

# **METaverse DISPUTE RESOLUTION COLLOQUIUM**

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## SCOPE OF THIS PRESENTATION

→ **Pratyush:**

- **Applicability of the New York Convention**
- **Validity of arbitration agreements in the Metaverse under Arts. II(3), V(1)(a) of the New York Convention**

→ **Emily:**

- **The writing requirement in Art. II(2) of the New York Convention**
- **Due process under Art. V(1)(b) of the New York Convention**



## APPLICABILITY OF THE NEW YORK CONVENTION

- **On-chain (automatic) enforcement of decisions:**
  - Smart contracts and the enforcement mechanism
  - Issues underlying the enforcement mechanism
  
- **The absence of a legal seat:**
  - Art. I(1) New York Convention
  - *Lex mercatoria* → *Lex cryptographia*?



## ON-CHAIN ENFORCEMENT: THE MECHANISM

→ **Smart contracts:**

- Definition: “self-executing digital transaction . . . using decentralized cryptographic mechanisms for enforcement”.
- To put it simply: “if  $x \longrightarrow$  then  $y$ ” function.

→ **Smart contracts embedded with arbitration agreements:**

- Usually provide for automatic enforcement (e.g., Kleros, Jur).
- Some leave enforcement in the hands of the arbitrators or the authority in-charge (e.g., CodeLegit, Hedera).



# ON-CHAIN ENFORCEMENT: THE ISSUES

## → **Identification of assets:**

- Escrow-like system: A mandatory crypto-payment remains in escrow until any initiated dispute has been resolved.

## → **Identification of counter-party:**

- Pseudonymity inherent in the blockchain: public key + private key = asymmetric cryptography.
- IP address: can be camouflaged using VPN.
- Solutions: Ongoing projects aimed at:
  - asset and identity tracing (Elliptic, Chainalysis and Worldcoin); and
  - linking online identities to personal information (so-called “soul bound tokens”).



## WHEN MAY THE NEW YORK CONVENTION BECOME APPLICABLE

- **If disputes are resolved off-chain** (e.g., user-platform disputes).
- **If disputes are resolved on-chain, but have off-chain ramifications** (e.g., on-chain enforcement insufficient due to breach, fraud or mistake).
- **If the disputes are resolved on-chain, but later converted to an off-chain award** (e.g., Mexican case).
- **Jurisdictional hurdles:**
  - Identification of counter-party.
  - Operators as garnishee (e.g., Binance France)?



## THRESHOLD ISSUE: THE ABSENCE OF A LEGAL SEAT

### → Scope of application of the New York Convention:

- Art. I(1) of the New York Convention: “arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought . . .”
- References to the seat of arbitration also found in Arts. V(1)(a), V(1)(d) and V(1)(e) of the New York Convention.
- Where does decentralized arbitration fit in: *lex cryptographia* – an avatar of *lex mercatoria*?
- Art. VII of the New York Convention : The Convention shall not “deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.”

### → Evolutive interpretation of the New York Convention:

- Article 31 VCLT.
- See, for e.g., 2006 UNCITRAL Recommendation on the interpretation of Article II of the New York Convention.



## OFF-CHAIN ENFORCEMENT: APPLICATION OF NEW YORK CONVENTION

### → **Validity of arbitration agreements:**

- **Art. II(3) of the New York Convention:** the agreement is “null and void, inoperative or incapable of being performed”.
- **Art. V(1)(a) of the New York Convention:** the “parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made”.

### → **Issues regarding validity of smart contracts:**

- **Issues of capacity:** Concerns arising out of pseudonymity in user-user agreements (see Model Law for DAOs).
- **Issues of unconscionability:** Concerns arising out of unfair terms in user-platform agreements (see *Coinbase v. Bielksi/Suski* litigation).
- **Issues of meeting of minds:** Principles of offer/acceptance/consent (see *Quoine Pte Ltd v. B2C2 Ltd.* [2020] SGCA(I) 02).





## **OFF-CHAIN ENFORCEMENT: APPLICATION OF NEW YORK CONVENTION**

### → **The writing requirement:**

- **Article II(2) of the New York Convention:** “[t]he term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”
- **Option 1 of Article 7 of the amended UNCITRAL Model Law:** “[t]he requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; ‘electronic communication’” means any communication that the parties make by means of data messages; ‘data message’ means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.”
- **2006 UNCITRAL Recommendation on the interpretation of Articles II and VII of the New York Convention**
- **UNCITRAL Working Group IV September 2022 Study on Provisions of UNCITRAL texts applicable to automated contracting.**



## OFF-CHAIN ENFORCEMENT: APPLICATION OF NEW YORK CONVENTION

### → Due process concerns:

- Article V(1)(b) NYC: “[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.” (see also Article V(1)(d) NYC).
- Amsterdam Court of Appeal Decision, ECLI:NL:GHAMS:2019:192
- Kleros vs. CodeLegit

Issue	Kleros	CodeLegit
Selection of Arbitrators	Anonymous / chances contingent on tokens	Parties or CodeLegit choose
Number of Arbitrators	Three	One
Disclosure Phase	No	No
Hearing	No	Yes
Decision	By votes / incentive to vote with majority	By award / in writing, could be reasoned



## **OFF-CHAIN ENFORCEMENT: APPLICATION OF NEW YORK CONVENTION**

### → **Public policy concerns:**

- **Article V(2)(b) NYC:** “[t]he recognition or enforcement of the award would be contrary to the public policy of that country.” (see also Article V(1)(e) NYC).
- **Ban on cryptocurrencies in some countries** (for e.g., Shenzhen Intermediate People’s Court decision of 2018 in *Gao Zheyu v. Shenzhen Yunsilu Innovation Development Fund Enterprise (L.P.) and Li Bin*, (2018) Yue 03 Min Te No. 719).

- **Reimagining the notion of law**
- **Reimagining the interpretation of law**
- **Reimagining the application of law**

**“There is no other justice than the justice to be found in the positive law of states.”**

**~ Hans Kelsen**

**“Justice is the constant and perpetual will to give to each his own.”**

**~ Ulpian**



**THANK YOU!**