



ARTICLE

Part 1: key issues in international arbitration of cryptocurrency disputes

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Following on from the phenomenal growth in the use of cryptocurrencies worldwide, there is increasing incidence of cryptocurrency disputes across the globe.

In probably one of the highest profile international cryptocurrency disputes in recent times, hundreds of derivatives investors are apparently looking to bring claims against cryptocurrency trading platform Binance for alleged losses arising from a widespread service outage in May 2021 which coincided with a massive drop in the price of Bitcoin. The massive sell off of cryptocurrencies at the material time allegedly resulted in clogged transactions which prevented investors from closing out or liquidating their trading positions during the outage.

In January this year, Singapore-based cryptocurrency exchange platform Crypto.com was hacked, with the accounts of over 400



users being affected and which resulted in unauthorized withdrawals of cryptocurrencies worth USD 35 million.

More recently, the volatile financial environments informed by force majeure events and geopolitical developments might have enhanced the risk profiles of several cryptocurrency based financial instruments and led to margin calls that could be disputed.

This piece highlights some strategic aspects around the international arbitration of cryptocurrency disputes. In my next article, I will examine legal issues in enforcement of international arbitration awards in cryptocurrency disputes and practical issues in enforcement against digital assets.

Cross-jurisdictional nature of cryptocurrency disputes

Cryptocurrencies are records on a series of ledgers in a large network of computers worldwide. There are no national borders in the decentralised blockchain. These digital assets are not located in any particular physical location and could be perceived to be “everywhere” at the same time. The users of cryptocurrencies may come from different parts of the world or may not even be readily identifiable. Cryptocurrency exchanges, NFT marketplaces and platforms may not necessarily have a legal presence in the place where the users come from, if at all, or may not have any or substantial real assets in places where they have a legal presence in. At the same time, cryptocurrencies held via a wallet or account in one part of the world can be readily transferred to another part of the world in minutes.

Accordingly, **cryptocurrency disputes are inherently cross-border by nature**, and invariably invokes legal issues that span across different countries. The internationality of such disputes means that the laws of different jurisdictions may apply, and possibly clash with each other, at the same time.

This presents fertile ground for parties to expend substantial time and money over technical, but no less real, disputes. This could take the forms of a jurisdictional challenge disputing over where the main dispute ought to be resolved, challenges on which system of substantive law ought to apply to determine the main disputes, the



choice of law rules to apply, and more. Savvy arbitrants could deploy cross border tactics, whether legitimate or guerrilla, to exhaust the counterparty such that there is little money and energy left by the time parties get to properly arbitrate their disputes.

The Binance class action arbitration provides a contemporaneous illustration of the myriad of technical challenges relating to the internationality of cryptocurrency disputes. Binance has been perceived to be a decentralized entity with no global headquarters. As the Binance User Terms could seemingly be clearer as to which specific Binance entity contracted with the investors (with a generic reference to “Binance operators”), parties may face jurisdictional challenges around whether any arbitration would be commenced against the correct party to the arbitration agreement.

Further, there could be challenges around whether the dispute could even be arbitrated to begin with. The Binance User Terms provide for a substantive law to govern its agreement. The same law however requires cryptocurrencies derivatives trading to be licensed. This could mean that the arbitral tribunal might have to first determine the preliminary question of whether the matter is arbitrable (and if so, under what system of law) before the arbitration may proceed.

There are in addition serious questions to be asked around whether the relevant arbitration rules allow for a “class action” arbitration. Where Binance’s consent is required under the rules for parties to be joined and arbitrations to be consolidated, and where such consent is not obtained, each investor may have to pay for separate costs for each arbitration. Other concerns include security for costs in a funded class action, and the extent in which the publication of the dispute across different fora would constitute a breach of the arbitration agreement, amongst others.

Emergency arbitration to prevent dissipation of cryptocurrencies

Given the ease in which cryptocurrencies can be transferred, converted into fiat currencies, disposed (NFTs are increasingly placed as collateral for loans), and dissipated to anonymous or unknown users in any location in the world, it is often of paramount importance that the cryptocurrencies be ‘frozen’ to preserve the status quo, pending the issuance of a final award by the arbitral tribunal. In



relation to NFTs, a digital wallet or trading account can be opened by anyone and the private keys to the NFT can be readily sold with a click of a button to third parties who have no notice that the NFT may be the subject matter of a dispute.

In this regard, the **Singapore International Arbitration Centre (“SIAC”) emergency arbitration** mechanism plays a vital role in ensuring that the final arbitration award is not rendered nugatory by the dissipation or disposal of cryptocurrencies prior to the determination of the dispute. The SIAC emergency arbitrator is empowered under Rule 30 read with Schedule 1 of the SIAC Rules 2016 to, at the request of a party, issue an order or an award granting an injunction or any other interim relief it deems appropriate. The SIAC Rules prescribe for an Emergency Arbitrator to be appointed by the President of the SIAC Court within one day of an emergency arbitration application, and the Emergency Arbitrator is compelled under the SIAC Rules to make any interim order or award within 14 days of his/her appointment.

The international enforceability of an SIAC emergency arbitration award is increasingly gaining recognition across different jurisdictions. Recently in August 2021, the Indian Supreme Court in the decision of *Amazon.com NV Investment Holdings LLC v Future Retail Limited & Ors* enforced an order for urgent relief issued by an emergency arbitral tribunal appointed by the SIAC.

It is now possible under English law (*Aa v Persons Unknown* [2019] EWHC 3556 (Comm), *Elena Vorotyntseva v Money-4 limited and others* [2018] EWHC 2596 (Ch)), Hong Kong law (*Nico Constantijn Antonius Samara v Stive Jean Paul Dan* [2019] HKCFI 2718) and more recently Singapore law (*CLM v CLN and others* [2022] SGHC 46) to obtain a proprietary injunction to prohibit counterparties from dealing with, disposing of or diminishing the value of the relevant cryptocurrencies where there is a dispute over ownership of the cryptocurrencies, or a *mareva* freezing injunction to restrain counterparties from dissipating assets of up to the value of the cryptocurrencies in question.

It remains to be seen to what extent can an anti-arbitration injunction be sought from a jurisdiction that does not allow such injunctions, in an attempt to counteract an emergency arbitration seeking to preserve the status quo of an arbitration.

Volatility, valuation concerns and the need for speed

The spot price of a digital token can be a few cents in Q1 2022, but rise to a (US) dollar plus come Q3 2022. If the obligation to pay cryptocurrencies crystalizes in time in Q1, should the arbitral tribunal order the obligor to compensate based on the spot price in Q1, or should the tribunal take into consideration the earnings that the obligee could have made in Q3 if payment was indeed made in Q1? What if, by the time the tribunal is prepared to assess the damages to compensate, the market value of the tokens drops to a level lower than what it was before the arbitration commenced (perhaps due to external *force majeure* events)?

Complex issues around the proper valuation of cryptocurrencies are common in many cryptocurrencies arbitrations, given the volatility of cryptocurrencies. There could be substantial differences between the market value of a token at the time of breach or obligation to pay, and the time when the arbitration award has been issued. The volatility of cryptocurrencies is recognised in the recent English decision of *Tulip Trading Ltd v Bitcoin Association for BSV & Ors* [2022] EWHC 2 (Ch), where cryptocurrencies are not considered good security for costs in a dispute, as the court adopted the view that a potential fall in the value of the cryptocurrencies would render these ineffective security.

Expert witnesses could be involved in an arbitration to submit on the valuation of the cryptocurrencies, where the valuation methodologies used and assumptions adopted by each expert might tested against each other. The valuation exercise may involve a consideration of a combination of factors such as the arbitrator's prior trading behaviour, historical trend and projections around the relevant cryptocurrency, market trends and predictions, inherent value of the token in question and of the token issuer if any.

Of course, a way to obviate complex issues around valuation altogether would be to resolve the cryptocurrency dispute in as fast a time as possible, before any dramatic shifts in valuation could possibly take place. JAMS, formerly referred to as the Judicial Arbitration and Mediation Services, Inc. in the United States, published a set of rules specifically catered to resolve disputes arising out of smart contracts. Notably, the rules mandate that disclosure of



documents shall be limited to the written statement of an expert witness as to the meaning of how relevant code in the smart contract should be interpreted, and the “only documentation that will be reviewed or considered by the Arbitrator shall be the written contract, the computer code and the [expert] witness’s testimony” (Rule 12). The arbitrator has to issue an award no later than 30 days after his/her appointment.

In a similar vein, the **SIAC’s Early Dismissal process** is eminently suitable to resolve straightforward disputes around obligations to pay cryptocurrencies. Under Rule 29 of the SIAC Rules 2016, a party may apply to an arbitral tribunal for the early dismissal of a claim or defence on the basis that a claim or defence is manifestly without legal merit. The SIAC Rules provide that the order or award shall be made within 60 days of the filing of the application.

Get in touch with us

We have an active practice in working with clients to design disputes prevention and disputes mitigation processes prior to the occurrence of any disputes, and to develop and deploy effective cross border strategies when disputes arise relating to cryptocurrencies and/or NFTs, representing clients in international arbitrations including enforcement work across a myriad of jurisdictions, and advising clients on investments in digital assets. Please get in touch with [Shaun Leong, FCI Arb](#) if you would like us to share our expertise or to understand in further detail any of the points covered in this piece.

This article is part one of two exploring this area. The second part has been published [here](#).

Get in touch



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