

Private International Law Aspects of Smart Derivatives Contracts
Utilizing Distributed Ledger Technology (Comparative Table)

The table below presents high-level responses to the various conflict-of-laws issues raised in various papers published by ISDA in collaboration with R3 (developer of the Corda DLT platform) and the counsel and contributing drafters noted below.¹ This table should be read in conjunction with the underlying papers referenced herein, which fully consider the issues discussed below and other related issues in greater detail.

This table is summary in nature. It should not be considered a guide to or an explanation of all relevant issues or considerations set out in these papers. It is not legal advice and should not be relied upon as a basis for providing definitive legal advice. You should consult your legal advisors and any other advisor you deem appropriate in considering the issues discussed herein. ISDA assumes no responsibility for any use to which any of these materials may be put.

Issue	England & Wales (Clifford Chance)	France (Jones Day)	Ireland (McCann FitzGerald)	Japan (Linklaters)	New York (Clifford Chance)	Singapore (Clifford Chance / Singapore Academy of Law)
Would a derivatives transaction that is documented on a DLT platform generally be admissible as evidence in the local court?	Yes, provided that the transaction and its terms are capable of being reproduced in a format that the court can read. (see page 18)	Yes, provided that the electronic format is intelligible. Note that parties can agree on a specific standard of evidence, which may be less stringent than statutory requirements. (see pages 13-14)	Yes, provided that the transaction and its terms are capable of being reproduced in a format that the court can read. (see page 18)	Yes, provided that it is submitted in a format that allows the judge to read/recognize the contents. (see page 11)	While no New York court has yet considered the admissibility of entries in a distributed ledger as evidence, there would seem to be strong argument that such entries would be capable of admission as evidence. (see page 13)	Yes. (see page 18)

¹ All papers can be found at <https://www.isda.org/2019/10/16/isda-smart-contracts/>

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Where parties have entered into a derivatives contract under an ISDA Master Agreement and utilizing a private, permissioned DLT system (such as R3's Corda), is it likely that a local court would disapply the parties' express choice of governing law with respect to the transaction?	No. (see pages 20-21)	No. (see page 14)	No. (see pages 19-20)	No. (see page 12)	Unlikely, unless the foreign jurisdiction has no reasonable relation to the agreement or enforcement of the clause would violate a fundamental principle of New York public policy. (see page 14)	No. (see pages 20-21)
Would your response be different if a permissionless DLT system was used?	Yes, there could be a greater degree of uncertainty, especially where the transaction is not backed by an off-ledger agreements and where the parties are domiciled in different jurisdictions. (see page 21)	No, provided the transaction is backed by an off-ledger ISDA Master Agreement. (see page 14)	Yes, there could be a greater degree of uncertainty, especially where the transaction is not backed by an off-ledger agreement and where the parties are domiciled in different jurisdictions. (see page 20)	Yes, there could be a greater degree of uncertainty, especially where the transaction is not backed by an off-ledger agreements and where the parties are domiciled in different jurisdictions. (see page 12)	There may be greater uncertainty, particularly where parties are anonymous or pseudonymous and where the transaction is not backed by an off-ledger ISDA Master Agreement. (see page 14)	Yes, there could be a greater degree of uncertainty, especially where the transaction is not backed by an off-ledger agreements and where the parties are domiciled in different jurisdictions. (see page 21)
Where parties have entered into a derivatives contract under an ISDA Master Agreement and utilizing a private,	No. (see page 22)	No. (see pages 14-15)	No. (see page 20)	No. (see page 13)	As above. (see page 15)	No. (see page 22)

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<p>permitted DLT system (such as R3's Corda), is it likely that a local court would disapply the parties' express choice of governing law with respect to the operation of the DLT system?</p>						
<p>In a scenario where the parties are exchanging tokenised securities as collateral pursuant to a derivatives contract where the relevant tokenised securities are designed simply to record real-world assets that are provided and exchanged on a DLT system, how might a dispute regarding a party's entitlement to any such tokenised securities be resolved?</p>	<p>By reference to the <i>situs</i> of the real-world securities. This could be one of a number of places, depending on the particular situation.</p> <p>(see page 26)</p>	<p>By reference to the law of jurisdiction where the real world asset is held or, in the case of intermediated securities, the law of the jurisdiction where the account holding the collateral is located.</p> <p>(see pages 18-19)</p>	<p>By reference to the <i>situs</i> of the real-world securities. This could be one of a number of places, depending on the particular situation.</p> <p>(see pages 24-27)</p>	<p>By reference to the governing law or location of the securities, depending on the nature and characteristics of the securities. It is uncertain whether Japanese conflict-of-law rules apply to dematerialized securities.</p> <p>(see pages 16-17)</p>	<p>Under this scenario, it is likely that the parties would employ a securities intermediary to maintain custody of collateral assets. In this scenario, the respective rights of the parties in respect of those assets will be determined by the law specified in the account agreement with the securities intermediary.</p> <p>(see pages 19-20)</p>	<p>By reference to the <i>situs</i> of the real-world securities. This could be the <i>lex incorporationis</i> or, where the share register for such securities is kept in a different jurisdiction, the jurisdiction in which such share register is kept (e.g. if the securities are held in a centralized deposit system which functions as a share register for the relevant company, the law of the country in which such system is located).</p> <p>(see pages 27-28)</p>

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<p>Would your response be different if collateral took the form of digital assets that possessed intrinsic value and had no relationship to any real-world securities?</p>	<p>Yes as, depending on the nature of the digital asset, there may be no <i>lex incorporationis</i> or centralized deposit system in which the digital asset is held.</p> <p>(see page 28)</p>	<p>Yes, particularly with respect to digital assets such as cryptocurrencies which to have had an identified issuer and which are held in wallets which may not be considered to be an account under the statutory meaning of the term.</p> <p>(see page 19)</p>	<p>Yes as the asset may not be represented by a physical instrument transferable by delivery. As such, it may not be possible to identify any single jurisdiction in which the digital asset is located.</p> <p>(see page 27)</p>	<p>No. While it is not certain what approach would be taken by a Japanese Court, it would try to find the relevant law to resolve the dispute.</p> <p>(see page 17-18)</p>	<p>Different rules may apply where (i) the permissionless system is based on a decentralized infrastructure and is maintained through a number of pseudonymous participants, or (ii) where participants hold collateral directly.</p> <p>(see page 20)</p>	<p>Yes as, depending on the nature of the digital asset, there may be no <i>lex incorporationis</i> or centralized deposit system in which the digital asset is held.</p> <p>(see page 28)</p>