

Legal aspects of virtual currencies



Dr Joanna Perkins, Financial Markets Law Committee

Registered Charity Number: 1164902

“FMLC” and “The Financial Markets Law Committee” are terms used to describe a committee appointed by **Financial Markets Law Committee**, a limited company.
Registered office: 8 Lothbury, London, EC2R 7HH. Registered in England and Wales: company number 8733443.

Private law rights

Property

Non-property

Real

Personal

e.g. quotas,
permissions
licences

e.g. land

Chattels
real

Chattels personal

e.g.
leasehold
interests

Tangible property/choses
in possession

Intangible property/choses in action

Documentary intangibles

Non-
negotiable
chattels

Negotiable
chattels

Negotiable
instruments

Negotiable
securities

Non-
negotiable
choses in
action

e.g. cars,
chairs,
ordinary
"things"

e.g. money
(coins)

e.g.
promissory
notes

e.g. bearer
bonds and
notes

e.g. non-
bearer
shares and
debts

**The
Classification
of Private Law
Rights in
English Law**

Virtual Currencies

Background

- What are virtual currencies?
- Virtual currencies are currencies that can be held and used only electronically (in the context of computer games or as an electronic reflection of “real world currency”)
- The best-known virtual currencies are: Bitcoin, Litecoin, Nemcoin, Ether and Ripple
- The majority of virtual currencies that interact with the real world economy share some common characteristics:
 - they are created through a process called “mining”
 - they are incorporated in a network supported by “distributed ledger technology” (DLT), also “blockchain”
 - they rely on cryptographic techniques to record transactions in DLT and to identify the unique character of individual coins
- Some virtual currencies platform (Ether) offers programmable, automated transaction functionality (smart contracts)

Virtual Currencies

Property and Personal Right

- What is the legal character of virtual currencies?
- Are they property or personal rights under the common law?

Before a right or an interest can be admitted into the category of **property**, or of a right affecting property, it must be definable, identifiable by third parties, **capable in its nature of assumption** by third parties and have some degree of permanence or stability (*Lord Wilberforce in National Provincial Bank v Ainsworth [1965] 1 AC 1175 at 1247-8*)

- Licenses, certain quotas, permissions will not qualify as property within the above definition
- Recent judicial decisions have tended to support the categorization of rights as property when they acquire **economic value** and show themselves **susceptible to transfer and trade**
- It seems likely that units of virtual currency which have both economic value and transferability among participants (i.e. are robust and well-engineered) will be categorised as a type of property

Virtual Currencies

“In action” or “In possession”?

- How can we “possess” virtual currencies?
- If virtual currencies are property they should be considered personal property, namely chattels personal
- If so, the question arises whether virtual currencies should be considered “choses in possession” (tangible) or “choses in action” (intangible) property?
 - If choses in possession, then how can we obtain possession?
 - If choses in action, than against whom does the action to enforce the rights of owner lie?
- Virtual currencies are commonly understood to be intangible objects which can be possessed in the way dematerialised cash can be possessed.
- Might they be a kind of hybrid “virtual choses in possession”?

Virtual Currencies

Documentary intangibles

- What kinds of intangible things can be possessed?
- One category of property that shares some of the characteristics of both choses in possession and choses in action is “documentary intangibles”
- The document is tangible (i.e. “in possession”) but the debt or interest that it represents is intangible (i.e. “in action”)
- A documentary intangible is therefore both an intangible thing and a thing that can be possessed
- Negotiable instruments and negotiable securities are both documentary intangibles
- Negotiable things are valuable tools in commerce because delivery, or a transfer of possession, is sufficient to transfer ownership. That means that a good faith acquirer has no need to make laborious enquiries as to the title of the transferor

Virtual Currencies

Possession, delivery and ownership

- Should a good faith acquirer of virtual coins be able to rely on his possession as evidence of ownership?
- Negotiable instruments and negotiable securities are unlikely to extend to new types of assets, such as electronic assets...
- A third category of property which has a negotiable quality is that of “negotiable chattels”
- The commonest examples of “negotiable chattels” are coins and bank notes (which are also negotiable instruments!), i.e. money...
- Might virtual coins be “negotiable chattels”, too?

Virtual Currencies

Money, money, money

- What is money?
- “The Societary theory of money” suggests that the negotiability of coins and notes stems from their ability to “pass in currency”, i.e. commonly and continuously to be accepted as payment in exchange for articles of commerce
- It is unclear which, if any, virtual currencies have achieved the status of money “passing in currency” in this way
- The European Court of Justice has classified virtual currencies as means of payment

Virtual Currencies

E-money: It's money, Jim, but not as we know it

- What kind of thing is electronic money? Is it “money” or a claim against the issuer?
- The case of so-called e-money has implications for virtual currencies: if e-money (defined in EU legislation) is indeed money then some objections to accepting some virtual currencies as money may fall away (i.e. that they cannot be possessed, that they are not legal tender and that they are not issued by the State)

Virtual Currencies

Foreign Exchange?

- What about the virtual currencies that have not (yet) gained widespread acceptance
- Foreign money may prove a useful analogy.
- Foreign currency cannot purchase articles of commerce or satisfy a debt unless expressly stipulated for by the creditor.
- Foreign money is not sovereign currency or legal tender
- There is no social practice of accepting foreign money in payment
- Ordinary debts within the jurisdiction are, by law, denominated in domestic currency unless another currency is stipulated for.
- Yet, under English law, foreign money is still regarded, in its legal aspect, as “money”.*
- If foreign money is money than the fact that a virtual currency has only limited acceptance should not necessarily preclude its being money

**Court of Appeal in Camdex International Ltd v Bank of Zambia* [1997] CLC 714

Virtual Currencies

A constant measure of value

- How do virtual currencies measure value?
- According to economic theory, money: (i) serves as a medium of exchange; (ii) serves as a store of value; and (iii) serves as a unit of account
- Risks such as the “double spending” of coins can undermine the ability of a virtual currency to act as a store of value
- The “store of value” concept may be similar to the threshold test for “property” (i.e. does the thing have real economic value?)
- There is a distinction between this concept and “constant measure of value”
- Being a “constant measure of value” is sometimes said to be a necessary characteristic of sovereign currencies but it is not a characteristic of money *per se* (*viz* foreign currencies)
- A virtual currency may be a store of value but it cannot be a constant measure of value unless it is pegged to a sovereign currency

Virtual Currencies

Regulatory Aspect

- If virtual currencies qualify as money, does that mean they must be regulated as money, rather than commodities or securities, say?
- Virtual currencies share certain key characteristics with commodities, securities and instruments of payment
- The CFTC has concluded that Bitcoin is a commodity*
- A US court has ruled, in an action brought by the SEC, that Bitcoin-denominated units or shares are securities*
- Virtual currencies have a strong claim to be “money” at law but this does not entail that they should be treated as “money” or “cash” in a regulatory context.
- A clear definition of the legal aspect of money may assist regulators in predicting the outcomes of proposed regulatory approaches

**(Order of the CFTC (Docket No. 15-29) in the Matter of Coinflip, Inc., d/b/a Derivabit, and Francisco Riordan)*

***SEC v Shavers (No-4-13-CV-416) Eastern District of Texas, September 18, 2014*

Conclusions