Cripps

Cryptocurrency as an asset in insolvency

It is now widely accepted that cryptocurrency falls within the broad definition of "*property*" under the Insolvency Act 1986 and, as such, Insolvency Practitioners (**IPs**) have a duty to realise its value, where possible.

What is cryptocurrency?

The principal characteristics of a cryptocurrency have been identified as:

- Intangibility;
- Cryptographic authentication;
- Use of a distributed transaction ledger;
- Decentralisation; and
- Rule by consensus.

A well-known example is bitcoin, the key features of which are:

- A digital token (**intangibility**) represented by a pair of data parameters – a public key and a private key. The public key contains information about the bitcoin and the private key authenticates transfers or other dealings with the bitcoin (**cryptographic authentication**).
- A ledger (known as a block chain), which is publicly available, records every bitcoin transaction (**distributed transaction ledger**).
- A transaction is only recorded on the block chain if the participants of the block chain (known as miners) determine that it complies with the applicable rules (**decentralised** and **rule by consensus**).
- The transaction is irreversible once it is recorded.

Identifying cryptocurrency as an asset of a company

Things an IP can look out for to determine whether or not a Company owns (or has a claim to) cryptocurrency are:

- References to cryptocurrency in the Company's bank statements (fiat currency, such as euros or GBPs, is often used for the initial investment in cryptocurrency).
- Evidence of private keys, which in the case of Bitcoin, is a 256-bit number, or a shorter format number (known as wallet import format), which is shorter (51 keys).
- Reference to cryptocurrency in emails and/or board minutes.
- Details of a private key in a safe.

If an IP requires more information, they are also able to use the powers set out in s.236 of the Insolvency Act 1986 to ask the Court to summon an office-holder to account of his dealings with the Company, or produce any books, papers or other records in his possession or control, which could extend to disclosing their knowledge of cryptocurrency owned by the Company and/or the associated private key.

Cryptocurrency and antecedent transactions

The immutable nature of a cryptocurrency transaction has led some to claim that such a transaction is beyond legal intervention because it cannot, technically, be amended. Unsurprisingly, this has not been accepted by legal commentators, who state that the ledger cannot be determinative of legal title.

As such, an IP is not prevented from pursuing an antecedent transaction that has been recorded in a ledger. This does not mean, however, that such a claim will be without difficulties – the main one being the ability to identify the recipient of the asset in order to trace it. Helpfully, the Courts have now accepted that cryptocurrency can be the subject of freezing orders, demonstrating that the tracing and identification of these assets for the purposes of legal proceedings is not impossible.

The future

It is safe to say that cryptocurrency is still new territory and until clear legislation and/or regulation of cryptocurrency is implemented, IPs should seek legal advice in circumstances where issues of cryptocurrency arise.

If you have any questions, please contact Hannah Proctor on 01892 489 586 or at hannah.proctor@cripps.co.uk.

You may also find the following articles useful:

- UK Jurisdiction Taskforce on Legal statement on cryptoassets and smart contracts
- Taxation of cryptocurrencies

Ed Weeks

Partner and Head of Corporate