

C L I F F O R D

C H A N C E



**TECH ARBITRATION
TRENDS 2023**



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As investment in the tech sector continues to boom, and potentially transformative technologies gain momentum, disputes will arise both between commercial parties and between investors and States seeking to navigate new ground such as crypto assets and the metaverse.

Investor-State tech disputes

The number of tech-related disputes being brought by investors against States under investment treaties has steadily grown. Investor-State tech arbitrations brought under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) have almost doubled over the last few years and now represent around 10% of ICSID's caseload. Governments are moving to regulate tech, and foreign tech investors, in a variety of ways such that investments have a high degree of sensitivity to the State's actions or omissions. For example, European States, Canada and Australia are banning Huawei from participating in 5G networks over national security allegations, the US FCC commissioner has called on Google and Apple to ban TikTok due to privacy and security concerns and Uber has exited certain markets due to unfavourable regulatory conditions. There are also signs that crypto exchanges have started to exit jurisdictions in which the regulatory burden has grown beyond what they are willing to tolerate (for example, Nexo leaving the US). This has led, and will continue to lead, companies to turn to investor-State dispute settlement to seek redress. Notably, Huawei has filed ICSID claims against Sweden over its 5G ban. There will be interesting times ahead as these complex cases will require tribunals to consider issues at the intersection between tech and policy issues such as security and privacy.

Arbitrating crypto disputes

An interesting feature of the proliferation of digital assets, smart contracts, blockchain and fintech is that many businesses in this sector use arbitration in their online user agreements. This means that a wide variety of disputes between crypto investors and exchanges, wallet providers and token-issuing DAOs are

required to be arbitrated. Cases that have become public include claims by users against platforms in relation to outages causing them trading losses, exchanges against users arising from failure to make payment and misrepresentation claims by investors against platforms concerning the represented risks of investment. Larger commercial claims are also emerging (for example, Genesis seeking to recover a \$2.4 billion loan to 3AC in ICDR arbitration). There have been recent attempts to craft arbitration rules specifically for digital disputes (JAMS and DDDR). This trend has generated (and will continue to generate) its fair share of challenges. Arbitration agreements are being challenged under consumer protection legislation in the US and the UK and those cases are now reaching appellate levels. Enforcement also remains an issue; 2022 saw a handful of attempts to enforce arbitral awards denominated in cryptocurrencies, which failed on public policy grounds. For more, see our [briefing](#), Arbitration for Cryptoassets and Smart Contract Disputes.

Metaverse-related arbitration

The metaverse is currently in its infancy but may, over time, become more widely accepted, at which point we will inevitably see an increase in arbitrations between well-known brands that are building a presence in the metaverse, suppliers, coders and perhaps other metaverse users. As with crypto businesses, centralised metaverse platforms appear to have a preference for including arbitration agreements in their user agreements. In the decentralised context, the rise of metaverse-related disputes will undoubtedly give rise to interesting issues of law. For example, which forum will have jurisdiction over virtual disputes? Do digital assets fall within the scope of an "investment" for the purposes of a

bilateral investment treaty? Intra-user disputes, which may touch on a wide variety of issues, depending on the nature of the metaverse, give rise to the intriguing possibility of arbitration-type processes being embedded into the metaverse combined with enforcement mechanisms that operate within the metaverse. On a more practical level, virtual reality may also fundamentally change the way in which arbitration and legal proceedings across countries are managed and run.

Commercial tech collaborations

Increasingly, companies across a range of sectors are collaborating with tech outfits to develop innovative solutions and products – a prime example being the automotive industry, in which growing numbers of suppliers are working together with software providers, battery producers and start-ups to develop solutions for self-driving and electric vehicles. Such commercial tech

collaborations are fundamentally commercial relationships and typically are entered into for a longer term, with the parties sharing a common goal of ensuring that the collaboration succeeds. These collaborations give rise to unique challenges, however. For example:

- issues over the manner and ways in which parties contribute to the project and how they ought to be compensated for their contribution (including how that contribution is to be quantified);
- how to deal with subsequent changes after the establishment of the collaboration, particularly where new technology, market demand, competitor activity, the regulatory framework or force majeure events cause disruption.

In these circumstances, the nature of the collaboration comes under stress, and disputes will arise.



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