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JURISPRUDENTIAL WATCH LEGAL PERSPECTIVES RECENT WORK

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01 JURISPRUDENTIAL WATCH

Last fall, French courts have issued at least two significant decisions for foreign players in the crypto asset market. The main contributions of these decisions are summarized below:

Paris Court of appeal, October 19th 2021, n°18/01254

International arbitration / JAMS / Access to justice and effectiveness

In a highly commented decision which considerable impact on international arbitration is to be expected, the Paris Court of appeal ruled as follows:

“Access to justice, insofar as it guarantees the effectiveness of rights, is a matter of international public policy. Consequently, an arbitration agreement that would impede such access would be contrary to international public policy and therefore null and void.”

Access to justice is a principle that has long been recognized by the French supreme court (Cour de cassation) which had already stated that “access to justice is a right that falls under international public policy¹”. However, it is the first time that it has been recognized, by a French jurisdiction, as an efficient way to defeat the enforcement of an international arbitration clause.

¹ Cass. Soc. 14 septembre 2017, n°15-26.737

Most of the cryptocurrency exchanges include arbitration clauses in their terms of use. It could be argued that their enforcement prevents small and individual investors to effectively access justice, in view of the inherent constraints of this type of procedure and the associated costs.

In this case, the Court did not find that the arbitration clause caused an imbalance between the cost of the procedure and the financial means of the parties such as to prevent their effective access to justice.

Yet, this decision certainly paves the way for this line of arguments.

Montpellier Court of appeal, October 21st 2021, n°21/00224

Territorial jurisdiction / Consumer law / Digital assets & cryptocurrency exchanges

In a recent decision, the Court of Appeal of Montpellier found French courts had jurisdiction in a dispute against a cryptocurrency exchange despite a jurisdiction clause designating the courts of Vilnius or, depending on the circumstances, the British Virgin Islands.

A French investor opened an account on a Lithuanian exchange and created a portfolio of cryptocurrencies. His account was hacked and all his assets were diverted.

In the case of a dispute between a French investor and a Lithuanian company, “Brussels I bis” European Regulation of 12 December 2012 should apply. Article 25§1 of that Regulation provides that when the parties to a contract provide for the jurisdiction of the courts of a Member State, that State has exclusive jurisdiction to hear any disputes arising between them. Accordingly, the courts of Vilnius or the British Virgin Islands should therefore have jurisdiction.

However, Article 18(1) of the Brussels I bis Regulation also provides that: *"A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts of the place where the consumer is domiciled."*

The consumer status of the investor was therefore discussed.

Despite factual elements that could suggest that the investor was acting as a professional (no other known sources of income, regular trading activity), the Court nevertheless ruled that *"these elements are not in any case decisive to qualify the disputed contract as having a professional purpose"*.

Consequently, the Court of Appeal ruled that the French courts had jurisdiction to settle the dispute.

This decision was expected as it is likely to apply in many similar situations. A potential ruling of the High Court on this subject would be welcome.

02 LEGAL PERSPECTIVES

Risk analysis | Liability of cryptocurrency exchanges in the event of transactions carried out during bankruptcy proceedings under French law

The opening of bankruptcy proceedings leads to the divestiture of the debtors' assets in accordance with the provisions of article L. 641-9 of the French Commercial Code. That means that any act carried out by the debtor after the opening judgment cannot be enforced.

In application of this provision, a bank that executed a transaction order while insolvency proceedings were pending must return the deducted amount to the judicial administrator. Good faith of the financial institution is irrelevant and the bank cannot rely on the lack or delay of publication of the judgment to avoid liability.

The only restriction to this rule has been set in a landmark decision of 30 June 2021 in which the French High Court ruled that a bank transfer could only be considered valid if the order had been issued before the bankruptcy procedure was initiated.

French banks have therefore adapted to this regulation and implemented internal procedures to freeze their customer's assets promptly after the opening of bankruptcy procedures to limit their financial exposure.

In our opinion, cryptocurrency exchanges might face a similar operational risk while operating on behalf of their French customers since cryptocurrencies are part of the debtor's assets. They should therefore pay close attention to the development of legislation and case law on that matter.

Legal analysis | Taking cryptocurrencies into account in bankruptcy proceedings

According to article L. 631-1 of the French Commercial Code, the opening of a reorganization or bankruptcy proceedings depends on the debtor's ability to meet its current liabilities with its "available assets".

Traditionally, available assets are all liquid assets that can be used for immediate payment of outstanding debts, including cash, bank checks or credit reserves and traded securities.

The increasing use of cryptocurrencies raises the question of its qualification as an "available assets".

However, the extreme volatility of cryptocurrencies makes it difficult to reliably assess the amount of the debtor's assets as their valuation may significantly change between the day the debtor is summoned to appear before the commercial court and the day the court rules.

It can be assumed that the inclusion of cryptocurrencies in the debtor's assets might depend on its structure and the nature of the cryptocurrencies under consideration.

03 RECENT WORK

Over the past few months, our firm has been committed to act on behalf of investors in several cryptocurrency-related disputes. Some of our highlights include:

- 01** Our firm was judicially granted the first seizure in the possession of Binance and its Operators of cryptocurrencies owned by a French company that misappropriated digital assets from two investors, our clients.

All accounts internationally held worldwide by our clients' opponents on the Binance exchange were therefore frozen.

- 02** We acted on behalf of an ICO team against a reporter who posted denigrating and defamatory comments on Twitter and Youtube regarding the company affecting the proper conduct of the ICO.
 - 03** We are currently assisting RR Crypto's investors in the course of criminal investigations relating to the disappearance of invested funds.
 - 04** Assisting an NFT sales platform in a dispute with (i) a provider regarding the allocation of tokens in the context of an ICO, and (ii) in a dispute with one of its shareholders.
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