

Legal Aspects of Virtual Currencies

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Slide 1—Legal Aspects of Virtual Currencies

At the heart of many of the regulatory questions which surround virtual currencies is the issue of their legal character.

That is the issue with which my organisation, the FMLC has grappled, over the past two years.

Slide 2— Virtual Currencies, Background

I should start by saying that legal classification will depend on technical classification and it is unlikely that there will be one acceptable definition across all virtual currencies. The options for technical classification are themselves many and varied. I will mention just a couple of the conceptual choices:

1. crypto vs non-crypto
2. pegged vs floating
3. mined vs minted
4. DLT vs consensus
5. Smart contracts functionality or not
6. Open or closed to real world currencies

The FMLC has taken a particular interest in crypto currencies which are functionally open to real world currencies which have real economic value.

Bitcoin is a good example.

Slide 3—Virtual Currencies, Property and Personal Right

So, what is the legal character of virtual currencies?

This is likely to depend on how robust and well-engineered the coins are technologically.

The legal test for property is whether the thing can acquire real economic value and whether it is susceptible to transfer and trade. This latter, of course, implies that the thing in question can not only acquire value but retain it too.

There is a good argument for believing that well-engineered virtual tokens will be identified by the law as property.

Slide 4— Legal Rights: a short primer

This slide demonstrates the categories of property rights in English law.

Personal property is subdivided into tangible and intangible property. Lawyers refer to these categories (esoterically) as choses in possession and choses in action.

On the bottom line there is a five-fold division of personal property of various kinds. I will mention “negotiable” in a minute but for the moment I would just like to draw your attention to these things called documentary intangibles. These are objects like bearer shares and promissory notes which represent at one and the same time some kind of intangible obligation, like a debt, and some kind of tangible property which can be possessed, like a certificate. So it is possible for some things to have a double or hybrid nature.

Slide 5—Virtual Currencies, “In action” or “In possession”

Tangible property, as the name suggests, consists of things that can be possessed and the act of possession is usually an assertion of the rights of ownership.

But intangible property consists of things that can be enforced or vindicated only through court proceedings, like a debt.

Categorising virtual tokens as either raises some difficult questions—they are designed to be passed around like the ordinary coins we handle every day but, on the other hand, they are intangible.

This hybrid quality that virtual tokens have means that lawyers are likely to become fixated in future on the kinds of questions that appear on the slide: how can we possess virtual currencies OR against whom can we enforce rights to virtual currencies? (Does the rightholder pursue the transferor, the system administrator, the currency designer or all the users on the virtual network? The answer, if there is one, will probably differ from currency to currency.)

My view is that the questions about possession will be easier to answer than the questions about enforceability.

Slide 6—Virtual Currencies, Possession, delivery and ownership

I said that I would return to the question of negotiable property.

The importance of negotiability lies in the observation that, with negotiable things, 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 and it means markets in those things can operate quickly and smoothly. Negotiability is a fundamental legal concept at the heart of today's securities and money markets.

The commonest example of something negotiable is actually something quite tangible: that is, coins and bank notes, i.e. money...

Might virtual coins be “money” and have this quality, too?

Slide 7—Virtual Currencies, Money, money, money

The core test for money appears to be whether it is commonly and continuously accepted as payment in exchange for articles of commerce.

It is unclear which virtual currencies, if any, have achieved this status but it is notable that the ECJ has classified virtual currencies as means of contractual payment.

We will return to the idea of “commonly and continuously” in a moment.

Slide 8—Virtual Currencies, E-money

There is good precedent for recognizing purely electronic forms of money, of course.

Most people think of their bank balance only as money in the bank even though it is a purely electronic phenomenon.

This is also true of other balances which appear on pre-payment cards and mobile phone credits. These forms of balance are defined as e-money in EU legislation and increasingly they are recognised, not as credit (with all the connotations that carries of credit worthiness) but as money.

So, the fact that a currency is virtual should not prevent its being money.

Slide 9—Virtual Currencies, Foreign Exchange

The idea of whether something is commonly and continuously accepted as payment has been a theme of the U.S. cases on virtual currencies. It is a fallacy to believe that this definition can only refer to “legal tender”. Money, in the eyes of the law, does not have to be sovereign currency. It does not even have to be commonly accepted within the jurisdiction and the legal system.

English law is clear that foreign money, which is not legal tender in the United Kingdom, is money for the purposes of English law.

Slide 10—Regulation

So virtual currencies may be money for the purposes of exchange. But they may also be other things from the regulatory perspective: they may be securities or commodities for example. This slide contains a number of references to the perspective of the CFTC, which has concluded that virtual currencies may be commodities for the purposes of the Commodities Exchange Act.

In July the US Securities and Exchange Commission announced that coin offerings and sales of digital assets are subject to the requirements of the federal securities laws. The announcement made it clear that the question whether a particular investment transaction involves the offer or sale of a security will depend on the facts and circumstances, including the economic realities of the transaction.

What I would like to stress today is that none of these developments preclude the possibility that virtual tokens may have the legal aspect of money while having some of the regulatory aspects of securities or commodities. The question is, as the SEC suggests, a fact-dependent and complex one.

Slide 11—Virtual Currencies, Conclusion

So...

- Some 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.