

# Kluwer Arbitration Blog

## YSIAC Conference Recap: Cryptocurrency, Blockchain and NFTs

Felicia Ng (Hogan Lovells Lee & Lee) · Friday, November 12th, 2021 · YSIAC

On 10 November 2021, YSIAC Conference 2021 ARBXTalk and panel discussion canvassed a myriad of dynamic developments in the arbitration space, amongst which included the impact of cryptocurrency, blockchain and non-fungible tokens (“NFTs”) (collectively referred to as “CBNFT”) on arbitral disputes, the enforcement of awards, and how practitioners can adapt to digital transformations and disruptions created.

Guest speaker Mr. Ziyang David Fan, Head of Digital Trade at the World Economic Forum, was first invited to share his insights on regulating technology in a digital age. Mr. Fan expressed his excitement to explore the intersection between technology on traditional industries such as shipping, trade and agriculture and its pull on such industries. He also warned of the legal issues that could arise as a result of technology progressing faster than the law as industries trudge swiftly ahead on the path of digitization. An apt example raised by him was the electronic bills of lading where tokenising bills of lading could face potential issues of contentious legal recognition, as well as inconsistent legal practices and treatment across the entire supply chain. To navigate these digital disruptions, Mr. Fan believes in agile governance – adopting an anticipatory approach with regulatory sandboxes to test, receive feedback on and calibrate policies that capture the nuances of new technologies.

Thereafter, the panel discussion was moderated by Ms. Wendy Lin (WongPartnership LLP), and discussion comprised Mr. Matthew McGhee (Twenty Essex), Mr. Rakesh Kirpalani (Drew & Napier LLC), Mr. Andy Meehan (Gemini Trust Company) and Mr. Calvin Koo (Kobre & Kim LLP).

The panel discussion was kickstarted by Mr. Kirpalani with succinct definitions of key terms (blockchain, hashing, cryptocurrency, NFTs, Smart Contracts) for the audience. In addition, Mr. McGhee emphasised the distinctions between the legal nature of crypto assets and the associated rights pertaining to the crypto asset. For instance, the ownership of an NFT which grants access to certain products may be proprietary in nature, while entitlement to those products may merely be contractual.

In particular, Mr. Kirpalani defined smart contracts as computer codes that automatically executes certain functionalities when certain conditions are met (i.e. If  $x$ , then  $y$ ). Building on this, Mr. McGhee highlighted the distinctions between smart contracts as Mr. Kirpalani defined, in its truest form, and pseudo / soft smart contracts. The latter referred to orthodox written contracts with smart

features bolted on e.g. where the purchase price is paid in advance to an escrow account that gets automatically released upon an event.

Having defined smart contracts, panellists turned to the question of whether smart contracts, in their truest sense, are legally binding. Mr Kirpalani believed there to be no reason, in theory, for the negative – some traditional contracts contain the same computational logic (If  $x$ , then  $y$ ). The heart of the matter boils down to whether one is merely breaching a computer code, or a legally defined agreement expressed in computer code. Mr. McGhee considered it possible that grounds of misrepresentation or mistake could arise due to faults in the code, but unlikely that parties may refuse to perform (seeing as smart contracts are automatically executing).

A consensus shared amongst the panellists was that arbitral disputes surrounding CBNFT do not differ greatly from disputes in other industries beyond the change in underlying subject-matter of the disputes. Mr. Meehan likened such subject matter to traditional disputes regarding investment contracts, service agreements and intellectual property, but reiterated that with the CBNFT space in its infancy, the future is unpredictable. His advice to arbitration practitioners in preparing for such changes was, to the extent that such disputes are resolved using traditional arbitral methods, to be well-equipped to handle navigate the CBNFT landscape the same way one would traverse other existing niche industries such as emerging medical technologies.

Pivoting to practical concerns of enforcing arbitral awards and tracing digital assets, Mr. McGhee expounded on the difficulties of obtaining protective injunctions in relation to crypto assets. For instance, freezing injunctions often exclude crypto assets due to the volatility in value of such assets and the ensuing magnitude of losses to the defendant if they were wrongfully frozen. The converse may be true for tracing crypto assets. Mr. Koo believes it may in fact be easier to trace crypto assets because transactions are immutable, public and can be viewed in real time. He recommended working with professionals with access to software that can crunch these data efficiently and view the transactional pathway, the different wallets and whether a wallet is associated to a particular exchange. Alternatively, Mr. Kirpalani recommended using Etherscan or other blockchain monitoring networks to trace the movement of crypto assets. Mr. McGhee further added that while tribunals may have limited power compelling third-party crypto exchanges, parties can consider obtaining court orders to compel crypto exchanges to provide details of their customers (for anonymous accounts) or freeze the account of an unknown party who could be referred to as beholder of the crypto wallet.

To pursue arbitral awards, the usual procedures for physical seizure of assets would not apply, and removing control of the private key to the crypto assets may face its own set of difficulties, especially with recalcitrant award debtors. To combat this, Mr. Koo suggests that the traditional exposure points and methods such as leveraging criminal liability (e.g. contempt of court) and reputational damage can still be engaged to increase pressure on the opposing party to comply.

## Conclusion

In sum, the guest speaker and panel discussion offered great insight into the technical matters arising from the proliferation of CBNFT, and demystified the topic with clarity and accuracy for arbitration practitioners. Cryptocurrency and NFTs are in its infancy and its future pathway is unpredictable. To navigate the complex and ever-evolving landscape of CBNFTs, practitioners

would benefit from utilising existing legal tools and strategies in the arsenal with agility, whilst understanding and leveraging the perks of CBNFT either as an underlying subject-matter for disputes or the target of enforcement.

*This post concludes our coverage of YSIAC Conference 2021. More coverage from YSIAC Conference is available [here](#).*


*To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).*


### **Profile Navigator and Relationship Indicator**

Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Learn more about the  
newly-updated  
*Profile Navigator and  
Relationship Indicator*





Wolters Kluwer

This entry was posted on Friday, November 12th, 2021 at 9:00 am and is filed under [Blockchain](#), [Cryptocurrency](#), [Enforcement](#), [NFT](#), [Smart Contracts](#), [Technology](#), [YSIAC Conference](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.

