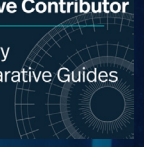


Legal500

Exclusive Contributor

Country
Comparative Guides
2024



The Legal 500
Country Comparative Guide
Blockchain 2024:
British Virgin Islands

CAREY OLSEN

1. Please provide a high-level overview of the blockchain market in your jurisdiction. In what business or public sectors are you seeing blockchain or other distributed ledger technologies being adopted?

The British Virgin Islands (the “BVI”) has established itself as a leading offshore finance centre that is resilient, agile and innovative and this is no more evident than in the way in which the BVI has positioned itself within the cryptocurrency, blockchain technology and Web3 space. The BVI has developed a balanced and business friendly legislative framework in the VASP Act (defined below) which seeks to encourage innovation and technological development, whilst also ensuring the BVI’s continued compliance with international standards and adherence to specific recommendations from the Financial Action Task Force (FATF) in respect of virtual assets.

Businesses across the full spectrum of digital assets and web3 projects routinely use BVI incorporated companies, helping the BVI secure its spot as the jurisdiction of choice for token generation. Most notably, the BVI has become the premier jurisdiction for issuing of tokens associated with protocols, platforms and applications from infrastructure to decentralised finance to gaming and NFTs. As discussed further below, the BVI VASP regime (which follows FATF guidance) does not regulate the primary issuance of a virtual assets making it a logical jurisdiction to consider for token issuance.

2. Please outline the principal legislation and the regulators most relevant to the use of blockchain technologies in your jurisdiction. In particular, is there any blockchain-specific legislation or are there any blockchain-specific regulatory frameworks in your jurisdiction, either now or envisaged in the short or mid-term?

The principal legislation relevant to the use of blockchain technologies in the BVI is the Virtual Assets Service Providers Act, 2022 (the “**VASP Act**”) which came into force on 1 February 2023. Any entity wishing to provide virtual asset services or to act as a VASP (as defined below) in or from within the BVI is required to be registered by the BVI Financial Services Commission (the “**Commission**”). Whilst VASPs already operational at the time the VASP Act came into force had until 31 July 2023 to submit an application to the Commission (enabling them to then carry on providing their virtual asset services whilst their application is under review), any new entities must register with the Commission before commencing any of the activities prescribed by the VASP Act.

The VASP Act defines a “VASP” as a virtual asset service provider who provides, as a business, a virtual asset service and is registered to conduct 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
- perform such other activity or operation as may be specified in the VASP Act or as may be prescribed by regulations.

A person engaged in any of the following activities or operations, for or on behalf of another person, will be deemed to be carrying on a virtual asset service:

- 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 automated 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
- engaging in any other activity that, under the Guidelines, constitutes the carrying on of the business of providing a virtual asset service, issuing virtual assets or being involved in virtual asset activity.

Whether an entity is carrying on a virtual asset service will turn on, among other things, whether the asset in question constitutes a “virtual asset”. For example, crypto-based derivative products would require more careful consideration and may be caught by one or both the VASP Act or the BVI Securities and Investment Business Act, 2010 (“**SIBA**”).

Similarly, consideration should also be given to the list of excluded activities that would take a BVI company outside the scope of the VASP Act, such as providing ancillary infrastructure to allow another person to offer a service, such as a cloud data storage provider or integrity service provider responsible for verifying the accuracy of signatures.

A BVI entity operating in the cryptocurrency, blockchain technology and Web3 space could also be caught by the BVI’s existing regulatory regime, including under:

- the BVI Business Companies Act, 2004 (as amended);
- SIBA;
- the Financing and Money Services Act, 2009;
- the Anti-Money Laundering Regulations, 2008 (as amended) (the “**AML Regs**”);
- the Anti-Money Laundering and Terrorist Financing Code of Practice; and
- the Economic Substance (Companies and Limited Partnerships) Act, 2018 (as amended) (the “**ES Act**”).

3. What is the current attitude of the government and of regulators to the use of blockchain technology in your jurisdiction?

The Government of the BVI and the Commission demonstrate a generally positive and supportive attitude towards the adoption of blockchain technology in the BVI, recognising the potential for blockchain technologies to drive innovation and economic growth. As evidence of this welcoming approach, the Commission has now approved a number of the first VASP applications submitted by 31 July 2023. They do, however, remain cognisant of the risks associated with operating within this new and evolving industry and regularly invite industry feedback and offer market guidance.

Organisations seeking to establish blockchain based or related projects and services in, or from within, the BVI can incorporate, test, develop and scale with proportionately risk based regulation and oversight.

4. Is there a central bank digital currency ('CBDC') project in your jurisdiction? If so, what is the status of the project?

The BVI does not have a central bank and as such no CBDC project exists.

5. What is the current approach in your jurisdiction to the treatment of cryptoassets and decentralised finance ('DeFi') for the purposes of financial regulation?

A DeFi application (i.e. the software program) itself should not be a VASP, on the basis that the VASP Act does not apply to underlying software or technology. However, in line with FATF guidance, creators, owners and operators or some other persons who maintain control or sufficient influence in the DeFi arrangements, even if those arrangements seem decentralised, may fall within the scope of the VASP Act as a VASP if they are providing or actively facilitating virtual asset services. Specialist advice is recommended.

6. What is the current approach in your jurisdiction to the treatment of cryptoassets and DeFi for the purposes of anti-money laundering and sanctions?

Amendments to the AML Regs, implemented by the Anti-Money Laundering (Amendment) Regulations 2022, brought the business of carrying on or providing virtual assets services when a transaction involves virtual assets valued at US\$1,000 or more within the scope of the BVI AML regulatory regime. The Commission also issued a Virtual Assets Service Providers Guide to the Prevention of Money Laundering, Terrorist Financing and Proliferation Financing to provide VASPs with clarity on specific AML/CTF obligations, including the requirements for robust customer due diligence and enhanced customer due diligence procedures, proper record-keeping measures, frameworks to fulfil statutory reporting obligations, and monitoring and assessment of risks that are present in the use and exchange of virtual assets and in the operations of VASPs themselves. This would apply to DeFi that falls within the scope of the VASP Act or other regulatory frameworks.

7. What is the current approach in your jurisdiction to the treatment of cryptoassets and DeFi for the purposes of taxation?

As of the date of this publication, the BVI does not currently have income, capital gains or value added tax and as such the question of how cryptoassets and DeFi are treated for tax purposes is, in the main, moot.

8. Are there any prohibitions on the use or trading of cryptoassets in your jurisdiction? If permitted, is cryptoasset trading common?

The proprietary use and trading of cryptoassets is not prohibited or regulated in the BVI. However, operating a virtual asset exchange, acting as a market maker or liquidity provider, and providing certain services to persons seeking to trade virtual assets are all activities that may be captured by the VASP Act. To the extent any such trading activities do fall within the scope of the VASP Act, the VASP registration will be required before any such activities may be carried on. BVI companies are frequently used for proprietary cryptoassets trading.

9. To what extent have initial coin offerings ('ICOs') taken place in your jurisdiction and what has been the attitude of relevant authorities to ICOs? If permissible, what are the key requirements that an entity would need to comply with when launching an ICO?

As above, the BVI became a jurisdiction of choice for ICOs during the ICO boom of 2017-18 and the BVI cemented its position as the leading jurisdiction for the creation and offering of new cryptocurrencies by excluding token issuances, in and of themselves, from the scope of the VASP Act.

However, in line with FATF guidance, persons who participate in, or provide related financial services to, issuers' offer and/or sale of virtual assets through activities such as ICOs (including book building, underwriting, market making, and placement agent activity) will be caught by the VASP Act and will be required to apply for registration accordingly.

An application for registration as a VASP must be made in the Commission's approved form specifying the category of VASP registration being applied for, and accompanied by, inter alia, (a) a business plan setting out the nature and scale of the virtual asset activities to be conducted, (b) details of the proposed directors, senior officers and compliance officer, including documentation to evidence that they satisfy the Commission's fit and proper criteria, (c) policies and procedures to be adopted by the applicant to meet the obligations under the VASP Act and the AML/CTF/PF legislative regime, and (d) the applicable application fee.

When the Commission approves a VASP application, it will register the applicant, issue a certificate of registration and impose such conditions (if any) on the registration as it considers appropriate (including a requirement to obtain professional indemnity insurance).

10. Are there any legal or regulatory issues concerning the transfer of title to or the granting of security over cryptoassets?

The BVI courts have established authority that cryptoassets constitute “property”, in line with recent English Court decisions.

Whilst the legislation does not expressly address the ability to grant security over virtual assets, principles applied and recognised under English common law have been used in BVI for the purposes of seeking security over virtual assets and in particular, the wallets in which the relevant virtual assets in question are stored.

11. How are smart contracts characterised within your legal framework? Are there any enforceability issues specific to the operation of smart contracts which do not arise in the case of traditional legal contracts?

The BVI recognises the common law principles of contract and to the extent a smart contract is established in the BVI in accordance with the recognised principles of the law of contract (being offer, acceptance, consideration and intention), then the BVI courts are likely to determine that a binding contract has been made which would be enforceable in the usual way. This was the conclusion in *ChainSwap v. Persons Unknown*, 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.

12. How are Decentralised Autonomous Organisations (‘DAOs’) treated in your jurisdiction?

There is no registration regime specifically for DAOs in the BVI. A DAO that is truly decentralised is treated in the BVI as an organisation without separate legal personality, but without any directors or beneficial owners, it cannot, as an organisation or protocol, apply for registration as a VASP under the VASP Act. Where a DAO has taken a legal form (e.g. company limited by guarantee/company limited by shares/charitable trust) or is wrapped by a legal person, the BVI will look at the activities being conducted by and/or through the DAO and seek to determine whether the legal person can be regarded as conducting such activity, or if not, what role they play as a legal person within or around the DAO for the purposes of identifying any regulated activity.

13. Have there been any governmental or regulatory enforcement actions concerning blockchain in your jurisdiction?

The VASP Act is still in its infancy and, as such, the Commission has not – to date – taken any public enforcement action thereunder. The VASP Act does, however, furnish the Commission with wide enforcement powers, including the power to:

- impose administrative penalties;
- appoint examiners or qualified persons to conduct investigations;
- issue directives imposing a prohibition, restriction or limitation on the financial services business that may be undertaken; and
- remove the director or other persons (or withdraw its approval of such persons as fit and proper persons).

In more extreme cases, the Commission may revoke or suspend a licence or apply to the Court under the BVI Insolvency Act 2003 for the appointment of a liquidator in respect of the licensee.

14. Are there any other generally-applicable laws, case law or regulations that may present issues for the use of blockchain technology (such as privacy and data protection law or insolvency law)?

The permissionless nature of DLT provides several issues from a control and oversight perspective and in particular in relation to the laws of data protection. The key issues are an individual’s right to have personal information corrected or deleted and the obligation on organisations to only retain information for as long as is necessary for the purpose of its use. The question of security is also potentially an issue due to the obligation on organisations using personal information to apply security and protective measures around personal information commensurate with the risk of harm to the individuals whose personal information is being used, although improvements in the technology itself may prove to be a workable solution in the medium to long term.

15. Are there any other key issues concerning blockchain technology in your jurisdiction that legal practitioners should be aware of?

As technological innovations advance, international standards will also continue to evolve. In this regard, it is anticipated that international pressure on the BVI to adopt the OECD’s Crypto-Asset Reporting Framework requirements into domestic law will increase. One area to note is that whilst the BVI may not regulate the primary issuance of digital assets, care should still be taken with regard to other jurisdictions where digital assets may be offered (i.e. licensing or registration may be required in those jurisdictions even if it is not in the BVI).

Key contacts

For further information or professional advice please contact our lawyers below:



Chris Duncan

Partner

D +1 345 749 2057

E chris.duncan@careyolsen.com



Katrina Lindsay

Counsel

D +1 284 394 4032

E katrina.lindsay@careyolsen.com

Our offices

Jurisdictions

Bermuda

Carey Olsen Bermuda Limited
Rosebank Centre
5th Floor
11 Bermudiana Road
Pembroke HM08
Bermuda

T +1 441 542 4500
E bermuda@careyolsen.com

British Virgin Islands

Carey Olsen
Rodus Building
PO Box 3093
Road Town
Tortola VG1110
British Virgin Islands

T +1 284 394 4030
E bvi@careyolsen.com

Cayman Islands

Carey Olsen
PO Box 10008
Willow House
Cricket Square
Grand Cayman KY1-1001
Cayman Islands

T +1 345 749 2000
E cayman@careyolsen.com

Guernsey

Carey Olsen (Guernsey) LLP
PO Box 98
Carey House
Les Banques
St Peter Port
Guernsey GY1 4BZ
Channel Islands

T +44 (0)1481 727272
E guernsey@careyolsen.com

Jersey

Carey Olsen Jersey LLP
47 Esplanade
St Helier
Jersey JE1 0BD
Channel Islands

T +44 (0)1534 888900
E jerseyco@careyolsen.com

International offices

Cape Town

Carey Olsen
Protea Place
40 Dreyer Street
Claremont
Cape Town 7708
South Africa

T +27 21 286 0026
E capetown@careyolsen.com

Hong Kong SAR

Carey Olsen Hong Kong LLP
Suites 3610-13
Jardine House
1 Connaught Place
Central
Hong Kong SAR

T +852 3628 9000
E hongkong@careyolsen.com

London

Carey Olsen LLP
Forum St Paul's
33 Gutter Lane
London EC2V 8AS
United Kingdom

T +44 (0)20 7614 5610
E londonco@careyolsen.com

Singapore

Carey Olsen Singapore LLP
10 Collyer Quay #29-10
Ocean Financial Centre
Singapore 049315

T +65 6911 8310
E singapore@careyolsen.com

OFFSHORE LAW SPECIALISTS

BERMUDA BRITISH VIRGIN ISLANDS CAYMAN ISLANDS GUERNSEY JERSEY
CAPE TOWN HONG KONG SAR LONDON SINGAPORE

[careyolsen.com](https://www.careyolsen.com)