HFW

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AND THE AWARD GOES TO... LEGAL INNOVATION!

The world is not static. Innovation and progress are constant in all areas of society, including economics, technology, and commerce. The law is no different and must adapt to society's ever-changing needs. In this article we discuss some important areas where the law and practice of law firms is developing or is likely to change in the future.

Space

As technology for space travel advances, it is inevitable that companies will seek to capitalise on resources available beyond our planet and in the wider universe.

Certain countries have already started to plan ahead by passing laws to allow space mining. In the US, the Commercial Space Launch Competitiveness Act was introduced in 2015 to provide its citizens with rights to extract and own resources obtained from asteroids. Luxembourg passed a similar law in 2017 which gives its citizens the right to own resources in space.

Such laws create a tension with the Outer Space Treaty of 1967, which provided a basic framework for international space law and adopted principles of collaboration and equality. The Treaty (to which over 100 countries are a party, including the US) included principles that the exploration and use of outer space should be carried out for the benefit and in the interests of all countries and that outer space is not subject to national appropriation by claims of sovereignty.

The ability of companies to economically mine resources from asteroids or other bodies in space is likely to take some time. The US and Luxembourg have paved the way for their citizens to capitalise on the opportunities presented by space. However, many legal issues arise. For example, if a company is the first to extract resources from an asteroid, would this prevent other companies from mining any other sections of that asteroid? What would the governing law be in the event of disputes in space mining or colonisation? Treaties and private agreements could be entered into to solve some of the difficulties but it is likely that space law will require the courts to consider novel issues, especially from a conflict of laws perspective.

Green innovation

At HFW, we have seen a dramatic shift in corporate attitudes towards population and planet health. For example, we now see the decommissioning of ships occurring in more ethical and environmentally sensitive ways, while the International Maritime Organization has set the 2020 global sulphur limit to further combat ship pollution.

Businesses should take the green issue seriously because the environmental tide is coming in. Clauses in contracts that require each party to comply with environmental laws are already common. As companies give more thought to environmental responsibility, we expect contracts to contain new and innovative clauses in efforts to protect the environment.

For example, in long-term joint venture contracts, the parties could agree a provision whereby each party must perform the contract in a manner that prevents or minimises damage to the environment. Such a provision may be a statement of intent or could be elevated to a stronger right that allows a party to terminate the contract if breached (although this would require careful and clear drafting).

Artificial Intelligence (AI)

Going forward, AI is likely to play an increasingly important role for law firms. Over the years law firms have often been subject to criticism for their lack of dynamism and innovation but recent technology advancements are changing the way lawyers carry out their work.

AI is a real opportunity to increase efficiency. Thanks to the use of AI tools, tasks which traditionally involved copious amounts of time and legal fees, such as disclosure and data harvesting, are no longer as burdensome. Legal investigations and data gathering exercises have reached new levels of efficiency.

AI is a real opportunity for law firms, but it should also be seen as of benefit to clients. By using AI tools, lawyers are able to minimise the time they spend on low value tasks and can instead focus on exercises which truly require them to wear their "legal spectacles". The client is paying for the value added by the lawyer.

Although some adjustments will undoubtedly be required, law firms currently have the chance to incorporate AI within their profession and shape it to the benefit of both their business, and most importantly, their clients.

Smart contracts

In the commodities sector, we continue to see interest in new technologies. With programming advancements and the improved security of blockchain technology, the move towards smart contracts has gained in popularity and they are increasingly regarded as part of the foreseeable future of the commodities industry. The term "smart contract" does not have an internationally recognised definition and different jurisdictions have defined it differently. For now, smart contracts are likely to include some terms written in code and performed automatically and others which still require human input and control, written in natural language. We are some way off seeing market confidence in fully automated, irreversible "permissionless" trading which does not allow for risk management in the form of human intervention.

Smart contracts are praised for their reliability, efficiency and cost saving potential. However, the use of such technology is expected to involve substantial changes to the commodities industry. Intermediaries such as brokers, clearing houses and pricing agencies will have to adapt. Despite the apparent likelihood that the commodities sector will use smart contract technology, some key issues remain to be resolved. Along with the lack of an internationally recognised legal definition of the term "smart contract", regulatory, commercial and technological provision will vary by jurisdiction too. Creating coding which can accommodate the complexities of a contract and include elements of flexibility or discretion where required remains hugely challenging. Consider for example how to automate the concept of good faith or the use of reasonable endeavours.

The law will also need to develop and the English judiciary is alive to this and active in developing its understanding. Issues of principle such as whether the code elements of a contract are valid and binding under English law are fundamental[1]. Lastly, smart contracts are subject to the same Issues as traditional contracts in relation to the provenance and traceability of

1. In November 2019, the UK Jurisdiction Taskforce issued a statement which indicated that smart contracts should, in principle, be able to form a binding contract under English law. However, each smart contract would have to independently satisfy the relevant rules.

funds and the anonymous nature of blockchain is likely to cause legal complications.

E-signatures

In the commodities sector, e-signatures are perceived as a way to carry out and conclude transactions in a more efficient way. The term e-signature can denote a number of different concepts, including digital signatures involving key cryptography, scanned signatures and PINs. These are regarded as means which enable the parties to avoid referring to standard procedures relating to the execution of documents.

As useful and practical as they may be, the regulatory framework surrounding e-signature is complex and certainly not homogenous at an international level. Though there are examples of international regulations such as the eIDAS in the EU, most countries seem to have developed their own bespoke legal regime. Needless to say, given the international nature of the commodities sector, one can easily appreciate how crucial it is to ensure that the right form of execution is carried out in the relevant country.

A further difficulty relates to the possibility of encountering synthetic and forged signatures. This could be particularly sensitive when considered in the context of commodities trading where documents play an essential role. Scenarios where goods are released upon presentation of synthetic or forged documents are not unlikely or indeed uncommon and they should be given an adequate level of consideration. Despite this, the efficiency advantages linked with e-signatures make them a particularly appealing tool for the commodities industry.

Cyber attacks and Cryptocurrency

Major cyber attacks and scams are becoming increasingly common and the law in relation to where liability falls is developing. There is a risk of sale contract payments being prevented or diverted. A cyber attack is unlikely to affect a buyer's payment obligations under a contract unless specifically provided for, such as by listing it as an event of force majeure. Where payment is diverted as a result of a cyber attack or where the buyer pays into the wrong account as a result of a scam, the buyer can be left exposed. Buyers should consider whether to make provision in their contracts for a payment deadline to be postponed in the event of a cyber attack or to expressly allocate risk in the event that payment is made to the wrong account as a result of a breach of cyber security in the seller's IT systems.

We recommend that parties review their existing policies and consider obtaining specific insurance against cyber attacks where necessary. Causation/attribution issues in complex cyber claims can cause major difficulties and tensions. Insurance policies need to be checked carefully to ensure that adequate protection is provided in relation to the relevant risks associated with cyber attacks, including breaches of payment obligations under sale contracts and related losses.

Since the advent of Bitcoin over a decade ago, cryptocurrencies have increasingly vied for attention amongst digital enthusiasts. Whilst cryptocurrencies have not yet developed a level of reliability such as to be used in commercial business and trade contracts, it is not inconceivable that, in the future, with appropriate regulatory blessing, increased cleansing of the criminal element and the use of complementary technology such as blockchains and smart contracts, they could become an alternative method of payment in such contracts. Blockchain technology, which enables parties to record and store information securely on databases, has made cryptocurrency transactions substantially more secure and appealing to a wider range of industries.

Further Reading

ISDA Smart Derivatives – The Future?
https://www.hfw.com/ISDA-Smart-Derivatives-The-Future-Jun-19

Email payment frauds – Staying One Step Ahead
https://www.hfw.com/Email-payment-frauds-staying-one-step-ahead-Jan-20

Cryptocurrencies are property and capable of enforcement – UK Taskforce confirms
https://www.hfw.com/Cryptocurrencies-are-Property-and-Capable-of-Enforcement-UK-Taskforce-Confirms

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