THE LAW COMMISSION: CONSULTATION PAPER ON DIGITAL ASSETS AND (ELECTRONIC) TRADE DOCUMENTS IN PRIVATE INTERNATIONAL LAW

CLLS FINANCIAL LAW COMMITTEE RESPONSE

INTRODUCTION

The City of London Law Society ("**CLLS**") represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multijurisdictional legal issues.

In June 2025, the Law Commission released the Consultation Paper 273 entitled, "Digital assets and (electronic) trade documents in private international law" (the "**Consultation Paper**"); and members of the Commercial and Common Law team at the Law Commission published the FAQs entitled "Property and permissioned DLT systems in private international law: FAQ" (the "**FAQs**")[1]. This response to the Consultation Paper and FAQs (this "**Response**") has been prepared by the Financial Law Committee ("**FLC**") of the CLLS, whose members specialise in major financings involving obligors incorporated in multiple jurisdictions, creditors incorporated or doing business in multiple jurisdictions, and assets located, or deemed by principles of private international law to be located, in multiple jurisdictions. Concepts of English law and other laws relating to digital assets and the development of these concepts are increasingly critical to the transactions and advisory matters on which members of the FLC advise. Full details of the members of the FLC appear on the CLLS website.

In its preparation of this Response, the FLC has been assisted by a Working Group (the "**WG**") of subject specialists drawn from members of the Committee and more widely. The names of the members of the WG, and their law firms, are set out at the end of this Response.

The FLC continues to appreciate greatly the thorough work and detailed analysis undertaken by the Law Commission with regard to the legal issues that arise in the context of digital assets, including the private international law issues which are the subject of the Consultation Paper and the FAQs. As the FLC noted in its response (the "**CfE Response**") to the Law Commission's Call for Evidence entitled "Digital assets and ETDs in private international law: which court, which law?" (the "**Call for Evidence**"), the work being undertaken by the Law Commission is critical and the FLC is keen to assist so as to encourage the development of an appropriate and internationally recognised new applicable law rule to govern "native" or "endogenous" digital assets, particularly in the context of

[1] Members of the Commercial and Common Law team at the Law Commission published another relevant FAQs paper in January 2025, entitled "Digital assets in private international law: FAQs on the relationship with tax law, banking regulation, and the financial markets" (the "**January 2025 FAQs**"). The January 2025 FAQs are also relevant to some of the concerns we have expressed in this response.

their relationship with the digitisation of financial assets such as debt and equity instruments, and also in the financing and trading of digital assets. English law is one of the two legal systems that dominate cross-border financing transactions; and its concepts are the cornerstones of other common law systems. We consider it to be of utmost importance that the development of English law in the context of digital assets builds upon the flexibility and ingenuity of common law concepts (including principles of equity) that have underpinned cross-border commercial and financial dealings for many decades.

We set out below the FLC's responses to the proposals contained in the Consultation Paper and the content of the FAQs. Consistent with the FLC's own focus on financial law matters, the scope of this Response has been limited to consideration of the appropriate private international law rule to determine the applicable law governing contractual and proprietary issues relating to digital assets. The FLC is submitting a separate response to the proposals on ETDs contained in Chapter 7 of the Consultation Paper (the "**ETD Response**"). We note that other important matters are impacted by, and covered in, the Consultation Paper and the FAQs which we do not address here or in the ETD Response. Specifically, this Response does not include itemised responses to the 19 Consultation Questions raised in the Consultation Paper, for two reasons. First, in our view, a number of the proposals made in the Consultation Paper would, if implemented, cut across party autonomy and the approach to the determination of proprietary rights that underlie (and are capable of continuing to underlie) cross-border trade and financial arrangements, and rather than set out individual responses to the Consultation Questions, we have set out our broader concerns with this approach. Secondly, a number of the earlier Consultation Questions pertain to litigation matters, which are beyond the remit of the FLC, albeit we note that many of the concerns posed with respect to these Consultation Questions would not arise if party autonomy is respected.

The manner in which, and the extent to which, English law develops in order to embrace challenges perceived to be created by digital assets is of fundamental importance to financial dealings, whether one is viewing digital assets as items of trade (in all facets, including in the context of digital assets as rights over which security interests may be created and, therefore, which may be used as collateral) or as methods of payment. As the Law Commission, members of the FLC and others have noted since the Law Commission's work on digital assets started, English principles of common law and equity have adapted and evolved over the centuries, including in the context of private international law, in order to recognise and protect new concepts of property and developments in commercial practices. We, as well as the members of the WG, would be happy to meet with the Law Commission, and/or the members of its Commercial and Common Law team, to explore not only the ideas and analysis set out in this Response, but also our views and thinking with respect to a number of the other important conflict of laws issues considered in the Consultation Paper.

1. GENERAL OBSERVATIONS AND HIGH-LEVEL SUMMARY

The FLC notes that the Law Commission has distinguished between conflict of laws issues affecting digital assets held in permissioned private DLT systems, generally dealt with in the FAQs, and those affecting digital assets held in permissionless public systems, dealt with in the Consultation Paper. However, it is important to recognise that these categorisations are mere labels and, in practice, it is possible that systems falling within both categories could share similar features giving rise to the same sorts of issues (and need for solutions) from a conflict of laws perspective. For example, while we agree that it is more likely that a permissioned, private DLT system would have a central administrator with overall responsibility for the operation of the system and the ability unilaterally

(and solely) to make changes to the state of the ledger, it is equally possible that this may not be the case. Instead, transfers through a permissioned, private DLT system may be validated and recorded by the operation of the consensus mechanism, with validating node operators, potentially located in multiple different jurisdictions, being pre-selected and pre-approved to perform these functions by the system administrator (and possibly subject, where local policy reasons dictate, to jurisdiction-specific regulation of those approved to operate the nodes). In such cases, the permissioned system will *not* have a central administrator acting as a "gatekeeper" which has *"reserve[d] to itself the authority to commit updates to the ledger"*[2] and *"no single node holds a prominent position in storing, managing or securing the ledger"*[3] (much in the same way as a decentralised, permissionless DLT-based system).

Another distinction that is made by the Law Commission is between "exogenous" digital assets, and "endogenous" or "native" digital assets. The former refers to digital assets which are linked or "stapled" to another asset such as a share, debt claim or interest under a trust. The latter refers to digital assets which have, or are intended to have, an inherent value in themselves and are not linked to any other "external" asset. We agree with this distinction. We also recognise the proposition that exogenous digital assets should, in principle, be outside the scope of any new private international law rule used to determine the applicable law governing proprietary or other issues in relation to digital assets, because there will be an existing private international law rule which applies to the asset (for example, a share) with which the exogenous digital asset or token is linked. Indeed, as the FLC stated in its CfE Response, we consider that the "normal" conflict of laws rules determining the applicable law for proprietary issues affecting the underlying linked asset should have primacy and will govern.

However, there are nonetheless still material legal uncertainties in applying these existing private international rules to familiar types of assets which are represented in "tokenised" form (in other words, constitutively linked to a digital token). Taking the example of a tokenised share or other registered security:

- there is an existing private international law rule determining the applicable law governing proprietary matters in relation to a registered security confirmed in *Macmillan Inc v Bishopsgate Investment Trust Plc (No.3)*[4] ("***Macmillan***");
- this, in essence, confirms that the applicable law governing proprietary issues in relation to a registered security (such as a share or fund unit) will be the law of the jurisdiction where the register, which is the primary record of entitlement to the security, is maintained;
- it is relatively easy to identify the *lex situs* in accordance with *Macmillan* where it is possible to point to the register being maintained by the issuer or its registrar in a single jurisdiction;
- however, where that register is maintained using a DLT system, it may be the case that no such single jurisdiction can be easily identified as the place where the register is maintained because the validating node operators who are responsible for validating and recording

[2] FAQs, 1.26.
[3] Consultation Paper, 2.47(2)(b).
[4] [1996] 1 WLR 387.

updates to the ledger as part of the consensus mechanism are spread across multiple jurisdictions.

For this reason, the FLC considers that further work is needed to bring much-needed legal certainty in this area to assist in determining how, in practice, certain existing rules on applicable law governing proprietary issues for "traditional" assets (such as shares, debts or other claims), when linked to a token recorded on a DLT-based ledger, are to be applied.

However, the remainder of this Response deals solely with "native" digital assets given that this is the focus of the Consultation Paper.

The following is a high-level summary of the key points raised in this Response:

1. **We have significant concerns with the Law Commission's proposal for English law to adopt a "supranational" solution to determine the applicable law governing contractual and proprietary issues affecting digital assets**. It would not provide financial market participants that are structuring legal arrangements involving digital assets (for example, the creation of a security interest over a digital asset) with the necessary *ex ante* legal certainty they would require as to the applicable law that would govern relevant proprietary issues (such as the perfection or priority steps that must be taken to ensure that any such security interest is enforceable against, and takes priority over any adverse interest in the digital asset vested in, third parties).

2. **We consider that party autonomy is the appropriate basis for a private international law rule governing both proprietary and contractual issues in relation to digital assets (with a waterfall of "fall-back" options if a particular governing law is not chosen)**. Such a solution would open the door to much needed legal certainty in the financial markets, by allowing participants to structure their legal arrangements so as to take advantage of a clear and straightforward private international law rule determining the applicable law governing proprietary and contractual issues when they deal in or with digital assets (including when using them under title transfer or security collateral arrangements).

3. **We disagree with the view expressed in the Consultation Paper that party autonomy and other multilateralist private international law solutions are inappropriate or unsuitable to be used in this context, and with certain key elements of the reasoning in support of this view.** We provide counterarguments below to some of the Law Commission's arguments in support of these assertions.

   Finally, although we note that insolvency law does not fall within the scope of the Law Commission's remit (per the terms of reference set out in Appendix 1 to the Consultation Paper), and that the January 2025 FAQs state (correctly) that private international law and financial services regulation are two distinct legal regimes, it is, of course, axiomatic that neither insolvency law nor financial services regulation exists in a vacuum. The manner in which English law develops its private international law concepts applicable to digital assets will be fundamental to the manner in which digital assets are treated under both insolvency law and financial services regulation, and to the safety and soundness of financial market infrastructure. These concepts are critical to, for example, the settlement of securities trading transactions and dealings with financial collateral.

2. ISSUES WITH THE SUPRANATIONAL APPROACH

The Consultation Paper proposes the adoption of a, so-called, "supranational" solution to identify the applicable law governing proprietary and contractual issues affecting digital assets. We understand this solution to involve the development by the English courts of a set of special *domestic* rules or principles that English Courts could apply in "omni-territorial" cases. The Consultation Paper suggests that the English courts would develop these rules or principles by being guided by the principle of what would result in a *"just disposal of proceedings"* in any particular case.

Our immediate observation is that the "supranational" label does not appropriately capture the scope of the Law Commission's proposal. We would consider that a truly supranational approach to developing private international law rules would involve a cross-border approach in the form of a unified agreement (e.g. by way of Convention or Treaty) between different sovereign states resulting in a single solution to conflict of laws issues which are of global significance. Existing examples of supranational approaches in private international law include the Hague Securities Convention of 5 July 2006 on the Law Applicable to certain Rights in respect of Securities held with an Intermediary.

However, this is not what we understand the Law Commission to be proposing. Instead, the "supranational" solution discussed in the Consultation Paper would be developed solely by the English courts, with each other jurisdiction across the world potentially establishing its own individual private international law solution for the same, single issue.

This leads into our principal and most important concern with the "supranational" solution, which is that it would not offer the *ex ante* legal certainty that is critical for financial market participants to be able to structure transactions and associated legal arrangements with confidence. In practice, financial market participants need to know, first, which law (whether as a matter of the law of obligations or the law of property) will govern (or might otherwise affect) their financial transactions or other arrangements when structuring such transactions or other arrangements; and, second, with regard to such applicable law, what steps need to be taken to ensure such transactions or other arrangements are legal, valid and effective both as between the parties to the transaction, and as against third parties who may be affected by the transaction or who might claim an adverse interest in an asset the subject of the transaction. Deciding in court once a dispute arises is too late – the law must be clear from the outset.

However, under the "supranational" approach, the applicable law governing proprietary issues (for example, associated with the perfection or priority of security interests) will not be clear from the outset. A collateral-taker will not be able to establish with the required degree of confidence that if a particular step is taken to protect the priority of its security interest over the relevant digital asset as against third parties, that step will be effective to achieve that aim under the relevant applicable law if (contrary to the collateral-taker's expectations) a different law (requiring different steps to protect priority) were subsequently determined by a court to govern proprietary issues on the basis of the *"just disposal"* of a relevant dispute. That applicable law will not be capable of being objectively determined because the collateral-taker cannot establish, with any reasonable degree of confidence, what factors an English court would apply (and what weight it would attribute to each of these factors) in determining the applicable law that would govern such proprietary issues.

This is an issue of critical significance for the financial markets more broadly, but even more so for operators of financial market infrastructure subject to the CPMI-IOSCO Principles for Financial Market Infrastructures (the "**PFMIs**") (and the participants in the systems operated by FMIs), who

are required under Principle 1 to have a "*well-founded, clear, transparent, and enforceable legal basis for each material aspect of its activities in all relevant jurisdictions*".

For these reasons, in addition to our material concern that an inevitable outcome would be the fragmentation of international laws into discrete specialised domestic laws governing the same legal issue, the FLC considers that the "supranational" approach is inappropriate as a basis for a private international law solution for proprietary and contractual issues relating to digital assets. Such an approach would be impractical and fail to provide the necessary legal certainty required for digital assets to be adopted at scale in the financial markets. This should not be regarded solely as an academic issue that can be appropriately addressed by a focused, academic approach. The FLC encourages the Law Commission to reflect on the practical impact and significance of its proposals for persons dealing with, transacting in, and taking security over, digital assets in the context of business activities which have a significant role to play in the broader UK and global economy.

3. THE FLC'S PREFERRED SOLUTION

We maintain the view expressed in the FLC's CfE Response that the optimal private international law rule to determine the applicable law governing ***both*** proprietary and contractual issues in relation to digital assets is one based on party autonomy. This would allow the developers and participants in a system to choose a law that they have identified, providing confidence and a clear, well-founded and enforceable legal basis to govern obligations and property rights or interests affecting digital assets recorded in their system. This would provide a transparent, robust, practical, and internationally-recognised solution allowing participants (and non-participants dealing with, including by taking security over, digital assets recorded in the system) to regulate their system-related affairs with confidence and legal certainty. Such a solution would have important practical advantages given the chosen governing law would be easy to identify and would be consistent with the legitimate expectations of the parties or participants in the DLT or other digital/electronic system that have agreed to apply this law. It would also be consistent with the legitimate expectations of any persons who may wish to acquire an interest in relation to digital assets recorded in the system, but do not themselves have a contractual relationship with the operator/administrator or participants in the system. This latter category of persons can be reasonably expected to undertake an appropriate level of due diligence to identify the law that has been selected to govern both (a) the contractual rights and obligations between participants in the system, and (b) relevant proprietary issues affecting digital assets recorded in the system, such as whether a security interest over such assets is effective against third parties. Such legal certainty would enhance the attractiveness of the system for investors and participants, as well as those providing liquidity to the system or otherwise by using the digital assets recorded in the system by way of collateral.

It would also be a solution capable of producing a private international law rule that can be applied to both permissioned and permissionless DLT systems, offering the benefits of consistency across different types of DLT system and digital assets. As set out in our CfE Response, we consider that once the economic and system benefits accorded by a party autonomy solution become appreciated by the developers and participants of a decentralised, permissionless system, there is every incentive for them to adopt a specific governance rule for the applicable law (both for contractual and proprietary issues affecting digital assets recorded in their system) – much in the same way as for a centralised, permissioned system.

Nonetheless, we recognise that situations may arise in which parties or participants in a DLT system have not expressly chosen a particular governing law, notwithstanding the strong incentive that would

exist to do so assuming that English law adopted a party autonomy-based private international law rule to govern proprietary and contractual issues affecting digital assets. The relevant private international law rule will therefore need to provide a "waterfall" of fall-back options where the first option (the law selected by the participants in the DLT system, which is given primacy) cannot be applied due to the absence of an expressly chosen governing law.

For further detail and analysis, please refer to our CfE Response.

4. THE LAW COMMISSION'S ARGUMENTS AGAINST PARTY AUTONOMY (AND MULTILATERALIST APPROACHES MORE BROADLY) BEING SUITABLE

The Law Commission appears to reject existing multilateralist approaches (which would include party autonomy, as well as other existing rules) as being suitable bases for the development of a private international law rule for digital assets. However, we consider it important for thorough consideration to be given to respective merits of such approaches.

The Consultation Paper's tendency against multilateralist approaches appears to be based on the following key propositions:

(a) Party autonomy cannot produce an appropriate private international law rule for proprietary issues because this effectively involves a "contracting out" of the *lex situs* as a form of mandatory law.

(b) The existence of contractual arrangements in centralised or permissioned applications of DLT reduce or obviate the need to consider property issues in the development of private international law as affecting digital assets recorded in such systems.

(c) Party autonomy is not generally recognised in private international law for issues of a proprietary nature, which are addressed by the *lex situs*.

(d) Multilateralist approaches tend to lean to the choice of law "*with the least tenuous connection*" or "*an arbitrary outcome*".[5]

We consider that there are strong counter-arguments in respect of each of the above points which are important to reflect in any analysis on these issues. These counter-arguments, which are set out below, demonstrate that contrary to certain views expressed in the Consultation Paper and the FAQs, multilateralist approaches can be regarded as a perfectly appropriate solution for proprietary and contractual issues affecting digital assets (recorded in either a permissioned or permissionless DLT (or other digital/electronic) system).

(a) Party autonomy would involve a "contracting out" of mandatory law, namely the *lex situs* rule as an established principle of private international law

In the Call for Evidence, the Law Commission set out its reasoning for the view that party autonomy is contrary to property law as mandatory law. Allowing the possibility of parties to choose the law that applies to govern proprietary issues affecting digital assets recorded in a DLT system would, in the Law Commission's words, be allowing parties to *"shift aside"* the provisions of the *lex situs* and

[5] Consultation Paper, 6.113-1.114.

thereby impose at their will legal effects on third parties who have not consented to this choice. In cases where there is a clear country or territory to whose laws the *lex situs* rule points, the property rules and principles of that law apply; *lex situs* cannot be contracted out of.

This appears to be one of the key reasons why a consideration of party autonomy has been omitted from the Consultation Paper (as affecting permissionless systems – although the same logic would apply for proprietary issues affecting digital assets held in a permissioned system). However, Chapter 5 of the Consultation Paper acknowledges that, in relation to wholly decentralised DLT systems, *lex situs* has no role to play because there is typically no clear country or territory that can be identified by applying this rule. Therefore, at the very least in relation to these types of systems, the Law Commission's objection to the party autonomy principle does not operate. Allowing parties to expressly choose the law governing proprietary issues would not be tantamount to them "contracting out" of the *lex situs*, because as a practical matter this rule cannot be applied to digital assets recorded in a truly decentralised DLT system.

This observation is not necessarily limited to public, permissionless DLT systems. As we note above in our general observations, while the notion of a neat divide between public, permissionless DLT and private, permissioned DLT is conceptually attractive, it is not truly reflective of the wide spectrum of DLT systems that exist in practice and which could develop in the future. The FAQs assume in various places that there would be a central administrator in the context of private, permissioned or "centralised" DLT systems who acts as "gatekeeper" (and *"reserves to itself the authority to commit updates to the ledger"*).[6]

However, this assumes that all such systems will share this key feature when that might not be the case in practice or in the future, including in the context of systems based on technologies other than DLT. Indeed, the UK Jurisdiction Taskforce Legal Statement on the issuance and transfer of digital securities under English private law recognised that it is possible to create operating models where there is no central administrator having unilateral control over the ledger, even in the case of private, permissioned DLT systems.[7] There is nothing inherent about those systems that means that there *must* be a central administrator.

A private, permissioned DLT system, depending on its design, could therefore share the same relevant attributes (i.e. the lack of a central administrator or operator capable of making unilateral updates to the ledger e.g. through a "master key" or "master node") which circumvents the policy concerns identified by the Law Commission of allowing the applicable law chosen by the system (for its consensus mechanism) to govern proprietary issues. In essence, there is no "clear winner" as a single sovereign jurisdiction to be identified as the *lex situs*, which might otherwise "trump" party autonomy and make any choice of law by the developers of a system (and its participants) for proprietary issues contrary to a public policy or *ordre public* which requires the law of the situs exclusively to govern such issues.

It follows from the above that, at least where the DLT system lacks the necessary attributes for *lex situs* to have a role, there is no "mandatory law" which can be "contracted out of" when the participants in that DLT system choose the law to govern proprietary issues affecting digital assets recorded in it. Consequently, the objection to party autonomy on the aforementioned public policy

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[6] FAQs, 1.35.
[7] UK Jurisdiction Taskforce, *Legal Statement on the issuance and transfer of digital securities under English private law* (LawTech UK, 2023): Appendix 1. Retrieved from: https://lawtechuk.io/insights/ukjt-digital-securities

grounds would lose all force, as well as undermine the legal certainty that the participants in the system are seeking to achieve precisely because there is no clear "mandatory law".

(b) **There is no need to develop a private international law rule to address proprietary issues arising in relation to private, permissioned DLT systems because all relevant arrangements will be governed purely by contract**

The FAQs state:

"The existence of contractual arrangements in centralised or permissioned applications of DLT... reduce or obviate the need to consider property issues in the conflict of laws".[8]

We disagree with this position for the reasons outlined below. We understand that the Law Commission's view is that in relation to private, permissioned DLT systems, there is no need to develop a private international law rule to address proprietary issues concerning digital assets recorded in such systems because all relevant issues relating to such assets would be decided by matters of contract.

As a result, the FAQs do not contemplate a true potential priority dispute arising which would be addressed as a creature of property law (as opposed to the law of obligations). The argument seems to be that, if there is a dispute between two competing assignees of a digital asset (and the digital asset is a token linked to a debt or some other claim), this dispute can be resolved by looking to who the debtor/obligor recognises as its creditor. For this reason, so the argument goes, there is no need for a private international law rule to identify the applicable law governing proprietary issues – the priority issue as between the two assignees is to be determined, for centralised, permissioned systems, by the law governing the debt/claim (as required under Article 14(2) of the Rome I Regulation) as the law determining the relationship between the debtor/obligor and an assignee.

We do not consider this position to be correct. This approach, in the view of the FLC, mischaracterises priority and other proprietary issues in permissioned, centralised DLT systems as matters for the law of obligations (i.e. contractual issues). This position also fails to fully appreciate the analysis underpinning the rule in *Dearle v Hall.*[9]

The rule in *Dearle v Hall*, which concerns the priority of rights to a debt in the case of competing assignments, has two key elements – the second of which is sometimes missed, leading to an overall mischaracterisation of the rule itself:

- First, the rule establishes that, where there are competing assignments of a debt, the assignee who is entitled to payment from the debtor (and against whom the debtor can obtain a good discharge) is the assignee who first gives notice to the debtor of the assignment. However, this is only part of the rule in *Dearle v Hall*.

- Second, the first assignee to give notice to the debtor of its assignment will only take priority over another (first in time) assignee if, at the time it provided its consideration for the assignment, it did not have notice of the existing assignment of that debt to the other assignee. For example, if assignee 1 receives an assignment of a debt from an assignor ("A") and the same debt is later assigned by A to assignee 2, assignee 2 may be the first assignee

[8] FAQs, 1.32.
[9] (1828) 3 Russell 1 38 ER 475.

to give notice to the debtor and the debtor may therefore receive a good discharge of its obligations by making payment to assignee 2. However, if assignee 2 had notice of the previous assignment of the debt by A to assignee 1 at the time it provided its consideration for the assignment by A of the debt to it, its interest would take subject to the prior interest of assignee 1. It would hold its rights in relation to the debt (including any proceeds paid to it by the debtor by way of principal repayment or interest) on trust for assignee 1.

It can therefore be seen from the above that the two components of the rule in *Dearle v Hall* address different types of issues/legal concepts. The first component addresses an issue that falls to be determined by the law of obligations, namely the relationship between an assignee and a debtor and the question of whether the debtor can obtain a good discharge of its obligations by making payment to that assignee. The second component, on the other hand, concerns a different issue which should be properly regarded as falling within the sphere of property law, namely which assignee's rights (i.e. as a matter of the relationship between an assignee and another assignee) to the same item of property take priority where there are two competing assignments.

Dearle v Hall illustrates that the issue as to which assignee takes priority will be determined, not by the answer to the question of who the obligor recognises as entitled to the relevant rights under the assigned debt, contract or other transferable interest, but instead by the relevant priority principle under property law. Thus, we do not agree with the statement that "*the existence of contractual arrangements in centralised or permissioned applications of DLT… reduce or obviate the need to consider property issues in the conflict of laws*".[10] This position fails to recognise that, although there is often a close nexus between contractual issues and property law issues, the existence of a pre-existing contractual relationship does not remove the potential for issues or disputes to arise which are addressed by property law rules or principles.

The point we raise above regarding the second component of the rule in *Dearle v. Hall* was not part of the *ratio decidendi* in the case of *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC (the Mount)*[11] ("***Raiffeisen***"), and we do not consider the Law Commission's conclusions on the *Raiffeisen* decision to be a correct analysis of the law.

Even for permissioned, centralised systems, it is therefore necessary to have a practical and appropriate rule to determine which jurisdiction's (property) law applies to resolve priority disputes and other issues of a proprietary nature. As for a decentralised, permissionless DLT system and as explained above, we consider such a practical and appropriate rule to be one based on party autonomy i.e. the law chosen by the developers of and participants in the system as the applicable law to govern proprietary issues affecting the digital assets recorded in the system. For a DLT-based system without a central administrator/"gatekeeper" which has reserved to itself the authority to commit updates to the ledger, the law chosen by the participants to govern proprietary issues affecting digital assets instantiated in the system is the only sensible, practical law – and is the law of the courts who solely have, through the operation of the consensus mechanism in accordance with such law, *"practical and effective control over the state of the ledger".*

(c) **Party autonomy is not generally recognised in private international law for issues of a proprietary nature**

[10] FAQs, 1.32.
[11] [2001] EWCA Civ. 68.

The FAQs state that "*...party autonomy is not recognised in private international law for the issues to which the lex situs rule applies*".[12] The FLC disagrees and notes in this respect that there are at least two clear examples of party autonomy being adopted internationally as a solution to addressing conflict of laws in relation to issues of a proprietary nature:

- *The Hague Securities Convention*: the primary conflict of laws rule set out in Article 4(1) of this Convention identifies "*the law in force in the State expressly agreed in the account agreement as the State whose law governs the account agreement or, if the account agreement expressly provides that another law is applicable to all such issues, that other law*".[13] This "primary rule" governs the various matters set out in Article 2(1), which include matters which are clearly proprietary (rather than contractual) in nature (by virtue of the explicit references to the effects on third parties).

- *Section 12-107 of the US Uniform Commercial Code (UCC)*: Section 12-107 of the UCC establishes a private international law rule for "controllable electronic records". This provides that the local law of the controllable electronic record's jurisdiction governs certain matters (including those of a proprietary nature) "*unless an effective agreement determines that the local law of another jurisdiction governs*". The "*controllable electronic record's jurisdiction*" is determined by a waterfall of tests set out in paragraph (c), the first of which is the jurisdiction expressly provided by the controllable electronic record as its jurisdiction for the purposes of this article or the UCC (if any).

We also disagree with the view expressed in the FAQs that Principle 5 of the UNIDROIT Principles on Digital Assets and Private Law is solely concerned with issues that are properly characterised as matters of contract, and not proprietary.[14] An analysis of the UNIDROIT Principles themselves, and of related external commentary, provides a clear basis for concluding that this is not the case. For example, Principle 5 and the commentary accompanying this demonstrate a clear intention for Principle 5 to apply to determine the applicable law governing issues that have effects on third parties, which would ordinarily be characterised as within the sphere of property law. We note that a misunderstanding of the references to "consent" in Principle 5 and the commentary may have contributed to the Law Commission's view. "Consent" in this context is not limited to the kind of express consent that is a typical feature of contractual relationships, and is instead explained in the commentary to mean that third parties are taken, by virtue of their dealings in relation to a digital asset, to have accepted the choice of law the relevant DLT system (in which that asset is recorded) has adopted.[15] Third parties who want to acquire or seize assets instantiated in a DLT-based system can be expected to undertake due diligence and inform themselves about the applicable law chosen by the system to govern proprietary issues.

As far as external commentary is concerned, we would refer the Law Commission to two recent relevant articles by distinguished academics. The first is by Professor Matthias Lehmann, who was a member of the working group of UNIDROIT involved in the development of the Principles,[16] and the

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[12] FAQS, 1.168.

[13] If it is not possible to apply this "primary" conflict of laws rule due to the absence of an expressly chosen governing law under the account agreement, it is then necessary to turn to the "fall-back" rules set out in Article 5.

[14] UNIDROIT Principles on Digital Assets and Private law (2023) *International Institute for the Unification of Private Law,* Section II: Private International Law, Principle 5: Applicable law. Retrieved from: https://www.unidroit.org/wp-content/uploads/2024/01/Principles-on-Digital-Assets-and-Private-Law-linked-1.pdf

[15] Consultation Paper, 5.5 and 5.16 (for the commentary on Principle 5).

[16] Matthias Lehmann, "Digital assets in the conflict of laws: a comparative search for the 'ideal rule'," *Singapore Journal of Legal Studies* (September 2024): 1- 26.

other is by Professors Louise Gullifer and Ignacio Tirado,[17] who were members of the drafting committee for the Principles. Both articles provide strong external evidence that Principle 5 was intended to serve as a conflict of laws rule for proprietary issues in relation to digital assets.

(d) Multilateralist approaches tend to arbitrary outcomes or a law being selected which has the "*least tenuous connection*" to the relevant issue or matter at hand

A final reason for the Law Commission's rejection of a multilateralist approach is that these approaches tend to result in a choice of law *"with the least tenuous connection"*[18] or *"an arbitrary outcome"*[19]. The example is given of Professor Andrew Dickinson's view that the application of a conflict of laws rule based on a "closest connection" test in relation to a dispute concerning a transfer of Bitcoin would likely point to the law of the People's Republic of China, because that is where most of the validating nodes in the Bitcoin consensus mechanism are located. A finding that the law of China would govern the contractual or proprietary issue produces an undesirable outcome because (a) this is arguably an arbitrary result, assuming there are no other strong connectors to China in the particular dispute at hand, and (b) this is likely to be contrary to the legitimate expectations of the parties to the dispute.

However, we are of the view that, contrary to the views expressed by the Law Commission, there is a genuine way of finding, in relation to issues or disputes concerning digital assets recorded and transacted through a DLT system, relevant real connecting factors using a multilateralist approach which do not produce arbitrary outcomes (for example, the identification of a governing law with the "least tenuous connection" to the issue or dispute in hand).

For proprietary issues affecting digital assets, we consider that the starting point for an appropriately-crafted private international law rule should be the location of the place of the person who has centralised control over the state of the ledger or, in the absence of such a person, the proprietary laws, rules and principles of the jurisdiction which have been chosen by the developers and participants to govern proprietary issues affecting the digital assets recorded in the relevant system.[20] Far from producing an arbitrary outcome, such a solution would produce the most sensible and practical result because the courts of this jurisdiction would be the only courts with the practical and effective ability to compel compliance with an order affecting the state of the ledger (for example, a rectification order requiring the entering up of a new person as the legal holder of digital assets).

Even if a particular DLT system has no central administrator with control over the ledger, and no expressly chosen governing law has been selected, there are various "fall-back" solutions (based on multilateralist approaches) that could operate as part of a waterfall and nonetheless produce outcomes which are not arbitrary in nature. Such fall-back solutions, such as the place of the habitual residence of the transferor, produce a result which has a clear, and far from tenuous, connection to the dispute or issue and are likely to be the best available options in the absence of an express choice of law and/or central administrator with unilateral control over the state of the ledger.

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[17] Louise Gullifer and Ignacio Tirado, "Proprietary rights and digital assets: a 'modest proposal' from a transnational law perspective," *Law and Contemporary Problems*, 87 (2025): 211- 232.
[18] Consultation Paper, 5.96, 5.109, 5.110 and 6.113.
[19] Consultation Paper, 6.114 and 6.122.
[20] As we note above in Section 3, where there is no choice of law or central administrator, a waterfall of "fall-back" options would apply including, for example, the place of the issuer of the digital asset (if there is one) and the place of habitual residence of the transferor.

For contractual issues, we consider that the key question which is not asked in the Consultation Paper is *"what is the nature of the contract we are concerned with in the DLT system to determine its existence and validity under Article 10 of the Rome I Regulation?"* We consider this to be a contract *to transfer* a digital asset – and not a contract of barter as suggested by the Law Commission.

Where a transfer is to be effected against payment of fiat currency, then in accordance with the jurisprudence relating to Article 4(2) of the Rome I Regulation, the law governing any putative contract of transfer will be the law of the habitual residence of the transferor – as, in accordance with our analysis, the person who is performing the characteristic performance of the contract of transfer. Equally, if the transfer of the digital asset is being effected against the delivery of stablecoins as instruments of payment, we consider the same analysis should apply to determine the governing law of the putative contract of transfer.

If there are two transfers of digital assets and Article 4(2) of the Rome I Regulation (or corresponding rule under common law) does not apply because the delivery of neither asset can be characterised as a "payment", then we would argue that it would be appropriate either (a) (in accordance with Article 4(4) of the Rome I Regulation) to determine *"the law of the country with which the contract is most closely connected"* or (b) (if the common law principle applies) the legal system with which the contract has *"the closest and most real connection".* In either case, the same fundamental principles apply, and a governing law can be identified consistent with the legitimate expectations of the parties to the transaction.[21]

If there are two contracts of transfer constituting the single transaction, it might be possible to identify a *"clear winner"* for the legal system which performance of the single transaction has the closest and most real connection/with which the contract is most closely connected. This would involve an analysis of which law governs each component of each transfer contract to determine whether the contract is effective to achieve its purpose and so has been "performed", that is (a) to transfer the asset as between the transferor and transferee (an issue of attachment), (b) to make the transfer effective as between the transferee and any debtor/obligor (under the law of obligations), and (c) to make the transfer effective as between the transferee and third parties (an issue of property law e.g. priority of the transferee's title as against that of a competing transferee). If this exercise is undertaken for each side of the contract (i.e. as two transfers), up to six applicable laws may be identified and it may be that one system of law is repeated more times as governing a component of each transfer so as to become the *"clear winner"* with which the transaction as a whole is most clearly connected/has its closest and most real connection.

If this exercise does not produce a *"clear winner"* as the applicable law to govern the existence and validity of the putative contracts, then it would be appropriate and possible under a process of *dépeçage* (a principle based on inferred intention and reflective of the reasonable expectations of the parties in the absence of a legal system with which the transaction as a whole is most closely connected/has its closest and most real connection) is to consider each transfer contract separately to determine its own governing law – which, on the basis that we would now have a clear characteristic performance on each side of the transaction (i.e. on the one hand, the transfer of digital asset X; and, on the other hand, the transfer of digital asset Y, viewed and characterised as separate contracts with

[21] Lord Collins of Mapesbury and Professor Jonathan Harris, *Dicey, Morris & Collins on the Conflict of Laws* 16th Ed. (Sweet & Maxwell, 2022), 32-007.

their own applicable law) would likely refer to the place of habitual residence of the transferor under each, now separate and severed under the principle of *dépeçage*, transfer contract.

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