

Commercial litigation newsletter – May 2023



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HK Court recognises cryptocurrencies as properties for the first time

Introduction

In the recent landmark decision of *Re Gatecoin Ltd*, it was held that cryptocurrencies constitute "property" under Hong Kong law and are capable of being held on trust. This decision brings Hong Kong in line with other common law jurisdictions which have already ruled on the issue, and suggests that cryptocurrency will be protected by the law as with other forms of property.

Background

This case relates to Gatecoin, a Hong Kong company that operated a cryptocurrency exchange platform through which it provided services to its customers. By opening and registering an account with Gatecoin, users could deposit cryptocurrencies or fiat currencies into Gatecoin for trading or withdrawal purposes.

In 2019, a winding-up petition was brought against Gatecoin, and joint provisional liquidators were appointed. The liquidators applied for directions to determine (1) the characterisation of cryptocurrency, and (2) the allocation of cryptocurrency to the customers of Gatecoin. In particular, the court was asked to consider whether Gatecoin held the currencies on trust for any of its customers.



Whether cryptocurrency is "property"

Under section 197 of the Companies (Winding-Up and Miscellaneous Provisions) Ordinance (Cap. 32) ("**CWUMPO**"), a liquidator has to take into custody all "property" upon a winding-up order. It was therefore necessary for the court to determine whether cryptocurrencies held by Gatecoin classify as property.

As the CWUMPO itself does not contain a definition of "property", the court referred to section 3 of the Interpretation and General Clauses Ordinance (Cap. 1), which defines property as including "(a) money, goods, choses in actions and land; and (b) obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as defined within paragraph (a) of this definition". The question the court had to answer was therefore whether cryptocurrencies fell within this definition.

The Court also considered the status of cryptocurrencies in other jurisdictions such as England and Wales, Singapore, the United States, Canada, Australia, and New Zealand, where the courts had already recognised cryptocurrency as property. The Court referred to the New Zealand case of *Ruscoe v Cryptopia* in particular, which held that cryptocurrency satisfies the four criteria of "property" and is a type of intangible property in that:

1. It is definable as the public key allocated to a cryptocurrency wallet is readily identifiable, sufficiently distinct and capable of being allocated uniquely to individual account holder.
2. It is identifiable by third parties in that only the holder of a private key is able to access and transfer the cryptocurrency from one wallet to another.
3. It is capable of assumption by third parties in that it can be and is the subject of active trading markets where (a) the rights of the owner in that property are respected, and (b) it is potentially desirable to third parties such that they want themselves to obtain ownership of it.
4. It has some degree of permanence or stability as the entire life history of a cryptocurrency is available in the blockchain.

The Court held that although the definition of "property" in Hong Kong is different from those adopted in other jurisdictions, the definition is "an inclusive one" and is "intended to have a wide meaning". It was therefore appropriate to conclude that cryptocurrency is "property" and is capable of being held on trust.

Whether Gatecoin held cryptocurrencies on trust

However, the question of whether Gatecoin held the cryptocurrencies on trust of its customers was dependent on the terms and conditions which governed their relationship.

The court first considered the "three certainties" that must be met in order for a trust to be created, namely certainty of subject matter, object, and intention. It was held that there was sufficient certainty of subject matter despite the lack of segregation of the cryptocurrencies, as the customers co-own and share the cryptocurrency in proportion to their credit balances. The second requirement of certainty of object was also satisfied, as there was no ambiguity or uncertainty in the definition of the class of beneficiaries.

In determining whether there was sufficient certainty of intention, the Court referred to the terms and conditions between Gatecoin and its customers, and found that some cryptocurrencies were held on trust while some were not. This entirely depends on whether the terms and conditions have expressly provided for a trust – the later set of terms and conditions have all the trust language removed.



Conclusion

The judgement in *Re Gatecoin Ltd* is important as it confirms that cryptocurrencies are property and may be treated the same way as other intangible property such as shares. It also offers clarity for owners of cryptocurrencies who may want to rely on proprietary remedies. Lastly, it also shows that whether cryptocurrencies are held on trust depends on the mutual intention of the parties, which may be determined by the terms and conditions in force.

This article was written by **Emily Li**, Partner and **Ken Chu**, Trainee solicitor, both of Stephenson Harwood.

Could you give evidence in the Mainland for foreign proceedings?

According to the PRC Ministry of Justice's Reply to Frequently Asked Questions on Cross-border Judicial Assistance in Civil and Commercial Matters (中华人民共和国司法部国际民商事司法协助常见问题的解答) ("MOJ FAQ")¹, it is provided that:-

1. foreign judicial authorities cannot take evidence in the mainland without permission of the relevant authorities. This includes taking evidence by foreign judicial authorities through lawyers or other persons in mainland or through virtual meetings. In simple terms, foreign court cannot cross examine a witness in the mainland via video conference facilities, which is a way that is now frequently adopted in BVI and Cayman Courts.
2. Official permission should be sought in order to do so; and
3. One could voluntarily give evidence if the process and contents thereof meet the relevant provisions of the Data Security Law, the Personal Information Protection Law and the Civil Procedure Law (including the legality of the prior service procedure, etc.).



Ways of getting official permission

The application should be made according to the Hague Convention on Evidence Taking or other relevant bilateral treaties signed among the countries. The proper applicant would be the competent judicial body in which the foreign proceedings take place and the relevant papers

should be submitted to the PRC Ministry of Justice. In the event that the countries making the request is not a party to the Hague Convention or a bilateral treaty with the Chinese mainland, then the application should be submitted to the PRC Ministry of Foreign Affairs.



Upon approval by the Ministry of Justice or the Ministry of Foreign Affairs (as the case may be), the application would be accordingly processed by the relevant PRC People's Courts.

If cross examination is requested and approved, the process would then take place in the relevant PRC People's Court and subject to the PRC People's Court's permission be conducted by a lawyer.

What evidence can be provided from the Mainland?

When considering the giving of evidence, one needs to comply with the PRC Civil Procedure Law, Data Security Law and Personal Information Protection Law ("PIPL"). This means that if the giving of evidence falls within any circumstances under the Data Security Law or PIPL that require local authorities/organisations assessment and permission, the relevant requirements will need to be satisfied before the evidence can cross the borders. The legality of the prior service procedure, etc. is also important as it goes to the compliance of the PRC Civil Procedure Law.

¹ [中华人民共和国司法部 \(moj.gov.cn\)](http://www.moj.gov.cn)

"Voluntarily"?

Although the wording in the MOJ FAQ does not prohibit Mainland parties from submitting evidence to overseas courts on a voluntary basis, we wish to highlight that there is still uncertainty in the understanding of this issue in existing Mainland legislation and explanatory materials (including MOJ FAQ), in particular how "voluntary" should be understood. We could not rule out the possibility that the Mainland People's Court or the Ministry of Justice will later expand the interpretation of the relevant requirements in the future.

As for whether the evidence materials trigger the approval and filing requirements of the Data Security Law and the Personal Information Protection Law, Mainland lawyer would need to analyze it on a case-by-case basis.

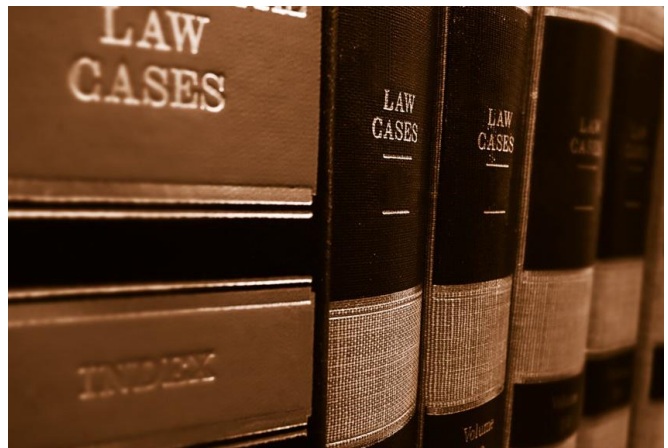
Hong Kong, an exception?

Hong Kong is obviously not a "foreign country" to the Mainland, so the Hague Convention does not automatically apply to service and collection of evidence between Hong Kong and the Mainland. Relevant judicial assistance between Hong Kong and the Mainland is required in accordance with the Annex Arrangement on Mutual Entrustment by the Courts of the Mainland and the Hong Kong Special Administrative Region for Service of Judicial Documents in Civil and Commercial Matters 最高人民法院关于内地与香港特别行政区法院相互委托送达民商事司法文书的安排 ("**Service Arrangement**") and the Arrangement on Mutual Entrustment of Courts of the Mainland and the Hong Kong Special Administrative Region to Extract Evidence in Civil and Commercial Cases 最高人民法院关于内地与香港特别行政区法院就民商事案件相互委托提取证据的安排 ("**Arrangement for Collection of Evidence**").

Nevertheless, in these arrangements, apart from simplifying the handling channels to facilitate the assistance procedures between the Mainland and HK, the assistance provided by the Mainland to HK is in principle basically the same as that provided by the Convention. For example, the scope of requests for evidence taken by the Mainland under the Hague Convention on the Taking of Evidence is generally the same as the scope of assistance that Mainland courts can provide to HK courts under the Arrangement for Collection of Evidence. In addition, article 284 of the Civil Procedure Law also refers to judicial assistance procedures applicable to Hong

Kong, Macau and Taiwan in practice. Therefore, the content of MOJ FAQ on the collection of evidence and the questioning of witnesses by foreign judicial organs and judicial personnel has certain reference significance for mainland evidence and witness issues involved in Hong Kong court proceedings. In the circumstances, it is prudent and advisable for HK lawyers to check with Mainland lawyer as and when such need arises.

This article was written by Partner **Zoe Zhou** and Counsel **Xueqing Wan** from Wei Tu Law Firm, together with Managing associate **Stephanie Poon** from Stephenson Harwood.



The anti-doxxing regime on the road

The Personal Data Privacy (Amendment) Ordinance 2021 (the "**Amendment Ordinance**") came into effect on 8 October 2021 with a new anti-doxxing regime introduced. The Amendment Ordinance further criminalises doxxing acts, and empowers the Privacy Commissioner for Personal Data (the "**Commissioner**") to carry out criminal investigations, institute prosecutions for doxxing-related offences and issue cessation notices to demand the removal of doxxing messages.

This article provides an overview of the new anti-doxxing regime and its enforcement since the implementation of the Amendment Ordinance.



A quick overview of the anti-doxxing regime

Some of the key points with respect to the anti-doxxing regime under the Amendment Ordinance are highlighted below.

Introduction of two new disclosure offences

The Amendment Ordinance introduces two new offences that criminalise the disclosure of personal data without the consent of the relevant data subject.

The first-tier summary offence attracts a fine of up to HK\$100,000 and imprisonment of up to 2 years. To be convicted, the discloser must either have the intention to cause "specified harm" to the data subject or their family member(s), or must be reckless as to such harm being inflicted. There is no requirement to prove actual "specified harm" caused under the.

"Specified harm" is defined widely to include harassment, molestation, pestering, threat,

intimidation, bodily or psychological harm, harm causing the person reasonably to be concerned for his/her safety or well-being or damage to property. The second-tier indictable offence is punishable with a fine of up to HK\$1,000,000 and imprisonment for up to 5 years. An offence will fall under this category if the discloser discloses the personal data of another person without consent, whether recklessly or with intent to cause "specified harm" to the person or his/her family member(s), and the disclosure causes any specified harm to the relevant data subject or his/her family member(s).

New investigation and prosecution powers conferred on the commissioner

The Amended Ordinance also empowers the Commissioner to conduct criminal investigations into and institute prosecutions for doxxing related offences. The Commissioner's new powers include:

1. the power to require the provision of materials and answer relevant questions to facilitate an investigation into doxxing and its related offences;
2. the power to obtain search warrants;
3. the power to access electronic devices without a court warrant under urgent circumstances;
4. the power to stop, search and arrest a person who is reasonably suspected of committing a doxxing or its related offences; and
5. the power to prosecute the first-tier doxxing offence and other summary offences under the Personal Data (Privacy) Ordinance in the Magistrates' courts.

Cessation notices

The Amended Ordinance also empowers the Commissioner to serve cessation notices to demand the removal of doxxing messages. To account for the global reach of the internet, a cessation notice can be served on a party regardless of whether the disclosure is made in or outside of Hong Kong. A failure to comply with a cessation notice is a criminal offence. On a first conviction, the offence is liable to a maximum fine of HK\$50,000 (with an additional fine of HK\$1,000 for every day during which the offence continues) and imprisonment of up to 2

years. On each subsequent conviction, the offence is liable to a maximum fine of HK\$100,000 (with an additional fine of HK\$2,000 for each day during which the offence continues) and imprisonment of up to 2 years.

The enforcement of the anti-doxxing regime

According to the Commissioner's report published in February 2023, since the implementation of the Amendment Ordinance to 31 December 2022, the Commissioner handled a total of 2,128 doxxing cases, initiated 114 criminal investigations, and made 12 arrests.

As of March 2023, there were 3 convictions relating to doxxing. In the first sentencing case, the defendant was sentenced to 8 months' imprisonment on 15 December 2022 after he was convicted of seven offences of "disclosing personal data without consent" on 6 October 2022. The defendant and the victim had a short relationship before breaking up. The defendant then disclosed the victim's personal data – including her name, photos, phone number and residential address, private and office telephone numbers, name of her employer and her position – on four social media platforms. He also set up accounts in the victim's name and invited people to visit her at her residential address.

The second sentencing case was convicted by the Shatin Magistrates' Court on 1 February 2023. In this case, the defendant was an online trader and the victim was her supplier. The business relationship turned sour due to a monetary dispute and the defendant subsequently disclosed the personal data of the victim and her husband, including both their Chinese names and photos as well as the phone number of the victim in 14 groups on a social media platform. The defendant pleaded guilty and was subsequently sentenced to two months of imprisonment, suspended for two years.

Other than criminal proceedings, the PCPD also reported that they issued a total of 1,500 cessation notices to 26 online platforms, requesting the removal of 17,703 doxxing messages since the implementation of the Amendment Ordinance until 31 December 2022. It was reported that the compliance rate exceeds 90%.

The enforcement actions taken by the Commissioner have sent a clear message to the public that the Hong Kong Government is keen to combat doxxing

activities which are intrusive to personal data privacy, and that the Amendment Ordinance is being robustly implemented.

How to protect your business

Businesses, especially those with an internet presence, must handle their customers' and employees' personal data with care. Otherwise, they may face potential criminal liabilities for breaching the anti-doxxing regime. The impact of such a criminal conviction can be severe, potentially resulting in fine and imprisonment punishment and damage to the company's reputation. Steps should therefore be taken to avoid their online platform(s) from being used to advance doxxing activities. Such steps may involve:

1. Updating the terms and conditions of the online platform(s) to make clear that any form of doxxing activities is prohibited and all users of the online platform(s) should ensure that they comply with the Amendment Ordinance;
2. Updating existing personal data policies and procedures for handling cessation notices and investigations conducted by the Commissioner;
3. Providing training to the staff on the scope and implications of the Amendment Ordinance and the potential consequences for breaching it, how to handle potential doxxing activities, cessation notices and investigations initiated by the Commissioner;
4. Monitoring the activities undertaken on the online platform(s) and the information (including all posts/comments) regularly to make sure they are in compliance with the Personal Data (Privacy) Ordinance;
5. Where content/comment which may potentially violate the Amendment Ordinance is found on the online platform(s), it should be removed promptly and a report should be made to the Commissioner as soon as practicable; and
6. If any customer or employee of the business becomes a victim of a doxxing attack, a report should also be made to the Commissioner promptly.

This article was written by **Karis Yip**, Managing associate of Stephenson Harwood.

News update

Webinar

We will be hosting our next commercial litigation webinar on 30 May 2023, please see the details below and register [here](#).

Date	Speakers	Topic
30 May 2023	Stephanie Poon (Managing associate, Litigation)	你应该知道的香港遗产法的法理与案例

Please also contact us if you would like to view our recent commercial litigation webinars:

Date	Speakers	Topic
22 November 2022	Karis Yip (Managing associate, Litigation), Kevin Lau (Barrister, Des Voeux Chambers)	Winning at the starting line - pre-action access to information
18 August 2022	Alexander Tang (Partner, Restructuring and insolvency) and Henry Zhu (Partner, Wei Tu Law Firm*)	Commercial litigation Greater Bay Area series - part 2
6 July 2022	Ivan Ng (Partner, Litigation) and Emily Li (Partner, Litigation)	Cross-border injunctions – the Shanshui case as an example [^]
12 May 2022	Emily Li (Partner, Litigation) and Henry Zhu (Partner, Wei Tu Law Firm*)	Commercial litigation Greater Bay Area series – part 1

[^]This is an exclusive webinar for a particular client. If you also wish to receive any tailor-made webinar, please feel free to contact Emily Li at emily.li@shlegal.com.

Previous editions

Date	Author	Title
27 October 2022	Emily Li, Karis Yip and Stephanie Poon	Commercial litigation newsletter - October 2022
29 July 2022	Emily Li, Karis Yip and Stephanie Poon	Commercial litigation newsletter - July 2022
26 April 2022	Emily Li, Karis Yip and Stephanie Poon	Commercial litigation newsletter - April 2022
17 January 2022	Emily Li, Karis Yip and Stephanie Poon	Commercial litigation newsletter - January 2022

Corporate and Commercial Disputes Hub

Please visit the [Stephenson Harwood Corporate and Commercial Disputes Hub](#) to see latest updates from our team.

Office news

Hong Kong partner Emily Li recently hosted three insightful seminars to the Hong Kong General Chamber of Commerce (HKGCC).

The seminar topics included the roles of directors and shareholders in Hong Kong companies; practical tips in handling SFC investigations; and maximizing recovery in difficult times and risk mitigation. The workshops were designed to be a blend of engaging lectures and interactive discussions, creating an effective learning environment.

The seminars were attended by more than 40 members of the HKGCC and received positive feedback.

Get in touch

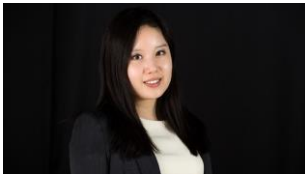
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*Wei Tu (a PRC law firm registered in Guangzhou) and Stephenson Harwood (a law firm registered in Hong Kong) are in a CEPA association under the name "Stephenson Harwood - Wei Tu (China) Association". CEPA (Closer Economic Partnership Arrangement) is a free trade agreement concluded between Mainland China and Hong Kong. Under CEPA, Hong Kong based law firms are permitted to operate in association with Mainland Chinese law firms to provide comprehensive legal services in Mainland China governed by Chinese and non-Chinese laws.

Stephenson Harwood is a law firm of over 1300 people worldwide, including 190 partners. Our people are committed to achieving the goals of our clients – listed and private companies, institutions and individuals.

We assemble teams of bright thinkers to match our clients' needs and give the right advice from the right person at the right time. Dedicating the highest calibre of legal talent to overcome the most complex issues, we deliver pragmatic, expert advice that is set squarely in the real world.

Our headquarters are in London, with eight offices across Asia, Europe and the Middle East. In addition, we have forged close ties with other high quality law firms. This diverse mix of expertise and culture results in a combination of deep local insight and the capability to provide a seamless international service.