**UK Jurisdiction Taskforce – Digital Assets and English Insolvency Law**

**Consultation**

**Response – November 2023**

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**Are there any material issues of concern to stakeholders in relation to the application of English insolvency law to digital assets, other than those set out in the Annex to this consultation paper?**

We are pleased to have the opportunity to respond to this consultation. In terms of answering the principal question, we have found it most useful to reflect upon the particular questions outlined in the Annex to the consultation paper. We also provide our answers to the questions.

1. **Are digital assets “property” forming part of the estate of the insolvent company or individual for the purposes of the English insolvency legislation?**

Yes, digital assets are property objects (see the Law Commission’s consideration of the matter in *Digital Assets: Consultation Paper* (Law Com No 256, 2022) and *Digital Assets: Final Report* (Law Com No 412, 2023) and the sources cited therein) and can be considered “property” forming part of the estate of an insolvent company or individual for the purposes of the English insolvency legislation. The definition of “property” in s 436(1) of the Insolvency Act 1986 is very wide and non-exhaustive. However, if there is any doubt on the point, a minor amendment to expressly include digital assets could be considered (which could also have the benefit of determining what types of such assets fall within the meaning of property here and which do not).

It is important to note that although the consultation is examining English law, the definition of “property” in the Insolvency Act 1986, s 436(1), also applies to corporate insolvency law in Scotland. As such, any amendments should take account of the Scottish position. There is a general absence of case law on digital assets in Scotland and limited commentary, but see e.g. A Held, A MacPherson and B Yüksel Ripley, *United Kingdom (UK) Report on Cryptocurrencies: With a Focus on the Law of England and Wales and the Law of Scotland*, especially p 45 onwards (and see p 70 ff for insolvency law), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4543838>.

1. **For international allocation of insolvency jurisdiction based upon location of centre of main interests (COMI), what rules apply to determine where digital assets are located and/or administered?**

As well as focusing on international allocation of insolvency jurisdiction, based upon location of COMI, this question should consider cross-border jurisdiction issues within the UK, e.g. between England and Wales and Scotland.

There is some authority in English law which provides that cryptoassets are located where the party who owns the digital assets is domiciled (*Ion Science v Persons Unknown* (unreported) (21 December 2020) and *Fetch.ai Ltd v Persons Unknown* [2021] EWHC 2254 (Comm)). However, there are other possibilities too. For private international law issues relating to digital assets, see e.g. A. Dickinson, “Cryptocurrencies and the Conflict of Laws” in D Fox and S Green (eds), *Cryptocurrencies in Public and Private Law* (2019), ch 5; and A Held, A MacPherson and B Yüksel Ripley, *United Kingdom (UK) Report on Cryptocurrencies: With a Focus on the Law of England and Wales and the Law of Scotland* (see above), p 47 onwards. It may also be useful to refer to the *UNIDROIT Principles on Digital Assets* (2023).

1. **Is a claim to digital assets held by a company or bankrupt capable of being a claim to recover property? If so, what factors determine whether it is to be so characterised.**

If digital assets are recognised as property objects, then a claim to digital assets held by a company or bankrupt should be considered a claim to recover property in the same way as for other property objects.

1. **If a claim to digital assets held by a company or bankrupt is a monetary claim, is it a claim for a liquidated sum so as to be capable of founding a statutory demand/winding up petition? Is it a claim in a “foreign currency” such that it should be converted to the currency of the insolvency on day one?**

We do not consider a claim to digital assets held by a company or bankrupt to ordinarily be a monetary claim. Digital assets are generally non-monetary units and a claim to such property should be considered to give rise to a claim for unliquidated damages. We also do not think that such a claim is a foreign currency claim, albeit that the position could change for certain digital assets, such as central bank digital currencies. More broadly in relation to the questions in the annex, respondents may wish to draw distinctions between the treatment of different types of digital assets. It may therefore be worthwhile to consider whether the questions in their current form will sufficiently allow respondents the opportunity to make such a point.

1. **Are office-holders subject, generally, to any obligations in relation to holding/realisation of volatile digital assets in an English insolvency?**

The rules should be the same as for other assets, which can also be volatile in terms of value e.g. shares. While office-holders have to take reasonable steps to maximise the value of the estate when realising assets, they ordinarily have discretion as to when precisely they realise assets (assuming they have acted in good faith and in a reasonably competent manner). Reference can be made to case law in this area, such as *Medforth v Blake* [2000] Ch 86. If this question were to be extended to ask whether office-holders should be subject to distinct rules, formulating a separate approach for the holding and realisation of digital assets would be very difficult to devise and create a highly complicated set of rules.

1. **Can you perceive any difficulties in the application of the English insolvency legislation relating to avoidance of prior transactions to pre-insolvency dealings with digital assets? If so, what are they?**

There may be issues ascertaining the precise point at which a transfer takes place, and proving that there is an intention to prefer a particular party. The identity of recipients of assets or preferences over assets may be difficult to determine given the pseudonymous nature of many digital assets systems, and this may be of particular significance if the transfer is to an associate. The flexibility that exists in terms of remedies in English law will allow for various circumstances and factors to be taken into account, but giving regard to the potential complexities of digital assets in terms of remedies could be a challenge. (By contrast, in Scotland there is less flexibility and a general hierarchy of remedies, which may not sufficiently take account of the complicated circumstances relating to digital assets.) Also, an office-holder or another creditor may be less likely to be aware of the earlier transfer of digital assets than for other property, and it will probably be more expensive and complicated to successfully investigate and challenge such a transaction. All of this may dissuade officeholders from seeking to recover such property or at least create difficult dilemmas for them regarding potential action.

1. **If a claim to digital assets held by a custodian company can be a proprietary claim, what mechanisms are available to deal with mixing of the property of various clients and/or a shortfall in an insolvency of an exchange or custodian?**

It will be important to determine whether particular digital assets can be traced and who holds them, but this may be a costly process. More broadly, an approach consistent with the position for other property in equivalent scenarios should be adopted, which could involve e.g. equal-ranking personal claims or proportional proprietary claims for property in a bulk, depending on the circumstances.

1. **What interlocutory, investigatory or enforcement procedures are available to insolvency officeholders under English law, in order to get in digital assets or their monetary equivalent for the benefit of the insolvent estate?**

The same procedures as for other assets should generally apply here – see e.g. Insolvency Act 1986 s 234 onwards. However, we recognise that there may be particular practical challenges for such property, which could justify some specific provision, but this should be kept to a minimum.

It may be advisable to have a general question in the consultation focused on the extent to which there should be bespoke rules for digital assets or their incorporation into the rules applicable to property generally (or the rules for analogous types of property).