

Advisory:

Law Commission Issues Call for Evidence on Digital Assets & Private International Law and Draft Legislation for Digital Assets & Personal Property Rights

23 February 2024

On 22 February 2024, the U.K.'s Law Commission (the "**Commission**") [issued](#) a Call for Evidence (available [here](#)) ("**CfE**") to examine the question of "*in which country's courts should the parties litigate their dispute, and which country's law should be applied to resolve it*" when dealing with international digital assets disputes. The CfE will remain open for submissions until 16 May 2024. Separately, the Commission also issued a short consultation following its Digital Assets report in June 2023 on draft legislation to confirm the existence of a "third" category of personal property, which would encompass crypto-tokens and other assets ("**Draft Bill**"). The Commission seeks views on the Draft Bill by 22 March 2024.

The Call for Evidence

Issues of private international law are engaged where there is the potential for conflicts between different private law systems; for example, where the parties to a private law dispute are based in different countries, or where the facts and issues giving rise to the claim cross national boundaries. The three key questions which arise are:

- i) Where will the dispute be litigated?
- ii) Which law should be applied to resolve the dispute?
- iii) How can a judgment be recognised and enforced in another country?

These are regular questions arising on digital asset disputes and the CfE considers that DLT-technology poses fundamental issues in connection with those questions, given its inherent features that make it possible for a DLT network to have simultaneous and equally valid connections to multiple jurisdictions arise.

Jurisdiction

In the context of whether it is appropriate for the courts of England and Wales to accept jurisdiction to adjudicate a private law dispute, the Commission is focusing on the jurisdictional gateways that must be satisfied in order for a defendant outside of England and Wales to be served with a claim and on particular challenges that have arisen in cryptoasset cases to date and which may be more likely to arise in the future. In particular, the Commission is considering:

1. Relevant jurisdictional gateways, including where damage or detriment is suffered in England and Wales, an unlawful act is committed in England and Wales; and an object or asset is located in England and Wales;
2. The rules of international jurisdiction that apply to consumer contracts;
3. The question of where a contract concluded via smart contract was made;
4. In the case of online frauds or scams, where the damage or detriment is sustained and where the acts are committed;
5. Where a crypto-token is situated and the point in time at which this is relevant.

Applicable Law

As regards applicable law specifically, the Commission is focusing on centralised applications of DLT as it does not consider that contractual disputes in a fully decentralised context will be litigated frequently given the anonymity of parties involved.

Advisory: (continued)

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The Commission is particularly focusing on contracts relating to crypto tokens which involve an intermediary: an individual or (more commonly) organisation that holds crypto tokens, or an interest in the crypto tokens, on behalf of their customers. Intermediaries, as identifiable individuals or organisations that occupy a prominent position in the factual matrix surrounding the contract, provide a point of centralisation. It is the Commission's view that the existing framework under the Rome I Regulation (which supplies rules to determine the applicable law) provides relative certainty with its focus on the person effecting the characteristic performance of the contract as a means of identifying the applicable law.

As regards consumer protection, the Commission is of the view that the consumer contract rules in the Rome I Regulation (which allow consumers to benefit from the mandatory protection laws of their home state) will most likely apply in the crypto-token context between individuals and centralised crypto exchanges.

In the tort context, the Commission seeks to examine how the general rule under the Rome II Regulation of applying the law of the country in which the damage occurred and whether the "escape clause" of a tort being manifestly more closely connected with another country might apply. The Commission asks whether the damage should be conceptualised as pure economic loss as opposed to pleading of damage or interference to the claimant's crypto token(s), particularly in tort claims arising from decentralised finance transactions.

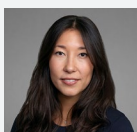
The Draft Bill

The Draft Bill reflects the Commission's view as expressed in its Final Report on Digital Assets published on 28 June 2023 that a thing is not, and should not be, deprived of legal status as an object of personal property rights merely by reason of the fact that it is neither a thing in action nor a thing in possession.

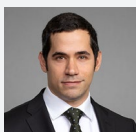
Statutory recognition of digital assets as property will, in the view of the Commission, allow the law of England and Wales to discuss crypto-token systems (and other systems that might manifest third category things) more directly in terms of powers and incentives/incentive mechanisms of participants, rather than in terms of claims/rights, corresponding duties and obligations.

The Draft Bill is technology neutral and drafted broadly to confirm a third broad category of property even where it is neither a "thing in possession" nor a "thing in action", enabling the law to interrogate assets on a case-by-case basis, endorsing English law's flexibility and openness as a system.

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