

Status of cryptoassets and smart contracts under English law

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On 18 November 2019, the UK Jurisdiction Taskforce¹ published an authoritative statement on the legal status of cryptoassets and smart contracts under English law. This is a leading development for the legal, business and technological communities, as it makes the UK the first jurisdiction to clarify that cryptoassets can be treated as property and that smart contracts are capable of being enforced in the UK.

Summary

The rise in the adoption of cryptocurrencies, digital assets and smart contracts has created a need to understand how related transactions should be defined and treated as a matter of law. In order to provide greater legal certainty in this growth area, the UK Jurisdiction Taskforce (UKJT), composed of leading lawyers, industry experts and members of the government and the judiciary, has produced a legal statement which aims to answer the key questions facing the main stakeholders involved in cryptoassets. Taskforce Chair Sir Geoffrey Vos, Chancellor of the High Court, described this statement as “*a watershed for English law and the UK’s jurisdictions. Our statement on the legal status of cryptoassets and smart contracts is something that no other jurisdiction has attempted.*”

In brief, the UKJT has concluded that:

- Cryptoassets (including cryptocurrencies) should in principle be treated as property; and
- Smart contracts (defined primarily by their “automaticity”) should be capable of satisfying the requirements for a binding contract in English law, and are thus enforceable by the courts.

As noted by the UKJT, the English common law system is particularly well suited to deal with developing scenarios and technologies given its inherent flexibility. The statement is persuasive, but the English courts can be expected to develop the law with these findings in mind.

Cryptoassets can be treated as property

The UKJT determined that cryptoassets have all the legal indicia of property necessary to constitute being “property” under English law.² It concluded that the novel and unique features of cryptoassets do not disqualify them from being treated as property and, accordingly, cryptoassets should in principle be treated as property by the courts applying English law.

¹ The UKJT is one of the six taskforces of the LawTech Delivery Panel of the Law Society.

² The UKJT identified the following indicia of property in its legal statement: (i) definable; (ii) identifiable by third parties; (iii) capable in its nature of assumption by third parties; (iv) have some degree of permanence or stability; (v) certainty; (vi) exclusivity; (viii) control; and (viii) assignability.

This view sits comfortably with a recent ruling of the Singapore International Commercial Court in *B2C2 v Quoine*, which was one of the first instances where a court applied contractual principles and trust law to a case involving cryptocurrency trading (see update [here](#)).

The characterisation of cryptoassets as property is of importance because proprietary rights, in contrast to personal rights, are recognised against the whole world. These rights are of particular significance in an insolvency, where they generally have priority over claims by creditors, and when seeking to recover something that has been lost, stolen or unlawfully taken (i.e. in cases of fraud and theft). Another important implication is that certain types of security (mortgages and equitable charges) can be created over cryptoassets, making them a useful asset for companies/individuals seeking to raise capital.

However, despite being defined as property, the UKJT also concluded that cryptoassets are not “things in possession” as due to their virtual and intangible nature they are not capable of being possessed. This means that cryptoassets:

- do not constitute “goods” for the purposes of the Sale of Goods Act 1979;
- cannot be the object of a bailment as this inherently requires the transfer of possession; and
- cannot have certain types of security granted over them (e.g. pledges and liens).

The UKJT also touched on the interesting and complex question of how a court would determine whether English law governs the proprietary aspects of dealings in cryptoassets. It reached no conclusion on this but observed that this issue would be best resolved by legislation, together with international cooperation. The UKJT highlighted some factors that may be relevant when assessing this question, which will likely provide helpful guidance to the courts.³

Smart contracts are enforceable

The UKJT’s second key conclusion is that smart contracts are capable of satisfying the requirements for a binding contract under English law and are thus enforceable by the courts. A smart contract consists of self-executing electronic instructions drafted in electronic code, using blockchain technology as a platform. While the UKJT did not establish a precise definition of a smart contract, it noted that the defining feature was the contract’s automaticity, *i.e.*, that a smart contract is performed (at least in part) automatically and without the need for human intervention. This characteristic, according to the UKJT, is not a good reason for treating smart contracts differently to conventional contracts.

In its statement, the UKJT noted that English law does not normally require contracts to be in any specific form and that contract law is concerned with the enforcement of promises. Consequently, so long as the defining features are present (offer, acceptance, the intention to be legally bound and consideration) the rules of contract law should equally apply to smart contracts.

The UKJT also observed that the role of contractual interpretation for smart contracts written wholly in computer code will be limited as the language (in this case code) typically will be clear and unambiguous, although issues may arise where a program is ill-defined. A further welcome clarification by the UKJT was its view that the statutory requirements for a signature on a contract can be met by techniques such as private key encryption.

Comment

The UK is the first jurisdiction to produce an authoritative statement on these issues. While these findings have no binding legal force and have yet to be tested by the English courts, they are likely to be treated as persuasive authority, particularly when the courts have yet to consider these issues substantively. The UKJT’s legal statement should also provide comfort to stakeholders using cryptoassets and smart contracts and may well lead to an increase in their use.

³ The factors are: (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); and (d) whether the law applicable to the relevant transfer (perhaps by reason of the parties’ choice) is English law.

However, it is not likely to be the last word on the subject and there are a number of complex legal questions (for example in matters concerning data protection, intellectual property, taxation, consumer protection and regulatory capital), which will require judicial scrutiny and development.⁴

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⁴ Notably, the High Court recently granted a freezing order over bitcoin and ethereum held by a cryptocurrency trading company (*Vorotyntseva v Money-4 Ltd (T/A Nebus.com) and others* [2018] EWHC 2596 (Ch)). In the judgment, there was no suggestion from the court that a cryptocurrency could not be a form of property.