SICC NEWS
SICC.GOV.SG
SICC | SINGAPORE INTERNATIONAL COMMERCIAL COURT
ISSUE NO. 22
**JUNE 2020**

# A SIGNIFICANT STEP TOWARDS CLARITY IN JUDICIAL PROCEDURES BETWEEN SINGAPORE AND MYANMAR JUDICIARIES

The Association of Southeast Asian Nations (ASEAN) represents an economy of over 650 million and a GDP of 2.4 trillion USD. With the consistent growth of trade, business, investment and finance across the ASEAN region, it is a booming market that offers opportunities for both market entrants from abroad and local businesses. However, this increase in cross-border transactions has seen a concomitant rise in both numbers and complexity of cross-border disputes.

Chief Justice Sundaresh Menon, in his Keynote address at the international conference "Doing Business across Asia: Legal Convergence in an Asian Century" on 21 January 2016, mentioned: "Certainty in enforcement of judgments will enable businesses to have greater confidence to invest and trade freely".

Fast forward to 2020, the Supreme Court has signed Memoranda of Guidance (MOGs) with several jurisdictions with the intent to enhance clarity and promote mutual understanding of the laws and judicial processes concerning the enforcement of money judgments between the respective courts. The effect is to lift business sentiment and strengthen investor confidence as the MOG, although not having the same impact as a treaty, is part of the overall legal infrastructure which parties can draw on to obtain final outcomes that they can rely on when disputes are adjudicated in the respective courts.

The latest of these MOGs occurred on 10 February 2020, where Chief Justice Sundaresh Menon of the Supreme Court of Singapore and Chief Justice Htun Htun Oo of the Supreme Court of the Union of Myanmar signed a

Memorandum of Guidance as to Enforcement of Money Judgments in Nay Pyi Taw, Myanmar. The signing of the MOG marked a significant milestone in bilateral relations between the Singapore and Myanmar judiciaries. This is also the first such MOG established between the courts of two ASEAN member states. With this enhanced clarity on enforcement, this would make dispute resolution at the Singapore International Commercial Court (SICC) an attractive dispute resolution forum for parties doing business with Myanmar counterparties, and strengthens the role of the SICC as a trusted neutral venue for effective and efficient resolution of transnational commercial disputes.

To know more of the procedures to recognise and enforce money judgments, please click the following link
https://go.gov.sg/enforcement-money-judgments

# THE CODE OF LAW, AND THE LAW OF CODE

*By Mr Nathanael Lim, Senior Associate, Pinsent Masons MPillay LLP*

The paper *"Private International Law Aspects of Smart Derivatives Contracts Utilizing Distributed Ledger Technology" [published by ISDA, Clifford Chance, R3 and Singapore Academy of Law dated 13 January 2020*(the "**Paper**") [https://go.gov.sg/isda-pte-intl-law] sets out an approachable introduction to determining the governing law of derivative contracts which make use of Distributed Ledger Technology ("**DLT**"), and its positive conclusion that an express choice of law clause will generally be upheld will be comforting to both commercial parties and lawyers.

While the Paper had kept its analysis to contractual claims, it should not be too difficult to apply traditional principles of conflict of laws to determine the governing law for non-contractual claims as well. After all, in the context where DLT is only applied to a limited part of the contract, and there is still an overarching agreement governing the transaction, the transaction would by and large be a "conventional" transaction, so the use of the DLT would not make too significant a difference in identifying the relevant connecting factors and relevant jurisdiction.

That said, the question of governing law is but the first step into the myriad of legal issues that need to be considered in the use of DLT, in particular, where disputes arise in relation to any alleged errors in the software code. For example, if the code performs in a way which one party does not expect it to (but perhaps in the reasonable expectation of the other party), what legal remedies should be available to the aggrieved party?

One case study which illustrates this is the case of the Decentralised Autonomous Organisation ("**DAO**"). The DAO was a virtual "fund manager", and the contribution and distribution of rewards were controlled and effected by code which was made available for viewing by all its participants. To briefly summarise, an individual (the "**Exploiter**") later "exploited" a part of the code (a recursive call function) which allowed him to extract a "disproportionate" amount of funds, in a way that was contrary to what participants of the DAO had understood or expected. The legality of such actions is not that straightforward because, despite what might have seemed to be a "common understanding" of the distribution of funds, it could be argued that the operation of the code "governed" all transactions within the DAO, and therefore anyone operating within the four walls of the code (which is what the Exploiter did) should be "legal".

A straightforward solution might be to have a governing agreement, instead of just agreeing to a governing body of code. Parties could also make it clear that the written language should prevail over the agreed code. However, this means that parties continue to be restricted by the requirement of having a full transactional document, which to some may seem to compromise on the efficiencies the use of code is intended to bring about. To allow these developments, some have already started to theorize whether a separate body of law, referred to as *Lex Cryptographia*, should be adopted, which could govern transactions making more use of code.

This is an exciting area of law which is ripe for development. As we continue to push the frontiers of incorporating technology into transactional work, there are three things which are worth bearing in mind:

1. First, an incremental approach to the application of DLT into transactions will be a prudent way forward, which will allow the law to develop alongside such changes.

2. Second, there is going to be a greater interaction between the software coding and legal communities, so it will be worthwhile for both sides to start being more comfortable with each other's area of work.

3. Third, the legal community should start to deeply consider and not shy away from new developments in the law needed to tackle with unique issues that may arise from disputes involving evolving technology. In this manner, the decision of the SICC in *Quoine Pte Ltd v B2C2 Ltd [2020] SGHC(I) 02* (https://go.gov.sg/sicc-judgment-2020-sgca-02) ("**Quione**") is a good example of how this can be approached. The Quione case traverses multiple areas of law, and the judgment sets out in no small detail the legal nuances that need to be considered when these are applied to evolving commercial technology (in the Quoine case, the use of algorithmic code in determining prices). As jurisprudence continues to develop in this area, lawyers will do well to keep abreast of these changes and keep themselves updated on the exciting new developments this area of law will bring.

*The views expressed in this article are the writer's and do not necessarily reflect those of the Supreme Court of Singapore and the SICC. For the full article please click the follow link.* https://go.gov.sg/sicc-articles

*Nathanael is a technology lawyer and regularly advises regional and international companies in the technology space on a range of matters. He has been recognised by leading legal directories and clients for having "a breadth of knowledge in the legal and technical space". He has been recognised by leading legal directories and clients for having "a breadth of knowledge in the legal and technical space".*

*Scan the QR Code for Private International Law Aspects of Smart Derivatives Contracts Utilizing Distributed Ledger Technology"*

*Scan the QR Code for Nathanael's full article "The Code of Law and the law of code"*

# LANDMARK DECISION BY THE COURT OF APPEAL ON CRYPTOCURRENCY AND COMPUTER AUTOMATED CONTRACTS

*By (from left to right) Mr Jon Chan Wenqiang (Senior Associate, Ravindran Associates LLP) and Mr Alvin Tan Jing Han (Associate, Ravindran Associates LLP)*[1]

*Quoine Pte Ltd v B2C2 Ltd*[2] is the first legal dispute in Singapore involving cryptocurrency. The central and most difficult issue in this case was how the doctrine of mistake could be applied in the field of cryptocurrency trading which used deterministic computer algorithms without any direct human involvement (i.e. algorithms which always produce the same output when provided with the same input). Notwithstanding the novel circumstances, the Court of Appeal gave guidance on how existing legal principles governing the doctrine of mistake could still be meaningfully adapted and applied.

This case involved a dispute between Quoine Pte Ltd ("**Quoine**"), an operator of a cryptocurrency exchange platform ("**Platform**"), and B2C2 Ltd ("**B2C2**"), who traded on said Platform entirely using its algorithmic trading software with little to no human involvement. Due to Quoine's failure to make certain necessary changes to critical operating systems on the Platform, a chain of events was set off leading to 13 trades ("**Disputed Trades**") being concluded between B2C2 and 2 other traders on the Platform (the "**Counterparties**").

B2C2 had offered to sell one type of cryptocurrency (Ethereum), for another type (Bitcoin) at a particular rate as part of B2C2's pre-configured algorithm. The Counterparties accepted this offer through Quoine's pre-configured algorithms. This resulted in the Disputed Trades being concluded without any human involvement wherein the Counterparties contracted to pay B2C2 250 times the market rate of the said cryptocurrencies. When Quoine became aware of the Disputed Trades, it cancelled and reversed the transactions.

B2C2 sued Quoine, with the case transferred to the SICC with the parties' consent. B2C2 claimed that Quoine's unilateral cancellation of the Disputed Trades and reversal of the transactions was in breach of contract and/or breach of trust.

The matter was heard at first instance before International Judge Simon Thorley ("**Thorley IJ**") who ruled in favour of B2C2 and found that there was both a breach of contract and trust by Quoine. In so doing, Thorley IJ rejected the defences advanced by Quoine, including the contention that the Disputed Trades were void or voidable on the basis of unilateral mistake.

Quoine's appeal was heard by a 5-member coram of the Court of Appeal. Due to the novelty and complexity of the matter, Professor Goh Yihan from the Singapore Management University was also appointed as amicus curiae to assist the Court of Appeal.

### *Breach of contract and unilateral mistake*

On the breach of contract issue, a 4-judge majority, with Chief Justice Sundaresh Menon delivering the judgment, ("**CA Majority**") affirmed Thorley IJ's decision, on slightly different grounds, that the Disputed Trades were not void on the basis of unilateral mistake at common law.

The CA Majority found that there was simply no mistake by the Counterparties as to a <u>term</u> of the sale transactions with B2C2. The Counterparties had committed to transact on the Platform using pre-determined algorithms in such a way that they would not be able to know when a contract would be formed and on what terms. The Disputed Trades were executed on the basis of the parties' respective algorithms which performed exactly as programmed.

The CA Majority also agreed with Thorley IJ that there was no unilateral mistake in equity as B2C2 lacked the requisite knowledge of the Counterparties' mistake. B2C2 had not programmed its algorithm software with the awareness or intention to take advantage of a mistaken bid by a counterparty.

On this point, International Judge Jonathan Mance ("**Mance IJ**") dissented from the CA Majority and was of the view that there was a unilateral mistake in equity which rendered the Disputed Trades voidable. While the CA Majority focused strictly on the programmer's knowledge at the time of programming up to the point of formation of the contract, Mance IJ propounded a broader test of equitable mistake which asked if a reasonable trader with knowledge of the market circumstances would have thought that a fundamental mistake had occurred.

As we enter into the age of smart contracts, contracts will be formed and concluded in milliseconds and on terms automatically determined by pre-determined computer algorithms without any human intervention. To allow a general right for parties to relook the reasonableness of their transactions and dispute the validity of the contract will likely introduce considerable uncertainty.

In this commercial reality, the CA Majority's approach provides welcome certainty to contracts where parties have committed to the use of algorithmic processes and have chosen not to bargain for a right to review, confirm or invalidate any ensuing contract that might emerge from the arrangements they had committed to.

### *Breach of trust*

On the breach of trust issue, an interesting question arose as to whether cryptocurrency could be regarded as a species of property that is capable of being held on trust. While this point was not disputed by the parties in the Court below, Thorley IJ nevertheless considered that cryptocurrency appeared to satisfy all the characteristics in the classic definition of a property right.

On appeal, the Court of Appeal noted that while there may be good reasons to consider cryptocurrency as a species of property, there were also difficult questions as to the type of property that is involved. Ultimately, the Court of Appeal declined to reach a definite conclusion on this issue as it found that there was no certainty of

*continued to page 4*

intention to create a trust based on the evidence. Accordingly, the Court of Appeal reversed Thorley IJ's decision on this point and held that there was no breach of trust by Quoine.

The observations by Thorley IJ and the Court of Appeal on this complex issue have been very recently considered and cited with approval by the New Zealand High Court[3] which conclusively ruled that cryptocurrencies could be considered as property that could be held on trust.

*The views expressed in this article are the writers' and do not necessarily reflect those of the Supreme Court of Singapore and the SICC.*

*"Jon practises in all aspects of intellectual property law and has advised and acted for clients from a range of industries such as luxury brands, pharmaceuticals, information technology, and solar energy."*

*"Alvin has been involved with various IP litigation before the Singapore High Court, spanning both trademark and patent disputes. He is also involved in the management of client trademark portfolios and advises on the filing strategies both in Singapore and overseas."*

*[1] The authors are grateful to Mr M. Ravindran (Managing Partner) for his helpful comments on an earlier draft.*

*[2] [2020] SGCA(I) 02. https://go.gov.sg/sicc-judgment-2020-sgca-02*

*[3] Ruscoe v Cryptopia Limited (in liquidation) [2020] NZHC 728 at [76]–[83], [148], [162]–[166].*

# NEWS

## MOVING AHEAD AMIDST THE PANDEMIC

**By Sir Bernard Eder, IJ**

The COVID-19 pandemic has had an important impact on the conduct of hearings in the SICC as well as in other courts in Singapore and around the world. In particular, since March 2020, in accordance with Registrar's Circular Nos. 4 and 5, the courts in Singapore have heard only essential and urgent matters - with the majority of such hearings using remote communication technology such as Zoom ("virtual hearings"). In the SICC, this has worked very well - and enabled the SICC to continue its work as an important forum for the resolution of international disputes during these unprecedented times.

In fact, even before the onset of the pandemic, the SICC embraced virtual hearings. Thus, since 2019, there have been some 25 cases in which at least one case management conference or hearing in the SICC was conducted at least partially through video conference ("VC"); and three cases or originating summons hearings conducted at least in part via VC - one with Ramesh J sitting in open court, Giles IJ and Reyes IJ participating via video conference from Australia and Japan and the parties' experts giving evidence from China and another location in Singapore; one with Ramesh J again sitting in open court with Bergin IJ and Eder IJ participating via VC from Australia and London to hear oral closing submissions; and one with Thorley IJ sitting alone participating via VC from London.

Needless to say, the conduct of virtual hearings is not without some logistical difficulties. Access to fast and secure internet is obviously a prerequisite. It is also imperative that all concerned - including Court, Counsel and any witnesses – have ready access to relevant documents in their different locations. Different time zones can also present a challenge. For example, since London was 8 hours behind Singapore time, the virtual hearing in which Eder IJ was one of the Judges meant that his start time was 1.30am London time!

Thus, there is no doubt that virtual hearings require careful preparation in advance to ensure that they can take place in an efficient way always mindful of the critical need to ensure that the case is conducted fairly for all parties. With the assistance of the SICC Registry, the experience of the SICC in conducting virtual hearings had led the way for international dispute resolution. Even after this pandemic ends, it seems likely that, where appropriate, the practice of conducting virtual hearings will continue.

### Latest Judgments

28 May 2020
Beyonics Asia Pacific Limited & Others v Goh Chan Peng and another — [2020] SGHC (I) 14

11 May 2020 — [2020] SGHC (I) 12
BYL & anor v BYN

4 May 2020 — [2020] SGHC (I) 11
CEB v CEC and anor

For more judgement, please click on the following link:
https://go.gov.sg/sicc-judgments

### Registered Foreign Lawyers

As at 16 June 2020, the SICC has 87 registered foreign lawyers (RFLs) on its register. Foreign lawyers are welcome to apply to be registered with the SICC. To view the full list of RFLs and find out more about registration, please visit https://go.gov.sg/sicc-registration-foreign-lawyers

### SICC Model Clauses

The SICC has model clauses available, including clauses for submission of disputes to the jurisdiction of the SICC (both pre- and post-dispute) and in relation to the parties' rights of appeal. You may view them here: https://go.gov.sg/sicc-model-clauses

1 Supreme Court Lane,
Singapore 178879

Tel: +65 6336 0644
Email: SICC_Development@supcourt.gov.sg

*Published bimonthly by*
Singapore International Commercial Court

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