



Financial Markets Law Committee

An Addendum to the FMLC Discussion Paper on Issues of Legal Uncertainty Arising in the Context of Virtual Currencies

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In July 2016, the Financial Markets Law Committee (the “FMLC” or the “Committee”) published a paper prepared by the FMLC secretariat following discussion in a working group convened to consider areas of legal uncertainty in relation to virtual currencies. In that paper, the Committee expressed the view that the virtual currencies which have achieved status as a medium of exchange within a significant user community have a good claim to be regarded as money.

Since publication of that paper, two decisions in the U.S. have taken conflicting views on the question whether Bitcoin, one of the most commonly used forms of virtual currency, is to be regarded as money. The context in which the question arises for consideration is critical to the interpretative outcome and, in both cases, the context was the term “money” within a criminal statute.

In the first case, *Florida v Espinoza*² the defendant was accused of unlawfully selling Bitcoin in contravention of §560.125(5)(a), Fla. Stat., which prohibited an unlicensed person from engaging in the business of a “money services business”. The definition of money services business included a person who acts as a “payment instrument seller”, and “payment instrument” is defined as

a check, draft, warrant, money order, travellers check, electronic instrument, or other instrument, payment of money, or monetary value whether or not negotiable.

The judge concluded that the defendant was not a payment instrument seller because Bitcoin did not fall within the definition of “payment instrument”, relying in part on an IRS statement that virtual currency was treated as property for federal tax purposes. The judge noted:

While Bitcoin can be exchanged for items of value, they are not a commonly used means of exchange. They are accepted by some but not by all merchants or service providers. The value of Bitcoin fluctuates wildly and has been estimated to be eighteen times greater than the U.S. dollar ... With such volatility they have a limited ability to act as a store of value, another important attribute of money.

² No.F.14-293 (Fla. Cir. Ct. July 22, 2016)

She concluded,

The Court is not an expert in economics, however, it is very clear, even to someone with limited knowledge in the arena, that Bitcoin has a long way to go before it is the equivalent of money.

In the second case, *U.S. v Murgio*, the United States District Court, Southern District of New York, took a different view. The defendant was charged with operating and conspiring to operate a “money transmitting business” in violation of 18 U.S.C. §1960. “Money transmitting” was defined as including “transferring funds on behalf of the public by any and all means...” The court held that Bitcoin are “funds” under the statute, since the ordinary meaning of the term “funds” included money and “money” is in turn defined as “something generally accepted as a medium of exchange, a measure of value, or a means of payment.”

In reaching this conclusion, the court commented that Bitcoins can be accepted as a payment for goods and services, or bought directly from an exchange, such that they function as pecuniary resources, and are used as a medium of exchange and a medium of payment.

The *Espinoza* decision was held to be wrong, the New York court concluding that the judge in *Espinoza* had considered only the possibility that Bitcoin was a “payment instrument” for the purposes of §560.125(5)(a), Fla. Stat., and had not considered the possibility that it was “monetary value”. In *Murgio*, the court concluded that

there is no plausible interpretation of monetary value or payment instruments as the terms are used in Chapter 560 that would place Bitcoins outside the statute’s ambit.

It further noted that the fact that the IRS had decided to treat virtual currency as property for federal tax purposes had no relevance to the question whether Bitcoins qualify as payment instruments under Florida law.

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