BRITISH VIRGIN ISLANDS

Sara Hall, Iain Tucker, Jan Golaszewski, Andrew Chissick, Iona Wright & Daniel Hayward-Hughes
Walkers

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1. Are cryptoassets (including, for example, cryptocurrencies, stablecoins and non-fungible tokens) defined and, if so, what are the major elements?

The British Virgin Islands (BVI) does not have a definition of "cryptoassets" as such. It has introduced legislation that defines "virtual assets" and regulates the provision of services related to virtual assets. This legislation is the Virtual Assets Service Providers Act 2022 (VASP Act). It is based on, and aligned with, global standards, set out by the Financial Action Task Force. Under the VASP Act, a "virtual asset" is defined as a digital representation of value that can be digitally traded or transferred and can be used for payment or investment purposes. A digital representation of a fiat currency (essentially, legal tender) is excluded. Not all cryptoassets are "virtual assets". For example, non-fungible tokens, unless used for payment or investment purposes, would not meet the definition of a "virtual asset" under the VASP Act. A cryptoasset may also be a "security" depending on its characteristics.

2. What are the major laws/regulations specifically related to cryptoassets?

The principal regulatory framework in the BVI is contained in the VASP Act. This came into force on 1 February 2023. It requires registration with the BVI Financial Services Commission (the FSC) for anyone operating a "virtual assets service" in or from within the BVI, known as virtual assets service providers (VASPs).

Associated Guidance on the Prevention of Money Laundering, Terrorist Financing and Proliferation Financing (VASP AML Guide) and Guidance on Application for Registration of a VASP (VASP Registration Guidance) has also been published.

If a cryptoasset has the characteristics of a "security", activities conducted in relation to that cryptoasset may be regulated under the BVI Securities and Investment Business Act 2010 (as amended) (the Securities and Investment Business Act).

3. How are different types of cryptoassets regulated?

The FSC is the principal regulator of the financial services industry in the BVI, including the VASP Act. The FSC's functions include responsibility for the regulation, supervision and monitoring of regulated entities, and the enforcement of financial services laws.

"Virtual assets" themselves are not regulated, but they are a prerequisite for the provision of a "virtual assets service", which is defined in the VASP Act as the business of engaging, on behalf of another person, in any VASP activity or operation, and includes:

- hosting wallets or maintaining custody or control over another person's virtual asset, wallet or private key;
- providing financial services relating to the issuance, offer or sale of a virtual asset;
- providing kiosks (such as automatic teller machines, bitcoin teller machines or vending machines) for the purpose of facilitating virtual asset activities through electronic terminals to enable the owner or operator of the kiosk to actively facilitate the exchange of virtual assets for fiat currency or other virtual assets; or

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- engaging in any other activity that constitutes the carrying on of the business of a virtual assets service, issuing virtual assets or being involved in a virtual assets activity, pursuant to the issuance of guidelines.

In addition, the definition of a VASP includes the conduct of one or more of the following activities or operations for or on behalf of another person:

- exchange between virtual assets and fiat currencies;
- exchange between one or more forms of virtual assets;
- transfer of virtual assets, where the transfer relates to conducting a transaction on behalf of another person that moves a virtual asset from one virtual asset address or account to another;
- safekeeping or administration of virtual assets or instruments enabling control over virtual assets;
- participation in, and provision of, financial services related to an issuer's offer or sale of a virtual asset; or
- any such activity or operation as may be specified in the VASP Act or prescribed by regulations.

Operating a "virtual assets exchange" or providing "virtual assets custody services" (as defined under the VASP Act) also requires registration with the FSC.

The sale of newly created virtual assets to the public in or from within the BVI is not in scope.

If a cryptoasset is a security, activities in relation to that cryptoasset may be regulated under the Securities and Investment Business Act.

4. Is there an authorisation/licensing regime applicable to cryptoasset issuers/providers/exchanges and if so, what are the requirements?

There is a registration regime under the VASP Act. Applicants are required to include the following in their applications:

- the names and addresses of the persons proposed as directors and senior officers of the VASP;
- the names and addresses of the persons who hold shares, including their level of shareholding in the VASP;
- the names and addresses of the persons who have a controlling interest in the VASP;
- the physical address in the Virgin Islands of the VASP;
- the name and address of the auditor of the VASP, including the auditor's consent to act as such;
- the name and address of the proposed authorised representative of the VASP;
- a business plan;
- a written risk assessment of the VASP, outlining the risks the VASP will or may be exposed to and specifying how those risks are to be identified, measured, assessed, monitored, controlled and reported;
- a written manual showing how the applicant intends to comply with the requirements of the VASP Act, including measures to safeguard against money laundering, terrorist financing and proliferation financing;
- the internal safeguards and data protection (including cyber security) systems intended to be utilised; and

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- the systems to be put in place with respect to the handling of complaints and client assets and custodian relationships (where relevant).

Where a VASP is applying to operate a "virtual assets exchange" and/or provide "virtual assets custody services", additional requirements apply.

On receipt of a complete application (together with the relevant application fee), the FSC will endeavour to process it and provide initial comments within six weeks. The FSC's service standard requires the application process to be concluded within six months from the date of initial submission, although timelines for review and approval will be dependent on the quality of the application and information submitted in response to any FSC requests.

5. Is the promotion of cryptoassets to consumers or investors regulated and if so, how?

The VASP Act does not require any white paper or other information to be provided in connection with any sale or promotion of cryptoassets. There is no financial promotions regime expressly applicable to cryptoassets. If the cryptoasset is a security, such as a tokenised share of a fund, prospectus requirements may apply, depending on the kind of security.

The VASP Act prohibits a VASP from doing any of the following, where the VASP knows it is false or misleading or contains an incorrect statement of fact:

- issuing, or causing or permitting to be issued, an advertisement, brochure or similar document; or
- making, causing or permitting to be made, a statement, promise or forecast.

In addition, a VASP is prohibited from being reckless as to whether an advertisement, brochure, document, statement, promise or forecast, in a material particular, is false or misleading, contains an incorrect statement of fact or dishonestly conceals a material fact.

If the FSC is of the opinion that an advertisement, brochure or other similar document issued, or to be issued, or a statement, promise or forecast made, or to be made, by or on behalf of a VASP contravenes these prohibitions or is contrary to the public interest, it may:

- direct the VASP not to issue the document, or not to make the statement, promise or forecast, or to withdraw it; or
- grant approval to the VASP to issue the document, or make the statement, promise or forecast, with such changes as the FSC may specify.

There are penalties for contravening these provisions of the VASP Act.

6. What anti-money laundering requirements apply to cryptoassets?

The Anti-Money Laundering Regulations, 2020 Revised Edition (as amended) (AML Regulations) and the Anti-Money Laundering and Terrorist Financing Code of Practice, 2020 Revised Edition (as amended) (AML Code) were amended for VASPs with effect from 1 December 2022.

In particular, the AML Regulations require that entities conducting "relevant business", which includes the business of carrying on or providing a virtual assets

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service when a transaction involves virtual assets valued at USD 1,000 or more, must comply with the AML Regulations and the AML Code.

The updates to the AML Regulations and the AML Code should be read together with the VASP AML Guide, which sets out guidelines on specific AML/CFT/CPF obligations for VASPs under BVI law. These include requirements for customer due diligence and enhanced customer due diligence procedures, recordkeeping measures, and frameworks to fulfil statutory reporting obligations and the monitoring and assessment of risks present in the use and exchange of virtual assets and the operation of VASPs. A VASP is also required to appoint a Money Laundering Reporting Officer and notify the FSC and the Financial Investigations Authority within 14 days of the appointment or any change thereof.

7. How is the ownership of cryptoassets defined or regulated?

The BVI court has cited *AA v. Persons Unknown* [2019] EWHC 3556 (Comm) as authority that cryptoassets should be treated as "assets or property" for the purposes of a liquidation: *Philip Smith v. Torque Group Holdings Limited* BVIHC (COM) 2021/0031, unreported, 5 July 2021.

Outside of a liquidation context, in *ChainSwap v. Persons Unknown* BVIHC (COM) 2022/0031, unreported, 4 May 2022, the BVI courts indicated that had ChainSwap (the service-provider) been able to establish an arguable case that the stolen tokens were its property and made the relevant application for relief, the court would have been able to grant a proprietary injunction as "cryptocurrencies are a form of property", citing *Torque Group* as authority.

Whether NFTs are property as a matter of BVI law has not been judicially determined but it is likely that the BVI courts would continue to follow English authority in this respect and conclude that NFTs are capable of being legal property: *Osbourne v. Persons Unknown* [2022] EWHC 1021 (Comm).

The criteria to demonstrate ownership as a matter of BVI law is also likely to follow English authorities, which are trending towards ownership being determined by who holds the private key required to access and transfer that asset. Ownership on this basis would likely be subject to the following: where the private key holder has obtained the keys unlawfully, they may not be treated as the lawful owner; and where they legally hold the keys on behalf of others, an analysis of the "true ownership" would likely be determined by any relevant principles of contract, trust or agency.

See above, Question 3 for details on the BVI VASP registration regime.

8. How are Decentralised Autonomous Organisations (DAOs) treated?

A DAO is often described as a blockchain-based community-led system that operates pursuant to a set of self-executing rules deployed on a public blockchain and whose governance is decentralised, for example, through the exercise of governance rights held by token holders.

There is no registration regime specifically for DAOs in the BVI and a "DAO" is not a defined legal term or form of legal arrangement. Members of a DAO who are involved in running a business which is within the registration or

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licensing provisions of BVI financial services law would be required to apply for the necessary licence or registration from the BVI FSC. Members of a DAO may be considered as forming a partnership in certain circumstances. A DAO may, however, organise itself so that it acts through a corporate vehicle governed by token holders (such as via a company limited by guarantee) so as to mitigate this risk.

9. Are there any particular laws or rules which apply in the event of the crypto bankruptcy or insolvency?

As cryptoassets are treated as property under BVI law, they will be assets capable of being secured and/or forming part of a liquidation estate.

However, whether a debt denominated in crypto is capable of forming the subject matter of a statutory demand (such that non-payment gives rise to the right to wind up the company on the basis of statutory insolvency) has yet to be determined in the BVI. Some guidance may come from Singapore, where the courts there found that a debt denominated in crypto could not form the basis of a debt for a statutory demand, holding that the word "indebted" in the relevant statute was limited to a debt denominated in a fiat currency (*Algorand Foundation Ltd v. Three Arrows Capital Pte Ltd* (HC/CWU 246/2022) (30 March 2023) (General Division of the High Court, Singapore). The relevant statute in the BVI contains almost identical wording, so it is likely (although not certain) that the BVI courts would reach the same conclusion.

When considering a company's solvency, the court is able to apply a broad test that includes considering the debtor's holistic position — not just liquidated claims, but those that might be made on its non-monetary assets (such as crypto).

As with any liquidation, collecting the assets will be crucial. All the tools available to insolvency professionals with respect to non-crypto property would ordinarily be available with respect to cryptoassets. These include: interim proprietary injunctions to freeze the cryptoassets or the relevant account or wallet on a particular exchange; disclosure orders in support of interim injunctions; and third-party or non-party disclosure orders such as Norwich Pharmacal and Bankers Trust orders. A trustee in bankruptcy can sell cryptoassets to generate recoveries in the same way that a liquidator would, however, this would only apply to individuals who are resident, present or carrying on business in the BVI.

10. Is a smart contract enforceable as a legal contract?

There are no laws or regulations dealing specifically with smart contracts in the BVI. However, if the common law requirements for the formation of a 'traditional' contract are present in the smart contract — offer, acceptance, consideration and intent to create legal relations — then the BVI courts are likely to determine that a binding contract has been made which would be enforceable in the usual way. Such was the conclusion in *ChainSwap v. Persons Unknown* BVIHC (COM) 2022/0031, unreported, 4 May 2022, where the BVI court determined that the relevant crypto was property and that the smart contract governing the various transfers across the blockchain was a contract in relation to which a party could seek relief.

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11. What recourse does a victim of crypto fraud have?

As cryptoassets are treated as property under BVI law, the full suite of remedies available in respect of other property (including fiat currency) is available. These include interim proprietary injunctions (see above, Question 9).

The BVI courts take a pragmatic approach to service, particularly where the defendant/respondent might be "persons unknown". They have ordered service by email and would, in appropriate cases, likely follow English authority to permit service via NFT.

BVI judgments can be enforced via an order for seizure and sale of goods, garnishee proceedings, charging orders over land or other assets, insolvency proceedings, or through the appointment of a receiver.

Foreign judgments are enforceable in the BVI under either the Reciprocal Enforcement of Judgments Act 1922 (Reciprocal Enforcement Act) or at common law.

The Reciprocal Enforcement Act applies to money judgments only and has at present been extended to the following countries and states: Scotland, England and Wales, Northern Ireland, the Bahamas, Barbados, Bermuda, Belize, Trinidad and Tobago, Grenada, Guyana, St Lucia, St Vincent, Jamaica, New South Wales (Australia) and Nigeria. Accordingly, all other foreign judgments will need to be enforced at common law.

For the purposes of enforcement at common law, a foreign judgment is generally enforceable where the following conditions are satisfied: the court issuing the judgment had personal jurisdiction over the defendant; the judgment is final and conclusive (albeit that it may be subject to an appeal); and the judgment has not been obtained by fraud or given in breach of natural justice, and is not contrary to public policy (i.e. it is not punitive or a tax judgment).

While non-money judgments are not enforceable under the Reciprocal Enforcement Act or at common law, a non-money judgment based on a BVI-recognised cause of action may enable a fresh claim to be brought at common law and for it to be determined by summary judgment on the basis of equitable estoppel; additionally, the BVI courts are empowered to grant interim relief in support of foreign proceedings, including injunctive orders and orders for the appointment of receivers.

12. Are there any other ongoing legal or regulatory consultations or other legal frameworks in the pipeline relating to cryptoassets?

The BVI Regulatory Code (2020 Revised Edition) as amended underpins BVI's financial services legislation. As it is impracticable for that legislation to contain complex and technical detail, the FSC has issued a Code containing more detailed and technical requirements that can more easily be changed as industry and markets quickly change. The VASP Act expressly applies certain sections of the Code to VASPs. However, the BVI Regulatory Code has not, as of March 2024, been amended to account for the VASP Act, although an amendment is expected in due course.

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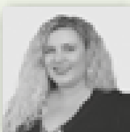
AUTHOR BIOGRAPHIES

Sara Hall
Sara Hall is a partner in Walkers' Global Regulatory & Risk Advisory Group. She practises BVI, Cayman Islands and Bermuda law. Sara specialises in all aspects of financial services and international regulation, with a focus on digital assets, DAOs, and NFTs, as well as traditional financial products and services. Sara has over 30 years' experience in global roles at regulated financial institutions, as well as in private practice, and at the UK financial services regulator.

Iain Tucker
Iain Tucker is a partner in the Insolvency & Dispute Resolution Group in the British Virgin Islands. He advises on contentious commercial work with a particular focus on international insolvency and fraud-related litigation. Iain brings extensive experience in complex, high-value, cross-border disputes and proceedings. He regularly acts for clients based in North America, China and East Asia. Iain has particular experience in assisting clients in relation to freezing orders and other urgent injunctive relief, often in support of foreign court and arbitration proceedings.

Jan Golaszewski
Jan Golaszewski is a partner and head of Walkers' London Insolvency & Dispute Resolution practice, advising on Cayman Islands, Bermuda and BVI law matters. He has 20 years' experience in private practice as an onshore and offshore disputes lawyer in London, the Caribbean and Asia, specialising in multi-jurisdictional commercial litigation, arbitration and insolvency matters. Jan advises bondholders, insolvency practitioners, financial institutions and directors on insolvencies, restructuring, shareholder disputes and complex litigation.

Andrew Chissick
Andrew Chissick is a Partner in Walkers' London Insolvency and Dispute Resolution Group, advising on BVI, Bermuda and Cayman Islands law. Andrew has 10 years' experience in private practice in London and the BVI, and has worked offshore since 2015. He advises clients on complex and high value multi-jurisdictional disputes, and his clients include leading corporations, banks, financial institutions and insolvency practitioners.



Iona Wright
Iona Wright is senior counsel in Walkers' Global Regulatory & Risk Advisory Group. She practises BVI law and is based in Walkers' BVI office. Iona has substantial expertise across a wide range of financial services regulatory matters, with a particular focus on virtual assets regulation. She has over 12 years' experience in advising on onshore and offshore financial services regulation, both in-house and in private practice.

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Daniel Hayward-Hughes
Daniel Hayward-Hughes is a senior associate in Walkers' Insolvency & Dispute Resolution Group, based in the London office, where he co-leads the blockchain disputes practice. He practises BVI, Cayman Islands and Bermuda law. Daniel specialises in all aspects of contentious insolvency and dispute resolution, with a particular focus on cryptocurrency and digital assets. He regularly contributes articles and presents on crypto disputes.

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