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THE VALUE OF KNOWING

UNSCRAMBLING BLOCKCHAIN : REGULATORY FRAMEWORKS IN CRYPTOCURRENCY

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REGULATION IN SOUTH AFRICA

David Geral



SOUTH AFRICAN USE CASES

| Issuer | Name of Token | Classification of Token | Size of ICO |
|------------------|---------------|--|---------------|
| Prosperiprop | PropX | Utility & Currency or Payment Token ER20 compliant | ZAR 2,836,360 |
| Newtown Partners | DTB | Currency or Payment Token and Utility Token Backed by Bitcoin Blockchain | USD 1,000,000 |
| Newtown Partners | Dala | Utility Token ER20 compliant | USD 1,200,000 |
| Ubu Core | UBX | Utility token ER20 compliant | Unclear |

CURRENT REGULATION

| Law | Policy maker | Regulator | Mandate | Potential application |
|---------------------|------------------|------------------|--|--|
| Constitution | Parliament | State | <p>Effective, transparent, accountable and coherent government [s 41(1)]</p> <p>Promote spirit, purport and objects of Bill of Rights [s 39(2)]</p> <p>SARB currency mandate [ss 223,224]</p> <p>Bill of Rights: Equality; Privacy; Trade; Administrative Action</p> | |
| SARB Act | Finance Minister | State FinSurv | Protect the value of the currency of the Republic in the interest of balanced and sustainable economic growth in the Republic | <p>“financial instrument” incl “any right or benefit related to” a security or other financial instruments as defined in statutes below and any instrument declared as such by the Minister (but primarily relevant for SARB’s own investments)</p> <p>Powers to:</p> <ul style="list-style-type: none"> -make, issue and destroy “bank notes and coins” -“regulate payment, clearing or settlement systems” -“accept money on deposit” -deal in “bills of exchange and promissory notes” -deal in “financial instruments” -deal in precious metal and “hold other articles of value” -deal in “foreign currency” <p>Exchange Control Regulations</p> |

| | | | | |
|------------------------------------|------------------|-------------------|---|---|
| National Payment System Act | Finance Minister | SARB | Functional systems; systemic risk | Not all about “money” |
| Banks Act | Finance Minister | FSCA/SARB | Business of a bank | All about “money”, BUT FSCA can recommend amendments to terms “deposit” and “business of a bank”, and Minister can effect through regulation (after consulting SARB Governor) |
| Financial Markets Act | Finance Minister | FSCA; Exchange | <p>Ensure SA financial markets are fair, efficient and transparent; increase investor confidence; stability of market; protection of all participants; reduce systemic risk; promote competitiveness of SA financial markets and securities services</p> <p>Section 6(3) international supervisory standards; proportionate restriction; facilitating innovation in securities services; international nature; pro-competition; protect investors; guidance notes</p> | <p>Core definition of “traditional” “securities” PLUS “an instrument similar to one or more of the above prescribed as such by the Authority for purposes of this Act</p> <p>Minister has power to prescribe regulation of unlisted securities</p> <p>FSCA powers of conditional exemption (incl foreign players)</p> <p>Impact of external participant's home regime (different but “similar”)</p> |

| | | | | |
|--|------------------|------|---|---|
| Collective Investment Schemes Control Act | Finance Minister | FSCA | Regulate CIS incl Hedge Funds | Invited to invest "money or other assets" "portfolio defined as "group of assets, incl. cash" "participatory interest" broader than a security |
| FAIS Act | Finance Minister | FSCA | Regulate advisory and intermediary services | "financial products" incl "instruments", CIS participatory interests, "foreign currency denominated instrument" AND "other product similar in nature...declared by the registrar" AND "similar foreign product" |
| FIC Act | Finance Minister | FIC | Anti-money laundering (AML) and Counter Terrorist Financing (CTF) | "carries on a business" "suspicious or unusual activity" |
| Tax Laws | Finance Minister | SARS | Value-Added Tax Act Income Tax Act STT Act | Income tax Capital gains tax |

| | | | | |
|----------------------|---|------|---|--------------|
| Companies Act | Member of cabinet responsible for companies | CIPC | <p>Promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law;</p> <p>Promote the development of the South African economy by -</p> <ul style="list-style-type: none"> • encouraging entrepreneurship and enterprise efficiency; • promoting innovation and investment in the South African markets; • encouraging the efficient and responsible management of companies; and • providing a predictable and effective environment for the efficient regulation of companies. | “securities” |
|----------------------|---|------|---|--------------|

INTERPLAY OF DEFINITIONS 1/2

- Loose / broad definitions of “securities” in Co Act, FMA, SARBA = common law kicks in with all that entails:
 - Develop i.a.w. Constitution
 - Relative weight of subsequent legislation
 - Relevance of foreign law, incl. foreign case law: *Howie* / US SEC risk
 - Switzerland, **Singapore**, Japan offer sophisticated analytical reference points
- Broadest definitions in FAIS, probably due to consumer protection element: advice and intermediation in crypto space likely to be covered already or else easily done by declaration (FSCA): expect developments soon, but don't assume inapplicability in the meantime
- FMA allows FSCA to prescribe types of securities – administrative power in context of explicit objectives / statutory mandate suggests a duty to at least consider prescribing – FSCA is “there” now

INTERPLAY OF DEFINITIONS 2/2

- Our laws around “money” are “safe” from alternative money interpretations:
 - Crypto deposit taking is not banking
 - *Petix* approach to definition of money as “fiat currency” should apply here
 - SARB does not have power to issue digital fiat currently, requires primary legislative change – watch this space!
- SARB can hold “other articles of value” and “foreign currency” – crypto and foreign digital fiat covered
- If crypto is a security, then a crypto exchange handling it is a securities exchange - but exchange regulations inappropriate, so general / specific exemption should be considered (s6(3) FMA?)
- FICA: “suspicious transactions” already applicable; Luno and FIC discussing “voluntary accountable institution” status – will set the scene



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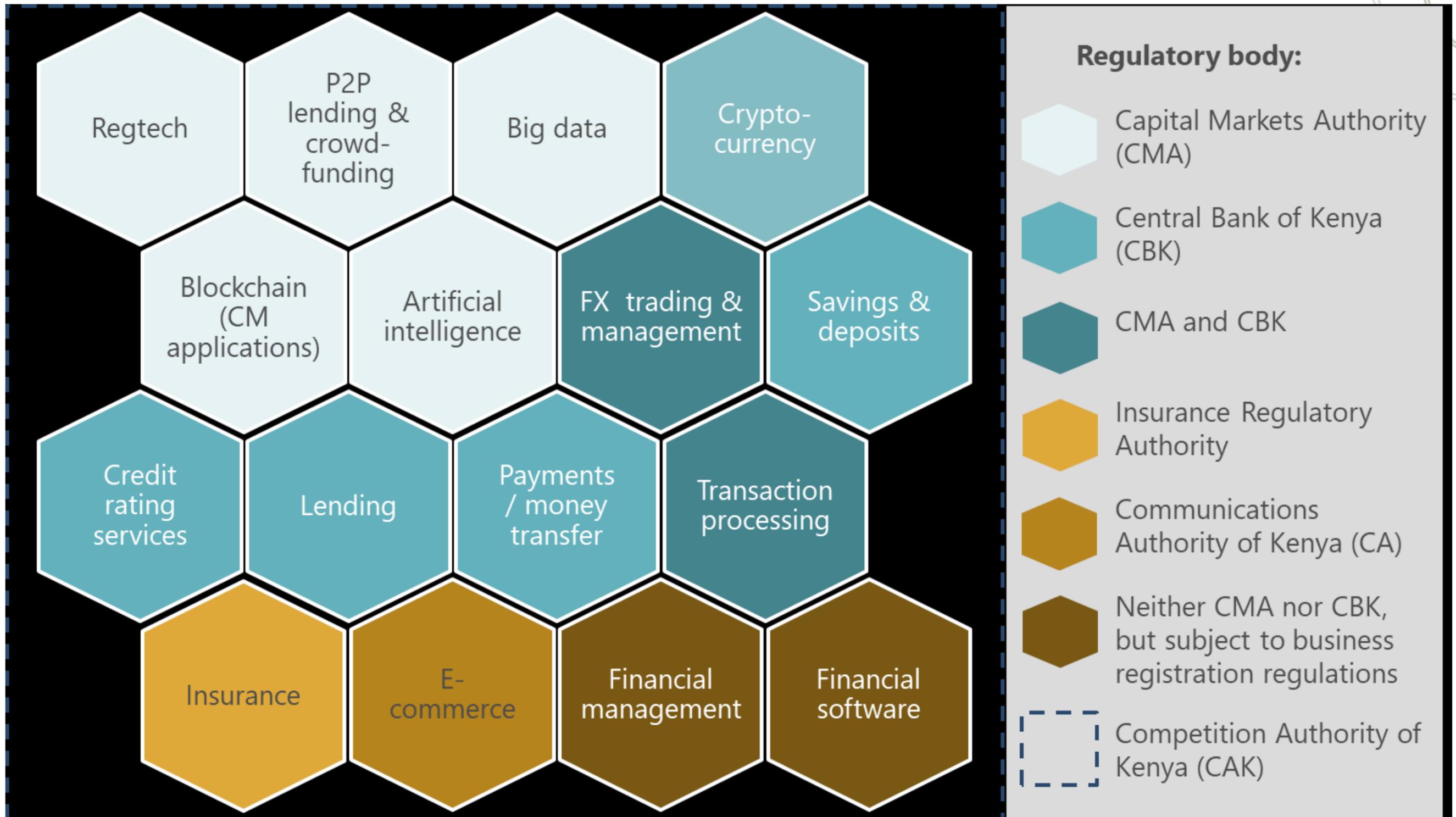
THE VALUE OF KNOWING

REGULATION IN KENYA

Irene Muthoni



SNAPSHOT OF FINTECH IN KENYA



MOST NOTABLE FINTECH INNOVATIONS

The Kenyan fintech space is one of the most vibrant in the region, most innovations have been focused on:

- mobile money e.g. M-Pesa, T-Kash, Airtel Money, etc.
- lending platforms e.g. Branch, Tala, Malaika.
- savings e.g. M-Shawari
- mobile payments e.g. Mpesa Buy Goods/ Paybill
- crowdfunding e.g. M-Changa
- Securities e.g. treasury bond purchase through M-Akiba
- Cryptocurrencies

IS FINTECH REGULATED IN KENYA?

- Regulation is largely dependent on the nature of the fintech innovation. Primarily, fintech is regulated under the following laws:
 1. The National Payments Systems Act administered by the Central Bank of Kenya (CBK)
 2. The Capital Markets Act administered by the Capital Markets Authority (CMA)
 3. The Kenya Information and Communication Act administered by the Communications Authority.

A 3D rendered word 'Yes!' in a bright orange color, with a slight shadow underneath, positioned in the bottom right area of the slide.

REGULATION OF FINTECH...CONT

Broad regulatory categories:

The drafting of Kenyan regulation tends to be broad and inclusive as opposed to narrow and focused which has had the effect of creating licensing and regulatory categories which most fintech innovations can qualify.

Active regulatory philosophy

The regulators in Kenya, specifically the CBK and the CMA have generally demonstrated an active approach to regulation. They tend to interpret their powers and responsibilities as widely as possible and have demonstrated a willingness to include new innovations under their regulatory purview.

THE NATIONAL PAYMENTS SYSTEMS ACT

- The **National Payment System Act (NPS Act)** makes provision for the regulation and supervision of payment systems and payment service providers and for connected purposes.
- The NPS Act brings all payment service providers, including mobile phone service providers, into a single regulatory framework, and provides the CBK with direct oversight of these service providers and their products to ensure the safety and efficiency of their platform.
- Currently the three telecommunications companies which offer mobile payment services i.e. Safaricom Airtel and Telkom are licensed as payment service providers under the NPS Act.

THE BANKING ACT

- **The Banking Act** regulates banking business which is characterized by the taking of deposits from members of the public.
- Fintech innovations which include an aspect of taking deposits such as savings are rolled in collaboration with banks as bank products e.g. M-Shwari which is a collaboration between Commercial Bank of Africa and Safaricom.



MONEY REMITTANCE REGULATIONS

- Money remittance business is regulated by the **CBK** under the **Money Remittance Regulations**.
- Fintech companies require licensing where they offer a service for the transmission of money or any representation of monetary value without any payment accounts being created in the name of the payer or the payee, where –
 - a) funds are received from a payer for the sole purpose of transferring a corresponding amount to a payee or to another payment service operator acting on behalf of the payee; or
 - a) funds are received on behalf of, and made available to the payee.

ANTI-MONEY LAUNDERING

- The **Proceeds of Crime and Anti-Money Laundering Act (AML Act)** establishes money laundering and the use of proceeds of crime as criminal offences.
- The drafting of the AML Act is not restricted to money as it includes “property” which has a broad definition. To the extent that fintech innovations would fall under this broad definition of property in the AML Act, they may reasonably be considered to be subject to the AML Act.
- The operators of some fintech innovations which include the transfer of money or value may be deemed to be “reporting institutions” under the AML Act and have reporting and compliance obligations.

CRYPTOCURRENCIES IN KENYA

- Are cryptocurrency treated as legal tender in Kenya?
- Are cryptocurrencies considered assets under the law in Kenya*?
- Are cryptocurrencies licensed in Kenya?

NO

ARE CRYPTOCURRENCIES SECURITIES UNDER THE CAPITAL MARKETS ACT?

- The **CM Act** defines the term “security” and identifies some types of securities such as:
 - ✓ shares
 - ✓ debt instruments
 - ✓ rights options or relating to other securities
 - ✓ futures relating to assets or property
 - ✓ depositary receipts
 - ✓ asset backed securities.
- The definition of securities also includes interests, rights or property commonly known as securities
- Further the CM Act provides that securities include any other instrument prescribed by the CMA to be a security.
- **This allows the CMA to prescribe cryptocurrencies as securities. The CMA has yet to designate cryptocurrencies as securities.**

WHAT IS THE REGULATORS RESPONSE TO CRYPTOCURRENCIES?- THE CBK

- The CBK in December 2015 issued a public warning on the use of cryptocurrencies due to their perceived volatility and the lack of specific regulation.
- The CBK clarified that it does not regulate virtual currencies and offers no comfort to members of the public.
- Despite the warning by the CBK there is no law prohibiting their use. However, depending on their nature, various elements of cryptocurrencies may be subject to existing regulations.



WHAT IS THE REGULATORS RESPONSE TO CRYPTOCURRENCIES?- THE CMA

- The **CMA** has issued a public warning notifying the public that it has not approved any initial coin offerings.
- The CMA has now set up a regulatory sandbox which will help the CMA gain visibility into new innovations as the innovator tests their products and services in live environments. The boundaries that the regulatory sandbox puts around live testing also reduces risks to consumers from new financial products and services.

PREDICTIONS ON THE FUTURE OF FINTECH

- We expect increased financial innovation in the fintech space and an increased willingness by regulators to engage with blockchain ledger technology.
- The Government thorough **the Ministry of ICT** is showing an increased appetite to embrace the use of distributed ledgers for record keeping. These efforts are likely to intensify and may culminate in the use of distributed ledger technology in government registries.
- The initiative to use fintech to roll out financial services to the mass market is likely to continue and focus on non-bank services such as insurance and investments.
- The use of ICOs to raise capital is likely to gain momentum.



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REGULATION IN UGANDA

Brian Kalule





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SCOPE OF DISCUSSION

- Cryptocurrencies in Uganda presently.
- Relevant laws.
- Reasons for the absence of Regulations.
- The future.



CRYPTOCURRENCIES IN UGANDA PRESENTLY

- Cryptocurrencies are digital tokens with ascribed value. This value may fluctuate depending on the supply and demand.
- Cryptocurrencies can be used as a medium of exchange.
- They are mostly data driven and use blockchain technology.
- **Currently the most popular cryptocurrencies in Uganda are; Bitcoin, One coin and Firstcoin.**
- The most known trading platform is BITPESA which predominantly trades in Bitcoin. This Bitcoin can be paid for using MTN Money and Airtel Money.

CRYPTOCURRENCY REGULATION IN UGANDA

- Currently cryptocurrencies are not regulated under any law.
- The Central Bank of Uganda passed a circular warning the public that cryptocurrencies are not recognised as currency in Uganda and whoever deals in them did so at their risk.
- What this means in real terms is that Cryptocurrencies are neither prohibited nor allowed. They are just not recognised by the Central Bank.
- But this has not stopped people from dealing in them. The implication is that in case of a dispute, one cannot run to court to enforce such dealings.

But what does the law say?

- Section 20 of the **Bank of Uganda Act**; The Bank of Uganda has the sole right to issue legal tender and no person shall issue any notes, coins or tokens that are likely to be passed as legal tender.
 - In effect, anything else not issued by the Bank of Uganda is not legal tender including cryptocurrencies. The BOU does not presently issue cryptocurrencies.
- Legal tender is a medium of payment recognized by a legal system to be valid for meeting a financial obligation. **Contracts Act 2010**, to form a valid contract, there must be among other things, lawful consideration.
 - This means that contracts premised on cryptos as consideration are invalid under Uganda law and cannot therefore be enforced by Ugandan courts.

- However, parties to an agreement may subject their disputes to arbitration.
- Section 34 of the **Arbitration Act**: A court may set aside an award if it is contrary to public policy of Uganda. It can be argued that an award based on illegal consideration offends public policy.
- The better option is to choose arbitration under a law of a different country.

- **Capital Markets Act** defines securities to mean; bonds, stock, warrant, option or future and any instrument commonly known as securities. This definition does not expressly exclude cryptocurrencies from being termed as securities on the capital markets.
 - But we think the CMA would be reluctant to accept ICOs given that they would not constitute lawful consideration under Uganda law.
 - The CMA has not issued any official position on this preferring instead to address it as and when it arises.

NOTE: The CMA is in the process of developing a regulatory sandbox which will help the CMA gain visibility into new innovations as the innovator tests their products and services in live environments.

It is hoped ICO's will be part of this sandbox.

REASONS FOR THE ABSENCE OF REGULATIONS

- Fast pace of evolution and developments, which is not covered under the already existing law.
- And law reform is generally slow in our country. It can take between 2 to 5 years to amend laws or pass new ones **(except those that lift the age limit for Presidents. These tend to take a shorter time)**
- Existence of a knowledge gap where lawmakers and regulators are largely groping in the dark. One cannot regulate what they do not understand.

GAZING INTO THE CRYSTAL BALL; WHAT WE SEE IN FUTURE

- The future of cryptos in Uganda will largely depend on world trends. The more they are accepted in other parts of the world, the more likely they will be accepted in Uganda. We tend to bide our time and see how things turn out before we act.
- Which I think is very smart.
- If this is done, then laws will be changed to legalise them.
- Of course if the reverse happens, and they ultimately fail in the bigger parts of the world, then Government will do the same.
- The use of ICOs to raise capital is likely to gain momentum. But this will also depend on what position the CMA takes.



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QUESTIONS?



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THANK YOU

