

INSOL Europe Insolvency Tech & Digital Assets Wing

This new section of eurofenix will bring you the most relevant news in the field of insolvency tech and digital assets. To contribute an article to a future edition, please send your proposal to: insolvencytech@insol-europe.org or the individual Chairs:
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Cryptocurrencies and Crypto-Tokens

In this edition, we ask what makes money actually money, and new definitions of crypto-tokens



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The TMA Annual European 2022 conference, held in Madrid, included an interesting panel on “Blockchain, Bitcoin & Cryptocurrency in Restructuring”. One of the topics covered by the panel was what makes money actually money and thus, whether cryptocurrencies fall under the category of money or not.

In order to answer this question, the panellists considered that, economically, money is defined as “*any item or verifiable record that is generally accepted as payment for goods and services and repayment of debts*”.¹ Money should also be a unit of account and allow to store value for the future.

Panellist Lisa Hough (Unchained Capital, USA) supported the idea that cryptocurrencies seem to be as good as money for any transaction. She mentioned that, in some countries, such as El Salvador or the Central African Republic, cryptocurrencies have been adopted as legal currency and pointed out that, in countries such as the United States of America, you can buy a car (for example, a Tesla) or even fast food using

cryptocurrencies. In fact, cryptocurrencies can also be used as payment in 20 USA chains like Petco, Chipotle, Office Depot and Regal Cinemas.² Cryptocurrencies are thus generally accepted means of payment and serve as a unit of account. They also are a means to store and deposit value; actually, the easiest way to store value in war times, as one could just cross the border and would only need a computer and their private key (passwords) in order to access their value. For all these reasons, cryptocurrencies should be considered money.

Although all these criteria make perfect sense, from a legal perspective, panellist José Carles highlighted the fact that one of the legal characteristics of money is that it must represent a claim on the issuer (i.e. in the euro area, a claim on the European Central Bank). This has been the reason why Courts in Spain³ have not considered whether cryptocurrencies are money, as cryptocurrencies do not represent any claim for which the issuer is liable. Spanish Courts also addressed the point that, despite being value stored under electronic means, cryptocurrencies can neither be considered electronic money, as electronic money should

also comply with the requisite of representing a claim against the issuer. Therefore, Spanish Courts have affirmed that cryptocurrencies are neither money nor electronic money, but an intangible asset.

Panellist Élodie Trevillot (Banque Delubac, France) supported the same conclusions, since only central banks can issue money and it is clear that cryptocurrencies are not issued by a central bank. This means that cryptocurrencies are not real money, but cryptoassets. Again backing these allegations, panellist Dr. Christian Hilpert (Eversheds Sutherland, Germany) indicated that, since cryptocurrencies are not accepted as payment, in Germany, they are not considered money.

The panellists addressed many other issues regarding bitcoins and cryptocurrencies and, specifically, their treatment under restructuring proceedings. Although courts have already cleared some of these issues, answers will come from the practical field from ongoing proceedings all around the world (i.e., the liquidation of Three Arrows Capital in the BVI, Voyager Digital or Celsius in the US, Zipmex in Singapore or the expected insolvency proceedings of 2gether in Spain).⁴

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Crypto-Tokens: Towards a tertium genus of personal property in England and Wales

Courts have already ruled in England and Wales that crypto-tokens can be considered as personal property despite not falling under any of the two existing categories of personal property: “*choses in possession*” (tangible, moveable and visible things) and “*choses in action*” (personal property capable of being enforced by action).

In *AA v Persons Unknown*,⁵ the High Court of England and Wales granted a proprietary injunction over cryptocurrencies (specifically, bitcoin), thus recognizing that bitcoin constitutes property. Mr. Justice Bryan stated in this case that it was “*fallacious to proceed on the basis that the English law of property recognises no forms of property other than choses in possession and choses in action*”. The EWHC concluded that “*a crypto asset such as bitcoin are property*” and explained that **bitcoin met the criteria of the classic definition of property: “being definable, identifiable by third parties, capable in their nature of assumption by third parties, and having some degree of permanence”.⁶**

Consistent with this decision, in *Ion Science v Persons Unknown*,⁷ the English Commercial Court also considered bitcoin as property and again granted proprietary injunctions.

While this solution might just make sense for most of us, other jurisdictions have ruled otherwise based on their property laws. In Japan, the Tokyo District Court ruled in the *Mt. Gox* case that “*it is not the case that bitcoin has the necessary corporeality and the susceptibility of exclusive control to be the object of ownership*”.⁸

Aware of the increasing relevance of digital assets in modern times (i.e. they have a value in themselves and are used as a means of payment), the UK’s Digital Assets Consultation Paper,⁹ published on 28 July 2022, points out that some aspects of **English and Welsh law should be**



reformed to acknowledge the specific features of digital assets.

This would create certainty, grant “*consistent legal recognition and protection*” and position England and Wales as a global hub for digital assets (and, specifically, for both “*crypto-tokens and crypto-token systems*”).

The Consultation Paper’s key recommendation is the explicit recognition of a new, third category of personal property (“**data objects**”) that are distinct from those already existing categories. The proposed definition of *tertium genus* of property follows three cumulative criteria:

- (1) being composed of data represented in an electronic medium;
- (2) existing independently of persons and of the legal system; and
- (3) being rivalrous.

Although a fourth criteria (divestibility) is also considered, it is not proposed as a standalone criterion with the purpose of allowing for further flexibility.

Having considered stakeholder feedback that possession and possessory concepts are inappropriate for digital assets, the Law Commission provisionally suggests developing the **concept of control** through the common law instead. A person in “control” of a data object can exclude others from it, use it, transfer it and identify themselves as the person able to do these things.

The Consultation Paper goes on to discuss various issues around cryptoassets, including their

transfer, the defence of good faith for a purchaser for value without notice, custody arrangements and trusts, and their treatment as security and collateral. It also considers how existing legal frameworks for things such as breach of contract, vitiating factors, following and tracing, equitable wrongs, proprietary restitutionary claims, and unjust enrichment can be applied to them.

The deadline set for responses to the consultation¹⁰ is set for 4 November 2022. ■

Footnotes:

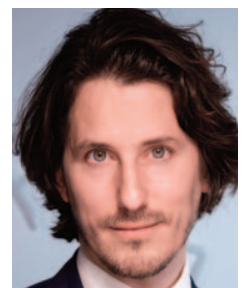
- 1 In this regard, <https://en.wikipedia.org/wiki/Money>.
- 2 In this regard, <https://www.wsj.com/articles/the-secs-cryptocurrency-confusion-coinbase-tokens-securities-register-payment-bitcoin-equity-scam-regulation-11659463294>.
- 3 Ruling of the Supreme Court of 20 June 2019 and ruling of the Court of Appeal of Barcelona (Section 21) of 4 November 2021.
- 4 As per news such as <https://es.cointelegraph.com/news/in-spain-2gether-calls-a-meeting-of-partners-to-request-insolvency-proceedings>, the company is expected to file for Spanish “concurso de acreedores” anytime soon.
- 5 *AA v Persons Unknown* [2019] EWHC 3556 (Comm).
- 6 Lord Wilberforce’s classic definition of property established those four criteria in *National Provincial Bank v Ainsworth* [1965] 1 AC 1175.
- 7 *Ion Science v Persons Unknown* (21 December 2020, unreported).
- 8 Literal translation from Japanese to English available at: https://www.law.ox.ac.uk/sites/files/oxlaw/mtgox_judgment_final.pdf. In this case, the Court considered that access to the private key does not really grant exclusive control (a characteristic of ownership in Japan) over bitcoin because bitcoin transactions need third parties to replicate them in the blockchain for the transaction to be confirmed.
- 9 Available at: <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11j5xon24uy7q/uploads/2022/07/Digital-Assets-C-consultation-Paper-Law-Commission-1.pdf>.
- 10 Responses may be sent through an online form available at: <https://consult.justice.gov.uk/law-commission/digital-assets-consultation> or by e-mail to: digitalassets@lawcommission.gov.uk.



The Consultation Paper’s key recommendation is the explicit recognition of a new, third category of personal property: “data objects”



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