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# What About Volatility? Enforcement Of Crypto-Related Decisions in Spain

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## Abstract

This article deals with the possibilities at the disposal of a judgment or award creditor to obtain the refund in kind of crypto assets and digital assets during enforcement proceedings in Spain. We explore the enforcement orders that Spanish Courts may issue and the existing alternatives when those orders fail to provide with the return in kind of the digital assets. In particular, we will cover the risk of volatility and the instruments at the disposal of the creditor to reduce it according to Spanish law.

## 1. Request for Legal Opinion: a case study

CryptoABC obtained an international arbitration award against the Spanish company XYZTechno.<sup>1</sup> In that award, XYZTechno was ordered to return to CryptoABC a certain amount of digital assets, consisting of cryptocurrencies and various types of tokens, which CryptoABC had provided as interest-free funding to XYZTechno.

CryptoABC has asked for our opinion about the possibility to enforce such award in Spain. CryptoABC is interested in tracing and recovering those digital assets,

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<sup>1</sup> This article refers to an actual case that is the subject of an international arbitral award issued in 2022 and administered by one of the world's leading arbitral institutions. For reasons of confidentiality, the reference to the award is omitted. For the same reasons, the names of the parties and references to the products and services covered by the cryptographic platform have been modified and anonymized.

wherever they may be. Bearing in mind that the arbitral award ordered XYZTechno to those digital assets in kind -and not their monetary equivalent-, CryptoABC has asked us to consider whether Spanish courts may issue disclosure and attachment orders, addressed both to the debtor and to third parties that may lead to: (i) ascertaining the crypto exchange where those digital assets may be deposited (ii) making sure that those digital assets are returned to CryptoABC. CryptoABC is also interested in learning more about the enforcement alternatives under Spanish law, in case the disclosure and attachment orders fail, i.e., they do not lead to the tracing and recovery of the digital assets. Also, and crucially, CryptoABC is asking what protection Spanish law has to offer against the risks arising from the volatility of such assets, meaning, who bears the risk of potential loss in value of those digital assets between the date when they were delivered to XYZTechno and the time when those same assets will be possibly returned to CryptoABC.

In this article, we explore the Spanish legal framework to the extent necessary to answer those questions and provide insight in this particularly topical area.

## 2. Background

CryptoABC is a crypto exchange, i.e., a company dedicated to the trade and custody of cryptocurrencies and other digital assets. As such, it enjoys a solid reputation as a safe and reliable operator in the market.

XYZTechno is a market leader delivering liquidity solutions to blockchains. In this capacity, it reached an agreement with CryptoABC to provide market maker services<sup>2</sup> on one of the cryptocurrency exchange platforms developed by CryptoABC, called "ABC SuperExchange".

To help it launch its services as a market maker, CryptoABC provided XYZTechno with interest-free funding (via the signature of several Loan Agreements)

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<sup>2</sup> “The term market maker refers to a firm or individual who actively quotes two-sided markets in a particular [asset], providing bids and offers (known as asks) along with the market size of each. Market makers provide liquidity and depth to markets and profit from the difference in the bid-ask spread. They may also make trades for their own accounts, which are known as principal trades.”, *Market Maker Definition: What It Means and How They Make Money*, Investopedia (Dec 8, 2022), <https://www.investopedia.com/terms/m/marketmaker.asp>. This begs the question, why are market makers necessary? A market maker serves as a middleman or broker between the demand and supply for digital assets. Market makers provide liquidity in markets of digital assets, which ensures there is enough orders to buy and sell, while cryptocurrency exchanges offer the infrastructure that allows traders to operate. Market makers ensure traders can quickly and easily liquidate their holdings. Market makers are also necessary because they maintain price stability in a market with a somewhat small bid-ask spread. In addition to being seen as reputable and trustworthy by cryptocurrency traders, a market with price stability is an indication of significant liquidity, since it means that many participants are transacting, which in turn increases the market maker's profit.

consisting of exact quantities of cryptocurrencies and digital assets (payment and utility tokens)<sup>3</sup> that XYZTechno would have to return.

At one point, CryptoABC requested TechnoXYZ to return the exact quantities of the cryptocurrencies and digital assets loaned at TechnoXYZ's account in ABC SuperExchange. TechnoXYZ failed to comply with this request, which led the parties to arbitration. A sole arbitrator was appointed to handle the dispute.

### **3. The Object of the Refund: Digital Assets, or its Equivalent Initial Value in Fiat Currency?**

This was one of the critical issues of the dispute. CryptoABC argued it provided funding in the form of an exact quantity of digital assets. CryptoABC further claimed that XYZTechno had to reconstitute this interest-free funding in the exact same quantities as received, in conformity with the parties' intention that the funding should always remain the property of CryptoABC and that XYZTechno would bear the risk of losing it.

XYZTechno argued that funding had to be repaid based on its initial value in Euro, and not token-for-token.

The consequences of one option or the other are obvious. If the sole arbitrator was to order that the funding had to be refunded based on its initial value in fiat currency (the currency used was Euro), the volatility risk of the digital assets would be borne by the funder, insofar as that initial Euro value would be equivalent, at the time of repayment, to an amount different from that which was the initial subject of the funding.

If, on the other hand, the sole arbitrator was to rule that the funding had to be repaid in the exact amount of digital assets originally received, the volatility risk would be borne by the borrower since, if it did not hold the digital assets received, it would have to purchase them on the market at their equivalent price in Euro at the time of repayment.

### **4. What the Award Rules**

The award rules that the parties intended the return of the digital assets on a token-for-token basis, and not on a monetary value basis. It further considered that the

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<sup>3</sup> "Payment tokens" are issued with payment medium functions on a given blockchain, while "utility tokens" grant the right to claim the provision of a service from issuers. There are also "security tokens", which have equivalent functions to financial instruments (i.e. Initial Coin Offerings (ICOs) or other crypto-assets that represent tradable financial instruments, such as shares, bonds or rights to investment contracts).

parties agreed on an obligation to return the funding received in the same asset and in the same quantity as received.

#### **5. Can a Spanish Court issue Disclosure and Attachment Orders to the Debtor and Third Parties in relation to Digital Assets?**

Considering that the award orders the restitution of digital assets in kind (and in the exact amount initially received), CryptoABC needs to know whether a Spanish court can, during enforcement of the award, issue disclosure and attachment orders to the award debtor and to third parties – aimed at learning about the whereabouts of such digital assets and to make them available to the Spanish court, for their delivery to the award creditor.

The answer to this question of Spanish law is affirmative. A Spanish court may, according to the Spanish Code of Civil Procedure, issue disclosure orders to the award debtor and to third parties. First off, the Spanish court may order the award debtor to disclose whether it keeps the received digital assets and where they are deposited; the Spanish court may also order the award debtor to make these digital assets available to the court for delivery to the creditor.

To third parties (e.g., cryptocurrency exchange platforms, where the digital assets may be under custody), the Spanish court may also request them to disclose whether they deposit those assets and, if applicable, to make them available to the court for delivery to the award creditor.

#### **6. Limitations on the Effectiveness of Disclosure and Attachment Orders Addressed to the Award Debtor and to Third Parties**

Even though it is possible to issue orders both to the debtor and to third parties, the effectiveness of both types of order is potentially different, particularly in matters related to cryptocurrencies, whose place of deposit can be anywhere in the world.

On the one hand, the award debtor is fully subject to the jurisdiction of the enforcement court and must comply with its orders. If he fails to do so, the Spanish court may impose coercive fines on him. In addition, repeated non-compliance with judicial disclosure orders, as well as incomplete or mendacious responses to such requests, may be criminal offences under the Spanish Criminal Code.

However, in the case of third parties and, particularly, in the case of crypto exchanges, one can expect that it will only be materially possible to force them to comply with the Spanish court's orders if their domicile is Spain. If their domicile is not Spain (as is usually the case for most crypto exchange platforms), there are

generally no international instruments that would allow Spanish courts to force the third party to comply with such order. In any case, the few legal instruments that may be considered are very difficult to apply in practice. This is a considerable limitation to international asset tracing and recovery affecting all types of assets, both digital and non-digital.

#### **7. What Enforcement Options does the Award Creditor have if the Debtor of Third Party fails to comply with the Orders issued by the Spanish Court?**

To answer this question, it is first necessary to analyse the legal nature of cryptocurrencies (which Spanish legislation names "virtual currencies") and other digital assets (which Spanish legislation names "crypto assets").

In relation to the former, Spanish regulations define them as "a digital representation of value, not issued nor guaranteed by a central bank or public authority, and not necessarily associated with a legally established currency, which does not have the legal status of currency or money, but which is accepted as a medium of exchange and can be transferred, stored or traded electronically". What is noteworthy about this definition is that virtual currencies do not have the legal status of "currency" or money under Spanish law.

As for digital assets or "crypto-assets", Spanish financial regulations define them as the "digital representation of a right, asset or value that can be transferred or stored electronically, using distributed ledger technologies or other similar technology". It follows from this definition that crypto assets are purely electronic and decentralised assets. It also follows that digital assets are fungible and, as such, likely to be used as a medium of exchange in economic transactions.

We must therefore conclude that the cryptocurrencies and other digital assets that are the object of the award have the legal nature, under Spanish law, of non-cash and fungible assets (as opposed to the so-called "NFTs" or Non-Fungible Tokens, which, by definition, have a different legal nature). Therefore, the enforcement of any court or arbitral decision whose object is cryptocurrencies and other fungible digital assets will follow the legal regime of non-monetary enforcement and, specifically, that of the enforced delivery of generic or indeterminate assets. In other words, the delivery of cryptocurrencies and digital assets has the same legal procedural treatment as that of a kilo of rice or potatoes (also generic or indeterminate assets); as opposed to the regime of delivery of a Picasso painting (which would be a specific movable asset, non-fungible and, therefore, the legal-procedural equivalent of an "NFT"...).

### **7.1. Option 1: Attachment of the debtor's assets to pay for the acquisition of the fungible digital asset**

When the debtor has refused to comply with the order to deliver fungible (i.e., generic, or indeterminate) assets, Spanish law allows the award creditor to acquire such assets at the debtor's expense. For this purpose, the creditor may request the court to empower him to acquire them, ordering at the same time the attachment of sufficient assets of the debtor to pay for the acquisition.

Naturally, the attachment of sufficient assets will be made in the fiat currency governing the enforcement; typically, in Spain, such currency will be Euros, but it could be any other of legal tender.

Therefore, an interesting question is what value, or "exchange rate" in fiat currency, will be used to determine the exact amount of the debtor's assets that will have to be seized to finance the acquisition of the cryptocurrencies and other fungible digital assets that are the object of the award. Some of the (countless) possibilities could be: (i) the exchange rate at the time when they were delivered to the borrower; (ii) at the time when the breach occurred; (iii) at the time of the arbitration claim; (iv) at the time of the award; (v) at the time of enforcement; (vi) or at the time of the award creditor's acquisition of such cryptocurrencies and digital assets.

The correct answer under Spanish law is the latter: the debtor's assets will be seized according to their value in fiat currency at the time of acquisition of the digital assets by the award creditor during the enforcement of the award. In this way, the risk of volatility of the digital assets will rely on the award debtor and not on the award creditor. The creditor will receive value in fiat currency of the digital assets at the time of purchase and can therefore buy the same exact number of cryptocurrencies and digital assets that were borrowed at the time by the award debtor.

### **7.2. Option 2: Request that the non-delivery of the digital assets be replaced by the payment of a fair monetary compensation**

Spanish law also contemplates the possibility of it becoming impossible to purchase the generic or indeterminate asset. This possibility is relevant in the case of cryptocurrencies and digital assets, one of whose characteristics, in some instances, is their lack of liquidity. In certain cases, such lack of liquidity may make it impossible to find buyers and sellers of the cryptocurrency or digital asset in question (hence the importance of the "market maker" services that XYZTechno undertook to provide on the CryptoABC platforms).

In these cases, Spanish law provides that the impossibility to deliver the asset should be replaced by the payment of a fair pecuniary compensation. What should the amount of such compensation be? In our opinion, the compensation should cover, on the one hand, the value in fiat currency of the undelivered cryptocurrencies and digital assets (at the time when such compensation is calculated, i.e., at the time of the failed attempt to purchase them). On the other hand, the compensation should cover any other demonstrable damages that the creditor has suffered because of the non-delivery of the cryptocurrencies and digital assets (i.e., direct and indirect damages). To this end, the Spanish Code of Civil Procedure provides for a specific proceeding for the creditor to assert and prove the totality of damages suffered.

## **8. Conclusion**

Spanish procedural law has not undergone any modification to adapt to the enforcement of court and arbitral decisions on the return of cryptocurrencies and other digital assets. However, the current regulation is already relatively well-suited to certain aspects relating to the enforcement of judgments and awards involving the delivery in kind of such assets. Spanish law provides that, in the absence of return in kind, the creditor may acquire the digital (fungible) assets at the debtor's expense, seizing his other assets for the value, in fiat currency, necessary to purchase such assets at the time of the acquisition during the enforcement. If this is not possible, Spanish law provides that the creditor may claim a fair monetary compensation from the debtor. In either case, Spanish law protects the creditor against the inherent volatility of digital assets, allowing the creditor to recover the exact amount of digital assets recognised in the enforceable title, to be calculated in fiat currency at the time of the enforcement.

In this case, paradoxically, the latter option in the enforcement stage would reach the opposite solution to the one envisaged in the award, which rejected that the return of the digital assets could be made in fiat currency instead of being made in kind. However, one must acknowledge there are no alternatives to the impossibility of recovering the digital assets in kind, other than converting them into their fiat currency value, be it to attach the debtor's assets to assist in the purchase, or to pay to the award creditor a fair monetary compensation. Therefore, the basic element to consider is protection for the award creditor against the volatility in the value of cryptocurrencies and digital assets. As we have seen, Spanish law contemplates what seems a fair solution to this problem.