Legal high Committee for
Financial markets of Paris

REPORT ON THE DETERMINATION OF THE LAW APPLICABLE TO ASSETS REGISTERED IN DISTRIBUTED LEDGERS

of the Legal high Committee for Financial markets of Paris

31 May 2024

9 rue de Valois, 75001 Paris, France - Tel.: +33 (0)1 42 92 20 00 - hautcomite@hcjp.fr - www.hcjp.fr

Report on the determination of the law applicable to assets registered in distributed ledgers

Table of contents

Background and purpose of the report

In connection with the adaptation of French law to the entry into force of a European framework for distributed registry technologies[1] , the Financial Markets Authority (AMF) asked the Legal High Committee for Financial Markets of Paris (HCJP) to prepare a report on the state of solutions in French private international law to conflicts of laws relating to the proprietary effects of assets registered in a distributed ledger.

The issues to be addressed under French law are part of a rapidly changing context. Several countries, including the United States, Switzerland, Germany, Monaco and Liechtenstein, have adopted specific substantive law and conflict-of-laws rules concerning certain types of assets registered in "distributed" or "decentralized" ledgers[2] .

A draft set of *Principles on Digital Assets and Private Law* ("DAPL") was adopted in May 2023 by the Unidroit General Assembly[3] , consisting of substantive law principles and a specific conflict-of-laws rule (hereinafter, the "Unidroit Principles"). The work carried out by Unidroit was envisaged as a possible starting point for the development of an international instrument on the subject by the Hague Conference on International Law, as part of a "joint initiative" between the two organizations[4] . However, this joint initiative was halted in view of France's reservations about its premises, which were shared by other member states of the HCCH[5] .

In France, the entry into force of the "pilot regime" regulation[6] has led to several adaptations to securities law[7] , while the adoption of the "MiCA" regulation[8] has recently been the subject of further work in the marketplace. This report has endeavored to integrate this evolving framework into its presentation and proposals, making a clear distinction between *de lege lata*

---

[1] See the definition given in Article 2 of Regulation (EU) 2022/858 of the European Parliament and of the Council of 30 May, 2022 on a pilot regime for market infrastructures based on distributed ledger technology, and amending Regulations (EU) No 600/2014 and (EU) No 909/2014 and Directive 2014/65/EU: "For the purposes of this Regulation, the following definitions apply: (1) 'distributed ledger technology' or 'DLT' means a technology that enables the operation and use of distributed ledgers; (2) 'distributed ledger' means an information repository that keeps records of transactions and that is shared across, and synchronised between, a set of DLT network nodes using a consensus mechanism", taken up by article 3, 1) and 2) of Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May, 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937.

[2] On the adoption of the European notion of distributed ledger technology in this report, see below, the explanations on the expression "assets registered in distributed ledgers".

[3] Governing Council, Item n° 4 on the agenda: Adoption of Draft UNIDROIT Instruments (C) Principles on Digital Assets and Private Law: UNIDROIT 2023, C.D. (102) 6, April 2023, 102nd session, Rome, 10-12 May 2023 (hereinafter, the UNIDROIT 2023 Principles - C.D. (102) 6).

[4] CGAP, Proposal for Joint Work: HCCH-UNIDROIT Project on Law Applicable to Cross-Border Holdings and Transfers of Digital Assets and Tokens, Prel. Doc. No 3C of January 2023: https://assets.hcch.net/docs/a91fd233-acf7-4c42-9aad-a426c4565068.pdf, spec. pts. 17 and 18, p. 6.

[5] PB, HCCH-UNIDROIT Digital Assets and Tokens Joint Project: Report, MARCH 2024 PREL. DOC. NO 3, p. 7, n° 28; CGAP Conclusions & Decisions (C&D), March 2024, p. 2, n° 8.

[6] Regulation (EU) 2022/858, above.

[7] Introduced by Loi n° 2023-171 du 9 mars 2023 portant diverses dispositions d'adaptation au droit de l'Union européenne dans les domaines de l'économie, de la santé, du travail, des transports et de l'agriculture and Décret n° 2023-421 du 31 mai 2023 portant adaptation du droit des titres au règlement européen dit « régime pilote ».

[8] Regulation (EU) 2023/1114, above.

and *de lege ferenda* elements, in particular as regards the avenues for adapting French law to the MiCA regulation recommended in a HCJP report published during its preparation[9] .

It was in this context that the undersigned were asked to set up a working group to identify any gaps or shortcomings in French conflict-of-laws rules, and to consider the relevant connecting factors for the purposes of drawing up any specific rule. The working group[10] met six times between November 2023 and May 2024, to decide on the method to be used, then to examine the determination of the relevant connecting factor for transferable securities registered in a distributed ledger technology, before considering the characterization and possible connecting factors for assets other than transferable securities.

This report is therefore concerned with determining the law applicable to the proprietary effects of assets registered in distributed ledgers.

*

As such, the purpose of this report calls for a number of explanations.

The expression "assets registered in distributed ledgers" implies two clarifications:

- the term "***registered asset",*** without any other qualifier, covers both known financing or investment instruments likely to be registered in distributed ledgers, such as transferable securities[11] , and new types of assets, without prejudging their characterization or classification. However, several instruments have been excluded from the scope of this report's proposals, given the specific considerations they require[12]. More generally, the term "asset" assumes the proprietary nature of the registration, which results in a double exclusion: any "extrapatrimonial" data is excluded from consideration; any property object that cannot be transmitted by modification of the registration does not constitute a registered asset as such.
- the notion of ***distributed ledgers*** does not refer to any specific text or definition in force. It is, however, closer to the European notion of "distributed ledger technology"[13] than to the notion used in French law of "shared electronic registration device" (“Dispositif d’enregistrement électronique partagé”, hereinafter “DEEP”), for which it was recommended that the European notion be substituted in the aforementioned report on the MiCA regulation[14]. It also underlines the essential difficulty in terms of localization posed by the fact that the ledger is not held on a central server.

---

[9] Report on the MiCA regulation of the HCJP, January 27, 2024.

[10] See the composition of the working group in the appendix to this report.

[11] According to the internal nomenclature for financial instruments set out in Article L.211-1 of the French Monetary and Financial Code. It must be stressed out that in referring to “transferable securities” to translate the French concept of “titres financiers”, the English terms encompass not only shares, bonds and securities giving the right to acquire or sell or receive a cash settlement of them but also share or units in collective investment undertakings. Under French law, the legal characterization and regime under property law and as to the proprietary effects of the latter are identical to those of share or bonds. For an overview of the conceptual framework regarding the classification of financial instruments in European Union Law, see ESMA, Consultation paper On the draft Guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments, 29 January 2024 ESMA75-453128700-52.

[12] See 3.1.1 below.

[13] See note 1.

[14] Report on the MiCA Regulation, op. cit., p. 14.

As stated in the introduction, the working group's discussions were also limited to determining the law applicable to the ***proprietary effects of*** assets, as defined during the discussions[15]. The category was understood to include the main questions relating to the determination of real rights and the ways in which they can be exercised and transferred over assets.

In particular, this concerns the identification, or not, of the asset as *property*[16] , the determination of the rights to which it may be subject - ownership and dismemberments - for the holder and for the benefit of third parties, the conditions for exercising these rights, in particular through the exercise of an action for recovery and the protection of the holder duly registered in good faith (the innocent acquirer), and the terms and effects of the transfer of ownership - subject to the overriding mandatory provisions, applicable in the matter[17] . For the sake of consistency, the discussion has been extended to ***the creation and enforceability of legal or contract security interests***. The inclusion of security interests within the scope of the study was essentially dictated by the need to determine the scope of the chosen connecting factor.

After methodological reflection, the working group decided to deal separately with the determination of the law applicable to transferable securities registered in a distributed ledgers and to other assets registered in distributed ledgers[18] .

At the end of its work, it appeared possible to determine the law applicable to transferable securities registered in distributed ledgers (II) by making a distinction between :

- *registered securities, not subject to the pilot scheme regulations and registered in a DLT*, governed, in application of the principles of French private international law, by the law of the issuer;
- *securities subject to the pilot scheme*, registered on a DLT market infrastructure, and governed, according to a specific conflict-of-laws rule, by the law applicable to the market infrastructure providing the custody service, either the DLT settlement system or the DLT trading and settlement system, as the case may be.

---

[15] Following the method already implemented in a previous report commissioned by the a Direction générale du Trésor et de la politique économique (French Treasury) : Rapport sur un projet de règle de conflit de lois en matière de titres financiers (Report on a draft conflict-of-laws rule for transferable securities), July 1, 2008er, Prés. H. Synvet, n° 15, p. 6. V. In particular, the proposal to introduce an article L.211-17 whose purpose is to determine the law applicable in the presence of an intermediary, and whose scope is specified in the second paragraph: "Sont soumis à la loi ainsi désignée, notamment, la détermination des droits attachés à l'inscription en compte, l'opposabilité de ces droits aux tiers, le régime de leur transmission, les conditions de la revendication des titres financiers, la constitution et les effets des garanties conventionnelles sur titres financiers, les sûretés légales susceptibles de les grever, le conflit de droits concurrents portant sur les mêmes titres financiers". Comp. art. 2 of the Convention of July 5, 2006 on the law applicable to certain rights in respect of securities held with an intermediary.

[16] Particularly in view of the development of "Soulbounds tokens", also known as "social, community and reputation tokens", whose classification as an "asset" in a proprietary sense is inaccurate, given the impossibility of disposing of them. V. CGAP, Proposal for Joint Work: HCCH-UNIDROIT Project on Law Applicable to Cross-Border Holdings and Transfers of Digital Assets and Tokens, op. cit. pts. 13-15.

[17] Anticipating, for example, future deadlines imposed on the settlement of transferred crypto-assets, by analogy with securities law.

[18] It is not accurate to speak of "crypto-assets" from the outset, as one of the problems raised is precisely that of specifying the connecting category. Because of its coincidence with the "MiCA" regulation, the term crypto-assets would suggest the need to align the scope of the conflict-of-laws rule with the assets covered by the regulation. On this question, infra, 3.1.3.

With regard to other assets registered in distributed ledgers (III), the working group concluded that it was necessary to enact a new, specific conflict-of-laws rule, articulating, in hierarchical form, objective attachments that take into account the diversity of crypto-assets. Some crypto-assets are not issued, and the use of a custody service is not a necessity.

Given the impossibility of establishing one or other of these criteria as the sole connecting factor, the working group unanimously agreed on the relevance of two criteria: the law of the issuer and the law of the custodian, supplemented in a very subsidiary way by a connecting factor based on the holder's habitual place of residence.

However, the group did not unanimously agree on the order of these criteria. The majority of the group's members wished to put forward a proposal[19] for a rule making assets registerd in distributed ledgers other than transferable securities subject to the law designated by :

- A principled connecting factor based on the custody of the assets ;
- A subsidiary connecting factor based on the issuance, in the absence of a custody relationship ;
- A final connection based on the holder's habitual residence.

Before reporting on the analyses carried out on these two questions, it is worth explaining the reasons for this dissociated approach. This is based on the reservations expressed against an overly broad characterization applied to assets registered in distributed ledgers, which would lead to an approach based on the form of assets in private international law, which are fundamentally different in nature in substantive law (I).

*

I. Reservations concerning the undifferentiated characterization of assets registered in distributed ledgers

From a French and European perspective, private international law thinking on the introduction of conflict-of-laws rules must be seen in the context of the development of substantive law.

French law and European Union law each adopt a different approach to the characterization and regulation of assets registered in distributed ledgers, depending on whether they are

[19] *See below, 3.2.2. ii), the proposal put forward and the alternative discussed by some of the working group members.*

transferable securities or other types of assets[20] (1.1.). This state of positive law justifies exploring a dissociated approach to these different assets in private international law (1.2.). This approach is reinforced by the reservations that can be expressed about the premises of the Unidroit Principles, which are based on a single, undifferentiated characterization of all "digital assets"[21] (1.3.).

1.1. Differentiating between transferable securities and other assets under substantive law

In French law, the so-called *"Ordonnance blockchain"*[22] - clarified by its implementation decree[23] also applicable to the issue and transfer of mini-bons[24] -, established a principle of equivalence of registrations within a DEEP with securities account registrations and their scope[25] , for unlisted transferable securities[26] . The law of March 9, 2023[27] , then extended the possibility of registration in a DLT to listed transferable securities, in application of the Pilot Regime Regulation. This scheme coexists with that of the "Loi Pacte"[28] , which recognizes the category of digital assets[29] and distinguishes them from transferable securities and "bons de caisse", broken down into two categories:

- the first category consists of tokens, characterized as[30] intangible properties for the purposes of applying token issuer status and, by reference, digital asset service provider (DASP) status; and
- the second category is made up of digital assets, representing a value, and fulfilling an "exchange" function similar to that of money, but formally distinct from it under the terms of article L.54-10-1, 2° of the French Monetary and Financial Code.

This state of positive law marks the choice of a dualism of characterization and substantive applicable regimes. While the dividing line is bound to evolve in line with European Union

[20] For the purposes of private international law, this state of positive law was not questioned by the working group, whose discussions simply drew on the latest thinking on the difficulties of distinguishing between financial instruments and crypto-assets. Lastly, ESMA, Consultation paper On the draft Guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments, 29 January 2024 ESMA75-453128700-52.

[21] Literal translation of digital assets, which does not coincide with the French concept of "actifs numériques" (digital assets) that will be considered below.

[22] Ordonnance n° 2017-1674 du 8 décembre 2017 relative à l'utilisation d'un dispositif d'enregistrement électronique partagé pour la représentation et la transmission de titres financiers.

[23] Décret n° 2018-1226 du 24 décembre 2018 relatif à l'utilisation d'un dispositif d'enregistrement électronique partagé pour la représentation et la transmission de titres financiers et pour l'émission et la cession de minibons.

[24] The regime created by the Ordonnance n° 2016-520 du 28 avril 2016 relative aux bons de caisse was repealed by the ordonnance n° 2021-1735 du 22 décembre 2021 modernisant le cadre relatif au financement participatif.

[25] L.211-3, paragraph 2 of the French Monetary and Financial Code.

[26] By reference only to the provisions of article L.211-7, paragraph 2, concerning transferable securities not admitted to the operations of a central securities depository.

[27] Loi n° 2023-171 of March 9, 2023, aforementioned.

[28] Loi n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises.

[29] L.54-10-1 of the French Monetary and Financial Code.

[30] L.552-1 of the French Monetary and Financial Code.

law[31] , a dualism of characterizations and regimes necessarily follows from it, and will thus endure.

In European Union law, the dissociation between the treatment of financial instruments and other assets registered in a distributed ledger is the result of the pilot regime and MiCA regulations. In contrast to the US regulatory choice to extend the constraints of federal securities law to assets registered in distributed ledgers[32] , a specific framework has been developed for crypto-asset markets, from which financial instruments are formally excluded.

The pilot scheme, which led to the adaptation of French law by the aforementioned law of March 9, 2023, extended the procedures for registering financial instruments in distributed ledgers in the context of transactions concluded on DLT infrastructures. By its very purpose, it concerns the admission to trading on DLT infrastructures only of financial instruments within the meaning of Article 4(1)(15) of Directive 2014/65/EU (by reference to article 2.12 of the Pilot Regime Regulation), which are then qualified as "DLT financial instruments" (article 2.11 of the Pilot Regime Regulation).

According to article 1 §1, the MiCA regulation aims to establish *"uniform requirements for the offer to the public and admission to trading on a trading platform of crypto-assets other than asset-referenced tokens and e-money tokens, of asset-referenced tokens and of e-money tokens, as well as requirements for crypto-asset service providers".* This text is therefore first and foremost a regulatory *text* in the sense of the Unidroit Principles[33] - establishing requirements for professional status, the performance of certain operations and the sanctioning of market abuses. It is nonetheless based on certain definitions and elements of substantive law enabling crypto-assets to be identified, and an exclusion from its scope of application of crypto-assets qualifying as financial instruments[34] .

1.2. The need to dissociate financial securities from other assets in private international law

This French and European approach thus differs in particular from that followed by the Unidroit Principles, based on a twofold inspiration:

- **on a substantive level, the Principles subscribe to a form-based approach of the registered instruments**, strongly inspired by American uniform law[35] , which subjects all types of registered values or rights indiscriminately to a body of substantive rules, with reference to the concept of *digital asset*. The unity of the category derives from

[31] On the relationship between the concepts of digital assets and crypto-assets, see the analyses and proposals in the Report on MiCA Regulation, op. cit. pp. 14-16. See 3.1.2 below.

[32] According to the position adopted by the SEC, applying the "Howey test" for the purposes of characterizing securities under federal law, established by the Supreme Court in SEC v. W. J. Howey Co. 328 U.S. 293 (1946) : U.S. Securities and Exchange Commission (SEC), "Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO", No. 81207 (2017), available at https://www.sec.gov/litigation/investreport/34-81207.pdf (last accessed 03/28/2024).

[33] V. I.3.

[34] V. Art. 2.4, a).

[35] Article 12 of the Uniform Commercial Code on Controllable Electronic Records.

the possibility of exercising control[36] over the right or value contained in the electronic record, the criterion of control itself taking up in Principle 6 the main elements of definition it received in the recent amendments to the *Uniform Commercial Code*[37] ;

- **in the field of conflict-of-laws rules, Principle 5 follows a delocalized approach to the instrument.** Following in the footsteps of the first academic reflections on the subject, a number of studies[38] have highlighted the general difficulty of *locating* assets registered on a distributed ledger, and the importance of providing a response through transnational rules. This approach has a twofold consequence:

    - The proposed *waterfall structure* gives priority to the principle of party autonomy, with the law designated in the asset as the first connecting factor and the law designated in the "system" as the second. Recourse to an objective connecting factor based on the law of the issuer only comes as a third rank criterion;

    - The scope of the designated law is broader than the substantive law issues covered by the other Principles. Within the meaning of the Explanatory Note, the law designated under the connections of Principle 5 covers a number of substantive issues formally excluded from the scope of the Principles[39] , in particular all those excluded by Principle 3 concerning the characterization of assets as properties, the rights to which they may be subject and the validity requirements for transferring such rights.

Determining an undifferentiated characterization such as “digital assets”, as defined by the Unidroit Principles, means that the same conflict-of-laws rule applies to the crypto-assets usually distinguished - crypto-currencies, assets referring to other assets or electronic money tokens - as well as to financial instruments and intellectual property rights.

But these qualifications do not simply have consequences in terms of regulation. They also have their own private law dimension.

The characterization approach adopted by the Unidroit Principles thus fails to take into account the specific nature of financial instruments within the category of assets registered in distributed ledgers, and is out of step with substantive law, giving priority to the form of the instrument over the substance of the rights it contains. More specifically, in private international law, financial instruments are already covered by a conflict-of-laws framework[40] , the adequacy of which and possible adaptations of which can be considered separately.

In addition, the qualification of digital asset focuses on the record itself, and thus leads to the consideration of a number of long-standing dematerialized instruments in France, such as transferable securities, as "linked assets" within the meaning of Principle 4. This principle

---

[36] Principle 2(2): 'Digital asset' means an electronic record which is capable of being subject to control'.
[37] Section 12-105.
[38] Financial Markets Law Committee, Distributed Ledger Technology and Governing Law: Issues of Legal Uncertainty, March 2018 (hereinafter, "FMLC", March 2018).
[39] Pt. 5.2, of the commentary.
[40] See 2.1 below.

subjects to a law different from the designated following the principle of party autonomy two essential questions relating to the existence of the link between the record and the asset it represents, as well as the effect in terms of transfer of ownership of the asset represented by the record. These questions are determined by the law applicable to the linked asset.

This unbundling between the electronic record and the asset represented does not coincide conceptually with the distinction between *instrumentum* and *negotium*, and assumes a proprietary autonomy of the electronic record itself, which is far removed from the traditional analysis of negotiable instruments in French law.

1.3. Comments on the undifferentiated approach proposed in the Unidroit Principles

The choice made by the Unidroit Principles in favour of a first rank connecting factor in the principle of party autonomy is consistent with the premise of a characterization based on the form of the instrument. The diversity of instruments is such that common objective elements of connection cannot be determined for all of them.

In terms of method, it is therefore the adoption of a unified characterization and regime for all recorded assets in distributed ledgers or other electronic technology that justifies recourse to party autonomy principle. This approach is based on various justifications, set out in the commentary, the main ones of which call for reservations:

- the principle of party autonomy as a principle a main connecting factors allows all digital assets to be subject to a single connecting factor, thus reinforcing the principle of technological neutrality in terms of conflicts of laws, which is made possible by an undifferentiated approach to all digital assets[41] .

On closer examination, this argument is reversible. The creation of original substantive and conflict-of-laws rules confirms the singularity of certain digital media and processes. It modifies the approach to common investment instruments, such as financial instruments, which find themselves assimilated for a large part of their proprietary regime to other, very different instruments.

In this respect, the obvious observation that private international law concentrates on questions of private law is not sufficient to absolutely legitimize the generalization of a reasoning in terms of characterization based exclusively on form, since assets and instruments with the same form can be the subject of a profoundly different analysis in substantive law. In private law, distinctions naturally need to be made in the applicable legal regime, depending on the status of the parties, the nature of the commitment or the ways in which their rights are protected[42] . According to a functional approach, conflict-of-laws rules must take account of these differences. In private law, the rules governing negotiable instruments have been

[41] *V. Pt. 0.5 et seq. of the introduction.*
[42] *With a particular focus on negotiable instruments.*

shaped by their use, in order to encourage their development. And it is because of their characteristics as negotiable instruments that a certain type of conflict-of-laws rule can be applied to them. The form of an instrument is only one way of approaching its characterization, which can be combined with other considerations[43] . It is also in view of the wide divergences in analysis made in the substantive field that characterizations and conflict-of-laws rules may or may not be adapted and generalized[44] .

- the law of autonomy would be intrinsically suited to determining the applicable law for *digital assets*[45] , given their lack of *situs* and the incentive thus given to operators to determine the applicable law themselves.

This analysis is doubly debatable. Firstly, in practice, the law of autonomy is not necessarily the most appropriate connecting factor in terms of legal certainty and predictability. In the abstract, it can lead to a succession of changes in the law applicable to the same asset, based solely on the unilateral decision of the disposing party, and thus give rise to complexities in determining the scope of the change, especially in terms of third-party effectiveness[46] . From a sociological point of view, then, the assertion of its incentive effect presupposes that the principle of party autonomy can effectively correspond to the context of its implementation and to the expectations of players in the crypto-economy. For the time being, this is only hypothetical. The sensitivity of operators to differences in legal tradition in terms of property law has not yet been proven, and the incentive effect of the principle of party autonomy is only hoped for[47] .

In the absence of any empirical evidence that operators are seeking autonomy in terms of the conditions and proprietary effects of the assets they hold, it therefore seems highly hypothetical that party autonomy meets a need felt and understood by the holders of assets registered in distributed ledgers.

This observation calls for clarification in the context of the MiCA regulation, whose annexes require mention, in the White Paper, of the law applicable to the offer and the law applicable to crypto-assets, as well as the competent court[48]. A difficulty of interpretation may arise in identifying in these requirements an implicit choice in favor of party autonomy. It should be

---

[43] By way of a simple analogy, the development of paper-based instruments in international trade has not historically led to the establishment in private international law of a category of "paper assets" subject to a single connecting factor. This is, however, no more than an analogy, given that paper lends itself to the exercise of materially more extensive prerogatives than electronic recording.

[44] The clearest example is given by the state of ratifications of the Convention of July 5, 2006 on the law applicable to certain rights in respect of securities held with an intermediary, which can be explained by divergent analyses of the acceptance of the concept of intermediated securities. Adapted to legal systems admitting such a concept, the conflict-of-laws rules contained therein appeared inadequate in systems rejecting its relevance.

[45] Pt. 5.4, of the commentary.

[46] See 3.2.1 below.

[47] At the time of their adoption, the commentary to the Principles itself stressed the very limited practical expression, as it stands, of party autonomy: "although many digital assets, or systems, currently do not include a specification of applicable law, the rules in Principle 5(1)(a) and Principle 5(1)(b) provide an incentive for such a specification to be included" (pt. 5.5). In this sense, the discussions held during the preparatory work: Study LXXXII - W.G.6 - Doc. 4, Nov. 2022, spec. no. 37, p. 8 and 41, p. 9.

[48] The MiCA regulation includes among the items in the white paper the determination of the law applicable to the offer and the law applicable to crypto-assets (respectively, for crypto-assets other than asset-referenced tokens or e-money tokens, Annex I, E, §19 and Annex I, G, §10; for asset-referenced tokens, Annex II, C, §15 and Annex II, D, §17 and for e-money tokens, Annex III, C, §4 and Annex III, D, §8).

stressed, however, that in the context of MiCA, these mentions constitute regulatory requirements for the purpose of transparency on the conditions of offerings of crypto-assets. As the MiCA regulation is a regulatory text, it is not intended to introduce rules of private international law. As it stands, operators' practice is based on a freedom of choice, frequently in favour of the law of the issuer, which is explained by the absence of any specific conflict-of-laws rule. It is therefore impossible to conclude from MiCA that the party autonomy has been implicitly enshrined by a hidden conflict rule. It is not impossible to assume that a State law would objectively hold in its conflict rules a connecting factor, for example to the law of the issuer, to identify the law applicable to the assets, without this being in contradiction with the MiCA regulation, which is not a text of private international law.

- the law of autonomy, limited to matters of private law, maintains intact the separation between matters of public law - *regulatory law* - which are not subject to it, and matters of private law relating to real status of the asset, which are subject to it[49] .

However, this separation between private and public law issues seems schematic[50] . While it does not impose such a separation, it does not rule out the search for predictability in terms of applicable law, through a possible convergence of connecting factors, where appropriate. In addition, the implementation of party autonomy in a context that is now largely regulated raises a number of practical uncertainties[51] .

The advantages offered by party autonomy are therefore not indisputable and fail to justify the need for an undifferentiated approach to assets.

These observations led the group to undertake a specific review of transferable securities, in view of the extension of the registration medium to include distributed ledgers.

*

II. Determining the law applicable to transferable securities registered in distributed ledgers[52]

[49] V. Pt. 0.9 and, under principle 1, pt. 1.1, of the commentary.

[50] As a general observation, it should be noted that, on the one hand, public law rules governing professional status also aim to protect certain category interests, in particular the protection of investors, while taking into account the rights and prerogatives of the latter under private law; on the other hand, private law rules are not, in the field of property law in particular, devoid of any consideration of issues of general interest. In addition to the conditions of protection of the right of ownership, there is the essential determination of things in and out the ambit of trade ("choses hors commerce", see former art. 1128, of the French Civil Code).

[51] See 3.2.1 below.

[52] This periphrasis has been chosen to avoid any ambiguity, despite other possible names, such as "digital" or "tokenized transferable securities": see the Rapport sur les titres financiers digitaux (Report on digital financial securities) ("Security Tokens"), November 27, 2020 and the Rapport sur la réforme des titres financiers numériques (Report on the reform of digital financial securities), dated May 20, 2022, by the HCJP.

In view of the dual system already mentioned, which applies to securities registered in registers and distributed on a substantive basis, a specific thought to this issue is necessary in order to determine a connecting factor. The starting point should be the conflict rules applicable to transferable securities registered in a securities account (2.1.), in order to determine by analogy their relevance and the need to adapt them (2.2.). Finally, the scope of the connecting factors can be clarified to include the constitution and third-party effectiveness of security interests within the scope of the designated law (2.3.).

2.1. Conflict rules for book-entry securities

The solutions to conflicts of law relating to book-entry securities are based on a series of rules and principles of varying scope, which explains the diversity of the presentations that are usually made in the legal literature. They do, however, appear to be relatively stable, given the way they were presented in a report published some fifteen years ago[53] , which was regularly referred to by the working group during its discussions.

In this respect, the reminder underlines the need for ongoing reflection on securities law, by setting out the principles and rules that form positive law (2.1.1.) and mentioning the possible developments already envisaged (2.1.2.).

2.1.1. Positive law

The international law of transferable securities is based on a combination of several connecting factors, the articulation of which remains difficult to systematize, given their scope and sources, other than by following the chronology of operations relating to the creation and circulation of the security.

1° The general principles governing the delimitation of the issuer's law conferring jurisdiction over the conditions of issuance, the validity and form - e.g. registered or bearer - of the securities issued, the relationship between the issuing entity and the holders, and the substantive conditions for the transfer of ownership and its effectiveness against the latter[54] .

2° Provisions relating to the conditions of holding and the medium of the security with, in particular, article L.211-3, paragraph 1er , of the French Monetary and Financial Code[55] : *"Transferable securities, issued on French territory and subject to French law, are registered either in a securities account held by the issuer or by one of the intermediaries mentioned in 2°*

[53] *Rapport sur un projet de règle de conflit de lois en matière de titres financiers, cited above.*
[54] *It is also fair to observe that the scope of the issuer's law is understood more broadly with regard to equity securities, while debt securities open up a wider space for the party autonomy to govern the issuance contract.*
[55] *Article L.228-1, paragraph 6 of the French Commercial Code refers to securities issued by joint stock companies.*

to 7° of article L. 542-1, or, in the cases provided for in article L. 211-7, in a shared electronic recording device"[56] .

3° The rules governing the exercise of ownership rights, determined by reference to the *lex rei sitae*, according to the location of the register held by the issuer or the securities account held by the intermediary, depending on whether the security is registered or bearer.

More specifically, the reference to the account as a connecting factor resolves three difficulties envisaged by the texts that make up the "European acquis" consisting of the provisions of the three directives *Finality*[57] *, Winding Up*[58] and *Collateral*[59] , transposed into domestic law:

- within the scope of the *Finality* Directive, rights in collateral securities held for the benefit of system participants or central banks - including the ECB - are subject to the law of the State in which the register, account or central deposit system in which their rights are registered is located[60] ;
- in the *Winding Up Directive*, the exercise of ownership rights over securities registered in a register, account or centralized deposit system in a Member State is governed by the law of that State[61] ;
- finally, within the scope of the *Collateral* Directive on the regime applicable to financial collateral arrangements, the *legal nature and proprietary effects of collateral in the form of financial instruments transferable by book entry* are subject to the law of the country where the relevant account is maintained[62] .

The common criterion underlying the European acquis requires identification of the relevant account. It thus excludes any choice in determining the relevant intermediary, unlike that adopted by the *Convention of July 5, 2006 on the law applicable to certain rights in respect of securities held with an intermediary*.

This in itself raises difficulties in determining the relevant account. As the account itself has an intangible dimension, there are several possible ways of determining the intermediary holding the account. The European Commission upholds the need for a common interpretation of the connecting factor between the three directives, and considers as valid any differences in approach to the question in the various national laws[63] including, in particular, those

---

[56] Representative certificates are an exception to this rule: R.211-7 COMOFI: " Un dépositaire central peut créer des certificats représentatifs de titres financiers français ne pouvant circuler qu'à l'étranger.
Il peut déléguer ce droit à un adhérent pour une émission déterminée ».

[57] Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJEC, No. L 166, 11 June 1998, pp. 45-50).

[58] Directive n° 2001/24/EC of the European Parliament and of the Council of April 4, 2001 on the reorganization and winding-up of credit institutions (JOCE, n° L 125, May 5, 2001)

[59] Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (JOCE, n° L 168, 27 juin 2002, p. 43-50)

[60] Finality Directive, art. 9 (L. 330-2 IV, French Monetary and Financial Code) .

[61] Winding Up Directive, art. 24 (L. 613-31-8, French Monetary and Financial Code).

[62] Collateral Directive, art. 9 (art. L.211-39, French Monetary and Financial Code).

[63] European Commission - Fact Sheet, Covered bonds, cross-border distribution of investment funds and cross-border transactions in debt or securities (europa.eu), spec. §4 On the Commission Communication on the law applicable to securities: "Cette communication expose le point de vue de la Commission sur la manière dont les dispositions concernées de la DCDR, de la directive concernant la liquidation et de la DCGF peuvent actuellement être appliquées. La Commission est d'avis que la différence de formulation entre les trois directives n'implique aucune différence quant au fond. En outre, sans préjudice

determining the criterion to the place of provision of the custody service or to the place of account-keeping as identified in the account-keeping agreement[64] .

4° Lastly, article L.211-41 of the French Monetary Code establishes ***a principle of assimilation of transferable securities issued under foreign law for*** the purposes of articles L. 211-3 to L. 211-40-1 of the French Monetary and Financial Code, which has not given rise to much litigation[65] and whose scope has not been fully explored in legal literature[66] .

2.1.2. Proposed developments

By way of introduction, the above rules and principles have been maintained in the absence of ratification by the European Union of the above mentioned Hague Convention on the law applicable to intermediated securities.

Nevertheless, a number of proposals have been made to clarify or simplify existing legislation.

On the domestic front, the main changes are the result of a report already referred to, aimed at clarifying the scope of matters governed by the law of the issuer, the submission of registered securities to the law of the issuer or to the law designated by the issuer, and the determination of a specific connecting factor for intermediated securities.

The working group noted in particular the interest and topicality of the proposal to include in the law a conflict rule determining the scope of application of the law of the issuer[67] .

---

d'éventuelles décisions futures de la Cour de justice de l'Union européenne, la Commission est d'avis que toutes les différentes façons de déterminer où un compte est « situé » ou «tenu» en vertu de la loi nationale sont valables. La Commission pourrait être amenée à l'avenir à examiner, en fonction des évolutions internationales, de la technologie ou des marchés, si une autre solution permettrait d'obtenir de meilleurs résultats ».

[64] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the law applicable to property consequences of securities transactions, COM(2018) 89, March 12, 2018 (https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:52018DC0089&from=FR), spec. point 3.2. p. 6.

v. HCJP, Rapport sur le nantissement de titres financiers dans l'Union européenne (Report on the pledging of financial securities in the European Union), October 2021, pp. 12-13.

[65] Applied, for instance, admitting assimilation, par AMF, CDS, 12 oct. 2016, SAN-2016-13, p. 6, regarding shares of a Panamian law joint stock company for the purposes of classifying the activity of financial investment advice; rejecting it, AMF, CDS, 1er juill. 2019, SAN-2019-09, n° 109, dismissing the assimilation of the shares of an American Limited Liability Company for real estate investment purposes from the characterization of equity securities issued by a joint stock company, and confirmed by CE, 6ème - 5e ch.., réunies, Nov. 24, 2021, no. 434011.

[66] This text essentially raises two problems of interpretation. The first relates to the scope of assimilation, given the provisions governing transferable securities. Does this assimilation imply compliance with dematerialization rules? with rules regarding transfer of ownership and negotiability? with rules on pledging? Can these questions be dissociated? The second is linked to the characterization used, which involve determining the equivalent instruments and representative rights by reference to the concept of "financial investment" ("placement financier"), which logically tends to encompass the distinctions made in French law between equity securities, debt securities and shares or units of collective investment undertaking, and to the notion of entity. While issuance is the basis for assimilation, the implementation of assimilation presupposes the identification and recognition of entities distinct from those referred to in article L.211-2 of the French Monetary and Financial Code.

[67] Rapport sur un projet de règle de conflit de lois en matière de titres financiers, cited above, in which a future article L.211-15 is included, identifying questions falling under the law of the issuer. Initially included in the draft reform of securities law, it was withdrawn from the final text of Ordinance no. 2009-15 of January 8, 2009 on financial instruments. This proposal is consistent with subsequent proposals to clarify the scope of the lex societatis: HCJP, Rapport sur le rattachement des sociétés, 31 mars, 2021. A rule specific to corporate law, it is nonetheless of interest in determining what is governed by the law of the issuer and what is governed by the law applicable to the security as an object of ownership, to complement the proposed modification of the connection to the real seat in favor of the statutory seat. In addition, the same report proposes to identify,

The discussions also underlined the value of the method adopted in determining the scope of the conflict rule, by reference to proprietary effects, as specified in the provision relating to intermediated securities[68] .

At the European Union level, an initiative that has not yet been followed by action was aimed, among other things, at specifying the criterion of the account as a connecting factor[69]. Reflection on this subject has been postponed[70].

2.2. Adapting the connecting factor for transferable securities registered in distributed ledgers

Various studies carried out abroad[71] have highlighted the general difficulty of *locating* assets registered in a distributed ledger. It is in response to this difficulty that the Unidroit Principles subscribe to a principle based on the party autonomy.

In the context of French law, it is also possible to observe a problem of determining the connecting factor, given the connection to the account used for book-entry securities. Expressed as a principle in article L.211-3, paragraph 2 of the French Monetary and Financial Code, the principle of equivalence generally requires the extension of the substantive law provisions applicable to account-registered securities to those registered in a distributed ledgers.

In private international law, however, it does not appear possible to identify an equivalent to the securities account in the context of distributed ledgers. Based on a succession of time-stamped entries recounting transactions, the distributed ledger operates more like a journal book than a securities account.

In this respect, the working group noted that the use of a distributed register does not fundamentally change issuers' accounting practices for registered securities, given the need to periodically update individual securities accounts in line with the securities movement register. The medium is nonetheless mentioned in different terms.

The principle of equivalence thus calls for the individualization of the instrument and its transfer through registration in the distributed ledger. Any transaction records communicated

by non-exhaustive enumeration, the questions falling within the scope of the lex societatis in a future article 1837-1 of the Civil Code, providing, inter alia, that " « La loi applicable à la société en vertu de l'article précédent régit notamment : (…) k) les droits et obligations des associés ; l) la preuve, l'acquisition et la perte de la qualité d'associé ; m) la détermination des titres susceptibles d'être émis par la société (…) »

[68] See note 15.

[69] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the law applicable to property consequences of securities transactions, cited above.

[70] Ibid. and European Commission - Fact sheet, supra note 53.

[71] FMLC, Distributed Ledger Technology and Governing Law: Issues of Legal Uncertainty, prec.

to holders via access to their *wallets* thus remain outside the scope of this registration and exempt from the application of the principle of equivalence.

As a result, the identification of the applicable law by reference to the location of the relevant account, specific to securities law, cannot be implemented in its dual sense.

The ***Hague Convention*** *on the law applicable to certain rights in respect of securities held with an intermediary,* which requires the location of the relevant intermediary as a connecting factor, is out of step with the fact that there is no intermediated holding, as the security is only registered in the distributed ledger.

Secondly, ***according to the European acquis***, the absence of an account logically excludes any possibility of connection to the account. The exemptions in the pilot scheme suggest that DLT offers the possibility of doing away with the concept of a securities account, thus making it possible to dispense with a custodian account keeper ("teneur de compte conservateur" or "TCC") in order to centralize via DLT[72] . Consequently, it seems inappropriate to establish a rule of private international law based on a connecting factor to the account.

It is therefore impossible to apply the account criterion without overlooking the difficulty, given the different record-keeping procedures (2.2.1) applicable to registered securities (2.2.2.) and to securities subject to the pilot scheme (2.2.3.).

2.2.1. Need to differentiate between registered transferables securities and transferable securities subject to the pilot scheme

On examination, the substantive law on financial securities overcomes this difficulty. In the case of book-entry securities, the determining factor in practice is the identification of the relevant intermediary, rather than the account itself[73] . The reasoning is based on the criterion of the entity guaranteeing the legal integrity of the right holder.

However, positive law is based on two alternative registry systems enabling the identification of a custodian:

- for registered securities subject to the provisions of the "Blockchain" ordinance of December 8, 2017, the register is kept by the issuer[74] - or its agent[75] ;
- for securities subject to the pilot scheme, registration and/or listing are handled by a DLT infrastructure. It is therefore necessary to identify the registry activity that is the most relevant connecting factor between registration and listing.

[72] Recital 30: DLT's major strength lies in its ability to merge custody (including investor custody), trading and settlement into a single operation.
[73] In this regard, Rapport sur un projet de règle de conflit de lois en matière de titres financiers, cited above, n° 13, p. 5.
[74] L.211-7, al. 2, French Monetary and Financial Code. Adde, R.211-2, and 322-2, II, General Regulation of the AMF.
[75] Art. R. 211-3, French Monetary and Financial Code.

2.2.2. Registered transferable securities governed by the law of the issuer

The case of registered transferable securities has been found to pose few problems for the purposes of determining the applicable law. Their registration in a register held by the issuer makes it easy to apply the principles of private international law applicable to registered securities. The law of the issuer offers fixity and security for third parties and can be applied as the law of the registry by simply adapting the criterion of account keeping.

The possible presence of an agent entrusted by the issuer with the administration of registrations does not alter the analysis for a distributed ledger any more than it does for a securities account, in the absence of any specific provision relating to the status of this agent, since liability for maintaining the registration falls in any event on the issuer[76] .

As this is a simple variation on the rule used for distributed ledgers, the group felt that it was not necessary to formulate it in a specific provision.

However, expressly formulating such a provision could be an opportunity to proclaim the solution both for registered transferable securities in an account and in a distributed ledger[77].

Proposal No. 1: Registered transferable securities in a distributed ledger should be governed by the law of the issuer, as to their conditions and proprietary effects.

2.2.3. Determining the connection factor for transferable securities under the Pilot regime: Location of *registration infrastructure[78] - DLT SS or DLT TSS*

The working group was motivated by a dual concern in determining the connection for transferable securities subject to the pilot scheme. On the one hand, a solution must be adopted that is consistent with the content of the regulatory framework as a whole, with a view to its eventual Europe-wide roll-out by adapting the solutions that make up the current European acquis; and on the other hand, a solution must be adopted that takes account of the dual reality represented by acts of disposal carried out directly on or off the distributed ledger ("on/chain v. off/chain transactions")[7980] .

---

[76] Cf.,Fr. Mon. and Fin. C., art. L. 211-8 and R. 211-3.

[77] See the Rapport sur un projet de règle de conflit de lois en matière de titres financiers, cited above, p. 6, proposing a new article under the number L.211-16.

In view of the absence of any specific liability on the part of the agent towards registered investors, the working group did not wish to take a position on the appropriateness of admitting renvoi in this area.

[78] This criterion is the same as that of the system operator, referred to in the work of the FMLC (p. 18-19, n° 6.16-6.19) as "PROPA - Place of the Relevant Operating Authority/Administrator". Within the scope of the pilot scheme regulation, it seems preferable to stick to a presentation based on the definitions and concepts of the latter.

[79] In general, on the distinction and performance of on-chain and off-chain transfers, UK Jurisdiction Taskforce Legal Statement (n 19) paras 45 and 48.

[80] V. Questions and Answers On the implementation of Regulation (EU) 2022/858 of the European Parliament and of the Council of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology, 2 June 2023 ESMA70-460-189, in which ESMA states that partial tokenization is possible. It is up to the infrastructure to reconcile the two issuances.

In this respect, it appeared by analogy with book-entry securities that an objective connecting factor offered the indisputable advantage of legal certainty by unifying the law applicable to the execution of the transaction and the entry in the register that may result[81] .

On this basis, the discussion highlighted the relevance of a connecting factor to the market infrastructure in charge of the registration of the transferable securities themselves or for holding them[82]. Depending on the case, this will be a DLT settlement system (hereafter, "DLT SS") or a DLT trading and settlement system (hereafter, "DLT TSS")[83] .

This choice initially appeared preferable to other objective connecting factors. In particular, it seemed better suited to the purpose of the conflict rule than the connection to the supervisory authority. It was noted that the latter approach offers a number of advantages. It brings the handling of private law issues in line with the application of a regulatory mechanism[84] . It also limits the uncertainties that can affect the infrastructure in the event of a change of statutory seat.

For a number of reasons, however, the connection to the supervisory authority has appeared inadequate.

- While their practical results are similar, the disadvantage of the connections set out in Article 12 of the pilot scheme regulation is that they determine the competent authority differently, depending on the operator and the type of infrastructure[85] .
- In addition, this connecting factor is based on an analysis of the infrastructure as a regulated entity, which has not been used to determine the connection to the account of the relevant intermediary in securities law. The rights to which they are subject and the terms and conditions governing the circulation of securities are not covered by the pilot scheme. From a French and European perspective, this criterion is therefore

---

[81] Comp. Rapport sur un projet de règle de conflit de lois en matière de titres financiers, cited above, no. 13, p. 5.

[82] According to the definition given in Article 2, 7), a "DLT settlement system" or "DLT SS" is " a settlement system that settles transactions in DLT financial instruments against payment or against delivery, irrespective of whether that settlement system has been designated and notified in accordance with Directive 98/26/EC, and that allows the initial recording of DLT financial instruments or allows the provision of safekeeping services in relation to DLT financial instruments".

[83] For the purposes of article 2, 10), a "DLT trading and settlement system" or "DLT TSS" is "a DLT MTF or a DLT SS that combines the services performed by a DLT MTF and a DLT SS".

[84] Comp. the choice made by §32 of the German Electronic Securities Act (Gesetz über elektronische Wertpapiere - eWpG), German Federal Law Gazette (BGBl.), June 3, 2021, Part I, p. 1423 : "§ 32 Anwendbares Recht (1) Soweit nicht § 17a des Depotgesetzes anzuwenden ist, unterliegen Rechte an einem elektronischen Wertpapier und Verfügungen über ein elektronisches Wertpapier dem Recht des Staates, unter dessen Aufsicht diejenige registerführende Stelle steht, in deren elektronischem Wertpapierregister das Wertpapier eingetragen ist. (2) Steht die registerführende Stelle nicht unter Aufsicht, so ist der Sitz der registerführenden Stelle maßgebend. Ist der Sitz der registerführenden Stelle nicht bestimmbar, so ist der Sitz des Emittenten des elektronischen Wertpapiers maßgebend". "Sec. 32 - Applicable Law (1) Unless Sec. 17a of the German Securities Deposit Act (Depotgesetz) applies, rights in an electronic security and dispositions of an electronic security shall be governed by the law of the country under whose supervision the registrar in whose electronic securities register the security is entered is located. (2) If the registrar is not under supervision, the registered office of the registrar shall be decisive. If the registered office of the registrar cannot be determined, the registered office of the issuer of the electronic security shall be decisive" (English Convenience Translation by Prof. Dr. Christoph H. Seibt, available at the following link: https://www.degruyter.com/document/doi/10.9785/9783504388010-009/html, last accessed on March 18, 2024).

[85] This article is therefore designed to coordinate with the regulatory system to which the operator is subject. Thus, for MTF DLTs and DLT TSS, if the operator is an investment firm, the connection is made to the authority of the home state, i.e. the state of the registered office (art. 4, paragraph 1, point 55) a) ii) and iii), of directive 2014/65/UEDirective MIF). By analogy, the supervisory authority of the home state would be competent when the operator is a trader. For DLT SS and TSS, the competent authority will be determined in accordance with Article 2(1)(23) of Regulation (EU) no. 909/2014, which defines the home Member State as the State of establishment of the central securities depository operating the infrastructure.

irrelevant to the consideration of the connecting factor relating to the conditions and proprietary effects of securities registered in an account.

- Moreover, in the context of the pilot scheme, being attached to the competent authority does not mean that could not be considered and determined which infrastructure needs to be taken into account.

It was then observed that under the pilot scheme, **two distinct connections can be identified according to the activities carried out by DLT infrastructures, depending on whether they register securities by admission to trading or carry out their initial registration[86] .**

The connection to the listing infrastructure - "DLT multilateral trading facility" or "DLT MTF"[87] - has a major weakness. Contingent, it requires the adoption of a subsidiary connection that is difficult to determine and implement, making the conflict rule more complex to handle.

Such a subsidiary criterion is difficult to identify other than the place from which the investor operates. This subsidiary connection is doubly problematic[88] .

It suggests an analysis in substantive law that authorizes the investor to connect directly to the DLT and carry out the activities of custody of his own securities. The approach to this issue is not harmonized at European level. As the French Monetary and Financial Code currently stands[89], intermediation is limited to the administration of financial instruments. The service relates to "holding the means of access to the securities" and not to the securities themselves, so that it cannot be considered as a genuine element enabling them to be located. Even in the presence of an intermediary, the securities remain registered and located at the level of the DLT SS/TSS market infrastructure.

In practice, it also leads to a fragmentation of the law applicable to identical securities registered in the same settlement system.

Attachment based on the registration infrastructure offering the custody service has none of these disadvantages.

Finally, **registration infrastructure as a connecting factors offers several intrinsic advantages**.

It ensures the unity of the law applicable to the transaction and the registration. The fact that the criterion is fixed does not call into question the possibility of off-chain transactions subject to the party autonomy for the determination of the obligations of the parties to the deed of

---

[86] Art. 2, 7), cited above.

[87] Art. 2, 6).

[88] In addition to the traditional consideration to be given to the identification of the connecting factor itself depending on whether the investor is a legal entity or a natural person, and, in the latter case, between domicile and habitual residence, the latter appearing to be more appropriate for natural persons.

[89] R.211-4, al. 2, Fr. Mon. and Fin. C.: « Un propriétaire de titres financiers au porteur inscrits dans un dispositif d'enregistrement électronique partagé en application du règlement (UE) 2022/858 du Parlement européen et du Conseil du 30 mai 2022 sur un régime pilote pour les infrastructures de marché reposant sur la technologie des registres distribués, et modifiant les règlements (UE) n° 600/2014 et (UE) n° 909/2014 et la directive 2014/65/ UE peut charger un intermédiaire mentionné à l'article L. 211-3 ou une " infrastructure de marché DLT " au sens de ce même règlement de détenir les moyens d'accès à ses titres, y compris sous la forme de clés cryptographiques privées, et de traiter les événements concernant ces titres, dans les conditions fixées par le règlement général de l'Autorité des marchés financiers ».

transfer, nor the intervention, as overriding mandatory provisions[90] , of provisions determining trading and settlement deadlines, which may be supplemented by market rules.

The connecting factor at the statutory seat of the infrastructure is based on an analysis of the location of transferable securities on a substantive law ground. It is consistent with the choices made by Law no. 2023-171 of March 29, 2023 and its implementation decree no. 2023-421 of May 31, 2023, allowing digital transferable securities to take bearer form for the purposes of admission to trading on a DLT market infrastructure[91] . This option allows securities to be located at the level of the market infrastructure operating the DLT. The choice of such a connection is based on *the bearer form of* the security, as analyzed from a substantive point of view.

Connecting the registration infrastructure (SR/SNR DLT) to its statutory seat ensures predictability of the applicable law and legal certainty in two respects. The infrastructure will have to be approved under the Pilot Scheme by the competent authority of its place of establishment. The infrastructure will therefore be deemed to be located where it has been approved[92] . In addition, this connecting factor determines the applicable law, irrespective of the presence of an intermediary carrying out administration activities[93] .

2.3. Scope of the connecting factor - inclusion of issues relating to the constitution and third-party effectiveness of security interests

A brief analysis of the relevance of the connecting factor must be carried out in order to consider the inclusion within the scope of the designated law of the granting and third-party effectiveness of legal or contract security interests likely to encumber transferable securities.

The location of the settlement and trading system is a relevant and appropriate connecting factor to extend in this area.

Subjecting constitution and third-party effectiveness to the same law as that governing other proprietary effects is an important factor of simplification, the relevance of which needs to be assessed.

In addition to the simplification brought about by the unification of applicable law issues, it should be noted that the inclusion of security interests is in line with the logic of the European acquis and, in particular, of the *Finality* Directive[94] . Both for security interests created within a system[95] and for the rights and obligations resulting from its operation, the law of the system

---

[90] Governing law as generally defined in article 9 of the Rome I regulation, which applies irrespective of the research and analysis of the content of the law that the parties may have chosen to govern their respective obligations.

[91] Art. L.211-7, al. 3 and R. 211-2, al. 2, Fr. Mon. and Fin. C.. Option recommended by the HCJP report on the reform of digital financial securities, cited above, p. 5 and pp. 9-13.

[92] The logic behind the passport system will be identical to that of the MiFID and CSD systems referred to in Article 12. In any event, the regulation will enable the infrastructure to be located via its approval and authorization under the pilot scheme.

[93] R.211-4, paragraph 2 of the French Monetary and Financial Code.

[94] Finality Directive, art. 9.2 (L. 330-2 IV, Fr. Mon. and Fin. C.).

[95] See art. L.330-1, I of the French Monetary and Financial Code.

is applicable. The connection thus follows a logic of unification of the law applicable within the system and suggests the interest of its extension to rights and obligations outside the system, in particular with regard to the creditor with security.
The working group found no objection to subjecting the creation and perfection of contractual security interests to the law applicable to other property effects.

<u>Proposal no. 2</u>: the working group recommends the inclusion, in the sub-section of the Monetary and Financial Code relating to the registration of transferable securities, of a specific conflict-of-laws rule making transferable securities covered by the pilot regime subject to the law of the DLT settlement system or the DLT trading and settlement system, as to their conditions and proprietary effects.

" L. XXX Code monétaire et financier : ***The conditions and proprietary effects of transactions in financial securities registered using distributed ledger technology under the conditions set out in Regulation (EU) 2022/858 of the European Parliament and of the Council of May 30, 2022 on a pilot scheme for market infrastructures based on distributed ledger technology, and amending Regulations (EU) No 600/2014 and (EU) No 909/2014 and Directive 2014/65/EU are determined by the law of the State in which the entity authorized to operate the DLT settlement system or the DLT trading and settlement system, as the case may be, is located".***

Following the method outlined in the introduction, in favor of identifying the scope of the connecting factor, the working group also agreed to suggest a possible formulation of a complement to the conflict rule thus formulated, by means of an indicative statement of the scope of the chosen connecting factor.

"The law thus designated governs, in particular, the nature of the rights to which these transferable securities are subject, the third-party effectiveness of these rights, the conditions governing their transfer, the conditions for reclaiming them, the creation and effects of contract guarantees on transferable securities, legal security interests that may encumber them, and the conflict of competing rights relating to the same transferable securities"[96] .

*

[96] *Comp. Rapport sur un projet de règle de conflit de lois en matière de titres financiers, cited above. no. 15, p. 6. in particular, the proposal to introduce an article L.211-17, already cited.*

III. Determining the law applicable to other assets registered in distributed ledgers

The working group considered separately the conditions for developing a conflict rule dedicated to assets registered in distributed registers other than transferable securities. Consideration of the need to introduce a conflict rule is part of a threefold context:

- At a domestic level, there are no conflict rules specifically devoted to these new assets. The draft Code of Private International Law drawn up under the aegis of the Chancellerie does not generally include any provisions relating to dematerialized and negotiable instruments.

The only provisions relating to intangible property concern intellectual property rights (art. 105 et seq.). Should this instrument be adopted, its only systematic scope likely to be mentioned is the general delimitation of the law applicable to real rights, understood in the sense of article 97 as *"the right of ownership, rights over the property of others and real security interests" ("le droit de propriété, les droits sur la chose d'autrui et les sûretés réelles").*

- At a European level, the issue of the connecting factor of instruments registered in a distributed ledger was incidentally postponed in a working document, as it was considered premature[97] . It was, however, introduced as part of the work on the proposal for a regulation on the law applicable to the assignment of claims[98] , in a document drawn up by the Council[99].

- A great deal of thought has gone into the subject, mainly **on an international scale.** Of varying scope and scale, the works carried out seem too numerous to be presented in full in this report[100].

They culminated in the inclusion of a conflict-of-laws rule in the Unidroit Principles on Digital Assets and Private Law already mentioned[101] . These Principles are conceived as a non-binding instrument designed to guide the development of practice by both operators and national legislators[102] , whose influence on the development of a future conventional framework remains uncertain.

The joint Unidroit-Hague Conference initiative

---

[97] European Commission, "Capital Markets Union: covered bonds, cross-border distribution of investment funds and cross-border transactions in claims and securities", cited above.

[98] Proposal for a Regulation of The European Parliament and of the Council, on the law applicable to the third-party effects of assignments of claims: COM/2018/096 final - 2018/044.

[99] Proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims - 4 column table", December 3, 2021 .

[100] In addition to the works already mentioned, it is worth mentioning, without being exhaustive, the various works dealing more or less closely with the issue of electronically represented assets, in the field of security law, the UNCITRAL Model Law on Secured Transactions (2016), to be articulated in the field of conflicts of laws with the work of the European Law Institute, ELI Principles on the Use of Digital Assets as Security - Report of the European Law Institute, 2022, which will be referred to below (3.3.2.) and, in relation to the circulation of claims, the provisions of the Unidroit Model Law on Factoring, adopted at the same session as the Unidroit Principles, which includes provisions of substantive law and a rich chapter VIII devoted to conflicts of laws.

[101] See above, 1.2.

[102] UNIDROIT Principles 2023 - C.D. (102) 6, Introduction to the Principles, § 0.3, p. 11.

In the wake of the adoption of the Unidroit Principles, a joint initiative has been undertaken with the Hague Conference on Private International Law with a view to enacting an instrument inspired by the "digital assets" approach proposed by the Unidroit Principles and the conflict rule they contain.

As mentioned in the introduction, this initiative was discontinued at the beginning of 2024, in view of the reservations expressed by France and shared by other members of the HCCH[103] .

UNCITRAL Model Law on Electronic Transferable Records (2017)

The Unidroit principles, which focus on the world of distributed registries, are to be compared with an UNCITRAL Model Law concerning other electronic representations of assets and instruments of international trade, hitherto excluded from conventional harmonization texts[104]. The articulation of the principle of international recognition of electronic transferable documents with the rules of private international law relating to assets registered in distributed registries is giving rise to considerable reflection abroad[105] and calls for specific questioning in the context of a possible transposition of the Model Law into French law, by creation of a specific legal regime to " titres transférables électroniques" in a legislative bill (Proposition de loi n°2623 visant à accroître le financement des entreprises et l'attractivité de la France).

NB: the Law was adopted during the process of translating the present report from its original French version, under the following reference: LOI n° 2024-537 du 13 juin 2024 visant à accroître le financement des entreprises et l'attractivité de la France. The applicable legal regime to the French equivalent of Electronic transferable records, characterized as "titres transférables électroniques" is provided for under articles 14 to 17 of the Law.

*

In this dense and unstable context, the working group did not wish to formulate proposals on each of the difficulties that will be outlined. Instead, it was decided to confine itself to identifying the main choices to be made, in the light of ongoing changes in substantive law, the direction of which is not always already known, given the adaptations to French law under discussion because of the adoption of the MiCA regulation.

To this end, the working group began to consider the development of a conflict rule by determining the connecting category (3.1), before identifying the connecting factor (3.2). The discussion was completed by clarifying the scope of the conflict rule (3.3.).

---

[103] See above, the introduction to this report.

[104] For example, the United Nations Convention on the Use of Electronic Communications in International Contracts, of November 23, 2005 excluded bills of exchange, promissory bills, bills of lading and other transferable instruments entitling the bearer or beneficiary to demand delivery of goods or payment of a sum of money.

[105] See, in the UK, the consultation launched by the Law Commission, Digital assets and ETDs in private international law: which court, which law? Call for evidence, February 2024.

3.1. Defining the connecting category

The diversity of assets and instruments registered in distributed ledgers is considerable. Distributed registry technology has had the dual effect of giving a new form to well-known instruments and enabling the advent of new types of assets. As a result of this diversity, private international law thinking can be very wide-ranging. Not necessarily exhaustively[106] , the working group considered that a certain number of instruments should be excluded from the scope of the study, in view of their specific nature (3.1.1.).

To benefit from these exclusions, it is necessary to determine the substantive legal elements that make it possible to identify a connecting category in the first place (3.1.2.) and to specify the methodological alternatives opened by this (3.1.3.).

It should be emphasized here that the analyses and alternatives mentioned in the delimitation of the connecting category in no way prejudge the adequacy or inadequacy of the rules applicable in substantive law, as may have been envisaged in other works on the subject.

3.1.1. Excluded assets

Identifying the relevant categories also led the group to restrict the scope of its work, by excluding from the scope of the study three categories of digital currencies issued by central banks ("CBDC") (i), "non-fungible tokens" (ii) and electronic transferable records (iii).

i. CBDC

Given the questions surrounding their legal nature and the appropriateness of issuing them, as well as the work underway at European level on the subject and the different forms that CBDCs could take (retail CBDCs and wholesale CBDCs), central bank digital currencies have been kept outside the scope of the study.

Over and above the questions raised by their admission from the point of view of monetary policy and law[107] , they raise specific difficulties of connection, but also of the scope of the law designated by the conflict rule, given its articulation with the law of the issuing State (*lex monetae)*, which determines the technological and legal modalities.

First, it should be emphasized that the current discussions at the HCCH recognize the particular nature of CBDCs in the field of private international law[108] . It should also be noted that,

---

[106] For example, the working group did not analyse the relevance of including or excluding carbon credits. Discussions on the diversity of situations led to a focus on the analysis of certain instruments and the justifications for their exclusion, which could be extended to other instruments, for the benefit of subsequent, specific analyses.

[107] IMF Working Paper, Legal Aspects of Central Bank Digital Currency: Central Bank and Monetary Law Considerations, WP/20/254, November 2020.

[108] Exploratory work: Private international law aspects of central bank digital currencies (CBDCs) - Prel. Doc. No. 4 of January 2024

although they are theoretically included in the category of digital assets defined by the Unidroit Principles, the commentary on these Principles highlights the need for a link between the law applicable to CBDC as an asset and the *lex monetae,* which confers a broad scope of application on the latter, to the point of making the perimeter of the law applicable to MNBC as property objects[109] uncertain.

The working group thus concluded that a dedicated project was required, going beyond the scope of its reflections.

ii. NFT

NFTs have been excluded in view of a number of difficulties that go beyond the scope of a discussion of property law alone. In particular, in addition to their proprietary dimension, NFTs can also be considered in terms of the law of evidence. Moreover, even in their patrimonial dimension, the determination of the conflict rule implies examining their similarity to an object of intellectual property. It therefore seemed beyond the scope of the working group to consider NFTs in themselves.

iii. Electronic transferable records

Finally, were excluded instruments covered by the UNCITRAL Model Law on Electronic Transferable Records. The Model Law is an instrument of substantive law whose essential provisions are a principle of recognition of the effectiveness and validity of electronic transferable records from a substantive point of view (Article 7) and in an international context (Article 19), together with a general principle of functional equivalence between paper and electronic records (Chapter II).

Its scope of application is, however, largely in the hands of States, with only a few express exclusions resulting from Article 1§3. It is thus up to States to determine their own exclusions in the light of their conception of certain instruments, as the drafters admit in particular with regard to the law of commercial papers and negotiable instruments[110] .

By virtue of the principle of technological neutrality which they share, this model law and the Unidroit Principles call for coordination in hypothetical transposition texts.

There are two main reasons for their exclusion from the scope of this report.

On the one hand, the Model Law does not intend to affect existing conflict-of-laws rules relating to the different types of instruments qualifying as electronic transferable records. Article 19.2 states that " *Nothing in this Law affects the application to electronic transferable records of rules of private international law governing a transferable document or instrument".* Consideration of the determination of a conflict rule would thus presuppose its confrontation

[109] UNIDROIT Principles 2023 - C.D. (102) 6, commentary, n° 2.12. Alongside the law applicable to the asset as an object of ownership, the Lex monetae is intended to govern, among other things, the holder's relations with the issuing Central Bank, the status of the currency, understood as its convertibility into fiduciary money, its legal tender...

[110] see nos. 30 to 33 of the explanatory note.

with the pre-existing framework, which is extremely extensive and responds to its own imperatives, in exchange or transport matters, for example[111] .

On the other hand, insofar as distributed registers are only one modality of digitization of private law instruments, the difficulty lies in determining whether the documents and instruments covered by the Model Law can also qualify as digital assets within the meaning of the Unidroit Principles. The difficulty was observed by the drafters of the Unidroit Principles. While they may qualify as "digital assets" under the Unidroit Principles, electronic transferable records remain subject to their own substantive and conflict-of-laws rules, given their specific characteristics. In the explanatory note, it is proposed to overcome this difficulty of articulation by giving priority of application to the transposition laws specific to electronic transferable records over the rules relating to digital assets[112] .

3.1.2. General information on the characterization of "crypto-assets"

Characterization of assets registered in distributed ledgers under substantive law is essential to correctly identifying the category to which they belong. One difficulty arises from the analysis of assets other than transferable securities under substantive law, which remains largely undeveloped. The wide variety of answers provided by comparative law underlines the difficulty of the undertaking. Several legal systems have developed original legal definitions, varying in scope depending on the legal tradition and the purpose of the relevant legislation:

- US law has already been mentioned[113] and stands out. It now proposes a unitary definition, based on the criterion of control, with *Controllable Electronic Records* (CER), the subject of Article 12 of the *Uniform Commercial Code[114]* , while in terms of regulation, the *SEC* applies the *Howey test* derived from Supreme Court case law to determine which assets are subject to federal securities law[115] ;
- in the more general universe of English-inspired Common Law, a decision of the Supreme Court of Singapore[116] applied the characterization of "*things* [or *things*] *in action*" to identify among the assets[117] the Tether *stablecoin* with the dollar as its

---

[111] From a French point of view, it is therefore appropriate to continue to use, for example, the Geneva system (June 7, 1930) for bills of exchange, or, for substantive purposes, the "Hague-Visby" rules for bills of lading (the Brussels Convention of August 25, 1924 for the unification of certain rules relating to bills of lading was the subject of two amending protocols on February 23, 1968 and December 21, 1979 ("Hague-Visby Rules"). It is worth mentioning that France signed but has not yet ratified the United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978) (the "Hamburg Rules").

[112] On the prevalence of state provisions incorporating the Model Law, supra, and on the "Principles", see UNIDROIT Principles 2023 - C.D. (102) 6, Commentary, no. 3.6, p. 24.

[113] See above, I.

[114] Some ten States have already incorporated Article 12 of the UCC into their state legislation, including California (Cal. Com. Code § 12101 et seq.) and Delaware (Del. Code Ann. tit. 6, § 12-101 et seq.).

[115] The conflict-of-laws rule is to be found in Section 12-107, c), which follows the waterfall structure rule method. In very simplified terms, this applies first to the law designated in the CER, then to the law of the system in which the CER is registered, and finally to the law of the District of Columbia.

[116] [2023] SGHC 199, Originating Claim No 320 of 2022 (Summonses Nos 910 and 1526 of 2023), ByBit Fintech Limited v. Ho Kai Xin and others, spec. §§ 29-39, spec. §34.

[117] §§. 29-33, on prior qualification as "property", spec. §33: "This description of crypto assets shows that they can be defined and identified by modern humans, such that they can be traded and valued as holdings. They certainly meet Lord Wilberforce's oft-quoted dictum in National Provincial Bank v Ainsworth [1965] 1 AC 1175 at 1248: Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability".

reference value, to determine the possibility of ensuring its holding as the object of a *trust*[118] ;

- In the United Kingdom, the *Law Commission* has been working to identify a concept that will enable assets to be analyzed as objects of property[119] . In a recent document submitted for consultation until March 2024[120] , the results of which are not known, a legislative proposal adopts a generic qualification of things "digital in nature" as objects of property[121] , going beyond the distinction in use between *things in action* and *things in possession,* derived from case law[122] . The aim of the proposal is thus not to define conceptually a third category of *personal property* object, but to admit the existence of such a category in a subsidiary manner for things that do not fall within the usual distinction[123] .
- The concept of “droits-valeurs inscrits”, an extension of "droits-valeurs", was introduced into Swiss law by the Federal Act on the Adaptation of Federal Law to Developments in the Technology of Distributed Electronic Registers (FF 2020 7559), which introduced articles 973d ff of the Swiss Code of Obligations (hereinafter "CO"). The qualification concerns all records in registers with the attributes of distributed electronic registers[124] , and which incorporate rights vis-à-vis issuers in a similar way to paper securities.
- Liechtenstein has also forged an original civil law qualification with "tokens"[125] ;
- Lastly, we should mention the Monaco law, which adopted a mechanism quite similar to that of the Pacte law, excluding financial tokens from the category of digital assets, both being grouped together under the generic definition of “crypto-assets” (“crypto-actifs”)[126] .

---

[118] More precisely, an "institutional constructive trust", determined even in the absence of an express manifestation of the settlor's will.

[119] V. Digital Assets: Final Report (2023) Law Com No 412, from the Law Commission, following the consultation launched in July 2022: Digital Assets: Consultation paper, Law Com No 256, July 28, 2022. Must also be mentioned the recent Electronic Trade Documents Act 2023 [20th July 2023], 2023.c.38, unifying the applicable regime to electronic documents.

[120] Law Commission, Digital assets as personal property Short consultation on draft clauses, February 2024.

[121] Personal property as opposed to real property (interest in land).

[122] Colonial Bank v Whinney (1885) 30 Ch D 261 at 285, by Fry LJ.

[123] V. Digital assets as personal property, op. cit. pt. 2.24, pp. 8-9: "We have therefore concluded that a thing is not, and should not be, deprived of legal status as an object of personal property rights merely by reason of the fact that it is neither a thing in action nor a thing in possession. We recommended the explicit recognition, in statute, of a third category of personal property, to encourage a more nuanced consideration of new, emergent things. A distinct, third category will better allow the law to focus on attributes or characteristics of the things in question, without being fettered by analysis or principles applicable to other traditional objects of personal property rights. As discussed below, we consider that such things include, but are not necessarily limited to, crypto-tokens such as bitcoin".

[124] See art. 973d, para. 2 of the Swiss Code of Obligations.

[125] Gesetz vom 3. Oktober 2019, über Token und VT-Dienstleister (Token- und VT-Dienstleister-Gesetz; TVTG) (Law on Tokens and Trusted Technologies) - TVTG, “Art. 2 Begriffsbestimmungen und Bezeichnungen: 1) Im Sinne dieses Gesetzes gelten als: a) "vertrauenswürdige Technologien (VT)": Technologien, durch welche die Integrität von Token, die eindeutige Zuordnung von Token zu VT-Identifikatoren sowie die Verfügung über Token sichergestellt wird; b) "VT-Systeme": Transaktionssysteme, welche die sichere Übertragung und Aufbewahrung von Token sowie darauf aufbauende Dienstleistungserbringung mittels vertrauenswürdiger Technologien ermöglichen; c) "Token": eine Information auf einem VT-System, die: 1. Forderungs- oder Mitgliedschaftsrechte gegenüber einer Person, Rechte an Sachen oder andere absolute oder relative Rechte repräsentieren kann; und 2. einem oder mehreren VT-Identifikatoren zugeordnet wird”.

[126] n°1528 - Loi du 7 juillet 2022 portant modification de diverses dispositions en matière de numérique et réglementation des activités des prestataires de services sur actifs numériques ou sur crypto-actifs : « ARTICLE PREMIER. Le premier tiret de l’article premier de la loi n° 1.383 du 2 août 2011 pour une Principauté numérique, modifiée, est modifié comme suit : « - « actif numérique », la représentation sous une forme numérique d’une valeur, d’un bien ou d’un droit de nature patrimoniale. Les actifs numériques comprennent notamment les actifs financiers virtuels, les jetons non fongibles et les jetons d’usage, à

In French law, the provisions of the “loi Pacte”[127] recognizing the category of digital assets (“actifs numériques”)[128] , have already been mentioned[129] . The entry into force of the MiCA regulation is set to have a major impact on the latter, as suggested in a recent report by the HCJP, particularly with regard to the classification of assets falling within the scope of the legal framework[130] .

It therefore did not seem useful to the working group to take as a starting point the current definitions of domestic law distinguishing between tokens, qualified as intangible assets[131] and other digital assets, as a representation of a value and performing an "exchange" function, but formally distinct from money. Substantive law is thus more a result of the choices made in the MiCA regulation.

A reminder of the elements to be found in the MiCA regulation (i) paves the way for a number of adaptations to French law that could have an impact on characterization effort (ii).

i. Data from the MiCA regulation

This text, which is directly applicable in domestic law, is first and foremost a regulatory text establishing requirements relating to professional status and the performance of certain operations[132] . The elements presented will be restricted to a reminder of the relevant definitions and provisions of the regulation, to emphasize that the appropriateness of the conflict rule will depend on the choices made on the substantive level. These elements were analyzed in detail in the above-mentioned report recommending ways of adapting French law to the MiCA regulation[133] .

The "MiCA" Regulation modifies French conceptions stemming from the Pacte law on digital assets, with a new nomenclature within the general category of "crypto-assets", defined as *“a digital representation of a value or of a right that is able to be transferred and stored electronically using distributed ledger technology or similar technology"* (art. 3.1, 5)).

As a preliminary point, it should be noted that, in addition to the definition itself, the scope of the regulation excludes certain assets, in view of their characteristics[134] or the issuing authority[135] .

---

l’exclusion des jetons financiers ; ». (…) Est inséré, après le vingt-troisième tiret de l’article premier de la loi n° 1.383 du 2 août 2011 pour une Principauté numérique, modifiée, et avant le vingt-quatrième tiret, un nouveau tiret rédigé comme suit : « - « crypto-actif », la représentation sous une forme numérique d’une valeur, d’un bien ou d’un droit de nature patrimoniale, comprenant notamment les actifs numériques et les jetons financiers ; ».

[127] Loi n° 2019-486 du 22 mai 2019, above.

[128] L.54-10-1 of the French Monetary and Financial Code.

[129] See above 1.1.

[130] Report on the MiCA Regulation, pp. 14-16.

[131] L.552-1 of the French Monetary and Financial Code.

[132] See in particular Article 1, paragraph 1.

[133] Report on the MiCA regulation, pp. 33 et seq.

[134] art. 2.3. v. below, pt. 3.1.1, on the exclusion of NFTs from the scope of this report.

[135] This includes digital assets issued by central banks acting in their capacity as monetary authorities, including central bank money in digital form (cons. 13; adde art. 2.2.c)). On the exclusion of CBDC from the scope of the report, see below pt. 3.1.1.

In addition, this definition has a double impact in terms of substance.

It begins with a series of definitions identifying three categories of tokens[136] : "asset-referenced tokens", "electronic money tokens", and "utility tokens" (article 3.1.6), 7) and 9)). However, this is a "secondary" classification, insofar as utility tokens do not have their own legal status. They only lead to a limited adaptation of the rules governing tokens "other" than those referring to assets or electronic money (see Annex I of the Regulation on the content of the White Paper for this type of token). More generally, the structure of the Regulation proposes a classification based on a residual category of purely negative definition, that of crypto-assets "other" than asset-referenced tokens or e-money tokens, the subject of Title II, then asset-referenced tokens (Title III) and e-money tokens (Title IV).

Secondly, elements of the text determining the regulatory regime for custody support, but do not require, an analysis of crypto-assets as objects of owernship, and thus the possibility of conducting an analysis from the perspective of property law. This is true of the reference to ownership and property rights in recital 82 and article 70, as well as the terminology used in article 75, concerning obligations relating to custody and administration activities. Paragraph 1 includes among the elements of the agreement between the service provider and the client the applicable law (g), which includes in particular the implementation of a segregation obligation, which analyzes the custody of crypto-assets in terms of the legal and "functional" separation of assets, in paragraph 7[137] .

It follows from all these elements that crypto-assets are incidentally referred to in the MiCA regulation as objects of proprietary rights, without the characterization or regime being determined in substantive law.

ii. Paths to adapting French law

French concepts of property law easily allow immaterial values to be subjected to the legal regime of property, through the qualification of intangible movable properties (“**biens meubles incorporels”)**. Unlike other legal systems[138] , French law thus offers an open-ended characterization, allowing assets in distributed ledgers to be considered as things objects of proprietary rights[139] .

Without going into the difficulties involved in determining the criteria for identifying property in civil law, the work of the working group raised a number of questions likely to have an influence on the category of attachment:

- Are other assets in distributed ledgers conceivable beyond the crypto-assets covered by MiCA regulations?

---

[136] By reproducing recital 18 of the Regulation.

[137] More descriptively, however, the term "exchange" of crypto-assets for cash or other crypto-assets (art. 77) generically evokes a "transaction" in the sense of an operation, rather than a private law term. Comp. art. 1702 C.civ.: « L'échange est un contrat par lequel les parties se donnent respectivement une chose pour une autre ».

[139] AVANT-PROJET DE RÉFORME DU DROIT DES BIENS, dir. H. Perinet-Marquet, 2008: "Article 520 - Sont des biens, au sens de l'article précédent, les choses corporelles ou incorporelles faisant l'objet d'une appropriation, ainsi que les droits réels et personnels tels que définis aux articles 522 et 523".

- Are there any distinctions to be made among the crypto-assets governed by MiCA regulations?
- Is it conceivable to envisage an original definition, likely to apply to all assets by virtue of their registration on a digital medium, in the way that certain foreign legislators have operated?

3.1.3. Methodological alternatives and challenges

In the context of the entry into force of the MiCA regulation, several methods of delimiting the connecting category and enacting the conflict rule are possible (i), alternatives to which must be added those relating to the location of the conflict rule to be developed according to the choices of characterization made in substantive law (ii).

It was considered valuable to reiterate these points, so as to be able to control the level of complexity of the system that may result.

i. Alternatives in the development of the conflict rule

Simplicity can either result from the very small number of conflict rules, or from the hierarchical nature of the criteria.

Depending on the uniqueness or plurality of the definitions and regimes elaborated by the legislator, essentially two paths are conceivable:

- the enactment of a single conflict rule, articulated according to alternative or cascading connecting factors, in the manner of Principle 5 of the Unidroit Principles, in response to the difficulty of identifying a single adequate one;
- several conflict rules for different assets, depending on their characteristics.

The scope of the MiCA regulation does not in itself preclude the enactment of a single conflict-of-laws rule. The MiCA regulation distinguishes between three possible situations: crypto-assets that fall within its scope, NFTs that are exempt from its application even though they meet its definition, and other assets that do not fall within the definition of crypto-assets. However, these distinctions are only valid for the purposes of its application as a regulatory mechanism.

However, it is still possible to envisage distinctions in the characterization to be given to different assets. A plurality of qualifications is conceivable, both to distinguish assets falling within the scope of the MiCA regulation from those that would not, and within the various crypto-assets covered by the MiCA regulation.

To understand the diversity of these situations, a distinction can be made between the alternatives offered by available general civil law concepts and those resulting from the determination of a specific regime for certain assets.

1° Civil law characterization

Characterization as intangible properties does not contradict the letter of MiCA regulation, but raises the general difficulty of identifying the connecting factor, which will be considered below, in the absence of an obvious location. In any case, it is not sufficient to account for the content of a crypto-asset, which, according to the MiCA regulations, represents "rights or values"[140] .

Indeed, crypto-assets identified as representing "rights" against an issuing entity constitute claims, which could lead to the identification of the applicable law by reference to that applied to the assignment of claims. Depending on the presence of an issuer, the characterization as claim would only apply to issued crypto-assets representing a right, while the generic characterization of intangible movable property would apply to unissued crypto-assets representing a value, calling for a fictitious location to be determined,

However, identifying certain crypto-assets as claims in order to determine the scope of the conflict rule seems inadequate[141] . Indeed, such an analysis would lead to the application of Article 14 of the Rome I Regulation to crypto-assets that are merely qualified as claims, leaving the important question of their third-party effectiveness outside the scope of the conflict rule[142].

Under civil law, the classification of crypto-assets representing a right as claims leads to the application of the provisions of Article 14 of the Rome I Regulation, which remains poorly adapted in the absence of a clear principle of solutions in the field of the law applicable to third-party effectiveness[143].

2° Original in kind characterization

Original qualifications of varying scope may arise, given the current state of thinking. As a preliminary point, the working group noted the risk that the number of qualifications and distinctions proposed between assets would multiply the problems of interpreting conflict rules.

- in the footsteps of certain foreign laws, they may result from an original civil law or property law concept, in the manner of Swiss law.

It is then conceivable to adopt a conflict rule specific to the characterization envisaged, going beyond the typology and scope of the MiCA regulation, to include, for example, NFTs, taking into account the diversity of the assets thus targeted in terms of attachment.

---

[140] MiCA regulation, article 3.1(5).

[141] Comp. the Report on the MiCA regulation, pp. 26-30, noting the inadequacy in substantive law of the application of the Civil Code's regime of assignment of claims and the uncertainties surrounding the conditions of transfer of ownership.

[142] Reading reinforced by the EUCJ: BGL BNP Paribas c/ TeamBank AG Nürnberg, aff. C-548/18, 1er ch., Oct. 9, 2019: " Article 14 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ('Rome I') must be interpreted as not designating, directly or by analogy, the applicable law concerning the third-party effects of the assignment of a claim in the event of multiple assignments of the claim by the same creditor to successive assignees". In comparative law, third-party-effectiveness lends itself to the most varied connecting factors: the law applicable to the assignment contract, to the assigned claim, to the domicile of the assignor or the assignee.

[143] Without discussing work in progress regarding the proposed regulation on the law applicable to the third-party effects of assignments of claims: see above.

- In the context of the MiCA regulation, the qualification of crypto-assets could itself constitute a connecting category. Their submission to a single substantive law regime would thus call for a single conflict rule. The advantage of this approach would be that it would comply with EU law, even insofar as it respects the exclusions of the MiCA regulation itself. It thus maintains the interest of conducting a specific reflection on central banks digital currencies (CBDC), excluded from the notion of crypto-assets in the MiCA regulation, with a view to drawing up a dedicated international instrument[144] .

This choice would have a dual impact. On the one hand, it would lead to the determination of the law applicable to crypto-assets covered by the MiCA regulation and to exempted crypto-assets or other "crypto-assets" not falling within the definition of the regulation, in two separate conflict rules. On the other hand, this choice would entail the determination of connecting factors that would make it possible to grasp the diversity of crypto-assets covered by the MiCA regulation. As will be considered, the crypto-assets covered by the MiCA regulation do not all answer the same objective criteria. This last drawback can be reduced if it can be managed to simplify the architecture and stick to a single distinction between two categories of tokens, one example being the criterion of issuance.

As an alternative to this approach based on the MiCA regulation's concept, a recent report already mentioned suggests a finer-grained qualification deduced from the submission of certain assets to a particular ownership regime[145] . This would apply to crypto-assets, which would be subject to an *ad hoc* regime inspired by that for negotiable transferable securities, in the precise case where they have been placed in the custody or under the control of a custodian[146] . It would therefore be appropriate, even in the context of the MiCA regulation, to distinguish between two regimes applicable to crypto-assets: an *ad hoc* regime in the presence of a custodian, and a regime based on ordinary civil law rules and concepts.

Like the above-mentioned report, the working group observes that the proposal implies "a choice of legal policy"[147] which is not neutral in terms of substantive law. It presupposes the identification of a modality of transfer of ownership associated with the control that may be exercised by a trusted third party[148], thus marking a willingness to reintermediate the field as a condition for benefiting from a protection regime for investors. In this way, the essential element of the MiCA regulation, conditioning the determination of the private law regime applicable to crypto-assets, is the presence of a particular intermediary among all the professionals concerned, namely the custodian.

The consequences appear to be as follows.

---

[144] CGAP 2024 MARCH 2024 PREL. DOC. NO 4, Exploratory Work: Private International Law Aspects of Central Bank Digital Currencies (CBDCs), spec, §8-16, p. 3-7.

[145] Report on the MiCA regulation, op. cit. pp. 30-33.

[146] Ibid. The aim is to remedy the uncertainties surrounding the application of common law to intangible property, leading to uncertainties in terms of the conditions of transfer of ownership, the extent of protection for the possessor in good faith (innocent acquirer), and the seizability of crypto-assets in the absence of escrow.

[147] Report on the MiCA Regulation, op. cit., p. 32.

[148] For the time being, the terms and conditions of the transfer are referred to a choice to be made by the General Regulation of the AMF between registration in the distributed ledger or in the statement of position on electronic format made the crypto-assets service provider providing custody and administration : Report on the MiCA regulation, op. cit. p. 31.

In the first place, this choice breaks the unity of the category of crypto-assets in substantive terms. Their regime would find itself formally divided between the rules of a regime borrowed from negotiable securities, anticipated in a special Code, the Monetary and Financial Code, and that to be deduced from the ordinary civil law rules and concepts of the Civil Code.

Secondly, this distinction may have an influence on the connecting factor. Distinctions are still conceivable between crypto-assets depending, for example, on whether or not they are issued[149]. However, as soon as the negotiable instruments regime, which governs the transfer of ownership or the protection of the registered holder, is based on the presence of an intermediary, this *ad hoc* regime calls for the law governing the activity of the custodian to be adopted as the connecting factor for the crypto-assets that fall under it. This criterion therefore formally invites the enactment of another criterion for crypto-assets that are not subject to a custody service.

As a result, a single rule of conflict would not necessarily be appropriate. It also means that the choice made in the substantive field, to associate protective rules in the field of property law with the presence of a custodian, can be expressed in different ways:

- it is possible to make it a connecting factor in a bilateral rule, by determining the application of the law of the custodian;
- it is also possible, in the interests of determining the application of a French substantive rules inspired to protective purposes, to make it a unilateral rule, determining the application of French law to crypto-assets held or controlled by custodians located in France.

- finally, and even more narrowly, it is conceivable to subject certain assets identified as a particular category, given their particular use, to a special conflict rule. This could be the case, for example, of a conflict rule specifically established to take into account the rules of monetary law applicable to the state currency taken as reference by a *stablecoin*, whether it's a "asset- referenced token", which may combine several reference values, or an "electronic money token" taking exclusively as reference a state currency, within the meaning of the MiCA regulation.

Considering the situation of *stablecoins* in particular, it seemed to the working group that it could more appropriately be considered at the stage of determining the scope of the law applicable to assets, which will be considered below[150] .

ii. Alternatives for the location of the conflict rule

The analysis carried out on assets in the substantive field is likely to influence our thinking on the location of the conflict-of-laws rule. Pending the choices of adaptations to be made, only the main alternatives are briefly mentioned here.

[149] On the criterion of the issuer, see 3.2.2 below.
[150] See 3.3 below.

Following an analogy with securities law, the conflict rules applicable to crypto-assets could be found in the special code determining the rules relating to their ownership regime. This is not a necessity, however, and will depend on a reflection of substantive law on what crypto-assets are and whether they should be analyzed according to civil law or according to an *ad hoc* regime.

However, in the case of an *ad hoc* regime applying only to assets that are the subject of a custody service, the location of the conflict rule for other assets raises a difficulty of readability that calls for coordination, by means of possible cross-referencing of texts between the special code enacting the *ad hoc* regime and the conflict rule specific to assets held by a custodian and other assets, covered by another regime and subject to its own law.

On the other hand, drafting substantive rules based on an original characterization compared to that of the MiCA regulation, such as the "droits-valeurs inscrits" of Swiss law, could lead to a different location[151] . For the sake of readability, it is preferable for the conflict rule to be located within the body that determines the substantive framework, be it a special law or a code such as the Civil Code.

Here again, it is not out of the question to introduce, for coordination purposes, a cross-reference provision in special codes dealing with other aspects of the assets in question, such as, for example, a provision in the Monetary and Financial Code referring, for the determination of the proprietary effects of crypto-assets, to the conflict rule contained in a special law on the subject.

3.2. Determining the connecting factor

In March 2018, the *Financial Markets Law Committee*[152] (FMLC) carried out a summary study of a large number of possible connecting factors, which was reproduced in a working document in tabular form by the HCCH permanent bureau[153] . Without discussing the content in full, the working group focused on the main proposed connecting factors to determine which seemed irrelevant (3.2.1.) and which could be considered (3.2.2).

3.2.1. Excluded connecting factors

i. Party autonomy

The connecting factor based on the principle of party autonomy calls for a brief analysis, particularly in the light of of the current thinking at an international level.

---

[151] In view of its generality, it is not out of the question to integrate it into a future code of private international law, should the draft under discussion be enriched with developments devoted to intangible properties beyond intellectual property rights, which are the subject of articles 105 and 106 of the Draft.

[152] Distributed Ledger Technology and Governing Law: Issues of Legal Uncertainty, March 2018.

[153] CGAP 2021 MARCH 2021 PREL. DOC. NO 4 , Developments with respect to PIL implications of the digital economy, including DLT.

The working group noted its use, in varying ways, in various conventional instruments, even in the widely understood field of real rights[154] . Its *a priori* theoretical relevance as a remedy for the difficulty of identifying objective connecting factors does not seem to raise any objections of a principled or dogmatic nature.

In addition, section 1.3 of the first part of this report discussed the difficulties in interpretation of the MiCA regulation's requirement of an indication in the white paper on the law applicable to the offer and the law applicable to crypto-assets, in which it did not seem accurate to the working group to identify a hidden conflict rule in favor of party autonomy, MiCA not being a private law text.

With a broader view to drafting an international text, however, it is necessary to reflect further on the premises of the Unidroit Principles to determine whether they may remain adequate for the development of a conflict rule for digital assets, beyond transferable securities.

Following to the waterfall structure already mentioned[155] , Principle 5 identifies as the main connecting factor the law designated in the asset itself, then that designated in the platform and finally, in an objective manner, that of the issuer. These three main connecting factors are completed by the application of the principles by the court seized and, failing that, its own conflict rules. Basically, the law of autonomy is retained as the only connecting criterion suitable for encompassing all assets that may take the form of *"digital assets"*, the other sub-criteria being analyzed as contingent[156] : there is not always an operator of the platform; crypto-assets do not always result from an issuance and therefore, from an issuer. The Unidroit Principles' choice of a principled connecting factor based on party autonomy stems from the observation that there is no objective connection that is sufficiently convincing to apply to all crypto-assets in all their diversity.

The choice of party autonomy (comp. *Chosen law of the transaction/transfer/assignment*) in itself presents certain imperfections which have already been highlighted, relating to the difficulty of identifying the applicable law to settle conflicts between sub-purchasers, the practical difficulty of establishing the agreement of the participants in a system on the applicable law and, more generally, the fragmentation of the law applicable to different assets registered within the same[157] system and over time. Principle 5.2.e) of the Unidroit principles accepts a change of applicable law, subject to the maintenance of the prior law for rights acquired before that change: *"(e) if, after a digital asset is first issued or created, the applicable law changes by operation of paragraph (1)(a), (1)(b) or (1)(c), proprietary rights in the digital asset that have been established before that change are not affected by it".* Although it could be admitted, by virtue of the hierarchy of connecting factors, to give preference to the law

---

[154] For example, the Convention of July 1er 1985 on the Law Applicable to Trusts and on their Recognition (XVe Session) does not require any particular link between the law chosen by the settlor and the trust (art. 6), while the aforementioned Convention of July 5 2006 on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary (XIXe Session) requires a link between the law designated in the account agreement and the relevant intermediary (art. 4).

[155] See above, I.2.

[156] Pt. 5.4 of the commentary: "Principle 5 recognises that the usual connecting factors for choice-of-law rules (e.g. the location of persons, offices, activity, or assets) usually have no useful role to play in the context of the law applicable to proprietary issues relating to digital assets. Indeed, adoption of such factors would be incoherent and futile (except in the limited case where there is an identified issuer, see Principle 5(1)(c)) because digital assets are intangibles that have no physical situs".

[157] CGAP 2021 MARCH 2021 PREL. DOC. NO 4, Prec. p. 9.

designated in the system over that of the issuer, and to the law chosen in the asset over that of the system, is the reverse admissible? What scope should be given to the need to subject assets of the same nature to a single law? Preserving of the original law application may ultimately lead to fragmentation of the law applicable to the same asset; recognition of the principle of autonomy will also, over time, fragment the law initially applicable to the same issuance.

This problem of fragmentation of applicable law is compounded by a number of uncertainties in the implementation of the principle within the scope of the MiCA regulation. The formal separation between private and regulatory law issues on which the Unidroit Principles[158] are based does not resolve a number of difficulties linked to the implementation of the law of autonomy in a certain regulatory context.

It is distinct from its expression in the contractual field, since it stems in time from a unilateral choice by the "holder", the practical details of which remain uncertain. The solution of principle, resulting from the choice of law in the asset itself, seems unconvincing in practice. Its technical implementation remains uncertain, as the unilateral choice of applicable law by the holder is not easy to generalize. What's more, it is necessarily contingent and, in the absence of choice, calls for the determination of an objective criterion.

These difficulties extend to alternatives based on the will of the participants in the form of a law determined between them and valid within a network - *elective situs*[159] or *modified elective situs* :

- how is the law applicable to an object of ownership determined unilaterally? Under what conditions would the potential buyer be informed of this[160] ?
- in the context of MiCA, should crypto-assets be subject to party autonomy? Under what conditions? Should the law determined by the participants themselves or by the operator of the trading platform[161] be preferred? How would the possibility of a change in the law applicable to an asset or the platform in the course of its activity be accepted or rejected?

Could we then give priority to the Unidroit sub-criterion identified in the law of the system?

In short, the simplicity sought in the determination of the connection generates numerous complications to make it possible on the regulatory ground.

The working group has observed that, although it is not concerned with private law issues, the coordination between the requirements of the MiCA regulation, involving regulated service providers, and the implementation of party autonomye raises questions of

[158] Spec. pt. 0.9 and 1.1 of the commentary.
[159] CGAP 2021 MARCH 2021 PREL. DOC. NO 4, p. 8.
[160] "See UK Law Commission Report, "Smart legal contracts Advice to Government", Nov. 2021, spec. no. 7.71 et seq., p. 183 et seq. ("Expressing a choice of law in code"), spec. no. 7.74, p. 184: "it is very difficult for parties to express a choice of law clause in code, whereby code we mean operational, deterministic code".
[161] See art. 3.1. 16), b), including in crypto-asset services the "operation of a trading platform for crypto-assets".

implementation and calls for a large number of clarifications, to the point of making the determination of the applicable law particularly complex depending on the hypotheses.

Thus, the radical separation between private law and regulatory law assumed by the Unidroit principles is sufficient per se to make the choice of in favor of party autonomy a criterion of simplification.

ii. Technological criteria

A number of the criteria envisaged by the Financial Markets Law Committee can be disregarded, as they have more of a technological than a legal dimension. Such is the case of the *Lex codicis*, the law of residence of the programmer, the law of location of the master key holder (*PREMA - Primary Residence of the Encryption Private Master keyholder).* [162]

What's more, these criteria have the disadvantage of being based on certain technical design and operating procedures for digital registers, which contravene the principle of technological neutrality.

iii. Connecting factors generating mobile conflicts

Still others, although more closely linked to the exercise of rights over crypto-assets, are intrinsically flawed due to the difficulty of determining them *in concreto* and their variability, which generates mobile conflicts and, in particular, the location of the private key.

The same applies, to a lesser extent, to the criterion of the location of the "participant"[163] , adopted by the English courts[164] .

If it is necessary on a purely subsidiary basis in the absence of any other determinable connecting factor, the location of the participant presents a significant logical shortcoming, particularly in the context of an action for recovery. The conflict-of-laws rule must precisely determine who the owner is, so that determining the applicable law on the basis of the residence of the person asserting the right is circular reasoning. It also raises a number of uncertainties[165] , as to its practical implementation in terms of both traceability and legal technique, to determine, within a translational chain, the rights actually acquired by the claimant[166] .

However, it has another important advantage, apart from its applicability in the absence of any other objective criterion in the context of a legal claim. Indeed, it is likely to be equally applicable, over and above questions relating to patrimonial effects, particularly in determining the competent court and the law applicable to liability claims. A consistent

---

[162] PREMA - Primary Residence of the Encryption Private Master keyholder

[163] Location of the Participant/Transferor/(User) Private Encryption Key

[164] Tulip Trading Ltd v Bitcoin Association for BSV [2022] EWHC 667 (Ch) (Tulip Trading v Bitcoin).

[165] In particular, the traditional issue in private international law of its location, to domicile or habitual residence.

[166] CGAP 2021 MARCH 2021 PREL. DOC. NO 4, p. 10: "A significant disadvantage is that this rule gives no clear answer to questions of entitlement where there are: joint transferors, chains of assignments, or change in habitual residence by the transferor".

approach to these various issues is likely to be simpler and more coherent from the holder's point of view.

iv. Fundamental claim law

As mentioned above with regard to the delimitation of a connecting category[167] , the approach based on the application of the regime of claims to crypto-assets seems to be of little use[168] and comes up against the fact that certain crypto-assets representing "values" and generated without any issuing entity cannot be analyzed as claims. Reasoning in terms of the law of fundamental claims presupposes, indeed, that its application to what qualifies as claims.

3.2.2. Connecting factors considered: law of the issuer and law of the custodian

Upon examination, the two most relevant criteria have appeared to be the law governing the issuer and the law governing the custodian (i). As these two criteria are contingent, it seems necessary to identify their hierarchy and to supplement them with a subsidiary criterion, in the form of a waterfall structured conflict-of-laws rule (ii).

i. Justifications and limits

The two most relevant criteria were the law of the issuer and the law of the custodian. It should be noted that these two criteria, limited by assumption to the determination of proprietary effects, do not neutralize the holder's freedom of choice to use the services of an unregulated custodian or to acquire assets from an issuer located in a tax haven[169] .

The purpose of the conflict rule under consideration, which is limited to the recognition and conditions of exercise of property rights, does not, however, imply the determination of a connecting factor in a purely regulatory perspective. In any event, it remains possible to invoke against the law designated by virtue of these connecting factors the general mechanisms of exceptions to the applicable law resulting from the public policy exception, as well as the fraud against exception, making it possible to render its effects unenforceable.

The law of the issuer is a relevant connecting factor in determining the law applicable to crypto-assets. From a theoretical point of view, its justifications are different from those likely to be proposed in the law of financial instruments. Here, the issuer no longer acts as a registrar, as is the case for registered transferable securities[170] .

---

[167] *See above, 3.1.2.*

[168] *As it stands, the application of this law was envisaged, using terminology that is now obsolete, for claims arising from crypto-assets other than financial instruments or electronic money, for the purposes of third-party effectiveness in the aforementioned document Proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims - 4 column table", of December 3, 2021, p. 140.*

[169] *This possibility is commonly referred to as "regulatory arbitrage risk" (risque d'arbitrage réglementaire).*

[170] *See above, 2.2.2.*

This criterion has already been used in comparative law by the Liechtenstein law[171] as an alternative connecting factor to party autonomy. It also constitutes a subsidiary connecting factor, even in systems where the principle connecting factor is party autonomy, by applying the law designated in the assets, as in Swiss law[172] , or the Unidroit Principles[173] .

While linking an account to identify the intermediary makes sense when there is a chain of intermediaries, crypto-assets are not the subject of such a chain. In principle, there is only one level of intermediation between the investor and the issuer. As this is an easily identifiable link in most situations, the law of the issuer seems appropriate to the relationship.

It should be noted that the main limitation of the issuer's criterion is that it is naturally inapplicable to unissued crypto-assets, which have no reference assets, such as Bitcoin. In addition, when building up a portfolio, it leads to a necessary fragmentation of the applicable law, thereby generating difficulties in delimiting its scope with regard to the creation and third-party effectiveness of security interests[174] . Finally, in the context of the crypto-economy, an additional difficulty may arise from determining the connecting factor to the issuer itself. This difficulty must, however, be put into perspective in view of current developments concerning the status of DAOs[175] .

For a number of reasons, **the law of the custodian** also appeared as an adequate connecting factor. Formally, the definition of custody in article 3.1, 17)[176] refers to the custodian's more or less extensive activities, all of which reflect the custodian's control over the assets, without the need to distinguish between these activities on the basis of the specific agreement between the parties. The connecting factor to the custodian's law also satisfies the need for legal certainty. Under the MiCA regulation (spec., art. 75), the service provider providing a custody service must leave the investor in no doubt as to the fact that the crypto-assets are deemed to be held by the authorized custodian, even in the event of sub-custody, for the sake of legibility and legal certainty. Investors can easily determine the rights attached to their

---

[171] Comp. Liechtenstein law: Token und Vertrauenswürdige Technologien Gesetz (law on tokens and trusted technologies) - TVTG : "Art. 3 Gegenstand und Geltungsbereich: 1) Dieses Kapitel regelt die zivilrechtliche Qualifikation von Token und deren Verfügung auf VT-Systemen. 2) Es findet Anwendung, wenn: a) Token durch einen VT-Dienstleister mit Sitz oder Wohnsitz im Inland erzeugt oder emittiert werden; oder b) Parteien in einem Rechtsgeschäft über Token dessen Vorschriften ausdrücklich für anwendbar erklären. 3) Art. 4 bis 6 und 9 gelten sinngemäss auch für Token, die keine Rechte repräsentieren".

[172] Article 145a of the Swiss Private International Law Act (hereinafter "SPILA") provides as follows: « 1 Le droit désigné dans un titre revêtant la forme d'un papier ou une forme équivalente détermine si ce titre représente une créance et si le transfert de la créance se fait par l'intermédiaire de ce titre. À défaut d'une telle désignation, la question est régie par le droit de l'État dans lequel l'émetteur a son siège ou, faute de siège, sa résidence habituelle. 2 En ce qui concerne les droits réels relatifs à un titre physique, les dispositions du chapitre 7 sont réservées. » Art. 145a of the LDIP applies not only to traditional "papier-valeurs", but also to their non-paper equivalents, such as tokens similar to "papier-valeurs" in a blockchain system.

[173] Art. 5.1.c).

[174] See 3.3.2 below.

[175] See the presentation of the development of special laws determining the "legal wrappers" of DAOs in HCJP's Report on the reception of decentralized autonomous organizations in French law, forthcoming.

[176] "'providing custody and administration of crypto-assets on behalf of clients' means the safekeeping or controlling, on behalf of clients, of crypto-assets or of the means of access to such crypto-assets, where applicable in the form of private cryptographic keys;"

assets and expect them to be subject to the same law as that governing other assets held in custody.

This criterion is also consistent with the traditional principles of securities law, which deem the location of the securities to be the place where the custodian account keeper is located for bearer transferable securities. Indeed, as pointed out above, in securities law, application of the issuer's law is frequently justified for registered transferable securities because of the issuer's account-keeping activity. In itself, the law of the issuer is more relevant for determining the rights arising from assets than the effects of transactions carried out on crypto-assets.

However, this criterion has a number of drawbacks. Firstly, it is contingent. The use of an intermediary is not an obligation under current regulations, in line with distributed ledger technology, designed to disintermediate investment and payment relationships. In this respect, the analogy with securities law has its limits. The connecting factor to the custodian's law seems appropriate for determining the rights and effects of transactions in a necessarily intermediated context, but is less so when this intermediation becomes a contingent element.

Secondly, the advantage perceived by the investor of the unity of the applicable law may be put into perspective in view of the regulatory framework applicable to the activity of custody resulting from the MiCA regulation. The investor's main concern stems from the custodian's obligations in terms of control and restitution of assets, within the framework now set by public policy provisions[177]. As a result, the plurality of applicable laws is an element of complexity for custodians, which does not intrinsically worsen the investor's position. Determining as a connecting factor the custodian unifies the parameters for the performance of some of its obligations, but does not really alter their content as far as the investor is concerned.

Finally, in view of the observable solutions adopted by foreign legislations, the choice of the law of the custodian is not yet widely adopted. The legislative policy generally followed is to determine the applicable law on the basis of a market logic indifferent to intermediation. Adopting such an approach as a matter of principle would not make French law any easier to understand, and would not necessarily be perceived by other legal systems as suitable for determining proprietary effects. It has been observed, however, that adopting such a connecting factor would enable to measure its operational consequences in relation to other legal systems that do not use this criterion.

ii. Consequences

An analysis of the advantages and disadvantages of the two possible connecting factors suggests the need for a conflict rule determining a hierarchy of connecting factor. Both the custody criterion and the criterion based on the presence of an issuer lead to **incomplete solutions** in determining the applicable law. The criterion of custody presupposes the presence

[177] *See article 75, para. 7, 2, of MiCA Regulation. Comp. Principle 13 of Unidroit Principles.*

of an intermediary, which is not always met in practice, while the criterion of issuance makes it impossible to identify the law applicable to non-issued crypto-assets.

Whatever criterion is adopted as a matter of principle, it must be supplemented by an even more subsidiary connecting factor for the case of unissued, non-intermediated assets. Despite the imperfections to which it is subject[178] , the criterion that must be met in the event of a legal claim is that of the holder's habitual residence, at the time the claim is submitted[179] .

The working group was unanimously of the opinion that a single conflict rule, based on a waterfall structure of several connecting factors, was desirable, with the holder's habitual residence as a very subsidiary connecting factor, which could be adapted according to the criterion of the center of main interests or central administration for legal entities.

On the other hand, there was no consensus on the order of the main criteria, consisting of the issuer's law and the custodian's law and as to the need to give priority, at this stage of the debate, to formulating a rule.

The study showed that two competing rules could be formulated:

- One granting priority to the application of the law of the custodian, then, failing that, to the law of the issuer, and finally, in a very subsidiary way, to the law of the holder's habitual residence.

- The other, making the law of the issuer the primary connecting factor, then, failing that, that of the custodian, and finally, in a very subsidiary way, that of the holder's habitual residence.

Regarding this alternative, a minority of the members of the working group insisted on the importance of the problem of determining the connecting factor in terms of legal policy, considering the importance conferred to the custodian as a potential one. These members supported the view that it was premature to issue a proposal in favour of one alternative or the other and that it would be preferable to open up possible avenues solutions to conflicts of laws by setting out two possible conflict-of-laws rules, one of which would make applicable the law of the issuer, alongside a rule based in principle on the application of the law of the custodian.

The first rule would follow the following structure:

1° The conditions and proprietary effects of assets registered in distributed ledgers representing a right against an issuing entity are governed by the law of the issuer.
2° If the law applicable to the issuer cannot be determined, or failing any issuance, the assets recorded in the distributed legers are governed by :
a) the law governing the custodian, or

---

[178] See above, 3.2.1, iii).
[179] The state of the case law draws on the analysis of Andrew Dickinson, 'Cryptocurrencies and the Conflict of Laws' in Fox and Green, Cryptocurrencies in Public and Private Law (OUP 2019) at para 5.08. In particular, the opinion of Falk J, in Tulip Trading Ltd v Bitcoin Association for BSV [2022] EWHC 667 (Ch) (Tulip Trading) observing that Professor Dickinson's analysis is not based on domicile but on "the country where the participant resides or carries on business at the relevant time".

b) in the absence of a custodian, the law of the State in which the holder has his habitual residence.

A majority of the group's members were in favor of setting out a proposal, making the law of the custodian the first criterion, and that of the issuer the second. In particular, this position was supported, given the quantitative importance of the activity of custodians in terms of trading volume, and assuming insofar as, in practice, it will generally be the same institutions that offer custody services for securities and crypto-assets. In addition, this approach seemed consistent with the prospects for reform currently underway in the substantive field, subjecting assets handed over to a custodian to a special proprietary regime[180].

This posi1on is based on the very strong desirability of the solu1on by analogy with transferable securities law, in terms of predictability. The choice of a first rank connecting factor based on the custodian leads, in a national and European context, to the coincidence of the determination of proprietary effects with the identification of the custodian and thus ensures, in the context of the MiCA regulation, the treatment of private law questions issues with the law applicable to a professional subject to a regulated status.

Proposal no. 3: It is proposed to introduce a conflict-of-laws rule – subject to the characterization choices to be made in substantive law - on the following model:
1° The conditions and proprietary effects of assets registered in distributed ledgers are governed by the law of the custodian.
2° In the absence of a custodian, the assets are governed by :
a) the law of the issuer or
b) if this cannot be determined, or failing any issuance, the law of the State in which the holder has his habitual residence.

3.3. Scope

The enactment of a specific conflict-of-laws rule leads us to specify the scope of the connection in terms of articulation with the law applicable to the custody relationship (3.3.1.) and the inclusion within its perimeter of the conditions for the granting and third-party effectiveness of security interests (3.3.2.). The more specific case of *stablecoins* also calls for general consideration of the rules of monetary public policy laid down by each State in relation to its own currency (3.3.3.).

[180] See 3.1.3. i, 2°, above, the work carried out and solutions discussed in relation to the transfer of ownership, in particular, the Report on the MiCA regulation referred to above, which envisages the creation of an ad hoc legal regime for the transfer of ownership of crypto-assets by subjecting them to a regime similar to that existing for transferable securities, differentiating, according to whether or not the crypto-assets are held by a regulated custodian, the relevant record, which would be either the electronic statement of position as provided for under article 75 of the MiCA Regulation, or the DLT itself for non-intermediated crypto-assets.

3.3.1. Relationship with the law applicable to the custody relationship

In principle, the determination of the law applicable to proprietary effects has no bearing on the contractual relationship between the custodian and his client[181] or on the custodian's statutory obligations.

A difficulty may, however, be envisaged by analogy with the law governing book-entry securities. The law applicable to the security is likely to affect the restitution obligation incumbent on the account keeper for transferable securities subject to foreign law, in the event of bankruptcy of the central custodian, or of the local sub-custodian bank, when the securities are located there. In principle, the custodian account keeper's liability remains unchanged in the event of outsourcing, in accordance with article 322-35 of the AMF General Regulation. Paragraph 3 of this article does, however, contain a limitation to such liability in the case of custody of securities issued under foreign law[182] .

The question arises as to whether it would be appropriate to consider a similar adaptation of the liability regime for custodians of assets other than transferable securities in the event of outsourcing to a sub-custodian[183] , given the difference in the purpose of the obligations incumbent on third-party custodians and custodian account keepers. For the former, the obligation incumbent on custodians relates alternatively to the assets or to the means of accessing them[184] .

3.3.2. The question of the creation and perfection of security interests

The inclusion of the creation and third-party effectiveness of security interests in crypto-assets in a conflict-of-laws rule based on the law of the custodian or issuer calls for special consideration. The simplification brought about by a single connecting factor may seem desirable, but the submission of security interests to a rule identical to that governing proprietary effects is not, as a matter of principle, a necessity[185] .

The dissociation of the two questions seems to depend on choices of substantive law as well as technical conditions for the creation of security[186] .

---

[181] Comp. according to the Unidroit DAPL, the custody agreement is subject to the law of autonomy as specified in the custody agreement itself for all matters governed by principles 10 to 13 (principle 5(3)). These include: the identification of custodial activities (Principle 10); the determination of the custodian's duties owed to its client (Principle 11); the protection of the innocent client (Principle 12); and the regime applicable to claims by the custodian's creditors in the event of its insolvency (Principle 13), deducing the consequences of the segregation of assets held by the custodian from the assets offered to its own creditors.

[182] According to this provision, " « Toutefois, lorsqu'un teneur de compte-conservateur conserve pour le compte d'un client professionnel des titres financiers émis sur le fondement d'un droit étranger, il peut convenir d'une clause totalement ou partiellement exonératoire de sa responsabilité avec ce client professionnel ».

[183] According to article 722-2, paragraph 2, General Regulation of the AMF:« La responsabilité du conservateur d'actifs numériques vis-à-vis de son client n'est pas affectée par le fait qu'il recoure à un tiers ».

[184] See art. 722-1, 6° RG AMF. V. Report on the MiCA Regulation, p. 30.

[185] Comp. the Unidroit Principles, which exclude two questions from the determination of the applicable law according to the law of autonomy (Principle 5(4)): that of the effectiveness against third parties of a security interest created by a method other than the transfer of control, and that of the priority given to the creditor with a security interest so created.

[186] The working group did not consider it useful to include in its work the specific case of financial collateral arrangements, which calls for specific consideration in view of the European source of the system in this field. The problem of determining the applicable law presupposes the extension of the system to crypto-assets, according to the alternative indicated in a previous

The working group thus considered the work carried out in 2022 by the European Law Institute on the use of "*digital assets*" as security[187] . From a methodological point of view, it noted the relevance of distinguishing between connecting factors that determine the law applicable to the creation of a security interest and its third-party effectiveness According to a conflict-of-laws rule following a waterfall structure, principle 3 in fact subjects the creation of a security interest to the law of the place of business, central administration or habitual residence of the grantor (*security provider)*, limited by and articulated with various exceptions.

In view of the scope of the issue and the practical problems that may arise from the diversity of security interests that may be created, the working group has decided to confine itself to a summary of the difficulties and possible solutions, based on the main connecting factors previously discussed in the conflict-of-laws rule concerning the proprietary effects of crypto-assets.

Two questions were considered, concerning the appropriateness of the proposed criteria for security interests in general (i) and the more specific case of a security interest created without dispossession (ii).

i. Impact of connecting criteria applicable to proprietary effects

On examination, the criteria of the law of the issuer and the law of the custodian may be considered. However, another approach is conceivable, involving the application of a substantive rule of private international law to contract securities, in conjunction with the law chosen by the parties.

When assets are subject to the law of the issuer, it was first observed that it might seem difficult to create a security interest that would apply indiscriminately to an indistinct set of crypto-assets subject to the law of different issuers. The difficulty thus stems from identifying the asset encumbered by the security right, enabling its creation to be subject to a single law. In line with the project to adapt the pledge of securities accounts in the European Union[188] , discussed in a previous HCJP report, the security can only be created under a single law, necessarily distinct from that applicable to the assets considered individually.

Submitting the guarantee to the law applicable to the custodian's activities would therefore appear to be more appropriate and relevant in practice, given the crypto-asset accounting it performs. The custodian operates a statement of position[189] . The segregation requirement

report (inclusion of crypto-asset transactions in the scope of financial obligations and/or inclusion of crypto-assets in the scope of eligible assets). As this choice is likely to be made at the level of the European institutions, the adaptation of the connecting factor contained in the collateral directive is not yet an issue.

[187] ELI Principles on the Use of Digital Assets as Security - Report of the European Law Institute, 2022.

[188] Report on the pledging of financial securities in the European Union, above. Following the wording of article 14 of regulation Rome 1, the choice is made to translate French "nantissement" as the main security over intangible movables by "pledge".

[189] In practice, this statement of position can be kept using cold wallets, which are rarely individualized for each client, but at least individualized in an omnibus account for all a custodian's clients.

laid down in the MiCA regulation[190] provides sufficient conditions for controlling changes in the collateral base through the distribution of recorded transactions[191] .

However, it was subsequently observed that this approach is not a technical necessity. The extension of the pledge of transferable securities account to the pledge of specific transferable securities is based on the possibility of delimiting the collateral to certain encumbered securities in particular[192] . In this respect, by analogy with securities law, the aforementioned recent report on the MiCA regulation envisages the possibility of adapting pledge law to specific crypto-assets[193]. Thus, technically, a particular crypto-asset could be specifically designated as the object of a security interest, making it possible to subject its proprietary effects and the security interests to which it could be subject individually to a single specific law.

Submission to the law of the issuer nonetheless conceals an additional weakness in that it is logically inadequate to governing unissued crypto-assets.

Given the highly technical nature of the ways in which creditors can exercise their rights in the DLT context, the role of contractual freedom should not be overlooked, whether for the purposes of determining the basis of the security in the case of a *fork*, the right of retention granted to the pledgee, or the enforcement of the security[194] . Basically, the real issue in determining the applicable law is not so much the application of a detailed regime - particularly in view of the disruptive intervention of insolvency law - as the determination of a particular form of constitution and third-party effectiveness.

In this way, the determination of the applicable law does not necessarily require the identification of an objective connecting factor, distinguishing between the relationship between the grantor and the creditor, and third-party effectiveness.

The creation of a security interest could be based on the recognition of a space extended to party autonomy[195] . Third-party effectiveness could then take the form of a substantive rule limited to the mere indication of a minimal formalism[196] .

By way of analogy with material loss of possession as means to ensure third-party effectiveness of a pledge, the criterion of control could be considered. The content of the rule to be established presupposes, in this sense, the identification of the relevant third-party effectiveness formalism, based on an analysis of substantive law.

---

[190] Article 75§7.

[191] According to a distribution in the cold wallets, possibly individualized, of the operations recorded on the hot wallets, connected.

[192] L.211-20, II, al. 2, Fr. Mon. and Fin. C.

[193] Report on the MiCA Regulation, pp. . 35-37 , spec. p. 37.

[194] See the proposals for adapting the pledge regime to crypto-assets: Report on the MiCA Reguation, op. cit. pp. 35-37.

[195] Even if accepted, the law of autonomy will, for example, at the very least, need to be articulated with the law applicable to insolvency proceedings in order to identify the ranking of creditors: see Principle 5(7) a) of the Unidroit Principles.

[196] By analogy with article L.313-27 of the Financial Security Act of August 1er 2003, concerning the assignment or pledging of professional claims : « La cession ou le nantissement prend effet entre les parties et devient opposable aux tiers à la date apposée sur le bordereau lors de sa remise, quelle que soit la date de naissance, d'échéance ou d'exigibilité des créances, sans qu'il soit besoin d'autre formalité, et ce quelle que soit la loi applicable aux créances et la loi du pays de résidence des débiteurs ».

ii. The question of providing security in the event of direct holding

The working group considered *de lege ferenda the* hypothesis of a conventional non-possessory security, based on an obligation for the grantor to maintain the assets encumbered by the security right of the beneficiary. The question arises from the need to identify the law applicable to a non-possessory security, whereby the grantor is responsible for the custody and preservation of the crypto-assets.

Several members of the working group expressed doubts about the relevance of this hypothesis, particularly in view of the practical impossibility for the beneficiary to effectively enforce the security[197] .

Others have noted the absence of any theoretical obstacle, and the possibility of technical adjustments that would make it possible to establish the diligence carried out by the grantor in terms of custody of the crypto-assets used as collateral. It has also been pointed out that the benefit to the creditor of a security interest created in this way may arise from the priority thus conferred on the creditor over other creditors, and from the rank that may be assigned to the creditor in the event of the grantor's submission to insolvency proceedings.

Thus, in the case of a non-possessory security interest, it is logically impossible to rely on the law of the custodian. The justification for applying the law of the issuer may remain but is once again unsuitable for unissued assets.

In the absence of any of the objective criteria available to determine other proprietary effects, the application of party autonomy[198] is a conceivable alternative. We would reiterate that the main limit to freedom of contract in this area should be the protection of third parties. The grantor's creditors must have the objective information they need to determine the conditions and proportions under which the grantor's assets are subject to security.

As mentioned above for pledges, the solution could then be based on a substantive rule limited to the mere indication of a minimal formalism to ensure third-party effectiveness - necessarily distinct from mere possession - in addition to the submission of the creation of the security interest to party autonomy. In any case, it remains possible to admit ex post exception to the law applicable *a posteriori*, by examining the prerogatives conferred by the security with regard to public policy in this area[199] .

---

[197] Comp. on this point, noting the practical impossibility of carrying out a seizure in the absence of a registrar acting as an authorized intermediary under the regime for seizures of intangible rights other than money claims: Report on the MiCA Regulation, p. 28-29.

[198] According to Principle 5(5), the Unidroit Principles exempt from the application of the law designated in the asset the third-party effectiveness of security interests created other than by a change of "control" and the ranking of secured creditors.

[199] Is here intended the reference to a traditional case law on automobile pledges, whose reasoning based on public policy exception remains and must be extended to intangible property, although the specific solution has now been abandoned as a result of the acceptance in French law of the validity of commissary pacts ("pactes commissoires"): Cass. 1re , civ., July 8, 1969, Bull. civ. I, n° 268, Soc. DIAC.

3.3.3. Monetary public policy rules for *stablecoins*

Although they do not fall into the category of proprietary effects as hitherto understood, the rules of public policy laid down by States relating to their currency are necessarily linked to the law applicable to an asset whose reference value is constituted by the currency of one or more States.

The working group noted that the question has practical implications within the European Union, due to the special regime for the issuance of electronic money tokens, established by the MiCA regulation[200] , in view of the obligation placed on the competent authorities to inform the central bank of the State whose currency other than the euro would be used as a reference for a token of significant importance.

[200] The regulation itself contains a specific rule limiting the content of the rights represented by electronic money tokens, with article 50 prohibiting the payment of interest to the issuer.

Appendix I: Composition of the working group

Chairmen

Jérôme Chacornac, Associate Professor, Université Paris-Panthéon-Assas

Hubert de Vauplane, Partner, Kramer Levin Naftalis & Frankel LLP

Working Group members

Thiebald Cremers, Director of Legal Affairs, AMAFI - French Financial Markets Association

Philippe Goutay, Partner - Member of the Paris Bar, Jones Day

France Drummond, Professor of Private Law, Université Paris-Panthéon-Assas

Julien Goldzlagier, Digital Assets Project Manager, Department of Civil Affairs and Sealing

Maxime Julienne, Professor of Private Law at Paris-Saclay University

Caroline Kleiner, Professor of Private Law at Université Paris Cité

Francesco Martucci, Professor of Public Law, Université Paris-Panthéon-Assas

Aurélien Parent, Legal Affairs Division, **Autorité des marchés financiers (AMF)**

Arnaud Reygrobellet, Professor of Private Law, Université Paris X-Nanterre

Clément Saudo, Legal Affairs Division, **Autorité des marchés financiers (AMF)**

Group Secretary

Chloé Ahnine, **Student lawyer**