

# Kluwer Arbitration Blog

## Seoul ADR Festival Recap: Current Trends and Predictions on Digital Assets Disputes

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The Seoul ADR Festival (“SAF”) 2023, hosted by the Korean Commercial Arbitration Board (“KCAB”) INTERNATIONAL, was held from 30 October to 3 November 2023. The 12th Asia-Pacific ADR Conference, the flagship event of SAF 2023, took place on 1 November 2023 and was attended by approximately 300 participants on-site as well as other attendees simultaneously joining the conference online. It covered a broad range of topics over four sessions. The fourth session of the day, entitled “Your Money in the Digital Jungle: What Does It Mean to You?” brought together experienced arbitration professionals from various jurisdictions to discuss an array of topics on international arbitration, digital assets, fin-tech, and other relevant matters.

The panel was moderated by Leng Sun Chan SC (Senior Counsel and Arbitrator, Duxton Hill Chambers) and its discussants comprised of Duncan Speller (Partner, Willkie Farr & Gallagher), John Choong (Partner, Freshfields Bruckhaus Deringer), Mike McClure KC (Partner, Herbert Smith Freehills), and Shaun Leong (Partner, Withersworldwide).

Mr. Chan opened the session by introducing the relevance of the session topic, explaining it in the context of digital assets and the value of such assets in our physical world, and inviting the panelists to provide their perspectives based on recent experiences.

### Definition and Examples of Digital Assets

Mr. Speller first offered a definition of the term “digital assets” in laymen’s terms: an “asset” is something of value, while “digital” means comprised of data, particularly numeric data. An example would be a non-fungible token (or NFT), which is identified on a disclosed database that provides a means for certifying ownership. Mr. Speller pointed out that a United Kingdom judicial taskforce produced a [paper](#) explaining that digital assets do not necessarily fall into the historic categories of property but do have certain indicia of being property (covered in this blog, [here](#)). In many jurisdictions, he explained, there is growing jurisprudence that digital assets can be the subject of proprietary rights and remedies.

### The Kinds of Disputes that Arise Involving Digital Assets

Mr. Choong introduced four types of disputes involving digital assets. The first category would be fraud / misappropriation claims with regard to crypto assets. This is currently the most common kind of dispute relating to digital assets, but such disputes are usually handled through litigation rather than arbitration, according to Mr. Choong. The second category of disputes involves mis-selling claims, which typically arise in the context of insolvency. He added that he has seen an uplift of these claims in the last 1-2 years. The third category is classic claims involving share purchase agreement or investor agreement claims. Lastly, the fourth category comprises financing disputes on how security granted over digital crypto assets is enforced.

Following Mr. Choong's introduction of the four categories of digital asset disputes, Mr. McClure pointed out that there have also been award enforcement cases involving digital assets. He discussed some examples of countries with policies and legislation that have led the courts to refuse enforcement of awards on public policy grounds where the arbitrators ordered payment in bitcoin. Mr. McClure mentioned that the list of such jurisdictions includes the People's Republic of China ("PRC") and Greece.

### **Characteristics of Disputes on Digital Assets (in the Present and Future)**

In response to inquiries on this topic, Mr. Choong observed that the majority (80-90%) of the disputes related to digital assets in which he has been involved concern legal matters that also arise in other non-digital asset disputes such as conflicts on share purchase agreement or joint venture agreements. But he pointed out that a minority of disputes implicate the elements of digital assets that make them unique, specifically, their intangible and mutating nature.

He divided the disputes that belong to the latter category into three groups. In the first group are disputes that concern whether the digital assets should be treated as property in nature. He emphasized that many jurisdictions, such as Hong Kong, Singapore, and the [Republic of Korea](#), actually do take that perspective, but he also cautioned that certain issues are likely to occur as a consequence of taking this stance, e.g., two individuals sharing rights to one common digital asset. The second group of disputes concern the legality of digital assets. For this category, the seat of arbitration, the applicable law (governing law), and the enforcing state court are variables that may impact the legality of crypto assets. The third group of disputes are those that relate to the value of crypto assets or their lack of volatility.

Mr. Leong then shifted gears to consider the possible future interactions between Artificial Intelligence ("AI") and Blockchain technologies. He underscored that AI is by nature a biased system as it has to rely on the data it has accumulated and, in order to be as unbiased as possible, the system needs a large volume of data – something the decentralized system of Blockchain can effectively provide. Similarly, Mr. Choong claimed that Blockchain can just as much benefit from AI because in digital transactions the latter can increase the efficiency of the former.

### **Digital Assets' Lack of Physicality and Conflict of Law Issues**

Mr. McClure then started off discussions on the next matter by underscoring the complexity of the digital assets and related conflict of law issues. He then shared his understanding of the English courts' approach, which is to try to find the location of the digital asset by determining the place of

residence of the owner of the asset. He noted that conflict of law issues still persist with this approach because digital asset platforms span across many jurisdictions and have many users from different jurisdictions. He suggested that the best way to address this issue is via well-written contracts.

Mr. Speller, noting that this is an area of law where there is a good amount of uncertainty, added that it is important for parties to make clear what governing law they intend to apply as well as what jurisdiction they intend to select.

Agreeing with the challenges his fellow panelists acknowledged, Mr. Leong also contributed to the debate by mentioning legal as well as practical difficulties related to this topic. He indicated that losing parties to an arbitration could make use of the negative perspectives some jurisdictions have toward the legality of digital assets as well as the losing parties' potential capability to hide crypto assets and deter the enforcement of awards in digital asset-related disputes. He mentioned that several jurisdictions are working on ways to prevent such methods from taking place.

### **Other Memorable Moments at the 12th Asia-Pacific ADR Conference**

Whilst the session described above offered stimulating debates on the status of digital assets in the realm of international arbitration, other sessions of the day also offered lively contributions from established legal practitioners and academics, making for one of the meaningful and in-depth SAF conferences in recent history. In his Keynote Speech titled "New World, No Map," Christopher Lau SC (Arbitrator, Three Verulam Buildings) delivered a speech on AI and the actions the international arbitration community needs to take in response.

Thereafter, in the first session of the day, representatives from the KCAB and other institutions gave their perspectives on how they have responded to the latest challenges in the arbitration arena, such as crypto-currency, fin-tech, and COVID-19. Despite facing different circumstances, the institutional speakers agreed that they share a unified goal of working together with users to provide effective and efficient arbitration services.

Next, Kap-You (Kevin) Kim (Senior Partner, Peter & Kim) stylishly kicked off discussions on the second session, titled "Keep Up or Perish: Practitioners' Dilemma in the New Digital Age," by presenting a talking AI version of himself on the conference screen. Panelists then shared their views on the role of AI in the current and future arbitration market, lauding its ability to help humans in terms efficiency, objectivity, and drafting of awards, while also cautioning about some of its downsides. Nevertheless, all panelists agreed that AI will not be able to completely replace the human element that is critically fundamental to the upholding of arbitral justice.

In the third session, Professor Hi-Taek Shin (Arbitrator, Twenty Essex) invited panelists from the Republic of Korea, PRC, and India to share the latest developments in the realm of investor-state disputes. Anna Joubin-Bret (Secretary, UNCITRAL) and Meg Kinnear (Secretary-General, ICSID) also gave presentations on their respective organizations' recent achievements in advancing their contributions.

*More coverage from Seoul ADR Week is available [here](#).*


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