Law Commission
Reforming the law

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

Summary of the Call for Evidence

February 2024

Digital assets and ETDs in private international law: which court, which law? Call for Evidence Summary

What is this paper about?	The private international law rules that apply to digital assets and electronic trade documents.
What are we doing?	We are seeking views from a wide range of stakeholders, to gain a better understanding of the key challenges and priorities in this area.
Where is the full Call for Evidence?	The Call for Evidence is available on our website at: **https://lawcom.gov.uk/project/digital-assets-and-etds-in-private-international-law-which-court-which-law/**
Who do we want to hear from?	We are keen to receive comments from as many stakeholders as possible, including: legal practitioners, technologists, participants in sectors where digital assets and electronic trade documents are used, and academics.
How do I respond?	Please respond using the online form available at **https://consult.justice.gov.uk/law-commission/digital-assets-and-etds-in-pil** Alternatively, comments may be sent: 1. by email to **conflictoflaws@lawcommission.gov.uk**; or 2. by post to the 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).
What is the deadline?	The submission period closes on **16 May 2024.**
What happens next?	After reviewing all responses, we will set out our provisional law reform proposals in a consultation paper.

`

Introduction

In recent years, a significant aspect of the Law Commission's work has focused on emerging technologies, including smart legal contracts, electronic trade documents, digital assets, and distributed ledgers. These technologies are versatile and increasingly prevalent across a wide range of socio-economic applications. Depending on their nature, they can be used as a substitute for traditional means of payment, as investments, to facilitate international trade, to streamline existing commercial practices, or to act as a record of asset holdings or transfers.

Our work has shown that these technologies raise 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, and which country's private law should be applied to resolve the claim. Private international law is the body of domestic law that supplies the rules used to determine these questions.

Those who invest in or use emerging technologies require 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 as to the law that will apply are frustrated by a rule of private international law.

This project complements our existing work on emerging technologies. 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.

Whilst these questions may arise from the use of a wide range of emerging technologies, we focus on those arising from dealings in crypto-tokens as a particular type of digital asset, and electronic bills of exchange and bills of lading as particular types of electronic trade documents. We do so for two main reasons. First, these objects exemplify the types of challenges that emerging technologies pose for private international law on a theoretical level. Second, given that use of these objects is already prevalent in market and commercial practice, we think these are the use cases that require the most certainty as regards the legal issues that we are tasked to consider.

The Call for Evidence

This is a summary of the longer Call for Evidence, which sets out the core challenges in detail. We ask stakeholders for their views and evidence on both (i) the most theoretically intractable problems; and (ii) the most prevalent issues in practice. The questions for stakeholders are listed in Chapter 13 of the Call for Evidence, and in the online response form linked above.

We hope to draw upon the views and evidence of a diverse body of stakeholders from a wide range of perspectives and jurisdictions. This includes, but is not limited to, academics, legal practitioners, technologists, and market participants in the financial, shipping and other sectors where digital assets and electronic trade documents are used. We believe that such range of views and evidence will help to ensure that our work strikes the appropriate balance between the theoretical aspect of the law and its practical application.

We request responses to the Call for Evidence by **16 May 2024**. Stakeholders need not respond to every question and are welcome to respond only to those questions that align with their area(s) of interest and experience. Stakeholders are, nevertheless, encouraged to read the foundational Chapters 2, 3, 4, and 6 alongside the chapters which discuss the issues in which they are particularly interested, for an overview of how we understand the core issues that we are tasked to consider.

Private International Law

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".[1] Issues of private international law arise because "law has become the prerogative of territorial sovereigns, whereas human affairs freely cross state and national boundaries".[2]

There are three main issues that usually need to be resolved when questions of private international law arise.

1. In which country's court should the parties litigate their dispute? 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? This is the "applicable law" question, also known as the "conflict of laws" or "choice of law" question.

3. How can a judgment be recognised and enforced in another country? This question only arises if the litigation actually results in a judgment being given. This is the "recognition and enforcement" question.

A historical overview of private international law shows a range of approaches to resolving these core questions. These tend to reflect the specific political and legal conditions under which they were developed.

Nevertheless, the historical record shows that there are three basic methods for resolving issues of private international law.

[1] 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.

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

`

Each has its own merits and demerits, in both theoretical and practical terms. We therefore provide a brief introduction to each of these three methods.

1. **Supranational law.** This resolves issues of private international law through special international rules that apply wherever there is an international element to a private law dispute.

2. **Unilateralist approach.** This resolves the applicable law question, by determining whether any of the laws which potentially apply were intended to apply in the given circumstances.

3. **Multilateralist approach.** This resolves the applicable law question, by using a theoretically self-contained system of rules which is premised on the proposition that every legal issue to be determined by a court in litigation has a "natural home" in a single legal system.

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.

However, each of these three approaches to the core question of "how to resolve conflicts that may exist between different private law systems" is present in some form or another in the modern law. In England and Wales, this is reflected in the range of legal sources from which the current system of private international law is drawn, which include:

1. common law principles;
2. UK statutes and statutory instruments;
3. assimilated EU law; and
4. international conventions.

We consider the rules derived from each of these sources in more depth throughout the Call for Evidence.

The Core Problem

Problems of private international law are by no means a recent phenomenon; the conditions that give rise to these problems date from at least the fourth century BC. The problems are, however, becoming increasingly difficult as the conditions that give rise to them 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.

Today, human affairs no longer merely cross state boundaries. The internet allows human affairs to be conducted in real time across the geographical boundaries of different states 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. In turn, this increasingly strains the methods and techniques by which private international law resolves conflicts between the private law systems of sovereign states.

The changes precipitated by the advent of information technology, such as digitisation and the internet, therefore pose challenges for private international law because they challenge the territorial basis upon which modern systems of private international law are premised.

For jurisdiction, the sovereign authority to adjudicate private law disputes and enforce

laws by means of a judgment is usually limited to the territorial boundaries of that sovereign state.

For applicable law, the prevailing multilateralist approach to the conflict of laws proceeds from the theoretical premise that every legal issue that arises for determination by a court has a "natural home" in the territory of a single sovereign state. In addition, multilateralist rules themselves are usually expressed in terms of a physical location within the territorial borders of a sovereign state. These are often called the "connecting factors" that link a legal issue to its "natural home." The connecting factors that we give particular consideration to in this project include:

1. the location of an object of property rights;
2. the location where an event occurred; and
3. the location of a person.

The application of the multilateralist rules generally means that persons and objects physically located in the territory of a particular sovereign state will be subject to the laws of that state. Similarly, acts or events occurring in the territory of a particular sovereign state will be subject to the laws of that state.

The tensions between information technology and these traditional territorial constraints on sovereign authority were identified some decades ago with the rise of the internet as a global, interconnected network. In the early years of its inception, some subject matter experts argued that the internet could not be regulated using traditional legal techniques, including those of private international law. There was, however, disagreement in the academic literature as to whether the traditional methods of private international law could cope with the challenges that come with the internet as arguably a distinct "place" independent of "real world" geographical borders where acts, events, and transactions may nevertheless still "occur".

Notwithstanding some views that the global nature of the internet is incompatible with the traditional methods of private international law, the existing legal framework of private international law has generally prevailed, albeit in slightly varied forms. For the most part, this has involved finding new ways to connect acts, events, and transactions occurring in the online space to "real world" sovereign territories.

More modern technologies, however, have added another layer of complexity to these established challenges. Phenomena like Bitcoin and distributed ledger technologies ("DLT") challenge the underlying territorial premise of the law to such an extent that the existing law arguably no longer works.

For example, files stored digitally or transactions entered into over the internet can, in some way or another, be thought of as being located in one particular country. A digital file stored offline on the hard drive of a single laptop with an identifiable location, or a fixed number of identifiable computers, offers a discrete number of countries whose laws may apply. Private international law has many techniques for narrowing these down to a single country.

Digital files stored online in the cloud or in distributed servers in discrete data "shards" are more problematic but can still usually be located in one particular country: by reference to the data-storage provider. This is largely because the data-storage provider occupies a prominent position in the factual matrix as the "central authority" which stores,

`

manages, and secures the data on behalf of its customers.

By contrast, the foundational premise of DLT goes beyond the mere distribution of data across multiple servers. The core difference is that DLT was deliberately designed to avoid any recourse to a "central authority" to store, manage, and secure the data recorded on a distributed ledger. The result is that a master copy of the ledger is stored on every single computer or device that is connected to the DLT network, and every single computer or device contributes in an equal way to storing, managing, and securing the ledger. The absence of a central authority means that DLT is regarded as "decentralised" technology.

The fundamental nature of the challenges for private international law that arise in these circumstances is reflected in the term "omniterritoriality", which was coined to describe phenomena that "cannot be linked to a specific country because they have simultaneous and equally valid connections to jurisdictions all over the world".[3]

In these cases, the problem is not so much that the act, event, or object exists in a distinct "place" independent of geographical borders. Rather, it is that the use of DLT can mean that the act, event, or object arguably exists "everywhere and nowhere*, at the same time*".[4] This strains the methods previously used in the online sphere and poses a greater challenge to the principle that the sovereign power to make and enforce laws is territorially constrained.

However, mere use of the internet or DLT does not necessarily mean that intractable problems of private international law will arise. To the contrary, the ways in which many modern applications of emerging technologies are deployed across a vast range of commercial applications mean that the existing methods of private international law may well cope without undue difficulty.

Accordingly, we have identified two main priorities of equal importance for this stage of our project.

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.

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;

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:

[3] The term was coined by Professor Matthias Lehmann in "Extraterritoriality in Financial Law", in A Parrish and C Ryngaert (eds), *Research Handbook on Extraterritoriality in International Law* (2023) p 427.

[4] 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.

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.

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

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.

We therefore propose to investigate 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 issue be accommodated by the existing law?

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

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

2. To what extent does the issue cause problems in practice (or is it 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?

We hope to be able to classify all issues on three broad levels of priority for the next stage of our project: high, medium, and low.

Jurisdiction

In the context of private international law, to say that a court has jurisdiction means that a court 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.

There are practical reasons why it is important that international jurisdiction is properly founded. When faced with a request to recognise and/or enforce the judgment of a foreign court, most courts around the world will consider the basis on which the foreign court accepted international jurisdiction before proceeding to determine the claim and enforce the judgment in question. If the court from which recognition and/or enforcement is sought considers that international jurisdiction was improperly founded, it may well refuse the request.

The rules of international jurisdiction that we consider are those relating to applications to service out of the jurisdiction. These are governed by the common law and Part 6 the

`

Civil Procedure Rules 1998 (including Practice Direction 6B).

International jurisdiction: an overview

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. In practical terms, this often means asking whether a court may legitimately assert sovereign 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 (i) the defendant; or (ii) the facts and issues of the case.

The law of England and Wales traditionally places great importance on the first measure of assessment. Ordinarily, a person physically present within the territory of England and Wales may be served with process and brought under the jurisdiction of the courts of England and Wales. The result of this is that the courts of England and Wales will assert jurisdiction over the claim.

However, we are primarily concerned with the second measure of assessment. Generally, where the defendant does not have ties to the state in which the claimant issues proceedings, a clear connection between the facts, issues, or nature of the case and the territorial boundaries of that state is usually sufficient to justify its courts accepting international jurisdiction over the claim.

In such circumstances, the law of England and Wales requires the claimant to obtain permission to serve proceedings on the defendant outside England and Wales. To do this, they must, amongst other things, satisfy a jurisdictional "gateway". These gateways identify the connections between the facts and issues in 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.

These gateways are mostly expressed in territorial terms. We consider in particular:

1. damage or detriment suffered in England and Wales;

2. an unlawful act committed in England and Wales; and

3. an object or asset located in England and Wales.

Digital, decentralised, and omniterritorial phenomena are often difficult to reconcile with the gateways because they challenge the territorial premise on which the gateways are based. Where, for example, an object or asset arguably exists "nowhere and everywhere at the same time", it is difficult to say whether, and if so why, it exists any more in one territorial jurisdiction than another.

The courts of England and Wales have been faced with these difficulties in a range of recent cases concerning crypto-tokens. These have usually involved a claimant based in England and Wales who has suffered a cyber-attack that results in a loss of their crypto-tokens. With the help of a specialist investigator, the claimant traces the missing tokens to an exchange based overseas. The claimant then brings an action against the "persons unknown" who have caused the loss and seeks interim relief against the exchange.

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 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. 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. They further note that 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.

We recognise that the cut-and-thrust context in which litigation is conducted is not always ideal for a more principled approach to these theoretical issues. We therefore consider some of the issues that have arisen in practice in greater depth.

International jurisdiction: specific issues

Our primary focus is on the more problematic issues that have arisen in the crypto-token cases that have come before the courts of England and Wales. We also consider claims that may pose particular theoretical challenges, may be prevalent, or which raise particular policy considerations.

We therefore consider in greater depth:

1. the special rules of international jurisdiction that apply to consumer contracts;

2. the question of where a contract concluded via a smart contract was made, for the purpose of the international jurisdiction of the courts of England and Wales over claims made in contract;

3. the question of where damage or detriment caused by frauds and other scams committed online is sustained, for the purpose of the international jurisdiction of the courts of England and Wales over claims made in tort and in breach of confidence;

4. the question of where frauds and other scams committed online are committed, for the purpose of the international jurisdiction of the courts of England and Wales over claims made, amongst others, in tort and against constructive trustees; and

5. the questions of where a crypto-token is situated and the point in time at which this is relevant, for the purposes of the international jurisdiction of the courts of England and Wales over claims relating to property within the territorial boundaries of England and Wales.

We seek views and evidence on whether the approach of the courts is consistent and theoretically sound, and on how prevalent these issues are, or are likely to become, in legal and commercial practice.

`

Applicable law

The question of applicable law involves identifying which country's private laws will determine whether the claimant's claim will succeed or whether the defendant may raise a defence. This branch of private international law is traditionally known in England and Wales as the "conflict of laws".

The rules of applicable law that we consider in this project have a variety of legal sources:

1. the assimilated Rome I and Rome II Regulations;
2. UK statutes;
3. international conventions; and
4. the common law.

These are each governed by distinct bodies of jurisprudence, case law, and principles of interpretation.

Applicable law: an overview

We build upon the introduction to the methodologies by which issues of private international law may be resolved. In particular, we explain in more detail the process by which the prevailing system of applicable law in England and Wales resolves the conflicts that may exist between different private law systems. We also set out some of the core objectives of this approach and proposals as to how it might adapt to the internet and emerging technologies.

Under the multilateralist approach to resolving conflicts between different private law systems, the process for identifying the law that should apply to resolve the legal issue in dispute is threefold.

1. **Characterisation.** The court must identify what kind of legal issue is in dispute between the parties. For example, is it a legal issue relating to breach of contract, property entitlements, or damage sustained in tort?

2. **Identify the relevant rule.** The court will then refer to the rule that applies to this kind of legal issue. The rules are expressed in abstract terms using a "connecting factor", such as the place where some act occurred, or the place where an object of property rights is located.

3. **Identify the relevant applicable law on the facts of the case.** Finally, the court will refer back to the facts of the case to ascertain the place where the relevant rule points. It will then apply the law of that place to the issue in dispute.

The core challenges faced by private international law in the context of emerging technology arise due to the tension between transactions, events, and objects transcending national borders, but law being limited to the territorial boundaries of sovereign states.

In the context of applicable law, this tension arises because many of the applicable law rules used today are expressed in territorial terms. These are supposed to point to the law of a single sovereign state as the law applicable to the legal issue in dispute.

However, objects, events, and acts that exist or occur "everywhere and nowhere at once" cause problems. This is because the application of such rules does not narrow down the options to a single legal system. Rather, it will point to several legal systems, each in equal measure. The application of

the rule therefore does not assist the court in identifying the applicable law.

We identify and discuss the various ways in which private international law has met the challenges of human affairs being conducted across territorial boundaries in the digital, online, and decentralised spheres. We are of the view that these warrant careful consideration in relation to the first of our stated priorities, that is, the extent to which the challenges posed by digitisation and decentralisation can be accommodated within the existing law.

Applicable law: specific issues

We consider specific rules of applicable law and the particular issues that arise in various different areas of the law.

Contracts

The applicable law rules for contract are well-established and are contained in the assimilated Rome I Regulation.

The general rule is that the law applicable to contractual obligations is the law chosen by the parties. Where the parties have not made a choice, the Rome I Regulation supplies rules to determine the applicable law. These point to the law of the country in which the party that renders the "characteristic performance" (that is, the non-payment obligation) under the contract has their habitual residence. Where the applicable law cannot be identified by either of the first two approaches, the law of the country with which the contract is "manifestly more closely connected" will apply. As a final resort, if none of these approaches identify the applicable law, the law of the country that is "most closely connected" with the contract will apply.

At this stage, we do not think that the contractual disputes that might arise in a fully decentralised context (such as Decentralised Finance or "DeFi") will be litigated frequently. This is due to the anonymity of participants in, and parties to, DeFi transactions. To the extent that such disputes are litigated, we think that the same analysis will apply to the transactions whether they are entered into in a centralised or decentralised context. We ask stakeholders whether they agree.

Instead, we focus on centralised applications of DLT. In particular, we focus on contracts relating to crypto-tokens which involve an intermediary: an individual or (more commonly) organisation that holds crypto-tokens, or an interest in the crypto-tokens, on behalf of their customers. Intermediaries, as identifiable individuals or organisations who occupy a prominent position in the factual matrix surrounding the contract, provide a point of centralisation.

We identify three key situations in which crypto-tokens might feature in otherwise familiar contractual scenarios:

1. fiat currency is exchanged for crypto-tokens;
2. goods or services are exchanged for crypto-tokens; and
3. crypto-tokens are exchanged for crypto-tokens.

At this stage, we consider the outcome of applying the Rome I Regulation to these scenarios to be relatively certain. We think the focus that the relevant rules place on the person effecting the characteristic performance of the contract (the non-payment obligation) will, for the most part, enable the courts to identify the applicable law. Whilst anonymity or pseudonymity is

`

prevalent amongst holders of crypto-tokens, we assume that a claimant will not litigate a contractual dispute unless their counterparty is identifiable.

We therefore do not think that it will often be necessary in practice for courts to apply the tests which examine where a contract relating to crypto-tokens is "manifestly more closely connected", or "most closely connected". However, if application of these tests is necessary (for example, where the characteristic performance of a contract cannot be easily identified, such as in cases of barter), we think that the courts will be able to identify the country to which the contract is "most closely connected" on a case-by-case basis.

We therefore ask consultees whether the provisions of the Rome I Regulation can be relied on to identify the applicable law in these scenarios without undue difficulty, and to what extent this has proved problematic in practice.

Consumer contracts

Under the Rome I Regulation, consumers who enter into contracts with professionals are given special protections. These allow them to benefit from the mandatory consumer protection laws of their home state. The policy underpinning this rule is aimed at protecting the consumer, who is usually in a weaker bargaining position than the professional.

We think that the consumer contract rules will most likely apply in the crypto-token context between individuals and centralised crypto exchanges, such as Binance or Coinbase.

Our analysis suggests that the consumer contracts rule in the Rome I Regulation can be applied without undue difficulty; existing case law on the meaning of a "consumer" and a "professional" can be applied in this novel context. We ask stakeholders whether they agree, and whether the provisions are problematic in practice.

We identify one area of difficulty. The consumer contracts rule under the Rome I Regulation contains various exclusions for contracts relating to financial products. There is scope for classifying crypto-tokens as a form of financial instrument or transferable security. If these exclusions are interpreted widely, then many consumer contracts relating to crypto-tokens may be excluded from the consumer protections in the Rome I Regulation.

We tentatively conclude that the exclusions can be interpreted restrictively, such that many contracts between consumers and crypto-exchanges will not be caught within them. We ask stakeholders whether they agree.

Torts and delicts

Claims in tort may arise in a wide variety of circumstances. Much of the crypto-token litigation before the courts of England and Wales passed through the gateway requirement on the basis of a claim made in tort where damage was sustained in England and Wales. Claims in tort may well also arise in the contexts of DeFi and of electronic trade documents.

The rules on applicable law for torts and delicts are contained in the Rome II Regulation. The general rule points to the law of the country in which the damage occurs. An exception is made for cases in which the parties to the claim have their habitual residence in the same country at the time when the damage occurs. Finally, where, in all the circumstances of the case,

the tort/delict is “manifestly more closely connected” with another country, the law of that country will 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. This final exception based on a “manifestly closer connection” to another country is usually referred to as the “escape clause”.

In considering where “damage occurs” under the general rule, we build upon an observation drawn from the crypto-token litigation before the courts of England and Wales. In these cases, the pleaded claims in tort did not 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. 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.

We therefore consider whether the tortious damage in such should be conceptualised as pure economic loss. We think that 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. We ask stakeholders whether they agree.

We also ask when the courts might appropriately have recourse to the “escape clause” and apply the law of the country with which the tort is “manifestly more closely connected”.

Given that the “escape clause” expressly refers to a pre-existing contractual relationship between the parties, we think it might be appropriate for the courts to have recourse to this provision in many cases concerning centralised applications of DLT. These include permissioned networks, crypto-token holdings through an intermediary, and any other context where access to the crypto-token or network is premised on some type of contractual agreement. We also note that electronic trade documents embody contractual obligations. We therefore ask in what circumstances it would be appropriate for the courts to have recourse to the “escape clause” on the basis of a pre-existing contractual relationship.

We also ask when *else* it might be appropriate for the courts to have recourse to the “escape clause”, and which factors the courts should consider when identifying a country “manifestly more connected” to the tort.

Finally, we note that many of the crypto-token cases that have come before the courts have been issued to further a particular litigation strategy. It is our understanding that, often, the claimant has no real intention of pursuing proceedings against the defendant “person unknown”, but rather seeks to target the crypto exchange intermediary. We therefore ask 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.

`

Bills of lading and other negotiable instruments

For the most part, the applicable law rules in England and Wales are found in the Rome I and Rome II Regulations. However, these Regulations contain an identical exclusion for obligations arising under bills of exchange, cheques and promissory notes, and under other negotiable instruments "to the extent that the obligations under such other negotiable instruments arise out of their negotiable character".

Many of these negotiable instruments include trade documents which may, when in electronic form, seek to benefit from the provisions of the Electronic Trade Documents Act 2023. We therefore take the exclusion contained in the Rome I Regulation as the starting point for determining whether it is the Rome I Regulation, the common law rules, or some other system of private international law, that provides the relevant applicable law rules for contractual obligations arising from "negotiable instruments".

We focus 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.

Second, the Electronic Trade Documents Act 2023 establishes a legal link between an 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. Electronic bills of lading are therefore a real-life test for the existing law.

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.

Finally, we committed during the passage of the 2023 Act to look at the private international law issues raised by the Act, including those relating to bills of lading.

We seek views from stakeholders as to: how market practice is likely to be affected by the Electronic Trade Documents Act 2023; the nature of the systems used to store electronic bills of lading (and the degree to which these platforms are likely to be decentralised); and precisely when and how the Hague-Visby Rules will apply to electronic bills of lading.

Bills of exchange, cheques and promissory notes

We consider contractual obligations arising under bills of exchange, cheques, and promissory notes separately to other negotiable instruments caught by the exclusions in the Rome Regulations. This is because the applicable law rules for contractual obligations arising under these instruments are presently found together in section 72 of the Bills of Exchange Act 1882.

Bills of exchange, cheques, and promissory notes are also trade documents which may, when in electronic form, seek to benefit from the provisions of the Electronic Trade Documents Act 2023. We think there may be

renewed interest in the 1882 Act as a result of the Electronic Trade Documents Act 2023.

We therefore consider the private international law implications that flow from the Electronic Trade Documents Act 2023; section 72 of the Bills of Exchange Act 1882; and the relationship between the 1882 Act and the 2023 Act as part of a wider discussion on the law applicable to contractual obligations arising under electronic bills of exchange, cheques and promissory notes, and other electronic trade documents.

We take section 72(1) of the Bills of Exchange Act 1882 as the point of departure and examine the question of where an electronic bill of exchange, cheque, or promissory note is "issued" and "delivered" to a first holder. We recognise that these concepts are more difficult to apply to the transfer of electronic documents than their paper counterparts.

However, we also think that the requirement in the Electronic Trade Documents Act 2023 that the electronic trade document be held in a reliable system may assist in the search for an appropriate connecting factor. One of the functions of such a reliable system under the 2023 Act is to ensure that electronic trade documents can be transferred effectively. The ways in which "reliable systems" provide for electronic trade documents to be transferred may therefore provide a basis for localising the "delivery" and the "issue" of an electronic trade document for the purpose of section 72(1).

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 fall within the scope of the Electronic Trade Documents Act 2023.

We also recognise that an extended application of section 72 of the Bills of Exchange Act 1882 to cover electronic delivery and issue within a "reliable system" would only provide a solution for the trade documents which fall within the scope of the 1882 Act. By contrast, the Electronic Trade Documents Act 2023 applies to a vast range of instruments.

We therefore 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. We also ask for views on the scope of any new rules, the approaches we could take, and the broader objectives of the conflict of laws that we should keep in mind in the event that a new conflict of laws regime for electronic trade documents under the 2023 Act is desirable.

Property

Questions of applicable law for property are governed by common law rules. The general rule, consistent across legal systems, is that issues relating to property rights are determined according to the law of the place where the property object is situated (*lex situs*).

This rule is far easier to apply to tangible objects than it is for digital objects. In particular, applying the *lex situs* rule to decentralised objects is one of the most difficult problems raised by DLT. This is because decentralised crypto-tokens are the paradigm example of "omniterritorial" phenomena: the object does not simply exist "nowhere", but "nowhere and everywhere, *at the same time*." As such, it exemplifies the

`

challenges that digitisation and decentralisation pose to the principle of territoriality which underpins private international law.

We set out some of the distinct features of property disputes that make them challenging for private international law. In light of these challenges, and cognisant of alternative approaches (in particular, party autonomy) and possible solutions that have been proposed by commentators and by international organisations, we ask stakeholders for their views on the most appropriate way to identify the law applicable to property issues arising in respect of wholly decentralised objects.

We also consider whether a specific approach might be taken for certain types of property transactions. In particular, we focus on security interests, notably pledges and charges, that are frequently granted over digital assets and electronic trade documents.