JOINT RESPONSE OF THE COMMERCIAL BAR ASSOCIATION AND THE CHANCERY BAR ASSOCIATION TO THE LAW COMMISSION'S CONSULTATION ON DIGITAL ASSETS AND ELECTRONIC TRADE DOCUMENTS IN PRIVATE INTERNATIONAL LAW

1 October 2025

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This response the joint response of the Commercial Bar Association ("**COMBAR**") the Chancery Bar Association ("**ChBA**") and is confined to those questions concerning digital assets (so excluding Questions 13-19).

References to "CP" are to the Law Commission of England and Wales' *Digital Assets and (electronic) trade documents in private international law, including Section 72 of the Bills of Exchange Act 1882: Consultation Paper* (Consultation Paper No 273, 5 June 2025).

Consultation Question 1

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?**

1.1. The proposal is ambiguous as to whether what the Law Commission is aiming at is a new substantive power to grant relief, a new head of jurisdiction for service out of the existing power of the courts to grant information orders, or a combination of both.

1.2. It appears to us that the courts already have the power to make free-standing information orders (variously Norwich Pharmacal or Bankers Trusts orders) and it is unclear what this statutory power would add. The common law courts are well equipped to develop the case law as necessary.

1.3. If the proposal is a purely procedural one aimed at establishing the English court's jurisdiction to make such orders, whilst authors can see the instinctive desirability of a new information gateway, we are doubtful as to whether the Law Commission's proposal will significantly improve on the jurisdictional gateway introduced into the Civil Procedure Rules at Practice Direction 6B 3.1(25) ("**Gateway 25**") in October 2022. Gateway 25 already allows jurisdiction for claimants seeking disclosure from

foreign third parties about either the identity of a potential defendant or what has become of their property.

1.4. Authors do not disagree with the guiding principles of access to justice, necessity, and preventing injustice in the modern digital and decentralised environments. This is particularly so where, as acknowledged in *Boonayem v Persons Unknown* [2023] EWHC 3180 (Comm) at [32], "*the claims that have come before the courts of England and Wales involving digital assets have almost exclusively been fraud cases"*. However, we consider these principles have to be considered alongside the need for coherence among the jurisdictional gateways and setting appropriate limits on the extra-territorial reach of the courts of England and Wales.

1.5. Authors were sceptical as to what the proposed information gateway would add to the current gateway 25, and whether such orders are any more likely to yield a response than the current options (as to which see Q4 below).

Consultation Question 2

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.

- **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.**
- **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.**
- **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.**
- **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?

2.1. In summary, no, we do not agree. The test appears to introduce considerable uncertainty, and is out of step with the test applied for other jurisdictional gateways and the grant of Norwich Pharmacal or Bankers Trust orders. Authors consider that the detailed test is a matter best left to the courts to flesh out in line with existing principles.

It is also unclear to what standard these criteria must themselves be established on an application for permission to serve out, i.e. does the Law Commission intend that there be a new gateway, and that the test as set out in *Kaefer Aislamientos v AMS Drilling Mexico* [2019] EWCA Civ 10 will apply?

Case of a certain strength

2.2. The standard selected by the Law Commission – more than barely capable of serious argument and yet not necessarily one with more than 50% chance of success – is one where there is ongoing development in the case law. In particular, the appropriate merits standard for permission to serve out, on an application for a freezing order, and on an application for Norwich Pharmacal/Bankers Trust and for other injunctions is far from settled (see e.g. *Dos Santos v Unitel SA* [2024] EWCA Civ 1109). It is not clear where the freestanding information order is intended to sit in that spectrum. As noted above, there are potentially two aspects to the proposal – there is the test for the court's jurisdiction to grant the remedy (and permission to serve out) and then the substantive test for grant of the relief itself because it is freestanding. As result, where an order is made in advance of a pleaded claim, the making of the order encompasses both (service out of the) jurisdiction and substantive relief. Given that the case law is developing in slightly different directions on these two aspects, we think this is a matter best left to the courts and should not be subject to strict statutory definition.

2.3. It must also be noted that any merits threshold test has to be assessed by reference to the correct applicable law, which may itself be controversial. We previously noted in response to the Call for Evidence that the analysis can be (and has, in some of the existing cases, been) circular, as the court assumes English law applies for the purpose

of founding jurisdiction, but on the (apparently sole) basis that the claim is being brought here.

Necessity

2.4. We disagree with the introduction of a test that the relief must be 'necessary in order to enable the applicant to bring the claim'. This appears to be a stricter test than is required for the grant of relief for a Norwich Pharmacal or a Bankers Trust order:

2.4.1. The second condition for the court to exercise the power to order Norwich Pharmacal relief is that '*there must be the need for an order to enable action to be brought against the ultimate wrongdoer*' (Lightman J in *Mitsui v Nexen Petroleum* [2005] 3 All ER 511 at [21]). The need or necessity requirement is a threshold condition, but the bar is not high. Whilst the court will not grant relief where the information sought can be obtained by other practicable means (*Mitsui* at [24]) the test does not require the remedy to be one of last resort (see *Rugby Football Union v Consolidated Information Services Ltd* [2013] 1 All ER 928 at [16]).

2.4.2. For a Bankers Trust Order (which is perhaps more comparable with the information order contemplated by the Law Commission), although sometimes expressed as a test of necessity, in the commonly cited formulation of the test by Warby J in *Kyriakou v Christie Manson & Woods Ltd* [2017] EWHC 487 (QB), the relevant question (his third limb) is that the order should not be wider than necessary to achieve the purpose.

2.5. We further doubt that such a test of necessity is likely to be satisfied in practice, given the possibility to plead claims against 'persons unknown'. This can lead to different results depending on what category of persons unknown is concerned, but in most cases even if a disclosure order is unfruitful, a claimant can nevertheless proceed to final judgment (at least in respect of proprietary remedies) against identifiable 'persons unknown', without ever discovering the identity of the wrongdoer(s). A test of necessity is unlikely to be satisfied in such circumstances:

2.5.1. First, it is very possible that the information order is ignored and produces no results. This was the case in *Boonyaem* where the first category of persons unknown – the bad actor who had induced the fraudulent transfer of fiat currency and purchase and dissipation of tether tokens – was never identified. These information orders, being directed at the primary fraudsters, are not ones to which an exchange can necessarily respond, and are perhaps less likely to yield any information. As indicated in the judgment, "*the disclosure order produced no useful results*" and so in that case the judge held that no final judgment for personal remedies could be entered against them (see at [31]-[35]). However, this was disapproved in *Mooij v Persons Unknown* [2024] EWHC 814 (Comm); [2024] 1 W.L.R. 3800 where the judge held that even category A persons unknown could be the subject of a final judgment for personal remedies against them, and there was no additional qualification to the grant of interim relief that their identities be ascertained or ascertainable at the time of final judgment (see the detailed analysis at [19]-[50]).

2.5.2. The courts have had no difficulty in proceeding to a final (summary) judgment against so-called second category (or category B) persons unknown. In *Boonyaem* these were the defendants who were unknown but identifiable holders of the wallets into which the claimants' Tether tokens, purchased with a fraudulently induced transfer of her fiat currency, had been transferred. The judge expressly considered whether the claimant ought to have sought a disclosure order to identify the defendants and was persuaded that it was not reasonable, and in accordance with the Overriding Objective, to have required her to do so. He noted that "*technology has made it possible to bring these proceedings effectively to the attention of those persons or entities, and it is therefore possible for them both to be sued and to have an enforceable judgment given against them as "Persons Unknown" in the second category*" (and see *Mooij* to similar effect).

2.5.3. We do note, however, that a different and more restrictive approach was taken in *Chirkunov v Person(s) Unknown & Ors* [2024] EWHC 3177 (KB) which was not a cryptocurrency case but concerned an application for service out of the jurisdiction as part of a data protection claim against person(s) unknown,

the court (at [40] – [41], [82] and [108]) refused permission on the basis of evidential failures (at [47] – [53] and [95]) by the claimant to identify the defendants. The Judge held that that an application for Norwich Pharmacal Order ("NPO") should have been made against the webhosting provider "to identify people who publish anonymously online", referring to the Judge's own decision in *Davidoff v Google LLC* [2024] 4 WLR 6 ("*Davidoff*"). The Judge rejected (at [51]) the claimant's argument made by reference to the case of *Brett Wilson LLP v Persons Unknown* [2016] 4 WLR 69, that an NPO was likely to be ignored by the webhosting provider. However, in *Davidoff* (at [101] to [107]), an NPO was refused by the same Judge on the basis that the email provider (Google LLC) of the email that was used in the posting of defamatory remarks, through an account in a website (Trustpilot), was held to be merely an onlooker/witness in relation to the alleged claim. Therefore, it is notable that applying the broad reasoning in the decision in *Davidoff* (mentioned in *Chirkunov* at [50]) to any webhost case, there is no certainty that an NPO will be granted against the webhosts of the publishing website. Authors can see that a freestanding information order would alleviate some of these difficulties, albeit that opinions differ as to whether this is best left for the courts to resolve.

Impossibility of bringing a claim elsewhere

2.6. We disagree with the introduction of this limb. It is not clear whether the test envisaged is one of impossibility or unreasonableness, which are different standards, but we see either as likely to cause practical problems.

2.7. The Law Commission recognises (at paragraphs 4.127 and 4.128) that in determining jurisdiction, it does not necessarily matter if links can be identified to more than one legal system as established principles will regulate the conflict between jurisdictional options. We agree with that, and consider it is important that those established principles apply consistently across the jurisdictional thresholds. The Law Commission considers this is not about showing an 'adequate link' to the jurisdiction but goes to an aspect of international jurisdiction which it calls 'fairness and practicalities of litigation' (paragraph 4.128). We are not convinced that distinction can be drawn. It is precisely in cases where there may be more than one available forum that private international law has rules to identify the most appropriate forum,

or allows a defendant to argue that England and Wales is not the most appropriate forum. In other words, we think these principles of *forum (non) conveniens* are also concerned with arguments over 'adequate link', as well as 'fairness and practicality'.

2.8. As such, we doubt that a test of impossibility (or unreasonableness) of bringing a claim elsewhere is appropriate, as it appears to shut out the possibility for *forum conveniens* principles to apply at all, and imposes a much higher threshold of impossibility. Even if the threshold is to be the lower standard of unreasonableness, by what standards will the court assess whether it is unreasonable for the claimant to proceed elsewhere if not by the established rules of *forum non conveniens?*

2.9. We do not think that this limb is practically workable. For example, if the new jurisdictional threshold is to be incorporated within Practice Direction 6B, there is a well-established case law as to how that exercise is approached, which the Law Commission's test appears to oust entirely. Further, as noted above, the claimant is required to show a plausible evidential basis for the application of a relevant gateway. The evidential burden of showing that nowhere else in the world would entertain the claim or application is potentially significant, and disproportionate.

A link to England and Wales

2.10. This is the only aspect of the test that positively provides a connecting factor to England and Wales but we consider as formulated it is extremely nebulous. As the Law Commission itself identifies elsewhere in the CP, when considering governing law, there is controversy as to what will be a relevant and sufficient connecting factor.

2.11. We refer to our comments below on 'control', but note particularly here that, depending on the point in time at which that is assessed, 'control' looks more to the putative defendant. In the kind of scenario where an information order is sought, 'control' is likely to be unhelpful for the very reason that the information order is needed – the identity of the putative defendant and his/her location is not known. A requirement simply that the claimant be a national of, domiciled or habitually resident in England and Wales (para 4.104) without any requirement to prove that s/he is the owner of the relevant crypto-token is pointless and risks being circular. The claimant is assumed to be the owner when that is the very thing in issue if the relevant property has been misappropriated and is in the control of a putative defendant.

Consultation Question 3

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?

3.1. Opinions differed in response to this question.

3.2. Authors doubt that, on the existing law, it is conceptually possible for a freestanding power to circumvent the requirement for a gateway to be satisfied, and that what this question appears to assume would require a more substantial change to the existing conceptual framework around jurisdictional gateways and permission to serve out than has been canvassed in the CP.

3.3. There is a difference between the substantive power and the conditions for service out of the jurisdiction on a putative defendant. E.g. the court has a freestanding power to make injunctions as contained in s.37 of the Senior Courts Act, but an application for such relief must still satisfy the requirements of PD6B and fall within a relevant gateway to be served out of the jurisdiction.

3.4. Some authors were therefore troubled by the idea of introducing an exception to that regime, contrary to the established civil procedure rules for service out of the jurisdiction of Norwich Pharmacal, Bankers Trust (where not concerned with digital assets), freezing and proprietary injunctions in any other case. We note that in many of the crypto-fraud claims, there are applications for a number of different varieties of injunctive relief, and a claimant will also need permission to serve out of the jurisdiction in respect of the underlying claim. It is not always the case that a disclosure order is sought prior to taking these steps; in our experience, many of these cases start with applications against 'persons unknown' and the application for service out in respect of the claim, freezing and proprietary relief, and information relief, are all undertaken together at an initial ex parte hearing. That is necessarily so where a claimant has to act quickly when it has been defrauded – it does not have the

luxury of taking each head of relief in stages. Therefore, introducing one exception is unlikely to reduce the burden on claimants, who will be preparing applications to serve out under the gateway system in any event, and may introduce significant confusion in the legal tests to be applied.

3.5. An alternative view was that more is required to be done to counter increasing online fraud, which is hampered by the restrictive approach by the English courts to permission to serve out of the jurisdiction, on the basis that this service should be regarded an interference with the sovereignty of the State in which process will be served. An example of this is *Tai Mo Shan Ltd v Persons Unknown* [2024] EWHC 1514 (Comm), where the court permitted service by NFT. However, it considered (at [14] and [15]) that due to the issue of comity of the English court with other courts around the world, the order granting permission to serve should reflect the terms of CPR 6.40(4) and include an express qualification that it will not be effective in any country where service by the alternative means is contrary to the law of the country where the defendant is located, given that it was not known in what country the defendant was located.

3.6. On this alternative view, the procedural requirements around service out of the jurisdiction should be expressly relaxed or revoked for English domiciled parties seeking permission to serve originating process out of the jurisdiction so that more English judgments may be enforced in the relevant jurisdiction(s) where the foreign entities of the corporate group which operate unregulated exchanges (see response to Q4 below) are incorporated, and other 'persons unknown' fraudsters. A potential approach would be for a specific Gateway to be added dealing with any claim relating to the online activities of any actor(s), whether they are foreign-based individuals or corporate entities. Such a Gateway would be available for any claimant (i) who is domiciled in England and Wales and has a claim based on acts carried out through online activities or by the use of online measures and/or (ii) where there were assets in England and Wales, the online acts or measures were performed and/or at any time before proceedings commenced in England and Wales. This could be combined with removing the requirement for permission to serve originating process out of the jurisdiction (as has been done in a number of jurisdictions more generally, such as

BVI, DIFC and ADGM). This alternative view would necessarily involve far greater reform than has currently been contemplated by the Law Commission.

Consultation Question 4

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

4.1. Opinions differed in response to this question.

4.2. So far as third parties are cryptocurrency exchanges, some authors consider it necessary to draw a distinction between those which are, and those which are not, registered with the FCA in respect of the MLRs or the equivalent in other countries which give effect to FATF's Recommendation 15 and its Interpretative Note, (i.e. FATF compliant jurisdictions), and those which are, and those which are not, regulated in jurisdictions which provide a regulatory regime. Those which are registered with the FCA, for example, will be subject to high standards of AML/KYC regulatory requirements to their cryptoasset activities. These cryptocurrency exchanges are likely to comply with English court orders, even if they are located abroad. The case law has numerous examples and Authors have seen this as a matter of practice.

4.3. By contrast, there are foreign-based cryptocurrency exchanges that are not registered or regulated in any FATF-compliant jurisdiction ("Unregulated Exchanges"). Authors consider these Unregulated Exchanges are less likely to comply with court orders. Some exchanges may (whether registered or regulated or not) also refuse to comply with any disclosure of information order on the basis that it could violate local laws, just as the regulated banks did in e.g. *Scenna v Persons Unknown* [2023] EWHC 799 (Ch) (where interim information orders against foreign banks were discharged due to the likelihood of violation of local laws).

4.4. Authors also doubt whether any compliance from Unregulated Exchanges would necessarily provide meaningful information to a claimant. If any such response were obtained, the identity documentation that might be provided by such Unregulated

Exchanges may be incomplete or fraudulent due to it not having been collected with the same diligence required of those subject to the MLRs (or equivalent).

4.5. Other authors considered that this question could be answered without having to draw the distinction between registered (or regulated) and unregistered (or unregulated) exchanges. In their experience, compliance with information orders granted by English courts was very much dependent on the specific exchange in issue. Whilst there might be some link with the exchange being registered or unregistered/regulated or unregulated, that is not always the distinguishing feature between compliance or not. Larger and more well-known exchanges have become more sophisticated entities in recent years and many do show a willingness to engage with law enforcement and Court orders. The key challenge however relates to jurisdiction because frequently compliance by exchanges in response to such orders is expressed by the exchanges as being "voluntary". Whilst that does not negate the utility of such orders (as the information would not be provided at all without a Court order), significant uncertainty remains over whether, in the event an exchange chose not to comply with such an order, anything could be done to enforce it. These authors have significant doubts and reservations in that regard unless and until there is more wholesale consideration of the scope and appropriateness of English courts' jurisdiction to make such orders.

Consultation Question 5

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?

5.1. We broadly agree, although not without some significant concerns.

5.2. Our view is that proposal 5(1) needs to be considered by reference to both established principle and practicality. We do not regard the requirement for practicality as a mere matter of expediency or convenience. We note the observation (in paragraph 4.134 of

the CP) that the rationale for the *forum rei sitae* or forum situs rule can be understood largely by reference to practical considerations. In this context, therefore, we would regard principle and practicality as two sides of the same coin.

5.3. We use the term "established principle" because we do not see the characteristics of crypto-tokens as creating a need for some novel principle. Those characteristics may well not be static over time, or uniform from one crypto-token to another. A novel principle formulated to address the circumstances as they apply today may prove outdated in 10 years time. We thus agree that the applicable established principle should be the *forum rei sitae* rule, the question being how it should be applied.

5.4. We agree that the general principles that underpin the *forum rei sitae* rule can be applied even for omniterritorial objects. We accept that, in the process of "localisation", there are a variety of factors to which primacy might be given: the location of the "owner", the location of "generalised control over the software underpinning the network" or the location of "control over any discrete crypto-token" (there may be others). We are broadly persuaded that in many cases it will be the last of these factors which would sit best with the requirement for practicality (in terms of the ability of the court "to facilitate a remedy of delivery up or restitution of the object in dispute"). It would be wrong, we think, to seek to draw analogies between, for example, the location of conventional registers and the location of "the software underpinning the network".

5.5. We do, however, have two significant concerns:

5.5.1. how is the location of "control" to be identified? Even here, there could be an element of multi-territoriality (e.g., the location of a person sitting at a computer, the location of a server etc);

5.5.2. the above analysis does not solve the problem created by the acquisition of "control" by a fraudster in another jurisdiction (where, for example, "control" ought to be in England but, in fact, is not). We note that jurisdiction would likely not be established for many of the existing cases if this were the criterion, because on the facts the putative defendant controls the relevant crypto-asset.

5.6. We return to the observation in paragraph 4.134 of the CP:

"*The rationale for the (forum rei sitae) rule can be understood largely by reference to practical considerations relating to an adequate remedy, and to considerations relating to the recognition and enforcement of judgments*."

5.7. We accept that the court best able to provide an adequate remedy and to have its judgments recognised and enforced may be (but will not necessarily be) the court of the place where there is "*control over any discrete crypto-token*". However, it is not difficult to conceive of circumstances where what might be said to be the court "of the place where the crypto-token can effectively be dealt with" is not the court best able (or is unwilling) to provide an adequate remedy. We do have concerns about the potential for injustice if the process of identification of the location of "control" is conducted too mechanistically.

5.8. In summary, whilst we broadly agree with proposition (1), we consider the devil to lie in the detail of identifying "the place where the crypto-token can effectively be dealt with" in any particular case. We consider that there could be the potential for injustice in cases where the very thrust of a claim is that the technical means of controlling a crypto-token or otherwise dealing with it effectively have been wrongfully acquired by a person physically in another jurisdiction. This restrictive criteria could deprive of jurisdiction the court of the place where control ought to be.

5.9. As to proposal (2) and the "when" question, we agree that the time when proceedings are issued may provide the best fit with considerations of established principle, practicality and certainty. There could be obvious practical difficulties in determining, for example, the time when any cause of action may have accrued. If "the place where the crypto-token can effectively be dealt with" were then to change before issue, it may be difficult see why the appropriate court should be that of a place where the token can no longer effectively be dealt with. However, this is subject to our overriding concerns in relation to proposal (1) (and in particular, that it does not assist with cases of crypto-fraud when control has, by definition, been lost at the point in time of issuing a claim) and about the need to analyse with care on a case by case basis where it is that best fulfils the "effectively dealt with" requirement.

5.10. We are alive to the possibility that the "location" of a crypto-token may change before or after the date of issue. If it changes after the date of issue, it may be that, on a case

by case basis, the power of the court to control its own procedures (for example, by imposing a stay or taking other steps to prevent abuses of its process) could be employed to address any problems which may arise. In relation to changes before the date of issue, we recognise the desirability of some degree of certainty but can equally see that overly rigid or inflexible rules as to jurisdiction have the potential to create injustice. What if the "location" of the crypto-token is deliberately changed between the accrual of a cause of action and the date of issue for the very purpose of avoiding jurisdiction? What if the claimant has a reasonable belief as to the "location" of the crypto-token as at the date of issue but that belief is subsequently alleged to be incorrect? We do not disregard the obvious advantages of using the date of issue for this purpose (a date which can be easily established) but do feel that there needs to be some degree of flexibility in cases where inflexibility might cause injustice.

Consultation Question 6

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.

6.1. We do not think there is a need for a new specific gateway for this issue for the reasons given at paragraph 4.172 of the CP. However, we anticipate that the concept of control as a way of interacting with property such as cryptoassets is an issue that will continue to develop in English common law and amendments to the existing gateways may need to be considered in order to make this clear that the concept of control is within their scope.

6.2. More generally, we are in favour of making the gateways more principled and simplistic rather than increasing the number, complexity and potential overlap between them.

Consultation Question 7

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?

7.1. We do not agree.

7.2. The common law has already developed principles for locating damage for the purpose of the jurisdiction gateways, especially in *FS Cairo (Nile Plaza) LLC v Brownlie* ('Brownlie 2') [2022] AC 995 giving a broad meaning to the concept of indirect damage. We see no reason why the common law cannot continue to develop to accommodate digital assets cases. Further, the Law Commission's formulation appears restricted to natural persons, whereas it is possible that legal persons may also suffer damage which needs to be located (cf. the discussion in *Tulip Trading* [2023] 4 WLR 16 (CA) as to whether, in the case of a company, this should be the place of incorporation, place of residence/domicile of a sole director/shareholder, location of a server or some other place). These issues are best left to the courts to resolve.

7.3. We doubt whether (2) will add a meaningful residual rule of jurisdiction. In the majority of the digital assets cases coming before the English courts, the victim is unable to identify the putative wrongdoer and so the defendant is a category or categories of persons unknown. In such a scenario, it is impossible to identify the defendant's home court. We consider *forum conveniens* principles better able to adapt and cater for difficult cases. We refer further to our comments on 'omniterritoriality' below.

Consultation Question 8

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?

8.1. The central tenet of the Law Commission's proposal is that '*the relevant act, event, or object does not simply exist "nowhere", but exists "nowhere and everywhere at the same time"*' (FAQ on Property and permissioned DLT systems in private international law at [1.18]; also the CP at [2.49], [4.138], [4.201], [5.141], [6.4]).

8.2. Whilst a pithy soundbite, we are concerned that this may overstate the 'omniterritoriality' of DLT networks, and therefore overstates the challenge in seeking to identify one 'applicable law'. Moreover, the reference on a 'just disposal of the proceedings' appears to give primacy to that over any challenges in identifying one applicable law and hence over certainty. We address this balance of justice and certainty in response to Qu 9 below.

8.3. As to the supposed difficulty of omniterritoriality, at the prosaic level, the nodes of the network are all located somewhere; the data is sent over physical networks; and private keys will likewise be stored somewhere.

8.4. Of perhaps greater relevance is the fact that every proceeding before the courts will involve at least two parties. Ultimately, the claimant will be claiming that a defendant is liable (or a defendant seeking a declaration that it is not liable to the claimant), or should be required by the court to act in some way. Individuals have a physical location. Legal persons will be incorporated somewhere.

8.5. Further, the proceedings will involve some particular transaction, action, or alleged relationship between the parties which may well have an identifiable location.

8.6. Two examples are given by the Law Commission to explain their proposal: (a) contractual obligations in DeFi; and (b) property relationships in a wholly decentralised environment (CP at [5.61]).

8.7. Considering first the question of whether a contract could arise under a DeFi protocol, the Law Commission suggests that Article 4 of the Rome I Regulation provides no satisfactory answer. Whilst we do not underestimate the difficulties that a judge would face in relation to such questions:

8.7.1. As noted above, the CP seems to consider the question largely in the abstract, on the basis that the transaction is 'everywhere and nowhere'. However, any such dispute will involve two parties with physical locations. That provides a degree of territoriality which needs to be factored into the analysis.

8.7.2. The situation is not dramatically dissimilar from a foreign exchange transaction. If A (based in England) agrees to exchange USD 1 million for EUR 1.1 million with B (based in Japan), then any dispute would have to be resolved on traditional conflicts of laws principles. There may be more 'territoriality' in this example, given that any subsequent payment from A or B would need to use traditional banking, but the example presents many of the same issues examined by the Law Commission at CP [5.85]-[5.88]. This foreign exchange transaction would be akin to barter, and probably conducted largely online, but a court would still be expected to determine the appropriate law to apply.

8.8. As to property issues, we would again point to the fact that the claimant and defendant will be physically (or legally) based somewhere. We do not agree that a dispute between those parties involves a dispute which is 'nowhere and everywhere'. Whilst one could debate which of their locations, or a third location, is the *situs*, we do not agree that such analysis should be characterised as tenuous or arbitrary. Absent some alternative principles to apply, the law of the country of one of the participants seems preferable to throwing out the traditional concepts of private international law.

8.9. That said, we recognise the attraction of a new rule being imposed (e.g. by statute) which embodies a distinct choice of a single law – even if that is subject to fall-back

choices in the nature of a waterfall. UNIDROIT's "Principles on Digital Assets and Private Law", Principle 5 is, we consider, useful.

8.10. We also question the distinction that the Law Commission has drawn between 'permissioned' and 'permissionless' DLT networks, where the suggestion appears to be that the primary difficulties exist in the latter but not the former category:

8.10.1. It is not clear to us that the distinction between permissioned and permissionless DLT networks put forward by the Law Commission is as significant, or indeed as hard-edged, as suggested.

8.10.2. First, there may be debate about what counts as a 'permissioned' versus 'permissionless'. We note that that there is a degree of online controversary as to whether Ripple – one of the examples used in Professor Dickinson's chapter in Fox and Green (ed) *Cryptocurrencies in Public and Private Law* (Oxford, OUP, 2019) – is permissionless or not.[1]

8.10.3. Second, depending on the definition of 'permissioned' DLTs, there may not be any formal terms and conditions that users have to accept. In the case of Ripple, anyone can download the protocol and it is not clear to us that the approved validators have express contracts with Ripple Labs. This means that the key distinguishing factor relied upon in the Law Commissions FAQ on Property and permissioned DLT systems may not exist.

8.10.4. Third, it seems possible that both permissioned and permissionless DLT networks might be characterised as essentially contractual. Both English private law (in *The Satanita* [1897] AC 59) and European law in the context of Rome I Regulation (see Dickinson *op cit* at [5.29]) have accommodated multilateral relationships within contractual analysis. *The Satanita* was

[1] See https://cointelegraph.com/learn/articles/permissioned-blockchain-vs-permissionless-blockchain-key-differences ('*A good permissioned blockchain example is Ripple…*'); https://www.oracle.com/uk/developer/permissioned-blockchain/ (which gives Ripple as example of a permissioned blockchain); and https://www.reddit.com/r/cotinetwork/comments/7ser57/permissioned_vs_permissionless_blockchain_systems/ (where the original post cites Ripple as a permissioned system because it relies on third party validators approved by Ripple Labs; whereas the first post in response insists that it is permissionless).

concerned with yacht owners who are taken to have accepted contractual obligations to comply with the rules of a yacht competition by taking part. Applying that logic to the Bitcoin network, it might be said that each actor acting on the network is undertaking on a contractual basis to act in accordance with the 'rules' of the network as expressed from time to time in the consensual mechanisms applying to the network. If this analysis is correct, then both permissioned and permissionless DLT networks essentially have a contractual basis to a similar extent.

8.10.5. Fourth, where a permissioned DLT does not relate to any underlying asset, another distinguishing factor relied upon by the Law Commission is absent.

8.11. We accept that permissioned DLTs will have some form of '*central or authorising authority*' which may give reason for preferring a single country (if the identity of the authorising entity and its location is clear). The point we are making is that the distinctions appear to be less clear-cut than the Law Commission seems to suggest.

8.12. Nevertheless, we accept that there are significant practical difficulties in locating the 'one applicable' law, as DLT and online transactions generally become less and less tethered to any particular location. If the proper law is very difficult to determine, then the likely result of a dispute becomes difficult to predict, and we accept that any decision which depended on an assessment of where (at any one time or, perhaps in 2009 or 2017[2]) the largest number of miners was based would appear arbitrary. However, we are doubtful that this solution would appeal to an English Court. Instead, we would expect the Court to pay greater attention to the territoriality of the actors.

8.13. The difficulties in predicting the proper law does point to the attractions of an alternative approach, but only if a valid candidate exists. If there was an internationally agreed approach (such as along the lines of UNIDROIT Principle 5 or the FMLC's 2018 paper "Distributed Ledger Technology and Governing Law: Issues

[2] See Professor Dickinson *op cit* at [5.47].

of Legal Uncertainty") which obviated the difficulties, then we may well support it as preferable to engaging with the fine details of location in the above examples. However, for the reasons set out in answer to subsequent questions, we take the view that a wholly new 'supranational' approach crafted by English judges alone is not only inappropriate (principally for reasons of uncertainty) but is impermissible under current law.

8.14. Until such time as an internationally agreed approach exists, we agree with the Law Commission's confidence in the common law method of incremental case-by-case development. This, coupled with confidence in our judges, means that we would not expect the current approach to the conflict of laws to lead to unjust results. However, the time which it would take for a consistent body of principle to develop could be short-circuited by a statutory rule.

Consultation Question 9

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?

9.1. We disagree with the proposed 'supranational' approach. Moreover, it is unclear to us whether the repeated phase in the CP 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" is intended to indicate that the 'supranational' approach disavows the need to identify one set of domestic laws to apply to each issue characterised under English conflict of laws rules (i.e. to each "… the issue in dispute"); alternatively, and to similar effect, a new approach to characterisation which results in far more granular issues being identified than under the traditional approach. To the extent that is the intention, we strongly disagree.

9.2. It seems to us that 'supranational' solutions (as the name suggests) work best where they are based on a form of convention or other international consensus. The examples given in the CP are the 'law merchant' and the Hague-Visby Rules (i.e., the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, and its Protocols).

9.3. We are not aware of 'supranational' approaches which are, in fact, a single jurisdiction unilaterally asserting its ability to create a new set of rules said to represent the law of 'everywhere' and 'nowhere'.

9.4. The CP at [6.60] asserts 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.*'

9.5. While the reference to the law of 'no country' and 'every country' could be little more than a soundbite, it may indicate a far more substantive, and radical approach. We do not understand what it would mean to apply the law of 'every country' to a dispute, particularly where the Law Commission itself is uncomfortable with the notion that

the law of China could invalidate cryptocurrency transactions: CP at [5.109]. The 'supranational' approach advanced appears to mean that Courts would be free to pick parts of laws of countries to apply to issues identified by traditional characterisation rules (or, possibly, to apply to more granular issues, as determined by the Court without regard to those rules), in order to fashion a result that is just, and hence which accords with the expectations of the parties.

9.6. Given that the Law Commission proposes that the judges should fashion this 'supranational' law on a case-by-case basis (which we think impermissible on current law – see question 10 below), it seems to us that the proposal has two possible outcomes in practice:

9.6.1. When faced with a novel situation, the English judge would fall back on common law principles (including common law characterisation rules). By definition, the current state of common law is that which the courts have concluded provides a just solution, and any decision contrary to binding authorities would very likely be appealable. This would mean that the supposed 'supranational' approach would be indistinguishable from the application of the common law (i.e., applying the law of the forum as a fallback), which the Law Commission says is inappropriate.

9.6.2. Alternatively, the judge does not apply the common law, but is expected to fashion a new law based on little more guidance than that the new law should reflect '*the law of every country*' and deliver a just result. We do not think judges would welcome, or are well-equipped, to fashion a new form of law different from the common law of England, or to apply only selective parts of foreign legal systems in a "pick-and-mix" way. Whilst parties could provide evidence of what other jurisdictions do, which jurisdictions' domestic laws should a judge apply in the 'supranational' approach?

Consultation Question 10

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?

10.1. Insofar as this question is asking whether a judge would be free to fashion a 'supranational' approach to resolving a conflict of laws issue, without statutory intervention, we disagree.

10.2. To take the Law Commission's example of a case raising the question whether a contract existed in a DeFi setting, it seems to us that the Court would be required to apply Articles 4 and 10 of the Rome I Regulation, which states that the dispute '*shall be determined …*' in accordance with those provisions. This is mandatory. We do not see any room in the Rome I Regulation for a judge to decide that he or she should not determine the country with which the transaction is most closely connected (however tenuous or arbitrary the conclusion might be), in favour of a 'supranational' approach.

10.3. In any event, insofar as a wholly new set of rules is to be applied to 'omniterritorial' disputes, we think that such rules should be the subject of legislation, ideally implementing an international convention or at least set of rules which have garnered a significant degree of international support.

Consultation Question 11.

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?

11.1. We do not think that the proposal would avoid protracted disputes. We think it would encourage more disputes.

11.2. First, the 'supranational' approach would remove much (if not all) of any sense of certainty engendered by the current choice of law rules. Moreover, the approach itself does not seem likely to be conducive to certainty, or likely to yield its own unique but predictable jurisprudence, since each case will be decided by reference to a hotch-potch of rules taken from various jurisdictions simply to do justice in the individual case - thereby, seemingly eschewing the value of precedent. A lack of certainty essentially means a lack of predictability as to how disputes will be resolved, which makes alternative dispute resolution harder and thereby encourages more litigation (or arbitration).

11.3. Secondly, given the lack of any suggested legislation, there would be no obvious basis for a court to take the Law Commission's preferred approach. There would undoubtedly be the same dispute that one would currently face as to the applicable law, with the added complication that one party would be asking the court to depart from (e.g.) the Rome I Regulation and established law.

11.4. Thirdly, supposing that a judge could be persuaded that they were entitled to craft a rule under the 'supranational' approach in principle, one could expect the parties to marshal the same evidence as to the DLT networks, etc. One party might well argue that the case is not truly 'omniterritorial' because it can identify transactions, servers, or actors, in specific locations.

11.5. Fourthly, assuming that the Court might be persuaded that the issue was 'omniterritorial', the Law Commission's reference to '*the law of every country*' would encourage the parties to seek evidence on the law of numerous jurisdictions in an attempt to persuade the court that their solution should be preferred, increasing litigation complexity and hence cost.

11.6. Fifthly, appeals would abound.

Consultation Question 12.

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

12.1. It is difficult to say where 'omniterritorial' disputes might arise. It seems to us that most disputes will have some element of territoriality, if only because (as described in response to Q 8) of the location of the parties.

12.2. As with any field of dispute, it is likely that any market dislocation or shock will produce the largest number of disputes, whether based on the collapse of individual exchanges or cryptocurrencies. This is difficult to predict.

[END]