Kluwer Arbitration Blog

Is Online Dispute Resolution The Future of Alternative Dispute Resolution?

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The tech revolution has been underway for some time now but has only recently come to the forefront of the general public's consciousness from the explosion in attention to bitcoin. The progress of technology has allowed it to creep into the domain of alternative dispute resolution. There is now online mediation, online arbitration, and even arbitration utilising the same blockchain technology as cryptocurrencies: blockchain arbitration. These forms of alternative dispute resolution, known as "online dispute resolution", are increasingly making their presence felt.

Online mediation

An online mediation is usually commenced when an email is sent to the parties informing them of the basic information of the online mediation. Meetings are then conducted virtually in "chat rooms" where the mediator can communicate separately with each party or simultaneously with both parties. There is usually one chat room for joint sessions, one for caucuses or "breakout rooms", and another for filing and storing documents. This can also be conducted through emails.

Asynchronous online mediation has been shown to be the most popular form of online mediation as it allows parties flexibility and faster resolution of the matter compared to offline mediation, which may see a mediation be put off to a distant date because of the parties' conflicting schedules. It would also allow parties time to fashion their response, as one's immediate response at a mediation is not always one's best response. Other benefits include savings in cost, time and convenience. For example, just last month, the Singapore State Courts' Community Justice and Tribunals System launched its "e-Mediation" to help those with neighbourly disputes save time and money as they no longer need to go to the courts to file their documents.

However, the downside to online mediation is that it dilutes some of the key features of mediation, which is the human relational aspect of mediation. Online mediation may not effectively capture the various needs, interests, motivations and emotions of the parties involved. The use of emails to convey messages instead of face to face dialogue may also embolden parties to make inflammatory comments which may not occur if they were in the same room with a mediator (a phenomenon that one can easily observe from social media). The effectiveness of communication at the mediation is also highly dependent on the parties' literary skills in expressing themselves over email. The largely asynchronous nature of online mediation may also be detrimental to the mediation process, as it breaks the momentum that a long and uninterrupted mediation session can bring.

Online arbitration

Online arbitration can be defined as an arbitration in which all aspects of the proceedings are conducted online. Online arbitrations can have hearings through the use of video conferencing, but most online arbitrations simply require parties to upload their evidential documents, respond to questions from the arbitrator and they will receive a decision from the arbitrator. Online arbitration shares many similar advantages as online mediation, such as lower costs and greater flexibility due to their asynchronous nature. The disadvantage of online arbitration not having face-to-face interactions is also less significant as arbitrations rely less on the parties' interactions but more on evidentiary written submissions.

Online arbitrations are widely used for internet domain name disputes and these can be legally binding or non-binding in nature. Internet domain name disputes are usually governed by the Internet Corporation for Assigned Names and Numbers' ("ICANN") Uniform Domain Name Dispute Resolution Policy ("UDRP"). The World Intellectual Property Organization ("WIPO") is one of the UDRP dispute resolution service providers administering the UDRP Administrative Procedure for domain name disputes and is responsible for appointing panellists to determine the dispute. The decisions made under the UDRP Administrative Procedure are non-binding but they are nevertheless highly effective. This is because while these decisions are not binding on parties, it is binding on the domain name provider, who will then effect the changes as determined by the panellists. While the parties have recourse to litigation if they are unsatisfied with the decision, this is rarely done as the expensive and time-consuming cross-border litigation is unlikely to be justified by the value of the domain name.

Online arbitrations over domain name disputes can also be legally binding. The HKIAC administered Hong Kong Domain Name Dispute Resolution Policy ("HKDRP") takes a more direct approach in effecting the panel's decision. Article 4 of the HKDRP states that the parties are required to submit to a mandatory arbitration proceeding which is governed by the Hong Kong Arbitration Ordinance. The award rendered is therefore not subject to appeal in any court and is considered as an arbitration award rendered in Hong Kong for the purpose of enforcement under the New York Convention.

Online arbitration is also used in business to consumer disputes. However it is generally unpopular not because it is a poor medium for dispute resolution, but because consumers view such arbitration agreements as denying them access to justice through the courts and in particular, to class action suits which would offer more compensation.

Smart contracts and blockchain arbitration

All of the aforementioned forms of online dispute resolution have been around for some time, but there is a new form of online dispute resolution which is currently being developed: blockchain arbitration. Blockchain arbitration has been developed as the dispute resolution mechanism of choice for disputes arising from smart contracts. Some knowledge of blockchain technology and smart contracts is required to understand blockchain arbitration.

The blockchain is essentially an incorruptible digital ledger of transactions that can be programmed to record not only financial transactions, but almost anything that is of value for record. While originally devised for cryptocurrencies, there are many potential uses for the technology. The blockchain database is not stored in any single location but is instead spread across many times

over a network of millions of computers simultaneously. The blockchain ledger containing the information has been touted to be incorruptible, because to alter any information on it would require the hacker to have the processing capability to overpower the entire network of millions of computers.

What has arisen from blockchain technology are smart contracts. Unlike regular contracts, smart contracts are not written in natural languages such as English or French, but entirely in code. Another point of difference is that, like a program, smart contracts automatically execute or enforce obligations. For example, in a simple contract to sell an item, the smart contract could be coded in such a way that once payment is received, it would automatically transfer the ownership of the item to the buyer.

Blockchain arbitration has in turn been developed in order to service the dispute resolution needs that may ensue from smart contracts. It is unlikely in the previous scenario of a simple buy and sell smart contract that any disputes would occur. However, disputes can come about from more complex contracts which may involve some element of misunderstanding in the transaction. This is where blockchain arbitration comes in. There are currently several models of blockchain arbitration being developed, such as CodeLegit and Kleros. CodeLegit has even drafted a set of Blockchain Arbitration Rules and envisions an Appointing Authority (it is unclear whether it will be an arbitral institution) which will appoint an arbitrator who may be a jurist or a blockchain technician. Communication would be done by email and there might even be an oral hearing over video conference should the arbitrator call for it. This is in essence quite similar to online arbitration.

Kleros on the other hand represents a different system of blockchain arbitration, in which the developers appear to be creating an entire quasi-judicial system, with a general court, followed by two tiers of sub-court divisions e.g. transport division and then air transport division. A rather complex process then occurs where “jurors” who volunteer at these Kleros court divisions would be selected by random number generation. It has also worked into place an appeal system and even bribe resistance system for the jurors.

All of these are fascinating developments in the virtual world, but what does this mean for arbitration practitioners? Despite several tech enthusiasts’ claim that blockchain arbitration is the future of dispute resolution, there are still several fundamental issues preventing blockchain arbitration from replacing traditional arbitration.

First, as a smart contract is entirely in code, some national legislations may not recognise it as a valid contract because it does not fulfil formality requirements. There may also be discrepancies when translating complex contracts into smart contract codes.

Secondly, while smart contract disputes will benefit from arbitration because of its flexibility and its relative ease in cross-border enforcement of awards, there are some difficulties with the arbitral clause in smart contracts. It is not clear whether the smart contract containing the arbitral clause (which is in code) will fulfil the requirement set out in Article 2 paragraph 2 of the New York Convention which requires that the arbitral clause be in writing. However, this problem can be overcome by interpreting Article 2 paragraph 2 according to the doctrine of functional equivalence as stated at paragraph 16 of the UNCITRAL Model Law on Electronic Commerce 1996. Such an interpretation is supported by part two of the New York Convention, which contains UNCITRAL’s recommendation to interpret the “in writing” requirement non-exhaustively. Smart contracts can

also be tethered to a written agreement setting out the seat of arbitration, governing law and arbitral rules, which would ensure that the "in writing" requirement is complied with. This would also remove any uncertainties about choice of law or the *lex arbitri* in the blockchain arbitration.

A problem specific to Kleros-type blockchain arbitration is that it only allows its "jurors" to make a decision based on the transaction evidence on the blockchain, and not hear any arguments from the disputing parties. The resulting arbitral award may be refused recognition and enforcement under Article V(1)(b) of the New York Convention for not giving the party the opportunity to present its case. It may require a significant revamp in Kleros' blockchain arbitration model in order to adapt it to the New York Convention.

Technology for Lawyers: Beware The Ides of March?

Complex and high value disputes will remain the province of traditional alternative dispute resolution. However, with traditional arbitration increasingly incorporating modern technology into its proceedings, the distinction between online arbitration and traditional arbitration is becoming less clear. What cannot be denied is that with improved technology and automation, less complex disputes work will be claimed by online dispute resolution services. It is therefore imperative that lawyers continue to improve themselves and keep abreast of the latest legal and technological developments to avoid falling by the way side in the wake of technology's relentless march.

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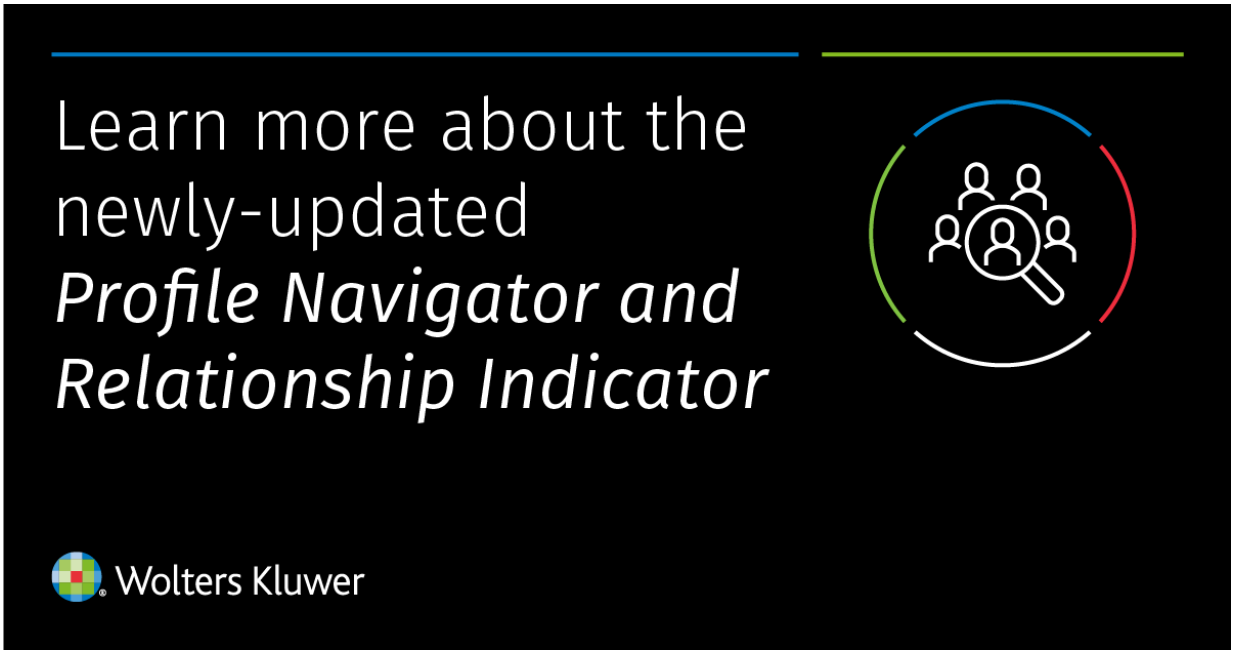

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