
UK Jurisdiction Taskforce of the LawtechUK Delivery Panel

Public consultation

Digital Assets and English Insolvency Law

UK Jurisdiction Taskforce

17 October 2023

Foreword

by Sir Geoffrey Vos, Master of the Rolls

In November 2018, the UK Jurisdiction Taskforce published its **Legal Statement on the Status of Cryptoassets and Smart Contracts**. The Legal Statement expressed the view that cryptoassets were property and smart contracts were contracts under English law, and has been well received in many jurisdictions.

In April 2021, the UK Jurisdiction Taskforce published its **Digital Dispute Resolution Rules** to be incorporated into on-chain digital relationships and smart contracts. They allow for arbitral or expert dispute resolution in very short periods, for arbitrators to implement decisions directly on-chain using a private key, and for optional anonymity of the parties.

In February 2023, the UK Jurisdiction Taskforce published its **Legal Statement on the issuance and transfer of digital securities under English private law**. This Legal Statement addressed the question of whether equity, debt or other securities can be validly issued and transferred under English law using blockchain systems.

The UK Jurisdiction Taskforce has now turned its attention to the way in which English insolvency law applies to digital assets.¹ We are asking experts and members of the public to provide their input into the questions that the proposed **Legal Statement on Digital Assets and English Insolvency Law** can most usefully answer.

We will be very grateful to receive responses from as many people as possible in the legal, digital and insolvency sectors. The UKJT intends to host a public event to discuss the consultation in November 2023. It will formally close the consultation on Monday 4 December.

It is intended that an expert panel within the UKJT will prepare the Legal Statement for publication thereafter.

The UKJT comprises:-

Sir Geoffrey Vos (Chancellor of the High Court and Chair of the UKJT)

Professor Sarah Green (Law Commissioner for commercial and common law, as an observer)

Richard Hay (Linklaters LLP)

Lawrence Akka KC (Twenty Essex)

David Quest KC (3 Verulam Buildings)

Peter Hunn (Accord Project)

Nicholas Smith (Crypto Policy, Financial Conduct Authority as an observer)

Mary Kyle (City of London Corporation)

Sir Richard Snowden (Lord Justice of Appeal)

Sir Antony Zacaroli (Justice of the High Court)

¹ For present purposes, by 'digital assets' we mean a digital asset, such as a crypto-token or an NFT, that is (under English private law) capable of being the object of personal property rights, but that is neither a thing in action nor a thing in possession. In that sense, we attribute to the term a broadly equivalent meaning to that given to "*digital objects*" in the Law Commissions Final report on Digital Assets (Law Com No 412)

Consultation on the Digital Assets and English² Insolvency Law

1 The UK Jurisdiction Taskforce

The UK Jurisdiction Taskforce (UKJT) is a part of LawtechUK, an industry-led group tasked with supporting the digital transformation of the UK legal services sector and with positioning English law as a law of choice for new technologies.

The UKJT brings together the Judiciary, the Law Commission of England and Wales, the regulators and technology and legal professionals within its membership. The remit of the UKJT is to provide legal certainty for new technologies under English law.

In November 2019, the UKJT published an authoritative legal statement on the legal status of cryptoassets and smart contracts.³ The legal statement was drafted by a panel of practising lawyers (Lawrence Akka KC, David Quest KC, Matthew Lavy and Sam Goodman) and has since received judicial approval in various jurisdictions. It has been instrumental in providing legal certainty that certain cryptoassets are to be regarded as property under English law and that English law will support legally binding smart contracts. The legal statement was preceded by a public consultation process, which informed the list of questions to be addressed.

The UKJT has also undertaken other work in this area, including publishing a second legal statement (this time addressing issuance and transfer of digital securities under English private law)⁴, publishing a set of digital dispute resolution rules (which seeks to enable the rapid resolution of blockchain and crypto legal disputes)⁵ and publishing a report on Smarter Contracts.⁶

2 Background to this consultation

Digital transformation has become a top priority for many institutions operating in the financial markets. It is widely recognised that blockchain, DLT and associated technologies offer significant potential in this regard. Institutional investors have increasingly embraced digital assets in their portfolios. The UK, including the UK legal services sector, would benefit considerably if English law and forum were to be a leading choice of law/forum for such arrangements.

At the same time, the past 18 months have seen increased turbulence in the digital asset markets. Recent high-profile collapses of digital asset exchanges, platforms and funds⁷ have highlighted the importance of robust insolvency processes to ensure fair and predictable outcomes in respect of this form of investment.

² In this consultation paper, references to “English law” should be read as references to the law of England and Wales.

³ Available at <<https://lawtechuk.io/explore/cryptoasset-and-smart-contract-statement>>

⁴ Available at <<https://ukjt.lawtechuk.io/>>

⁵ Available at <<https://resources.lawtechuk.io/files/2.%20UKJT%20Digital%20Disupte%20Rules.pdf>>

⁶ Available at <<https://lawtechuk.io/programmes/smarter-contracts>>

⁷ See e.g. Mt. Gox, FTX, Zipmex, Terra, Celsius, Voyager Digital and Three Arrows Capital

Including in light of the collapses referenced above, the application to digital assets of the insolvency regimes of various other jurisdictions has now been tested in the courts of those jurisdictions.

The English courts have thus far not had occasion to address the application of various important English insolvency law concepts to digital assets. English insolvency law is nevertheless on any view capable of coherent application to an extremely broad range of assets.

In order to provide clarity to the market as to the application of English insolvency law to digital assets, the UKJT accordingly sees merit in delivering a further legal statement, (a “**Legal Statement on Digital Assets and English Insolvency Law**”).

The aim of this consultation paper is to ensure that the issues addressed in the Legal Statement on Digital Assets and English Insolvency Law are those about which key stakeholders are most concerned.

3 Scope of the Legal Statement on Digital Assets and English Insolvency Law

Following initial exploratory discussions with legal and insolvency practitioners, the UKJT understands that such practitioners would welcome guidance and certainty as to how various aspects of the English insolvency law regime apply to issues involving digital assets.

Further, the UKJT has been advised that greater certainty, in that respect, would potentially assist investors when choosing English law as the governing law for e.g. debt instruments, or selecting England as a forum for pre-insolvency restructuring or a formal insolvency (and, if a formal insolvency, selecting which type of procedure to use).

The purpose of the proposed Legal Statement is accordingly to offer such guidance and promote certainty, by seeking to answer questions relating to the application of English insolvency law principles to digital assets. A draft set of such questions is set out in the Annex to this consultation paper. The purpose of this consultation is to seek input from key stakeholders on this list of questions.

4 Consultation questions

Your input is sought in relation to the following question:

Are there any material issues of concern to stakeholders in relation to the application of English insolvency law to digital assets, other than those set out in the Annex to this consultation paper?

In your response, you are also invited to comment on the questions in the Annex to this consultation paper (for example, are any of these questions not material, or could they be framed

differently). There is no need to provide an answer to those questions themselves (although you may of course do so if you wish).

5 Consultation process

This consultation will remain open for responses until Monday 4 December. Once this consultation has closed and the results have been considered, it is intended that the Legal Statement on Digital Assets and Insolvency Law will be published in early 2024. It will then be possible to see whether any further steps are necessary or appropriate.

Written responses to the consultation questions should be provided by email to UKJT@justice.gov.uk

The UKJT will also be hosting a virtual consultation event in order to receive feedback on the consultation questions. This will take place on Tuesday 28 November. The UKJT will provide further detail in due course.

Annex

Questions to be addressed in the Legal Statement on Digital Assets and Insolvency

Each of the following questions is posed as a matter of English law:

- 1** Are digital assets “property” forming part of the estate of the insolvent company or individual for the purposes of the English insolvency legislation?
- 2** For international allocation of insolvency jurisdiction based upon location of centre of main interests (COMI), what rules apply to determine where digital assets are located and/or administered?
- 3** Is a claim to digital assets held by a company or bankrupt capable of being a claim to recover property? If so, what factors determine whether it is to be so characterised.
- 4** If a claim to digital assets held by a company or bankrupt is a monetary claim, is it a claim for a liquidated sum so as to be capable of founding a statutory demand/winding up petition? Is it a claim in a “foreign currency” such that it should be converted to the currency of the insolvency on day one?
- 5** Are office-holders subject, generally, to any obligations in relation to holding/realisation of volatile digital assets in an English insolvency?
- 6** Can you perceive any difficulties in the application of the English insolvency legislation relating to avoidance of prior transactions to pre-insolvency dealings with digital assets? If so, what are they?
- 7** If a claim to digital assets held by a custodian company can be a proprietary claim, what mechanisms are available to deal with mixing of the property of various clients and/or a shortfall in an insolvency of an exchange or custodian?
- 8** What interlocutory, investigatory or enforcement procedures are available to insolvency office-holders under English law, in order to get in digital assets or their monetary equivalent for the benefit of the insolvent estate?