

CAYMAN ISLANDS

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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?

The Cayman Islands does not have a specific definition of ‘cryptoassets’ in its legislation. 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, 2020 (as amended) (the 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. Similarly, ‘virtual service tokens’ (being digital representations of value that are not transferable or exchangeable with third parties, such as digital tokens that only provide access to an application or service or that provide a service or function directly to their owner) are not treated as virtual assets. A cryptoasset may also be a ‘security’ if it falls within the narrow definition of security in Schedule 1 of the Securities Investment Business Act (2020 Revision) (as amended) (SIBA).

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

The principal regulatory framework in the Cayman Islands relates to virtual assets. This is contained in the VASP Act. This came into force on 31 October 2020. It requires anyone operating a virtual assets service as a business in or from within the Cayman Islands to register with the Cayman Islands Monetary Authority (CIMA). Such service providers are known as ‘virtual assets service providers’ (VASPs). If conducting certain higher risk activities, the VASP will also be required to obtain a licence from CIMA (once the relevant provisions in the VASP Act come into force).

VASPs must also comply with the Cayman Islands Anti-Money Laundering Regulations (2023 Revision) (the AML Regulations). The AML Regulations are supplemented by CIMA’s guidance notes on the prevention and detection of money laundering and terrorist financing (the AML/CTF Guidance Notes). Included in this guidance is sector specific guidance for VASPs.

If a cryptoasset falls within the definition of a ‘security’ under SIBA, persons conducting certain specified activities in relation to that cryptoasset may be regulated by CIMA under that Act. In that case, either a licence or a registration must be obtained from CIMA, or an appropriate exemption identified.

3. How are different types of cryptoassets regulated?

CIMA is the principal regulator of the financial services industry in the Cayman Islands, including the regulation of VASPs under the VASP Act. CIMA’s functions include responsibility for the regulation, supervision and monitoring of regulated entities, and the enforcement of financial services laws. It derives its powers from the Monetary Authority Act (2020 Revision) (as amended).

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. This means the issuance of virtual assets or the business of providing one or more of the following services or operations for, or on behalf of, another person:

- exchange between virtual assets and fiat currencies;
- exchange between one or more forms of convertible virtual assets;
- transfer of virtual assets;
- virtual asset custody service;
- participation in, and provision of, financial services related to an issuer's offer or sale of a virtual asset.

The sale of newly created virtual assets to the public, in exchange for some form of consideration, is also included in the definition of a virtual asset service. This means that although certain kinds of non-public issuances should not be regulated, a person will need to be registered if they issue virtual assets to the public using a Cayman Islands vehicle. Non-public issuances include employee, intra-group and, in particular, private sales. A private sale is defined as a sale, or offer for sale, which is:

- not advertised; and
- is made available to a limited number of persons or entities who are selected prior to the sale by way of a private agreement.

The effect of this is that some, but not all, token issuers will be VASPs and will be required to register with CIMA.

The VASP Act provides that after the issuer is registered, the issuer has to submit a 'virtual asset issuance request' to CIMA for prior approval of the virtual asset issuance. Such a virtual asset issuance approval regime is currently not in effect as at March 2024.

Definition of a VATP

A 'virtual asset trading platform' (VATP) is defined under the VASP Act to mean a centralised or decentralised digital platform that facilitates the exchange of virtual assets for fiat or other virtual assets on behalf of third parties for some form of reward and that:

- holds custody of or controls the virtual asset on behalf of its clients to facilitate an exchange; or
- purchases virtual assets from a seller when transactions or bids and offers are matched, in order to sell them to a buyer (however, VATPs do not include a platform that only provides a forum where sellers and buyers may post bids and offers, or a forum where the parties trade on a separate platform or in a peer-to-peer manner).

Generally, a provider of virtual asset custody services or a VATP operator will need to be licensed under the VASP Act (once the licensing provisions are in force). Other virtual service providers will also generally be required to be registered. However, it is for CIMA to decide whether to direct that any VASP be licensed or apply for a sandbox licence.

If a cryptoasset is a security, persons conducting certain activities in relation to that cryptoasset may be regulated under SIBA and require a registration with or licence from CIMA.

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

Under the VASP Act, a registration regime is currently in effect for VASPs although a licensing regime will be brought into force for higher risk activities. The requirements for the application for registration are detailed, however, the key deliverables include:

- completion of CIMA's prescribed form;
- a comprehensive business plan;
- where the VASP is not a stand-alone entity, a comprehensive group structure chart showing all the ultimate beneficial owners;
- the names and addresses of the persons proposed as directors and senior officers of the VASP, plus the prescribed information evidencing they are fit and proper and have the necessary experience and competencies to be directors 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 10% or more interest in the shares of the VASP (whether that is a voting or merely an economic interest) or are otherwise a controller of the VASP, plus the prescribed information evidencing they are fit and proper and have the necessary experience and competencies to be controllers of the VASP;
- full details of the AML/CFT compliance framework including details of the required AML officers; and
- the internal safeguards and data protection (including cyber security) systems intended to be utilised.

On receipt of a complete application (together with the relevant fee), CIMA will assess whether the application may proceed. If it may, CIMA will assess the appropriate fee and once this is paid, CIMA will consider the application.

The timelines for review and approval will be dependent on the quality of the application and information submitted in response to any CIMA requests.

A VASP seeking a registration may expect to receive a decision from CIMA within eight to ten weeks of submitting the application, if the matter is straightforward.

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

If the promoter or seller is operating in or from within the Cayman Islands, it must consider whether it is within the registration provisions of the VASP Act and/or SIBA. If so, it must obtain the necessary registration and/or licence from CIMA. Physical meetings in the Cayman Islands or the use of a Cayman Islands internet service provider to target residents may bring the promoter into scope of regulation.

Even if not in the scope of the VASP Act or SIBA, a promoter operating in or from within the Cayman Islands may still be within the registration and licensing provisions of Cayman Islands law.

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

Anti-money laundering requirements are applicable to persons rather than assets.

The Proceeds of Crime Act (2020 Revision) (POCA) requires that a person conducting 'relevant financial business' must comply with the AML Regulations.

As VASPs are conducting relevant financial business, they must comply with the AML Regulations, as supplemented by CIMA's AM/CFT Guidance Notes.

The AML Regulations include the requirement for the VASP to risk assess their business, and their customers, and to document such risk assessments (and keep them updated). A VASP must conduct customer due diligence (and where appropriate, enhanced customer due diligence) procedures, as well as adhere to recordkeeping measures, and conduct appropriate training. The VASP must have in place 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 (MLRO), a deputy MLRO and an Anti-Money Laundering Compliance Officer. Where suspicious activity is detected, the MLRO must file a suspicious activity report with the Cayman Islands Financial Reporting Authority.

Whether or not conducting relevant financial business, all persons in the scope of the POCA must ensure they are not laundering the proceeds of crime. They must also adhere to Cayman Islands financial sanctions. Therefore, an unregulated sale of virtual assets will still require some customer due diligence to be conducted to ensure compliance.

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

Whether cryptoassets are 'property' has not yet been determined by the Cayman courts. However, the Cayman courts are likely to follow English authority on this point, particularly the decisions in *AA v. Persons Unknown* [2019] EWHC 3556 (Comm) which held that cryptoassets were property, and *Osbourne v. Persons Unknown* [2022] EWHC 1021 (Comm) which held that NFTs were property, at least as a matter of English law. The Legal Statement of the UK Jurisdiction Task Force on cryptoassets (to which many English authorities on this point refer), provides the following criteria for cryptoassets:

- that they are to be treated as property;
- that they can be the subject of security; and
- that they fall within the relevant definition of property under section 436 of the English Insolvency Act 1986.

In Cayman the definition of property in the relevant statutes (Companies Act 2023 and Interpretation Act 1995) derives from almost identical wording as that found in section 436 of the English Insolvency Act. Accordingly, it is highly likely that as a matter of Cayman law, cryptoassets will be treated as legal property, following both English judicial authority and statutory interpretation.

The criteria to demonstrate ownership as a matter of Cayman 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.

Please refer to Question 3, above, for details on the Cayman Islands VASP registration and licensing regime, and the potential for a SIBA registration or licence to be required.

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 applicable to DAOs in the Cayman Islands and a DAO is not a defined legal term or form of legal arrangement. Members of a DAO, if involved in running a business which is within the registration or licensing provisions of the Cayman Islands financial services law, would be required to apply for the necessary licence or registration from CIMA. 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 so as to mitigate this risk.

The Cayman Islands has attracted many DAOs to use a Cayman Islands foundation company for their operations. This kind of company is particularly suitable for DAOs as it is not required to have any shareholders. Instead, decision-making may (and often is) conducted by members of a community. As a foundation is a company, this has practical benefits for community members, for example, the foundation may execute contracts and have a bank account.

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

On the assumption that cryptoassets will likely be treated as property under Cayman 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 Cayman. 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: the relevant statute in Cayman contains almost identical wording, so it is likely (although not certain) that the Cayman courts would reach the same conclusion.

As with any liquidation, collecting and securing 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.

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

There are no laws or regulations dealing specifically with smart contracts in Cayman. 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 Cayman courts are likely to determine that a binding contract has been made which would be enforceable in the usual way.

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

On the assumption that cryptoassets will likely be treated as property under Cayman law, the full suite of remedies available in respect of other property (including fiat currency) is available. These include interim proprietary injunctions as discussed above.

The Cayman 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.

Cayman 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 Cayman either under the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) (Reciprocal Enforcement Act) or at common law.

The Reciprocal Enforcement Act applies (with some limited exceptions) to money judgments only and has at present only been extended to Australia and its external territories. 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 it is:

- a final and conclusive judgment or order;
- made for the payment of a sum of money;
- made by a foreign court of competent jurisdiction; and
- made in proceedings for compensation or damages.

The following types of foreign judgment are enforceable at common law in Cayman (where they meet the appropriate criteria):

- money judgments;
- certain *in personam* (non-money) judgments or orders from a court with competent jurisdiction, which is final and conclusive, and where the Cayman court is required to enforce judgments of this type on the principles of comity and equitable estoppel;
- declaratory judgments;
- default judgments;
- enforcement orders and (pre-judgment) attachment orders; and
- where a foreign order grants a provisional measure, the Cayman 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?

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

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