



# **“Arbitrating Distributed Ledger Technology Disputes: What Do We Do With Crypto and Smart Contracts?”**

**Keynote Speaker: Paul Sills**

**Moderator: Simon Wong**

**Date: Tuesday, 23 November 2021**

**Time: 6:00pm (HKT)**

# Moderator & Speaker

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# Introduction

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- In 1994 Nick Szabo (legal writer and cryptographer) defined a smart contract as "*a smart contract is a computerised transaction protocol that executes the terms of a contract.*"
- Mr Szabo went on to say that the consequences of smart contract design on contract law and economics, and contract drafting had been little explored.
- The field of Electronic Data Interchange (EDI) was at the time a primitive forerunner to smart contracts.
- In his 1994 paper Mr. Szabo signalled the possibility of synthetic assets – securities formed by combining securities (such as bonds) and derivatives (options and futures) in a wide variety of ways.
- Finally, Mr. Szabo also saw the concept of smart contracts being extended to property.

# Smart Contracts - Introduction

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- An early example of a smart contract that is often quoted is your typical vending machine.
- The form of many smart contract being analysed today is slightly different from the traditional e-contracts as many modern smart contracts are now essentially just computer code.
- Today we typically focus on smart contracts that utilise blockchain technology and are distributed on nodes (computers) throughout the world. But smart contracts need not be on a Distributed Ledger.

# Types Of Smart Contracts

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- Two types of smart contract are generally referred to.
- Smart contract code: It is software, typically now on a blockchain ledger, that is stored, verified and then executed electronically. This may look like the execution of a traditional contract as the code may result in a change of rights or obligations. This could include the transfer of property. However, is it a traditional contract?
- Smart legal contracts – these are more readily identifiable by lawyers as they refer to smart contract coding technology used either as a compliment to or in substitution for a traditional written legal contract.



# Some Definitions And Concepts

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- A blockchain is a decentralized ledger of all transactions across a peer-to-peer network. Using this technology, participants can confirm transactions without a need for a central clearing authority. Potential applications can include fund transfers, settling trades, voting, and many other issues.
- A smart contract is an automatable and enforceable agreement. Automatable by computer, although some parts may require human input and control. Enforceable either by legal enforcement of rights and obligations or via tamper-proof execution of computer code. ("Smart Contract Templates: foundations, design landscape and research directions" Clack, Bakshi and Braine).
- A cryptocurrency is a digital or virtual currency that is secured by cryptography, which makes it nearly impossible to counterfeit or double-spend. Many cryptocurrencies are decentralized networks based on blockchain technology—a distributed ledger enforced by a disparate network of computers. A defining feature of cryptocurrencies is that they are generally not issued by any central authority, rendering them theoretically immune to government interference or manipulation.

# Some Definitions And Concepts Cont.

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- **A decentralised network** is one made up of computers (also known as nodes) that interact on a direct, peer-to-peer basis. They do so without the need for third-party intervention. This is made possible by the Internet. Information is distributed to every single “node” within the decentralised network. The result - each node has an updated copy of all the recorded data on that network.
- A blockchain is a **system of recording information** in a way that makes it difficult or impossible to change, hack or cheat the system. Think of it as a digital ledger of transactions that is duplicated and distributed across the entire network of nodes that make up the decentralised network.
- In turn, **digital currency** is a currency that exists purely in digital form. It is not a tangible asset like cash or other commodities (gold, rare metals etc). Digital currency can include cryptocurrencies but is not limited to them. In fact, most of the digital money in the world is owned by banking institutions. Digital currency is money that the banks hold electronically, either to trade or invest.

# Some Definitions And Concepts Cont.

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- **Cryptocurrencies** are a type of digital money that exists within a blockchain network. Cryptocurrency is mined, traded or bought, and kept in digital “wallets” until the owner is ready to spend or redeem it. Examples include Bitcoin, Dogecoin, and Ether.
- The various components explained above can collectively be considered as a part of Distributed Ledger Technology (**DLT**).
- DLT has the potential to revolutionise business operations by improving such things as security, speed and reliability. DLT can remove the need for trust, security for commercial transactions and reduce transaction and enforcement costs.
- However, the decentralised nature of smart contracts and DLT’s means that both the users and the servers on which the technology is housed can be located anywhere in the world, which can be problematic when disputes arise.



# Examples Of Smart Contracts

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- **Travel insurance:** Axa set up a form of parametric insurance – this is insurance that does not pay out on the actual loss incurred, but instead pays out a predetermined amount if an event occurs within defined parameters. Performance is implemented without any third-party intervention. Now discontinued by Axa (it did not meet its commercial targets – i.e. insufficient uptake in the market).
- **Crop insurance:** again, a parametric insurance policy which pays out a predefined amount when triggered by predefined circumstances. In this instance the weather (and typically temperature related issues with crops like oranges).
- **Blockchain property registers:** electronic property titles used on the blockchain to record property ownership and transfers.

# Are Smart Contracts Perfect?

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- The benefits of smart contracts is that they are said to create efficiencies and resolve transactional trust issues. They may largely eliminate the need for letters of credit, bonds and other security agreements between contracting parties. They do this by digitising automatic enforcement or payment.
- However, a 2016 study revealed that there are typically 100 errors per 1000 lines of coding. Applied to smart contracts this may indicate that a number of smart contracts do not accurately encompass the parties' original intentions.
- Disputes will therefore arise. When they do some of the benefits of decentralised ledgers (e.g. automation, self-regulation, immutability) will cause problems for the resolution of disputes.

# Possible Issues With Smart Contracts

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- The coder engaged to record the parties' original intentions in code may make errors or omissions in the coding.
- Hackers may interfere with or manipulate these contracts.
- It may be difficult to apply long held principles of offer, acceptance and consideration to smart contracts – depending on the jurisdiction.
- Is a coded transaction a contract? Are the keys that are used to encrypt smart contracts the signatures of the parties?

# Possible Issues With Smart Contracts Cont.

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- At their simplest, smart contracts are computer programs filled with "*if/then*" clauses that identify the obligations and eventualities agreed between the parties.
- Once these contracts have been created and accepted, they can be self-enforcing. This is a benefit. It helps with trust and it eliminates payment and security issues. It also creates an issue when the parties are in dispute.
- Smart contracts are even more secure when they are written in the blockchain. Again, both a benefit and an issue.
- Even though DLTs are said to be immutable and secure, the technology can be manipulated. Hard forks (copies of the blockchain) can be used to steal information or corrupt a contract.

# Possible Issues With Smart Contracts Cont.

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- Fake data may be used to either fail to trigger an if/then clause or incorrectly trigger a clause.
- Coding issues may result in improperly structured contracts.
- Hackers may try and manipulate data to their own advantage, or on behalf of one of the parties.
- Issues of consent may arise – whether there is evidence of effective communication of the transfer of rights and obligations as between the parties.



# Issues With Smart Contracts Continued

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- In common law jurisdictions the question is whether the computer code represents true offer, acceptance and consideration – the traditional pillars of a contract.
- Civil law jurisdictions argue whether there is sufficient documentary evidence to support legal enforcement of the smart contract.
- If you get past contract formation questions, then there are the jurisdiction and other legal issues mentioned above.
- Smart contract anonymity gets even harder for enforcement when the contract uses a crypto currency. It can become impossible to identify the parties involved.
- How does a third-party determiner (court or arbitrator) interpret the contract – given it is written in code. Also, how does a court intervene to prevent or reverse self-regulating if/then executions?
- How does the third-party determiner deal with any gaps in the contract or implied term arguments if the blockchain does not allow for modifications?

# Issues With Smart Contracts Continued

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- It is difficult to renegotiate the terms of a smart contract – they in effect become self-governing and self-executing. Particularly if placed on a blockchain.
- Self execution eliminates transaction costs. It also replaces trust. Automation is efficient and reduces enforcement costs but causes issues for dispute resolution.
- Flaws in coding can result in exploitation without there being necessarily any breach or fraud. Remedies can be draconian – including hard forks to terminate the contract or investment opportunity.
- Oracles can cause reliability and data delivery issues. Oracles are susceptible to being hacked the same as other information sources on the Internet of Things.

# Issues With Smart Contracts Continued

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- Smart contracts and blockchain technology do not operate in a vacuum. The both require data from outside of the network to confirm for example the if/then execution protocols within the contract.
- Blockchain Oracles are a medium (reference to ancient Greece) between a smart contract and the real world. They provide external data – for example temperature in an area for crops or flight departure times for travel insurance.
- The oracles are therefore susceptible to delays in the timing of data, hacking, loss of connection issues and the like.

# Issues With Smart Contracts Continued

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- Within smart contracts there can be both inadvertent coding errors and unintended vulnerabilities that can be exploited.
- Inadvertent coding errors are mentioned elsewhere and could result in the coder be held liable for those mistakes in translating a more traditional type of legal contract into code.
- There is an infamous example of a vulnerability in code being exploited at great cost. A Distributed Autonomous Organisation (DOA) was set up to fund and provide governance to a project. Investors purchased Ethereum coins (Ether) to invest.
- The DOA was going to be split and there was to be a 48-day delay during which time funds could not be withdrawn by investors. A coder found a loophole which he used to hack \$1.5 billion of Ether coins from the DOA. But the hacked funds were held up for 48 days.
- Ultimately a hard fork in the code was agreed to by the investors and all funds were returned - this was seen as being the only mechanism to prevent payout of the \$1.5 billion.

# Issues With Smart Contracts Continued

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- There are many areas where smart contracts are not yet suitable, including areas where the framework of the contract is not a simple set of if/then executions.
- That is not to say that smart contracts will not move into these areas with time and increased computing power, simply that they are not yet sufficiently sophisticated for issues such as:
  - Catering for variables
  - Subjective tests
  - Human nature
- (Chapter 19 Smart Contracts and Blockchain – Online Dispute Resolution – Theory and Practice Second Edition)



# Enforcement Of Smart Contracts

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- What are the remedies available when a party wants to prevent enforcement or harder still reverse a payment.
- This is where benefits become roadblocks – enforcement is automatic and the code is immutable.
- Where do the parties turn to in order to resolve smart contract disputes? Will contract law apply? What law will govern the transaction and what evidence is available of the formation of the contract?
- Anonymity will make it difficult to determine who the parties actually are. The decentralised nature of these contracts will make jurisdiction and choice of law issues complicated.
- What remedies will be available and who will write the new code to update a smart contract that utilises DLT?

# Key Legal Issues

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- The legal jurisdictional issues include the following:
  - Which law applies to agreements between the parties using a blockchain?
  - What forum can be used to address any disputes arising from transactions using novel digital technologies?
  - How can any agreement reached between the parties to a dispute involving a DLT or smart contract be enforced internationally?
  - Which legal system applies to a smart contract or blockchain transaction?
- There are many other significant issues to consider that are outside the scope of this webinar. For example, the conflict between data protection legislation (for example GDPR) and the distributed nature of the information on the DLT.

# The UK Position On Smart Contracts – An Example

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- The UK Government's UK Jurisdiction Task force has, in its "*Legal Statement on cryptoassets and smart contracts*" concluded that both types of smart contract are contracts as commonly understood (including smart contract code).
- The Taskforce said "*it might be argued that the automaticity of smart contracts, and the mechanistic way in which computer code operates, means that there is strictly no need for a party either to promise performance or to resort to the law to enforce a promise by the counterparty: the code will simply do what it has been programmed to do. Even if that is right, however, we do not think it is a good reason for treating smart contracts as being different in principle from conventional contracts.*"

# The UK Position On Smart Contract – An Example

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- If the UK Task force position were to become the "norm" for how that the global legal system will approach smart contracts, then it means these contracts will have traditional concepts of contract law applied to them.
- That means issues such as context, implied terms, unconscionable terms, misrepresentation, duress and other issues of contract law will be applicable.
- In addition, questions of reasonableness, good faith negotiation and force majeure arguments will also be available to the parties, even where the contract in question is a smart contract code.
- (Chapter 19 Smart Contracts and Blockchain – Online Dispute Resolution – Theory and Practice Second Edition)



# Why Arbitration?

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- Many countries are turning to arbitration to address the difficult jurisdictional questions surrounding smart contracts and cryptocurrencies. See, for example, the Digital Dispute Resolution Rules published by the UK Jurisdiction Taskforce that deal specifically with the status of cryptoassets and smart contracts disputes.
- Parties to international transactions can address all four jurisdictional issues in their arbitration agreement in a way that brings certainty to the relationship without the need for court intervention.
- These parties have the added advantage of being able to rely upon the New York Convention as a means of ensuring that any awards can be enforced in signatory countries.
- In addition, arbitration provides an opportunity for subject-matter experts to be appointed as arbitrators. The Digital Dispute Resolution Rules are an example of that. The parties to DLT disputes may find comfort in subject matter experts being used to determine their disputes.
- Arbitration, with its strong emphasis on confidentiality, will also help keep the outcome of DLT disputes “off the grid”. While this may not be ideal from the perspective of the development of the law in this area it will be attractive to the parties themselves. The concern here of course will be how “off the grid” the activities of the parties actually are – ransom payments for cyber-attacks are paid in cryptocurrencies for a reason.



# Suitability Of Arbitration

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- Once you accept, as the UK Taskforce did, that all forms of smart contract are enforceable as contracts then it opens up the opportunity for arbitration to play a significant role in the resolution of DLT and smart contract disputes.
- In addition to the well-known flexibility of the arbitration process, the opportunity for specialist arbitrators to resolve the disputes of such a highly technical nature cannot be ignored. In fact, there are already institutions dedicated to technology disputes.
- The Silicon Valley Arbitration and Mediation Centre has a specialist list of arbitrators and mediators.
- There is a specialist body in Poland to deal with blockchain and new technologies.
- Issues of enforceability and confidentiality have already been dealt with.

# The UK Digital Dispute Rules

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- The Rules were published following the UKJT's November 2019 Legal Statement on the Status of Cryptoassets and Smart Contracts, which expressed the view that cryptoassets were property and smart contracts were contracts under English law.
- The purpose of the Rules is to facilitate the rapid, cost effective and specialised resolution of commercial disputes involving digital technology, including cryptoassets, cryptocurrency, smart contracts, distributed ledger technology, and fintech applications.

# Key Features Of The Rules

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- **Speed** - The default position is that the arbitrators must use their best endeavours to determine the dispute within 30 days of their appointment. The rules however are flexible, and the parties are able to select their own timetable.
- **Power over digital assets** – the tribunal has the power to operate, modify, assign or cancel any digital asset relevant to the dispute using either a cryptographic key or other digital access. The tribunal also has the power to direct any interested party to do any of those things on-chain.
- **Expert panel** - The arbitrators and experts will be appointed by the Society for Computers and Law – they are selected from a panel of digital technology experts. There should therefore be a high level of technical sophistication within the arbitrators and experts.

# Key Features Of The Rules Cont.

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- **Automatic decision** - The rules do provide for the possibility of an automatic dispute resolution process. A legally binding resolution would be automatically selected by an AI agent. The decision would be implemented directly within the digital asset system.
- **Confidentiality** - the Rules recognise that the parties may desire anonymity. While arbitration practitioners are familiar with arbitrations being private and confidential, the Rules envisage that the text incorporating the agreement to arbitrate may also provide for “anonymous dispute resolution”. That is, each party’s identity will be concealed from the other and provided only to the tribunal.

# Rules – Incorporation And Joinder

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- The Rules will not apply to disputes automatically. The parties must elect to adopt the Rules by incorporating them into the contract, digital asset or digital asset system.
- One of the consequences is that the Rules will not apply to disputes that relate to criminal acts (such as theft or hacking).
- The Rules will also not apply if the parties do not have a contractual relationship.
- The Rules are therefore aimed at commercial parties who are willing to cooperate with the arbitral process.
- The Rules can be incorporated into a contract regardless of whether the text is electronic or in a uniquely encoded form. Where the text is in encoded form, one party might argue that it was unaware of its presence, and therefore did not have the requisite intention to incorporate it in the agreement.



# Rules – Enforcement

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- The Rules provide for the possibility of on-chain determination – meaning that awards are received by the successful party instantaneously, without any further action required.
- The Rules suggest that arbitrators can implement decisions directly on-chain through the use of a private key. That may necessitate that the parties are willing to share private keys. Question whether they will do so or whether they will require some assurances as to security from the arbitrators.
- If on-chain enforcement is not adopted by the parties then the New York Convention will still apply to enforcement.
- A point to watch out for will be the requirement in the Convention for proof of the "original agreement" or a duly certified copy – difficult if the agreement is in code only.

# Rules – Appeals And Legal Precedent

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- An award by the Tribunal under the Rules will be final and binding and there will be no right of appeal on any point of law.
- Use of the Rules to resolve technology disputes will not therefore result in the development of precedents that can help them inform their newly emerging digital sector.
- However, if the tribunal considers that an award or decision is of sufficient general interest, then subject to any right of veto by the parties, the decision or award may be anonymised and provided to the Society for Computers and Law for publication.

# Dlt's And The Use of Arbitration

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- There are 2 key ways in which blockchain technology and arbitration can be intertwined for the resolution of smart contract disputes.
- Firstly, arbitration can be used as the dispute resolution mechanism for resolving issues arising under smart contracts.
- Secondly, blockchain technology itself can be used in the arbitration process.

# The Use Of Blockchain Technology In Arbitration

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- Data protection in arbitration is a significant issue which has received a lot of attention since the start of the pandemic.
- A blockchain could be used to assist with the encryptability of data relating to the arbitral process, as well as a record of the proceedings and evidence.
- See for example the Baidu search engine blockchain solution for legal arbitration.
- It aims to ensure electronic evidence is trustworthy, accurate, and safe from tampering. The platform also allows for secure storage and transmission of data.
- A blockchain can be used for an automatic referral of disputes to an arbitrator or other form of dispute resolution (refer below to examples).
- Cryptocurrencies could be used for security for costs or similar payment or escrow issues – although of course volatility would be an issue for consideration by the arbitral tribunal and the parties

# Online Dispute Resolution For Smart Contracts

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- Online arbitration, crowd-source dispute resolution and AI powered resolutions.
- Many developers have turned to online arbitration for resolving blockchain disputes.



# Sagewise

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- Sagewise was not intended to provide an arbitration solution itself.
- Instead, it's technology is intended to be integrated into a smart contract which provides for predetermined parameters regarding contract execution and disputes.
- The parties can choose various dispute resolution processes for resolving any disputes and for enforcing online judgements. – includes mediation and arbitration.

# OpenBazaar

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- OpenBazaar is a peer-to-peer market platform for the sale of goods and services using Bitcoin and other crypto currencies.
- It uses online arbitration for any dispute. The parties to the transaction can elect to have a notary – a third party – verify the contract and its execution.
- If there is a dispute the notary can become an arbitrator and determine the dispute based on evidence presented by the parties.
- Transactions are not therefore entirely self-executing and have additional layers of verification.

# Crowdsourcing

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- Effectively determination by the mob – as crowd source dispute resolution uses anonymous third-party users to vote on the “winner” of a dispute.
- Many now use a process involving tokens where jurors vote with funds (crypto currency). These funds are lost if the jurors vote for the losing side. Voting on the winning side generally gains a reward of some description (typically paid in tokens).
- Built around game theory and are designed to encourage the jurors to make as informed and honest a decision about the outcome as possible.

# Crowdsourcing Examples

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- **Kleros** - An online arbitration "court" built on the Ethereum platform.
- The parties present their case to the jurors who then secretly vote in favour of one party or the other.
- The vote must be justified so the parties can understand the decision.
- Jurors are paid from the arbitration fee the parties pay the Kleros court and from the tokens of the jurors who voted for the "losing" party.
- A court in Mexico has recently held that a decision of the Kleros jurors in a landlord/tenant dispute was enforceable.

# Crowdsourcing Examples Cont.

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- **Aragon** - A similar online arbitration system to Kleros.
- A party brings a claim by posting a bond (typically tokens) and providing an outline of the complaint.
- Jurors are selected and also post bonds.
- Those who side with the winning party receive a monetary reward.
- Appeals are possible – by the party posting a larger bond.
- There is also a supreme court which is made up of jurors with the highest success rate on the Aragon network.



# Crowdsourcing Examples Cont.

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- **Jur.io** – the website says *“Jur unites you with legal teams, parties, and arbitrators in an end-to-end & easy-to-use digital arbitration platform. It helps you cut all the unnecessary steps that make common arbitral procedures long and expensive.”*
- Again, similar to Kleros. That is, voters who vote against the majority lose their tokens. The theory of this across all of the platforms is it will encourage considered and fair voting and discourage dishonesty.
- Jur can be an open or closed dispute resolution system meaning that any token holder who wishes to vote can do so or only certain voters who have been vetted can be allowed to contribute.

# Use Of ODR Clauses And Smart Contracts

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- As with traditional dispute resolution clauses, a dispute resolution clause can be inserted into a smart contract at its creation to stipulate how a dispute between the parties will be dealt with.
- The dispute process (possibly an ODR dispute process) could be triggered by one or either of the parties "pushing" a button (virtual or otherwise) to freeze execution of the contract if/then clauses and thereby triggering the dispute resolution process.
- Strict timelines would need to be observed to help prevent misuse of this dispute resolution function otherwise such smart contracts would be denied the benefit of technology and no longer be efficient nor self-regulating.

# Binance Arbitration - #1

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- A Europe-based individual has reportedly brought a US\$140 million ICC claim against Binance, as more claimants sign up to a prospective HKIAC claim against the world's largest cryptocurrency exchange (discussed below).
- ICC proceedings between the unnamed “wealthy investor” and Binance have apparently begun in Switzerland after months of negotiations.
- It is reported that the investor alleges that the platform - which has an automated liquidation system - forced him to sell large amounts of a crypto coin in November 2020 against his own interests. He also claims that the company had a conflict of interest in the liquidation.
- The investor has reportedly directed his claim at more than 45 entities globally that are supposedly connected to Binance, which does not disclose its headquarters.

# Binance Arbitration - #2

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- Binance is also facing another potential lawsuit from its own users. A group of six investors have raised \$5 million to sue the exchange over an outage on 19 May 2021 when the price of Bitcoin dropped drastically.
- They claim they lost more than \$20 million combined. Since they announced their intentions to sue the exchange, over 700 claimants have joined the potential lawsuit.
- While no requests for arbitration or other statements of case have been made publicly available (it is not known, for example, which Binance entity is a respondent), a video interview by CNBC with Liti Capital CIO, David Kay, along with other media comments, have revealed some details around the potential allegations involved and approximate quantum of the claims.
- Of the 700 potential traders as claimants, six individuals allege losses of over US\$20 million in aggregate, with the size of the total claims possibly reaching more than US\$100 million.
- From the information available, most if not all of the potential claimants appear to have been trading cryptocurrency derivatives.

# Key Aspects Of The Binance Arbitration

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- The dispute presents features in common with many other disputes submitted to international arbitration.
- Binance has Terms of Use that provide a reference to HKIAC arbitration, the seat of arbitration being in Hong Kong and Hong Kong law being the governing law.
- Binance has a number of corporate vehicles behind the platform, one of which is Binance Limited, a company incorporated and with an address in Hong Kong.
- The prospective claimants may attempt to file a class arbitration against Binance, but it is understood that the Terms of Use provide a waiver of class arbitrations.



# Unique Challenges In Binance Arbitration

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- Identifying the proper parties: Binance's Global corporate structure is largely unknown. Who are the proper parties to the arbitration? What is the legal status of the Binance trading platform itself?
- Identifying the substantive legal and liability regimes that may apply to the derivatives trading. How suitable is it to have only 1 legal regime (in this case Hong Kong) applying to an international and decentralised set of services that are most likely performed by and provided to parties outside the jurisdiction.
- Are there questions of illegality (Hong Kong does not allow unlicensed derivatives trading in its territory) and arbitrability under Hong Kong law.

# Unique Challenges In Binance Arbitration Cont.

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- Enforcement against crypto assets. This issue in part revolves around the question of the legal nature of crypto assets in jurisdictions around the world – although this is becoming more certain with time (refer below).
- The bigger issue is the on-chain enforcement of any award. That is, the possibility of ownership of crypto assets being automatically transferred to the winning party through the execution of smart contracts. This would dispense with the necessity of resorting to traditional enforcement such as national courts.

# Crypto Assets As Property

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- In *Ruscoe v Cryptopia Ltd (in Liquidation)* [2020] NZHC 728 the New Zealand High Court held that cryptocurrencies, as digital assets, are a form of property that are capable of being held on trust.
- The decision is important.
- As one of only a few in the common law world to address expressly the question, in a fully reasoned judgment, as to whether digital assets such as cryptocurrencies constitute property and can be the subject of a trust; and
- Because it also addresses the difference between “pure information”, on the one hand, and “digital assets”, on the other, in terms of characterisation as property (this is an issue of significance in areas going beyond the realm of cryptocurrencies and DLT – for example, in relation to ownership of machine-generated data created by AI and the IoT).

# Why Were The Crypto Assets Property?

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- Lord Wilberforce's opinion in the House of Lords in the English case of *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) at 1247–1248
- Identifiable subject matter.
- Identifiable by third parties.
- Capable of assumption by third parties.
- Some degree of permanence or stability.

# Why Was There A Trust?

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- The Court held that the 3 elements required to give rise to a trust were met.
- **Certainty of subject matter:** the subject matter of the trusts (cryptocurrencies) was recorded in Cryptopia's database.
- **Certainty of objects:** There was no uncertainty who the beneficiaries of the relevant trusts were. They were those account holders with positive balances for the respective currencies in Cryptopia's database.
- **Certainty of intention:** The intention of the settlor to create a trust had been established. The database that Cryptopia created showed that the company was a custodian and trustee of the digital assets.



# Conclusion

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- The law has had to find solutions for innovative technology throughout history.
- Every few decades a new development has legal academics launching into print about whether the law could cope with such a dramatic change. Recently, significant developments have occurred every few years and continue to gain momentum.
- Based on the exponential rate of change in technology, and especially with the introduction of AI, we can now expect this challenge to arise several times a year.
- The challenges will also become more complicated (at least factually) as technology and AI become increasingly integrated into our lives (Terminator 3: Rise of the Machines anyone?).



# Q&A



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