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Crypto Disputes Report 2024

Data-driven analysis and trends in England and Wales

Foreword

To date, there have been 118 High Court cases that relate materially to cryptoassets, with the first case issued in 2017. There is an upward trend, and we expect volumes to continue on this trajectory as more claims are issued, more judgments are handed down, the law becomes more certain, and it becomes more attractive to litigate the right cases.

In June 2023, the Law Commission published its final report into digital assets. The Law Commission had been tasked by the government with making recommendations for reform to ensure that the law of England and Wales is capable of accommodating both cryptoassets and other digital assets.[1]

The Law Commission concluded that "*the common law of England & Wales is, in general, sufficiently flexible and already able, to accommodate digital assets and therefore that any law reform should be through further common law development where possible*".[2] The Law Commission recommended only two areas for legislative change:

— Provide statutory confirmation to the effect that digital assets can attract personal property rights, even though they may not fit within traditional definitions of property (and the Law Commission has consulted on draft legislation)[3]

— Put in place a bespoke statutory framework for certain cryptoasset collateral arrangements (and we await further developments).

This means that the higher courts of England and Wales have an important role in relation to cryptoassets. These courts are deciding how the law applies to cryptoassets and the novel legal issues they raise.

In this report, we look at the course of cryptoasset disputes in England and Wales from 2017 to present. We focus on judgments from the higher courts, identifying key trends and decisions, and forecasting what may lie ahead.We also touch on class actions and off-chain arbitration.

We hope you find our report interesting and informative.

Kushal Gandhi
Partner & Solicitor Advocate
T +44 20 7367 2664
E kushal.gandhi@cms-cmno.com

Vanessa Whitman
Partner & Solicitor Advocate
T +44 20 7367 3198
E vanessa.whitman@cms-cmno.com

Rachel Harrison
Senior Associate & Solicitor Advocate
T +44 20 7367 2497
E rachel.harrison@cms-cmno.com

Reeve Boyd
Associate
T +44 20 7367 3329
E reeve.boyd@cms-cmno.com

And with thanks to Robyn Byrne (Paralegal) for her contributions.

[1] Law Commission, *Digital assets: Final report* (Law Com No 412, 28 June 2023)
[2] Ibid., para. 2.3(1)
[3] Law Commission, *Digital assets as personal property - Short consultation on draft clauses* (Law Com CP 256, 22 February 2024)

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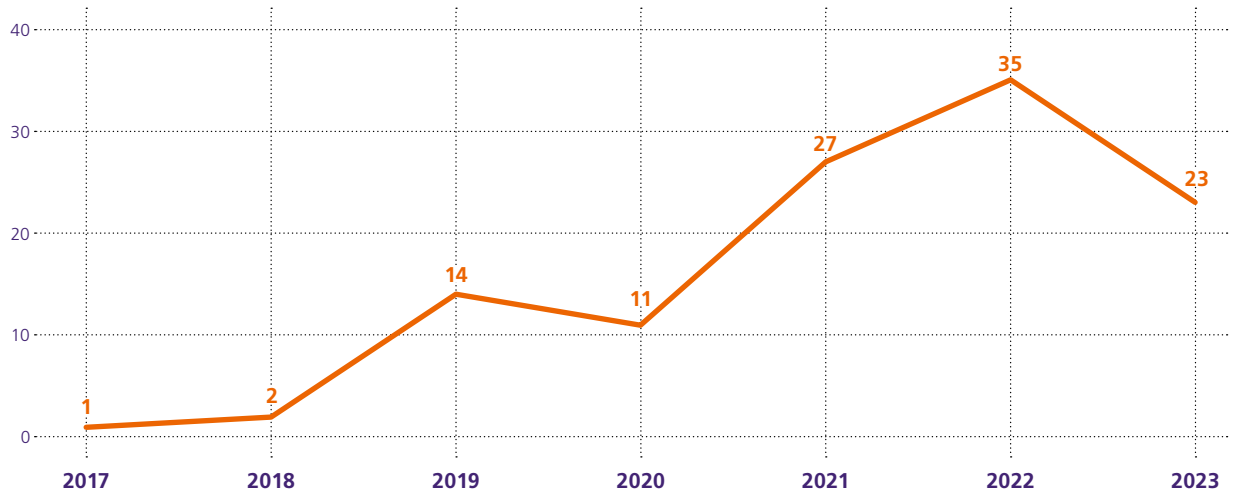
High Court Proceedings

Volume of claims

Issued crypto claims



— We have identified 118 High Court claims that relate materially to cryptoassets.

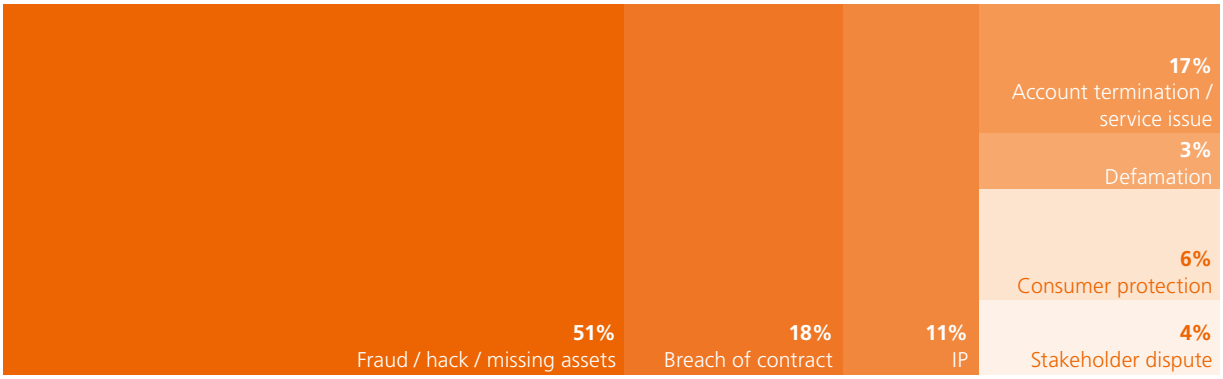
— Since 2017, there has been an upward trend in case numbers. The small downturn in 2020 can be attributed to the outbreak of the Covid-19 pandemic, which affected claims volumes more generally that year. It is not yet clear why case numbers declined in 2023.

County Courts

A detailed analysis of cryptoassets disputes in the County Courts is beyond the scope of this report. In particular, there is limited data available on sector-specific actions. However, the County Courts provide an important forum for straightforward, lower-value cryptoassets disputes.

Type of claims

Issued crypto claims: underlying issues



There is sufficient publicly available information to determine the key underlying issue for 71 of the 118 issued claims.

— Claims involving **alleged frauds, hacks or otherwise missing assets** make up over 50% of these claims.

— The second commonest underlying issue is **alleged breaches of contract**, underpinning 18% of these claims.

— The third commonest underlying issue is **alleged breaches of intellectual property**, underpinning 11% of these claims. Half of these intellectual property claims have been brought by Craig Wright.

Type of judgments

Underlying hearing types

— We have identified 50 cryptoasset claims in which judgments have been handed down, whether by the High Court or the Court of Appeal. Some cases have given rise to more than one judgment, resulting in a total number of 86 judgments.

— 88% of these judgments are on applications for interim remedies such as injunctions. In cases involving frauds, hacks or otherwise missing assets, most of those applications were unopposed.

— Three of the judgments have been subject to appeal.[4]

[4] *Soleymani v Nifty Gateway* [2022] EWHC 773 (Comm); *Tulip Trading Limited v Van Der Laan* [2022] EWHC 667 (Ch); *Wright v BTC Core* [2023] EWHC 222 (Ch)

Key principles

Cryptoassets are capable of being property

The longest-established key principle to arise from these judgments is that cryptoassets are arguably capable of being property, even though they do not fall neatly within the conventional categories of "choses in possession" or "choses in action". This is important for reasons including that the concept of property is widely used in statutes and cases, that property rights are central to many legal relationships, that property rights feature heavily in the rules around insolvency and succession, and that property rights are recognised against the whole world.

In 2019, Bryan J gave judgment in *AA v Persons Unknown* [2019] EWHC 3556 (Comm), writing that:

> *"I consider that cryptoassets such as Bitcoin are property".*

This finding that bitcoin is property has been affirmed in other judgments (including of the Court of Appeal), and the higher courts have also found that other cryptocurrencies (e.g. Ether), stablecoins (e.g. Tether) and NFTs are capable of being property.[5]

In June 2023, in its final report on digital assets, the Law Commission observed that:

> *…the Court of Appeal [has] said that "a cryptoasset such as bitcoin is property" under the law of England & Wales. This is affirmed (or necessarily implicit) in at least 23 other cases decided at first instance, although most were decided in connection with interim relief.*[6]

It is important to note, as the Law Commission did, that many of the judgments on the categorisation of cryptoassets as property were decided in connection with interim relief. This means that the standard of proof was lower than the normal standard of "on the balance of probabilities". It is also important to note that many of the underlying applications for interim relief were unopposed, meaning there was no opponent to present counterarguments to the court (see 'Types of judgments', above).There remain those who hold the view that cryptoassets are not property.[7]

The Law Commission's draft Bill states that digital assets can attract personal property rights. Assuming the draft Bill passes into law, it should put to rest any lingering debate about whether cryptoassets are capable of being property. It will not answer the question of precisely which cryptoassets are or are not property, and this will need to be addressed by the courts on a case-by-case basis.

Location of cryptoassets

A second key principle to arise from these judgments is that, under English and Welsh law, the *lex situs* of cryptoassets is the place where the person who owns them resides.[8] This was established in *Tulip Trading Limited v Van Der Laan* [2023] EWCA Civ 83, modifying a previous understanding that the *lex situs*[9] of cryptoassets would be based on domicile. Ownership will typically be established by looking at who controls the private key to the cryptoassets.

In cases where victims of fraud residing (or domiciled) in England and Wales and in pursuit of stolen cryptoassets have approached the higher courts seeking interim relief, the courts have been prepared to find that the *lex situs* of those assets is within the jurisdiction. This is on the basis that the victim, as beneficial owner of the cryptoassets, is within England and Wales.[10]

Cryptoasset disputes often have an international dimension.It is important to note that where a dispute spans various jurisdictions, the courts of other jurisdictions may not take the same view as the English and Welsh courts as to which court has jurisdiction.In the UK, this has prompted the Law Commission to publish a call for evidence on the question of "*which court, which law*?"[11]

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[5] For example, *Tulip Trading Limited v Van Der Laan* [2023] EWCA Civ 83, *Ion Science v Persons Unknown* (unreported) (21 December 2020), *Jones v Persons Unknown* [2022] EWHC 2543 (Comm), *Boonyaem v Persons Unknown* [2023] EWHC 3190 (Comm), *Osbourne v Persons Unknown* [2022] EWHC 2021 (Comm)

[6] Law Commission, *Digital assets: Final report* (Law Com No 412, 28 June 2023), para. 3.40

[7] For example, Robert Stevens, 'Crypto is not Property' (2023) 139 LQR 695

[8] *Lex situs* is the place in which property is situated for the purpose of conflicts of law/jurisdictional disputes

[9] *Ion Sciences Ltd v Persons Unknown* (unreported) (21 December 2020), *Fetch.ai Ltd v Persons Unknown* [2021] EWHC 2254 (Comm)

[10] See, for example: *Osbourne v Persons Unknown* [2022] EWHC 1021 (Comm), *D'Aloia v Persons Unknown* [2022] EWHC 1723 (Ch), *Danisz v Persons Unknown* [2022] EWHC 280 (QB)

[11] Law Commission, *Digital assets and ETDs in private international law: which court, which law?* (22 February 2024)

Data-driven predictions

Rising claims volumes

The volume of cryptoasset claims is low when compared with the fact that almost 10% of UK adults have held cryptocurrency,[12] that some 67% of European institutional investors had adopted digital assets by 2022,[13] and that there are 44 cryptoasset firms registered with the Financial Conduct Authority (FCA).

One possible explanation is that claimants have struggled to assess the merits of their claims, given the relevant law has been in its infancy, and that this has dissuaded them from issuing claims. However, this barrier is getting lower: as more claims are issued and more judgments are handed down, the law becomes more certain, and it becomes more attractive to litigate the right cases. We expect case volumes to rise as a result.

We also expect case volumes to rise as greater numbers of cryptoasset disputes approach limitation, which typically falls at six years. Claimants often wait until limitation is approaching before issuing proceedings, using the intervening period to investigate their claims and to try to resolve them by alternative means. To date, the higher courts have been called upon predominantly to decide on time-critical matters like applications for interim relief in fraud claims and injunctions to prevent alleged breaches of intellectual property (see 'Type of claims' and 'Type of judgments', above). We expect that they will increasingly be called upon to decide other issues as the less time-critical claims dating from the crypto bull and the wider prevalence of cryptoassets approach limitation.

[12] Financial Conduct Authority, *Research Note: Cryptoassets consumer research 2023* (Wave 4) (8 June 2023)
[13] Fidelity Digital Assets, *Institutional Investor Digital Assets Study: Key Findings* (October 2022)

Determination of new issues

We are beginning to see novel issues come before the courts. For example, *Tulip Trading Limited v Van Der Laan* (BL-2021-00013) raised the question of whether Bitcoin developers owe duties to holders of bitcoin (arguably they do[14]), and *Dr Craig Steven Wright v BTC Core* (IL-2022-000069) raised the question of when a file format (in that case, the "Bitcoin File Format") attracts copyright.[15]

These are just the tip of the iceberg: cryptoasset disputes raise many novel questions that the courts will need to answer. For example, how does the law on property and on the location of digital assets deal with situations where control over digital assets is joint, split or sharded? how would one sue structures like decentralised autonomous organisations (DAOs) which may not fall within recognised corporate structures under English and Welsh law? and how should cryptoassets be treated in an insolvency?[16] It is inevitable we will see the courts grapple with novel issues such as these.

Defended fraud claims

We also expect to see more defended fraud claims. There has recently been a trend towards victims of fraud tracing their cryptoassets to "last hop" accounts at crypto exchanges, then bringing proceedings against those crypto exchanges. The victim typically argues that the crypto exchange received the cryptoassets as constructive trustee, that any withdrawals that the exchange allowed were in breach of trust, and that the exchange is liable to account to the victim. This is a creative solution to the problem that victims are unlikely to make recovery from the fraudsters, and several interim judgments have been made on the basis these arguments might be right. However, the recent judgment in *Piroozadeh v Persons Unknown* [2023] EWHC 1024 (Ch), in which a crypto exchange successfully challenged the grant of interim relief, is likely to give other exchanges the confidence to defend these arguments.

We consider this would be positive for the development of the law as it applies to cryptoassets, ensuring that judgments are handed down only after a range of arguments have been put to the court.

[14] *Tulip Trading Limited v Van Der Laan* [2023] EWCA Civ 83
[15] See further *Wright v BTC Core* [2023] EWCA Civ 868
[16] This topic has not yet been considered in detail by the courts, but has recently been considered by the UK Jurisdiction Taskforce in its *Legal Statement on Digital Assets and English Insolvency Law* (2024)

Class actions

Class action risk has grown significantly in England and Wales in recent years. More and more claimant-focused law firms have entered the market, encouraged by the increased availability of litigation funding and by new technologies making it simpler to coordinate large claimant groups.

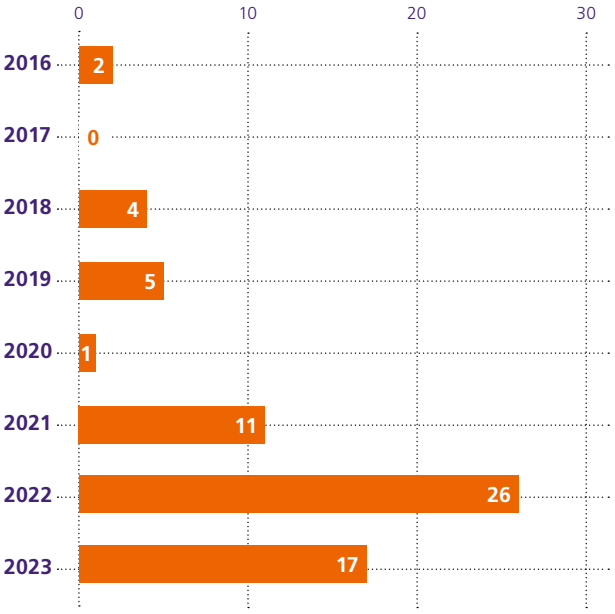
The risk stems from claimants' use of opt-out class action mechanisms. These allow a representative claimant to bring proceedings on behalf of an entire class of potential claimants, without members of that class proactively having to choose to be included. If the representative claimant is successful in their claim, the remedy awarded will be available to the entire class (other than members who choose to opt out). This can lead to very large awards of damages.

Claimants have favoured the competition class action mechanism under s47B Competition Act 1998. This allows a claimant to seek a Collective Proceedings Order from the Competition Appeals Tribunal (**CAT**) for alleged competition law breaches on an opt-out basis. The CAT will consider factors including whether it is just and reasonable to authorise the proposed class representative, whether the claims raise common issues, and whether the claims are suitable to be brought as collective proceedings. If the CAT is minded to permit the claim, it will consider whether to authorise it as an opt-in or opt-out claim. The CAT and the higher courts have applied a low threshold to the certification process and some defendants have not resisted certification. This competition class action regime has gained traction in recent years, with approximately 68% of all claims having been brought since the beginning of 2022.

It is also possible to bring opt-out proceedings under rule 19.8 of the Civil Procedure Rules. This allows a claimant to bring proceedings for any cause of action as the representative of a wider class comprising members who all share the "same interest" in the claim. However, whilst claimants continue to explore this mechanism, the courts have not yet awarded damages on an opt-out basis in a claim that uses it.

For an in-depth analysis of class action risk in England and Wales, please see our European Class Action Report 2023

Issued competition class actions



Cryptoasset class actions

BSV Claims Limited v Bittylicious Limited

In June 2024, a hearing will take place to decide whether a Collective Proceedings Order should be granted in the first competition class action related to cryptoassets: *BSV Claims Limited v Bittylicious Limited* (CAT Case No. 1523/7/7/22).

The claim relates to allegations that the defendant crypto exchanges engaged in anti-competitive practices when de-listing Bitcoin SV and that these caused loss and damage to an estimated 240,000 UK holders of Bitcoin SV.

The claim is brought on an opt-out basis, with damages estimated between GBP 51m and GBP 9.9bn. At the higher figure, this would be the third largest case to go through the CAT:

Top five cases by damages claimed to be issued in the CAT

Data-driven predictions

There are signs that cryptoasset businesses may face particular class action risk:

— The financial and technology sectors represent the second and third largest sectors for class actions in the UK by value.[17] Cryptoassets are financial products that use novel technologies.

— In the US, class actions are routinely brought against crypto exchanges for issues including alleged breaches of regulation, alleged contractual breaches, alleged tortious behaviour, and alleged consumer protection failings. Claimant law firms are looking at how to target crypto exchanges in similar ways in England and Wales. We have seen claimant law firms attempting to form classes in relation to an exchange outage and in relation to the alleged mis-selling of crypto derivatives. We are aware that claimants are exploring a further class action against crypto exchanges. This claim would allege that the exchanges have breached the Financial Services and Markets Act 2000 (FSMA) in violation of the general prohibition on carrying out regulated activities without permission and the rules governing financial promotions.

[17] Please see our European Class Action Report 2023

Arbitration

Arbitration is a confidential process and, as such, there are limited available data points to track the number of cryptoassets disputes that are being arbitrated. However, it is clear that arbitration has found favour amongst cryptoasset businesses looking to resolve disputes.

Arbitrating crypto disputes

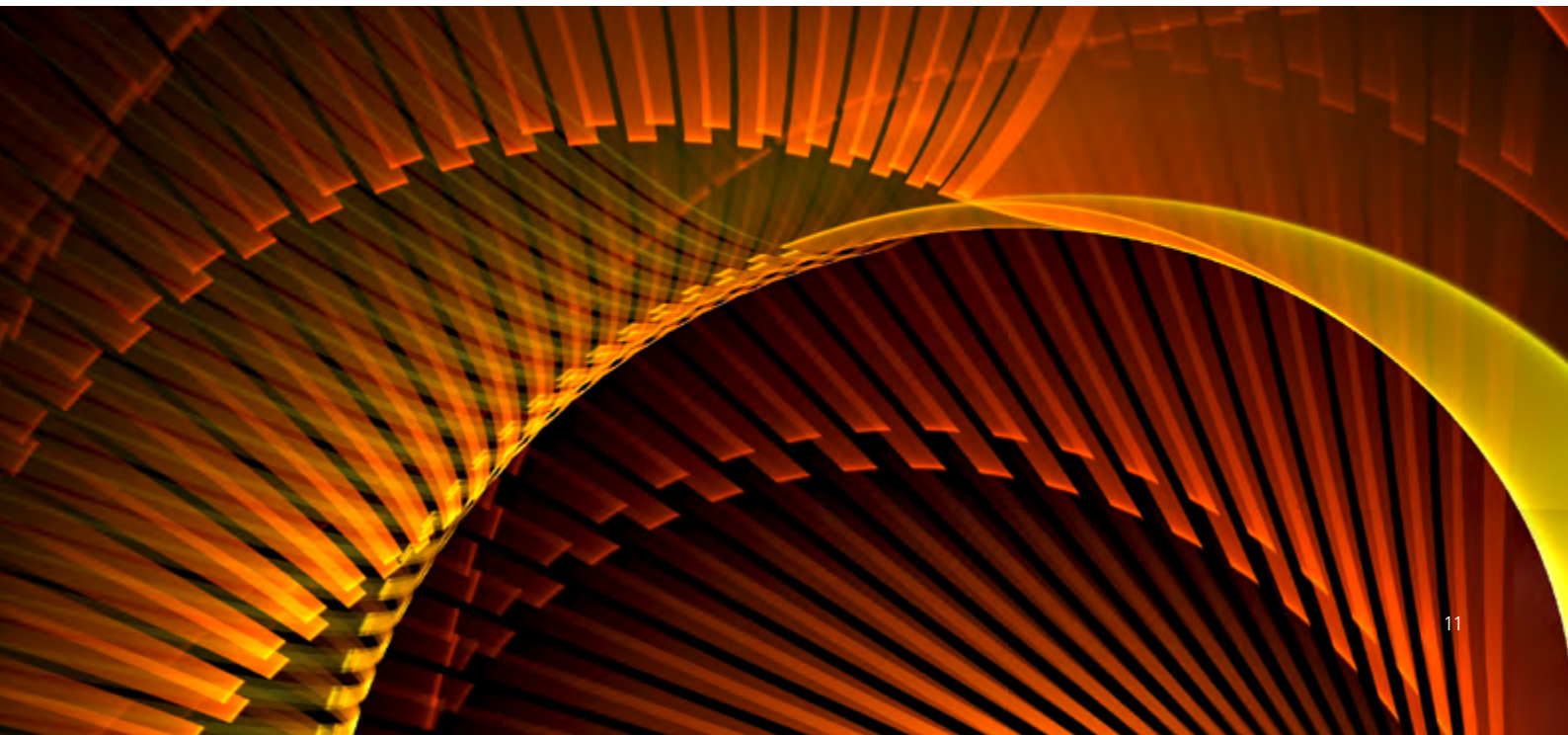
Arbitration can be well-suited to disputes involving cryptoassets:

- Cryptoasset businesses typically operate on a transnational basis, and arbitration allows for disputes to be decided under a legal system of the parties' choosing and understanding.
- There is wide cross-border recognition of arbitral awards (e.g. via the New York Convention), whereas it can be more difficult to enforce court awards.
- Arbitration is typically quicker and cheaper than litigation, which can be attractive to those businesses operating with limited resources.
- The confidential nature of arbitration can suit it to some disputes (e.g. disputes involving commercially sensitive information or parties who wish to remain pseudonymous).
- Specialist arbitrators may be appointed to decide highly technical issues.

However, arbitration will not be suitable for every type of cryptoasset dispute:

- Industry stakeholders often say they would benefit from greater legal certainty. Arbitration cannot deliver greater legal certainty: unlike judgments of the higher courts, arbitral awards do not have precedent value. There is a case for litigating cases which may give rise to judgments that create helpful precedents.
- There are particular challenges when it comes to arbitrating consumer disputes (see 'Arbitrating consumer disputes', below).

In 2021, the UK Jurisdiction Taskforce (or UKJT) published the Digital Dispute Resolution Rules (DDRR), a set of rules aimed at creating a streamlined arbitral process for resolving disputes arising out of digital technologies. There is no data on the extent to which the DDRR are being used to resolved disputes but, anecdotally, take up is low. Instead, disputes are being arbitrated using traditional organisations like JAMS and the SIAC.



Arbitrating consumer disputes

Cryptoasset businesses typically roll out standard terms and conditions to customers on a multi-national basis. These terms and conditions may, for example, specify that any disputes will be resolved by arbitration in San Francisco, under the JAMS rules, and in accordance with California law, regardless of where the consumer resides.

There have been four English and Welsh judgments concerning the interoperability of such terms and conditions and applicable consumer protection legislation: *Soleymani v Nifty Gateway* [2022] EWCA Civ 1297,[18] *Chechetkin v Payward* [EWHC] 3057 (Ch), and *Payward v Chechetkin* [2023] EWHC 1780 (Comm). In each judgment, the court placed a clear emphasis on safeguarding consumer rights:

Soleymani v Nifty Gateway

In *Soleymani v Nifty Gateway*,the Court of Appeal held that it was a matter for the English and Welsh courts to determine whether an arbitration agreement that provided for disputes to be arbitrated in New York under New York law was effective.

Chechetkin v Payward

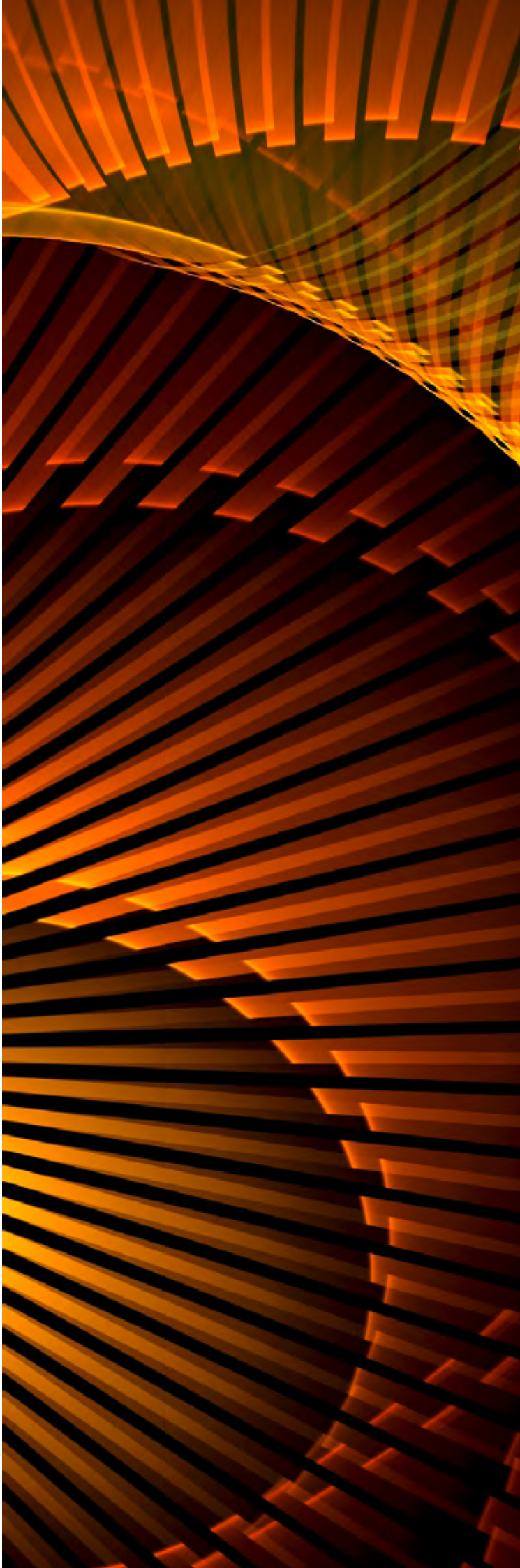
In *Chechetkin v Payward*, the High Court accepted jurisdiction over Mr Chechetkin's claim against a crypto exchange, notwithstanding that the exchange's terms and conditions required disputes to be arbitrated in San Francisco.[19]

Payward v Chechetkin

In *Payward v Chechetkin*, the High Court refused to enforce a crypto exchange's JAMS arbitral award against a customer in England, as to do so would be contrary to public policy in San Francisco under California law.[20]

These cases demonstrate that arbitration, and particularly foreign arbitration, may not be an appropriate way for cryptoasset businesses to resolve disputes with English and Welsh consumers.

[18] The judgment on appeal was *Soleymani v Nifty Gateway* [2022] EWHC 733 (Comm)
[19] For in-depth analysis of this case, please see our LawNow.
[20] For in-depth analysis of this case, please see our LawNow.



Methodology

The data in relation to volume and types of cryptoasset claims was located using keyword searches on Solomonic and legal databases. Where possible, a manual review of available statements of case and judgments was also carried out.

The data in relation to the Competition Class Action claims brought under s47b Competition Act 1998 is taken from the results of a public case search via the Competition Appeal Tribunal's webpage and a review of other publicly available information.

Solomonic

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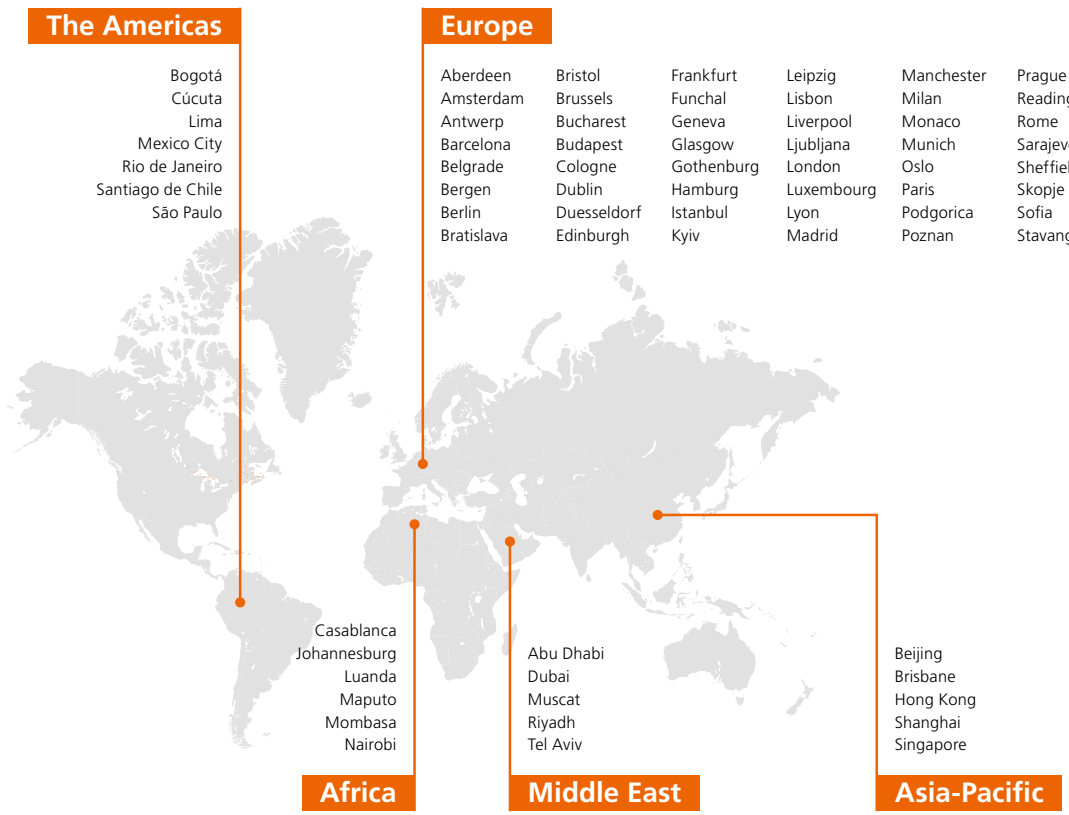

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CMS Cameron McKenna Nabarro Olswang LLP
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78 Cannon Street
London EC4N 6AF

T +44 (0)20 7367 3000
F +44 (0)20 7367 2000

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