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Arbitrating Crypto, NFTs and Other New Technologies: Demystifying the Landscape

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New technologies, such as blockchain and artificial intelligence, are evolving into their own ecosystem of attractive yet complex structures. The legal and regulatory landscape surrounding such technological developments has historically lagged. Legislators, regulators and courts struggle to keep up with a sector that moves quickly and in multiple directions.

Conversely, the arbitration community stands out in that regard, as the agility and speed that are its *raison d'être* can be particularly fitting for the fast-evolving technology space. In this article, I look at the appeal of arbitration for this growing industry and the potential challenges it presents for arbitrators. I then turn to the legal and regulatory landscape arbitrators will navigate when faced with cases involving new technologies.

There is limited visibility on the number of technology-related matters that are being heard in arbitration proceedings. However, the attractiveness of arbitration as an alternative dispute resolution mechanism is clear.

First, arbitration gives parties the ability to appoint an adjudicator who has experience in their industry. They even have the option of appointing arbitrators who are technology professionals and not lawyers. Although this may not be necessary in all cases, there may be situations where the complexity of the dispute and facts involved warrant the selection of an arbitrator who is well-versed in the technology terminology and the dynamics of its actors.


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Also, as a swifter and generally more efficient process than the court system, arbitration is an obvious choice for a business where time is generally of the essence and speed is necessary to keep up with competitors, funders and the market generally.

In that regard, the ability to minimize the procedural timeline with arbitration seems to be especially important in light of the significant valuation fluctuations that have marked the sector.

Finally, the confidential nature of the arbitration process and the opportunity it affords parties to avoid national court proceedings are generally quite appealing given the various multi-jurisdictional facets of most of these disputes.

As attractive as arbitration may be to the technology players, the industry does present some inherent complexities that an arbitrator will have to address when hearing a technology matter.

To start, the pseudonymity of its constituents may pose a problem in confirming an arbitrator's jurisdiction, which requires that all parties to an arbitration agree to the terms of an arbitration agreement.

Another challenge relates to cases involving the platforms that house the products and their trading infrastructure. Such businesses tend to operate globally but without a physical locale, making the determination of their "jurisdictional base" difficult for the arbitrator.

There may also be enforceability issues that the arbitrator will want to consider when deciding their case: although the 1956 UNCITRAL Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) affords arbitration awards the deference needed to ensure the effectiveness of the process internationally, there are certain exceptions that could be particularly relevant in a technology dispute. For example, a domestic court may refuse to enforce a foreign arbitral award that is based on an aspect of the technology that collides with its home country's acceptable norms. A ruling of this nature would presumably fit within the confines of the New York Convention's public policy exemption to the enforcement of arbitral awards.

Notwithstanding such potential complications, the legal landscape of technology disputes is, in and of itself, rather straightforward: most of the disputes can be analyzed based on established legal principles.

Ultimately, basic contract law concepts, intellectual property protections and restrictions, and general tort notions apply to all such matters and will often form the basis of the scrutiny required in their adjudication.

Indeed, once an arbitrator "peels off" the technical elements of the dispute, they will generally be faced with facts requiring a legal analysis that is similar to that of other commercial cases. For example, a significant number of legal disputes involving cryptocurrencies have been based on claims of fraud, fraudulent or negligent misrepresentations and breach of contract.

Although there have been fewer NFT cases given that it's a newer technology, we can already see intellectual property-based disputes arising. Going forward, we should expect an increasing number of disputes involving the platforms that house such technology "assets" based on similar claims.

Some trickier issues, however, revolve around the regulatory framework that may be applicable to both the technologies and their platforms. For example, an adjudicator may need to determine whether the technologies underlying a dispute are "securities," and thus regulated by the Securities and Exchange Commission (SEC), or derivatives to be regulated by the Commodities Futures Trading Commission (CFTC), or otherwise subject to the rules of one or more regulatory agencies.

Indeed, although the regulatory landscape may not necessarily impact a claim itself, it may have ramifications on the scope of a cause of action and the type of remedies available to a claimant.

To date, guidance from the legislators and the regulators on these questions has been somewhat nebulous. Certain agencies have acted on matters they have deemed to fall within their jurisdiction based on their general rules and standards. They have largely done so in an *ad hoc* manner, without articulating any specific or meaningful guidelines that take into account the intricacies and specificities of new technologies.

Similarly, courts have applied traditional rules in assessing whether certain technologies, and the related actors, are subject to a regulated regime. Generally, to determine whether or not a specific technology-based transaction falls within the securities regulatory scheme, in the absence of regulatory or legislative guidance tailored to the technology

space, courts have simply applied the "Howey Test," established by the Supreme Court in 1946 (under this 4-prong test, a transaction will be deemed to be an "investment contract" subject to the securities laws when it involves an investment of money, in a common enterprise, with a reasonable expectation of profits, derived from the efforts of others).

Most recently, on March 23, the SEC's Office of Investors Education and Advocacy issued an Investor Alert entitled "Exercise Caution with Crypto Asset Securities." In it, it states that "[t]hose offering crypto asset investments or services may not be complying with applicable law, including federal securities laws." It highlights a number of protections afforded to holders of securities registered with the SEC and confirms that "no crypto asset entity is registered with the SEC as a national securities exchange."

It further states that some offering entities "may" be subject to federal securities laws but it does not give any clear indication of which such entities should be registered, or more generally fall under their jurisdiction.

It remains to be seen whether a similar alert regarding NFTs and their platforms will be issued. This Crypto Investment Alert came days after Coinbase was issued a Wells notice in which the SEC states that the crypto platform may be violating US securities laws. However, no specific allegations were made, so it is uncertain what exactly is at stake and what will follow.

Separately, on March 27, the CFTC filed a complaint in the US District Court for the Northern District of Illinois against Binance Holding Ltd. (and related entities and persons), a platform which purports to be the world's largest digital asset exchange by volume.

The complaint alleges, among other things, that Binance actively solicited US clients for its commodity derivatives transactions and that it was required to register with the CFTC and knowingly violated its rules and regulations.

It's unclear whether the SEC's Crypto Investor Alert and the CFTC's complaint are precursors to the issuance of instructive guidelines or rules. As technology cases find their way to the courts, the regulatory landscape may evolve.

Until then, courts will likely continue to follow previously-established guidelines in analyzing these cases. Arbitrators will want to follow this same path when deciding similar issues in technology cases, in particular when assessing the type of remedies available to a claimant.

Arbitration is undoubtedly a natural fit for disputes involving new technologies. The technology community, in its eagerness to limit the legal distractions and to focus on a fast-paced business, will likely increasingly turn to arbitration. It will likely look to leverage the flexibility of the arbitral process and its ability to adapt quickly and effectively to an ever-changing landscape.

As mystifying as the underlying technology may be, the legal framework in which new technologies operate parallels that of traditional commercial disputes and will require a similar legal analysis.

The arbitrator's task when dealing with these disputes remains clear and feasible, notwithstanding the intricacies of the industry and uncertainty surrounding the applicable regulatory regime.

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