Digital assets as personal property

Responses to consultation on draft Bill

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Note: Professor Yuliya Guseva and Professor Andreas Rahmatian both submitted journal articles in response to the consultation. Due to copywrite concerns, neither response has been included in this compilation of consultee responses.

[redacted]

[redacted]
Law Commission
1st Floor
Tower
52 Queen Anne's Gate
London
SW1H 9AG

18 March 2024

By email to: digitalassets@lawcommission.gov.uk

Dear Law Commission,

Re: Digital Assets as Personal Property: Short Consultation on Draft Clauses in draft Property (Digital Assets etc) Bill, Consultation Response from 4 Pump Court

Introduction

We write to you on behalf of the members of 4 Pump Court, a barristers' Chambers in London.

4 Pump Court is widely recognised to be a leading set of Chambers specialising in IT and Telecoms law, both in the UK and internationally. Further information can be found at www.4pumpcourt.com.

Members of 4 Pump Court have extensive experience of advising and representing a wide variety of clients and industry bodies, both in the UK and internationally, on regulatory, non-contentious and contentious legal issues associated with Virtual Assets, as well as lecturing and publishing in the area.

By way of recent example only:

- [redacted]
- [redacted]

We have carefully read your recent Consultation Paper on 'Digital Assets as Personal Property', as well as the draft Bill attached to it, and we have discussed these documents with various other members of Chambers with a specialist expertise and interest in the subject matter.

Our consultation responses

(1) <u>Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?</u>

Yes: in summary, we agree with the general approach of the draft Bill, and we agree that it will achieve the desired effect.

Such a Bill, if enacted, should provide clear statutory support as a matter of English law for the proposition that Virtual Assets are capable of attracting property rights, and should thereby remove such doubt as may otherwise exist by reason of the *tertium quid* issue, and additionally dispel any suggestion that there is a legislative or public policy reason why Virtual Assets should not be capable of attracting property rights.

We are in favour of the highly focused nature of the Bill, which addresses the *tertium quid* issue head on but does not seek to define the boundaries of a third type of property. We would not have been in favour of a broader approach, owing to the risk of unintended consequences and, in particular, the uncertainty that a broader approach might have introduced in relation to the treatment of information at law.

Although we do not consider that this is required for present purposes, we would note, for the sake of comparison, that certain other common law jurisdictions have sought to define Virtual Assets with greater legislative precision. For example, section 2(1) of Bermuda's Digital Asset Business Act 2018 expressly defines "digital assets" as follows:

> ""*digital asset" means anything that exists in binary format and comes with the right to use it and includes a digital representation of value that—*
>
> *(a) is used as a medium of exchange, unit of account, or store of value and is not legal tender, whether or not denominated in legal tender;*
>
> *(b) is intended to represent assets such as debt or equity in the promoter;*
>
> *(c) is otherwise intended to represent any assets or rights associated with such assets;*
>
> *or*
>
> *(d) is intended to provide access to an application or service or product by means of distributed ledger technology;*
>
> *but does not include—*

(e) a transaction in which a person grants value as part of an affinity or rewards program, which value cannot be taken from or exchanged with the person for legal tender, bank credit or any digital asset; or

(f) a digital representation of value issued by or on behalf of the publisher and used within an online game, game platform, or family of games sold by the same publisher or offered on the same game platform".

Our view is that the Law Commission's proposed approach is more suitable for this jurisdiction at this time.

(2) <u>What do you consider the positive impact of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?</u>

It is difficult to quantify the positive impact of the Bill, if enacted, in monetary terms.

However, it is clear (both anecdotally and in our collective experience as barristers) that legal and regulatory uncertainty increases the risk of (a) additional costs and delays in the dispute resolution and regulatory process, in the event of a legal or regulatory dispute, and (b) additional transactional costs, and commercial uncertainties, in the transactional context.

Despite the strong line of well-reasoned Court judgments that have already acknowledged the capacity of Virtual Assets to attract property rights as a matter of common law, there is inevitably a degree of residual risk and uncertainty that, on the facts of any given case, and in the absence of legislation, this issue might be re-visited by an appellate Court, or by a foreign Court or foreign tribunal that is required to consider and determine the issue under English law.

Moreover, anecdotally, it would appear that the *perception* of risk and uncertainty exceeds the *actual* degree of risk: but the mere perception of risk is itself sufficient to impact upon business decisions, particularly in circumstances where on an international level, domestic courts and legislators have adopted various approaches to the treatment of Virtual Assets.

In principle, therefore, the enactment of the Bill should assist with the ongoing promotion of England and Wales as efficient, legal jurisdictions (and English law as an appropriate governing law) for the conduct of responsible business activities associated with Virtual Assets, and for the resolution of any disputes associated with Virtual Assets.

(3) <u>What do you consider the costs and/or risks of the Bill to be?</u>

We do not consider that the Bill will generate any particular costs, if enacted, in and of itself.

There is, inevitably, some risk of unintended, or unexpected, consequences, potentially in other areas of the law, in the absence of any statutory definition of "a thing" or "a thing that is digital in nature". This is properly recognized by the Law Commission in its Consultation Paper. For example, there are a variety of situations, outside the context of Virtual Assets, in which Courts

have had to consider whether unusual, or novel, forms of 'things' are capable of attracting property rights (or liabilities), including (by way of historic example only):

- Human bodies and human body parts;
- Certain types of information;
- A power of revocation under a trust;
- The listing status of a company;
- Business licences;
- Milk quotas;
- EU carbon emissions allowances; and
- Goodwill.

However, we do not consider that the draft legislation, in and of itself, increases the risk of unintended, or unexpected, consequences, beyond the risks and uncertainties that already exist as a matter of common law. We consider that the Law Commission's approach to drafting the legislation, and its very narrow focus, assists in this regard.

We hope that this consultation feedback is helpful.

Yours sincerely,

[redacted]

Response ID ANON-12XZ-CHBQ-K

Submitted to Digital assets as personal property draft clauses
Submitted on 2024-03-21 15:28:36

About you

What is your name?

Name:
Professor Orkun Akseli

What is the name of your organisation?

Enter the name of your organisation:

The University of Manchester Law School

Are you responding to this consultation in a personal capacity or on behalf of your organisation? How should you/your organisation be named if we later refer to your response?

Capacity and name for quoting:

Personal Capacity. Professor Akseli

What is your email address?

Email:
[redacted]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Tell us why you regard the information as confidential:

Consultation questions

Consultation Question 1: Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?

Yes

Please explain your answer:

I support the Law Commission's draft Bill and approach to this matter. I also commend the Law Commission on their detailed work in this difficult and sensitive field.

A paternalistic legislative intervention is necessary for a number of reasons including protection of stakeholders' interests, reduction of transaction costs and courts' workload as well as providing legal clarity in this field (we have seen similar interventions in CA2006 duties of directors, and SBEEA 2015 and the accompanying regulations on banning anti-assignment clauses). This is also important in achieving commercial and legal certainty (commercial certainty is part of English law since Vallejo v Wheeler (1774) 1 Cowp 143).

Courts have already recognised the third category of things on which personal property rights relate to and that this category is not things in possession or things in action but yet it is a property (paras 2.17-2.18 explain this point clearly). Codifying this will bring certainty to law and eliminate the need for courts to re-establish this. In other words, confirmation of existing law is beneficial, and the Law Commission's recommendation of statutory confirmation of a 'third thing' will achieve the desired effect (I agree with the analysis in pars 2.24-2.29).

This is also important in the field of credit and security law where stakeholders would need to be certain about their rights and obligations, how to create a charge on these new set of things, how to perfect etc. These will be developed further by common law's established principles and rules. International and other national comparative examples also follow the same direction.

In law reform while in certain situations it would be wise to reform in a piecemeal fashion so that established practices are not adversely affected, when the field is novel a wholesale approach would work better. The approach that the Bill takes is desirable as it leaves the creation and development of parameters (contents, the type of personal property rights etc) which describe a third category thing to common law/courts. Common law has established rules and these will help the development of these parameters. This is a feasible approach.

Consultation Question 2: What do you consider the positive impacts of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?

Positive impact:

I think this can only be quantified once the Bill is enacted and implemented. But points 4.3-4.8 explain the benefits and impact clearly.

What do you consider the costs and/or risks of the Bill to be?

Costs or risks of the Bill:

I do not see any risks of the Bill.

From: [redacted]
To: DigitalAssets
Subject: Digital assets as personal property - Short consultation on draft clauses
Date: 22 March 2024 08:45:35

Thank you for this proposal and your work generally in relation to digital assets. Like you, we believe that the position under the common law is already as set out in clause 1 of your draft Bill. We also agree with your observation that the Bill would "definitively lay to rest any lingering doubt about the existence of a third category of property accommodating the unique nature of digital assets". For this reason, we support the proposal and suggest that any explanatory notes (to the extent they fall within your remit) emphasise the confirmatory nature of the Bill.
Allen & Overy LLP

[redacted]

Ashurst

Ashurst LLP
[redacted]

22 March 2024

By email

digitalassets@lawcommission.gov.uk

Law Commission
1st Floor, Tower
52 Queen Anne's Gate
London SW1H 9AG

Dear Commissioners and Staff,

Consultation on Digital Assets as Personal Property

On behalf of Ashurst LLP, I have the pleasure to provide this response to the Law Commission's Short Consultation on Draft Clauses to address Digital Assets as Personal Property.

Ashurst LLP is a leading international law firm, and our global, multi-disciplinary team of experts provides innovative advice to local and global corporates, financial institutions, and governments on all areas of commercial law. Our practitioners have deep experience and are involved across the cryptoasset and Digital Asset industry on some of the most strategic and innovative projects to date.

Our response contains our own views based on our general knowledge of Digital Assets and our experience of advising clients in respect of specific examples of Digital Assets. Our response is not made on behalf of any of Ashurst's clients. We have set out our views on each of the three questions raised by the Law Commission below:

(1) Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?

Yes, we strongly agree with the general approach of the draft Bill. We believe that it will achieve the desired effect for Parliament to disapply the presumed rule from *Colonial Bank v Whinney* that there are only two classes of personal property.

(2) What do you consider the positive impact of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?

The proposed Bill will create a foundation for the development of the common law of Digital Assets. We have previously expressed concerns about uncertainty and confusion arising from reliance on *dicta* in decisions that were made when electric lighting was still a novelty. The Law Commission's Final Report on Digital Assets is a strong and compelling statement that the law of personal property is not limited to the two classes described in *Colonial Bank v Whinney*, but Parliament should put the matter to rest in order to provide confidence to the courts.

It is impossible to quantify how much time might be saved by implementing the measures in the draft Bill, but the experience of the traditional securities markets demonstrates that the common law tends to lag behind shifts in technology (eg, from paper to book-entry, dematerialised securities), even by decades. This is

understandable, due to the ways that disputes arise and are dealt with, but uncertainty can affect risk assessments made by businesses and inhibit investments. The greatest (although immeasurable) impact of providing clarity through statute is likely to be the resolution of questions that stand in the way of commercial and technical developments through investment.

(3) What do you consider the costs and/or risks of the Bill to be?

We do not expect that there will be significant costs for industry participants arising from the draft Bill. It will represent savings for litigants and provide a basis for further development of the law without distortions due to confusion or uncertainty.

From a risk perspective, questions will remain about the nature of Digital Assets and the ways that rules of personal property can be applied to them. The Bill is a meaningful first step to address them.

We strongly support the proposal of the Law Commission and look forward to the adoption of the Bill in due course.

We hope that our comments are of assistance. We are available to discuss any of the points in this response.

Yours faithfully,

[redacted]

ASHURST LLP

VIA E-MAIL ATTACHMENT

digitalassets@lawcommission.gov.uk
Law Commission
Commercial and Common Law Team
1st Floor, Tower, 52 Queen's Anne Gate
London, SW1H 9AG

24th March 2024

Re: Law Commission's "Digital assets as personal property Short consultation on draft clauses" (February 2024) (the "Consultation")

Dear Madam or Sir,

The European Focus Committee of the Association of Global Custodians (AGC-EFC) is grateful for the opportunity to submit this contribution to the Law Commission in response to the above-referenced Consultation.

Established in 1996, the Association of Global Custodians (the "Association") is a group of 12 global financial institutions[1] that each provides securities custody and asset-servicing functions primarily to institutional cross-border investors worldwide. As a non-partisan advocacy organization, the Association represents members' common interests on regulatory matters and market structure. The member banks are competitors, and the Association does not involve itself in member commercial activities or take positions concerning how members should conduct their custody and related businesses.

The Association has long engaged extensively with government and regulatory authorities throughout the world to support their work to better understand our industry and ensure the safe and efficient provision of securities custody services for the benefit of investors and the financial system as a whole. The Association continues to support these efforts and stands ready to provide assistance and information – within the boundaries of competition and antitrust constraints - as authorities require.

The AGC-EFC together with the Association of Financial Markets in Europe ("AFME") previously jointly responded to the Law Commission's Digital Assets Consultation Paper, Law Com No 256 (28th July 2022) ("Law Com No 256"). In our previous submission, we recommended that a statutory foundation be provided for digital assets as a class of personal property, and expressed concern about the Law Commission's preference for, as the main sources of law, common law decisions informed by the opinions of experts. We stated that this approach that would be insufficient to provide the legal

certainty required to support the development of markets in digital assets, including in particular digital securities. We wrote:

> *We do not envision that litigation can or should be the primary motor for legal reform in an area based upon innovative technology that breaks down the traditional (and highly regulated) roles and responsibilities of actors in securities markets. While disputes will arise, which require the assistance of the courts to resolve, the focus of cases on particular facts and arguments in the interests of the parties is unlikely to lead to clarity where it is needed most. In the book-entry securities markets, there are problems that never reach the courts, because the actors resolve them between themselves in commercially appropriate ways; leaving academics to speculate on how the lacuna ought to be filled. Where disputes do reach the courts, the results may not provide satisfactory clarity even if they do reach the "correct" result.*

There have been significant developments since Law Com No 256, including the Law Commission's own proposals: the recommendations set out in the Consultation are of course extraordinarily well considered and supported, as the Law Commission itself has noted. However, our fundamental concern – referenced above in our prior submission - remains in view of the reality of market expectations.

We note the Law Commission's statement in Para 2.28 of the Consultation:

> *A statutory confirmation is likely to help protect new and emergent forms of property from intermediation imposed by the application of ill-fitting private law principles, such as the concept that such things are things in action. A statutory confirmation is also likely to help protect emergent forms of property from regulation which might mandate intermediation or reduce a person's ability to self-custody their own asset; that is, to hold it directly rather than through an intermediary such as a wallet provider.*

We understand that the Law Commission is attempting to "future-proof" the law so that it accommodates the widest context possible. However, in doing this, we remain concerned about the implications for legal and regulatory clarity where these are needed. In the Consultation, the Law Commission suggests ways in which the market can shape this clarity by referring - by way of example - to the recording of certain "offchain" things using tokens and asserting that "[l]egal rights (as opposed to things such a crypto-token) that are created within blockchain or DLT-based systems or multilateral contractual frameworks will be treated as things in action by the law."[2] As noted by the Law Commission[3], this was also the conclusion of the Financial Law Committee of the City of London Law Society in their response to Law Com No 256:

> *… with particular regard to private, permissioned systems, the claimant is likely to have some form of [thing] in action in the traditional sense in relation to the digital asset held and transferred through the system; and, to that extent, the subject-matter of that claim will be recognised under traditional English law concepts as a form of incorporeal property.*

[2] Consultation, Para. 3.29
[3] Consultation, Footnote 56.

Consultation Para. 3.29 goes on to refer to the UKJT's "Legal statement on the issuance and transfer of digital securities under English private law" (2023), para 68, for the proposition that such a power [to have ultimate control over the register or record] may, depending on the structure, "be incompatible with the recognition of any tokens deployed in the system as the object of property."

The Law Commission asserts at Consultation, Para 3.41:

> *The law should … focus on the attributes or characteristics of the thing with which it is concerned in a particular case. It should not attempt rigidly to apply to third category things legal principles that were formulated by reference to other things that are capable of being objects of personal property rights. This will be a common law assessment for the courts to make, assisted by existing property principles and reflective of the unique nature of third category things. Although this is in some ways a significant task for the courts, it reflects the development of the law relating to things in possession and things in action.*

Rigidity and flexibility are of course relative concepts. We continue to believe that – especially in the context of equity securities and fixed income securities which make up the bulk of the capital markets that are instrumental to the UK's and wider economy as well as other major asset classes that could have significant systemic impacts (such as tokenized loans or other real world assets, for example) – clarity is warranted in order to enhance certainty that investors will have property rights that will be respected by the courts, including where there is an insolvency of a platform or an intermediary.

At this point however, it seems clear that the market, together with regulatory authorities, will need to fill the gaps left in statutory law in the UK. This, we now understand, is by design. In view of the need for predictability, legal certainty and regulatory clarity in order for to achieve scale in the UK, we especially take note of the Law Commission's recommendation in the Consultation[4] that the Government should create or nominate "a panel of industry-specific technical experts, legal practitioners, academics and judges to provide non-binding guidance on the complex and evolving factual and legal issues relating to control involving certain digital assets (and other issues relating to digital asset systems and markets more broadly) in order to assist the courts."

Establishing a predictable boundary – or at least commonly applied and well understood principles – to separate *choses in action* from the new, third category of property will be, in our view, crucial in order for the UK to be attractive to financial services and fintech industries. The AGC-EFC stand ready to assist authorities to achieve this goal.

[4] Consultation, Footnote 61.

As noted above, the AGC-EFC welcomes the opportunity to respond to this call for evidence and would be pleased to follow up on our response with a meeting with the Law Commission if requested.
Sincerely,

[redacted] European Focus Committee
Association of Global Custodians

Response ID ANON-12XZ-CHB4-P

Submitted to Digital assets as personal property draft clauses
Submitted on 2024-03-22 18:19:10

About you

What is your name?

Name:
James Burnie FRSA

What is the name of your organisation?

Enter the name of your organisation:

gunnercooke llp / WAGMI Advisers

Are you responding to this consultation in a personal capacity or on behalf of your organisation? How should you/your organisation be named if we later refer to your response?

Capacity and name for quoting:

I am responding in both capacities. Please quote as:

James Burnie FRSA on behalf of gunnercooke llp and WAGMI Advisers

What is your email address?

Email:
[redacted]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Tell us why you regard the information as confidential:

Consultation questions

Consultation Question 1: Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?

Yes

Please explain your answer:

We agree with the general approach of the draft Bill as a useful starting point for clarifying the law in relation to the subset of cryptoassets to which it applies.

We would suggest that the bill be phrased to make clear that it is a clarification, rather than a change in the law per se, to avoid the potential for dispute over whether actions in relation to cryptoassets pre-bill were not in relation to property (i.e. to avoid an argument that if the law changed the make cryptoassets property then cryptoassets before the change is law were not property). In this respect, we note the helpful discussion in the Law Commission paper regarding the fact that courts have already tended to conclude that specific crypto assets have property rights – and so arguably this point is already to some extent established.

We would also emphasize that this is very much a starting point. In this respect, we welcome the recommendation that Government creates or nominates a panel of industry-specific technical experts, legal practitioners, academics and judges to provide non-binding guidance on the complex and evolving factual and legal issues relating to control involving certain digital assets (and other issues relating to digital asset systems and markets more broadly) in order to assist the courts. We would be glad to assist with this if helpful.

Consultation Question 2: What do you consider the positive impacts of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?

Positive impact:

Generally, there is a tendency in the legal profession to take a cautious approach to advising on matters unless there is regulatory certainty. For example, in the context of insolvency, there is a tendency to not commit whether a particular security will work unless it has been successfully tested in court. This has been to the detriment of the industry, in that (for example in the context of lending, it has led to a reluctance to rely on security linked to cryptoassets).

Providing statutory clarity therefore has the potential for material cost savings for both the legal system and any entities or individuals engaged with cryptoassets, because it gives a legal basis on which practitioners can be more sure of advice. More fundamentally than reducing the time period of a dispute, it may actually avoid the need for a dispute in the first place.

What do you consider the costs and/or risks of the Bill to be?

Costs or risks of the Bill:

The ambitious scale of the bill, and the fact that represents a starting point rather than a conclusion to the question of the legal treatment of cryptoassets, means that it (unavoidably) incurs the costs involved in working out the consequences of certain cryptoassets being property.

These costs are unavoidable, however, if the view is to be taken that cryptoassets do not fall within an existing category of cryptoasset – and for the reasons set out in the Law Commission Consultation we agree this is the case – the bill at least avoids the costs of answering the preliminary question of whether cryptoassets are property and allows practitioners to focus on the consequences of cryptoassets being property.

There will, therefore, be an ongoing cost as implications of the bill are determined, and this would include legal and advisory costs.

The risks are therefore in our view twofold:

1) There is a risk that the way in which cryptoassets as property are interpreted by advisors is hindered by the fact that they do not fall within a pre-existing category of property.

2) There is a risk of a cryptoasset being treated as property in circumstances where that is not appropriate (for example, where it is acting as a record only and does not have the indicia of being property). This issue could be exacerbated for those cryptoassets that changes their attributes during their lifecycle (and so arguably could be / not be property at different points of the lifecycle.

Digital Assets as Personal Property – Law Commission of England and Wales Short Consultation on Draft Clauses

Response by the Centre for Commercial Law and the Centre for Scots Law at the University of Aberdeen

This response is provided by a joint working group of the Centre for Commercial Law and the Centre for Scots Law at the University of Aberdeen. [redacted]

(1) Do you agree with the general approach of the draft bill, and agree that it will achieve the desired effect?

If English law is to maintain its traditional distinction between 'choses in possession' and 'choses in action', there is some value in the draft bill. It offers certainty on a particular point of classification and the recognition that the possession/action dichotomy is not exhaustive would give the law a degree of flexibility. Nor, as the wording of the bill makes clear, would the impact of such flexibility necessarily be confined to *digital* assets. The bill also arguably offers the courts some latitude as to the remedies that they could grant in respect of digital assets. All in all, statutory recognition of a third category of personal property would mean that the courts would not feel compelled to classify all property objects not fitting into the 'choses in possession' category as 'choses in action'.

While producing a code on digital assets would be onerous, and would no doubt bring its own problems, the fact that the draft bill has only one substantive provision is unfortunate. It savours of a missed opportunity. Much of the law's development will simply be left to the courts. If there is to be legislation on a third category of personal property, a number of points would benefit from clarification. For example, it would be helpful for the legislature to define the boundaries of this third category, lest it become nothing more than a vague miscellany. Is the third category defined *negatively*: that is, simply as any type of personal property that does not fit into the more established categories of choses in possession and choses in action? It would also be useful to clarify what this new category would exclude. If there are limits on what can constitute a property object, what are those limits? Whether or not the third category is defined positively or negatively, what is it about the three types of personal property which makes them distinctively categories of *property*, such as to distinguish them from other private law categories? What characteristic(s) do they have in common which others do not share? Clarification of what is *excluded* from being a property object (e.g. pure information) would be helpful, not least given the assertion, at paragraph 3.14, that 'any potential third-category thing will need to be capable of attracting property rights in the first place – *and some digital assets are not*' (emphasis added).

Another area on which clarification would be welcome is the availability of bespoke remedies for digital assets, including debt enforcement (execution) provision, and bespoke rules regarding such matters as transfer and good faith acquisition. Again, the bill seems to leave the task of developing the law on such matters to future litigation. The brevity of the draft bill belies the thoughtful discussions in the consultation documentation. Perhaps that documentation would one day offer interpretative guidance, but such guidance should perhaps be provided in the draft bill itself. It might be argued that much of what the consultation documentation identifies is principles rather than rules and that

statutes lend themselves more readily to the latter than to the former. However, it is possible for legislation to give expression to principles as well as to rules, and placing those principles in the legislation would be conducive to legal clarity.

It may be questioned whether this bill was necessary. The one substantive provision that it contains simply confirms what is already generally understood to be the law. Further, arguably, there was always going to be a bespoke regime for digital assets, much as for intellectual property, and that would have been so whether digital assets had been regarded simply as a form of choses of action and/or as (sometimes) belonging to some third category. Perhaps the bill would serve a symbolic function, signalling to the courts that the law in this area should be developed further wherever possible. It is only unfortunate that there is a lack of guidance as to *how* the law should be developed.

One point to consider is whether some types of property hitherto classified as 'choses in action' – perhaps simply because they are not choses in possession, coupled with the traditional perception that property objects must constitute either choses in possession or choses in action – would 'migrate' to the new category of personal property recognised in the draft bill. Conversely, even on the recognition of this new third category of property, it is worth considering whether *all* digital assets that constitute property objects would necessarily belong to that third category. Conceivably, some digital assets would fall under the 'choses in action' category and others under the new category. In other words, digital assets might cut across two categories. That being so, and assuming that the purpose of the draft bill is to foster a bespoke regime for digital assets, is there any real need for, or benefit in, the legislative recognition of a third category of personal property? A key advantage of legislation – which can consist of rigid, fact-specific rules – over common law principles – apt to be expanded by analogy in future cases – is that it is possible to provide targeted legislation in certain areas and for certain purposes without upsetting, say, the traditional dichotomy between choses in action and choses in possession. Arguably, such targeted legislation on digital assets would be more useful than what is currently proposed.

We are also uncertain as to the precise relationship between the categories specified in this draft bill and electronic trade documents. We note the comments at paragraph 3.21 of the consultation paper, as well as s 3(4) of the Electronic Trade Documents Act 2023 which specifies that such a document "is to be treated as corporeal moveable property" (i.e. broadly the equivalent of choses in possession) for the purposes of Scottish legislation relating to the creation of pledges over moveables (the broad equivalent of personal property). However, it is not wholly clear to us whether the intention now is for an electronic trade document to be a thing in possession due to the Electronic Trade Documents Act or a third category thing in English law, in terms of the draft bill. The consequences of such categorisation will also need to be considered.

Whatever the merits of the draft bill for the purposes of English law, it should not extend to Scotland. Any third category of personal property recognised in English law should not have any effect on Scots law, given the substantial differences between the two systems of property and the non-alignment of their taxonomical approaches to property categories. Given that there may be a greater need for legislative intervention as regards digital assets in Scotland than in England and Wales, due to the absence of case law in the former, it is important that Scotland does not adopt a parallel approach to England by default.

(2) What do you consider the positive impact of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might be reduced)?

Such limited clarification as the bill would provide may produce a saving in the long term. It would probably obviate the need for *some* litigation. Again, however, the minimalistic approach adopted in the draft bill, which deliberately leaves many important areas to be developed by the courts, would make the law more reliant on the courts, and thus on costly litigation, than would be the case with an alternative approach with further clarificatory provisions in the bill. This approach also means that the law will only develop if and when there is relevant litigation.

(3) What do you consider the costs and/or risks of the Bill to be?

As stated above, the minimalistic approach in the bill will most likely lead to more litigation than there would have been under a more detailed bill. In addition, there is a substantial time and resources cost in passing and implementing any piece of primary legislation. Consequently, a bill with a single provision may seem like a wasted opportunity, particularly if further legislation may be desirable in future. There is also a risk that one of the higher courts decides a case on digital assets and property categories in the relatively near future and prior to the bill passing or coming into force. Such a case might confirm that the law is already as stated in the legislation, thus somewhat undermining the justification for it.

[redacted]

CLEARTOKEN

[redacted]

By Email: digitalassets@lawcommission.gov.uk

22 March 2024

Response to the Law Commission's Short Consultation on Draft Clauses - Digital Assets as Personal Property dated February 2024 (the "Draft Bill Consultation")

ClearToken Holdings Limited ("**ClearToken**") welcomes the opportunity to respond to the Draft Bill Consultation.

ClearToken is building a Central Counterparty (CCP) to deliver robust financial market infrastructure to the digital asset ecosystem. This infrastructure will mitigate bilateral counterparty risk for settlement, financing, and derivative transactions by centralising clearing, collateral, and risk management arrangements. The company will operate 24/7 to provide uninterrupted service while managing risk in real-time through margin and default fund contributions. As a horizontal CCP, ClearToken will facilitate transactions from multiple venues and OTC markets globally. ClearToken intends to be multi-custodial and will adhere to the highest AML and KYC standards. ClearToken's team comprises established corporate governance and financial markets professionals who share the objective of implementing the necessary framework for the digital asset market.

ClearToken has reviewed the Law Commission's Final Report on Digital Assets (the "**Digital Assets Report**") dated 27 June 2023 and the Draft Bill Consultation containing the text of the proposed new draft bill (the "**Draft Bill**") dated 22 February 2024.

ClearToken strongly supports and commends the work undertaken by the Law Commission in producing both the Digital Assets Report and Draft Bill Consultation (collectively "**the Consultation Papers**") as we believe that the Reports will provide the necessary legal certainty and reinforcement of how digital assets can be treated within the digital asset ecosystem under English law. ClearToken supports the intention of the Law Commission to direct His Majesty's Treasury ("**HMT**") to act on the Draft Bill.

1 Response to the Draft Clauses Consultation

1.1 Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?

ClearToken agrees with the general approach of the draft Bill.

We believe that the Draft Bill provides a strong basis around which a clear legal framework can be developed and will promote legal certainty as to the categorisation of, and handling of property rights pertain to, digital assets under English property law.

1.2 What do you consider the positive impact of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?

ClearToken strongly supports and welcomes the position that the Draft Bill Consultation takes in relation to providing legislative confirmation of the common law recognition of the existence of a third category of property and the rights that will attach to, and that may be exercised in relation to, that third category of property.

[redacted]

[redacted]

CLEARTOKEN

[redacted]

We believe that the legislative changes proposed by the Draft Bill Consultation will bring into enacted law removal of any residual uncertainty on the treatment in law of this third category of property and codification of this position within the Draft Bill is likely to have a positive effective on achieving greater legal certainty in the digital assets clearing and settlement processes and shall provide opportunity for more complex financial transactions involving digital assets to be undertaken in the UK market.

Therefore, ClearToken believes that the draft Bill has the potential to positively facilitate the development of a true digital assets market in the UK. Revenues in the digital assets market are projected to reach US$80B in 2024, with projected total amounts of US$112B by 2028[1]. Disputes in relation to title and interest in digital assets (in particular alleged fraudulent assertion of those rights or fraudulent denial of those rights is commonplace, and expensive. These disputes often revolve around remedies and redress available. The Draft Bill would have material benefit in these issues.

1.3 What do you consider the costs and/or risks of the Bill to be?

We are not aware of any risks associated with the Draft Bill other than its jurisdictional limitations (which are unavoidable and we hope that other jurisdictions (such as Scotland) will follow the Law Commission's lead). We do not regard the Draft Bill's expectation that common law would develop to define where the boundaries of "third category things" lie as a risk.

ClearToken therefore strongly supports the Law Commission in instructing the Treasury to act and bring the Draft Bill for consideration before Parliament at the earliest opportunity.

Yours sincerely,

[redacted]

[1] Source: Statista, Inc

[redacted]

28 March 2024

Clifford Chance response to the Law Commission's Short Consultation on Draft Clauses - Digital Assets as Personal Property dated February 2024 (Consultation)

Clifford Chance welcomes the opportunity to respond to this consultation, following on from the wider work undertaken by the Law Commission in this space. We refer to our response dated 4 November 2022 to the Law Commission's Consultation Paper 256 on Digital Assets (Previous CC Response).

1. **Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?**

We agree with the general approach of the draft Bill.

Consistent with the Previous CC Response, we are supportive of clarification of the law in this area by statutory intervention confirming the existence of a third category of property. As the Law Commission has identified in the Consultation and previously, there are challenges with categorising certain cryptoassets as either choses in possession or choses in action. We agree that the best way to address this is the creation of a new and third category of property, as outlined in the Consultation and draft Bill.

As outlined in the Previous CC Response, our main concern with clarification of the law in this area is that great care needs to be taken in defining any new third category of property, particularly at an early stage of market development, to avoid creating new uncertainties and/or unintended consequences. Therefore, the approach now proposed with a draft Bill that merely confirms that digital assets are capable of being the object of personal property rights while leaving scope for what does and doesn't fall within such category to be determined on a case-by-case basis is very helpful from our perspective. This will allow judges to make assessments of the exact parameters and the legal treatment relevant to third category things in line with the particular circumstances, and also with market understanding and practices as they develop and evolve over time. This should help to ensure, for example, that the new third category is not overly expansive and does not include uses of distributed ledger technology (DLT) that it would not be appropriate to extend to, for example where cryptoassets are already caught by the traditional two-limbed test or where DLT is used for record keeping purposes only and no new asset is created. This will also allow judges to consider where there may be other existing legal concepts that may be capable of being utilised, with adaptation where appropriate.

Such a confirmation being made on a statutory basis will provide greater legal certainty for market participants around the categorisation of digital assets and will provide a clear foundation for the common law to continue to develop consistently and iteratively.

One area that it is important to consider is whether any assets falling within the new statutory category would also fall within the ambit of the definition of "property" for the purposes of section 436 of the Insolvency Act 1986. We think this would be the case based on the reference to "every description of property wherever situated" included in the definition, particularly as we note that judges have already shown flexibility around the interpretation of property in this context as outlined in the Consultation. However, for the avoidance of any doubt, it might be useful for the Law Commission to confirm this. We assume that this is also likely to be addressed by the upcoming UK Jurisdiction Taskforce (UKJT) statement on the treatment of digital assets in English insolvency law.

2. **What do you consider the positive impact of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?**

While the English judiciary and common law have adapted and provided some useful clarification in decisions in relation to the status of cryptoassets under English law, along with the helpful statement issued by the UKJT in November 2019, there is currently still some residual uncertainty on whether and how certain cryptoassets constitute property. This means that law firms giving advice and opinions in this area may be required to undertake a lengthy "better view" analysis and rationalisation based on case law to date and the UKJT statement, rather than offering clear legal opinions. This leads to market participants paying more in legal fees and ultimately may lead to lost business opportunities due to perceived risks in relation to the uncertainty.

Introduction of the Bill would give market participants much greater legal certainty. It would help to reduce the level of legal analysis required by law firms when opining on cryptoasset-related queries and therefore should reduce the level of legal fees payable. We agree that introduction of the Bill would also reduce the time spent by the courts on questions of categorisation of objects of personal property rights, allowing them to focus on the substantive issues before them and so reduce legal fees and court time in relation to contested matters as well.

Removing this legal uncertainty would also provide the UK with a competitive advantage, building on wider UK regulatory initiatives in this space. Together these would offer the potential for stronger development of the UK market.

3. **What do you consider the costs and/or risks of the Bill to be?**

We do not consider there to be any particular costs or risks associated with the draft Bill.

As the Bill is an enabling measure, merely confirming that a third category of things capable of being the object of personal property rights exists and which is broadly consistent with the position under common law already, we do not consider that the introduction of the Bill would

generally have a negative impact on existing commercial arrangements. To the extent existing commercial arrangements have been brought into being based on a previous understanding between parties or legal advice that conflicts with the position under the Bill, we are confident that this would be taken into account as part of a judicial assessment for any particular decision to the extent necessary.

We would be happy to discuss further if it would be helpful.

Yours sincerely,

Clifford Chance LLP

THE LAW COMMISSION'S CONSULTATION ON THE DRAFT BILL ON OBJECTS OF PERSONAL PROPERTY RIGHTS

CLLS FINANCIAL LAW COMMITTEE RESPONSE

INTRODUCTION

The City of London Law Society (CLLS) represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multijurisdictional legal issues.

This Response to the Law Commission's Consultation on its short draft Bill (the "**Bill**") on objects of personal property rights (the "**Consultation**") has been prepared by the Financial Law Committee ("**FLC**") of the CLLS, whose members specialise in major financings involving obligors incorporated in multiple jurisdictions, creditors incorporated or doing business in multiple jurisdictions, and assets located, or deemed by principles of private international law to be located, in multiple jurisdictions. Concepts of English law and other laws relating to digital assets, and the development of these concepts, are increasingly critical to the transactions and advisory matters on which members of the FLC advise. Full details of the members of the FLC appear on the CLLS website. Members of the FLC who are partners of Clifford Chance LLP,.Linklaters LLP and Norton Rose Fulbright LLP have taken no part in the preparation of this Response and have notified the Chairman of the FLC that their firms are submitting their own response to the Consultation in which they take a different view on a number of issues from that expressed in this Response; those members have, accordingly, notified the Chairman that they and their firms do not wish to be associated with this Response by reason of their membership of the FLC.

The FLC continues to appreciate greatly the thorough work and detailed analysis undertaken by the Law Commission with regard to the legal issues that arise in the context of digital assets, including the Call for Evidence on conflict of laws aspects issued in February 2024. As the FLC noted in its response dated 4 November 2022 (the "**Response**") to the Law Commission's Consultation Paper on Digital Assets issued in July 2022 (the "**July 2022 Consultation Paper**"), and as has also been recognised by the UK Jurisdictional Taskforce (the "**UKJT**"), the very nature of most types of digital assets has given rise to, and will continue to give rise to, complex cross-border legal issues, and we fully support the Law Commission's ongoing work in this area.

We set out below the FLC's responses to the three questions listed in paragraph 4.10 of the Consultation. First, we set out some introductory comments on the draft Bill.

We agree that the development of English law in this area is, as a general matter and subject to specific targeted legislative reforms, best left to the common law and principles of equity, which have proven to be more than up to the task of evolving over time in England and Wales and in other common law jurisdictions. The case law developed by the English courts over the past decade itself demonstrates the willingness of judges to use existing and well-established principles of law to address issues arising

from the creation and development of digital assets. We note, and agree with, the commentary in the Consultation that most of the cases over the past decade in which the English courts have considered the nature of crypto-tokens and other digital assets have been interim or interlocutory applications which may not have required, or permitted, detailed analysis of the legal nature, or the proper and most coherent categorisation, of the assets in question. We also note, as was explained in the July 2022 Consultation Paper (and in the Law Commission's Final Report issued in June 2023 (the "**Final Report**")), that the proper scope of the concept of a "thing in action" as a matter of current common law remains undetermined and, indeed, is subject to considerable academic debate. Nonetheless, there is a clear trend of development of the common law and principles of equity in this area, with more substantive judgments issued by senior English courts recognising the ability of crypto-tokens and other digital assets to be the objects of personal property rights. The fundamental question is, it seems to us, whether the Bill is needed at all. In the view of the FLC, it is not, or, not at this point in time. If, notwithstanding our view, a short legislative instrument is considered desirable to provide clarity or support legal certainty in this area, for the reasons we set out in our response to Question 1 below, we do not consider that the Bill in the form proposed in the Consultation achieves those objectives. We have proposed changes to the draft Bill (set out in the Annex and explained in our response to Question 1 below) to support the achievement of those aims and to minimise the risk that the Bill, were it to be enacted, might inhibit a proper policy-based evolution by the English senior courts of the common law principles and related taxonomy for personal property rights as affecting digital assets.

It may be that the ongoing work of the Law Commission in this area, including the most recent Call for Evidence on conflict of laws issues, will identify lacunae in English law which would benefit from assistance in the form of statutory provisions. We are also interested to see the Statement which the UKJT has recently indicated it will issue in April 2024 following its recent consultation on digital assets and English insolvency law. At the moment, however, we are not convinced that the introduction of the Bill (in the form proposed in the Consultation) is necessary or helpful.

In our Response, we indicated our concerns regarding the "third category" of personal property suggested in the July 2022 Consultation Paper Although we note that the Final Report addressed some of these concerns, and the Consultation itself reflects the preference to leave the development of English law in this area largely to the judiciary, we are concerned that the Bill may result in fettering the ability of judges of the senior English courts to develop the law in a coherent manner, reflecting and expanding upon the existing jurisprudence. We note, also, that the law applicable to digital assets cannot be viewed without also considering the regulatory environment in which numerous persons operate, including investors in and users of digital assets and those providing finance for the acquisition of, or secured by, digital assets. We appreciate that not all persons who deal with digital assets operate in a regulated environment, but many do, and it is critical that the regulatory environment reflects, so far as possible (noting again that principles of private international law are almost invariably engaged when dealing with digital assets), accepted legal characteristics of these types of personal property and the rights, obligations and restrictions to which these characteristics give rise. To take an obvious example, there are well-developed principles applicable to the custody of financial assets in English law and UK financial services regulation, founded principally on trust law concepts developed with respect to intangible assets; we are concerned that any development of a "third type" of personal property for digital assets subject to custody arrangements, potentially attracting legal concepts loosely analogous to those developed for things in possession (e.g. bailment), would cloud and confuse the law in this area and the associated regulatory regimes.

RESPONSES

Our responses to the three questions raised in the Consultation are set out below.

1. **Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?**

1.1 We are concerned that the Bill is drawn too widely for a legislative instrument potentially affecting the personal property rights of businesses or individuals. We understand that the mischief to which the Bill is addressed is the perceived need to provide clarity and certainty as to the capability of an intangible thing (that is not a thing in possession, i.e., a thing/chose that is capable of possession whether under the common law or by statute) to be the object of personal property rights. For the reasons explained further below, in order to address any concerns regarding the effectiveness and enforceability against the world of rights in relation to an intangible asset that is not a thing in possession and exists independently of the legal system or of persons (including crypto-tokens and other similar digital assets), we suggest that clause 1 of the Bill should be amended so that it reads:

> "*A thing is capable of being the object of personal property rights even though it is neither -*
> *(a) capable of possession, nor*
> *(b) a right that may only be claimed or enforced by legal action or proceedings against another person or persons*."

This wording would limit the scope of the clause to deal specifically with its targeted mischief i.e. to clarify that a thing may be the object of personal property rights, even though (to use the language of the Consultation) it is not a thing in action "in the narrow sense". For the reasons we explore further below, we believe it would be unhelpful for the Bill to adopt the undefined term, "thing in action", as a central concept to determine the scope and effect of the legislation. We consider it essential that what is intended by the term "in the narrow sense", as outlined in the July 2022 Consultation Paper, the Final Report and the Consultation, be unpacked and set out specifically in the Bill in order to support its objectives of clarity and legal certainty.

Consistent with our suggestions above, we also suggest that the title of the resultant Act be amended so that it does not refer expressly to digital assets.

A revised draft of the Bill, reflecting our suggestions above, is set out in the Annex.

1.2 The Consultation itself recognises that the proper scope of the concept of a "thing in action" is, as a matter of our current common law, uncertain, although as we noted in our introductory remarks and as recognised in the Consultation, it is clear that English law is moving in the general direction of recognising that crypto-tokens and other similar digital assets may be the object of personal property rights. The analysis at paragraphs 4.29 to 4.38 of the July 2022 Consultation Paper and at paragraphs 3.35 to 3.42 of the Final Report underlines that, at present, there remains a material degree of judicial and academic debate as to what may or may not properly be regarded as a "thing in action" as a matter of common law. Specifically, it is possible that, notwithstanding the first instance decisions made as part of interim or interlocutory proceedings, the common law might (absent the Bill) develop to recognise a "residual" concept of a thing in action, i.e., as embracing all categories of intangible personal

property that are not choses in possession (the "wide view"), and not the "narrow view" adopted by the Consultation supporting the Bill (i.e., that which conceptualises a thing in action as being limited to a right that can only be claimed or enforced by legal action or proceedings). This uncertainty under the existing common law is emphasised by the repeated use of the phrase "in the narrow sense" throughout the Consultation when referring to the concept of a thing in action as contemplated by the Bill. To our mind, this approach recognises that, absent the Bill, there remain potentially two senses in which the English courts (and, in particular, the English senior courts) might ultimately determine how the concept of a "thing in action" should (as a matter of English personal property law) be interpreted and applied. There is already, for example, evidence in existing case law and in academic commentary that the dictum of Fry LJ in *Colonial Bank v. Whinney*[1] is neither exhaustive nor dispositive, or may indeed have contemplated an expansive and dynamic interpretative approach to what may fall within the scope of a "thing in action"[2].

1.3 This use of the undefined term "thing in action" in clause 1 of the Bill runs the risk of creating legal uncertainty. As the Bill itself does not appear to be (and, for the reasons outlined above, cannot be) a declaratory enactment, the use of the term in clause 1 potentially creates other wider issues. Even though the scope of the term is in itself uncertain as a matter of the existing common law, the implicit effect of clause 1 is to require the term to be given some form of narrow interpretative scope. If the Bill supported a wide view of the concept of a "thing in action", there would be no need for the additional category of personal property that is supported by clause 1 as all things that are not amenable to or capable of possession, but which are intended to remain capable of being the object of personal property rights, would be or would fall within the category of "things in action".

1.4 As a consequence, the Bill is not simply clarifying the common law and does not act as a declaratory enactment. Absent the Bill, it would remain open to the Court of Appeal or the Supreme Court to recognise crypto-tokens and other digital assets as falling within the scope of an expanded concept of a chose or thing in action. The Bill, as drafted, pre-empts any such common law development and effectively provides a statutory declaration that the concept as a matter of common law is to be limited to a right that can only be claimed or enforced by legal action or proceedings (i.e. the "narrow view" of the term, "thing in action"). The policy objective of the Bill does not require such a declaration to be made by Parliament – the English courts may themselves determine that a crypto-token or other digital asset is the object of personal property rights by including them within a taxonomy for personal property that includes the "wide view" of what a thing in action is.

1.5 A further concern with the declaration implicitly being made by the Bill is that a non-declaratory enactment potentially creates issues for the presumption of non-retrospectivity where a retrospective application of an enactment can cause unfairness for those affected by it (see Bennion, Bailey & Norbury on Statutory Interpretation, Eighth Edition (2020) at paras. 7.13 and 7.14). For example, if a person (prior to the

[1] (1885) 30 Ch.D. 261 at 285

[2] In this context, we note that in a recent decision of the Singaporean High Court, issued after publication of the Law Commission's Final Report, the judge concluded that the crypto assets the subject of the litigation were things in action and that the category of things in action as a matter of common law is "broad, flexible and not closed": see ByBit Fintech Limited -v- Ho Kai Xin & Ors. [2023] SGHC 199 at paragraphs [34] and [35].

Bill's enactment or proposed enactment), and reasonably relying on an interpretative analysis of the existing common law that all intangible things that are not choses in possession are choses in action, were to take a charge over the chargor's "choses in action" believing (with the chargor) that this term (as a matter of law) includes the chargor's crypto-tokens and other digital assets, the Bill, as drafted, if given retrospective effect, would now remove crypto-tokens and other digital assets from the scope of the relevant charging clause. This would prevent the chargee (contrary to its legitimate expectation or belief and the chargor's intention) having an equitable proprietary interest in the relevant digital assets of the chargor. This potentially raises the concern that the Bill could retrospectively, unnecessarily and unfairly prevent the chargee's peaceful enjoyment of its property for the purpose of the European Convention on Human Rights, or otherwise operate unfairly upon the legitimate interests or expectations of parties affected by the Bill. In order to avoid such a result, a court might therefore use the presumption against retrospectivity and apply the Bill only to things that arise or are created, or proprietary rights or interests that arise or are created in or in relation to intangible things (not amenable to possession), after the Bill comes into force. That approach would, though, defeat one of the key purposes of the Bill, which is to clarify the law of personal property rights as applicable to crypto-tokens and other digital assets (as well as proprietary rights or interests in or in relation to such assets) howsoever and whensoever arising or existing – and so avoid "two tiers" of personal property rights in or in relation to digital assets dependent upon the time they are considered to exist or arise. This could also raise material legal uncertainty as to the practical application of the Bill, once enacted, as affected by difficult temporal issues relating to when a digital asset, or relevant right or interest, is to be considered to exist or arise so as to be properly within or outside the scope of the Bill's operative provisions.

2. **What do you consider the positive impact of the Bill to be? Could you quantify them [sic] (for example, by how much in £ or days/hours might a dispute be reduced)?**

2.1 We do not consider that there will be a positive impact of the Bill, for the reasons stated in our introductory comments and in our response to Question 1. As the Consultation rightly notes, in our view, the substantive law should continue to be developed by the common law and principles of equity, and we do not believe that much, if any, time or costs will be saved by the introduction of the Bill. We are also concerned that the Bill, at least in the form proposed by the Consultation, will limit the ability of the English senior judiciary to develop the law in this area robustly, coherently and consistently with other common law jurisdictions.

3. What do you consider the costs and/or risks of the Bill to be?

3.1 It is not possible to determine with any precision the costs that may be incurred if the Bill is enacted. Possible categories of potential costs would include (a) litigation arising from the concern we raise in paragraph 1.5 above regarding the temporal scope or limitations of the Bill (notably, whether it would, or would not, have retroactive effect), and (b) the costs that may be incurred by regulatory authorities in determining, and perhaps seeking advice in connection with, the extent to which the Bill (or the potential developments in English personal property law that the Bill may be taken to support adopting possessory-like concepts) may impact upon regulated activities, including (i) the safeguarding and custody of digital assets and the distribution of digital assets in the event of an insolvency of the custodian or any other person who

has a personal property right to those digital assets, and (ii) whether it is correct, for the purposes of determining regulatory capital requirements, to assume that regulated custodians should hold capital against operational risk but not necessarily against counterparty risk or market risk. The Law Commission may wish to raise this question directly with the Prudential Regulation Authority and the Financial Conduct Authority. These areas of potential uncertainty and litigation may affect precisely the most sensitive areas for the financial markets in the UK - the allocation of resources to persons with proprietary interests and creditors without such interests in cases where a failed business may hold an insufficiency of assets to satisfy all claims - an area where the scope for expensive litigation should be minimised as the associated costs will likely reduce the asset pool further and may place additional costs on parties already suffering, or potentially exposed to, substantial losses. Issues such as these will need to be considered and developed in any event, but it is not clear that the Bill (or wider principles of English personal property law that it may be taken to support) will provide any meaningful assistance in resolving them.

3.2 As regards the risks associated with the enactment of the Bill in its current form, or at all, we refer to our introductory comments and our response to Question 1.

ANNEX
Suggested Revised Draft Bill

A

BILL

TO

Make provision about the types of things that are capable of being objects of personal property rights.

BE IT ENACTED by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: -

1. **Objects of personal property rights**

A thing is capable of being the object of personal property rights even though it is neither –
(a) capable of possession, nor
(b) a right that may only be claimed or enforced by legal action or proceedings against another person or persons.

2. Extent, commencement and short title

(1) This Act extends to England and Wales only.

(2) This Act comes into force at the end of the period of two months beginning with the day on which this Act is passed.

(3) This Act may be cited as the Property (Objects of Personal Property Rights) Act 2024.

Response to digital assets as personal property – short consultation on draft clauses dated February 2024 (the "Consultation")

We are pleased to see the publication of the Consultation and the draft Bill set out at paragraph 3.1 and Appendix 1 of the Consultation (the "**Bill**").

Our responses to the Consultation are set out in full below.

1. RESPONSES TO THE CONSULTATION

1.1 *Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?*

We agree with the general approach of the draft Bill and agree with the Law Commission that it will achieve the desired effect.

While there is an argument to be made for legislation which is more prescriptive, we agree with the Law Commission's view that incremental common law development is a preferable approach.

In the process of such development, the Bill will provide a solid basis around which a coherent legal framework can be built; fully incorporating digital assets into English property law.

1.2 *What do you consider the positive impact of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?*

Our view is that it is currently difficult for law firms to give clean legal opinions to market participants (e.g., issuers and financial institutions) in relation to tokenised securities. While there has been some recognition of digital assets as property by the English courts in relation to injunctions, such developments are, by their nature, piecemeal, specific to the circumstances of the particular case, and at risk of being overturned by subsequent judicial decisions. In the absence of a clear and conclusive legal foundation, in our experience, competition from other jurisdictions is strong.

Consequently, English law governed issuances of tokenised securities are currently considered by some market participants to involve a degree of legal uncertainty. In our experience, more issuances are taking place in other jurisdictions where the position of digital assets is perceived as being more certain (with several jurisdictions having passed legislation that caters for or addresses the adoption of blockchain technology and digital assets). In our practice, we have seen this being a cause of frustration for the UK market.

Our view is that the Bill has the potential to provide legal certainty to market participants and their advisers, facilitating the development of digital assets markets in the UK.

1.3 *What do you consider the costs and/or risks of the Bill to be?*

We are not aware of there being any costs and/or risks associated with the Bill.

[redacted], CMS Cameron McKenna Nabarro Olswang LLP

[redacted], CMS Cameron McKenna Nabarro Olswang LLP

[redacted], CMS Cameron McKenna Nabarro Olswang LLP

22 March 2023

Response ID ANON-12XZ-CHBD-6

Submitted to Digital assets as personal property draft clauses
Submitted on 2024-03-19 14:16:06

About you

What is your name?

Name:
[redacted]

What is the name of your organisation?

Enter the name of your organisation:

Coinbase

Are you responding to this consultation in a personal capacity or on behalf of your organisation? How should you/your organisation be named if we later refer to your response?

Capacity and name for quoting:

[redacted]

In my capacity as:
[redacted] Coinbase

What is your email address?

Email:
[redacted]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Tell us why you regard the information as confidential:

Consultation questions

Consultation Question 1: Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?

Yes

Please explain your answer:

Coinbase strongly supports the general approach of the draft Bill. In our prior responses submitted through the International Digital Assets Counsel group we advocated for exactly this type of targeted statutory intervention to formally recognise crypto assets as a third category of property under the laws of England and Wales.

We consider this a helpful step to eliminate any residual uncertainty regarding the status of digital assets as property and demonstrate that the UK is willing to embrace transformational technology.

Consultation Question 2: What do you consider the positive impacts of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?

Positive impact:

Increased certainty on this point will be positive for all market participants, and establishing this solely through common law will take an unknown amount of time, especially for this to be considered “settled law”. For this reason we would strongly support the Law Commission's Draft Bill to establish the principle that crypto assets are a category of property, and then allow common law to further refine and integrate this into the existing body of law in future.

What do you consider the costs and/or risks of the Bill to be?

Costs or risks of the Bill:

We believe that today crypto assets are, or would be, recognised as a form of 'property' by the courts, and that common law would adequately interpret the existing law of property to adjust to the realities of this new type of asset. Given that the Draft Bill seeks to ratify this understanding, we do not foresee significant risks associated with its enactment. Instead the additional certainty provided should help contribute to the development of this industry in the UK.

JOINT RESPONSE OF THE COMMERCIAL BAR ASSOCIATION AND THE CHANCERY BAR ASSOCIATION TO THE LAW COMMISSION'S CONSULTATION ON DIGITAL ASSETS AS PERSONAL PROPERTY DRAFT LEGISLATION

28 March 2024

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[1] Co-ordinator of this response.

Introduction

1. This response is from the Commercial Bar Association ("Combar") (with assistance from the Chancery Bar Association ("ChBA")) in relation to the Law Commission's call for evidence concerning the short Bill on digital assets as personal property as set out in the February 2024 short consultation paper (the "draft Bill" and the "2024 CP" respectively). The Draft Bill implements the Law Commission's recommendation set out in its Digital Assets: Final Report (2023) Law Com No 412 (the "June 2023 Report").

2. Combar represents over 1,800 individual practitioner members of the Commercial Bar in England and Wales, a number of whom have developed expertise in cryptoasset-related disputes or who have an academic interest in the area.

Consultation Question 1

1. Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?

1.1. The majority[2] of the Authors disagree with the general approach of the draft Bill.

1.2. First, the stated purpose of the draft Bill in the June 2023 Report (paragraph 2.6) was to express the position in legislation that digital assets are capable of attracting personal property rights. However, within that same recommendation, the Law Commission acknowledged that *'this is clearly the position at common law'* (*ibid.*). That tension in the approach, between, on the one hand, the significant reliance on the ability of the common law to develop the law[3] and, on the other hand, the idea that legislation is necessary, permeates the 2024 CP. Paragraph 2.2 of the 2024 CP

[2] One Author considered that the recognition of a third category was helpful and that the draft Bill reflects the existing common law. Another Author considered that things in action and things in possession are conceptually exclusive and, if anything, cryptoassets are things in action, and there is no room for a third category.

[3] See, for example, 2024 CP, paras 3.15; 3.20; 3.36; 3.41. The Law Commission leaves the common law to address: (i) whether a digital (or other) asset is capable of attracting property rights; (ii) where the boundaries of third category things lie and what considerations are relevant in determining where those boundaries are to be drawn; (iv) what the content of those personal property rights are; and (v) what consequences flow from a digital asset being the object of personal property rights (e.g. what claims are available for interferences with it). See paragraphs 1.5 to 1.8 of this Response below.

acknowledges that *'Court decisions over the last ten years show that the common law of England and Wales has moved toward the recognition of a "third" category of things to which personal property rights can relate but which do not fall easily within either of the two traditionally recognised categories…more recently,* [this development] *has been in response to crypto-tokens.'* This 'confirms'[4] the draft wording of clause 1 of the draft Bill already. Authors therefore question whether the draft Bill serves any purpose at all.

1.3. The justification for the draft Bill provided in the 2024 CP, paras 1.10, 2.3, and 2.25[5], is that explicit recognition of a third category of things to which personal property rights can relate would facilitate the law's future development and lay to rest any lingering doubt about the existence of such a category. However, the Law Commission itself relies on case law which has not been held by back by resistance to the idea of a *tertium quid*;[6] the common law's future development therefore needs no facilitation. To the extent any *'lingering doubt'* can be said to remain in light of the early 19th century Court of Appeal case of *Colonial Bank v Whinney*[7] (and the Authors do not consider there is any such doubt), that will be resolved upon a Supreme Court case (or, practically, a suitable case before the Court of Appeal) confirming what has been stated and accepted in the lower courts, namely that a given type of digital asset can be the subject of personal property rights despite not being a thing in possession or a thing in action. Once that occurs, the draft Bill will be moot.

1.4. Given the Law Commission's confidence in the common law, Authors consider[8] it would be more appropriate to allow the issue to be developed in the Courts, as it has been to date with no claims of any ill effects (as to which, see the response to Consultation Question 3, below). And at some point, the issue of digital assets can be considered by the Supreme Court, unhampered by the draft Bill.

1.5. Second, at least on one view, the draft Bill leaves open the very questions that the Law Commission seeks to answer. Crucially, it does not define a 'thing', save that

[4] 2024 CP, para 1.8.
[5] See also the June 2023 Report, e.g., paras 2.6, 2.17, 2.53, 3.75.
[6] 2024 CP, paras 2.18 to 2.23 and, for a list of cases, footnote 166 of the June 2023 Report.
[7] 2024 CP, paras 2.1 to 2.3 and 2.25.
[8] As did the Authors of the 2022 Combar response, paras 2.2 and 2.5.

the wording in parentheses in clause 1 implicitly asserts that a collection of code (ultimately a series of ones and zeros on a hard drive somewhere) can be a 'thing'.

1.6. The language of 'things' is ambiguous. As Robert Stevens' response to this consultation notes,[9] the word is used to refer both to physical objects and rights in the phrases 'thing in possession' and 'thing in action'. In the context of further categories of rights, is the 'thing' an object, or a right, or something else? The draft bill gives no guidance on how wide this definition of a 'thing' is: does it include an email address? What about an idea for a book? Is happiness a 'thing'?[10] To date the Courts have not considered it necessary to determine whether cryptocurrencies are 'things', or what that concept may mean, but the draft Bill could force the Courts to do so, creating disputes and litigation where currently there is none. After all, *prima facie,* all 'things' are capable of being the object of personal property rights under the draft Bill.[11]

1.7. The draft Bill also leaves open the question that one would have thought it might seek to answer, namely, when a '*thing*' is '*capable of being the object of personal property rights*'. Not only are the criteria not spelled out, but the language itself is not clear; it has two obvious interpretations.

1.7.1. First, it might be taken to mean that property rights can, or will in particular situations, attach to any 'thing'. The 2024 CP makes the point at para 2.8(a) that physical objects exist regardless of whether anyone lays claim to them: in that sense they are 'capable' of being the object of personal property rights. If a person asserts ownership over some 'thing', can that bring with it property rights?

1.7.2. Second, the language might be read to the effect that third category 'things' may or may not be subject to property rights. It seems that the Law Commission intends this: para 3.5 of the 2024 CP refers to '*things that could*

[9] Digital assets as personal property: response to consultation, Robert Stevens, Professor of English Private Law, University of Oxford, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4746868

[10] Authors provided many other examples: the planet Jupiter may be a 'thing', as may the Metaverse, wild bees, clouds in the sky, a password to a computer.

[11] Some Authors also saw the force of the points set out in Mr Stevens' response concerning the confusion created by the draft Bill between rights and things. For example, a debt is a "thing in action", but the personal property right is also the debt. Put another way, there is no separate right to the debt; there is only the debt itself (which is a legal right).

potentially be capable of attracting property rights' (upon fulfilment of other unspecific criteria). The underlined language is used by the Law Commission to avoid ambiguity in simply using the word 'capable', but that is precisely the language used in the draft Bill.

1.8. Accordingly, the language in the draft Bill should be clearer.

1.9. Para 2.24 of the 2024 CP suggests that '*A distinct, third category will better allow the law to focus on attributes or characteristics of the things in question*' and para 2.25 suggests that this will '*provide greater legal certainty and will allow the law to develop from a strong and clear conceptual foundation*'. The majority of Authors consider that the language of the draft Bill does not do this. All it says (subject to the caveats above) is that there is or may be a further category (or categories) of property rights beyond the traditional two categories. It provides no guidance as to any attributes for the 'third' (or 'fourth', 'fifth' etc) category, and very little assistance as to the conceptual foundation on which such property rights might develop.

1.10. It is also suggested at para 2.28 of the 2024 CP that the draft Bill '*is likely to help protect emergent forms of property from regulation which might mandate intermediation*'. It is unclear how the draft Bill is thought to affect any future regulation, and nor does the 2024 CP (or the predecessor publications) give any detailed rationale for what regulation may or may not be appropriate for a wide category of 'things' that might be the subject of property rights. This is an unprincipled basis for changing the law.

Consultation Question 2

2. What do you consider the positive impact of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?

2.1. Authors' experience was that, at least by the time counsel was instructed, the issue whether cryptoassets were property had been conceded and this was not a contentious issue, and certainly not since the proliferation of authorities establishing (at least to the standard of a serious issue to be tried, or equivalent) that cryptoassets are property,

including at the Court of Appeal level. Accordingly, Authors considered that a dispute would not be narrowed by the draft Bill and there would be no positive impact in that regard.

2.2. One Author expressed the view that an inexperienced legal representative or litigant may find the draft Bill assists in that it confirms the common law position without being obliged to trawl the relevant authorities and consider their conclusions.

2.3. However, the majority of Authors consider that the draft Bill has the potential to create more disputes and attendant costs than it resolves. This is because of the lack of definition of a 'thing'; the lack of specificity as to what is meant by such a *'thing'* being *'capable of being the object of personal property rights'*; and, potentially, what is meant by the words *'digital', 'electronic'* and *'in nature'*. In addition, Authors note the difference between the draft Bill extract at para 3.1 of the 2024 CP (*'including a thing that is digital in nature'*) and the draft Bill in Appendix 1 (*'including a thing that is digital or electronic in nature'*). It is unclear which version is to be adopted in the final legislation. If the inclusion of *'electronic'* was not accidental, that risks further uncertainty and debate – an electronic device is already classified as a thing in possession – if it means something other than a device that relates to a flow of electrons or otherwise to electricity, that appears to be more confusing than singling out *'digital things'* for special treatment.

2.4. The draft Bill also does not reduce any points of dispute concerning the issues referred to in footnote 2 of this response above. It also does not grapple with the approach to be taken to electronic trade documents ("ETDs"), which were distinguished by the Law Commission in its earlier publication.

Consultation Question 3

3. What do you consider the costs and/or risks of the Bill to be?

3.1. We refer to our responses in relation to Questions 1 and 2. For the reasons set out above, Authors consider there is a real risk that the draft Bill will increase the costs of litigation because arguments upon the proper interpretation of the language used

in the draft Bill would arise. Against that, there seems to be no real downside in not enacting the draft Bill, given it is merely intended to be confirmatory of the common law position in any event.

3.2. The Law Commission also does not appear to have taken into consideration other legislation concerning property, property rights and cryptoassets. For example, Authors note the following:

3.2.1. Section 136 of the Law of Property Act 1925 addresses the requirements for a legal assignment of *'any debt or other legal thing in action'*. That Act does not contemplate a third category of property. Do, or should, those requirements apply to cryptoassets (or any other third category of *'thing'*?)

3.2.2. Section 4(1) of the Theft Act 1968 defines "property" as including *'money and all other property, real or personal, including things in action and other intangible property'*. It does not use the language of *'things'* outside the term *'thing in action'*. Presumably, a cryptoasset would fall within the wide and inclusive definition set out in section 4(1), which refers to *'other intangible property'* (underlining added); however, the draft Bill does not classify a cryptoasset as property; instead, it merely allows it to be a *'thing…capable of being the object of personal property rights'*.

3.2.3. The Economic Crime and Corporate Transparency Act 2023 ("ECCTA") was enacted on 26 October 2023 to upgrade both the criminal and civil asset recovery tools under the Proceeds of Crime Act 2002 ("POCA"), to enable law enforcement to seize, freeze, and recover cryptoassets more easily. The ECCTA extends the power to destroy property held by persons subject to confiscation orders to *'cryptoassets'*, *'so far as the property consists of cryptoassets'* thereby already assuming that cryptoassets are property. The draft Bill seems superfluous in the context of this legislation.

(1) [Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?

Yes. I think the minimalist approach is certainly the best. As experience to date suggests, courts are best placed to work through the more granular problems if and when they arise in contested disputes.

(2) What do you consider the positive impact of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?

I have no view on this.

(3) What do you consider the costs and/or risks of the Bill to be?

The basic justification for recognising something as an object of property is made by Merrill. He writes that:

> ‘‘The "things" to which property attaches are scarce resources that humans find valuable, and they are valuable because they are things people want. Property does not attach to things that are so plenteous they are not scarce, or to things that no one wants.’ – Thomas Merrill, ‘Property and the Right to Exclude II’ (2014) 3 Brigham-Kanner Property Rights Conference Journal 1, 4.

More specifically, something should be the object of property rights if it is something people want and it is subject to non-consensual transfer (i.e. what we would more generally call ‘theft’ – I have made this argument in Crawford, ‘Contract as Property: Triangles and Tragic Choices’ [2023] 82 *Cambridge Law Journal* 83, 85–7). Because cryptocurrencies satisfy this requirement, there is a *prima facie* case for considering them objects of property, irrespective of the tangible/intangible distinction or their precise classification in English law.

On the other hand, systems of private property are not free. Those who use courts to vindicate their rights in court do not, for instance, completely internalise the costs of doing so. For most objects of property, this does not much matter as the benefits of ‘propertising’ most resources are broadly shared, so that the benefits exceed the costs. However, this is not obviously true of purely speculative commodities such a cryptocurrencies. Those who use the courts to litigate claims in respect of crypto assets generate uninternalised costs in order to vindicate rights to assets whose benefits are entirely confined to those who (successfully) speculate in them. A similar argument, though not in so many words, can be found in Stevens, ‘Crypto is not property’ (2023) 139 *LQR* 615. This is, however, more of an argument for *not* recognising crypto assets as an object of property rather than an argument about which taxonomical category they should fall into.

Response ID ANON-12XZ-CHBW-S

Submitted to Digital assets as personal property draft clauses
Submitted on 2024-03-22 15:08:57

About you

What is your name?

Name:
[redacted]

What is the name of your organisation?

Enter the name of your organisation:

CryptoUK

Are you responding to this consultation in a personal capacity or on behalf of your organisation? How should you/your organisation be named if we later refer to your response?

Capacity and name for quoting:

On behalf of CryptoUK

[redacted]

What is your email address?

Email:
[redacted]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Tell us why you regard the information as confidential:

Consultation questions

Consultation Question 1: Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?

Yes

Please explain your answer:

We agree with the general approach of the draft Bill as a useful starting point for clarifying property rights within the law for the subset of cryptoasset economic use cases to which it applies.

We would suggest that the bill be phrased to make clear that it is a clarification, rather than a change in the law per se, to avoid the potential for dispute over whether actions in relation to cryptoassets pre-bill were not in relation to property (ie, to avoid an argument that if the law changed to now clearly make cryptoassets property then cryptoassets before the change is law were not property). In this respect, we note the helpful discussion in the Law Commission paper regarding the fact that courts have already tended to conclude that specific crypto assets have property rights – and so arguably this point is already to some extent established.

We would also emphasize that this is very much a starting point. In this respect, we welcome the recommendation that Government creates or nominates a panel of industry-specific technical experts, legal practitioners, academics and judges to provide non-binding guidance on the complex and evolving factual and legal issues relating to control involving certain digital assets (and other issues relating to digital asset systems and markets more broadly) in order to assist the courts.

CryptoUK would be glad to participate if helpful.

In this respect, we set out below a non-exhaustive list of some of the more pressing issues we are seeing and that remain to be addressed. In our view, addressing these should be a priority to reduce unnecessary cost.

1. Explicitly providing limits to the application of specific elements of an asset in possession to cryptoassets that could be so difficult to implement that they would be harmful to the ongoing development of these assets and their economic uses.
For example, some elements of possession could make it intractable for mature entities to serve as cryptoasset custodians.

2. Clarifying the exact economic use case(s) for cryptoassets to which the changes apply. For example, are the proposed changes limited to only those cryptoassets uses that are analogous to holding a GBP coin as a collectible, and not when using GBP as fiat or as a financial asset in some way?

3. Matters of insolvency – currently, it is unclear how cryptoassets should be dealt with in an insolvency, as the treatment of assets depends on their status as property (or not). This issue is linked to the discussion regarding pledge in the consultation, however we see it as a broader point regarding the need for clear rules for the treatment of cryptoassets in an insolvency (and so the lenders etc can more precisely plan how to mitigate the risk of potential solvency).

4. Other settings where current economic use cases for cryptoassets may not meet the use case(s) examined in the Law Commission report on which the recommendations are based:
a. That is, those uses whereby a cryptoasset is not the equivalent of a GBP coin held in a collection (for example) with the hopes of appreciation, and with the risks of loss, either in value or in possession.
i. Some experts have suggested that this is the sole (or primary) use case to which the Law Commission's proposed "third" classification applies, whereas cryptoassets use cases are substantially broader than this current and limited setting.
b. Examples of economic uses cases that do not appear to be addressed adequately in the proposals and research includes, but are not limited to:
i. Cryptoassets in transit for payment of goods or services
ii. Cryptoassets whose economic uses varies over its life cycle of use
For example, a GBP coin collection that is lent out, returned, and then used to purchase goods or services.
iii. All settings where the proposed Law Commission and statutory classification is different from the IFRS accounting standards or HMRC tax definitions:
For example, some stablecoins may be classified as financial assets under current US GAAP or IFRS accounting standards. It could be beneficial to understand the definitions used within the accounting standards and how/if they are in conflict with the Law Commission proposals.

Consultation Question 2: What do you consider the positive impacts of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?

Positive impact:

Generally, there is a tendency in the legal profession to take a cautious approach to advising on matters unless there is regulatory certainty. For example, in the context of insolvency, there is a tendency to not commit to whether a particular security will work unless it has been successfully tested in court. This has been to the detriment of the industry, in that (for example in the context of lending, it has led to a reluctance to rely on security linked to cryptoassets).

Providing statutory clarity therefore has the potential for material cost savings for both the legal system and any entities or individuals engaged with cryptoassets, because it gives a legal basis on which practitioners can be more sure of advice. More fundamentally than reducing the time period of a dispute, it may actually avoid the need for a dispute in the first place.

What do you consider the costs and/or risks of the Bill to be?

Costs or risks of the Bill:

The ambitious scale of the bill, and the fact that represents a starting point, rather than a conclusion to the question of the legal treatment of cryptoassets, means that it (unavoidably) incurs the costs involved in working out the consequences of certain cryptoassets being property.

These costs are unavoidable, however, if the view is to be taken that cryptoassets do not fall within an existing category of cryptoasset – and for the reasons set out in the Law Commission Consultation we agree this is the case – the bill at least avoids the costs of answering the preliminary question of whether cryptoassets are property and allows practitioners to focus then on the consequences of cryptoassets being property.

There will, therefore, be an ongoing cost as implications of the bill are determined, and this would include legal and advisory costs.

The risks are therefore in our view twofold:
1. There is a risk that the way in which cryptoassets as property are interpreted by advisors is hindered by the fact that they do not fall within a pre-existing category of property.
2. There is a risk of a cryptoasset being treated as property in circumstances where that is not appropriate (for example, where it is acting as a record only and does not have the indicia of being property). This issue could be exacerbated for those cryptoassets that change their attributes during their lifecycle (and so arguably could be / not be property at different points of the lifecycle.

The notion of risks and costs very much stems from the answers to Q1 that point out the significant use cases for which Law Commission and statutory proposals may not be currently applicable. The risks involve the presence of gaps in the current legal framework for an increasing number of use cases covered by our answers to Q1, most of which involve adding substantial costs to the legal system and those engaged with cryptossets as they grapple with these still unaddressed matters of law.

We would suggest that:
1. There is particular attention to providing clarifications and developing guidance on the areas we have identified in Q1 (which could be an area of focus for the panel of industry-specific technical experts).
2. There is a consultation with the London-based IFRS Foundation on their approaches and concerns about defining and classifying intangible assets in general, and cryptocurrencies, in particular. There may be opportunities to learn from each other in a way that enhances each other's projects:
For example the IFRS Foundation is considering the addition of a major project to relook at accounting for intangible assets.
As such, as we have noted in various meetings with policy makers and standard-setters globally, when cryptocurrencies and cryptoassets are classified as property or intangible assets for accounting or tax purposes, costs can mount quickly due to the need to apply barter accounting or taxation rules where they possibly do not make economic sense.

D2LT Response (March 2024)

Law Commission's 'Short Consultation on Draft Clauses for Digital Assets as Personal Property' dated 22 February 2024

Introduction

This paper sets out the views of D2 Legal Technology ("**D2LT**") on the Law Commission's short consultation on the 'digital assets as personal property' draft clauses published on 22 February 2024 (the "**Consultation**").

D2LT is a legal data and change consulting firm, sitting at the intersection of FinTech and LegalTech. With offices in London, Frankfurt, New York, Charlotte, Singapore, Hong Kong and Sydney, it provides inter alia, strategic advice and implementation services to c. twelve leading investment banks and various other financial firms on the digitisation of legal agreements and opinions. This has assisted its clients in the areas of resource management (such as capital, liquidity and collateral), regulatory reporting and compliance (such as qualified financial contract reporting (often colloquially known as "living wills reporting"), client assets & money compliance and ECB close-out netting reporting) and operational management.

D2LT's work has included leading legal data and agreement digitalisation programmes for major trade associations in the capital markets industry, such as the International Swap and Derivatives Association (ISDA), International Capital Markets Association (ICMA) and the International Securities Lending Association (ISLA). This has included creating for these clients, an industry Clause Taxonomy and Library for their published master agreement documentation, which is regarding as an important stepping-stone and legal agreement data standard to facilitate the use of smart contracts in the OTC derivatives, repo and securities lending industries respectively. As part of its engagements at major investment banks to set up and provide expertise to LegalTech and Legal Innovation teams, it has been involved in a number of projects and consultations related to smart contracts and digital assets in recent years (including in relation to the operational infrastructure required). It has been instructed by regulators to advise on digital asset regulation, infrastructure and supervision, and has supported a number of digital asset vendors and service providers operating in the finance, crypto-token and blockchain ecosystems.

Its responses have been mainly provided by:

We welcomed the opportunity to respond to the Law Commission's Call for Evidence in 2021 and the Consultation Paper in 2022 on this topic, and we commend the tremendous effort that has clearly gone into producing the Final Report in 2023, which we believe is already serving to promote legal certainty in this industry and has greatly assisted market participants in observing the desire and efforts of the judicial system of England and Wales to support the digital assets industry. We expect that the effect of this foundational work will be further amplified once the final version of the draft Bill is published.

We are currently in the process of submitting a response to the Law Commission's consultation on the rules relating to conflicts of laws as they apply to digital assets and electronic trade documents in private international law, and we are looking forward to receiving the Law Commission's work arising out of the call for evidence on Decentralised Autonomous Organisations. We look forward to continuing to engage with the Law Commission in this vital area, to support the growing digital agenda and to support the progress to date, and we welcome any further discussion on these matters.

Consultation Questions

(1) Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?

We agree with the general approach of the draft Bill and with the view of the Law Commission that there is a strong case for concluding that a "third" or open-ended category of property already exists under English law. We agree with the decision to not include explicit statutory requirements such as "rivalrousness" which may inadvertently undermine existing precedents and analysis used by the courts in determining whether certain types of intangible things (e.g. EU Allowances) constitute property. As a result of this decision, we are pleased that the Law Commission addressed concerns that we and other market participants raised regarding the status of VCCs and EUAs, reflecting our observation that these types of things are currently treated in the market as instruments which amount to a form of intangible property as a matter of English law.

To ensure that this jurisdiction continues to be an attractive place to deal with crypto-tokens and other things which may fall outside of the narrow interpretation of things in actions and things in possession, it is important that the advice given to clients on these matters is, to the extent possible, clear and consistent across the industry. While we agree with the Law Commission that this is a matter for the courts to develop through the common law, and that providing statutory footing for hard boundaries between these categories is problematic, further clarity over the following perceived consequences of the draft Bill would reduce associated legal costs for digital asset service providers. As part of the Law Commission's ongoing work on this topic, we would welcome complementary guidance on whether a thing can be treated both as a thing in action and as a thing under this open category, the consequences of a thing transitioning from one category to another, and the relationship and priority of a thing in this open category to a thing in the former two categories. We agree with the view of the Law Commission that the legal treatment relevant to things in action and things in possession will be helpful (and in some cases, persuasive) when determining how the open category things should be treated, but should not be determinative, given their novel features.

We understand that the reference to 'digital assets' in the title of the draft Bill ("*Property (Digital Assets etc) Bill*") reflects the subject matter of this consultation, while its scope is not limited to digital assets. Given that digital assets are not directly referenced in the substantive paragraphs of the draft Bill, it may be clearer to title this, for example, the "*Types of Property Bill*" to reflect its wider purview and future-proof this Bill against perceived limitations arising from the scope of 'digital assets'.

Overall, we strongly support the draft Bill and agree with the Law Commission that the further development of category, including questions arising from the delineation of these two categories, is rightly a matter for the courts to consider and we expect that many of these issues will be resolved with time through the common law.

(2) What do you consider the positive impact of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?

Where the existence of property rights has been tested in a series of court cases, for example in the context of freezing orders and disputes over stolen digital assets, the feedback that we have gathered from parties to those proceedings is that there are significant cost-savings to be had where both parties do not challenge the view that things that do not fall neatly within the narrow interpretations of the two categories are capable of being the object of personal property rights. As a result of the draft Bill, a rough estimate of these savings in disputes where this is raised as a key argument can amount to as much as 20 to 30% of the total cost of proceedings. In this context, the draft Bill will encourage parties to look to the existing body of law and authorities which it affirms and to consider the unique intangible nature of these things.

(3) What do you consider the costs and/or risks of the Bill to be?

Entities seeking legal due diligence and opinions on the status of their digital assets may find that the costs quoted and diversity of responses and analysis given will not be reduced by this draft Bill, given that the approach of the common law thus far has been piecemeal. As the draft Bill merely seeks to give statutory footing to what we consider to be the existing English common law position, we are not aware of any risks arising as a result. We would welcome further discussion on any of these matters.

Response ID ANON-12XZ-CHBS-N

Submitted to Digital assets as personal property draft clauses
Submitted on 2024-03-22 15:49:00

About you

What is your name?

Name:
[redacted]

What is the name of your organisation?

Enter the name of your organisation:

[redacted]

Are you responding to this consultation in a personal capacity or on behalf of your organisation? How should you/your organisation be named if we later refer to your response?

Capacity and name for quoting:

writing on behalf of DeCaDE, the UKRI Centre for the decentralised digital economy

What is your email address?

Email:
[redacted]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Tell us why you regard the information as confidential:

Consultation questions

Consultation Question 1: Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?

Other

Please explain your answer:

It would have been a clearer "Yes" to the first sentence, but a more cautious "who knows" to the second. As the proposal acknowledges, to a large extent it kicks the can down the road. The further development of the contours of the new class is left to the judiciary, with the possible assistance of an expert panel whose recommendations however would not be binding. Obviously, such a panel may or may not get appointed, and if it doesn't, a very open-textured piece of legislation, whose application requires considerable technical knowledge, would be left to the courts. While we agree with the overall approach and think that, taking into account the development of the case law that has already happened, there are some reasons for optimism that the law will develop in the direction the Commission clearly prefers, it is difficult to make more confident statements than that.

A comparative approach is in this regard potentially interesting: the clarified conception of "ownable thing" would be very similar to the one the Austrian ABGB, Art 285 and 291. Despite the clear wording of that law (which arguably is even more decisive that the "third category" is included), the Austrian judiciary developed the interpretation of that provision in a highly restrictive way, so that today digital assets of the form the Commission discussed are deemed excluded - contra legem. While one of the reasons for this development - attempts to align Austrian law with that of Germany - do not apply in this form in England (though the "Scottish question" may have similar effects, in theory at least), this was also caused by the nature, and unfortunate selection of, those few cases that came before the court.

The approach by the Commission is to be technology-neutral - something we consider entirely the right thing to do. But this also means that the "next generation" of digital assets could by accident rather than design create the type of cases that push the legal development back in the wrong direction, as the Austrian example shows.

Without giving up the philosophy that informs the Commission proposal, we think that more of the contour for "ownable digital assets" could be included - for instance in the form of a statement that says that "assets generated by technologies that achieve sufficient functional equivalence regarding rivalrousness, and/or permit functionally equivalent forms of control" This would preserve the main insights by the Commission, while still leaving most of the details to the courts. The focus on "functional equivalence" would furthermore prevent the current, blockchain-centric discussion to inadvertently preventing the application to future technologies.

Consultation Question 2: What do you consider the positive impacts of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?

Positive impact:

We could not quantify the benefits, and while those of our industry partners who participated in our workshops were broadly in favour, neither could they. The main benefit is legal certainty, which is always welcome. But from our perspective, the greatest benefit of the Bill could be a "heuristic signal" it sets for software developers and businesses in the digital economy: IF you think that your business/your customers would benefit from a property right in the digital assets you provide, THEN these are the design requirements you need to think about - and if you come up with good design solutions, the law will recognise your efforts. We mentioned the example of in-game items already in our response to the 1. consultation: IF a platform thinks giving their players property in in-game items, as a USP for the business to differentiate their offering from that of competitors, THEN this is the type of functionality (control by owner, rivalrousness etc) that you need to develop. This could be a significant incentive for the software industry to develop new and original tools and functionalities.

What do you consider the costs and/or risks of the Bill to be?

Costs or risks of the Bill:

Given that the precise consequences of the new rights are still unclear, there could be concerns by the "infrastructure providers" that they suddenly get obligations towards these parties that can't be mitigated by contract. What are the obligations of a digital infrastructure provider, far removed from a specific DAO, its members and the digital assets that generate and share, if these are now deemed "property". Is suffering a server outage the equivalent, in the physical world, of a local water company accidentally flooding my property? As the commission notes, digital assets are by their nature more "fragile" than physical assets. We agree with the commission that this is not a reason to exclude them from being ownable, but third parties may need some assurances about just how much responsibility they now shoulder on other people's property to continue to invest in these services.

The second concern remains that inadvertently, companies may feel nudged towards the use of environmentally particularly problematic systems. The Commission addresses this directly, and it is true, the technology-neutral formulation of the Act "should" prevent it from becoming a boost to "proof of work blockchain technologies only". But it remains a fact that the discussion took place because of the excitement and controveries that that specific technology has generated, and also the Commission's own document uses crypto assets such as NFTs as paradigmatic cases, while rejecting "at least" current forms of digital music files, ebooks, in-game assets etc. Given this background, it seems not implausible that companies who want to "play it safe" will direct their efforts to those technologies that seem the most likely to gain the desired recognition for their assets. This is why we suggest that the language of the Bill may want to emphasise that what is asked for is functional equivalence only, however it is achieved,

Response ID ANON-12XZ-CHB5-Q

Submitted to Digital assets as personal property draft clauses
Submitted on 2024-03-22 17:03:14

About you

What is your name?

Name:
[redacted]

What is the name of your organisation?

Enter the name of your organisation:

Electronic Money Association

Are you responding to this consultation in a personal capacity or on behalf of your organisation? How should you/your organisation be named if we later refer to your response?

Capacity and name for quoting:

[redacted] Electronic Money Association

What is your email address?

Email:
[redacted]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Tell us why you regard the information as confidential:

Consultation questions

Consultation Question 1: Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?

Other

Please explain your answer:

We overall agree with the general approach of the draft Bill but think that a change to the wording would be helpful to achieve its desired effect of ensuring that digital assets such as electronic money and cryptoassets are capable of being recognised by the law as property.

In our previous submission to you (of 11 November 2022), we set out our reasons why we believe electronic money should be considered as a third category thing. While you did not refer to electronic money in your final report on digital assets (of 28 June 2023), we nonetheless hope that the Bill will allow electronic money to be treated as an object of personal property. This is a matter of some importance for the ongoing calibration of the legal framework governing the issuance and use of electronic money as a means of payment. However, the argument made below equally applies to cryptoassets (some of which will also be categorised as electronic money).

The wording of the Bill as proposed appears to suggest that third category things are objects of personal property despite being neither things in action nor things in possession. This exclusionary approach will make it harder to regard things as third category things if they share certain aspects with things in action or things in possession yet fall into neither category.

For example, electronic money is defined as “electronically (including magnetically) stored monetary value as represented by a claim on the electronic money issuer” (Regulation 2(1) of the Electronic Money Regulations 2011, emphasis added), thereby being associated with a claim right. Electronic money could also, if stored on a payment card, be physically possessed. Yet, electronic money is not simply a claim right, as its normal usage in making payments does not involve its redemption with the issuer. Nor does it usually take physical form, it being most commonly issued in the form of an electronic value recorded in the issuer’s systems.

We therefore suggest making the following change to the text in section 1 of the Bill:

A thing (including a thing that is digital or electronic in nature) is capable of being the object of personal property rights even though it is neither exclusively—
(a) a thing in possession, nor
(b) a thing in action.

This change would make it clear that third category things may share some aspects of things in action and things in possession and do not form an exclusive third group of personal property. It would thereby allow the courts to take a more flexible and technologically-neutral approach to the categorisation of digital assets, inclusive of assets that share the same functional characteristics but differ in other respects, such as central vs. decentralised issuance. As you recognise in your consultation on the draft Bill, there are things that are difficult to categorise, and this change would ensure that the status of personal property is available to widest group of assets.

Consultation Question 2: What do you consider the positive impacts of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?

Positive impact:

What do you consider the costs and/or risks of the Bill to be?

Costs or risks of the Bill:

Federation of Small Businesses

Sent via email: digitalassets@lawcommission.gov.uk

21 March 2024

Dear Sir/Madam,

RE: Digital assets as personal property

FSB welcomes the opportunity to provide a response to the above call for views.

FSB is a non-profit making, grassroots and non-party political business organisation that represents members in every community across the UK. Set up in 1974, we are the authoritative voice on policy issues affecting the UK's 5.5 million small businesses, micro businesses and the self-employed.

We do not often respond to consultations relating to proposed technical changes to the law, but as we have been considerably exercised with regard to issues arising out of digital commerce and the implications of so called 'artificial intelligence' (AI) on property ownership from an intellectual property (IP) standpoint, we believe that it may be useful for us to contribute to the consultation.

First, we are entirely supportive of proposed amendments to the law which result in greater clarity and certainty for businesses. It is essential that businesses are able to have confidence that their investments and research and development efforts will produce outcomes that they can own and control, otherwise the economic case for such innovations is undermined.

We therefore support the proposed Bill. Where we are less comfortable is with regard to the academic assumption that it is satisfactory for the common law to develop from the proposed legislation through caselaw. Many businesses, especially smaller ones, cannot afford the luxury of establishing precedent and must avoid taking existential risks. It would therefore be helpful to future innovation if more could be done by the Bill and government to clarify the extent of digital assets that businesses might enjoy and prescribe a number of obvious cases where those rights accrue and may be protected.

Developments over the past twenty years in ecommerce via platforms have generated issues relating to unfair business practices involving issue of business data and materials such as bar codes, QR codes, product and catalogue numbers and online platform product identifiers such as ASINs (Amazon standard identification numbers). The solution would appear to be to create business rights which are not in the nature of standard IP rights or digital assets, but are more hybrid and require protection as unique or distinct business assets – perhaps by creating a right akin to the database right.

Recent developments in generative AI tools have made it a simple matter for malign actors to create voice and video fakes which are of course digital in nature. It is unrealistic to expect the police or Ofcom to have the resources to tackle all of these increasingly frequent incidences. What would be helpful to both businesses and individuals would be the creation of property rights for an individuals

Federation of Small Businesses

to own and control use of their voice and image as IP or quasi IP rights and enforceable in the same way as other IP rights. Ownership and control would essentially relate to preventing reputational, criminal or commercial behaviour which damaged the individual involved. Exceptions would of course be required so as not to stifle legitimate media and police/security services activity. Such rights (sometimes referred to as 'promotional rights') are available in some States in the USA though the overall position is a patchwork. Modern ills must be tackled using modern tools, and voice and image rights creation would enable efficient self-help against digital deep fakes and result in quicker takedown without having to rely upon the police or Ofcom, and would cost the government nothing.

We hope that early opportunity will be taken to address some of these additional digital property related matters and would welcome the ability to discuss them further with the Commission and other interested parties.

Yours sincerely,

[redacted]

[redacted]

[redacted]

Response ID ANON-12XZ-CHBE-7

Submitted to Digital assets as personal property draft clauses
Submitted on 2024-03-20 23:22:47

About you

What is your name?

Name:
Joshua Getzler

What is the name of your organisation?

Enter the name of your organisation:

Faculty of Law, Oxford University

Are you responding to this consultation in a personal capacity or on behalf of your organisation? How should you/your organisation be named if we later refer to your response?

Capacity and name for quoting:

Personal capacity.
I can be identified as Professor of Law and Legal History, University of Oxford.

What is your email address?

Email:
[redacted]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Tell us why you regard the information as confidential:

Consultation questions

Consultation Question 1: Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?

No

Please explain your answer:

The key section of the bill by attempting to create an object of personal property distinct from things in possession and things in action makes a fundamental error, in the sense that it breaches the grammar and semantic structure of property as conceived and used in our common law tradition. The results will be nugatory and deeply confusing. The word "thing" in law is equivalent to "res" as a marker of value, an asset. There can be corporeal and incorporeal property that can be either real or personal (pertaining to land or to other sources of value). Such property rights are themselves legal things; *things* does not refer to the physical land or the pencil; or the promised conduct or prestation; things are rights. Not all claims are things in the narrower sense of realisable as transferable wealth, eg a claim in defamation; yet the realisation of that action has value to the claimant; it is not a personal property right but it is a thing in action. A contractual claim may be assignable or non-assignable and it may realise little cash value if sued successfully but still may have value to the claimant. There is no conceivable category of claim in the world that is not captured successfully by the existing categories of things in action (claims realised through a legal suit, whether obligational or proprietary) and things in possession (claims over assets where those rights may be enjoyed by the possession of the underlying objects to which those rights relate). One can by legislation create fresh rights to control behaviour (eg intellectual property licencing powers and other such monopolistic controls of third party behaviour); and the legislature may make such claims assignable in order to constitute markets in these claims. If digital assets are for policy reasons worthy of recognition by creating such exclusory and assignable rights in them, then do this directly by enlarging the category of things in action.

Consultation Question 2: What do you consider the positive impacts of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?

Positive impact:

Negative impacts only, by confusing he legal system and increasing costs of trade an dcosts of litigation in defining, proving, asserting and remedying claims.

What do you consider the costs and/or risks of the Bill to be?

Costs or risks of the Bill:

Already stated.
In addition, this clumsy reform brings the process of law reform and legislation in this country into disrepute, and will be derided in other jurisdictions, which have far more intelligent approaches to the legal recognition of, and constitution of markets, in digital assets.

Reply to Law Commission consultation: Professor Louise Gullifer, Rouse Ball Professor of English law, University of Cambridge

(1) Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?

I do agree with the approach. Although it might seem a little strange to pass a piece of legislation apparently overruling a dictum in a case (*Colonial Bank v Whinney*), the dictum (that all personal things are either in possession or in action) has been relied on in argument in many cases[1] and even in at least one decision (*Your Response* case). While this reliance was misplaced (the statement has been taken out of context and is not authority for the proposition that there are only two categories of personal property, see my joint response with Professor Fox to the Law Commission consultation on digital assets) the dichotomy of 'two types of personal property' has formed the basis of some academic arguments, and is part of the discussion in most cases[2] and academic articles[3] relating to whether digital assets can be the subject of proprietary rights (even if the conclusion is that a 'third' category of property exists). We don't yet have an English law case at the highest level establishing that digital assets can be the subject of proprietary rights, and the issue was not fully argued in the CA decision in *Tulip Trading.* It seems to make the utmost sense to pass a Bill which does not actually change what most people think to be the law, if this gives the judiciary sufficient certainty to develop this area of law, especially as the question of property may well arise in many different contexts and in relation to different types of assets (for example, voluntary carbon credits, which are currently being considered at a transnational level by UNIDROIT). There are already types of assets which have been held to be 'other intangible property' such as Carbon Emission Allowances[4] and milk quotas, and this Bill would enable the law to be developed further in relation to such assets without the '*Whinney*' question having to be discussed each time.

(2) What do you consider the positive impact of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?

The positive impact is largely the ability of the judiciary to develop the law in relation to proprietary rights in assets which appear to be neither things in action or things in possession. It could save court time, by making arguments that would otherwise be made redundant.

(3) What do you consider the costs and/or risks of the Bill to be?

The costs are those of taking a Bill through Parliament. The risks are low, in that the Bill does not state that digital assets (or any type of assets) are not things in action (or things in possession) and therefore if the courts were to develop the law in such a way that they were held to be (for example) things in action (as the Singapore High Court has done in *ByBit*) the Bill would not prevent this. The worst that could be said was that, in relation to that type of assets, the Bill was a waste of time, but given that new types of assets arise in many contexts, it is unlikely that the Bill could be said to be a complete waste of time.

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[1] England and Wales: AA v Persons Unknown [2019] EWHC 3556 (Comm); Hong Kong: *Re Gatecoin* Ltd [2023] HKCFI 914 [47 – [59]; Singapore : ByBit Fintech Ltd v. Xin [2023] SGHC 199 [34] – [36], where the court took the Whinney view as correct and characterised crypto assets as things in action; New Zealand: Ruscoe v Cryptopia Ltd [2020] NZHC 728, [122] – [125].

[2] [2] England and Wales: AA v Persons Unknown [2019] EWHC 3556 (Comm); Hong Kong: *Re Gatecoin* Ltd [2023] HKCFI 914 [47 – [59]; Singapore : ByBit Fintech Ltd v. Xin [2023] SGHC 199 [34] – [36], where the court took the Whinney view as correct and characterised crypto assets as things in action; New Zealand: Ruscoe v Cryptopia Ltd [2020] NZHC 728, [122] – [125].

[3] See, for example, W. He, Is cryptocurrency personal property under Australian Law? It depends (2023) 52 Common Law World Review 14, 26.

[4] *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch 156 ; *Swift v Dairywise (No 1)* [2000] 1 WLR 1177, [2000] BCC 642 .

ICE Futures Europe response to *Digital assets as personal property: short consultation on draft clauses*

Intercontinental Exchange Inc., on behalf of itself and its subsidiaries (collectively "ICE") appreciates the opportunity to comment on the Law Commission's consultation. ICE operates regulated marketplaces for the listing, trading and clearing of a broad array of derivatives contracts and financial instruments, such as commodities, interest rates, foreign exchange and equities as well as corporate and exchange-traded funds, or ETFs. We operate multiple trading venues, including 13 regulated exchanges and six clearing houses, which are strategically positioned in major market centres around the world, including the U.S., U.K., European Union, or EU, Canada, Asia Pacific and the Middle East.

ICE's energy and environmental markets play a leading role in facilitating the pathway to a net zero economy. Nearly 95% of all globally traded environmental futures and options trade on ICE exchanges. Over 115 billion tonnes of carbon allowances have traded on ICE since we acquired the Climate Exchange in 2010. In 2021, a record 18 billion tonnes of carbon allowances traded, representing a notional value of $1 trillion. In 2022 and 2023, 13.5 billion tonnes and $1 trillion of carbon allowances per annum have traded.

ICE supports the Law Commission's work to provide legal certainty on the application of property law to digital assets, including voluntary carbon credits. ICE's current view is that voluntary carbon credits would likely be treated as intangible property as a matter of English law based on the argument that emission allowances - that share sufficient characteristics with voluntary carbon credits - are also a type of intangible property under UK case law. However, ICE appreciates that the legal characterisation of voluntary carbon credits has been subject to legal uncertainty and therefore welcomes legislative action to bring needed certainty and clarity to the market. The legal nature of carbon credits is relevant in determining the laws that govern the creation, transfer, retirement or cancellation of the instrument, in addition to the security rights that can be granted over it. Therefore, the legal certainty that would be provided by legislation arising from the Draft Bill could help scale the voluntary carbon credit market in the UK with integrity and confidence.

Consultation Questions

(1) Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?

Yes. ICE supports the intention of the bill to *"definitively lay to rest any lingering doubt about the existence of a third category of property accommodating the unique nature of digital assets, setting the future direction of the law in favour of commercial certainty and confidence."*

(2) What do you consider the positive impact of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?

The uncertainty on the legal nature of a carbon credit is one of the challenges in the voluntary carbon market. ICE's view is that legal certainty provided by future legislation can help bring confidence, certainty and clarity to the market and contribute to its growth.

(3) What do you consider the costs and/or risks of the Bill to be?

No comment.

IDAC RESPONSE TO LAW COMMISSION: 'Short Consultation on Draft Clauses'

[redacted]

By Email 22 March 2024

Response to the Law Commission Short Consultation on Draft Clauses - Digital Assets as Personal Property dated February 2024 (the "Draft Clauses Consultation")

The International Digital Assets Counsel ("**IDAC**") welcomes the opportunity to respond to the Draft Clauses Consultation.

IDAC welcomed publication of the Law Commission's Final Report on Digital Assets (the "**Digital Assets Report**") dated 27 June 2023 and the Short Consultation on Draft Clauses (the "**Draft Bill**"), dated 22 February 2024.

We commend the Law Commission on the thoughtful and extensive analysis that went into producing the Digital Assets Report and Draft Bill (collectively "**the Reports**"). We believe that the Reports have made a significant and valuable contribution in reinforcing legal certainty within digital asset ecosystem under English law. We now look to encourage the Law Commission to direct His Majesty's Treasury ("**HMT**") to act on the Draft Bill.

1 Response to the Draft Clauses Consultation

1.1 Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?

IDAC agrees with the general approach of the draft Bill.

We believe that the Draft Bill provides a strong basis around which a coherent legal framework can be developed and will promote legal certainty as to the categorisation of digital assets under English property law.

1.2 What do you consider the positive impact of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?

IDAC considers that the Draft Bill confirms what we understand the English common law position to be in respect of the existence of a third category of property. However, we are of the view that there is still some uncertainty on this point. In turn, this limits the ability of law firms to provide, and market participants to obtain, clear legal opinions on the matter. This threatens the competitiveness of UK markets.

We believe that statutory intervention confirming this position is required to remove any residual uncertainty on this issue. Codification of this position within the Draft Bill is likely to have a positive effective on achieving greater legal certainty in digital asset markets, and the infrastructure that supports those markets.

Therefore, we believe the Bill has the potential to provide legal certainty to market participants and their advisers, facilitating the development of digital assets markets in the UK.

[redacted]

1.3 What do you consider the costs and/or risks of the Bill to be?

We are not aware of any risks associated with the Draft Bill.

In line with the above considerations, we encourage the Law Commission to instruct the Treasury to act and bring the Draft Bill for consideration before Parliament.

Yours sincerely,

[redacted]

IDAC Executive Committee: *Charles Kerrigan, CMS*; *Charlie Kirk, Copper Technologies; Dina White, Zodia Markets; Laura Bates, Hidden Roads; Matthew Kimber, Matter Labs; Thomas Morgan, Coinbase.*

IDAC Secretariat: *Antonia Bain, CMS; Charles Kerrigan, CMS.*

IDAC Members: *Clare Weaver, Cleartoken; Matthew Nyman, CMS; Mike Ringer, CMS; Roshi Sharma, LawBEAM; Sarah Neuraz, Demerzel Solutions Limited (t/a Nethermind).*

[redacted]

[redacted]

By Email 22 March 2024

Response to the Law Commission Short Consultation on Draft Clauses - Digital Assets as Personal Property dated February 2024 (the "Draft Clauses Consultation")

The International Swaps and Derivatives Association, Inc. ("**ISDA**") welcomes the opportunity to respond to the Draft Clauses Consultation.

ISDA welcomed publication of the Law Commission's Final Report on Digital Assets (the "**Digital Assets Report**") dated 27 June 2023. As noted in our response to the preceding Digital Assets Consultation dated 28 July 2022 "**Digital Assets Consultation**"), legal certainty is integral to safe and efficient derivatives markets.

We commend the Law Commission on the thoughtful and extensive analysis that went into producing the Digital Assets Report. We believe that the Digital Assets Report has made a significant and valuable contribution in reinforcing legal certainty within digital asset ecosystem under English law. We were pleased to see that many of ISDA's suggestions were taken onboard and that the Law Commission continues to engage widely and constructively on these issues. We also look forward to the Law Commission's forthcoming consultations and reports on the other recommendations set out in the Digital Assets Report.

1 Response to the Draft Clauses Consultation

1.1 Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?

ISDA agrees with the general approach of the draft Bill set out within Section 3.1 of the Draft Clauses Consultation (the "**Draft Bill**").

We believe that both the Digital Assets Consultation and subsequent Digital Assets Report presented a strong case for concluding that a third category of property already exists under English law. However, we acknowledge that there are benefits associated with the Law Commission's proposal for the laws of England and Wales to recognise a third category of property so as to avoid any perceived or residual uncertainty on this matter.

ISDA's response to the Digital Assets Consultation noted that attempts to define the proposed third category (particularly where introduced by statute) may give rise to difficult boundary issues that could have the effect of introducing greater uncertainty (whether by implication or otherwise) for intangible assets that do not fall neatly within any such definition. In particular, we highlighted concerns relating to Verified Carbon Credits ("**VCCs**") and EU Allowances under the EU Emissions Trading Scheme ("**EUAs**"). In many instances, the market in VCCs and EUAs already operates on the basis that these instruments amount to a form of intangible property as a matter of English law.

We are pleased that the Law Commission agreed with ISDA's response and has sought to address our concerns within the Draft Bill. As such, we agree with the Law Commission's approach:

(i) Not to delineate between what does and does not constitute a 'thing' for the purposes of determining the proposed scope of the Draft Bill;

(ii) Not defining or confirming the status of any particular type of thing (that is neither a thing in possession nor a thing in action) as the object of personal property rights.

(iii) Not to define the personal property rights that such things may be the object of.

We note that the Draft Bill expressly refers to things that are "digital in nature" as things that *could* potentially be capable of attracting property rights despite not being things in possession or things in action. We agree with the Law Commission's view that digital things (such as crypto-tokens) are likely to be the main type of thing that market participants will be concerned with in the medium- to long-term.

We do however believe it is important - as the Law Commission notes - to ensure that the Draft Bill is not restricted to things that are "digital in nature" and that it avoids any implication that all things that are "digital in nature" will fall within this third category of property. Again, we agree with the Law Commission's approach on this issue.

1.2 What do you consider the positive impact of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?

As noted above, ISDA considers that the Draft Bill confirms what we understand the English common law position to be in respect of the existence of a third category of property. However, we do agree that a statutory intervention confirming this position is likely to remove any perceived or residual uncertainty on this issue and that is likely to have a positive effective on achieving greater legal certainty in digital asset derivatives markets, and the infrastructure that supports those markets.

1.3 What do you consider the costs and/or risks of the Bill to be?

As the Draft Bill merely seeks to confirm what we consider to be the existing English common law position, we are not aware of any risks associated with the Draft Bill.

We would welcome further discussion on any of these matters.

Yours sincerely,

[redacted]

Response ID ANON-12XZ-CHBJ-C

Submitted to Digital assets as personal property draft clauses
Submitted on 2024-03-19 21:32:25

About you

What is your name?

Name:
[redacted]

What is the name of your organisation?

Enter the name of your organisation:

International Trade & Forfaiting Association

Are you responding to this consultation in a personal capacity or on behalf of your organisation? How should you/your organisation be named if we later refer to your response?

Capacity and name for quoting:

[redacted] International Trade & Forfaiting Association

What is your email address?

Email:
[redacted]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Tell us why you regard the information as confidential:

Consultation questions

Consultation Question 1: Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?

Other

Please explain your answer:

As explained in your report, the current law is supportive of the status of crypto assets as property but their precise characterisation is not settled. This is undesirable, not least because of the role that English law plays as a pathfinder not just in the Commonwealth but elsewhere. A statute to put the issue beyond doubt is therefore helpful both domestically and internationally.
Admirably short as it is, I suggest that the addition of the three criteria you have identified which generally characterise a cryptoasset, namely : it consists of data; it is independent of a legal system and it is rivalrous. Arguably including these factors may limit development of qualifying assets but I would argue that they provide suitable "tramlines" along which to develop such assets with predictability and certainty. The DIFC, as an emerging if sophisticated market, has included these criteria in its recent law on digital assets. This may be because, as a developing asset class, it is necessary to show investors, developers and providers what they can safely build and invest in. Although the UK is a more mature jurisdiction, the asset class is not and similar considerations should apply.

Consultation Question 2: What do you consider the positive impacts of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?

Positive impact:

What do you consider the costs and/or risks of the Bill to be?

Costs or risks of the Bill:

Response ID ANON-12XZ-CHBV-R

Submitted to Digital assets as personal property draft clauses
Submitted on 2024-03-23 15:05:09

About you

What is your name?

Name:
Prakash Kerai

What is the name of your organisation?

Enter the name of your organisation:

[redacted]

Are you responding to this consultation in a personal capacity or on behalf of your organisation? How should you/your organisation be named if we later refer to your response?

Capacity and name for quoting:

I'm responding in my personal capacity: my name is Prakash Kerai, [redacted]

[redacted]

I'm very happy to be contacted about my response, and also very happy to support the Law Commission on this and related consultations.

What is your email address?

Email:
[redacted]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Tell us why you regard the information as confidential:

Consultation questions

Consultation Question 1: Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?

Yes

Please explain your answer:

I agree with the general approach, and also the reasoning of the Law Commission. The drafting of the statutory confirmation / draft Bill, and the reasoning in this consultation document, in my opinion provide certainty and help to avoid any future common law decision (or 'tree' of decisions) that cut across the decisions to date and conflict with how people treat (or expect the courts to treat) crypto coins, crypto tokens, and crypto assets.

Noting that this consultation document uses the crypto 'token' terminology, the 'techie' in me initially queried this (as technically there is a distinction between a crypto 'coin' and a crypto 'token'). However, that terminology isn't used in the draft Bill so I don't see this causing an issue (and I note that the consultation document gives Bitcoin as an example of a crypto 'token' which allays any concerns I had on this).

As a final note, I would say that we are on our way to an inflexion point where advanced computer processing (Quantum Computing, but perhaps sooner with High-Performance Computing combined with new and yet to be created mathematical methods) will seriously threaten the cryptographic methods used for crypto assets. Once these are cryptographic methods are penetrated – for example, private keys generated through brute force, or private keys 'calculated' from public keys (currently thought to be impossible) – the question of who has actual 'possession' or control will not be as important as the personal property rights of the true owner (from whom the crypto-asset was effectively stolen). The statutory confirmation / draft Bill, gives us a very solid basis on which to allow people to protect their crypto assets in such scenarios.

Consultation Question 2: What do you consider the positive impacts of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?

Positive impact:

What do you consider the costs and/or risks of the Bill to be?

Costs or risks of the Bill:

[redacted]

From: "Kloczkowski Michal" [redacted]

Sent: 18 March 2024 16:10
To: DigitalAssets
Subject: Objection to the Creation of Laws for Securing Crypto-Tokens and Tokenised Securities

Dear Sir or Madam,

I am writing to express my strong objection to the proposal for the creation of laws aimed at securing crypto-tokens and tokenised securities. While I appreciate the efforts of the Law Commission to adapt legal frameworks to evolving technologies, I believe that introducing laws in this domain may be counterproductive and unnecessary.

Now, I've heard through the grapevine that there's talk of creating laws to secure these elusive digital critters. But hold your horses! Shouldn't crypto-tokens be allowed to roam free like mischievous little rascals? After all, they're the rebels of the financial world, born to be decentralized and untamed. It's like trying to put a saddle on a unicorn – it just ain't natural!

And let's not forget the ingenious minds behind these digital wonders. These folks are the Einsteins and Teslas of the digital age! They're out there concocting schemes and codes that even Sherlock Holmes would struggle to crack. Do we really think they need a helping hand from the government? I mean, they've got this whole crypto thing down to a science! If anything, the government should be asking them for tips on how to navigate the digital wilderness.

So, in the spirit of keeping things lively and unpredictable, I propose we let the crypto-tokens roam free, like a circus without a ringmaster! Let them perform their digital acrobatics and dazzle us with their daring feats. After all, life's too short to put a leash on innovation, am I right?

Thanks for considering my amusing little objection. And remember, when it comes to crypto, sometimes it's best to sit back, relax, and enjoy the show!

Michal Kloczkowski

[redacted]

Law Society response to Law Commission consultation: *Digital assets as personal property – draft clauses*

March 2024

Law Society response to Law Commission consultation: *Digital assets as personal property – draft clauses*

Introduction

1. The Law Society is the independent professional body for solicitors in England and Wales. We are run by our members, and our role is to be the voice of solicitors, to drive excellence in the profession and to safeguard the rule of law.

2. As the body representing solicitors and with a statutory public interest role, part of the Law Society's overarching purpose is to safeguard the rule of law in the best interests of the public and the client. We are driven by our core objectives to promote access to justice, safeguard the rule of law, promote diversity and inclusion, the international practice of law and to support our members' businesses.

3. We welcome the opportunity to respond to the Law Commission's consultation on the draft causes for digital assets as personal property. As in our response to the Commission's previous consultation on digital assets[1], our submission here underscores the importance of limited statutory reform for digital assets, balanced with common law development to determine specific parameters. We look forward to continuing to engage with the Law Commission in this vital area of law to support the growing digital agenda and the progress made to date.

Question 1
Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?

4. We agree with the general approach of the draft Bill taken by the Law Commission and agree that it will achieve the desired effect. The creation of a new Bill to reflect that a thing is capable of being the object of personal property rights even though it is neither 'a thing in possession' nor 'a thing in action', as outlined under s1 of the draft Bill, removes the legal uncertainty arising from case law, while not prescribing what 'a thing' is and what the personal property rights are that a digital 'third category thing' is the object of.

5. The Bill provides support for the decision of the court in *AA v Persons Unknown (2019)* for those who hold Bitcoin and will further safeguard and strengthen the English legal position. This will bolster certainty and allow for faster, effective recourse for victims of cryptofraud and theft to access proprietary remedies in the courts. This is important to enable the greater use and expansion of distributed ledger technology for innovation in financial markets.

6. Although the Bill does not dictate a hierarchy of legal rights, in introducing a third, new category of legal rights, the Bill may result in the manifestation of a hierarchy of legal rights in practice. Our understanding of the Law Commission's prior work and consultation paper on this issue is that a hierarchy would exist uniquely, such that a right cannot simultaneously be a real property right and an intangible one; and if something

[1] https://www.lawsociety.org.uk/campaigns/consultation-responses/law-commission-consultation-on-digital-assets

is already a thing in action, then it cannot be a new form of right. A hierarchy of legal rights may also manifest by nature of client considerations as to how a single or a bundle of rights could be designated. This may be driven by any current or future differences in the regulatory treatment of the third category of rights. A hierarchy may also emerge where there are different remedies attached to different rights by virtue of their potential reliance on the wider operations of a network or system, and the need to provide remedies in the context of interconnected rights and obligations (where one person's digital asset depends upon another not burning their tokens and destabilising a protocol). Additionally, there may be circumstances when it could be advantageous for this new form of property right to take priority over categorisation of an asset as a traditional thing in action, again perhaps driven by future differences in available remedies or regulatory treatment, or recognition internationally.

7. We recommend that the Law Commission provide complementary guidance to clarify how the different category of rights could be dealt with in practice, for example, through a decision-tree or matrix. This would provide legal certainty and clarity on how our members could advise clients regarding digital assets as personal property. Such guidance should be developed in collaboration with digital assets experts and legal practitioners.

8. Another example, which would benefit from clarification within complementary guidance, is presented if a new form of property right subsequently became a thing in action. This may be by virtue of a network operator introducing protocol rules granting asset holders a right of action against the network operator as issuer, by the common law implying such a contractual matrix, or perhaps where a change in the law affected the legal mechanism used to link an offchain certificated security with its related digital ledger entry. As a result, further guidance on the hierarchy of legal rights would increase legal certainty in context of the new third category of property rights.

9. As we explain in our response to Question 3, while we agree with the Law Commission that a common law approach to regulating digital assets as personal property, this common law clarification may take time to develop, and clarity would be welcome in the meantime on the interrelationship between such existing forms of intangibles and third category things, which may carry important commercial implications for capital market treatment of these new forms of rights.

10. The extent, commencement, and short title in Articles 2(1), (2), (3) of the draft Bill respectively remain within the remit of the Law Commission of England and Wales and in line with Government procedures.

11. Overall, we support the draft Bill and agree with the Law Commission that further questions related to what falls within this third category and what personal property rights attach to third category things, along with related consequences, are matters for the courts to develop through the common law.

Question 2

What do you consider the positive impact of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?

12. We consider the positive impact of the Bill to be increased legal certainty with regards to the existence of a third category of personal property and further confirmation as established by case law that digital assets can be recognised by law as property. We agree with the Law Commission that the Bill would make disputes more efficient by enabling parties to focus on the substantive question about legal treatment of crypto-tokens or other third category things.

13. Further, we support the positive development in removing the restrictive third category of data objects as previously categorised by the courts as it could exclude and create uncertainty for intangible property like Verified Carbon Credits or EU emissions allowances as noted in the Law Commission's consultation paper. As EU emissions allowances are already recognised as property under commons law, the open category of 'thing' in the draft Bill is useful in that it supports the current flexible approach of the courts.

14. As the Law Society of England and Wales, ensuring that English law is the jurisdiction of choice across all practice areas is of paramount importance. We agree with the Law Commission that the implementation of this draft Bill will help to ensure that this jurisdiction continues to be an attractive place to deal with, and litigate in respect of, crypto-tokens and other third category things.

Question 3

What do you consider the costs and/or risks of the Bill to be?

15. As with any introduction of new legislation, we foresee that in the short-term there may be a lack of clarity around what falls within the third category introduced by the Bill and what personal property rights attach to third category things as well as the consequences of introducing in law this third category. However, legal principles may take time to develop and we agree with the Commission that it is appropriate for the common law legal principle specific to third category things to diverge from existing legal principles of possession and the associated legal constructs applicable to possessable things.

16. More broadly, we note that some issues related to digital assets may not be sufficiently addressed by the courts as they are unlikely to be able to incrementally evolve to produce a cohesive response without substantial evidence underpinning them. For example, we would welcome clarification on whether a network capable of giving rise to conditions of rivalrousness would need to be decentralised. We note that currently there is legal uncertainty over the precise meaning of the term "decentralised". We understand that there is upcoming work at the European-level under the European Union Markets in Crypto-Assets Regulation to define the meaning of decentralisation. We would welcome similar progress under English law on definitions on decentralisation and its effect on the crystallisation of digital property rights. For example, network operators would require legal certainty on when the functioning of their network may give rise to a right of property in database entries, and when or

whether that right could be lost, such as through a change at the network layer. As such, it would be helpful for the Law Commission to provide a legal statement or further evidential work on decentralisation.

17. Finally, notwithstanding the ongoing work of the courts and Law Commission in supporting access to justice for victims of cryptofraud, there are many barriers remaining, not least the cost of obtaining a freezing injunction in digital assets disputes. We echo the calls of HHJ Pelling KC, and other senior court leaders, in supporting the development of alternative means of resolving digital asset disputes that are capable of functioning quickly, at low-cost, and on a multi-jurisdictional basis.

LawBEAM

[redacted]

The Law Commission
1st Floor, Tower
52 Queen Anne's Gate
London SW1H 9AG

By Email: digitalassets@lawcommission.gov.uk

21 March 2024

Response to the Law Commission

We refer to the Law Commission's Final Report on Digital Assets dated 27 June 2023 (the **Digital Assets Report**)[1] and the Digital Assets as Personal Property - Short Consultation on Draft Clauses dated 22 February 2024 (the **Consultation**)[2].

I am writing on behalf of LawBEAM, a crypto and digital asset focused legal practice. LawBEAM represents a wide range of UK and international crypto firms, advising on the full spectrum of legal and regulatory matters affecting the digital asset sector.

We appreciate the opportunity to provide our input on this important legislative proposal and set out our responses to the Consultation questions below.

The Law Commission deserves high praise for its thorough and insightful work on digital assets. The Digital Assets Report reflects impressive depth, understanding, and quality of research. We believe the legal clarity provided by the draft Property (Digital Assets etc.) Act 2024 (the **Bill**) will benefit the UK digital asset sector.

(1) Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?

Yes, LawBEAM firmly agrees with the general approach taken in the draft Bill. By confirming that a thing can attract personal property rights even if it does not fall neatly into the traditional categories of things in possession or things in action, the Bill provides much-needed clarity on the legal status of emerging digital assets.

We believe the Bill will achieve the desired effect of removing legal uncertainty and enabling courts to develop appropriate principles for property rights in relation to digital asset innovations. The light touch approach of simply confirming the existence of this third category is an elegant solution.

[redacted]

(2) What do you consider the positive impact of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?

We consider the positive impacts of the Bill to be as follows:

(a) Increased legal certainty for a rapidly expanding asset class. By putting beyond doubt that crypto-tokens and similar digital things can be objects of property rights, the Bill will provide a solid legal foundation for industry to confidently innovate and invest. Greater certainty should translate into lower risk premiums and transaction costs.

(b) More efficient dispute resolution. With the question of whether digital assets can be property answered, courts and litigants can focus time and resources on the substantive issues in a case.

(c) Strengthening the UK's status as a hub for digital asset business. Clear, flexible, pro-innovation legislation will be an important draw for blockchain and Web3 entrepreneurs in an increasingly competitive global landscape.

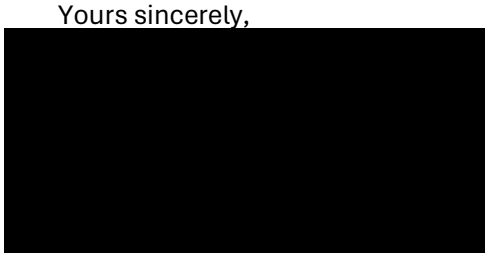
(3) What do you consider the costs and/or risks of the Bill to be?

We do not foresee any significant costs or risks arising from the draft Bill in its current form. As it primarily codifies the direction courts are already moving in, it should not require disruptive changes to business practices.

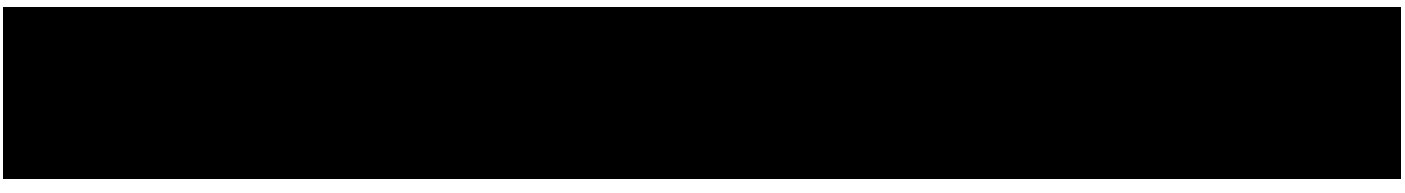
One potential risk is if courts interpret the "third category" too broadly, bestowing property rights on digital things that are not a natural fit. However, the Bill mitigates this by preserving common law flexibility rather than legislating prescriptive criteria. The Law Commission may wish to consider issuing guidance to assist courts in weighing factors like rivalrousness, definability and exclusivity.

We commend the Law Commission for this well-crafted Bill and encourage its swift passage into law. By establishing a clear and adaptive framework for proprietary rights in digital assets, it will reinforce the UK's position at the forefront of the crypto economy.

Yours sincerely,



LawBEAM



Linklaters

[redacted]

By Email

20 March 2024

Response to the Law Commission's short consultation on a draft Bill in respect of digital (and other intangible) assets as personal property dated February 2024 (the "CP")

We welcome the opportunity to respond to the CP.

The Law Commission's extensive analysis and evaluation of the law as it applies to digital assets has bolstered legal certainty and is helping to pave the way for further clarification and development of the law where needed. This work is instrumental in protecting and strengthening the position of English law[1] as a foundation for global commercial activities amid ongoing digital disruption.

We concur with the conclusions of the Law Commission's final report on digital assets, which were closely aligned with our feedback. The draft Bill gives effect to one of the Law Commission's key recommendations. While we view the Bill as merely confirming the position under the common law, it will remove a perceived obstacle in the eyes of a number of commentators to further development of the common law on a principled basis.

We strongly support the formulation of the draft Bill. As the Law Commission recommended in its final report, this should be a highly targeted intervention simply to remove any doubt that English law has moved on from recognising only two categories of personal property. In particular, the Law Commission has taken the right approach in neither defining the boundaries of a third category of property nor prescribing the consequences of falling within that category. As we have previously commented, these are highly nuanced and complex issues which are best left to development under the common law.

The proposed approach provides for flexibility and longevity, which is particularly important in a rapidly evolving environment. While some uncertainty will remain as to the precise boundaries around what qualifies as an object of personal property and what legal rules apply to novel forms of property for which the jurisprudence remains underdeveloped, we consider that there is sufficient certainty for market participants to structure arrangements in a way that achieves the desired legal outcome.[2]

The Law Commission may wish to consider amending the title of the Bill so that it does not refer specifically to digital assets, given that the effect is much broader. While the title will not impact the operation of the Bill, it may influence how it is perceived.

We agree with the Law Commission's assessment in relation to anticipated costs and benefits. Given the nature of the Bill, we expect the impact only to be positive. Above all, it will provide greater clarity to the market and avoid unnecessary agonising or debate, both in the context of structuring and in the context of disputes.

1 More precisely, the laws of England and Wales.

2 See our response to the Law Commission's Consultation on Digital Assets dated November 2022 for further explanation.

[redacted]

[redacted]

We would be happy to expand on any elements of this response if that would be helpful.

Yours sincerely,

Linklaters LLP

[redacted] [redacted]

Mattereum's Response to the Law Commission Consultation on Digital Assets as Personal Property

1. Mattereum is a lawtech company established in London in 2017 by Vinay Gupta who prior to that was the launch coordinator of the Ethereum blockchain in 2014-2015. Mattereum's commercial activity focuses on bridging the divide between physical (real world) assets and their digital representations on the blockchain. The Mattereum Asset Passport is a digital container for legally binding digital representations about physical assets. Mattereum welcomed the publication of the UK Jurisdiction Taskforce's Digital Dispute Resolution Rules in 2021, and incorporated the Rules into smart contracts to build in an enforceability layer. Mattereum's aim is to enable frictionless global commerce which occurs under the full protection of international law.

2. Previously Mattereum welcomed the adoption of the Electronic Trade Documents Act 2023 as potentially a key enabler for blockchain facilitated trade in physical goods, as the Act provides clarity about the very broad and inaccurate conception held by some that any bundle of data recorded on chain is an "asset". The ETDA makes clear that that is not the case for electronic documents such as warehouse receipts which are used in trade. We believe that the provisions of the Act could extend to the digital representations of information about assets (such as documents about ownership, movement, or storage of physical assets) which were previously recorded on paper and can instead be recorded digitally in Mattereum Asset Passports.

3. We welcome and applaud the work of the Law Commission to produce the draft Bill to confirm that crypto-tokens, and potentially other assets such as voluntary carbon credits, are capable of being recognised by the law as property.

4. Some digital assets bind to physical property, for example a smart contract which digitally represents a gold bar, whilst others exist in digital form only, for example a document denoting ownership of shares in a PLC. Ownership of both can be denoted electronically, and both can be traded digitally. Ultimately if disputes arise it is up to the courts to determine precedent around the application of legislation to particular assets, this becomes especially pertinent if they are of a hybrid nature. As such whilst a body of common law is being built up, development of new kinds of digital assets may be slowed down as entrepreneurs might not want to invest if there is doubt about an asset's utility or the rights associated with it, for example. The draft Bill goes some way to addressing this. Once it is enacted, it may be an area which the UK Jurisdiction Taskforce could consider looking at, alongside the Electronic Trade Documents Act, to explore developing a Legal Statement which could lead to further clarification around the status and utility of different types of assets, documents, and smart contracts which exist and operate on blockchains.

5. We believe that when it comes to legislative provisions in this sector, certainty and flexibility are two sides of the same coin. In the EU, new MiCA regulations go some way to providing certainty to industry. Developments like the draft Bill, which contribute towards clarity in law and in practice, strengthen the UK's and the City of London's competitiveness within the fast moving landscape of digitally enabled commerce globally.

6. Mattereum would be happy to participate in and otherwise support activities which publicise the new legislation and bring it to the attention of industry. Mattereum CEO Vinay Gupta is a member of the Steering Group of the Lord Mayor of London's Smart Economy Networks Initiative: forums similar to that one may be suitable for such activities. It may also be beneficial to publicise these new developments internationally to underscore the competitive nature and advantages of the UK's evolving legislative landscape with regard to industry and digitally enabled global commerce and its attractiveness as the world's hub for digital transactions.

7. For more information, please contact contact@mattereum.com

Mattereum
London, March 2024

Response ID ANON-12XZ-CHB6-R

Submitted to Digital assets as personal property draft clauses
Submitted on 2024-03-21 17:16:05

About you

What is your name?

Name:
Katie McCay

What is the name of your organisation?

Enter the name of your organisation:

University of Bristol Law School

Are you responding to this consultation in a personal capacity or on behalf of your organisation? How should you/your organisation be named if we later refer to your response?

Capacity and name for quoting:

I am responding in a personal capacity. I am a PhD candidate in the Law School at the University of Bristol. You are welcome to use my name if you refer to my response.

What is your email address?

Email:
[redacted]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Tell us why you regard the information as confidential:

Consultation questions

Consultation Question 1: Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?

Other

Please explain your answer:

The intended effect of the draft Bill is to "confirm that crypto-tokens, and potentially other assets such as voluntary carbon credits, are capable of being recognised by the law as property."

I can see the benefits of putting this confirmation in law, it accords with recent case law (e.g. AA v Persons Unknown & Ors, Re Bitcoin [2019] EWHC 3556 (Comm), [58]-[59]), and in particular the reasoning of the UK Jurisdiction Taskforce (for instance Legal statement on cryptoassets and smart contracts, 2019, [77]). The thing in action and thing in possession categorisation does not prevent a crypto-token from being classified as property. This part of the Bill is, in my view, not a controversial position, irrespective of whether you believe crypto-tokens are or are not or should or should not be property, or whether they are accurately characterised as a thing in action or as a third category thing.

However, the way in which the Bill seeks to achieve these aims is more controversial, and does not make the law clearer. Indeed, it risks making the law even more unsettled. I have four main arguments related to this:

1. The definition of a thing in action does not need to be as narrow as suggested. A correct reading of the case law gives a broader meaning to 'thing in action.' As such, this broader definition does not exclude assets such as crypto-tokens from its scope.

My reading of the Law Commission's position is that a thing in action refers only to a right that is enforceable by legal action. As crypto-tokens, according to the Law Commission, do not consist of rights enforceable by action, they cannot be things in action (in the narrow sense) (Law Commission, Short consultation, 2024, 2.12). In that view, the third category becomes a necessity if we are to accept crypto-tokens as property. However, this need not be the case.

The original statement denying the tertium quid comes from Fry LJ's dicta in Colonial Bank v Whinney [1885] 30 ChD 261. However, Fry LJ was not using the narrow construction of the thing in action which the Law Commission is using. Instead, Fry LJ adopts an exceptionally broad notion of a thing in action, suggesting that any "personal property of an incorporeal nature" (at 276) might be within the scope of the definition. The Law Commission uses thing in action definition stripped from its context, instead adopting a very narrow definition, requiring the existence of the third category to include

things that would fall within Fry LJ's broader definition of a thing in action.

However, this narrow conceptualisation does not have to be the case. The categorisation of thing in action is broad enough to encompass intangible assets such as crypto-tokens. For instance, Gendall J in the New Zealand case of Ruscoe v Cryptopia says the following:

'Fry LJ in his judgment did not seem to be taking a narrow view of what can be classified as property, but rather he was simply wanting to push all examples of property into one of two categories. There is nothing, as I see it, in Fry LJ's dictum that would lead a court to conclude that cryptocurrencies are not property. The most that could be said is that cryptocoins might have to be classified as [things] in action.' (Ruscoe v Cryptopia Limited (in liquidation) [2020] NZHC 728), 124] (Gendall J).
This also accords with the UKJT, who have stated that "...Colonial Bank is not therefore to be treated as limiting the scope of what kinds of things can be property in law." UKJT statement, [77].

The breadth of the thing in action category means it is perhaps more accurate not to talk of rights to sue, but instead, as the authors of The Law of Personal Property put it, a "claim capable of being realized through the medium of a court action" (Michael G Bridge and others, The Law of Personal Property (Sweet & Maxwell 2021), 4-008).

In sum, the thing in action category, if interpreted broadly (and in my view, correctly) does not require us to create a third category to accommodate crypto-tokens as property.

2. Related to 1, the conception of something being property, even where there are not necessarily rights involved is alien to personal property law.

The High Court of Australia in Yanner v Eaton [1999] HCA 53 stated that "'property" does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing." This statement is cited in Law Commission, Digital Assets: Consultation paper (Law Com No 256, 2022), 2.11. In other words, property is, strictly speaking, concerned with rights, rather than things.

In personal property, the two categories of thing in action and thing in possession are framed in terms of rights. The thing in possession relates to a tangible object, the rights to which are enforced through taking physical possession. The thing in action is an assignable right (often to payment or to sue), that does not relate to any physical thing. As it is intangible, there is no external object to which the right relates. Instead, the property is the right itself, enforceable by action (e.g. Torkington v Magee [1902] 2 KB 427, 430-31; 433 (Channell J)).

We can assume that any piece of personal property (at least property that is a thing in action or thing in possession) consists of rights. The question then becomes, what rights are there in a crypto-token that either justify their inclusion in the category of thing in action or justify the inclusion of a third category?

A full discussion of the rights that relate to crypto-tokens is beyond the scope of the consultation, which does not ask a question related to this, nor does it require a discussion of policy questions. This is because the Law Commission is not asking questions on policy aspects (Law Commission, Short Consultation, 2024). As it relates to the consultation question, the point I am making is that if we suggest that a crypto-token can be property, even if not a thing in action nor a thing in possession, then what about the question of rights? One of two things happens:

i. If we recognise that crypto-tokens can be property, then some right is in play. It might be some type of transactional power (David Fox, Digital Assets as Transactional Power 2022 1 Journal of International Banking and Financial Law 3), but the bottom line is that there is some type of legally enforceable right (otherwise no remedy would exist upholding the right). This right does not relate to a physical object, so it must be a thing in action, which makes a third category redundant.

ii. If we reject the possibility that a crypto-token can be a thing in action, and we instead place it in a third category, then why have a categorisation that consists of rights in tangible things (thing in possession), rights with no physical thing as the object of the right (thing in possession) and other things (unrelated to rights otherwise it would be a thing in action, whatever this third category entails)? This does not appear to be consistent. I appreciate that at 3.12 of the Short Consultation, 2024, there is a suggestion of what falls into the third category, as well as an acknowledgement that the boundaries of the category are defined in a circular manner. This is not helped by the inclusion of the Ainsworth criteria at 3.16 (Ainsworth describes whether a right is property, not whether something is property). This circularity is a problem, as it undermines the case for the need for a third category.

I think the fundamental problem is that there is still a lack of clarity over what the property aspect of the crypto-token actually is. Fox's idea of transactional power is the most convincing as it realistically describes the relationships at play where a crypto-token is stored. What it fails to explain is why that transactional power should be property.

3. The use of the word 'thing' in the Bill risks being circular.
Section 1 of the draft Bill states that "A thing (including a thing that is digital in nature) is capable of being an object of personal property rights even though it is neither— (a) a thing in possession, nor (b) a thing in action."

The use of the word "thing" here is interesting. For the first use of "thing" in the Bill, it is meant in the legal sense (like how we might refer to a chose or thing in action), or is it meant in the lay sense, as an object or defined asset that may or may not be the object of property rights?

I understand that 3.3(1) of the 2024 Short Consultation does cover this, when it says that the draft Bill "does not attempt to delineate what does and does not constitute 'a thing.'" Nevertheless, for the Bill to achieve its purpose and be clear, it is necessary to know what should fall within the scope of "thing" here.

4. The meaning and scope of property varies depending on the context and this does not appear to be reflected in the commentary to the draft Bill.

The consultation on the draft Bill gives two scenarios (1.8(1) and (2)). The first (1.8(1)) relates to interim remedies, such as proprietary freezing injunctions,

which only operate if the asset is property. The second (1.8(2)) relates to (final?) remedies, with the consultation paper suggesting that "[i]f someone's digital assets are taken from them or destroyed, the remedies available to them are significantly stronger if those assets are regarded as being their property than if the law does not recognise any property interest in them."

The question then is whether something is property has the same meaning in both scenarios (at least at present, before any reforms are enacted). We might be content to have a looser, broader definition of property in an interim remedy, with the finer details being discussed later at the final remedies stage. In any case, the property nature of the asset, appears to be less important to the final remedy than any interim remedy. A claimant may wish to have a proprietary remedy, though personal remedies will ordinarily be sufficient. Restitution for unjust enrichment and damages or an injunction under the economic torts will be available in a large proportion of cases. The Law Commission identifies only a very small number of scenarios (e.g. burning crypto-tokens: Law Commission, Digital Assets: Final Report, 2023, 2.101-2.102) which would leave a claimant without an available cause of action (and by extension without an available remedy).

Additionally, it is important that any statutory provision that relates to the proprietary nature of these assets is wise to the fact that property is not the same in every context. Insolvency cases such as Re Celtic Extraction have a justifiably broad definition of property, as the case relates to the definition under the Insolvency Act 1986, s436, which is much broader than the concept of property in (for example) the property torts. We cannot use the reasoning in Re Celtic Extraction to justify expansion in other areas, where a narrow definition of "property" is justified.

Consultation Question 2: What do you consider the positive impacts of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?

Positive impact:

What do you consider the costs and/or risks of the Bill to be?

Costs or risks of the Bill:

Response ID ANON-12XZ-CHBB-4

Submitted to Digital assets as personal property draft clauses
Submitted on 2024-03-22 15:53:37

About you

What is your name?

Name:
Felicity McMahon

What is the name of your organisation?

Enter the name of your organisation:

[redacted] I am responding on my own behalf.

Are you responding to this consultation in a personal capacity or on behalf of your organisation? How should you/your organisation be named if we later refer to your response?

Capacity and name for quoting:

Felicity McMahon, media law barrister.

What is your email address?

Email:
[redacted]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Tell us why you regard the information as confidential:

Consultation questions

Consultation Question 1: Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?

Yes

Please explain your answer:

I agree with the approach of the draft Bill and agree that it will achieve the desired effect.

The Bill is short, and in my view achieves its aim of establishing in statute that things that are neither things in possession nor things in action can be property – effectively that there is a third category of property beyond those two types.

I agree with the Law Commission that it is sensible to include the reference in brackets to "(including a thing that is digital or electronic in nature)" to reinforce this point, and as the types of thing that are currently envisaged as being immediately covered by this third category are indeed digital or electronic in nature (such as cryptocurrency).

There are a number of matters that the draft Bill does not deal with. I understand that this is deliberate. Those matters will need to be dealt with, but I agree that these are matters which the common law is capable of dealing with. There is merit is leaving certain matters to be dealt with on a case by case basis, not least because the technology in this area is fast-moving, and it is therefore difficult to comprehensively describe what will fall within this category of property or how it should be dealt with (for example in respect of tort law principles) in statute at the outset. Having statutory definitions and provisions of this nature which may become swiftly outdated would risk stymying the development of the law and its application to new things. As the Law Commission recognises, the common law already has a considerable body of case law dealing with, for example, recognising whether a thing is property at all; all of which can be drawn on. The Law Commission has provided some provisional suggestions as to how the law may deal this third category of property. As it happens I take the view that the law may well need to recognise the tort of conversion in respect of this category, or at least something akin to it, in order to properly protect owners of this type of property. However, this is not a matter for the current draft Bill, but for the development of the common law which comes after it (and so, a discussion for another day). The way the draft Bill is drafted gives room for the common law to develop the law in this area in whichever way it sees fit.

I agree that the common law has already on a number of occasions recognised things such as cryptocurrencies and various types of credits as property, despite the potential limitations or difficulties in doing so presented by case law that suggests there are only two types of property (although there is considerable doubt as to whether this is the correct way to understand those decisions). However, I take the view that the Bill will be useful in clarifying the position, and ensuring that it is clear in particular that such digital things that are by their nature not things in possession do not need to be

shoehorned into the category of things in action, and can be considered to be a third type of property, which properly reflects the reality of what the thing is – i.e. neither a thing in possession nor a thing in action.

I also take the view that the draft Bill and the new category of property which it enshrines in statute law has the potential to be utilised beyond things such as cryptocurrencies, which were one of the triggers for this law reform, and may well be at the forefront of lawmakers' minds. I consider this to be a good thing, and allow for growth and development of the law to deal with new and emerging technologies and conceptions of property, particularly in the digital sphere.

Consultation Question 2: What do you consider the positive impacts of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?

Positive impact:

I consider the draft Bill will have a considerable positive impact in terms of clarity in the law, as set out above. Again as set out above, the draft Bill does leave certain matters to the common law, which of course will all need to be argued. However, the clarity the Bill does bring in respect of there being a type of thing that is property, but is not a thing in possession or a thing in action, will allow the court to move straight to the meat of the argument about how the law should be applied. This will save time and legal costs. The amount of costs is difficult to quantify as it will depend upon the nature of the dispute and the lawyers involved (both in terms of their costs and whether they are experts specifically in this area or are touching upon it when the issue impacts upon their area(s) of expertise). However, at present if one is seeking to argue that a thing is property, even though it does not quite fit into either the thing in action or thing in possession category, one must set out and explain all the relevant case law. This is not a short task. One must also deal with Colonial Bank v Whinney, which suggests that there are only two types of property, a case a court may be reluctant to go against even though it is possible to do so. The clarity provided by the draft Bill will avoid all of that cost and uncertainty, both at the stage of arguing matters before a court, and at the stage of explaining the position to a client. Legal certainty will have a positive impact for clients, lawyers and the courts.

What do you consider the costs and/or risks of the Bill to be?

Costs or risks of the Bill:

I do not consider there to be any costs to the Bill, on the contrary I think it will provide clarity and as such reduce costs, as explained above. Generally speaking the risks of legislating in relation to digital innovation is that legal change may soon be overtaken by further technological and other developments. For the reasons set out above in relation to why I agree that the draft Bill will have the intended effect, I do not think this is the case here. The draft Bill is a short and limited legal change, that simply makes clear in statute that things that do not fit well into either the category of things in possession or things in action can be property. It does not seek to address exactly what falls within that category or property, or how it should otherwise be dealt with by the law. This leaves significant room for innovation both in law and in technology, allowing the common law to fill in the gaps, and deal both with existing property of this type, and any things that fall within this category of property. I do not see any particular risks of the Bill.

Digital assets as personal property – Short consultation on draft clauses

Norton Rose Fulbright LLP response

This is the response of Norton Rose Fulbright LLP to '*Digital assets as personal property – Short consultation on draft clauses'*, published by the Law Commission in February 2024. Queries regarding this response should be addressed to [redacted]

As with our responses to the previous extensive consultations on this topic, we are supportive of the approach taken by the Law Commission and see its work as important in enabling the development of a robust ecosystem for digital assets and decentralised finance under the auspices of English law and within the United Kingdom. In particular, we are grateful for the analysis set out by the Law Commission of the nature of digital assets and the novel legal questions that they raise and we expect their work to continue to be an important reference on this subject.

We are supportive of the draft Bill, on the basis that it will direct the development of the common law to treat digital assets as a separate category of property deserving of new and distinct rules. Otherwise, the common law's incremental approach might mistakenly assimilate digital assets to things in action and propose inappropriate rules by analogy.

Our responses to the individual questions in the consultation are as follows:

(1) Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?

We agree with the general approach of the draft Bill in specifying that certain assets, including digital assets, should be treated as a third category of property. As we have commented previously and is set out in your previous consultations, digital assets are a distinct type of property that is both intangible and exists independently of any legal system. Rules such as those governing the transfer of these assets, causes of action that are available in case of their misappropriation or destruction, custody and security and conflicts of law and jurisdiction must be developed taking into account these characteristics.

The common law is capable of developing appropriate rules, but there is a significant danger that its incremental approach will seek to assimilate this new category into one of the existing categories and to apply the existing rules of that category. This would hamper the development of the digital asset economy and impose risk and uncertainty on participants in digital asset platforms. The danger is most acute in the simplistic equation of digital assets with things in action because both are intangible. In fact, if anything, the analogy with things in possession is more apposite, because both things in possession and digital assets exist independently of any legal system.

The significance of the draft Bill is not that otherwise digital assets would not be recognised as property at all. *AA v Persons Unknown*[1] and the many subsequent recent decisions, including *Tulip Trading v Van Der Laan*[2] in the Court of Appeal, show that the judiciary will find a way to accord property rights to assets that have the characteristics of property. The significance is not even as a resolution to the debate whether the existing category of things in action can function as a residual category that accommodates digital assets. The draft Bill does not necessarily take a position on this. Criticism of the Bill on the basis that it requires a narrow definition of things in action is not just wrong, it is misconceived.

Rather, we see the significance of the draft Bill not as saying that digital assets could only be a third category of property, but that they should be a third category of property. That is, without taking a view on the precise ambit of the existing categories, it directs the judiciary to develop rules relating to digital assets that are not simply incremental offshoots of rules applicable to things in action or things in

[1] [2019] EWHC 3556 (Comm)
[2] [2023] EWCA Civ 83

[redacted]

possession, but take account of the unique characteristics of digital assets. For instance, we foresee the development of a concept to intermediate between the legal system and the factual nature of these assets in the same way as the concept of possession intermediates between legal rights and the facts applicable to a thing in possession, such as where it is or who has it. Such development is necessary but would be difficult if digital assets were classed as things in possession or things in action.

Although the consultation only enquires as to the general approach of the draft Bill, we add the following comments on wording:

- We suggest replacing 'even though it is neither' with 'that is neither'. This would make it clearer that the draft Bill does not require any particular view of the ambit of the existing categories and would forestall criticism of the Bill on this basis, while not affecting its substance.
- 'including a thing that is digital or electronic in nature': as this language is only permissive, we do not see it as causing a significant problem, but we note that the control mechanisms set out in the various Law Commission consultations, such as rivalrousness, are not explicit here. It will be up to the judiciary to restrict the scope of this new category.

(2) What do you consider the positive impact of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?

We see the positive impact as promoting legal certainty and the development of appropriate rules to determine questions regarding digital assets, such as their transfer, custody and security and conflicts of law.

It is difficult to quantify the benefit of a hypothetical correct rule created in the future over a hypothetical counterfactual incorrect rule. The many recent High Court actions started to recover misappropriated digital assets may serve as an example. Although they proceeded on the basis that proprietary remedies were available, this has not been tested properly at a full trial and *Piroozzadeh v Persons Unknown*[3], where an interim proprietary injunction was discharged, shows that this area is still in flux. Rules on tracing and following, proprietary remedies, dishonest assistance and knowing receipt and the scope of the bona fide purchaser defence will all need to be elucidated. Without the draft Bill, there is a risk that these rules will not be developed correctly and claimants in these cases will be left without a remedy.

This example has wider repercussions. If the rules developed in relation to digital assets are inappropriate, digital asset platforms are less likely to select English law or to be based in the United Kingdom. The digital asset ecosystem, as with any property-based section of the economy, is dependent on clear underlying legal rules and is threatened without them. It is also a highly mobile sector – the certainty and professionalism of the English legal system is currently a key competitive advantage.

(3) What do you consider the costs and/or risks of the Bill to be

The draft Bill leaves future development of the law open – there is no attempt to define the categories of asset that might be included in the third category other than by the parenthetical reference to digital and electronic assets, which are left as undefined terms. This will create uncertainty in the short term and it is possible, if further incremental development takes a wrong turn, that the borders to the new third category will not be set appropriately.

[3] [2023] EWHC 1024 (Ch)

From: [redacted]
To: DigitalAssets
Cc: [redacted]
Subject: RE: Law Commission consultation on "third thing" legislation [redacted]
Date: 20 March 2024 15:34:45
Attachments: [redacted]

[redacted],

Given I'm keeping an eye on your project largely to ensure England doesn't shoot Scotland in the foot and vice versa, I'm not proposing to say much about your proposal other than that it doesn't cause problems in Scotland as it's not incompatible with what I think should happen in Scotland. Scotland doesn't have the choses in possession/action division of our moveable property as you have for English personal property and in some ways your draft Bill clarifies the English position as being pretty similar to what I think the Scottish currently is – where a digital asset can be said to be property most of the existing law of moveable property can be applied to it if the courts wish to do so. The Scottish Parliament can make any clarifications as to the application of that moveable property law that seem sensible (and we can try to ensure that any such changes are compatible with the English position at the time).

One difference will be that Scots law will not have a "third category" of moveable property (unless the Scottish Parliament decides to introduce one) – we'll just have corporeal and incorporeal property. The reason we probably don't need a third category of moveable property is that Scottish incorporeal property was already broader than English choses in action and you can probably analyse most digital assets as incorporeal property in Scotland.

I think we'll need to watch out as the detail develops however – and in particular regarding the extent to which chose in possession analysis is used in England regarding third category assets and how we keep our systems compatible. David Fox has been quite keen on using corporeal property analysis in Scotland for digital assets – but I and some others here think it's unhelpful as a general approach and that you do not need to assimilate digital assets to corporeal property to apply control analysis via some sort of stretched concept of possession and that you can readily go straight to control for incorporeal property (where I always think of the sorry lesson in financial collateral of the unnecessary references to possession as well as control). Clearly possession worked for digital bills of lading on both sides of the border – but as you note in your consultation this plugged into existing quite specialised analysis and law regarding the relatively narrow specialised digital asset being considered. There will doubtless be further special cases emerge that require special treatment.

Hopefully this helps address your comments on Scotland in para.3.8 of your consultation. I'll obviously be very happy to discuss further as things move forward further on both sides of the border.

Kind regards,
Hamish

Dr H.A. Patrick
[redacted]

[redacted]

FAO: [redacted]
Law Commission
1st Floor
Tower
52 Queen Anne's Gate
London
SW1H 9AG

Our Ref

Your Ref

Date 22 March 2024

Email [redacted]

Direct Line [redacted]

BY EMAIL ONLY
digitalassets@lawcommission.gov.uk

RESPONSE TO THE LAW COMMISSION'S SHORT CONSULTATION ON DIGITAL ASSETS AS PERSONAL PROPERTY (DRAFT CLAUSES)

1. We welcome the opportunity to provide comment in response to the Law Commission's call for evidence regarding a short Bill to confirm that a thing can be the object of property rights even though it is neither a thing in action nor a thing in possession, and the recommendation that legislation be enacted to confirm the existence of a *third category* of personal property rights, capable of accommodating certain digital assets including crypto-tokens.

2. Digital assets, and in particular cryptocurrencies, have become a pervasive feature of modern transacting, with specific prevalence in the practice areas of both criminal and civil fraud. We are therefore of the view that a discussion concerning possible statutory and legislative reform in this area is fundamentally necessary.

3. We address the three consultation questions in turn below.

Question 1: "*Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?*"

4. The draft Bill comes in the wake of a series of regulatory and legislative amendments in the digital asset space, which have sought to bolster consumer and market certainty to curtail the rampant forms of criminality that have marred the sector. For example, the recent enactment of the Economic Crime and Corporate Transparency Act 2023, which received Royal Assent on 26 October 2023, has augmented the powers available to law enforcement in the search and seizure of cryptoassets,

[redacted]

specifically through the amendment of criminal confiscation powers under Parts 2 to 4 of the Proceeds of Crime Act 2002, and civil recovery powers in Part 5. Additionally, the Financial Services and Markets Act 2023 (which received Royal Assent on 29 June 2023) has, amongst other things, brought cryptoassets under the purview of the definition of '*investment*' for UK Regulated Activities.

5. These legislative reforms have been brought about to effect legal certainty. The technological sophistication of digital assets often begets confusion, which bad actors have sought to exploit. Therefore, we agree with the intended market certainty that the Law Commission intends to bring about with the introduction of its draft Bill. Paragraph 2.29 of your Consultation Paper ("**the Paper**") sets out the proposed reasoning employed by the Law Commission when drafting this Bill, in that "*statutory confirmation will provide a strong signal to market participants that the law of England and Wales will continue to protect personal property rights, even in new and emergent forms of property*."

6. We agree with the Law Commission's use of a technologically neutral approach. As set out in paragraph 3.34 of the Paper, we accept that "*this will allow the law to interrogate the particular features of the asset in question when considering its proprietary status. It avoids drawing arbitrary boundaries or creating rigid definitional issues. It emphasises the success, and trusts in the continued ability, of the common law to develop sensitively and flexibly in the face of rapidly developing technology*." The legal and technological landscape has shifted exponentially. The reasoning in *Colonial Bank v. Whinney* [1] is outmoded and at odds with the realities of modern finance. The distinction is no longer binary in that property can be more than things in action or things in possession. However, the common law has already established and cemented this principle, and we question whether the draft Bill is able to provide further certainty in this regard.

7. For instance, paragraph 1.8 of the Paper states that the draft Bill "*will enable courts to determine a number of issues, including, for example, in the following situations* […] *If digital assets are the subject of a legal dispute and there is a danger of their holder dissipating them before that dispute can be resolved, a court can, if these assets are classed as property, order a proprietary freezing injunction over them to prevent this.*" The majority of civil fraud cases involving digital assets have involved applications for interim relief, with a specific focus on securing assets from dissipation. The common law has already established a strong judicial basis by which to enact such relief, which in large part has focussed on the adaptive and dynamic nature of the courts of England & Wales, to find practical remedies from existing legislative provisions.

[1] [1885] 30 Ch.D 261

8. We wonder whether the Bill will, rather than providing further clarity on the position, instead complicate matters. The Bill is drafted specifically to allow for judicial interpretation of what assets can be brought under this third category of property. On the one hand, the Bill has been drafted to codify what has already been established by the courts, to remove the ambiguity that comes with differing judicial treatment. Conversely, the Bill is reliant on the common law to establish what can and cannot constitute this third category of property. It creates certainty in one respect, whilst simultaneously creating the potential for further variation.

9. However, we accept the Law Commission's position that the courts have been limited, to an extent, when determining property rights issues under the common law. This in itself is a problem. Footnote 29 of the Paper states that, "*most cases involve interim applications in which a party seeks an order or directions before the substantive hearing of a claim. They are therefore concerned with specific preliminary issues (such as whether the court has, or should accept, jurisdiction), and subject to rules which limit the extent to which these issues are argued before the court. Jurisdictional facts may only need to be proved to the standard of a "good arguable case", and certain issues may not be in dispute for the purposes of the application although not determined finally.*" We therefore agree that the common law has been restricted in its ability to deal with property issues and has not been afforded the opportunity to fully test these matters. Furthermore, whilst the linguistic ambiguity of the Bill has its pitfalls (for further commentary on the risks associated with the ambiguity of the Bill's language, please see Question 2 below), it would be impracticable to set defined boundaries as to what should and should not be included in the third category. Digital assets and the underlying technology are likely to evolve at a rate that would far outpace our ability to legislate completely for them.

10. Consequently, we agree that the Bill and the general approach as outlined by the Law Commission are a positive advancement, which on balance, provides greater clarity in cementing a position that has already been road-tested to some degree through the courts of England & Wales under the common law. We believe that by enacting this proposed legislation, this will further highlight to the global community and market users that the English courts are adaptive to emerging technologies, and are supported in their endeavours with a legislative backing.

Question 2: What do you consider the positive impact of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?

11. As previously mentioned, the Bill will provide further certainty to some extent and will confirm what the common law has already sought to establish. In this regard, we agree with the Law Commission's reasoning as set out in paragraph 1.9 of the Paper that "*the common law has answered some questions in relation to some kinds of*

digital assets, but the result is, inevitably, both piecemeal and vulnerable to different judicial approaches in the future." The Bill will provide a definitive statutory underpinning to what has already been broached by the common law.

12. Statutory confirmation that property rights exist in relation to digital assets will undoubtably reduce the time spent by the courts on establishing whether, cryptocurrencies for example, can amount to property. As has been the norm since *AA v Persons Unknown*[2], the majority of cases that have a digital asset nexus, at least in a civil fraud context, tend to provide commentary on the attribution of property rights. It is evident from paragraph 2.27 of the Paper that the Law Commission's intention is to streamline this process, and that the Bill will allow the courts to instead "*focus on the substantive issues before them*."

13. However, as the language of the Bill has been purposefully drafted to exclude a definition as to what types of assets would fall under this third category, it is our concern that whilst the courts may be able to reduce the time dedicated to establishing whether digital assets can be property, instead the courts will now have to dedicate time to ascertain whether a specific asset can fall within this new category. Any time saving measures will effectively be negligible. As the Law Commission states at paragraph 3.11 of the Paper, "*whether or not a thing amounts to a third category thing to which personal property rights can relate under the law of England and Wales is a complex and dynamic question, which is ill-suited to static definition in statute*." The very purpose of the Bill is to avoid differing judicial approaches on the issue. However, by requiring the common law to provide the answers to what things fall within the third category, what personal property rights attach to third category things, and the consequences of that[3], this approach could still lead to "*piecemeal*"[4] results and uncertainty.

14. Perhaps once a bank of suitable test cases has been established, and there is a clearer understanding as to what type of assets can be captured by the proposed statute's provisions, then it is possible that the courts will not need to dedicate as much time to questions concerning the underlying property characteristics of a given digital asset. However, until then, it is possible that the overtly broad language of the draft Bill, will in fact (at least in the short term) increase time expenditure in this regard. We are therefore of the view that data on the reduction of a dispute in terms of *"£ or days/ hours*" is not quantifiable at present, and will require practical application and monitoring, if and when the Bill is enacted.

[2] [2019] EWHC 3556 (Comm)
[3] Paragraph 3.10 of the Paper
[4] Paragraph 1.9 of the Paper

Question 3: What do you consider the costs and/or risks of the Bill to be?

15. For the avoidance of repetition, please see the specific issues as highlighted in the responses to Questions 1 and 2 above.

Yours faithfully,

[redacted]

PETERS & PETERS SOLICITORS LLP

Response ID ANON-12XZ-CHBT-P

Submitted to Digital assets as personal property draft clauses
Submitted on 2024-03-22 15:35:34

About you

What is your name?

Name:
[redacted]

What is the name of your organisation?

Enter the name of your organisation:

The Powering Net Zero (PNZ) Group

Are you responding to this consultation in a personal capacity or on behalf of your organisation? How should you/your organisation be named if we later refer to your response?

Capacity and name for quoting:

Responding on behalf of my organisation. My organisation should be named as The Powering Net Zero Group.

What is your email address?

Email:
[redacted]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Tell us why you regard the information as confidential:

Consultation questions

Consultation Question 1: Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?

Yes

Please explain your answer:

The Powering Net Zero (PNZ) Group fully supports the general approach of the Draft Bill and agrees that subject to case law, it will achieve its desired effect. The PNZ Group considers Voluntary Carbon Credits (VCCs) to be an example of assets that would benefit from being recognised by the law as property.

We particularly agree with the Law Commission's assessment that rivalrousness is a helpful indicator of property in the case of digital assets, and in our case, VCCs. This is because the use (retirement) of a VCC by one buyer necessarily prejudices the ability of others to make equivalent use of it.

We also agree with the Law Commission's assessment that common law is the most appropriate tool for dealing with difficult boundary issues relating to digital assets that are based on varied technologies, including VCCs, and further agree that statutory definitions of particular technologies would exacerbate existing grey areas for VCCs.

While the PNZ Group fully recognises that the specifics of products and uses of digital assets that qualify under the proposed further category of personal property are to be defined under common law, we would expect emission rights before they are credited (rights in the plant, equipment or process that generates GHG emission reductions and/or removals) to fall into this third category of rights. This is again on the grounds that these are non-fungible and rivalrous items that do not neatly fit into the existing two categories.

About PNZ Group

The PNZ Group is facilitating the UK's transition to Net Zero, by funding the affordable retrofitting of British homes from the commercial demand for transparent, localised carbon credits. Our carbon credits can help fund domestic home retrofit without the need for further Government spending or the imposition of costs on households.

Homes are the single largest contributor of carbon emissions from the built environment, accounting for almost a quarter of the UK's total carbon emissions, and representing the largest barrier to reaching net zero by 2050. The scale of investment needed to tackle this means that unlocking private sector investment will be critical to decarbonising the housing stock, to ensure that households aren't penalised in the transition.

Voluntary carbon markets are the best way to do this. This is a market in which businesses can buy, sell and trade carbon credits — which account for one tonne of carbon dioxide being removed, or avoided. High quality carbon credits, when used effectively, can help businesses and investors reach their net zero goals more quickly and target their capital into impactful projects that make a genuine and measurable impact.

Consultation Question 2: What do you consider the positive impacts of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?

Positive impact:

As per our response to Q1, the PNZ Group considers Voluntary Carbon Credits (VCCs) to be an example of a thing that would benefit from the further category of personal property, because at present there is not a category of personal property that exists in which VCCs can neatly fall.

Through providing courts with a third category of personal property rights, additional legal certainty for buyers of VCCs would be achieved, and importantly also for project developers like PNZ Group itself while we are in ownership of the credits themselves.

According to the Taskforce on Scaling Voluntary Carbon Markets (TSVCM), demand for carbon credits could increase by a factor of 15 or more by 2030, and by a factor of up to 100 by 2050. Overall, the market for carbon credits could be worth upward of $50bn in 2030. Through increasing certainty over the legal status of VCCs, confidence in the broader Voluntary Carbon Market will also increase. This will in turn drive further investments, facilitating the kind of net zero delivery that the PNZ Group is involved in providing.

What do you consider the costs and/or risks of the Bill to be?

Costs or risks of the Bill:

We consider the costs and risks to the Bill to be limited. With reference to the consultation document, the Law Commission correctly identified recent judgements which do apply property rights to those items sitting outside the existing two definitions. The Law Commission’s proposal to formalise these rights is therefore a logical next step.

As per our response to the Q1, the PNZ Group also endorses the Law Commission's assessment that common law is the most appropriate tool for dealing with difficult boundary issues relating to digital assets that are based on varied technologies, including VCCs, and further agrees that statutory definitions of particular technologies would exacerbate existing grey areas for VCCs.

In summary, the PNZ Group views the Law Commission’s Draft Bill as eminently proportionate, fair and justified.

Response ID ANON-12XZ-CH2X-A

Submitted to Digital assets as personal property draft clauses
Submitted on 2024-03-23 04:24:31

About you

What is your name?

Name:
Fred Pucci

What is the name of your organisation?

Enter the name of your organisation:

Legal scholar, University of Adelaide

Are you responding to this consultation in a personal capacity or on behalf of your organisation? How should you/your organisation be named if we later refer to your response?

Capacity and name for quoting:

Personal capacity.

What is your email address?

Email:
[redacted]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Tell us why you regard the information as confidential:

Consultation questions

Consultation Question 1: Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?

Other

Please explain your answer:

I agree with the general intention of the draft Bill but disagree with the emphasis set out in the February 2024 short consultation (F24SC), for the following related reasons.

- First, the new provision should operate as a fallback, not as a primary avenue for pursuing property rights. The provision should be invoked only to the extent necessary to pursue a specific action or remedy, and not invoked automatically for all available proprietary actions or remedies for the relevant thing.

It would be invoked, for example, in circumstances where a judge adopts a rigid 'no tertium quid' approach, where the action or remedy being sought is being denied because it is held to be available only to a (narrowly-read) thing in possession or a thing in action, and not to any analogous thing.

Common law actions and remedies have their own specific varied and particular ways of evaluating and addressing the rights which a person has in relation to the thing against other persons. The content of duties attached to a thing will vary, since property rights include rights that impose a wide variety of different legal relations that 'differ in their impact on third parties', as MacFarlane and Douglas said (in a different context) in https://doi.org/10.1093/ojls/gqaa043. As those duties and relations differ, so too will the actions and remedies available to address the duties and relations. Specific common law actions and remedies that apply to things in possession and things in action are varied in the extent to which they embrace analogies. Some detailed examples may be provided by the author to the Law Commission, if required. The author is currently conducting research on Property Rights pertaining to Digital Assets, including an upcoming article entitled: Digital Assets and the Property Syllogism.

- Secondly, within the wide scope of 'digital assets' considered by the Law Commission, simple crypto assets such as Bitcoin (also known as crypto tokens) have been seen to get by without reliance on the Act, via actions and remedies through the common law. This is in contrast to other, more complex or different, digital assets considered by the Law Commission, which may need to rely on the Act.

The explanations in the F24SC (including paragraph 3.41) suggest that the Bill is intended to promote a 'forking' of the law (facilitated by the Act) to reflect the unique nature of third category things. Such a 'forking' does not (yet) seem necessary or desirable. It overlooks the significant differences between crypto assets and other digital assets considered by the Law Commission. Such a ‘forking’ risks distorting or stretching the law to less certain terrain.

Instead, the preferred way is to allow the common law to develop by analogy, which will lead to more robust law, with greater certainty. In other words, the risk of distortion is exactly the inverse of what is described in paragraph 3.41 of the F24SC.

The second sentence in paragraph 2.26 of the F24SC is objectionable when it says, '... rather than in terms of claims/rights, corresponding duties and obligations'. This may give the wrong impression for the new legislation. The specific duties, rights and claims associated with a property right of course will be examined by a court for a relevant action or remedy. Duties must be evaluated, without limitation, by reference to the manifested intentions of participants (applying Edelman J in the Hocking case (2020) at 206). A manifested intention to exercise control of a digital asset personally in a manner that excludes unauthorised interference may tell us as much, or more, about a relevant duty as any design labels used in the code or white paper created for the digital asset; those labels might literally be interpreted as suggesting that no participant owes any duties at all, for example.

- Thirdly, the statement made in the F24SC that a digital asset cannot be a thing in action because it exists independently of the legal system comes across as a rather narrow reading of the law. The common law adopted the law merchant to find pragmatic solutions (including fictions relating to deeds) to accommodate commercial relations that existed for periods of time independently of the legal system. The law incorporated certain commercial relations which previously existed outside the legal system, ex post. The law also developed through Chancery courts to characterise certain legal relations (that had a prior life as non-proprietary) as proprietary, ex post. Why is now any different?

One possible suggested solution to address these concerns is for the Explanatory Notes to the Bill to specifically note that:

(a) the Act is intended to apply as a fallback to the common law, where a specific action or remedy is being denied because the thing is interpreted for that specific action or remedy as being neither a thing in possession nor a thing in action, and the action or remedy is being interpreted as being only available to a thing in possession or a thing in action and not to any analogous thing;

(b) a common law action or remedy may be available for the thing, without limitation, where the law applicable to the action or remedy considers the thing to be sufficiently analogous to a thing in possession or a thing in action; and

(c) if a common law action or remedy treats a thing as neither a thing in possession nor a thing in action, this does not preclude another common law action or remedy applying in respect of its property rights.

Consultation Question 2: What do you consider the positive impacts of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?

Positive impact:

If the Explanatory Notes are published as suggested above, or words to that effect, the positive impacts of the Bill will be to provide a fallback, or property law safety net, for digital assets, to supplement the development of the common law.

What do you consider the costs and/or risks of the Bill to be?

Costs or risks of the Bill:

A forked law, as briefly described above, would add legal uncertainty. This would be an unintended consequence of the Bill, but a negative for the digital asset community and a disappointing outcome for all common law jurisdictions.

Digital Assets Bill Consultation

I respond to this consultation as an individual. I am currently Professor of Business Law at the University of Leeds with an interest in personal property law.

You ask three main questions which I will take in turn

1) Do you agree with the general approach of the Bill and agree that it will have the desired effect?

In my view this is a solution in search of a problem. However, taking the Bill on its own terms as you ask, I accept that it is much better to legislate negatively (ie to say that x can be property even if it is not a chose in possession or in action) than positively (ie to say that if x has characteristics y and z then it is a third type of property). This way you are not excluding anything that a court might be inclined to accord proprietary status by fiat when it is of a type of thing not previously imagined. It minimises unintended consequences.

The phrase "is capable" indicates that where a court is considering whether a thing is property it does not have to conclude it is just because it thinks it is considering a thing. Digital files are things, but despite some recent scholarship are definitely not property. This Bill does not require a court to say they are (although it permits it).

2) What do you consider the positive impact of the Bill to be

None. This Bill requires nothing. It will almost certainly therefore have no impact at all on any judicial decision in the sense that no case will be decided differently because the Bill is passed (or not). Courts have pretty much decided that crypto-tokens are property and do not appear much fussed about whether they are choses in action or something new. It would be a very brave Supreme Court that decided that bitcoin was not property now. The Bill does not change that. In fact the UKSC could (but probably won't) decide that bitcoin are not property even with the passage of the Bill into law. To stress, the Bill requires nothing. Crypto-tokens are said to be capable of being property, but that does not require a court to decide that they are property. If it did, you would have a very serious problem because you would at a stroke have legislated that things like digital files, email accounts, domain names, magic swords in a multiplayer online role-playing game (MPORG) all of which are things, but none of which should be seen as property are property. Indeed by not defining chose in action you still leave it open for courts to adopt the view held by Bridge, Gullifer, McMeel and Low that all intangible property should be seen as choses in action (apart I suppose from patents), rendering the legislation utterly pointless.

Nor do I think it will make any difference to working through the incidents of digital assets as property. The thing about intangible property is that it is heterogenous. A carbon credit is not the same as a bank account, which is not the same as a company share, which in turn is not the same as copyright or a patent or a bitcoin. What matters here is patient analysis of the characteristics of the asset. The Bill says nothing about this.

3) What do you consider the costs/risks of the Bill to be?

None. This Bill requires nothing. It can be ignored with no real consequence to legal reasoning as explained above. There are no decisions a court can make now that would be impermissible under the Act. Conversely there are no decisions a court could make after the Bill passes into law that it cannot make now. To illustrate, a court could decide that digital files are property and this Bill permits that. That would be a mistake (they are not), but it is a mistake currently open to a court to make at common law and so the Bill makes no difference.

Duncan Sheehan

Response ID ANON-12XZ-CHBN-G

Submitted to Digital assets as personal property draft clauses
Submitted on 2024-03-20 12:42:38

About you

What is your name?

Name:
Lionel Smith

What is the name of your organisation?

Enter the name of your organisation:

University of Cambridge

Are you responding to this consultation in a personal capacity or on behalf of your organisation? How should you/your organisation be named if we later refer to your response?

Capacity and name for quoting:

Personal capacity. I should be named by my name.

What is your email address?

Email:
[redacted]

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Tell us why you regard the information as confidential:

Consultation questions

Consultation Question 1: Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?

No

Please explain your answer:

The draft bill seems to rest on a confusion. The dichotomy between things in possession and things in action, properly understood, is between two categories of rights (and other legally recognised prerogatives such as licences). Things in possession refers to rights that are tied to a tangible movable thing; things in action, to rights that are not. This is a logically exhaustive dichotomy.
But it is a dichotomy of legally recognised prerogatives. It is a legal tool for thinking about the law.
The Short Consultation says (2.12) "Crypto-tokens would continue to exist even if the law were to fail to recognise them as objects of personal property rights and even were a law to prohibit their existence." They would exist in a sense, just as Bilbo Baggins exists in a sense. But they would not exist in law.
The dichotomy is arguably flawed, because on its face it opposes physical things with legal rights, when in fact it is concerned with two categories of legal rights.
The draft clauses would make this confusion worse, because they would be introducing into a categorization of legally recognised prerogatives something that is explicitly not a legally recognised prerogatives and does not relate to one.
There is already enough confusion around the word and concept "property" (acknowledged in the Short Consultation (2.5-2.6). This is exacerbated by the ambiguity of "thing": in "thing in possession" it means a tangible thing, but in "thing in action" it means a right or other legally recognised prerogative.
The Bill would make this confusion worse in my view. If and to the extent that one has rights in relation to what the Short Consultation calls a "third category thing", then those rights are a chose in action. If one does not have legal rights, then there is nothing for the legal system to categorize.
This confusion is evident in the draft clauses themselves: "A thing (including a thing that is digital or electronic in nature) is capable of being the object of personal property rights even though it is neither—
(a) a thing in possession, nor
(b) a thing in action." Here "thing" clearly does not mean "tangible movable thing" nor does it mean "legal right or other legally recognised prerogative" since if it meant either of those things, we would be within the traditional dichotomy.
So as a whole, Clause 1 effectively says: "a person can hold rights in relation to something in which they do not hold any rights".

Consultation Question 2: What do you consider the positive impacts of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?

Positive impact:

I think it would generate disputes, not reduce them.

What do you consider the costs and/or risks of the Bill to be?

Costs or risks of the Bill:

It would introduce a kind of incoherence into fundamental property law.

Digital assets as personal property: response to consultation

Robert Stevens

Professor of English Private Law, University of Oxford

1. Introduction

The Draft Bill's operative clause is:

> "1 **Objects of personal property rights**
>
> A thing (including a thing that is digital in nature) is capable of being an object of personal property rights even though it is neither—
>
> (a) a thing in possession,
>
> nor
>
> (b) a thing in action"

This clause, if enacted, would be counterproductive in any attempt to clarify the law.

2. "Object"

The "object" of title to a chair may be said to be a physical thing, the chair. The object of a title to land is then an area of space (eg Blackacre).

As drafted, it appears that "thing in possession" in the clause is intended to refer to the *physical things* that can be the "object" of rights ([2.8], but see p 3 fn 2). However, this makes no sense when referring to a "thing in action".

A thing in action refers to a transferable *right* that is not in relation to a physical thing. For example, receivables and shares are things in action. However, such rights do not have as their "object" any external thing. Receivables are obligations to pay sums of money. Shares in a company give their holder rights against the company (to dividends, vote, return of capital) and against other shareholders. As such "things in action" do not refer to any external *object* of a right. They refer to the right itself. It is incorrect to refer to "right in things in action." (p 3 fn 2).

Given this, if we intend "things in possession" to refer to a species of a genus to which "things in action" belong, then the category of "things in possession" must refer to the *rights in relation to* physical things capable of possession. In other words, they refer to the rights themselves, not the physical things that are their subject matter. In which case it is also mistaken to refer to things in possession as an "object" of property rights, just as it is more obviously mistaken to refer to things in action as their object.

The error is to confuse rights and things. This is apparent at [2.8] of the consultation paper. We are told that things in possession refer to tangible movable things such as a bag of gold. Things in action, by contrast, are said to refer to debts and shares in a company. The first refers to physical things which exist independently of any system of law. The second refers to rights recognised by the legal system. A debt is not the "object" of a right; it is the right. These two categories as defined are not species of a genus of "property". They are as completely different as fish and the colour blue. The consultation paper, and so the clause, elides the distinction between rights (eg a contract debt, title to a car) and the "objects" of rights (eg a physical thing, an area of land, a form of information).

3. The Problem the Clause Seeks to Address

Some things in action do have an "object" in the clause's sense (other than the action to be done, or not done, to comply with the obligor's duty). Intellectual property rights, for example, have as their "object" varieties of information. Copyright has as its object literary or

artistic work. Trademarks refer to the symbols that distinguish a particular producer of goods or services. Patents relate to innovations or inventions.

Digital assets, such as Bitcoin, also clearly refer to something external to ourselves that is independent of the law. Bitcoin and other cryptocurrencies are best conceived as information on a system given special features (rivalrousness) by virtue of blockchain technology. Regardless of whether this characterisation is correct, however, it would be perfectly possible to enact for the recognition of legal rights in relation to Bitcoin or any other digital asset. Such rights would, if recognised, not be in relation to physical things, such as a table or vase. They would therefore fall into the category of "things in action", just as intellectual property rights do. What then is the problem that the proposed clause is intended to address?

The consultation states ([2.12]):

> Digital assets do not sit easily in either of the traditionally recognised categories of things in possession or things in action (at least in the narrow sense). They are not tangible things in the normal sense, meaning that courts are likely to feel unable to find that they are things in possession. Nor are they claimable or enforceable only by legal action or proceedings. Crypto-tokens would continue to exist even if the law were to fail to recognise them as objects of personal property rights and even were a law to prohibit their existence. Their useful characteristics and the ability of people to use, enjoy and interact with them (and exclude others from them) would also continue to exist: the functionality of the crypto-token system would remain unaffected. They therefore function more like objects in themselves.

The reasoning seems to be that digital assets are independent of there being any rights in relation to them (as are cattle and apples) and they also do not (always?) have any legal rights in relation to them (as, by contrast, a patent by virtue of legislation always does), therefore they are a third kind of "property" that needs to be recognised.

This is, at best, unhelpful. “Property” in the patrimonial sense refers to transferable legal rights. It therefore includes both rights in relation to things (eg title to a gold coin) and rights that are not in relation to things (eg debts, shares). “Property” in any useful legal sense does not however include anything in relation to which there is no right. The apparent intention of the clause is to remove the barrier to recognition of something as “property” that there is any recognised legal right in relation to it. This would only be productive of confusion.

The consultation paper gives as an example of the problem of classifying property into the exhaustive categories of things in possession and things in action that of the varieties of legal privileges that are valuable and capable of transfer, and so realisable in money. Milk quotas,[1] environmental emission allowances[2] and transferable state licences[3] in general take this form. These transferable privileges are however still transferable *legal* relations. No legal problem is caused by categorising such privileges as things in action, although the word “action” may be thought inexact. It does not follow however that something in relation to which there is no legal right of any kind recognised by the law also constitutes “property.”

4. “Capable”

There are arguments that the law does not recognise many forms of digital assets, such as Bitcoin, as property, and that neither the legislature nor the courts should take this step. Nobody has ever suggested however that the division of property rights into “things in possession “ and “things in action” provides any justification for such non-recognition. If there were to be such recognised legal rights in relation to digital assets, they would be things in action. The consultation paper, and hence the clause, by implying that the barrier to recognition is the failure of the law to recognise a *tertium quid* addresses a problem that does not exist, and is not considered the problem by critics of the recognition of crypto as “property”. The problem is not that the various digital assets are incapable of being the objects of property. Of course they are, just as any other form of information is so capable. The problematic question is whether the law currently does so recognise them, and whether it would be a good idea to do so.

[1] *Swift v Dairywise (No 1)* [2000] 1 W.L.R. 1177; [2000] 1 All. E.R. 320.
[2] *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch); [2012] Env.L.R. D4.
[3] *Saulnier v Royal Bank of Canada* 2008 S.C.C. 58; [2008] 3 S.C.R. 166.

5. “Property”

The clause leaves the meaning of both “property” and “personal property” undefined. In cases of doubt therefore a court is likely to turn to the report that led to the enactment to discover what was intended. Unfortunately, the consultation paper adopts multiple different usages without distinguishing between them.

The consultation commences ([1.2]):

> Personal property rights are important for many reasons. They are important in cases of bankruptcy or insolvency, in cases where objects of property rights are interfered with or unlawfully taken, and for the legal rules concerning succession on death. They are also important for the proper characterisation of numerous modern and complex legal relationships, including custody relationships, collateral arrangements and structures involving trusts. Property rights are powerful because, in principle, they are recognised against the whole world, whereas other — personal — rights (such as contractual rights) are recognised only against someone who has assumed a relevant legal duty.

This defines “property rights” as being rights that are exigible *erga omnes* (“the whole world”). On this definition, title to a bicycle is a property right, whereas a contractual debt is not, as merely exigible against the debtor.

The consultation continues, consistently ([2.1])

> “Property” can be divided into real property (interests in land) and personal property (interests in other things).

On this definition, although title to Blackacre would be real property, and title to the bicycle would be personal property, a contractual debt would be neither as not an interest in a thing.

Correctly, and again consistently, we are told ([2.5])

> Colloquially, the term "property" is used interchangeably to describe both a thing, and a claim or entitlement to that thing. However, in a stricter legal sense, the term describes a relationship between a person and a thing, and not the thing itself.

Which again would exclude contractual debts and shares in a company from "property" as they do not concern the relationship between a person and a thing.

However, we are then told ([2.8])

> Things in action are, traditionally, any personal property that can only be claimed or enforced through legal action or proceedings. Common examples of things in action are debts, rights to sue for breach of contract, and shares in a company.

This is to use "property" in a completely different sense. Implicitly it excludes rights that are incapable of transfer (eg the rights to our bodies or our reputation) but encompasses all rights that are so capable. It is to use "property" in the patrimonial sense of the term, when the earlier uses in the consultation define it in terms of exigibility. It therefore includes contractual debts and shares. (The clause's use of "property rights" is a pleonasm, like "tuna fish" or "free gift." All forms of property are constituted by rights, but not all rights are property.)

We are then later told ([2.18])

> the use or enjoyment of a thing in action is dependent entirely on the enforceability of the right or claim of which it is constituted. That is not true of crypto-tokens, for example. This is the crucial distinction that needs to be made for proprietary classification purposes.

Here the claim is that the digital asset is capable of being "property" despite there being no right in relation to it (so that it does not fall into the category of things in action). This is a still wider, and idiosyncratic, definition of property than the patrimonial sense.

The consultation paper therefore uses "property" in, at least, three different senses, which are not adequately distinguished. The failure to clarify which sense of "property" is being referred to in the clause is therefore a source of confusion.

It would not be helpful to enact this confusion into law. Just as in legal discourse we refer to something as "property" in different senses, what constitutes "property" may vary according to the legal context (eg insolvency, freezing orders, the conflict of laws, the law of torts). Where our goal is to realise a bankrupt's wealth in order to meet their liabilities, or discourage crime by confiscating proceeds, it may be wise to define "property" broadly in the patrimonial sense. Where the question is whether a third party should be liable without blame in tort for the interference with an asset, the same expansive definition is inappropriate. These distinctions are lost in the brief clause proposed.

6. The Premise

The consultation commences, as did the final report ([1.1]):

> Digital assets are fundamental to modern society and the contemporary economy.

This claim is extremely contentious.[4] If the claim is that *all* digital assets, such as (the most prominent) Bitcoin, other varieties of so-called cryptocurrencies, and Non-Fungible Tokens, are "fundamental", many will dissent. Despite Bitcoin having been in existence for sixteen years, nobody has, as yet, discovered any (legal) commercially important use for it. Whether encouraging the use of Bitcoin and other forms of crypto by recognising it as "property" in English domestic law for some or all purposes is commercially sensible is a matter for debate.

It may be that using blockchain technology for the secure transfer of securities, such as shares, or even rights to land, will prove useful. Here, however, the "property" is the underlying right itself that is being transferred, not the digital blockchain technology that is used to do so (cf [1.1]). The "property" (ie the right) is not digital, and could not be.

The rhetoric of this consultation, like the Report that preceded it, is that English law is being held back by an archaic nineteenth century classification that is no longer fit for purpose. Digital assets cannot, so it is claimed, be comfortably accommodated within such an outdated scheme. One danger is that, if enacted, this clause will be interpreted as meaning not just that the various digital assets, including Bitcoin, are "capable" of being the subject matter of a right (nobody actually denies that they are) but rather that they are hereby recognised by the legislature as being property rights. This danger would be low if it were clear what mischief the suggested legislation was intended to address, unfortunately it is not.

The distinctions between the tangible and intangible, and what is recognised by the law and what is not, are not out of date. Nor could they be.

7. Conclusion

The proposed legislation should not be carried forward. No alternative drafting is suggested because it is unclear what the mischief that it is sought to address is.

[4] See, for example, https://www.ecb.europa.eu/press/key/date/2023/html/ecb.sp230623_1~80751450e6.en.html; on crypto and tax evasion, see K Baer, R de Mooij, S Hebous, and M Keen, "Taxing Cryptocurrencies" IMF WP/23/144.

Response ID ANON-12XZ-CHBC-5

Submitted to Digital assets as personal property draft clauses
Submitted on 2024-03-04 09:10:29

About you

What is your name?

Name:
Robert Stevens

What is the name of your organisation?

Enter the name of your organisation:

University of Oxford

Are you responding to this consultation in a personal capacity or on behalf of your organisation? How should you/your organisation be named if we later refer to your response?

Capacity and name for quoting:

Pesonal

What is your email address?

Email:
[redacted]

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Tell us why you regard the information as confidential:

Consultation questions

Consultation Question 1: Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?

No

Please explain your answer:

Digital assets as personal property: response to consultation
Robert Stevens
Professor of English Private Law, University of Oxford
1. Introduction
The Draft Bill's operative clause is:

"1 Objects of personal property rights
A thing (including a thing that is digital in nature) is capable of being an object of personal property rights even though it is neither—

(a) a thing in possession,
nor
(b) a thing in action"

This clause, if enacted, would be counterproductive in any attempt to clarify the law.

2. "Object"
The "object" of title to a chair may be said to be a physical thing, the chair. The object of a title to land is then an area of space (eg Blackacre).

As drafted, it appears that "thing in possession" in the clause is intended to refer to the physical things that can be the "object" of rights ([2.8], but see p 3 fn 2). However, this makes no sense when referring to a "thing in action".

A thing in action refers to a transferable right that is not in relation to a physical thing. For example, receivables and shares are things in action. However, such rights do not have as their "object" any external thing. Receivables are obligations to pay sums of money. Shares in a company give their holder rights against the company (to dividends, vote, return of capital) and against other shareholders. As such "things in action" do not refer to any external object of a right. They refer to the right itself. It is incorrect to refer to "right in things in action." (p 3 fn 2).

Given this, if we intend “things in possession” to refer to a species of a genus to which “things in action” belong, then the category of “things in possession” must refer to the rights in relation to physical things capable of possession. In other words, they refer to the rights themselves, not the physical things that are their subject matter. In which case it is also mistaken to refer to things in possession as an “object” of property rights, just as it is more obviously mistaken to refer to things in action as their object.

The error is to confuse rights and things. This is apparent at [2.8] of the consultation paper. We are told that things in possession refer to tangible movable things such as a bag of gold. Things in action, by contrast, are said to refer to debts and shares in a company. The first refers to physical things which exist independently of any system of law. The second refers to rights recognised by the legal system. A debt is not the “object” of a right; it is the right. These two categories as defined are not species of a genus of “property”. They are as completely different as fish and the colour blue. The consultation paper, and so the clause, elides the distinction between rights (eg a contract debt, title to a car) and the “objects” of rights (eg a physical thing, an area of land, a form of information).

3. The Problem the Clause Seeks to Address

Some things in action do have an “object” in the clause’s sense (other than the action to be done, or not done, to comply with the obligor’s duty). Intellectual property rights, for example, have as their “object” varieties of information. Copyright has as its object literary or artistic work. Trademarks refer to the symbols that distinguish a particular producer of goods or services. Patents relate to innovations or inventions.

Digital assets, such as Bitcoin, also clearly refer to something external to ourselves that is independent of the law. Bitcoin and other cryptocurrencies are best conceived as information on a system given special features (rivalrousness) by virtue of blockchain technology. Regardless of whether this characterisation is correct, however, it would be perfectly possible to enact for the recognition of legal rights in relation to Bitcoin or any other digital asset. Such rights would, if recognised, not be in relation to physical things, such as a table or vase. They would therefore fall into the category of “things in action”, just as intellectual property rights do. What then is the problem that the proposed clause is intended to address?

The consultation states ([2.12]):
Digital assets do not sit easily in either of the traditionally recognised categories of things in possession or things in action (at least in the narrow sense). They are not tangible things in the normal sense, meaning that courts are likely to feel unable to find that they are things in possession. Nor are they claimable or enforceable only by legal action or proceedings. Crypto-tokens would continue to exist even if the law were to fail to recognise them as objects of personal property rights and even were a law to prohibit their existence. Their useful characteristics and the ability of people to use, enjoy and interact with them (and exclude others from them) would also continue to exist: the functionality of the crypto-token system would remain unaffected. They therefore function more like objects in themselves.

The reasoning seems to be that digital assets are independent of there being any rights in relation to them (as are cattle and apples) and they also do not (always?) have any legal rights in relation to them (as, by contrast, a patent by virtue of legislation always does), therefore they are a third kind of “property” that needs to be recognised.

This is, at best, unhelpful. “Property” in the patrimonial sense refers to transferable legal rights. It therefore includes both rights in relation to things (eg title to a gold coin) and rights that are not in relation to things (eg debts, shares). “Property” in any useful legal sense does not however include anything in relation to which there is no right. The apparent intention of the clause is to remove the barrier to recognition of something as “property” that there is any recognised legal right in relation to it. This would only be productive of confusion.

The consultation paper gives as an example of the problem of classifying property into the exhaustive categories of things in possession and things in action that of the varieties of legal privileges that are valuable and capable of transfer, and so realisable in money. Milk quotas, environmental emission allowances and transferable state licences in general take this form. These transferable privileges are however still transferable legal relations. No legal problem is caused by categorising such privileges as things in action, although the word “action” may be thought inexact. It does not follow however that something in relation to which there is no legal right of any kind recognised by the law also constitutes “property.”

4. “Capable”
There are arguments that the law does not recognise many forms of digital assets, such as Bitcoin, as property, and that neither the legislature nor the courts should take this step. Nobody has ever suggested however that the division of property rights into “things in possession “ and “things in action” provides any justification for such non-recognition. If there were to be such recognised legal rights in relation to digital assets, they would be things in action. The consultation paper, and hence the clause, by implying that the barrier to recognition is the failure of the law to recognise a tertium quid addresses a problem that does not exist, and is not considered the problem by critics of the recognition of crypto as “property”. The problem is not that the various digital assets are incapable of being the objects of property. Of course they are, just as any other form of information is so capable. The problematic question is whether the law currently does so recognise them, and whether it would be a good idea to do so.

5. “Property”
The clause leaves the meaning of both “property” and “personal property” undefined. In cases of doubt therefore a court is likely to turn to the report that led to the enactment to discover what was intended. Unfortunately, the consultation paper adopts multiple different usages without distinguishing between them.

The consultation commences ([1.2]):

Personal property rights are important for many reasons. They are important in cases of bankruptcy or insolvency, in cases where objects of property rights are interfered with or unlawfully taken, and for the legal rules concerning succession on death. They are also important for the proper characterisation of numerous modern and complex legal relationships, including custody relationships, collateral arrangements and structures involving trusts. Property rights are powerful because, in principle, they are recognised against the whole world, whereas other — personal — rights (such as

contractual rights) are recognised only against someone who has assumed a relevant legal duty.

This defines “property rights” as being rights that are exigible erga omnes (“the whole world”). On this definition, title to a bicycle is a property right, whereas a contractual debt is not, as merely exigible against the debtor.

The consultation continues, consistently ([2.1])

“Property” can be divided into real property (interests in land) and personal property (interests in other things).

On this definition, although title to Blackacre would be real property, and title to the bicycle would be personal property, a contractual debt would be neither as not an interest in a thing.

Correctly, and again consistently, we are told ([2.5])
Colloquially, the term “property” is used interchangeably to describe both a thing, and a claim or entitlement to that thing. However, in a stricter legal sense, the term describes a relationship between a person and a thing, and not the thing itself.
Which again would exclude contractual debts and shares in a company from “property” as they do not concern the relationship between a person and a thing.

However, we are then told ([2.8])

Things in action are, traditionally, any personal property that can only be claimed or enforced through legal action or proceedings. Common examples of things in action are debts, rights to sue for breach of contract, and shares in a company.

This is to use “property” in a completely different sense. Implicitly it excludes rights that are incapable of transfer (eg the rights to our bodies or our reputation) but encompasses all rights that are so capable. It is to use “property” in the patrimonial sense of the term, when the earlier uses in the consultation define it in terms of exigibility. It therefore includes contractual debts and shares. (The clause’s use of “property rights” is a pleonasm, like “tuna fish” or “free gift.” All forms of property are constituted by rights, but not all rights are property.)

We are then later told ([2.18])

the use or enjoyment of a thing in action is dependent entirely on the enforceability of the right or claim of which it is constituted. That is not true of crypto-tokens, for example. This is the crucial distinction that needs to be made for proprietary classification purposes.

Here the claim is that the digital asset is capable of being “property” despite there being no right in relation to it (so that it does not fall into the category of things in action). This is a still wider, and idiosyncratic, definition of property than the patrimonial sense.

The consultation paper therefore uses “property” in, at least, three different senses, which are not adequately distinguished. The failure to clarify which sense of “property” is being referred to in the clause is therefore a source of confusion.

It would not be helpful to enact this confusion into law. Just as in legal discourse we refer to something as “property” in different senses, what constitutes “property” may vary according to the legal context (eg insolvency, freezing orders, the conflict of laws, the law of torts). Where our goal is to realise a bankrupt’s wealth in order to meet their liabilities, or discourage crime by confiscating proceeds, it may be wise to define “property” broadly in the patrimonial sense. Where the question is whether a third party should be liable without blame in tort for the interference with an asset, the same expansive definition is inappropriate. These distinctions are lost in the brief clause proposed.

6. The Premise

The consultation commences, as did the final report ([1.1]):

Digital assets are fundamental to modern society and the contemporary economy.

This claim is extremely contentious. If the claim is that all digital assets, such as (the most prominent) Bitcoin, other varieties of so-called cryptocurrencies, and Non-Fungible Tokens, are “fundamental”, many will dissent. Despite Bitcoin having been in existence for sixteen years, nobody has, as yet, discovered any (legal) commercially important use for it. Whether encouraging the use of Bitcoin and other forms of crypto by recognising it as “property” in English domestic law for some or all purposes is commercially sensible is a matter for debate.

It may be that using blockchain technology for the secure transfer of securities, such as shares, or even rights to land, will prove useful. Here, however, the “property” is the underlying right itself that is being transferred, not the digital blockchain technology that is used to do so (cf [1.1]). The “property” (ie the right) is not digital, and could not be.

The rhetoric of this consultation, like the Report that preceded it, is that English law is being held back by an archaic nineteenth century classification that is no longer fit for purpose. Digital assets cannot, so it is claimed, be comfortably accommodated within such an outdated scheme. One danger is that, if enacted, this clause will be interpreted as meaning not just that the various digital assets, including Bitcoin, are “capable” of being the subject matter of a right (nobody has ever denied that they are) but rather that they are hereby recognised by the legislature as being property rights. This danger would be low if it were clear what mischief the suggested legislation was intended to address, unfortunately it is not.

The distinctions between the tangible and intangible, and what is recognised by the law and what is not, are not out of date. Nor could they be.

7. Conclusion

The proposed legislation should not be carried forward. No alternative drafting is suggested because it is unclear what the mischief that it is sought to address is.

Consultation Question 2: What do you consider the positive impacts of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?

Positive impact:

None. It will add confusion and so increase legal costs.

What do you consider the costs and/or risks of the Bill to be?

Costs or risks of the Bill:

The cost is the confusion added to the current law, with no discernible upside.

Response ID ANON-12XZ-CHBY-U

Submitted to Digital assets as personal property draft clauses
Submitted on 2024-03-17 12:20:36

About you

What is your name?

Name:
[redacted]

What is the name of your organisation?

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Are you responding to this consultation in a personal capacity or on behalf of your organisation? How should you/your organisation be named if we later refer to your response?

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If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

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Consultation questions

Consultation Question 1: Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?

Yes

Please explain your answer:

I believe that the draft Bill strikes the right balance between reducing uncertainty (by confirming that there is a third category of thing which is capable of being the object of personal property rights) and not restricting the approach of the Courts going forwards when it comes to defining the scope of that category.

Consultation Question 2: What do you consider the positive impacts of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?

Positive impact:

I believe that the Bill will, by removing an area of uncertainty, reduce the issues in dispute between parties in cases involving digital assets. It is difficult to quantify the impact of this (particularly given that the Courts have moved towards recognising this already) but, if it removed the need for a preliminary hearing on the issue in a particular case, that would result in a substantial cost saving.

What do you consider the costs and/or risks of the Bill to be?

Costs or risks of the Bill:

Given that the Bill confirms a position which the Courts have moved towards already, which has been well received and which strengthens remedies available in cases involving digital assets, the risks appear to be minimal. No doubt the risks would have been more complex and difficult to anticipate if the Bill had sought to define the scope of the third category, but that is not the approach which has been taken.

LEGAL

[redacted]

Law Commission Consultation: Digital Assets as Personal Property – Short Consultation on Draft Clauses

Date of Submission: 22 March 2024

Sent via email to: digitalassets@lawcommission.gov.uk

From: W Legal Limited

W LEGAL RESPONSE

Firm's Background

W Legal is a boutique firm of lawyers specialising in corporate law, commercial and civil litigation and advice, financial crime, family proceedings, GDPR and data handling.

Our practitioners have experience with blockchain and digital asset technology (including, regulation, tracing and recovering lost/stolen digital assets, Initial Coin Offerings, Non-Fungible Tokens ("NFTs") and the 'Metaverse'), fraud, cyber-security, and divorce and separation proceedings involving distribution of digital assets. Additionally, review work has been carried out by the firm for a submission on the future of Central Bank Digital Currency from a legal/economic perspective, the future regulation of AI and the use of digital wills to replace paper-based wills.

[redacted] These senior members of the firm have expertise in the areas of digital assts, acting as consultants to the firm in developing legal work. Additionally, they work with digital technology groups based internationally – including Ukraine, Poland, Turkey, and the US.

Whilst the firm was not in a position to respond on the 2023 Law Commission review, it did present its views to an earlier UK Jurisdictions Task Force review ("UK JTFR") and the firm attended reviews in the UK Jurisdiction Legal Task Force/Computer Law group.

In the firm's submission to the UK JTFR, we concluded that, whilst digital assets would not be things in possession, they could be much closer to things in action whilst not being a complete fit, therefore we would welcome the new category. Additionally, the firm provided summary input on the questions governing private international law, the conformity of smart contacts with English contractual laws, and the question of whether security can be given over digital assets, concluding that mortgage or equitable interests should be capable of being created over digital assets.

In the intervening years, we can see that both English and many foreign Courts (notably, mostly Courts of common law jurisdictions) have recognised that digital assets are a type of property giving rise to rights and remedies, which can be enforced by the Courts (including by way of injunctive and equitable relief). The draft Bill clearly demonstrates the Law Commissions' legal and political commitment to stay in line with what has already been recognised by the English Courts, namely the legal status of (and, accordingly, the rights and

obligations associated with) digital assets. It will help guide the development of financial and legal regulations in this area and help to give greater understanding in related areas of policing money laundering; sanctions; intellectual property; the creation of security over such assets; consumer and investor rights. The draft Bill, whilst (correctly, in our view) not stating which instruments fall within the new category, will help the development of the common law and equity in this area by the English Courts and, in turn, the Courts of other common law jurisdictions.

The UK, in adopting the new Bill, will be moving forward in line with other leading foreign jurisdictions – both common law (including Canada, Australia, Hong Kong and New Zealand) and civil law-based (including Japan, Lichtenstein, Switzerland and Dubai) – helping to shape this important area of developing law and regulation.

Following the drafting and implementation of this Bill, stakeholders across various sectors will benefit from increased clarity and certainty regarding the legal status and treatment of digital assets. Financial institutions, investors, and businesses will be better equipped to navigate the regulatory landscape surrounding digital assets, fostering innovation and investment in this rapidly evolving field. As the English Courts continue to interpret and apply the provisions of the draft Bill, they will play a crucial role in shaping the future legal framework governing digital assets, thereby establishing precedents that will influence jurisdictions worldwide. Overall, the introduction of this legislation marks a significant milestone in the journey towards mainstream acceptance and integration of digital assets into the global financial system.

W Legal would be most interested and willing to be involved in the more in-depth consideration planned for the Digital Asset Collateral Review project in the future.

In particular, we would welcome the opportunity to discuss and provide insights on the following topics:

- Current law/regulation and consider potential impact in business and financial areas, including “smart contracts”;
- Impact on matrimonial dispute cases; search and freezing orders (in the UK and worldwide) and in insolvency areas.
- Legal approach in other jurisdictions and in cross-border situations;
- The material differences produced by different types of digital assets, including intellectual property rights, and the perimeter issues with tokenised art and in online gaming;
- Assessment of the impact of so-called “staking”, gas fees and minting; and
- Future impacts - Where are we heading with AI/quantum computing and future developments that could further impact the evolution of the law/regulations in this area.

These areas and questions are currently under consideration with a number of our blockchain, DLT and IT clients, and our network. Such areas and questions reflect practical and strategic issues that are arising in the commercial and legal world. We would be happy to introduce some of the specialist IT groups we are working with, as part of our contribution to the next stage of legal review, in order to advance the legal/regulatory technical issues in this fast developing and complex area.

[redacted]

Question 1: Do you agree with the general approach of the draft Bill, and agree that it will achieve the desired effect?

We agree with the general approach of the draft Bill but consider that it leaves a lot of open issues and uncertainties to be resolved. In particular, the types of instruments which would fall into this new category, and the rights and remedies which attach to them. However, we consider that it is appropriate that these issues be left to the Court to consider, determine and resolve in the usual way and to be assisted by expert advice from individuals and groups focused on the technology and legal aspects so as to ensure that the legal regime surrounding such assets remains flexible and evergreen.

W Legal welcomes the developments signalled by the draft Bill, that it will recognise this third category of things and that the simplistic historic categorisation stated in *Colonial Bank v Whinney* [1885] 30 Ch.D 261 by Fry J when he said that "all personal things are either in possession or in action. The law knows no tertium quid [third thing] between the two" should be seen now as outmoded. Granted this was a case arising from 19th century legislation and we concur that it was stretching it out of context, away from its genesis in bankruptcy matters, in applying it previously to certain software/digital asset cases.

The more helpful analysis in *AA v Persons Unknown* [2019] EWHC 3556 by Bryan J following on from the UK JTFR expressly pointing out that it would be "fallacious to argue that English Law does not recognise forms of property other than choses in possession or action", signals the way in which business and finance need to see the law develop, supplemented by the 4 criteria for defining property that were set out in *National Provincial Bank v Ainsworth* [1965] AC 1175 and in the Law Commission's recent consultation paper.

In the realm of digital assets, existing legal frameworks need to go beyond principles solely focussed on things in possession and action. Analogous to EU's carbon emission allowances, milk quotas and other carbon credits/tokens, digital assets are not physical and, as such, the rights attaching to them can be complex to enforce. In recognising a third category, the draft Bill formalises a position already achieved for real property; bankruptcy actions and intellectual property through legislation. Rather than allocate to a thing in possession or action, digital asset claims may initiate new legal principles outside of the traditional areas. We could finally recognise a third category of intangible property, which builds on the existing legal principles attached to personal property (and, in particular, intangible possessions) whilst developing bespoke (and, to the extent necessary, new) legal principles, actions and remedies, suitable for such assets, and which can be recognised, enforced and adopted in other jurisdictions. We note that on 8 March 2024, the Dubai International Financial Centre Authority enacted its Digital Assets Law with the aim to provide legal clarity on digital assets as a matter of property law and recognised digital assets as a separate category of property, in DIFC.

In the case of *Your Response v Datateam Business Media Ltd* [2014] EWCA Civ 281, the Court of Appeal debated the notion of a third thing, but Moore-Bick LJ held that *Colonial Bank* was hard to overturn as it did not recognise a third thing. We understand the draft Bill will reverse this conclusion once and for all and will apply the logic seen in *AA v Persons Unknown* which, as mentioned above, we support the approach of.

In the Legal Statement, a key paragraph summarises the following approach which our firm has supported and which we consider is carried through in the draft Bill: "A cryptoasset is not a thing in possession. Whether it is a thing in action depends on how that term is used, i.e.

whether it means a right that can be claimed by action or simply anything that is not in possession. Our view is that if a cryptoasset does not embody a legally enforceable right or obligation then it is neither necessary nor useful to classify it as a thing in action. If it is necessary to classify it at all, then a cryptoasset is best treated as being another, third, kind of property, as the court was prepared to do with the EU carbon emission allowances in *Armstrong v Winnington*".

Despite having the view that digital assets fall into the thing in action category more than in the thing in possession category, we believe that creating a third category will offer the development of digital assets, and the law around them, the maximum clarity and flexibility for innovation in the future. In setting the boundaries and perimeters around what constitutes digital assets and the attendant rights and remedies in terms of equivalent assets, it will provide a strong foundation for the Courts to develop this area of law as the technology and its uses develop and mature.

In establishing a third category for digital assets, it is crucial to recognise the unique attributes and complexities inherent in these assets. Unlike traditional physical assets or even some intangible assets, such as intellectual property rights, digital assets often exist solely in digital form. This raises questions regarding the proper location of such assets, the correct/best/most appropriate jurisdiction to determine disputes relating to them, as well as ownership, control, and transferability that may not neatly fit within existing legal frameworks. Again, we consider that these are matters best reserved to the Courts to determine to ensure that the legal framework surrounding these assets remains evergreen, and to preserve England's status as one of the leading jurisdictions for the development of digital asset and blockchain technology.

One of the key challenges in categorising digital assets lies in determining their legal status and defining the rights and obligations associated with them. Unlike tangible assets, which have well-established rules governing ownership and possession, digital assets often blur the lines between ownership, access, and usage rights. For example, ownership of a digital token on a blockchain network may not equate to traditional notions of possession, as the token's value and utility depend on its functionality within the network rather than physical control. To that extent, there may be little difference between blockchain-linked digital assets and carbon credits (such as EUAs) or milk quotas. The category of digital assets will need considerable clarification by the Courts in relation to the function, purpose and underlying asset as it is by no means clear that the same legal and regulatory rules should apply for monetised currency tokens, art related NFTs and online gaming tokens/rewards. There may well need to be further refinements in relation to public and private blockchain digital assets and their treatment in law and regulation.

Moreover, the rapid pace of technological innovation in the digital asset space introduces additional complexities. New types of digital assets, such as NFTs or decentralised finance (DeFi) protocols, gaming, staking, minting and gas payments continuously emerge, challenging regulators and legal experts to adapt quickly to evolving market dynamics. The dynamic nature of these assets necessitates a flexible legal framework that can accommodate innovation while still ensuring investor protection and market integrity.

In addition to regulatory challenges, the enforcement of legal rights and remedies for digital assets presents practical hurdles. With transactions occurring across borders and often involving pseudonymous parties, traditional legal mechanisms for dispute resolution and enforcement may prove inadequate (although we note that the English Court has become very

adept at resolving such disputes). Developing effective mechanisms for resolving disputes, enforcing contracts, and safeguarding against fraud in the digital asset space requires collaboration between legal experts, technologists, and policymakers.

Despite these challenges, the creation of a dedicated legal category for digital assets offers numerous benefits. It provides much-needed clarity for market participants, facilitating investment, innovation, and adoption of digital asset technologies. Moreover, a well-defined legal framework can enhance consumer protection, mitigate systemic risks, and foster trust in digital asset markets, ultimately contributing to the long-term sustainability and growth of the digital economy.

In summary, while the establishment of a third category for digital assets poses significant challenges in terms of defining boundaries and legal frameworks, it also presents opportunities to create a more adaptable, inclusive, and resilient regulatory environment. By addressing these challenges proactively and collaboratively, stakeholders can unlock the full potential of digital assets to drive economic growth and societal transformation in the digital age.

Question 2: What do you consider the positive impacts of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might a dispute be reduced)?

The positive impacts of the bill that are not quantifiable in £ or days/hours are the following:

Clarity and Legal Recognition: By explicitly recognising digital assets as objects of personal property rights, the bill provides clarity in legal frameworks. This recognition can reduce ambiguity in transactions involving digital assets. Quantifying this impact could be challenging, but it might lead to a reduction in legal disputes and associated costs.

Reduced Disputes and Litigation: Clarity in property rights can reduce disputes over ownership and rights related to digital assets. This could lead to fewer legal proceedings, saving both time and money for individuals and businesses involved. Quantifying the reduction in disputes might involve estimating the number of cases related to digital asset disputes and calculating the associated legal fees and time spent in litigation.

Facilitation of Innovation and Investment: Clear legal recognition of digital assets as property can foster innovation in the digital economy. It may encourage investment in digital assets and related technologies by providing a stable legal environment. Quantifying the impact on innovation and investment could involve analysing trends in digital asset investments and evaluating the growth of related industries.

Protection of Property Rights: The draft Bill ensures that individuals' property rights extend to digital assets, offering protection against unauthorised use or appropriation. This protection can enhance confidence in digital asset ownership and usage, potentially encouraging broader adoption and utilisation of digital assets. Quantifying the value of this protection might involve assessing the financial worth of the digital assets protected under the new legal framework.

Efficiency in Asset Management: Clear legal recognition of digital assets allows for more efficient management and transfer of these assets, potentially streamlining processes such as

[redacted]

inheritance, estate planning, and asset distribution. Quantifying the efficiency gains might involve estimating the time and resources saved in managing digital assets under the new legal framework compared to previous practices.

While these potential positive impacts are significant, quantifying them precisely might be challenging due to various factors, such as the complexity of legal systems, the dynamic nature of the digital asset markets, and individual circumstances. However, it is evident that providing legal clarity and recognition to digital assets can contribute to a more efficient and secure digital economy.

Nevertheless, we would suggest that, in a given dispute around digital assets, that by clarifying at a high level the property nature of the assets, (which then allows the parties to adduce claims, evidence and precedents from prior case law involving other types of "property"), this can substantially reduce and simplify pleadings, clarify areas of recoverable economic loss and afford the availability of a range of existing equitable and common law remedies. This should achieve cost savings which could range from hundreds to thousands of pounds sterling and even beyond in terms of saving Court time.

We are supportive of developments which have been seen in the Courts in Singapore to develop worldwide digital asset freezing orders and would encourage the development of comparable remedies in the English Courts.

Question 3: What do you consider the costs and/or risks of the Bill to be?

Enforcement Challenges: Enforcing property rights in the digital realm may present unique challenges, such as jurisdictional issues and the pseudonymity/anonymity of participants. Law enforcement agencies may require enhanced capabilities and resources to investigate and prosecute crimes involving digital assets.

Technology and Infrastructure Requirements: The legal recognition of digital assets may necessitate advancements in technology and infrastructure to support their secure storage, transfer, and management. Investments in cybersecurity and blockchain technology, for example, may be required to ensure the integrity and authenticity of digital assets.

Unintended Consequences: As with any new legislation, there is a risk of unintended consequences. The draft Bill may have unforeseen effects on various stakeholders, including individuals, businesses, and regulatory bodies. Continuous monitoring and evaluation of the draft Bill's impact may be necessary to address any unintended consequences promptly.

International Harmonisation: The draft Bill's application limited to England and Wales could create discrepancies in legal frameworks across jurisdictions, potentially complicating cross-border transactions involving digital assets. Efforts to harmonise regulations internationally may be required to facilitate global trade and investment in digital assets.

Curtailing Digital Innovation: Whilst the initiative of introducing the draft Bill is overall positive, it is possible that its high-level approach may, in time, lead to developing law and regulation in England and Wales along different lines to other key jurisdictions. This, in effect, could impede the growth of the digital assets sector in England and Wales and, therefore, we consider it very important to gain early clarification as to the perimeters for the definition of "Digital Assets" and to see the Courts/Legislature/Regulators working in harmony to clarify the legal and regulatory treatment in a flexible yet clear way which conforms to expectations of technologists, international businesses, and jurists.

[redacted]