FIRE STARTERS

Fraud • Insolvency • Recovery • Enforcement

FUTURE THOUGHT LEADERS

page by page towards tomorrow

2ND EDITION: THE FUTURE THOUGHT LEADERS ESSAY COMPETITION, A FIRE STARTERS GLOBAL SUMMIT SPECIAL EDITION

INTRODUCTION

"The next generation has always been and will be better than the previous one. If it is not, then the world would not be moving forward."

Kapil Dev

We are delighted to present the 2nd edition of the Future Thought Leaders Essay Competition, where our entrants were asked *"Imagine it is the year 2033, what types of cases will the FIRE practitioner of the future be working on?".*

We are delighted to have received entries from a multitude of jurisdictions, showing our true commitment of bringing the global asset recovery community together. Congratulations to **Joseph Rome** of Sequor Law who was our 2023 winner, along with **Arno Duvenhage** of MJM Limited Bermuda and **Carola Binney** of 4 New Square Chambers who came second and third respectively.

Thank you to our esteemed judging panel and other entrants for their contribution to this year's competition.

We hope you enjoy this special issue in conjunction with FIRE Starters Global Summit 2023.

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OUR STORY

ThoughtLeaders4 are serious about providing opportunities to up-and-coming practitioners specialising in Asset Recovery, Fraud, Insolvency and Enforcement. We strongly believe that the next generation of practitioners should be writing, speaking at and attending events in order to build their network and further their careers. With this in mind, we are proud to present the **2nd Edition** of our **Future Thought Leaders Essay Competition**.

Assessed by an illustriously experienced, senior and broad-ranging panel of practitioners this is your chance to stick your head above the parapet and mark yourself as the one-to-watch. With the opportunity to **attend and speak at the FIRE Starters Global Summit: Dublin** as well as **attend the FIRE International: Vilamoura event in Portugal**, we look forward to your submissions and to welcoming you to the FIRE Starters community.

THE BRIEF

This year, we focus entrants' minds onto some serious crystal-ball gazing.

Imagine it is the year 2033. What types of cases will the FIRE practitioner of the future be working on?

Applicants could address issues including, but not limited to:

- **Climate Change Fraud**
- **AI Technology and its use in Asset Tracing**
- **Crypto and Global Tracing Enforcement**

This is not an exhaustive list. We invite you to be creative, opinionated, and tease out the crossovers between fraud, insolvency, asset recovery and economic change. We want your view on where you think the industry is headed; what will the bulk of your work be in 2033, if you had to guess?

We encourage applicants to discuss the way their work is changing, any legislative changes in the field, how their own toolkit for dealing with fraud claims is changing, and how practitioners of the future may respond to new global challenges.

Do cite specific examples and case law, and of course, follow the conventions of academic writing, but feel free to express your creative opinion in your submission.

A letter from one of our JUDGES

JANE COLSTON

Jane Colston's practice focuses on complex and high-value commercial banking, contract and tort disputes as well as company, shareholders and partnership disputes. Jane has acted in numerous complex fraud cases and has extensive experience of forensic investigations, most of which have involved working with teams of investigators and accountants, and coordinating lawyers in multiple jurisdictions to trace and freeze assets. She has managed numerous cases involving freezing, proprietary, search, disclosure, gagging, imaging and delivery up injunctions as well as breach of confidence and privacy claims. Jane is also a CEDR Accredited Mediator.

One of the great attractions and difficulties of the FIRE profession is the ever-present need to look ahead and reflect upon the issues that we as FIRE practitioners (and our clients) will be facing in the future. Not only does a consideration of future issues provide us with an insight about which indicators to look out for today, it is a practice that embodies what it means to be a 'thought leader'. This year's FIRE Future Thought Leaders Essay Competition sought to provoke thought with the question: "Imagine it is the year 2033. What types of cases will the FIRE practitioner of the future be working on?"

My firm and I are proud to have been part of the distinguished judging panel. We were impressed by the astonishing level of crystal-ball gazing in the submissions this year. The creative approaches to the topic – in technical conceptual analysis and language – indicates there is a strong pipeline of FIRE talent for the future. That prospect thrills me.

The quality of the essays submitted has remained as high as last year's competition, and it made choosing a winner very difficult. Ultimately, the panel was pleased to choose **Joseph Rome from Sequor Law** as the winner for this year's competition. His essay was titled **"New Tools in New Places: Digital Assets and a New Chinese Frontier"**. Joseph merged his knowledge of international legal issues in the digital asset space with an array of well-supported predictions about China's increasing attractiveness as a commercial platform and as an international centre for legal enforcement action, a key issue that we know the English Courts have been grappling with in recent years. He also discussed, in staggering detail, the potential utilisation of digital securities and contracts by fraudsters and the potential methodologies that may be employed. Joseph receives free tickets to the FIRE Starters Global Summit and FIRE International in Vilamoura, Portugal, but will also have a unique opportunity to present a summary of his winning essay at the FIRE Starters Global Summit.

Congratulations are also due to both **Arno Duvenhage of MJM Limited Bermuda** and **Carola Binney from 4 New Square Chambers,** who came second and third respectively. Thank you to everyone who submitted essays, which have all been published and can be read in this edition of the FIRE Starters Magazine, together with thanking my colleagues in the judging panel for their valuable time and assistance with judging the competition.

JUDGING PANEL

KEVIN HELLARD
PARTNER,
INSOLVENCY PRACTICE LEADER
GRANT THORNTON

Kevin is the practice leader of Grant Thornton's insolvency practice. He has more than 25 years' experience of contentious insolvency investigating fraud, misfeasance, professional negligence and asset tracing across multiple jurisdictions.

JAMES POPPERWELL
PARTNER
MACFARLANES

James is head of Macfarlanes fraud practice. He specialises in asset tracing and enforcement and the management of complex, international disputes in state courts and arbitration. As well as running disputes at all levels of the English courts, James has significant experience in managing parallel proceedings in different jurisdictions.

NATHALIE KER
PARTNER
LIM CHEE WEE PARTNERSHIP

Nathalie is a partner at LCWP and is a commercial litigator. Her work focuses on commercial and corporate disputes, restructuring and insolvency, and fraud and asset recovery.

MOHAMMED AL DAHBASHI
MANAGING PARTNER
ADG LEGAL

Mohammed is a leading Emirati lawyer, whose practice spans both contentiousand non-contentious matters. He has broad commercial/corporate law experience including restructuring, complex contract negotiations, JVs and corporate governance.

NICOLA BOULTON
PARTNER
PCB BYRNE

Nicola is a highly experienced commercial litigator who brings her pragmatic and tenacious approach to bear for high-net-worth individuals, legal and financial services professionals, corporates and hedge funds.

JANE COLSTON
PARTNER
BROWN RUDNICK

Jane's practice focuses on complex and high-value commercial banking, contract and tort disputes as well as company, shareholders and partnership disputes. Jane has acted in numerous complex fraud cases and has extensive experience of forensic investigations.

KEITH HAN
PARTNER
OON & BAZUL

Keith is the Co-Head of Oon & Bazul's Restructuring and Insolvency Practice. He specialises in complex commercial dispute resolution and restructuring and insolvency.

DAVID FAIRCLOUGH
DIRECTOR
GRANT THORNTON

David is a Director in the Insolvency and asset recovery team at Grant Thornton UK LLP with 20+ years' experience investigating fraud and cross border recovery cases in the UK and Cayman Islands, most notably the group of MTIC fraud cases and claims referred to as Bilta (UK) Ltd.

Upcoming Events

FIRE Starters Global Summit: Dublin

22nd - 24th February 2023 | Conrad Hotel, Dublin, Ireland

FIRE Americas: Cayman

12th - 14th March 2023 | The Westin, Grand Cayman

FIRE International: Vilamoura

17th - 19th May 2023 | Anantara Hotel, Vilamoura, Portugal

Crypto in Disputes

28th June 2023 | London, UK

FIRE UK: Welcome Back

September 2023 | London, UK

FIRE Middle East

12th -14th November 2023 | Dubai, UAE

To register for the events and speaking opportunities contact:

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NEW TOOLS IN NEW PLACES

DIGITAL ASSETS AND A NEW CHINESE FRONTIER

Authored by: Joseph Rome, Attorney at Sequor Law (USA)

The year is 2033. Fortunately for my practice, if not so much for humanity, advances in technology and new legislation have not yet eliminated fraud, deadbeat defendants, or corruption, and I continue to handle many of the kinds of cases that I did ten years ago. Yet, even as human nature has stayed the same, two disparate trends have converged to change the types of cases that I regularly work on. First, digital assets have become as commonplace as they are traceable. Second, China has slowly but surely opened an important new battlefield in which to search for and seize assets just as Chinese targets become more common and valuable.

Digital Assets Mature and Transform the Money Supply

Ten years ago, the cryptocurrency bubble exploded[1]. Today, cryptocurrencies are still around, but they remain a niche asset class for those that have difficulty in obtaining or trading traditional fiat currency, such as criminal enterprises or residents of countries with strict currency controls. [2] Yet, the previous decade's crypto boom spurred banks, insurers, and even governments to integrate cryptocurrencies' signature blockchain technology into more useful assets.

Banks and fintech startups have aggressively built blockchain technology into their products, rewriting all kinds of securities as automated smart contracts that require little supervision or processing after sale. Smart contracts have been described as "an automated, secure digital escrow account[s]," though they can be programmed to do more than just transfer money.[3] Financial institutions have been able to halve the time needed to trade and settle syndicated loans for investment banking clients, lowered the origination costs of mortgages by hundreds of dollars per loan in US and European markets, and eliminated billions of dollars in overhead costs for insurance claims processing. [4]

1 The Economist, "Is This the End of Crypto?", Nov. 17, 2022, available at https://www.economist.com/leaders/2022/11/17/is-this-the-end-of-crypto (discussing the collapse of cryptocurrency exchange FTX and the resulting fallout).

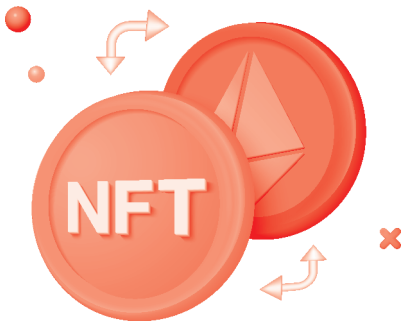
2 Id.

3 See In re Bibox Grp. Holdings Ltd. Sec. Litig., 534 F. Supp. 3d 326, 330 (S.D.N.Y. 2021), reconsideration denied in part sub nom. In Re Bibox Grp. Holdings Ltd. Sec. Litig., No. 20CV2807, 2021 WL 2188177 (S.D.N.Y. 2021).

4 Capgemini Consulting, "Smart Contracts in Financial Services: Getting from Hype to Reality" at 2, 2016, available at https://www.capgemini.com/consulting-de/wp-content/uploads/sites/32/2017/08/smart_contracts_paper_long_0.pdf.

More important to me, a busy FIRE practitioner, digital securities and contracts have become far bigger asset classes than cryptocurrencies were at the height of their bubble, and digital financial assets are frequent subjects of my cases.[5]

As it turns out, smart contracts are a convenient way for fraudsters and cheating spouses to automatically move assets without having to put in new calls to their financial advisors in the event their lies are discovered. For example, a Ponzi schemer might conceal code in a smart contract to automatically send cash to a personal, offshore account if a public stock dips below a certain price. Luckily, these transactions are generally recorded on a blockchain somewhere. I increasingly subpoena blockchain data files from banks and other financial institutions to determine the location of misappropriated digital bonds and other tokenized securities. I also regularly hire experts in order to unwind the automated digital transactions done under smart contracts, and I have increasingly petitioned courts to craft unique preliminary relief to assign or reprogram automated smart contracts before they self-execute.[6]



As dynamic as the private sector has been, governments have not lagged far behind. Some government attempts to jump on the cryptocurrency bandwagon quickly flopped.[7] That has not stopped regulators of nearly all the world's major currencies from exploring how to digitize traditional money to compete with cryptocurrencies.[8] Such digital fiat currencies are referred to as Central Bank Digital Currency (CBDC).[9] Central banks are most interested in CBDC to reduce transaction costs and to centralize control over the money supply, but digitization has the added benefit of recording the flow of each individual unit of currency.[10]

Effectively, cash is no longer fungible for the purpose of asset recovery.

Transforming just a portion of the world's currencies into non-fungible assets has had dramatic effect on my work. A decade ago, there was much ado about non-fungible tokens (NFTs). Inexplicably, people paid millions of dollars for NFTs of bad modern art.[11] Now, for example, each Bahamian dollar is essentially a unique NFT worth one Bahamian dollar that can be traced and audited across thousands of transactions. Turning dollars and euros into unique NFTs has upended the traditional rules distinguishing the kinds of recover available for non-fungible assets and fungible currency.[12] The traditional rule, at least in common law jurisdictions, is that stolen fungible items, like dollar bills, could not be recovered once they passed to innocent third parties.[13] Now that many of my cases involve non-fungible CBDC, I can often track the specific currency at issue, dollar by dollar, through multiple subsequent purchasers along a blockchain. Just as police detectives recover specific dollar bills when they show that the serial numbers of each bill recovered match those of the stolen bills after a sting operation, I can recover the particular dollars stolen from my clients regardless of where I find them. It just takes a subpoena to the appropriate central bank.

China Gets in on the Judgment Enforcement Game

Despite the professed intent of many of the inventors of cryptocurrencies to create decentralized currencies free of government control, the Chinese government has found that CBDC lends itself to central government control of all Renminbi denominated transactions and has moved rapidly to digitize its currency.[14] The People's Bank of China experimented with CBDC early, and now nearly all Renminbi transactions around the world use digital currency. [15]

Even as Chinese currency becomes easier to track, it has become a more common subject of global disputes because Chinese companies have charged to the forefront of the global energy transition. As the effects of climate change became ever clearer (and the flooding around my office in Miami during king tide season got worse), the public and private sector both saw huge investments in renewable energy and climate adaptation. Chinese companies have long been among the most successful competitors selling solar panels, electric vehicle batteries, wind turbines, and nuclear energy to the world. The Ukraine war added additional geopolitical impetus to the transition away from fossil fuels.[16] The war encouraged European nations wary of China's human rights record and military ambitions to swallow their doubts while they extracted themselves from even more compromised governments selling hydrocarbons, such as Russia.

5 CapGemini Consulting, "Navigating Decentralized Futures" at 7, 2021, available at https://www.capgemini.com/wp-content/uploads/2022/03/DecentralizedFutures_PoV_2021.pdf.

6 See Max Raskin, "The Law and Legality of Smart Contracts", 1 Geo. L. Tech. Rev. 305, 332 (2017) (discussing means by which courts can deal with smart contracts).

7 Joey Flechas, Miami Herald, "Crypto has dropped in value. Why is Miami Mayor Francis Suarez still supporting it?", July 27, 2022, available at https://www.miamiherald.com/news/local/community/miami-dade/article263809613.html#storylink=cpy; The Economist, "El Salvador's Bitcoin Experiment Is Not Paying Off", Nov. 17, 2022, available at https://www.economist.com/the-americas/2022/11/17/el-salvadors-bitcoin-experiment-is-not-paying-off.

8 "Navigating Decentralized Futures" at 7, supra n. 5.

9 Id.

10 Markets Committee, Bank for International Settlements, "Central Bank Digital Currencies" § 3.3, Mar. 2018, available at https://www.bis.org/cpmi/publ/d174.pdf.

11 Daniel Van Boom, CNET, "NFTs explained: Why People Spend Millions of Dollars on JPEGs", Jan. 13, 2022, available at https://www.cnet.com/culture/nfts-explained-why-people-spend-millions-of-dollars-on-jpegs/.

12 Alliant Tax Credit 31, Inc v. Murphy, 924 F.3d 1134, 1150 (11th Cir. 2019) ("Whether a court orders turnover of the assets or enters a money judgment for their value hinges only on whether the assets or their proceeds are traceable.").

13 See United States v. United Mktg. Ass'n, 220 F. Supp. 299, 307 (N.D. Iowa 1963).

14 The Atlantic Council, "Central Bank Digital Currency Tracker", last accessed Nov. 25, 2022, available at https://www.atlanticcouncil.org/cbdctracker/.

15 Id. (noting Chinese pilot program).

16 Brad Plumer, NYTimes, "War in Ukraine Likely to Speed, Not Slow, Shift to Clean Energy, I.E.A. Says", Oct. 27, 2022, available at https://www.nytimes.com/2022/10/27/climate/global-clean-energy-iea.html.

The upshot is that Chinese firms cut green energy deals in nearly every country in the world even as globalization receded in other industries. Not all of these green investments were carefully executed, and billions were lost to fraud, corruption, or simply failed bets.

The bad actors in my cases are by no means always Chinese, but, when they are, the most straightforward and often only source of recovery is from assets within China.

Unfortunately, for most of the 20th and early 21st centuries, Chinese courts only rarely granted recognition to foreign judgments unless from one of the 35 (generally middle-income) countries with a judicial assistance treaty.[17] Indeed, Chinese courts had confirmed such judgments only from United States, South Korea, Singapore, and Germany before 2022.[18] On December 31, 2021, the situation changed dramatically when the Supreme People's Court of China issued an official document guiding lower courts to apply a legal reciprocity test.[19] While not binding legislation, Chinese judges got the message. The first concrete evidence of the new policy was when, on March 17, 2022, the Shanghai Maritime Court recognized and enforced an English judgment for the first time, reasoning an English court would likely enforce a hypothetical Chinese judgment.[20] The court ordered the Chinese defendant to pay up, including interest.[21]

Since then, courts around the world made conscious efforts to return the favor. Even American courts, despite continuing military and economic tensions, continued to enforce Chinese judgments, affirming the basis for Chinese courts to reciprocally recognize American judgements.[22] For example, when a New York court denied recognition to a Chinese judgment because of "the lack of judicial independence in [Chinese] proceedings involving politically sensitive matters," the appellate court promptly overturned the ruling because there was no evidence of political interference in the breach of contract case at issue.[23] These efforts have borne fruit, as Chinese courts continue to recognize US judgments more often than not.[24]

That is not so say that China has thrown itself open to the world—far from it. While the Communist Party permits judges autonomy when adjudicating non-political matters, "it is the Party that has the say in what is political and what is not, and whatever the Party decides, courts have to comply".[25] Moreover, foreigners have occasionally found themselves in the crossfire of Chinese political machinations.[26] Nevertheless, there are an increasing number of paths through these political perils to recoverable assets in China, especially when they are traceable digital assets like Renminbi or bank securities.

Conclusion

Although my practice has successfully evolved to encompass new digital asset and Chinese asset cases over the last ten years, I must keep learning and adapting if I intend to survive the next ten.

Dreams of recovering assets in outer space or conducting insolvency proceedings in a metaverse have not borne out in the last ten years, but they may by 2043.

Whatever comes, the skills and contacts I develop thanks to the ThoughtLeaders4 FIRE network will surely be critical in seizing these new opportunities.

17 Mung Yu, China Justice Observer, "China Introduces New Reciprocity Rules for Enforcing Foreign Judgments, What Does It Mean?", June 30, 2022, available at https://www.chinajusticeobserver.com/a/china-introduces-new-reciprocity-rules-for-enforcing-foreign-judgments-what-does-it-mean#:~:text=Starting%20from%202022%2C%20Chinese%20courts,Chinese%20judges%20on%20such%20cases

18 Id. Singapore and South Korea have judicial assistance treaties with China, but they do not include judgment recognition.

19 Id.

20 Zilin Hao, ConflictofLaws.net, "The Chinese Court Recognizes an English Commercial Judgment for the First Time", May 16, 2022, available at https://conflictoflaws.net/2022/the-chinese-court-recognizes-an-english-commercial-judgment-for-the-first-time/.

21 Id.

22 An American court first recognized a Chinese judgment in 2009. Nalco Co. v. Chen, Case No. 12 C 9931 (N.D. Ill. Feb. 2, 2018).

23 Shanghai Yongrun Inv. Mgmt. Co. v. Xu, 203 A.D.3d 495 (1st Dept. 2022).

24 Meng Yu, China Justice Observer, "2022 Guide to Enforce US Judgments in China-CTD 101 Series", Sep. 15, 2022, available at https://www.chinajusticeobserver.com/a/2022-guide-to-enforce-us-judgments-in-china

25 Ling Li, "Political-Legal Order and the Curious Double Character of China's Courts", 6 Asian J. L. & Soc'y 19, Mar. 4, 2019, available at https://www.cambridge.org/core/journals/asian-journal-of-law-and-society/article/politicallegal-order-and-the-curious-double-character-of-chinas-courts/8435D39655ED3B06E7C5218FC6B95F6B

26 Jenni Marsh, CNN, Westerners are increasingly scared of traveling to China as threat of detention rises, Mar. 9, 2021, available at https://www.cnn.com/2021/03/09/china/china-travel-foreigners-arbitrary-detention-hnk-dst-intl/index.html

60-SECONDS WITH:

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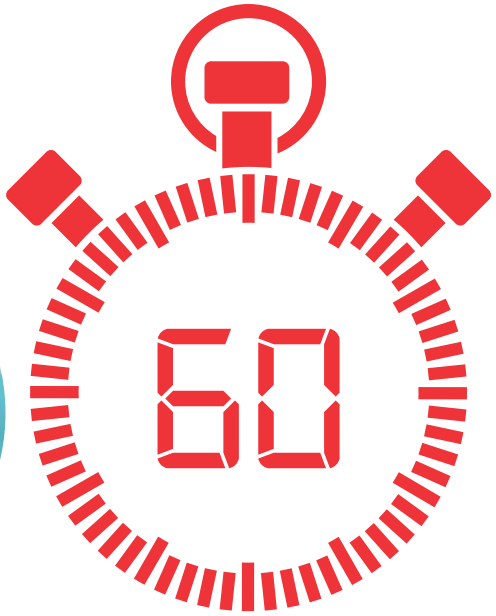

Q **What would you be doing if you weren't in this profession?**

A Maybe a historian of East Asian architecture.

Q **What is the strangest, most exciting thing you have done in your career?**

A One time I was having an argument with opposing counsel about whether his client had made 14 payments. I showed him the bank records reflecting only 12 payments, but he insisted there were 14. I had to count on my fingers with him from one to 14 to get him to understand how many payments there were. I couldn't believe that I had gone to law school so that I could count all the way to double digits, but I also felt strangely satisfied that at least I was irreproachably competent at basic addition.

Q **What is the easiest/hardest aspect of your job?**

A The easiest part of my job is: Going for the jugular. It is always fun to rip apart an opponent's faulty logic or uncover their misrepresentations.
The hardest part of my job is: Executing a long term plan. Not every fight can be won quickly, and it can be painful to stick to a long-term strategy when it means forsaking short-term gain or even conceding a strategic loss.

Q **If you could give one piece of advice to our FIRE Starters (next gen) practitioners, what would it be?**

A Don't forget to develop a bedrock set of hard skills.

Q **What do you think will be the most significant trend in your practice over the next 12 months?**

A A lot of corporate frauds are going to get exposed as the world tips toward recession and money gets tight—the FTX collapse is likely just the beginning of a bigger wave.

Q **Who has been your biggest role model in the industry?**

A Ed Davis. In addition to being a great lawyer, he is always careful to analyze the psychology and personal interests of the key players in a case.

Q **If you could learn to do anything, what would it be?**

A Kiteboarding.

Q **What is the one thing you could not live without?**

A Running. I'm completely addicted.

Q **Which famous person would you most like to invite to a dinner party?**

A Elena Ferrante (see next question infra). I'm as curious as to her real identity as anybody.

Q **What is a book you think everyone should read and why?**

A My Brilliant Friend by Elena Ferrante (and the rest of the Neapolitan Novels). I only recently discovered this psychological masterpiece, and ever since I've been trying to push it on anyone and everyone I can.

Q **What are you most looking forward to in 2023?**

A Seeing the cases I have been working so hard on finally come to fruition.

Q **The FIRE Starters Global Summit Drinks Reception is themed 'Heroes and Villains'. Who is your favourite superhero, and why?**

A These may be controversial, but I really loved Jane Foster's run in the comics as Lady Thor. Every time her magic hammer transformed her into an invulnerable god, it purged her chemotherapy drugs from her system while healing her cancer cells. As a result, every time crisis hit, she had to weigh the good she could do for others against the damage she would do to her own body. It was a beautiful metaphor for compulsively fighting for justice no matter the personal cost.

Q **What are you most looking forward to as an attendee and speaker at this year's FIRE Starters Global Summit in Dublin?**

A The opportunity to meet so many talented and experienced practitioners in my field and to absorb a bit of their wisdom.

FIRE International

FIRE International 2023

17th - 19th May 2023
Anantara Hotel, Vilamoura, Portugal

For more details about the event, contact:

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THINK GLOBAL & DIGITAL / FOLLOW CLIMATE & CRYPTO / ACT SWIFTLY

Authored by: Arno Duvenhage, Senior Associate at MJM Limited (Bermuda)

Introduction

Welcome to 2033, another picturesque Monday morning in the city of Hamilton, Bermuda. Notwithstanding, a receding hairline and some general body ache (I suspect having tried to 'bring sexy back' over the weekend did not help my cause), I am eagerly on my way to the office and will, for the most part, be attending to two separate matters today.

First, consultations and the consideration of legal process, comprising a derivative claim, issued against my clients, the board of directors to a publicly listed energy and petrochemical company incorporated in Bermuda and operational in the USA, by an aggrieved non-profit environmental charity qua shareholder, alleging that my clients` had breached their duties to promote the interest of the company and act with a reasonable amount of care, skill and diligence as a result of the company allegedly having an inadequate energy plan, which inadequacy, so the argument continues, is directly and negatively impacting on the companies` long-term commercial viability and competitiveness.[1]

Second, a consultation with my Singaporean client, the sole shareholder, director and CEO of a Bermuda incorporated company which operated as an online digital currency trading platform. After discovering that one of her employees committed fraud, by way of executing multiple unauthorised trading transactions with investor monies, my client`s company became insolvent overnight and precipitated an urgent winding up order and the appointment of liquidators. Now, in conjunction with the appointed liquidators and an investigative report from a leading consulting firm specialising in digital asset fraud and recovery, the strategic and judicial approach aimed at both preserving and recovering assets on behalf of the body of creditors needs to be outlined and executed.[2]

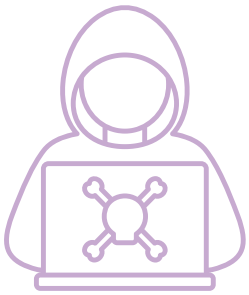
This present day essay, using these theoretical scenarios as a vantage point, seeks to briefly identify and discuss certain developing trends in climate change fraud and related regulation, as well as cryptocurrency ("crypto") and the role of artificial intelligence in tracing crypto, which trends, as part of my own best guess, will set the scene for what we as practitioners (next generation fraud and asset recovery FIRE Starters) could expect the bulk of our practice to gravitate towards in a decade from now.

Paying homage to the expression 'dream big; start small; act now' – I would encourage existing and future practitioners to similarly 'think global and digital; follow the climate and crypto; and act swiftly'.

1 The first scenario is roughly based on the current claim issued against the directors of Shell by the non-profit ClientEarth in the UK. See TaylorWessing (31 March 2022) 'Disputes Quick Read: ClientEarth v Shell – climate change litigation shifts focus to UK companies', available at https://www.taylorwessing.com/en/insights-and-events/insights/2022/03/disputes-quick-read-climate-change-litigation-against-uk-companies---clientearth-v-shell

2 The second scenario is roughly based on the liquidation of Torque Group Holdings Limited in the BVI. Most recent judgment cited under Philip Smith v Torque Group Holdings Limited et al BVIHC (COM) 0031 OF 2021.

THINK GLOBAL & DIGITAL



Today`s typical fraudster, could easily sit in the comfort of his or her own home, or their parents` basement (no judgment), and execute highly sophisticated cyber-attacks and related digital fraud manoeuvres, causing everyone from large corporates to government, as well as small to medium enterprises, irreparable financial and/or reputational harm.

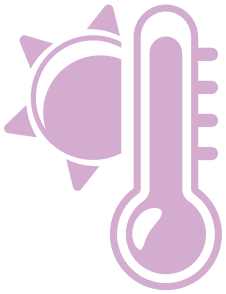
Consequently, the importance for practitioners to think in global terms within a digital age, characterised by global interconnectivity, is eloquently illustrated by the following statement of the Australian government:[3]

"Across the globe, the pace of digital transformation is accelerating. The private sector continues to invest in disruptive technologies to get ahead of the competition. They adapt their business models to meet ever increasing customer expectations. The pace of change continues to blur the boundaries of the physical and digital worlds. It is redefining traditional industry sectors and the way we live and work. Emerging technologies, growing amounts of data and smarter ways of getting insights are changing the way people, businesses and governments interact."

Axiomatically, considering the pace at which technological innovation is influencing the legal profession, it should come as no surprise that both the metaverse and the blockchain are already being used to resolve disputes.[4]

FOLLOW CLIMATE

Setting the global climate scene with noteworthy legislation



Significantly, the UK has introduced new mandatory climate-related financial disclosure requirements under the Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2022, which regulations have amended parts of section 414 of the UK Companies Act 2006 and the accompanying regulations for LLP`s.

The importance of the UK tying its environmental regulations to section 414 of the Companies Act, essentially mandating the disclosure of environmental liabilities as part of a qualifying company`s statutory financial reporting requirements, is that it now places each director of a publicly traded company at risk of committing a statutory offence and further leaves directors vulnerable to allegations of breach of duty and/or professional negligence, the consequences of which, whether in a statutory offence or civil law context, could include any, or all of the following: fines, damages, disqualification and the like.

Furthermore, the essence of the regulations, practically speaking, require publicly listed companies to report on environmental matters specifically, including the impact of the company's business on the environment, the company's environmental policies and the effectiveness of those policies.[5]

The growing risk for publicly listed companies is that investors and lenders use financial reporting and accompanying executive plans on climate change issues to value a company`s business and its securities for the purpose of deciding whether or not to invest or lend.

Nature of changing work and toolkit

It is expected that the future work for practitioners within the contours of climate change and related fraud will primarily arise as a result of four factors, as identified by the author Wasim, which negatively impact the value of publicly traded companies.[6]

First, the physical impacts of climate change causing the disruption to supply chains and operations of companies, taking the form of things such as changes in sea level, the arability of farmland and water availability and quality. Second, the potential of environmental regulations to upset company planning and directly contribute to increased cost of compliance and litigation. Third, as public awareness increases, particularly from institutional investors, a company may suffer financially if it attracts negative publicity regarding its stance on climate change or compliance with legislation. Fourth, the heightened risk for particular industries being disproportionately impacted, such as the oil & gas industry.

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3 See website post of Australian Government, Digital Transformation Agency (undated), available at https://www.dta.gov.au/digital-transformation-strategy/impact-digital-revolution.

4 Lee, J `Arbitrating blockchain and smart contract disputes: The smarter option?' (2022), Thoughtleaders4 Crypto Insight at p. 8-9. See also the announcement on 11 November 2022 of the Abu Dhabi Global Market Arbitration centre launching a hearing facility in the metaverse for arbitration and mediation, available at https://www.adgm.com/media/announcements/abu-dhabi-global-market-launches-mediation-in-the-metaverse.

5 See UK Department for Business, Energy, & Industrial Strategy non-binding guidance: `Mandatory climate-related financial disclosures by publicly quoted companies, large private companies and LLP` February 2022 at p 4-8.

6 R Wasim `Corporate (non)disclosure of climate change information`, 2019 Columbia Law Vol 119, No 5.

How practitioners may respond to global climate challenges

Considering the recent suit filed against the directors of Shell by ClientEarth in the UK, it is expected that the nature of environmental regulations insofar they appear, at least theoretically, to create a basis for holding either subject companies liable on the basis of misrepresentation or fraud, or the directors of subject companies personally liable for breach of duty or professional negligence - will be pursued, defended, adjudicated and commensurately developed over the next decade.

FOLLOW CRYPTO AND ACT SWIFTLY

Setting the global crypto scene with noteworthy legislation

Researchers estimate the global blockchain market will grow from $4.67 billion in 2021 to $163.83 billion by 2029.[7]

In light of such estimated growth, it would be worthwhile to travel around the globe briefly: South Africa has classified crypto assets as 'financial products' [8]; there is a provisional agreement on the E.U. level to extend anti-money laundering regulations to the transfer of crypto assets and bring it under a regulatory framework known as the 'Regulation on Markets in Crypto Assets' [9]; in the UK there is a proposed amendment to the Financial Services and Markets Act 2000 to now regulate all 'crypto assets' and related activities as defined therein.[10] From an offshore perspective, Bermuda has promulgated the Digital Asset Business Act 2018, for businesses seeking to conduct 'Digital Asset Business', whilst conjunctively, the Digital Asset Issuance Act 2020, has introduced a regime to regulate persons seeking to carry on a 'Digital Asset Issuance'.[11]

Nature of changing work and practitioner toolkit

Within the nascent environment created by crypto, AI is playing a leading role both on the preventative measure side, seeking to negate fraud, and on the recovery side, seeking to trace assets.

From a preventative perspective, Mastercard is debuting a new piece of software that helps banks identify and cut off transactions from crypto exchanges prone to fraud, namely Crypto Secure, the system relies on data from the blockchain and uses sophisticated artificial intelligence algorithms to determine the risk of crime associated with crypto exchanges on the Mastercard payment network.[12] From a recovery perspective, a technology known as Elliptic, produced by the company Chainalysis, acts as a blockchain analytics provider that can monitor more than 500 crypto assets for signs of fraudulent activity.[13]

Practitioners` work in the crypto space has gone from 'trickling in' in the past few years to flowing like a 'waterfall' if one considers the recent publicised meltdowns of Three Arrows Capital, Terra, FTX and Almeda, some of whom, have been compared to the Madoff and Enron frauds.[14]

At least conceptually, tracing crypto does not appear to be too different from asset tracing in general. Broadly speaking, it would entail identifying the wallet address, or multiple addresses, where lost or stolen assets either started or ended up, or identifying a transaction hash related to the lost assets. The next step would be to trace the fund flow across the blockchain, likely with the aid of forensic software that allows an investigator to map the movement of the funds including any stops on the way. In the ideal scenario, the stolen assets will end up in one wallet or multiple wallets connected to one individual or entity. If a wallet is hosted online by an exchange, it may be the case that know-your-customer ("KYC") information will identify the wallet holder connected to the funds in question. Accordingly, a practitioner would be able to employ legal tools and

7 Summary of research report available at https://www.fortunebusinessinsights.com/industry-reports/blockchain-market-100072.

8 Government Gazette Notice No. 47334 at p.3: 'Declaration of crypto asset as a financial product under the Financial Advisory and Intermediary Services Act, 2002'.

9 Council of the EU press release (29 June 2022), available at https://www.consilium.europa.eu/en/press/press-releases/2022/06/29/anti-money-laundering-provisional-agreement-reached-on-transparency-of-crypto-asset-transfers/

10 Huw Jones of Reuters (27 October 2022) 'Britain proposes regulation of all cryptoassets', available at https://www.reuters.com/world/uk/britain-proposes-regulation-all-cryptoassets-2022-10-27/

11 Brief discussion on both respective pieces of legislation available at https://bermudalawblog.bm/2021/12/fintech-update/.

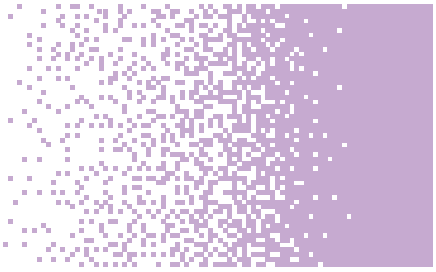
12 CNBC`s Ryan Browne (4 October 2022) 'Mastercard pushes deeper into crypto with new tool for combating fraud', available at https://www.cnbc.com/2022/10/04/mastercard-deepens-crypto-push-with-tool-for-preventing-fraud.html

13 Tim Keary of Venturebeat (May 2022) `Chainalysis expands crypto fraud detection platform with $170m`, available at https://venturebeat.com/business/chainalysis-expands-crypto-fraud-detection-platform-with-170m/

14 As one of many reports, see Ruholamin Haqshanas of cryptonews (November 2022) 'Defunct Billion-Dollar Crypto Hedge Fund Three Arrows Capital Speaks Out, Blames Collapse on FTX', available at https://cryptonews.com/news/defunct-billion-dollar-crypto-hedge-fund-three-arrows-capital-speaks-out-blames-collapse-on-ftx.htm.

related process in the jurisdiction where the money ended up and target the wallet holder in real life and recover the assets.[15]

How practitioners may respond to global crypto challenges swiftly



Practitioners will be challenged particularly within an insolvency context where it appears that uncertainty remains on how exactly insolvency law would apply to technology such as decentralised finance (Defi).[16] On the bright side, the UNCITRAL Model Law could become particularly helpful in either utilising its discovery power, for an insolvency representative to access KYC information collected by exchanges to which stolen crypto has been traced or obtaining 'entrustment' relief, which allows the representative to take control of the debtor's assets located in the relevant jurisdiction and could also be used to compel third parties to turn over the private keys to wallets containing stolen cryptocurrency. [17]

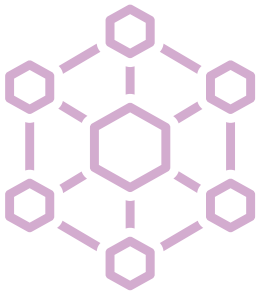
In the face of a fraud in the crypto space, which allows for the dissipation of assets at 'the click of a mouse', whether within or outside an insolvency context, the courts will continue to be utilised by practitioners to find swift and innovative ways to trace, seize, preserve, recover and ultimately realise crypto for value.

In this regard, from an English common law perspective, there has been a line of cases primarily granting the following relief on an urgent and ex-parte basis:

- **interim proprietary injunctions aimed at preventing dissipation of traceable crypto;**
- **worldwide freezing orders against 'persons unknown' typically targeted at the end wallet and relevant exchange on which it is held;**
- **banker`s trust disclosure orders against the particular exchange regarding information about the account holders of the end wallet as well as permission to serve outside the jurisdiction and by alternative digital means.**

In the context of interim injunctive relief and related hearings, the following developing principles of relevance to those practising in the Commonwealth, have crystalized pursuant to judicial scrutiny [18]: both crypto and non-fungible tokens are currently regarded as property under English law [19]; the lex situs of a crypto asset is at the place where the owner is domiciled [20]; although crypto is too volatile in order to be put up as security for costs, it is capable of forming part of a third-party debt order [21]; service on unknown persons via NFT`s are permitted and there appears to be a good arguable case that crypto exchanges attract liability qua constructive trustee [22]; software developers of crypto networks have been held not to owe any fiduciary duties or a duty of care to assist aggrieved claimants in recovering lost or stolen crypto [23]; liquidators are able to 'de-risk' crypto held by an insolvent company in exchange for stablecoins or fiat currency [24]; an English court has recently diverted from existing authority and granted a Norwich Pharmacal disclosure order against a third party foreign entity [25]; finally, from an enforcement perspective, the Privy Council, on appeal from the BVI lower courts, confirmed that under English law the general equitable injunctive power includes the power to grant a standalone freezing injunction solely in aid of enforcement in foreign proceedings.[26]

CONCLUSION



In an interconnected global and digital world, where commercial activity is spurred by capitalism and Darwinian principles, there could be little doubt that financial technology, artificial intelligence and climate change will greatly influence the bulk of a practitioner`s work in 2033.

15 Daniel Saval, Amanda Tuminelli and Andrew Stafford of Kobre & Kim (2 August 2022) `Recovering crypto from insolvent companies may be easier than you think', available at https://forkast.news/how-recover-digital-assets-from-insolvent-companies/.

16 CMS (April 2022) 'A CMS guide to Restructuring & Insolvency in Crypto', available at https://cms.law/en/media/local/cms-cmno/files/publications/publications/a-cms-guide-to-restructuring-insolvency-in-crypto?v=1

17 Daniel Saval Op cit. note 15.

18 See also McKernan, T 'Tracing Cryptocurrency and the English Court`s power to compel disclosure from foreign respondents' (2022), ThoughtLeaders 4 Fire Magazine Issue 9 at p 70-71.

19 AA v Persons Unknown & Ors, Re Bitcoin [2019] EWHC 3556 and Osbourne v Persons Unknown & Anor [2022] EWHC 1021 (Comm).

20 Ion Science Ltd v Persons Unknown and others (unreported) [2020] (Comm).

21 Tulip Trading Ltd v Bitcoin Association for BSV & Ors [2022] EWHC 2 (Ch) in respect of security for costs and Ion Science ibid in respect of third party debt order.

22 D'Aloia v Person Unknown & Ors [2022] EWHC 1723 (Ch).

23 Tulip Trading Ltd v Bitcoin Association for BSV & Ors [2022] EWHC 667 (Ch).

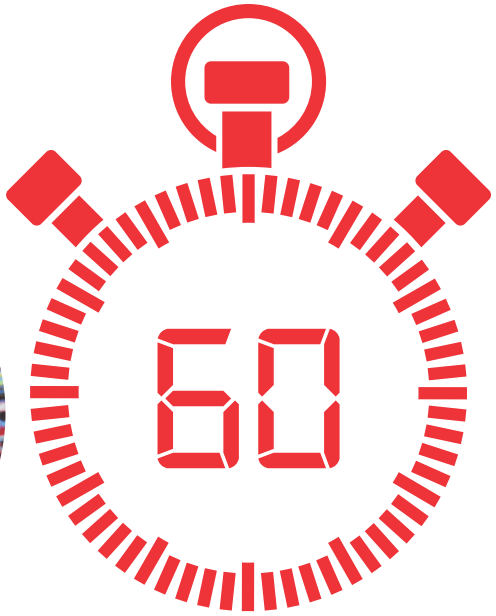
24 Philip Smith v Torque Group Holdings BVIHC (COM) 0031 OF 2021.

25 Mr Dollar Bill Limited v Persons Unknown and Others [2021] EWHC 2718 (Ch).

26 Convoy Collateral Ltd v Broad Idea International Ltd [2021] UKPC 24.

60-SECONDS WITH:

ARNO DUVENHAGE
SENIOR ASSOCIATE
MJM LIMITED



Q **What would you be doing if you weren't in this profession?**

A Ideally, reading and teaching philosophy and religious studies somewhere in the French countryside.

Q **What is the strangest, most exciting thing you have done in your career?**

A Resigning from my practice as a barrister in South Africa and deciding to join a shorts wearing and scooter driving legal fraternity in Bermuda.

Q **What is the easiest/hardest aspect of your job?**

A The easiest is getting into a good suit. The hardest tends to be making sense of and explaining to a client why an arbitrator or judge disagreed with our argued position.

Q **If you could give one piece of advice to our FIRE Starters (next gen) practitioners, what would it be?**

A Smile, it all works out in the end.

Q **What do you think will be the most significant trend in your practice over the next 12 months?**

A From a Bermuda and inherently bias perspective, with one eye on the anticipated ruling of the Privy Council in FamilyMart China Holding Co Ltd (Respondent) v Ting Chuan (Cayman Islands) Holding Corporation (Appellant) (Cayman Islands), I suspect to see a growth in the willingness and demand for parties to arbitrate corporate disputes traditionally ventilated in the courts.

Q **Who has been your biggest role model in the industry?**

A I try and avoid placing anyone in particular on a pedestal. That being said, my pupil mentor, Johan Mÿburgh of Group 33 in South Africa, influenced me significantly.

Q **If you could learn to do anything, what would it be?**

A Fold a wrap/burrito properly.

Q **What is the one thing you could not live without?**

A My Spotify playlist.

Q **Which famous person would you most like to invite to a dinner party?**

A I would hope he could be regarded as posthumously famous – the mystic Alan Watts.

Q **What is a book you think everyone should read and why?**

A Contentment: A Way to True Happiness by Robert Johnson. Perhaps it helps people realise that the next qualification, new job, promotion or significant legal victory – in all likelihood –will not bring the ever elusive contentment it initially promised.

Q **What are you most looking forward to in 2023?**

A Professionally, continuing to provide well thought out and commercially astute legal advice to valued clients. Personally, good weather, good company and good wine, all of which, will hopefully be present at the FIRE Starter events that I attend.

Q **The FIRE Starters Global Summit Drinks Reception is themed 'Heroes and Villains'. Who is your favourite superhero, and why?**

A I probably envy Wolverine the most. As an "anti-hero" he gets to indulge in being selfish, disrespectful and dangerous – all in aid of the greater good of course.

Q **What are you most looking forward to as an attendee at this year's FIRE Starters Global Summit in Dublin?**

A Two aspects equally. First, the unique opportunity to leverage the truly diverse and content rich platform created by TL4 FIRE and hear from industry recognised professionals on topics which are highly relevant and interesting; secondly, the opportunity to have some lively interaction with what I suspect will be a group of fantastic delegates.

FIRE Americas

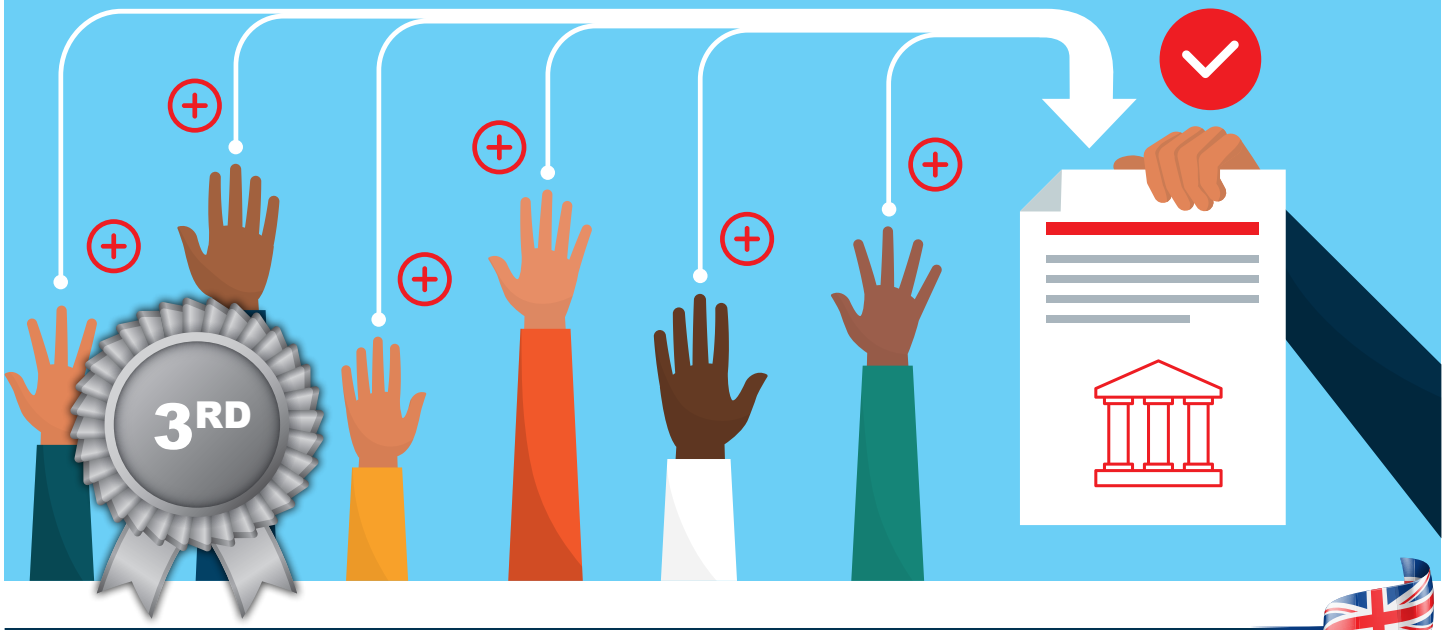
FIRE Americas: Cayman

12th - 14th March 2023 | The Westin, Grand Cayman

Bringing together experts from across North America, South America and the Caribbean

THE MORE THE MERRIER?

FRAUD, FSMA AND THE UNTAPPED POTENTIAL OF GROUP LITIGATION



Authored by: Carola Binney, Barrister at 4 New Square Chambers (UK)

Following the November collapse of FTX, Sam Bankman-Fried's cryptocurrency exchange, a deepfake video of "SBF" did the rounds on Twitter, promising FTX users compensation for their loss in a phishing scam designed to shake the very last digital cents from their crypto wallets.[1]

This is, without a doubt, a contender for the most buzzword-packed news item of 2022. But the production line in new terminology and general sense of techy complexity were FTX's smoke and mirrors. Beneath all that, Sam Bankman-Fried was staging a reproduction of a classic: also doing the rounds since FTX's collapse is an April 2022 episode of Bloomberg's Odd Lots podcast in which Bankman-Fried describes a particularly profitable crypto trading practice called "yield farming" as, basically, a Ponzi scheme.[2]

What was new about FTX was not the concept but the scale. Not in terms of the money lost – by that metric, Bankman-Fried was big but not the biggest. While precisely what happened at FTX is yet to become entirely clear, around $8bn is thought to be missing.[3] Bernie Madoff defrauded his investors of around $18bn – or $65bn, if you include the promised returns.[4]

But whereas Madoff had around 37,000 victims,[5] Bankman-Fried had upwards of a million.[6] Apps, the internet and decentralised finance have democratised investing: Madoff majored in robbing HSBC to pay Santander; Bankman-Fried was, in a far more literal sense, robbing Peter to pay Paul.

Crypto had yet to hit the headlines in 2013 and may well be old news by 2033. New technologies will bring new challenges, perhaps particularly in terms of tracing and recovery - but that type of crystal ball gazing may be best left to teenagers with JavaScript textbooks.

1 'FTX Founder Deepfake Offers Refund to Victims in Verified Twitter Account Scam', VICE, 21 November 2022 FTX Founder Deepfake Offers Refund to Victims in Verified Twitter Account Scam (vice.com).

2 'Sam Bankman-Fried Described Yield Farming and Left Matt Levine Stunned', Bloomberg UK, 25 April 2022 Podcast: Sam Bankman-Fried Described Yield Farming and Left Matt Levine Stunned - Bloomberg.

3 'The money is gone': people who lost out in FTX's collapse, The Guardian, 19 November 2022 'The money is gone': people who lost out in FTX's collapse | Cryptocurrencies | The Guardian.

4 'Where did Madoff's money go?', Yale Insights, 27 October 2015 Where Did Madoff's Money Go? | Yale Insights

5 'Bernie Madoff, mastermind of the nation's biggest investment fraud, dies at 82' CNBC, 14 April 2021 Bernie Madoff dies: Mastermind of the nation's biggest investment fraud was 82 (cnbc.com)

6 'Over a million are owed money by failed crypto exchange', BBC News, 16 November 2022 Over a million are owed money by failed crypto exchange - BBC News

What we can be sure about as lawyers and insolvency practitioners is that the cases of the future will be exercises in crowd control.

The procedural framework

The primary mechanism for the bringing of collective proceedings is the Group Litigation Order ("GLO"). GLOs were introduced as part of the new CPR regime in 1999 [7] and create a procedural framework as opposed to a US-style class action – each claimant will still need to establish his or her individual cause of action, but the GLO enables connected claims giving rise to "common or related issues" to be case managed together.

Uptake has been slow. Only 111 GLOs have so far been granted, [8] very few of which have anything to do with civil fraud – and most of which are at the decidedly less glamorous end of the litigation spectrum (cf the defining issues in the McDonalds Hot Drinks litigation: "whether the Defendant was negligent in dispensing and serving hot drinks at the temperature at which in fact they did in these cases".) [9]

While GLOs are now at least on the radar for lawyers working on industrial disease, nuisance, product liability and competition matters, they are yet to be widely recognised as a tool in the fraud and asset recovery practitioner's toolkit.

But why not? Investment fraud, in particular, ought to be prime GLO territory: large numbers of potential claimants, each of them having lost a comparatively small but personally very significant sum in precisely the same way.

Fraud litigation is often unusually document-heavy and complex, making hearing these claims separately even more uneconomical. The pool of potential claimants will very rarely be jurisdictionally confined, but the same features of the English legal system that make it attractive to claimants in traditional fraud actions (the worldwide freezing order jurisdiction, for example) make England and Wales an appealing place to bring a mass claim.

Opt-in or opt-out?

The limited uptake of GLOs is often attributed to ours being an "opt-in" system. The first and most important challenge for any piece of prospective group litigation is in getting as many potential claimants signed-up as possible: the longer the list, the bigger the value of the claim and the greater the chance of securing third party funding (the second existential challenge facing a budding class action).

The solution adopted in jurisdictions including the US, Australia, Canada and the Netherlands is to make the process "opt-out", so that all claimants falling within the defined class are automatically joined to the claim unless they elect otherwise.

The CPR 19.6 "representative action" procedure does allow representative claimants to bring proceedings on behalf of a defined class whose members have not been individually identified at the time of issue (i.e. it is in some sense "opt-out"). However, the courts' unwillingness to entertain claims for monetary relief brought by way of representative action, unless those claims can be quantified on a common basis across the class, makes it difficult to envisage the CPR 19.6 regime being of much use in the fraud and asset recovery context. [10]

There has been a degree of creep in the "opt-out" direction in recent years: since 2015, "opt-out" procedures have been introduced for certain claims before the English Competition Appeal Tribunal [11] and in the Scottish Courts.[12]

It seems unlikely, however, that in 2033 many of us will be bringing fraud proceedings on behalf of persons unknown. From an English legal perspective, the concept of a letter landing on the doormat informing you that you are now a claimant in a lawsuit you did not previously know existed remains uncomfortable (and likely to fall foul of the common law rules against champerty and maintenance). This is particularly true in the context of fraud claims, which will usually involve allegations of dishonesty that must be brought on clear instructions.

An example: securities fraud

At present, the closest the fraud world gets to group litigation with any (but still not much) regularity is securities litigation.

Under ss. 90-90A and Schedule 10A of the Financial Services and Markets Act 2000 ("FSMA"), shareholders in listed companies are able to bring deceit-based claims in respect of dishonest statements made to the market. The basic premise of these claims is not as complex as their reputation suggests: often following a Deferred Prosecution Agreement or some other settlement

7 The jurisdiction is contained in CPR r. 19.11.

8 List of group litigation orders as updated on 10 November 2022 List of group litigation orders - GOV.UK (www.gov.uk)

9 The answer was no: Bogle and Others v McDonalds Restaurants Limited [2002] EWHC 490 (QB).

10 Lloyd v Google [2021] UKSC 50, at [80]-[83].

11 Consumer Rights Act 2015, Sch 8.

12 The Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018.

with a government agency, the market learns that a listed company has been behaving badly. That news causes the share price to fall; if the shareholders can establish that they relied on an untrue or misleading statement in the company's published information, they may have a claim.

At first blush, the cause of action appears extraordinarily wide-ranging: almost anything bad that happens at or to a public company could in theory give rise to a claim. But the jurisdiction is again remarkably underused: few Schedule 10A claims have ever been brought, and most of those that have been issued have settled before trial.

At the time of writing, we have one solitary example of a decision in a Schedule 10A claim: Mr Justice Hildyard's 1,300-page judgement (plus appendices) in the HP litigation, widely touted as the biggest fraud trial ever to hit the English courts.[13] The case concerned HP's $11bn acquisition of a tech start-up called Autonomy in 2012, which turned out to be a bad one – and for which HP blamed various misleading omissions from Autonomy's accounts. HP won, and its success is likely to bolster funder confidence and pave the way for more FSMA claims.

The HP litigation was brought, effectively, by HP – but most of the Schedule 10A claims commenced to date have been collective actions of some variety, and it is only a matter of time before one of them makes it to trial. While some of the issues that have arisen at the interlocutory stage in these proceedings have been specific to their statutory context, others are of more general application with respect to group litigation in which fraud is alleged.

The Tesco litigation, for example, settled before trial (but not before inspiring many an 'Every Little Helps' headline). The PTR judgement provides a useful insight into the issues surrounding reliance in respect of misrepresentation claims brought on behalf of a class.[14] There are obvious evidentiary difficulties associated with proving that a large number of individuals or entities relied on a particular statement: key issues include the degree of reliance it is necessary to establish, the extent to which the courts will infer reliance on a fraudulent statement, and who precisely needs to have relied on it. In Tesco, for example, decisions about the claimants' dealings with their shares had been made on their behalf by their investment adviser and manager; had the proceedings made it to trial, the legal nature of that relationship and the extent to which it was capable of giving rise to reliance would have been potentially determinative issues. [15]

Likewise, Various Claimants v G4S plc [2021] EWHC 524 (Ch) illustrates the tension between the time required to conduct a comprehensive and accurate book-building exercise and the ticking of the clock. In one of several procedural judgements in the G4S securities fraud litigation currently rumbling its way through the English courts, Mr Justice Mann struck out certain of the s.90A claims against G4S on the basis that the claimants had failed to get their "ducks in a pen, let alone in a row" before the expiry of the limitation period.[16] A large number of the 93 claimants were held to have been joined to the proceedings out of time; applications to amend or substitute various of their names were substantially refused, leading to the loss of 90% of the quantum of the claims.

What does the future hold?

Wide-ranging legislative change, including the introduction of an "opt-out" procedure, seems unlikely: if group litigation is to become a feature of the fraud and asset recovery landscape, it will get there through litigation funding and – as ever – the internet.

Very many largescale fraud claims are now professionally funded: if it is possible to obtain funding for the victims of McDonalds' bad brews, investment and pensions frauds frequently worth many millions ought to be very attractive prospects. As the funding industry continues to develop, the number of law firms equipped with the expertise necessary to successfully promote and operate proceedings of this type is likely to grow. At their disposal will be all the same technological developments that are now enabling large numbers of individual investors to lose their money in the first place. With the right legal tech, you can join a class action on the bus home: all it takes is two minutes and a smartphone.

A cultural shift is also needed. The necessity of promoting proceedings to potential claimants, coupled with the prevalence of personal injury and nuisance claims on the current GLO list, doubtless makes many a blue chip practitioner think of the last time they received a phone call about a car crash that wasn't their fault.

There is, however, nothing inherently grotty about group litigation: with the right funding, the right tech and the right teams, mass fraud claims could be some of the most high-value and high-profile of the next decade.

13 ACL Netherlands BV & Ors v Lynch & Anor [2022] EWHC 1178 (Ch), in which the trial took 10 months.

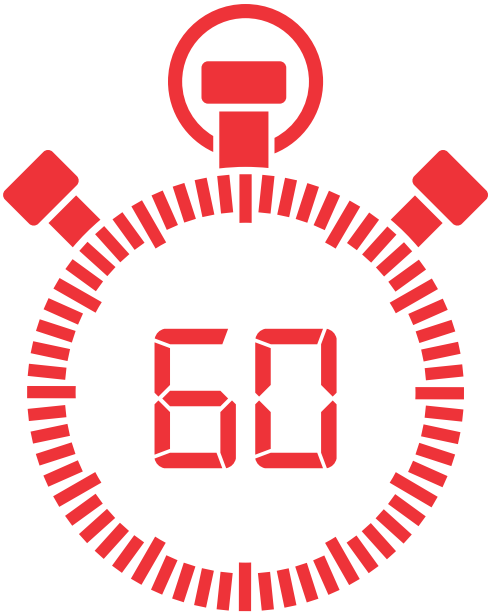
14 Manning & Napier Fund, Inc & Anor v Tesco plc [2020] EWHC 2106 (Ch).

15 See, in particular, [9](1) of the PTR judgement.

16 At [86].

60-SECONDS WITH:

CAROLA BINNEY
BARRISTER
4 NEW SQUARE CHAMBERS



Q What would you be doing if you weren't in this profession?

A A features writer churning out the occasional Booker winner, given you can't establish otherwise.

Q What is the strangest, most exciting thing you have done in your career?

A I'm not sure these always go hand in hand, but it's anyway much too early to say!

Q What is the easiest/hardest aspect of your job?

A I would very rarely describe it as easy, but that is the best bit about it – there is always a new and more challenging case, and even much more senior colleagues tell me they're still learning.

Q If you could give one piece of advice to our FIRE Starters (next gen) practitioners, what would it be?

A I'd pass on the best piece of advice I've been given, which is to always think about how you can improve – and to try not to take it personally that you need to. I also try to remember to enjoy it – it's a really fun job – and to never leave home without a laptop charger.

Q What do you think will be the most significant trend in your practice over the next 12 months?

A I've kindly been invited to answer these questions because I wrote an essay about how we'll all be group litigators by 2033 – so I'm going to stick with that, although 12 months is a bit on the soon side.

Q Who has been your biggest role model in the industry?

A It's early days, and meeting inspiring people very regularly is one of the best bits of the job. Lucy Colter, who has led me, and Lizzy Stewart, my senior clerk, spring to mind – there's a lot I hope to emulate about both of them, their wardrobes included.

Q If you could learn to do anything, what would it be?

A To sing, but sadly I think that's a lost cause.

Q What is the one thing you could not live without?

A My friends, my running shoes, my large collection of black roll necks.

Q Which famous person would you most like to invite to a dinner party?

A Maybe Nora Ephron, whose writing always makes me laugh and who I'm absolutely convinced I'd have been friends with, given the chance.

Q What is a book you think everyone should read and why?

A I'm not a big reader of the sort of book that normally gets discussed in these terms! I just finished White Teeth by Zadie Smith and thought it was even more brilliant than everyone says it is.

Q What are you most looking forward to in 2023?

A I have spent the last 12 months on a 20-week fraud trial finishing on 3 March – so I'll be honest, a holiday.

Q The FIRE Starters Global Summit Drinks Reception is themed 'Heroes and Villains'. Who is your favourite superhero, and why?

A Edna Mode from the Incredibles, if that counts – and for no good reason at all.

Q What are you most looking forward to as an attendee and speaker at FIRE Starters Global Summit in Dublin?

A Due to the above-mentioned trial I am very sadly having to miss it – but what I am most looking forward to for you is a Guinness with my brilliant colleagues from 4 New Square who are attending (including Hannah Daly, who is giving a talk)

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THE FUTURE-EFFECT OF THE CRYPTO FRENZY:

THE EMERGENCE OF CRYPTOCURRENCY FRAUD LITIGATION AND CYPRIOT COURTS AS AN ATTRACTIVE FORUM?

Authored by: Eleana Poulladou, Associate Lawyer at Michael Kyprianou & Co (Cyprus)

Introduction

Over the past decade, the Fintech industry has been constantly booming, affecting many aspects of life; the legal world has certainly not been left untouched!

Crypto-assets and other blockchain-related products and services have been rapidly invading traditional business settings globally. A significant amount of global market players have already invested in crypto-assets and even provided security based on them, but due to their volatile and complex nature and because they are largely still unregulated, crypto assets carry with them incredible opportunities of risk. Indeed, they have undoubtedly become an attractive medium for fraudsters to defraud victims on a global scale.

It all looks like by 2033, cryptocurrency fraud will be at its highest and associated litigation will be at its peak.

The growing public awareness and constant increase in the investment and use of crypto-assets combined with the high risk that they entail, will surely open the floodgates of cryptocurrency fraud litigation all over the world. Questions that will haunt litigators in the next decade are, amongst others, the following: what judicial tools can we use to effectively protect victims of crypto-fraud? can crypto-assets be treated as property and if so, will freezing injunctions be issued against crypto-assets?

This essay will consider the above questions in light of current trends and recent judicial developments and their importance for placing cryptocurrency fraud litigation at the top of the legal charts by 2033. Finally, the potential of Cyprus as an attractive forum for such litigation will also be considered.

Current trends and emerging cryptocurrency fraud litigation

Cryptocurrency fraud has become a growing global concern. So many different types of cryptocurrency fraud have already been reported by various countries; it is inevitable that they will multiply in the next decade. For example, in 2019, the United Kingdom Financial Conduct Authority issued a warning to the public after cryptocurrency scam reports tripled.[1]

As stated by Trozze, Kamps and Akartuna: "this trajectory of criminals defrauding individuals who have purchased or transacted using cryptocurrencies

1 Financial Conduct Authority (2019), Cryptoasset investment scams, available at: https://www.fca.org.uk/scamsmart/cryptoasset-investment-scams

(cryptocurrency 'users') suggests the cryptocurrency space offers yet unexploited opportunities for crime."[2]

These trends suggest that demand for litigation by victims of crypto-fraud who will either wish to hold accountable the fraudsters or recover their assets will sky-rocket in the next decade.

Litigation regarding crypto-assets is expected to grow exponentially over the next few years, and it will be expected from both litigators and the judiciary to adapt their approach to effectively protect the victims of crypto-fraud. It is therefore of paramount importance for litigators to be actively considering whether the drastic judicial tools already available in relation to conventional assets, such as disclosure and freezing orders, can also be used in relation to crypto-assets. Failure to do so, will surely refute their purpose and effectiveness. Imagine, in 2033, securing an interim freezing order whose ambit does not include the respondent's crypto wallet?

However, litigation involving cryptocurrency fraud will certainly involve complexities and will require special considerations in comparison to litigation involving more traditional assets. Courts in some parts of the world and specifically common law countries have already started to explore the issue and have even recognised crypto-assets as property that can be the subject of proprietary injunctions. Will Cyprus follow their lead?

Crypto-assets as property subject to freezing orders

Freezing crypto-assets is increasingly becoming an emerging trend. UK Courts have been, so far, the frontliners in this battle since several judgments have already been issued recognising crypto-assets as property that can be the subject of interim freezing orders.

In 2019, the United Kingdom Jurisdictional Task Force ("UKJT") issued a legal statement of authoritative but not binding nature, that crypto-assets possess all the characteristics of property and their intangibility ought not to disqualify them. In AA v Persons Unknown, [3] the England and Wales High Court was faced with the question of whether bitcoin could be classified as property that could fall within the ambit of a proprietary injunction to recover stolen cryptocurrency as a result of a cyberattack. The Court followed the insight of the UKJT and decided that crypto-assets should be categorised as property, even if they do not meet the actual definition of the latter, and stated that labelling them as "a third type of property" can be a good idea. Ultimately, the injunction was granted. AA v Persons Unknown [4] is a landmark decision that will surely be the basis for future judicial and regulatory considerations. Similarly, the High Court in Vorotyntseva v Money-4 Ltd (T/ANebus.com) [5] treated cryptocurrencies as property and a freezing order was issued in that respect.

Furthermore, in Fetch.ai Ltd v Persons Unknown [6], the UK court issued a worldwide freezing injunction against the unknown perpetrators, as well as Bankers Trust and Norwich Pharmacal orders for information held by the cryptocurrency exchange to be able to promote their claim against the fraudsters. Similar relief was provided in Mr Dollar Bill Limited v Persons Unknown and Others. [7]

Very recently, the first ever third-party debt order (formerly known as a "Garnishee order") in relation to crypto-assets was granted by the UK High Court. [8]

The Singapore International Commercial Court in B2C2 Ltd v Quoine Pte Ltd [9] followed the English case law and held that cryptocurrencies fulfilled Lord Wilberforce's classic definition in National Provincial Bank v Ainsworth [10] so as to amount to "property" in a generic sense and should be categorised as such. The reasoning of the Court was followed on appeal.[11]

More recently, in Ruscoe v Cryptopia Ltd (in liq)[12], the High Court of New Zealand held, after full argument, that digital assets of a cryptocurrency exchange constituted "property" and were held on trusts for accountholders on that exchange.

There are, thus, increasing indications that common law will treat crypto-assets as property, subject to satisfaction of the basic characteristics of property. Consequently, crypto-assets that meet the relevant criteria will increasingly become the subject of freezing orders in the next decade.

Cyprus – an attractive forum for cryptocurrency fraud litigation?

2 Trozze, A., Kamps, J., Akartuna, E.A. et al. Cryptocurrencies and future financial crime. Crime Sci 11, 1 (2022). https://doi.org/10.1186/s40163-021-00163-8 ; See also Kethineni, S., & Cao, Y. (2020). The Rise in Popularity of Cryptocurrency and Associated Criminal Activity. International Criminal Justice Review, 30(3), 325-344. https://doi.org/10.1177/1057567719827051

3 [2019] EWHC 3556 (Comm).

4 See n3 above.

5 [2018] EWHC 2596 (Ch).

6 [2021] EWHC 2254.

7 [2021] EWHC 2718 (Ch).

8 Ion Science Ltd v Persons Unknown (unreported, 28 January 2022).

9 [2019] SGHC(I) 03.

10 [1965] AC 1175.

11 [2020] SGCA(I) 02 at [144].

12 [2020] NZHC 728.

According to section 29(1)(c) of the Courts of Justice Law N.14/1960 the Cyprus Courts will apply the common law and the principles of equity. Cyprus courts are therefore expected to follow English case law and, consequently, crypto-assets will eventually be categorised as property and similar protection and interim relief can be provided in Cyprus to victims of crypto-fraud.

Cyprus is one of the very few common-law jurisdictions in the European Union that allows for the issuance of worldwide freezing orders, a powerful weapon in the fight of any crypto-asset fraud victim because of the international nature of cryptocurrency fraud. The jurisdiction to issue worldwide freezing orders was expressly recognised by the Surpeme Court of Cyprus in the landmark case Seamark Consultancy Services v Joseph P Lasala [13].

In fact, Cyprus courts have exercised their discretion to issue worldwide freezing orders over a wide array of different assets, including among others money held within the jurisdiction [14] vehicles [15], shares[16] and land [17]. This is indicative of the courts' willingness to exercise their powers efficiently and for the purposes of securing that full justice will be awarded at a later stage and it is likely that the Cyprus Courts will be willing to extend their powers to issue worldwide freezing orders against crypto-assets. However, this willingness is exercised in cases where there is a real danger of dissipation. The former President of the Supreme Court of Cyprus, Petros Artemis, and the former Supreme Court Judge, George Erotocritou, in their book on injunctions, warn against the abuse of the courts' jurisdiction in cases where there is no such danger.[18]

The risk of dissipation will always be high in the case of crypto-assets as this specific type of asset is by its very nature easy to hide, and with the use of the proper mechanisms, crypto-assets can be rendered completely untraceable.[19]

Similarly, after the boom of the Forex Industry in Cyprus in the early 2010s, the Courts were exponentially flooded with fraud claims against forex companies by their retail Clients and between forex companies. The Courts quickly became familiar with the concept and operations of the industry, an area that was, in general, unknown territory. It is therefore very likely that within the next decade, the Courts will embrace the concept of blockchain and cryptocurrencies and will be willing to broaden the use of judicial tools available such as interim freezing orders and will adapt their approach to effectively protect the victims of crypto-fraud.

Therefore, while the law of the Republic of Cyprus does not seem to preclude the issue of worldwide freezing orders and since the courts in Cyprus have held a positive stance towards expanding the injunction's ambit to a plethora of different asset types, one could conclude that the law in Cyprus will sooner or later include crypto-assets. Yet, we cannot be certain unless such a decision ever arrives, or the lawmaker makes an explicit provision about it. Additionally, the legal system in Cyprus is currently under vigorous reform with the aim of building a more modern and efficient system for administering justice. The new Civil Procedure Rules were approved by the Supreme Court in May 2021 and are due to be implemented.

Another aspect of the pending reform that will certainly facilitate international asset tracing is the establishment of a specialised Commercial Court. The new Commercial Court will handle high-value commercial disputes with fast track and more simplified procedures. The Commercial Court will hear commercial claims with a value of over €2 million, including disputes relating to, inter alia, the following: business contracts; the provision of services; the operation of capital markets; commercial agency; and disputes between regulated entities. Litigants may elect to confer jurisdiction to the Commercial Court even where the dispute has no connection to Cyprus and they will also have the option to choose the English language as the language of the proceedings. Hence, the Commercial Court is expected to take up a large volume of commercial cases with cross-border elements, within the framework of which applications for interim orders are usually pursued for asset recovery purposes.

In addition to the above, Cyprus remains one of the most cost-effective common law forums for litigating international fraud claims. A combination of the above factors will very likely result in Cyprus being treated as a highly attractive forum for crypto-asset fraud litigation by 2033.

Conclusion

All roads lead to the assumption that by 2033, many new types of crypto-asset fraud will emerge and litigation involving crypto fraud will be on the top of the legal charts! Additionally, Cyprus will, most likely, be an attractive forum for such litigation and applications for the issuance of freezing orders against crypto-assets will skyrocket. Nevertheless, due to the lack of regulation and domestic case law as well as the complex and evolving nature of crypto-assets, it is difficult to guarantee the level of judicial protection that will be available. We are however hopeful that the Cyprus Courts will follow the sign of the times and fraud litigation will also embrace crypto-assets.

13 (2007) 1 CLR 162.

14 Ship "Tina" v Ventmare Maritime (1981) 1 CLR 248.

15 Pantelides v Pieris (1998) 1 CLR 2111.

16 Seamark Consultancy Services Ltd v Joseph P Lasala (2007) 1 CLR 162.

17 See n13 above.

18 Erotocritou and Artemis, Injunctions (2016), p.224.

19 Lars Haffke, Mathias Fromberger, and Patrick Zimmermann, "Cryptocurrencies and anti-money laundering: the shortcomings of the fifth AML Directive (EU) and how to address them" (2020) 21 Journal of Banking Regulation 125, 130–131.

THE DIGITALLY AGED

Authored by: Sam Thompson, Manager at Grant Thornton (British Virgin Islands)

Setting the scene

I'll start by introducing a disclaimer; I know I've entered an essay writing competition, but I've never really classed myself as particularly "academic". It's fair to say that this it outside my comfort zone but, as an accountant who is particularly interested in the development of cryptocurrency in insolvency over the coming years, I couldn't refuse the opportunity to put my thoughts down on paper.

As I visualise the scene in 2033, there are more teenagers on the streets as a result of the baby boom caused by Covid-19 related-restrictions. Each wearing skinny jeans, which are a nostalgic throwback fashion of the early 2010s, using Dogecoin to pay for their food shop. Tesla has been wound-up due to world battery shortages and seated drones are now the choice of transport.

Cryptocurrentcy (pun intended)

Undeniably, digital assets have experienced an unprecedented rise to fame during the last 10 years. The fame hasn't always been for good reason, but it is undeniably justified.

During 2021, it was reported that cryptocurrency had a total market cap of US$3 trillion.

The technological nature of digital assets has empowered a core following, including a high volume of intellectual yet introverted people. Amongst these have been countless people who have profited substantially in the process.

This unprecedented success has resulted in followers who refuse to accept that cryptocurrencies could fail.

These followers continue to insist that prices are going to the moon, with the only way to support their claims being to encourage increased demand. This has the potential to create a highly toxic environment for cryptocurrencies.

Unintended scheming

Through the powers of social media, desperation continues to cause some people to push investment schemes, token issuances and other opportunities. Whilst a few of these will undoubtedly be wildly successful, I anticipate that the vast majority won't achieve the success to maintain their promised returns. Ultimately, whether intended or not, showing similar traits to Ponzi schemes.

My personal view is that a high percentage of Ponzi schemes weren't originally intended to be fraudulent. People become driven by overwhelming personal confidence and the industry (usually from a prior success) and become certain they can continue achieving that success. Unfortunately, when that doesn't become the reality, they have no option but to rely on new capital to sustain promises and slip into a Ponzi scheme.

Don't get me wrong, I'm not suggesting that Madoff or Stanford accidentally slipped into unintended decline. I'm sure there will always be individuals who set out with fraud being their sole intention and purpose. There will also always be those individuals who become greedy and lose perspective, dangerous to the unknowing investor.

Predictable pop

I'm often asked what tulips, web address and more recently, cryptocurrencies, have in common. Of course, it's bubbles.

Bubbles are primarily driven by an unprecedented surge in demand, causing prices to increase exponentially. This will inadvertently catch news headlines, with the general public all wanting to be involved.

This then conveniently leads us to the age-old proverb of the fear of missing out ("FOMO"). Whether we like it or not, FOMO is probably something we all fall victim to and could range from missing a social event, to a windfall from investments.

Unfortunately, FOMO can be exacerbated for cryptocurrencies, for two main reasons; the lack of understanding and the cost-of-living crisis:

1. understandably, FOMO can lead to some knee jerk reactions. For FX or stock trading, investors would potentially do basic due diligence to understand what they're investing in. Unfortunately, the unprecedented nature of blockchain technology and cryptocurrency exchanges means that some investors weren't even able to undertake basic due diligence. This creates a great opportunity for opportunistic fraudsters.
2. more recently, we've had another interesting component thrown into the works. Covid-19 has caused an emotional rollercoaster effect, with highs of people having countless hours in front of a computer screen, to lows of the cost-of-living crisis. In many countries, surging inflation and negative GDP growth is stretching families. Couple this with low barriers to entry on cryptocurrency exchanges due to a lack of AML procedures, and more people are willing to take bigger risks to grow their wealth.

I'm aware that I should be talking about 2033 but have not made it to the present day. However, how frequently do we look at insolvency work, particularly fraud, which took place decades ago? What we're going to be enduring in 2033 is likely to have already happened or be happening right now.

Mainstream manipulation

Aside from the fraudulent schemes currently being perpetrated, digital assets are also the perfect storm for manipulation. Wherever there are large sums of money changing hands, there will be people trying to benefit, both legally and illegally.

Traditionally more commonplace in the stock markets, manipulation takes places in some sophisticated forms. Whether it's spreading misleading information, rigging trading volumes or quotas, the same techniques can be applied to cryptocurrencies. We're now seeing vloggers and exchanges pushing 'fake news' and whales or bad actors wash trading.

The scary part about cryptocurrency market manipulation is how mainstream it has become in the media. Traditionally, day traders would have worked in their masses on Wall Street, backed by huge funds, to hide their transactions. Of course, there will always be the Reddit conspiracies that their sheer size means regulators and politicians are also willing to turn a blind eye to this.

More recently, Elon Musk only had to post a picture of a spaceship on Twitter and the value of Dogecoin rocket by 50%. The manipulation of digital assets has become so more visible, only supplemented by the improving capabilities of blockchain analysis. Individuals have also wash traded NFTs to artificially increase prices and influential individuals/groups on Reddit have pumped cryptocurrency prices by surges in demand, only to dump their holdings at a substantial profit.

The exchanges themselves could also be guilty of manipulation, by misrepresenting their financial position. Most exchanges have their own token, which they hold a majority of. Being the majority holder, they have some ability to control the value. They subsequently seek loans from other deregulated financiers, using their tokens as collateral. If (or perhaps when!) these tokens fall in value, they are exposed to loan obligations which exceed their assets, causing them to become insolvent.

Of course, most exchanges are registered in jurisdictions with little public disclosure requirements. Therefore, the extent of their collateral and obligations are rarely reported. Whistleblowers may leak financial information to the media, causing a mass lack of confidence, exacerbating the position earlier and risking liquidity exposure too.

Given that the exchanges form such expansive and wealthy groups, there's the possibility for funds to be intermingled and shared amongst the group of entities. This will potentially lead to breaches of fiduciary duties and claims against individuals.

The lack of legislation surrounding digital assets has allowed individuals to openly exploit the markets. However, this may ultimately prove to be their downfall.

Legislative crackdown

Across the globe, institutions and governments are struggling. Those that aren't backed by huge sovereign wealth funds have just had the financial life squeezed from them during the global Covid-19 pandemic and subsequent inflation. As we've already seen with tax increases and reduced public spending, governments are going to be looking for

any angle to balance the books.

I see this impacting the future of insolvencies and cryptocurrencies in two ways; legislation to challenge these transactions, potentially even retrospectively, and onerous tax legislation.

After all, the prospect of a deregulated currency isn't something governments and institutions are likely to financially support.

In the first instance, I foresee more actions being taken against historic manipulation. This will either be from legislative reform to manipulation which has already happen, and will continue to happen, with potentially more severe consequences than other manipulation. Furthermore, once case law and precedents are set, this will only fuel more proceedings being considered.

Secondly, something which will perhaps arrive sooner from an insolvency perspective, is tax clamp downs. I suspect these cases will being arriving well before 2033. I know, it's verging off topic, I'll keep it brief. We're going to see the uneducated from a tax perspective, who've never paid tax before, to those who avoid paying tax altogether, by concealing their gains.

Governments aren't likely to take to tax fraud for deregulated finance lightly. I suspect we will see numerous governments taking action against a variety of tax evasion, subcontracting the forensic analysis and insolvency advice to the private sector. This will ultimately lead to high volumes of enforcement and asset recovery cases, similar to historic tax frauds. I also suspect preferential treatment of revenue claims in the UK will increase the public interest in these claims.

Jurisdiction jumping

Historically, a popular method to attempt to avoid insolvency proceedings, asset tracing and recovery matters has been to jump between or combine multiple jurisdictions. In particular, jurisdictions that have very low Anti-Money Laundering and disclosure requirements. The anonymous nature of digital assets will increase popularity of 'jurisdiction jumping'.

Initially, exchanges, funds and issuers will amend their articles or transfer companies between jurisdictions, as new legislation or government enforcement arrives. This has already taken place once. Large volumes of cryptocurrency work are understood to have moved from the Cayman Islands to the British Virgin Islands ("BVI"), following the Virtual Asset (Service Providers) Act 2020 being enacted in 2022. If further legislation is brought in the BVI, these entities may seek to circumvent regulation again.

So, where next?

I suspect St Vincent & The Grenadines, Bahamas and Barbados are on the horizon, based on the local regulation and legislation. This movement will continue over the next decade, until eventually all jurisdictions worldwide become aligned and similar standards are set. Not too dissimilar from the gradual removal of bearer shares.

As time progresses, and cryptocurrency values experience volatility, increased fraud and manipulation will be identified, resulting in more insolvency matters, especially in the smaller jurisdictions.

Furthermore, the attraction of being a digital nomad will be an additional factor. It's now commonplace for board members at digital asset organisations to be work remotely from a treehouse in Costa Rica. The attraction of being resident and incorporating entities in low tax jurisdictions will influence this further.

The year 2033

Whilst the majority of this impact feels imminent, the reality is that there will be a domino effect. Legislation and case law will be put in place, entities will make continued attempts to evade it and then eventually enforcement, forensic and insolvency proceedings will commence.

Some cryptocurrencies, namely Bitcoin, have been created with a finite supply. Which, according to economic theory, means that prices will continue to increase, providing that there is the pull of demand.

However, with everyone glued to their TV and laptop screens throughout 2020 and 2021, will we ever see the sheer volume of attention and popularity to fuel this demand again?

I remain skeptical that we are experiencing a 'crypto winter' and that there is a summer around the corner. My view is that cryptocurrency values may, in reality, be closer to a market equilibrium now, and that we are likely to see the volatility and fluctuations again. However, regardless of this, the unprecedented fame of digital assets over the last 10 years has already created a cocktail of toxic scenarios, which have caused huge frauds and failures, such as Voyager, Celsius and 3 Arrows Capital. I anticipate that further failures will be uncovered, particularly if values of digital assets continue to decline.

I may end up eating my words, but I think there's digital asset insolvency work on the horizon! I'll personally keep myself hedged. A sensible investment of cryptocurrency, alongside a keen interest in digital asset insolvency.

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HERE TO STAY

THE BURGEONING CRYPTO MARKET AND ITS CROSSOVER WITH INSOLVENCY DISPUTES

Authored by: Oliver Terry, Trainee Solicitor at Collas Crill (Jersey)

The growth of cryptocurrency generally and in Jersey

Crypto's role in the legal world is complex. The legal crypto industry is in constant evolution given the need to adapt to an ever-changing regulatory and legal landscape. Analysts estimate that the global cryptocurrency market will have tripled by 2030, hitting a valuation of nearly $5 billion. [1]

With the number of new bitcoins issued per block halving every four years or so, the final bitcoin is not expected to be generated until 2140, and Bitcoin will exist even beyond this.[2]

The opportunities that the crypto world offers and will continue to offer to the legal industry and FIRE practitioners through to 2033 and beyond should not be overlooked.

How does crypto relate to law?

Litigation in the cryptosphere is rapidly developing. In just three years, the English Court has confirmed that Bitcoin is capable of being property (AA v Persons Unknown & Ors [3]); that the legal jurisdiction of cryptocurrency is where the owner is based (Ion Science Ltd v Persons Unknown & Ors [4]); that cryptoassets are capable of being held on trust (Wang v Darby [5]); and that cryptoassets may not be used as security for costs (Tulip Trading Ltd v Van Der Laan [6]). Many cases heard in

1 "Thought Leaders 4: Crypto Insight 2022" (2022) Crypto Insight 2022.

2 Hayes, A. (2022) What happens to Bitcoin after all 21 million are mined?, Investopedia. Investopedia. Available at: https://www.investopedia.com/tech/what-happens-bitcoin-after-21-million-mined/#:~:text=With%20the%20number%20of%20new,6.25%20as%20of%20May%202020. (Accessed: November 7, 2022).

3 AA v Persons Unknown & Ors [2019] EWHC 3556 (Comm).

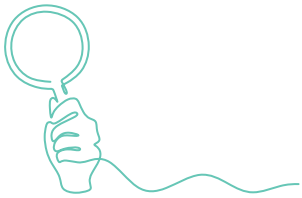
4 Ion Science Ltd v Persons Unknown & Ors (Unreported) 2020.

5 Wang v Darby [2021] EWHC 3054 (Comm).

6 Tulip Trading Ltd v Van Der Laan [2022] EWHC 667 (Ch).

the English Court will be in relation to asset recovery and involve applications for freezing orders, disclosure orders, and orders to allow the recovery of cryptoassets. In such cases, it is absolutely essential to get the underlying basics right before initiating the action. [7]

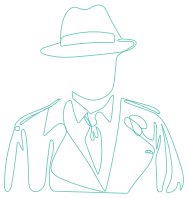
Road to recovery



Because cryptoassets are by their very nature hidden, the key question becomes what legal remedies are available to recover cryptoassets that have been misappropriated by hacking or through fraud.

The victim must act quickly to locate and secure their crypto assets because of their temporary nature.[8] One way in which this issue might be addressed is by issuing urgent ex parte applications for injunctions (as exemplified in the case of Fetch.Ai Limited v Persons Unknown & Ors[9]) against the wrongdoers that may hold information relevant to the tracing of the misappropriated cryptoassets. Such applications should be made without notice and hearings should be held in private in order to make it more difficult for offenders or holders of the criminally tainted assets, to be tipped off.[10] Whilst the courts in Jersey have not had to contend publicly with freezing crypto assets to date, we can draw parallels with the position taken by the English Court in Fetch.Ai Limited v Persons Unknown & Ors [11]

The identity crisis



A key feature of cryptocurrency is that it is anonymous. Originally, it was almost impossible to identify its owner, however this has now changed.

The law commission[12] defines crypto in its consultation paper as a 'data object' which is a 'thing' that can be considered a physical object or property. The paper's definition of this is welcome, as a data object follows rules which can support the legal process.

Legally, crypto must be property otherwise an injunction cannot be secured.

The 'thing' or crypto is held in a wallet (software programmes designed to hold public or private keys that allow owners to trade, monitor, track and hold their cryptocurrency[13]) that shows you how many 'things' you have. There are also crypto exchange businesses, custodian services/platforms where crypto can be bought/sold. These exchanges hold coins in the platform's wallet. Identifying this difference as to who holds the coins is key as this relationship dictates one's contractual rights in law. Custodians are crucial in the litigation recovery process as these exchanges hold the relevant information about a person. It is possible to obtain disclosure from such crypto exchanges – Binance is a popular one.

When 'things' go wrong

Common causes of action involving crypto are: breach of contract (Vorotyntseva v Money-4 Ltd[14] (Birss J)), fraudulent misrepresentation (Ion Science Ltd v Persons Unknown[15] (Butcher J)), breach of confidence (Fetch.ai v Persons Unknown[16] (Judge Pelling)) and insolvency applications (Ruscoe v Cryptopia Ltd[17] (Gendall J)). It is reported that crypto is becoming one of the most traditional forms of asset recovery with Chainalysis being the most reputable firm for this.[18] FIRE Insolvency Practitioners (IP) suggest that crypto is where insolvency work is headed. Additionally, London will see more crypto-related international arbitration.[19]

With the growth of digital assets comes a parallel growth in fraud. Around $8.6 billion in cryptoassets is estimated to have been laundered in 2021 alone and it is likely that financial crimes will accelerate in direct proportion to the use of cryptocurrency. As a result, cryptocurrency disputes are on the rise. There are various areas of disputes where crypto is involved, including fraud and asset recovery.

The good news is that while crypto fraud is increasing, so too are the systems developed to trace these formerly untraceable assets.[20]

7 "Thought Leaders 4: Crypto Insight 2022" (2022) Crypto Insight 2022.

8 Freezing crypto assets in the Cayman Islands (2022) Collas Crill. Available at: https://www.collascrill.com/news-updates/articles/freezing-crypto-assets-in-the-cayman-islands-practical-considerations-1/ (Accessed: November 7, 2022).

9 Fetch.Ai Limited and Fetch.AI Foundation PTE Limited v Persons Unknown & Ors [2021] EWHC 2254 (Comm)

10 Freezing crypto assets in the Cayman Islands (2022) Collas Crill. Available at: https://www.collascrill.com/news-updates/articles/freezing-crypto-assets-in-the-cayman-islands-practical-considerations-1/ (Accessed: November 7, 2022).

11 Ibid.

12 UK (2022) Digital Assets: Consultation Paper. London: Law Commission. (Accessed: November 7, 2022).

13 Freezing crypto assets in the Cayman Islands (2022) Collas Crill. Available at: https://www.collascrill.com/news-updates/articles/freezing-crypto-assets-in-the-cayman-islands-practical-considerations-1/ (Accessed: November 7, 2022).

14 Vorotyntseva v Money-4 Ltd [2018] EWHC 2596 (Ch).

15 Ion Science Ltd v Persons Unknown & Ors (Unreported) 2020.

16 Fetch.Ai Limited and Fetch.AI Foundation PTE Limited v Persons Unknown & Ors [2021] EWHC 2254 (Comm).

17 Ruscoe v Cryptopia Ltd [2020] NZHC 728.

18 Thought Leaders 4: TL4 FIRE Magazine Issue 10 - Contentious Insolvency (2022) (Accessed: November 7, 2022).

19 Ibid.

20 Thought Leaders 4: Crypto Insight 2022" (2022) Crypto Insight 2022.

Service of proceedings is a pre-requisite to any legal action. Crypto cases makes this difficult, as how is an unknown person served? You must identify a person from the description of the crypto transaction (AA v Persons Unknown[21]). There are also conflicting views on which jurisdiction you serve the proceedings or application, whether the relevant jurisdiction is where a person/owner is domiciled or where a person/owner is resident. HMRC, in the case of Tulip[22] take it as residence. I don't believe it should be a person's residence because this isn't necessarily where the cryptocurrency is held. One's crypto wallet is on their mobile device so why can't situs be linked to the device? These are all issues IPs must take into account when thinking about bringing claims.

The impact of crypto within the legal industry IP world.

Track and trace

Virtual currencies are not totally anonymous. You can seize bitcoin and trace transactions, if done correctly. People try to launder using crypto, but it is now possible to track and trace these transactions making it more difficult to hide money. Similarly, if an illegal product is bought, it is now possible to trace these transactions back to the purchaser/seller.

If an IP's investigations reveal a "voidable" transaction in cryptoassets, it may be necessary to seek a return of those assets.[23] Chainalysis, or its main competitor CipherTrace, are firms that specialise in tracing these types of crypto transactions.[24]

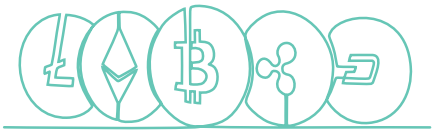
However, criminals are often one step ahead. They will use cutting edge technology to hide their fraudulently obtained gains. As a result, the victims of a fraud face a daunting challenge when they seek to recover assets. Unfortunately, it is extremely unlikely that asset tracing projects will recover all assets and the resources that need to be deployed may be disproportionate to the returns. However, artificial intelligence may be increasingly helpful in crypto tracing as it could make the process more efficient.

International forensic investigator Burke Files, says: "It is all blockchain and very traceable when you have found the entry point".[25]

Insolvencies on the rise

It will come as no shock that we are heading towards another economic crisis. With the increased cost of living and rocketing inflation, businesses will struggle and there will be more insolvencies on the horizon. Crypto-related business is no different from the normal world. It will struggle too, and with the crypto market currently at one of its lowest points in years,[26] insolvencies are inevitable. Work to restructure these companies has grown and will continue to grow.

The growing use of cryptocurrency in Jersey and beyond



Jersey is quietly offering crypto investors incentives to move their money from more traditional tax havens. The island is attracting crypto, blockchain and other fintech firms thanks to its favourable tax laws.[27] A number of Singapore managers are also using Jersey as the jurisdiction in which to domicile their crypto funds.

Given the increasing links to crypto in Jersey, it's highly likely that there will be crypto-related insolvency cases for Jersey lawyers. It is therefore important for lawyers in Jersey to understand crypto and its evolving ecosystem.[28]

The importance of crypto know-how

There are many scams and frauds involving crypto and this activity is on the up. Criminals use crypto so that their criminal transactions are difficult or impossible to trace. It is therefore vital that insolvency and fraud practitioners understand what crypto is and the way it relates to their field, before advising clients on such matters.[29]

The current collapse of the crypto market is creating a string of insolvencies and posing new challenges for insolvency practitioners seeking to restructure crypto firms. The recent collapse of the crypto exchange FTX is an example of this.

21 AA c Persons Unknown & Ors [2019] EWHC 3556 (Comm).

22 Tulip Trading Ltd v Bitcoin Association for BSV [2022] EWHC 667 (Ch).

23 Richie.turei@hsf.com (2022) Crypto winter is here – what does it mean for insolvency practitioners?, Herbert Smith Freehills | Global law firm. Available at: https://www.herbertsmithfreehills.com/insight/crypto-winter-is-here-%E2%80%93-what-does-it-mean-for-insolvency-practitioners (Accessed: November 7, 2022).

24 Greggwirth (2021) US law enforcers partner with cryptocurrency tracking firm to fight financial crime, Thomson Reuters Institute. Available at: https://www.thomsonreuters.com/en-us/posts/investigation-fraud-and-risk/cryptocurrency-financial-crime/ (Accessed: November 7, 2022).

25 Thought Leaders 4: Crypto Insight 2022" (2022) Crypto Insight 2022.

26 Top 50 cryptocurrency prices, Coin Market Cap, price charts and historical data / crypto.com. Available at: https://crypto.com/price (Accessed: November 7, 2022).

27 Glover, G. The UK's offshore tax havens are quietly luring investors away from the likes of the Cayman Islands and Bermuda this 'crypto winter', Business Insider. Business Insider. Available at: https://markets.businessinsider.com/news/currencies/crypto-bitcoin-tax-havens-jersey-guernsey-investing-analysis-regulation-law-2022-8 (Accessed: November 7, 2022).

28 Kient (2022) Jersey an attractive option for Asia's Crypto Fund Managers, Law.asia. Available at: https://law.asia/jersey-singapore-tax/ (Accessed: November 7, 2022).

29 Trozze, A. et al. (2022) Cryptocurrencies and future financial crime - crime science, BioMed Central. Springer Berlin Heidelberg. Available at: https://crimesciencejournal.biomedcentral.com/articles/10.1186/s40163-021-00163-8 (Accessed: November 7, 2022).

It is critical for insolvency practitioners to immediately investigate upon appointment whether a distressed company may hold any cryptoassets, and if so, take rapid steps to secure those assets.

Securing cryptoassets can be a complex exercise. It may involve dealing with counterparties in multiple jurisdictions with enforcement difficulties similar to traditional asset tracing and recovery.[30]

The implications of getting it wrong (and some advice)

There are pitfalls aplenty when it comes to navigating the legal landscape of crypto. For example, when dealing with an application for a freezing order which carries with it a cross-undertaking in damages, it is important to freeze the correct crypto wallet. Failure to do so might block the ability to secure any monetary sum.[31]

Similarly, litigators may rush to apply for a worldwide freezing order on the basis of a risk of dissipation. However, in some cases this might be the wrong decision and sometimes a proprietary injunction would have been a better strategic move in terms of specifying particular property, obtaining disclosure orders and return of the cryptoassets.[32]

Even at the conclusion of a case, it is critical to retain focus. Settlement awards must be analysed. Consideration should be given to how the obtained crypto has been stored; either hot[33] or cold[34]. Storing on an exchange might not be secure enough for a client; in January 2022, Crypto.com admitted that hundreds of customers' accounts were compromised in a hack with losses of somewhere between $15 million and $33 million worth of Ethereum. It is also vital to seek expert advice on the sale of these assets if that is the planned course of action.

The release of too many tokens in a volatile market could have catastrophic consequences, dramatically reducing or entirely destroying value for your client.[35]

30 Richie.turei@hsf.com (2022) Crypto winter is here – what does it mean for insolvency practitioners?, Herbert Smith Freehills | Global law firm. Available at: https://www.herbertsmithfreehills.com/insight/crypto-winter-is-here-%E2%80%93-what-does-it-mean-for-insolvency-practitioners (Accessed: November 7, 2022).

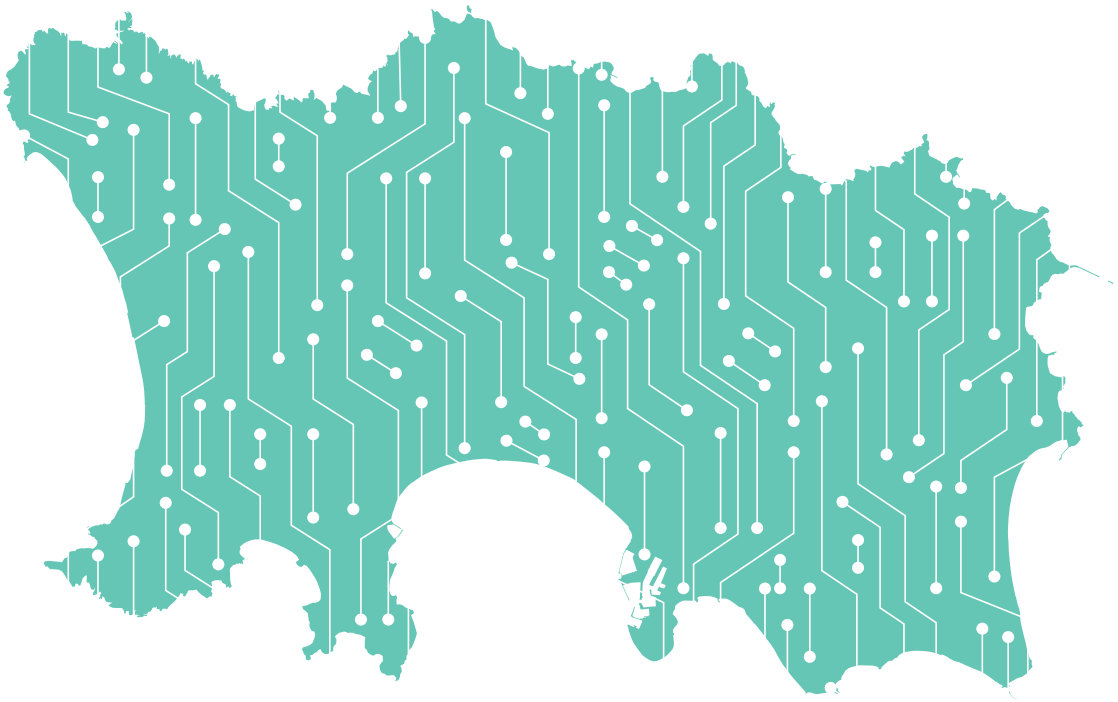
31 Thought Leaders 4: Crypto Insight 2022" (2022) Crypto Insight 2022.

32 Ibid.

33 A hot wallet is connected to the internet and could be vulnerable to online attacks, which could lead to stolen funds, but it's faster and makes it easier to trade or spend crypto.

34 Cold storage is offline which can protect your digital assets. Since these digital wallets aren't connected to the internet, they're less susceptible to hacks.

35 Thought Leaders 4: Crypto Insight 2022" (2022) Crypto Insight 2022.



IS THIS THE REAL LIFE? IS THIS JUST FANTASY?

FRAUD, INSOLVENCY, RECOVERY AND ENFORCEMENT IN THE AGE OF THE METAVERSE

Authored by: Tom Serafin, Associate at HFW (UK)

The year is 2033. The decade-long energy crisis rages on. Cost of living continues to skyrocket. Resources are scarce and sterling is worth just 12 US cents. To paraphrase Ernest Cline,[1] the world is an ugly place indeed.

To escape this miserable reality, humanity seeks its fortunes in the virtual metaverse. The metaverse is no utopia though. For with the fortune-seekers also come the chancers, the fakers and the illicit money-makers, alongside the FIRE practitioners pursuing them. Against that background, this essay examines: (i) the metaverse as a concept, (ii) how it is evolving and (iii) why FIRE practitioners should pay attention. With that said, let's put on our VR headsets and begin.

What is the metaverse?

The term 'metaverse' [2] is a portmanteau of the prefix 'meta' (from the ancient Greek meaning 'beyond') and the word 'universe'. As this marriage of words suggests, it is a "world – or reality, even – beyond our physical world on Earth". [3]

The best examples of such parallel worlds include Plato's Cave, [4] the Wachowski's The Matrix, James Cameron's Avatar, and Ernest Cline's Ready Player One. We are however, in the author's opinion, some years away from seeing such worlds unfold wherein we can experience them with all the same senses as in the one we inhabit today.

For now, the metaverse is an iteration of the internet manifesting itself as an immersive virtual world, often assisted through augmented or virtual reality hardware.[5] Early examples of such platforms include Second Life and World of Warcraft. However, with the development of Web3 (which is the internet as we know it, but incorporating the technologies that make cryptocurrency, non-fungible tokens (NFTs) and decentralised online ecosystems possible) the possibilities are expanding rapidly and attracting interest from a variety of sectors. With

1 The author of sci-fi novel Ready Player One (Arrow Books, 2012), which inspired this prologue.

2 First appearing in Neal Stephenson's sci-fi novel Snow Crash (Penguin Books, 2011).

3 Pin Lean Lau, 'The metaverse: three legal issues we need to address', The Conversation (online, 1 February 2022) <https://theconversation.com/the-metaverse-three-legal-issues-we-need-to-address-175891>.

4 Plato, The Republic (Penguin Classics, 1955) 278-286.

5 Lau (n 3).

the global metaverse industry valued at USD63.08 billion in 2021 and projected to grow to USD1.6 trillion by 2030, [6] it's no surprise.

Who is already getting a dose of virtual reality?

In April 2020, rapper Travis Scott held a concert in the popular battle-royale game Fortnite. It drew an audience of over 27 million [7] and was even covered by Rolling Stone magazine in-play.[8]

That same year, rapper Snoop Dogg partnered with The Sandbox, a popular metaverse game operating on the Ethereum network, announcing the sale of virtual plots of land located next to his virtual property in the 'Snoopverse'.[9] One fan reportedly spent USD450,000 for the privilege.[10] But it's not just business-savvy rappers and cashed-up fans that see the potential in this brave new world.

In February 2022, J.P.Morgan bought a virtual plot of land to build a virtual lounge for its customers in Decentraland, another popular metaverse game built on the Ethereum blockchain. It also published a report asserting "the metaverse will likely infiltrate every sector in some way in the coming years, with the market opportunity estimated at over $1 trillion in yearly revenues"[11] and sees itself playing a major role in that space.[12] Less than a month later, HSBC announced it too had purchased virtual land, but on The Sandbox, with a view of developing it to engage and connect with sports, esports and gaming enthusiasts.[13]

Prominent fashion labels are also developing a presence in the metaverse. Adidas, for example, launched its 'Into the Metaverse' line. 29,620 NFTs went on sale and sold out within minutes, earning Adidas more than USD22 million.[14] Meanwhile, arch-rival Nike recently filed several applications with the US Patent and Trademark Office to trademark the word 'Nike', slogan 'Just Do It', its swoosh, Air Jordan and Jumpman logos in the virtual world.[15] It also launched Nikeland, a bespoke metaverse, where fans create avatars, fit them out with virtual trainers, and play sports.

Governments too are taking interest in the metaverse. The Emirate of Dubai's Virtual Assets Regulatory Authority (VARA) has recognised its potential, establishing MetaHQ to serve as a forum to engage global virtual asset service providers in launching applications, welcoming new licensees, sharing expertise and driving worldwide interoperability.[16] MetaHQ will use The Sandbox platform to allow users to create, sell and purchase digital assets.

This announcement follows merely months after:

- VARA's establishment under the Dubai Virtual Asset Regulation Statute.[17] The body is the world's first independent regulator for virtual assets aimed at establishing a framework to regulate the virtual asset industry to protect investors and promote opportunities that virtual asset services and products present;[18] and
- the Dubai Municipality revealed, at the World Government Summit, it would create a digital twin city of the emirate in a virtual world called One Human Reality.[19]

Why should it matter to the FIRE practitioner?

There is clearly big money backing the metaverse. And with so many players looking for their piece, the fraudsters, money-launderers and opportunists are too. Indeed, they are seeing the same opportunities to scam, launder and hide assets in the metaverse, as they have already done with cryptocurrency and NFTs. They will capitalise not only on their victims' unfamiliarity with the space, but also on the lack of knowledge by professionals tasked with the identification and recovery of assets in a new and foreign landscape.

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6 Emergen Research, Market Synopsis of Metaverse Market, By Component (Hardware, Software), By Platform (Desktop, Mobile), By Offering (Virtual Platforms, Asset Marketplace, Avatars, and Financial Services), By Technology, By Application, By End-Use, and By Region Forecast to 2030 (April 2022) <https://www.emergenresearch.com/industry-report/metaverse-market>.

7 @FortniteGame (Twitter, 27 April 2020, 6.00pm) <https://twitter.com/FortniteGame/status/1254817584676929537>.

8 Charles Holmes, 'I've never played Fortnite, but was forced to attend Travis Scott's Fortnite Concert', Rolling Stone (online, 24 April 2020) <https://www.rollingstone.com/music/music-features/travis-scott-fortnite-concert-989209/>.

9 The Sandbox, 'The Snoopverse LAND sale', Medium (blog post, 1 December 2021) <https://medium.com/sandbox-game/the-snoopverse-land-sale-c01a3e99e7f7>.

10 Samantha Hissong, 'Someone spent $450,000 for 'Land' next to Snoop Dogg's NFT House', Rolling Stone (online, 7 December 2021) <https://www.rollingstone.com/culture/culture-news/sandbox-decentraland-virtual-land-sales-soar-metaverse-nfts-1267740/>.

11 J.P.Morgan, Opportunities in the metaverse (2022) <https://www.jpmorgan.com/content/dam/jpm/treasury-services/documents/opportunities-in-the-metaverse.pdf> 2.

12 Ibid 15.

13 The Sandbox, 'HSBC to become the first global financial services provider to enter The Sandbox', Medium (blog post, 16 March 2022) <https://sandboxgame.medium.com/hsbc-to-become-the-first-global-financial-services-provider-to-enter-the-sandbox-c066e4f48163>.

14 Jay Peters, 'Adidas sold more than $22 million in NFTs, but it hit a few snags along the way', The Verge (online, 18 December 2021) <https://www.theverge.com/2021/12/17/22843104/adidas-nfts-metaverse-sold-bored-ape>.

15 United States Patent and Trademark Office, Nike, Inc. (Web Page) <https://uspto.report/company/Nike-Inc#trademarks>.

16 Dubai World Trade Centre, 'Dubai's VARA becomes the world's first Regulatory Authority to enter the Metaverse' (press release, 3 May 2022) <https://www.dwtc.com/en/press/dubais-vara-becomes-the-worlds-first-regulatory-authority-to-enter-the-metaverse-2022#:~:text=VARA%20MetaHQ%20will%20serve%20as%20its%20primary%20channel,awareness%2C%20enable%20safe%20adoption%2C%20and%20drive%20global%20interoperability>.

17 Law No. 4 of 2022 (Emirate of Dubai).

18 Virtual Assets Regulatory Authority, VARA's Regulatory Objectives (Web Page) <https://www.vara.ae/en/>.

19 Anup Oommen, 'Dubai in the metaverse: Dubai Municipality to create a futuristic, virtual version of the city', Arabian Business (online, 30 March 2022) <https://www.arabianbusiness.com/industries/technology/dubai-in-the-metaverse-dubai-municipality-to-create-a-futuristic-human-centred-version-of-the-city>.

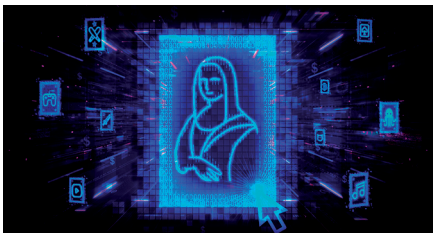
The Chancers

Unsurprisingly, there are as yet no reported decisions of individuals attempting to frustrate the enforcement of judgments and court orders by hiding or inappropriately dealing with assets in the metaverse. However, in the context of cryptocurrency itself there are.

In one case a father invested in cryptocurrency despite there being a court order restraining him from dealing with or disposing of any property owned by him or in which he had an interest.[20] When confronted over this breach, the father claimed he thought the order meant that he could not "sell a car and gamble it away, that sort of thing" and that no lawyer explained to him what the order meant.[21] The court did not accept that; it held the father was an educated, intelligent business owner and did not require the assistance of a lawyer to understand the order. "The Father", the court said, "engaged in the purchase of cryptocurrency with, at best, casual disregard for his obligations under the orders."[22]

In the author's opinion, attempts to hide assets and frustrate their rightful distribution will become more commonplace with the expansion of the metaverse. As with cryptocurrency, there will be millions, if not billions, tied up in NFTs taking the digital form of anything perceived of value on one or more of the many platforms available. It is the Chancer's hope that these types of assets will be so far off the FIRE practitioner's radar that they will be able to successfully evade it. The FIRE practitioner must ensure that they do not.

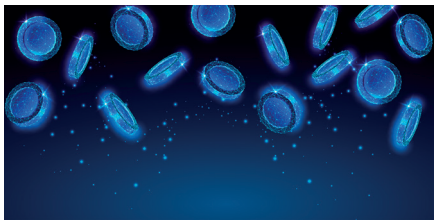
The Fakers



In November 2022, car manufacturer Porsche tweeted its concern about counterfeit NFTs being sold in their name.[23] This is not an isolated incident. Numerous big brands, either with or without a presence in the metaverse, have complained of their trademarks being infringed by alleged virtual knockoffs. In January 2022 French luxury designer Hermès sued a digital artist for creating and selling 'MetaBirkins' NFTs inspired by its famous Birkin trademark.[24] Whilst companies like Nike and Rolex are taking steps to protect their trademarks in the metaverse, where infringements do occur.

FIRE practitioners need to be familiar enough with the metaverse conceptually to enforce those trademarks effectively, ensure the delivery up/disposal of the infringing goods and recover damages or an account of profits as a result.

The Illicit Money-Makers



The metaverse is an inherently decentralised environment, and thus far a largely unregulated one. Coupled with a sense of global hype, unsuspecting participants, and total anonymity, the metaverse makes a perfect playground for cybercriminals.

- **Rug-pulls:** Also known as an 'exit scam', it involves a developer promoting a project and then abandoning it, but not before siphoning away investors' funds. Recent examples include:
- **Evolved Apes:** a project involving 10,000 unique NFTs depicting apes with various personas to participate in a blockchain fighting game. The developer, aptly named 'Evil Ape', even made a promotional video. With all the surrounding hype, the NFTs reportedly sold out in 10 minutes. Evil Ape then disappeared with the equivalent of USD2.7 million that was intended to fund the project;[25] and
- Squid: capitalising on the global popularity of the Netflix series Squid Game, developers marketed a cryptocurrency token called 'Squid' for use in an online game (ostensibly 'under development') inspired by the series. Like many of its contestants, the scheme died quickly, but not before USD3.38 million disappeared with it.[26]
- **Ponzi schemes:** The Ponzi scheme achieves the same end but maintains the illusion of legitimacy for much longer. Ginko Financial, an unregulated virtual investment bank in Second Life, promised investors returns exceeding 40% funded ostensibly by undisclosed investments. Following its collapse in 2007, investors lost the equivalent of USD740,000.[27]

20 Powell & Christensen [2020] FamCA 944 [272]-[275].

21 Ibid [276].

22 Ibid.

23 @Porsche (Twitter, 7 November 2022, 10.41pm) <https://twitter.com/Porsche/status/1589749815688146945>.

24 Complaint, United States District Court Southern District of New York, Hermes v Rothschild <https://www.schwimmerlegal.com/wp-content/uploads/sites/833/2022/01/sdny-hermes-v-rothschild-complaint.pdf>.

25 Ekin Genç, 'Investors Spent Millions on 'Evolved Aped' NFTS. Then They Got Scammed.', Vice (online, 5 October 2021) <https://www.vice.com/en/article/y3dyem/investors-spent-millions-on-evolved-apes-nfts-then-they-got-scammed>.

26 'Squid Game crypto token collapses in apparent scam', BBC News (online, 2 November 2021) <https://www.bbc.com/news/business-59129466>.

27 Pixeleen Mistral, 'Ginko Financial's End-Game', The Alphaville Herald (blog post, 6 August 2007) < http://alphavilleherald.com/2007/08/ginko-financial-2.html>.

Account takeovers: Whilst the blockchain underlying the metaverse is itself inviolable, their users' accounts and digital wallets are not. No matter how good a platform's security features are, they will be useless if users are careless with their data or fall for conventional phishing attacks. According to a recent report, account takeover fraud increased by 90% from 2020, to USD11.4 billion, in 2021.[28] With the global metaverse industry projected to grow to USD1.6 trillion by 2030,[29] these unhappy statistics may continue to rise.

Money laundering: The metaverse, like the real world, has its own economy, populated by businesses and consumers buying and selling assets, goods and services. However, unlike the real world, the predominant medium of exchange within the metaverse is cryptocurrency. Its decentralised nature means there is no central authority to intercept and prevent transfers, making it relatively easy to move large amounts of capital across jurisdictions quickly, without scrutiny. It can also be almost impossible to identify the individuals concerned or the provenance of the funds, especially if the account being used to launder was taken over fraudulently. For these reasons, money launderers will be attracted to washing dirty money via the metaverse.

Conclusion

The metaverse is still in its infancy. How it shall ultimately take shape is yet to be seen. And whilst many aspects of the metaverse remain undeveloped and beyond many people's comprehension, it is abundantly clear that FIRE Practitioners will not be able to escape its effects in their future practice. From the one-off chancers attempting to misapply and hide their assets, to the sophisticated fraudsters and cybercriminals dealing with tainted or misappropriated assets, FIRE Practitioners will have to, at some point, interact with this expanding technology. Until then, we would be wise to learn as much about it as possible to eliminate the inevitable blind spots if we are to successfully investigate, enforce and ultimately recover assets or their value for our clients.

28 Karen Hoffman, 'Identity fraud skyrockets as hackers stick to pre-pandemic techniques', (online, 6 April 2022) <https://www.scmagazine.com/analysis/identity-and-access/identity-fraud-skyrockets-as-hackers-stick-to-pre-pandemic-techniques>.

29 Emergen Research (n 6).

Communities

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A unique community connecting practitioners from both Competition Law and Litigation.

CRYPTO AND GLOBAL TRACING ENFORCEMENT: LIFTING JURISDICTIONAL WALLS

Authored by: Maria Eduarda Moog, Professional Support Lawyer at Ogier (Cayman Islands)

Initial considerations

The challenge of this essay was well set: to focus onto some serious crystal-ball gazing in order to predict what types of cases will the FIRE practitioner of the future be working on in 2033. Since I am no magician, I though the best way to predict future events was to use historical data, as arguably suggested by the mathematical model of predictive analytics. Therefore, in an attempt to accomplish this not so easy mission, this brief article will examine the international law and global tracing enforcement developments in two different decades (2003 and 2023), in order to predict what 2033 holds.

Our guess? A legal system without walls.

2003: formalism and territorialism in national jurisdictions

It is 2003, Switzerland requested, through letter rogatory,[1] the assistance of the Brazilian judiciary to allow them investigate allegations of trafficking of women by a criminal organisation operating in Brazil. The Swiss authorities requested information regarding accounts held with Brazilian banks and that the assets of the criminal organisations to be frozen to prevent the continued operation of the organisation pending those investigations.

Notwithstanding the important subject matter of the investigation, the Brazilian Supreme Court decided that letters rogatory could not be used to disclose legally protected information such as bank accounts, except if there was specific provision in an international treaty or a final judicial decision compelling their disclosure.[2]

By denying judicial assistance in favour of territorialism and showing little concern for the solution of global issues which international cooperation demands, the Brazilian courts prevented the completion of the investigations.

Like in Brazil, English courts have also shown a territorialist approach when dealing with evidence tracing mechanisms and enforcement tracing. An example is the decision in R (Omar) v Secretary of State for Foreign and Commonwealth Affairs [2013] 1 All E.R. 161.

In Omar, three claimants had been indicted before the International Crimes Division of the Ugandan High Court on charges of terrorism, murder and other offences. The claimants petitioned the Ugandan Constitutional Court claiming

1 Letters Rogatory usually travel through diplomatic channels and deal with formal requests from one jurisdiction to another in order to serve a defendant and/or obtain evidence both in civil and criminal matters.

2 DIPP, Gilson. A cooperação jurídica internacional e o Superior Tribunal de Justiça: comentários à Resolução n. 9/05 in Manual de cooperação jurídica internacional e recuperação de ativos : cooperação em matéria civil / Secretaria Nacional de Justiça, Departamento de Recuperação de Ativos e Cooperação Jurídica Internacional (DRCI). – 3. ed. Brasília : Ministério da Justiça, 2012, p. 28/29.

that their prosecution was an abuse of process and unconstitutional, alleging that they had been unlawfully rendered from Kenya to Uganda and that they had been tortured. The claimants began proceedings in the United Kingdom seeking information and evidence for use in the Ugandan proceedings from the Secretary of State for Foreign Affairs on Norwich Pharmacal[3] principles alleging that United Kingdom intelligence officers had been mixed up in the rendition and ill-treatment and sought evidence regarding that alleged wrongdoing.

In Ramilos Trading Ltd v Buyanovsky [2016] EWHC 3175 (Comm), the English court considered a wide-ranging application for a Norwich Pharmacal order and, in particular, whether the statutory regime set out in the Evidence (Proceedings in Other Jurisdictions) Act 1975 excluded the Norwich Pharmacal jurisdiction in relation to foreign civil proceedings. Applying Omar and the exclusive statutory argument,[4] Norwich Pharmacal relief was again refused as the evidence sought was in connection with foreign civil proceedings.

Likewise Brazil, England also created national statutory exclusivity arguments that ended up preventing global cooperation. Examples from excess of territorialism and formalism towards global cooperation with regards to evidence gathering, asset tracing and enforcing mechanism are however not limited to those above.

The applicability of Free Standing Mareva Injunctions[5] is also debatable. A landmark trio of English decisions: Siskina v Distos Compania Naviera SA [1979] A.C. 210, Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] A.C. 334 and Mercedes Benz AG v Leiduck [1996] 1 A.C. 284 held that courts can only issue Mareva injunctions against defendants over whom they have personal jurisdiction. This rule rejects free-standing Mareva injunctions, which are issued in aid of foreign proceedings whose merits the court cannot adjudicate upon. Again, it was used the national statutory exclusivity arguments in key fraud and asset tracing instruments to arguably prevent access to justice.

2023: technology revolution and global community cooperation

By 2023, the world had developed rapidly and was more globalised than ever was. Internet is inexpensive and widely accessible by a substantial portion of the world's population. News travel fast - and so does money and assets. With the increase of globalisation and the interconnectedness of financial markets, banking transactions can be done in the palm of the hand.

And as the digital world grows, "private money is back." [6]

With the rapid and intense internet spread, an alternative form of online payment was created by private parties using encryption algorithms: the cryptocurrency. Afterall, a dollar bill is a piece of paper that was given value just as much as crypto is just an algorithm that some have accepted as a currency.[7]

The right to mint money – one of the defining powers of a nation and that was formerly in the hands of national banks – is now not so exclusive. Notwithstanding the multiple great possibilities that comes with private monies, because cryptocurrencies don't need banks or any other third party to regulate them; they tend to be uninsured and sometimes hard to convert into a form of tangible currency. In addition, since cryptocurrencies are technology-based intangible assets, they can be hacked like any other digital asset and susceptible to the commission of fraud.[8]

In recent years, the law has tried to catch up with technological developments in order to improve global asset tracing and fraud prevention.

In Brazil, the letters rogatory jurisprudence became more cooperative towards global tracing enforcements.[9] In effect from October 2022, the English Civil Procedure Rules Practice Direction 6B paragraph 25[10] provided a new service gateway that will hopefully expand the applicability of the Norwich Pharmacal relief in aid of foreign proceedings already commenced. Many commonwealth countries have followed what was said by Lord Nicholls of Birkenhead in his dissenting judgment in Mercedes Benz and accepted the grant of free-standing Mareva injunctions as an effort "made by courts to prevent the legal process being defeated by the

3 Norwich Pharmacal Relief is an English judicial remedy originated from the case Norwich Pharmacal Co v Commissioners of Customs & Excise ([1974] A.C. at 175) that aids litigators to answer key pre-action questions when there is a suspicion of fraud or wrongdoing. Through the Norwich Pharmacal Relief, the Court can order discovery against a person that, innocently or not, might be responsible by the alleged wrongdoing. Notwithstanding the fact that the defendant in a Norwich Pharmacal Relief might not be the responsible party to a wrongdoing, they have the duty to assist the victim in obtaining information about the wrongdoers.
Through a Norwich Pharmacal Relief, it is possible to determined (i) who to sue; (ii) where to sue; and (iii) whether suing is worthwhile. A Norwich Pharmacal relief, therefore, is available against non-cause of action parties, as pre-action relief and in aid of post-action enforcement. It is available not only to identify defendants and/or the whereabouts of assets but also to provide "the missing piece of the jigsaw) necessary to perfect the primary cause of action" (Ramilos, paragrapf 35). It is available where the alleged primary wrongdoing is a crime, tort, breach of contract, equitable wrong, contempt of court or actionable anti-avoidance.

4 First made by Lord Diplock in Rio Tinto Zinc Corporation v Westinghouse Electric Corporation [1978] AC 547. In the occacion, it was said that "The jurisdiction of English courts to order persons within its jurisdiction to provide oral or documentary evidence in aid of proceedings in foreign courts has always been exclusively statutory".

5 A Mareva injunction, so named after the English case named Mareva Compania Naviera SA v International Bulk Carriers SA (1980) 1 All ER 213 which recognised the court's jurisdiction to grant such relief. "Such injunctions have the effect of restraining a wrongdoer from removing, disposing of or otherwise dealing with their assets whether within or without the jurisdiction of the court. Mareva injunctions will be granted in respect of assets sufficient to satisfy an anticipated or existing judgment. This type of injunction seeks to restrain the disposal of assets where the plaintiff claims to be the true owner of those assets and wishes to preserve those assets intact until the court has determined the question of ownership. It is invariably necessary for those advising a defrauded company to consider both types of injunctive relief." (DUCKWORTH, Charles Adams Ritchie &, COLLIER, David W, International Fraud & Asset Tracing 2015 (Sweet & Maxwell International Series), 2019, Thomson Reuters). A free-standing Mareva injunctions are freezing orders to preserve assets in aid of foreign proceedings.

6 Alan Greespan, former chairman of the United States Federal Reserve, in a speech held in 1996 about technical revolution has affirmed that "technical revolution could bring back private money, which might be a good thing".

7 In the words of Nathaniel Popper "The essential quality of successful money, through time, was not who issued it—or even how portable or durable it was—but rather the number of people willing to use it." (Digital Gold: Bitcoin and the Inside Story of the Misfits and Millionaires Trying to Reinvent Money, Harper Paperbacks; Reprint edition (May 24, 2016)).

8 OSWEGO State University of New York, The Basics about Cryptocurrency.

9 The change came with the new Constitutional Regulation n. 45 of 2004 that determined that Letters Rogatory should be heard by the Superior Court of Justice and not the Federal Court of Justice. The new Court has then changed the previous jurisprudence in order to be more cooperative and less formalist when ruling letters rogatory.

10 English Civil Procedure Rules Practice Direction 6B paragraph 25: "A claim or application is made for disclosure in order to obtain information –(a)regarding:(i)the true identity or a defendant or a potential defendant; and/or
(ii)What has become of the property of a claimant or applicant; and
(b)the claim or application is made for the purposes of proceedings already commenced or which, subject to the content of the information received are intended to be commenced either by service in England and Wales or pursuant to CPR 6.32, 6.33 or 6.36".

ease and speed with which money and other assets can now be moved from country to country."[11]

In addition, countries and their regulators around the world have made an attempt to engage in international treaties and memorandums of cooperation, such, to name a few, the 2019 Hague Judgements Convention[12], the Egmont Group[13], and the International Organization of Securities Commissions (IOSCO)[14].

Fortunately, countries seem to be easing their formalism and terriorialism barriers in favour of combating fraud, tracing enforcement and dealing with multijurisdictional matters. On this note, the Plexcoin case[15] in the United States is a good example of the successful participation of multiple jurisdictions in providing evidence against cryptocurrency fraudsters.[16]

2033: One Global Court

The year is 2033, cryptocurrencies are widely accepted and the vast majority commercial transactions across the world are made online. The increase of non-bank intermediation activities have grown and artificial intelligence is being used for multiple purposes. There is a huge fragmentation in securities and derivatives markets and national governments are having difficulty in regulating all the new technologies and financial activities. Companies are easily setup across the globe, and because the internet does not require a specific geographical location for transactions to be made, forum-shopping and cases involving multijurisdictional matters have increased drastically - and so to the constant communication/assistance between courts and regulatory bodies in order to gather evidence.

Due to the lack of geographical barriers in the internet, fast transactions speed and the increase of private and diverse financial activities, opportunities were created for fraudsters who either sought to mislead investors into bad/non-existent assets or to money laundry illicit financial resources with the new multiple cryptocurrencies and securities.

In order to combat fraudsters in an effective manner, government authorities have decided to waive part of its single jurisdictional powers in favour of a global court with the power to make orders, deliver and enforce judgements and create global precedents with regards to cases involving multiple jurisdictions.

The international treaty signed in order to create this global court was consistent with the international law principles, which are "rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations, with such definitions and modifications as may be established by general consent".[17]

This global court – composed by judges from multiple jurisdictions and backgrounds – is a step further in international law, although in many ways not so different than what already exists in Europe with the Court of Justice of the European Union (CJEU). The global court, unlike the CJEU, should not be a revision court, but a first instance and appeal court with general powers to act in cases where multiple jurisdictions are involved.

As in the CJEU, judges from both civil law and common law countries sit together in order to deliberate the correct law. In fact, globalisation has already directly affected law. Common law countries – that traditionally deferred to customary law and had the law making process typically via court precedents – have slowly introduced statutory law that needs to be followed by the courts. Similarly, civil law countries, whose law is mainly statutory, have been increasingly growing the power and force of case law precedents as rule making instruments.

With globalisation and international trades more common than ever, contracts are also becoming more standard and so is the legal thinking, all of which paves the perfect scenario for a successful global, multidisciplinary and diverse court, that could lead to much more efficiency in the hearing and determination of multi-jurisdictional

11 The Royal Court of Jersey in Solvalub Limited v Match Investments Limited [1996] JLR 361, ruled that the Court had power to grant a Mareva Injunction in aid of a foreign procedure. In the occasion, Sir Godfray Le Quesne K.C. said: "In my judgment it is within the power of the Royal Court to grant a Mareva injunction in aid of proceedings in a foreign court and to do that in proceedings here in which no relief other than the grant of the Mareva injunction is sought." The Royal Court has raised that this power should be appropriate for a finacial center such as Jersey: "If the Royal Court were to adopt the position that it was not willing to lend its aid to courts of other countries by temporarily freezing the assets of defendants sued in those other countries, that in my judgment would amount to a serious breach of the duty of comity which courts in different jurisdictions owe to each other. Not only so, but the consequence of such an attitude would be that Jersey would quickly become known as a safe haven for persons wishing to evade liabilities imposed on them by the courts to which they are subject. This is exactly the reputation which any financial centre strives to avoid and Jersey so far has avoided with success." (Solvalub Limited v Match Investments Limited [1996] JLR 361).
Also Hong Kong, after legislative reforms, started to authorize the granting of Mareva Injunctions in aid of foreign proceedings if: (a) the subject matter of those proceedings would not give rise to a cause of action over which the Court of First Instance would have jurisdiction; or (b) the appointment of the receiver or the interim relief sought is not ancillary or incidental to any proceedings in Hong Kong. (Section 21M of the High Court Ordinance (Cap. 4).).

12 The Hague Judgments Convention was a significant milestone in improving the international enforceability of commercial court judgments as 'an apex stone for global efforts to improve real and effective access to justice' with the goal to fill 'an important gap in the landscape of private international law'.

13 The Egmont Group is a united body of 166 Financial Intelligence Units (FIUs): FIUs are uniquely positioned to support national and international efforts to counter-terrorist financing. FIUs are also trusted gateways for sharing financial information domestically and internationally per global anti-money laundering and counter-financing of terrorism (AML/CFT) standards.

14 The International Organization of Securities Commissions (IOSCO), for example – which its Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (MMoU) currently holds 128 signatories, have approved the Enhanced MMou (EMMoU) with additional tools to meet the challenges of combating financial misconduct in an increasingly complex, interconnected and technology-driven global financial market. Under the EMMoU's framework for mutual assistance and exchange of information, securities regulators can obtain and share audit working papers, telephone and internet records, compel attendance at interviews and provide guidance on freezing of assets, being a very important evidence gathering tool for fraud and asset tracing purpose. In February 2021, the Board published its 2021-2022 Work Program, which calls on IOSCO to work on eight priorities that included crypto-assets, artificial Intelligence and machine learning.

15 SEC v. PlexCorps, Dominic LaCroix, and Sabrina Paradis-Royer Case No. 17-cv-7007 (CBA) (RML) (E.D.N.Y.). In this case, the Cyber Unit of the United States Securities and Exchange Commission (SEC) filed a case against Quebec-based defendants that were conducting Initial Coin Offerings (ICO). In 2017, two Quebec citizens raised over $15 million soliciting funds from investors for their ICO of Plexcoin through misleading statements. Funds raised from investors were deposited into accounts in the U.S. and Canada. Both SEC and Quebec Autorité des Marches Financiers.alleged that Plexcoins were securities under the applicable standard and therefore Plexcoin should have been registered with the regulators or be exempted registration in both jurisdictions and that defendants' misstatements to investors were unlawful.

16 According to SEC, over eleven jurisdictions were involved. PlexCorps, Dominic Lacroix, and Sabrina Paradis-Royer (Release No. LR-24635; Oct. 2, 2019) (sec.gov) (accessed in 20 November 2022).

17 Wheaton, International Law, pt. 1, chap. 1, secs, 4, 14.

cases such as the ones that usually involve fraud, asset tracing, insolvency and asset recovery in this world of rapid economic change.

In order to respond to new global changes, future practitioners will also have to be multidisciplinary and have a wider knowledge of international law and legal backgrounds as to better understand different legal processes that will, ultimately, form one global legal process.

Conclusion

Not too long ago, national courts tended to be extremely formalist and territorialist towards global tracing cooperation and letters rogatory would often have its objective frustrated by responses lost in the time of bureaucracy or in the interjurisdictional lack of confidence. By 2023, some of the old formal technical requirements have been overcome in favour of more effective judicial assistance and nations and governmental organizations were more keen and open to join international treaties. In 2033, with the vast increase of digital transactions and digital monies, national courts will not suffice to follow the speed of money and cyber operations, reason why a global court should be established to hear multi-jurisdictional cases in a prompt and efficient manner.

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