Law Commission
Reforming the law

Digital assets and (electronic) trade documents in private international law

including Section 72 of the Bills of Exchange Act 1882

Consultation paper

Consultation Paper 273

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THE LAW COMMISSION – HOW WE CONSULT

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Topic of this consultation: Issues of private international law arising from use of (electronic) trade documents, digital assets, and distributed ledger technologies.

Geographical scope: This consultation applies to the law of England and Wales.

Duration of consultation: We invite responses from 6 June 2025 to 8 September 2025.

Responses to the consultation may be submitted using an online form at: https://consult.justice.gov.uk/law-commission/etds-and-digitalassets-in-privateinternationallaw.

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Availability of materials: The consultation paper and a summary of it is available at: https://lawcom.gov.uk/project/digital-assets-and-electronic-trade-documents-in-private-international-law/.

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Glossary

Term	Definition
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.
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 delivers the document to that party.
Bill of exchange	An unconditional written order to pay a certain sum of 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 7, paragraph 7.25.
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.
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 to the legal discipline concerned with "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.
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 Final 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.
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 Rome law and which remains prevalent in Continental legal system. 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 report, 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.
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.
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.

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 jurisdiction in which an asset is situated. In Latin shorthand, *forum situs*.
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.
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 used to refer to applicable law issues for property in respect of which the territorial connecting factor changes over time.
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 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 in which 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 at the relevant time. In Latin shorthand, *lex situs.*
Multilateralist approach to private international law	A 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. For further description, see Digital assets and ETDs in private international law: which court, which law? (2024) Law Commission Call for Evidence from paragraph 2.20.
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.
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.
Permissioned	Requiring authorisation to perform a particular activity.
Permissionless	Not requiring authorisation to perform a particular activity.
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. 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. Inherent in this is an assertion of entitlement to 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 its centre of operations. In the multilateralist approach to the conflict of laws, the terms 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 principle	The principle of international law that sovereign authority is limited to geographically defined territories.

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. For further description, see Digital assets and ETDs in private international law: which court, which law? (2024) Law Commission Call for Evidence from paragraph 2.12.

List of abbreviations

BoEA 1882	Bills of Exchange Act 1882
ETDA 2023	Electronic Trade Documents Act 2023
BIS	Bank for International Settlements
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
CBDCs	Central bank digital currencies
CPR	Civil Procedure Rules
CJEU	Court of Justice of the European Union
DAO	Decentralised autonomous organisation
DeFi	Decentralised finance
DLT	Distributed Ledger Technology
ETD	Electronic trade document
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
MELTR	Model Law on Electronic Transferable Records
NFT	Non-fungible token
Recast Brussels I	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
Rome I	Regulation on the law applicable to contractual obligations (EC) No 593/2008, Official Journal L177 of 04.07.2008
Rome II	Regulation on the law applicable to non-contractual obligations (EC) No 864/2007, Official Journal L 199 of 31.07.2007
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 visited 4 June 2025.

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, decentralised autonomous organisations (DAOs) and digital assets such as crypto-tokens. These developments often rely on distributed ledger technology (DLT), which uses a network of computers – potentially located all over the world – to record and store data. DLT is versatile and increasingly prevalent in modern commerce. It can be used, for example, to facilitate international trade, to hold or transfer assets, and as a substitute for traditional payments systems.

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 borders. In the law of England and Wales, it is traditionally said that questions of private international law arise where there is a "foreign element" to a private law dispute before the courts.

1.3 In these circumstances, there are two main questions that need to be resolved:

(1) In which country's court should the parties litigate their dispute? This is the "international jurisdiction" or "forum" question.

(2) Which law or combination of laws should be applied to resolve their dispute? This is the "applicable law" question, or the "conflict of laws" or "choice of law" question.

Once these two questions are answered, and provided that the litigation actually proceeds to judgment, there is a final question:

(3) How can the judgment be recognised and enforced in the courts of another country? This is the "recognition and enforcement" question.

1.4 Private international law is the body of domestic law that supplies the rules used to determine these questions.

1.5 Private international law shares with public international law certain theoretical foundations, which were developed in the 16th and 17th centuries by Continental European legal theorists.[1] As such, private international law is premised on the basic principle of international law that all national systems of law, as an expression of sovereign authority, are constrained in their application to sovereign territories that are defined by geographical boundaries. This is often known as the "territoriality principle".

1.6 By contrast, modern technologies, and DLT in particular, transcend and defy traditional geographical boundaries. They are, therefore, problematic for private international law because they potentially challenge the territorial premise on which

[1] See generally A Mills, *The Confluence of Public and Private International Law* (2009).

the existing rules of private international law have been developed. As a result, the methods by which private international law has traditionally resolved each of the jurisdiction, applicable law, and recognition and enforcement questions have become increasingly strained by the digital and decentralised realities of 21st century social and economic life.

1.7 This poses significant problems. 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 if the rules of private international law point to a different applicable law. Finally, the entire litigation process may be of limited practical value if the resulting judgment cannot be recognised and enforced in other courts.

1.8 The Law Commission has been asked to examine and clarify the legal framework in which questions of private international law arising from the use of emerging technologies stand to be resolved. This project is intended to be complementary to our past work on related areas.

1.9 In this paper, we focus on areas of the current law which we think need modification, clarification or modernisation to ensure that the private international law of England and Wales can respond appropriately to the challenges presented by these new technologies, and to the expectations of parties to cross-border litigation and users of the law in the modern world. We set out our provisional conclusions and proposals for law reform and ask consultees for their views.

PREVIOUS WORK ON EMERGING TECHNOLOGY

1.10 This project is the most recent instalment of the Law Commission's work on emerging technology. While questions of private international law are also relevant to our work on DAOs, the most pressing issues arise in the context of electronic trade documents, digital assets (particularly crypto-tokens), and smart (legal) contracts. This project therefore focuses private international law in the context of these three issues.

Smart legal contracts

1.11 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.

1.12 We published our final paper as an Advice to Government in November 2021.[2] We 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.

[2] Smart legal contracts: Advice to Government (2021) Law Com No 401.

1.13 However, we identified private international law as an area which required further work to support the use of smart legal contracts.[3] 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.[4]

Electronic trade documents ("ETDs")

1.14 In 2022, the Law Commission published a report on electronic trade documents (the ETD Report).[5] In it, we recommended that the law should recognise the electronic and paper forms of trade documents as equivalent. Those recommendations were brought into effect by the Electronic Trade Documents Act 2023 ("ETDA 2023").

1.15 Trade documents are widely used in international trade which is, by its very nature, a context with considerable potential for issues of private international law to arise. The ETD Report did not examine private international law in detail but noted that the use of electronic trade documents can give rise to private international law difficulties; and 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.[6]

1.16 Given the complexity of those issues and the fact that many of them also arise in relation to digital assets more broadly, we said we would consider them in this more general project on private international law and emerging technology.[7]

Digital assets

1.17 Our digital assets project looked at whether and how the substantive private law of England and Wales could accommodate digital assets, including crypto-tokens. Our final report, published in 2023,[8] concluded (amongst other things) that the existing common law rules are sufficiently flexible to allow for recognition of crypto-tokens and certain other digital assets as objects of property rights under the private law of England and Wales. We recommended statutory reform to confirm that assets such as crypto-tokens can constitute property despite not fitting easily into the categories of personal property that have traditionally been recognised. A Bill implementing those recommendations is, at the time of writing, before Parliament.[9]

1.18 Our report did not look in detail at the private international law issues which can arise in crypto-token dealings. However, we recognised the need to consider how a conflict

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

4 Above para 7.145.

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

6 Above, para 8.98.

7 Above, paras 1.20 and 8.107.

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

9 The Property (Digital Assets Etc) Bill; see further at https://bills.parliament.uk/bills/3766.

of laws analysis applies to crypto-token collateral arrangements, due to the "the global nature of crypto-token and cryptoasset markets".[10]

1.19 It is important to recognise that private law and private international law are distinct legal disciplines, with distinct objectives and methodologies. For example, although private international law uses many terms also used in substantive private law, such as "contract" and "property", these terms are used in different ways and have different meanings in each of these legal contexts. It cannot be assumed that use of these terms in private international law reflects substantive definitions and concepts from private law, and vice versa.

ABOUT THIS PROJECT

Terms of reference

1.20 The Ministry of Justice has asked the Law Commission to conduct this project considering how the private international law rules of England and Wales will apply in the digital context. In particular, the Law Commission was asked to consider the disputes which are likely to arise in the digital context (including contract, tort and property disputes), and make any recommendations it considers necessary or desirable to ensure that this area of law is relevant and up to date.

1.21 In addition, we have recently agreed an update to the terms of reference to include a particular reference to making proposals to modernise section 72 of the Bills of Exchange Act 1882 ("BoEA 1882") that would apply generally (that is, to documents in both paper and electronic form) rather than only in the context of electronic bills of exchange and promissory notes. Our full terms of reference, including exclusions from scope, are included at Appendix 1.

The call for evidence and the three "FAQs"

1.22 We published a call for evidence in February 2024. This was a detailed document that set out the basic principles of private international law and its sources in England and Wales; the core problem that digitisation and decentralisation pose for private international law; and the considerations that apply to international jurisdiction and to applicable law, both in general and specific terms. We asked a range of questions designed to identify issues of private international law in the context of emerging technologies that users of the law have come across or expect to come across in future.

1.23 We received 34 responses to our call for evidence from a wide range of stakeholders including practising lawyers, academics, technologists, and commercial entities. We considered the responses in detail and have developed our thinking to take into account many of the points raised by respondents. A summary of the responses, together with copies of the responses themselves, will be made available on our website.

1.24 As we explain in more detail in Chapter 2, our work focuses on a particular and novel challenge that some applications of DLT pose to the current rules of private international law. The nature of these challenges is such that we provisionally

[10] Digital Assets: Final Report (2023) Law Com No 412, para 8.136.

conclude that some law reform will be required if the private international law of England and Wales is to remain up to date and relevant in light of these technologies.

1.25 It is important to note that not all applications of DLT and use of crypto-tokens pose challenges of this type. In fact, many applications seen in commercial practice, such as in the financial markets and in the context of reliable systems for ETDs, can be accommodated by the existing rules of private international law. They do not, therefore, pose such challenges that law reform would be required, and as such they do not form a core focus of our work.

1.26 However, it was clear from our discussions with stakeholders and the responses received to the call for evidence that there remains uncertainly as to how the current rules of private international law should be interpreted and applied in these contexts. We therefore published three FAQ documents to respond directly to some concerns raised by stakeholders. These documents seek primarily to clarify the existing legal position and do not make proposals for reform.

(1) Our first FAQ, published in October 2024, focuses on ETDs in private international law.[11] In it, we broadly address concerns regarding how the Electronic Trade Documents Act 2023 operates in the cross-border legal context and how it interacts with private international law. We summarise some of the core aspects of this FAQ and relevant recent developments at the international level in Chapter 7.

(2) Our second FAQ, published in January 2025, focuses on digital assets in private international law.[12] In it, we address concerns regarding how certain rules of private international law might apply in the wider legal context, with a particular emphasis on the tax law and financial services regulation contexts. We also look briefly at the private international law issues that may arise in relation to tokenisation. We discuss some of the core aspects of this FAQ in Chapter 2.

(3) Our third FAQ, published in June 2025, focuses on property and permissioned DLT systems in private international law. [13] In it, we discuss in more detail why permissioned applications of DLT are less problematic for private international law, the importance of characterisation (particularly in relation to financial assets), and the modern pressures on the traditional *lex situs* rule for property issues in the conflict of laws. We discuss some of the core aspects of this FAQ in Chapter 6.

1.27 We encourage readers with an interest in the use of DLT and crypto-tokens other than in the truly decentralised contexts to refer to the FAQ documents.

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11 ETDs in private international law: FAQs (2024) Law Commission Paper.

12 Digital assets in private international law: FAQs on the relationship with tax law, banking regulation, and the financial markets (2025) Law Commission Paper.

13 Property and permissioned DLT systems in private international law: FAQs (2025) Law Commission Paper.

This consultation paper

1.28 We seek views on our provisional conclusions and proposals for law reform by 8 September 2025. Our aim is to publish our final recommendations in 2026. It will thereafter be for Government to decide whether or not to implement our recommendations.

TERRITORIAL EXTENT

1.29 As the Law Commission of England and Wales, we can make law reform recommendations for England and Wales only,[14] and not for Scotland or Northern Ireland.

1.30 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.[15] The ETDA 2023 also applies to the whole of the UK.[16]

1.31 We would therefore be interested to hear from stakeholders in Scotland and Northern Ireland about any particular challenges or differences under the laws of those jurisdictions.

ACKNOWLEDGMENTS AND THANKS

1.32 In preparing this consultation paper, 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.

1.33 At the inception of this project, we had the benefit of an Advisory Panel of experts whose names are listed in Appendix 2. The contents of this paper have not been reviewed by the Advisory Panel and are not intended to represent, and may not be reflective of, the views of its members.[17]

STRUCTURE OF THIS CONSULTATION PAPER

1.34 This consultation paper comprises six further chapters and two appendices.

(1) In Chapter 2, we offer an introduction to the core problem that digitisation and decentralisation pose for private international law. We also set out our overall approach to the problem. This chapter does not contain proposals for reform.

(2) In Chapter 3, we explain the bases on which a court might accept international jurisdiction to hear a case with a cross-border element. We introduce the rules of international jurisdiction that apply in England and Wales that are often referred to as the "gateways for service out of the jurisdiction". We consider the

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

15 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.

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

17 We do, nevertheless, wish to thank Professor Andrew Dickinson and Professor Alex Mills, who have both generously continued to support us in an advisory capacity throughout the project.

crypto-token cases over which the courts of England and Wales have accepted international jurisdiction and note that most of these so far have comprised applications for interim orders in cases of fraud or hacking.

(3) In Chapter 4, we make provisional proposals for a new free-standing information order. This would assist claimants at the initial investigations stage of proceedings where the pseudo-anonymous and decentralised nature of the crypto-token environment present significant obstacles to formulating and issuing a fully pleaded substantive claim in the courts. We also set out how we think certain gateways for service out of the jurisdiction are to be interpreted in the context of claims relating to crypto-tokens.

(4) In Chapter 5, we explain the different approaches to applicable law or the "conflict of laws". We demonstrate the challenges that truly decentralised phenomena present to the existing approach to resolving conflicts of law, which requires courts to identify "the" applicable law from a range of potential options. We provisionally conclude that an alternative approach is required for cases where the degree of decentralisation is such that a forced application of the existing rules mean that the benefits of the existing approach to the conflict of laws are no longer being delivered.

(5) In Chapter 6, we set out our provisional proposals for resolving a conflict of laws in cases where the degree of decentralisation is such that a different approach is required. We illustrate our proposals by reference to (i) contracts allegedly arising in a wholly decentralised finance application and (ii) property disputes in relation to crypto-tokens arising in a wholly decentralised environment.

(6) In Chapter 7, we focus on applicable law issues arising from the ETDA 2023. In particular, we discuss section 72 of the BoEA 1882 as an area of private international law that we have identified as ripe for reform, independently of the digital and decentralised context we were initially asked to consider. We make proposals for reform to section 72 of the BoEA 1882.

(7) Chapter 8 contain a list of all the consultation questions.

1.35 In Appendix 1 to this report, we list the terms of reference for our project.

1.36 In Appendix 2 to this report, we include a list of consultees who responded to our call for evidence, together with a list of stakeholders with whom we have met during the project.

THE TEAM WORKING ON THIS PROJECT

1.37 The following members of the Commercial and Common Law team have worked on this Consultation Paper: David Hertzell (senior counsel), Laura Burgoyne (team manager), Amy Held (lawyer), and Christopher Long (research assistant). Additional research and support has been provided by Saiba Ahuja (research assistant).

1.38 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 Advisory 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, but the provisional proposals and questions in this consultation paper have been determined by the Commissioners.

Chapter 2: Overview of the problem and our general approach

2.1 In this chapter, we give a brief overview of private international law and the novel challenges that modern technological developments pose for this area of the law. A fuller background was included in our call for evidence.[18]

2.2 This chapter does not contain any provisional proposals for law reform.

THE CORE PROBLEM

2.3 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 borders. 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".[19] Issues of private international law arise because "law has become the prerogative of territorial sovereigns, whereas human affairs freely cross state and national boundaries".[20]

2.4 The conditions giving rise to questions of private international law have existed since ancient times. These questions began to arise "as members of different societies whose legal systems had sufficiently matured began to deal with one another … [and this was] as early as the fourth century BC".[21] 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 them become increasingly pervasive and complex. In this respect, the advent of information technology in the late 1980s was a catalyst of socio-economic change that has had a significant impact on private international law.

2.5 Today, the internet allows human affairs to be conducted in real time across national borders 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.

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18 Digital assets and ETDs in private international law: which court, which law? (2024) Law Commission Call for Evidence, chs 3, 4, and 6.

19 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.

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

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

Territoriality

2.6 To understand these challenges better, it is important to understand that the general principle of international law since the 17th century has been that sovereign authority is limited to geographically defined territories. This is often known as the "territoriality principle" and it continues to form one of the main operating principles of both modern public international law and modern private international law.

2.7 Depending on the context and type of sovereign act in question, the territoriality principle applies in slightly different ways. Three types of acts can be distinguished in public international law, which are reflected in private international law. These can be illustrated by asking three basic questions.

(1) When can a person or set of facts be subjected to the laws of a particular sovereign state? For example (and while the answer may seem self-evident in today's globalised world), must tourists comply with the laws of the foreign country to which they travel whilst on holiday there? Do they continue to be subject to the laws of where they usually live, even when they travel abroad? The application of a state's laws to a set of facts or person is an exercise of "prescriptive jurisdiction" and roughly corresponds with the "applicable law" question in private international law.

(2) When can a sovereign state exercise coercive power or control over persons or property? For example, can a bailiff or other enforcement officer of England and Wales seize assets physically located in a foreign country and commit the person in possession of them to custody? Committing a person to custody or seizing their assets is an exercise of "enforcement jurisdiction" and roughly corresponds with the "recognition and enforcement" question in private international law.

(3) When can a sovereign state assert power through its national courts? For example, can the courts of England and Wales summon a person who lives abroad to defend a claim issued against them here, or summon a foreign witness to give evidence in the proceedings? This is the exercise of "adjudicatory jurisdiction". It engages prescriptive jurisdiction insofar as a court will be applying the substantive law of a sovereign state to a set of facts. It also involves enforcement jurisdiction insofar as litigation usually results in a judgment that parties wish to enforce. "Adjudicatory jurisdiction" roughly corresponds with the "international jurisdiction" question in private international law.

2.8 The territoriality principle underpins each of these three types of sovereign acts, but with certain distinctions:

(1) Enforcement jurisdiction is strictly territorial: a state may only commit a person to custody or seize their assets when the person or assets are within the state's territorial boundaries.

(2) Prescriptive jurisdiction is less clear cut. The general rule is that the laws of a state apply within its territorial boundaries, but not generally outside them. However, what counts as "within the territorial boundaries" for these purposes is

a complex question. Many states extend parts of their law extraterritorially to their nationals or residents, or on the basis of other accepted justifications. For example, states 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.[22]

(3) Adjudicatory jurisdiction is also less clear cut. In private law matters, the general rule of international jurisdiction is that the claimant must sue in the "home" court of the defendant. Most legal systems additionally admit grounds of jurisdiction based on other factors. Typically, what is required is an "adequate link" between the facts and issues of the case and state in whose court the claim is being litigated.

2.9 Against this backdrop, private international law has traditionally placed significant emphasis on geographical location within the territory of a sovereign state when determining in which national court parties should litigate their dispute and which national system of law should be applied to resolve it.

2.10 This emphasis on territoriality is apparent on the face of the traditional rules that private international law uses to answer these questions. These rules are typically expressed in territorial terms, such as "the courts of the place where the property object is situated" or "the law of the place where the damage occurred". The result is that persons and objects physically located within the territorial boundaries of a country will be subject to the courts and laws of that country; and acts or events occurring within the territorial boundaries of a country will be subject to the courts and laws of that country.[23]

2.11 In the past, these rules were quite effective in resolving conflicts of jurisdictions and of private laws. In the 17th century social and economic contexts in which the foundational principles of international law were developed, persons, objects, acts, and events typically only could "exist" or "occur" in one place at a time. Application of the traditional rules of private international law pointed to a single place – and therefore a single legal system – to the exclusion of all others. It was therefore easy to resolve conflicts of jurisdiction and of private laws to reach a relatively clear and straightforward answer to the questions with which private international law is concerned to resolve.

Challenges to territoriality

2.12 The changes precipitated by information technology in more recent times pose challenges for private international law because they challenge this underlying 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

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[22] 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.

[23] Territoriality is thus the premise of modern private international law. It underpins the rules of international jurisdiction and applicable law in slightly different ways. These we consider in more depth in chs 4 and 6.

> 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.[24]

2.13 The basic problem is, therefore, that application of the traditional rules of private international law in an increasingly globalised socio-economic environment usually points to a multiplicity of places rather than a single place. It therefore becomes harder to resolve conflicts of jurisdictions and of applicable laws because no single national court or single system of private law emerges as the clear "winner" over each of the others.

2.14 To illustrate these issues in the digital and decentralised context under consideration in this project, we discuss three technological trends that have been increasingly posing problems for private international law since the 1980s: digitisation, the internet, and distributed ledger technology (DLT).

Digitisation

2.15 The traditional rules of private international law for property disputes are a helpful starting point. These use the place where the property object is situated as the "connecting factor",[25] that is, one particular feature of the facts and issues of the case that "connects" a property dispute to a single country. For example:

(1) property disputes should be litigated in the courts of the place where the property object giving rise to the dispute is situated (the *forum rei sitae* rule, which is often abbreviated to *forum situs*);

(2) property disputes should be resolved by the law of the place where the property object giving rise to the dispute is situated (the *lex rei sitae* rule, often abbreviated to *lex situs*); and

(3) recognition and enforcement of a judgment on a property dispute may be refused if, in the view of the court where recognition and enforcement is sought, the property object giving rise to the dispute was not actually situated in the place in which the parties had litigated.

2.16 These rules are inherently territorial. They prescribe simply and without further qualification that property disputes should be litigated in the courts of the place where the property object is situated; and that the law of the place where the property object is situated should determine which of the parties will win.

2.17 For traditional objects of property rights, such as land or tangible objects such as cars, these rules are quite effective. Land, of course, does not change location, so

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[24] 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* (2024) p 190.

[25] We discuss connecting factors in more detail from para 3.21 of our Call for Evidence.

application of the rules is particularly straightforward in this context,[26] but even tangible things that can cross borders will only ever exist in a single place at any particular time.

2.18 Application of these traditional rules for property disputes will therefore generally point to a single place – and a single legal system – to the exclusion of all others. Conflicts of jurisdictions and of applicable laws are therefore easily resolved; and the parties will know in which court they should litigate their dispute and which law will be applied to it with relative certainty that any judgment will be recognised and enforced in the courts of other countries.

2.19 Intangible things, including digital things, exist "nowhere" in terms of a physical place simply by virtue of the fact that they are intangible. As such, they are not constrained by concepts of physical location and cannot be said to be located within the territorial boundaries of a country with the same ease as land or a car. Yet that is not in itself a problem for private international law, which has long developed methods for dealing with objects with no physical existence. Private international law is ultimately concerned with finding some feature of the facts and issues of the case that convincingly connects the legal issue in dispute to a single country. In this, a wide range of considerations – physical, factual, and legal – may be taken into account.

2.20 As we have said, such features that "connect" a legal issue to a country are called "connecting factors". Some of the most relevant connecting factors and rules for our project include: (i) the location of an object of property rights; (ii) the location where an event occurred; (iii) the location of a person; and (iv) personal connecting factors.

2.21 The first three types of connecting factor are called "territorial" connecting factors. This is because they refer simply to place where an act occurs or where an object or a person "is". The traditional rules for property disputes we set out above express territorial connecting factors, namely, the place where the property object is located.

2.22 The fourth type of connecting factor is called a "personal" connecting factor. Personal connecting factors reflect personal membership of a community. Prominent examples included the personal tie of civil allegiance to a sovereign authority (nationality) and the personal tie of religion.

2.23 Whilst nationality remains in wide use in public international law, its use has declined in private international law, which tends to use, instead, domicile and habitual residence. These are often referred to as "hybrid" connecting factors. The reasons why one of these may be preferred over another depends on the context and underlying policy of private international law.

2.24 From this, the fact that a debt is an object of economic value that has no obvious physical location does not mean it is impossible to "connect" a dispute arising from a debt to a particular country. All this means is that territorial connecting factors are less

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[26] Even where the territorial borders of sovereign states change, the same plot of land will still usually fall within the boundaries of a single sovereign state. Where a plot of land is divided by a territorial border and therefore falls within the territorial boundaries of two or more sovereign states, the situation is more complex but is usually dealt with at the level of public international law.

helpful. The traditional approach to debts in private international law is to "localise" them using a personal connecting factor in relation to the debtor.

2.25 Other objects that have no obvious physical location might be analysed differently. Digital files, for example, might technically be data or information rather than a legal right, or the digital file might technically exist in (negligible) 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 that convincingly connects the legal issue in dispute to a single country. In this search for a connecting factor, a wide range of features – both physical and legal – may be taken into account.

2.26 As a result, private international law takes a highly analytical and granular approach. 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 search for a 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".

2.27 Given that a physical device can easily be localised in the territorial boundaries of a single country, the existing rules of private international law 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 down the range of potential applicable laws to identify one as being the most appropriate.

2.28 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.

2.29 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.

2.30 If the five devices are located in five different countries, 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.

2.31 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.

2.32 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

2.33 The internet, as a global, interconnected network, gives rise to more difficult problems for private international law. Professor Tobias Lutzi has described the challenges 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.[27]

2.34 From this, a digital file stored online poses more difficult challenges than a digital file stored locally on a hard drive. To understand why, it is important to distinguish between various methods by which the data comprising a digital file is stored online.

2.35 Cloud storage is a mode of data storage in which 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. 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. Where the whole of the data comprising a 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.[28]

2.36 Distributed servers are more challenging. 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.

2.37 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 in identifying where the digital file is "situated". Nevertheless, as with the case of a digital file stored on the

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

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

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.

2.38 One technique is simply to focus on another feature of the object, facts or issues of the case itself as the factor that connects the dispute to a legal system. 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. 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 to identify the courts in which the parties should litigate and the law that should be applied to resolve their dispute arising from the digital file. If rights to the data can only be exercised with the cooperation of the provider, the underlying rationale in private international law is then to focus on that effective control. This essentially means "localising" the issue by reference to the location of the provider. This often makes uses of a personal or hybrid connecting factor based on the provider.

Distributed ledger technology

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

2.40 A distributed ledger is a digital store of information or data. It is shared (that is, "distributed") among a network of computers (known as "nodes"). The nodes may be located anywhere in the world. Distributed ledger technology enables the operation and use of a distributed ledger. Blockchain is a particular type of DLT.[29]

2.41 Blockchain was invented in 2009 and is most commonly known as a feature of Bitcoin. Bitcoin was invented with the express intention of creating an alternative payments system that did not rely on any form of centralised third party (such as a central bank) to ensure that the records of a payments ledger are accurate.[30] Its aim was to decentralise the authority to update the ledger of a payments system across the participants of the payments system itself. In this way, every participant in the Bitcoin payments system has an equally authoritative and definitive copy of the ledger of bitcoin transactions; and participants must collectively agree to proposed updates before they are committed to the ledger according to a defined consensus mechanism.

2.42 DLT was thus deliberately designed as a direct challenge to the traditional concepts of centralised, state-backed authority – including, necessarily, the prerogative of states to make and enforce their own laws. This has popularised a particular type of "anti-

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29 For a fuller explanation of DLT see: Digital assets and ETDs in private international law: which court, which law? (2024) Law Commission Call for Evidence, para 3.84 to 3.137.

30 See the original Bitcoin whitepaper: Satoshi Nakamoto, "Bitcoin: A Peer-to-Peer Electronic Cash System" (2008).

state" ideology, which is often associated with the slogan "code is law" and the notion of a "*lex cryptographia".*[31]

2.43 The term *lex cryptographia* was first coined in 2015 and refers to "rules administered through self-executing smart contracts and decentralized (autonomous) organizations".[32] It reflects the original Bitcoin ideal in its suggestion that, to determine the "law" applicable to a particular transaction or dispute within a DLT system, there is no need to look outside the system itself. This proposition – that the "code is law" – says that the system itself, by virtue of its technological structure, automatically and necessarily executes transactions and that what the code does must, by its very nature, be correct.

2.44 Taken to its most extreme, this leads to the conclusion that DLT will obviate the need for the law, being another form of centralised authority. This proposition underpinned at least the original conceptions of, and use cases for, DLT. It has been explained as follows:

> In a system regulated by self-enforcing smart contracts and other technical arrangements, there is less of a need for judicial enforcement, because the way in which the rules have been defined—the code—is the same mechanism by which they are enforced. Over time, law and code may merge, so that the only way for people to infringe the law is to effectively break the code.[33]

2.45 From this, Bitcoin and the decentralised ideal is the starting point for understanding the challenges that DLT potentially poses to private international law.

2.46 Bitcoin is wholly permissionless. To begin, 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.[34] Furthermore, once the source code is downloaded and installed, the device on which the source code is stored becomes a "node" and participates fully in the DLT network in accordance with the ideal of decentralised trust. In sum:

(1) All nodes may propose updates to the blockchain ledger of Bitcoin transactions (that is, send bitcoin to another node).

(2) All nodes contribute to the processing and validating of all proposed updates to the blockchain ledger of bitcoin transactions.

(3) All nodes store a complete and up-to-date version of the blockchain ledger of bitcoin transactions. There is no "master" copy of the blockchain ledger; each

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31 A Wright and P de Filippi Primavera, "Decentralized Blockchain Technology and the Rise of Lex Cryptographia" (2015). https://ssrn.com/abstract=2580664.

32 Above, p 4.

33 A Wright and P de Filippi Primavera, "Decentralized Blockchain Technology and the Rise of Lex Cryptographia" (2015) https://ssrn.com/abstract=2580664, p 26.

34 The Bitcoin source code is made available freely to download at https://bitcoin.org/en/download.

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

2.47 From this, the challenges that such decentralisation poses to private international law can be demonstrated in the following comparison between cloud storage services and the Bitcoin system.

(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 can be used to connect the dispute to a legal system 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 like the Bitcoin blockchain, the ledger is deliberately designed so that updates to the ledger require the participation of every node of the DLT network:

(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.

2.48 In these circumstances of true decentralisation, the techniques used by private international law to connect the facts and issues arising in a case to a single legal system are no longer as effective. Unlike in the cases of cloud storage services or digital files stored offline, there is no single feature in a wholly decentralised DLT network that emerges as particularly prominent, such that it may be effectively used as a connecting factor.

2.49 The fundamental challenges that decentralised phenomena thus pose to private international law 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".[35] Thus, the problem is not that the objects have no genuine connections to a single territory. Rather, it is that they exhibit too many genuine connections to too many territories, each in equal measure.[36] The problem is, therefore, not that some types of modern digital objects exist "nowhere" but that they exist "nowhere and everywhere at the same time".[37]

2.50 That said, it is important to recognise that not every use of DLT will give rise to these problems of "omniterritoriality" in private international law. Many subsequent

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

36 Above.

37 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.

developments in the DLT sphere do not subscribe to the Bitcoin ideal of total decentralisation.

2.51 One example is the eco-system of intermediaries that has developed around the bitcoin and other cryptocurrency networks. Most users of bitcoin do not actually participate in the Bitcoin DLT network as a node. Rather, they use third-party crypto service providers, such as crypto exchanges and wallet providers, who intermediate participation in a DLT network. Crypto intermediaries such as these provide a strong point of centralisation that mitigates considerably the challenges that DLT can pose for private international law. As with the cloud service provider discussed above, these intermediaries can often convincingly connect a dispute arising in the crypto-token context to a legal system.

2.52 In addition, subsequent developments in DLT, notably the Ethereum DLT network, precipitated a further range of practical applications of DLT that are not necessarily intended as an alternative and decentralised payments system. In many cases, DLT is used to streamline existing commercial or administrative processes and practices, rather than create a crypto-token that is valued in itself as an object of property rights (like an art non-fungible token (NFT) or so-called cryptocurrency).

2.53 In the financial markets, for example, DLT is often used specifically as a ledger or record of transactions in relation to other financial assets, such as a registered security, or to streamline the process the issuance of securities in the primary financial markets. In the banking sector, central banks around the world are exploring DLT solutions to issue “central bank digital currencies” as an electronic version of state-backed currencies.

2.54 Another core use of DLT has been in the context of electronic trade documents, such as electronic bills of lading and electronic bills of exchange. Wave BL and Enigio AB are two service providers that facilitate use of electronic trade documents through a DLT-based platform. These two service providers, however, work at different levels of decentralisation.

2.55 Importantly for our purposes, the vast majority of these applications of DLT differ from the Bitcoin system in that they are not intended as a challenge to centralisation and do not typically operate on a permissionless basis. Typically, the software underpinning these networks were developed by private technology 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 licensing agreement between the system operator and the private company that developed and owns intellectual property rights in the DLT application.

2.56 More significantly, commercial applications of DLT are generally permissioned or private networks in which participation is restricted by the system operator. Unlike the Bitcoin system, only those who have been admitted to the system by the system operator may participate in the DLT system. The system operator is, therefore, often referred to as a “gatekeeper”. In addition, the system operator typically also reserves to itself the authority to commit updates to the ledger. There is, therefore, a strong degree of centralisation present in the system operator or “gatekeeper” to the DLT

systems used in commercial practice, which can therefore be used as connecting factor for the purposes of private international law.

2.57 In this way, DLT is used in wide range of commercial contexts, to varying degrees of decentralisation, and for various different reasons. For example, blockchain bonds, so-called “cryptocurrencies” such as bitcoin, tokenised securities, stablecoins, and some electronic bills of lading are all “crypto-tokens” created by use of DLT. There is no accepted taxonomy in the market, regulatory contexts, or legal contexts for labelling these different types of crypto-tokens,[38] which can give rise to significant difficulties when discussing and distinguishing these different use cases.

2.58 From this, it is difficult to describe or assess the challenges that DLT poses for private international law in any general way because the technology is deployed in such a wide variety of ways and for different purposes, not all of which will necessarily be decentralised. It is, therefore, particularly important to identify why particular use cases of DLT are more problematic for private international law than others. As we discuss below, this is the approach we have taken.

OUR GENERAL APPROACH

2.59 Our terms of reference are very broad and potentially cover a wide range of use cases. These include but are not limited to, for example:

(1) electronic trade documents (which may or may not use DLT);

(2) Bitcoin and other “native”[39] crypto-tokens 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 DLT in the financial markets and which, in substance, may fall within the regulatory perimeter, such as initial coin offerings, tokenised securities/tokenised financial instruments, or blockchain bonds to raise traditional finance;[40]

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

(7) Decentralised autonomous organisations (“DAOs”), a type of internet-based collaborative organisation that coordinates people (potentially unknown and

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38 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).

39 A "native” crypto-token" is the primary digital “currency” or token that is created and used exclusively on a specific DLT system, essentially acting as the foundational currency of that network, like Bitcoin (BTC) on the Bitcoin blockchain or Ether (ETH) on the Ethereum blockchain.

40 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.

pseudo-anonymous, located all over the world) and resources using rules expressed in computer code.[41]

2.60 We were, therefore, faced with early decisions as to how to approach and structure our project. We set out key aspects of our general approach below.

Identifying our priorities

2.61 We recognised at the outset that DLT is used in a wide variety of commercial contexts for a wide variety of purposes, giving rise to a wide range of crypto-tokens. We took the decision, however, not to make distinctions on the basis of how DLT is used in commercial practice, such as by reference to "tokenised securities", "electronic trade documents", and "bitcoin". This is because we thought that structuring our project by reference to commercial practice might result in a fragmented discussion of the underlying issues insofar as they are generally relevant and problematic for private international law.

2.62 For example, an NFT bill of lading and a tokenised bottle of rare whisky are two applications of DLT arising in different commercial sectors and which use different terminology. However, the underlying analysis for private international law is largely the same for both. We decided, therefore, to take an overall approach that would reflect the methodology of private international law as the specific area of law that we have been asked to consider, and to focus on addressing the issues that truly pose problems for this specific area of law. As we have demonstrated, the real issue that DLT potentially poses for private international law is decentralisation. The extent to which any application of DLT is decentralised is not, however, always clear from various commercial applications or by reference to terms that reflect a particular commercial usage.

2.63 Since publishing our call for evidence, we have considered in more detail the principles we would apply within that overall approach. We have based our approach to this consultation paper on three core principles, each of which we discuss below:

(1) law reform only where truly needed;

(2) focusing on identifying the underlying policy promoted by the relevant rule of private international law, not geographical fictions; and

(3) maintaining an international outlook.

Law reform only where truly needed

2.64 One of our stated core objectives for the call for evidence was 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.

2.65 Implicit in this objective was the view that legislative intervention should be reserved for issues that cannot be satisfactorily accommodated by the existing framework,

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41 See: Decentralised autonomous organisations (DAOs): Scoping Paper (July 2024), Law Com.

including by common law development through the courts. Our preliminary views in this regard had been as follows.

(1) Truly decentralised applications of DLT 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 DLT will be less problematic, and many of these will be easily accommodated within the existing law.

(3) The online and digital contexts in general will be less problematic for the existing law. It might be possible to accommodate them within the existing law, but the extent of the challenge will fall along a spectrum according to the individual use cases, such that some might be easily accommodated with no significant problem, whereas others will pose some, or even significant, difficulty.

2.66 Many stakeholders agreed with us on both the approach and our preliminary assessments.

2.67 In their written response to our call for evidence, Hogan Lovells said that, while they had identified "points for clarification and certain gaps that need to be filled", this should be done as far as possible "using a minimal intervention approach". Herbert Smith Freehills also stressed that it was important to consider any rule as it applies generally, and not just in the digital context. The International Swaps and Derivatives Association (ISDA) and Financial Markets Law Committee (FMLC) agreed that permissioned systems will generally be easy to accommodate by the existing framework.

2.68 From these responses, much of our work in this project is less about proposing law reform, and more about discussing how the existing rules might apply in the digital and decentralised contexts. This we do primarily through the FAQs we have published on ETDs, on digital assets, and on property and permissioned DLT systems.[42]

2.69 Stakeholders told us that this would be helpful. For example, the Society of Trust and Estate Practitioners ("STEP") said that:

> even if [the issues are] not settled by legislation, we believe that any decision by the court setting a common-law precedent would benefit considerably from the detailed analysis that could be provided by the Law Commission, rather than relying on the specific parties to a dispute to present the arguments.

2.70 There was also clear consensus at our digital assets practitioner roundtable in April 2024 that new rules were not generally required; what would be more helpful is guidance on how the existing rules should be interpreted and applied.

[42] See ch 1 para 1.22 onwards.

2.71 From this, we only provisionally propose law reform where the issue cannot be satisfactorily accommodated by the existing rules at all, or not without the need for significant modification.

Underlying policy, not fictions of geographical location

2.72 The core issue we considered in our Digital Assets FAQ was the nature of the challenge that modern digital assets pose for the traditional *forum* and *lex situs* rules.[43] We recognised that private international law often seems to be asking a question that ultimately requires us to identify the geographical location of an object.

2.73 We have seen above that private international law has long developed techniques for dealing with objects that do not have an obvious physical location. Typically, the emphasis is on where the property object can be effectively dealt with. Thus, patents are usually "localised" by reference to the register in which the relevant entitlements are maintained, and debts are traditionally "localised" by reference to the debtor. From this, it has become conventional in some parts of the private international law discourse to refer to the "artificial" *situs* of intangible objects.

2.74 We recognise the intuitive appeal of such expressions. However, we consider that such expressions can be unhelpful because they obscure the nature and ultimate objective of the exercise, as well as the policy considerations that it engages. Ultimately, private international law is concerned to identify the most appropriate national court in which the parties to a cross-border dispute should litigate, and the most appropriate national law to resolve their dispute.

2.75 Where the object that has given rise to a property dispute has obvious physical features, the traditional *forum* and *lex situs* rules work relatively well. It is, therefore, not usually necessary to undertake a more detailed analysis of the policy considerations that underpin these traditional rules. Where, however, the object does not have obvious physical features, these underlying policy considerations come to the fore.

2.76 We therefore said that it is preferable to think of the apparent "localisation" exercise in terms of the objectives of private international law: to find something in the facts or issues of the case that convincingly connects the legal issue in dispute to a single country. In this, a wide range of considerations – physical, factual, and legal – may be taken into account. The fact that the object that has given rise to a dispute lacks obvious physical features is, therefore, not necessarily problematic for the case as a whole.

2.77 Framing the ultimate objective in terms of a geographical location can potentially be unhelpful in the broader legal context. This is because other areas of law, including tax law and financial services regulation, also focus in some contexts on questions of geographical location (of a person, or action). This can make it seem like each of these areas of law are asking the same question, and therefore should return the same answer. However, this is not the case. Different areas of law are underpinned by different objectives and policies that influence significantly both how the question is

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[43] Digital assets in private international law: FAQs on the relationship with tax law, banking regulation, and the financial markets (2025) Law Commission Paper, p 4 to 9.

approached and the process of finding an answer. The “location” of a person or act for one legal purpose need not, therefore, be the same as the “location” for another.

2.78 This is important to bear in mind, even within private international law. it cannot be assumed that there can only be one single “place” where a digital asset or ETD can be “localised” for the purposes of private international law. To begin, international jurisdiction and the conflict of laws are underpinned by different methods, objectives, and underlying policy considerations.

2.79 In addition, we have said that it is critical to appreciate that the rules of private international law do not apply “to” crypto-tokens, ETDs, or other digital and decentralised phenomena. Rather, the rules of private international law apply to the different types of legal rights, obligations, and relationships that arise in relation to these things. These rules are organised in categories that are largely based on the familiar categories of private law, such as contract, tort, and property, but do not mirror the definitions used in private law.

2.80 From this, it is important to appreciate that each of these categories of rules are guided by their own specific internal policies. Contract, for example, is concerned with obligations voluntarily assumed, often in the commercial context. Tort, by contrast, is concerned with allocating loss between a claimant who has suffered loss through no fault of their own, but at the hands (and often, unintentionally) of the defendant. Property, on the other hand, is ultimately concerned with determining which of two (usually innocent) parties’ claims to a property entitlement should take priority.

2.81 It is important to keep in mind these various policy considerations, specific to each area of private law, that are inherent in the rules of private international law. This is because these policy considerations drive considerably the process of interpretation of the rules in cases, such as in the digital and decentralised contexts, where the proper interpretation of the rule is not immediately clear. As we will see, the search for a connecting factor in these difficult cases is not a random process, but is guided by the principles and policies that underpin both private law and private international law.

An international outlook

2.82 Private international law is a domestic body of law. As such, our project is concerned with the private international law of England and Wales. We are, however, aware that it is equally important to emphasise that the private international law of any one jurisdiction operates in the international context. Even though we are concerned with the law of England and Wales, private international law is a unique body of domestic law insofar as it is only ever engaged when there is a “foreign” element to the facts and issues of the dispute.

2.83 Our terms of reference for this project require us to consider equivalent international rules and developments, and we recognise the importance of maintaining an international outlook. Rules of private international law are most effective when harmonised, or at least coordinated, across jurisdictions.

2.84 The benefits of harmonised approach are, perhaps, most apparent in the recognition and enforcement of judgments: where states have agreed the bases on which international jurisdiction should be asserted, the risks of a judgment being

subsequently refused recognition and enforcement among these states (on the basis that the court rendering the judgment did not have jurisdiction over the claim) is greatly reduced. One of the core objectives of the Brussels I Regulation on Jurisdiction was the free circulation of judgments amongst the Member States.[44]

2.85 International coordination also ensures a consistent application of the rules of private international law among national courts. In this respect, it is important to recognise that, in practice, the answer to the "jurisdiction" question will have considerable influence over the "applicable law" question.

2.86 For all these reasons, we have been engaging with stakeholders at both domestic and international levels. This has included bilateral discussions with experts from different jurisdictions around the world, including the US, Canada, Australia, Japan, and various EU Member States. We have also been active members of the UK delegation to the Hague Conference on Private international Law (HCCH) on their current work on Digital Tokens.[45] The HCCH is an intergovernmental organisation whose unique mandate is "the progressive unification of the rules of private international law".[46]

2.87 We will continue to engage with the international community and experts and stakeholders from a wide range of jurisdiction as our project moves into its next phase.

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44 Brussels I Regulation on Jurisdiction (EU) No 1215/2012, Official Journal L 351/1 of 12.12.2012.

45 Amy Held has been sitting for the Law Commission as part of the UK delegation to the HCCH Digital Tokens project. For details, see https://www.hcch.net/en/projects/legislative-projects/digital-tokens1.

46 Article 1, Statute of the Hague Conference on Private International Law 1955.

Chapter 3: International jurisdiction – an overview and the current position

3.1 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 or that otherwise has links to other countries.

3.2 In this chapter we explain the general principles of jurisdiction, and the core challenges that digitalisation and decentralisation pose for this branch of private international law. We review the cases so far that have considered jurisdiction in a crypto context and identify a range of challenges highlighted by the judgments. In the next chapter, we discuss potential solutions to these challenges and make proposals for reform.

GENERAL PRINCIPLES OF INTERNATIONAL JURISDICTION

3.3 When a dispute has a cross-border element, in which country's courts should that dispute be heard? Although the rules of civil procedure around the world differ and a wide variety of considerations are discussed in the literature, two key considerations emerge as underpinning the rules of international jurisdiction to inform the answer to this question.[47]

3.4 The first consideration relates to the fairness and everyday practicalities of the litigation in question. This concerns a wide range of issues relating to the conduct of litigation itself. Some are inherently practical, such as the languages that the parties speak and whether litigating in a particular forum will entail logistical issues such as considerable travel for all those required to be present in court. Other considerations are concerned with justice in a more abstract sense, such as providing access to the courts to obtain an effective legal remedy.

3.5 The second issue reflects the need for the courts of one country to justify the assertion of international jurisdiction over a private law dispute if the dispute also has links to other countries. This often involves asking whether a state, acting through its courts, may assert sovereign authority over the defendant by summoning them to its courts and subjecting them to its processes.

3.6 By contrast, there is usually little need to justify this assertion of judicial authority over a claimant. By 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 referred to as that party's "voluntary submission to the jurisdiction".

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47 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) 20(2) *Journal of Private International Law* 391.

3.7 Unlike the claimant, the defendant is not usually a voluntary party to the litigation. Rather, the defendant is 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 does not voluntarily submit to the jurisdiction or challenges the court's jurisdiction, summoning the defendant to court to answer the claimant's case requires more justification. It is for this reason that questions of international jurisdiction frequently involve considerations of when and why a court may assert judicial authority over the defendant.

An "adequate link" between the country and the litigation

3.8 Reflecting these considerations, it will usually be appropriate for the courts of one country to assert jurisdiction over a private dispute with connections to other countries if there is an "adequate link" between the country whose courts are asserting jurisdiction, and either of (i) the defendant; or, alternatively (ii) the facts and issues of the case. In the rules of international jurisdiction, these two alternative bases for establishing an "adequate link" are typically kept distinct and are governed by different principles. We therefore consider them separately.

An adequate link between the country and the defendant

3.9 The general rule of international jurisdiction, which lies "at the root of all international, and of most domestic, jurisprudence on the matter", is that the claimant must sue in the "home court" of the defendant.[48] The defendant's "home court" is often referred to as the court that exercises "ordinary personal jurisdiction" over the defendant.

3.10 Most domestic systems of civil procedure expressly set out the situations in which a country considers that its relationship with a person is sufficiently strong to subject that person to the ordinary personal jurisdiction of its courts. There are many different ways to conceptualise and define such personal tie between a person and a country or state. In public international law, nationality is generally used. By contrast, in private international law, use of nationality has declined in favour of habitual residence and domicile.[49] Even within private international law, however, "habitual residence" and "domicile" are defined according to slightly different criteria, depending on the context.

3.11 The rules of international jurisdiction based on the country's relationship with the defendant personally tend to differ between legal systems only in the nature and strength of the personal tie to the country required. Such ties may include, for example:

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

49 These principles can be clearly seen in the EU rules of international jurisdiction, which generally require a relationship of domicile between the defendant and the state. Thus, the general rule in Article 4 of the Brussels I Regulation (Recast) provides that, subject to the special rules contained in the Regulation, "persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of the Member State".

(1) for natural persons, mere physical presence within the territorial borders, even for the most fleeting period of time,[50] or for legal persons any fixed place of business within the territorial borders;[51]

(2) domicile within the territorial borders.[52]

3.12 Where the defendant does not have these kinds of personal ties to the country in which the claimant issues proceedings, something else is required to justify summoning them to the courts of that country. In these circumstances, a clear link between the facts, issue, or nature of the case and 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. We look at this further below.

3.13 First, we emphasise that, as between the two alternative bases for establishing an adequate link, there is long-standing international consensus that the link with the defendant takes precedence as the basic rule of international jurisdiction.[53] This rule is often referred to in Latin: *actor sequitur forum rei*, that is, "the claimant follows to the courts of the matter in dispute", where the "courts of the matter in dispute" is understood as the "home court" of the defendant. We explained the reason for this emphasis on the defendant, rather than the claimant, above.

An adequate link between the country and the facts and issues of the case

3.14 In addition to the general rule pointing to the home court of the defendant, most legal systems admit additional or supplementary grounds of international jurisdiction. These continue to reflect the basic principle of international law that there is an "adequate link" between a country and an object, event, or person relevant to the case over which it asserts sovereign authority. This will cover, for example, territorial links based on where an act occurred, where damage was sustained, or where objects of property rights or a person was located at the relevant time.

3.15 In appropriate situations, these grounds of jurisdiction can be used as an alternative to the default rule that the claimant sues in the home court of the defendant. In rare and well-defined situations, they may displace the general rule as an exclusive rule of international jurisdiction.

3.16 For example, in disputes concerning property rights in relation to immovable property (that is, land and buildings), there is near-absolute consensus at the international level that these must be litigated where the immovable property is located.[54] That is, the courts of the place where the immovable is situated have exclusive jurisdiction over

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50 A Briggs, *The Conflict of Laws* (4th ed 2019) p 99.

51 This is the approach, in principle, taken in England and Wales.

52 This is the approach predominantly taken in the EU.

53 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.

54 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris, and Collins on the Conflict of Laws*, (16th ed, 2022), para 24-003. See also *Kireeva v Bedzhamov* [2024] UKSC 39, [2024] 3 WLR 1010 at [1] by Lord Lloyd-Jones and Lord Richards.

property claims in relation to an immovable;[55] and courts must refuse recognition and enforcement of a foreign judgment ruling on property rights relating to immovables if the immovable was not situated in the territory of the foreign court.[56] There is a long-standing common law rule that the courts of England and Wales do not accept jurisdiction over claims whose substance depends on establishing title to foreign land.[57] We discuss this special rule of exclusive jurisdiction – the *situs* rule – further below.[58]

3.17 Otherwise, the supplementary nature of international jurisdiction based on an adequate link between the country and the facts and issues of the case itself (as opposed to the adequate link with the defendant) is apparent in both the rules of the EU and of England and Wales. Under the Brussels I Regulation, these rules are contained under the heading "Special Jurisdiction", with additional and exclusive grounds for specific types of cases.

3.18 In England and Wales, the grounds of international jurisdiction based on an adequate link between the country and the facts and issues of the case itself are found in the gateways for service out of the jurisdiction (discussed in detail below). Service out of the jurisdiction is sometimes said to be an exceptional or "exorbitant" exercise of jurisdiction.[59] Although the appropriateness of this terminology has been questioned,[60] there does remain a significant difference between service out of the jurisdiction and service within the jurisdiction. The permission of the court is required to serve proceedings on a (foreign) defendant out of the jurisdiction, whereas a claimant may serve proceedings on a defendant within the jurisdiction "as of right".

The relationship between jurisdiction and enforcement

3.19 It is crucial to note that there are very practical reasons for ensuring that international jurisdiction is properly founded in any particular case. This is to do with the recognition and enforcement of judgments.

3.20 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 of another country. Most courts, when faced with a request to

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55 See, eg Art 24(1) of the Brussels I Regulation (Recast). See also E M Kieninger, "Immovable Property", in J Basedow and others (eds) *Encyclopaedia of Private International Law* Vol 2 Entries I-Z (2017), p 893; L d'Avout, "Property and Proprietary Rights", in Basedow and others (eds) *Encyclopaedia of Private International Law* Vol 2 Entries I-Z (2017), p 1429; Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris, and Collins on the Conflict of Laws*, (16th ed, 2022), para 23-009 fn 16 and text.

56 See eg Article 6 of the Hague Judgments Convention 2019. See also *Kireeva v Bedzhamov* [2024] UKSC 39, [2024] 3 WLR 1010.

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

58 From para 3.117.

59 For the origins of this expression see: Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 7-009.

60 *Abela and others v Baadarani and Another* [2013] UKSC 44, [2013] 1 WLR at [53] to [54] by Lord Sumption. See also A Briggs, *Civil Jurisdiction and Judgments* (7th edn 2021) para 24.06; A Mills, "Exorbitant Jurisdiction and the Common Law" in J Harris and C McLachlan (eds) *Essays in International Litigation for Lord Collins* (2022) p 256 to 260.

recognise and/or enforce the judgment of a foreign court, will consider the circumstances in which the foreign court accepted international jurisdiction before proceeding to determine the claim and render the judgment in question. This "review" of jurisdiction 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.[61]

3.21 It is important to consider how any reforms we propose for jurisdiction may affect recognition and enforcement of our judgments in other jurisdictions. To put the extreme case, if England and Wales were to adopt an approach to jurisdiction considered by other countries to be wholly inappropriate, those countries could be less willing to recognise or enforce judgments made by the courts of England and Wales on the basis that our courts lacked jurisdiction to hear the case. This would be extremely harmful for claimants in England and Wales who would incur the time and monetary costs of court proceedings to obtain a judgment which could ultimately be of very limited use to them.

3.22 More broadly, it may affect the reputation of the courts in this jurisdiction, and ultimately negatively impact the approach to recognition and enforcement of our judgments generally. It is worth noting that the UK is party to the 2019 Judgments Convention.[62] Article 5 sets out the bases on which a judgment is eligible for recognition and enforcement in Contracting States, and Article 7 provides grounds on which recognition and enforcement may be refused. It is often helpful to keep these in mind when considering the grounds of direct jurisdiction.

3.23 All in all, it is important that any reforms that we propose would not only be good for the law and courts of England and Wales, but would also be acceptable and justifiable from an international perspective.[63] A different way of saying this is that there must of course be some principled basis for any reforms.

The current rules of international jurisdiction in England and Wales

3.24 Under the common law rules of England and Wales, the general principle is that "where there is service, there is jurisdiction": if a defendant can lawfully be served with proceedings, the courts will assert jurisdiction over the defendant.[64] It is for this reason that our rules for defining jurisdiction are framed as rules to determine whether and when it is lawful to serve proceedings on the defendant.[65]

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61 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.

62 The Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

63 D Foxton, "The jurisdictional gateways – some (very) modest proposals" [2022] *Lloyd's Maritime and Commercial Law Quarterly* 70.

64 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins on the Conflict of Laws* (16th ed 2022) para 11R-001; A Briggs, *Civil Jurisdictions and Judgments* (7th ed 2021) para 21.02.

65 A Briggs, *The Conflict of Laws* (4th ed 2019) p 46.

3.25 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 proceedings and thereby be brought under the jurisdiction of the courts of England and Wales.[66] In principle, it does not matter how long the defendant was present in the territory or the reason why they were there.[67] Physical presence alone suffices. There are various rules on how service can be effected, including personally delivering the claim form to the defendant,[68] or by post to a specified address.[69] Claimants may serve proceedings within England and Wales "as of right", that is, without the need to obtain permission of the court.[70]

3.26 Special rules apply to service on partnerships and companies. For companies, service may be effected at a registered address or at a place within England and Wales where the company carries on business, or at the place of business of the company's legal representatives if authority for that is given by the company.[71]

3.27 Where the defendant (whether a natural or legal person) is within England and Wales, there is clearly a basis on which jurisdiction may be established: the defendant can simply be served within England and Wales. We look now at situations when a claimant seeks to bring a defendant before the courts of England and Wales who is not within the jurisdiction or whose location is not known.

Service out of the jurisdiction

3.28 If the defendant is not physically within (or, as relevant, does not have a place of business or legal representatives in) the territory of England and Wales, a claimant who wishes to bring the defendant to the courts of England and Wales must generally obtain permission from the court to serve the claim form on the defendant outside England and Wales.[72] In the nomenclature of the Civil Procedure Rules (CPR), this is known as "service out of the jurisdiction" or more colloquially amongst practitioners as "service out". Unlike with service within the jurisdiction, claimants must apply to the court for permission to serve out of the jurisdiction. Applications for permission must be made in accordance with Part 6 of the CPR and is done without notice to the defendant. [73]

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66 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".

67 *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.

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

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

70 Civil Procedure Rules, r 6.9.

71 Civil Procedure Rules, r 6.9.

72 There are certain exceptions including in the context of consumer contracts. 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 jurisdiction.

73 In particular, Practice Direction 6B.

3.29 Generally, the court will grant permission (and thereby indicate a willingness to assert international jurisdiction over the claim) if the claimant satisfies the court that the following three conditions are met.[74]

(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 CPR. 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. These establish the "adequate link" between the country and the facts and issues of the case discussed above.

(2) There is a serious issue to be tried on the merits of the claim.[75] This is ultimately a question of fairness to the defendant: the defendant should not be summoned to answer a claim in England and Wales 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).[76]

(3) In all the circumstances, England and Wales is the proper place or "convenient" forum for the trial of the claim.[77] This limb provides the court with considerable discretion to refuse permission, and is the subject of a very detailed line of common law authority.[78] Matters to be taken into account are wide and varied, ranging from the everyday practicalities of litigation to the fairness as between the parties in relation to such practical matters. The proper place to bring the claim is often referred to as the *forum conveniens*.

3.30 Given that our core focus in this project is the ways in which digitalisation and decentralisation challenge the territoriality premise of certain rules of private international law, we focus on condition (1) relating to the jurisdictional gateways. The vast majority of the gateways are framed in territorial terms and are therefore directly relevant to our core focus. Conditions (2) and (3) relate to the fairness and practicalities of the litigation and do not engage the territoriality principle.

The jurisdictional gateways

3.31 The jurisdictional gateways identify the links between the dispute and England and Wales that are considered adequate to justify summoning a foreign defendant to our courts to answer a claim. Historically, at common law, the court would only exercise adjudicatory jurisdiction over defendants within the jurisdiction.[79] However, statutory

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

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

76 Lord Justice Coulson (ed), *White Book 2023*, r 6.37.15.

77 Above, r 6.37(3).

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

79 For a "potted history", see D Foxton, "The jurisdictional gateways – some (very) modest proposals" [2022] *Lloyd's Maritime and Commercial Law Quarterly* 70.

intervention in the 19th century gradually extended the scope of jurisdiction so that it was possible to effect service out of jurisdiction.

3.32 These statutory interventions were at first related to service of actions out of jurisdiction that concerned property within the jurisdiction,[80] but later statutory provisions permitted service out where the cause of action was based on acts within this jurisdiction.[81] Following this, the gateways were established as long ago as 1845, and the power to add to them was subsequently provided for in the Supreme Court of Judicature Act 1875 and its successor acts. This is the basis of the modern gateways which are set out in Practice Direction 6B of the CPR. The individual grounds on which service out of the jurisdiction may be granted have been further extended over the years.[82]

3.33 Today, there are no fewer than 38 separate gateways provided for in the Civil Procedure.[83] The vast majority of these reflect the territoriality principle and are expressed in terms of an act, person, or object within the territory of England and Wales.

(1) Gateways 6 and 7 concern **contracts** and provide for situations where, amongst other things, a claim is made in respect **of a contract made within** the jurisdiction,[84] or where **a breach is committed within** the jurisdiction.[85]

(2) Gateway 9 provides for claims in **tort** where damage is:

(a) **sustained within** England and Wales; or

(b) **sustained from acts committed within** the jurisdiction.[86]

(3) Gateway 11 provides for claims about **property within** the jurisdiction.

(4) Gateway 15 provides for claims brought against the defendant **as a constructive trustee, or as trustee of a resulting trust**, where the claim:

(a) arises out of **acts committed or events occurring within** England and Wales,[87] or

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80 Service out of the Jurisdiction (England and Ireland) Act 1832.

81 Common Law Procedure Act 1852, ss 18 and 19.

82 Most recently, they were expanded in October 2022, following recommendations made by the Service Sub-Committee of the Civil Procedure Rule Committee and implemented by the 149th Update – Practice Direction Amendments.

83 Practice Direction 6B, para 3.1.

84 Practice Direction 6B, paras 3.1(6)(a) and (c) respectively.

85 Practice Direction 6B, para 3.1(7).

86 Practice Direction 6B, para 3.1(9)(a) and (b). Sub-para (c) provides for a claim in tort that is governed by the law of England and Wales.

87 Practice Direction 6B, para 3.1(15)(a).

(b) relates to **assets within** England and Wales.[88]

(5) Gateway 16 concerns claims for restitution arising out of **acts committed within** England and Wales, or where **the enrichment is obtained in** England and Wales.[89]

3.34 Gateway 9(a) (tortious damage sustained within England and Wales), gateway 11 (property within the jurisdiction), and gateway 15(b) (constructive trust claims relating to assets within England and Wales) have been relied on in the crypto-token cases so far and are therefore of particular relevance for our purposes. As we will see below, the fact that these gateways all express the territoriality principle gives rise to the core problem identified in Chapter 2: locating omniterritorial assets and acts in any particular geographical place or jurisdiction.

The crypto-token litigation

3.35 The last few years have seen a series of reported cases that have engaged the question of whether the courts of England and Wales have international jurisdiction to hear a claim concerning crypto-tokens. We have identified 22 cases involving crypto-tokens since 2019.[90]

3.36 These cases have some novel features that reflect the specific digital and decentralised contexts from which they arise. For present purposes, it is important to appreciate that these features cause problems for our rules of international jurisdiction because by their nature they do not happily sit with the assumptions regarding cross-border litigation that prevailed when the rules were developed.

3.37 In our call for evidence, we focused on the challenges to the underlying principles of international jurisdiction that arise from the assumption inherent in the rules that the facts and issues arising in a cross-border case will have a clear link to the territory of a particular country. We said that there is a tension between objects and acts that are by their nature aterritorial or "omniterritorial", and the territoriality principle inherent in the gateways for service out of the jurisdiction. Omniterritorial phenomena are a relatively recent development which, as we have seen in Chapter 2, can mean that there is no obvious adequate link between the facts of the case and any particular country. Whilst there may previously have been challenges to the territoriality

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88 Practice Direction 6B, para 3.1(15)(b). Para 3.1(15)(c) provides for claims against trustees where the claim is governed by the law of England and Wales.

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

90 *AA v Persons Unknown* [2019] EWHC 3556 (Comm), *Ion Science Limited v Persons Unknown* (21 December 2020) EWHC (Comm) (unreported), *Lubin Betancourt Reyes v Persons Unknown* [2021] EWHC 1938 (Comm), *Fetch.ai Ltd v Persons Unknown* [2021] EWHC 2254 (Comm), *Wang v Derby* [2021] 3054 (Comm), *Danisz v Persons Unknown and Huboi Global Ltd* [2022] EWHC 280 (QB), *Osbourne v Persons Unknown & Anor* [2022] EWHC 1021 (Comm), *Soleymani v Nifty Gateway LLC* [2022] EWHC 773 (Comm), *D'Aloia v Persons Unknown* [2022] EWHC 1723 (Ch), *Jones v Persons Unknown* [2022] EWHC 2543 (Comm), *LMN v Bitflyer Holdings Inc & Ors* [2022] EWHC 2954 (Comm), *Tulip Trading v Van der Laan* [2022] EWHC 667 (Ch), *Osbourne v Persons Unknown & Ors* [2023] EWHC 39 (KB), *Osbourne v Persons Unknown Category A* [2023] 340 (KB), *Mannarino v Persons Unknown* [2023] EWHC 3176 (Ch), *Tulip Trading v Persons Unknown* [2023] EWCA Civ 83, *Piroozzadeh v Persons Unknown Category A & Ors* [2023] EWC 1024 (Ch), *Boonyaem v Persons Unknown Category A & Ors* [2023] EWHC 3180 (Comm), *Mooij v Persons Unknown* [2024] EWHC 814 (Comm), *D'Aloia v Persons Unknown* [2024] EWHC 2342 (Ch), *Tai Mo Shan* [2024] EWHC 1514 (Comm), *Tai Mo Shan* [2024] EWHC 2532 (Comm).

principle, none have presented such a stark challenge to the theoretical premise of private international law.

3.38 Through our call for evidence and subsequent consultations, we have identified another set of challenges to the rules of international jurisdiction arising in the crypto-token context. These arise from a tension between, on the one hand, the need to provide access to justice and to prevent injustice in the digital socio-economic realities of the 21st century; and, on the other, grounds of international jurisdiction developed in the 19th century which are not necessarily well suited to some of today's challenges.

3.39 To consider all of these issues in more depth, it is helpful first to consider the 19th century assumptions about litigation, and particularly about cross-border litigation, that underpin the current rules of international jurisdiction.

Litigation in the 19th century

3.40 The existing rules of international jurisdiction in England and Wales date from the mid-19th century.[91] This was a period in which issues of private international law became increasingly common before the courts with the rise of cross-border trade.[92] Typical cross-border litigation at that time might have arisen from a contract of carriage by sea of goods from one country to another, an international sale of goods, or the financing associated with either of these transactions.

3.41 In consequence, the rules of international jurisdiction that developed during this period reflect certain 19th century assumptions regarding litigation, both generally and in the cross-border context with which private international law is concerned.

3.42 First, the defendant's identity and location would generally be known, well before the time the claimant issues proceedings. In a commercial case, the claimant and defendant will typically already be known to one another, usually as contracting parties. In other cases, a claimant will have undertaken significant preliminary investigations before a claim is issued to identify who is responsible for the wrong that they have suffered and the best way to proceed in the courts.

3.43 The assumption that the parties are known to one another before proceedings are formally issued is particularly strong in modern civil litigation in England and Wales. The CPR impose obligations on litigants to comply with pre-action protocols before the claim is issued.[93] Parties to litigation cannot comply with these unless they have been identified to one another.

3.44 All in all, the rules on service of proceedings in England and Wales (both within the jurisdiction and out of the jurisdiction) generally proceed on the basis that the defendant is identified and known by the time the proceedings are formally issued. Whilst there are some exceptions for certain types of persons unknown (which we discuss in more detail below), claimants usually face little difficulty in identifying a

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91 From para 3.31.

92 Practice Direction 6B, para 3.1(16)(a) and (b). Para 3.1(16)(c) provides for claims for restitution which are governed by the law of England and Wales.

93 Practice Direction on Pre-Action Conduct and Protocols; Civil Procedure Rules, para 18.

defendant and formulating a precise claim to plead against them by the time proceedings are issued in the courts. There have been some developments in this respect in purely domestic cases where, for example, injunctions are necessary to deal with protests by unknown protesters,[94] but these fall outside the international jurisdiction issues we consider in this paper.

3.45 Second, the claimant will usually have taken extensive legal advice as to the feasibility of their claim and before taking a decision on whether or not to proceed with it. The defendant may also have taken legal advice before making a decision on whether or not to defend the claim. Ultimately, the objective of the litigation for both parties is to have their respective rights and obligations determined by a judgment of the court.

3.46 Third, where the litigation has a cross-border dimension (thereby engaging private international law), it will generally be possible to apply jurisdictional rules that reflect the territoriality principle. Litigation over rights relating to tangible goods shipped by sea or finance agreements concluded between parties who have been doing business with one another for many years are easy to accommodate within the existing framework of international jurisdiction. Similarly, litigation concerning a breach of contract concerning the international sale of goods, or a tortious act resulting in damage to those goods in transit, would fall easily within the existing rules and raises few, if any, challenges for the territorial premise of the gateways.

3.47 It is important to recognise that the existing framework of international jurisdiction, even if developed in the 19th century, will continue to be suitable and appropriate for the vast majority of cases with a "foreign element" that come before our courts. The basic framework, though first developed almost 200 years ago, has continued to be developed incrementally over time to meet the needs of a changing society. As we will see, the basic framework will continue to be appropriate even for certain types of cases involving crypto-tokens and distributed ledger technology (DLT).

Litigation involving crypto-tokens

3.48 We reiterate here the point made in Chapter 2 that not all use cases of crypto-tokens or DLT pose problems for private international law. For the purposes of international jurisdiction, not all cases concerning crypto-tokens will necessarily have an omniterritorial element nor raise issues of access to justice in the digital and decentralised environments in which crypto-tokens are used. This means that in many cases concerning crypto-tokens, it will be possible and appropriate to apply the existing rules of international jurisdiction without any undue difficulty. However, the vast majority of crypto-token cases that have come before our courts have had certain features that challenge the 19th century assumptions (but which continue to be valid for most cross-border litigation today) as to the context and circumstances in which claimants may wish to invoke the coercive power of the courts.

3.49 First, the vast majority of the cases have a similar fact pattern, concerning allegations of fraud or hacking leading to misappropriated crypto-tokens in the pseudo-anonymous context of the DLT ecosystem. In these circumstances, it is often nearly impossible for the victim to identify the person/s responsible for the fraud, let alone

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[94] See eg *Transport for London v Persons Unknown* [2025] EWHC 55 (KB), *Shell UK Ltd v Persons Unknown* [2024] EWHC 3130 (KB), *Thurrock Council v Adams* [2024] EWHC 2575 (KB).

where they are located, for the purposes of the general rule of international jurisdiction (that is, that the claimant sues in the "home court" of the defendant). These cases have therefore been brought against "persons unknown", and some other basis of jurisdiction other than the "home court" of the defendant has had to be pleaded. A range of gateways has been relied on, most notably the tort, property, and constructive trust gateways described above. As we discuss further below, the way that the courts have been interpreting the gateway requirements has not always been consistent with the general principles that underpin the rules of international jurisdiction.

3.50 Second, where, in a typical case, the claimant will already have taken extensive legal advice as to the feasibility of their claim before bringing it for the purposes of a final determination of their rights; in the crypto context, the cases have often been brought at a much earlier stage and for a very different purpose. Typically, claimants have been invoking the assistance of the courts to help them complete the initial investigations necessary to plead a substantive cause of action and issue a claim, such as identifying the defendant and/or locating their crypto-tokens. Where, for example, crypto-tokens have been taken from a person by an unknown fraudster and passed on to third parties, it is impossible to evaluate the merits of any potential claim without knowing further information; such as who the defendant might or should be, and the circumstances under which the third parties had received the crypto-tokens. These cases have therefore tended to focus on immediate practical considerations, such as interim relief, rather than the merits of any actual claim. They have also been heard on an *ex parte* basis (that is, with only the claimant's side represented in court).

3.51 Third, the cases have concerned objects and acts that may by their nature be aterritorial or "omniterritorial". This causes difficulty when trying to plead a claim falling within the gateways, most of which are expressed in territorial terms. Significant difficulty arises in finding that an act occurred in England and Wales, or that an object is within England and Wales, if the relevant 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.

3.52 The first two trends are particularly well reflected in the summary of the crypto-token cases so far given by Mr Richard Salter KC, sitting as a Deputy Judge of the High Court, in *Boonyaem v Persons Unknown*:[95]

> The anonymity which digital currencies and online trading more generally permit is one of the factors which makes the digital space so attractive to those seeking to perpetrate fraud. The claims that have come before the courts of England and Wales involving digital assets have almost exclusively been fraud cases. In these cases, the courts have generally taken a pragmatic approach, permitting such actions to be begun against the unidentified fraudsters as "persons unknown" (provided only that the category is defined sufficiently clearly to ensure that anyone served with or receiving notice of the issue of a claim can tell immediately if he, she

[95] [2023] EWHC 3180 (Comm) at [32] to [33] by Mr Richard Salter KC sitting as a Deputy Judge of the High Court.

or it comes within the class) and granting freezing and disclosure orders to assist in securing and recovering (so far as possible) the proceeds of the fraud.

Those disclosure orders typically involve a *Norwich Pharmacal* and/or a *Bankers Trust* type order[96] addressed to a third party innocent intermediary requiring the delivery up of information in the possession of the intermediary (typically KYC[97] and destination account information) that will enable the claimant either to identify those who have taken his, her or its assets without authority (primarily the purpose of the *Norwich Pharmacal* jurisdiction) or to locate those assets or their traceable equivalent (primarily the purpose of the *Bankers Trust* jurisdiction).

3.53 It is clear from the above that the vast majority of crypto-token cases so far have tended to look very different from the typical cross-border cases for which the existing rules were developed.

3.54 That said, it is equally important to note that not all crypto-token cases that have come before the courts will be of this sort. *Tulip Trading v Bitcoin Association*[98] and *Wang v Derby*[99] are two examples where some of the 19th century assumptions as to litigation remain relevant and valid. Critically, these cases involving crypto-tokens have been brought against defendants who are known, and have not been applications for interim and/or ancillary orders to assist the claimant complete the initial investigations required to bring a substantive claim.

(1) *Wang v Derby* concerned the correct construction of certain crypto-token purchase and re-purchase agreements between the parties. International jurisdiction was not in dispute in this case: the claimant, Mr Wang, was an Australian national who sued the UK national defendant, Mr Derby, in the defendant's home court in line with general principles of private international law.

(2) *Tulip Trading* was a challenge to the jurisdiction in respect of novel claims asserting novel fiduciary duties and/or duties in tort against identified foreign defendants, who were core software developers who maintain the Bitcoin network on a voluntary basis. Although the case at first instance required determinations on "where" a crypto-token is considered to be located for the purposes of the property gateway, the issues at appellate level concerned the question of whether there was a "serious issue to be tried" in respect of the pleaded fiduciary duties and duties in tort. The Court of Appeal found that there was, and overturned the judge below. The claimant's ultimate objective was to

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96 Both of these court orders are directed at third parties to litigation (that is, parties who are not accused of any wrongdoing) to help the claimant obtain the information they think they need to bring a claim. They are typically granted in cases of fraud or other wrongdoing. The precise nature of these two orders, the circumstances in which they are available, and the threshold tests for the grant of relief differ. We discuss both orders in detail below in Chapter 4 para 4.18.

97 KYC stands for "Know Your Customer".

98 *Tulip Trading v Persons Unknown* [2022] EWHC 667 (Ch); *Tulip Trading v Persons Unknown* [2023] EWCA Civ 83.

99 *Zi Wang v Graham Derby* [2021] EWHC 3054 (Comm), [2022] Bus LR 121.

secure access to crypto-tokens which they alleged had been misappropriated through a hack of their private keys.

3.55 For present purposes, the essential point to note in relation to both of these cases is that they involved a clear substantive claim pleaded against the defendant who is identified and engaging with the litigation, whether by defending the merits of the claim itself, as in *Wang v Derby,* or challenging the jurisdiction, as in *Tulip Trading*. In such cases, the existing framework of international jurisdiction, including the default rule that the claimant sues in the "home" court of the defendant, can still be applied. The cases show, however, that there have still been some difficulties in applying territorial gateways to omniterritorial phenomena.

3.56 Although there have been few cases that both concern crypto-tokens and which reflect the 19th century assumptions about litigation, litigation practitioners have told us that they anticipate more of these types of cases will come before the courts in future. Several high-profile crypto exchange insolvencies, such as the highly publicised FTX case,[100] have only increased the chances of litigation.

3.57 In these cases, even where the defendant is known, and the issues at hand are substantive rather than applications for urgent interim relief, there may still be challenges for private international law if the case involves truly aterritorial or omniterritorial issues. *Tulip Trading*, for example, was one such case: the defendants were known and engaging with the proceedings, but it was still necessary for the court at first instance to consider "where" a crypto-token is considered to be located for the purposes of the property gateway.

CHALLENGES TO INTERNATIONAL JURISDICTION IN THE CRYPTO CONTEXT

3.58 Our terms of reference require us to set out the current rules on conflict of laws and jurisdiction as they may apply in the digital context and make recommendations for reform if necessary to ensure that the private international law of England and Wales in this context remains relevant and up to date.

3.59 As we have set out above, our analysis of stakeholder responses and subsequent consultations has shown that not every case involving DLT or crypto-tokens will necessarily cause problems or challenges for the existing rules of private international law. Where a DLT or crypto-token case does engage issues of private international law, these issues will not necessarily be the same in each and every crypto-token case.

3.60 However, in legal and academic debates and commentary surrounding the cases that have come before the courts so far, the different challenges and the different issues to which they give rise in private international law have not always been distinguished. Rather, they have been lumped together under the broad umbrella of "issues arising in crypto-token litigation". This (misleadingly) suggests that "crypto-token litigation" is a homogenous category raising the same issues in every case.

3.61 We consider that failure to distinguish between these issues has been a key obstacle to understanding what the issues are and identifying what exactly is required to

[100] For a very general overview see https://en.wikipedia.org/wiki/Bankruptcy_of_FTX.

ensure the law in this area remains relevant and up to date. We therefore distinguish between two broad categories of novel issues of international jurisdiction arising in crypto-token litigation: (i) issues concerning access to justice in the DLT environment; and (ii) issues concerning the tension between the gateways, which are expressed in territorial terms, and litigation concerning acts or objects that are aterritorial or omniterritorial.

3.62 These two broad categories of issues are complex and sometimes inter-connected. Below, we provide a brief summary of the main issues and concerns as an introduction to these issues. In the next chapter, we develop our analysis in more detail, and in some cases propose solutions.

Issues surrounding access to justice in the DLT environment.

3.63 Many of the cases so far have been brought by claimants who allege that they have been victims of fraud which has resulted in the claimant's crypto-tokens being misappropriated. The fraudster has usually contacted the victim online and all interactions between them have remained online. In most cases, the victim has been fraudulently induced to transfer their crypto-tokens to a blockchain address nominated by the fraudster ostensibly for the purpose of making an investment.

3.64 Given the pseudo-anonymous nature of the crypto-token ecosystem, it can be very difficult for the victim to know what to do once they realise they have been defrauded or scammed. Even if they know the social media accounts used by the fraudster or the blockchain address to which they were induced to transfer their crypto-tokens, there is no real or immediate way to link these with a person "in the real world" who can be sued.

3.65 In most cases, the victim will enlist the help of a specialist technological investigator who is able to follow and/or trace the misappropriated crypto-tokens (or its traceable proceeds) as it is transferred from one blockchain address to another. Usually, this exercise ends when a blockchain address is identified as being in the control of a person who can be identified "in the real word" (and who can, therefore, be sued).[101] This person is typically an innocent intermediary, such as a crypto-exchange,[102] who has had nothing to do with the fraud.

3.66 Proceedings are then issued following a very particular litigation strategy. In it, the primary objective is to obtain relief against the intermediary, who remains the only identifiable person; and who has, or at some point had, control over the misappropriated crypto-tokens. The ultimate aim is to recover those crypto-tokens or their identifiable proceeds; or to obtain further information about the accounts in whose name the crypto-tokens are or were held by the intermediary. The basic pattern is as follows.

(1) A variety of claims will be pleaded against the fraudsters as defendant persons unknown. Given that it is not really possible to say that the defendants are

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101 For example, *D'Aloia v Persons Unknown* [2022] EWHC 1723 (Ch).

102 Crypto-exchanges are basically brokerage platforms, allowing customers to trade crypto-tokens for other assets including fiat currency or other crypto-tokens.

within the jurisdiction, these claims are used to satisfy the gateway requirement for service out of the jurisdiction.

(2) The claimant will seek ancillary relief (to be deployed against the intermediary) in support of the claim against the defendant. Typically, disclosure orders are sought to obtain information about the persons on whose behalf the intermediary maintains the relevant blockchain address and/or to obtain further information as to subsequent transactions out of the blockchain address. Freezing orders are also sought in case the crypto-tokens are still held at that blockchain address to prevent further dissipation.

3.67 Given that there is still no way of identifying who the defendants are or where they are located, the courts have variously permitted service of proceedings by alternative means. These have included by Facebook messenger, WhatsApp, and by transfer of a non-fungible token ("NFT") "containing an appropriate hyperlink to the claim form and Particulars of Claim and response documents" to the relevant blockchain addresses.[103]

3.68 In this way, access to justice in the DLT gives rise to a variety of issues, including:

(1) difficulties identifying the perpetrators of the fraud that has been practised on the claimant and which has resulted in the loss of their crypto-tokens;

(2) difficulties in locating where the misappropriated crypto-tokens have gone and who is presently in control of them;

(3) difficulties in invoking the assistance of the courts to help claimants complete the preliminary investigations in relation to both (1) and (2) so that they may fully plead a claim and issue substantive proceedings in the courts;

(4) difficulties in invoking the assistance of the courts to help claimants complete the preliminary investigations in relation to both (1) and (2) where the only person able to assist the claimant is an innocent third party intermediary, such as a crypto exchange;

(5) difficulties surrounding service of proceedings in the omniterritorial and pseudo-anonymous DLT environment; and

(6) difficulties surrounding the types of remedy that can be obtained and enforced against defendants unknown served by alternative means.

3.69 We consider in more detail the most salient issues below.

Orders sought against identifiable (but innocent) third parties to the fraud

3.70 In the vast majority of crypto-token cases so far, and certainly in all of the cases concerning fraud, the real objective of issuing proceedings has been to obtain interim relief (typically in the form of an information order and/or freezing order) against an

[103] *Tai Mo Shan v Persons Unknown* [2024] EWHC 1514 at [1] by HHJ Pelling KC.

innocent intermediary. They remain at this stage the only identifiable person "in the real world" who has had any dealings with the misappropriated crypto-tokens.

3.71 A large part of the difficulty with these types of crypto-token cases arises from the fact that the courts of England and Wales have traditionally declined to grant interim relief where substantive pleadings against a defendant have not been issued in the courts of England and Wales or are not contemplated in the courts of England and Wales. This is especially so where the relief is sought against an innocent third party to the litigation and/or over whom the courts do not exercise ordinary personal jurisdiction. These reservations are in line with the principles of international law surrounding the assertion of adjudicatory jurisdiction.

3.72 As we discuss below, developments over the past few decades in the courts of England and Wales have mitigated this position in relation to particular types of interim relief (and, in particular, the freezing order, often also known as the freezing injunction) for the purpose of supporting claims pending in foreign courts.[104] However, the general requirement that our courts must have jurisdiction over the substantive proceedings before interim relief can be sought or granted has meant that claimants have generally tended to issue proceedings pleading nominal or "placeholder" substantive claims against the defendant fraudsters. Interim relief is then sought to support the claims.

3.73 It is important to appreciate that, unlike in a typical (non-crypto) case, the claimants in these cases have not issued proceedings with the objective of a final determination by the court of the mutual rights and obligations as between the claimant and the defendant persons unknown. As we have said, the pleaded claim is a "placeholder" claim asserted in order to obtain interim relief against the only person who has been identified so far: the innocent third party intermediary.

3.74 For the purposes of international jurisdiction, the key problem is that this "placeholder" claim has been used to satisfy the gateway requirement in an application to serve proceedings out of the jurisdiction. We have said above that claimants have sought to rely on a range of different gateways, and that the interpretation of these gateway requirements has not always been consistent with general principles.

3.75 There was general agreement amongst practitioner stakeholders that none of the existing gateways for service out of the jurisdiction are on "all fours" with the crypto-token cases that they are being asked to advise on, but practitioners are generally able to "muddle through" to find a way to satisfy one of the existing gateways. Judges hearing these applications have generally been pragmatic.

3.76 We think that the underlying litigation strategy pursuant to which these claims have been pleaded (as "placeholder" claims) accounts for much of this inconsistency in the

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[104] The first case where such orders were granted was *Nippon Yusen Kaisha v Karageoris* [1975] 1 WLR 1093. However, more detailed reasons for the granting of such orders were given in the second case where the Court of Appeal granted the order, *Mareva Company Naviera SA v International Bulk Carriers SA* [1975] 2 Lloyd's Rep 509. It has been suggested that it is for this reason that the order became known as the *Mareva* order. See further Foxton J "The Big Freeze: The Rise and the Rise of the *Mareva* Injunction" A Talk to Manchester Business and Property Courts Forum (30 October 2024) https://www.judiciary.uk/wp-content/uploads/2024/11/The-Big-Freeze-Paper.pdf

interpretation of the gateway requirements. We consider this in more detail below as the second category of novel issues of international jurisdiction arising in crypto-token litigation.

Obstacles to obtaining information orders

3.77 We were told by practitioner stakeholders that interim orders compelling the disclosure of information, which are so critical in the crypto fraud context, raise particular challenges. Stakeholders spoke of some uncertainties and difficulty surrounding gateway 25[105] which provides a ground of international jurisdiction where:

> A claim or application is made for **disclosure in order to obtain information**—
>
> (a) regarding:
>
> (i) the true identity of a defendant or a potential defendant; and/or
>
> (ii) what has become of the property of a claimant or applicant; and
>
> (b) the claim or application is made **for the purpose of proceedings already commenced or** which, subject to the content of the information received, **are intended to be commenced** […] **in England and Wales**.[106] (emphases added)

3.78 The requirement that the information order is sought for use in substantive proceedings brought or intended to be commenced in England and Wales has been a challenge for victims of crypto-token fraud. At this stage, victims are not aways able to say that they definitely intend to commence proceedings in England and Wales. Typically, prospective claimants are at a complete loss as to how and where to issue proceedings. What they need at this initial stage of investigations is information to help them identify who is in control of their crypto-token and who they ought to pursue.

3.79 Once they have obtained an information order and have been able to complete the initial investigations that parties to litigation typically conduct before issuing a substantive claim, England and Wales might not necessarily turn out to be the best or most appropriate jurisdiction in which to continue proceedings. The courts of another jurisdiction might be better placed to order the return of the crypto-tokens or might have ordinary personal jurisdiction over the defendants.

3.80 In these circumstances, the requirement in gateway 25 that the claimant at least intends to commence proceedings in England and Wales is a significant limitation on the availability of information orders to victims of crypto-token frauds.

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105 Civil Procedure Rules, Practice Direction 6B, paragraphs 3.1(25).

106 Claimants do not require permission to serve proceedings within the jurisdiction, and in consumer cases where the claimant is a UK-domiciled consumer: see Civil Procedure Rules 6.32, 6.33 and 6.36.

Example case: *LMN v Bitflyer Holdings Inc & Ors* [2022] EWHC 2954 (Comm)

A cryptocurrency exchange was hacked and had millions of dollars' worth of cryptocurrency transferred from their systems.

The cryptocurrency exchange instructed an expert to trace the cryptocurrency. The expert's report identified 26 different exchange addresses to which the cryptocurrency had been transferred.

The Claimant argued that the KYC and anti-money laundering information would provide more information to allow it to trace the cryptocurrency further.

The judge granted all of the information orders.

For the information orders to fall within paragraph 3.1(25)(a)(i) and paragraph 3.1(25)(a)(ii) CPR 6B the Claimant **was required to state** that their intention was that "should the information obtained reveal potential cause of action defendants in the jurisdiction, it will commence proceedings against them here. Equally, if the information indicates that they are outside the jurisdiction, C intends to commence proceedings here and to seek to serve such proceedings out of the jurisdiction".[107]

Service of proceedings by alternative means in the crypto-token environment

3.81 In fraud claims arising in the pseudo-anonymous crypto-token environment, it is difficult or impossible to serve proceedings on a defendant fraudster by the usual methods as set out in the CPR. As we have said above, the defendants in the crypto-token fraud cases remain persons unknown and the claims against them are largely "placeholder" claims pleaded for the purposes of obtaining ancillary relief against a third party to the claim. It is therefore not possible to serve proceedings at, for example, the defendant's home address or place of business.

3.82 Given that the claimant has generally had no contact with the fraudsters other than in the online and DLT environment, the courts have permitted alternative service by novel means. These include service by Facebook messenger, WhatsApp, and by transfer of a transfer of a NFT to the relevant blockchain addresses. Service by such novel means has become so prevalent in these types of cases that, in *Tai Mo Shan,* His Honour Judge Pelling KC said that he was "entirely satisfied" that alternative service "by NFT placed into the blockchain by use of the various addresses, or perhaps wallet addresses" was:

> in accordance with a growing body of authority permitting service by that alternative means in cryptocurrency frauds of this nature and by necessary incremental development to the enforcement of foreign judgments relating to such claims.[108]

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107 *LMN v Bitflyer Holdings Inc & Ors* [2022] EWHC 2954 (Comm), [27].

108 [2024] EWHC 1514 (Comm), [13].

3.83 We recognise that allowing alternative service by methods including NFT is a pragmatic and innovative response on the part of the courts to allegations of fraud in modern digital and decentralised contexts. However, we also recognise that this relatively recent trend has been occurring in the courts of first instance, and in the somewhat exceptional circumstances of a claimant having pleaded "placeholder" claims against nominal defendants for the purposes of obtaining interim relief against a third party to the claim.

3.84 In these circumstances, it is worth the reminder that, in England and Wales, jurisdiction is based on the principle of the **lawful** service of proceedings as an expression of sovereign authority being asserted over the defendant through the courts. This is reflected in the origins of the claim form in the writs issued by the king from around the 12th century that summoned the defendant personally to appear before the royal courts.[109] Such a relationship between sovereign and service has always underpinned the common law understanding of the jurisdiction of the courts.[110]

3.85 Against this history, it seems premature to say that the recent and relatively niche cases in which alternative service by NFT was permitted amounts to a "growing body of authority". Firstly, decisions of the High Court are not, strictly speaking, "authority" under the common law doctrine of precedent.[111] Second, such service has been permitted only as a pragmatic response on the part of the courts in circumstances where what a victim of fraud urgently needed was interim relief against a third party to what has been, in reality, a "placeholder" claim. Third, the recent cases surrounding summary judgment against persons unknown (which we discuss below) show a real need to give proper consideration to the legal effect of such service by such novel alternative means. All in all, these cases demonstrate the difficult reality that the digital and decentralised environment is developing at a faster rate than the common law can reasonably keep up with.

3.86 The proper service of proceedings is not only important, however, as a matter of domestic civil procedure. It also has wider significance in the international context we are concerned with in our project. As we have said above, international jurisdiction in private international law corresponds to adjudicatory jurisdiction in public international law, that is, assertions of sovereign authority by a state, acting through its courts.

3.87 CPR Rule 6.40(4) provides a good example of why it is, therefore, important to appreciate the underlying principles, policies, and other interests that are engaged by the cross-border service of proceedings. This rule provides that nothing in the civil procedure rules on the methods of service out of the United Kingdom and in another country or in any court order "authorises or requires any person to do anything which is contrary to the law of the country where the claim form or other document is to be served".

3.88 In *Tai Mo Shan*, His Honour Judge Pelling KC was unpersuaded by the submission that, because service by NFT "takes place in the blockchain which is accessible anywhere in the world", this means that services does not take place in any particular

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109 See generally, F Maitland, *The Forms of Action at Common Law* (ed AH Chaytor and WJ Whittaker) (1939).

110 See eg A Briggs, *Civil Jurisdiction and Judgments* (7th ed 2019) para 24.02.

111 *Willers v Joyce* [2016] UKSC 44, [2018] AC 843 at [9]; *Roberts v SAAFA* [2017] EWHC 1104 (QB) at [2].

country.[112] Even if there is no obligation to open an NFT, the judge considered that, if a defendant chooses to open the NFT by which proceedings have been served, they will be located somewhere geographically when they do open the NFT. There is, therefore, a potential risk that such a person may be located in a country where it is contrary to the law of that country to serve process by means other than that authorised by the law of the country concerned.

3.89 These concerns of the judge are not simply matters of interpreting our domestic rules of civil procedure and trying to apply these in the digital and decentralised contexts. Rather, they reflect more fundamental principles of international law under which the service of proceedings is considered an exercise of adjudicatory jurisdiction: an exercise of sovereign authority by a state acting through its courts. In this context, it is worth noting that the UK is a party to the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, which simplifies and expedites the service of documents in other contracting states through mutual judicial assistance. One of the aims of the Convention is to protect defendants from default judgment being entered against them unless it is established that service was effective under the Convention, as such service ensures the defendant has had a fair opportunity to present their case or challenge the jurisdiction.

3.90 These international sensitivities surrounding the service of proceedings are further reflected in the academic commentary. As Professor Adrian Briggs observes, traditionally, the service of proceedings issued by the courts of England and Wales out of the jurisdiction was technically not service of proceedings, but service of the **notice** of proceedings. Professor Briggs continues that in some countries, it is a criminal offence to serve process issued by a foreign court within the territorial boundaries of that country unless this is done through the official channels.[113] Special rules further apply for service of proceedings on foreign heads of state.[114]

3.91 The proper service of proceedings is also fundamental to the recognition and enforcement of judgments. The UK is also party to the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. Under Article 7(1)(a) of this Convention, a court may refuse to recognise and enforce the judgment of another court if service of the claim was "incompatible with fundamental principles … concerning the service of documents" or was not notified to the defendant "in sufficient time and in such a way as to enable [the defendant] to arrange for their defence". The extent to which states will consider, for example, the transfer to a blockchain address of an NFT containing hyperlinks to court

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112 *Tai Mo Shan v Persons Unknown* [2024] EWHC 1514 at [14].

113 A Briggs, Civil Jurisdiction and Judgments (7th ed 2019) para 24.02 fn 10. Professor Briggs cites Article 271 of the Swiss Penal Code. Subsection (1) provides (in translation): Any person who carries out activities on behalf of a foreign state on Swiss territory without lawful authority, where such activities are the responsibility of a public authority or public official, any person who carries out such activities for a foreign party or organisation, [or] any person who facilitates such activities shall be liable to a custodial sentence not exceeding three years or to a monetary penalty, or in serious cases to a custodial sentence of not less than one year.

114 For a recent case on the issue see *Privinvest Shipbuilding SAL (Holding) v Filipe Jacinto Nyusi* [2024] EWCA Civ 184.

documents as being compatible with these principles in any request for recognition and enforcement remains to be seen.

3.92 All in all, service by novel means, and particularly by NFT, has been a pragmatic response to injustice in the modern digital and decentralised environments. Given, however, the wider implications of service of proceedings, there is a balance to be struck between ensuring the law remains up to date and relevant in light of profound socio-economic changes; and ensuring the law continues to reflect and uphold fundamental principles surrounding the proper conduct of proceedings and procedural fairness between the parties to litigation.

Example case: *Osbourne v Persons Unknown & Ors* [2023] EWHC 39 (KB)

This was the first known case where service was effected only by NFT.

The claimant alleged that the first defendant, persons unknown, had removed two NFTs from their wallet. The claimant traced the NFTs to two wallets linked to a US company.

Service by NFT was permitted because it was the only method of service available.

Example case: *D'Aloia v Persons Unknown* [2022] EWHC 1723 (Ch)

The claimant alleged that he had been fraudulently misappropriated of crypto-tokens which he had bought on a website, "tda-finan", that appeared to be legitimate but was a scam. They engaged a blockchain investigator to establish where the crypto-tokens had been transferred. Some of the crypto-tokens could be tracked to private addresses and exchanges under the control of several cryptocurrency exchanges.

The claimant brought proceedings against the unknown defendants and the cryptocurrency exchanges to which his crypto-tokens had been traced. He sought (i) service out of jurisdiction of claims based on the exchanges as constructive trustees (ii) *Bankers Trust* orders against the exchanges, and (ii) freezing injunctions against the persons unknown and the exchanges.

The judge granted the majority of the claimant's applications and permitted alternative service by email and NFT against the defendants unknown and against the exchanges. They noted that "there can be no objection to it [service by NFT]; rather it is likely to lead to a greater prospect of those who are behind the tda-finan website being put on notice of the making of this order, and the commencement of these proceedings".[115]

[115] *D'Aloia v Persons Unknown* [2022] EWHC 1723 (Ch) at [39].

Summary judgment against unknown defendants served by non-fungible token

3.93 Since we finalised our call for evidence, there have been further developments in the courts that emphasise the need for clarity on the legal effect of service of proceedings on persons unknown by novel means in the crypto-token and DLT environments.

3.94 Service on persons unknown is not in itself problematic in the civil procedure of England and Wales. In *Cameron v Liverpool Victoria Insurance Co Ltd*,[116] Lord Sumption considered different types of defendant persons unknown for the purposes of service of proceedings. This was a domestic case concerning the liability of an unknown hit and run driver, raising the question of the circumstances in which a claim form can be issued and served on unknown defendants. In considering whether it is conceptually possible to serve such defendants, Lord Sumption distinguished between two different types of unknown defendants:

> The first category comprises anonymous defendants who are identifiable but whose names are unknown. Squatters occupying a property are, for example, identifiable by their location, although they cannot be named. The second category comprises defendants, such as most hit and run drivers, who are not only anonymous but cannot even be identified. The distinction is that in the first category the defendant is described in a way that makes it possible in principle to locate or communicate with him and to know without further inquiry whether he is the same as the person described in the claim form, whereas in the second category it is not.[117]

3.95 Lord Sumption considered that the first category of persons could be served with a claim form, and if necessary, by alternative service. This was because defendants who are identifiable, but anonymous, could be located or communicated with; and it is therefore possible to identify them as the person described in the claim form.[118] However, Lord Sumption considered that it would be impossible to serve the second category of defendant because not only can such a defendant not be found, but also it is not known who they are.[119] Such defendants could not therefore properly be brought within the jurisdiction of the court.

3.96 Lord Sumption's categories of persons unknown were considered in two crypto-token fraud cases where summary judgment had been sought against defendant persons unknown served by NFT.

3.97 In *Boonyaem*,[120] Mr Richard Salter KC, sitting as a Deputy Judge of the High Court, refused the application for summary judgment against the defendants who fell into Lord Sumption's second category of unidentified persons unknown. The Deputy Judge said that the disclosure order made previously by Mr Justice Bryan had produced "no useful results". Although the claimant had purported to serve the defendant(s) by alternative service including by NFT, they remained unidentified; the fact that they had

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116 [2019] UKSC 6, [2019] 1 WLR 1471.

117 [2019] UKSC 6, [2019] 1 WLR 1471 at [13].

118 Above at [16].

119 Above at [17].

120 *Boonyaem v Persons Unknown* [2023] EWHC 3180 (Comm).

perpetrated the fraud on the claimant was not in itself sufficient identification for them to be sued properly to final judgment.

3.98 By contrast, in the subsequent case of *Mooij*,[121] His Honour Judge Russen KC, sitting as a Judge of the High Court, reached the opposite conclusion. Noting that *Cameron* concerned difficulties in identifying a person unknown for the purposes of effecting service, the judge distinguished *Mooij* and *Boonyaem* from *Cameron* on the basis that relevant (unknown) defendants in *Mooij* had already been served by NFT. The judge said that they did not, therefore, fall within Lord Sumption's second category of defendants categorised in *Cameron*, because this category was for those who could not even be served with proceedings.[122] The judge considered that the defendants in *Mooij* had been served, thereby bringing them within the jurisdiction of the courts of England and Wales. From this, the judge saw no reason why summary judgment could not be granted against a person he considered had been properly brought within the jurisdiction of the courts.

3.99 Finally, it is worth noting *Tai Mo Shan*,[123] an application before the courts of England and Wales for the recognition and enforcement of judgment of the courts of New York against a defendant person unknown who had been served by NFT. His Honour Judge Pelling KC sitting as a Judge of the High Court did not consider Lord Sumption's categories of persons unknown, but was prepared to enter final judgment against the unidentified defendant persons unknown. The judge was, however, concerned to give the defendants extra time to apply to vary, set aside, or stay the default judgment. The judge therefore directed that the judgment should not be enforced immediately, but after a short period of time.[124]

3.100 Some stakeholders have expressed concern at these more recent developments surrounding suing defendant persons unknown served by NFT to final judgment. There was a strong feeling that such developments have occurred in a very short space of time, without the full implications of service by NFT having been properly considered.

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121 *Mooij v Persons Unknown* [2024] EWHC 814 (Comm).

122 Above, [49] – [57].

123 *Tai Mo Shan v Persons Unknown* [2024] EWHC 1514 (Comm).

124 *Tai Mo Shan v Persons Unknown* [2024] EWHC 2532 (Comm) at [17].

Example case: *Mooij v Persons Unknown* [2024] EWHC 814 (Comm)

The claimant was induced to send Bitcoin to fraudsters under an investment scam via a trading platform.

They applied for summary judgment for proprietary relief including delivery of Bitcoin, and monetary judgments for value of bitcoin.

Summary judgment was granted against unidentifiable fraudsters and the unknown but identifiable individuals operating the wallets.[125]

Issues surrounding the territoriality principle and the gateways

3.101 As noted in Chapter 2, 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 objects and acts that are by their nature aterritorial or "omniterritorial".[126]

3.102 In the context of the rules of jurisdiction in England and Wales, this tension arises from the fact that, in general, the courts of England and Wales take a highly territorial approach to jurisdiction. As we explained above, a natural person physically present within the territory of England and Wales may be served with process and thereby be brought under the jurisdiction of the courts of England and Wales. For companies, service may be effected at a registered address or at a place within England and Wales where the company carries on business, or at the place of business of the company's legal representatives if authority for that is given by the company. No permission is required from the courts to serve proceedings on a defendant who is present within the jurisdiction.

3.103 Where a claimant in England and Wales seeks to serve proceedings on a defendant who is not present within the jurisdiction, permission from the court is required. In any application for permission to serve proceedings out of the jurisdiction, claimants are required to show (amongst other things) a good arguable case that the pleaded claim against the defendant falls within one of the jurisdictional gateways set out in paragraph 3.1 of Practice Direct 6B of the CPR.

3.104 These 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. In line with the general approach taken to jurisdiction in England and Wales, the vast majority of the gateways reflect the territoriality principle. For example, they may require a claimant to show that an act or event occurred within England and Wales; or

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125 *Mooij v Persons Unknown* [2024] EWHC 814 (Comm).

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

that a person or property object was located within England and Wales at a relevant time.

3.105 However, where a case contains an aterritorial or omniterritorial element, these rules of international jurisdiction become difficult to apply. 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. While challenges to the territoriality principle are not necessarily new, none have presented such a stark challenge to the theoretical premise on which our rules of international jurisdiction are based.

3.106 In recent years, these challenges have arisen in live cases with which the courts have had to grapple. We have identified 22 cases to date involving crypto-tokens since 2019. We analysed the vast majority of these in our call for evidence and said that the basis of these decisions is not necessarily consistent or clear cut. We also said there had been suggestions that some of these decisions might not withstand rigorous debate and analysis. [127]

3.107 We have come to understand better that much of the inconsistency in the crypto-token decisions on the gateway requirement might well be attributable to what are really distinct issues concerning access to justice in the DLT environment. We have therefore considered those issues separately and, as we discuss in the next chapter, we anticipate that a targeted solution to those problems might well ease some of the pressure on the gateways.

3.108 That said, we recognise that these targeted solutions will not obviate the need for us to consider and address the fundamental challenge arising from the tension between the gateways, which are expressed in territorial terms, and litigation concerning acts or objects that are aterritorial or omniterritorial.

3.109 As we said above, cases involving DLT or crypto-tokens give rise to a wide variety of issues. Not all of these will necessarily be problematic for private international law. Where a DLT or crypto-token case does engage issues of private international law, these issues will not necessarily be the same in each and every crypto-token case. For some issues, we consider that the existing rules of international jurisdiction will still be appropriate. For others, we have provisionally concluded that the existing rules cannot provide an adequate solution, and therefore reform may be required.

3.110 We therefore consider here in more detail the gateways that have emerged as priorities following our call for evidence and subsequent consultations: property and tort. We look at the property gateways for two main reasons:

(1) notwithstanding the emphasis so far in the cases on interim relief, claimants are ultimately seeking the return of misappropriated assets (the crypto-tokens) in what is really a property claim; and

[127] Digital assets and ETDs in private international law: which court, which law? (2024) Law Commission Call for Evidence, Chapter 5.

(2) it is in the property gateways that the challenge of omniterritoriality is the most acute.

3.111 We look at the tort gateway because it is the most commonly-invoked ground of jurisdiction in the cases so far.

Property within the jurisdiction

3.112 Stakeholders have told us that, while what is immediately wanted from the court in the crypto-token cases so far is some form of interim relief, the claimant's ultimate objective is usually to recover the misappropriated crypto-tokens (or if this is not possible, their financial equivalent.)

3.113 The real nature of the claimant's case is therefore generally proprietary. For example, claimants will follow and/or trace the misappropriated crypto-token until they identify the person who is currently in control of them, or failing that, an identifiable person who can at least be sued. Although these persons may well be innocent third parties to the fraud, a property claim is nevertheless pleaded (usually on the basis of an equitable interest).

3.114 We have been told by litigation practitioners that pleading outright property claims, however, is generally avoided. This is owing to the significant difficulty involved in satisfying the English and Welsh rules of international jurisdiction for property claims.

3.115 Practice Direction 6B paragraph 3.1 provides two grounds of international jurisdiction for claims relating to property or assets within England and Wales, both of which have been relied on in several of the crypto cases so far.

(1) Gateway 11 provides a ground of jurisdiction where "the subject matter of the claim relates wholly or principally to property within the jurisdiction". Gateway 11 is not limited to any particular category of property.

(2) Gateway 15(b) provides a ground of jurisdiction where "a claim made against the defendant as constructive trustee or as trustee of a resulting trust", and the claim "relates to assets within the jurisdiction".

3.116 Before considering these in more depth, it is worth noting that, in private international law, property disputes are often referred to as actions or claims *in rem* ("in the thing") and judgments that rule on property entitlements are often referred to as judgments *in rem*.[128]

The general principles

3.117 We have explained above that the general rule of private international law is that the defendant should sue in the "home court" of the defendant. There is, however, an exception for property disputes. This reflects a broader consensus in private international law that the place where a property object is situated (the *situs*) should take precedence as the primary connecting factor to identify both the court in which a

[128] The terminology reflects Continental concepts of property law, which are usually referred to as "the law of things". Claims and judgments *in rem* are often contrasted with claims and judgments *in personam*" ("in/against a person").

property dispute should be litigated and the law applicable to a property dispute.[129] This general consensus around the *situs* in property claims is often referred to as "the *situs* principle".

3.118 In relation to international jurisdiction, the traditional rule is often expressed in Latin as the *forum rei sitae* rule (court of the place where the object is situated) or *forum situs* rule (court of the situation/location). The strength of the *situs* principle, however, differs, depending on the type of property object in dispute.

3.119 For immovables, there is near-absolute consensus on the *situs* principle amongst the domestic and international rules of international jurisdiction: the courts of the place where the immovable is situated have exclusive jurisdiction over property claims in relation to the immovable;[130] and courts must refuse recognition and enforcement of a foreign judgment *in rem* relating to immovables if the immovable was not situated in the territory of the foreign court.[131]

3.120 For tangible movables, the *situs* principle is less absolute. Some jurisdictions, like England and Wales, continue to provide expressly only for the *forum situs* in their rules of international jurisdiction for property claims. Other jurisdictions provide rules that include as alternatives both the *forum situs* as well as the general rule of international jurisdiction that the claimant must follow the matter in dispute to the "home court" of the defendant.[132] Some legal systems do not provide for the *forum situs* at all.[133] In these jurisdictions, the general rule of international jurisdiction applies to property claims in respect of movables.

3.121 In property matters, there is an especially close relationship between jurisdiction, the recognition and enforcement of judgments. Typically, a court will recognise and enforce a foreign judgment *in rem* if the property object was situated within the country in which the property dispute was litigated. Thus, the common law rules[134] for the recognition and enforcement of foreign judgments *in rem*, as summarised in *Dicey* Rule 50, reads:

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129 See A Held, "The modern property situationship" (2024) 20(2) *Journal of Private International Law* 391, fns 1 to 10 in particular.

130 See, eg Art 24(1) if the Brussels I Regulation (Recast). See also EM Kieninger, "Immovable Property", in J Basedow and others (eds) *Encyclopaedia of Private International Law* Vol 2 Entries I-Z (2017), p 893; L d'Avout, "Property and Proprietary Rights", in Basedow and others (eds) *Encyclopaedia of Private International Law* Vol 2 Entries I-Z (2017), p 1429; Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris, and Collins on the Conflict of Laws*, (16th ed, 2022), para 23-009 fn 16 and text.

131 See eg Art 6 of the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. See also See also *Kireeva v Bedzhamov* [2024] UKSC 39, [2024] 3 WLR 1010.

132 See eg the entry for Argentina and "jurisdiction based on actions concerning property which is not subject to registration" pursuant to s 2666 of the Civil and Commercial Code in Permanent Bureau of the HCCH, "Comparative Table on Grounds of Jurisdiction" (2015) available at https://assets.hcch.net/docs/03c39e9f-878b-400d-a359-e70b7937edde.pdf

133 The domestic rules of France and Germany, for example, do not provide for jurisdiction *in rem* for movables.

134 The rule is stated in near identical terms to section 4(2)(b) of the Foreign Judgments (Reciprocal Enforcement) Act 1933. This provision sets out the circumstances in which the courts of England and Wales considers that the foreign court rendering the judgment had jurisdiction over the property claim.

> A court of a foreign country has jurisdiction to give a judgment *in rem* capable of enforcement or recognition in England if the subject-matter of the proceedings wherein that judgment was given was immovable or movable property which was at the time of the proceedings situate in that country.[135]

3.122 In the case of immovables, the rule of jurisdiction that confers exclusive jurisdiction on the *forum situs* means that courts *must* refuse recognition and enforcement of a foreign judgment *in rem* relating to immovables if the immovable was not situated in the territory of the foreign court.[136]

3.123 The *forum situs* rules for both direct and indirect jurisdiction tend to be underpinned by practical considerations relating to effective enforcement. Where a claimant seeks delivery up of a property object on the basis that it belongs to them and is therefore "theirs", the general effect of the *situs* rules is that the claimant must go to the courts of the place where the property object is situated.[137] This ultimately reflects a basic rule of international law in relation to enforcement: exercise of enforcement jurisdiction, that is, the coercive power of states to seize objects or commit a person to custody, is strictly territorial.

3.124 For intangible property, recourse to the *situs* principle is often not necessary. If a legal system conceptualises intangible property essentially as a personal obligation (such as the way in which the law of England and Wales conceptualises a chose in action or debt), the relevant rules of international jurisdiction might rather be for claims arising in relation to a contract. That said, insofar as fictions are used to "localise" property objects that do not have an obvious physical existence, these tend to point to the courts of the place where the object can be effectively dealt with. In this way, debts have traditionally been "localised" at the place where the debtor is habitually resident or domiciled; [138] and shares have been "localised" at the place where the shares can be effectively dealt with as between the company and the shareholder. [139] We discuss this further at paragraph 4.136 in the next chapter.

3.125 Drawing these considerations together and viewing them from the perspective of litigation, the principles that apply to international jurisdiction over the 'paradigm' property claim play out in the follow way:

> (i) the claimant follows the object to identify the defendant, who is sued simply because he happens to have possession or control of the object […] what usually

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135 Lord Collins of Mapesbury and J Harris, *Dicey, Morris, and Collins on the Conflict of Laws*, (16th ed, 2022), para 14R-108.

136 See eg Article 6 of the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

137 Early explanations of the rule include those by Savigny: "He who wishes […] to exercise a right to a thing, goes for that purpose to its locality, and voluntarily submits himself […] to the local law that governs in that region" (trans W Guthrie), *A Treatise on the Conflict of Laws*, (2nd edn, 1869), 129; and Westlake: "No other sovereign can lawfully use force to change or maintain their existing state of possession, and it is therefore a matter of mere fact that the *forum* of the situation of every corporeal chattel must conclusively determine on its property", J Westlake, *A Treatise on Private International Law, or The Conflict of Laws* (1858), 243.

138 See ch 4 para 4.136.

139 *Macmillan Inc v Bishopsgate Investment Trust Plc (No.3)* [1996] 1 WLR 387.

> happens next is: (ii) the claim is issued in the courts of the place where the object, in the control of the defendant, is found because (iii) only the sovereign of that state is able to effect the change in property entitlements underpinning a remedy *in rem*. Where the object is incorporeal: (iv) the claim is issued in the courts exercising personal jurisdiction over the defendant such that he may be compelled to perform; and (v) such place is often described as the "artificial situs" of the incorporeal.[140]

3.126 As we have seen, this is the typical fact pattern that underpins many of the crypto-token cases. For example, in *D'Aloia*: (i) the claimant used a specialist blockchain investigator to track to where the relevant crypto-tokens had been transferred; (ii) the claimant sought to bring proceedings against the crypto exchanges which had control over the tracked crypto-tokens. However, the crypto cases so far have then diverged from this typical pattern: proceedings have been brought in England and Wales, rather than in the jurisdiction to which the crypto-tokens have been tracked.

Temporal factor and the *conflit mobile*

3.127 Movable property poses particular challenges for the *situs* principle. This is because the place where the object is located can very easily change. For example, applying a rule based on the *situs* principle to a car means that the country to which the rule points will change every time the car crosses a national border. This is a question often encountered with applicable law issues in respect of movable property and is known in French as a *conflit mobile*.

3.128 As "the place where the car is located" can, therefore, point to a number of different places, depending on the point in time, it becomes important to specify in the relevant rule of private international law **when** the location is to be assessed. Such qualifications as to time are often expressly included in the rules for the recognition and enforcement of judgments *in rem*. Some rules even anticipate why recognition and enforcement of a judgment *in rem* over movables might even be sought:[141] those cases where the movable in question has been brought to the territory of the court in which recognition and enforcement is sought during or since the trial of the matter.

3.129 Of the legal systems that include a temporal qualification in their rules for recognition and enforcements of judgments *in rem,* all provide that the foreign judgment will be recognised and enforced if the property object was within the territory of the foreign court **at the time of proceedings**.[142]

3.130 This includes England and Wales. We have set out *Dicey* Rule 50 above, and repeat it here with the relevant part in emphasis:

> A court of a foreign country has jurisdiction to give a judgment *in rem* capable of enforcement or recognition in England if the subject-matter of the proceedings

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140 A Held, "The modern property situationship" (2024) 20(2) *Journal of Private International Law* 391.

141 See s 517(1) Codigo Procesal Civil y Comercial de la Nacion (National Code of Civil and Commercial Procedure, Argentina).

142 See eg s 7(3)(b) Foreign Judgments Act 1991 (Australia); Article 22 quinquies (f) Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial (Law of the Judiciary, Spain); s 517(1) Codigo Procesal Civil y Comercial de la Nacion (National Code of Civil and Commercial Procedure, Argentina).

wherein that judgment was given was immovable or movable property which was **at the time of the proceedings** situate in that country.[143] (emphasis added)

3.131 The overall effect is that, if the courts of England and Wales are faced with an application to enforce or recognise a foreign judgment *in rem*, the courts must consider whether the relevant property object was situate in that foreign country at the time of the proceedings giving rise to the foreign judgment. If this was not the case, the courts of England and Wales must refuse recognition of that foreign judgment on the basis that the foreign court rendering the judgment did not have jurisdiction over the claim.[144]

Property cases with an omniterritorial element

3.132 We said above that, although the cases in England and Wales have all been brought primarily with the ultimate objective of recovering misappropriated crypto-tokens, relatively few have relied outright or solely on the property or constructive trustee gateways.

3.133 As we have seen above, there are two questions that arise when applying the property gateway(s) to cases involving crypto-tokens:

(1) In what circumstances can a crypto-token be said to be located in England and Wales? That is, **where** is a crypto-token located?

(2) **When** must the crypto-token be in England and Wales in order for it to provide the basis of jurisdiction under the property gateway?

The "where" question

3.134 In our call for evidence we identified five cases in which the location of crypto-tokens was considered for a claim under the property gateway.

(1) In *Ion Science v Persons Unknown*, Mr Justice Butcher noted that, at the time of his decision, there was no judicial authority regarding the location of crypto-tokens that would assist with the determination of the property gateway.[145] In the absence of any such authority, Mr Justice Butcher cited a proposal of Professor Dickinson, and extrapolated from this a separate proposition that the location of a cryptocurrency is the place where the person or company who owns it is domiciled.[146] As we discuss below, and in more detail in Chapters 5 and 6 on applicable law, this does not appear to be what Professor Dickinson had actually proposed.[147] In addition, his proposal was made in the context of

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143 Lord Collins of Mapesbury and J Harris, *Dicey, Morris, and Collins on the Conflict of Laws*, (16th ed, 2022), para 14R-108.

144 Section 4(1)(a)(ii) Foreign Judgments (Reciprocal Enforcement) Act 1933; Lord Collins of Mapesbury and J Harris, *Dicey, Morris, and Collins on the Conflict of Laws*, (16th ed, 2022), para 14R-108 and 14-109.

145 Unreported, 21 December 2020 at [13] by Butcher J.

146 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.

147 We are grateful to Professor Dickinson for discussing his proposal with us, which has aided our understanding of it.

applicable law, not international jurisdiction. Nevertheless, the solution adopted by Mr Justice Butcher is another way of addressing the issue, given that a crypto-token has no physical location of its own in the conventional sense.

(2) The approach taken by Mr Justice Butcher in *Ion Science* was cited, and broadly followed, in each of *Fetch.ai v Persons Unknown*, *D'Aloia v Persons Unknown*, and *Osbourne v Persons Unknown*.[148]

(3) In *Tulip Trading v Bitcoin Association for BSV,* Mrs Justice Falk (as she then was) had considered at first instance the property gateway (which was not the basis for her decision in the case, and which was not challenged on appeal) .[149] In the first instance case, 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.[150] 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,[151] although that distinction was not material in *Ion Science* itself. 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.[152] 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.[153]

3.135 Thus, the courts have so far taken a reasonably consistent approach to the question of "where" a crypto-token is "located": the place where the "owner" is domiciled; or, alternatively, where the "owner" is habitually resident. However, these cases have mostly been made on an *ex parte* basis in circumstances where the claim has been pleaded for specific tactical purposes and the courts have been concerned with the more practical issues of access to justice. There is as yet no comprehensive judicial reasoning on this discrete issue, and certainly no consideration by an appellate court. All in all, the decisions could be said not appear to accord with the general principles

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148 Although in some cases permission to serve out was actually granted under a different gateway.

149 *Tulip Trading v Persons Unknown* [2022] EWHC 667 (Ch); *Tulip Trading v Persons Unknown* [2023] EWCA Civ 83.

150 [2022] EWHC 667 (Ch) at [142] by Falk J (as she then was).

151 Above at [143] to [144].

152 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/.

153 The appeal concerned the "serious issue to be tried" limb of the test for service out of the jurisdiction. Mrs Justice Falk's decision at first instance had been there was not a serious issue to be tried that, on the fact pleaded, the defendants owed fiduciary duties to the claimant. See [2022] EWHC 667 (Ch) at [142] to [148].

that underpin international jurisdiction, or the general approach to interpreting the property gateway.

3.136 Further, in several cases the court has purported to apply Professor Dickinson's proposal, but in fact the approach taken in the courts is not always or necessarily consistent with that put forward by Professor Dickinson. As we discuss in more detail in Chapter 5, Professor Dickinson's proposals were made in the context of applicable law and are far more nuanced than the courts have appreciated. For example, Professor Dickinson was not proposing any broad-brush rule for any and all "proprietary issues" but separate solutions for very discrete and specific issues that might arise between those who participate directly in DLT networks, and between those who do not participate directly in DLT networks but may well enter into transactions with those who do. The consequent proposals were, therefore, premised considerably on questions of characterisation in the conflict of laws.

3.137 Thus, Professor Dickinson's proposals are founded on a contractual characterisation of the relationships arising between direct participants in a DLT network, and conceptualising the value of a crypto-currency in terms of those relationships. Moreover, outside these relationships, Professor Dickinson invokes the analogy of goodwill to suggest an incremental development of the common law's *lex situs* approach for intangible property to support the proposition that the proprietary effects outside a crypto-currency system of a transaction relating to crypto-currency shall in general be governed by the law of the country where the participant resides or carries on business at the relevant time.[154]

3.138 From this, to say that Professor Dickinson's proposal was that "the *lex situs* of a cryptoasset is the place where the person or company who owns it is domiciled"[155] would seem to be a significant misinterpretation of what Professor Dickinson had actually proposed.[156] Nor is it necessarily appropriate to take a proposal for applicable law and apply it directly in the context of international jurisdiction. As we discuss in more detail below, the rules of international jurisdiction over property claims are underpinned by distinct policy and practical considerations specific to this branch of private international law. These are not issues Professor Dickinson purported to address in this publication.

3.139 Since the publication of the call for evidence, the case of *Tai Mo Shan Ltd v Oazo Apps Ltd* has reinforced some of the ongoing challenges associated with the application of the property gateways, the *situs* principle, and "locating" a crypto-token.[157]

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154 Professor Dickinson suggests, however, that if the dispute arises solely between the parties to the transaction, there is a strong argument for applying the law governing the transaction, in line with Art 14(1) and Recital (38) to the Rome I Regulation.

155 *Ion Science v Persons Unknown* (21 December 2020) EWHC (Comm) (unreported) at [13]; cited with approval in *Fetch.ai v Persons Unknown* [2021] EWHC 2254 (Comm) at [14].

156 A Dickinson, "Cryptocurrencies and the Conflict of Laws" in D Fox and S Green (eds), *Cryptocurrencies in Public and Private Law* (2019).

157 [2024] EWHC 1514 (Comm) and [2024] EWHC 2532 (Comm).

3.140 In that case, the claimant (a Cayman-registered company) had fallen victim to a fraud perpetrated by persons unknown and had lost their crypto-tokens as a result. The claimant invoked the aid of both the courts of England and Wales and the courts of New York. Substantive proceedings were issued in New York against the fraudster persons unknown (within Lord Sumption's second category of unidentified persons). Before the courts of England and Wales, the claimant applied for and was granted a freezing injunction. The unknown defendant was served by NFT.[158]

3.141 During the course of proceedings, the claimant had succeeded in locating the misappropriated crypto-tokens (or the traceable proceeds of the fraud) in a wallet hosted by a decentralised finance application called Oasis. Oasis was operated by an English-incorporated company called Oazo Apps.

3.142 Given that Oazo Apps had the technical ability to seize these crypto-tokens, the claimant sought and was granted an order of the court of England and Wales that Oazo Apps seize the relevant assets. To do so, Oazo Apps perpetrated its own hack on behalf of the claimant to recover the crypto-tokens identified in the wallet; and then transferred them to a wallet controlled by the claimant's English and Welsh solicitors. The claimant then obtained a proprietary declaration in relation to those crypto-tokens by way of summary judgment in New York.

3.143 The claimant subsequently issued a claim in England and Wales to recognise and enforce the proprietary declaration in the New York judgment. An application was made to serve those proceedings out of the jurisdiction on the defendant persons unknown who had perpetrated the hack.

3.144 In the application for recognition and enforcement, His Honour Judge Pelling KC in the High Court classified the New York judgment as a judgment *in rem*, that is, a judgment ruling on property rights "in" the crypto-tokens, rather than against a person.

3.145 He then adopted two quite different approaches to "localising" a crypto-token for the purposes of international jurisdiction.

(1) For the purposes of establishing direct jurisdiction for a freezing injunction,[159] the judge held that, "applying English law principles it is at least arguable that New York was the situs of cryptocurrency stolen from the claimant at the time it was stolen".[160] The basis of this is not, however, entirely clear. The judge purported to apply the courts' interpretation of Professor Dickinson's proposal for applicable law. However, he ultimately concluded that the crypto-tokens were situated in New York at the time they were misappropriated from the claimant, because this is where the claimant company – the "owner" – had its

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158 We discuss this, including this case, above from para 3.81.

159 "Direct jurisdiction" is the jurisdiction of the court that hears the case and renders the judgment. "Indirect jurisdiction" is relevant to the recognition and enforcement of judgments. 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".

160 *Tai Mo Shan Ltd v Persons Unknown* [2023] EWHC 1514 (Comm) at [9].

central management and corporate control. This was notwithstanding that the claimant was a company registered in the Cayman Islands.

(2) For the recognition and enforcement proceedings, the judge said that England and Wales was the most appropriate forum, because the crypto-tokens in relation to which recognition and enforcement was sought were located, or to be treated as located, in England and Wales.[161] This was because the persons with actual control over those crypto-tokens (the claimant's solicitors) were located in England and Wales. Only the courts of England and Wales could, moreover, release the solicitors from the undertakings to hold the crypto-tokens in accordance with the orders of the court.

3.146 To summarise, the judge "located" the crypto-tokens in different places for different purposes.

(1) For the purposes of international jurisdiction, he said they were in New York, because this is where the Cayman Islands-domiciled "owner" has its central management and corporate control.

(2) For the purposes of recognition and enforcement, he said they were in England and Wales, since following an order by the courts of England and Wales, they had been placed under the practical control of solicitors based in England and Wales.

3.147 *Tai Mo Shan* illustrates the ongoing difficulties with interpreting the property gateways and applying the principles that underpin the *forum situs* rules. Two very different reasons were given "localising" the relevant crypto-tokens in New York and in England and Wales that are, moreover, inconsistent with one another. If, following the first approach, the place of the corporate claimant's central management and corporate control (over the company's operations) is the relevant factor, there would have been no basis to say that the crypto-tokens were in England and Wales for the purposes of recognition and enforcement: the claimant's place of central management and corporate control remained in New York. Conversely, if following the second approach, effective practical control over the relevant crypto-tokens is the relevant factor, there would have been no basis to say that the place of control was New York when the New York proceedings were issued, given that, at this stage, it was not clear where the misappropriated crypto-tokens were being held.

3.148 We return to this case in Chapter 4 when discussing how we think the property gateway should be applied in cases concerning crypto-tokens.

The "when" question

3.149 In our call for evidence, we 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.

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[161] *Tai Mo Shan Ltd v Persons Unknown* [2023] EWHC 1514 (Comm) at [6].

(1) *Fetch.ai v Persons Unknown:* In respect of the constructive trustee gateway, [162] 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**".[163] 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.[164]

(2) *Denisov v Delvecchio*: In respect of the constructive trustee gateway, the same judge, His Honour Judge Pelling KC, appeared to suggest a different approach: the assets in question must be within England and Wales at the time the application to serve out is made.[165]

(3) *D'Aloia v Persons Unknown:* 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. 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.[166]

(4) *Osbourne v Persons Unknown*: 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.[167] 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.[168] 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. Ultimately, however, he did not make a final determination on this

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[162] [2021] EWHC 2254 (Comm) at [15] by HHJ Pelling KC.

[163] 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.

[164] Above.

[165] *Denisov v Delvecchio* [2022] EWHC 377 (Comm) at [19] by HHJ Pelling KC. It is worth noting that this was not a crypto-token case.

[166] [2022] EWHC 1723 (Ch) at [22] by Trower J.

[167] *Osbourne v Persons Unknown* [2023] EWHC 39 (KB) at [36].

[168] Above at [36].

matter, and instead held it to be "a matter which may arise for decision in due course in a contested and fully-argued case".[169]

3.150 We provisionally concluded in the call for evidence that Mr Justice Lavender was correct. As we will discuss further in Chapter 4, stakeholders near-unanimously agreed in their written responses to our call for evidence with our analysis on the "when" question; that is, that a crypto-token must be located in England in Wales at the time the application is made in order to establish jurisdiction on this basis.

Summary of issues with the property gateways

3.151 The courts so far have taken a variety of approaches to both the "where" and "when" questions, not all of which have reflected the wider principles and policies in relation to international jurisdiction over cross-border property claims. In the next chapter, we explain how we think the property gateways should be interpreted in property claims to crypto-tokens. We set out our provisional conclusions and ask whether consultees agree.

Damage suffered within England and Wales (the tort gateways)

3.152 The law of tort in England and Wales encompasses a wide range of actions that may be available to a claimant where they have suffered loss or damage as a result of a breach of non-contractual duty by the defendant. Many of these actions may be suitable for a crypto-token claim. For example, the tort of deceit might be available for fraudulent misrepresentations that induce a claimant to transfer their crypto-tokens to a fraudster. Alternatively, misuse of confidential information could be pleaded when there has been misappropriation and use of the claimant's private key by a fraudster.

3.153 There is an especially close relationship between property and tort in the law of England and Wales. Many property rights are vindicated by tortious causes of action, such as trespass and conversion. In our Digital Assets Final Report we suggested that a control-based equivalent of conversion should be developed for digital assets such as crypto-tokens.[170] For the same reasons, it might also be arguable that a claim analogous to trespass to goods might be available. However, as we discuss in Chapter 4, these areas of the substantive private law are generally under-developed. Moreover, the extent to which the property torts will be helpful where the claimant seeks to recover their misappropriated crypto-tokens remains unclear.

3.154 This is because the standard remedy for tortious causes of action is damages to compensate the claimant for their loss. Notoriously, this is so, even for the property torts. Unlike Continental systems of private law, 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 (inherent in which is a right to possession).[171]

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169 Above at [37].

170 Digital Assets: Final Report (2023) Law Com No 412, Chapter 5. Indeed, in the context of electronic trade documents (ETDs), we have suggested that it should be possible to bring an action in conversion given that the Electronic Trade Documents Act 2023 deems ETDs to be capable of possession: Electronic Trade Documents: Report and Bill (2022) Law Com No 405, 8.50.

171 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; [2008] 1 AC 1at [308].

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.[172]

The general principles

3.155 The traditional rules for tort in private international law use the place of the tort (*locus delicti*) as the primary connecting factor. There are, however, two alternative interpretations of this rule: the place where the tortious act was committed (*locus delicti commissi*) or the place where the damage was sustained (*locus damni*). Although in the past, the place where the tort was committed took precedence, the place where the damage was sustained is equally prevalent in the modern rules of international jurisdiction.

3.156 In England and Wales, the location of damage or detriment is used as a connecting factor to found international jurisdiction in a range of non-contractual claims. Under Practice Direction 6B paragraph 3.1, relevant provisions include:

(1) gateway 9(a): a claim made in tort where "damage was sustained, or will be sustained, within England and Wales".[173]

(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".[174]

3.157 We focus our discussion on gateway 9(a), although our analysis is equally applicable to gateway 21(a). Not only has gateway 9(a) been the most commonly-invoked ground of international jurisdiction in the crypto-token cases so far, but "claims in tort" is a wide category that encompasses a broad range of causes of action.[175]

3.158 For our purposes, it is important to note that, notwithstanding the relative simplicity of gateway 9(a), the question of "where" tortious damage is suffered or sustained is not a simple question in private international law. The challenge of "localising" damage in tort for both international jurisdiction and applicable law more generally has long been riddled with uncertainty. We discuss two core challenges that predate the advent of DLT and omniterritorial phenomena: torts committed online and pure economic loss.

Online torts

3.159 Rules of private international law that refer to the place where tortious damage "occurs" 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

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172 Torts (Interference with Goods) Act 1977, s 3(2).

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

174 Above para 3.1(21)(a).

175 A Tettenborn, M Jones *Clerk & Lindsell on Torts* (24th Ed 2023, Supplement 2024), section 3(a), para 1-31 to 1-58. See also B Rudden, "Torticles" (1991–92) 6/7 Tulane Civ.L. Forum 105, 110.

normative environments of online platforms and similar ecosystems"[176] rather than in physical locations.

3.160 For example, using the place of the tort as the connecting factor in a case concerning a defamatory post on X (formerly known as Twitter) leads to various possibilities.[177] 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.[178]

3.161 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. In such cases, Professor Alex Mills has observed that the application of territorial connecting factors to cases where defamatory material is published online 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". [179]

3.162 Professor Tobias Lutzi has also examined the challenges that arise when attempting to apply traditional connecting factors, typically expressed in territorial terms, to torts committed online. Given the challenges of "localising" tortious damage in the online and decentralised contexts, Professor Lutzi considers it may be more appropriate to focus on the parties in a tort claim themselves, rather than the place of harm or the event giving rise to it.[180] Accordingly, in the context of international jurisdiction, his proposal is that international jurisdiction over online torts should be based on the defendant's domicile, thereby aligning the rule with the general rule of jurisdiction prescribed in Article 4(1) of the Brussels I Regulation Recast. This reflects the general rule of international jurisdiction that a defendant should be sued in their "home" court.

3.163 In our call for evidence, we discussed a further challenge in "localising" damage sustained in the online sphere that builds upon these long-recognised difficulties. In *Tulip Trading v Bitcoin Association for BSV*,[181] 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. In the first instance decision, the question arose as to where the loss was suffered. The judge explicitly

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176 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) fn 71.

177 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.

178 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* (2024) p 192.

179 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* (2024) p 192 to 193.

180 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 fn 73.

181 *Tulip Trading v Persons Unknown* [2022] EWHC 667 (Ch).

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.[182] This element of the first instance decision was not challenged by either party on appeal.

3.164 From this, damage or loss that is sustained as a result of malware or a hack that prevents a person from accessing an online account raises particular challenges. If the victim could 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?

Pure economic loss

3.165 Financial or economic loss is a difficult issue in both the substantive law of torts and in private international law. In private international law, it is the subject of much debate and controversy; both in the domestic context and in the EU context.

3.166 For present purposes, it is important to note that private international law has special rules for "localising" financial or economic losses in tort. These rules are more restrictive than the rules that apply to "localising" physical damage or loss. If a claim in respect of crypto-tokens that engages private international law is a claim for pure economic loss, then those special rules should in principle apply.

3.167 In England and Wales, "localising" tortious damage for the purpose of international jurisdiction, including consideration of pure economic loss, was considered by the Supreme Court in *Brownlie I and II.*[183] These cases concerned a claim in tort arising from a road traffic accident in Egypt. The harmful act and the immediate damage – a car crash resulting in personal injury and death – both occurred in Egypt. A claim for damages was made for pain, suffering, and physical injury said to have been sustained in Egypt and which continued to be sustained upon returning home to England and Wales. The claimant further claimed damages for bereavement and loss of dependency in her capacity as a widow, which was said to have been sustained in England and Wales.[184] In *Brownlie II,* the Supreme Court held by a majority of four to one, that both were damage suffered in England and Wales for the purposes of gateway 9(a).

3.168 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".[185] Therefore, although the decisions in *Brownlie I and II* suggest that the tort gateway is

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182 Above at [164].

183 *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.

184 Above, [83]. A third claim for damages was made in the claimant's capacity as executrix of the estate of her late husband.

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

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.

3.169 Pure financial or economic damage is also the subject of a long line of the Court of Justice of the European Union (CJEU) caselaw, 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. 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 the "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".[186] *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.[187] 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.[188] 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 the contract which had resulted in a definitive reduction in her assets in Austria.[189]

3.170 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

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186 Case C-168/02 *Kronhofer v Maier* [2004] ECR I-6009 at [21].

187 Case C-375/13 *Kolassa v Barclays Bank Plc* [2015].

188 Case C-304/17 *Löber v Barclays Bank Plc* [2018].

189 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.

the injured party's domicile, purely on the basis of that connecting factor and without more, cannot be justified.[190]

3.171 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.[191] We note, however, this jurisprudence does not, strictly speaking, bind the courts of England and Wales on the interpretation and application of the gateways.

Cases with an omniterritorial element

3.172 In our call for evidence, we identified no fewer than six ways in which the courts had conceptualised damage and found that it was or would be "sustained within England and Wales".

(1) In *Ion Science v Persons Unknown,* the second claimant and his computer were in England and Wales when false representations were allegedly made to him inducing him to cede control over his computer. The court said there was a good arguable case that the damage was sustained in England and Wales because that was **where the claimant was deprived of access to the misappropriated crypto-token**.[192]

(2) In *Lubin Betancourt Reyes v Persons Unknown*, the claimant was domiciled in England and Wales but alleged that he had fallen victim to a phishing scam while on holiday in Spain. Notwithstanding the fact that the claimant and his laptop were in Spain at the relevant time, the judge said the damage was sustained in England and Wales because that was **where the claimant was habitually resident and where he conducted business.**[193]

(3) In *Jones v Persons Unknown*, the claimant alleged he had been induced to transfer crypto-tokens to fraudsters thought to be based in Russia. The judge said that the damage was sustained in England and Wales because that was **where the claimant was domiciled.**[194]

(4) In *Fetch.ai Ltd v Persons* Unknown, a case concerning misappropriation of private keys, the court held that the damage was sustained in England and Wales because that was **where the corresponding crypto-tokens were located.** The judge adopted the reasoning of Butcher J in *Ion Science* at [13] where he said that the "*situs* of a cryptoasset is the place where the owner or company who owns it is domiciled". On this basis the judge concluded that the crypto-tokens were located here and that, as a consequence, the "losses

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190 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.

191 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.

192 *Ion Science v Persons Unknown* (21 December 2020) EWHC (Comm) (unreported).

193 *Lubin Betancourt Reyes v Persons Unknown* [2021] EWHC 1938 (Comm) at [22] by HHJ Pelling KC.

194 *Jones v Persons Unknown* [2022] EWHC 2543 (Comm) at [6] by Mr Nigel Cooper KC.

caused by the allegedly fraudulent scheme were suffered here as a consequence".[195]

(5) In *Tulip Trading v Bitcoin Association for BSV,* the claimant alleged that it had been deprived of its private key as a result of a hacking incident and could therefore no longer access its crypto-tokens. In the first instance decision, Mrs Justice Falk expressed the view that if there had been a serious issue to be tried, there was a good arguable case that the damage was sustained in England and Wales because that was **where the claimant would experience the deprivation of access to the misappropriated crypto-token**. 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. As we said above, the defendants (who in this case had been identified) argued that, because the crypto-tokens could in theory have been accessed anywhere in the world, the damage was **not** sustained in England and Wales. The judge explicitly rejected this argument.[196]

(6) In *AA v Persons Unknown*, the claimant was an English insurance company that had paid a ransom in bitcoin to a hacker who had installed malware on the computer system of one of the claimant's policyholders. The court allowed service out under the tort gateway on the basis that **England and Wales was where the financial loss was sustained because the company had paid for the bitcoin from an England bank account and was a company registered in England and Wales.** England and Wales was the place where the pure financial loss associated with the crypto-token was incurred.[197]

(7) In *D'Aloia v Persons Unknown*, the claimant was alleged to have been induced to transfer crypto-tokens into digital wallets operated by unidentified fraudsters. The judge said it was arguable that the damage would be sustained in England and Wales because that is **where the crypto-tokens were held immediately before the fraudulent misrepresentations were made**. The judge considered that the *lex situs* of a crypto-token is the place where the owner is domiciled, and that, as the claimant was domiciled in England, the crypto-tokens "of which he was deprived of the first defendant, i.e., the persons unknown, was located in England".[198]

3.173 There is a considerable degree of difference and even contradiction between these approaches. This raises questions as to whether the damage in **all** of these cases could be said to have been sustained "in England and Wales" on an application of general principles, such that it is appropriate for the courts to accept international jurisdiction over these types of claims.

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195 *Fetch.ai Ltd v Persons Unknown* [2021] EWHC 2254 (Comm), at [14] and [18].

196 *Tulip Trading v Persons Unknown* [2022] EWHC 667 (Ch) at [164].

197 *AA v Persons Unknown* [2019] EWHC 3556 (Comm) at [68] by Bryan J.

198 *D'Aloia v Persons Unknown* [2022] EWHC 1723 (Ch) at [10].

3.174 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*).

3.175 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.

3.176 Further, the decision in *Lubin Betancourt Reyes* appears to go against a trend seen in other cases, where damage has been "localised" by reference to the place where the victim was first deprived of access to their crypto-token. In *Lubin Betancourt Reyes*, the place where the victim was first deprived of access to their crypto-token was Spain, where the claimant was holidaying when he fell victim to a phishing scam. However, the "damage" was found to have "occurred in England and Wales" because this is where the victim had their habitual residence and/or the place where they conduct business.

Summary of issues with the tort gateways

3.177 We were told by stakeholders that, in these circumstances, the popularity of gateway 9(a) is due to its breadth. Practitioners have emphasised that gateway 9(a) is relatively easy to satisfy in that it does not require a claimant to grapple directly with more difficult questions like where a crypto-token is "located". Nevertheless, the exercises in "localising" tortious damage for the purpose of gateway 9(a) have largely focused on where the crypto-token was "located" at the relevant time. The "localisation" exercise for the purpose of a tort gateway has therefore largely proceeded along the same line of analysis as that employed for "localising" the asset for the purpose of the property and constructive trustee gateways. As we explain in more detail in the next chapter, we think this is a conflation that fails to recognise the distinct policies underpinning the property and tort gateways.

3.178 Although we recognise the specific circumstances in which these claims were pleaded, we think it is equally important to recognise that granting access to justice in these cases may be seen as having come either at the expense of principle, or straining consideration of the novel issues arising from crypt-tokens into more conventional frameworks that are not entirely suited for this purpose. We therefore consider in more detail in the next chapter how "damage or detriment suffered in England and Wales" should be interpreted in the crypto context given the underlying principles of private international law.

Chapter 4: International jurisdiction – proposals for reform

4.1 We have seen in the previous chapter that the cases in the crypto context so far give rise to a range of different issues and challenges. These issues and challenges, however, have not always been fully explored, given the urgent context in which the claims have been brought.

4.2 Although the courts have been concerned to ensure claimants are not denied immediate access to justice, they have not necessarily been focused on the general principles of international jurisdiction that underpin the gateways for service out of the jurisdiction. Recent developments in the courts suggest that the distorting effects of this focus on immediate justice have now spread beyond interpreting the grounds of international jurisdiction. They appear also to raise issues in relation to the principles surrounding service of proceedings and the jurisdiction of the courts to enter final judgment against foreign and/or unknown defendants.

4.3 Stakeholders generally agreed that the approach to international jurisdiction in the crypto-token cases so far – particularly in the cases alleging fraud against unknown defendants – is understandable in the circumstances, but will at some point come under greater scrutiny. They also generally agreed that greater thought needed to be given to the principles that underpin the rules of international jurisdiction generally, and how the rules should apply in cases involving a crypto-token or which have an omniterritorial element.

4.4 We agree that there is a need to consider more carefully how the principles of international jurisdiction that underpin the existing jurisdictional rules apply in cases involving a crypto-token. This is especially so, given that these principles are of a general application and should, therefore, be applied consistently in practice; irrespective of whether or not the case concerns a crypto-token. Nevertheless, we do also consider that there is an argument that the overall framework of international jurisdiction, which was developed in the 19th century, does not presently provide for some of the novel challenges that arise in modern cross-border litigation in relation to acts and events occurring in the distributed ledger technology (DLT) and crypto-token environment.

4.5 We therefore return to first principles. Building on the summary of issues provided in the previous chapter, we analyse how we think the current law ought to be applied in the context of crypto-token litigation. We consider separately the two different challenges for international jurisdiction we identified in the previous chapter: (1) access to justice in the crypto-token and DLT environment, and (2) the interpretation of the gateway requirements in cases with an aterritorial or omniterritorial element.

ACCESS TO JUSTICE IN THE CRYPTO-TOKEN ENVIRONMENT

4.6 As we have explained, the vast majority of the crypto-token claims that have come before the courts have had some elements that reflect the specific digital and

decentralised contexts from which they have arisen. As such, these cases illustrate the tension between access to justice and preventing injustice in the digital socio-economic realities of the 21st century, and the assumptions on which the grounds of international jurisdiction were developed in the 19th century.

4.7 Based on our review of the cases so far and some of the responses to our call for evidence, we think there is a demonstrable need for a mechanism by which the courts can provide immediate assistance to claimants who might otherwise be deprived of any chance of an adequate remedy for an injustice suffered in the DLT or crypto-token environment. At the same time, the existing cases provide ample evidence that these types of cases cannot easily be accommodated by the existing rules of international jurisdiction. Administering justice in these cases has therefore come at the cost of consistency, clarity, and a principled application of the law.

4.8 Our provisional view is that there is a case for law reform to target these particular issues, in the form of a new power to grant free-standing information orders.

Identifying the real issue: interim relief against third parties

4.9 We expand here on the sets of facts that have founded several of the crypto cases seen so far, together with the legal procedural issues at play in England and Wales.

(1) The claimant has been (or claims to have been) the victim of a fraud or hack resulting in the loss of crypto-tokens. The pseudo-anonymity of the crypto-token environment means it is near-impossible to obtain any information that might help them identify the perpetrators of the fraud and/or where the misappropriated crypto-tokens have gone. They are therefore unable to conduct the normal initial investigations a person might undertake when deciding whether to issue a claim in the court; and if so, against what defendant and in what jurisdiction.

(2) The claimant knows the blockchain address to which the crypto-tokens were transferred, so engages specialist technologists who follow the misappropriated crypto-tokens through the transaction histories recorded on the blockchain from and to specific blockchain addresses. However, even with this information, it remains very difficult to obtain complete information regarding the identity or location of the person who controls these addresses for the purpose of bringing a claim.

(3) Some of these blockchain addresses might, however, be linked to an identifiable person. These are typically crypto-token intermediaries, such as a crypto-token exchange. These intermediaries may have information about the person on whose behalf they maintain the relevant blockchain addresses. Even if they do not have such information, if the crypto-tokens remain ‘held’ at one of these addresses, the intermediary may have the practical ability to freeze or even move the crypto-tokens.

(4) However, these intermediaries themselves are often arranged in complex corporate structures that obscure which particular entity controls the identified blockchain address and where that company is located. The claimant may therefore still be unable to complete the normal initial investigations: they first

must identify which entity has the relevant information that may help them identify the correct defendant to any potential claim. Claimants have therefore sought court orders to compel an identified intermediary or other third party to provide the information necessary to complete the preliminary investigations.

(5) In these circumstances, when the defendant – and therefore their home court – is not (yet) identifiable and it is unclear which intermediary is the correct respondent to any court order, stakeholders have told us that claimants have turned to the courts of England and Wales for a variety of reasons. These include existing relationships with solicitors in this jurisdiction; an understanding of the existing legal and courts system; the likelihood that a subsequent judgment may be enforced over assets held by a financial services institution based in the City of London; the relative ease of enforcing court orders of England and Wales; and trust in the legal system of England and Wales.

(6) Under the civil procedure rules of England and Wales, the only way to obtain certain types of interim relief – notably information orders – against a non-party to the litigation, is to commence, or intend to commence, substantive proceedings in England and Wales; and then apply for an information order in support of that claim. This is provided for under gateway 25 (information orders against non-parties), which we discuss more fully below. [199]

(7) As claimants have no idea who the defendant is, let alone whether they are within England and Wales, they have been issuing proceedings against persons unknown and applying for permission to serve proceedings out of the jurisdiction. This requires the claimant to show, amongst other things, a good arguable case that the claim falls within one of the gateways. As we have seen above, this entails showing that the facts and issues arising in the case have an adequate (and usually territorial) link to England and Wales.

(8) Accordingly, the courts have been asked to make interim, *ex parte* decisions granting permission to serve out on the basis of a claim against an unknown defendant and which has an adequate territorial link to England and Wales. Given that the perpetrators of the fraud remain unknown, proceedings have been served by alternative and digital means. These have included service by Whatsapp, Facebook messenger, and the transferring of a non-fungible token (NFT) containing links to the relevant court documents to a blockchain address.[200]

(9) In reality, what claimants have sought are free-standing information orders, freezing orders and proprietary injunctions aimed at third party intermediaries who are potentially able to assist claimants in their initial investigations as to the identity of the defendant and the best claim to plead against them. At this point claimants do not know whether proceedings will be brought in England and Wales, nor who the defendant is.

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[199] Civil Procedure Rules, Practice Direction 6B, paras 3.1(25). See below from para 4.15.

[200] See *Jones v Persons Unknown* [2022] EWHC 2543 (Comm), *LMN v Bitflyer Holdings Inc & Ors* [2022] 2954 (Comm), *Osbourne v Persons Unknown* [2023] EWHC 39 (KB), *Tai Mo Shan* [2024] EWHC 1514 (Comm).

4.10 These features clearly distinguish what have really been applications for interim relief from (a) any fully-pleaded substantive legal claim and, more generally (b) the typical cross-border case for which the existing gateways were developed.

4.11 Against this backdrop, when all that is realistically sought is interim relief, it is not difficult to see why the courts have been keen to provide assistance; and have not been overly focused on the real detail of the case or the interpretation of the gateways. However, the combined impact of the cases appears to constitute a growing body of decisions that are inconsistent with one another as well as the general principles of international jurisdiction. We have identified two distinct issues as being left particularly confused in the wake of these cases:

(1) In what circumstances might a claimant who has no information about the identity or whereabouts of the defendant seek the courts' assistance in obtaining such information? In particular, in what circumstances might a claimant obtain interim relief from the courts of England and Wales against an innocent third-party to the claim who is not subject to the ordinary personal jurisdiction of our courts and when it is not yet certain that proceedings will be brought in England and Wales?

(2) In what circumstances might the courts assert adjudicatory jurisdiction over a defendant or third party to a claim, such that those persons may be subjected to the courts' processes, coercive powers, and have their legal rights altered by means of a final judgment? In particular, in what circumstances might a claimant who serves an unknown defendant by NFT obtain final/summary judgment against them?

4.12 We discuss these issues below and provisionally propose a reform that would take applications for information orders at the initial stages of investigations out of the existing general framework of international jurisdiction.

Free-standing information orders at the initial stages of investigations

4.13 As we have seen, claimants have generally sought a variety of interim orders to assist them at the initial investigations stage of proceedings. Under the civil procedure rules of England and Wales, certain types of interim relief, such as freezing orders , are available without any requirement that proceedings will be issued in England and Wales. They are, therefore, available both at the pre-action stage and where the substance of the dispute is pending in a foreign court. In these circumstances, the order granted by the courts of England and Wales is made to support those foreign proceedings, whether they have already been instituted or are yet to be commenced.[201]

4.14 However, this is not the case with information orders.

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[201] Freezing orders (originally known as *Mareva* orders after the case in which they were developed) are available in a wide range of circumstances; such as at the pre-action stage of proceedings, in support of foreign proceedings (actual or anticipated), and in relation to assets within and outside the jurisdiction. Applications for free-standing *Mareva* relief may be made under gateway 5 and s 25 of the Civil Jurisdiction and Judgments Act 1982. We explain this development in freezing orders further below, from para 4.53.

The existing limitations on the grant of Information orders

4.15 Information orders are one of the primary drivers of many of the crypto-token cases seen so far, but they are subject to particular constraints. They are available under gateway 25,[202] but only one crypto case we are aware of so far has relied exclusively on gateway 25. All the other crypto claims, even those where information orders were sought, have relied on claims falling within other gateways (usually the tort gateway) and have made applications for ancillary information and freezing orders to support those claims. This is, at least in part, because the constraints on gateway 25 have proved to be problematic in the crypto context.

4.16 Gateway 25 provides a ground of international jurisdiction where:

> A claim or application is made for **disclosure in order to obtain information**—
>
> (a) regarding:
>
> (i) the true identity of a defendant or a potential defendant; and/or
>
> (ii) what has become of the property of a claimant or applicant; and
>
> (b) the claim or application is made **for the purpose of proceedings already commenced or** which, subject to the content of the information received, are **intended to be commenced** either by service in England and Wales, by service out of the jurisdiction, or [where permission is not required to serve proceedings on the defendant] (emphasis added).[203]

4.17 Paragraph (a) lists two types of information orders: one for information about the defendant, and one for information about property. Both are typically sought and granted in cases of fraud or other wrongdoing and are directed at third parties to litigation (that is, parties who are not accused of any wrongdoing) to help the claimant obtain the information they need to bring a claim.

4.18 The two types of order listed in gateway 25 accommodate orders developed at common law. These are:

(1) *Norwich Pharmacal* orders,[204] which are directed to an innocent third party who, through no fault of their own, has become "mixed up" in some wrongdoing in a way that facilitates the commission of the wrongdoing. The order compels the **disclosure of the name and address of a potential, but as yet unidentified, defendant from the third party to whom the order is addressed**. *Norwich Pharmacal* orders are available in support of personal claims, such as in tort. *Norwich Pharmacal* orders are accommodated in Gateway 25(a)(i).

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202 Civil Procedure Rule, Practice Direction 6B, paragraphs 3.1(25).

203 Claimants do not require permission to serve proceedings within the jurisdiction, and in consumer cases where the claimant is a UK-domiciled consumer: see Civil Procedure Rules 6.32, 6.33 and 6.36.

204 The order was first granted in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133.

(2) *Bankers Trust* orders,[205] which are directed at a specific type of innocent third party for a very specific purpose. They are directed at financial institutions, such as a bank, and order them to disclose information about a customer's account. The *Bankers Trust* jurisdiction is only exercisable where, on the face of it, there is a clear case that the **relevant funds held by, or that passed through, the bank belong to the claimant** and the claimant has been fraudulently deprived of them. *Bankers Trust* orders are available only in support of proprietary claims and are accommodated in gateway 25(a)(ii).

4.19 Gateway 25(a) is intended to accommodate cases in which *Norwich Pharmacal* or *Bankers Trust* relief is sought against third-party intermediaries who are not present within England and Wales. An application for permission to serve such relief out of the jurisdiction must be made in accordance with the usual three-limb test.

4.20 In all the relevant crypto cases so far, these intermediaries have been out of the jurisdiction. As such, if claimants had sought free-standing *Norwich Pharmacal* or *Bankers Trust* relief against the intermediaries, they would have had to rely on gateway 25. However, gateway 25 has not been widely used. This is owing to the requirement in gateway 25(b) that the information is sought for proceedings already commenced or intended to be commenced in England and Wales. Claimants in the crypto-token proceedings have not been able to say this would be the case: given that they did not know the identity or whereabouts of the ultimate defendants when the application for the information orders were made, they have not been able to say that proceedings would be commenced in England and Wales. As we have seen, claimants have instead been forced to rely on other gateways and to issue claims against the defendants unknown in order to obtain interim relief ancillary to those claims.

4.21 The distorting effect that such litigation strategies have had on the interpretation of the gateways might not have been overly problematic had the decisions remained firmly at the early stages of proceedings. However, developments seen in some more recent cases have shown that the approaches taken to the gateways and the service of proceedings at the jurisdiction stage of proceedings have now carried over into the judgments stage.[206]

4.22 We consider these cases below to illustrate why we think it is important to emphasise that information orders under our proposed new power would be free-standing orders against the respondent third party, and not in support of any conventional substantive proceedings against a known defendant in any jurisdiction.

Service by NFT and summary judgment against defendant persons unknown

4.23 In the previous chapter, we discussed recent developments surrounding the grant of summary judgment against defendant persons unknown who had been served by NFT. We identified two cases in which the courts had reached differing conclusions on whether summary judgment could be entered against a defendant unknown who had

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[205] The order was first granted in *Bankers Trust Company v Shapira* [1980] 1 WLR 1274.

[206] *Boonyaem v Persons Unknown* [2023] EWHC 3180 (Comm), *Mooij v Persons Unknown* [2024] EWHC 814 (Comm), and *Tai Mo Shan v Persons Unknown* [2024] EWHC 1514.

been served by NFT. A core part of the reasoning in those cases turned on the correct interpretation of *Cameron v Liverpool Victoria Insurance Co Ltd.*[207]

4.24 In *Cameron*, Lord Sumption considered that the first category of unknown persons – defendants who are identifiable, but anonymous – can be located or communicated with. It is therefore possible to identify them as the person described in the claim form. They can thus be served with a claim form, if necessary by alternative service, and brought within the jurisdiction of the court. However, Lord Sumption considered that it would be impossible to serve the second category of unknown persons such persons, "are not only anonymous, but cannot even be identified".[208]

4.25 With these considerations in mind, Mr Richard Salter KC, sitting as a Deputy Judge of the High Court, in *Boonyaem v Persons Unknown* refused the application for summary judgment against one category of defendants who fell into Lord Sumption's second category of unidentified persons unknown. The disclosure order made previously by Mr Justice Bryan had not produced any "useful results".[209] Although the claimant had purported to serve the defendant(s) by alternative service including by NFT, they remained unidentified; and the fact that they had perpetrated the fraud on the claimant was not in itself sufficient identification for them to be sued properly to final judgment.

4.26 By contrast, in *Mooij*,[210] His Honour Judge Russen KC, sitting as a Judge of the High Court, reached the opposite conclusion. Noting that *Cameron* concerned difficulties in identifying a person unknown for the purposes of effecting service, the judge distinguished *Mooij* and *Boonyaem* from *Cameron* on the basis that relevant (unknown) defendants in *Mooij* had already been served by NFT. The judge said that they did not, therefore, fall within Lord Sumption's second category of defendants categorised in *Cameron*, because this category was for those who could not even be served with proceedings.[211] The judge considered that the defendants in *Mooij* had already been served, thereby bringing them within the jurisdiction of the courts of England and Wales.

4.27 From this, the judge saw no reason why summary judgment could not be granted against a person properly brought within the jurisdiction of the courts:

> The court assumes jurisdiction over parties for the purpose of making orders against them. This includes defendants who are deemed to have been served but who choose not to acknowledge the jurisdiction. The ultimate purpose behind the court's jurisdiction is so that it may grant judgment on the claim.[212]

4.28 The judge recognised that the practical obstacles to enforcing judgment where the defendant remained unidentified might well be "insurmountable" but did not see this as

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207 [2019] UKSC 6, [2019] 1 WLR 1471.

208 Above, [13].

209 *Boonyaem v Persons Unknown* [2023] EWHC 3180 (Comm).

210 *Mooij v Persons Unknown* [2024] EWHC 814 (Comm).

211 [2024] EWHC 814 (Comm) at [44].

212 [2024] EWHC 814 (Comm) at [47].

a reason against the court exercising its jurisdiction to grant relief, including by the grant of a final money judgment, in the first place.[213]

4.29 On a strict analysis of these two cases, we think there are some logical difficulties surrounding jurisdiction, particularly for the purposes of final judgment, and service of proceedings by NFT. It is hard to see how and on what basis a defendant unknown who falls into Lord Sumption's second category can become a defendant unknown of the first category, simply because the claimant has, with the permission of the court, succeeded in transferring an NFT "containing an appropriate hyperlink to the claim form and Particulars of Claim and response documents" to a particular blockchain address.[214] There is no guarantee that the address remains in use, or that it even "belonged" to the defendant in the first place. The fact remains that transferring the NFT has not led the claimant any closer to identifying the defendant. To build upon Lord Sumption's example: a hit and run driver who cannot be identified does not subsequently become identified simply because the claim form has been nailed to a lamppost near the site of the accident, or has been thrown from the place of the accident in the general direction in which the car had driven off.

4.30 From this, the real question in *Mooij* and *Boonyaem* does not seem to be whether a claimant has been able to effect a transfer of a particular NFT to a particular blockchain address. The question seems rather to be whether the anonymous and unidentified persons have been sufficiently identified such that they are properly within the jurisdiction of the court.

4.31 In *Boonyaem*, the previous application for information orders had not yielded any results such that the relevant defendants had subsequently been identified. They therefore remained just as unidentified as they had been at the time when permission to serve by alternative means had been granted. This is, moreover, the very challenge posed by the pseudo-anonymity of the crypto-token environment: save for cases where "on chain" crypto-token holdings are voluntarily disclosed by "real world" persons, there is no real or reliable way to link blockchain addresses with a natural or legal person "in the real world" who can be summoned by a court.

4.32 We therefore think *Boonyaem* was right to conclude that, irrespective of the fact that the claimant had sent an NFT containing hyperlinks to court documents to a particular blockchain address, the relevant defendants remained unidentified persons not capable of being brought within the jurisdiction of the court at the time when the application for summary judgment had been brought.

4.33 The reasoning in *Mooij* might have been influenced by the fact that, when the claimant made the original application for permission to serve proceedings out of the jurisdiction, they were required to show a good arguable case that there was a claim against a defendant that fell within one of the gateways. When deciding that original application, the courts may have been more relaxed about the "adequate link" to England and Wales, appreciating that what was really wanted was an information

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213 [2024] EWHC 814 (Comm) at [48].

214 *Tai Mo Shan v Persons Unknown* [2024] EWHC 1514 (Comm) at [1].

order against the third-party exchange. The use of the gateway has been, in these circumstances, something of a fiction.

4.34 Nevertheless, it seems to us that what began as allowing, in the interests of justice, what are effectively claims for interim orders to proceed through the substantive gateways on the basis of service of proceedings by NFT has now been developed beyond this initial concern in what is arguably an unprincipled way. In these circumstances, it is helpful to reiterate the broader principles engaged by service of proceedings and the rendering of judgments we discussed in Chapter 3. Two points bear repeating.

4.35 From a domestic perspective, jurisdiction in England and Wales has always been based on service of proceedings as an expression of sovereign authority being asserted over the defendant through a (royal) summons to the courts. It is for this reason that our rules for defining jurisdiction are framed as rules to determine whether and when it is **lawful** to serve process on the defendant.[215] From the international perspective, the service of proceedings in a manner that is inconsistent with "fundamental principles", both relating to service and justice to the defendant, is a basis on which a court may refuse recognition and enforcement of a foreign judgment under the Hague Judgments Convention 2019.[216]

4.36 All in all, we would suggest that the legal effect of sending an NFT containing hyperlinks to court documents to a particular blockchain address should be subject to a full and proper consideration before being generally accepted as a basis of establishing jurisdiction for the purposes of final judgment against an unknown defendant who remains in Lord Sumption's second category.

4.37 More broadly, we think it is important to recognise that the pragmatic response of the courts in relation to the immediate risk of injustice arising in novel circumstances may have had some unintended consequences. Moreover, we do not think that the need for interim relief in novel circumstances should necessarily have to be justified by reference to procedural fictions, which are liable to give rise to such unintended consequences. Rather, we think that the question of appropriate interim relief should be addressed directly. We therefore turn now to our provisional proposal for a new power to grant free-standing information orders.

A PROVISIONAL PROPOSAL: A NEW POWER TO GRANT FREE-STANDING INFORMATION ORDERS AT THE INITIAL STAGES OF INVESTIGATIONS

4.38 We have provisionally concluded that, in the digital and decentralised environment, some of the established principles of international jurisdiction hinder, rather than promote, access to justice. Particular challenges are presented by two main considerations: (i) the general consensus surrounding what constitutes an adequate link to England and Wales sufficient for our courts to assert international jurisdiction in civil and commercial proceedings, and (ii) the premise that certain types of relief

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215 A Briggs, *The Conflict of Laws* (4th ed 2019) p 46.

216 The Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. Article 7(1)(a) of the Convention is of particular relevance.

against non-parties are unavailable unless substantive proceedings will definitely be commenced in England and Wales against an identified defendant to final judgment.

4.39 In response, we provisionally propose the recognition of a new power of the courts to grant free-standing information orders in those digital and decentralised contexts where pseudo-anonymity or difficulty in following and tracing misappropriated assets present significant obstacles to bringing a claim. We think this could meet the evident need for a means by which claimants can access justice in these novel circumstances, while preserving the existing framework of international jurisdiction for more typical cross-border cases (including those involving crypto-tokens) that continue to reflect the assumptions as to cross-border litigation inherent in the gateways.

4.40 As we discuss in more detail below, the proposed new power would be based on the principles of access to justice, necessity, and preventing injustice in the modern digital and decentralised context. Its purpose would be to provide assistance to a claimant who has clearly been a victim of wrongdoing, but who is unable to complete the initial investigations necessary to bring a fully-pleaded claim owing to the pseudonymous and omniterritorial features of the DLT environment. It would enable the courts to grant free-standing information orders to claimants who are able to demonstrate to a relevant threshold that they have been the victim of a wrong but are not yet in a position to say where they should and will litigate.

4.41 While we note that claimants have tended to seek both information and freezing injunctions, we concentrate specifically on information orders because, as we have noted above, free-standing freezing orders are already available to claimants in these circumstances.[217]

Three key features of the proposed power

4.42 We look now in more detail at three aspects of the proposal that we recognise as being potentially controversial:

(1) the free-standing nature of the order;

(2) the absence of a conventional “adequate link” to the jurisdiction; and

(3) the interaction between information orders and the Evidence (Proceedings in Other Jurisdictions) Act 1975.

The free-standing nature of the order: no defendant nor claim as yet

4.43 We envisage that the proposed new power would operate at the initial investigations stage at which there is not yet any defendant on whom proceedings can be served. Nor would there be any formulated claim. Rather, the entire point of the proposed new power is to help a claimant conduct the initial investigations that are usually undertaken by a prospective claimant before deciding whether to issue a claim; and if so, against whom, in which court, and the nature of the claim.

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[217] We explain this further from para 4.59.

4.44 It is therefore worth clarifying that we do not envision the new power to be a new gateway. These generally reflect claims against an identified defendant in which the facts and issues of the case have an "adequate link" to England and Wales.

4.45 Rather, we think a more apposite precedent in the current Civil Procedure Rules (CPR) might be claims brought under the alternative procedure in Part 8 of the CPR. The Part 8 procedure is generally used when the claimant seeks "the court's decision on a question which is unlikely to involve a substantial dispute of fact".[218] Notably, it does not always require a defendant to be named.[219] Applications for *Norwich Pharmacal* information orders currently may be brought under Part 8 or Part 23, which sets out the procedure for interim applications. The authorities are clear that where there are no existing proceedings against the defendant, the Part 8 procedure is appropriate for an application for *Norwich Pharmacal* relief.[220]

4.46 We think that these procedural details are important to highlight. This is primarily because, as said above, we think the requirement that the claimant show a good arguable case that the pleaded claim (against a defendant) falls within one of the gateways has been a major cause of the inconsistent interpretations of the gateway requirements. Clearly, the circumstances in which the information order is sought do not align with these requirements: the information order is sought precisely in order to identify the defendant and the nature of the claim that will be advanced against them.

4.47 Overall, we think that making a clear distinction between the gateways and our provisional proposal has the benefit of avoiding fictions that only add conceptual uncertainty and confusion. We think it preferable to recognise openly that, at this initial stage of investigations when our proposed new power will operate, although there is a clear indication of wrongdoing on the facts, there is no identifiable defendant nor any claim in law.

The absence of a conventional "adequate link" to the jurisdiction

4.48 It is a basic principle of international law that the exercise of judicial power requires an adequate link between the state whose courts are asserting international jurisdiction and either the defendant (as the person to whom the coercive power of the court is directed), or the facts and issues of the case. In England and Wales, this basic principle is expressed in the rules on service within the jurisdiction and the gateway requirements for service out of the jurisdiction.

4.49 We said above that, in the decentralised crypto-token context we are concerned with, this requirement is proving to hinder, rather than facilitate, access to justice and that we considered it may need some modification. We are proceeding on the basis that, in reality, the target of judicial power in the cases with which we are concerned will be an innocent third party based in a foreign jurisdiction. They will, therefore, not be within the ordinary personal jurisdiction of our courts. Nor are there any substantive

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218 Civil Procedure Rules, part 8, para 8.1.

219 Civil Procedure Rules r 8.2A; Chancery Guide 2022 (December 2024 revision), para 13.38.

220 *Magomdeov v Kuzovkov* [2024] EWHC 2527; *Santander Bank plc v National Westminster Bank* [2014] EWHC 2626 (Ch).

proceedings that have been instituted or contemplated in England and Wales to which the order sought is ancillary.

4.50 It is important therefore to recognise the proposed new power as an exception to this requirement for an "adequate link" as is generally understood in the context of international civil and commercial litigation. This is not a position we have reached lightly. Rather, it is one we have reached after careful consideration of various precedents from which we could draw. Here, we discuss the two we have found to be the most relevant and helpful: the *Mareva* jurisdiction (under which the freezing order was developed) and the doctrine of *forum necessitatis*.

Some inspiration: the Mareva jurisdiction

4.51 In formulating our provisional proposal, we have drawn some inspiration from the history of the *Mareva* injunction, now known in more modern times as a freezing injunction or order. The nature of the order was authoritatively described by Lord Bingham in a 2007 case as follows:

> *Mareva* (or freezing) injunctions were from the beginning, and continue to be, granted for an important but limited purpose: to prevent a defendant dissipating his assets with the intention or effect of frustrating enforcement of a prospective judgment. They are not a proprietary remedy. They are not granted to give a claimant advance security for his claim, although they may have that effect. They are not an end in themselves. They are a supplementary remedy, granted to protect the efficacy of court proceedings, domestic or foreign.[221]

4.52 Although freezing orders are today well established as a settled feature of our civil procedure, it is instructive to note their history of development in the courts. First granted in 1975, the juridical nature of the order remained somewhat uncertain for a number decades, notwithstanding the increasing regularity with which the courts in this jurisdiction were prepared to grant freezing orders.

4.53 Freezing orders are of particular interest in private international law for several reasons. The early private international law cases all concerned foreign defendants who had assets situated in England and Wales. Those assets were, therefore, subject to the enforcement jurisdiction of our courts. As such, freezing orders were granted in anticipation of a judgment debt that might be enforced against those assets.

4.54 From this, two cross-border developments are worth noting: (i) the extension of the *Mareva* jurisdiction to assets situated outside of England and Wales (the so-called "worldwide freezing order"); and (ii) applications to serve proceedings out of the jurisdiction where the only claim is for a freezing order (that is, in circumstances where no substantive proceedings were contemplated in England and Wales and, rather, were pending before a foreign court). These developments were not without some controversy, but were finally settled after some decades of refinement in the courts.

4.55 The real interest for our purposes lies in some of the arguments that were made for extending *Mareva* relief in cases that strained the basic principle that the exercise of judicial power is territorially constrained. A major concern was the relaxation of export

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221 *Fourie v Le Roux* [2007] UKHL 1 [2007] 1 WLR 320, [2], by Lord Bingham.

controls on flows of capital, which could consequently move freely in and out of the jurisdiction with increasing speed.[222]

4.56 Of particular interest for present purposes is Lord Nicholls' dissenting opinion in *Mercedes Benz AG v Leiduck,* a 1996 decision of the Privy Council on appeal from the Court of Appeal of Hong Kong. The issue in that case was whether the Rules of the Supreme Court of Hong Kong permitted the service of proceedings out of the jurisdiction on the defendants in Monaco if the only claim made in the courts of Hong Kong was for an interim freezing injunction. In Lord Nicholls' words, the essence of the issue before the court was that:

> [The defendant's] assets are in Hong Kong, so the Monaco court cannot reach them; he is in Monaco so the Hong Kong court cannot reach him. This cannot be right. That is not acceptable today. A person operating internationally cannot so easily defeat the judicial process. There is not a black hole into which a defendant can escape out of sight and become unreachable.[223]

4.57 Lord Nicholls recognised that granting *Mareva* relief in the circumstances of the case would be an extension of the principles surrounding the grant of an injunction. He concluded that, if the courts of Hong Kong could not permit free-standing *Mareva* relief out of the jurisdiction on the defendants in Monaco:

> The alternative result would be deeply regrettable in its unfortunate impact on efforts being made by courts to prevent the legal process being defeated by the ease and speed with which money and other assets can now be moved from country to country.[224]

4.58 Lord Nicholls further said that "the exercise of the jurisdiction must be principled, but the criterion is injustice...to be viewed and decided in the light of today's conditions and standards, not those of yesteryear".

4.59 Lord Nicholls' opinion did not prevail in *Mercedes Benz AG* but was subsequently endorsed by the majority of the Privy Council 25 years later in the 2021 case of *Broad Idea v Convoy Collateral*.[225] There, the majority considered it was "both necessary and important" to "confront and decide" whether there is power for the court to grant a freezing injunction against a defendant in aid of foreign proceedings when no substantive claim is made against that defendant in proceedings before the domestic court.[226] Importantly, the majority considered that declining to address the question in light of the modern practice of granting injunctions would "involve putting the clock back".[227]

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222 See Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 10-008.

223 *Mercedes Benz AG v Leiduck* [1996] 1 AC 284, 305B, by Lord Nicholls.

224 *Mercedes Benz AG v Leiduck* [1996] 1 AC 284, 313H.

225 [2021] UKPC 24, [2022] 1 All ER 389.

226 Above, at [120] by Lord Leggatt.

227 Above, at [115] by Lord Leggatt.

4.60 With the benefit of hindsight, Lord Nicholls' minority view in *Mercedes Benz* was in some ways ahead of its time. In light of our terms of reference to ensure the law of England and Wales in relation to international jurisdiction remains relevant and up to date, we think the broader picture painted by the development of the *Mareva* jurisdiction is helpful. We particularly note Lord Nicholls' statement that "injustice" must be measured in light of modern conditions and standards and conditions, and not those of yesteryear. More broadly, we further recognise that the law of England and Wales is traditionally hostile to any type of "black hole" in the law.[228]

4.61 These developments in relation to the *Mareva* jurisdiction means that freezing orders are now available as a free-standing order before a claim has been issued,[229] where proceedings are pending in a foreign jurisdiction,[230] and in relation to assets that are not within the jurisdiction.[231] An application for a free-standing freezing order can be brought under gateway 5 and section 25 of the Civil Jurisdiction and Judgments Act 1982, and under the common law jurisdiction developed by the Court of Appeal in *Re G*,[232] following the 2021 Privy Council decision in *Broad Idea v Convoy Collateral*.[233]

4.62 All in all, we think the *Mareva* jurisdiction is a relevant precedent from which to develop a new power in light of a new type of injustice arising in the decentralised realities of the 21st century that is comparable to those arising in the banking and financial sectors in the late 20th century.

Further inspiration: the forum necessitatis

4.63 The *forum necessitatis* ("court of necessity") provides an exceptional ground of international jurisdiction based on necessity. It developed in the human rights and constitutional contexts of the right to a fair trial and an effective remedy. It is, therefore, a ground of jurisdiction strongly associated with human rights and family law; it is generally not recognised in the civil (that is, private law) or commercial context. It is noteworthy for our purposes because it does not require the usual "adequate link" between a country and either of (i) the defendant or (ii) the facts and issues of the case for the courts of that country to assert international jurisdiction over the claim.

4.64 The *forum necessitatis* is not recognised in the common law but is a feature in the EU systems of civil procedure. Various EU Regulations expressly provide for the *forum necessitatis* as a ground of jurisdiction, as do the domestic laws of various EU Member States. Article 11 of the EU Succession Regulation is a good example of a modern provision for *forum necessitatis*.[234] It includes an exception to the principle

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228 See, for example, the discussion of contractual damages in relation to a third party's loss and cases such as *The Albazero* [1977] AC 774 and *Linden Gardens Trust v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 in H Beale (ed), *Chitty on Contracts* (35th ed 2024), 21-052 to 21-055.

229 *Broad Idea v Convoy Collateral* [2021] UKPC 24, [2022] 1 All ER 389.

230 Civil Jurisdiction and Judgments Act 1982, s 25.

231 s 37(3) of the Senior Courts Act 1981.

232 *Re G (Court of Protection: Injunction)* [2022] EWCA Civ 1312 [2022] 3 WLR 1339.

233 [2021] UKPC 24, [2022] 1 All ER 389.

234 Succession Regulation (EU) No 650/2012, Official Journal of the European Union L 201, 27.7.2012 p 107, Art 11.

that the grounds of jurisdiction contained in the Regulation are exhaustive and provides:[235]

> Where no court of a Member State has jurisdiction pursuant to other provisions of this Regulation, the courts of a Member State may, on an exceptional basis, rule on the succession if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the case is closely connected.
>
> The case must have a sufficient connection with the Member State of the court seised.[236]

4.65 Recital (31) of the Succession Regulation further explains that:

> In order to remedy, in particular, situations of denial of justice, this Regulation should provide a *forum necessitatis* allowing a court of a Member State, on an exceptional basis, to rule on a succession which is closely connected with a third State. Such an exceptional basis may be deemed to exist when proceedings prove impossible in the third State in question, for example because of civil war, or when a beneficiary cannot reasonably be expected to initiate or conduct proceedings in that State. Jurisdiction based on *forum necessitatis* should, however, be exercised only if the case has a sufficient connection with the Member State of the court seised.[237]

4.66 The *forum necessitatis* tends to be recognised in countries where rules of international jurisdiction are quite strict. For example, Article 11 of the Belgian Private International Law Code was drafted with the aim of mitigating the undesirable consequences of a system based on strict rules of jurisdiction.[238] By contrast, countries with wide grounds of jurisdiction do not generally tend to recognise *forum necessitatis*.[239] It is perhaps for this reason that the civil procedure of England and Wales does not recognise *forum necessitatis* as a distinct ground of jurisdiction.

4.67 These preliminary caveats aside, the provisions for the *forum necessitatis* in the domestic rules of various EU Member States differ in some of the details but contain the same basic requirement that proceedings in another forum are either (i) impossible or (ii) cannot reasonably be brought. In addition, most (although, not all) also require (iii) that there is some link with the court that is invited to exercise

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235 Succession Regulation (EU) No 650/2012, Official Journal of the European Union L 201, 27.7.2012 p 107, Art 11.

236 Provisions in almost identical terms are found in Article 11 of the Matrimonial Property Regime Regulation (EU) No 2016/1103, Official Journal of the European Union L 183/1 8.7.2016 p 1, Art 11.

237 Succession Regulation (EU) No 650/2012, Official Journal of the European Union L 201, 27.7.2012 p 107. Provisions in almost identical terms are found in Recital 16 of the Maintenance Regulation (EU) No 4/2009, Official Journal of the European Union L 7, 10.01.2009 p 1.

238 Article 11 Belgian Code on Private International Law, see T Lutzi, E Piovesani, D Zgrabljic Rotar, *Jurisdiction Over Non-EU Defendants* (2023) p 50.

239 For example, Cyprus and Bulgaria. See Chapter II Comparative Report in T Lutzi, E Piovesani, D Zgrabljic Rotar, *Jurisdiction Over Non-EU Defendants* (2023).

jurisdiction as a *forum necessitatis*. We consider each of these requirements briefly in turn.[240]

(1) Impossibility is generally interpreted in the objective sense of no other court having competence to hear the claim.

(2) Unreasonable difficulty has been found where: foreign judgments would meet with procedural difficulty in any application for recognition and enforcement in the court invited to exercise the *forum necessitatis*; urgent proceedings would be delayed; bringing an action abroad would lead to significant and/or disproportionate expense; the circumstances are such that it would be unacceptable to require the claimant to submit the case to the jurisdiction of an otherwise competent court, for example, where the claimant would be subject to political persecution.

(3) A "sufficient" link with the *forum necessitatis* has included the claimant's habitual and/or mere residence; the claimant's domicile; and the claimant's mere presence in the jurisdiction.

4.68 Although *forum necessitatis* is not recognised at common law, it is evident that the common law *forum (non) conveniens* (the proper or most appropriate forum and, conversely, the inappropriate forum) doctrines are underpinned by similar, if not the same, considerations. These include the risk that justice will be denied, impossibility, and unreasonableness.[241]

4.69 We appreciate that *forum necessitatis* is an exceptional ground of jurisdiction recognised in a very particular procedural context and in specific areas of law. However, we think it is also an established precedent in private international law with a clear structure and principled framework from which we might usefully draw.

Risks of non-compliance

4.70 We recognise that our proposed new power potentially raises some difficulties in relation to enforcement. It is important to appreciate the difficulties in enforcing an order of the courts of England and Wales if the court does not exercise personal jurisdiction over the respondent nor enforcement jurisdiction over assets within the jurisdiction.

4.71 These concerns are reflected in the test of expediency that applies in applications for free-standing *Mareva* relief in support of foreign proceedings under section 25 of the Civil Jurisdiction and Judgments Act 1982. This was originally enacted to reflect Article 24 of the Brussels Convention,[242] which provided a mechanism by which courts of the EU Member States may grant interim relief in support of proceedings pending in

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240 These requirements are variously seen in Austria, Belgium, the Netherlands, Germany and Malta. For details see T Lutzi, E Piovesani, D Zgrabljic Rotar, *Jurisdiction Over Non-EU Defendants* (2023) particularly p 37.

241 T Lutzi, E Piovesani, D Zgrabljic Rotar, *Jurisdiction Over Non-EU Defendants* (2023) p 15 to 16

242 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters Official Journal L 299 of 31/12/1972, p 32 to 42.

another EU Member State. Section 25(2) of the Civil Jurisdiction and Judgments Act 1982 provides that:

> on an application for any interim relief under [section 25(1)] the court may refuse to grant that relief if, in the opinion of the court, the fact that the court has no jurisdiction apart from [section 25] in relation to the subject matter of the proceedings in question makes it inexpedient for the court to grant it.

4.72 In *Motorala Credit Corporation v Uzan and others*,[243] the Court of Appeal considered the test of expediency in applications for free-standing *Mareva* relief, which is worth setting out in full owing to its relevance for principles of international law:

> It is plain that, in relation to the grant of worldwide relief, **the jurisdiction is based on assumed personal jurisdiction**; as such it has the potential for extra-territorial effect in the case of non-residents with assets abroad. Thus it is likely that the jurisdiction will prove extremely popular with claimants anxious to obtain security against defendants in disputes yet to be decided where they cannot obtain it in **the court of primary jurisdiction or the court of the defendants' residence or domicile, which courts are the natural fora in which to make such applications.** There is thus an inherent likelihood of resort to the English jurisdiction as an 'international policeman', to use the phrase employed by Moore-Bick J [as he then was], in cases of international fraud. We would do nothing to gainsay, and indeed would endorse, the observations of Millett LJ [as he then was] in *Cuoghi* to the effect that **international fraud requires courts, within the limits of comity, to render whatever assistance they properly can without the need for express provision by an international convention requiring it**. However, even in the case of Article 24 of the Brussels Convention it has been made clear that:
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> > "… the granting of provisional or protective measures on the basis of Article 24 is **conditional on, inter alia, the existence of a real connecting link between the subject matter of the measures sought and the territorial jurisdiction of the contracting state of the court before which those measures are sought**." see (*Van Uden Maritime B.V. v Kommanditgesellschaft In Firma Deco*-Line [1999] 2 WLR 1181 at 1210 para 40).
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> Further, in so far as 'police' action is concerned, **policing is only practicable and therefore expedient if the court acting in that role has power to enforce its powers if disobeyed**. In that respect the principle in *Derby v Weldon* already quoted plainly has application and is apt to be applied in cases of this kind.[244] (emphases added)

4.73 The reference to *Derby & Co Ltd v Weldon*[245] is also worth considering. In that case, the court held that in cases where it is appropriate, the court has the power to issue a *Mareva* injunction when a defendant has no assets in the jurisdiction. In the first instance, the court should look to assets within the jurisdiction; and, in the majority of

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243 [2003] EWCA Civ 752.

244 Above, [114].

245 *Derby & Co Ltd v Weldon (Nos.3 and 4)* [1990] Ch 65.

cases, there will be no justification for looking to foreign assets. Nevertheless, where it is necessary to make orders concerning foreign assets to prevent a defendant from taking action designed to frustrate subsequent orders of the court, such orders should be made "subject, of course, to ordinary principles of international law". [246]

4.74 The Court of Appeal in *Motorola* then set out five particular considerations the court should bear in mind when considering the test of expediency:

(1) whether the making of the order will interfere with the management of the case in the primary court;

(2) whether it is the policy in the primary jurisdiction to not make worldwide freezing/disclosure orders itself.

(3) whether there is a danger that the orders made will give rise to disharmony or confusion and/or risk of conflicting inconsistent or overlapping orders in other jurisdictions**, in particular the courts of the state where the person enjoined resides or where the assets affected are located. If so, then respect for the territorial jurisdiction of that state should discourage the English court from using its unusually wide powers against a foreign defendant**; (emphasis added)

(4) whether at the time the order is sought there is likely to be a potential conflict as to jurisdiction rendering it inappropriate and inexpedient; and

(5) whether, in a case **where jurisdiction is resisted and disobedience to be expected, the court will be making an order which it cannot enforce**.[247] (emphasis added)

4.75 The risk of non-compliance is already apparent in the crypto-token litigation. In *Boonyaem*, the judge noted that the second and third defendants had so far ignored the disclosure orders made by the court. However, he said:

> Despite some initial scepticism as to the usefulness of doing so, I have however been persuaded … that I should repeat those orders, in the hope (rather than the expectation) that they will now be complied with. No application has as yet been made for disclosure orders against the exchanges or any other innocent third parties.[248]

4.76 The issues are even more complex in the situation with which we are concerned. Here it is difficult to pin down exactly the basis on which the courts of England and Wales are asserting personal jurisdiction over a third-party respondent. Although the courts have broadly recognised an equitable obligation on the part of innocent third parties to assist claimants whose proprietary rights have been infringed, such recognition has been in cases in which the third parties were within the ordinary personal jurisdiction of the courts of England and Wales and the claimant's property rights were not in

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246 Above, at 79.

247 [2003] EWCA Civ 752.

248 [2023] EWHC 3180 (Comm) at [46]

dispute.[249] It is difficult to impose substantive English and Welsh obligations on innocent third parties to a claim who are not subject to the ordinary personal jurisdiction of the courts and where, as in fraud claims, the rights and interests of the claimant may be in dispute.

Conclusions on the absence of an adequate link

4.77 We are conscious that the proposed new power is exceptional because it would not require an adequate link between the country whose courts are asserting international jurisdiction and either of (i) the respondent against whom the information order is sought (as the person to whom the coercive power of the court is directed), or (ii) the facts and issues of the case.

4.78 Nevertheless, our provisional conclusion is that it responds to a clear need in the context of crypto litigation and is therefore necessary in the interest of justice. Having considered the most controversial aspects of our provisional proposal, we think it strikes a balance between effectiveness and proportionality, and between necessity and principle.

The Hague Evidence Convention 1970 and the Evidence (Proceedings in Other Jurisdictions) Act 1975

4.79 As we have explained above, gateway 25 (which provides a ground of international jurisdiction for information orders) is limited to proceedings already commenced or intended to be commenced in England and Wales. Claimants seeking to serve an application for an information order out of the jurisdiction must, therefore, show that they have commenced or intend to commence proceedings in England and Wales. Stakeholders have told us that, whilst the provision presents a difficulty for claimants, the limitation reflects a concern to preserve the operation of the Evidence (Proceedings in Other Jurisdictions) Act 1975 (the "1975 Act"). This implements the UK's obligations under The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Evidence Convention").

4.80 The Hague Evidence Convention establishes methods of co-operation between states for the taking of evidence abroad in civil or commercial matters. It establishes, amongst other things, a method by which courts may assist a foreign court in obtaining evidence required for proceedings in that foreign court. These mechanisms are set out in section 1 of the 1975 Act:

(1) Section 1(a) of the 1975 Act requires that a request is to be made for the evidence from the court of the jurisdiction where proceedings will occur.

(2) Section 1(b) of the 1975 Act provides that the court from whom evidence is requested must be satisfied the evidence is for the purposes of civil proceedings which "either have been instituted before the requesting court or whose institution before that court is contemplated".

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[249] See eg the "website-blocking injunction" in *Cartier International AG and others v British Telecommunications Plc and another* [2018] UKSC 28, [2018] 1 WLR 3259.

4.81 There is authority considering how orders that compel the giving of evidence interact with the 1975 Act, with consideration given in more recent cases on how the *Norwich Pharmacal* jurisdiction interacts with this regime.

(1) In *Rio Tinto v Westinghouse*,[250] the House of Lords held that the jurisdiction to provide evidence in aid of proceedings in a foreign court is "exclusively statutory", that is, governed by the 1975 Act. However, the court did not expressly consider the availability of *Norwich Pharmacal* relief in such circumstances.

(2) *Norwich Pharmacal* orders have been used to obtain information that has been subsequently deployed in foreign proceedings, without having complied with the process prescribed by the 1975 Act. One such case was *Shlaimoun v Mining Technologies International Inc*.[251] In this case, the grant of *Norwich Pharmacal* relief had been justified on the basis that, at the time of the application, it was not inevitable that a claim would be started in the foreign jurisdiction in which the claimant ultimately brought proceedings. At the time of the application for *Norwich Pharmacal* relief, there was a range of potential jurisdictions such that proceedings had not been 'instituted' or 'contemplated' anywhere for the purpose of engaging the 1975 Act.

(3) In *Ramilos Trading Ltd v Buyanovsky*,[252] Mr Justice Flaux (as he then was) confirmed that *Norwich Pharmacal* orders fall within the scope of the 1975 Act. Mr Justice Flaux explained that where a claimant has already identified the jurisdictions in which a claim could be brought, the institution of proceedings within the meaning of section1(b) of the 1975 Act was contemplated. Additionally, it was deemed impermissible to bypass the statutory regime by asserting that the case was at a stage before foreign proceedings were contemplated. This is because it would result in illogicality – that a claimant suspects wrongdoing and wishes to seek information to confirm this but is at a stage of proceedings where it does not have enough information to show the threshold for a *Norwich Pharmacal* order, which is a good arguable case of wrongdoing.

4.82 We recognise that the requirement in gateway 25 that it can only be used in support of proceedings already commenced or intended to be commenced in England and Wales may present difficulties for claimants in crypto cases, who might not necessarily intend to bring proceedings in England and Wales. Rather, what they want is information about the identity of the defendants and/or the whereabouts of their assets. Once they have that information, they may well sue in another jurisdiction; that is, in the "home court" of the defendant or in the courts of the jurisdiction in which control of the assets is located.

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250 [1978] AC 547.

251 [2011] EWHC 3278, [2012] 1 WLR 1276.

252 [2016] EWHC 3175 (Comm), [2016] 2 CLC 896.

4.83 We also acknowledge the authorities that hold that the *Norwich Pharmacal* jurisdiction is not available where the information is sought for use in foreign proceedings, and that the giving and taking of evidence is governed by the 1975 Act.

4.84 We do not think, however, that information orders granted under our proposed new power would conflict with the statutory regime established by the 1975 Act. Section 1 of the Act prescribes the scope of the statutory jurisdiction, and subsection 1(b) defines the scope by reference to the purposes for which the evidence is sought in the following terms:

> …the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated.

4.85 Subsection 1(b) is of particular importance for both gateway 25 and our proposed new power. In *Ramilos,* Mr Justice Flaux considered and distinguished *Shlaimoun v Mining Technologies International Inc*.[253] In that case, Mr Justice Coulson (as he then was) had granted a *Norwich Pharmacal* order to obtain evidence, which was ultimately used in proceedings in Canada. Three justifications for granting the order were given; but, for present purposes, the point of interest is the findings of the judge in relation to the respondent's submission that the application for *Norwich Pharmacal* relief was an abuse of process (that is, a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process).[254]

4.86 Mr Justice Coulson rejected the submission that the application was an abuse of process. This was because:

> … at the time of the applications, the respondent did not know what claims were going to be commenced, let alone where they were going to be commenced. Thus, at the time of the making of the applications, they were not and could not be an abuse of process.[255]

4.87 In *Ramilos,* Mr Justice Flaux disagreed with the three reasons given by Mr Justice Coulson for justifying the grant of relief in *Shlaimoun* but considered that the actual decision could be justified by reference to the conclusion that the *Norwich Pharmacal* applications were not an abuse of process. Mr Justice Flaux continued:

> There **had clearly been wrongdoing** within the jurisdiction, namely the defrauding of the respondent and […] **at the time of the applications, the respondent was trying to find out where the money had gone, and genuinely did not know where any proceedings would be commenced, whether in England or abroad or whether such proceedings would be viable**. It seems to me that is the true ratio of the decision … and **it is not a case about proceedings being contemplated in a foreign jurisdiction at all**.[256] (emphases added)

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253 [2011] EWHC 3278, [2012] 1 WLR 1276.

254 *Attorney General v Barker* [2000] EWHC 453 (Admin).

255 [2011] EWHC 3278, [2012] 1 WLR 1276 at [21].

256 *Ramilos Trading Ltd v Buyanovsky* [2016] EWHC 3175 (Comm), [2016] 2 CLC 896 at [79].

4.88 From this, we think that the proposed new power can be distinguished from *Ramilos* for the same reason as Mr Justice Flaux distinguished *Shlaimoun*: both concern a situation where there is a victim against whom, to use the words of Mr Justice Flaux, there has "clearly been wrongdoing" and the victim "genuinely [does] not know where any proceedings would be commenced, whether in England or abroad or whether such proceedings would be viable". It is precisely to make a decision on these issues that victims seek an information order.

4.89 Accordingly, we do not think the proposed new power would conflict with the scope of the 1975 Act. As we set out above, section 1(b) of that Act provides for the circumstances where proceedings have either been instituted before the requesting court or whose institution before that court is contemplated. We think the position is, therefore as follows.

(1) *Norwich Pharmacal* relief is not available where evidence is sought for use in proceedings that have either been instituted in a foreign court or are contemplated in a foreign court; in these circumstances, the 1975 Act applies (*Ramilos*).

(2) *Norwich Pharmacal* relief is available and may be served out of the jurisdiction under gateway 25 where proceedings are contemplated in England and Wales.

(3) *Norwich Pharmacal* relief is available where clearly a wrong has been committed but the claimant genuinely does not know whether and where proceedings will be issued, and seeks information to inform those decisions (*Ramilos*, distinguishing *Shlaimoun*).

4.90 We therefore think that the statutory framework of the 1975 Act does not present difficulties with the reform that we envisage. Broadly, we do not think the 1975 Act is to be taken to be so comprehensive as to occupy the entire field in relation to evidence for use in foreign proceedings, such that common law development would be excluded. This is particularly so in relation to the type of case in which we envision our power would be used. In any event, any statutory reform to implement our proposed new power could, as a matter of drafting, more clearly delineate its scope in relation to the 1975 Act.

Proposed threshold test

4.91 We now consider what a claimant would need to show in order to pass the requisite threshold before the court may exercise the discretion to grant a free-standing information order to assist a claimant at the initial investigations stage of proceedings. In proposing a threshold test, we have drawn upon the familiar tests that apply in applications for *Bankers Trust* relief, *Norwich Pharmacal* relief, and for interim remedies more broadly (*American Cyanamid*). We have also referred to the requirements in various jurisdictions surrounding the exercise of the *forum necessitatis* jurisdiction.

4.92 We provisionally propose four requirements that must be met before the discretion to grant the order can be exercised:

(1) A "case of a certain strength" (the merits test),

(2) Necessity,

(3) Impossibility or unreasonableness,

(4) A connection to England and Wales.

4.93 We discuss each in more detail below. Note that, while we quote from existing judgments in relation to the merits limb of the test, we are not necessarily proposing particular statutory language, but rather referencing a standard formulation recognised at various times in the common law authorities.

A case of a certain strength

4.94 The first test that we provisionally propose is that there should be a "case of certain strength".[257] The court must be satisfied that the claimant has shown there has clearly been wrongdoing on facts that disclose a potential case "which is more than barely capable of serious argument and yet not necessarily one which the judge believes to have a better than 50 per cent chance of success".[258]

4.95 This requirement reflects the formulations of the merits test originally expressed in two different authorities on the *Mareva* jurisdiction. The long formulation of the test was expressed in *The Niedersachsen* as: a case that is "more than barely capable of serious argument and yet not necessarily one which the judge believes to have a better than 50 per cent chance of success". [259] The *Niedersachsen* was an appeal that considered the probability of success on the merits that the claimant needed to show when applying for the grant or continuation of a freezing injunction. The formulation has since evolved through "a good arguable case"[260] to the modern "serious issue to be tried".

4.96 The "serious issue to be tried" formulation, however, is used for many different types of applications. It is used, for example, in the merits test for applications for interim remedies under the *American Cyanamid* principles, the merits test for applications for summary judgment, as well as the merits limb of the three-stage test for permission to serve proceedings out of the jurisdiction. Given the breadth of the situations and applications in which the "serious issue to be tried" formulation now applies, we have provisionally concluded that it is preferable to use a different formulation to reflect the specific features of the proposed new power. We do not, for example, think it necessary for an applicant to meet a merits test that applies for summary judgment. In that context, the test applies to the merits of a fully pleaded claim or defence. Our proposed merits test, on the other hand, is intended to apply to applications for information orders at the initial stage of investigations where there is clear evidence of wrongdoing on the facts but as yet no pleaded claim or defendant**.**

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257 *Ninemia Maritime Corp v Trave Schiffahrts GmbH & Co KG (The Niedersachen*) [1983] 1 WLR 1412, 402J.

258 Above.

259 Above.

260 Originally expressed by Lord Justice Denning in *Rasu Maritima SA v Perusahaan Pertambangan Minuak Dan Gas Bumi Negara* [1978] QB 644, 661G.

4.97 Similar issues of various usage apply to, the "good arguable case which is more than barely capable of serious argument and yet not necessarily one which the judge believes to have a better than 50 per cent chance of success" formulation originally used in the context of the *Mareva* jurisdiction and subsequently adopted for the *Norwich Pharmacal* jurisdiction.[261] It then evolved into the "good arguable case" formulation set out in *FS Cairo (Nile Plaza) LLC v Lady Brownlie*[262] as adopted for the modern gateway limb of the three-stage test for applications to serve proceedings out of the jurisdiction.[263] Again, we think it would be preferable to use a different formulation to emphasise the different context in which our proposed merits test is to apply.

4.98 That said, we think that the guidance on the *Norwich Pharmacal* jurisdiction should remain broadly relevant. For example, in *Hickox v Dickinson*,[264] Ms Clare Ambrose sitting as a Deputy Judge of the High Court gave some guidance on the distinction between an impermissible and speculative fishing expedition and the merits test for relief. The court explained that a *Norwich Pharmacal* order cannot be seen as a fishing expedition merely because the claimant had not yet identified the specific wrongdoing. The very nature of *Norwich Pharmacal* relief is to support developing claims, so a lack of specificity does not always justify dismissing an application. All that is required is a "good arguable case that there has been wrongdoing".

4.99 Taking all of these considerations into account, we think that the "case of a certain strength" is the best of the potential formulations we could refer to. This is because it is not presently used in any other procedural context but remains a formulation that developed in the interim and pre-action procedural context with which we are concerned. All in all, we think that it would be appropriate that the claimant must plead facts that show there has clearly been some wrongdoing, but not to require the prospects of any potential claim that might be pleaded from those facts to meet a merits test set at a standard that is disproportionately high in relation to the context in which the application is made.

Necessity

4.100 The second test that we propose is necessity: the court must be satisfied that the relief sought is necessary in order to enable the applicant to bring legal proceedings or seek other legitimate redress for the wrongdoing.

4.101 This requirement reflects the second threshold condition for *Norwich Pharmacal* relief. We consider this appropriate, given that one of the core objectives of the proposed power is to provide justice to a claimant who has, on the facts, clearly been the victim of wrongdoing by assisting them to "identify those who have taken [their] assets without authority … or to locate those assets or their traceable equivalent;"[265] in circumstances where "at the time of the applications, the respondent did not know

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261 *Ramilos Trading Ltd v Buyanovsky* [2016] EWHC 3175 (Comm).

262 [2021] UKSC 45, [2021] 3 WLR 1011.

263 See *Dos Santos v Unitel SA* [2024] EWCA Civ 1190 on the relationship between the three.

264 [2020] EWHC 2520 (Ch) at [50].

265 *Tippawan Boonyaem v Persons Unknown and others* [2023] EWHC 3180 (Comm) at [33] by Mr Richard Salter KC sitting as a Deputy Judge of the High Court.

what claims were going to be commenced, let alone where they were going to be commenced ...".[266]

Impossibility or unreasonableness

4.102 The third test we propose is impossibility or unreasonableness: the court must be satisfied that there is no other court in which the claimant could reasonably bring the application. This requirement shows the influence taken from the *forum necessitatis* jurisdiction. It is an inversion of the *forum (non) conveniens* doctrines insofar as the emphasis would be on the alternative courts (that are said to be unavailable) rather than on the courts of England and Wales (either as the appropriate forum or inappropriate forum). In sum, the core distinction with the *forum (non) conveniens* doctrines, which focuses on identifying "**the** natural forum", is the **absence** of such "natural forum".

A connection to England and Wales

4.103 The final test we propose is a link to England and Wales: the court must be satisfied that there is a connection to England and Wales. The claimant's habitual residence, domicile, or nationality would indicate such connection.

4.104 This requirement also reflects the influence of the *forum necessitatis* jurisdiction. Although we recognise that some jurisdictions do not impose any requirement that the case must have some connection with the state whose courts are asserting the *forum necessitatis* jurisdiction, that reflects the exceptional circumstances in which the *forum necessitatis* is relevant.[267] For the purposes of our proposer power, we think it appropriate to require some type of link between the proceedings and the jurisdiction. We therefore take the approach of those jurisdictions that require the claimant to be a national of, domiciled in, or resident in the state whose courts are exercising the *forum necessitatis.*

Scope of the proposed new power

4.105 We have explained why we consider that this provisionally proposed power is necessary in cases involving DLT and crypto-tokens, given the pseudo-anonymous nature of the crypto-ecosystem and the resultant challenges in identifying a defendant or locating misappropriated crypto-tokens. These situations may be ones in which a claimant is at some stage before they are in a position to contemplate the institution of proceedings, but still knows enough to show some wrongdoing sufficient to justify the exercise of this new power. It may be that there are other circumstances in which the grant of such a power could be justified, such as in the DeFi context we explore in Chapter 5. However, considering circumstances outside of the digital assets context is beyond the scope of our work and we therefore provisionally propose that it is available in cases involving crypto-tokens or DLT, especially where the decentralised and pseudo-anonymous nature of the DLT context presents a significant obstacle to completing the initial investigations usually undertaken before a claim is issued.

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266 [2011] EWHC 3278, [2012] 1 WLR 1276, at [21].

267 See above from para 4.63.

Consultation questions

Consultation Question 1.

4.106 We provisionally propose the creation of a new discretionary power of the courts of England and Wales to grant free-standing information orders at the initial stage of investigations in cases where the features of the digital and decentralised environments make it otherwise impossible for a claimant to obtain the information they need to formulate and bring a fully-pleaded substantive claim.

4.107 We provisionally propose that such power should be based broadly on the principles of access to justice, necessity, and preventing injustice in the modern digital and decentralised environments.

Do consultees agree?

Consultation Question 2.

4.108 We provisionally propose the following as the threshold test that the claimant must be able to meet before the discretion to grant an order under the proposed power may be exercised. All four limbs would have to be satisfied.

(1) A case of certain strength: the court must be satisfied that there has clearly been wrongdoing on facts that disclose a potential case that is more than barely capable of serious argument and yet not necessarily one which the judge believes to have a better than 50 per cent chance of success.

(2) Necessity: the court must be satisfied that the relief sought must be necessary in order to enable the applicant to bring a claim or seek other legitimate redress for the wrongdoing.

(3) Impossibility or unreasonableness: the court must be satisfied that there is no other court in which the claimant could reasonably bring the application for relief.

(4) A link to England and Wales: the court must be satisfied that there is a connection to England and Wales, such as the claimant's habitual residence, domicile, or nationality.

Do consultees agree?

Assessing the impact

Consultation Question 3.

4.109 We invite consultees' views on the potential impact of this proposal if it were implemented. For example, would this power be useful for obtaining information that makes it possible to bring proceedings, leading ultimately to remedies such as recovery of crypto-tokens in cases of fraud or hacking? Do consultees consider that claimants would rely on the proposed new power, as well as free-standing freezing orders, rather than relying on a gateway?

Consultation Question 4.

4.110 We invite consultees' views on whether exchanges and other third-party respondents are likely to comply with any such free-standing information orders.

Mechanism for implementation and ongoing review

4.111 We do not make specific proposals about how the proposed power should be implemented. However, for completeness, we note that it could be created in statute but that it might also be possible for it to be created in the CPRs, provided that the appropriate statutory authority is available. It would also be possible for it to be developed at common law.[268]

THE GATEWAYS AND THE TERRITORIALITY PRINCIPLE

4.112 In the previous chapter, we summarised a variety of ways in which we think that the gateways have been inconsistently interpreted in the crypto-token cases so far. We have said that we think this inconsistency is due in large part to the circumstances in which the cases have been brought and the purposes for which the courts have been asked to make the decisions. To address these considerations, we provisionally proposed above a new power for the courts to grant information orders to claimants trying to identify a defendant or the location of their assets in the crypto-token environment such that they can embark on litigation proper. We think that such a power would have helped in many of the crypto-token cases so far; and will be helpful in many that are to come.

4.113 However, a new power for information orders at the initial investigations stage of proceedings would not remove the need to consider how the existing gateways can and should be interpreted in cases that reflect the 19th century assumptions about cross-border litigation (such as the defendant's identity being known or parties seeking a final determination of their respective rights and obligations) but which have

[268] We think it could potentially be developed under section 37 of the Senior Courts Act 1981.

an aterritorial or omniterritorial element. In the previous chapter, we discussed two such cases that have come before the courts. We expand on them a little here.

4.114 In *Wang v Derby*,[269] international jurisdiction was not in dispute between the parties: the foreign claimant sued the defendant in his "home court" of England and Wales pursuant to the general rule of international jurisdiction. Whilst the case did not involve the challenge of interpreting the gateways in a case concerning crypto-tokens, it is a good reminder that, in crypto-token cases that continue to reflect 19th century assumptions as to cross-border litigation, it will not always be necessary to try to "localise" an omniterritorial act, event, or object to establish the supplementary adequate link between the country and the facts and issues of the case.

4.115 If the defendant has already been identified, the adequate link based on the defendant's personal tie to a particular country will always be available. There will, therefore, always be at least one forum available in which the parties can litigate their dispute: it will always be possible to bring such claims in the defendant's home court pursuant to the general rule of international jurisdiction. As *Wang v Derby* shows, this is likely to be favourable for defendants who are based in England and Wales, especially if they are natural persons, because they will not be forced to defend a claim in a foreign court.

4.116 By contrast, international jurisdiction was in dispute between the parties in *Tulip Trading*:[270] the foreign defendants, having been identified and notified of proceedings, were challenging the jurisdiction of the courts of England and Wales. To establish international jurisdiction over the claim, the court at first instance was required to grapple with how the gateways should be interpreted and applied in cases that reflect the 19th century assumptions about cross-border litigation, but which also have an omniterritorial element.

4.117 In doing so, the court naturally referred to the other crypto-token cases that have been decided by courts. However, in hindsight, it is clearer that, when referring to these other cases, the court in *Tulip Trading* did not expressly appreciate that all of these other cases had been brought in highly usual circumstances. As we have said, the vast majority of the crypto-token cases before the courts of England and Wales have concerned fraud. As such, immediate practical concerns regarding access to justice have understandably taken priority over the principled interpretation and application of our rules of international jurisdiction. Administering justice in these fraud cases has, however, come at the cost of certainty and principle.

4.118 Outside of these fraud-type cases, we recognise that claimants may have various reasons for preferring not to sue in the defendant's "home" court, even where the defendant has been identified. There may be valid reasons for seeking to issue proceedings in the courts of another country on the basis of a supplementary adequate link to that country based on the facts and issues of the case. A claimant may wish to sue in England and Wales because practical control over the relevant crypto-tokens in dispute can be exercised in England and Wales. In such cases, the

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269 *Zi Wang v Graham Derby* [2021] EWHC 3054 (Comm), [2022] Bus LR 121.

270 *Tulip Trading v Persons Unknown* [2022] EWHC 667 (Ch); *Tulip Trading v Persons Unknown* [2023] EWCA Civ 83.

adequate link between England and Wales and the facts and issues of the case is established by showing that there is a good arguable case that the claim falls within one of the gateways for service of proceedings out of the jurisdiction.

4.119 Practitioners have told us that they expect that cases that reflect 19th century assumptions about cross-border litigation but which also concern crypto-tokens will increasingly come before the courts. Such cases may include disputes involving commercial parties who have voluntarily entered into a transaction, and are willing to litigate every point of dispute, including questions of jurisdiction. Practitioners have said that, in such cases, courts would have to address the underlying issues surrounding international jurisdiction more explicitly and on a more principled basis.

4.120 It seems clear that the underlying tension between acts, events, and objects that are omniterritorial and gateway requirements expressed in territorial terms will continue to give rise to problems; and will do so in procedural circumstances in which the defendant may well be prepared to challenge the jurisdiction to a far greater extent than has been the case so far. As the Commercial Bar Association and Chancery Bar Association said in their written response to our call for evidence, most of the decisions have arisen in contexts with only one party being represented such that the Court has not necessarily had the advantage of considered arguments from both sides. Overall, as Hogan Lovells said in their written response to our call for evidence: "while the theme of recent cases is that English courts have been relatively sympathetic to claimants based in England and Wales, the case law is inconsistent".

4.121 We therefore think it is important to consider how the gateways should be applied in cases involving an aterritorial or omniterritorial element, in accordance with the underlying principles of private international law. To do so, we return to the general principles of international law; and then examine how these principles underpin the two grounds of jurisdiction we have identified as particularly problematic. These are: gateway 9(a) for claims in tort where damage was suffered in England and Wales; and gateways 11 and 15(b) for claims relating to property within England and Wales.

4.122 We think the proper interpretation of these rules becomes clear if they are considered in light of the policies underpinning the general rules of international jurisdiction, as well as the specific policies underpinning claims in property and in tort.

General principles of international jurisdiction: an "adequate link"

4.123 As we said in our Digital Assets FAQ, private international law is ultimately concerned with identifying the most appropriate court in which parties to a cross-border private law dispute should litigate, and the most appropriate law that should determine who should win the dispute.[271] In identifying the "most appropriate" court and law, private international law is guided by its own internal principles and policies.[272] Such

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[271] Digital assets in private international law: FAQs on the relationship with tax law, banking regulation, and the financial markets (2025) Law Commission Paper, para 1.12.

[272] We recognise that the word "appropriate" is also sometimes used interchangeably with "convenient" in the context of the common law doctrines of *forum (non) conveniens*, usually as a more natural English translation of the Latin. It is therefore important to state that, for the purposes of our project, we use the term "appropriate court" in a distinct international sense, which applies in England and Wales to the gateway limb of the test for service out of the jurisdiction. Our references to the "appropriate court" should not be taken as

principles and policies, moreover, differ as between the rules of international jurisdiction and the rules for applicable law.

4.124 In claims arising in the aterritorial and omniterritorial contexts, these principles and policies have tended to be obscured. Given that the existing rules of private international law are typically expressed in territorial terms, fictions have been used to "localise" an aterritorial or omniterritorial act or object for the purposes of those rules.

4.125 We recognise that the use of such fictions is often intuitive, but we consider that they can be unhelpful and potentially misleading insofar as they tend to suggest that private international law is concerned only with questions of geographical location. Further, the apparent ease with which one might ascribe a fictitious "location" to an act, event, or object in the omniterritorial context (including with reference to the claimant) makes it equally easy to forget that there are existing principles of private international law that should determine the approach in such cases.

4.126 In the cases on international jurisdiction so far, very little (if any) consideration has been given to the underlying principles and policies that determine what counts as the "most appropriate" court or law. In particular, we think there has been a conflation between:

(1) an adequate link based on the relationship between a country and the defendant (generally, that the claimant sues in the "home court" of the defendant); and, in the alternative

(2) an adequate link based on the relationship between a country and the facts and issues of the case (for example, that the claim relates to an action that occurred in the jurisdiction, or that the loss was sustained there, or that the property is located there).

4.127 Such conflation has been most apparent where an act, event, or object has been fictitiously "localised" by reference to a person other than the defendant (usually the claimant) for the purposes of establishing an adequate link based on the facts and issues of the case. Crypto-tokens have been "localised" by reference to where the putative "owner" is located for the purposes of the property gateways.[273] It has also been held variously that tortious damage in relation to a crypto-token was sustained in the place where the claimant was domiciled,[274] or habitually resident,[275] or where the claimant would experience the deprivation of access to the misappropriated crypto-token[276] for the purposes of the tort gateway. We consider the various issues arising from these interpretations of the gateways further below.

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a reference to the *forum conveniens* limb of the test for service out of the jurisdiction, which is guided by its own distinct considerations, policies, and common law authorities.

273 *Ion Science v Persons Unknown* (21 December 2020) EWHC (Comm) (unreported).

274 *Jones v Persons Unknown* [2022] EWHC 2543 (Comm) at [6] by Mr Nigel Cooper KC.

275 *Lubin Betancourt Reyes v Persons Unknown* [2021] EWHC 1938 (Comm) at [22] by HHJ Pelling KC.

276 *Tulip Trading v Persons Unknown* [2022] EWHC 667 (Ch); *Tulip Trading v Persons Unknown* [2023] EWCA Civ 83.

4.128 Before we consider these in more depth, it is worth the reminder that, unlike in the context of applicable law, a rule of international jurisdiction is not required to narrow down the potential options to a single place. Where more than one forum can satisfy the ground contained in a rule of international jurisdiction, there are well-established doctrines that regulate such conflicts of international jurisdiction. These, however, go to the "fairness and practicalities of litigation" aspect of international jurisdiction, rather than the "adequate link" between the country and the litigation.

4.129 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.[277]

4.130 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 in an application for service out of the jurisdiction. The full test involves showing: (1) a good arguable case that the claim falls within one of the gateways; (2) there is a serious issue to be tried on the merits of the claim; and (3) England and Wales is the "convenient" forum for the trial. The gateways do not themselves typically engage questions of fairness between the parties or the practicalities and fairness of the litigation.[278]

Property within the jurisdiction[279]

4.131 As explained in the previous chapter, Practice Direction 6B para 3.1 provides two grounds of international jurisdiction for claims relating to property or assets within England and Wales. Both of these have been relied on in several of the crypto cases so far.

(1) Gateway 11 provides a ground of jurisdiction where "the subject matter of the claim relates wholly or principally to property within the jurisdiction". Gateway 11 is not limited to any particular category of property.

(2) Gateway 15(b) provides a ground of jurisdiction where "a claim made against the defendant as constructive trustee or as trustee of a resulting trust", and the claim "relates to assets within the jurisdiction".

4.132 As we explained in the previous chapter, there are two questions that arise when applying the property gateway(s) to cases involving crypto-tokens:

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

278 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.

279 See further, A Held, "The modern property situationship" (2024) 20(2) *Journal of Private International Law* 391; 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, "Cryptoassets and Decentralised Ledgers: Does Situs Actually Matter?", in M Lehmann, A Bonomi, and S Lalani (eds) *Blockchain and Private International Law* (2023).

(1) In what circumstances can a crypto-token be said to be located in England and Wales? That is, **where** is a crypto-token located?

(2) **When** must the crypto-token be in England and Wales in order for it to provide the basis of jurisdiction under the property gateway?

4.133 We consider how these questions might be answered in claims concerning crypto-tokens.

Where is a crypto-token "located"?

4.134 We said in the previous chapter that most, if not all, systems of private international law today provide that cross-border property disputes should be litigated in the courts of the place where the property object is situated. This is often expressed in Latin as the *forum rei sitae* rule (court of the place where the object is situated) or *forum situs* rule (court of the situation/location). The rationale for the rule can be understood largely by reference to practical considerations relating to an adequate remedy, and to considerations relating to the recognition and enforcement of judgments.

4.135 These considerations relating to an effective remedy underpin more generally how private international law treats what the substantive law of England and Wales traditionally calls "intangible property". Even though such objects cannot physically be "situated" within any particular territory, the practical concerns surrounding an effective remedy are at the forefront of interpreting the *situs* rules in relation to such "property".

(1) Simple debts have traditionally been considered "situate" at the habitual residence of the debtor because enforcement of the obligation underpinning the debt requires the "owner" to bring proceedings in the courts that exercise personal jurisdiction over the debtor to compel payment. [280] For example, if there is a contract providing for payment in London to a company incorporated in England, but the debtor is habitually resident in Germany, then the debt is often said to be "situate" in Germany.[281] Where, however, there is an exclusive jurisdiction or arbitration agreement, the debt is more likely to be considered "situate" at the place of the chosen court or agreed seat of the tribunal, as this is where judgment may be obtained and enforced against the debtor.[282]

(2) Shares are considered "situate" where, under the law of the country in which the company was incorporated, they can be effectively dealt with as between the owner for the time being and the company. For example, in *Macmillan Inc v Bishopsgate Investment Trust Plc (No 3)*,[283] it was held that a dispute relating to shares of a company incorporated in New York was governed by New York law.

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280 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 Rule 136(1), para 23-026 to 23-032.

281 *In Re Claim by Helbert Wagg & Co Ltd* [1956] 2 WLR 183, 344.

282 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 23-026.

283 [1995] EWCA Civ 55, [1996] 1 WLR 387 (CA).

(3) Financial instruments, where the title is evidenced in a register or an account managed by an intermediary, are said to be "situate" in the state in which the register or account with the relevant entry is maintained.[284]

(4) Where cash is held in accounts in credit institutions, the asset is held to be "situate" in the state in which the credit institution which holds the relevant account has its central administration. If the account is held with a branch of a credit institution, then the asset is held to be "situate" in the state where the branch is located;[285]

(5) Where the ownership to property is recorded in a public register, other than shares, then the asset is "situate" in the state where the register is kept.[286]

4.136 These interpretations of the *forum rei situs* rule are often referred to as involving a "fictional *situs*" or "artificial *situs*" for intangible property. It has become conventional in some parts of the private international law discourse to refer to the "artificial" or "juridical" *situs* of intangible objects, with expressions such as: "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".

4.137 We recognise the intuitive appeal of such expressions. However, we consider that such expressions can be unhelpful because they obscure the nature and ultimate objective of the exercise – which is to identify which country's court is most appropriate to hear and determine the cross-border private law issue arising from the object and which country's law is most appropriate to resolve that issue – and the policy considerations that this exercise engages. For this reason, phrases such as "artificial" or "juridical *situs*" have been criticised in both academic[287] and judicial contexts.[288]

4.138 More importantly, speaking of an "artificial" *situs* is unhelpful because it emphasises the conclusion ultimately reached having undertaken an exercise in legal reasoning, rather than the principles that have guided that exercise in legal reasoning. This is particularly unhelpful in the present context because of the nature of the challenge that omniterritoriality poses to private international law. If the *situs* rules are taken at face value, the application of the *forum rei situs* rule to a crypto-token held in accordance with the bitcoin ideal of decentralisation points to "nowhere and everywhere, at the same time".[289] Without an appreciation of the relevant principles

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284 Insolvency Proceedings Regulation (Recast) (EU) 2015/848, Official Journal L 141 of 5.6.2015 p 19 to 72, Art 2(9)(ii).

285 Above, Art 2(9)(iii).

286 Above, Art 2(9)(iv).

287 P Rogerson, "The Situs of Debts in the Conflict of Laws: Illogical, Unnecessary, and Misleading" (1990) 49(3) *Cambridge Law Journal* 441 to 460; A Held, "The modern property situationship" (2024) 20(2) *Journal of Private International Law* 391.

288 *Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC (The Mount I)* [2001] EWCA CIV 68, [2001] QB 825 at [35] by Mance LJ.

289 A Held, "Cryptoassets and Decentralised Ledgers: Does Situs Actually Matter?", in M Lehmann, A Bonomi, and S Lalani (eds) *Blockchain and Private International Law* (2023), 250

that underpin the *forum rei situs* rule, it is easy for the process of legal reasoning to become a "free for all" exercise in which "anything goes".

4.139 The interpretation of the property gateway in the crypto-token litigation context has shown no real engagement with the principles underpinning the *forum rei situs* rule. As we have seen in the previous chapter, the courts have tended to "localise" a crypto-token by reference to the purported "owner" of the crypto-token, referring variously to the place of residence, domicile, and central management and control; all without giving any real reason why any one of these should be preferred over the other; nor any justification for departing from the general principles underpinning the *forum rei situs* rule.[290] This might be attributable, at least in part, to the significant misinterpretation of Professor Dickinson's proposal for applicable law, which we outlined in Chapter 4 and consider in more detail in Chapters 5 and 6.

4.140 In fact, we think that the general principles that underpin the *forum rei situs* can be applied even for omniterritorial objects. If the basic principle is to look to the place where the object can be effectively dealt with, the cases show that there are many ways in which this place can be identified.

4.141 The most obvious possibility would be to look to the private key. Crypto-tokens are designed to be controlled exclusively by private keys, so an interpretation in line with the general principle underpinning the *forum rei sitae* rules might be that the crypto-token is "located" at the place where the person who knows or has access to the private key is located.

4.142 The crypto-token cases show, however, that there are alternative ways to "localise" a crypto-token based on the general principle of control. Many of these refer to a more generalised control over the software underpinning the network itself, rather than control over any discrete crypto-token:

(1) In *Tai Mo Shan*,[291] the defendant company had technical control over the crypto-tokens in dispute through their control over the decentralised finance application in which those crypto-tokens were traded and held. They were therefore ordered to execute what has been called an "ethical hack" and place the relevant crypto-tokens in the control of the claimant's solicitors.

(2) In *Tulip Trading*,[292] the claim was premised on the fact that the defendant software developers exercised control over the relevant DLT networks, such that they could implement a "software patch" that would enable the claimant to regain control over the relevant crypto-tokens "held" at two blockchain addresses. From this, the claimant alleged that the defendants owed them a duty in tort and in fiduciary duty to implement the software patch and assist them regain access to the crypto-tokens.

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290 See above ch 3 from 3.134.

291 *Tai Mo Shan v Persons Unknown* [2024] EWHC 1514 (Comm); *Tai Mo Shan* [2024] EWHC 2532 (Comm).

292 *Tulip Trading v Persons Unknown* [2022] EWHC 667 (Ch); *Tulip Trading v Persons Unknown* [2023] EWCA Civ 83.

4.143 We provisionally conclude therefore that crypto-tokens can and should be "localised" by reference to practical or effective control, rather than by reference to the "owner". This reflects the existing principles that underpin the rules for international jurisdiction.

When must the crypto-token be located in England and Wales?

4.144 As we explained in the previous chapter, movable property poses particular challenges for the *situs* principle. This is because the place where the object is located can very easily change.

4.145 In our call for evidence, we analysed the temporal factor for the purposes of gateways 11 and 15(b). We noted that gateway 11 is phrased in the current tense: the subject matter of the claim relates wholly or principally to property within the jurisdiction.[293] This suggests that the property must be within the jurisdiction at the time of the application. This is consistent with the underlying principles of effective remedies and the rules on the recognition and enforcement of judgments. There is nothing in gateway 11 that suggests it applies to property which was in the jurisdiction at the time of the alleged wrongdoing but which is, at the time of proceedings, in another jurisdiction.

4.146 The difficulties with the temporal factor in the crypto-token cases so far seem, rather, to arise because the constructive trustee gateway provides two separate sub-rules that express different grounds of jurisdiction. As such, they rely on different temporal factors.

4.147 Gateway 15(a) essentially focuses on the personal claims that might arise in the context of a trust (against the trustee). As such, it is drafted in materially identical terms to various grounds of jurisdiction that provide for claims in tort and in restitution:

(1) 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".**

(2) gateway 16(a): a claim made for restitution where "the defendant's alleged liability **arises out of acts committed within the jurisdiction".**

(3) 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**".

(4) 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".**

4.148 Gateway 15(b) on the other hand focuses on the property claims that might arise in the context of a trust. As such, it is drafted in materially identical terms to gateway 11:

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[293] Digital assets and ETDs in private international law: which court, which law? (2024) Law Commission Call for Evidence, para 5.110.

(1) gateway 15(b): a claim made against the defendant as constructive trustee or as trustee of a resulting trust and the claim "**relates to assets within the jurisdiction".**

(2) gateway 11: the subject matter of the claim "**relates wholly or principally to property within the jurisdiction".**

4.149 We therefore expressed the preliminary view in our call for evidence that the two limbs of gateway 15 are to be construed independently.[294] In relation to the temporal factor, this means:

(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. This would be consistent with gateways that are based on similar underlying causes of action and are therefore drafted in materially identical terms, such as gateways 9(b), 21(b), and 16(a),

(2) Where gateway 15(b) is relied on, the appropriate time for localising the assets is the time when proceedings are issued. This would be consistent with gateways that are based on similar causes of action and are therefore drafted in materially identical terms, such as gateway 11.

4.150 In their responses to the call for evidence, stakeholders almost all agreed with our analysis on the "when" question; that is, that a crypto-token must be located in England in Wales at the time the application is made in order to establish jurisdiction on this basis. As the joint submission of the Commercial Bar Association and the Chancery Bar Association explained, this is necessary because "if the relevant property was formerly, but is no longer in the jurisdiction, the underlying rationale for the gateway falls away".

4.151 In addition, such interpretation of gateways 11 and 15(b) is harmonious with the rules on the recognition and enforcement of foreign judgments. As we have said above, many rules for the recognition and enforcement of a foreign judgment *in rem* expressly provide that such judgment will be recognised and enforced if the property object was within the territory of the foreign court at the time of proceedings.[295]

4.152 We think therefore that it should be relatively uncontroversial to say that, to found jurisdiction under the property gateway in a case concerning crypto-tokens, the crypto-tokens must be located in England and Wales when the proceedings are issued.

The "adequate link" between a country and a crypto-token claim in property

4.153 In light of the analysis above, we provisionally conclude that:

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294 Digital assets and ETDs in private international law: which court, which law? (2024) Law Commission Call for Evidence, para 5.113.

295 See eg section 4(2)(b) Foreign Judgments (Reciprocal Enforcement Act 1993 (UK); section 7(3)(b) Foreign Judgments Act 1991 (Australia); Article 22 quinquies (f) Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial (Law of the Judiciary, Spain); s 517(1) Codigo Procesal Civil y Comercial de la Nacion (National Code of Civil and Commercial Procedure, Argentina).

(1) The appropriate court to hear a cross-border property claim concerning a crypto-token is the court of the place where the crypto-token can effectively be dealt with at the relevant point in time

(2) The relevant point in time should be place when proceedings are issued.

4.154 The effect of this provisional conclusion would be that there will be a good arguable case that a claim falls within gateways 11 and 15(b) where the claim relates to a crypto-token that can be controlled from within England and Wales at the time when proceedings are issued.

Method of implementation

4.155 We do not think that our provisional conclusion represents any law reform as such, but merely an interpretation of the gateways that is consistent with or deduced from the general principles underpinning the existing rules of international jurisdiction. We do not therefore think that the creation of a new gateway is required to implement our provisional conclusion. That said, we can see the argument that the courts and litigants would have more certainty if there were a ground of jurisdiction or gateway specifically concerned with the "location" of crypto-tokens for the purposes of a property claim.

4.156 In general, stakeholders were divided on what, if any, reform was needed in relation to the gateways.

4.157 Some stakeholders thought that the gateways as drafted could be applied in crypto-token cases, and that no reform was needed. They said all that was required was an explanation as to how the existing gateways could properly be interpreted in these novel circumstances.

4.158 Two stakeholders were in favour of a new, crypto-specific gateway:

(1) The Bar Council suggested in their written response to our call for evidence that there should be a new discretionary gateway for proprietary claims. Four factors were suggested as relevant to its application: (i) whether any relevant off-chain asset is located in England and Wales; (ii) whether there is any centralised control over the cryptoasset in England and Wales; (iii) whether a particular cryptoasset is controlled by a particular participant in England and Wales (because, for example, a private key is stored here), or was controlled by such a participant before the justiciable act occurred; (iv) whether the law applicable to the relevant transfer (perhaps by reason of the parties' choice) is English law.

(2) The Financial Markets Law Committee proposed in their written response to our call for evidence a "new jurisdictional gateway whereby the courts of England and Wales would have jurisdiction to determine proprietary disputes in relation to digital assets". Such new gateway should apply where (i) the digital asset or (failing that) the DLT system contains an express election in favour of the jurisdiction on the courts of England and Wales or (ii) in the absence of an express election, the governing law of the claim would be the law of England and Wales.

4.159 Some stakeholders cautioned against introducing a new gateway specifically for crypto-token cases, given that these represent only a very small proportion of the cases that are issued in the courts. These stakeholders emphasised the need to consider "knock-on" effects on other aspects of crypto-token cases, such as those arising in the transactional rather than litigation legal context.

4.160 As a general starting point, we note that the existing property gateways are not specific to any particular type of property. This is in contrast to the position before 1998, when various gateways applied to land and to debts "secured on immovable property". Following the implementation of the CPR 1998, the land and moveable property gateways were amalgamated into a single gateway which has been refined over time.

4.161 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".[296] 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.

4.162 From this, we do not think there is any real reason to depart from this general trend. As we have said above, we consider our conclusion to be an interpretation of the property gateways in line with the general principles that underpin the rules of international jurisdiction over property claims. Whilst we appreciate that there might be an argument for setting out how these general principles apply in various concrete situations, we do not think this is necessary. In the common law legal method (as opposed to Continental legal method), the elaboration of how a rule applies in specific circumstances is a task traditionally left to the courts, supplemented by academic commentary by reference to the decided cases. In the case of the gateways, this commentary is set out in the White Book.

4.163 Were we to consider any reform, in the sense of a new ground of international jurisdiction for property claims, this would need to be considered carefully against the general principles of international jurisdiction. We do not consider that any of the factors proposed by the Bar Council (that do not relate to control) and the Financial Markets Law Committee represent any truly novel factor arising in a claim involving crypto-tokens. Rather, such factors show the importance of a more granular approach to matters of characterisation. Linked assets and crypto-tokens in which there is someone in a position to express a valid choice of law will, in practice, both have significant overlaps with contract.[297]

4.164 We think much of the discussions surrounding "property rights" in private international law has been rendered somewhat confused by the imprecise way in which the term "property" is used. This has been illustrated by the confusion even between the two limbs of the constructive trustee gateway.

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

297 We discuss this in more depth in our Property and permissioned DLT systems in private international law: FAQ.

4.165 As we said above, gateway 15 contains two grounds of jurisdiction that may refer to an object of property as the connecting factor, but which are ultimately concerned with two different types of claim: gateway 15(a) essentially is a claim arising in the law of obligations; and gateway 15(b) essentially is a claim arising in the law of property.[298] Notwithstanding that they are both contained in the same gateway in our domestic rules of international jurisdiction, obligations and property raise their own considerations in private international law. As we have seen, this includes the relevant point in time at which the connecting factor – here, the location of the property object that is said to be the subject matter of the trust – is to be assessed. Such differences are of prime importance in private international law.

4.166 We briefly consider the suggestion from some stakeholders that it should be possible to establish jurisdiction in a property claim if the claim itself is governed by the law of England and Wales. Stakeholders referred to both the law applicable to the transfer of the crypto-token and the law applicable to the property claim itself.

4.167 The law of England and Wales already recognises some grounds of international jurisdiction on the basis that the claim is governed by the law of England and Wales.[299] These grounds of jurisdiction, however, are controversial in both private international law and in public international law.[300] As Professor Alex Mills has said:

> The basis for questioning this ground of jurisdiction is that the governing law of the contract does not necessarily establish a significant link between the English courts and the parties or their dispute. It may further be questioned whether this basis of jurisdiction offers another conflation of different concepts of jurisdiction in international law terms—this time allowing adjudicative jurisdiction to be established on the basis of the applicable law, which is a matter of prescriptive jurisdiction. This basis of jurisdiction is not widely available in other legal systems, which also raises questions about whether it may be characterized as consistent with international practice—it has, nevertheless been long established under the common law rules in England.[301]

4.168 A more practical concern relates to the utility of a property gateway based on the applicable law. As we have seen, the rules of international jurisdiction over property claims tend to reflect practical considerations of an effective remedy. From this, we

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298 See from para 4.148.

299 Gateways 6(c), 9(c), and 15(c), for example, provide grounds of international jurisdiction over claims arising in contract, tort, and in relation to trusts respectively that are governed by the law of England and Wales.

300 Stakeholders at our digital assets in private international law roundtable expressed concern in relation to gateway 9(c), which provides a ground of international jurisdiction for claims in tort where the claim is governed by the law of England and Wales. In addition, Associate Professor Brooke Marshall discussed *UniCredit Bank Gmbh v RusChemAlliance LLC* [2024] UKSC 30; [2025] EWCA Civ 99 and the gateways that provide grounds of international jurisdiction over claims that are governed by the law of England and Wales at the "Characterisation in the Conflict of Laws" conference held at St Hilda's College, Oxford, 20-21 March 2025. For a report of the conference, see https://eapil.org/2025/04/02/report-of-the-oxford-conference-on-characterisation-in-the-conflict-of-laws/

301 A Mills, "Exorbitant Jurisdiction and the Common Law" in *Essays in International Litigation for Lord Collins* edited by J Harris and Campbell McLachlan (2022), p 258.

have received no evidence as to why an additional property gateway based on the applicable law would be necessary or what it would achieve.

4.169 Furthermore, any such ground of jurisdiction would need to consider carefully and accommodate the well-known problems of *conflit mobile* and adaptation of property rights that arise in the conflict of laws. Such difficulties arise where the property object moves between jurisdictions, leading to a change in the applicable law and the types of property rights that are recognised as subsisting "in" the object.

4.170 As *Tai Mo Shan*[302] shows, ultimately, property claims will end up in the courts of the place that can facilitate a remedy of delivery up or restitution of the object in dispute. Accordingly, issuing proceedings in other courts based on other grounds of jurisdiction (or, indeed, other interpretations of the existing rules that express the *forum rei sitae* principle) seem to add little but expense and time. The claimant could have begun simply by issuing a property claim in England and Wales on the basis that a company incorporated in England and Wales had practical control over the relevant crypto-tokens; then have gone immediately from jurisdiction to the enforcement of the judgment in the same court in line with the *forum rei sitae* principle that underpins the rules of both direct and indirect jurisdiction without the need for any New York proceedings.

Provisional conclusions

4.171 We therefore provisionally conclude that a property claim concerning a crypto-token should be heard by the court of the place from where the crypto-token can be effectively dealt with at the time when proceedings are issued. The courts of England and Wales would therefore have jurisdiction when a crypto-token can be controlled or otherwise effectively dealt with from within the jurisdiction at the time when proceedings are issued.

4.172 As we have explained, we think this does no more than interpret the existing rules of international jurisdiction in line with the principles underpinning the *forum rei sitae* rules. We do not therefore think that a specific crypto-token gateway is required, and we note that there are not currently property gateways for specific types of property. That said, we are aware of suggestions from some stakeholders that a crypto-specific gateway would provide more certainty. Such a gateway/ground of jurisdiction could provide for the courts to have jurisdiction where a crypto-token can be controlled or otherwise dealt with effectively from within England and Wales at the time when proceedings are issued. We ask consultees whether they think such a gateway/jurisdiction would be desirable.

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302 *Tai Mo Shan* [2024] EWHC 1514 (Comm), *Tai Mo Shan* [2024] EWHC 2532 (Comm).

Consultation Question 5.

4.173 We provisionally propose that:

(1) The appropriate court to hear a cross-border property claim concerning a crypto-token is the court of the place where the crypto-token can effectively be dealt with at the relevant point in time.

(2) The relevant point in time should be the time when proceedings are issued.

Do consultees agree?

Consultation Question 6.

4.174 We invite consultees' views on whether there is a need for a new gateway/ground of jurisdiction explicitly providing that the courts of England and Wales have jurisdiction when a crypto-token can be controlled from within the jurisdiction at the time when proceedings are issued.

Damage or detriment suffered in England and Wales

4.175 Under Practice Direction 6B paragraph 3.1, relevant provisions include:

(1) gateway 9(a): a claim made in tort where "damage was sustained, or will be sustained, within England and Wales".[303]

(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".[304]

4.176 We focus our discussion on gateway 9(a), as it has been the most frequently used in the crypto-token cases so far. Of the 22 cases we have analysed, 7 concerned this gateway. However, our analysis is equally applicable to gateway 21(a).

4.177 As explained in the previous chapter, there are two distinct questions that arise when applying gateway 9(a):

(1) **what** is the nature of the damage sustained?

(2) **where** is the damage sustained?

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

304 Above, para 3.1(21)(a).

What is the nature of the damage sustained?

4.178 Before we can consider the question of "where" damage is sustained, it is necessary to consider how damage in the crypto-token cases should be conceptualised. As we discussed in the Chapter 3,[305] pure economic loss in the context of certain torts – particularly negligence – is subject to its own principles for the purposes of private international law.

4.179 In our call for evidence, we considered whether the crypto-token cases we had discussed were actually cases concerning pure economic loss. We had acknowledged 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).[306]

4.180 From this, we observed that none of the cases so far alleged damage **to** a crypto-token, or even to a physical device associated to the crypto-token, such as the computer on which the crypto-token was stored. All of the cases alleged losses sustained by reason of having been deprived of the crypto-tokens themselves or the financial consequences that follow from such deprivation.[307]

4.181 We therefore recognised that, given the nature of crypto-tokens, it is arguable that they are susceptible in the main only to tortious damage by reason of deprivation. Accordingly, in the absence of any physical damage upon which the deprivation of access to crypto-tokens is consequent, we said 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.

4.182 Since we finalised our call for evidence, the Supreme Court has handed down judgment in *Armstead v Royal and Sun Alliance.*[308] This was not a case raising issues of private international law; rather, it concerned the substantive law of pure economic loss in tort. It has, however, featured heavily in the responses we received in relation to pure economic loss. We therefore discuss it briefly here.

4.183 *Armstead* concerned a car that had been hired by the claimant from a hire car company. The car was then damaged in a road traffic accident caused by the negligence of a van driver, and was taken away for repairs. Under the terms of the hire contract, the claimant incurred a liability to pay the hire car company a specified sum of money each day that the car was out of action. The claimant then brought proceedings against the van driver's insurer. This included claims in damages for both (i) the costs incurred for the repairs to the car; (i) the costs incurred under the contractual liability to pay the hire car company the specified sum of money each day that the car was out of action. Accordingly, the question before the Supreme Court was whether the claimant could recover the second set of costs (that is, the additional

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305 See para 3.165.

306 Digital assets and ETDs in private international law: which court, which law? (2024) Law Commission Call for Evidence, para 5.48.

307 Digital assets and ETDs in private international law: which court, which law? (2024) Law Commission Call for Evidence, para 5.49.

308 [2024] UKSC 6, [2024] WLR 632

payments due under the contract to the car hire company) from the defendant as flowing from the damage caused by his negligence. The Supreme Court held, unanimously, that the losses were not pure economic loss and that the losses were recoverable.

4.184 From this, stakeholders were divided on what this meant for tortious loss sustained in relation to crypto-tokens. For example, Norton Rose Fulbright considered that, in light of *Armstead*, the tortious damage in crypto-token cases are not cases of pure economic loss. The Commercial Bar Association and the Chancery Bar Association noted that the members of their panel were divided as to whether this meant tortious damage in the crypto-token cases were pure economic loss. Herbert Smith Freehills considered that these cases were pure economic loss.

4.185 Whilst *Armstead* is a case concerning tangible property and does not touch on the question of pure economic loss in relation to intangible property,[309] we are conscious that the substantive law in relation to torts involving crypto-tokens and other digital assets will continue to develop. This is especially so, given our conclusion in our digital assets project that the common law is beginning to recognise a further category of personal property that might be subject to torts analogous to, for example, conversion.[310] Herbert Smith Freehills, for example, said that, although the cases so far were probably still cases of pure economic loss, the rules on pure economic loss refer to tangible property and so "may apply differently in relation to the Law Commission's proposed third category of property".

4.186 Accordingly, it would be premature for private international law to draw firm conclusions on the extent to which certain types of damage in relation to a crypto-token are or are not pure economic loss. It is worth the reminder that our concerns with pure economic loss in private international law differ to those that arise in relation to substantive law. In the latter, the question might be whether losses sustained in relation to a crypto-token are subject to the limits on recoverability or remoteness of damage. In private international law, the question is rather whether the authorities and jurisprudence on "localising" pure economic loss for the purposes of the *locus damni* rules apply. Here, we note that, in the cases so far, claimants have not necessarily had to plead in detail a full cause of action in tort. It has, therefore, not always been clear what type of damage is actually being asserted.

4.187 Nevertheless, drawing from the cases, we have identified various different ways in which damage **could** be conceptualised:

(1) **Interference with** a crypto-token.

(2) Being **deprived of** a crypto-token.

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309 A Tettenborn, M Jones *Clerk & Lindsell on Torts* (24th Ed 2023, Supplement 2024), para 2.161A.

310 See Digital Assets: Final Report (2023) Law Com No 412. We concluded that the courts could potentially recognised a control-based alternative to conversion, but did not make a formal recommendation on this issue. It is not included in the Property (Digital Assets etc) Bill currently before parliament, which states only that a thing is not denied the status of property merely because it is neither a thing in action nor a thing in possession.

(3) Being **deprived of access to** a crypto-token having been denied access to an online account or computer system.

(4) The **experience or consequences of** being deprived of a crypto-token or access to a crypto-token.

(5) The loss of **crypto-tokens paid** as a ransom.

(6) The loss of the **money used to purchase** crypto-tokens paid as a ransom.

4.188 Of these different ways of potentially conceptualising damage, we focus in particular on the first three possibilities: interference with a crypto-token, and being deprived of a crypto-token, and being deprived of access to a crypto-token specifically as a result of having been denied access to an online account. These are directly relevant to the digital or decentralised environments; either by referring to direct damage relating to a crypto-token as the object of loss, or to direct loss sustained in the online or decentralised context.

4.189 We further offer some comment on the fourth possibility: the experience or consequences of being deprived of a crypto-token or access to a crypto-token. The cases so far have shown that litigants and courts have been distinguishing between an initial and direct loss of a crypto-token or being deprived of access to a crypto-token that is suffered in one place; and the experience of that loss being felt in another place. This distinction raises issues of private international law.

4.190 We do not focus in much detail on the final two possibilities: the loss of crypto-tokens paid as a ransom, and the loss of the money used to purchase crypto-tokens paid as a ransom. These seem to relate more to consequential and/or pure economic loss. For example, in *AA v Persons Unknown*, it seems less controversial to say that the immediate loss and damage was the hack itself, whereas the ransom paid in bitcoin and the money used to pay for that bitcoin were consequential to that loss. Beyond this observation, we make no comment on whether these would be pure economic loss for the purposes of interpreting gateway 9(a) – and therefore subject to special considerations – for the reasons we gave above on the developing state of the substantive law.

Where is the damage sustained?

4.191 We think it helpful to return to some basic principles and analogies with tangible assets to examine the issues relating to the "localisation" of damage and crypto-tokens more clearly. We therefore start by dissecting the various elements of a property tort and how each of these could be used as a connecting factor in private international law. We then consider how these connecting factors might be used in simple cases of direct damage to a tangible object. From this, we consider the connecting factors might be used in more complex circumstances.

Direct interference with a crypto-token and direct loss of a crypto-token

4.192 The traditional connecting factor used for claims arising under tort is the *locus delicti* (place of the tort). It is, however, helpful to break down the various aspects of a simple tort that involves damage to or deprivation of a physical object to illustrate how the broad concept of *locus delicti* actually contains five separate aspects of a property tort.

These are: the victim, the tortfeasor, the object that has been damaged or lost, the unlawful act giving rise to the damage, and the damage itself. Each of these can be used in private international law as separate sub-connecting factors for cross-border claims arising in tort.

4.193 The choice of one sub-connecting factor over another will often depend on the facts surrounding the tort itself. We begin with the simple 19th century case and progress through increasingly complex cases.

4.194 **The simple 19th century-style case.** As we have said, the rules for international jurisdiction in England and Wales were developed in the 19th century and therefore reflect certain 19th century assumptions about cross-border litigation. In a claim arising in tort, the basic assumption is that the victim, object, and tortfeasor are all in the same place. This is, furthermore, simultaneously the place where the tort is committed and the place where the damaged is sustained in a single overall event or occurrence. Thus, the traditional connecting factor used for tort has been the *locus delicti*: all five elements of a 19th century property tort would have likely coincided in a single place.

4.195 Of these five potential connecting factors, the place where the harmful or unlawful act was committed (*locus commissi*) has tended to be emphasised with an interpretation of *locus delicti* as the place where the unlawful act was committed. This largely reflects a broader rule of private international law known as the *locus regit actum* rule (the place governs the act). In sum, it reflects the principle that, if the alleged tortfeasor's act was lawful at the place where it was committed, it cannot give rise to a claim in tort. Thus, until 1995, foreign torts in the courts of England and Wales were subject to the "double actionability" rule: the conduct had to be actionable under both the law of England and Wales, and the law of the place where the act was committed.[311] In the simple 19th century case, however, emphasising one connecting factor over another did not often matter, as all five tended to coincide in the same place.

4.196 **The less simple case.** During the 20th century, the rise of cross border trade meant the various elements of a tort coincided less and less in the same place. In *Bier v Mines de Potasse d'Alsace SA*,[312] the defendant French mining company had discharged chloride from their factory in France into the river Rhine. The pollution carried downriver, ultimately damaging the claimant's seedlings in a nursery based in the Netherlands. Given the difficulty of identifying "the place where the harmful event occurred"[313] for the purposes of Article 5(3) of the Brussels Convention, the European Court of Justice interpreted this to include both the place where damage occurred (*locus damni*) and the place where the event giving rise to the damage occurred

311 Until 1995, foreign torts in the courts of England and Wales were subject to the "double actionability" rule: the conduct had to be actionable under both the law of England and Wales, and the law of the place where the act was committed. This was abolished by s 10 Private International Law (Miscellaneous Provisions) Act 1995.

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

313 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.

(*locus commissi*).[314] In January 1987, the tort gateway was amended to reflect this ruling, thus the basis of gateway 9(a) for claims where "the damage was sustained" within the jurisdiction.

4.197 **The more complex case.** The facts of recent 21st century cases illustrate further complexity in "localising" a tort. *Okpabi v Royal Dutch Shell Plc and another* concerned oil spills and pollution in Nigeria, which had resulted in significant environmental damage in the villages where the claimants lived.[315] Although this damage was said to have occurred due to the operations of a Nigerian company in Nigeria, the claimants asserted that the ultimate parent company, a UK-domiciled company, was liable for the damage. This was on the basis that the UK parent exercised significant control over the Nigerian subsidiary. From this, "localising" the various elements of the tort become even more challenging: on the basis of the claimant's claim against the UK parent, the unlawful act arguably occurred in the UK and/or jointly in the UK and in Nigeria; whereas the damage was sustained in Nigeria.

4.198 Taking the facts further into a hypothetical situation, if a villager who happened to be staying in a neighbouring village at the time of the oil spill and the damage to his home, the unlawful act, tortfeasor, damage, object of damage, and victim can arguably be all in different locations.

4.199 **The omniterritorial case**. In the vast majority of the crypto-token cases so far, the victim has been in one place, the object itself is an omniterritorial crypto-token, and the tortfeasor is in an unknown location. The place where the unlawful act was committed is therefore also unknown. The place where the damage was sustained is the question with which we are concerned.

4.200 We think that an analogy with damage sustained in relation to a tangible object helps focus the analysis. For example, consider direct interference with a car by tampering with its brakes or being deprived of a laptop because it has been taken from one's desk. Both would give rise to causes of action in trespass and/or conversion. In these cases, it seems reasonable to say that that the initial direct damage – in the interference with the car and the taking of the laptop – is sustained at the place where the object was when it was interfered with or taken. We do not consider for the moment the consequential losses that flow from this initial loss, such as damage sustained as a result of the car brakes failing (such as a car accident) or the losses that flow from loss of the laptop (such as failure to deliver a work-related deliverable resulting in a breach of contract).

4.201 In the omniterritorial case, determining the place where the object was at the time of interference or unlawful removal becomes complex because the object does not exist in any one place. In the case of a crypto-token held in accordance with the bitcoin ideal of decentralisation, the object exists "nowhere and everywhere, at the same time". It is for this reason that it is often said that it becomes necessary to ascribe to the object a "fictional" location.

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

315 [2021] UKSC 3, [2021] 1 WLR 1294. The action remains ongoing and no findings have been made as yet on causation.

4.202 We have said above and in our Digital Assets FAQ that is not always helpful to think of private international law as being concerned with an exercise in geographical location.[316] Ultimately, private international law is concerned with identifying the most appropriate court in which a cross-border claim should be heard and the most appropriate law to apply to resolve that claim. It is, therefore, preferable to think of the "localisation" exercise in terms of the objectives of private international law: to find some feature of the facts or issues of the case that convincingly connects the legal issue in dispute to a particular country. In this exercise, private international law is guided, not only by its own broader underlying objectives and policies, but also of those that are specific to each different area of private law.

4.203 For present purposes, it is important to stress that any exercise in apparently "localising" the crypto-token for the purposes of "localising damage" for international jurisdiction over a claim in tort is a very different exercise to "localising" a crypto-token for the purposes of international jurisdiction over a property claim. These two apparent "localisation" exercises in private international law are driven by very different underlying policies and objectives that are specific to property and to tort more broadly.

4.204 In a property claim, the ultimate issue is usually determining which of two (usually innocent) parties' claim to entitlement should take priority. From this, international jurisdiction over a property claim is largely driven by practical considerations of an effective remedy, such as restitution or delivery up of the object. "Localising" a crypto-token for the purposes of a property claim will therefore largely focus on identifying the place of practical control at the time where proceedings are issued so that any remedy that relates to the object can be made effective. Similarly, "localising" a debt focuses on identifying the courts of the place that exercise personal jurisdiction over the defendant, as ultimate enforcement of the debt will require the claimant to take action in the courts.

4.205 Tort, however, is underpinned by very different considerations. In the first instance, tort is concerned ultimately with the allocation of loss as between two parties who have, sometimes as a matter of unfortunate chance, been brought into a legal relationship of (alleged) tortfeasor and victim through the claimant having suffered some loss for which they were not at fault. In this assessment of who should bear the loss, broader public policy considerations specific to tort are taken into account.[317]

4.206 This might include what is reasonable to expect of a defendant in relation to intention, the standard of care, and/or foresight. We said above that the prevailing connecting factor for tort was traditionally the *locus commissi* and that this underpins the rationale of the old "double actionability" rule of England and Wales. These rules do not only reflect the *locus regit actum* rule, but also, in part, reflect considerations of fairness to the defendant. In sum, their conduct should not be assessed by reference to a law or by a court they could not reasonably foresee. In this, the defendant is, as a starting

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316 See from ch 2 para 2.73 and from ch 4 para 4.125.

317 See generally on fairness between the parties T Lutzi, *Private International Law Online: International Regulation and Civil Liability in the EU (*2022).

point, entitled to consider that, if their conduct is lawful where the act was committed, they will not incur any liability in tort.

4.207 Such considerations relating to fairness to the defendant must then be weighed against considerations of fairness to the claimant. Such considerations might be what losses are reasonable for the claimant to bear, or whether it would be fair for a claimant to litigate in a foreign court where evidence of the damage sustained would be less readily available, or would be measured by a standard that would be inadequate by the standard in place where the damage was sustained.

4.208 Such general considerations as to fairness between the parties also apply to the property torts. As we said above, the property torts do not give rise to a right to delivery up; the standard remedy remains damages to compensate for damage or loss.[318] Ultimately, therefore, the law remains concerned with fairness between the two parties and allocating losses between them, taking into account what is reasonable to expect of both.

4.209 The "localisation" of damage for the purposes of a property tort thus engages a very different set of considerations to those that might apply in property, or indeed, contract. Even where the tortious damage involves an object and this is used as the connecting factor to "localise" the tort, the guiding policy objectives in any "localisation" exercise are those that are relevant to tort, not property.

4.210 From this, the *locus damni* rule expresses a territorial connecting factor that refers to where a certain event occurred. Where that event involves interference with an object or the deprivation of an object, it makes sense to focus on the location of the object itself when it was damaged or taken from the victim. Thus, in *Fetch.ai Ltd v Persons Unknown*,[319] a case concerning misappropriation of private keys, the court held that the damage was sustained in England and Wales because that was **where the corresponding crypto-tokens were located.**

4.211 Where, however, it is not possible to "localise" the object itself, it may become necessary to look to other connecting factors. As we have seen above, the analysis might then shift to the parties themselves. This gives rise to two options: the place where the victim was or the place where the tortfeasor was at the time of the relevant damage to or concerning the object.

4.212 In this, the courts have largely opted to focus on the victim, which seems appropriate, given that the analysis remains on "localising" damage. By contrast, a focus on the tortfeasor might be more appropriate if the analysis were to focus on the place where the unlawful act was committed, such as would be the case under gateway 9(b).[320]

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318 Torts (Interference with Goods) Act 1977. See further, A Tettenborn, M Jones *Clerk & Lindsell on Torts* (24th Ed 2023, Supplement 2024), Chapter 16.

319 *Fetch.ai Ltd v Persons Unknown* [2021] EWHC 2254 (Comm).

320 Gateway 9(b) was considered in *Jones v Persons Unknown* [2022] EWHC 2543. In this case, the unlawful act was described as "a large-scale cyber fraud perpetrated by a group of online cyber criminals located overseas". Although it was suggested that these criminals were based in Russia, the judge nevertheless 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. We discuss whether it is appropriate to use a personal connecting factor for rules expressing a territorial connecting factor in para 4.125 onwards.

For present purposes, however, a focus on the victim (as a stand-in for the object) to "localise" damage in a property tort under gateway 9(a), the real question becomes identifying where the victim was at the time of the relevant damage.

4.213 However, it is not always clear whether the courts are focussing on the victim as a victim of the tort (as would be appropriate in a claim in tort), or the victim as the "owner" of the crypto-token (in an analysis that borrows from claims in property). In *Fetch.ai Ltd v Persons Unknown,* the court clearly adopted the latter: the judge adopted the reasoning of Butcher J in *Ion Science v Persons Unknown* at [13] where he said that the "*situs* of a cryptoasset is **the place where the owner or company who owns it is domiciled"**. On this basis the judge concluded that the crypto-tokens were located here and that, **as a consequence, the "losses caused by the allegedly fraudulent scheme were suffered here as a consequence".**[321]

4.214 We think this could potentially represent a conflation of two separate issues. Although a crypto-token might be used as a connecting factor for both property and tort, this does not necessarily mean the "localisation" exercise is the same for both. To unpack this, it is necessary to distinguish between personal and territorial connecting factors.

4.215 As we said in our call for evidence, territorial connecting factors simply refer to the place where a certain event or act occurred.[322] Even where the reference point for that event or act is a person, the interpretation of a territorial connecting factor requires only an answer as to where they were at a particular point in time. For example, the traditional common law rules on service within the jurisdiction are, in principle, strictly territorial. It does not matter why a person was physically present within the territorial borders, how long they were there, and whether they are domiciled or habitually resident elsewhere: mere presence within the territory is sufficient to bring them within the personal jurisdiction of the courts of England and Wales.

4.216 By contrast, personal connecting factors express a far more significant relationship between a person and a country or state. Nationality, for example, remains widely used in public international law to connect a person and the sovereign authority of a state, and is often a matter of birth and long residence within a state. Habitual residence and domicile, on the other hand, are more widely used in private international law. Whilst easier to acquire than nationality, they require a more significant relationship between a person and a country than mere physical presence within the territorial borders. Habitual residence and domicile typically give rise to more significant mutual rights and obligations as between a person and a state as a matter of administrative law, such as the liability to pay taxes and entitlements to social security benefits. In the private international law of the EU, domicile is considered a sufficient personal tie between a person and a country to justify bringing that person within the coercive power of the courts of that country, that is, to consider them within the ordinary personal jurisdiction of those courts.

4.217 From this, property law often makes use of personal connecting factors to "localise" intangible property. Debts are traditionally localised at the habitual residence or

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321 *Fetch.ai Ltd v Persons Unknown* [2021] EWHC 2254 (Comm), at [14] and [18].

322 Digital assets and ETDs in private international law: which court, which law? (2024) Law Commission Call for Evidence, from para 3.21.

domicile of the debtor, because to enforce such debt, the creditor must sue in the courts that exercise ordinary personal jurisdiction over the debtor. This also illustrates, again, that the enforcement of remedies lies at the heart of the property jurisdiction.

4.218 By contrast, for the purposes of a "localising" damage in a property tort, recourse to the victim is only a stand-in for the property object at the time when damage was sustained. It is worth the reminder that gateway 9(a) is a rule of international jurisdiction that expresses a territorial connecting factor. It is therefore only concerned with identifying where a certain object (the property object in dispute) or person (the victim) was when a certain act (the damage) occurred.

4.219 In most cases, the courts have looked to where the victim was when they were deprived of access or induced to cede control over the misappropriated crypto-tokens. Thus, in *Ion Science v Persons Unknown,* the second claimant and his computer were in England and Wales when false representations were allegedly made to him inducing him to cede control over his computer. The court said there was a good arguable case that the damage was sustained in England and Wales because that was **where the claimant was deprived of access to the misappropriated crypto-token**.[323]

4.220 By contrast, in some cases discussed in the previous chapter, the courts have used personal connecting factors when applying a rule that expresses a territorial connecting factor. Three cases are worth revisiting:

(1) In *Lubin Betancourt Reyes*, the place where the victim was first deprived of access to their crypto-token was Spain, but the "damage" was found to have "occurred in England and Wales" because this is **where the victim had their habitual residence and/or the place where they conduct business**.

(2) In *Jones v Persons Unknown*, the claimant alleged he had been induced to transfer crypto-tokens to fraudsters thought to be based in Russia, but the damage was found to have been sustained in England and Wales because that was **where the claimant was domiciled.**

(3) In *Tulip Trading v Bitcoin Association for BSV,* the claimant alleged that it had been deprived of its private key as a result of a hacking incident and could therefore no longer access its crypto-tokens. In the first instance decision, Mrs Justice Falk expressed the view that if there had been a serious issue to be tried, there was a good arguable case that the damage was sustained in England and Wales because that was where the claimant would experience the deprivation of access to the misappropriated crypto-token. 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. These observations were however not part of the *ratio* of the case.

4.221 No reasons were given in these cases as to why habitual residence and domicile were considered to be relevant. Gateway 9(a) expresses a territorial connecting factor that

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[323] *Ion Science v Persons Unknown* (21 December 2020) EWHC (Comm) (unreported).

requires a court to identify where a certain act or event (in this case, direct damage in relation to a crypto-token) occurred. Where a person, namely, the victim, is being used as a physical reference point for this damage, gateway 9(a) in the first instance simply asks where the person was at the time of the damage. This place may be utterly fortuitous, but this is simply in the nature of a claim in tort.

4.222 On the whole, we think that greater thought needs to be given to the factors to be taken into account when seeking to "localise" damage involving a crypto-token. In particular, a clearer distinction needs to be made between this exercise and the exercise in property claims; and between when it is appropriate to have recourse to a personal connecting factor and a territorial connecting factor in relation to a person.

Being deprived of access to a crypto-token having been locked out of an online account or computer system

4.223 Frauds committed online that result in the victim being denied access to an online account raise complex questions that build upon the recognised challenges for online torts. As we discussed in the previous chapter, a single defamatory social media post uploaded in one location can result in damage sustained in 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. Accordingly, academic commentary has suggested that such cases may call into question the legitimacy of territorial regulation and might well justify recourse to personal, rather than territorial, connecting factors. For the purposes of international jurisdiction, it was suggested that, rather than trying to "localise" an event that is, by its nature, aterritorial, it might be preferable to return to the general rule of international jurisdiction (that is, the claimant sues the defendant in the "home court" of the defendant). [324]

4.224 In cases concerning tortious damage sustained as a result of being denied access to an online account, these difficulties arising in the online contexts are even more profound. In such cases, the damage is not simply sustained in multiple places, but is arguably sustained everywhere and anywhere that the claimant might have been able to access the account. Where such access to an account was available from anywhere in the world, simply by logging in from a device connected to the internet, the question arises: where does the victim suffer damage when they are denied access to the account? This question is conceptually similar to localising an omniterritorial object: the damage arguably was sustained everywhere.

4.225 This issue was considered In *Tulip Trading v Bitcoin Association for BSV.* [325] In this case, the claimant alleged that it had been deprived of its private key as a result of a hacking incident and could therefore no longer access its crypto-tokens. In the first instance decision, the defendants (who in this case had been identified) argued that, because the crypto-tokens could in theory have been accessed anywhere in the world, the damage was *not* sustained in England and Wales. The judge explicitly

[324] See ch 3 from para 3.160.

[325] [2022] EWHC 667 (Ch).

rejected this argument but no further detail was given as to the reasoning for this conclusion.[326]

4.226 Whilst we recognise the complexity of the question, there is at least one useful precedent from which we might draw. In *Besix SA v Wasserreinigungsbau Alfred Kretzschmar*,[327] the CJEU considered Article 5(1) of the Brussels Convention, which provides that a defendant domiciled in one Member State may, in matters of contract, be sued in the courts of other Member States if this is where the contractual obligations are to be performed. Such rule is a special ground of jurisdiction that supplements the general rule of jurisdiction that a defendant is to be sued in the courts of the Member State in which they are domiciled.

4.227 *Besix*, however, concerned contractual obligations **not** to do something. The parties had agreed to submit a joint tender for a public contract, and their contract contained certain non-competition and exclusivity clauses. Given that these obligations are negative, they were, in principle, "to be performed in any place whatever in the world".[328] The question was, therefore, whether this meant that the defendant could, pursuant to Article 5(1), be sued in every Member State as the places where the non-competition and exclusivity clauses were to be performed.

4.228 The Court of Justice of the European Union considered that, in a case characterised by a "multiplicity of places of performance of the contractual obligation in question", it is necessary to identify a "single place of performance".[329] In principle, this will be the place presenting the closest connection between the dispute and the court having jurisdiction. However, in the present case, there was no single location that emerged as more closely connected with the non-competition and exclusivity clauses than any of the others. As such, the Court held that Article 5(1) did not apply. Rather, the defendant should be sued in the courts of the place of their domicile pursuant to the general rule of jurisdiction in Article 2. This was considered to be the more predictable solution, as well as being fairer as between the parties.

4.229 Additionally, the Court emphasised that, within the framework of the Brussels Convention at least, the rules of special jurisdiction, such as Article 5(1), are exceptions to general rules and must be interpreted strictly. Where there is no definable place where the contractual obligation is to be performed, allowing the claimant to sue in each and every state, simply because the relevant obligation is technically to be performed "everywhere", would undermine legal certainty.

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326 *Tulip Trading v Persons Unknown* [2022] EWHC 667 (Ch) at [164].

327 Case C-256/00 [2002] ECR I-1718.

328 Question submitted by the Belgian court, cited at para 21: defendant domiciled in a Contracting State may, in another Contracting State, be sued, in matters relating to a contract, in the courts for any of the places of performance of the obligation in question, in particular where, consisting in an obligation not to do something - such as, in the present case, an undertaking to act exclusively with another party to a contract with a view to submitting a joint bid for a public contract and not to enter into a commitment with another partner - that obligation is to be performed in any place whatever in the world?

329 Case C-256/00 [2002] ECR I-1718, [32].

4.230 *Besix* is a helpful precedent for analysing the *locus damni* rule in tort in cases where damage results from being denied access to an online service or account that can, in principle, be accessed from anywhere and everywhere in the world.

4.231 From this, we think that, where damage consists of being denied access to an online account that could have been accessed anywhere in the world, more needs to be said for any conclusion that such damage was sustained in one place rather than anywhere else. If no real reason can be given for such conclusion, we think there is considerable force in the argument – across the academic commentary and in the case law of the Court of Justice of the European Union discussed above – that legal certainty and justice between the parties may be better served if the defendant is sued pursuant to the general rule of jurisdiction, that is, in their "home" court.

The experience or consequences of being deprived of a crypto-token or access to a crypto-token

4.232 The discussion so far has focused on direct damage in relation to a crypto-token: either by interference with the crypto-token, deprivation of the crypto-token, or deprivation of access to a crypto-token. The analysis differs, however, for the fourth type of potential damage we consider. This is damage in the form of the consequences or experience of being deprived of a crypto-token or access to a crypto-token.

4.233 As we saw above, in *Tulip Trading v Bitcoin Association for BSV,*[330] the court made a distinction between damage through deprivation of access to a crypto-token, and where the claimant would experience such deprivation of access to the misappropriated crypto-token. Although it is possible that such distinction was drawn to avoid the outcomes of using a personal connecting factor (which would have pointed to the Seychelles), it is worth pausing briefly to consider the distinction between an initial loss and consequential loss. As both *Tulip Trading* and *Brownlie* show, it is possible for initial loss to be sustained in one place and consequential loss to be sustained in another.

4.234 Suppose that Alice is a French national who is domiciled in England and Wales. She was on holiday in Spain when she was fraudulently induced to transfer crypto-tokens away on a transaction concluded on his laptop. On the analysis we gave above, for the purposes of the territorial connecting factor expressed in the *locus damni* rules, such damage occurred in Spain because this is where Alice was physically present when damage was suffered. Recourse to personal connecting factors are inapposite here: there is no basis to say the damage occurred in France because this is the country of Alice's nationality, nor that the damage occurred in England and Wales because this is where Alice is domiciled.

4.235 Suppose further that Alice was under a contractual obligation to transfer those (or equivalent) crypto-tokens to Bob under a swaps agreement. Alice, however, can no longer perform her obligations to deliver, and therefore incurs a contractual liability to Bob. Such loss is a new head of loss consequent to the initial damage sustained in Spain. Following the reasoning in *Brownlie* as to bereavement and loss of

330 [2022] EWHC 667 (Ch).

dependency, we think the damage sustained in relation to the contractual liability could properly be said to have been sustained elsewhere than in Spain.

The "adequate link" between a country and a crypto-token claim arising in tort

4.236 In light of the analysis above, we provisionally conclude that:

(1) Where it is necessary or desirable to "localise" loss for the purposes of the *locus damni* rule by reference to the victim, the damage is sustained where the victim was physically present at the time of the damage. Recourse to personal connecting factors, such as habitual residence, domicile, place of business, are not relevant in this analysis.

(2) Where damage consists of being denied access to an online account that, in principle, could previously have been accessed from anywhere in the world and no real reason can be given for saying the damage "occurred" in one location over the others, it would be appropriate to revert back to the general rule of international jurisdiction pointing to the defendant's home court, where this is possible.

4.237 The effect of this provisional conclusion would be that there will be a good arguable case that a claim falls within gateways 9(a) and 21(a) where the victim was physically present within England and Wales at the time of the damage. The provisional conclusion also serves as a reminder that the general rule of international jurisdiction will always be available in cases where the defendant has been identified.

Consultation Question 7.

4.238 We provisionally propose that:

(1) Where it is necessary or desirable to "localise" loss for the purposes of the *locus damni* rule by reference to the victim, the damage is sustained where the victim physically was present at the time the damage occurred.

(2) Where damage consists of being denied access to an online account that, in principle, could previously have been accessed from anywhere in the world and if no real reason can be given for saying the damage "occurred" in one location over the others, the defendant should be sued in their home court, where this is possible.

Do consultees agree?

Method of implementation

4.239 Again, we do not think that our provisional conclusion represents any law reform, but merely an interpretation of the gateways that is consistent with the general principles underpinning the existing rules of international jurisdiction. We do not therefore think that the creation of a new gateway is required to implement our provisional proposal.

Chapter 5: Applicable law (or, "the conflict of laws") – an overview and the current law

5.1 In private international law, the issue of applicable law goes to the question of which country's substantive law will apply to determine whether the claimant's case against the defendant will succeed.

5.2 This branch of private international law is traditionally known in England and Wales as the "conflict of laws". The rules used in this context are often referred to as "choice of law", "conflict of laws", or "applicable law" rules. For reasons we explain below, we prefer to return to the term "conflict of laws" generally, and use "applicable law" in a very particular way.

5.3 In this chapter we look first at the general approaches to resolving conflicts of laws, the method that prevails in most legal systems today, and the objectives of, and justifications for, the conflict of laws. We then turn to the specific context in which we are looking at the conflict of laws, and repeat our points from Chapter 2 that decentralised phenomena present a fundamental challenge to the theoretical premise of the prevailing approach to the conflict of laws. We illustrate the challenge using two examples: (i) contractual obligations in the context of wholly decentralised finance applications, and (ii) property relationships in respect of crypto-tokens arising in a wholly decentralised environment. We provisionally conclude that a different approach is needed to resolve conflicts of laws arising in cases presenting truly decentralised and omniterritorial challenges.

5.4 We also discuss briefly the treatment of property relationships arising in permissioned applications of distributed ledger technology (DLT). A more detailed discussion of these issues can be found in our "property and permissioned DLT systems in private international law: FAQ" published in June 2025.

THE CURRENT APPROACH TO THE CONFLICT OF LAWS

5.5 In our call for evidence,[331] we noted that there are three distinct approaches to solving the basic problem of "how to resolve the conflicts that may exist between different private law systems".[332]

5.6 The "supranational" approach effectively avoids any conflict of laws issues arising by using a special body of substantive rules that apply wherever there is an international element to a private law dispute. The basic substance of the supranational approach

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331 Digital assets and ETDs in private international law: which court, which law? (2024) Law Commission Call for Evidence, ch 2 para 2.6 onwards. There, we discuss each of the three basic methods and the historic prevalence of the supranational approach in England and Wales in more detail.

332 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).

can be seen in various forms throughout legal history.[333] The old "law merchant" from which modern negotiable instruments developed is one example of the supranational approach. Today, this approach to resolving the potential conflicts between different systems of private law is often formalised at the level of public international law through conventions and treaties. The approach does not, however, require the special substantive rules to be a state-based law or be agreed at an international level.

5.7 The "unilateralist" or "statutist" approach looks at the relevant legal provision to determine whether the legislature intended that provision to apply on the facts of the relevant case. The approach is not easy to apply – if it can be applied at all – to the common law system of rights and remedies because there is no legislature whose intentions can be consulted. It can, however, be applied to UK statutes. There is 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 show an intention that the statute is to apply extraterritoriality.

5.8 The "multilateralist" approach uses a self-contained system of rules and principles. Its core theoretical premise is that every legal issue that comes before a court "naturally belongs to" or "has its 'objective seat' in" one national legal system or another.[334] From this premise, multilateral systems prescribe a complete set of 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 case to a location that is described in general terms. Having followed the relevant signpost, a court is able to identify which particular country's law should be applied in any given case. In this chapter and the next, the terms "applicable law" and "applicable law rules" are used specifically to refer to the multilateralist approach and its rules.

5.9 It is common for all of these three approaches to the conflict of laws to be present in any one legal system. In England and Wales, these approaches can be seen in the following legal provisions:

(1) Supranational approach: the 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) as implemented in UK law as the Carriage of Goods by Sea Act 1971. This prescribes the private law rights and obligations of shippers and carriers arising from international contracts of carriage of goods by sea.

(2) Unilateralist approach: section 1(1) of the Inheritance (Provision for Family and Dependants) Act 1975. This provides that certain classes of family and dependants (irrespective of where they live in the world) may apply for an order under section 2 of that Act in circumstances where the deceased person died domiciled in England and Wales.

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333 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).

334 The term "seat" was used by Friedrich Carl von Savigny, the German jurist who developed the multilateralist system.

(3) Multilateralist approach: the assimilated Rome I Regulation provides for the law applicable to contractual obligations; the Rome II Regulation provides for the law applicable to non-contractual obligations; section 72 of the Bills of Exchange Act 1882 (BoEA 1882) provides for the law applicable to certain contractual issues arising from bills of exchange and promissory notes; and the common law rules for the law applicable to property issues.

5.10 The most prevalent approach in private international law today across jurisdictions is the multilateralist approach. While its theoretical premises have been challenged and it has fallen out of favour in some jurisdictions, it remains the starting point for the conflict of laws in most legal systems around the world today. It is therefore the focus of much of this chapter.

5.11 To understand the nature of some of our proposed reforms, it is helpful to appreciate that the multilateralist approach to resolving conflicts of laws is often called a "jurisdiction-selecting" approach. This is because it proceeds on the basis that any conflicts that may exist between the private laws of different legal systems are to be resolved by selecting one (and only one) over all the other possibilities as **the** applicable law.

5.12 More generally, it is important to be aware of the three basic approaches – and the prevalence of the multilateralist approach – to understand the nature of the reforms that we propose in the next chapter. As we will see, we consider that the intractable nature of the challenge that truly omniterritorial phenomena present to the theoretical premise of the multilateralist approach is such that the objectives and benefits of this approach can arguably no longer be delivered when applied in this context. We therefore provisionally propose a move away from this approach in cases where the degree of decentralisation is such that the problems of omniterritoriality present a true challenge to the conflict of laws.

The existing applicable law rules in practice

5.13 The multilateralist approach uses a three-stage process to resolve conflicts of laws:

Step 1: characterisation.

The court will first ask: what kind of legal issue is in dispute between the parties?

Step 2: identify the applicable law 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 an act occurred or where an object is located.

Step 3: apply 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.

Step 1: characterise the issue in dispute

5.14 Characterisation requires a court to look at the case before it and identify what kind of legal issue is engaged. In other words: what is the real nature of the dispute between the parties to the cross-border litigation? Is it an issue of, say, contract, property or tort? Whilst characterisation may seem to be a relatively simple task, it can be a challenging and complex process.[335] It is also extremely important, having considerable influence over the outcome of the three-stage process.

5.15 The nature and function of the characterisation process is often difficult to discern as an independent process in the conflict of laws. In the context of our project, it has been especially obscured by expressions prevalent in the market and parts of the academic discourse, such as "the law applicable to a crypto-token" or "the law applicable to an electronic trade document ("ETD")". Such expressions are often unhelpful; not only because they underestimate the importance of the characterisation process, but also because they misconstrue how the multilateralist approach to the conflict of laws actually works. As we discuss in more detail below, there are no conflict of laws rules that apply "to" particular types of things, such as a painting, car, crypto-token, or ETD. Rather, applicable law rules apply to legal rights, obligations, and relationships that arise from dealings in those things.

5.16 Characterisation is also particularly complex in this project. This is because DLT, crypto-tokens, ETDs, and other digital assets are used in a wide variety of ways in different commercial contexts and for different purposes. These give rise to a wide range of legal rights, obligations, and relationships, which must be carefully analysed to determine the real nature of the legal issue in dispute.

5.17 For example, just like a painting or a car, a crypto-token could be the subject matter of a sales contract, or it could be stolen, or could be offered as collateral in a secured transaction. The legal issues that arise in each of these cases will differ. Contractual issues will be referred to the conflict of laws rules for contractual issues; property issues will be referred to the conflict of laws rules of property issues; and so on. Where there is both a contractual and a property issue arising from dealings in an object, these issues may ultimately be referred to different applicable laws

5.18 For this reason, identifying the real nature of an issue in dispute between the parties to cross-border litigation requires a careful analysis. It is difficult to overstate the importance of characterisation in the multilateralist approach to the conflict of laws.

Step 2: identify the relevant applicable law rule and the abstract location

5.19 Once the issue in dispute has been characterised, the court will then refer to the applicable law rule for this type of legal issue.

5.20 The current applicable law rules in England and Wales are spread between (i) two EU Regulations which are now assimilated law (the Rome I and Rome II Regulations)[336]

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335 *Macmillan Inc v Bishopsgate Investment Trust Plc (No 3)* [1996] 1 WLR 387 at 417 by Aldous LJ: "the problem of characterising which judicial concept or category is appropriate is not easy".

336 The Rome I Regulation (EU) No 593/2008 is concerned with contractual obligations. The Rome II Regulation (EU) No 864/2007 deals with non-contractual obligations such as torts, product liability, and

and (ii) common law rules. These domestic rules are found in both UK statutes and the common law authorities.[337]

5.21 For our purposes, the most important of these are:

(1) The assimilated Rome I Regulation on the law applicable to contractual obligations in civil and commercial matters.

(2) The assimilated Rome II Regulation on non-contractual obligations in civil and commercial matters. This covers issues arising from what we would call torts in England and Wales.

(3) Section 72 of the BoEA 1882. This provides multilateralist rules for certain contractual obligations arising under bills of exchange and promissory notes. This is relevant to our consideration of ETDs in chapter 7.

(4) The applicable law rules for property matters. These have always been beyond the scope of the Rome Regulations and are governed under domestic rules.

5.22 There are some cases in which the forum, having identified the relevant applicable law rule, will decline to apply it. There are two main circumstances in which this may occur.

5.23 First, cases where the result of applying the rule would be against the public policy of the forum. If the courts in England and Wales have accepted international 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.[338] This is a rare occurrence: the result has to be "wholly alien to fundamental requirements of justice as administered by an English court" for a conflict of laws rule to be disapplied on the basis of public policy.[339]

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unjust enrichment claims. Following the UK's withdrawal from the EU the Rome I and Rome II Regulations continue to have effect in England and Wales as assimilated law, 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).

337 In the context of private international law, the rules that are domestic in origin are referred to as "the common law rules". These include s 72 of the Bills of Exchange Act 1882 and the common law *lex situs* rule. These "common law rules" are to be contrasted with PIL rules of international origin which are also contained in statutes. An example of this is the Civil Jurisdiction and Judgments Act 1982, which implements various rules of private international law with an international origin. These include, most recently, the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

338 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.

339 *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.

5.24 Second, cases where the application of foreign law is inconsistent with an overriding mandatory law of the forum, such as those considered "crucial by a country for safeguarding its public interests".[340]

Step 3: apply the applicable law rule to the facts of the case

5.25 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 applicable law rule to the facts of the case and identify the law by which the parties' dispute is to be resolved.

Challenges to the traditional multilateralist approach

5.26 Under the multilateralist theory, applying the rule in Step 3 should be a straightforward process resulting in an obvious conclusion. This is because the rule is supposed to reflect the "objective seat" of the legal issue in dispute by pointing to the legal system to which it "naturally belongs".[341]

5.27 Reflecting this, conflict of laws rules traditionally took the form of what is now called a "fixed" rule: a rule that prescribes a single criterion for "connecting" a legal issue with the national legal system to which it "naturally belongs". For example, one of the traditional rules for the law applicable to claims arising in tort is the *lex loci damni*, that is, "the law of the place where the damage occurred". Such criterion used in an applicable law rule is known as the "connecting factor". Thus, the connecting factor in the *lex loci damni* rule is "the place where the damage occurred".

5.28 As we explain further below, simple fixed rules under the multilateralist approach are said to promote legal certainty. However, in modern private international law, simple fixed rules are less common than they were in the past. This is in part due to criticisms of the theory underlying this approach and the practical consequences that flow from it. In the next section, we look briefly at developments in this area in the USA and the EU.

The US conflicts revolution and the "open-textured" rule

5.29 The most significant criticism of the multilateralist approach gained traction in the USA during the mid-20th century. This was a reaction against the multilateralist conflict of laws rules in place in the US since the 1930s as set out in the First Restatement of the Conflict of Laws (First Restatement).[342] This adopted a highly rigid approach, with absolute multilateralist rules expressed in wholly territorial terms; both of which were

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340 Article 9(1) of the Rome I Regulation (EU) No 593/2008. These cases are a little more common than the public policy cases. For example, obligations arising under international conventions (like the Hague-Visby Rules for shipping contracts) are also often mandatory rules of the forum.

341 Although the expressions in inverted commas are not quotes from any specific source, they are translations of what are now understood as terms of art, as underpinning the major premise of the multilateralist system.

342 The First Restatement of the Conflict of Laws (1933), drafted by the American Law Institute, a "private, independent, nonprofit organization that publishes Restatements of the Law, Principles of the Law, and Model Codes to further its mission to clarify, modernize, or otherwise improve the law to promote the better administration of justice …ALI's publications are persuasive authorities, not controlling law". See further https://www.ali.org/faq.

strongly criticised in academic commentary on the basis of their rigidity and adherence to theory rather than pragmatism.[343]

5.30 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 widely prevalent until, in 1963, the courts openly departed from the rules.[344] This, for practical purposes, was the start of what has been called the "US conflicts revolution".[345]

5.31 In response to this "revolution", Second Restatement of the Conflict of Laws (Second Restatement) signalled a retreat from rigid multilateralist rules that "preselect" the applicable law for the court, replacing them with a more flexible "approach". This is often known as an "open-textured" rule. This involves a court consulting a list of prescribed factors to consider when identifying the applicable law.[346] Section 6 of the Second Restatement, for example, which concerns the law applicable to claims in tort, instructs the courts 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.[347]

5.32 This approach has "proven popular [with] judges but […] is generally dimly regarded by professors".[348] Academic commentary has suggested, however, that the reactionary climate in which the Second Restatement had been developed means that the US "conflicts revolution" is not yet complete.[349]

5.33 The American Law Institute began work on a Third Restatement of the Conflicts of Laws (Third Restatement) some 40 years after the Second Restatement, which aims to provide more predictability while retaining the flexibility of the open-textured approach. To do this, it draws upon empirical data collated over forty-odd years since the Second Restatement was adopted, which relate to the factors that influence judicial decision-making when applying the list of factors the court is instructed to

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343 See eg S C Symeonidies, *Choice of Law* (2016) p 45.

344 *Babcock v Jackson* (1963) 191 NE 2d 279 (NY).

345 S C Symeonidies, *Choice of Law* (2016) p 124.

346 Above p 111.

347 Restatement (Second), Art 6(2).

348 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.

349 K Roosevelt III, "Legal Realism and the Conflict of Laws" (2015) *University of Pennsylvania Law Review Online* 329.

consider. As at the present date, more than fifty percent of the drafts for the Third Restatement have been approved.[350]

The modern European approach

5.34 In the EU and the UK, the ideology underpinning the US conflicts revolution did not take full root, but it did have a noticeable influence. This can be seen in a shift away from the traditional "fixed rule" form of applicable law rules and towards a more sophisticated structure in the drafting of the rule that allows for more detail and flexibility.

5.35 For example, we said above that one of the traditional "fixed" rules for the law applicable to claims arising in tort is the *lex loci damni*, that is, for "the law of the place where the damage occurred". Although this continues to underpin the modern default rule in Article 4 of the Rome II Regulation on the law applicable to non-contractual obligations, Article 4 provides further alternative rules that apply in specific circumstances.

5.36 Article 4(1) begins with a traditional fixed rule of "general application".[351] It provides:

> 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.

5.37 Article 4(2) provides an exception to this general rule, which applies where there is a "special connection" between the parties in the form of a shared habitual residence.[352] 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.

5.38 Finally, Article 4(3) provides an "escape clause" intended to allow for a degree of judicial discretion in each case:

> 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.

5.39 Article 4(3) then provides 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.

5.40 This basic structure underpins other rules in the Rome Regulations. The common pattern is often called a "cascade" or "waterfall" because one starts as the top of the

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350 The status of the project may be found at https://www.ali.org/project/conflict-laws.

351 Recital (18) of the Rome II Regulation (EC) No 864/2007, Official Journal L 199 of 31.07.2007.

352 Defined in the Rome II Regulation (EC) No 864/2007, Official Journal L 199 of 31.07.2007, Art 23.

provision and makes one's way down until the appropriate rule is found, in the following top-down order.

(1) First, there is a general fixed rule that applies as the default rule and points to a specific location.

(2) Second, there are more specific fixed 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.

5.41 The "escape clause" and "catch all provision" are often described as "open-textured" rules that leave courts discretion to decide whether another law might be more appropriate than 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.

5.42 Such open-textured rules are a last resort under the EU system, where the fixed rules are considered and applied first and are presumed in most cases to be sufficient. As such, it has been said that there is a "high hurdle" to pass before recourse to the "escape clause" in Article 4(3) of the Rome II Regulation can be justified".[353] In the context of the Rome I Regulation, it has been said that recourse to the "escape clause" requires that the connecting factors of the alternative place must "clearly and decisively outweigh" the general and specific rules.[354]

5.43 The modern EU approach can be seen as using a combination of fixed rules and open-textured rules. This approach continues to form part of the private international law of England and Wales in the assimilated Rome I and Rome II Regulations. The approach of the US Second Restatement of the Conflicts of Law – based entirely on an open-textured rule – is controversial among many commentators across the EU, the UK, and even the USA.[355]

The objectives of and justifications for the conflict of laws

5.44 These modern challenges to the multilateralist approach throw a spotlight on the objectives and justifications of the modern conflict of laws. The basic premise of the conflict of laws – that the courts of one country might, or even should, apply the law of

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353 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].

354 *Molton Street Capital LLP v Shooters Hill Capital Partners LLP* [2015] EWHC 3419 (Comm) at [94].

355 K Roosevelt III, "Legal Realism and the Conflict of Laws" (2015) *University of Pennsylvania Law Review Online* 329. This article was written in response to C Wassertein Fassberg, "Realism and Revolution in Conflict of Laws: In with a Bang and Out with a Whimper", (2015*) University of Pennsylvania Law Review Online* 1919. See also Law Commission and Scottish Law Commission, Private International Law: Choice of Law in Tort and Delict (1984) Law Com Working Paper No 87. We discuss this paper further below.

another country – is in itself somewhat unusual. In criminal, public, revenue, administrative, and civil procedural law matters, courts will apply their own domestic law.[356]

5.45 By contrast, in private law matters, the entire discipline of conflict of laws is premised on the basis that courts should – and often will – apply the substantive law of another country. The fact that courts do so is a characteristic feature of civil disputes.[357] The question of why courts do so, however, has been an issue of contention for almost as long as the discipline itself has existed in its modern form.

5.46 Some of the main theories as to why courts apply the substantive private law of another sovereign state include:[358]

(1) Comity with other states, that is, the idea that "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".[359]

(2) To give effect to vested private rights validly acquired or granted by the law of another country.[360]

(3) To give effect to the legitimate expectations of the parties who may have arranged their cross-border affairs on the basis of certain understandings and expectations. Importantly, the current edition of *Dicey* states 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".[361] We return to this below.

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356 *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. These domestic laws, however, might sometimes refer to the content of foreign law. For example, the criminal procedural law of Country A might provide that evidence obtained in Country B is only admissible in Country A if that method of obtaining evidence was lawful according to the laws of Country B. The courts of Country A will, however, always apply the criminal law of Country A to determine whether the defendant is guilty or is acquitted.

357 A Mills, "Justifying and Challenging Territoriality" in R Banu, M S Green and R Michaels (eds), *Philosophical Foundations of Private International* Law (2024) p 182.

358 We discussed these in more detail in our Call for Evidence. See Digital assets and ETDs in private international law: which court, which law? (2024) Law Commission Call for Evidence from para 6.106.

359 A Briggs, *The Conflict of Laws* (4th ed 2019) p 32.

360 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, see A V Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (1896) p 10. 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, see 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.

361 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 1-006.

(4) Increasingly, to recognise party autonomy and freedom of choice, particularly in matters relating to contract. Party autonomy is a relatively recent phenomenon in private international law that is gaining recognition in other areas, such as tort, but continues to be resisted in matters of property.[362]

(5) Promoting decisional harmony, that is, the idea that it should not matter in which national court the parties litigate because all courts will apply the same applicable law rule to identify the law governing the dispute.[363]

(6) Legal certainty and predictability of outcomes.[364]

5.47 We have considered these different objectives and justifications in developing of law reform proposals in respect of the core challenges to the conflict of laws that are under review in this project. We return to these now.

THE CONFLICT OF LAWS AND THE CORE PROBLEM

5.48 We noted in Chapter 2 the core challenge that decentralised applications of DLT poses to private international law today is reflected in the term "omniterritoriality". The problem is not that omniterritorial transactions, acts, or objects have no genuine connections to a single territory. Rather, the problem is that they exhibit too many genuine connections to too many territories.

5.49 This challenges one of the core premises of the multilateralist approach to the conflict of laws: the notion that every legal issue has a single objective seat in one legal system, which is identified through a connecting factor. It is worth noting this difference with international jurisdiction: whereas a connecting factor need not necessarily point to a single legal system for the purposes of international jurisdiction, the multilateralist approach to the conflict of laws is premised on the proposition that every legal issue before a court "naturally belongs" to a single legal system.

5.50 In cases with truly omniterritorial features, application of a multilateralist rule does not narrow down the options to a single legal system that emerges as the "clear winner". It will instead point to several legal systems, each in equal measure, "leav[ing] a court no closer to identifying the applicable law than it was before the rule was applied".[365] This presents a fundamental challenge to the "jurisdiction-selecting" approach of the multilateralist theory, which resolves any conflict between the private laws of different legal systems by selecting one in preference to the others as **the** applicable law.

5.51 Our provisional conclusion, discussed in further detail below, is that cases with truly omniterritorial elements require a different solution and we make provisional proposals as to how the law of England and Wales might meet the challenges that

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362 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.

363 Digital assets and ETDs in private international law: which court, which law? (2024) Law Commission Call for Evidence, para 6.121.

364 Digital assets and ETDs in private international law: which court, which law? (2024) Law Commission Call for Evidence, para 6.124.

365 A Held, "The modern property situationship" (2024) 20(2) *Journal of Private International Law* 391,395.

omniterritoriality poses for the relevant conflict of laws rules. We illustrate the need for reform and how our proposals might work in practice by reference to the following two case studies:

(1) the existence and validity of contracts (purportedly) concluded by smart contracts in wholly decentralised finance ("DeFi") applications; and

(2) property relationships in respect of crypto-tokens held in accordance with the bitcoin decentralised ideal.

5.52 Both of these case studies illustrate the novel problems to the existing applicable law rules as truly decentralised applications of DLT, and have been identified by stakeholders as likely to become prevalent in practice even though they have not yet been brought before the courts in this jurisdiction.

5.53 Other uses of DLT and crypto-tokens which have elements of centralisation (such as permissioned systems) can be accommodated under the existing rules and do not therefore fall within our main focus and priorities for law reform. Before we look at the challenges of omniterritoriality and our case studies, we briefly discuss permissioned systems.

Permissioned systems

5.54 As we explained in Chapter 2, the use of DLT does not in itself necessarily mean that a use case will be genuinely decentralised. Not every use of DLT will therefore give rise to these problems of omniterritoriality. On the contrary, many contemporary commercial applications of DLT, most of which are centralised and/or permissioned systems, do not subscribe to the original Bitcoin ideal of total decentralisation. Rather, they leverage the technology to streamline existing commercial processes.

5.55 Centralised and/or permissioned applications of DLT are less problematic for private international law. First, there is a strong presence of contract, such as the contractual terms and conditions that a prospective participant must agree before they are admitted to the system. Second, permissioned DLT networks will have a strong point of centralisation that can normally be used satisfactorily as a connecting factor. This point of centralisation will typically be the operator of or "gatekeeper" to the system, as the person or entity in a position of power over the DLT network and its participants; and on whose contractual terms and conditions the system operates. The applicable law provision in Principle 5 of UNIDROIT's Principles of Digital Assets and Private Law,[366] for example, operates on the premise that there is a person in such a position of power.

5.56 The combined effect of these two factors is that many issues arising in permissioned applications of DLT are likely to be characterised as contractual. As is normally the case in matters of contract, the contracts engaged in permissioned applications of DLT may well include an express choice of law. In the absence of such a choice, the fact that these contracts concern established types of commercial transactions between parties who are easily identifiable "in real life" will mean the relevant rules

[366] The UNIDROIT Principles on Digital Assets and Private Law were adopted by the UNIDROIT Governing Council at its 102nd session (10 to 12 May 2023) and published on 4 October 2023.

that apply in the absence of a choice will be relatively unproblematic to apply. In the final instance where the rules require consideration of the place to which the contract is "most closely connected", the presence of a central or authorising body on whose terms participants in the DLT system are admitted make it significantly easier to connect the facts and issues of the case to a single legal system.

5.57 Our focus for law reform in this consultation paper is on issues arising in wholly decentralised applications of DLT that are, or likely to become, prevalent. This means we do not address certain issues that, while not necessarily in need of reform, are nevertheless of concern to many stakeholders. In particular, stakeholders have raised concerns as to how the traditional *lex situs* rule for property issues should be applied to issues arising from the use of crypto-tokens in the financial markets, shipping, and international trade finance contexts. We understand that the enforceability of secured transactions in which crypto-tokens have been given and accepted as collateral is of particular concern. We have also been told that the *lex situs* rule is often used by regulated entities to determine the extent to which crypto-tokens as such collateral may be used for capital adequacy purposes.

5.58 We understand that such concerns typically arise in relation to permissioned applications of DLT. As such, we consider these issues can be accommodated within the existing law without the need for reform. As we have said, not only do permissioned systems disclose a strong point of centralisation, but they are often underpinned by contractual agreements between parties who are known to one another and transact with one another in real life. As such, they do not pose the same novel challenges to the theory underpinning the current rules of applicable law as truly decentralised use cases.

5.59 We do, nevertheless, recognise that these issues may benefit from further analysis and clarification. We have therefore published a FAQ document addressing property issues arising in permissioned applications of DLT in private international Law. This third FAQ document explores in more detail why characterisation in relation to what the substantive law of England and Wales calls choses in action, debts, or intangible property is so complex. It also discusses how these considerations surrounding characterisation may be relevant for commercial applications of DLT, where the technology is used for a specific purpose rather than to create an object of value in itself. It distinguishes between various types of crypto-tokens and/or DLT use cases based on the precise contractual or other legal arrangements that underpin their commercial applications. It also discusses the applicable law provision set out in Principle 5 of UNIDROIT's Principles of Digital Assets and Private Law.[367]

5.60 We therefore encourage stakeholders concerned with property issues arising in permissioned applications of DLT, including secured transactions, to read the FAQ.

5.61 We turn now to the two issues that we consider do cause fundamental challenges to existing rules on conflict of laws and therefore demonstrate that law reform may be required: contractual obligations said to arise from DeFi transactions, and property issues arising in wholly decentralised DLT systems.

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[367] Above.

(Contractual) obligations arising from DeFi transactions

5.62 DeFi is a general term for decentralised and/or disintermediated applications that facilitate the provision of services traditionally associated with finance (such as payments, lending, trading, investments insurance and asset management). These applications operate on a settlement layer that is generally decentralised and often blockchain-based. DeFi applications also generally involve some level of automation through use of smart contracts.

5.63 Smart contracts are computer programs that run automatically, in whole or part, without the need for human intervention. Smart contracts can also be used to define and perform the obligations of a legally binding contract: we have called this a "smart legal contract".[368] DeFi systems are likely to use a combination of these to execute transactions, typically involving the transfer of crypto-tokens, amongst participants of the system.

5.64 Participants will generally engage with a DeFi application on the basis of a "white paper", being in this context a document prepared by the people behind a crypto project which summarises the important information about the project. It will usually cover the project's goals, products, and features; and will set out what a participant in the system can expect. It is also likely to explain the rules of the "protocol", which is effectively the rules by which the smart contracts will operate.

5.65 In our call for evidence we took the preliminary view that contractual disputes in the context of decentralised finance or "DeFi" were unlikely to come before the courts. We suggested that, because of the technology underpinning these platforms, it was unlikely that any contracts would be formed between participants in this context. Some consultees agreed with this assessment. However, the vast majority of consultees disagreed. Many consultees were of the view that, at least in some instances, it would be possible for contractual claims to be brought that arise in the DeFi context, and thought that such claims are likely to start coming before the courts. We have therefore re-considered this issue.

5.66 Stakeholders have told us that the question of legal rights and obligations in the DeFi context is a prevalent concern: what rights, obligations, assets, or powers are conferred on participants as a matter of law when smart contracts execute their programmed functions?

5.67 The extent to which an application of DLT is decentralised has a significant bearing on the analysis in private international law. Decentralisation exists along a spectrum.[369] In their written response to our call for evidence, Andreessen a16z, a technology stakeholder, described true decentralisation in the context of DeFi as an arrangement where:

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

369 We discuss this in detail in Decentralised autonomous organisations (DAOs): Scoping Paper (July 2024), Law Com ch 2, which discusses decentralisation generally and in the context of DAOs.

(1) information regarding the operation of the protocol (that is, the coding rules according to which the application is programmed to operate) is transparent and available to all;

(2) the protocol is composed of open-source code and no single person or group of persons acting pursuant to an express or implied agreement can materially alter its primary purpose, and its design prevents any such person or persons from amending or reversing transactions executed and recorded on the blockchain; and

(3) public participants can, without prior approval from any centralised authority, access the protocols and execute digital asset transactions through them in accordance with predetermined, non-discretionary automated rules and algorithms.

5.68 Such truly decentralised DeFi systems are to be distinguished from "DeFi apps". DeFi apps are programmed "on top of" a DeFi protocol and typically provide a user interface that intermediates interaction with the DeFi protocol. DeFi apps are offered by a centralised entity for some kind of contractual consideration. As Andreessen a16z said in their written response to our call for evidence, "DeFi Apps are operated by centralised parties, have a business plan, a place of business, and there may be user terms provided in relation to the provision of such software services".

5.69 A study by Dr Pascal Favrod-Coune has shown that many DeFi apps do indeed include express choice of law clauses.[370]

5.70 For the purposes of the conflict of laws, in such a situation, the existing applicable law rules for contractual obligations are likely to be appropriate and unproblematic in their application. In a DeFi app, there will be a central authority that could be used as the connecting factor; and given that these are organised commercial undertakings, there is far more likely to be an express choice of law (and also perhaps a dispute resolution clause). As stakeholders have told us, this does not necessarily mean that there will not be any practical difficulty in enforcing these clauses in a decentralised and pseudonymous context. However, these are matters for international jurisdiction and the initial investigation stage of proceedings which we considered in Chapters 3 and 4, rather than for applicable law.

5.71 Nonetheless, Dr Favrod-Coune's research also showed that a number of DeFi apps do not have governing law clauses.[371] This will be more problematic for the conflict of laws. Stakeholders have said that this leaves a significant legal vacuum because the applicable law will have to be determined based on the traditional connecting factors used in private international law, such as the habitual residence of the party giving

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370 For example: Aave (Cayman Islands law); Uniswap (New York law); StakeDAO (Swiss law); PancakeSwap (Hong Kong law); Compound (Californian law); dYdX (Californian law); and SaucerSwap (Floridia law). We are grateful to Dr Favrod-Coune for sharing his research with us. P Favrod-Coune, "Decentralised Finance (DeFi) – Which Law is Governing the Entities, Which Transactions?" presentation at the Digital Assets and Private International Law Conference held by the Interdisciplinary Association of Comparative and Private International Law, University of Vienna, and the European Banking Institute on 11 and 12 April 2024 in Vienna.

371 For example, MakerDAO, Curve, Beefy, Yearn and SushiSwap.

characteristic performance, or another country that is more closely connected to the contract. These principles may not be easily applicable in the context of DeFi protocols, given their decentralised nature, the absence of physical, human actions of offer/acceptance etc and the potential for parties to be pseudo-anonymous and/or located anywhere in the world.

5.72 Many respondents to our call for evidence referred to relationships between users and intermediaries who facilitate interaction with a DeFi protocol. For example, the Bar Council and D2LT noted that, where intermediaries are used for parties to interact with the DeFi protocol, then contracts are formed with those intermediaries. Professor Ugljesa Grusic distinguished between three different relationships that may arise in this context: User 1 – User 2; User 1 – DeFi Platform Provider; User 2 – DeFi Platform Provider.

5.73 Given our focus on the challenges that omniterritoriality pose to the conflict of laws, we do not address in any more detail these intermediated arrangements surrounding DeFi platforms. Rather, we address the conflict of laws rules that are engaged by contractual obligations said to arise (or not arise) from transactions in crypto-tokens concluded through direct interaction with smart contracts hosted on public blockchain networks as part of a truly decentralised DeFi arrangement. Much of that analysis, however, may be applicable to other types of contractual relationships arising in the more centralised or intermediated DeFi contexts, such as DeFi apps without a governing law clause.

Smart contracts

5.74 We considered in detail the substantive law question of whether and when a smart contract amounts to a legal contract in our Advice to Government on Smart Legal Contracts, published in 2021.[372] We explained that there are several requirements for the formation of a legally binding contract under the law of England and Wales: agreement, consideration, certainty and completeness, intention to create legal relations, and compliance with formalities (including in relation to deeds). We concluded that smart contracts could potentially satisfy all these requirements such that they would amount to a contract in law (a "smart legal contract"); but that there might be challenges in determining some of these requirements particularly where the transaction is entered into via an interaction on a distributed ledger. We note that in the context of private international law, the law of England and Wales might not necessarily be the law that applies to the question of whether a contract has been created in any particular case.

5.75 In response to our call for evidence on our current project, stakeholders were divided on the question of whether contractual obligations arise as between participants in the particular context of a DeFi application:

(1) We received evidence, primarily from technologists, that traditional concepts of contract between participants to a DeFi protocol do not arise. Each participant interacts with the protocol on a peer-to-protocol basis (that is, each participant interacts only with the smart contract code), rather than on a peer-to-peer basis (that is, participants do not interact directly with one another). It has also been

[372] Smart legal contracts: Advice to Government (2021) Law Com No 401, ch 3.

suggested to us that many participants in decentralised DLT systems, including the context of DeFi, genuinely subscribe to the Bitcoin ideals of individual responsibility in relation to participation in the network, and generally eschew recourse to any type of centralised authority, including legal mechanisms such as contracts and courts of law.

(2) That said, we also received evidence, primarily from legal practitioners, that disputes surrounding contracts purportedly concluded over a DeFi protocol have in fact arisen. They said that, on a legal analysis, there is often a basis to consider all participants in a DeFi protocol as engaged in a series of multilateral contracts. The Commercial Bar Association and the Chancery Bar Association said that a "disgruntled party may seek to argue that there is an intention to create legal relations evidenced by the code".

5.76 From our analysis of stakeholder responses and consultations, we have identified the core concern for our project to be: what law determines the existence and validity of a contract allegedly concluded as a result of engaging with the DeFi protocol? It is worth noting that the law currently resolves this question by reference to the rule for the law governing the substance of a contractual obligation. Our analysis can therefore be applied to the question of what law applies to a contractual obligation, as well as what law determines the question of whether a contractual obligation has come into existence.

5.77 As we will see in the next section, we do not think the current law provides a satisfactory answer to this question.

The law governing the existence and validity of a contract

5.78 The conflict of laws provides rules for a wide range of contractual issues. The most well-known of these is the issue of the substantive obligations arising under the contract, that is, what the parties have agreed to perform and the consequences of failing to perform. Another issue is the formal requirements that the parties must comply with when concluding their contract. We consider these and other contractual issues in relation to bills of exchange, cheques, and promissory notes in Chapter 7.

5.79 The contractual issue we discuss here is whether a contract has been validly concluded and brought into existence. A defendant to a contractual dispute may, for example, seek to argue that they are not in breach of a contractual obligation because the contract under which that obligation allegedly arose never came into existence as a matter of law.

5.80 Article 10(1) of the Rome I Regulation (which applies as assimilated EU law in England and Wales) provides a rule that identifies the law under which the existence or validity of a contract is to be determined:

> The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.

5.81 The basic rule under Article 10(1) requires us to assume the contract has come into existence; and then look to the law that would govern the substantive obligations

arising under it. Article 10(1) provides that it is this law that determines the existence and validity of the contract. To identify the law to which Article 10(1) points, it is therefore necessary to have regard to the law governing the (assumed) substantive contract itself.

5.82 The rules for identifying the law governing the substantive obligations arising under the contract are contained in Articles 3 and 4 of the Rome I Regulation. Article 3 provides the default rule that the parties may choose the law applicable to a contract. Article 4 provides the rules that apply in the absence of a choice of law.

5.83 In the context of contractual obligations arising (or not arising) in the wholly decentralised DeFi context, choice of law clauses are exceptionally rare. This is to be expected, given the general premise of decentralised systems. That said, if a valid choice of law can be established in respect of a smart legal contract, the courts are likely to uphold that choice pursuant to Article 3.[373] In our work on smart contracts we recognised that parties may purport to choose that their agreement be governed solely by the protocol of a particular platform. We concluded that this was not a choice open to parties under the Rome I Regulation. Instead, we said that a better mechanism for reflecting a platform's protocol in an agreement may be to incorporate the protocol rules as terms of the smart legal contract.[374] We come back to the question of "choosing" code below.

5.84 We turn now to Article 4. Article 4 takes the "waterfall" structure described above, which starts at the "top" with fixed and specific rules that become increasingly open-textured as one makes their way "down" the sub-provisions until the appropriate rule is found. The assumption is that the specific rules at the "top" of the waterfall should in most cases suffice; with the open-textured rule at the bottom being the last resort.

5.85 Article 4(1) provides for specific types of contracts, such as contracts for the sale of goods, supply of services, tenancies of immovable property and franchise agreements. Article 4(1) provides a rule for each of these contracts that applies in the absence of a choice.

5.86 If the contract in question is not one provided for in Article 4(1) or has elements of more than one of the specific types of contracts provided for, Article 4(2) then applies. Article 4(2) makes use of the concept of "characteristic performance" under the contract. This usually means the non-money obligation, that is, the contractual obligation for which money is being provided in exchange. For example, in a contract for the sale of goods, the "characteristic performance" is the provision of the goods being sold, rather than the payment of the purchase price. The analysis is a little harder in certain types of contract, such as barter, where there is no money obligation at all. Where, for example, goods are exchanged directly for other goods, it is more difficult to identify which obligation is the characteristic performance. A transaction on a DeFi platform, where participants trade different types of crypto-token, might be seen as akin to a contract of barter.

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373 We discuss these issues in more detail in Smart legal contracts: Advice to Government (2021) Law Com No 401, chs 3 and 7.

374 Smart Legal Contracts: Advice to Government (2021) Law Com No 401, from para 7.65.

5.87 Once the characteristic performance has been identified, it becomes necessary to identify the person obliged to perform it and where they are habitually resident. This is because the rule contained in Article 4(2) does not point to the place of characteristic performance, but points to the law of the place where the party obliged to perform the "characteristic" obligation has their habitual residence.[375]

5.88 Article 4(3) is an "escape clause" that provides an exception to the rules in Articles 4(1) and 4(2). Article 4(3) provides that, if the contract is "manifestly more closely connected" with a country other than the countries indicated by Articles 4(1) or 4(2), the law of that country may be applied instead.[376] Recourse to the "escape clause" requires that the connecting factors of the alternative place must "clearly and decisively outweigh" the general and specific rules.[377]

5.89 Article 4(4) 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 provides that the contract is governed by the law of the country with which it is "most closely connected".[378]

5.90 We do not consider that an (alleged) contract concluded on a DeFi lending protocol could be classified as one of the specific contracts provided for in Article 4(1).[379] The analysis therefore shifts to identifying the party who is to provide the "characteristic performance" under the contract. Given, however, that we consider the essence of a (alleged) contract concluded on a DeFi protocol will be one where one crypto-token is exchanged for another crypto-token, Article 4(3) will not provide an answer. [380] As such, the "residual" rule[381] in Article 4(4) will apply. This provides that the contract is governed "by the law of the country with which it is most closely connected".

5.91 As we said above, the open-textured rules at the bottom of the "waterfall" structure used in the Rome Regulations are intended as a last resort when none of the preceding rules higher up in the waterfall apply. In these circumstances, Recital (21) of the Rome I Regulation provides some guidance.

5.92 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".[382] If, for example, the trade took place in a "multilateral system" to facilitate peer-to-peer trading, there might be a close relationship between the contract

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375 Rome I Regulation (EC) No 593/2008, Official Journal L 177 of 04.07.2008, Art 4(2).

376 Above Art 4(3).

377 *Molton Street Capital LLP v Shooters Hill Capital Partners LLP* [2015] EWHC 3419 (Comm) at [94].

378 Rome I Regulation (EC) No 593/2008, Official Journal L 177 of 04.07.2008, Art 4(4).

379 This was the view we took in Digital assets and ETDs in private international law: which court, which law? (2024) Law Commission Call for Evidence, para 7.67 onwards.

380 Digital assets and ETDs in private international law: which court, which law? (2024) Law Commission Call for Evidence, para 7.75.

381 H Beale (ed), *Chitty on Contracts* (35th ed 2023) para 34-124.

382 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.

governing the use of the platform and the contract between the traders. The choice of law governing the use of the platform might also apply to the trades.[383]

5.93 These considerations, however, find no application in the wholly decentralised DeFi context. One of the distinguishing features of the DeFi systems we are focusing on is total decentralisation: public participants can access the protocols and execute digital asset transactions through them in accordance with predetermined, non-discretionary automated rules and algorithms.[384] There is, therefore, unlikely to be a contractual relationship between the DeFi protocol and the participants because these networks are permissionless.[385] This, moreover, is precisely the point of these protocols.

5.94 Accordingly, the courts will need to look at all the connections that the contract may have with various countries; and then find the country with which the contract is "most closely connected".

With which country is a smart contract "most closely connected"?

5.95 As we have already discussed, the core problem posed by omniterritoriality is that a contract in the DeFi context will have simultaneous connections to every country in the world in which there is a node that participates in the DeFi protocol. There is, therefore, in principle no country that is more "closely" connected with the contract than the others.

5.96 It is, however, worth noting that Article 4(4) does not require the contract to have significant connections to the country identified by the rule; the country only needs to be that with which the contract is "most" closely connected. In principle, the connections between the contract and each of the various countries might be very weak in all cases. This, however, is no real obstacle to the application of the rule: Article 4(4) essentially points to the country with which the contract is "least tenuously connected". This opens up the analysis to more tenuous connections that may arise on the facts of any given case.

5.97 For example, it might be possible to use either of the parties to the dispute as a connecting factor. However, it would be difficult to decide which party should take precedence for the same reasons Article 4(2) of the Rome I Regulation cannot be applied: there is typically no characteristic performance in a DeFi transaction because the exchange is a barter-like contract in which a crypto-token is exchanged for another. Balancing the, competing, interests of the parties to the dispute to arrive at a single connecting factor would be specifically tailored to the facts of each individual case; it would be very difficult to formulate a rule of general application as to which party should take precedence.

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383 See the discussion of Art 4(1)(h) from para 8.54 of our Call for Evidence.

384 See above para 5.67.

385 In the context of DAOs, we have discussed in detail why the normal rules of contract formation under the law of England and Wales may not be satisfied between DAO participants who interact only through the protocol. In particular, the intention to create legal relations is likely to be absent. See Decentralised Autonomous Organisations: Scoping Paper (2024) Law Com, from para 3.101, and Appendix 5.

5.98 That said, some commentators have formulated a general proposal for the law to which Article 4(4) would point.

5.99 In a book chapter, which seems to have been misinterpreted in a jurisdictional context,[386] Professor Andrew Dickinson addressed three conflict of laws issues that might arise in relation to a cryptocurrency system: (i) the law applicable to relationships between the direct participants of a cryptocurrency system; (ii) cryptocurrencies as "money" in the conflict of laws; and (iii) cryptocurrencies as "property" in the conflict of laws. Professor Dickinson analysed these issues by reference to the Bitcoin and Ripple systems.[387]

5.100 To appreciate Professor's Dickinson's proposal in relation to the "property" issues in the Bitcoin and Ripple systems, it is necessary first to understand his proposal in relation to the relationships between the direct participants in a cryptocurrency system. This is because he considers that the "property" character of a cryptocurrency depends on these relationships.[388] In the first instance, such relationships would be directly relevant for claims brought between two or more participants in connection with the operation of the system.[389] Given its relevance for the present analysis, we focus on this aspect here. We return to the "property" aspects of Professor Dickinson's proposal below.[390]

5.101 It is important to underscore at the outset that all of these are proposals for applicable law that depend on a particular characterisation of the relationships arising from participation in a cryptocurrency system. In the same vein, we note that Professor Dickinson's proposals were not made in relation to relationships arising (or not arising) from use of a DeFi protocol, but in relation to Bitcoin and Ripple as two case studies of cryptocurrency systems. Given, however, that the proposal considers decentralised DLT systems and is premised on Article 4 of the Rome I Regulation, we consider it here.

5.102 Although Professor Dickinson acknowledges some difficulties with characterising the relationships between direct participants in a cryptocurrency network as contractual for the purposes of applicable law and jurisdiction, he proceeds on the basis that a contractual characterisation would nevertheless be both appropriate and correct.[391] He then notes that the question of whether binding contractual obligations exist at all between participants is a matter for Article 10(1) of the Rome I Regulation, and that this refers back to the law governing the substance of the obligation.[392]

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386 As discussed in ch 3 paras 3.136 to 3.138.

387 We are grateful to Professor Dickinson for discussing his proposal with us, which has aided our understanding of it.

388 A Dickinson, "Cryptocurrencies and the Conflict of Laws" in D Fox and S Green (eds), *Cryptocurrencies in Public and Private Law* (2019) para 5.95.

389 A Dickinson, "Cryptocurrencies and the Conflict of Laws" in D Fox and S Green (eds), *Cryptocurrencies in Public and Private Law* (2019) para 5.15.

390 See below para 5.125.

391 Above, para 5.34.

392 Above, para 5.34.

5.103 Given that neither Bitcoin nor Ripple contain, within their consensus rules, express choices of law, Professor Dickinson therefore turns to Article 4 of the Rome I Regulation. In considering the "waterfall" of sub-rules that we set out above at paragraph 5.36 to 5.41, and relying in particular on Article 4(4), Professor Dickinson draws conclusions regarding the law to which they point. In this, emphasis is given to the important role played by miners in maintaining the blockchain within the Bitcoin system; and by Ripple Labs in operating key validator nodes and the vetting of others within the Ripple system. From this, for Bitcoin, the concentration of mining nodes in China at the time of writing means that there is a "significant prospect" that the law of China would be found as the law applicable to the relationships between participants in the Bitcoin system.[393] For Ripple, given that Ripple Labs has had its place of central administration in California, the law of California would apply to the relationships between participants in the Ripple system.[394]

> Charlie and Dan both participate directly in the Bitcoin system. Using his private key, Charlie sends two bitcoins from a public address he controls to a public address controlled by Dan.
>
> Professor Dickinson's proposal means that any dispute between Charlie and Dan as to the transfer recorded on the Bitcoin blockchain (as an aspect of the relationship between direct participants in the Bitcoin system) will be governed by the law of the country with which the Bitcoin system had its closest connection when the consensus rules crystallised; this being the place where mining activity for the Bitcoin system is concentrated. In Professor Dickinson's view, this is likely to be China.

5.104 An alternative that we had canvassed in our call for evidence is that proposed by Michael Ng.[395] His proposal builds upon Professor Dickinson's analysis of cryptocurrencies as, essentially, relationships between participants in the relevant cryptocurrency network that fall within the scope of Article 4 of the Rome I Regulation. In considering the final provision in Article 4(4) as to the place that is "most closely connected" with the contract, Michael Ng considers this to be the State of Massachusetts. In this, he considered several different factors, 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 the Massachusetts Institute of Technology ("MIT"), 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 Michael Ng 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

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393 Either under Article 4(1)(b), 4(2), or 4(4).

394 A Dickinson, "Cryptocurrencies and the Conflict of Laws" in D Fox and S Green (eds), *Cryptocurrencies in Public and Private Law*, para 5.61 to 5.67.

395 M Ng, Choice of Law for Property Issues Regarding Bitcoin under English Law (2019) *Journal of Private International Law* 315 to 338 at 337 to 338.

from any legal system, is "more closely connected" to Massachusetts than any other system.[396]

5.105 In our call for evidence, we considered the question of whether only very tenuous connections are appropriate in relation to international jurisdiction and the question of whether a contract has been "made" in England and Wales. Stakeholders told us that, in the modern commercial environment, the place where a contract is "made" (however that may be defined) is often a matter of pure coincidence. Individuals might sign a contract while on holiday or travelling on a plane. In these cases, the place where the contract is "made" has only a very weak and coincidental connection to the courts and law of that place; too weak and coincidental to subject the contract to those courts and that law. In the context of the conflict of laws, we are not aware of any arguments that the law of the place where the contract was made should apply.

5.106 We also discussed some of these issues in our 2021 Advice to Government on Smart Legal Contracts. There, we noted that the question of where a (smart legal) contract is "made" depends on technical and coincidental factors, which had been criticised as being impractical, artificial and arbitrary.[397]

5.107 Ultimately, the question for us seems to be whether only a very tenuous connection between a country and a contract allegedly concluded as a result of two participants interacting with a DeFi smart contract is sufficient to bring that alleged contract – and its existence and validity – under the law of that country.

5.108 Both Professor Dickinson and Michael Ng appreciate that the law of China and the law of the State of Massachusetts might not necessarily have particularly strong connections with the contractual relationships arising between participants.[398] Professor Dickinson, however, observes that, if these connections to a particular place are rejected on the basis that they are too tenuous, this would leave a lacuna in the law, as Article 4 would then fail to specify the governing law. In the absence of any other alternative, the most likely outcome would be the default application of the law of the forum.[399] We recognise the force of this argument and note that the absence of any other alternative under the current law may be an issue for us to consider for reform.

5.109 Our provisional view of the existing position is that, although Article 4(4) is framed in the relative terms of the country with which the contract is "most closely connected", adopting an applicable law rule effectively based on "the least tenuous connection" would reduce the analysis to a mere technicality. Such a technical approach would fail to consider the policy objectives inherent in and pursued by any applicable law rule, such as giving effect to the legitimate intentions and expectations of the parties. As Professor Dickinson recognised, the application of the proposed rule (leading, for example, to the law of China in the case of Bitcoin system) might produce a result in terms of the law applicable to relationship within the system that runs contrary to the

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396 Above.

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

398 A Dickinson, "Cryptocurrencies and the Conflict of Laws" in D Fox and S Green (eds), *Cryptocurrencies in Public and Private Law* (2019) para 5.65 to 5.67.

399 Above, para 5.66.

expectations of many system participants.[400] For example, as China has all but prohibited cryptocurrencies, this may well result in a finding that the transactions in the system are illegal or otherwise incapable of giving rise to enforceable rights under the relevant applicable law rules of England and Wales.[401] Professor Dickinson's view was that, the fact that the applicable law might produce a result that runs contrary to the expectations of many system participants would not in itself be a reason to find the conclusion invalid, and it is not immediately obvious that there is a more satisfactory way of framing the rule.[402]

5.110 Whilst we recognise that the intentions of parties in relation to wholly decentralised applications of DLT and DeFi protocols may be varied, we do not think it would be appropriate to rule out consideration of these intentions entirely. As is becoming increasingly apparent, many users of wholly decentralised applications of DLT have honest, if sometimes secretive, intentions. An applicable law rule formulated on the basis of "the least tenuous" connection that did not take legitimate expectations into account would be arbitrary and artificial, causing unfairness to the parties.

5.111 We also note that such a mechanistic approach is opposed to Lord Wright's view in *Mount Albert BC v Australasian Temperance and General Mutual Life Assurance Society Ltd*.[403] This case concerned the applicable law rule for contractual obligations prevailing at that time, and Lord Wright had "refused to treat [applicable law rules] as conclusive rigid arbitrary criteria". Rather, Lord Wright said that the law governing contractual obligations was a matter "to be ascertained in each case on a consideration of the terms of the contract, the situation of the parties and generally on all the surrounding factors".[404] Obviously this is a case of some age and was at a time when digital assets and smart contracts were not even conceived. However, our interest in the case rests in the statement regarding the approach to be taken in the conflict of laws, here in relation to identifying the law governing contractual obligations. This remains equally valid today, irrespective of the fact that the question arises in digital and decentralised contexts.

5.112 For these reasons, we do not think that seeking to identify the country with which a (smart legal) contract in the DeFi context is "most closely connected" is helpful or particularly viable. We conclude therefore that the existing law does not give a satisfactory answer – to the extent that it gives an answer at all – to the question of which law applies to determine the existence (or otherwise) of a smart legal contract. We think therefore that an alternative approach is required.

5.113 Before considering what that might look like, we first we look at similar challenges arising in respect of property issues in wholly decentralised DLT systems. We then

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400 Above, para 5.67.

401 Above, from para 5.81. This considers issues of illegality under the law governing the contract and other conflict of laws rules addressing the consequence of illegality. For the position in China, see Z Chen and D Yang, "China" in M Lehmann and T Morishita (eds), *Cryptocurrencies in National Laws* (2025).

402 Above, para 5.63

403 [1938] AC 224.

404 Above, at 240 by Lord Wright.

consider a general approach, and consider how it might respond to both these challenges.

Property issues arising in wholly decentralised DLT systems[405]

5.114 As we note in Chapter 3, the vast majority of crypto cases that have been before the courts so far have ultimately been proprietary in nature. Although what is immediately wanted is some form of interim relief, the claimant's ultimate objective is usually to recover the misappropriated crypto-tokens (or if this is not possible, their financial equivalent). The typical pattern is, therefore, that claimants will follow and/or trace the misappropriated crypto-token until they identify the person who is currently in control of them, or failing that, an identifiable person who can at least be sued.

5.115 For the purposes of applicable law, the core point to emphasise is the nature of the relationship between the claimant and defendant. As we have said, characterisation is of utmost importance in the conflict of laws. It is, therefore, critical to distinguish proprietary relationships from relationships that are characterised as contractual or tortious in nature. As we have seen, the fact that the relationship between a creditor and debtor gives rise to something the common law traditionally calls "intangible property" (that is, a thing in action) does not mean that their relationship will be characterised as "proprietary" in the conflict of laws. Rather, the courts of England and Wales have characterised such relationships as contractual.

5.116 In contrast to cases involving voluntary relationships and dealings between the parties to litigation, the quintessential example of a property dispute 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.[406]

5.117 This is well illustrated by *D'Aloia v Persons Unknown*.[407] In this case, the claimant (based in England and Wales) alleged that they had been unlawfully deprived of crypto-tokens, which had been traced to an account held at the defendant exchange (based in Thailand). The claimant then brought proceedings against the exchange on the basis that it was a 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.

5.118 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*:

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405 See further, A Held, "The modern property situationship" (2024) 20(2) *Journal of Private International Law* 391; 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* (2025); A Held "Cryptoassets and Decentralised Ledgers: Does Situs Actually Matter?", in M Lehmann, A Bonomi, and S Lalani (eds) *Blockchain and Private International Law* (2023).

406 A Held, "The modern property situationship" (2024) 20(2) *Journal of Private International Law* 391.

407 [2024] EWHC 2342 (Ch).

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.[408]

5.119 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. It is, therefore, important to keep the essential nature of a proprietary relationship in mind.

The *lex situs* rule

5.120 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,*[409] are determined according to the law of the place where the property object is situated (*lex situs*). For tangible movables,[410] this is summarised in the following *Dicey* Rule:

> #### 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.[411]

5.121 *Dice*y also includes in the property section of that text debts and other intangible movables:

> #### Debts and other intangible movables (Rule 143)

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408 A Held, "The modern property situationship" (2024) 20(2) *Journal of Private International Law* 391.

409 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* subsist "in" the thing itself, and are therefore 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.

410 The rule for immovables is addressed in *Dicey* Rule 140 and the commentary. 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. See Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) ch 24.

411 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 25R-001.

(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.[412]

5.122 The inclusion of the rules for the assignment of debts in the 'property' section in *Dicey* mirrors the substantive English property taxonomy.[413] In the domestic context, debts and things in action are classified as a type of personal property. However, such classification according to national substantive approaches can be misleading in the context of private international law. For the purposes of the conflict of laws, the "transfer" of an intangible right 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 Article 14 (Voluntary assignment and contractual subrogation) of the Rome I Regulation.[414]

5.123 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".[415] 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". Accordingly, the Commentary concludes that the category of "intangible things" remains coherent.[416]

5.124 In our call for evidence, we said that this proposition must be doubted. We return to this further below.

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412 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 25R-057.

413 See further, Digital assets and ETDs in private international law: which court, which law? (2024) Law Commission Call for Evidence from para 6.88.

414 *Raiffeisen Zentralbank v Five Star Trading LLC* [2001] EWCA Civ 68, [2001] QB 825. See further discussion in Call for Evidence from para 6.90.

415 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 25-059.

416 Above, para 25-058.

Application to crypto-tokens

5.125 It is worth returning at this point to Professor Dickinson's analysis of cryptocurrencies as "property" in the conflict of laws. As we explained above, the "proprietary" aspects of Professor Dickinson's proposal are premised on a conceptualisation of cryptocurrencies as a "bundle of entitlements" arising between direct participants of a cryptocurrency network.[417] These are characterised as contractual relationships falling within the scope of Article 4 of the Rome I Regulation.

5.126 From this, the "property" aspects of cryptocurrencies embrace, distinctly, the effects upon those entitlements of transactions that take place within a cryptocurrency network and the effects of transactions that occur "outside" of the cryptocurrency system. The latter category is concerned with transactions that might be between a direct participant and a non-participant, or a transaction that does not involve a "transfer" of cryptocurrency between public addresses within the network that is recorded on the blockchain.

5.127 Professor Dickinson gives as an example a secured transaction in which a crypto-token is offered as security. This could be effected in two ways. First, the debtor could transfer the crypto-token to the secured creditor as a transfer from the debtor's public address to the secured creditor's public address. In this case, the parties' relationship would fall to be characterised as one arising between direct participants in the cryptocurrency system. Second, the debtor could make some arrangement with the creditor external to the system, such as giving access to the debtor's cryptocurrency wallet. In this case, the creditor need not necessarily be a direct participant in the cryptocurrency system. It is this type of transaction "external" to the cryptocurrency system with which Professor Dickinson's "property" analysis focuses.[418] He considers that the effects upon the entitlements of the direct participants of a cryptocurrency network of transactions that take place within that network are governed by the law applicable to the cryptocurrency network, classified as contractual and determined in accordance with the Rome I Regulation.

5.128 Professor Dickinson's proposal for "external" transactions begins with characterisation. Cryptocurrencies are characterised as a species of intangible property, which gain their value by reason of the relationship between the participants in the cryptocurrency system. The characterisation is, therefore, premised on the analysis on the relationships between direct participants in a cryptocurrency system. As he puts it, cryptocurrencies are to be conceived as:

> a bundle of 'entitlements' arising by reason of participation in a cryptocurrency system, comprising claims exercisable against, and benefits other than claims derived from, other system participants. The most important and valuable of these entitlements is a claim or legitimate expectation to be associated with and have the

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417 See above para 5.100.

418 A Dickinson, "Cryptocurrencies and the Conflict of Laws" in D Fox and S Green (eds), *Cryptocurrencies in Public and Private Law* (2019) para 5.93.

power to engage in transactions in relation to particular units of cryptocurrencies within the system.[419]

5.129 Here, the conflict of laws analysis takes two paths. From the "bundle of entitlements" against other system participants, Professor Dickinson distinguishes between: (i) things in action or "claims" in the sense of a legally enforceable right against the other participants; and (ii) "other" entitlements and benefits that are factual, rather than legal, such as the legitimate expectation to be associated with particular units of cryptocurrency.

5.130 Claims in the sense of legally enforceable obligations against other system participants would fall within the applicable law rules for the assignment of claims contained in Article 14 of the Rome I Regulation. It is important to appreciate that Professor Dickinson characterises a "transfer" of the claims aspect of the "entitlements" that give cryptocurrencies value to be a matter of contractual assignment.[420]

5.131 Factual entitlements, benefits, and legitimate expectations, however, fall outside the definition of a "claim" for the purposes of Article 14. Professor Dickinson observes that, in the Bitcoin and Ripple systems, the value of the participants' "entitlement" does not depend on the existence of a legal right to be associated with units of cryptocurrencies. Rather, the value derives from the legitimate expectation, founded on technological features of the system, that the consensus rules which underpin the system will be applied and will not be altered fundamentally such as to deprive each participant of the association to particular units within the system and the power to deal with those units.[421]

5.132 From this, although the "entitlements" that make cryptocurrencies in the Bitcoin and Ripple systems valuable are factual rather than legal, by an analogy with goodwill, these legitimate expectations as to how the system will operate can be treated as a species of intangible property for the purposes of the English and Welsh conflict of laws.[422]

5.133 It is worth pausing here to note that, as we pointed out in our call for evidence, the rules for transfers of "intangible property" under the common law rules, as set out by the relevant *Dicey* Rule, are materially identical to the rules for the assignment of claims in Article 14 of the Rome I Regulation. It is of utmost importance in private international law to look beyond whether the conflict of laws rule is categorised as a rule for "property" or for "contract" within the relevant system of the conflict of laws. It is far more productive to identify the precise legal relationship to which the rule is supposed to apply. We reiterate that characterisation is of considerable importance.[423]

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419 Above, para 5.100.

420 Above, para 5.101.

421 Above, para 5.107. Professor Dickinson refers in footnote 182 to the substantive law characterisations of Philipp Paech and Kelvin Low and Ernie Teo.

422 Above, para 5.108.

423 See Property and permissioned DLT systems in private international law: FAQ (2025) Law Commission Paper.

5.134 From this, there are several aspects to the rule that Professor Dickinson actually proposed that are worth distinguishing:

(1) The rule to be considered in the following paragraphs **does not** apply to determine the effects as between the direct participants of a cryptocurrency system of transfers of cryptocurrencies that are recorded on the blockchain.

(2) The rule applies to transactions (external to the blockchain) that relate to the benefits that arise from participation within the cryptocurrency system; but (save in the case where that participation gives rise to legally enforceable rights) that cannot be characterised as a claim to which Article 14 of the Rome I Regulation applies.

(3) Such external transactions are governed by the law of the place of where **the participant most closely connected with that participation** is resident or carries on business.

5.135 It is worth noting that, although Professor Dickinson builds upon case law considering the *lex situs* of intangible assets (in particular goodwill) he eschews calling this an application of the *lex situs* rule via a fictional *situs*.[424] Rather, he describes the relationships to which the rule is to apply, and then states the rule. To the extent that it might be tempting to say this amounts to a "fictional" *situs*, Professor Dickinson states the rule can be more "straightforwardly and appropriately" expressed as

> the proprietary effects outside the cryptocurrency system of a transaction relating to cryptocurrency (conceptualised as a type of chose in action represented by a legitimate expectation against other participants within the system) shall in general be governed by the law of the country where the participant resides or carries out business.[425]

[424] Above, para 5.109.

[425] Above, para 5.109.

Erin is not a direct participant in the Bitcoin system and does not wish to become a direct participant in the Bitcoin system. Erin, however, agrees to lend Dan £70,000, secured on one bitcoin. As Erin does not wish to become a participant in the Bitcoin system, Dan creates a new public address "1skkkkw0q1" and segregates one of his bitcoins by sending it to that address. He then makes a paper copy of the private key that corresponds to public address "1skkkkw0q1" and gives the paper on which the private key is written to Erin.

According to Professor Dickinson's proposal, any dispute arising between Erin (who is not a direct participant in the Bitcoin system) and Dan (who is a direct participant in the Bitcoin system) as to the bitcoin attributed to public address "1skkkkw0q1" will be governed by the law of the place where Dan is resident. This is because Dan is the participant of the Bitcoin system with which the bitcoin held at "1skkkkw0q1" is most closely connected.

5.136 It is important to note that Professor Dickinson's analysis reflects the traditional common law terminology of "intangible property" to which Dicey Rule 143 can be applied, at least by analogy.

5.137 In our Digital Assets report, we reached the conclusion that crypto-tokens should not be regarded as things in action.[426] We recognised that, as a matter of substantive private law, 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.[427] Nor do they require special legal techniques such as assignment to facilitate transfers (if the rights are indeed alienable at all) that are necessary for the transfer of things in action. Rather, crypto-tokens can be moved 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.[428] Nonetheless, we concluded that crypto-tokens are and should be things to which personal property rights can relate,

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426 Digital Assets: Final Report (2023) Law Com No 412, para 3.32.

427 Above.

428 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* (2025).

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, not requiring assignation/novation, and as 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.

and we recommended that (in line with the position already emerging in the cases) a third category of personal property should be recognised.[429]

5.138 To the extent that a third category represents a development in the substantive law, crypto-tokens are not a thing in action or "intangible property" as the common law has traditionally understood that term. As such, the proposition that *Dicey* Rule 143 can indeed be considered a uniform rule for all "intangible things" must be doubted.[430] There is a significant difference between the types of objects mentioned in the Commentary (which assumes a right that can be assigned) and crypto-tokens. Crypto-tokens are not (in themselves) premised on any obligation or legal right. They cannot therefore be considered analogous to contractual rights or other types of legal rights, although they can of course be linked to such rights (for example, in the case of a tokenised security).

5.139 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.[431] In these debates, there is a general 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 the claim itself. In other words, there is no obligation that is to be enforced against some obliged person. As a result, many commentators 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 (Voluntary assignment and contractual subrogation) cannot apply to crypto-tokens and argue that a rule aligned with the traditional *lex situs* approach will be required.[432]

5.140 However, 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*".[433] We turn now to this issue.

Nowhere and everywhere, at the same time

5.141 Applying the *lex situs* rule to decentralised crypto-tokens is one of the most difficult problems raised by truly decentralised applications of DLT. We said in Chapter 2 that the fact that crypto-tokens have no discrete and singular physical location is not in

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429 The Property (Digital Assets etc) Bill, which would implement this recommendation, is before Parliament at the time of writing.

430 See further, 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.

431 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).

432 Above, K Henkel, "Cryptovaluta in het conflictenrecht: een verkenning" (2022) 1 *The Netherlands Journal of Private International Law* (Netherlands).

433 K Takahashi, "Law applicable to proprietary issues of crypto-assets" (2022) *Journal of Private International* Law 347.

itself the problem. This is because, although the conflict of laws seems to be concerned with questions of geographical location, it is ultimately concerned with finding some objective feature of the facts and issues of a case that convincingly connects the case to one particular sovereign territory in preference to all the others.

5.142 For example, 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 the conflict of laws. 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.

5.143 Connecting factors need not necessarily reflect the physical features of the object itself (if indeed, the object has any). If a property object does not have any physical features, this simply means that physical features are not useful in the search for a factor that connects a property dispute convincingly to the legal system of a single sovereign state. The conflict of laws has developed methods for applying the *lex situs* rule without reference to physical criteria.

5.144 From this, the real problem that wholly decentralised crypto-tokens pose for the conflict of laws is that these established methods of connecting property disputes to the authority of a single sovereign state are no longer as effective. Consider the following examples which we discussed in more detail in Chapter 2:

(1) A simple digital file stored offline on the hard drive of a laptop can easily be "situated" where the laptop itself is situated.

(2) A simple digital file stored offline on the hard drives of more than one physical device is more challenging because each of these devices may be in a different country. Where this is the case, it is harder to "localise" the file in a single country, but some other process might be used to narrow down the options. Focusing on temporal connecting factors, such as choosing the laptop on which the file was first created, might still be effective in narrowing down a single legal system from many potential candidates.

(3) A digital file stored online need not necessarily be problematic: if it is stored on a single server, then the digital file can be easily "situated" at the place where the server is situated.[434]

(4) A digital file stored online in the cloud in a distributed server too need not necessarily be problematic. Even if the data shards comprising the digital file are stored on different servers across the world, the cloud storage service provider is a potential alternative connecting factor. This is owing to the prominent position it holds in storing, managing, and securing the data shards

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

comprising the file. Access to the data file will often require the cooperation of the cloud storage services provider.[435]

5.145 By contrast, in the context of decentralised applications of DLT, there is no feature that emerges as more significant than any of the others: a complete and whole copy of the ledger is stored on every single node; and no single node holds a prominent position in storing, managing, or securing the ledger.

5.146 We said in chapter 4 that, for the purposes of international jurisdiction, the "*situs*" principle can be interpreted as a question of identifying the place where the crypto-token can be controlled, at the time of proceedings. In principle, the same approach could be taken for applicable law. There is an initial point of difference: in this context of applicable law, the relevant point in time differs. For applicable law, the relevant point in time is not the time when proceedings are issued, but the time at which the defendant allegedly acquired a property right in relation to the object. The law of the place where the property object was at the time of this acquisition determines whether the defendant acquired good title, thereby extinguishing the claimant's prior right, or whether the claimant's right prevails.[436]

5.147 For example, in *D'Aloia v Persons Unknown*, if control is taken as the relevant connecting factor, application of the *lex situs* rule would require the courts to look to the place where the crypto-tokens "were" at the time when the defendant crypto-exchange acquired control over them. On the basis that defendant's location is more relevant to the disputed acquisition than the claimant's location,[437] this place would have been Thailand. Thai law would then determine whether the exchange obtained good title, thereby defeating the claimant's claim.[438] It is important to note that the law of England and Wales applied to the claim because applicable law was not in dispute between the parties before the courts of England and Wales.

5.148 Alternatively, the editors of *Dicey* have proposed 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.[439] If an encryption key is known to multiple people, the "owner" should generally be

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435 See the discussion of *United States v Microsoft Corp* 584 US (2018) in Chapter 3 of our Call for Evidence from para 3.70 onwards.

436 We discuss this in further detail in Digital assets and ETDs in private international law: which court, which law? (2024) Law Commission Call for Evidence para 12.43.

437 By contrast, the claimant's location might be more appropriate if the focus is on the transfer, rather than the acquisition. In such cases, the relevant point in time would be the time when the transferor authorised the transfer. For the temporal discrepancy between transfer/entry in the system and acquisition in the Bitcoin system, see 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* (2025) p 278 to 282.

438 See *Piroozzadeh v Persons Unknown* [2023] EWHC 1024 (Ch) where the exchange gave evidence it intended to raise the good faith purchaser for value without knowledge defence.

439 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 23-050 (citations omitted).

understood as the party who *in fact* exercises control over the cryptocurrency, for example, through effecting a sale to a third party.

5.149 It is worth repeating that there is a significant difference between the considerations that apply for international jurisdiction and for applicable law. As we said above in paragraph 5.49, for international jurisdiction, it does not necessarily matter if a case has links to more than one legal system: such conflicts of jurisdiction are regulated by established principles of international jurisdiction. By contrast, for applicable law, the premise of the multilateralist approach is that there is a single legal system in which an issue arising in a case has a "natural home". As such, the choice of connecting factor must lead to a single convincing "winner" over all the other potential options.

5.150 From this, we observe that using control over a crypto-token as the connecting factor for applicable law does not necessarily point convincingly to a single place. Not only can private keys be duplicated, but the cases show that alternative forms of control might be indeed possible for DLT networks and are being relied on before the courts.[440] At the same time, the basis for control leads to equally difficult problems of decentralisation.

5.151 In *Tulip Trading*, the claimant, TTL, issued proceedings on the basis that the defendant core software developers exercised a sufficient degree of control over the Bitcoin systems such that they could make changes to the blockchain record itself. We address this in more detail below, but note here a separate point: the defendants had denied they had such power.

5.152 The defendants' evidence had been that, although they were involved in implementing minor software updates, such significant changes to the way in which the Bitcoin systems were programmed to work would not be accepted by the mining nodes. Their position on their alleged control over the Bitcoin systems was summarised in the judgment in the following way:

> The Defendants challenge this, portraying (particularly in the case of the BTC Developers) a decentralised model in which, to the extent that they are or continue to be involved in software development for the Networks (which is disputed for some of them), they are part of a very large, and shifting, group of contributors without an organisation or structure. Further, any change that they were able to propose to address TTL's complaint would be ineffective, because miners would refuse to run it and instead would continue to run earlier versions of the software. What TTL sought went against the core values of bitcoin as a concept. A disagreement could lead to a "fork" in the Networks, resulting in the creation of additional networks rather than a resolution of the issue. The Fifteenth and Sixteenth Defendants also claim that if they attempted to make the changes sought to the BCH ABC Network it would have a severely detrimental effect on their reputations, and participants would refuse to adopt them.[441]

5.153 Alternatively, 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

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[440] See above ch 4 para 4.143.

[441] *Tulip Trading v Bitcoin Association for BSV* [2022] EWHC 667 (Ch) at [34].

the law of the place where the original coder has their primary residence.[442] 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".[443]

5.154 The majority of stakeholders to our call for evidence favoured recourse to the *lex situs* rule to determine law governing property disputes in relation to crypto-tokens. Although many of these responses were premised on there being a centralised system operator, even still, there was no consensus as to the appropriate connecting factor to be used. The suggestions included: the location of the relevant participant, residence or domicile of the owner of the crypto-token, residence or domicile of the person in control of the crypto-token.

5.155 Overall, we have provisionally concluded that the existing *lex situs* rule does not give a satisfactory answer – to the extent that it gives an answer at all – to the question of which law applies to resolving property disputes arising in relation to wholly decentralised crypto-tokens. We think this provides further evidence that an alternative approach is required. We set out our thinking in the next chapter.

442 Financial Markets Law Committee, "Distributed Ledger Technology and Governing Law: Issues of Uncertainty" (March 2018) para 6.28.

443 Above.

Chapter 6: The conflict of laws - proposals for reform

6.1 We have seen in the previous chapter two particular situations in which omniterritoriality presents a challenge to the conflict of laws.

6.2 In the context of contractual obligations in the DeFi context, we saw this in relation to Article 4 of the Rome I Regulation: application of that rule from "top down" through the waterfall left us no closer to identifying the applicable law than we were before we applied the rule. Article 4(4) of the rule, which is supposed to be the last resort, emerged as the starting point. In the property context, we saw that there is no existing method for applying the *lex situs* rule to intangible things; and that rules for assignment cannot be easily applied given that crypto-tokens are not contractual rights. In both cases therefore, the existing rules leave us in the situation of being unable to identify the applicable law.

6.3 Insofar as omniterritoriality is a direct and unprecedented challenge to the theoretical premise on which the multilateralist approach is based, this is not entirely surprising. The implications of applying the relevant rule but being still unable to identify the applicable law are therefore significant.

6.4 As we have said, the application of a multilateralist applicable law rule is supposed to point to a single legal system as the natural seat of any given legal issue. In the past, these rules largely worked as intended. When, however, such rules are applied to omniterritorial phenomena, they point to "nowhere and everywhere, at the same time".[444] Accordingly, the application of such rule leaves a court "no closer to identifying the applicable law than it was before the rule was applied".[445]

6.5 We have also explained that we do not think that it is helpful to rely on extremely tenuous and arbitrary connecting factors, nor use these as the basis for a fictional *situs*. Our provisional conclusion is that new approaches are required to meet these unique challenges. Although cases raising these issues have yet to come before the courts of England and Wales, we have heard from stakeholders that they are likely to do so in future. In this chapter, we explain how we think the law should be ready to meet these challenges when they come.

IDENTIFYING AN ALTERNATIVE APPROACH: RELEVANT CONSIDERATIONS

6.6 Given that we find ourselves without any relevant precedents in the multilateralist approach to the conflict of laws, we have looked more broadly and beyond the confines of the multilateralist approach to design our proposed way forward. In particular, it has been important to bear in mind that the multilateralist approach to the conflict of laws, while prevalent and highly influential, is not the only legitimate

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444 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).

445 A Held, "The modern property situationship" (2024) 20(2) *Journal of Private International Law* 391, 395.

approach. As Professor Ralf Michaels has said, to focus only on the multilateralist approach when considering the conflict of laws risks taking an "unduly narrow" view that "substitutes one approach for a whole discipline".[446]

6.7 We set out some of the core aspects of our thinking below.

Broader challenges arising from omniterritoriality

6.8 The challenges faced by private international law are, on a broader view, symptomatic of more fundamental challenges that omniterritorial phenomena pose generally to socio-legal norms. Of these, we have identified two core challenges as particularly relevant to our project: the challenges posed to (i) the private laws of different legal systems; and (ii) the very idea of law as the "prerogative of territorial sovereigns".[447] We consider these briefly in turn.

Uncertainty in the substantive law

6.9 The multilateralist approach to the conflict of laws is traditionally said to be "blind" to the substantive outcomes of a case and concerned only to identify **which** particular state's private law will apply in a given set of circumstances. It traditionally takes a neutral view on the substantive content of different systems of private law and takes as the starting point that each system of private law is as equally just and valid as each of the others.

6.10 It is important to recognise that this traditional approach to the conflict of laws is premised on each system of private law being largely at the same point of maturity as each of the others, as well as having a shared common core.[448] Reflecting these assumptions, it has been said that the conflict of laws "seems to flourish best […] where law-making power [is] dispersed and a shared legal tradition, rather than the command of a central authority, made law cohesive".[449]

6.11 However, in the wholly decentralised context we are considering, the private law is neither mature nor cohesive across jurisdictions. Rather, it is uncertain, developing, or in many cases, still nascent. The comparative perspective on the substantive law relating to Distributed Ledger Technology (DLT) presents a highly fragmented picture. Some jurisdictions, including England and Wales, show a willingness to embrace digital assets as objects of property rights. Other jurisdictions take a more conservative approach, either banning certain types of digital assets outright[450] or

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446 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.

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

448 As we said in our Call for Evidence, the conflict of laws developed in Upper Italy when the remnants of the old Roman law still coexisted alongside the laws of the emerging city states. See Digital assets and ETDs in private international law: which court, which law? (2024) Law Commission Call for Evidence, para 2.13.

449 F Juenger, *Choice of Law and Multistate Justice* (1993) p 44.

450 For example, in China, every court decision concerning transactions involving cryptocurrencies has indirectly invalidated the transaction on the basis that it is contrary to good morals and public order under paragraph 2 of Article 153 of the Chinese Civil Code; see Z Chen and D Yang, "China" in M Lehmann and T Morishita (eds) *Cryptocurrencies in National Laws* (2025). For examples of other countries that take a conservative approach to cryptocurrencies, see A Elkahwagy, "Egypt" and F Karagussov, "Kazakhstan" in M Lehmann and T Morishita (eds) *Cryptocurrencies in National Laws* (2025).

denying recognition of digital assets as objects of property rights.[451] There is no way to predict how different legal systems will continue to respond to these novel phenomena. Nor can we be certain that these, often very significant, differences between the private laws of different legal systems will soon or ever be reduced.

6.12 As such, the extent of the potential for conflicts between the private law of different legal systems in relation to these phenomena remains unclear. This marks a stark contrast to the socio-legal environment in which the multilateralist approach to the conflict of laws developed.

6.13 In these circumstances, the traditional multilateralist approach to the conflict of laws as a neutral "jurisdiction selecting" method concerned only to identify a single national system of private law comes under some pressure. Parties plan their affairs around the commercial positions they take by knowingly and voluntarily entering into DeFi transactions. They enter into these transactions by engaging with a decentralised protocol on a public DLT network. Crypto-tokens are acquired and traded in accordance with the bitcoin ideal of a decentralised system for honest commercial purposes.

6.14 From this, we have already seen that applying the existing applicable law rules in this context might either fail to identify an applicable law, or give an arbitrary result pointing to the law of a jurisdiction that has only a very tenuous connection to the parties and the issues of the case. The law that is identified on these dubious connections might, however, also happen to be one which has not yet adapted to digital trends or indeed remains unlikely to do so. Application of that law will, therefore, frustrate the intentions and legitimate expectations of parties who have knowingly and reasonably adopted the technological trends of the modern age.

6.15 The extreme disparity between the private laws of different countries in relation to digitalisation therefore raises questions as to whether continued adherence to the multilateralist approach – including its traditional "outcomes blind" position – still nevertheless delivers overall the benefits associated with this method. We have provisionally concluded that it does not.

Challenge to the multilateralist approach posed by uncertainty in the substantive law

6.16 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.

6.17 This is often known as "decisional harmony" and was one of the core objectives pursued by the multilateralist ideal.[452] 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. A single applicable law, applied by all courts as a result of applying the same applicable

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451 In many jurisdictions, only corporeal objects may be the object of property rights. A good example is Germany; see Article 90 of the German Civil Code and J H Binder, "Germany" in M Lehmann and T Morishita (eds) *Cryptocurrencies in National Laws* (2025).

452 Digital assets and ETDs in private international law: which court, which law? (2024) Law Commission Call for Evidence, para 6.121.

law rule, thus reduces the risk of irreconcilable or contradictory rules with which persons must comply.

6.18 We are aware that users of the law look to conflict of laws rules to plan their cross-border affairs and transactions in advance. To this end, we appreciate the appeal of fixed applicable law rules and the legal certainty that they apparently provide. However, we think it is important to acknowledge that the unprecedented uncertainty in the substantive laws of different legal systems places significant limits on the extent to which the multilateralist approach to the conflict of laws can provide legal certainty.

6.19 Where there is such extreme disparity between the digitalisation laws of private law systems, the apparent legal certainty provided by a fixed applicable law rule is likely to be off point. First, and as a more general point, modern fixed applicable law rules are typically quite complex and sophisticated. As we have seen, even the modern EU approach, as an example of a continued adherence to traditional fixed rules, leaves considerable room for a court to apply an open-textured rule. Furthermore, there is little certainty as to how a court might characterise the issue at the prior stage of identifying which applicable law rule is engaged by the facts and issue of the case.

6.20 Even if a fixed applicable law rule did provide near-absolute certainty in advance as to which country's substantive law will apply to a transaction or an event, the result of applying that law might not necessarily accord with the parties' expectations and intentions surrounding their use of technology.

6.21 In particular, it is our understanding that stakeholders in this context are concerned less about knowing in advance which law will apply to their dealings or transactions, and more about knowing that the relevant law will ultimately uphold the validity of any legitimate transactions that make novel use of technology. As we have said, some countries have banned outright certain types of digital assets or otherwise deny that they may be the object of property rights. A fixed rule that pointed to the applicable law of one of those states would therefore frustrate the reasonable and legitimate expectations of the parties. This is contrary to the position expressed in the current edition of *Dicey*, 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".[453]

6.22 Here, the traditional "outcomes blind" method of the multilateralist approach ultimately emerges as an obstacle in the conflict of laws to giving effect to these legitimate expectations. The conflict of laws does not traditionally look to the outcomes of applying the law identified by the relevant conflict of laws rules, such as whether it is a digitalisation-friendly law that will uphold the validity of a transaction that makes use of novel technologies. For this type of legal certainty, there is only one real way to eliminate wholly the kind of cross-border legal risk that arises from the potential conflicts between different private law systems: countries must all adopt similar substantive private laws or at least a similar policy underpinning the content of their substantive laws in relation to digitalisation. Where laws are uniform across legal systems, conflicts of law are eliminated at their source, and it will not matter in which

[453] Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 1-006.

court parties litigate their dispute because every court will resolve the dispute by applying the same substantive principles.

6.23 Evidently, for this approach to work in the present context of digitalisation, all countries would need to be committed at least to a consistent approach to novel technologies and digitalisation. Without such commitment, there remains the possibility for conflicts of laws between those countries that are receptive to digitalisation and those that are not. At the same time, we recognise that these policy and legal decisions as to whether to enact digitalisation-friendly laws remain within the prerogative of sovereign states.

6.24 For the purposes of the multilateralist approach to the conflict of laws, however, the fact that some countries, including England and Wales, are receptive to technological developments does not necessarily mean that all other countries will or must make a similar choice. Where countries remain less receptive, or simply need more time to enact legislation to recognise and facilitate digitalisation, this does not necessarily create an injustice that the law of England and Wales can seek to remedy through its conflict of laws rules. After all, the conflict of laws is premised on there being differences in national laws.

6.25 To the extent that stakeholders seek legal certainty so as to ensure the application of a "pro-digitalisation" law, this is not the type of legal certainty that the multilateralist approach to the conflict of laws is designed to address. We have, therefore, considered how and to what extent we could provide more legal certainty using other methods and approaches to the conflict of laws.

A direct challenge to the idea of law

6.26 More fundamental ideological issues arise from the fact that, as we explained in Chapter 2, DLT was deliberately designed as a direct challenge to the traditional concepts of law and centralised authority – including, necessarily, the prerogative of states to make and enforce their own laws.[454]

6.27 The term *lex cryptographia* was first coined in 2015 and refers to "rules administered through self-executing smart contracts and decentralized (autonomous) organizations".[455] It reflects the original Bitcoin-style proposition that, to determine the "law" applicable to a particular transaction or dispute within a DLT system, there is no need to look outside the system itself: the "code is law". This proposition says that the system itself, by virtue of its technological structure, automatically and necessarily executes transactions and that what the code does must, by its very nature, be correct. Taken to the extreme, this approach (at least in theory) excludes the need to rely on state-recognised courts to adjudicate disputes or enforce rights. As we will see below, some degree of this ideology is likely to form part of the legitimate expectations and understandings of participants in these arrangements.

6.28 Not all wholly decentralised application of DLT are deployed with the intention of circumventing the application of the state-backed laws. Nevertheless, it is important to

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454 From para 2.42.

appreciate the extent of the challenges that DLT's technological architecture poses to the idea of law as a state-centric territorial construct. As we have seen, in private international law, these challenges go to the very theoretical premises on which the existing rules have been developed.

6.29 Many legal commentators (as opposed to those on the technology side) who have written about "code is law" or the "*lex cryptographia*" do not themselves subscribe to the view that DLT will eliminate the role and function of the law. Rather, they argue that the particular characteristics of DLT may require "a shift in the way we perceive the role of law".[456] As Aaron Wright and Primavera de Fillippi have said in relation to smart contracts, DAOs, and DLT:

> While it might seem that smart contracts and decentralized organizations could take away many of the functions of law and governments, the mainstream deployment of blockchain-based application is unlikely to eliminate the role of these centralized institutions. Rather, it may shift the balance between law and architecture, requiring alternative regulatory mechanisms to successfully manage society.[457]

6.30 From this, we have considered how and the extent to which it is necessary to rethink the approach to resolving "the conflicts that may exist between different private law systems".[458] In functional terms, this is the question with which the conflict of laws is concerned. We have, therefore, given particular consideration to how the balance between the state and its laws, technology, individuals, and the values and objectives of the conflict of laws could be adjusted in light of novel phenomena that challenge the theoretical and ideological premises on which the existing legal paradigms have been developed.

An international outlook

6.31 We recognise the need to maintain an international outlook in relation to omniterritorial phenomena. The primary challenge posed by omniterritoriality in the international context is a distinct challenge to the traditional organising principle according to which the private law of any one state, as an expression of sovereign authority, has been held to apply in cross-border circumstances. There is, therefore, a need to ensure that any solution we propose is neither siloed nor unduly domestic in approach; and this remains the case, irrespective of the particular method we might adopt to resolve the conflicts that may exist between different private law systems.

6.32 Whilst the multilateralist approach is, perhaps, the most formally premised on coordination between states, any potential departure from that method does not necessarily mean a departure from maintaining an international outlook. We do not think that the failure of a multilateral conflict of laws rule to identify the applicable law

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456 A Wright and P de Filippi Primavera, "Decentralized Blockchain Technology and the Rise of Lex Cryptographia" (2015) https://ssrn.com/abstract=2580664 p 44.

457 A Wright and P de Filippi Primavera, "Decentralized Blockchain Technology and the Rise of Lex Cryptographia" (2015) https://ssrn.com/abstract=2580664 p 51.

458 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); Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 1-010.

necessarily means the law of the forum automatically applies as the default in the absence of any alternative.[459]

6.33 An unduly domestic approach would remain undesirable, whatever method we might propose to answer the question of how to resolve cases with an omniterritorial element. After all, the premise of the problem that omniterritoriality poses is that the law of no country would be appropriate to apply and the law of every country would be appropriate to apply to resolve a cross-border private law dispute.

6.34 We will therefore continue to engage with the international community and ensure any proposals we make leave room for the law of England and Wales both to contribute and respond to common themes and areas of consensus that may emerge at the international level.

Finding a way forward in the conflict of laws

6.35 We have kept these broader socio-legal considerations in mind whilst considering in more concrete terms how the law of England and Wales might approach the core problem that omniterritoriality poses to the conflict of laws.

Considerations informing our general approach

6.36 As we have seen above, there are differences in views as to the overriding objective of the modern conflict of laws.[460]

6.37 Some experts favour an approach that would give effect to the legitimate expectations of the parties,[461] while others favour an approach that would promote legal certainty and predictability.[462] These share many similarities, at least insofar as the legitimate expectations of the parties in commercial matters have often been shaped by a certain and predictable legal framework.

6.38 From this, 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 traditionally not at all for property.[463] In relation to legal certainty, it is less easy to say it applies in tort, that is, that the parties require legal certainty for a tortious act they did not necessarily intend nor foresee. Vested rights

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459 See, A Dickinson, "Cryptocurrencies and the Conflict of Laws" in D Fox and S Green (eds), *Cryptocurrencies in Public and Private Law* (2019) para 5.66.

460 See ch 5 from para 5.44.

461 See eg Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 1-006.

462 See eg the American Law Institute work on the Third Restatement. The status of the project may be found at https://www.ali.org/project/conflict-laws See further: 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.

463 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.

theory[464] has been said to be relevant for property[465] and in certain other contexts,[466] but less relevant for the modern conflict of laws more broadly.[467]

6.39 In our work, we have kept in mind these differing objectives. There is also a balance to be struck between the two extremes represented by a fixed rule and an open-textured rule or approach. This balance was considered by the Law Commission of England and Wales and the Scottish Law Commission in a joint 1984 working paper called "Private International Law: Choice of Law in Tort and Delict". Many of the issues considered in 1984 remain equally valid today, to the extent that we are asking the same questions about formal issues in designing and drafting a legal rule.[468] Although we are now considering the design of rules to apply to omniterritorial phenomena, which of course were not at issue in 1984, the observations about what makes a good rule a good rule remain relevant and valid, and we refer to that paper throughout the remainder of this chapter.

6.40 On the question of balance between certainty and flexibility, the Commissions said:

> While it is important that our reformed choice of law rule should possess a high degree of certainty, it is also important that it should be sufficiently refined to be capable of selecting an appropriate system of law in as high a proportion of cases as possible, so that the courts are only rarely faced with the choice of either applying an inappropriate law or using a device to escape altogether from the choice of law rule in tort and delict. Unfortunately, these two factors (certainty and refinement) tend to pull in opposite directions, in that it is the simple rule which is more certain, and the refined rule which is less so. The appropriate balance between certainty and refinement is, in our view, the major test which an acceptable choice of law rule in tort and delict must satisfy.[469]

6.41 The appropriate balance has been said to rest ultimately on whether the emphasis is upon:

(1) prioritising certainty and foreseeability so that parties can organise their affairs in advance; meaning fixed rules which, if applied consistently, might not necessarily identify the most appropriate law in any given case; or

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464 See above ch 5 n 360.

465 A Held, "The modern property situationship" (2024) *Journal of Private International Law* 391.

466 See generally 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.

467 See 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.

468 Law Commission and Scottish Law Commission, Private International Law: Choice of Law in Tort and Delict (1984) Law Com Working Paper No 87. See also Private International Law: Choice of Law in Tort and Delict (1990) Law Com No 193.

469 Law Commission and Scottish Law Commission, Private International Law: Choice of Law in Tort and Delict (1984) Law Com Working Paper No 87 para 4.18.

(2) giving courts flexibility in applying the most appropriate law in every given case, thereby "ensuring justice in the individual case;" meaning "less predictable solutions overall".[470]

6.42 Judicial experience in applying applicable law rules and how these rules fit within our common law legal method and adversarial mode of procedure are also important considerations when making these assessments.

Possible approaches to formal design

6.43 To the extent that any reform is needed to address the challenges presented by emerging technology, there is a variety of options available.

6.44 Where we make proposals using the multilateralist approach, as we do in Chapter 7, the options available to us include a combination of fixed and open-textured rules, one single open-textured rule, or many fixed but necessarily detailed rules. We also consider the extent to which the application of the proposed rule would achieve the broader objectives of and justifications for the multilateralist approach.

6.45 For the purposes of the issues considered in this chapter, we have provisionally ruled out simple fixed rules as too blunt, rigid, and arbitrary, especially in the circumstances we are considering in this project.

6.46 As explained in the joint Commissions' 1984 working paper:

> To achieve maximum certainty, a choice of law rule must be based on a clear and simple connecting factor, with as few exceptions as possible. Such rules have a high degree of rigidity … [however] a certain but crude choice of law rule which is not sufficiently subtle to cater adequately for the circumstances of particular cases may result in the application of what is clearly not the most appropriate law. This becomes important where the result of applying that law to the dispute differs from the result which would be obtained by applying another apparently relevant system of law, although it matters little where the results would be similar.[471]

6.47 The paper also said that while "such an approach would achieve maximum certainty,[472] it would be indefensible as it would fail to do justice".[473]

6.48 We next considered the technique of complementing a fixed rule with further provisions that ultimately lead to an open-textured rule as a last resort. An example is

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470 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.

471 Law Commission and Scottish Law Commission, Private International Law: Choice of Law in Tort and Delict (1984) Law Com Working Paper No 87, paras 4.16 and 4.17.

472 Law Commission and Scottish Law Commission, Private International Law: Choice of Law in Tort and Delict (1984) Law Com Working Paper No 87, para 4.16.

473 The Law Commission Working Paper cited the quotation from Lord Wilberforce in *Boys v Chaplin* [1971] AC, 391: "no purely mechanical rule can properly do justice to the great variety of cases where persons come together in a foreign jurisdiction, for different purposes with different pre-existing relationships, from the background of different legal systems". Also, Professor Carruthers has rejected this approach as too "blunt", see J Carruthers, *The Transfer of Property in the Conflict of Laws* (2005) p 234.

the "catch all" clause used in the Rome Regulations. Whilst we appreciate that such a technique allows for more flexibility than a simple fixed rule, our analysis of the relevant rules of the Rome I Regulation above has shown that, in the wholly decentralised DeFi context, the open-textured rule intended as the last resort would realistically become the starting point.

6.49 We therefore provisionally concluded that the technique of placing the fixed rule first would not be helpful in this context. In any event, the technique of a fixed rule complemented by more detailed fixed rules, exceptions, or presumptions, has in itself its own merits and demerits.[474]

6.50 We then considered the following different options.

(1) A bare open-textured rule, which provides only that the applicable law is "the most appropriate law" or the "law of the place with which the issue has the most significant connection".

(2) An open-textured rule accompanied by a list of factors that the court is instructed to consider, such as the approach taken in the US Second Restatement of the Conflicts of Law.

(3) The supranational approach to the conflict of laws, that is, special substantive rules that apply in international circumstances.

6.51 Given the problems we have identified with a simple fixed rule, it appears that the flexibility of a bare open-textured rule might be appropriate; especially in light of the still-nascent state of the technology and the uncertainty in the substantive private laws across legal systems. The approach finds expression in the common law doctrine of the "proper law" of a contract, which has been expressed in the following terms: "proper law is [the] system of law with which the transaction has its closest and most real connection".[475] If, as we said above, the ultimate objective of an applicable law rule is to identify the most appropriate law to resolve a cross-border dispute, this objective lies at the heart of the bare open-textured rule.

6.52 Furthermore, the bare open-textured rule seems ideally suited to the traditional strength of the common law method in case-by-case development of the law in response to societal change. Its basic principle may be discerned in many common law authorities.[476]

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474 See further, Private International Law: Choice of Law in Tort and Delict (1984) Law Com Working Paper No 87. In this paper the Law Commission noted the impossibility of devising exceptions to a general rule. First, the exceptions are either too wide so that they displace the general rule in cases it should not, or too narrow so that it does not apply where, normatively, it should. Second, a case could fall into several exceptions and the only way to resolve this would be to develop an order of priority which would be hard to justify and would require complex statutory rules. Third, the way around this, making the exceptions non-mandatory, essentially makes the rule the same as an open textured rule.

475 *Cie Tunisieene de Navigation SA V Cie d'Armement Maritime SA* [1971] AC 572, at 603 to 604 by Lord Diplock.

476 See eg *Raiffeisen Zentralbank v Five Star Trading LLC* [2001] EWCA Civ 68, [2001] QB 825, at 840 by Mance LJ; *Macmillan Inc v Bishopsgate Investment Trust plc* (No 3) [1996] 1 WLR 387 at 407 by Auld LJ.

6.53 At the same time, we have significant reservations in saying that an open-textured approach amounts to a "rule". Our reservations are best illustrated when considering how an open-textured rule might be placed on a statutory footing. As the Law Commission of England and Wales and the Scottish Law Commission said in their joint working paper in 1984, "a statutory rule would…have to contain more than a simple assertion that the [most appropriate law] was to apply: such a rule would merely be a statement of the desired result and would provide no guidance about how to reach it".[477]

6.54 A bare open-textured "rule" thus does not provide any of the certainty that one would and should expect from any legal rule. It was on this basis that the bare open-textured rule was considered jointly by the Law Commissions in 1984 as "unacceptably uncertain, and unsuitable for statutory reform".[478] We consider that this observation regarding the formal design of an applicable law rule and statutory reform remains equally valid today.

6.55 We therefore next considered the technique of using a bare open-textured rule, complemented by a list of factors for courts to consider when identifying "the most appropriate law". This is the approach of the US Second Restatement discussed above.

6.56 However, even in the US, the approach of the Second Restatement is acknowledged as being an incomplete solution to the rigidity of a simple fixed rule. This is why work was begun on the Third Restatement of the Conflicts of Law, which is expected to bring "greater predictability to choice of law by providing more determinate rules, rather than open-ended balancing".[479]

6.57 We further note that the Law Commissions jointly in 1984 also considered the technique of using a "list of factors, stated in general terms […] which would be taken into account when identifying the proper law in any particular case".[480] The Commissions concluded, however, that this:

> would not of itself be sufficient to introduce into the basic rule an acceptable degree of certainty. It would be desirable to arrange the factors to be taken into account in order of importance, but we can see no principled way in which this could be done, since the importance which should be attached to each factor would differ from case to case. Further, a mere catalogue of the factors present would not necessarily point in the direction of any particular system of law.[481]

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477 Private International Law: Choice of Law in Tort and Delict (1984) Law Com Working Paper No 87, para 4.132.

478 Private International Law: Choice of Law in Tort and Delict (1984) Law Com Working Paper No 87, para 4.133.

479 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.

480 Private International Law: Choice of Law in Tort and Delict (1984) Law Com Working Paper No 87, para 4.134.

481 Private International Law: Choice of Law in Tort and Delict (1984) Law Com Working Paper No 87, para 4.135.

6.58 Again, these same arguments on the formal design of an applicable law rule apply in the present context.

6.59 We finally considered the supranational approach as a different solution entirely: that is, developing a set of special rules that would apply in the event that a court in England and Wales is faced with a case with an omniterritorial element. This would involve a significant departure from the prevailing multilateralist approach. However, its potential for openly using substantive rules of decision to apply in the cross-border context is a core distinguishing feature that, unlike the other approaches, would enable the courts to address not only the issues arising in private international law, but also many of the other issues arising in the wider socio-legal context. It is, for example, the only method we have identified that would allow the courts to respond in some way to the difficulties that arise from uncertainty in the substantive private law.

6.60 In essence, the supranational approach recognises that, in cases with an omniterritorial element, it is not necessarily appropriate to apply the purely domestic private law of **any** one given country. Whilst any substantive rules developed and applied by the courts of England and Wales would ultimately remain a common law decision of our courts, it would not be an application of the "ordinary" law of England and Wales that would continue to apply in a purely domestic case. Rather, it would be a special body of substantive rules of decision that apply only in private law cases in which the law of no country would be appropriate to apply to resolve the issue in dispute, and the law of every country would be appropriate to apply to resolve the issue in dispute.

6.61 We have provisionally concluded that developing supranational rules is the best solution in the face of the challenges posed to the question of "applicable law" by truly omniterritorial phenomena.

6.62 We consider next what those special rules might be. To do so, we look first at the underlying aims of the exercise.

Reframing the objective: "resolve a dispute with an omniterritorial element" rather than "identify *the* applicable law"

6.63 If we proceed on the basis that the multilateralist approach cannot satisfactorily accommodate truly omniterritorial cases and that the supranational approach would be more appropriate, it is important to note that the approach would differ entirely. There is no longer any question of needing to identify **the** applicable law. Rather, in relevant circumstances, instead of **the** applicable law, there would be a special body of substantive law that the courts of England and Wales would develop and apply in cases with an omniterritorial element.

6.64 We no longer therefore use the term "applicable law" to refer to the approach we propose the courts should take. This is because we consider that the term "applicable law" contains an inherent implication of the multilateralist approach. It tends to suggest that the objective must necessarily be identifying **the** – as in, the one and only – (national) applicable law. As we have explained, we do not think this is helpful in the omniterritorial context

6.65 Moreover, we think these inherent implications in the term "applicable law" obscure the extent to which the common law, in line with its distinct legal method, does in fact recognise a more flexible approach, such as we have seen above with Lord Wright's statements for the Privy Council in *Mount Albert BC v Australasian Temperance and General Mutual Life Assurance Society Ltd*.[482] In resolving the conflict of laws arising in that case in relation to certain contractual obligations, Lord Wright said that the law governing those obligations was a matter "to be ascertained in each case on a consideration of the terms of the contract, the situation of the parties and generally on all the surrounding factors".[483]

6.66 Similar judicial statements include that of Lord Justice Mance (as he then was) in *Raiffeisen Zentralbank v Five Star Trading LLC*:

> 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;[484]

and that of Lord Nicholls in *Kuwait Airways Corp v Iraqi Airways (Nos 4 and 5*):

> Conflict of laws jurisprudence is concerned essentially with the just disposal of proceedings having a foreign element.[485]

6.67 These statements are, strictly speaking, *obiter*[486] and, to some extent, have been taken out of the wider context in which they had been expressed. However, in the context of the unprecedented challenges to private international law posed by omniterritoriality, they are a helpful reminder of the unique legal context in which conflict of laws rules in England and Wales have been – and will be – developed and applied in practice.

6.68 From this, we take particular note of the reference to conflict of laws, at least from a common law perspective, as being a search for appropriate **principles** in **particular situations** involving conflicts of laws. This perspective is quite distinct from the jurisdiction-selecting approach that forces a choice of a single legal system amongst many others as **the** applicable law found, for example, in the Rome Regulations on **the law** applicable to contractual and non-contractual obligations. Considered within the context of the challenge that omniterritoriality poses to private international law, the implications of this distinction become clearer.

6.69 We have seen that, in this context, an applicable law rule points to a vast range of legal systems, each in equal measure, which makes it difficult to decide which should be preferred over all the others as the clear "winner". By contrast, if the essential objective is conceptualised instead as resolving a dispute that engages a conflict of

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482 [1938] AC 224. See above at para 5.111.

483 *Mount Albert BC v Australasian Temperance and General Mutual Life Assurance Society* Ltd [1938] AC 224 at 240 by Lord Wright.

484 *Raiffeisen Zentralbank v Five Star Trading LLC* [2001] EWCA Civ 68, [27]; [2001] QB 825 at 841 by Mance LJ.

485 *Kuwait Airways Corp v Iraqi Airways (Nos 4 and 5*) [2002] 2 AC 883 at [15] by Lord Nicholls.

486 This means that the statements do not fall within the part of the judgment that is binding legal authority.

laws or, in the words of Lord Nicholls, the "just disposal of proceedings with a foreign element", there is less pressure – if any at all – to identify **the** applicable law. Nor would this approach preclude the application of a single appliable law in circumstances where it would be just and appropriate to do so.

6.70 The next question for us therefore seems to be determining what amounts to a "just disposal of proceedings with an omniterritorial element" and to where "the search for appropriate principles to meet [omniterritorial] situations"[487] leads. That is, what should the "special rules" be? To consider this, we return to the basic objectives of and justifications for the conflict of laws discussed above.

What are the underlying objectives of the conflict of laws?

6.71 We said above there are different views as to why courts apply the law of another state, including: comity with other states; giving effect to vested rights; giving effect to parties' legitimate expectations; recognising party autonomy; promoting decisional harmony; and providing legal certainty.[488]

6.72 We noted that the most recent edition of *Dicey* states 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".[489]

6.73 Indeed, the legitimate expectations and understanding of the parties appears to have a general application across the modern conflict of laws. Unlike, for example, party autonomy, it is a principle that finds general application across the conflict of laws considered as a whole. For our purposes, it is particularly worth noting that the legitimate expectations and understandings of the parties have been invoked in matters relating to property[490] as well as contract.[491] Unlike arguments based on comity, vested rights, and decisional harmony, it is a context-neutral statement that can be applied in the territorial context of nation states and the omniterritorial context of DLT alike.

6.74 The legitimate expectations and understandings of the parties to a transaction or occurrence have certain overlaps with other context-neutral considerations such as certainty, predictability, and party autonomy. As we have said above, it is premature to expect certainty and predictability in the substantive law as it might apply in relation to

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487 *Raiffeisen Zentralbank v Five Star Trading LLC* [2001] EWCA Civ 68 at [27], [2001] QB 825 at 841 by Mance LJ.

488 See ch 5 para 5.46.

489 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 1-006. See also R Neuner, "Policy considerations in the Conflict of Laws" (1942) 20 *Canadian Bar Review* 482; E Cheatham and W L M Reese, "Choice of the Applicable Law" (1952) 52 *Columbia Law Review* 971.

490 In *Glencore International AG v Metro Trading International Inc (No.2)* [2001] 1 All ER (Comm) 103; [2001] 1 Lloyd's Rep. 284 at [28] the court referred to the primary justification for the *lex situs* as "accord[ing] with the natural expectations of reasonable men and facilitat[ing] business".

491 See *Mount Albert BC v Australasian Temperance and General Mutual Life Assurance Society* [1938] AC 224, 240 (PC) by Lord Wright; *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277, 299 (PC).

DLT and other omniterritorial phenomena. Any attempt to provide the same kind of certainty as is provided by the law in other areas could only be unrealistic.

6.75 That said, the legitimate expectations of the parties, party autonomy, legal certainty and predictability might all be seen as representing different stages of the cycle of legal development. This is particularly true in the common law context of incremental development of the law on a case-by-case basis. To illustrate:

(1) A novel opportunity presents itself due, for example, to new and emerging technologies. Parties take the opportunity to benefit from these technologies and begin to use it in their commercial affairs and transactions. In the absence of precedents, they design the relevant transactions and agreements in a way that they think is best for their commercial purposes. This reflects the liberal values of individual agency and self-determination that underpin party autonomy in private international law.

(2) The practice develops and more and more parties begin to adopt this method of arranging their transactions. What began as a private commercial decision on the part of just a few parties now begins to emerge as a wider custom that reflects expectations and understandings more broadly across a commercial sector.

(3) Disputes start to come before the courts. Provided the parties' expectations and understandings reflect legitimate aims, comply with any mandatory norms, and do not offend public policy, the courts are likely to recognise and uphold these legitimate expectations and understandings. Such expectations and understandings begin therefore to become part of the law.

(4) Over time, the law continues to develop and refine its response to the practice to a higher degree of specificity. Eventually, a body of law emerges that provides the certainty and predictability that parties generally seek from the law when planning their affairs. Their initial legitimate expectations and understandings are now reflected in the legal rules on which they may rely with a high degree of certainty.

6.76 There is already evidence of this cycle in the context of crypto-tokens. Born from the Bitcoin philosophy which was originally anarchic, anti-state, and anti-law in nature, DLT and crypto-tokens are now used by a huge range of users and use cases – from consumers to financial institutions, from so called "cryptocurrencies" to collateral for secured transactions. This in turn has led to recognition of such assets and related transactions by states and courts. At least in this jurisdiction, there can be no serious doubt that a court would refuse to uphold a contract entered into on a permissioned platform run by a financial institution merely on the basis that it involved DLT, and we have already discussed the fact that courts have recognised crypto-tokens as property. Given these legal trends, some parties are now going even further and are expressly incorporating into their contractual agreements clauses pursuant to which the relevant parties agree that certain decision-making functions will be outsourced to and determined by clearly defined coding protocols.

6.77 There is therefore ample evidence of what began as individual agency and self-determination being recognised by the courts, leading to legitimate expectations

among users that their transactions and agreements will be protected in law. Although, as we have seen, such legal recognition is not by any means uniform across all legal systems, users may still take some degree of comfort that their legitimate expectations and understandings will not be considered wholly irrelevant in the eyes of the law. We provisionally conclude therefore that one of the broader objectives of the supranational rules should be to recognise, and potentially give effect to, the legitimate expectations and understandings of the parties.

"Code is law" or "code as a legally relevant fact"?

6.78 From this, we have given particular consideration to what the legitimate expectations and understandings of those who participate in wholly decentralised DLT networks might be.

6.79 We have seen above that participants will generally enter into transactions in the wholly decentralised context on the basis of a white paper and the protocol determining how the smart contracts will operate. Such actors typically each act unilaterally when joining the protocol and on the same basic footing: they are all individuals who have voluntarily chosen to participate in the network. To the extent that it might be said that there is any agreement formed between them when participating in the network, this could only really be said to be on a peer-to-peer basis, rather than a business-consumer relationship (as is prevalent in the crypto-exchange environment) when they interact with the DLT network.

6.80 According to the Bitcoin ideal of pure decentralisation, the protocol and smart contracts operate without external influence such that "code is law". Stakeholders have told us that many participants genuinely subscribe to these ideals, generally eschewing all types of centralised authority, including the courts of law. Such participants take full responsibility for all interaction with the network as a direct participant, rather than participating through an intermediary. They are also (at least in theory) prepared to accept the burden of any losses that may be incurred as a consequence of how the coding protocols have been programmed to operate. Whilst, of course, there may be some participants who ultimately do seek redress from the courts where the operation of protocol has been to their detriment, this does not mean that the other participants agree that the courts should interfere with how the protocol is programmed to operate.

6.81 These issues are well illustrated in *Tulip Trading v Bitcoin Association for BSV*.[492] In this case, the claimant was a participant in the Bitcoin system and had lost access to their crypto-tokens following a hack of their private keys. Rather than accept these losses as flowing from how the protocol is intended to operate (that is, that the private key is the sole means by which participants can transfer their bitcoins), they brought proceedings against the core software developers of the source code underpinning the relevant bitcoin networks (the defendants). The claimant's case was that, as persons with considerable control over such source code, the defendants could reverse the effects of the hack by implementing a software "patch" that would either transfer the assets to a new public address with new private keys, or create replacement private keys for the identified public addresses. They further alleged that

[492] [2022] EWHC 667 (Ch).

the software developers owed to the claimant fiduciary duties and duties in tort to implement the software "patch" and help them recover the crypto-tokens.

6.82 Mrs Justice Falk (as she then was) ruled that there was no serious issue to be tried in relation to the existence of fiduciary duties or duties in tort. The decision on the existence of any fiduciary duty on the pleaded facts was subsequently reversed by the Court of Appeal. However, some of the considerations that Mrs Justice Falk had taken into account are worth recounting here. She noted that:

> … some users may not agree that a system change …, contrary to their understanding of how the system is intended to operate, accords with their interests, … The fact that the [defendants] may be preparing to make a system change to accommodate loss of access to private keys … does not mean that any such change, whether a general one or specific to [the claimant], can be imposed on others.
>
> Further, acceding to [the claimant's] demands could expose the Defendants to risk on their own account. Apart from the potential difficulty … just mentioned about the general expectations of other users, more specifically a rival claimant to the bitcoin in issue in this case could have a legitimate complaint against the Defendants, a complaint which would not necessarily be brought in the English courts, and against which they would not be protected. [493]

6.83 Thus, Mrs Justice Falk considered the potential impact on other participants ("users") in the DLT network if the defendants implemented the requested software patch, noting that implementing such a patch would be contrary to participants' expectations of the system and, therefore, potentially contrary to their interests. Mrs Justice Falk further noted that, although by no means determinative of this point, the claimant had not sought to join as parties any third parties who have asserted rival claims, but "rather has reached its own conclusion that those claims are not seriously credible". [494]

6.84 Irrespective of the legal position in relation to the substantive law on fiduciary duties, for our purposes we think that these broader concerns as to the legitimate expectations and understandings of the participant of a DLT network reflect a well-founded consideration in the conflict of laws.

6.85 At the same time, we also recognise that such a position may appear to bear similarities with the ideologies of "code is law" and a "*lex cryptographia*" discussed in paragraphs 6.27 to 6.29 above. We think it is important to confirm expressly that we do not consider that "code is law" nor that code could or should ever displace the broader societal function and role of the law. Nor do we consider that the operation of the coding protocols, as programmed, should never be disturbed or altered by operation of the law.

6.86 We do, however, think there is a justifiable case for acknowledging that the operation of the code according to the rules set out in the DLT protocol should be recognised as at least an element of the legitimate expectations and understandings amongst the

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493 *Tulip Trading v Bitcoin Association for BSV* [2022] EWHC 667 (Ch) at [77] to [78] and [83] by Falk J.

494 [2022] EWHC 667 (Ch) at [80] and fn 3.

participants in a DLT network as to how that network is to operate. We provisionally think that these coding protocols could be taken into account by the courts as a legally significant and relevant fact that reflects the parties' legitimate expectations and understandings. Moreover, we do not consider this would be any radical proposition; to the contrary, the law already accommodates such legally relevant facts as a factor to take into account when resolving an issue before the courts. Below, we look at situations in which a court has applied its own domestic law, which has in turn allowed it to look to another "law" or set of rules/assumptions to assist it in determining an outcome.

6.87 One example of this is Article 17 of the Rome II Regulation on non-contractual obligations. This provides that, when assessing the liability of a defendant to a claim in tort or delict, "account shall be taken" of the rules of safety and conduct that were in force at the place and time of the event giving rise to the liability "as a matter of fact and insofar as is appropriate". Such rules of safety and conduct might include, for example, the emergency protocols in force in a place of employment, or the speed limits in force around a particular locality. Where a defendant has allegedly breached a non-contractual obligation, Article 17 provides a legal mechanism for such rules to be taken into account when assessing the defendant's liability.

6.88 Another example is ways in which "non-state law" is treated by the law. Non-state law can be understood as law or comparable binding norms other than the law of a country.[495] Examples of non-state law include religious laws, such as Sharia (Islamic law) or Halakha (Jewish law); [496] the law of a state that is not recognised under international law, such as a failed state; [497] or international principles or rules, such as the UNIDROIT Principles of International Commercial Contracts.[498] Non-state law has been recognised by national courts across jurisdictions to greater and lesser extents.[499] International agreements, such as the Hague Principles on Choice of Law in International Commercial Contracts, also provide for the recognition of non-state law.[500]

6.89 A good illustration of how the courts of England and Wales have treated non-state law is *Halpern v Halpern (Nos 1 and 2)*.[501] In this case, the Court of Appeal considered an application for summary judgment to enforce an alleged compromise of a Beth Din

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495 A Mills, *Party Autonomy in Private International Law* (2018) Ch 10; Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins on the Conflict of Laws* (16th ed 2022) para 32-075.

496 For example, *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd* [2004] EWCA Civ 19, [2004] 1 WLR 1784; *Halpern v Halpern (Nos 1 and 2)* [2007] EWCA Civ 291, [2008] QB 195; *Dubai Islamic Bank PJSC Energy Holding BSC* [2013] EWHC 3186 (Comm).

497 *Hesperides Hotels v Aegean Turkish Holidays* [1978] QB 205, 218; *Upright v Mercury Business Machines Co* (1961) 13 AD 2d 36, 38 (App Div NY); A Mills, *Party Autonomy in Private International Law* (2018) p 498 to 499.

498 A Mills, *Party Autonomy in Private International Law* (2018) p 491.

499 French courts may apply non-state law to govern arbitration agreements. See further A Mills, *Party Autonomy in Private International Law* (2018) p 279.

500 The Hague Principles on Choice of Law in International Commercial Contracts 2015. See further A Mills, *Party Autonomy in Private International Law* (2018) p 504.

501 In *Halpern v Halpern (Nos 1 and 2)* [2007] EWCA Civ 291 [2008] 195, the Court of Appeal found the applicable law to be English law but considered that Jewish law could be used as an aid to interpretation.

arbitration and considered the extent to which parties may choose Halakha (Jewish law) as the law applicable to a contractual obligation under the general rule in the Rome Convention that such obligations are governed by the law chosen by the parties.

6.90 The Court of Appeal ruled the parties could not choose Halakha under the Rome Convention, because the law governing a contractual obligation under the conflict of laws must be the law of a state. From this, the law governing the contractual obligation in question was found to be the law of England and Wales. Nevertheless, the Court of Appeal held that the relevant principles of Halakha could be used as an aid to interpreting the contract as part of the wider contractual framework. Thus, in *Halpern*, the courts were not "applying" Halakha as the law governing a contract. Rather, the courts gave effect, to the extent possible under the existing legal principles, to the intention of the parties that Halakha should apply to their agreement.

6.91 A further example that shows the receptiveness of the courts to considering non-state law is where they have taken into account the law of unrecognised states. In *Hesperides Hotels v Aegean Turkish Holidays,*[502] the court said that they could recognise the acts or laws of a body with effective control of territory, even if that control was not recognised by the UK government. The New York courts have reached a similar position, and justified it on the basis that "the acts of such a de facto government may affect private rights and obligations".[503] Professor Alex Mills has suggested that the courts in these cases have taken account the law of unrecognised states on the basis that it would be unjust to deprive those de facto living under such legal systems of the rights that they have accrued under those systems.[504]

6.92 It is important to recognise that courts, by taking non-state law into account when disposing of a case, do not "apply" that non-state law as the applicable law. Rather, the court is applying the law of a state (that is, English and Welsh law or New York law), which may direct or permit the court to take certain non-state law factors into account.

6.93 Finally, a historical example is the old *lex mercatoria*, or "law merchant". As we discussed in the call for evidence,[505] this was not a body of "law" as such, but the mercantile customs developed by the medieval merchants in the chief trading and port towns of Europe. The common law was initially hostile to these customs, which could only be enforced in special merchant courts. Gradually, however, the common law courts began to give effect to the law merchant, leading to an assimilation into the

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502 *Hesperides Hotels v Aegean Turkish Holidays* [1978] QB 205, 218 reversed on other grounds [1979] AC 508.

503 *Upright v Mercury Business Machines Co* (1961) 13 AD 2d 36, 38 (App Div NY).

504 A Mills, *Party Autonomy in Private International Law* (2018) p 498 to 499.

505 Digital assets and ETDs in private international law: which court, which law? (2024) Law Commission Call for Evidence, Ch 6.

common law by the 1600s. By the late 19th century, the common law authorities were placed on a statutory footing.[506]

6.94 Although much of the old law merchant has since been incorporated into the private laws of different countries, often by instruments of public international law, commercial customs remain an important part of the modern legal landscape. For example, the International Commercial Terms, often known as "Incoterms", published by the International Chamber of Commerce, are a set of standards and definitions used in international and domestic contracts for the delivery of goods. Although they do not have the force of law, they are recognised by UN Commission on International Trade Law as the "global standard for the interpretation of the most common terms in foreign trade".[507] The Incoterms can thus be used in commercial contracts to help define the parties' obligations and liabilities and will be recognised by the courts as part of the parties' contract.

6.95 We do not suggest that the coding protocols underpinning a DLT network are equivalent to a body of religious laws, the laws of unrecognised states, a set of international principles (such as the UNIDROIT Principles of International Commercial Contracts), or international commercial customs (such as the International Commercial Terms). However, we draw on these as examples in a more general sense of being essentially standards and norms once wholly outside the concept of law as an expression of the sovereign authority of a nation state.

6.96 From this, we think the protocols of wholly decentralised applications of DLT may well be another set of norms originally outside the scope of law as an expression of sovereign authority, but which may well in time become recognised by such law as a relevant factor when determining the rights and obligations of those who voluntary accept and act in accordance with those norms. We accept that this might not yet be obvious, given that the technology itself is a mere 15 years in the making.

6.97 We provisionally conclude that the courts of England and Wales could appropriately take into account the legitimate expectations and understandings of the parties when developing and applying any supranational rules to apply in cases with a truly omniterritorial element. We consider that, in this context, these legitimate expectations and understandings will include the coding protocols and any relevant blockchain conventions in relation to a permissionless DLT network.[508] We therefore suggest that these protocols could be a legally relevant fact to be taken into account in the "just disposal of proceedings with an omniterritorial element".

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506 See P S Atiyah, *The Rise and Fall of the Freedom of Contract* (1979) p 135 onwards. The reception of the law merchant into the common law was furthermore a long and gradual process, see for example *Clerke v Martin* (1702) 2 Ld Raym 757, 1 Salk 129.

507 https://iccwbo.org/business-solutions/incoterms-rules/.

508 For conventions surrounding settlement finality on a blockchain, see 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* (2025).

OUR PROVISIONAL PROPOSAL: THE JUST DISPOSAL OF PROCEEDINGS WITH AN OMNITERRITORIAL ELEMENT

6.98 We explored above the challenges that omniterritoriality poses to the conflict of laws by reference to smart (legal) contracts allegedly entered into by participants in a wholly decentralised DeFi protocol, and property claims arising in relation to crypto-tokens in a wholly decentralised environment. We demonstrated that, in such cases that exhibit truly omniterritorial features, the multilateralist approach to the conflict of laws – whether in a fixed rule framed in terms of a territorial location, or in an open-textured "rule", or a combination of both – does not provide a satisfactory solution as to how to resolve the conflicts that may exist between private law systems. We provisionally concluded that application of even the most flexible of multilateralist rules, namely, the open-textured "rule", would result in the arbitrary application of a law that has only a very tenuous connection to the parties and their dispute.

6.99 We considered that such outcomes would neither further the traditional objectives of the multilateralist approach to the conflict of laws, nor deliver overall the benefits associated with this approach. We therefore looked more broadly beyond the multilateralist approach, bearing in mind that there are many different ways in which to resolve the conflicts that may exist between different private law systems. We identified the supranational approach with its use of special substantive rules that apply in non-domestic contexts as the most suitable alternative.

6.100 We noted that the supranational approach has a core benefit in that it does not require courts to identify **the** – in the sense of, one and only – applicable law. It would further enable our courts to address some of the issues that arise from the fact that the both the technology itself and the substantive law that applies to the technology remains in development. The supranational approach would permit a degree of substantive rule-making for cases where, given the truly omniterritorial features of the case, it would not be appropriate to apply the law of any one particular (territorially constrained) sovereign state. We observed that the flexibility of such approach has a natural affinity with the common law method of incremental case-by-case development.

6.101 Accordingly, we provisionally concluded that the courts of England and Wales, when faced with cases in which the degree of decentralisation is such that the application of a multilateralist rule would lead to arbitrary results, should not be constrained by the jurisdiction-selecting method of the multilateralist approach and be required to identify "**the** applicable law". Rather, adopting the supranational approach would enable the courts to focus, instead, on the fundamental issue with which the conflict of laws – and, indeed, the law more broadly – is ultimately concerned: the just disposal of proceedings.

6.102 We therefore considered what the just disposal of proceedings in cases with truly omniterritorial features might look like under the supranational approach to the conflict of laws. We identified several core considerations that can be generalised as factors to take into account. At the forefront of these was the core emphasis of the modern conflict of laws on the reasonable and legitimate expectations of the parties. We provisionally concluded that, in this context, these expectations will likely extend to how DLT networks are to operate, which may require the courts to consider and weigh

up in the balance the coding protocols and the conventional understandings amongst users of those networks when disposing of the case.

6.103 In sum, we think the courts of England and Wales could take a special approach to cases involving decentralised phenomena where the omniterritorial element is such that it would not be appropriate to disregard any relevant blockchain conventions or coding protocols, and/or it would not be appropriate to apply the law of any one single country, including the law of the forum. In this, we recognise the force of the argument that, under the current approach, the only feasible options under the relevant multilateralist rules are a law identified on the basis of a very tenuous connection or a default to the law of the forum for want of any other alternative.[509] From this, we consider our provisional proposal to be a further alternative, one that aligns better with the parties and their legitimate and reasonable expectations, before recourse to the law of the forum.

6.104 We think it is instructive to remember that the traditional discipline of private international law is at once a body of domestic law and a body of international law that developed as a response to the specific challenges that arise from conflicts of national laws where human affairs traversed national borders. As has been traditionally said in the law of England and Wales: the conflict of laws is a body of domestic law that applies when there is a "foreign element" to a dispute before the courts.[510] From this, we have said that, although private international law is a domestic body of law, it is a unique body of domestic law insofar as it only ever applies in the international context.

6.105 By incremental development, we might say that our proposed supranational approach to omniterritorial phenomena would be at once a body of domestic law and a body of supranational law that applies when there is an "omniterritorial element" to a dispute before the courts. Omniterritoriality presents challenges in the wider international law context that are distinct to those arising in the transnational or cross-border situations that the multilateralist approach to the conflict of laws sought to address. A different approach is therefore required.

6.106 From this, the core point is that, in cases with a "foreign" and "omniterritorial" element alike, it would not be appropriate for the courts to treat that dispute in the same way as the purely domestic dispute. At the same time, we think that the result of having taking a different approach, tailored to the "foreign" or "omniterritorial" features of the case, should still be subject to the public policy and mandatory rules of the law of England and Wales. As with the case with the three-step process of the multilateralist approach to the conflict of laws, we think any decision by the courts in the just disposal of proceedings with an omniterritorial element should remain subject to the mandatory rules and public policy of the law of England and Wales.

6.107 Below, we consider briefly how our provisional proposals and conclusions might apply in the two different contexts we identified above: (i) the existence of contractual obligations arising from participation in a wholly decentralised DeFi protocol; and (i) competing property claims to a crypto-token held within a wholly decentralised DLT

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509 See A Dickinson, "Cryptocurrencies and the Conflict of Laws" in D Fox and S Green (eds), *Cryptocurrencies in Public and Private Law* (2019).

510 *Kuwait Airways Corp v Iraqi Airways (Nos 4 and 5*) [2002] 2 AC 883 at [15] by Lord Nicholls.

system. Given the fact-sensitive nature of the parties' legitimate expectations, we do no more than indicate what, on the basis of our understanding of the way in which the technology is used, might be appropriate. It would be for the parties themselves in any particular case to provide evidence and make submissions as to what should be taken into account, including in relation to their legitimate expectations and understandings as to how the code is intended to operate.

6.108 We do this by reference to an example case study.

Our proposals in practice

Example case study

Frank (based in Austria) is a participant in a fully decentralised DeFi protocol. The protocol is made available on a public, open-source basis. The website interface includes a white paper and a description of the protocol to explain how crypto-token trades will be matched amongst participants. There is no information on the legal persons behind the DeFi protocol, where they might be based, nor a choice of law provision.

The smart contract programme matches Frank's account with another participant's, resulting in an automatic execution of a transfer of crypto-tokens between their accounts in accordance with the protocol.

Frank is dissatisfied with the outcomes and seeks to recover the crypto-tokens. He hires a specialist investigator to trace the crypto-tokens, and traces them to Dan (based in England and Wales) as the person in control of the assets.[511]

Frank sues Dan in the courts of England and Wales, as Dan's "home court".

Frank asserts a property claim to the crypto-tokens in Dan's public address.

Dan denies the claim, asserting in his defence that he acquired good title to the crypto-tokens under the contract concluded in the DeFi protocol.

Erin (based in France) is joined as a second defendant as a person with control over one of the crypto-tokens with a paper copy of the private key. Erin denies the claim and asserts a security interest in the crypto-token.

Frank replies that no contract was concluded in the DeFi protocol, so Dan did not acquire title. In consequence, Erin's security interest is not valid and/or has not been perfected.

Applicable law is in dispute for all claims.

[511] Potentially with the assistance of a free-standing information order under the new power we propose in Chapter 4.

6.109 This example raises questions concerning both the existence of a contract between participants of a DeFi protocol, and competing property claims to the same crypto-token.

The just disposal of proceedings and the existence of contractual obligations arising (or not) in a DeFi protocol

6.110 As we have seen above, the core question arising in the context of DeFi is what law should apply to determine whether a contract has been concluded between participants in a genuinely decentralised DeFi protocol. What law should apply to determine the existence of a contract between Frank and Dan?

6.111 In these circumstances, the relevant rule under the existing multilateralist approach for the law applicable to the existence and validity of a contract is Article 10(1). This refers the issue to the law that applies to the substance of the obligation under Articles 3 and 4. The relevant provision is Article 4(4), which is an open-textured "catch all provision" that refers the issue to the law of the place with which the contract is "most closely connected".

6.112 On the facts of the example case, the possible connecting factors could include:

(1) The place where the majority of mining nodes are located.[512]

(2) The place where the website with the white paper is registered.

(3) The place where the majority of the platform's contributor team who maintain the smart contract are located.[513]

(4) The place where the creator of the DeFi protocol is domiciled.[514]

(5) The location of the last auditor of the relevant pool.

6.113 Under the existing approach, the law that would determine whether a contract was concluded between Frank and Dan would be the law of the place with which the putative contract is "most closely connected". The court therefore must evaluate the connecting factors and determine which of these is the place with which the contract is "most closely connected". In such a situation, the exercise is effectively identifying which has the "least tenuous connection". None is ideal.

6.114 By contrast, under our proposed supranational approach, the courts of England and Wales would not need to identify **the** law with which the putative contract Dan asserts exists has its closest connection. If the level of decentralisation on the facts of the case is such that problems of omniterritoriality arise when seeking to apply Article 4(4), leading an arbitrary outcome, courts could instead adopt our supranational approach.

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512 A Dickinson, "Cryptocurrencies and the Conflict of Laws" in D Fox and S Green (eds), *Cryptocurrencies in Public and Private Law* (2019).

513 See Beefy Finance Protocol available at https://docs.beefy.finance/ecosystem/protocol.

514 See Yearn User Documents available at https://docs.yearn.fi/getting-started/intro.

6.115 In this, we propose that the courts should focus on the just disposal of the proceedings, taking into account a wide range of factors. Given the problem of omniterritoriality, the premise is that the law of no country would be appropriate to apply to resolve the issue in dispute, and the law of every country would be appropriate to apply to resolve the issue in dispute. One of the factors the court should consider is the legitimate expectations of the parties and the understandings as to how the protocol is intended to operate.

6.116 From this, we suggest that relevant factors could be:

(1) The contents of any technical "white paper"[515] or other public disclosure by the DeFi protocol provider on which a participant might have reasonably relied when joining the protocol.

(2) The principles of each of the substantive contract laws submitted by the parties as being relevant, as well as the contract law of the forum.

(3) The fact that the parties have both (voluntarily) engaged with the DeFi protocol.

(4) Any prejudice to other participants to the DeFi protocol, and the implications of potentially creating a precedent for similar disputes between other participants in this protocol.

(5) The policies that underpin contract law more broadly; such as freedom of contract, the parties' intentions, understandings, reasonable expectations as commercial actors, and the nature of the obligations to be performed.

6.117 On this basis, we think that the courts should be able to look to the content of the white paper, and any public facing website, and any other material that Frank and Dan would have had access to. This would give the courts evidence as to the basis on which they interacted with the protocol and their respective legitimate expectations and understandings in relation to their transaction. These would be considered as legally significant facts in a broader evaluation of other relevant factors to determine whether a contract has been concluded between Frank and Dan in a just disposal of proceedings with an omniterritorial element.

The just disposal of proceedings and competing property claims to a decentralised crypto-token[516]

6.118 As we have seen above, the quintessential example of a property dispute is one in which the claimant and defendant(s) are strangers who have had no prior dealings with one another. Usually, the only reason that the defendant(s) are being sued is because they happen to have in their current possession or control something that the

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[515] A white paper in this context is a document prepared by the people behind a crypto project to summarise the important information about the project. It will usually cover the project's goals, products, features, and information about the project's participants.

[516] See further, A Held, "The modern property situationship" (2024) 20(2) *Journal of Private International Law* 391; 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* (2025); A Held "Cryptoassets and Decentralised Ledgers: Does Situs Actually Matter?", in M Lehmann, A Bonomi, and S Lalani (eds) *Blockchain and Private International Law* (2023).

claimant asserts belongs to them. This is the case in our example with Frank, Dan, and Erin.

6.119 In these circumstances, the relevant rule under the multilateralist approach is the common law *lex loci rei sitae* rule. This refers to the place where the crypto-token "was" at the relevant time. Although a crypto-token has no physical location, the courts could still apply the rule, keeping the underlying objective of the multilateralist approach to the conflict of laws in mind. In this, the courts would ultimately be seeking to find some feature on the facts and issues of the case that convincingly connects the dispute to the law of a single country in clear preference to each of the other possibilities.

6.120 On the facts of the example case, the possible connecting factors could include:

(1) The place where the servers are hosted.

(2) The place where the majority of mining nodes are located.

(3) The place from where the crypto-tokens can currently be controlled, being England and Wales (where Dan is located) or France (where Erin is located).

(4) The place where the original coder has their primary residence.

(5) The place where the person who had control over the private key that authorised the transfer of the crypto-tokens was at the time of transfer (where Frank was located when the transfer was effected).

(6) The place where the person acquiring the crypto-tokens was at the time of the disputed acquisition/s (where Dan and/or Erin respectively were when they "acquired" the crypto-token or interest in the crypto-tokens).

6.121 Ultimately, there is no real reason to pick any one of these alternatives over the other: none emerge as the "clear" winner in preference to all of the others. Given the problems of omniterritoriality, there is no real basis for saying that the relevant crypto-tokens in dispute are "located" in any one place over any of the others, such that it would be appropriate to resolve the various competing property claims arising in the case to the law of that place.

6.122 Alternatively, under our proposed supranational approach, the courts of England and Wales would not need to identify **the** place where the crypto-token "was" at the relevant time. If the level of decentralisation on the facts of the case is such that problems of omniterritoriality arise when seeking to apply the *lex loci rei sitae* rule, leading an arbitrary outcome, courts could instead adopt our supranational approach.

6.123 In this, we propose that the courts should focus on the just disposal of the proceedings, taking into account a wide range of factors. Given the problem of omniterritoriality, the premise is that the law of no country would be appropriate to apply to resolve the issue/s in dispute, and the law of every country would be appropriate to apply to resolve the issue/s in dispute. One of the factors the court should consider is the legitimate expectations of the parties and the understandings as to how the protocol is intended to operate.

6.124 From this, relevant factors could be:

(1) The contents of any white paper or other public document/disclosure in relation to the DLT network.

(2) The principles of each of the substantive property laws submitted by the parties as being relevant, as well as the property law of the forum.

(3) The fact that Frank and Dan (although not Erin) have (voluntarily) participated in the DLT network.

(4) Any prejudice to Erin as a third party to the DLT network.

(5) Any prejudice to other participants to the network, and any risk or possibility of a precedent being created for subsequent property claims in this DLT network by a finding on applicable law in the present case.

(6) The effectiveness of any remedy that might be granted.

(7) The policy underpinning property law more broadly, such as certainty for third parties, clarity, commercial certainty and convenience, and the sovereign authority to grant property rights.

6.125 On this basis, we think that the courts should be able to look to the content of the white paper, and any public facing website, and any other material that Frank and Dan (and possibly Erin too) would have had access to. This would give the courts evidence as to the basis on which they interacted with the protocol and their respective legitimate expectations and understandings in relation to how crypto-token entitlements are to be distributed amongst the participants of the system. These would be considered as legally significant facts in a broader evaluation of other relevant factors to determine the property entitlements of Frank, Dan and Erin in a just disposal of proceedings with an omniterritorial element.

CONSULTATION QUESTIONS

Consultation Question 8.

6.126 We provisionally propose that, in cases where the level of decentralisation is such that omniterritoriality poses a true challenge to the premise of the multilateralist approach, seeking to identify the one “applicable law” to resolve the dispute would not result in a just disposal of the proceedings and therefore an alternative approach is required.

Do consultees agree?

Consultation Question 9.

6.127 We provisionally propose that, where the level of decentralisation is such that the multilateralist approach would not result in the just disposal of proceedings, the courts of England and Wales should consider the alternative method of the supranational approach to resolving the conflicts that may exist between different private law systems.

6.128 Under this provisional proposal:

(1) The premise of the supranational approach in these cases should be that the law of no country would be appropriate to apply to resolve the issue in dispute, and the law of every country would be appropriate to apply to resolve the issue in dispute.

(2) The overall objective of the courts in these cases should be the just disposal of the proceedings with an omniterritorial element.

(3) To achieve the just disposal of proceedings, the courts should take into account a wide range of factors. In particular, this would include considering the legitimate expectations of the parties which, in these circumstances, are likely to consider elements of the basis on which the participants have interacted with the relevant system, such as the terms of the protocol.

(4) The outcomes of the case will remain subject to the public policy and overriding mandatory rules of England and Wales.

Do consultees agree?

Mechanism for implementation

6.129 We have explained above that our provisional proposals require a significant shift from the established multilateralist approach to the conflict of laws. We have also said that the types of cases we envisage have not yet started coming before the courts.

6.130 Accordingly, our provisional view is that it is too early to propose statutory intervention on these issues. We think, however, that should these issues begin to come before the courts, it would be open to the courts to start taking these matters into consideration. As we have said, we think that the traditional strength of the common law method of case-by-case development has a natural affinity with the approach we provisionally propose.

6.131 It is also worth noting that, in any event, a statutory rule might not necessarily be the most appropriate method of implementing our provisional proposal. As a matter of formal design, our approach is comparable to the open-textured “rule”. The reasons noted above as to why such approach does not lend itself to a statutory rule are equally applicable in this context.

Consultation Question 10.

6.132 We provisionally propose that it would be premature at this point to propose statutory reform on the question of resolving a conflict of laws in the context of omniterritorial phenomena. We also provisionally propose that the approach might not necessarily be a good candidate for a statutory rule.

Do consultees agree?

Assessing the impact

Consultation Question 11.

6.133 We invite consultees' views about the potential impact of this proposal if it were implemented. Do consultees consider that this could avoid protracted disputes about applicable law, and lead to more efficient resolution of disputes? What do consultees consider the costs or risks of such an approach would be?

Consultation Question 12.

6.134 We invite consultees' views as to when relevant cases might start to come before the courts. In what circumstances might disputes arise?

Chapter 7: Electronic Trade Documents (ETDs) and section 72 of the Bills of Exchange Act 1882

7.1 In our call for evidence, we focused on three main issues that arise from the existing rules of private international law for paper trade documents and their application in the electronic context following the passage of the Electronic Trade Documents Act 2023 (ETDA 2023). These were:

(1) the provisions in the Rome I and Rome II Regulations that exclude contractual obligations arising under negotiable instruments from the scope of those Regulations;[517]

(2) the question of "where" a bill of lading is "issued" for the purpose of the Hague-Visby Rules; and

(3) the question of "where" an electronic bill of exchange is "issued" and/or "delivered" for the purposes of section 72 of the Bills of Exchange Act 1882 (BoEA 1882).

7.2 Our core question related to the merits and demerits of three possible connecting factors that we could use to "localise" the "issue" and "delivery" of an electronic bill: the reliable system; the transferor; and the transferee.

7.3 After publishing our call for evidence, we were directed to two issues to which we had not given independent consideration:

(1) how the ETDA 2023 operates in the cross-border legal context generally (rather than strictly as a private international law matter); and

(2) concerns that section 72 of the BoEA 1882 has failed to keep up with developments over the past century in the conflict of laws generally – rather than in the digital context specifically.

7.4 We addressed the first of these in some detail in our ETDs FAQ, and include only a brief summary below. The rest of this chapter focuses on section 72 of the BoEA 1882, which we provisionally propose should be reformed to bring it in line with modern approaches in private international law.

OUR ETDS IN PRIVATE INTERNATIONAL LAW: FAQS

7.5 Our ETDs FAQ addressed whether a trade document in electronic form will be upheld as valid in a dispute involving foreign parties, courts, and/or laws. We identified this as our stakeholders' primary concern about the application of the ETDA 2023 in a cross-

[517] Article 1(2)(d) of the Rome I Regulation provides that "obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such negotiable instruments arise out of their negotiable character" are excluded from the scope of the Regulation.

border legal context. This was usually expressed by stakeholders as concerns surrounding “electronic validity”. More broadly, stakeholders queried how to determine “the law governing an electronic trade document”.

7.6 We therefore gave an overview of how the ETDA 2023 interacts with both substantive law and the conflict of laws. Given that both the ETDA 2023 and UNCITRAL’s Model Law on Electronic Transferrable Records (MLETR) utilises the same legal technique of recognising functional equivalence between paper and electronic trade documents/transferrable records, the analysis in our FAQ is equally applicable to legislation in other states that implement or are inspired by the MLETR.

7.7 In the FAQ, we explained that concerns surrounding “electronic validity” or “the law governing an electronic trade document” give rise to complex issues requiring separate consideration of several distinct questions in the conflict of laws. We also explained that the ETDA 2023 supplements the existing “trade documents law” of the UK and, as such, the ETDA 2023 cannot itself be “chosen” by parties as the law to apply in the case of a dispute.

7.8 We also noted that, in a cross-border dispute arising from an electronic trade document, the relevant applicable law rules might well point to the law of a jurisdiction that does not recognise trade documents in electronic form. We said that, under the existing conflict of laws methodology, such result would not necessarily be one that would justify the disapplication of the relevant applicable law rule.

7.9 We recognised the commercial significance of any legal finding that a particular dealing in an electronic instrument is not electronically valid and expressed sympathy with our stakeholders who are concerned to avoid such an outcome. However, we also explained why attempts to manipulate our rules of private international law to avoid the cross-border legal risk that a trade document in electronic form (such as, expressing a choice of law) would not necessarily be effective in practice, nor appropriate as a matter of international law.

7.10 We said that the fact that the benefits of recognising functional equivalence between electronic and paper instruments have been secured in England and Wales through the ETDA 2023 does not necessarily mean that all other states will or must make a similar choice. Where states decline to pass similar legislation, or simply need more time to enact such legislation, this does not necessarily create an issue that the law of England and Wales can seek to remedy unilaterally through its rules of private international law. It would be a very significant political decision at the international level for one state to adopt rules of private international law that ultimately seek to cut across or undermine the sovereign prerogatives of other states to determine the content of their domestic laws. In any event, such attempts might not always be effective in practice.

7.11 Ultimately, we said, the only way to eliminate any cross-border legal risk is for all states to implement laws that recognise trade documents in electronic form. We also noted, however, that litigation in this area of international trade is rare due to the strength of commercial custom and trust among market participants, and suggested that digitalisation is unlikely to change this fundamental feature of the market.

7.12 We refer consultees who are interested in these issues to read our ETDs FAQ. In it, we explain more fully the limits of what private international law can do in relation to such cross-border legal risk, such that we do not make general proposals in this consultation paper in relation to ETDs in private international law.

The work of the Hague Conference on Private International Law and the UNCITRAL MLETR

7.13 Since the publication of our ETDs FAQ, there have been developments at the international level that may provide an opportunity to reconsider these issues in the appropriate international setting of the Hague Conference on Private International Law (HCCH).

7.14 We were active delegates in work of the HCCH on Digital Tokens in 2024. On the basis of evidence from our stakeholders, we raised the private international law issues arising from the ETDA 2023 and MLETR as a use case that merited the Experts' Group's attention.

7.15 In March 2025, the HCCH Council of General Affairs and Policy mandated "the establishment of an [Experts' Group] to study the [private international law] issues raised by digital tokens".[518] This is to include, as a separate workstream, consideration of private international law issues arising from the MLETR, which is to be done in coordination with UNCITRAL.[519] This work will be of direct relevance for electronic trade documents under the ETDA 2023.

7.16 We will continue to be active in this work of the HCCH. In particular, we will highlight the issues we had identified in our ETDs FAQ that: (i) there is room for the existing conflict of laws rules to point to a jurisdiction that does not recognise trade documents in electronic form, thereby undermining the effect of the ETDA 2023 and other MLETR-inspired legislation; but (ii) under the existing conflicts of laws method, it would be exceptionally difficult to justify the disapplication of such rules.

7.17 As we said in our ETDs FAQ, it is not for a single state to adopt unilaterally a "pro-electronic trade documents" policy in its conflict of laws rules, as this would effectively cut across the sovereign prerogative of other states to adopt and implement such policy. However, the HCCH, as an intergovernmental organisation whose unique mandate is "the progressive unification of the rules of private international law",[520] is the natural and appropriate forum to debate, negotiate, and ideally agree such policy multilaterally with other Member States.

7.18 The rest of this chapter addresses the specific question of section 72 of the Bills of Exchange Act 1882.

IS SECTION 72 OF THE BILLS OF EXCHANGE ACT 1882 OUT OF DATE?

7.19 Section 72 of the BoEA 1882 is a conflict of laws provision that identifies the law applicable to particular issues arising in connection with bills of exchange and

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518 https://assets.hcch.net/docs/1828feba-831f-4f6f-a95e-6286e0495057.pdf para 15.

519 https://assets.hcch.net/docs/8aad1b4d-c3a7-46b5-99c4-1ee589115685.pdf para 18.

520 Article 1, Statute of the Hague Conference on Private International Law 1955.

promissory notes. The provision was drafted almost 150 years ago and, as we explain below, has not kept up with significant developments in the conflict of laws since then. Many stakeholders have expressed dissatisfaction with section 72 in its current form, for a variety of reasons.

7.20 It is important to emphasise that the most serious criticisms of section 72 are independent of the issues of private international law arising in digital and decentralised contexts that we were initially asked to consider in our project. That said, the reforms we provisionally propose in this chapter will have the effect of resolving many of the challenges we identified in our call for evidence. In particular, the nature of our provisional proposals mean that it would no longer be necessary to identify "where" an electronic bill of exchange is "issued" and/or "delivered" for the purposes of section 72 of the BoEA 1882.

BILLS OF EXCHANGE, CHEQUES, AND PROMISSORY NOTES

7.21 Bills of exchange, cheques and promissory notes are negotiable instruments embodying a claim to the payment of a sum of money. They have their origins in 14th century Florentine banking practices[521] that developed to accommodate the commercial need to finance transactions unconstrained by state borders or interests.[522] They also sought to mitigate the risks associated with travelling long distances or across seas carrying money in order to do trade in different countries.

7.22 Although there is often emphasis on a negotiable instrument itself as an object (for example, a paper or electronic document) or their characteristic legal features (such as transferability or negotiability), it is not always helpful to conceptualise negotiable instruments for what they "are". It is sometimes more productive to consider how they function commercially as a means of facilitating cross-border payments and the provision of credit amongst parties to the instrument according to several well-defined mechanisms.

7.23 From this, negotiable instruments give rise to a very particular configuration of legal rights and obligations among a range of various parties. Our focus is these legal rights and obligations, rather than the instrument itself.

7.24 Bills of exchange, cheques, and promissory notes differ from one another in the precise configuration of legal rights and obligations they entail. We focus on the bill of exchange, as an understanding of the bill of exchange provides the foundation for both cheques and promissory notes.

Bills of exchange: the paradigm negotiable instrument

7.25 The BoEA 1882 defines a bill of exchange as:

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521 For a comprehensive account, see the four-part article by W S Holdsworth, "Origins and Early History of Negotiable Instruments" (1915) 31 *Law Quarterly Review* 12; (1915) 31 *Law Quarterly Review* 173; (1915) 31 *Law Quarterly Review* 376; (1916) 32 *Law Quarterly Review* 20. The Florentine statutes are discussed in Part II.

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

> 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.[523]

7.26 To understand this definition, it is helpful to understand both (i) the parties to a bill of exchange and their roles in the transaction; and (ii) each of the parties' legal rights and obligations. We explain each below.

The parties to a bill of exchange

7.27 There are several core parties to a bill of exchange and it is the nature of their interrelated relationships, rights, and obligations that characterise a bill of exchange. It is therefore important to understand each of the parties' roles and functions.

The drawer

7.28 The drawer is the person who creates or "draws" the bill of exchange by writing down the order to another party, known as the "drawee", to pay a third party a specified sum of money.

7.29 The drawer's order addressed to the drawee to pay is one of the most characteristic aspects of a bill of exchange. The form of the order is crucial to the recognition of what is otherwise just a bit of writing on a piece of paper (or digital equivalent) as bringing into existence the characteristic configuration of legal rights, obligations, and relationships that are synonymous with the term "bill of exchange".

The drawee

7.30 The drawee is the person to whom the drawer's order to pay is addressed. The drawee may or may not accept the drawer's order to pay. Whether the drawee accepts or refuses the drawer's order to pay has significant legal consequences for all parties to the bill. We return to this in more detail below.

7.31 If the drawer does accept the drawer's order to pay, they become known as the "acceptor". Although the acceptor and drawee are the same person as a matter of fact, the legal obligations of a drawee and acceptor differ considerably. We therefore consider the acceptor's legal position separately below.

The payee

7.32 The payee is the third party to whom the drawee is ordered to pay the sum of money. Typically, the drawer owes money to the payee or is providing them with credit.

7.33 The drawer may specify that the payment must be made to the specified payee and no one else. Such bills are described as "non-negotiable".[524] Alternatively, the drawer may specify that the payment must be made "to the order" of the specified payee. This means that the specified payee may themselves subsequently specify another party

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523 Bills of Exchange Act 1882, s 3.

524 Bills of Exchange Act 1882, s 8(1).

as the person to whom the drawee is ordered to pay. Again, the payee may owe that party money or is providing them with credit.

7.34 Bills of exchange that allow the payee specified by the drawer to order the drawee to pay another party are known as “to order” or “negotiable” bills. The “to order” aspect reflects the fact that the specified payee may make a new order to the drawee regarding the party whom the drawee should pay.

7.35 The process by which the payee of a “to order” bill nominates the person to whom the payment should be made is called an “indorsement” or a “negotiation” of the bill. This involves the payee writing on the instrument the name of the person to whom payment should be made, signing it, and handing the instrument over to that person.

7.36 The decision by a payee of a “to order” bill to negotiate it has significant legal consequences. We return to these below. For now, it is sufficient to know that if a payee does negotiate the bill, they become an “indorser”. Again, although the payee and (first) indorser will be the same person as a matter of fact, the legal obligations and rights of a payee and indorser differ considerably. We therefore consider the indorser’s legal position separately below.

7.37 In the process of indorsement/negotiation, the person to whom the indorser specifies that payment should be made (and to whom they hand over the instrument) is known as the “indorsee”. We consider the legal position of the indorsee below.

7.38 Finally, a bill of exchange may be made payable “to bearer”. This means that the drawee is ordered to make the payment to the person who has possession (or the electronic equivalent of possession) of the bill. Bearer instruments are extremely rare in modern commercial practice, owing to security concerns.

The first holder

7.39 Once the bill has been drawn up by the drawer, the drawer signs it and gives it to the “first holder”. This is usually the payee specified on the face of the bill and, as such, the first holder/payee will be entitled to present the bill to the drawee.

7.40 “Presentment” of the bill will in the first instance be to obtain the drawee’s consent to accept the drawer’s order to pay. This is known as a “presentment for acceptance”. As we have said above, if the drawee consents to accept the drawer’s order, they become an acceptor. If the drawee refuses their consent to comply with the order of the drawer, the bill will be “dishonoured by non-acceptance”.

7.41 It is worth noting that the payee may well have negotiated a bill of exchange before it has been presented to the drawee for acceptance.

The legal relationships arising from a bill of exchange

7.42 At the core of a bill of exchange lies a primary contractual obligation to pay the sum of money specified on the face of the bill by the drawer. Ultimately, the “sole objective” of

a bill of exchange is to secure payment of this sum of money to the person entitled to payment.[525]

7.43 This primary obligation to pay is imposed by the drawer on the drawee as a written order. On the face of the bill, the order is unilateral, and there is nothing to show why the drawee should comply.

7.44 Here, it is worth remembering that bills of exchange are a means of facilitating cross-border payment or the provision of credit. As such, bills of exchange are used in the context of a far wider range of contractual and commercial arrangements. The early relationship between the drawer and drawee often was that the drawee was the drawer's agent in a foreign country with authority to disburse payments in that country to the order of the drawer.[526] This web of commercial relationships is useful to keep in mind when considering the parties' legal rights and obligations.

The acceptor's obligations

7.45 We said above that the drawee specified on the bill may or may not accept the drawer's order. If, upon a presentment of the bill for acceptance, the drawee indicates their consent to accept the drawer's order, the bill has been "accepted" and the drawee has assumed the contractual obligations of an acceptor. They are now a legal party to the bill as the "acceptor".

7.46 By accepting the bill, the acceptor undertakes to pay the person entitled to payment according to the "tenor" (that is, the terms) of the instrument. Payment is usually upon a second presentment of the bill for payment. The acceptor is in this way the person with "primary liability" on the bill.

7.47 We said above that if a drawer declines to become the acceptor (by refusing to accept the drawer's order), the bill is "dishonoured by non-acceptance". If the drawer has become an acceptor, but fails to pay upon presentation for payment, the bill is "dishonoured by non-payment". Dishonour of the bill, either for non-acceptance or non-payment, has significant legal consequences for all other parties to the bill.

The drawer's obligations

7.48 There is nothing on the bill that shows it, but by drawing the bill, the drawer is not merely writing an order to the drawee. The drawer is also undertaking their own contractual obligations on the bill.

7.49 The essence of this undertaking is that, should the drawee either (i) refuse to accept the drawer's order to pay; or (ii), having accepted the order, fail to pay, the drawer themself will pay the sum of money to the person entitled to payment.

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525 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 33-355.

526 See generally W S Holdsworth, "Origins and Early History of Negotiable Instruments" (1915) 31 *Law Quarterly Review* 12; (1915) 31 *Law Quarterly Review* 173; (1915) 31 *Law Quarterly Review* 376; (1916) 32 *Law Quarterly Review* 20.

7.50 The drawer is, therefore, a person with "secondary liability" on the bill. If the bill is dishonoured (either for non-acceptance or non-payment), the drawer becomes liable to pay.

The indorser's obligations

7.51 We said above that a payee may be granted the power to make a new order to the drawee, and specify that payment should be made to another party. If the payee does this, they become known as the "indorser" and the party to whom the drawee should pay is known as an "indorsee".

7.52 Again, there is nothing on the bill that shows this, but by "indorsing" the bill with a new written order that payment should be made to the indorsee, the indorser also undertakes contractual obligations.

7.53 The indorser's obligations are the same as the drawer's: they undertake that, if the bill is dishonoured (either for non-acceptance or non-payment), they, the indorser, will pay.

The holder

7.54 In broad terms, the person entitled to present the bill, either for acceptance or for payment, is the present "holder" of the bill. The first holder is usually the payee to whom the drawer gives the bill once it has been written and signed.

7.55 If the first holder subsequently negotiates the bill, they will write the name of the indorsee (the person to whom payment should be made), sign it, and then give the bill to the indorsee. In this way, the indorsee becomes the holder.

7.56 The indorsee themselves might then also negotiate the bill to yet another party. The indorsee then becomes an indorser incurring secondary liability on the bill.

7.57 In this way, the bill might be indorsed multiple times before the present holder decides to present the bill, either for acceptance or for payment. If the bill is dishonoured in either case, the holder has recourse against the drawer and each of the indorsers for payment of the sum.

7.58 It is important to recognise that, as with the drawer and indorsees, the holder will have become a party to the bill pursuant to a commercial transaction "external" to the bill itself. Often, they will be accepting the bill of exchange as a means of payment or as a means of credit. Although this external transaction is independent of the internal framework of liabilities and rights of the parties to the bill, the question of whether the holder "gave value" for the bill (that is, they gave contractual consideration in exchange for the bill in the external transaction) has important consequences for the holder's rights under the bill as against the acceptor and indorsers.[527]

The "several laws" theory

7.59 It should now be apparent why, for all the focus that is often placed on the instrument itself, a bill of exchange is better thought of in legal terms as a complex network of

[527] Bills of Exchange Act 1882, ss 27 to 30.

contractual relationships, rights, and obligations. The primary obligation is on the part of the acceptor to pay according to the tenor of the instrument upon its due presentation by the holder. Surrounding this primary obligation is a web of secondary rights and obligations conferred or imposed upon secondary parties to the bill.

7.60 The characteristic configuration of contractual rights, obligations, and liabilities that "makes a bill of exchange a bill of exchange", broadly are:

(1) The primary obligation of the acceptor, having indicated their consent to comply with the order of the drawer, to pay the holder upon presentment for payment.

(2) The right of the holder of the bill to be paid upon presentment.

(3) The secondary liability of the drawer to pay the holder the sum if the bill is dishonoured.

(4) The secondary liability of each indorser to pay the holder the sum if the bill is dishonoured.

7.61 For the purposes of a conflict of laws analysis, it is critical to recognise that these rights, obligations, and liabilities arise under separate and independent contracts on the bill. This is known as the "several laws" theory, which recognises that, whilst there is only one bill of exchange and one primary obligation to pay, each negotiation of the bill (that is, a new order to the drawee in relation to whom they should pay) constitutes a new and independent contract. Bills of exchange therefore embody a "congeries of contracts dependent on one original contract, which always has a certain effect on the others".[528]

7.62 The main consequence of the "several laws" theory in the conflict of laws is that **each** contract on the bill is subject to its own conflict of laws analysis. It is therefore helpful to keep in mind the main contracts on a bill of exchange: the drawer's contract, the acceptor's contract, and the contracts of each indorser. Each of these contracts is essentially entered into with the current holder of the instrument. The obligations arising under each contract may be governed by different applicable laws.

BILLS OF EXCHANGE, CHEQUES, AND PROMISSORY NOTES IN THE CONFLICT OF LAWS

7.63 Obligations arising from negotiable instruments are contractual in nature. However, in most systems of private international law, the applicable law rules for obligations arising from negotiable instruments are not typically found under the general rules for contractual obligations.

7.64 For example, Article 1(2)(d) of the Rome I Regulation on the law applicable to contractual obligations expressly excludes from the scope of the Regulation:

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[528] Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 33-355.

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. [529]

7.65 The Drafting Group explained the reason for the exclusion. In its view, the provisions of the predecessor Rome Convention "were not suited to the regulation of obligations of this kind. Their inclusion would have involved rather complicated special rules".[530] As we will see below, this proposition has been challenged.

7.66 Another reason why the Rome Convention may have excluded obligations arising from bills of exchange from its scope might have been the Geneva Convention for the Settlement of Certain Conflicts of Laws in connection with Bills of Exchange and Promissory Notes 1930 ("Geneva Conflicts Convention"). The Geneva Conflicts Convention is an international body of private international law that unifies the conflict of laws rules of various states in relation to bills of exchange and promissory notes. Many of the Member States of the EU have long been parties to the Geneva Conflicts Convention.

7.67 The UK is not a party to the Geneva Conflicts Convention. In the UK, the conflict of laws provisions for bills of exchange and promissory notes were codified some fifty years prior in section 72 of the BoEA 1882. Section 72 sets out various conflict of laws rules that apply in cases where a bill drawn in one country is negotiated, accepted, or payable in another.

7.68 Although section 72 is drafted in respect of bills of exchange, it applies also to promissory notes (with certain modifications).[531] We continue to concentrate our discussion on bills of exchange as representative of the legal position, whilst recognising that these two instruments have slightly different commercial features.

WHAT DOES SECTION 72 OF THE BILLS OF EXCHANGE ACT 1882 COVER?

7.69 Section 72 contains the conflict of laws rules for certain contractual issues that may arise from dealings in bills of exchange. It does not address all contractual issues that may arise from dealings in bills of exchange. Nor does it address property issues (that is, those of priority between different indorsees), which are traditionally resolved by reference to the *lex situs* at the relevant time.

7.70 As set out above, a bill of exchange is characterised by a very particular framework of contractual rights, liabilities, and obligations. Section 72 provides rules to identify what law applies to the rights, duties, and liabilities of the relevant parties in cross-border circumstances. Four contractual issues are covered:

(1) The formal requirements for the conclusion of contracts on the bill.

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529 Article 1(2)(c) of the Rome II Regulation is drafted in identical terms but to exclude non-contractual obligations.

530 The Giuliano and Lagarde Report on the Rome Convention [1980] Official Journal C 282 of 31.10.1980 p 11, para 4.

531 Bills of Exchange Act 1882, ss 73 and 89(1).

(2) The interpretation of the contracts on a bill (and the mutual rights and obligations of the contracting parties).

(3) The duties of the holder in respect of presentation and upon dishonour.

(4) […][532]

(5) The due date of payment.

7.71 Some of these rules, such as those for formal requirements and interpretation, apply to each individual contract on the bill. Others, notably the duties of the holder and the due date of payment, have a more limited scope. We consider each briefly in turn.

Section 72(1): validity as regards requisites in form

7.72 Section 72(1) concerns "requisites in form", otherwise known as "formalities" or "formal validity". Section 72(1) identifies the law that determines two questions of formal validity in relation to bills of exchange: (i) the formal validity of the bill itself; and (ii) the formal validity of supervening contracts, such as acceptance and indorsement.

7.73 Before considering these, it is helpful to consider formal validity generally.

What is formal validity?

7.74 At common law, many contracts can be made quite informally, with no writing or other form necessary. Other contracts are subject to certain formalities: requirements that must be followed to give legal effect to the agreement or transaction. For example, the law might require that certain types of contracts be recorded "in writing" or in a "document", and are "signed" by the relevant party or parties; or that the document must comply with requirements specifying the size of the lettering and the colour of the print and paper.[533] These requirements are the formalities or, in the language of section 72(1), the "requisites in form".

7.75 For present purposes, it is convenient to think of formalities as relating to whether a contract has been validly concluded in the eyes of the law. Owing to the "several laws" theory, each contract on a bill of exchange will be analysed on its own terms to determine whether it has been validly concluded.

Formal validity of the bill

7.76 The formal validity of a bill of exchange itself goes to whether the drawer's contract on the bill has been validly concluded. That is, has the drawer legally bound themself to pay the holder if the bill is dishonoured; and, by doing so, brought into play the characteristic configuration of rights, obligations, and liabilities that are synonymous with the term "bill of exchange"?

7.77 Many of the formality requirements for the drawer's contract relate to what that drawer must write on the instrument. To understand these better, it is useful to look at the various substantive provisions on formal validity to see how they differ. For this

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[532] Section 72(4) was repealed by the Administration of Justice Act 1977.

[533] Regulations made or to be made by the Secretary of State under the Consumer Credit Act 1974 s 60; see H Beale (ed), *Chitty on Contracts* (35th ed 2023) para 42-082.

purpose, we look at the BoEA 1882 and the 1930 Geneva Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes ("Geneva Uniform Law for Bills").

7.78 Section 3 of the BoEA 1882 and Articles 1 and 2 of the Geneva Uniform Law for Bills both reflect the same basic commercial feature of the instrument – an unconditional order of one person to another person to pay fixed sum of money to a third person. One core difference between the BoEA 1882 and the Geneva Uniform Law on Bills is that the term "bill of exchange" must be included in the body of the instrument for it to be valid as a bill of exchange under the Geneva Uniform Law for Bills. No such requirement is prescribed by the BoEA 1882.

Heidi is the drawer. She draws and signs a (paper) bill of exchange in London that orders Ivan, a German resident, to pay the sum of money to the order of Judy. Ivan is therefore the drawee and Judy is the payee.

Heidi then hands the bill to Judy in France who takes it as the first holder. Judy negotiates the bill by signing and delivering it in Scotland to Ken.

Heidi does not include the term "bill of exchange" on the bill. Is it formally valid?

7.79 The conflict of laws rules on the formal requisites of a bill of exchange determine, essentially, whether the drawer's contract on a particular bill of exchange is subject to section 3 of the BoEA 1882, or to Articles 1 and 2 of the Geneva Uniform Law for Bills, or to the provision on formal validity of some other legal system.[534]

7.80 Conflict of laws rules in themselves may differ between countries. In England and Wales, the first part of section 72(1) provides a general rule for the formal validity of the bill, followed by a proviso. Here we are concerned primarily with the general rule, but return to the proviso below.[535]

> 72(1) The validity of a bill as regards requisites in form is determined by **the law of the place of issue** […] (emphasis added)
>
> Provided that—
>
> (a) Where a bill is issued out[side] of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue:
>
> (b) Where a bill, issued out[side] of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of

[534] Other matters falling within the scope of formal validity are thought to be whether a bill is conditional or unconditional, and the effect on the chain of indorsements where an indorsement is procured by fraud or is signed by an agent without indicating that it is being signed as such.

[535] From para 7.96 below.

enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.

7.81 "Issue" and "delivery" in this context are both defined in section 2 of the BoEA 1882:

> "Issue" means the first delivery of a bill or note, complete in form to a person who takes it as a holder;

and:

> "Delivery" means transfer of possession, actual or constructive, from one person to another.[536]

7.82 If the formal validity of Heidi's bill were in issue before a court in England and Wales, section 72(1) of the BoEA 1882 directs the court to look to the place of issue. In turn, this is the place where the bill was first delivered. In our scenario above, the bill was issued when it was delivered to Judy as the first holder.

Heidi delivered the bill to Judy in France, where the Geneva Uniform Law for Bills is in force. Articles 1 and 2 of the Geneva Uniform Law for Bills provides that the term "bill of exchange" must be included on the bill, otherwise the bill is invalid.

The court in England and Wales will conclude that the bill is formally invalid.

7.83 It is worth comparing section 72(1) of the Bills of Exchange Act 1882 with Article 3 of the Geneva Conflicts for Bills Convention. Article 3 of the Geneva Conflicts for Bills Convention also provides a general rule for formal validity (which prescribes the law of the place where the contract was signed), with two provisos which are not relevant for our purposes.

7.84 If the formal validity of Heidi's bill were put in issue before a French court, Article 3 of the Geneva Conflicts for Bills Convention will direct the French court to look to the place where the bill was signed.

Heidi signed the bill in London, where the Bills of Exchange Act 1882 is in force. Section 3 of the Bills of Exchange Act 1882 does not require the term "bill of exchange" to be included on the bill.

The French court will conclude that the bill is formally valid.

[536] In our Call for Evidence, we were primarily concerned with how to interpret the requirement of "delivering possession" in the electronic context.

Formal validity of supervening contracts

7.85 Questions relating to the formal validity of a supervening contract relate to the acceptor's contract and each of the indorsers's contracts. Each of these contracts will be subjected to its own conflict of laws analysis.

7.86 As an example, we consider here the contract of indorsement. The formal validity of a contract of indorsement concerns whether the indorser's contract transferring the rights of a holder from the indorser to indorsee has been validly concluded. The issue at stake is whether the indorsee has become a lawful holder and is as such: obliged to comply with the rules on presentation; entitled to present the bill for payment to the acceptor; and entitled to sue the drawer or any indorser for payment if the bill is dishonoured.

7.87 Again, the BoEA 1882 and the Geneva Uniform Law Convention differ on the formal requirements of an indorsement.[537] The key difference is whether the indorsement must be written and signed on the bill itself (required by the BoEA 1882 Act), or whether an indorsement may be written and signed on a slip affixed to the bill (as permitted by the Geneva Uniform Law Convention).

Judy negotiates the bill by indorsing and signing on a slip affixed to the bill and delivering both bill and slip to Ken. Both signature and delivery occur in Scotland.

Is the negotiation formally valid such that Ken is now the holder of the bill?

7.88 If the formal validity of the indorsement were put in issue before the courts of England and Wales, the second part of section 72(1) of the 1882 Act provides:

> the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance supra protest, is determined by **the law of the place where such contract was made**. (emphasis added)

7.89 Under the conflict of laws rules of England and Wales, the question of whether an indorsement written and signed on a slip affixed to the bill, rather than the bill itself, is valid therefore depends on the law of the place where the indorsement was completed by delivery.

The contract was made in Scotland, since Judy delivered the bill and slip to Ken in Scotland.

In Scotland, the Bills of Exchange Act 1882 applies.

The courts of England and Wales will conclude the indorsement is invalid.

[537] Section 32 of the Bills of Exchange Act 1882 and Article 13 of the Geneva Uniform Law for Bills.

7.90 The same conclusion would be reached by a court applying Article 3 of the Geneva Conflicts for Bills Convention. Although the connecting factor used in Article 3 for formal validity is the place of signature, Judy both signed and delivered the bill and slip in Scotland. The BoEA 1882 would therefore apply.

Formal validity and the "several laws theory"

7.91 The conflict of laws is traditionally said to be blind to the consequences of applying the law to which a conflict of laws rule points. The conclusion that a contract or other legal transaction has failed to comply with the formalities is a question on which the conflict of laws is traditionally neutral. From the perspective of the law of negotiable instruments, however, the interrelated nature of the contracts on a bill of exchange means that, where one contract on a bill of exchange is found to be invalid, questions arise as to what this means for all the others.

7.92 To illustrate, we return to our examples above.

> Heidi's drawing of the bill might be invalid or valid, depending on whether the BoEA 1882 or the Geneva Conflicts for Bills Convention applies.
>
> Judy's negotiation of the bill to Ken was invalid under both the BoEA 1882 and the Geneva Conflicts for Bills Convention.
>
> Assume that Ken then negotiates the bill by signing and delivering it to Laura in Spain. Ken complies with the formal requisites for a valid indorsement by the law of England and Wales.
>
> No one has had any reason to think that Judy's indorsement to Ken is invalid, nor that Heidi's bill might be invalid.
>
> Has Ken validly negotiated the bill such that Laura now the holder?

7.93 There are several ways to think about this question.

(1) If Heidi's drawing of the bill is invalid, one could say that no bill of exchange ever came into existence. Judy never became a holder, and there was nothing Judy could negotiate to Ken, and nothing Ken could negotiate to Laura. Laura therefore cannot be a holder, because there is no bill to be a holder of.

(2) If Heidi's drawing of the bill is valid, one could say that Judy became a holder, but Ken did not because Judy failed to comply with the relevant formal requisites on her contract of indorsements. Ken therefore never had anything to negotiate to Laura, even if Ken has complied with the relevant formal requirements applicable to his contract of indorsement. Laura therefore did not become a holder, because Ken's contract is invalid.

From this, a further question might be asked:

(3) If Heidi's drawing of the bill has complied with the formal requisites applicable to her contract of drawing the bill, does it also need to comply with the formal requisites imposed by the law that applies to, say, Ken's contract of indorsement? Does the validity of Ken's indorsement require that the law applicable to his contract also recognise the bill as valid?

7.94 This is a good point at which to return to the "several laws" theory. We said above that, even though there is a single instrument and ultimately a single primary payment obligation, each contract on the instrument is treated as a separate and independent contract that is subject to its own conflict of laws analysis. This is why the contracts of drawer, acceptor, and indorser are each treated separately under section 72 of the BoEA 1882.

7.95 However, the effect of the "several laws" theory on the issue of formal validity raises particular questions due to the fact that, as a matter of commercial practice (and perhaps logic), each contract on a bill of exchange is independent. These issues have been discussed in the academic literature, and various views have been expressed. For example, it has been said that:

(1) Each indorsement on a bill of exchange is tantamount to the drawing of a new bill; there is therefore no scope for a prior failure to comply with the relevant formalities to invalidate a subsequent contract on the bill.[538]

(2) The form of the bill is "fixed" at the time of issue; there is no further requirement that the bill itself also complies with the law that determines whether the subsequent contracts of indorsement are formally valid. The basic idea is the bill "once valid, is always valid", and does not have to comply with another set of formal requirements each time the bill is negotiated.[539]

The flipside of (2) seems to be:

(3) If a bill fails to comply with the formal requisites of the law governing the formal requisites of the bill itself, it can never be valid. No subsequent indorsement on the bill could therefore be valid.[540] The basic idea is the bill, once invalid, is always invalid.

Validating provisions

7.96 It is worth at this point returning to the "proviso" contained in section 72(1) mentioned above. This is known as a "validating" provision. Validating provisions are found throughout the applicable law rules for negotiable instruments, and they address the problems that may arise when the "several laws" theory means that the formal validity of the various contracts on a bill are referred to different laws.

7.97 Many conflict of laws rules for negotiable instruments anticipate the problems that may arise when a single instrument embodies or represents several contracts that may be

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538 B Geva and S Peari, *International Negotiable Instruments* (2020) para 4.92 and fns 201 to 202.

539 B Geva and S Peari, *International Negotiable Instruments* (2020) para 4.93 and fns 205 to 206.

540 B Geva and S Peari, *International Negotiable Instruments* (2020) paras 4.83 to 4.95.

subject to different formal requirements. Section 72(1) contains two validating provisions:

> (a) Where a bill is issued out of the United Kingdom, it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue:
>
> (b) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.

7.98 The effect of the validating provisions in section 72(1) is that the courts of England and Wales will in some cases uphold the formal validity of a bill or contract on a bill that fails to comply with the requirements of the law to which the general rule in section 72(1) points. If, for example, the law of this place requires a bill to be stamped, section 72(1)(a) provides that the courts of England and Wales will not treat an unstamped foreign bill as invalid, simply because it has not been stamped.

7.99 Similarly, if a foreign bill fails to comply with the formal requisites of the place to which section 72(1) points but complies with the formal requisites imposed by section 3 of the BoEA 1882, it will be treated as valid as between all persons who enter into subsequent contracts on the bill within the United Kingdom for the purpose of enforcing payment.

7.100 Validating provisions mark a tension between, on the one hand, the "several laws" theory; and on the other, the commercial reality that the parties' trading relationships are all interrelated. Common sense intuition, arising from the fact of an instrument that passes from one party to another, further militates away from the "several laws" theory and towards the idea that there is a single instrument in law.

7.101 We return to these issues below. For now, it suffices to note that validating provisions represent a "pro formal validity" approach and seek to mitigate some of the risks that arise from the "several laws" theory, particularly those arising from referring questions of formal validity to various different laws.

Section 72(2): interpretation

7.102 Section 72(2) concerns the interpretation of the drawing, indorsement, acceptance, or acceptance of a bill. Like section 72(1), it provides a general rule for interpretation and a proviso:

> Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance supra protest of a bill, is determined by **the law of the place where such contract is made.**
>
> Provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer be interpreted according to the law of the United Kingdom. (emphasis added)

7.103 The second paragraph of section 72(2) is another proviso that addresses the complexities that arise from the "several laws" theory. An "inland bill" is effectively one

where the payer is either a UK resident or is bound to perform the payment obligation in the UK.[541]

7.104 The effect of this proviso is that the primary obligation to pay (which will be in the UK) will be interpreted according to the law of the United Kingdom. This reflects the general rule that a contract is governed by the law of the place where it will be performed (*lex loci solutionis*). We return to this further below.

7.105 Section 72(2) concerns "interpretation", but there is debate as to what this actually covers. The two main views are as follows:

(1) Under the "narrow" view,[542] "interpretation" should be read literally to mean that section 72(2) covers only the meaning and construction of the words used in the contract in question. On this view, substantive matters, such as the "effect or obligation of each contract, including, apparently, the measure of damages on dishonour, as well as questions of intrinsic validity, would all be left to be governed, independently of the statute, by the proper law of each contract".[543]

(2) Under the "wide" view, "interpretation" should be read broadly to mean that section 72(2) covers, not only the construction and interpretation of the words used in the contract, but also substantive matters or "legal effects" of the words. On this view, section 72(2) identifies also the law applicable to the "obligations of the parties as deduced from such interpretation"[544] or, put differently, "the rights of the parties *inter se* [between or among them]".[545]

7.106 The editors of *Dicey* suggest that the second "wide" approach is the better view of the law that is supported by judicial opinions.[546] However, the judicial authorities are not recent, and there is still significant debate among academic commentators.[547] We think therefore that there is genuine uncertainty as to the scope of the current provision that could usefully be clarified by a change to the provision. We discuss this further below.

Section 72(3): the duties of a holder

7.107 Section 72(3) relates to the duties of a holder:

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541 Bills of Exchange Act 1882, s 4.

542 Crawford and Falconbridge, *Banking and Bills of Exchange* (8th ed. 1986) p 1720 to 1722.

543 Above.

544 Sir M D Chalmers, *A Digest of the Law of Bills of Exchange* (9th ed 1927) p 282.

545 J M Phillips, I Higgins, R Hanke, *Byles on Bills of Exchange and Cheques* (30th ed 2019) para 25.018.

546 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 33-370.

547 See S Gleeson (eds), *Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes* (8th ed 2017) para 12-015; Crawford and Falconbridge, *Banking and Bills of Exchange* (8th ed 1986) p 1720 to 1722; I Higgins, J M Phillips, and R Hanke, *Byles on Bills of Exchange and Cheques* (30th ed 2019) para 25-018.

> The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.

7.108 Notwithstanding the way in which section 72(3) is drafted as a single statutory provision, it contains four separate conflict of laws rules:

(1) The duties of the holder with respect to presentment for acceptance […] are determined by the law of the place where the act is done;

(2) The duties of the holder with respect to presentment for payment […] are determined by the law of the place where the act is done;

(3) The necessity for or sufficiency of a protest or notice of dishonour, or otherwise, [by non-acceptance] are determined by the law of the place where […] the bill is dishonoured.

(4) The necessity for or sufficiency of a protest or notice of dishonour, or otherwise, [by non-payment] are determined by the law of the place where […] the bill is dishonoured.

7.109 Different systems of substantive law impose different obligations on the holder in relation to both types of presentment and upon dishonour. It is not necessary to consider these in any depth, but a brief overview is useful to understand better what this section covers.

7.110 In the UK, the duties of a holder with respect to presentment for acceptance are contained in section 41 of the BoEA 1882, and those with respect to presentment for payment are contained in section 45. Presentment for payment is subject to far stricter rules that prescribe, for example, how the bill is to be presented and where.

7.111 In relation to protest and notice upon dishonour, a core difference between the approach in the UK and many countries that are party to the Geneva Convention is the requirement to publicise dishonour by a formal "authentic act"[548] if the holder is to protect their rights against the drawer and indorsers. This involves a formal procedure performed by a public official, typically a notary,[549] at the place where the bill has been dishonoured.

Section 72(5): the due date

7.112 For the sake of completeness, we mention section 72(5):

> Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.

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548 Article 44 of the Geneva Convention provides "Default of acceptance or of payment must be evidence by an authentic act".

549 We were told by the Society of Scrivener Notaries that an understanding of bills of exchange and notarial protest remains a compulsory part of the academic training required for admission as a notary public and for the further qualification of scrivener notary in the UK.

7.113 Section 72(5) is relatively unproblematic. If the place of payment is not specified on the bill itself (as may be required if the Geneva Uniform Law for Bills applies), the place of payment is usually identified by reference to the acceptor.

IS SECTION 72 OF THE BILLS OF EXCHANGE ACT 1882 OUT OF DATE?

7.114 Stakeholders have criticised section 72 on the basis that it does not reflect the modern approach to the conflict of laws. This criticism is primarily directed at sections 72(1) and (2), both of which use the place where the contract on the bill of exchange is made as the connecting factor that identifies the law governing formal requisites and "interpretation". This rule is traditionally known in Latin as the *lex loci contractus* (the law of the place where the contract is made).

7.115 In our 2021 Advice to Government on Smart Legal Contracts, we identified the challenges involved when seeking to determine whether a contract has been "made" in England and Wales (albeit we discussed this in the context of a jurisdiction gateway which used the same test).[550] We considered how an offer is accepted, and generally where that acceptance is communicated to the offeror.[551] This 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.[552] By contrast, if acceptance is communicated by post, the contract is "made" in the place where the acceptance is posted.[553] These distinctions had been criticised for being impractical, artificial and arbitrary.[554]

7.116 At our digital assets practitioner roundtable in April 2024, we considered these same issues in the context of the jurisdictional gateways. Stakeholders said that, in the modern commercial environment, the place where a contract is "made" (however that may be defined) is often a matter of pure coincidence. Individuals might sign a contract while on holiday or travelling on a plane. In these cases, the place where the contract is "made" has only a very weak and coincidental connection to the courts and law of that place.

7.117 Further issues were said to arise as to how physical location should be understood where the actions taken to conclude the contract are performed by a computer without

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550 Gateway 6(a) provides a ground of international jurisdiction when the contract was "made within the jurisdiction". Gateway 6(a) has since been supplemented by amendments published in July 2022 in the 149th Practice Direction Update. The relevant change was: (4) In paragraph (6)— (a) in sub-paragraph (a), for "made within the jurisdiction" substitute "(i) made within the jurisdiction or (ii) concluded by the acceptance of an offer, which offer was received within the jurisdiction". This relieves some of the difficulties in the context of Gateway 6(a).

551 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 [72] to [73] by Roth J.

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

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

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

any human interaction; or where the act itself can be done either in multiple places or, conversely, where it is difficult to ascertain that location or IP address.

7.118 The issues we discussed in our Advice to Government on Smart Legal Contracts and at our digital assets practitioner roundtable in April 2024 remain relevant to our current discussion of sections 72(1) and (2) of the BoEA 1882.

7.119 Sections 72(1) and (2) of the BoEA 1882 thus use a connecting factor that has been independently recognised as problematic in modern private international law. It is, however, important to appreciate the nature of the criticisms that have been directed at "section 72" as being out of date.[555] In sum, the dissatisfaction is not with what the rule is, but what the rule is **not**. In modern private international law, party autonomy is widely acknowledged to be the default rule for the law applicable to contractual obligations; and modern commercial parties therefore expect to be able to select the law that will govern their contractual obligations. Section 72(2), on the face of the rule, does not allow for this.

7.120 Although there has been some debate as to what "interpretation" under section 72(2) covers, there is a significant consensus that it includes the mutual rights and obligations of the parties that arise under the contract. From this, the fact that section 72(2) does not expressly provide for party autonomy is said to be anachronistic and at odds with both the general principles of modern contract law and private international law. The criticisms directed at section 72(2) are, therefore, not directly related to the difficulties of identifying "where" a contract "is made".

7.121 Less, if any, attention is directed at section 72(1). This is not surprising, given that it reflects a conflict of laws rule "universally recognised since the Middle Ages"[556] that a contract is formally valid if the contracting parties have complied with the formalities prescribed by the law of the place of contracting.

7.122 In turn, this reflects another well-established principle in private international law traditionally known as *locus regit actum* ("the place governs the act"). This principle applies with particular force in relation to the formalities with which a person must comply when undertaking formal legal acts, such as getting married or writing a will. It is important to emphasise at the outset that, for such issues, party autonomy is not recognised in private international law. This is, in part, a recognition that formality requirements are at the substantive level a mandatory form of law from which parties cannot "opt out".

7.123 At the policy level, there is no criticism that section 72(1) is out of date; at least in relation to the broader proposition that parties must comply with the formalities prescribed by the law if they wish to give legal effect to their intentions. We recognise, however, that the application of the principle to contractual matters arising in the modern digital and decentralised environments leads to a result where the law of a place with only tenuous or fortuitous connections with the contract is identified as the

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555 For example, eg S Gleeson (ed), *Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes* (8th ed 2017) para 12-002 to 12-004; B Geva and S Peari, *International Negotiable Instruments* (2020) paras 6.07 to 6.09 and 7.07 to 7.08.

556 See Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 32-156.

applicable law. As we will see below, this is part of a far broader issue in private international law relating to the law applicable to formal requisites for legal acts and transactions.

7.124 We therefore consider there is a case to be made for reform to both sections 72(1) and 72(2) of the BoEA 1882. We adopt a two-stage approach to examine the issues further:

(1) First, we consider in more detail:

(a) the principle of party autonomy and the law applicable to contractual obligations, as relevant to section 72(2); and

(b) the *lex loci contractus* rule and the law applicable to the formal validity of a contract, as relevant to section 72(1).

(2) Second, we consider whether there are any further factors unique to negotiable instruments law that we ought to consider, given the view that contractual obligations arising from negotiable instruments "require rather complicated special rules".[557]

7.125 Finally, we emphasise that sections 72(1) and (2) of the BoEA 1882 are underpinned by different policy considerations. Section 72(2) concerns the obligations that the parties voluntarily intend to assume and the rights they voluntarily intend to confer upon one another by entering into a contract. Section 72(1) concerns the requirements that the law imposes for certain legal acts and with which the parties must comply to give legal effect to their transactions.

7.126 To put it another way:

(1) section 72(2) concerns the relationship between the two contracting parties vis-à-vis each other;

(2) section 72(1) concerns the relationship between the two contracting parties vis-à-vis the sovereign authority to prescribe formal requirements for certain types of legal transactions.

7.127 Given our broader emphasis on the policy underpinning private international law over fictions of geographical location, we repeat that it is of utmost importance that a distinction is made between consideration of section 72(2) and section 72(1). Whilst party autonomy is recognised more broadly in relation to the law governing a contractual obligation, party autonomy is not recognised in relation to the law governing the formal requisites of a contract.

Section 72(2): the law applicable to contractual obligations

7.128 In modern private international law, the default rule for the law applicable to contractual obligations is the law chosen by the parties. This is seen, for example, in the default rule in Article 3(1) of the Rome I Regulation on the law applicable to

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[557] The Giuliano and Lagarde Report on the Rome Convention [1980] Official Journal C 282 of 31.10.1980 p 11, para 4.

contractual obligations. Recital 11 of the Regulation refers to the right of parties to choose the applicable law as a "cornerstone" of conflict of laws rules in matters of contractual obligations.

7.129 Although party autonomy in matters relating to contractual obligations is well established in nearly all systems of private international law, this reflects a distinct contemporary approach that has emerged in the last century or so.[558] In England and Wales, the general presumption prevailing even in the 19th century was that parties intended their contracts to be governed by the law of the place where the contract was to be performed (*lex loci solutionis*). Although by the late 19th century, courts were prepared to accept that an express choice of law by the parties could displace that presumption,[559] many cases even in the 20th century continued to exhibit the (minority) view that an express choice of law was merely one factor to be taken into account when identifying the applicable law.[560]

7.130 Ultimately, however, the principle of party autonomy in contract became "firmly entrenched" in England and Wales at the highest levels of authority. In the 1970 House of Lords case of *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd*, Lord Reid said:

> Parties are entitled to agree what is to be the proper law of their contract … There have been from time to time suggestions that parties ought not to be so entitled, but in my view there is no doubt that they are entitled to make such an agreement, and I see no good reason why, subject it may be to some limitations, they should not be so entitled.[561]

7.131 It is now a "fundamental principle of the English rule of conflict of laws that intention is the general test of what law is to apply" to a contractual obligation.[562] An express choice of law has been said to be "conclusive" of the law governing a contractual obligation.[563]

7.132 In other jurisdictions, the principle of party autonomy gained a more qualified acceptance. In some jurisdictions, choices of law are limited to those which have some connection with the contract and choices of law are limited to cases that properly engage the conflict of laws (that is, the contracting parties are based in different countries or the terms of the contract or the facts surrounding its performance traverse national borders).

7.133 Party autonomy has thus become a core feature of the private international law of contract, and it has more recently slowly been extending beyond that original

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558 See generally A Mills, *Party Autonomy in Private International Law* (2018).

559 *Jacobs v Crédit Lyonnais* (1884) 12 QBD 589, 600.

560 See Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 32-066 onwards. The editors cite Westlake Ch 12.

561 *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd* [1970] AC 583 at 603 by Lord Reid.

562 *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 at 299 (PC).

563 *R. v International Trustee, etc* [1937] AC 500 at 529 by Lord Atkin. See also Lord Wright, *Legal Essays and Addresses*, p 164; *Tzortzis v Monark Line A/B* [1968] 1 WLR 406 at 411 by Lord Denning.

application.[564] The Rome II Regulation on the law applicable to non-contractual obligations allows limited scope for the parties to choose the applicable law. In light of 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"[565] of modern private international law, even amounting to a "rule of customary law".[566]

7.134 However, such wider trend does not render the principle of party autonomy immune from critical analysis.[567] As we have seen in relation to the law applicable to the formal validity of a contract, there are significant limitations to the principle of party autonomy, even in matters relating to contract.

7.135 Against this general background, however, section 72(2) of the BoEA 1882 is certainly anachronistic. There does not seem to be any articulated reason why, in modern private international law, a contractual obligation voluntarily assumed should continue to be governed by the law of the place where the contract was made.

7.136 To the contrary, it has been said that much of the debate surrounding the precise scope of section 72(2) (discussed above at paras 7.105 to 7.106) has arisen due to a reluctance to apply that rule and refer the substantive obligations of parties to a bill of exchange to the law of the place where the contract is made. Professors Benjamin Geva and Sagi Peari have said that "the controversy is …arguably result-driven, with each position holder fearing the outcome of accepting the opposite position". Thus:

> … those who adhere to the broad meaning of 'interpretation' fear the vacuum that would result from the lack of any [Bills of Exchange Act 1882] provision addressing a choice of law rule for the legal effect of an obligation …proponents of the narrow meaning of 'interpretation' are dissatisfied with the choice of law rule assigned under the [Bills of Exchange Act 1882] to the contracts of primary parties … rather they prefer the ... place of payment.[568]

7.137 All in all, we think there is an arguable case for reform to section 72(2). We therefore consider whether there are any additional factors that arise from the nature of negotiable instruments law below.

Section 72(1): the law applicable to the formal requisites of a contract

7.138 As we said above, section 72(1) reflects a contractual rule of universal recognition since the Middle Ages and which underpins both the Rome I Regulation and the

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564 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.

565 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).

566 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.

567 See generally, A Mills, *Party Autonomy in Private International Law* (2018).

568 B Geva and S Peari, *International Negotiable Instruments* (2020) para 4.64.

common law rules on the law applicable to the formal validity of a contract.[569] In turn, these rules on formal validity in the context of contracts can be seen as a contractual expression of a broader rule traditionally known as the *locus regit actum* (the place governs the act). The *locus regit actum* rule also applies more broadly, such as in relation to the formal validity of wills,[570] deeds, marriages, and other formal legal acts and transactions.

7.139 The basic principle that "the place governs the act" has been said to be justified on grounds of tradition, authority, as well as obvious justice and convenience. There is no objection to this general proposition. In the commercial context, however, it has long been recognised that the place of contracting is often uncertain and fortuitous. These difficulties are further compounded in the digital environment, where contracting parties are frequently based in different countries, and documents are received, signed, and delivered in electronic form.

7.140 As a result of these difficulties, an alternative rule has come to be recognised for the law applicable to the formal requisites of a contract. This alternative rule provides that a contract can be treated as formally valid if the contracting parties have complied with the formalities prescribed by the law that governs the substance of the contract. Put another way, this approach holds that the law that applies to the rights and obligations arising under the contract will also apply to the formal requisites of the contract. This general approach can be seen in other areas of the law, such as the formal validity of a matrimonial property agreement.[571]

7.141 Another trend has emerged in relation to the applicable law rules for the formal requisites of a legal act. Unlike section 72(1) of the BoEA 1882, which provides a fixed applicable law rule with a single connecting factor, many of the more recent applicable law rules for the formal validity of a legal act provide a list of various different laws, only one of which needs to be satisfied in order for the formal validity of the legal act to be upheld.

7.142 Article 11 of the Rome I Regulation is a good example of both these newer approaches. Article 11(1) provides that, where the contracting parties are in the same country at the time when the contract is concluded, the contract will be formally valid if it complies with either the formal requirements of the law which governs its substance under the Regulation, or of the law of the country where it is concluded.

7.143 Article 11(2), however, goes further in cases where the contracting parties (or their agents) are in different countries at the time when the contract is concluded. In such cases, the contract will be formally valid if it complies with the formal requirements of no fewer than five alternatives (using a combination of the factors):

(1) the law that governs the substance of the contract;

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569 The Giuliano and Lagarde Report on the Rome Convention [1980] Official Journal C 282 of 31.10.1980 p 30; fn 583.

570 eg Sections 1 and 2 of the Wills Act 1963.

571 See eg Council Regulation implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (EU) 2016/1103, Official Journal L 183, 8.7.2016, p 1–29, Art 25.

(2) the law of **either** of the countries where **either** of the parties (or their agents) is present at the time when the contract was concluded; or

(3) the law of the country where **either** of the parties had their habitual residence at the time when the contract was concluded.

7.144 This "menu" approach is also apparent in other areas of the law of England and Wales, and in relation to even earlier developments in the globalisation of social and economic life. Section 1 of the Wills Act 1963 on the law applicable to the formal validity of a will provides several different connecting factors, the combination of which provides for no fewer than seven different options, or eight for immovable property.[572] Only one of these needs to be met for the formal validity of the will to be upheld.

7.145 These developments all suggest that modern private international law in relation to the formal validity of a legal act has developed considerably since the late 19th century when section 72(1) of the BoEA 1882 was enacted. Against this backdrop, section 72(1), with its use of a single connecting factor in favour of a place that has long been recognised as fortuitous, seems incongruous.

7.146 From this, we think there is an arguable case for reform to section 72(1). We therefore consider whether there are any additional factors that arise from the nature of negotiable instruments law below.

Are obligations arising from bills of exchange "special"?

7.147 Obligations arising from bills of exchange, cheques, and promissory notes are excluded from the Rome Regulations. We explained that the Drafting Group had taken the view that the provisions of the predecessor Rome Convention "were not suited to the regulation of obligations of this kind. Their inclusion would have involved rather complicated special rules".[573]

7.148 This raises the question as to whether negotiable instruments law raises additional considerations that may negate the preliminary conclusions we have reached above as to an arguable case for reform.

7.149 The issue is considered comprehensively by Professors Benjamin Geva and Sagi Peari in their *International Negotiable Instruments*,[574] which is the leading – and only – modern academic treatise on international negotiable instruments.[575] Their central thesis is a "challenge [to] the common view" that obligations arising from negotiable instruments should be excluded from the "ordinary choice of law analysis". Professors

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572 Wills Act 1963, ss 1 and 2 provide for: (i) the place where the will was executed; (ii) the place where the testator had his domicile, either at the time of execution or at the time of their death; (iii) the place where the testator was habitually resident, either at the time of execution or at the time of their death; (iv) the place where the testator had their nationality, either at the time of execution or at the time of their death; and (v) with respect to immovable property, the place where the property is situated.

573 The Giuliano and Lagarde Report on the Rome Convention [1980] Official Journal C 282 of 31.10.1980 p 11, para 4.

574 B Geva and S Peari, *International Negotiable Instruments* (2020).

575 The monograph covers both substantive law and private international law across all three major systems of negotiable instruments around the world.

Geva and Peari acknowledge that the "internal structure of negotiable instruments law is complex"[576] and that this "creates a significant challenge for traditional contract and property doctrine and the choice of law analysis applied to them".[577] However, they do not consider that this requires any exclusion from "the scope of general contract and property law doctrines and their subsequent exclusions from ordinary choice-of-law analysis".[578]

7.150 We appreciate that aspects of negotiable instruments law are indeed complex and require careful consideration. We explore some of these below.

An exception to the "ordinary" principles of private law?

7.151 Negotiable instruments are often referred to as an exception to the "ordinary" principles of private law.[579] As we have said above, the transferability and negotiability of personal obligations as a legal concept has a different lineage to most aspects of "ordinary" private law: they derive from mercantile custom, as developed from Florentine banking practices in the 14th century.

7.152 In centuries past, the "law merchant" provided for such radically different rights, obligations, and remedies as between a debtor and creditor that the common law courts were initially hostile to the concept of negotiability. However, from the late 1600s, the common law courts slowly began to recognise the law merchant as part of "the common law of the land".[580] By the late 19th century, the common law authorities were largely codified and set on a statutory basis. The Bills of Exchange Act 1882 is an example of this.

7.153 From this, whatever the history of the law of negotiable instruments, we do not think that in today's legal environment negotiable instruments can be considered as exceptions to the "ordinary" principles of private law. To the contrary, under the various statutes, it is clear that certain types of negotiable instruments are clearly part of the "ordinary" law of England and Wales. To suggest otherwise would be to suggest by parity of reasoning that companies under the Companies Act 2006 also are an "exception" to the types of legal person recognised under the law of England and Wales.

7.154 We do, however, recognise that negotiability as a legal characteristic does remain in one way "exceptional". We have focused our analysis in the preceding paragraphs on instruments, such as bill of exchange, cheques, promissory notes, and bills of lading, that have been provided for in statute. There do, however, remain legal tests for the recognition of new types of negotiable instruments, including that the negotiability of

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576 B Geva and S Peari, *International Negotiable Instruments* (2020) para 0.03.

577 B Geva and S Peari, *International Negotiable Instruments* (2020) para 0.04.

578 B Geva and S Peari, *International Negotiable Instruments* (2020) para 0.03.

579 See, eg W S Holdsworth, "Origins and Early History of Negotiable Instruments" (1915) 31 *Law Quarterly Review* 12, 13; A Grisoli, "Uniform Law of Bills of Exchange from the Standpoint of Anglo-American Law" (1958-1959) 33 *Tulane Law Review* 289 and W G Crauford, "Differences Between the English and the German Law Relating to Negotiable Instruments" (1957) Vol 6 Issue 3 *International & Comparative Law Quarterly* 418 to 441.

580 See J H Baker, "The Law Merchant and the Common Law Before 1700" [1979] *Cambridge Law Journal* 38 295.

an instrument can only be established by statute or by the courts but only on the basis of established mercantile usage. [581]

7.155 We recognise that there are sound policy reasons for "restricting the right of private parties to create negotiable instruments at will".[582] By extension, we also recognise that the formal requirements imposed by the law in relation to the familiar negotiable instruments are likely to be underpinned by significant policy considerations. These are considerations that we think are important to bear in mind.

A complex structure of interrelated rights and obligations.

7.156 As Professors Geva and Peari acknowledge, the internal structure of negotiable instruments law is complex. Our explanation of bills of exchange above clearly shows that, even if individual obligations arising from bills of exchange are simply contractual obligations, these are all undertaken in a complex framework of interrelated rights and obligations.

7.157 This marks a clear point of difference with both (i) an ordinary bilateral contract, such as a sale of goods; and (ii) a multilateral contract, such as the rulebook of a multilateral trading facility. In particular, the joint and several liability of the drawer and each indorsee to a holder, but only upon default of the primary liability of the acceptor, is an idiosyncratic feature of bills of exchange not found in any other type of contract, even within the sphere of negotiable instruments law.

7.158 From this, the external commercial and legal context in which negotiable instruments are used adds further complexity. We said above that, although it is not apparent from the bill itself, each contractual liability incurred on the bill forms one side of a commercial transaction external to the bill itself. Within the context of this wider transaction, a bill typically functions as the means of payment or is advanced as a means of credit.

7.159 All these factors are unique to negotiable instruments law and require careful consideration. We observe, furthermore, that they interact in different ways with the policies underpinning each of sections 72(2) and (1). We therefore consider them separately.

The substantive obligations of the parties: section 72(2)

7.160 We do not think that the idiosyncratic features of negotiable instruments law have any bearing on the basic question of whether, in modern private international law, a party who voluntarily assumes contractual obligations should be permitted to choose the law that governs that obligation.

7.161 We recognise that each individual obligation arising from the instrument is assumed within a wider framework of interrelated rights and liabilities; and that the negotiability of the primary obligation of the acceptor to pay was historically an "exceptional"

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581 H Beale (ed), *Chitty on Contracts* (35th ed 2023) para, 37-005, footnotes omitted. Similarly, Carver on Bills of Lading at para 6-005: "a document cannot become a negotiable instrument by the will of the parties: it can acquire this characteristic only by custom or statute".

582 H Beale (ed), *Chitty on Contracts* (35th ed 2023) para 37-005, footnotes omitted, fn 45. The reason is that "such freedom could, in relation to both types of documents, operate to the prejudice of third parties".

feature. However, we think that the full implications of the "several laws" theory leads to only one conclusion: each of the obligations arising on the bill are incurred under independent contracts.

7.162 We have no reason to think that the individual contractual obligations assumed by the drawer, acceptor, and each indorser are "exceptional". Certainly, we have not found any argument or reason to think they should be beyond the general modern principle that a person who voluntarily assumes a contractual obligation can choose the law applicable to that obligation.

7.163 We have therefore provisionally concluded that the approach in section 72(2) merits updating to reflect the modern principle of party autonomy in the law applicable to contractual obligations. The renewed interest in trade documents law as a result of the ETDA 2023 presents a good opportunity to consider this.

The formal validity of contracts on a bill of exchange: section 72(1)

7.164 By contrast, we consider that the internal structure of negotiable instruments law does raise some very particular issues in relation to formal validity and section 72(1). There is a tension between, on the one hand, the "several laws" theory; and, on the other, the reality that each of the contracts arising on a bill, together with the contracts external to the bill, form a commercial unity.

7.165 As a matter of law, we recognise that the liabilities of the drawer and each indorsee are secondary: they are incurred only if and when the bill has been dishonoured, that is, when there has been default on the primary liability of the acceptor to pay. Taking one step further back, the acceptor's liability is further conditional on the drawer having successfully brought into existence the bill of exchange at all.

7.166 As we explored in detail above, complex questions have arisen as to the relationships between the formal validity of each of the contracts arising on a bill of exchange. These have, in turn, given rise to various "validating provisions". Although these are intended to mitigate some of the complexities with a "pro formal validity" approach, they arguably exacerbate those complexities with complicated rules that are often difficult to interpret and apply.

7.167 These considerations do not necessarily mean there is no case for reform of section 72(1) or that the trends seen in the conflict of laws relating to the formal validity of a contract are irrelevant. Rather, we consider that the internal structure of negotiable instruments law is a significant factor to bear in mind when formulating proposals for reform to section 72(1).

OUR PROPOSALS

7.168 We make three provisional proposals in relation to section 72 of the BoEA 1882.

7.169 Our main proposals concern sections 72(1) and 72(2). Given the substance of these proposals, it is convenient to discuss them in reverse order. We also make some proposals in relation to section 72(3), which we think merits reform.

7.170 Before considering these in depth, it is important to note that our provisional proposals preserve the "several laws" theory. As this is contrary to the preference for a "single laws" approach expressed by some stakeholders, we consider this issue first.

A "single law of the instrument" approach?

7.171 Our provisional proposals are informed generally by the ordinary principles and rules that apply to contractual issues. We agree with Professors Geva and Peari that, while the internal structure of negotiable instruments is complex, much of this can be broken down into principles that are consistent with the ordinary law of contract and the private international law rules applicable to contractual issues.

7.172 We consider that implicit in this approach is a commitment to the "several laws" theory: each independent contract on the bill can be analysed as a simple contract.

7.173 Many of our stakeholders have expressed the view that they prefer what is essentially a "single law" approach to a vast range of issues that may arise under a bill of exchange. Ian Clements and Alexander Hewitt, for example, said:

> Our strong preference would be for the original parties to a bill or note to be able to choose the governing law for all issues relating to their bill or note by including a choice of law clause on the face of the bill or note – and for this choice to bind all parties to the bill or note from time to time.

7.174 Further discussion with stakeholders has confirmed that this view is shared by many other market participants and stakeholders. We understand that the parties to a modern bill of exchange are generally known to one another, and the number of parties in total rarely exceeds six or seven, with exceptional cases being around eleven. The terms of the bill are usually negotiated well in advance by the primary parties before it is drawn. Indeed, the parties' relationships and contracts are so interdependent that market participants may even conceptualise their relationships as a collective undertaking of some sort, much like a partnership or unincorporated association comprising a nexus of contracts among them.

7.175 We recognise that one of the objectives of the modern conflict of laws is to give effect to the legitimate expectations and understandings of the parties. We also recognise that, in the present case, there seems to be considerable support in the market for a move away from the "several laws" theory and towards the "single law" theory in a "law of the instrument" approach.

7.176 We further acknowledge that digitalisation has led to an even more fragmented private law landscape where the application of the "several laws" theory may have more drastic and disruptive effects on the overall framework of rights and liabilities between the parties to a bill of exchange. In these circumstances, there is naturally a very strong concern to preserve the unity of the overall commercial framework through a "single law" approach. We understand that stakeholders have been concerned in particular with questions of electronic validity.

7.177 That said, we think that adopting the "single law" theory in a modern "law of the instrument" approach would be a very significant decision that could not be undertaken in the conflict of laws alone. As Simon Gleeson has emphasised to us, the

BoEA 1882 is not a normative framework that expresses a particular policy to be achieved, but is descriptive of practices developed over centuries in commerce and as reflected in the common law. As such, the "several laws" approach is not a policy decision undertaken by Parliament but is inherent in the very nature of how these instruments function. It would not, therefore, be desirable nor possible to consider a "single law" approach in relation to section 72 without significant consideration of the substantive law set out in the entire BoEA 1882. Such consideration is, however, beyond the scope of our project.

7.178 All in all, there is a clear consensus in both the legal provisions in different jurisdictions[583] and among commentators that negotiable instruments law is premised on the "several laws" theory.[584]

7.179 In addition, we anticipate practical issues that would need to be resolved were a "law of the instrument" approach to be adopted. The main question would be who chooses any such "law of the instrument": whilst the drawer is the party who brings the network of contracts on the bill into existence, the primary debtor on the bill is the acceptor. In the absence of a choice, courts would be in a position of trying to identify which of the contracts or parties should take precedence as the connecting factor to whom all other parties, contracts, and liabilities should refer.[585]

7.180 We also express some reservations insofar as a "single law of the instrument' approach gives the strong impression that *all* issues arising from the instrument will be subjected to that law. In our ETD FAQ and in Chapter 2 paragraph 2.79 to 2.81 of this paper, we have explained in detail why it is not helpful to think in terms of "the law applicable to an ETD".[586]

7.181 In these circumstances, we think it preferable to use, where appropriate or desirable, the techniques of the conflict of laws to give the effect of a "single law" approach that would nevertheless maintain the "several laws" theory. As we explain in more depth below, we think that adopting modern drafting techniques for the rules on the law applicable to the formal validity of each contract on a bill could be appropriate to this end.

Section 72(2): the law governing contractual obligations arising from a bill of exchange

7.182 We provisionally propose that section 72(2) should be amended to make it clearer that it applies to all the issues that fall under the "wide" view of what section 72(2) currently encompasses. On this reading, the amended section 72(2) would cover not only the construction and interpretation of the words used in the contract, but also substantive

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583 Articles 3-9 of the Geneva Convention of 7 June 1930 for the Settlement of Certain Conflicts of Laws in Connection with Bills of Exchange and Promissory Notes, for example, is premised on the several laws theory in that it provides different rules for different contracts arising on a bill of exchange or a promissory note.

584 B Geva and S Peari, *International Negotiable Instruments* (2020) para 4.17 to 4.20.

585 Although the academic literature tends to suggest that the person making the choice might be the drawer, this is an issue on which we have not been able to find any dedicated analysis. See B Geva and S Peari, *International Negotiable Instruments* (2020) para 5.85.

586 ETDs in private international law: FAQs (2024) Law Commission Paper. p 7 to 10.

matters or the "legal effects" of the words. This means that the amended section 72(2) would also identify the law applicable to the rights and obligations of the parties. It would also include matters of material validity, such as whether a contractual obligation is void for substantive reasons, such as illegality.

7.183 We provisionally propose adopting a multi-limb structure that would use party autonomy as the default rule. We then propose rules that would apply where each relevant party has not made a valid choice, distinguishing between the acceptor and the parties incurring secondary liability on the bill. Under our proposals, the basic structure would be:

(1) The default rule for the law applicable to each contract on a bill is the law chosen by the party incurring the relevant obligation.

(2) In the absence of a valid choice by:

(a) **The acceptor**: the law of the place where the instrument is payable, as interpreted consistently with the place of "proper presentment" under section 45 of the BoEA 1882.

(b) **The drawer, indorsees, and other secondary parties**: the law of the relevant secondary party's habitual residence.

7.184 It is worth noting that our provisional proposal does not include an "escape clause" or "catch all" provision. We explain each of these points further below.

Limb 1: the default rule

7.185 We provisionally propose that the default rule for the law governing contractual obligations of the parties to a bill of exchange, understood in line with the "wide" interpretation of the current section 72(2), should be the law chosen by the person incurring the obligation. Parties should indicate their choice of law on the face or reverse side of the bill alongside their signature in a way that clearly identifies the choice of law to be applied to that party's obligations. Such choice of law will be subject to the usual limitations on party autonomy in the law applicable to contractual obligations.

Limb 2: the law applicable where no valid choice has been made

7.186 Where no valid choice has been made, we provisionally propose to adopt the traditional *lex loci solutionis* ("the law of the place where the contract is to be performed") rule for contractual obligations as the general approach.

7.187 We distinguish between the various parties that incur liability on the bill.

Limb 2(a): The acceptor

7.188 In the absence of a valid choice by the acceptor, we provisionally propose that the law governing the acceptor's liability arising from their contract of acceptance should be the law of the place where the instrument is payable, as interpreted consistently with the place of "proper presentment" under section 45 of the Bills of Exchange Act 1882:

(1) The law of the place where the instrument is payable, as indicated on the face of the bill.

(2) Where no place of payment is specified, but the address of the drawee/acceptor is given in the bill, the law of the place of the address.

(3) Where no place of payment is specified and no address given, the law of the place where the drawee/acceptor has their habitual residence.

7.189 We think that the place where the bill is payable represents a strong connecting factor that would reflect the commercial features of the acceptor's contract as well as provide legal certainty. We understand that the place where the bill is payable is usually written on the face of the bill as a matter of practice; and, in countries where the Geneva Uniform Law for Bills applies, the place of payment is a mandatory requirement. In most cases, therefore, we think the place where the bill is payable should be clear and easy to determine.

7.190 This focus on the place where the bill is payable therefore reflects commercial customs surrounding the details that are conventionally included on the face of a bill of exchange. We think that any address of the drawee/acceptor given on the face of the bill is a strong connecting factor that is still well connected to the acceptor's contract and will be clear and easy to determine.

7.191 Our primary concern is limb (3), which applies where no place of payment is indicated on the face of the bill and no address of the drawer/acceptor is given. In line with the general approach in contract law, we propose that the applicable law should be a law identified by reference to the acceptor.

7.192 There are, however, several ways we could formulate this rule.

(1) There are four main connecting factors that could be used: (i) place of business; (ii) ordinary residence; (iii) domicile; or (iv) habitual residence.

(2) From this, we could: (i) choose one of the three options as the sole rule; or (ii) utilise several in an order of priority.

7.193 The "place of business" and "ordinary residence" are used in section 45 of the BoEA1882 Act. As we have said, our provisional proposal for the acceptor's contract mirrors the provisions contained in section 45 on the proper place of payment. Use of "place of business" and "ordinary residence" would therefore ensure consistency with other provisions of the BoEA 1882.

7.194 On the other hand, the language of the BoEA 1882 may now be outdated. Moreover, both the "place of business" and "ordinary residence" are factors that could be taken into account when interpreting the prevailing use of habitual residence in modern private international law.

7.195 In our call for evidence, we explored the connecting factors used for persons and noted that domicile and habitual residence are the core concepts used. These are 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.

7.196 Domicile has its origins in the traditional common law rules and has different meanings for common law and statutory purposes. Habitual residence tends to prevail in the Continental systems of private international law. The two concepts are closely related but remain distinct.

7.197 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.[587] The test of domicile under the Civil Jurisdiction and Judgments Act 1982 is significantly easier to meet than its common law counterpart.[588] However, this definition applies in the context of international jurisdiction, not the conflict of laws. Given that the policy considerations between these two branches of private international law differ, we do not consider this statutory definition further.

7.198 Under the Rome Regulations, habitual residence has strong associations with a centre of interests, both personal or business.[589] The Court of Justice of the European Union (CJEU) has identified several criteria as relevant to determine whether a natural person's 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.

7.199 The habitual residence of a corporate body under the Rome Regulations is defined as "the place of central administration".[590] This reflects the approach of most Continental jurisdictions, which is to look to "the real administrative seat" of the company.[591]

7.200 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.[592]

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587 *Dicey* Rule 12 states that 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.

588 See s 41, and in particular ss 41(2) and (6). 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.

589 See *Tan v Choy* [2014] EWCA Civ 251 at [29] by Aikens LJ. See GP Calliess and M Renner, *Rome Regulations: Commentary* (3rd ed 2020), p 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.

590 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.

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

592 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.

7.201 In *Re B (A Child),* Lord Wilson described the identification of habitual residence as "overarchingly a question of fact", 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".[593]

7.202 Following discussions with various stakeholders, we have taken the provisional view that, although domicile reflects the older common law approach, we think its use in the statutory context of jurisdiction as well as in the family law context, would introduce definitional uncertainty to use it in the context of section 72 of the BoEA 1882. We also note it is a strenuous test to meet, at least for natural persons.

7.203 We further note that habitual residence is a more flexible test that, as *Re B (A Child)* shows, is fact-sensitive.[594] We also note that the users of the law will already be familiar and comfortable with the concept of habitual residence.

7.204 We provisionally propose that, in the absence of a valid choice of law by the acceptor, and where no place of payment nor address is given on the bill of exchange, the law governing the acceptor's contractual obligations on a bill of exchange should be governed by the law of the acceptor's habitual residence.

Limb 2(b) The drawer, indorsees, and other secondary parties

7.205 In the absence of a valid choice by a person incurring secondary liability on the bill, we propose that the law applicable to that person's liability should be a law identified by reference to that secondary party. We propose using the same methods we have suggested above for the acceptor.

7.206 We considered an alternative approach that would, in the absence of a choice by a party incurring secondary liability, refer to the law of the place where the bill is payable. This would give the overall effect of a "single law of the instrument" approach by reference to the primary obligation, whilst nevertheless maintaining the "several laws" theory. We have provisionally decided, however, not to advance this as our preferred proposal, for the following reasons.

7.207 We do not think there is a sufficient connection between the secondary parties' liability to pay and the place where the primary payment obligation on the bill is payable to justify subjecting the secondary parties' obligations to the latter. Secondary party liability is conditional on default by the drawee/acceptor. However, this does not mean that secondary parties would prefer their obligations to governed by the law applicable to the primary payment obligation.

7.208 On a similar note, we think that to subject the secondary party's liability in the absence of a valid choice to the law of the place where the instrument is made is inconsistent with the principle of party autonomy we adopt more broadly. Where a party has not made a valid choice in relation to a contractual obligation voluntarily assumed, this

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593 In *Re B (A Child)* [2014] UKSC 1, [2014] AC 1038 at [46] by Lord Wilson and [57] by Baroness Hale and Lord Toulson (as cited in Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins*, *The Conflict of Laws* (16th ed 2022) para 6-137).

594 *Re B (A Child)* [2014] UKSC 1, [2014] AC 1038.

does not mean their intentions and reasonable expectations are no longer to be taken into account.

7.209 Recourse to the place where the bill is payable will not necessarily always ensure the effect of the "single laws" approach:

(1) The acceptor may well make a choice of law to govern their obligation, and this might not necessarily be the law of the place where the instrument is payable.

(2) The acceptor's contract, however, might not necessarily come into existence. The acceptor may refuse to accept the order and the bill might be dishonoured.

7.210 All in all, we think that departing from the approach we have taken in relation to the law governing the acceptor's contract in the absence of a choice to attempt to give the effect of a "single law of the instrument" approach would neither be workable in practice nor principled in theory.

7.211 We also considered the alternative advanced by Professors Geva and Peari in their monograph on international negotiable instruments law. In the absence of a valid choice by a party with secondary liability on the bill, they suggest a law identified by reference to the holder at the time they acquired the instrument.[595] Such proposal has been developed by careful consideration of possible precedents, including the law of suretyship, the law of assignment, and the law of payments.[596] Professors Geva and Peari however, accept that this is a novel proposal that is not without its downsides:

> The option entails a situation in which a signer would not know at the time of incurring liability which law will apply to it. We are further cognizant that in the eyes of many this may be too high a cost to pay in order to achieve what we believe is doctrinal consistency.

7.212 We appreciate the complex arguments made to support the proposal and recognise the extent to which the proposal accommodates the idiosyncratic features of negotiable instruments law. Ultimately, however, our main concern is as Professors Geva and Peari themselves acknowledge: a law identified by reference to the holder would give rise to considerable uncertainty for the secondary party. Furthermore, a law identified by reference to the holder would mean that the law governing the secondary party's liability would, in theory, change each time the bill is negotiated.

7.213 We provisionally propose that, in the absence of a valid choice of law by the drawer, indorsees, and other secondary parties, the law governing those secondary parties' contractual obligations on a bill of exchange should be governed by the law of the relevant secondary party's habitual residence.

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595 B Geva and S Peari, *International Negotiable Instruments* (2020) para 6110.

596 B Geva and S Peari, *International Negotiable Instruments* (2020) para 6.98.

An “escape clause” or “catch-all” provision?

7.214 Many conflict of laws rules for the law applicable to contractual obligations include a final provision. For example, the Rome Regulations provide for an “escape clause” and a final “catch all” provision.

7.215 For example, Article 4(3) of the Rome I Regulation is an “escape clause”.[597] It 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”. Article 4(4) of the Rome I Regulation 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”.

7.216 The common law makes similar provision for the “catch-all” provision. The final limb of the common law test for the proper law of a contract is “the most appropriate law”.[598] This applies when the law has not been expressly or impliedly chosen by the parties and serves as a catch all provision to determine the applicable law to the contract. As explained in the Supreme Court judgment of *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* “in the absence of such choice, the law with which [the contract] is most closely connected” is the applicable law of the contract.[599] The Court quoted with approval Lord Diplock’s characterisation of this test, which is that the “proper law is [the] system of law with which the transaction has its closest and most real connection”.[600]

7.217 We gave careful consideration to whether an escape clause and/or catch-all provision should be included.

7.218 On the one hand, we recognise that commercial parties need certainty above all else. In the absence of a valid choice, a clear and objective connecting factor may be preferable to an abstract consideration of whether another law might be “manifestly more closely connected” to the contract or what would be “the most appropriate law”.

7.219 On the other hand, we recognise that liability on a bill of exchange is often incurred as one part of a commercial transaction external to the bill of exchange itself. Usually, the bill is given by the indorser to the indorsee as payment or as the provision of credit as one side of a transaction external to the bill. There may well be reasons why the indorser, who incurs liability internally within the bill of exchange, may nevertheless wish to subject that liability to the law governing the external contract in which the bill has been given as contractual consideration. At the same time, stakeholders have told

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597 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para 32-126.

598 Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (16th ed 2022) para [16-020]; *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [2020] WLR 4117.

599 *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [2020] WLR 4117 at [27].

600 *Cie Tunisieene de Navigation SA V Cie d’Armement Maritime SA* [1971] AC 572, at 603 to 604 by Lord Diplock. *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [2020] WLR 4117 at [36].

us that, in modern commercial practice, the obligations arising from a bill of exchange are usually kept distinct from the obligations arising external to the instrument itself.

7.220 On balance, our provisional conclusion is that an "escape clause" or "catch all" provision would be unnecessary; and serve only to introduce uncertainty and unpredictability into well-established commercial relationships and agreements by qualitative judgments by a court on the "most appropriate law" or the country with the "closest and most real connection" with the relevant contract. We think that our provisional proposal gives sufficient scope for parties to select the law that is to apply to their contractual obligations, and that it would be rare for a party not to indicate a choice of law. Even in the absence of a choice, we think that the framework we have proposed gives a clear indication of the applicable law that accords with commercial realities of the transactions and expectations of the parties. There would be little commercial reason to not to apply that law.

7.221 We therefore provisionally propose that no "escape clause" or "catch all" provision is needed for potential situations where, in the absence of a valid choice, it might be the case that the contract has a closer connection with the law of another country than the law of the place where the secondary party has their habitual residence.

Consultation Question 13.

7.222 We provisionally propose that section 72(2) should be amended to make it clearer that it applies to all the issues that fall under the "wide" view of what section 72(2) currently encompasses. This would mean that the amended section 72(2) would apply to the law governing contractual obligations (understood in the ordinary modern sense of the substantive rights and obligations of the parties) arising from a bill of exchange and is not limited to "interpretation" in a narrow sense.

Do consultees agree?

Consultation Question 14.

7.223 We provisionally propose that the default law applicable to contractual obligations arising from a bill of exchange should be the law chosen by the party incurring the obligation, as indicated on the bill alongside their signature.

Do consultees agree?

Consultation Question 15.

7.224 We provisionally propose that, where no choice of law is made on the face of the bill, the acceptor's liability arising from their contract of acceptance should be the law of the place where the instrument is payable, as interpreted consistently with the place of "proper presentment" under section 45 of the Bills of Exchange Act 1882:

(1) The law of the place where the instrument is payable, as indicated on the face of the bill.

(2) Where no place of payment is specified, but the address of the drawee/acceptor is given in the bill, the law of the place of the address.

(3) Where no place of payment is specified and no address given, the law of the place where the drawee/acceptor has their habitual residence.

Do consultees agree?

Consultation Question 16.

7.225 We provisionally propose that, in the absence of a valid choice by a person incurring secondary liability on the bill, the law applicable to that person's liability on the bill should be the law of the place where that person has their habitual residence.

Do consultees agree?

Consultation Question 17.

7.226 We provisionally propose that no "escape clause" is necessary or desirable. The framework we have provisionally proposed gives sufficient scope for parties to select the law that is to apply to their contractual obligations, and that it would be rare for a party not to indicate a choice of law. Even in the absence of a choice, the framework we have proposed gives a clear indication of the applicable law that accords with commercial realities of the transactions and expectations of the parties.

Do consultees agree?

Section 72(1) Formal validity

7.227 We make two main provisional proposals in relation to section 71(1) on the law applicable to the formal requisites of a contract on a bill of exchange.

The law governing the substance of the contract

7.228 We provisionally propose a shift away from the *locus regit actum* rule (the place governs the act), as reflected in the current use of the *lex loci contractus* (the law of the place where the contract is made). We think that in the modern commercial context, the place where a contract "is made" is in most cases too fortuitous to provide any substantial connection to the legal system of that place.

7.229 We provisionally propose that, as a general approach, the law governing the formal validity of each contract on a bill of exchange should be the law that governs the substance of the relevant contract. We consider this approach to the law applicable to the formal validity of a contract is consistent with both the common law approach and wider trends in the conflict of laws.

A pro-formal validity policy: a "menu" approach

7.230 We provisionally propose adopting a "menu" approach comparable to Article 11 of the Rome I Regulation and section 1 of the Wills Act 1963. We do this to mitigate the recognised complexities arising from the application of the "several laws" theory to the formal validity of the contracts on a bill of exchange.

7.231 We have several reasons for doing so:

(1) The general principle of contract law that parties do not intend to enter into invalid agreements.

(2) The fact that, notwithstanding the "several laws" theory, each of these contracts are interrelated and often form a commercial unity sufficient to give rise to support in the market for a "law of the instrument" approach.

(3) The unnecessary complexity and controversy that arises from various "validating" rules and principles.

(4) The increased risk of fragmenting the overall commercial unity by greater differences arising in the digital environment.

7.232 To this, we add one idiosyncratic feature to reflect the internal structure of negotiable instruments law. The menu of options in Article 11 of Rome I and section 1 of the Wills Act 1963 largely use connecting factors that refer to the contracting parties themselves, such as domicile, habitual residence, nationality, or geographical location at a relevant time.

7.233 We provisionally propose to depart from this approach and, instead, include in our "menu" of options each of the contracts that arise on the bill of exchange. This would give the effect of a "single laws" approach to formal validity though a cumulative approach that preserves the "several laws" theory, whilst mitigating the complexity that arises from formal validity being referred to different laws.

7.234 Accordingly, our provisional menu of options would include:

(1) The law governing the substance of the relevant contract.

(2) The law governing the substance of the drawer's contract.

(3) The law governing the substance of the acceptor's contract.

(4) The law of the place where the instrument is payable.

7.235 Each contract on a bill of exchange would only need to comply with the formal requirements applicable to one of these options in order for it to be upheld as formally valid. There would be no need for complex validating provisions.

7.236 We include the law governing the drawer's contract on the basis that it is this contract that brings the framework of rights and obligations into existence, that is, the bill itself. We include the law governing the acceptor's contract and the place where the instrument is payable on the basis that these reflect the primary obligation on the bill.

7.237 We think that with this menu, a "single law of the instrument" effect can be achieved, whilst recognising that each contract on a bill of exchange nevertheless remains separate.

7.238 We have considered whether it is necessary or desirable to add to these options. In particular, the place where the contract was made remains an option in recognition of the traditional *locus regit actum* rule. We also recognise that the Rome I Regulation includes the law of either contracting party's habitual residence.

7.239 We provisionally conclude that it is neither necessary nor desirable to add to the list we propose. In relation to the option of the law of the place where the contract is made, we recognise the significant consensus that the place where the contract was made is increasingly irrelevant to the realities of modern commercial practice.

7.240 In relation to options based on the relevant party, we think these are both (i) unnecessary, given the range of options we include; and (ii) less relevant to our overall objective of giving the effect of a "single law of the instrument" for questions of formal validity.

Consultation Question 18.

7.241 We provisionally propose that the formal validity of a contract on a bill of exchange should be upheld if it complies with one of:

(1) The law governing the substance of the relevant contract.

(2) The law governing the substance of the drawer's contract.

(3) The law governing the substance of the acceptor's contract.

(4) The law of the place where the instrument is payable.

Do consultees agree?

Section 72(3) The duties of a holder upon presentment and dishonour

7.242 We said above that, although section 72(3) is drafted as a single statutory provision, it actually contains four separate conflict of laws rules. This has given rise to some criticism[601] and uncertainty as to interpretation.[602] It also uses connecting factors that are increasingly difficult to justify in modern private international law.

7.243 We did not give section 72(3) independent treatment in our call for evidence on the basis that 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 were therefore of the preliminary view that it would not make a difference whether the bill of exchange takes electronic or paper form.

7.244 Stakeholders however told us that section 72(3) does raise some difficulty in the electronic environment. "Presentment" is not one of the terms defined for the purposes of the Act in section 2. However, we have been told that presentment involves the physical presentation of the bill of exchange to the acceptor with a formal demand for payment. We have also received evidence that presentment has been defined in the substantive case law for the purposes of sections 41, 45, and 52 of the BoEA 1882 as involving physical delivery of the bill to the payer.[603] As such, a bill will be dishonoured by non-payment at the place where it has been duly presented for payment.

7.245 From this, the difficulties of determining "where" an electronic bill is "issued", "delivered", or in this case "presented", that we had focused on in our call for evidence will continue to be problematic for section 72(3).

7.246 All in all, we think there is an arguable case for reform to section 72(3). We provisionally propose to do so by clearly distinguishing the four sub-rules implicit in the current rule. In addition, and in line with our broader approach of focussing on the policy underpinning rules of private international law, rather than geographical location, we also provisionally propose to avoid using connecting factors that refer – ultimately – to the location of the bill itself at the relevant times.

7.247 Our provisional proposals are therefore as follows:

(1) The duties of the holder with respect to presentment for acceptance should be governed by the law of the place where the drawee has their habitual residence.

(2) The necessity for or sufficiency of a protest or notice upon dishonour by non-acceptance should be governed by the law of the place where the drawee has their habitual residence.

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601 Cheshire and North, *Private International Law*, (12th ed, 1992) p 526, cited in S J Gleeson, *Chalmers and Guest on Bills of Exchange and Cheques* (18th ed 2016) para 12-031.

602 S J Gleeson, *Chalmers and Guest on Bills of Exchange and Cheques* (18th ed 2016) para 12-031; Lord Collins of Mapesbury and J Harris (eds), *Dicey, Morris & Collins, The Conflict of Laws* (15th ed 2018) para 33R-366.

603 *Barclays Bank Plc v Bank of England* [1985] 1 All ER 385 at 394.

(3) The duties of the holder with respect to presentment for payment should be governed by the law of the place where the bill is payable.

(4) The necessity for or sufficiency of a protest or notice upon dishonour by non-payment should be governed by the law of the place where the bill is payable.

7.248 Our provisional proposals for section 72(3) reflect the underlying approaches we have taken in relation to sections 72(1) and 72(2).

7.249 We distinguish between presentment for acceptance and presentment for payment. Presentment for acceptance is more personal to the drawee than presentment for payment. The drawee has not yet accepted liability on the bill when it is presented for acceptance. At this point, the bill may be dishonoured by non-acceptance. From this, we think the place of presentment for acceptance and place of dishonour by non-acceptance should be by reference to the drawee, rather than the bill itself at the relevant time.

7.250 By contrast, we recognise that payment may be in a place other than the drawee/acceptor's residence or place of business. We also recognise the argument advanced by Professors Benjamin Geva and Sagi Peari that the holder's duties in relation to presentment for payment are correlative to the acceptor's liability to pay. There might, therefore, be some justification for referring the holder's duties in relation to presentment to the law governing the acceptor's contract.

7.251 However, we recognise certain factors in relation to presentment for payment that may justify recourse to the law of the place where the bill is payable. In particular, we think the relationship between presentment for payment and notice/protest upon dishonour by non-payment is a significant reason to refer the holder's duties upon presentment and upon dishonour to the same law. We also note that presentment for payment is typically subject to quite stringent substantive requirements.

7.252 For notice and protest upon dishonour by non-payment, our thinking is that the requirements of notarial protest in some jurisdictions warrant an objective connecting factor based on the place of dishonour. Under our proposals for a new section 72(2), the law governing the acceptor's obligations to pay would be subject to party autonomy. We think there may be difficulties in potentially allowing a choice of law to circumvent the publicity considerations underpinning notarial acts where an acceptor is liable to pay in a jurisdiction that requires notarial protest.

7.253 Finally, we think the place of dishonour will often be, in practical terms, the same place as the place where the instrument is payable.

Consultation Question 19.

7.254 We provisionally propose that section 72(3) should be reformed as follows:

(1) The duties of the holder with respect to presentment for acceptance should be governed by the law of the place where the drawee has their habitual residence.

(2) The necessity for or sufficiency of a protest or notice upon dishonour by non-acceptance should be governed by the law of the place where the drawee has their habitual residence.

(3) The duties of the holder with respect to presentment for payment should be governed by the law of the place where the bill is payable.

(4) The necessity for or sufficiency of a protest or notice upon dishonour by non-payment should be governed by the law of the place where the bill is payable.

Do consultees agree?

Chapter 8: Consultation Questions

Consultation Question 1.

8.1 We provisionally propose the creation of a new discretionary power of the courts of England and Wales to grant free-standing information orders at the initial stage of investigations in cases where the features of the digital and decentralised environments make it otherwise impossible for a claimant to obtain the information they need to formulate and bring a fully-pleaded substantive claim.

8.2 We provisionally propose that such power should be based broadly on the principles of access to justice, necessity, and preventing injustice in the modern digital and decentralised environments.

Do consultees agree?

Paragraph 4.106

Consultation Question 2.

8.3 We provisionally propose the following as the threshold test that the claimant must be able to meet before the discretion to grant an order under the proposed power may be exercised. All four limbs would have to be satisfied.

(1) A case of certain strength: the court must be satisfied that there has clearly been wrongdoing on facts that disclose a potential case that is more than barely capable of serious argument and yet not necessarily one which the judge believes to have a better than 50 per cent chance of success.

(2) Necessity: the court must be satisfied that the relief sought must be necessary in order to enable the applicant to bring a claim or seek other legitimate redress for the wrongdoing.

(3) Impossibility or unreasonableness: the court must be satisfied that there is no other court in which the claimant could reasonably bring the application for relief.

(4) A link to England and Wales: the court must be satisfied that there is a connection to England and Wales, such as the claimant's habitual residence, domicile, or nationality.

Do consultees agree?

Paragraph 4.108

Consultation Question 3.

8.4 We invite consultees' views on the potential impact of this proposal if it were implemented. For example, would this power be useful for obtaining information that makes it possible to bring proceedings, leading ultimately to remedies such as recovery of crypto-tokens in cases of fraud or hacking? Do consultees consider that claimants would rely on the proposed new power, as well as free-standing freezing orders, rather than relying on a gateway?

Paragraph 4.109

Consultation Question 4.

8.5 We invite consultees' views on whether exchanges and other third-party respondents are likely to comply with any such free-standing information orders.

Paragraph 4.110

Consultation Question 5.

8.6 We provisionally propose that:

(1) The appropriate court to hear a cross-border property claim concerning a crypto-token is the court of the place where the crypto-token can effectively be dealt with at the relevant point in time.

(2) The relevant point in time should be the time when proceedings are issued.

Do consultees agree?

Paragraph 4.173

Consultation Question 6.

8.7 We invite consultees' views on whether there is a need for a new gateway/ground of jurisdiction explicitly providing that the courts of England and Wales have jurisdiction when a crypto-token can be controlled from within the jurisdiction at the time when proceedings are issued.

Paragraph 4.174

Consultation Question 7.

8.8 We provisionally propose that:

(1) Where it is necessary or desirable to "localise" loss for the purposes of the locus damni rule by reference to the victim, the damage is sustained where the victim physically was present at the time the damage occurred.

(2) Where damage consists of being denied access to an online account that, in principle, could previously have been accessed from anywhere in the world and if no real reason can be given for saying the damage "occurred" in one location over the others, the defendant should be sued in their home court, where this is possible.

Do consultees agree?

Paragraph 4.238

Consultation Question 8.

8.9 We provisionally propose that, in cases where the level of decentralisation is such that omniterritoriality poses a true challenge to the premise of the multilateralist approach, seeking to identify the one "applicable law" to resolve the dispute would not result in a just disposal of the proceedings and therefore an alternative approach is required.

Do consultees agree?

Paragraph 6.126

Consultation Question 9.

8.10 We provisionally propose that, where the level of decentralisation is such that the multilateralist approach would not result in the just disposal of proceedings, the courts of England and Wales should consider the alternative method of the supranational approach to resolving the conflicts that may exist between different private law systems.

8.11 Under this provisional proposal:

(1) The premise of the supranational approach in these cases should be that the law of no country would be appropriate to apply to resolve the issue in dispute, and the law of every country would be appropriate to apply to resolve the issue in dispute.

(2) The overall objective of the courts in these cases should be the just disposal of the proceedings with an omniterritorial element.

(3) To achieve the just disposal of proceedings, the courts should take into account a wide range of factors. In particular, this would include considering the legitimate expectations of the parties which, in these circumstances, are likely to consider elements of the basis on which the participants have interacted with the relevant system, such as the terms of the protocol.

(4) The outcomes of the case will remain subject to the public policy and overriding mandatory rules of England and Wales.

Do consultees agree?

Paragraph 6.127

Consultation Question 10.

8.12 We provisionally propose that it would be premature at this point to propose statutory reform on the question of resolving a conflict of laws in the context of omniterritorial phenomena. We also provisionally propose that the approach might not necessarily be a good candidate for a statutory rule.

Do consultees agree?

Paragraph 6.132

Consultation Question 11.

8.13 We invite consultees' views about the potential impact of this proposal if it were implemented. Do consultees consider that this could avoid protracted disputes about applicable law, and lead to more efficient resolution of disputes? What do consultees consider the costs or risks of such an approach would be?

Paragraph 6.133

Consultation Question 12.

8.14 We invite consultees' views as to when relevant cases might start to come before the courts. In what circumstances might disputes arise?

Paragraph 6.134

Consultation Question 13.

8.15 We provisionally propose that section 72(2) should be amended to make it clearer that it applies to all the issues that fall under the "wide" view of what section 72(2) currently encompasses. This would mean that the amended section 72(2) would apply to the law governing contractual obligations (understood in the ordinary modern sense of the substantive rights and obligations of the parties) arising from a bill of exchange and is not limited to "interpretation" in a narrow sense.

Do consultees agree?

Paragraph 7.222

Consultation Question 14.

8.16 We provisionally propose that the default law applicable to contractual obligations arising from a bill of exchange should be the law chosen by the party incurring the obligation, as indicated on the bill alongside their signature.

Do consultees agree?

Paragraph 7.223

Consultation Question 15.

8.17 We provisionally propose that, where no choice of law is made on the face of the bill, the acceptor's liability arising from their contract of acceptance should be the law of the place where the instrument is payable, as interpreted consistently with the place of "proper presentment" under section 45 of the Bills of Exchange Act 1882:

(1) The law of the place where the instrument is payable, as indicated on the face of the bill.

(2) Where no place of payment is specified, but the address of the drawee/acceptor is given in the bill, the law of the place of the address.

(3) Where no place of payment is specified and no address given, the law of the place where the drawee/acceptor has their habitual residence.

Do consultees agree?

Paragraph 7.224

Consultation Question 16.

8.18 We provisionally propose that, in the absence of a valid choice by a person incurring secondary liability on the bill, the law applicable to that person's liability on the bill should be the law of the place where that person has their habitual residence.

Do consultees agree?

Paragraph 7.225

Consultation Question 17.

8.19 We provisionally propose that no "escape clause" is necessary or desirable. The framework we have provisionally proposed gives sufficient scope for parties to select the law that is to apply to their contractual obligations, and that it would be rare for a party not to indicate a choice of law. Even in the absence of a choice, the framework we have proposed gives a clear indication of the applicable law that accords with commercial realities of the transactions and expectations of the parties.

Do consultees agree?

Paragraph 7.226

Consultation Question 18.

8.20 We provisionally propose that the formal validity of a contract on a bill of exchange should be upheld if it complies with one of:

(1) The law governing the substance of the relevant contract.

(2) The law governing the substance of the drawer's contract.

(3) The law governing the substance of the acceptor's contract.

(4) The law of the place where the instrument is payable.

Do consultees agree?

Paragraph 7.241

Consultation Question 19.

8.21 We provisionally propose that section 72(3) should be reformed as follows:

(1) The duties of the holder with respect to presentment for acceptance should be governed by the law of the place where the drawee has their habitual residence.

(2) The necessity for or sufficiency of a protest or notice upon dishonour by non-acceptance should be governed by the law of the place where the drawee has their habitual residence.

(3) The duties of the holder with respect to presentment for payment should be governed by the law of the place where the bill is payable.

(4) The necessity for or sufficiency of a protest or notice upon dishonour by non-payment should be governed by the law of the place where the bill is payable.

Do consultees agree?

Paragraph 7.254

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);[604] 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 Law Commission is additionally asked to review section 72 of the Bills of Exchange Act 1882 and make recommendations for reforms where necessary. Section 72 applies to bills of exchange and related documents in both paper and electronic form, and any recommendations made by the Law Commission will similarly apply no matter the medium.

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"); and

(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.

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[604] This could be transfers of value by disposition or by way of a security interest.

Appendix 2: Acknowledgements

The Law Commission team met or otherwise corresponded with the following people and organisations in relation to this project.

Government and public bodies

American Law Institute

HM Treasury

HM Revenue and Customs

Ministry of Justice

The Bank of England

International Organisations

The Hague Conference on Private International Law (HCCH)

UN Commission on International Trade Law (UNCITRAL)

Businesses

Wave BL

Enigio AB

Individuals

Jacqueline Cook

Marina Comninos

Professor Andrew Dickinson

Sean Edwards

Mark Evans

Professor Benjamin Geva

Nick Grandage

Josh Folkard

Simon Gleeson

Paul Landless

Professor Matthias Lehmann

Professor Alex Mills

Charlie Morgan

Professor Sagi Peari

Tudor Plapcianu

Professor Koji Takahashi

Professor Chris Whytock

Andrew Wood

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Groups and associations

Bar Council

City of London Law Society's Financial Law Committee

Commercial Bar Association and Chancery Bar Association

International Swaps and Derivatives Association (ISDA)

Society of Scrivener Notaries

Society of Trust and Estate Practitioners (STEP)

Financial Markets Law Committee (FMLC)

Businesses and financial institutions

Aave

Andreessen Horowitz (a16z)

D2 Legal Technology (D2LT)

Enigio AB

Wave BL

Law firms

Ashurst LLP

Herbert Smith Freehills LLP

Hogan Lovells LLP

Kennedys Law LLP

Linklaters LLP

Norton Rose Fulbright

W Legal

Individuals

Professor Janeen Carruthers

Ian Clements and Alexander Hewitt

Marina Comninos

Sean Edwards

Professor Ugljesa Grusic

Dr Lorna Gillies

Denis Jude Haughton

Associate Professor Benjamin Hayward

Dr Sara Hourani

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