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Cryptocurrency disputes: five things every litigant should know

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In December 2020, the World Economic Forum reported that *"cryptocurrencies have reached a point of inevitability"*. In some business circles, the hype has been enormous with Jack Dorsey, the CEO of Twitter, having predicted that, *"the internet will have a single currency. I personally believe that it will be Bitcoin."* The facts appear to be bearing out at least the former view: in the last six months, the price of Bitcoin has risen from a low of US$18,137 to a high of over US$63,000; Mastercard has announced it will start accepting crypto payments on its network; Tesla has indicated it may price its cars in cryptocurrency; and the US government seized more than US$1 billion worth of Bitcoin in enforcement actions related to the defunct darknet marketplace, Silk Road.

Cryptocurrencies raise several legal and practical issues for English litigants, issues that the English courts have already begun to grapple with. Here are five key points relating to Bitcoin, which any litigant in England should be aware of.

1. **Bitcoin is (probably) property and can (in principle) be frozen, charged and enforced over**

For Bitcoin – or any cryptoasset – to be recognised by an English court as capable of being frozen, secured and/or enforced over, it must first meet the English law criteria of being legal property. Whether it does so is not necessarily a simple question. A Bitcoin is essentially an entry in a global ledger known as the blockchain: it has no physical presence, does not exist independently of the blockchain and (unlike a bank account) does not bring with it an enforcement right against an identifiable third party. It therefore lacks features that English law would generally associate with legal property.

The point was considered in an advisory report published by the UK Jurisdiction Taskforce in 2019 – one of six "law tech" taskforces set up by the Law Society and chaired by a senior judge, Sir Geoffrey Vos, Chancellor of the High Court. That report opined that cryptoassets will generally be regarded as property (although subject to limitations because they are not physical property), and as a result are amenable to at least some types of security and enforcement. The report's analysis has since been picked up and expressly endorsed in High Court cases (see *AA v Persons Unknown & Ors*), although it has not yet been considered at appeal level.

2. Ownership of Bitcoin can be kept secret…

It is often believed that the Bitcoin blockchain is completely anonymous, though that is not strictly true. Instead, each individual blockchain user is identified only by their blockchain wallet address or addresses – a string of numbers and letters somewhat akin to a bank account number. Wallet addresses allow a user to interact with other users of the blockchain, i.e. to send and receive Bitcoin, but do not identify the real person behind the address. Bitcoin will therefore be attractive to those who wish to keep their ownership of assets off any public record.

This form of anonymity arises because of the so-called "decentralised" or "distributed" nature of the blockchain. Whereas traditional finance transactions are implemented by large institutions (primarily banks) who are required to identify their clients, the blockchain has no such institutions. Transactions are implemented by mass consensus of the users of the blockchain according to rules embedded in the blockchain's coding. That is not to say there are no institutions active on the blockchain; in fact, there are many, including so-called "exchanges" which provide wallets and operate transactions in a similar way to a traditional bank and which will often require users to identify themselves in order to access their services.

3. … but, with a little information, Bitcoin can be traced

Whilst the identity of individual blockchain users may be secretive, the blockchain itself is not. In fact, the blockchain can be publicly accessed for free, and transactions viewed in real time.

It is also possible – in practice often with specialist assistance – to view individual Bitcoin wallet addresses, including their current balances and all historic Bitcoin transactions into and out of those addresses. Transactions can then be followed through into the next address, and the next and so on, meaning (in principle) that it is possible to trace any Bitcoin to its current location, back to its original source and which addresses it has passed through to get there. So, if a Defendant is holding Bitcoin and the Claimant is aware of their wallet address, that Claimant may be able to ascertain where the Bitcoin came from. If the Defendant has dissipated the Bitcoin, the Claimant may see where it went.

Of course, this aspect is known to Bitcoin users and there are also complex techniques (such as 'mixing' and 'peeling') that sophisticated users can implement to try to obscure their transactions.

4. There are practical steps Claimants can take to preserve Bitcoin for enforcement

Claimants, in particular those with the benefit of freezing orders, will need to consider what information to aim to extract from Defendants with Bitcoin assets, whether third parties may be able to provide information, and which third parties may be able to give effect to asset freezes or enforcement orders. Some examples of points to consider are:

Knowing the Defendant's wallet addresses is key – with the advantage of a known address connected to a Defendant, Claimants can monitor the activity of that address and trace in-bound and out-bound transfers. Advanced transaction analytic techniques can also make it possible to identify other addresses that are likely to be under common ownership with the known address.

Third parties may have information – whilst the blockchain does not require the involvement of institutions to operate, in practice various types of institutions have sprung up, some of which perform roles analogous to traditional financial institutions. Exchanges are a major such example, with around 60% of Bitcoin users making use of exchange wallets. Bitcoin

miners also typically participate in largescale "mining pools" which combine computing power across miners. Depending on the jurisdictions in which they operate and the regulatory regime to which they are subject, both types of organisations will often perform client due diligence on their users, and court orders compelling the production of this information may be possible in certain circumstances.

Third parties may have de facto control over a Defendant's Bitcoin. Depending on the exact arrangements between an exchange and a user, the exchange may have a level of control over a Bitcoin wallet very similar to that of a bank over a bank account, i.e. the exchange may be able to block transactions attempted from that wallet.

5. Bitcoin issues are inherently multi-jurisdictional

The blockchain has no fixed physical location: it is accessed across the world by users in multiple different jurisdictions and Bitcoin can flow freely between accounts held by individuals across those jurisdictions. Around 60% of all Bitcoin mining is conducted in China; Bitcoin exchanges are incorporated all over the world (in locations as diverse as the UK, Eastern Europe, Samoa, and the Seychelles); and the 20 countries with the highest number of active Bitcoin nodes include the USA, Germany, China, Australia and Finland.

Any substantial Bitcoin tracing, enforcement or even information gathering exercise is therefore very likely to cross jurisdictional boundaries and encounter systems of law with varying degrees of readiness to deal with complex cryptoasset issues.

At Hogan Lovells we are already working on a number of cases involving Bitcoin and other cryptoassets – including enforcement work across several jurisdictions – and would be delighted to share our expertise from these cases, or to cover any of the above points in more detail. If you would be interested to hear further about what we have to offer in such cases, please contact Richard Lewis or James Wise.

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