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TABLE OF CONTENTS

ARTICLES

Title	Author(s)	Page
YOUNG ITA WRITING COMPETITION WINNER. GATHERING CROSS-BORDER EVIDENCE IN SUPPORT OF ARBITRATION AFTER ZF AUTOMOTIVE	*Michael Arada Greenop & Augusto García Sanjur*	1
YOUNG ITA WRITING COMPETITION FINALIST. THE NEW YORK CONVENTION ON THE ENFORCEMENT OF DECENTRALIZED JUSTICE SYSTEMS' DECISIONS: A PERSPECTIVE FROM THE EVOLUTIONARY INTERPRETATION OF TREATIES	*David Molina Coello*	44
NAFTA AND THE USMCA: THE SUBSTANTIAL DIFFERENCES	*The Hon. Bernardo Sepúlveda-Amor*	85
ENTRY TO FOREIGN LAWYERS & LAW FIRMS IN INDIA & ITS IMPACT ON INTERNATIONAL ARBITRATION IN INDIA	*Sushant Mahajan*	90
BUILDING STANDARDS: ESG IN THE INFRASTRUCTURE INDUSTRY	*Iván Larenas Lolas*	95
THIRD-PARTY FUNDING: A TOOL TO DETER INVESTOR MISCONDUCT?	*Dr. Üzeyir Karabiyik & Charles B. Rosenberg*	107

INTERVIEWS

Title	Author(s)	Page
PERSPECTIVES ON THE IRAN-US CLAIMS TRIBUNAL AFTER 40 YEARS	*Rafael T. Boza & The Hon. Charles Brower*	112

BOOK REVIEWS

Title	Author(s)	Page
GUÍA DE ARBITRAJE DE INVERSIÓN CO-EDITED BY YAEL RIBCO BORMAN AND SANDRO ESPINOZA QUIÑONES	*Pilar Álvarez*	130

YOUNG ITA

Title	Author(s)	Page
#YOUNGITATALKS MEXICO AND CENTRAL AMERICA: HABILIDADES Y ESTRATEGIAS EN EL ARBITRAJE: CÓMO PRESENTAR MEJOR EL CASO	*Liliana Pérez Rodríguez*	139

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2022-2023 YOUNG ITA WRITING COMPETITION AND AWARD: "NEW VOICES IN INTERNATIONAL ARBITRATION" FINALIST

THE NEW YORK CONVENTION ON THE ENFORCEMENT OF DECENTRALIZED JUSTICE SYSTEMS' DECISIONS: A PERSPECTIVE FROM THE EVOLUTIONARY INTERPRETATION OF TREATIES

by David Molina Coello

I. INTRODUCTION

Internet users have grown to almost five billion in just 22 years.[1] This is approximately 62% of the current world population.[2] On one of its many applications, internet has changed the way international business and transactions operate by eliminating geographical limitations for the exchange of information.

That, however, is not all. Only ten years after the internet's big boom, blockchain technology came into existence. The blockchain is a form of connectivity in which information and any of its variations are registered in an unalterable network. The chain comprises all the network's devices.[3] Consequently, it is virtually impossible to hack,[4] because hackers must enter all the chain's devices to modify any information. Therefore, the blockchain creates a "secure transfer of value and data directly between parties."[5] Put simply, blockchain technology is a new form of bookkeeping[6]

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[1] Abby McCain, *How fast is technology advancing? [2023]: Growing, evolving and accelerating at exponential rates*, ZIPPIA (Jan. 11, 2023), https://www.zippia.com/advice/how-fast-is-technology-advancing/#:~:text=This%20is%20up%20from%20a,hit%201.43%20billion%20in%202022.

[2] The world population prospect for 2022 is 8 billion people. *See* United National Department of Economic and Social Affairs, *World population prospects* 2022, UNITED NATIONS (2022), https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/wpp2022_summary_of_results.pdf.

[3] Georgios Dimitropoulos, *The Law of Blockchain*, 95 WASH L REV 1117, 1127-1129 (2020).

[4] Santiago Enrique Rodríguez, *The what, the why, and the how: Blockchain as a solution for Institutional Arbitration*, 37 SPAIN ARBITRATION REVIEW 77, 79 (2020).

[5] Organization for Economic Co-operation and Development, *OECD Blockchain Primer* 3, OECD (Jul 27, 2019), *available at* https://www.oecd.org/finance/OECD-Blockchain-Primer.pdf.

[6] Peter L. Michaelson & Sandra A. Jeskie, *Arbitrating Disputes Involving Blockchains, Smart Contracts, and Smart Legal Contracts*, 74 (4) AAA-ICDR DISPUTE RESOLUTION JOURNAL 89, 92 (2019).

that ensures the fidelity of the information presented in the system.

Initially, blockchain became a business network to decentralize payments from the control of financial institutions by using cryptocurrencies, the blockchain's coinage.[7] Now, it has evolved to serve as a platform for automating international transactions by the implementation of self-enforceable agreements. There are smart contracts (SCs) and smart legal contracts (SLCs).[8] SCs are completely self-enforceable, upon the meeting of the conditions expressed in the program.[9] Currently, SCs cannot foresee every possible scenario involving a transaction, and their code is not built to deal with uncertainty.[10] As a consequence, parties will look to avoid uncertainty by coding as many scenarios as possible, increasing negotiation costs.[11] As an alternative, parties can conclude SLCs which are "an amalgam of [SC] and traditional contract[s]."[12] While the SLC is concluded as if it was a plain contract, it might contain, for example, a self-enforceable clause for payment.[13] Parties might choose one or the other depending on factors that increase the likelihood of encountering an unexpected scenario, like the contract's duration or the market's volatility.[14] SCs and SLCs' popularity is likely to grow exponentially.

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[7] Julie Pinkerton, *The History of Bitcoin, the First Cryptocurrency*, U.S. NEWS (Aug. 7, 2023), https://money.usnews.com/investing/articles/the-history-of-bitcoin#:~:text=%22In%20June%202011%2C%20it%20hit,was%20worth%20more%20than%20%241%2C000.

[8] Darcy W. E. Allen, et al., *The Governance of Blockchain Dispute Resolution*, 25 HARV NEGOT L REV 75, 78 (2019). *See also* Bronwyn E. Howell & Petrus H. Potgieter, *Uncertainty and dispute resolution for blockchain and smart contract institutions*, 17 JOURNAL OF INSTITUTIONAL ECONOMICS CUP, 545 (2021), *available at* doi:10.1017/S1744137421000138.

[9] Georgios Dimitropoulos, *The Law of Blockchain*, 95 WASH L REV 1117, 1135 (2020).

[10] Bronwyn E. Howell & Petrus H. Potgieter, *Uncertainty and dispute resolution for blockchain and smart contract institutions*, 17 JOURNAL OF INSTITUTIONAL ECONOMICS CUP 545, 549 (2021), *available at* doi:10.1017/S1744137421000138.

[11] Darcy W. E. Allen, et al., *The Governance of Blockchain Dispute Resolution*, 25 HARV NEGOT L REV 75, 81-82 (2019).

[12] Peter L. Michaelson & Sandra A. Jeskie, *Arbitrating Disputes Involving Blockchains, Smart Contracts, and Smart Legal Contracts*, 74 (4) AAA-ICDR DISPUTE RESOLUTION JOURNAL 89, 95 (2019).

[13] *Id.*

[14] Smart contracts are less suitable for executory contracts. *See* Bronwyn E. Howell & Petrus H. Potgieter, *Uncertainty and dispute resolution for blockchain and smart contract institutions*, 17 JOURNAL OF INSTITUTIONAL ECONOMICS CUP 545, 551 (2021), *available at* doi:10.1017/S1744137421000138.

SCs and SLCs generally include dispute settlement (DS) clauses opting for a DJS, especially in case of SCs.[15] DJS solve blockchain disputes by cyber proceedings that conclude with a decision rendered by a jury or a tribunal which is then implemented using computational code. Although DJS' were designed for blockchain disputes, they are not limited to them. Pursuant to the principle of freedom of contract, and due to their cost and efficiency, they are an attractive option for regular or off-chain disputes.[16] Thus, there is a need to determine the legal treatment that states will give to DJS decisions and whether they will recognize and enforce them.

This work deals with the possibility of enforcing DJS decisions under the New York Convention[17] asserting that such scenario is possible by interpreting its provisions in an autonomous and evolutionary manner.

Chapter two explains how DJS operate and the issues surrounding their enforcement as arbitral awards within the scope of the Convention [**II**]. Chapter three describes the Contracting States' approaches to the Convention's territoriality criterion to conclude that there is a tendency to exclude DJS decisions from its scope of application [**III**]. Chapter four sets out an autonomous and evolutionary

[15] This work assumes that the electronic form of the dispute resolution clause in SCs is no limitation for its validity under Art. II of the New York Convention to narrow the scope of the discussion to the recognition and enforcement of DJS decisions. Two reasons sustain this assumption. First, the general tendency of states is to allow the conclusion of electronic agreements, especially after the sanitary crisis that started in 2020 by the COVID 19 propagation. For example, there are states like the UK where the encouragement of electronic commerce goes as far as being recognized as a matter of public policy. Second, paragraph 57 of the Explanatory Note on the United Nations Convention on the Use of Electronic Communications in International Contracts States that the convention applies to arbitration agreements in electronic form and recognizes its validity. Thus, there is a tendency among states to allow the conclusion of arbitral agreements by electronic means, and code is one of them. *See* U.N. Comm. on International Trade Law, *Explanatory Note on the United Nations Convention on the Use of Electronic Communications in International Contracts* ¶ 57, Jan. 2007, UNCITRAL; *see also* Haitham A. Haloush, *Jurisdictional Dilemma in Online Disputes: Rethinking Traditional Approaches*, 42 (3), AMERICAN BAR ASSOCIATION STABLE (Publisher), 1129, 1132 (2008), *available at* https://www.jstor.org/stable/23824404.

[16] The off-chain and on-chain classification is taken from the categories of blockchain governance. *See*. Georgios Dimitropoulos, *The Law of Blockchain*, 95 WASH L REV 1117, 1178-1179 (2020). Also *See* Peter L. Michaelson & Sandra A. Jeskie, *Arbitrating Disputes Involving Blockchains, Smart Contracts, and Smart Legal Contracts*, 74 (4) AAA-ICDR DISPUTE RESOLUTION JOURNAL 89, 96 (2019); *see also* Ramona Elisabeta Cirlig, *Party Autonomy in Determining the Law Applicable in International Commercial Arbitration and its Limits Derived from the New York Convention*, 34 SPAIN ARBITRATION REVIEW 47, 49 (2019).

[17] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, June 10, 1958, 330 U.N.T.S. 38, 7 I.L.M. 1046. [hereinafter New York Convention].

interpretation of the Convention's provisions to disregard the Contracting States' local approaches to the territoriality criterion and justify the enforcement of DJS decisions [**IV**]. Following the comparative process of chapters three and four, chapter five conducts an evolutionary interpretation of the Convention while addressing the rest of the issues surrounding the enforcement of DJS decisions [**V**]. Finally, chapter six deals with the possibility of states refusing the enforcement of DJS decisions under Art. V (2) of the Convention and suggests a solution through blockchain governance [**VI**].

II. ISSUES SURROUNDING THE ENFORCEMENT OF DJS DECISIONS UNDER THE CONVENTION

DJS emulates conventional adversarial proceedings to settle bilateral disputes in the blockchain. They are decentralized because they operate in the blockchain with no anchor to a state's jurisdiction to govern the proceeding.[18]

DJS generally work as follows: the claimant files a claim in the DJS, the defendant submits a response, both parties present digital evidence, and a collegiate body (jurors or tribunals) rules on the dispute. Finally, the decision is self-enforced using blockchain in two ways. It could take the form of an SC itself or become an order (also called *oracle*) in computational code to enact the preestablished consequence that an existing SC forecasts in case of a breach.[19]

Kleros is an example of a DJS. Its procedure is akin to the description above. However, it has three key features. First, Kleros' decisions are taken by a jury selected by the system. Jurors have different specializations and are elected from a pool according to their expertise. Second, parties can challenge the decisions within the system by filing an appeal. Parties can file as many appeals as they see fit, one after the other. Every time there is an appeal, however, a jury twice as big as the last one will solve the dispute, increasing the costs. This is to dissuade parties from such

[18] Maxime Chevalier, *From Smart Contract Litigation to Blockchain Arbitration, a New Decentralized Approach Leading Towards the Blockchain Arbitral Order*, 12 (4) JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 558, 565 (2021), *available at* https://doi.org/10.1093/jnlids/idab025.

[19] Darcy W. E. Allen, et al., *The Governance of Blockchain Dispute Resolution*, 25 HARV NEGOT L REV 75, at 87, 93 (2019).

recourse. Finally, jurors are not obliged to state the reasons for their decision. The matrix asks them a yes or no question regarding their findings in a specific case.[20] Even though Kleros is currently used in minor cases, their developers expect to eventually enter the market of medium and large disputes.[21]

Can DJS proceedings be considered as arbitrations? Arbitration works under the belief that parties can decide to opt-out of the jurisdiction of states' judiciary to submit their dispute to a private tribunal and proceedings of their choice.[22] Thus, arbitration as a concept may differ from arbitration as a legal institution. As a concept, it only refers to the submission of a dispute to a private person whose decision the parties have agreed to implement. As a recognized legal institution, arbitration encompasses states' legislation, finding limitations for its use. For example, while an arbitration regarding family law is conceptually an arbitration, there are jurisdictions in which states have prohibited arbitration in matters of family law,[23] making them inarbitrable.[24]

When arbitration is recognized as a legal institution in a domestic jurisdiction, the arbitrators' awards are final.[25] The award's creditor can draw upon a state's means of compulsory enforcement to oblige the debtor's compliance. Also, awards can only be challenged in domestic courts on a specific number of grounds, narrowed to reduce a state's regulatory power, enhancing the principle of parties' autonomy.[26] The

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[20] Federico Ast, *Kleros, a Protocol for a Decentralized Justice System*, MEDIUM (Sept 11, 2017), https://medium.com/kleros/kleros-a-decentralized-justice-protocol-for-the-internet-38d596a6300d.

[21] Fernando Quirós, *Federico Ast, cofundador y CEO de Kleros: "Blockchain tiene muchas aplicaciones en el ámbito legal"*, COINTELEGRAPH (Feb. 10, 2020), https://es.cointelegraph.com/news/federico-ast-co-founder-and-ceo-of-kleros-blockchain-has-many-applications-in-the-legal-field.

[22] THOMAS SCHULTZ & THOMAS D GRANT, ARBITRATION: A VERY SHORT INTRODUCTION 20 (Oxford University Press 2018).

[23] *Id.* at 25.

[24] For the concept of arbitrability *see* Loukas A. Mistelis, *Part I Fundamental Observations and Applicable Law, Chapter 1*, in 19 INTERNATIONAL ARBITRATION LAW LIBRARY – ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 1, 3-6 (Loukas A. Mistelis & Stavros Brekoulakis eds., 2009).

[25] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3520 (Kluwer Arbitration, 3rd ed. 2021).

[26] U.N. Comm. on International Trade Law, Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006 (Vienna: UN, 2008), UNCITRAL [hereinafter UNCITRAL Model Law], Art. 34.

importance of the recognition of arbitration by states relies on these features.

DJS proceedings are conceptually arbitrations.[27] Parties agree on a procedure and choose their private adjudicators. Likewise, they accept to be bound by an eventual decision. Thus, also conceptually, DJS decisions are awards. The issue is whether DJS decisions can be regarded as enforceable awards under the Convention.

For the New York Convention to be applicable, the decision must be taken by an arbitral tribunal, comply with formalities and be rendered in a different state than the one where enforcement is sought.[28] Hence, there are four issues to analyze while determining the possibility of enforcing DJS decisions by way of the Convention. These are:

1. Whether the DJS platforms can be characterized as arbitrators, or the anonymous jurors appointed in DJS like Kleros can be categorized as arbitrators.
2. Whether the DJS decisions can be defined as awards in either the Contracting states' national legislation or the Convention.
3. Whether DJS decisions adopt the form of an award as provided in the Convention or the Contracting States' national legislation.
4. Whether DJS decisions comply with the Convention's territoriality requirement.

It is worth mentioning that there are considerations for enforcing DJS decisions that are not part of this analysis as they are better dealt with by modifying the DJS' protocols. For example, blockchain members only know the other participants' cryptographic private keys but not their physical identity.[29] This issue, which makes the enforcement of a DJS decision in the physical world near impossible, is better solved by creating a rule in the DJS by which the parties will provide information

[27] The platform is the administrator of the proceedings. *See* U.N. Comm. on International Trade Law, Technical Notes on Online Dispute Resolution ¶ 26, UNCITRAL (2017).

[28] UNCITRAL Model Law, *supra* note 26, Arts. 10, 31; New York Convention, *supra* note 17, Arts. I and IV.

[29] Maxime Chevalier, *From Smart Contract Litigation to Blockchain Arbitration, a New Decentralized Approach Leading Towards the Blockchain Arbitral Order*, 12 (4) JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 558, 563 (2021), *available at* https://doi.org/10.1093/jnlids/idab025.

about their physical identity to the system. Furthermore, when this is the case, the code could include a condition by which the physical identity of the counterparty will be revealed if there is a DJS decision in need of enforcement in national courts.

III. NATIONAL INTERPRETATIONS OF THE TERRITORIALITY REQUIREMENT IN ART. I (1) OF THE CONVENTION AND ITS APPLICATION TO DJS

Art. I (1) sets out the Convention's scope of application. The Convention applies to awards "made in the territory of a State"[30] different than the State of the enforcement action, or "not considered as domestic awards"[31] in that State. This chapter deals with the treatment of the territoriality requirement in the Contracting States' national legislations and judicial interpretations of the Convention. First, it shows states' tendency to reject "a-national" decisions as awards within the scope of the Convention and the scholarly assertion that the same logic applies to DJS decisions [A]. Second, it describes a clever but ineffective option to enforce DJS decisions as traditional awards [B]. Finally, it presents the USA and France's approaches to recognizing and enforcing "a-national" awards as a further practical step towards the enforcement of DJS decisions [C].

A. *States are Likely to Disregard Decentralized Decisions*

This segment explains the foundations of the current discussion surrounding the territoriality criterion of Art. I (1) of the Convention and its connotations in enforcing DJS decisions.

Territoriality appears to be a criterion derived from common sense. Sovereignty is generally understood in its Westphalian definition, perceiving interaction between states as the polarized representation of regulatory and political power.[32] States hold a police powers' monopoly within their territories and are equal in the realm of international law.[33] Thus, states can conclude international agreements to affect their monopoly of power in favor of other states to recognize and enforce their

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[30] New York Convention, *supra* note 17, Art. I (1).

[31] *Id.*

[32] Rainer Grote, *Westphalian System*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Anne Peters & Rüdiger Wolfrum dirs., 2006).

[33] *Id.*

judicial decisions. For the equation to work, every binding decision relies on a state, that has agreed to be part of this international system for the enforcement of such decisions.

It seems that the arbitral system also works under the same logic. Under Art. 1 (3) of the UNCITRAL Model Law, territoriality determines whether an arbitral proceeding is regarded as international and, in consequence, within the law's scope of application.[34] Further, the territoriality criterion in Art. I (1) of the Convention was instituted with the apparent assumption that every arbitral decision must be anchored to a state's legal order. Thus, this logic commands that every arbitration needs to be governed by the law of a physical seat to be enforced under the Convention.[35]

Nonetheless, the Convention has two unique features that empower the tendency to accept a broader interpretation of the territoriality criterion. First, Arts. V and VII have been interpreted to offer the possibility to enforce an award regardless of, for example, the fact that proceedings were set aside in the seat of the arbitration.[36] Second, awards rendered in states that are not a party to the Convention also fall within the scope of Art. I (1).[37] The default rule is that Contracting States must recognize and enforce arbitral awards seated in states that are not obliged to reciprocate them. In other words, the Convention general framework departs from the PIL rule on reciprocity. Consequently, states need to make a reservation to apply reciprocity to Art. I (1).[38] Currently, roughly 75 of more than 160 nations have made

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[34] UNCITRAL Model Law, *supra* note 26, Art 1 (3). Also U.N. Comm. on International Trade Law, A/CN.9/WG.II/WP.49 at 6-7, *Note on the Model law on international commercial arbitration: territorial scope of application*, UNCITRAL, *available at* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/acn9_wg.ii_wp.49_e.pdf.

[35] Emmanuel Gaillard, *International Arbitration as a Transnational System of Justice* in ARBITRATION: THE NEXT 50 YEARS 66, 67 (Albert Jan van den Berg ed., Wolters Kluwer 2012).

[36] Furthermore, Art. V (1) (d) of the New York Convention provides that the composition of the arbitral tribunal will be firstly determined by the agreement of the parties. The law of the seat is only a default rule in case of lack of agreement. *See* Roy Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration* in 17 (1) ARBITRATION INTERNATIONAL 019, at 23.

[37] New York Convention, *supra* note 17, Art. (I) 1.

[38] It takes the name of "reciprocity reservation".

this reservation.[39] More than 50% of the signatories agree with the Convention's default framework, allowing the recognition and enforcement of arbitral awards regardless of whether the State of the seat has ratified the treaty.

The unique features of the Convention and the principle of autonomy of the parties as the foundation of the arbitral system[40] are the basis for a debate as old as the Convention.[41] The issue is whether the territoriality criterion of the Convention, understood as the unchanging requirement that an arbitral award be connected to a state law via the seat of arbitration, is preferred to an absolute application of the principle of autonomy of the parties, which would allow the parties to proceed with an arbitration without a designated seat. Accepting that there is a primacy of the principle of autonomy of the parties comes with embracing the idea that a-national awards, or awards without a seat, are enforceable under the Convention.[42]

While arguing the possibility of enforcing an award set aside in the court of the seat, Prof. Emmanuel Gaillard explains that the debate is about legitimacy. Any position on this matter will depend on one of three competing visions of international arbitration.[43] First, the monolocal vision contests that the arbitral proceeding is preauthorized by the law of the seat. Hence, an award set aside at the seat cannot be enforced in a different jurisdiction.[44] Second, the Westphalian vision believes the law of the seat is one of several laws relevant to international arbitration. Of course, another relevant law is the law of enforcement. Thus, the award's legitimacy can be

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[39] *Contracting States*, NEW YORK ARBITRATION CONVENTION, https://www.newyorkconvention.org/countries (last visited Sep. 7, 2023).

[40] Ramona Elisabeta Cirlig, *Party Autonomy in Determining the Law Applicable in International Commercial Arbitration and its Limits Derived from the New York Convention*, 34 SPAIN ARBITRATION REVIEW 47, 49 (2019).

[41] The *travoux preparatoires* registered a debate on the territoriality criterion that ended in the Contracting States leaving Art. I as it is but modifying Art. V to fit the possibility to relax the criterion. *See (a) Awards "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought*, 1958 NEW YORK CONVENTION GUIDE, https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=617&opac_view=-1#617 (last visited Sep. 7, 2023).

[42] Marike & Paulsson, THE 1958 NEW YORK CONVENTION IN ACTION 107-109 (Kluwer Law International 2016).

[43] Emmanuel Gaillard, *International Arbitration as a Transnational System of Justice* in ARBITRATION: THE NEXT 50 YEARS 66, 67 (Albert Jan van den Berg ed., Wolters Kluwer 2012).

[44] *Id.*

based on different legal systems.[45] Finally, the transnational vision "considers that international arbitration is anchored in the collectivity of legal systems." In other words, international arbitration is an "a-national legal order, not an autonomous legal order."[46] Hence, the legitimacy of awards is based on majoritarian principles and not on "idiosyncratic or outdated rules of law."[47] The Convention allows for the enforcement of set aside awards under the Westphalian and transnational approaches to international arbitration.[48] Likewise, the transnational view enables the possibility to enforce an award rendered with no seat.

The majority view on the discussion is that a-national awards fall outside the Convention's scope. It relies on the plain text of Art. I (1), the fact that other provisions recognize the role of the *lex arbitri*,[49] and an inference from the Convention's legislative history asserting that Contracting States intended to exclude this type of awards from the treaty's scope of application. In Prof. Van den Berg's words:

> The Convention applies to the enforcement of an award made in another State. Those who advocate the concept of the 'a-national' award, on the other hand, deny that such award is made in a particular country ('sentence flottante', 'sentence apatride'). How could such award then fit into the Convention's scope?[50]

Art. 36 of the UNCITRAL Model Law uses the exact wording as Art. V of the Convention. Thus, the debate regarding recognizing a-national awards in national legal systems resembles the one under the Convention. However, some states have decided to lean their legislation toward rejecting a-national awards. For example, Art. 840 (5) of the Italian Code of Civil Procedure and Art. 1076(1)(A)(e) of the Netherlands Private International Law Act provide for the mandatory refusal of

[45] *Id.*

[46] *Id.* at 69.

[47] *Id.* at 70.

[48] *Id.*

[49] Roy Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration* in 17 (1) ARBITRATION INTERNATIONAL 019, at 23.

[50] ALBERT JAN VAN DEN BERG, THE NEW YORK CONVENTION OF 1958 (Deventer, Kluwer Law and Taxation Publishers 1981).

enforcement in cases in which the award has been set aside by the courts of the seat,[51] creating the logical necessity for every arbitration to have a seat.

In sum, the majority view on the Convention's territoriality criterion, and which has been incorporated in some national systems, is that a-national awards fall outside of the scope of the Convention since they are not rendered in connection with a seat. Thus, awards should have a seat for enforcement under the Convention.

The majority view arguments to reject the enforcement of a-national awards are applicable to DJS decisions due to its even greater level of decentralization. Referring to Kleros, Mauricio Virues asserted that "[g]iven that Kleros … decisions cannot be … considered 'foreign' by any of the contracting States[,] [they fall] out of the scope of [the] New York Convention".[52]

Thus, the narrow view on the territoriality criterion of the Convention and a-national awards creates a tendency to interpret DJS decisions as falling outside the Convention's scope of application. There are two pragmatic reasons to rethink this approach. First, blockchain creates a new reality for international transactions that will be limited in development if the regulation's approach is not dynamic. Second, and likewise, disregarding DJS decisions under the Convention without considering their purpose and functionality is against the treaty's purpose. These issues will be dealt with in chapter three below.

B. *The Enforcement of a Kleros Decision as a National Award in Mexico: A Clever but Ineffective Solution.*

At this point of the analysis, it is important to disregard what seems to be an obvious observation against the relevance of this study. States generally recognize parties' autonomy to a large, but not absolute, extent. Thus, if the seat of the arbitration is of secondary importance in practice, why wouldn't the parties agree on

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[51] Roy Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration* in 17 (1) ARBITRATION INTERNATIONAL 019, at 24.

[52] Mauricio Virues Carrera, *Accommodating Kleros as a Decentralized Dispute Resolution Tool for Civil Justice Systems: Theoretical Model and Case of Application* 8-9, *available at* https://ipfs.kleros.io/ipfs/QmfNrgSVE9bb17KzEVFoGf4KKA1Ekaht7ioLjYzheZ6prE/Accommodating%20Kleros%20as%20a%20Decentralized%20Dispute%20Resolution%20Tool%20for%20Civil%20Justice%20Systems%20-%20Theoretical%20Model%20and%20Case%20of%20Application%20-%20Mauricio%20Virues%20-%20Kleros%20Fellowship%20of%20Justice.pdf (last visited Aug. 13, 2022).

a seat that allows waiving the awards' challenge and use a DJS for their arbitral procedure? Furthermore, why would the parties not agree that the DJS decision is rendered in a way that complies with the formal requirements of the physical world to be enforced? Said differently: if parties can adapt DJS technology to the current arbitral system, is there a need to contest the narrow interpretation of the territoriality criterion adopted by most states in their national interpretations of the Convention?

This issue is addressed in three steps. First, is the possibility of adapting DJS' technology to traditional arbitration through the example of a national award enforced in Mexican courts. Second, is the option of adjusting this solution to international arbitration. Third, is the disadvantages of following this seemingly pragmatic approach.

First, a case of enforcement of a national arbitral award whose ruling was decided by Kleros jurors in the courts of Jalisco, Mexico is empirical evidence that applying DJS technology to traditional arbitration is possible. The case related to the breach of a lease of MXN$4.000,00 (US$200) per month. The lease contained an arbitration agreement (AA) in which parties appointed a sole arbitrator (SA) and agreed that a Kleros jury would solve the merits of their disputes. Furthermore, the parties waived their right to challenge the award. Both parties were Mexicans, the property object of the lease was in Jalisco, and the seat of the arbitration was also Jalisco.

The lessor instituted arbitral proceedings to terminate the agreement due to the lease's lack of payment. As the parties agreed in the AA,[53] the proceedings concluded in a month and envisaged the following steps: (i) the claimant sent his claim and the supporting evidence via email to the SA;[54] (ii) the SA notified the defendant,[55] and the latter submitted her response and evidence; (iii) the SA drafted a Procedural Order No. 1 summarizing the parties' positions, listing the evidence and outlining the

[53] *Id.* Annex I: Original Arbitration Agreement, at 28-30.

[54] *Id.* Annex II, at 32.

[55] *Id.* Annex II, at 33-34.

procedure to submit the dispute to Kleros;[56] (iv) the SA submitted the electronic file and the order to Kleros for adjudication;[57] (v) Kleros initiated a proceeding in its system and appointed a jury; (vi) the jury came to a decision declaring the breach;[58] (vii) the SA was notified with the decision; and, (viii) rendered an award implementing it.[59] Then, the claimant filed for enforcement of the award in the courts of Jalisco, which recognized and enforced it under Jalisco's Code of Civil Procedure.[60] The parties to the lease agreement came up with a clever solution to submit their disputes to Kleros while ensuring its enforcement by agreeing that the decision will be rendered in the form of a traditional award.

Second, to implement this solution in international arbitrations, parties should agree on a seat for the proceedings depending on their type of contract and the DJS they wish to implement. If the dispute is regarding an SC or an SLC, the seat should be in a place in which these contracts are regulated, to avoid the risk that the award is set aside for breach of public policy.[61] Also, if the DJS chosen by the parties provides for a revision in the system, like in the case of Kleros, parties will need to find a jurisdiction in which the right to challenge an award is waivable, as it happens in France[62] or Switzerland.[63] This way, they will ensure there is no re-litigation. It goes without saying that this option solves not only the issue of the territoriality of the award but those surrounding the award's definition, its formal requirements, and the DJS as arbitrators, which will be dealt with in chapter four.

However, there are three reasons to deem this option inefficient.

First, it allows the parties to challenge the validity of the AA in the courts of the

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[56] *Id.* Annex III, at 37-39.

[57] *Id.* Annex III, at 40.

[58] *Id.* Annex IV, at 43.

[59] *Id.* Annex V, at 45-50.

[60] *Id.* Annex VIII, at 63-65.

[61] Peter L. Michaelson & Sandra A. Jeskie, *Arbitrating Disputes Involving Blockchains, Smart Contracts, and Smart Legal Contracts*, 74 (4) AAA-ICDR DISPUTE RESOLUTION JOURNAL 89, 129 (2019).

[62] CODE OF CIVIL PROCEDURE, Art. 1522 (Fr.).

[63] FEDERAL ACT ON PRIVATE INTERNATIONAL LAW, Art. 192 (Ch.).

seat via Art. II of the Convention, before initiating proceedings in the DJS. This denaturalizes DJS' proceedings applied to SCs and SLCs, abolishing some of their benefits. One of the reasons Kleros proceedings are expedited is because juries cannot decide jurisdictional issues.[64] There is no doubt about the parties' agreement to access the DJS since it is coded in detailed conditions. The same happens with their capacity, certified via their cryptographic private keys. In other words, DJS replaced judicial revision of the AA's validity with the coded corroboration of the parties' agreement. Thus, the dispute is solved directly on the merits. Likewise, the legality of the AA is determined by the parties' agreement coded in the blockchain. Attaching it to national legislation is against the chain's nature, which was created to avoid states intervention.[65]

Second, it adds a further obstacle to enforce DJS' decisions. In the case above, the SA did not resolve the dispute. It operated as a formal nexus between the parties and the real adjudicators in the DJS. Thus, courts of enforcement will need to assess the legality of this theoretically feasible situation. The outcome will depend on the treatment that each legislation gives to arbitrators. If the enforcement is sought in a jurisdiction in which arbitrators are equated to judges in their duty to preserve the rule of law,[66] the courts of enforcement might be obliged to make a two-step analysis to determine if both the SA and the jury in the DJS are arbitrators within the scope of their national law. In an unfavorable scenario, enforcement could be rejected due to violation of public policy for lack of the minimum due process guarantees in the proceeding–*i.e.*–the right to be judged by a competent and state recognized authority.[67] Under this solution, the issue of whether DJS or their juries are

[64] Maxime Chevalier, *From Smart Contract Litigation to Blockchain Arbitration, a New Decentralized Approach Leading Towards the Blockchain Arbitral Order*, 12 (4) JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 558, 569 (2021), *available at* https://doi.org/10.1093/jnlids/idab025.

[65] Georgios Dimitropoulos, *The Law of Blockchain*, 95 Wash L Rev 1117, 1120 (2020).

[66] Like it happens, for example, in Italy where arbitrators are equated to judges. *See* CODE OF CIVIL PROCEDURE, Art. 824-bis (It.).

[67] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols* Nos. 11 *and* 14, Art. 6(1) (Nov. 4, 1950), ETS 5, *available at* https://www.refworld.org/docid/3ae6b3b04.html (last visited Sep. 7, 2023).

arbitrators for the purposes of enforcement remains outstanding. It is preferable to assess this issue directly, to seek a greater degree of certainty regarding the applicability of the Convention to DJS decisions.

Finally, adapting DJS to traditional arbitral proceedings limits the development of international arbitration as it does not deal with the new technologies' regulatory challenges. This is a concern because it could institute a states' practice in favor of the territoriality principle in a globalized world in which decentralized dispute settlement is a plea for efficiency. There are two considerations. First, the institution of a states' practice in favor of the territoriality principle will complicate, if not make it impossible to interpret the Convention in favor of the direct enforcement of DJS decisions in the future.[68] Second, improving DJS' technology will take longer due to the increased risks of implementation in medium and large disputes. In consequence, implementing DJS decisions in the form of traditional awards is contrary to the reality of blockchain applied to international transactions and could affect the technology's development. Consequently, dealing with the possibility to enforce DJS decisions by interpreting the Convention is preferable.

C. *The USA and France Interpretations of the New York Convention's Territoriality Criterion: A Step Towards the Enforcement of DJS Decisions*

There are jurisdictions whose national legislation and courts' interpretation of the Convention adopt a broader approach to the territoriality criterion that may allow enforcement of DJS decisions. This segment deals with the USA and France's acceptance that a-national awards fall within the scope of the Convention and its application to DJS decisions.

First, US courts have accepted the possibility of applying the Convention to enforce a-national awards, or awards without a seat. The US Court of Appeals for the Ninth Circuit enforced an award rendered by the Iran-United States Claims Tribunal holding that an award need not be rendered under a national law to be enforceable under the Convention.[69] It relied on Art V (1) (d), which does not allow parties to resist

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[68] *Vienna Convention on the Law of Treaties*, May 23, 1969, Art. 31 (3) (b), 1155 U.N.T.S. 331.

[69] *Islamic Republic of Iran v. Gould Inc et al.*, 887 F.2d 1357 (9th Circuit. 1989).

enforcement if the procedure was in accordance with their agreement. In other words, it interpreted the provision as an indication that parties can validly decide to detach their proceedings from any seat. The court clarified that Art. I (1) of the Convention does not include a "separate jurisdictional requirement that the award be rendered subject to a national law."[70]

It is uncertain if the US courts would allow the enforcement of DJS decisions following the same logic adopted for a-national awards since cyberspace is qualified as a "no place." However, it is reasonable to expect that US courts would accept that there is no need to render an a-national award in a physical place for its enforcement under the Convention, given that they already excluded the need of a *lex arbitri*. In any case, the risk exists. The outcome is contingent on the interpretation of the US courts regarding the requirement of having an award rendered in a different territory than the enforcement proceedings.[71] In other words, a decision to enforce a DJS in the US will depend on the way judges solve the issues surrounding jurisdiction over cyberspace and the blockchain. Suppose they decide to allow self-regulation in the blockchain by application of the parties' autonomy principle. In that case, DJS decisions will be enforceable under the US approach to the Convention's territoriality criterion.

Second, the courts in France have held that parties can agree to detach the arbitration from any seat. This conclusion came from the French perception of international arbitration which is "based on the premise that there is an arbitral legal order, which is distinct from the legal order of individual states … [and that] this arbitral legal order – and no national legal order – … confers juridicity to arbitration."[72]

The courts understand international arbitration as a separate regime, unrelated and more important than national law.[73] On that note, the Court of Appeal of Roen

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[70] *Id.*

[71] New York Convention, *supra* note 17, Art. I (1).

[72] Dominique Hasher, *The Review of Arbitral Awards by Domestic Courts – France*, in 6 IAI SERIES ON INTERNATIONAL ARBITRATION: THE REVIEW OF INTERNATIONAL ARBITRAL AWARDS 97 (Emmanuel Gaillard ed. Juris 2010).

[73] Paris Cour d'Appel [Paris Court of Appeal] Dec. 18, 2018, Rev. Arb. 847, *New Euro. Corporate Advisory Ltd v. Innova 5/LP-ès Qualités de Liquidateur de la Société Twelve Hornbeams Sarl* (Fr.).

decided to enforce an award based on an AA that expressly excluded any national law as *lex arbitri*.[74] Even though the courts in France have not dealt with the enforcement of DJS decisions, a favorable decision seems likely.

In sum, both the USA and France interpretations that the scope of the Convention includes the enforcement of a-national awards are aligned with the path to recognition and enforcement of DJS decisions. Thus, they are likely to become popular *forums* for the enforcement of DJS decisions, or at least their courts will be the starting point to attempt their enforcement.

The broad and narrow interpretation of the Convention's territoriality criterion leads to different results. While the broad interpretation is likely to allow the enforcement of DJS decisions as a-national awards, the narrow interpretation deems them as falling outside the scope of the Convention. This limits the adaptability of the Convention to new realities and the uniform application of its provisions in the Contracting States' courts. The issue is the different interpretations of the Convention performed by the Contracting States.[75] The problem is evident when analyzing DJS decisions, the way states understand blockchain and cyberspace, and any other technology to decentralize commercial operations.

IV. THE TERRITORIALITY REQUIREMENT OF ART. I (1) OF THE NEW YORK CONVENTION IS OUTDATED

This chapter deals with the possibility that DJS decisions meet the territoriality criterion via an autonomous and evolutionary interpretation of the New York Convention. First, it analyzes the theory of sovereignty over cyberspace and the existence of an autonomous legal order in the blockchain. It does so by showing that the traditional approach to territoriality is not fit for the new reality created by the blockchain [**A**]. Second, it proposes an autonomous and evolutionary interpretation of Art. I (1) of the Convention to contest that DJS decisions comply with the

[74] Rouen Cour d'Appel [Rouen Court of Appeal] Nov. 13, 1984, 982/82, *Société Européenne d'Etudes et d'Entreprises* (S.E.E.E.) *v. République Socialiste Fédérale de Yougoslavie* ; *see also* Paris Court d'Appel [Paris Court of Appeal], 9 Dec. 1980, Rev. Arb. 306, *Société Aksa v. Société Norsolor* (Fr.).

[75] Cristina M. Mariottini & Burkhard Hess, *Chapter 3: The Notion of "Arbitral Award"*, in 61 INTERNATIONAL ARBITRATION LAW LIBRARY: AUTONOMOUS VERSUS DOMESTIC CONCEPTS UNDER THE NEW YORK CONVENTION 27, 49 (Franco Ferrari & Friedrich Jakob Rosenfeld eds., Kluwer Law International 2021).

Convention's territoriality criterion [**B**].

A. *The Territoriality of International Awards and the Jurisdiction over Cyberspace: Westphalian Sovereignty against the Blockchain Legal Order*

This section explains the struggle to regulate the internet. Then, it justifies changing the theoretical foundations of jurisdiction over the internet to deal with blockchain, which will shape the new cyberspace.[76]

For the first time in history, humanity started interacting outside the physical world using the internet. Thus, states have had issues deciding whether internet should be regulated, finding ways to create minimum standards for internet navigation, and identifying which of its spheres will be relevant for their legal systems. There are two primary considerations. First, the access to cyberspace's democratization allows categorizing it as a global public good.[77] Second, there are no treaties or international instruments in which states have come to an agreement on how to regulate cyberspace at an international level.

The current approach to regulation is that every state creates legislation prohibiting several types of conduct performed on the internet.[78] Hence, the attempts to regulate the internet are concentrated on rejecting its delocalization and adapting it to the Westphalian concept of sovereignty.[79] In consequence, states deem their jurisdiction over the internet as being of a local or national nature. Also, they only regulate the effects that the internet might have in their territories, but they cannot shape the way it is used, creating conflicting *de facto* jurisdictions.[80]

An example of the above is the 2018 Cambridge Analytica scandal involving

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[76] This work understands cyberspace as a global infrastructure "consisting of the interdependent network of information systems structures including the Internet, telecommunications networks, computer systems, and embedded processors and controllers." *See Definition of cyberspace*, COMPUTER SECURITY RESOURCE CENTER, https://csrc.nist.gov/glossary/term/cyberspace (last visited Sep. 7, 2023).

[77] Joanna Kulesza & Rolf Weber, *Protecting the Internet with international law*, 40 105531 COMPUTER LAW & SECURITY 1, 7 (2021), *available at* https://www.sciencedirect.com/science/article/pii/S0267364921000042.

[78] *Id.* at 9.

[79] Even though the Westphalian concept of sovereignty is not applicable. *See Id.*

[80] Haitham A. Haloush, *Jurisdictional Dilemma in Online Disputes: Rethinking Traditional Approaches*, 42 (3) AMERICAN BAR ASSOCIATION STABLE (Publisher) 1129, 1134 (2008), *available at* https://www.jstor.org/stable/23824404.

Facebook users' personal information. The matter became so significant that Mark Zuckerberg, Facebook's CEO, was summoned to the US Senate to explain the company's actions.[81] For the same matter, Facebook had to pay a fine in the UK in the amount of GBP 0.5 million.[82] Nonetheless, there was no possibility to oblige Facebook to comply with a unified and worldwide standard on the use and protection of its users' personal data. Also, most states could not impose substantive sanctions against the company's assets, so they could only condemn it via statements. Facebook's policies on personal data changed from that day but were shaped solely by those states with some sort of control over the company's transactions.

The problem is even deeper. States cannot create rules to ensure their citizens' rights are respected on the internet. Even though there could be decisions in which national courts determine a violation of rights, the use of the power of police for compliance will depend on the ability of the State to interfere with the rights or assets of the person or company committing the violation. The truth is that most of the infringements will not even be noticed by the states due to their lack of relevance and judicialization. Realistically, most operations on the internet are governed by the terms and conditions of the different platforms, regardless of their compliance with any national law.

There is scholarly opposition to the "nationalization" of the internet for regulation purposes. The criticism is that it denies its decentralized nature and status as a global public good. States should be worried about internet governance by doing their due diligence and accepting they have shared jurisdiction over the internet on an international level.[83]

[81] *Facebook, Social Media Privacy and the Use and Abuse of Data : Hearing on Hart 216 before the S. Comm. on Commerce, Science, & Transportation* (Apr. 10, 2018), *available at* https://www.commerce.senate.gov/2018/4/facebook-social-media-privacy-and-the-use-and-abuse-of-data.

[82] Paolo Zialcita, *Facebook Pays $643,000 Fine For Role In Cambridge Analytica Scandal*, NPR (Oct. 30, 2019), https://www.npr.org/2019/10/30/774749376/facebook-pays-643-000-fine-for-role-in-cambridge-analytica-scandal?t=1659627829342.

[83] Roy Balleste & Joanna Kulesza, *Signs and Portents in Cyberspace: The Rise of Jus Internet as New Order in International Law*, 23 (4) FORDHAM INTELLECTUAL PROPERTY MEDIA & ENTERTAINMENT LAW JOURNAL 1311, 1319 (2013), *available at* https://ir.lawnet.fordham.edu/iplj/vol23/iss4/4.

In any case, the territorial approach to internet's regulation has prevailed since it is not difficult to spot the links between the object of regulation and the physical world by locating it and its assets. This is not the case when dealing with the blockchain.

An operation in the blockchain does not involve a developer incentivized to comply with certain regulations due to the potential risks for its rights or physical assets. It does not have a specific server located in a physical place to store the information. It uses nodes located all over the world.[84] Likewise, it generally involves cryptocurrencies, which were specifically created to bypass the costs of financial institutions and state regulation with them.[85] Finally, transactions are self-executed within the system. For these reasons, it is said that blockchain "promises a spaceless economy."[86]

While the internet changed the way people interact, it is undeniable that blockchain departs from the known cyberspace and creates a new reality in which there are self-sufficient cyber communities with no strings attached to any state. The blockchain has a clear jurisdiction to prescribe, adjudicate and enforce transactions,[87] using code to generate an effect that looks a lot like the states' police powers. Thus, it goes as far as creating a legal order autonomous from any state's jurisdiction.[88]

Even though it seems that the general understanding is that states have no jurisdiction over the blockchain,[89] they have started to regulate some of its developments. For example, in states like the UK, cryptocurrencies are considered

[84] Maxime Chevalier, *From Smart Contract Litigation to Blockchain Arbitration, a New Decentralized Approach Leading Towards the Blockchain Arbitral Order*, 12 (4) JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 558, 564 (2021), *available at* https://doi.org/10.1093/jnlids/idab025.

[85] Georgios Dimitropoulos, *The Law of Blockchain*, 95 WASH L REV 1117, 1120 (2020).

[86] *Id.* at 1161.

[87] This is the criteria to determine the existence of a legal system. *See* Thomas Schultz, *Private Legal Systems: What Cyberspace Might Teach Legal Theorists*, 10 (1) YALE JOURNAL OF LAW AND TECHNOLOGY 151, 173 (2008), *available at* http://digitalcommons.law.yale.edu/yjolt/vol10/iss1/5.

[88] Georgios Dimitropoulos, *The Law of Blockchain*, 95 WASH L REV 1117, 1122 (2020).

[89] Peter L. Michaelson & Sandra A. Jeskie, *Arbitrating Disputes Involving Blockchains, Smart Contracts, and Smart Legal Contracts*, 74 (4) AAA-ICDR DISPUTE RESOLUTION JOURNAL 89, 122 (2019).

money for tax purposes.[90] Again, the method merely adapts what was previously done with internet regulation. The steps are finding a connection with the physical world and then regulating as if cyberspace was part of it.

What is important for this work is to spot the problems in the very logic of this approach, that assumes that the jurisdiction of cyberspace is of national or local nature because the regulation is national. There are two issues. First, it rejects the international effects of cyberspace, its nature, and worldwide reach. Second, it allows states to regulate the internet as a form of interaction between people, but it does not allow cyberspace users to benefit from the treaties created by states for other transnational interactions, like the Convention.

The same effect with no disadvantages can be accomplished if the theoretical assumption changes to accept that the legitimacy of every national cyber regulation comes from a shared jurisdiction of states over cyberspace at an international level.[91] This way every state has the right to regulate the internet's impact in their territories, but they also acquire an international obligation of due diligence and a tendency for uniformity in the treatment of cyberspace. This can be done by application of the general principles of Public International Law (PIL), such as cooperation and good faith.[92]

The assumption that jurisdiction over the internet is of local nature is unsustainable when analyzing the new reality offered by blockchain technology. This reality is better explained if cyberspace is understood as a global public good that is used for people's interactions and in which there is room for states' regulation due to their shared jurisdiction at an international level. Hence, states hold the power to regulate cyberspace with the limits portrayed by the recognition of the parties'

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[90] Georgios Dimitropoulos, *The Law of Blockchain*, 95 WASH L REV 1117, 1134 (2020).

[91] Some will go as far as contesting the existence of a *Jus Internet* as an adaptation of the Roman institution of *Jus Gentium* to cyberspace. *See* Roy Balleste & Joanna Kulesza, *Signs and Portents in Cyberspace: The Rise of Jus Internet as New Order in International Law*, 23 (4) FORDHAM INTELLECTUAL PROPERTY MEDIA & ENTERTAINMENT LAW JOURNAL 1311, 1317 (2013), *available at* https://ir.lawnet.fordham.edu/iplj/vol23/iss4/4.

[92] Joanna Kulesza & Rolf Weber, *Protecting the Internet with international law*, 40 105531 COMPUTER LAW & SECURITY 1, 9 (2021), *available at* https://www.sciencedirect.com/science/article/pii/S0267364921000042.

autonomy principle. Thus, some of the features and alleys of cyberspace cannot be regulated as they are legitimized in cyber communities which do not abide by rules from the physical world but are operating without affecting any national legal system. Therefore, one of the aims should be to create ways to ensure cooperation between these blockchain communities and the physical world.[93]

By accepting that there is a shared and non-absolute jurisdiction over cyberspace, states would be in a better position to interpret the existing framework and apply it efficiently to the new challenges brought by technology. For the purposes of this work, this new assumption allows contesting that the issue of DJS decisions is of transnational nature, when there are no indications that the matter is local or national, and therefore it should be solved by interpreting the existing international framework. In other words, it is a way to ensure that the discussion remains in the realm of international law, even though the regulation over cyberspace tends to be national.

B. *The Autonomous and Evolutionary Interpretation of Art. I (1) of the New York Convention Towards the Acceptance of the Transnational Approach To Arbitration*

Changing the assumption for the jurisdiction over cyberspace locates the phenomenon of blockchain in the realm of international law. Generally, this new reality would not have a specific effect since there are no international treaties dealing with cyberspace. Nonetheless, it also allows interpreting treaties whose scope might encompass one of the multiple applications of the blockchain. This section interprets Art. I (1) of the Convention to contest that DJS decisions fall within the Convention's territorial scope of application. To do so, it deals with two issues. First is the need to interpret the Convention's provisions autonomously from the Contracting States' national legal systems. Second is the possibility to give a new interpretation to the territoriality requirement in Art. I (1) of the Convention due to the new circumstances that international transactions face with the implementation

[93] Roy Balleste & Joanna Kulesza, *Signs and Portents in Cyberspace: The Rise of Jus Internet as New Order in International Law*, 23 (4) FORDHAM INTELLECTUAL PROPERTY MEDIA & ENTERTAINMENT LAW JOURNAL 1311, at 1313, 1349 (2013), *available at* https://ir.lawnet.fordham.edu/iplj/vol23/iss4/4.

of the blockchain.

First, the Convention must be interpreted autonomously from the Contracting States' national laws. The Convention is a framework treaty. It aims to unify the proceedings for the enforcement of arbitral awards among the Contracting States. Thus, the interpretation of its provisions is not governed by party autonomy or the law of the seat.[94] It is governed by the rules on interpretation under Customary International Law (CIL) codified in Arts. 31, 32, and 33 of the Vienna Convention on the Law of Treaties (VCLT).[95] Furthermore, a uniform interpretation of the Convention is likely by using rules of international law. Uniformity contributes to the Convention's goal to ensure the effectiveness of arbitration by safeguarding the recognition and enforcement of arbitral awards.[96] Consequently, an autonomous interpretation of the Convention is preferred over the national perception of its provisions.

Pursuant to Art. VII (1), courts have held that they are allowed to use national conflict of law rules in an enforcement proceeding under the Convention if the analysis triggers the application of a law that is more favorable for the recognition or enforcement of the award.[97] This possibility is not limited by the autonomous interpretation of the Convention. The interpretation is to determine the meaning of the treaty's wording and its scope of application as a framework treaty. Furthermore, it ensures that the Convention is not interpreted to widen its scope instead of broadening it according to its object and purpose. Said in a different way, the

[94] Franco Ferrari & Friedrich Jakob Rosenfeld, *Chapter 11: The Interplay of Autonomous Concepts and Municipal Law under Article V(1)(d) of the New York Convention*, in 61 INTERNATIONAL ARBITRATION LAW LIBRARY: AUTONOMOUS VERSUS DOMESTIC CONCEPTS UNDER THE NEW YORK CONVENTION 273, 247 (Franco Ferrari & Friedrich Jakob Rosenfeld eds. Kluwer Law International 2021).

[95] *Vienna Convention on the Law of Treaties*, May 23, 1969, Art. 31 (3) (b), 1155 U.N.T.S. 331.

[96] Cristina M. Mariottini & Burkhard Hess, *Chapter 3: The Notion of "Arbitral Award"*, in 61 INTERNATIONAL ARBITRATION LAW LIBRARY: AUTONOMOUS VERSUS DOMESTIC CONCEPTS UNDER THE NEW YORK CONVENTION 28, 49 (Franco Ferrari & Friedrich Jakob Rosenfeld eds., Kluwer Law International 2021).

[97] Bundesgerichtshof [BGH] [Federal Court of Justice] Sep. 21, 2005, III ZB 18/05 (Ger.), https://newyorkconvention1958.org/index.php?lvl=notice_display&id=278 (the application of German conflict-of-laws rules via Art. VII (1) of the New York Convention directed the Court to apply Dutch law, which contained more liberal formal requirements for an arbitration agreement than those under Art. II).

autonomous interpretation of the Convention allows for a unifying understanding of its provisions to ensure that national legislations do not take steps backwards on recognizing and enforcing awards. That is precisely the aim of the interpretation to allow the enforcement of DJS decisions under the Convention.

Second, according to Art. 31 of the VCLT, a treaty must be interpreted in good faith and in accordance with: (i) the ordinary meaning of its terms; (ii) its context, and (iii) considering its object and purpose.[98] The recourse to the treaty's preparatory work is reserved for when the interpretation leads to an ambiguous, obscure, unreasonable, or absurd result.[99] Every treaty interpretation must follow the steps set out in Art. 31 VCLT.

As a rule, the interpreter will analyze the ordinary meaning of the terms of the treaty in two moments in time: the conclusion of the treaty and the moment the interpretation is carried out. This exercise is the content of the contemporaneity principle of interpretation.[100] Nonetheless, this rule is not absolute. There are exceptions that allow the interpreter to analyze the meaning of the treaty's terms solely with the context set out when the interpretation is taking place. This is called evolutionary interpretation and is a tool to implement the principle of evolution of treaties. This principle consists in the ability of treaties to adapt to new realities when their terms cannot reasonably apply in the way they were used in the past.[101]

There are two scenarios where the evolutionary interpretation is accepted. First, when the wording of the treaty is proof of an implied choice of the parties to make it subject to an evolution of its content. Second, when there are objective reasons to opt for an evolutionary interpretation in absence of a guide as to the parties' intentions.[102] The Convention meets both scenarios.

First, the Convention is a framework treaty with general rules for the recognition

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[98] *Vienna Convention on the Law of Treaties*, May 23, 1969, Art. 31, 1155 U.N.T.S. 331.

[99] *Vienna Convention on the Law of Treaties*, May 23, 1969, Art. 32, 1155 U.N.T.S. 331.

[100] Eirik Bjorge & Robert Kolb, *Part V: Treaty Interpretation, 20.- The Interpretation of Treaties over Time* in THE OXFORD GUIDE TO TREATIES 489, 493 (2nd ed.) (Duncan Hollis ed. 2020.

[101] *Id.* at 494

[102] *Id.* at 495.

and enforcement of arbitral awards. It was open for signature after the United Nations Conference on International Commercial Arbitration held in New York City in 1958. The Conference's Final Act gives context to the Convention's provisions. It expresses the goal of states to increase arbitration's effectiveness and that the Convention was one of the many tools they saw fit for the mission.[103] The other enlisted fronts to work in favor of arbitration are: the creation of new arbitral institutions, publishing the information on arbitral laws, and procuring uniformity in national arbitral laws.[104] The Contracting States wanted to protect the right of their citizens to opt for an arbitral proceeding to solve their transnational disputes at an international level, admitting that there is room for change and aiming that it will be aligned with a broad room for arbitration. They wanted to ensure the party's autonomy prevalence.

With this intention in mind, one can understand the way the Convention is drafted. Art. I (1) does not define arbitral award. Also, the territoriality criterion is descriptive rather than prescriptive. It states that the Convention applies to awards rendered in a place different than the enforcement territory to characterize awards as foreign, as opposed to national awards which are governed by the relevant local law. By reading the Convention this way, the second scenario of application of Art. I (1) becomes obvious. The Convention also applies to awards rendered in the place of enforcement but characterized as non-domestic according to the local arbitration law. Thus, the seat system is a way to give nationality to an award and determine if it is local or foreign in the enforcement stage. In other words, it is just a formal rule the parties can opt-out from.[105]

Likewise, Art. I (1) of the Convention is drafted in a way that ensures the broadest possible application. The provision repealed the reciprocity rule to determine the

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[103] UNCITRAL, *Final Act of the United Nations Conference on International Commercial Arbitration* ¶ 1, E/CONF.26/8 Rev.1 (1958).

[104] *Id.* at ¶16.

[105] Haitham A. Haloush, *Jurisdictional Dilemma in Online Disputes: Rethinking Traditional Approaches*, 42 (3), AMERICAN BAR ASSOCIATION STABLE (Publisher), 1129, 1140-1141 (2008), *available at* https://www.jstor.org/stable/23824404.

Convention's scope of application. The text mandates that any foreign award is to be enforced under the treaty. This intention can also be identified in the treaty's text. Art. X (1) creates the obligation for the Contracting States to declare that the Convention extends to all the territories under their control. The New York Convention was created to become a framework treaty accepted worldwide, in all territories, and across all jurisdictions. Thus, the Contracting States intended for the Convention's provisions to be capable of adapting and evolving over time.

Rendering awards in a physical seat was the only foreseeable option when the Convention was opened for signature. Cyberspace was far from becoming a reality. Hence, the wording of Art. I (1) is adapted to the context of the treaty's signature, in which it was unthinkable that people could interact on a decentralized and transnational platform, far from the reach of states' legal systems. In any case, the fact that the wording of the Convention is adapted to a certain reality does not contradict the fact that it suggests that the Contracting States chose to allow the evolutionary interpretation of its text.

Second, the Convention does not include rules for the interpretation of its provisions and there is an objective reason to make an evolutionary interpretation of its terms: efficiency. Assuming that the future tendency in international transactions is to use blockchain, DJS will become the most popular means for solving international commercial disputes. The Convention at its very core is a recognition of the principle of autonomy of the parties and the right to choose arbitration to solve their disputes. Blockchain and DJS represent a new expression of such autonomy. On that note, DJS decisions encompass the goal of the Convention which is to recognize decisions rendered in arbitral proceedings pursuant to the agreement of the parties. Thus, Art. I (1) of the Convention should be interpreted in an evolutionary manner.

To make an evolutionary interpretation, the interpreter must follow the same steps provided in Art. 31 VCLT. The aim is to employ the new reality as context for the plain meaning of the treaty's terms. Up to this point, the context of the treaty's creation was useful to find that the Convention's terms can be subject to an

evolutionary interpretation. The next step is to establish the ordinary meaning of Art. I (1) solely in the context of blockchain and cyberspace, in light of the object and purpose of the Convention.

As already established, DJS decisions are rendered in cyberspace. That means the proceedings are "everywhere and nowhere at the same time."[106] Thus, the notion of the arbitral seat and foreign award need adjustments. On this point, it has been said that the concept of foreign or national awards is no longer relevant in cyberspace arbitrations and the application of the Convention should concentrate exclusively on whether the decision deserves to be enforced.[107] This view should not be accepted as it disregards the terms of Art. I (1) without interpreting them. It does not adapt the current system to enforce DJS decisions.

Considering DJS decisions as the product of a new form of arbitration created in the blockchain, and with the assumption that States have shared sovereignty over cyberspace at an international level, an evolutionary interpretation of Art. I (1) of the Convention allows for the enforcement of DJS decisions. Where the Convention says it "shall apply to the recognition and enforcement of arbitral awards *made in the territory of a State other than the State where the recognition and enforcement of such awards are sought*,"[108] the ordinary meaning should be that the Convention applies to any award rendered outside of the jurisdiction of the State where the enforcement is sought. Thus, national courts will determine if the award is national or foreign considering the reality of the transaction, like the US approach to non-domestic awards, but with a presumption in favor of accepting that there is international jurisdiction over decisions rendered in the cyberspace. This way, DJS decisions comply with the requirement of Art I (1) and fall within the Convention's scope of regulation.

This interpretation is consistent with the Contracting States' practice, which is one of the criterions to consider when interpreting a treaty according to Art. 31

[106] *Id.* at 1140.

[107] *Id.* at 1145.

[108] New York Convention, *supra* note 17, Art. I (1) (emphasis added).

VCLT,[109] but in an indirect manner. As it was explained in chapter two, the general tendency of national courts is to disregard decentralized decisions from the scope of application of the Convention. Hence, the position of the Contracting States contradicts the evolutionary interpretation of the treaty. Nonetheless, the general view of states on this issue comes from their understanding of jurisdiction. A-national awards are not accepted as part of the scope of application of the Convention because the general understanding is that they are not anchored to any jurisdiction. Thus, it can be said that the states' practice in its core is to enforce arbitral awards that come from a jurisdiction different than the one of enforcement. If the assumption changes to accept a shared jurisdiction over the cyberspace at an international level, state practice remains consistent, while accepting the evolution of the concept of jurisdiction to deal with the reality created by cyberspace and the blockchain.

Finally, DJS can be perceived as the sacralization of the transnational approach to arbitration, which states that its legitimacy comes from an international consensus,[110] given its self-enforcement capabilities.[111] The same goes for the assumption that there is a shared jurisdiction over the blockchain. It helps to build in favor of the existence of an arbitral legal order that is not anchored to any jurisdiction and which states have recognized because of an international consensus found in the Convention's provisions. Hence, the evolutionary interpretation of Art. 1 (1) has the potential not only to allow for the enforcement of DJS decisions but to terminate the debate regarding the different views about the legitimacy of international arbitration by preferring the transnational approach.

V. DJS PLATFORMS, JURORS, AND ELECTRONIC DECISIONS: NATIONAL LEGISLATIONS VS. THE NEW YORK CONVENTION'S AUTONOMOUS AND EVOLUTIONARY INTERPRETATION

This chapter deals with the remaining issues to enforce DJS decisions under the

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[109] *Vienna Convention on the Law of Treaties*, May 23, 1969, Art. 31, 1155 U.N.T.S. 331.

[110] DOLORES BENTOLILA, 43 INTERNATIONAL ARBITRATION LAW LIBRARY: ARBITRATORS AS LAWMAKERS 5-6 (Kluwer Law International 2017).

[111] Maxime Chevalier, *From Smart Contract Litigation to Blockchain Arbitration, a New Decentralized Approach Leading Towards the Blockchain Arbitral Order*, 12 (4) JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 558, 575 (2021), *available at* https://doi.org/10.1093/jnlids/idab025.

Convention. It uses the same structure as the analysis regarding the territoriality criterion in Art. I (1) of the Convention, contrasting national courts interpretations of the Convention and making an autonomous and evolutionary interpretation of its provisions. First, it deals with whether DJS platforms or jurors can be understood as arbitrators under the Convention [**A**]. Second, it analyses whether DJS decisions can be considered arbitral awards [**B**]. Finally, it contests that DJS decisions comply with the formal requirements for arbitral awards under the Convention [**C**].

A. *DJ Platforms or Jurors as Arbitrators*

In an oversimplification, DJS' like Kleros rely on people for the decision-making process. Juries are human beings that have agreed to solve a dispute using their expertise. Thus, they are arbitrators in the ordinary meaning of the word, a group of persons that adjudicate a dispute by agreement of two parties. Hence, there should be no need to go any further in the analysis on whether DJS decisions are rendered by arbitrators.

Nonetheless, there are two considerations. First, even though juries decide on the dispute, the code implements it. Thus, the allocation of responsibility behind the implementation of the decision should have some influence on who is considered the adjudicator in DJS disputes. Second, juries are generally anonymous. This could complicate the enforcement of a DJS decision given the possibility that having an unidentified decision maker violates the public policy of the place of enforcement.[112] Thus, this section addresses the possibility that the DJS themselves are considered as arbitrators, allocating the liability for implementing the award in the blockchain on them to ensure the recognition and enforcement of the award. This is regardless of the possibility that the platforms' protocols reveal the identity of the arbitrators, oblige them to give reasons for their decisions, and make them sign the awards, which will also ensure the enforcement of DJS decisions under the Convention.

The next issue is whether the company that owns the DJS could sit as an arbitrator. National legislations do not generally prohibit this possibility, but the

[112] New York Convention, *supra* note 17, Art. V (2) (b).

underlying assumption is that the arbitrators should be natural persons. For example, the UNCITRAL Model Law assumes that the arbitrators will be natural persons by using the pronouns he/she or his/her in its text.[113] The same happens with the national arbitration laws of the United Kingdom and the USA.[114] However, in states like Qatar, the role of an arbitrator is reserved for natural persons only.[115] There are different views in national legislation on this issue. Thus, as with the territoriality criterion of Art. I (1), an autonomous interpretation of the Convention is preferred to procure uniformity on whether corporations can sit as arbitrators.

Art. I (2) provides that awards made by appointed arbitrators and by "permanent arbitral bodies" are within the scope of the Convention. Furthermore, the Convention does not assume arbitrators can only be natural persons. On the contrary, it expressly accepts awards rendered by arbitral bodies.[116] It will be a matter of interpretation of what the provision means by arbitral bodies. Traditionally, it might be understood that the Convention refers to arbitral institutions whose existence has been accepted by the State in which they are located, like the ICC Court of Arbitration or the SCC Arbitration Centre. Nonetheless, an evolutionary interpretation of the provision allows the inclusion of DJS as arbitral bodies, since the parties agreed to submit their disputes to them, and they exist in cyberspace. Again, this position builds in favor of the transnational approach to arbitration, with the AA being sufficient to determine the existence of such arbitral body.

However, the Convention does not specify if the appointed arbitrators should be natural persons. Thus, understanding the DJS as a corporation appointed in an ad hoc arbitration could also be an option. An autonomous and evolutionary interpretation of the Convention in this matter creates the possibility of comparing

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[113] UNCITRAL Model Law, *supra* note 26, Art. 11; *see also* João Ilhão Moreira & Riccardo Vecellio Segate, *The 'It' Arbitrator: Why Do Corporations Not Act as Arbitrators?*, 12 (4) JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 525, 536 (2021), *available at* https://doi.org/10.1093/jnlids/idab022.

[114] *Id.* at 537-538.

[115] Civil and Commercial Arbitration Law 2017 (State of Qatar), Art. 11.1.b.

[116] João Ilhão Moreira & Riccardo Vecellio Segate, *The 'It' Arbitrator: Why Do Corporations Not Act as Arbitrators?*, 12 (4) JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 525, 537 (2021), *available at* https://doi.org/10.1093/jnlids/idab022.

DJS decisions to arbitrators or arbitral institutions. Therefore, the criterion in Art. I (2) of the Convention is met since DJS decisions are rendered by arbitrators.

B. *DJS Decisions and the Arbitral Award's Definition*

The Convention is applicable to "arbitral awards" according to its Art. I (2).[117] Nonetheless, it does not provide a definition of arbitral awards. The same happens with the UNCITRAL Model Law where arbitral award is not defined either. They solely provide for arbitral awards' formal requirements, an issue that is addressed in the next section, and their characteristics. Regarding the latter, Art. V (1) (e) of the Convention and Art. 36 (1) (a) (v) of the UNCITRAL Model Law provide that an enforceable award must be final and binding between the parties.

The definition of arbitral awards for both the Convention and the UNCITRAL Model Law should be pragmatic. An arbitral award is a decision rendered by an arbitrator or arbitral body after a proceeding to solve a dispute referred to them by the agreement of the parties. Under this definition, DJS are arbitral awards. The issue is the finality and binding effect of DJS decisions, which are the requirements for their enforceability under both the Convention and the Model Law.

First, the finality requirement is met if the arbitral award cannot be subject to challenge or revision. DJS decisions comply with it when the proceeding in the revision mechanism ends, and the code is enacted. Thus, DJS decisions are final when the decision is rendered in the system or when the code is enacted, depending on whether the dispute is regarding an SC, an SLC, or a traditional contract. At this point, it is futile to analyze the finality requirement linked to the seat of arbitration. The use of the seat was already disregarded for the territoriality criterion of the Convention. Thus, the rest of the issues to enforce DJS decisions under the Convention should follow the same fortune.

Second, there is a debate regarding the enforceability of arbitral awards. The issue is whether the binding effect of arbitral awards required by the Convention is met if the decision comes from a contractual source, or the award must be binding

[117] New York Convention, *supra* note 17, Art. I (1).

according to the law of the seat.[118] The general view is that arbitral awards must be binding according to the law of the seat and the binding effect of the award by the contractual agreement of the parties is not enough to avail recourse to the Convention.[119] Nonetheless, states like Italy have interpreted the Convention as lacking a requirement for the award to be judicially binding in the law of the seat. Thus, contractual finality is enough to enforce an award using the Convention. The Italian courts reached this conclusion with the assumption that the Convention is a framework treaty that should be interpreted in a flexible manner, beyond concepts and provisions of their own national law.[120] In other words, the Italian courts performed an autonomous and evolutionary interpretation of the Convention.

At first sight, DJS decisions fall in the discussion on its bindingness. If that is the case, the Italian interpretation should be preferred. The ordinary meaning of "binding" in the context of a treaty whose goal is to protect the recourse to arbitration, as an expression of the principle of autonomy of the parties, can only be that the parties acquired the obligation to comply with the juries' decisions, regardless of its source.

However, the assumption that there is a shared jurisdiction over cyberspace is another way to solve this issue. It can be contested that the judicially binding character of DJS decisions comes from all the other states where enforcement is not sought, since they share jurisdiction over cyberspace. This is just an extra step in the evolutionary interpretation for the territoriality criterion carried out in the last chapter.

In conclusion, an autonomous and evolutionary interpretation of the Convention allows the conclusion that DJS decisions are binding arbitral awards.

C. *Formal Requirements for Arbitral Awards*

Finally, there is the issue of the formal requirements that the Convention and

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[118] Cristina M. Mariottini & Burkhard Hess, *Chapter* 3: *The Notion of "Arbitral Award"*, in 61 INTERNATIONAL ARBITRATION LAW LIBRARY: AUTONOMOUS VERSUS DOMESTIC CONCEPTS UNDER THE NEW YORK CONVENTION 28, 34 (Franco Ferrari & Friedrich Jakob Rosenfeld eds., Kluwer Law International 2021).

[119] *Id.* at 35-38.

[120] *Id.* at 39-41.

national laws demand on arbitral awards. On the one hand, Art. IV of the Convention imposes three formal requirements for enforcement of awards: (i) presenting the original or certified copy of the award, (ii) the AA and (iii) their translations to the language of the State of enforcement.[121] On the other hand, the formal requirements in Art. 31 of the UNCITRAL Model Law are that the awards are: (i) made in writing, (ii) signed by the arbitrators, (iii) with a statement of the reasons for the tribunal's decision, (iv) and with determinations of the date (v) and place of arbitration.[122]

The UNCITRAL Model Law standard is incompatible with DJS decisions because it requires the determination of the place of the arbitration. It assumes that every award must have a seat and nationality. The other requirements can be met by changing the system's rules to reveal the identity of the jurors or to render the decision itself, sitting as arbitrator, and implementing the obligation to express the reasons for the decision. The Model Law standard is higher than the one of Art. IV of the Convention. For the Convention is enough if the decision is in writing and the originals or certified copies of the award and the AA are provided to the court of enforcement.

It has been said that the formal requirements for the enforceability of an arbitral award are to be understood from the national law of the enforcement state, as it is the way a state implements the Convention. Furthermore, one view on digital blockchain awards is that lacking a determination in the Convention on what is the meaning of having an award in writing, their enforceability will depend on the standard in the law of enforcement.[123] This creates a complication for the enforcement of DJS decisions in Model Law jurisdictions. While Art. 7 provides for the possibility to conclude an AA by electronic means, Art. 31 implies that the award should be physically rendered, in hard copies, and manually signed by the arbitrators. This approach is far behind the current reality of international transactions. Now,

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[121] New York Convention, *supra* note 17, Art. IV.

[122] UNCITRAL Model Law, *supra* note 26, Arts. 31 (1), (2), and (3).

[123] Maxime Chevalier, *From Smart Contract Litigation to Blockchain Arbitration, a New Decentralized Approach Leading Towards the Blockchain Arbitral Order*, 12 (4) JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 558, at 572-573 (2021), *available at* https://doi.org/10.1093/jnlids/idab025.

the identity of a person is easily determined by electronic means with encrypted information. Tools like electronic signatures and tokens allow for signing documents with the guarantee of the signatory's identity. This is especially true regarding blockchain technology, in which the cryptographic key is an irrefutable way of identification, and the DJS is easily recognizable. Furthermore, even a debate on whether DJS decisions comply with the Model Law's formal requirements on awards proves that the Convention's standard is to be preferred since it is less restrictive. This is a scenario in which the national standard is less favorable for enforcement of the award. Thus, Art. VII of the Convention is inapplicable. The Convention should be applied autonomously from the Contracting States' national law when their formal requirements on awards are more burdensome than the ones in the Convention.

Next, the issue is whether DJS decisions are in writing according to Art. IV of the Convention. The provision does not describe the criteria for the writing requirement, it merely states that the party seeking to enforce an award should provide the courts of enforcement with the original or certified copy of the decision. In other words, a corroboration of the award's authenticity is enough to meet the criterion. The term "original" must be interpreted under the CIL rules on treaties interpretation, instead of applying the Contracting States' national laws. Also, the term is broad enough to conclude that the Contracting States had the intention to allow an evolutionary interpretation of the criterion. The ways to corroborate the authenticity of a document have changed since the Convention was concluded. This new reality allows the interpreter to determine what is the ordinary meaning of an original document in the context of blockchain and cyberspace.

The answer is somehow less formalistic than the one expected in the traditional definition of original documents, while complying with any possible standard of documents' authentication. Instead of a signature with a certification of authenticity, an original document in the blockchain will have a specific identification in the chain, including its creator and any modification within. Thus, the courts of enforcement can corroborate that the decision was rendered by a DJS, based on the specific contract from which the dispute between the parties arose. This with a higher level

of certainty than any other certification in the physical world, which may depend on the corroboration of the document made by a third person who has been entrusted with the responsibility to certify the veracity of documents. By interpreting the Convention in an autonomous manner and accepting the evolutionary interpretation of the requirements in Art. IV, the interpreter can ensure compliance with the goal of the Convention to promote the effectiveness of arbitration worldwide. Hence, the interpretation is consistent with all the steps in Art. 31 of the VCLT.

By interpreting Art. IV in this way, the Convention will become accessible for all awards rendered in cyberspace, constituting a milestone in the evolution of international commercial arbitration. Consequently, national laws might enter a period of adjustment to relax their formal requirements for the enforcement of arbitral awards, meeting the Convention's standard.

In sum, an autonomous and evolutionary interpretation of the Convention's provisions allows enforcing DJS decisions as arbitral awards. First, Art. I (1) territoriality would be met when the decision is rendered out of the jurisdiction of the enforcement state. DJS' decisions are within the scope of Art. I (1) by using the theoretical assumption that there is a shared jurisdiction over cyberspace at an international level. Second, the DJS jurors are conceptually arbitrators and, in any case, the DJS could render the decisions themselves, pursuant to Art. I (2) of the Convention. Third, DJS decisions are binding awards by both contractual and jurisdictional criteria. Finally, Art. IV formal requirements allow for the enforcement of blockchain-rendered arbitral awards. Hence, DJS decisions can be recognized and enforced under the New York Convention.

VI. THE AFTERMATH: HOW SHOULD STATES GOVERN DJS?

The final step of this analysis is dealing with the grounds for refusing enforcement that Contracting States' courts can raise *proprio motu*, according to Art. V (2) of the Convention. The enforcement of an award is to be denied when the subject matter of the dispute is not arbitrable under the law of the enforcement; or if the award is contrary to that state's public policy. The issue is how to reconcile the autonomous and evolutionary interpretation of the Convention conducted in this work with the

fact that states have a discretionary right to refuse enforcement in cases of non-arbitrability or breach of public policy.

There are three considerations. First, the issues related to the use of new technologies like blockchain, and artificial intelligence can raise public policy concerns in the enforcement stage,[124] given the fact that most legal systems have not adopted their procedural standards for the use of these new technologies. Hence, they lack regulation. Second, blockchain creates a practical impediment for states' regulatory powers to reach the cyber communities using this network. Hence, the only control states could exercise in the blockchain dispute settlement system is when a specific case has an enforcement stage in the physical world. In addition, there is uncertainty in the treatment that states will give to DJS decisions. Finally, DJS developers exercise a *de facto* jurisdiction over their proceedings in the blockchain, from their institution to their self-enforcement in the system.

There is a possible solution to allow states to set minimum standards to ensure that the enforcement of DJS decisions does not represent a violation of their public policies. The first step is accepting that some of the blockchain communities' activities are beyond the reach of any state's jurisdiction. Thus, the principle of autonomy of the parties is to be extended as a legal fiction encompassing these activities. This way, the factual situation in which states cannot regulate blockchain is covered by a legal fiction that creates a previous step dealing with the legitimacy of states' control over cyberspace. When a state jurisdiction cannot reach a private activity in the blockchain it means that it is protected by the principle of autonomy of the parties, accepted and guaranteed by that state. This illusion of control reinforces the need for the theoretical assumption that states have shared jurisdiction over the blockchain at an international level. If the issue is of an international nature, the solution can be found in one of the options for cyberspace

[124] Bianca Berardicurti, 25. *Artificial Intelligence in International Arbitration: The World is All That is The Case*, in 40 UNDER 40 INTERNATIONAL ARBITRATION 377, https://www.kluwerarbitration.com/document/kli-ka-40under40-2021-029-n?q=Artificial%20Intelligence%20in%20International%20Arbitration%3A%20The%20world%20is%20All%20That%20is%20The%20Case.

governance that have been proposed due to the lack of treaties dealing with the internet.[125]

The idea is that states should enter into agreements with the non-state actors operating in the blockchain to set the minimum standards needed for the recognition of their activities in national jurisdictions.[126] This way, states can accept the autonomous and evolutionary interpretations of the Convention to safeguard the possibility to enforce DJS decisions in the physical world, while ensuring the system's compliance with national public policy issues and clarifying the range of arbitrable disputes in their territories, all in the form of contractual obligations.

This form of cyberspace governance is opposed to the traditional view of the absolute and authoritative jurisdiction of states, which are only allowed to enter into agreements amongst themselves to regulate global public goods. However, it is a practical way to reach the spheres where states have no power by using cooperation with non-state actors. For the purposes of this work, the conclusion of agreements between the states and the DJS will allow fulfilling two significant goals. On the one hand, states can ensure compliance with minimum standards of due process and other public policy considerations. On the other hand, there will be certainty on the treatment of states to DJS decisions if one of the parties pursues enforcement in the physical world. Hence, the blockchain technology applied to dispute settlement will be able to enjoy free reign for its development and use in medium and large disputes.

VII. CONCLUSION

Blockchain technology is shaping the future of international transactions. SCs and SLCs are automated and cost-effective options to do business. Unlike traditional contracts, SCs eliminate the risk of non-compliance. The applications of the blockchain in businesses and transactions are growing in importance. DJS' are no exception. They are blockchain-based decentralized dispute settlement mechanisms created for disputes involving SCs and SLCs. Their decisions are self-enforceable in

[125] Joanna Kulesza & Rolf Weber, *Protecting the Internet with international law*, 40 105531 COMPUTER LAW & SECURITY 1, 7 (2021), https://www.sciencedirect.com/science/article/pii/S0267364921000042.

[126] *Id.* at 12.

the blockchain. Nonetheless, DJS' are likely to be chosen as a dispute settlement forum for traditional contracts, due to their multiple benefits when compared with conventional arbitration and court litigation. DJS is faster, cheaper, automated, and specialized. Thus, it is important to analyze the possibility to recognize and enforce DJS decisions under the Convention.

There are four issues for the recognition and enforcement of DJS decisions under the Convention. First, the territoriality criterion of Art. I (1) of the Convention. Second, the concept of arbitrators and the possibility that it includes DJS providers and juries. Third, whether DJS decisions fall within the definition of awards. Fourth, DJS decisions' compliance with the formal requirements of Art. IV of the Convention.

First, DJS decisions are enforceable under the Convention by making an autonomous and evolutionary interpretation of its provisions. The autonomous interpretation is necessary to ensure the uniform application of the Convention since Contracting States have different views on the issue of territoriality. The main view is that all awards need to be seated or governed by a state to fall within the scope of application set out in Art. I (1) of the Convention. This logic is extended to DJS decisions given the nature of cyberspace, which is not located in a physical destination. Nonetheless, states like the USA and France have accepted the possibility to enforce a-national awards, or awards without a seat. They are examples of jurisdictions in which DJS decisions can be enforced as a-national awards even though their views come from their local interpretation of the Convention. This also constitutes a pragmatic reason to make an autonomous interpretation of the Convention since the views on the territoriality criterion are contradictory between states, which is inconsistent with the goal of the Convention to ensure uniformity in favor of international arbitration.

Art. I (1) of the Convention can be interpreted in an evolutionary manner. It is written in broad wording to include all the possible scenarios it could be extended to. Likewise, the Convention is a framework treaty for international arbitration. There are objective reasons to interpret its provisions in an evolutionary manner since arbitration is linked to the way international transactions are made, and blockchain

technology has created a new reality for them. Equally, blockchain is a new expression of party autonomy, a principle protected by the Convention.

The goal of the evolutionary interpretation of the Convention's territoriality criterion is to adapt the treaty's text to the new blockchain reality. To do so, the assumption on the jurisdiction over cyberspace and blockchain must change. The current understanding is that cyberspace is beyond any state's jurisdiction and any existing regulation has a local or national nature since their effects are not corroborated directly in the cyberspace but in the physical territory of the state that enacts them. The new understanding should be that states have a shared jurisdiction over cyberspace at an international level. This theoretical assumption is consistent with the nature of cyberspace as a global public good and allows it to elevate any debate regarding its changes and new technologies to the international arena. Likewise, it allows cyberspace users to benefit from the international framework existing for transnational transactions, including the Convention.

The conclusion of interpreting Art. I (1) of the Convention in an evolutionary manner is that the territoriality criterion refers to the exercise of jurisdiction of other states over the award to be enforced. In other words, the requirement is that the award does not fall within the jurisdiction of the state in which enforcement is sought. By assuming there is a shared jurisdiction over cyberspace there is a presumption that the jurisdictional requirement is met if the decision was rendered in the blockchain. Thus, DJS decisions comply with the Convention's territoriality requirement unless there are indications that the decision is to be governed by the enforcement state's national law.

Second, companies owning DJS can sit as arbitrators according to Art. I (2) of the Convention. The provision allows for permanent arbitral bodies to render awards, and it does not assume arbitrators must be natural persons. An autonomous interpretation of Art. I (2) of the Convention is preferable to deal with this issue since there is no uniformity on the national laws' treatment. Also, an evolutionary interpretation of the provision should understand that DJS are permanent arbitral bodies even if they are not formally accepted as such by any state. Their legitimacy

comes from the principle of autonomy of the parties governing the blockchain and the parties' agreement to refer their disputes to the systems.

Third, the Convention does not define "arbitral award". This is an indication that an evolutionary interpretation of this concept can take place. Thus, what is understood as an arbitral award depends on the context at the time of the interpretation of the treaty. Blockchain-rendered decisions are arbitral awards since they solve a dispute referred by agreement of the parties to a DJS, which can be equated to an arbitrator or arbitral body. Thus, the requirement is met.

Fourth, the formal requirements for the enforcement of arbitral awards in Art. 31 of the UNCITRAL Model Law assume that all awards must be physically rendered and signed. This is not the case with Art. IV of the Convention which only requires the authenticity of the decision and its translation, if necessary. The Convention is to be interpreted in an autonomous manner. Using the Model Law to modulate Art. IV of the Convention is against the Convention's goal to create a favorable framework for international arbitration. The Convention does not provide for a criterion on documents' authenticity, and an evolutionary interpretation taking blockchain into account concludes that the electronic certification of authenticity meets the requirement. Thus, DJS decisions are enforceable as awards under the Convention.

Finally, even though an autonomous and evolutionary interpretation of the Convention ensures the enforcement of DJS decisions in the courts of the Contracting States, there is the issue of Art. V (2) of the Convention. States can refuse enforcement of awards on grounds of arbitrability or public policy. To ensure that Contracting States' public policy is not breached by DJS decisions, states can enter into agreements with the systems' providers, to set minimum requirements for the proceedings. This way of blockchain governance gives non-state actors an active role in the regulation of DJS, ensuring states' authority in arenas that are otherwise unreachable.

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The Institute for Transnational Arbitration (ITA) provides advanced, continuing education for lawyers, judges and other professionals concerned with transnational arbitration of commercial and investment disputes. Through its programs, scholarly publications and membership activities, ITA has become an important global forum on contemporary issues in the field of transnational arbitration. The Institute's record of educational achievements has been aided by the support of many of the world's leading companies, lawyers and arbitration professionals. Membership in the Institute for Transnational Arbitration is available to corporations, law firms, professional and educational organizations, government agencies and individuals.

A. MISSION

Founded in 1986 as a division of The Center for American and International Law, the Institute was created to promote global adherence to the world's principal arbitration treaties and to educate business executives, government officials and lawyers about arbitration as a means of resolving transnational business disputes.

B. WHY BECOME A MEMBER?

Membership dues are more than compensated both financially and professionally by the benefits of membership. Depending on the level of membership, ITA members may designate multiple representatives on the Institute's Advisory Board, each of whom is invited to attend, without charge, either the annual ITA Workshop in Dallas or the annual Americas Workshop held in a different Latin American city each year. Both events begin with the Workshop and are followed by a Dinner Meeting later that evening and the ITA Forum the following morning - an informal, invitation-only roundtable discussion on current issues in the field. Advisory Board Members also receive a substantial tuition discount at all other ITA programs.

Advisory Board members also have the opportunity to participate in the work of the Institute's practice committees and a variety of other free professional and social membership activities throughout the year. Advisory Board Members also receive a

free subscription to ITA's quarterly law journal, World Arbitration and Mediation Review, a free subscription to ITA's quarterly newsletter, News and Notes, and substantial discounts on all ITA educational online, DVD and print publications. Your membership and participation support the activities of one of the world's leading forums on international arbitration today.

C. THE ADVISORY BOARD

The work of the Institute is done primarily through its Advisory Board, and its committees. The current practice committees of the ITA are the Americas Initiative Committee (comprised of Advisory Board members practicing or interested in Latin America) and the Young Arbitrators Initiative Committee (comprised of Advisory Board members under 40 years old). The ITA Advisory Board and its committees meet for business and social activities each June in connection with the annual ITA Workshop. Other committee activities occur in connection with the annual ITA Americas Workshop and throughout the year.

D. PROGRAMS

The primary public program of the Institute is its annual ITA Workshop, presented each year in June in Dallas in connection with the annual membership meetings. Other annual programs include the ITA Americas Workshop held at different venues in Latin America, the ITA-ASIL Spring Conference, held in Washington, D.C., and the ITA-IEL-ICC Joint Conference on International Energy Arbitration. ITA conferences customarily include a Roundtable for young practitioners and an ITA Forum for candid discussion among peers of current issues and concerns in the field. For a complete calendar of ITA programs, please visit our website at www.cailaw.org/ita.

E. PUBLICATIONS

The Institute for Transnational Arbitration publishes its acclaimed Scoreboard of Adherence to Transnational Arbitration Treaties, a comprehensive, regularly-updated report on the status of every country's adherence to the primary international arbitration treaties, in ITA's quarterly newsletter, News and Notes. All ITA members also receive a free subscription to ITA's World Arbitration and Mediation Review, a law journal edited by ITA's Board of Editors and published in four

issues per year. ITA's educational videos and books are produced through its Academic Council to aid professors, students and practitioners of international arbitration. Since 2002, ITA has co-sponsored KluwerArbitration.com, the most comprehensive, up-to-date portal for international arbitration resources on the Internet. The ITA Arbitration Report, a free email subscription service available at KluwerArbitration.com and prepared by the ITA Board of Reporters, delivers timely reports on awards, cases, legislation and other current developments from over 60 countries, organized by country, together with reports on new treaty ratifications, new publications and upcoming events around the globe. ITAFOR (the ITA Latin American Arbitration Forum) A listserv launched in 2014 has quickly become the leading online forum on arbitration in Latin America.

Please join us. For more information, visit ITA online at www.cailaw.org/ita.

Institute for Transnational Arbitration
ITA IN REVIEW

Table of Contents

Articles

Young ITA Writing Competition Winner.
Gathering Cross-border Evidence in Support of Arbitration after ZF Automotive — *Michael Arada Greenop & Augusto García Sanjur*

Young Ita Writing Competition Finalist.
The New York Convention on the Enforcement of Decentralized Justice Systems' Decisions: A Perspective from the Evolutionary Interpretation of Treaties — *David Molina Coello*

NAFTA and The USMCA: The Substantial Differences — *The Hon. Bernardo Sepúlveda-Amor*

Entry to Foreign Lawyers & Law Firms in India & Its Impact on International Arbitration in India — *Sushant Mahajan*

Building Standards: ESG in the Infrastructure Industry — *Iván Larenas Lolas*

Third-party Funding: A Tool To Deter Investor Misconduct? — *Dr. Üzeyir Karabiyik & Charles B. Rosenberg*

Interviews

Perspectives on the Iran-US Claims Tribunal After 40 Years — *Rafael T. Boza & The Hon. Charles Brower*

Book Review

Guía de Arbitraje de Inversión ARBANZA
Co-Edited by Yael Ribco Borman and Sandro Espinoza Quiñones — *Pilar Álvarez*

and Much More.

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