Legal qualification of cryptocurrencies under Swiss insolvency law

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Switzerland is home to one of the world's largest cryptocurrency ecosystems, the so-called 'Crypto Valley' in the city of Zug. However, with cryptocurrencies growing in popularity, problems are inevitable.

In July 2018 the Financial Market Supervisory Authority (FINMA) opened enforcement proceedings against the German-Swiss cryptocurrency mining venture Envion AG on suspicion that it had illegally accepted public funds. Shortly before, Envion AG had raised $100 million in an initial coin offering (ICO), one of the largest ICOs at that time. Only a few months later in November 2018, the bankruptcy court of Zug decided to liquidate Envion AG.

The Envion AG insolvency inevitably begs the question of how cryptocurrencies should be treated in debt enforcement and insolvency proceedings. For instance, the bankruptcy administrator may have to locate and liquidate cryptocurrencies held by Envion AG and creditors may want to recover the cryptocurrencies which they invested during the ICO of Envion AG.

Cryptocurrencies have a number of particularities which distinguish them from other asset categories, including that they:

- are entirely electronic;
- are virtual unlike physical assets;
- are anonymous by design and their owners' identities are unknown; and
- may be held at an exchange, but these exchanges are often not supervised like banks and vary in their level of cooperation with financial authorities.

These particularities raise numerous questions relating to (for example) the seizure, attachment and liquidation of cryptocurrencies from a Swiss insolvency law perspective.

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Legislative context

The prevailing view today in Switzerland is that cryptocurrencies qualify as intangible assets sui generis (Report of the Swiss Federal Council of 14 December 2018). For instance, the tax authorities of the Canton of Zurich have qualified cryptocurrencies as (taxable) movable objects similar to cash or precious metals. Similarly, in its 2015 report on the revision of the Money Laundering Ordinance, FINMA defined cryptocurrencies as tradable digital representations of a value that takes over the function of money.

Further, cryptocurrencies can be used as a means of payment for real goods and services, even if they are privately issued and used within a limited circle of users; however, they are not accepted as legal tender. Virtual currencies are thus classified as assets in the sense of the Money Laundering Ordinance.

What does this qualification of cryptocurrencies mean in the context of Swiss insolvency law? As intangible assets sui generis, cryptocurrencies in general seamlessly fit into the existing Swiss civil law framework even without a law in place that expressly deals with distributed ledger technology-based tokens and the like. Therefore, cryptocurrencies may be subject to regular debt enforcement and insolvency proceedings, including seizure and attachment proceedings.