

# Kluwer Arbitration Blog

## What is Cryptocurrency, Exactly? Navigating Korea's Developing Landscape of Cryptocurrency Jurisprudence

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According to a [2022 report by a cryptocurrency payment gateway company](#), since the cryptocurrency boom in 2017, Korea has truly become the “crypto hub of Asia,” powering nearly 30% of all cryptocurrency trades. But the unfortunate reality of these voluminous Korea-powered trades is that related disputes will inevitably arise.

It is no secret that many private parties seeking to resolve their crypto-related disputes choose arbitration as their dispute resolution mechanism. This may be not least because they appreciate the harmony between the decentralized character of cryptocurrency and the freedom of party autonomy in international arbitration, which cannot be found before national courts.

That said, like any other jurisdictions, Korea's crypto jurisprudence is still far from settled, and stakeholders as well as counsel are navigating an era of uncertainty. Although court precedents are accumulating and new regulatory schemes are being instituted, there is not yet a definitive answer to even the most basic question on the nature of cryptocurrency: *what is cryptocurrency, exactly?*

This question is not an easy one to answer, as we have seen, for example, in [the two rulings from the U.S. District Court for the Southern District of New York](#) where the court reached seemingly conflicting conclusions on whether buyers that purchased certain cryptocurrencies on secondary trading platforms had a reasonable expectation of profit, which would make the sales “investment contracts” subject to U.S. federal securities laws.<sup>1)</sup> (*See also* a [past article](#) on whether cryptocurrency qualifies as property.)

The question is not just an abstract one either, as it fundamentally impacts how parties should frame their specific requests for relief or enforcement measures, which can even determine the outcome of a case. Below, we examine how the Korean courts have grappled with this question and how practitioners can strategically enforce against crypto assets.

### What is Cryptocurrency, Exactly?

The legislative and regulatory framework for cryptocurrency is still being developed in Korea. Consequently, various issues about the legal nature of cryptocurrency (and their implications) have thus far mostly been dealt with by the courts.

### *Cryptocurrency is Digital Information, and Not a “Thing”*

In the [Seoul High Court Judgment No. 2021Na2010775](#) dated 8 December 2021, the Seoul High Court reviewed whether a cryptocurrency exchange defendant violated its duty of care when the plaintiff requested that its cryptocurrency be transferred to one address, but the defendant transferred it to another. There, the court held that the defendant must transfer to the plaintiff the cryptocurrency of the same kind, quality, and amount. But in the process, the court noted that the defendant’s duty to do so does not arise under a bailment contract. According to the court, custody could be entrusted under a bailment contract only for “things” as defined under the [Korean Civil Procedure Act \(“KCPA”\)](#). But cryptocurrency was in essence digital information and not “corporal thing[s], electricity, [or] other natural forces which can be managed,” and thus did not qualify as a “thing” under the KCPA (*see* KCPA, Articles 98, 693).

### *Cryptocurrency is an Intangible Asset with Property Values*

In the [Supreme Court Judgment No. 2018Do3619](#) dated 30 May 2018, the court was asked to review the lower court’s ruling that the defendant’s criminal proceeds in cryptocurrency could be confiscated under Korean law. The Supreme Court upheld the lower court’s ruling, holding that cryptocurrency could be confiscated because it qualified as “intangible assets with property values” under the relevant law. From the court’s perspective, this conclusion was apparent in view of how the defendant had received the cryptocurrency in consideration for certain pornographic material.

### *Cryptocurrency—At Least According to One Lower-Level Court—is Not “Currency” that Can be Paid, Nor a “Thing” that Can be Delivered*

In the [Seoul Southern District Court Judgment No. 2019GaHap112183](#) dated 3 September 2020, the plaintiff sought a claim for the defendant to “pay” an amount in a particular cryptocurrency. There, the court dismissed the case without prejudice on the grounds that one cannot “pay” in cryptocurrency. In the court’s view, a claim for payment was proper only as to currency that had the force of legal tender—a status exclusively bestowed in Korea on notes issued by the Bank of Korea under Articles 47 and 48 of the [Bank of Korea Act](#). This view was later confirmed in the [Supreme Court Judgment No. 2020Do9789](#) dated 16 December 2021.

The Seoul Southern District Court noted in *dicta* how the plaintiff might have presented its claim. In particular, the court noted that (i) a claim for the defendant to “deliver” the cryptocurrency would also have been dismissed because cryptocurrency was not a “thing” that can be delivered (*see supra* Seoul High Court Judgment No. 2021Na2010775); (ii) but the court might have granted an order for the defendant to take the digital steps necessary for the transfer of ownership of the cryptocurrency being sought, considering that cryptocurrency is an “intangible asset with tangible property values” whose ownership can be transferred (*see supra* Supreme Court Judgment No. 2018Do3619 dated 30 May 2018).

## How Should One Enforce Against Crypto Assets in Korea?

To maintain the *status quo* and minimize enforcement risks at a later stage, a potential judgment creditor may consider seeking provisional measures against the potential judgment debtor's assets in Korea before initiating, or in parallel with, arbitral proceedings (or civil litigation).

The application for a provisional measure should specify the asset that will be subject to the measure (whether the provisional measure is a *preliminary attachment* that is designed to freeze a potential judgment or award debtor's particular asset to secure the potential award creditor's monetary claim, or is a *preliminary injunction* that more broadly orders a party to take or to refrain from taking certain actions).

Unlike in many common law countries, a **Mareva injunction** is not generally available in Korea. That is, unlike a Mareva injunction, which operates on an *in personam* basis and restrains a respondent from disposing of or diminishing the value of its assets, freezing orders in Korea operate *in rem*, meaning that they involve the court's attachment of the particular assets themselves. The practical implication of this difference is that determining the exact nature of the assets against which freezing orders are sought is particularly important in Korea, because different types of provisional measures should be sought depending on the nature of the assets. In this context, the uncertain nature of crypto assets has created a lack of clarity as to how parties should structure their enforcement measures before Korean courts.

### *Preliminary Attachment Against Crypto Assets to Secure Enforcement of Monetary Claims*

This lack of clarity can be observed in examples of applications for preliminary attachments against crypto assets. The fact that there is not yet an agreed set of rules on how digital assets (including cryptocurrency) are classified has created pitfalls.

For instance, in Seoul District Court Decision No. 2018KaDan800115, an application to attach certain portion(s) of "bitcoins" was dismissed because the applicant invoked a provision under Korean law through which a debtor could take possession of corporeal movables, which the bitcoins at issue were not, according to the court. In **Ulsan District Court Decision No. 2017KaHap10471 dated 5 January 2018**, an application to preserve "a claim for the delivery of bitcoins" was dismissed, because, in the court's view, such a claim was not a monetary claim that could be preserved in the form of a preliminary attachment under Korean law.

However, there at least appears to be a generally accepted best practice for preliminary attachments from certain successful applications: we gather that, nowadays, it has become standard practice for parties seeking a preliminary attachment against a potential judgment or award debtor who holds assets mainly in cryptocurrency to target the potential debtor's claim to retrieve its cryptocurrency from a cryptocurrency exchange.

### *Preliminary Injunctions Concerning Cryptocurrency*

The jurisprudence surrounding *preliminary injunctions* related to cryptocurrency is still quite unclear. There is at least one first-instance court decision that granted an injunction against the sale

(disposition) of cryptocurrency (Gwangju District Court Decision No. 2021KaHap50078 dated 3 February 2021) because the court was satisfied that there was a sufficient need to preserve the applicant's right to bring a claim under an agreement for the defendant to transfer certain bitcoins to the applicant. But practitioners seeking similar injunctions should proceed with caution because an appeal for the case is still pending and also because there currently appears to be some controversy about how preliminary injunctions concerning cryptocurrency fit into the existing Korean legal framework on civil execution.

## Conclusion

In view of the still-developing crypto regulations and jurisprudence in Korea, we recommend trying to preempt and offset the risks arising therefrom to the extent possible, through smart and detailed contract drafting. For instance, parties could ensure that their crypto-related contracts provide what specific rights and claims will arise in relation to any crypto assets. They can also consider adding appropriate security measures.

Still, the bottom line is that uncertainty remains about the nature of cryptocurrency. Thus, we should keenly monitor the constantly evolving jurisprudence in search for an answer to this fundamental question: *what is cryptocurrency, exactly?*

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## References

*SEC v. Ripple Labs, Inc.*, No. 20-CV-10832 (AT), 2023 WL 4507900 (S.D.N.Y. July 13, 2023);  
**?1** *SEC v. Terraform Labs Pte. Ltd.*, No. 23-CV-1346 (JSR), 2023 WL 4858299 (S.D.N.Y. July 31, 2023).

This entry was posted on Thursday, November 16th, 2023 at 8:21 am and is filed under [Crypto](#), [Cryptocurrency](#), [Korea](#), [Technology](#)

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