Law Commission of England and Wales Consultation on Digital Assets and (Electronic) Trade Documents in Private International Law including Section 72 of the Bills of Exchange Act 1882

Response by Burcu Yüksel Ripley and Alisdair MacPherson

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This response is provided by Professor Burcu Yüksel Ripley and Dr Alisdair MacPherson from the University of Aberdeen. The opinions expressed in this response are theirs alone and do not represent the views of any advisory, working or expert groups they are part of, either individually or collectively, on digital assets and related subject matters (including the Advisory Panel of the Law Commission of England and Wales in this law reform project).

General Comments

[1] We appreciate the opportunity to respond to this consultation and acknowledge the important work undertaken by the Law Commission of England and Wales (LCEW) in this area, including this project concerning private international law (PIL).

[2] Although the LCEW can only make law reform recommendations for England and Wales, and not for Scotland (or Northern Ireland), we note that some of the key sources of PIL as well as some other legislation relevant to this consultation, such as the Electronic Trade Documents Act (ETDA) 2023 and the Bills of Exchange Act 1882, apply to the whole of the UK. We, therefore, emphasise the importance of UK-wide law reform in this area where possible and appropriate, and specifically in relation to the pieces of legislation that apply across the three jurisdictions of the UK to ensure alignment among them. We think that this project offers a valuable basis for a possible UK-wide law reform and collaboration in this area and consider that engagement and close cooperation between the Scottish Law Commission and the LCEW, as well as further expert input from key Scottish stakeholders during this project is beneficial and important as the project develops (see further B Yüksel Ripley and A MacPherson, "Digital Assets Law Reform in England and Wales and Prospects for Scotland", (2022) Aberdeen Law School Blog, https://www.abdn.ac.uk/law/blog/digital-assets-law-reform-in-england-and-wales-and-prospects-for-scotland; B Yüksel Ripley, A MacPherson and L Carey, "Digital Assets in Scots Private Law: Innovating for the Future" Edinburgh Law Review, vol. 29, no. 2 (May, 2025) 175, https://www.euppublishing.com/doi/full/10.3366/elr.2025.0955, pp.204 and 209).

[3] We noticed that some of the issues which the call for evidence paper (February 2024) had sought views on were not further considered in the consultation paper, such as the issues concerning the ETDA 2023 and the *situs* (location) of an electronic trade document (ETD). We wondered why this is the case and would welcome further clarification. We read the FAQ papers published by the LCEW on ETDs in PIL and on property and permissioned DLT systems in PIL. However, we think that there are still uncertainties and concerns in relation to those issues. In particular, we think that clarity is still needed regarding to the ETDA 2023's cross-border dimension and its (territorial) sphere of application and also the identification of the *situs* of an ETD (see further B Yüksel Ripley, "Cross-Border Dimension of the UK's Electronic Trade Documents Act (ETDA) 2023 and the Question of the Law Applicable to Electronic

Trade Documents", (2025) Aberdeen Law School Blog, https://www.abdn.ac.uk/law/blog/crossborder-dimension-of-the-uks-electronic-trade-documents-act-etda-2023-and-the-question-of-the-law-applicable-to-electronic-trade-documents/). We think that these issues would benefit from further consideration by the LCEW.

[4] We note that there are international and comparative developments in relation to cryptoassets demonstrating growing support for party autonomy in decentralised and digital contexts, such as UNIDROIT DAPL Principle 5 (see further B Yüksel Ripley, A MacPherson and L Carey, "Digital Assets in Scots Private Law: Innovating for the Future" Edinburgh Law Review, vol. 29, no. 2 (May, 2025) 175, https://www.euppublishing.com/doi/full/10.3366/elr.2025.0955, pp. 205-206). We also note the proposals of the Financial Markets Law Committee (FMLC) based on party autonomy in Digital Assets: Governing Law and Jurisdiction (2024), https://fmlc.org/wp-content/uploads/2024/06/Report_Digital-Assets-Governing-Law-and-Jurisdiction.pdf. However, party autonomy and related issues do not seem to have been considered in the consultation paper. Although we agree that there would be typically no choice of law (or court) clauses in permissionless systems, we do not think that this possibility should be excluded altogether from the future developments in the area. We, therefore, think that party autonomy and related issues (including its operation among pseudonymous participants, its extent to property law matters, and the impact of weaker party (e.g. consumer) protection in this context and the effect of choice of law on third parties (e.g. in good faith acquisition)) would benefit from further consideration by the LCEW (in relation to party autonomy in applicable law, see further B Yüksel Ripley, "The Law Applicable to (Digital) Transfer of Digital Assets: The Transfer of Cryptocurrencies via Blockchains" in M Fogt (ed) *Private International Law in an Era of Change* (Edward Elgar, 2024) 123, pp.146-149; B Yüksel Ripley, "Cryptocurrency Transfers in Distributed Ledger Technology-Based Systems and Their Characterisation in Conflict of Laws" in J Borg-Barthet, K Trimmings, B Yüksel Ripley and P Živković (eds), *From Theory to Practice in Private International Law: Gedächtnisschrift for Professor Jonathan Fitchen* (Oxford, Hart Publishing 2024) 109, pp.120-123; B Yüksel Ripley, A MacPherson, M Poesen, A Albargan and L Xuan Tung, with O Momoh as an observer, "Response to UNIDROIT Digital Assets and Private Law Consultation" (2023), https://www.abdn.ac.uk/law/research/centre-for-commercial-law/public-policy-stakeholder-engagement-1109.php, pp.4-5).

Responses to the Consultation Questions

Consultation Question 1.

We provisionally propose the creation of a new discretionary power of the courts of England and Wales to grant free-standing information orders at the initial stage of investigations in cases where the features of the digital and decentralised environments make it otherwise impossible for a claimant to obtain the information they need to formulate and bring a fully-pleaded substantive claim.

We provisionally propose that such power should be based broadly on the principles of access to justice, necessity, and preventing injustice in the modern digital and decentralised environments.

Do consultees agree?

[5] We understand the reasons behind this proposal and we, in principle, have no objections to it. We recognise the difficulties relating to the identification of the defendant/defender in cryptoasset litigation and issues concerning alternative means of service (e.g. via an NFT airdrop in cryptoasset fraud cases against persons unknown) because of pseudonymity in cryptoasset systems. We have identified such difficulties in Scotland too, where the problems are more substantial than in England and Wales (see further B Yüksel Ripley, A MacPherson and L Carey, "Digital Assets in Scots Private Law: Innovating for the Future" Edinburgh Law Review, vol. 29, no. 2 (May, 2025) 175, https://www.euppublishing.com/doi/full/10.3366/elr.2025.0955, pp.207-208 and 210).

[6] We are, however, unsure about the potential legal and practical value of the proposed free-standing information orders abroad. We think that free-standing information orders granted by courts in England and Wales, as proposed, would likely have no legal value or force elsewhere unless those orders are recognised or enforced by the respective foreign courts. Without such recognition or enforcement, free-standing information orders would be unlikely to be complied with by intermediaries elsewhere. This is because such compliance would be potentially a breach of agreements they have with their customers as well as any data protection and privacy legislation that the intermediaries are subject to in their respective countries, unless they obtain customers' consent for providing their information to third-parties. Without a freezing order, seeking such consent from a customer would include the risk that the customer, who became aware of the information order, could easily move cryptoassets elsewhere. In addition, the intermediaries, which provide information about their customers to third-parties in the absence of a recognised court order or customers' consent, could also possibly be exposed to a reputational risk in the market.

[7] We understand from the consultation paper that claimants have tended to seek both information and freezing orders. Given the time and costs involved in recognition or enforcement of foreign court orders abroad and the ability to move cryptoassets swiftly from one place to another on-chain and off-chain at any time, we also note that the practical usefulness of free-standing information orders might be limited without freezing orders, even in cases where those information orders might be recognised or enforced elsewhere.

Consultation Question 2.

We provisionally propose the following as the threshold test that the claimant must be able to meet before the discretion to grant an order under the proposed power may be exercised. All four limbs would have to be satisfied.

(1) A case of certain strength: the court must be satisfied that there has clearly been wrongdoing on facts that disclose a potential case that is more than barely capable of serious argument and yet not necessarily one which the judge believes to have a better than 50 per cent chance of success.

(2) Necessity: the court must be satisfied that the relief sought must be necessary in order to enable the applicant to bring a claim or seek other legitimate redress for the wrongdoing.

(3) Impossibility or unreasonableness: the court must be satisfied that there is no other court in which the claimant could reasonably bring the application for relief.

(4) A link to England and Wales: the court must be satisfied that there is a connection to England and Wales, such as the claimant's habitual residence, domicile, or nationality.

Do consultees agree?

[8] We broadly agree, subject to the comments below.

[9] Regarding (1), a case of certain strength, we broadly agree with the proposal, but we also think that the threshold might not be very straightforward to assess in the way it is described in the consultation paper. We understand that the proposed formulation has been borrowed from some relevant cases. However, if there will be a statutory provision on this, we think a different formulation would be preferable based on the demonstration of, for example, a 'good arguable case' or '*prima facie* case' that there has been wrongdoing.

[10] Concerning (2), necessity, the consultation paper seems to provide different explanations on this in its different parts. Must the relief sought be necessary to enable the applicant "to bring a claim or seek other legitimate redress for the wrongdoing" (paragraphs 4.100 and 4.108), or rather to decide "whether to issue a claim; and if so, against whom, in which court, and the nature of the claim" (paragraph 4.43)? The difference in these wordings (i.e. "to bring a claim" vs "to decide whether to issue a claim") might seem trivial, but it may make a difference in the evaluation of a court of a foreign country in which recognition or enforcement of the order would be sought. If the claimant decided to bring a claim and needs this information to be able to identify the defendant and forum, this might make a stronger case for the recognition or enforcement of the order abroad. If there is no such decision and this is only a possibility, this might make a weaker case for the recognition or enforcement of the order abroad.

[11] Regarding (3), impossibility or unreasonableness, we broadly agree but also note that *forum necessitatis* usually applies in exceptional circumstances where there is no other competent court available in the given circumstances, for example where the claimant is unable to bring a claim abroad because of an ongoing war there. We are, therefore, unsure how this requirement would operate in the proposed context as, in many cases, it could be well-argued that the claimant could seek such relief from the court abroad where the intermediary is located and therefore there would be no impossibility as such. The question then becomes what would be reasonable or unreasonable in the given circumstances. Further clarification would be helpful regarding this test.

[12] Concerning (4), a link to England and Wales, we agree.

Consultation Question 3.

We invite consultees' views on the potential impact of this proposal if it were implemented. For example, would this power be useful for obtaining information that makes it possible to bring proceedings, leading ultimately to remedies such as recovery of crypto-tokens in cases of fraud or hacking? Do consultees consider that claimants would rely on the

proposed new power, as well as free-standing freezing orders, rather than relying on a gateway?

[13] We are unsure about this and think that the usefulness of such information orders might remain rather limited depending on the circumstances. Please see further our response to question 1 above.

Consultation Question 4.

We invite consultees' views on whether exchanges and other third-party respondents are likely to comply with any such free-standing information orders.

[14] We do not think that exchanges and other third-party respondents are likely to comply with any such free-standing information orders unless those orders are recognised or enforced by a court in their respective countries or they obtain consent from their customers to provide customer information to third-parties. This is because of the risk of breaching agreements they have with their customers, as well as any data protection and privacy legislation they are subject to in their respective countries, and also because of the reputational risk they would be exposed to in the market by providing customers' information to third-parties when there is no recognised court order requiring them to do so or no customers' consent. Please see further our response to question 1 above.

Consultation Question 5.

We provisionally propose that:

(1) The appropriate court to hear a cross-border property claim concerning a crypto-token is the court of the place where the crypto-token can effectively be dealt with at the relevant point in time.

(2) The relevant point in time should be the time when proceedings are issued.

Do consultees agree?

[15] Regarding (1) and relating to the question of where a crypto-token is located, the proposal suggests "the place where the crypto-token can effectively be dealt with", however we are unsure what "can effectively be dealt with" precisely means or refers to in that context. The consultation paper seems to use different explanations (or concepts) in relation to this in its different parts. For example, at paragraph 4.154, it refers to the place where a crypto-token "can be controlled from"; at paragraph 4.171, however, "be controlled or otherwise effectively dealt with". Earlier in the consultation paper, at paragraph 4.143, there is also a reference to "practical or effective control". Regarding the concept of control, we also wonder how this should be identified, e.g. with reference to private keys, and what the difference is between practical control and effective control? In addition, does "can effectively be dealt with" refer to the practical ability to deal with an asset, through practical control, or does it refer to the ability to deal with an asset in a way that is legally permissible, even if practical control resides elsewhere? We think this proposal would benefit from further clarity.

[16] Regarding (2), we agree.

Consultation Question 6.

We invite consultees' views on whether there is a need for a new gateway/ground of jurisdiction explicitly providing that the courts of England and Wales have jurisdiction when a crypto-token can be controlled from within the jurisdiction at the time when proceedings are issued.

[17] We do not have any particular view as to whether what is needed is guidance or a new gateway/ground of jurisdiction on this matter. However, we understand from the FLMC report on Digital Assets: Governing Law and Jurisdiction (see https://fmlc.org/wp-content/uploads/2024/06/Report_Digital-Assets-Governing-Law-and-Jurisdiction.pdf, paragraphs 6.9-6.12) that, from the viewpoint of financial markets, a new gateway could bring certainty to the determination of jurisdiction for proprietary disputes in this area.

Consultation Question 7.

We provisionally propose that:

(1) Where it is necessary or desirable to "localise" loss for the purposes of the locus damni rule by reference to the victim, the damage is sustained where the victim physically was present at the time the damage occurred.

(2) Where damage consists of being denied access to an online account that, in principle, could previously have been accessed from anywhere in the world and if no real reason can be given for saying the damage "occurred" in one location over the others, the defendant should be sued in their home court, where this is possible.

Do consultees agree?

[18] We do not agree with these proposals.

[19] Regarding (1), we think that the victim's physical location at the time the damage occurred may be transient or purely coincidental (e.g. where the victim is travelling or on holiday) and therefore arbitrary to serve as a basis of jurisdiction in this context. We are also unsure how the test of the victim's physical location would be applied to legal persons. Instead of the victim's physical location, we think that the victim's domicile or habitual residence would be preferable in localising loss for the purposes of the *locus damni* rule.

[20] Regarding (2), it appears that the rationale of this proposal comes from the idea that crypto-tokens or decentralised ledgers are "nowhere and everywhere at the same time", which is repeated throughout the consultation paper. Although we can see that this idea tries to point to a factual situation, we do not think that it would be sensible, on the basis of this idea, to reach the legal conclusion that "damage… is arguably sustained everywhere and anywhere that the claimant might have been able to access the account" (paragraph 4.224). In our view, in determining where the damage is sustained, it does not matter where the claimant might have been able to access the account, as this is merely a hypothetical issue. What really matters is

where the claimant ordinarily accesses the account. In many circumstances, this would be one place (e.g. domicile or habitual residence of the victim) and, in some circumstances, may be more than one place; but in no circumstances would that be "everywhere and anywhere in the world". Given that, in cases where that relevant place is in England and Wales, we see no strong reason as to why the victim should not be able to bring a claim in England and Wales as the place where the damage is sustained but instead should sue the defendant in the defendant's home court.

Consultation Question 8.

We provisionally propose that, in cases where the level of decentralisation is such that omniterritoriality poses a true challenge to the premise of the multilateralist approach, seeking to identify the one "applicable law" to resolve the dispute would not result in a just disposal of the proceedings and therefore an alternative approach is required.

Do consultees agree?

[21] We are confused about this proposal.

[22] We do not think that the multilateralist approach always operates or seeks to proceed in the way described in the consultation paper "that any conflicts that may exist between the private laws of different legal systems are to be resolved by selecting one (and only one) over all the other possibilities as the applicable law" (paragraph 5.11). For example, under the Rome I Regulation, parties can select the law applicable to the whole or to part only of the contract (see Article 3(1)), which is known as *dépeçage*. Therefore, the possibility that the contract can be governed by more than one law is recognised and permitted through party autonomy. Similarly, the law applicable to the validity of a contract and the law applicable to the questions of capacity are typically determined separately. They may well be different laws and also different than the law applicable to the substance of the contract. So, different issues in a contractual dispute can be subject to different applicable laws (although this may not always be desirable).

[23] We recognise challenges faced in PIL in determining the applicable law in the context of distributed and decentralised digital contexts. However, we do not think in relation to the Rome I Regulation and the *lex situs* rule that "…the existing rules leave us in the situation of being unable to identify the applicable law" (paragraph 6.2 of the consultation paper). As noted in B Yüksel Ripley, "The Law Applicable to (Digital) Transfer of Digital Assets: The Transfer of Cryptocurrencies via Blockchains" in M Fogt (ed) *Private International Law in an Era of Change* (Edward Elgar, 2024) 123, p.153:

> "Disintermediation makes it difficult to identify a service provider or characteristic performer. The distributed nature of the ledger raises issues with ascribing the ledger or blockchain and an asset digitally recorded on it to a real-world location and also gives rise to the lack of concentration of connections with a particular place. Pseudonymity poses problems with the identification of system participants as well as their locations. In addition to PIL techniques based on localisation, some of the key PIL concepts are also challenged, such as internationality and characterisation.

> This does not, however, mean that the existing PIL rules cannot provide any solutions to these problems, and there is a need for creating an entirely new PIL regime for cryptocurrency transfers or other types of digital assets underpinned by blockchain or DLT. There are already some existing tools that can be utilised for determining the law applicable to the transfer of digital assets, including cryptocurrencies via blockchains. It is, however, the case that those existing tools may need a different interpretation (e.g., party autonomy) or may benefit from an alternative way of thinking by analogy to similar concepts (e.g., EFTs and funds transfer systems) to be able to address the applicable law issues raised by cryptocurrency transfers."

[24] We understand that the primary concern relates to wholly decentralised and distributed systems. In the following two paragraphs, we cite parts of our research and proposals from different publications which might be of assistance on the applicable law issues (for fuller analysis of them, see B Yüksel Ripley, A MacPherson and L Carey, "Digital Assets in Scots Private Law: Innovating for the Future" Edinburgh Law Review, vol. 29, no. 2 (May, 2025) 175, https://www.euppublishing.com/doi/full/10.3366/elr.2025.0955; pp.197-210; B Yüksel Ripley, "The Law Applicable to (Digital) Transfer of Digital Assets: The Transfer of Cryptocurrencies via Blockchains" in M Fogt (ed) *Private International Law in an Era of Change* (Edward Elgar, 2024) 123, pp.131-154; B Yüksel Ripley, "Cryptocurrency Transfers in Distributed Ledger Technology-Based Systems and Their Characterisation in Conflict of Laws" in J Borg-Barthet, K Trimmings, B Yüksel Ripley and P Živković (eds), *From Theory to Practice in Private International Law: Gedächtnisschrift for Professor Jonathan Fitchen* (Oxford, Hart Publishing 2024) 109, pp.115-127).

[25] In relation to the application of the Rome I Regulation in this context, we refer to the proposals conceptualised under the 'unitary approach and application of a single law' and 'segmented approach and splitting the applicable law' in B Yüksel Ripley, "The Law Applicable to (Digital) Transfer of Digital Assets: The Transfer of Cryptocurrencies via Blockchains" in M Fogt (ed) *Private International Law in an Era of Change* (Edward Elgar, 2024) 123, pp.144-151. It is stated there at pp.147-151 that (footnotes omitted, please see the publication itself):

> "…the unitary approach may not always be feasible to apply to permissionless cryptocurrency systems such as Bitcoin. Since there is no obvious entity that owns or operates permissionless systems, there would typically be no choice of law designated by consensus rules or protocols. Pseudonymity among participants located across the world almost entirely eliminates the possibility for them to agree upon an applicable law (and also upon the same applicable law). In the absence of such a choice of law, the applicable law would be determined according to the forum's objective conflict of laws rules. However, objective conflict of laws rules based on the service provider or characteristic performer, such as Article 4(1)(b) and Article 4(2) Rome I respectively, will not offer a workable solution here either in the absence of an obvious entity that can be considered as the service provider or the characteristic performer. Objective conflict of laws rules based on the closest connection, such as Article 4(4) Rome I, are also difficult to apply to permissionless systems. It has been argued that it is impossible to determine the state with the closest connection here since these systems are completely delocalised and de-nationalised with no connections to any particular state. [footnote 106] In the absence of widely accepted and internationally agreed conflict of

laws rules, the national conflict of laws rules likely give rise to the identification of different applicable laws (potentially indicating only a tenuous connection) by different courts because of the decentralised and distributed nature of these systems and the lack of concentration of connections in the systems. It is doubtful if there exists a single law that governs a permissionless system in its entirety under the unitary approach. Given the importance of mining and/ or the role of miners in cryptocurrency systems, it has been argued that the applicable law can be the law of the place where mining is centred in a given system under Article 4(4) Rome I [footnote 107] or where the highest concentration of full nodes is. [footnote 108] However, connections based on mining activity and/or miners are rather temporal and coincidental in permissionless systems. The application of a law determined based on such temporal and coincidental connections would not be desirable as it would not be foreseeable by participants and would not provide legal certainty to them.

… Therefore, focussing on the system itself as a whole under the unitary approach for the purposes of determining the applicable law would not be feasible for these systems. The segmented approach, instead, is a better method to determine the law applicable to cryptocurrency transfers taking place within these systems by focussing on individual transfers (not the system itself) and making each transfer subject to its own applicable law. This would, however, mean that the ledger will split in its applicable law.

…Party autonomy and choice of law can possibly work under the segmented approach depending on what is understood from the term 'parties' in the context of cryptocurrency transfers via blockchains and whether the term is limited to the transferor and the transferee or also includes miners...If the term is limited to the transferor and the transferee, this means that it is only their agreement that is needed on the applicable law. Choice of law can function effectively under this narrow interpretation, and the given transfer can be governed by the law chosen by the transferor and the transferee… In cases where there is an agreement on the applicable law between some of these parties, i.e., the transferor and transferee, this agreement is to be respected and protected under the principle of party autonomy.

In cases where there would be no choice of law or where the choice is invalid, certain difficulties will still be faced in the determination of the law applicable to cryptocurrency transfers under the segmented approach depending the forum's objective conflict of laws rules on contractual relationships. Under Article 4 of Rome I, the question would be whether it can be considered that the relationship arising out of the transfer is based on a contract for the provision of services and, if so, whether miners could be deemed as service providers for this purpose under Article 4(1)(b) of Rome I. If not, the next question would be if they could be deemed as characteristic performers in the transfer under Article 4(2) of Rome I. As is stated above, it is coincidental which miner will be involved in a transfer and it is not something that can be foreseen in advance. Given this and the pseudonymity of miners, there should not be much weight attached to miners as either service providers or characteristic performers in determining the applicable law of the cryptocurrency transfer. [footnote 110] A different approach would lead to results that would not be in line with the reasonable expectations of the parties in the vast majority of cases. This leads the analysis to the determination of the objectively applicable law of cryptocurrency

transfers based on the closest connection test under Article 4(4) Rome I. Some connections, such as the location of the transferor or the transferee, could be deemed relevant in a transfer in question to the extent that these are known or identifiable and given appropriate weight depending on the facts of the case. The relationship arising out of the transfer could be considered most closely connected to the law of the country where the transferor is located on the ground that the transfer is initiated in this country, and the following steps on the blockchain mainly serve the purpose of carrying out the transferor's transfer message.[footnote 111] Alternatively, the relationship arising out of the transfer could be considered most closely connected to the law of the country where the transferee is located on the ground that the transferee receives payment (or value) in this country, and this is the decisive act in the transfer.[footnote 112] Another possibility could be applying the technique of the 'accessory connection' and making the transfer subject to the law of the underlying relationship between the transferor and the transferee as the main connection.[footnote 113]

… Regardless of the method adopted to determine the applicable law, the ledger will split in its applicable law under the segmented approach since each cryptocurrency transfer recorded on the ledger or blockchain will be subject to its own applicable law. Although this is not ideal for systems facilitating various transactions among their participants, as it would, in many cases, lead to the application of different laws to transactions taking place within a single system, [footnote 115] the segmented approach at least offers a workable solution for individual transfers within permissionless systems with no obvious service provider or characteristic performer. Any unsatisfactory result arising from the potential application of the law identified under the segmented approach can be addressed on a case-by-case basis by using the devices that exist in conflict of laws for that kind of situation, such as escape clauses like the one in Article 4(3) Rome I, as appropriate. It is doubtful whether efforts to find a single law to govern these systems, including the transfers taking place within them, would lead to any better result in the absence of widely accepted and internationally agreed conflict of laws rules providing such a single law governing these systems."

[26] In relation to the application of the *lex situs* rule in this context, we suggested a test based on 'the habitual residence or place of business of the last known holder' for off-chain situations in B Yüksel Ripley, A MacPherson and L Carey, "Digital Assets in Scots Private Law: Innovating for the Future" Edinburgh Law Review, vol. 29, no. 2 (May, 2025) 175, https://www.euppublishing.com/doi/full/10.3366/elr.2025.0955, pp.206-207) (footnotes omitted, please see the publication itself):

> "Difficulties with localisation would also occur in determining the *situs* of cryptoassets in off-chain situations external to the systems. This determination could be important in dealing with proprietary matters (such as the creation of security interests, enforcement of debts, or governmental acts affecting cryptoassets), [footnote 187] and provisional and protective measures that can be granted in Scotland in the absence of substantive proceedings.[footnote 188] It has been argued that cryptocurrencies constitute a form of intangible property within the conflict of laws, [footnote 189] and, by adapting this argument, cryptoassets can be regarded as a type of incorporeal moveable in Scots PIL. PIL solutions have been developed for other types of incorporeal moveables with no physical location (e.g. money debts, shares, or rights of

action) by ascribing them to an artificial legal *situs* where they can be pursued or enforced, [footnote 190] but not yet for cryptoassets. It is not clear how the Scottish courts would determine the *situs* of a cryptoasset underpinned by DLT. In England and Wales, there is no settled authority on this matter, with different court decisions referring to the place of domicile of the owner [footnote 191] or the place of residence of the owner, [footnote 192] based on Professor Dickinson's proposal. [footnote 193] The Scottish courts can take a similar view on the matter based on a habitual residence or place of business test, but the "last known holder" would be a better reference point for this test. It is because the "owner", from a legal point of view, would likely be what is disputed in property cases and the "holder", without a reference to a particular time, could refer to the wrongdoer whose whereabouts are unknown in cryptoasset fraud cases."

Consultation Question 9.

We provisionally propose that, where the level of decentralisation is such that the multilateralist approach would not result in the just disposal of proceedings, the courts of England and Wales should consider the alternative method of the supranational approach to resolving the conflicts that may exist between different private law systems.

Under this provisional proposal:

(1) The premise of the supranational approach in these cases should be that the law of no country would be appropriate to apply to resolve the issue in dispute, and the law of every country would be appropriate to apply to resolve the issue in dispute.

(2) The overall objective of the courts in these cases should be the just disposal of the proceedings with an omniterritorial element.

(3) To achieve the just disposal of proceedings, the courts should take into account a wide range of factors. In particular, this would include considering the legitimate expectations of the parties which, in these circumstances, are likely to consider elements of the basis on which the participants have interacted with the relevant system, such as the terms of the protocol.

(4) The outcomes of the case will remain subject to the public policy and overriding mandatory rules of England and Wales.

Do consultees agree?

[27] We do not agree with this proposal.

[28] Under this proposal, no one would be able to know what the applicable law is until a dispute arises, is brought before a court in England and Wales, and the court determines which law will be applied to the dispute. In our view, the proposal would bring a lot of uncertainty and offer no legal foreseeability and predictability on the applicable law. We think that could be a major concern for the markets and market participants.

[29] We support the development of widely accepted and internationally agreed conflict of laws rules and also substantive law rules, and think that the relevant projects and work of various

international organisations, including the HCCH, UNIDROIT, and UNCITRAL, are valuable and important for this purpose. However, we find this proposal confusing. For example, the consultation paper provisionally concludes that "developing supranational rules is the best solution in the face of the challenges posed to the question of "applicable law" by truly omniterritorial phenomena." (paragraph 6.61). But it then says that "…instead of the applicable law, there would be a special body of substantive law that the courts of England and Wales would develop and apply in cases with an omniterritorial element" (paragraph 6.63). It continues that "…Whilst any substantive rules developed and applied by the courts of England and Wales would ultimately remain a common law decision of our courts, it would not be an application of the "ordinary" law of England and Wales that would continue to apply in a purely domestic case. Rather, it would be a special body of substantive rules of decision that apply only in private law cases in which the law of no country would be appropriate to apply to resolve the issue in dispute, and the law of every country would be appropriate to apply to resolve the issue in dispute." (para 6.60). We struggle to understand this proposal, what it tries to achieve and how.

[30] Regarding element (1) of the proposal, it appears that the rationale of this proposal comes from the idea that crypto-tokens or decentralised ledgers are "nowhere and everywhere at the same time", which is repeated throughout the consultation paper. Similar to our response to question 7 above, we do not think that it would be sensible, on the basis of this idea, to reach the legal conclusion that "the law of no country would be appropriate to apply to resolve the issue in dispute, and the law of every country would be appropriate to apply to resolve the issue in dispute" as it is based on hypothetical thinking.

[31] Concerning elements (2) and (3) of the proposal, according to what criteria would the court decide what is 'just' in the disposal of the proceedings? Further, in a case before a court, we consider that 'the legitimate expectation of the parties' would be inevitably different and that is why there is a dispute between the parties. In relation to taking account of the terms of the protocol, we do not think that there is any legal barrier for that under existing rules.

Consultation Question 10.

We provisionally propose that it would be premature at this point to propose statutory reform on the question of resolving a conflict of laws in the context of omniterritorial phenomena. We also provisionally propose that the approach might not necessarily be a good candidate for a statutory rule.

Do consultees agree?

[32] As we noted in our general comments above, there are international and comparative developments in this area demonstrating growing support for party autonomy, such as UNIDROIT DAPL Principle 5. We also note the timely work being undertaken by the HCCH in its Digital Tokens Project, which recognises "the importance of avoiding fragmentation among legal instruments developed by different intergovernmental organisations on related subject matters, including the UNIDROIT Principles on Digital Assets and Private Law" (see further https://www.hcch.net/en/projects/legislative-projects/digital-tokens1). We additionally note the proposal by the FMLC for a new statutory governing law rule (see FMLC, Digital Assets: Governing Law and Jurisdiction (2024), https://fmlc.org/wp-

content/uploads/2024/06/Report_Digital-Assets-Governing-Law-and-Jurisdiction.pdf, paragraphs 5.33-5.51). We think that it would be useful if they and other proposals we referred to in our response to question 8 above could be further considered by the LCEW. This could provide a more widely informed view on whether or not there is a need for statutory reform concerning applicable law.

[33] Concerning the mechanism for implementation of the provisional proposal on the supranational approach, the consultation paper states that "…our provisional view is that it is too early to propose statutory intervention on these issues…As we have said, we think that the traditional strength of the common law method of case-by-case development has a natural affinity with the approach we provisionally propose…It is also worth noting that, in any event, a statutory rule might not necessarily be the most appropriate method of implementing our provisional proposal. (paragraphs 6.130-6.131)". We are unclear on what legal ground a court could possibly not apply (or could disapply) the relevant existing conflicts of law rules in legislation and instead applies the proposed supranational approach.

Consultation Question 11.

We invite consultees' views about the potential impact of this proposal if it were implemented. Do consultees consider that this could avoid protracted disputes about applicable law, and lead to more efficient resolution of disputes? What do consultees consider the costs or risks of such an approach would be?

[34] As we noted in our response to question 9 above, we think that this proposal, if implemented, would bring a lot of legal uncertainty regarding the applicable law for the markets and market participants, as no one would be able to know what the applicable law is until a court determines it. We think that this could create major concerns for relevant stakeholders given that how crucial legal certainty and predictability is for commercial transactions.

[35] In addition, we consider that there could be a dispute resolution related risk, since legal certainty and predictability in a given forum is an important consideration for a forum's attractiveness for dispute resolution.

Consultation Question 12.

We invite consultees' views as to when relevant cases might start to come before the courts. In what circumstances might disputes arise?

[36] We have no particular comment on this in relation to England and Wales. However, for Scotland, we have assessed that: "There is certainly a considerable hurdle to overcome to raise an action successfully relating to cryptoassets where the parties are unknown, and it is, at best, unclear whether the court would be able to devise an exception in terms of service method and identifying the defender(s)" (see further B Yüksel Ripley, A MacPherson and L Carey, "Digital Assets in Scots Private Law: Innovating for the Future" Edinburgh Law Review, vol. 29, no. 2 (May, 2025) 175, https://www.euppublishing.com/doi/full/10.3366/elr.2025.0955, p.208).

There are also litigation costs hat have to be borne by relevant parties. Given all this, we think that it could possibly take some time for relevant cases to start coming before the courts.

Consultation Question 13.

We provisionally propose that section 72(2) should be amended to make it clearer that it applies to all the issues that fall under the "wide" view of what section 72(2) currently encompasses. This would mean that the amended section 72(2) would apply to the law governing contractual obligations (understood in the ordinary modern sense of the substantive rights and obligations of the parties) arising from a bill of exchange and is not limited to "interpretation" in a narrow sense.

Do consultees agree?

[37] We agree. There are currently different views on the scope of section 72(2) and we think that the proposal would provide a helpful clarification on this matter.

Consultation Question 14.

We provisionally propose that the default law applicable to contractual obligations arising from a bill of exchange should be the law chosen by the party incurring the obligation, as indicated on the bill alongside their signature.

Do consultees agree?

[38] We support the provision of party autonomy, but suggest a different formulation for this provision as proposed in B Yüksel Ripley, "Cross-Border Dimension of the UK's Electronic Trade Documents Act (ETDA) 2023 and the Question of the Law Applicable to Electronic Trade Documents", (2025) Aberdeen Law School Blog, https://www.abdn.ac.uk/law/blog/crossborder-dimension-of-the-uks-electronic-trade-documents-act-etda-2023-and-the-question-of-the-law-applicable-to-electronic-trade-documents/:

> "Allowing party autonomy aligns with the modern contractual conflict of laws approaches. However, a choice of law indicated by each party to a bill alongside the signature, as currently proposed, does not appear to be a common (or existing) practice in international trade. It could also give rise to uncertainties and unnecessary complications arising from, for example, the wording of such a choice of law clause, or the extent to which it would constitute a choice of law 'agreement' between the relevant parties. An alternative approach, as suggested by Ian Clements and Alexender Hewitt and noted at para 7.173 of the consultation paper, would be preferable in the provision of party autonomy to enable that if the original parties to a bill or note choose the applicable law by inserting a choice of law clause on the face of the bill or note, this choice of law would, in principle, bind them and also anyone who subsequently becomes a party to the bill or note. In that case, becoming a party to the bill or note could, in principle, demonstrate the party's consent to the choice of law on the face of the bill or note. Considering the proposition in Dicey, Morris and Collins at para 33.359 noted above, such a choice on the face of the instrument may not be unacceptable even

under the current law. It would be, therefore, preferable if section 72(2) is reformed to enable or clarify that a choice of law on the face of the instrument shall be given effect and be, in principle, binding on all parties to the instrument. In addition, section 72(2) could also provide that the validity of the choice of law is to be determined by the chosen law."

Consultation Question 15.

We provisionally propose that, where no choice of law is made on the face of the bill, the acceptor's liability arising from their contract of acceptance should be the law of the place where the instrument is payable, as interpreted consistently with the place of "proper presentment" under section 45 of the Bills of Exchange Act 1882:

(1) The law of the place where the instrument is payable, as indicated on the face of the bill.

(2) Where no place of payment is specified, but the address of the drawee/acceptor is given in the bill, the law of the place of the address.

(3) Where no place of payment is specified and no address given, the law of the place where the drawee/acceptor has their habitual residence.

Do consultees agree?

[39] We agree.

Consultation Question 16.

We provisionally propose that, in the absence of a valid choice by a person incurring secondary liability on the bill, the law applicable to that person's liability on the bill should be the law of the place where that person has their habitual residence.

Do consultees agree?

[40] We agree.

Consultation Question 17.

We provisionally propose that no "escape clause" is necessary or desirable. The framework we have provisionally proposed gives sufficient scope for parties to select the law that is to apply to their contractual obligations, and that it would be rare for a party not to indicate a choice of law. Even in the absence of a choice, the framework we have proposed gives a clear indication of the applicable law that accords with commercial realities of the transactions and expectations of the parties.

Do consultees agree?

[41] We do not agree with this proposal.

[42] As stated in B Yüksel Ripley, "Cross-Border Dimension of the UK's Electronic Trade Documents Act (ETDA) 2023 and the Question of the Law Applicable to Electronic Trade Documents", (2025) Aberdeen Law School Blog, https://www.abdn.ac.uk/law/blog/crossborder-dimension-of-the-uks-electronic-trade-documents-act-etda-2023-and-the-question-of-the-law-applicable-to-electronic-trade-documents/:

> "This is a departure from the modern contractual conflict of laws approaches. Article 4(3) of the Rome I Regulation provides an escape clause and, as acknowledged in Recital 20 therein, resort to the escape clause can be justified for linked contracts. This may be particularly the case where the linked contracts that an instrument/transaction consists of are governed by different laws and this causes serious issues or inconsistencies regarding the rights or obligations of the parties to the instrument/transaction. In such cases, an escape clause can be justified and have been used by courts to make the linked contracts subject to the single and the same law (see further B Yüksel, *Uluslararası Elektronik Fon Transferine Uygulanacak Hukuk [The Law Applicable to International Electronic Funds Transfer]* (Istanbul, XII Levha 2018) pp. 157-165). English courts have used this method for letters of credit under Article 4(5) of the Rome Convention (see e.g. *Bank of Baroda v. Vysya Bank* [1994] 1 Lloyd's Rep 87). In reforming section 72(2) of the Bills of Exchange Act, it could be therefore useful if an exception clause (drafted based on Article 4(3) and Recital 20 of the Rome I Regulation) is included to the proposed framework, particularly to help with addressing potential problems that might arise from the application of the several laws theory, if to be retained, in the absence of a (valid) choice of law."

[43] As far as we are aware, bills of exchange and promissory notes typically do not contain a choice of law clause. We would find it helpful to know if the LCEW's view that "it would be rare for a party not to indicate a choice of law" is evidence-based in the current trade finance landscape or rather a perceived potential impact of the proposal on the provision of party autonomy.

Consultation Question 18.

We provisionally propose that the formal validity of a contract on a bill of exchange should be upheld if it complies with one of:

(1) The law governing the substance of the relevant contract.

(2) The law governing the substance of the drawer's contract.

(3) The law governing the substance of the acceptor's contract.

(4) The law of the place where the instrument is payable.

Do consultees agree?

[44] We agree. This is a sensible approach and aligns with the modern contractual conflict of laws approaches on formal validity.

Consultation Question 19.

We provisionally propose that section 72(3) should be reformed as follows:

(1) The duties of the holder with respect to presentment for acceptance should be governed by the law of the place where the drawee has their habitual residence.

(2) The necessity for or sufficiency of a protest or notice upon dishonour by non-acceptance should be governed by the law of the place where the drawee has their habitual residence.

(3) The duties of the holder with respect to presentment for payment should be governed by the law of the place where the bill is payable.

(4) The necessity for or sufficiency of a protest or notice upon dishonour by non-payment should be governed by the law of the place where the bill is payable.

Do consultees agree?

[45] We agree.