



A Global Guide for In-House Counsel:

Doing business in a rapidly changing world



In the following pages you will hear from 75+ IR Global members who share their insight on a range of topics such as crypto & NFT's, global mobility, transient workers, the metaverse, ESG, deal activity and alternative dispute resolution (ADR). To keep up with the pace of the global business environment, you need tailored advice and our member-firms are on hand to offer bespoke support around the world.

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IR Global – Going Beyond Expectations

IR Global was founded in 2010 and has since grown to become the **largest practice area exclusive network of advisors in the world**. This incredible success story has seen the network awarded Band 1 status by Chamber & Partners, featured in Legal 500 and in publications such as The Financial Times, Lawyer 360 and Practical Law, among many others.

The group's founding philosophy is based on bringing the best of the advisory community into a sharing economy; a system that is ethical, sustainable and provides significant added value to the client.

Businesses today require more than just a traditional lawyer or accountant. IR Global is at the forefront of this transition, with members providing strategic support and working closely alongside management teams to help realise their vision. We believe the archaic 'professional service firm' model is dying due to it being insular, expensive and slow. In IR Global, forward-thinking clients now have a credible alternative, which is open, cost effective and flexible.

Our Founding Philosophies

- **Multi-Disciplinary**

We work alongside legal, accountancy, financial, corporate finance, transaction support and business intelligence firms, ensuring we can offer complete solutions tailored to the client's requirements.

- **Niche Expertise**

In today's marketplace, both local knowledge and specific practice area/sector expertise is needed. We select just one firm, per jurisdiction, per practice area, ensuring the very best experts are on hand to assist.

- **Vetting Process**

Criteria is based on both the quality of the firm and the character of the individuals within it. It's key that all of our members share a common vision towards mutual success.

- **Personal Contact**

The best relationships are built on trust and we take great efforts to bring our members together via regular events and networking activities. The friendships formed are highly valuable to the members and ensure client referrals are handled with great care.

- **Co-Operative Leadership**

In contrast to authoritarian or directive leadership, our group puts teamwork and self-organisation in the centre. The group has steering committees for 12 practice area and regional working groups that focus on network development, quality controls and increasing client value.

- **Ethical Approach**

It is our responsibility to utilise our business network and influence to instigate positive social change. IR Global founded Sinchi, a non-profit that focuses on the preservation of indigenous culture and knowledge and works with different indigenous communities/tribes around the world.

- **Strategic Partners**

Strength comes via our extended network. If we feel a client's need is better handled by someone else, we are able to call on the assistance of our partners. First priority is to always ensure the client has the right representation whether that be with a member of IR Global or someone else.



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FOREWORD

A Global Guide for In-House Counsel: Doing business in a rapidly changing world

The world is changing fast. From the emergence of new digital technologies creating commercial opportunities, to fast-changing macroeconomic issues like the climate crisis, political unrest and economic volatility generating cause for concern, it is a rapidly changing world indeed – and for global in-house counsel, it's a challenging landscape to navigate.

Commercial opportunities in this new world are varied, but volatile. Cryptocurrencies and NFTs are both examples of exciting but ultimately uncertain prospects. High risk but potentially high reward, it's critical that the right action is taken to balance the potential return with the risk it entails. Despite several high-profile NFT devaluations, particularly in the art space, the appetite for investment is still strong, with weekly sales rising from 100 in 2017 to 50,000 in 2022, and year-on-year growth of 3,246% - driven perhaps by ongoing hype around the metaverse, which will radically change the role NFTs play financially. Yet NFTs are still very much an emerging investment, and global recognition of their status as an asset is still patchy. While some jurisdictions recognise NFTs as an asset for taxation purposes or in insolvency proceedings, they are not automatically covered by the same protections as physical assets, creating a confusing situation for investors and their counsel.

Similarly, cryptocurrencies continue to generate both excitement and fear, and face a comparatively disparate legal standing that varies between jurisdictions, particularly when it comes to insolvency and inheritance disputes. The collapse of 'stablecoin', as well as the bankruptcy of major crypto exchange FTX and crypto trading platforms Voyager and Celcius, has rocked the market but not necessarily cryptocurrency investment appetite – as you will see from the insight of our members in the Commercial chapter of this publication.

Digital change is not only impacting businesses and individuals from a purely commercial perspective. It seems that we have emerged from the global pandemic into a different world, one where digital tools have enabled us to change both the way we work and where we work from. There were approximately 35 million 'digital nomads' worldwide in 2021 – a figure likely to have increased in 2022 due to post-pandemic travel restrictions easing – with most of those nomads being high earners taking home \$50,000-250,000 a year. Many governments are recognising the economic opportunity

these nomads represent and creating (or easing) legislation to encourage them. It raises an interesting premise for both individuals looking for a lifestyle change, and businesses looking to source from a wider pool of talent. Yet every opportunity brings with it challenges, and throughout these chapters our members highlight some of the most important issues to be aware of. For organisations, it's about balancing employee expectations and demands with implications on employment contracts, taxation and basic day-to-day operations. For individuals it's an equally delicate matter, with potential pitfalls regarding tax and income needing to be managed alongside the personal and professional opportunities remote working can bring.

Underlying all of the above subjects is the issue of ESG – the environmental, social and governance aspects of every investment, every opportunity, every choice. It is increasingly difficult to ignore the impact that our actions – as businesses, investors, individuals and advisors – are having on the world around us, both environmentally and socially. To build a sustainable future, as well as a commercially viable one, we need to address this impact and drive change.

When it comes to deal making, ESG has become an area of critical importance, both as an integral part of due diligence but also as a driving force for future acquisitions. During the first half of 2022, regulatory and commercial ESG pressures saw a spike in mergers and acquisitions focused on companies that provide ESG-related software, consulting and outsourced services, with ESG-focussed M&A rising 111%.

In the following pages, IR Global members share unique insight from the jurisdictions into the rapidly changing world we live and work in. Tackling everything from IP protections in the metaverse to the practical and legal implications of remote working, *A Global Guide for In-House Counsel* provides a broad scope of perspectives from experts around the world to help you navigate an exciting and challenging future.



Editor

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EMPLOYMENT

Transient Workers

Our Employment members are extremely active at the network and share their thoughts on the Transient Workforce. They discuss the shift in employee/workforce expectations in their respective jurisdictions and how their clients can protect their business interests in employment contracts. They examine the benefits and risks of facilitating a more transient workforce and how they are helping clients to manage legislative and taxation issues.




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Gabriel Bleser, Partner, was admitted to the Luxembourg Bar in 1997 and has more than 20 years of professional experience. He is recognised for his experience in European law. He also advises on Luxembourg competition law, unfair competition law, labour law and social security law, administrative law and public law, public procurement law and procedures.

Bonn & Schmitt is one of the leading independent Luxembourg full-service law firms with an extensive local and international practice. The firm is a trusted legal partner of leading international business and financial institutions, industrial corporations, international organisations, as well as national and foreign public entities and organisations. We also advise the Luxembourg State, Luxembourg local authorities, as well as Luxembourg regulatory bodies.

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Elena Arnò, Senior Associate, has been a member of the Luxembourg Bar since 2016. Her practice focuses on litigation in civil, commercial, banking and financial matters, as well as in labour and social law (such as individual dismissal, temporary work, cross-border employment, international secondment, collective redundancies, etc.) and all types of disputes that may arise in connection thereto.

QUESTION ONE

Are you seeing a shift in employee/workforce expectations in your jurisdiction, when it comes to flexibility, length of contract, remote working, hours of work, etc.? How can clients both reflect this and protect their business interests in employment contracts?

As of the pandemic, most Luxembourg employers are facing an increased demand for flexibility from employees in the execution of their employment agreement.

Matters regarding the workforce in Luxembourg should always be apprehended taking into account the small size of the territory, which implies the existence of a high ratio (45%) of daily cross-border workers (from France, Germany, Belgium), but also an important number of international employees.

Pursuant to Luxembourg law, an employee is not allowed to work for a Luxembourg employer solely remotely from his country of residence, as the "main place of work" where the employee usually performs his/her work must be located on Luxembourg's territory.

As of 2020, most employees, to the extent possible, performed their working contract from their domicile (whether in Luxembourg, but also abroad), which called in specific consequences on social security affiliation and taxation.

Should an employee perform more than 25% of the activity outside of Luxembourg's territory, he/she could be liable for double contributions, which would generate high costs for the employer who would have to register in another country. There is also a risk of double taxation (or taxation in both countries) in case of exercise of the activities both in Luxembourg and abroad.

Amendments to the existing double tax treaties have been negotiated with neighbouring countries, setting up a maximum number of working days per year that can be performed outside Luxembourg's territory without incurring adverse tax consequences.

Therefore, both employers and employees must always take into account these thresholds when dealing with questions relating to remote working, place and hours of work, etc.

The employer has no legal obligation to comply with an employee's request to work remotely. To correctly apprehend the current shift in workforce expectations with regard to flexibility, employers are advised to set up clear and detailed working policies that constitute an integral part of the working agreement, bearing in mind the aforementioned thresholds.

The implementation of remote working and the hours of work must be specifically agreed between the parties involved and employee's representatives must be consulted beforehand. In companies with 150 or more employees, their agreement is compulsory.

QUESTION TWO

What is the biggest benefit, and the biggest risk, to businesses facilitating a more transient workforce?

Luxembourg employers need to rely on foreign and temporary employees, which is often a transient workforce.

One of the biggest benefits for an employer in relying on this type of workforce is the cost-effectiveness and prompt access to specific skills compared to traditional recruitment.

Hiring a permanent employee is a significant financial commitment for the employer (with costs such as job advertisement, onboarding, training, salary and benefits), whereas by using flexible recruitment such as interim and short-term employees, the employer can manage his budget in a cost-efficient way by ensuring they only pay for the skills and services which are needed.

Flexible workers are a valuable source of skills for the company. This type of workforce can be particularly important in case of short-term needs, needs of particular skills to complete a one-time project or specific tasks, or the need of additional staff to meet a seasonal peak in demand.

In such situations, employers may use the services of temporary-work agencies or short-time employment agreements.

However, it should be noted that the rules applicable to temporary employment and interim workforce, as well as fixed-terms employment agreements, are very strict under Luxembourg law because they are considered as a precarious type of employment. For example, an assignment contract must specify that the employer may permanently hire the employee at the end of the assignment.

Indeed, one of the inherent risks in a transient and temporary workforce is the lack of control and integration into the workforce, meaning that there is no certainty that the employee will fit into the company's culture and working practices.

An employer must also be aware of potential discrimination between transient workers that might not be considered permanent members of the organisation and permanent employees.

Finally, Luxembourg employers need to adapt to changing talent acquisition trends, as well as workforce expectations, and be prepared to change the way employees are recruited by being flexible but bearing in mind specific legal provisions applicable for each employment regime.

QUESTION THREE

How are you helping your clients to manage legislative and taxation issues around their transient workforce? For example, are there bi-lateral agreements with other jurisdictions or tax provisions to be aware of?

Employment of transient workforce and flexible working conditions, in terms of place and hours of work, necessarily calls for matters relating to specific legislative and taxation issues, particularly according to international double taxation agreements between Luxembourg and neighbouring countries.

In order to help businesses to correctly apprehend the consequences of employing a transient workforce, it is important to keep clients updated in terms of changing legal provisions.

Employers must bear in mind that in terms of taxation, an employee's income will be taxed in the State where the professional activity is carried out and taxation is 100% maintained in Luxembourg if the following thresholds are not exceeded:

- Belgium: 34 working days per year outside Luxembourg
- France: 29 (34 as of 1st January 2023) working days per year outside Luxembourg
- Germany: 19 working days per year outside Luxembourg

Should these thresholds be exceeded, by adding days of remote working or in the event of any other activity carried out in another country, then the salary related to all the days worked outside Luxembourg is subject to taxation in the country of the actual activity.

Also, Luxembourg companies face an increasing need to supplement their workforces with qualified workers with in-depth knowledge in specific sectors. It is therefore also important to inform companies that are looking for specific highly skilled workers of the existence of incentive tax regimes, whereby costs of highly qualified workers incurred by the employer may be declared as deductible operating expenses. A highly qualified worker who is hired or seconded to a company located in Luxembourg may, under certain circumstances and for a limited period of time, benefit from a total or partial tax exemption for expenses in kind or in cash directly related to the move to Luxembourg.

“Luxembourg companies face an increasing need to supplement their workforces with qualified workers with in-depth knowledge in specific sectors”



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Tony Van de Calseyde is one of three partners of BUYSSENS Employment Lawyers. Admitted to the Antwerp Bar in 2001, he has broad expertise in the various domains of individual and collective employment law, as well as social security law and complementary pensions. Following his traineeship, he co-managed a company in the private sector for three years, after which he joined the Bar again. Alongside his profession, Mr. Van de Calseyde has been teaching social law in the Mediation postgraduate training program at the University of Antwerp and Ghent. He regularly speaks at employment law seminars and has written many publications on this discipline. Mr. Van de Calseyde is a Board member of the Antwerp Employment Law Association and of the editorial committee of the Rechtskundig Weekblad, one of Belgium's leading law journals. He assists employers and employees with advisory services, in court proceedings, and he also has experience with proceedings before the Belgian Constitutional Court.

BuysSENS Employment Lawyers is a Belgian boutique law firm based in Antwerp specializing in employment law and social security law, including complementary pensions. In addition, we also advise on contracts between self-employed persons and competition issues.

Founded in March 2017, its partners have over 65 years of collective experience, providing the best guarantee for both efficiency and high-quality work. However, our focus on employment law does not prevent our lawyers from focusing on other legal disciplines encouraging "out of the box" thinking and generating new insights.

From businesses of all sizes to private individuals with a business profile, we understand both sides of the coin and want to keep doing that.

QUESTION ONE

Are you seeing a shift in employee/workforce expectations in your jurisdiction, when it comes to flexibility, length of the contract, remote working, hours of work, etc? How can clients both reflect this and protect their business interests in employment contracts?

There was already an increase of questions from our clients related to flexibility in working hours, as well as the legal issues regarding remote working. Now, as a result of the COVID-19 pandemic, many clients introduced a remote working policy, allowing employees to work remotely 2 out of 5 working days on average. Clients now feel this has become an expectation and believe that like this, a healthy work/life balance is reached. Also, many clients accepted a remote working policy, because it gives them an extra argument towards potential candidate-employees to choose their company as their new employer. Next to that, it allows companies to save costs on their working space.

Of course, this calls for measures regarding working control and the safety of confidential information. Employers should make sure that whatever system they put in place, still allows them to differentiate on an individual level, based on performance.

Next to that, legislation has been put

in place very recently, allowing employees to remain working full-time, but spread their working time over 4 instead of 5 days per week. Also, the possibility of a working cycle of mostly 2 weeks, and in some cases up to 4 weeks has been discussed. It remains to be seen whether these new possibilities will prove successful. With the war for talent still raging out there, I can imagine that at least some employers will want to participate in this, thus also making them even more attractive for candidate employees.

On top of this, the new legislation can allow for employees to already start working for another employer in case they have been dismissed with a notice period. This is what is now called a "transition path" in the new law. In such a case, it can be agreed that a part of the salary, or even the entire salary, is compensated by the new employer. Also, extra measures to promote a quicker re-employment of the employee are introduced and a part of the employer cost, dedicated to the notice period or indemnity, is now reallocated for this purpose.

Other recent legislation has been introduced, mainly as a result of the European Directive on transparent and predictable working conditions (n° (UE)2019/1152), foreseeing all kinds of new rights for employees, such as the right to receive information/confirmation regarding certain working conditions, as well as to apply more flexible working conditions for a certain period to take care of a child up to 12 years or a family member for medical reasons.

QUESTION TWO

What are the biggest benefits and risks to businesses facilitating a more transient workforce?

When talking about remote working, the biggest benefits are cost savings and making the company more attractive for candidate-employees. Of course, this can also be a factor in retaining existing employees. The main challenge is to achieve a climate of trust and a healthy balance between remote working and office work. And also on how to deal with certain individuals that will, sooner or later, abuse the employer's trust. Policies put in place should not deprive employers of any rights in this area.

When talking about a "transient workforce" as a more temporary workforce, composed of freelance workers or contractors, the benefit for companies can be to have more flexibility, enabling them to respond more rapidly to their quickly changing business needs at limited cost. However, a company that is unaware of the legal risks involved in this, especially in a country like Belgium, could afterwards be paying for this in cash. The provision of a temporary workforce to companies and the delegation of employer authority are strictly regulated, and in many cases even totally forbidden. I believe Belgium has one of the strictest legislations in place in this area. And, even when allowed, one should still be aware that several legal mechanisms exist, thus enabling the government to hold companies liable for certain breaches of the law, especially in the area of social security and employment, by their business partners.

TOP TIPS

Preserving company culture and retaining staff in flexible working arrangements

- ✔ Define your business needs when it comes to the workforce and seek advice on how these needs can be met, taking into account the legal framework of the jurisdiction(s) your company is in. This can be very different from one country to another.
- ✔ Perform a thorough check on your potential business partners before engaging with them. However, there is no reason not to do this when already in a contractual relationship – allowing you to address issues proactively, before they become a real problem that could cost you a lot of money.
- ✔ Non-competition and confidentiality clauses can be interesting tools that should be drafted taking into account local legislation and case law. Bare in mind that enforcing such clauses is not always easy.
- ✔ Think about exclusivity and training deduction clauses, allowing workers to reimburse costs for training provided.
- ✔ In light of recently introduced legislation, existing clauses should be reviewed to see if they can still be enforced.

QUESTION THREE

How are you helping your clients to manage legislative and taxation issues around their transient workforce? For example, are there bilateral agreements with other jurisdictions or tax provisions to be aware of?

We assist clients in drafting and enabling policies, adapted to their situation. In the case of cross-border situations, questions related to applicable tax, social security, and employment law are addressed.

When it comes to concluding contracts and collaborating with independent contractors and freelancers, we are consulted to examine whether a contractor is trustworthy; or whether a freelancer is okay to hire as a self-employed worker. In that perspective, we have developed certain standards any contractor or collaboration with a freelance worker should live up to, depending on the nature of the client's business. One of the key elements a contractor or freelancer should always live up to is the ability to provide a decent contract to our client. Such a contract must show that they are professional and aware of the legal risks at stake in their area of activity. In the absence thereof, we will mostly advise our client against doing business with such a party, regardless of the other elements of the check we perform.



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Dezan Shira & Associates is a specialist foreign direct investment practice with a pan-Asian presence. Since its establishment in 1992, the firm has grown into one of Asia's most versatile full-service consultancies with operational offices across China, Hong Kong, India, Indonesia, Singapore, and Vietnam; and Asian Alliance member firms in Malaysia, Philippines, and Thailand, as well as liaison offices in the United States, Italy, and Germany. The company directly employs more than 300 professionals in the region.

QUESTION ONE

Are you seeing a shift in employee/workforce expectations in your jurisdiction, when it comes to flexibility, length of contract, remote working, hours of work, etc? How can clients both reflect this and protect their business interests in employment contracts?

After the Covid-19 pandemic was under control and all social distancing measures were lifted, there has been a significant shift in office working arrangements in Vietnam.

Although there have not been many changes in employment terms and conditions, as well as the minimum required number of work hours, most companies have implemented more flexible working arrangements for their employees including patterns and locations of work. Based on our observations, most employers do not specify such arrangements in the employment agreements, nor company policies, but often brief the employees via unofficial communication methods such as emails or companies' dashboards. The reason for this is to subtly let employees know that flexible working arrangement is a privilege and is conditional, and that employers have the right to revoke this if inefficiency and unproductivity are noticed.

QUESTION TWO

What is the biggest benefit, and the biggest risk, to businesses facilitating a more transient workforce?

Before the outbreak of Covid-19, office workers were used to their daily eight to five or nine to six work routines. Most employers considered remote work unrealistic and flexible working arrangements were often given to "disposable or unimportant" staff. However, the stringent quarantine requirements and social distancing measures implemented by the Vietnamese Government resulted in companies having no other options but to temporarily shut down or let their employees work from home. Most companies chose the latter

and implemented strict work-from-home policies to ensure that there would not be a significant decline in employees' productivity. Only after a short implementation period, many companies admitted their prejudice and that most transient workers can be trusted to work anywhere outside the office setting. There are certain trade-offs, but in certain industries, the costs are outweighed by the benefits that it has to offer.

Benefits

- Flexible working arrangements can help businesses to boost their employees' morale by allowing them a certain control level over their working schedules, significant reduction of travelling costs and improvements in work-life balance.
- Businesses can also benefit from employee satisfaction, which would likely result in employee commitment and retention.

Risks

- Certain roles cannot be performed remotely and employees in such roles are required to be always physically available during business hours. This can create an envious ambience between different members in different job positions.
- Certain team leaders, who prefer the traditional management approach, may find it difficult to manage their teams without direct supervision of their staff's workflows.
- Some people may not work in a productive and efficient manner without constant supervision. In addition, jobs that require team coordination may be at risk because participants may not hold the same work schedule.

QUESTION THREE

How are you helping your clients to manage legislative and taxation issues around their transient workforce? For example, are there bi-lateral agreements with other jurisdictions or tax provisions to be aware of?

Over the years, we have consulted and helped our clients, especially conglomerates with a global presence, resolve many legal and tax issues with their employees' global assignments. We have seen very interesting cases, such as:

1. An Australian Web Developer who came to Vietnam to coach new team members of a Vietnamese subsidiary for a two-week period, fell in love with a local woman and began a relationship, so decided to stay in Vietnam for another two years whilst still working for the parent company in Australia and remaining an Australian resident for tax purposes under domicile test. During this time, he still worked remotely and received a salary from his Australian employer, who is required to make PAYG tax withholdings on his salary. Meanwhile, by staying for more than 183 consecutive days in Vietnam, he was considered a Vietnamese tax resident and is taxed on his worldwide income, including his Australia-sourced salary.

2. A Singaporean strategic consultant, who has never set foot on Vietnam's soil before, signed an agreement to work as a contractor adviser for a company in Vietnam. Under Vietnam's tax law, the company in Vietnam must withhold tax at the flat rate of a non-resident before paying him. As a tax resident in

TOP TIPS

Preserving company culture and retaining staff in flexible working arrangements

- ✓ **Commitment:** Request everyone to be at the office the full Monday and full Friday to get everyone together regularly for announcements, activities and to catch up.
- ✓ **Retention:** Offer flexible work models in general and at least one day for every staff member. The Gen-Z workforce especially prefers to have this option.
- ✓ **Bonding:** Share joint activities in a group so everyone stays informed and engaged about social activities.
- ✓ **Performance:** Follow up with deadlines regularly to keep everyone engaged.
- ✓ **Guidance:** Handle obvious trust violations with targeted and individual solutions, do not punish the whole team for issues with individuals.

Singapore, he is required to pay tax on his global income.

The above cases are perfect examples of legal and tax issues for the transient workforce and people with flexible working arrangements. Each country has their own compliance requirements and tax legislation to consider and thus, the issue of double taxation can happen more and more frequently. In these scenarios, we have to rely on double taxation treaties between Vietnam and other countries to assess and make professional judgements for each case separately.

Although flexible working arrangements can offer many benefits and help employers in staff retention as well as reduction of turnover, companies should also pay attention to staff socials and communications. Sometimes, managers are happy with certain remote employees' performance and trust them completely; they are willing to let such employees handle their own work without having any say or intervention. In such cases, the staff may sometimes feel isolated and unappreciated. Therefore, it is vital that managers provide their employees with clear goals and expectations, continuously show appreciation and give constructive feedback on their work efforts.

Making remote workers feel included and connected with the company as a brand is also very important. Employees should feel that they belong and share the same vision and culture with their company. Many businesses have done this successfully via weekly CEO updates on the company's online dashboard, group chats on Yammer and company social media channels or groups.

Although the concept of a transient workforce is not new, it has not been widely implemented or properly regulated under Vietnamese law. We expect that hybrid and more flexible working models will become more common in the very near future. In order to be successfully implemented, there should be input from government officials and relevant regulations to protect both employers' and employees' interests and prevent possible exploitations from both sides.



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“Employers in Switzerland may risk creating a permanent establishment in the country of residence of the employee by allowing home office work for extended periods of time”

DUFOUR Advokatur AG is a full-service firm. Monika’s focus within the firm is on employment law (corporate, international, expats), contract, trade and company law, negotiation (management and tactics), mergers and acquisitions (M&A) and dispute resolutions (litigation and arbitration).



QUESTION ONE

Are you seeing a shift in employee/workforce expectations in your jurisdiction, when it comes to flexibility, length of contract, remote working, hours of work, etc? How can clients both reflect this and protect their business interests in employment contracts?

There is a noticeable increase in the expectations for more flexible working conditions from employees, which include the possibility to work from home at least part-time. However, the mandatory labour law requirements, which – apart from a few exceptions – are applicable to all employees, set certain limitations.

Setting clear rules for flexible work conditions which set out employer expectations and establish clear boundaries is highly recommended. This could be done by establishing rules and regulations with the employees for flexible work, which become part of the employment agreement.

Switzerland’s labour laws are liberal, allowing employers to adapt terms and conditions as long as they observe certain procedural requirements. These are aligned with the Swiss rules on termination of employment contracts, which provide minimal protection for the employees. Most unilateral changes of terms and conditions are not possible.

QUESTION TWO

What is the biggest benefit, and the biggest risk, to businesses facilitating a more transient workforce?

The biggest benefits for employees is having the possibility to create a better work-life balance and saving time, as well as reducing their environmental footprint due to less commuting. The benefit for employers is to have employees that are more likely to be satisfied with their working conditions. The downside of a more transient workforce is that where employers formerly benefited from directly managing employees on a daily basis, face-to-face, they now have to adapt to remote leadership with less personal interaction. This makes management more challenging and knowledge transfer between employees is more difficult.

QUESTION THREE

How are you helping your clients to manage legislative and taxation issues around their transient workforce? For example, are there bi-lateral agreements with other jurisdictions or tax provisions to be aware of?

As Switzerland welcomes many cross-border workers, i.e. individuals resident in another country but working in Switzerland, it has entered into a number of bilateral agreements with the EU and with other countries regarding taxation as well as social security. For social security matters, there are over 40 agreements in place. The most important is the Agreement of the Free Movement of Persons with the EU (Annex II). These agreements wish to prevent loss of entitlements or double contributions for international employees. As a rule, social security contributions are payable in the country where the place of work is. Prior to the Covid-19 pandemic, home office work could lead to the social security regime in the country of residence of the employee to apply. However, due to the increase in home-office work as a result of the Covid-19 pandemic, the application of a number of these agreements has been deferred until after June 30, 2023. Negotiations are currently underway to prolong this exception. Most likely, after 1st July 2023 a general 25% limit for work conducted by the employee in their country of residence will apply prior to the social security regime changing.

For cross-border employees or foreign nationals resident in Switzerland (with certain exceptions) and working in Switzerland, tax at source will be deducted directly from their salary. The applicable tax rate varies from Canton to Canton.

For double taxation purposes, the exceptions are not the same as for the social security agreements, so these must be taken into account as well. Employers in Switzerland may risk creating a permanent establishment in the country of residence of the employee by allowing home office work for extended periods of time (particularly where the employee has a senior position and takes decisions on behalf of the employer). This can inadvertently lead to the employer becoming taxable in the country of residence of the employee.

Additionally, Switzerland has implemented certain mandatory rules to counteract potential salary dumping and has therefore declared a number of collective bargaining agreements to be mandatory. Their scope of application

TOP TIPS

Preserving company culture and retaining staff in flexible working arrangements

- ✓ **Speak to and listen to your employees.** Employee representatives can be a helpful sounding board to help find solutions which address both employee and employer interests.
- ✓ **Set clear guidelines.** Employees should know what the rules (and risks) are. Create opportunities for unstructured interaction among employees. Ensure regular face-to-face exchanges between employees and management, both work-related as well as activities outside the immediate work environment.
- ✓ **Get feedback.** Periodically ask your employees and management what is working and what needs to be adapted.
- ✓ **Adjust the rules,** if needed. If feedback suggests adaptations, recognise the input and either make changes, or explain why not.

is usually for a specific industry and region. They apply to employers from other countries deploying personnel in Switzerland.

Switzerland has recently issued more stringent laws regarding data protection, which will enter into force on 1st September 2023. Contrary to EU GDPR regulations, a breach of Swiss data protection laws can lead to personal criminal liability of members of the board of the company. Electronic supervision of the remote workforce needs to be compliant with said laws.



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gunnercooke is one of the UK's fastest growing law firms, providing a wide range of corporate and commercial legal services to businesses, banks and financial institutions. The firm was founded in 2010 to challenge, improve and evolve the way that legal services are delivered. We believe that the legal industry serves neither clients nor lawyers the way it should. Our founders set about doing things differently from day one, flattening out the traditional hierarchy and establishing a new model based upon flexibility, transparency and freedom. The firm has been recognised for 44 industry awards and currently employs over 330 legal professionals and management consultants across offices in London, Manchester, Leeds, Birmingham, Edinburgh, Glasgow, Berlin and New York.

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QUESTION ONE

Are you seeing a shift in employee/workforce expectations in your jurisdiction, when it comes to flexibility, length of contract, remote working, hours of work, etc? How can clients both reflect this and protect their business interests in employment contracts?

There is no question that employees now expect a flexible workplace. The traditional concept of commuting to a physical office five days a week increasingly seems like something from a bygone era, and there is a growing body of evidence that there is no going back to the way things were. There is a greater demand for flexibility, whether in terms of location, length of contract or the ability to decide working hours, and this is especially notable with younger workers and employees.

The UK government for its part is in favour of flexibility and has recently announced planned legislative changes that will allow new employees to request flexible working arrangements as a "day one" right instead of having to wait six months to do so. They will also be able to make up to two requests per year and employers will be required to respond to these requests more quickly.

The debate has now mainly shifted to what the new method of working looks like, but there is no generic answer here. For every Elon Musk that decrees their employees must either return to the office or "pretend to work somewhere else", there is an example of a successful business embracing the different things that people want out of work without compromising productivity.

A traditionalist employer shouldn't need to make significant changes to their employment contracts at all, as any temporary arrangements made during the pandemic have almost certainly come to an end and there have been few notable developments in employment law in recent years. In other words, they are free to carry on as they were – even if this means turning a blind eye to the changing times. The duties to respond to statutory flexible working requests and to avoid discrimination remain, but these are not new considerations.

For those who recognise there is a paradigm shift and are open to change, this is an opportunity to modernise working

practices and enhance the wellbeing of your workforce at the same time. The starting point is to understand the needs of your business and how the productivity of your employees is measured. The likelihood is that this has less to do with a constant office presence and more to do with responsiveness, delivery of tasks and communication. It is also advisable to consult with your staff, and to do this widely, so that you maximise inclusion and gain "buy in" across the business.

Once you have these components and know what is needed, these can be formalised via employment contracts and written policies, commonly contained in an employee handbook. Care is needed to avoid the risks of imposing unilateral variations on existing employees, but this is unlikely to be problematic if properly managed and given you are introducing positive changes, which will probably be welcomed by the workforce.

I recommend ensuring that new employment contracts make it clear that any flexible or hybrid working arrangements are capable of being changed from time to time in order to suit the needs of the business. There should also be a specific right to require employees to physically attend the office at the reasonable discretion of management. These measures will ensure that you retain control over the new regime and can be responsive to future changes if needed.

“The traditional concept of commuting to a physical office five days a week increasingly seems like something from a bygone era”

QUESTION TWO

What is the biggest benefit, and the biggest risk, to businesses facilitating a more transient workforce?

I think businesses will generally prefer a more agile workforce than simply a more transient one. This is because businesses will still value retention and reliability of workers, even if the location, means, and delivery of their work is becoming much more flexible. For example, allowing an employee to work from home for three days a week or to decide their own workload does not mean that you don't want them to remain with the business on a long-term basis. Of course, some sectors will prefer a more contractor-based or freelance model which favours short term working arrangements, but even that is different to actively promoting a more transient pool of resource.

The biggest benefit of facilitating a more transient workforce is the flexibility this will bring in terms of being able to scale labour costs up or down to match the needs of the business. By contrast, the biggest risks are the lack of a reliable core of workers, the challenge of maintaining a consistent company culture and the likelihood of much higher staff turnover which will in turn require more investment in training and recruitment.

TOP TIPS

Preserving company culture and retaining staff in flexible working arrangements

- ✔ Does your business still need a traditional working model to maintain productivity? If not, then you may gain a happier workforce by introducing a degree of flexibility and prioritising output over presenteeism.
- ✔ Consult your workforce so that you understand what they value and can make changes that are aligned with this.
- ✔ Aim for fair pay and a more productive work-life balance, so that workers can pursue happiness that aligns with their personal tastes and preferences.
- ✔ All team members should be present in the office when needed, but they should also be trusted to manage their own deliverables where possible.
- ✔ When attendance in the office is required, make sure the experience is worth the commute. Managers should interact with colleagues when they are in the office and also invest time in team building activities which promote inclusion and interaction.

QUESTION THREE

How are you helping your clients to manage legislative and taxation issues around their transient workforce? For example, are there bi-lateral agreements with other jurisdictions or tax provisions to be aware of?

I have already touched on the starting steps for moving away from the traditional workspace model and how these changes can be implemented without friction through contractual variations and changes to staff policies.

Where a business wishes to facilitate a more transient workforce, this will naturally lead to questions of employment status and taxation. This will include examining the operation of the IR35 legislation, which was introduced to crack down on tax avoidance through the use of a company to avoid paying employee income tax and national insurance contributions. Those rules will not apply where the worker's company supplies the worker's services to public sector clients or medium or large private sector clients that have a UK connection, but in those instances the off-payroll working rules become relevant instead.

There are additional legal considerations when dealing with requests from employees to work from abroad for more than one month. This requires consideration of the existing employment contract, the host country's employment laws and applicable tax arrangements including tax residence status.



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Holst, Advokater is a limited liability partnership and one of the fastest growing legal practices in Denmark. We have offices in both Copenhagen and Aarhus. Our experienced lawyers are known and respected for their legal skills. As a full-service firm Holst, Advokater encompasses the legal competencies required by large as well as smaller clients, private as well as public, national as well as international. We work under the highest professional and ethical standards based on our corporate culture and core values. Holst, Advokater's international ratings include Chambers and Partners, Legal 500, and IFLR 1000.

QUESTION ONE

Are you seeing a shift in employee/workforce expectations in your jurisdiction, when it comes to flexibility, length of contract, remote working, hours of work, etc? How can clients both reflect this and protect their business interests in employment contracts?

The labour market has always been competitive, but competition has changed in the past year. Expectations have shifted, in particular to the working conditions offered by companies.

Employees are currently the strongest players in the Danish labour market, where unemployment right now is only 2.5%. Workplaces are being compared in terms of flexibility and working conditions, and many would start looking for a new job if their current workplace does not offer flexibility.

The fact that employees are gradually gaining power also means that employers must think differently. It is no longer possible to control the employees' actions in the same way as when they go to work and work from an open-plan office. The flexible labour market requires the development of "distance management" skills. All employees working remotely should update their calendars with information about where they can be reached (office and/or digital communication channels) and during which hours. Companies may want to introduce virtual coffee breaks or set aside the last five minutes of virtual meetings for an informal chat. Managers should actively consider the number of attendees in digital meetings and consider the benefits of fewer attendees in such meetings, enabling a video image of each person in a reasonable size which should create greater commitment from attendees. An option could be for the company to have inhouse social media, or to set daily check-ins between managers and employees. There is a need to create a new digital culture: companies must decide whether to become "virtual first", meaning that all tasks, meetings etc. should be organised so that employees rank equally and have the same access and opportunities, regardless of their distance.

Regardless of the length of contract, physical presence or number of working hours, employees need professional management, social attention and recognition. In addition to the fact that the requirements for management are increasing, there are also several legal requirements that clients must pay special attention to when, for example, remote working is made available to employees in Denmark.

Foreign employers must be particularly aware that if the work is to be carried out in Denmark, the provisions of the Danish Health and Safety at Work Act will apply. If employees work from home more than two days a week, the employer must ensure that the home office complies with the rules for arrangement. Danish companies whose employees live abroad and work from home, e.g., in Sweden or Germany, must comply with the health and safety regulations applicable in the country in question. Companies/clients that manage to adapt to this change will be able to retain their employees, recruit new employees and, not least, rise above the competition.

QUESTION TWO

What is the biggest benefit, and the biggest risk, to businesses facilitating a more transient workforce?

"Some of the work may be made remotely, as we offer remote working." This sentence has often been seen in job advertisements in 2022 in Denmark.

The big benefit of flexibility and the flexible workplace is that employees are "set free" to work anywhere and anytime. The feeling of freedom is also seen as a sign of confidence granted by the employer; to work without "supervision". The ability to work from home gives employees more time and energy for family and leisure and can contribute to increased productivity, and job satisfaction and motivation generally increase. Working from home will in most cases provide more peace of mind – away from open-plan offices and small distractions all the time. Employers will have more productive employees. Employers will be able to retain employees who, for geographical reasons, would otherwise have had to resign, or to recruit employees who otherwise would not have applied for the job. It is important that remote working is voluntary, as it is the employee's own needs that are crucial in the current labour market.

The challenges of the flexible labour market and workplaces are how to maintain teamwork and human relations in the companies. Working from home weakens the daily human contact between employees, and between managers and employees. Employees can lose access to informal knowledge sharing and knowledge about what is happening in the company. Managers find it difficult to support the work and acknowledge the work effort. It therefore requires a targeted effort from the companies, including management. The feeling of belonging to a company may become weaker, which is why job satisfaction in remote working must be put on the

agenda of employers. New routines must be introduced – and here technology can be used as a tool. Ongoing professional seminars and social events, where everyone can participate virtually, contributes to a good sense of belonging, development, and knowledge sharing. It could be the small things that are important, such as a picture on an email profile (of an employee you may never have seen in real life). When employees engage in remote working, they still need to feel included and updated in everything going on in the company. Only creativity can limit employers' actions in the digital world.

QUESTION THREE

Is private equity widely available in your jurisdiction? What are the advantages and drawbacks of financing a deal using equity, in your experience?

It is complex to advise foreign clients on Danish employment law and tax law issues. The questions that arise in connection with the recruitment of temporary workers are rarely the same, as it largely depends on the specific circumstances, which is why we have gathered our most important advice here.

Work permits: A residence and work permit must be obtained for non-European workers before beginning work in Denmark. Special exceptions apply to researchers, special, individually qualified employees, agricultural employees, and mobile workplaces.

Employees versus self-employed: According to Danish legislation governing employment and Danish collective agreements, only employees have rights. Whether it is an employee or a self-employed is therefore important for deciding whether a person has rights according to employment law and thus the right to collective negotiation on pay and working conditions, and whether the contracting party has obligations as an employer; or whether the contracting parties are independent undertakings operating freely on the market. Some employment contracts have ambiguous names, for instance 'freelancer contract' or 'consultancy contract' or the contract is designated as self-employed thereby avoiding the rules of labour law, even though the content of the contract might be something quite else.

Remote working and tax: When an employee receives pay from a Danish employer it is crucial for tax liability where the employee physically performs the work. If the employee works from Denmark, the employee will be liable to pay tax subject to the employee's pay here in Denmark. If the work is carried out in the employee's home country or a third country, the employee will not be liable to pay tax in Denmark, but probably in the home country. In relation to companies, the general rule is that the company is liable to pay tax on any profits in Denmark when the company is run with a permanent establishment here in Denmark, regardless of whether the company is Danish or foreign.

“Workplaces are being compared in terms of flexibility and working conditions, and many would start looking for a new job if their current workplace does not offer flexibility”



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SCR Abogados is a Chilean law firm established in 2017 which offers legal services in corporate, labour, intellectual property, compliance and other related areas, focusing on the needs of clients to create long lasting relationships with clients and assure high quality service standards. Our value proposition consists of involving seasoned lawyers with hands-on experience in each task we undertake to provide timely, high quality, business-oriented and comprehensive advice to expedite business processes for the benefit of our clients. We aim not only to provide services, but also to become true strategic partners, supporting and assisting our clients so that they can swiftly and comprehensively navigate into (and manage the intricacies of) the Chilean jurisdiction.

QUESTION ONE

Are you seeing a shift in employee/workforce expectations in your jurisdiction, when it comes to flexibility, length of contract, remote working, hours of work, etc? How can clients both reflect this and protect their business interests in employment contracts?

Yes, we do see that shift, especially in regard to workplace flexibility since Covid-19. Before the pandemic, the only regulation regarding remote work was related to the limitation of working hours, in the sense that employees who rendered their services preferably outside the company’s premises were not subject to the statutory maximum of work hours; and, consequently, they did not have to record attendance and working hours and did not have the right to be compensated for overtime.

As a consequence of lockdowns and mobility restrictions decreed during the pandemic, legislative discussion concerning remote work was accelerated. On 26th March 2020 under act No. 21,220 on remote work and teleworking was advertised in the official gazette. This act regulates issues related to working time, the right to disconnect, supervision and control mechanisms, the employer’s obligation to provide employees with the equipment, tools and materials for the work (assuming the respective operating costs) and the employer’s hygiene and

safety obligations with respect to remote working employees.

Nowadays mobility restrictions are no longer in force, but the majority of the workforce has formally asked to maintain the flexibility that teleworking allows and has agreed on alternatives on workday distribution order to reconcile work, personal time and family. It is relevant to consider that our labour legislation does not allow flexible working hours for those employees subject to fixed and limited hours. Additionally, Congress is currently discussing a regulation that seeks to reduce the maximum weekly work hours from 45 to 40 hours.

Regarding the duration of the employment contract, in Chile the principle of employment stability prevails. Accordingly, the general rule is that the contracts are of indefinite duration and the rules on termination of the employment relationship are strict. Thus, Chilean labour legislation is structured in contracts that seek indefinite relationships, contemplating legal hypotheses by virtue of which fixed-term contracts become indefinite and restricting temporary employment relationships to special companies with a specific line of business consisting in temporary personnel supply. Additionally, fixed term employment contracts and contracts subject to specific tasks are limited to certain exceptional cases and for limited periods.

In Chile, the execution of a written employment agreement between the parties containing the terms and conditions of the employment relationship is mandatory. Therefore, the way in which clients can reflect these trends together with protecting their businesses interests is to analyse – based on objective criteria – which positions can be performed flexibly and the terms and conditions under which the company wishes to implement such flexibility. Then, addendums to the respective employees’ employment contracts must be executed, reflecting the regulations of the policy that modify the current contractual terms, ideally in temporary terms.

QUESTION TWO

What is the biggest benefit, and the biggest risk, to businesses facilitating a more transient workforce?

The biggest benefit to businesses facilitating a more transient workforce is that teleworking allows them to access employees that otherwise may not have been able to work, thus attracting new talent.

From a labour law perspective, the biggest risk to businesses facilitating a more transient workforce is being exposed to lawsuits (especially for work related accidents and professional illnesses) and/or fines based on the breach of the employer’s legal obligation to adopt all necessary measures to effectively protect the life and health of employees. Clearly, it is more difficult to adopt these kind of measures with respect to employees that render services outside the company’s premises.

Additionally, from a general perspective, other risks to be considered are those related to potential information security and confidentiality breaches. The first related to being prepared to avoid potential security breaches derived from remote access or the use of uncontrolled storage devices in the company’s network. The latter relates to the existence of potentially confidential information in uncontrolled environments, both of which need to be addressed in advance.

TOP TIPS

Preserving company culture and retaining staff in flexible working arrangements

One of the most important things in a work environment with an increasingly transient workforce is to foster a sense of belonging. While on the company’s premises there are many ways to do this: corporate colours, stationery products, merchandising material, company events and what not. How to preserve this sense of belonging is key to retain and attract talent and yet “traditional” means to achieve this have to be revisited in an increasingly digital work environment. While there is no “one size fits all” way to do this, it is key to: compartmentalise personal time with company productivity; respect disconnection times rationalising the hours and frequency of use of emails and instant messaging; generate instances for employees to meet and interact with each other; provide them with teleworking kits using the products customarily available at the office; and preserving communication channels with their teams and team leaders in the transition. It is also essential to provide training to mitigate risks and assist in adapting to the new work environment. Not an easy task, but a necessary one.

QUESTION THREE

How are you helping your clients to manage legislative and taxation issues around their transient workforce? For example, are there bi-lateral agreements with other jurisdictions or tax provisions to be aware of?

We are always reviewing administrative and judicial labour case law regarding these matters, keeping our clients updated on any relevant information.

Please note that Chilean teleworking legislation only applies to transient workforce that renders its services within national territory, not abroad. Indeed, by virtue of the territoriality principle, Chilean teleworking regulations are not applicable to services rendered through technological means from foreign countries. By virtue of the foregoing, the labour legal consequences/applicability associated to employees rendering services to a Chilean company from abroad must be analysed in accordance with the regulations of the country in which the services are being rendered. Additionally, bear in mind that the risk from a tax perspective is the creation of a permanent establishment in the country from which the transient workforce renders services. Should that happen, they will need to file for tax returns in the said country. From the employees’ perspective, the nature of these services may trigger the obligation to pay taxes both in Chile and in their country of residence. Both issues are usually ruled by tax bi-lateral tax agreements executed by and between Chile and certain countries.



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The Torrey Firm represent employers in litigation and advise management on a broad range of employment matters. From creating effective personnel practices to defending employers at trial, we have the experience and judgement to help manage the maze of regulation and the risk of litigation that comes with it. As workplaces reflect societal developments, changes in personnel practices will occur. We assist businesses in looking ahead to improve human resource practices and reduce unnecessary risk.

QUESTION ONE

Are you seeing a shift in employee/workforce expectations in your jurisdiction, when it comes to flexibility, length of contract, remote working, hours of work, etc? How can clients both reflect this and protect their business interests in employment contracts?

In the US, and in California in particular, there has been a remarkable shift in employee expectations over the past few years among white-collar employees who we would have previously described as "office workers". This shift does not necessarily apply to employees working in other sectors, including retail sales, hospitality, construction, transportation, manufacturing, and domestic workers, as their jobs have not significantly changed with respect to remote work.

Many office jobs in California metro areas have become either hybrid or entirely remote. This is due to employees' insistence that they are able to work remotely and flexibly at least part of the time, along with employer adjustments to pandemic conditions. The expectation of at least some remote work is driven by the younger segment of the workforce, a group critically important to employers during talent shortages for the survival of the business. In our experience, most white-collar employees have a preference for the comfort and convenience of working from home, as well as the opportunity to reduce the amount of time they spend commuting. It is not uncommon for urban workers to commute to work a minimum of 30 to 60 minutes each way, with remote work offering extra hours of free time that would have been spent going back and forth to work.

Apart from fully remote work, the most common hybrid work schedule used currently is two or three days in the office with the rest of the week flexible. This schedule often demands less total office space, and there is a trend towards office hoteling where employees share desk space with others coming in on alternative dates. A growing number of employers are providing the flexibility of up to several months remote work from other states or countries, an option particularly attractive to younger workers. In most cases, it is a perk not an entitlement and

can present some complications for employers in terms of supervision, coordinating work schedules between time zones and various regulatory matters.

Most US based employees are at-will employees, a practice that has not changed with remote, hybrid or flexible work schedules. For that reason, relatively few employees in the US have contracts for any specified term of employment. While certain employers are willing to flex hours to accommodate part time work that provides employees with flexibility to do other work, pursue travel or other hobbies, be with family or whatever they choose, that practice has not been adopted across the board by most employers. Labour shortages have required employers in some instances to accept part time schedules in order to hire and retain qualified employees on the terms they are willing to work.

As the movement towards a transient workforce has grown, the law regarding contractor status has tightened in California. With few exceptions, most workers in California are presumed by law to be employees regardless whether they are classified as such by the entity for which they perform services. This removes as a viable option the inclination to classify workers as contractors to simplify compliance.

QUESTION TWO

What is the biggest benefit, and the biggest risk, to businesses facilitating a more transient workforce?

The biggest benefit to businesses in facilitating a more transient workforce is being able to meet labour needs by offering more flexible terms than the competition. Many younger white-collar workers will not even consider a job in a traditional office setting without hybrid and/or remote work options. Satisfying this desire for more flexible conditions of employment has left employers scrambling to develop options and market themselves as an attractive place to work.

In addition to flexible schedules and remote or hybrid work, many employees request to work where they chose, including in other locales, states, and countries where employers don't have a presence or an office. Managing these expectations and offering workable options that facilitate employee preferences, satisfy regulatory requirements and garner productive results are serious challenges to employers that have not previously considered a dispersed workforce and its impact on company culture. The compliance requirements and associated risks can be very significant and require some planning and compromises.

QUESTION THREE

How are you helping your clients to manage legislative and taxation issues around their transient workforce? For example, are there bi-lateral agreements with other jurisdictions or tax provisions to be aware of?

With respect to tax compliance, clients should use a payroll service or software that accommodates workers in all the US states and provides a fully compliant process for the payment and withholding of taxes for both employer and employee. Often this requires business registration in other states and

TOP TIPS

Preserving company culture and retaining staff in flexible working arrangements

Preserving workplace culture requires careful thought about a company's values and how to cultivate and encourage employees to embrace them. Employers need to develop new and interesting ways for employees to communicate with each other and get to know co-workers not in a centralised location. This may involve virtual coffee breaks, participatory activities, new ways to air concerns, as well as informal discussion and mentoring. Digital connections don't in-and-of-themselves bind people together like personal working relationships ideally can do.

The most common complaints I hear from departing employees include the lack of training, inadequate supervision and the absence of enough person-to-person contact, including no real relationship with one's supervisor. Not all employees work well remotely, and many supervisors are ineffective with employees who they don't personally interact with on a regular basis.

Management training is more critical with the transition towards a transient workforce. Employers must reconsider how to incentivise and assess performance and how to communicate both strengths and shortcomings in a way that supports individual development. The shift towards a transient workforce is a major societal change requiring new thinking about optimal ways that people may work together while working apart.

cities, a new employer tax identification number and the filing of corporate tax returns and payment of taxes on revenue earned where employees are located. In order to avoid costly legal and financial surprises, it is critical that businesses carefully consider these issues with an accountant and/or tax attorney in connection with each jurisdiction where they permit employees to work.

Employers should regularly review their personnel policies and practices and raise the level of internal sophistication in terms of human resources and personnel management. Companies are expected to comply with the laws applicable to the location where employees actually provide services even if the business does not have a physical presence or office location there. For a remote workforce within US borders, that would include compliance with federal and state laws and regulations, as well as local ordinances. Employment laws vary significantly across the states with the most common differences found in minimum wage requirements, the method and timing of payment of compensation, leaves of absence, paid sick time benefits, harassment and discrimination protections and employer recordkeeping requirements.

For US employees working outside the country, it is critical that employers get local legal and accounting assistance or risk being out of compliance in very significant ways.

COMMERCIAL

Crypto & NFTs

Our Commercial members offer their thought leadership on the Crypto and NFT environment in their jurisdiction. They focus on what the biggest investment opportunities are in digital and how they advise their clients on the best entry points, they explore how crypto can be a volatile market and how they advise their clients to mitigate risk when trading in digital currencies whilst managing the legal challenges of NFTs.



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Avila Law is a full-service boutique business law firm located in Miami, Florida, which blends the depth and sophistication of a large firm with the personalized service and flexibility of a small firm, providing its clients with an exceptional experience. The firm specialises in international and domestic litigation and business and financial transactions, including a banking practice that is among the strongest and most experienced in Florida. Our founding partners include the former heads of the financial services, immigration, and international arbitration practices in one of the largest firms in the United States. The firm is a proud member of the Alliott Group.

QUESTION ONE

What are the biggest investment opportunities in digital – and how can clients decide on the best entry point for them?

When investing it is important to learn about the investment. There are thousands of different types of digital currencies and assets, and each has its own characteristics. Most are not legally backed by anything at all. Therefore, clients should understand the characteristics of the digital asset being acquired. If investing as part of a corporate strategy, then prior to starting to invest a client should conduct a risk assessment of the new investment and adopt policies, procedures and internal controls to mitigate risks. This should include an analysis of the best entry and exit points for the investment.

QUESTION TWO

Crypto can be a volatile market: how do you advise your clients to mitigate risk when trading in digital currencies?

Because by their nature digital currencies employ decentralised control, clients cannot yet rely on a robust regulatory scheme to impose controls on this \$2 trillion+ industry. Consequently, customers must assume their own control to ensure that they are protected in conducting trading in digital currencies.

Most importantly, clients should conduct their own due diligence in engaging in this activity. What does that mean? First, ensure that the exchanges or virtual asset service providers (VASPs) with whom the client is doing business are properly licensed, if required. Although the industry itself is not regulated, much of the activity being conducted by the exchanges and VASPs may require some type of license – in particular a money service business/money transmission license. Such license is issued at a state level so the client should ensure that the counter party has the appropriate license. In addition, registration of money services businesses should also be registered with the Financial Crimes Enforcement Network (FinCEN), the U.S.'s financial crimes regulator.

Secondly, clients should try to engage in these activities through their bank or broker-dealer. Because these entities are regulated and have significant internal controls, clients can better rely upon these institutions when investing in unregulated digital assets. While the bank or broker-dealer will not engage in the activity directly, it is likely they will use vendors (exchanges and VASPs) that they have vetted through their vendor selection process. It is important to note that cryptocurrency and digital assets will not be covered by government deposit or securities insurance even if purchased through a bank or broker-dealer.

Be aware of the fraud risks with digital assets, which are not limited to hacking risks. Other risks include the possibility of insiders misappropriating cryptocurrency and digital assets, especially where control of those assets, through keys or otherwise, are in control of only one or a few persons.

Lastly, clients should stay alert with regulatory developments. It is anticipated that regulation will likely be implemented in the near future with respect to digital assets. New regulation can affect the viability of some digital assets.

“It is important to note that cryptocurrency and digital assets will not be covered by government deposit or securities insurance even if purchased through a bank or broker-dealer”

QUESTION THREE

How is your jurisdiction managing the legal challenges of NFTs: for instance, taxation on purchases, IP, ownership and theft?

Florida has a general sales tax on purchases but has not specifically pronounced itself with respect to the sales tax applying to purchases of NFTs. The laws are broad enough, however, to apply to such purchases. Therefore, if the sales activity rises to a level of more than casual, then it is likely that such sales will generate a sales tax.

In August 2022, Florida had the first ever sale of a house as an NFT. The seller transferred the ownership to the house into a limited liability company (LLC) and then “minted” the LLC into an NFT and the property rights are to be stored on the blockchain. The house was paid for in cryptocurrency.

Florida's CS/HB 273 comes into effect on 1st January 2023. This act creates a new definition for “virtual currency” as “a medium of exchange in electronic or digital format that is not currency.” The definition specifically excludes virtual currency that is “issued by or on behalf of a publisher and used solely within an online game, game platform, or family of games sold by the same publisher or offered on the same game platform” or “[u]sed exclusively as part of a consumer affinity or rewards program and can be applied solely as payment for purchases with the issuer or other designated merchants but cannot be converted into or redeemed for currency or another

TOP TIPS

Exploring digital asset investments

✔ If the digital assets are part of a company's investment portfolio:

- Learn about the digital asset – not all digital assets are the same.
- Conduct a risk assessment of the asset to be purchased – it is essential to understand the product and the risks.
- Implement internal controls to manage the risks.
- Recognise there is a need to commit to technology to support this investment and ensure that the persons managing these investments are capable. There needs to be the correct and sufficient resources.
- Manage cyber security risks, including managing custody, approval processes for transactions, and addressing other vulnerabilities that may be inherent to the specific type of asset.
- Consider using the company's bank or licensed broker-dealer for the purchase and custody of the assets.
- Conduct due diligence on the parties involved: ensure entities have proper licenses.
- Conduct public record searches on the parties involved to confirm that there are no outstanding or historical claims that may cause concern.
- Stay alert to regulatory developments.
- Analyse the tax implications.
- Consider an incremental approach. Start on a limited basis and expand once the risks are recognised and managed: digital assets are potentially high risk, high reward.

medium of exchange.” CS/HB 273 also indicates that only those persons acting as an intermediary in a “virtual currency” transaction require a money services business license in the State of Florida. Previous to the passage of this legislation, it was unclear whether a person engaging in trading of “virtual currency” for their own account would be deemed to be a money transmitter, and recent court rulings had indicated that two-party transactions would be subject to MSB registration. This legislation provides clarity on this issue.

Florida further has the Florida Fiduciary Access to Digital Assets Act, which aims to regulate the manner in which a fiduciary acting under a decedent's will, trust or power of attorney can access digital assets. The Act allows users to indicate their intent with respect to their digital assets after incapacity or death. Such intent can be expressed in their will, trust, power of attorney or through the platforms they use directly. If a direction is not explicitly stated then a fiduciary will not have control or access to a client's digital assets.



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A&C Legal is a law firm incorporated in Bogotá, Colombia in 2009, as a solution for organisations that require high quality legal services and paralegal support at a reasonable cost, provided with opportunity and with qualified staff always available. A&C Legal is committed to minimising the risk inherent in the operations of its clients and assist with the implementation of safe practices for the benefit of shareholders, employees and the community in general. The Firm is also committed to the integral development of its employees, whose purpose and focus is consumer service.

Under the BPO (Business Process Outsourcing) model, A&C Legal functions as a law firm in the client's offices, for which a team of lawyers and paralegals is assigned to attend, in an integral manner, the day-to-day legal requirements of the clients, in areas such as corporate, contractual, commercial, labour, administrative, litigation, and policy and procedure support. The Firm also takes care of legal filing, answering of communications and procedures before different entities and, in general, of the administration of the legal area of the companies.

QUESTION ONE

What are the biggest investment opportunities in digital – and how can clients decide on the best entry point for them?

Given the volatility of cryptocurrencies and the fact that they are not considered legal tender in Colombia, it may be more interesting to invest in or develop NFTs, although this does not mean you can leave aside the challenges they bring from a legal point of view.

NFTs in areas such as logistics operations, traceability of origin (e.g., for products whose value proposition is vegan or animal cruelty-free), assignment of copyrights in musical and artistic works, among others, can be investment opportunities, provided that it has been determined that the blockchain is the best way to record transactions and that a simple centralised database is not sufficient.

It is important that the market is demanding and valuing the use of clean energies in the development of these operations to reduce the environmental impact they represent (due to the high energy consumption that servers allow for the storage and management of large amounts of information).

QUESTION TWO

Crypto can be a volatile market: how do you advise your clients to mitigate risk when trading in digital currencies?

In Colombia, as in several countries around the world, cryptocurrencies are considered intangible assets and not legal tender. In other words, they do not constitute foreign exchange currencies, since they do not meet the conditions established by law. As intangible assets, they can be exchanged for other goods and, as they are likely to increase the wealth of the holder, they must be considered in the income tax return, either as an intangible asset (investment) or inventory.

The recent news of the FTX bankruptcy has destroyed confidence in the industry, which has been reflected in the fall in the price of several currencies, bringing back to the table the discussion whether to regulate this market.

It is interesting to learn from the situations that, according to market participants, have generated this debacle, such as high energy costs (for those who do mining), compliance questioning and risky investments.

To mitigate the risk that volatility represents it is suggested to:

- Seek expert advice to gain a thorough understanding of the characteristics of crypto-assets and the risks involved in holding them.
- Understand blockchain in-depth and the characteristics of crypto-assets.
- Verify that the cryptocurrency holder's territories have exchanges through which cryptocurrencies can be exchanged for legal tender or for goods or services.
- Conduct due diligence on the exchanges operating in each territory, so that their reputation is verified, as well as reviewing that they have no money laundering or terrorist financing issues and that they have the licenses that each territory has established.
- Diversify, so that all investments are not solely in cryptos.
- Verify that mining companies have overcome energy costs or use clean energy.

QUESTION THREE

How is your jurisdiction managing the legal challenges of NFTs: for instance, taxation on purchases, IP, ownership and theft?

The Colombian Superintendency of Companies has pointed out that crypto-assets are not legal tender, are not backed by the Central Bank, are not currency, are not cash, nor are they financial assets, so their issuance or any transaction involving them that seeks an exchange of goods, services or returns without reasonable financial explanation or guarantee of the promised returns or benefits, could constitute illegal money collection – especially if it is carried out by an entity that is not part of the financial system. It is therefore essential to seek expert advice when entering the NFT market to ensure that the planned transaction does not in any way constitute an operation to collect funds from the public that could be questioned.

It is important to note that in Colombia there is a regulatory sandbox for entities supervised by the Financial Superintendency for innovative technological developments.

The National Tax and Customs Administration (DIAN) in turn has indicated that, as they are not legal tender, they constitute crypto-assets and define them as "intangible or incorporeal

TOP TIPS

Exploring digital asset investments

- ✓ Learn as much as you can about blockchain.
- ✓ Understand what Smart Contracts are and how they are programmed.
- ✓ Be aware of what physical assets are being tokenised. This is where NFTs are going.
- ✓ Know about the Internet of Things, and what assets it is being implemented in, as this will facilitate the development of NFTs.
- ✓ Track technology developments in innovative assets that financial firms are working on with support from reputable technology and real sector firms.
- ✓ Demand and promote the use of clean energy in the technology services you contract and use.
- ✓ Seek expert advice before engaging in a transaction you don't fully understand.

assets that can be valued, form part of the patrimony and can lead to obtaining income. Although it is not a recognised currency, and therefore does not have unlimited liberating power, it is clear that crypto-assets are recognised as an asset. An asset that, by its nature, and for tax purposes, will be considered as an Intangible asset". It has also indicated that in their condition as an asset, Colombian residents who have them in their patrimony must declare them in their income tax return. On 14th October 2022, DIAN issued a compilation of the relevant tax doctrine on crypto-assets that answers several questions, such as how to make adjustments for exchange differences, how to declare the income, and how to make the income, among other questions.

The Superintendency of Companies, in the regulations on Money Laundering, Financing of Terrorism and Financing of the Proliferation of Weapons of Mass Destruction (SAGRILAF), defines Virtual Assets as "the digital representation of value that can be traded or transferred digitally and can be used for payments or investments. Virtual assets do not include digital representations of fiat currency, securities and other financial assets that are already covered elsewhere in the FATF Recommendations". It also includes companies belonging to the Virtual Assets sector among those that must comply more strictly with SAGRILAF precisely because of the ML/TF risk posed by the use of pseudonyms in blockchain transactions.

Colombia has regulated other relevant matters in the NFT and Smart Contracts market, such as intellectual property, competition law, unfair competition, data privacy, electronic signature mechanism, validity of electronic documents, and consumer protection laws, among others, which must be observed when operating NFTs in the country, so again, it is relevant to have adequate legal advice if you want to enter this market.



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Barcellos Tucunduva Advogados (BTLAW) has over 68 years of experience in business law and judicial and administrative litigation. BTLAW is based in São Paulo / SP and has offices in Rio de Janeiro and Brasília, and correspondents in the main cities of Brazil. The firm is recognized in business litigation for its constant victories and high success rates in well-known cases, as well as in legal advice on highly complex issues. As nominated by its clients, for several years BTLAW has been named one of the most admired Brazilian law firms by the yearbook "Análise Advocacia - Os Mais Admirados". Internationally, BTLAW has constantly received awards and nominations from renowned publications, such as Chambers and Leaders League.

QUESTION ONE

What are the biggest investment opportunities in digital – and how can clients decide on the best entry point for them?

As the digital ecosystem evolves, financial assets such as NFTs, cryptocurrencies and other virtual currencies are leading the way in the search for investment.

In Brazil, according to the Brazilian Association of Financial and Capital Markets Entities (ANBIMA), the volume of money traded by investors in the crypto-assets market has reached R\$300 billion, which is half of the total amount of transactions carried out through B3, the largest and leading securities exchange in Brazil.

In addition, the Central Bank of Brazil (Bacen) has been promoting discussions regarding Central Bank Digital Currencies (CBDC) to create a digital currency called "Real Digital", for which guidelines were published in May 2021, aiming to improve the efficiency of the National Financial System and the Brazilian Payment System, as well as to keep up with the dynamism of the technological evolution of the Brazilian economy in the global scenario, while improving international payments.

QUESTION TWO

How is your jurisdiction managing the legal challenges of NFTs: for instance, taxation on purchases, IP, ownership and theft?

Despite the existence of rules related to investments in virtual currencies, as in the case of Normative Instruction RFB 1.888/2019, which requires legal entities and individuals to report to the Brazilian Federal Revenue the operations performed with crypto-assets, Brazil was one of the countries without specific regulation for crypto-assets and NFTs until the end of last year.

On 29th November 2022, the National Congress approved Bill 4.401/2021, which, inspired by arguments like those presented in the past by the European Central Bank on the

systemic risks involving cryptocurrency activities, aims to ensure that activities involving virtual currencies are regulated.

The bill now goes to the presidential sanction, which may be done in full agreement with the wording of the National Congress or with some vetoes.

According to the proposed regulation, companies that provide the following services will be considered service providers of virtual assets: (a) the exchange between virtual assets and national currency or foreign currency; (b) the exchange between one or more virtual assets; (c) transfer between virtual assets; (d) custody or administration of virtual assets or instruments that allow control over virtual assets; and/ or (e) participation in financial services and services related to the offer by an issuer or sale of virtual assets.

The Brazilian President will be responsible for appointing the specific entity that will regulate and supervise the crypto activity. It is expected that the Central Bank will be responsible for the operation, regulation, and supervision of crypto-active services, including licensing companies to operate in Brazil.

The regulator will have the following responsibilities regarding virtual assets service providers: (a) authorising the operation and corporate changes; (b) establishing management rules and the exercise of statutory and contractual positions; (c) supervising and applying penalties; (d) cancelling authorisations; and (e) establishing rules and criteria regarding the foreign exchange market.

"It is worth noting that operations involving virtual currencies, despite being allowed in Brazil, continue to be considered as high-risk transactions by financial and capital market regulators"

Securities concepts

In parallel to the crypto-assets regulation, in October 2022, the Brazilian Securities Commission (CVM) issued a statement about the criteria for framing crypto-assets as securities, to state its concerns and limits in the exercise of its regulatory power.

From the concepts of securities applied to crypto-asset products, inspired by what occurs in the United States, CVM highlights the following: (1) expectation of economic benefit generated in the investor, who expects to be entitled to redemption, receipt or participation in the results of the investment; (2) effort of entrepreneur or third party, since the result of the investment does not depend on the direct action of the investor, but of third parties; and (3) public offering, taking into consideration the digital features used to reach the public and affect the investments made by residents in Brazil. In other words, the so-called "Howey Test" will be considered.

CVM's understanding is that the legal protections for crypto-assets should cover financial liquidity, systemic risk mitigation, and fraud and crime prevention.

To ensure the transparency and confidence of crypto-assets submitted to public offering, CVM advocates measures so that information about the offerings is clear, coherent,

TOP TIPS

Exploring digital asset investments

- ✓ Upon entering the Brazilian market, the virtual asset service providers should be aware of the new regulations, which are expected to change substantially in the coming months.
- ✓ The virtual currency market also creates opportunities for adjacent digital services companies. Technology and digital payments companies, for example, can add value to the flow of investments, the functionality and security of transactions, and the custody of virtual assets.
- ✓ The proposed new regulation indicates that companies that already have a license to operate issued by the Central Bank will be able to also provide virtual asset services, which is why many companies in the market are already looking for projects that involve a relationship with the Central Bank.
- ✓ When exploring investments in crypto-assets, it is important to be assisted by experts who understand and are familiar with the regulatory standards of the Central Bank and CVM (Securities Commission) and the legal aspects involved in each service the company wishes to provide.

understandable, and complete to all investors, without discrimination.

The bill's text foresees it will come into effect within 180 days from its official publication. Regarding the act that will designate the responsible entity to supervise the crypto-assets activities, there is no specific deadline for this to occur.

While all the regulatory guidelines have not been completely defined by the body that will be responsible for supervising crypto-assets, it is worth noting that operations involving virtual currencies, despite being allowed in Brazil, continue to be considered as high-risk transactions by financial and capital market regulators, because they are not guaranteed by any national monetary authority and are not backed by real assets.

NFTs have been debated and heavily exploited by investors and investment firms, but so far there is no bill or regulation involving them.



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Blaser Mills Law is a leading UK law firm, with offices in the City of London and the Home Counties. Our firm is consistently ranked in industry recognised publications, the Legal 500 and Chambers & Partners. The firm delivers cutting edge legal advice, using technology to provide consistently high service levels whilst building strong relationships with its clients. Clients include multinationals, large corporates and SMEs across a number of sectors including technology, sport, automotive, freight and logistics, telecoms and retail. Blaser Mills Law has significant expertise in cross-border transactions and international markets, regularly advising clients in the UK doing business overseas and international clients wanting to invest in the UK.



QUESTION ONE

What are the biggest investment opportunities in digital – and how can clients decide on the best entry point for them?

We do not give investment advice to clients. The UK wealth management industry generally urges caution in relation to investing in cryptocurrencies or NFTs due to the lack of regulation, high market volatility and requirement for the investor to acquire detailed market knowledge. They note instead the continuing development and expansion of blockchain technology as tending to suggest tech equities and growth funds as potentially attractive opportunities for investment.

QUESTION TWO

Crypto can be a volatile market: how do you advise your clients to mitigate risk when trading in digital currencies?

Accepting cryptocurrency as payment for goods and services offers the potential attractions of low fees, fast cross-border transactions and the potential to engage with new groups of consumers.

However, cryptocurrencies are prone to huge fluctuations in value, sometimes on an hourly basis. As a result, few UK businesses currently accept direct payments in exchange tokens such as Bitcoin and Ethereum, choosing instead to adopt indirect methods to engage with the sector, for example:

- Allowing consumers to use cryptocurrency to purchase gift cards which may then be used to purchase goods. This is the preferred route for many leading retailers.
- Using payment gateways such as Bitpay, which lock-in exchange rates for up to 15 minutes while customers complete their order.

Meanwhile, the UK government's preferred approach is to encourage the use and acceptance of stablecoins via their proposed regulation, with the objective of making the country "a global hub for crypto-asset technology and investment".

QUESTION THREE

How is your jurisdiction managing the legal challenges of NFTs: for instance, taxation on purchases, IP, ownership and theft?

Intellectual property challenges come into sharp focus when an NFT is minted or purchased that relates to an asset containing real-world IP rights, such as a piece of physical or digital art, or a digital replica of a real-world branded item. Such NFTs could contain IP rights such as trademarks, designs, copyright in art, text or cinematic works. Ownership of the NFT will not confer any IP rights in the underlying asset. The NFT authenticates ownership, rather like a signed print of a physical artwork but, like a signed print, it does not grant the buyer the copyright in that work.

Where a buyer wishes to commercialise the NFT, e.g. reproducing and selling the artwork represented by the NFT, due diligence is crucial. The usual real-world steps should be taken to ensure that the owner of the IP in the underlying asset grants to the buyer right to use that IP when they purchase the accompanying NFT. Typically, this would involve a licence from the rights holder. A buyer may value an exclusive licence, whereas a rights holder may prefer to retain the right to use the IP itself or grant the rights to others. A rights holder may also wish to limit the purposes for which the buyer can use the IP, e.g. solely for use in the virtual world.

The other side of this equation is that the owners of brands and IP rights need to be vigilant to prevent unauthorised use of their IP (e.g. sales of goods containing that IP) in the NFT space. Traditional avenues for pursuing trademark infringement have yet to be tested extensively by the UK courts in the context of NFTs, but we would expect existing principles to continue to apply. A trademark owner can seek to sue for infringement under the Trade Marks Act 1994, or under the common law action of passing off. Claims for passing off have historically succeeded for brand owners against so-called domain name "squatters" registering internet domains names featuring well-known brands, where the brand owners were able to demonstrate use of the domains as a "tool of deception" to infer a connection between the unauthorised website and the brand. We might expect to see claimants take a similar approach against unauthorised NFT minters and buyers.

There is currently no HMRC tax guidance dedicated to NFTs. Until such guidance is published, it seems reasonable to expect that NFTs will be treated much like any other chargeable asset:

- Profits and losses on sale or transfer will be subject to capital gains tax.
- NFTs will be chargeable assets for inheritance tax purposes.
- Transfer is likely to be subject to VAT, though whether as a supply of goods or services has not been determined.

In addition, trading in NFTs may create corporation tax or income tax liabilities. It is also possible that written instruments reflecting an underlying smart contract might attract stamp duty. Care and sound professional advice are essential.

Despite the apparent transparency and security of the blockchain, NFTs have been shown to be open to abuse. From

"The NFT authenticates ownership, rather like a signed print of a physical artwork but, like a signed print, it does not grant the buyer the copyright in that work"

TOP TIPS

Exploring digital asset investments

✓ **Assess your appetite for risk.** NFTs, cryptocurrencies and other digital assets are high risk investments. The market is highly volatile with high price fluctuations. Valuation of assets can be difficult. Transactions are anonymous and irreversible, attracting scams, fraud and cyber-attacks. However, these issues have not slowed the continuing trend of institutional investors increasing their exposure to the sector, the prevailing view being that the upside opportunity outweighs the risk.

✓ **Understand the options for investment.** It is possible to invest directly in NFT tokens on marketplaces like OpenSea and Rarible. However, this exposes investors to the full volatility of this asset class. An alternative approach is to invest in NFT-related stocks, focusing on companies at the cutting edge of finance, technology and digital assets.

✓ **Do your homework.** NFTs are unregulated in the UK. There is no obvious trusted source for investment advice in the sector and investors must rely on their own due diligence on NFT creators, community and contracts. This may present opportunities to 'get ahead of the curve'. Social media forums, online communities and industry blogs have become prime research targets.

wallet heists and pass key crackers, to fake NFT stores and 'pump and dump' schemes, fraudsters have found multiple ways to steal valuable NFTs and sell fakes.

In the landmark OpenSea case, the victim's NFT wallet was hacked and two of her NFTs stolen. She traced the stolen NFTs to where they were held and was granted an injunction to freeze those assets. However, she could not identify the physical owners of the new wallets. An injunction was granted against both on the untraceable hackers and the NFT trading platform, OpenSea. The judgment highlights the courts' strong approach to protect victims of NFT fraud and theft, but also how difficult it can be to identify anonymous perpetrators (while metadata can be used to verify the author and owner of an NFT on the blockchain, it cannot link that identity to a physical person). Given this difficulty, it is important to ensure that appropriate safeguards are put in place, such as:

- Using clear and comprehensive written contracts for NFT sales and accompanying grants of rights.
- Keeping comprehensive records of underlying digital files linked to the NFT.
- Using strong pass keys.
- Putting in place clear policies and training staff.



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James R. Holbein is an experienced international trade and customs lawyer and former U.S. federal executive. Since 2017 he has participated in and studied blockchain and related technologies. His professional articles educate clients about the existing U.S. legal regime and how they may organise their businesses to manage the risks posed by scams, rug pulls and frauds that drag down confidence in digital assets and cryptocurrency. The U.S. government may produce legislation to address digital assets issues in 2023. James provides clients with analysis and recommendations on how to best navigate this sector and influence the shape of new legislation. It is important to distinguish between decentralised businesses and cryptocurrencies because the risk of over-regulation and insufficient oversight could crush innovation if not handled well. There is potential for decentralised autonomous organisations (DAOs) to contribute to regenerative enterprises that reward members for acting in collaborative, symbiotic, composable, transparent, and emergent ways.

Braumiller Law Group, PLLC, is a highly respected law firm focused on international trade compliance and proven strategies to optimise global trade business practices. The attorneys and trade advisors of Braumiller Law Group know exactly how to navigate the intricate maze of global trade regulations, and they have a successful track record for helping clients save millions of dollars in compliance penalties. These clients also leverage the expertise and experience of the Braumiller Law Group team to ensure that their global trade operations are legally structured to maximise efficiency and profitability. For clients around the world, a partnership with Braumiller Law Group extends beyond compliance support to generate measurable business value.

QUESTION ONE

What are the biggest investment opportunities in digital – and how can clients decide on the best entry point for them?

I do not participate in the cryptocurrency investment market and therefore do not counsel my clients about investment opportunities in cryptocurrencies. I have focused my digital assets practice on understanding what the digital assets are and how the underlying technology may be regulated as a more decentralised economy is created. I have been advising clients about the regulatory and procedural requirements to establish decentralised autonomous organisations (DAOs). My approach is to help build organisations that will participate in the regenerative Web3 economy.

In my experience, cryptocurrencies are the outgrowth of crowdfunding various start-ups that were designed to provide value through development, services, NFTs or other means. The tokens generated by these start-ups have been a means of crowdfunding the early stages of the companies' development. Once the token becomes traded, the value of the token is not clear to me other than as a representation of a small ownership interest in the venture, much like a share of stock, which is a simple explanation of why the Securities and Exchange Commission deems most cryptocurrency tokens to be securities.

The best entry point into investment, in my opinion, is with the bigger, established digital asset firms that operate in a truly decentralised manner,

so that all transactions are visible on a blockchain that is accessible to members and customers of the firm, if not the public. Newer players that are seeking to build a regenerative Web3 economy are also likely to be engaged in more transparent and non-speculative business.

QUESTION TWO

Crypto can be a volatile market: how do you advise your clients to mitigate risk when trading in digital currencies?

The implications for the digital assets sector of the sudden collapse in November 2022 of FTX, the second largest cryptocurrency exchange, are obviously important. Based on press reports, the nearly complete lack of financial controls, record-keeping, or responsible fiduciary behaviour, if not outright criminal fraud, by the owner and employees of the exchange is shocking. The self-dealing between related companies and the obvious “pump and dump” approach to building value in FTT, the native token of the exchange, should have raised red flags long before the exchange collapsed. The fact that the Chairman of the SEC was familiar with the owner and viewed the firm as worthy of advising Congress and regulators about how to regulate digital assets raises a major question as to what the SEC was actually doing to oversee FTX. This financial disaster is likely to influence potential legislation, regulation and oversight that can and should be brought to bear to curb such obvious abuse. So, anyone trading in cryptocurrencies should be aware of both the transparency of the token, but more importantly, the transparency offered by the exchange on which the token is traded. If the exchange is centralised and the transactions are not visible on a blockchain for the members or customers of the exchange, then beware of doing business with that firm.

“The obvious “pump and dump” approach to building value in FTT, the native token of the exchange, should have raised red flags long before the exchange collapsed”

TOP TIPS

Exploring digital asset investments

- ✓ Perform stringent due diligence before purchasing tokens. Look at the underlying fundamentals of the organisations, at the team that is promoting the investment, and avoid any firm that is operating in a “black box” outside the scrutiny of investors and users of the tokens. If a firm is shielding its users from information that they need to truly assess the value of the token, do not invest because there have been so many frauds committed in the name of cryptocurrency that would have been avoided if the information was more readily available on a blockchain.

QUESTION THREE

Is private equity widely available in your jurisdiction? What are the advantages and drawbacks of financing a deal using equity, in your experience?

There is an effort in the United States to develop regulations for the digital assets sector. The President issued an Executive Order on Ensuring Responsible Development of Digital Assets in March and nine reports have been published from several federal agencies to provide ideas and approaches for both regulation and the development of a central bank digital currency (CBDC). Several draft bills have been introduced in Congress in the session that will end in December, and the next session of Congress, beginning in January 2023, will likely see those bills, and perhaps others, introduced to provide some clarity in the digital sector. The state of New York has a very comprehensive approach to digital assets that may influence federal legislation.

What is important is that digital assets are not just cryptocurrencies. While the fraud and hype surrounding cryptocurrencies may drown out other efforts, digital assets include non-fungible tokens (NFTs) which offer an interesting approach to managing and protecting intellectual property. The new decentralised firms being created as DAOs also offer an on-ramp into digital assets and decentralised approaches to performing work and accomplishing projects that are not best accomplished with centralised, national organisations.



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“Many retail investors, particularly those who chose to put their money into FTX, went looking for the greater fool only to find themselves looking in the mirror”

Dickie, McCamey & Chilcote has protected the professional and personal interests of our clients for over 110 years. Our high-performance, results-oriented professionals deliver proactive counsel based on in-depth knowledge of legal precedents, trends and regulatory shifts. Whether the situation requires subtle negotiation or aggressive action, we've been there before. Our standard: to ensure you're further ahead at the end of the day. It's the same standard by which we want you to judge us – every day, in every

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legal matter impacting your business. For more than a century, Dickie McCamey has offered client-centred service focused on results. More than offering legal counsel on demand, we provide proactive guidance from advisors versed in the complexities of both law and business. Our attorneys actively advise local, regional, national and international businesses, non-profits and healthcare organisations. We are committed to delivering not only responsive service, but results-oriented action.

QUESTION ONE

What are the biggest investment opportunities in digital – and how can clients decide on the best entry point for them?

It is always critical for attorneys to remind their clients, and specifically in-house counsel reporting to in-house clients (i.e., board of directors, c-suite personnel, etc.) that internal legal departments are not made up of investment advisors but rather risk mitigation officers. With that in mind, and given the ever-changing landscape of digital investment opportunities, in-house counsel's role in advising on investment opportunities and entry points for digital and cryptocurrencies should be no different than any typical investment approach, albeit with an even higher level of scrutiny. Namely: (a) ignore the noise surrounding flavour-of-the-month cryptocurrencies that are seemingly sky-rocketing from nothing overnight; (b) perform due diligence with regard to crypto companies' management team, financial records, and prospectuses; and (c) develop a long term approach based on risk tolerance.

While long term value is uncertain, and it depends on their industry, NFTs can provide an alternate avenue for companies and as well as investment in the digital landscape. Media and publishing companies should consider minting NFTs to protect their content and monetise it in the digital world. Using NFTs, companies can create a digital record equivalent for their intellectual property like patents, copyrights, trademarks and trade secrets. Even if your company has no interest in minting NFTs, in-house counsel and risk managers should monitor NFT platforms like OpenSea, to ensure their intellectual property, trademarks and copyrights have not found their way into the NFT marketplace without the company's permission.

QUESTION TWO

Crypto can be a volatile market: how do you advise your clients to mitigate risk when trading in digital currencies?

In the wake of the collapse of FTX, BlockFi and Celsius, mitigating risk when trading in digital currencies seems near impossible. In fact, that may be accurate, and it should be considered best practice to remind your clients of this reality. The rapid decline of FTX and its token FTT demonstrates the pitfalls of digital currencies backed by nothing more than the full faith and credit of an unknown entity and highlights the need for a solid due diligence analysis before committing company capital to these investments.

Undeniably, the digital currency market was predicated on the Greater Fool Theory of investing. The concept of the Greater Fool Theory is that, during a market bubble, one can make money by buying overvalued assets and selling them for a profit later, because it will always be possible to find someone who is willing to pay a higher price, i.e. the greater fool. Such strategy is subject to large sell-offs and rapid decline when the inflated price of the asset is exposed. Digital currencies and NFT trading operated under this pretext exclusively as tokens and new currencies sprung up overnight. Now, unfortunately, many retail investors, particularly those who chose to put their money into FTX, went looking for the greater fool only to find themselves looking in the mirror.

To lessen the potential exposure from digital currencies without outright avoiding them altogether, clients should look

to exchanges based in the U.S., the UK or the European Union. Although regulation of digital currencies still lags behind the industry, these venues at least provide some level of potential recourse for investors get back their funds (at least some of them) in the event of a digital currency collapse which occurred with FTX.

QUESTION THREE

How is your jurisdiction managing the legal challenges of NFTs: for instance, taxation on purchases, IP, ownership and theft?

The Commonwealth of Pennsylvania has several bills on deck that identify cryptocurrency or virtual currency as a form of money for use in any transactions. Nothing has passed to date and cryptocurrency remains officially undefined under Pennsylvania law. However, Pennsylvania has been considering action by way of House Bill 1724 which was introduced in July 2021. The Bill proposed establishing a digital currency taskforce to understand and study the use of digital currency, cryptocurrency and blockchain within Pennsylvania. The taskforce would set out to understand the who, what, where, why and how of digital currency use in Pennsylvania. Specifically, the taskforce would study: the number of currencies currently being traded and their approximate percentage of market share; the number of exchanges operating in this Commonwealth; the State and local tax issues; potential market manipulation; the regulatory measures taken by the Federal Government, other states, foreign countries and foreign political and economic unions to regulate the marketplace. Eventually, the taskforce would make legislative and regulatory recommendations to increase transparency and security, enhance consumer protections and to address the long-term impact on the use of cryptocurrency. The Bill has not made it to the House or Senate floor to date and may now be indefinitely stalled due to recent developments with FTX. On the other hand, perhaps the disappearance of almost \$11 billion overnight from FTX customers provides the push necessary to get this Bill the floor of the Pennsylvania Legislature. Otherwise, it may be too little, too late for Pennsylvania investors.

One certainty clients can count on is that no state will pass up the opportunity for new tax revenue via NFTs and crypto transactions. This year the Pennsylvania Department of Revenue added NFTs to Pennsylvania's taxability matrix, but provided no other guidance. By placing NFTs on the taxability matrix, Pennsylvania without much, if any, comment characterised NFTs as property subject to state sales tax. Thus, in short order every NFT sale will be treated like any other property sale and the taxing body will get its share.



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Greg's practice focuses primarily on transactional services and assisting Canadian and international franchisors.

He works with franchisors, master franchise owners, franchisees and multi-unit franchisees. He helps franchisors expand across Canada and internationally and provides valuable advice on brand protection and the myriad of laws regulating franchising. Greg's service sectors include quick-service restaurants, retail, hospitality, education, manufacturing, and technology. Greg identifies problems before they arise and offers critical support for the unexpected. He has extensive experience developing practical business solutions that assist clients in managing their day-to-day operations and the long-term strategic growth of their businesses. When franchisees and franchisors are ready to move their business forward and upward, they rely on Greg's extensive expertise and experience in the franchise industry.

Dipchand LLP is a boutique Toronto law firm focused on Intellectual Property, Corporate Law, Franchise Law and Litigation. We work with ventures – from cutting-edge start-ups to established enterprises – to achieve their goals by providing practical and business-oriented legal advice.

Our value as a trusted advisor is measured by the calibre of our legal advice, quality of service, and the stellar reputation that we have carefully cultivated and strive to maintain. If your business' cornerstone is its intellectual capital, we are your legal partners. Our eyes are on your legals, so yours can be on business. At Dipchand LLP, we are committed to building strong, long-lasting relationships with clients and their advisors looking for practical and strategic counsel to navigate their ventures through the ever-changing legal landscape.

QUESTION ONE

What are the biggest investment opportunities in digital – and how can clients decide on the best entry point for them?

Given that the ethos of digital assets is that of decentralization and freedom, I believe the best investment opportunities lie in tools that empower individuals, companies, and communities to leverage this ethos: or conversely, tools that help governments fight bad actors taking advantage of the opacity and complexity of these assets.

Digital assets that link to IRL utility like event passes, marketing, etc. (think NFT's, with extended utility), coupled with tools that make the interaction between these and the masses, also stand a good chance of providing value and making money.

Lastly, I believe that ecosystems that combine all of the vital CeFi, DeFi and neobanking features will be one of the biggest investing opportunities for 2023.

According to one of Bankrate's recent reports, more than 60% of users find it challenging to use crypto-first applications. The challenges include registration and identity verification issues (33%), complicated user interfaces (49%) and even more confusing digital assets purchasing and trading (57%).

A seamless, hassle-free experience can only be achieved by deploying next-generation technologies, and companies such as Blockbank are known for being a true powerhouse for introducing innovative solutions. The best entry point is determined by their time horizons and risk appetites.

“The crypto market has cooled and values have stayed low, with this period being dubbed The Crypto Winter”

QUESTION TWO

Crypto can be a volatile market: how do you advise your clients to mitigate risk when trading in digital currencies?

Like any early-stage technology, there are many risks associated with digital assets as we have observed in the past year. Since the collapse of stablecoins TerraUSD, LUNA and more recently FTX, cryptocurrency values have dropped significantly. Companies that work in the cryptocurrency space were equally impacted. The crypto market has cooled and values have stayed low, with this period being dubbed 'The Crypto Winter.'

So how do you mitigate risk? Generally, the elevated levels of risk come from high volatility in the value and liquidity of crypto assets. First and foremost, you need to gauge how much risk is suitable for you. You should not be investing amounts that you cannot afford to lose. Your investments should be diversified to reflect your goals and risk tolerance. Make sure you are trading on a registered crypto asset trading platform that has security as a priority, one that has safeguards to protect your assets from loss, theft, or misuse. Platforms that operate in Canada and trade securities or derivatives are required to register with securities regulators. Also make sure you have an understanding of how your coins will be stored: a hot wallet (connected to the internet) or a cold wallet (offline storage).

Secondly, do your research. Look into a project's reputation, news articles, market capitalization, recent trading volume, executive experiences and profile of their team, their community, and so on. Once you are satisfied, use your secure platform to invest in that asset. Your research is crucial in helping you identify red flags and recognize risks. Crypto scams will often promise astronomical returns capitalizing on your fear of missing out on a great opportunity. They will charm you with great marketing, and excite you with guaranteed returns. If we have learned anything this Crypto Winter, it is that crypto is volatile and there is no guarantee.

Finally, seasoned professionals and reputable resources are out there to help you succeed. Take advantage of them. Some clients decide to invest before getting guidance from investment advisors or professionals such as lawyers or accountants. We often remind them that "going it alone" is difficult and carries a lot of risk. Successful investors and advisors devote considerable time to build knowledge and skill through research and practice. This is experience that you should capitalize on, as they will help you understand the market, develop investment strategies, and lead you to trustworthy platforms.

QUESTION THREE

How is your jurisdiction managing the legal challenges of NFTs: for instance, taxation on purchases, IP, ownership and theft?

NFTs are taxable in Canada and earnings from NFT dispositions are treated as business income or capital gains depending on the circumstances. Merely holding NFTs is not taxable. Where NFTs are traded in the course of business activity, any earnings are considered business income and are 100% taxable. Accordingly, if a business accepts NFTs as a form of payment, they may need to pay sales tax and remit the amounts owed. By contrast, where the sale of an NFT is not in the course of business activity, then any earnings are treated as a capital gain

TOP TIPS

Exploring digital asset investments

When considering an investment into the crypto/blockchain/web3.0 space, keep the following three points at the forefront of your decision-making process:

- ✓ Diversification of reliable service providers.
- ✓ Custody of assets is key -
- ✓ Consider futures and ETFs

(or capital loss), of which 50% is taxable; as such, recording the adjusted cost base of the NFT is crucial for accurate capital gains reporting.

The intersection of NFTs and intellectual property (IP) rights is still unsettled in Canada, but the general rule for NFT purchasers is caveat emptor. The IP rights (if any) associated with an NFT are governed by the terms or contract underlying the NFT. It's a common misconception that owning an NFT automatically confers IP rights (such as trademark or copyright) to the underlying work itself. Instead, most NFTs only provide purchasers a limited license to display or use the NFT in specific ways. For example, Bored Ape Yacht Club NFTs provide purchasers with an unlimited, worldwide license to use the NFT for commercial purposes, as opposed to full copyrights in the work. In any event, any assignment of copyright in Canada needs to be in writing and signed by the author, which obviously complicates any NFTs ability to confer copyrights in Canada.

In Canada, like other jurisdictions, once an NFT is stolen there is little recourse available and the nature of decentralized assets makes recovery unlikely. NFTs are generally stolen using phishing-style scams that gain access to credentials that enable thieves to drain victims' wallets. As with purchasing NFTs, the best course of action NFT owners can take for security is to practice caution and prudence in all online interactions. How Canadian courts characterize NFTs (i.e. personal property vs negotiable instruments) and their corresponding remedies remains unclear. However, jurisdictions such as the UK and Singapore have recognized NFTs as protectable digital assets and a form of legal property, and this jurisprudence may influence the future decisions of Canadian courts.



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Dr Robert Lewandowski studied mathematics and German philology at the University of Warsaw and law at the University of Mainz, Germany, and later joined the list of German lawyers at the Frankfurt Bar Association in Germany, as well as the list of legal advisers at the District Chamber of Legal Advisers in Warsaw. For almost 20 years, Robert has specialised in corporate law, with a focus on private Mergers & Acquisitions, cross-border work, general corporate advice and litigation as well as insolvency law. His sector focus covers regulated industries and private equity. Robert is the author of over one hundred articles, many legal books and commentaries on business law published in Poland and abroad. He is currently working on his post-doctoral thesis and pursuing a professorship in the field of civil law with an emphasis on corporate law.

DLP Dr. Lewandowski & Partners (DLP) is an established legal firm in the heart of Warsaw, offering a comprehensive range of services and legal advice fully tailored to our Polish and international clients.

We specialise in helping foreign clients enter the Polish business sector and offer our expertise regarding the setting up of entities, acquisition of enterprises and providing their market valuation, representing clients in commercial litigation cases before Polish state and arbitration courts, and enforcing (cross-border) judgments. Our multilingual staff provide services in Polish, English, German and Russian.

We provided advice for the City of Warsaw for the UEFA EURO 2012 competition, as well as the construction of the National Stadion PGE in Warsaw and Deepwater Container Terminal (DCT) in Gdańsk. DLP is a member of IsFIN with its seat in Brussels (Belgium). This is a platform of emerging market advisors, which allow DLP to provide its services on a worldwide level. DLP is also a member of DIRO network, with its office in Hamburg (Germany).

QUESTION ONE

What are the biggest investment opportunities in digital – and how can clients decide on the best entry point for them?

It should be stressed at the beginning that investment in digital assets has become a very popular investment opportunity in recent times. These digital assets are deemed to be any assets having a certain value. Typical assets include videos, images, documents, animations and digital books, as well as cryptocurrencies themselves. In other words, digital assets with no value are not an asset in the definition of virtual market terminology. In Poland, trading in digital assets is not forbidden by law and opportunities on the digital market may be a source of successful investment. However, it is not new that any investment in digital assets begins with consideration as to whether the given asset has or doesn't have the potential to create value, which can be used to generate value for the owner. Such valuable investments may be made, for instance, in areas such as the cloud, security software, hardware upgrades and also digital payments.

QUESTION TWO

Crypto can be a volatile market: how do you advise your clients to mitigate risk when trading in digital currencies?

When it comes to trading in digital currencies in Poland, there are many risks that may be associated with this. Firstly, the cryptocurrency is not backed by the Polish National Bank (NBP) and the Supervisory Financial Commission (KNF) and many other financial institutions, including banks. There is also a lack of legal regulations in Poland protecting consumers. Due to this, several insurers are not prepared to write coverage to protect clients buying cryptocurrency against loss or damage caused by theft, collusion or extortion. Secondly, companies and individuals involved in cryptocurrency are dealing with ransomware attacks, cyber threats and many other criminal activities that can expose them to lose main security features. Thirdly, the volatility of cryptocurrency greatly decreases its usefulness, often resulting in illiquidity of cryptocurrency as well, especially for cryptocurrency held by an institution that is not able to provide liquidity to customers when it is needed. Fourthly, any disruption in dealing with cryptocurrency can also have a negative impact on the brand and image of a financial institution. To mitigate all of these risks and uncertainties, it is important to undergo detailed and comprehensive due diligence prior to any dealing with cryptocurrency and achieve a currency coverage if possible. Furthermore, it is also important to choose the law applicable to the deal that provides the most transparency and protection, while reducing opportunities for money laundering and other illegal activities.

“To mitigate all of these risks and uncertainties, it is important to undergo detailed and comprehensive due diligence prior to any dealing with cryptocurrency”

QUESTION THREE

How is your jurisdiction managing the legal challenges of NFTs: for instance, taxation on purchases, IP, ownership and theft?

Polish legal provisions are still not sufficient to shape up ways to address security and other underwriting concerns. The definition of cryptocurrencies is found in Article 2(2)(26) of the AML Act. However, it should be borne in mind that Polish regulations introduce the term “virtual currency”, which in its scope includes crypto.

This means that not every cryptocurrency or token will meet these conditions. For digital assets, some regulations are mainly provided within tax laws. For instance, income from

TOP TIPS

Exploring digital asset investments

- ✓ Learn about digital assets and their nature: currencies (crypto, stablecoins, CBDCs) and tokens (NFTs, security tokens).
- ✓ Tailor certain digital assets to your business strategy.
- ✓ Inform yourself about initial coin offerings and any other digital assets offers/cryptocurrency exchanges that may suit your requirements.
- ✓ Stay on top of the latest industry trends in the relevant sector.

trading in virtual currencies is recognised under Polish tax law as income from gain capital. Cryptocurrencies are subject to a tax of 19%. The same rate applies to companies also settling on a capital gains basis. On the other hand, peer to peer (p2p) trading or providing services as a cryptocurrency exchange, stock exchange or tokenisation project, may be subject to different rates depending on the characteristics of the business. P2P allows exchanging, buying and selling BTC, ETH or other cryptocurrencies between verified blockchain sellers. In Poland, however, from October 31 2021 this type of activity requires registration on the Register of Virtual Currency Activities, which brings further obligations for entities operating within this market sector.

The entity interested in running business activity in the scope of transactions covering virtual currency is obliged to fulfil two specific requirements:

- No criminal record requirement.
- Professional qualifications requirement.

Only entities which fulfil both of the above-mentioned requirements will be entered on to the register of activities in the field of virtual currencies. The latter requirement is met in the case of:

- Completion of training or a course covering legal or practical issues related to the activity in the field of virtual currencies, or;
- Performing, for a period of at least one year, activities related to the activity in the field of virtual currencies.



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“In the field of intellectual property, the French art market has not remained unaffected by the NFT phenomenon”

Gebauer Stein specialise in cross-border matters. Our team of lawyers permanently advises clients from all over the world in German and French law. Among them are numerous clients who invest in real estate, companies and shareholdings in France. These investments place particular demands on advice in the areas of wealth tax, inheritance and gift tax, as well as income tax. Transactions on online platforms, such as the acquisition of digital art, also require the inclusion of significant civil law aspects, which we address in our team.

QUESTION ONE

What are the biggest investment opportunities in digital – and how can clients decide on the best entry point for them?

France has a strong art market for cultural reasons, which now also extends to digital artworks. While buyers of classical (analogue) art acquire their works mainly out of love for the art, keep them in their possession for a long time and are less interested in a possible increase in value, we observe that a large proportion of buyers of NFT art act primarily out of a financial investment motive. We therefore attach particular importance to making these clients aware of the tax consequences of frequent and repeated purchases and sales (impending commercial activity and VAT liability). Only when this understanding has been conveyed do we tackle the question of the “right” investment object. Since we are lawyers and not art experts, we therefore recommend consulting qualified advisors for art investments.

QUESTION TWO

Crypto can be a volatile market: how do you advise your clients to mitigate risk when trading in digital currencies?

First, we advise our clients to assess the state of their savings and start to invest in risk-free investments before investing in cryptocurrencies, which are very volatile (invest only what you are willing to lose). As the risk of scams is quite high in the cryptocurrency market, we advise that clients avoid new or little-known cryptocurrencies with promises of huge returns. It is also important to find out about the platforms that are used to trade in cryptocurrencies. Indeed, the intermediaries authorised to offer some services, such as the sale or purchase in legal tender or the storage of crypto, must in France be registered (Article L54-10-3 of the French Monetary and Financial code) with the Financial Markets Authority (AMF) as a Service Provider on digital assets (PSAN). The Financial Markets Authority has also published a white and blacklist of intermediaries.

Moreover, methods of storing cryptocurrencies are also important. Several ways to store cryptocurrencies exist: offline (cold wallet), online software (hot wallet), etc. Each type of storage has pros and cons (for instance, risk of loss or theft for a storage on a physical support, or risk of piracy for an online storage solution) that must be carefully considered when trading in digital currencies, the best being to diversify the storage modes.

Finally, the last piece of advice we give to our clients is to anticipate the consequences of an investment in cryptocurrencies in terms of tax law, inheritance law, etc. in order to avoid any subsequent disputes.

QUESTION THREE

How is your jurisdiction managing the legal challenges of NFTs: for instance, taxation on purchases, IP, ownership and theft?

In the field of intellectual property, the French art market has not remained unaffected by the NFT phenomenon, and it evolves to consider the articulation between NFT and copyright. A clear distinction must be made between the NFT and the work associated with it. Although the NFT is not protected by copyright, the intellectual work on which it is based, if it meets the criteria of an intellectual work as provided by French law, benefits from the protection offered by copyright and confers on its author economic and moral rights. The development of NFTs may infringe the rights thus conferred on the author of the intellectual work concerned, such as: the reproduction or exploitation of the work without the author's consent, the risk of counterfeiting (e.g., MetaBirkin case) and the possible application of a “droit de suite” (a percentage received by the author or his beneficiaries on the resale of an intellectual work, when these sales are made through an art market professional) etc. These aspects should not be neglected in the context of an investment, particularly in the NFT art market.

With regard to the inheritance of crypto-assets, no interaction with a third party, such as a banking institution, will allow easy apprehension of the concerned asset. Because of the prevalent decentralisation, it is in principle the holder and he alone who is accountable for the transmission of his cryptographic assets. This situation therefore requires both the holder and his heirs to be particularly cautious and to be aware of the existing legal rules and tools, in particular to avoid the risk of loss from one generation to the next. In view of the particular risks that may arise in relation to crypto-assets, heirs have a number of specific tools available to them in the regulatory context of French law.

The tax obligation to declare certain digital assets is an indirect way to have access to the decedents' crypto-assets, especially for online platforms located out of France.

If the decedent did not leave specific instructions to his heirs, Article 85 of the French Data Protection Act allows them to some extent to identify his digital assets. Under the terms of this regulation, they can exercise the decedents' rights over his personal data, in particular in order to “identify and obtain communication of information useful for the liquidation and distribution of the legacy”. Consequently, on the condition that they know the hosting sites and platforms, the heirs have the right to access information allowing the identification of the crypto-assets.

Access, in particular under the terms of the order of 25 July 2016 amending the order of 14 June 1982 on the extension

TOP TIPS

Exploring digital asset investments

✔ **Check the owner.** Be careful and check, before investing in NFT, whether the person who created the NFT was the owner of the intellectual work or had the authorisation of the owner of the intellectual work to exploit it.

✔ **Identify the content.** Whether a token only conveys the right to call up a work of art on a screen for a certain period of time or whether it gives the purchaser the right of ownership to the digital artwork behind it is usually not apparent from the token. The clarification of the question of which rights are conveyed is therefore of particular importance. Be fair and transparent. Hiding information or a hidden agenda will eventually be counterproductive and only come back to haunt you. The best protection from litigation is a good and solid relationship developed with the other party. No lawyer or agreement can replace that.

✔ **Make an inventory.** In view of the specific challenges and uncertainties in this area, the benefits of having recourse to a specialised lawyer or notary in order to anticipate one's succession are obvious in the current regulatory context. In the notarial context in particular, a digital asset inventory can be particularly beneficial. Such an inventory will therefore exhaustively include, in addition to dematerialised or physical portfolios of crypto-assets and crypto-currencies, other dematerialised assets (or liabilities) such as Google drive accounts, domain names, software etc.

of an automated system for managing the bank account file, by notaries, to the FICOBA file of bank accounts and similar accounts and, in the case of capitalisation and life insurance contracts, to the FICOVIE file, also provides an indirect means of obtaining knowledge of the decedents' crypto-assets. It is worth noting, however, that in practice a large proportion of assets are not currently identifiable in this way, as today the reporting obligation does not apply directly to exchange platforms or to blockchains.

From a tax perspective, French law already contains a number of provisions relating to trade and the realisation of capital gains on the sale of NFTs. Nevertheless, there are significant uncertainties in the classification of digital artworks, especially when it comes to the question of whether they can benefit from the favourable tax rates applicable to the sale of analogue artworks.



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Glaser Weil Fink Howard Avchen & Shapiro LLP, based in Los Angeles, is one of the country's premier full-service law firms. Glaser Weil is consistently chosen to represent diverse and selective clients—including disruptive start-ups, multinational corporations and high-profile individuals—because of its unprecedented level of service and commitment to client interests. Since its founding, Glaser Weil has never lost sight of that most non-negotiable mission: to provide clients with the imaginative, astute, responsive, and dedicated service that best promotes their business and personal interests. The depth of skill and experience among the firm's lawyers, combined with Glaser Weil's cross-practice, interdisciplinary approach, enables the firm to best serve clients in a wide range of matters and venues.

QUESTION ONE

What are the biggest investment opportunities in digital – and how can clients decide on the best entry point for them?

Glaser Weil is not in the business of providing "investment advice" to its clients. Nevertheless, we want our clients to be fully informed as to trends in the digital marketplace. Covid-19 has accelerated the growth of digital transformation in many sectors, but in the legal field that acceleration was already well underway, matching what we see in the general marketplace. For example, we see a greater use of video and streaming to persuade potential consumers and decision makers, and the use of automation to perform high volume data management and analytical tasks. We also see digitisation as an ongoing wave that is very broad and does not appear to

have peaked. As a result, we believe that companies which are most efficiently and effectively adopting digital technology into their platforms are going to be better positioned to succeed in the marketplace, and better able to satisfy their clients and investors. This is true in the legal field; and it is also true in the financial, industrial and entertainment sectors where many of our clients operate their businesses. We also anticipate the use of cloud-based storage platforms becoming more and more essential.

QUESTION TWO

Crypto can be a volatile market: how do you advise your clients to mitigate risk when trading in digital currencies?

The global crypto market remains in a bear market. The \$3 trillion market cap in November 2021 has declined to around \$1 trillion. Large market players have failed, including the algorithmic "stable coin" Terra Luna and bankruptcy of the second largest crypto exchange FTX.

The United States Congress is considering several bills, including the Digital Commodities Consumer Protection Act of 2022, to provide greater clarity regarding crypto. In September 2022, President Biden issued an executive order focusing on research to "ensure the responsible development of digital assets." In November, the G20 countries renewed the call for an international crypto framework based on "same activity, same risk, same regulation." In December, the House Financial Services Committee will hold bipartisan hearings on the FTX collapse and need for comprehensive crypto legislation. Without federal legislation, the SEC is attempting to manage crypto through "regulation by enforcement." For example, the SEC is suing Ripple (a company focusing on facilitating cross-border payments through the blockchain) contending that Ripple's token XRP is an unlawful "digital security." The landmark case is scheduled for trial in May 2023, and the outcome will likely impact the global crypto market, including digital asset values.

While we do not provide investment advice to our clients, we note the following mitigation strategies to deal with the risks of a volatile crypto market: careful researching before investing; avoiding direct investment, and instead targeting companies holding crypto and/or crypto infrastructure; investing in funds that include crypto; diversifying investments; and investing to hold for the longer term.

QUESTION THREE

How is your jurisdiction managing the legal challenges of NFTs: for instance, taxation on purchases, IP, ownership and theft?

U.S. taxing authorities view crypto-assets as "property," making them subject to gift, estate, and income tax. Upon death, the tax basis of crypto-assets will be "stepped up" (or down) based upon date of death value. Valuation can be challenging or, in some cases, nearly impossible. This is particularly true of NFTs (non-fungible tokens). Each NFT is a unique asset, with value determined only by what a willing seller and willing buyer may agree to at a given time.

With no traditional ownership of crypto-assets, beneficiary designations are generally not available. Owner access is through a combination of "public keys" and "private keys," with

TOP TIPS

Exploring digital asset investments

- ✔ While the market for digital assets has been extremely volatile, it appears that the marketplace for these asset classes is here to stay. Any exploration into this field should recognise the long-term potential.
- ✔ More regulation of digital asset investments is coming and should be watched carefully by potential investors.
- ✔ Owners of digital asset investments should carefully tailor their estate plans to secure the assets upon death or incapacity.
- ✔ Tax advisors should be consulted for reporting requirements in the event of transactions involving cryptocurrency and NFTs.

crypto-assets stored on "exchanges", in "cold wallets" (offline storage devices, such as a hard drive), or in "hot wallets" (connected to the internet). While exchanges provide an easy method to store and trade crypto-assets, they are more susceptible to security risks (such as hacking). Cold wallets provide a higher level of security but also create a higher risk of human error. Millions of dollars of crypto have been "lost" due to individuals inadvertently misplacing their passwords or cold wallets, or failing to advise others of the location and passwords for their crypto-assets in the event of death or incapacity.

Estate plans must be tailored to ensure that crypto-assets will not be lost at death or incapacity. Specific provisions should be incorporated into the owner's trust, will and power of attorney. A separate memorandum referenced in the owner's trust and/or power of attorney can be used to identify the owner's crypto-assets and provide instructions to the trustee, administrator or agent regarding how to secure the assets.

There remains considerable uncertainty regarding taxation of NFTs and other digital assets. While there are no applicable Federal sales or use tax requirements, most U.S. states do impose a sales tax on digital assets. Certain states exempt intangible property; however, the devil is in the details. For example, California exempts intangible property from sales tax, but the asset may become tangible property subject to sales tax if delivered to a customer via tangible device. If downloaded over the internet, the digital asset likely retains its status as intangible property. Other states (e.g., Washington State) have enacted specific rules for the tax treatment of digital assets. Any sale of digital assets is subject to income tax. Accordingly, if an NFT appreciates in value during the owner's holding period, sale of the asset would produce taxable income (in most cases, capital gain). An exchange of one digital asset for another digital asset is also taxable.

Starting in 2023, cryptocurrency exchanges, custodians and platforms will be required to issue Forms 1099 annually to report sales and exchanges of most digital assets recorded on blockchain technology to the Internal Revenue Service. Reporting requirements will likely cover all cryptocurrency.



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Links & Gains is a full service corporate and commercial law firm, offering multi-jurisdictional legal expertise. Our diverse understanding of business and extensive industry experience, has positioned us to offer a wide range of specialized services that would consider the real gains to our clients. Our core values of excellence in customer service, professionalism, and credibility are strongly embedded in the firm's culture.

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QUESTION ONE

What are the biggest investment opportunities in digital – and how can clients decide on the best entry point for them?

With national plans and strategies such as Egypt's Digital Transformation Vision (Digital Egypt), The Central Bank of Egypt's (The CBE) FinTech and Innovation Strategy (The Fintech Strategy), and The Information and Communications Technology 2030 Strategy (The ICT 2030 Strategy) in place, Egypt is most certainly prioritizing digital transformation in a multitude of sectors and working to establish itself as an incubator for digital investments in the region.

Each of these strategies prioritize collaborations with the private sector. For instance, according to the CBE, it will continue to expand its international cooperation agreements with regulators and relevant stakeholders to enable joint work and knowledge sharing for implementation of the Fintech Strategy. Moreover, The CBE is studying the establishment of a Fintech Innovation Fund with the aims of increasing investments promoting emerging FinTech startups and supporting innovation in the banking and financial services sectors.

According to the Ministry of Communications and Information Technology, among the main pillars of building Digital Egypt is the development of Egypt's digital infrastructure by putting a focus on further enhancing Egypt's – already – "advanced international and

national infrastructures". The development plan focuses on four elements: expansion in international infrastructure outside Egypt, expansion in international infrastructure inside Egypt, expansion in Africa's international network and expansion in establishing data centers.

Therefore, to ensure the implementation of these strategies, the Egyptian government has been involved in discussions regarding several collaborations with private investors and tech giants such as Lenovo, Huawei, Intel and Amazon Web Services [During the 42nd edition of GITEX Global held in October of this year, the Egyptian delegation met with representatives from each of the companies to discuss investment and cooperation opportunities in Egypt].

Egypt has been concluding several agreements to those ends as well, such as the agreement concluded between Atos and the Egyptian Government, represented by Egypt's Information Technology Industry Development Agency (ITIDA) in 2021 which aims "to accelerate the development of the digital sector in Egypt and create new employment opportunities locally" according to ITIDA's press release, and the agreement signed between Valeo Egypt and ITIDA "to foster innovation and research in digitization and Artificial Intelligence" according to ITIDA's press release..

A notable investment opportunity for clients would be in digital infrastructure, as current governmental plans constitute a prime opportunity for investors wishing to enter into the Egyptian Market on a wide scale while also being one of the main actors in Egypt's digital development strategies.

QUESTION TWO

Crypto can be a volatile market: how do you advise your clients to mitigate risk when trading in digital currencies?

Egypt, as many countries around the world, did not issue a clear executive regulation when it comes to regulating or prohibiting the use of cryptocurrencies. Nevertheless, a new development in that regard has been introduced by Article 206 of the CBE No. 194/2020 for the year 2020 requires investors to obtain a license from the Board of Directors of the Central Bank of Egypt to issue, trade or promote cryptocurrencies or digital currency, or otherwise it is prohibited to have any transactions in this regards. The Central Bank is expected to issue a series of executive decisions to further regulate these licenses according to the Legal Counsel of the CBE. This opens the door for future possibilities of regulation and licensing, but not yet since no company thus far managed to get the cryptocurrency trading license.

However, when it comes to FinTech, Egypt is steadily moving towards its inclusion in its regulatory sphere by offering many exemptions to new investors, such as Article 201 of the Law No. 194 for the year 2020 temporarily exempts start-ups in financial technology from some licensing requirements according to the procedures stated by the CBE's Board of Directors.

In order to mitigate risks, international business representatives should diversify their investment portfolio in general due to the international economic impacts, and shorten the term of their investment in each digital currency to avoid any risk brought on by long-term engagement, in addition not to volatile the market of digital currencies in Egypt, until it gets regulated.

TOP TIPS

Exploring digital asset investments

- ✓ Investors should be well educated on all matters related to blockchains, digital technologies and cyber-security is essential before starting going into digital investments.
- ✓ An investor should make sure that they have acquired all necessary authorizations and licenses (if any).
- ✓ Implementing a comprehensive risk management plan could come a long way in terms of combating the digital investment market.
- ✓ Implementing a risk-parity, strategy when allocating different parts of an investment portfolio could be recommended; by using risk as a factor of allocation of investments, an investor could avoid high-risk investments.

QUESTION THREE

How is your jurisdiction managing the legal challenges of NFTs: for instance, taxation on purchases, IP, ownership and theft?

Egyptian Law does not specifically address NFTs up to this point in time, and since they are not considered a "currency", one could not legitimately expect that Article 206 of the CBE Law applies to NFTs.

Due to the absence of regulations that address NFTs in the Egyptian system, regulating their use and trade could be referred, for the time being, to existing regulations on trade and intellectual property. In fact, some Egyptian artists have already started using NFTs to share their art and maximize their profit.

An NFT creator can avoid copyright infringement by: using his/her own independent creation without reproducing another entity's work, using content with no copyright associated to it, using content, which is already on the public domain with expired copyright, seeking a licence from the copyright owner associated to the content used, using licensed content by purchasing these from licensed digital libraries or collection societies, and ensuring that the licence extends to reproducing these images for NFT activities.

Many companies protect the visual appearance associated with their products through industrial designs protection, as well as technical features underlying these products through patents, in that regard, the current law No. 82 of 2002 regarding the Protection of Intellectual Property regulates the general conditions of patents and licenses.

During a round-table organised by the Egyptian Supreme Council of Culture, the issue of NFTs regulation has been raised. According to certain News and media talks, within the legal specialists and artists, were in consensus regarding NFT being a great opportunity for the preservation of art and culture, however, they also agreed that implementation would require the intervention of the Egyptian legislator to regulate all issues raised.



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QUESTION ONE

What are the biggest investment opportunities in digital – and how can clients decide on the best entry point for them?

Blockchain and distributed ledger technology (DLT) are presented as revolutionary technologies in the financial sector, termed disruptive by some. One of their main applications is crypto-assets.

At the moment there is not a common European framework that regulates the crypto-asset market. There is a proposal for a Regulation of the European Parliament and the Council on Markets in Crypto-assets, and amending Directive (EU) 2010/1937 (MiCA). The proposal is pending approval by the European Parliament.

In Spain, the definition of crypto-assets is in rule 2. e) of Spanish National Securities Market Commission (CNMV) Circular 1/2022 of 10 January, on the advertising of crypto-assets presented as a means of investment (BOE nº. 14, of 01/17/2022) as follows: "Crypto-asset: digital representation of value, a right, or an asset that can be transferred or stored electronically, using distributed ledger technologies or other similar technology". Cryptocurrencies fit into this concept.

In Spain there is a legal definition of virtual currency. Art. 1. 5 of Law 10/2010, of April 28, on the prevention of money laundering and terrorist financing (BOE nº. 103, of 4/29/2010), introduced by Royal Decree-Law 7/2021 of April 27. Virtual currency shall be understood as a digital representation of value that is not issued or guaranteed by a central bank or public authority, is not necessarily attached to a legally established currency, and does not possess a legal status of currency or money, but is accepted as means of exchange and can be transferred, stored and traded electronically.

Beyond cryptocurrency purchases (Bitcoin and other Altcoins) there are investment opportunities in digital assets, among others: non-fungible tokens (NFTs); future contracts for difference (CFDs); derivatives with crypto-assets such as underlying assets; life insurance policies linked to investment funds with crypto-assets as underlying assets; ETFs acquiring structures bonds whose underlying assets are cryptocurrencies; staking, etc.

Volatility and lack of regulation make investment in crypto-

assets very risky. Knowing your own profile as an investor helps you decide. You should never invest in products that you don't understand.

QUESTION TWO

Crypto can be a volatile market: how do you advise your clients to mitigate risk when trading in digital currencies?

On the 17th March 2022, The European Supervisor Authorities (EBA, ESMA and EIOPA – the ESAs) published a warning to consumers on the risks of crypto-assets (ESA 2022 15). They identify the following key risks: extreme price movement; misleading information; absence of protection; product complexity; fraud and malicious activities; market manipulation, lack of price transparency and low liquidity; hacks, operational risks and security issues.

Investing in crypto-assets is not regulated, may not be suitable for retail investors, and the entire amount invested may be lost. The cross-border and global nature can make it very difficult to claim damages.

To find a suitable product, you must find out about the profitability (the remuneration to be obtained), the risk (credit, market, liquidity, fraud, operational, volatility, etc.) and the expenses and costs that will influence the final profitability (commissions, expenses associated with operations, taxes, etc.).

Knowledge is essential. It is important to be informed and understand the information about the product and all the risks, and be especially prudent if the ability to assume risks is severely limited by the particular financial situation.

You should not invest in products whose characteristics and risks are unknown.

“Volatility and lack of regulation make investment in crypto-assets very risky. Knowing your own profile as an investor helps you decide”

QUESTION THREE

How is your jurisdiction managing the legal challenges of NFTs: for instance, taxation on purchases, IP, ownership and theft?

On NFTs, the issues are complex and novel. The lack of specific regulation makes it necessary to address case-by-case to be able to fit it into existing regulation. It is not possible to establish a general criteria.

There are some interesting decisions on sales operations of NFTs for the purposes of value added tax (VAT).

Directorate General of Taxes (DGT), Ministry of Finance and Public Function, Spain, in two recent binding opinion (V2274-22, of 10/27/2022 and V0486-22, of 3/10/2022), understood that sales of NFTs are operations subject to and not exempt from VAT

TOP TIPS

Exploring digital asset investments

✓ **Know your own risk profile:** Ask yourself questions before deciding, and periodically throughout the duration of the investment, among others. What is your financial situation (income, assets, expenses, debts)? What is your ability to bear losses? What is your knowledge about crypto-assets? What are your financial goals? How long can you keep the investment? Do you understand the risks involved in acquiring crypto-assets? What level of risk are you willing to take?

✓ **Know the product:** Learn and understand before deciding, and periodically throughout the duration of the the investment about, among others: the advantages and risks of crypto-assets; their costs; the purpose of the project; the business model; its profitability; the circumstances of the entities that promote the project, provide the services and safeguard the assets; the liquidity in case you want to undo the investment; if there are customer protection mechanisms and funds guarantees; how the price of the crypto-assets is constituted.

✓ **Know the technology:** Find out about and understand before deciding, and periodically throughout the duration of the investment, the underlying technology used. Establish and maintain adequate and updated security measures in the devices used to buy, store or transfer crypto-assets and for the custodian of credentials or private keys.

(because NFTs subject to consultation should not participate in the nature of cryptocurrencies and other digital currencies since they are not configured as currencies or are fungible goods).

To determine whether the operation is a delivery of goods or a service, DGT understood classification as delivery of goods would not proceed (because the object of transaction was the digital certificate of authenticity that represents the NFT, without having a physical delivery of the image file or the digital file associated with it itself).

So, transmissions, under those conditions, should be classified as electronic supplies service that, if understood to be carried out in the territory of application of the Tax, had to pay VAT at the general rate of 21%.

In relation to intellectual property rights, NFTs may be considered as an object of intellectual property under Spanish Intellectual Property Law (Royal Legislative Decree 1/1996, of April 12, BOE nº. 97, of 4/11/1996). Article 10.1 says that all original literary, artistic or scientific productions expressed in any mode or form, whether tangible or intangible, known at present or that may be invented in the future, are subject to intellectual property.

Problems arise, for example, when the person uploading and trading the NFTs is not the original creator and it becomes necessary to determine whether converting a work into an NFT implies a transformation that may affect the rights of its author or, if on the contrary, the ownership of a physical work allows to transform it into an NFT, and those are new issues on which there are no precedents.



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MZLS LLC is a boutique law firm located in San Juan Puerto Rico, that brings many years of distinguished experience from different backgrounds. Our sophisticated team of attorneys come from different backgrounds including the executive and legislative branches of government, public and private corporations as well as major local law firms. We combine substantive experience and detailed knowledge of Puerto Rico's tax laws, insurance laws, labour laws, corporate laws, governmental structures and business climate. As well as being a general practice, the firm has wide experience in the design, procurement, negotiation of Public Private Partnership Agreements and other privatisation contracts.



QUESTION ONE

What are the biggest investment opportunities in digital -and how can clients decide on the best entry point for them?

Digital assets have been around for decades, but have recently become more popular. While digital assets come in many forms and vary in value (some possess tangible and intangible value), this sector includes a broad array of investment types, including but not limited to: Cryptocurrencies, DeFi platforms, decentralised applications, and non-fungible tokens (NFTs). These digital assets represent an attractive investment opportunity to diversify an investment portfolio representing about \$3 trillion of global assets and is poised for further growth. When focusing on digital currencies, the best opportunities for investment include: saving; staking; farming; swapping; and trading.

Clients should consider whether these investments fit their portfolio goals, risk profile and personal convictions. In addition, it's essential to get educated on the ins and outs of this fast-growing industry before investing, and be prepared for volatility: the digital currency world is not for the faint of heart, it moves quickly and is known for being highly volatile.

QUESTION TWO

Crypto can be a volatile market: how do you advise your clients to mitigate risk when trading in digital currencies?

Trading is currently the most common activity in the crypto-asset ecosystem. Nevertheless, consumers, investors, and businesses investing in cryptocurrencies are exposed to a variety of risks. Two of the main risks of digital currency are:

- Volatility: Unexpected market changes can provoke significant and sudden moves in cryptocurrencies' value.
- Lack of regulation: as a decentralised currency, they lack uniform regulation, making the market lack certain protections and susceptible to fraud, scams or/and hacking from bad actors.

While this market continues to be underregulated, in the United States cryptocurrency transactions can be covered by the Bank Secrecy Act and anti-money-laundering laws. For example, the Anti-Money Laundering Act of 2020 codified prior FinCEN guidance by making all transactions in "value that substitutes for currency" (which includes digital currency) subject to reporting requirements and money transmitter registration. In 2015, the CFTC declared virtual currency a "commodity" subject to oversight under its authority under the Commodity Exchange Act (CEA). Hence, CFTC has jurisdiction to protect market users and their funds, consumers, and the public from fraud, manipulation, and abusive practices related to derivatives and other products that are subject to the CEA. Finally, financial intermediaries, such as broker-dealers, exchanges, transfer agents, and clearing agencies, that perform any of their activities in the digital asset context, may be subject to regulation under the Securities Exchange Act. Depending on the activities of the entity, compliance with the Securities Exchange Act may include obligations such as registration, capital requirements, reporting, disclosures, and filings of forms and policies with the SEC for approval.

Participants in the digital asset market should also review the guidance and interpretations concerning digital asset products and market participants provided by the CFTC, the SEC, FinCEN, the IRS, and state regulators such as the DFS.

Specifically to Puerto Rico, there are several legislative efforts currently underway looking to regulate certain activities at a local level. From the different bills presented, the most comprehensive one is House Bill 1425 which looks to create the "Act for the Promotion of Blockchain Products and Services of Puerto Rico". If passed, this bill would amend existing statutes regarding IFE's and Monetary Services in the Island.

QUESTION THREE

How is your jurisdiction managing the legal challenges of NFTs: for instance, taxation on purchases, IP, ownership and theft?

The utility of blockchain technology has extended beyond cryptocurrencies to the creation, ownership, and sale of digital assets through tokenisation. These digital assets are referred to as non-fungible tokens (NFTs). Even though NFTs' popularity has risen, the legal treatment of these tokens continues to evolve and is unsettled. Some of the legal issues concerning NFTs are: Intellectual Property Rights (IP) and taxing NFTs.

Intellectual Property

At present, the most widespread use of NFTs is in the form of digital collectables, such as digital artwork. But the relationship between NFTs and the legal ownership of digital or physical property is unclear. This raises questions about IP rights protection.

Taxing NFTs

The U.S. tax code doesn't formally address how NFTs should be taxed. But this year the IRS issued tax guidelines stating that NFTs are taxed the same way as cryptocurrencies and stablecoins. Per IRS guidance, any crypto-to-crypto transaction is a taxable event, making the NFT activities taxable when said transactions are involved. However, this could apply depending on the use, purpose and actions an owner of an NFT takes with regards to this asset. In general terms, some NFTs are sold merely as tokenised art, while others are not.

TOP TIPS

Exploring digital asset investments

- ✓ Before investing in digital assets, clients should consider whether it fits their portfolio goals, risk profile and personal convictions before investing. In addition, it's essential to get educated on the ins and outs of this fast-growing industry before investing. Investors also need to prepare for volatility: the digital currency world moves quickly and is known for being highly volatile.
- ✓ Participants in the digital asset market should also review the guidance and interpretations concerning digital asset products and market participants provided by the CFTC, the SEC, FinCEN, the IRS, and state regulators such as the DFS. Given the constantly evolving market, technologies and policies, it is important to always keep up to date.
- ✓ These are opportunities that can be as risky as potentially rewarding. However, the same as with traditional investments, participants should seek legal, accounting, and financial advice from adequate professionals to minimise exposure and take those measures that allow you to mitigate risk.

Some jurisdictions have started taxing the sale of NFTs. Washington and Pennsylvania were the first two states to wade into NFT sales tax. In fact, both states could retroactively collect money related to NFT sales. This happened because, instead of enacting new legislation, they provided guidelines that interprets existing tax law.

In Puerto Rico, the Department of the Treasury recently published a draft with the purpose of including NFTs among the provisions of the Sales and Use Tax (IVU). According to the draft, the proposal would redefine the definition of "Specific Digital Products." This would be defined as: "electronically transferred or delivered digital audiovisual works, digital audio works, or other digital products...including digital products in the format or medium of non-fungible token or 'NFT'..."

The fact is that, although most states haven't directly addressed the taxability of NFTs, multiple jurisdictions can impose sales tax on NFTs without enacting new legislation. However, there are many complexities when trying to apply sales tax to NFTs that are not present in normal physical transactions. States could expand current law to include taxation of NFTs. Allowing sellers to rely on their own research could make them run the risk of being held liable for non-collection of state sales tax.



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Oyagbola Chambers is a Law Firm dedicated to meeting the needs of businesses, and committed to offering excellent, highly professional, and pragmatic business solutions. The Firm offers advice to various sectors and industries. Our strength and focus at Oyagbola Chambers is, through a proper understanding of your needs, to become your trusted business adviser. We ensure that our personnel are equipped with all necessary resources and that they are well trained and provided with tools to enable them to stay abreast of all business and legal developments, the operations of infrastructure funds and resolving challenges associated with sweeping regulatory changes.



QUESTION ONE

Could alternative dispute resolution become compulsory in your jurisdiction? If so, what steps are currently being taken to bring this into legislation?

Alternative Dispute Resolution (ADR) has become widely accepted as a viable alternative to conflict resolution. The 1999 Nigerian Constitution recognises the important role that ADR can play in that it contains a foreign policy objective for the "seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication". ADR not only provides speedy resolution of conflicts, but it is also seen by many as an avenue for the preservation of the sanctity, continuity, and confidentiality of agreements. ADR is not compulsory, but ADR principles are now routinely used to settle conflicts. Most courts currently insist that litigants should engage in some form of pre-action ADR. Compliance must be proved as a precursor to the institution of a lawsuit.

Many jurisdictions across Nigeria have set up ADR centres. The Lagos State Multi-Door Courthouse was the first in 2002. Others since include the Abuja Multi-Door Courthouse and the Federal High Court Alternative Dispute Resolution Centre. The National Industrial Court, which has divisions across Nigeria that deal with employment disputes, has established ADR centres in five of those divisions.

ADR continues to be available even where disputes have gone on appeal. The Court of Appeal Rules 2016 and the Court of Appeal Mediation Rules 2018 provide a framework for the resolution of appeal cases by ADR.

Many first instance courts now require reports on the outcomes of initial mediation efforts before further steps can be taken. Judicial pronouncements have generally given directives to litigants to adopt ADR.

Finally, it is pertinent to note that a duty is imposed on every Nigerian legal practitioner to inform every client seeking to commence a lawsuit that ADR is a viable option.

The importance of ADR in Nigeria and its international importance is demonstrated by recent efforts to update Nigerian law by incorporation of UNCITRAL's updated model law. A bill to amend the Arbitration and Conciliation Act was passed by the Nigerian Senate on the 10th of May 2022. ADR is now

commonplace in Nigeria. The advantages of ADR over traditional courts are generally admitted. Nevertheless, the element of choice, which is one of ADRs attractions, would tend to prevent it being made compulsory. The best that we can hope is for more ADR centres to be made available and for more potential users to be made aware of its availability, speed, and utility.

QUESTION TWO

The 'international' nature of the digital and subscription economy can increase the complexity of disputes – what ADR issues does this raise in your jurisdiction, particularly in regard to international disputes?

Commonly, the two major factors that make operations in the Digital and Subscription Economy difficult and unique are the geographical separation between the product (or application) owner and the purchaser (user) and the difference in legal systems between the owner and the purchaser.

Unlike trade in physical goods, the end user of digital and subscription products buys them from persons who may be in a remote jurisdiction. This distinction explains the customary contractual set up for the sale and distribution of digital and subscription products.

Dealings in digital and subscription products are based on End User Licence Agreements (EULAs), which are broadly framed to cover diverse jurisdictions. Such agreements are standard forms differentiated only by variations in municipal laws.

Typically, standard forms retain significant power in the hands of the maker or distributor. The user's choices are to take the product or leave it. An arbitration clause in such an agreement will be dictated by the product owner. Such arrangements either unduly favour the product owner or are prohibitively expensive for the end user. Although consumer protection agencies exist in Nigeria, none has been provisioned to address the complexities involved with the purchase and use of digital and subscription products.

Even where an end user manages to secure an arbitral award, enforcement may be a major hurdle. The product owner may have no assets within the user's jurisdiction and, in the absence of reciprocal enforcement agreements, enforcement may be impossible.

Representative (class) action may be the answer which forces the product owner to come to the mediation or arbitration table to avoid reputational damage.

“The best that we can hope is for more ADR centres to be made available and for more potential users to be made aware of its availability, speed, and utility”

TOP TIPS

Exploring digital asset investments

- ✓ It is now official policy for ADR to be widely marketed. Increased use will relieve the congestion as well as the funding challenges within the legal system.
- ✓ Pre-action mediation, a form of ADR, is increasingly becoming compulsory on account of court procedure rules and general legislation.
- ✓ Persons entering into any agreement should always incorporate well considered ADR clauses.
- ✓ It is best before executing an agreement to think through the process to be employed in the settlement of conflicts.
- ✓ Always carefully read End User Licence Agreements (EULAs) before you purchase a digital or subscription product.

QUESTION THREE

What role is ADR playing in an increasingly volatile utilities market? Is that role likely to change in the near future?

Utilities in Nigeria include Telecommunications, electricity, water, and natural gas. Historically, water and electricity were provided by government agencies, regulated by statutes. That is still largely the case with water although, due to paucity of State resources, many individuals and communities have resorted to building private boreholes and maintaining water treatment plants.

The power architecture has gone through many restructurings over the last 20 years. Currently, a few power generating plants are in private ownership whilst the distribution companies are all substantially privately owned. The distribution companies are, however, significantly underfunded and have had problems with meeting the needs of consumers. The pricing and supply of power to the distribution companies is a major issue, regulated by an entity set up by the Federal Government. The Nigerian Bulk Electricity Trading Plc. (NBET) fixes bulk power prices. The electricity market can therefore not be said to be free.

Natural gas is utilised by both power generating companies and other industries. The natural gas market, either delivered by pipeline or as Compressed Natural Gas (CNG) in canisters, is a free one, subject to market forces.

Telecommunications is heavily regulated by the Nigerian Communications Commission (NCC). NCC regulations include approval of price increases and investigation and rulings on consumer complaints. ADR is most helpful when applied to the settlement of freely negotiated contracts between parties. Over-regulation and near monopoly situations distort the use and utility of ADR for conflict settlement. The natural gas market is the only one in which ADR can be said to be of any significant importance.



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QUESTION ONE

What are the biggest investment opportunities in digital – and how can clients decide on the best entry point for them?

There are many investment opportunities. An investor can purchase digital assets directly on crypto exchanges or through brokers. Choosing the right investment is the main challenge. These assets have no track record or history. It is more speculating of what is going to happen. An investor may be found with more than 15,000 cryptocurrencies and obviously not all of them will stay for long. Even the popular ones have had price swings. Bitcoin was as high as USD 69,000 in 2021 and went down by more than 50%.

There are several factors to be considered - One of the main factors is to check how liquid the digital assets are. Cryptos are known for their illiquidity or even if they are liquid, they may become illiquid. Not to say that some investors will tell you they have made good money out of digital assets. But is this good as an encouragement? The answer is not a straightforward yes or no.

There has been an immense evolution in the FinTech sector in Mauritius, from the introduction of the Regulatory Sandbox Licence for FinTech projects years back to having enacted the Virtual Asset and Initial Token Offering Services Act 2021 (the Act). The Act provides for five types of licences which are crypto-broker, crypto exchange, advisory in the crypto world, custodian of digital assets and wallet services. Investors should deal with those brokers or other professionals who are regulated.

The Financial Services Commission (FSC) which is the financial regulatory body in Mauritius has issued different guidelines for the Fintech sector to ensure most of the crypto and digital assets businesses are covered under either an act of law, a rule or a guideline. This is very interesting. The guidelines recently issued by the FSC are for securities token offerings and securities taken trading system. Mauritius has increased the viability of its jurisdiction by issuing a guidance note on Recognition of Digital Assets as an asset class for investment by some categories of investors.

In considering the best entry point, it is very important to invest in digital assets on exchanges which are regulated.

There is no better comfort especially as it's already a volatile investment. Therefore, the liquidity and regulations surrounding digital assets stand out as an entry point.

QUESTION TWO

Crypto can be a volatile market: how do you advise your clients to mitigate risk when trading in digital currencies?

Crypto has always been considered volatile, with the potential for significant upward and downward movements over shorter time periods. It is not surprising that you see all new concepts take time to settle and be accepted, and the same holds true for crypto. Cryptos attract a lot of investors but the high volatility in prices is a key element to consider and this risk needs to be reduced or managed. The recent decline in Bitcoin value is an example but it went high as well. Clients should follow the market tendencies, take expert advice and be ready for risks. It is not as stable as traditional assets such as gold.

Cryptocurrencies can be extremely risky for investors and it is to be considered for high-risk takers.

QUESTION THREE

How is your jurisdiction managing the legal challenges of NFTs: for instance, taxation on purchases, IP, ownership and theft?

Non-Fungible Tokens (NFTs) are a new concept and it has not yet been fully circled in terms of legislation.

Mauritius has recently introduced rules regarding NFTs whereby the regulatory position of NFTs has been clarified. Each NFT is recorded as distinguishable from any other NFT and allows each NFT to be given unique features and to be associated with physical or virtual assets. This avoids theft. NFTs usually take different forms and must have different regulatory treatment.

The Financial Services Commission in Mauritius has clarified the following about NFTs:

- NFTs as digital representations of collectables but not used for payment on investment purposes. This type of NFT, which is linked to an underlying asset, may be used and marketed to the member of the public.
- NFTs displaying characteristics of securities. This type of NFT has the characteristic of a transferable financial asset and is fractional, which means that numerous purchasers can acquire partial ownership or interest in the underlying financial asset and it is considered as securities.

Other NFTs under the Virtual Assets and Initial Tokens Offerings (VAITOS) Act in Mauritius.

- Issuers of NFTs which fall under such category (not digital collectables and not securities) shall apply for registration under the VAITOS Act.

Mauritius has positioned itself as a first-mover regulatory jurisdiction for NFTs where these can either be regulated under the Securities Act or the VAITOS Act.

On the other hand the rules regarding taxation on purchase, IP and ownership is not explicitly there but are covered in a way. Specific tax rules should follow soon as there have been talks to include digital assets in our Income Tax Laws.

TOP TIPS

Exploring digital asset investments

✓ **Go for a Licenced and regulated company.** Mauritius offers various options and vehicles for investors in crypto-assets. Investors should take advantage of the regulations as a safeguard. Other jurisdictions have similar laws as Mauritius, such as the United Arab Emirates (Dubai).

Mauritius has rules for Crypto Funds, that is, those Funds which invest in digital assets. Mauritius has its own proper law on Virtual Asset Service providers and issuers of Initial Token Offerings. The Virtual Asset and Initial Token Offering Services Act 2021 (the Act) regulates the following activities:

- Exchange between virtual assets and fiat currencies;
- Exchange between one or more forms of virtual assets;
- Transfer of virtual assets;
- Safekeeping of virtual assets or instruments enabling control over virtual assets;
- Administration of virtual assets or instruments enabling control over virtual assets;
- Participation in and provision of financial services related to:
- An issuer's offer and sale of a virtual asset;
- An issuer's offer or sale of a virtual asset.

In addition, we have established regulations catering for the custody of digital assets licence. This allows digital custodians to be regulated in a reputable jurisdiction which is internationally recognised.

✓ **Check your risk appetite and go small.** If you are willing to go either way (loss or profit) and afford to lose all, it may be worth going for it. If properly done, investments in liquid digital assets can achieve good returns.

✓ **Safekeeping.** Securely keep and store digital assets against hacking or code stealing. An investor runs the risk of losing all if he has not safely stored his digital assets. Go for renowned crypto exchanges rather than unknown or new ones. Whether storage should be in a centralised or decentralised exchange, these two options should be considered. The choice of the crypto exchange is important as lately some exchanges have gone bankrupt.

✓ **Take Expert Advice and get educated on cryptos.** You need to take expert advice. Every day, new things are happening in the crypto world. You need to get an expert advisor to advise what is best for you. They follow the market and should be able to give you a good picture. Expert advisors are well-placed to educate you about the risks involved with a particular digital asset and your exposure to crypto.

PRIVATE CLIENT & TAX LAW

Global Mobility


Our Private Client & Tax members share their expertise on Global Mobility and how their jurisdiction is developing immigration legislation to deal with 'digital nomads'. They touch on what taxation issues their clients will need to be aware of if they are emigrating long-term or exploring temporary remote work visas in different jurisdictions and what the main challenges are relating to short-term residency.




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4i Advisory Services provides Tax, Regulatory and Business services with a collaborative vision of building one of the finest professional services firms. With an experienced team of professionals, we provide well-thought-out strategies and solutions to complex problems, based on our understanding of clients' businesses and their objectives. We recognise that today's complex financial world requires simplicity and authenticity. From this we derive our commitment to deliver innovative solutions that are technically sound and actionable. Our focused approach rests on a foundation of wisdom and a passion for excellence. With offices in Bangalore, Chennai, Bombay and Delhi, the Firm provides comprehensive services on corporate and international taxes, mergers and acquisitions, private equity and assurance services. The Firm is led by Mr. NS Shastri, who has close to three decades of experience working with a number of Indian and multinational corporates and is ably supported by Partners and their teams. The Firm has positioned itself as a boutique advisory and a 'go to' firm for start-ups and emerging companies.

“The India IT Act provides short stay tax exemption to foreign nationals on remuneration received for providing their services in India”

QUESTION ONE

Is your jurisdiction developing immigration legislation to deal with 'digital nomads' – and if so, how is this set to change in the year ahead?

'Digital Nomads', a concept that was propelled by the pandemic, is gaining familiarity and acceptance amongst millennials. Though the concept of 'Digital Nomads' has long been in existence, it has gained more momentum globally since the onset of the pandemic and many countries have since endorsed and implemented immigration policy catering to 'Digital Nomads' exclusively. However, India as a jurisdiction has so far not developed or implemented any separate immigration legislation for 'Digital nomads'. Currently, a foreigner who wishes to enter India needs to apply for visa which is granted for a specific number of days based on reason of visit. We do not expect any development in this regard in the immediate years ahead.

QUESTION TWO

What taxation issues do clients need to be aware of if they are emigrating long-term or exploring temporary remote work visas in your jurisdiction?

As per Indian taxation, the incidence of tax on a person is primarily dependent on (a) the residential status of such person during the year of taxation; and (b) whether the income received by such person has a nexus to India. The residency status of a person depends on their longevity of physical stay in India. As per the provisions of Income-tax Act, 1961 (the India IT Act), a person would be a resident in India for a given year, if such person (a) has been in India for more than 182 days during that year; or (b) has been in India for more than 60 days during that year and more than 365 days during the preceding four years. Based on these provisions, a person qualifying as a non-resident would be subject to tax only on India sourced income, whereas a person qualifying as a resident would be subject to tax on global income and would also be required to disclose all the foreign assets held by them. The residential status of a person would differ from year to year and therefore the exercise of determining the residential status of a person for a given year needs to be undertaken every year. After assessing the residential status of a person, one must assess the extent of taxation based on the provisions of the India IT Act and the relevant Double Taxation Avoidance Agreement (DTAA). The India IT Act provides for specific exemption, referred to as short stay exemption in common parlance, to foreign nationals on salary income received in India if prescribed conditions are collectively satisfied. Such short stay exemption can also be availed under the DTAA vide 'Dependent Personal Services' Article which provides that subject to satisfaction of given conditions, salary income of a foreign national shall be taxable only in the place of permanent residence and not in India. While the above discusses tax implications from the perspective of an individual foreign national, it would be also important for the employer foreign company of such foreign nationals to assess whether the arrangement of sending their employees to work in India would deem the said foreign company to have a permanent establishment (PE) in India. The DTAA's entered by India typically contain a clause pertaining to service PE under the PE Article which deems a foreign company to have a PE in India if their employees render services in India for a period

TOP TIPS

Extending a short-term stay to permanent

✓ The current outlook of immigration system in India is such that visa is provided to intended visitors for a specified time period basis their reason of visit. It is possible to extend visa in certain cases, however the period of extension permitted would not be long or permanent. A person would be required to go back to their home country and re-apply for a longer period visa or a permanent residency visa.

more than the prescribed number of days. In such a case, part of profits earned by the foreign company would get attributable to their employee working out of India and may be subject to tax in India. From a compliance perspective, a taxpayer maybe required to obtain a tax residency certificate to avail tax benefits under the DTAA. Further, the India IT Act requires persons earning taxable income to obtain a permanent account number (PAN) and file a return of income.

QUESTION THREE

Are there any challenges related to short-term residency that clients need to be aware of, and how can they overcome them?

As previously discussed, the India IT Act provides short stay tax exemption to foreign nationals on remuneration received for providing their services in India. To avail this exemption, the foreign national is, however, required to satisfy all the prescribed conditions collectively which are (a) such person is a foreign national and is an employee of the foreign enterprise; (b) the foreign enterprise is not engaged in any trade or business in India; (c) such person does not stay in India during the given year for more than 90 days; and (d) the salary income is not liable to be deducted from the income of the employer which is chargeable to tax under the India IT Act. Further, DTAA also provides for short stay exemption and the nature of conditions prescribed for availing the same are (a) the recipient of salary income is resident in India for not more than the prescribed number of days during a given year; (b) the remuneration is paid in India on behalf of the foreign company employer; and (c) the remuneration is not borne by PE of such foreign company employer in India. If these conditions are satisfied, the salary income received by foreign national will not be taxed in India.



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Marc Marsal is a Tax Lawyer that provides advice on international taxation, cross-border transactions, global mobility, VAT, tax planning, and Double Taxation Treaties (DTA), in relation with both individuals and companies moving to or having interests in Spain. He is the founding and managing partner of Marsal Law, having started his career in Big Four firms in the fields of international taxation and Transaction Services (M&A). Marc holds both the Degree in Law by the Pompeu Fabra University (Barcelona) and the degree in Economics by the Central University of Barcelona. He is member of the Barcelona Bar Association and member of the CTA Spain ("AEDAF").

Marsal Law is a specialist tax boutique with headquarters in Barcelona and covering services in the whole Spanish territory. The firm was founded in 2006 and counts with a team of highly skilled international tax lawyers able to assist clients in multiple languages. Among our clients we count with multinational companies of different sectors of activity (ie: Pharma, software, etc.), and from SMEs to companies trading in the stock market.



QUESTION ONE

Is your jurisdiction developing immigration legislation to deal with 'digital nomads' – and if so, how is this set to change in the year ahead?

The Spanish Parliament has recently approved a new law known as "Startups law" to promote innovative entrepreneurship and attract investment and talent in the new digital economy.

In these new regulations, that are already in force, are stated relevant changes affecting digital nomads both from the immigration law and tax sides.

In relation with immigration legislation, it has created the new visa for digital nomads as a residence permit that could be extended to 5 years and that allows those individuals nationals from non-European Union countries, living and remotely working in Spain for those employers or clients of them located all-over the world.

This type of visa may be accessed by those who carry out remote work or professional activity for companies located outside of Spain, through the exclusive use of computer, telematic and telecommunication means and systems.

This new visa permits could be obtained by highly qualified professionals. Applicants must demonstrate the previous real existence of the professional or employment relationships with foreign companies for a period of at least three months before the visa application, and that those professional obligations can be remotely performed.

There are two different ways for applying for this digital nomad visa permit:

- On the one hand, individuals can apply directly from Spain if legally being in our country (i.e. because of having a tourist visa), directly obtaining the 3-year visa permit.
- But, on the other hand, it also allows the individual to apply from the country of origin (at the consulate) by obtaining a 1-year visa to be able to enter Spain and subsequently modifying this to a 3-year visa permit.

It is important bearing in mind that obtaining the abovementioned digital nomad visa permit implies that the individual could freely move himself along all the European Union territory.

QUESTION TWO

What taxation issues do clients need to be aware of if they are emigrating long-term or exploring temporary remote work visas in your jurisdiction?

Non Spanish tax residents planning to move their tax residence to Spain are one of the groups that benefits the most from the aforementioned recently approved regulations.

They are now able to enjoy a much easier access to the Spanish expatriate's Personal Income Tax regime (widely known as Beckham Law), when moving their tax residencies to our country.

Most relevant tax advantages of the abovementioned special Personal Income Tax (hereinafter "PIT") regime are the following:

- 24% PIT flat rate for labour and professional incomes up to 600,000 Euro/Year (47% PIT rate for the portion of incomes exceeding that amount), instead of the generally applicable PIT progressive rate that could be jumping into a 54% rate depending on the region.
- Wealth Tax only applicable to those assets located in Spain.
- Incomes from foreign source are not taxable in Spain (with the only exemption of labour incomes).

To benefit from this Special Personal Income Tax regime, foreigners had to prove that they had not been regarded as Tax Residents in Spain for the last 5 years.

Till 2022 this special Beckham regime mainly applied to those individuals moving their tax residency to Spain because of a job offer in our country or because of having being displaced to Spain by his existing employer, but the changes made by the abovementioned Startups Law, make it fully applicable too to:

- Those employees that are moving to Spain to start living and working from here for a foreign employer ("digital nomads"),
- Those taking the position of Director of a company
- Those starting certain innovative entrepreneurial activities in Spain.
- Highly skilled professionals rendering their services to emerging companies or working in R&D

On the other hand, Beckham regime now will be extensive to the family members (if requested) that are moving to Spain with the main applicant.

Beckham regime is applicable for the first 6 years in which the individual is tax resident in Spain. An express application for the regime must be made in that regard.

If emigrating long-term to Spain and becoming tax residents in our country, but not being eligible or not applying for the Beckham regime, besides of the personal income tax obligations (applying the progressive PIT rates), it has to be born in mind that tax residents in Spain are also obliged to file a Wealth Tax return in relation with all the assets they own worldwide.

Wealth Tax is levied on the net wealth of the individual (it is by deducting the liabilities) and although being regulated by a state law, the different regions ("Comunidades Autónomas") could approve specific changes to those regulations applying in their territories.

According to the state law, tax rates range are applied on a progressive manner ranging from 0,2% to 3,5%. Notwithstanding the above and as mentioned, the different regions can approve changes to that scale.

It also exists a minimum exempt amount (700.000 EUR in the state law), and some assets could be considered totally or partially exempt of Wealth Tax (ie. Shares in family businesses, primary residence etc.).

Some regions such as Madrid have approved relevant

TOP TIPS

Extending a short-term stay to permanent

In that regard we always recommend to our clients:

- ✔ Carrying out the proper tax simulations to determine the eventual tax convenience or not to move their tax residency to Spain by considering the global tax burden that could arise because of that decision.
- ✔ Because of the existence of a special expatriate's regime in personal income tax (that always requires a previous formal application), and because of establishing that regime, among other tax privileges, a 24% flat rate on labour and professional incomes up to 600,000 EUR/Year, it is always recommendable analysing if requirements to apply for that special regime could be met to duly file on time the proper application.

- ✔ Spain counts with a wealth tax that could apply to the individual's worldwide assets, and it has to be born in mind that the tax impact of it could vary among the different regions. Because of that it is always recommendable analysing the eventual impact of Wealth Tax for the concrete individual's case. In some cases, before moving the tax residence of the individual to Spain, it could be convenient to change the individual's assets composition to take advantage of some tax allowances, exemptions etc. regulated in the wealth tax regulations of each concrete region.

changes to the State law by stating bonifications to the Wealth Tax due, so then the impact of this tax has to be concretely analysed for each personal situation according to the region in which the individual plans to establish his residence.

QUESTION THREE

Are there any challenges related to short-term residency that clients need to be aware of, and how can they overcome them?

According to domestic Spanish regulations, an individual could be deemed to be considered as tax resident in Spain if they are in Spain more than 183 days during the calendar and tax year, or if Spain is the centre of their economic interests. Often, individuals interested in defending a sort-term residency in Spain, that would not trigger the tax residency in our country, make the mistake of just paying attention to the days that they spend in the Spanish territory, and don't consider "temporary absence". When applicable, this could allow the tax authorities to consider that short absences (ie. a vacation trip outside Spain) would also count as days of effective stay in our country for tax residency purposes.

We strongly recommend that our clients carrying out tax simulations determine how convenient moving their tax residency in Spain will eventually be and to analyse their particular case with a tax professional.



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Pagecorp Group is a leading provider of corporate and other professional services in local and international markets. Having experience in the legal and corporate industries and with a worldwide network of affiliates, Pagecorp Group services organisations and entrepreneurs from around the world wishing to structure their business through Cyprus.

Through a comprehensive range of specialised services, Pagecorp Group provides complete, tailored solutions to suit every client's business needs. Pageserve Ltd, the Administrative Service Provider of Pagecorp Group, is licensed to provide administrative services and is at present authorised and regulated by the Cyprus Securities and Exchange Commission. With over 30 years of experience, the Group considers corporate social responsibility as a fundamental component to growth and success. We strongly believe ethical, sustainable practices bring positive change in the corporate services sector and the business community in general.



QUESTION ONE

Is your jurisdiction developing immigration legislation to deal with 'digital nomads' – and if so, how is this set to change in the year ahead?

Globally there is the shift to remote working. Following this trend, the Cyprus Ministry of Interior Affairs has introduced, since January 2022, the Digital Nomad Visa regime, which currently has a maximum ceiling of 500 beneficiaries. The Cyprus Digital Nomad Visa Scheme allows nationals from non-EU and non-EEA countries, who can perform their work location-independently using telecommunications technology, to reside temporarily in Cyprus and work for an employer registered abroad or perform work through telecommunications technology for companies or clients located abroad.

This is a residence permit scheme and not a work permit one. Digital nomads will have the right to stay in Cyprus for up to one year, with the right of renewal for another two years, and they can be accompanied by their family members, who are granted, upon request, a residence permit that expires at the same time as that of the financial supporter of the family. During the stay in Cyprus, the spouse or partner and the minor members of the family are not allowed to engage in any form of economic activity in the country. It shall be noted that if they reside in the Republic for one or more periods which are in aggregate more than 183 days within the same tax year, they

are considered Cyprus tax residents, provided that they are not tax residents in any other country.

QUESTION TWO

What taxation issues do clients need to be aware of if they are emigrating long-term or exploring temporary remote work visas in your jurisdiction?

The Cyprus tax system offers a number of incentives to individuals who relocate to Cyprus for work related reasons. Natural persons who were not Cyprus tax residents for any three out of the last five years prior to commencement of employment in Cyprus and at the same time were not Cyprus tax residents in the previous year, provided that they receive emoluments over €100,000 per year, are granted a tax deduction of 50% on emoluments for a period of 10 years.

Furthermore, as from the 26th July 2022, an individual employed for the first time in Cyprus, who was previously not resident here, and for a period of three consecutive years prior to the commencement of the employment in Cyprus was employed by a non-resident employer and was residing outside Cyprus, has the right to a tax exemption of 20%: up to €8,550 for a period of seven years. A tax exemption of 50% is granted to any person employed for the first time as of 1st January 2022, who was previously not resident in Cyprus for a period of at least 10 years.

Other benefits of the Cyprus tax regime include, among others, that: no restrictions on foreign share ownership exist; there are no withholding taxes on dividends or interest; the sale of shares and other titles is exempt from tax; the corporate tax rate is one of the lowest in the European Union (EU), while non-Cyprus tax residents (or non-domiciled) enjoy a number of tax exemptions.

A physical person that is Cyprus tax resident but non-domiciled in Cyprus is exempt from the obligation to pay Special Defence Contribution (SDC). This applies also to individuals that are foreign tax residents. SDC is applied on passive income (namely rents, interest and dividends). Clients who relocate to Cyprus and obtain non-dom status are not subject to SDC.

QUESTION THREE

Are there any challenges related to short-term residency that clients need to be aware of, and how can they overcome them?

Although the procedure is relatively straightforward and can be completed easily (provided the applicant has obtained the correct documentation and fulfils the criteria set out by the relevant authorities) there are certain practical issues that could pose challenges to any applicant. An applicant should have in mind that in most cases, the applications need to be made by appointment. Therefore, the authorities who are handling the appointments operate a centralised online system that the user needs to use in order to secure an appointment for the submission of their application. In certain cases, the system can be overloaded and it may be months before an appointment can be secured, despite the fact that the applicant may be ready to submit. This is a relatively new measure introduced during the outbreak of the Covid-19 pandemic, in order to avoid

TOP TIPS

Extending a short-term stay to permanent

- ✓ The applicant and his/her family will need to show reasonable income and/or funds that will enable them to sustain themselves in Cyprus so that their short-term application can be extended to a longer term.
- ✓ There are various types of permits that enable this and afford certain rights to the applicant and the applicant's family members. Additionally, the Cyprus permanent residence by investment permit is a very popular and efficient choice, as it enables the applicant and his/her family to benefit from an expedited procedure for the granting of a permanent residence permit, upon the acquisition of a significant real estate holding in Cyprus, being a new residential property valued at a minimum of €300,000.
- ✓ Processing times vary in accordance to the workload and the complexity of the application, however usually it is fast-tracked and approved within a relatively short period of time.
- ✓ It is essential that the applicant has paid at least €200,000 at the time of the application so that the application can be processed under the fast-track procedure.

overcrowding in public offices. It is advisable that applicants who wish to apply secure their appointments well in advance, as due to the current global developments and efforts by the government to attract highly-skilled professionals, Cyprus has been receiving a significant influx of individuals seeking to relocate in Cyprus. In addition to the above, certain applications may require the applicant to open and maintain a local bank account in Cyprus, as local banks may take some time to onboard a new client, it is advisable that the applicant is also aware to avoid delaying their bank opening application and cooperate with the bank in order to provide all necessary information in order for their application to be processed without any delay.

“Digital nomads will have the right to stay in Cyprus for up to one year, with the right of renewal for another two years, and they can be accompanied by their family members”



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Probst Partner AG was established in 1995 in Winterthur. Its lawyers advise and represent domestic and foreign corporations, organisations and individuals regarding all legal and tax aspects with a connection to Switzerland. Ever since, PROBST PARTNER AG has had a strong focus on advisory work related to cross-border transactions and legal issues in an international environment. Its core business also includes legal advice on immigration, employment and tax aspects related to the relocation of private clients to Switzerland.

PROBSTPARTNER

QUESTION ONE

Is your jurisdiction developing immigration legislation to deal with 'digital nomads' – and if so, how is this set to change in the year ahead?

In contrast to many other countries, the Swiss legislator has not yet introduced any special rules applicable to digital nomads in particular and it is currently not apparent that immigration legislation will develop in the near future. Hence, digital nomads are subject to the usual entry, residence and work permit provisions in Switzerland as illustrated hereafter.

Depending on nationality, a visa is required for entering Switzerland. As a rule, nationals of member states of the Schengen Area are generally exempt from any visa requirements. By contrast, nationals of Non-Schengen states are typically subject to certain visa requirements unless an exemption applies by virtue of a mutual agreement between the country of origin and Switzerland or unless such nationals are already in possession of a Schengen visa from another Schengen member state. In any case, it is advisable to inquire about the current visa requirements on a case-by-case basis before travelling to Switzerland.

Based on the Agreement on the Free Movement of Persons, EU/EFTA nationals enjoy the right to settle and work in Switzerland. For stays up to three months, no residence permit is required. For stays exceeding three months, a residence permit must be obtained, either in the form of a short-term residence permit (L EU/EFTA permit) for stays lasting between three and twelve months or in the form of a residence permit (B EU/EFTA permit) for stays of more than one year or for an indefinite period. The residence permit is usually valid for five years, after which it can be extended if required. The (short-term) residence permit is subject to certain conditions. Among others, EU/EFTA nationals must provide sufficient proof that they have enough financial assets to cover their living expenses during their stay in Switzerland and that they have sufficient health insurance coverage.

Third-country (non EU/EFTA) nationals are allowed to stay in Switzerland for a period of three months without a (short-term) residence permit being required. However, as mentioned above, depending on nationality, a visa may be required for entering

Switzerland. For any stays exceeding three months, a residence permit would be required. Such a permit is usually only granted in exceptional cases (e.g. where the applicant has close relatives in Switzerland or in the case of important public interests).

QUESTION TWO

What taxation issues do clients need to be aware of if they are emigrating long-term or exploring temporary remote work visas in your jurisdiction?

Individuals performing gainful activities in Switzerland are basically subject to Swiss taxation by virtue of either unlimited or limited tax liability. Swiss residents are subject to unlimited tax liability, which means that they are taxed on their worldwide income and wealth, excluding certain income from sources abroad. A person is deemed a Swiss resident, if he or she stays in Switzerland for a consecutive period of at least 30 days and exercises a gainful activity or for a consecutive period of at least 90 days without gainful activity. Beyond that, such gainful activities performed by non-Swiss residents are also subject to limited tax liability in Switzerland.

According to the double taxation treaty rules, a short-term stay in Switzerland does typically not establish a tax residency for treaty purposes so long as the centre of vital interests of an individual still remains in his or her home country. Income from employment is basically subject to tax in the country of residence only unless such employment is exercised in another country. However, in such cases the right to tax remains with the country of residence if the work activity in the country abroad lasts 183 days or less within a period of twelve months and the remuneration is not paid by a local employer or a local permanent establishment. Hence, if a digital nomad works in Switzerland for less than half a year, for an employer located abroad, the right to tax typically remains with the individual's country of residence and no income tax would be due in Switzerland accordingly. However, it is recommendable that the taxation modalities applicable to a specific case be analysed more in-depth on a case-by-case basis.

QUESTION THREE

Are there any challenges related to short-term residency that clients need to be aware of, and how can they overcome them?

Short-term residents may become subject to the Swiss social security in certain constellations. In such cases, registration with the competent Swiss social security administration and payment of Swiss social security contributions is required. It is strongly advised to check the coordination rules applicable between the EU/EFTA member states and Switzerland respectively between the non-EU/EFTA country of residence and Switzerland, as the case may be, in advance. Likewise, it is also recommended to clarify on a case-by-case basis whether or not mandatory Swiss health insurance is required.

Third-country (non-Schengen) nationals who wish to travel to Switzerland should inquire about visa requirements early on. All visa requirements for each nationality are electronically published by the State Secretariat for Migration. As a rule, short-term visa applications (up to 90 days, Schengen visa) can be submitted electronically at the earliest six months before entering the Schengen area.

TOP TIPS

Extending a short-term stay to permanent

✓ For stays in Switzerland of up to three months, no residence permit is required. Digital nomads who wish to extend their stay in Switzerland may apply for a (short-term) residence permit directly at the resident's registration office of the local municipality. Note that such applications should be submitted early enough, otherwise it may become necessary to leave Switzerland after a period of three months.

✓ In the context of applying for a residence permit, proof of sufficient funds and health insurance coverage will be required. Proof of sufficient funds can be provided for example by submitting the employment contract or bank account statements. Health insurance coverage must be confirmed with a valid certificate of entitlement issued by a foreign health insurance provider if continued insurance is eligible in the country of residence. Note that for third-country (non EU/EFTA) nationals an extension of a short-term stay in Switzerland to a period exceeding three months is basically not possible, unless in exceptional cases. However, a third-country national may basically return to Switzerland for another three months after staying abroad for a minimum period of 3 months.

“Digital nomads who wish to extend their stay in Switzerland may apply for a (short-term) residence permit directly at the resident's registration office of the local municipality”



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Dominique Pepin is an attorney-at-law with a Master's degree in taxation. She was formerly a Tax Partner with Ernst & Young in Barbados and founded Tailored Tax Solutions group in 2015. Dominique served as a director on the Board of the Barbados International Business Association (BIBA) until recently and was Chair of BIBA's Tax Committee for several years. She was a member of the Task Force which advised Government on the new tax regime implemented in January 2019. Dominique represented BIBA on the Barbados Treaty Negotiating Team up to 2022. Dominique has authored a number of articles on various tax topics. Her extensive experience has allowed her to be a speaker at many conferences in Barbados, Latin America and Canada.

Tailored Tax Solutions is a boutique firm specialised in tax and immigration matters. Our team is composed of experienced legal and accounting professionals, who can assist you with all tax aspects in relation to your activities in the Caribbean. Our services include, but are not limited to, tax advisory services; assistance with immigration matters; preparation of corporate and personal tax returns as well as Value Added tax returns; assistance with tax audits; objections and appeals, and; generally providing tax advice in respect of Barbados tax law and practice. We also render tax services in regard to other Caribbean countries such as Antigua, Dominica, Grenada, St. Kitts, St. Lucia, and St. Vincent and the Grenadines



QUESTION ONE

Is your jurisdiction developing immigration legislation to deal with 'digital nomads' – and if so, how is this set to change in the year ahead?

In response to the Covid-19 Pandemic, and as a means to diversify Barbados' tourism product, the Remote Employment Act, 2020 was introduced to establish the Welcome Stamp Programme, a 12-month visitor visa which permits individuals to work remotely from Barbados where proof of the following is provided:

- Valid passport.
- Annual income of at least US\$50,000 generated outside Barbados.
- Valid health insurance for each individual.

The visa was initially aimed at non-nationals looking to work for their overseas employers while in Barbados. However, due to increased interest, the scope of the programme was expanded to anyone who satisfies the visa conditions and provides proof of sufficient funds to support themselves whilst in Barbados including families, students and retirees.

In 2021, the Remote Employment Act was amended to allow for the renewal of the visa for an additional year upon the payment of the renewal fees.

The Welcome Stamp Programme has since gained further recognition as observed by Savills Plc's Impact Report 2022 Executive Nomad Index, which ranks Barbados as the fifth destination out of fifteen countries for long-term remote workers. The Index continues to note that Barbados has the fastest internet in the Caribbean, ranking the island number one within the region, surpassing St. Lucia and the Bahamas.

QUESTION TWO

What taxation issues do clients need to be aware of if they are emigrating long-term or exploring temporary remote work visas in your jurisdiction?

A holder of the Welcome Stamp visa is treated as a visitor in Barbados during this 12-month period. A visa holder is therefore restricted from working locally as the main condition of the visa is for the individual to generate income outside of Barbados. For income tax purposes, a visa holder is deemed non-resident in Barbados, and is liable to tax on his Barbados income only, which should be nil. Advice should be sought in the home country to understand if such an individual is still considered tax resident and subject to tax in that country. If the tax residency is challenged, the tax treaty would not apply to assist in determining the actual tax residency of that individual since Barbados does not recognise a Welcome Stamp holder as tax resident.

Where an individual seeks to emigrate long-term to Barbados, he may become tax resident in Barbados, benefit from its tax treaty network and its advantageous resident non-domiciled tax regime where foreign income is taxed only when remitted to Barbados. Options other than the Welcome Stamp must be considered. An individual with a work permit or a Special Entry Permit (SEP) may qualify as tax residents if they meet the criteria discussed below.

Under a work permit, non-nationals are allowed to work in Barbados for a Barbados company.

SEP grants an individual the right to reside in Barbados only. Similar to the Welcome Stamp Programme, a SEP holder is prohibited from working for a Barbados employer. However, unlike the Welcome Stamp, the SEP allows an individual to become tax resident in Barbados. There are two (2) categories of SEPs available:

- High Net Worth Individuals with US\$2 million investment in Barbados and a net worth of at least US\$5 million.
- Retirees with US\$300,000 real estate investment in Barbados.

Barbados also offers a one year SEP which affords an individual time to find and make the required investment in Barbados.

Considering this, an individual with a work permit or SEP should be aware that where one of the following criteria is met, they shall be deemed resident in Barbados and must file personal tax return in Barbados annually:

- 1) Spend an aggregate of more than 182 days in Barbados per year; or
- 2) Be deemed ordinarily resident, that is;
 - a. Have a permanent home available to you at all times; and
 - b. Give notice to the Barbados Revenue Authority (BRA) that you intend to reside in Barbados for at least 2 years.

QUESTION THREE

Are there any challenges related to short-term residency that clients need to be aware of, and how can they overcome them?

Employers of individuals seeking to utilise the Welcome Stamp Programme should have consideration for the potential risk of creating a permanent establishment (PE) in Barbados.

TOP TIPS

Extending a short-term stay to permanent

✓ Make a list of all the things you consider important for a great quality of life: outdoor activities, good schools, great restaurants, nice weather, proximity of family & friends, etc. These aspects are less important on a short-term stay but take forefront when a permanent move is considered. If you love the theatre but you need to take four flights to get to one, the idyllic beach where you bought your new home may lose its charm quickly.

✓ Speak to your tax advisors both in Barbados and in your home country beforehand so you are fully aware of the tax implications of your relocation in both countries. Planning your relocation allows you to better manage your affairs. It's much easier, and often less onerous, to plan in advance than to try to fix mistakes after the fact.

✓ Speak to people who relocated to Barbados to hear about their experience but please be careful. They can give you great tips on restaurants or your new dentist, but their business and/or financial situation is most likely very different from yours and the tax advice they received may not be suitable for you. Advice from professionals specially tailored to your needs is invaluable and can avoid many headaches.

A PE is often defined as a fixed place of business through which the business of an enterprise is wholly or partially carried on: this includes amongst others, a place of management, a branch or an office. The scope of a PE can extend to include a person, acting on behalf of an enterprise, who habitually exercises, in another country, an authority to conclude contracts in the name of the enterprise.

The risk of establishing a PE may result in any income earned from the services provided through the PE to be considered taxable in Barbados. In the event that a PE is established, the administrative burden of the enterprise may increase as there will be a requirement to register the company locally and file corporate documents and tax returns annually. The income of the PE would be subject to corporate tax at the maximum rate is 5.5%.

In light of the potential risk posed by remote work, we recommend that advice be sought by the company prior to allowing employees who exercise a certain level of authority to work remotely from a foreign country. The existence of a Double Taxation Treaty with Barbados may provide PE protection which should be considered. Barbados is party to Treaties with approximately 40 countries, including the United States, the United Kingdom, and Canada.



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WDM International is a full-service Maltese firm that was founded in 1994. Truly entrepreneurial in character and form, the firm offers a multidisciplinary service to local and international clients ranging from tax and corporate consultancy to accountancy, audit and business advisory services.

The firm prides itself on a large client portfolio spread over a broad range of industries, from financial services operators to entrepreneurs and high net worth individuals. The firm is at the forefront in offering consultancy in a number of lines of expertise, including: international and local tax advice; private clients; governance, risk management and control; corporate structuring and compliance; finance and cashflow management; valuations and business modelling; asset protection and succession planning.



QUESTION ONE

Is your jurisdiction developing immigration legislation to deal with 'digital nomads' – and if so, how is this set to change in the year ahead?

Malta has been attracting digital expats from the EU for a number of years, ever since Malta became a hub for gaming companies. Over time Malta has become a multi-cultural, cosmopolitan country. The technological investment and change in mindset brought about by Covid-19 accelerated the shift from the traditional office towards remote working, enabling certain individuals to continue performing their employment or self-employment activities from anywhere in the world.

The introduction of the Nomad Residence Permit (NRP) in June 2021 enables third country nationals (TCNs) to legally reside and work from Malta, even when the entities or customers to whom they are providing services have no presence in Malta. TCN applicants are subject to an initial application fee of €00 (application can be renewed annually at a further cost of €00) and must:

- Be over 18 years of age.
- Have a valid travel document.
- Possess a valid property rental/purchase agreement covering the whole duration of the permit upon approval of application.
- Hold a valid health insurance policy upon approval of application (not applicable to British nationals).
- Enjoy a minimum gross yearly income of €2,400.
- Prove that they are working remotely from Malta using telecommunications technology.
- Further prove that they fall under any one of the following three categories: contractually employed, self-employed or freelance.

If the prospective applicant has a contract with a foreign employer but will be offering services to a Maltese subsidiary company, the prospective applicant will not be eligible to apply for the NRP.

After the completion of a background verification check on each application to ensure that the main applicant and any of his dependents is not, or may not be, a potential threat to

national security, public policy or public health, and subject to all the eligibility criteria being satisfied, an NRP is issued. This will in turn allow the NRP holder to travel within the Schengen Area without the need of a visa as long as the permit is valid.

With millions of people on the move worldwide and the increasingly popular trend to work remotely, Malta acknowledges the impact that the NRP might have to its economy. Consequently, and in order to further enhance the already thriving digital nomad community on the island, authorities are constantly striving to improve the application process whilst investing heavily in infrastructure to continue attracting digital nomads to its shores.

QUESTION TWO

What taxation issues do clients need to be aware of if they are emigrating long-term or exploring temporary remote work visas in your jurisdiction?

International migration is intimately intertwined with issues of taxation, both in home and destination countries. Individuals who intend to emigrate to Malta, whether on a long-term or temporary basis, must take into account tax consequences and all the reporting formalities. Any foreign national who resides in Malta for more than three months is required to apply for a Residence Permit.

From a tax perspective, when transferring residence it is necessary to consider whether a nexus remains for continuing liability in the home jurisdiction of the emigrant. Such a nexus may typically consist of a place of residence, a holiday home or an extended regular physical presence (stay). If not properly addressed, this may result in a situation where the individual will be simultaneously resident in two countries (under their domestic tax laws). Malta has concluded over 75 double tax treaties with a number of countries and jurisdictions. These treaties regulate taxing rights between the countries that are parties to the respective treaty and allocate the income that a person obtains between them so as to avoid double taxation. The double tax treaty is applied to determine in which of the two countries the individual will be considered resident for treaty purposes.

Another tax issue to consider when changing residence is exit tax, an expatriation tax or an emigration tax, which are taxes imposed on persons who cease to be tax resident in a country. This often takes the form of a capital gains tax against unrealised gain attributable to the period in which the taxpayer was a tax resident of the country in question. In most cases, expatriation tax is assessed upon change of domicile or habitual residence.

Any prospect for tax optimisation ought also to be considered. An individual who is both ordinarily resident and domiciled in Malta is taxed on his worldwide income. However, in Malta emigrants would, upon satisfying certain criteria, usually be considered as being resident but not domiciled. This could result in possible optimal tax planning scenarios, as resident but not domiciled individuals would only be taxed in Malta on income arising in Malta and income arising abroad but remitted to Malta.

Another tax issue to look into revolves around social security and the rights of long term or temporary residents to access social protection benefits. Such individuals may be denied access or have limited access to social security because of their status or nationality or due to the insufficient duration of their periods of employment and residence. This is particularly important in the case of long-term benefits (such as those for invalidity and old age) where qualifying periods may be considerable. In the area of social security, Malta enjoys several bilateral and multilateral agreements that govern reciprocity between the contracting parties and ensure that their nationals receive equal treatment.

QUESTION THREE

Are there any challenges related to short-term residency that clients need to be aware of, and how can they overcome them?

A particular challenge arises from the fact that a person may be tax resident in Malta even if he is also resident for tax purposes in another country. In such situations, an individual would be considered as having dual residence for tax purposes, with the latter potentially giving rise to significant tax implications.

When an individual is present in Malta for more than 183 days (in any particular year) they will be considered as tax resident in Malta for that year, regardless of the purpose and the nature of the individual's stay in Malta. On the other hand, an individual who does come to Malta to establish residence becomes resident from the date of his arrival, regardless of the duration of his stay in Malta in any particular year.

It is therefore very important to understand when an individual is considered as tax resident in a jurisdiction. Tax rules can be complex and there may be different rules in each country. Consequently, the best way to overcome such challenges is to get proper advice as to the tax implications arising in the home and destination countries, giving particular attention to any double tax treaty provisions to tackle, for example, the determination of where an individual resides and how foreign income can be taxed.

“In order to further enhance the already thriving digital nomad community on the island, authorities are constantly striving to improve the application process whilst investing heavily in infrastructure”


REAL ESTATE

Inflation

Our network of Real Estate members stay up to date on how the market is being affected by inflation. They highlight where the opportunities are and what investors should be aware of, particularly in the rental market. They touch on any significant risks of real estate prices stagnating due to rising inflation vs declining GDP and how can investors protect themselves.





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Meriç Bahçivan is head of the real estate practice at Başgöl. He advised Turkish and international clients including commercial and individual sellers, purchasers, and investors on complex real estate, construction, and infrastructure projects and transactions. He also represented clients before Turkish courts on real estate related cases including the zoning plan, licensing, and expropriation disputes. He frequently advises non-Turkish clients on their real investments in Turkey. One of such clients noted in respect of a real estate matter that “[he is] excellent and very responsive – our matter was dealt with efficiently, in particular maintaining communication with us throughout. Highly recommended”.

Başgöl is an Ankara and İstanbul based full-service law firm providing tailored, practical, and high-quality legal services. Başgöl has the capability to assist international clients regarding their operations in Turkey. We offer:

- **An experienced and agile team:** The attorneys at Başgöl have represented Turkish and international clients during their time in Başgöl as well as their previous employments at reputable local and international law firms (including White & Case and SNR Denton).
- **A tailored and responsive legal service:** Our dynamic team will listen and understand you and then tailor the legal services to meet your unique expectations. At least

QUESTION ONE

How is the real estate market in your jurisdiction being affected by inflation?

The exceptionally high inflation in 2022 has materially increased real estate prices throughout all segments of the real estate market. As of October 2022, the annual inflation stands at 65.26% according to the official statics, whereas alternative sources (e.g., the Inflation Research Group, ENAG) note that the actual annual inflation is around 185.34%.

The expectation that inflation will get even worse going forward also created a demand-pull inflation and contributed to an overall rise in the real estate market, especially in housing prices.

Another driver of dynamism in the Turkish real estate market is Turkey’s rather liberal approach to the acquisition of real estate by foreigners. Foreign individuals, foreign companies and Turkish SPVs with foreign capital can obtain real estates without burdensome requirements. By way of such acquisitions, foreigners can also acquire citizenship or a residence permit if the sale price of the property is more than USD 400,000. After becoming a Turkish citizen, they will not be subject to certain limitations imposed on foreigners, such as obligation to develop a construction project, or to deposit foreign currency as the sale price into a Turkish bank. Turkish jurisdiction also limits obtaining real estates that are allocated to some certain purposes (e.g., agricultural lands). By way of acquiring

one partner will always pick up the phone and act very quickly when needed.

- **Particular expertise in the real estate investments of international clients:** We offer creative solutions in terms of our client’s real estate investments in Turkey. We know the locals’ perceptions and the practices of land registries as well as other authorities. We conduct thorough due diligence. As such, our team helps you to mitigate risks in contemplated transactions at early stages. We also have a good track record of settling real estate disputes for our non-Turkish clients and thus avoiding lengthy court proceedings.

citizenship, such limits shall no longer be imposed either. Real estate has always been an appealing investment tool in inflationist environments. We observed that this was one of the motivations behind the increasing demand in 2022. Rentals, like sales prices, escalated since the real estate markets seem to be out of the woods after the pandemic. As such, investors have actively searched for lucrative real estate acquisition opportunities that can potentially enable shorter return periods for their investments.

That said, starting from the third quarter of 2022, real estate transactions started to slow down, especially due to increasing difficulties in terms of access to financing.

It should also be noted that Turkey aimed at mitigating the adverse effects of high inflation on the residential sector before the elections in 2023, by way of introducing a massive real estate project in September 2022. This is described as “the grandest of its history”. With the participation of Housing Development Administration of Turkey (aka TOKİ), 500,000 residential flats, 1 million parcels of land, and 50,000 commercial properties will be made available with a favourable financing model.

QUESTION TWO

Are there opportunities that real estate investors should be aware of, particularly in the rental market?

Commercial real estates that surface 15 million square meters will be available with the completion of the Istanbul Finance Centre (IFC) in 2023. IFC is a long-awaited project that will help Istanbul to compete with other global financial hubs. The Law on IFC came into force in June 2022. This law introduces many incentives and exemptions for the investors who obtain “Participant Certificate to IFC” on different topics varying from tax, wages, and social security premiums to work permits for foreign individuals:

- 100% of the corporate income tax will be exempted for the years between 2022 and 2031. The exemption rate will be 75% starting from 2031.
- Transactions will be exempt from banking and insurance transactions tax.
- Employees will be exempt from income tax at varying rates and from obligation to hold work permits.
- Lease agreements on real estate in IFC will be exempt from all fees and stamp duty.
- 50% of the project will be allocated to public authorities and financial institutions.

QUESTION THREE

Does your jurisdiction pose any significant risk of real estate prices stagnating due to rising inflation vs declining GDP? If so, how can investors protect themselves against these risks?

In 2022, Turkey introduced a 25% cap on the annual TRY rent price increase rates in respect of residential leases. The cap does not apply to commercial estates and will stay in effect until July 2023. Prior to this amendment, Turkish Code of Obligation envisaged a cap corresponding to the yearly consumer price index. This means that if the 25% cap had not been introduced, such limit would have been 65.26% as of November 2022. While the destiny of this cap after July 2023 is still unknown, it

TOP TIPS

Making informed real estate decisions in an inflation-hit market

It is worth exploring the opportunities in Istanbul Finance Centre (IFC). The IFC contains 15 million square meters of commercial real estate. The project is expected to be completed in 2023. The Law on IFC, which came into force in June 2022, introduces various incentives and exemptions regarding taxes, wages, and social security premiums as well as work permits for foreign individuals.

Non-Turkish individuals may consider Turkish citizenship opportunities through acquisition of real estate. If the sale price of the property is more than USD 400,000, foreigners can also acquire Turkish citizenship through such acquisitions. After becoming a Turkish citizen, they will not be subject to certain limitations imposed on foreigners (such as obligation to develop a construction project, or to deposit foreign currency as the sale price into a Turkish bank).

has led to many eviction disputes. Under Turkish law, landlords are entitled to eviction only on limited grounds, such as defaulting two times on the lease payments. The landlords may need to wait up to three years for a court’s decision on eviction and its enforcement. As a practical mitigant going forward, the landlords might consider obtaining an undated letter of eviction from the tenants: a remedy for eviction, the validity of which has recently been accepted by court decisions. This should avoid lengthy and difficult litigation proceedings.

“Foreign individuals, foreign companies and Turkish SPVs with foreign capital can obtain real estates without burdensome requirements. By way of such acquisitions, foreigners can also acquire citizenship or a residence permit if the sale price of the property is more than USD 400,000”



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DSC Legal Rechtsanwalts-gesellschaft mbH (DSC Legal) focuses on rendering legal advice and providing notary services with respect to real estate law, asset management and projects in the area of renewable energies. The firm is highly experienced in the aforementioned areas of consulting, with special expertise in advising national and international clients. DSC Legal's objective is to create an alternative to the major law firms on the German market. The firm combines first-class legal consultancy with personalised service for its clients. The partners believe that it is only possible to provide professionally and personally individual, yet comprehensive legal services, by focusing on the expectations of clients.

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QUESTION ONE
 How is the real estate market in your jurisdiction being affected by inflation?

Developers and real estate investors had to deal with substantial supply chain problems in the aftermath of the global pandemic that not only delayed the realisation of residential building projects, but also led to massively increased costs. The war in Ukraine and particularly its huge impact on energy prices in Germany have made matters worse. Unsurprisingly, the number of newly constructed buildings as well as the number of building permits have noticeably dropped in recent months. On the other hand, the financial leeway for potential homeowners is narrowing due to extraordinarily high inflation: the German consumer price index has exceeded a level of 10% in October 2022, a figure unseen in the past 70 years. In addition, the European Central Bank's attempt to fight inflation resulted in a steep mortgage rate hike that has made financing substantially more expensive. While a mortgage loan with a fixed interest rate for 10 years cost less than 1% per annum a year ago, the interest rate has now risen above 4%. As residential real estate has become much less affordable, asking prices are currently stagnating and, in some areas, slightly declining for the first time in 13 years. Potential buyers seem to turn to the rental market instead.

QUESTION TWO
 Are there opportunities that real estate investors should be aware of, particularly in the rental market?

Unlike in many other countries, the residential rental market in Germany is, compared to the owner occupier market, very sizeable. In general, more than half of German households are renters, and in Berlin, as one of the top seven German metropolitan areas, even more than 80%. Demand for housing in metropolitan areas continues to exceed the number of available homes by far. Given the increasing backlog of homes to be built and the additional pressure on the German rental market caused by refugees from Ukraine and other countries, a strong rise in apartment rents can currently be observed. In Berlin, for example, the rents for newly built apartments have increased by approximately 10% within the last year. Due to exorbitant energy costs, the operating costs for less energy efficient buildings have recently, however, risen to new heights, so that landlords of older buildings may not be able to increase the net cold rent similarly. It can be assumed that, under the current market conditions, the quality of the asset (in terms of location, building standard, energy efficiency and maintenance level) will play an increasingly important role for its valuation and the price that sellers can achieve in case of an exit.

Even though many investors who financed their property in Germany with bank loans agreed in the past years on fixed interest periods of 10 to 20 years (or even longer), those who require re-financing in the coming months and years will have to pay much higher interest rates. Particularly in cases where the purchase was highly leveraged and only small repayments were made, (re-)financing could become stressful. Taking into account the increased operating and maintenance costs, particularly for older, unrefurbished buildings, and the darkened exit prospects due to higher financing costs, it may well be that purchasing opportunities will emerge on the market that have not been available for a long time.

Equity strong investors – particularly with a value-add strategy such as energy efficient refurbishments – should therefore await buying opportunities on the German residential real estate market. That is especially true for U.S. dollar-based investors who can currently benefit from their historically strong currency. To the same extent the euro has depreciated against the U.S. dollar, German real properties have become cheaper on a U.S. dollar basis. The current strength of the U.S. dollar therefore presents an excellent window of opportunity for investments in German real estate.

QUESTION THREE
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TOP TIPS
 Making informed real estate decisions in an inflation-hit market

Indexed leases in which the rent can annually be adjusted according to the index change (CPI or similar index) can provide a good protection against inflation, particularly in times of extraordinarily high inflation. Rent adjustments based on indexed leases are usually also less prone to dispute because the rules are clear for both parties. While an upwards-only rent review is not permissible under German law, i.e. an index change could potentially also lead to a rent decrease, in the past decades only the CPI has usually risen.

Modernisations and refurbishments of buildings that improve their energy efficiency can substantially increase the value of the real property and provide the basis to achieve higher net rents. Public subsidies are often available to finance energy efficient refurbishments. The acquisition of older buildings in need of such refurbishments at a discount could therefore be a potential value add investment strategy for investors in German real estate. U.S. dollar investors can currently benefit from the strength of their currency that makes German real estate comparatively cheaper.

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Loren & Kean Law is a boutique law firm located in Palm Beach and Fort Lauderdale, Florida. At Loren & Kean Law, our clients are partners in the creation of their legal strategies. Our clients know and rely upon our ability to consistently deliver high-quality legal services and innovative and pragmatic business solutions in a timely and cost-effective manner. Each case is unique, which requires listening to our clients and determining the best course of action based on their individual needs. Our team's top priority is resolving clients' cases quickly and efficiently, which requires us to be responsive to their needs and adept at navigating the legal system. In addition, we have a great deal of respect for each other and our clients, as demonstrated through honest communication, courtesy and trust.

QUESTION ONE

How is the real estate market in your jurisdiction being affected by inflation?

Florida is a large state with over 25 million residents, separated into very distinct economic environments: South Florida (Miami, Fort Lauderdale and Palm Beach); Tampa/West Coast; and the rest of the state. Though the populated markets in South Florida and Tampa/West Coast can be treated similarly, the remainder of the state is far more rural and should be treated separately.

So far, the data demonstrates that higher inflation has had little or no impact on the residential real estate market in the more populated and wealthy areas. Recent surveys of title companies reveal that a significant portion of real estate purchasers for properties in excess of \$1 million do so without lenders and that that percentage has been increasing. These markets are also driving Florida's continued population growth. According to data from the U.S. Census Bureau, Florida's population grew by 14.6% from 2010 to 2020, but the number of housing units increased by just 9.7%. Since Covid-19, for example, these markets have seen a greater influx of financial service and technology companies, all with well-paid employees looking for luxury residential real estate. Also, without a personal state or local income tax, Florida residents often have ten percent of their income to spend on other expenses, such as real estate.

For working class families, and more rural areas, the outlook may not be as rosy. Residential real estate prices have increased significantly at an energetic pace. Although they are predicted to "soften" in 2023, there is no indication of any drastic decrease in prices. Add that to increased interest rates and cost of living inflation, working class families in Florida are limited in new home purchases. Construction industry data for new residential homes in this price range (i.e., \$250,000-\$700,000) will continue at a healthy pace through 2023, but are expected to slow at the end of the year. Existing owners can sell their homes at a profit, but cannot afford the replacement. Rather than holding out hope that prices will suddenly return to where they were pre-pandemic, many buyers and sellers are exploring alternative options like "rent-to-own" programs.

Renovation at all levels, rather than new purchases, is robust and will continue to be very strong. Contractors have a backlog of work, and often are more selective in choosing projects.

Contractors are not willing to negotiate prices and not agreeable to commit to a completion date. Currently, a contractor's entitlement to additional monies for the increased cost of materials between the time of contract execution and delivery is often an area of intense contract negotiation. Compromises and protections are available to both the owner and contractor if each party is willing to take some risk.

"Residential real estate prices have increased significantly at an energetic pace. Although they are predicted to "soften" in 2023, there is no indication of any drastic decrease in prices"

QUESTION TWO

Are there opportunities that real estate investors should be aware of, particularly in the rental market?

In the last two years, residential rental rates have rapidly increased to levels never seen before, at all price points. Rental offerings are open for only a few days, with landlords only accepting tenants with the best credit, no pets and, sometimes, those that can pay a greater portion of rent up-front. It is not uncommon for rental rates during the rental season to range from \$15,000-\$30,000 per month for above-average properties.

The greatest opportunity for investment may be purchasing a home that is outdated and devote the time and money to modernise. Expect to invest in a new kitchen, bathrooms, flooring and wall coverings. Easier said than done – renovation costs (and longer construction times) have increased significantly. Expect to pay a contractor the costs of the renovation, plus a fee of 20-25%. But, once the property is available to rent, obtaining a tenant should not be difficult, especially if you are contemplating renting only for the winter season. Investors often recoup all their annual costs for a winter seasonal rental, and then use the property for their own use or pure profit for the remainder of the year.

On the commercial side, investment in the development and construction of 55+ and assisted living facilities has been strong and has no indication of slowing. Florida's population is older and often wealthy. The demand for high-end assisted living facilities and people willing to pay that cost will not decrease. Anecdotally, there is a strong demand for "mid-level" assisted living facilities. In other words, facilities that are clean, safe and offer some of the same services, but at a less expensive cost.

TOP TIPS

Making informed real estate decisions in an inflation-hit market

Do not expect a crash in residential housing prices in the near future. For the last two years, residential prices have quickly sky-rocketed to levels hardly seen before. While there are signs that residential prices have and will continue to "soften," local experts do not expect any significant correction. The population of Florida continues to increase, supply is low and many purchasers buy in cash. Do not wait for a significant downturn in prices to buy – it is unlikely to happen.

Even though assisted living facilities has been a lucrative market for some time, it is never too late to invest in this space. The Florida population is older and the need for comfortable, assisted living facilities will continue to increase. There is a real need for a "the middle market" option in this area. Be fair and transparent. Hiding information or a hidden agenda will eventually be counterproductive and only come back to haunt you. The best protection from litigation is a good and solid relationship developed with the other party. No lawyer or agreement can replace that.

Residential rentals have been red hot for a number of years and are expected to continue. Many local people purchase older homes that need some renovation and then rent. Rents are so high that landlords are recouping investments in a much shorter time period. Not surprisingly, some people cannot afford to live where they work and are willing to live in less expensive areas just outside main cities. Don't be afraid to investigate more suburban areas.

QUESTION THREE

Does your jurisdiction pose any significant risk of real estate prices stagnating due to rising inflation vs declining GDP? If so, how can investors protect themselves against these risks?

For the residential market, the influx of buyers moving from out of state is expected to prevent prices from any significant decrease, as opposed to places with stagnant or shrinking populations. If an investor has purchased at the height of the market and cannot sell at a profit, the rental option or rent-to-own option is often used to hold the property until prices start to rise. Rental markets are strong for investors.

The significant risk lies in the ownership and rental of office space. With more employees working remotely, businesses have less need for large office space and are opting, instead, for smaller rentals with office hoteling or "hot desking." Hoteling is reservation-based unassigned seating, whereas hot desking is reservation-less unassigned seating. Both are popular. Office building owners are expected to create smaller rental premises to accommodate this increased demand.



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David A. Lum is a Principal at McCarthy, Lebit, Crystal, and Liffman with 30 years of experience in Real Estate, Corporate and M&A transactions. David has extensive experience in all aspects of the corporate real estate life cycle. His resume includes representation of a national retailer in the leasing, development and roll out of over 100 free standing retail stores nationwide and another national retailer in the divestiture of hundreds of facilities throughout the Midwest. David's practice focuses on facilitating successful real estate transactions and helping business clients to maximise their real estate investments, including negotiating new office leases, developing new facilities, facilitating sale-leaseback transactions and completing structured finance transactions. He also frequently advises on real estate issues in M&A transactions. During his career, David has represented diverse players on all sides of the real estate transaction, including corporations, local and national real estate developers, borrowers, bankers, buyers, sellers, landlords and tenants, and leverages this experience to optimise the transaction process. David has been recognised for his high caliber work in Real Estate Law and Corporate Law by Best Lawyers in America® (2013-2023) and Ohio Super Lawyers®.

McCarthy, Lebit, Crystal & Liffman Co., LPA is a nationally acclaimed, full-service law firm offering a wide range of sophisticated legal solutions in over twenty practice areas. We provide a full suite of business, tax, and litigation services to start-ups, small and medium sized businesses, and publicly traded corporations, as well as offer personalised services for individuals and families. Success for our clients is achieved through skilled and tenacious advocacy, personal attention, and thoughtful, informed advice. McCarthy Lebit's distinguished real estate practice focuses on protecting and advancing client interests in all types of real estate transactions and disputes. Our breadth of experience includes negotiating commercial real estate transactions, drafting real estate documents and agreements, and handling litigation matters related to development, construction, and property transactions. Our expertise extends across the full life cycle of a real estate transaction, including acquisition, development, leasing, financing, divestiture, condemnation and property tax contests.

QUESTION ONE

How is the real estate market in your jurisdiction being affected by inflation?

Rising construction costs are dramatically affecting development and re-development projects. During the life cycle of a development project, from initial design through the bidding process, budgets can be affected by 20%, 30% or even up to 50%. In addition, supply chain issues present significant hurdles when coordinating any construction or development project. Typical terms in standard construction contracts are no longer taken for granted. Very rarely will you find a contractor that is willing to take on any significant price risk in a fixed fee contract because prices can change so quickly and dramatically. Likewise, if there is any supply chain risk, contractors will be reluctant to agree to per diem contracts or other penalties for delayed delivery.

Further, conversions of older office buildings to residential properties are skyrocketing in downtown markets. Hybrid and remote work schedules for office workers, increased cost pressures due to inflation and the demand for modern amenities for employees that do come to the office are causing a "flight to quality" in the office market. Two major trends are driving this hot market: firstly, a surge in central business district office users seeking to reduce their office footprint, and secondly, the value proposition of adding modern amenities often lacking in an older building. This is creating opportunities for investors willing to renovate and convert old, empty

office buildings for residential, hotel and similar uses. Cleveland and Cincinnati, with their relatively old central business office stock, rank nationally in terms of recent conversion projects. Because the office buildings are quite old, many of those projects qualify for tax incentives and credit programs like the Historic Tax Credits, New Market Tax Credits, Opportunity Zone Tax Credits, Tax Increment Financing, Special Improvement Districts, Community Reinvestment Act, Downtown Redevelopment Program and, if large enough, the Transformational Mixed-Use Development Program. While these conversion projects can be expensive and a huge undertaking, Ohio's tax incentives and credit programs, often stacked on one another, provide the necessary push to get these huge projects off the ground.

QUESTION TWO

Are there opportunities that real estate investors should be aware of, particularly in rental markets?

One way in which an inflationary market presents an opportunity for real estate owners and/or investors is a corresponding reduction in tax value. As interest rates rise, so does the cost of capital used to purchase real estate. If it costs a buyer/investor more to finance a property, then there is less money left to go towards the principal. This will certainly affect the value of real estate in an inflationary market. If rising interest rates are causing a reduction in value in your area, make sure to seek a tax reduction with your local Board of Revision.

Those seeking a reduction of value should consider the following tips. If you do not have a recent arms-length sale of the property to support the requested value, you will usually need to obtain and present a professional appraisal to support the proposed reduction in value. Make sure that the potential savings on any proposed reduction in tax value justify the cost of obtaining a professional appraisal. Further, those seeking tax reductions will likely benefit from a new law Governor DeWine signed into effect in Ohio on 21st April 2022 that makes it significantly more difficult for School Boards or other third parties to file complaints against the valuation of property or appeal determinations of value by the Board of Revision.

QUESTION THREE

Does your jurisdiction pose any significant risk of real estate prices stagnating due to rising inflation vs. Declining GDP? If so, how can investors protect themselves against these risks?

As the cost of capital goes up due to rising interest rates, the cost of real estate will correspondingly stagnate. The key to avoiding this price stagnation is to find the "hot" market or submarket. In Ohio, despite rapidly rising interest rates, the demand for industrial and warehouse space is still at historically high levels. In the northeastern Ohio market, the vacancy rate for industrial space is hovering around 3% – a historically low vacancy rate. That high demand is keeping cap rates high and attracting interest in speculative buildings from investors. End users are having a difficult time finding new space if they need to grow and frequently elect to expand their existing facilities. High demand, low vacancy and difficulty finding new development opportunities are keeping this market quite hot compared to other sectors of the real estate market.

TOP TIPS

Making informed real estate decisions in an inflation-hit market

Sellers should beware of price "re-trading" in an inflationary environment. In any typical commercial real estate purchase agreement, there will be a due diligence period where buyers have a chance to inspect the property, obtain title or survey, financing, permits, approvals and the like before they are fully committed to purchase the property.

Due diligence periods can be as short as 30 days or as long as 120 days (or longer with extensions). In a hyper-inflationary environment, the cost of capital for the buyer can change dramatically with rising interest rates before the due diligence period expires. If the cost of capital goes up, then the value of the property will likely go down. If the buyer is still within its due diligence period, they may ask the seller for price concessions – or re-trade the deal – based on the increased cost of capital to acquire the property.

The Seller is then in a tough position because the cost of capital has gone up for all potential buyers and if you terminate the deal and put the property back on the market, all other buyers will be facing the same pricing pressures based on rising interest rates. So as a seller, protect yourself by: shorter due diligence periods; looking for cash buyers with adequate capital; asking for evidence of financing approval; verifying that down payment capital is available; limiting the right to terminate during due diligence to property condition issues only and finally; asking for "hard money" (non-refundable) to compensate you if the buyer walks out on the deal.

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BUSINESS LAW FIRM Fontana Ros is a medium-sized law firm based in Milan, Bolzano, with a correspondence office in Dubai with focus on International Business Law and Real Estate. The law firm provides high legal advice, assistance and support in international business law on a tailor-made basis. Drawing on the diverse backgrounds of our passionate attorneys, BUSINESS LAW FIRM Fontana Ros provides comprehensive legal services to every client it represents. For matters falling into an international context BUSINESS LAW FIRM Fontana Ros can use its access and connections to experts in various jurisdictions to implement an integrated, comprehensive consulting approach.



QUESTION ONE

How is the real estate market in your jurisdiction being affected by inflation?

Real estate is considered, in all jurisdictions, as a leading and master indicator of economic trends. At first sight, the real estate market would not seem to be directly linked to inflation, which is calculated on prices of goods and services across the economy over time. In fact, economics and finance are worlds that strongly influence each other. Hence inflation – which is currently the global concern, even in our jurisdiction – also has a major impact on the real estate sector.

In Italy, as inflation rises so do rents and rental fees (which in most cases are indexed to inflation through annual increases), the cost of raw materials, interest rates, and even the value of underlying assets. Rising inflation and the consequent rising prices also affect real value of savings. Notwithstanding this, high inflation could certainly be seen as an incentive to invest in real estate assets.

Real estate and real assets in general represent a 'certain' value in our jurisdiction and one that remains over time precisely because in the long-term, property values/prices tend to rise along with other prices, causing returns on real estate investments to show a positive correlation with inflation.

By virtue of the above, we can state that in our jurisdiction, inflation has not caused a decrease in the percentage of investments in the real estate sector. This is also confirmed by the EBA, which, in its document entitled "Thematic note on residential real estate exposures of Eu banks - risks and mitigants", highlighted the current "Overheating of residential real estate markets".

Of course, this is not a rule and no historical period is the same as others, but certainly the current conditions and current inflation provide an optimistic scenario for real estate as long as attention remains high and investment researches take place in the right areas and, above all, with the right time horizon.

QUESTION TWO

Are there opportunities that real estate investors should be aware of, particularly in the rental market?

Some investment opportunities provide more certainty and carry less risk for investors. As already pointed out, inflation enhances and promotes investment in real estate, but this does not mean that all investment opportunities are worth seizing.

Even though real estate has proven to be a refuge from inflation, it is still necessary to weigh one's investments. There are indeed some sectors that have less flexibility (e.g. residential real estate) than others that can be managed more easily (logistics sector, hotel industry, etc.).

The investment opportunities and inflation sensitivity of a property also have to reckon with its location and use. For an investor in the rental market, it is appropriate and necessary to focus on areas where rents are indexed to inflation and where tenants are able to afford any possible increase. Rising rents can provide a buffer against inflation.

The type of property is also important. Investing in environmentally friendly buildings offers better protection against rising operating costs or with respect to "fixer-upper" properties. Buildings that have the potential to reduce energy consumption through innovative design, sustainable materials and renewable energy sources will be cheaper to run than others. In addition, rents for such buildings can also be higher.

“While for other European countries the risk of real estate prices stagnating due to rising inflation and falling GDP could be significant, in Italy this will happen less”

QUESTION THREE

Does your jurisdiction pose any significant risk of real estate prices stagnating due to rising inflation vs declining GDP? If so, how can investors protect themselves against these risks?

The risk of real estate price stagnation has been present in Italy for the last 10 years. While house prices have soared throughout Europe over the last decade, because bond yields have gone to zero and mortgages to buy houses (as a source of revenue) cost almost nothing, this has not always been the case in Italy.

This circumstance stems from the fact that in recent years Italy has not grown economically as much as other European countries. This means that while for other European countries the risk of real estate prices stagnating due to rising inflation and falling GDP could be significant, in Italy this will happen less; this is due to the fact that despite the low economic growth in recent years, real estate investments in Italy have

TOP TIPS

Making informed real estate decisions in an inflation-hit market

- ✓ Rely on the experts (lawyers and financial experts) who will certainly know how to minimise risks, investigate thoroughly and perform adequate due diligence.
- ✓ Diversify your investments while remaining in the real estate sector; diversifying your portfolio will also help you bear even less risk if any of the areas suffer from stagnant demand at any time.
- ✓ Be fair and transparent. Hiding information or a hidden agenda will eventually be counterproductive and only come back to haunt you. The best protection from litigation is a good and solid relationship developed with the other party. No lawyer or agreement can replace that.

always increased and real estate start-ups and banks or listed real estate investment companies can confirm this. It is obvious that on the one hand, inflation and falling GDP could make an investment riskier. However, as long as bond yields are still low and mortgages do not rise too much (rising interest rates are actually slower than inflation), real estate is still attractive as an investment asset (as opposed to shares, which are certainly riskier and more dependent on GDP developments).

This is confirmed by various studies carried out by experts of real estate matters, according to which – despite inflation and falling GDP – the price of housing purchases in Italian tourist locations and destinations have risen by an average of 3% in one year, with peaks of up to 7% in some areas. Prices are rising because demand is holding up, but also because of a rather technical fact. The rise of raw material prices, at all levels, has also affected construction, creating a general rise in the prices of new build properties. In the real estate market, however, prices generally move together, so if new property goes up, existing second-hand property also goes up accordingly.

Investors should protect themselves against these risks by adopting measures such as: avoid lending for house purchase or mortgage loans, moving towards properties located in big cities or highly touristy areas, choosing sustainable and environmentally friendly properties or buildings, indexing rents to inflation.



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Peter Moerman graduated at the Catholic University of LEUVEN in 2001 (cum laude) and obtained in 2002 an additional degree in Tax law at the same Catholic University of LEUVEN. Peter Moerman started his career in 2002 with the law firm Verhaegen Walravens, where he specialised in Commercial & Economic Law. He subsequently specialised in Construction and Real Estate law at the law firms Wery & Associés (2004-2005) and Mattijs Voet & Co (2005-2021). During his career at Mattijs Voet & co he achieved a Postgraduate degree in Real Estate at the Catholic University of LEUVEN in 2006 and was appointed Partner in 2011. In December 2021 Peter joined Seeds of Law to strengthen its real estate and construction law team.

Seeds of Law is a full-service law firm providing legal consultancy and advocacy, specialised in corporate law, real estate, construction law and administrative law. Our mission statement "All the flowers of tomorrow are in the seeds of today" is put into practice by our team every day. Offering strategic and sustainable solutions go hand in hand with our client-focused and pragmatic approach. We like to reflect creatively and out-of-the-box in partnership with our clients to help them on a targeted, proactive and effective manner, making their projects a reality and resolving all the obstacles that arise in the process.



QUESTION ONE

How is the real estate market in your jurisdiction being affected by inflation?

We see three important issues regarding inflation that influence the market. Firstly, in our jurisdiction the price of building materials is rising. This problem is influencing the execution of contracts that were signed before the inflation crisis. Contractors are facing a rise in prices from their suppliers, but can only pass on these increasing prices to their customers when this was explicitly foreseen in a hardship clause in their contract.

In new legislation that will be implemented in our New Civil Code, the law will include a legal hardship rule that can be invoked by the contracting parties, that did not include any hardship clause in their contract. In any case of hardship, the contracting parties can start a procedure in court pursuant to this new legislation in which the judge can be asked to adapt the contractual clauses in function of the hardship that is occurring.

This new legislation will be applicable on contracts, that will be signed after the 1st January 2023 and that do not foresee any other arrangement regarding hardship problems.

Secondly, another important modification in the legislation is that the indexation of renting prices is temporarily restricted for residential real estate that has a low sustainability level. Therefore, landlords of residential real estate with such a low sustainability level cannot fully charge the costs of inflation to their renters, which has a negative impact on the yield of their property. In this way, older buildings with a low sustainability level will be confronted with a faster diminishing value.

We make a point of fully familiarising ourselves with our client's company and sector, which allows us to strategically think together. Our client portfolio and expertise range from small and medium sized enterprises to listed companies and entrepreneurs, operating throughout the world and in a wide variety of sectors, as well as government services and other administrations. The diversity we have achieved in our team allows us to better understand our customers and their concerns, to assist them in a broad array of matters and to offer services in nine different languages

A third important issue is the general increase of the interest rates that are charged on the credit market. A consequence of this increase is that every investment or mortgage will be more expensive in the future as long as this increase has not stabilised.

Over the medium term, this will have consequences for the yield of real estate investments and more in general for the value of real estate.

QUESTION TWO

Are there opportunities that real estate investors should be aware of, particularly in the rental market?

Due to legislation that was implemented as a consequence of the energy crisis, there are important restrictions in the indexation of renting prices of residential real estate in Belgium. Only buildings that have a certain level of sustainability in function of energy consumption, can be a subject of a full indexation of its renting price in order to pass on the market's inflation.

It is possible that this crisis legislation will become permanent legislation, which will affect the price setting for buildings in function of their sustainability. Sustainable real estate will become more interesting for investors, and will see consumers searching to find real estate that is adapted to their needs in a market with increasing energy prices. In this way, we expect that sustainable real estate will become more valuable. This increase in value will not only be limited to residential real estate.

Considering the limitation of the sources on the credit market as a consequence of increasing interest rates, real estate investors will try to create real estate that can assure them the highest return on investment. It is logical that the return on investment will be higher for real estate that is able to handle with the challenges of the future over the medium term, as well as the long term.

This is a second reason why investments in sustainable real estate seems to be the opportunity to face and exit the crisis in the most competitive way.

"It is possible that this crisis legislation will become permanent legislation, which will affect the price setting for buildings in function of their sustainability"

TOP TIPS

Making informed real estate decisions in an inflation-hit market

✔ **Invest in sustainable real estate.** This the best way to cope with today's inflation problems due to limitation of indexation of renting prices and the market's need to reduce energy costs. At the same time, the investor's real estate portfolio will be prepared for the long term, because sustainability will remain important.

✔ **Give special attention to the drafting of contractor agreements,** which should foresee a balanced arrangement for hardship problems. Hardship problems such as increasing prices of building materials will continue to affect the market and will remain a risk for real estate investments. Contractual clauses are the best protection against hardship problems.

✔ **Stay as accommodating as you can be in the relationship to customers and suppliers.** Everybody is having a hard time because of inflation difficulties. A certain solidarity with all players in the market can have a positive effect on your real estate business over the medium and long term

QUESTION THREE

Does your jurisdiction pose any significant risk of real estate prices stagnating due to rising inflation vs. Declining GDP? If so how can investors protect themselves against these risks?

It's not only the limitation of the indexation of renting prices of residential real estate, that should cover the inflation, that's affecting renting prices.

The cost of living has increased as well due to inflation and is influencing renting prices in a negative way. Renters have a lower budget to spend on their rent, while buyers have the same problem with their budget for the purchase of real estate units.

Therefore, we can speak of a pressure on the yield of real estate investments, especially for real estate that isn't sustainable. In order to cope with this pressure, it is important to invest in the sustainability of real estate, which is the best safeguard to preserve a balanced yield.

Of course, other value drivers, such as the location of the real estate, will maintain their significance.

Real estate investors will have to be even more creative to use the scarce funds in the market in the best possible way. It will be important to make decisions that make sure that the real estate portfolio will be competitive in the short term, but the same real estate portfolio should be prepared for the medium and long term needs that the market will have.



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Jaco Lötter is currently responsible for a large part of Tonkin Clacey Inc.'s strategic management, with an aim to build on the firm's considerable reputation as a specialist property law firm. After his admission as an attorney in 1995, Jaco joined Tonkin Clacey Inc. as a novice conveyancer to pursue his interest in property law. Not only did he attain his professional skills from the ground up, but his intimate exposure through the years to every level of the firm served as invaluable preparation for his current position as senior director. Jaco completed a Diploma in Business Management in 2000 from Damelin Management School, where he received the Merit Award as the top student. Jaco is a Fellow of the Association of Arbitrators and a trained mediator from the Society of Mediators, London, through the Association of Arbitrators.

Tonkin Clacey Inc. is a boutique property law firm in Johannesburg, South Africa, with an ever-growing, diverse team of highly experienced professional staff focussing on property development and property finance. The firm's principal objective is to offer specialised legal services relating to property transactions, property development, and property and development finance. The firm has established a strong network of relationships with colleagues, banks, local authorities, deeds registries and the South African Revenue Service, all of which complement a service offering vital to property transactions. The firm practises primarily in the areas of property developments and commercial agreements relating to legislative and regulatory advice, corporate property finance mortgage bonds, conveyancing, and various notarial services. Additional services ancillary to our core business such as wills, estate planning, administration of deceased estates and antenuptial agreements add further value to client needs.

QUESTION ONE
Inflation and the real estate market

Although real estate should form part of any diversified investment portfolio, investing in property is often viewed with scepticism due to restricting factors such as liquidity and transaction costs. However, a clear advantage of investing in property is that it is usually an excellent hedge against inflation. This is the view of Dawie Roodt, Chief Economist at the Efficient Group, a South African asset manager and financial services group. South African property prices, as is the case in many other jurisdictions, have mostly kept up with inflation, but Roodt cautions investors of a downside. Rising inflation and elevated inflation expectations resulted in the South African Reserve Bank steadily raising the prime lending rate over the past 12 months with a cumulative 350 basis points, from a 50-year low of 7% to the current rate of 10.5%. More hikes are likely, with the current interest rate cycle predicted to peak by the second quarter of 2023. Interest rates are the single most important variable to affect property prices and although it remains resilient despite the current economic climate, further increases in the lending rate will slow price increases further. Residential building plan approvals is an important indicator of the direction in the market. South Africa's largest business website, BusinessTech, reports that John Loos, property sector strategist at FNB Commercial Property, has raised a red flag on weakening planning approvals over the third quarter of 2022, which

possibly points to a slowing in building activity. The slowdown is likely due to rising inflation, hiked interest rates, and the knock-on effects of rising costs in mortgage debt servicing. Due to the residential market being highly credit-dependent and thus interest rate sensitive, the slowing in planning activity reflects the combination of recent rising inflation and interest rates.

Chris Renecle, CEO of veteran Johannesburg property developer, Renprop, agrees. Increasing construction- and finance costs have slowed the number of new residential building projects, with the price of units in new developments comparatively higher than similar units in existing buildings. However, Renecle believes that in an environment where rental increases fell behind the interest rate increases of 30% over the past year, investment opportunities still exist for the discerning investor.

QUESTION TWO
Investment opportunities and the rental market

There's been a noticeable improvement in investment property buying year to date, reports influential South African business weekly, Financial Mail. According to data from mortgage originator ooba, the number of home loan applications processed by banks to fund buy-to-let properties surged almost 30% in the third quarter of 2022. Industry players believe the rebound has been supported by the cumulative interest rate increase which has pushed up the relative cost of buying vs renting. Says ooba CEO Rhys Dyer: "The sharp uptick in buy-to-let and investment buying is indicative of the rising demand for rentals as rising interest rates put the dream of home ownership on hold."

Post-pandemic South Africa saw an increasing number of households relocating from the metropolitan centres of Gauteng to the coastal regions of KwaZulu-Natal and the Western Cape, with investment buying in the Western Cape's Garden Route and Cape Town areas being particularly pronounced. Dyer reportedly says the increased demand for rental properties in the Western Cape has been triggered by this wave of "semigration", reinforced by lifestyle opportunities and perceptions of relative safety and good governance. This trend is confirmed by rental processing firm, PayProp, whose 2022 second-quarter data indicate Gauteng has the highest vacancy rate in South Africa, while the Western Cape has the lowest.

Dawie Roodt believes that in an emerging country like South Africa property investment opportunities always exist. However, the nature of these opportunities is changing. Until recently, student accommodation and retail properties were favourites, but these have lately lost momentum. Roodt sees opportunities in the entry-level residential market, especially targeting young civil servants.

According to the Financial Mail, PayProp figures show that all nine provinces in the country recorded positive rental growth in the second quarter of 2022. With the latest rental and house price data from PayProp and ooba taken as benchmarks, buy-to-let investors are earning an average gross annual rental yield of 6.8. When property running costs are deducted, average net yields typically drop to about 4.8%. However, depending on property size and type, price bracket and supply-and-demand dynamics, gross rental yields of 8%-12% can be achieved in many areas.

TOP TIPS
Making informed real estate decisions in an inflation-hit market

- ✔ Plan an investment strategy carefully, underpinned by sound professional advice. Buy-to-rent investments require a long-term view to allow for capital appreciation and increasing rental income over the investment period. By contrast, acquiring a property to renovate and sell pose different capital and tax risks.
- ✔ "Location, location, location" is a mantra that rarely fails. A modest investment in a growing, well-maintained neighbourhood will in time always return better yields than the largest property in a declining area. Insight into regional and local socio-economic trends is essential to make informed investment decisions.
- ✔ Capital is readily available. Take advantage of competition between lenders to secure attractive interest rate concessions on home loans.
- ✔ Short-term rental pools offer investors with furnished units a guaranteed rental return over a fixed term and over longer periods can provide a hedge against interest rate fluctuations.
- ✔ 2 - 3 bedroom sectional title units of R1.5m - R2m in secure, well managed complexes close to amenities like schools, shopping centres and hospitals always deserve a good look.

QUESTION THREE
Risk of real estate prices stagnating

Roodt explains that inflation typically supports rising property prices, although high or rising inflation means monetary policy will also become more restrictive through higher interest rates. This in turn tends to slow rising property prices further. In a South African context, property prices are likely to continue to increase in nominal terms, but in real terms prices could fall.

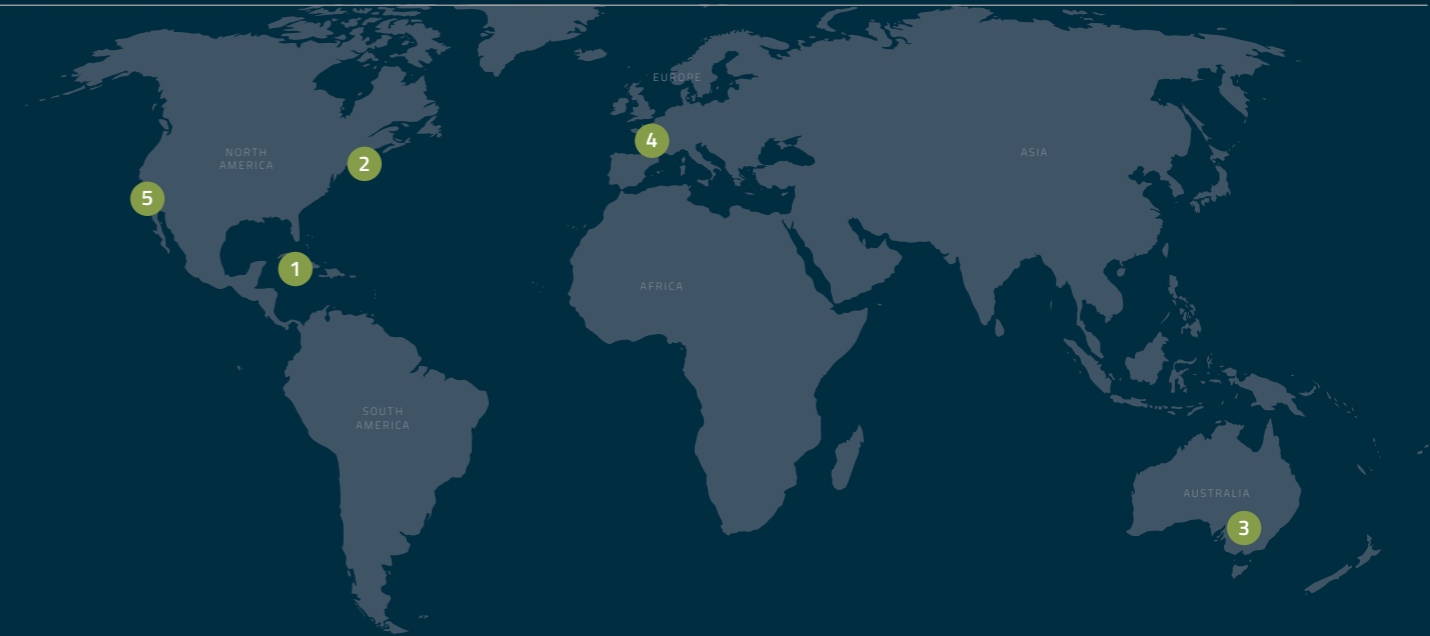
Despite a drop in residential transfers registered in deeds registries, depressed property activity, and lower sales volumes the Financial Mail reports that property prices are still climbing, albeit at a slower pace. First National Bank economist Siphamandla Mkhwanazi says housing prices in many global capitals are now overheated and as a result South Africa is still relatively more affordable. Factors he cites that support the market are real disposable-income growth having overtaken house-price growth for the first time in 20 years, and still readily available credit.

Encouraging for investors, the Financial Mail concludes that counter-intuitive as it may seem given the stuttering economy, high unemployment, infrequent electricity supply and more rate hikes to come, the South African housing market is not expected to come crashing down soon.

INSOLVENCY

Crypto

IR Global’s insolvency members showcase their expertise on how cryptocurrency is treated as an asset in a bankruptcy proceeding in their jurisdiction, what legal tools can be used against exchanges to recover stolen cryptocurrency and how can the filing of a Chapter 15 proceeding be used in connection with a cryptocurrency exchange that is the subject of a foreign insolvency proceeding.




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Ian Lambert is a partner at Broadhurst LLC in the Cayman Islands with more than 19 years of experience in complex contentious matters, with 12 of those years practising in the Cayman Islands. Ian has a wide range of expertise and experience in the financial services and offshore environment with a significant concentration in the areas of multi-jurisdictional commercial litigation, insolvency, restructuring, asset recovery, contract disputes, fraud litigation and trust litigation.

Ian is rated as a "Global Leader" in restructuring and insolvency by Who's Who Legal and is ranked as a top lawyer in Chambers and Partners Ian advises and appears in all levels of the Courts in the Cayman Islands on behalf of provisional and official liquidators, receivers, creditors, shareholders, directors and other professionals in relation to a wide variety of disputes.

Broadhurst LLC is a Cayman Islands offshore specialist litigation and corporate boutique law firm advising both local and international clients. Our areas of expertise include: litigation & dispute resolution; corporate & commercial; insolvency & restructuring; trusts; compliance & regulatory; private client; personal injury; insurance; and conveyancing.

Internationally recognized, Broadhurst is ranked in Chambers and Partners, the Legal 500 and GRR 100.

As a client focused law firm, we work closely with our clients to identify and resolve their legal issues with practical and creative solutions. We are frequently engaged in local and international

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Kyle Broadhurst is the Managing Partner of Broadhurst LLC. He has been practicing law in the Cayman Islands for over twenty years and is accustomed to tackling challenging areas of the law. Ranked as a top lawyer in Chambers and Partners which notes Kyle to be a "strong strategist and litigator" who "understands the ins and outs of Cayman Islands law." Clients are reported as "valuing his ability to take on complex mandates." His areas of experience include insolvency, bankruptcy, fraud, judgment enforcement, trust and complex commercial disputes. Kyle is regularly instructed in high value matters with multi-jurisdictional elements.

disputes and transactions by multinational institutions, high-net-worth individuals, creditors, debtors, directors, officers, shareholders, liquidators, receivers and other professionals. We frequently handle Cayman litigation and transactions on behalf of non-Cayman law firms and in-house counsel.

As a client first law firm, we apply our extensive knowledge and experience to vigorously represent the interests of our clients while at the same time providing them with the highest standard of professionalism through our exceptional responsiveness, service, and approachability.

QUESTION ONE

How is cryptocurrency treated as an asset in a bankruptcy proceeding in your jurisdiction?

While the Cayman Court has not yet had the opportunity to rule on the matter, it is highly likely that cryptocurrencies will be treated as property of the company which the liquidators are empowered to collect and which is to be applied in satisfaction of the company's liabilities.

In this regard, it is instructive to look at the position under English law. In November 2019, The UK Jurisdiction Taskforce issued an opinion in which it determined that, although the classification would ultimately depend on the nature of the crypto-asset, in principle crypto-assets should be treated as property and that they had no doubt that they could be property for the purposes of the English Insolvency Act 1986. In the subsequent decision in *Science Ion v. Persons Unknown*, the English Court held that cryptocurrencies are capable of being property for the purpose of

obtaining a Norwich Pharmacal order.

Also of interest is the decision in the BVI in the matter of *Smith and Kardachi* (in their capacity as joint liquidators of Torque Group Holdings Limited) v. Torque Group Holdings Limited (in liquidation) wherein the BVI Court determined that cryptocurrencies were to be considered an "asset" for the purposes of the BVI Insolvency Act 2003, notably the definition of an "asset" under the BVI Act accords with the definition of "property" within the English Insolvency Act 1986. Those definitions also closely coincide with the definition of "property" as stated in the Cayman Interpretation Law (1995 Revision). Based upon the foregoing, it is anticipated that the position in the Cayman Islands will likely be that cryptocurrencies will be treated as property falling within our insolvency regime.

QUESTION TWO

Are there legal tools in your jurisdiction that can be used against exchanges to recover stolen cryptocurrency?

The Cayman courts have yet to make a decision concerning the freezing of or the recovery of cryptocurrency assets. However, we are quite confident that Cayman Islands investors/litigants will be able to use the standard and wide-ranging legal tools in the Cayman Islands against exchanges to recover stolen cryptocurrency.

One of the key legal tools that can be used in the infancy of a legal proceeding is a worldwide freezing order. The Cayman courts can grant worldwide freezing orders ordering a defendant, an unidentified defendant and/or third parties not to deal with, diminish or dispose of assets. The definition of asset encompasses informal control and the definition of owner extends to assets that are legally or beneficially owned. Worldwide freezing orders cover worldwide assets and will need to be recognised by the applicable foreign court for them to have effect outside of the Cayman Islands. Failure to comply with a freezing order that contains a penal notice is contempt of court and can be punishable with fines, asset seizure and imprisonment.

At the time the Cayman courts make the worldwide freezing order they will often make disclosure orders ordering the defendant to disclose their worldwide assets. The defendant will often have very limited time (i.e., two days) to disclose their worldwide assets by location and value.

To prevent a defendant, an unidentified defendant and/or third parties from disposing of or diminishing the value of a specific asset, a claimant can seek a proprietary injunction from the Cayman courts.

A Norwich Pharmacal order can be obtained before an action is commenced against third parties that are unlikely to be defendants to the action and who could have relevant documents and/or information. These orders almost always contain an order prohibiting the third parties from disclosing the existence of the order to any other party.

A Bankers' trust disclosure order is also available against third parties to assist claimants with a proprietary claim in tracing assets of the defendant.

TOP TIPS

Taking legal and financial protection of crypto-assets in insolvency proceedings

Act swiftly. In order to protect a cryptocurrency asset, it is vital to move quickly to identify and secure the asset. Given both the fluidity of the asset and the ongoing development of the law it is important to take legal advice and action promptly.

Engage professionals. Experts with knowledge in blockchain forensics and transaction tracing are a vital tool. These professionals are experts in de-anonymizing users, leading in the investigation of the cryptocurrency asset flow, and determining the whereabouts of digital assets and will provide legal and financial protections to investors.

Understand the exchange. It is important to understand the laws of the country where the assets are held. This is significant because the UK Court found that law of the jurisdiction in which the cryptocurrency assets are located is the law of the jurisdiction where the individual or company who owns the asset is domiciled. Investors should consider selecting a cryptocurrency exchange that is domiciled in the jurisdiction in which they are domiciled or a jurisdiction in which the laws and case law are favourable to investors in claims of misappropriation against cryptocurrency exchanges.

Consider Chapter 15 proceedings. Given the global nature of cryptocurrency and the risk of claims in multiple jurisdictions, Liquidators should consider seeking foreign assistance such as Chapter 15 proceedings. This will provide the benefit of both an automatic stay in the United States and access to discovery within that jurisdiction.

QUESTION THREE

How can the filing of a Chapter 15 proceeding be used in connection with a cryptocurrency exchange that is the subject of a foreign insolvency proceeding?

Provided it can meet the requirements of U.S. law, a cryptocurrency exchange could seek to utilise Chapter 15 proceedings the same way as other non-US companies that are subject to foreign insolvency proceedings. Commonly, Chapter 15 is utilised by such companies to obtain the benefit of an automatic stay which provides protection from creditors seeking to file lawsuits or tie up assets in the United States. Another common form of relief sought from the U.S. Bankruptcy Court is the ability to obtain discovery concerning the company's assets, affairs, rights, obligations and liabilities.



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Thomas Curran has developed his practice over the past four decades, focusing primarily on bankruptcy and insolvency proceedings and debt and asset recovery. He assists clients in navigating in asset recovery, assignments for the benefit of creditors, foreclosures, repossessions, and the sale of distressed assets and businesses. He has extensive experience in all facets of cross border insolvency litigation and cross-border debt and asset recovery strategies in an insolvency scenario, with particular emphasis on United States/Western Europe jurisdictions. He has cultivated extensive knowledge and skill in commercial and complex business litigation including asset location and recovery, veil piercings, corporate officer and director liability, successor liability, fraudulent conveyance, transfer litigation and constructive trust litigation.

Curran Antonelli represents a wide variety of clientele in litigation and transactional matters throughout the United States and Western Europe. We have navigated a broad range of commercial litigation cases, including debt and asset recovery, cross-border insolvency, institutional creditors' rights, and "bet the company" litigation, and have earned a winning track record throughout the United States. Our group has a unique speciality in counselling on financing, buying and selling, and investing in distressed assets. We assist domestic and foreign firms with these complex transactions from a debt and asset recovery perspective.

QUESTION ONE

How is cryptocurrency treated as an asset in a bankruptcy proceeding in your jurisdiction?

Recently, Texas passed novel laws regarding cryptocurrency, or "virtual currency" as it is referred to in the bill. The "Texas Virtual Currency Bill" is cryptocurrency-specific legislation and was passed in Texas when Governor Abbott signed House Bill 4474 into law on 15th June 2021. The bill adds amendments to the Texas Business & Commerce Code, specifically addressing virtual currency.

As a result of these amendments, Texas now recognises the legal status of virtual currency, ensures that cryptocurrencies are privy to commercial laws under Texas regulations, and guarantees legal rights to cryptocurrency holders. The Texas Virtual Currency Bill went into effect 1st September 2021.

Despite the Texas Virtual Currency Bill Texas, and the federal government, still do not recognise cryptocurrencies as legal money. They do, however, recognise them as a taxable commodity that can be used for transactions. The Internal Revenue Service (IRS) does not consider cryptocurrencies to be legal tender but does consider them to be taxable income that must be reported when they are provided for services. Taxes apply to cryptocurrency comparably to a mutual fund, stock or bond.

In bankruptcy proceedings, cryptocurrency holdings are appearing more and more frequently on the bankruptcy schedules of debtors. In Texas, cryptocurrency can be classified in a few different types of asset categories. For instance, it can be classified as "cash" or a "financial security", yet it does not fit into either classification. At a minimum, debtors are expected to disclose the asset as an 'other asset' on their bankruptcy schedules.

Currently, on the issue of bankruptcy exemptions in Texas, cryptocurrency is not perfectly classified as any type of "exempt asset" within which crypto would qualify.

Further, similar to any other asset, a transfer of cryptocurrency within two years of a bankruptcy filing could be susceptible to a claim of fraud. If the debtor transferred the cryptocurrency voluntarily or involuntarily with the actual intent to hinder, delay, or defraud any entity to which the debtor was

indebted, it may be considered a fraudulent transfer. Regardless of how cryptocurrency is classified, it is likely that it will be treated as any other valued asset for asset recovery purposes.

The most significant issue that the bankruptcy courts will face regarding cryptocurrency is valuation. The cryptocurrency market is highly volatile, and no tangible market exists. Each cryptocurrency has its own software for valuation, and it changes frequently. A trustee in bankruptcy would need to take additional steps to understand the software for the specific cryptocurrency in question and would require access to the exchange on which that cryptocurrency is traded for any type of meaningful valuation to be undertaken.

QUESTION TWO

Are there legal tools in your jurisdiction that can be used against exchanges to recover stolen cryptocurrency?

Stealing cryptocurrency is considered theft in the state of Texas. On the Federal level, losses suffered due to cryptocurrency scams are a tax-deductible event. The loss is reported on IRS Form 1040, Schedule D. In Texas, if one discovers that their cryptocurrency has been stolen, there are legal avenues to pursue both on the criminal side as well as the civil side of the law. In terms of remedies, there are experienced blockchain searchers who are capable of investigating the theft and recovering the funds for a fee.

Reports of cryptocurrency crimes are on the rise. In September 2022, a woman was faced with indictment for theft of more than \$300,000 in Bitcoin after a January 2021 burglary. The items stolen included a safe containing Bitcoin account passwords and a follow-up investigation revealed that the passwords had been used to access accounts and transfer \$570,000 of Bitcoin.

Most recently, on 30th November 2022, the United States Attorney's Office for the Eastern District of Texas released court documents indicting 21 people in Texas for their involvement in a scheme to launder stolen money using cryptocurrency. The parties involved opened and controlled business bank accounts in the names of the companies. They persuaded people to deposit, wire and/or transfer funds into the bank accounts and mail funds to specific addresses. In total, this scheme resulted in more than \$300 million in money laundering transactions, forfeited millions of dollars in both cash and cryptocurrency and impacted thousands of victims. The parties involved were charged with wire fraud, mail fraud and conspiracy.

QUESTION THREE

How can the filing of a Chapter 15 proceeding be used in connection with a cryptocurrency exchange that is the subject of a foreign insolvency proceeding?

Filing for Chapter 15 Bankruptcy is often a strategic decision for most parties. The use of Chapter 15 for cryptocurrency related companies is a useful tool to prevent creditors who want to file lawsuits or lock assets within the United States. Chapter 15 establishes United States procedures for filing claims in the foreign proceeding and facilitates asset sales approved in the foreign proceeding.

One of the most notable recent examples is Three Arrows

TOP TIPS

Taking legal and financial protection of crypto-assets in insolvency proceedings

Educate yourself: If you find yourself involved in legal or insolvency proceedings involving cryptocurrency assets, it is imperative to understand both the cryptocurrency market in your jurisdiction for transfer and valuation analysis. Moreover, as the cryptocurrency market is constantly changing, so are the laws regulating it. Therefore, an initial analysis of the statutory regulatory construct in your jurisdiction will guide the initial asset protection and/or recovery strategy.

Report crimes: If you suspect cryptocurrency has been inappropriately transferred or stolen before or during a bankruptcy proceeding, do not hesitate to report such transfer to authorities including the United States Trustee's office, as quickly as possible. Cryptocurrency is treated the same as any other theft despite its virtual properties, yet its fluid nature may render recovery elusive if sought after using traditional asset recovery methodologies.

Consider Chapter 15 where applicable: With the undeniable wave of cryptocurrency related insolvency proceedings expected throughout the world, utilising Chapter 15 of the Bankruptcy Code to assist in the recovery and protection of cryptocurrency assets which are related to a foreign insolvency proceeding, will be imperative. Many US courts have already ruled that cryptocurrency is subject to freezing orders under Chapter 15.

Capital (3AC), a Singapore-based crypto hedge fund that recently filed for Chapter 15 bankruptcy. On 6th July 2022, Voyager Digital, a New York-based cryptocurrency firm, filed for chapter 11 relief in the United States Bankruptcy Court for the Southern District of New York after it sent notice of default to 3AC for failure to make payments on loans ascribed as 15,250 bitcoin and \$350 Million (approximately \$650 million). In response, 3AC initiated an insolvency proceeding in the British Virgin Islands and on 1st July 2022, 3AC commenced a Chapter 15 proceeding in the Southern District of New York, requesting to recognise the British Virgin Islands insolvency proceedings. Just over a week after the Chapter 15 filing, on 12th July 2022, Bankruptcy Judge Martin entered an order freezing 3AC's assets.



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QUESTION ONE

How is cryptocurrency treated as an asset in a bankruptcy proceeding in your jurisdiction?

There is not yet any settled law on the legal character of cryptocurrency as an asset in Australia, although recent case law suggests that crypto is to be treated as a form of personal property. As such, crypto-assets are subject to existing Australian laws (including common law), which apply to personal property.

In bankruptcy, a person's interest in crypto on or after the date of bankruptcy will therefore vest in the Bankruptcy Trustee as an asset of a bankrupt estate and may be realised for the benefit of creditors. Ownership of any crypto-assets must be disclosed and failure to do so may constitute an offence under the Bankruptcy Act 1966 (Cth). Treatment of crypto in each administration will vary depending on the circumstances and the particular context in which it was being used (i.e., trading crypto as an investment as opposed to using a small amount of crypto to buy goods and services). The position is similar in corporate insolvencies.

Given the volatility of the value of digital assets, the insolvency practitioner appointed must immediately investigate and take steps to secure crypto-assets from the debtor and transfer them to a wallet held by the insolvency practitioner to be sold to ensure the assets are not transferred or lose their value. The proceeds then form part of the estate to be administered to creditors.

QUESTION TWO

Are there legal tools in your jurisdiction that can be used against exchanges to recover stolen cryptocurrency?

There are a variety of legal tools available in Australia to recover stolen cryptocurrency, including:

- Obtaining a Court Order for the detention, custody, preservation or inspection of property, which can extend to directing a person to produce the public and private keys to the wallet holding a crypto-asset;

- By using legislative powers available to insolvency practitioners to compel third parties (such as crypto exchanges) to provide information such as identities of account holders and public and private keys to the wallet containing the crypto, in order to ascertain the account holders, take possession of the stolen crypto or obtain injunctive relief against the exchange to freeze the relevant account. Such powers include: inspection of books and records; production of books and property of the bankrupt/ insolvent company; public examinations; search warrants and seizure of property by the insolvency practitioner clawing back stolen crypto transferred to third parties.
- Legal regimes under cross-border insolvency laws (the UNCITRAL Model Law on Cross-Border Insolvency) and other Australian legislation provide tools for tracing and recovering stolen crypto-assets transferred across borders, such as obtaining discovery and evidence from parties located in Australia without having to first initiate legal proceedings against those parties. Using the discovery power, the foreign insolvency practitioner could access client information collected by Australian exchanges to which cryptocurrency has been traced. Further, the insolvency practitioner is able to obtain relief, such as discovery or freezing orders which allows them to take control of the debtor's crypto-assets located in Australia.

In addition to the legal tools available, there are also crypto analysis tools available to assist in identifying, classifying and realising digital assets.

Given the highly volatile and complex nature of crypto-assets and recent collapses of large crypto-exchanges (ACX and FTX), including in Australia, the regulation of digital assets is becoming of increasing concern. In the past 12 months, there has been a push for greater regulation of digital assets in Australia to promote confidence and growth whilst safeguarding consumers against unnecessary financial harm. In 2022, a draft Bill titled Digital Assets (Market Regulation) Bill 2022 was introduced loosely following draft Bills introduced in Singapore and the United States around licensing and regulation of crypto stablecoins. Under the proposed legislation, the standards for digital asset exchanges operating in Australia would include regulation of the conduct of participants, protection for participants, segregation and management of customer funds, disclosure and cybersecurity requirements and for key personnel to be based in Australia. Stakeholders will be following closely to see whether it is passed into legislation in 2023. Introduction of the legislation will no doubt provide more tools for the recovery of stolen crypto.

QUESTION THREE

How can the filing of a Chapter 15 proceeding be used in connection with a cryptocurrency exchange that is the subject of a foreign insolvency proceeding?

Many crypto exchanges operate or are incorporated outside of Australia. A crypto exchange that is the subject of insolvency proceedings in a foreign jurisdiction may hold crypto or other assets in Australia and may also be subject to litigation in Australia. In addition, where the insolvency proceedings arise from the theft of crypto, those who participated may be located in Australia and the stolen cryptocurrency be traceable to Australian cryptocurrency exchanges.

In these circumstances, the Cross-Border Insolvency Act

TOP TIPS

Taking legal and financial protection of crypto-assets in insolvency proceedings

- ✔ Due to the volatility of crypto, swift action must be taken to identify, locate and secure the crypto-assets to prevent the asset losing its value.
- ✔ If possible, obtaining the public and private keys to the wallets containing the crypto-assets is the quickest and easiest way to secure and preserve the asset.
- ✔ To locate crypto-assets, reviewing bank statements and collecting digital electronic evidence is vital for insolvency practitioners in their investigation into the ownership and tracing of crypto-assets. Once found, the insolvency practitioner must act urgently to secure the crypto-assets and transfer them into a wallet held by the practitioner.
- ✔ Utilise crypto analysis tools that are available to assist in identifying, classifying and realising digital assets and determining the exit points for the crypto and their respective domain addresses.
- ✔ A wide range of legal remedies are available to insolvency practitioners under the Bankruptcy Act 1966 and the Corporations Act 2001 to recover crypto-assets (treated as property) or to obtain information regarding the identity of the holder of the assets, such as freezing orders, orders for discovery and search warrants.
- ✔ If the debtor or crypto-assets are subject to foreign insolvency proceedings, the insolvency practitioner can utilise the UNCITRAL Model Law on Cross-Border Insolvency to recover crypto in a foreign jurisdiction.

2008 (Cth), the Model Law similar to Chapter 15 proceedings in the United States, may provide assistance to the foreign representative of a foreign insolvent estate (such as the foreign insolvency practitioner) to trace, access, freeze and turnover the debtor's cryptocurrency in the possession of a third party, including held by another exchange. If such an application is successful, any proceedings against the debtor or property of the debtor in Australia are stayed and the foreign representative can be entrusted with the debtor's Australian assets and powers to seek the turnover of the debtor's crypto in the possession of a third party, including another exchange.



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Ravet & Associés has been assisting a clientele of businesses, French and foreign banks, organisations, private persons, managers, shareholders and entrepreneurs, in France and abroad, for nearly 30 years. The firm has recognised expertise and skills, both as counsel and in litigation, in the key areas of business law: financing, structuring and restructuring of activity, assets and debts, bankruptcy proceedings, mergers/acquisitions, contract law and criminal business law.



QUESTION ONE

How is cryptocurrency treated as an asset in a bankruptcy proceeding in your jurisdiction?

Since the early 2010s, the use of cryptocurrencies has developed in the French economy through services allowing their purchase, sale or use as financial instruments.

French law was one of the first to legislate digital assets in France, establishing, for example, a legal framework for ICOS in the "Loi Pacte" of April 11, 2019.

Under French law, cryptocurrencies have no clear legal status and are not recognised as financial instruments. Thus, cryptocurrencies are currently not regulated.

The French legislator has not yet defined clear legal rules concerning the treatment of cryptocurrencies in insolvency proceedings. It is appropriate to proceed by analogy with the known mechanisms of French insolvency law adapted to the cryptocurrency system.

In the field of amicable and insolvency proceedings, the concept of cessation of payments is central to determine the severity of the difficulties encountered by a company to choose the most appropriate proceeding.

The state of cessation of payments implies comparing the quick assets of a company with its accrued liabilities.

The quick assets correspond to all of the company's liquid assets and immediately realisable values.

Cryptocurrencies can be immediately converted into euros by reselling them on specific trading platforms. They should be taken into account in order to determine the available assets of a company and thus to assess its situation according to the criteria of the law on companies in difficulty.

European regulators tend to consider that cryptocurrencies are not official currencies and therefore could not be the subject of a claim by a creditor of the company in insolvency.

Rather, cryptocurrencies are considered as intangible personal property that would be difficult for a creditor to use as collateral due to the significant fluctuations in their value.

Once the insolvency proceedings are opened, the insolvency administrator may proceed to the resale of the cryptocurrencies to finance the continuation of the company's activity during the observation period.

These assets may also be included in the scope of an assignment plan for the total or partial sale of the company. French practitioners of insolvency law will have to learn how to handle crypto currencies while waiting for a precise legal regulation of these assets whose particularity lies in the fluctuations in value to which they are subject.

QUESTION TWO

Are there legal tools in your jurisdiction that can be used against exchanges to recover stolen cryptocurrency?

There is currently no specific criminal offence under French law that would punish fraudulent behaviour in cryptocurrencies and allow for the recovery of these specific stolen assets.

Nevertheless, hacking of cryptocurrency exchange platforms or crypto jacking can be punished according to general criminal qualifications.

Thus, hacking of cryptocurrency exchange platforms, essentially involving the falsification of private keys that allow one to "sign" a transaction and the introduction of malicious software, can be qualified as theft, or similar criminal offences.

As such, crypto-jacking can be punished by the French Penal Code, which punishes attacks on automated data processing systems, including fraudulent access or maintenance in this type of system.

The provisions punishing the action of hindering or distorting the functioning of an automated data processing system may also be applicable to this type of act.

However, since 2014, the French Criminal Code specifically criminalises another offence, unlawful data mining, with a sentence of five years in prison and a €150,000 fine, which is a heavier sentence than theft.

Furthermore, in the field of insolvency law, in order to recover assets belonging to the debtor and which have been misappropriated by a third party, the administrator or the court-appointed Receiver in charge of the proceedings could initiate actions for the reconstitution of the debtor's assets against the third party.

The blockchain system allows for some traceability of transactions made with stolen cryptocurrencies.

Nevertheless, the success of such actions remains uncertain, given the lack of legal regulation that cryptocurrencies are currently subject to and their volatile nature.

QUESTION THREE

How can the filing of a Chapter 15 proceeding be used in connection with a cryptocurrency exchange that is the subject of a foreign insolvency proceeding?

Under French law, if insolvency proceedings have been opened abroad against a debtor having assets in France, the effects of these proceedings in France vary according to the country in which they were opened.

When the proceedings are initiated in a Member State of the U.E, except Denmark, Regulation 2015/848 of 20th May 2015 applies. The opening judgment of a collective proceeding in a Member State is automatically recognised in all the other Member States of the European Union without having to apply

TOP TIPS

Taking legal and financial protection of crypto-assets in insolvency proceedings

Under French insolvency law, there are general methods to provide some protection for the debtor's assets.

- ✓ First, the opening of insolvency proceedings automatically results in a suspension of individual creditors' proceedings, this means that the creditors can no longer act against the debtor to obtain payment of money.
- ✓ Once the insolvency proceedings are opened, the creditor will not be able to use his writ of execution to act against the debtor, whose cryptocurrencies will be protected for the duration of the insolvency proceedings.
- ✓ In addition, it would be possible to place cryptocurrency assets in a French trust. The assets will be placed in a trustee's estate and protected from creditors' actions.

for the exequatur of this opening judgment. It allows the French judge to recognise the validity of a foreign decision in France.

Thus, once the insolvency proceedings have been opened in a Member State, the main procedure will have a universal effect and will include all the debtor's assets.

If the assets located in another Member State allow for an establishment to be located in that territory, a secondary procedure can be opened in another Member State.

Then, a secondary insolvency proceeding can be initiated in all Member States where the debtor's assets are located.

If insolvency proceedings are opened in a foreign country that is not a member of the European Union, and if they have not been the subject of an exequatur decision, they will not be able to produce any effect in France. The rule of suspension of judicial proceedings will not apply and creditors will be able to sue the debtor on the assets he holds in France.

On the contrary, the exequatur decision granted to a foreign judgment opening insolvency proceedings will allow the protection in France of the debtor's assets as long as the law applicable to the foreign proceedings provides for a restriction on the creditors' right to pursue the debtor.

As cryptocurrencies are considered as assets of the debtor, these solutions are applicable to them.



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Sanli Pastore & Hill, Inc.'s principals and senior professionals have over 100 years of combined experience with offices in Los Angeles, Sacramento, San Diego, Chicago, Lagos, and Brussels. Our partners have been named as expert witnesses in over 1,200 court proceedings and have provided over 4,000 financial opinions and testimony for shareholder disputes, marital dissolution, intellectual property litigation, mergers and acquisitions, fairness and solvency situations, and other advisory services. We provide expert testimony and opinions in both transactions and disputes.

QUESTION ONE

How is cryptocurrency treated as an asset in a bankruptcy proceeding in your jurisdiction?

In the United States, cryptocurrency is considered an asset in bankruptcy and must be disclosed when filing for bankruptcy. Failure to disclose a cryptocurrency may constitute an offence under the Bankruptcy Act, like failure to disclose shares, cash in your bank, etc. Cryptocurrency is valued in bankruptcy on the dollar equivalent at the time of filing for bankruptcy.

Unlike traditional bank accounts or brokerage accounts, crypto-assets are not backstopped or guaranteed by any governmental or other agency, like the FDIC or SIPC. If Coinbase or another similar platform were to file for bankruptcy, and assets held in custodial accounts were deemed to be the property of the bankruptcy estate, customers could make claims as unsecured creditors to try to recover the value of their assets, but they would not have the protections afforded more traditional investment accounts, and their unsecured claims may be paid at just pennies on the dollar, if at all.

Holders of crypto can mitigate these risks by carefully deciding how their crypto will be held, carefully reviewing any third-party custodial agreement and applicable state law, and consulting legal advisors to help navigate these complex issues.

QUESTION TWO

Are there legal tools in your jurisdiction that can be used against exchanges to recover stolen cryptocurrency?

Where the stolen cryptocurrency can be traced to another exchange, there are several steps parties can take to recover those assets or seek the identity of the holder. Most major exchanges own and control the wallets holding the cryptocurrency on deposit. Where that is the case, a party could seek injunctive relief against the exchange, requesting that the exchange freeze the account linked to the stolen cryptocurrency.

It is also possible to compel exchanges to turn over the

identities of account holders through "John Doe" proceedings. In this type of proceeding, the plaintiff sues an unknown John Doe defendant and then issues third party subpoenas to an exchange or other source to obtain discovery of the John Doe's real identity. That information can facilitate litigation or collection against the ultimately identified individual. It bears noting that most major cryptocurrency exchanges have adopted "know your customer" rules that require users to provide proof of identity before being allowed to trade. Therefore, customer identifying information is available from these exchanges.

Depending on the circumstances, and particularly in cases involving fraud or criminal activity, it may also be possible to obtain an informal injunction by putting the exchange on notice that a particular wallet or transaction is tainted. As cryptocurrency exchanges come under increasing regulatory scrutiny, they are highly sensitive to being seen as facilitators of illegal activity. If a creditor can convince an exchange to halt further transactions from an account pending resolution of a dispute, that will effectively achieve the same result as a formal injunction or restraining order.

Where stolen cryptocurrency cannot be traced to an exchange, recovery can be much more difficult because the blockchain will not allow the transfer of cryptocurrency ownership without the private key. By analogy, although physical assets may be traced to an unbreakable safe, that knowledge is useless without the key or the ability to compel the person with the key to open the safe.

In these cases, creative and resourceful litigation is necessary to both link the cryptocurrency assets to a physical person or entity or obtain access to the private keys. Where the holder of the stolen cryptocurrency can be identified and is subject to the jurisdiction of a court of competent jurisdiction, an option would be to seek a court order requiring the holder to turn over the private keys or the cryptocurrency itself, or face contempt of court. In some cases, especially where sanctions for civil contempt include imprisonment, these types of orders may be effective.

Another possible path to recovery is identifying any point of contact the cryptocurrency assets have with the traditional financial system. There are still relatively limited opportunities to exchange cryptocurrency for goods or services of significant value. As a result, cryptocurrency is typically converted to cash before it can be usefully spent. If a creditor can obtain information showing a link between cryptocurrency and a bank account, it may be possible to direct enforcement efforts at that bank account rather than the cryptocurrency itself.

Sanli Pastore & Hill is not a legal firm. The information provided in this article is not, and is not intended to be, legal advice. Please seek legal advice from an appropriate attorney.

QUESTION THREE

Is private equity widely available in your jurisdiction? What are the advantages and drawbacks of financing a deal using equity, in your experience?

Given the recent downturn in the cryptocurrency markets and the bankruptcy filings emanating from this downturn, the use of chapter 15 for cryptocurrency related companies instituting foreign insolvency proceedings remains a useful tool to protect assets within the United States.

Chapter 15 authorises the representative of a foreign insolvency estate to commence an ancillary bankruptcy case in the US. Chapter 15 provides the foreign representative with

TOP TIPS

Taking legal and financial protection of crypto-assets in insolvency proceedings

Financial protection of crypto holdings is a daunting task. Cryptos, unlike stocks, bonds, or other investments, have no assets to back them. Their very existence relies on the faithful willingness of individuals to exchange their hard-earned government currencies (such as United States dollars, Euros, British pounds, Swiss francs, etc.) for cryptos. Essentially, governments back their currencies via the strength of their respective economies, assets, and reputations. Strong economies with robust industries, real estate, services, and trading markets tend to have stronger, more stable, and more wanted currencies. Everyone wants to own United States dollars, Euros, British pounds, Swiss francs, and a few others because there will always be a buyer for them.

On the other hand, cryptos have no assets to back them. Only if the countries with the strongest currencies were to officially adopt cryptos and start to accept their redemption at their central banks will cryptos become protectable and long-term assets for which recovery protections will exist in bankruptcy settings, in loan foreclosures, or in hedging positions.

The current domino effect like bankruptcies of several companies in the crypto ecosystem is a symptom of the fact that cryptos have no backing. Crypto advocates talk about the "decentralised freedom from governments" which is an abstract concept with no connection to the underlying requirement that a currency needs sustainable value creation to stay. I cannot see any value creation behind them. At this time, I cannot see a strategy to protect crypto positions in any setting.

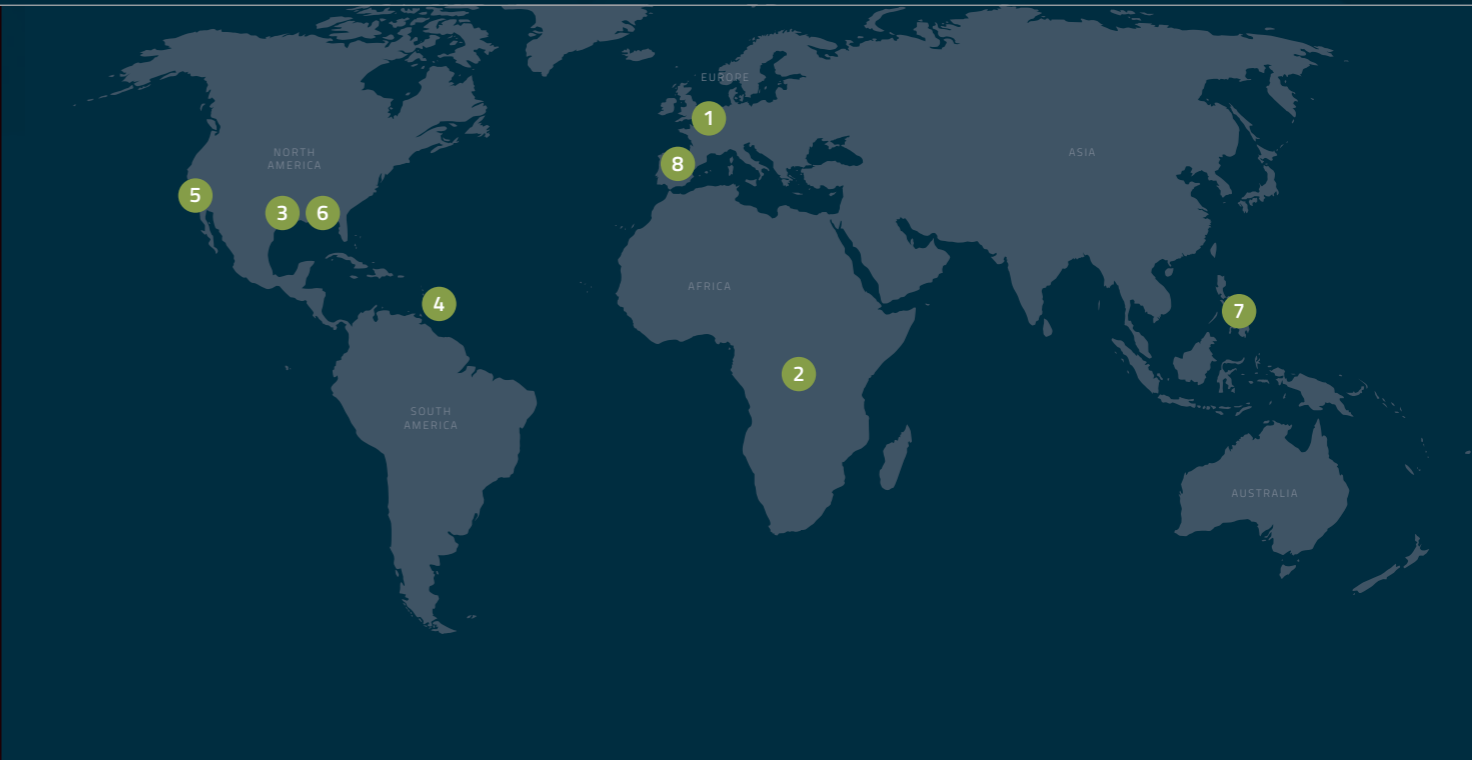
several beneficial tools in preserving and maximising value for creditors, including customers of an insolvent exchange.

A cryptocurrency exchange in insolvency proceedings abroad may hold cryptocurrency or other assets in the US and may also be subject to litigation in the US. In addition, where the insolvency proceedings arise from the theft or embezzlement of cryptocurrency, those who participated in the wrongdoing may be in the US and the stolen cryptocurrency may be traceable to US exchanges. In each of those circumstances, Chapter 15 may aid the foreign representative.

ESG & DEALMAKING

Deal Activity in 2023


In the following chapter, you will hear from our members about the ESG commitments shaping corporate strategy, what are the biggest challenges it represents and how can you manage all aspects of ESG effectively. We also highlight the post-Covid operational changes that have affected the M&A due diligence process, how are deals using digital tools to streamline and enable faster international deal-making so they can thrive in an adaptive world.




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Agio Legal is a major Belgian independent law firm, boasting a strong team of lawyers with specialisations in areas including corporate, company, labour, IT, commercial, insolvency, public, sports, real estate, corporate criminal, and tax law, in advice and litigation.

Agio Legal is much more than just a team of specialised lawyers. Entrepreneurs benefit more from a legal partner who is interested in their growth and success, and can also enjoy the assistance of its business partners Agio Capital (corporate finance) and Agio Finance (accounting). Together we look at your goals and along the way, we get to know your business.

QUESTION ONE

Post-Covid operational changes have affected the M&A due diligence process – what steps should businesses be taking to formalise these changes and avoid unexpected headaches during the deal process?

The Covid-19 pandemic represented an unprecedented disruptive event, both in the respect of personal and social relationships, as well as in the operation, management and preservation of corporations. It has had a significant effect on companies and their operations, including mergers and acquisitions (M&A), financing, securities market, and contractual and commercial agreements.

An increasing number of investors see ESG as a fundamental driver of financial success. However, in a post-covid period of “greenwashing” where every business self-assesses itself as ESG and sustainable, these ESG key performance indicators merit a closer analysis during the due diligence.

There has been much discussion and even litigation at an international level regarding MAE clauses during the pandemic.

This clause typically gives the buyer the right to terminate a purchase or association transaction prior to closing, upon the occurrence of an event or circumstance that has a material adverse effect on the financial or business condition of the target company. A detailed analysis of the MAE clause, as well as the particular impact on the company, is required to determine if a different material adverse effect may have occurred.

Companies will likely do everything that they can to cover themselves for either another pandemic or a future crisis. Strengthened internal audit processes in preparation of due diligence, new amendments, emergency planning procedures, insurance quotes and cancellation options could suddenly become commonplace in the most straightforward of agreements.

QUESTION TWO

M&A deals are increasingly using digital tools to streamline and enable faster international deal-making. Does this present any risks to the process in your jurisdiction?

M&A is a complex, challenging combination of the right capital, transaction strategy and effective deal execution to drive

value. The future of M&A dealmaking means significantly more information needs to be captured, processed, analysed and interpreted than ever before. Traditional means are no longer effective in delivering a competitive edge. At the heart of providing greater transparency lies technology, with digital tools seen as playing a major role in the industry. Digital capabilities can streamline M&A activities in several ways. Doing business in an increasingly international and remote digital world requires collaboration tools to meet and negotiate online. Other digital tools can assess the perception and market recognition of the target.

Virtual data room

Virtual data rooms are omnipresent in M&A deals to gather documents and ensure that they are fully complete, including all exhibits, schedules, and amendments. They provide a secure online environment in which team members who are not co-located can nonetheless review the increasingly voluminous amount of data associated with potential targets. The introduction of virtual data rooms, allowing vast amounts of documentation to be uploaded instantly into a secure, online environment, accessible to multiple viewers at any one time and providing sophisticated searchable functionality, has been a positive technological development in the M&A process and has become the standard approach to managing the due diligence element of any deal.

Electronic signatures

Belgian law recognises electronic signatures as legal and enforceable and, under certain limited conditions, they are fully assimilated to wet ink signatures. However, for critical or disputed decisions or important documents with third parties, especially abroad, a wet ink signature (or a qualified electronic signature) is still recommended. A signing and/or closing process may become delayed due to the signature collection. It is therefore important to collect wet ink signatures sufficiently in advance.

Closing

In case of a cross-border transaction, it may be recommended to have the purchase price wired to the purchaser’s counsel third party account in order to swiftly wire these funds. Parties or their legal counsels are also advised to liaise with their banks in order to have the wiring of the purchase price prepared in advance and to ensure that they can issue a simultaneous confirmation of receipt of the purchase price payment. The signing of the shareholders’ register, which is the only valid proof of title under Belgian law, must be organised in advance. In times where closings are in many cases virtual, only counsel will have to meet to sign and exchange the share register.

QUESTION THREE

Businesses need to be adaptive to thrive in our fast-paced world: how is the M&A process changing to facilitate more adaptive, changeable ways of doing business?

Integration

Integration is a highly complex activity given that every acquisition is unique and the progression of integration depends on a number of dynamic variables. Integration should not take place on a one-size-fits-all approach. A team with empowered representatives from every function and entity is also more likely to respond and make changes based on evolving situations, thereby increasing the chances of successful integration.

TOP TIPS

Understanding M&A due-diligence in relation to digital assets and processes

Although a new digital wind is blowing through the European Commission to regulate big tech by imposing more responsibility on them, a lot of technology remains unregulated. You must be able to think out-of-the-box and apply legal principles that were not developed for the digital age to new technologies. Due diligence checklists with a focus on technology are a good start, but a technology lawyer has the understanding the technology at issue in order to interpret whether it falls under the scope of current and future regulations.

Not only current legislation must be considered. The revised NIS Directive (NIS 2.0) may be the first step to force essential and important organisations to focus more on cybersecurity, given that its text is likely to include fines similar to the GDPR. The cyber threat to many organisations that introduced remote working due to Covid-19, has certainly also given a boost to the importance of cybersecurity. More target companies will fall under the scope of application of the revised NIS Directive, leading to increased importance in conducting (legal) cyber security due diligence in the future.

A technology lawyer must always learn about new technologies and their operation to better understand the applicability of rules. This leads to better M&A due diligence of digital assets and better client outcomes.

Deal strategy

Covid-19 has influenced how parties to a transaction may wish to structure their M&A transactions. Rather than buying or selling 100% of a company, the parties to a transaction may decide to share the risk on valuation by dealing with a stake in the company instead. The deal may also be structured to allow the purchaser to obtain full control of the business in due course and to allow the seller a full exit. A possible alternative to acquiring a minority stake in ordinary shares would be to structure the transaction using a different capital instrument, such as a preference or convertible share.

Warranty and indemnity insurance

One of the most heavily negotiated matters in acquisitions is the indemnification rules. While a seller agrees to a number of representations and warranties, these cannot be relied on indefinitely. They may be time-barred, or made subject to caps, de-minimis clauses or baskets. Apart from this, certain specific indemnities may be agreed on which form an exemption to these rules. W&I insurance will likely become more prevalent in our fast-paced world as this solution becomes more and more known, resulting in the need to recalibrate the view on market norms and the balance of risk between buyer and seller.



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ALF is a law firm based in Kinshasa since January 5, 2010. In its practice of law, the Firm has specialised in corporate law. ALF assists its clients, which are generally commercial companies, from their creation, throughout their life, until their dissolution. ALF helps its clients to face all the difficulties related to the exercise of their activities in the Democratic Republic of Congo and even outside the borders of the Democratic Republic of Congo when circumstances allow it. This is how it has, within it, various specialties (corporate law, civil law, criminal law, labour law, etc.) to assist and represent its clients, individuals and legal entities, in their activities.



QUESTION ONE

How are ESG commitments shaping corporate strategy in the drc?

Due to its large area, its location in the center of Africa, its enormous natural wealth and its large population, the Democratic Republic of the Congo is one of the giants of Africa. It is crossed by the equator and includes three climates: the equatorial climate, the tropical climate and the mountain climate.

With this configuration, the DRC is an ideal framework for the application of ESG commitments. It represents an important stake for the global ecosystem. ESG commitments must therefore be developed there by both local and international political and private actors.

QUESTION TWO

What are ESG commitments?

ESG (Environment, Social and Governance) commitments, an acronym which originates from the concept known as "triple performance" or "triple P" (People, Planet, Profit) introduced in the 1990s, aim to show that companies do not have an interest in focusing solely on the criterion of simple profit but rather on ESG criteria, the pillars of socially responsible investment.

ESG criteria are the three cardinal points of sustainable governance. They are key indicators allowing the analysis of the consideration of sustainable development in the strategy of organizations.

In the field of economy and finance, where they have been particularly fashionable lately, they serve as extra analysis tools for the evaluation of economic actors outside the usual criteria. By adopting these criteria, it is possible for organisations to stand out and prove their responsible commitment, thus promoting the "sustainable" nature of their governance.

The current trend of legislators is to develop legal instruments that can force large companies to carry out extra-financial reporting. Today, the interest of these three environmental criteria is to measure the importance that the company attaches to:

- Environmental challenges: greenhouse gas emissions,

waste production, climate change

- Social criteria, in other words the way in which the company considers the people with whom it collaborates (diversity, management of human capital, health, safety, working conditions, equal opportunities)
- Criteria related to governance, referring to the way of running the company (transparency, independence of the board of directors, diversity, structure of the board of directors, tax practices, executive compensation, etc.)

The message conveyed by the ESG criteria is simple.

A company is more likely to be successful over time if it generates value for all stakeholders: in other words for its customers, employees, suppliers and the environment. A company that acts for society in general is part of a positive approach that will bear fruit.

Investors are increasingly applying these non-financial factors as part of their analysis process to identify material risks and opportunities for growth.

This means ESG needs to be at the forefront of any corporate strategy for sustainable development.

To illustrate the above statement, most corporates, essentially multinational companies, take commitments to set ambitious goals to achieve carbon-neutral operations.

Further, on the social part of ESG, considering the last two years, while the world was dealing with the Covid-19 pandemic, corporates have played an important and significant role, such as deploying and providing oxygen concentrators and Covid-19 relief material to the remote part of the DRC, as well as several doses of vaccines around the country.

They also understand that it is their responsibility to take ambitious action in addressing climate challenges. Most corporate organisations within the DRC are committing to sustainability throughout their day-to-day operations, while at the same time investing in long-term transformational solutions for their respective industry (government, mining in Katanga south east DRC, telecoms Nationwide's companies, etc.)

In the DRC, corporates and public sector understood that the path toward sustainability requires new strategies, such as removing and storing Earth's excess carbon. For example, the Yangambi Center for Natural Carbon Capture (on natural carbon storage systems, including biological ecosystems), located in Equator tropical DRC forest, supported by local and international corporate funds, is one of the key initiatives set in place with ambitious goals to catalyse interdisciplinary research across the natural sciences and engineering in an effort to accelerate the removal and storage Earth's excess carbon. Moreover, through several efforts, private and public sectors are now aiming to create a portfolio of carbon removal strategies that have impacts in the DRC as well as at global scale.

In order for businesses in the DRC to manage all aspects of ESG effectively, they should take a proactive approach. For example, by referring and using all recent progress on environmental standards as a roadmap.

ESG reporting can be used as a tool to attract investors. ESG performance in ESG reports is also a way of businesses to shine in the eyes of the public, stand above competition, and attract investors and financing. Businesses need to set smart KPIs for the three components of ESG. Practically, those KPIs may be illustrated by the following examples:

Environmental:

Businesses should:

- set of measurable initiatives to illustrate how they are fighting against climate change, by reducing carbon emissions, to preserve biodiversity, improve water and air quality, protect

forest, manage waste...

- Hold meetings of the Board of Directors and Executive Committees without papers;
- Reduce electricity consumption by turning off all offices at 6:00 p.m.;
- Use of solar energy and other non-polluting energies and recyclable batteries;

Social:

What Businesses in the DRC are doing or should do to improve lives?

- Take into account social and cultural diversity and minorities when hiring employees;
- Make their employees participate to the profits of the company by incorporating a well-defined percentage of the profits as a thirteenth month or bonus at the end of each accounting year;
- Respect for the labour law and social security of their employees
- Implement gender rights and inclusivity initiatives.
- Apply community involvement recommendations, human rights, labour standards, data protection and privacy.

Governance: Businesses in the DRC have to:

- Fight against corruption by setting up traceability policies for funds entering and leaving the company by setting up internal controls, policies, principles and procedures governing their leadership, audit structure, anti-bribery policies, whistleblower programs, board composition, and executive compensation
- Integrate employees' participation in company decisions; A growing number of companies in the DRC are looking abroad for debt or equity financing. In recent years, environmental, social and governance (ESG) factors have become an increasingly pressing priority for States and, consequently, for institutional investors required, alongside traditional parameters, to take them into account in their commitment process.

QUESTION THREE

Obstacles to ESG criteria in the DRC?

A survey by global research and advisory firm Oxford Business Group (OBG) found that "although ESG implementation should be a top priority for Africa, only a third of companies surveyed in the region currently have a special department dedicated to ESG". For OBG, "Africa would greatly benefit from stricter regulations, more incentives, and more awareness and information related to ESG criteria"

In the eyes of OBG investigators, "the tacit acceptance that corruption is simply part of doing business in some places is a significant impediment to advancing the governance segment."

Faced to this conclusion, the DRC is not left out. Companies are adapting their strategies and policies to access finance, which we hope will only be available to companies that comply with ESG criteria.



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CCK Strategies is a unique Tax, Accounting and Business Advisory firm, founded in 1997. CCK's historic growth mindset has created a work environment that promotes opportunities for entrepreneurial partners to work with clients in the US and around the globe. The partners share a passion for focusing on international cultures, relationships, and business opportunities while they continue making a difference in the local, state, national and global economies, and specifically enhance the value and success of their clients. New technologies, unique strategies and complex lines of business are not strangers to CCK and the firm approaches each as a challenge to overcome while working to maintain the highest quality of delivery of client service. CCK's award-winning approach to working with middle market entrepreneurs have kept them on the list of Top US Accounting Firms. CCK's long-standing success can be attributed to three fundamental principles: service, value, and care.

QUESTION ONE
 Post-Covid operational changes have affected the M&A due diligence process – what steps should businesses be taking to formalise these changes and avoid unexpected headaches during the deal process?

Technology advancements are transforming the due diligence process. Artificial intelligence drives efficiencies and automation for due diligence teams by reducing data entry, measuring financial accuracy, and creating value enhancement. Software syncing to cloud-based accounting systems can assign a health score to client's financials and allow for quick fixes of common issues. Our CCK diligence team utilises software applications to perform cash flow projections and create customisable dashboards highlighting specific KPIs. The same process our buy-side diligence team uses in performing due diligence engagements is also used by our selling clients to prepare for a buy-side engagement team. Assisting our selling clients with Receivable and Payable systems automation results in better data and enhances value for working capital and supply chain improvement.

In addition to the traditional operational processes, as business moves to more virtual operations, the need for strong cyber security is at an all-time high. Company strategies to address cyber risks should include

disaster recovery and data protection. Increasing use of SOC or GDPR examinations of electronic data controls and processes enable a business to address data protection for their customers and employees, as well as streamline a diligence process and increase the value of the business. The business should also deploy a Comprehensive Crisis Management Plan to address potential threats arising from a changing world environment.

QUESTION TWO
 M&A deals are increasingly using digital tools to streamline and enable faster international deal-making. Does this present any risks to the process in your jurisdiction?

Additional work is necessary both prior to and during the diligence process, due to the additional risks that have arisen from a more virtual environment. In any diligence process, it is important to "follow the cash" but now, with so many data formats and multiple parties involved, it is just as important to follow the data to the source. This means direct access or direct observation of records from accounting software, bank records from the bank's website, inventory observations from independent third parties, introductions to key customers, and verification of the capability of vendors and manufacturers, who are most likely in different countries themselves. Additional risks arise with the reliance on local partners that are part of the diligence team: how do you know who to trust on the ground?

A well-positioned and prepared company should have established policies related to their business. Areas of particular awareness and concern in the current climate, in addition to digital assets and virtual working environment, include sustainability and diversity, equity, and inclusion (DEI). Formally adopted policies evidence of how the company is addressing these issues and reduce risks associated with non-compliance.

Multi-jurisdictional tax regimes add complexities to the diligence process. As the M&A process speeds up, cross-border tax implications are often considered as an afterthought, which can lead to unintended consequences. While tax should never lead the deal, understanding and planning for the tax implications early on will create a win for all parties. As members of IR Global and having a broad expertise in tax, accounting and diligence matters, CCK along with our IR colleagues are well positioned to guide companies through a successful transaction.

QUESTION THREE
 Businesses need to be adaptive to thrive in our fast-paced world: how is the M&A process changing to facilitate more adaptive, changeable ways of doing business?

The shifting M&A landscape now sees due diligence teams reducing their physical or face-to-face interactions and increasingly relying on virtual communication and verification. This shift has led to a higher dependence on local partners to assist with the due diligence process and additional or different steps to verifying the underlying data received. The volume of work involved has increased. With more information gathering required, diligence teams have a theme of "send us everything!"

TOP TIPS
 Understanding M&A due-diligence in relation to digital assets and processes

The diligence process involves analysis of hundreds of aspects for a target. In recent international M&A transactions these are some of the most important:

- ✔ **Data integrity:** following data to the source and evaluating the reliability of the data
- ✔ **Revenue:** gaining confidence in the expected stability of future annual recurring revenue.
- ✔ **Costs:** confirming normal and projected operating expenses, and additional costs from integrating and operating a foreign operation.
- ✔ **Labour, and labour mobility:** who are the key employees? How will talent be retained? How can talent be moved to or from the target business? What are the tax consequences of labour located in a new jurisdiction?
- ✔ **Supply chain:** how reliable and sustainable are partners in this chain? Is additional investment needed in reducing fragility or improving sustainability?
- ✔ **Valuation:** what are the digital assets of the company, and how are those valued and protected? How do they integrate with acquiring company assets and processes.

B2B and B2C buyers are more concerned than ever about sustainability, which is a comprehensive term focusing on people, profit, and planet. Diligence preparation services can include advising on sustainable practices and a review of ESG (Environmental, Social, and Governance) factors such as climate impact, waste and pollution, employee relations and diversity, community impact, related tax strategy, and board governance and makeup. Sustainability is becoming more and more linked to a global emphasis on diversity, equity, and inclusion. Employee satisfaction, crucial in today's job market, can be increased by engaging employees to create socially responsible business practices, including diverse hiring, equitable pay across gender, and reducing the company's ecological footprint. Our CCK team is positioned to assist with connecting companies with sustainable scorecard programs to audit their current state and create an intentional plan for future changes.



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Dowell's Advisory Services Inc is a full-service boutique accounting and advisory firm based in Barbados, that provides financial solutions to international and domestic clientele. The firm was established over 20 years ago by its principal, Oral R. Dowell, CPA, CGMA, FCA. We dedicate time to you, learn what your business is about and where you want to progress to. We are equipped with the knowledge and experience to thoroughly analyse your business and provide strategic insights that finds simple and effective ways to help you improve and achieve positive financial results. Dowell's Advisory is a team of professionals whose approach is centered around providing clients with international corporate tax structuring, accounting, corporate governance and problem solving that allows them to be and remain compliant, thriving and relevant. Our client advisory department uses a strategic approach in advising businesses that builds on the relationship you will have with your Trusted Advisor!

QUESTION ONE

How are ESG commitments shaping corporate strategy in your jurisdiction, and what are the biggest challenges it represents?

Many companies in the Caribbean region have started the conversation on Environmental Social and Governance (ESG) considerations albeit with different levels of implementation and measurement. ESG as a concept globally continues to have proponents and detractors, but generally has been accepted in the Caribbean as a key component to corporate strategy.

As the level of sophistication increases in shaping long-term shareholder value many larger companies are seeking to incorporate ESG in their strategic plans and this trend is manifesting in the Caribbean business landscape. Stakeholders are becoming acutely aware of the need to have a greater long-term focus on corporate decision making and companies with a positive public perception are generally looked upon more favourably by investors, regulators and customers.

While adoption is generally recognised as a path forward, it is not without its challenges. Harmonization of metrics that allows for a measure of comparability across metrics will offer investors and stakeholders the opportunity to make meaningful assessments of a company's ESG impact. ESG standards continue to evolve which adds another layer of complexity in evaluating a company's performance in this area.

Some measures are not easily identifiable or measured in terms of social and environmental impact. This lack of clarity contributes to the perception that ESG does not have a direct link to a company's performance.

Some detractors of ESG view it as more symbolic than impactful, with the public relations element needing to be clearly linked to achieving well-defined targets and ultimately improving company performance. It is viewed by some detractors as another layer of expense without truly creating shareholder value due to the points mentioned above. In smaller jurisdictions, such as the Caribbean region, where information and its availability are generally challenging, the level of information and data gathering capabilities will be tested and may also prove to be a costly exercise.

QUESTION TWO

ESG covers a combination of obligations and voluntary initiatives: how can businesses in your jurisdiction manage all aspects of ESG effectively?

In order for ESG to be successful, it requires significant management buy-in and focus. ESG must form part of an organisation's corporate mission and have a well-defined means of measurement. Given the broad focus of ESG there is an imperative to have harmonisation of ESG reporting measures to ensure a minimum requirement for disclosures that ensure comparability across companies for obligations, while allowing flexibility for voluntary initiatives.

Once businesses have identified a well-defined ESG corporate charter, it must be integrated into strategic plans which form part of the company's risk register and operating KPIs, with ultimate responsibility for oversight residing at Board level. ESG implementation will require a similar level of discipline and rigour as displayed in financial reporting for it to truly permeate companies' cultures and performance metrics. Companies can utilise already established guidelines such as the International Sustainability Standards Board (ISSB), the Task Force on Climate-related Financial Disclosures (TCFD) and the United Nations supported Principles for Responsible

Investment as a baseline for their ESG roadmap. Each company will have unique externalities to respond to and may necessitate the need for dedicated resources to ensure ESG initiatives are being consistently implemented, with the ESG charter being used as a reference point to measure the company's maturation in its ESG implementation.

Some companies in the region have already started to report on ESG in their annual reports. This can also help in ensuring that ESG is being effectively rolled out to the extent that measurement and comparability are well defined enough that markets will allocate value to a company's level of impact from its ESG scores. Some companies in our region, such as Portland Private Equity, have taken it a step further where ESG forms a part of their investment criteria. Wider adoption of this policy at the level of wider capital markets and lending institutions will allow for greater use of both voluntary and required initiatives.

QUESTION THREE

While ESG can be good for business, it's not without its financial challenges. How do you advise businesses navigate compliance and growth?

While ESG has generally been recognised as good for business, it does present companies with a disconnect if shareholder value cannot be directly linked to a robust ESG program. The need for comparability and minimum disclosure requirements is likely to add another layer of expense to a company's bottom line. This may be by way of increased headcount or from actions to be taken to protect our climate, improve corporate social responsibility or improving governance policies.

Against this backdrop, there is still a very compelling case for the adoption of ESG as a means of creating long term shareholder value while also mitigating risks which may, in the longer term, cause shareholder value to be eroded. Strategic decision-makers need to be clear in their mandate as it relates

TOP TIPS

Understanding corporate ESG expectations in the Caribbean jurisdiction

As Caribbean entities embark on their ESG journey, there are some key factors to consider.

- ✔ Be committed to incorporating ESG into long term strategy. ESG must have genuine leadership commitment in corporate actions to be able to drive meaningful impact.
- ✔ Be clear in setting out a measurement criteria for ESG programme. Clearly defined corporate charters need to be put in place with criteria set out in KPIs to provide a goal post for implementation.
- ✔ Have a team dedicated to continuously monitoring ESG performance and making recommendations for improvements. ESG is constantly evolving, organizations need to remain nimble to be able to pivot and focus on continuously improving their programmes.
- ✔ Ensure that you have robust data analytic capabilities to ensure you are appropriately utilizing ESG insights. Many companies are transitioning to being data driven, and being able to leverage ESG insights, will be pivotal to driving longer term value creation.

to ESG and must identify value levers and risk mitigants as they develop ESG initiatives. ESG can be used as a means of reducing carbon footprint and fossil fuel exposure which in the longer term, as technology improves, may allow for cheaper forms of energy which is currently creating a drag on financial performances for many companies. The risk of customers moving away from companies who are not good corporate citizens is very real, particularly in a social media dominated society where customer boycotts are ever present. In small close-knit communities, like the Caribbean region, good governance and compliance will be key to maintaining investor confidence as Caribbean economies face strong headwinds as a result of a volatile global macro-economic climate.

The need to be able to navigate the risk factors previously identified is particularly acute in the Caribbean, where the impact of climate change is having a significant impact on methods of doing business. The region's agricultural sectors have been under pressure from prolonged droughts and periods of intense rainfall, but the climate impact stretches into the financial services sector as well, with exposure to significant wind-storm events that has also seen reinsurance rates continue to increase. The banking sector is also facing greater regulatory scrutiny and with some Canadian banks actively seeking to exit the region, the governance structure and associated cost of it will continue to come under scrutiny.

These factors support a pro-ESG approach to mitigate risk and ultimately, through responsible corporate actions, create value for shareholders and stakeholders alike.



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EGC is a woman-owned environmental boutique law firm based in the San Francisco Bay Area. EGC's clients include Fortune 500 and S&P 500 companies, national and international privately held companies, publicly traded companies, public agencies, family businesses, trusts, and a B Corporation. EGC also represent real estate clients, the maritime industry, national food and beverage manufacturers and retailers, and various manufacturing industries.

QUESTION ONE

What legal requirements in the field of environmental law are shaping ESG commitments and corporate strategy in your jurisdiction, and what are the biggest challenges they represent?

While climate change has dominated the environmental aspects of ESG among institutional investors, ESG casts a broad net. For some investors and companies, ESG includes environmental stewardship and public health at the intersection of environmental and social issues – especially among private investors and in certain industries. Environmental stewardship itself also casts a broad net but can include initiatives to reduce or eliminate certain chemicals in consumer products and/or to ensure compliance with environmental laws up and down a company's supply chain.

One source for assessing issues of interest to private socially conscious investors is As You Sow, a California non-profit, widely recognised as a leading influencer in the ESG field. As You Sow has gained prominence and national attention by introducing shareholder resolutions on a broad range of ESG issues. Though largely about climate change, resolutions also include requiring the disclosure of the use of pesticides in agricultural supply chains. As You Sow has also filed claims seeking to reduce the presence of chemicals in various foods, such as chocolate and spinach.

In addition, more active and informed consumers, coupled with social media platforms, also play into the mix. In the wake of highly publicised stories such as the presence of benzene in popular shampoo brands, consumers are demanding information about the ingredients and risks associated with their products – sometimes specifically asking about compliance with a California law known as Proposition 65.

Proposition 65, a 1986 ballot initiative, is a unique law and the only law of its kind in the United States. It requires businesses who sell products in California to warn consumers about significant exposures to chemicals identified by California as reproductive toxicants or carcinogens. Though only one state, California is poised to overtake Germany as the world's fourth largest economy and thus represents a significant market for consumer goods subject to Proposition 65. Proposition 65 has had a significant impact on businesses around the globe. Some businesses have placed warnings on their products while others have elected to reformulate their products to avoid making warnings.

One example of a robust environmental stewardship initiative is a sophisticated program adopted by Yeti, Inc., a publicly traded American manufacturer of coolers and accessories. Among other things, Yeti requires that all of its suppliers provide declarations of compliance with several international, federal, and state environmental laws, including California's Proposition 65. In addition, Yeti requires that their suppliers identify the concentrations in their products of any Proposition 65 listed chemicals – a requirement not found in Proposition 65 itself.

An environmental stewardship program presents significant challenges – as does requiring a company's suppliers to certify compliance with Proposition 65. Some companies may have hundreds or even thousands of suppliers, making it difficult to track the chemicals or concentrations of such chemicals in each and every ingredient. Moreover, there may be differences of opinion – from a legal and/or technical perspective – about what constitutes compliance with Proposition 65, what type of testing and analysis is appropriate to establish compliance, and what information is necessary or appropriate to provide sufficient assurances of compliance.

Certifying compliance with Proposition 65 also presents challenges from a legal perspective because it is primarily enforced by private citizens who often advance creative theories about its interpretation and reach. Because most parties prefer to settle rather than litigate, many of these theories (while arguably beyond the intended scope of Proposition 65), have never been addressed by any court, but are common targets for private party enforcement actions. Companies will need to evaluate whether they will interpret Proposition 65 requirements according to the most logical reading of the statute itself or based on the allegations of private enforcers.

QUESTION TWO

ESG and environmental stewardship covers a combination of obligations and voluntary initiatives: how can businesses in your jurisdiction manage all aspects of an environmental stewardship program effectively?

In addition to variation in the ability to allocate resources to environmental stewardship programs, different industry sectors have a range of consumer expectations – based either on the product itself or the demographic of its consumers. In some

cases, companies may want to establish a scope for their ESG program by use of professionals who can help them identify shareholder and/or customer values and concerns.

Not all companies will choose to launch an environmental stewardship program or will have the resources to do so; all companies, however, should comply with applicable environmental laws.

For purposes of establishing a compliance program, companies should evaluate the applicability of various laws depending on the market for their products. In the United States, Proposition 65 is an obvious candidate for compliance. In addition, other federal and state laws may apply. For example, the regulation of per-and poly-fluoroalkyls, known more commonly as PFAS, has emerged as an issue of increasing interest to state legislatures and the federal government. PFAS are found in a broad range of consumer goods, including cookware, pizza boxes, raincoats, carpeting, paper packaging, nonstick and weather-resistant coatings, and various rubber and plastics. Several states, including California, Maine, Michigan, and Vermont have adopted various measures to regulate PFAS.

Companies should also, of course, consider national and international laws that regulate chemicals in products, including the European Union's REACH regulations (an acronym for the "registration, evaluation and authorisation of chemicals"), which regulates the manufacture and import of chemical substances.

For those companies that conclude an environmental stewardship program is an appropriate choice for their ESG program, they may choose to adopt a company policy of compliance with specific laws or they may decide to adopt other measures not required by any law – such as sourcing ingredients with lower (or no) concentrations of certain chemicals or releasing information about the concentrations of chemicals in their products. Companies should identify a scope for stewardship that is achievable, affordable, and consistent with company, shareholder, and customer values.

QUESTION THREE

While ESG can be good for business, it's not without its financial challenges. How do you advise businesses navigate compliance and growth?

Notwithstanding the challenges of a product stewardship program, product stewardship initiatives also provide an opportunity for suppliers to cement relationships with their customers, boost their own sustainability profile, and improve their own environmental compliance program. Suppliers will, however, need to map out a plan for response, engage with the appropriate technical and legal professionals and seek to collaborate with their customers to meet program objectives without creating unnecessary liabilities and burdens for either customers or suppliers.



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KNAV is an Atlanta-based full-service accounting firm offering a complete suite of assurance, taxation, transfer pricing, valuation, risk and business advisory services. KNAV started in 1999 with offices in the US and has since expanded in Canada, India, Netherlands, Singapore and the UK. Being a robust organisation with more than two decades of international experience serving various industries including automotive, BFSI, entertainment & media, manufacturing, pharma & healthcare, retail, technology and telecommunications, KNAV still retains its customised and partner-led solutions. The firm, with its qualified team of 200+ pioneers, caters to the distinct requirements of multinational organisations from its offices across the globe.

QUESTION ONE

Post-Covid operational changes have affected the M&A due diligence process – what steps should businesses be taking to formalise these changes and avoid unexpected headaches during the deal process?

Though the M&A market has experienced some turbulence of late, the US continues to be a very active and friendly M&A market. To make deals succeed, businesses are adopting a tailored approach to screening, diligence, and integration. With dispersed teams across the globe, maintaining the personal touch in a remote environment is taking a great deal of creativity.

Reliance on new-age digital tools has increased far more than expected and use of technology to conduct due diligence is the new normal. Businesses are being proactive in setting up virtual data rooms with complete information to avoid repeating the diligence process with multiple bidders and they are retaining little to no liability, and this has created a greater need to perform robust due diligence that confirms the value of the deal under consideration. Buyers on the other hand are increasingly moving to more data-intensive due diligence, leveraging advanced analytics to assess large amounts of data, often in areas that were previously out of the scope of traditional diligence. They are relying heavily on descriptive analytics,

diagnostic analysis, predictive analytics, and prescriptive analytics to conclude the diligence process efficiently and faster. Of late, we have also seen an increase in the warranty and indemnity insurance being utilised by buyers in deals of all sizes to avoid unexpected headaches in an M&A process mainly post-integration.

QUESTION TWO

M&A deals are increasingly using digital tools to streamline and enable faster international deal-making. Does this present any risks to the process in your jurisdiction?

We are living in an exciting time, with enormous opportunities for organisations to go global through inorganic measures. In this fast-changing world, with increasing deal complexities, deal making is more complex and hence even the best acquirers are facing the need to revisit their M&A capabilities. Traditional deal making takes considerable time and resources – two things which are usually limited in any transaction. As they say, speed is today's currency and by digitising their M&A capabilities, organisations are not only increasing their transaction speed but also integrating and creating value faster.

As advisors, we don't foresee any material risks when the M&A process is digitised instead often suggest our clients adapt to the next generation approach to deal making i.e., combining strategy with technology. Having a service provider on your deal team that specialises in deal strategy and who can leverage state-of-the-art technology can enable you to expedite the M&A process and free up resources. Further, the use of cognitive technology is becoming more accurate, limiting human tendencies to tire, get distracted, or overlook critical information.

However, even in this digital era where the deals landscape is ever-changing, one must not forget that the fundamental aspects of dealmaking will never change. The use of advance technology can complement deal making but it can never be a substitute for people. One must use digital tools as a force multiplier that allows people to turbocharge their work—and get deals done more quickly, more efficiently, and often at a lower cost.

QUESTION THREE

Businesses need to be adaptive to thrive in our fast-paced world: how is the M&A process changing to facilitate more adaptive, changeable ways of doing business?

Covid-19 has upended the work environment. Almost every procedural stage now takes place in a virtual environment. Digitalisation of the M&A process has been building gradually over the past few years, but post Covid-19 it is the need of the hour. In the current deal making environment, the array of digital tools available to address the M&A process are plenty and businesses that leverage on these tools by developing capabilities in areas such as virtual diligence and virtual integration are making great strides to stay ahead of the competition.

With digital M&A processes, geographic distances mean less, which adds to the attractiveness of our rich investment environment and technology ecosystem. This has enabled digital target screening far easier and faster for businesses as compared to previous times. As they say, data is the new oil, in the age of digital deals, businesses looking for acquisitions must know how to structure and prepare data. They should invest in data visualisation tools like Tableau, which enables much more insightful interpretations of financial data, including M&A transaction records than traditional static graphics do. Going forward with the introduction of the metaverse, the use of digital solutions on both sides of the negotiation table is likely to increase where AI will play a key role where acquirers will think of integrating AI in their deal scoping and company analysis setups whereas on the sell-side, technologies like VR may lead to offering virtual company tours to potential investors.

We believe, businesses should make digital deal making their new year's resolution and not accept the status quo to stay ahead of the exciting times that are evolving every year in the M&A landscape.

“In this fast-changing world, with increasing deal complexities, deal making is more complicated and hence even the best acquirers are facing the need to revisit their M&A capabilities”



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Villaraza & Angangco is a full-service law firm that has been at the forefront of the Philippine legal landscape since 1980. It offers professional services of the highest calibre, housing only the top lawyers who are adept at handling the most intricate problems and providing comprehensive end-to-end solutions. The firm is heavily involved in M&A transactions amounting to billions of pesos in various industries throughout the Philippines. Notable M&A deals include assisting a corporation in expanding its interests in the country's flagship deep-water gas-to-power project, handling the successful entry of the third major telecommunications provider in the Philippines, and counselling a corporation in acquiring a huge interest in one of the most well-known corporations in the Philippines, with an end-view to modernise and digitalise the logistics industry.

QUESTION ONE

Post-Covid operational changes have affected the M&A due diligence process – what steps should businesses be taking to formalise these changes and avoid unexpected headaches during the deal process?

The Covid-19 pandemic has brought about grave economic setbacks and logistical challenges resulting from sudden operational contingencies adopted to combat the widespread health risks. In the Philippines, several variations of community lockdowns and quarantine rules were imposed. Widely known to have one of the longest lockdowns in the world since the start of the pandemic, the Philippine economic situation affected different business sectors in unique ways. In response, the Philippine government imposed a multitude of regulations to combat the economic downfall and presented new recovery measures for businesses.

With the recent easing of quarantine guidelines, the Philippine economy has slowly opened, with the aim of recovering from the adverse effects of the global pandemic. This necessitated the relaxation of several restrictive legislative measures to stimulate economic growth, such as increasing the compulsory notification threshold for business transactions, designed to promote competition and curtail abuse of market position. Various government agencies have also adopted various technological solutions to streamline the processes and allow digital or online compliance with the various regulatory requirements.

In response, businesses should be identifying key factors to make their physical structure more digitally capable, including keeping tabs with technological trends and the applicable laws implemented. Businesses should also ensure that workforces are aware and proficient in navigating around available digital solutions to address physical challenges in case of another worldwide pandemic.

Businesses should take steps to make their deal-making model more responsive to any contingency, while at the same time observing the operational and legal formalities for a valid transaction. Businesses must ensure that they are more digitally capable for and amenable to an M&A due diligence

process, structure a transaction consistent with change, and implement a more technology-driven model to streamline M&As and answer for any unexpected physical restraints caused by traditional methods. Thoughts must also be placed in formalising organisational structures, as well as governance and transaction policies capable of effecting responsive action not held back by conventional limitations.

Due considerations must also be made to severe government delays due to compiling unfinished work left during strict lockdowns. Businesses should be prepared on regulatory contingencies by keeping abreast of dynamic national and local issuances of various government agencies and units that are still recovering financially from the post-effects of the global pandemic.

In summary, businesses should consider implementing a more adaptable M&A due diligence process that could be accomplished purely online. Businesses should already integrate digital means and adopt flexible policies that accommodate digital processes, while simultaneously ensuring both authenticity and confidentiality.

QUESTION TWO

M&A deals are increasingly using digital tools to streamline and enable faster international deal-making. Does this present any risks to the process in your jurisdiction?

While it is becoming increasingly popular to conduct M&A deals using digital tools, businesses must take note of the various risks and limitations involved.

Corollary to increased accessibility and convenience is the increased exposure of confidential information. As with most countries, the Philippines has stringent laws in place for the regulation of data and protection of confidentiality, imposing penalties for breaches. Accordingly, parties in M&A dealings should ensure that measures are in place to ensure confidentiality and compliance with data privacy and cyber laws.

Unlike the traditional M&A process, where dealings are mostly done in person and information kept in a physical space, virtual M&As also increase risks. Control over the online and digital spheres are assured, with digital files and processes more prone to unwarranted exposures such as hacking. Business cannot heavily rely on the national enforcement agencies of the Philippines in protecting confidential information. Unfortunately, despite the proliferation of digital crimes, the Philippines has not been fully equipped with the proper tools to deter and combat increasing violations happening in the digital world.

While risks cannot be completely removed, parties must ensure that they endeavour to mitigate the same by engaging a trusted virtual data room service provider; revisiting their digital data organisation, management and security measures; maintaining data integrity; and staying updated with any policy developments.

QUESTION THREE

Businesses need to be adaptive to thrive in our fast-paced world: how is the M&A process changing to facilitate more adaptive, changeable ways of doing business?

TOP TIPS

Understanding M&A due-diligence in relation to digital assets and processes

- Information is money. The internet has transcended geographical limitations, which resulted in a number of complex cross-border transaction and raised novel transactional issues such as legal, taxes, and finances.
- With the majority of transactions occurring in the cloud, businesses should immediately adapt and join technological trends. Costly face-to-face meetings should be avoided, except in important milestones such as signing of agreements. By default, contracting parties should also utilise virtual data rooms (VDR) which are essentially considered information databanks that provide a clear picture of the background, compliance status, and risks involved in a target business. VDRs should contain all the electronic versions of a company's corporate files, permits, transactions, and other documents or files relevant to its business and the due diligence process.
- However, with the advent of the digital age comes the proliferation of deceitful schemes, fake news, stolen identities and hackers, desperate to get a piece of the pie. Thus, businesses should be equally mindful of the risks involved in deriving the benefits of the internet and invest in security measures to avoid becoming victims of digital crimes.

With the advancement of technology, businesses have been integrating digital tools to gain flexibility and facilitate smoother and streamlined transactions. The options available in the technological and online sphere offer businesses abundant ways to record, organise, and disclose data, as well as various ways to communicate with other parties at any time deemed convenient.

Changes in traditional M&A transactions are evident as early as the negotiations stage, where business meetings and drafting of term sheets by top corporate officers are by default done through online teleconferencing platforms such as Zoom and Microsoft Teams. Transitioning to the actual due diligence process, important corporate documents are no longer examined physically but are scanned, uploaded, and stored in a virtual digital space. This ensures minimal disruption during office hours, protection against loss, theft, and natural disasters, including convenient and swift access of documents especially on cross-border transactions where distance and time zones are important considerations. At closing, transacting parties take advantage of the use of electronic signatures as a way of signifying their consent, especially when timelines must be strictly adhered to and authorised signatories are scattered across the globe.

However, while there are undeniable advantages offered by a primarily digital M&A process, parties to an M&A must not completely disregard face-to-face interactions and on-site inspections and reviews. Much like relationships that are better fostered through physical exchanges, parties looking to establish interpersonal relationships should remember that businesses are still better understood through personal experiences.



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You are Capital (YaC) is an International Corporate Finance Advisory firm located in Madrid and Barcelona, with more than 30 years of track-record in the industry and a global network of over 40 Partners & Senior Advisors leading it to be the number one independent midcap M&A advisory in Spain. Founded by Jean-François Alandry, YaC counts on an international internal execution team specialising in cross-border buy and sell-side M&A, Private Placements, Capital Restructurings, Fundraising for both Equity and Debt, Financial and Strategic advisory and Private Equity advisory, in its three offices in Madrid, Barcelona and Paris. YaC leverages its expertise and global reach to provide specialist corporate finance advisory services in industries such as IT, Technology and Telecommunications, Digital Economy, Healthcare and Life Sciences, Consumer Goods, Distribution/Retail, B2B Services, Transports and Logistics, Environmental and Renewable Energies, Leisure and Experiences among others.

QUESTION ONE

How are ESG commitments shaping corporate strategy in your jurisdiction, and what are the biggest challenges it represents?

Our expectations are that the positive trend toward comprehensive ESG reporting, particularly within the European Union, will have a significant impact on corporate strategy, both in organic corporate development and investment activity. As large corporates and investors will be expected to disclose ever more information on ESG matters, we believe investor appetite will be increasingly, albeit not exclusively, tied to responsible governance.

It is important to note that many European market participants, including Private Equity players, have already taken steps toward optimising and started reporting on ESG matters, given the consistent indication of lawmakers and investors toward such disclosures. Spanish private markets are still lagging somewhat when compared to markets such as Germany and France, but catching up quickly, especially in the Private Equity segment where the normal divestment counterparties for local PEs are usually North-American global PE players which are increasingly requesting for ESG compliance within Due Diligence processes.

As stricter EU regulations on reporting for publicly listed entities and financial market participants are currently being implemented, we expect

investment decisions to be impacted. This will be amplified within private markets, especially within SME investing. Small and Medium-sized (with yearly revenues below €50m) family-owned and local businesses are under somewhat lax ESG reporting regulations and many times operate outside the required standards for investors. These discrepancies can become burdensome within the investment process, leading to protracted due diligences, complex contract negotiations and closing conditions that may endanger deal making.

As advisors, the understanding of investor ESG standards is steadily growing in importance, while counselling entrepreneurs on their ESG approach and compliance as well as assisting in communications with potential investors on the subject is expected to become an integral part of M&A activity.

“Within Europe and Spain, the Social aspect of ESG is quite closely monitored, so minimum standard labour practices are mostly followed and workforces enjoy legal protections”

QUESTION TWO

ESG covers a combination of obligations and voluntary initiatives: how can businesses in your jurisdiction manage all aspects of ESG effectively?

Given that ESG compliance is becoming ever more crucial for businesses in Europe, managers are expected to dedicate an increasing amount of time to ensuring best practices are being followed in day-to-day activities as well as in strategic initiatives. Larger corporates and financial market participants are increasingly appointing personnel to exclusively deal with said issues.

It is important to take varied approaches regarding different ESG aspects. Regarding Governance, businesses are increasingly driving toward transparency in reporting, with improving clarity in audits, conflict of interest disclosures, whistleblowing policies, foreign investment in strategic segments and other relevant areas. As regulators within Spain and the EU increase corporate scrutiny into such measures, businesses must ensure effective internal controls, both from financial departments and upper management. While SMEs do not necessarily face the same regulatory governance scrutiny as publicly listed entities, the voluntary implementation of best practices, though time consuming and potentially costly, is in our view conducive to

growth and eases investment processes greatly.

Within Europe and Spain, the Social aspect of ESG is quite closely monitored, so minimum standard labour practices are mostly followed and workforces enjoy legal protections. In order to further build on current social practices, promoting an inclusive workforce and ensuring equal pay and respectful work environments, Human Resource Management becomes essential, with clear, confidential and unbiased communication channels being key to ensuring internal accountability. Within some segments, however, we see corporates actively and voluntarily pursue policies aimed at talent retention. This is particularly noticeable within the Tech segment, where a lack of qualified personnel increasingly leads to employee benefits. As such, management of Social issues runs both through effective internal controls coupled with management of workforce requirements, which can lead to economic costs due to external pressures.

Environmental issues are complex and can be managed in different ways. Larger corporates in the energy segment, for instance, already dedicate entire departments to ensuring compliance to Environmental standards and we can observe a decided increase in voluntary forays into new initiatives, with new dedicated corporate venture funds being launched, etc. Many businesses, especially financial institutions and listed entities, could find it beneficial and economical to externalise environmental impact analysis, and we currently see a significant rise in environmental consultancy. We also observe regional choices, with Spanish companies, different from other EU markets, choosing to adopt for ex. waste gasification technology as opposed to incineration: incurring R&D expenses, but with long-term environmental benefits.

QUESTION THREE

While ESG can be good for business, it's not without its financial challenges. How do you advise businesses navigate compliance and growth?

It is important to understand that ESG compliance standards are becoming mandatory for several industries, including Private Equity, listed entities and others. From an advisory perspective it becomes paramount to impress upon companies that many ESG initiatives bring long-term benefits. Many aspects of ESG, especially relating to Social and Governance, relate strongly to well-structured internal controls and, while those may generate additional expenses, compliance with best practices can lead businesses to become more attractive to talent as well as potential investors.

Environmental compliance and assessment are very dependent on industry. For many lower impact industries, internal optimisation of environmental practices can have a significant overall effect while leading to cost savings. In more energy heavy and environmentally impactful segments, while companies may face more significant capital expenditures to comply with regulations, increased efficiencies derived from process optimisation and new “green” investment initiatives could, in the middle to long term, allow for cost savings.

IP

The Metaverse


In the IP world, it is so important that businesses investigate, monitor, and protect their IP as the metaverse evolves, particularly when it comes to use of established trademarks and copyrighted materials. Our IP members talk about the key IP opportunities relating to the metaverse that brands/trademarks should be exploring and how the metaverse might complicate IP infringement prosecution and cease and desist processes.




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Dipchand LLP is a boutique Bay Street law firm which is the destination for purposeful, innovative and creative legal solutions. Dipchand LLP's commitment to cultivating strong relationships with our partners and clients results in tailored, strategic advice to guide ventures of all sizes through Canada's dynamic legal landscape. Our value is as trusted advisors of unparalleled calibre in both our legal advice and quality of service. Our shop has earned a rock-solid reputation over years of dependable service, which we constantly strive to maintain.



QUESTION ONE

How will businesses need to investigate, monitor and protect their IP as the metaverse evolves, particularly when it comes to use of established trademarks and copyrighted materials?

Understanding IP in the metaverse begins with embracing evolution. As technology continues to advance, its practical impact and implementations on society will prompt the law to develop. While it may seem like the metaverse boldly arrived only a short time ago, its foundation goes back decades. Building on the likes of The Sims, Minecraft, and Pokemon Go, the metaverse is on the road to be a three-dimensional experience, an immersive and multi-sensory world.

The commercial potential for the metaverse has garnered the attention of ventures big and small; with value projected to hit a trillion dollars in the next few years, that list will continue to grow. The increasing value of intangible assets in an intangible world means that legal strategies must immediately be sought to protect intellectual property. Currently, copyright and trademark considerations are coming to the forefront of metaverse-focused IP strategies for consumer brands and content creators. Regardless of how the patchwork of platforms gets stitched together to make the metaverse, the interactive and explorable universe expands the way companies can interact with consumers, and how consumers can engage with content. However, these strategies hardly come out of nowhere – partner affiliation, branding, and product placement are all well-known practices that came out of the gaming industry. The difference in the gaming industry is that people could control where games were sold and generally know what countries and markets they were going to be used in – it's not so for the metaverse.

Therefore, associated investigative and monitoring activities will flow from the metaverse product delivery and/or consumer engagement activities. Proactive steps include ensuring that agreements and authorisations are clear, specifying assets, authorised parties and duration of use. Monitoring will be difficult since there is yet to be a single unifying platform, but focusing on the larger, more developed platforms can mitigate risks and focus resources.

QUESTION TWO

What are the key IP opportunities relating to the metaverse that businesses and established brands/trademarks should be exploring?

For forward-thinking companies, the metaverse brings the opportunity to rethink the way their products are presented and consumed. Fake food sold in an imaginary place? Think virtual Happy Meals being sold in the metaverse at virtual McDonald's restaurants. Not that far-fetched, nor without precedent. Those of a certain age and inclination will remember being able to buy virtual food and weapons, potions and provisions in video games using gaming currency. Companies who recognise the opportunity of "meta-ising" their products and services will not only realise entry into a new market, but will help reshape how their products are consumed.

Why stop at meta-ising products and services? What about creating your own branded metaverse? That's exactly what Nike is doing and spending a lot of money in the process. For others without the same level of resources, strategic partnerships with existing metaverse platforms easily suffice and potentially reduce the barriers to consumer adoption and access – what's the point of being in the metaverse if others are not there with you?

As product and platform offerings expand as per the dictates of the technology, keeping an eye on the associated rights is critical. The delineation of traditional IP rights – patent, trademark and copyrights – from other use rights are only now coming to the forefront because people are now able to do something new and previously unconsidered in the metaverse and blockchain. NFTs are a great example of this – copyrights are distinct from NFT rights. On one hand, "owning" an NFT does not necessarily mean that you have the right to do anything you want with the NFT. Indeed, the terms of "ownership" of the NFT may be dictated by the terms and conditions of their minting and sale rather than a direct consequence of the law. Further, having physical ownership of a thing – a painting or sculpture – does not confer the right to mint an NFT of that work. Traditional copyrights continue and in the absence of a license to do so, the owner of the physical work does not implicitly have the right to reproduce or otherwise deal with copies of the work. While there are few Canadian decisions regarding NFTs, we can extrapolate from traditional copyright legal principles as well as draw from other legislatively similar jurisdictions such as the US.

QUESTION THREE

How does the metaverse complicate IP infringement prosecution and cease and desist processes, particularly in terms of jurisdictional 'grey areas' online?

Traditional laws are bounded by borders, but what happens when there are no borders? Intangible assets in an intangible world begs the question of how IP rights can be asserted and enforced. In Canada, that question is far from answered

TOP TIPS

Understanding your jurisdiction's legal standpoint on IP in the metaverse

- ✔ **Meta-ise Your Products and Services** – mindfully consider how you want to engage with consumers in the metaverse and how this will impact their experience with your offerings.
- ✔ **Meta-ise your IP Portfolio** – review and audit your existing IP portfolio and ensure that you are capturing all of the IP arising from meta-ising your products and services.
- ✔ **Meta-ise your Contracts and Agreements** – review and ensure your existing agreements with vendors, distributors, creators, employees, licensees/licensors, etc. expressly address the allocation of rights separate from IP rights that are current or may arise in the future.

just yet. With traditional multi-billion-dollar consumer brands jumping into the metaverse – think Nike, Hermes, Coca-Cola, Lamborghini, and more – there is no doubt that these questions will eventually come before the Court.

We anticipate that companies will use traditional enforcement mechanisms at the outset, namely Cease and Desist letters and platform-specific infringement reporting mechanisms if they exist. What logically follows will be to seek injunctive relief, but the issues of jurisdiction will need to be dealt with front and centre. Factors that will tend towards convincing a court to assume jurisdiction to address conduct in the metaverse will include: where the rights holders reside, where the wrongdoers reside, and whether consumers in Canada can and were in fact exposed to the infringing activities.

We have yet to have a Canadian decision regarding trademark or copyright infringement in the metaverse, however we can be guided by the American experience. Already we are seeing examples coming out of the US where prominent companies are taking litigious steps to enforce IP rights in the metaverse. Notably, the luxury brand Hermes brought an action in the US to preclude an artist from selling "MetaBirkins", namely NFTs of the iconic Hermes Birkin bag. Similarly, Nike sought to preclude an online reseller of Nike products, from selling NFTs prominently featuring NIKE marks.

The question of liability is a significant issue that begs the question of whether the platform owner may be liable for the infringing activities of platform participants and/or content creators. In the context of NFTs where the transfer of ownership is traceable, will each owner attract liability along the chain? The legal complexities are compounded by the practical realities – many of these entities and/or people may not have a real and substantial connection to the jurisdiction making damages recovery difficult.



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AMPACC Law Group, PLLC is a Pacific Northwest-based intellectual property law firm with multiple global affiliates helping clients with their legal needs in the U.S. and abroad. Being a strategically situated boutique firm, AMPACC offers the personalised attention of a small firm, coupled with the expertise of a large firm. Consisting of a seasoned team of intellectual property and legal professionals who have years of experience working in premier U.S. and foreign law firms, AMPACC leverages a blend of legal and technical expertise to optimise its clients' intellectual property portfolios while meeting their business objectives in all industries and across multiple jurisdictions.

QUESTION ONE

How will businesses need to investigate, monitor and protect their IP as the metaverse evolves, particularly when it comes to use of established trademarks and copyrighted materials?

Successful protection for established trademarks and copyrighted materials on metaverse platforms requires unique, tailored, and adaptable strategies. When we talk about the metaverse, what we are really talking about are interactive online platforms where users can experience—and even create—3D environments and experiences. Such experiences include interactive gaming, online events, and participating in virtual marketplaces. While analogous to conventional online platforms (i.e., Meta, Twitter, etc.) – in terms of user-platform and user-to-user engagement, platform provider management, and perpetual changing of user offerings – metaverse platforms are unique in that they vary in terms of their structure (decentralised vs. centralised), level of interactive engagement (user-created vs. platform provided), accessibility (largely user only), and offer unique goods and services (i.e., digital goods such as non-fungible tokens—NFTs). Such similarities and differences mean rights holders must adopt IP protection strategies based on existing online IP protection practices, but also ensure their strategies are tailored to address the unique characteristics and perpetual changes

on metaverse platforms.

So what do effective metaverse IP protection strategies look like? As with any online IP protection strategy, rights holders must first understand how protectable IP appears on the metaverse platforms of interest and the platform policies/terms of services that govern its usage. Many metaverse platforms, such as Roblox or Fornite, allow for user-created content, requiring monitoring of actual user activities. However, as reported by other commentators, unlike conventional online platforms, much of that content may only be visible by other platform users, meaning rights holders will need to directly monitor and investigate cases of potential infringement as platform users or retain platform users to perform the same. As each metaverse platform is unique and ever-changing, IP protection strategies will have to be tailored to each platform's unique characteristics and be flexible enough to address any platform changes.

The uniqueness of each metaverse platform also impacts what IP protection and enforcement strategy should be adopted. As with conventional online platforms, each metaverse platform will be subject to the jurisdictions where they are located, and each platform owner will dictate how cases of IP infringement will be handled on their platform. This requires adopting protection strategies often used in conventional online IP enforcement, namely trademark and copyright prosecution in the controlling jurisdiction(s) of a metaverse platform, in the case of trademarks—registering existing marks for digital products as offered from such platform, and utilising extrajudicial means of enforcement available on the platform and in the controlling jurisdiction(s) (e.g., DMCA enforcement in a platform subject to U.S. jurisdiction) to combat infringement.

QUESTION TWO

What are the key IP opportunities relating to the metaverse that businesses and established brands/trademarks should be exploring?

IP opportunities businesses and rights holders should be exploring on the metaverse include protections for digital products, collaborative works, as well as personalities and personas. As mentioned, the metaverse has become a substantial marketplace for digital products such as NFTs. As digital products are often distinct from other types of goods and services in the trademark context, it is not only advisable, but increasingly required, for established brands to register their existing brands for digital products to ensure sufficient protection in the metaverse as existing rights to non-digital products may not extend to digital products. Doing so not only ensures brand protection in this emerging market, it is also needed to avert unauthorised claims to exclusive rights as it has been reported that many unauthorised metaverse users have sought to register existing, well-known brands for digital products, with some even succeeding, making the need for such trademark prosecution even more acute for existing brands.

Another area of opportunity is effective protection for collaborative works. As mentioned, a number of metaverse platforms allow for users to create their own environments

and experiences, often through collaboration with other users, creating unique works and potential means for monetisation. As collaborative works absent agreement are considered jointly-owned in most jurisdictions, and as many metaverse platforms terms of service are silent about ownership of such works, rights holders and businesses that create collaborative works in the metaverse should establish tailored license and/or assignment terms with co-creators in such engagements to ensure ownership and control to such novel creations.

Lastly, obtaining IP in metaverse personas is an area that businesses and rights holders should be exploring. As offerings on the Metaverse are largely persona-driven, from celebrities, to influencers, to fictional characters, business and rights holders should look to what extent they can protect IP assets in such personas through trademark and copyright regimes, and in the alternative, through existing personality rights laws. While personality and persona protections are important in any market, protection for such personal traits in the Metaverse's interactive digital environment is disproportionately more vital, as personas largely drive digital product offerings, and persona IP protection can help to deter imposters and unauthorised persona usage.

QUESTION THREE

How does the metaverse complicate IP infringement prosecution and cease and desist processes, particularly in terms of jurisdictional 'grey areas' online?

Metaverse platforms pose multiple IP enforcement challenges, most notably limitations on personal jurisdiction over users and extrajudicial enforcement. Many metaverse platforms are decentralised, meaning while a metaverse platform may be housed and subject to the laws of a particular jurisdiction, its decentralised structure means an infringing user or particular infringing content may not be subject to such jurisdiction, and more concerning, such a user or content's location may not be identifiable. Such complicated personal jurisdiction environments mean rights holders will need to adopt protections for their established IP across multiple jurisdictions where metaverse users may reside and work with qualified foreign counsel in foreign jurisdictions when needed for jurisdictional-specific enforcement. Further, should the identity or locale of an infringing user or content be difficult to ascertain, rights holders may need to consider working with online forensic experts as well as platform officials to address cases of anonymous infringement.

Such personal jurisdictional challenges also create an environment where extrajudicial enforcement, such as the DMCA notice and takedown protocols, may not be available. While a typical cross-border enforcement challenge with any form of online IP, many jurisdictions do not provide the means for rights holders to extrajudicially enforce their IP rights online, which can result in costly and time-delayed judicial means of enforcement. While there are unfortunately no shortcut solutions in many of such instances, working with qualified foreign counsel may help to identify alternative, jurisdictional-specific means of enforcement to deal with such challenges.



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Justi has a long and distinguished career in IP law and is recognised as one of Indonesia's leading figures in the area. He is recognised by WTR 1000 as The World's Leading Trademark Professionals and Highly Recommended lawyer in IP by legal 500 Asia Pacific for more than three consecutive years. Justi is also recognised as one of Indonesia's Top 100 Lawyers by Asia Business Law Journal. In addition to being the Managing Partner, Justi's main role in the firm is to lead the Dispute Resolution as well as the Commercial IP, and Corporate and Technology practice groups.

Justi currently serves as Chairman of MIAP (Indonesia Anti-Counterfeiting Society). Justi is also a regular instructor for various training organised by and for the Indonesian Police Force and Visiting Lecturer at Pelita Harapan University. Justi is also involved as a member of various task forces within the Directorate General PPI of the Ministry of Communication and Informatics.

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Ghifari has provided legal assistance to clients on corporate, technology, and commercial IP matters. He has advised various local and foreign clients in relation to technology law aspects, mainly privacy and personal data compliance. He advised an Indonesian state-owned telecommunication company to ensure its internal governance policy on technology utilization complies with the Indonesian regulatory framework, conducted a privacy impact assessment for a leading global airline, and assisted a fast-moving consumer goods company in establishing data governance guidelines. Besides his involvement in technology matters.

He also has advised local and international clients on various corporate matters and IP commercials, among others, acted as legal counsel in a payment service provider acquisition, and assisted one of the world's largest ready-to-assemble furniture retailers in franchise matter.

K&K Advocates is a boutique Intellectual Property firm that specializes in providing services in all spectrums of IP areas and technology. K&K provides a full range of services relating to IP and TMT with a particular strength in IP Prosecution, Commercial IP and Enforcement or Litigation, as well as general corporate matters with focus on Banking, Fintech, Privacy and Data Protection, and Construction.

Our knowledge of Indonesian regulatory context and international network is regularly sought by multinational clients, foreign governments, and international organisations to manage the IP portfolios of a diverse range of clients across many industries and technologies.

Our attorneys' dedicate themselves to understanding our clients' businesses and work closely with them to achieve the best possible commercial result from the transaction. Whatever your business, seeking discerning legal advice to secure your IP rights is critical to making strategic commercial decisions.

**Trademark in Metaverse:
Should businesses worry?**

In 2021, Mark Zuckerberg announced that Meta will build a digital environment that will enable billions of people to inhabit and spend hours in virtual and augmented worlds - the Metaverse. This world combines several technological elements, including virtual reality, augmented reality (AR), and video. In society, especially the tech-savvy, it has been a long time since dreaming of connections, working, shopping, interacting with others, and playing roles play in the virtual world is now a reality. The excitement of the Metaverse was welcomed in Indonesia, and the government soon prepared to migrate from the real world to the virtual world. With approximately 204.7 million internet users in Indonesia, the potential market for Metaverse in Indonesia is very high.

The implementation of Meta's vision is only in the beginning phase. From there, the boundaries between physical and virtual reality are set for an overhaul as we can work, learn, socialise, play, and even do business in a digital world. Therefore, while this new phenomenon provides many opportunities, there are also challenges and concerns with potential legal claims.

One of the potential legal claims is in relation to Intellectual Property. The purpose of IP law is to protect creators by giving them exclusive rights over their creations which may include copyright, trademarks, patents, industrial designs, or trade secrets. Service trademarks and copyright may be the aspect that attracts the most interest, due to the massive use of artwork involved in the making of avatars, design of the interface, or due to protection.

The gaming industry has been a leader in developing this new space, with gamers able to make in-game purchases using the virtual in-game currency of digital objects, like "skins" or "avatars." But for the trademark owner in the real world, protecting their marks in the Metaverse will be the first strategy to prepare. The question is, how can the law protect trademarks in Metaverse in Indonesia?

Article 20 and Article 21 of Trademark Law stipulate that a trademark infringement generally occurs when there is no distinguishable feature, the trademark is owned and registered by another party, and the mark is an imitation or resemblance of another party without its written consent. In proving an infringement in the Metaverse, the mark owner needs to assume a similarity between virtual and physical goods. On the other hand, the Metaverse worlds may have different territorial boundaries than we usually recognise in the physical world. Therefore, it will not always be clear which laws and within what jurisdiction disputes arise in the Metaverse should be considered.

Nevertheless, until a clear regulatory framework is introduced, mark owners must be particularly vigilant regarding infringements and enforcing their rights against other parties. As a safeguard, registering trademarks in multiple jurisdictions may be worthwhile at this stage.

Mark owners who need to protect their rights to the virtual goods and services trademark may find it difficult to combat infringement and effectively enforce their rights in the Metaverse. In a recent case, Nike sued StockX, a marketplace in the Metaverse, for commercialising Nike's footwear as NFTs, and Nike considered this practice harmful to Nike's reputation. One thing that we can learn from Nike and StockX is immediately extending the scope of mark protection into the virtual world is also beneficial to cover the potential mark infringement when a third party suddenly registers the mark, including virtual goods and services when the original mark

TOP TIPS

Shaping mark protection in the Metaverse

- ✓ **Expanding the registration of the mark:** With the presence of Metaverse, the current mark registration application certainly needs to be more specifically clarified regarding its existence in digital form.
- ✓ **Drafting licensing and distribution agreements:** Considering the dynamic development of the Metaverse, licensees need to have more flexibility to facilitate development and interaction.
- ✓ **Preparing necessary legal strategy in case of infringement:** Even though the infringement has not yet occurred, the mark owner must prepare mitigation steps and strategies in case there is an infringement. Careful preparation and a wise strategy could become the right step in protecting the rights and dignity of the owner of the marks.

Consulting with the mark office: We recommend the mark owner actively obtain the latest information on the approach of the mark office regarding Metaverse.

is only registered in the conservative mark class. Therefore, some forward-looking mark owners have already taken steps by applying to register their marks for goods and services relating to the Metaverse.

Indonesia Trademark Office has started to include the protection of Metaverse-related specifications of goods. Numerous discussions have taken place formally or informally with the examiners and they have shown their conformity to this approach.

Another key issue facing mark protection in the Metaverse in Indonesia is when a mark created by a person from the Metaverse becomes famous and well known in the Metaverse and is planning to register the mark in the physical but with no intention to use the mark in the physical world. Could this mark be considered unused? In general, everyone's the right to register their marks in every part of the world. However, according to Article 74 of Trademark Law, registering the mark which will not be used in the physical world may provide a chance for any third party to file a deletion because the mark has not been used for three consecutive years. Can extensive use in Metaverse without the real use of the mark itself in the real world be considered unused under the Indonesian practice? The concerns have yet to be addressed given that there has yet been any court decision that has been issued pertaining to the issues.

"In proving an infringement in the Metaverse, the mark owner needs to assume a similarity between virtual and physical goods"



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Kenji Kuroda passed the National Bar Examination at 20 years of age. After developing practical experience as an attorney, he attended law school in China (Fudan University Faculty of Law, Advanced Study Course), Denmark and the United States (Duke University Law School). Following his admission to the bar in New York in the United States, Mr. Kuroda founded Kuroda Law Offices and Kuroda Patent Offices in 1995, later establishing our Shanghai office in 2004 and opening the first Japanese law firm in Taiwan in 2009, specialising in cutting-edge fields, such as Chinese law, information technology, and intellectual property.

In its ranking of leading attorneys, Nihon Keizai Shimbun selected Mr. Kuroda second in the international law section and eighth in the international law section (December 19, 2012) and more recently seventh in the Intellectual Property section (December 22, 2022).

In addition, Nikkei Business selected Mr. Kuroda third in the international matters section of its business attorneys ranking (December 22, 2014).

KLO provides all sorts of legal services (such as labour law, corporate law, IP law, fraud surveys and dispute resolution) to Japanese subsidiaries of foreign companies. With offices in Shanghai and Taipei, and our affiliate, KLO Consulting (Shanghai) Co., Ltd., we provide comprehensive service locally. Furthermore, we offer advice to maximise client profits, such as ways to effectively use IP rights, strategic planning to design and develop new products and services without infringing third party rights, and methods to prevent all manner of litigation and disputes. We also have ample experience with litigation in new fields (such as LEDs).



QUESTION ONE

How will businesses need to investigate, monitor and protect their IP as the metaverse evolves, particularly when it comes to use of established trademarks and copyrighted materials?

Trademarks can be protected by acquiring and maintaining registered trademarks, but since there is a high possibility that virtual products in the metaverse and real products will be deemed to be dissimilar, they should assume that the trademark will not be protected in the metaverse unless they obtain a registered trademark designating goods and services relating to virtual products. For example, if you have a registered trademark that designates clothing (class 25), it is recommended that you consider applying for the same trademark designating goods and services relating to virtual clothing (classes 9 and 41, among others). Once you have acquired a registered trademark for virtual goods, it is important to continue using the trademark in the metaverse (even if it is by a licensee) in order not to become subject to a request to cancel the trademark due to non-use. In the future, if it becomes common for merchants who handle a certain product to handle products that are virtualised from the product, there is a possibility that similarity will be recognized.

Unregistered trademarks (including remarkably distinctive product forms) that are well-known or famous in Japan may be protected in both the real world and the virtual world under the Unfair Competition Prevention Act. However, since the hurdles to assert and prove rights pursuant to this law are high, it is better to acquire a trademark registration.

As for copyrighted materials, works covered by copyright law are automatically protected in the metaverse without registration or use of the notice. Moreover, since many of the provisions restricting rights under the Copyright Act (there are no fair use provisions in Japanese law, and individual exceptions are provided for restrictions of rights) are intended for use of the works in the real world, copyright protection is stronger in the metaverse than in the real world. However, provisions restricting rights tend to be amended frequently, and it is necessary to pay attention to trends in future amendments.

For example, in the real world, the non-commercial, free

and unremunerated presentation, performance, screening or dictation of a published work, and the exhibition of the original by the owner of the original work of art or photography (excluding permanent outdoor installations of original works of art) can be performed without permission, but permission from the copyright holder is required to perform equivalent acts in the metaverse. With respect to designs among IP, since designs subject to protection under the Design Act are limited to articles in the real world and special images ("images provided to operate devices" and "images displayed as a result of devices performing their functions"), it has been pointed out that it is difficult to protect virtual product designs and other content from counterfeits, and it is expected that the law will be amended in the future.

With respect to investigating and monitoring IP infringement, it is expected that research companies that provide monitoring services and monitoring tools will also support the metaverse. It could also force metaverse providers to monitor for IP infringement.

QUESTION TWO

What are the key IP opportunities relating to the metaverse that businesses and established brands/trademarks should be exploring?

By opening their own virtual store in the metaverse (of course, businesses can display their own brand logos and marks in outdoor advertisements and inside the store) and displaying and selling various products from their own brands (they can sell real products as well as virtual products), it is possible for businesses to increase sales opportunities, acquire new customers, and improve brand power and recognition at a lower cost than opening a physical store.

In addition, by linking their own brand products or content to NFTs and adding value as one-of-a-kind or limited items, businesses may be able to expect advertising effects.

Furthermore, the metaverse is expected to increase the distribution of different virtual products and create and increase licensing opportunities, so it is also conceivable to aim to increase licensing revenue.

QUESTION THREE

How does the metaverse complicate IP infringement prosecution and cease and desist processes, particularly in terms of jurisdictional 'grey areas' online?

If an infringing act occurs in a highly anonymous metaverse space, it may be necessary to identify the infringer using procedures for the disclosure of identification information of the sender under the Act on the Limitation of Liability of Providers.

There is still no established theory as to how to determine the law governing IP infringement. In Japanese court practice, many decisions are made based on (1) in principle, the place where the result of the infringing act occurred, in the case of claims for damages, and (2) "the laws of the country where protection is claimed" (Article 5.2 of the Berne Convention),

TOP TIPS

Understanding your jurisdiction's legal standpoint on IP in the metaverse

With respect to IP protection in the metaverse, the first thing businesses should do is consider whether it is necessary to obtain a registered trademark at the Japan Patent Office for designated goods and services relating to virtual products (classes 9 and 41, among others).

Copyrights are better protected in the metaverse than in the real world, and there are concerns that this will interfere with use in the metaverse. Future revisions to the law may enact some sort of provisions restricting rights based on the use of copyrighted material in the metaverse.

The designs of virtual goods and content, at this stage, have little protection in the metaverse. This point is expected to be revised in the future, but for the time being, if businesses wish to prevent unauthorised copying of virtual goods, it is possible to attach to the virtual goods a registered trademark designating them as such.

"Copyrights are better protected in the metaverse than in the real world, and there are concerns that this will interfere with use in the metaverse."

in the case of claims for injunction on the grounds of copyright infringement. Moreover, (3) in the case of claims for injunction on the grounds of trademark infringement, it is likely that a decision would be made based on the country in which the infringed trademark is registered.

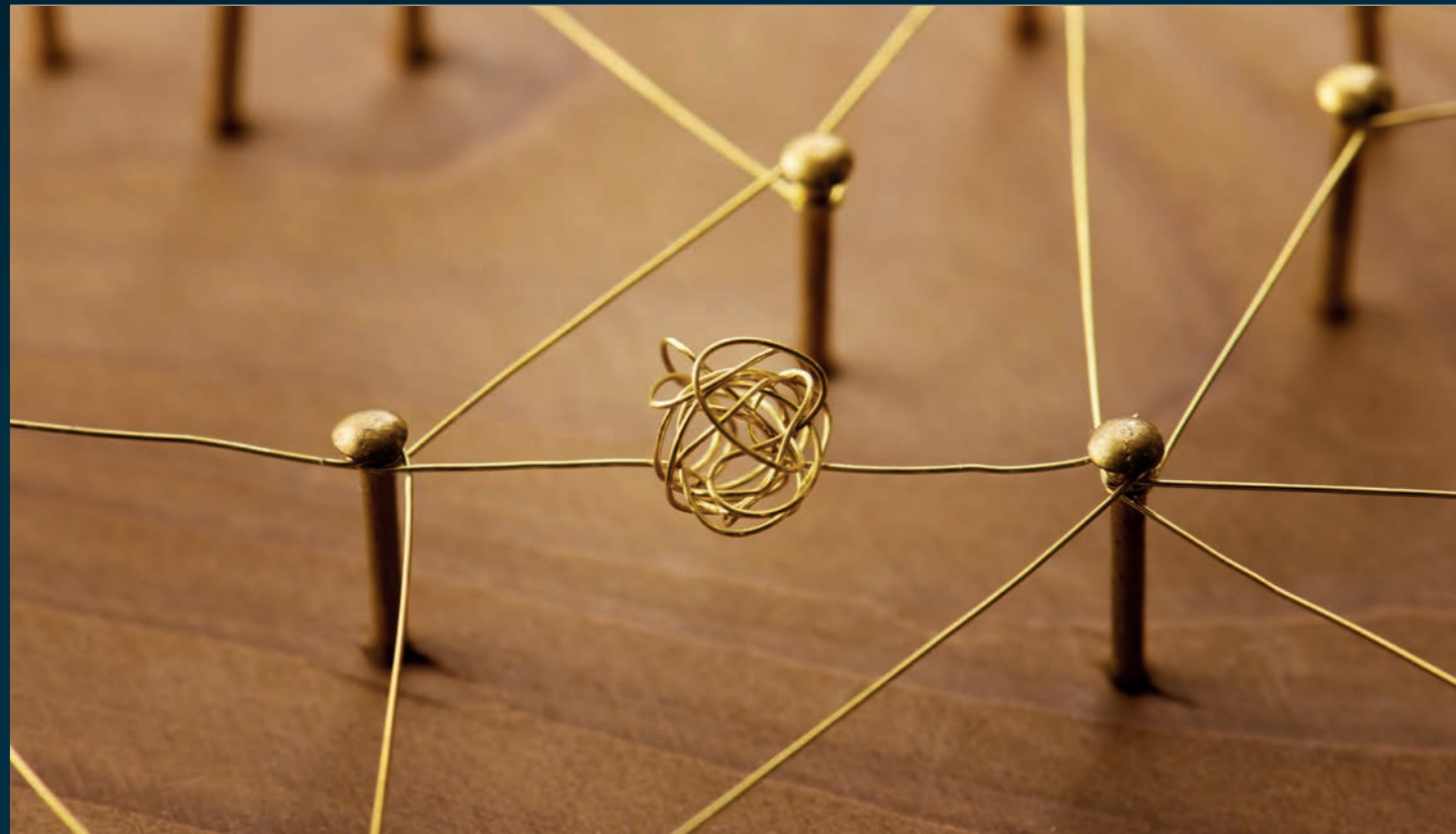
Furthermore, with regard to (1) and (2) above, there are many views on how to determine the place of occurrence of the result and the country where protection is claimed. According to one widely accepted opinion at the moment, the destination of the metaverse services in which infringement occurs (the place where the content is received) corresponds to the place of occurrence of the result and the country where protection is claimed (it is also possible that all laws in places that have access will apply).

The above discussion is based on Japanese court practices, and does not necessarily apply to court cases in countries other than Japan.

DISPUTES

Alternative Dispute Resolution

Our Disputes members are at the forefront of the professional services industry. They discuss Alternative Dispute Resolution becoming compulsory and what steps are currently being taken to bring this into legislation. They focus on what role ADR is playing in an increasingly volatile utilities market and how the 'international' nature of the digital and subscription economy can increase the complexity of disputes.



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Chris Niekamp is a Corporate and Commercial Litigation attorney who represents large and small businesses and individuals in matters related to bankruptcy and creditors' rights, mergers and acquisitions, real estate (including litigation), and shareholder disputes. Niekamp is a leading authority, has published articles and has represented numerous minority and majority shareholders in issues involving closely held businesses, fiduciary obligations and dissolution. Niekamp served as the Liquidating Trustee for one of Ohio's oldest law firms – Day Ketterer, Ltd.

“As a result of the growing trend toward ADR, as of 2020, Ohio’s Courts see only 1% of the filed civil claims going to trial, whereas nationally, the rate is at 2%”

Buckingham, Doolittle & Burroughs is a corporate law firm that counsels middle-market executives and business leaders all over Ohio and beyond. Buckingham has served Northeast Ohio for more than 100 years through sophisticated and practical legal services. With more than 70 attorneys in Akron, Canton and Cleveland, Ohio, Buckingham has extensive experience working with owners of middle-market businesses in all aspects of their operations. Buckingham's mission is to deliver meaningful experiences through the practice of law, exceed expectations in terms of service, counsel and business sense, and to offer continuous value to the industries, communities and clients they serve.



QUESTION ONE

Could Alternative Dispute Resolution (“ADR”) become compulsory in your jurisdiction? If so, what steps are currently being taken to bring this into legislation?

In Ohio, ADR is not mandatory for civil suits and claims unless otherwise mandated by state statute (O.R.C. §§ 2710, 2711, 2712), court order, administrative agency, or set out in an agreement. Generally, ADR is encouraged to settle disputes before reaching the Court systems. The Constitution provides each citizen and entity with “their day in court.” U.S. Constitution – Seventh Amendment. However, getting your day in court has become extremely costly, time-consuming, and emotionally taxing on all parties involved.

In the past few years, there has not been any significant support for legislation to make ADR compulsory for private individuals and entities involving Ohio disputes. ADR has become a very popular alternative to litigation and is commonly negotiated and inserted into business agreements (no matter the recovery at stake) and is often embedded into consumer software and application licensing (usually by “check the box” unknown means). ADR's insertion into agreements has resulted in obligatory ADR as the primary mechanism for resolution of their disputes, sometimes requiring mediation or negotiations before resorting to Court proceedings. However, that does not and cannot replace traditional

court proceedings, which still have their place when parties fail to agree or properly include language that mandates ADR. As a result of the growing trend toward ADR, as of 2020, Ohio's Courts of Common Pleas see only 1% of the filed civil claims going to trial, whereas nationally, the rate is at 2%. Cases have either been settled through ADR – like proceedings or dismissed.

QUESTION TWO

The ‘international’ nature of the digital and subscription economy can increase the complexity of disputes – what ADR issues does this raise in your jurisdiction, particularly in regard to international disputes?

Because of the growing volatile markets and the growth in international business transactions, using the ADR resources available is crucial to preventing issues such as jurisdiction disputes, enforceability and collection. The use of ADR is increasing, and trials are decreasing. The benefits of ADR outweigh litigation costs, and there is a noticeable shift towards ADR in Ohio and throughout the U.S.

ADR contracting parties who do not adequately construe their language in their agreements can still end up in court. This results in a more lengthy and costly dispute resolution because the parties now disagree on the ADR provision/process and have yet to resolve the original dispute; adding in an international person or entity is a combination that will not yield for cost savings or results. To avoid such issues, many lawyers are turning to providers like Judicial Arbitration and Mediation Services (“JAMS”), The American Arbitration Association (“AAA”) and The International Institute for Conflict Prevention and Resolution (“CPR”), who are leading service providers in ADR. These companies help aid in the ADR process through streamlined discovery agreements and appropriate remedies. Utilizing these resources can alleviate some of the costs and issues that often arise in litigation and aid in avoiding court intervention and attorneys' fees spent on unnecessary discovery disputes.

QUESTION THREE

What is the history of ADR in the United States? What is in store for ADR in the future?

ADR holds a portion of its roots in the old English Legal System. During that time, ADR consisted of informal meetings with respected community leaders who joined together to resolve issues within their community instead of taking them to the King for adjudication. Later, as the United States was forming, they began to develop their version of ADR through the Patent Act of 1790, The Board of Mediation and Conciliation, and the Federal Arbitration Act. Fast forward to the 1970s, when new civil rights laws for issues such as age discrimination brought new rules. ADR became a routine and sometimes required process for the increased volume of employment claims. As ADR provisions became the norm, other benefits of ADR became apparent such as decreased litigation costs. ADR has become a staple in the United States legal system through its development as the first stop before litigation.

The future of ADR is potentially in the form of “Smart

TOP TIPS

Successfully navigating ADR in your jurisdiction

- ✓ Educate yourself on Alternative Dispute Resolution processes, especially when selecting private ADR providers. You want to ensure that your client goals are achieved, business practices are followed, and the contracting parties' intent is observed and enforceable.
- ✓ Become familiar with the different private ADR providers to ensure that you provide your client with the best and most cost-effective resources to achieve their goals.
- ✓ Create an ADR provision in a contract or agreement. Make sure that it is a thoughtful process to keep costs low and yield better results.
- ✓ Outline in the agreement which disputes will be governed by the ADR provision or agreement v. Court decided disputes.
- ✓ Incorporate a meaningful discovery process to avoid fishing expeditions and costly discovery disputes.
- ✓ If a court order is the desired result, then avoid ADR and consider the most favorable and proper jurisdiction to enforce the contract provisions.
- ✓ Be timely in initiating an Alternative Dispute Resolution process.

Contracts” and “blockchain” emerging technologies. Private parties may elect to utilize this radically forming technology which bypasses the Court system and a formal ADR process altogether. (See, Uniform Law Review, Volume 24, Issue 2, June 2019, Pages 430–448). The blockchain ethos follows the principles of decentralization and crypto currencies and may be utilized by nefarious players or when dealing with nefarious individuals, countries or businesses when the rule of law may not exist or the governing law may not adequately protect or enforce property rights. This system has the potential to fail in the same manner as crypto currency since the system has no enforcement backing by a governmental/judicial body and since the currency utilized likely involves bitcoins. This process involves a rudimentary escrow system where funds involved in a transaction are held in abeyance until the buyer approves the goods. If a dispute occurs, then the parties submit to a process involving a dispute summary through an arbitration and appeal process where arbitrators vote on the merits. Arbitrators receive rewards (bitcoin) and greater compensation for being on the winning side of a decision and may be promoted for larger appeals. Also, Smart Contracts may be self-enforced, for example if tied to a delivery date and if delivered late, the price may be automatically reduced or credited to the buyer. The system for Smart Contracts is full of pitfalls and hazards, but its usages are likely to continue to be explored and expanded.



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Dispute resolution is Haytham's main expertise. He has profound knowledge and experience in various practice areas of dispute resolution including arbitration, litigation, and other alternative dispute resolution procedures. Haytham has arbitrated and litigated high-stake disputes covering a wide range of substantial commercial disputes, usually complex, commercially sensitive, and multi-national or multi-party nature. His experience focuses on industrial and professional sectors with an emphasis on telecommunications, distribution agreements, construction, hospitality, natural resources, international trade, shareholders disputes, and sports disputes. Haytham dedicates an important portion of his professional time to serving as chairperson, sole, and party-appointed arbitrator in disputes crossing the economic spectrum.

Haytham is regularly advising and representing individuals and companies on cross-board investigations and multijurisdictional proceedings related to economic sanctions, unfrozen funds, anti-corruption, and money laundering matters. He has gained unparalleled experience in the field and has represented high public figures.

Haytham has gained invaluable first-hand experience in competition practices, with an emphasis on private enforcement practices. He strategically and commercially advises multinational and domestic corporations in relation to competition and Anti-dumping issues. He provides claims handling assistance to in-house legal departments of leading corporations and business services groups.

Haytham is a Visiting Professor at the University of Paris I Panthéon-Sorbonne-Cairo Branch, where he teaches Competition Law. Haytham completed his studies of Law in Cairo, Paris, and Montpellier Universities. He followed an Executive program at the Business School of Chicago Booth. He admitted to practice by the Egyptian Bar Association. He practices in Arabic, English, and French.

Ali & Co is a dispute resolution boutique that embodies strictly assorted lawyers who manifest the Firm's success driven operation of cases and who possess authentic leadership with flawless capabilities of tailoring all difficulties into meeting clients' needs with keen mental faculties that persist in resolving any disputes through not only their undisputed expertise, but also through their innovative solutions and their unique understanding of the business.

QUESTION ONE

Could Alternative Dispute Resolution become compulsory in your jurisdiction? If so, what steps are currently being taken to bring this into legislation?

Compulsory ADR by the consent of the parties.

If the parties to a dispute abide themselves to one or more ADRs to resolve their disputes, then the agreed-upon mechanism would be compulsory for the contracting parties.

Compulsory ADR under the Egyptian Law

However, away of the parties' Agreement, the compulsory nature of ADR under the Egyptian Law is dependent on the type of ADR.

Arbitration

Under the Egyptian Arbitration Law no.27/1994, Arbitration is not of a compulsory nature and will not be in the near future. Thus, Arbitration is always of an optional nature under the Egyptian Law. In this regard, on many occasions, the Egyptian Constitutional Court adjudicates that the compulsory nature of arbitration is not constitutional. Also recently, law no.4/2020 was promulgated on 02 February 2020. In which the compulsory arbitration mentioned in law no.97/1983, which regulates the public sector and its affiliated companies, was repealed. However, law no.4/2020 gives any of

the disputing parties, that their disputes were raised under the compulsory arbitration regime under law no.97/1983 before the issuance of law no.4/2020, the right to choose whether to continue with such arbitration or to refer it to the competent court based on the request of any of the disputing parties.

Mediation

For Mediation, on the other hand, there is room for the compulsory nature of such mechanisms under the Egyptian jurisdictions. Also, there is a rising trend to make such mechanisms of compulsory nature. For example, a compulsory mediation regime already exists under the law that regulates the Economic Courts no.120/2008. Another example can be found in the collective employment disputes, as according to Article 169 of the labour law no. 12/2003, if a dispute arises, the disputing parties shall enter into a collective negotiation to solve it within 30 days. If such negotiation fails, then the parties can enter into a mediation process.

Moreover, Egypt as a signatory to the Singapore Convention is promoting Mediation as an efficient mechanism for the settlement of disputes. Thus, it is expected to take more steps towards compulsory mediation.

QUESTION TWO

The 'international' nature of the digital and subscription economy can increase the complexity of disputes – what ADR issues does this raise in your jurisdiction, particularly in regard to international disputes?

To determine what is an "international dispute" under the Egyptian Law, reference is made to Article 4 of the Egyptian Arbitration Law no.27/1994 which states: "Within the context of this Law, the arbitration is international whenever its subject matter is a dispute related to international commerce in any of the following cases: First: If the principal places of business of the two parties to the arbitration are situated in two different States at the time of the conclusion of the arbitration agreement. If either party to the arbitration has more than one place of business, due consideration shall be given to the place of business which has the closest relationship with the arbitration agreement. If either party to the arbitration does not have a place of business, then the place of its habitual residence shall be relied upon. Second: If the parties to the arbitration have agreed to resort to a permanent arbitral organization or to an arbitration centre having its headquarters in the Arab Republic of Egypt or abroad. Third: If the subject matter of the dispute falling within the scope of the arbitral agreement is linked to more than one country. Fourth: If the principal places of business of the two parties to the arbitration are situated in the same State at the time of the conclusion of the arbitration agreement, but one of the following places is located outside the said State: a) the place of arbitration as determined in the arbitration agreement or pursuant to the methods provided therein for determining it; b) the place where a substantial part of the obligations emerging from the commercial relationship between the parties shall be performed; or c) the place with which the subject matter of the dispute is most closely connected." Digital and subscription economy is the shift from pay by product business model to the subscription model in the sphere of digital services. The most obvious example is the example of online streaming

service. The international nature of the disputes arises between subscribers and the service providers comes from the fact that anyone from anywhere, usually, can subscribe to the service. Thus, the service providers and subscribers are usually come from different nationalities or from different place of residences. The contract between the parties here took the form of terms and conditions, that the subscriber cannot amend or change. Making such terms and conditions a quasi-adhesion contract with no true and clear will to choose the ADR. Under the Egyptian Law, the intent to arbitrate for example shall be clear to be enforceable.

Another issue in this aspect is the issue of access to justice because it is too costly for the subscriber to sue the service provider making it inefficient course of action. Also, the enforceability of the award or the decision of arbitrators would be faced with lots of hardens if the service provided is against public policy in Egypt, For the service provider who have the utmost bargaining power in the contract, it would be always inefficient to sue the subscriber as the price of subscription is always trivial, but the more efficient course of action is to suspend his/her subscription.

Yet, ADR would have a prevalence over the principal dispute mechanism (litigation) with respect to the international disputes. As nowadays, ADR's hearing and submission can be done without the need of physical attendance which saves time, money and effort, the digital and subscription economy needs a more revolutionary ADR that can ensure both justice and efficiency to the subscribers.

QUESTION THREE

What role is ADR playing in an increasingly volatile utilities market? Is that role likely to change in the near future?

The volatile utilities markets are characterized by the frequent disputes that arises during the long-term contractual relations that governs such markets. Thus, ADR with its qualities, from which the pace and efficient solution of the disputes, could play a vital role in the volatile utilities market. Yet despite such qualities of ADR, still the most common ADR mechanisms (Arbitration, mediation and conciliation) cannot face disputes arises in such markets as efficient as in any other markets. However, an efficient mechanism can be found in Dispute boards, which is permanent panels set up to accompany the performance of a contract. They also assist in avoiding or overcoming disagreements and disputes. Such mechanism can solve the disputes on spot. Thus, it is expected that Dispute Boards will play an increasingly important role in the disputes arises in within the realm of utilities market and their role may change from construction industry, where they first adopted, to the utilities market.



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Antonio Varvaro is a Senior Italian Lawyer and Arbitrator with over 30 years of experience. He graduated in Law in Italy in 1987 and qualified as a Lawyer in 1990. Antonio is a member of the Bar Association in Italy and registered as a Senior Lawyer with rights of audience before the Court of Cassation. He is currently a member of the Rome Bar Association and registered in DIFC (Dubai International Financial Centre) Courts with no restricted rights of audience. During his career, Antonio has been appointed as a Counsel in several legal disputes both before the Italian State Courts and before the DIFC Courts in Dubai. Antonio has served in Dubai and in Italy as Legal Advisor, appointed by the Italian Government.

Antonio M. Varvaro Legal Consultants DMCC is one of the three Italian Law Firms authorized by Dubai Ruler's Court to practice Law in the Emirate. In Dubai, the firm is registered with DIFC Courts, English speaking Common Law Courts. The firm has a transnational vocation and provides companies with full legal assistance in their process of internationalization, as well as with consultancy in Foreign Direct Investments (FDIs) both in the UAE and abroad. The firm is also a Trademark Agent licensed by the UAE Ministry of Economy and an Official Agent for International Business Companies formation (offshore), registered with RAK International Corporate Centre (RAK ICC), a UAE Governmental Authority. The firm is also included in the directories of the Consulate General of Italy in Dubai and the Italian Trade Agency (Dubai office) and is a Legal Adviser of the Italian Industry and Commerce Office in the UAE.

QUESTION ONE

Could Alternative Dispute Resolution become compulsory in your jurisdiction? If so, what steps are currently being taken to bring this into legislation?

**Compulsory mediation
 Dubai onshore jurisdiction**

The Dubai Law 16 of 2009 created a forum for the amicable settlement of disputes. The Dubai Reconciliation Centre provides mediation services, which the parties to the dispute must mandatorily participate in, provided that it has jurisdiction and provided that the President of the Court has referred the parties to it as well as those that all parties in a dispute agree to refer to the Centre for Mediation.

The Centre has jurisdiction whatever the value or the nature of said disputes except: (1) summary and interim orders and actions; (2) Actions to which the Government is party; (3) Actions beyond the jurisdiction of the Courts; (4) Actions registered before the Courts before the coming into force of the provisions hereof.

According to article five of the aforementioned law, "The disputes submitted before the Centre shall be heard and settled amicably through a number of specialists under the supervision of the competent judge".

Disputes against banks.

In Dubai, claims of AED50,000 or less, claims concerning commonly owned property and claims where any bank is a party must first be referred to the Dubai Centre for Settlement of Amicable Disputes (Centre). One party will complete a request and a hearing will be scheduled for the parties (together with their representatives) to discuss the dispute. Following the hearing the Centre will issue a notice of settlement or refer the matter to the relevant Court.

The DIFC Courts actively encourage parties to settle their disputes (RDC 27.1. and 27.2.). The Court may go beyond encouraging the parties to use justice by reconciliation as the case manager may order the parties to make use of justice by reconciliation (RDC 26.44). Significantly, the RDC also confer upon the judiciary the power to award costs in the mediation.

The Abu Dhabi Global Market (ADGM) Courts announced

the launch of their court-annexed mediation service for ADGM entities and litigants before the ADGM Courts.

Federal Regulation.

The Federal Law No. 26/1999 concerning the Establishment of Conciliation and Arbitration Committees at Federal Courts established conciliation and reconciliation committees at the Federal Courts for facilitating the settlement of civil, commercial, and labour disputes. Any settlement reached through the committees is embodied in a court document and treated as a writ of execution.

Employment cases.

If a dispute arises between employer and employee, for either party to initiate a claim, they must first file a complaint with the Ministry of Labour who then requires the parties to undertake conciliation. The conciliation process should consist of three meetings between the parties (no representatives) and a Ministry of Labour inspector. In practice, the process often consists of only one meeting following which the inspector concludes that settlement is unlikely.

QUESTION TWO

The 'international' nature of the digital and subscription economy can increase the complexity of disputes – what ADR issues does this raise in your jurisdiction, particularly in regard to international disputes?

Lack of a public registry of the companies

In the UAE a public registry of companies doesn't exist. Therefore, you can't get information about shareholders and managers of a company without a Court Order. Despite the formation over one year ago of an online National Economic Register (NER) held by the Ministry of Economy, there is little information available on such registry. Neither information about the legal address of the company nor the identity and address of the company's managers are available. The NER makes general information available only.

Lack of Certified Electronic Email address

There is also no Certified Electronic Email address system for every company formed in the UAE. Therefore, the official companies' emails often don't work, are simply abandoned by the company's manager or, in the worst of the cases are fake.

Consequently, even the certainty that the addressee received an e-mail is missing.

Uncertain cross-border e-service of documents.

In this context, service of documents is very hard. A certified cross-border e-service strictly interconnected with new technologies like blockchain (whose technical features are not limited by geographical boundaries) would be an efficient solution to this issue. Missing such cross-border e-service, it is highly recommended to draft an appropriate clause for the legal validity of service making it compulsory for any contracting party to inform the other party about any variation of postal and/or email address.

QUESTION THREE

What role is ADR playing in an increasingly volatile utilities market? Is that role likely to change in the near future?

It believe that Countries should create a digital single market strategy, the aim of which is to reduce barriers and stimulate business. The reduction of barriers, however, should be addressed via new and innovative procedural laws like the development of ADR mechanism as a complementary means for courts building up procedural connections among courts by re-addressing rival parties to the State court for specific matters (i.e., precautionary measures).

Currently, there is not a real legal and procedural interaction between judicial systems and ADR settlement because they are understood as procedurally separated. Indeed, judicial systems are regulated by the procedural laws of each country, while ADR is part of the private justice system on a voluntary-based procedure internationally oriented.

Within this legal context, a technologically interconnected society looking at the Internet of Things (IoT) or Artificial Intelligence (AI) will need not only the development of alternative methods for resolution of disputes but also a dynamic procedural system in order, overall, to cope with the needs of a modern society.

In the next future the ADR system will play a significantly role being directly linked to development of the economy. The arrival of Internet on the world stage has shortened distances, connecting people. Dispute resolution systems must go at the same speed.

Governments are called to think beyond their national boundaries to cooperate for an interconnected global legal system. An epochal challenge.

"If a dispute arises between employer and employee, for either party to initiate a claim, they must first file a complaint with the Ministry of Labour who then requires the parties to undertake conciliation"



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Mr. Aguilar's professional practice has focused for over 20 years on the areas of civil, commercial, administrative, agrarian and amparo litigation. He has participated in matters related to conflicts between shareholders, nullity of shareholders and boards resolutions, compliance, and enforcement of civil and commercial contracts, as well as several commercial insolvency proceedings.

Some of the matters in which he develops his professional activity are special commercial trials (bonds, execution of guarantees, commercial bankruptcy, among others), as well as controversies related to civil liability derived from the performance of commercial activities. Likewise, he has participated in litigation related to the ownership and possession of land subject to the agrarian property regime, as well as in matters related to land limits.

CAMYA is law firm formed by specialists in different branches of law who count with more than 20 years of experience in leading firms in Mexico. It is currently recognized by the specialized directories "The Legal 500" and "Who's Who Legal".

The lawyers that form part of CAMYA are graduates of the best universities in the Country and have postgraduate and/or master's degrees in Mexico or abroad, which have allowed them to have the adequate preparation for the correct attention of strategic matters related to national and international clients, with satisfactory results.

CAMYA's work is complemented and consolidated by the important presence and participation of several of its members in academic forums, which allows them to keep abreast of legal changes and advances.

CAMYA is committed to thoroughly understand its clients' industries and lines of business to offer them personalized legal services, with due and timely attention to their needs, and with a clear business vision that adds value to their activities. The above, in order to provide comprehensive and optimal solutions to their problems and implement conflict prevention strategies.

CAMYA is a firm that is fully committed to providing excellent legal services, but with the clear and unwavering objective of always acting under national and international standards of ethics and integrity, in favor of our clients and society.

Our members are lawyers with a full conviction of a legal practice where public and private standards of honesty and legality must be respected.

QUESTION ONE

Could Alternative Dispute Resolution become compulsory in your jurisdiction? If so, what steps are currently being taken to bring this into legislation?

During the last year, Federal Courts in Mexico attended an approximate of 105,000 new cases per month -this means that Federal Courts in Mexico handled about 1.2 million cases per year with an approximate of 1,000 Courts nationwide-. In addition, each Federal State provides a Local Courts System that, additionally, handles cases related with local matters -mainly civil, family & criminal law- (as an example, during 2021 the Courts in Mexico City received almost 222,000 new cases with almost 100 of Courts for its management). This clearly demonstrates that Mexico is propense to litigation and even though the Judiciary has made strong efforts to reduce the cases handled by Court, tendency does not prove to reduce to the contrary, cases are increasing.

Regarding, Alternative Dispute Resolution ("ADR") the Mexican Constitution recognizes its importance in order to provide an easy and quick access to a resolution. For this reason, through a Constitutional amendment dated June 18, 2008, Section 17 (third paragraph) was modified to provide, as follows: "The laws shall provide alternative mechanisms to resolve controversies. Regarding to criminal matter, the laws shall regulate application

of such mechanisms, ensure redress and establish the cases in which judicial supervision is required."

The amendment to Section 17 of the Constitution integrates as a fundamental right for any person or entity, the implementation and access to the ADR, and for this reason, different mechanisms to resolve a controversy emerged such as conciliation, mediation, arbitration, alternate justice, settlement meetings, negotiation, among others. The original Constitutional Amendment does not provide as compulsory the use of ADR but enforces its regulation and use in any kind of proceeding.

As consequence of the Constitutional amendment, as of 2008, legislative changes were made in criminal matters, with the purpose of favoring the use of ADR (mainly mediation) to generate agreements regarding the redress of the damages caused to the victim. Subsequently, at the State level, various regulations were enacted to provide the use of ADR, however, their use is merely optional for the parties (it does not constitute a previous condition to initiate a legal action before a Court).

In 2017, a Constitutional amendment was implemented regarding the justice administration system in labor matters, due to said modification, the use of conciliation was established as mandatory prior to the start of the process. To this day, this is the only case in which the use of an ADR is mandatory.

In addition, there is a project of "General Law on Dispute Resolution Mechanisms" whose main objectives are (i) to unify the regulation about ADR, (ii) to determine its application in family, civil, commercial, and administrative matters, & (iii) to set the consequences of the agreement adopted. In terms of the bill, the use of ADR will not be mandatory nor will constitute a condition to initiate a process before a Court.

According to the foregoing, it is clear that Mexico recognizes the use and access to ADR as part of the human right of access to justice, in this sense, there is a clear trend towards the recognition and adoption of the ADR, however, we are far from consider that its use will be mandatory all over the country. Undoubtedly, the use of ADR will continue in those relations between individuals that, due to their specialty or complexity, requires a specialized mechanism to solve any dispute arising from that relation.

QUESTION TWO

The 'international' nature of the digital and subscription economy can increase the complexity of disputes – what ADR issues does this raise in your jurisdiction, particularly in regard to international disputes?

In the field of international transactions, Mexico is part of various treaties that provides the execution of several procedural acts needed during a trial (notifications, ways to obtain evidence abroad, recognition and enforcement of a foreign judgment, among others), however, due to the complex instrumentation and application of these provisions, the ideal conditions for the use of ADR were generated. The application of ADR has proliferated in the execution of contracts whose effects could be generated in different countries, or, with respect to those entered by and between parties from different jurisdictions. In Mexico, arbitration constitutes the ADR with the strongest roots and demand in the country, this circumstance led to the arrival of international institutions specialized in the matter, as well as the creation of national institutions in this regard. Notwithstanding, in recent times and due to its recognition at the Constitutional

TOP TIPS

Successfully navigating ADR in your jurisdiction

✓ In Mexico, the use of ADR is not unknown in legal relations between entities of the same country and, of course, between entities of different jurisdictions. Although arbitration is the most recognized and used mechanism, it is not the only ADR that can be implemented in the execution of an agreement. Mexican legislation recognizes the need to provide alternative mechanisms, and, in this sense, there are alternatives such as mediation with substantial advantages regarding the effects of the agreement that the parties may execute. The effectiveness of the ADR will depend on a clear provision of the specific mechanism that the parties agree, as well as the consequences that may derive from its adoption. The agreements by which they commit to the use of an ADR must be clear in terms of the mechanism and its effects. Undoubtedly, the correct provision of an ADR will provide the parties with a prompt and efficient solution to conflicts that may arise from the execution of an agreement, which will avoid the necessity to appear before a Court that, as has been said, face a significant workload.

level, different forms of ADR have been adopted, among which mediation and conciliation stand out.

Therefore, regarding international transactions, ADR are more deeply accepted by parties, rather than the cases that involves conflicts at the local or national level. This has encouraged the specialization in the use, instrumentation and execution of ADRs (both from the point of view of the company, as well as from the perspective of the litigant).

QUESTION THREE

What role is ADR playing in an increasingly volatile utilities market? Is that role likely to change in the near future?

In this regard, due to the special legal regime that is applicable to these markets, the use of ADR is regulated on a merely optional basis for the parties, the authorities and individuals may be involved in a conciliation as long as there is an specific agreement in this regard. It is important to stress that the use of ADR does not constitutes an obligation or a condition to initiate a process (it is only one mechanism that the parties may use to seek for an alternate solution). In this sense, the use of ADR found better basis and wider development among those relations between individuals who participate in carrying out activities related or linked to the referred markets.

As referred, the use and application of ADR in these markets is eminently optional for the interested parties (authorities and individuals). Based on the previous development of ADR in these markets, it is possible to estimate that, in the case of those relations between individuals and authorities, the application and use of these mechanisms will possibly remain in the current terms, we do not foresee a different tendency claiming for the adoption of ADR in these markets.



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CNPLaw LLP (CNP) is a full-service law firm with a talent for cross-border business. With about 90 staff, including approximately 47 lawyers, and a strong network of international contacts, CNP delivers legal solutions in Singapore and beyond. Our lawyers are qualified in various international jurisdictions as well as in Singapore and advise on cross-border transactions under English law. With strong contacts in all foreign jurisdictions where our clients do business, CNP is well-placed to meet the ever-increasing need for practical and effective legal services in Singapore and for cross-border business in Asia and beyond. CNP is consistently recognised as being amongst the top law firms in Singapore by leading legal publications such as Legal 500 Asia Pacific, IFLR 1000, Benchmark Litigation, Chambers and Partners and AsiaLaw Profiles. CNP has also been ranked by The Straits Times as one of Singapore's Best Law Firms.

QUESTION ONE

Could Alternative Dispute Resolution become compulsory in your jurisdiction? If so, what steps are currently being taken to bring this into legislation?

The Singapore Courts actively encourage parties to consider alternative dispute resolution (ADR) at the earliest possible stage. Some ADR services are provided for free or at a small fee at the State Courts' Court Dispute Resolution Cluster (CDRC). Under the Rules of Court 2021, which came into operation on 1st April 2022, parties to proceedings have a duty to consider amicable resolution of the dispute before the commencement and during the course of any action. A party is to make an offer of amicable resolution before commencing the action, unless parties have reasonable grounds not to do so. Such an offer must not be rejected by the counterparty unless there are reasonable grounds to do so.

The Singapore Courts may order parties to attempt to resolve the dispute by amicable resolution. If either party refuses, the Court can order that party to submit a sealed document setting out that party's reasons for such refusal. This would be opened by the Court after the conclusion of the proceedings and may be used in

assessing costs each party has to bear.

Notwithstanding the aforesaid, the Courts remain cognisant of party autonomy, and the fact that ADR such as arbitration and mediation require parties' consents.

QUESTION TWO

The 'international' nature of the digital and subscription economy can increase the complexity of disputes – what ADR issues does this raise in your jurisdiction, particularly in regard to international disputes?

Subscription models aim to create predictable, perpetual revenue streams. For this reason, such businesses try to focus on building and maintaining long-term relationships with their customers with the objective of establishing brand loyalty. The emergence and rapid rise of the subscription economy comes with increased financial exposure on the part of consumers.

Further, in the digital economy, disputes are seldom completely domestic as businesses now look to expand their reach on a global scale. The international nature of the digital and subscription economy presents increased complexity to disputes. The following illustration supports this position.

A Singapore incorporated company (A) signs up for a free-trial with a company that offers streaming services (B), on behalf of its employee residing in New Zealand (C). B's headquarters are located in California. C is the one using B's services. Subsequently, A forgets to discontinue the free-trial. The subscription automatically renews and A is subsequently charged a monthly fee even though the account was not used by A or C after the expiry of free-trial. A sues B for the monthly fees charged to it after the expiry of free-trial.

If the dispute is referred to arbitration in Singapore, two main pieces of arbitration legislation are potentially applicable: the International Arbitration Act (IAA) which applies to international arbitrations or the Arbitration Act (AA) which applies to domestic arbitrations.

Amongst other factors, an arbitration is an "international arbitration if one of the following places is situated outside the State in which the parties have their places of business: any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is mostly closely connected with (section 5(2)(b)(ii) of the IAA).

This is also a similar factor that the Singapore Courts have to consider in enforcing a mediated settlement agreement under the Singapore Convention on Mediation Act 2020 (SCM) (i.e. whether the mediated settlement agreement is "international" in nature): Section 2(1) of the SCM read with article 1(b) of the United Nations Convention on International Settlement Agreements resulting from Mediation (the "Singapore Convention").

With the international and digital presence of commercial entities, it is foreseeable that an increasing number of disputes will be plagued with jurisdictional issues that will have to be preliminarily determined.

Enforcement also tends to pose an issue when it comes to international disputes. Fortunately, the recent push in Singapore for ADR to be more attractive to businesses has led to easier enforcement of arbitral awards and mediated settlement agreements. International arbitral awards are enforceable under the New York Convention. Mediated settlement agreements

TOP TIPS

Successfully navigating ADR in your jurisdiction

- ✓ Participation in ADR is generally subject to parties' mutual consent or contractual provisions for parties to first attempt ADR in the event of a dispute.
- ✓ When determining if a dispute is appropriate for ADR, businesses and their in-house counsel should consider weighing the merits of the dispute with their commercial interests, including whether they intend to preserve the relationship with the counterparty, or resolve the dispute without scrutiny from the public eye.
- ✓ Even when court proceedings have been commenced, businesses should note that Singapore Courts actively encourage parties to attempt ADR, at the earliest stage.

entered into in Singapore can be recorded and enforced as an order of court. Under the Singapore Convention, parties may enforce and invoke international mediated settlement agreements across borders in another contracting state.

QUESTION THREE

What role is ADR playing in an increasingly volatile utilities market? Is that role likely to change in the near future?

The energy landscape is experiencing a new emergence of supply risks and volatilities. Singapore relies on imported natural gas for almost all its electricity production, making the country vulnerable to the effects of global supply and demand shocks. Further, climate change issues and the shift to renewable energy widens the scope for disputes between players in the industry.

Given the various stakeholders involved in the various sectors of the utilities market, ADR stands to play a progressively important role in the increasingly volatile utilities market.

Disputes relating to price reviews, new technologies and supply chain disruptions are amongst the top disputes arising within the energy sector today. The effects of litigating these disputes are delays in supply, delays in infrastructure growth, and the destruction of essential long-term relationships between players in the industry.

Mediation presents a quicker, cheaper alternative. Determining who shall bear the burden of increasing costs attributed to external unforeseeable market factors is an issue that may be more appropriately decided through collaborative option generation at mediation. Arbitration is similarly attractive as it offers parties confidentiality, a critical benefit when disputes involve trade secrets or sensitive technical know-how. Arbitration allows disputes to be decided by experts and specialists who are well acquainted with the industry and its practices. For an energy market with a host of international players, it is an appropriate and preferred forum for cross-border disputes to be determined.



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Thomas Curran has developed his practice over the past four decades, focusing primarily on bankruptcy and insolvency proceedings and debt and asset recovery. He assists clients in navigating in asset recovery, assignments for the benefit of creditors, foreclosures, repossessions, and the sale of distressed assets and businesses. He has extensive experience in all facets of cross border insolvency litigation and cross-border debt and asset recovery strategies in an insolvency scenario, with particular emphasis on United States/Western Europe jurisdictions. He has cultivated extensive knowledge and skill in commercial and complex business litigation including asset location and recovery, veil piercings, corporate officer and director liability, successor liability, fraudulent conveyance and transfer litigation and constructive trust litigation.

Curran Antonelli represents a wide variety of clientele in litigation and transactional matters throughout the United States and Western Europe. We have navigated a broad range of commercial litigation cases, including debt and asset recovery, cross-border insolvency, institutional creditors' rights, and "bet the company" litigation, and have earned a winning track record throughout the United States. Our group has a unique speciality in counselling on financing, buying and selling, and investing in distressed assets. We assist domestic and foreign firms with these complex transactions from a debt and asset recovery perspective. With our innovative and aggressive approach to complex litigation and asset recovery challenges, we consistently and effectively deliver unparalleled value to our clients. Our reputation for reliable counsel and consistent results is what continually drives clients back to Curran Antonelli for all their litigation, business, and corporate legal needs.

QUESTION ONE

Could Alternative Dispute Resolution become compulsory in your jurisdiction? If so, what steps are currently being taken to bring this into legislation?

In Massachusetts, Alternative Dispute Resolution (ADR) began to impact the legal field in the late 1980s. Currently, ADR is available and is encouraged through private providers and court-connected programs.

While ADR is not currently compulsory in state or federal courts in Massachusetts, it could be in the future. The courts in Massachusetts are overwhelmed by volume and ADR is thought to be a mechanism to help alleviate some of this backlog. Massachusetts G.L. C. 211B s. 19 prescribes the authority, subject to various conditions, for a "Mandatory ADR program" where the parties are not bound by the results of the ADR resolution. A pilot for this mandatory program was established in Bristol, Worcester, and Suffolk Counties under the supervision of the chief justice of the trial court.

Currently, in the Massachusetts federal courts, ADR is entirely voluntary for the disputing parties, but judicial officers are required to encourage the use of ADR.

The Massachusetts State Trial Courts offer court-connected ADR as an option in all Trial Court Departments. Court-connected ADR is governed by the Uniform Rules on Dispute Resolution, Supreme Judicial Court Rule 1:18. ADR is more ad hoc in most state courts, with the exception of probate and family court where dispute intervention is mandatory. Other courts, such as the Land Court, do not require ADR intervention and it is entirely voluntary. Massachusetts Trial Courts encourage parties in civil cases to explore the option of ADR as it saves parties involved in disputes the time, expense, and uncertainty of going to trial.

ADR in Massachusetts is governed by M.G.L. C. 251 and the most common forms of ADR are arbitration and non-binding mediation. In Massachusetts, ADR clauses requiring arbitration in contracts are valid and enforceable. If a party denies the existence of a binding ADR agreement in a contract, the issue of whether there is a valid ADR agreement will be heard before the Superior Court, and if the Court finds that there is an ADR agreement, the parties will be ordered to proceed to arbitration.

M.G.L. C. 251 Section 3 provides a method for choosing an arbitrator if one has not been appointed.

QUESTION TWO

The 'international' nature of the digital and subscription economy can increase the complexity of disputes – what ADR issues does this raise in your jurisdiction, particularly in regard to international disputes?

As with all international issues, the complexity of ADR issues increases with the digital and subscription economy. International Dispute Resolution Procedures provide a framework for the parties, their counsel, arbitrators, and mediators before, during and after dispute resolution.

One issue that arises with international disputes is the ultimate location, or venue, of the ADR proceeding. When a party contracts with a foreign entity or person, they run the risk of legal and logistical ramifications of that foreign entity's location. This can pose issues of travel, unfamiliar legal and cultural norms and financially it can present a burdensome component to the dispute. ADR can be used to resolve many international issues without the need to attend a court proceeding or dispute resolution proceeding in a foreign court or tribunal. The International Centre for Dispute Resolution (ICDR) is the international division of the largest arbitral institution in the world, the American Arbitration Association.

Along the same lines of venue location for the dispute, is the language barrier and foreign formalities issue that often come with international disputes. When this arises, the conflict becomes that much more difficult to resolve, both through litigation and ADR. A similar result occurs when parties in a dispute have conflicting document interpretations based upon varying cross border legal regimes.

"While there certainly are rules of procedure to be followed, there are fewer and less stringent rules than there are in a court litigation"

For the aforementioned reasons, the ICDR recommends that the parties include the selected and agreed upon location of any arbitration or ADR, as well as the language to be used at arbitration, in their initial contract. Parties may also include the country and legal jurisdictional regime that they wish the entirety of the contract to be governed by.

A common issue following the completion of the ADR process is enforcement of the award. If the ADR is conducted in a foreign tribunal, the parties, in most cases, are still required to move to have the arbitral award recognised in the United States. This naturally results in a lag between the award being issued through ADR and ultimate relief. Massachusetts Courts

TOP TIPS

Successfully navigating ADR in your jurisdiction

Utilise the International Dispute Resolution Rules: When faced with a cross border dispute or one with cross border implications, utilise the International Dispute Resolution Procedures Rules, of the ICDR. Provide for International Dispute Resolution provisions in your ADR clauses to include in your contracts to navigate ADR in Massachusetts for both international and domestic disputes.

Include information in your contracts: When drafting any contract or agreement, be sure to always include the jurisdictional location, procedural rules and participating parties to be involved in any ADR hearing or process and the agreed upon tribunal along with the number of decision makers. Also obtain and provide for the language in which the hearing or proceeding will be conducted. The Massachusetts courts recognise ADR clauses and will generally uphold pre-dispute agreements regarding ADR in subsequent litigation in court.

Review the Rules and get connected: Massachusetts ADR is governed by M.G.L. C. 251 and court-connected ADR is governed by the Uniform rules on Dispute Resolution, Supreme Judicial Court Rule 1:18. You should review these statutes when considering ADR in Massachusetts and be aware of the rules for the process. Massachusetts has a designated coordinator for ADR services who can be contacted at ADR@jud.state.ma.us.

will generally recognise an ADR award as binding once it is properly recognized in the US.

QUESTION THREE

What role is ADR playing in an increasingly volatile utilities market? Is that role likely to change in the near future?

ADR is still one of the most favoured forms of dispute resolution in the increasingly volatile utilities market. In a volatile utilities market, there is often a lack of common law precedent as well as statutory laws applicable to the issues in dispute. Without statutes and common law precedent, there is little for the courts to rule on, and therefore much less predictability on outcomes. Further, ADR allows for more creativity when it comes to a settlement. ADR melds civil law procedure and common law procedure and allows the parties to resolve disputes outside of the formalities of the litigation and sometimes inflexible judicial regimes. While there certainly are rules of procedure to be followed, there are fewer and less stringent rules than there are in a court litigation. This results in a faster paced, and more freewheeling environment within which to resolve issues.



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Shilpen Savani is a dispute resolution specialist with a 20 year+ track record of achieving successful outcomes in complex commercial disputes and contentious corporate matters. He is known as a deft negotiator and trouble-shooter, advising on many contentious and sensitive business challenges for clients in a range of business sectors including media, technology, real estate, fashion and luxury brands, as well as financial and professional services. Shilpen is known for his employment law expertise and advises employers, employees and others in workplace matters and actions in both the Employment Tribunal and High Court. Shilpen is a committed advocate and driver for diversity and inclusion in the workplace and a pro bono supporter and Advisory Board member of Creative Equals.

gunnercooke is one of the UK's fastest growing law firms, providing a wide range of corporate and commercial legal services to businesses, banks and financial institutions. The firm was founded in 2010 to challenge, improve and evolve the way that legal services are delivered. We believe that the legal industry serves neither clients nor lawyers the way it should. Our founders set about doing things differently from day one, flattening out the traditional hierarchy and establishing a new model based upon flexibility, transparency and freedom. The firm has been recognised for 44 industry awards and currently employs over 330 legal professionals and management consultants across offices in London, Manchester, Leeds, Birmingham, Edinburgh, Glasgow, Berlin and New York.

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QUESTION ONE

Could Alternative Dispute Resolution become compulsory in your jurisdiction? If so, what steps are currently being taken to bring this into legislation?

It looks increasingly likely that compulsory ADR will become a reality in the UK soon. ADR has gradually become a normal feature of the dispute resolution landscape, and mediation and arbitration are soaring in popularity. In fact, the existing civil procedure rules in England and Wales already involve compulsory participation in ADR at several stages.

Solicitors have a duty to advise their clients about mediation and there are ADR requirements in the pre-action protocols, the CPR, and court guides. The court is also expected to provide active case management, which includes encouraging parties to use ADR where appropriate and facilitating the use of such a procedure. Where parties refuse to consider alternatives to litigation this can result in sanctions being imposed. The court can also decide to suspend litigation so that the parties can explore mediation.

Despite all this support for an out-of-court settlement, the position until very recently was that a court still could not directly order litigants to participate in ADR because this would divert from a party's enshrined Article 6 right to have access to justice.

However, there has been further movement since July 2021, when the Civil Justice Council published a report expressing the view that compulsory ADR did not clash with Article 6 and was therefore lawful and should be encouraged. This in turn triggered a wide consultation by the Ministry of Justice, with several interesting themes emerging. There is broad support for the automatic referral of small claims to mediation, but strong reservations remain concerning compulsory mediation when it comes to higher-value and more complex cases.

It is interesting that the term "ADR" is itself coming under scrutiny on the basis that it is no longer an "alternative" at all. A good example is the change of name adopted by the Commercial Court from "alternative" to "negotiated."

All of these things point to greater prominence and role for ADR ahead. The future could quite conceivably be a world where courts are fully empowered to compel parties to use out-of-court methods to resolve their disputes.

QUESTION TWO

The 'international' nature of the digital and subscription economy can increase the complexity of disputes – what ADR issues does this raise in your jurisdiction, particularly regarding international disputes?

The global economy is becoming increasingly digital in nature, and the flow of data across borders is crucial for economic growth and the improvement of living standards in developing countries. This means it is essential to have effective protection for trade secrets, intellectual property, and the privacy of individuals. However, it is difficult to achieve uniformity and there is a lot of scope for conflict and disagreement around applicable laws.

Things are much simpler where the agreement is clear about applicable laws and the choice of jurisdiction for any dispute. But if there is no agreement or the contract is silent, then the parties will have to turn to private international law.

The EU's jurisdiction and enforcement treaty, the Lugano Convention, provided certainty for cross-border contracts and was very valuable to the UK. It helped the country's favoured status as the chosen legal venue for disputes involving companies from across the EU. However, the UK's membership ended in 2020 and its subsequent application to rejoin the Lugano Convention is still undecided. So in the meantime, parties must either rely on the Hague Convention or existing bilateral treaties or face the potentially daunting prospect of the different national regimes.

QUESTION THREE

What role is ADR playing in an increasingly volatile utility market? Is that role likely to change soon?

ADR has a prominent role in resolving disputes between UK traders and their private customers. The ADR Regulations 2015, which apply to all UK businesses providing goods, services, or digital content to consumers, required traders to access a certified provider of ADR services in their sector. The Regulations did not make use of ADR mandatory for traders, though some sectors such as financial services, energy, and communications already had specific requirements which have continued. However, all affected traders must provide their consumers with details of a certified ADR provider and advise whether they intend to use that provider.

Consumers and business owners in the energy sector have access to the Energy Ombudsman, which is an independent body authorised by the regulator to help resolve billing, customer service, installation, and misselling issues for free.

Ofgem recently imposed further measures in the industry sector after carrying out a strategic review of the microbusiness retail market. The review led to new requirements for issuing principal contractual terms to ensure consumers receive key information, including third-party costs. Ofgem has also decided that energy suppliers can only work with brokers that are signed up to a qualifying dispute resolution scheme.

TOP TIPS

Successfully navigating ADR in your jurisdiction

- ✓ Think ahead when entering commercial contracts. If things go wrong how – and where – would you like to resolve any dispute? This should be negotiated with all parties and clearly documented at the outset. Doing this will provide certainty and avoid relying on the other party's goodwill or cooperation once a dispute has already broken out.
- ✓ If you want to ensure that ADR is built into the dispute resolution mechanism, then this should be spelled out clearly in writing. Compulsory mediation is commonly included as a precursor to starting legal proceedings. It is also possible to avoid the courts altogether by the parties agreeing to arbitrate or refer any disagreement to expert determination.
- ✓ Make sure you are clear about not only the applicable law but also the jurisdiction that will have the authority to decide any disputes.
- ✓ Seek legal advice regarding the goods and services to be provided and ensure compliance with local laws. This is especially important when dealing with cross-border data flows.
- ✓ If you are a consumer or a microbusiness, be alert to compulsory ADR mechanisms that may be available to you.

“Things are much simpler where the agreement is clear about applicable laws and the choice of jurisdiction for any dispute”



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OBLIN was established in 2005 and has become a leading international litigation and arbitration law firm based in Vienna, Austria. We represent businesses in cross-border disputes, international commercial litigation and arbitration proceedings (including enforcement), as well as white-collar crime matters. Our team consists of 16 counsel covering six jurisdictions (bar admissions). The specialised members of our team combine their multi-disciplinary and international backgrounds to provide profound yet practical solutions.

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QUESTION ONE

Could Alternative Dispute Resolution become compulsory in your jurisdiction? If so, what steps are currently being taken to bring this into legislation?

There is no statutory obligation under Austrian law to pursue ADR before commercial litigation, and such an obligation is currently not foreseeable. ADR by design is based on the principle of party autonomy and might become compulsory only if agreed upon between parties. For example, a court will not have jurisdiction over the claim if a contract has an arbitration clause. It should be noted that an Austrian court could recommend mediation between the parties during a pre-trial hearing. Parties are not, however, bound to follow this recommendation.

QUESTION TWO

The 'international' nature of the digital and subscription economy can increase the complexity of disputes – what ADR issues does this raise in your jurisdiction, particularly in regard to international disputes?

Technical complexity. The digitalisation of business transactions creates new spheres of knowledge that lie often beyond the (traditional) professional knowledge of ADR professionals. As a result, the scope of factual and legal inquiry that ADR professionals need to undertake into the dispute may involve ever more novel technical issues. To deal with this, expert witnesses are increasingly called upon to give testimony on such issues (e.g., social media, computer algorithms).

Informational overload. The ease with which data can be electronically generated, stored, and shared has increased the volume of the relevant evidence in international disputes. Particularly where the ADR method requires a full and exhaustive determination of facts, an increase in the sheer volume of evidence may contribute to undue delays and expenses. Consequently, in complex disputes, the competitive advantage of ADR (especially arbitration) over litigation in terms of speed and efficiency may be threatened. Proper case management is therefore essential.

Strain on the third-party neutral. There are finite limits to the complexity that arbitrators or mediators can deal with. However, in complex disputes involving multiple parties and issues, there is a threat of the third-party neutral becoming inundated with lengthy written submissions and large volumes of evidence. This may compromise the efficiency of the dispute resolution process.

Data security and confidentiality. The pressure to address the complexities in international business has led ADR proceedings to become more and more digital. This has been reflected particularly in the extensive use of videoconferencing in mediations and arbitration hearings, as well as digital file management. It is essential for all parties involved in an ADR proceeding to be cognisant of confidentiality, security and data integrity, including their GDPR obligations. Cyber security risks are exacerbated when parties and tribunals use technologies unfamiliar to them and work from home via unsecured networks.

QUESTION THREE

What role is ADR playing in an increasingly volatile utilities market? Is that role likely to change in the near future?

In the commercial sector, it is common for parties to agree on an ADR clause in energy and resources agreements, be it construction contracts or supply agreements. Various means of ADR (arbitration, mediation, and expert determination) are widely used in the utilities industry. The popularity of ADR in the industry lies in the long-term nature of contracts and ADR's ability to offer a quick and efficient resolution of disputes, which suits the business interests of stakeholders. Increasing private participation in the utilities market and globalisation will likely

TOP TIPS

Successfully navigating ADR in your jurisdiction

✓ **Choose the right type(s) of ADR.** No one form of ADR will be a perfect fit for every situation. Thus, before developing an ADR strategy, decide which type of ADR suits you. There are two types of ADR mechanisms in Austria: adjudicative (arbitration) and non-adjudicative (mediation, conciliation). While the former involves a third-party neutral reaching a binding decision on the dispute, the latter concentrates on the provision of assistance to parties to negotiate a settlement. The factors to be considered when choosing the type of ADR might be the need to maintain ongoing relationships, budget, time, etc. It is also possible to combine different ADR mechanisms by agreeing on a multi-tiered dispute resolution process with the opposing party.

✓ **Provide for an ADR clause in your contract.** While it is possible to agree on ADR once the dispute arises, it may become impossible due to increased tension between the parties. Thus, it is advisable to conclude an ADR clause that is specific enough at the outset of the contractual relationship.

✓ **Choose the right third-party neutral and counsel.** Apart from professional seniority and language capabilities, choosing professionals that possess the necessary ADR skills can contribute to more efficient proceedings in case of a dispute.

make ADR's role stronger in commercial disputes in the future.

In the investment context, even though arbitration was one of the most favoured methods of dispute resolution for investment treaty claims in the utilities sector, its use within the EU, including Austria, has now been restricted due to the ongoing investor-state dispute settlement system backlash in Europe. In recent years, the ECJ has curtailed investment arbitration in the EU, including on the basis of the Energy Charter Treaty. It is a possibility that the current regime will be replaced by a stand-alone multilateral investment court.

Notably, investment treaties between Austria and non-EU states are unaffected and non-EU investors can still bring claims to arbitration regarding breaches of their rights in the utilities sector.

In consumer-related disputes, despite the fact that litigation was the most common method of dispute resolution for a long time, there has been a remarkable trend in EU Member states to use ADR mechanisms. After the introduction of the EU Directive on Alternative Dispute Resolution in Consumer Matters (ADR Directive) in 2013, every EU Member State including Austria established voluntary ADR bodies that offer conciliation services for disputes between utility companies and end consumers. In Austria, any system user can submit a complaint against suppliers and system operators to the Conciliation Service for Consumer Transactions, regarding water, or Energie-Control-Austria (E-Kontrol) regarding electricity and gas. These bodies offer ADR services free of charge and operate without prejudice to the jurisdiction of the competent courts.



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SLJ Abogados is exclusively a litigation firm. Our sole activity is that of the defence of our clients' interests in civil, commercial, bankruptcy and/or white-collar criminal cases. We support our client throughout the entire processing of the case and involve ourselves in the client's problem as if it were our own. We stoutly defend our client's interests both in court and during any negotiations. We only accept a limited number of cases where our intervention is able to make a difference. If we are unable to help, we will recommend another firm which may be able to. Our natural environment is where matters are complex and/or of an international nature. We are used to working with firms and lawyers in other jurisdictions and/or other specialities. Before anything else we will propose a full legal strategy and estimate the entirety of the costs associated with the case together with the possibilities of success. SLJ Abogados has been nominated as one of the best legal boutiques in Spain by the most important Spanish economic newspaper, Expansion.

QUESTION ONE

Could Alternative Dispute Resolution become compulsory in your jurisdiction? If so, what steps are currently being taken to bring this into legislation?

Currently in Spain, ADR's are not compulsory before initiating legal proceedings, except in certain procedures (i.e. libel and slander complaints, some employment procedures, etc.). However, this situation will change in the near future, as the Spanish Government has a draft law on the way on procedural efficiency. The aim of this law is to consolidate a public justice service that is sustainable through ADR as an essential and mandatory measure, so it will basically change from voluntary to mandatory.

The Procedural Efficiency Law is a regulation that contemplates a series of measures aimed at streamlining the functioning of judicial bodies (which are saturated and extremely slow in Spain), reducing resolution times and facilitating access to other means of dispute resolution. The Ministry of Justice has indicated that the aim of ADR is to initiate a change from the Spanish culture of litigation and judicialisation of dispute, to a culture of negotiation and agreement, that in many other jurisdictions work very well.

The aim of this draft law is to: bring quality and satisfaction to citizens who face disputes; provide them with a complete and adjusted range of ways to resolve it; promote compliance with

agreements; and broaden the basis of access to justice.

The mechanisms contemplated are negotiation, private conciliation, confidential binding offers, the opinion of independent experts, mediation, as well as any other procedures provided for in special legislation.

The validity of the agreement reached is exactly the same as if it was resolved by a judge and a lawsuit cannot be filed for the same purpose. The creation of 54 ADR units is currently planned in Spain in order to assess their functioning, adapt their composition if necessary, and later adjust the number of units on the basis of this learning. Undoubtedly, the future Procedural Efficiency Law will introduce important changes in the functioning of justice in Spain.

According to the Ministry of Justice, "if it is achieved that one out of every four civil proceedings ends in an agreement between the parties, the judicial system will be relieved of more than half a million procedures" and there will be a "re-channelling of resources" of some 380 million euros per year for matters that require it.

QUESTION TWO

The 'international' nature of the digital and subscription economy can increase the complexity of disputes – what ADR issues does this raise in your jurisdiction, particularly in regard to international disputes?

Electronic commerce has multiplied on a large scale as a result of the tools offered by new information technologies, thus allowing commercial relations to extend beyond the national territory of a State, due to the economic phenomenon of Globalisation.

By virtue of this, online dispute resolution (ODR) methods were created, based on the various alternative dispute resolution mechanisms that already existed with a technological component that benefits parties located in different territories.

Electronic methods are beneficial for the resolution of disputes that require fast, efficient, cost-effective and de-localised problem-solving mechanisms that often involve a plurality of parties, with diverse languages, contexts and legal systems.

The advantages offered by technology are really significant. All information, correspondence and documents relating to a dispute are available instantly and efficiently. All documentation, information, communication and correspondence are available 24/7. Asynchronous communication is possible in discussions, as well as the use of discussion forums. Systems are available for storing, ordering and translating texts. The storage of certain data allows for the accountability of the activity carried out by professionals. Also, we must not forget about some of the issues that we will still have to overcome when using ADR or ODR and combining it with new technologies. Confidentiality, privacy, and data protection could be some of the issues that would have to be taken into consideration.

In Spain in particular, there is an ODR platform created by the government for online dispute resolution to help consumers and traders resolve disputes relating to purchases made on the Internet. ODR can enormously benefit in promoting ADR and adapting the current global situation to an alternative system away from the classical litigation system.

TOP TIPS

Successfully navigating ADR in your jurisdiction

- ✓ To focus on the solution, look forward by putting the problem behind and finding a solution, as sometimes lawyers get blindsided when trying to negotiate the best interests for their clients.
- ✓ Make sure your claim or defense is believable and support it with evidence.
- ✓ Define the goals and understand them: it is the only way to achieve a good outcome.
- ✓ Develop strategies together with your client to enhance your credibility and to help the process proceed in a way that's most productive for all parties involved.
- ✓ Decide what your client is open with and decide what your walkaway is going to be.
- ✓ Listen and truly understand the other party's needs. Only by understanding everyone's interest will be possible to reach a good solution.

QUESTION THREE

What role is ADR playing in an increasingly volatile utilities market? Is that role likely to change in the near future?

ADR plays a fundamental role in the utilities market, as disputes in companies consume a significant part of resources, both human and financial, and also lead to a loss of opportunities, damaging the corporate image with the consequent loss of market position and profits.

It is true that in Spain, ADR has been present in the resolution of disputes between companies for a long time, but it has only been in recent years that the public authorities, both national and European, have definitively promoted the admission of mediation and arbitration as an alternative to the "classic" judicial system. Spain has everything it takes to be a country where national and international ADR becomes a great option for companies for different reasons: good legislation, court collaboration, a critical mass of talent, experience, training, and exchange of ideas at the highest level, as well as high quality arbitrators, lawyers, and experts in the field of arbitration.

Business organizations and public administrations can help a lot to change the near future of ADR in Spain if they conceive dispute resolution systems as a way of generating wealth and as a competitive element for Spain at the international level. A country that invests in these issues is definitely an advanced country.

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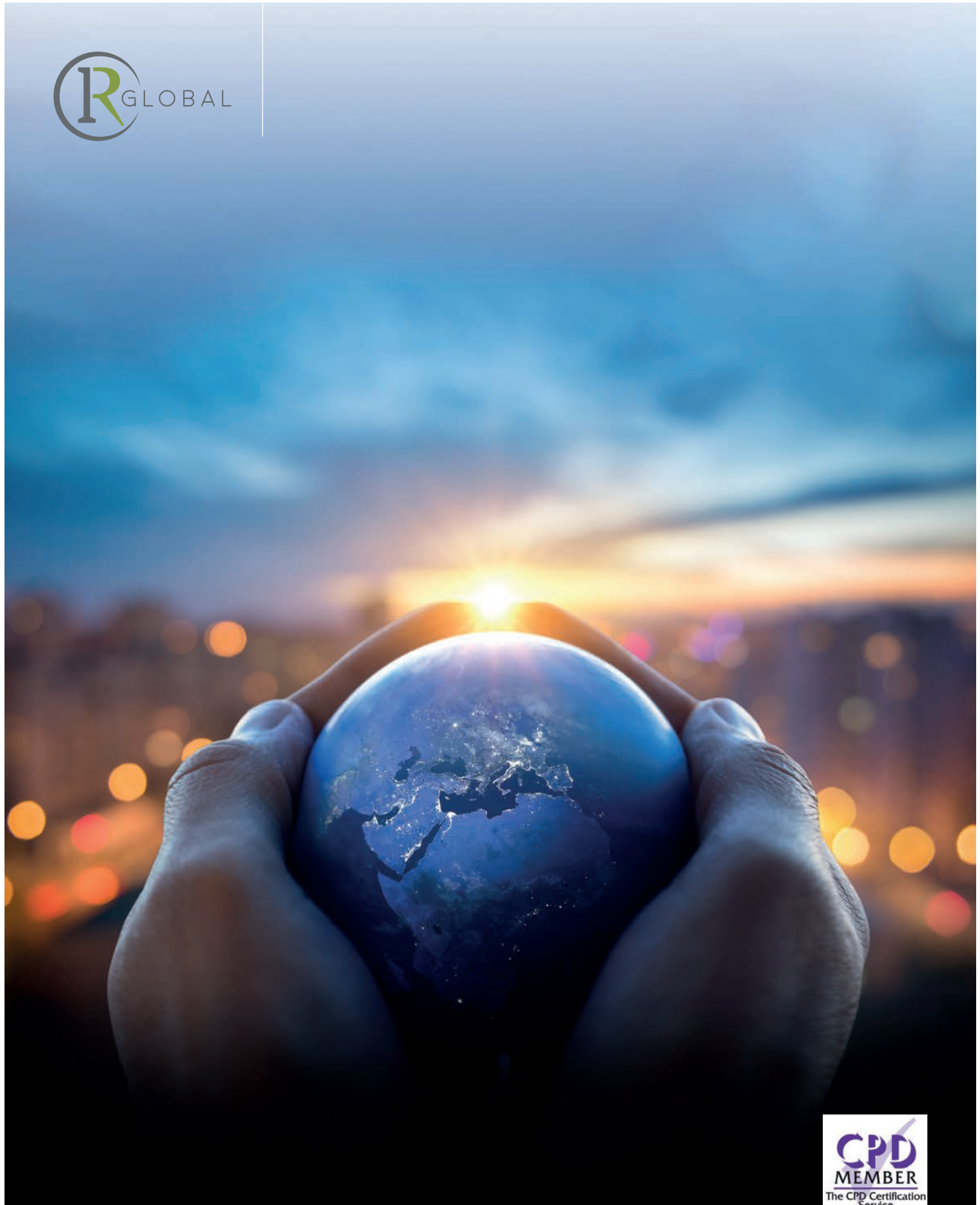
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