

Crypto and NFT Assets in Fraud and Asset Recovery Litigation

International and Vietnam Law Perspectives

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I. Introduction

1. Cryptocurrency has been widely accepted to be any form of currency that exists digitally or virtually and uses cryptography to secure various transactions including but not limited to money remittances and gaming prizes. Its unique proposition is its use of a decentralized system to record transactions and issue new units and it does not rely on traditional mechanisms for financial transactions such as banks to verify the customer and the nature of the transaction. It's a peer-to-peer system that can enable anyone anywhere to send and receive payments. While highly touted with its potential to disrupt the whole financial industry as the wave of the future, it is, in large respects still unregulated.
2. Another development in the blockchain universe is the concept of non-fungible tokens or NFTs. It means something that is unique and cannot be replaced with something else. At the higher levels, NFTs are part of the Ethereum blockchain (although other blockchains have implemented their own version of NFTs). While Ethereum is a cryptocurrency but its blockchain also keeps track of who's holding and trading NFTs.
3. Estimates show that the US leads crypto ownership in terms of total value, with India in second place. However, if the metric is in terms of the population percentage of crypto ownership, Vietnam tops the rankings with one in five people owning crypto.
4. Indeed, Vietnam is the global leader in grassroots cryptocurrency adoption, one of the three Southeast Asian countries to top the list in 2022.¹ Its main adoption drivers are play-to-earn gaming and remittances from overseas.
5. Vietnam has been home to Axie Infinity, the biggest crypto game that has gained wide popularity across Southeast Asia, resulting in a ripple effect that led to the growth of demand for blockchain games in Vietnam, the Philippines, and Thailand. In early 2022, the explosive growth of Axie Infinity was referred to have "*turned Vietnam into the world's most surprising crypto startup hotspot*".²
6. In its heyday, Axie Infinity was once valued at around \$3 billion, with a market capitalization of \$10 billion, and a total transaction value of \$2 million per day, and what a heyday it has been. In March 2022, news of a major hack made headlines to the tune of hackers making off with US\$ 620 million worth of cryptocurrency – the biggest heist in crypto history.
7. Incidents such as the hacking of Axie Infinity, and the collapse of FTX in the US had increased legal action commenced in courts by aggrieved crypto owners with much of their life savings invested in crypto wiped off in a matter of days, if not hours.
8. This article provides an update as to the issues being raised in overseas jurisdictions and perspectives from the courts of Vietnam.

¹ Chainalysis' latest "Geography of Cryptocurrency" report, along with the Philippines and Thailand in the top 5 list.

² Grady McGregor, " 'The beginning of something very big': How one blockchain unicorn turned Vietnam into the world's most surprising crypto startup hotspot", 4 May 2022. See <https://fortune.com/2022/05/04/axie-infinity-sky-mavis-vietnam-crypto-blockchain-startups/>.

II. International Developments in cryptocurrency and NFT asset recovery

9. International jurisprudence has grappled with the question of whether crypto and NFT assets may be classified as “property,” within the protection of the law. Developments show courts displaying a clear openness to issuing the necessary orders to protect the holdings of victims of fraud or crypto scams.
10. In *B2C2 Ltd v. Quoine Pte Ltd*, [\[2019\] SGHC\(I\) 3](#), the Singapore International Commercial Court considered BTC and ETH in the plaintiff’s account with the respondent as “property”, such that the respondent may be held liable for breach of trust when it reversed trades made at an abnormal exchange rate. *B2C2* is considered landmark jurisprudence in crypto litigation, such that it has been cited in future cases concerning these same issues.
11. The question of whether cryptocurrency is “property” was further discussed on appeal with the Court of Appeal in *Quoine Pte Ltd v B2C2 Ltd* [\[2020\] 2 SLR 20](#). The Court of Appeal refrained from making a definitive ruling on the matter but appeared supportive of the notion (and affirmed the reliefs afforded to plaintiffs).
12. *B2C2* and *Quoine* were then cited in *CLM v. CLN* [\[2022\] SGHC 46](#), where the Singapore High Court issued a proprietary injunction, worldwide freezing orders, and disclosure orders against the defendants, in relation to stolen BTC and ETH.
13. The Hong Kong court in *Nico Constantijn Antonius Samara v Stive Jean Paul Dan* [\[2019\] HKCFI 2718](#) and [\[2022\] HKCFI 1254](#) (“*Samara*”) sided with the plaintiff, who was a victim of bitcoin misappropriation. In 2017 and 2021, the High Court issued injunctions against the defendant’s assets, including the total 45.09 bitcoin still in the defendant’s account. After trial, the High Court ruled that the defendant, who was constituted as the plaintiff’s sales agent by way of WhatsApp and email, breached his fiduciary duties and was ordered to compensate the plaintiff.
14. English courts, over the years, likewise appear to have been increasingly sympathetic to plaintiffs of recovery claims of crypto assets. An early case establishing this trend is *AA v Persons Unknown* [\[2019\] EWHC 3556](#). The English High Court granted proprietary injunctions in favour of the plaintiff, who was coerced to transfer bitcoin into the unknown perpetrators’ wallets. Impleaded in the case were the unidentified hackers as Persons Unknown and the operators of the cryptocurrency exchange Bitfinex. In the matter of the proprietary injunction, the court grappled with the issue of whether bitcoin could be considered “property”, which may be the subject of the relief prayed. While ruling that cryptocurrency is neither *choses in possession* nor *choses in action*, the court, referencing *B2C2*, considered that “a crypto asset such as [b]itcoin are property,” as they meet the 4 criteria of property “as being definable, identifiable by third parties, capable in their nature of assumption by third parties, and having some degree of permanence.”
15. In *Fetch.AI Ltd v Persons Unknown Category A and others* [\[2021\] EWHC 2254](#) (Comm), the English High Court explicitly recognized crypto assets as “*choses in action*”, over which plaintiffs could raise an arguable claim for breach of confidence, a conclusion which seems to differ from *AA*. Therefore, the court issued worldwide freezing orders and proprietary injunction orders against the respondents. The court also granted the plaintiff’s request for

*Bankers Trust*³ and *Norwich Pharmacal*⁴ disclosure orders. This case is significant, as it establishes the entire breadth of relief that is available to victims of crypto fraud, and the English courts' readiness to grant the same.

16. In the later *Mr Dollar Bill Limited v. Persons Unknown* [2021] EWHC 2718 (Ch), the English High Court granted a more expansive relief to the plaintiffs, as it ordered *Norwich Pharmacal* disclosures against respondents based outside the UK. Notably, the court departed from earlier rulings, including *Fetch.AI*, which suggested that *Norwich Pharmacal* orders are not available against offshore respondents.
17. The foregoing jurisprudence suggests that from the perspective of common law jurisdictions, particularly those in the Commonwealth, cryptocurrency assets constitute "property", over which the courts may grant interim remedies.
18. Much of the discussion is within the context of requests for interim relief. In this regard, the courts issuing such interim relief need not (and did not) pass upon the question of the nature of cryptocurrency with definitive doctrinal certainty.
19. As regards NFTs, in *Osbourne v. Persons Unknown* [2022] EWHC 2012 (Comm), in the context of a *Bankers Trust* application, the English High Court ruled that "*there is at least a realistically arguable case that such tokens are to be treated as property as a matter of English law.*" However, the decision left the final determination on this issue to further stages in the case. Therefore, the question as to whether NFTs will likewise be subject to similar remedies under common law is yet to be conclusively decided. Nonetheless, it appears that the trend leans toward the issue being decided in the affirmative. The case also establishes that interim relief is likewise available to victims of NFT fraud.
20. A common thread throughout these cases is the inherent difficulty in gathering information on the perpetrators, the status of the assets, and the transactions forming the fraud. After all, one of cryptocurrency's prominent characteristics is anonymity. Therefore, that disclosure remedies (such as *Norwich Pharmacal* and *Bankers Trust* orders) are available and will play a crucial and significant role in evidence gathering and enforcement.
21. In the recent cases regarding the disclosure orders, the plaintiff's affidavit and supporting evidence were considered by the courts as sufficient for proving an arguable case. The courts in the cited cases above appeared sympathetic to plaintiffs who gave accounts of how they were either locked out of their accounts or lost significant sums of bitcoin to unauthorized trades.
22. Enforcement may also prove a challenge as regards cryptocurrency assets, particularly due to the volatile nature of the asset value, as well as the covertness of both the identity of the assets and their holders. In *Samara*, the Hong Kong Court issued [among other reliefs] an "*an Order that the defendant shall pay equitable compensation to the plaintiff in the event*

³ A type of injunctive remedy which requires a financial institution to provide information and documents in respect of a customer who has perpetrated fraud. It provides a potential means to ascertain the identity of perpetrators of fraud in cases involving the misappropriation of cryptocurrency through currency exchanges.

⁴ A type of injunctive remedy obtained against innocent third parties who know the identity of a wrongdoer or potential wrongdoer. The order directs the innocent third party(ies) to disclose this information to the victim.

that the plaintiff is unable to recover the 45.08883459 bitcoins ... with quantum to be assessed.” With the fluctuating prices of cryptocurrency, the valuation of the cryptocurrency could be a significant discussion point in any recovery measure.

III. Overall regulatory framework for virtual assets/cryptocurrencies in Vietnam

23. In contrast to the jurisprudence discussed above, virtual assets and cryptocurrency may not enjoy the same protection under Vietnamese law.
24. There is yet no official legislation to govern virtual assets or cryptocurrencies in Vietnam. A draft legal framework is in the pipeline as the Government is planning to establish an official legal framework for virtual assets/cryptocurrencies.⁵ Particularly, the following were planned:
 - a. In August 2018, the Ministry of Justice (the **MOJ**) shall submit a report on the applicability of virtual asset or cryptocurrency in Vietnam and examine the international experience on this subject to the Prime Minister (the **PM**).
 - b. In December 2018, the MOJ shall prepare and submit to the PM a proposal on a draft regulatory framework on virtual asset or cryptocurrency.
 - c. In June 2019, the Ministry of Finance shall prepare and submit to the PM a proposal on the establishment of tax regulation on virtual asset or cryptocurrency.
 - d. In September 2019, the Ministry of Public Security and MOJ shall prepare and submit to the PM a draft regulation on criminal offenses and an administrative violation relating to virtual asset/cryptocurrency.
 - e. In December 2020, the MOJ shall complete a comprehensive draft regulation on cryptocurrency and submit a dossier to the PM for approval.

However, the above-mentioned timeline is currently delayed. On 1 April 2020, the MOJ submitted Report No. 70/BC-BTP to the PM on the applicability of virtual asset or cryptocurrency in Vietnam and the examination of the international experience, which should have been submitted in August 2018. In April 2020, a research group on cryptocurrencies and virtual assets of the Ministry of Finance was established under Decision No. 664/QD-BTC.

25. Accordingly, the concept of “virtual asset or cryptocurrency” does not (yet) fall under any current regulatory framework. The authorities have confirmed this understanding in various directives and official letters.
 - a. The State Bank of Vietnam (the **SBV**) has taken the view that cryptocurrency is not a valid form of payment under the laws of Vietnam.⁶ Therefore, cryptocurrency is not considered as cash or coin (i.e., fiat money), cheques, payment orders, collection

⁵ Section II of Decision No. 1255/QD-TTg dated 21 August 2017 of the Prime Minister on approving the project of establishing a legal framework for the management of virtual assets, electronic money, and cryptocurrency.

⁶ Official Letter No. 5747/NHNN-PC dated 21 July 2017 of the State Bank of Vietnam sent to the Government Office in response to Mr. Vu Thai Ha’s proposal on building computer centre for Bitcoin, Litecoin and other cryptocurrencies.

- orders, or bank cards. In addition, it is not recognized as a foreign currency or electronic money.
- b. Vietnam eCommerce and Information Technology Agency (now known as Vietnam eCommerce and Digital Economy Agency) has taken the view that bitcoin does not have the basic characteristics of goods and services, thus, it is neither a good nor service.⁷ In a broader sense, this viewpoint covers also other cryptocurrencies.
 - c. The State Securities Commission (the **SSC**) announced that cryptocurrency is a new product which is not governed by the current legal and regulatory framework.⁸ It can be inferred that the SSC does not recognize cryptocurrency as a type of security under the current Law on Securities.
26. Regarding the transaction relating to virtual asset or cryptocurrency, the authorities of Vietnam share a common view that these transactions are not encouraged for the time being. In particular:
- a. The PM had taken to task all relevant ministries and bodies (i) to warn the public of the risks associated with cryptocurrency trading, and at the same time, (ii) to prohibit credit institutions and securities companies to conduct transactions relating to cryptocurrency.⁹
 - b. The SBV prohibits all Vietnamese credit institutions and intermediary payment service providers from processing banking transactions related to cryptocurrency (including transactions via bank cards issued by such credit institutions).¹⁰
 - c. The SSC prohibits all public companies, securities companies, fund management companies, securities investment funds from issuing cryptocurrency, conducting, and brokering transactions involving cryptocurrency.¹¹ Previously, SSC advised all investors to be careful when participating in such cryptocurrency-related transactions.¹²
27. In 2017, a Vietnamese Court gave judgment on the first case of cryptocurrency. The case revolves in relation to tax duties arising from bitcoin transaction. The court held that the tax authority has made a mistake while determining that cryptocurrency is a commodity. The legal framework of cryptocurrency is under development and the interpretation of the tax authority may interfere with the monetary policy of the State Bank of Vietnam.¹³

⁷ MOJ proposal attached to Statement No. 24/TTr-BTP dated 05 June 2017.

⁸ Announcement published on SSC official website <[Chi tiet tin \(ssc.gov.vn\)](http://Chi_tiet_tin_(ssc.gov.vn))> on 29 January 2018 at (Vietnamese only).

⁹ Directive No. 10/CT-TTg dated 11 April 2018 of the Prime Minister on enhancement of management on activities in relation to Bitcoin and other similar cryptocurrency.

¹⁰ Directive No. 02/CT-NHNN dated 13 April 2018 of the State Bank of Vietnam on measures to enhance the controls over transactions and activities in relation to cryptocurrency.

¹¹ Official Letter No. 4486/UBCK-GSDC dated 20 July 2018 of the State Securities Commission on management of the issuance, conducting and brokerage of cryptocurrency-related transactions

¹² Announcement published on SSC official website <[Chi tiet tin \(ssc.gov.vn\)](http://Chi_tiet_tin_(ssc.gov.vn))> on 29 January 2018 at (Vietnamese only)

¹³ Judgment No. 22/2017/HC-ST of the People's Court of Ben Tre.

28. In 2020, there is a robbery case related to bitcoin in Vietnam. The suspects used violence to take bitcoin and some other cryptos from their owner and a criminal case has been filed in court. The court remitted the case to the police authorities for further investigation, but not due to lack of jurisdiction. It is argued that if cryptos are not considered “property” under Vietnamese law, the above case cannot be considered a criminal case with a proper subject matter of robbery. The subject matter of a robbery case must be considered “property”. Since the case has proceeded at the procuracy and even to the court, it means that cryptos have been considered as “property”. Until now, the case has not been finally settled by the court, leaving the issue of whether or not crypto is considered “property” unsettled.
29. In conclusion, “virtual asset or cryptocurrency” does not fall under any existing definition of the current legal and regulatory framework of Vietnam. Considering such understanding, cryptocurrency-related transactions are not governed by any laws and regulations and may not enjoy any protection under the law. Accordingly, authorities have warned the public to be careful with such transactions, while prohibiting all banks and securities companies from processing and participating in the transactions.
30. However, it does not mean that there is no other recourse for defrauded and aggrieved cryptocurrency investors. If there is any criminal element involved in the transactions such as but not limited to fraud, deceit, cheating, or robbery, then the aggrieved investors could well be within their rights to file a criminal case against the defendant.

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