

# Kluwer Arbitration Blog

## 2022 Taipei International Conference: Past, Present and Future of International Dispute Resolution – Part 2

Elizabeth Chan (Allen & Overy) and Winnie Jo-Mei Ma (The Arbitration Chambers and Bond University) · Thursday, December 1st, 2022

The Chinese Arbitration Association, Taipei and Asian Center for WTO & International Health Law and Policy co-hosted this year's Taipei International Conference on Arbitration and Mediation during the Taiwan Arbitration Week on 5 October 2022. With onsite and online moderators and speakers, three sessions of the Conference explored how the pandemic, digital economy and ESG (environment, society and governance) affect the evolution and adaptation of international dispute resolution in the past, present and future. This Part focuses on Session II, while [Part 1](#) reports on Sessions I and III.

### Session II: Digital Economy

Moderators: Dr. Winnie Jo-Mei Ma (The Arbitration Chambers and Bond University) and Jeffrey Li (Lee & Li)

The speakers' topics will be addressed thematically as follows: (1) issues relating to dispute resolution involving novel technologies; (2) tokenised funding; and (3) data protection.

*Issues relating to dispute resolution involving novel technologies*

#### (i) The types of disputes that may arise involving novel technologies

Joyce Chen (Lee & Li) in her presentation entitled "Dispute Resolution in the New Digital Era" noted the existence of high-profile disputes involving crypto assets, including the alleged theft of Jay Chou's Bored Ape Yacht Club Non-Fungible Token (NFT), worth about 133 ETH / US\$550,000. More broadly, she noted that disputes arising from crypto assets touched on issues including ownership, copyrights, trademarks, phishing scams, breach of contract, and data protection. These types of disputes will require resolution.

#### (ii) The different types of ADR methods suitable for resolving these disputes

As to the appropriate methods for resolving such disputes, Dr. Yueh-Ping (Alex) Yang (National Taiwan University College of Law) in his presentation entitled "The Crowd's Wisdom in Smart Contract Dispute Resolution: Is Crowd-Sourced Smart Contract Dispute Resolution Arbitration?"

addressed the use of crowd-sourced Smart Contract Dispute Resolution (SMDR). In sum, this form of dispute resolution generally involves parties staking tokens to initiate the dispute resolution and interested network users also staking tokens to be selected as voters. Voters vote on the proposed resolutions for the matter, and the majority opinion is the final resolution.

Dr. Yang raised the definitional question of whether this form of dispute resolution even constitutes arbitration at all. Even if it does, he raised some practical questions about SMDR, including the risk of parallel proceedings, *res judicata* issues, the enforceability of eventual “awards” and the (ir)revocability of such awards.

(iii) A focus in particular on blockchain arbitrations

Building on Dr. Yang’s research, Jun Hong Tan (Duxton Hill Chambers) in his presentation titled “Blockchain Arbitration for NFT-Related Disputes”<sup>1)</sup> took a deep dive into how Kleros, a decentralised dispute resolution process using blockchain technology and economically incentivised voting, works in practice:

- After the Kleros jurors are “appointed” (which is based on whoever stakes the most tokens), the parties have the opportunity to submit evidence. Jurors are incentivised to vote in line with the majority as they will lose a percentage of their tokens if they do not.
- Decisions often will contain limited reasoning, if any.
- There is the opportunity for the dissatisfied party to appeal and have the dispute ruled on again. Each appeal will involve double the number of jurors in the previous round plus one and therefore each level of appeal will be more expensive than the last.

In his paper, Mr. Tan also discussed other decentralised justice platforms including Aragon and Jur.

(iv) Enforceability issues under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Elizabeth (Lizzie) Chan (Allen & Overy) in her presentation entitled “Something Borrowed, Something Blue: The Best of Both Worlds in Metaverse-Related Disputes”<sup>2)</sup> and Mr. Tan engaged in a discussion on the implications of enforcement under the New York Convention for awards rendered in accordance with a blockchain arbitration protocol. These implications included:

- whether the New York Convention is necessary, where decisions are self-enforced or the decision-maker is empowered to directly implement its decision in a particular digital asset system;
- whether there would be a valid arbitration agreement (especially where smart contracts are involved);
- whether party anonymity would be tolerable under the New York Convention (as it would go to issues of formal and substantive consent, and many national enforcing courts would likely require disclosure of parties’ identities);
- whether the absence of a legal seat might render an eventual award unenforceable under the New York Convention;
- whether the features of blockchain arbitration / SMDR (e.g., juror anonymity, economic incentives for voting, and the lack of reasoning) would cross any due process bottom lines under the New York Convention; and

- whether awards might not be recognised or enforced on due process grounds.

Many of the speakers also chimed in on whether the New York Convention even has a role in the enforcement of such awards. If it does, the speakers discussed whether the interpretation of existing concepts under the New York Convention should be adapted for dispute resolution using blockchain technologies. If it does not, the speakers also considered whether a separate enforcement regime would be useful in this context, to enable parties using blockchain arbitration to still enjoy the benefits of a global enforcement system.

### *Tokenised funding*

Prof. Julien Chaisse (City University School of Law) in his presentation entitled “Tokenized Funding and Initial Litigation Offerings” predicted that blockchain technology would disrupt the monetisation of litigation claims through tokenisation. Tokenisation refers to the process by which physical assets are substituted for an equity- or profit-sharing token, by way of a smart contract.

Prof. Chaisse argued that tokenisation brings about several important advantages for third-party funding, including: lowering costs and reducing the need for intermediaries; offering greater liquidity and enlarged (global) access to investments; facilitating fractional ownership; enabling faster transactions; and offering “*the advantage of tokenomics*”. Additionally, security tokens can be embedded with voting rights, which allows active third-party funding pools to operate (more) efficiently.

Prof. Chaisse also warned of the legal and regulatory challenges of tokenised funding. For example, some jurisdictions including the US, the UK and Singapore are already regulating this area, so the use of tokens (by whatever name) for funding activities may constitute regulated activity involving securities. Many other jurisdictions, including Taiwan, Hong Kong and Switzerland, are also looking into regulating this area.

### *Data protection and ADR in cross-border data disputes*

Dr. Tsai-fang Chen (National Yang Ming Chiao Tung University (NYCU) School of Law) in his presentation entitled “Adequate Level of Data Protection and ADR in Cross-border Data Disputes – International Trade Law Perspective” considered the legal challenges arising in the digital economy in a different context from the other speakers. He shared his research on data protection and ADR in cross-border data disputes from an international trade law perspective.

Dr. Chen explained that regulatory measures in cross-border data flows are necessary for the proper implementation of personal data protection laws, such as the General Data Protection Regulation (GDPR). He observed that under the GDPR, the European Commission may make a finding that a third country ensures an adequate level of personal data protection and therefore that the transfer of personal data to that country does not require specific authorisation (i.e., the Adequacy Approach). He explained that these adequacy decisions are critical for the operation of digital trade, given the costs and uncertainty associated with cross-border transfer of personal data.

Dr. Chen noted, however, that this Adequacy Approach may have negative implications for trade in the form of trade barriers and may raise issues of discrimination and necessity. To best protect a subject’s personal data, he argued that an effective ADR mechanism should be adopted to supplement the GDPR’s requirement of effective administrative and judicial redress for the data subjects. This would necessarily require that the Adequacy Approach be relaxed to reduce the

relevant international trade issues.

## Conclusion

This was a thought-provoking panel on the emerging subject matter of disputes resolved by arbitration coupled with novel technologies. Preparation and professionalism together with adaptability and collegiality made this session seamless, spontaneous, and exceptionally engaging. The pandemic and ESG (environment, society and governance) provide further challenges and opportunities for adaptation and innovation in international dispute resolution (see [Part 1](#)).<sup>3)</sup>

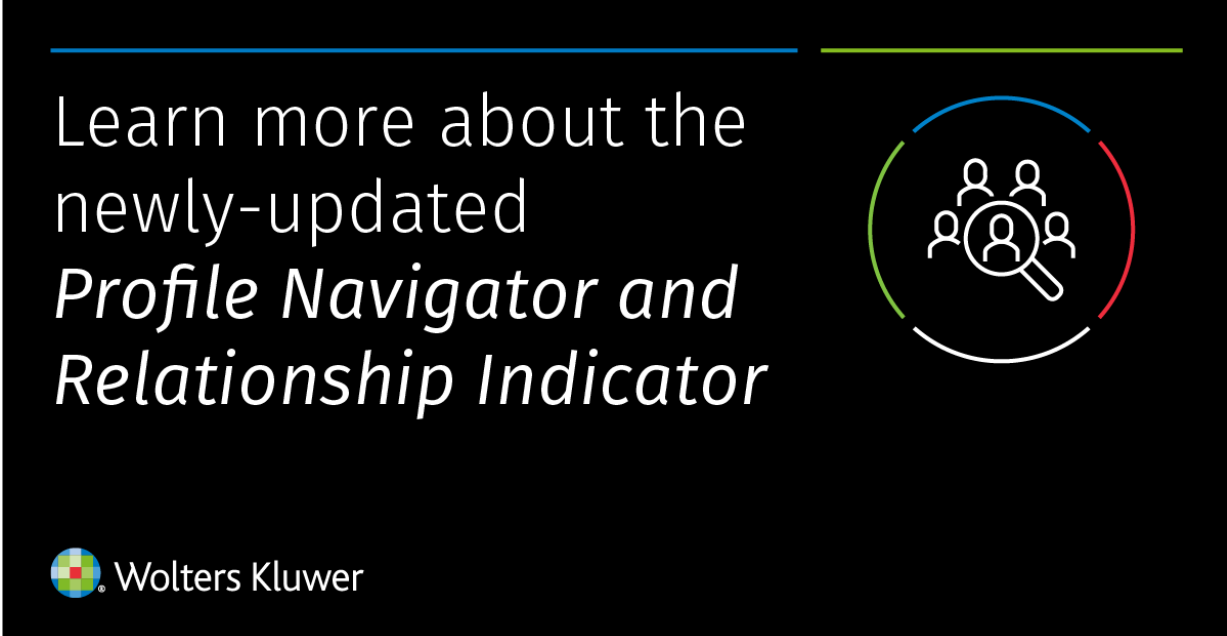
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## References

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- ?1 The abstract on which this presentation was based was the runner-up of the 2022 Call for Conference Abstracts.
  - ?2 The abstract on which this presentation was based was co-authored with Emily Hay of Hanotiau & Van Den Berg and was the winner of the 2022 Call for Conference Abstracts.
  - ?3 The authors thank all speakers and assistants (Kevin Hou, Tsung-Lin (Joe) Tsai and Julian Hsiang Luo) for their contribution to this blog post.

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