

KEY POINTS

- Novel forms of technology are increasingly being adopted and used in the financial services and banking sectors.
- Disputes involving distributed ledger technology (DLT), such as blockchain technology, can raise difficult questions regarding the appropriate jurisdiction and governing law.
- The Digital Dispute Resolution Rules (Digital DR Rules) offers a means by which parties can resolve their disputes in a more certain, efficient and cost-effective manner.
- Parties involved in contracts related to DLT should consider incorporating the Digital DR Rules into new and existing agreements. Parties should also consider which bespoke rules to incorporate in addition to the standard rules.

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The Digital Dispute Resolution Rules: the future of digital disputes

This article summarises some of the key points arising out of the newly published Digital Dispute Resolution Rules (Digital DR Rules). The advantages of adopting the Digital DR Rules are explored as well as considering how the rules might be incorporated into new and existing agreements.

THE DIGITAL DISPUTE RESOLUTION RULES

On 22 April 2021 a government backed UK Jurisdiction Taskforce (UKJT) at LawtechUK published a set of rules to be used for and incorporated into on-chain digital relationships and smart contracts. The Digital DR Rules therefore could assist in the resolution of disputes in distributed ledger technology (DLT), blockchain, cryptoassets and smart contracts. The UKJT of LawtechUK was chaired by Sir Geoffrey Vos, Master of the Rolls, and included input from a specialist sub-committee as well as wider input from technical experts, lawyers and those working in financial services.

WHAT DO WE MEAN BY DLT, SMART CONTRACTS AND CRYPTOASSETS?

It is important to note that the technology is not strictly defined in the rules and therefore these rules are suitable for digital technologies not yet envisaged. The definition and scope of these digital technologies are outside the parameters of this article. However, for the purposes of this article it is sufficient to note by way of example:

- DLT is a decentralised database managed by multiple participants, across multiple nodes (devices). Blockchain is a type of DLT.
- A smart contract is a recording of a legal agreement between parties that is written in a language that is both human-intelligible and machine-

readable, whose text incorporates an algorithm which automates some or all of the performance of the agreement (Dr Jason Allen).

- Cryptoassets are a general term used to describe assets stored on DLTs. Cryptocurrencies, for example Bitcoin and Ethereum, are types of cryptoassets.

THE USE OF THIS TECHNOLOGY IN BANKING AND FINANCIAL SERVICES

At the outset of the Digital DR Rules a quote is provided by Alessandro Palombo, CEO of Jur, which highlights the significance of these rules to the banking and financial services sectors:

“Digital business relationships and digital assets are eating the world. In this context, the emergence of new digital dispute resolution methods is highly necessary. These rules are a bright example of how innovating in the legal field is possible, without requiring major legislative intervention.”

There is a growing awareness and interest in non-fungible tokens and the smart contracts market. Over the past decade interest in, and the adoption of, these new forms of technology has increased. These technologies offer the potential of improving efficiency and reducing costs. JP Morgan is just one example, along with many others, who are increasingly using smart contracts

– even testing the world’s first bank led tokenised value transfer in space executed by smart contracts on a blockchain network (details available at JP Morgan Insights).

With the increasing prevalence of novel digital technology in the financial services and banking sector, the rise of disputes involving smart contracts, cryptoassets and blockchain technologies are only set to continue.

WHY THE NEED FOR THE DIGITAL DR RULES?

The objective of the Digital DR Rules is to enable faster and more cost-effective resolutions to legal disputes relating to digital technologies such as DLT, cryptoassets and smart contracts. It is hoped that by creating the Digital DR Rules this will in turn foster confidence amongst businesses, and users, who adopt and use these technologies.

It is important to see the Digital DR Rules in the context of previous publications including the November 2019 UKJT’s publication of the first legal statement on the status of digital assets and smart contracts under English and Welsh law. The legal statement has been very useful to practitioners working in the area of digital assets and smart contracts. In short, the legal statement expressed the view that cryptoassets are property and that smart contracts are contracts under English law. The legal statement has been well regarded in other jurisdictions and indeed the statement itself has also been referred to by the Courts of England and Wales in the decision of *AA v Persons Unknown* [2019] EWHC 3556 (Comm). The Digital DR Rules therefore form part of a broader movement of fostering confidence in the adoption of these technologies and positioning England

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and Wales as a desirable jurisdiction for the resolution of commercial disputes of this kind.

DIGITAL DISPUTES

While a point of broader discussion outside the scope of this article, some argue that smart contracts could themselves reduce the number of disputes arising in the first place – given the self-executing and enforcing nature of smart contracts. However, the use of these technologies may of course give rise to disputes:

- Smart contracts relate to actions and consequences in the physical world and as such do not eliminate the need for external inputs and outputs.
- Furthermore, given the self-executing and irreversible nature of DLT, disputes may arise. This therefore leaves limited scope for rectification in the event of an error. Certainly, in the medium term while parties adjust to using these new technologies and adopting them, this may give rise to learning points in practice, and consequently disputes may arise.
- Finally, given the distributed nature of these technologies the relevant parties to a dispute tend to be located in multiple jurisdictions. In practice difficult questions may arise regarding the appropriate jurisdiction to hear the dispute and questions regarding choice of law. As the Digital DR Rules themselves outline: “[w]hen services are decentralised and participants can be located all over the world, it can be very difficult to work out which country’s laws apply when there is a dispute, and in which country the dispute should be resolved”. Such issues may also slow down the ultimate resolution of the dispute.

While adoption and use of these technologies is occurring, and certain cases have proceeded to be litigated, there has been limited input up to now as to how these disputes can be resolved in an efficient and cost-effective process.

HOW THE DIGITAL DR RULES OPERATE

The Digital DR Rules run to 15 pages and an FAQ style section at the end of the rules which sets out some further information. Before

adopting the Digital DR Rules parties should of course carefully review the Digital DR Rules and ensure that they are suitable in light of the individual requirements of the agreement. However, the following are some of the key aspects of the Digital DR Rules:

- **Incorporation in writing:** The Digital DR Rules do not apply automatically and should be incorporated into the agreement in writing. This can be done before the dispute arises or the parties may also agree to the Digital DR Rules after the dispute has arisen. Parties should of course be aware that once a dispute has arisen one party may be less co-operative in agreeing how the dispute will proceed. Therefore, parties should consider dispute resolution prior to a dispute arising. The Digital DR Rules however do accommodate for subsequent incorporation or agreement.
- **Nature of the dispute:** There is no limitation in terms of subject matter of the dispute.
- **English law:** Unless the parties agree otherwise, disputes will be resolved in accordance with English law.
- **Commencement of proceedings:** A party (the claimant) may commence proceedings by giving a notice of claim to each other interested party against whom a claim is made (a respondent) and to the appointment body. The requirements of that notice are set out at para 6 of the Digital DR Rules. Each recipient of the notice then has three days in which to send an initial response. The Tribunal is then appointed “as soon as practicable” after the time of receipt of the initial responses.
- **Timeline:** Unless the parties agree otherwise, the Tribunal will use its best endeavours to determine the dispute within 30 days from its appointment.
- **The Tribunal:** The member(s) of the Tribunal will be determined by the method for resolving the dispute (as mentioned above). The individual(s) will be appointed by the Society for Computers and Law.
- **Evidence:** Having consulted the parties, the Tribunal shall have absolute discretion as to what evidence and argument it receives and in what form but shall as far

as practicable, permit parties to submit evidence and argument electronically.

- **Written submissions:** The Tribunal will determine the dispute based on written submissions and no party has a right to an oral hearing.
- **Binding decision:** The decision or award will be given in writing. The Tribunal’s decision or award is final and binding. Therefore, the parties should be aware that rights of appeal or challenge are limited.
- **On-chain implementation:** Decisions can be implemented directly on-chain using a private key.
- **Consolidation:** Tribunals appointed in different arbitrations under the Digital DR Rules may, if each tribunal concurs, order that the arbitrations be consolidated and that a consolidated tribunal (composed of some or all of the members of the different tribunals) be appointed to hear the disputes.

ADVANTAGES AND INTEGRATION INTO BANKING AND FINANCIAL SERVICES CONTRACTS

Adopting a mechanism of dispute resolution has a number of advantages that include the following:

- **Speed:** The aim of the Digital DR Rules is to facilitate the rapid resolution of disputes. The procedure can also be flexible enough for disputes to be resolved quickly or indeed to be expedited. As set out above, para 12 of the rules envisages that: “[t]he tribunal shall use its best endeavours to determine the dispute within any time period specified or agreed by the parties or, if none is specified or agreed, within 30 days from its appointment”.
- **Flexibility:** The parties can have the choice of either arbitration or expert determination. While the Digital DR Rules helpfully set out a number of points the parties may wish to adopt, the Digital DR Rules are not prescriptive, and the parties therefore can be flexible in the manner in which the Digital DR Rules are adopted. For example, the parties may select the number of experts/arbitrators, preferences as regards procedure, timings and cost recoverability.

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- **Expertise:** The nature of many of these disputes is that the parties will benefit from the ability in arbitration or expert determination to select and appoint individuals or panels with the requisite technical understanding rather than the lack of choice in litigation.
- **Optional anonymity:** Blockchain transactions are sometimes conducted anonymously. There is the option of anonymity for the parties should they wish. Paragraph 13 of the rules provides that in the case of optional anonymity the claimant and each respondent must provide details and evidence of their identity to the reasonable satisfaction of the Tribunal. If the incorporating text allows for anonymous dispute resolution, or the parties agree, then a claimant or respondent may provide identity details confidentially to the Tribunal alone and need not include them in a notice of claim or initial response. In that case the Tribunal shall not disclose the identity details unless disclosure is necessary for the fair resolution of the dispute, for the enforcement of any decision or award, for the protection of the Tribunal's own interests, or if required by any law or regulation or court order.
- **Enforceability:** As set out above, given the distributed nature of the underlying technology parties may be in different jurisdictions and as such jurisdictional issues may arise. Arbitral awards are enforceable across the globe pursuant to the New York Convention. The benefits of arbitrating the dispute between the parties may alleviate some of the jurisdictional issues which arise because of the decentralisation of the blockchain and the potential global nature of some of these disputes. Related to this point regarding enforceability, the inclusion of a well-drafted arbitration clause into the agreement would also help address some of the jurisdictional issues and consequently challenges posed by the decentralised nature of blockchain.

MEANS OF INCORPORATION

As set out above the Digital DR Rules are not prescriptive and care should be taken when

seeking to incorporate the rules into a new or existing agreement in light of the other provisions in the contract and of course of the needs of both parties. Furthermore, while the Digital DR Rules have been drafted so as to be compatible with the Arbitration Act 1996 the rules should be read alongside the background of the Arbitration Act 1996 which casts light on certain default positions where the Digital DR Rules or the contract does not expressly deal with a set of circumstances.

The Digital DR Rules does briefly address incorporation. Paragraph 3 of the rules, titled "Incorporation", provides that the Digital DR Rules may be incorporated into a contract, digital asset or digital asset system by including the text (which may be in electronic or encoded form):

"Any dispute shall be resolved in accordance with UKJT Digital Dispute Resolution Rules."

Optionally parties may also specify in their contract matters such as:

- Whether any particular issue or type of dispute (an expert issue) should be resolved by expert determination instead of arbitration.
- Any preferences as to the number, identity or qualifications of any persons to be appointed as arbitrators or experts.
- Any preferences as to the procedure to be adopted for the resolution of a dispute, including as to form and timing of any decision or arbitral award (as applicable), recoverable costs and anonymity.
- Any modifications to the application or operation of the Digital DR Rules.

The benefit of incorporating the Digital DR Rules is outlined at para 4 of the rules which states that "[t]he outcome of any automatic dispute resolution process shall be legally binding on interested parties".

If parties subsequently agree to using the Digital DR Rules after the dispute has arisen, para 5 of the rules provides that any dispute between parties which was not the subject of an automatic dispute resolution process shall be submitted to arbitration in accordance with the version of these rules which is current at the time of submission.

CONCLUSION

As the UK increasingly seeks to establish itself as a tech hub, the Digital DR Rules are a welcome development. They offer the benefits of a set of dispute resolution rules which apply in a specialist setting and hopefully should assist parties in resolving disputes in a quicker and more cost-effective way.

In the foreword of the Digital DR Rules Sir Geoffrey Vos notes that the UKJT will "keep a close watch" on how the Digital DR Rules are used, and "will aim to consider whether experience suggests they need revision within the coming year". This is therefore an area that should be kept under review in the event that changes are made to the Digital DR Rules in due course. Interestingly, para 5 of the Digital DR Rules provides for the publication of anonymised awards and decisions if the Tribunal considers that an award or decision "is of general interest, and if the parties do not object, the tribunal may provide it in anonymised form to the appointment body for publication". Depending on the nature of disputes in the future, and parties not objecting to their publication, it may be possible to read the decisions and gain an insight into the types of disputes being determined under the Digital DR Rules.

This is an area which will no doubt develop over time, both in terms of how the Digital DR Rules operate in practice but also in terms of how the technology develops. However, what is certain is that these rules should be reviewed, parties should consider whether to incorporate this regime into their respective agreements and if so, what bespoke requirements the parties may wish to include. ■

Further Reading:

- Does situs actually matter in disputes concerning bitcoin? (2021) 4 JIBFL 269.
- What sort of property is a cryptoasset? (2021) 2 JIBFL 83.
- LexisPSL: News: UKJT launches Digital Dispute Resolution Rules.