

Legal Personality and Innovative Technology Arrangements

Finance Malta

BlockFinance: Opportunities in the Asset Management sector

Dr. Max Ganado
Senior Partner
GANADO Advocates

Legislative State of Affairs Today

- MDIA, ITAS and VFA enacted;
- MDIA in force;
- MFSA issuing draft guidelines and rules;
- MDIA drafting guidelines for issue soon;
- AML guidelines still pending;
- Tax guidelines still pending;
- Private law provisions, including legal personality still pending;

Idea of Legal Personality

- Malta A Leader in DLT Regulation
- Legal Personality for Blockchains, DAOs and Smart Contracts
- Legal Organisations and Technology Arrangements
- Maltese Technology Foundations – Initial Thoughts on an Important Proposal

Risk of being considered a Legal Organisation

- A partnership;
- An association of persons;
- A collective investment scheme;
- An irregular foundation;

..... With their own liability regimes;

..... All without legal personality;

When does an ITA qualify to be treated as a Legal Person?

- Simple smart contracts operating simple code will not qualify – you don't need legal personality for this to work;
- Only “Complex” arrangements will qualify as these have enough substance in effects of operations to justify the legal support by a state;
- “Complex” implies looking at the WHOLE of the arrangement as one operational reality - interface with the world outside;

Why is Legal Personality Important?

Capacity

- **Capacity**: implies that the **legal person can carry out the same acts as humans**, subject to logical physical limitations;
- The ITA will be able to **achieve its purpose more effectively** and with **greater legal certainty**;
- Solves the problem of **legal powers** and **capacity** - has the **power to contract** and the power to **sue and be sued**;
- The law usually **reads through to an individual**, usually the owner of the asset, and assumes it is **his capacity that is operating**;
- This implies **personal liability** – **SOLUTION**: use existing legal entities, which have their own legal personality;

Liability (1)

- ***Distinct Patrimony***: Legal personality results in a *distinct patrimony*;
- Its own *assets* and *liabilities*;
- Tool for *limited liability* of persons involved in certain organisations;

Liability (2)

- High levels of **legal certainty** including that on **liability** and **recourse**;
- **Clear protections** to users of the technology through the **use of segregated cells** (immunity of some of the technology from attachment and bankruptcy);
- Legal personality is necessary to achieve this:
 - **clear rights of action on specific assets**;
 - sets out the **limits of liability resulting from autonomous actions**;

Liability (3)

- **Participation** in the ITA or **even its use, can also lead to liability** (users or nodes on a blockchain may potentially be liable for loss caused to other users or third parties);
- Granting **legal personality** to an ITA is a ***solution to the risk of personal liability to all involved: the creation of a distinct patrimony***;
- Liability will be placed squarely onto the patrimony of the legal person;
- Requirements of:
 - **publicity** regarding the existence of the legal person;
 - **accounts and audit** to determine the extent of the patrimony;
etc

Others issues

- **Tokens**, which operate in many contexts through smart contracts, can create **challenges as to who the “real” administrators and shareholders are**;
- Not only for establishing liability but also **to determine who is subject to qualifying, fit and proper testing**;
- Use of **open source software** is prevalent and poses a challenge in liability attribution;
- This should not arise for a **party who has shared his work for the general public benefit** and would not even be aware of the use of the software in an ITA;

Why personality? Why a foundation?

- ITAs have features which support the argument that they **could qualify as a legal entity**, such as a **partnership**, even **unintentionally**;
- The active participation of many people and related consensus mechanisms **BUT no associative intent of the users**;
- The design of a **variant** of a foundation is more suited – the *Innovative Technology Foundation (ITF)*; The ITA is:
 - a “**universality of things**” (asset) dedicated to a **purpose**;
 - purpose achieved through **governance structure – automated or physical**;
 - if procedures (e.g. registration) - are respected it could qualify as a **foundation having legal personality**;

Administrators

- All legal persons are required to have administrators;
- This new technology can be automated and even intelligent;
- New challenges need new solutions;
- New solutions have to cater for known contexts under current laws;
- Current laws need to catch up;
- DAOs;
- Not everything can be predicated and **human intervention is necessary**;

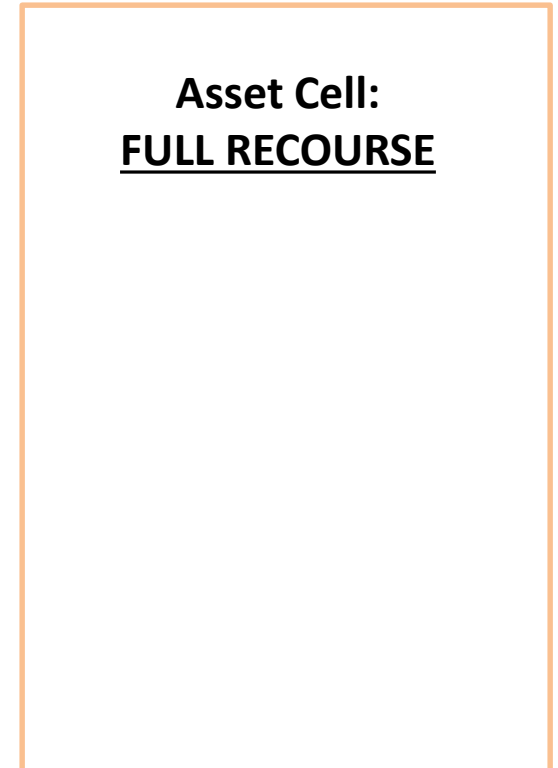
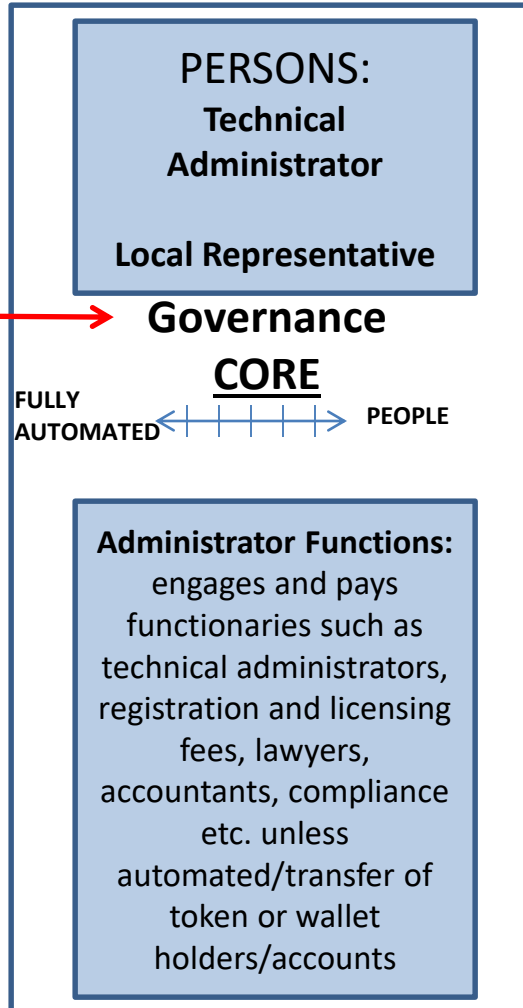
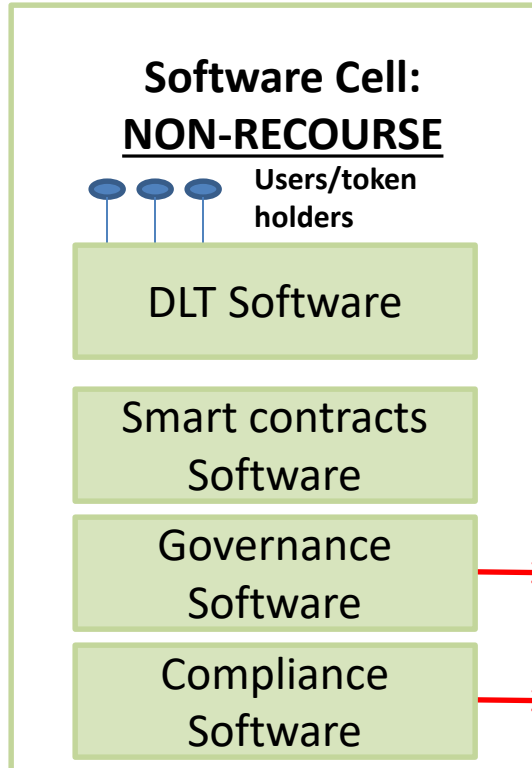
Governance & Compliance Functions

- Current model of purpose foundations imposes a defined form of a board of administration (**centralised feature**);
- Lack of legal certainty created around the potential automation of compliance by an ITA: **no persons to see-through to in the case of non-compliance**;
- Best solution: **cater for a range of possibilities** from 100% automation to very little automation (allow for different calibration on different topics or matters);
- Leaving a **choice in design is important** (e.g. actions around compliance with mandatory laws which can change from time to time);

BANKRUPTCY REMOTE
IMMUNE FROM
ATTACHMENT ON SUIT

ADMINISTRATIVE
PILLAR

AVAILABLE to claimants
who can sue
Foundation



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IMMUNE FROM
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ADMINISTRATIVE
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AVAILABLE to claimants
who can sue
Foundation

Third Pary Assets

User Assets
represented by
tokens

Cell 1, 2,3
or subsidiary
companies

Voting Rights

Transferability

BANK/
TRUSTEE

Automated
% tokens
→
Administrative
Charge/
contribution to
operation

Governance
CORE

Engages and pays
functionaries unless
automated

Cash Flow

CAPITAL
Initial/
Additional/
income
generated
e.g. sale of
tokens

Fund Raising
ICOs

PROJECTS
cells or
companies

Inhouse e.g.
software
development
or building a
school etc.

Link

Automated %

Link

Liability Cell

Insurance

Sinking Fund

Guarantee/Support
Fund

BANK/
TRUSTEE

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Thank you.

Dr. Max Ganado

mganado@ganadoadvocates.com

www.ganadoadvocates.com



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