Cryptocurrencies, *Le Bitcoin*, and Regulatory Reach

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Reviewing Iris M. Barsan, *Legal Challenges of Initial Coin Offerings (ICO)*, 3 **Revue Trimestrielle de Droit Financier (RTDF)** (2017), available at SSRN.

Cryptocurrencies and Initial Coin Offerings (ICOs) present an extreme challenge to law organized by national boundaries. *Legal Challenges of Initial Coin Offerings* by Iris M. Barsan—a modestly titled (for US standards) and concise article—provides a comparative account of the regulation of cryptocurrencies. Fundamental questions are at stake: What are cryptocurrencies? Are they money? Securities? Something completely new? One of the article's strengths is its recognition that we should care deeply about who gets to provide the answer. The article contributes to a growing literature about a hot topic by being explicit about the jurisdictional and choice-of-law issues inherent in transactions carried out in what the author describes as "completely virtual spaces without any territorial or geographic boundary."

What are cryptocurrencies? Existing categories are of limited help. Cryptocurrencies have characteristics of money or securities, so regulation could borrow from these areas, but their structure varies and they do not fall cleanly into one category or the other. Barsan contests the characterization of cryptocurrency as a legally unidentified object (*objet juridique non identifié*). Instead the author suggests that we should think of it as having multiple identifications based on the characteristics of the particular cryptocurrency, especially currency-like or security-like tokens.

The author also points out that the characterization of cryptocurrencies depends on what country gets to define them. An example from the article provides a sense of the complexities. Assume you need to determine the law that governs an ICO or cryptocurrency transaction. Absent a choice-of-law clause, the governing law might be that of the consumer's home state (if investors count as consumers). Or the law of the seller's state might govern, but only if investors do *not* count as consumers *and* tokens are considered "sale of goods." If no governing law can be determined, the default is the "law of the country where the damage occurs." But even that default is problematic in these transactions that lack "territorial attachments." (Where is an investor's virtual wallet?) Finally, national courts may simply apply mandatory national investor protection rules, regardless of other conflict-of-laws issues. You get the picture. Ultimately, these complications illustrate the need for articles like this one that patiently detail the legal framework.

The complexity of the topic may prompt in the reader an urge for a more literal and simplified map. I provide the chart below both to highlight the author's contributions and to push the author to think about formats for more simplified reference. (The underlying information is derived from the article, though any mistakes are mine.)

Table: EU Conflict of Jurisdiction Rules

† The author points out the difficulty of establishing directed activity if the white paper is “written in English only, published on an English website” with an extension “like .com or .net” and the currency used was Bitcoin or Ether.

The US SEC Chairman opened a recent statement by pointing to a world “abuzz” about cryptocurrencies and ICOs, adding this novelistic take: “There are tales of fortunes made and dreamed to be made.” In this context—a frenzy of activity, dreams of great fortunes, and fears of bubbles and busts—part of the article’s appeal is its tone of understated pragmatism. It is not normative, nor does it claim to provide a universal solution. Intergalactic financial regulation does not exist, and the article is restrained even in identifying a unified European solution. Its last paragraph concludes that uniformity in Europe might very well be desirable, but ends with this final sentence: the “European legislator is, however, not known for his speed.” Ultimately, the article’s value is not in providing a solution, but rather in mapping the problem and the beginnings of regulatory responses.

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