

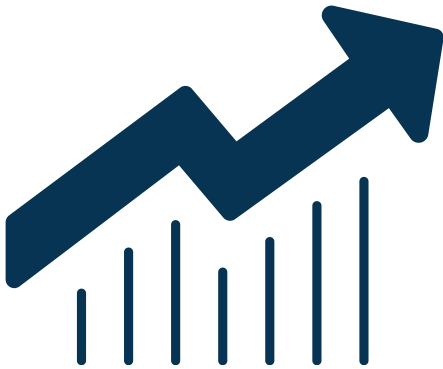


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Crypto businesses transcend borders: they typically service customers on a multi-national basis from operational hubs in just a few jurisdictions. This can present challenges when things go wrong: where should any dispute be litigated? which country's law should apply? and will any judgment be enforceable in other countries?

Crypto businesses often look to side-step these challenges by requiring customers to agree terms of business that include arbitration agreements. An American crypto business might, for example, require its customers to agree that all disputes will be arbitrated in San Francisco, under the JAMS Rules, and in accordance with California law.

We touch on the benefits of this approach, but also on why crypto businesses should not rely on arbitration as a 'one-size-fits-all' tool for resolving disputes with customers in England and Wales.



## What is arbitration?

Arbitration is an alternative to litigation, which can only take place by agreement of the parties. It involves the parties' appointment of one or more arbitrators to make a binding decision on their dispute. Arbitration can be ad hoc, where the parties determine their own rules, or conducted under the rules of an arbitral institution. Western crypto businesses typically favour American arbitral institutions like JAMS or the AAA; Asian crypto businesses often look to the SIAC or the HKIAC.

## Why arbitrate?

Arbitration can allow crypto businesses to side-step some of the key challenges involved in litigating their disputes:

### Choice of law / enforceability

The intangible, decentralised nature of cryptoassets makes crypto disputes particularly susceptible to conflict of laws issues. These arise when it is unclear which country's courts have jurisdiction to resolve a dispute.



Crypto-forward jurisdictions have established rules for determining where cryptoassets are deemed to be located (their 'lex situs') and are examining conflict of laws issues. In England and Wales, for example, the Court of Appeal has determined the lex situs of cryptoassets to be their owner's place of residence. (*Tulip Trading v van der Laan (2023) EWCA Civ 83*) and the Law Commission has recently closed a call for evidence on Digital assets and ETDs in private international law: which court, which law?

However, there is no guarantee that the courts of other jurisdictions will reach the same conclusion. This can lead to expensive satellite litigation about which court has jurisdiction, as well as difficulties with the cross-border enforcement of judgments.

Arbitration can allow crypto businesses to avoid these issues: parties can choose the venue for their dispute resolution, and arbitral awards have wide cross-border enforceability under international agreements like the New York Convention.

## Specialist arbitrators

Some countries' courts are well-versed in crypto disputes and the underlying technologies. However, other countries' courts are unfamiliar with, and sceptical of, cryptoassets. This can lead to bad outcomes for crypto businesses. In arbitration the parties have the flexibility to choose an arbitrator, who may be chosen for specific qualifications like industry expertise.

## Confidentiality

Arbitral proceedings are typically confidential, which can allow crypto businesses to avoid commercially sensitive information in public.

## Portfolio management

Crypto businesses may have an in-house legal team based in a single jurisdiction. It would present a considerable challenge for that team if the business was involved in litigation worldwide: they would need to onboard numerous local counsel, gain some understanding of local law, and appreciate that outcomes can vary considerably between jurisdictions. By contrast, arbitration can allow crypto businesses to streamline their disputes portfolios, with most disputes dealt with in a materially similar way.



## Class action risk

Arbitration is also used a mechanism to mitigate against class action risk in some jurisdictions. This operates on the principle that if a contracting party has agreed to arbitrate its disputes, it cannot then seek to bring proceedings in the courts, which is where mechanisms for class actions are available. Also, since arbitration is dependent on an agreement between the parties, arbitral proceedings under different agreements with different parties typically are not capable of being consolidated.



## Bespoke arbitral schemes

The advantages of arbitration have been recognised in the creation of bespoke arbitral schemes for resolving digital disputes. In the UK, for example, the UK Jurisdiction Taskforce published the Digital Dispute Resolution Rules in 2021. Anecdotally, these have had very limited take up. We observe that there is a lack of industry familiarity with these rules, particularly amongst crypto businesses operating from outside the UK.

## Pitfalls of arbitration

Whilst arbitration undeniably presents benefits, there are also pitfalls to relying on arbitration as a 'one-size-fits-all' tool for resolving disputes, particularly with consumer-customers.

## Lack of precedent

Crypto businesses often advocate for greater legal clarity about cryptoassets. In England and Wales, this clarity will come from common law developments, in other words from judgments of the higher courts. This is clear from the Law Commission's Digital assets: Final report, published in June 2023, which stated that "the common law of England and Wales is, in general, sufficiently flexible and already able to accommodate digital assets and therefore any law reform should be through further common law developments where possible".

If crypto businesses want to achieve greater legal clarity in England and Wales, they cannot simply arbitrate their disputes. It is incumbent on them to choose the right cases to litigate (or indeed defend) to allow the creation of judicial precedent.

## Consumer disputes

Crypto businesses need to take particular care when including arbitration agreements in their terms of business with consumers. There are three English and Welsh judgments that consider the interoperability of crypto businesses' terms of business and applicable consumer protection legislation, and, in each, the arbitration agreement has failed to some degree:

- In *Soleymani v Nifty Gateway (2022) EWCA Civ 1297*, Nifty Gateway's terms of business provided that all disputes would be arbitrated in New York, under the JAMS Rules, and in accordance with New York law. The Court of Appeal of England and Wales held it was a matter for the English and Welsh courts to determine whether, as a result of applicable consumer protection legislation, this arbitration agreement was null and void, inoperative, or incapable of being performed.
- In *Checketkin v Payward (2022) EWHC 3057 (Ch)*, Kraken's terms of business provided that all disputes would be arbitrated in San Francisco, under the JAMS Rules, and in accordance with California law. The High Court of England and Wales held that, as a consumer, Mr Checketkin could nevertheless start proceedings against Kraken in the English and Welsh courts.



- In *Payward v Chechetkin (2023) EWHC 1780 (Comm)*, the High Court refused to enforce Kraken's arbitral award against Mr Chechetkin, finding that the arbitration clause was unfair as a matter of English and Welsh consumer law.

These cases demonstrate that arbitration, and particularly foreign arbitration, may not be an appropriate way to resolve disputes with English and Welsh consumers – at least not without the risk of a conflicting decision in England and Wales.

### Final word

Arbitration offers significant advantages to crypto businesses, from flexibility in the choice of venue to the selection of specialist arbitrators and maintaining confidentiality. However, it's not without its setbacks. If crypto businesses wish to guide the process of English and Welsh law on crypto, and if they want to stay the right side of consumer protection law, a nuanced approach is essential.

