parties in a tort claim involving digital assets and electronic trade documents have a pre-existing contractual relationship? Would these represent the vast majority of cases?

(3) If the parties to a tort claim do not have a pre-existing contractual relationship, when else would it be appropriate for the courts of England and Wales to have recourse to the escape clause? What factors should the courts consider when identifying the country "manifestly more closely connected" to the tort?

Paragraph 9.54

Question 13.

13.13 We seek evidence, particularly from market participants, on how market practice in respect of bills of lading has been affected, or how it is likely to be affected, by the introduction of the Electronic Trade Documents Act 2023.

Paragraph 10.59

Question 14.

13.14 We seek evidence on market sentiment relating to use of DLT platforms for electronic bills of lading.

(1) Is it likely that market participants will move towards a wholly decentralised DLT platform for bills of lading?

(2) To what extent can we assume that market participants will be reluctant to join a DLT platform that does not at least offer a user agreement setting out the terms on which the DLT platform will operate, and the rights and obligations of all users of the platform?

(3) Other than wholly decentralised DLT platforms, how else might DLT be used to issue and transact with electronic bills of lading (under the 2023 Act or otherwise)?

Paragraph 10.65

Question 15.

13.15 We seek evidence on the difficulties, if any, of incorporating the Hague-Visby Rules where an electronic bill of lading has been used.

(1) How often do disputes arise as to incorporation of the Hague-Visby Rules, specifically because an electronic bill of lading has been used, and how likely are they to in future?

(2) Are there concerns in the market, both in the marine insurance and shipping sectors, regarding the incorporation of the Hague-Visby Rules in electronic bills of lading? Please provide detailed examples in your answer and, where possible, distinguish between electronic bills under the Electronic Trade Documents Act 2023 and electronic bills held within contractual "approved systems."

Paragraph 10.77

Question 16.

13.16 We seek evidence on market practice to help us identify where it could be said that an electronic bill of lading is "issued" for the purpose of the Hague-Visby Rules, as implemented in the UK by the Carriage of Goods Act 1971.

(1) How, in practical terms, does a carrier wishing to issue an electronic or tokenised bill of lading do so within the respective electronic "approved" system or DLT system? What steps must a carrier take within the system?

(2) How, in practical terms, does a shipper "receive" an electronic or tokenised bill of lading within an "approved" system or DLT system? What steps must a shipper take within the system?

(3) Does the issue of an electronic or tokenised bill of lading between carrier and shipper involve the platform provider, or do the systems allow for electronic or tokenised bills to be sent directly from carrier to shipper?

(4) What are the market standards or best practices relating to existing electronic or DLT systems on the "issue" of a bill of lading?

Paragraph 10.83

Question 17.

13.17 We seek views on the most appropriate connecting factor for determining where an electronic bill of exchange is “delivered to a first holder" for the purposes of section 72(1) of the Bills of Exchange Act 1882.

(1) As the connecting factor for determining where an electronic bill of exchange is “delivered to a first holder", what are the relative merits and demerits of recourse to: (i) the reliable system, and (ii) a relevant person?

(2) If the reliable system were used as the connecting factor, should it make a difference whether the reliable system is a central registry or a DLT system? Is it desirable for a single connecting factor to be used for all types of reliable systems?

(3) Can we assume that the “reliable systems” that are or will be used in the context of bills of exchange will largely be comparable to those used in the context of bills of lading?

(4) If a relevant person were used as the connecting factor, what are the relative merits and demerits of recourse to (i) the transferor; and (ii) the transferee?

(5) To what extent does the question of the formal validity of a paper bill of exchange arise in practice? How likely is it that the question of the formal validity of an electronic bill of exchange will arise in practice?

(6) Do electronic bills of exchange pose any other issues for section 72 of the Bills of Exchange Act 1882 that we have not considered here?

Paragraph 11.49

Question 18.

13.18 We seek views on whether it would be desirable to have a single conflict of laws regime to cover all types of electronic trade documents that fall within the scope of the Electronic Trade Documents Act 2023.

(1) Would it be preferable for electronic bills of exchange, cheques, and promissory notes to continue to be governed by the Bills of Exchange Act 1882 through an extended application of section 72; or for them to fall within new rule for all electronic trade documents under the 2023 Act?

(2) If a single conflict of laws regime for all electronic trade documents under the 2023 Act is preferable, what should be its scope? Should it cover contractual obligations only, or both contractual and proprietary obligations arising within the reliable system?

(3) If a single conflict of laws regime for all electronic trade documents under the 2023 Act is preferable, what approach should we take to any new regime and what broader objectives of the conflict of laws should we keep in mind? Stakeholders may wish to refer back to Chapter 6 from paragraph 6.103.

Paragraph 11.59

Question 19.

13.19 We seek views on the law applicable to property disputes in relation to digital assets and ETDs. Where possible, we ask that stakeholders contextualise their responses, for example, give details as to whether it relates to a pledge over an ETD or property entitlements in crypto-token litigation.

(1) To what extent would recourse to contractual principles obviate the need for us to consider the *lex situs* rule?

(2) Do permissioned networks and/or cases where there is clearly a contractual or hierarchical relationship between the parties represent the vast majority of DLT applications for digital assets and ETDs?

(3) Should we need to consider a new conflict of laws regime for property rights in digital assets and ETDs, what approach should we take to any new regime and what broader objectives of the conflict of laws should we keep in mind? Stakeholders may wish to refer back to Chapter 6 from paragraph 6.103.

(4) To what extent would recourse to a distinct rule based on the connecting factor of the "owner" or "transferor" for cases where parties have voluntarily dealt with one another obviate the need for us to consider further the application of the *lex situs* rule to cases where the parties to the dispute are strangers?

(5) In what circumstances could a rule based on the "owner" or "transferor" be satisfactorily used? Do creditors taking security over ETDs typically require, as a matter of contract, that the debtor warrants their title to grant the security interest?

(6) To what extent is it likely that the courts will be asked to determine disputes relating to wholly decentralised digital assets held in permissionless DLT networks where the parties have not dealt with one another and there has been an "involuntary dispossession"?

(7) How should courts approach the question of applicable law in such disputes relating to decentralised digital assets held in permissionless DLT networks where the parties have not dealt with one another and there has been an "involuntary dispossession"?

Paragraph 12.118

Appendix 1: Terms of Reference

The Law Commission is asked to:

(1) Set out the current rules on conflict of laws and jurisdiction as they may apply in the digital context (including in relation to digital assets, smart contracts and associated technologies), and consider equivalent international rules and developments;

(2) consider various factual scenarios and disputes that are likely to arise in the digital context from both a conflict of laws and jurisdictional perspective. These include (but are not limited to):

  (a) contractual disputes;

  (b) tortious disputes;

  (c) property related disputes (including issues pertaining to transfer and associated priorities);[893] and

  (d) security perfection.

(3) make such recommendations and give such advice to Government as it considers necessary or desirable to ensure that the law in this area remains relevant and up to date.

The follow areas of law are excluded from the scope of the Commission's work:

(4) data protection;

(5) tax;

(6) insolvency;

(7) intellectual property;

(8) the issue of renvoi ("sending back");[894] and

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893 This could be transfers of value by disposition or by way of a security interest.

894 Where a matter before a court has an international element, the court will initially apply the private international law rules of the jurisdiction in which it is located (A) to decide which law applies. If A's law is the applicable law, the court will apply A's domestic law. However, if the applicable law is that of another jurisdiction (B), the court must decide whether to apply B's domestic law or B's law including B's own private international law rules. If the court decides on the latter and B's private international law rules refer back to the law of A, or refer to the law of a third jurisdiction, this referral is known as renvoi ("sending back" in French).

(9) other areas of law that the Law Commission considers necessary to exclude from the scope of this project, as shall be agreed with Ministry of Justice officials during the project term.

Appendix 2: Acknowledgements

Advisory Panel

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Amy Held (who joined the Law Commission in November 2023 to work specifically on this project as a law reform lawyer, and has not since then been a member of the Advisory Panel)

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Government and public bodies

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The Bank of England

Groups and associations

Financial Markets Law Committee

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