

Virtual Currencies



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Registered Charity Number: 1164902

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Registered office: 8 Lothbury, London, EC2R 7HH. Registered in England and Wales. Company Registration Number: 8733443.

Virtual Currencies

Background

- What are virtual currencies?
- The commonest virtual currencies are “cryptocurrencies”, which:
 - are created through a process called “mining”
 - are incorporated in a network supported by “distributed ledger technology” (DLT), also “blockchain”
 - rely on cryptographic techniques to record transactions.
- Virtual currencies share certain key characteristics with money, commodities, securities and instruments of payment.

Virtual Currencies

Property and Personal Right

- What is the legal character of virtual currencies?
- 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

Property

Real

Personal

e.g. land

Tangible

Intangible

“Documentary intangibles”

**Property
Rights in
English
Law**

Non-negotiable
chattels

Negotiable
chattels

Negotiable
instruments

Negotiable
securities

Non-negotiable
chooses 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

Virtual Currencies

“Possessions”?

Questions lawyers like to ask:

- Can we “possess” virtual currencies?
- If not—i.e., if they are more like a kind of “debt”—against whom can holders enforce their rights?

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Delivery and ownership

- Some things are said to be “**negotiable**” in English law.
- Negotiable things are valuable tools in commerce because delivery is sufficient to transfer ownership. (That means that a good faith acquirer has no need to make enquiries as to the title of the transferor.)
- One familiar example is bearer bonds.
- But the commonest example of all is coins and bank notes, i.e. money...
- Might virtual coins be “negotiable”, too? Why is it important?

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Virtual Currencies

Money, money, money

- What *is* money?
- At law, money is something that will “*pass in currency*”, i.e. commonly and continuously 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

- Does English law recognise “electronic” money?
- Electronic bank account balances and online credit balances are commonly treated as money.
- If e-money is indeed money than some objections to accepting some virtual currencies as money may fall away.

Virtual Currencies

Foreign Exchange?

- Does it matter that virtual currencies have a small user community?
- Coins can “pass in currency” even when they are not commonly accepted as a means of exchange.
- Under English law, foreign money is still regarded, in its legal aspect, as “money”.*
- If foreign currencies are money, then so may be virtual currencies.

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

Virtual Currencies

Regulation

- The CFTC has concluded that Bitcoin is, for the purposes of its regulatory jurisdiction, a commodity.⁽¹⁾
- A US court has ruled that Bitcoin-denominated units or shares are securities.⁽²⁾
- A Florida court declined to categorise Bitcoin as money for the purposes of anti-money laundering legislation in 2016 but a short time later a NY court reached a decision that it would qualify as money.⁽³⁾

1. See *Order of the CFTC (Docket No. 15-29) in the Matter of Coinflip, Inc., d/b/a Derivabit, and Francisco Riordan*. See also complaint in the Southern District of New York, filed 21 September 2017, against Gelfman Blueprint, Inc for operating a fraudulent commodities scheme in respect of Bitcoin spot transactions.

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

3. *Florida v Espinoza* (Case No. F14-2923), concerning unlicensed money transmission; and *US v Murgio* (Case No. 15-cr-00769).

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Conclusion

- Virtual currencies have a strong claim to be recognised as “money” under English law.
- But regulation must respond to their innovative nature and may treat them as “money-plus”, adding layers of additional control which would be appropriate for securities, commodities etc.