

# Tech Disputes

## Autumn 2022

Our quarterly round-up of key cases and developments arising in the wide world of tech provides a road-map to highlight issues which may impact your business.

### Key developments

#### ***Collapse of cryptocurrency exchange FTX***

On 11 November 2022, FTX, the world's second largest cryptocurrency exchange, filed for bankruptcy in the US. FTX was unable to meet customer withdrawals (worth ~\$5bn) following concerns in the market regarding its financial health and related transfers to Alameda Research – a trading company owned by FTX's founder, Sam Bankman-Fried. The filing comes after a failed attempt by FTX to secure assistance from its rival, Binance (the world's largest crypto-exchange), in the form of a takeover. The run on FTX has significantly disrupted the sector and has prompted other crypto-exchanges to reassure their clients that their liquidity reserves would enable them to meet any customer withdrawals if required. The event may also be the catalyst for greater regulatory focus on the sector in various jurisdictions.

#### ***CMA ruling on the acquisition of Meta (Facebook Inc) of Giphy Inc***

The CMA has ordered Meta to sell Giphy, the social media GIF library, which it acquired in May 2020. Despite an appeal by Meta, the ruling confirms the CMA's original findings in November 2021 – i.e. that the merger had resulted or may be expected to result in a substantial lessening of competition in the markets for social media and display advertising, harming social media users and businesses in the UK. The final CMA report is available [here](#).

#### ***Proposed Revised Product Liability Directive***

The Revised Product Liability Directive proposed by the European Commission is expected to modernise the rules around strict liability of manufacturers by, amongst other things, including artificial intelligence (AI) systems in the definition of 'Product'. 'Defects' will include the "effect on the product of any ability to 'continue to learn after deployment'" while damage will be expanded to incorporate 'loss and corruption of data'. In parallel, the AI Liability Directive will provide remedies for damages caused by the output of an AI system against any person. These proposals now sit alongside the EU's proposed EU AI Act. According to the EU, these proposals will "adapt liability rules to the digital age", particularly in relation to AI. See our [article](#) for an analysis on the way these proposals will interact.

#### ***UK Government plans to replace UK GDPR***

On 3 October 2022, Michelle Donelan, Secretary of State for Digital, Culture, Media and Sport, gave a speech announcing new plans to replace the UK GDPR with a 'British data protection system'. Although detail about the new system was scarce, Donelan's speech stated that it will continue to protect consumer privacy whilst providing a simpler landscape for businesses to navigate. Donelan's criticism of the UK GDPR focussed on the current requirements for smaller organisations "in the main [being] forced to follow the same one-size-fits-all approach as a multinational corporation". The Data Protection and Digital Information Bill which is currently progressing through parliament, is now likely to be abandoned. See our [Insights article](#) for more information.

#### ***IPO guidance on AI invention patent applications***

The Intellectual Property Office (IPO) has published guidance on the practice within the IPO for the examination of patent applications for inventions relating to AI. In summary, whilst UK patent law excludes from patent protection inventions relating solely to a mathematical method and/or a program for a computer, this should be a matter of "substance not form". When the task or process performed by an AI invention reveals a technical contribution to the known art, the AI invention is not excluded and is patent-eligible. To accompany the guidance, the IPO has provided a number of example scenarios in various areas of technology. The guidance, including a helpful executive summary, can be found [here](#).

#### ***Law Commission Consultation on Digital Assets***

The Law Commission is proposing changes to current legislation on digital assets with a view to enhancing their recognition and protection as well as allowing a greater range of people, groups and companies to benefit from them. In particular, it proposes to review the personal property laws relating to digital assets such as NFTs and crypto-tokens which are currently not well-adapted to the intangible nature of these assets. We have drawn out some key points in the October edition of our [Cryptoview](#).

# Key cases

## ***Soleymani v Nifty Gateway LLC [2022] EWCA Civ 1297***

On 6 October 2022, the Court of Appeal overturned a High Court decision to stay English court proceedings, holding that the issue of whether a New York arbitration clause in a technology company's standard Terms of Business was enforceable, should be determined at a full trial. Nifty Gateway now faces a trial on whether it is entitled to rely on the arbitration clause to prevent Mr Soleymani from pursuing his claims in the English Courts. The Court of Appeal decision, and its comments on consumer rights principles, has important lessons for international technology companies with arbitration clauses in their consumer-facing standard contracts. Please see our article [here](#) for further commentary. The full judgment can be found [here](#).

## ***Amazon 'Buy Box' collective CAT claim***

Another 'opt-out' class action has been announced in the UK. The claim is expected to be filed in the Competition Appeal Tribunal (CAT) against Amazon.com, Inc. and will allege that Amazon is abusing its dominant market position in breach of UK competition law. The claim arises in relation to the platform's 'Buy Box', which the class representative alleges uses a targeted algorithm to promote goods sold directly by Amazon or by third party retailers that pay higher fees to Amazon. Consumers are purportedly led to believe that goods in the Buy Box are the best offer available and are dissuaded from navigating the site to find cheaper offers. This claim follows a European Commission and CMA investigation into Amazon's business practices. The class will seek £900 million in compensation (see more [here](#)).

## ***Optis Cellular Technology LLC v Apple Retail UK Ltd [2022] EWCA Civ 1411***

On 27 October, the Court of Appeal ruled that Optis was entitled to a FRAND injunction (to restrain infringement of standard essential patents (SEPs) in the UK), unless Apple agreed to enter into a licence on terms to be determined by the Court to be FRAND (fair, reasonable and non-discriminatory). Apple argued that it should be given an opportunity to see the terms of the licence set by the Court before making a commitment to enter into the licence. The Court of Appeal disagreed and held that in the absence of such a commitment, a FRAND injunction was an appropriate remedy where a SEP covering the UK had been found to be valid and infringed. The issue arises out of the parties' disagreement as to what constitutes FRAND licence terms in accordance with the intellectual property rights policy of ETSI (the standard setting body). A separate trial on the terms of the FRAND licence took place in June and July this year and is awaiting judgment. Of note, is that Lord Justice Arnold commented on the "dysfunctional state" of SEP dispute resolution and called on standard setting organisations to make legally-enforceable arbitration of SEP/FRAND disputes part of their intellectual property right policies. The judgment is available [here](#).

## ***IBM United Kingdom Ltd v Lzlabs GmbH & Ors [2022] EWHC 2094 (TCC)***

The defendants in this case were subject to related US and English claims brought by US parent company IBM Corp and its English subsidiary IBM UK. The defendants sought to rely on an exclusive jurisdiction clause to join IBM Corp to the English proceedings by serving Part 20 claims on it out of the English jurisdiction and applied for interim anti-suit injunctions in relation to the US proceedings. Amongst other jurisdictional issues, the High Court found that IBM Corp was not a party to the relevant customer agreement containing the exclusive jurisdiction clause and therefore the US dispute did not fall within its scope. It held that the US entity was entitled to sue in the US for infringement of its IP. The decision highlights the need for careful drafting of exclusive jurisdiction clauses, particularly in agreements concerning the license of software and other IP. The judgment is available [here](#).

## Contract Masterclass Webinar Series: 2022

Our annual contract masterclass webinar series started on 1 November and runs until 29 November.

It is designed to provide the most up to date guidance on contractual issues in English law. The scheduled sessions will share practical guidance on the latest legal developments and key points to be aware of as contractual relationships come under pressure from global economic and political challenges.

From Formation to Force majeure and frustration to Tax considerations the series will cover a wide range of topics and go into depth about the latest legal developments.

You can sign up [here](#).

# Keen to find out more?



## Online resources available at the click of a button

- Global insights - ESG 1.5: headwinds and fairwinds**  
 The global ESG landscape is changing at pace beneath our feet and being pulled by challenging financial markets, geopolitical crises and growing political and regulatory fragmentation. In [this webinar](#) we look at ESG 1.5. and how this new landscape is impacting our clients and their ESG agenda.
- GAITKeepers podcast series**  
[GAITKeepers](#) brings you the latest insights within tech, gaming and the Metaverse and is delivered to you by the Simmons Gaming and Immersive Tech (GAIT) group.
- Markets in Crypto Assets Regulation**  
 Join the first session in our new webinar series focused on the Market in Cryptoassets Regulation (MiCA). In [this session](#) experts from our UK and European offices will cover the key points of the MiCA regulation and how it'll impact different firms.
- EU / US Data Transfers – Update**  
[Join us](#) for a webinar where we will focus on the detail of the recently finalised and published Executive Order to Implement the European Union-U.S. Data Privacy Framework.



## Related publications

- [Lexology Getting The Deal Through – FinTech 2023](#)**  
 We are pleased to have contributed to the 2023 edition of GTDT FinTech. We have authored chapters for Belgium, China, Germany, Hong Kong, Netherlands, Singapore, Spain, the UK and the UAE.
- [UK proposal for a new AI rulebook - Insights for organisations](#)**  
 The UK government published its proposals (the AI Paper) on the future regulation of artificial intelligence (AI) taking a pro-innovation, light-touch and markedly less centralised approach than the EU's draft AI Act.
- [UpData](#)**  
 UpData provides regular updates on contentious, criminal and insurance risks relating to data, from cyber-attacks to regulatory enforcement.
- Our Meta-Versus insights series focuses on disputes in the Metaverse:**
  - [Meta-Versus: Part 1 - Introduction to disputes in the Metaverse](#)
  - [Meta-Versus: Part 2 - a non-exhaustive taxonomy of Metaverse disputes](#)
  - [Meta-Versus: Part 3 - How will disputes be resolved in the Metaverse?](#)
  - [AI: stay smart](#)  
Key regulatory updates relating to AI around the world.
  - [Crypto View](#)  
Timely global updates on the world of digital assets.
  - [Digital download](#)  
The latest, need-to-know information, communications and technology updates.



Please view any of these updates using the links above, or contact a member of our team to discuss any of the issues highlighted.

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