

BERMUDA

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CRYPTOASSETS

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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?

For Bermuda law purposes, the term “digital asset” is broadly defined under the Digital Asset Business Act 2018 (as amended) (DABA). Under DABA, “digital assets” is defined as anything that exists in binary format that comes with the right to use it, and includes a digital representation of value that is:

- used as a medium of exchange, unit of account or store of value and is not legal tender, whether or not determined in legal tender;
- intended to represent assets such as debt and equity in the issuer;
- otherwise intended to represent any assets or rights associated with such assets; or
- intended to provide access to an application, service or product by means of distributed ledger technology.

Accordingly, in Bermuda, the term “digital asset” captures most forms of coins and tokens, including cryptocurrencies, stablecoins and non-fungible tokens.

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

The two principal pieces of legislation that form the Bermuda legal framework for digital assets are:

- the Digital Asset Issuance Act 2020 (DAIA); and
- DABA.

The same definition of “digital asset” is used for both DAIA and DABA.

Under DAIA, any undertaking wishing to conduct a digital asset issuance in or from within Bermuda is required to seek prior authorisation from the Bermuda Monetary Authority (the BMA), Bermuda’s sole financial services regulator, before conducting any such offering.

DABA is Bermuda’s licensing and supervisory framework for entities seeking to engage in a digital asset business activity in or from within Bermuda. There are three classes of licence available (see below, Question 4), and such licences are issued by the BMA.

3. How are different types of cryptoassets regulated?

Due to the definition of “digital assets” being deliberately broad, the BMA will regulate all types of cryptoassets on a similar basis in the sense that they regulate offerings of cryptoassets and business activities involving cryptoassets, rather than having differing regimes dependent on each type of cryptoasset. However, the BMA applies a risk based, proportionate approach to licensing and supervision having regard to the nature, scale, complexity and risk profile of the offering or business activity, which will inherently mean that the risk profile of the digital assets will be taken into account.

Where a cryptoasset has an underlying traditional asset i.e. a digital representation of an investment, such as shares, funds, options or futures, these cryptoassets may also be considered an “investment” under a different regulatory regime, the Investment Business Act 2003 (as amended) (IBA), which may also need to be considered.

For further details regarding the DABA licence requirements, see below, Question 4.

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

DAIA imposes an authorisation regime for digital asset issuers, and DABA provides a licensing regime regulating digital assets business activities in or from within Bermuda, including intermediaries, lenders, custodians and digital assets and digital assets derivative exchanges.

Authorisation under DAIA

Under DAIA, a Bermuda entity will only require authorisation to the extent that it conducts an offer via a “digital asset issuance” in or from within Bermuda. A digital asset issuance under DAIA is defined as “an offer to the public to acquire digital assets or to enter into an agreement to acquire digital assets at a future date, and ‘offer or offering, via a digital asset issuance’ shall be construed accordingly”.

A person is prohibited from conducting a digital asset issuance in or from within Bermuda, unless authorised by the BMA. In order to obtain authorisation under DAIA, an applicant must submit the following documentation to the BMA:

- a business plan;
- a copy of the issuance document (i.e. an offering document);
- particulars for the applicant’s arrangements for the management of the offering;
- the application fee (currently USD 2,266); and
- any other information and documents the BMA may reasonably require for the purposes of determining the application.

Once authorised by the BMA, details of the offering and the undertaking will be published on the BMA’s website and the issuer will also be required to pay an authorisation fee. The authorisation fee is based on a sliding scale dependent on the value of the digital asset issuance and ranges from USD 5,000 in respect of an offering of not exceeding USD 20 million to USD 50,000 in respect of an offering exceeding USD 500 million.

Licensing under DABA

Under DABA, a Bermuda entity will be engaging in a “digital asset business”, if it provides one or more digital asset business activities to the general public. These activities are:

- issuing, selling or redeeming virtual coins, tokens or any other forms of digital asset;
- operating as a payment service provider business utilising digital assets, which includes the provision of services for the transfer of funds;
- operating as a digital asset exchange;
- carrying on digital asset trust services;
- providing custodial wallet services;
- operating as a digital asset derivatives exchange provider;
- operating as a digital asset services vendor;
- operating as a digital asset lending or digital asset repurchase transactions service provider.

Accordingly, a Bermuda entity acting as a cryptoasset issuer/provider/exchange will be required to be licensed in order to provide the business to the

general public. The term “general public” is narrowly constructed and an activity will only be excluded from being interpreted as provided to the “general public” where the activity is conducted purely for an entity’s own business purposes or for the purposes of a group undertaking (as defined in the Digital Assets Exemption Order, 2023).

There are three classes of licence available under DABA:

- a Class F licence, which is a full licence that enables the licensed undertaking to carry on one or more of the various categories of digital asset business activities specified in its licence for an indefinite period;
- a Class M licence, which is a “modified” licence issued for a limited period (typically 12 – 18 months) to allow entities to transition from testing a proof-of-concept under Class T licence (described below) to becoming a Class licensee through the use of a regulatory “sandbox”; and
- a Class T licence, which is a temporary testing license used to evaluate a novel business model, a minimum viable product or service, or the running of a pilot in or from Bermuda.

The BMA may impose (and subsequently amend or remove) such limitations on the scope of the digital asset business activity or the operation of the digital asset business as it determines to be appropriate having regard to the nature, scale and complexity of the proposed business.

Notwithstanding the class of licence applied for, the BMA may determine that another class of licence is appropriate, having regard to the interests of clients and potential clients and the public generally and the imposition of obligations concerning the nature of the digital asset business activities intended to be carried on. To obtain a licence under section 12 of DABA, an applicant must state the class of digital asset business licence it requires, and submit the following to the BMA:

- a business plan setting out the nature and scale of the digital asset business activity which is to be carried on by the applicant;
- particulars of the applicant’s arrangements for the management of the business;
- policies and procedures to be adopted by the applicant to meet the obligations under DABA and the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008;
- such other information and documents as the BMA may reasonably require for the purpose of determining the application; and
- an application fee for a class T licence application, currently BMD 1,000, and for a class M or class F licence application BMD 2,266.

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

A person conducting a public offer for the acquisition of digital assets (i.e., digital asset issuance), in or from Bermuda, will typically be required to publish an offer document and file it with the BMA. Issuers who conduct the digital asset issuance via a digital asset exchange licensed by the BMA or an equivalent competent authority will not be required to publish an offer document.

The offer document is usually based on the White Paper which, to the extent not already included, must contain the following information required under the DAIA:

- details of the registered or principal office of the promoter and the officers of the promoter;
- details of all persons involved with such issuances, including the applicant's directors, chief executives, senior executives, shareholder controllers, promoters, service providers and auditors;
- disclosure of any legal proceedings;
- the name and nature of the project;
- key features of the product or service to be developed;
- a description of the project and proposed timelines, including any milestones;
- the targeted digital acquirers and jurisdictions (and any restrictions that apply);
- the amount of money intended to be raised;
- a description of the proposed offer, including the timing of opening and closing the offer;
- two-year financial projections;
- details and descriptions of the technologies being used;
- a description of the risks associated with the issuance and any mitigations in place;
- details of the custodial arrangements in place; and
- a description of the data protection and privacy in place.

Exceptions

An offer is not deemed to be made to the public, and consequently the issuer is not required to publish and file an offer document, if it is:

- an offer which the board considers as not being calculated to result directly or indirectly in the digital assets becoming available to more than 150 persons;
- an offer to "qualified acquirers"; or
- an offer which the board considers as not being calculated to result directly or indirectly in digital assets becoming available to persons other than those whose ordinary course of business involves the acquisition, disposal or holding of digital assets, whether as principals or agents.

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

Entities authorised under DAIA or licensed under DABA must comply with Bermuda's applicable anti-money laundering (AML) and anti-terrorist financial legislation (ATF) and regulations, including the Proceeds of Crime Act 1997 (POCR) and Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008. Requirements under Bermuda's AML/ATF legislation and regulations include having appropriate policies, procedures, controls and measures in place relating to the identification and verification of a customer's identity, record-keeping and an internal audit requirement for compliance purposes. Any person regulated under Bermuda's AML/ATF legislation and regulations are subject to applicable money transmission laws (also

known as wire transfer requirements) where conducting money or digital asset transmission. Additionally, under the POOCR, a person must make a suspicious activity disclosure to the Financial Intelligence Agency (FIA) if:

- that person knows, suspects or has reasonable grounds to suspect that:
 - any currency, funds or other assets are derived from or used in connection with any criminal conduct; or
 - a money laundering offence has been committed, is in the course of being committed or has been attempted; and
- this information has come to that person in the course of trade, profession, business or employment.

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

Whether cryptoassets are “property” has not yet been the subject of a published judgment of the Bermuda courts. However, the Bermuda Supreme Court has followed persuasive English authority on this point in the unreported decision of *In the Matter of BlockFi International Ltd (in provisional liquidation for restructuring purposes)* No. 363 of 2022, 6 October 2023, which followed the decision in *AA v. Persons Unknown* [2019] EWHC 3556 (Comm), which held that cryptoassets were property. Although as yet undecided, on the same basis it is likely that the Bermuda courts would also follow the judgment in *Osbourne v. Persons Unknown* [2022] EWHC 1021 (Comm), which held that NFTs were property, at least as a matter of English law.

The UK Jurisdiction Task Force Legal Statement on cryptoassets (to which many English authorities on this point refer), concluded that cryptoassets should be treated as property; and that they fall within the relevant definition of “property” under section 436 of the English Insolvency Act 1986; and that they can be the subject of security.

The criteria to demonstrate ownership as a matter of Bermuda law is also likely to follow English and other common law authorities, such as the decision of the BVI court in *Re Smith & Kardachi as the Joint Liquidators of the Torque Group Holdings Ltd (in liquidation)* BVIHC (COM) 0031 of 2021, which was cited to the Bermuda court in the *BlockFi International Ltd* decision, 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.

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

There is no bespoke legislation for this form of arrangement or association. Instead, vehicles such as a company limited by guarantee have been utilised to organise a corporate vehicle governed by token holders to mitigate any potential risk. If such entities are conducting digital assets business activities, they require a licence under DABA.

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

There are no statutory provisions which apply exclusively to the insolvency or liquidation of a digital assets business in Bermuda. The usual insolvency framework will therefore apply, being the Companies Act 1981 (as amended) and the Companies (Winding Up) Rules 1982. However, Bermuda has already proven that it is a jurisdiction with a flexible framework capable of overseeing complex, cross-border insolvencies involving cryptoassets.

The Supreme Court has demonstrated its ability to adapt to commercial and technological developments by applying its “light-touch” provisional liquidation framework to insolvencies involving cryptoassets. How those assets are treated in an insolvent situation will ultimately depend upon the terms governing how those assets are held. For example, cases such as *Ruscoe v. Cryptopia Ltd (in liquidation)* [2020] NZHC 78 and *Torque Group Holdings Ltd* have dealt with applications of joint provisional liquidators (JPL) or liquidators, in both cases successfully, for the return of digital assets owned personally by the account holders as they did not form part of the assets of the insolvent company’s estate. The Bermuda Supreme Court dealt with similar applications in *BlockFi International Ltd*, finding that, in view of the terms of use in that case, crypto held in the BlockFi wallets did not constitute estate property.

There are also certain nuances that apply to DABA entities in an insolvency. For example, pursuant to section 20(1)(a) of DABA, the appointed Senior Representative (as defined under DABA) must notify the BMA forthwith on his reaching a view that there is a likelihood of the licensed undertaking for which he acts becoming insolvent. Within 14 days of such notification, the Senior Representative must furnish a report setting out the particulars of the case that are available to him.

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

Yes, Bermuda’s legal framework has been developed in a manner which anticipates the broader use of technology, with the legislature and regulator having responded as necessary to technological developments.

Part II of The Electronic Transactions Act 1999 (ETA) sets out the provisions applicable to smart contracts, with section 8 providing for the legal recognition of electronic records and the enforceability of information (as defined to include data, text, images, sounds, codes, computer programs, software and databases) documented or referred to in an electronic record. Section 9 provides that, where information is required by law to be in writing, that requirement is met by an electronic record if the information contained therein is accessible and capable of retention for subsequent reference.

The Bermuda Government further demonstrated its commitment to the development and use of smart contracts in January 2021, when it signed a Memorandum of Understanding with The Proof of Trust to begin testing a blockchain and smart contract application called Nebula, with the objective of improving the Government’s inter-departmental connectivity by leveraging blockchain technology.

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

The BMA has stringent requirements for any business seeking to obtain a DABA licence, and also has broad investigatory powers.

Victims of crypto fraud will have various options available to them for the sourcing of information, the preservation of assets and the investigation and recovery of those assets. Taking each step, in turn:

- 1) **Investigation and disclosure:** pre-action disclosure is not typically available in Bermuda, but victims of fraud may seek to obtain information by way of, for example: a Norwich Pharmacal Order, to compel the disclosure of information from third parties which may assist with identifying those ultimately responsible for committing the fraud, and the investigation and pursuit of those persons; and/or a Bankers Trust Order, which can be made against a bank or other institution holding (or being a conduit for) misappropriated or stolen funds.
- 2) **Preservation of assets:** victims of fraud may seek to preserve assets by obtaining a worldwide freezing injunction through the Bermuda courts.
- 3) **Recovery:** it is likely that an owner of digital assets who is domiciled in Bermuda will have the right to seek a remedy via the Bermuda courts, whether or not the digital asset broker is registered in Bermuda and notwithstanding that the digital assets are not necessarily located in Bermuda (being intangible assets, their location as a mixed question of law and fact may not easily be determined). Of course, there may be jurisdictional and/or governing law clauses which could impact the court's jurisdiction to hear a claim, and where a tortious act has taken place overseas, there may be disputes regarding where the claims arising out of those acts ought to be brought (although the Bermuda Court has accepted jurisdiction for tortious acts such as fraud and conspiracy previously, provided that the wrong was actionable and could be pursued in the place where it was committed (i.e. pursuant to the "double actionability" rule).
- 4) **Possible claims:** where the right to bring a claim before the Bermuda courts is established, the victims may make claims under a number of heads, such as unjust enrichment, breach of fiduciary duties, breach of trust, unlawful means conspiracy and dishonest assistance in breach of trust, breach of contract and fraudulent misrepresentation. It remains to be seen whether (under English law, and therefore likely to be followed in Bermuda), developers of decentralised networks could potentially be liable for a breach of duty owed to investors, such that they are required to pay equitable compensation in damages for breach of those duties.
- 5) **Remedies:** victims of crypto fraud could seek a variety of remedies for recovery or compensation for loss. Such remedies include damages, the appointment of provisional liquidators to investigate and recover digital assets, the appointment of an equitable receiver over digital assets, restitution orders against the company or beneficiaries, enforcement of a monetary judgment or other forms of relief.

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

There are currently no legal or regulatory consultations relating to cryptoassets that are open to the public.

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Steven White is a partner in the Insolvency and Dispute Resolution Group based in Walkers' Bermuda office. He specialises in commercial litigation, insolvency and restructuring and trust disputes, often with a cross-border element and including regulatory and digital assets aspects. He has advised company directors, liquidators and trustees on risk and custody issues associated with digital assets and has been heavily involved in the first two significant Bermuda liquidations of international digital assets businesses. Steven has 20 years' experience in the UK and Bermuda and is recommended as a leading practitioner by the Legal 500 Caribbean and Chambers' Global. He is a fellow of INSOL International.

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