

Kluwer Arbitration Blog

Arbitration Tech Toolbox: Applicable Law, Choice of Courts and Enforcement Issues in Metaverse Disputes

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On 24 March 2023, the [Metaverse Dispute Resolution Colloquium](#) was organised by the [Digital Law Center](#) (University of Geneva), the [Geneva Center for International Dispute Settlement \(CIDS\)](#) and [MetaverseLegal](#) to explore selected legal issues arising from disputes in/about the metaverse. Previous contributions to this blog have explored metaverse-related issues [here](#).

After the introductory remarks by Prof. [Jacques de Werra](#), Director of the Digital Law Center, Professor at the Faculty of Law at the University of Geneva and member of the [MIDS Committee](#), the panellists presented their ideas and interacted with the audience online.

[Laura Azaria](#) and [Juliette Asso](#) (LALIVE) discussed the ‘Applicable Law and Choice of Courts in Metaverse Disputes’, followed by a presentation on ‘Enforcement Issues in Metaverse Disputes’ by [Emily Hay](#) and [Pratyush Panjwani](#) (Hanotiau & van den Berg). The PowerPoint presentations of the panellists at the [colloquium](#) are available [here](#). This post is a summary of the discussions during the colloquium.

Applicable Law and Choice of Courts in Metaverse Disputes

As Azaria and Asso explained, there are no uniform rules of law at the international level concerning the metaverse specifically. However, several working groups are studying whether specific rules are required, for instance, the [UNIDROIT Working Group on Digital Assets and Private Law](#), and the UK Law Commission Project entitled ‘[Digital Assets: Which Law, Which Court?](#)’. E-commerce transactions are generally governed by the existing private international law (PIL) rules. Yet, the distinctive features of the metaverse strain the application of traditional connecting factors.

Dispute Resolution or Choice of Law Agreements

Parties can agree on a dispute resolution or choice of law clause in advance that would determine where a metaverse-related claim can be brought or the applicable law of the proceedings. However, in practice, choice of law clauses are found only in transactions between metaverse platforms and

their users (not in transactions among users). This is because they are generally included in the terms of use of metaverse platforms (e.g. ICC arbitration seated in Panama and Panama law for [Decentraland](#) and AAA arbitration seated in the Cayman Islands and law of the Cayman Islands for [Axie Infinity](#)).

Regarding transactions among users, the metaverses' terms of use are usually silent on dispute resolution method. To resolve some problems in advance, it would be technically possible to include dispute resolution and choice of law clauses (or a reference to the terms and conditions of the seller's website that contain such clauses) in the code of the smart contracts that are generally used to automatically execute metaverse transactions. Would they be valid? Most PIL rules provide that the choice of court or arbitration agreements must be either (i) in writing, or (ii) by any other means of communication, as long as the text remains accessible for subsequent reference. Hence, dispute resolution clauses in smart contracts may be valid as the text will remain accessible. There is generally no form requirement for choice of law agreements. However, the key question is whether the users would be deemed to have found, read and therefore consented, to these clauses, and the answer would depend on the parties to the transaction and would require a case-by-case analysis.

Default Jurisdiction and Applicable Law

Absent a valid dispute resolution or choice of law agreement, connecting factors typically used in PIL to determine the competent court or the applicable law are the place of the defendant's habitual residence, place of business, domicile, place of performance of the contract or place to which the parties have the closest connection. However, none of these factors are suitable for metaverse-related transactions involving anonymous avatars or dematerialised assets – the location of which cannot be determined. Possible alternative connecting factors, such as the location of the metaverse servers, the digital assets or the metaverse company registered seats appear to be equally unsuitable.

Potential Solutions

To ensure that access to justice is preserved, existing connecting factors need to be adapted to the specific features of metaverse transactions.

Universal jurisdiction where all national courts would be competent to hear metaverse-related disputes is unlikely to be a feasible solution in practice. This is because universal jurisdiction derogates from the ordinary rules of jurisdiction requiring a territorial or personal link. Instead, the workaround (i.e. only where the existing connecting factors of PIL do provide a suitable solution) would be for a claimant to have an option to initiate proceedings before the courts of his/her domicile or place of business. This solution was confirmed by the High Court of Singapore ([Janesh s/o Rajkumar v Unknown Persons \[2022\] SGHC 264](#)). As to the applicable law, a subsidiary solution could be the *lex fori*.

While the forum and the law of the claimant's domicile/place of business are traditionally considered unsatisfactory connecting factors of PIL for contractual disputes (because of the unjustified imbalance created between the parties), the speakers consider that this exception is

justified in relation to metaverse-related disputes to ensure an access to justice and connect the transaction to a legal order in every situation.

Enforcement Issues in Metaverse Disputes

Hay and Panjwani discussed that for awards and arbitration agreements in the metaverse, issues arise on the applicability of the New York Convention (NYC), substantive validity of arbitration agreements, the writing requirement and due process.

Applicability of NYC

The NYC may not be relevant for enforcing decisions rendered within the metaverse because of on-chain enforcement, *i.e.*, automatic enforcement using blockchain technology. However, the NYC can apply to decisions relating to the metaverse but rendered off-chain. (*see e.g.* the [Kleros Protocol award enforced by the courts in Mexico](#)).

However, there are two significant challenges to applying the NYC in on-chain and off-chain enforcement.

First, for off-chain enforcement, NYC [Article I(1), Articles V (1)(a), (d) and (e)] requires a seat. But a seat may not be stipulated by users of decentralised arbitration platforms because of some users' belief in exempting the arbitration from the supervision of any particular jurisdiction – and the seat may also not be capable of being determined due to the delocalised nature of the arbitrations as well as the underlying transactions taking place in virtual world. Some scholars thus advocate for *Lex Cryptographia* (a version of *Lex Mercatoria*), supporting arbitration regulated by a transnational concept of arbitral consent rather than a seat. While French courts have used Article VII of the NYC to put *Lex Mercatoria* into practice, Panjwani discussed how it may be an academic fantasy at present to interpret Article VII to apply a transnational legal order. This is because the favourable right under Article VII emanates from a national legal order, rather than a transnational legal order.

Second, identifying the party / parties to claim against may itself be an issue due to the anonymity of avatars in the metaverse. Several organisations have thus emerged to work on asset tracing and identifying parties in on-chain enforcement. Ethereum's founder has also spoken about “soul bound tokens” that includes due diligence of users when entering into smart contracts. In the context of off-chain enforcement, an ingenious solution has been followed in the [Binance France case \(2022\)](#) to implead Binance as a garnishee to freeze assets of the debtor.

Substantive Validity of Arbitration Agreement

There are also three key issues of the substantive validity of the arbitration agreement [Articles II(3) and V(1)(a)] if the NYC applies.

First, the anonymity of metaverse users makes it difficult to ascertain the users' legal capacity to

enter into an arbitration agreement as per the applicable law.

Second, user-platform disputes may involve arbitration clauses which are one-sided in nature or unconscionable, especially in the business-to-consumer context. The US Supreme Court has rendered its decision on this issue in *Coinbase v Bielski* (2023).

Third, who has offered/accepted the contract: avatars or programmers of the smart contracts. Offer/acceptance requires knowledge of the contract. Panjwani discussed *B2C2 Ltd case (Singapore)* on the attribution of knowledge of contract in the metaverse. The majority opinion held that the knowledge of the contract should be knowledge of the programmer and not of the user or avatar. The dissenting opinion observed that a programmer's knowledge cannot be struck in time when the program was made and should consider facts and circumstances after the contract was entered into.

Writing Requirement

Another significant issue is whether Article II(2) of the NYC can accommodate arbitration agreements arising within the metaverse. Some developments in international law allow a flexible interpretation of Article II(2). For example, [Option 1 of Article 7 of the amended UNCITRAL Model Law](#), the 2006 UNCITRAL Recommendation on the interpretation of Articles II and VII of the NYC, and the works of [UNCITRAL Working Group IV](#).

In this regard, legal texts addressing electronic communications and digitalisation are designed to be technology neutral. However, the interactions in the metaverse are still speculative and barely resemble conventional electronic communication. As metaverse transactions grow, issues will arise concerning how to enter into an agreement and how various agreements interact. With flexible interpretation, the writing requirement of the NYC may not pose an insurmountable obstacle, because blockchain technology is highly suitable to creating an immutable record.

Due Process and Public Policy

Articles V(1)(b) and V(1)(d) of the NYC and national legal order raise concerns of due process. Hay discussed the [Amsterdam Court of Appeal decision](#) of 29 January 2019 which addressed that due process requirements are mandatory even in cases where the dispute resolution takes place online or through email. Additionally, the Court observed that there was neither any seat nor applicable national law for arbitration. Therefore, the Court refused to enforce the award under NYC.

Where arbitrators are anonymous, the parties are denied opportunity to challenge the independence and/or impartiality of the arbitrators. Further, questions arise where the arbitrators have a financial interest in the matter due to their staked tokens. Parties may incline towards efficiency than rigorous due process, with a desire to opt out of due process requirements. This will require determination of scope and contents of mandatory rules of due process. In general, the language of NYC does not set these limits. As such, there is room for evolution in our understanding of due process, in coordination with national law and interpretation by national courts.

Conclusion

There are no uniform rules of law concerning the metaverse, and the distinctive features of the metaverse limit the application of traditional connecting factors of PIL – or otherwise require one to translate traditional requirements (e.g. of arbitration agreements being in writing) to a new context. While the above shows that there may be no definite answers to all questions, it may be a helpful guide to navigating the legal issues which may be relevant in metaverse disputes.

Further posts in our Arbitration Tech Toolbox series can be found [here](#).

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