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Arbitration Tech Toolbox: Can the New York Convention Stand the Test of Technology Posed by Metaverse Awards?

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While the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") has been one of the driving factors behind the success of international arbitration, its provisions have not evolved in parity with technological advancements, leading to concerns that the Convention may not survive the test of technology.

One cause for concern involves arbitrating in the metaverse based on the arbitration clauses found in a new generation of instruments: smart contracts or blockchain-based contracts. Smart contracts are self-executing instruments, drafted in code form on a distributed ledger that often provide for arbitration in the metaverse. This involves certain automated functions such as invocation of the clause and rendering an award, possibly in the form of code. However, it is not certain that the award will be automatically executed – parties may have to approach state courts for recognition and enforcement. It is against this backdrop that this post aims to address whether the New York Convention is equipped to enforce awards rendered in relation to arbitration disputes that take place in the metaverse and, if not, whether resort to the UNCITRAL Model Law on Electronic Commerce ("Model Law on Electronic Commerce") or the United Nations Convention on the Use of Electronic Communications in International Contracts ("Electronic Communications Convention"), which could be enabled by the New York Convention's "more favorable rule" provision, could resolve doubts as to the recognition and enforcement of such awards.

Metaverse Awards and Form Requirements

The reliance on blockchain-based contracts with self-executing arbitration agreements involves the automatic invocation of the arbitration agreement if a dispute arises. While such contracts are secure and safe from cybersecurity threats (as discussed in a previous post by Ibrahim Shehata), they do not conform to the form requirements of Article II(2) of the New York Convention, as they are code-based. Second, and more importantly, blockchain-based arbitration agreements are digital, and standards to determine consent in case of traditional instruments may not be the right tools for them. Consent is a crucial aspect of arbitration that cannot be ignored and should be determined in a manner that serves the dual purposes of not jeopardising the award and facilitating technological advancements in arbitration.

Article II(2) requires contracting states to recognise an arbitration "agreement in writing" by which

parties agree to resolve their disputes. Article II(2) defines "agreement in writing" to include instruments that have been "signed by the parties or contained in an exchange of letters or telegrams". Metaverse arbitration agreements and awards are based on blockchain technology. That is, once a dispute arises, the proceedings use blockchain technology and automate steps such as invocation of the clause, conduct of arbitration proceedings, and rendering of an award. However, the award will not be signed in the traditional sense, as a blockchain-based arbitration agreement and the eventual award that will be rendered constitute a self-executing instrument based entirely on code (discussed in a previous post by Derric Yeoh), which may not be readable.

While arbitration that takes place in the metaverse is based on a self-executing agreement, parties still need to enforce arbitral awards through the courts of New York Convention States, where the situation may not be favourable. In this regard, the form requirement of the award is not the only challenge at the enforcement stage. When an award is filed for recognition and enforcement, the party is required to submit an authenticated and original award, along with the original arbitration agreement or a duly certified copy of the same, per Article IV of the New York Convention. Considering the code-based arbitration agreement, it will be difficult for enforcement courts to affirm its form, even when a code may be provided to them, as there is a possibility that it may not be in a readable format.

Determining Consent in Online Arbitration

Traditionally, a written arbitration agreement is viewed as an instrument that entails consent to arbitrate between the parties concerned. Since the New York Convention is silent on contemporary means of expressing consent, it has generally come to mean that consent should necessarily be in writing. This aspect can be remedied by referring to Article 9(3)(a), Electronic Communications Convention, which provides that form can be satisfied by using a method to identify the parties and their intention contained in the event of electronic communication. However, this in itself will not be sufficient to determine consent due to the aspect of anonymity in blockchain arbitration.[1] As a result, enforcement courts lacking technological means to authenticate codes and determine the parties' consent to the same, may not find sufficient consent in the first place.

How Does the "More Favourable Rule" Fit Here?

While a series of enforcement difficulties exist for blockchain-based arbitration agreements and awards rendered in the metaverse, the solution may well lie within the New York Convention itself. Article VII(1) allows a party to avail itself of the benefits of a more favourable treaty or regime that is applicable at the place where the award has been filed for recognition and enforcement. The drafting history of this provision suggests that the drafters wanted the parties to an international arbitration to avail themselves of the benefits contained in any international conventions and national laws if they provide for lesser requirements for the recognition and enforcement of their awards.[2] This leads to discussion of the possible use of the Model law on Electronic Commerce or the Electronic Communications Convention under the "more favourable rule" provision of the New York Convention.

The Model Law on Electronic Commerce provides under Article 5 that an instrument should not be

invalidated if it is in the form of a data message. Additionally, Article 7(1)(a) provides that the requirement for a signature can be satisfied if a method is used to identify a person and their approval of the information contained in a data message. The Electronic Communications Convention, which applies to formation and performance of contracts between parties from different states, has similar provisions. Article 9(1) provides that a contract or any communication need not be evidenced in a particular form. Additionally, when national laws may require the contract to be evidenced in writing, Article 9(2) provides that such a writing requirement is satisfied if the information contained in the contract is accessible in a manner which makes it "usable for subsequent reference." In this regard, it can be argued that blockchain-based arbitration agreements, including details of the parties and the content, can be seamlessly verified by the courts without risk of tampering, owing to its decentralised nature. Blockchain-based technology allows parties to authenticate any claims by way of decentralized trust services, such as CertCoin, Blockstack and MyData. These platforms can issue certificates of authentication for user identification as well as data verification, which can aid an enforcement court once it has decided to apply the relevant provisions contained in the two more favourable regimes discussed above. With requirements of form and consent satisfied, courts should not encounter difficulties in recognising and enforcing metaverse awards.

Conclusion

Blockchain technology and the metaverse are poised to influence transactions over the next couple of decades, and arbitral process cannot lag behind and be deprived of the benefits of a decentralised and largely secure ecosystem. However, the proposed use of the more favourable rule under the New York Convention may come with its own hurdles, primarily because courts in different legal systems may have a different approach towards the rule. While one set of courts may extend the benefits of the Electronic Communications Convention or a similar rule in their domestic law to the parties, other courts may not be open to adopting such an interpretation. The pro-enforcement spirit of the New York Convention should allow the courts to determine form as well as consent of blockchain-based agreements and awards, which is why enforcement courts should try to address this issue through the mechanism of the more favourable rule. Ultimately, this would contribute towards enhancing the technological efficiency of the New York Convention.

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