

CRYPTOCURRENCIES SANS FRONTIÈRES

Jurisdictions around the world are approaching the regulation of cryptocurrencies in a variety of ways. Here, four Legalink lawyers provide snapshots of the latest thinking in their region



Julia Charlton

Countries are responding in different ways to the disruption caused by the rampant interest in cryptocurrencies. While some are banning Initial Coin Offerings (ICOs), others are taking a more nuanced approach. In this article, attorneys from four Legalink member firms offer their perspectives on the regulatory framework, or lack thereof, for such cryptocurrency-related opportunities in their jurisdictions.

accounts, and the latter \$500,000. Licenses can only be obtained by the residents of High-Tech Park (HTP) – a special ‘sandbox’ regime.

Fourth, companies will be allowed to conduct operations with tokens (except holding) using an HTP resident. The resident is also allowed to perform most operations with tokens. The HTP will work as a large sandbox to play with cryptos – almost 200 companies are in and new players are welcome.

Given the recent tightening of regulations in other countries, it is expected that this new law will allow Belarus to become a hub for crypto activities.

Hong Kong

Charlton's principal partner *Julia Charlton* writes: Hong Kong's Securities and Futures Commission (SFC) warned investors of cryptocurrency-related risks on 9 February 2018 and noted that it has written to seven ICO issuers and seven crypto exchanges regarding the regulatory requirements applicable to cryptocurrencies that are securities or futures under Hong Kong law.

Cryptocurrencies are typically treated as ‘virtual commodities’ which are not regulated in Hong Kong. However, where they have characteristics of securities, such as a right to share revenues or to repayment, they may constitute shares, interests in a collective investment scheme or debentures.

ICOs are typically structured as sales of ‘utility tokens’ which provide access to a platform and/or a means of payment for its services. These are generally seen as not constituting securities and the SFC's latest warning confirmed that utility tokens, while not defined, are not securities. Ultimately, this is a decision for the courts.

Cryptocurrency exchanges require a money service operator licence for offshore receipts or remittances of fiat currencies. Cryptocurrency exchanges and ICO issuers are adopting best practices in implementing AML and CTF procedures.

Belarus

Vilgerts partner Roman Shpakovsky writes: In December 2017, Belarus hit the headlines around the world with its new law governing cryptocurrency markets. Decree of the President of the Republic of Belarus, No. 8 ‘On Development Of Digital Economy’, dated 21 December 2017, is intended to make Belarus one of the top crypto-friendly countries globally. The new law came into effect at the end of March.

Under the new law, operations related to cryptocurrencies will be tax-free for individuals. Mining, exchanging, and converting cryptocurrencies and tokens to ‘fiat’ money will not create tax obligations. For companies, most operations will also be tax-free (including VAT), including the proceeds from ICOs.

Second, a token will be recognised as an asset for legal and accounting purposes. Tokens will also create legal obligations between the issuer and the holder.

Third, a framework for crypto-exchanges and platforms (to arrange ICOs and other complex transactions with tokens) will be established. The former will require cash reserves of at least \$100,000 on the



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Hong Kong's reticence to clamp down on ICOs is welcome given that ICOs are providing a legal means of crowdsourced fundraising, particularly for start-ups where bank and venture capital financing may not be an option. In turn, these ICOs are providing the funding vital to blockchain technology.

Portugal

Sêrvulo & Associados associate Francisco Mendes Correia writes: In Portugal the legal landscape underlying ICOs is uncertain and most national financial supervisors – the Portuguese Securities Market Commission (CMVM) and the Portuguese Banking Authority (Banco de Portugal) – have issued warnings on the risks of virtual currencies, and virtual currency offerings in particular.

On 3 November 2017 the CMVM took the view that “the clear majority of ICOs are not regulated”. Based on that assumption, it warns about typical risks associated with virtual currencies: price volatility, fraud, money laundering and inadequate information.

Banco de Portugal has a similar view and assumes that issuing and distributing virtual currencies in Portugal is not per se illegal, while pointing to the unsupervised and unregulated nature of these activities. It issued a letter to supervised entities in 2015 (Carta-Circular no11/2015/DPG), recommending them not to acquire, hold or sell virtual currencies. This is in line with its previous warnings, wherein risks were emphasised. It should also be noted that the Banco de Portugal referred to supervised entities' AML obligations: this can be viewed as an indication of this supervisor taking the view that virtual currencies are covered by AML national and EU regulations.

US

Bell Nunnally & Martin partner and litigation chair Christopher Trowbridge writes: With the Securities and

Exchange Commission (SEC) launching a major investigation into cryptocurrency firms, the regulatory heat is increasing in the US. On 28 February The Wall Street Journal reported the SEC had issued “dozens of subpoenas and information requests to technology companies and advisers involved in the red-hot market for cryptocurrencies.”

SEC chairman Jay Clayton foreshadowed this in his speech before the Senate on 6 February bemoaning that some market participants “have sought to prey on investors’ excitement about the quick rise in cryptocurrency and ICO prices.”



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Christopher Trowbridge

While reinforcing his optimism that innovation enables capital formation and opportunities, Clayton cautioned that there is less investor protection in cryptocurrency/ICO markets than in traditional securities markets. Reiterating that structures of ICOs appear to implicate securities registration and other investor protection provisions of US securities laws, he bluntly characterised arguments to the contrary as “form over substance”.

With respect to the retail fund space, Clayton stated the SEC will not permit “ETFs and other retail investor-oriented funds to invest in cryptocurrencies in a manner inconsistent with their obligations under the federal securities laws” with liquidity, valuation and custody of the holdings, and creation, redemption and arbitrage remaining as issues needing to be addressed.

He further announced the SEC was collaborating with the Commodity Futures Trading Commission, the Treasury, and the Department of Justice to recommend enforcement against those who conduct ICOs, or otherwise market cryptocurrencies, in violation of federal securities laws.

This initial volley of subpoenas from the SEC appears to be the start of careful scrutiny of how innovation around cryptocurrencies and ICOs will fit into the US traditional securities regulatory framework.



REGULATORY TRENDS – FROM TEXAS TO TOKYO

The world's interest in cryptocurrency has soared and, along with this interest, regulatory scrutiny has increased. China and South Korea have banned ICOs, and countries including Hong Kong, Singapore, and the US have issued regulatory guidelines.

Despite such bans and warnings, with Bitcoin trading above \$19,000 in December 2017, up from around \$800 in December 2016, financial markets have taken note and everyone from individual retail investors in Asia to global trading giants like US-headquartered Goldman Sachs are exploring cryptocurrency strategies. Investors and funds alike are seeking advice on which jurisdictions will

provide the most advantageous platform for pursuing cryptocurrency opportunities. Legalink member firms are uniquely positioned to work together to advise clients on regulation involving ICOs and token sales in jurisdictions around the globe. In January, Legalink published a compendium ‘ICOs and Token Sales – Regulatory Framework in Various Jurisdictions’ sourced from 42 jurisdictions around the globe to provide insight into those countries’ regulatory perspectives on the burgeoning and unpredictable cryptocurrency movement. The compendium can be accessed at www.legalink.ch.

From Texas to Tokyo, businesses and organisations can look to Legalink member firms to obtain access to a global legal perspective on the cryptocurrency scene.