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SHIP AHOY! MARITIME CLAIMS AND WHAT IT MEANS TO ARREST A SHIP

Cherie Gopie

Do you know that a ship can be arrested?

If a person or an entity has a claim against a shipowner, that person or entity (a Claimant) may be entitled to arrest a ship belonging to that owner as that ship enters Trinidad and Tobago waters, irrespective of the flag of that ship. The Claimant can therefore prevent that ship from leaving Trinidad and Tobago waters by means of a warrant of arrest. A warrant of arrest is made by making an application to the High Court of Trinidad and Tobago. Once all the required documentation is filed with the request for the warrant, the Court determines the application expeditiously given the possibility that a ship can leave the jurisdiction at a moment's notice.

Maritime claims which trigger the application for a warrant of arrest include: claims relating to the ownership of a ship or a share in a ship; the possession, delivery, employment or earnings of a ship; any mortgage, or other charge on or off a ship; damage caused by or to a ship, whether by collision or otherwise; loss of life or personal injury caused by a ship or any defect in a ship or occurring in connection with the employment of a ship; and loss of, or damage to, goods including the baggage and the personal belongings of the master, officers or seamen of a ship.

If there is a claim against a shipowner as a result of some legal injury as described above, for example, the claimant can try to recover its losses by moving against the shipowner's property, that is, the ship. In this regard, the claimant can approach the court to obtain a warrant of arrest. Arresting a ship is therefore a mechanism to protect the interests of the Claimant and to ensure that justice is not thwarted by the shipowner simply sailing the ship to another jurisdiction.

When a ship is arrested, the matter can be determined in a variety of ways. Once the ship is arrested, the ship falls under the control of the Court, specifically the Admiralty Marshal. However, depending on the circumstances, and whether the shipowner can offer another form of financial security to the Claimant, the ship can be released from arrest quickly. Alternatively, other parties interested in the ship continuing its voyage (such as the charterer, cargo-owner or ship's bankers or insurers) may negotiate the provision of financial security in return for the ship's release.

When a ship is arrested, many claims by other entities can be also made against the ship. If the Court determines that the claim against the ship is valid, the ship will be sold by order of the Court. The proceeds of the sale are paid into the Court and are used to satisfy any expenses incurred by the keeping of the vessel and fees of the Admiralty Marshall. The balance is paid to the Claimants and any balance left over is paid to the owner. All the maritime claims against the ship are ranked in order of priority for the purpose of being paid from the proceeds of the sale. The maritime claims are ranked if the proceeds of the sale are insufficient to pay all the claims. The order of priority is a matter of law.

Keeping a ship under arrest until the Court decides on your maritime claim can be very costly. The Admiralty Marshal must take precautions to preserve the ship. The Court will require a deposit or other form of financial security from the Claimant. Additionally, if the ship arrest is made negligently or without probable cause or in bad faith, any person suffering loss or damage as a result of the arrest may be able to sue you for that wrongful arrest.

There are therefore many things to consider before a potential Claimant attempts to arrest a ship and given the potential for damages against the Claimant, a decision to arrest a ship should not be taken lightly. Nonetheless, once executed, it can be a powerful mechanism for a potential Claimant to secure its claim.

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C O N T E N T S

BITCOIN AND OTHER CRYPTOCURRENCIES

David Hamel-Smith

Bitcoin is back in the news following price surges and the US Congress introducing two new cryptocurrency bills. While the terms "Bitcoin" and "cryptocurrency" have become household words, many of us are still intimidated by them. This Article aims to enlighten the less technologically inclined on the legal/regulatory status (as we see it) of Bitcoin and similar cryptocurrencies.

Simply put, Bitcoin is a virtual currency that is supported by a digital ledger (the blockchain). The blockchain facilitates transactions by keeping track of every transaction made within the system. The information required for future payments, and the security of the currency itself, is generated and maintained by using the record of past transactions.

Bitcoin is often confused with fiat currency, which is currency issued by a government and declared to be a legal form of tender without any backing to a physical commodity. For example, the Trinidad and Tobago dollar, which is fiat currency, is issued by the Central Bank as dictated by fiscal policy. The Government controls its supply. Bitcoin in comparison is not issued by a central authority and there is no Bitcoin central bank which can issue additional Bitcoins.

Immense computing power is required to generate and maintain the ledger. This potential constraint is alleviated by the network of Bitcoin "miners". The "miners" contribute the computing power necessary to verify the transactions and maintain the ledger in exchange for Bitcoin.

Besides "mining", Bitcoin can be acquired through barter, by purchasing it directly from an exchange or by accepting it as payment from a Bitcoin user. Those who acquire Bitcoin are then free to treat it like any other asset that can be sold or bartered for goods and services. The benefit of using Bitcoin, as opposed to any other physical asset (e.g. gold), is that it is digital. Transactions can therefore be processed instantaneously and without the transactional costs associated with other types of payment.

To better understand the legal/regulatory status of Bitcoin (and other similar cryptocurrencies) it helps to think of it as an asset rather than as a currency. An asset's value is largely reflective of its relative abundance. Bitcoin's design limits the total number of units that can ever be in circulation at twenty-one million. This limited supply helps to create the "value" that we attribute to Bitcoin.

In January 2019, the Central Bank, Securities and Exchange Commission and the Finance Intelligence Unit ("the Authorities") issued the following joint statement:

> *"Virtual currency is a digital representation of value that can be digitally traded and functions as a medium of exchange within a specified online community, but does not have legal tender status in Trinidad and Tobago and in most other jurisdictions… Providers of virtual currencies are neither regulated nor supervised by the Authorities at present… Virtual currencies tend to be volatile and their value can fluctuate significantly."*

If we consider that Bitcoin is an asset rather than a form of fiat currency, many of the restrictions and regulations which are currently applicable to fiat currencies fall away. This is not to say that Bitcoin is completely unregulated, just that it is not regulated as a form of currency, at least, not at present. Bitcoin exchanges are also not treated as financial institutions.

As alluded to by the Authorities, one of the primary challenges facing Bitcoin is its susceptibility to price fluctuations and manipulation. For example: as recently as 2nd April 2019 the price of Bitcoin shot up by seventeen percent (17%) in thirty minutes. One theory is that the cryptocurrency market will always fluctuate and be subject to manipulation unless it is tightly regulated. A possible solution is for central banks to issue their own regulated cryptocurrencies. In theory, this will provide the efficiencies of digitization while maintaining the benefits of regulation (i.e. managed supply and some protection against price manipulation). One can assume that these digitized fiat currencies would not be considered assets, and unlike the present state of Bitcoin transactions, would be regulated accordingly. On the downside, increased regulation could result in an increase in the transactional costs associated with cryptocurrencies.

While many may be skeptical of Bitcoin and other cryptocurrencies, or even dismiss them as a fad, we should remember that the internet itself was once received with similar skepticism. That is not to say that Bitcoin will enjoy similar successes, just that we should be wary of dismissing it without careful consideration.

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HOW WELL DO YOU KNOW YOUR PENSION PLAN?

Linnel Pierre

Many employees in the private sector in Trinidad and Tobago (T&T) are members of a pension plan established by their employer. These plans are usually classified in two broad categories: (1) defined ben-e-fit or (2) de-fined con-tri-bu-tion. What's the difference between these types of pension plans? In this article, we touch on the regulatory framework in T&T for pension plans for persons employed in the private sector and briefly set out some of the differences between defined benefit and defined contribution pension plans.

Regulatory Framework

The Central Bank of Trinidad and Tobago is responsible for regulating all pension plans established in T&T under the Insurance Act Chap 84:01, which serves as the primary legislation for regulating pension plans established by employers in the private sector in T&T. The Act provides that no person may operate a pension fund plan unless it is registered with the Central Bank in accordance with the Act. The Financial Stability Report 2017 published by the Central Bank highlighted that, as at December 2017, there were 186 active registered occupational pension plans with a total membership of approximately 96,000 persons.

Most pension plans are set up under a trust with either an institutional trustee (such as a Trust Company licensed to do trust business under the Financial Institutions Act 2008) or a specific number of individual trustees who are nominated by the employer and the employees that are members of the plan. The pension plan documents are usually comprised of a trust deed and Rules, which are required to be approved by and registered with the Central Bank and the Board of Inland Revenue. Similarly, all amendments to the trust deed and rules of the plan are to be submitted to the Central Bank and the Board of Inland Revenue for registration. Whether individual or institutional trustee, the trustee (s) are responsible for managing the administration of the pension plan to ensure that it is administered in accordance with the laws of T&T, the trust deed and rules and in the best interest of the beneficiaries of the plan. Some plans also have a Management Committee which is charged with managing the day to day affairs of the pension plan and which also supervises the trustee's performance.

Defined Benefit (DB) Plan

Un-der a DB plan, the em-ploy-er as-sures the employee of a specified or 'defined' pen-sion benefit at the em-ploy-ee's retirement. This benefit is based on a par-tic-u-lar ben-e-fit formula which takes into account the years of service of the employee and, in most cases, wages and salary history. Typically, both the employer and employee pay contributions into the pension plan fund although there may be cases in which the plan may be non-contributory that is, a plan in which the trust deed and rules of the plan do not require the employee to contribute monies to the plan. The funds that are contributed to the pension plan are invested by the trustee to accumulate earnings. Whether contributory or non-contributory, under a DB plan, the pension benefit that the employee will receive is not determined by the contributions made to the scheme or the performance of the investment of the funds. In DB plans, it is the employer that is obligated to meet the ultimate cost of the pension promised. The level of the employer's contribution that is necessary to meet the cost of paying pensions and other promised benefits under the plan is advised from time to time by the plan's actuary.

Defined Contribution (DC) Plan

Under a DC plan, the employer and, in some cases, the employee are both required to make regular contributions to the pension plan. The amount of the contribution is typically a predetermined fraction of each employee's salary. The fraction may vary with different levels of salaried employees and may change over the course of an employee's career with a particular employer. The contributions of the employer and the employee go into a particular account for the employee. The funds in each employee's account is invested and the benefits that the employee will be entitled to will depend on the combined contributions of the employer and the employee as well as the earnings on the investment of the funds in the account. These funds are however affected by the proportion of the plan's losses and expenses that are allocated to the employee's account. At retirement, the employee receives a lumpsum and/or an annuity, the size of which depends on the value of the funds accumulated in the account of each employee.

DB vs DC

DB schemes have become less popular with employers in recent years, largely because of the increase in the costs and the risks of funding such schemes which lie with the employer's contribution obligations. Combined with other factors such as rising cost of annuities and lower investment returns, the number of DB plans in existence has been on a steady decline, lending to the increased popularity of DC plans for employers. For DC plans, the investment risks lie with the employees, not the employers, as the funds available for an employee upon retirement will be directly affected by earnings on the investment of the pension fund. Under the DB plan, the employer would be obligated to meet the balance of cost of funding the promised pension benefit, regardless of the performance of the investment. Under the DC plan the employer has greater certainty over the cost of providing the pension as compared to DB plans where annual plan costs are less predictable for the employer.

These are just some of the characteristics that influence the popularity and attractiveness of DB and DC pension plans for employers and employees. Regardless of the type of plan, having a secure retirement plan should be high on everyone's agenda. Understanding the type of pension plan to which one belongs is the first step in achieving that goal – but, as is often said, pensions, like life itself, are a work in progress.

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