



Breaking the corporate form – the continuing evolution of decentralised digital governance structures

Bourn Collier and Sharon A. Beesley

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Many jurisdictions have introduced or are introducing formal structures for the regulation and governance of decentralised autonomous organisations (DAOs). This new type of vehicle, involving decentralised governance conducted on blockchain or distributed ledgers, however, has proved a challenge for legislators and regulators.

Since the launch of the original DAO (Decentralised Autonomous Organisation) in 2016¹, there have been a proliferation of DAO structures established with a focus in sectors including DeFi as well as arts and culture. According to analytics service DeepDAO there were in early March 22,274 DAOs live holding over \$40 billion in treasury assets².

While the flexibility of governance models of DAOs – which can comprise a mixture of contractual provisions, code (including smart contracts and protocol arrangements) as well as administrative arrangements, has made them popular with developers, DAOs have proved more challenging from a legal perspective, due to difficulties in characterisation and regulating relationships between DAO participants, processes and assets in the off-chain world (outside of on-chain processes and assets).

Characterisation and legal personality

While there does not appear to be an agreed or accepted definition of what constitutes a DAO³, recent publications

¹ The DAO project achieved a high profile due to the amount and speed of fundraising and also the subsequent exploit. (https://en.wikipedia.org/wiki/The_DAO). However an earlier effort developed by a team including lawyer Preston Byrne (and purportedly the first DAO project launched on the Ethereum network) was the Eris platform, launched in 2014 (<https://archive.is/vwguR>).

² As at 16 March - <https://deepdao.io/>

³ *Policy Recommendations for Decentralized Finance (DeFi) Consultation Report*, The Board of the International Organisation of Securities Commissions (IOSCO), September 2023, Annex D, <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD744.pdf> (**IOSCO Report**).

See also *Decentralised autonomous organisations (DAOs): Call for Evidence*, Law Commission of England and Wales, page viii – “no unified understanding or definition of a DAO”, [https://cloud-platform-](https://cloud-platform-e218f50a4812967ba1215eaeced923f.s3.amazonaws.com/uploads/sites/30/2022/11/DAOs-Call-for-Evidence-LC.pdf)

[e218f50a4812967ba1215eaeced923f.s3.amazonaws.com/uploads/sites/30/2022/11/DAOs-Call-for-Evidence-LC.pdf](https://cloud-platform-e218f50a4812967ba1215eaeced923f.s3.amazonaws.com/uploads/sites/30/2022/11/DAOs-Call-for-Evidence-LC.pdf) (**LawCom Consultation**)

have defined DAOs as “a form of coordination for a group of people who coalesce around common goals” which use smart contracts and other technologies⁴ and “a novel type of technology-mediated social structure or organisation of participants” involving the use of open-source software-based systems”⁵. The latter definition, formulated by the Law Commission of England and Wales in its 2022 Consultation Paper (for which the response is expected to be published later in the year), was significantly influenced by a number of amicus curae briefs filed in the *Ooki DAO* case⁶, in which the Commodity Futures Trading Commission (CFTC) successfully obtained a default judgment against a DAO (known as the Ooki DAO, formerly bZx DAO), for breaches of the Commodity Exchange Act 1936 due to the Ooki DAO engaging in unlawful off-exchange leveraged retail commodity transactions, without being registered as a futures commission merchant (amongst others). The decision turned on the finding that the DAO in question was an unincorporated association and was a legal person who could be sued (while many of the amicus curae filings argued unsuccessfully that the Ooki DAO was not a legal person or association⁷).

The Law Commission of England and Wales has considered that from an English law perspective a DAO may be characterised as an unincorporated association (where undertaken for a non-business purpose)⁸, comprising:

“two or more persons bound together for one or more common purposes, not being business purposes, by mutual undertakings each having mutual duties and obligations, in an organisation which has rules which identify in whom control of it and its funds rests and on what terms and which can be joined or left at will⁹,”

or, if it can be inferred that there is an express or inferred agreement between two persons to carry on a business in common with a view to profit, as a general partnership¹⁰. The Law Commission also considered that certain DAOs may be characterised as simple asset holding structures based on the law of trusts (for which the law of England and Wales was considered sufficiently clear) or as a holding of jointly owned assets or property (although thought this analysis unlikely due to the property typically being held for a purpose)¹¹.

More recently there have been steps to legislate for DAOs to be deemed to have legal personality if they have not been established with an organisational structure which has legal personality (such that they can sue and be sued), including

⁴ IOSCO Report (see note 3 above), page 70

⁵ LawCom Consultation (see note 3 above), paragraph 1.1

⁶ *Commodity Futures Trading Commission v. Ooki DAO*, United States District Court Northern District of California, Case 3:22-cv-05416-WHO Filed 06/08/23, <https://www.cftc.gov/media/8736/enfookidaoordero60923/download>

⁷ Brief of LexPunk Regarding Plaintiff’s Motion for Alternative Service” (filed 17 October 2022), at page 9, <https://fingfx.thomsonreuters.com/gfx/legaldocs/zdpxolloyvx/frankel-CFTCvbZeroX--lexpunkamicus.pdf>.

⁸ LawCom Consultation (see note 3 above), paragraph 3.9

⁹ *Conservative and Unionist Central Office v Burrell* [1982] 1 WLR 522, 525 by Lawton LJ.

¹⁰ LawCom Consultation (see note 3 above), paragraph 3.21

¹¹ LawCom Consultation (see note 3 above), paragraphs 3.29 – 3.33

recently introduced legislation in Wyoming¹² and Utah¹³ (and a bill in New Hampshire¹⁴) and a form of model legislation promoted by expert group the Coalition of Automated Legal Applications (COALA)(**DAO Model Law**)¹⁵. Prior to this there had been consideration that a regulatory regime introduced in Malta in 2018¹⁶, which permitted the registration of service providers in respect of innovative technology arrangements with or without legal personality might encourage the formation and registration of DAOs without legal personality¹⁷.

DAOs as organisational Structures

Whilst new legislation deeming DAOs to have legal personality is helpful and will likely lead to greater certainty, until now, many DAO projects have opted to set up a legal entity or structure in parallel to the code or protocol, such that the DAO can be considered to be constituted by, or operating with a recognised legal structure. As noted by the Law Commission of England and Wales, there are a wide range of structures which DAOs can potentially utilise including private companies limited by shares or guarantee, limited partnerships or limited liability partnerships, charitable incorporated organisations or registered societies (co-operative societies and community benefit societies) amongst others¹⁸.

For some jurisdictions, vehicles have been adopted by market practice (such as the use of foundations and associations in the Cayman Islands, Panama, Switzerland or special purpose trusts in the Cayman Islands and Guernsey) or through legislation to recognise DAOs as limited liability companies (in Vermont, Wyoming and the Marshall Islands). In Bermuda there is not yet a developed practice of established DAOs although similar forms of legal entity and organisational structure are available to be used.

It will remain to be seen whether going forwards developers favour establishing organisational structures alongside new DAOs or instead seek to register DAOs themselves.

Regulatory approach – activity based

The rise of DAOs has been accompanied by widespread adoption of regulation over blockchain focussed businesses, particularly following the update in 2019 by the Financial Action Task Force (FATF) of its recommendations to include

¹² Wyoming Decentralized Unincorporated NonProfit Association Act 2024, Chapter 32 (Senate File No. SF0050). <https://www.wyoleg.gov/2024/Introduced/SF0050.pdf>

¹³ Decentralized Autonomous Organization Act (Utah Code Title 46 Chapter 5) <https://le.utah.gov/xcode/Title46/Chapter5/48-5.html>

¹⁴ NH HB645 New Hampshire Decentralized Autonomous Organization Act <https://www.billtrack50.com/billdetail/1519370>

¹⁵ Model Law for Decentralized Autonomous Organizations, COALA (2022) <https://coala.global/wp-content/uploads/2022/03/DAO-Model-Law.pdf>. In a Forbes article, Fatemah Fannizadeh, a COALA contributor, stated that the New Hampshire and Utah legislation had been inspired by the DAO Model Law <https://www.forbes.com/sites/digital-assets/2023/03/07/-new-hampshire-utah-recognize-daos-as-legal-persons/>

¹⁶ Innovative Technology Arrangement and Services Act 2018 (ITAS) <https://legislation.mt/eli/cap/592/eng/pdf>

¹⁷ Malta Technology Arrangements – The Return of The DAO? Holland & Knight Blockchain Blog, August 2018 <https://www.hklaw.com/en/insights/publications/2018/08/malta-technology-arrangements--the-return-of-the-d>

¹⁸ LawCom Consultation (see note 3 above), paragraph 4.2.

the requirement that Virtual Asset Service Providers (VASPs) be licensed where they are created and where their place of business is¹⁹ - with many jurisdictions introducing VASP legislation and regulatory regimes.

Key features of the FATFs approach included:

- *Focus on the value or instrument:* The FATF definition of 'virtual assets' includes a digital representation of value, although carves out representations of existing financial assets including fiat currencies and securities²⁰. For many jurisdictions, implementing VASP legislation, a wide definition of digital representations of value is incorporated.
- *Focus on the activity and the person carrying out such activity as a service provider:* The FATF Recommendation definition of a VASP is by reference to activities carried out by the VASP – including exchange, transfer, safekeeping or administration and participating in the issue of virtual assets.

Interestingly the latter concept – regulation of a service provider carrying out an activity, has been at the centre of many regulatory regimes for virtual assets/cryptoassets.

In the case of Bermuda, legislation for regulating virtual assets – or 'digital assets' as they are known, is set out in the Digital Assets Business Act 2018 (**DABA**), along with ancillary legislation and regulatory oversight and guidance by the Bermuda Monetary Authority (**BMA**). The regulated activities under DABA, 'digital asset business', include a broader range of activities than specified under the FATF Recommendations, comprising: token issuance, payment services, operating an exchange (and derivative exchange), carrying on or providing trust services, custodial wallet services, lending or repurchase transactions denominated or involving digital assets and being a vendor of services in respect of digital assets.

Key points to note in respect of DAOs is that firstly, there are no DAO specific activities (in Bermuda and in other jurisdictions), although in other jurisdictions there may be recognised DAO structures and secondly, operating a DAO is likely to involve a number of other licensable activities – such as issuing voting tokens etc. *Thus in addition to the organisational form, developers looking to operate DAO structures in jurisdictions with licensing regimes will need to consider other licensable activities ancillary or pursuant to the core DAO functions (of holding and operating governance structures for digital assets).*

This confluence of existing regulatory oversight of licensable activities for virtual assets with operating a DAO is consistent with current international prudential regulatory policy. In the IOSCO Report²¹, which focussed on the

¹⁹ Interpretive Note to Recommendation 15 (New Technologies), <https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html>

²⁰ FATF Recommendations, see note 19, General Glossary.

²¹ See note 3.

decentralised finance (DeFi) sector in general but in which DAO governance was considered, it was noted that a recommended approach involved applying consistent regulatory treatment to the “same activity, same risk, same regulatory outcome” across traditional finance and DeFi – which would suggest regulation will develop to apply similar regulatory obligations to operators of DAOs as other businesses, including such that even if no organisational structure is used (and the DAO is ‘unregulated’), other regulated activities may be undertaken – in which case regulators may impose requirements such as for there to be a legal structure (including an entity with legal personality which shall be licensed or registered) and supervisory authorities may impose additional regulatory requirements in respect of the operation of DAOs.

Unincorporated associations from a Bermuda perspective

If DAOs structured as unincorporated associations are to be established with regularity in jurisdictions such as Bermuda then in the absence of statute which deems such structures to have legal personality it may fall to guidance from the common law and there is a stratum of practice and jurisprudence in Bermuda and other jurisdictions which would be relevant. In Bermuda there is a familiarity with unincorporated associations as they are a vehicle by which a charity can be established²².

In a recent case in the Supreme Court of Bermuda, *East Bank Consultants v Livio Ferigo*²³, a claim by an unincorporated association was struck out, ostensibly due to the failure to perfect an assignment by notice to the Defendant before issue of the writ. However in an Ex Tempore Judgment, Kawaley CJ noted two relevant questions but did not make a formal ruling – first, on whether the lack of legal personality of the claimant unincorporated association (and the validity of an amendment to the writ which substituted the claimant with an individual trading under the name of the claimant) would be a sufficient ground for strike out²⁴ and second on the “*interesting and more complicated issue[s]*” as to whether the purported assignment would be a nullity due to the lack of capacity of the plaintiff to enter into the assignment and that the resulting deed would lack certainty (which was “*seriously and strongly arguable*”²⁵). This would suggest difficulty for an unincorporated association to have standing (absent a legal person acting on its behalf). Similarly, in respect of liability attaching to an association, in *Cats Ltd v Juliet Wilkinson*²⁶ it was held that a corporation which was a successor to an unincorporated association ought not to be liable for wrongs of the prior association (liabilities of the association would not lawfully pass to a subsequently established corporation).

On the other hand, in another case considering the application of legislation establishing segregated accounts

²² [Charities Act 2014.]

²³ [2016] SC (Bda) 88 Civ (31 October 2016)

²⁴ See note 22, paragraph 6.

²⁵ See note 22, paragraphs 13 and 15.

²⁶ [2019] SC (Bda) 14 Civ

companies (a limited recourse structure in Bermuda introduced by statute²⁷), *Re CAI Master Allocation Fund Ltd*²⁸, which involved an insolvent fund and questions as to piercing of the corporate veil established between the difference segregated accounts comprising different asset pools, Kawaley CJ declined to pierce the corporate veil between the segregated accounts without agreement of the account owners by virtue of the statutory segregation:

"Absent agreement on the part of investors, or a binding variation of their share rights, it seems to me that the separate status of segregated accounts in companies registered under the 2000 Act is sacrosanct, particularly in the event of insolvency..."

... Any attempt to get behind what is not merely a corporate veil but a statutory "Iron Curtain" separating the various segregated accounts would, it seems to me, have to be justified by reference to the provisions of the Act itself.²⁹"

This approach has been followed in subsequent cases involving insolvency of segregated accounts companies³⁰.

From the foregoing it would seem that if legislation were introduced in Bermuda to establish a corporate veil applicable to DAOs (such as deemed legal personality as is the approach in the DAO Model Law), then the Bermuda courts would adopt and respect the limits or legal personality applicable to the DAO and its assets.

Conclusion

The rapid development of alternative forms of conducting business in the digital and cryptocurrency sector is leading to new approaches and new challenges for legal practitioners globally.



Sharon A. Beesley
Managing Partner & Head of Corporate
sabeesley@beesmont.bm
+1 441 474 9000



Bourn Collier
Senior Corporate Counsel
bcollier@beesmont.bm
+1 441 400 4747

²⁷ Segregated Accounts Companies Act 2000.

²⁸ [2011] Bda L.R. 57

²⁹ See note 26, paragraphs 17 and 18.

³⁰ Northstar Financial Services Bermuda Ltd [2023] SC (Bda) 57 Civ. 28 July 2023