Law Society of Scotland

Consultation Response

Digital Assets and (Electronic) Trade Documents in Private International Law

September 2025

Introduction

The Law Society of Scotland is the professional body for over 14,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Private International Law Reference Group and Banking, Company & Insolvency Sub-Committee welcomes the opportunity to consider and respond to the Law Commission of England and Wales (**Law Commission**) Consultation on Digital Assets and (Electronic) Trade Documents in Private International Law (**Consultation**).

The views expressed in this paper are in alignment with the consultation response submitted to the Law Commission by Professor Burcu Yüksel Ripley and Dr Alisdair MacPherson of the University of Aberdeen's Law School in August 2025.[1] Both of these authors are valued members of the above noted committees and have commented extensively on the issue of digital assets and electronic trade documents in their academic research.[2]

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[1] See further B Yüksel Ripley and A MacPherson, Law Commission of England and Wales Consultation on Digital Assets and (Electronic) Trade Documents in Private International Law including Section 72 of the Bills of Exchange Act 1882 (August 2025), https://www.abdn.ac.uk/law/research/centres/centre-for-scots-law/law-reform--public-policy-engagement/.

[2] See e.g. B Yüksel Ripley, "Cross-Border Dimension of the UK's Electronic Trade Documents Act (ETDA) 2023 and the Question of the Law Applicable to Electronic Trade Documents", (2025) Aberdeen Law School Blog, https://www.abdn.ac.uk/law/blog/crossborder-dimension-of-the-uks-electronic-trade-documents-act-etda-2023-and-the-question-of-the-law-applicable-to-electronic-trade-documents/.
B Yüksel Ripley, A MacPherson and L Carey, "Digital Assets in Scots Private Law: Innovating for the Future" Edinburgh Law Review, vol. 29, no. 2 (May, 2025) 175, https://www.euppublishing.com/doi/full/10.3366/elr.2025.0955.
B Yüksel Ripley, "The Law Applicable to (Digital) Transfer of Digital Assets: The Transfer of Cryptocurrencies via Blockchains" in M Fogt (ed) *Private International Law in an Era of Change* (Edward Elgar, 2024) 123.
B Yüksel Ripley, "Cryptocurrency Transfers in Distributed Ledger Technology-Based Systems and Their Characterisation in Conflict of Laws" in J Borg-Barthet, K Trimmings, B Yüksel Ripley and P Živković (eds), *From Theory to Practice in Private International Law: Gedächtnisschrift for Professor Jonathan Fitchen* (Oxford, Hart Publishing 2024) 109.
B Yüksel Ripley and A MacPherson, "Digital Assets Law Reform in England and Wales and Prospects for Scotland", (2022) Aberdeen Law School Blog, https://www.abdn.ac.uk/law/blog/digital-assets-law-reform-in-england-and-wales-and-prospects-for-scotland.

General Remarks

We note the Scottish Government's view that *"digital assets are transforming the financial sector and that they present new economic opportunities for Scotland"*.[3] It is expected that a Digital Assets Bill, clarifying the status of digital assets as objects of property in Scots private law, will shortly be introduced to the Scottish Parliament.[4] We note that private international law issues were not included in the Scottish Government's Consultation on the Bill. It is worth mentioning that private international law is part of Scots private law, in terms of s 126(4) of the Scotland Act 1998, and generally is devolved to the Scottish Parliament.

We consider that, given the cross-border dimensions of digital assets and electronic trade documents, it is important that efforts are made to review and reform private international law to strengthen legal certainty and protection for business, consumers and the wider public in Scotland (and beyond). Whilst we are aware that the Law Commission can only make recommendations on legal reform in this area for England and Wales, we believe it is crucial that Scottish legal perspectives are also fed into these discussions. This is particularly so in relation to proposals concerning legislation with a UK-wide effect and application in this area, including the Bills of Exchange Act 1882,[5] the Electronic Trade Documents Act 2023,[6] and the assimilated Rome I Regulation.[7] On this point, we note the importance of possible UK-wide reform concerning digital assets and (electronic) trade documents in private international law relating to legislation with a UK-wide effect and application. This is also important given the proximity of trading relations and wider economic ties that exist between Scotland, England and Wales, and Northern Ireland.

Furthermore, in relation to the proposals concerning the Civil Procedure Rules in England and Wales (which are not applicable to Scottish civil procedure), we anticipate that if they are implemented, they will be influential for legal practice in Scotland too. With this in mind, legislative amendments in Scotland may also be desirable (including with reference to Acts of Sederunt), and so prompt engagement with the Scottish Courts and Tribunals Service and Court of Session would be helpful. We therefore welcome the opportunity to provide input into this Consultation at this early stage.

Consultation Questions

Question 1: We provisionally propose the creation of a new discretionary power of the courts of England and Wales to grant free-standing information orders at the

[3] Pg2 - Digital Assets in Scots Private Law Consultation
[4] See further the Scottish Government consultation, https://consult.gov.scot/financial-services/digital-assets-in-scots-private-law-consultation/. See also the Scottish Government's Programme for Government 2025/26 which includes a commitment that a Digital Assets Bill will form part of the legislative programme, https://www.gov.scot/programme-for-government/.
[5] Bills of Exchange Act 1882.
[6] Electronic Trade Documents Act 2023.
[7] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

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?

Given the challenges with identifying a defendant and related issues concerning service against persons unknown in pseudonymous and decentralised cryptoasset systems, we see some potential value, in limited circumstances, in providing the courts of England and Wales with a new discretionary power to grant free-standing information orders (**Information Order**) to enable a party to bring a claim.

However, we have the following points for consideration in developing this proposal further.

1. The Enforcement of an Information Order Abroad

We have concerns surrounding the practical and legal value in obtaining an Information Order from a court in England and Wales where this needs to be recognised or enforced elsewhere. Without such recognition or enforcement of the Information Order by a foreign court (including that of the Scottish courts and the courts of other UK and dependent territories), we believe it is unlikely that respondents or "information holders" located outside of England and Wales would be compelled to comply with the terms of such orders. As noted in the response submitted by Professor Burcu Yüksel Ripley and Dr Alisdair MacPherson, this issue is likely to be exacerbated if the disclosure of relevant information is in breach of data protection or privacy law in place in that jurisdiction, and/or should the disclosure expose third-parties to a reputational risk in the market.

Therefore, whilst we do not object to the proposal in principle, we think that the legal and practical worth of such orders would be limited elsewhere unless they are recognised or enforced by the relevant foreign courts.

2. The Need for Freezing Orders

We believe that the benefits associated with Information Orders are only likely to be fully realised when combined with a freezing order or injunction (the broad equivalents in Scottish civil procedure are an arrestment on the dependence and an interim interdict, with their respective applicability and effectiveness depending on the circumstances). Such orders would allow for a pursuer to prevent an owner

of a digital asset from disposing or moving it when they become aware of a claim against them, so that the digital asset identified at an early stage of proceedings could ultimately be used to satisfy any future judgment to be obtained.

However, once again, we note the need for enforcing these orders elsewhere by the relevant foreign courts, particularly given the ease and speed of moving digital assets from one jurisdiction to another.

It seems to us that international judicial cooperation would be important in relation to both freezing orders and Information Orders.

3. Differences in the Law of England and Wales and of Scotland

We finally point to differences in the law in obtaining information in Scotland compared with that in England and Wales under the Civil Procedural Rules. For example, in Scotland the rules underpinning information gathering lies predominantly in motions for commission and diligence.

In comparison to England and Wales, we also note the difficulties in bringing cases against persons unknown in Scotland and issues concerning alternative means of service (e.g. via an NFT airdrop) in such cases. In an article co-authored by Professor Burcu Yüksel Ripley and Dr Alisdair MacPherson (with Luci Carey) highlighting this matter,[8] reference is made to the case of *Lord Advocate v Scotsman Publications Ltd*[9] and the views expressed by Robert Howie KC that a defender has to be named, or sufficiently identified, and have an action served upon them, and that this rule cannot be sidestepped for cryptoasset cases unless its application to those cases is removed by legislation or a UK Supreme Court decision. In view of this, we think that such issues will need to be considered separately in Scotland for any possible law reform relating to Scottish civil procedure.[10]

Question 2: We provisionally propose the following as the threshold test that the claimant must be able to meet before the discretion to grant an order under the proposed power may be exercised. All four limbs would have to be satisfied.

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

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[8] See B Yüksel Ripley, A MacPherson and L Carey, "Digital Assets in Scots Private Law: Innovating for the Future" Edinburgh Law Review, vol. 29, no. 2 (May, 2025) 175, https://www.euppublishing.com/doi/full/10.3366/elr.2025.0955.

[9] 1989 SC (HL) 122.

[10] See further B Yüksel Ripley, A MacPherson and L Carey, "Digital Assets in Scots Private Law: Innovating for the Future" Edinburgh Law Review, vol. 29, no. 2 (May, 2025) 175, https://www.euppublishing.com/doi/full/10.3366/elr.2025.0955, pp.207-208 and 210.

2. Necessity: the court must be satisfied that the relief sought must be necessary in order to enable the applicant to bring a claim or seek other legitimate redress for the wrongdoing.
3. Impossibility or unreasonableness: the court must be satisfied that there is no other court in which the claimant could reasonably bring the application for relief.
4. A link to England and Wales: the court must be satisfied that there is a connection to England and Wales, such as the claimant's habitual residence, domicile, or nationality.

Do consultees agree?

We consider that the 'necessity' and 'impossibility or unreasonableness' criterion would benefit from further clarification as to how they would operate in practice in the proposed context.

Question 3: We invite consultees' views on the potential impact of this proposal if it were implemented. For example, would this power be useful for obtaining information that makes it possible to bring proceedings, leading ultimately to remedies such as recovery of crypto-tokens in cases of fraud or hacking? Do consultees consider that claimants would rely on the proposed new power, as well as free-standing freezing orders, rather than relying on a gateway?

We refer to the points we have raised in response to question 1 above.

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

We believe that it is unlikely that exchanges and other third-party respondents located outside of England and Wales will comply with free-standing Information Orders granted by courts in England and Wales unless those orders are recognised or enforced by the relevant foreign courts. As noted above, there are also issues around data protection, client confidentiality and other privacy laws as relevant. Please refer further to the points raised in response to question 1 above.

Question 5: We provisionally propose that:

1. The appropriate court to hear a cross-border property claim concerning a crypto-token is the court of the place where the crypto-token can effectively be dealt with at the relevant point in time.
2. The relevant point in time should be the time when proceedings are issued.

Do consultees agree?

In relation to (1), we agree with the response submitted by Professor Burcu Yüksel Ripley and Dr Alisdair MacPherson that this proposal requires further clarification. We note that the proposed interpretation asserts jurisdiction to the place where a crypto-token can be effectively dealt with at a relevant point in time, and in

determining this, we understand that the concept of control over that asset is intended to be used. However, we believe the proposed interpretation and the meaning of control in this context require further clarity. For example, should control be identified with reference to private keys; or should control be considered as a practical ability to deal with digital assets, or the ability to do so in a legally permissible way?

In relation to part (2), we agree that the logical relevant point in time would be when proceedings are issued. We believe this would provide certainty to the parties, particularly given the ease with which a digital asset can be moved to another jurisdiction.

Question 6: We invite consultees' views on whether there is a need for a new gateway/ground of jurisdiction explicitly providing that the courts of England and Wales have jurisdiction when a crypto-token can be controlled from within the jurisdiction at the time when proceedings are issued.

We have no particular comments to make in response to this question, but in general it is important to ensure legal certainty concerning the determination of jurisdiction.

Question 7: We provisionally propose that:

1. Where it is necessary or desirable to "localise" loss for the purposes of the locus damni rule by reference to the victim, the damage is sustained where the victim physically was present at the time the damage occurred.
2. Where damage consists of being denied access to an online account that, in principle, could previously have been accessed from anywhere in the world and if no real reason can be given for saying the damage "occurred" in one location over the others, the defendant should be sued in their home court, where this is possible.

Do consultees agree?

We do not agree with these proposals.

We agree with the response submitted by Professor Burcu Yüksel Ripley and Dr Alisdair MacPherson that domicile or habitual residence are more appropriate tests to use for this purpose. Domicile and habitual residence are well-established concepts in law. The victim's physical location at the time the damage occurred would introduce difficulties where it is transient or coincidental, for example, when the victim is travelling abroad on holiday. We believe that these types of situations will ultimately lead to legal uncertainty and therefore the test based on physical location of the victim should be avoided.

For the second proposal, as noted in the response submitted by Professor Burcu Yüksel Ripley and Dr Alisdair MacPherson, if the victim ordinarily accesses their account in England and Wales, we do not think that there are any strong reasons as to why the victim should not be able to bring a claim there as the place where the

damage is sustained but instead should sue the defendant in the defendant's home court.

Question 8: We provisionally propose that, in cases where the level of decentralisation is such that omniterritoriality poses a true challenge to the premise of the multilateralist approach, seeking to identify the one "applicable law" to resolve the dispute would not result in a just disposal of the proceedings and therefore an alternative approach is required.

Do consultees agree?

We find this proposal confusing. We are, in principle, open to alternative approaches which can provide novel and satisfactory solutions to the issues faced in this area, including the solutions going beyond the traditional private international law thinking or solutions based on substantive law. However, this depends on what the actual solution is, how it would be formed and created, and whether it would be operable in practice in this context.

Question 9: We provisionally propose that, where the level of decentralisation is such that the multilateralist approach would not result in the just disposal of proceedings, the courts of England and Wales should consider the alternative method of the supranational approach to resolving the conflicts that may exist between different private law systems.

Under this provisional proposal:

1. The premise of the supranational approach in these cases should be that the law of no country would be appropriate to apply to resolve the issue in dispute, and the law of every country would be appropriate to apply to resolve the issue in dispute.
2. The overall objective of the courts in these cases should be the just disposal of the proceedings with an omniterritorial element.
3. To achieve the just disposal of proceedings, the courts should take into account a wide range of factors. In particular, this would include considering the legitimate expectations of the parties which, in these circumstances, are likely to consider elements of the basis on which the participants have interacted with the relevant system, such as the terms of the protocol.
4. The outcomes of the case will remain subject to the public policy and overriding mandatory rules of England and Wales.

Do consultees agree?

Although we are open to novel approaches in the area, we do not agree with this proposal.

Whilst we acknowledge that many of the issues identified in this Consultation are difficult to address and that solutions to these may require new approaches or interpretations, we have concerns as to how this specific proposal would be achieved and operate in practice.

Our concern centres on the method by which a set of (supranational) rules would be established and legal uncertainty around this. We note from the Consultation that the proposal is for this to be developed through judicial precedent in the courts of England and Wales. However, such an approach would be heavily reliant on a large volume of cases making their way through the court system, each of which would also need to raise a novel point of law. We believe that it would take many years for a sufficient number of cases to materialise. What is proposed is therefore not very helpful for legal certainty as no one would be able to know what the applicable law is until a court in England and Wales determines that point. This uncertainty will not provide trust and confidence to the markets.

The proposal is also too open-ended. The 'just disposal of the proceedings' test does not help much given that there will be divergent views as to what that is. The proposal could also bring procedural difficulties, for example in relation to expert evidence on foreign law. In addition, it is unclear to us what the proposal tries to achieve between national laws. We understand that the proposal aims to offer a substantive law solution. Whilst we commend the Law Commission's attempt to develop alternative solutions, including through a new *"ius commune"* proposal, we consider that this could only work once the main jurisdictions agree what this is. However, we note that substantive law is absent in this area in most legal systems. We therefore consider that the proposal is not sufficiently cognisant of this reality nor granular enough.

With the above in mind, we believe that international fora are more suitable to develop supranational solutions, compared to a single jurisdiction. We believe that an emphasis should be placed on international co-operation between countries. We also agree with Professor Burcu Yüksel Ripley and Dr Alisdair MacPherson's support for the development of widely accepted and internationally recognised conflict of law rules alongside the value they attach to the work of international organisations such as HCCH (Hague Conference on Private International Law), UNIDROIT (International Institute for the Unification of Private Law) and UNCITRAL (United Nations Commission on International Trade Law). We also note that an emphasis is being placed on party autonomy in the area, as seen for example in Principle 5 of the UNIDROIT Principles on Digital Assets and Private Law, in an attempt to enhance legal certainty and predictability in digital assets transactions.

Question 10: We provisionally propose that it would be premature at this point to propose statutory reform on the question of resolving a conflict of laws in the context of omniterritorial phenomena. We also provisionally propose that the approach might not necessarily be a good candidate for a statutory rule.

Do consultees agree?

We have no particular comments to make on this question, but in general it is important to ensure legal certainty concerning the determination of the applicable law issues.

Question 11: We invite consultees' views about the potential impact of this proposal if it were implemented. Do consultees consider that this could avoid protracted disputes about applicable law, and lead to more efficient resolution of disputes? What do consultees consider the costs or risks of such an approach would be?

We are concerned that this proposal, if implemented in its current form, would bring legal uncertainty to digital asset transactions.

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

In Scotland, we anticipate that it could take a significant amount of time for relevant cases to come before the courts. However, as adoption of digital assets increases, more cases might appear.

However, we also note the difficulties in bringing cases against persons unknown in the Scottish courts, as detailed above in our response to question 1. We see this as posing a significant obstacle in bringing digital asset related matters before the courts in Scotland where the parties are unknown.

Question 13: We provisionally propose that section 72(2) should be amended to make it clearer that it applies to all the issues that fall under the "wide" view of what section 72(2) currently encompasses. This would mean that the amended section 72(2) would apply to the law governing contractual obligations (understood in the ordinary modern sense of the substantive rights and obligations of the parties) arising from a bill of exchange and is not limited to "interpretation" in a narrow sense.

Do consultees agree?

We, in principle, agree with this proposal.

Question 14: We provisionally propose that the default law applicable to contractual obligations arising from a bill of exchange should be the law chosen by the party incurring the obligation, as indicated on the bill alongside their signature.

Do consultees agree?

We, in principle, support the provision of party autonomy but do not agree with the proposed requirement that the chosen law is to be indicated by the party incurring the obligation alongside their signature on the bill.

We agree with the proposal made by Professor Burcu Yüksel Ripley on this point that if there is a choice of law clause on the face of a bill of exchange (or promissory note), this choice of law should, in principle, be binding on all parties

to the bill (or note), and the chosen law should apply to contractual obligations arising from the bill (or note).[11]

Question 15: We provisionally propose that, where no choice of law is made on the face of the bill, the acceptor's liability arising from their contract of acceptance should be the law of the place where the instrument is payable, as interpreted consistently with the place of "proper presentment" under section 45 of the Bills of Exchange Act 1882:

1. The law of the place where the instrument is payable, as indicated on the face of the bill.
2. Where no place of payment is specified, but the address of the drawee/acceptor is given in the bill, the law of the place of the address.
3. Where no place of payment is specified and no address given, the law of the place where the drawee/acceptor has their habitual residence.

Do consultees agree?

We, in principle, agree with this proposal.

Question 16: We provisionally propose that, in the absence of a valid choice by a person incurring secondary liability on the bill, the law applicable to that person's liability on the bill should be the law of the place where that person has their habitual residence.

Do consultees agree?

We, in principle, agree with this proposal.

Question 17: We provisionally propose that no "escape clause" is necessary or desirable. The framework we have provisionally proposed gives sufficient scope for parties to select the law that is to apply to their contractual obligations, and that it would be rare for a party not to indicate a choice of law. Even in the absence of a choice, the framework we have proposed gives a clear indication of the applicable law that accords with commercial realities of the transactions and expectations of the parties.

Do consultees agree?

We do not agree with this proposal.

We agree with the proposal made by Professor Burcu Yüksel Ripley on this point that an escape clause would be helpful to have in the proposed framework and

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

resort to it could be justified for linked contracts as acknowledged in Recital 20 of the Rome I Regulation.

Question 18: We provisionally propose that the formal validity of a contract on a bill of exchange should be upheld if it complies with one of:

1. The law governing the substance of the relevant contract.
2. The law governing the substance of the drawer's contract.
3. The law governing the substance of the acceptor's contract.
4. The law of the place where the instrument is payable.

Do consultees agree?

We, in principle, agree with this proposal.

Question 19: We provisionally propose that section 72(3) should be reformed as follows:

1. The duties of the holder with respect to presentment for acceptance should be governed by the law of the place where the drawee has their habitual residence.
2. The necessity for or sufficiency of a protest or notice upon dishonour by non-acceptance should be governed by the law of the place where the drawee has their habitual residence.
3. The duties of the holder with respect to presentment for payment should be governed by the law of the place where the bill is payable.
4. The necessity for or sufficiency of a protest or notice upon dishonour by non-payment should be governed by the law of the place where the bill is payable.

Do consultees agree?

We, in principle, agree with this proposal.

For further information, please contact:

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