

# Kluwer Arbitration Blog

## The Blockchain ADR: Bringing International Arbitration to the New Age

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Sometimes, the establishment needs to step aside to let the next promising generation create a new way forward: So it commences with entrepreneurial students at the University of Miami, combining talents of engineering, technology, and international law and arbitration. It is by thinking out of the box that disruptive changes happen and they must in order to break through an outdated *status quo*. The founder of “Blockchain ADR”, Alexander Fischetti, launched the idea of using blockchain for international arbitration in Sao Paolo, in March 2018. The University of Sao Paolo and the Global Legal Institute for Peace collaborated with the World Economic Forum to understand blockchain from the engineering, the economic, and the legal perspective.

The idea of blockchain is that it is a platform, a technological carrier of data, if one wishes to understand it that way. When an engineer from the University of Sao Paolo, not versed in international arbitration, asks: “*Are international arbitrations mostly conducted with written submission and in person hearings?*” One could still answer defiantly that in the modern era of electronic communication, institutions handle arbitrations by accepting electronic submissions and facilitating virtual hearings. However, then the engineer asks: “*Are those documents submitted through email platforms and similar carriers?*” The answer is: “*Yes, probably.*” Email carriers are far less secure than a blockchain carrier. They are too easy to hack. Blockchain is not. The step from paper submissions to email seemed acceptable when the step to blockchain was not. The resistance to blockchain by the establishment is the resistance to disruptive change but not a rational one, and it is certainly not an informed resistance.

What are the advantages of blockchain? The secure transportation of data, the possibility of storing original data and the almost 100 % guarantee that data will not get lost. What then could the outcome be under the New York Convention? Are there advantages and new challenges? Yes.

### Article II of the New York Convention and the Blockchain

Article II of the New York Convention provides that arbitration agreements must be, in principle, recognized as binding. If the requirements listed under Article II are met, a court shall refer the parties to arbitration. This provision was perhaps construed in a timely fashion during the three week conference in 1958 but the consensus to add Article II to the New York Convention was one of the 11th hour and with that came some inevitable drafting errors.

Article II dictates that the arbitration agreement must be valid and its subject matter must be

arbitrable. Recognition cannot take place if the agreement would be null and void or incapable of enforcement. Yet, the real hurdle to modern day recognition of the arbitration agreement is the ‘in writing’ requirement of Article II(2) of the New York Convention. The agreement meets the ‘in writing’ requirement if the agreement or the clause has been signed by the parties or has been concluded through an exchange of telegrams or telefaxes. The 2006 UNCITRAL Recommendations addressed the outdated idea of telegrams. UNCITRAL recommends that this requirement must be read to ‘include’ the electronic means of communication, and this would open the door to using blockchain as a means to conclude arbitration agreements.

So what is the advantage of blockchain for arbitration agreements? The arbitration agreement once concluded cannot be altered on this platform. The original is preserved on the blockchain. As far as securing those agreements and not losing the data, it is better placed on the blockchain. Now that UNCITRAL has endorsed the use of electronic communications, parties ought to use a blockchain format rather than other electronic carriers. The blockchain provides the users with unique keys with which only they can access the data. This means that the parties to the arbitration have a unique way to access the original arbitration agreement without being able to alter it (or lose it for that matter). Subsequently, the parties can allow the arbitral institution to have a key as well to the data and they can provide that data to any enforcement court that is called upon to refer the parties to arbitration. Article II with its ‘in writing’ requirement is not simply a matter of evidence as it is under most national arbitration laws. At the time, an ample discussion took place among delegates to feature the idea of tacitly accepting an agreement to arbitrate. At the time, that idea was rejected because the delegates recognized the reality that modern customs in international trade dictated the use of agreements in writing. The takeaway is that the New York Convention including Article II should over time be adapted to modern customs in international trade, and soon that should include arbitration agreements on the blockchain.

#### **Article IV of the New York Convention**

If Article II has often led to the premature death of arbitration because most agreements did not meet the now rather stringent ‘in writing’ requirement, one has yet to explore the challenges under Article IV of the New York Convention, which I tend to refer to as the Pandora’s Box. Article III is perhaps the core instruction to courts under the New York Convention: courts of the country where enforcement is sought must recognize awards as binding. There is a presumption of validity. Pieter Sanders, the founding father of the New York Convention, created the allocation of the burden of proof in Articles IV and V (referred to in Article III). Refusal can only take place on the basis of the grounds listed in Article V. A court can grant the enforcement if the applicant has complied with the requirements listed in Article IV. A court will assess the submission of documents under Article IV on a *prima facie* basis only. Article IV of the New York Convention provides that the successful party in arbitration must supply the original arbitration agreement or a copy thereof, the original award or a copy thereof, and finally, the applicant must provide a sworn translation in the official language of the country where enforcement is sought.

With that, the request for enforcement ought to be simple which supports the idea that enforcement of an award by the successful party in the arbitration should be relatively simple which is in line with the purpose of the New York Convention, which contributes to the effectiveness of international arbitration. Yet, in practice, Article IV became a volatile article and the subject of unscrupulous use by counsel and judges alike. This is because Article IV also requires that copies must be certified and signatures authenticated. However, not a single guideline was provided as to who should do this, where this should be done and what should be authenticated: the daunting

‘Ws’.

If the parties were to use the Blockchain ADR as a platform for international arbitration and enforcement under the New York Convention, many of these obstacles under the New York Convention could be disposed of.

The Blockchain ADR, as discussed above, would be the platform holding all documents and data related to an international arbitration procedure from beginning to end, meaning that the arbitration agreement and the arbitral award(s) would be stored here. This means that the party requesting the enforcement of the award under Article IV of the New York Convention, can simply access the blockchain server with its unique key to find not a copy but the original arbitration agreement and the original arbitral award. Because the data on the blockchain is authentic, no certification of copies or authentication of signatures is required. Blockchain holds originals that are secured, that cannot be altered or lost. It provides an answer to the many questions raised under Article IV of the New York Convention. It would, therefore, be wise for users in arbitration and stakeholders to implement the idea of blockchain in order to preserve some of the core provisions of the New York Convention and transplant those sixty year old texts to the next era.

### **Moving Forward**

In order for users to rely on this, it will again be necessary for institutions and legislators to adapt rules and laws. First, the New York Convention – Article IV – does not include the possibility of using the Blockchain for international arbitration, surprisingly in 1958. UNCITRAL would have to issue recommendations as they did in 2006, to endorse the use of blockchain in addition to the other forms of electronic communication that provides a legitimate basis for including blockchain-based ADR – with its secured storage of data that are originals and authentic – in Article IV. It would have to issue a recommendation that provides that originals are not only paper originals but ‘blockchain originals’ that do not require authentication or certification given the nature of blockchain. No more daunting ‘Ws’. Admittedly, the status of those recommendations under Article 31 of the Vienna Convention on the Law of Treaties is one of soft law only. But realism compels us to resort to this, as one could not imagine a replacement of the treaty itself or even an amendment or supplement to the treaty. Yet, we must allow our disruptive game changers to bring this pivotal form of dispute resolution to the New Age of international trade.

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