The Bar Council

**Bar Council response to the Law Commission Consultation on Digital assets and (electronic) trade documents in international private law**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Law Commission Consultation on Digital assets and (electronic) trade documents in international private law.[1]

2. The Bar Council is the voice of the barrister profession in England and Wales. Our nearly 18,000 members – self-employed and employed barristers – make up a united Bar that aims to be strong, inclusive, independent and influential. As well as championing the rule of law and access to justice, we lead, represent and support the Bar in the public interest through:

- Providing advice, guidance, services, training and events for our members to support career development and help maintain the highest standards of ethics and conduct
- Inspiring and supporting the next generation of barristers from all backgrounds
- Working to enhance diversity and inclusion at the Bar
- Encouraging a positive culture where wellbeing is prioritised and people can thrive in their careers
- Drawing on our members' expertise to influence policy and legislation that relates to the justice system and the rule of law
- Sharing barristers' vital contributions to society with the public, media and policymakers
- Developing career and business opportunities for barristers at home and abroad through promoting the Bar of England and Wales
- Engaging with national Bars and international Bar associations to facilitate the exchange of knowledge and the development of legal links and legal business overseas

3. To ensure joined-up support, we work within the wider ecosystem of the Bar alongside the Inns, circuits and specialist Bar associations, as well as with the Institute of Barristers' Clerks and the Legal Practice Management Association.

[1] Digital assets and electronic trade documents in private international law – Law Commission

4. As the General Council of the Bar, we are the approved regulator for all practising barristers in England and Wales. We delegate our statutory regulatory functions to the operationally independent Bar Standards Board (BSB) as required by the Legal Services Act 2007.

**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 welcome the Law Commission's provisional proposal in Chapter 4 for a new statutory power to grant free-standing information orders at the initial stage of proceedings. We support the proposal for the following reasons:

Promoting access to justice

6. In the context of digital assets, victims of fraud and other wrongdoing are frequently unable to identify defendants or trace misappropriated assets without access to court-ordered information. Without such a mechanism, claimants may be left unable even to commence proceedings, despite having a strong underlying case. Free-standing information orders would ensure that the courts are not powerless to assist those who can demonstrate a genuine need for relief.

Restoring clarity and coherence

7. At present, courts have been compelled to rely on strained interpretations of jurisdictional gateways to meet the urgent demands of crypto-related disputes. A clear and independent statutory basis for free-standing information orders would provide principled clarity, remove uncertainty and thereby enhance confidence in the law.

Balancing fairness with necessity

8. The proposal is carefully calibrated: relief would only be available where it is necessary, where no alternative remedy is possible, and where there is a sufficient connection to England and Wales. These safeguards ensure proportionality while giving courts the tools they need to respond effectively to novel forms of wrongdoing in

decentralised and pseudonymous systems.

9. For these reasons, we support the introduction of a free-standing information order power as a proportionate and principled reform, one which modernises the jurisdictional framework while upholding access to justice in the digital era.

**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?**

10. Yes.

**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?**

11. The proposed 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 decentralized environments make it otherwise impossible for a claimant to obtain information they need to formulate and bring a fully-pleaded substantial claim is likely to be very useful in the initial stages of fact-finding and evidence gathering which, at present, are particularly difficult, if not often impossible, in hacking, fraud and other and crypto related cases.

**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**

12. It is more likely than not that reputable exchanges and other third-party potential respondents who wish to see their industry succeed and play a part in the proper functioning of it are likely to comply with any free-standing information orders, as a matter of good practice.

**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?**

13. We support the Law Commission's provisional conclusion that the appropriate court to hear a cross-border property claim concerning a crypto-token is the court of the place where the token can be controlled or otherwise effectively dealt with. We agree with this approach for three reasons:

<u>It ensures an effective remedy</u>

14. Jurisdiction should lie with a court that can give effect to its own orders. In the case of crypto-tokens, control (typically via private keys or intermediaries such as exchanges) determines whether a token can be transferred, frozen, or restored. Locating jurisdiction where effective control exists ensures that judgments are not merely theoretical but can be enforced in practice.

<u>It maintains coherence with existing private international law principles</u>

15. The approach is consistent with the established treatment of other intangibles. Debts are situated where the debtor can be compelled to pay, and shares are situated where they can be dealt with under the law of incorporation. Applying the same logic to crypto-tokens avoids creating a special regime for digital assets and preserves coherence in the law.

<u>It supports recognition and enforcement internationally</u>

16. Foreign courts are more likely to recognise and enforce judgments where the property was considered to be within the jurisdiction of the deciding court. By tying

jurisdiction to the place of control, this approach reduces the risk of conflicting or unenforceable outcomes in cross-border disputes, promoting certainty for litigants and international confidence in English judgments.

17. For these reasons, we endorse the Law Commission's proposal as principled, practical, and aligned with the wider objectives of private international law. However, we respectfully disagree with the suggestion that the relevant time for fixing that jurisdiction is (necessarily and in all cases) the date of issuing proceedings.

18. We note the Law Commission's provisional proposal that jurisdiction for cross-border property claims concerning crypto-tokens should be fixed at the date proceedings are issued. We recognise the reasoning advanced in support of this position — namely, consistency with existing property gateways, alignment with stakeholder views, and facilitation of recognition and enforcement abroad.

19. However, the distinctive mobility of crypto-assets warrants a more flexible approach. Crypto-tokens can be transferred across borders almost instantaneously. There is therefore a real risk that, although jurisdiction was properly founded at the date of issue, control may no longer be located within England and Wales by the time of the hearing. In such circumstances, the policy justification for jurisdiction — that the court should only assume jurisdiction where it can grant an effective remedy — no longer applies.

20. We therefore propose that jurisdiction should ordinarily be assessed at the date of issue, but the court should retain a discretion to decline jurisdiction if, by the time of the hearing, effective control has moved abroad such that it is impossible for the court to grant an effective remedy. This approach preserves consistency with existing gateways and international recognition frameworks, while also ensuring that proceedings in England and Wales do not continue where they are destined to be futile.

**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.**

21. We respectfully disagree with the Law Commission's provisional conclusion that a crypto-specific jurisdictional gateway is unnecessary.

22. The existing gateways (such as gateways 11 and 15) require that assets are "located" within the jurisdiction. This language is apt to cause confusion in the context of crypto-assets, which are inherently omni-territorial and decentralised. It is misguided to invite the courts to allocate a geographical location to an asset whose very structure is to exist without

one.

23. Without further clarification, there is a real risk of inconsistent decisions as judges attempt to fit crypto-assets into rules intended for tangible or territorially-fixed property. We therefore consider that it would be prudent to make it explicitly clear that, in the case of crypto-assets, jurisdiction should be entertained by reference to a test of effective control rather than artificial "location".

24. We remain of the view that clarity and consistency would be advanced by providing the courts with non-exhaustive guidance of the kind described in the UKJT's Legal Statement on Cryptoassets and Smart Contracts (November 2019). Factors which could guide the court in deciding whether to accept jurisdiction might include:

a) Whether any relevant off-chain asset is located in England and Wales;

b) Whether there is centralised control over the crypto-asset in England and Wales;

c) Whether a crypto-asset is controlled by a participant in England and Wales (for example, because a private key is stored here), or was controlled here before the justiciable act occurred.

25. Such an approach would strike the correct balance between principle, pragmatism and flexibility, and would ensure that the Courts of England and Wales have a clear and coherent basis for assuming jurisdiction in crypto cases.

**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?**

26. Yes.

**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?**

27. Any alternative approach would need to be guided by the principle of legal certainty. An alternative approach could be to reach international agreement on the establishment of a dispute resolution centre with its own specific rules to adjudicate disputes where the level of decentralisation is such that omni territoriality poses an insurmountable challenge to the premise of the multilateralist approach, seeking to identify the one "applicable law" to resolve the dispute.

**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?**

28. We respectfully disagree with the Law Commission's provisional conclusion 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 proceed on the basis of the supranational approach; namely that where the law of no country would be appropriate to apply to resolve the issue in dispute, the law of every country would be appropriate to resolve the issue in dispute because the proposed approach is likely to lead to

significant uncertainty, delay and other practical difficulties which are unlikely to contribute or lead to the just disposal of proceedings or legal certainty.

**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?**

29. Yes.

**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?**

30. Please see the answer to Question 9 above.

**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?**

31. Disputes arising from crypto asset theft, fraud, hacking, and related wrongdoing are accelerating at an alarming pace. The most significant hurdle in the initial stages of investigation is adequate fact-finding and evidence gathering. The proposed new discretionary power of the Courts of England and Wales to grant free-standing information orders at the initial stage of investigations where the features of the digital and decentralised environments make it otherwise impossible for a claimant to obtain the information needed to formulate and bring a fully-pleaded substantive claim should assist potential claimants and the Courts in the just disposal of this type of dispute.

**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?**

32. Yes.

**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?**

33. Yes.

**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?**

34. Yes.

**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?**

35. Yes.

**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?**

36. Yes.

**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?**

37. Yes.

**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?**

38. Yes.

**Bar Council**

**26 September 2025**

For further information please contact:

Eleanor Baker, Policy Analyst: Regulatory Issues, Law Reform & Ethics

Email: EBaker@BarCouncil.org.uk

The General Council of the Bar of England and Wales

289-293 High Holborn, London, WC1V 7HZ