

The Law Society of Hong Kong's 5th Belt and Road Conference:

“Metaverse and Money on the Belt and Road”

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Money on the Belt and Road

How do we deal with currency, payment issues and digital assets in negotiating and enforcing contracts?

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Data and Data Contracts

- “Data”
 - “Representation of information in electronic form” (*Legal issues related to digital economy – proposal for future work on data transactions, UNCITRAL*).
 - UNCITRAL has drawn a distinction between two types of “data contracts”:
 - **Data provision contract** - involves a person providing data to another person for the other person to use or otherwise process.
 - **Data processing contract** - involves a person processing data for another person and providing the processed data to the other person.

Digital Assets

- “**Digital asset**” – “an electronic record which is capable of being subject to control”. (*UNIDROIT’s Draft Principles, Digital Assets and Private Law Project*)
- “**Digital asset**” – “a collection of data, stored electronically, that is of use or value.” (Legal issues related to the digital economy – digital assets, UNCITRAL)
- UNCITRAL highlighted two types of digital assets:
 - digital assets that represent intrinsic value owing to the rules of the system in which they exist; sometimes referred to as “payment” tokens (e.g. **cryptocurrency**).
 - digital assets that represent value owing to their connection to some “real world” tangible or intangible asset such as goods (or rights in goods), receivables, and other rights, which connection is established by the rules of system in which they exist. A common form of such digital asset is **asset-backed tokens**.

Challenges

No universally agreed definition or characterisation of data and digital assets

Involves emerging, rapidly evolving technology

Intangible and non-rival:
The same data can be used simultaneously, or over time, without exhaustion

Transactions may occur without a physical location; difficulty in determining the applicable law

Pseudonymity or anonymity of users and decentralised nature may make enforcement difficult

Uncertainty in the applicable legal rule and regimes undermines predictability

Tackling the Challenges

UNCTAD: Digital Economy Report 2021

- In view of the characteristics of data, data need to be treated differently from conventional goods and services.
- Rather than trying to determine who “owns” the data, what matters is who has the right to access, control and use the data.
- The borderless nature and openness of the digital space has blurred the line of territorial boundaries.
- Data can be better understood as shared, rather than as traded or exchanged.
- Approaches applied to international trade cannot be easily applied to data.

United Nations Commission on International Trade Law (“UNCITRAL”)

- Ongoing work in developing a taxonomy of emerging technologies and their applications, covering the following areas:
 - Artificial intelligence
 - Distributed ledger systems
 - Smart contracts
 - Digital assets
 - ◆ Data transactions
 - ◆ Online platforms
 - ◆ Dispute resolution
- Emphasis on technology-neutrality, party autonomy and transparency.

Data Transactions

- There are discussions of whether the United Nations Convention on Contracts for the International Sale of Goods (“CISG”) may be applicable to **data provision contracts** or serve as a possible source of inspiration for future work on data provision contracts.
- The Notes on the Main Issues of Cloud Computing Contracts may be helpful in addressing some legal issues arising from **data processing contracts**.

Digital Assets

UNCITRAL is considering the relevance of the following texts to digital assets:

- Functional equivalence rules in **the Model Law on Electronic Transferable Records** may be relevant to giving legal effect to tokens purporting to constitute negotiable instruments or negotiable documents.
- **The Model Law on Electronic Commerce** might serve as a useful basis for developing harmonised rules to support transactions involving digital assets.
- The application of **CISG** to digital assets as “goods” raises issues similar to data provision contracts.
- **UNCITRAL model laws on insolvency**

CISG

- Applicable to the HKSAR with effect from 1 December 2022
- The Sale of Goods (United Nations Convention) Ordinance will come into operation on the same date.

Issues for consideration:

- Are data or digital assets regarded as “goods”?
- Are data or digital assets transactions “contracts of sale”?
- Does payment of cryptocurrencies constitute “payment of the price”?
- Are provisions of the CISG appropriate for transactions involving data or digital assets?

International Institute for the Unification of Private Law (“UNIDROIT”)

Digital Assets and Private Law Project

- UNIDROIT and UNCITRAL closely collaborate with each other on the project on digital assets and private law.
- UNIDROIT is studying and working on a future legal instrument containing principles and legislative guidance in the area of private law and digital assets.
- Principles include private international law issues, control, transfer, custody, secured transactions, enforcement and insolvency, etc.

Hague Conference on Private International Law (“HCCH”)

HCCH’s work on the digital economy focuses on the following issues:

- Jurisdiction and choice of court (e.g. how to determine the competent court to resolve a dispute in relation to a crypto asset)
- Applicable law and choice of law (e.g. connecting factor(s) defining the law applicable to a transaction via blockchain)
- Recognition and enforcement (e.g. how to enforce a foreign judicial decision in relation to a service regulated by a smart contract)
- Cross-border and cross-platform cooperation mechanisms

Asia-Pacific Economic Cooperation ("APEC")

In 2018, the **Digital Economy Steering Group** was established in APEC to facilitate the development of the internet and digital economy, including e-commerce and digital trade, guided by the Internet and Digital Economy Roadmap (the "Roadmap").

The Roadmap is a framework that provides guidance on key areas and actions to facilitate technological and policy exchanges among member economies and to promote innovative, inclusive and sustainable growth, as well as to bridge digital divide in the APEC region.

The focus areas of work as set out in the Roadmap include, *inter alia*:

- Development of holistic government policy frameworks for the internet and digital economy
- Promoting coherence and cooperation of regulatory approaches affecting the internet and digital economy
- Enhancing trust and security in the use of information and communications technology
- Facilitating the free flow of information and data for the development of the internet and digital economy, while respecting applicable domestic laws and regulations
- Facilitation of e-commerce and advancing cooperation on digital trade

APEC ODR Framework

- APEC Collaborative Framework for Online Dispute Resolution (ODR) of Cross-Border Business-to-Business Disputes launched in May 2022 (<https://www.apec.org/SELI/ODR-Providers>)
- “Online dispute resolution can assist parties in resolving the dispute in a simple, fast, flexible and secure manner, without the need for physical presence at a meeting or hearing.” (UN General Assembly Resolution 71/138, 13 December, 2016)
- Utilising modern technologies, ODR provides the means for resolving cross-border disputes in an expeditious, convenient, cost-effective and secure manner.

Asian-African Legal Consultative Organization (“AALCO”) Hong Kong Regional Arbitration Centre

- AALCO Hong Kong Regional Arbitration Centre open in May 2022
- AALCO is an inter-governmental legal consultative organisation in the Asian and African region comprising many major states from Asia and Africa
- AALCO Working Group on International Law in Cyberspace

Thank you!

