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### India Arbitration Week 2022

#### Session: Arbitration in the era of Web 3.0 and Tokenomics

Event Date / Time : 10<sup>th</sup> October 2022 / 10 am

Event Duration : 1 Hour 5 minutes

#### SPEAKERS NAMES:

1. **Alipak Banerjee,** : Leader, International Dispute Resolution and Investigations Practice
2. **Ashish Kabra,** : Head, Singapore Office, NDA
3. **Baiju Vasani,** : Twenty Essex Chambers, London
4. **Belinda Lim,** : Co-Founder, Me3 and Singapore Representative of Women in Blockchain Asia
5. **Shobana Iyer,** : Swan Chambers, London
6. **Vyapak Desai,** : Leader, International Dispute Resolution and Investigations Practice

**Neeti Sachdev**

Good morning, everybody and welcome to the 2nd edition of India ADR Week. We have a week plan from today up to 14th of October, with 20 different virtual sessions with the support of 50 supporting organizations spread across universities, different Arbitral Institutions, Chambers of Commerce, Bar Associations, and, of course, the support of the International and Domestic law firms, Expert Organizations, and Arbitral Institutions. What we look forward to is an interesting discussion over the week, and we're very glad that we have the inaugural message from the Chief Justice of India, Justice U.U. Lalit, which I'm very happy to play for all of you.

**Justice U. U. Lalit**

Good morning, ladies and gentlemen, I would like to start by congratulating the team at the Mumbai Center for International Arbitration for putting together the 2nd edition of India ADR Week for the year 2022. I understand that the ADR Week will see participation from International and Domestic practitioners across 20 technical sessions held during the week. I'm happy to see that an event of this scale, that is being organized in India, is supported by Arbitral Institutions, Bar Associations, Chambers of Commerce, Universities, Expert Organizations, and law firms from around the world.

I'm confident that events such as these will go a long way in promoting India as a favourable jurisdiction for not just arbitration, but mediation and ODR that is Online Dispute Resolution as well. Alternate forms of dispute resolution have come a long way from being casually adjudicated out-of-court settlements, to structured processes that instill confidence in not just the parties but the courts as well. The ADR mechanism was introduced with the intention to allow for the speedy disposal of cases and delivery of justice. The primary objective of ADR is avoidance of vexation, expense and promotion of the ideal of access to justice for all.

Events like the ADR week, not only give an opportunity for stakeholders to deliberate on relevant topical issues, but also creates a robust platform for young practitioners to explore important aspects of alternative methods of dispute resolution. The Supreme Court has been instrumental in ensuring that Institutional Arbitration gains greater acceptability in India. On multiple occasions, the Supreme Court of India has referred matters under Section 11 of the Arbitration and Conciliation Act 1996 to Institutional Arbitration. This not only enables parties to seamlessly move that matter to Institutional Arbitration, but has also reduced the burden on the courts.

It has been my experience that disputes can be settled with greater efficiency, when there is a non-adversarial environment that is created between parties. The best way in which this may be achieved is by parties referring their matters to mediation. Here too, the courts have been extremely encouraging and have urged parties to refer their matters to mediation. As India grows economically, it is important that the courts look at quicker, more affordable forms of dispute resolution. While still in a nascent state, Online Dispute Resolution for small matters of limited complexity, may pave the way to ensure that poorer litigants are given greater access to justice.

I'm happy to see the scope of ADR being expanded to include newer, future-focussed topics and solutions. I'm confident that non-partisan initiatives such as the India ADR Week will go a long way in demonstrating to the world why India is a favorable jurisdiction for disputes, in addition to encouraging parties to look beyond courts for litigation. I wish the India ADR Week, its partners and participants, the very best. Thank you.

**Neeti Sachdev**

With that, Vyapak, I hand it over to you to kick start the Indian ADR Week with the 1st session of the day.

## Vyapak Desai

Thank you. Thanks a lot, Neeti and Madhukeshwar and the whole team of MCIA, Steffi for pulling this through. I think this was a humongous effort. Being part of the Council and Co-Chairing the Council at MCIA, we know a lot of hard work has gone into putting this program through. So, congratulations to each one of you. And it's one of the most unique programs, in a way that while there are more than 20 technical sessions through the week, including 2 or 3 sessions even done by the Young MCIA physically, between Bombay and Delhi. There are also networking sessions in the evenings, which are being set up in Mumbai, Delhi and Bangalore.

So it's uniquely hybrid, where we can include a lot of speakers and organizations, I'm told more than 50 organizations have supported this event. And most of the Arbitral Institutions have been participating in this event. So, it's truly international in that sense. So thanks a lot, and congratulations for that. With that, let me start straight away to the topic. Today, we are going to discuss arbitration in the era of Web 3.0 and Tokenomics.

Now, why we chose this topic particularly for the very first session of the India ADR Week, is for the simple reason that while there are many existing issues, there are many current present issues that we are dealing with for International Arbitration, and particularly arbitration in India, we thought it might be a good idea to start the event looking at the future, and see what is coming, so that we can also gear up for that. And we have some excellent speakers, some of the very experienced people both from the industry and from the arbitration world across the jurisdiction.

So straight away, I will introduce the speakers very, very quickly. We have Baiju Vasani, I would have introduced him just to say he's a friend. But he has more than two decades of experience with law firms, including Jones Day, where he was running between, literally running between Washington and London. And then now he's joining as a Barrister with Twenty Essex, and one of the best lawyers that we have dealt very closely, on several matters in the past. He acts as an



arbitrator and counsel and has vast experience on energy, charter treaty, public international law, and also a Professor of Law at several important universities across the world.

We also have Belinda Lim, representing the industry that we are going to talk about or I would say the new world that we are going to talk about. I don't think it's an industry, it's a new world that she's representing. She is a Co-Founder at Me3, which was formerly known as Avarta. She is also a Singapore representative at Women in Blockchain and also a very, very renowned author and speaker at several events taking the cause further. Along with Belinda, we also have Shobana Iyer, she is a Barrister with Swan Chambers. She's also joining from London and I think I forgot mentioning Baiju and Shobana have joined us at very, very early hours.

So, thanks a lot both of you for doing this at 10 am India time, which I don't know now what time it is in London, but I'm sure it's very, very early. And she practices commercial and corporate law. But she has very keen interest and very, very deep expertise covering issues related to software and hardware, procurement, outsourcing, supply and development, SAS contracts, E-commerce, and of course, the new world that is emerging with Web3. So, she has lot of practical experience and advice, a lot of clients in this field. So we'll be very, very happy to hear her views today.

Along with the external speakers, I have two of my colleagues, Ashish Kabra, who heads our Singapore office and does a lot of arbitration, corporate advisory and recently, he has been advising a lot of clients on contracts related to Tokenomics and Web3. So, he'll also share his experience sitting out of Singapore. And we also have Alipak Banerjee, who is a senior member of our firm, sitting out of our Delhi office, Co-Chair at Young MCIA, and doing some amazing work at NDA for last 10 years.

So with that introduction, and so this topic, I don't want to dwell too much on the topic, because we have some great speakers to hear, but we have seen some very, very deep interest and changing scenarios, particularly for dispute resolution, because the business models that are emerging because of Web3, crypto currencies, Blockchain technologies, and the Tokenomics,

the whole industry or the ecosystem around it in terms of issuances, transfer and exits, we have seen some very interesting contracts emerging, which involves multi jurisdiction, multi parties. So, without going too much into the topic, I'll hand it over to Alipak to straight away getting to the business models first, and then we'll deal with the legal issues. Thank you.

### **Alipak Banerjee**

Thank you so much Vyapak. Great to be here joining everyone, early morning. So as Vyapak mentioned, I think first we'll try to understand a bit about the industry before we get the lawyers to do the talking. From that perspective, my first question would be to Belinda to briefly explain the new businesses and business model emerging due to new technology, like Web3, NFT, Blockchain. And in particular, we are requesting you to explain the currently established businesses, the new trends, the new use cases, and how are the larger institutions adapting to the new technology? Over to you Belinda.

### **Belinda Lim**

Thank you for having me here. I'm very honoured to be part of this event. I just want to share with you a little bit of the history of like, what's going on. Bitcoin, as we all know, it was started in the 2008. So, the whole industry is it's not as new as we thought, right now it's about 14 years since the start of Bitcoin and Bitcoin, I think the market cap today is about 370 billion. With some of this, the established business, we can see from the most regulated ones, we have like the exchanges, the crypto exchanges, and we have a lot of venture capitalists, firms who have been investing in this space. We have the new Metaverse company. I think Facebook has rebranded themselves to Meta.

And this is a part of the whole entire Web3 ecosystem. We have the less regulated one is of course the defi space, which is known as decentralized finance. And I think recently, we have seen a lot of game fi, which is all of these games coming on the Web3. So, I think we have a huge



variety of the business model. I would say that in terms of the most established businesses with probably the exchanges, or we have seen like Coinbase, which is listed in the US of the market cap of around \$10 billion. So, I think there's a wide range of businesses we have seen in the space. And I think in terms of statistics, I think there's a reason why people are coming into the space. Web3, a lot of the statistic shows that it could be up to about USD 33 billion by 2030.

Some say that it will be even higher, like 80 billion by 2030. And when people project the metaverse space, part of the web directory space, or some people estimate it to include ecommerce, including VR to be around \$13 trillion. So, I think definitely, there's a lot of opportunity and hype around this particular area. In terms of the whole entire trend, I think we are quite lucky. We're all in Asia-Pacific, the Asia-Pacific is anticipated to have the fastest growth of all the Web3 development.

Also, I think this is a great time to all look at this phase at the moment, because I think we are in the era of growth. I think there's also increasing advancements in 5G, artificial intelligence and machine learning. These are all key factors of how the Web 3.0 industry can grow. We have a lot of our investment in research and development in terms of the industry infrastructure. And in terms of the statistics, so we have seen like your Web3 and crypto startup, raising more than 1 billion USD in funding across like I think about 43 deals in the first six months of 2022. So, I think we saw a lot of investment I think we are in top 4 for innovation. So, I think that in terms of the trend we are definitely growing.

And I think are we going way faster that we are seeing. In terms of the trend, I will say that, right now we're looking at more regulation, covering a broad range, including licensing, crypto licenses, we're talking about data protection, and we're talking **[inaudible 00:15:20]**. I think in the past six months, we have seen a lot of consolidation in the market. I think there has been crashes with a large company who were supposed to be too big to fail, failing. So, I think, right now, I think it's very important, especially for the government worldwide, to increase the amount of protection for the consumer.

So, I think in terms of trend, I think that's something that we are seeing more and more regulation, and I think this is actually a good thing for the industry. Because I think we need more regulation for people to not hit and run. We need people to have all the investment being put at the right projects and building the infrastructure for the future, as we speak. So, I think one thing really interesting is that there's an increased focus on ESG. As we know, generally speaking near the Bitcoin proof of work consensus mechanism has wasted a lot of electricity. So, this has always been a big point in the crypto industry or Web3 industry, we are using a lot of electricity which is really bad for the environment.

So, I think there's a lot of innovation in the space, we have seen companies for dealing with carbon credit tokenization. So, I think that has been a very interesting space. And in terms of exchanges, we just talked about established businesses, I think the exchanges are also going through a period of consolidation. About the largest exchange Huobi, they are one of the top 10 exchanges, they are just, I think about two today's back, they are about to be acquired by a Hong Kong based investment company, an M&A fund, I think size is more than a billion dollars. So, I think a lot of exchanges after many years of the wow, cowboy style, they're starting to be consolidated.

Also, I think due to the increased need of regulation, you need more resources to be able to meet all this like, specification for different countries. And most exchanges have to deal with like multiple jurisdictions. So, the internal resourcing, I think there's something that's very interesting. In terms of the use case, I would say that there, I'm not sure whether you have heard of this thing called DAO, the Decentralized Autonomous Organization. So while it is really an organization that's constructed rules on a computer program. So, in fact, it's more of like a member or community without centralized leadership using tokens, or NFTs that govern voting power.

So, it's extremely powerful as members can raise money with a central purpose. So, for what the most famous DAO is probably the Constitution DAO, that was formed in November 2021. They wanted to buy a copy of the Constitution, they raised about \$47 million for the whole entire market.



And this is still not a centralized organization, but a decentralized organization. So, I think right now, I think the market has shown that DAO can raise a lot of money for central purpose. So, this is interesting, in a sense, there's no way to talk about ESG, right? A lot of times, some areas are not getting enough funding if you're going to the traditional route.

But with the DAO structure, like for example, if you're very interested in like women led investment, you can create a DAO around the central cause. But of course, because it's decentralized, there is a lot of question regarding the corporate structure of it, how the regulation and how do you protect it. So, I think generally speaking, I think this is some key trends I've seen in the market. In terms of the institution, I think institutions are still trying to figure their way out.

Some institutions are really spinning more product offering, or implementing **[inaudible 00:18:48]**. So, I think we see two different pathways for company. So, for example, in Singapore, the largest bank, DBS, they have launched their own crypto exchange for accredited investors. Then they also launched a plot of land in this, the metaverse through collaboration with the sandbox company. So banks, they are also trying to figure out what they are doing. But the easiest way is, of course, to offer crypto offerings to their existing pool of customer.

So, I think it's something that we have seen. And then, I will say something that's more interesting, that's going through not just the financial institution, is also something called the tokenization. So, if you know, tokenization is idea of being able to fractionalize like a lot of this ownership. So, if you're trying for them, you have a developer, you're trying to be like I'm trying to sell like a big plot of land. What you could potentially do is to fractionalize the land and anyone who own a piece of that, like a fraction of it, you can actually find ways faster and potentially have more liquidity on the market.

So, I think a lot of the companies from different industry, also ETF tokenization or like in supply chain, generally speaking we are talking about like using supply chain or using a Blockchain for provenance, making sure everything is in line. And then for luxury brands I've seen them doing to



verify the authentic part of things to make sure that this is the certification ownership. And this is real. So, I've seen a lot of companies that are doing different things.

And I think particularly for brands, the whole entire NFT space has given them a lot of opportunities. They have launched a lot of what we call phygital, physical digital products. So, for example, if you buy a, maybe a shoe, they can give you NFT. And then the NFT, for the shoe be worth more than extra shoes. Don't ask me why. The market has tried, such that there's more opportunities to make their money in the industries. So, I think that's just quick roundup of what's happening.

### **Alipak Banerjee**

Thank you so much, Belinda for giving us insights. Now, I have one more question to you before I hand over to Vyapak. So, what are the different commercialization models? And in particular, what does the underlying contracts they look like? What are the roles and what is the nature, if you can briefly touch upon that?

### **Belinda Lim**

I will say generally speaking, most Web3 as to corporate entities, with VIERA contraction needs, like starting from fundraising, like we have the simple agreement for equity super agreement for tokens. And also, there's a lot of need for contract with vendors, for example, like six centralized crypto exchanges, they are working with technology stacks, right? They have a lot of this vendor relationship all the way to consumer term of use. So, they have a lot of contractual and I think, if we are thinking about it, it's not that, it is still running like a normal entity.

So, I think in fact there is, for example, if you're hiring employees, so that's also employment contract, but I don't actually company, generally speaking, could be more international, compared to a normal business. So, I think there could be some implications in terms of the jurisdiction. But

how do you pay your employee overseas, regarding a part-time full-time position, some of these nuances, covering this. In terms of the DAO, I think that something that no one knows yet, because it's decentralized. A lot of these terms of use, even in this contract where you put your money in. So, I think this is something that is a huge area of unknown.

And I think we need a lot of collaboration between different industry partners to define this. How do we define, how do we manage this as a decentralized organization? What happens if there's a hack, and then majority of funds are lost? How do you protect a lot of this, like financial assets? So, I think in terms of that, I would think that if probably for pretty much the same as we think now, in the physical world. I think personally, for me, I think the investment side is something that we definitely need more help on, because a lot of time the market shifts really fast. So, for now, with this business model, we have seen a lot of people who have seen in other business doing the same thing, and then it shifted assets over. So, I think the contracts are really important to protect the interests of the investors, especially in this space.

### **Alipak Banerjee**

Thank you, over to you Vyapak.

### **Vyapak Desai**

Sure. Thanks a lot. And let me take this little further on. I think at NDA, we always talk about that every new business model brings in a new legal, tax or regulatory issue, and this new world or ecosystem is no different. So straight away to Shobana, what's your take on this? Financial crimes, fraudulent activities, how regulators are looking at it? And from a public policy perspective, as well, how are regulators dealing with this?

## Shobana Iyer

It's a complicated landscape. And I think it's because it's evolving still at the present moment. You have to think about why it is still evolving, it is mainly because even the technology in this area is evolving rapidly as well. They've got unique characteristics, the variety of tokens, in terms of the crypto assets, and the rapid evolution in the landscape, and the uses of these tokens. I mean, now you have a variety of different tokens from exchange tokens to utility tokens, there could be security tokens, stable coins, or Non-Fungible Tokens.

So you've got the complete variety of these just on crypto assets, let alone when you add in the smart contracts in play with that, and as Belinda has said, with DAO structures. So, the area is evolving. DAO was in existence from 2016, but I say that over the last 18 months, it's grown rapidly like anything and people are seeing how it can actually apply in all different sectors.

So initially, yes, you would think it's in the FinTech sector with regard to investments, etc. But now, even with mixing DAO structures with crypto assets as well, you get these completely new models of initial coin offerings being provided and assessed by DAO structures. So, you've got this whole new world of all these new technologies coming together. And so we have this kind of rapid landscape. And if you look at things like crypto assets itself, when I'm talking about crypto assets, I'm looking at any kind of the definition of crypto assets which is used here in the UK.

And which Financial Conduct Authority means crypto assets are cryptographically secure digital representations of value, or contractual rights, that use some type of distributed ledger technology and can be transferred, stored or traded electronically. That's a similar kind of definition that's being used by the European Banking Authority, as well as the markets and financial authority as well. So, you see that the definition of crypto assets is so wide itself and it's evolving. So, you see that there are major differences in and major hurdles, which of course, the regulators have to deal with, not just on the financial side, but you've got regulations in advertising.

You may have heard about the Kim Kardashian kind of issue with her advertising, I think it was F-max, she got into trouble for. And that, of course has put out things like the Advertising Standards Authority here in the UK, coming up with guidelines and proposals as to how to do advertising or promotion of these. So, it's mainly been held in several kind of areas. One is, of course, data protection issues, but also the consumer protection issues. We know that a case has gone, a recent case has gone all the way to the Court of Appeal.

With regard to the arbitrability, I mean, with consumer protection, whether you can use a consumer protection law to actually challenge the arbitration agreement as being unfair. So, it's gone as being void and null, that the arbitration agreement could be null and void because of the consumer protection issues that are there. So that's a case that's gone, I think it's about but I think, it's gone all the way to the Court of Appeal. And the real issue is whether the data protection issues, and consumer protection issues can actually be challenged. And so, you've got those kinds of areas as well as the financial and regulatory areas.

### **Vyapak Desai**

Sure. Any thoughts Ashish, from your side on this particularly touching upon India, and maybe a little bit of Singapore as well?

### **Ashish Kabra**

Sure Vyapak, thank you. Firstly, thank you for having me here. It's quite privileged to be sharing this panel with such esteemed speakers. In context of India first, now, India obviously had a chequered start. We had the Reserve Bank of India coming down and instructing more regulated entities to not provide their services to anyone dealing with virtual currencies. So, effectively stalling the entire industry. I'm quite proud to say that our firm and I know Alipak in particular on this panel, was quite instrumental in having that circular struck down by the Supreme Court of India as unconstitutional.

And that probably kicked off the industry in an Indian context with the exchanges coming in. An exchange is obviously the focal point for any token, because that's the place where you derive value, that's where the token gets its liquidity from. So that kick started the industry, but thereafter, it's divided into multiple spheres. The legislature is dealing it with differently. We had the first draft bill, which was named as Prohibition of Cryptocurrency and Digital Assets Bill. Then, we came to the second bill, which was named the word prohibition got deleted and it was Regulation of Digital Assets and Cryptocurrency. That's how the legislature is currently moving. You can see the trend of the legislature.

When we look at the regulators, obviously it's a different math altogether. Actually, we now see a lot of companies and some of the areas that Belinda was talking about earlier, using the regulatory sandbox available under various regulators such as SEBI, and in particular, the Gift City regulator IFSC, their regulatory sandbox regimes to launch these New Age areas, and we have assisted a few clients in that space, I think real estate tokenization is going to take up in a big way in India. We know bond tokenization, fractionalization and tokenization is also coming to India.

So, while the traditional players are there, we are also seeing regulators now moving forward, giving the approvals in a very short timeframe and taking that, having that risk taking appetite, at least within the sandbox regime to bring this new age industry within India as well. And then obviously, the last piece, which is the tax. So, we now also have tax authorities in India trying to tax it. So that sort of shows you where India is currently.

Singapore very briefly, I can say is at a very advanced stage, they obviously have a very good set of regulations in place. Internationally, companies are actually looking at the Singaporean regime to get licensed, which once they are licensed makes it very easy for them to raise capital. So actually, because of this whole regime that Singapore has developed, and its efficiency around this licensing aspect and the understanding of the regulators on this area, has actually become an epicenter globally for such New Age technologies, and particularly in context of Asia Pacific.

## **Vyapak Desai**

Thanks Ashish and Shobana, for giving that perspective. And I know this session is a little bit technical in nature. But don't worry, we have a full video recording and transcription of this session, and which will be available on India ADR website, adrweek.in. So even if you have missed some technical jargons that some of our speakers have used, I think you can go through the recording later. And please feel free to put your questions on Q&A chat box, we'll take through those questions, and also have some time at the end of the sessions to deal with it.

So let me bring in Baiju here, I think he's been patiently listening to everyone here. But Baiju, till now, in arbitration conferences, we have been dealing with joinder of parties, multilateral contracts, cross jurisdictions, emergency arbitrations, we are still grappling with these issues. But how is arbitration world warming up to this new Web3 Tokenomics? Is arbitration still the best solution in this new world order? What are the applications you are seeing? And maybe Shobana, you can then chip in after Baiju as well.

## **Baiju Vasani**

Thank you, Vyapak. Good morning, everyone. I have been waiting patiently, I'm more the old man learning from my colleagues on this, on this exciting new space. And Vyapak, I think you're right, it really is the future. The reason I think it's so exciting and so, so terrifying for countries is that our world is based on nation states and sovereignty, especially currency and the ability to regulate movement of assets and value, both in country and around the world. And that is under threat. But I think that's what makes this area so exciting. What the future is going to look like will depend on regulation. And I think we saw the India situation, and where we'll see the biggest move as to what the future will look like is what the United States does.



And I think as that comes in, some regulation came in this year and in the future, we'll see what type of space we have. But it also sounds like there is a present as well as the future. It's already a big industry that is throwing up disputes. And the question Vyapak is, where is the best place for these disputes? So, first of all, I'd say that arbitration is not necessarily the best place for these disputes. I think if a court and it would need a government to go behind it, were to establish itself as the place for this space, that place I think would do very well.

I mean, frankly that's how London became a center, because they embraced shipping and insurance. And it became the place, no matter where your shipping disputes take place, you come to the English court. So, I think if a Court were to embrace this type of technology and say this is the court to come to and we have an established set of rules, I think they do rather well. But having said that, and being an arbitration practitioner, and of course, to promote arbitration, which is in and of itself a good thing. I think arbitration is well suited for these types of disputes, and I'll give four aspects before I pass the floor.

I think first is as we all know; arbitration has inherent flexibility. We as the parties can decide on how to structure the dispute. Particularly, I think what's important here is speed. These types of disputes can't last for years, like other more standard commercial disputes. The companies that are individuals can't just hold that type of dispute for years on time. I think we also have to look at the size of the user. We're looking at these exchanges and it is literally individuals or small companies right now, or venture capital funds buying this type of crypto or tokens.

And so, I think we have to be mindful of the type of user; we're not talking at the present yet, of huge companies and huge banks coming in; although I think that is something to come. Within flexibility. I'd also put, of course, expertise of the arbitrators or expertise of the counsel, you have a few on this panel. And then the fact frankly, you can do this virtually, just as arbitration. We all in the pandemic started to do virtual arbitration, I think it's a very nice way of dealing with this space that people are in different locations as we heard Belinda, and I think that's a good way of doing it.



Second, I would call confidentiality. I don't mean to sound denigrating on this, but I think people use crypto for some sorts of confidentiality in the first place, and maybe, I'm casting shade on the industry and that's my own prejudice or the prejudice of governments and regulators. But the fact that you use tokens and crypto, is you want to probably keep yourself outside of a certain type of regulation or certain eyes or certain scrutiny and arbitration is well suited to that, because you could keep it in the virtual space. It is between the parties, there's no third-party coming in and indeed, if you had things like trade secrets, the secret source to your token, you could even have an Attorney's-eyes-only, where issues are not even shared as between the parties.

The third one is finality. And it's linked to speed, you decide the dispute, and you move on, you're not caught up in an appeal process for years and years. I think it's very important. The final one is enforcement. And then I'll pass the floor because Shobana wants to talk about enforcement as well. As long as it is an award. And there is some question on Blockchain arbitration as to whether a decision is or is not an award. But as long as it's an award, you have the New York convention, and that makes it enforceable.

The two things, and I know we're going to talk about these, so I'll just set these up is one, how does one denominate the damages? Because if it's a crypto dispute, I think it would be rather difficult to denominate the damages in crypto, I'm not sure where one could enforce an award like that. So, you probably have to put it into a currency depending on the place of the arbitration and the place of enforcement. And the second, which I think is the sort of the elephant in the room, so to speak, is the policy aspect, because there are many countries. India sounds mixed, the United States is certainly mixed the UK, Shobana says sounds mixed, I think until they get positive on the space. You are not getting the type of safe havens for enforcement.

And then you actually have countries like China, Russia, and others who are anti crypto. And so, you're going to have big issues if the person dealing with crypto is in that place, and you can't enforce against their assets in that country. So, I think arbitration is well suited to that. I do think,

though, that a court system could embrace this technology, along with the government and actually I think do very well to create its own cottage industry.

### **Vyapak Desai**

Yes, sure. Thanks, Baiju. Any additional point Shobana particularly how the English courts have dealt with some of the interim measures, dealing with these issues, and also how you look at arbitration in general.

### **Shobana Iyer**

Yes, so absolutely right is what Baiju has said, and I think another advantage is, of course, the speed and efficiency with regard to what arbitration can actually bring. But with regard to enforceability, and this is one of the advantages I said that we got with arbitration as compared to the normal court procedures, because it's not just about and I'm talking here about the enforceability of a court decision here, any of the court decisions here in the UK.

But majority of the cases that happen here with regard to enforceability, or to try and find out most of interim measures are usually done to try and find out the identity of the wrongdoers or to trace where they are. And the problem with that is, the victims have a double hurdle, actually, first of all, is to try and find out who the fraudsters are. And also, of course, they have the technical problems about serving outside the jurisdiction.

So here normally in a domestic state, you'll probably be able to get something like a Norwich pharmacal order, but the problem with a Norwich pharmacal order and this is a first instance, authorities say that there is no gateway within the practice directions here to permit a claim of a Norwich pharmacal order to be served outside of the jurisdiction, whether as a free standing claim or a claim made by the same claim form, because it's a very technical process through a claim 8,

under the claim 8 proceedings, but we can get things such as Bankers Trust orders, to try and identify from third parties etc., about who the wrongdoers are.

But since this depends necessarily on the proper party gateway, the claim has to be included in the claim against the fraudsters, who at that stage will still be will still not have been identified. They usually are persons against persons unknown. And there needs to be evidence of urgency, and the order is being sought in aid of a hot pursuit. So, since the jurisdiction is only available to support a proprietary claim, the claim must be against a putative fraudster and must be formulated in that sort of way.

But saying that, the UK courts have, I would say adapted law and of course, they've adapted it from; one of the best things that have happened here, I'd say in the UK jurisdiction is, of course, the legal statement that's provided from the UK Legal Jurisdiction Task Force on crypto assets and smart contracts, which specifically states that crypto assets are property, and can be enforceable as property. So therefore, you we can actually deal with getting these kinds of orders from here and that's something that has been in progress in this country quite well, with regard to how crypto assets have been provided. So even as I've been finding out from what I would call our crypto judge, which is it's not just Mr. Justice Mark Pelling Casey.

There's about approximately an application at least every fortnight that's happening and I think it might have gone down, but I'm not sure; but it's happening in the UK courts for these interlocutory applications. And a recent one reported is in June in Mr. Fabrico de Allara against persons unknown, so no need to find most of these were in the High Court. That was for interim injunctive relief and disclosure and ancillary orders against a number of defendants, arising out of what he alleges to be a forged misappropriation of cryptocurrencies. And it appears that the alleged fraudsters modus operandi was to imitate a well-known brokerage in order to con unsuspecting investors, such as the claimant, out of the funds that they wish to invest.

So, the claimant used an intelligence investigator to try and identify what had happened, and the Judge gave permission for the investors report to be used as evidence for the purposes of the application and the claim advanced in fraudulent misrepresentation and deceit, unlawful means and conspiracy for unjust enrichment. One another important case which I would say that it's worth reading, if you're interested in this area is of course, the Tulip Trading Limited against Bitcoin Association. I mean, this really gives you a context of what happens here in the UK as well. Because here you've got Tulip Trading Ltd, a company that's incorporated in Sicily. The CEO of that is Dr. Craig White.

Now there's other matters with regard to Dr. Craig White, on defamation proceedings. because he was one of his friends alleged about the fact that he was trying to say that he was the originator of the Blockchain, etc. and Bitcoin. But Mr. White is an Australian citizen who has been resident in England since 2015. And the claim relates to a very substantial amount of crypto currency assets that Tulip Trading claims to have owned, and is currently unable to control because of the Blockchain that was developed. And he was trying to get fiduciary duties against the Blockchain developers, which didn't succeed in that way forward. But I believe the case has settled.

And so you'll see that there is this kind of growth in this area of, where, I would say the UK is trying to be that major hub. So, we've had the legal statement, but also now at the present stage, we've got the Law Commission, published a consultation paper on the recognition and protection of digital assets and that consultation closes on the 4th of November. It focuses on the legal statement of digital assets and recommends a law reform to create a 3rd category of personal property referred to as data objects. And that's beyond things, things that possession, such as physical objects and things in action, such as contractual rights.

The paper is important and as the master of roles, Sir Jeffrey identified in a recent speech, that there are 6 key pillars, that a legal system must have to provide a foundation for distributed ledger technology. And these are legal certainty, a dispute resolution process that accounts for how on-chain transactions happen, procedural ability for a legal system to deal with disputes over digital

transactions, a private law backdrop allowing the issue and transfer of securities via the digital distributed ledger technology and the industrial and Governmental familiarity with the smart contracts use cases and appropriate regulatory environment.

So, at the moment, the UK is going through a proper consultation period to try and make sure that they come up with the right approach to dealing with these kinds of new technologies in this kind of area. And as I said, there are the possibilities of getting, there have been a significant number of orders that have been interim orders, that have been freezing orders that have been provided in order to stop the fraudsters from obtaining any kind of benefit from this, but that's the way forward.

**Vyapak Desai**

Sure, thank you.

**Alipak Banerjee**

Thank you Shobana. Now let me just go back to Baiju. In terms of strategizing a dispute in this scope, how would you go about strategizing it? What are the key issues? And this also ties in with the question which Kishore has asked on the chat box? So, what are the do's and don'ts? And how will you plan an arbitration involving the new technology?

**Baiju Vasani**

Thanks, Alipak. I'm going to approach this in a bit of an old-fashioned way, in the sense that there's always going to be new sectors. So, 20 years ago, the internet and tech itself, Web 2.0 was a new sector, before that energy or space. And I think the first thing to say, because I am relatively new to the space, as maybe some people watching, the answer is I don't think there's

anything particularly different or special in the way that we as lawyers need to approach this space, we don't need to be experts in this particular space in order to conduct an arbitration in the space. And that is because I would think by and large, just as it is in any other sector, the type of disputes that you are going to see are ones that throw up the usual issues.

So, just thinking about it in terms of the exchanges, so you would have investment in the platform. So, the venture capital firm that Belinda mentioned, would invest in an exchange, there would be disputes between shareholders or between the owner and the debtor. That's as it would be if we had a factory or we had a mine. Similarly, financial transactions with these NFT's, you have sometimes failure to return the NFT, but this would be similar to a securitization for me, I'm trying to analogize it to a banking transaction. One major issue that I've seen is outages on platforms where people have lost money because of these outages.

For me, that's a supply of services dispute. So just as you would have any type of service contract, on a platform, on a regular website, your inability to service your customer, depending on the terms and conditions, would govern the supply of services. You might have sale of goods issues on defective tokens, certainly, and Shobana mentioned this, is fraud and mis-selling. This sounds like something that is pretty big. And so those of us who do and I know you guys do a lot of white-collar work, we work together on white-collar cases. So, I think a big fraud and mis-selling proposition like we have in pensions, or in banking products, you're going to have exchanges that mis-sell NFTs or crypto. You have obvious ones like debt collection, people owe people money. That is something that's pretty standard.

And then those of you who do IP, I think there's interesting artwork questions on NFT. So my brother two years ago, or a year ago, tried to convince me to buy one of these NFT's with the ape on it. He said, it's the future, Paris Hilton had one and if I don't buy it, I'll regret it and he's going to be a millionaire. I didn't buy it. And of course, he's not a millionaire. At least, I think he's not. But it's interesting, because, people have tried to rip off that same design, and obviously sell it as their own. So, you're going to get a lot of claims to say, because the token, of course is unique.

It's like a painting or a piece of art, it is frozen. And that is the value, is what it is. And if people try to replicate that, then that's going to throw out massive IP issues, copyright, trademark.

So, the way Alipak, to answer the question, I don't think and Shobana might disagree with this, because she is much more tech savvy than I am. But I would approach this very much as I'd approach any new sector, which is that I think it will throw up legal issues that we are familiar with. There will obviously be nuances and differences. But I think we can use experts to assist us to understand just as if we had a pipeline issue, and we need to understand how a undersea pipeline works, we will learn that. So, I certainly am no longer scared, let's say to approach this new area and say, well, I don't know much about crypto.

### **Vyapak Desai**

We will be not out of job.

### **Baiju Vasani**

Well, exactly. I think that's the key, is we should be all be confident that as this area grows, we have a role in that. It's not just specialists who are were fully savvy in these issues but we all have a role in this. Because I think the issue is by and large that have been thrown up, are the ones we have dealt with in every other sector.

### **Alipak Banerjee**

Sure. Thank you Baiju. Now, let me quickly get Ashish. I have one specific question for you. What about the seat of arbitration, and what are the practical considerations from enforcement and public policy considerations? Also, in the current situation, Ashish, do you think emergency arbitration is a practical solution, in terms of the speed involved in these kinds of disputes?

## Ashish Kabra

Sure, Alipak. I think I'll have to follow from Baiju, because he mentioned that these disputes aren't that distinct from normal ones. And yes, in our experience, the first ones that we did were similar disputes around ownership of companies involved in these businesses. But as we are seeing new age disputes coming up, there are a few distinctive points which are emerging slowly, as he mentioned, with any new sector. So, to your first question on seat, again, I'll answer it from a practical viewpoint to the 3 points that were raised earlier by our colleagues.

First, Shobana mentioned about the consumer case. Interestingly, that is also one arising out of the NFT issuance and somebody who had initially bought NFTs and then realize they are worthless, as Baiju was luckily able to avoid that situation, and then had to raise issues in relation to whether there are consumer protection interests which are involved and whether those issues are arbitrable. Now obviously, this is a question of seat as well, because in relation to these contracts, if you see such type of arbitration in a jurisdiction where such dispute is non-arbitrable, it will consequently have an impact on your arbitration.

If you look at the other point again Baiju had mentioned earlier, about denomination of your damages in cryptocurrency or fiat currency. We have already had a case in China, which obviously is not a very favourable jurisdiction in context of such currencies, where the court set aside the award on the grounds of it being in violation of the public policy, because it granted an award in damages for dealings in cryptocurrency, and that the court viewed was basically conversion of cryptocurrency into fiat currency, which is prohibited under the Chinese law or was, I am not sure if that is still the case, but yes, and consequently, the award was set aside. So obviously, there are practical considerations that play, which you need to take into account while deciding your seat of the arbitration.

I think the last one is again, something which was earlier mentioned in relation to DAOs. Now, you need to know whether an arbitration agreement with an anonymous or automated



counterparty, will be recognized by the court or not, is that an arbitration agreement which will be given effect to. So again, going on, if your seat doesn't recognize it, it will obviously have an impact on your arbitration. So, there are various aspects which are involved. One last point which I would like to mention, which is a key feature, which one needs to take into account in any dispute. And as we move forward, we are seeing not just cryptocurrency, every asset being tokenized.

So rather than having a REIT, you will have a token fractionalizing real estate, rather than having securitization of debt, you are having bonds being fractionalized and tokenized. So, every asset is going to be denominated through tokens. Now, the understanding of what is a token is important. It is not some asset or digital asset which is kept in an account of yours. No, token is nothing but a denomination of what belongs to you on a public, or whichever form of ledger, which is there. What you have is an access through a private key the ability to transfer the token. Now say in context of an arbitration where issues of tokens are involved or any cryptocurrency for that matter. In the duration of the arbitration, if the counterparty against whom you're suing says I'm sorry, I dropped my private key, and somebody stole my tokens.

Now the whole case is frustrated, or you got the award, but the counterparty transferred the token because it just takes a minute to key in a few letters and make a few clicks, and suddenly the tokens are transferred to a jurisdiction where you cannot reach and no longer will the counterparty. Now, this is where the other point where you raised in context of emergency arbitration comes up, even though do we apply the same standard of risk as we take in the current environment for grant of interim reliefs to cases in relation to cryptocurrencies?

If not, then do we have third party agencies, because no arbitrator will take control of these tokens, they're not going to come and take the risk on their head? Do we have third party agencies who can act as escrows, take onus and control of these tokens while we resolve these disputes. Is an emergency arbitration procedure quick enough to ensure, while the time the counterparty comes and again.

**Vyapak Desai**

Preserve and preserve the value? No, you are absolutely right, we are coming to actually close of the session. These are very, very interesting topics. I hope we have answered some of the already asked questions by Vivek, Kishore and Vinod. So, we have already put our answers on the chat box, but if you have more questions, please put in, till we last on this topic.

But before we end, because we are coming to the end of our allocated time, maybe last words from Belinda, you have already heard the legal side of your business. In that sense, do you have any thoughts or final comments and then maybe Baiju, I'll come to you and Shobana as well, for your final comments, including the aspects if you can deal with as to whether we really need any specialized tribunals or specialized rules. I think Baiju has already dealt, it's old wine in the new bottle, but maybe Shobana, you can end with that. Yes, Belinda.

**Belinda Lim**

If you want international collaborations, and I work in terms of the financial crime, for example, there is the Financial Action Task Force. So, I think a lot of these recommendations, including what we call the travel rule, will apply to a lot of international service providers, that I think it will give a lot of assurance to people on the space. So, I think that's definitely one of the key trends that we have seen and then I think you will have in the arbitration also.

**Vyapak Desai**

Yes. Baiju, any last comments.

### **Baiju Vasani**

You put it nicely and I think this is a very interesting model, because, as I said, I think it's a space for the first time that challenges nation states and currency. And for that reason, it's definitely here to stay and I take a specious point that there are differences. I'll give you just one very quick example of how it's been used, crypto has been used is to circumvent sanctions, for example, I did a lot of work in Russia. And one way to circumvent sanctions and the taking away of SWIFT and the banking shutdown is crypto. So, I think, the uses are many, but they also potentially very dangerous. So, I'll just end with that, Vyapak.

### **Vyapak Desai**

Thank you. Thanks a lot. Shobana, your last point, do we need any specialized rules, tribunals or are they still evolving?

### **Shobana Iyer**

Yes, I would say that arbitration in this field, particularly in this sector, I think there's a big distinction between on and off-chain arbitrations, which is a traditional arbitration using existing commercial arbitral rules, or dedicated Blockchain rules etc. So, we know that a number of crypto exchanges and NFT marketplaces already in corporate arbitration agreements are as standard terms. For example, we know that a popular cyber buy actually contains an arbitration agreement for terms and conditions, for all disputes to be administered by the Hong Kong International Arbitration Centre. And then you've got NIFTY that goes for Janssen, New York. In the UK, we have got the new digital dispute resolution rules that have come out into force in April 2021.

And that actually came into a process to try and deal with these kinds of concerns. So as far as Baiju went and said, the traditional offline method, yes, we'll be using those sorts of things. And if you've got somebody in your panel that can deal with it, because you are looking at sector



expertise in whichever area you're going to. But when you're looking at not just the offline process, but the online arbitration solutions, and I think that's where you probably need to know about the mechanics. I don't think it's too difficult. You don't have to be a programmer. But if you've got an interest, I know very well, our younger members that are coming into the field will be all into all this.

But the requirements of on-chain arbitration solutions, I think are evolving. This includes a wide spectrum of possibilities. And I said, it's always evolving, where there's a self-executing code contained within the smart contracts, which is decentralized, peer to peer justice systems, have consensus on the Blockchain, and they make decisions as to the requirements for the parties to opt to a platform, for incorporating a specific code, parties to select the number of expertise of the arbitrator, jurors, etc., at the outset, so it's all already automatically put in.

And most importantly, I'd say is this, particularly with crypto exchanges, the automatic freezing mechanism that pauses or freezes a smart contract once a dispute is initiated. So, I think that would really assist in avoiding all the kind of problems that we would have to go through with all the discovery, etc., in the court system, on the prices and all that. So, if we can freeze the assets straightaway.

### **Vyapak Desai**

Sure. I think as we say, there will be a combination of old methods and the new issues that we will grapple with, and I'm sure we'll find solutions. We lawyers are always ahead of the game. Maybe not regulators, but lawyers are always ahead of the game. So, I guess with that good note, and a positive note, thanks a lot, everyone.

I think we are just about time to close this session. And thanks, Baiju and Shobana specifically to come at this time, and of course Belinda for giving a very, very good insight on the business as well. Thanks, Ashish and Alipak. Thank you everyone who has joined. I hope we have answered



some of your questions, but please look at this transcript and video record or send us any questions later as well. Thank you, everyone.