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The fitness of arbitration in resolving crypto disputes: an uneasy fit

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Resumen: En la última decada el arbitraje se ha convertido en el método preferido para resolver disputas comerciales, en comparación con el litigio tradicional. Esta tendencia se extiende al sector de las criptomonedas, en donde las disputas que involucran activos virtuales y la tecnología blockchain van incrementando su presencia en arbitraje. Mientras los académicos han discutido ampliamente los beneficios y preocupaciones generals asociadas al arbitraje y los conflictos de criptos, los autores, mediante este artículo, presentan un punto de vista desde la práctica que no ha sido aun explorada dentro de la encrucijada del arbitraje y los conflictos de criptos. En este sentido, los autores sostienen que, a pesar de los beneficios que pueden perverse, el arbitraje no es el 'método ideal' para resolver disputas de criptos.

Abstract: Over the past decade, arbitration has become a preferred method for resolving commercial disputes compared to traditional litigation. This trend extends to the cryptocurrency sector, where disputes involving virtual assets and blockchain technology are increasingly submitted to arbitration. While scholars have widely discussed the benefits and general concerns associated with arbitration and crypto disputes, the authors through the present article, present a practitioner's viewpoint that has not yet been explored within the crossroads of arbitration and crypto disputes. As such, the authors argue that despite the perceived benefits of arbitration, it is not 'fit for purpose' for resolving crypto disputes.

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Palabras Claves: Criptomonedas | Resolución de conflictos | Entidades de Criptos | Adecuado | Litigio de Cripto

Keywords: Cryptocurrency | Dispute Resolution | Crypto Entities | Fit for Purpose | Crypto Litigation

Sumario:

I. Introducción

Over the last decade, arbitration has emerged as a preferred method of dispute resolution among commercial parties due to its flexibility, confidentially, low costs, and efficiency compared to traditional dispute resolution mechanisms, such as litigation[1]. These attributes have made arbitration an attractive option for various commercial companies, including those involved in crypto businesses. Consequently, disputes arising from cryptocurrency activities, agreements, and transactions have increasingly been submitted to arbitration for resolution[2].

Similarly, scholars have argued for arbitration as the most reliable mechanism to resolve crypto disputes[3]. However, the authors of this article contend that, despite the advertised benefits, arbitration is not well-suited to resolve crypto disputes. We argue that such crypto disputes require traditional dispute resolution mechanisms.

Given this backdrop, the purpose of this article is to challenge prevalent literature and launch a discussion on why arbitration is 'not fit for purpose' in effectively resolving crypto disputes. In Part II, the authors provide a framework of what constitutes a crypto business and a crypto dispute and what would need to be achieved for arbitration to be a 'fit for purpose' forum for resolution. In Part III, the authors categorise various crypto disputes and analyse whether arbitration is fit to resolve them. In Part IV, the authors explore various online dispute resolution forums, such as Kleros, and assess whether these forums are 'fit for purpose' in resolving crypto disputes. In Part V, the authors suggest the proper recourse for resolving crypto disputes and highlight the benefits of litigation.

II. Understanding the scope

A. Crypto Businesses

The rapid and inherently globalist nature of the virtual assets sector has catalysed a transformative trend, prompting businesses to incorporate some crypto as-

[1] Keith N. Hylton, "Arbitration: Governance Benefits and Enforcement Costs," *Notre Dame Law Review* 80, no. 2 (January 2005): 489-500.

[2] Tamar Meshel; Moin A. Yahya, "Crypto Dispute Resolution: An Empirical Study," *University of Illinois Journal of Law, Technology & Policy* 2021, no. 2 (Fall 2021): 187-256.; J Chaisse and J Kirkwood, "Smart Courts, Smart Contracts, and the Future of Online Dispute Resolution" *Stanford Journal of Blockchain Law & Policy* (2022) 5: 62.

[3] Jared Bond, "Crypto and Arbitration: The Perfect Pair," *Cardozo Journal of Conflict Resolution Blog*, February 2, 2024, 78, https://larc.cardozo.yu.edu/cgi/viewcontent.cgi?article=1078&context=cjcr-blog.; Amy J. Schmitz, "Resolving NFT and Blockchain Disputes," *Stanford Journal of Blockchain Law & Policy*, (June 2023); Maxime Chevalier, "From Smart Contract Litigation to Blockchain Arbitration, a New Decentralized Approach Leading Towards the Blockchain Arbitral Order," *Journal of International Dispute Settlement* 12, no. 4 (December 2021): 558–584, https://doi.org/10.1093/jnlids/idab025.

pects into their operations[4]. This shift has led to a significant increase in cryptocurrency usage over the past decade. According to the Report published by Triple-A on Crypto Ownership Data, currently, there are over 560 million cryptocurrency users worldwide, representing a substantial increase from merely 18 million in 2018[5]. Further, the global crypto market capitalisation has surpassed USD 2.5 trillion[6], highlighting the acceptance of cryptocurrency and digital assets into traditional finance and businesses.

This rapid growth has fostered the emergence of a diverse array of crypto businesses, ranging from wallets and exchanges to blockchain-based applications (dApps) and decentralised finance (DeFi) platforms. In particular, they include cryptocurrency exchanges that facilitate the buying, selling, and trading of virtual assets[7]; investment platforms offering opportunities to invest in cryptocurrencies and related projects;[8] blockchain development firms creating and maintaining blockchain infrastructure and applications to create more efficiencies and reduce costs[9]; and various service providers offering products and services related to cryptocurrencies, such as

[4] *See* for instance, Starbucks in 2022 entered into the digital space by launching its NFT, that offer customers unique experiences, rewards, and exclusive content ("Starbucks Brewing Revolutionary Web3 Experience for its Starbucks Rewards Members," *Starbucks*, September 2022, https://stories.starbucks.com/press/2022/starbucks-brewing-revolutionary-web3-experience-for-its-starbucks-rewards-members/.). Tesla in 2021 announced that it would start accepting Bitcoin as a payment method for its cars, while it was later paused due to environmental concerns, it demonstrates a significant step towards the adoption of cryptocurrencies in mainstream commerce (Noor Zainab Hussain, Nivedita Balu, ″Tesla will ′most likely′ restart accepting bitcoin as payments, says Musk,″ *Reuters*, July 22, 2021, https://www.reuters.com/business/autos-transportation/tesla-will-most-likely-restart-accepting-bitcoin-payments-says-musk-2021-07-21/.). Major retail sites, including, Amazon, while not officially adopted, have depicted possible integration of cryptocurrency payment options on such platforms, including third-party services like BitPay. Various Payment Service Providers, such as PayPal, have included crypto services into their platform, allowing users to buy, hold, and sell cryptocurrencies directly through their PayPal account, and can even use these cryptocurrencies to pay for goods and services (PayPal, "Buy, sell, and hold cryptocurrency," https://www.paypal.com/manage-money/crypto.).

[5] "Cryptocurrency Ownership Data – Triple-A," *Triple*, June 5, 2024, https://www.triple-a.io/cryptocurrency-ownership-data.

[6] Dipen Prabhan, "Top Cryptocurrency Statistics and Trends in 2024," *Forbes*, May 21, 2024, https://www.forbes.com/advisor/in/investing/cryptocurrency/cryptocurrency-statistics/#Sources.

[7] *See* for instance, Binance, Bybit, Coinbase Global Inc., OKX, and Crypto.com. Benjamin Taubman, "Bybit Is Now the World's Second-Largest Crypto Exchange," *Bloomberg*, June 25, 2024, https://www.bloomberg.com/news/articles/2024-06-25/bybit-is-now-the-world-s-second-largest-crypto-exchange

[8] *See* for instance, the biggest digital currency asset management company, Multicoin Capital, Digital Currency Group, Grayscale Investments, Galaxy Digital.

[9] *See* for instance, the biggest digital currency asset management company, Blockchain Studioz, the NineHertz, Altoros, Intellectsoft, and Aspired. Ankur Shrivastav, "Top 20 Blockchain Development Companies", *Entelligens Technologies*, https://www.etelligens.com/blog/top-blockchain-development-companies/.

wallets[10], consultancy services, and payment processors[11].

With the rise of any industry comes the inevitable rise of complex legal difficulties, resulting in novel forms of crypto disputes. Due to the decentralised, pseudonymous, and largely unregulated nature of the crypto sector, these disputes can encompass a wide range of issues. While crypto disputes might involve familiar legal matters, they frequently demand innovative application of established legal principles due to the unique characteristics of distributed ledger technology (DLT), virtual assets, and the broader Web3 environment[12]. These conflicts often involve assets and stakeholders from different jurisdictions and occur in dynamic markets where prompt action is crucial.

B. Crypto Disputes

Despite the diverse nature of these disputes—whether related to ownership and governance of a project, legal rights linked to virtual assets, responsibility for stolen cryptocurrency, or the impact of regulatory changes—these disputes share common elements—*i.e.*, the usage of virtual assets in the underlying business. Some of these disputes present novel challenges, such as determining which law applies to a blockchain transaction without a governing law clause or whether a binding dispute resolution clause can be incorporated into a smart contract. However, when the relationship between the disputing parties is defined by a traditional contract, which is sometimes the case, lawyers will recognise many of the issues involved, similar to those encountered in non-crypto disputes[13].

However, an important question arises: should all disputes involving a crypto aspect in the underlying business be considered crypto disputes? Specifically, does a dispute qualify as a crypto dispute merely because the company uses cryptocurrency? For example, if a construction company accepts cryptocurrency as a form of payment, does a resulting dispute fall under the category of a crypto dispute? Another example is if a DeFi

[10] *See,* for instance, MetaMask, Coinbase Wallet, Trust Wallet, Crypto.com, and Blue Wallet.

[11] *See,* for instance, Circle Internet Financial (promoting USDC stablecoin and payment solutions), Tether (a blockchain-enabled platform designed to use fiat currency digitally), BitPay, Coinbase Commerce, and CoinGate.

[12] Web3 is the third generation of the World Wide Web (WWW), which involves direct immersion into the digital world. Web 3.0 encompasses individual control of personal data and the use of cryptocurrencies and blockchain. Jason G. Allen, et. al., "Legal and Regulatory Consideration for Digital Assets," *Cambridge Centre for Alternative Finance Report*, https://www.jbs.cam.ac.uk/wp-content/uploads/2020/10/2020-ccaf-legal-regulatory-considerations-report.pdf.
"DLT, Digital Assets and Web3 - the Decentralization of the Digital World," *Zeb*, accessed July 16, 2024, https://zeb-consulting.com/en-DE/topics/digital-assets-DLT.

[13] Edward Taylor, *et. al.*, "Crypto Arbitration: A Survival Guide," *Kluwer Arbitration Blog*, September 29, 2022. https://arbitrationblog.kluwerarbitration.com/2022/09/29/crypto-arbitration-a-survival-guide/.

platform hires service providers and there is a contractual dispute with a provider over compensation, would that constitute a crypto dispute? Potentially yes, but likely no. As this article will further explain, only disputes where the core issue directly involves cryptocurrency or blockchain technology should be classified as crypto disputes. This distinction is crucial to understanding the appropriate mechanisms for resolution. Put another way, if the cryptocurrency element of a dispute (that may or may not involve a crypto business) is tangential or irrelevant to the facts of the dispute, it would not constitute a crypto dispute.

To further clarify what constitutes a crypto dispute, we examine the types of conflicts that typically arise in this sector. For example, investment disputes can stem from various issues, such as venture capital firms investing in upcoming crypto projects and shareholder disputes associated with such investments would be no different from any ordinary investment-related dispute. However, where the investment involves compensation for the investor in the form of the project's proprietary token, the facts acquire the kind of novel element that makes it a crypto dispute. Financial transaction disputes might include margin calls against traders, forced close-outs of trades by crypto exchanges, and the failure of crypto platforms to return non-fungible tokens (NFTs) or other crypto assets provided as collateral for cryptocurrency loans. Service supply issues, like service outage claims by crypto exchange users and the sale of goods, such as defective or delayed delivery of bitcoin mining equipment, also contribute to potential conflicts where the core issue relates to cryptocurrency. Fraud and mis-selling disputes are common, including misrepresentations about the nature or value of reserve assets behind stablecoins. Outstanding debts, such as the failure of crypto hedge funds to repay loaned crypto assets, and intellectual property disputes, including using artworks for NFTs without copyright licences, are additional sources of contention within the industry[14].

Against this backdrop, the authors have categorised crypto disputes into the following categories: (i) Scams and Induced Investments; (ii) Exchange Platform Disputes; (iii) Service Provider Contract Disputes; (iv) Intellectual Property Disputes; (v) Theft and Hacking Disputes; (vi) Deficient KYC- and AML-related Disputes; (vii) Taxation Disputes; (viii) Investor Disputes; (ix) Custody, Ownership, and Control of Tokens Disputes; and (x) Consumer Protection Disputes. These shall be analysed in Part III in greater detail. Addressing these disputes effectively is essential for maintaining stability and fostering trust within the crypto sector, underscoring the need for robust and

[14] Taylor, "Crypto."

adaptable dispute resolution mechanisms – where arbitration has tried to establish itself as a preferred forum.

C. *Arbitration – A Dispute Resolution Mechanism and Understanding 'Fit for Purpose'*

With blockchain arbitration–both on-chain and off-chain–becoming a mainstay in this evolving field[15], arbitration tribunals have emerged as the preferred forums for resolving crypto disputes. Scholars argue that arbitration's confidential and specialised nature aligns well with the innovative and dynamic environment of the cryptocurrency industry[16]. They further assert that arbitration is an integral part of the dispute resolution landscape for crypto disputes[17], and its ability to resolve them efficiently and privately has contributed to a more stable and predictable business environment for crypto businesses[18]. Likewise, scholars have, on the other hand, also argued upon the general concerns raised by relying on arbitration, such as transparency, accountability, and the enforceability of arbitral awards across different jurisdictions[19].

Despite the theoretical benefits and challenges associated with arbitration, from a practitioner's perspective, arbitration is not fit for the purpose of resolving crypto disputes. To understand this, we must define what "fit for purpose" means in this context. For any individual[20] filing a request for arbitration against a crypto business, three primary concerns arise: achieving justice, obtaining a favourable award, and securing the outcome–specifically, recovering the lost or claimed funds. The critical ques-

[15] Hiroo Advait, *et. al.*, "Smart Contracts and Blockchain Arbitration: Smart Solutions Paving the Way for a Better Dispute Resolution Mechanism," *SCC Times*, April 25, 2022, https://www.scconline.com/blog/post/2022/04/25/smart-contracts-and-blockchain-arbitration-smart-solutions-paving-the-way-for-a-better-dispute-resolution-mechanism/.

[16] Darshan Bhora and Aisiri Raj, "Blockchain Arbitration – the Future of Dispute Resolution Mechanisms?," *Cambridge International Law Journal Blog*, December 16, 2020, https://cilj.co.uk/2020/12/16/blockchain-arbitration-the-future-of-dispute-resolution-mechanisms/; Armand Terrien, et al., "Blockchain and Cryptocurrencies: The New Frontier of Investment Arbitration?," *Kluwer Arbitration Blog*, November 5, 2018, https://arbitrationblog.kluwerarbitration.com/2018/10/18/blockchain-and-cryptocurrencies-the-new-frontier-of-investment-arbitration/.

[17] Nilava Bandyopadhyay and Moonmoon Nanda, "Resolving Disputes in the Globalised and Technological Landscape," *The Financial Express*, September 29, 2023, https://www.financialexpress.com/business/digital-transformation-resolving-disputes-in-the-globalised-and-technological-landscape-3257880/.

[18] Joyce W. Chen, "Dispute Resolution in the New Digital Era–Exploring Arbitration as a Suitable Mechanism to Resolve Disputes Over Crypto Assets," *Contemporary Asia Arbitration Journal* 15, no. 2 (November 2022): 255-282.

[19] Rana Sajjad Ahmad, "Blockchain Arbitration: Promises and Perils", *American Review of International Arbitration*, March 23, 2023, https://aria.law.columbia.edu/blockchain-arbitration-promises-and-perils/.

[20] In this article, the term 'individual' is an umbrella term for any party filing a case against a crypto business. As such, it includes both individual entities and individual persons.

tion then arises: which of these goals is most important to the individual?

Firstly, an individual may achieve justice through a fair hearing and a justified decision, but this does not guarantee they would obtain the practical relief they seek. *Secondly*, obtaining a favourable award from an arbitral tribunal is not synonymous with achieving the desired outcome if the award cannot be enforced efficiently. Practical enforcement challenges include cross-border enforcement concerns, locating a jurisdiction where the award can be enforced with minimal friction from local courts and identifying the assets of the crypto business, given the unique structuring of such businesses that is commonplace in the sector. *Thirdly*, as such, the ultimate aim for any individual involved in a crypto dispute is often to get the outcome, *i.e.*, the recovery of lost, stolen or unpaid funds. Therefore, practically, obtaining an award does not necessarily equate to recovering the lost money and thus achieving justice. This pragmatic understanding then questions whether arbitration can provide meaningful relief to individuals in a crypto dispute, *i.e.*, recovery of funds or any other kind of efficiently enforceable outcome.

III. Arbitration: Not 'fit for purpose' for crypto disputes

In Part IV, we will explore the different types of disputes categorised in Part II above and critically analyse why arbitration fails to address the specific needs and intricacies of individuals embroiled in these matters.

A. Exchange Platform and Trading Disputes

Exchange platforms, or cryptocurrency exchanges, are online platforms where users may trade virtual assets for traditional fiat money or other virtual assets[21]. However, disputes often arise related to the performance and reliability of these exchanges[22], which can significantly impact users' financial interests, returns and experience.

Exchange Platform and Trading Disputes usually concern the exchange's functionality or the underlying transaction being executed by the exchange. For instance, a dispute may arise when the exchange experiences a complete shutdown, leaving individuals unable to perform trades. Such failures can result in significant financial loss to the user since they prevent the user's access to their funds or to execute time-sensitive transactions. Other disputes, for instance, may arise from the non-perfor-

[21] Rashi Maheshwari, "What Are Crypto Exchanges And How Do They Work," *Forbes*, January 10, 2024, https://www.forbes.com/advisor/in/investing/cryptocurrency/what-is-a-crypto-exchange/.
[22] Nell Perks, "Crypto disputes on the rise – a 2024 look at litigation, arbitration and regulation," *Finextra*, January 31, 2024, https://www.finextra.com/the-long-read/926/crypto-disputes-on-the-rise--a-2024-look-at-litigation-arbitration-and-regulation.

mance of contractual obligations, such as when a party fails to meet a margin call in time, leading to the liquidation of their investment portfolio[23]. For instance, in 2021, Binance, one of the world's leading crypto trading platforms, suffered a service outage that left multiple users unable to trade during a period of falling crypto prices, ultimately leading to a crypto dispute between the individuals and Binance[24]. This event, along with other crypto businesses' collapses after the crypto-catastrophe year[25], such as Voyager Digital[26], Celsius[27], Terraform Labs[28], FTX[29], and BlockFi[30], resulted in

[23] Tamar Meshel, and Moin A. Yahya, "Crypto Dispute Resolution: An Empirical Study," *Journal of Law, Technology and Policy* 2021, no. 2 (2021).

[24] Matthew Leising, "Coinbase and Binance's Outages Show the Fragility of Crypto Exchanges," *Fortune*, February 8, 2022, https://fortune.com/2021/05/19/coinbase-binance-outage-crypto-bitcoin-crash/.

[25] The crypto-catastrophe year, also referred to as the 'crypto winter', the 'bloodbath', was a period of significant drop in the prices of cryptocurrencies. This was primarily in 2022. This event exemplifies the significant challenges within the crypto industry. This further led to a fallout of major players in the market. See for instance, "The Final Crypto Crash? It's Not Looking Good," *Readers Digest*, Accessed July 18, 2024, https://www.readersdigest.co.uk/money/investment/the-final-crypto-crash-its-not-looking-good.; Medha Singh and Lisa Pauline Mattackal, "Cryptoverse: Forget Crypto Winter, This Is a Bitcoin 'Bloodbath,'" *Reuters*, December 7, 2022, https://www.reuters.com/technology/cryptoverse-forget-crypto-winter-this-is-bitcoin-bloodbath-2022-12-06/.; Joshua Oliver, "Year in a Word: Crypto Winter," *Financial Times*, December 28, 2022, https://www.ft.com/content/9ccc707e-e5a5-409c-978e-e72934fabaca.

[26] In July 2022, Voyager Digital, a cryptocurrency brokerage company suspended "*trading, deposits, withdrawals and loyalty rewards*". The fall of major crypto tokens TerraUSD and Luna led to the collapse of hedge fund Three Arrows Capital, to which Voyager was exposed. Voyager entered bankruptcy and faced a class action suit for selling unregistered securities and misleading customers. Anirudh Saligrama and Niket Nishant, "Binance to Relaunch Bid to Buy Bankrupt Voyager Digital - Coindesk ," *Reuters*, November 17, 2022, https://www.reuters.com/technology/binance-relaunch-bid-buy-bankrupt-voyager-digital-coindesk-2022-11-17/.

[27] In June 2022, Celsius Network LLC, a major crypto lender decided to pause all withdrawals and transfers due to: ″extreme market conditions″ as the values of different coins fluctuated. Celsius's fall led to a loss of US$4.7 billion for their users. A former investment manager at Celsius Network sued the crypto lender alleging that it used customer deposits to rig the price of its own crypto token and failed to properly hedge risk, causing it to freeze customer assets and accused Celsius of running a Ponzi scheme. Jonathan Stempel, "Lawsuit Accuses Troubled Crypto Lender Celsius Network of Fraud," *Reuters*, July 8, 2022, https://www.reuters.com/technology/lawsuit-accuses-troubled-crypto-lender-celsius-network-fraud-2022-07-08/.

[28] Terraform Labs set up the TerraUSD, a stablecoin whose price was designed to be pegged to US$. Before collapsing in May 2022, TerraUSD was the third-largest stablecoin by market capitalisation. In May 2022, after TerraUSD began to break its peg to the US dollar, the price dropped from US$119.51 to 10 cents. This led to a loss of almost $45 billion in market capitalisation within a week. The co-founder of Terraform Labs, the creator of the algorithmic stablecoin TerraUSD, faces two class-action lawsuits and an arrest warrant in South Korea. Shashank Bhardwaj, "Terraform Labs' Employees Probed for Intentional Luna, UST Price Manipulation," *Forbes India*, accessed July 18, 2024, https://www.forbesindia.com/article/crypto-made-easy/terraform-labs-employees-probed-for-intentional-luna-ust-price-manipulation/76861/1.

[29] In November 2022, FTX, the world′s second-largest cryptocurrency exchange, filed for bankruptcy in the US. David Yaffe-bellany, "Embattled Crypto Exchange FTX Files for Bankruptcy," *The New York Times*, November 11, 2022, https://www.nytimes.com/2022/11/11/business/ftx-bankruptcy.html.

[30] BlockFi, a digital assets lender which was valued at $3 billion, ended up filing for bankruptcy in November 2022. BlockFi suspended withdrawals and limited activity on its platform after being affected by the down-

significant financial distress[31]. According to a report, exchange platform failures and outages are common, affecting approximately 10% of all active cryptocurrency traders worldwide[32].

1. Arbitration: An Uneasy Fit

Usually, exchanges include arbitration clauses in their terms and conditions ("T&C") for dispute resolution[33]. As such, any dispute arising between an individual and the exchange must be resolved through arbitration. However, the question then arises, which is the thesis of this article, whether arbitration is truly fit for the purpose of resolving these disputes.

Binance, for instance, provides a clear reference to arbitration under the rules of the Hong Kong International Arbitration Centre ("HKIAC"), with both the seat and governing law set to be Hong Kong[34]. Binance's User Terms include an arbitration agreement between the user and "Binance Operators," an open-ended definition that includes legal entities (*e.g.*, Binance UAB), unincorporated organisations, and teams that provide Binance services and are responsible for such services. When any dispute arises, it is upon the claimant to determine the "counterparties", *i.e.*, to identify the specific parties against whom the claim is made "*depending on the specific services you* [the user] *use and the particular actions that affect your* [the users'] *rights or interests*". Further, since Binance uses an opaque organisation structure[35], wherein Binance has several corporate

fall of FTX. In February 2022, BlockFi settled with the SEC and 32 states over similar claims, for an amount of $ 100 for failing to register the offers and sales of its retail crypto lending. "Blockfi Agrees to Pay $100 Million in Penalties and Pursue Registration of Its Crypto Lending Product," *U.S. Securities and Exchange Commission*, February 14, 2022, https://www.sec.gov/news/press-release/2022-26.

[31] Sophie Nappert and Mihaela Apostol, "How national courts in several jurisdictions are approaching the emerging field of Digital Assets litigation," *Principia Journal of the Research and Studies Center for Dispute Resolution of Monteávila University*, No. 8 (2023): 67-93.

[32] Yuxi Chen, *et. al.*, "A Review of Crypto-Trading Infrastructure," *World Federation of Exchanges*, August 29, 2023, https://www.world-exchanges.org/storage/app/media/Crypto%20Infrastructure%20Review.pdf.

[33] Crypto exchanges usually include arbitration clauses in their T&Cs for dispute resolution. For instance, Crypto.com under its U.S. T&Cs mentions in Clause 13.3 that *"you and crypto.com waive your rights to a jury trial and to have any dispute resolved in Court"*; Binance, under its Terms of Use, references HKIAC arbitration, with Hong Kong as the seat of arbitration and Hong Kong law as the governing law; Coinbase, under Clause 7.3 ("Arbitration"), states, *"You agree to be bound by the Arbitration Agreement in Appendix 5 to this Agreement"*; Bybit also mentions arbitration, as a preferred method of dispute resolution, designating Singapore as the seat of arbitration.

[34] "Terms," *Binance*, accessed July 18, 2024, https://www.binance.com/en/terms.

[35] Binance's global corporate structure, for instance, currently involves the main entity incorporated as 'Binance Limited' in Hong Kong, and other as 'Binance Holdings Limited' in Cayman Islands, with other entitles unclear. Binance's global corporate structure continues to be opaque and unknown, even to regulators such as the UK's FCA, who reportedly requested this information and was refused by Binance's UK entity. Scott Chipolina, "UK Regulator: Binance 'Not Capable' of Being Supervised," *Decrypt*, August 26, 2021, https://decrypt.co/79456/uk-regulator-binance-not-capable-of-being-supervised.

vehicles, it becomes difficult for individuals to determine the counterparty.

Similar concerns were raised during the *Liti Capital* dispute[36]. Following the shutdown of Binance's online trading platform on 19 May 2021, traders faced significant losses due to their inability to access their accounts. Liti Capital, a third-party funder based in Switzerland, planned to fund a class action-style arbitration through the HKIAC on behalf of potentially up to 700 claimants[37]. After the Liti dispute, Binance changed its Terms of Use, to explicitly provide for a waiver of class arbitrations, ultimately not allowing small users to file an arbitration claim against the exchange collectively.

As such, given the intricate challenge of identifying the parties to the arbitration agreement, a fundamental flaw arises in using arbitration to resolve crypto disputes. Owing to the unique and opaque organisational structures comprising various corporate entities, the process of pinpointing the correct counterparty is complicated for individuals. Piercing the corporate veil, which allows courts to hold the controlling entities accountable despite the nominal separation, becomes increasingly relevant in such scenarios[38]. This legal mechanism can help ensure the true controlling parties behind complex corporate structures are held accountable. However, the courts have been reluctant to apply this mechanism, given it challenges the inherent principles of corporate form, such as limited liability, monitoring of assets and liabilities, and separate legal entity.

Moreover, arbitration's confidential nature and the inherent power imbalance between individual users and large platforms like Binance further impedes justice. Unlike court proceedings, which are often public and create reputational pressure that can encourage settlements, arbitration lacks this transparency. This confidentiality can ultimately disadvantage the individual who lacks the bargaining power to negotiate a fair resolution compared to the exchange platform. Public court cases can potentially motivate large corporations to set-

[36] Sean McCarthy, et al., "The Impending Binance Arbitration: A Primer on the World of Cryptocurrencies, Derivatives Trading and Decentralised Finance on the Blockchain," *Kluwer Arbitration Blog*, October 7, 2021, https://arbitrationblog.kluwerarbitration.com/2021/10/13/the-impending-binance-arbitration-a-primer-on-the-world-of-cryptocurrencies-derivatives-trading-and-decentralised-finance-on-the-blockchain.

[37] 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. "Crypto Investors Seek Damages from Binance," *CNBC*, August 19, 2021, https://www.cnbc.com/video/2021/08/19/crypto-investors-seek-damages-from-binance.html.; Greg Thomson, "Binance Lawsuit: Claimants Mount up in Arbitration for Decentralization," *Cointelegraph*, August 27, 2021, https://cointelegraph.com/news/binance-lawsuit-claimants-mount-up-in-arbitration-for-decentralization.

[38] Yarik Kryvoi, "Piercing the Corporate Veil and Enforcement", *Kluwer Arbitration Blog*, May 3, 2010, https://arbitrationblog.kluwerarbitration.com/2010/05/03/piercing-the-corporate-veil-and-enforcement/#:~:text=.

tle disputes to avoid negative publicity, a dynamic absent due to the inherently confidential nature of arbitral proceedings.

These limitations highlight why arbitration, in its current form, is not suitable for resolving the unique challenges posed by crypto disputes. The need to pierce the corporate veil, identify the correct counterparty, and lack of public accountability underscores the limitation of arbitration in such disputes.

B. Fraud, Scams, Theft, and Hacking Disputes

The number of crypto fraud, theft, scams and asset recovery disputes is rising, with crypto crime reaching a record $20 billion in 2022[39]. The majority of these disputes stem from fraud-related cases[40], including, Ponzi and pyramid schemes[41], hacking[42], rug pulls[43], and inducing investment into certain cryptocurrencies[44]. These crypto disputes often involve 'unknown defendants'[45] because the scammers fake their identities before defrauding someone, making it difficult for claimants to seek justice.

In such crypto disputes, claimants typically attempt to identify fraudsters by seeking information from exchanges through which these fraudulent activities are usually routed. To support their claims, they can pursue several types of court orders, including disclosure orders to support injunctions like freezing or interim injunctions, Bankers Trust orders to request documents from non-parties for tracing claims, and Norwich Pharmacal orders to obtain information

[39] Elizabeth Howcroft, "Crypto Crime Hits Record $20 bln in 2022, Report Says ," *Reuters*, January 13, 2023, https://www.reuters.com/business/finance/crypto-crime-hits-record-20-bln-2022-report-says-2023-01-12/.

[40] In 2021 scammers stole US$ 6.2bn from victims worldwide. The UK authorities report that from October 2021 to September 2022 users lost £226 million through fraudulent transactions (32 % more than the previous year). Kate Beioley and Siddharth Venkataramakrishnan, "Crypto Fraud Jumps by a Third in UK," Financial Times, November 28, 2022, https://www.ft.com/content/c7d2eeae-9a66-4dc4-a10e-11dcd2807600.

[41] A Ponzi scheme is an investment scam that involves the payment of purported returns to existing investors from funds contributed by new investors. Examples include BitConnect (US$ 2,4 billion). David Voreacos, "BitConnect Promoter Gets 38 Months in $2.4 Billion Ponzi Scam," *Bloomberg*, September 17, 2022, https://www.bloomberg.com/news/articles/2022-09-17/bitconnect-promoter-gets-38-months-in-2-4-billion-ponzi-scam.

[42] Gaining authorised access to a person's computer usually followed by a ransom request.

[43] Rug pull involves advertising a project, raising money to develop it and then disappearing with the funding and shutting down the project. Examples include: Onecoin (US$ 4 billion); Africacrypt (US$ 3.6 billion); Thodex (2 billion). Rebecca Moody, "Worldwide Crypto & NFT Rug Pulls and Scams Tracker," *Comparitech*, August 17, 2022, https://www.comparitech.com/crypto/cryptocurrency-scams/. Roxanne Henderson and Loni Prinsloo, "South African Brothers Vanish, and So Does $3.6 Billion in Bitcoin," *Bloomberg*, June 23, 2021, https://www.bloomberg.com/news/articles/2021-06-23/s-african-brothers-vanish-and-so-does-3-6-billion-in-bitcoin.

[44] Nappert, "How National Courts," 67.

[45] Wendy Lin and Leow Jiamin, "Enforcement Issues and Strategies in Crypto-Related Fraud and Asset Recovery Disputes," *NUS Centre for Technology, Robotics, AI, and the Law*, September 2023, https://law.nus.edu.sg/trail/enforcement_issues_strategies_crypto-related_fraud/#_ftn3.

from non-parties involved in wrongdoing. However, such orders can only be issued by courts. Recognising the increasing number of crypto disputes, courts have progressively allowed for serving these orders outside their jurisdiction, effectively aiding in tracing and addressing fraudulent activities in the crypto sector[46].

This pragmatic approach has led to more instances of the courts in various jurisdictions addressing legal issues related to crypto assets and granting injunctions and orders over them. For example, the case of *Fetch.ai Ltd and Anr v Persons Unknown Category A and Ors*,[47] in which the fraudster gained access to the private keys associated with cryptocurrency accounts held by the claimant. This breach allowed the fraudster to withdraw and sell the assets from these accounts. In response, the Court granted a proprietary injunction to freeze the assets or their proceeds, a worldwide freezing injunction against any individuals knowingly involved in the fraud, and disclosure orders against third parties believed to have information that could help trace the stolen assets.

Another such example is *ByBit Fintech Ltd v Ho Kai Xin and Ors*[48], where the claimant was defrauded by an unauthorised transfer of USDT by the defendant to addresses controlled by the defendant. In its judgment, the Singapore High Court recognised crypto assets as 'property' and found that wrongdoers held the stolen assets on constructive trust for the claimants. Various jurisdictions, including courts in Hong Kong (see, for instance, *Yan Yu Ying v Leung Wing Hei*; *Nico Constantijn Antonius Samara v Stive Jean Paul Dan*), Singapore (see, for instance, *CLM v CLN and others*), and England & Wales (see, for instance, AA v Persons Unknown) have been willing to grant such injunctions over crypto assets, specifically against 'Unknown Persons'[49].

However, given the scope of this article is limited to whether arbitration is 'fit for purpose' in resolving crypto disputes, the underlying question arises – whether arbitration could assist in resolving such disputes. To initiate arbitral proceed-

[46] In *LMN v Bitflyer Holdings Inc and ors,* [2022] EWHC 2954 (Comm) at [35-[37], the English High Court has allowed Bankers Trust orders to be served outside of its jurisdiction in exceptional circumstances, emphasizing that it is impractical and unjust to require victims to file speculative applications in various jurisdictions to locate relevant exchange companies and seek disclosure.

[47] Fetch.ai Ltd and another v Persons Unknown Category A and others [2021] EWHC 2254 (Comm).

[48] ByBit Fintech Ltd v Ho Kai Xin and ors, [2023] SGHC 199.

[49] Although the legal question of whether crypto assets are considered "property" is still debated in many regions, courts in Hong Kong (see for instance, *Yan Yu Ying v Leung Wing Hei,* [2022] HKCFI 1660; *Nico Constantijn Antonius Samara v Stive Jean Paul Dan,* [2022] HKCFI 1254.) and Singapore (see for instance, *CLM v CLN and others,* [2022] SGHC 46.) have nevertheless issued proprietary injunctions over crypto assets. English courts (see for instance, AA v Persons Unknown, [2019] EWHC 3556 (Comm).) have similarly been willing to grant such injunctions.

ings, the first requirement is for the parties to choose arbitration as a forum based on mutual consent. However, since the defrauding party is usually 'unknown' in such a case, it is impossible to establish an arbitration agreement in place with unknown fraudsters. As such, these disputes are ultimately left for resolution through traditional litigation forums, *i.e.*, courts for both final and interim relief, as provided above, since there is no way or method for arbitration to be validly invoked, making it unfit for purpose for these kinds of disputes.

C. Custody, Control, Ownership of Tokens, and Induced Investment Disputes

While a subset of fraud and scams, Custody, Control, and Illegal Ownership of Tokens Disputes involve defrauders taking custody of tokens without the individual′s knowledge. These disputes can arise in various forms, including unauthorised access to wallets, transferring tokens to unauthorised addresses, and inducing individuals to invest in certain tokens under false pretences.

Furthermore, scholars have argued that if fraud or scams were induced by influential individuals engaged by crypto firms to market and endorse certain investments that later turned out to be fraudulent, claimants might seek relief from these influencers based on fraudulent or negligent misrepresentation[50]. However, the question again arises whether a valid arbitration agreement exists between the influencer and the user. The straightforward answer is no, making arbitration an unviable option for dispute resolution in such cases.

Similar to fraud disputes, these disputes also lack an underlying arbitration agreement between the parties. Instead, they fall under the jurisdiction of traditional litigation, where courts can issue orders and injunctions to trace and recover the assets, providing a legal pathway to justice for the victims.

Another question is whether a defrauded user can file an arbitration against the underlying central network owner. As was observed in *Tulip Trading Limited (A Seychelles Company) v Bitcoin Association for BSV and Ors*[51], the crypto-asset software developers owed fiduciary and tortious duties to crypto asset owners utilising their network. However, such a matter could only be decided 'during the trial', *i.e.*, litigation[52]. This, *firstly*, rules out the possibility of seeking relief through arbitration. *Secondly*, even if the defrauded user sought arbitration as a preferred mode of dispute resolution, there needed to be an underlying arbitration agreement, which would be unavailable for such crypto dis-

[50] Lin, "Enforcement Issues and Strategies."
[51] *Tulip Trading Limited (A Seychelles Company) v Bitcoin Association For BSV & Ors,* [2023] EWCA Civ 83.
[52] "Tulip" at [91].

putes. Thus, arbitration is unsuitable for resolving crypto disputes involving fraud, inducement, scams, theft, and hacking.

D. Service Provider Contract Dispute

Service provider contract disputes involve disagreements between crypto businesses and their service providers, such as consultants, developers, marketing firms, *etc.* These disputes usually arise because of issues like breach of contract, non-payment, failure to deliver agreed-upon goods and services or other general claims. In a broader sense, these service provider contracts could also be understood as general commercial disputes, wherein one party engages another to provide goods or services related to a specific aspect of their business. They sometimes contain arbitration clauses.

As Part II of this article explained, such disputes are not inherently crypto disputes simply because one of the parties is a crypto business. An illustrative example of a service provider dispute in the crypto sector would be where a claim arises between a crypto business and its service provider engaged in marketing and promotional services for the crypto business. However, if any dispute arises over the quality and delivery of the services, such a dispute, while adjudicated through arbitration, would inherently be concerned with interpreting general commercial contracts. As such, it would not constitute a crypto dispute. Since the scope of this article is to assess whether arbitration is fit for resolving crypto disputes, the question of arbitration's suitability for general commercial contract disputes does not arise, as these are not inherently crypto disputes because the element of cryptocurrency is unlikely to be a core feature of the dispute in most instances.

E. Intellectual Property Disputes

Crypto businesses frequently develop software, create algorithms, or design blockchain-based solutions. These projects often involve significant Intellectual Property (IP) concerns, and disputes sometimes arise regarding the ownership or use of this IP, including patents, trademarks, copyrights, and trade secrets. These disputes usually arise when it is unclear which party would ultimately be entitled to the IP or when a third party infringes on a crypto business's IP by illegally using it as part of its business operations[53]. In most cases, no arbitration clause would exist in such disputes.

IP usage or development may play a role in some agreements with certain service providers or general commercial arrangements, such as when influencers use a crypto business's logo as part of promotional content or when a developer house uses a crypto business's pro-

[53] Birgit Clark, "Blockchain and IP Law: A Match Made in Crypto Heaven?," *WIPO*, February 2018, https://www.wipo.int/wipo_magazine/en/2018/01/article_0005.html.

prietary code to help with bug fixes or for backend development for new features. These service provider agreements may include arbitration clauses.

While these disputes involve the crypto industry, the core issues remain tied to general and commercial IP concerns. For example, a crypto business might hire a software developer to create a new blockchain protocol under contract with an arbitration clause. If a dispute arises over who owns the IP rights to this protocol, the matter will be referred to arbitration. However, this does not make it a crypto dispute. The fact that the business operates within the crypto sector does not fundamentally alter the nature of the dispute–it remains a contractual disagreement with an IP component, as observed in service provider agreement disputes discussed above. The fact that the IP in question concerns blockchain technology is tangential.

A pertinent case illustrating the crossroads of crypto businesses and IP disputes is the *Hermès v. Mason Rothschild* case[54]. Here, Rothschild created NFTs featuring Hermès' Birkin handbags, named "MetaBirkins". Hermès sued Rothschild for trademark infringement, trademark dilution, and cybersquatting. The Court noted that consumers would be confused about the source of the MetaBirkins, potentially thinking Hermès was associated with the project. The court ultimately banned the MetaBirkins NFTs, citing potential consumer confusion and irreparable harm to Hermès.

Another example is the case of *Juventus Football Club v. Blockeras S.r.l.*, where the Court granted a preliminary injunction against Blockeras to stop minting, advertising, and selling NFTs featuring Juventus's trademarks. Blockeras argued that Juventus' trademark rights were limited to a different class of goods, but the court rejected this argument, protecting Juventus's trademark rights in the digital realm.

These cases underscore that when this kind of dispute occurs in the crypto sector, it revolves around traditional IP issues and, as such, does not inherently qualify as a crypto dispute. These are similar to any IP dispute that any technology company would encounter as part of the usual course of business. As such, *firstly*, since they do not qualify as crypto disputes, the inherent question of whether these disputes are 'fit for purpose' for arbitration does not arise. *Secondly*, arbitration may not always be suitable for resolving these disputes, especially when an arbitration agreement is absent, or the nature of the dispute requires court intervention for adequate resolution. Courts are often better equipped to provide comprehensive remedies, such as injunctions and orders to trace or remove infringing content as

[54] Hermès International Hermès of Paris Inc v. Mason Rothschild Sonny Estival, 22-cv-384 (JSR).

well as create publicly available precedents to deter similar future conduct.

F. Investor Disputes

Investor disputes in crypto often arise from agreements like Token Warrant Agreements, Simple Agreements for Future Tokens (SAFTs), and Simple Agreements for Future Equity (SAFEs). These agreements assist crypto businesses in raising money on their equity or tokens issued to the investor at a future date. A SAFT would typically require the crypto business to deliver tokens at a later stage usually on a schedule following the Initial Coin Offering (ICO). These agreements often contain arbitration clauses. For instance, where the crypto business does not issue the required tokens to the investor, the investor may file a request for arbitration against the crypto business.

However, there are concerns about arbitration's efficacy in realising investors' rights. In particular, the practicality and cost of choosing arbitration to achieve the investor's goal, *i.e.*, receiving the tokens, are difficult to realise through arbitration.

Firstly, arbitration can be an extremely high-cost dispute resolution mechanism[55]. For an investor to obtain an award in their favour, they might need to spend hundreds of thousands of dollars by the time the arbitration has run its course (assuming that the project does not engage in guerrilla tactics)[56]. This high cost can be prohibitive, especially for individual investors or when the disputed tokens represent smaller investment amounts – it would not make sense to spend hundreds of thousands of dollars on an arbitral proceeding when the underlying investment is usually for USD 50,000-200,000 on average[57]. *Secondly*, the primary concern for an investor is to obtain a practical outcome—receiving their tokens or a monetary equivalent in a timely manner—rather than merely obtaining an arbitration award. Even if an award is granted in the investor's favour, the actual delivery and value of the tokens post-dispute are compromised. This often happens because the market value of the tokens can fluctuate significantly, and delays caused by

[55] Raphael Ng′etich, "The Current Trend of Costs in Arbitration: Implications on Access to Justice and the Attractiveness of Arbitration," *Alternative Dispute Resolution 5,* no. 2 (2017): 111-129.

[56] Phillip Landolt, ″Controlling Costs in International Arbitration,″ Bloomberg, October, 2023, https://www.bloomberglaw.com/external/document/XABGU4JK000000/litigation-professional-perspective-controlling-costs-in-interna.; Ashish Sharma, "Guerrilla Tactics in Arbitration vis-a-vis International Arbitration," *International Journal of Law Management and Humanities* 4, no. 2 (2021): 670 - 677, http://doi.one/10.1732/IJLMH.26131.

[57] See, for instance, Lennart Ante, Ingo Fiedler, Marc von Meduna, and Fred Steinmetz, ″Individual Cryptocurrency Investors: Evidence from a Population Survey,″ *International Journal of Innovation and Technology Management* 19, No. 9 (2022).; José Almeida, Tiago Cruz Gonçalves, "A systematic literature review of investor behaviour in the cryptocurrency markets," *Journal of Behavioral and Experimental Finance* 37, (2023): 100785.

the arbitration process can lead to substantial depreciation in their value by the time the dispute is resolved. As such, the tokens of a crypto project may not retain their value and frequently lose value soon after ICO[58]. If the tokens are not sold timeously, the investors may realise a loss on their initial investment through no fault of their own.

A practical solution (a practitioner's one) would typically involve the investor leveraging public pressure to achieve a favourable resolution. This is particularly impactful in the earlier days of a project's lifecycle, usually before ICO or soon after. Arbitration typically includes confidentiality obligations, which prevent investors from publicly disclosing the details of the dispute. A more effective approach may involve private negotiation and leveraging market dynamics through public disclosure of the dispute. Every crypto business, especially those with proprietary tokens, is at least somewhat sentiment-driven[59]. The risk of public disclosure and the impact this could have on fundraising, especially when the investor's claim may have merit, would incentivise the parties to come to an equitable solution faster.

Arbitration provides a mechanism to resolve investor disputes but is not 'fit for purpose'. The high costs, potential devaluation of tokens while resolution is sought, loss of value of the underlying investment, and confidentiality requirements make arbitration less suited to achieving the ultimate objective of the parties, *i.e.*, to realise justice timeously.

G. KYC and AML Procedure Failures Disputes

Compliance with regulations is an increasingly essential yet complex process for crypto businesses. They must adhere to the Know Your Customer (KYC) requirements, perform anti-money laundering (AML) screening, and implement preventive measures against fraud. Non-compliance may result in substantial fines, as evidenced in 2024 when Binance settled a deal with the U.S. courts for failing to maintain an effective anti-money laundering programme[60]. In India, the Delhi High Court has stated that transactions in cryptocurrency must comply with the general law in force in India and with the Reserve Bank of India's regulations regarding KYC, Combating of Financing of Terrorism, and AML requirements[61]. The Court held

[58] P. De Andrés, D. Arroyo, R. Correia, & A. Rezola, "Challenges of the market for initial coin offerings," *International Review of Financial Analysis* 79 (2022): 101966.
[59] Ahmet Faruk Aysan, Massimiliano Caporin, Oguzhan Cepni, "Not all words are equal: Sentiment and jumps in the cryptocurrency market", *Journal of International Financial Markets, Institutions and Money* 91, (2024):101920, https://doi.org/10.1016/j.intfin.2023.101920
[60] Sabrina Willmer, Anna Edgerton, "Binance's $4.3 Billion Payment in US Plea Deal Approved by Judge," *Bloomberg,* February 24, 2024, https://www.bloomberg.com/news/articles/2024-02-23/binance-4-3-billion-payment-in-us-plea-deal-approved-by-judge.
[61] Hitesh Bhatia v Kumar Vivekanand, Case No. 3207 of 2020.

that KYC is the responsibility of the intermediary and is crucial to ensuring the legitimacy of the source and destination of money, and the establishment of the parties' real identities.

The regulatory requirement includes the following key compliance activities: customer identification and identity verification, performing risk-based assessments, ongoing monitoring (including transaction monitoring), and screening against sanctions lists, Politically Exposed Persons (PEP) lists, and other relevant sources[62]. However, crypto businesses may try to expedite these onboarding processes, ultimately creating disputes through negligence.

These disputes are inherently regulatory and are subject to the jurisdiction of governmental and regulatory authorities[63]. As such, arbitration is not fit for the purpose of resolving such crypto disputes. Public disclosure and 'naming and shaming' of non-compliant companies are a part of regulatory enforcement activity in any jurisdiction to deter other companies from following the example set by the penalised entity.

IV. Online dispute resolution: not 'fit for purpose' for majority of crypto disputes

Arbitration is a structured method of dispute resolution where parties agree to submit their conflict to one or more arbitrators whose decision is binding. The process begins with an arbitration agreement, often stipulated in a contract. Next, the parties mutually select the arbitrator(s), either through agreement or via an arbitral institution. The claimant initiates the process by filing a statement of claim, outlining the facts, the legal bases, and the reliefs sought. The respondent then submits a statement of defense, which may include counterclaims. The claimant can reply to the defense, and the respondent may respond to this reply. Given the technical nature of crypto disputes, expert evidence is often crucial, with both parties presenting expert testimony and reports. The proceedings typically start with opening submissions from both parties, followed by an evidentiary hearing where evidence, witness testimony, and expert reports are presented and challenged. The parties then make closing hearing submissions, summarising their arguments. Finally, the arbitrator(s) deliberate and issue an award. This process usually spans over a period of six (6) to eighteen (18) months.

Given the large volume of disputes arising out of the blockchain and Web3 sector, various autonomous dispute resolution forums have emerged, promoting arbitration through innovative technologies like Kleros, Aragon Court, and

[62] "Navigating KYC in Crypto: Your Key to Secure Transactions," *LexisNexis*, May 17, 2023, https://www.lexisnexis.com/blogs/gb/b/compliance-risk-due-diligence/posts/kyc-in-crypto.
[63] A. A. Papantoniou, "RegTech: steering the regulatory spaceship in the right direction?," *Journal of Banking and Financial Technology* 6, no. 1 (2022): 1-16, https://doi.org/10.1007/s42786-022-00038-9.

OpenCourt. These platforms leverage Web3 capabilities to create a fast, automated online dispute resolution model. Some may argue that despite what has been set out in the article, individuals may always seek arbitration through these platforms to resolve disputes. However, we argue that these platforms also fail to resolve crypto disputes effectively.

To understand this, it is first important to understand how these platforms function. As a decentralised third party, Kleros, as mentioned in its Whitepaper[64], offers on-chain arbitration primarily for smaller disputes, arguably with the potential to handle both simple and highly complex cases. For Kleros to function as an optional judicial system, parties in a smart contract must actively choose Kleros as their forum for arbitration[65]. Once selected, any dispute arising is adjudicated by 'jurors'—randomly chosen individuals from a larger 'juror pool'[66].One can become a Kleros juror without any formal screening or permission, though it requires an investment of capital[67]. A majority vote among the selected jurors determines the outcome of a dispute[68].

Further, Kleros's Whitepaper clarifies that it uses 'game-theoretic incentives' to ensure jurors rule cases correctly[69]. The game-theoretic incentives mean that the arbitrators must rule honestly because after a dispute concludes, jurors whose votes are inconsistent with the majority will not be paid their arbitration fees and further will lose some of their staked tokens[70]. As such, this system relies not on the honesty of a few individuals but on economic incentives grounded in game theory. Once Kleros reaches a decision, tokens are unfrozen and redistributed among the jurors. This entire arbitration process usually spans one (1) to two (2) hours[71].

However, from a practitioner's perspective, this raises significant concerns regarding the effectiveness of platforms like Kleros. *Firstly*, unlike traditional arbitration, where arbitrators are qualified and experienced, Kleros jurors are cho-

[64] Clément Lesaege, Federico Ast, and William George, "Short Paper v1.0.7," *Kleros WhitePaper*, September 2019, https://kleros.io/static/whitepaper_en-8bd3a0480b45c39899787e17049ded26.pdf. Since there is not much existing scholarship on the challenges associated with Kleros, the authors have done a first-hand practitioner's analysis to formulate the arguments.
[65] Luis Bergolla, Karen Seif, and Can Eken, "Kleors: A Socio-Legal Case Study of Decentralised Justice and Blockchain Arbitration", Ohio Journal on Dispute Resolution 37, No. 1 (2022): 56-98.
[66] Alesia Zhuk, "Applying blockchain to the modern legal system: Kleros as a decentralised dispute resolution system," International Cybersecurity Law Review 4, (2023): 351-364.
[67] Clément Lesaege, Federico Ast, and William George, "Long Paper v1.0.0," *Kleros WhitePaper*, March 2020, https://kleros.io/whitepaper_long_en.pdf.
[68] Lesaege, "Long Paper Kleros Whitepaper" at [11].
[69] Lesaege, "Long Paper Kleros Whitepaper" at [16].
[70] Bergolla "Kleros". See The Kleros Juror Starter Kit, *Kleros*, https://blog.kleros.io/the-kleros-juror-starter-kit/.
[71] Bergolla "Kleros".

sen without formal screening and are driven by financial incentives. This random selection of jurors means they may lack the necessary technical knowledge and legal expertise. *Secondly*, since jurors receive their fees only if they vote with the majority, the decisions may be swayed by the desire to align with the majority rather than seeking a just outcome. This system also fundamentally challenges the principle of arbitrator neutrality, as jurors may prioritise financial rewards over unbiased judgment. *Thirdly*, since jurors make decisions within a set time frame, this limits their ability to examine claims thoroughly and excludes the consideration of expert evidence – this presupposes that the jurors already have this technical knowledge or is a situation where a resolution timeously received is prioritised over a thorough examination of the facts and applicable legal precedents.

As such, this raises questions about the platform's ability to impartially and competently resolve complex crypto disputes, suggesting a potential compromise in the quality and integrity of the arbitration process.

A. ODR: A Solution for Small Value Disputes

While the effectiveness of platforms like Kleros for resolving medium- to high-stake disputes remains questionable, they present a viable option for small-value disputes. Traditional arbitration and dispute resolution mechanisms, such as litigation, can be costly and time-consuming, making it impractical for smaller-value cases[72]. In contrast, Kleros offers a cost-effective and swift dispute resolution mechanism where the stakes are lower and the jurors provide some resolution.

For smaller-value disputes, the random selection of jurors without formal screening might not pose significant risks, as the simplicity of these cases often does not require technical legal expertise. Kleros's financial incentives can potentially ensure juror participation and engagement in these scenarios, providing a means for achieving resolution where it might otherwise be inaccessible[73]. Further, the rapid decision-making process of these platforms eliminates the need for time-extensive traditional dispute resolution mechanisms, which

[72] Herbert B. Evans, William A. Bulman, "Small Claims and Arbitration - Parallel Alternative Methods of Dispute Resolution," *Pace Law Review* 3, No. 2 (1983): 183.; Robert Schur, "Keeping Dispute Resolution Costs Smaller Than Your Small Business: The Case for International Commercial Arbitration under the New York Convention," *Loyola University Chicago International Law Review* 14, No. 1 (2016): 73.
[73] Zhuk, "Applying".

span over six to eight months[74], and usually incur substantial costs[75].

Kleros and similar platforms fill an important niche in the broader dispute resolution ecosystem by offering an efficient and economical alternative for small-value disputes. Therefore, while Kleros may not be suitable for resolving high-value disputes, it plays an important role in resolving small-value crypto disputes that may otherwise never see any formal resolution process as the costs involved would make traditional arbitration or other resolution methods or fora prohibitive. This does not, however, take away that such solutions do not guarantee the quality or suitability of the outcomes or that the decisions have been examined and tested against the ordinary expectations for applicable laws of evidence. The resolutions and decisions are made at face value by examination of provided evidence with little time or incentive for deeper or more rigorous analysis.

V. Suggestion

Given the inherent problems associated with arbitration, litigation is evolving to adapt to crypto disputes[76]. Courts, with time, have deployed various pro-consumer/ user remedies against the larger crypto business network. Traditional substantive and procedural legal principles have been adapted to the new landscape, requiring judges to address issues such as the classification of Bitcoin as 'personal property' (court answered: yes)[77], the acceptability of Bitcoin as security for costs (court answered: no, for now)[78], the eligibility of individuals trading crypto assets as consumers under consumer protection laws (court answered: yes)[79], and whether a crypto business owed fiduciary duties towards its users (court answered: yes)[80].

A. Comparing Traditional Litigation and Arbitration: Challenges and Limitations

Traditional dispute resolution mechanisms ultimately assist in achieving just outcomes. For instance, courts have successfully granted injunctions against crypto businesses, as was observed in the Hong Kong case of *Nico Constantijn Antonius Samara v Steve Jean Paul Dan*[81].

[74] Amit Moza, Virendra Kumar Paul, "Review of the Effectiveness of Arbitration," *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction* 9, No. 1 (2016).; "Arbitration vs. litigation: the differences," *Thomas Reuters*, October 4, 2022, https://legal.thomsonreuters.com/blog/arbitration-vs-litigation-the-differences/

[75] Christopher R. Drahozal, "Arbitration Costs and Form Accessibility: Empirical Evidence," *University of Michigan Journal* of Law Reform 41, no. 4 (Summer 2008): 813-842

[76] Farshad Ghodoosi, "Crypto Litigation: An Empirical View," *Yale Journal on Regulation Bulletin*, November 28, 2022, https://www.yalejreg.com/bulletin/crypto-litigation-an-empirical-view/.

[77] AA v Persons Unknown & Ors, Re Bitcoin, [2019] EWHC 3556 (Comm).

[78] "Tulip" at [153].

[79] Lochan v. Binance Holdings Limited, 2023 ONSC 6714.

[80] "Tulip" at [83].

[81] Nico Constantijn Antonius Samara v Steve Jean Paul Dan, [2022] HKCFI 1254.

The court granted a freezing and proprietary injunction since there was a real risk of dissipation of assets. Similarly, in the Singapore case of *CLM v CLN & others*[82], an action was commenced to trace and recover crypto assets that unidentified persons had allegedly misappropriated. The Singapore High Court determined no obstacles to issuing injunctions, including proprietary injunctions, against unknown persons based on existing legal precedents. The court held that cryptocurrencies met the definition of 'property', that there was a serious question to be tried, and that the balance of convenience favoured granting the injunction. This was due to the real risk of dissipation of the stolen crypto assets, which would hinder recovery even if a judgment was obtained.

Courts have demonstrated a willingness to support innocent parties by granting applications for tracing and recovery assistance, including Mareva injunctions[83] and disclosure orders[84]. While the courts have gone above and beyond to enforce these interim remedies[85], these are not readily available to obtain and enforce through arbitral proceedings. National courts have established legal frameworks that allow for immediate and enforceable interim relief, which is important for preventing asset dissipation and ensuring justice. In contrast, arbitration often lacks the procedural rigour and powers necessary to enforce interim measures effectively[86], leading to potential delays and complications.

Further, as observed in various cases, courts have also not themselves supported arbitration as a dispute resolution mechanism in crypto disputes. For instance, as observed in the case of *Lochan v. Binance Holdings Limited*[87], the Court declined to stay a class proceeding against a cryptocurrency trading platform in favour of arbitration. The Court held that the arbitration agreement embedded in the trading platform's website—requiring arbitration in Hong Kong under Hong Kong law—was both unconscionable and contrary to public policy. The Court determined that the arbitration clause effectively turned arbitration

[82] In *CLM v CLN*, [2022] SGHC 46, the General Division of the Singapore High Court expressed: cryptocurrencies 'are susceptible to being transferred by the click of a button, through digital wallets that may be completely anonymous and untraceable to the owner, and can be easily dissipated and hidden in cyberspace'.
[83] The landmark case of *Mercedes Benz AG v Leiduck*, [1996] AC 284, 305 observed that Marvera Injunctions are granted so that the defendant does not reach to a ′black hole′, where he is out of sight and becomes unreachable.; *CLM v CLN*, [2022] SGHC 46.
[84] *CLM v CLN*, [2022] SGHC 46.
[85] See, for instance, Fetch.ai Ltd and another v Persons Unknown Category A and others [2021] EWHC 2254 (Comm).; LMN v Bitflyer Holdings Inc and ors, [2022] EWHC 2954 (Comm) at [35-[37].; *AA v Persons Unknown,* [2019] EWHC 3556 (Comm).
[86] James E Castello, Rami Chahine, ″Enforcement of Interim Measures,″ Global Arbitration Review, May 17, 2023, https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/3rd-edition/article/enforcement-of-interim-measures.
[87] Lochan v. Binance Holdings Limited, 2023 ONSC 6714.

into a vehicle for circumventing the consumer protection provisions of Ontario's securities legislation. This case underscored the limitations and challenges of relying on arbitration for resolving crypto disputes, particularly when consumer protection and public policy considerations were at stake.

Similar views were also observed in *Payward Inc v. Chechetkin*[88], where the English Commercial Court refused to enforce an arbitration award issued by an arbitration tribunal seated in California on the basis it would be contrary to UK public policy. The award had favoured the trading platform operator against a UK-based lawyer who had incurred losses of £600,000 trading cryptocurrency. The Court determined that the investor qualified as a consumer and thus had a statutory duty to assess the fairness of the terms. Specifically regarding arbitration clauses in crypto agreements, the Court concluded that although such clauses were not inherently unfair, it was unreasonable for this consumer to agree to arbitration in California. This was due to the high cost and inconvenience of hiring US counsel, the lack of an appeals process for errors in English law, and the unsuitability of United States federal courts for overseeing matters of English law.

However, an obvious question arises regarding the global enforcement of court judgments, which is often considered more challenging than arbitration due to arbitration′s advantage through instruments like the New York Convention. While we acknowledge that global enforcement of court judgments can be challenging, it is far from impossible. As suggested above, courts have progressively adapted to the unique demands of the crypto space, as evidenced by their willingness to grant cross-jurisdictional injunctions. As observed in the landmark case of *Joseph Keen Shing Law v Persons Unknown and Huobi Global Limited*[89], the Court facilitated the recovery of crypto assets by ordering the crypto exchange to transfer assets into England and Wales to facilitate enforcement of the judgement. This case exemplifies how cross-border recovery can be facilitated through traditional litigation procedures. Despite this, if scholars argue that arbitration is a better mechanism for cross-border enforcement[90], these scholars themselves argue that blockchain arbitration for crypto disputes raises significant concerns for enforce-

[88] *Payward Inc v. Chechetkin,* [2023] EWHC 1780 (Comm).

[89] *Joseph Keen Shing Law v Persons Unknown & Huobi Global Limited*, [2023] 1 WLUK 577.

[90] Michael Black QC, Wendy Kennedy Venoit, George J. Pierson, ″Arbitration of Cross-Border Disputes," The Construction Lawyer 27, No. 5 (2007): 5-15.; Neil Hannan, "International Commercial Arbitration and Cross Border Insolvency", International Trade and Business Law Review, 17, No. 447 (2014).; Niuscha Bassiri, Pratyush Panjwani, "Cross-border Enforcement of Arbitral Awards Rendered in ODR," BCDR International Arbitration Review 8, No. 1 (2021): 145-174.;

ment in various parts of the world[91]. Thus, while arbitration may be 'fit for purpose' for resolving crypto disputes in theory, its practical application often falls short.

VI. Conclusion

In conclusion, while arbitration theoretically offers a streamlined and potentially effective avenue for resolving crypto disputes, it faces significant practical limitations. Despite its slower pace, traditional litigation provides robust mechanisms for ensuring just outcomes, supported by established legal frameworks and the ability to grant effective remedies. Courts have shown adaptability to the unique challenges posed by the crypto sector, including cross-jurisdictional enforcement of judgments. Moreover, platforms like Kleros, leveraging Web3 technology, promise speed and decentralisation but may fall short in neutrality, following expected standards for evidence examination and processes and depth of expertise.

[91] Ahmad, "Blockchain".; Pietro Ortolani, "Chapter 21 Recognition and Enforcement of the Outcome of Blockchain-Based Dispute Resolution," In Blockchain and Private International Law, (*Leiden, The Netherlands: Brill | Nijhoff*, 2023).; Yannick Gabuthy, "Blockchain-Based Dispute Resolution: Insights and Challenges," *Games* 14, no. 3 (2023): 34.

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Como parte de las herramientas de investigación y formación académica que promueve el CIERC, nace la necesidad de realizar una publicación que conjugue diferentes artículos de opinión, académicos y de información acerca del desarrollo de los diferentes mecanismos alternativos de resolución, para seguir fomentando el estudio y el desarrollo intelectual en esta área.