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From Cryptic to (Some) Clarity: English Law and Policy Rising to the Challenge of Cryptoassets (Part 3)

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In the first two instalments of our series we examined the progress of English law to provide a secure and certain legal infrastructure for cryptoasset investment and management. In particular, we looked at how recent English case law has addressed the following questions:

(1) Are cryptoassets property and (2) Can cryptoassets be held on trust? (see Part 1 here) (3) Where are cryptoassets located for the purposes of securing jurisdiction over claims and remedies? (see Part 2 here).

To recap, a line of recent cases has now made clear that English law recognises cryptocurrencies as property. Although there is no direct English decision on this point yet, there appears to be no reason why cryptocurrencies could not be held on trust. In terms of the location of cryptocurrencies, and therefore securing jurisdiction of the English courts, whether that is the place where the person or company who owns them is domiciled, or where they are resident probably remains open for debate.

In this third (and final) part of the series, we preview potential legal initiatives which are designed to continue building the legal infrastructure for digital assets in the UK, including initiatives such as the UK Law Commission's Digital Assets Project and the UK Jurisdictional Taskforce's (**UKJT**) Digital Dispute Resolution Rules.

What's next for cryptoassets and crypto-disputes in the UK?

A number of other legal policy initiatives, outside the regulatory sphere, aim to continue the development of the legal infrastructure to assist the UK's development as a leading cryptoasset and smart contracts hub. There are three notable initiatives.

Initiative 1: The Digital Assets Project

It is possible that the Law Commission's Digital Assets Project (the **Project**) will propose potentially significant changes to the law surrounding digital assets (including cryptocurrencies). The Law Commission may make recommendations for reform to ensure that English law is capable of providing a legal framework to allow crypto and other digital assets to flourish whilst providing appropriate security and support for investors.

Specifically, the project will consider whether digital assets should be "possessable". As mentioned above, English law does not recognise the possibility that a digital asset can be "possessed" because the concept of "possession" is currently limited to physical things. This has consequences for how digital assets are transferred, secured and protected under the law, and the Project will look at whether reform in this regard that would provide legal certainty is feasible. The Law Commission is also considering whether English law's historic characterisation of personal property as having to be either a thing in possession or a thing in action (which has caused much of the technical difficulty around recognising cryptoassets as property, discussed in *AA v Persons Unknown* above) may have outlived its usefulness, and whether it may be time to include a third category of personal property, which would fit the circumstances of digital assets and which would be neither a thing in action nor a thing in possession. The UKJT has suggested that the argument that no such third category of property could (ever) exist would entail reading more into the 19th century case law than (unsurprisingly) could have been intended by the judges at the time who were more concerned with whether shares were things in action within the meaning of the Bankruptcy Act 1883[1], than with how to deal with Bitcoins.

Adding a third category of personal property and clarifying its characteristics would be a welcome development to the extent it provides some further clarity on the legal characterisation of digital assets, including cryptocurrencies. This would bring increased legal certainty and promote potentially wider and more secure use of cryptocurrencies in the UK.

The Law Commission has recently published an interim update, with the digital assets consultation paper expected to be published in mid-2022. We will continue to report on developments as the Project progresses.

Initiative 2: UKJT's Digital Dispute Resolution Rules

In 2021, the UKJT published the Digital Dispute Resolution Rules (the **Rules**) with the aim of enabling the rapid, innovative and cost-effective resolution of blockchain and crypto-disputes, as part of the same drive to establish the UK's dominance and attractiveness in the digital asset world.

The Rules aim to facilitate the resolution of digital disputes by offering a procedural framework for the resolution of disputes by arbitration under the English Arbitration Act 1996 or an expert determination process. Some of the key features of the Rules are as follows:

- They may be incorporated into a contract, digital asset or digital asset system by including reference (which may be in electronic or encoded form) to the Rules.
- They set out a fast procedure, with the tribunal to use its best endeavours to resolve the dispute within 30 days from appointment and are intended to offer maximum flexibility to adapt to as yet undeveloped technologies.
- Arbitrators and experts will have appropriate digital technology expertise (to be appointed by the Society for Computers and Law). The Rules also provide for the possibility of an automatic dispute resolution process, where a legally binding resolution will be automatically selected by an artificial intelligence agent, whose vote or decision will be implemented directly within the digital asset system.
- The Rules include provisions specific to digital technologies including, where the relevant network enables such functionality, optional anonymity for parties and enabling on-chain implementation of decisions by giving the Tribunal powers in relation to digital assets (by operating, modifying or cancelling any digital asset relevant to the dispute).
- The Rules aim to provide easy enforcement of arbitral award and expert determinations in the English courts and of arbitral awards under the New York Convention.

It remains to be seen to what extent the Rules will be adopted (and they will have inevitably more utility in commercial disputes than in cases involving crypto-fraud), but in any event they provide a further building block to establish market confidence in English law and England as a preferred location for crypto-related dispute resolution.

Initiative 3: Potential Civil Procedure Rule changes to grounds for serving claims out of the jurisdiction

In his speech on 24 February 2022, Sir Geoffrey Vos foreshadowed that the English Civil Procedure Rules may be amended to facilitate the English courts' ability to manage crypto-fraud cases. He explained:

> "*In the world of crypto fraud, there are no national barriers and unlawfully obtained cryptoassets can be difficult to trace. That is the experience of lawyers working in this field. Accordingly, the Deputy Head of Civil Justice and I have set up a sub-committee of the Civil Procedure Rules Committee to look at amending or expanding the grounds on which proceedings can be served out of the jurisdiction. It is that obstacle that has impeded many sets of proceedings aimed at tracing the proceeds of crypto fraud. Under current case law, third party disclosure applications cannot easily be served outside the jurisdiction, even if one can serve out orders requiring a third party to disclose documents relating to the account of someone who can be shown to be prima facie responsible for a fraud. I hope that developments in the court's rules will make this fine distinction less significant and will make it generally easier to litigate issues that arise in relation to on-chain transactions and the tracing of cryptoassets*."

We will continue to report on new trends and significant changes in the law and regulation of cryptoassets in the UK on Proskauer's Blockchain and the Law blog, so watch this space!

[1] *The Colonial Bank v Whinney* (1886) 11 App. Cas. 426.

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