

3VB'S FINANCE COLUMN: CRYPTOCURRENCY: WHAT IS IT, WHERE IS IT, AND WHY DOES IT MATTER?

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Victor Steinmetz of 3VB explores the key features of cryptocurrency as well as some of the legal concepts that lie at the heart of recent litigation involving cryptocurrency-related fraud cases.

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Cryptocurrency is a much-debated topic, notoriously prone to fraud and price volatility, and still largely unregulated. Despite these risks and uncertainties, the growth of cryptocurrency has been explosive and seemingly unstoppable. It appears that crypto is here to stay.

This note explores some of the legal concepts that lie at the heart of recent litigation involving cryptocurrency-related fraud cases, namely what cryptocurrency is and where it is located.

WHY DOES IT MATTER WHAT AND WHERE CRYPTOCURRENCY IS?

These questions are vital to cases involving cryptocurrency because the remedies that are frequently sought in fraud cases involving cryptocurrency (proprietary injunctions, worldwide freezing orders and ancillary information disclosure, and Bankers Trust orders) are all dependent on cryptocurrency being defined as property.

For more information on these remedies such as proprietary injunctions, worldwide freezing orders and ancillary information disclosure, and Bankers Trust orders see, Practice notes:

- *Freezing orders: what must be proved?: Proprietary injunction: no need to show risk of dissipation.*
- *Jurisdiction: common law rules: Jurisdiction where defendant served outside the jurisdiction.*

Establishing where the cryptocurrency is located is important in determining the applicable law and jurisdiction and the approach adopted by the English courts has allowed them to find that English law applies and that they have jurisdiction over in cryptocurrency-related fraud cases.

CRYPTOCURRENCY: WHAT IS IT?

A cryptocurrency is a digital currency which is held and exchanged on a blockchain, a decentralised ledger. The more interesting question, at least for lawyers, has been whether or not it constitutes property.

Until the advent of cryptocurrency, English law only recognised two forms of property: choses in possession and choses in action. However, in *AA v Persons Unknown* [2019] EWHC 3556 (Comm) (paragraphs at [55], [59], and [61]), Bryan J held that although cryptocurrencies did not fall within either of these two categories, as they are virtual, intangible and cannot be possessed, and do not embody any right capable of being enforced by action, they nevertheless constituted a form of property (and were thus capable of being the subject of a proprietary injunction).

In *Reyes v Persons Unknown* [2021] EWHC 1938 (Comm) (paragraph 12) and *Fetch.ai Ltd and another v Persons Unknown* [2021] EWHC 2254 (Comm) (paragraph 9), HHJ Pelling KC also held that cryptocurrencies constituted property, but on the basis that they did fall within the category of choses in action. In the later cases of *Danisz v Persons Unknown* [2022] EWHC 280 (QB) and *Jones v Persons Unknown* [2022] EWHC 2543 (Comm), both of which do not refer to the decisions in either *Reyes* or *Fetch.ai*, the respective judges agreed with and followed Bryan J's judgment in *AA*.



In the recent judgment in *Tulip Trading Ltd v van der Laan* [2023] EWCA Civ 83, the Court of Appeal did not engage with the debate in any detail, as the point was not in dispute. However, Birss LJ, who gave the leading judgment, did confirm that a cryptoasset was property, referring with apparent approval to the relevant passage in Bryan J's judgment in *AA*.

As a result, although there is judicial agreement that cryptocurrencies do constitute property, the basis on which one arrives at that result is less clear. The Law Commission is currently considering this issue and stated in its [consultation paper](#) that although English law had so far proven to be sufficiently flexible to accommodate digital assets such as cryptocurrency as property, there was a need for reform, including the express recognition of a "third" category of property, in addition to things in possession and things in action, called "data objects". The Law Commission further suggested that the factual concept of control rather than that of possession should apply to data objects, leaving it however to the courts to develop an accurate concept of control that could apply to data objects. The Law Commission will publish its final report some time this year. For more information, see [Toolkit, Blockchain and digital assets toolkit: Law Commission Digital Assets Consultation](#) and [Practical Law Dispute Resolution: What to expect tracker; Digital assets: Law Commission projects](#).

Until then, what is important is that the courts are willing to take a pragmatic approach and recognise cryptocurrency as property, which allows for relief to be provided in fraud cases.

CRYPTOCURRENCY: WHERE IS IT?

As mentioned above, cryptocurrency is held on a blockchain, which works as a form of distributed or decentralised register (or ledger), where such register exists simultaneously in several locations, often without any single identifiable location. Cryptocurrency is thus effectively everywhere and nowhere at the same time.

In *Ion Science v Persons Unknown* (unreported) (21 December 2020) (paragraph 13), Butcher J stated that the *lex situs* of a cryptoasset is the place where the person or company who owns it is domiciled. HHJ Pelling KC followed this approach in *Fetch.ai*. This approach thus differs from that applicable to ('ordinary') money held in a bank account, which is a debt owed by the bank to the customer, where the debt is considered to be situated in the county where the debtor, i.e. the bank or branch where the account is kept, resides. (Dicey, Morris & Collins on the Conflict of Laws, 16th Ed, [23-026]-[23-029])

In those debt cases, the focus is thus on the debtor, and not on the owner or creditor.

Once the *lex situs* of a cryptocurrency is established as the place where the person or company who owns it is domiciled the English courts can determine that English law applies pursuant to Article 4.1 of Rome II, where it is the law of the country in which the damage occurred, and that they have jurisdiction over cryptocurrency-related fraud claims, where the owner and thus the property in question was domiciled in England (gateway 11) and the damage was suffered within the jurisdiction (gateway 9).

For more information on Rome II, see Practice notes:

- [Service of the claim form and other documents: outside the jurisdiction: Service out of the jurisdiction when permission required \(CPR 6.36\)](#).
- [Governing law: non-contractual obligations: Effect of Brexit on continued application of Rome II in the UK](#).