CLLS FINANCIAL LAW COMMITTEE

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Evidence submitted via:https://committees.parliament.uk/submission/#/evidence/3480/preamble

DIGITAL ASSETS: Written evidence to the House of Lords Special Public Bill Committee on the Property (Digital Assets etc) Bill [HL]

The City of London Law Society (the "**CLLS**") represents approximately 17,000 City solicitors through individual and corporate membership including some of the largest international law firms in the world. Its specialist Committees comprise leading solicitors in their respective fields. These solicitors and their law firms operating in the City of London act for UK and international businesses, financial institutions and regulatory and governmental bodies in relation to major transactions and disputes, both domestic and international. This response to the Call for Evidence published by the House of Lords Special Public Bill Committee on the Property (Digital Assets etc) Bill (the "**Bill**") has been prepared by the Financial Law Committee ("**FLC**") of the CLLS, whose members specialise in financing transactions involving obligors incorporated in multiple jurisdictions, creditors incorporated or doing business in multiple jurisdictions, and assets located, or deemed by principles of private international law to be located, in multiple jurisdictions. Members of the FLC also act for clearing and settlement systems and exchanges, including exchanges which facilitate the trading of digital assets, and for financial institutions which provide custodial services for digital assets. Concepts of English law and other laws relating to digital assets, and the development of these concepts, are increasingly critical to the transactions and advisory matters on which members of the FLC advise.

Full details of the members of the FLC appear on the CLLS website. The partners of fourteen law firms are members of the FLC.

The FLC responded in March 2024 to the Consultation issued by the Law Commission with respect to the Bill, noting in this response (the "**Response**") a number of concerns regarding the draft Bill annexed to the Consultation paper. We understand that the Special Public Bill Committee has seen the Response. As the Bill published by the Government in September 2024 is in the same form as the draft Bill annexed to the Consultation paper, the FLC reiterates the concerns noted in the Response, and notes, further, that there have been developments in other common law jurisdictions which support the comments made in the Response, that the development of the common law in this area is best left to the judiciary, and that the Bill, as currently worded, may limit the development of English common law by unnecessarily limiting the concept of a chose, or thing, in action in English law. The responses to the questions set out below are, accordingly, supplemental to the Response.

1. Please summarise your view on the Bill in fewer than 300 words.

The Bill is intended to be facilitative; we think it would fail in that endeavour if, as a consequence of the Bill, English common law were to diverge from the development of the common law in this area in other common law jurisdictions, and if it were to result in the need for further developments, and perhaps statutory intervention, being required in order for the English legal system to establish the concepts necessary to support a third type of personal property right. Those developments

would take time, create uncertainty while in the course of development, and would have unquantifiable costs.

Judges in common law jurisdictions including Australia, New Zealand and Singapore[1] have not limited the concept of a chose in action so as to exclude digital assets. The Supreme Court and, before that, the House of Lords have noted over the years that consistency in the development of the common law should be encouraged across all the common law jurisdictions. The Bill has the potential to undermine this approach.

The FLC noted in the evidence it gave in January 2023 to the Special Public Bill Committee established to consider the Electronic Trade Documents Bill that this bill did not adequately address conflict of laws issues that may arise in the context of electronic trade documents. In October 2024, the Law Commission published FAQs[2] on the Electronic Trade Documents Act 2023 (the "**ETDA 2023**"), noting in the introduction to the FAQs that they had been published because "*Following the publication of our Call for Evidence, we became aware that there are significant concerns among stakeholders on how the ETDA 2023 operates in the cross-border legal context*". Albeit a different context[3], we are concerned that there would be unintended and unquantifiable consequences in the private international law treatment of digital assets if English law recognised them as a third type of personal property, but other jurisdictions, including other common law jurisdictions, did not. The Law Commission has announced its intention to consult on conflict of law issues; in our view, it would be better for the Bill to not proceed until a full examination of the development of the law in other common law jurisdictions, and the conflicts of law analysis, have been completed.[4]

2. Do you think that the Bill, in its current form, is necessary and effective?

We reiterate the concerns we raised in the Response.

3. Would the Bill have any negative or unexpected consequences?

We are concerned that the Bill could have the following negative or unexpected consequences:

- the divergence of English common law of personal property rights from the corresponding regime in other common law jurisdictions;

- the Bill could result in uncertainty around the legal principles relevant to the custody of digital assets determined to be a third type of personal property, and the taking of security over digital assets determined to be a third type of personal property. The current common law concepts applicable to choses in action would apply to digital assets, if determined to be choses in action (i.e., avoiding the "narrow" interpretation), but we are concerned that it

[1] Some of the judgments were issued after the Law Commission's Consultation on the Bill. See, for example the decision of the Supreme Court of Victoria in Re. Blockchain Tech Pty. Ltd. [2024] VSC 690 (12 November 2024), in particular paragraphs 358 to 394 of the judgment Re Blockchain Tech Pty Ltd [2024] VSC 690 (12 November 2024)

[2] https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2024/10/FAQs-ETDs-in-PIL.pdf

[3] Most trade documents covered by the ETDA 2023 are "documentary intangibles" for the purposes of English law and, therefore, would be subject to a different legal treatment from most types of choses in action.

[4] We note also the concerns raised in respect of the Bill by Jackman J. of the Federal Court of Australia in the attached article: What Has Taxonomy Ever Done for Us? UNCITRAL's 2023 "Taxonomy of Legal Issues Related to the Digital Economy"

is not clear that they would apply easily (and if so, how) to a third type of digital asset which borrows from the concept of possession in English common law. For example, the current approach of treating fungible choses in action held in omnibus client accounts subject to an equitable tenancy in common may not (on current case law) work if it is determined that a digital asset is separately identifiable from any other digital asset in the same "wallet" or on the same blockchain;

- the resultant legal uncertainty, particularly if it does not exist in other common law jurisdictions (including Ireland), could result in parties choosing to transact in digital assets and/or litigate claims with respect to digital assets in other jurisdictions.

4. How could the Bill be improved? How should it be amended to achieve this?

If the Bill proceeds, we suggest that it is amended so as to read in the form set out in the Annex to the Response. This amendment would have the advantage of not inhibiting the English courts from treating digital assets as choses in action rather than falling within a third type of personal property right.

5. Should the Bill have retroactive effect?

No; that would create significant legal uncertainty.

6. What implications could the Bill have for the development of this area of common law, both in England and Wales and in other legal jurisdictions?

There is no question that the English courts can, and have, recognised digital assets as types of personal property rights; the issue comes down, therefore, to whether English common law in this area develops, or should develop, in a different direction from the law in other common law jurisdictions. The personal property law in other common law jurisdictions is already being developed by judges who are comfortable that the concept of a chose in action in the common law is not limited so as to exclude digital assets from being treated as such, or to preclude them from being treated as fungible where appropriate. It is always easier to develop and encourage the evolution of existing concepts of law than to create new legal concepts; that is one of the beauties of the common law system. The current direction of travel is that other common law jurisdictions do not see a need to create a third type of personal property right in order to accommodate digital assets; that being the case, the English legal system may be considered to be less effective if it takes a different approach.

Addendum

While the responses set out above reflect the views of the majority of the members of the Committee, four members wish to note in this submission that their firms take a contrary view and are supportive of the Bill. Those firms are Clifford Chance LLP, Linklaters LLP, Norton Rose Fulbright LLP and Simmons & Simmons LLP. That contrary view may summarised as follows:

- the Bill will not itself cause England and Wales to be an outliner among common law jurisdictions. Whether or not the Bill is passed, there is authority to the effect that English law already recognises more than two categories of property and, to that extent, it may already be an outlier. The Bill may also inspire other jurisdictions to follow the lead of English law. In any event, while consistency with other common law jurisdictions is desirable where possible, that should not be the prevailing consideration determining the evolution of English law.

- the Bill will enable the common law to develop in a principled and coherent way. It will do this by removing residual uncertainty as to whether English law recognises a category of property

other than things in possession and things in action. This is needed because certain digital assets (and other intangible things) exhibit features that distinguish them from both existing categories of personal property. Classifying such assets as things in action risks undermining the coherence of the category of things in action and/or constraining the courts from developing rules that are appropriate for the asset class.

- the Bill will not introduce any new areas of uncertainty. This is because the courts will need to grapple with the distinguishing features of digital assets regardless of whether the Bill is passed (and they are already doing so). It does not follow that existing rules for things in action automatically apply to all intangible things by reason of their being categorised as such. Some rules that have historically applied to things in action are not applicable or appropriate for other intangible things. The Bill will not undermine the ability for English law to uphold the commercial intentions of parties in the digital assets markets, including with regard to security arrangements, custody or trusts.

- the drafting of the Bill avoids constraining the courts or introducing boundary issues. Whether or a not a thing amounts to property, or what type of property it amounts to, are complex matters, ill-suited to definition in statute. The Bill removes the residual uncertainty referred to above in a highly targeted way, without unnecessarily constraining the courts. This will give the Bill longevity.