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An overview of remedies in British Virgin Islands crypto asset disputes

Introduction

The rapid development of the digital assets space and Web 3.0 ecosystem over the last 10 years has meant that courts in the British Virgin Islands (“**BVI**”) have been faced with an ever-increasing number of disputes in this space. The rapid development of the digital assets space and web3.0 ecosystem over the last 10 years has meant that courts around the world have been faced with an ever-increasing number of disputes in this space. This includes the courts in the British Virgin Islands (“**BVI**”). The cases before the BVI courts have varied in terms of the parties and stakeholders involved and the nature of the dispute (breach of fiduciary duties, unfair prejudice through, among other things, exclusion of shareholder(s), and fraud, as well as the remedy sought. This Legal Analysis provides an overview of the legal status of crypto assets and some of the remedies which are available in BVI disputes concerning them.

The article below is being published with permission from our affiliated law firm, [Loeb Smith Attorneys](#), as it is of interest to many of our corporate services clients who are incorporated in the BVI.

Definition of crypto assets as property

Digital assets are neither tangible property (which can be possessed) nor are they an asset that can give rise to a right that is enforceable. Notwithstanding this, the English High Court in AA v Persons Unknown and Others¹ (“**AA Case**”) provided much needed clarity on the legal status of Bitcoin (and indeed other cryptocurrencies). Justice Bryan held that “*I am satisfied...that crypto currencies are a form of property capable of being the subject of a proprietary injunction.*” This finding is significant because it includes cryptocurrencies as a whole (and not just Bitcoin).

English law is highly persuasive authority in the BVI. The AA Case was cited in the BVI case of Philip Smith and Jason Kardachi v Torque Group Holdings Limited (in liquidation)². Wallbank J. stated that “*...it is a reasonable conclusion that crypto assets are to be considered as assets for the purposes of liquidation.*”

¹ [2019] EWHC 3556 (Comm)

² BVIHC (COM) 0031 of 2021

Remedies

Defining crypto assets is of practical importance not least because if crypto assets are seen as property in the eyes of the court (which they are), then the remedies which are available will be based on established proprietary rights.

Worldwide freezing order

The BVI case of *ChainSwap Limited v Persons Unknown*³ re-affirmed that cryptocurrencies are a form of property. The claimant sought, *among other things*, a worldwide freezing order against persons unknown (being those allegedly responsible for cybercrime consisting of the theft of the digital assets). Justice Jack had no difficulty in granting a freezing order as there was “*an obvious risk of dissipation if no freezing order is granted.*”

Proprietary injunction

The English case of *Fetch.AI v Persons Unknown*⁴ saw the court order, *among other things*, a proprietary injunction and a worldwide freezing order. Hackers had obtained access to accounts which were maintained by the first claimant (first applicant) with Binance, within which were held various cryptocurrencies (including Tether). The assets were then fraudulently transferred into third-party accounts at a massive undervalue, which had incurred losses of over US\$2.6 million. Judge Pelling QC, in granting the orders sought, stated that “*I am satisfied that the assets credited to the first applicant’s accounts on the Binance Exchange are to be regarded as property...They are...a chose in action, and a chose in action...is generally regarded as property.*”

Norwich Pharmacal order (“NPO”)

The BVI court’s jurisdiction to grant a NPO is well-established – they “*are an every-day feature of the legal and corporate service landscape in the BVI.*”⁵

Bankers Trust order

There is some overlap between an NPO and a Bankers Trust order (although the two remain distinct from each other). Many recent cases have seen both NPOs and Bankers Trust orders being sought. The court has been ready to find that the respondent crypto exchange is required to give disclosure to the claimant. For example, in the English case of *Mr Dollar Bill Ltd v Persons Unknown*⁶, the claimant had been the victim of an alleged cryptocurrency fraud. To assist in tracing the missing Bitcoins, an NPO and a Bankers Trust order against two cryptocurrency exchanges were granted. The claimant was also granted a proprietary injunction to prevent further dissipation of the Bitcoins.

Third party debt order (“TPDO”)

The English High Court in *Ion Science Ltd v Persons Unknown*⁷ granted what is thought to be the first TPDO in proceedings arising from cryptocurrency fraud relating to a cryptocurrency initial coin offering.

³ BVIHC (COM) 2022/0031

⁴ [2021] EWHC 2254 (Comm)

⁵ *CIF v DLG and GIY* BVIHCM2023/0050 at [21]

⁶ [2021] EWHC 2718 (Ch)

⁷ [2020] EWHC 3688 (Comm)

Conclusion

The cases and remedies set out above demonstrate the pragmatic and flexible approach which the common law courts have taken. Existing legal principles have been applied to the digital asset space in order to tackle the increasingly frequent cybercrime involving digital assets and to grant the appropriate (combination of) remedies. The courts have generally permitted the claimant(s) to commence action against the unidentified fraudsters/hackers (as “persons unknown”) and grant freezing and disclosure orders in their favour to assist in securing and recovering (to the extent possible) the proceeds of the fraud.

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