

New Tools in New Places: Digital Assets and a New Chinese Frontier

The year is 2033. Fortunately for my practice, if not so much for humanity, advances in technology and new legislation have not yet eliminated fraud, deadbeat defendants, or corruption, and I continue to handle many of the kinds of cases that I did ten years ago. Yet, even as human nature has stayed the same, two disparate trends have converged to change the types of cases that I regularly work on. First, digital assets have become as commonplace as they traceable. Second, China has slowly but surely opened an important new battlefield in which to search for and seize assets just as Chinese targets become more common and valuable.

Digital Assets Mature and Transform the Money Supply.

Ten years ago, the cryptocurrency bubble exploded.¹ Today, cryptocurrencies are still around, but they remain a niche asset class for those that have difficulty in obtaining or trading traditional fiat currency, such as criminal enterprises or residents of countries with strict currency controls.² Yet, the previous decade's crypto boom spurred banks, insurers, and even governments to integrate cryptocurrencies' signature blockchain technology into more useful assets.

Banks and fintech startups have aggressively built blockchain technology into their products, rewriting all kinds of securities as automated smart contracts that require little supervision or processing after sale. Smart contract have been described as “an automated, secure digital escrow account[s],” though they can be programmed to do more than just transfer money.³ Financial institutions been able to halve the time needed to trade and settle syndicated loans for investment banking clients, lowered the origination costs of mortgages by hundreds of dollars per loan in US

¹ The Economist, “Is This the End of Crypto?”, Nov. 17, 2022, available at <https://www.economist.com/leaders/2022/11/17/is-this-the-end-of-crypto> (discussing the collapse of cryptocurrency exchange FTX and the resulting fallout).

² *Id.*

³ See *In re Bibox Grp. Holdings Ltd. Sec. Litig.*, 534 F. Supp. 3d 326, 330 (S.D.N.Y. 2021), reconsideration denied in part sub nom. *In Re Bibox Grp. Holdings Ltd. Sec. Litig.*, No. 20CV2807, 2021 WL 2188177 (S.D.N.Y. 2021).

and European markets, and eliminated billions of dollars in overhead costs for insurance claims processing.⁴

More important to me, a busy FIRE practitioner, digital securities and contracts have become far bigger asset classes than cryptocurrencies were at the height of their bubble, and digital financial assets are frequent subjects of my cases.⁵ As it turns out, smart contracts are a convenient way for fraudsters and cheating spouses to automatically move assets without having to put in new calls to their financial advisors in the event their lies are discovered. For example, a Ponzi schemer might conceal code in a smart contract to automatically send cash to a personal, offshore account if a public stock dips below a certain price. Luckily, these transactions are generally recorded on a blockchain somewhere. I increasingly subpoena blockchain data files from banks and other financial institutions to determine the location of misappropriated digital bonds and other tokenized securities. I also regularly hire experts in order to unwind the automated digital transactions done under smart contracts, and I have increasingly petitioned courts to craft unique preliminary relief to assign or reprogram automated smart contracts before they self-execute.⁶

As dynamic as the private sector has been, governments have not lagged far behind. Some government attempts to jump on the cryptocurrency bandwagon quickly flopped.⁷ That has not stopped regulators of nearly all the world's major currencies from exploring how to digitize traditional money to compete with cryptocurrencies.⁸ Such digital fiat currencies are referred to

⁴ Capgemini Consulting, "Smart Contracts in Financial Services: Getting from Hype to Reality" at 2, 2016, available at https://www.capgemini.com/consulting-de/wp-content/uploads/sites/32/2017/08/smart_contracts_paper_long_0.pdf.

⁵ CapGemini Consulting, "Navigating Decentralized Futures" at 7, 2021, available at https://www.capgemini.com/wp-content/uploads/2022/03/DecentralizedFutures_PoV_2021.pdf.

⁶ See Max Raskin, "The Law and Legality of Smart Contracts", 1 Geo. L. Tech. Rev. 305, 332 (2017) (discussing means by which courts can deal with smart contracts).

⁷ Joey Flechas, Miami Herald, "Crypto has dropped in value. Why is Miami Mayor Francis Suarez still supporting it?", July 27, 2022, available at <https://www.miamiherald.com/news/local/community/miami-dade/article263809613.html#storylink=cpy>; The Economist, "El Salvador's Bitcoin Experiment Is Not Paying Off", Nov. 17, 2022, available at <https://www.economist.com/the-america/2022/11/17/el-salvadors-bitcoin-experiment-is-not-paying-off>.

⁸ "Navigating Decentralized Futures" at 7, *supra* n. 5.

as Central Bank Digital Currency (CBDC).⁹ Central banks are most interested in CBDC to reduce transaction costs and to centralize control over the money supply, but digitization has the added benefit of recording the flow of each individual unit of currency.¹⁰ Effectively, cash is no longer fungible for the purpose of asset recovery.

Transforming just a portion of the world's currencies into non-fungible assets has had dramatic effect on my work. A decade ago, there was much ado about non-fungible tokens (NFTs). Inexplicably, people paid millions of dollars for NFTs of bad modern art.¹¹ Now, for example, each Bahamian dollar is essentially a unique NFT worth one Bahamian dollar that can be traced and audited across thousands of transactions. Turning dollars and euros into unique NFTs has upended the traditional rules distinguishing the kinds of recover available for non-fungible assets and fungible currency.¹² The traditional rule, at least in common law jurisdictions, is that stolen fungible items, like dollar bills, could not be recovered once they passed to innocent third parties.¹³ Now that many of my cases involve non-fungible CBDC, I can often track the specific currency at issue, dollar by dollar, through multiple subsequent purchasers along a blockchain. Just as police detectives recover specific dollar bills when they show that the serial numbers of each bill recovered match those of the stolen bills after a sting operation, I can recover the particular dollars stolen from my clients regardless of where I find them. It just takes a subpoena to the appropriate central bank.

China Gets in on the Judgment Enforcement Game.

Despite the professed intent of many of the inventors of cryptocurrencies to create decentralized currencies free of government control, the Chinese government has found that CBDC lends itself to central government control of all Renminbi denominated transactions and has moved rapidly

⁹ *Id.*

¹⁰ Markets Committee, Bank for International Settlements, “Central Bank Digital Currencies” § 3.3, Mar. 2018, available at <https://www.bis.org/cpmi/publ/d174.pdf>.

¹¹ Daniel Van Boom, CNET, “NFTs explained: Why People Spend Millions of Dollars on JPEGs”, Jan. 13, 2022, available at <https://www.cnet.com/culture/nfts-explained-why-people-spend-millions-of-dollars-on-jpegs/>.

¹² *Alliant Tax Credit 31, Inc v. Murphy*, 924 F.3d 1134, 1150 (11th Cir. 2019) (“Whether a court orders turnover of the assets or enters a money judgment for their value hinges only on whether the assets or their proceeds are traceable.”).

¹³ See *United States v. United Mktg. Ass'n*, 220 F. Supp. 299, 307 (N.D. Iowa 1963).

to digitize its currency.¹⁴ The People’s Bank of China experimented with CBDC early, and now nearly all Renminbi transactions around the world use digital currency.¹⁵

Even as Chinese currency becomes easier to track, it has become a more common subject of global disputes because Chinese companies have charged to the forefront of the global energy transition. As the effects of climate change became ever clearer (and the flooding around my office in Miami during king tide season got worse), the public and private sector both saw huge investments in renewable energy and climate adaptation. Chinese companies have long been among the most successful competitors selling solar panels, electric vehicle batteries, wind turbines, and nuclear energy to the world. The Ukraine war added additional geopolitical impetus to the transition away from fossil fuels.¹⁶ The war encouraged European nations wary of China’s human rights record and military ambitions to swallow their doubts while they extracted themselves from even more compromised governments selling hydrocarbons, such as Russia.

The upshot is that Chinese firms cut green energy deals in nearly every country in the world even as globalization receded in other industries. Not all of these green investments were carefully executed, and billions were lost to fraud, corruption, or simply failed bets. The bad actors in my cases are by no means always Chinese, but, when they are, the most straightforward and often only source of recovery is from assets within China.

Unfortunately, for most of the 20th and early 21st centuries, Chinese courts only rarely granted recognition to foreign judgments unless from one of the 35 (generally middle-income) countries with a judicial assistance treaty.¹⁷ Indeed, Chinese courts had confirmed such judgments only

¹⁴ The Atlantic Council, “Central Bank Digital Currency Tracker”, last accessed Nov. 25, 2022, available at <https://www.atlanticcouncil.org/cbdctracker/>.

¹⁵ *Id.* (noting Chinese pilot program).

¹⁶ Brad Plumer, NYTimes, “War in Ukraine Likely to Speed, Not Slow, Shift to Clean Energy, I.E.A. Says”, Oct. 27, 2022, available at <https://www.nytimes.com/2022/10/27/climate/global-clean-energy-iea.html>.

¹⁷ Mung Yu, China Justice Observer, “China Introduces New Reciprocity Rules for Enforcing Foreign Judgments, What Does It Mean?”, June 30, 2022, available at <https://www.chinajusticeobserver.com/a/china-introduces-new-reciprocity-rules-for-enforcing-foreign-judgments-what-does-it-mean#:~:text=Starting%20from%202022%2C%20Chinese%20courts,Chinese%20judges%20on%20such%20cases>.

from United States, South Korea, Singapore, and Germany before 2022.¹⁸ On December 31, 2021, the situation changed dramatically when the Supreme People’s Court of China issued an official document guiding lower courts to apply a legal reciprocity test.¹⁹ While not binding legislation, Chinese judges got the message. The first concrete evidence of the new policy was when, on March 17, 2022, the Shanghai Maritime Court recognized and enforced an English judgment for the first time, reasoning an English court would likely enforce a hypothetical Chinese judgment.²⁰ The court ordered the Chinese defendant to pay up, including interest.²¹

Since then, courts around the world made conscious efforts to return the favor. Even American courts, despite continuing military and economic tensions, continued to enforce Chinese judgments, affirming the basis for Chinese courts to reciprocally recognize American judgements.²² For example, when a New York court denied recognition to a Chinese judgment because of “the lack of judicial independence in [Chinese] proceedings involving politically sensitive matters,” the appellate court promptly overturned the ruling because there was no evidence of political interference in the breach of contract case at issue.²³ These efforts have borne fruit, as Chinese courts continue to recognize US judgments more often than not.²⁴

That is not to say that China has thrown itself open to the world—far from it. While the Communist Party permits judges autonomy when adjudicating non-political matters, “it is the Party that has the say in what is political and what is not, and whatever the Party decides, courts have to comply”.²⁵ Moreover, foreigners have occasionally found themselves in the crossfire of

¹⁸ *Id.* Singapore and South Korea have judicial assistance treaties with China, but they do not include judgment recognition.

¹⁹ *Id.*

²⁰ Zilin Hao, ConflictOfLaws.net, “The Chinese Court Recognizes an English Commercial Judgment for the First Time”, May 16, 2022, available at <https://conflictoflaws.net/2022/the-chinese-court-recognizes-an-english-commercial-judgment-for-the-first-time/>.

²¹ *Id.*

²² An American court first recognized a Chinese judgment in 2009. *Nalco Co. v. Chen*, Case No. 12 C 9931 (N.D. Ill. Feb. 2, 2018).

²³ *Shanghai Yongrun Inv. Mgmt. Co. v. Xu*, 203 A.D.3d 495 (1st Dept. 2022).

²⁴ Meng Yu, China Justice Observer, “2022 Guide to Enforce US Judgments in China-CTD 101 Series”, Sep. 15, 2022, available at <https://www.chinajusticeobserver.com/a/2022-guide-to-enforce-us-judgments-in-china>.

²⁵ Ling Li, “Political-Legal Order and the Curious Double Character of China’s Courts”, 6 *Asian J. L. & Soc’y* 19, Mar. 4, 2019, available at <https://www.cambridge.org/core/journals/asian->

Chinese political machinations.²⁶ Nevertheless, there are an increasing number of paths through these political perils to recoverable assets in China, especially when they are traceable digital assets like Renminbi or bank securities.

Conclusion

Although my practice has successfully evolved to encompass new digital asset and Chinese asset cases over the last ten years, I must keep learning and adapting if I intend to survive the next ten. Dreams of recovering assets in outer space or conducting insolvency proceedings in a metaverse have not borne out in the last ten years, but they may by 2043. Whatever comes, the skills and contacts I develop thanks to the ThoughtLeaders4 FIRE network will surely be critical in seizing these new opportunities.

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²⁶ Jenni Marsh, CNN, Westerners are increasingly scared of traveling to China as threat of detention rises, Mar. 9, 2021, available at <https://www.cnn.com/2021/03/09/china/china-travel-foreigners-arbitrary-detention-hnk-dst-intl/index.html>.