

The cryptosphere and arbitration in the British Virgin Islands

The BVI has significantly developed and promoted its role in international arbitration in the last decade. The BVI Arbitration Act 2013 (the **Act**), which is modelled on the UNCITRAL Model Law, came into force in 2014, shortly after the territory joined the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the **Convention**). In 2016 the BVI International Arbitration Centre opened its doors with its rules based on 2010 UNCITRAL Arbitration Rules. It is a modern and familiar framework that links the BVI to the global arbitration community.

This period has also seen a meteoric rise in the global use of digital assets, leading to an increase in disputes with a crypto angle. Many such disputes are cross border and there are potential advantages to dealing with them through arbitration (although the BVI Courts have also shown a progressive stance in this regard).

The BVI has been a popular jurisdiction for those providing services within the cryptosphere, having attracted a number of cryptocurrency exchanges, token issuers, crypto-linked funds, and other providers of DeFi and blockchain services. This has – and will – inevitably lead to disputes that involve or relate to BVI companies that operate within the cryptosphere.

Digital asset disputes

Disputes relating to blockchain or crypto can come in many shapes and sizes. Broadly speaking, they can be split into two categories: those scenarios where a claimant seeks to recover digital assets, which tend to involve a blockchain tracing component; and those where there is some other form of dispute, be it contractual or corporate in nature and where the underlying contract or business relates to crypto or blockchain services.

Given the popularity of the BVI for crypto-related business, it is likely that those dealing with digital asset disputes will encounter the jurisdiction.

In these circumstances, consideration should be given as to whether arbitration provides a more effective route to recovery. Many exchanges have arbitration clauses within their terms of service which may force claimants to use this forum to determine certain types of disputes. But even those who have not previously agreed to use arbitration may elect to have disputes determined in this manner on an ad hoc basis.

Advantages of arbitration in digital asset disputes

Some of the advantages of arbitration include: confidentiality; flexibility; expertise of tribunal; bespoke relief; and finality and enforceability of the resulting award.

The confidentiality of arbitration may be particularly attractive in the context of crypto disputes bearing in mind that users of digital assets value its anonymity (or more accurately, its pseudonymity) and that projects providing crypto-related services generally prefer not to be seen as litigious within the relatively small community. It remains to be seen whether the confidentiality of arbitration could also accommodate participation in disputes by those wishing to remain unknown to other parties, such as those accused of hacking and/or misappropriating digital assets.

The ability to choose a tribunal with relevant expertise is also crucial when dealing with rapidly developing technology and the emergence of new products. The variety of digital assets and how they are acquired, stored, used, and traded is a universe with its own language, complex rules and customs. Those adjudicating disputes in the cryptosphere must be knowledgeable about its intricacies and the potential for its misuse.

Arbitration can also be quicker than court proceedings, especially when one considers the limited grounds of appeal in arbitration and the speed with which arbitral awards can be enforced. A final award issued by a Convention member state enjoys enforceability in over 170 countries, with minimal grounds for refusal.

Enforcement of New York Convention awards in the BVI

Convention awards can be recognised and enforced in the BVI either by commencing an action in the BVI Court suing on the arbitral award or filing an application in the BVI Court for leave to enforce the award. Any Convention award which is enforceable in accordance with the above procedures, will be treated as binding for all purposes on the persons between whom it is made. As such, it will be enforceable in the same manner as any other judgment or order of the BVI Court.

The second of these options tends to be the quickest and most efficient route to recognition and such application may be made on an ex parte basis. Further, the BVI Courts have allowed awards recognised in this manner to be executed upon prior to the recognition order being served on the respondent.

Importantly, the grounds upon which the BVI courts may refuse to enforce a Convention award are very limited. They are as follows:

- 1) Incapacity of a party to the arbitration agreement
- 2) Invalidity of the arbitration agreement
- 3) Lack of proper notice of the arbitration or appointment of the arbitrator, or where a party was unable to present their case
- 4) The award deals with matters that do not fall properly within the scope of the arbitration
- 5) The composition of the arbitral tribunal or the procedure employed was not in accordance with the agreement of the parties or the law of the country where the arbitration took place
- 6) Where the award is not yet binding on the parties, or it has been set aside or suspended in the jurisdiction in which it was made
- 7) If the Court finds that the subject matter of the award is not capable of settlement by arbitration under BVI law or if the award contravenes the public policy of the BVI

This means that unless it would contravene BVI public policy to enforce an award granting a particular form of relief, the relief is irrelevant to the question of whether an award will be recognised in the BVI. Taking the example given above – where an award directs a person to transfer specific digital assets – such an award would become enforceable as if it were a judgment of the BVI Court provided that one of the grounds to refuse enforcement are not met. This is likely a far more straightforward route to enforcing such relief than if it were a foreign court order. Generally speaking, non-monetary judgments would need to be enforced by suing upon the original decision and relying on issue estoppel, which can be a far more protracted process.

Examples of remedies available on enforcement

An arbitration award creditor can typically expect to be able to: freeze digital assets, including with the help of the exchange that holds them; appoint a receiver over them, and charge the asset with the cooperation of the holder; obtain a proprietary injunction; obtain a disclosure order allowing digital assets to be traced; and, as we have already seen, to direct a third party to transfer digital assets to another.

Conclusion

As a dispute resolution method, arbitration offers some distinct advantages to resolving disputes involving cryptocurrencies and other digital assets. The BVI, as a pro-arbitration jurisdiction that has made significant strides in being at the forefront of the digital asset space, is well-suited to both adjudicating such disputes and ensuring that foreign awards with a crypto angle are effectively enforced for the benefit of the wronged party.



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