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DO WE NOW HAVE CRYPTO CERTAINTY UNDER ENGLISH LAW?

Cryptoassets are capable of being property which can be owned and smart contracts can be legally enforceable, says a Legal Statement published by the UK Jurisdiction Taskforce of the LawTech Delivery Panel (UKJT) in November. While the Legal Statement is not binding, it will give market participants greater certainty around crypto transactions.

The Legal Statement, which covers distributed ledger technology (DLT), cryptoassets and smart contracts, was drafted by senior barristers following a public consultation issued by the UKJT in May 2019.

The Legal Statement confirms our view expressed [earlier this year](#) that cryptoassets are capable of being owned and transferred as property under English law, reflecting that existing cryptoassets (for example Bitcoin) are already universally dealt with in this way – i.e., there is not, and should not be, any such thing as a “law of cryptoassets.” The Legal Statement also confirms that smart contracts are capable of constituting binding legal contracts.

Cryptoasset characterisation

A cryptoasset or crypto “token” is simply a tool which is used to effect a transaction. The role of the law is to decide:

- (1) Whether or not to give effect to that transaction; and
- (2) Whether the transaction has been entered into in accordance with the laws which apply to a transaction of that type.

As regards (1), the law should approach any issue involving cryptoassets or “tokens” by asking three simple questions:

- What was the token designed to do?
- What did the participants in the transaction concerned believe that they were doing?
- Would that assessment have been shared by people generally?

If the answers to all of these questions are clear, then the law should strive to deliver the intended outcome of the transaction.

As regards (2), the primary legal task is to characterise the underlying transaction. For example, if the offer of a token constitutes the offer of an investment, then the offer should be subject to ordinary laws and regulation applying to the offer of investments. What is important here is not whether the underlying transaction is effected using a token or not, but the legal nature of the underlying transaction.

Enforceable smart contracts

The Legal Statement confirms that a smart contract is capable of satisfying the conditions for an enforceable contract under English law (“that two or more parties have reached an agreement, intend to create a legal relationship by doing so, and have each given something of benefit”). Whether these conditions have been satisfied or not will depend on an analysis of the facts for any given smart contract transaction.

The Legal Statement also confirms that, in principle:

- use of a private key to authenticate a document would satisfy a legal requirement for a document to be “signed;” and
- a smart contract recorded in source code would satisfy a legal requirement for a document to be “in writing.”

Scope and limitations of the Legal Statement

The Legal Statement focuses on cryptoassets possessing the following key characteristics:

- intangibility;
- cryptographic authentication;
- use of a distributed transaction ledger;
- decentralisation; and
- rule by consensus,

and concludes that these characteristics do not disqualify them from being property under English law. It does not, therefore, expressly consider the status of cryptoassets or tokens on private, permissioned DLT platforms of the type that most financial institutions are exploring, or tokens representing off-chain (or non-“native”) assets (e.g. where a token on a DLT platform represents physical gold) in any detail, although much of the analysis still has some relevance.

The Legal Statement deliberately does not address the regulation of dealings in, or remedies in relation to, cryptoassets, believing these best addressed post-common law characterisation. Certain other matters (including taxation, criminal law, data privacy, consumer protection, regulatory capital, monetary policy and AML/CTF) were also expressly excluded from its scope.

Impact of the Legal Statement

The Legal Statement does not have the force of law or judicial precedent and is not binding; however, we expect it to be influential in the UK given the industry weight backing the paper (it was reviewed by leading legal experts including Clifford Chance partner Simon Gleeson).

However, while the guidance is welcome, cryptoassets and the many stakeholders in underlying DLT networks are typically not confined to a single jurisdiction, and so the international picture remains a relevant consideration. This remains very fragmented, even on a regional basis looking at the European level for example, and differences in characterisation approach and conflicts of law issues remain.

This, combined with the limitations outlined above, means that the Legal Statement will not avoid the need for specific legal advice to be sought for individual projects. However, it will certainly encourage continued innovation and improve market confidence for those in the global financial services industry and beyond.

For a more comprehensive analysis of these and other issues such as the grant of security over cryptotokens, together with the case law underpinning them, please see our full report [The Treatment of Cryptotokens at English Law: Back to the Future](#) by scanning here or at www.cliffordchance.com/fintech



For more on the international crypto picture including Clifford Chance’s global fintech capability and resources, or to be added to our weekly global fintech regulatory round-up, please email fintech@cliffordchance.com

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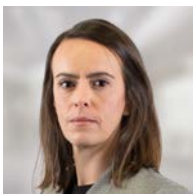
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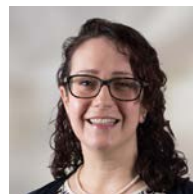
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