Kluwer Arbitration Blog

2024 PAW: All You Need to Know about Arbitration and Crypto Assets

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On 18 March 2024, the first day of the Paris Arbitration Week ("PAW"), the School of International Arbitration at Queen Mary University of London and Université Paris I Pantheon-Sorbonne held a joint conference on crypto assets and arbitration.

The first roundtable, moderated by **Professor Mathias Audit** and **Dr. Maria Fanou**, provided a general introduction on the legal issues surrounding crypto assets, including the definition of crypto assets, their legal status, as well as typical litigations which have arisen out of crypto assets. **Chloë Bell** of 3 Verulam Buildings in London and **Professor Anne Claire Rouaud** of Sorbonne Law School offered the various approaches under common law and French civil law, respectively.

The second roundtable, moderated by Professor Mathias Audit and **Professor Dr. Maxi Scherer**, delved into the specific issues surrounding arbitrations involving crypto assets. **Nino Sievi** and **Chiann Bao** provided perspectives of counsel and arbitrator, and **Dr. Mariel Dimsey,** immediate past Secretary-General of the Hong Kong International Arbitration Centre ("HKIAC") offered insights from the institutional viewpoint.

Categories and Legal Status of Crypto Assets

Anne Claire Rouaud gave a brief overview of the concept of crypto assets. Crypto assets are classified based on the technology they utilize, primarily distributed ledger technology ("DLT"), such as blockchain. However, their legal classification depends on the rights conferred by the tokens. In France, the Pacte Law of 2019 defines digital assets and sets a framework for digital asset services and initial coin offerings. The **EU's Markets in Crypto-Assets Regulation** ("MiCA"), effective from 30 December 2024, will replace many provisions of the Pacte Law. MiCA distinguishes among three types of crypto assets: asset-referenced tokens (known as stablecoins), e-money tokens, and utility tokens. Notably, MiCA does not apply to financial instruments or non-fungible tokens ("NFTs") but may apply to fractional parts of NFTs.

Determining the legal status of crypto assets involves considering the rights confirmed by law. The Pacte Law recognizes tokens as intangible assets subject to ownership rights. MiCA also acknowledges ownership rights over crypto assets, but leaves certain issues, especially in insolvency proceedings, to be determined by national law.

Chloë Bell emphasized that in the case of insolvency, the proprietary status of crypto assets is crucial. She gave the example of the New Zealand High Court case of ***Ruscoe v. Cryptopia*** as an illustration. In that case, the court concluded that crypto assets held by an exchange were held on trust for account holders. This determination affected the distribution of assets in liquidation proceedings, i.e. the personal creditors received less than 50% of their claims.

Unresolved Issues Regarding the Nature of Crypto Assets

With regard to legal classification under common law, Chloë Bell clarified that crypto assets have so far been analyzed as a form of property. Nevertheless, courts have yet to determine whether crypto assets are "things in possession" or "things in action", or whether they might belong to a third novel category.

For instance, in the United Kingdom, the Law Commission has recently introduced a **Bill** wherein it refrains from explicitly taking a stance on whether crypto assets fall within the confines of the two traditional property categories. Instead, it has sought consultation on this matter, recommending that such assets are likely best classified as a separate and distinct category of property.

Elsewhere in other common law jurisdictions, the Singapore Court of Appeal rendered a decision in the case of ***B2C2 v. Quoine Pte Ltd***, affirming the cryptocurrency's status as property, eligible for holding in trust. Similarly, the Canadian Federal Court has made a significant ruling declaring Bitcoin as property. In the United States, various cases are being pursued *in rem*, with the asset itself as the defendant, by prosecuting authorities. Likewise, the Hong Kong Court of First Instance and the British Virgin Islands have classified crypto assets, including Bitcoin, as forms of property.

As jurisprudence surrounding crypto assets evolves, future cases will likely delve into nuanced considerations regarding the nature of these assets, their fungibility, and the array of remedies sought by investors before various courts.

Providing the French law perspective, Anne Claire Rouaud gave an overview of three outstanding questions regarding the nature of crypto assets as property. Although French law admits that intangible goods might be subject to ownership rights, certain issues remain.

First, regarding the transfer of ownership, it is yet unclear whether ownership transfer of crypto assets occurs solely through on-chain registration in the blockchain or if off-chain methods, such as delivery of private keys or registration changes by custodians, are sufficient. The timing and nature of ownership transfer depend on the legal status of crypto assets, with considerations for their fungibility. The second question concerns the rules applicable during insolvency proceedings against custodians of crypto assets. For instance, Article 70(1) of the MiCA mandates adequate protection of clients' ownership rights but lacks specificity regarding such safeguarding methods. Debates among French academics revolve around whether owners have a claim in kind on their assets, considering their fungible nature, prompting considerations for potential regulatory alignments with provisions for financial instruments under the French monetary and financial code. Third, it remains to be determined whether a bona fide purchaser of a crypto asset can establish title based on possession against a claim by the true owner. It contrasts the provisions of the French civil code, where possession is considered to be equivalent to title, with the applicability of these provisions to intangible assets like crypto assets. This leads to consider the necessity for tailored

legal frameworks for crypto assets and prompts reflection on the adequacy of existing regulations governing intangible property.

Typical Disputes

According to Chloë Bell, in common law jurisdictions, disputes so far primarily revolve around fraud, typically involving instances where victims have their cryptocurrency wallets hacked or assets stolen, prompting legal action seeking remedies. Legal proceedings often begin with obtaining injunctions against unidentified individuals linked to wallet addresses or transaction IDs. However, challenges arise when assets enter crypto exchanges, necessitating disclosure orders to track asset movements. Exchanges may resist providing information, citing obligations to investors. Litigants often face complexities in tracing assets through multiple transactions and engaging with bona fide purchasers. Instances like the ***D'Aloia v (1) Persons Unknown (2) Binance Holdings Limited & Others*** highlight attempts to hold exchanges accountable for facilitating fraudulent activities.

In France, a notable early case in the realm of crypto assets involved the Mt. Gox platform, a Tokyo-based Bitcoin exchange, that abruptly vanished in 2014. Before its disappearance, a Paris court ruled in 2013 that the activities of the European company, which collected the funds paid by buyers and paid them to the sellers, constituted a payment service under the Payment Services Directive, requiring authorization as a payment services provider. Recent cases involve fraud prosecutions against intermediaries, but no bankruptcies of French crypto asset platforms have been registered with the French financial regulator (the AMF). Liability claims have been raised against platform operators, leading to jurisdictional questions. For instance, in one case, a customer sued a Lithuanian-based platform after his account was hacked and funds lost. The Montpellier Court of Appeal, aligning with EU jurisprudence, ruled that the customer was a consumer, and that the court of Montpellier therefore had jurisdiction over the claim. However, recovering funds from abroad-based intermediaries is often challenging for investors, leading them to seek recourse from banks that executed their funds transfer orders. This issue extends beyond crypto assets to other atypical investments, with banks generally not held liable beyond the duty of diligence in detecting apparent anomalies. In a judgment from 2020, the Commercial Court of Nanterre ruled that Bitcoins being fungible and consumable goods, the borrower became the owner of the loaned Bitcoins and was not obliged to return to the lender the Bitcoin Cash resulting from the fork in the blockchain that happened during the term of the loan.

When Crypto Assets Meet Arbitration

Nino Sievi outlined three main categories of disputes that might end up in arbitration: hackings, off-chain contract disputes, and on-chain disputes resolved via blockchain or decentralized justice protocols. Fraud claims against fraudsters are unlikely to go to arbitration, but those involving oversights by exchanges often do, along with claims arising out of financing agreements and joint venture agreements in the crypto ecosystem, as these entities often include arbitration agreements in their terms and conditions.

Mariel Dimsey highlighted characteristics of crypto-asset arbitrations from the institutional perspective, noting the absence of disputes regarding fraud due to the lack of agreement, limited

mechanisms for dealing with mass arbitrations apart from consolidation or joinder and challenges in efficiently managing disputes involving sophisticated counsel.

Criteria for selecting arbitrators were also discussed, with an emphasis on the fact that scarcity of arbitrators with specific subject matter knowledge does not constitute an impediment to a high-quality arbitration, as most underlying issues relate to contractual interpretation. Nino Sievi added that the knowledge of the people and of the drafting style in the industry is often more important.

Chiann Bao addressed concerns about the arbitrability of disputes under consumer protection laws, citing cases like ***Nifty Gateway LLC v. Amir Soleymani*** and ***Coinbase, Inc. v. Bielksi***. Mariel Dimsey also mentioned the Ontario Superior Court case of *Lochan v. Binance Holdings Limited*, which declared an arbitration agreement unenforceable due to public policy concerns relating to consumer protection.

Additionally, Nino Sievi and Mariel Dimsey highlighted the unique challenges of crypto asset arbitrations, including poorly drafted contracts and the procedural complexity of low-value disputes. Chiann Bao raised questions about the protection of investments in mining farms and other crypto-related ventures in investment arbitration contexts.

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