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Arbitration Tech Toolbox: Arbitrating Digital Asset Disputes

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At the YSIAC Conference 2021 ARBXTalk symposium at the end of 2021, it was noted that "*[a] consensus shared amongst the panellists was that arbitral disputes surrounding [cryptocurrencies, blockchains and non-fungible tokens; collectively, 'digital assets'] do not differ greatly from disputes in other industries beyond the change in underlying subject-matter of the disputes*."

Yet even if the differences between digital asset disputes and other commercial arbitrations might not be described as "great", there is something separate and distinct about digital asset arbitrations as recognised in several developments arising from the work of the UK Jurisdiction Taskforce ("**UKJT**").

The Legal Statement on Cryptoassets and Smart Contracts

The British Ministry of Justice set up the UKJT in 2019, in conjunction with the English judiciary and the Law Society of England and Wales, to consult the legal and technology communities over the status of distributed ledger technology, cryptoassets, smart contracts and associated technologies, and to produce an authoritative legal statement on the status of cryptoassets and smart contracts under English private law.

The UKJT published the fruits of its consultation and research in November that year in the form of the Legal Statement on Cryptoassets and Smart Contracts (the "**Statement**"). The Statement concludes *inter alia* that as cryptoassets cannot be physically possessed but are "*purely 'virtual'*", as a matter of English law they cannot be the object of bailment and only some types of security can be granted over them.[1)]

The Statement has had persuasive traction in the English Courts including in *AA v Persons Unknown and ors* [2019] EWHC 3556 (Comm), the first English case to expressly discuss and recognise cryptocurrencies as property under English law. The Statement has also been repeatedly relied upon in later cases including *Ion Science Limited & Anr v Persons Unknown* (21 December 2020), *Fetch.ai Ltd v Persons Unknown* [2021] EWHC 2254 (Comm), and *Zi Wang v Graham Darby* [2021] EWHC 3054 (Comm).

The Digital Dispute Resolution Rules

While it remains to be seen whether other common law courts agree with these propositions, the UKJT has not sat still. In 2021, it published rules for the resolution of digital disputes known as the Digital Dispute Resolution Rules ("**DDRR**"). This is one of the first major efforts to create arbitration rules for digital asset disputes, noticeable not least because the major arbitral institutions have at present not introduced any special rules for cryptocurrency disputes. The DDRR is designed to be incorporated into on-chain digital relationships and smart contracts. The sixteen rules allow for arbitral or expert dispute resolution within a very short period of time.

There are many notable aspects of the DDRR:

1. **Extremely broad applicability to digital asset disputes coupled with maximum flexibility.** The DDRR "*may be incorporated into a contract, digital asset or digital asset system by including the text (which may be in electronic or encoded form) "Any dispute shall be resolved in accordance with UKJT Digital Dispute Resolution Rules" and, optionally, by specifying: a. whether any particular issue or type of dispute (an expert issue) should be resolved by expert determination instead of arbitration; b. any preferences as to the number, identity or qualifications of any persons to be appointed as arbitrators or experts; c. any preferences as to the procedure to be adopted for the resolution of a dispute, including as to form and timing of any decision or arbitral award (as applicable), recoverable costs and anonymity; d. any modifications to the application or operation of the rules*."[2] This rule and the proposed arbitration clause capture both the range of disputes that may arise ("*[a]ny dispute…*") and offer maximum flexibility in the application of the DDRR, permitting "*any modifications*" to their application or operation. This is appropriate given the wide definition of a "*digital asset*" under the DDRR.[3]
2. **Accommodation of automatic dispute resolution processes.** The DDRR define an automatic dispute resolution process as "*a process associated with a digital asset that is intended to resolve a dispute between interested parties by the automatic selection of a person or panel or artificial intelligence agent whose vote or decision is implemented directly within the digital asset system (including by operating, modifying, cancelling, creating or transferring digital assets)*".[4] Rule 4 gives considerable legal force to automatic dispute resolution processes by stating that "*[t]he outcome of any automatic dispute resolution process shall be legally binding on interested parties*" and rule 5 states that the DDRR shall not apply to disputes that have been subjected to an automatic dispute resolution process.
3. **Preference for use of electronic means of communication.** Rule 6(b) mandates that a request for arbitration "*shall include*" the "*electronic contact details for the claimant and each respondent*", and the respondent is obliged to include its electronic contact details in its response to the request. No definition of "*electronic contact details*" is stipulated in the Rules. They are distinguished from the "*identity details*" of the parties (also undefined). Rule 10 contains the nub of the preference for electronic means: the tribunal shall "*have absolute discretion as to what evidence and argument it receives and in what form but shall as far as practicable permit parties to submit evidence and argument electronically*".
4. **Arbitrator appointments by a specialist, expert body.** The DDRR provide for the arbitrators to be appointed by the Society for Computers and Law ("**SCL**") if not chosen by the parties (rule 8). The SCL, which also administers arbitrations under the DDRR, is expected to develop a panel of arbitrators with experience in relevant technologies, well-versed in the particular language and concepts of cryptocurrencies, including the technical coding side and the business practices of their trade.

5. **Direct enforcement by the tribunal**. Rule 11 grants powers to arbitrators "*at any time to operate, modify, sign or cancel any digital asset relevant to the dispute using any digital signature, cryptographic key, password or other digital access or control mechanism available to it. The tribunal shall also have the power to direct any interested party to do any of those things*". This provision echoes the automatic dispute resolution processes permitted by the DDRR, but relies on the parties granting access to the arbitrator to the relevant digital assets.
6. **Extension of the usual principles of anonymity – but permissive publication of the award.** There is an interesting extension of the usual principles of confidentiality in rule 13: parties are obliged to provide details and evidence of their identity to the reasonable satisfaction of the tribunal, but the parties may agree to provide that evidence to the tribunal alone and not include them in the notice of claim or initial response. The tribunal is obliged not to disclose the identification details unless disclosure is necessary for the fair resolution of the dispute, enforcement, protection of the tribunal's own interests, or if required by law, regulation or court order. This clearly goes well beyond mere right of confidentiality over process. Furthermore, rule 15 permits the tribunal to provide the award in an anonymised format to the SCL for publication, if the tribunal *"considers that an award or decision is of general interest*" and the parties do not object. This raises the curious spectre of a discrete body of DDRR jurisprudence potentially arising.
7. **Courts experienced in cryptocurrency arbitrations as the default seat, in a jurisdiction friendly to digital assets.** The default seat is England and Wales (rule 16), whose courts are gathering considerable early experience in digital asset disputes.[5)]

Conclusion

The DDRR have not (to this author's knowledge) yet been tested, and there appears to be no publicly available awards or judicial treatment in any cases. They were, however, described by the Law Commission of England and Wales in its advice to the UK Government on smart legal contracts as being "*particularly well-suited"* for digital asset disputes.[6)] In all, the DDRR are a very welcome addition to the panoply of tech-bespoke arbitral dispute resolution mechanisms that include Codelegit (which uses human arbitrators), Kleros, a decentralised arbitration service that enables peers to sit as 'jurors' and pass judgment over the dispute, and the draft JAMS Rules Governing Disputes Arising out of Smart Contracts.

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References

?1 Statement, para. 17, page 7.

?2 Rule 3.

?3 Rule 2(a) states that "*a digital asset includes a cryptoasset, digital token, smart contract or other digital or coded representation of an asset or transaction; and a digital asset system means the digital environment or platform in which a digital asset exists*".

?4 Rule 2(c).

?5 E.g. *Ion Science, Fetch.ai* and *Zi Wang*; *Vorotyntseva v Money-4 Limited, trading as Nebeus.com* [2018] EWHC 2598 (Ch) and *Liam David Robertson v Persons Unknown* (unreported 15th July 2019), where bitcoin was recognised as property; *Toma v Murray* [2020] 2295 (Ch), where an injunction over bitcoin was discharged because damages were an inadequate remedy given the price volatility of bitcoin; and *Tulip Trading v Bitcoin Association for BSV & Ors* [2022] EWHC 141 (Ch), where cryptocurrency was insufficient security for costs, again given its price volatility.

?6 Para. 5.156, page 14.

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