# After Token Rush: International Litigation and Initial Coin Offerings (ICO) – Part 2


*This article considers some of the international litigation questions that arise out of Initial Coin Offering (**ICO**).*

*In the first part of this article, we discussed in particular issues relating to jurisdiction. We now continue this discussion while also considering questions relating to applicable laws.*

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Issues of jurisdiction are made somewhat more complex by the circumstance that many ICO's general terms and conditions (***TnC***) contain clauses that may directly or indirectly affect the jurisdiction of courts. In this respect, the most obviously relevant type of agreement are forum selection clauses; in the case of the *Tezos* ICO, for instance, the TnC specified that "*(a)ny dispute arising out of or in connection with the creation of the* [tokens] *and the development and*

*execution of the Tezos Network shall be exclusively and finally settled by the ordinary courts of Zug, Switzerland*". As noted by the District Judge denying the motion to dismiss, this is best understood not as a "*clickwrap agreement*", but as a "*browsestrap*" one: when subscribing, investors were not asked to check a box indicating consent to the TnC, but simply enabled to retrieve the TnC on the website advertising the ICO. In order to determine whether the forum selection clause is binding, hence, a case-by-case assessment is necessary, evaluating whether – given the circumstances of the case, such as the structure of the website – it is reasonable to expect that users in general accessed the TnC, and whether the claimant(s) in particular had any demonstrable knowledge of the contents of the TnC. For these reasons, should the same type of problem arise in the European Union, the case-law of the Court of Justice of the European Union (the ***CJEU***) concerning click-wrap (Case C-322/14, *Jaouad El Majdoub v CarsOnTheWeb.Deutschland*) would not always be directly applicable, depending on how the contribution process was structured – but most importantly, whenever the investors may be qualified as consumers, the enforceability of a pre-dispute forum selection clause would be precluded by Article 19 of Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the ***Brussels I bis Regulation***). Furthermore, additional obstacles would exist in cases where the claimant purchased the tokens on the secondary market: in this case, the forum selection clause would bind the tokenholder only if she/he succeeds in the rights and obligations of the primary market purchasers under the applicable national law, and if she/he has the possibility to acquaint her/himself with the contents of the TnC.[1] And, to add a further layer of complication, it is in any case doubtful to what extent a choice-of-court agreement may cover tortious claims (such as the ones based on an allegation of securities fraud), the language and scope of the agreement

playing a crucial role in this respect according to the CJEU[2].

The same observations largely apply to cases where the TnC contain a reference to arbitration agreements: arbitration clauses included in TnC may be regarded as unenforceable in jurisdictions excluding the arbitrability of consumer disputes, and further problems may in any case arise depending on the attitude adopted by the seized court as to the incorporation by reference of agreements to arbitrate[3], and on the scope of the clause *vis-á-vis* non-contractual claims.

A subtler issue concerns TnC provisions purporting to select the place where the contribution procedure and the token creation and allocation takes place. For instance, the *Tezos* TnC read as follows: "*The Contribution Software and the Client are located in Alderney. Consequently, the contribution procedure, the* [token] *creation and* [token] *allocation is considered to be executed in Alderney*". This provision, if accorded deference, may potentially be relevant for the identification of both the place of performance (for contract claims) and the place where the harmful event occurred (for tortious claim). Does this mean that, despite the potential unenforceability of the forum selection clause, the *Tezos* TnC ultimately succeed in influencing the jurisdiction of State courts? Despite its undoubted historical interest, with fortifications described by William Ewart Gladstone as "*a monument of human folly*", the little island (population 1,903) may not be a particularly practical choice for international litigation. In practice, however, the contents of the TnC are unlikely to be decisive, as the analysis necessary to locate the relevant facts of the case ultimately remains a factual one. Any such clause, hence, should normally be disregarded when it appears that, in reality, the relevant facts of the case took place elsewhere.

Finally, what about applicable law? TnC often contain a choice-of-law clause: in the case of the *Tezos* ICO, for

instance, the TnC idenfitied Swiss law as the applicable law. In the European Union, Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (***Rome I Regulation***) excludes rights and obligations which constitute a financial instrument from the general rule applicable to consumer contracts, in order to ensure uniformity in the applicable law (*see* in particular Recital 28). Therefore, for contractual claims, the law selected in the TnC may potentially be relevant as "*law chosen by the parties*" under Article 3 of Rome I Regulation; however, the same doubts illustrated above with reference to browsestrap agreements are to a certain extent relevant here, and it is therefore necessary to perform a case-by-case assessment of the procedure whereby the contribution took place and the tokens were created and allocated. But, most importantly, any applicable law clause would in any case be irrelevant if the cause of action is in tort. If, hence, the securities laws of the forum are applicable to a certain ICO, their applicability may not be excluded by an agreement whereby the parties subject their contractual relationship to any given foreign law. For this reason, the choice for Swiss law in the *Tezos* TnC is likely to be irrelevant, as far as the claims based on alleged violations of securities law are concerned.

## ***Conclusions***

The recent wave of ICO-related litigation raises a number of delicate private international law questions, which are yet to find a definitive answer. Especially in cases where general jurisdiction does not attach to the defendant, determining jurisdiction is likely to require a careful assessment of the facts of the case (both in the US and in the EU), so as to establish some form of territorial link with the forum. The relevance of provisions such as forum selection agreements, contained in ICO TnCs, is sometimes curtailed not only by the arguable consumer status of retail investors, but also by the

"*browsestrap*" nature of the agreement, by the difficulties entailed by the extension of the effects of the clause to secondary market purchasers, and by the tortious nature of certain claims. As for the law applicable to the merits, any choice-of-law clause is likely to be irrelevant if the claim is based on an alleged securities fraud. In their short, exciting but troubled history, ICOs have prepared us to expect the unexpected; the latest "*plot twist*" may lead us to explore some uncharted territories of international litigation.

[1] Case C-366/13, *Profit Investment SIM SpA v. Stefano Ossi and Others*.

[2] Case C-595/17, *Apple Sales International and Others*; C-352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Evonik Degussa GmbH and Others*.

[3] Alessandro Villani, "*Arbitration Clauses Incorporated by Reference: An Overview of the Pragmatic Approach Developed by European Courts*", Kluwer Arbitration Blog, 3 March 2015, accessible here.

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