

The coming of crypto arbitration

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Cryptocurrency and cryptoasset-related (crypto) disputes are on the rise globally.[1] Arbitration is becoming the dispute-resolution mechanism of choice in the crypto sector,[2] due to several features that are suited to crypto disputes.

These include neutrality and the ability to be enforced widely through the New York Convention, both of which align with the decentralised and cross-border nature of crypto trade[3]; flexibility, which enables the appointment of subject-matter experts to adjudicate technical disputes[4]; confidentiality, which appeals to crypto users who tend to value pseudonymity[5]; and the ability to be agreed to up front in online agreements.

The types of crypto disputes that lend themselves to arbitration are many and varied.

The categories most commonly seen to date include breach of service contract claims by investors against trading platforms, typically arising from a lack of access to the platform and consequent loss[6] – a prominent example being the Binance "class" arbitration initiated in the HKIAC by up to 700 claimants against the world's largest crypto exchange, arising from the shutdown of many parts of the Binance trading platform on 19 May 2021, the day of one of the largest percentage drops in the value of Bitcoin ever, allegedly resulting in huge losses to crypto derivative traders[7].

Other examples include claims by platforms against investors arising from failure to make payment[8]; claims by investors against platforms based on fraud and mis-selling (e.g., misrepresentations as to the reserve assets behind stablecoins, or the risk of investment)[9]; payment of outstanding crypto-denominated debts; financial transactions (e.g., failure of platforms to return non-fungible tokens or other crypto assets provided as collateral for cryptocurrency loans)[10]; and many more.

(Cases of outright crypto fraud and theft do not lend themselves to arbitration, since crypto scammers are generally disinclined to enter into consensual dispute resolution with their victims. Much jurisprudence has been generated by the courts in various jurisdictions concerning freezing orders issued in respect of stolen crypto assets – but that is beyond the scope of this note.)

Arbitration in the crypto sector depends in practice on the parties having concluded an agreement to arbitrate before a dispute arises.

Arbitration agreements are common in the sector. Examples of crypto agreements containing arbitration clauses include sale agreements requiring the transfer of cryptoassets; online service provider – user agreements (such as crypto exchanges and marketplaces), which are frequently constituted by the platform's terms of use and agreed to by the investor through click-wrap or browse-wrap contracting; and the terms of an Initial Coin Offering, usually hosted on the website of the issuer or a related entity[11].

Arbitration agreements in the crypto sector have been challenged with varying success on a number of grounds, including that the user did not have proper notice of the terms on a website, or that they were not actively required to confirm the terms (i.e. a browse-wrap agreement)[12], or that competing and incompatible versions of the agreement exist – a common problem with online agreements that are often updated, removed or overlap with other versions[13].

Another potential problem relates to arbitrability, resulting from the fact that various jurisdictions have either banned crypto outright or heavily regulated its use[14]. This has led some courts to conclude that crypto disputes are not arbitrable, or to refuse enforcement of awards, on grounds of public policy[15].

In China, a court set aside a China-seated award that ordered payment of damages in Chinese Yuan for failure to transfer the equivalent amount of Bitcoin in terms of an agreement. The award was set aside on grounds that it would facilitate the circulation of crypto and its exchange with fiat currency, which might disrupt the integrity and security of the Chinese financial system[16].

Even in jurisdictions that do not ban or onerously regulate crypto, courts have sometimes refused to uphold awards in crypto disputes on public policy grounds. In Greece, a court of appeal refused to recognise a US-seated award for the repayment of a Bitcoin venture finance loan.

The court reasoned that since crypto is considered a digital asset under Greek law, and not money, the European Central Bank did not guarantee any right to use it as payment, thereby posing a risk to users and potentially facilitating tax evasion and fraud[17].

In England, the Commercial Court recently refused, unusually, to enforce a US-seated award on public policy grounds, despite the terms and conditions of the crypto trading platform providing for Californian law and arbitration[18].

The UK-based user (who was pursuing parallel proceedings in the English courts that the platform was in breach of the Financial Services and Markets Act 2000, FSMA) resisted enforcement on the basis that the arbitrator had refused to apply or even consider English law, specifically the Consumer Rights Act 2015 and FSMA.

The court found that those UK statutes are instruments of UK public policy, that the user was a consumer, and that his contract with the platform (a UK entity albeit trading overseas) was one with a close connection to the UK. It would therefore be contrary to public policy to allow the platform to side-step UK consumer rights legislation by enforcing the award.

Other challenges that may arise in crypto arbitrations include the identification of the correct counter-party, given that crypto businesses may be organised and operated in an opaque manner, sometimes by several entities in a number of different jurisdictions[19]; securing interim measures over crypto assets, by an emergency arbitrator or, more commonly, by the courts[20]; and difficulties in the valuation of crypto assets and crypto businesses for the purposes of quantifying loss[21].

Advancing technology also raises the prospect of new forms of rules and procedures, including bespoke rules developed by JAMS, as well as the possibility of "on chain" arbitration – a term that covers anything from enhancing current procedures and rules by providing for communication and storage of case documents on blockchains, to radical departures from traditional forms of dispute resolution[22].

This may overlap with "on chain" enforcement, which similarly may take various forms, including empowering an arbitrator to modify a smart contract (i.e. a computer program stored on a blockchain that runs when predetermined conditions are met – typically used to automate the execution of an agreement so that all participants can be immediately certain of the outcome, without any intermediary's involvement or time loss) directly; to release cryptoassets from escrow or a multi-signatory account; or the reflection of the award itself on the blockchain[23].

Among other "known unknowns" raised by the prospect of on chain arbitration and on chain enforcement is the question of what the role of lawyers will be in the new types of procedure that will inevitably evolve.

As the crypto landscape continues to develop rapidly, arbitration is providing an efficient, flexible and neutral mechanism for the resolution of crypto disputes, while crypto disputes and blockchain technology, in turn, promise to take arbitration into new and unknown territory.

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Footnotes

[1] Andrea UTASY CLARK, "[Cryptocurrency disputes increasingly referred to arbitration, with unique issues arising](#)" (15 September 2023).

[2] Sam Brown, "[Arbitration of cryptoasset and smart contract disputes: arbitration unchained?](#)", Thomson Reuters Practical Law, 19 July 2023 (15 September 2023).

[3] UTASY CLARK, *op. cit.*, and BROWN, *op. cit.*

[4] BROWN, *op. cit.*

[5] UTASY CLARK, *op. cit.*

[6] Edward TAYLOR, Jennifer WU and Zach LI, "[Crypto Arbitration: A Survival Guide](#)", 15 September 2023.

[7] Sean MCCARTHY and Sophie NAPPERT, "[The Impending Binance Arbitration: a Primer on the World of Cryptocurrencies, Derivatives Trading and Decentralised Finance on the Blockchain](#)", (15 September 2023).

[8] UTASY CLARK, *op. cit.*

[9] TAYLOR *et al.*, *op. cit.*

[10] TAYLOR *et al.*, *op. cit.*

[11] BROWN, *op. cit.*

[12] *Ibid.*

[13] *Ibid.*

[14] TAYLOR *et al.*, *op. cit.*

[15] *Ibid.*

[16] UTASY CLARK, *op. cit.*; BROWN, *op. cit.*; *Gao Zheyu v Shenzhen Yunsilu Innovation Development Fund Enterprise (L.P.) and Li Bin*, (2018) Yue 03 Min Te No. 719.

[17] UTASY CLARK, *op. cit.*; BROWN, *op. cit.*; *Court of Appeal of Western Central Greece, No. 88/2021* (unreported).

[18] Martin KING and Bilal KHATTAB, "[Rights and Public Policy Prevent Recognition of Crypto US Arbitration Award in England](#)", (15 September 2023); Charlie MORGAN and Elizabeth KANTOR, "[English Commercial Court takes rare decision to refuse enforcement of arbitration award on public policy grounds in crypto case](#)", (15 September 2023); BROWN, *op. cit.*; *Payward Inc. v Chechetkin* [2023] EWHC 1780 (Comm).

[19] TAYLOR *et al.*, *op. cit.*

[20] *Ibid.*

[21] Elizabeth CHAN, Nicole TANG and Edward TAYLOR, "Crypto Disputes: The Valuation Challenge", *Dispute Resolution International* 17, May 2023.

[22] BROWN, *op. cit.*

[23] *Ibid.*

