

# Twenty-First Century Arbitration: Who Do You Trust?

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International arbitration (IA) maintains its popularity as business' premier choice of dispute resolution in the 21<sup>st</sup> century. This does not mean that the process is free from criticism which raises the question how IA attracts and retains the trust of its users in spite of its limitations.

The question of trust comes to the fore in a particularly acute manner in light of the advent of new technologies and their promise of decentralized, trustless justice by way of blockchain 'arbitration'.

## Theoretical Frameworks

Legal Sociology scholarship has identified various theories about trust and the judiciary. Two popular theories are those of Relational Trust and Procedural Justice. The Relational Trust theory posits that trust is premised on the belief that the trustee has the right intentions as well as the requisite competence. Given that this belief is rarely rooted in individual empirical experience, it tends to be based on (possibly anecdotal) knowledge about the abilities and motivations of the trustee.

The Procedural Theory takes the emphasis away from the actors (trustor/trustee) and focuses instead on the process of adjudication. It suggests that the legitimacy of any justice-dispensing institution is based on its guarantee of a fair process, far

more than the promise of a favourable outcome. The perception of fairness is based on a demonstration of neutrality, even-handedness, representation, respect, and care towards all the parties involved.

## **Trust in IA**

The fundamental promise of IA is party autonomy. It is the only adjudicatory mechanism that gives parties the freedom to determine who decides their dispute, pursuant to what law and under what procedure. Both the above theories help explain why users trust the IA mechanism.

IA meets all three premises of the Relational Trust theory: parties select arbitrators based on their perception of the arbitrators' background, experience and competence.

IA provides users with a significant degree of control over the selection of decision-makers as well as flexible procedural rules. Parties can thereby imprint their own understanding and concept of fairness in the conduct of the process. This control and attendant perception that the system can be adapted to reflect known values places the parties at the centre of the process and goes a long way towards inducing trust. The Procedural Theory thus explains why surveys regularly reflect the preference of business parties for arbitration over other, less flexible, adjudicatory mechanisms.

## **Criticisms**

One of the most persistent criticisms of IA is the opacity of the decision-making process and its lack of transparency. Recent scholarship<sup>[fn]</sup> R Oldenstam & J Ragnwaldh, "Trust and Transparency in Arbitrator Time Reporting" in S Tung, F Fortese, C Baltag, eds. *Finances in International Arbitration - Liber Amicorum Patricia Shaughnessy* (Wolters Kluwer 2020).<sup>[/fn]</sup> illustrates that opacity pervades even the basis for the remuneration of arbitrators. Another criticism is bias, which comes up in the discourse around diversity in IA. The pool of arbitrators is still largely homogenous, individuals shaped by their own cultural contexts. Statistics suggest that only a small minority of IA users finds that enough has been done

towards ensuring geographical diversity.

The demographics of the international business community are more reflective of the diversity of our world. Individuals seeking arbitral justice are diverse and driving the push towards a more inclusive arbitration community. A popular example of this is African-American Rap Artist Jay-Z decrying the lack of diversity in arbitrator pools after his experience with the process. A more institutionalised example can be found in the Prague Rules, which aim to provide a civil-law oriented alternative to the IBA Rules on the Taking of Evidence in international Arbitration. The criticism about diversity can be understood within either theory of trust. Under the Relational Trust theory, while homogenous clients could place faith in homogenous arbitrators, the distinct backgrounds and perspectives of diverse clients necessarily entail that they place their trust in decision-makers who they perceive as representative of that diversity. Under the Procedural Theory, the historically homogenous pool of arbitrators has ceased to be representative of users in ways that are of fundamental importance to the dispensation of arbitral justice, and hence cannot deliver the level of fairness that users now expect and demand.

Looking at these concerns through the prism of the trust-generating values outlined above, it appears that they are motivated not by a fundamental shift in IA values themselves, but rather by a shift in the context in which these values play out. The movement towards increased transparency has come in the form of demands for reasoned institutional decisions (say on arbitrator challenges) as well as for the publication of awards. Given the central role of arbitral institutions in shaping the arbitration landscape, they are at the receiving end of users' trust in the same way as are arbitrators. Reasoned decision-making is integral to the users' understanding of procedural fairness and a basic tenet of natural justice. An important motivation behind the movement to obtain access to awards is to obtain verifiable information about the output of arbitrators and the desire to select the best performers. This is easily explained by the Relational Trust theory, with parties seeking as much information as possible to verify the competence of their trustees.

## **Trust(lessness) and decentralised justice**

Blockchain, the distributed ledger technology used in cryptocurrency transactions, is also disrupting historical dispute resolution dispensed by centralised courts and arbitration.

Blockchain was created and rolled out initially to coincide with the aftermath of the financial crisis (and the resulting distrust in big finance) as a network of peer-to-peer financial trades for cryptocurrency (the most well-known of which is Bitcoin) that is hosted on thousands or millions of computers (called *nodes*) simultaneously. Blockchain is premised on the core principle of no central authority and no central database, it is free of transaction costs (although participation in it obviously carries an infrastructure cost), it is open to anyone, it can be anonymous and it is not owned by any single entity.

One of the central philosophies underpinning blockchain, given the fact that stakeholders do not know each other, is that of “trustlessness”. The theory is that the technical attributes of distribution and cryptographic security guarantee the “trustlessness” of the entire system, which differs from traditional ledgers where the trustworthiness of the ledger keeper is fundamental. This is also true of the legitimacy of any centralised organisation, which is a function of the trust placed in its actors. The blockchain reasoning is that stakeholders can trust the code alone, without having to know or trust any of the nodes running the network. This engenders trust in non-trusted counterparties or what enthusiasts call “trustless trust”. Reliance on human institutions, such as banks or courts, is replaced with reliance on technology.

“Blockchain arbitration”, pioneered by applications such as Kleros, uses a network of anonymous human “jurors” on the blockchain, randomly selected based on the amount that they stake to be selected – the higher the amount, the greater the chance of random selection. Anyone can be a juror, and jurors are monetarily incentivized to decide with the majority in accordance with pre-programmed outcomes along a game theory model called the Schelling Point.

Parties and jurors alike can resort to an indefinite number of appeals, to larger and larger groups of jurors, with financial viability as the only underpinning consideration.

In the emerging world of decentralized justice, applications like Kleros reason that e-commerce transactions without boundaries need like-minded and equally varied

jurors. The dispensation with qualification standards implies that disputes are resolved by lay peers, people just like the users, promising a mutual understanding of the world. This model does away with the Procedural Theory and brings the Relational Trust theory to the fore by delivering on parties' expectations. The Kleros White Paper also hints at the potential diversity of the jurors, stating that only juror interest and statistics will determine who judges a case. Kleros says that this leaves no room for concerns about representativeness, and explicitly defines the selection process as both fair and transparent since it is premised on a single denominator for all: the maximization of monetary gain. The prespecified options and the requirement of voting with the majority constitute an explicit attempt to make the decision-making process more transparent. Perhaps more importantly, Kleros hopes to do away with any external considerations and bias, by making economic incentive the only motivation for deciding a certain way. The indefinite appeal option reduces the amount of trust required in the first place, by doing away with any sense of finality from the award rendered. The differences are thus strongly reflective of an attempted response to the changes seen in worldwide commerce.

## **Conclusion**

The makeup of our world is changing, altering in turn the lenses through which IA values are perceived. The shifting trust in IA as historically practiced is not reflective of its impending demise, but rather of a remediable lack of responsiveness by its actors and gatekeepers to the challenges presented by our increasingly digital environment. Reminding ourselves that trust stands at the core of the IA process is a helpful first step towards greater, and faster, responsiveness.