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Disputes MAGAZINE

ISSUE 9

SUMMER EDITION: WHERE LEGAL STRATEGY MEETS CHESSBOARD PRECISION

INTRODUCTION

""In early June the world of leaf and blade and flowers explode, and every sunset is different."

- John Steinbeck

We are delighted to present Issue 9 of Disputes Magazine, which is jam-packed full of the latest insights and discussions in the dispute resolution area. In this issue, we have a special supplement by **Bond Solon**, one of the UK's largest providers of Witness Familiarisation training who explore a variety of topics including sourcing and vetting expert witnesses, litigation in the metaverse, and more. This issue also includes chapters on India, following our India Dispute Resolution Forum, Crypto & Digital Assets ahead of our Crypto in Disputes Conference at the end of June, along with Corporate Disputes, and Arbitration.

Thank you to all our members, contributors, and community partners for their ongoing support.

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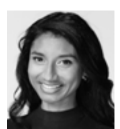

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Upcoming Events

Event	Date
Crypto in Disputes	28th Jun 2023
International Arbitration and Enforcement: A Changing Landscape	4th Oct 2023
Group Litigation and Class Actions	10th - 11th Oct 2023
Corporate Disputes	10th - 11th Oct 2023
India Dispute Resolution Forum - Mumbai	Nov 2023
	1st - 2nd Dec 2023

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Witness evidence can make or break a case. Give your clients the support they need to mitigate the risk of a poor performance at court.

Bond Solon's team of specialists are experts in understanding the specific requirements of a case. Over the last 30 years, our essential pre-hearing service has helped over 250,000 witnesses achieve a positive outcome at the hearing stage.

Working with our clients, we create bespoke training and interactive workshops that will build witness confidence - allowing them to perform at their very best, taking chance out of the equation.

Find out how we can help you to secure a positive outcome.

bondsolon.com/witness-familiarisation

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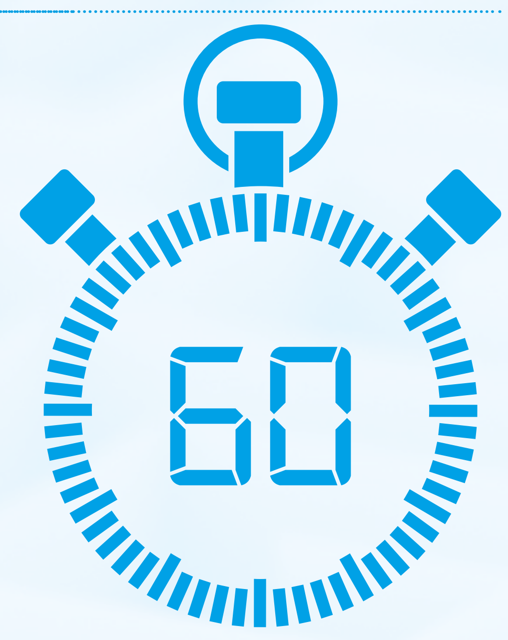
60-SECONDS WITH:

CLAIRE JACOBS
BARRISTER AND BOND SOLON TRAINER



Q **Imagine you no longer have to work. How would you spend your weekdays?**

A In no particular order, gardening, studying, volunteering. Oh, and taking some fabulous holidays!

Q **What do you see as the most important thing about your job?**

A Helping to give witnesses knowledge, understanding and confidence.

Q **What motivates you most about your work?**

A Keeping my brain stimulated, meeting different people, helping people.

Q **What is one work related goal you would like to achieve in the next five years?**

A I would like to do some more pro bono Witness Familiarisation work.

Q **What has been the best piece of advice you have been given in your career?**

A 'Be directive' - (Mark Solon) In other words, when working with a group of people - don't ask for volunteers just tell people what they are being volunteered for!

Q **What is the most significant trend in your practice today?**

A Virtual platforms have given us the ability to be more flexible in how we deliver training. Since Covid, there is less demand for international travel due to effective virtual training platforms.

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

A In the law, my late father, Philip Jacobs; my husband, Robin Hilton; and my ex-head of chambers, the late Nicholas Jarman QC. At Bond Solon, Mark Solon.

Q **What is one important skill that you think everyone should have?**

A To listen.

Q **What cause are you passionate about?**

A Nature.

Q **Where has been your favourite holiday destination and why?**

A They're all my favourite!

Q **Dead or alive, which famous person would you most like to have dinner with, and why?**

A Moses - for all the obvious reasons.

WITNESS FAMILIARISATION:

AN INTRODUCTION

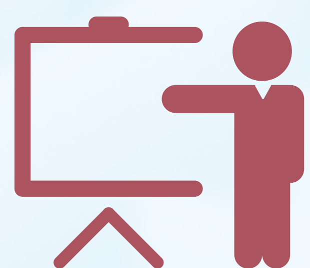
Authored by: Bond Solon

Being a witness is a daunting experience. Not only does it often involve the shock of receiving summons about a historic incident or event but also the prospect of giving evidence in the unfamiliar setting of a formal court room or arbitration — and therefore, having to relive the event itself — which can take its toll on anyone.

It is important to remember that while your clients might be leaders in their field of expertise – directors of multi-million-pound companies, esteemed scientists, or even sports professionals, it is likely that they have never entered a courtroom before. Yet, they will be expected to attend a hearing where they will face cross-examination by an experienced Barrister or KC, despite having little understanding of court room protocol.

In addition to this, witnesses risk falling foul to leading questions or intimidating cross-examination techniques. If not appropriately prepared, even a confident and astute witness can become flustered or angered and fall for opposing counsel's tactics. This has the potential to not only undermine their evidence, but also have a detrimental impact your client's case.

This is where witness familiarisation comes in.



What is Witness Familiarisation?

Witness Familiarisation is training undertaken by witnesses due to give evidence in any type of hearing. The primary goal of witness familiarisation training is to mitigate legal risks by ensuring witnesses are aware of the theory, practice, and procedure of giving evidence, as well as giving them an insight into what is expected of them throughout the hearing stage of a case. The session will prepare witnesses on how to give clear, relevant and honest testimony; thus, preventing a poor performance, which could result in undermining a case.

Witness familiarisation is not only offered to lay witnesses (witnesses of fact) but can also benefit expert witnesses as well.

Who is Bond Solon?

Bond Solon is one of the UK's largest independent providers of Witness Familiarisation training. Since 1992, our extensive pool of experienced lawyer trainers – covering the full spectrum of practice areas – have worked with over 250,000 witnesses. Witnesses gain the knowledge and skills required to give pertinent evidence, delivered with confidence.

The benefits of the training we provide is evidenced by the high percentage of repeat users of the service. Our clients include the top 100 UK law

firms (including all of the Magic Circle), international legal practices, corporate and public bodies.

We provide training, support, and guidance on a global basis for anyone who is facing the prospect of being cross-examined or questioned in any type of legal forum, regulatory hearing, meeting or interview.

How does Bond Solon's Witness Familiarisation training work?

Our Witness Familiarisation training demystifies the process of giving evidence and explains the techniques cross-examining lawyers use to disconcert and discredit witnesses. It also incorporates some practical experience of cross-examination in a mock-hearing to enable witnesses to build confidence and receive feedback on their performance.

Training can be virtual or face to face and is designed and delivered by professional trainers, who have all undergone a strict vetting process. At least 15 years of legal practice experience of a wide variety of disputes and legal forums is essential, as well solid experience working with different types of witnesses, from individuals going through divorce, to CEOs of multinational companies. This enables our trainers to seamlessly tailor the sessions to fit any case strategy, and the specific requirements of each witness (for example, the legal forum they are giving evidence in, their key character traits and any concerns they may have).

As witness coaching is prohibited, our trainers will never prepare witnesses on what they should say or attempt to persuade the witness into changing their evidence. Instead, the sessions focus on providing witnesses with the skills they need to give an honest and objective account of their evidence at the hearing stage. They cross-examine witnesses using material unrelated to the facts and issues at hand, such as a case study or on a personal scenario or opinion. The case studies are designed to highlight common techniques, and help witnesses get familiar with referring to their statement and supporting documents.

Let's hear from some of our clients (and witnesses)!

"The Bond Solon team were excellent and played an integral role in our preparation for trial, enabling the witnesses to give their evidence in the most effective way. The trainer was worth his weight in gold."
(Richard Twomey, Partner, DWF)

"The training given by Bond Solon was vital for our witnesses who were giving evidence for the first time. It transformed even the most nervous and reluctant individual into a calm, clear and measured witness, even under extraordinary pressure in cross-examination. I have no doubt that the training vastly improved the weight given to her evidence."
(Andrew Burnette, Partner, Burges Salmon LLP)

"Really good course, well run. The trainer was very good, perhaps more aggressive than I expected and perhaps more critical too. But I can see why, and I feel much better from having those weaknesses exposed now rather than later."
(Witness, Client: OFGEM)

"Without having any experience in providing evidence or being cross examined before, I now feel more confident and less anxious about doing so at a forthcoming hearing."
(Witness, Client: Addleshaw Goddard LLP)

"This course was very informative and has certainly quashed a lot of my anxiety about appearing in court around the types of questions I could be asked and how to respond. It has also provided valuable information on what I need to do in preparation for attending court and how to address people. The cross-examination section allows you to try out the things you have just learned and get feedback which is very helpful."
(Witness, Client: APHA)

SOURCING AND VETTING AN EXPERT WITNESS

Authored by: Bond Solon

As every litigator will confirm, expert witnesses are often the most critical witnesses in a courtroom, with the ability to make or break a client's case. In fact, an expert witness retained even before litigation has begun (in the pre-action stage of a dispute) can provide litigators with invaluable insight as to whether a case has merit and is, therefore, worthy of pursuing (or defending) in court. This is carried out in the procuring of a brief advisory report or screening report.

The gravitas that expert witnesses bring to court cases must never be underestimated.

Litigators should therefore treat the task of instructing experts with the upmost care. This includes identifying, as early as possible, whether an expert witness is needed in the case but also the process of vetting and selecting an expert.

Failure in due diligence can not only collapse a case but it can also prove costly – see the 2019 carbon credits trial, where the expert witness was found to lack basic training, qualifications, and expertise, and had no understanding of his responsibilities and duties as an expert witness. The judge in this case criticised the instructing parties liable for their failure in conducting due diligence. This highlights the fact that it is the responsibility of the instructing parties — as well as the expert— to verify that they are giving evidence within the remit of their expertise.

While most established litigators and firms will hold their own trusted list of expert witnesses, there will be times where a more niche expertise is required.

We've set out below the key stages of expert due diligence that instructing solicitors should be aware of as part of their decision-making process.

Verify qualifications (as much as possible)

Conducting background checks can be both laborious and time-consuming, particularly if you are verifying the training and professional development of an experienced professional.

However, this stage in the process should never be compromised, even for an expert you have used previously or one who has been recommended to you by a colleague. You never know what your new searches might uncover. A disciplinary action? A lapsed practice certificate? It is always preferable to find this out yourself than have it revealed to you by your opponent at trial.

Check professional registration(s)

There are countless professional regulating bodies, all attached to a specific profession or professions. Expert witnesses should be registered with their respective professional body, and some will even be registered with multiple regulating bodies. It is a red flag if an expert witness you are looking to instruct is not registered with their respective professional body or has not renewed their membership, so do ensure you check the register(s) as part of the vetting process.

Analyse their field of expertise

This part of the vetting process differs from the first step, which purely looks at an expert's professional development. It is not only important to verify that the expert holds the qualifications that he or she claims to hold but also that the expert has the requisite expertise you require for your client's case. Depending on how niche, or complex the case, this could well be the most difficult stage of the vetting process, and one that even experts might find difficult to prove.

One crucial way you can verify this is by looking at the experts who were instructed on past cases with similar facts or matters in dispute. Another is to find experts who have published articles or research papers in the relevant field of expertise.

Look beyond the CV

Qualifications and expertise will only get you so far. When looking for an expert, try to find one with the full package – someone who not only looks good on paper, but has years of practical experience under their belt as well.

Character is of prime importance and communication skills are key. The last thing you want is to find the perfect expert on paper but then have it all fall apart when they fail to deliver in conference with counsel. Before formally instructing an expert witness, arrange a preliminary meeting or interview (in person or via video call) so you can gauge how they might come across in the courtroom. Keep an eye out for red flags – for example, agreeable experts or those who might easily become defensive or flustered during cross-examination. Speak to colleagues or contacts who instructed them previously and ask for honest feedback about their performance on the stand.

Assess and critique any expert witness experience to date. Find out whether they have undertaken any expert witness training. Another quick and easy way of ensuring they are aware of their responsibilities and duties is to choose an expert who is registered on a professional accredited register. Bond Solon's National Register is an exclusive online list of expert witnesses who have been awarded the highly regarded Cardiff University Bond Solon (CUBS) and/or University of Aberdeen Bolon Solon (UABS) Expert Witness Certificates, and are committed to completing 6 hours of expert witness continuing professional development every two years.

Reputation

The conduct of expert witnesses is taken very seriously by the court. Court judgments will often refer to an expert witness by name, as well as providing commentary around their performance.

It is prudent to search court judgments when either searching for an expert or as a final check before instructing one.

Expert Witness Checklist

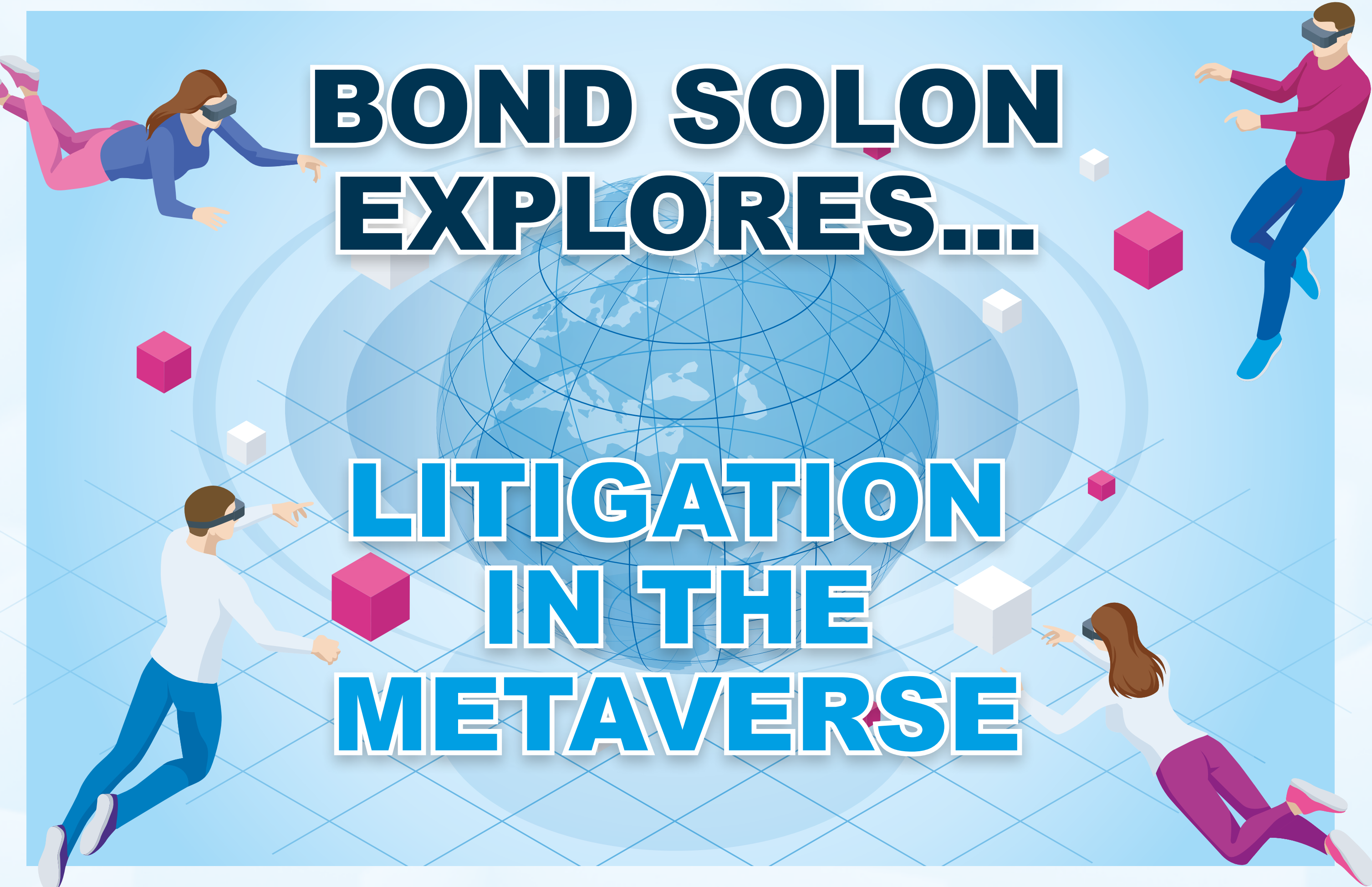
- ✔ Do you need an expert witness in order to prove your client's case or dispute an element of a claimant's case?
- ✔ Have you conducted thorough identity and background checks on the expert witness?
- ✔ Does the expert witness have the requisite expertise you need for your client's case?
- ✔ Does the expert witness have sufficient practical experience?
- ✔ Have you conducted an informal interview with the expert witness? Has this brought up any red flags?
- ✔ Is the expert witness aware of their responsibilities and duties under law? Can they evidence this with practical experience/professional training?
- ✔ Are there any issues of negative conduct/reputation?

Conclusion

The search for an expert should begin as soon as possible after a client approaches you with a case that will require expert evidence.

As we've explored above, finding the best expert for your client's case and vetting said expert will often involve much more than flicking through a few CV's or choosing a name from a pre-approved list.

Giving yourself the luxury of time, and the benefit of thorough research, will ensure that you have fulfilled your professional obligation to your clients as well as your professional duties to the court.



Q&A with: Sarah Malik, CEO and Founder, and Swetha Sivaram, Associate at SOL International Ltd.

The metaverse is undoubtedly the future of the internet. Although its development is still very much at a nascent stage, the legal industry is already seeing the impact of metaverse technologies and artificial intelligence. Virtual offices are being set up in the in the metaverse. Disputes are being litigated in the metaverse. Disputes are arising out of complications in the metaverse. Whether they like it or not, law firms and international organisations must learn how to adapt to and navigate this changing landscape.

Bond Solon sat down with CEO and Founder, Sarah Malik and Associate, Swetha Sivaram of renowned global law firm, SOL International Ltd to discuss the benefits and challenges of litigating in the metaverse, the impact that this is likely to have on witnesses giving evidence and what global trends we are likely to see in the latter half of this year.

1 Law 360 recently reported that we are going to see a ''huge wave of litigation'' in the metaverse, particularly in the areas of IP and data privacy. What, in your opinion are the reasons for this shift? What types of disputes have we seen, and will continue to see litigated in the metaverse?

The metaverse is a virtual world/a 3D version of the internet where people can engage in a virtual wide range of activities, including socialising, gaming, and shopping. The metaverse market was valued at USD 68.49 billion in 2022 and is estimated to surpass USD 1.3 trillion by 2030. As the metaverse continues to grow in popularity and complexity, it has become an increasingly important area of focus for legal issues, particularly in the areas of intellectual property (IP) and data privacy.

One of the main reasons for the shift towards litigation in the metaverse is the increasing commercialisation of virtual worlds. With more businesses and leading household names entering the metaverse, the potential for IP disputes has grown. Companies may claim that their trademarks or copyright materials are being used without permission in virtual environments. Similarly, disputes will arise over ownership of virtual goods and assets.

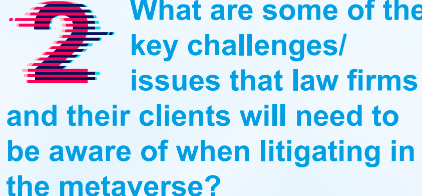
Another factor driving the rise of litigation in the metaverse is the growing concern around data privacy. As people spend more time in virtual worlds and personal information is shared, there is naturally an increased risk of cybersecurity and data breaches, as well as other privacy violations. Virtual

environments collect personal data such as IP addresses and location data, purchases made by users and social media conversations with other individuals. These are then used for targeted advertising or other purposes without the user's consent.

Also, with sports teams building digital arenas in the metaverse, broadcasting rights will become an issue that is likely to be litigated over.

Some of the disputes we have seen litigated in the metaverse include cases related to trademark and copyright infringement, virtual property ownership, and fraud. We have seen cases involving NFTs in the metaverse such as the Meta-Birkin, Nike vs. StockX and Miramax LLC vs Tarantino. These are IP related issues and have been litigated in Courts. At some stage litigation could regularly take place within the metaverse itself once the metaverse becomes a more sophisticated environment with its own laws and own legal systems.

We are likely to see increased litigation, including disputes over virtual currency and payments, online harassment and cyberbullying, and the use of artificial intelligence in virtual worlds. To minimise the risk of legal issues, companies functioning within the metaverse will need to carefully consider the legal implications of their actions and take steps to protect their IP and user data. This thought process will take place in line with an evolving legal landscape, which will be tailored to cater for the issues that are arising and are likely to arise in a virtual world.



2 What are some of the key challenges/ issues that law firms and their clients will need to be aware of when litigating in the metaverse?

Litigating in the metaverse presents various unique challenges and issues that law firms and their clients will need to be aware of. Some of the key challenges include:

1. **Jurisdictional issues:** The metaverse is a fluid environment that transcends borders, law, and geography. As the metaverse exists beyond physical borders, determining jurisdiction will be challenging and there are no clear-cut answers. Where parties are located in different countries, governing laws and jurisdiction will become an issue as well as where any potential dispute will take place, whether in the real or virtual world. It is likely that users of the metaverse will prefer expedient resolution of disputes within the metaverse, which will be seen to be easier and faster than disputes arising in the real world with more complex and longer procedures.
2. **Technical complexity:** Litigating in the metaverse often involves technical issues, such as analysing code and digital evidence, which will require specialised knowledge and expertise. Lawyers and judges will need to be able to understand and work with AI and virtual worlds.
3. **Difficulty in collecting evidence:** In the virtual environment, evidence is stored in multiple locations and in various formats, making it difficult to collect and preserve. Additionally, evidence can be easily manipulated, hacked into, or destroyed in virtual worlds, which will necessarily complicate any discovery process.
4. **Data Privacy concerns:** Privacy concerns in the metaverse are significant. Law firms and their clients will need to be aware of how data is being collected and stored. Clients will also need to take additional steps to protect user data, such as implementing more stringent privacy policies and protocols. There could be a scenario where a defendant hacks into the claimant/plaintiff's headset and could therefore follow their movements and conversations, possibly even thoughts.
5. **Emerging legal frameworks:** As the metaverse continues to grow and evolve, legal frameworks are still emerging. Therefore, there will not be clear precedents or case law for many legal issues. This uncertainty will make litigation more challenging. Lawyers and judges will need to interpret existing laws and possibly new laws specific to the metaverse and apply them to new and complex situations in a virtual environment.
6. **Litigants in person:** Individuals who are litigants in person are probably more affected in respect of virtual court hearings because it is unlikely that the majority will have access to complex technology to be able to access the metaverse.

To overcome these challenges, law firms and their clients will need to work closely with experts in virtual reality, data privacy, and other related disciplines to understand the technical aspects of the case. They will also need to take a proactive approach to collecting and preserving evidence and invest in technologies such as blockchain to ensure data integrity. Additionally, they may need to stay up to date with emerging legal frameworks and precedents in the metaverse to build effective legal arguments.

In our experience, some of the newer qualified lawyers show a huge interest and affiliation with the virtual space and an understanding which can be used effectively by law firms.

3 What are some of the key benefits of litigation taking place in the metaverse?

Whilst litigation in the metaverse has its own challenges, there are also potential benefits that will arise from resolving legal disputes in virtual environments.

Litigating in the metaverse is likely more cost-effective than traditional litigation, as it will not require physical travel (VR headsets will suffice). Virtual reality tools, such as virtual mediation platforms, will be used to resolve disputes without the need for in-person meetings. In addition, tools that are used to create 3D models and visualisations will assist lawyers and judges to better understand various complex and technical issues or evidence.

As a globalised platform, the metaverse will make the legal system and litigation more accessible to people who may not be able to attend in-person hearings. such as those who live in rural areas or have mobility issues. It will also open avenues for people of different socio-economic backgrounds to be able to access justice in the metaverse.

In comparison to traditional litigation, litigating in the metaverse will potentially be faster and more efficient, as virtual environments will enable real-time collaboration and streamline different aspects of the legal process.

There will also certainly be a boost in innovation and experimentation within the legal industry as lawyers and judges work to adapt to new technologies and find new ways to resolve disputes in virtual environments.

Overall, while there are challenges associated with litigating in the metaverse, there are also key benefits that can make the legal process more efficient, accessible, and innovative.

A court hearing in Colombia recently took place in the metaverse, with participants using virtual reality headsets and appearing as avatars. If this process is rolled out worldwide, what implications is this likely to have on the litigation process, particularly with regards to witnesses giving evidence?

The use of virtual reality and avatars to conduct court hearings has the potential to significantly impact the litigation process, particularly with regards to witnesses giving evidence. There are also some potential implications in terms of witness credibility, language barriers, security concerns, technical challenges, and improved access to justice.

Credibility of witnesses while giving evidence is seen as a key matter in trial processes globally. Therefore, there will naturally be concerns about whether witnesses have been coached while giving evidence. It will also be difficult to verify the identity of a witness appearing as an avatar, and it will be harder to assess their body language and other non-verbal cues that can indicate truthfulness. However, we have already seen a trend towards virtual/hybrid hearings during the COVID-19 pandemic and this issue has been dealt with using 360-degree cameras in rooms where witness testimony is being provided. Witnesses are also able to provide evidence from different locations geographically, potentially reducing the costs and logistical difficulties associated with traveling to give testimony. This in turn will increase access to justice for individuals who are not able to attend court in-person.

Conducting court hearings in the metaverse requires technical infrastructure, which is not readily available in all regions globally. Additionally, not all participants have the same affordability or access to the necessary equipment, such as virtual reality headsets. The more sophisticated the use of technology is the more likely it is to lead to glitches depending on where one accesses the virtual environment.

Virtual courtrooms may require the use of machine translation software to facilitate communication between participants speaking different languages, which may well introduce errors and inaccuracies in the proceedings.

Security concerns, such as hacking or impersonation, which would undermine the integrity of the proceedings are also likely to arise with the use of the virtual environment to conduct court hearings.

For virtual reality court hearings to become more widely adopted, many of these challenges will need to be addressed. Improved standards for verifying witness identities will need to be developed, and upgrades to machine translation software will be necessary to ensure accurate communication between participants speaking different languages. The use of virtual reality in court hearings presents both opportunities and challenges. It will be important for legal systems to proceed with caution while adopting these technologies keeping in mind the various implications.

What are your predictions of the litigation trends in the latter half of 2023 and beyond?

With the growing threat of cyberattacks and data breaches, we are likely to see an increase in litigation related to cybersecurity and data privacy. This will include cases involving allegations of hacking, unauthorised access to sensitive information, or failure to adequately protect personal data.

Environmental, social, and governance (ESG) issues are becoming increasingly important to investors and regulators, and this is likely to translate into more litigation related to ESG concerns. This could include cases involving allegations of environmental damage, labour violations, or board misconduct related to corporate governance.

As virtual and augmented reality technologies continue to evolve; cases involving allegations of copyright infringement, trademark disputes, or data privacy violations in virtual environments are likely to arise.

Almost all industries are introducing and integrating AI within their existing systems. There may well be a rise of litigation related to cases involving allegations of bias or discrimination in AI algorithms, or disputes over intellectual property related to AI inventions.

Class action lawsuits are becoming increasingly common in many jurisdictions, and this trend is likely to continue.

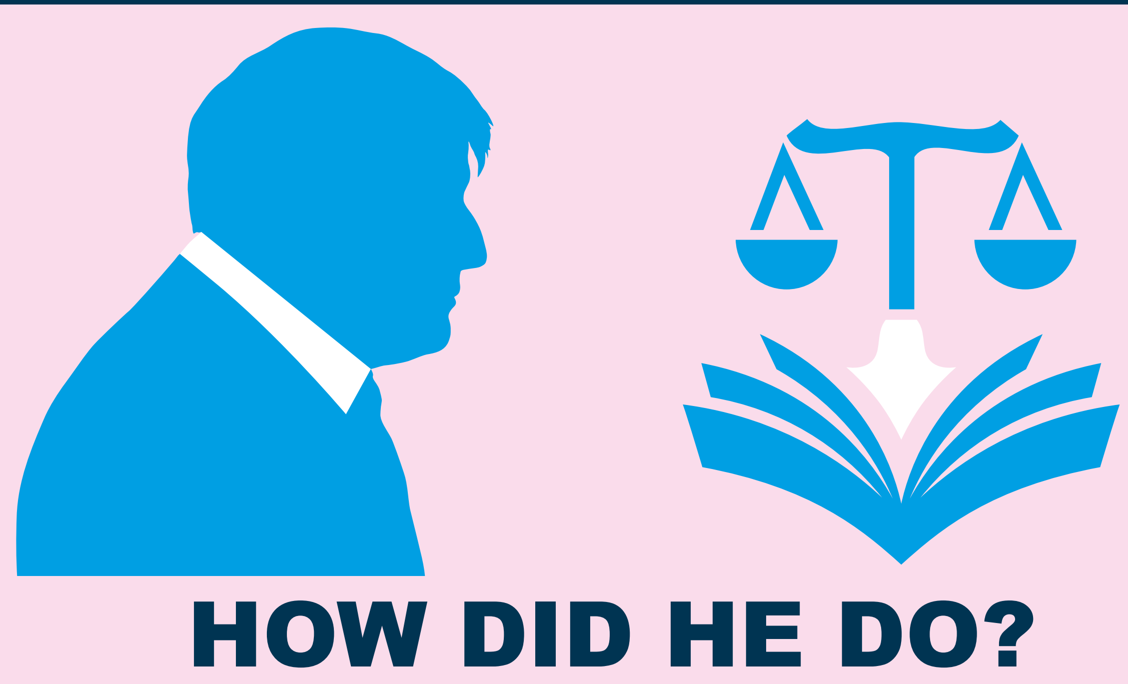
It is important to note that these predictions are based on current trends and developments and are subject to change based on various factors such as changes in technology, legal and regulatory developments, and unforeseen events.

Sarah Malik, CEO of SOL International Ltd, is an award-winning lawyer who achieved Litigator of the Year (2022) at the first GCC Women in Law Awards and received an honourable mention as Law Firm Leader of the Year. SOL is named by Legal 500 EMEA as a 'Firm to Watch' in Dispute Resolution: Arbitration and International Litigation and in 2023 Sarah has been listed as a leading practitioner in 'The Arbitration Powerlist: Middle East'.

Swetha Sivaram is an Associate at SOL International Ltd. She is a newly qualified solicitor from England and Wales and is a registered practitioner at the DIFC Courts. She prepares first drafts of pleadings and bundles, drafts notes, liaises with Clients, and is involved with the business development of the firm. Having graduated with a BBA (Hons) in Law she developed a particular interest in dispute resolution along with intellectual property law and company law.]

Bond Solon is the UK's leading legal training and information company specifically for non-lawyers. Since 1992, our extensive pool of experienced trainers have provided training and information on legal knowledge, procedure, evidence and skills across our five main business units: Witness Familiarisation, Expert Witness, Investigations, Health & Social Care and HR & Development. We are the market leaders in providing innovative, relevant, and experiential courses designed to improve best

BORIS JOHNSON ON TRIAL



HOW DID HE DO?

Authored by: Bond Solon

On 21 April 2022, the House of Commons passed a motion calling for the then Prime Minister, Boris Johnson, to be investigated by the Commons Privileges Committee over Partygate allegations.

The investigation is of course twofold:

- Firstly, whether Boris Johnson misled Parliament in statements that he made in the Commons about alleged breaches of lockdown rules in Downing Street.
- Secondly, whether this misleading of Parliament may have constituted a contempt of Parliament.

On Wednesday 22 March, the committee took evidence from Johnson himself – a live screening that garnered as much interest and intrigue as the Wagatha Christie libel trial. As the hearing took place (over approximately five hours), there was a flurry of news reports commenting on Johnson's every move – his attitude, his body language, his responses, his reactions, as well as questioning his future in politics. The outcome of this investigation is crucial, as if Johnson is found guilty, MPs could hand him a suspension, which in turn could give constituents the opportunity to remove him as their MP in a by-election.

As the UK's leading provider of Witness Familiarisation training, we at Bond Solon watched the live screening with interest, concentrating specifically on Johnson's 'performance' as a witness, and the potentially detrimental impact it could have on the investigation.

Read on for an analysis of the key elements of Johnson's performance.

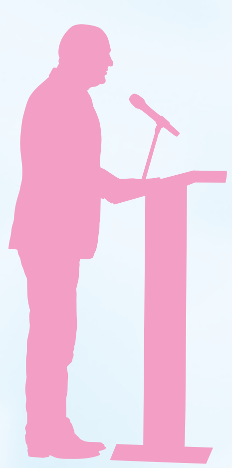
Prior to giving evidence

As the Chair, Harriet Harman KC gave her opening speech, Johnson should have known that his reactions and body language would be closely observed (and noted), not just by the rest of the Committee but by the wider public watching the hearing as well.

Yet, he is sat, facing the committee, hunched over his desk, hands in front, often fisted, in an almost threatening stance. A few times, he was caught looking at his watch as if he had got somewhere else to be, as if this wasn't important to him. And then before giving his speech, he dared to inform the Committee about the forthcoming vote, which of course, as MPs, they would have been more than aware of.

While Johnson's attitude should not or will not have any bearing on the conclusions formed by the Committee (it is his answers that matter), in relation to the specific questions raised by the investigation, this will have done him no favours.

At Bond Solon, we remind witnesses to remain conscious of their own body language and reactions throughout the duration of hearing, even when they are not on the stand.



Opening speech

Johnson proceeded to give his opening speech, setting out the facts surrounding the investigation and his position.

While doing so he continued his slouched stance, eyes barely looking up from the piece of paper in his hands. There were several occasions where he mentioned the Chair in his speech, yet neglected to address her in person, opting instead to fix his eyes on the paper before him.

One of our top tips for witnesses who attend our training, is to face the decision maker(s) when speaking, when answering questions, and generally giving evidence. Not only does this project a confident, assured image but it also enables the witness to observe the decision maker(s)'s reaction and gauge whether their point has been understood.

Questioning

It's fair to say that for the most part, Boris Johnson did not respond well to being questioned or challenged. This was clearly visible in his tone of voice, his body language, and the way he interacted with the Committee.

Key features of this are as follows:

- The raising of his voice, in obvious frustration and sometimes anger.
- The sharp nodding of his head and hand gestures.
- Interrupting and talking over members of the Committee.
- Giving long winded answers, that don't address the question asked, even when a succinct answer is explicitly requested.
- A considerable amount of repetition.
- Sarcastic, often defensive comments.
- His growing impatience and anxious facial expressions.

Whilst the Committee will have placed more emphasis on the content of what was said rather that how he might have said it, it was clear that Johnson's attitude presented an obstacle to the Committee establishing the concrete facts of the matter.

It is also worth noting that whilst the Committee themselves were irritated by Johnson's unhelpful approach to questioning, they remained calm and considered throughout.

Summary

At this stage, it is impossible to speculate on the conclusions that the Committee might draw. But purely from looking at Boris Johnson's performance as a witness, he did not make a very credible one.

Giving evidence can be a daunting and nerve-wracking prospect, particularly in a lengthy hearing like this one. Questioning can cripple even a reliable and intelligent witness if they have not been properly trained, or if they let their own emotions take over.

Bond Solon's witness familiarisation training focuses on techniques and exercises to build confidence, allay any concerns a witness may have, and ultimately improve a witness' performance. It does not try to change the facts or truth or rewrite the evidence. Instead, it teaches witnesses what to expect during the process of giving evidence and how to effectively deal with cross-examination.

It is not known (although it appears highly unlikely) whether Boris Johnson had any form of witness training. If he had attended Bond Solon's witness familiarisation training, it would have dealt with the importance of giving succinct, concise evidence, and making concessions where appropriate—two of the criticisms made by the Committee during the hearing on Wednesday.

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EMERGING GLOBAL LEGAL TRENDS IN CRYPTO AND VIRTUAL ASSETS

Authored by: Noel Campbell (Partner), Kevin Warburton (Partner), Dan Perera (Partner), Scott Cruickshank (Partner), James Hanson (Senior Associate), Hugo Costa Liziario (Associate), Rick Brown (Partner), Neil Chauhan (Associate), Nick Braganza (Partner), and Nicola Gare (Knowledge Counsel) - HFW

With our deep knowledge of each of energy, resources, commodities, carbon credits, crypto, and regulation across key jurisdictions, HFW is uniquely placed to advise and act in disputes in the crypto space.

In this article we briefly explore topical issues emerging from the global crypto hubs.

BVI

In our experience as a local BVI firm with experience in this area – most recently acting for the joint liquidators of the Three Arrows Fund, the feeder fund of Three Arrows Capital (a former crypto hedge fund), we are aware that a significant number of crypto exchanges, funds, and leading fintech companies have taken advantage of the flexible nature of BVI law and regulation, and have incorporated, and/or made initial coin offerings, in the BVI. This has in turn lead to a growth in crypto-related disputes and insolvencies emanating from, and being heard in, the jurisdiction.

The enactment of the Virtual Assets Service Providers Act 2022 (the Act) reflects the BVI maturing as a market for the regulation of virtual assets. The Act requires all new virtual asset service providers (VASPs) to register with the BVI Financial Services Commission (FSC).

Existing VASPs have until 31 July 2023 to register. After this date, all VASPs that have not registered will be considered to be conducting unauthorised business, and will be subject to the enforcement mechanisms of the FSC.

Far from deterring VASPs, our view is that the Act is likely to increase the popularity of the BVI as a jurisdiction for virtual assets.

In terms of crypto-related disputes – the BVI courts have followed the courts of England and other common law jurisdictions in finding that cryptoassets constitute property[1], and the BVI courts have also granted freezing orders against persons unknown in crypto-related disputes.[2] It seems likely that the BVI courts may generally continue to follow English judgments in the crypto space in the future.

1 Philip Smith and Jason Kardachi (in their capacity as joint liquidators of Torque Group Holdings Limited) v Torque Group Holdings Limited (in liquidation) BVIHC (COM) 2021/0031.

2 Chainswap Limited v Persons Unknown BVIHC (COM) 2022/0031.

Dubai, United Arab Emirates

Dubai has positioned itself as a global hub for crypto in recent years, evidenced by the large number of high-profile developers, blockchain networks and major exchanges flocking to the city. An example of this is the growing interest we are seeing from clients in the crypto sphere. We are currently acting for the developer of a global blockchain technology ecosystem, specialising in the tokenisation of assets. This dispute is being heard in the DIFC Courts and involves questions of ownership of cryptoassets and the use of cryptocurrency as security for costs.

In order to regulate such activity in the Emirate, the Virtual Assets Law (the VAL) was issued in February 2022. The VAL created a legal framework for investors and businesses alike involved in virtual assets.

The VAL also created the Virtual Assets Regulatory Authority (VARA), an independent regulatory body that sits within the Dubai World Trade Centre. VARA regulates all virtual asset related activities in Dubai, except the Dubai International Financial Centre (the DIFC).

The DIFC maintains its own regulatory regime, with the Investment Token Regime and the Crypto Token Regime.

Aside from regulation, the DIFC Courts recently launched the world's first Digital Economy Court (DEC). The DEC will oversee complex national and transnational disputes related to current and emerging technologies, including blockchain, AI and fintech, amongst others.

The DIFC Courts recently issued a judgment in a crypto-related dispute; one of the first in the region, and one of the few reported cases globally concerning issues such as the safe transfer of cryptocurrency between buyer and seller, and the obligations of a custodian of cryptocurrency.

England

The United Kingdom has continued to be a popular hub for cryptocurrency and other digital asset transactions. And, in the past four years, the English courts have proven themselves to be hugely capable in the sphere of crypto and other digital asset-related disputes, it being one of the first countries in the world to declare cryptocurrency a specie of property in 2019.[3] Since then, the courts have granted proprietary injunctions over cryptocurrencies[4], have permitted service of legal documents exclusively by NFT[5] and have confirmed that misappropriated cryptocurrencies can be held on constructive trust for victims of crypto-related fraud[6].

Over the past four years, therefore, case law has time and time again demonstrated the English court's willingness and ability to push the boundaries as regards to crypto-related disputes. However, whilst this trend is likely to continue, the prevailing trend in 2023 is likely to centre on one major issue: regulation. Indeed, with several high-profile insolvencies over the past year alone (including the infamous and sudden fall of FTX), in addition to a 100% rise in the number of people owning cryptoassets over the past 1-2 years in the UK[7], regulation is an important agenda item for the UK government.

Presently, the UK does not have a dedicated statute dealing explicitly with the regulation of digital assets. Instead, cryptocurrency businesses are regulated by the Financial Conduct Authority (the FCA), the UK's main financial regulatory body. However, the remit of the FCA is limited to making sure that crypto firms comply with anti-money laundering and counter terrorism legislation. It has no oversight whatsoever over direct investments in cryptocurrencies and other digital assets[8].

But the pace of change is fast. On 1 February 2023, His Majesty's Treasury launched its consultation on how it should regulate cryptoassets in financial services (including in relation to disclosure requirements, corporate governance, and the requirements for granting licenses to cryptocurrency exchanges).

Further, the Financial Services and Markets Bill is close to being passed. The Bill, if passed, will introduce a regime that will allow the Treasury to regulate stablecoins and cryptocurrencies.

This space is therefore worth watching over the next coming months.

Hong Kong

As experienced, insolvency, fraud, and disputes lawyers in Hong Kong, we are actively engaged in this area (in particular crypto related fraud claims) and confirm that Hong Kong is similar to Singapore, and has also very recently recognised cryptocurrencies as a specie of property, capable of being held on trust[9]. The ruling comes shortly after

3 AA v Persons Unknown [2019] EWHC 3556 (Comm).
4 Ion Science Ltd v Persons Unknown (unreported, 21 December 2020, Commercial Court)
5 Osbourne v Persons Unknown Category A [2023] EWHC 39 (KB)
6 Jones v Persons Unknown [2022] EWHC 2543 (Comm)
7 TR_Privacy_edits_Future_financial_services_regulatory_regime_for_cryptoassets_vP.pdf (publishing.service.gov.uk)
8 FCA reminds consumers of the risks of investing in cryptoassets | FCA
9 Re Gatecoin Limited (In Liquidation) [2023] HKCFI 914

Hong Kong's Securities and Futures Commission (SFC) commenced a consultation process in relation to the proposed requirements for virtual asset trading platform operators[10], and permitting retail investments in certain tokens trading on licensed exchanges.

The new SFC licensing requirements due to enter into force on 1 June 2023, seek to position Hong Kong as a global centre for regulated, and safe, digital token trading activities.

Further, with a number of centralised crypto exchanges operating out of Hong Kong (amongst other global hubs), licensing (and, therefore, legitimising) their activities may assist in maintaining their presence on the ground, rather than risk losing them to other emerging Asian jurisdictions. This coupled with Hong Kong's existing reputation as a leading regional dispute resolution centre, also assists in elevating Hong Kong as an attractive jurisdiction of choice for restructuring and insolvency proceedings, including for foreign companies meeting the relevant criteria.

Hong Kong's emergence as a hub for Web3-related activities is noteworthy, and stands in distinct contrast to the prevailing regulatory environment in the PRC.

Singapore

From our experience of crypto disputes in Singapore, it is clear that Singapore has positioned itself to be a leading global hub for the resolution of Web3-related disputes in arbitration. Given the de-centralised and multi-national nature of Web3 projects generally, arbitration is well-suited for dispute resolution, and Singapore has built on its growing status as a global arbitration powerhouse in order to attract crypto-related disputes.

The local courts remain supportive of the arbitration process, including within the Web3 space. This has been demonstrated recently, when the Singapore High Court acted[11] to uphold an arbitration agreement by imposing a mandatory stay on the parallel court proceedings - including those involving third parties - pending the resolution of the on-going arbitration.

This latest judgment in the Web3 space, will assist in settling the local legal position, and will strengthen Singapore's claim to the title of the 'Web3 arbitration forum of choice'.

Previous judgments have confirmed Singapore's stance that both cryptocurrencies[12], and other crypto assets, including NFTs[13], constitute property rights (although, most recently, also dismissed an application seeking to establish that stablecoins should be regarded as "money"[14]), which may be of tremendous significance in an insolvency scenario.

With an updated set of SIAC arbitration rules eagerly anticipated, Singapore must be considered a leading jurisdiction and arbitration seat for the resolution of Web3 disputes.

As seen from the above tour of five jurisdictions, the crypto space is fast moving. We expect to see further developments and what we hope will be greater harmonisation between the various key jurisdictions in this area.

10 https://apps.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=23PR5
11 Parastate Labs Inc v Wang Li and others [2023] SGHC 48
12 CLM v CLN [2022] SGHC 46
13 Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE") [2022] SGHC 264
14 Algorand Foundation Ltd. v Three Arrows Capital Pte. Ltd., March 2023

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SOME HOT TOPICS IN CRYPTO CLAIMS

Authored by: Zoe O'Sullivan KC (Barrister) - Serle Court

Cryptocurrency frauds and cryptoexchange insolvencies have given crypto a bad reputation. Yet given that crypto has legitimate uses (making secure, cheap payment transfers is just one example), the law will need to evolve to address the special characteristics of cryptoassets. There are many current projects in different jurisdictions which aim to develop principles designed to facilitate transactions in digital assets, such as the Law Commission's report on Digital Assets, due to be published later in 2023. In the meantime, the common law courts have been showing their customary flexibility in adapting the law to the digital world and fashioning effective remedies for claimants whose cryptoassets have been hacked.

Cryptoassets have been described as a "conglomeration of public data, private key and system rules"

(see the Legal Statement on Cryptoassets and Smart Contracts published by the UK Jurisdiction Taskforce in November 2019). A fundamental question is whether cryptoassets are property. Why does this matter? Because property rights are rights against the whole world (save the bona fide purchaser for value), and the owner can assert a right to recover the asset itself, which might be important if it has increased in value, or if the asset is unique (as with an NFT).

An interference with property rights affords particular causes of action, such as a claim in constructive trust against the thief of an asset, now applied by analogy to hackers. Property rights are also critical in an insolvency: if the owner can show that the asset was held for it on trust, it can recover the asset and defeat claims of the unsecured creditors.

English law has traditionally recognised property of two kinds: tangible assets such as land or objects which can be physically possessed, and intangible assets or "things in action" such as debts, which can be enforced by legal action. Cryptoassets do not fall into either category. Nonetheless, in England, the courts have been willing to assume that it is at least arguable that cryptoassets are property. The issue has not yet been tested to the trial standard, as all the reported cases involve pre-trial applications for permission to serve out of the jurisdiction or interim relief. In reaching their conclusion, the courts have applied the definition of property set out by Lord Wilberforce in National Provincial Bank v Ainsworth [1965] AC 1175, where he said that before a right or interest can be admitted into the category of property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence and stability. The courts have also placed reliance on the discussion in the influential Legal Statement, above. The English cases with the fullest analysis are AA v Persons Unknown [2019] EWHC (Comm) and Ion Science v Persons Unknown (unreported, 21 December 2020). In Singapore, the Court of Appeal in Quoine v B2C2 [2020] SGCA(1)(02) has deliberately left the question open.

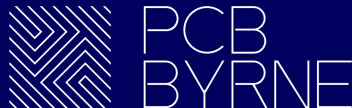
In New Zealand, the High Court has held to the trial standard in Ruscoe v Crytopia [2020] NZHC 728 that cryptoassets are property. Applying Lord Wilberforce's criteria, the court found that cryptoassets are definable by their unique private key, that they are identifiable by third parties because the controller of the private key has the ability to prevent others from dealing with the asset, that they are capable of being transferred again by use of the private key, and that they are sufficiently permanent and stable because their entire history is recorded on the blockchain. The court went on to hold that the remaining assets of the insolvent exchange were held on trust for the customers. By contrast, the New York bankruptcy court found in Re Celsius Network LLC, on a purely contractual analysis, that title to the assets had passed to the insolvent exchange, leaving the customers with worthless personal claims.

Cryptoassets are expressly designed to be decentralised, and thus cannot be said to be located in any particular place. This presents real challenges when determining whether the courts of a particular place have jurisdiction in a crypto dispute. Thus far, the English courts have addressed this question by holding that it is at least arguable that cryptoassets are located in the place where the person who controls the private key is resident, or domiciled, or carries on business, giving the courts of that place an arguable basis for asserting jurisdiction: see Tulip Trading Ltd v van der Laan [2022] EWHC 667 (Ch), not challenged on appeal.

This opens up a number of potential jurisdiction gateways under Practice Direction 6B which may be invoked where the claimant wants to serve a third party such as a cryptoexchange out of the jurisdiction. These include Gateway 11 (claims about property in the jurisdiction) and Gateway 15 (claim made against the defendant as constructive trustee arising out of acts committed in the jurisdiction or assets within the jurisdiction). There are unanswered questions as to whether the asset still has to be located in the jurisdiction at the time when the application for permission is made: see Osbourne v Persons Unknown [2023] EWHC 39 (KB). Where the private key has been used to misappropriate assets, there may be a claim for breach of confidence within Gateway 21: see Fetch AI Ltd v Persons Unknown [2021] EWHC 2254 (Comm). The landmark decision of the Court of Appeal in Tulip Trading v van der Laan [2023] EWCA Civ 83 also tells us that it is arguable that the software developers who control and run bitcoin networks owe fiduciary duties to the true owners of cryptoassets (and thus new Gateway 15B may apply).

Since the introduction of new Gateway 25 in October 2022, applications for information orders against cryptoexchanges have proliferated, making the exchanges the initial target of claims against "persons unknown". Although crypto transactions are anonymous, exchanges often hold KYC and AML information on their customers which is valuable for claimants seeking to trace hacked assets: see LMN v Bitflyer Holdings Inc [2022] EWHC 2954 (Comm).

That case suggests that the major exchanges are increasingly willing to co-operate in providing such information (while not submitting to the jurisdiction): they appear to recognise that public confidence will be enhanced if the exchanges are seen to be assisting in the prevention of crime.



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- according to the Legal 500 United Kingdom 2022 edition.

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CRYPTO TRACING: THE STATUS OF THE NEW SERVICE OUT GATEWAY FOLLOWING SCENNA & ANOR V PERSONS UNKNOWN

Authored by: Tom McKernan (Senior Associate) and Marie Smale (Associate) - PCB Byrne

The recent High Court case of Scenna & Anor v Persons Unknown [2023] EWHC 799 (Ch) ("Scenna") illustrates the limits of the new service out Gateway 25 in compelling disclosure from overseas parties. This has implications in particular for the developing line of cases relating to the recovery of crypto assets.

Background

To serve proceedings out of the jurisdiction it is necessary for a claimant to show that:

1. there is a serious issue to be tried on the merits;
2. there is a good arguable case that one of the Gateways in Practice Direction 6B of the Civil Procedure Rules ("PD6B") applies; and
3. the English court is the appropriate forum in which to hear the dispute.

The new Gateway 25 in Practice Direction 6B permits service overseas of an application for 'Norwich Pharmacal' or 'Bankers Trust' relief: i.e. for third-party disclosure of information regarding the identity of the wrongdoer and/or what has become of the claimant's property. It was introduced following a line of cases where the courts ordered offshore crypto exchanges to disclose information to the victims of crypto fraud seeking to trace their stolen assets on the blockchain.[1]

The issue for the English Court is that its interim disclosure order is unlikely to be enforceable in the respondent's local Court. This has inevitably led to doubts as to whether crypto exchanges would comply with such disclosure orders. This has implications for the exercise of the Court's discretion in granting disclosure and for the forum test (i.e. 3 above), particularly where the foreign court would grant the same relief in support of English proceedings.[2]

1 See further our previous article which argued for this introduction of such a gateway here: https://thoughtleaders4.com/images/uploads/news/TL4_FIRE_Magazine_Issue_9_DIGITAL_VERSION_%282%29_1.pdf)

2 As in the BVI and the Cayman Islands with respect to Norwich Pharmacal Orders

In LMN v Bitflyer [2022] EWHC 2954 (Comm) ("Bitflyer"), the first reported case decided under the new Gateway, the Court granted a Bankers Trust Order ("BTO") against a number of crypto exchanges, most of whom had indicated a willingness to comply with the order once made.

Scenna

In this case, the proceeds of fraud were traceable to two Australian banks (the "Banks"). The Claimants obtained ex parte BTOs against the Banks, for disclosure of information to establish the whereabouts of the stolen monies, which the Banks subsequently challenged.

The Court discharged the BTOs on the following grounds:

i. The detriment to the Banks in providing the disclosure outweighed the interests of the applicants for the purposes of the balancing exercise that the Court conducts in deciding whether to grant a BTO[3]. The Court noted that, where the respondent is a foreign bank, special considerations apply and the order should only be granted in exceptional circumstances, such as in cases of 'hot pursuit'[4] – whereas here the trail was only 'luke warm'. This is because of the strong likelihood that the disclosure will conflict with the Banks' legal duties in their home jurisdiction – here the Court found that there was a real risk that the disclosure could place the Banks in breach of Australian law and expose them to financial and reputational damage. It was also common ground that the same disclosure relief was available in the Australian Courts.

ii. There was no serious issue to be tried for the purposes of the test for service out of the jurisdiction (point 1 above), given the finding on the merits of the disclosure application.

iii. The English Court was not the appropriate forum for the purposes of the service out test (point 3 above), given that the proceedings concerned disclosure by Australian banks of information in Australia.

The Court distinguished Bitflyer on the basis that, in that case, the location of the documents was unknown and so the only alternative to an English order was speculative applications in multiple jurisdictions. The Claimants in Scenna expressed reluctance at commencing proceedings in up to three jurisdictions (England, Australia and potentially Hong Kong) but the Court was not persuaded that this outweighed the detriment to the Banks identified above.

However, in some respects it is difficult to reconcile these cases. For example, the Court in Bitflyer did not appear to consider whether the overseas courts would grant disclosure in support of the English proceedings.

One respondent in Bitflyer did raise a foreign law objection, but the Court considered this could "be sufficiently dealt with by the provision that the order did not require the defendant to do anything prohibited by local law".

In Scenna, the Court also allowed the Banks' application to set aside service of the substantive claims against them for lack of jurisdiction. This followed from the Court's findings that the English court was not the appropriate forum for claims to recover the proceeds of fraud from the Banks, and that none of the various claims advanced by the Claimants against the Banks amounted to a serious issue to be tried.

Conclusions:

Scenna illustrates the limitations of the new Gateway and the inherent difficulties of seeking extraterritorial interim disclosure orders. Even where the Gateway applies, it will be difficult to persuade the English Court to grant disclosure orders against overseas respondents where there are local law impediments that could be overcome by seeking relief in the foreign court.

Although Scenna did not involve crypto, it will be highly relevant where BTOs are sought in respect of stolen digital assets that are traceable to an overseas exchange. If the legal entity holding the documents can be identified, victims of crypto fraud will need to take local law advice in the home jurisdiction of the exchange before deciding how to proceed.

Each case will turn on its facts and there are certainly elements prevalent in crypto cases that may well tip the balance in favour of applicants, such as: multiple jurisdictions, opaque legal structures underpinning crypto exchanges, the unknown location of relevant documents, and the 'hot pursuit' of stolen assets.

3 The 'fourth limb' of the BTO test; Kyriakou v Christie Manson and Woods Ltd [2017] EWHC 487 (QB)
4 Mackinnon v Donaldson, Lufkin & Jenrette Corp [1986] Ch 482

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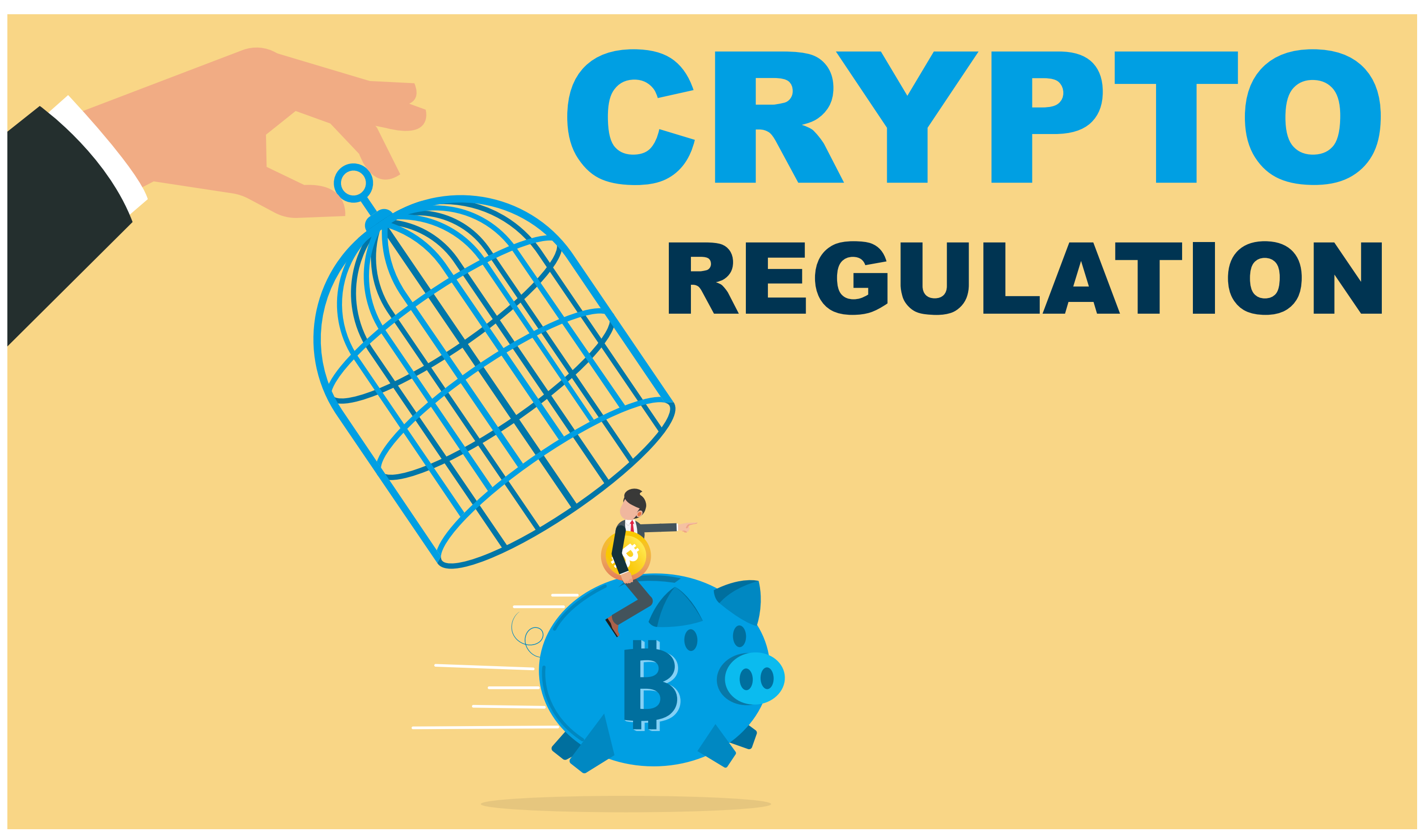


Authored by: Syed Rahman (Partner) - Rahman Ravelli

New UK legislation is set to target the promotion of crypto-related investment opportunities. Syed Rahman, cryptocurrency expert at financial crime specialists Rahman Ravelli, considers the proposals.

Proposed new UK legislation regarding cryptoasset promotions has the potential to break new ground. It is not exaggerating to say that the implications could be major for the UK and its crypto sector.

The new draft legislation is the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) Order 2023. This legislation (which I will refer to as the Order) looks set to bring both clarity and change, especially regarding the implications for non-compliance.

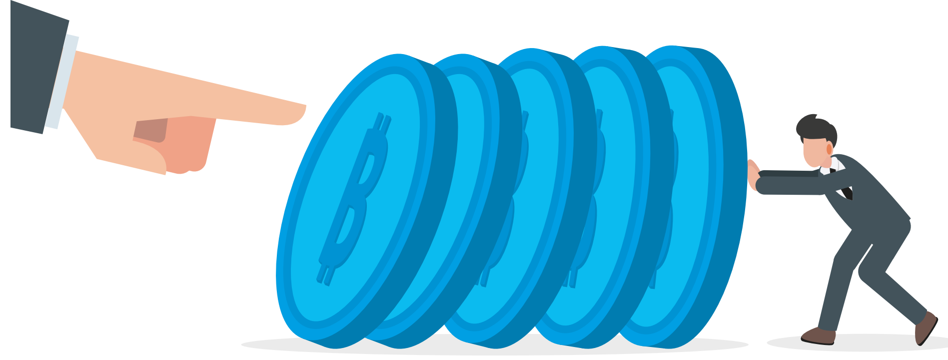
The Order is an expansion of the current Section 21 of the Financial Services and Markets Act (FSMA), which deals with financial promotions. It will provide for the regulation of cryptoasset financial promotions - a move intended to both improve consumers' understanding of the risks associated with cryptoasset investments and ensure that cryptoasset promotions are held to the same standards as the wider financial services market. This will be done by amending another Financial Services and Markets Act order (from 2005) to create what is termed a new controlled investment (defined as a "qualifying cryptoasset") and modify some of the regulatory exemptions already in place relating to cryptoassets.

Regime

Some cryptoassets, such as security tokens, are already subject to the financial promotions regulatory regime. The Order, however, will bring most cryptoassets – including exchange tokens such as Bitcoin – into the regime's scope. Although non-fungible tokens (NFTs) will not be, as these are usually used as digital collectibles rather than financial investments.

The Financial Conduct Authority (FCA) will become the regulator and supervisor of the cryptoassets covered by the Order, and would be capable of taking action against those that fail to comply with their obligations.

There will be a four-month period between when the Order is made and when it comes into force, to give those affected by it time to understand and fully comply with it.



Section 21 of FSMA states that that a person, in the course of business, must not communicate an invitation or inducement to engage in investment activity, or claims management activity, unless they are an authorised person (under Part 4A of FSMA), or the content of the communication is approved by an authorised person, or there is an exemption that applies.

The amendments to Section 21 contained in the Order are aimed at removing the risks posed by misleading cryptoasset advertising – risks highlighted five years ago in a report by the Cryptoasset Taskforce, which involved the FCA, Treasury and Bank of England. The FCA's findings since then indicate that while UK ownership of cryptoassets has risen, there has been a reduction in the understanding of the associated risks. The volatility of crypto values and the numerous high-profile cryptoasset firm failures – FTX being the most notable recent example – make any lack of understanding particularly dangerous.

Positive effect

Against this backdrop, it is encouraging to see efforts being made at the legislative level to have a sustained and positive effect on the crypto sector – an effect that will benefit the consumer. This comes at a time when the UK is setting out its stall in a bid to become a leader in financial innovation. It makes perfect sense, therefore, to try and shape the cryptoassets landscape for the better.

We cannot say for certain what the consequences will be. But what is being proposed seems logical and the reception it has been given by those in the crypto sector has been generally positive. There has been a need for clarity regarding crypto for some time.

It will take some time for the sector to lose its reputation for being the financial world's equivalent of the wild west. But the consultation that preceded the Order helped create the momentum for a change for the better – and that change now looks set to happen.

It is a change that will protect investors, attract more investment, individuals and institutions into the sector and may - as the government hopes – position the UK as a global crypto hub. There is an argument that the UK remains a couple of steps behind the European Union (EU) when it comes to crypto regulation. And while there is no doubt that the EU has taken bigger, quicker strides in this direction, this is no reason to write off the UK's efforts.

The EU's Markets in Crypto-Assets (MiCA) Regulation is set to blaze a trail by establishing a harmonised set of rules for crypto-assets and related activities. It is also part of a much wider approach to digital finance that the EU is introducing. But being the first does not necessarily mean being the best. There will be opportunities to learn from what the EU achieves (and doesn't achieve) in its role as frontrunner.

For now, UK regulators simply need to ensure their measures are introduced and enforced as effectively as possible.

OPERATION CHOKEPOINT 2.0: CRYPTO

Authored by: Rory Carter (Senior Associate) - Forsters

A co-ordinated campaign by US bank regulators to drive crypto business out of the financial system is underway, according to US law firm Cooper & Kirk. Businesses and personal account holders are losing their bank accounts, suddenly, and with no explanation from their bankers. This crypto cleanse is allegedly a result of informal guidance documents published by bank regulators that single out cryptocurrency customers and businesses as a risk to the banking system. This is coupled with the Securities and Exchange Commission's (SEC) refusal to issue actual rules to guide crypto participants, preferring a strategy of issuing enforcement actions.

The bank regulators' campaign came to the fore with the flight of deposits from US regional banks in March 2023 when federal regulators shut down a solvent bank known to be serving the crypto industry, Signature Bank, in the third-largest bank failure in US history. After intervening, the Federal Deposit Insurance Corporation (FDIC) put Signature Bank up for sale on the condition that any buyer divest entirely from crypto and digital asset banking.

The FDIC's purpose is to maintain stability and public confidence in the US financial system, however, its actions have been labelled as an illegal regulator overreach against the crypto industry and Congress is being called to perform its oversight role and hold the federal agencies to account.

The SEC is also being accused of regulatory overreach and fostering an uninhabitable environment for crypto companies in the US. The chair of the SEC, Gary Gensler, was called before the House Financial Services committee on 18 April 2023 and was rebuked by US Congressman, Patrick McHenry:

> ***Congress must provide clear rules of the road to the digital asset ecosystem because the regulators cannot agree. Regulation by enforcement is not sufficient nor sustainable. [The SEC's] approach is driving innovation overseas and endangering American competitiveness.***

The opaque approach by the SEC was highlighted when McHenry asked Gensler to give a definitive answer on whether Ether, the second most popular cryptocurrency, qualified as a security under the SEC's oversight or a commodity under the Commodity Future Trading Commission's (CFTC) purview. CFTC's chair believes that Ether is a commodity and McHenry stressed that an asset cannot both be a commodity and a security. In spite of being pressed to confirm the SEC's position, Gensler refused to comment on whether the SEC classifies Ether as a security.

In Cooper & Kirk's view, the pattern of events is not random as this has been seen before. Federal bank regulators, working with their state-level counterparts, have used their supervisory authority to label

businesses unworthy of having a bank account and working in secret to purge lines of undesirable, but legal, businesses from the banking system in Operation Chokepoint 1.0: gun stores, pawn shops, tobacco stores, payday lenders all being de-banked. Cooper & Kirk successfully challenged Operation Chokepoint 1.0 after bringing a lawsuit against three federal regulators – the Federal Reserve, the FDIC and the OCC (Options Clearing Corporation).

US officials have so far uniformly denied the existence of any coordinated agenda, whilst critical observers see the Biden administration and federal regulators as using whatever means necessary to cut the crypto industry off from banking services.

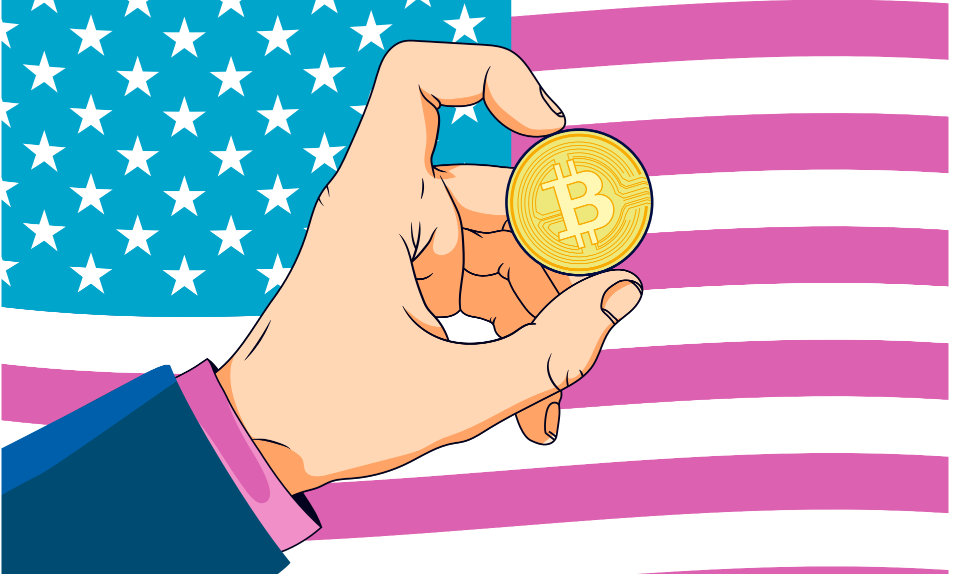
In July 2022, Coinbase (a US registered crypto exchange) filed a petition with the SEC requesting that the SEC "propose and adopt rules to govern the regulation of securities that are offered and traded via digitally native methods, including potential rules to identify which digital assets are securities". According to Coinbase, the SEC did not provide a response or comment on that petition. Instead, the SEC issued a Wells Notice against Coinbase in March 2023, which precedes an enforcement action, reinforcing its reputation for regulating by enforcement rather than providing guidance to the crypto community.

The lack of regulatory certainty and an oppressive Biden regime is driving US crypto companies offshore with two flagship crypto brands, Coinbase and Gemini, opening up exchanges in Bermuda and Singapore respectively.

As the US flounders in its regulatory positioning, the rivals to the US as centres of global financial markets are waiting in the wings to take advance to the opportunities and innovation the USD $1trn presents.

The UK has an excellent record of capturing the regulatory arbitrage opportunities. London became the centre of all FX trading after the US left the gold standard due to currency restrictions, and succeeded again in later capturing the Eurodollar and derivative markets.

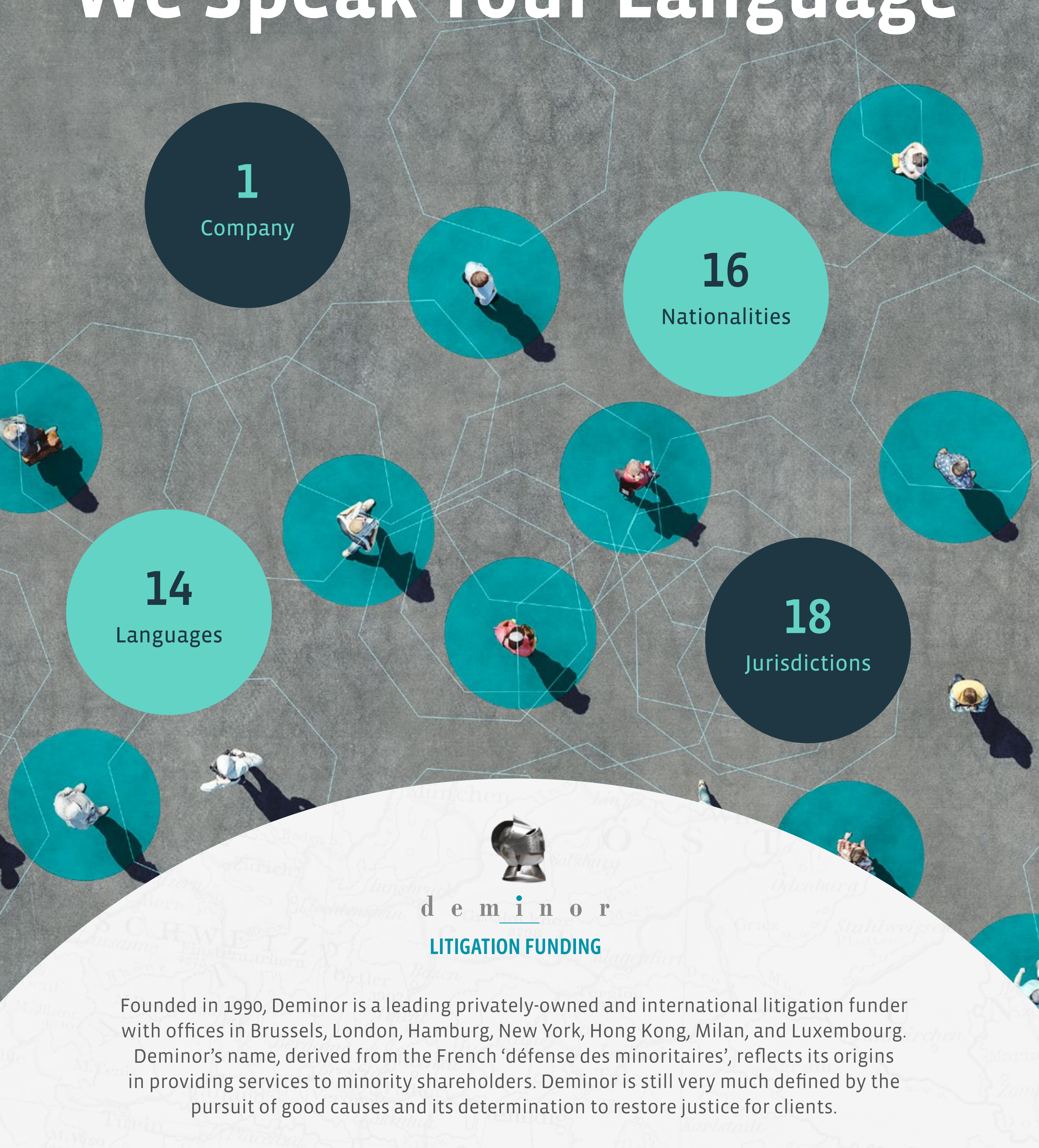
Early signs indicate that the UK government is acutely aware of the opportunities with the Treasury stating its objective is to "establish a proportionate, clear and regulatory framework, which enables firms to innovate at pace, while maintaining financial stability and clear regulatory standards". If that is successful, the UK has the potential to become the epicentre for crypto and blockchain technology companies, having already tabled the Financial Services and Markets bill which will regulate issuers, custodians and service providers for fiat backed stable coins.



Whilst may still consider the crypto world as the wild west, and the collapse of FTX (the second largest exchange) only served to exacerbate this view, Bitcoin was conceived as a result of the 2008 financial crisis and 15 years later depositors still face systemic risks which were thought to have been eradicated by tightening of bank regulations. The introduction to the Bitcoin Whitepaper by Satoshi Nakamoto serves as a reminder of the underlying vision and solution:

Commerce on the Internet has come to rely almost exclusively on financial institutions serving as trusted third parties to process electronic payments.…What is needed is an electronic payment system based on cryptographic proof instead of trust, allowing any two willing parties to transact directly with each other without the need for a trusted third party.

What began as a concept in a whitepaper released on 31 October 2008 has grown into a USD $1.17 trn industry in 15 years. A key aspect to the pace of growth in the cryptospace is that open source is a fundamental principle with development taking place in a transparent manner by independent entities. With the correct application, and provided there are no more bad actors at the helm, there may well be an opportunity for the UK and European markets to foster crypto innovation in the face of the US regulatory crackdown.



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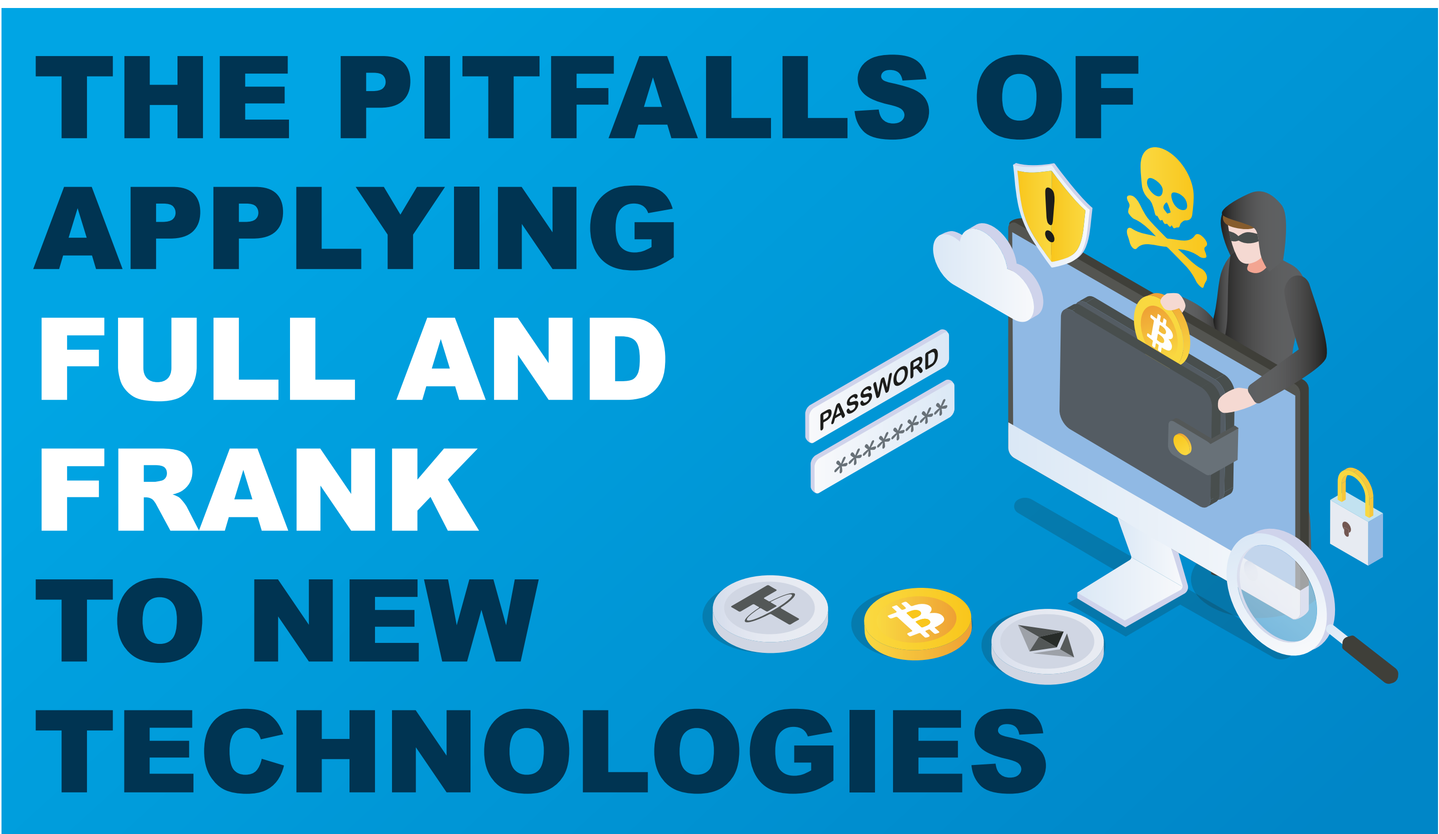
THE PITFALLS OF APPLYING FULL AND FRANK TO NEW TECHNOLOGIES



Authored by: Helen Pugh, Barrister at Outer Temple Chambers and Nicola McKinney, Partner at Quillon Law

Piroozzadeh is the latest in an expanding category of cases concerned with recovery of misappropriated cryptocurrencies. Whilst it does nothing to undermine the now established caselaw that the English court will grant proprietary and ancillary orders in respect of cryptoassets in appropriate cases, it has drawn stark attention to the need to comply with the duty of full and frank disclosure in this evolving area of law.

The factual matrix will be familiar to crypto fraud lawyers. The Claimant, Mr Piroozzadeh, had been tricked by unidentified fraudsters into transferring 870,818 USD Tether ("USDT") into cryptocurrency wallets belonging to D3. After engaging an investigator and legal representatives he had allegedly traced his assets on the blockchain to so-called 'Last Hop Wallets' on two exchange platforms, Binance Holdings Limited ("Binance") and Aux Cayes Fintech Co Ltd ("Aux Cayes"). Mr Piroozzadeh then successfully applied for the relief we typically see in these cases – various orders the judge described as orders restraining dealing with the Tether (presumably freezing orders) against 'Persons Unknown', being the unidentified fraudsters, and, also now common, a proprietary injunction against the exchanges.

The basis for this was alleged to be a proprietary claim on the basis that the exchanges held his assets as constructive trustees. All of this was done on an ex parte basis.

At the return date Binance applied to discharge the interim proprietary injunction on various grounds including that:

(a) the application should not have been made without notice;

(b) that Mr Piroozzadeh had failed to discharge his duty of full and frank disclosure in applying for the Orders by reason of failing to identify their alleged bona fide purchaser defence;

(c) Mr Piroozzadeh had failed to explain why there was a risk of a sufficient breach of trust;

(d) there was no explanation as to why damages would be an inadequate remedy; and

(e) there was also no explanation as to how Binance was expected to comply with the injunction in practice (which it said it couldn't by reason of the way it operated its wallets).

Trowers J agreed that notice should have been given – the fact that there was justification to proceed ex parte against one defendant did not, without more, justify proceeding against another ex parte. The order could have been obtained against Persons Unknown and then served on Binance as a non party. However, he concluded that taken purely in isolation this factor alone would not have justified discharge of the injunction.

On the question of fair presentation, however, the Judge was clear: the duty had not been discharged and the orders against Binance, and by extension against Aux Cayes, would not be continued.

The Judge canvassed the authorities. Upon an application without notice for injunctive relief, it is well-established

that the applicant and their legal advisor have a duty to give full and frank disclosure of all material facts, to make fair presentation and to show the utmost good faith (Siporex[1]). The duty encompasses a requirement to anticipate the absent respondent's potential defences (emphasised in Pugachev[2]), and which the respondent would raise were they present. In Fundo Soberano de Angola[3], it was clarified that the applicant cannot rely on the judge to identify key points in full and frank disclosure. The judge in such an application is likely to be acting under constraints of time, often upon voluminous exhibits; key points must be signposted in affidavits and skeleton arguments. In short, and unsurprisingly, all of the obligations which exist in seeking an ex parte injunction continue to apply where crypto assets are involved.

Applying those principles to this case, the judge found that:

1. The movement of digital currency and how any particular exchange generally treats those assets is relevant to the question of whether property rights survive, and therefore of what defences may be available.

2. Binance's evidence was that, even assuming that the applicant's digital assets were traceable to an exchange wallet, 'the uncontradicted evidence…is that the user does not retain any property in the Tether deposited with the exchange'. Binance utilises a 'hot wallet', sweeping all incoming cryptocurrency into a pooled wallet. The user's account is credited with the deposit amount, but no segregation of assets takes place. Trower J held "it should have been apparent that the consequence of pooling was that the users' right to receive substitute assets from the exchange was at the very least likely to constitute the exchange a purchaser for value of anything that was transferred in to the account in the first place".

3. The fact Binance operated in this fashion and the fact it was likely to rely on a bona fide purchaser defence was apparent from its position in another case (D'Aloia). Mr Piroozzadeh's counsel had appeared for the claimant in that other case and accordingly were aware that Binance were likely to raise the same defence to Mr Piroozzadeh's claim.

The judge also noted that it remained unclear to him, even at the ex parte hearing, why it was said that damages were not an adequate remedy and why it was said that Binance was able to identify the traceable proceeds of the applicant's Tether.

This case is a salutary lesson in the care which must be taken in complying with the duty of full and frank disclosure in the still evolving field of cryptoassets, and in the case of novel technologies generally.

In particular:

1. Whilst blockchain technology is new (or at least in relative terms), the law is not. Where a fraud has been perpetrated utilising digital assets, it is still vital to consider the usual fraud defences. Bona fide purchaser defences are a staple defence to proprietary claims in many frauds.

2. But, because the technology and the services infrastructure built around it are new, it is also vital to deliberate on whether there may be atypical defences in cryptofraud cases. It is vital to have someone on the legal team with a respectable level of understanding of the unique features of cryptofrauds who can draw these to the court's attention.

3. Think carefully whether it is even necessary to assume a duty of full and frank disclosure. It is important to consider the justifications for applying ex parte in relation to each distinct defendant. In respect of exchanges not alleged to be fraudulent actors themselves, Piroozzadeh is a firm indication that ex parte applications would not be appropriate.

This case provides welcome confirmation of the high standards required on ex parte hearing and helpful insight into the type of issues which ought to be covered in ex parte crypto misappropriation cases. It is also unlikely to be the last interesting hearing in the Piroozzadeh case – Aux Cayes has applied for strike out or reverse summary judgment.

1 Siporex Trade SA v Comdel Commodities Ltd [1986] 2 Lloyd's Rep 428
2 [2014] EWHC 4336 (Ch)
3 [2018] EWHC 2199 (Comm)

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CRYPTO TRANSACTIONS AND DISPUTES: THE RISKS AND REGULATORY ISSUES

Authored by: Noor Kadhim (Consultant), Mark Pearce (Private Wealth Consultant), and Emily Drake (Legal Director) - Gateley Legal

The rapidly evolving digital asset market offers exciting opportunities for investors. Digital assets are more accessible than traditional financial investments and can present returns that are uncorrelated to the market. Their reward potential is, therefore, often much higher.

These advantages also come with risks, particularly for unsophisticated investors. The volatility and rapid fluctuation of cryptocurrency value can result in significant losses, as can the inherent risks of electronic storage and transfer. The market's susceptibility to fraud and money laundering, due to less stringent regulation, transactions that are often not transparent, and difficulty tracing assets once they are stolen or removed, is also already well documented.

Although the UK, EU, and USA – among others – are developing new regulations to protect investors, including the introduction in many jurisdictions of Virtual Asset Service Provider (of "VASP") legislation, the risks detailed above present a significant barrier to the wider adoption of digital assets. This article seeks to address these risks, outline how to achieve redress in the event of fraud, and discuss the regulatory forecast in certain key jurisdictions.

Practical risks for potential claimants

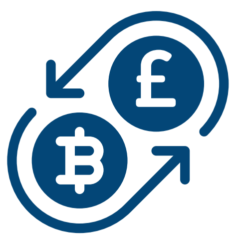
Following economic loss in a crypto dispute, a potential claimant must consider two issues: whether there is a right of action in law against the alleged fraudster, and whether pursuing said fraudster is likely to achieve redress.

A significant hurdle in both cases is tracing the stolen assets and, ultimately, identifying the fraudster(s). While the blockchain technology on which crypto transactions are based provides data that can be used for tracing, this is often negated by the privacy and pseudo anonymity such digital transactions can afford to wallet holders. This is complicated by exchanges or 'mixers', a common feature of jurisdictions such as North Korea and Russia, which are designed to obfuscate the flow of funds or assets. Enhanced privacy is even a mark of distinction for some cryptocurrencies. Monero and Zcash, for example, use advanced cryptographic techniques to obscure transaction details. This means that, even if a claimant successfully traces assets to a wallet, they are unlikely to uncover the fraudster's details.

Conducting transactions on exchange platforms can provide a safety net, as will be discussed in more detail below, but platforms are not always obliged to disclose wallet holder details unless forced by a Norwich Pharmacal Order, Bankers Trust Order or their equivalents in jurisdictions outside the UK. A platform's location will also have an important bearing on their willingness to cooperate when unmasking fraudsters and tracing assets. It is easier, for example, to obtain disclosures from Las Vegas-headquartered Bitcoin than it is Tether, which is based in Hong Kong and less accepting of foreign court orders or cryptocurrencies.

Even unmasking the trail of a stolen asset is no guarantee of that asset's recovery. Without fast intervention such as freezing, assets can be dissipated or converted into fiat currency.

At this point, they become as difficult to trace as traditional bank transfers, particularly if the recipient's chosen monetary platform is outside the claimant's jurisdiction.



Are exchange platforms a better target for redress?

With individual fraudsters proving difficult to trace and target, the intermediary platforms that hold wallets through which digital assets are transferred are becoming an increasingly popular alternative route to redress. Established, reputable platforms will usually owe a contractual obligation or duty of care, making them a more straightforward route for the courts to impel disclosure of information and enforce against assets.

From a UK perspective, the potentially pivotal case of Tulip Trading Ltd v van der Laan provides a useful example of a claimant using a platform's capabilities and obligations to achieve redress.

According to the Court of Appeal: "It is indeed conceivable that relevant individuals, when they are acting in the role of developers, should be held to owe a duty in law to Bitcoin owners".

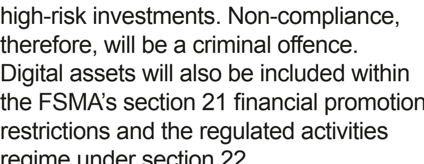
In this case, the duty extended to the platform varying the blockchain's underlying source code to retrieve approximately $4.5bn of Bitcoin that hackers had deleted. It remains to be seen, however, how a court may enforce orders against developers to rewrite source code to bring about the appropriate redress (e.g. access to wallets without knowing the private key)."

Crypto regulation – what is coming?

A legal route against the exchange platforms is not always available. It will depend largely on a platform's credibility and liability, and its contractual and tortious obligations towards its customers. As such, it does not provide a complete remedy for the absence of effective 'policing' by global regulators.

Regulation is finally starting to gather pace, particularly in the wake of several high-profile company collapses and international scams within the crypto asset market, such as FTX.

In the UK, such regulation could come into force within the next year. A bill containing amendments to the Financial Services and Markets Act (FSMA 2) is expected to tighten rules around crypto promotions, which would impact firms, influencers, or celebrities being able to promote currencies, and equate them with



high-risk investments. Non-compliance, therefore, will be a criminal offence. Digital assets will also be included within the FSMA's section 21 financial promotion restrictions and the regulated activities regime under section 22.

Cryptocurrency regulations passed in the EU in April 2023 will also take effect in 2024. Emphasising consumer protection, environmental safeguards, and traceability, they will cover digital assets not already within the remit of existing financial services legislation. These regulations are expected to be among the most wide-ranging legislation applicable to cryptocurrency.

The USA remains less consistent in its approach across agency, state, and federal level. While cryptocurrencies are now classed as securities rather than commodities and therefore fall under the extensive enforcement and regulatory powers of the Securities and Exchange Commission (SEC), general digital assets are considered commodities. This makes them subject to the Commodity Futures Trading Commission (CFTC), which can enforce, but not regulate.

What does the future hold?

Clarity around operating rules in the crypto space is likely to be welcomed by the digital community. Government regulation could also provide the safeguards required to make digital assets more attractive to investors. Until such measures are established, however, investors should limit exposure to fraud by keeping within the transaction limits imposed by multinational banks and only undertaking transactions via reputable platforms established within jurisdictions with solid legal frameworks.

Given that digital assets were originally intended as a decentralised financial system free from government control, there must be a balance between maintaining the advantages of an open, egalitarian financial system, and protecting consumers from unlawful exploitation. It remains to be seen how state regulation and justice systems will achieve this over the coming years.

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LITIGATION INVOLVING CRYPTOCURRENCIES AND DIGITAL ASSETS

COMMUNICATING IN A CHANGING REGULATORY ENVIRONMENT

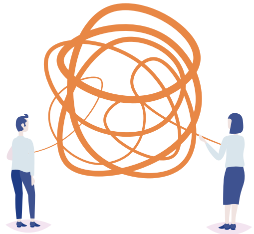
Authored by: Giles Kenningham (Founder) and Tom Anelay (Director) - Trafalgar Strategy

The recent "crypto winter", the expectation defying resilience of consumer demand for cryptocurrencies, and the worldwide development of regulatory models for cryptocurrencies and digital assets indicate that the sector will continue to keep the courts busy.

Given so much of the digital asset sector is unregulated or under-regulated, lawyers have quickly become accustomed to using analogue statute, common law and regulatory guidance to bring and defend actions concerning this newfangled phenomenon. However, as consumer and business usage of digital assets maintains its momentum, a much wider group of stakeholders are finding themselves in the crosshairs of an uncertain legal landscape.

The inherent complexity of cryptocurrencies and digital assets makes providing guidance a challenge. Terms such as NFTs, decentralised finance and algorithmic stablecoin are not well understood and nor do they lend themselves to clear and concise communication. At the same time, a rapidly changing regulatory environment in which states around the world are seeking to catch up with technological developments whilst also seeking to facilitate or disincentivise economic growth in these asset classes results in an almost impenetrable policy ecosystem.

This article examines some of the communications challenges of crypto and digital asset litigation and assesses the different approaches taken by governments to regulate the sector.



Technical complexity and jargon

It is no surprise that the most well known crypto-related scandal of recent times does not rely on the intricacies of blockchain. Instead, from what has been made public of FTX's demise, it seems to be plain, simple, old-fashioned poor governance (and maybe a little fraud - but the courts will determine that). There is little doubt that it is through the prism of corporate governance failures that the world's financial media have approached their reporting.

Nonetheless, future disputes relating to cryptocurrencies and digital assets are likely to necessitate substantive discussion of the technologies themselves amongst lawyers, journalists, interested parties, and the general public.

> ***Without significant effort, including from regulators, there are risks that many members of the public will fail to understand their rights. They could also fail to bring actions they are entitled to bring. More broadly, there is a risk that the judicial process itself is undermined due to confusion and misinterpretation caused by industry specific jargon and technical terms.***

The motive to regulate

One of the ironies of cryptocurrencies and digital assets is that in many of their forms, a core tenant of their appeal is that they exist outside of existing financial (and regulatory) institutions. However, from a political perspective, several elements make regulation vital. First, the risk (no matter how valid) that they might undermine confidence in existing financial systems. Put more starkly - currencies are how states control the fortunes of their economies. Second, the fact that cryptocurrencies and digital assets are often marketed directly to consumers and consumers need protecting. Third, the risk that they can be used for terrorism or crime. Fourth, they are a potential source of tax revenue.

Whilst scandals such as FTX have little to do with cryptocurrencies themselves, there is no doubt that they galvanise momentum. Across the globe, we have seen the regulatory landscape develop at different paces in different states. This momentum is increasing. There is also a general consensus that because you cannot ban the mathematics on which digital asset technologies are based, it is too difficult to ban cryptocurrencies (although China has tried). Instead, countries across the globe are seeking to assert varying levels of control of digital assets. Different governments are consequently taking approaches which mirror domestic concerns and, in many cases, the opportunities they see in attracting fintech investment.

A patchwork of rights

The result of this policy development is a rapidly evolving legislative and regulatory landscape in which regulatory divergence between states is common. Countries such as Switzerland have moved early to try to create regulatory certainty whilst the EU's flagship MiCAR Act seeks the same outcome but on a larger scale. Many see it as an attempt by the EU to set global standards much as it did with data and GDPR. The US approach has been characterised by strong enforcement by agencies such as the SEC rather than federal regulation, whilst the UK and Dubai are developing their own regimes whilst claiming to create crypto-friendly states.

There is an irony that a nation-state patchwork of regulation is springing up for crypto technologies which are often inherently borderless. The challenge for any interested parties is that this nation-state regulatory approach adds confusion.

The lack of a global approach to digital asset regulation causes several other issues too. From a competition perspective there is no level playing field. Furthermore, despite a global consensus towards regulation, the risk of a race to the bottom is increasing as companies in the crypto sector move their operations to the nations with the friendliest approaches to the crypto community.

Conclusion

It is clear that regulatory developments will continue to have a significant impact on ongoing litigation whilst opening up new avenues for disputes. However, it also seems that despite the efforts of regulators to provide clarity, the development of regulations will create more cross-jurisdictional complexities associated with litigation. Disputes are already regularly involving parties from different countries, each of which have varying regulatory approaches and legal systems. Similarly, several regulatory regimes only cover parts of the crypto asset value chain. Given the sector's track record of innovation, regulators will struggle to keep pace, leaving the courts to pick up the pieces.

In this regard, regulators would do well to remember that many of the failed high profile businesses in the cryptocurrency and digital asset space were run by people who were relatively inexperienced in providing financial services. It is here that the Kelly Report into the failure of the UK Co-operative Bank in 2013 provides a salutary lesson. Sir Christopher found that the bank had failed not because of lack of regulation but because of its leaderships' lack of knowledge. It is possible that no new regulation would have saved the bank from collapse. In the same way, it is possible that no new regulation can save consumers from crypto-related harm.

This is not to say that regulation is futile but to highlight the importance of enforcement by state agencies and the enforcement of rights by individuals and companies. However regulation develops, the courts will play a vital role in continuing to arbitrate uncertainties.

The coming years will require lawyers, companies, journalists, regulators and politicians to adopt transparent and accessible communication strategies to bridge the gap between the legal world, regulatory changes, and the general public. There will be plenty of education as well as litigation to be done.

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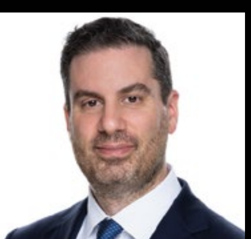

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INDIA RAISES THE BAR ON ESG DISCLOSURES

Authored by: Neha Aggarwal (Director) and Jack Mullan (Partner) - Mintz Group

India has long had a framework for corporations to disclose the corporate social responsibility initiatives they undertake for the benefit of society at large. The list of qualifying CSR activities, however, is intentionally broad, ranging from supporting the protection of historically important sites to promoting safe drinking water. The increasing emphasis of both investors and regulators around the world on the more narrowly defined ESG metrics led the Securities and Exchange Board of India (SEBI) to introduce, in 2021, an ESG disclosure framework for the country's 1,000 largest listed companies. This ESG disclosure framework, the Business Responsibility and Sustainability Report (BRSR), is built off of the nine principles set forth in India's 2018 National Guidelines on Responsible Business Conduct. The BRSR is a comprehensive document, requiring companies to report on metrics ranging from percentage of R&D and capital expenditure on technology to improve the environmental and social impact of products and processes to the percentage of employees that have health insurance.

Increasing reliability, broadening scope

The BRSR represents a significant step forward in developing a sophisticated ESG regulatory regime akin to those being developed in major global economies while also maintaining an emphasis on priorities specific to India. This March saw another important step in India's ESG evolution, with SEBI's approval of enhancements to the initial BRSR disclosure framework. The consultation paper released in February seeking public comment on the proposed changes noted two major factors driving the need for improved ESG disclosure.

> ***The first is the need for a higher level of assurance regarding the reliability of reported data to "enhance credibility of disclosure and investor confidence." Until now, the BRSR reporting metrics have been to the standard of limited assurance—evidence is systematically gathered, but without the level of depth, evaluation, and risk assessment that defines the higher standard of "reasonable assurance."***

In order to increase confidence in ESG disclosures while ensuring that compliance requirements remain attainable, SEBI has established "BRSR Core"—a subset of the BRSR's ESG

metrics that must be measured with reasonable assurance The BRSR Core requirement will apply to India's largest 150 companies in FY 2023-2024 and to the top 1000 companies in FY 2026-2027. The metrics proposed for the new BRSR Core cover a wide range of areas. For example, the BRSR Core metrics include waste recovered through recycling, percentage of wages paid to workers in smaller towns (to promote more inclusive economic development) and percentage of media coverage that is negative (to measure fairness in engaging with customers and suppliers).

Importantly, to combat greenwashing in ESG financial products, SEBI is also requiring ESG ratings providers to rate companies on their compliance with the SEBI Core reasonable assurance disclosures and to require ESG financial products to invest at least 65 percent of their assets under management in companies that are complying with the BRSR Core disclosures. Compliance with those disclosures will thus have concrete implications for the company and its position within the investor community.

The second major ESG disclosure goal of the consultation paper is improving disclosure regarding the supply chains of reporting companies. Currently, the metrics relating to a company's supply chain are covered under the BRSR's "Leadership Indicators"—metrics that are both voluntary and conducted with limited assurance. However, as the consultation paper notes, there is an increased perspective among investors that a comprehensive understanding of a company's ESG impact and risk must include its supply chain. At the same time, SEBI recognizes that there are significant complexities regarding supply chain disclosure, including the fact that many suppliers may be small firms and that companies may have many tiers of vendors in their supply chains.

SEBI is thus proposing that, starting in FY 2024-2025, India's top 250 listed companies also disclose the BRSR Core metrics for their suppliers, on a "comply or explain" basis. Although assurance would not be mandatory during the first year, starting in FY 2025-2026, assurance for supply chains would be on a "comply or explain" basis as well.

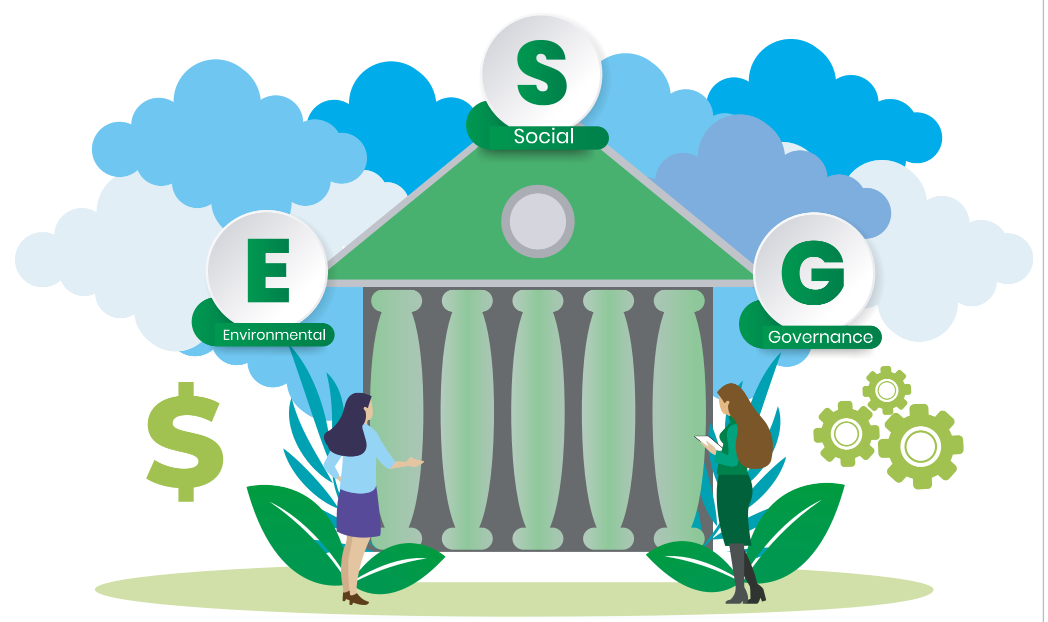
Implications for Indian companies

These regulatory priorities bring significant implications for the compliance function of major Indian companies. Some of the work meeting the higher level of assurance proposed for ESG disclosures will be done by accounting firms. But for many metrics, the responsibility will fall to the company itself—requiring the company to conduct disinterested due diligence on its operations and possibly those of its suppliers. It will no longer be sufficient for companies to take at face value internal records on water consumption or its expenditures on health insurance and employee childcare.

And beyond the new BRSR Core, the February consultation paper includes a list of proposed parameters that ESG ratings agencies adopt to reflect ESG priorities specific to India. These include whether the company has operations in or around ecologically sensitive areas and its sourcing from micro, small and medium-sized businesses.

While these evaluations would be under the purview of the rating agency, it would still be incumbent upon the company to have clear-eyed, reliable answers to these questions itself, so that it can proactively manage its ESG footprint.

SEBI's recent revisions to the ESG reporting framework are likely to be only one step in India's ESG regulatory evolution; the trend toward broader and more reliable ESG data is likely to only continue. India's large, listed companies thus need to prepare to ensure that their ESG disclosure capabilities—whether in-house or through working with external resources—are at the level needed to operate under greater scrutiny.



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INDIA OPENS UP:

LIBERALISATION OF THE INDIAN LEGAL MARKET

Authored by: Tulsi Bhatia (Associate) - Cooke Young & Keidan

Background and announcement of the Rules

India's history of allowing foreign lawyers and foreign law firms entry into India has been chequered to say the least, with the Bar Council of India ("BCI") historically being in opposition to this in any form and the Indian judiciary deliberating on this issue on various occasions in the past. Despite the BCI's position, various ministries and arms of the Indian government have been in a dialogue with Law Councils and Societies of foreign countries (including that of England & Wales) to explore the potential and prospect of opening the practice of law in India to foreign lawyers, for almost two decades. Recently, in a long-awaited move, the BCI published a notification on 10 March 2023[1] ("Notification"), allowing the entry of foreign lawyers and foreign law firms in India for the first time, and setting out the rules for their registration and regulation ("Rules"). The Notification states that the demand for an open, responsive, and receptive legal profession in India from clients who operate international businesses could no longer be ignored and that the globalisation of legal practice and internationalisation of the law has become increasingly relevant to the growth of the legal profession in India[2].

BCI's announcement is in fact not surprising when looked at in the context of the extensive negotiations that have been taking place for an India-UK free trade agreement ("FTA")[3]. India was the UK's 12th largest trading partner, with the total trade of good and services between the countries being valued at £34 billion in the four quarters to the end of Q3 2022, which accounts for 2.1% of total UK trade[4]. It is reported that one of issues highlighted by the UK during trade talks was foreign investors' need for foreign law support when doing business in India[5]. This sentiment was echoed in a press release dated 19 March 2023, in which the BCI noted that multinational and foreign companies have historically preferred places like

1 The Notification can be found at https://www.livelaw.in/pdf_upload/bar-council-of-india-rules-for-registration-and-regulation-of-foreign-lawyers-and-foreign-law-firms-in-india-2022-463531.pdf

2 Paragraph 3, Objects and Reasoning section, Notification

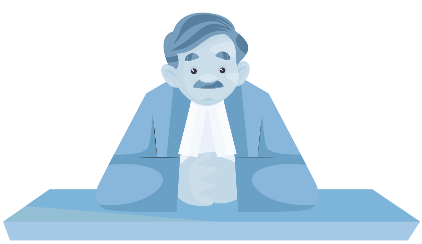
3 The UK and India concluded the seventh round of talks for the FTA on 10 February 2023 and the eighth round is due to take place later this spring: https://www.gov.uk/government/news/joint-outcome-statement-uk-india-round-seven-fta-negotiations.

4 https://www.india-briefing.com/news/india-uk-fta-25699.html/; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1150598/india-trade-and-investment-factsheet-2023-04-20.pdf

5 https://www.india-briefing.com/news/india-uk-fta-25699.html/

London, Singapore and Paris over India as a venue for arbitration, since in India they have not been allowed to bring lawyers and law firms from their own countries to advise them in international commercial arbitration proceedings but the Rules now address this issue in the hope that this will help India become a hub for international commercial arbitration[6].

The Law Society of England & Wales issued a statement regarding the BCI's decision, saying: "We have long campaigned for this historic opening up of India's legal services sector to foreign law firms. We thank the Bar Council of India and the Indian Ministry of Law and Justice for our constructive and productive discussions on the issue."[7]



What can foreign lawyers and law firms do under the new Rules?

Foreign lawyers and law firms can now advise on and practice foreign law, engage in international arbitration matters for foreign clients, and advise on international legal issues in non-litigious matters in India on the principle of reciprocity. At this stage there is some ambiguity on what a foreign client is[8] and on what reciprocity means in practice. The Notification states that the UK has said to have authorized Indian lawyers and law firms to establish offices in England & Wales, allowing them to practice Indian law, international law, and provide legal advice under English law and in response, the BCI stated that it will verify these claims and reciprocate accordingly.

Further, foreign lawyers and law firms can conduct transactional and corporate work, such as joint ventures, mergers and acquisitions, intellectual property matters, and drafting contracts, among other related matters. However, they are not allowed to appear before any courts, tribunals, or other statutory or regulatory authorities in India.

Foreign lawyers and firms are required to register with the BCI, for which the fees are $50,000 for a firm and $25,000 for an individual. This, however, does not apply in the "fly in and fly out" practice, which is only permitted if it does not exceed 60 days in any period of 12 months.

Local Indian firms' reception of the Rules

It is worth noting that the Society of Indian Law Firms ("SILF") has expressed concerns about the timing and manner of this development while welcoming BCI's initiative in framing the Rules. In its representation to the BCI submitted on 31 March 2023, SILF noted inter alia that the Rules are discriminatory toward Indian lawyers who are governed by the code of conduct and regulations under the Indian Advocates Act, 1961. This Act entails archaic rules that forbid Indian lawyers from forming limited liability partnerships, any form of marketing and innovative fee structures, whereas foreign lawyers and law firms will be governed by their home country's rules, which are unlikely to be as restrictive.

How this feedback is going to be implemented is yet to be seen but having a level playing field for Indian lawyers is imperative to the local legal industry.

Comment

While it appears that there are several points in relation to the Rules that need clarification and possibly some fine tuning, this is the first step (or leap) toward India becoming more globalised and accessible to the world and especially to foreign investors.

6 Paragraph 6, Press Release which can be found at https://images.assettype.com/barandbench/2023-03/57a2a39d-a1a9-4d43-ae22-aa1a5fbf3e8d/Press_Release_Dated_19_03_2023.pdf.

7 https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/historic-decision-to-open-up-india-to-foreign-lawyers

8 Although under the Rules, a foreign client is defined as "an individual/s who is/are citizen/s of a foreign nation or a firm/corporation/business entity having its registered office/head office in a foreign country with a branch/regional office or manufacturing unit in India", it is not clear how this definition will be applied to multinational corporations that have complex corporate structures.

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For more information, please contact Dan Tilbury.

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THE VIEW FROM EMEA:

M&A DISPUTES ON THE RISE IN 2023

Authored by: Daniel Ryan (Managing Director), David Rogers (Managing Director) and Andrew Webb (Managing Director) - BRG

Economic and geopolitical uncertainty will continue to drive disputes in Europe, the Middle East, and Africa.

The outlook for 2023 deal activity is mixed after last year's decline in mergers and acquisitions, with reason for optimism in some industries offset by banking-sector turmoil that could chill dealmakers' appetites for M&A. But the economic and geopolitical uncertainties that drove last year's spike in M&A disputes show no signs of slowing down, setting the stage for more conflicts to come—particularly in the Europe, Middle East, and Africa (EMEA) region, which BRG's 2022 M&A Disputes Report identified as the expected leader in such activity this year.

In what follows, we'll examine how factors such as the protracted war in Ukraine and mounting regulatory pressures could influence M&A disputes in EMEA. Issues around cryptocurrency and environmental, social, and governance (ESG) factors also are casting shadows over the disputes landscape in the region and beyond—a topic that BRG plans to explore in greater depth in our upcoming 2023 M&A Disputes Midyear Report.

2023 Outlook: EMEA M&A Landscape

This year, EMEA is seeing some M&A activity, driven—as a February Bloomberg report put it—"by corporates looking to take advantage of cheap valuations and strong balance sheets to drive their growth agendas."

Major transactions in the works include:

(1) Biotechnology giant Amgen's **planned $28 billion acquisition** of Dublin-based Horizon Therapeutics

(2) A **$4 billion bid** by the main shareholder of Rothschild & Co. to take the storied French banking firm private

(3) Swiss building-materials company Holcim's **$1.3 billion-announced deal** for US roofing systems company Duro-Last

(4) UK chemical maker Ineos Group's **$1.4 billion purchase** of South Texas oil assets from Chesapeake Energy

Recent banking-sector upheaval, however, potentially could curb M&A volumes, despite earlier forecasts identifying sectors including technology, media, and telecommunications as expected drivers of EMEA deal activity this year.

The Middle East also may offer opportunity for deals, with a senior banker at Saudi Arabia's SNB Capital noting, "We see 2023 as an M&A year" due to accelerated investments by the kingdom's sovereign wealth fund and heightened transactional activity among the private sector.

Unpredictable Market Conditions Increase the Likelihood of M&A Disputes

However, ongoing uncertainty and market volatility in EMEA also are expected to increase the propensity for deal-related disputes, as shifting conditions affect how deals are structured and as the economics that underpin transactions evolve between the time of signing and completion.

Rapid market shifts can make it hard for buyers and sellers to gauge the value of the businesses being bought and sold, which can result in a "valuation gap" where both parties want to do a deal but struggle to agree on price. One way that dealmakers can address this is by using contingent consideration such as earn-outs, which allow the buyer and seller to share some risk. These mechanisms are on the rise: they were the second-ranked dispute driver in EMEA last year, BRG's research found.

For their part, buyers may try to renege in instances where value has declined sharply, as Elon Musk appeared to attempt (unsuccessfully) with Twitter. Acquirers also may consummate a deal only to find that what they have received is not what they had bargained for, because of undisclosed factors such as supply chain disruptions or regulatory interventions.

Sector-specific upheaval is feeding the disputes pipeline too, most prominently in the area of cryptocurrency.

Last year saw a record number of crypto-related M&A deals, including the London Stock Exchange Group's purchase of TORA, a provider of technology for trading digital and other assets.

But the announced value of crypto M&A transactions fell by more than half in 2022 compared to 2021 amid the crypto winter, providing impetus for post-deal disagreements.

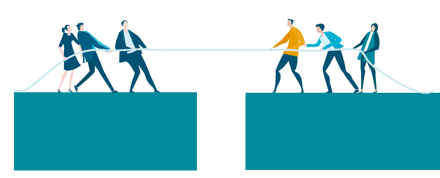
The War in Ukraine and Other Geopolitical M&A Dispute Drivers in EMEA

Nearly one-third of EMEA respondents to our 2022 survey cited political strife as a factor they expected to drive disputes in 2023—the highest of all regions we surveyed. Those issues could well come into play in EMEA in the coming months.

A prime example: additional economic sanctions on Russian banks and other entities as the country's invasion of Ukraine drags on. Shut out of many American and European banks, Russian money has been flowing to more friendly destinations such as the United Arab Emirates. The UAE's Central Bank, for instance, revoked a license it had granted Russia's MTS Bank to operate in the country after the US included the lender in a list of sanctions, giving the bank six months to wind down its operations in Abu Dhabi. The move comes as the US appears increasingly keen to encourage the UAE and other Middle Eastern countries to do more to slow down Russian economic activity fuelling the war in Ukraine.

Stepped-up sanctions and/or more aggressive enforcement of such measures could lead to M&A-related disputes, similar to the impact of anti-corruption laws. Say a Western company has invested in a business in the Middle East that has been close to the line where Russian sanctions are concerned—and then either the business crossed it, or the line shifted due to stepped-up enforcement. Complex multinational supply chains also could snare companies in sanctions-related M&A disputes if, for example, a company's downstream supplier is in breach of sanctions but that vulnerability wasn't disclosed at the time of the deal. In times of economic turmoil, potential nondisclosures are more likely to lead to disputes, with disappointed buyers looking to assuage some of their dissatisfaction through warranty or misrepresentation claims.

On the other hand, energy-market turmoil tied to the Ukraine conflict hasn't damaged the European economy as much as some had anticipated. A milder than usual winter and strong government support has blunted some expected impacts for most Western European countries, though Eastern European countries that rely more on energy-intensive manufacturing are expected to be harder hit. That steadier-than-expected economic footing could potentially avert some dispute activity tied to M&A deals for EMEA companies.



Heightened Focus on Antitrust and Environmental, Social, and Governance

The regulatory environment was a prime driver of M&A disputes in EMEA last year: nearly one-third (31 percent) of survey respondents in the region selected it as a key factor leading to disputes.

We expect that trend to continue in the coming year, as European Union and UK authorities enact stricter rules on

issues including antitrust, data privacy, and ESG. Regulatory interventions that slow the progress of deals often can result in transactions that don't create the value initially anticipated, creating an environment primed for disputes. UK regulators in particular are becoming more assertive.

For example, in February the UK Competition & Markets Authority told Microsoft that the software giant's $69 billion acquisition of Activision Blizzard could harm competition in the UK gaming market. While the CMA has since narrowed the scope of its investigation, the probe adds to existing pressure on the deal from US regulators. These sorts of regulatory interventions can affect deal terms around representations, warranties, or other contractual commitments—and so trigger M&A disputes.

The EU's Foreign Subsidies Regulation, set to apply later this year, also could slow some M&A deals and open up others to disputes. The FSR grants the European Commission powers to investigate subsidies from non-EU states that distort competition in the EU's internal market. The rule also allows the EC to impose far-reaching conditions, such as divestment or dissolution of deals, for transactions where a foreign subsidy may affect competition in the EU.

ESG in the Legal Spotlight

A heightened focus on ESG among authorities—not to mention investors and advocates—continues to cast a shadow over the regional M&A disputes landscape.

BRG's research found that evolving ESG rules in the EU, UK, and elsewhere are expected to reveal previously undisclosed issues that could feed deal-related disputes. Nearly 80 percent of survey respondents agreed that the aggressive regulatory environment and lack of established metrics and rules around ESG make M&A disputes in this area more likely in 2023.

These issues have been increasingly showing up in EMEA legal venues. In February, the advocacy group ClientEarth, which is also a Shell shareholder, sued the oil giant's board of directors in a UK court for failing to manage the material and foreseeable risks that climate change poses to the company. The lawsuit alleged that the directors had breached their duties under the UK Companies Act of 2006, as well as their duty of reasonable care, skill, and diligence, and had the support of key financial investors.

That vulnerability also could extend to companies that buy assets that are in compliance with ESG standards that are current at the time those deals are completed, sparking disputes around duty of care laws and companies' obligations to disclose, manage, and prevent ESG-related risks in the future. The 2021 order by the Hague District Court for Shell to reduce its worldwide CO_2 emissions by 45 percent by 2023 was based on an unwritten duty of care in Dutch tort law that the court found required the oil giant to prevent dangerous climate change.

That decision is now under appeal, but such litigation and court decisions show that companies can be found liable for historical acts that, on the face of it, may have appeared at the time to be consistent with then-applicable legislation or ESG standards. Due diligence during M&A processes is evolving to encompass these considerations and must assess whether liability might arise from acts or omissions, whether or not these comprised breaches.

Under this lens, a warranty that the operation of an asset was compliant with prevailing in-country regulations may not be adequate to protect a new owner's reputation and ESG record. Instead, the due diligence must drill down into the scale and nature of the impact of that operation on the environment and local communities; then an informed decision must be made as to the extent to which this might come back to bite the new owner—if the risk is deemed too great, it could prevent the acquisition. Similarly, sellers are taking greater care about whom they sell to if one of the reasons for the sale of an asset is that it no longer fits within their ESG tolerance.

What's Next for M&A Disputes?

As 2023 unfolds, BRG will be watching carefully to see how the rapidly evolving conditions may affect our clients and readers. BRG will explore ESG's impact on deal-related disputes in greater detail in our upcoming M&A Disputes Midyear Report. That research also will examine how cryptocurrency and other digital assets are influencing M&A disputes in EMEA and beyond.

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HACKERS-FOR-HIRE: LONESTAR COMMUNICATIONS CORPORATION V KAYE

Authored by: Zachary Kell (Barrister) and Alexander Kingston-Splatt (Barrister) - Radcliffe Chambers

Introduction

"In applying a foreign concept of law, we should weigh all of the benefits and choose the blessings." These words of Mabande J., delivering the judgment of the Supreme Court of Liberia in Quelo v Providence Concrete Works [1981] LRSC 29, 301 ("Quelo"), were cited as an example of what Foxton J. called the "strong discretion" of a Liberian judge when deciding the content of Liberian law (Lonestar Communications Corporation v Kaye [2023] EWHC 421 ("Lonestar")). Foxton J.'s judgment is the first time the Commercial Court of England and Wales has heard a claim for damages following a distributed denial-of-service ("DDoS") attack, a form of cyber-attack designed to overwhelm a victim's machine or network and prevent legitimate connection requests, for example from its customers (Lonestar, §39). In this article we will look at three particular areas of interest from the judgment, namely (i) the treatment of Liberian law and the approach taken by the Court in determining the claimant's cause of action; (ii) the problems with quantum faced by the claimant which led to a failure to beat a without prejudice save as to costs ("WPSATC") offer; and (iii) important guidance on the appropriate rate of interest applicable to US Dollar judgments given in the Commercial Court.

Facts

The claimant is a major provider of cellular communication and internet services in Liberia and is part of the largest mobile network operator in Africa. A series of DDoS attacks were carried out from October 2015 to February 2017 which disrupted its service. Mr Kaye, the first defendant, was a hacker-for-hire. He was hired by the second defendant, the CEO of Cellcom Liberia ("Cellcom"), a competitor of the claimant, to carry out the attack with assistance from the fourth defendant, an employee of Cellcom. Cellcom was owned by a BVI company, the third defendant, which sold its interest in April 2016 to Orange Group, with Cellcom rebranded as Orange Liberia, the fifth defendant. Mr Kaye was sentenced to 32 months in prison in England and did not take part in the trial, nor did the other individual defendants. The BVI company provided evidence of fact and expert evidence but did not attend trial. Orange Liberia defended itself at trial.

The cause of action

It was common ground that the claims were governed by Liberian law, a common law system in which decisions

of the Supreme Court constitute a source of law, alongside legislation (Lonestar, §113). Section 40 of the Liberian "General Construction Law" provides that, except where it is modified by the laws of Liberia, "the common law and usages of the courts of England and of the United States of America" are considered to be part of Liberian law ("the Reception Statute"). Lonestar's claim was predicated on four causes of action: (i) lawful means conspiracy; (ii) unlawful means conspiracy, the unlawful means being breaches of (a) the UK's Computer Misuse Act 1990 and (b) s.76 of the Liberian Telecommunications Act 2007 ("2007 Act"); (iii) unlawful interference; and (iv) a claim under the Liberian general tort of "action of damages for wrong" (Lonestar, §124). No claim was advanced under s.80 of the 2007 Act, which allows a person who has sustained loss or damage resulting from any act or commission contrary to the 2007 Act (or its subordinate legislation) to bring civil proceedings against any person who "engaged in, directed, authorized, consented to or participated in" that act or omission.

Considering the evidence of three experts, two of whom gave live evidence, including a former Chief Justice of the Liberian Supreme Court, Foxton J. rejected the English tort claims, finding it unlikely that the Reception Statute would be used to adopt these torts into Liberian law, in part because Liberia looks more to US than English jurisprudence, due to the very close links between those two countries (Lonestar, §§119, 175). Considering the development of the law of torts from the fifteenth century to modern day (and adopting a commentary of Prof. David Ibbetson on the subject; see §148), Foxton J. considered whether Liberian law had developed a full range of recognised or nominate torts (e.g., trespass and nuisance), each with their own particular rules, or whether it retained an open-ended set of "torticles" which fall outside the primary, recognised torts. Whilst finding that it was not quite as broad as the latter, Foxton J. held that there was a general Liberian tort ("the action of damages for wrong") which was sufficiently broad to encompass breach of a Liberian statute such as s.76 of the 2007 Act. On this basis, he found the individual defendants liable in damages and the corporate defendants vicariously liable as a matter of Liberian law (see §§177-201, 205-224 for the treatment of vicarious liability).

Quantum, Interest and Offers

The claimant had sought c.$50million in its claim. However, Foxton J. awarded only c.$4.3million in total for both lost profits and wasted expenditure.

The judgment for consequential matters is at [2023] EWHC 732 (Comm) ("Consequential Judgment"). Foxton J. decided that the starting point for interest on the US dollar judgment would be US Prime. He held that this should be the default rule going forward for judgments entered in US Dollars in the Commercial Court, irrespective of whether the claimant has a US place of operations or whether it is a maritime claim (as much of the previous caselaw had been) (Consequential Judgment, §14).

This was because:

(1) of several previous decisions made by the Court (§§4-7)

(2) LIBOR is in the course of being discontinued

(3) LIBOR itself is an interbank rate, rather than a commercial borrowing rate

(4) the trend of more recent authorities favoured US Prime; and

(5) a default rule would not achieve the requisite clarity if it did not apply to particular commercial sectors of indeterminate scope.

As US Prime is the rate offered by US banks to their most creditworthy business customers, Foxton J. held that (i) in some cases, even without evidence, it will be obvious from the general characteristics of a claimant that it would have to pay a rate higher than US Prime, and so the Court may be prepared to award US Prime plus 1 or 2%; and (ii) claims for more than US Prime plus 2% would likely require evidence. Given the nature of Lonestar, he awarded US Prime without any uplift (Consequential Judgment, §§16-17).

The total award of damages plus interest was therefore $5.4million (Consequential Judgement, §21). Before considering two WPSATC offers made by Orange Liberia, Foxton J. decided that because of, inter alia, the overexaggerated quantum of the claim, the claimant was entitled to recover 40% of its costs against Orange Liberia, subject to the offers made. On the basis of a WPSATC offer, the claimant also found itself liable for Orange Liberia's costs (see §39 for the different costs orders made between the parties).

Conclusion

Mabande J. described the law as "a dynamic and progressive science" (Quelo, 301).

The judgment in Lonestar is another example of the Commercial Court's dynamism in parsing complex issues. There are three key takeaways from the judgment. First, the Commercial Court is always willing to work outside of the recognise bounds of English tort law to carefully apply applicable foreign law. Second, the decision to apply US Prime as a default rule provides welcome clarity in cases going forward. Third, the judgment is a salutary warning to claimants overexaggerating the quantum of their claims and the risk of substantial irrecoverable costs that creates.

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FINANCIAL SANCTIONS IN THE UK

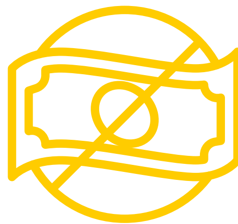
Authored by: Cecilia Xu Lindsey (Barrister and Arbitrator) - No5 Chambers

With the financial sanctions imposed against Russia has been widening and deepening over the past year, more and more businesses and investors have paid attention to the regulatory obligations for compliance.

Legal framework

The Sanctions and Anti-Money Laundering Act 2018 (the "Act") provides statutory power and legal foundation for imposing sanctions in the UK. The UK government also implement sanctions imposed by the United Nations (UN). The enforcer and implementer in the UK is the Office of International Sanctions Implementation ("OFSI") which is part of HM Treasury.

Other legislations relating to sanctions include The Terrorist Asset Freezing Ect. Act 2010, Immigration Act 1971 and Export Control Order 2008.



Financial sanctions

Financial sanctions apply to all sectors and concern all forms of financial services through freezing or preventing funds, financial services, financial products and economic resources which would otherwise be made available for the benefit of the designated persons, persons connected with a prescribed description or a prescribed description of persons connected within a prescribed country.

For instance, on 27 September 2022, OFSI imposed monetary penalty of £30,000 on Hong Kong International Wine and Spirits Competition Ltd (a UK registered company) for its breach between 2017 and 2020 of regulations 3 (1) and 6 (1) of the Ukraine (European Union Financial Sanctions (No.2) Regulations 2014 and Articles 2 (1) and (2) of the Council Regulation (EU) No 269/2014. In this case, HKIWSC received funds and wine bottles (tangible economic resource) from a designated entity, the State Unitary Enterprise of the "Republic of Crimea" Production-Agrarian Union ("Massandra") which entered into the competitions in the years and used the platform and publicity (intangible economic resource) to increase sales of wine and exchange for funds.

HKIWSC failed to make voluntary disclosure to the UK authorities, so a reduction discount would not be applicable. Further, OFSI was satisfied on balance of probability that HKIWSC breached the prohibitions imposed by financial sanctions legislation and that HKIWSC knew or had reasonable cause to suspect that it was in breach of these prohibitions. HKIWSC then applied for a ministerial review under available provisions of Policing and Crime Act 2017 ("PACA"), the Economic Secretary to the Treasury conducted the review and conclusively upheld OFSI's decision on the penalty and amount of the penalty.

"Designated person"

Section 9 (5) of the Act provides that "person" includes any organisation, association or combination of persons, in addition to an individual, a body of persons corporate or unincorporate.

Financial sanctions may target the entire government / regime of a prescribed country or target specific recipients such as individual residents and assets.

There are currently 34 regimes in total as target of the UK's financial sanctions.

Compliance

The UK financial sanctions apply to all legal entities including branches established pursuant to the UK laws and other entities operating in the UK. Businesses and investors should increase awareness and develop good practice to ensure compliance, in particular if there is operation abroad and serves overseas customers. Any breaches committed after 15 June 2022 would incur a strict civil liability, which means that the sanctions requirements must be complied with, failure of which would have consequence of written warnings, publication of the breach, civil monetary penalties, and may even incur criminal sanctions imposed by National Crime Agency (NCA). In addition, OFSI carries out enforcement on a case-by-case basis.

To maintain compliant, entities ought to consider the international scope of their business, ensure sufficient measures in place, manage potential risks of breach and, where necessary, apply to OFSI for (general or specific) licence that allows activities which would otherwise be prohibited by the financial sanctions.

Licence application is a complex legal and commercial process which is based on the relevant grounds and cannot be made retrospectively. Timing of the licence application would also likely be extended when UN will need to approve or be made aware of, as a result of which the entity should take into account of any deadlines which may affect the urgency and process of licence application.

International institutions might also fall within the remit of the UK sanctions where a UK nexus could be established, albeit a variety of circumstances could be found to establish the required UK nexus.

Understandably, matters could be far fetching, involving numerous parties across jurisdictions and regimes. For instance, the UK provides major financial services and Fintech sector in the global market; it also has the largest insurance sector in the world's maritime industry. UK reinsurers may provide cover for overseas underwriters who have insured risks for the beneficiary based in a third country against which the UK sanctions have been imposed. Dispute may easily arise due to varied expectations and goals of diverse parties who are based in different countries.

A most recent development is that on 5 December 2022 the UK and EU imposed a general prohibition from importing Russian-origin seaborne crude oil, subsequent to the United States's ban on all imports of Russian crude oil, petroleum, natural gas, coal and oil earlier in the year. A new Unit within OFSI has been set up to institute a licencing and enforcement system for Price Cap, to engage with industries, monitor the Price Cap level and impact and work with other government agencies and with international counterparts for implementation. This will undoubtedly impact on transportation, insurance, financing, freight and other operations of oil shipment.

It is therefore crucial for businesses and investors to carry out rigorous due diligence timely even before entering into a transaction, regularly assess the situation of sanctions and monitor related development to remain up-to-date, identify companies and individuals against the consolidated sanctions list, checking ownership and control of persons against the sanctions list, communicate with other parties in the transaction, mitigate risks when dealing with designated persons, report to OFSI on which you have knowledge or suspicion, and seek independent legal advice for support in order to make informed decisions and achieve compliance.

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Authored by: Nadia Osborne (Partner) and Tim Reinhard (Associate) - Fladgate

Introduction

In this article, we consider the key arbitration statistics contained in the recent English Commercial Court ("Court") Report for the year 2021 - 2022 ("Report"). We also discuss how the statistics tie in with the proposed reforms to the Arbitration Act 1996 ("Act").

These reports are published annually by the Judiciary of England and Wales and provide an overview as to the work undertaken by the Court, including its decision-making. They provide a useful insight for arbitration practitioners in terms of insight into the number of applications made to the Court to challenge arbitration awards and the outcome of such applications.

The majority of arbitral claims to the Court relate to challenges to arbitration awards under the Act:

(1) On the grounds of lack of substantive jurisdiction (s67);

(2) On the grounds of serious procedural irregularity (s68); and

(3) Appeals on a point of law (s69).

In short, the Court maintains its non-interventionist approach to arbitral awards, such that challenges to arbitral awards should not be undertaken lightly and the proposed reforms to the Act follow the Court's non-interventionist approach.

The Report

In total, matters arising from arbitration made up around 25% of the Court's cases in 2021 - 2022. The Report shows a significant increase in arbitration related applications in this period compared to previous years:

(1) Section 67 applications: the Court saw a 59% increase relating to challenges for lack of substantive jurisdiction. However, out of the 27 applications filed with the Court, 5 were dismissed on the papers, 1 was unsuccessful, 1 was discontinued and 20 remain pending.

(2) Section 68 applications: there has been a 54% increase relating to challenges for serious irregularity with the Court receiving 40 such applications. Of those, 5 were dismissed on the papers, 1 was dismissed at a hearing, 2 were discontinued, 1 transferred out and 31 are pending and awaiting decision.

(3) Section 69 applications: an 8% increase relating to appeals on a point of law saw permission to appeal being granted in 13 out of 40 cases. The final decision on the appeals was pending at the time of publication of the Report. However, the Report points out that as arbitration applications may span a year-end, it is important to look at prior year figures. A review of the 37 applications received in 2020 – 2021 shows that only 2 of the 37 applications were ultimately successful.

Despite the (large) increase in arbitral award challenges under the Act as outlined above, the Court continues to strive to respect awards and decisions issued by arbitral tribunals. The likely prospects of success that an applicant faces on section 67, 68 or 69 applications should serve as a timely reminder for arbitration practitioners to carefully consider any challenges they wish to bring; the Report confirms that there remains a very high threshold for challenging arbitral awards under these provisions.

Reforms to the Act

The Report points out that the Judges of the Court have liaised with the Law Commission on the potential reform of the Act.

In light of the responses received to its first consultation paper the Law Commission published the second consultation paper on the reform of the Act on 27 March 2023.

Amongst other important topics such as discrimination in arbitral appointments, the second consultation paper addresses challenges to an arbitral tribunal's substantive jurisdiction under section 67 of the Act and proposes limits on the ability to bring section 67 challenges.

The Law Commission is seeking views on the following proposed limits:

(1) the court should allow the challenge where the decision of the tribunal on its jurisdiction was wrong;

(2) the court should not entertain any new grounds of objection, or any new evidence, unless even with reasonable diligence the grounds could not have been advanced or the evidence submitted before the tribunal; and

(3) evidence should not be reheard, save exceptionally in the interests of justice.

The proposed reforms are intended to prevent applicants from having the opportunity of a 're-hearing' and are in line with the principle that an arbitral tribunal is entitled to rule on its own jurisdiction (the 'competence-competence' principle). Interestingly, the Law Commission has recommended a 'softer type of reform' by including the proposed limits within the Court rules rather than the Act itself as this would allow the proposed limits to be within the scope of the Court's review and allow the Court to adjust the limits accordingly if necessary.

The reforms proposed may have, if implemented, an additional deterrent effect on arbitration practitioners considering whether to bring a section 67 challenge, in addition to the already low success rates of section 67 challenges.

Comment

The Report should be welcome news for London based arbitration practitioners. The rise in arbitration related applications shows that London continues to be one of the key international arbitration centres and confirms that the Court remains reluctant to intervene in the arbitration process. The English judiciary's respect of the arbitration process and the tribunal's decision-making is further confirmed by the section 67 reforms proposed by the Law Commission. If the section 67 reforms are indeed implemented, we expect to see a drop in section 67 challenges to give further certainty of the arbitral process.

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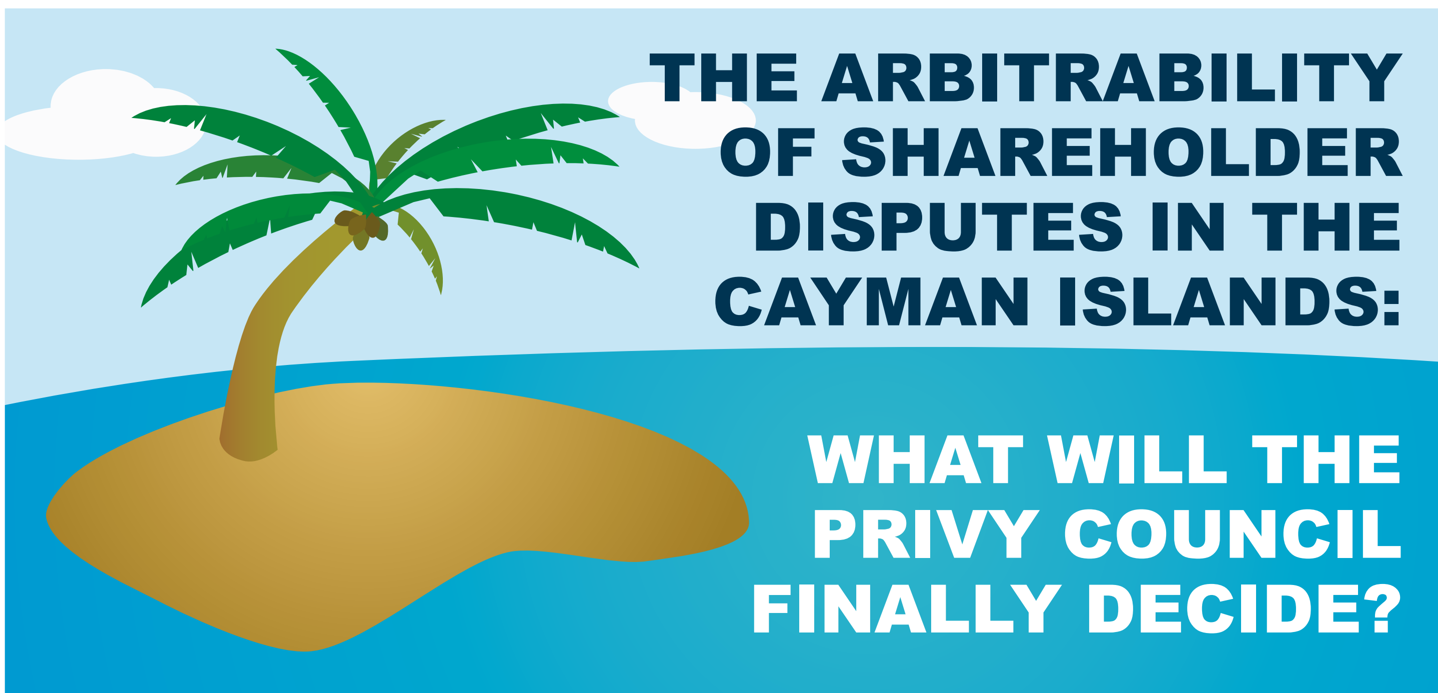

THE ARBITRABILITY OF SHAREHOLDER DISPUTES IN THE CAYMAN ISLANDS:

WHAT WILL THE PRIVY COUNCIL FINALLY DECIDE?

Authored by: Alex Potts KC (Barrister) - 4 Pump Court

It is now over 6 months since the Judicial Committee of the Privy Council heard the important appeal from the Cayman Islands Court of Appeal (CICA) in the case of Ting Chuan (Cayman Islands) Holding Corporation v FamilyMart China Holding Co Ltd, JCPC, 2020/0055.

The Privy Council's judgment was reserved at the conclusion of the hearing, but the judgment is expected to be delivered any day now, and hopefully within the next six months.

The hearing of the appeal was a historic occasion, as the Judicial Committee of the Privy Council physically heard the appeal at a special sitting held in the Cayman Islands itself (for the first time in the legal history of the Cayman Islands).

The case, however, has even greater historic significance associated with the fact that it relates to the important issue of the arbitrability of shareholder disputes involving Cayman Islands companies and, in particular, shareholders' petitions for the compulsory winding up of a solvent company on 'just and equitable' grounds.

The appeal is of public importance, and of international interest, for a number of reasons.

Most importantly, the appeal presented the first opportunity for a final appellate court such as the Privy Council, to consider arguments relating to the arbitrability of shareholder disputes in some detail, having regard not only to Cayman Islands law, but also comparative jurisprudence from other common law jurisdictions, including a number of pro-arbitration decisions of the Court of Appeal of England and Wales, and also the appellate courts of Hong Kong.

Given the fact that Privy Council decisions are treated as either binding, or highly persuasive, in a number of common law jurisdictions, the Privy Council's judgment, when it is eventually published, has the potential to promote, or to undermine, the arbitrability of a large number of corporate shareholder disputes, not only in the Cayman Islands, but in a number of different jurisdictions.

By way of a very brief summary of the background facts to the appeal, CVS (Cayman Islands) Holding Corp is a company incorporated in the Cayman Islands (the Company) and the ultimate owner of a business comprising some 2,400 convenience stores in China.

The Appellant (Ting Chuan) owns 59.65% of the shares of the Company and the Respondent (FamilyMart) owns the remaining 40.35%. Ting Chuan and FamilyMart are parties to a shareholder agreement which contains an arbitration agreement.

On 12 October 2018, FamilyMart presented a shareholder's petition to wind up the Company, complaining about Ting Chuan's conduct of the Company's affairs. Ting Chaun applied to strike out this petition on the ground that any disputes should be resolved by arbitration.

The Grand Court of the Cayman Islands (Mr. Justice Kawaley) dismissed the strike out application in 2019, but ordered the petition be stayed until the complaints in the petition had been arbitrated.

The Cayman Islands Court of Appeal (Moses JA, Martin JA and Rix JA) allowed FamilyMart's in 2020, holding that no part of the petition was arbitrable. Having reviewed the facts of the case, the relevant winding-up provisions of the Cayman Islands' Companies Act, and various lines of authority at common law,

the Cayman Islands Court of Appeal held that "where the underlying issues are central and inextricably connected to determination of the statutory question whether the company should be wound up on just and equitable grounds, the possibility of hiving off those issues becomes more difficult ... in order to determine the threshold issue as to whether there are sufficient grounds to justify winding up on just and equitable grounds, the court must evaluate all the circumstances of the case".

The Cayman Islands Court of Appeal noted, in particular, that English Court of Appeal cases such as Fulham Football Club (1987) Ltd v Richards [2011] EWCA Civ 855 could be distinguished, because in those sorts of cases, the courts had not needed to consider relief that invoked the "exclusive jurisdiction of the court, namely whether the company should be wound up".

Ultimately, the appeal in this case reflects an inherent tension between the statutory winding up provisions of the Cayman Islands' Companies Act on the one hand (which are somewhat unique to the Cayman Islands, given the absence of a separate regime locally for the resolution of unfair prejudice claims, outside the context of a winding-up petition), and the pro-arbitration provisions of the Cayman Islands' Arbitration Act and the Foreign Arbitral Awards Enforcement Act on the other hand.

It will no doubt take a degree of careful reasoning (or mental gymnastics) on the part of the Privy Council to reconcile the two sets of conflicting, public policy considerations, that inform the two sets of statutes.

Since predicting the future is a fool's errand, there is little benefit in this author trying to predict the decision of the Privy Council in any great detail, especially given the potential for a split Court, and dissenting judgments.

On balance, however, it is anticipated by this author (and certainly hoped) that the Privy Council's judgment (whether unanimously or by a majority) will adopt a pro-arbitration approach, whether as a broad matter of principle, or having regard to the specific facts of this case, and the particular nuances of local Cayman Islands law relating to shareholder disputes.

In any event, the eventual outcome, and the Privy Council's judgment in due course, should be of significant interest to anybody with a legal, commercial, professional, or academic interest in the resolution of corporate disputes in common law jurisdictions, including the Cayman Islands, whether by litigation or by arbitration.

There are also a number of other first-instance judgments, and pending cases in the Cayman Islands, whose final determination depends, to a considerable extent, on the judgment of the Privy Council.

For example, in the recent first-instance judgment in the case of Re Ren Ci & Ors (FSD 210 of 2022), the Grand Court of the Cayman Islands granted a stay of Cayman Islands Court proceedings dealing with a corporate shareholder dispute, in favour of a HKIAC arbitration. The Court held that an arbitration clause contained in a Shareholders' Agreement applied broadly, and even to a complaint based on an alleged breach of the company's Articles of Association.

On the other hand, in the Grand Court's recent judgment in the case of Jian Ying Ourgame High Growth Investment Fund (in Liquidation) v Powerful Warrior Limited (FSD 255 of 2021), the Court refused to enforce an arbitration agreement in favour of HKIAC arbitration, where it had doubts as to the validity of the arbitration agreement itself.

By separate coincidence, the Cayman Islands has recently established its own arbitration centre, known as the Cayman Islands Mediation and Arbitration Centre ('CIMAC'), and so the jurisdiction is well-equipped to deal with the full range of corporate disputes, whether in Court or in arbitration. Additionally, the Grand Court of the Cayman Islands has also adopted a new Practice Direction, providing for mandatory judicial mediation in appropriate cases.

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