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Part 2: Key issues in international arbitration of cryptocurrency disputes

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The phenomenal growth in the use of cryptocurrencies worldwide has led to an exponential increase in incidence of cryptocurrency disputes across the globe.

This piece highlights the legal issues in enforcement of international arbitration awards in cryptocurrency disputes and practical issues in enforcement against digital assets. To read my previous piece highlighting the speedy and volatile nature of international arbitration of cryptocurrency disputes, please [click here](#).

Legal issues in enforcement of an international arbitration award

An international arbitration award is enforceable in over 150 countries under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").



This is particularly important given the cross-border nature of cryptocurrency disputes.

An award can only be refused enforcement under the New York Convention on very limited grounds, one of which is if the enforcement of the arbitration award would be contrary to the public policy of the country where enforcement is sought (Article V, New York Convention). Given the increasingly robust regulatory environments all over the world in the treatment of cryptocurrencies, we can expect greater pressure being placed on this “public policy” ground to challenge the enforcement of an arbitration award of a cryptocurrency dispute.

In April 2020, the Shenzhen Intermediate People’s Court in the case of *Gao Zheyu v Shenzhen Yunsilu Innovation Development Fund Enterprise (LP) and Li Bin* (2018) Yue 03 Min Te No. 719 set aside an award issued by an arbitral institution in Shenzhen. The award was for damages in USD in lieu of cryptocurrency. However, China has banned cryptocurrencies and does not recognize digital currencies as having any legal status of a currency. The arbitration award was set aside on the ground that the arbitration award was contrary to China’s public policy and in particular, as contravening China’s mandatory laws prohibiting the exchange of cryptocurrencies into fiat currencies. Other countries including several in the Middle East have similarly banned cryptocurrencies or imposed strict rules against dealing with cryptocurrencies.

This presents serious difficulties given that we can expect arbitral tribunals to commonly issue awards ordering a party to pay monetary damages to compensate for losses suffered equivalent to the value of the cryptocurrencies in question, as opposed to ordering a party to pay the disputed cryptocurrencies, given the substantial challenges in tracing the cryptocurrencies, assuming if they are not already dissipated to a secret account, a multitude of anonymous users or otherwise innocent third-party users. The award for monetary damages would invariably have to be prescribed in a particular fiat currency. If monetary award is perceived under the mandatory laws of a jurisdiction as an unlawful, automatic conversion of cryptocurrencies to fiat currency, that would mean the award would be unenforceable in that jurisdiction. The better view would be that cryptocurrencies, *being property as opposed to a form of currency* (notwithstanding the nomenclature), was lost, and all the tribunal did



was to order monetary damages to compensate for the loss of the property; it did not convert cryptocurrency into fiat currency. This would obviate the arbitration award from contravening those mandatory laws prohibiting the conversion of cryptocurrency to fiat currency, thereby guaranteeing its enforceability locally.

There appears to be some authority for this position. The Shanghai First Intermediate People's Court in the case of *Li and Bu v Yan, Li, Cen and Sun* (2019) Hu 01 Min Zhong No. 13689 recognised Bitcoins as valuable property. While the value of Bitcoins could not be determined by its trading price on cryptocurrency exchanges, given that these are not legalised nor recognised in China, the court found it appropriate to order the unsuccessful party to return the specific Bitcoins owed to the successful party.

Practical issues in enforcement against digital assets

While there may be difficulties in locating the cryptocurrencies in question, such difficulties are not insurmountable. Indeed, one might view cryptocurrencies as easier to trace than cold hard cash, all things being equal. This is due to the fact that cryptocurrency activity is not private, and in fact quite transparent where transactions are recorded on the blockchain, publicly viewable at any point in time by anyone with access to the blockchain. The blockchain never forgets and its immutability means that users invariably leave behind a record that can be traced, even if the cryptocurrency has passed through several layers of ownership. Most digital assets platforms including those dealing with NFTs require some form of identifying information to open a trading account, and a user would need an account with a bank when converting cryptocurrencies to fiat currencies. Buyers and sellers leave behind digital signatures on the blockchain that can be traced. Likewise, wallets have addresses that can be traced on the blockchain. IP addresses of the computers and URLs of platforms used by users can be connected with Bitcoin addresses. Indeed, the anonymity may very well be uncovered when one accumulates sufficient data points.

Nevertheless, the advent of new technologies has made tracing the flow of cryptocurrencies increasingly difficult. Users may take advantage of the enhanced encryption that comes with privacy coins, which are banned in several jurisdictions, to make it very difficult to



track transactions. Some privacy coins use secret addresses to blur or misdirect a blockchain trail or have collusion functions to allow genuine transactions to disguise amongst decoy or fake transactions. There are also coin mixers or mixing platforms, wallets which allow a group of cryptocurrency transactions to be randomly swapped and mixed together so as to obfuscate the paper trail with a mix of user addresses and transaction histories. Finally, wallets can be owned by people who were specifically engaged just to facilitate the cryptocurrency transaction, without knowledge of the identities of the true parties behind the transaction. There are digital forensic and blockchain analytics tools to overcome such challenges.

In the instance where the cryptocurrencies could be traced, how does one compel the actual transfer of cryptocurrencies to the successful party when enforcing an arbitration award? There could be a myriad of excuses given by the unsuccessful party – the private keys are lost, the wallet was hacked, the trading account is lost or otherwise blocked from access, and more. The solution may very well lie in on-chain enforcement. There are increasingly more initiatives which allow for this. The transfer of cryptocurrencies from one party to the another could be written in code on the blockchain, most commonly in the form of a smart contract, upon the occurrence of several conditions (including the issuance of a final arbitration award) prescribed prior to the commencement of an arbitration. The mandatory, automatic transfer of cryptocurrencies on the blockchain in execution of the smart contract would obviate any attempt by the unsuccessful party to evade enforcement of an award. These mechanisms, such as the Hedera Hashgraph platform, Datarella's CodeLegit, and the Digital Dispute Resolution Rules published by the UK Jurisdiction Taskforce of LawtechUK, could take the form of an on-chain, substantially automated arbitration, or a hybrid off-chain traditional arbitration with powers, both legal and technical, granted to the arbitral tribunal to amend the smart contract as may be required.

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.

Get in touch



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Crypto and digital assets

