Overview
First Tuesday Update is our monthly take on current issues in commercial disputes, international arbitration, and judgment enforcement.

Over the last decade, cryptocurrencies have flourished. The first cryptocurrency was developed in 2009 and, as of this writing, the market capitalization of all cryptocurrency is over $332 billion.[1] However, open questions remain as to how legal systems and courts will treat cryptocurrency assets. In particular, the question of whether or how courts will be able to enforce judgments against cryptocurrency assets is still a developing matter.

Cryptocurrencies are digital currencies that rely on encrypted, decentralized ledgers to record all transactions securely.[2] The security and reliability of the decentralized ledger is a hallmark of cryptocurrencies, and it makes cryptocurrency assets fairly traceable. However, courts and regulatory bodies are still determining whether or how to enforce judgments against those assets. Despite the reliability and traceability of the ledgers, cryptocurrency is obviously not a physical asset that can be seized. Moreover, because the value of cryptocurrency is dependent solely on the market, courts seem to have difficulty ascertaining how to value cryptocurrency.

In the United States, the precise legal status of cryptocurrency is not settled,[3] but since 2014, the IRS has considered cryptocurrency to be "property" for purposes of federal taxes.[4] This suggests that, like other property, it can be seized by a judgment creditor.

The law is a bit more developed in England, where Steptoe’s litigation team has been at the forefront of cryptocurrency-related developments though our London office. In particular, in September 2018 Steptoe secured before the High Court in London what is believed to be one of the first proprietary freezing injunctions over cryptocurrency in England.[5] In that case, Steptoe’s client applied for a freezing order over two types of cryptocurrency—namely, Bitcoin and Ethereum—valued at the time at approximately £1.5m ($1.8m). In court, the defendants offered to undertake to preserve the relevant sum of cryptocurrency pending the outcome of the claim, to which Steptoe’s client agreed subject to the defendants providing evidence to confirm that the cryptocurrency had not already been dissipated. However, having reviewed the two screenshots provided by the defendants as purported evidence of their possession of the cryptocurrency, the English judge accepted the position of Steptoe’s client that the defendants had “produced at least one document which appears to have been altered in some way and another document which simply does not prove the proposition that is put forward to achieve”—namely, that the defendants still held the cryptocurrency in dispute. The English judge concluded that these findings were “very significant” and made the freezing order as sought by Steptoe’s client.

This decision was significant as it showed a willingness by the English court to treat cryptocurrency as “property,” such that it could be protected from dissipation by means of a freezing order. The judge wrote that he was “satisfied that the court” had the power to issue an injunction over cryptocurrency, so long as it is “otherwise appropriate to do so.”
Since that decision, the issue of classifying cryptocurrency as "property" has been considered more closely in the context of English law. In particular, in November 2019 the UK Jurisdiction Taskforce published its Legal Statement on Cryptoassets and Smart Contracts (the Statement). The Statement recognized that cryptoassets and smart contracts "undoubtedly represent the future" and would "no doubt be the subject of judicial decision." While not binding on English courts, the Statement concluded—in line with the decision above—that cryptoassets, and therefore cryptocurrency, "have all the indicia of property" and are therefore to be treated as such. The Statement acknowledges the significant consequences of this classification, in particular in respect of the application of the law on inheritance, insolvency, fraud, and breach of trust.

Since its publication, the English court has considered the Statement in at least one reported decision from December 2019 and endorsed its conclusion as to cryptocurrency constituting "property" within the meaning of English law. In doing so, the English court ordered the freezing injunction sought by the claimants in that case, too.