

CHAPTER 5

Metaverse and Private International Law: Challenges in Determining Governing Law

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The advent of the Internet has already presented substantial challenges to the realm of Private International Law (PIL).¹ Those challenges have taken on a new dimension within the context of the metaverse. The metaverse's lack of physicality has significantly disrupted the conventional processes of determining applicable laws.²

To determine the governing law, it is necessary, first, to classify the issue at stake, and then to select and apply a relevant PIL rule.

As to the issue classification, legal relationships within the metaverse now predominantly mirror conventional legal constructs (1). While familiar, those constructs often collide with the digital paradigm of the metaverse, complicating the choice of the relevant PIL rules (2) and their implementation (3).

I Main Categories

Two main categories that can affect the choice of applicable law are the type of the underlying obligation and its subject-matter.

Type of Obligations

Legal relationships in the metaverse operate within the two natural-world categories of contractual and non-contractual obligations. The latter category encompasses torts (delicts) and quasi-delicts, such as unjust enrichment or *culpa in contrahendo*. For ease of reference, we will only refer to torts, contrasting them with contracts.

The distinction between obligations arising out of contracts and those arising out of torts is crucial for identifying the applicable set of PIL rules. For instance, within the EU, different PIL regulations apply to contractual

obligations (Rome I Regulation) and non-contractual obligations (Rome II Regulation). While the distinction between the two categories had already been blurred in some cases,³ the metaverse has added an additional layer of complexity.

Contractual matters involve voluntary commitments between parties,⁴ that the metaverse readily accommodates. Contractual configurations in the metaverse encompass arrangements between users (such as a loan using a metaverse land plot as collateral⁵ or an exchange of metaverse cryptocurrencies with a sell-back option⁶), and between a user, on one hand, and a platform, on the other. The latter embody the platform's terms and conditions, giving rise to the platforms' obligations as to the quality of their services⁷ and the security they provide.⁸ It is also conceivable to imagine contracts concerning digital assets located in the metaverse involving non-users and external platforms. For instance, a non-user might acquire metaverse cryptocurrency on an external cryptocurrency exchange or a metaverse land plot on an external NFT marketplace.

Conversely, torts involve liability arising from outside of any contractual commitment. In the metaverse, tort disputes notably cover an array of personal offenses, including harassment, discrimination and defamation, misappropriation of digital assets,⁹ and trademark infringements.¹⁰

This seemingly simple distinction between contracts and torts is not always easy to follow within the context of the metaverse.¹¹ Arguably, the metaverse relies on different crypto-networks, each of which can give rise to a multitude of seamless contractual links. It means that a contractual relationship can exist where there would be none in the natural world. For instance, the last indirect NFT's buyer can potentially bring an action against the NFT's creator for having misleadingly presented its creation or used illegal elements during its minting.¹² Such action could be classified as arising out of a tort, as it is currently done under EU law for the non-contractually connected members of the property-transferring contract chain.¹³ Alternatively, it could be viewed as a contract issue, since the NFT is tied to a smart contract¹⁴ that may be considered a legally binding agreement among all participants in the chain, regardless of any separate contractual arrangements they may have individually entered into. Moreover, some issues, like a cyberattack initiated by users and directed

towards the platform,¹⁵ can pertain either to a breach of contract (such as terms and conditions and implied duty of loyalty) or to a tort not covered by any contract.

Subject-Matter

The identification of the relevant PIL rule is impossible without a proper qualification of the subject-matter at stake.¹⁶

The convergence of contractual and non-contractual obligations within the metaverse often, but not exclusively, revolves around digital assets like cryptocurrency, metaverse land plots, avatars and wearables, which can take the form of NFTs. Naturally, the regime applicable to digital assets and to the obligations involving such assets relies on the variable legal recognition of those assets across jurisdictions.¹⁷

Different qualifications of the subject-matter can point towards different applicable laws. If one considers a digital asset as property (like in the UK, Singapore, Italy and Russia¹⁸), its regime should depend, in principle, on the law of the country in which it is located (*lex rei sitae*) – which is hard or even impossible to establish in the context of the metaverse.¹⁹ The situation will be different if the digital asset at hand is perceived as a security (as in the US, under certain conditions²⁰), foreign currency or legal relationship. Some digital assets might be simply prohibited in some jurisdictions, like cryptocurrency in China.

While the legal regime applicable to digital assets is taking shape in a more centralised fashion in some States (such as the UK²¹), in others, it is giving rise to a multitude of divergent positions. To illustrate the volatility of the qualification process, in 2023, while bringing their lawsuits against Binance, two different regulatory authorities in the US, the Commodity Futures Trading Commission and the Securities and Exchange Commission, qualified the same crypto-asset (BUSD) as a commodity and a security, respectively²² – which, in PIL, would mean that different laws could apply.

In response to this challenge, multiple national and international authorities pushed for the creation of a distinct legal category for digital assets.²³ As the UK Law Commission explained in its recent Report on Digital Assets, the new category of “digital objects” does not fit neatly within the

existing classifications of things in possession or things in action (and hence within the established PIL categories).²⁴ At the same time, it seems that the capacity of the digital assets to be subject of proprietary rights is now widely uncontested.²⁵

2 Selection of Applicable PIL Rules

Even if the qualification itself is not subject to doubt, the metaverse introduces a degree of ambiguity into the selection of relevant PIL rules for both contractual and non-contractual matters.²⁶ Moreover, this selection process may differ before a State judge and an arbitrator.

PIL rules include material, i.e. directly applicable, and conflict-of-laws rules. Given the scarcity of the rules specifically tailored for digital assets, when State court judges encounter a scenario involving the metaverse, its users, or assets, they are mostly compelled to select from the existing array of rules applicable to the natural world. Those include, first, material rules that apply to broader concepts, such as property or contracts,²⁷ as well as to related areas like digital services, online platform liability, and securities.²⁸ Secondly, the potentially applicable set of PIL rules also include national or regional conflict-of-laws rules, which diverge across jurisdictions²⁹ and are not adjusted to the specificities of the metaverse relations.³⁰ The results can therefore differ depending on the forum.³¹

Conversely, where permitted by applicable arbitration laws and rules, arbitrators may bypass national conflict-of-law rules by using the *voie directe* method.³² This approach involves directly identifying the law most closely connected to the matter at hand.³³ When allowed, it can help determine the relevant national law without relying on potentially inappropriate conflict-of-law rules.

Another avenue lies in applying soft law such as *lex mercatoria* (including its codifications, such as UNIDROIT Principles), based on general principles of law, international trade and international arbitration, as the most appropriate set of applicable rules.³⁴ The recognition and role of soft law, along with its interaction with domestic legal systems, vary across jurisdictions. For instance, *lex mercatoria*, despite its name, usually is not con-

sidered formal “law”. While in arbitration it is generally not contested that the parties can choose such non-State rules of law as applicable to their dispute,³⁵ such a flexibility is rarely seen in State courts. Yet, within court settings, these non-state legal frameworks can still serve as contractual terms through incorporation by reference.³⁶ This means decision-makers might turn to national laws if the contract terms, implying *lex mercatoria*, are insufficient for resolving disputes and/or if they conflict with essential legal principles.

The hesitance among arbitrators to apply *lex mercatoria* without clear party consent stems from its non-binding nature, despite arbitration rules often giving them wide latitude in rule selection. Nevertheless, given the international nature of metaverse-related issues, parties and arbitrators may want to consider its application, or even consider opting for an *ex aequo et bono* mechanism. This would allow an arbitral tribunal to act as *amiable compositeur* and, in other words, base its decision on equity considerations.³⁷

One can even think of the emergence of *lex metaversia*, i.e., substantive transnational rules, taking into account the specificities of the metaverse-related matters.³⁸

3 Search for Connecting Factors

If the substantive rules, which have their own territorial scope of application, do not apply (which they potentially can if the existing definitions are stretched to include the metaverse realities), the decision-maker will consider various connecting factors to determine the applicable rules of law, i.e. links between a given situation and a specific applicable law.

The most obvious connecting factor to find an appropriate ‘applicable rule of law’ would then be the choice of the parties.³⁹ The principle of party autonomy is almost universally recognised. The parties can explicitly express their intent or, less commonly, imply it. While the principle of party autonomy often prevails, exceptions exist, notably when a weaker party is involved or when the situation falls within the scope of application of public policy provisions. It should be also noted that even though

the majority of the metaverses' terms and conditions stipulate a choice of law, this choice only applies to relationships involving the platform and does not extend to the relationships solely among the platform's users.

In scenarios where parties fail to designate the applicable law, PIL will require identifying the closest connection.⁴⁰ The conflict-of-laws rules provide for presumptions of this closest connection. For instance, under the Rome I Regulation, a contract for the sale of goods is governed by the law of the seller's habitual residence, while a contract for service provision falls under the law of the service provider's habitual residence.

The *voie directe* method also aims at identifying the most closely connected law. Contrary to the conflict-of-laws method, it does not rely on presumptions but on subjective appreciation of the factual matrix by the decision-maker.

In both cases, using connectors can be challenging within the context of the metaverse, mainly for two reasons.⁴¹

First, the identities of the involved parties and their respective habitual residences may or may not be known. Even in instances where one enters into a contractual relationship with a metaverse platform (such as through registration), establishing the identity of the counterpart within the metaverse can remain complex. This is because the metaverse might lack legal existence in form of a recognised legal entity and a clearly identifiable responsible individual. As an example, in *Tulip Trading Limited v. Wladimir van der Lan and Ors*, the High Court decided that developers of cryptocurrency networks cannot owe fiduciary duties to the owners of cryptocurrency used within that network (*pending appeal*).⁴²

Furthermore, even if a contracting party knows the natural-world identity of its counterpart, difficulties can still arise in proving the connection between the natural-world person and the disputed digital asset or its digital representation, typically established via the proof of control.⁴³

Secondly, the metaverse's inherent lack of physicality complicates the identification of the places where the digital property is situated (*lex rei sitae*), where the contract shall be performed (*lex loci contractus* or *solutio-*

nis) or where the damage occurred (*lex loci delicti*), all being the most common PIL connecting factors alongside the parties' habitual residence.

To address these hurdles, consideration can be given to other factors that can link the situation at hand to a particular national law, via fictitious residence of the parties. This fictitious residence can be established at the residence of entities involved in handling digital assets within the relationship (such as cryptocurrency exchanges, NFT marketplaces, wallets, and the metaverse platforms), as well as at the domicile of banks maintaining accounts used for crypto-asset transactions.⁴⁴ In case of a cybertort, the place of accessibility of the metaverse platform could be taken into account, sometimes coupled with other indicators allowing for the identification of the States targeted by the platform ("*méthode de focalisation*").⁴⁵ These indicators might include physical presence, the use of a specific language, the geographical origin of clients, and more – as it was already the case with the online platforms in general. When it comes to the infringement of intellectual property rights, the law of the country where the protection of those rights is sought (*lex loci protectionis*) may be also applicable.⁴⁶

The UNIDROIT Working Group on Digital Assets and Private Law went further by suggesting a tailored approach for digital assets. This approach recommends a sequential examination of the various relevant connectors, starting with the law of the State expressly specified by the digital asset or the system on which it is recorded. If this is not determinable, as it is normally the case, then the law of the State where the issuer is statutorily based should be considered, followed by the law of the forum State or the law determined by the PIL rules of the forum State.⁴⁷ While such a harmonisation effort is highly commendable, it seems that the traditional connectors might be still in play for a long time.

Notes

- 1 El Hage, Y. *Le droit international privé à l'épreuve de l'internet*. Paris: LGDJ (2022) §147; El Hage, Y. *La réglementation des NFT à la lumière du droit international privé : réglementation étatique ou extra-étatique ?* (2022) *RDBF*.4.2022.38, §2 (hereafter El Hage).
- 2 *Proposal for Joint Work: HCCH-UNIDROIT Project on Law Applicable to Cross-Border Holdings and Transfers of Digital Assets and Tokens*, January 2023, §§8-9.
- 3 For example, abrupt termination of established commercial relationship: *Granarolo v. Ambrosi Emmi France* (2016) ECJ C-196/15 (qualified as a contract issue by ECJ, contrary to French courts).
- 4 *Jakob Handte & Co. v. Traitements Mécano-chimiques des Surfaces* (1992) ECJ C-26/91, §15.
- 5 By analogy with NFT: *Janesh s/o Rajkumar v. Unknown Person* ("CHEFPIERRE") (2022) SGHC 264.
- 6 By analogy with Tezos: *Wang v. Darby* (2021) EWHC 3054 (Comm).
- 7 Fischer, T. "Crypto investor brings ICC claim against Binance" *Global Arbitration Review* (2021) <https://globalarbitrationreview-com.prx.law.columbia.edu/crypto-investor-brings-icc-claim-against-binance>; *Genesis Asia Pacific Pte. Ltd. v. Three Arrows Capital, Ltd.* (2022) ICDR Case No. 01-22-0002-5568, Procedural Order No. 1; *B2C2 Ltd v. Quoine Pte Ltd* (2019) SGHC(l) 03.
- 8 *McKimmy v. OpenSea* (cv-00545); *Tulip Trading Limited v. Bitcoin Association & Others* (2022) EWHC 667 (Ch).
- 9 *AA v. Persons Unknown* (2019) EWHC 3556; *CLM v. CLN* (2022) SGHC 46; *Fetch.AI Ltd v. Persons Unknown* (2021) EWHC 2254 (Comm); Lutzi, T. "Chapter 14 The Tort Law Applicable to the Protection of Crypto Assets" *Blockchain and Private International Law*, Leiden, The Netherlands: Brill | Nijhoff (2023) Section 2.1. (hereafter Lutzi).
- 10 *Nike v. StockX* (22-cv-983); *Hermès v. Mason Rothschild* (22-cv-384); *Miramax LLC v. Tarantino et al.* (cv-08979); *Roc-a-Fella Records v. Damon Dash* (21-cv-5411); *Free Holdings v. McCoy, Sotheby's et al.* (cv-00881).
- 11 Lutzi Section 2.2.
- 12 "Minting" refers to the process of creation of an NFT.
- 13 *Jakob Handte & Co. v. Traitements Mécano-chimiques des Surfaces* (1992) ECJ C-26/91.
- 14 "Smart contract" refers to a program that runs when predetermined conditions are met. NFTs are based on smart contracts, that contain all information about the NFT and its owners. They also ensure that ownership of the NFT is transferred only according to the agreed-upon terms. While smart contracts may not always qualify as legal contracts, depending on their content and the applicable law, they can be legally binding in some cases (see, *inter alia*, UK Law Commission's Report, *Smart legal contracts: advice to Government*, November 2021, §1.2).
- 15 *Global Holding Company Ltd v. 91 Individuals* (2022) AAA.
- 16 Krysa, F. "Chapter 7 Taxonomy and Characterisation of Crypto Assets in Private International Law" *Blockchain and Private International Law*, Leiden, The Netherlands: Brill | Nijhoff, Section 2.3. (2023).
- 17 El Hage §7.

- 18 *Vorotyntseva v. MONEY-4 Ltd (t/a nebeus.com) & Ors* (2018) EWHC 2596 (Ch); *Wang v. Darby* (2021) EWHC 3054 (Comm); *CLM v. CLN* (2022) SGHC 46; Trib. Firenze, 19 December-2018, Contratti 2019, 6, 661; Trib. Firenze, 21 January 2019, Giur. It. 2020, 2657; Villata, F. C. “Chapter 11 Cryptocurrencies and Conflict of Laws” *Blockchain and Private International Law*, Leiden, The Netherlands: Brill | Nijhoff (2023) Sections 2 and 4 (hereafter Villata); Ripley, B. Y., and Heindler, F. “Chapter 9 The Law Applicable to Crypto Assets: What Policy Choices Are Ahead of Us?” *Blockchain and Private International Law*, Leiden, The Netherlands: Brill | Nijhoff (2023). Section 3.2 (hereafter Ripley & Heindler).
- 19 Villata Chapter 11, Section 4; Ripley & Heindler Section 3.2; Held, A. “Chapter 8 Crypto Assets and Decentralised Ledgers: Does Situs Actually Matter?” *Blockchain and Private International Law*, Leiden, The Netherlands: Brill | Nijhoff (2023) Section 3.2.2.
- 20 Villata Section 2.1.
- 21 UK Law Commission, *Digital assets: Final Report*, 28 June 2023, Law Com No. 412.
- 22 Zuti Giachetti, F. “The SEC Goes After Binance: A Deep Dive Into The Case That Could Shape The Future Of Crypto” *Business And Leaders* (2023) <https://businessandleaders.it/2023/07/11/sec-binance-crypto/>.
- 23 Villata Section 2.
- 24 UK Law Commission, *Digital assets: Final Report*, 28 June 2023, Law Com No. 412.
- 25 UNIDROIT Principles on Digital Assets and Private Law, Principle 3(1); UK Law Commission, *Digital assets: Final Report*, 28 June 2023, Law Com No. 412; Villata Section 4; Wendehorst, C. “Chapter 5 Proprietary Rights in Digital Assets and the Conflict of Laws” *Blockchain and Private International Law*, Leiden, The Netherlands: Brill | Nijhoff (2023) Section 3.
- 26 Lutzi Section 1.
- 27 UK Law Commission, *Digital assets: Final Report*, 28 June 2023, Law Com No. 412.
- 28 Elzweig, B., & Trautman, L. J. “When Does a Non-Fungible Token (NFT) Become a Security?” (2023) 39 *Georgia State University Law Review* 295.
- 29 Torremans, P. & et al. *Cheshire, North & Fawcett: Private International Law*. OUP (2017) pp. 41-50.
- 30 El Hage §2.
- 31 Lutzi Section 2.2.
- 32 Mayer, P. *The Laws or Rules of Law Applicable to the Merits of a Dispute and the Freedom of the Arbitrator*. In *Dossier of the ICC Institute of World Business Law: Is Arbitration Only As Good as the Arbitrator? Status, Powers and Role of the Arbitrator* (2011) §10; Seraglini, Ch. & Ortscheidt, J. *Droit de l'arbitrage interne et international* LGDJ (2019) §891; Benedettelli, M. “Determining the Applicable Law in Commercial and Investment Arbitration: Two Intertwined Road Maps for Conflicts-Solving” (2022) *ICSID Review* 3. 687, §1A.
- 33 Pryles, M. & Waincymer, J. M. “Multiple Claims in Arbitration Between the Same Parties” in van den Berg, A. J. *50 Years of the New York Convention*. Kluwer Law International (2009) pp. 476-477; Lew, J. D. M. & Mistelis, L. *A Comparative International Commercial Arbitration*, Kluwer Law International (2003)

- §§17-67; Gaillard, E. & Savage, J. *Fouchard Gaillard Goldman on International Commercial Arbitration* Kluwer Law International (1999) §1552; Derains, Y. “Chapter 21: The International Arbitrators’ Responsibilities Regarding the Conduct of the Proceedings and the Applicable Law” in Reisman, W. M. & Blackaby, N. *Arbitration Beyond Borders: Essays in Memory of Guillermo Aguilar Álvarez*, Kluwer Law International (2003) p. 440; Jones, D. “The Substantive Rights of Parties in Arbitration: Voie Directe and Voie Indirecte” in Kaplan N. & Moser, M. J. *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles*, Kluwer Law International (2018) pp. 303-304.
- 34 Torremans, P. & et al. *Cheshire, North & Fawcett: Private International Law*. OUP (2017) p. 9; Mayer, P., Heuzé, V. & Remy, B. *Droit international privé* LGDJ (2019) §§752-753.
- 35 Seraglini, Ch. & Ortscheidt, J. *Droit de l’arbitrage interne et international* LGDJ (2019) §§890-892. Loquin, E. *L’arbitrage du commerce international*. Joly edition (2015) §§425 and 429.
- 36 UNCITRAL, HCCH and UNIDROIT Legal Guide to Uniform Instruments in the Area of International Commercial Contracts, with a Focus on Sales, §§44-47.
- 37 Seraglini, Ch. & Ortscheidt, J. *Droit de l’arbitrage interne et international* LGDJ (2019) §883. Loquin, E. *L’arbitrage du commerce international*. Joly edition (2015) §§529-531.
- 38 By analogy with *Proposal for Joint Work: HCCH-UNIDROIT Project on Law Applicable to Cross-Border Holdings and Transfers of Digital Assets and Tokens*, January 2023, §9, referring to “*lex cryptographica*”.
- 39 UNIDROIT Principles on Digital Assets and Private Law, Principle 5(1); Ripley & Heindler Section 5.1.
- 40 Lutzi Section 4; Held, A. “Chapter 8 Crypto Assets and Decentralised Ledgers: Does Situs Actually Matter?” *Blockchain and Private International Law* Leiden, The Netherlands: Brill | Nijhoff (2023) Section 2.2.2.
- 41 UNIDROIT Principles on Digital Assets and Private Law, Commentaries 0.14 and 5.4; Lutzi Section 3.
- 42 *Tulip Trading Limited v. van der Laan & Ors* (2022) EWHC 667 (Ch) & (2023) EWCA Civ 83.
- 43 *B2C2 Ltd v. Quoine* (2019) SGHC(1) 03.
- 44 Villata Section 5.1; Ripley & Heindler Section 5.2.1.
- 45 *Peter Pinckney v. KDG Mediatech* (2013) ECJ C-170/12.
- 46 Ripley & Heindler Section 5.2.3.
- 47 UNIDROIT Principles on Digital Assets and Private Law, Principle 5(1).