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Smart Contracts: the smart way forward in logistics?



This article aims to provide an overview of what smart contracts are, their possible uses in the logistics industry and the legal implications of adopting them.

What are smart contracts?

A “smart contract”, just one of the many technologies which are spurring on the Industry 4.0 movement, lacks a set definition. The original definition given by Nick Szabo in 1996 was *“a set of promises, specified in digital form, including protocols within which the parties perform on the other promises”* which was based on an individual’s interactions with a vending machine. This definition has been modified over the years to reflect the current understanding of the capabilities of smart contracts. The Smart Contracts Alliance (a Chamber of Commerce initiative) recently defined smart contracts as: *“Computer code, upon the occurrence of a specified condition or conditions, is capable of running automatically according to prespecified functions. The code can be stored and processed on a distributed ledger and would write any resulting change into the distributed ledger.”*

As can be inferred from the above, smart contracts are essentially computer code which have the ability to auto execute specific functions and work by using a simple *“if x then y”* operating logic. For example, smart contract code can be written so that when it receives data confirming the consignment of cargo has been received by the buyer, this data is verified and the smart contract automatically releases payment which had been held in escrow to the seller.

The smart contract code can be stored and processed on a distributed ledger (for example on a blockchain) which means that identical copies of the code are kept on multiple computers in multiple locations. When one of the copies is updated, the information is verified before it is filtered through to the rest of the copies and if so coded, the smart contract carries out its function, such as registering a new owner of property.

Possible uses in the logistics industry?

Smart contracts and blockchain are being trialled in many different industries, from banking to property transactions. The nature of how smart contracts operate and their compatibility with the Internet of Things ([see our previous article on Smart Mobility in the February 2019 issue](#)), lend themselves to being highly functional in the logistics industry. For example smart contracts could be used for:

- Letters of credit. Routinely used in the trade industry, smart contracts can provide an efficient solution for all parties involved. The transparency of blockchain allows all stakeholders (exporters, importers and financial institutions) access to view, track and digitally transfer Letters of Credit as required;
- Electronic bills of lading;
- Payment triggers. Sensors automatically notify the smart contract when a container has reached a predefined geographical location which has been agreed by the parties as the trigger for payment. The smart contract receives the information from the container, verifies it and releases payment from an escrow account to the seller;
- Inventory / distribution management. Again using smart contracts and GPS location sensors, each party in the supply chain can see what goods they have where. Whether this is a manufacturer seeing what stocks he has and where they are located, or a haulage company seeing how many client collections they have to complete, or a buyer knowing what is in his warehouse and when he needs to order more;

- Product tracing for consumers. With each consignment having its own tracking number and the ability to trace it through the supply chain from manufacturer to consignee, consumers can check to see if the products they are buying have been ethically sourced or are counterfeit (a particularly big problem in the pharmaceutical industry in developing countries);
- Real time cargo tracking through the supply chain. As part of the transparency achieved by smart contracts, this information would be available to all stakeholders. It is thought that this level of transparency would assist with cutting down port calls (and therefore demurrage) as these would be better timed. Customer expectations could be managed with early warnings of unforeseen events which could cause a delay; and
- Monitoring temperature sensitive cargo. Sensors attached to food products or the inside of reefer containers can constantly monitor the conditions in real time to ensure that they are kept as per the agreed contractual parameters.

All these practical applications of smart contracts seek to improve efficiency, reduce costs and provide a greater customer service through the whole supply chain.

Legal considerations

Smart contracts, however, should not be thought of in the traditional sense of the term “contract”, i.e. a set of legally binding obligations and rights of the parties to the contract. That said, if the requirements for a valid contract are contained in a smart contract, then there is nothing preventing it from being legally enforceable.

Under Hong Kong law, there are 5 elements which are required in order for a contract to be considered legally binding between parties. Namely; intent to be legally bound, offer, acceptance, consideration, and capacity to enter into a contract. The smart contract would need to capture all of these elements in order to be legally enforceable.

Consideration should also be given as to the law and jurisdiction which governs the terms of the smart contract. Smart contracts on a distributed ledger could have multiple copies in multiple jurisdictions. Unless agreed between the parties, the international nature of the smart contract could result in a conflict of laws dispute in the event an issue arose.

A legal contract between two parties often contains clauses which would not fit into the “*if x then y*” logic of a smart contract. Furthermore, some clauses in contracts are often drafted with deliberate vagueness so that they have a wide interpretation. These contractual nuances would not transfer into a smart contract, which very much relies on absolutes in order to function.

In light of these potential issues, there has been much discussion over the use of “hybrid contracts” where, for example, the obligations which are able to be coded are contained in the smart contract and those that require “human” interpretation in a natural language contract. Take for instance, an overarching master services agreement which contains clauses such as price increases to be discussed in good faith, with the operative parts (i.e. recording deliveries and executing payments) being contained in a smart contract. How the two will interact when it comes to a legal dispute is yet to be seen.

Are smart contracts the smart way forward?

The many advantages to using smart contracts are highly persuasive for their integration in to the logistics industry. However, the disadvantages of using technology that is still in the early development stage should not be overlooked. The table below provides a brief summary of the advantages and disadvantages of smart contracts.

Advantages

– **Reduced costs**

By digitally automating many of the paper-based functions and removing middlemen (e.g. brokers, warehouse verification workers etc.) the cost of transporting a cargo is considerably decreased. CargoX (an electronic bill of lading provider) estimates that the average paper bill of lading courier costs are USD 100 per document.

– **Reduced errors**

The use of real time distribution ledgers are thought to reduce human errors in documentation as they are verified by all parties involved and once added into the smart contract, cannot be changed. In addition, through the constant monitoring of the consignment any variations to the agreed terms of carriage can be picked up sooner rather than later.

Disadvantages

– **New technology**

Companies will need to check to see whether the existing technology they have is compatible with the new technology required to fully execute a smart contract. For example, is the freight forwarders' current container tracking equipment able to digitally interact with the smart contract code without any human interference? Or would it require a certain level of human input? If new technology is required, this could be an expensive up front cost. Furthermore, companies will need to bear in mind what the ongoing subscription costs for smart contract software would be.

– **Code language**

Smart contracts are written in computer code. This is a niche skill and one which most businesses will not have in house. Parties go to lawyers to draft contracts who are experienced and will ensure that the parties' intentions are accurately reflected. The contract can then be read by both parties to verify its contents. Computer code is a different language, and unless both parties are fluent in the code, then it is unlikely that the parties will be able to review this for themselves and ensure that it has captured the intended inputs and outcomes.

Advantages

- **Certainty**

Smart contracts cannot be stopped once they have been added to the distributed ledger. This gives the various stakeholders comfort that once the pre-set conditions have been agreed the automated obligation will be carried out once the correct inputs are given. For example, once the cargo has reached the agreed location, the smart contract will automatically release payment to the seller from escrow which the buyer had put in at an earlier date. This provides certainty to the seller that they will be paid once they have completed their obligations, the buyer cannot delay payment by alleging faults in the sellers' performance.

- **Reduced legal disputes**

"The code is law" is the view of some technologists. The idea being that the smart contract will only carry out functions that it has been programmed to do. There is no human initiative to suddenly breach the contract as they no longer feel like complying with the obligations. It is also likely the information contained in the consignment documents are more accurate leading to less disputes between the parties.

Disadvantages

- **Inflexibility and limitations**

Smart contracts are often called immutable. I.e. what has been coded cannot be changed once the smart contract has been entered into the distribution ledger. Therefore if the parties change their mind at a later date, it is not possible to update the smart contract with a change in the conditions.

There are limitations on what a smart contract can be coded to do. As discussed above, the code works on a "if y then x" basis. Therefore, if the agreement between the parties allows for an adjustment of price that is to be negotiated at a later date, this cannot be coded into the smart contract. The smart contract would not be able to execute an instruction that "if y then the parties are to mutually agree a price variation". In this situation, there would need to be a natural language contract as well.

- **Increased legal issues**

As discussed above, issues could arise from smart contracts as to their enforceability and jurisdiction and governing law status. Another consideration could be if the law changed which made the obligations coded unlawful, how would the parties be able to amend the smart contract to allow for this? Furthermore, smart contracts could essentially take away some of the legal remedies such as the ability to interrupt the performance of contractual obligations, or to rescind the contract.

Advantages

– **Tamper-proof**

By coding smart contracts in to distributed ledgers, the technology provides a secure environment for the information contained in the smart contract, lending itself to the description “tamper-proof”. This decreases the risk of fraudulent information being inputted into say a bill of lading. Any changes that are made are captured in the smart contract’s history and is capable of being audited. In addition, all inputted information needs to be verified before it is implemented which can catch out any fraudulent amendments to the information.

– **Increased efficiency and transparency**

By cutting out the middlemen and paper based documents, time is saved. All stakeholders have access to the information in real time and can update it with the relevant inputs (such as accepting a delivery), this gives overall transparency to the progress of a shipment.

Disadvantages

– **Security**

Whilst many believe that smart contracts provide a more secure way of carrying out a transaction, they are not impervious to hackers. There have been several high profile cases where cyber hackers have been able to write code that exploits weaknesses in a smart contracts code and have transferred a lot of the stored currency to the hackers.

– **All conditions must be met.**

A smart contract will not self-execute unless all the pre-programmed conditions have been met. Therefore parties need to think carefully about what is agreed to be locked into code and if it is achievable.

With the technology of smart contracts and distributed ledgers still in the relatively early stages of development, there are of course many drawbacks to consider along with the positives. The application of this technology in the logistics industry is being slowly trialled with companies appearing to favour a staged roll out to specific parts of the supply chain rather than tackling the whole journey in one go.



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The ability to cope with Supply Chain Disruptions in the context of HK



In recent months, Hong Kong's trade and logistics community has faced a number of challenges. These range from the effects of the ongoing trade war between China and the USA and protests in Hong Kong disrupting road and air travel, to multiple typhoons in the region and fast changing regulations both in China and elsewhere. Looking forward, the implementation on 1 January 2020 of the new IMO regulations on sulphur content in vessels' fuel is expected to cause disruption to sea carriage operations, at least in the short term.

So where does this leave the logistics and trade industries? In this article we will first discuss the practical steps which can be taken to mitigate against the effects of supply chain disruption. We will then consider the legal and contractual mechanisms which can assist in managing supply chain disruption and the impact arising therefrom.

What does “supply chain disruption” mean?

In this article, we use “supply chain disruption” to mean delay, change or suspension in the supply of goods or significant increase in the costs of moving goods from the producer to the end user. Supply chain disruption can occur in a number of ways but a simple classification is:

1. Disruption in the production of goods / at the source of goods – for example, export restrictions, factories or mines shutting down or suffering sudden loss of production, suppliers becoming insolvent or cancelling supply contracts.

2. Disruption in the transport of goods – for example, a typhoon preventing or delaying a vessel or aircraft moving goods from the place of receipt to the place of delivery, a carrier suffering a collision or loss of cargo or a carrier becoming insolvent.
3. Disruption in the place of receipt – e.g. increased import tariffs.

Given the wide potential for disruption, it is important that parties in the supply chain consider, implement and keep under review the ways in which they can mitigate disruption. It is not possible for a party to prevent or plan for every kind of disruption, but a party can seek to minimise the impact of that disruption on its operations by having contingency plan in place with a clear outline of how to respond to a major disrupting event.

Practical considerations

There are several practical steps that a party can take to make its supply chain adaptive, helping a party to deal with the consequences of a disrupting event, including:

- using diversified suppliers;
- using diversified transport routes and / or modes, including having the flexibility to redirect shipments;
- front-loading orders and shipments where there are known future disruptions; and
- increasing the use of technology along the supply chain to provide end-to-end visibility of shipments and to provide insights into possible disruptions using big data and predictive analytics.

Taking Hong Kong airport as an example, it is the busiest air cargo hub in the world, handling 5 million tons of cargo last year. The airport acts as a major transit hub and as a vital link for manufacturers in South East Asia. The knock-on effect of a disrupting event here is therefore wide.

Where disruption occurs to passenger flights carrying belly cargo, an alternative is for shippers to switch to freighters or, for cargo which is not time-sensitive, to ocean carriage. However, any large scale switch to a certain mode can of course strain supply, increasing carrier prices and possibly resulting in delays as shipments are rolled to ease supply constraints. One way of avoiding spikes in prices is for parties to enter into long-term service contracts with carriers to provide locked-in rates and some comfort on capacity availability, as discussed further below.

Where significant disruption occurs, for a prolonged period, there is also the possibility of re-routing cargo to nearby Mainland airports or ports, albeit with the increased costs and time loss associated with this.

Legal considerations

As always, contract terms are key. Contracts for the supply of goods usually include an absolute obligation to supply, with limited exceptions, one of which will usually be a mutual force majeure clause. If the supplier cannot supply the goods due to a disrupting event, the contract will have to be reviewed very carefully to verify what remedies it provides to the buyer in the event of a failure to supply and whether there is any entitlement to terminate the contract.

Carriers generally have no obligation to deliver goods within a certain time and standard terms and conditions usually include a liberty to deviate, to go by any geographical route, to call at any ports in any order and to tranship. This gives carriers maximum flexibility in managing their capacity but also provides a level of adaptability when it comes to working around disrupting events. However, it also means that generally carriers are not liable for any delays in delivery caused by events outside of their control but again the terms of the contract of carriage must be carefully reviewed to confirm the scope of the carrier's responsibility.

One way in which shippers and freight forwarders can obtain more protection from carriers regarding capacity, time for delivery and prices (commitments which are crucial when there is a disrupting event) is to enter into a service agreement. The purpose of a service agreement is to agree with the carrier a higher level of service commitment that would otherwise be offered on spot terms. Care must be taken in drafting the agreement to ensure that the commitments also apply in times of disruption although this will also be a matter for commercial negotiation.

Frustration v Force Majeure

When faced with supply chain disruption one or both parties may wish to terminate the supply / carriage contract. Whether a party is entitled to terminate will always depend on (i) the nature of the disruption and (ii) the terms of the contract.

A party who is unable to perform will often say that certain disrupting events are "force majeure", entitling them to bring the contract to an end. However, it is very important to carefully consider whether a disrupting event does give rise to a right to terminate as wrongful termination could lead to a claim in damages.

There are generally two ways in which an unforeseen event can impact on a party's obligations to perform a contract: (i) frustration and (ii) force majeure. These doctrines are entirely separate and have different legal bases but are often confused. For ease, we summarise the key points for each doctrine in the table below:

Frustration

- Arises from common law and statute

- Restricted application

- Fortuitous, unforeseeable event, which occurs without fault of either party and which renders performance radically different from that contemplated by the parties either because performance has become illegal or impossible

- Effect is to automatically bring contract to an end, without the need for more

- Frustration is not available:
 - if the frustrating event is in existence at the time contract was made and does not get worse during contract term;
 - for mere economic hardship;
 - if there is an alternative method of performance;
 - if the parties have included a clause in the contract which makes express provision for the consequences of the frustrating event.

Force majeure

- Arises from a clause in the contract

- Only applies if the terms of the force majeure clause are fully complied with

- A force majeure event is only one which falls within the definition of force majeure event as agreed in the contract and the force majeure event must be the sole cause of the failure to perform

- Clauses often require parties to give notice of the force majeure event and to attempt to remedy or mitigate its consequences

- The mere existence of a force majeure event does not bring a contract to an end automatically, usually it just suspends obligations for the period in which the force majeure event continues or excuses a party from its non-performance due to the force majeure event

Conclusion

Whilst the risk of supply chain disruption is a necessary part of cross-border trade, there are steps that parties in Hong Kong can take to minimise the effect of disruption both on the operations side and when drafting their contracts with suppliers. Should you be exposed to significant supply chain disruption, Ince is well-placed to assist with reviewing and drafting contracts and also with disputes arising as a result of delays, disruption or failure to supply.



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Promoting Hong Kong as a mediation and arbitration centre for settlement of transport and logistics disputes in the Greater Bay Area



Hong Kong's geographical position and well-established independent legal system brings key advantages for Hong Kong to establish a mediation and arbitration services platform in the Greater Bay Area. The Hong Kong International Arbitration Centre ("HKIAC"), which is one of the more preferred and used arbitral institutions globally, has handled arbitration dispute cases valuing over HK\$52.2 billion in 2018 alone.

In 2018, international trade and maritime disputes were among the top three types of disputes registered with the HKIAC, while Hong Kong law and English law were the two most commonly selected governing laws. During the same period, Hong Kong and Mainland China were the top two geographical origin or nationality of parties in these arbitrations. These statistics confirm Hong Kong's status as a leading centre for international legal and dispute resolution services in the Asia Pacific region.

In recent years, the uncertainty and instability of the global economy, and an increase in protectionism between the world's largest export states, has led to the Guangdong-Hong Kong-Macao Greater Bay Area ("Greater Bay Area") playing a bigger role than ever before in global arbitration. Within the Asia Pacific region, the Greater Bay Area features prominently in key propositions of economic development.

However, this increasing prominence is not without its own challenges. Whether it is the mismatch of supply and demand structures or overcapacity, the region is constantly trying to tackle various issues to further develop its constituent economies and effectively support the advancement of China's Belt and Road Initiative.

Transportation and Logistics in the Greater Bay Area

For a detailed analysis of the Greater Bay Area, please see the article "The Greater Bay Area Initiative – Are You Ready For It?" in the [August 2018 edition of the Logistics Newsletter](#).

The Greater Bay Area was established in July 2017 and consists of the Hong Kong Special Administrative Region ("HKSAR"), the Macao Special Administrative Region ("Macao SAR"), along with nine municipalities in the Guangdong Province. Hong Kong is widely considered the most "international" city in the Greater Bay Area and has long been viewed as a "superconnector" for international companies to access the Mainland market and vice versa.

The Greater Bay Area covers a total area of 56,000 square kilometres, with a combined population of approximately 70 million at the end of 2017. In 2017, the gross domestic product of the Greater Bay Area stood at around RMB 10 trillion. In terms of trade, Hong Kong and the Mainland are each other's major trading partners. The Mainland's share of Hong Kong's global trade has increased significantly from 9.3% in 1978 to 50.2% (HK\$4,136.0 billion) in 2017.

It comes as no surprise, therefore, that there is great potential for growth in the transport and logistics industry in the area.

Greater Bay Area and Hong Kong's status as a leading centre for international legal and dispute resolution services

Over the years, Hong Kong has actively been promoting mediation and arbitration services for the settlement of transport and logistics disputes. These measures include, but are not limited to:

- the HKIAC, which maintains a panel and list of arbitrators including those with experience in the practice of transport and logistics; and
- a number of offices or arbitration centres that have been set up by various international arbitration commissions, such as the China Maritime Arbitration Commission and the Mainland – Hong Kong Joint Mediation Center. The latter was set up by the China Council for the Promotion of International Trade, in collaboration with the Hong Kong Mediation Centre.

There are many advantages of Hong Kong as a mediation and arbitration centre for the settlement of transport and logistics disputes in the Greater Bay Area. These include but are not limited to, the highly cost effective arbitration services in Hong Kong as well as Hong Kong being arguably the most geographically convenient world city in Asia. Dispute resolution will benefit from the breadth and depth of expertise of Hong Kong based law firms who specialise in these disputes. Parties and practitioners alike can rely on the reputation of the Hong Kong's legislative framework and arbitration friendly judiciary where judges have good knowledge of maritime and logistics issues.

Hong Kong's reputation as an arbitration centre was given judicial endorsement in the English High Court case of *Shagang South-Asia (HK) Trading Co Ltd v Daewoo Logistic Corporation* where the Court recognised that "Hong Kong is no doubt geographically convenient, it is also a well-known and respected arbitration forum with a reputation for neutrality, not least because of its supervising courts."

Current initiatives by the PRC Central Government that contributes to making Hong Kong a mediation and arbitration centre in the Greater Bay Area

Through the Outline Development Plan for the Guangdong-Hong Kong-Macao Greater Bay Area (Outline Development Plan), published on 18 February 2019, the PRC Central Government announced a development plan to promote and deepen economic development of the region.

The Outline Development Plan has set out a number of measures to benefit the region and promote the development of high-end and high value-added logistics services hub. These measures include:

- improving the development system of the city cluster and towns to improve the core cities, such as Hong Kong;
- developing quality innovation and technology carriers and platforms;
- building a modern comprehensive transport system;
- developing a system of modern service industries; promoting the development of Hong Kong's third-party and cold chain logistics, and raising the level of supply chain management;
- increasing the degree of market integration, which includes implementing agreements under the respective Mainland and Hong Kong Closer Economic Partnership Arrangements ("CEPAs") special liberalisation measures for Hong Kong and Macao with respect to sectors including maritime transport, logistics;
- jointly expand international markets to leverage the advantages of Hong Kong and Macao in international professional services, including ship finance; and
- enhancing the functions of the Shenzhen-Hong Kong Modern Service Industry Cooperation Zone in Qianhai of Shenzhen.

The effects of these measures are far reaching for Hong Kong and stand to boost growth and cooperation of transportation and logistics in and out of Hong Kong. It will also help to refine the mechanism for international commercial dispute resolution and further support Hong Kong's well-established mediation and arbitration centre.

Future Development

In 2018, the Office of the People's Government of Guangdong published an opinion on deepening systems innovation in Guangdong. It promoted the development of Guangdong-Hong Kong-Macao partnership and joint venture law firms and encouraged communication between arbitration institutions in the Greater Bay Area. We are likely to see further issuance of opinions of this nature in the future.

The Outline Development Plan and local government programs will further consolidate and enhance Hong Kong's status as an influential international transport and logistics hub, as well as support Hong Kong's development of high-end maritime services, such as high value-added freight, ship finance, and reinsurance services.

The current initiatives under the Outline Development Plan and liberalization measures under CEPA for market integration will also enable Hong Kong to leverage its advantages to further strengthen its mediation and arbitration and extend and optimize international service networks. This in turn will support and attract economic and trade activities in the Greater Bay Area.

The latest Report of the Panel on Administration of Justice and Legal Services to the Legislative Council, issued on 17 July 2019, confirms the Chief Executive's commitment to promote Hong Kong's legal and dispute resolution services in the Greater Bay Area. For example, the Chief Executive's administration has proposals to provide one-off funding support of HK\$150 million for the development of an Electronic Business Related Arbitration and Mediation ("eBRAM") Platform by the non-governmental eBRAM Centre.

The effects of this will no doubt promote Hong Kong as a dispute resolution centre in the region.

One way to cement Hong Kong as a mediation and arbitration centre would be to include Hong Kong as a new venue in standard form dispute resolution clauses. In the latest standard form time charter party issued by The Baltic and International Maritime Council ("BIMCO"), as a default option, Singapore has "SIAC arbitration" written into the standard form. Hong Kong could stand to benefit substantially with Hong Kong as an arbitral venue in standard form transport/logistics contracts. Local transport/logistics groups such as CILTHK, can promote Hong Kong's reputation as a world class legal service sector by issuing and/or including their own law and jurisdiction clause into the standard forms and encourage their members to incorporate into their contracts.

Conclusion

Notwithstanding the current trading climate, we are likely to see Hong Kong strengthen its judicial and legal exchanges and cooperation with Guangdong and Macao, promoting the development of Hong Kong as a centre for mediation and arbitration of the Greater Bay Area. Hong Kong's distinctive geographical advantages and well-established legal system will enable Hong Kong to develop joint planning, joint contribution and shared benefits in a region renowned for its highly developed transport and logistics hub.



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