

EMERGING GLOBAL LEGAL TRENDS IN CRYPTO AND VIRTUAL ASSETS



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With our deep knowledge of each of energy, resources, commodities, carbon credits, crypto, and regulation across key jurisdictions, HFW is uniquely placed to advise and act in disputes in the crypto space.

In this article we briefly explore topical issues emerging from the global crypto hubs.



BVI

In our experience as a local BVI firm with experience in this area – most recently acting for the joint liquidators of the Three Arrows Fund, the feeder fund of Three Arrows Capital (a former

crypto hedge fund), we are aware that a significant number of crypto exchanges, funds, and leading fintech companies have taken advantage of the flexible nature of BVI law and regulation, and have incorporated, and/or made initial coin offerings, in the BVI. This has in turn led to a growth in crypto-related disputes and insolvencies emanating from, and being heard in, the jurisdiction.

The enactment of the Virtual Assets Service Providers Act 2022 (the Act) reflects the BVI maturing as a market for the regulation of virtual assets. The Act requires all new virtual asset service providers (VASPs) to register with the BVI Financial Services Commission (FSC).

Existing VASPs have until 31 July 2023 to register. After this date, all VASPs that have not registered will be considered to be conducting unauthorised business, and will be subject to the enforcement mechanisms of the FSC.

Far from deterring VASPs, our view is that the Act is likely to increase the popularity of the BVI as a jurisdiction for virtual assets.

In terms of crypto-related disputes – the BVI courts have followed the courts of England and other common law jurisdictions in finding that cryptoassets constitute property¹, and the BVI courts have also granted freezing orders against persons unknown in crypto-related disputes.² It seems likely that the BVI courts may generally continue to follow English judgments in the crypto space in the future.

¹ Philip Smith and Jason Kardachi (in their capacity as joint liquidators of Torque Group Holdings Limited) v Torque Group Holdings Limited (in liquidation) BVIHC (COM) 2021/0031.
² Chainswap Limited v Persons Unknown BVIHC (COM) 2022/0031.



Dubai, United Arab Emirates

Dubai has positioned itself as a global hub for crypto in recent years, evidenced by the large number of high-profile developers, blockchain networks and major exchanges flocking to the city. An example of this is the growing interest we are seeing from clients in the crypto sphere. We are currently acting for the developer of a global blockchain technology ecosystem, specialising in the tokenisation of assets. This dispute is being heard in the DIFC Courts and involves questions of ownership of cryptoassets and the use of cryptocurrency as security for costs.

In order to regulate such activity in the Emirate, the Virtual Assets Law (the VAL) was issued in February 2022. The VAL created a legal framework for investors and businesses alike involved in virtual assets.

The VAL also created the Virtual Assets Regulatory Authority (VARA), an independent regulatory body that sits within the Dubai World Trade Centre. VARA regulates all virtual asset related activities in Dubai, except the Dubai International Financial Centre (the DIFC).

The DIFC maintains its own regulatory regime, with the Investment Token Regime and the Crypto Token Regime.

Aside from regulation, the DIFC Courts recently launched the world's first Digital Economy Court (DEC). The DEC will oversee complex national and transnational disputes related to current and

emerging technologies, including blockchain, AI and fintech, amongst others.

The DIFC Courts recently issued a judgment in a crypto-related dispute; one of the first in the region, and one of the few reported cases globally concerning issues such as the safe transfer of cryptocurrency between buyer and seller, and the obligations of a custodian of cryptocurrency.



England

The United Kingdom has continued to be a popular hub for cryptocurrency and other digital asset transactions. And, in the past four years, the English courts have proven themselves to be hugely capable in the sphere of crypto and other digital asset-related disputes, it being one of the first countries in the world to declare cryptocurrency a specie of property in 2019.³ Since then, the courts have granted proprietary injunctions over cryptocurrencies⁴, have permitted service of legal documents exclusively by NFT⁵ and have confirmed that misappropriated cryptocurrencies can be held on constructive trust for victims of crypto-related fraud⁶.

Over the past four years, therefore, case law has time and time again demonstrated the English court's willingness and ability to push the boundaries as regards to crypto-related disputes. However, whilst this trend is likely to continue, the prevailing trend in 2023 is likely to centre on one major issue: regulation. Indeed, with several high-profile insolvencies over the past year alone (including the infamous and sudden fall of FTX), in addition to a 100% rise in the number of people owning cryptoassets over the past 1-2 years in the UK⁷, regulation is an important agenda item for the UK government.

Presently, the UK does not have a dedicated statute dealing explicitly with the regulation of digital assets. Instead, cryptocurrency businesses are regulated by the Financial Conduct Authority (the FCA), the UK's main financial regulatory body. However, the remit of the FCA is limited to making sure that crypto firms comply with anti-money laundering and counter terrorism legislation. It has no oversight whatsoever over direct investments in cryptocurrencies and other digital assets⁸.

But the pace of change is fast. On 1 February 2023, His Majesty's Treasury launched its consultation on how it should regulate cryptoassets in financial services (including in relation to disclosure requirements, corporate governance, and the requirements for granting licenses to cryptocurrency exchanges).

Further, the Financial Services and Markets Bill is close to being passed. The Bill, if passed, will introduce a regime that will allow the Treasury to regulate stablecoins and cryptocurrencies.

This space is therefore worth watching over the next coming months.



Hong Kong

As experienced, insolvency, fraud, and disputes lawyers in Hong Kong, we are actively engaged in this area (in particular crypto related fraud claims) and confirm that Hong Kong is similar to Singapore, and has also very recently recognised cryptocurrencies as a specie of property, capable of being held on trust⁹. The ruling comes shortly after

3 AA v Persons Unknown [2019] EWHC 3556 (Comm).

4 Ion Science Ltd v Persons Unknown (unreported, 21 December 2020, Commercial Court)

5 Osbourne v Persons Unknown Category A [2023] EWHC 39 (KB)

6 Jones v Persons Unknown [2022] EWHC 2543 (Comm)

7 TR_Privacy_edits_Future_financial_services_regulatory_regime_for_cryptoassets_vP.pdf (publishing.service.gov.uk)

8 FCA reminds consumers of the risks of investing in cryptoassets | FCA

9 Re Gatecoin Limited (In Liquidation) [2023] HKCFI 914

Hong Kong's Securities and Futures Commission (SFC) commenced a consultation process in relation to the proposed requirements for virtual asset trading platform operators¹⁰, and permitting retail investments in certain tokens trading on licensed exchanges.

The new SFC licensing requirements due to enter into force on 1 June 2023, seek to position Hong Kong as a global centre for regulated, and safe, digital token trading activities.

Further, with a number of centralised crypto exchanges operating out of Hong Kong (amongst other global hubs), licensing (and, therefore, legitimising) their activities may assist in maintaining their presence on the ground, rather than risk losing them to other emerging Asian jurisdictions. This coupled with Hong Kong's existing reputation as a leading regional dispute resolution centre, also assists in elevating Hong Kong as an attractive jurisdiction of choice for restructuring and insolvency proceedings, including for foreign companies meeting the relevant criteria.

Hong Kong's emergence as a hub for Web3-related activities is noteworthy, and stands in distinct contrast to the prevailing regulatory environment in the PRC.



Singapore

From our experience of crypto disputes in Singapore, it is clear that Singapore has positioned itself to be a leading global hub for the resolution of Web3-related disputes in arbitration. Given the de-centralised and multi-national nature of Web3 projects generally, arbitration is well-suited for dispute resolution, and Singapore has built on its growing status as a global arbitration powerhouse in order to attract crypto-related disputes.

The local courts remain supportive of the arbitration process, including within the Web3 space. This has been demonstrated recently, when the Singapore High Court acted¹¹ to uphold an arbitration agreement by imposing a mandatory stay on the parallel court proceedings - including those involving third parties - pending the resolution of the on-going arbitration.

This latest judgment in the Web3 space, will assist in settling the local legal position, and will strengthen Singapore's claim to the title of the 'Web3 arbitration forum of choice'.

Previous judgments have confirmed Singapore's stance that both cryptocurrencies¹², and other crypto assets, including NFTs¹³, constitute property rights (although, most recently, also dismissed an application seeking to establish that stablecoins should be regarded as "money"¹⁴), which may be of tremendous significance in an insolvency scenario.

With an updated set of SIAC arbitration rules eagerly anticipated, Singapore must be considered a leading jurisdiction and arbitration seat for the resolution of Web3 disputes.

As seen from the above tour of five jurisdictions, the crypto space is fast moving. We expect to see further developments and what we hope will be greater harmonisation between the various key jurisdictions in this area.



¹⁰ <https://apps.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=23PR5>

¹¹ Parastate Labs Inc v Wang Li and others [2023] SGHC 48

¹² CLM v CLN [2022] SGHC 46

¹³ Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE") [2022] SGHC 264

¹⁴ Algorand Foundation Ltd. v Three Arrows Capital Pte. Ltd., March 2023