

Article Information

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Hong Kong court recognises that crypto is property

The Hong Kong High Court has found that cryptocurrencies are property in a [landmark case](#), further boosting the city's virtual asset industry and its ambition to become the [Asian crypto hub](#). This stands in stark contrast to recent events in the USA, where the Chair of the SEC, Mr Gary Gensler, was [unwilling to commit](#) to whether Eth was a commodity or security when questioned by Congress.

In the [Re Gatecoin](#) decision, the court needed to decide how crypto-assets belonging to a collapsed [crypto exchange](#) would be distributed to creditors. The court recognised crypto-assets as property "capable of being held on trust", the first time such a ruling has ever been made in Hong Kong.

Gatecoin operated in Hong Kong from 2015 till 2019 when it went into liquidation. Following the closure, Gatecoin's liquidators sought court guidance on whether the crypto-assets still held by Gatecoin belonged to customers and was held on trust or could be made available to general creditors. The liquidators had taken the view that some of the crypto-assets were held on trust and complicating matters were several different terms and conditions which customers of the exchange had agreed to, with terms which suggested that crypto-assets may have been held on trust.

If the crypto-assets were held on trust for customers, it means those customers could stand in priority to general creditors and receive a greater amount back in the liquidation.

In finding that crypto-assets were property, Justice Linda Chan said:

like other common law jurisdictions, our definition of 'property' is an inclusive one and intended to have a wide meaning.

Her Honour considered the growing list of common law decisions (including the NZ [Cryptopia](#) case and Singaporean decision of [Quoine v B2C2](#)) which have in turn almost all followed the principles set down in the [Legal Statement on cryptoassets and smart contracts](#) (which we reported on [here](#)) which suggested the principles in the *Ainsworth* decision should apply to the definition of property as it relates to crypto-assets. In that decision it was said that:

Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability

Crypto-assets of course are:

1. Definable;
2. Identifiable by third parties;
3. Capable of assumption by third parties; and
4. Have a high degree of permanence and stability.

While the court found that crypto-assets are property for the purposes of the insolvency, in determining whether a trust had been established the court needed to consider whether there was:

1. certainty of the subject matter alleged to be part of the trust;
2. certainty of the object of the trust; and
3. certainty of an intention to form a trust.

Justice Chan was satisfied that there was certainty of subject matter, despite the crypto-assets having been pooled in the exchange, as each customer's beneficial interest could be claimed on the pooled assets and could be identified. Similarly there was certainty over the object of a trust, as customers could be identified from the exchange's internal ledger records.

On the question of intention, the court needed to answer this issue:

by an objective assessment of the terms of the agreement or relationship (between the parties) with reference to that property

There were three separate terms and conditions used by the exchange, two of which suggested a trust *may* have been created over crypto-assets, but the court found the most recent terms and conditions had superseded the earlier terms and conditions and that as a result of construction of the agreement between the exchange and customers no trust relationship arose under the latter terms (which expressly disclaimed any fiduciary duty or trust relationship).

While the court recognised that there was a potential for a class of customers who had not agreed to the terms and conditions in force as at the date of the liquidation, and so potentially falling under the earlier terms and conditions, the court made an accommodation for any such customers to come forward and argue their position, noting that none had appeared to argue this issue when the matter was before the court.

Hong Kong is yet another jurisdiction adding to the growing list which support the UK approach to classifying digital assets as property, a position which remains divergent from the US approach of considering crypto-assets and digital assets to be securities, and not commodity/property for the purposes of certain regulation.

It is worth noting that the distinction between property and securities is not black and white, and that financial products can be assets / property in an insolvency, however it seems more logically sound to approach crypto-assets first as being a form of property, and then to turn to an analysis of whether something more is present which renders a crypto-asset a financial product or security in addition to it being a form of property, than to take a purely binary property/commodity vs financial product/security view.

Read the full decision [here](#).