

Key Points From New Blockchain Legal Guidance

By **Mark Dawkins and Jenny Arlington** (September 25, 2020, 3:42 PM EDT)

On Sept. 7, legal and regulatory guidance[1] on a wide range of issues concerning blockchain was published by The Law Society, the independent professional body for English solicitors, and the blockchain group of Tech London Advocates, a network of more than 9,000 tech leaders, entrepreneurs and experts in London, the U.K. and around the world.

The guidance, spanning over 140 pages, while not legally binding, is welcomed by developers and users of blockchain or distributed ledger technology, as well as their legal advisers, and endorsed by Sir Geoffrey Vos, chancellor of the High Court and chair of the U.K. Jurisdiction Taskforce, which at the end of 2019 published the first legal statement globally clarifying the legal status of crypto assets and smart contracts.

The guidance addresses eight areas of law and regulation concerning blockchain and provides key recommendations, including best practices for legal professionals and requests for further regulatory clarifications. It is anticipated that more binding clarifications in this exciting area of law will be forthcoming.

High Level Overview of the Guidance

It has become an almost universal truth that the global pandemic caused by COVID-19 has forced businesses, industries and society as a whole to fundamentally rethink the way they operate.

The use of technology has been accelerated, to some degree unexpectedly, and emerging or advanced technologies and concepts such as blockchain or digital ledger technology, smart legal contracts, smart contract code, crypto assets and cryptographic schemes, such as zero knowledge proofs, are likely to be deployed increasingly by market participants.

The legal implications of these concepts and their use will need to be understood by a much larger pool of legal practitioners. It is against that background that the guidance is particularly welcome.

The guidance is aimed at (1) assisting legal practitioners when they are required to advise their clients on matters related to digital ledger technology, or DLT, and (2) identifying and setting out areas in which



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further guidance is required from regulatory authorities or other bodies. In brief, the guidance addresses the following topics:

- Commercial application of blockchain/DLT — covering key considerations relevant to the conception, application and adoption of these technologies and including a use case example from the retail and consumer sector with a private blockchain being used to track and trace goods;
- Smart contracts and data governance — providing an analysis of the advantages and disadvantages of smart contracts, the impact of decentralized autonomous organizations on the legal profession and insights into the adoption of effective data governance measures;
- Blockchain consortia — discussing challenging issues about the creation and governance of such consortia;
- Data protection and data security — addressing the significant risks and uncertainties in relation to personal data and responsibilities for its processing in the blockchain environment;
- Intellectual property rights — setting out a comprehensive overview of the potential impact of blockchain/DLT on the recording, protection, management and enforcement of intellectual property rights;
- Dispute resolution — including an examination of the impact of blockchain/DLT in a contentious context, a review of the options for on-chain dispute resolution and an analysis of the utility of traditional off-chain dispute resolution mechanisms in the context of blockchain/DLT;
- Regulation of crypto assets — including the current treatment of crypto assets from a regulatory perspective and a detailed presentation of the future regulatory changes to be expected in this space; and
- Blockchain and tax — covering the key tax issues concerning blockchain and the technology's potential to revolutionize the tax system.

Two Areas of Interest: Data Protection and Dispute Resolution

The detailed guidance represents a formidable effort to provide explanations and clarifications concerning digital ledger technology and other advanced technologies, and would be a recommended read for many developers, users and legal professionals. In the interests of brevity, we focus below on two areas of particular interest: data protection and security, and dispute resolution.

In relation to data protection, the guidance discusses one of the key issues relating to blockchain in this area: whether various datasets in that environment are personal data under the General Data Protection Regulation.

There are more questions than answers here, including whether data can be truly anonymized; how the joint controllers concept would work in practice; and how the right to erasure, or right to be forgotten, may be interpreted in the context of blockchains that, at their core, are intentionally set up to prevent the unilateral modification of data.

In relation to enhancing data security — and addressing to an extent the concerns regarding

anonymization or privacy — the guidance provides some insights into the so-called zero knowledge proofs. Zero knowledge proofs are cryptographic outputs that can be shared and used by one party to prove to another that it is in possession of data with certain properties, without revealing anything else about that data.

The current capabilities of zero knowledge proof technologies were not available two or three years ago, as the guidance explains, and those capabilities are now having a profound impact on the structure and implementation of blockchains. The technologies are part of a greater trend to increase data privacy and further developments in this area would be very welcome.

As regards dispute resolution, the guidance discusses a number of issues — availability, scope, reliability — regarding the on-chain dispute resolution offerings that have more recently gained momentum, such as online arbitration, or solutions modelled on arbitration, rather than arbitration in the traditional meaning of the term, crowdsourcing models and AI-powered bots.

A separate topic covered is the availability and utility of off-chain dispute resolution mechanisms, specifically addressing issues of jurisdiction, applicable law and money-laundering and providing key recommendations for parties using DLT systems and smart contracts.

The guidance also addresses how concepts such as smart legal contracts are changing the traditional risk landscape — for instance, whether they would be drafted by lawyers or code developers — and what the role of the judiciary and magistracy would, or could, be in relation to technology-related litigation.

Next on the Agenda

Action points have been identified in the guidance. They include specific steps such as engaging in a dialogue with the relevant regulators so that further guidance on particular issues by those regulators could be promulgated, convening roundtables to discuss and elaborate on various matters, and producing toolkits to consider further the impact of these technologies.

The guidance indicates that where further regulatory or binding guidance is sought, a process will be established so that such guidance could materialize in a timely fashion.

The legal questions raised by the increased use and the constantly evolving nature of these technologies will undoubtedly continue at pace. There is every reason to believe that those questions will be answered at equal pace, especially in light of the inherent adaptability and flexibility of English law. Watch this space for further updates on these important issues.

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[1] <https://www.lawsociety.org.uk/topics/research/blockchain-legal-and-regulatory-guidance-report>.