

# The Law Applicable to Disputes Regarding Central Bank Digital Currencies<sup>(\*)</sup>

## Merkez Bankası Dijital Para Birimleri ile İlgili Uyuşmazlıklara Uygulanacak Hukuk

Dr. Öğr. Üyesi Gökçe ARIKAN<sup>(\*\*)</sup>

### Abstract:

In an environment where more than half of the states in the world aim to issue their own digital currencies, it is important to determine the law applicable to central bank digital currencies. One of the reasons that led to the emergence of Central Bank Digital Currencies, a digital form of fiat money issued by the central bank, is their ability to facilitate cross border transactions, which also introduces the element of foreignness when Central Bank Digital Currencies are used in cross border transactions. Because Central Bank Digital Currencies do not have physical existence like paper money and are intangible, the law applicable to disputes regarding Central Bank Digital Currencies also varies. It is aimed to classify disputes regarding Central Bank Digital Currencies and determine the applicable law. The most appropriate solution in terms of applicable law in Central Bank Digital Currency related proprietary disputes is to determine the law of the state where the issuer has its statutory seat as the applicable law, unless a choice of law has been made in the digital asset itself or in the system in which it is recorded. In disputes between intermediaries and end users, the most appropriate solution would be to choose the law in the agreements between them.

### Keywords:

Central Bank Digital Currency (CBDC), Applicable Law, Legal Tender, Statutory Seat of the Issuer, Digital Asset.

### Öz:

Dünyada devletlerin yarısından fazlasının kendi dijital para birimlerini ihraç etmeyi hedeflediği bir ortamda merkez bankaları dijital para birimlerine uygulanacak hukukun belirlenmesi önem arz etmektedir. Merkez bankası tarafından çıkarılan yasal para biriminin dijital bir biçimi olan Merkez Bankası Dijital Para Birimlerinin ortaya çıkmasına yol açan nedenlerden biri, sınır ötesi işlemleri kolaylaştırma özelliğidir ki bu aynı zamanda Merkez Bankası Dijital Para Birimlerinin sınır ötesi işlemlerde kullanılmasıyla yabancılık unsurunu da ortaya çıkarır. Merkez Bankası Dijital Para Birimlerinin kağıt para gibi fiziksel varlıkları olmadığından ve maddi olmadığından, Merkez Bankası Dijital Para Birimleri ile ilgili anlaşmazlıklara uygulanacak hukuk da farklılık gösterir. Merkez Bankası Dijital Para Birimleri ile ilgili uyuşmazlıkların vasıflandırılması ve böylece uygulanacak hukukun belirlenmesi amaçlanmaktadır. Merkez Bankası Dijital Para Birimi ile ilgili mülkiyet uyuşmazlıklarında uygulanabilir hukuk açısından en uygun çözüm, dijital

<sup>(\*)</sup> Makale hakem denetiminden geçmiştir.

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<sup>(\*\*)</sup> Balıkesir Üniversitesi, Hukuk Fakültesi, Milletlerarası Özel Hukuk Anabilim Dalı, Öğretim Üyesi, Balıkesir - Türkiye,

E-posta: gokce.arikan@balikesir.edu.tr,

Orcid No: <https://orcid.org/0000-0002-0883-1795>.

varlığın kendisinde veya kaydedildiği sistemde bir hukuk seçimi yapılmadığı sürece, ihraç edenin yasal merkezinin bulunduğu devletin hukukunun uygulanmasıdır. Araçlar ile son kullanıcılar arasındaki uyumsuzluklarda, aralarındaki sözleşmede hukuk seçimi yapılması en uygun çözümdür.

### Anahtar Kelimeler:

Merkez Bankası Dijital Para Birimi (CBDC), Uygulanacak Hukuk, Yasal Ödeme Aracı, İhraç Edenin Yasal Merkezi, Dijital Varlık.

## INTRODUCTION

In an environment where it is estimated that 93% of central banks are exploring CBDC (Central Bank Digital Currency) in 2022 and 58% are considering issuing retail CBDC in the short or medium term<sup>1</sup>, it is important to examine CBDC as a digital asset<sup>2</sup> in terms of Private International Law (PIL). Then, the fact that citizens and businesses can directly purchase other countries' CBDCs through distributed payment networks or digital wallets, easily bypassing the local currency payment system and foreign exchange management system, and without incurring additional fees and unfavorable exchange rates, makes the use of CBDCs in a cross border context more important<sup>3</sup>.

Given that no central bank plans to eliminate paper money, digital money and paper money will continue to coexist harmoniously for now<sup>4</sup>. However, it

<sup>1</sup> HCCH, Exploratory Work: Private International Law Aspects of Central Bank Digital Currencies (CBDCs), Prel. Doc. No 4 of January 2024, p. 3, <https://assets.hcch.net/docs/410f9f34-3360-4d22-87ff-0876377a3d87.pdf> (date accessed: 18.12.2024).

<sup>2</sup> UNIDROIT, Unidroit Principles on Digital Assets and Private Law, 2023, p. 16, <https://www.unidroit.org/wpcontent/uploads/2024/01/Principles-on-Digital-Assets-and-Private-Law-linked.pdf> (date accessed: 18.12.2024).

<sup>3</sup> Chaowei XU / Banggui JIN, "Digital Currency in China: Pilot Implementations, Legal Challenges and Prospects", (Juridical Tribune - Review of Comparative and International Law, 2022, Vol. 12, Iss. 2, p. 177-194), p. 188.

<sup>4</sup> Michael Lloyd, Central Bank Digital Currencies the Future of Money, Agenda Publishing, 2023, p. 19; Joseph Huber, The Monetary Turning Point: From Bank Money to Central Bank Digital Currency (CBDC), Palgrave Macmillan, Switzerland, 2023, p. 93; Tommaso Mancini Griffoli/ Maria Soledad Martinez Peria/ Itai Agur/ Anil Ari/ John Kiff/ Adina Popescu/ Celine Rochon, "Casting Light on Central Bank Digital Currencies", 2018, IMF Staff Discussion Note, p. 1-39, <https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2018/11/13/Casting-Light-on-Central-Bank-Digital-Currencies-46233> (date accessed: 18.12.2024); Muhammad Ashfaq/ Rashedul Hasan/ Jošt Merčon, Central Bank Digital Currencies and the Global Financial System, Walter de Gruyter, 2023, p. 77; Proposal for a Regulation of the European Parliament and of the Council on the establishment of the digital euro, COM(2023)369 final, COM(2023) 369 final, 2023/0212(COD), Brussels, 28.6.2023, par. 6, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023PC0369> (date accessed: 18.12.2024); The digital Turkish lira is planned to be offered for circulation upon request and to complement, rather than compete with, physical money. In this context, the digital Turkish lira aims to overcome the spatial limitations of the banknote the digital Turkish lira is planned to be offered for circulation upon request and to complement, rather than compete with, physical money., TCMB (Türkiye Cumhuriyeti Merkez Bankası), Dijital Türk Lirası Birinci Faz Değerlendirme Raporu, 2023, p. 36, <https://www.tcmb.gov.tr/wps/wcm/connect/509a3c6c-d906-4099-aa27-d1900d9227fc/>

will not be possible for paper money to compete with CBDC when the full potential of CBDC is taken into account. The fact that users can easily and cheaply access CBDCs of other central banks for remittances, travel or trade is one of the qualities that will make CBDCs more preferable<sup>5</sup>. CBDCs, a secure and liquid digital asset that reduces the number of financial intermediaries and payment risk, are expected to be increasingly adopted by central banks<sup>6</sup>. Since the issuance of CBDCs by a central bank differentiates them from cryptocurrencies, the elimination of instability and risks in cryptocurrencies has the potential to make CBDCs the preferred option over cryptocurrencies as well<sup>7</sup>.

The foreign element that arises from the use of CBDCs, especially in cross-border transactions, requires the determination of the law applicable to disputes related to CBDCs<sup>8</sup>. However, there is no legal regulation yet that determines the law applicable to such disputes. Designed to facilitate transactions involving digital assets<sup>9</sup> and intended to serve as a guide to ensure that States' private law is consistent with best practice and international standards regarding the holding, transfer and use of digital assets as collateral<sup>10</sup>, UNIDROIT's Digital Assets and Private Law Principles (The UNIDROIT Principles) provide guidance in determining the applicable law in disputes regarding CBDCs as a digital asset. This research article, which examines the law applicable to disputes regarding CBDCs from the perspective of the UNIDROIT Principles, consists of four chapters; CBDC's scope and definition, CBDCs overview, CBDC as a legal tender, and applicable law to CBDC.

## I. CENTRAL BANK DIGITAL CURRENCY'S SCOPE AND DEFINITION

In order for a medium to be accepted as money in the economy, the three basic functions it must fulfill are; being suitable for exchange in return for goods and services (medium of exchange function), being the reference unit of value of various goods (unit of account function) and ensuring the accumulation of

Dijital+Türk+Lirası+Birinci+Faz+Değerlendirme+Raporu.pdf?MOD=AJPERES&CACHEID=ROOT WORKSPACE-509a3c6c-d906-4099-aa27-d1900d9227fc-oO.7xaH (date accessed: 18.12.2024).

<sup>5</sup> Raphael Auer/ Philipp Haene/ Henry Holden, Multi-CBDC Arrangements and the Future of Cross-Border Payments, BIS (Bank for International Settlements), Monetary and Economic Department, BIS Papers No 115, March 2021, p. 12, <https://www.bis.org/publ/bppdf/bispap115.pdf> (date accessed: 18.12.2024).

<sup>6</sup> André Reslow/ Gabriel Soderberg/ Natsuki Tsuda, Cross-Border Payments with Retail Central Bank Digital Currencies Design and Policy Considerations, International Monetary Fund, May 2024, p. 4, <https://www.imf.org/en/Publications/fintech-notes/Issues/2024/05/15/Cross-Border-Payments-with-Retail-Central-Bank-Digital-Currencies-547195> (date accessed: 18.12.2024).

<sup>7</sup> Ashfaq/ Hasan/ Merçon, p. 139.

<sup>8</sup> Caroline Kleiner, Blockchain and Private International Law, Andrea Bonomi, Matthias Lehmann, Shaheeza Lalani (eds.), Brill/Nijhoff, 2023, p. 354.

<sup>9</sup> UNIDROIT, p. 1.

<sup>10</sup> UNIDROIT, p. 9.

values without losing value over a certain period of time (store of value function)<sup>11</sup>. In this sense, money, which is a store of value, is distinguished from payment instruments such as credit cards or checks used for value transfer. CBDCs issued by central banks are undoubtedly money in the economic sense, since the three basic functions a tool must fulfill in order to be accepted as money in the economy are not significantly affected by the digital representation of the currency<sup>12</sup>.

The 2021 BIS annual report defines CBDCs as “a form of digital money, denominated in the national unit of account, which is a direct liability of the central bank”<sup>13</sup>. A CBDC is a digital form of legal currency issued by a central bank. In this sense, central banks are responsible for issuing and managing a CBDC, which is similar to cryptocurrencies in that it uses a digital ledger to facilitate fast and secure digital transactions; this may or may not be based on blockchain technology<sup>14</sup>.

CBDC can generally be defined as a digital representation of a nation’s fiat currency, issued and regulated by the central bank<sup>15</sup>. For example according to the European Union’s definition of the Digital Euro, it means the digital form of the single currency available to natural and legal persons<sup>16</sup>. Central Bank Digital

<sup>11</sup> The Opinion of the Advocate General Pitruzzella, *Johannes Dietrich and Norbert Häring v Hessischer Rundfunk*, Joined Cases C-422/19 and C-423/19, 29 September 2020, par. 77, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62019CC0422> (date accessed: 18.12.2024); Leo Kriese, *Central Bank Digital Currency - A Technical, Legal and Economic Analysis*, Springer, 2023, p. 105; “Money, which represents a store of value, may be distinguished from a payment instrument such as a credit card or cheque that is used to transfer value.”, Bank for International Settlements (BIS), *Central Bank Digital Currencies: Legal Aspects of Retail CBDCs*, November 2024, p. 4, [https://www.bis.org/publ/othp88\\_legal.pdf](https://www.bis.org/publ/othp88_legal.pdf) (date accessed: 18.12.2024).

<sup>12</sup> Kriese, p. 106.

<sup>13</sup> BIS, *BIS Annual Economic Report 2020/21*, <https://www.bis.org/about/areport/areport2021.pdf> (date accessed: 18.12.2024).

<sup>14</sup> Ashfaq/ Hasan/ Merçon, p. 77; It is proposed to use a software-only, token-based CBDC without Distributed Ledger Technology (DLT). see, “DLT is an interesting design if no central party is available or if the interacting entities are not willing to agree on a trusted central party. However, this is hardly the case for a retail CBDC issued by a central bank. Distributing the central bank’s ledger with a blockchain merely increases transaction costs; it does not provide tangible benefits in a central bank deployment. Utilizing DLT to issue digital cash may be useful if there is no central bank to start with (...) or if the explicit intention is to do without a central bank (e.g. Bitcoin).”, David Chaum, Christian Grothoff, Thomas Moser, *How to issue a central bank digital currency*, SNB Working Papers, March 2021, <https://cognizium.io/uploads/resources/SNB%20-%20How%20to%20issue%20a%20central%20bank%20digital%20currency%20-%202021%20March.pdf>, (date accessed: 10.01.2025); Kleiner, p. 352.

<sup>15</sup> Tayo Tunyathon Koonprasert/ Shiho Kanada/ Natsuki Tsuda/ Edona Reshidi, *Central Bank Digital Currency Adoption Inclusive Strategies for Intermediaries and Users*, Fintech Note, International Monetary Fund, September 2024, p. 1, <https://www.imf.org/en/Publications/fintech-notes/Issues/2024/09/21/Central-Bank-Digital-Currency-Adoption-Inclusive-Strategies-for-Intermediaries-and-Users-555118> (date accessed: 18.12.2024).

<sup>16</sup> Proposal for a Regulation of the European Parliament and of the Council on the establishment of the digital euro, art.2/1.

Currency is defined as the digital form of a sovereign country's currency, and Digital Turkish Lira is also expressed as the digital form of the Turkish Lira<sup>17</sup>.

The UNIDROIT Principles consider a CBDC to be digital assets, even though they are an electronic record subject to control. Accordingly, “*digital asset means an information which is stored in an electronic medium and capable of being retrieved which is capable of being subject to control*” (The UNIDROIT Principles art.2/2). Digital asset is defined as information stored in an electronic medium that can be controlled and retrieved CBDCs are digital asset that is not sensory perceptible and spatially bounded<sup>18</sup>. In this sense, the UNIDROIT Principles recommend that States explicitly state in their legislation that digital assets can be the subject of proprietary rights<sup>19</sup>. In an environment where crypto assets are considered to be objects to property rights<sup>20</sup>, CBDCs should also be considered to be objects to property rights<sup>21</sup>.

## II. CENTRAL BANK DIGITAL CURRENCIES OVERVIEW

There are currently 36 ongoing CBDC pilots, including a digital Euro, while the Bahamas (*Sand Dollar*), Jamaica (*JAM-DEX*), Nigeria (*eNaira*) and Eastern Caribbean Economic and Currency Union (*DCash*) have launched a full CBDC<sup>22</sup>. There are CBDCs in the pilot phase, such as the People's Bank of China's CBDC (*DC/EP*), as well as CBDCs in the project phase, such as *Jasper* in Canada, *Ubin* in Singapore, and *RScoin* in the UK<sup>23</sup>. Although it is not possible to say that CBDCs are the new systemically dominant type of money today, it is expected that this result will be achieved in the future<sup>24</sup>.

CBDC is a public and private partnership that fosters competition and preserves the competitive advantages of digital currency providers. In this model, the public sector is responsible for ensuring trust, while the private sector focuses on providing customer service, designing user friendly interfaces, and encouraging innovation<sup>25</sup>. For example, the Central Bank of the Republic

<sup>17</sup> TCMB, p. 10.

<sup>18</sup> Kriese, p. 101.

<sup>19</sup> UNIDROIT, p. 24.

<sup>20</sup> Law Commission, Digital Assets: Consultation Paper, Law Com No 256, 28 July 2022, <https://s3-eu-west-2.amazonaws.com/cloud-platform-e218f50a4812967ba1215eaece923f/uploads/sites/30/2022/07/Digital-Assets-Consultation-Paper-Law-Commission-1.pdf> (date accessed: 18.12.2024).

<sup>21</sup> BIS, Legal Aspects of Retail CBDCs, p. 10.

<sup>22</sup> Atlantic Council Geoeconomics Center, <https://www.atlanticcouncil.org/cbdctracker/> (date accessed: 18.12.2024).

<sup>23</sup> XU/ JIN, p. 179.

<sup>24</sup> Huber, p. 87.

<sup>25</sup> Ashfaq/ Hasan/ Merçon, p. 57.

of Turkey reached a bilateral agreement with ASELSAN, HAVELSAN and TUBITAK in 2021 for the Digital Turkish Lira, whose R&D studies were initiated in 2020 and the first pilot test was implemented in 2022<sup>26</sup>.

Diversifying the monetary policy tools used by central banks, increasing safety of the financial system, promoting competition and innovation in payment systems, maintaining income in the form of a mint annuity in the conditions of limiting the issuance of cash, solving problems related to limiting the creation of money as a result of nonbank financing, counteracting financial exclusion are among the reasons why states are turning to the use of CBDC<sup>27</sup>. The declining use of cash<sup>28</sup>, the technological change in payment transactions such as contactless payment, mobile payment, cryptocurrencies and stablecoins, the protection of users from oligopolies in the digital payments sector, ensuring political independence in payment transactions, payments from anywhere to anywhere at any time, even across borders, simpler and faster transactions<sup>29</sup>, lower user fees expected due to this, and most importantly, programmability<sup>30</sup>, which will become even more important in the internet of things<sup>31</sup> are among the reasons for the ascent of CBDC<sup>32</sup>. With the digital euro, the European Central Bank aims to support the digitalisation of the economy, strengthen the strategic independence of the EU, avoid digital dollarisation, strengthen the international role of the euro and improve the costs and ecological footprint of the monetary and payment systems<sup>33</sup>.

<sup>26</sup> TCMB, p. 7.

<sup>27</sup> Ben Dyson/ Graham Hodgson, Digital Cash: Why Central Banks Should Start Issuing Electronic Money, Positive Money, 2016, p. 1-2, <https://www.datocms-assets.com/132494/1717792148-digital-cash-positive-money.pdf> (date accessed: 18.12.2024); Aleksandra, "Central Bank Digital Currency (CBDC): Barriers to Its Introduction", *Annales Universitatis Mariae Curie- Skłodowska*, (2023, Vol. 57, Iss. 2, p. 67-86), p. 72.

<sup>28</sup> In Sweden, for example, it is estimated that less than 10 per cent of payment transactions currently involve cash., Lloyd, p. 18.

<sup>29</sup> Research suggests that the primary purpose of digital currencies is to facilitate business to business transactions., Ashfaq/ Hasan/ Merçon, p. 78.

<sup>30</sup> The programmability of digital tokens and the ability to be linked to smart contracts are also envisaged for CBDCs., OMFIF/IBM, Retail CBDCs: The Next Payments Frontier, Official Monetary and Financial Institutions Forum, 2019, London, p. 7, 26, <https://www.omfif.org/wp-content/uploads/2019/11/Retail-CBDCs-The-next-payments-frontier.pdf> (date accessed: 18.12.2024); Deutsche Bundesbank, Digital Money: Options for Payments, Monthly Report, 2021, April, p. 65, <https://www.bundesbank.de/resource/blob/865166/f28d25bc79a5c78c7cf67d8002b78c81/mL/2021-04-digitales-geld-data.pdf> (date accessed: 18.12.2024); It is anticipated that the digital Turkish lira, if put into circulation, will contribute to increasing the financial inclusion rate, creating a complementary payment channel in line with the principle of uninterrupted and continuous payment operation, ensuring uniformity in digital payments, and creating a base for innovative areas of use by preparing a programmable payments infrastructure., TCMB, p. 11.

<sup>31</sup> Huber, p. 94.

<sup>32</sup> Kriese, p. 9-15.

<sup>33</sup> European Central Bank (ECB), Report on a Digital Euro, October 2020, p. 9, [https://www.ecb.europa.eu/pub/pdf/other/Report\\_on\\_a\\_digital\\_euro~4d7268b458.en.pdf](https://www.ecb.europa.eu/pub/pdf/other/Report_on_a_digital_euro~4d7268b458.en.pdf) (date accessed: 18.12.2024).

Unlike paper money, CBDCs can be transferred online, cross border, and between different currency areas, with the system containing the database relating to them being provided and maintained by the central bank, similar to how the history of digital token transactions is documented in a system database<sup>34</sup>.

In the current monetary system, the only direct recipients of central bank money are commercial banks, while the non financial corporate sector and the general public only participate indirectly in the system; whereas in the CBDC system, a retail digital money system, (account based for example in Nigeria or token based for example in the Bahamas)<sup>35</sup>, non financial businesses and individual citizens can also access and hold digital money directly issued to them by the central bank<sup>36</sup>. Therefore, instead of accessing commercial bank private money backed by central bank money, the CBDC system can establish a direct relationship between the citizen and the central bank<sup>37</sup>. Whether non financial businesses and individuals can access digital currencies issued by central banks directly or through financial intermediaries, including commercial banks, is a matter to be determined by each state's own regulations. For example, it is planned that access to the Digital Turkish Lira will be possible through financial intermediaries, including commercial banks. Thus, the distribution of the Digital Turkish Lira will be undertaken by banks and licensed participants<sup>38</sup>.

### III. CENTRAL BANK DIGITAL CURRENCY AS A LEGAL TENDER

Closely related to the concepts of money and currency, legal tender status is generally considered in each jurisdiction to be anything recognized by law as the means of settling debts or satisfying financial obligations<sup>39</sup>. In some jurisdictions, legal tender is merely a default means of payment, meaning that a currency means of payment has the effect of settling a debt to a creditor without the parties having to accept that form of payment, and hence in these jurisdictions, private businesses

<sup>34</sup> Huber, p. 78.

<sup>35</sup> Lloyd, p. 49, 129-134.

<sup>36</sup> "CBDCs can be released in two ways: They can be created in retail form to be accessible to any user and functional for all transactions, or they can be created in wholesale form, which is only accessible to financial institutions and interbank settlements. Therefore, the general public cannot access it. In the second way, central banks would be responsible for the issuance and distribution of digital money, while private banks could play a significant role in its circulation. Similar to the current fiat money, commercial entities could be responsible for distribution and customer engagement, and CBDCs could also provide financial services and solutions that are at the forefront of innovation.", Ashfaq/ Hasan/ Merçon, p. 49, 68.

<sup>37</sup> Lloyd, p. 18.

<sup>38</sup> TCMB, p. 20.

<sup>39</sup> BIS, Central bank digital currencies: Legal aspects of retail CBDCs, p. 5.

are not required to accept legal tender as payment. In other jurisdictions, acceptance of legal tender as payment is required to settle a debt<sup>40</sup>. While a means of payment can be granted legal tender status only if it is a form of money, not all forms of money are granted legal tender status<sup>41</sup>. In this sense, in most jurisdictions, only state issued currency in the form of banknotes and coins is given legal tender status.

According to the Court of Justice of the European Union<sup>42</sup>, the concept of 'legal tender' of a means of payment denominated in a currency unit signifies, in its ordinary sense, that that means of payment cannot generally be refused in settlement of a debt denominated in the same currency unit, at its full face value, with the effect of discharging the debt<sup>43</sup>.

According to the Proposal on the establishment of the digital Euro, the European Union regulates that the digital Euro shall be granted legal tender status (*art.7*)<sup>44</sup>, subject to exceptional circumstances<sup>45</sup>. The digital euro is intended to be widely accessible, usable and acceptable as a means of payment, being a digital currency with legal tender status denominated in euro issued by the European Central Bank and the national central banks of the Member States whose currency is the euro. Considering that El Salvador became the first country to make bitcoin

<sup>40</sup> Rosa Maria Lastra, *International Financial and Monetary Law*, 2nd Edition, Oxford University Press, Oxford, 2015, chapter 1.

<sup>41</sup> BIS, *Central bank digital currencies: Legal aspects of retail CBDCs*, p. 5.

<sup>42</sup> Judgment of the Court (Grand Chamber), Joined Cases C-422/19 and C-423/19, *Hessischer Rundfunk*, 26 January 2021, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=ecli:ECLI%3AEU%3AC%3A2021%3A63> (date accessed: 18.12.2024).

<sup>43</sup> Proposal for a Regulation of the European Parliament and of the Council on the establishment of the digital euro, para. 14.

<sup>44</sup> "The digital euro should have legal tender status for offline digital euro payment transactions occurring within in the euro area, similarly to euro banknotes and coins which have legal tender status in the euro area.", Proposal for a Regulation of the European Parliament and of the Council on the establishment of the digital euro, para. 17.

<sup>45</sup> While legally, payment using cash involves transferring possession of the paper money or coin from the payer to the payee, exceptions are provided because the need for a special technical system to transfer a CBDC may present difficulties in treating an CBDC as the legal equivalent of cash or subjecting it to the full system of rules applicable to cash in most jurisdictions., BIS, *Central bank digital currencies: Legal aspects of retail CBDCs*, p. 6; "Article 9 defines a set of exceptions to the obligation to accept the digital euro. This set of exceptions includes the right for a microenterprise not to accept the digital euro, unless it accepts comparable digital means of payment. Similarly, a natural person acting in the course of a purely personal activity is not obliged to accept the digital euro. The obligation to accept the digital euro fully respects the contractual freedom of parties, as a payee will furthermore not be required to accept digital euro payments if both the payee and the payer have expressly agreed on a different means of payment prior to the payment. Nevertheless, payees will be prohibited to use contractual terms that have not been individually negotiated (Article 10) as this would result in undermining the mandatory acceptance by payees and the contractual freedom of payers. Article 11 further recognises additional exceptions to the digital euro of a monetary law nature that the Commission is empowered to adopt by means of a delegated act.", Proposal for a Regulation of the European Parliament and of the Council on the establishment of the digital euro.



legal tender through the Bitcoin Law on September 7, 2021<sup>46</sup>, and then the Central African Republic (CAF) became the second country to make bitcoin legal tender in April 2022, the same month that Panama approved its own Crypto Law<sup>47</sup>, granting legal tender status to CBDCs issued by central banks is an expected result of being a digital representation of paper money<sup>48</sup>.

Granting legal tender status to the digital euro is intended to support its availability for payments across the euro area, thus ensuring the continued accessibility of central bank money in its role as a monetary anchor, as paper money alone cannot satisfy the needs of a rapidly digitising economy. Furthermore, the compulsive acceptance of payments in digital euro, as one of the basic conditions for legal tender status, will ensure that people and businesses take advantage of broad acceptance and can make payments in central bank money digitally and uniformly across the euro area<sup>49</sup>. In this sense, the digital euro is intended to have legal tender status for online digital euro payment transactions made to a payee resident or established in the euro area and where the payer is also resident or established in the euro area, as well as for online digital euro payment transactions made to a payee resident or established in the euro area, where the payer is not resident or established in the euro area<sup>50</sup>.

## IV. APPLICABLE LAW TO CENTRAL BANK DIGITAL CURRENCIES

### A. Classification of Disputes Regarding Central Bank Digital Currencies

Classification is provided to determine the law applicable to disputes that contain an element of foreignness<sup>51</sup> in private law that is, disputes that concern more than one country or jurisdiction<sup>52</sup>. The foreign element arises in disputes regarding CBDC, in cases where the CBDC is used for cross-border transactions<sup>53</sup>

<sup>46</sup> Fernando E. Alvarez/ David Argente/ Diana Van Patten, "Are Cryptocurrencies Currencies? Bitcoin as Legal Tender in El Salvador", Working Paper No. 2022-54, Becker Friedman Institute for Economics at Uchicago, April 2022, p. 4.

<sup>47</sup> Proposal for a Regulation of the European Parliament and of the Council on the establishment of the digital euro, para. 16.

<sup>48</sup> "... it is not so much the conceptual difference of digital assets from fiat currencies that excludes their classification as money.", Matthias, Private International Law in an Era of Change, Morten M. Fogt (ed.), Edward Elgar Publishing, 2024, p. 90.

<sup>49</sup> Proposal for a Regulation of the European Parliament and of the Council on the establishment of the digital euro, para. 16.

<sup>50</sup> Proposal for a Regulation of the European Parliament and of the Council on the establishment of the digital euro, para. 17.

<sup>51</sup> In a case where there is no foreign element, the question of the applicable law does not arise., John Greenwood Collier, Conflict of Laws, Cambridge University Press, 2001, p. 3.

<sup>52</sup> Collier, p. 13-14; Maria Carlota Ucin, Research Methods in Private International Law, Xandra Kramer, Laura Carballo Piñeiro (eds.), Edward Elgar Publishinh, 2024, p. 55.

<sup>53</sup> "one party pays or receives a payment in a currency which is not the one in force in the State where he/she is domiciled-cross-currency payment.", Kleiner, p. 354.

or when the CBDC is used by foreigners in the issuing state of the CBDC. The element of foreignness means that the parties to the case or the subject matter of the case have a connection with a legal system other than the legal system to which the court is subject<sup>54</sup>. Non-resident or non domiciled end users, including tourists, e-commerce consumers, international students, or those who prefer to hold a foreign CBDC for any reason, constitute a foreign element in disputes regarding their CBDC, and in this case, the determination of the applicable law becomes an issue.

The existence of a foreign element in disputes regarding CBDCs requires the determination of the law applicable to the case, for which the case must be classified. The issue of classification consists in determining which juridical concept or category is appropriate in any given case<sup>55</sup>. The theory that classification should be made according to the *lex fori*, that is, that the court should classify according to the categories of its own law, was proposed and became dominant on the Continent<sup>56</sup>. In this sense, whether a dispute regarding CBDCs is about proprietary or about the contractual relationship between the end users and the intermediaries is classified by the law of the forum (*lex fori*).

The points of contact that connects an individual or a subject to a legal system or a jurisdiction is the “*connecting factor*”<sup>57</sup>. The classified disputes are resolved by connecting them to a particular system of law through a “*connecting factor*”. The “*connecting factor*” relates facts to a particular system of law by specifying a particular place<sup>58</sup>. The points of contact that connects an individual or a subject to a legal system or a jurisdiction is the “*connecting factor*”.

<sup>54</sup> David McClean / Veronica Ruiz Abou-Nigm, Morris: The Conflict of Laws, 10th edition, Sweet & Maxwell, 2021, p. 1-2; Ergin Nomer, Devletler Hususi Hukuku, 23th edition, Beta Publishing, 2021, p. 5; Albert Venn Dicey/ J. H. C. Morris/ Lawrence Antony Collins, The Conflict of Laws, 16th edition., Thomson Reuters, 2022, p. 3; Adrian Briggs, The Conflict of Laws, 5th edition, Oxford Academic, 2024, p. 1-2; Aysel Çelikel, B. Bahadır Erdem, Milletlerarası Özel Hukuk, 18th edition, Beta Publishing, 2024, p. 5, 10; Cemal Şanlı, Emre Esen, İnci Ataman-Figanmeşe, 11th edition, Beta Publishing, 2024, p. 5.

<sup>55</sup> Dicey/ Morris/ Collins, p. 45.

<sup>56</sup> Another alternative is to classify according to the *lex causae*, that is, the law which governs an issue. However, if the governing law cannot be determined until the classification process is completed and if there are two possible foreign laws that will govern the issue, they will classify the issue differently, making the classification according to *lex causae* an exception. Another theory is to classify according to universal general principles based on *analytical jurisprudence and comparative law* studies. However, it is criticized because there are very few universal principles that can help in this area, it is not practical, and it has a negative effect on the duration and cost of the case., Collier, p. 15-17; Dicey/ Morris/ Collins, p. 16; McClean, David / Ruiz Abou-Nigm, p. 564; Briggs, p. 11.

<sup>57</sup> Briggs, p. 22.

<sup>58</sup> A.E. Anton / Paul Beaumont / Peter McEleavy, Private International Law, 3rd edition, W. Green, 2011, p. 17.

Since CBDCs have different characteristics than paper money, the use of CBDCs will bring different issues in terms of Private International Law. In this case, a more appropriate solution would be to establish a framework based on generally accepted the PIL principles rather than strict PIL rules in determining the law applicable to CBDCs<sup>59</sup>.

## **B. Determining the Applicable Law to Central Bank Digital Currencies**

### **1. Disputes Regarding Central Bank Digital Currencies Being a Legal Tender**

Money of account is a “*legal tender*” recognized by the *lex monetae* as a generally accepted unit of exchange within a State; therefore, it is solely the task of the *lex monetae* to determine what is “*legal tender*”<sup>60</sup>. In this sense, the law applicable to paper money is *lex monetae*, that is, the law governing money of account.

Since there is a law that creates money, it is the State that decides which notes and coins are to be used as *legal tender* for debts and the nominal value to be attributed to them; consequently, each State exercises these sovereign powers over its own currency, there must be a currency law (*lex monetae*) which determines whether particular banknotes or coins have the character of money and, if so, the nominal value to be attributed to them<sup>61</sup>.

The *lex monetae* defines the monetary unit in which an obligation is expressed or is to be performed, and the *lex monetae* (the law of the state that gave it a name and a value reference system)<sup>62</sup> generally govern the identification of the currency that forms the subject matter of the contract, define the amount of the obligation<sup>63</sup>. The *lex monetae* applies independently of the law applicable to the entire contract and the place of payment, and in particular the place of payment cannot change the selected monetary instrument<sup>64</sup>. The *lex monetae* does not apply to the right to claim compensation for the loss of value of money between the due date and the actual date of payment, or to the existence of the right to terminate an enforceable contract as a result of a

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<sup>59</sup> HCCH, Digital Economy and the HCCH Conference on Commercial, Digital and Financial Law Across Borders (CODIFI Conference): Report, Prel. Doc. No 3A of January 2023, p. 25, <https://assets.hcch.net/docs/a61a1225-2eb0-4fef-8a7e-24ca186b5919.pdf> (date accessed: 18.12.2024).

<sup>60</sup> Dicey/ Morris/ Collins, p. 2428, 2434.

<sup>61</sup> Charles Proctor, Mann and Proctor on the Law of Money, 8th Edition, Oxford University Press, 2022, p. 356.

<sup>62</sup> Kleiner, p. 360.

<sup>63</sup> Proctor, p. 120.

<sup>64</sup> Proctor, p. 361.

currency collapse<sup>65</sup>. Considering that there is a law that grants *legal tender* status to CBDCs issued by the central bank, the law of the state identifying a CBDC (*lex monetae*) governs the disputes regarding the CBDC being legal tender. The *causal connection factors* are terms that describe the connection between a fact or event and the applicable law<sup>66</sup>. The state identifying its own CBDC is the *casual connecting factor* in this sense.

## 2. Proprietary Disputes Regarding Central Bank Digital Currencies

The law of the forum (*lex fori*) classifies what would qualify as proprietary disputes regarding CBDCs<sup>67</sup>. The conventional approach to the determination of the applicable law is to focus on the subject and nature of the legal issues in question<sup>68</sup>. The issues of whether a person has a proprietary right in a CBDC or whether a proprietary right in a CBDC has been validly transferred to another person or whether a security right in a CBDC has been validly created or the rights as between a transferor and transferee of a CBDC or the rights as between a grantor of a security right in a CBDC and the secured creditor to whom the security right is granted or the legal consequences of third party effectiveness of a transfer of a CBDC or the requirements for, and legal consequences of, third party effectiveness of a security right in a CBDC are related to proprietary<sup>69</sup>. But the proprietary issues regarding CBDCs is not limited to those issues that are covered by the UNIDROIT Principles<sup>70</sup>.

The law applicable to proprietary disputes regarding CBDCs circulating across borders, including transfers and smart contracts, needs to be determined. The UNIDROIT Principles regulate the law applicable to proprietary issues especially related to a digital asset is transferred, acquired or otherwise transacted (*The UNIDROIT Principles 5/2/(c)*).

According to The UNIDROIT Principles;

“*proprietary issues in respect of a digital asset are governed by:*

*(a) the domestic law of the State expressly specified in the digital asset, and those Principles (if any) expressly specified in the digital asset; or, failing that,*

<sup>65</sup> Proctor, p. 362.

<sup>66</sup> Foreexample the *lex protectionis*, the law which grants legal protection to an intellectual property right or the *lex concursus*, the law of the court which is administering an insolvent estate or the *lex loci celebrationis*, the law of the place of celebration of marriage etc., Briggs, p. 30.

<sup>67</sup> UNIDROIT, p. 41.

<sup>68</sup> BIS, Central bank digital currencies: Legal aspects of retail CBDCs, p. 23.

<sup>69</sup> UNIDROIT, p. 23.

<sup>70</sup> UNIDROIT, p. 41.

(b) the domestic law of the State expressly specified in the system on which the digital asset is recorded, and those Principles (if any) expressly specified in the system on which the digital asset is recorded; or, failing that

(c) in relation to a digital asset of which there is an issuer, including digital assets of the same description of which there is an issuer, the domestic law of the State where the issuer has its statutory seat, provided that its statutory seat is readily ascertainable by the public” (The UNIDROIT Principles art.5/1)<sup>71</sup>.

Whether the applicable law is specified in a digital asset or in a system<sup>72</sup> where the digital asset is recorded must be easily determined by those who deal with the relevant digital asset. The rules in Principles 5/1(a) and 5/1(b) state that it must be expressly specified<sup>73</sup>. By automatically inserting a choice-of-law clause in the algorithm, the applicable law is specified in a digital asset or in a system<sup>74</sup>. Since the UNIDROIT Principles were prepared to cover all digital assets, including CBDC, it is not yet clear whether CBDCs or systems will include a specification of applicable law. Then, many digital assets, or systems, currently do not include a specification of applicable law<sup>75</sup>. In addition, even if the choice of law is technically available in a digital asset or in a system, central banks will prefer to choose their own law as the applicable law<sup>76</sup>.

The *lex situs* (the law of the place where the land, or other thing)<sup>77</sup> refers to the law of the place where property is situated<sup>78</sup>. Unlike a tangible property, an intangible thing cannot really be situated anywhere because it does not physically exist<sup>79</sup>. The *lex situs* that applies to physical money is not suitable for CBDCs, which are intangible and have no physical location<sup>80</sup>. The *lex situs* to issues concerning the proprietary of a

<sup>71</sup> UNIDROIT, p. 38-39.

<sup>72</sup> “The concept of a system includes any protocol, platform, application, transfer arrangement, and network, as long as it has the necessary capabilities to record digital assets. Given that networks are typically built in layers (e.g., physical layer, data link layer, network layer, transport layer, session layer, presentation layer, and application layer), the applicable law specified by the layer closer to the digital asset can be considered to apply.”, UNIDROIT, p. 43.

<sup>73</sup> “An approach that applies the law specified in the CBDC system itself as the governing law could also be a possible solution. This is what is proposed by Principle 5 of UNIDROIT Principles on Digital Assets and Private Law.”, BIS, Central bank digital currencies: Legal aspects of retail CBDCs, p. 24; Kleiner, p. 371.

<sup>74</sup> Kleiner, p. 371.

<sup>75</sup> UNIDROIT, p. 43.

<sup>76</sup> Kleiner, p. 371.

<sup>77</sup> Briggs, p. 30.

<sup>78</sup> Collier, p. 7.

<sup>79</sup> Collier, p. 251.

<sup>80</sup> Lehmann, p. 89.

CBDC presents difficulties due to the digital (intangible) nature of the CBDC, as the location of a CBDC is uncertain, especially if distributed ledgers are used<sup>81</sup>. The basic rules of PIL regarding intellectual property, indirect holdings of shares and securities can be compared in some ways to the realities of new technologies such as CBDC<sup>82</sup>. Intellectual property rights such as patents, copyrights and trademarks have their situs where they can be effectively transferred under the law that created them and a share or other security issued by a company is situated where the register is kept<sup>83</sup>. Similarly, there is a system in which a CBDC is also recorded.

The UNIDROIT Principles, which govern the law applicable to proprietary disputes regarding CBDCs, take into account the fact that CBDCs do not have physical assets such as paper money and are not tangible. If a choice of law has been made neither in the digital asset itself, nor in the system on which it is recorded, the law of the issuer's State applies as per the rules in Principle 5(1) (c)<sup>84</sup>. Since the issuer of each CBDC is a state's central bank, the rule in Principle 5/1(c), namely the domestic law of the State where the issuer has its statutory seat, would be appropriate to apply to disputes over the proprietary of the CBDC.

If none of the laws specified in The UNIDROIT Principles 5/1(a)-(c) apply, the law of the forum state shall apply (The UNIDROIT Principles 5/1(d))<sup>85</sup>. The UNIDROIT Principles 5/1(d) apply when the domestic law of the State where the issuer of a digital asset has its statutory seat cannot be applied. Since the UNIDROIT Principles are regulated by taking into account all digital assets, they provide options regarding the applicable law, taking into account cases where the domestic law of the State where the issuer of a digital asset has its statutory seat does not apply. Since there is a central bank issuing each CBDC, there will be no need to apply the rules in Principles 5/1(d).

The concept of issuer refers to central banks of the states<sup>86</sup>. Principle 5/1(c) refers to the State where the issuer has its statutory seat<sup>87</sup>. Issuer is defined in

<sup>81</sup> BIS, Central bank digital currencies: Legal aspects of retail CBDCs, p. 23.

<sup>82</sup> Briggs, p. 38.

<sup>83</sup> "... If a register is kept in each of two or more countries, the situs of a share is the place where a register is kept in which the shares can be effectively dealt with, or would usually be dealt with.", Collier, p. 251.

<sup>84</sup> UNIDROIT, p. 43.

<sup>85</sup> "... if none of the above sub-paragraphs applies: **OPTION A:** (i) those aspects or provisions of the law of the forum State as specified by that State; (ii) to the extent not addressed by sub-paragraph (d)(i), those Principles as specified by the forum State; (iii) to the extent not addressed by sub-paragraphs (d)(i) or (d)(ii), the law applicable by virtue of the rules of private international law of the forum State. **OPTION B:** (i) those Principles as specified by the forum State; (ii) to the extent not addressed by sub-paragraph (d)(i), the law applicable by virtue of the rules of private international law of the forum State (The UNIDROIT Principles art.5/1(d))".

<sup>86</sup> UNIDROIT, p. 40.

<sup>87</sup> UNIDROIT, p. 44.

Principle 5/2(f), and there are criteria that a person must meet to qualify as an issuer. Since natural persons are excluded from qualifying as issuers under these Principles, being a legal entity is required<sup>88</sup>. The issuer must have placed the digital asset into the flow of commerce for value<sup>89</sup>. The issuer must have identified itself in a manner that is readily identifiable to the public as the person placing the digital asset into the flow of commerce for value. Central banks already meet these criteria due to their nature. The UNIDROIT Principles are more comprehensive as they take into account all digital assets, not just CBDCs.

The most appropriate solution is to grant *client* a proprietary right in the digital asset rather than merely having a claim against the custodian<sup>90</sup>. Considering the general fact that in many cases the digital asset may not have a significant connection with any state<sup>91</sup>, the most appropriate solution to the applicable law in CBDC related proprietary disputes is the domestic law of the State where the issuer has its statutory seat<sup>92</sup>. In this sense, the “*connecting factor*”<sup>93</sup> is the statutory seat of the issuer of a CBDC.

### 3. Contractual Disputes Regarding Relationship Between an End User and Intermediary

The UNIDROIT Principles determine the law applicable to the contractual relationship between an end user and an intermediary when a CBDC is held in custody on behalf of a client by a custodian that has control of a digital asset or has entered into a custody agreement with a sub-custodian in respect of the CBDC (*UNIDROIT Principles art.10/2*). The term *custodian* refers to a person acting in this capacity who provides services to a client under a custody agreement; the term *sub-custodian* refers to a custodian who provides services to another custodian under a custody agreement; and the term *client* refers to a person to whom a custodian provides services under a custody agreement (*UNIDROIT Principles Article 10/1*). Therefore, under the custody agreement, the custodian is obliged to safeguard a CBDC (*UNIDROIT Principles Article 11/1(c)*).

In the event that issues arise in accessing CBDCs by non-resident or resident end users, including tourists, e-commerce consumers, international students, or those who choose to hold a foreign CBDC for any reason<sup>94</sup>, the law applicable to the contract be in question when the relationship between the intermediary and

<sup>88</sup> UNIDROIT, p. 44.

<sup>89</sup> UNIDROIT, p. 45.

<sup>90</sup> Lehmann, p. 89.

<sup>91</sup> UNIDROIT, p. 45.

<sup>92</sup> Christiane Wendehorst, Blockchain and Private International Law, Andrea Bonomi, Matthias Lehmann, Shaheez Lalani (eds.), Brill/Nijhoff, 2023, p. 115.

<sup>93</sup> Anton / Beaumont / McElevay, p. 17; Briggs, p. 22.

<sup>94</sup> BIS, Central bank digital currencies: Legal aspects of retail CBDCs, p. 21.

the end user is qualified by the *lex fori*. For example, if a person (*client*) in State A makes a payment with a CBDC issued by the central bank of State B through an intermediary (*custodian*) in State A and the CBDC system malfunctions and the transaction fails, the law applicable to the resulting dispute needs to be determined in the case against the custodian due to the damage suffered by the client<sup>95</sup>.

Contracts are governed (in general) by the law intended by the parties<sup>96</sup>. The UNIDROIT Principles determine the law applicable to contractual disputes regarding relationship between an end user and intermediary including whether the agreement is a custody agreement, of the domestic law of the State that is expressly specified<sup>97</sup> in the agreement as the law governing the agreement or if the agreement expressly provides that another law is applicable to all such issues, that other law (*The UNIDROIT Principles art.5/3*). Therefore, the contractual relationship between end users and intermediaries will be governed by the *lex contractus* (the choice of law stated in the contract, the law which governs a contract)<sup>98</sup>. In disputes between intermediaries and end users, the most appropriate solution would be to determine the applicable law in the agreements between them. This approach is also adopted by Article 4(1) of the Hague Securities Convention<sup>99</sup>.

The solution proposed by the UNIDROIT Principles, which is to determine the law applicable to the relationship between the end user and the intermediary as the law applicable to the custody agreement, would be an appropriate solution within the framework provided by the general PIL rules.

Similarly, it is recommended that the question of whether the complex relationships between the participants in a cryptocurrency system, namely those operating wallets or exchange platforms or those holding a copy of the blockchain

<sup>95</sup> BIS, Central bank digital currencies: Legal aspects of retail CBDCs, p. 22.

<sup>96</sup> Collier, p. 11.

<sup>97</sup> An alternative would be to determine the applicable law based on the location of the relevant intermediary (Place of the Relevant Intermediary Approach, PRIMA). This method allows non resident end users who access a CBDC through an intermediary in their jurisdiction to avoid the possibility of being subject to the laws of the jurisdiction that issued the CBDC. The law of the location of the intermediary could be specified as the applicable law in the custody agreement between the end user and the intermediary (for example, in the terms and conditions of the CBDC wallet service)., 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, OJ L 166, 11.6.1998, art.9/2, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31998L0026> (date accessed: 18.12.2024).

<sup>98</sup> BIS, Central bank digital currencies: Legal aspects of retail CBDCs, p. 23; Briggs, p. 30.

<sup>99</sup> Article 4(1) of Hague Securities Convention does not allow designating a completely unrelated third country law; the intermediary must have a certain relation (eg, having an office) to the designated jurisdiction., HCCH, Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, 5 July 2006, <https://assets.hcch.net/docs/3afb8418-7eb7-4a0c-af85-c4f35995bb8a.pdf> (date accessed: 18.12.2024).



register, create legally binding obligations and, if so, under what law, should be classified as contractual and that the Rome I Regulation<sup>100</sup> which determines the law applicable to contractual obligations in civil and commercial matters be applied<sup>101</sup>. The Rome I Regulation regulates that a contract is subject to the law expressly chosen by the parties (*The Rome I Regulation art.3*).

When the parties do not choose a law, the law with which the contract has the closest and most real connection must be applied to the contract<sup>102</sup>. The Rome I Regulation regulates that if the contract does not include a choice of law, the contract for the provision of services is governed by the law of the country in which the service provider has his habitual residence (*The Rome I Regulation art.4/1(b)*). Disputes regarding money held in bank accounts are governed by the law of the place where the bank is established, as they are a claim against the bank<sup>103</sup>.

The Court of Justice of the European Union has ruled that a contract for service must include the performance of a specific activity and does not necessarily require a monetary payment in return<sup>104</sup>, and has a wide scope, including the conferral of a commercial advantage or the provision of assistance, of economic value<sup>105</sup>. Considering that an intermediary (*custodian*) provides the

<sup>100</sup> 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), OJ L 177, 4.7.2008 [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2008.177.01.0006.01.ENG](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2008.177.01.0006.01.ENG) (date accessed: 18.12.2024).

<sup>101</sup> Dicey/ Morris/ Collins, p. 1430.

<sup>102</sup> Collier, p. 193; "Where the custody agreement provides no choice of law, the place of incorporation or the principal place of business of the intermediary can be used as a connecting factor. The client and third parties will know or can easily inform themselves about this place. They should consider all assets in the custody of an intermediary as being under the umbrella of its law. This enhances legal certainty and makes the management of such assets much easier.", Lehmann, p. 101.

<sup>103</sup> Lehmann, p. 89.

<sup>104</sup> Dicey/ Morris/ Collins, p. 1980; Judgment of the Court (Fourth Chamber), Case C-533/07 *Falco Privatstiftung and Thomas Rabitsch v Gisela Weller-Lindhorst*, 23.04.2009, para 29-44, (IP licensing agreement), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62007CJ0533> (date accessed: 10.01.2025); Order of the Court (Tenth Chamber), Case C-469/12, *Krejci Lager & Umschlagbetriebs GmbH v Olbrich Transport und Logistik GmbH*, 14.11.2013, para 26-29, (storage of goods), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CO0469> (date accessed: 10.01.2025).

<sup>105</sup> Dicey/ Morris/ Collins, p. 1980; Judgment of the Court (First Chamber), Case C-9/12 *Corman Collins SA v La Maison du Whisky SA*, 19.12.2013, para 39-40, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62012CJ0009> (date accessed: 10.01.2025); Judgment of the Court (Second Chamber), Case C-196/15 *Granorolo SpA v Ambrosi Emmi France SA*, 14.07.2016, para 40, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62015CJ0196> (date accessed: 10.01.2025); Judgment of the Court (Seventh Chamber), Case C-64/17 *Saey Home & Garden NV/SA v Lusavouga-Maquinas e Accessorios Industriais SA*, 08.03.2018, para 40, <https://curia.europa.eu/juris/document/document.jsf?jsessionid=DF7FE8E423C38D8368ACA200A1DB5860?text=&docid=200063&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=10091968> (date accessed: 10.01.2025).

end user (*client*) with the service of custody a CBDC, the contract in question can be considered within the scope of a service contract. The fact that States that seek to spread CBDCs do not charge client for the custody service of the intermediaries in question does not prevent the contract from being a service contract. In this sense, if there is no choice of law in the custody agreement, it is possible for the law of the country of habitual residence of the custodian to be applied to the custody agreement. In this sense, the habitual residence of the custodian becomes the *connecting factor*.

#### 4. Other Possible Disputes Regarding Central Bank Digital Currencies

Disputes outside the scope of the contract, such as the law applicable to torts (*lex delicti*)<sup>106</sup> arising from the fault of one of the parties, may be governed by the law of the country of damage. The general rule in question is regulated in the Rome II Regulation<sup>107</sup> art.4/1. However “*where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question*” (*The Rome II Regulation art.4/3*). Therefore, the tort arising from negligence between the end user (*client*) and the intermediary (*custodian*) can be governed by the law applicable to the contract, which is the more closely related law, since there is already a contractual relationship between them.

It may also arise where a third party who is not a party to the custody agreement commits a tort such as theft, fraud or blackmail over a CBDC. If the place where the damage occurred cannot be determined, it may be assumed that the damage occurred at the place of domicile of the victim<sup>108</sup>. The Rome II Regulation art.4/2 regulates the application of the law of the country where the person who is claimed to be liable and the injured person have their habitual residence in the same country at the time the damage occurs. In the case of torts related to CBDCs, it can be treated like any other tort with only minor adaptations required to the PIL rules<sup>109</sup>.

Unjust enrichment occurs when a CBDC is inadvertently transferred by its owner to another person. In the case of unjust enrichment, if the parties do not

<sup>106</sup> Briggs, p. 30.

<sup>107</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, <https://eur-lex.europa.eu/eli/reg/2007/864/oj/eng> (date accessed: 10.01.2025).

<sup>108</sup> Lehmann, p. 107.

<sup>109</sup> Lehmann, p. 108.

have a common habitual residence, the law applicable law is that of the country where the enrichment took place (*The Rome II Regulation art.10/3*). However, in the case of unjust enrichment related to CBDCs, there will be difficulties in determining the country in which the enrichment took place<sup>110</sup>. “Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of unjust enrichment is manifestly more closely connected with an other country, the law of that other country shall apply” (*The Rome II Regulation art.10/4*). Therefore, in such a case, the habitual residence of the enriched person can be used as a *connecting factor* in determining the applicable law.

The law governing insolvency proceedings determines the precise legal characterization of CBDCs. For example, it categorizes CBDCs as digital money with legal tender status. There is no need to devise special insolvency PIL rules for CBDCs, as the PIL rules of the forum of the bankruptcy court will determine the law applicable to them<sup>111</sup>. It is generally accepted that insolvency proceedings are conducted in accordance with the law of the opening state and that this also applies to cross-border relations<sup>112</sup>. In the event of the insolvency of the intermediary (*custodian*) party to the custody agreement, the insolvency administrator may need to resolve issues related to CBDCs of other jurisdictions<sup>113</sup>. In such a case, the *lex concursus* (the law of the State within whose territory the insolvency proceedings in question are opened), that is, the law of the court which is administering an insolvent CBDC can apply to case<sup>114</sup>. This general rule has also been adopted by the European Union (*The European Insolvency Regulation<sup>115</sup> art.7/1*). Considering the collective nature of insolvency proceedings, having a single law (*lex concursus*) generally applicable to both substantive and procedural questions in these proceedings minimizes classification difficulties and promote the administrative efficiency and cost-effectiveness of the process<sup>116</sup>.

While these traditional approaches may be sufficient for some situations involving CBDC, it should be noted that challenges may arise in other situations

<sup>110</sup> Lehmann, p. 109.

<sup>111</sup> Lehmann, p. 110.

<sup>112</sup> Reinhard Bork, In *Advanced Introduction to Cross-Border Insolvency Law*, Edward Elgar Publishing, 2023, p. 51.

<sup>113</sup> BIS, *Central bank digital currencies: Legal aspects of retail CBDCs*, p. 22.

<sup>114</sup> Briggs, p. 30.

<sup>115</sup> Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), OJ L 141, 05.06.2015, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32015R0848> (date accessed: 10.01.2025).

<sup>116</sup> Richard Snowden, *Commentary on the European Insolvency Regulation*, 2nd edition, Reinhard Bork, Kristin van Zwieten (eds.), Oxford University Press, 2022, p. 245.

due to the digital (intangible) nature of CBDC<sup>117</sup>. Therefore, when determining the law applicable to disputes regarding CBDCs, general rules of PIL should be adapted to suit the intangible nature of CBDCs.

## CONCLUSION

To conclude, it can be stated that considering the general fact that in many cases a digital asset may not have a significant connection with any state, the most appropriate solution in terms of applicable law in CBDC related proprietary disputes is to determine the law of the state where the issuer has its statutory seat as the applicable law, unless a choice of law has been made in the digital asset itself or in the system in which it is recorded.

The applicable law for contractual disputes between an end user of a CBDC and an intermediary is primarily the law chosen in the contract. Therefore, the contractual relationship between the end user and the intermediary will be governed by the *lex contractus* (the choice of law stated in the contract). In disputes between intermediaries and end users, the most appropriate solution would be to determine the applicable law in the agreements between them.

In tort cases related to CBDCs, the applicable law (*lex delicti*) may be the law of the place where the damage occurred. However, if the place where the damage occurred cannot be determined, the damage may be deemed that the damage occurred at the place of domicile of the victim.

Since CBDCs have different characteristics than paper money, the use of CBDCs will bring different issues in terms of Private International Law. In this case, a more appropriate solution would be to establish a framework based on generally accepted the PIL principles rather than strict PIL rules in determining the law applicable to CBDCs.

Considering the specific features of CBDCs, regulating the law to be applied in relevant disputes in the legislation of the states or in bilateral or multilateral agreements between states will provide legal certainty and encourage cross-border use and exchange of CBDCs.

<sup>117</sup> BIS, Central bank digital currencies: Legal aspects of retail CBDCs, p. 23.

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