

WHAT WOULD A 'REASONABLE CODER' THINK? LAW COMMISSION SAYS NO NEED FOR NEW LEGISLATION TO HANDLE SMART LEGAL CONTRACTS

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UK body says English law can handle new wave of computer-driven contracts but thorny questions remain

The answer at least is clear, if not yet all the implications. The Law Commission has confirmed that English law can accommodate smart legal contracts without the need for statutory reform. Its recommendation on 25 November follows the 2019 paper *Legal statement on cryptoassets and smart contracts* by the UK Jurisdiction Taskforce, an advisory body uniting industry experts, government and the judiciary, which concluded smart contracts can be enforceable under English law.

Smart legal contracts are legally-binding contracts in which some or all obligations are performed automatically by a computer program that is usually run on a blockchain network. They are touted as being able to generate efficiencies in the contract management process, while lowering costs, minimising the risk of human error and reducing instances of non-performance.

The use of self-executing computer code and ability to connect with other computer systems make smart legal contracts complex legal instruments. Unlike traditional legal contracts, they can be written entirely in computer code, entirely in natural language (with computer code separated from the contract), or in a combination of the two.

English law is flexible enough to allow current legal principles for traditional analogue contracts to apply to smart legal contracts, according to the Law Commission. While the use of computer code may give rise to novel legal issues and factual scenarios, existing legal principles can accommodate them.

The Law Commission acknowledges there are potential uncertainties in the legal treatment of smart legal contracts, though. For example, there may be difficulties in establishing a contract has been validly formed where it is created through interactions using distributed ledger technology and not by express agreement between parties.

NEW BOILERPLATE NEEDED

The use of computer code could also give rise to a raft of new issues. Code can behave in unexpected or unintended ways thanks to bugs and defects. The self-executing nature of the code in smart legal contracts may also prevent parties from modifying or terminating provisions once deployed on a blockchain network.

This increases the risk of defective performance. Although the Law Commission confirmed that remedies under current law should generally be available to affected parties, it is also encouraging parties to include in smart legal contracts express natural language terms that address uncertainties. This should include terms that allocate risk for the performance of the computer code.

This 'new boilerplate' should also contain terms setting out the relationship between natural language and computer code. Questions remain as to how English courts might in practice interpret computer code. The Law Commission recommended this is done by asking what a codified term would mean to a "reasonable coder", a person with the knowledge and understanding of code needed to interpret the term.

This may cause particular problems for consumer contracts. According to consumer protection law, written terms of consumer contracts must be plain, capable of being understood and legible. With computer programmers making up just 0.6% of the UK population in 2020, the Law Commission's suggestion that businesses should provide information to consumers explaining how codified terms operate would appear as necessary as it is sensible.

The pervasive nature of technology gives rise to further issues. Unlike traditional legal agreements, parties may enter into smart legal contracts under pseudonymous identities. At the same time, the distributed nature of blockchain technology facilitates cross-border transacting.

The difficulties this gives rise to in establishing the identity and location of parties can cause uncertainties around conflict of laws: the area of law that primarily determines where disputes should be adjudicated and the law applicable to those disputes. One mitigation is to include clear terms reflecting the applicable governing law and jurisdiction in any smart legal contract, but that may be easier said than done in contracts written entirely in computer code.

In any case, the problem of ascribing real-world locations to digital actions and objects remains one of the core challenges to overcome in relation to emerging technologies. This is recognised by the Law Commission and Government, who have agreed to launch a new project in 2022 looking specifically at the rules relating to conflict of laws. As Lord Wolfson of Tredegar QC notes, this is "essential to ensure English law supports emerging technologies."

Smart legal contracts have been showing their potential in the financial services sector for some time, particularly in the context of payments, derivatives and insurance. With this reassurance from the Law Commission, businesses in all sectors should be encouraged to start exploring their potential.

A considered approach needs to be taken, though. As the wave of lawyer-friendly smart legal contract platforms takes shape, businesses eager to benefit from this next generation technology must get their houses in order and build the Law Commission's advice into their legal transformation efforts.

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