

Short notes on:

Dispute Resolution in the Age of the Fourth Industrial Revolution

“Whoever controls the courts, controls the state.” Aristotle

The courts of ancient Athens were fundamentally democratic with tens, hundreds and in some instances thousands of jurors adjudicating trials. There was no Judge, which role was taken up by the pool of jurors adjudicating at that time. One of the founding principles held dear by Athenians was that of democracy, and it held that their justice system should also be based on this same system.

Contrasted with the 21st century, many countries, including South Africa, have determined that our justice system is better served by the adjudication of the vast majority of disputes by an individual adjudicator. Most matters, be they trial or application, are heard by single adjudicators, Magistrates, sitting in the Magistrates Court. The same is true of the High Court, and even in the Constitutional Court, the highest court in our land, a minimum of eight judges are required to hear a Constitutional Court case.

Whatever the reasons where for this shift in judicial authority from the collective to the individual, rapid advances in technology, as it relates to telecommunications specifically, mean that it may be viable, once again, to shift judicial authority back into the hands of the people. This article is not suggesting revolutionary changes in any governing ideals. This is an article about how new technology may have opened a world of possibility as it relates to adjudication of contractual disputes, making it quicker and cheaper to resolve than it has in the past with existing forms of dispute resolution.

Existing Forms of Dispute Resolution

Most formal contracts include a variety of dispute resolution clauses designed to provide clarity if a dispute should arise. The obvious and most common clause is one which provides that any dispute between parties must be resolved by being referred to a Court. Some clauses specifically exclude the ability of the parties to refer disputes to either the High Court or the Magistrates Court. The function of a Court is to decide cases before a judicial officer who has sworn to uphold and protect the Constitution, human rights and, importantly, to administer justice to all persons without fear,

favour or prejudice.¹ The beauty of a Court is that it functions independently of nothing but the constitution and the Law. They also do not charge parties for the benefit of access to its Halls of Justice, and thus anyone may make use of said Court. A legal expert may be required to help navigate the complicated nature of Law, but the infrastructure is present along an existing body of law or precedent with which to assist in the adjudication of a dispute.

South African Courts, however, are overburdened in many instances which results in varying degrees of a delay to access to justice. Another limiting factor is that some matters require specialist industry-specific knowledge which, in some instances, magistrates or judges do not have.

For these reasons, some parties include an arbitration clause in the contract which forces the parties to resolve disputes by way of Arbitration. The parties in this instance have decided that their agreement is such that any dispute would be best adjudicated upon privately by a person with existing specialist knowledge. This person, or arbitrator, is better equipped to resolve a dispute than a Court. Without having to worry about a court roll, Arbitration results in speedy resolution but which comes at a price – parties have to pay for the benefit of using a skilled expert and must generally pay for the use of a neutral venue. The result is a speedy but expensive result.

Worth bearing in mind is that there are many types of courts and adjudicatory bodies such as the Small Claims Court, Equality Courts, Consumer Tribunals and the Broadcasting Complaints Commission all with varying levels of efficacy, enforceability and barriers to entry. As has already been made clear - technology has advanced to the point that we may now be able to rely on a hyper-modern system similar in a way to the one once used by the ancient Athenians.

For the benefit of any potential naysayers and quoting from old case law, the late Chief Justice Innes once said: *“There come times in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas and to keep pace with the requirements of changing conditions.”*²

A Revised Form of Dispute Resolution

¹ LAWSA Courts and Tribunals MDJ Wallis at para 458

² Blower v Van Noorden 1909 TS 890

With increased connectivity, buying and selling products and services has become simpler and incredibly commonplace. Total revenue in 2018 for the eCommerce market in the United States reached a figure of 365 Million USD and 3.3 Million USD here in South Africa.³ These figures represent hundreds and thousands of transactions with each one governed by an individual contract or agreement. Dispute resolution clauses appear as common boilerplate provisions, but which have not necessarily taken into account certain fundamental concerns.

For a legal practitioner or a risk-assessor, the concern is that many transactions are low value and involve some form of cross-border transaction. If a user in South African needs the services of someone sitting in India and the value of the transaction is 100USD, how would these two contracting parties resolve a dispute quickly and efficiently? It would cost more than 100USD to dispute anything formally, and enforcement of the resulting order would be nigh impossible.

The solution, as envisioned by an decentralized application known as Kleros, is that using Smart Contracts and Blockchain Ecosystems we could build in a method of arbitration using a vast system of incentivised jurors. The white paper summarises the solution as follows: "*Kleros is a decentralised application built on top of Ethereum that works as a decentralised third party to arbitrate disputes in every kind of contract, from very simple to highly complex ones. It relies on game-theoretic incentives to have jurors rule cases correctly. The result is a dispute resolution system that renders ultimate judgments in a fast, inexpensive, reliable and decentralised way.*"⁴

A smart contract with a 'Kleros Clause' allows a user to note a dispute online which would automatically be sent out to a pre-determined set of jurors who would each vote independently of each other and collectively determine the outcome. This would be done automatically and within a matter of hours. It is a system which would greatly enhance the dispute resolution process, especially for low value and cross-border transactions.

Applicability and Legality of Kleros

s34 of the Constitution guarantees that everyone has the right to have any dispute resolved by application of the law before a court or, if appropriate, another independent and impartial tribunal or forum. However, the Constitutional Court has ruled that s34 does not apply or include within this

³ <https://www.statista.com/outlook/243/112/e-commerce/south-africa#market-paymentTypes>

⁴ <https://kleros.io/whitepaper.pdf> pg 1

ambit, private arbitration. Kleros would most likely be seen as a forum for private arbitration and would thus be held to the same standards as that of any Arbitration.

Our law recognises that private arbitration is not to be judged by the same yardstick as that of a court of law, but that arbitration proceedings should be fair and conducted in accordance with law and justice. Importantly, the proceedings must be consistent with constitutional values.

Whether an arbitration clause incorporating Kleros as the method of adjudication would be legally binding is a dispute that would, irony aside, have to be determined by a court. The question would be whether a Kleros Clause would in any way be contrary to our societies sense of justice and morals. The test to meet would be to confirm whether this type of clause would be contrary to law, morality or be prejudicial towards social or economic expedience. On the face of it, this type of clause would promote access to justice as it eliminates the time and cost usually associated with disputing a contract. In this sense, a Kleros Clause would advance law, morality and support social and economic expedience.

Although outwardly applicable, a Kleros type clause would have to be accompanied by additional clauses making the findings of the juror pool binding on the parties to the agreement. In addition, and to protect against the possibility that a Court would rule against such novelty, it would be wise to ensure that the agreement allowed for more than one type of form of dispute resolution. Finally, the Kleros Clause would have to be entirely severable from the rest of the contract.

Conclusion

Although existing forms of dispute resolution are certainly effective, they are limited in many regards. Most forms are either slow, expensive or both. It is likely that new technology such as Smart Contracts, Ethereum, BlockChain and Kleros will provide solutions to the problems we currently face. This much is a truism but at a time of uncertainty and change it is important to make clear. Using new technology is daunting, and the legal landscape needs to be carefully navigated, so when deciding to embark on a modernising exercise, be sure to take full and proper advice.

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