

## UKJT LEGAL STATEMENT ON DIGITAL ASSETS AND ENGLISH INSOLVENCY LAW

On 17 April 2024, the UK Jurisdiction Taskforce (UKJT) published a comprehensive Legal Statement on Digital Assets and English Insolvency Law (the Statement), following a public consultation in December 2023. A multidisciplinary team from Clifford Chance [responded](#) to the original consultation.

The Statement constitutes a significant step towards legal clarity in the rapidly evolving area of digital assets and their treatment under English insolvency law. While the Statement is non-binding, it is influential in providing clarity to critical legal questions under English law. It provides useful guidance regarding the legal status of, and basic principles applicable to, cryptoassets, distributed ledger technology (DLT), smart contracts and associated technologies under English insolvency law.

The Statement will be of interest to mainstream investors and market participants considering investment strategy given the previous uncertainty in relation to the recovery of digital assets in an insolvency scenario.

### Practical impact of the Statement

#### Using the right legal structure

Diego Ballon Ossio comments: "*The Statement is a good reminder of the importance of putting in place clear arrangements to deal with digital assets at the outset. Such arrangements need to ensure that stakeholders with interests in digital assets understand how the assets are to be held, used, and protected over the course of dealings including in the event of future distress. For example, if the arrangements are designed to ensure that the custody arrangements insulate customers from the risks of insolvency by way of a trust, then the Statement suggests the arrangements should expressly provide that there is a trust to have a high degree of certainty of the intention of the*

#### Key issues

- UKJT publishes Legal Statement on Digital Assets and English insolvency law on 17 April 2024.
- The Statement confirms that:
  - existing insolvency legislation is applicable to digital assets within an insolvent estate;
  - digital assets are within the definition of property; and
  - digital assets are not money (yet).
- Choosing the right structure is important to insulate against insolvency risks.
- UKJT to hold launch event on 24 April 2024.

*parties. Of course, in practice there may be different ways in which service providers characterise their service and what operational arrangements and pricing structures are in place, including on the use of the digital assets, which mean that an express statement of trust may not be evident or there may be technological or operational measures in place (e.g. use of multiple digital signatures and private keys) that the parties consider already provide sufficient protection, but understanding and allocating the risks associated with recovery in the event of an insolvency is crucial. The Statement provides some practical examples of how arrangements might typically be structured, including the use of centralised digital asset custodians, often designed to maximise execution efficiencies with the use of segregated wallets, omnibus wallets, or a combination of 'hot' and 'cold' wallets, or premium custody service arrangements. However, the Statement is also clear to note that the existence of the arrangement is not in itself determinative as to whether a valid trust exists and could in cases where the legal title is transferred to the custodian, not constitute a trust but a pure contractual arrangement. Custodians, exchanges, other service providers, principal holders, and investors will therefore need to ensure that they seek appropriate legal advice on how they structure their arrangements. It is certainly worth noting that the Statement emphasises a primary evidential factor which a Court may find persuasive in considering any dispute regarding the establishment of a trust, will be an express declaration of trust or similar statement that the custodian holds the assets for the benefit of the client. This may be required, if the intention behind the specific arrangements in question is to create a trust."*

#### **Characterisation in an insolvency and restructuring is crucial**

*Tim Lees, partner in our restructuring and insolvency team, comments: "The nature and treatment of assets is fundamental to any insolvency or restructuring scenario. The Statement sets out some important guidance as to how the judiciary will approach competing interests in digital assets when digital asset businesses face financial distress. We are pleased to see that the Statement reflects the potential application of schemes of arrangement and restructuring plans under the Companies Act 2006 to personal claims (as opposed to proprietary claims) relating to digital assets. The Statement is clear to emphasise however, that the digital assets must form part of the insolvent estate (i.e. not belong to other parties/held on trust for others) to be the subject of such arrangements. In this regard the Statement recognises that the legal treatment of digital assets depends upon the particular circumstances of the arrangements themselves which, as Diego mentions, need to be considered at the outset of transactions."*

#### **Nature of digital assets as 'property' in an insolvency**

The Statement unsurprisingly affirms that English insolvency law is already capable of addressing disputes involving digital assets by applying established legal principles. It concludes that digital assets can be classified as property within the insolvency legislation, thereby allowing proprietary rights to be asserted over digital assets in insolvent estates. As to whether the digital assets form part of an insolvency estate, as already mentioned, the Statement provides that this will be fact specific and determined by the basis upon which the insolvent party holds the assets.

#### **Digital assets are not (yet) money**

The Statement also notes that digital assets are not yet recognised as money (even if they are used as a means of payment), and thus cannot form the basis of a statutory demand to wind up a company which must be based on a liquidated debt. An important consideration appears to be that even stable

coins fluctuate in value (at least slightly) relative to fiat currencies. Of course, the Statement recognises that the usage of digital assets over time may change, so that if they are used as money, then changes to the approach may be required. The Statement therefore does not rule out that digital assets may be characterised as money in the future. The Statement also comments that it is unclear as to whether the special regulatory regimes (e.g. CASS) currently, or will in the future, apply to digital assets. These aspects may be clarified by the regulatory framework currently being developed.

### **English insolvency jurisdiction and rules apply to companies dealing in digital assets**

The Statement also clarifies the application of recognised international jurisdiction concepts, particularly the concept of Centre of Main Interests (COMI), for companies dealing in digital assets. It discusses the obligations of officeholders in realising and distributing digital assets while noting that, practically speaking, assistance may be required from other jurisdictions where the digital assets may be located. It outlines the powers available to insolvency officeholders to gather and manage digital assets within the existing insolvency process, including powers to realise and distribute assets which extend to making distributions to creditors of the digital assets themselves. Moreover, the Statement addresses the handling of transactions at an undervalue, preferences, and transactions defrauding creditors, indicating that existing principles allow for the reversal of such transactions involving digital assets. From a practical perspective it is recognised that remedies may need to be adapted to provide for equivalent or replacement assets (e.g. to make an equal and opposite transfer on the blockchain) instead of the recovery of the original digital assets. The Statement also covers the treatment of mixed digital assets and shortfalls, suggesting that, while the technology behind digital assets is novel, the traditional legal analysis of tracing and allocation of shortfalls remains applicable. However, as mentioned above, the Statement suggests it is not clear as to whether existing regulatory rules might also provide a framework for reconciling shortfalls.

While the Statement offers some insights into the application of the existing insolvency law to digital assets. It also recognises the practical challenges to insolvency practitioners in investigating, getting access to information and dependence upon specialist assistance in identifying, locating and recovering and then realising digital assets, including those outside of the UK.

A copy of the Statement is available [here](#). The UKJT is hosting a launch event on 24 April 2024.

Clifford Chance's insolvency and financial regulatory experts [responded to the original consultation](#), highlighting the flexibility in the existing English law approach and the benefits to be gained from the work of the UKJT and others (including the Law Commission, UNIDROIT, HM Treasury, the Financial Conduct Authority and the Bank of England) in matters such as characterisation of digital assets, choice of law and jurisdiction, regulatory issues, stability, and confidence in financial markets more generally.

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