

## Finally, certainty on cryptoassets and smart contracts under English law?

Whilst their role and visibility in financial services have increased exponentially, UK businesses and the legal profession alike have received limited legislative or regulatory guidance as to the status and treatment of cryptoassets and smart contracts under English law. In the absence of prominent court cases (at which key matters such as the legal status of a cryptoasset or the enforceability of a smart contract or indeed, the jurisdiction of the court, would be considered) there has been little context and therefore limited comfort for businesses and advisers alike.

However, on 18 November 2019, the LawTech Delivery Panel's UK Jurisdiction Taskforce issued the landmark "Legal statement on cryptotassets and smart contracts". This Statement, drafted by leading counsel, represents a major body of work and sets out a consensus of experts, informed by a wider consultation with businesses, technical experts, regulators, academics and the legal sector, on how cryptoassets and smart contracts are treated under English law.

While the Legal Statement does not have legislative force, nor is it binding on a court, it is undoubtedly a clear and concise analysis of the key legal issues relating to cryptoassets and smart contracts, and is likely to be highly persuasive in informing the view of courts and regulators, and hence legal and business practice, as to the requirement for regulation in this area and the availability of legal remedies in respect of the transfer or securitisation of cryptoassets.

The Legal Statement represents the first analysis in a leading commercial jurisdiction of the legal principles underlying cryptoassets and smart contracts within existing law and regulation, with the intention of providing much-needed confidence, legal certainty and predictability to market participants within the global financial services industry. The Statement shows that, as has been proven over the ages, English law retains the flexibility to respond and adapt to new concepts, technologies and business practices.

The Taskforce's key conclusions are set out below:

### **Cryptoassets**

#### *What is a cryptoasset?*

First, the Statement attempts to grasp the nettle by asking the question "*What is a cryptoasset?*". In recognising the difficulty in defining virtual or digital assets given the variety of systems in use and kinds of assets represented within such systems, the Legal Statement identifies cryptoassets by way of their principal novel and characteristic features when compared to conventional assets. These features are *intangibility, cryptographic authentication, use of a distributed transaction ledger, decentralisation and rule by consensus*, and the Statement clarifies that its analysis is concerned only with the "on-chain" cryptoasset itself as distinct from any other external or "off-chain" asset – money, debt, goods or land, securities, commodities and so on – which it might represent (such off-chain assets most likely being treated as property in their own right). The Statement makes clear that a cryptoasset is ultimately defined by reference to the rules of the system within which it exists. The cryptoasset arises from the combination of the public key (which discloses information about the asset to the public) and the private key (which confers control over the asset) with the rules of the relevant system, which provide the owner with the exclusive ability to effect or authenticate dealings with the cryptoasset.

#### *Is a cryptoasset "property", and why is this important?*

The Statement concludes that cryptoassets generally fulfil all the legal requirements of property and in principle should be treated as property under English law. Being a conglomeration of public data, private key and system rules, cryptoassets are more than pure information (which cannot itself be treated as property), and there is no reason why their novel features should disqualify cryptoassets from being recognised as property. Whether a particular

cryptoasset would be treated as property is, however, ultimately fact-dependant.

Classification of a cryptoasset as property means that it can be owned, which gives rise to proprietary rights in the asset. If recognised as property, there will be important consequences in cases of fraud, theft and breach of trust and also in the insolvency arena (ie. the vesting of property in personal bankruptcy, and the rights of liquidators in corporate insolvency) and regarding succession on death. Where a cryptoasset is recognised as property, security may be granted over it (although owing to its virtual nature, only certain types of security are available), and a trust declared in respect of it.

## **Smart contracts**

### *What is a “smart contract”?*

Similarly, the Legal Statement discusses smart contracts starting from the position of identifying the legally novel or distinctive features of these contracts, rather than attempting to formulate a precise definition. The characteristic feature of a smart contract is “*automaticity*”; that is, a smart contract is performed automatically and without the need for human intervention. That requires the terms of the contract to be recorded in code. Many smart contracts are embedded in a networked system that uses the same techniques as cryptoassets (i.e. cryptographic authentication, distributed ledgers, decentralisation, consensus), as discussed above.

### *Are smart contracts true contracts?*

The Statement concludes that smart contracts are as capable of satisfying the basic requirements of an English law contract (*agreement, intention to be legally bound, the giving of benefit or “consideration”*) as traditional contracts, and are therefore capable of having contractual force on their own. This is the case even though the “automaticity” of a smart contract is likely to mean that there is strictly no need for a party either to promise performance or to resort to the law to enforce a promise by their counterparty: the code will simply do what it has been programmed to do.

Whether the legal requirements for a contract are in fact met in any given case will depend on the parties’ words and conduct, just as it does with any other contract.

The Statement recognises that there is a spectrum of contractual formulations involving a “smart contract” element. Contractual obligations may be defined by computer code (in which case there may be little room for “interpretation” in the traditional sense); the code may implement an agreement whose meaning is to be found elsewhere (in which case the code is unimportant from the perspective of defining the agreement); or the contract may be a hybrid where some obligations are defined by code, others merely implemented by code, and others still not involving code at all. In any formulation, however, in principle a smart contract can be identified, interpreted and enforced using ordinary and well-established English legal principles, even if the interpretation of a contract existing solely or partly in code presents some practical difficulties.

### *Can smart contracts comply with English law requirements as to execution?*

The Legal Statement considers that where a legal rule requires documents to be signed or in writing, such a requirement can in principle be met by using a private key or by a smart contract whose code element is recorded in source code.

## **Other analysis**

The Legal Statement also considers and provides analysis of other, ancillary questions (such as, whether cryptoassets can represent documents of title, and the distributed ledger system a register of title; the legal structure of the transfer of cryptoassets; whether cryptoassets represent negotiable instruments or goods or bills of exchange) which are beyond the scope of this note.

The next step is for the Law Commission to consider whether any legislation might be desirable in this area. To access the Legal Statement in full, click [here](#).

## Fladgate's expertise

The current status of the Legal Statement as guidance, the wide variety of cryptoassets and networked systems, and the international and multi-jurisdictional nature of crypto projects, mean that specific legal advice will still be required for individual transactions and matters. The Statement also specifically excludes taxation, criminal law, data privacy, consumer protection, regulatory capital, monetary policy and AML/CFT from its scope, and advice on these areas of law may form a significant element of any project.

Fladgate has acted in relation to a range of transactions which involve fintech businesses and cryptoassets, including advising businesses on admission to capital markets, including the Main Market of the London Stock Exchange, initial coin offerings (ICO) or token generation events (TGE), and the establishment of crypto exchanges. Our approach is to consider them from a multi-disciplinary and multi-jurisdictional perspective, drawing on our established corporate and capital markets, taxation, financial and regulatory, funds, and commercial and data protection expertise, while also being cognisant of the technology issues arising from each project. We are also acting for clients in a number of disputes involving cryptoassets, including a claim for breach of contract relating to the off-chain transfer of cryptoassets as well as claims involving the alleged fraudulent transfer of cryptoassets.

## Fladgate team

### *Corporate & Capital Markets*



**Paul Airley**  
Partner

**T** +44 20 3036 7235

**M**: +44(0)7506 927 724

**E**: [pairley@fladgate.com](mailto:pairley@fladgate.com)

Paul is a corporate and equity capital markets lawyer. He has acted for corporations and financial institutions on a wide range of UK and international corporate finance and M&A transactions including: public and private acquisitions and asset transactions; joint ventures; IPOs on the London Stock Exchange's Main Market (Premium and Standard segments of the Official List) and AIM (including dual listings), UK and international secondary fundraisings and other transactions for listed companies; UK financings for overseas companies; and share buybacks and other corporate reorganisations.

More recently, Paul has advised tech companies on the structuring and implementation of token offerings, including compliance with securities, laws and other regulatory matters.





**David Robinson**

Partner

**T:** +44 (0)20 3036 7358

**M:** +44 (0)7729 032 028

**E:** drobinson@fladgate.com

David is a corporate lawyer with a broad practice spanning capital markets and mergers and acquisitions.

The capital markets side of his practice is largely represented by issuers, particularly those admitted to the AIM Market of the London Stock Exchange, where he has acted on numerous flotations, reverse takeovers and placings, as well as providing day to day advice on regulatory and corporate governance matters. David was the lead partner advising Argo Blockchain Plc, a provider of crypto-mining services, on its admission to the standard segment of the Official List and to trading on the London Stock Exchange's Main Market.

The M&A side of David's practice is focused on the SME market where he has a lot of experience in the publishing and technology sectors.

David has a particular interest in developing the firm's links with Asia and has acted on a number of transactions with significant Asian links, including the listing of foreign currency convertible bonds in Singapore for Indian issuers and on a London-Hong Kong dual listing for a Chinese business.



**David Lee**

Associate

**T:** +44 (0)20 3036 7184

**M:** +44 (0)7852 040 563

**E:** dlee@fladgate.com

David specialises in equity capital markets, primarily on the Main Market and on AIM, private mergers and acquisitions and group reorganisations.

David acts for a number of clients across industries ranging from media & technology to natural resources companies, with an increasing focus on advising companies with a blockchain or crypto-asset based business.

He advised Argo Blockchain PLC (the first crypto related business to have its shares traded on the Main Market) on its admission to the Official List and to trading on the Main Market of the London Stock Exchange, and has advised two UK companies on their initial token offerings. David also advises businesses working in cryptocurrency and related sectors on corporate matters generally.

## *Financial Regulatory*



### **Charles Proctor**

Partner

**T:** +44 (0)20 3036 7324

**M:** +44 (0)7985 471 552

**E:** [cproctor@fladgate.com](mailto:cproctor@fladgate.com)

Charles is a very experienced banking and finance lawyer who has worked both in London and the Far East. His wide-ranging background includes acquisition finance, real estate finance, trade finance and associated areas. He has also completed Shari'ah-compliant transactions for large scale transactions in the London investment property market.

Charles has been heavily involved in issues that have arisen in the wake of the financial crisis, with an increased focus on regulatory developments and the resolution of bank-to-bank disputes. In addition to his practice, Charles has written extensively on banking and financial issues. In particular, he has published five textbooks, most recently *The Law and Practice of International Banking*, a 1,000 page text published by Oxford University Press in March 2015. He is also a recognised expert in the sphere of monetary law and is the author of the Seventh Edition of *Mann on the Legal Aspect of Money* (Oxford University Press, 2012). Charles is a member of the Monetary Law Committee of the International Law Association.

## *Funds*



### **Ella Leonard**

Partner

**T:** +44 (0)20 3036 7328

**M:** +44 (0)7852 040 555

**E:** [eleonard@fladgate.com](mailto:eleonard@fladgate.com)

Ella heads our funds, finance and regulatory team, specialising in advising fund managers, asset and investment managers, promoters, sponsors and investors on issues surrounding the structuring, marketing and equity raising, financing, establishment, operation and exit of investment funds and collective investment schemes.

Ella has a noted reputation for advising on both onshore and offshore structures including limited partnerships, GPs, LLPs, limited companies, unit trusts and cell companies. Her funds practice includes expertise in debt funds, real estate and private equity. Through her time practising in the Middle East, and her continuing to act for many sizeable Middle Eastern family offices, she is also experienced in Islamic finance products.

Ella acts for Tritax, 23 Capital, Tadhamon Capital, various private onshore and offshore funds, large family offices and others. She recently acted on the structuring and establishment of an £400m alternative investment fund in the debt fund space.

## *Tax*



**Helen Cox**  
Partner

**T:** +44 (0)20 3036 7418

**M:** +44 (0)7508 648358

**E:** [hcox@fladgate.com](mailto:hcox@fladgate.com)

Helen Cox is a partner in the private client department at Fladgate. Helen specialises in advising on both corporate and personal taxation, both domestic and international. She acts for private individuals, family offices, entrepreneurs, trustees and corporate entities.

Helen's clients hold investments and operate across a wide range of sectors, including real estate, technology, healthcare, leisure, sports and financial services.

Helen advises high net worth and ultra high net worth individuals and families on a wide range of personal tax issues, offshore trusts and the tax efficient restructuring of existing trusts. She also advises entrepreneurs and fund managers on a broad range of tax issues, including structuring, financing and acquisitions and disposals.

Helen is a chartered tax adviser and a member of the Chartered Institute of Taxation. Helen is also an affiliate member of the Society of Trust and Estate Practitioners (STEP).

Helen regularly writes articles on current tax issues and has written for publications such as Tax Journal, Spears, CityWealth Magazine, Family Office Investor and STEP Journal. Helen is listed in the Citywealth Future Leaders Top 100 list.

## *Dispute resolution*



**Tom Bolam**  
Senior Associate

**T:** +44 (0)20 3036 7173

**M:** +44 (0)7852040561

**E:** [tbolam@fladgate.com](mailto:tbolam@fladgate.com)

Tom Bolam is a senior associate in the dispute resolution department at Fladgate. He specialises in commercial and business disputes with a focus on shareholder, joint venture and partnership disputes, claims relating to directors' breach of duty, insolvency litigation, fraud, commercial contracts, technology disputes and commercial agency disputes. He has extensive experience of applications for injunctive relief, including freezing injunctions.

Tom acts for private individuals, insolvency practitioners, trustees and companies across a wide range of industries.

He recently acted in a 12 day Commercial Court trial involving a dispute between joint venture partners over the conduct of a high profile property development in Berlin.

Tom graduated from Oxford University in 2006 with a degree in Modern History. After converting to law and obtaining a distinction on his Legal Practice Course, Tom joined Fladgate in 2011.

## *Commercial and data protection*



**Eddie Powell**  
Partner

**T:** +44 (0)20 3036 736

**M:** +44 (0)7852 040 590

**E:** [epowell@fladgate.com](mailto:epowell@fladgate.com)

Eddie is an intellectual property, technology and commercial law specialist and advises clients across a broad spectrum of legal issues.

He advises on commercial transactions such as licensing, distribution, franchising, agency and manufacturing arrangements, and technology projects such as IT procurement, supply and development. He regularly deals with e-business and FinTech issues for clients across a range of industries.

Eddie also has considerable experience in data protection and privacy legal issues. He routinely advises clients on risk management methods, such as contract terms and policies, as well as day-to-day compliance steps and handling complaints and disputes. He works with clients of the firm to help them implement General Data Protection Regulation compliance throughout their organisations.

Eddie's expertise in Commercial Contracts is consistently highlighted by the legal directories.