UAE cryptocurrency mining disputes: Dubai Court judgment sheds light on Bitcoin mining investment issues

April 6, 2023

Introduction

A recent judgment by the Dubai Appeals Court following a series of civil suits and criminal complaints has shed light on pitfalls and best practices when faced with disputes arising from cryptocurrency mining investments and when litigated before the UAE courts.

This case involved a complicated series of litigation including multiple civil disputes before the Dubai Courts at various levels, criminal complaints, and various investments.

This article explores the principal claims and remedies, with a focus on the complexities surrounding cryptocurrency mining and the legal ramifications when volatility is attached to such investments.

Case

<u>Claims of misrepresentation and inflated fees in a cryptocurrency mining investment</u>

The plaintiff claimed that they had invested USD 300,000 in a cryptocurrency mining device through a partnership, which was held for over four months before the device was purchased.

And that the defendants had admitted that the initial price of the device was USD 1,200,000 with the partnership share of the plaintiff at 25%.

The plaintiff also alleged that it was later discovered that the actual price of the device was USD 1,100,000 and the defendants had charged a commission of USD 220,000. As a result, the final price of the device was USD 880,000 and the actual partnership share of the plaintiff in the partnership owning the cryptocurrency mining device should have been 34%.

Inequitable distribution of Bitcoin earnings

The court sided with the plaintiff that the losses suffered were further exacerbated by the distribution of Bitcoin earnings based on the original partnership share of 25%, rather than the corrected share of 34% which led to the plaintiff receiving a lower value of USD 175,000.

Fluctuating Bitcoin value and delayed transactions

The plaintiff also argued another issue that contributed to their losses was the decline in the value of Bitcoin from USD 19,000 to USD 6,000 over the seven-month period during which the second defendant refused to transfer the cryptocurrency to the account of the plaintiff. Consequently, the plaintiff argued that the total amount they should have received was estimated at about USD 1,900,000 in relation to the Bitcoin mining device investment.

Lack of legal ownership and regulatory compliance

The court also noted that the plaintiff was not registered as the owner of a 34% share of the mining device, with the entirety of the ownership retained by the second defendant. Additionally, the plaintiff argued that the defendants were operating without a license from the Securities and Commodities Authority to engage in investment management activities.

Lack of Information on the mining device production

It was evidenced to the court that 66.21021 Bitcoins were transferred to the wallet of the plaintiff during the period from 27 September 2017 to 31 October 2018.

However, experts appointed by the court were not provided with data on the production capacity of the cryptocurrency mining and the number of Bitcoins produced during that period to verify the correctness of the Bitcoins transferred to the plaintiff, nor were the experts provided with information on Bitcoin distributions that had occurred after 31 October 2018.

Dispute over investment and rising mining costs

The investment was reportedly halted due to disputes between the parties and rising mining costs. This led the plaintiff and the defendants to suspend operations until the end of 2021 to decide whether to resume operations, sell the assets, or liquidate the project. The fate of the cryptocurrency mining device was not disclosed, and no evidence was provided to indicate that the device ceased operations on 31 October 2018.

Bitcoin wallet and losses

The plaintiff sold their Bitcoin wallet on the same date it was received. The total value of the Bitcoins sold amounted to USD 499,961.89.

The first defendant held the Bitcoin profits of the plaintiff for the period from October 2017 to February 2018, totaling five months.

The court found that the Bitcoin transfers to the plaintiff resumed on 17 March 2018, with the delayed payments resulting in a decrease in Bitcoin value and losses of USD 92,676.01 for the plaintiff.

Takeaways

Drawing upon the details of this case, we outline strategies and tactics to increase the efficacy of cryptocurrency mining claims and what pitfalls to avoid when litigating cryptocurrency mining investments before the courts in the UAE:

- Ensure transparency in crypto-mining investment agreements including accurate device prices, commission fees, and ownership percentages.
- Establish a fair and well-documented distribution of cryptocurrency earnings based on accurate ownership percentages and agreed-upon terms.
- Cryptocurrency value fluctuations can significantly impact investments. To minimize potential disputes arising from these fluctuations, parties should agree on strategies to mitigate their effects, such as setting predefined conditions for the transfer of assets or establishing a mechanism to address delays in transactions.
- Ensure that the ownership of mining devices and other assets is properly registered and compliant with local regulations and that parties engaging have the necessary licenses from relevant authorities.
- Justify hashrate and mining power guarantees. Disputes can arise if the mining company guarantees a certain hashrate or mining power but fails to deliver, especially if the reasons for underperformance are not clear or considered acceptable.
- When pursuing a cryptocurrency mining claim, it is crucial to have complete and accurate data on the production of the mining device and the amounts produced during the relevant period. This helps in verifying the correctness of the cryptocurrency distributions made to the involved parties. If the mining company has control over which mining pool to join, disputes can arise if investors believe the chosen pool is not providing optimal returns.

- In the event of rising mining costs, it is important to have a predefined plan in place to address such issues. The plan could involve suspending operations, selling assets, or liquidating the project, but should be transparent and agreed upon by all parties. Establishing a clear course of action in advance can help prevent additional losses and further disputes.

Cryptocurrency disputes can be highly complex and require specialized knowledge. It is essential to engage dispute counsel who have expertise in blockchain and digital asset disputes. Including various experiences, our team has advised on NFT disputes in the UAE and abroad, in litigation and arbitration, digital asset multi-jurisdictional fraud, and assisted in drafting new technology sovereign conventions.

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No tax penalties without Federal Tax Authority public clarification – rules the Dubai tax dispute resolution committee

April 6, 2023

In various decisions issued by the (second) Tax Dispute Resolution Committee of Dubai, the Committee ordered that tax obligations that are not explicitly provided for in the legislation do not create a tax obligation on the taxpayers until a public clarification is issued by the Federal Tax Authority.

Disputes

Three separate disputes were heard in 2023 by the (second) Tax Dispute Resolution Committee of Dubai on whether penalties should be applied to taxpayers against matters that are not explicitly clear in the legislation – but were instead clarified by the Federal Tax Authority via public clarification.

The FTA ordered the taxpayers to voluntarily disclose certain liabilities.

The FTA instructed the taxpayers that the tax legislation required certain tax liabilities to be disclosed by the taxpayers.

The taxpayers argued that the tax legislation did not explicitly require disclosing said liabilities.

The position of the FTA was that irrespective of whether the taxpayer had read the legislation in a particular manner – the understanding of the taxpayer should have been as that of the FTA.

The FTA also relied on a public clarification that it had issued in mid-2022 to justify its position.

The taxpayers complied with the FTA instructions and filed voluntary disclosures throughout the year 2022.

The FTA applied the tax liabilities in addition to tax penalties against voluntary disclosure filings and late payments.

The taxpayers disputed the taxes and penalties before the Tax Dispute Resolution Committee.

Decision

The Tax Dispute Resolution Committee issued similar findings in the three disputes as follows:

- The tax legislation does not explicitly require the disclosure that the FTA had instructed the taxpayers to make.
- The position on how the tax legislation should be applied by the FTA was unknown to the taxpayer as it was derived from the specific legislative interpretation by the FTA.
- The interpretation of the tax liabilities by the FTA only became known to the taxpayers via the public clarification issued by the FTA.
- The taxpayers cannot be penalized for tax liabilities that dominantly arise from a public clarification issued by the FTA if such tax liabilities are not explicitly provided for in the tax legislation.

The Committee ordered the cancellation of all penalties up to the date of issuance of the public clarification by the FTA.

Takeaway

A substantial number of tax disputes in the UAE arise from differences in interpretation of the tax legislation – whether value-added tax legislation, excise tax legislation, or in due course, corporate income tax laws.

The decisions issued by the (second) Tax Dispute Resolution Committee of Dubai provide solace to taxpayers who are faced with penalty liabilities dating back to October 2017 or January 2018 for interpretations of tax legislation that differ from the interpretation by the FTA.

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New instruments announced by Dubai Courts to expedite and support enforcement of judgments and arbitration awards

April 6, 2023

On 22 February 2023, Dubai unveiled a new strategic plan that is set to further advance its judicial system towards a world-class model for efficiency and service excellence. The benefits that will be derived by litigants in Dubai, especially those with high-value claims, cross-jurisdictional disputes, arbitration matters, and litigants with potentially insolvent debtors are significant.

The first major development in the strategic plan is the **Privatisation of Execution Procedures**. Aligned with the procedures of Civil Law No. (42) of 2022, the Dubai Courts will issue a decision to license private companies to provide judgment execution services. By allowing private companies to participate in the execution of judgments, the speed and efficiency of the process are expected to increase significantly. Moreover, to address market competition, private companies may provide innovative approaches to enforcement, which can lead to the development of new technologies and processes that improve the efficiency and effectiveness of enforcement actions.

Under the new plan, litigants with high-value claims will benefit from an advanced judicial system that exceeds global benchmarks for speed, efficiency, and service excellence. The new initiatives will expedite the execution of judgments and redesign processes to enforce court judgments, making it easier for judgment creditors to recover their assets. The **Electronic Writ of Execution Seal** initiative, for example, will facilitate the enforcement of court judgments and potentially arbitration awards through an electronic seal, making the process more efficient and less time-consuming. This can be particularly useful in cases where the judgment debtor is difficult to locate or where assets are spread across multiple jurisdictions.

Cross-jurisdictional disputes can be a challenge, but with the new initiatives, litigants in Dubai can expect an easier and more efficient process. The new plan includes the **Smart Requests** initiative, which aims to streamline the Writ of Execution procedures, making the process more transparent and easier to track. This will reduce delays and ensure that the judicial system runs smoothly.

Litigants involved in collection claims will also benefit from the new initiatives, especially those relating to recognition and enforcement. The **Disclosure Platform** initiative, for example, will enable all authorities and officials involved in the execution of a ruling to be notified about the funds and assets of judgment debtors. This will allow officials to track and recover assets, helping to ensure that the judicial system operates at peak efficiency more easily.

Litigants with potentially insolvent debtors can also expect to benefit from the new initiatives. The **Sale Notification**

System initiative creates a system for notifying officials in charge of the execution of a judgment about items confiscated as part of a ruling so that they can be sold within a specified time frame. This initiative will ensure that assets are sold in a timely manner, and that judgment creditors receive the compensation they are owed.

Furthermore, the integration with the **Ministry of Interior** will ensure that rulings are enforced with the help of police and security departments. This initiative will ensure that enforcement is efficient and transparent, helping to protect the rights of all parties involved in a case. This can be particularly beneficial for foreign investors and litigants who may be concerned about the enforceability of their rights in a foreign jurisdiction and can increase compliance with court orders and help prevent further disputes from arising.

In conclusion, the new strategic plan announced by Dubai Courts is set to benefit litigants in Dubai, especially those with high-value claims, cross-jurisdictional disputes, arbitration matters, litigants with potentially insolvent debtors, and will support procedures for recognition and enforcement of judgments and arbitration awards.

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UAE High Court finds ICC ADGM

office subjects Abu Dhabi seated ICC arbitrations to the jurisdiction of the ADGM Courts

April 6, 2023

Brief

Two parties to a construction contract agreed that all disputes would be subject to the International Chamber of Commerce Rules of Arbitration and for the arbitration to be seated in Abu Dhabi.

The arbitration award was challenged by one of the parties before the Abu Dhabi Appeals Court.

The Abu Dhabi Appeals Court found it had no jurisdiction and that jurisdiction was exclusive to the Abu Dhabi Global Market Courts.

The reasoning of the Abu Dhabi Appeals Court was that:

- the arbitration was subject to the ICC Rules which resulted in,
- the arbitration proceedings being subject to the ICC representative office in the ADGM,
- and as the ICC representative office in the ADGM is considered an ADGM establishment,
- then the ADGM Courts have exclusive jurisdiction to consider challenges to the arbitration award.

Petition

The party petitioning the Abu Dhabi Cassation Court argued substantively presenting a myriad of grounds addressing the UAE Federal Arbitration Law, the ADGM respective laws, and the New York Convention. The arguments of the petitioner were as follows:

- That the parties expressly agreed to settle disputes between them in accordance with the ICC Rules, provided that the procedures and place of arbitration are in the Emirate of Abu Dhabi, without allocating the spatial scope in the Emirate of Abu Dhabi, and that applying the ICC Rules does not make that ICC or any of its branches a place for arbitration because it violates the contract between the two parties.
- That the ICC having a representative office in the ADGM does not mean that the two parties have agreed that the seat of arbitration is this representative office as they agreed in the contract to subject arbitration and its procedures to the laws of the UAE, they also agreed that the Emirate of Abu Dhabi as the place for arbitration, and in accordance with Articles 1 and 2/1 of UAE Federal Arbitration Law No. 6/2018, the Abu Dhabi Appeals Court is the competent forum to adjudicate challenges against the arbitration award.
- That it was not mentioned in the arbitration award that it was issued by the ICC in its capacity as a local court in the ADGM or in its capacity as a local court in the Emirate of Abu Dhabi, and neither in the award nor in the contract was there agreement to apply the rules of the ADGM or the Arbitration Regulations of the ADGM.
- That the arbitration award was not issued in the name of The Ruler of the Emirate (Abu Dhabi) as required by Article 13/2 of ADGM Law No. 4/2013, and it was not issued by judges as required by Article 13/1 of said ADGM Law, nor by the representative office of the ICC located in the ADGM, but rather by the Secretariat of the International Court of Arbitration affiliated with

the ICC, nor did the ICC representative office in the ADGM notify the parties of the arbitration award, but the notification was rather conducted by the Secretariat.

- That assuming that the ADGM Courts are competent to hear challenges against the arbitration award, this causes a judicial vacuum because the Court of First Instance in the ADGM has no jurisdiction to hear the case and its jurisdiction is exclusively in accordance with the text of Article 7/13 of ADGM No. 4/2013.
- That neither the ADGM, nor any of the ADGM authorities, nor any of the ADGM establishments were party to the arbitration, and the contract was not concluded, completed, or executed, in whole or in part, and the incident was not completed in whole or in part in the ADGM, and the award is not an appeal against a decision or a procedure issued by any of the ADGM authorities.
- That the ADGM Courts apply the civil and commercial laws of the ADGM, specifically English laws, not the laws of the UAE, and the Abu Dhabi Appeals Court judgment violated the New York Convention, which requires under its Article Three the recognitions of arbitral awards as binding and enforceable in accordance with the rules of procedure of the territory where the award is relied upon, and para. (e) of Article V of the Convention prohibited those territories from refusing to recognize a foreign award or refusing to enforce it, and thus the Convention linked foreign awards to the legal system of the country that it was issued and in respect of the invalidity of arbitration awards and as the award is issued in the Emirate of Abu Dhabi, the Abu Dhabi Courts have exclusive jurisdiction to hear challenges against an award issued in the Emirate of Abu Dhabi and outside the ADGM.

Disposition of the Abu Dhabi Cassation Court

The petitioner filed their petition before the Abu Dhabi Cassation Court on 29 December 2022 and the Court issued its judgment on 18 January 2023 rejecting the petition and upholding the finding of the Abu Dhabi Appeals Court on the following legislative grounds:

- Article 18/1 of the UAE Federal Arbitration Law applies which states that: "The jurisdiction to examine the arbitration matters referred by the present Law to the competent Court shall be according to the applicable procedural laws in the State, and they shall, solely, have the power until all arbitration proceedings are terminated."
- Article 1 of the UAE Federal Arbitration Law defines the 'Court' as: "The federal or local Appeal Court agreed by all Parties or which the Arbitration is carried out within its area of jurisdiction."
- Article 1 of ADGM Law No. 4/2013 defines 'ADGM Establishments' as: "Any company, branch, representative office, establishment entity, or project registered or licensed to operate or conduct any activity within the ADGM by any of the ADGM authorities according to the provisions of this law or the ADGM regulations or the executive resolutions including the licensed financial ADGM Establishments."
- Article 13/1 of ADGM Law No. 4/2013 states that: "The ADGM Courts shall be of two degrees, first instance (formed of a single judge) and appeal (formed of three judges). Without prejudice to the provisions of this law and the ADGM Regulations, the ADGM Courts shall be considered as courts of the Emirate, with jurisdiction over disputes and matters in accordance with the provisions of this law and the ADGM Regulations."
- Article 13/7/d of ADGM Law No. 4/2013 states that: "The Court of First Instance and shall have exclusive jurisdiction to consider and decide on matters according to the following … Any request, claim or dispute which

the ADGM Courts have the jurisdiction to consider under the ADGM Regulations."

- Article 13/10 of ADGM Law No. 4/2013 states that: "The Court of Appeal shall have exclusive jurisdiction to consider and decide on appeals made against the judgments or orders issued by the Court of First Instance."
- Article 13/11 of ADGM Law No. 4/2013 states that: "Judgments of the Court of Appeal are final and may not be challenged by any method of appeal."

Relying on these provisions, the disposition of the Abu Dhabi Cassation Court was:

- All disputes arising from or in connection with the contract are to be finally decided by arbitration subject to the ICC Rules, the laws of the UAE, and seated in the Emirate of Abu Dhabi.
- There was no dispute between the parties that the ICC opened its fifth branch in Abu Dhabi during the arbitration procedures and before the issuance of the arbitration award.
- The ICC branch in the ADGM is considered a representative office of the ICC, and an ADGM establishment, and hence the place of arbitration is the ADGM subject to ADGM Law No. 4/2013.

Conclusively, the Abu Dhabi Cassation Court upheld the Appeals Court finding that the ADGM Courts have exclusive jurisdiction over challenges against the arbitration award because the arbitration agreement was subject to the ICC Rules and seated in Abu Dhabi, because the ICC representative office in the ADGM is considered an ADGM establishment.

<u>Significance of this judgment and takeaways</u>

The judgment is a high court judgment. The Abu Dhabi Cassation Court is the highest level of court proceedings in the Emirate of Abu Dhabi.

The judgment does not carry the status of stare decisis, and a conflicting judgment could be issued by the Abu Dhabi Cassation Court in the future.

However, for the time being, and given the expediency in which the Cassation Court issued its judgment in less than a month from the date the petition was filed, it appears the Cassation Court has taken a relatively resolute position on this matter.

By subjecting all arbitrations seated in Abu Dhabi and subject to the ICC Rules to the ADGM Courts, parties to such arbitration agreements need to consider the following:

- Review existing contracts and consider future dispute clause language to ensure that the parties choose which courts will have jurisdiction over the arbitration proceedings.
- Parties to an arbitration agreement can utilize the ADGM Courts for procedures outlined in the UAE Federal Arbitration Law, even where the ADGM is not the seat of arbitration, so long as the ICC Rules are agreed to be the rules of arbitration.
- Parties may utilize the ADGM Courts for various procedural powers under the UAE Federal Arbitration Law, even if the parties have no connection with the ADGM, as long as the arbitration agreement applies the ICC Rules and for the arbitration to be seated in the Emirate of Abu Dhabi, such as the following:
- Issuance of interim or precautionary measures under Article 18/2 of the UAE Federal Arbitration Law.
- Ruling on the jurisdiction of the arbitration tribunal under Article 19/2 of the UAE Federal Arbitration Law.
- Enforcement of interim orders and awards granted by the arbitration tribunal under Article 21/4 of the UAE Federal Arbitration Law.
- Seek the assistance of the ADGM Courts in taking

evidence during arbitration proceedings under Article 36/1 of the UAE Federal Arbitration Law.

- Amendment of the fees and costs assessed by the arbitration tribunal under Article 46/2 of the UAE Federal Arbitration Law.
- Challenging an arbitration award under Article 53 of the UAE Federal Arbitration Law.

Looking forward, the ratio decidendi of the Abu Dhabi Cassation Court may apply across the UAE, including before the Dubai Cassation Court and the Federal Supreme Court.

Because the reasoning relies on the provisions of the UAE Federal Arbitration Law which applies on a Federal level across the UAE.

Hence the analysis that the ICC representative office encapsulates arbitrations seated in Abu Dhabi to the ADGM, may also arguably apply to arbitrations seated elsewhere in the UAE.

This increases the necessity for parties with arbitrations seated in the UAE to agree on the courts that would have jurisdiction over the arbitration procedures, and not just rely on agreement on the seat of arbitration as an indicator.

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Corporate income tax disputes

under the new UAE Federal Decree-Law No. 47/2022 on the Taxation of Corporations and Businesses

April 6, 2023

The new UAE law on taxation of corporate ("Corporate Tax Law") and business income was promulgated on 03 October 2022 and applies to tax periods commencing on or after 01 June 2023.

The Corporate Tax Law does not define its own dispute procedure system.

The Corporate Tax Law is subject to the Tax Procedures Law (Federal Decree-Law No. 7/2017).

The Tax Procedures Law regulates tax disputes through a five-tiered system: reconsiderations with the Federal Tax Authority, objections with the tax disputes resolution committees, and litigation before the Federal Primary Court, the Federal Appeals Court, and the Federal Supreme Court.

Here, we look at the top five prior tax-related judgments that would carry over to corporate tax disputes under the Corporate Tax Law.

1. No tax penalties on payment delays caused by the tax authority.

The Federal Primary Court has ruled that:

the obligations of the taxpayer to make tax payments on time and the procedural nature of the law are undeniable, however, that does not produce an effect unless the way to implement the procedures is in accordance with what falls within the obligations of the Federal Tax Authority,

and if this is prevented by the Tax Authority without cause on the part of the taxpayer, there is no liability on the taxpayer that requires the imposition of penalties.

2. No tax penalties for re-submission of correct tax returns.

The Federal Supreme Court has ruled that:

"…it is decided that tax procedures are not an end in themselves, but rather a means to achieve the goal of the lawgiver in collecting the legally due tax. Allegedly, the tax returns made under the wrong procedure that were subsequently corrected were not taken into account. Rather, the FTA's right to collect the fine decided by the legislator on the wrong procedure only recedes, without this right going beyond that by imposing other fines for a tax collected on the date specified by the law, even under the aforementioned procedure."

3. No disputes available without tax or penalty liabilities:

The Federal Supreme Court has found that private clarifications are not disputable decisions until such clarification results in actual tax or penalties being applied to the disputing taxpayer.

In other words, if a decision by the Federal Tax Authority does not create a tax or penalty liability, it may not be disputed under the Tax Procedures Law.

4. No joint liability for tax evasion without laws validating the conviction.

The Federal Supreme Court overturned a judgment against a party found to be an accomplice to a tax evasion crime on the basis that joint liability requires explicit provisioning in the law:

"…the Appeals Court's finding that the mere presence of the goods in the second accused's warehouse is considered participation with the first accused in evading the tax as stipulated in the laws of the State, without indicating the laws criminalizing the act and validating conviction, stigmatizes the judgment for insufficient causation, and breaches the [second accused's] right of defense, which requires it to be quashed."

5. Time limits related to tax disputes.

The Federal Supreme Court ruled that the time limits related to tax disputes do not necessarily commence when notification is issued – but rather require evidence of the receipt and fulfillment of knowledge of the taxpayer of that decision and its contents.

Takeaway

As the Federal Courts consider a wider array of complex tax disputes, taxpayers would benefit from the guidance of the courts on general matters, such as those listed above – but also on more industry-specific matters such as those affecting the insurance industry, manufacturing, construction, and real estate.

As taxpayers begin planning for compliance with the Corporate Tax Law, it is necessary to understand the position of the courts and tax dispute resolution committees on substantive and technical issues.

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Dubai High Court denies enforcement of arbitration award against foreign party (Article III of the New York Convention)

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The Dubai Cassation Court, the highest tier of court litigation in the Emirate of Dubai, recently rendered judgment rejecting enforcement of an arbitration award against a foreign award debtor on the basis that the debtor does not have a domicile in the United Arab Emirates.

Furthermore, the Dubai Cassation Court provided an interpretation of Article III of the New York Convention in finding that its purpose is that enforcement of an award should be conducted "*…in accordance with the rules of procedures applicable in the territory of enforcement with the adoption of the easiest procedures, and the exclusion of the more onerous procedures…*".

The Dubai Cassation Court did not adopt the latter part of Article III which continues to state, "*than are imposed on the recognition or enforcement of domestic arbitral awards*", developing an interpretation of Article III to consider its second sentence requiring application of easy and non-onerous procedural rules, instead of requiring application of procedural rules that are not more onerous than those that apply to the enforcement of domestic arbitration awards.

The arbitration award:

The arbitration award was issued by the London Court of International Arbitration.

The award debtor is a foreign entity and has no domicile in the United Arab Emirates.

However, the award debtor owned shares in companies established and domiciled in the United Arab Emirates.

The award creditor applied for recognition and enforcement of the award before the Dubai Courts against the shares of the United Arab Emirates companies owned by the foreign award debtor.

The enforcement judge rejected the application on the basis that the Dubai Courts have no jurisdiction to enforce an arbitration award against a foreign party.

The award creditor challenged the finding through the courts, up to and in petitioning the Dubai Cassation Court.

The Dubai Cassation Court considered the following arguments made by the award creditor:

- Pursuant to the principle of voluntary – legislative – compliance with the accession of the United Arab Emirates and the United Kingdom to the Convention on the Recognition of Foreign Arbitral Awards (New York Convention) ratified by Federal Decree No. 43/2006, the rules of jurisdiction contained in the Federal Civil Procedures Law do not apply to the enforcement of foreign arbitral awards, considering that both the United Kingdom and the United Arab Emirates have acceded to the Convention on the Recognition of Foreign Arbitral Awards of 1958 (New York Convention) and implicitly accepted their jurisdiction to consider the application for the enforcement of foreign arbitral awards and are obligated to recognize and order their enforcement in accordance with the terms contained in the Convention.

- It is evidenced within the contract in dispute and within the arbitration award that the award debtor is the owner of shares of two companies registered in the United Arab Emirates.
- The parties to the arbitration agreed to the sale and purchase of the shares owned by the award debtor in those two companies.
- The legislator deviated from the general principle of domicile jurisdiction, allowing the creditors of a shareholder in a limited liability company to execute against the shares of a debtor shareholder by selling the shares and collecting the debts from the proceeds of the sale in accordance with Article 20 of the Federal Commercial Companies Law.

The Dubai Cassation Court rejected the petition for the following reasons:

- The text of Article III of the New York Convention of 1958 indicates that enforcement takes place in accordance with the rules of procedures followed in the territory of enforcement, with the adoption of the easiest procedures and the exclusion of the more onerous procedures.
- This matter is not limited to the general procedural law, which is the Federal Civil Procedures Law and its executive regulations, but rather includes any procedural rules for litigation and the implementation of its provisions contained in any other law that regulates these procedures, and to say otherwise is allocation without provision.
- And that it is established – in the jurisprudence of the Dubai Cassation Court – that the issue of sovereign or qualitative jurisdiction is one of the issues related to

public policy and is considered to exist in any litigation and always before the court, which the court must address it on its own accord, even if none of the litigants raise the issue.

- It is also decided – in the jurisprudence of the Dubai Cassation Court – that the company of any kind – with the exception of the joint venture company – has a legal personality and a financial liability independent of the liabilities of its shareholders, and it has the capacity to sue as a plaintiff or defendant, independently of its shareholders.
- The jurisdiction of the Dubai Courts in the enforcement of the arbitration award is not affected by the request to enforce against the shares of the award debtor in the two companies domiciled in Dubai (in the United Arab Emirates) as the arbitral award required to be enforced does not include an order against the two companies, in addition to the absence of any other rulings against them, and therefore they are not considered a party to the instrument (the arbitration award) required to be enforced.
- For the competence of the enforcement judge in the Dubai Courts to recognize (apply exequatur) and enforce a foreign award, the domicile of the award debtor against whom enforcement is requested must be within the State jurisdiction of the Dubai Courts whilst in this case the award debtor is domiciled in a foreign State.

Article III of the New York Convention

The Dubai Cassation Court cited part of Article III and supplemented its quotation with an interpretive addition to the provision while omitting the application of the latter part of Article III.

Article III of the New York Convention states:

“Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

Article III is generally understood to require that State courts treat enforcement of foreign arbitration awards in the same manner as enforcement of domestic arbitration awards.

The Dubai Cassation Court provided an interpretation of Article III of the New York Convention in finding that its purpose is that enforcement of an award should be conducted "*…in accordance with the rules of procedures applicable in the territory of enforcement with the adoption of the easiest procedures, and the exclusion of the more onerous procedures…*".

In coming to its disposition, the Dubai Cassation Court did not adopt the latter part of Article III which continues to state, "*than are imposed on the recognition or enforcement of domestic arbitral awards*".

The travaux préparatoires are the official documents recording negotiations, drafting, and discussions during the process of creating a treaty. The travaux préparatoires can be consulted and taken into consideration when interpreting treaties.

According to the New York Convention travaux préparatoires, the rule under Article III of the Convention limits the Contracting States' discretion to determine the rules of procedure applicable to the recognition and enforcement of foreign arbitral awards in their territories.

The purpose of this limitation, which has been referred to as the "national treatment" or "non-discrimination" rule, is to prevent national courts from imposing “unduly complicated enforcement procedures” and insurmountable procedural hurdles at the recognition and enforcement stage.

The second sentence of Article III prevents Contracting States from discriminating against foreign arbitral awards, whilst nothing prevents Contracting States from imposing conditions to the recognition and enforcement of foreign arbitral awards that are less onerous than those imposed on domestic awards.

The Dubai Cassation Court did not adopt the latter part of Article III which continues to state, “*than are imposed on the recognition or enforcement of domestic arbitral awards*”, developing an interpretation of Article III to consider its second sentence requiring application of easy and non-onerous procedural rules, instead of requiring application of procedural rules that are not more onerous than those that apply to the enforcement of domestic arbitration awards.

Contrastingly, awards issued in the UAE against foreign parties are enforceable by the Dubai Courts, which renders this novel interpretation of Article III a complex new paradigm for parties to consider when enforcing in the UAE.

Enforcement against shares (assets)

The award creditor relied on Article 20 of the Federal Commercial Companies Law which does indeed permit creditors to take action against shares. Quoted as follows:

“Article 20 – Execution against anything in lieu of the share

1- Personal creditors of a shareholder may not recover their rights out of the share of the debtor shareholder in the capital of the company. However, they may claim their rights from the share of the debtor in the profits of the company. If the company is terminated, the rights of the creditors shall be paid from the shares of the shareholder in the remaining assets thereof upon conclusion of the liquidation.

2- If the contribution of a shareholder in the company consists of shares, then the creditors thereof may, in addition to the rights set out in Clause 1 of the present Article, file a lawsuit before the competent court to sell these shares and subsequently recover their debts out of the sale proceeds."

Notwithstanding, the Dubai Cassation Court found that this right under Article 20 of the Federal Commercial Companies Law does not manifest in part because the arbitral award does not include an order against the two companies, in addition to the absence of any other rulings against them, and therefore they are not considered a party to the instrument (the arbitration award) required to be enforced.

The finding by the Dubai Cassation Court raises the risk of extending to other assets as well that are not named in an arbitration award.

In the same vein, the arbitration award in this dispute related to the sale and purchase of the shares in the companies domiciled in the United Arab Emirates.

Whilst the Dubai Cassation Court relied on Article 21 of the Federal Civil Procedures Law, this Article 21 does nevertheless state that the Courts shall have jurisdiction if "*the action is concerned with an obligation concluded, executed, or its execution was conditioned in the state or related with a contract required to be authenticated therein*".

Deductively, the Dubai Cassation Court appears to apply more weight to whether in fact the award debtor is domiciled in the country or not, irrespective of the underlying agreement.

Takeaway and alternatives

The judgment creates two substantial considerations for award creditors seeking enforcement of a foreign arbitral award in the United Arab Emirates:

1. If the award debtor is not domiciled in the United Arab Emirates, the Courts may refuse recognition and enforcement of the award.
2. If the award debtor assets are not named in the award, the Courts may refuse enforcement action against said assets.

Either of these risks may manifest independently, or in compound with each other.

Alternatively, arbitration award creditors can seek recognition and enforcement through other court systems in the United Arab Emirates that operate under different laws and regulations, those being the Abu Dhabi Global Market Courts which operate pursuant to English law, and the Dubai International Financial Courts which operate pursuant to common law, and each their respective independent rules and statutes.

The ADGM and DIFC Courts also provide parties with the ability to apply for Mareva Injunctions (i.e., worldwide freezing orders) even if the parties have no nexus with or assets in the ADGM or the DIFC in support of enforcement of foreign arbitration awards.

How we can assist

Wasel & Wasel has assisted domestic and international arbitration award debtors and creditors in the enforcement and set aside of arbitration awards before the various courts in the UAE (including the Dubai Courts and the DIFC Courts) on matters collectively exceeding USD 500,000,000. Our team has also acted on Mareva Injunction and Norwich Pharmacal Orders issued by the DIFC Courts, or issued abroad and enforced domestically in the United Arab Emirates, in relation to court judgments and arbitration awards.

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UAE Federal Court rules no tax penalties on payment delays caused by the tax authority

April 6, 2023

Brief

It was evidenced before the Federal Primary Court that the taxpayer had informed the Federal Tax Authority of an obstacle in the online tax filing portal that prevented the taxpayer from being able to file their tax returns.

The taxpayer continuously requested resolve of the issues since early 2018 until mid-2021.

The issue was finally resolved by the Tax Authority in 2021 and the taxpayer was able to file their returns and make tax payments after that date.

The Federal Tax Authority applied penalties retrospectively on the taxpayer for (i) late filing of tax returns and (ii) late payment of taxes.

Arguments

The taxpayer argued that Article 25(1)(i) permits the application of penalties in case the "…taxable person fails to settle the tax defined as the payable tax in the tax return that has been submitted or the tax assessment notified thereto within the period set forth under the tax law".

And since the payable tax never manifested because of the inability to file a tax return, nor by way of an audit, no tax had become payable.

The taxpayer argued that the Payment User Guide of November 2018 indicates that the filing of tax returns and payment of taxes are sequential procedures.

In that payment of the tax is a subsequent stage to accepting the tax return.

That is only after accepting the tax return, the taxpayer must pay the tax due, otherwise the Federal Tax Authority may implement penalties.

However, where the taxpayer does not have the opportunity to submit the tax return due to the fault of the Authority, without cause on the part of the taxpayer, the subsequent stage of paying the tax cannot be triggered.

In other words, the unencumbered submission of the tax return is a pre-condition for payment of the tax.

Judgment

The Federal Primary Court ruled that:

- the obligations of the taxpayer to make tax payments on time and the procedural nature of the law are undeniable,
- however, that does not produce an effect unless the way to implement the procedures is in accordance with what falls within the obligations of the Federal Tax Authority,

- and if this is prevented by the Tax Authority without cause on the part of the taxpayer, there is no liability on the taxpayer that requires the imposition of penalties.

Wasel & Wasel was counsel on this matter.

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Significant judgment by Dubai Court orders payment of damages in cryptocurrency instead of fiat currency

April 6, 2023

In a dispute over investment in Dash cryptocurrency, one of the more well-known and established altcoin cryptocurrencies, the Dubai Primary Court ordered payment to the plaintiff in Dash (as opposed to in Dirhams, US Dollars, or UK Pounds).

This is one of the first cases in the UAE where the court orders compensation in cryptocurrency as opposed to fiat currency providing substantial considerations for how disputes over cryptocurrency transactions should be managed.

Background

The plaintiff purchased 6000 Dash from the defendant for the amount of USD 540,000, on the promise that the defendant would invest the cryptocurrency for a return of 3% per week.

The defendant failed to pay the plaintiff the investment return, or the principal investment, despite multiple demands by the plaintiff.

The plaintiff sued before the Dubai Primary Court for USD 1,009,800 being the value of the Dash coins at the time plus the agreed upon returns of 3% per week.

Dubai Primary Court judgment

The Court ruled in favor of the plaintiff awarding the 6000 Dash instead of the amount of USD 1,009,800 claimed by the plaintiff.

Although the transaction agreement was evidenced and established, the Court did not award a monetary value in fiat currency on the basis that the plaintiff did not evidence the true market value of the Dash that was being claimed.

This is the first known case where a UAE court awards damages in cryptocurrency only, without identifying any fiat currency as a value to such cryptocurrency in the award.

The Court ordered in its judgment disposition:

“Obligating the defendant to return to the plaintiff an amount of (6000 Dash Cryptocurrency) to the electronic address of the plaintiff’s wallet.”

The Court based its reasoning on the Federal Commercial Transactions Law as follows:

“The meaning of the provisions of Articles 76, 77, 88, 90 of the Commercial Transactions Law is that if the debt arises from a commercial business and relates to a sum of money of known amount at the time the obligation arises and the debtor is late in paying it, then the creditor has the right to demand interest on it as compensation for delay, and this interest applies from the maturity date of this debt, and is calculated according to the price agreed upon in the contract concluded between the two parties. If no interest rate is specified in the contract, it is calculated according to the prevailing market price at the time of dealing, provided that it does not exceed 12% annually until the full payment.

…

The contract concluded between the two parties did not include a reference to any website whereby the unit price of the [crypto] currency will be calculated and therefore the benefits resulting from it cannot be estimated due to the lack of knowledge of its price in the market as it changes daily."

Takeaway

This is a significant judgment for those engaged in the digital asset economy in the UAE to account for; (i) at the time of contracting; (ii) at the time a dispute arises; (iii) and in strategizing the most appropriate relief to seek from the courts or arbitration tribunals to maximize return.

Should parties wish to recover their cryptocurrency in fiat currency at the time of making a claim, it is crucial to:

- At the time of contracting specify how the value of cryptocurrency will be determined and based on which references.
- Post-contracting, at the time of dispute, disputants should provide an expert/technical report on the true market value of the cryptocurrency using credible reference points.

On the other hand, should a plaintiff expect the value of the cryptocurrency to rise, this judgment provides grounds to make claims and request compensation in the cryptocurrency that was traded/invested as opposed to a monetary value.

If the price of the cryptocurrency is expected to increase, it may be beneficial to request the courts to grant relief in the form of the cryptocurrency as opposed to the monetary value.

This is because if the court awards relief in the monetary value of the cryptocurrency (as opposed to awarding the cryptocurrency itself) the value of the fiat currency in the judgment would be set at the date of the judgment and generally remain so during appeal and enforcement.

Appeals and enforcement could take months or years.

During which time the value of the cryptocurrency could increase in folds.

However, if the judgment awards a party in cryptocurrency instead of fiat currency, that cryptocurrency value would continue to increase as the parties go through appeal and enforcement procedures.

And the winning party would be able to enforce at the then-current price of the cryptocurrency (at enforcement), as opposed to the price at the time of the initial judgment.

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UAE Appeals Court invalidates

cryptocurrency agreement and defines Ponzi scheme in ‘OneCoin’ transaction dispute

April 6, 2023

In a rare judgment, the Appeals Court of Ras Al-Khaimah (UAE) applies the elements of contract formation of the Federal Civil Transactions Law to invalidate a cryptocurrency transaction – finding that the object of the agreement did not fulfill the requirements of being “*possible, specified or specifiable, and negotiable*”.

Furthermore, the Appeals Court classified the transaction as a Ponzi scheme and provided a definition thereof falling within the general understanding of a Ponzi scheme, but with a wider net that requires persons engaged in the digital asset economy in the UAE to be better attuned with the recent rules and regulation surrounding digital assets.

Also notable, the transaction in dispute involved the infamous OneCoin.

<u>Claim</u>

The claim alleged that the defendant (Seller) sold to the plaintiff (Buyer) 40,000 units of OneCoin at a value of AED 100,000 and despite the Buyer’s payment for the exchange, the Seller did not deliver the tokens/units.

The Seller sued the Buyer before the Primary Court of Ras Al-Khaimah.

<u>Primary Court technical analysis and judgment</u>

The Primary Court adopted the following technical provisions/understandings:

1. An encrypted digital currency is a virtual currency or a digital asset based on a network and is distributed across a large number of systems known as “Blockchain.” Due to this decentralized structure, an encrypted digital currency is considered not subject to the control of governments, authorities, and centralization. Bitcoin, Litecoin, and Ether are among the most popular of these currencies and in order to be converted into cash, a cryptocurrency must be traded on a special exchange.
2. To verify the actual value of that currency, a variety of sources on the internet were surveyed but no exchange trading OneCoin was found, and based on the information available on the internet, the OneCoin exchange known as “XCoinx” was closed without any notice and therefore the current and past value of this coin cannot be confirmed.

This Primary Court ruled to rescind the sale contract and obligated the Seller to return the purchase price of AED 100,000 and pay AED 10,000 in comprehensive compensation to the Buyer.

<u>Appeals Court procedures</u>

The Seller appealed the Primary Court judgment before the Appeals Court arguing that the sale is valid as it was conducted through a “Deal Shaker” platform, and it does not violate the law nor public policy.

The fact of the agreement – as argued by the Seller in appeal – between the two parties is that the Seller would maintain the cryptocurrency in accordance with the Seller’s terms and conditions as listed online and release it for transfer to the Buyer between certain periods of time.

The Seller argued that they had explained to the Buyer the rules of the exchange and the possibilities of profit and loss and the risks that might occur to the Buyer.

The Seller alleged that they had informed the Buyer of the period to acquire the OneCoin units but did not receive any confirmation from the Buyer.

The Buyer refuted any communication to acquire the units during that period had occurred.

<u>Appeals Court judgment</u>

The Appeals Court rejected the Seller’s appeal on the following reasoning.

The Court found that OneCoin (and its related companies and its founder Ruja Ignatova), as being the object of the underlying agreement, was deemed associated with fraud that tempts investors to join a Ponzi scheme.

The Court defined a Ponzi scheme as “…a form of defrauding investors by paying dividends to early investors based on money deposited by newer investors. This scheme leads its victims to believe that profits come from sales of products or other investment means and remain unaware of the fact that other investors are the source of funding without real investment in valid means.”

The Court concluded that the sold currency and its circulation constitutes fraud, which makes it an invalid transaction and a violation of law and public policy.

Consequentially – the Court found – the agreement does not fulfill the necessary elements for the formation of a contract under Article 129(b) of the Civil Transactions Law that is:

“The object of the contract must be something possible, specified or specifiable, and negotiable.”

Which invalidates the contract and renders it *void ab initio* and restores the contracting parties to the state prior to the coming into effect of the agreement, with the obligation on the Seller to refund the moneys paid to the Buyer.

Takeaway

The majority of cryptocurrencies derive their value and increase thereof from their supply and demand on exchanges, so within the wide-encompassing definition of the Ponzi scheme by the Appeals Court, there is a risk of cryptocurrency transactions falling afoul of Article 129(b).

In the past few years, the UAE Central Bank, the Securities and Commodities Authority, the ADGM and the DIFC have set out in regulating digital assets with instruments such as:

- Central Bank Circular No. 6/2020: Stored Value Facilities (SVF) Regulation
- Securities and Commodities Authority Decision No. 23/RM/2020: Concerning Crypto Assets Activities Regulation
- DIFC Dubai Financial Services Authority: Consultation Paper No. 143 – Regulation of Crypto Tokens
- Abu Dhabi Global Markets Guidance – Regulation of Virtual Asset Activities in ADGM (VER04.280922)

The regulations set forth, those above and others in the digital asset industry, provide for various forms of licensing depending on the activity in the digital asset economy.

Failing to operate within the confines of the rules and regulations, or license accordingly, may lead to the invalidation of digital asset transactions on the premise that they do not conform with Article 129(b) of the Civil Transactions Law, or be considered a Ponzi Scheme within the definition adopted by the Appeals Court.

And for buyers who may have suffered from questionable transactions, the Appeals Court judgment provides a sign of relief in the technical competency of the UAE courts to deduce and adjudicate digital asset disputes.

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Dubai Court rejects Bitcoin claim lacking proof of crypto-wallet ownership (and solutions for digital asset disputes in the UAE)

April 6, 2023

Dubai Court rejects claim of loss of 608 Bitcoins for lack of evidence of crypto-wallet ownership.

Dubai Primary Court rules:

"…the plaintiff had transferred the encrypted currency "Bitcoin" to the defendant…did not indicate how to prove the ownership of the account to the defendant, noting that by referring to the page shown in the advisory report taken from the "blockchain" website, it became clear to the court that they are symbols…"

In brief, the Court found that cryptocurrency claims require a plaintiff to evidence crypto-wallet ownership by the alleged debtor.

Background

The plaintiff met the defendant in Dubai, and accepted making an investment in Bitcoin in return for “fantastic financial returns”.

In January 2019, the plaintiff transferred 608 Bitcoins to the defendant.

The Bitcoins were transferred to the crypto wallet of an investment company in accordance with the terms of the agreement between the plaintiff and the defendant.

It was also agreed that after 15 February 2019, even if the project is not complete for any reason, the defendant and the company that owns the crypto wallet must return the Bitcoins to the plaintiff.

On 15 March 2019, the plaintiff demanded from the defendant and the investment company the return of the Bitcoins delivered to them.

The demand to return the Bitcoins was rejected by the defendant, and the defendant “disappeared”.

Claim and ruling

The plaintiff sued the defendant before the Dubai Primary Court claiming return of the 608 Bitcoins or their equivalent market value.

The plaintiff filed an expert report which evidenced the validity of the transfer by referring to a blockchain records website (public ledger) showing that the Bitcoins were held by a particular crypto wallet.

The Court commented that the expert report did not evidence that the crypto wallet belonged to the defendant nor the investment company as the only identification to the wallet's ownership were "symbols".

By "symbols" the Court is referring to the crypto wallet identification number.

In essence, the Dubai Court set a threshold for evidence of token possession by a wrongdoer.

Proof of identity of crypto wallets is an ongoing issue in digital asset disputes.

But solutions and remedies are available for claimants.

Solutions for digital asset disputes

Digital asset disputes – particularly involving the misappropriation of tokens – have resulted in innovative solutions in different jurisdictions using common law injunctive processes.

Mareva injunctions

A Mareva injunction is a worldwide freezing and asset disclosure order.

It extends to all a defendant's assets worldwide, limiting the defendant from utilizing those assets except for regulatory purposes (i.e., paying employment salaries) unless consent is granted by the plaintiff.

And requires the defendant to disclose its worldwide assets over a certain threshold value (i.e., over USD 10,000 or USD 50,000).

The Hong Kong High Court recently granted such remedy over Bitcoins that were fraudulently misappropriated in *Nico Constantijn Antonius Samara v Stive Jean Paul Dan*, freezing up to USD 2.6 million of the defendant's assets (including any digital assets).

Norwich orders

Norwich orders – or Norwich Pharmacal orders – are injunctive orders obtained against an innocent third party in order to identify a wrongdoer or details related to a potential wrongdoer.

A Norwich order compels an innocent third party (such as a cryptocurrency exchange) to disclose relevant information to a plaintiff/applicant.

In digital asset disputes, these orders have been used to compel exchanges to disclose details related to crypto wallets and digital assets.

The English High Court recently issued a Norwich order in *Mr Dollar Bill Limited v Persons Unknown and Others* – notably, the Norwich order was issued against cryptocurrency exchanges outside England compelling them to assist in identifying what had happened to the tokens in question.

Anton Piller orders

One increasing trend is the reliance on Anton Piller orders to access the digital assets of a defendant and investigate records that could prove the transfer of the tokens.

Anton Piller orders are a common law remedy which compels a defendant to permit a plaintiff to enter its property to search for and seize evidence and records, including electronic data and equipment.

An Anton Piller order in a cryptocurrency dispute was recently issued by the Ontario Superior Court of Justice in *Cicada 137 LLC v. Medjedovic* in relation to an alleged theft of CAD 15 million in digital assets from the plaintiff’s crypto wallet.

Solutions in the UAE

The UAE has two common law court systems: the Abu Dhabi Global Market Courts (ADGM) and the Dubai International Financial Centre Courts (DIFC).

Both the ADGM and the DIFC have authority to grant Mareva injunctions, and the DIFC has historically granted several Mareva injunctions against parties in the UAE and otherwise.

The ADGM and DIFC may also consider applications for Norwich orders to compel third parties to provide evidence in support of a dispute.

Anton Piller orders before the ADGM and DIFC courts are possible, but there are no records of execution of such orders to date.

Digital asset disputes in the UAE

According to 'The 2021 Geography of Cryptocurrency Report' by Chainalysis, the UAE hosted USD 25.5 billion worth of cryptocurrency transactions between July 2020 and June 2021.

With a significant value of cryptocurrency transactions taking place in the UAE, plaintiffs need to carefully strategize any dispute process and make use of all domestic and cross-border remedies.

Relying on archaic means of pursuing claims in an industry that is incrementally complex may not be fruitful – and instead innovative tactics and strategies must be put in place.

The UAE has six court systems – each with their own utility – and the UAE has agreements and treaties with various international dispute resolution forums and courts, that claimants need to consider when pursuing digital asset claims.

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