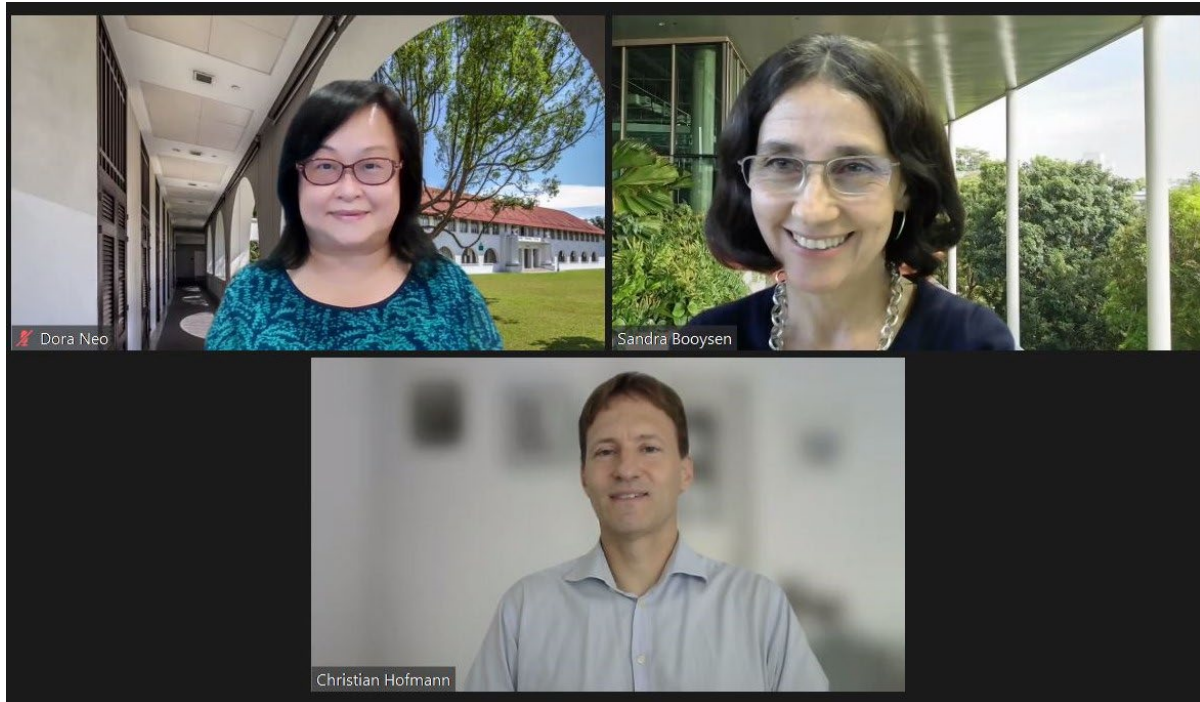


## CBFL Seminar Series: Liability for Digital Payment Fraud

23 March 2022, 4.00pm to 5.45pm

Webinar



*Left to right (Top): Assoc Prof Dora Neo (CBFL, NUS Law), Assoc Prof Sandra Booyesen (CBFL, NUS Law) and Assoc Prof Christian Hofmann (CALs, NUS Law)*

The issue of liability for digital payment fraud has come to the fore in recent months, as hundreds of OCBC customers fell prey to a phishing scam that saw millions of dollars fraudulently withdrawn from their bank accounts in late 2021. Associate Professor Sandra Booyesen and Associate Professor Christian Hofmann examined this issue in a seminar held on 22 March 2022, as part of the Centre for Banking & Finance Law (CBFL) Seminar Series. In the aftermath of the OCBC phishing scam, the bank undertook to voluntarily reimburse affected customers. Reimbursement was framed as being on a one-off goodwill basis. Such scams, however, may well recur, and banks may not be as willing to absorb future losses. The Monetary Authority of Singapore has announced that it is working to develop a framework for “equitable sharing of losses” resulting from scams. The question hence is more relevant than ever: how should liability be allocated in situations of digital payment fraud?

Associate Professor Booysen began the seminar by examining this question with regard to the common law, the contractual framework, and policy considerations. Some might view the common law as out-of-date when it comes to modern digital payment fraud, or side-lined by extensive contractual documentation. However, Associate Professor Booysen pointed out that the common law remains an essential starting point for determining what is a fair allocation of risk in cases of both authorised and unauthorised payment fraud; it provides a valuable yardstick by which to assess the fairness of contract terms that depart from this common law allocation. Through such contract terms, banks have expanded customers' common law duties while at the same time reducing their own duties, and shifted liability for payment fraud. Such terms raise the question as to whether banks may have over-corrected in their attempts at adapting the common law position for the digital era through contract. Instead, in determining a fair allocation, one proposition is that in the case of loss for an unauthorised transaction, if the customer has not been reckless, then the loss should be borne predominantly by the bank. Avenues for achieving a fair allocation include not only legislation, but also soft law or contract terms.

Associate Professor Hofmann continued the discussion on a potential legislative solution, with reference to the United Kingdom's Payment Services Regulations 2017 and the European Union's Unfair Contract Terms Directive. He explored, from a policy perspective, the questions of who should set the rules, and which party should be the primary loss bearer. Drawing parallels with earlier controversy in the EU over credit and debit card fraud, he traced the development of and detailed the UK legislative solution to liability for digital payment fraud. Under the current framework, absent exceptional circumstances (such as customers' gross negligence and disclosure of elements of the strong customer authentication process which banks are obliged to put in place), payment services users generally have limited liability. Nevertheless, it appears that fears of an explosion of losses and costs arising from mass fraudulent transactions – typically raised as an argument against such regulation – have not necessarily come to pass. Rather, regulatory clarity appears to have reduced the volume of payment fraud litigation. The UK and EU experiences hence yield helpful insights for future discussion about reforms that might be considered in the Singapore context.

The seminar was moderated by Associate Professor Dora Neo, Director of CBFL.