Can Blockchain Arbitration become a proper 'International Arbitration'? Jurors vs. arbitrators

Written by Pedro Lacasa, Legal Consultant, Universidad Nacional de Asunción

There is no doubt that the use of emerging technologies has impacted the international arbitration arena. This tech revolution was unprecedently accelerated by the 2020 pandemic whilst national States' borders were closed, and travel activity diminished (if not directly forbidden by some States).

The increase of the application of the Blockchain technology in commercial contracts and the proliferation of smart contracts (even though some think they are in essence merely a piece of software code[1]) have reached the point of being a relevant part of international commerce and suddenly they demand more attention than before (see the overview of these new technologies and its impact in arbitration here http://arbitrationblog.kluwerarbitration.com/2019/01/27/2018-in-review-blockchain-technology-and-arbitration/).

The omnipresence of technology in arbitration and the application of the blockchain technology to dispute resolution mechanisms in the international arena led to the naissance of the 'blockchain arbitration'.

But just because a method focuses on dispute resolution, is not *ipso facto* a proper '*arbitration*'.

While the utilization of a trusted chain of information enhanced by technology is encouraged in arbitration proceedings, particularly in international arbitrations, we must underscore the fact that not any dispute resolution mechanism is a proper '*arbitration*'... not even if based on the blockchain.

Blockchain arbitration models do not share some of the essential features of arbitration. The parties cannot choose the arbitrator in charge freely. They cannot easily choose aspects like the language of the procedure, the nationality of the arbitrators, the qualification of the arbitrators, the applicable law, etc. If the

parties choose the arbitrators based on their qualifications or nationality, such choices can directly impact the *availability* of the existing 'blockchain arbitrators'. *A fortiori,* the parties cannot choose the applicable law to the arbitration itself or to the merits of the dispute either.

Nominating the arbitrators

In Kleros, one of the most popular blockchain arbitration applications, the candidates for adjudicators first self-select themselves into specific courts (i.e., specific types of disputes) and then, the final selection of the adjudicators is done randomly (meaning a party cannot directly nominate someone in particular as an arbitrator for the underlying dispute). As it specifies in its whitepaper[2] *"contracts will specify the options available for jurors to vote"*, meaning the contract itself is the first factor that restrain party autonomy. In Kleros anyone can be an adjudicator. The probability of being drawn as an adjudicator for a dispute is proportional to the amount of tokens such user stakes within the platform.

Whilst other platforms such as Aragon[3] use the same drafting (of adjudicators) system, networks such as Jur[4], Mattereum and Sagewise[5] use a system that go a step closer to the International Arbitration legal framework (like the 1958 New York Convention, the UNCITRAL Model Law, etc.) in order to make their awards more enforceable worldwide but still lack the flexibility of a wider private autonomy and the role of the conflicts of laws, both present in classical international commercial arbitration processes.

These blockchain-based dispute resolution adjudicators are referred also as 'jurors'[6]. 'Jurors' are Blockchain users elected to vote in favor of one of the parties to the underlying dispute utilizing the Schelling Point method.

But without even analyzing what the Schelling Point methodology has to do with the art of rendering justice in a definitive and final manner, we must ask the question: if the 'jurors' have more features of a jury and not of an arbitrator, why do we call a mechanism that solves disputes through decisions made by jurors and not by arbitrators *arbitration*?

Moreover, these jurors, like users of the Blockchain, have a direct economic interest in serving as jurors in the dispute at hand[7]. However, to think that an arbitrator decided to assume the task of being a part of an arbitral tribunal in an

international arbitration constituted to resolve an international dispute, only because that would mean eventually more money to him, is an obscure idea at best. Such arbitrator was elected because of his or her qualities, experience, background, and reputation. This also occurs in domestic arbitrations. Nonetheless, such private autonomy is not possible in some blockchain arbitrations.

It is one thing to refer to such mechanisms as blockchain-based methods. But it is completely different is to maintain that such mechanisms are indeed 'arbitrations' *stricto sensu***[8]**, just like suggested by many authors[9] and professional associations such as the Blockchain Arbitration Society

Although the global society must embrace all the tech innovations regarding dispute resolution, the clear definition of what is an '*arbitration*' and what is not should be a healthy practice.

Conclusion

Overall, the technology evolution within the dispute resolution mechanisms is here to stay. This disruption needs a twofold adaptation: on one hand, the parties on an international contractual commercial relationship must adapt themselves to the new ways of solving disputes. The same goes for Sovereign States, that must update their domestic and international legislation to recognize and somehow regulate such new dispute resolution mechanisms.

On the other hand, these platforms for dispute resolution must adapt to the historical surrounding of the conflict solving industry, calling a dispute resolution mechanism for what it is and avoid euphemisms.

Lastly, the misconception on the dispute resolution mechanisms and international arbitration procedures may provoke a confusion to the detriment of the users of such digital networks.

[1] See Charlie Morgan 'Will the Commercialisation of Blockchain Technologies Change the Face of Arbitration?' [Kluwer Arbitration Blog, March 5, 2018] available at http://arbitrationblog.kluwerarbitration.com/2018/03/05/topic-to-be-confirmed/.

[2] Kleros white paper [September 2019] available at https://kleros.io/whitepaper.pdf.

[3] See "Juror staking" and " Juror drafting" https://github.com/aragon/whitepaper.

[4] See "Open Justice Platform" in Jur's whitepaper V 3.0.0 [March 2021], available at https://jur.io/wp-content/uploads/2021/03/jur-white-paper-v.3.0.0.pdf.

[5] See Darcy W.E. Allen, Aaron M. Lane & Marta Poblet, 'The Governance of Blockchain Dispute Resolution' [Harvard Negotiation Law Review, vol. 25, issue 1, Fall 2019] 75-102.

[6] Maxime Chevalier, 'From Smart Contract Litigation to Blockchain Arbitration, a New Decentralized Approach Leading Towards the Blockchain Arbitral Order' [*Journal of International Dispute Settlement*, vol. 12, issue 4, December 2021] 558 – 584 https://academic.oup.com/jids/article-abstract/12/4/558/6414874?redirectedFrom =PDF.

[7] Kleros white paper [September 2019] available at https://kleros.io/whitepaper.pdf.

[8] See for example Sharath Mulia & Romi Kumari, 'Blockchain Arbitration: The Future of Dispute Resolution' [Fox Mandal, November 2021] available at https://www.foxmandal.in/blockchain-arbitration-the-future-of-dispute-resolution/.

[9] For example, see Ritika Bansal, 'Enforceability of Awards from Blockchain Arbitrations in India [August 2019] available at: http://arbitrationblog.kluwerarbitration.com/2019/08/21/enforceability-of-awards-from-blockchain-arbitrations-in-india/.