

White Paper on Smart Derivatives Contract

by Matthias Lehmann

Smart contracts and the conflict of laws is a widely discussed topic today (see for instance the post by Giesela Rühl). A new contribution to this debate comes from ISDA, the International Swaps and Derivatives, in collaboration with the Singapore Academy of Law and leading law firms. Also involved is the provider of an existing smart contract platform (Corda), which guarantees the paper's practical relevance. The analysis focuses on a potential smart derivative contract to be implemented on Corda.

The authors of the paper take the view that a court in Singapore and the UK would have little difficulties in determining the law governing such a contract – it would simply be the one chosen in the derivatives master agreement. The same goes for the choice of the competent court. In this context, it is important to note that only B2B transactions are considered, with no consumer contracts being involved. The authors also see little risk for the intervention of public policy rules.

Collateralised derivative transactions, which are of utmost practical importance, are more problematic to the extent that the collateral is governed by the *lex rei sitae*.

But the paper also sees a way out here: The collateral could be represented by a token (through so-called tokenisation). Given that tokens have no real geographic location, the law applicable to the token could be determined again by a choice of the parties.

The paper even suggests an innovative way to avoid the need for enforcement: The parties could agree that the “notary” of the

platform must implement any judgment rendered by the chosen court. In this way, the need to apply for cross-border recognition and enforcement in the country in which the platform is established would fall away.

Whether

this proposal works in practice remains to be seen. One may reasonably fret that the platform will not enjoy complete immunity from the country in which it is established. As long as the courts of this country are liberal, there is however little reason for fear.

The Singapore High Court has already shown its readiness

to extending property protection to the holders of cryptocurrencies.

The country could thus provide a safe haven for the operation of a smart derivatives platform, but that does not exclude the continuing power of its courts to intervene and the possible application of national law, e.g. in case of an insolvency of the platform provider.