KLEROS FELLOWSHIP OF JUSTICE PROGRAM: RECOGNITION AND ENFORCEMENT OF KLEROS AWARDS UNDER THE NEW YORK CONVENTION IN DEVELOPING AREAS

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Executive Summary

Kleros is a unique protocol of online dispute resolution ("**ODR**"). Parties choose Kleros for their dispute resolution needs for the same fundamental reason parties choose arbitration over litigation. They want to ensure a more efficient and cost-effective dispute resolution method that best suits their needs. However, such a method becomes much less attractive if the award is ultimately not enforceable.

The decision of a Kleros jury can have the automatic effect of enforcement on the parties. However, this is not the same as legal recognition and enforcement of the award. In a scaled-up version of Kleros, will the process achieve the same result if a party ultimately seeks the legal recognition or enforcement of the award? This question remains to be definitively answered and is somewhat controversial.

The follow up question is whether a Kleros decision is capable of recognition and enforcement as a foreign arbitral award in accordance with the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958) ("**New York Convention**" or "**Convention**")[1] and if so, where?

In this paper, I will consider these questions with a particular focus on the Kleros dispute resolution procedure, the requirements of recognition and enforcement of foreign arbitral awards under the Convention, the issue of digital awards and signatures and then consider the relevant law in a geographic region experiencing large amounts of foreign direct investment and strong growth in the use of arbitration and ADR services, namely the Asia-Pacific.

I will consider the elements of a Kleros decision and apply them to the criteria set out by the New York Convention and other relevant international legal instruments. I will then focus on the jurisdiction of Sri Lanka, which can be seen as a jurisdiction that may meet all the necessary criteria and that belongs to the aforementioned region, as part of my analysis as to where, if at all, a Kleros decision might be legally enforceable.

I will also consider the amendments may be needed to a Kleros dispute resolution agreement to ensure any subsequent Kleros decisions will comply with all necessary formal and informal requirements, including in respect to the often-cited concerns related to "public policy".

Considering the clear and noble goals of Kleros to promote and support access to justice, it is hoped that there will be ways to counterbalance any public policy concerns.

[1] *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958).

Introduction

In 2017, it was estimated that between three and five percent of online transactions ended in a dispute.[2] An estimated 1.92 billion people purchased goods or services online in 2019, with e-retail sales surpassing 3.5 trillion U.S. dollars worldwide.[3] Three years on, the world is grappling with a global pandemic, permeating almost every aspect of economic life.

As a result, e-commerce has emerged as an essential service that will surely see a continued increase in the number of online transactions, their total value and corresponding disputes. Given the quantity of disputes involved, there is a clear risk of a growing "justice gap," in which many aggrieved parties are locked out of the possibility of a satisfactory resolution to their disputes.[4] This problem is particularly acute in disputes arising out of international transactions.

Readers will likely be aware that even before the emergence of Covid-19, a range of digital newcomers had emerged in recent years and established themselves as players within the world of international arbitration. Many of these service providers offer innovative ODR tools and decentralised courts, providing parties with a range of state-of-the-art, pioneering services.

A new field of "decentralised justice" involving "crowd intelligence" is emerging with contributions coming from actors within blockchain, cryptography, ODR, game theory and mechanism design.[5] However, these newcomers are not without their critics. Their operations are at the forefront of a market that inspires significant debate and even concern. Some commentators are concerned about the independence of arbitrators in respect to an incentivised decision-making process, for example.[6]

Yet given the Covid-19 pandemic and the need for social distancing, the promotion, protection and extension of access to justice has become more important than ever. Many commentators suggest there will be an increase in international arbitration in

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[2] Federico Ast and Clément Lesaege, *Medium*, "Kleros, a Protocol for a Decentralized Justice System" (11 September 2017) <https://medium.com/kleros/kleros-a-decentralized-justice-protocol-for-the-internet-38d596a6300d> citing M. Ethan Katsh and Orna Rabinovich-Einy, Digital Justice: Technology and the Internet of Disputes (Oxford University Press, 2017), p. 67.
[3] J. Clement, *Statista*, "E-commerce worldwide - Statistics & Facts" (24 September 2020) <https://www.statista.com/topics/871/online-shopping/#:~:text=In%202019%2C%20an%20estimated%201.92,3.5%20trillion%20U.S.%20dollars%20worldwide.>.
[4] Federico Ast, *Medium*, "The Role of Technology to Guarantee Access to Justice" (15 June 2020) <https://medium.com/astec/the-role-of-technology-to-guarantee-access-to-justice-da3c0e508171>.
[5] Sophie Nappert and Federico Ast, *Global Arbitration Review*, "Decentralised justice: reinventing arbitration for the digital age?" (1 May 2020) <https://globalarbitrationreview.com/article/1226075/decentralised-justice-reinventing-arbitration-for-the-digital-age>.
[6] Katarzyna Szczudlik, *Wardyński & Partners*, "'On-chain' and 'off-chain' arbitration: Using smart contracts to amicably resolve disputes" (4 June 2019) <https://newtech.law/en/on-chain-and-off-chain-arbitration-using-smart-contracts-to-amicably-resolve-disputes/>.

response to the pandemic.[7] It is therefore worth examining the role that these newcomers can play in meeting this increased demand.

This paper will examine one of the key new players in the international arbitration field, Kleros. According to its Long Paper, "Kleros provides judgments in an inexpensive, reliable, typically fast, and decentralized way."[8] According to the co-founders of Kleros, "[e]xisting dispute resolution technologies are too slow, too expensive and too unreliable for an online real-time world."[9]

Cognisant of an ever-increasing "justice gap," the founders of Kleros developed a platform to help resolve this.[10] As a result, some suggest that Kleros may even overtake traditional arbitration.[11] Kleros is thus at the forefront of ODR, but its ambitions are greater still. Kleros aims to scale up to help parties to resolve their disputes in "mainstream" cases.

Accordingly, this paper will assess whether a Kleros decision is capable of recognition and enforcement under the New York Convention with a focus on developing jurisdictions. It will first provide an overview of Kleros and a recent example of a Kleros "arbitration clause". It will then review the relevant rules on the recognition and enforcement of a foreign arbitral award under the Convention as well as the rules on digital agreements and signatures. It will then apply these rules with reference to Kleros and the aforementioned arbitration clause.

The paper will then consider which developing jurisdictions may be ripe for attention as Kleros continues to scale up, with a particular focus on Sri Lanka. It will then conclude with some suggestions as to how Kleros can continue its efforts to meet the increased demand for access to justice.

Kleros

What is it and how does it work?

[7] See, e.g. Aram Aghababyan, Anush Hokhoyan and Sadaff Habib, *Kluwer Arbitration Blog*, "Global Impact of the Pandemic on Arbitration: Enforcement and Other Implications" (19 August 2020) <http://arbitrationblog.kluwerarbitration.com/2020/08/19/global-impact-of-the-pandemic-on-arbitration-enforcement-and-other-implications/>, Corina Lefter, *Kluwer Arbitration Blog*, "Are We Ready for the Brave New World of Virtual Arbitrations? Insights from the 32nd Annual ITA Workshop" (25 August 2020) <http://arbitrationblog.kluwerarbitration.com/2020/08/25/are-we-ready-for-the-brave-new-world-of-virtual-arbitrations-insights-from-the-32nd-annual-ita-workshop/>.

[8] Clément Lesaege, William George, and Federico Ast, *Kleros Long Paper v1.0.0* (March 2020) <https://kleros.io/static/yellowpaper_en-28d8e155664f3f21578958a482f33bd1.pdf>.

[9] Federico Ast and Clément Lesaege, *Medium*, "Kleros, a Decentralized Court System for the Internet (Abridged)" (18 September 2017) <https://medium.com/kleros/kleros-a-decentralized-court-system-for-the-internet-abridged-1e415c04604a>.

[10] Federico Ast, *Medium*, "The Role of Technology to Guarantee Access to Justice" (15 June 2020) <https://medium.com/astec/the-role-of-technology-to-guarantee-access-to-justice-da3c0e508171>.

[11] See, e.g. David Molina, *Kluwer Arbitration Blog*, "¿Las Nuevas Tecnologías Extinguirán El Sistema Arbitral? Kleros: Una Mirada Al Futuro Del Arbitraje Internacional" (30 September 2020) <http://arbitrationblog.kluwerarbitration.com/2020/09/30/las-nuevas-tecnologias-extinguiran-el-sistema-arbitral-kleros-una-mirada-al-futuro-del-arbitraje-internacional/?> and Alex Aves, *The Daily Chain*, "Kleros decentralized courts: Are they the future of online arbitration?" (9 March 2020) <https://thedailychain.com/kleros-decentralized-courts-are-they-the-future-of-online-arbitration/>.

To understand the potential value of Kleros, it is important to provide some context to the organisation and explain its methodology. According to the abstract to the Kleros White Paper, Kleros is a decentralized application built on top of Ethereum that works as a decentralized third party to arbitrate contractual disputes.[12] It relies on game theoretic incentives to have jurors rule cases correctly and the result is a dispute resolution system that renders ultimate judgments in a fast, inexpensive, reliable and decentralized way.[13]

Essentially, Kleros is an "opt-in court system" encoded onto blockchain.[14] It works via a smart contract application in which the parties have designated Kleros as their dispute resolution mechanism. When the parties opt in, the smart contract will set out how many jurors and which Kleros "court" (for example, the Kleros insurance court for insurance disputes) will decide their case should a dispute arise.

Jurors are anonymously and randomly selected through a process in which the jurors submit a "stake" calculated in the Kleros e-currency to be appointed and are remunerated by way of reward when they vote in favour of the majority in a decision.[15] Parties can appeal as many times as they like, with each appeal doubling the number of sitting jurors and therefore increasing the arbitration fees.[16] The possibility of appeal is considered to be important "to prevent an attacker from bribing the jurors."[17]

Kleros is designed to resolve disputes of a more simplistic nature and up to an intermediate size. It has set its sights on scaling up to provide dispute resolution services to "mainstream" cases outside of Ethereum as well. In 2020, Kleros launched Project Themis which aims to foster the adoption of the Kleros protocol in mainstream use cases. It includes several research and technology development activities with the goal of enabling the use of Kleros in corporate and institutional customers.[18] The project will develop its "Kleros Layer 2," which is intended to have the same effect on decentralized justice as its initial iteration. So continues Kleros's steady march to bring justice as a service into the mainstream world.[19]

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[12] C. Lesaege, F. Ast and W. George, *Kleros Short Paper v1.0.7* (September 2019) <https://kleros.io/whitepaper_en.pdf> [accessed 30 April 2020], p. 1.
[13] C. Lesaege, F. Ast and W. George, *Kleros Short Paper v1.0.7* (September 2019) <https://kleros.io/whitepaper_en.pdf> [accessed 30 April 2020], p. 1.
[14] C. Lesaege, F. Ast and W. George, *Kleros Short Paper v1.0.7* (September 2019) <https://kleros.io/whitepaper_en.pdf> [accessed 30 April 2020], p.3.
[15] C. Lesaege, F. Ast and W. George, *Kleros Short Paper v1.0.7* (September 2019) <https://kleros.io/whitepaper_en.pdf> [accessed 30 April 2020], p. 2.
[16] C. Lesaege, F. Ast and W. George, *Kleros Short Paper v1.0.7* (September 2019) <https://kleros.io/whitepaper_en.pdf> [accessed 30 April 2020], p. 7.
[17] C. Lesaege, F. Ast and W. George, *Kleros Short Paper v1.0.7* (September 2019) <https://kleros.io/whitepaper_en.pdf> [accessed 30 April 2020], p. 7.
[18] Federico Ast, *The Blockchain Dispute Resolution Layer*, "Kleros Receives BPI France Innovation Grant" (22 January 2020) <https://blog.kleros.io/kleros-layer-2/>.
[19] Federico Ast, *The Blockchain Dispute Resolution Layer*, "Kleros Layer 2: Decentralized Justice in the Mainstream World" (6 January 2020) <https://blog.kleros.io/kleros-layer-2/>.

Kleros seeks to take advantage of the increasing number of lower-value online disputes and by doing so it aims to "bring justice to the *unjusticed*" (emphasis added).[20] Kleros by its very nature relies on party autonomy, the "opt in" system. Its platform incentivises the parties and the jurors not to misbehave, thereby ensuring correctness in the decisions reached.

This can be contrasted with a traditional legal system, such as that of a developed nation state, in which a similar incentive system is unnecessary as the system's long evolution has fostered significant trust between the state and the individual. Of course, it need not be said that a nation state with a long sovereign history has a significantly greater capacity to foster trust than a relatively newly established ODR service.

However, it is a point worth considering for Kleros as it works on scaling up to meet the increased needs of parties seeking justice in the online space. After all, Kleros operates on the blockchain and "[o]ne of the central philosophies underpinning blockchain, given the fact that stakeholders do not know each other, is that of 'trustlessness'."[21]

In the Kleros system "the jurors' self-interest in maximising financial gain also incentivises them to coordinate with each other by voting in favour of the 'true', or 'honest' outcome of the dispute, even without communication or deliberation."[22] This is controversial because conventional wisdom states that arbitrators "do not, and they must not, have a financial vested interest in the outcome of the dispute."

Yet – sidestepping the differences in the decision-making process – is a decision under the Kleros system truly so different from a decision under the traditional model of arbitration?

In both cases, the arbitrator is remunerated for reviewing the evidence before them and making a decision based on that evidence. Mistakes may be made in either process, but in both cases the overarching incentive is ultimately for the arbitrator to make the correct decision. Ultimately, it should be acknowledged that there are still hurdles for Kleros to clear before it can truly rival traditional arbitration service providers, who are not generally sitting still.[23]

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[20] C. Lesaege, F. Ast and W. George, *Kleros Short Paper v1.0.7* (September 2019) <https://kleros.io/whitepaper_en.pdf> [accessed 30 April 2020].
[21] Sophie Nappert and Avani Agarwal, *Kluwer Arbitration Blog*, "Twenty-First Century Arbitration: Who Do You Trust?" (2 March 2020) <http://arbitrationblog.kluwerarbitration.com/2020/03/02/twenty-first-century-arbitration-who-do-you-trust/?doing_wp_cron=1597661450.9255750179290771484375>.
[22] Sophie Nappert and Federico Ast, *Global Arbitration Review*, "Decentralised justice: reinventing arbitration for the digital age?" (1 May 2020) <https://globalarbitrationreview.com/article/1226075/decentralised-justice-reinventing-arbitration-for-the-digital-age>.
[23] See, e.g. *Thomson Reuters*, "Thomson Reuters Partners with Arbitration Institute of the Stockholm Chamber of Commerce to Offer Global Ad Hoc Arbitration Platform During COVID-19 Pandemic" (15 July 2020) <https://www.thomsonreuters.com/en/press-releases/2020/july/thomson-reuters-partners-with-arbitration-institute-of-the-stockholm-chamber-of-commerce-to-offer-global-ad-hoc-arbitration-platform-during-covid-19-pandemic.html>.

Example Kleros arbitration clause

Kleros recently reported on a success story in its quest to go mainstream.[24] The following is an example of a dispute resolution clause referring the dispute to the Kleros protocol ("**Clause**"), involving one party from Argentina and the other from Peru:

> This contract is governed under Peruvian law, so in the event of a vacuum, the current Peruvian Civil Code will be applied supplementally (sic). It also remains expressly established that, in case of controversy, discrepancy or claim arising from this contract, parties will resort to amicable and direct treatment to settle their differences. If a satisfactory and definitive solution is not achieved within 30 days, all disputes arising from this contract, including those of its expiration, nullity or invalidity, execution, fulfillment (sic) or interpretation derived from the provisions of this contract, will be resolved by the Kleros online arbitration system. Parties may appeal the decision only within the mechanisms provided by the Kleros system. The final decision reached within the Kleros system will be considered final and not subject to appeal by the parties.[25]

It can be observed that the Clause contains the following key elements:

i) the law applicable to the arbitration agreement is Peruvian;
ii) the parties agree to refer any disputes not capable of amicable settlement within 30 days to the Kleros system;
iii) the parties may only appeal the decision within the Kleros system; and
iv) the final decision of the Kleros system is considered final and not subject to appeal.

This paper will refer to the Clause throughout the analysis. Although beyond the scope of this paper, it is noted that the appeal mechanism under the Kleros protocol works by way of doubling the number of jurors hearing the dispute per appeal, up to a maximum of 511 jurors. After the decision is made in such a "final appeal", it is considered to be final and cannot be appealed.

Possible disputes under a smart contract

In addition to the general commercial disputes that may arise between contracting parties, commentators have referred to a number of possible disputes that may arise under a smart contract, such as:

i) allegations of fraudulent and/or negligent misrepresentation as to the effect of the smart contract;
ii) the code may not reflect what the parties understood to be their agreement;
iii) the smart contract may be void for illegality;
iv) lack of legal capacity of a party to enter into the smart contract; and

[24] Federico Ast, *The Blockchain Dispute Resolution Layer*, "Secure Your Contract With Kleros Dispute Resolution" (23 September 2020) <https://blog.kleros.io/secure-your-contract-with-kleros/>.
[25] Federico Ast, *The Blockchain Dispute Resolution Layer*, "Secure Your Contract With Kleros Dispute Resolution" (23 September 2020) <https://blog.kleros.io/secure-your-contract-with-kleros/>.

v) coding errors in the smart contract leading to incorrect and/or non-performance.[26]

The Kleros system is designed to administer all such disputes, but interestingly it may itself create difficulties for the parties in the event of any issues in the Kleros system. Although outside the scope of this paper, such disputes may thus need to be reviewed by a traditional court.

Will the Clause result in a binding arbitral award capable of recognition and enforcement?

Central to Kleros' plans is to ensure that its arbitration protocol will deliver decisions that are legally binding and capable of recognition and enforcement. Although the subject of some debate, it has certainly been argued that Kleros ODR process fits within the structures and frameworks of a legally binding arbitration protocol.[27]

To assess the suitability of Kleros, it is important to review how a decision or "award" of an arbitral tribunal is legally binding in foreign jurisdictions. The next section will therefore review the concepts of recognition and enforcement under the New York Convention and the elements typically required of an arbitral award, including a digital award.

Recognition and Enforcement under the New York Convention

Background

The New York Convention has been described as "the most successful, multilateral instrument in the field of international trade law."[28] Sixty years on, the Convention has become a cornerstone of cross-border commercial relations and it continues to extend its reach. In 2020 alone, a further four contracting states ratified or acceded to the New York Convention.[29] This despite an ongoing pandemic affecting the vast majority of its contracting states, leading to various disruptions and delays to the access of justice for

[26] Robert Coffey and Peter Stewart, *Arbitration Journal*, "Arbitrating disputes arising out of smart contracts" (19 January 2020) <https://journal.arbitration.ru/analytics/arbitrating-disputes-arising-out-of-smart-contracts/>.
[27] Dmitry Narozhny, *The Blockchain Dispute Resolution Layer*, "Is Kleros Legally Valid as Arbitration?" (12 June 2019) <https://blog.kleros.io/is-kleros-legally-valid-as-arbitration/> cf. e.g. Prof. Dr. Frank Emmert, *ResearchGate*, "A Critical Review of the Kleros 'Dispute Revolution'" (September 2019) <https://www.researchgate.net/profile/Frank_Emmert2/publication/335715800_A_Critical_Review_of_the_Kleros_Dispute_Revolution/links/5d777776299bf1cb80954c5c/A-Critical-Review-of-the-Kleros-Dispute-Revolution.pdf>.
[28] Prof. Pieter Sanders, April 2011 <https://www.conyers.com/wp-content/uploads/2018/06/2014_10_Article_The_New_York_Convention.pdf>.
[29] *1958 New York Convention Guide*, "All news" (2020) <https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=8&opac_view=-1&menu=715>.

disputing parties.[30]

The Convention's success may in part be attributable to the drafters' ability to navigate multiple legal and economic backgrounds and philosophies to build a near-unprecedented consensus. The development of Kleros and its contemporaries perhaps embodies that spirit of problem solving and represents a further shift in mentality needed to modernise and support the global economy.

The New York Convention regulates several aspects of international arbitration that are outside the scope of this paper. The Convention only applies to "non-domestic" arbitral awards, for example.[31] In this section, I will briefly set out the requirements of the New York Convention in respect to the form of an arbitral agreement, formality requirements and then the recognition and enforcement of an arbitral award, including the formality requirements.

Form of an agreement to arbitrate

According to Redfern and Hunter, "the agreement to arbitrate is the foundation stone of international arbitration."[32] It evidences the parties' consent to arbitrate, otherwise known as "party autonomy". It is this consent that also forms the basis of the Kleros system. Under Article II of the New York Convention, such agreement of the parties must be in writing:

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

Much about the way we do business today has changed since 1958, perhaps most starkly exemplified by today's methods of communication. An agreement to submit to Kleros ODR is clearly not an agreement "contained in an exchange of letters or telegrams". However, the United Nations Commission on International Trade Law ("UNCITRAL") has issued a recommendation that Article II, paragraph 2 be not "exhaustive".[33] Further, the UNCITRAL Model Law on International Commercial Arbitration

[30] See, e.g. Aram Aghababyan, Anush Hokhoyan and Sadaff Habib, *Kluwer Arbitration Blog*, "Global Impact of the Pandemic on Arbitration: Enforcement and Other Implications" (19 August 2020) <http://arbitrationblog.kluwerarbitration.com/2020/08/19/global-impact-of-the-pandemic-on-arbitration-enforcement-and-other-implications/>.
[31] *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958), Objectives, para. 1.
[32] Redfern and Hunter on International Arbitration (Sixth Edition) (Nigel, Partasides, Redfern, et al.; Sep 2015), p. 71.
[33] UNCITRAL, "Recommendation regarding the interpretation of Article II, paragraph 2, and Article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the

has attempted to resolve this problem:[34]

3. An agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

4. The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; 'electronic communication' means any communication that the parties make by means of data messages; 'data message' means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

Thus, the strict requirements as to the form of the agreement have been "relaxed".[35] However, there remains the requirement of a "permanent record" of the agreement to arbitrate.[36] For example, under Swiss law, the agreement will be valid if it can be "evidenced by a text".[37] In the case of an agreement to Kleros ODR, the parties make their agreement which is then executed via a smart contract. Accordingly, the parties will therefore have a clear record of their agreement to Kleros ODR, meeting the requirement under the New York Convention of an agreement to arbitrate in writing.

However, parties should be aware that certain jurisdictions apply stricter requirements as to the form of the agreement to arbitrate, which may exclude the application of the Convention to Kleros.[38] In the case of the Clause, there is a clear agreement to arbitrate evidence by a text. Should the relevant parties find themselves in a dispute which they then refer to the Kleros system, how does a winning party then make use of its award?

Recognition and enforcement of an arbitral award

As Redfern and Hunter state, in arbitration the purpose of recognition is to act as a shield, while the purpose of enforcement is to act as a sword.[39] In other words, the former is used as a defence to block an opponent, while the latter is used offensively, as a means to apply legal sanctions against an opponent. Indeed, it has been argued that "the automatic enforcement of Kleros dispute resolution is simply the enforcement of international arbitration awards."[40]

United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session", issued in *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), annex II <https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf> p.2.

[34] UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, Article 7.

[35] Redfern and Hunter on International Arbitration (Sixth Edition) (Nigel, Partasides, Redfern, et al.; Sep 2015), p. 77.

[36] Redfern and Hunter on International Arbitration (Sixth Edition) (Nigel, Partasides, Redfern, et al.; Sep 2015), p. 77.

[37] Swiss Private International Law Act 1987, section 178(1).

[38] Dmitry Narozhny, *The Blockchain Dispute Resolution Layer*, "Is Kleros Legally Valid as Arbitration?" (12 June 2019) <https://blog.kleros.io/is-kleros-legally-valid-as-arbitration/>.

[39] Redfern and Hunter on International Arbitration (Sixth Edition) (Nigel, Partasides, Redfern, et al.; Sep 2015), p. 612.

[40] Aleksandra Lamontanaro, *Fordham Intellectual Property, Media & Entertainment Law Journal*, "Self-Enforcing Blockchain Dispute Resolution: Justice Without the State Amid the Covid-19?" (20 April 2020) <http://www.fordhamiplj.org/2020/04/20/self-enforcing-blockchain-dispute-resolution-justice-without-the-state-amid-the-coronavirus/>.

Pursuant to Article III of the New York Convention, contracting states "shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon," subject to certain conditions and formality requirements, which will be discussed further below. These two remedies are relevant because, although smart contracts such as typically used in the Kleros system may be self-executory in nature and based on codes, this does not mean that disputes will not arise."[41] Parties may also seek to request subsequent judicial review of an already executed ruling, pursuant to the Convention.

In the case of Kleros, it is worth noting that the party seeking judicial review will typically be the losing party. Because of the self-executing nature of the smart contract, the funds are automatically transferred to the winning party, turning the tables in favour of the party presumed to be right under the Kleros system and in contrast to traditional arbitration in which the winning party may face a further battle to enforce their award.[42]

As Kleros moves into mainstream disputes, any parties who agree to refer their disputes to the Kleros system may have to resort to a domestic legal system for the recognition and enforcement of their agreement and any awards made thereunder. However, this is outside of the scope of this paper. Instead, it examines the requirements to recognize and enforce foreign arbitral awards, including the formality requirements under the Convention.

Formality requirements

The original or a copy?

Article IV of the Convention sets out certain formality requirements, such as the submission of a "duly authenticated" original or "duly certified copy" of the award and underlying arbitration agreement. While the requirements as to the form of the agreement have evolved, this is less developed in respect to the form of the award itself.

In the case of Kleros, any decision is typically self-enforcing. But as Kleros scales up to mainstream cases, such as evidenced by the Clause, the decisions under its arbitration protocol will result in a digital award. Such a digital award "needs to include information which makes sure that the award cannot be altered after it is created or which easily and securely records that no changes have been made, and in the case of which, it would no longer be an authentic award."[43]

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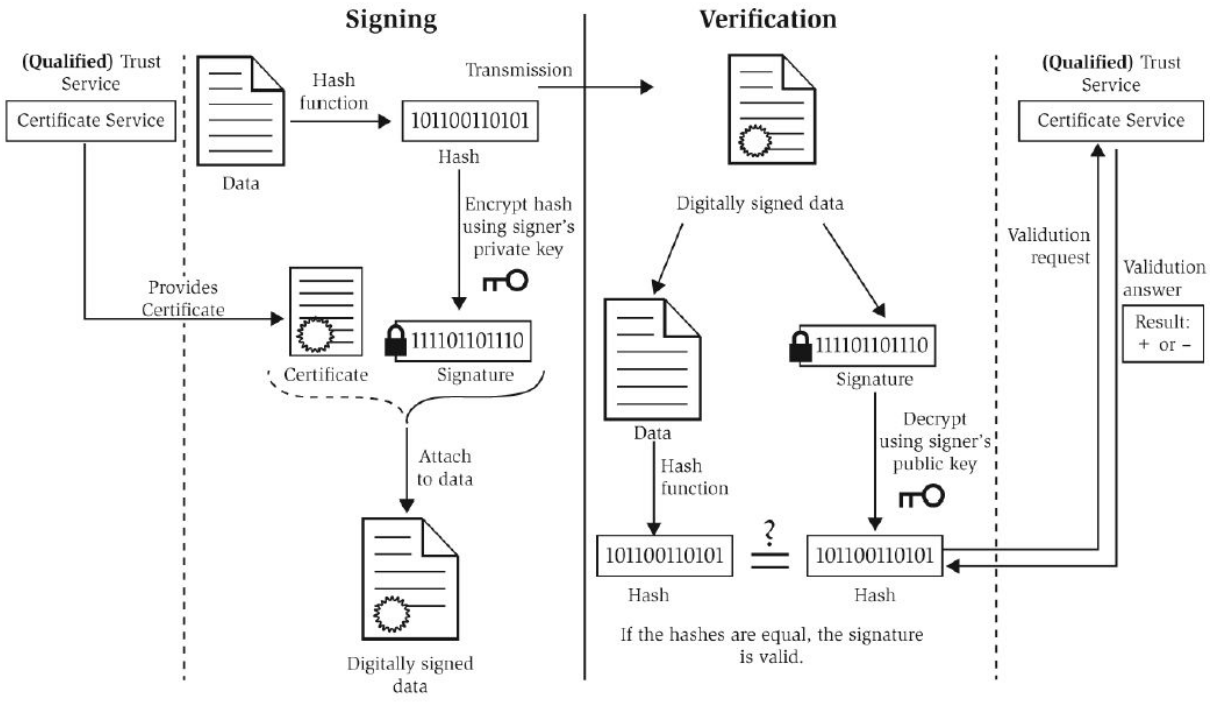
[41] Ashita Alag and Joy Ramphul, *ADR Arbitration Chambers*, "Interaction Between Blockchain Technology And Arbitration" (14 January 2020) <https://www.adrarbitration.ch/blog/interaction-between-blockchain-technology-and-arbitration>.
[42] See, e.g. Sam Vitello, *Kleros*, "Introducing Kleros Governor: A Smart Contract To Rule Them All" (12 February 2020) <https://blog.kleros.io/introducing-kleros-governor/>.
[43] Erik Schäfer, "E-Signature of Arbitral Awards", in Maxi Scherer et al. (eds), *International Arbitration and the COVID-19 Revolution* (Kluwer Law International 2020) <https://www-kluwerarbitration-com.ezp.sub.su.se/document/kli-ka-scherer-2020-ch08?q=International%20Arbitration%20and%20the%20COVID-19%20Revolution>, p. 3.

Yet, assuming there is "a cryptographic hash function" and a suitable digital signature, this should ensure a "trustworthy" system sufficient to meet the formality requirements under the New York Convention.[44] While an analysis of the technology is beyond the scope of this paper, it is important to consider the legality of digital signatures under national and international law.

Digital signatures

A digital or electronic signature may be defined as "data in electronic form, which is logically associated with other data in electronic form and which is used by the signatory



to sign."[45] The diagram below sets out a typical example of a digital signature.

Source: Erik Schäfer, "E-Signature of Arbitral Awards", in Maxi Scherer et al. (eds), International Arbitration and the COVID-19 Revolution (Kluwer Law International 2020).

According to Schäfer, the legal rules of the court recognizing or enforcing the award will determine the requirements as to: "(i) who may legalize the attestation; and (ii) according to which formal requirements are governed by the legal rules applied by the court recognizing or enforcing the award." Based on its assessment of which rules are applicable, the court may apply its own rules or those of the place of arbitration to

[44] Erik Schäfer, "E-Signature of Arbitral Awards", in Maxi Scherer et al. (eds), *International Arbitration and the COVID-19 Revolution* (Kluwer Law International 2020) <https://www-kluwerarbitration-com.ezp.sub.su.se/document/kli-ka-scherer-2020-ch08?q=International%20Arbitration%20and%20the%20COVID-19%20Revolution>, p. 3.
[45] Wikipedia, cited by Erik Schäfer, "E-Signature of Arbitral Awards", in Maxi Scherer et al. (eds), *International Arbitration and the COVID-19 Revolution* (Kluwer Law International 2020) <https://www-kluwerarbitration-com.ezp.sub.su.se/document/kli-ka-scherer-2020-ch08?q=International%20Arbitration%20and%20the%20COVID-19%20Revolution>, p. 3.

determine the formality requirements.[46]

A digital award will need to be signed and then possibly authenticated via a digital signature. Fortunately, as Schäfer points out:

> This type of technology and infrastructure is widely standardized and available for use. This technology enables the production and digital signature of digital documents that are authentic and can be attributed to a natural person as signee with a degree of certainty that is as trustworthy as any signed original paper document. This includes arbitral awards.[47]

Further:

> If legal rules are in force at the place of arbitration that, subject to certain requirements, establish the equivalence of a digital signature to a physical signature for the document category arbitral award and such requirements are met, the award would be considered as 'signed' by the arbitrator(s)."[48]

The parties are free to agree in their arbitration agreement to the use of such technology that can provide the issue and electronic delivery of electronically signed digital awards.[49] This could be achieved by the parties agreeing to refer their disputes to the Kleros protocol, such as in the case of the Clause, so long as the Kleros system meets this legal standard.

National and international law

Various instruments and organs of international law have sought to promote the use of digital signatures. For example, the UNCITRAL Model Law on Electronic Signatures aims to enable and facilitate the use of electronic signatures by establishing criteria of technical reliability for the equivalence between electronic and hand-written signatures.[50]

Adopted in 33 mostly developing states,[51] the United Nations Convention on the Use of

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[46] Erik Schäfer, "E-Signature of Arbitral Awards", in Maxi Scherer et al. (eds), *International Arbitration and the COVID-19 Revolution* (Kluwer Law International 2020) <https://www-kluwerarbitration-com.ezp.sub.su.se/document/kli-ka-scherer-2020-ch08?q=International%20Arbitration%20and%20the%20COVID-19%20Revolution>, p. 2.

[47] Erik Schäfer, "E-Signature of Arbitral Awards", in Maxi Scherer et al. (eds), *International Arbitration and the COVID-19 Revolution* (Kluwer Law International 2020) <https://www-kluwerarbitration-com.ezp.sub.su.se/document/kli-ka-scherer-2020-ch08?q=International%20Arbitration%20and%20the%20COVID-19%20Revolution>, p. 3.

[48] Erik Schäfer,"E-Signature of Arbitral Awards", in Maxi Scherer et al. (eds), *International Arbitration and the COVID-19 Revolution* (Kluwer Law International 2020) <https://www-kluwerarbitration-com.ezp.sub.su.se/document/kli-ka-scherer-2020-ch08?q=International%20Arbitration%20and%20the%20COVID-19%20Revolution>, p. 2.

[49] Erik Schäfer, "E-Signature of Arbitral Awards", in Maxi Scherer et al. (eds), *International Arbitration and the COVID-19 Revolution* (Kluwer Law International 2020) <https://www-kluwerarbitration-com.ezp.sub.su.se/document/kli-ka-scherer-2020-ch08?q=International%20Arbitration%20and%20the%20COVID-19%20Revolution>, p. 3.

[50] *United Nations Commission on International Trade Law*, "Status: United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005)" <https://uncitral.un.org/en/texts/ecommerce/conventions/electronic_communications/status>.

[51] *United Nations Commission on International Trade Law*, "Status: United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005)" <https://uncitral.un.org/en/texts/ecommerce/conventions/electronic_communications/status>.

Electronic Communications in International Contracts (New York, 2005) ("Electronic Communications Convention") and the subsidiary UNCITRAL Model Law on Electronic Signatures promote "the recognition of foreign certificates and electronic signatures based on a principle of substantive equivalence that disregards the place of origin of the foreign signature."[52]

For example, Sri Lanka is a signatory and has enacted the Electronic Transactions Act 2006 to "facilitate domestic and international electronic commerce by eliminating legal barriers and establishing legal certainty".[53] Further, the European Union ("EU") has also regulated electronic signatures. Article 25 of the Regulation (EU) No. 910/2014 of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market ("eIDAS") provides:

1. An electronic signature shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in an electronic form or that it does not meet the requirements for qualified electronic signatures.

2. A qualified electronic signature shall have the equivalent legal effect of a handwritten signature.

3. A qualified electronic signature based on a qualified certificate issued in one Member State shall be recognised as a qualified electronic signature in all other Member States.

Article 4 of eIDAS provides for the legal effect of a digital signature across the EU:

> there shall be no restriction on the provision of trust services in the territory of a Member State by a trust service provider established in another Member State for reasons that fall within the fields covered by this Regulation' and that products and trust services that comply with this Regulation shall be permitted to circulate freely and to be recognized in the internal market.

Further, Article 14 of eIDAS regulates the legal effect of a digital signature from outside the EU:

> trust services provided by trust service providers established in a third country shall be recognized as legally equivalent to qualified trust services provided by qualified trust service providers established in the Union where the trust services originating from the third country are recognized under an agreement concluded between the Union and the third country in question or an international organization in accordance with Article 218 TFEU.

Thus, if the eIDAS requirements are met, the member states of the EU will treat an electronic signature as equivalent to a handwritten signature of any arbitrator on an electronic award. Indeed, pursuant to sections 1054(1) and 130b of the German Code of Civil Procedure, electronically signed awards are valid under German law if the qualified electronic signature meets the relevant legal requirements.[54]

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[52] *United Nations Commission on International Trade Law*, UNCITRAL Model Law on Electronic Signatures (2001) <https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_signatures>.
[53] CommonLII, *Sri Lanka Consolidated Acts*, "Electronic Transactions (No. 19 of 2006)" s. 2, <http://www.commonlii.org/lk/legis/num_act/et19o2006281/>.
[54] Erik Schäfer, "E-Signature of Arbitral Awards", in Maxi Scherer et al. (eds), *International Arbitration and the COVID-19 Revolution* (Kluwer Law International 2020) <https://www-kluwerarbitration-com.ezp.sub.su.se/document/kli-ka-scherer-2020-ch08?q=International%20Arbitration%20and%20the%20COVID-19%20Revolution>, p. 5.

Kleros

Given the above, the New York Convention's formality requirements of an arbitral award are certainly within Kleros' range. An electronically signed digital award appears able to meet the standards of the law of the place of the arbitration as well as the law of the place of recognition and enforcement.

One question outside the scope of this paper is whether the anonymity of the Kleros jurors presents a hurdle. However, so long as the juror's electronic signature is capable of verification and correctly affixed to the authenticated award, this need not necessarily lead to any difficulty.

The identity of an arbitrator is mostly relevant in an assessment of any conflicts, rather than to the quality of their decision. Having considered whether Kleros meets the formality requirements under the Convention, this paper will now turn to the other grounds to refuse recognition and enforcement of an arbitral award.

Grounds to refuse recognition and enforcement

The grounds – Article V(1)

Assuming a Kleros ODR agreement and subsequent decision meet all the formality requirements as discussed above, the next issue is whether the court in which recognition or enforcement is sought will grant such an application.
Article V(1) of the Convention sets out the five exhaustive grounds for which recognition and enforcement of an arbitral award may be refused. These grounds are to be construed narrowly[55] and are as follows:

1. an incapacity of the parties or an invalid arbitration agreement under the law to which the parties have subjected it, or otherwise the law of the place of the arbitral award;[56]

2. a lack of proper notice of arbitrator appointment or the proceedings or other lack of due process;[57]

3. issues of jurisdiction;[58]

4. the composition of the arbitral tribunal or procedure was not in accordance with the agreement or the law of the place of the arbitration;[59] and

5. the award is not yet binding or has been set aside in and under the law of the

[55] Redfern and Hunter on International Arbitration (Sixth Edition) (Nigel, Partasides, Redfern, et al.; Sep 2015), p. 623, citing Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (Kluwer Law International, 1981), pp. 267 and 268.
[56] *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958), Article V(1)(a).
[57] *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958), Article V(1)(b).
[58] *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958), Article V(1)(c).
[59] *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958), Article V(1)(d).

> place of the arbitral award.[60]

Chief among the concerns raised in respect to Kleros ODR centres on the potential lack of due process by limiting the parties' opportunity to present their case.

Due process

In the Kleros system, a juror must make their decision based on the transaction evidence on the blockchain and critics claim jurors do not "hear" any arguments from the disputing parties.[61]

In reality, the parties do indeed have the opportunity to defend their case. In this sense, Kleros is no different from most other online dispute resolution systems. It can also be seen to comply with Article 18 of the UNCITRAL Model Law, which requires the parties to be treated with equality and for each to be given a full opportunity of presenting its case. In addition, the fact that the transaction is coded on the blockchain means that other users could potentially access the information and contribute to the arguments, much like an amicus curiae. This certainly avoids some of the potential hurdles raised by the due process requirement under the New York Convention.[62]

It should also be recognised that in the case of Kleros, the parties have expressly exercised their right to choose Kleros ODR as their dispute resolution mechanism, cognisant of the form and methodology it takes. Arguably, if the parties have willingly agreed to abdicate their right to request another procedure by choosing Kleros, this agreement should not be overruled by later arguments as to due process. Alternatively, it should be interpreted as a form of waiver to any right of complaint.[63] As Chief Judge Posner put it:

> Short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract.[64]

It should be acknowledged that the fundamental purpose of the due process protection under the Convention is to guarantee procedural fairness, regardless of the parties' agreement.

However, it is worth noting that cases in which the parties' procedural agreements will be found so unfair as to violate the Convention are extremely rare.[65] It is therefore

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[60] *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958), Article V(1)(e).
[61] See, e.g. Aleksandra Lamontanaro, *Fordham Intellectual Property, Media & Entertainment Law Journal*, "Self-Enforcing Blockchain Dispute Resolution: Justice Without the State Amid the Covid-19?" (20 April 2020) <http://www.fordhamiplj.org/2020/04/20/self-enforcing-blockchain-dispute-resolution-justice-without-the-state-amid-the-coronavirus/>.
[62] Derric Yeoh, *Kluwer Arbitration Blog*, "Is Online Dispute Resolution The Future of Alternative Dispute Resolution?" (29 March 2018) <http://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-future-alternative-dispute-resolution/?doing_wp_cron=1597679206.6630859375000000000000>.
[63] See, e.g. Gary B. Born, *International Commercial Arbitration*, (Kluwer Law International, 2nd ed., 2014), pp. 3537-3539
[64] *Baravati v. Josephthal, Lyon & Ross*, 28 F.3d 704, 709 (7th Cir. 1994).
[65] Gary B. Born, *International Commercial Arbitration*, (Kluwer Law International, 2nd ed., 2014), p. 3498.

reasonable to conclude that Kleros ODR should not be dismissed out of hand on the basis of arguments as to a lack of due process.

The grounds – Article V(2)

Additionally, Article V(2) of the New York Convention provides for the discretion to refuse recognition and enforcement of an arbitral award based on:

a) a lack of arbitrability under the law of the place in which recognition or enforcement is sought;[66] or

b) if it would be contrary to the public policy of the place in which recognition or enforcement is sought.[67]

Article V(2) refers frequently to the law of the place in which recognition or enforcement is sought. Although this demands additional foresight, parties are therefore advised to be mindful of the jurisdiction they will likely be seeking to enforce any Kleros decision. However, it should be recalled that one of the aims of the New York Convention is to promote international arbitration.

Indeed, Article V creates "a 'ceiling', or a maximum level of control".[68] The New York Convention has an implicit pro-enforcement bias.[69] Its use of permissive language, that a court "may" and not "must" refuse recognition and enforcement, can lead to interesting results.

For example, the French Cour de Cassation found that an award that had been set aside in England was enforceable because "an international arbitral award, which does not belong to any state legal system, is an international decision of justice and its validity must be examined according to the applicable rules of the country where its recognition and enforcement are sought."[70]

Delocalisation theory

The French approach aligns with the theory of "delocalisation,"[71] which is predicated on a delocalised, universal law of the arbitration. The French approach has been noted, although not endorsed, by the UK Supreme Court.[72] The delocalisation theory does away with the "dual system of control" between the courts of the place of arbitration and the

[66] *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958), Article V(2)(a).
[67] *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958), Article V(2)(b).
[68] Emmanuel Gaillard and Benjamin Siino, *The Guide to Challenging and Enforcing Arbitration Awards* (1st ed) "Enforcement under the New York Convention" (Global Arbitration Review, June 2019) <https://globalarbitrationreview.com/chapter/1178556/enforcement-under-the-new-%E2%80%89york-convention#footnote-057> .
[69] See, e.g. Diana Itzel Santana Galindo, "The Role of the Seat in Smart Contract Disputes", *International Journal of Online Dispute Resolution* 2020 (6) 1, p. 42.
[70] *Société PT Putrabali Adyamulia v Société Rena Holding et Société Mnogutia Est Epices* [2007] Rev Arb 507 cited by Redfern and Hunter on International Arbitration (6th Edition) (Nigel, Partasides, Redfern, et al.; Sep 2015), p. 637.
[71] See, e.g. Redfern and Hunter on International Arbitration (Sixth Edition) (Nigel, Partasides, Redfern, et al.; Sep 2015), p. 179.
[72] *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46.

courts of the place of enforcement of the award, in favour of the place of enforcement alone.[73]

In practice, the delocalisation approach is limited. According to Born, the law of the place of arbitration "ordinarily and presumptively play[s] a central role in defining the legal framework for international arbitral proceedings."[74] The mandatory law of the place of arbitration thus exposes the limits to party autonomy. As Born states, "ironically, an arbitration may be "delocalized" or "a-national" only when conducted in a nation whose arbitration law would permit this result."[75] Yet in the case of Kleros, its open source ODR protocol can be described as "a self-enforceable arbitration method.[76]

In this sense, Kleros ODR does not rely on a national legal system for the framework for the proceedings or the enforcement of the award. However, as Kleros scales up its offering to mainstream cases, this vital step will need to be more closely considered by the parties.

The "delocalisation,"[77] theory as applied by for example the French courts as mentioned above, is therefore of particular relevance to Kleros. However, a foreseeable difficulty that may arise is if a losing party to a Kleros decision seeks to set it aside by recourse to the courts of the place of the arbitration. In such a case, the courts (and therefore the parties who have agreed to Kleros ODR) may face a conflict of laws. However, as mentioned above, the Kleros system turns the tables in favour of the party that is presumed to be in the right, that is the winning party.

Which law applies?

As Möslein observes, "legal jurisdictions will always prevail over digital jurisdictions, at least as long as nation states exist (and technical difficulties of enforcement can be overcome)."[78] In the Clause, for example, the parties have expressly stated that Peruvian law governs the arbitration. This may be a sensible choice given that Peru is a signatory to the New York Convention.[79] However, the Clause does not specify the place of the arbitration. Although beyond the scope of this paper, it is important for the parties to consider which law governs the arbitral agreement as well as where the place of arbitration is.

As a method of dispute resolution that exists and takes place entirely online, the determination of the place of a Kleros "arbitration", the applicable arbitration law and indeed the law applicable to the contract itself may need to refer to the various conflicts

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[73] See, e.g. Redfern and Hunter on International Arbitration (Sixth Edition) (Nigel, Partasides, Redfern, et al.; Sep 2015), p. 179.
[74] Gary B. Born, International Commercial Arbitration (2nd Edition), (Kluwer Law International, 2014), p. 1592.
[75] Gary B. Born, International Commercial Arbitration (2nd Edition), (Kluwer Law International, 2014), p. 1590.
[76] Dmitry Narozhny, *The Blockchain Dispute Resolution Layer*, "Is Kleros Legally Valid as Arbitration?" (12 June 2019) <https://blog.kleros.io/is-kleros-legally-valid-as-arbitration/>.
[77] See, e.g. Redfern and Hunter on International Arbitration (Sixth Edition) (Nigel, Partasides, Redfern, et al.; Sep 2015), p. 179.
[78] Florian Möslein, *SSRN*, "Conflicts of Laws and Codes: Defining the Boundaries of Digital Jurisdictions" (1 May 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3174823>.
[79] See, e.g. Fernando Cantuarias Salaverry, "National Report for Peru (2018 through 2020)", in Lise Bosman (ed), *ICCA International Handbook on Commercial Arbitration* (Kluwer Law International, February 2020) pp. 1-38.

of laws rules.[80] There are a several approaches to determining the place of the arbitration, for example:

i) the law applicable to the online arbitration proceedings;
ii) the law of closest connection;
iii) the determination of the arbitral tribunal; and
iv) the agreement of the parties.[81]

Alternatively, the place where:

i) the website of the case in question is, established by determining where all case files and submissions of the parties are;
ii) the servers are located;
iii) the computer is based or where the emails of the arbitrator(s) are sent and collected;
iv) the e-arbitration provider is located; and
v) the e-platform used for the conduct of the e-arbitral proceedings is located.[82]

As for the law of the arbitration agreement, a recent decision of the UK Supreme Court provides some guidance to parties.[83] According to the UK Supreme Court:

i) The express choice of governing law for the contract will generally apply to an arbitration agreement which forms part of the contract.[84]
ii) In the absence of an express or implied choice of law of the parties, the default rule is the system of law with which the arbitration agreement is most closely connected.[85]
iii) Where the parties have chosen a seat of arbitration, the law of the arbitration will generally be the law of the seat, even if this differs from the law applicable to the parties' substantive contractual obligations.[86]

Thus, the parties potentially face a minefield to determine the applicable law or laws to a Kleros "arbitration". As Rühl states in relation to the law applicable to smart contracts, "the principle of party autonomy is, therefore, able to provide much needed legal

[80] See, e.g. Giesela Rühl, *Oxford Business Law Blog*, "The Law Applicable to Smart Contracts, or Much Ado About Nothing?" (23 January 2019) <https://www.law.ox.ac.uk/business-law-blog/blog/2019/01/law-applicable-smart-contracts-or-much-ado-about-nothing>.
[81] Ji Yoon Park and Jae Hoon Choi, Kluwer Arbitration Blog, "The Issue of the Seat of Arbitration in ODR Arbitration" (5 August 2020) <http://arbitrationblog.kluwerarbitration.com/2020/08/05/the-issue-of-the-seat-of-arbitration-in-odr-arbitration/?doing_wp_cron=1597661141.1424989700317382812500>.
[82] Cemre Kadioglu and Sadaff Habib, *Kluwer Arbitration Blog*, "Virtual Hearings to the Rescue: Let's Pause for the Seat?" (13 July 2020) <http://arbitrationblog.kluwerarbitration.com/2020/07/13/virtual-hearings-to-the-rescue-lets-pause-for-the-seat/?doing_wp_cron=1596091140.9944798946380615234375>.
[83] See, e.g. Mihaela Maravela, *Kluwer Arbitration Blog*, "Enka v Chubb Revisited: The Choice of Governing Law of the Contract and the Law of the Arbitration Agreement" (11 October 2020) <http://arbitrationblog.kluwerarbitration.com/2020/10/11/enka-v-chubb-revisited-the-choice-of-governing-law-of-the-contract-and-the-law-of-the-arbitration-agreement/>.
[84] *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb" & Ors* [2020] UKSC 38, [170].
[85] *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb" & Ors* [2020] UKSC 38, [156].
[86] *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb" & Ors* [2020] UKSC 38, [170].

certainty."[87]

When we consider the Clause, there is a clear choice of Peruvian law to govern the arbitration. However, the requirements of the New York Convention refer to the law of the place of the arbitration as well as the place where recognition and enforcement are sought. These are more difficult to assess, and parties may therefore need to tread carefully.

What parties should keep in mind is that their arbitration agreement and any subsequent award should preferably be valid in all relevant jurisdictions. However, the delocalised nature of the New York Convention entails that the law of the place where recognition and enforcement is sought is the most important here.

Given the number of possibilities and therefore level of uncertainty involved in respect to the other applicable laws, this paper will next focus on possible strategies to assist both Kleros and the parties to consider, such as the law of the place in which recognition or enforcement is sought.

Possible strategies to consider

It is worth briefly considering the specification of the law of the place of arbitration in a Kleros "arbitration". This section will therefore address the criteria of a suitable place of arbitration, before turning to the possibilities of recognition and enforcement in Sri Lanka and finally some general recommendations as to a possible model Kleros ODR clause.

What makes a good place of arbitration?

Traditional users of international arbitration tend to be very sophisticated and include large multinational corporations and state actors. Such entities value arbitration most for the enforceability of an arbitral award as well as the possibility to avoid domestic legal systems."[88]

However, these points will no doubt be important too, albeit less consciously, for parties seeking a cost-effective method of dispute resolution through Kleros. Consequently, it is worth considering what makes an attractive place of arbitration from the perspective of seasoned users of arbitration. Their criteria typically includes the place's 'general reputation and recognition,' its 'formal legal infrastructure,' the neutrality and impartiality of its legal system, the national arbitration law, and its track record in enforcing

[87] Giesela Rühl, *Oxford Business Law Blog*, "The Law Applicable to Smart Contracts, or Much Ado About Nothing?" (23 January 2019) <https://www.law.ox.ac.uk/business-law-blog/blog/2019/01/law-applicable-smart-contracts-or-much-ado-about-nothing>.
[88] School of International Arbitration at Queen Mary University of London and White & Case LLP, *2018 International Arbitration Survey: The Evolution of International Arbitration* (2018) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf>, p. 2.

agreements to arbitrate and arbitral awards."[89]

These criteria are worth bearing in mind, particularly as Kleros continues to scale up to more mainstream cases.

Recognition and enforcement in emerging markets

There are a number of tools available to assist parties in drafting an arbitration clause that will be enforceable under the New York Convention.[90] Such tools can also assist the parties to select applicable laws of the arbitration that best suit them in respect of any future dispute.

For the users of Kleros who are based in emerging markets, these may be particularly useful and offer a viable alternative to the standard practices of traditional arbitration users. For example, it has been observed that the trend in Asia, a key region of growth and a popular destination of foreign investment,[91] towards convergence in respect to enforcement, "continues unabated".[92] Many countries are actively developing their arbitration sectors.[93] One country that stands out in the region as a jurisdiction that may be suitable for Kleros ODR is Sri Lanka.

Sri Lanka

According to Santander's Trade Report, Sri Lanka has seen a steady increase in foreign direct investment following the end of conflict and its economic recovery.[94] It reports that the government, which has taken a number of measures to attract foreign investors, expects foreign investment to more than triple to USD 4 billion by 2022.[95]

Enforcement of foreign awards

Sri Lanka ratified the New York Convention on 9 April 1962.[96] The local arbitration law generally follows the Convention, including the grounds on which recognition and enforcement of a foreign award may be refused.[97] Further, the courts in Sri Lanka have

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[89] School of International Arbitration at Queen Mary University of London and White & Case LLP, *2018 International Arbitration Survey: The Evolution of International Arbitration* (2018) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf>, p. 2.
[90] See, e.g. *International Bar Association*, "Validity of arbitral awards – country reports" (November 2019) <https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Recogntn_Enfrcemnt_Arbitl_Awrd/Arbitralawards-countryreports.aspx>.
[91] United Nations ESCAP, "Foreign Direct Investment Trends and Outlook in Asia and the Pacific 2019/2020" (4 December 2019) <https://www.unescap.org/resources/foreign-direct-investment-trends-and-outlook-asia-and-pacific-20192020#>.
[92] Andre Yeap SC and Kelvin Poon, *Global Arbitration Review*, "Enforcement of Arbitral Awards in the Asia-Pacific" (24 May 2019) <https://globalarbitrationreview.com/chapter/1193370/enforcement-of-arbitral-awards-in-the-asia-pacific>.
[93] See, e.g. Albertus Aldio Primadi and Rizki Karim, *Kluwer Arbitration Blog*, "Indonesian Arbitration Law Turns 21: A Timely Metamorphosis?" (24 August 2020) <http://arbitrationblog.kluwerarbitration.com/2020/08/24/indonesian-arbitration-law-turns-21-a-timely-metamorphosis/>.
[94] Banco Santander, S.A., *Foreign Investment*, "Sri Lanka: Foreign Investment" (October 2020) <https://santandertrade.com/en/portal/establish-overseas/sri-lanka/investing-3>.
[95] Banco Santander, S.A., *Foreign Investment*, "Sri Lanka: Foreign Investment" (October 2020) <https://santandertrade.com/en/portal/establish-overseas/sri-lanka/investing-3>.
[96] *New York Arbitration Convention*, "Contracting States" (2020) <http://www.newyorkconvention.org/countries>.
[97] See *Arbitration Act No. 11 of 1995* (Sri Lanka), s. 34(1).

emphasized that party autonomy is a fundamental principle of arbitration.[98]

The parties' agreement to arbitrate should be evidenced in writing, and such agreement is "deemed to be in writing if it is contained in a document signed by the parties or in an exchange of letters, telexes, telegrams or other means of telecommunication which provide a record of the agreement".[99] The key is that there be a record of the agreement.[100]

According to the Sri Lankan Supreme Court, only a violation of a fundamental principle of law applicable in Sri Lanka would be contrary to public policy.[101] The phrase "public policy" is considered to cover fundamental principles of law and justice and consequently, instances such as corruption, bribery and fraud and similar serious cases would constitute a ground for setting aside an award on public policy grounds.[102]

Sri Lanka can therefore be described as a pro-arbitration jurisdiction.

Digital awards and signatures

Similar to the Convention, an application for recognition and enforcement must be accompanied by the original award and the original arbitration agreement, or duly certified copies of those documents.[103]

As mentioned previously, Sri Lanka has implemented the Electronic Communications Convention by enacting the Electronic Transactions Act 2006. Pursuant to § 4 of the Electronic Transactions Act 2006, "any information contained in a data message, electronic document, electronic record or other communication to an instrument reduced into writing, if the information contained therein is: (a) rendered or made available in an electronic form; and (b) accessible so as to be usable for a subsequent reference".[104]

Further, pursuant to § 7 of the Electronic Transactions Act 2006, "where an enactment requires a person to affix his handwritten signature or any mark on any document, it would suffice if the information is found in an electronic form and is authenticated by

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[98] Dilumi de Alwis, "National Report for Sri Lanka (2015 through 2017)", in Lise Bosman (ed), *ICCA International Handbook on Commercial Arbitration*, (Kluwer Law International; ICCA & Kluwer Law International 2020, Supplement No. 93, February 2017), p. 3.
[99] *Arbitration Act No. 11 of 1995* (Sri Lanka), s. 3(2).
[100] Dilumi de Alwis, "National Report for Sri Lanka (2015 through 2017)", in Lise Bosman (ed), *ICCA International Handbook on Commercial Arbitration*, (Kluwer Law International; ICCA & Kluwer Law International 2020, Supplement No. 93, February 2017), p. 5, *East West Textiles Lanka Ltd v. Ralli Brothers & Coney* [2003] (unreported) (Supreme Court) Case No. S.C. Appeal No. 83/2002 (decided on 25 November 2003).
[101] Dilumi de Alwis, "National Report for Sri Lanka (2015 through 2017)", in Lise Bosman (ed), *ICCA International Handbook on Commercial Arbitration*, (Kluwer Law International; ICCA & Kluwer Law International 2020, Supplement No. 93, February 2017), p.34 citing *Kiran Atapattu v. Janashakthi General Insurance Co. Ltd.* [2013] (Supreme Court) Appeal 30-31/2005 (decided on 22 February 2013).
[102] Dilumi de Alwis, "National Report for Sri Lanka (2015 through 2017)", in Lise Bosman (ed), *ICCA International Handbook on Commercial Arbitration*, (Kluwer Law International; ICCA & Kluwer Law International 2020, Supplement No. 93, February 2017), p. 34 citing *Light Weight Body Armour Limited v. Sri Lanka Army* 2007 (1) SLR 411.
[103] *Arbitration Act No. 11 of 1995* (Sri Lanka), s. 31(2).
[104] Justice Saleem Marsoof, "E-Commerce & E-Governance - Some Pertinent Issues" (Academia.edu) <https://www.academia.edu/12868743/E_Commerce_and_E_Governance_Some_Pertinent_Issues>, p. 5.

means of an electronic signature".[105]

In line with the UNCITRAL Model Law on Electronic Commerce (1996),[106] § 11 of the Electronic Transactions Act 2006 (Sri Lanka) provides that "… unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed in electronic form. A contract shall not be denied legal validity."

This suggests that an agreement to Kleros ODR and any subsequent Kleros decision would be covered by the relevant law in Sri Lanka. So long as there is a clear intention of the parties to arbitrate and the digital award and signature conform to the local legal requirements, a party seeking the recognition or enforcement of a Kleros decision should consider taking a closer look at Sri Lanka.

A model Kleros clause

Having considered Sri Lanka as possibly a viable destination for a party seeking the recognition or enforcement of a Kleros decision, it is worth returning to the Clause. To restate the key elements of the Clause:

i) the law applicable to the arbitration agreement is Peruvian;
ii) the parties agree to refer any disputes not capable of amicable settlement within 30 days to the Kleros system;
iii) the parties may only appeal the decision within the Kleros system; and
iv) the final decision of the Kleros system is considered final and not subject to appeal.

Although the midnight clause is frequently a near afterthought, given the relative novelty of ODR in international commerce, the parties to a Kleros "arbitration" are likely to be taking more time to consider their choice of agreement. Parties may wish to consider entering into a "parallel natural language contract"[107] like the Clause.

As future parties consider referring their disputes to arbitration, they may well come across the Clause. The author recommends that they consider clarifying their agreement to arbitrate as much as possible. The following additions or specifications to their arbitration agreement may therefore be of assistance:

i) the agreement to arbitrate under the Kleros protocol;
ii) the law of the contract;
iii) the law of the arbitration agreement;
iv) the place of the arbitration;
v) the language of the proceedings; and

[105] Justice Saleem Marsoof, "E-Commerce & E-Governance - Some Pertinent Issues" (Academia.edu) <https://www.academia.edu/12868743/E_Commerce_and_E_Governance_Some_Pertinent_Issues>, p. 6.
[106] Justice Saleem Marsoof, "E-Commerce & E-Governance - Some Pertinent Issues" (Academia.edu) <https://www.academia.edu/12868743/E_Commerce_and_E_Governance_Some_Pertinent_Issues>, p. 8.
[107] Robert Coffey and Peter Stewart, Arbitration Journal, "Arbitrating disputes arising out of smart contracts" (19 January 2020) <https://journal.arbitration.ru/analytics/arbitrating-disputes-arising-out-of-smart-contracts/>.

vi) that the decision will be final and binding following either a certain number of appeals and/or the lapse of a certain length of time.

The non-exhaustive list above is purely set out for informational purposes. However, it would appear that the greater the evidence of party autonomy covering all possibilities of dispute, the less scope a domestic court may have to refuse the recognition and enforcement of a Kleros decision.

Conclusion

The world of ODR that Kleros inhabits is one that inspires much debate and discussion. For some legal practitioners, there are concerns that the Kleros system may stray too far into the "Wild West."[108] Risks abound, not least those related to cyber-security in light of the number of online transactions taking place.[109]
Yet, it is often observed that "the legal world has yet to fully assimilate the new realities of technology, including smart contracts" and that this process will ultimately depend on the "individual legal processes in jurisdictions around the world".[110] While some lawyers may raise eyebrows, the users will vote with their feet. Many of such users may have limited means of accessing justice.

For them, "rough justice" is more than satisfactory to meet their needs. These users "do not care about the legal niceties. They just want to get a resolution and move on – and that is what ODR empowers them to do."[111] But this opportunity should also be made available to parties to "mainstream" cases.

Having considered whether a digital Kleros decision is capable of recognition and enforcement under the New York Convention and discussed the example of Sri Lanka, the author sees reason to be positive. However, questions outside the scope of this paper as to how Kleros can continue its efforts to meet the increased demand for access to justice remain. In particular, the development of a possible model Kleros clause for mainstream disputes may be of assistance to parties.

Ultimately, the emergence of Covid-19 combined with the continued increased in e-commerce transactions demonstrates that Kleros' mission to bring justice to the

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[108] James Metzger, University of New South Wales cited by Andrew Fenton, *Cointelegraph Magazine*, "Blockchain Startups Think Justice Can Be Decentralized, but the Jury Is Still Out" (23 December 2019) <https://cointelegraph.com/magazine/2019/12/23/blockchain-startups-think-justice-can-be-decentralized-but-the-jury-is-still-out>.

[109] See, e.g. Wendy Gonzales Lozano and Naimeh Masumy, *Young ICCA Blog*, "Online Dispute Resolution Platforms: Cybersecurity Champions in the COVID-19 Era? Time for Arbitral Institutions to Embrace ODRs" <https://www.youngicca-blog.com/online-dispute-resolution-platforms-cybersecurity-champions-in-the-covid-19-era-time-for-arbitral-institutions-to-embrace-odrs/>.

[110] See, e.g. Simon Chandler, *Cointelegraph*, "Smart Contracts Are No Problem for the World's Legal Systems, so Long as They Behave Like Legal Contracts" (8 February 2019) <https://cointelegraph.com/news/smart-contracts-are-no-problem-for-the-worlds-legal-systems-so-long-as-they-behave-like-legal-contracts>.

[111] Colin Rule, Amy J. Schmitz, Online Dispute Resolution and the Future of Consumer Protection (American Bar Association, 2017) cited by Dmitry Narozhny, *Kleros Fellowship of Justice Report*, "Due Process in Kleros' Consumer Dispute Resolution" (Kleros, 2019) <https://ipfs.kleros.io/ipfs/QmdH7vuFVATLqdsvWXBBq38fUX2jRp7tbiQ1MvBr8SDxBc>.

"unjusticed" in the age of social distancing has become more important than ever. Ensuring a legally sound award is therefore key to Kleros' continued promotion, protection and extension of access to justice.

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