



Summit
LAW LLP

CRYPTO ASSETS IN CROSS BORDER INSOLVENCY

**A PERSPECTIVE FROM
ENGLAND AND WALES**

Introduction

Crypto assets are currently a hot topic in the insolvency world and one with which IPs are engaging across the globe.

There are increasing numbers of cases worldwide where either a crypto business has failed, crypto assets form part of an insolvent Estate or assets in an Estate are converted into crypto assets with a view to avoiding payment to creditors.



What are crypto assets?



A crypto asset is a cryptographically secured digital representation of value or contractual rights that uses a form of distributed ledger technology and can be transferred, stored, or traded electronically.

A record of transactions is held on a “blockchain”.

The term “crypto asset” is wider than crypto currency and includes, for example non -fungible tokens (“NFTs”).



NFTs are a type of crypto asset whereby users purchase a cryptographic token of a particular asset (it can be either physical or digital), which cannot be swapped directly for other NFTs (ie they are non fungible).

They allow owners to cryptographically prove the authenticity of their asset and their ownership of it through the blockchain, giving it a perceived value.



NFTs are valuable because they verify the authenticity and ownership of a non-fungible asset. NFTs can digitally represent any asset such as digital artwork.

The Law Commission has recently published a report on Digital Assets which provides further detail and a copy of this is [here](#).

Why are so many crypto exchanges failing?

The cryptocurrency market went through a “crypto winter” at the end of last year when prices fell and a number of crypto exchanges filed for bankruptcy in the US.

A high profile example is FTX which filed for bankruptcy in November 2022 notwithstanding pre-bankruptcy valuations in excess of \$30 billion. FTX’s founder and CEO, Sam Bankman-Fried, is currently being prosecuted for fraud.



What are the considerations for an IP who is appointed in respect of an insolvent crypto exchange?

Once appointed, an IP will need to review the position with any crypto assets to determine whether the assets in question belong to a creditor or whether the assets are held on a creditor's behalf (which would mean that the creditor would rank as an unsecured creditor).

Any IP appointed should therefore review any terms and conditions related to the assets on this question and should seek legal advice on this.



What should an IP in England and Wales do initially where there are crypto assets in an insolvency?

An IP appointed in England and Wales has a duty to collect in and realise any assets in the Estate and this includes any crypto assets given the broad definition of 'property' in section 436 of the Insolvency Act 1986.

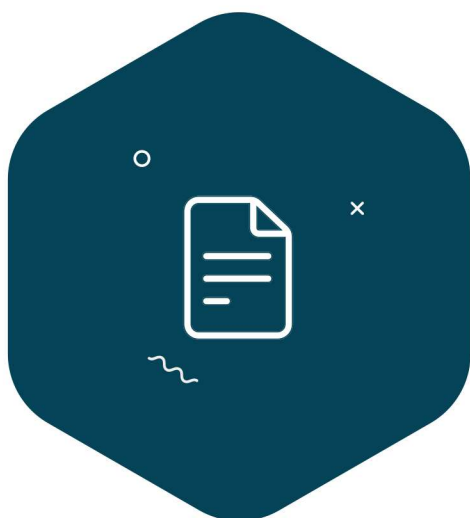
Faced with a situation where crypto assets may form part of an insolvent Estate, an IP should commence an investigation into their whereabouts.

Liquidators can utilise the provisions in sections 234 – 236 Insolvency Act 1986 to apply to Court to obtain books and records, compel witnesses to give evidence or make an enquiry into a company's dealings.





Before any application is issued, a formal legal letter should be sent to the proposed Respondent giving them reasonable time to respond.



Trustees in Bankruptcy have similar powers pursuant to sections 336 and 337 Insolvency Act 1986 to compel the bankrupt and/or witnesses to give evidence or to produce documents which may assist their investigations.

In addition (or alternatively), an IP should also look to appoint an expert who should be able to try to obtain access to the blockchain to ascertain the record of any transactions.

If the above exercises are carried out, then it may also uncover further potential recoveries!

What legal action can be taken by an IP in England and Wales?

Once crypto assets are found, then lawyers should be instructed to advise on how to take any action for their recovery.

There is case law which establishes, for the purposes of interim relief, that crypto assets such as NFTs and bitcoin constitute property for the purposes of the law of England and Wales.

Accordingly, it is possible to:-

- Obtain proprietary injunctions in respect of crypto assets;
- Obtain worldwide freezing orders in support of claims relating to crypto fraud;
- Enforce judgments against crypto assets.



How are cases dealt with in the Courts of England and Wales, are there any defining features?

The Courts have developed significant expertise in dealing with crypto assets and it is possible to bring insolvency related claims in the Insolvency and Companies List in the High Court.

IPs can also consider bringing civil claims in the Courts and these are commonly dealt with in the London Circuit Commercial Court.

The most interesting and unique feature about these cases is that very often the party making the application will attend the Court without notice to the other side. This does mean that the decisions are not binding authorities per se but the Courts do generally follow an approach which is consistent with previous interim decisions.



What issues arise when these cases are before the Courts?

The main issue which arises for an IP is to identify whether a crypto asset exists and if so, its whereabouts. This will often require the engagement of forensic blockchain investigators.

It is possible to obtain an injunction/judgment against “persons unknown” in appropriate cases.



When making an application for an injunction without notice, the applicant has a duty of full and frank disclosure and this is particularly relevant to digital asset disputes, see the decision in *Piroozzadeh -v- Persons Unknown, Binance and others* [2023] EWHC 1024 (Ch).

IPs should act quickly in any action due to the potential volatility of crypto assets and the risk that these may fall in value or dissipated/destroyed which may affect the outcome of any action and the ultimate recoveries made.

I'm an overseas IP, what can I do in respect of crypto assets in England and Wales?

If you are an overseas IP and wish to recover crypto assets in England and Wales, then you may be able to make an application to the Courts in this jurisdiction for a Recognition Order pursuant to the terms of UNCITRAL Model Law.

Broadly speaking, this will be possible in the following cases:-

- Where the owner of the crypto assets can be said to reside in the jurisdiction;
- An underlying contract specifies that the matter is to be dealt with in the English Courts or English law applies;
- The assets are located here;
- Any losses are suffered in England and Wales.

If a Recognition Order is obtained, it will give access to remedies available to litigants before the Courts of England and Wales.

If you are located in certain countries, then you may alternatively be able to apply to the Courts of England and Wales for Assistance pursuant to s426 Insolvency Act.

The Courts will usually grant assistance and this will give the office holder the option to apply English law or the law of the country where the IP is appointed (this has the scope to broaden out the remedies available).

Alternatively, if you have obtained a judgment in an overseas Court already, it is an option to apply for this to be recognized in the Courts of England and Wales so that it can be enforced in this jurisdiction.

If you would like any advice on any of the issues raised in this article, then please contact Alice Lithgow to find out what steps can be taken on al@summitlawllp.co.uk or (020 7467 3996).

The information provided in this document does not, and is not intended to constitute legal advice. Instead, all information is for general informational purposes only. Should you wish to obtain legal advice in relation to the matters raised, please do not hesitate to contact us.



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