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New updates relating to virtual asset trading and the Anti-Money Laundering and Counter-terrorist Financing Ordinance (Cap.615)

Simon Deane and Ruby Hui

There have recently been a number of new releases by different organisations and authorities relating to virtual asset trading and the Anti-Money Laundering and Counter-terrorist Financing Ordinance (Chapter 615) (“**AMLO**”) respectively.

AMLO

On 28 April 2023, the Commissioner of Customs and Excise (“**Commissioner**”) released the [Disciplinary Action Guideline on Imposition for Pecuniary Penalty indicating the way that the Commissioner proposes to exercise the disciplinary power to impose a pecuniary penalty on a Category B registrant](#).

The amendments to the AMLO which were published in the Gazette (Ord. No. 15 of 2022) came into effect on 1 June 2023, and each of the following authorities and organisations also released its own guidelines pursuant to the amended AMLO and the Insurance Ordinance (Chapter 41) (where applicable) on 25 May 2023:

1. the Commissioner released the revised [Guideline on Anti-Money Laundering and Counter-Financing of Terrorism \(For Category B Registrants Dealing in Precious Metals and Stones\)](#) and [Guideline on Anti-Money Laundering and Counter-Financing of Terrorism \(For Money Service Operators\)](#);
2. Estate Agents Authority released the revised [Guidelines on Compliance of Anti-Money Laundering and Counter-Terrorist Financing Requirements for the Estate Agency Sector](#);
3. The Securities and Futures Commission (“**SFC**”) released the [SFC Disciplinary Fining Guidelines](#);
4. Hong Kong Institute of Certified Public Accountants released the revised [Guidelines on Anti-Money Laundering and Counter-Terrorist Financing for Professional Accountants](#);

5. The Hong Kong Monetary Authority (“HKMA”) released the revised [Guideline on Anti-Money Laundering and Counter-Financing of Terrorism \(For Authorized Institutions\)](#) and [Guideline on Anti-Money Laundering and Counter-Financing of Terrorism \(For Stored Value Facility Licensees\)](#);
6. Insurance Authority released the revised [Guideline on Anti-Money Laundering and Counter-Terrorist Financing](#); and
7. The Law Society of Hong Kong released the revised [Guidelines on Anti-Money Laundering and Terrorist Financing \(Practice Direction P\)](#).

Virtual Asset Trading

On 25 May 2023, the SFC published the following guidelines on virtual asset trading relating to the Securities and Futures Ordinance (Chapter 571) and the AMLO:

- (i) the revised [Guideline on Anti-Money Laundering and Counter-Financing of Terrorism \(For Licensed Corporations and SFC-licensed Virtual Asset Service Providers\) and Prevention of Money Laundering and Terrorist Financing Guideline issued by the Securities and Futures Commission for Associated Entities of Licensed Corporations and SFC-licensed Virtual Asset Service Providers](#); and
- (ii) [Guidelines for Virtual Asset Trading Platform Operators](#).

On the same day, in addition to the above, the SFC released the paper forms or (where applicable) revised paper forms used for the following purposes:

1. licensing applications and notifications to the SFC under Part V of the SFO and the Securities and Futures (Licensing and Registration) (Information) Rules (Chapter 571S) only when WINGS is not in service (please see [here](#) for the relevant paper forms); and
2. analysis of client assets as at the end of the financial year for an associated entity of an intermediary to the SFC required under section 3 of the Securities and Futures (Account and Audit) Rules (Chapter 571P) (please see [here](#) for the relevant revised paper forms).

Court rules that cryptocurrency is property in Hong Kong

Simon Deane and Chris Wong

For most aficionados in the world of cryptocurrencies, the answer may have never been in doubt, but a court in Hong Kong in *Re Gatecoin Ltd* [2023] HKCFI 914 has formally held that cryptocurrencies can be property, and are capable of being held in a trust.

Gatecoin, a Hong Kong company wound up by the court in 2019, operated a cryptocurrency exchange platform, through which it came into possession of cryptocurrencies and fiat currencies for trading or withdrawal purposes. As a part of the liquidation process, the liquidators sought directions as to whether the cryptocurrencies held by Gatecoin were property that was held on trust by Gatecoin, or, if not on trust, whether the assets could be made available to creditors in the liquidation process.

After ruling that the latest terms and conditions entered into by the customers of Gatecoin did not create a trust, and that therefore the cryptocurrencies held were Gatecoin’s assets, the judge examined whether or not cryptocurrencies were “property”, noting that the term is not defined in either the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) or Interpretation and General Clauses Ordinance (Cap. 1). The judge examined several cases from other jurisdictions, including England and Wales, the United States, Canada, Australia, New Zealand, the BVI, and Singapore. Referring to the rules set out in the English case of *National Provincial Bank v Ainsworth* [1965] AC 1175, which provided that the requirements for property were that “*it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.*”, and the New Zealand case of *Ruscoe v Cryptopia* [2020] NZHC 728, the judge noted that cryptocurrencies were capable of meeting these requirements:-

- 1) Cryptocurrencies were definable, since the public key allocated to a cryptocurrency wallet was readily identifiable, distinct, and capable of being allocated uniquely to an individual account holder

- 2) Cryptocurrencies were identifiable by third parties as only the holder of a private key is able to access and transfer the cryptocurrency from one wallet to another
- 3) Cryptocurrencies were capable of assumption by third parties, as they are traded widely, an owner's rights to a cryptocurrency is respected, and cryptocurrencies are a desirable investment
- 4) Cryptocurrencies have some degree of permanence or stability, as the life history of a cryptocurrency is available in the blockchain.

Given the above, it was held that cryptocurrencies are property for the purposes of Hong Kong law.

As noted, this position would not be surprising to most practitioners and market participants, but by providing a modicum of legal certainty for market participants, the case represents a welcome step in the further recognition of cryptoassets in Hong Kong, as well as the virtual asset industry as a whole.

The case can be found [here](#).

HKMA announces commencement of the e-HKD Pilot Programme

Simon Deane and Jennifer Lok

In its position paper released on 20 September 2022, the HKMA introduced a three-rail approach for possible implementation of e-HKD, the retail Central Bank Digital Currency in Hong Kong. The position paper "e-HKD: Charting the Next Steps" can be accessed [here](#).

On 18 May 2023, the HKMA announced the commencement of the e-HKD Pilot Programme. The e-HKD Pilot Programme is a key component of Rail 2 of the three-rail approach, through which the HKMA and stakeholders can gain actual experience of application and examine use cases and other implementation and design issues relating to e-HKD.

The HKMA has selected 16 firms from the financial, payment and technology sectors to participate in the first round of pilots, which includes proposed use cases on programmable payments, settlement of tokenised assets and Web3 transactions, tokenised deposits, offline payments and full-fledged payments. In the next few months, the HKMA will collaborate closely with the selected firms in conducting the pilots. More rounds of pilots with the industry are expected in the future.

The HKMA has not yet decided whether to introduce e-HKD. Depending on actual outcome and results of the pilots, the HKMA aims to share key findings with the public at Hong Kong FinTech Week 2023.

Please click [here](#) for more information on the press release.

SFC Consultation Conclusion on VASP Regime

Simon Deane and Chris Wong

The SFC released its conclusions on its consultation on the regulatory regime for virtual asset service providers ("**VASPs**") on 23 May 2023. The month-long consultation process received a large number of submissions, reflecting the wide interest in the new regulatory regime and the opportunities it presents to the virtual asset industry.

Generally speaking, the SFC's requirements for the new regulatory regime were supported by respondents. Certain amendments were made to the guidelines to account for more practical concerns raised in the consultation, as well as in relation to the criteria for onboarding retail investors and admission of virtual assets for trade by retail investors.

From the SFC's responses, it would appear that the regulator is maintaining a flexible approach to regulation, making sure that VASPs are appropriately and strongly regulated, but retaining a light enough touch to be able to react flexibly to new developments. At certain points, the regulator noted that it will follow-up with further guidance for market participants (including FAQs) and conduct further reviews (particularly in relation to virtual asset derivatives). Such an approach is useful and warranted, given the rapidly developing and changing nature of the virtual asset industry.

The regulatory regime came into effect on 1 June 2023. As market players and potential applicants review the finalised guidelines and make plans to enter this new market, the date marks a big step forward in Hong Kong's opening up to the virtual asset industry.

The consultation conclusions and finalised guidelines can be found [here](#).

HKMA Publishes Discussion Paper on a Green Classification Framework for Hong Kong

Simon Deane and Ally Leow

On 30 May 2023, the HKMA released a discussion paper entitled "Prototype of a Green Classification Framework for Hong Kong" following its commission of Climate Bonds Initiative ("**Climate Bonds**") as an external consultant to develop a green taxonomy for use across Hong Kong's financial sectors.

The prototype aims to provide a structure for developing consistent and internationally recognised definitions of "green" and "environmentally sustainable" economic activities in Hong Kong, which are interoperable and inclusive of other green definitions used worldwide. It largely references the Common Ground Taxonomy designed to bridge the Mainland China and EU taxonomies, and also takes into account other frameworks including the ASEAN Taxonomy and Climate Bonds Taxonomy. The prototype has also been developed to align with the core principles of the Paris Agreement, to act as a proof against greenwashing, and to adopt science-based criteria and thresholds.

The HKMA and Climate Bonds are inviting interested stakeholders to share their views on the prototype and/or development and use of the Hong Kong taxonomy. Responses should be submitted on or before 30 June 2023 to the channels mentioned at the end of the discussion paper.

To view the discussion paper, please see [here](#).

To view the HKMA circular, please see [here](#).

Basel Committee to review recent market developments, advances work on climate-related financial risks, and reviews Basel Core Principles

Simon Deane and Ruby Hui

The Basel Committee on Banking Supervision ("**Basel Committee**") reviewed recent market developments in and risks to the global banking system, and discussed possible policies and supervisory initiatives in March.

Under the impact of current economic and financial market conditions such as risks of high inflation, lower growth and geopolitical tensions, the global banking system is facing different challenges. Such conditions only emphasise the importance of implementing all aspects of the Basel III framework in a full and consistent manner.

Also, the Basel Committee discussed the development of a Pillar 3 disclosure framework for climate-related financial risks. This framework aims to provide additional bank disclosures about the prudential risks. A consultation paper on the proposed framework will be published by the end of this year.

Further, the Basel Committee updated its review of both the structure and content of its core principles for effective banking supervision ("**Basel Core Principles**"). It agreed to consult on revisions to the Basel Core Principles by mid-2023.

After the publication relating to banks' exposures to cryptoassets by the Basel Committee in 2022, the committee approved a work plan for continuous assessment and mitigation of the risks of cryptoassets to the global banking system, which includes the treatment of permissionless blockchains and the eligibility criteria for "Group 1" stablecoins.

For more information, please see the press release of the Committee [here](#).

Want to know more?

Teresa Lau
Partner

teresa.lau@deacons.com
+852 2825 9701

Erica Wong
Partner

erica.wong@deacons.com
+852 2825 9418

Simon Deane
Consultant

simon.deane@deacons.com
+852 2825 9209

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