JOINT RESPONSE TO THE LAW COMMISSION REPORT

DIGITAL ASSETS AND (ELECTRONIC) TRADE DOCUMENTS IN PRIVATE INTERNATIONAL LAW (5TH JUNE 2025) ("THE CONSULTATION")

1. THE SIGNATORIES AND THE SCOPE OF THIS RESPONSE

1.1 This response is written and jointly signed by a wide range of law firms, accountancy firms, NGOs and other interested parties ("the Signatories").

1.2 In recognition of the important issues raised in the Consultation, the Signatories have taken the atypical step of coordinating a joint response. This is to reflect that a consensus has emerged in recent years concerning some of the issues, especially the approach to situs.

1.3 We would like to make clear that our primary interest is in the law of situs, which has important implications for a number of areas of law. For the reasons we give below, the law of situs is closely bound to private international law, and therefore these debates go hand in hand.

1.4 Given the broad coalition of parties that form the Signatories, it was not practicable to prepare a detailed response to each of the Law Commission's questions in the Consultation. Instead, the Signatories have focused our response on (what we regard to be) the most critical issues raised in the Consultation where we can provide our professional views.

1.5 Our response is largely confined to digital assets (or, as we refer to them below, cryptoassets), as opposed to Electronic Trade Documents. This is only appropriate as we, as a cross section of industry and industry-supporting NGOs, have had a great deal more exposure to the legal, tax and other challenges of cryptoassets than ETDs.

1.6 The Signatories wish to commend the output of the Law Commission. The serious work that has gone into the Consultation (and prior Law Commission publications) has, we believe, placed England and Wales as a leading jurisdiction in recognising the challenges associated with omniterritorial assets, and seeking solutions to those challenges. The Signatories agree strongly with the statement by the Society of Trust and Estate Practitioners ('STEP') quoted in the Consultation, in relation to situs, that 'any decision by the court setting a common law precedent would benefit considerably from the detailed analysis that could be provided by the Law Commission'[1]. Thus, the Signatories recognise the importance of the present Consultation and hope to offer our views on these matters which, we believe, require solutions (in some cases, urgently).

[1] Consultation, para 2.69.

2. IS SITUS AN INSURMOUNTABLE PROBLEM?

2.1 The Signatories agree that the common law can accommodate the localisation challenges associated with cryptoassets and other omniterritorial property.

2.2 The Signatories infer from the Consultation that the Law Commission does not believe that identifying a location for cryptoassets is "too difficult". The nature of omniterritorial objects presents an abundance of 'connecting factors', rather than a shortfall of them. The Consultation recognises this[2], as did the Law Commission in 'Digital assets in private international law: FAQs on the relationship with tax law, banking regulation, and the financial markets' published in January 2025[3] ("the January FAQs").

2.3 We agree, and believe that a court considering the issue of 'situs' substantively for the first time should be encouraged not to jump to a solution just because it is somehow "easiest"; not least because this is doomed to failure - what is easiest in the circumstances of one case before a court inevitably won't be in another.

2.4 Neither do we believe any other body (except Parliament) should impose a 'situs' solution based on the "easiest" solution; the common law has to be developed by courts, not *made,* and certainly not made as a result of capitulation to technical challenges. The common law should be practical to apply, but that does not mean a solution can be based only on whatever is considered "easiest". This has never been the approach under common law – whether in developing situs rules for intangibles or otherwise - and it should not be now. Furthermore, no development in the law should restrict the courts from considering the whole relevant factual circumstances of each case.

2.5 To remark upon the 'situs' of a cryptoasset is to identify which jurisdiction's courts and/or laws are most appropriate for private property disputes in respect of it. And to say which is the most appropriate, the relevant factors must be identified. In the case of cryptoassets, the relevant factors may point to more than one jurisdiction. This is not, however, a problem unique to cryptoassets. In determining the situs of a registered share, for example, a number of different factors can be relevant, depending on the circumstances. Just as the problem can be overcome for other intangible assets, so it can be for cryptoassets.

2.6 Thus we suggest that any approach to common law situs based only on "simple" or "workable" solutions is an entirely inappropriate approach to a form of property which is notable for its complexity and which, similar to other forms of intangible property, has

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[2] Consultation, para 2.20: *'As we have said, such features that "connect" a legal issue to a country are called "connecting factors". Some of the most relevant connecting factors and rules for our project include: (i) the location of an object of property rights; (ii) the location where an event occurred; (iii) the location of a person; and (iv) personal connecting factors.'*

Also at para 2.19, in relation to international jurisdiction: *'... a wide range of considerations – physical, factual, and legal – may be taken into account.'*

[3] January FAQs, para 1.15.

an abundance of connecting factors. In addition to workability, there is an additional requirement, which is that the chosen 'situs' test should yield outcomes which "feel" appropriate, and should not produce unnatural or arbitrary results. The law should not localise a cryptoasset in a territory where there is only a tenuous connection between that territory and the asset. We thus support the critiques in the Consultation concerning approaches which have yielded arbitrary results[4].

2.7 Neither do we necessarily believe, as will become clear in this response, that the abundance of connecting factors should naturally lead to an open-textured or flexible approach to determining questions of private international law (and thus situs), and certainly not as a starting point.

3. THE MEANING OF SITUS IN THIRD CATEGORY THINGS

3.1 In this section, we wish to outline our understanding of what 'situs' is, following careful deliberation between the Signatories.

3.2 It is incontrovertible that tangible assets have a "real" situs but that intangible assets often have an "artificial" situs.

3.3 The "situs" of intangible assets (and, we would suggest, third category things) is not really a remark upon where the assets are located (in a natural sense of the term). We agree with the statement in the January FAQs that

> *'the nature and ultimate objective of the exercise*…[i.e. determining the situs of an intangible asset]*…is to identify which country's system of private law is most appropriate to govern the cross-border private law issue arising from the object and the policy considerations that this exercise engages …*[5]
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> *Often, the "localisation" exercise turns on identifying the courts of the place where the object can be effectively dealt with for the purposes of particular remedies involving the object itself, such as delivery up of the object.'*[6]

3.4 In other words, the 'situs' of a given asset is shorthand for which law applies to a private property dispute and (although arguably perhaps to a lesser extent[7]) which courts can hear such a dispute). Doing so by alluding to a physical location is a metaphorical device, helping to match property to the location of the appropriate courts or law.

3.5 This is a critical point, and has consequences beyond private international law. The private international law meaning of situs, except to the extent it is modified by

[4] For example, Consultation, paras 5.103 – 5.108.

[5] January FAQs, para.1.17.

[6] Ibid, para 1.44.

[7] See our comments at footnote 25 below on applicable law and jurisdiction and the relationship of each with situs.

legislation, is adopted by many other important areas of law (such as tax, in addition to private international law matters such as succession planning and the administration of estates). Should this point be in doubt, we have set out authority in the footnote[8].

3.6 We note the statement in the Consultation that

> '*private international law has traditionally placed significant emphasis on geographical location within the territory of a sovereign state when determining in which national court parties should litigate their dispute and which national system of law should be applied to resolve it*'[9].

That is, for both international jurisdiction and applicable law.

3.7 We also note that, from this situs-centric starting point, the Law Commission then explain the different ways in which private international law has developed, to accommodate approaches that do not necessarily resort to geographical location.

3.8 Although the Law Commission articulate different ways in which private international law has developed, in relation to international jurisdiction we note (and support the fact) they advocate a *lex situs* approach.

4. SITUS AND INTERNATIONAL JURISDICTION

4.1 We note that a *lex situs* approach is proposed in the Consultation for international jurisdiction:

> '*Where a claimant seeks delivery up of a property object on the basis that it belongs to them and is therefore "theirs", the general effect of the situs rules is that the claimant must go to the courts of the place where the property object is situated. This ultimately reflects a basic rule of international law in relation to enforcement: exercise of enforcement jurisdiction, that is, the coercive power of states to seize objects or commit a person to custody, is strictly territorial … insofar as fictions are used to "localise" property objects that do not have an obvious physical existence, these tend to point to the courts of the place where the object can be effectively dealt with [eg debts or shares].'*

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[8] This point is consistent with the judgment in *English, Scottish & Australian Bank v IRC* [1932] AC 238. In that case, the House of Lords considered how to apply a specific aspect of tax legislation – s. 59(1) Stamp Act 1891 – which depended on whether or not a simple contract debt was situated in the United Kingdom, notwithstanding that the legislation did not define what that meant. They identified that private international law gave a clear definition, albeit in the context of probate rather than tax; but said that, as situs did not have another (non-statutory) definition, the implication must be that the private international law definition applies: *'it is in my opinion a fair assumption that the statute was passed with knowledge of the well established law relating to probate, and the phrases then used would be perfectly proper to cover debts where the debtors were out of the United Kingdom'.* The court commented further that: *'for purposes of probate and estate duty a simple contract debt is assumed to be situated where the debtor resides is established by a long series of authorities that stretch far back into the mists of antiquity.'* James Kessler KC makes the point even more emphatically– see the quotation at paragraph 5.5 below.

[9] Consultation, para 2.9.

Similar comments were made in the January FAQs.[10]

4.2 The Signatories agree with this premise, that effective enforcement determines jurisdiction (and hence 'situs').

4.3 Building upon this premise, our view on what the 'situs' rule should be is discussed in section 7, but first we wish to discuss whether this rule should diverge:-

(a) between different areas of law (section 5); and/or

(b) between international jurisdiction and applicable law (section 6).

5. DIVERGENCE BETWEEN DIFFERENT AREAS OF LAW

5.1 In the Consultation, the Law Commission state:

> *'Framing the ultimate objective in terms of a geographical location can potentially be unhelpful in the broader legal context. This is because other areas of law, including tax law and financial services regulation, also focus in some contexts on questions of geographical location (of a person, or action). This can make it seem like each of these areas of law are asking the same question, and therefore should return the same answer. However, this is not the case. Different areas of law are underpinned by different objectives and policies … The "location" of a person or act for one legal purpose need not, therefore, be the same as the "location" for another."*[11]

5.2 If by 'tax law' the Law Commission means tax statutes, then we agree with this preceding passage; Parliament passes its own laws which are (in theory at least) led by the policies of the government, which are distinct from the objectives of private international law. Alternatively, if 'tax law' in this passage means the application of common law as interpreted by the Tax Tribunal and the higher courts, then the position is more nuanced; and, to a large extent (and especially as regards decisions on situs which is our present focus), we would challenge the premise that there are different objectives and policies between tax and other areas of common law (as distinct from primary legislation).

5.3 It was noted in the January FAQs that '[m]*any stakeholders were of* [the] *view that private international law and revenue law should take a consistent approach to the question of where a digital asset is located*.'[12] The Signatories support a consistent

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[10] Eg January FAQs, para 1.44: '*the forum situs rule tends to be underpinned by practical considerations relating to effective enforcement. Often, the "localisation" exercise turns on identifying the courts of the place where the object can be effectively dealt with for the purposes of particular remedies involving the object itself, such as delivery up of the object.'*

[11] Consultation, para 2.7. The Signatories note the Law Commission suggested even more emphatically in the January FAQs that revenue law is distinct from private international law on these issues: *'[r]evenue law is guided by its own distinct policies, which must be considered on their own terms in any exercise undertaken by a revenue authority to determine the scope of its public law authority to levy taxes. These are, moreover, distinct to the policies that underpin the forum and lex situs rules, and private international law more broadly.'* January FAQs, para 1.63.

[12] January FAQs, para 1.61.

approach because, as expressed in section 3, 'situs' as it is understood for other purposes (such as tax and succession law) is generally a byword for a rule identifying which law applies to and which courts can hear a private property dispute (subject to the nuances we draw out in footnote 25). Therefore, consistency of approach is:

(a) *inevitable*, for the reasons set out in section 3, and

(b) *necessary*, to avoid areas of law which derive from the private international law position being left with considerable uncertainty. The situs of cryptoassets would be unanswerable, which any court would regard as unsatisfactory and anomalous. Parliament may decide to legislate prospectively on situs for capital gains tax purposes, say, but a consistent common law approach is still needed for inter alia (a) inheritance tax purposes (because, unlike capital gain tax, inheritance tax legislation does not include rules determining situs and implicitly adopts the private international law rules instead); (b) for both capital gains and inheritance tax questions prior to the enactment of such legislation; and (c) for succession law and administration of estates purposes. The approach would also apply for capital gains tax purposes if Parliament did not legislate to bring cryptoassets expressly within the statutory rules.

5.4 We would also question the extent to which 'revenue law' (in the non-statutory sense) is a distinct organism which develops its own jurisprudence and which is guided by its own 'rules, policies and objectives'. This is particularly untrue in situs cases where, as discussed in section 3, the Signatories (or at least those of them who practice in the field of revenue law) regard situs as a byword for rules of international jurisdiction and conflicts of laws as regards intangible property and 'third category' property – notwithstanding that these rules may have specific effects in various tax contexts. As such, it would be unprecedented for 'revenue law' (in the non-statutory sense) to develop a distinct situs rule. In this respect, we believe private international law carries the burden of responsibility in other areas of law beside its own, until either:

(a) Parliament legislates otherwise in a specific area of law, or

(b) the other areas of law truly develop their own jurisprudence (which, in the case of situs cases, would not happen).

5.5 The following quotation from James Kessler KC supports this position[13]:

> *'Dicey takes the view that situs for tax purposes may be different from situs for the purpose of private international law. But this expression conceals a muddle or a mistake … in the absence of contrary intention, references in a tax statute (or any statute) to the situs or location of property are taken as references to the private*

[13] For the avoidance of doubt, James Kessler KC is not a signatory to this response – a decision was made not to include barristers or other individuals, only firms and organisations.

international law concept of situs. The law does not distinguish between situs for (general) tax purposes and situs for private international law purposes'.[14]

5.6 In summary, the tax and succession law positions are a *consequence* of whatever position is taken in private international law, not a driver for adopting a particular 'policy'.

5.7 Accordingly, although the Law Commission are careful not to make pronouncements over revenue law, its conclusions will be binding upon it. Therefore, as a result of what we call above the 'burden of responsibility', questions of private international law cannot be made in isolation without regard to other areas of common law (including tax and succession law).

5.8 For all the above reasons it would be helpful, and avoid unnecessary uncertainty, if the Law Commission acknowledge in their final report the inseparability of certain laws on situs issues (especially tax and succession law), and the inevitability and necessity of a consistency of approach in these areas.

6. DIVERGENCE BETWEEN INTERNATIONAL JURISDICTION AND APPLICABLE LAW

6.1 Chapter 5 of the Consultation, which focuses on applicable law, draws a distinction between international jurisdiction (where '*it does not necessarily matter if a case has links to more than one legal system: such conflicts of jurisdiction are regulated by established principles of international jurisdiction')* and applicable law (where '*the premise of the multilateralist approach is that there is a single legal system in which an issue arising in a case has a "natural home")*.

6.2 We infer that one of the reasons the Law Commission provisionally suggest a fixed situs-based approach for international jurisdiction (specifically, the residence of the controller) is that it does not matter that this approach can (potentially) point to multiple jurisdictions.[15] In contrast, for applicable law, we infer that the residence of the controller approach is treated by the Law Commission with more caution, if it can point to different jurisdictions. However, as discussed in section 10, we do not regard multiplicity (for example of controllers) as a challenge which cannot be easily overcome. Thus we do not believe the inference we make in this paragraph is a reason to abandon a *lex situs* approach for applicable law.

6.3 Notwithstanding our comments in the preceding paragraph, we note the Law Commission begin a searching inquiry for a different approach:

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[14] James Kessler KC, Taxation of Foreign Domiciliaries, Chapter 108 ('Situs of Assets for IHT').

[15] Consultation, para 5.150: *'...we observe that using control over a crypto-token as the connecting factor for applicable law does not necessarily point convincingly to a single place. Not only can private keys be duplicated, but the cases show that alternative forms of control might be indeed possible for DLT networks and are being relied on before the courts.'*

*'that **the existing lex situs rule does not give a satisfactory answer** – to the extent that it gives an answer at all – **to the question of which law applies to resolving property disputes arising in relation to wholly decentralised crypto-tokens**. We think this provides further evidence that an alternative approach is required."*[16] [our emphasis]

6.4 The Signatories agree that the multilateralist approach, which works best when '*each system of private law* [is] *largely at the same point of maturity as each of the others',* may not be appropriate when some jurisdictions prohibit cryptoassets or deny property rights. We also agree that a multilateralist approach can produce an *'arbitrary result pointing to the law of a jurisdiction that has only a very tenuous connection to the parties and issues of the case.'* Some of the academic citations in the Consultation seem to confirm this.[17] In our view, the "blind" multilateralist approach would have surprising and undesirable outcomes for commercial parties when it comes to determining applicable law. It is not the sort of "bright line" test that the Signatories would support (more on which later, in section 7).

6.5 We note that, for these and other reasons, the Law Commission ultimately (but provisionally) suggest a supranational approach to applicable law in relation to decentralised assets, as

'*its potential for openly using substantive rules of decision to apply in the cross-border context is a core distinguishing feature that, unlike the other approaches, would enable the courts to address not only the issues arising in private international law, but also many of the other issues arising in the wider socio-legal context …"*[18]

6.6 We note that the Law Commission regard international jurisdiction and applicable law as 'two distinct aspects of modern private international law'.[19] However, the Signatories believe that it would create uncertainty across different areas of law to follow the *lex situs* rule for international jurisdiction, and a very different approach for applicable law purposes. In particular, it could create confusion about what the cryptoassets 'situs' rule is for other areas of law, given that (as explained in section 3) situs is merely a byword for the private international law rules on international jurisdiction and applicable law. If those rules diverge, as proposed in the Consultation, then what is the situs rule?

6.7 The attraction of the *lex situs* approach in applicable law is that it provides a fixed rule, or what judges call a 'brightline' test. Whilst we accept there has in recent times been a move in private international law towards a more "flexible" approach (multilateralist or open-textured) or towards a combination of fixed and open-textured (the Rome I and Rome II Regulations), the Signatories believe the proposed approach for applicable law

[16] Consultation, para 5.155.

[17] For instance, the work of Andrew Dickinson and Michael Ng, who posited the law governing bitcoin transactions could be China and Massachusetts respectively.

[18] Consultation, para 6.59.

[19] January FAQs, para 1.25.

would create uncertainty in other areas of law and, given the exceptional nature of cryptoassets (in particular, that they are capable of being recognised as a third category of property[20]), we would suggest they may be treated as an exceptional case on their own merits, which need not follow the "flexible" or combined flexible/open-textured trends in applicable law. The effect of these approaches, or the Law Commission's provisional suggestion of a supranational approach, could create uncertainty in the situs position of cryptoassets that does not exist for other categories of property. We believe this goes to the heart of fairness and justice in property matters; objectives which private international law aims to promote.

6.8 Accordingly the Signatories advocate a fixed rule for applicable law (pointing to location) as a starting point, the same as for international jurisdiction. However, in recognition of the challenges of multiplicity, we recognise that there should be recourse to a non-fixed rule where the fixed rule does not clearly point towards a jurisdiction (see section 10). Thus, not dissimilar to the approach in the Rome Regulations, the Signatories would propose a system that begins with a fixed rule but with a tie-breaker.

6.9 The Signatories note that in November 2019 the UK Jurisdiction Taskforce proposed a flexible approach to applicable law questions[21], which may suggest that the law has been evolving in this direction and that the Law Commission's provisional conclusion on applicable law is further confirmation of this trend. However, since the UK Jurisdiction Taskforce made this statement in 2019, we believe that a consensus has started to develop as to where cryptoassets are localised (see footnote 29). Accordingly, we would argue that, rather than moving towards a multilateralist or supranational approach to applicable law, the discourse has moved more towards a fixed test (at least as a starting point). Specifically, the legal discourse (including STEP, *Dicey & Morris* and increasingly case law[22]) points to a test based on the residence of the private key controller. Given that two of the four connecting factors proposed by the UK Jurisdiction Taskforce focused on control, we would suggest that the UKJT signposted the way towards a fixed rule based on control of the private keys, rather than pointing towards a more open-textured style approach.

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[20] Property (Digital Assets Etc) Bill 2024-2025 [HL].

[21] UK Jurisdiction Taskforce, Legal statement on cryptoassets and smart contracts, November 2019, para 99. The potential connecting factors being:-

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

(b) Whether there is any centralised control in England and Wales;

(c) Whether a particular cryptoasset is controlled by particular participant in England and Wales (because, for example, a private key is stored here);

(d) Whether the law applicable to the relevant transfer (perhaps by reason of the parties' choice) is English law.

[22] See footnote 29.

7. LOCALISING CRYPTOASSETS (OR "SITUS")

7.1 The Signatories accept that there is a debate as to whether an "artificial" situs should be assigned to cryptoassets at all.[23] However, there is a long established precedent that property (which a cryptoasset is) must have a local situation[24] and it is in the interests of citizens that there is a 'situs' rule for cryptoassets to ensure certainty in (among other things) the administration of estates, succession law, and taxation. We therefore proceed on the basis that a situation should be attributed.

7.2 Before providing our commentary on the Law Commission's provisional conclusion on a common law situs position, we quote the relevant section in full:

> *'we think that the general principles that underpin the forum rei situs can be applied even for omniterritorial objects. If the basic principle is to look to the place where the object can be effectively dealt with, the cases show that there are many ways in which this place can be identified. The most obvious possibility would be to look to the private key. Crypto-tokens are designed to be controlled exclusively by private keys, so an interpretation in line with the general principle underpinning the forum rei sitae rules might be that the cryptotoken is "located" at the place where the person who knows or has access to the private key is located … **We provisionally conclude therefore that crypto-tokens can and should be "localised" by reference to practical or effective control, rather than by reference to the "owner". This reflects the existing principles that underpin the rules for international jurisdiction.**'* [Our emphasis]

7.3 We believe this is the first time the Law Commission have given any opinion on situs. We agree with their provisional conclusion, and their reasoning. It follows from the fundamental principles of the doctrine of situs, explained in section 3, that:

(a) Traditionally, the consensus rule is that the "situs" of any given asset is a shorthand for indicating which courts should have jurisdiction and/or which law should apply to a dispute in respect of it (although clearly it is necessary to distinguish between applicable law and jurisdiction[25]). We recognise that the law has evolved to frequently

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[23] Financial Markets Law Committee: "Distributed Ledger Technology and Governing Law: Issues of Legal Uncertainty (March 2018) para 4.2: '*Where there is a distributed ledger, there is no available lex situs'; 'The very concept of a single situs for the asset becomes difficult to apply in the case, first, of intangibles, second, of digitised assets and, third, of assets constituted on a distributed network or platform'.*

[24] See the comments of Lord Tomlin in the House Lords in *English Scottish and Australian Bank, Limited v Commissioners of Inland Revenue* [1932] AC 238: *'I am disposed to agree with an observation thrown out in the course of the argument, that it is not easy to form a conception of property having no local situation'.*

[25] Of the two inquiries – applicable law and jurisdiction – there is a question as to which one a court should look to determine a question on situs. The conventional view is that the answer is applicable law, as when considering which country's laws should be used to determine the effect of property transactions, courts have traditionally applied the law of the country where the property is situated (see James Kessler KC, footnote 14, chapter on IHT situs). It is possible for there to be several countries whose courts have jurisdiction in a property dispute, or have jurisdiction 'in principle' to hear a dispute. In contrast, choice of law points towards one jurisdiction, which better aligns with the situs concept (where each asset can have one situs only). On the other hand, that is not to say that decisions on jurisdiction should have no bearing on situs. Most of the cryptoassets cases in England and Wales to date have concerned jurisdiction, but they have also looked to location as the primary (if not only) connecting factor (albeit we appreciate the cases have not considered the situs question substantively). Also, as we see it, court decisions on jurisdiction are often closely concerned with where the things in question are. Thus, we have expressed this statement such that situs rules derive from rules on both jurisdiction and applicable law, notwithstanding that it is to decisions on applicable law that a judge is more likely to look to when determining situs.

look to additional connections, other than location, but (as we say above), the omniterritorial features of cryptoassets make the application of a multifactorial approach hopeless in practice, which is why we advocate a *lex situs* approach.

(b) This rule serves a practical objective. The situs of an asset should match to the law which is most appropriate to resolve a dispute concerning the asset or to the private international law rules which determine which courts should have jurisdiction. Normally, these inquiries lead the court to identify the location from which the asset is controlled. That location is its situs.

(c) On the basis that a cryptoasset is controlled by whoever controls its private key, the location of the person who controls the private key therefore determines the situs of the cryptoasset.

7.4 This conclusion on situs also fits with the general principle, as stated by the editors of *Dicey & Morris* at Rule 136, that

> *'[t]he courts have attempted to keep the idea of control in mind and have laid down the general principle that choses in action are regarded as situate where they are properly recoverable or can be enforced'.*[26]

7.5 Strictly speaking, this refers to choses in action only, and not intangible assets more generally. But, in applying this principle to cryptoassets, we do not regard it as problematic that cryptoassets have been recognised by the courts (and soon – we anticipate – by Parliament) as not being choses in action but a 'third category' of property instead. Based on our understanding of the Property (Digital Assets Etc.) Bill, its purpose is to confirm that cryptoassets can be recognised as property without having to be placed into existing categories of property. This does not mean that features of cryptoassets cannot be analogous to choses in possession or action. Rather, as we understand it, the intention of the Bill is that the jurisprudence of third category things can develop freely and, where appropriate, draw from existing categories of property. Accordingly, we think it is appropriate that the legal treatment of cryptoassets - which, like other intangibles, lack any "real" situs - should draw on existing jurisprudence in relation to intangibles.. We note the Law Commission do not refer explicitly to choses in action in the passage we quote above at 7.2, but rather speak in terms of the 'basic principle' of enforcement and recoverability being applied to third category (omniterritorial) things. Because enforcement and recoverability of cryptoassets depend on factual control, we support the provisional conclusion to link questions of international jurisdiction to the place of control. We believe this approach is an iteration of Rule 136 in Dicey & Morris (i.e. the basic situs rule on choses in action) and accordingly there is strong authority for the Law Commission's provisional conclusion. We have heard one or two commentators question whether there is any case law precedent for determining location with reference to where

[26] *Dicey & Morris* at Rule 136 (16th Edition).

the asset is controlled; however, this rather misses the point, which is that the test should be determined by where the asset can be effectively dealt with, which in the case of cryptoassets requires the court to ascertain the location of practical or effective control (rather than legal control), which points to only one jurisdiction: where the controllers of the private keys reside.

7.6 Based on this, it is natural that *Dicey & Morris* says (albeit tentatively) that the situs of cryptoassets is the location of the person who controls them via control and the ability to actually use their private key[27]. STEP in a 2021 publication reached the same conclusion[28].

7.7 The Signatories also note that recent cases[29] suggest the courts are adopting the residence of controller position. We accept that these cases were made mostly on an ex-parte basis without recourse to the substantive situs issue. However, it appears there is judicial momentum in this direction. This is supported, inter alia, by the weight of publications by *Dicey & Morris* (as above) and STEP[30].

7.8 The Signatories note that there has been debate on the ongoing viability of the 'situs monopoly'[31] in private international law, but for the reasons above we would urge the Law Commission to confirm its provisional conclusion in the final report.

7.9 The only other viable approach to situs, in our view, is to look to the location of the device on which the private key is stored (with a tie-breaker for cases where private keys are split across jurisdictions). One argument for this approach would be that, given the central importance of the private keys in enforceability and recoverability, why not look to the private key itself as opposed to the persons controlling it (which is one layer removed from the "real" point of control)? That said, there is an argument that the residence of the controller has a stronger basis in private international law principles, based on our understanding as expressed at 7.5 that the jurisprudence of cryptoassets can (and probably should) draw upon the law of intangibles, and therefore that we look to the well-established *Dicey* rule 136. That is to say, one can enforce or recover against a private key controller, but not against the private key itself. We note that the courts in

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27 See para.23–050.

28 STEP Guidance Note: Location of Cryptocurrencies – an alternative view, STEP Technical Committee, 3rd September 2021.

29 Justice Falk in Tulip Trading stated that: *'[i]f necessary to my decision I would conclude that TTL has the better of the arguments on this point* [i.e. on the situs of the cryptoassets in question]. *I should add that in reaching that conclusion I have also taken into account the discussion in the Taskforce Statement, and in particular the suggestion at para 99 that the location of control of a digital asset, including by the storage of a private key, may be relevant to determining whether the proprietary aspects of dealings in digital assets are governed by English law.'*

In *Cheong Jun Yoong v Three Arrows Capital Ltd*, the Singaporean High Court used the extract from Falk J's judgment in *Tulip Trading* above as the authority that the residence of the private key controllers is the relevant rule to be applied. *Tai Mo Shan Ltd v Persons Unknown* [2024] EWHC 1514 (Comm) also follows this line of authority, although is very fact specific.

31 In particular Amy Held, 'Does Situs Actually Matter when Ownership to Bitcoin is in Dispute?' 2021 4 Journal of International Banking and Financial Law, pp. 209 – 258.

recent decisions (see footnote 29) are naturally moving towards an approach which looks to the private key controller.

7.10 Whilst the majority of the Signatories favour the residence of the controller approach (over the private key location approach), we believe they are two limbs of the same private key-centric approach. In other words, if we look to factual control in order to determine where one can recover or enforce their property rights, then the approach must usually be determined in some way with reference to the private keys.

8. THE MEANING OF 'CONTROL' IN THE CONTEXT OF SITUS

8.1 If cryptoassets are to be "localised" by reference to practical or effective control, the next question is what constitutes 'practical or effective control'.

8.2 The Signatories' concern is that whilst it is clear what 'practical' means – in our view, it means control over the private keys, hardware security modules, or similar infrastructure to access the asset without recourse to another person – it is less clear what 'effective' means – for example, does it refer to a broader understanding of control? The Signatories are concerned that arguments have been put forward in the present discourse[32] that control can mean something other than practical control: in particular, that it could be understood to mean anyone who has the legal authority to give instructions over cryptoassets to those with practical control, even if they have no practical control or possessory title themselves. We would call the former view the 'narrow view' of control and the latter the 'wide view'.

8.3 For the following reasons, the Signatories' view is that the narrow view is the only one that can have practical application in the context of how cryptoassets work and is hence the correct view.

(a) Control is used in a vast number of different contexts, and its meaning changes depending on what context is relevant.

(b) If the meaning of something is contextually dependent, as control is, its meaning must be determined by what the context requires.

(c) In the present context, where the meaning of who has control determines the situs of cryptoassets, the context indicates only one person should be considered to have control – because the case law says that assets can have only one situs.[33]

(d) The context also requires the meaning of control to help determine the appropriate jurisdiction's courts and laws for a dispute over the property in question (because this is the meaning of situs, as explained).

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[32] Albeit predominantly in non-published form.

[33] *R v Williams* [1942] AC 541.

(e) Accordingly, the correct answer to the meaning of control, insofar as it is relevant to the situs of a cryptoasset, is to determine how a court would enforce an order in respect of a claim in rem concerning the cryptoasset. In other words, against whom would the court make the order for the transfer of the cryptoasset?

8.4 This is the narrow view of control. If the narrow view were not followed and the 'wide view' of control was adopted instead, it could have unintended and undesirable consequences. Take the following anomalies as examples:

(a) It would result in multiple controllers – those who have practical control and those who have legal control – who may be in different jurisdictions. This would be a common problem in practice; and, as explained above, would be inconsistent with the case law that assets can have only one situs.

(b) It could result in the asset being situated where the beneficial owner is resident[34], *not* where it can be enforced, which contravenes the whole premise put forward in the Consultation. Any third party would enforce against those with the power to effect a transaction, not against those with mere legal control or rights. There is no case law precedent that the residence of the beneficial owner should determine situs, whereas an approach based on enforceability and recoverability (which leads to factual control) has the full weight of case law precedent (as manifested in *Dicey* rule 136).

8.5 It would be a very odd outcome, without precedent, for situs to be determined by someone who has legal (but not practical) control.[35] If practical control over cryptoassets means the ability to effect a transaction (by having access to the wallet), then what powers does legal control confer? In our view, it merely confers the power to *direct* the practical controller to take a certain action. This is akin to the powers a power of attorney holds over a bank, but no would ever suggest that the residence of a power of attorney holder should have any impact on the location of the asset.

8.6 We note that, in a section of the Consultation relating to damages in cryptoassets cases, the Law Commission make the following comment which suggests they interpret 'control' in a practical sense:-

> *'"Localising" a cryptotoken for the purposes of a property claim will therefore largely focus on identifying the place of* ***practical*** *control at the time where proceedings are issued so that any remedy that relates to the object can be made effective.'* [Our emphasis]

[34] A position put forward by HMRC in their published guidance (but not suggested by anyone else, to our knowledge).

[35] For example, as we say elsewhere, if a customer of a bank holds a limited power of attorney to make investments decisions and give instructions, this may have tax consequences in the jurisdiction where the power holder is resident for tax purposes, but there has never been any suggestion that this should change the situs of the asset.

8.7 In other sections, the Consultation make further tentative suggestions that control should be understood in the 'practical' sense[36], which we would support.

8.8 We note however that the Law Commission does not assert strong opinions on the matter of 'control', but we would welcome the Law Commission (or a similar panel, as recommended in the Digital Assets: Final Report' of 2023 ("the 2023 Final Report") doing so, given that (as we have seen in *Tai Mo Shan*), this is perhaps the most difficult question that judges will need to consider.

8.9 Finally, we note the Law Commission point to different aspects of control in *Tai Mo Shan* and *Tulip* Trading cases where control referred more to 'generalised control over the software underpinning the network itself, rather than control over any discrete crypto-token'.[37] We do not take this as support for the 'wider view' of control, but rather as references to control over different facets of the cryptoassets/blockchain ecosystem, (and the need for the court to have regard to the particular facts of each case) as opposed to control over private keys.

9. INTERMEDIATED CRYPTOASSETS

9.1 Intermediation of cryptoassets can take a number of forms. For example:

(a) a custody arrangement, where a person stores the private keys for cryptoassets owned by another person; and

(b) a 'centralised exchange', where an entity owns cryptoassets in a pooled omnibus wallet and records – in an internal ledger it maintains - the fractional interests in these cryptoassets owned by and traded between the exchange's users.

9.2 The legal treatment of these arrangements will differ from case to case, depending on the applicable terms, and may purport to be a bailment, trust (bare or substantive), agency agreement, some form of contractual arrangement, or may be silent on the legal arrangement. Generally though, they divide between cases where the customers of the custodian or exchange (as the case may be) have a proprietary interest in the underlying cryptoassets, and cases where they do not - and they instead have a purely contractual chose in action against the custodian/exchange. The Law Commission has commented on these previously – in its the 2024 *Call for evidence: Digital assets and ETDs in private international law: which court, which law?* – where it called the former 'custodial intermediated holdings' and the latter 'non-custodial intermediated holdings'.

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[36] For example, at para 4.220(c) of the Consultation, when commenting on *Tulip Trading*:- '[e]*ven though the claimant company was incorporated in the Seychelles, the company's agent resided in England and would have accessed and controlled the crypto-tokens using his computer in England. These observations were however not part of the ratio of the case.'*

[37] Consultation, para 4.142.

9.3 The situs of non-custodial intermediated holdings is determined by conventional principles (as set out above in *Dicey* Rule 136).

9.4 The situs of custodial intermediated holdings is determined differently. To explain by reference to the two examples above:

(a) The situs of the customer's interest in the cryptoassets held under the custody arrangement is determined by the conclusions in sections 7 and 8. Consequently, the situs is the residence of the custodian; as this is where the cryptoassets are controlled.

(b) The situs of the customers' interests in the cryptoassets owned via the centralised exchange could be determined by a place-of-register rule[38], but this raises the question of where is an online register located – servers and other computer systems may be split across jurisdictions[39]. For consistency reasons, we advocate a place-of-enforceability rule for exchange interests also (with the person against whom one enforcers being the private key controller). If an exchange practically controls the private keys and it is against the exchange that any action would be brought, then the location of the interest would be the residence or place of incorporation of the persons in control of the keys, i.e. the exchange. We do not see any reason for a special or separate rule for such intermediated holdings, and there is some nascent authority for this approach in *Tao Mo Shan.* Given the significance of intermediated holdings (via exchange) in the cryptoassets industry, it would be helpful if the Law Commission confirmed if their proposed approach would extend to intermediated holdings.

10. MULTIPLE POINTS OF CONTROL

10.1 One potential challenge with the *lex situs* approach above to international jurisdiction is the issue of multiple controllers of, for example, the private keys.

10.2 On this, the editors of *Dicey & Morris* say:-

> *'If an encryption key is duplicated, the ''owner'' should generally be understood as the party who in fact exercises control over the cryptocurrency, for example, through effecting a sale to a third party.'*[40]

10.3 There could, however, be multiple persons who exercise equal control over, say, a sale. A solution to this may lie in Andrew Dickinson's suggestion that the location of the cryptoassets should be determined by identifying the place of residence with which the participation in the cryptocurrency system is 'most closely connected'.

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[38] For example *Re The Estate of Bessie Bloom* 2004 BCSC 70.

[39] For example, as is the case with Google.

[40] *Dicey*, para 23–050.

10.4 Similarly, if a private key location argument was put forward (and we appreciate the Law Commission is not doing so), there would be similar private international law based solutions (for example where the majority of copies are located).

10.5 The scenario where multiple jurisdictions are relevant is where the beneficial owner transfers possession or legal title of the cryptoassets to a custodian – as raised at 8.4(a), this is one of the reasons why a 'narrow' view of control should be taken in order to avoid unnecessary complication.

10.6 In short, the Signatories do not believe that problems of multiplicity cannot be overcome by private international law rules. It does however mean that a purely fixed rule may not be viable. Instead, we suggest localisation should be determined by a fixed rule (most likely the residence of the controller) as the *starting point*, with a tie-breaker provision (possibly along the lines of the *Dicey* and/or Professor Andrew Dickinson approaches in 10.2 - 10.3 above) that shall apply only where the fixed rule does not conclusively point to a single jurisdiction. The Signatories believe this is a viable approach that, as discussed at 6.8, fits with the approaches taken in modern private international law.

11. OTHER POINTS

Whilst not the focus of the Signatories' interests, we have no objection to the proposal in the Law Commission to introduce free-standing orders in decentralised contexts. We would suggest any change in the law acknowledges that the enactment is made notwithstanding the absence of a conventional connecting factor to a particular jurisdiction (such as the absence of a recipient being resident or incorporated in the UK), so as not to undermine the general principles of international jurisdiction.

12. ECONOMIC CONSIDERATIONS

12.1 Whilst we appreciate the Law Commission is not concerned with policy, it should be noted that a clear situs recommendation by the Law Commission would be of considerable benefit to the cryptoassets industry in the UK, for example by attracting overseas talent to the UK. Currently, in our experience, important figures in the cryptoassets industry are sometimes put off moving to the UK due to the absence of a clear situs rule. Amidst the uncertainty HMRC has produced its own guidance on situs, which prejudices cryptoassets vis a vis every other asset class (by denying cryptoasset holders the benefits of the Foreign Income and Gains relief regime in most circumstances and giving them immediate inheritance tax exposure).

12.2 We appreciate the Law Commission is concerned only with reaching the most viable position under private international law, but to the extent the Signatories can speak for industry, we believe the provisional conclusion for a *lex situs* rule for international jurisdiction would immeasurably improve the attractiveness of the UK to individuals and businesses (subject to aligning the applicable law position to this).

13. CONCLUDING COMMENTS

13.1 Following the above, we would encourage the Law Commission to conclude that *lex situs* should be used as *the* connecting factor in international jurisdiction, and would encourage it to apply the same principle to applicable law to avoid the problems we outline above.

13.2 If our latter suggestion of alignment is inappropriate for the reasons the Law Commission give, then the common law is left with two competing rules to determine situs, which would create considerable uncertainty. We would therefore welcome a recommendation or guidance from the Law Commission that:-

(a) For courts who have the challenge of ascribing a 'situs' to a cryptoasset (for example in succession or tax disputes), the court could simply look to the location rule proposed by the Law Commission for international jurisdiction, based on controller of the private key, rather than undertaking full private international law analysis as to what is the situs based on questions of applicable law and international jurisdiction. This approach would seek to affirm 'situs' as a separate legal concept in the law of third category property (in the same way that situs is a "real" and separate concept when dealing with choses in possession), rather than a concept which derives from private international law, in order to resolve the challenges highlighted in this response.

(b) Alternatively, if there must be different rules for international jurisdiction and applicable law, then it is the rule for the former (i.e. the *lex situs* rule, based on residence of the controller, as proposed) that ought to be considered the applicable common law 'situs' rule, not the supranational or other approach taken for the purposes of applicable law. As we recognise above, determinations of applicable law are arguably more suitable to answer questions on situs (given that it points to one jurisdiction, rather than multiple). However, we believe it is tenable to align situs to jurisdiction rules, given that of the two inquiries (international jurisdiction and applicable law), the former is more analogous to the question of common law situs, as it is more closely (albeit heuristically) concerned with where the things in question are.

(c) As a last resort (although it would still leave uncertainty when advising our clients on these issues), if the Law Commission is not willing to provide such guidance, we would ask the Law Commission to recommend that, if location is to be one of a number of connecting factors (i.e. in a multilateralist or supranational approach), that it is *the* most important connecting factor. This is a last resort, however, and our preference would be one of the approaches we suggest in (a) or (b) of this paragraph, in order to establish some clarity in this area of law.

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