

CRYPTOCURRENCY – STATE OF PLAY IN INDIA

What is Cryptocurrency

A form of digital currency based on mathematics in which encryption techniques are used to regulate the generation of units of currency and verify the transfer of funds. It is exchanged between peers privately without the involvement of intermediaries such as banks or financial institutions.

State of Play

Cryptocurrency is currently not regulated in India. While not explicitly prohibited, it has no regulatory foundation or recognition.

- » **RBI:**– Since December of 2013, the RBI has cautioned users **thrice** against the use of virtual currency. The RBI noted that “the creation, trading or usage of VCs including Bitcoins, as a medium for payment are not authorised by any central bank or monetary authority” and stressed that use of virtual currency poses several **risks** -
 - » Virtual currency is prone to losses arising out of hacking, loss of password.
 - » There is no established framework for recourse to customer problems/disputes/charge backs with respect to payment of virtual currency.
 - » Virtual currencies have no underlying or backing of any asset and high volatility in the value of virtual currencies may expose the users to potential losses.

Not legal tender in India

Cryptocurrency is not legal tender in India. Legal tender is given legal recognition when it is either issued by a government authority or by an institution officially recognised by a government authority. Bank notes, coins and 'stored value' prepaid payment instruments are considered valid legal tender in India.

Bank notes: – The Reserve Bank of India (RBI) under the provisions of the **RBI Act, 1934**, has the exclusive right to issue bank notes.

Coins: – Coins are 'coined' at mint factories established by the Indian government and are issued under the authority of the **Central Government**. The term 'coin' is defined under the Coinage Act, 1906 to mean a coin that is stamped by the government or any other authority empowered by the government.

Prepaid payment instruments: – In 2007 the RBI recognised stored value pre-paid instruments that can be used to discharge payment obligations. The operations of payment systems undertaking clearance, payment and settlement of monies are regulated by the Payment and Settlement Systems Act, 2007.

- » Traders on exchange platforms are exposed to legal and financial risks, as there is no clarity on the legal status of these exchange platforms.
- » Virtual currencies may be used for illicit and illegal activities and could subject the users to unintentional breaches of anti-money laundering and combating financing of terrorism laws.
- » **Ministry of Finance Committee:** – On March 15, 2017, the Department of Economic Affairs, Ministry of Finance constituted an Inter-Disciplinary Committee to -
 - » take stock of the present status of virtual currencies both in India and globally;
 - » examine the existing global regulatory and legal structures governing virtual currencies;
 - » suggest measures to deal with such virtual currencies including issues relating to consumer protection, money laundering, etc; and
 - » examine any other matter related to virtual currencies which may be relevant. The committee has invited public comments and suggestions on how to regulate virtual currencies. No reports or white papers have been issued so far.
- » **Supreme Court proceeding:**– A petition challenging the legality of cryptocurrencies in India was registered on November 6, 2017 and is currently pending before the Supreme Court of India. The petition highlights the urgency and importance for the need to either prohibit or regulate the flow of cryptocurrency and that such cryptocurrency is made accountable to exchequer. No orders have been passed as yet on this petition.



Legal issues

Absent regulation or clarification from the RBI/ Indian government on the legal status of cryptocurrencies, the use of cryptocurrencies raises certain interesting questions:

>> Are cryptocurrencies “Goods”?

Goods are generally understood to mean movable property of any kind. By their nature, cryptocurrencies may be categorised either/both as a good/commodity or currency. If these are goods, do consumer protection laws apply? Are there any implied warranties associated with them?

>> Can cryptocurrencies be taxed?

Depending on whether cryptocurrency is treated as a currency or a capital asset, it may be contended that acquisition, trading or sale of cryptocurrency is subject to taxes such as capital gains. **News reports** also suggest that the tax department is scrutinising high net-worth individuals that are trading cryptocurrencies.



>> How would one enforce a cryptocurrency contract?

Contracts under Indian law need certain prerequisites to be enforceable. For instance, wagering contracts are void. Can it be a defence to enforcement that cryptocurrencies are wagering contracts? Would one enforce a cryptocurrency contract as monies due on a promise to pay? Or would it be a claim on defective goods?

>> Are cryptocurrencies subject to data protection laws?

Indian law regulates the collection, receipt, possession and storage of sensitive personal data (SPDI). The definition of SPDI includes items such as password and financial information (such as bank account, credit card). If the generation or any part cryptocurrency is considered as ‘financial information’, the users and cryptocurrency exchanges will be required to comply with handling such SPDI in the manner required by law.

>> Is foreign investment allowed in a cryptocurrency issuer/exchange?

Investment in financial services that are regulated by regulatory authorities is generally **allowed**. Receiving foreign investments in ‘Other Financial Services’ that are not regulated need prior government approval. If cryptocurrencies exchanges, for instance, are indeed “financial services”, they may be categorised as ‘Other Financial Services’ requiring prior approval.

