

**The Law Society of Hong Kong's 5<sup>th</sup> Belt and Road Conference**  
***“Metaverse and Money on the Belt and Road”***

**Session 4 - “How do we deal with currency, payment issues and digital assets in negotiating and enforcing contracts?”**

**Speech by Dr. James Ding, Law Officer (International Law)**

**10 November 2022 (Thursday)**

1. Good afternoon. I would like to thank the Law Society of Hong Kong for organizing the 5<sup>th</sup> Belt and Road Conference focusing on legal issues surrounding technological developments under the Belt and Road Initiative (BRI) and for inviting me to join this panel session.
2. As we have heard from the earlier sessions, technological innovation has transformed the global economy and brought new opportunities. At the same time, the BRI has promoted cross-border trade including trade in digital assets. Inevitably, legal practitioners will be faced with novel legal and practical issues when advising their client on cross-border transactions involving digital assets.
3. I would like to share with you some of the recent international developments with reference to the ongoing work by various regional and international organisations.

## **Data contracts**

4. First of all, let's start with the concepts of data and digital assets. In its ongoing work on a taxonomy of emergency technologies, United Nations Commission on International Trade Law (UNCITRAL) has defined "data" as "representation of information in electronic form".<sup>1</sup>
5. Given the various forms of contracts dealing with data, UNCITRAL has attempted to draw a distinction between two types of "data contracts", namely, data provision contract, which involves a person providing data to another person for the other person to use or otherwise process; and data processing contract, which involves a person processing data for another person and providing the processed data to the other person.<sup>2</sup>

## **Digital assets**

6. A closely related concept to data is digital assets. The International Institute for the Unification of Private Law (UNIDROIT) has defined digital assets as "an electronic record which is capable of being subject

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<sup>1</sup> See <http://undocs.org/en/A/CN.9/1117>, paragraph 8.

<sup>2</sup> *Ibid*, paragraphs 22 to 24.

to control” in the Draft Principles being developed under UNIDROIT’s Digital Assets and Private Law Project.<sup>3</sup>

7. For UNCITRAL, it considers “digital asset” to be “a collection of data, stored electronically, that is of use or value.”<sup>4</sup> UNCITRAL highlighted two types of digital assets in its work. One is digital assets that represent intrinsic value owing to the rules of the system in which they exist; sometimes referred to as “payment” token, for example, cryptocurrency. The other type of digital assets is those 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.<sup>5</sup>

## **Challenges**

8. The unique characteristics of data, digital assets and the digital world have prompted us to ponder on adequacy of our laws, such as contract

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<sup>3</sup> See <https://www.unidroit.org/work-in-progress/digital-assets-and-private-law/>

<sup>4</sup> See <http://undocs.org/en/A/CN.9/1012/Add.3>, paragraph 2.

<sup>5</sup> *Ibid*, paragraphs 5 to 6.

law, property law and private international law, in dealing with data, digital assets and other emerging concepts in the digital world.

9. Just to name a few key challenges that we may face: while UNCITRAL and UNIDROIT have started working on the terms, there is no universally agreed definition or characterisation of data and digital assets. This may lead to legal uncertainty particularly in cross-border transactions, as legal issues and principles may vary across different types of digital assets in different jurisdictions.
10. Another challenge is that the digital economy involves emerging, rapidly evolving technology. Hence, our laws may not be able to keep up with the constantly changing landscape and advancement in technology.
11. Data and digital assets are intangible and non-rival in nature, meaning that the same data can be used simultaneously, or over time, without exhaustion. Our existing laws on sale of goods and property law may not be easily applicable.
12. Transactions may occur without a physical location. Apart from the

difficulty in characterising such transactions, there may also be difficulties in determining the applicable law given the absence of a physical location.

13. When we come to enforcement, pseudonymity or anonymity of users in the digital world and the decentralised nature of digital economy may pose further difficulty in identifying the parties involved and in enforcing rights.

14. All these uncertainties in applicable legal rules undermines predictability and presents many challenges to lawyers.

### **Tackling the Challenges**

15. In the Digital Economy Report 2021 of the United Nations Conference on Trade and Development (UNCTAD)<sup>6</sup>, there are some useful observations on tackling these challenges. In view of the characteristics of data, UNCTAD noted that 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

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<sup>6</sup> See *Digital Economy Report 2021* of UNCTAD at <https://unctad.org/webflyer/digital-economy-report-2021>

to access, control and use the data. Legal practitioners should take particular caution in advising on the rights to access, control and use the data which are core parts of the contracts involving data and digital assets. 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.

## **UNCITRAL**

16. The general and practical observations by UNCTAD are useful but we also need to find more concrete and specific means to deal with the challenges. In this connection, UNCITRAL has been 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 and dispute resolution.<sup>7</sup> In UNCITRAL's work, it has emphasised on technology-neutrality, party autonomy and transparency.

17. For data transactions, there are discussions of whether the United

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<sup>7</sup> See <http://undocs.org/en/A/CN.9/1012>

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. It has been suggested that the Notes on the Main Issues of Cloud Computing Contracts of UNCITRAL may be helpful in dealing with some legal issues arising from data processing contracts.<sup>8</sup>

18. For digital assets, UNCITRAL is considering the relevance of the following texts to digital assets: the Model Law on Electronic Transferable Records, the Model Law on Electronic Commerce, CISG; and UNCITRAL model laws on insolvency.<sup>9</sup>

19. Earlier, I mentioned CISG. As you may be aware, CISG will become 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. In the context of digital economy, as observed in UNCITRAL's work so far, there are a number of issues for consideration when considering whether CISG may be applied.<sup>10</sup>

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<sup>8</sup> See note 1 above, paragraphs 28 to 45.

<sup>9</sup> See note 4 above, paragraphs 32 to 42.

<sup>10</sup> See note 1 above, paragraphs 31 to 40. See also <http://undocs.org/en/A/CN.9/1012/Add.2>, paragraphs 42 to 56; and <http://undocs.org/en/A/CN.9/1064/Add.2>, paragraph 11.

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 CISG appropriate for transactions involving data or digital assets? Can the provisions be suitably adapted? There may not be clear answers to these questions. Legal practitioners should consider the above issues when advising their clients in specific cases.

## **UNIDROIT**

20. In addition to the above, UNCITRAL also closely collaborate with UNIDROIT 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. The Principles include the subjects of private international law issues, control, transfer, custody, secured transactions, enforcement and insolvency, etc.<sup>11</sup>

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<sup>11</sup> See note 3 above.



## **Hague Conference on Private International Law**

21. The Hague Conference on Private International Law (HCCH) is also examining the issues of private international law which are relevant to the digital economy. In particular, their work on the following areas may be of particular relevance: jurisdiction and choice of court; applicable law and choice of law; recognition and enforcement; and cross-border and cross-platform cooperation mechanisms.<sup>12</sup> Practitioners may wish to keep abreast of HCCH's work, which may be useful for advising clients on cross-border transactions involving data and digital assets.

## **Asia-Pacific Economic Cooperation**

22. Apart from the work of the three sister organisations mentioned above, I would also like to introduce some relevant initiatives of regional organisations such as the Asia-Pacific Economic Cooperation (APEC).<sup>13</sup>

23. In 2018, the Digital Economy Steering Group was established to

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<sup>12</sup> See <https://www.hcch.net/de/projects/post-convention-projects/hcch-codifi-conference>

<sup>13</sup> See <https://www.apec.org/groups/committee-on-trade-and-investment/digital-economy-steering-group>

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).

24. 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; and facilitation of e-commerce and advancing cooperation on digital trade.
25. One of the concrete deliverables by APEC in response to digital economy is the APEC Collaborative Framework for Online Dispute

Resolution (ODR) of Cross-Border Business-to-Business Disputes.

The ODR Framework has been launched this year with a list of ODR service providers from APEC economies, including eBRAM Centre from Hong Kong, China.<sup>14</sup>

26. As recognised by the United Nations, “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”.<sup>15</sup> Utilising modern technologies, ODR provides the means for resolving cross-border disputes in an expeditious, convenient, cost-effective and secure manner. ODR may be a good option for dispute resolution in the context of data transactions or digital assets transactions. Practitioners may consider advising their clients to use ODR as a means for resolving such disputes.

**Asian-African Legal Consultative Organization Hong Kong Regional Arbitration Centre**

27. Talking about ODR, I should also mention the Asian-African Legal

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<sup>14</sup> See <https://www.apec.org/SELI/ODR-Providers>

<sup>15</sup> UN General Assembly Resolution 71/138, 13 December, 2016.

Consultative Organization (AALCO) Hong Kong Regional Arbitration Centre, which was open in May this year. The Centre also offers ODR platforms and technology for handling disputes including those involving digital assets.

28. In fact, AALCO is also working on various areas of international law relevant to the digital world, for example, it has established a Working Group on International Law in Cyberspace. Practitioner may wish to keep track of its work by reference to the relevant reports accessible on the website of AALCO.<sup>16</sup>

## **Conclusion**

29. As you can see from my presentation above, there is no ready answer to the questions surrounding digital assets. Various international organisations are continuing their work in the relevant areas. Practitioners may wish to keep abreast of their ongoing work and may also exchange views and participate in discussion at the relevant forums or events, including at our Conference today. Thank you.

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<sup>16</sup> See <https://www.aalco.int/>