



# DUE PROCESS IN KLEROS CONSUMER DISPUTE RESOLUTION

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# KLEROS

## Draft Report

Fellowship of Justice Program

### Due Process in Kleros' Consumer Dispute Resolution

Kleros is a decentralized application built on top of Ethereum that works as a decentralized 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 decentralized way.

This research is a result of the work in the Kleros Fellowship. It represents the work of the author and in no way it represents the opinion of Coopérative Kleros.

Work in progress, comments and contribution are highly appreciated.

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# Executive Summary

1. Kleros' dispute resolution technique meets the highest level of internationally recognized due process requirements. The main purpose of this Report is to deliver a model of Kleros' consumer redress scheme which is compliant to any identifiable regulatory coordinate system for conducting dispute resolution procedures.

2. ADR is an *umbrella term* encompassing out-of-court processes of dispute resolution, such as early neutral evaluation, online negotiation, mediation, arbitration, etc.

3. There is no universally accepted legal definition of ODR and it is therefore often defined for what it can offer and how it functions in specific contexts, that is as an online *case-management tool* for dispute resolution process.

4. Kleros' dispute resolution, being all in one a facilitative blockchain platform and a crypto-incentivized arbitration procedure is a unique process strictly not subject to existing definitions of ADR/ODR/crowdsourced procedures and requires a *distinct definition*.

5. Case-by-case study will be appropriate in cross-border implementation of Kleros' scheme, but that study will likely discover no regulation *precisely matching* Kleros' procedure in the majority of jurisdictions.

6. Respectively, Kleros' procedure *compliance* to the substantial international due process principles and current best practices of out-of-court dispute resolution processes will have a decisive effect and serve as a cross-border override key, a universal adapter to both common and civil law jurisdictions.

7. The suggestion of this Report is to conduct the examination through four distinguished layers:

- General principles of international due process;
- International conventions and Model laws;
- Best practices and Recommendations;
- Laws and Regulations.

8. Internationally recognized principles and best practices of due process have to be established in the entire Kleros scheme to the extent that suffice consumer dispute resolution.

9. The existing Kleros decentralized application corresponds to the following universally accepted principles of due process: independence, impartiality, jurisdiction/competence, effectiveness and accessibility, liberty, legality, expertise, fairness, decision reasoned explanation, immediate enforceability, appeal, condemnation of fraud and corruption, data confidentiality and security, transparency.

10. The workflow-related principles of fair process (due notice, procedural equality of the parties, right to be heard, evidence administration, reasonable length of procedure, language, res judicata) received an additional examination in this Report by means of a workflow modeling.

11. A universally suitable solution could be that to obtain the consumer's decision to enter Kleros' scheme *after* the dispute had arose, but before any dispute resolution procedure had commenced.

12. Before procedure commences, a full-scale website *disclosure* of information about Kleros and its dispute resolution scheme must be easily available and unavoidable to the consumers overview; a website information checklist will be useful.

13. To certify that consumers have a reasonable decision to participate in Kleros' scheme was obtained freely and knowingly, his *explicit consent statement* in a clear and unmistakable language must be captured:

- it should be separate from any other consumers statements,
- it may be concluded in electronic form, but the Kleros platforms website must notify the consumer of its binding nature, e.g., a mere hyperlink would not be enough,
- button-solution, or so called "click-wrap clauses", are not acceptable in E.U. law,

- the consumer should be expected to perform some type of action, such as typing the words "*Kleros dispute resolution*" into a text box, to accept the terms of agreement.

14. Annex to Regulation on consumer ODR provides an exhaustive list of the information that has to be provided when submitting a complaint. Complaint form can be filled in in an electronic manner and submitted on a website. The complaint form shall be user-friendly and easily accessible.

15. Finally, this report suggests to assemble the 3D model of both efficient and due Kleros process'.

The further extension of research can be undertaken in the following dimensions:

- 1) Applicable law and jurisdiction in cross-border Kleros consumer dispute resolution;
- 2) Consumer protection regulation: points of convergence with Kleros consumer dispute resolution;
- 3) GDPR compliance: possible solutions for Kleros' consumer dispute resolution;
- 4) Recognition of Kleros at consumer dispute resolution awards.

# Introduction

In order to understand the spectrum of ODR technologies better, and their application to dispute resolution in the UK, Thomson Reuters talked to 40 people, including lawyers, academics, ombudsmen, regulators, judges, mediators and technology providers. Responses have been anonymised.<sup>1</sup>

Beyond the protection of personal data, interviewees commenting on the public or "institutional" space – courts, tribunals, ombudsman and regulators – also noted the need for applied ODR technologies to deliver *demonstrable transparency and fairness* where they are deployed in support of, or as a substitute for traditional proceedings: "How do you ensure that the technology delivers justice not just efficiently but with ethics and integrity?"; "You need to make it [ODR] trustworthy, with integrity and ethics. Build in those ideas that people have about justice... harness that objectivity and idealism." – Academic".

Development of ideas of a fair and equitable adjudication process resulted in defining some baseline principles. Such *substantive* principles, which can provide a rule of decision for a particular controversy, join a set of core *procedural* requirements that are "simple and basic enough to describe the judicial process of civilized nations" – what has been dubbed "the international concept of due process." They are meant not to define a rule of law, but rather *the rule of law*.<sup>2</sup>

It would be no exaggeration to state that Kleros' dispute resolution technique meets the highest level of internationally recognized due process requirements. The main purpose of this Report is to deliver a model of Kleros' consumer redress scheme which is compliant to any identifiable regulatory coordinate system for conducting dispute resolution procedures.

As the Supreme Court of Canada has stated "There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be readjusted. A proper balance requires simplified and *proportionate procedures* for adjudication, and impacts the role of counsel and judges. This balance must recognize that

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<sup>1</sup> **The Impact of ODR Technology on Dispute Resolution in the UK.** Thomson Reuter (Spring 2016).

<sup>2</sup> Charles T. Kotuby Jr. and Luke A. Sobota, *General principles of law and international due process: principles and norms applicable in transnational disputes* (New York, Oxford University Press, 2017).

a process can be fair and just, without the expense and delay of a trial, and that *alternative models of adjudication are no less legitimate than the conventional trial.*<sup>3</sup>

One can wonder if at all there is any need of looking under the hood of Kleros' engine to discover strict correlations between its procedure and the worlds best practices of dispute resolution. This need is not a theoretical but practical one. As it was recently aptly observed: "Instead, the aim should be *to demonstrate and justify* to communities and society at large that the electronic alternatives to existing forms and practices are capable of at least meeting the same standards of authenticity, integrity, and legitimacy provided by prevailing legal standards."<sup>4</sup>

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<sup>3</sup> *Hryniak v Mauldin*, 2014 SCC 7, File No.: 34641. 2014.

<sup>4</sup> Dr Robert Herian, *Legal Recognition of Blockchain Registries and Smart Contracts* (The Open University Law School, December 2018).

## 2. In Search of a Legal Definition and Applicable Regulation

### 2.1. Legal Definition

The intention of this Report is to demonstrate Kleros decentralized application's capability of becoming an override key, a universal adapter to blockchain based dispute resolution for a wide range of jurisdictions practicing both common and civil law.

Kleros' approach to arbitration is radically different to traditional court systems and alternative dispute resolution methods. Relying on cryptoeconomics, it provides crowdsourced jurors the incentive to arbitrate on various types of disputes.<sup>5</sup>

To identify the applicable procedural regulation we have to determine the definition of Kleros dispute resolution scheme first. That is a challenging task. At first glance, sought definition lies under the scope of alternative and (or) online dispute resolution terms. But it appears to be a misleading impression.

**ADR.** There are plenty of laws elaborating what is an alternative dispute resolution, so let us take two of the most influential. The US adopted the following definition: "an alternative dispute resolution process includes any process or procedure, other than adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, minitrial, and arbitration..."<sup>6</sup>

The EU relevant Directive states that "ADR procedure" means a procedure, as referred to in Article 2, which complies with requirements set out in this Directive and is carried out by an ADR entity" – "any entity, however named or referred to, which is established on a durable basis and offers the resolution of a dispute through an ADR procedure..."<sup>7</sup>

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<sup>5</sup> Federico Ast and Daniel Dimov, *Is Kleros a Fair Dispute Resolution System?* Blogpost, available at: <https://blog.kleros.io/is-kleros-a-fair-dispute-resolution-system/>

<sup>6</sup> Alternative Dispute Resolution Act (28 U.S. Code § 651).

<sup>7</sup> Art 4 (1)(g),(h) of the Directive on consumer ADR (Directive 2013/11/EU of 21 May 2013).

As anyone can see, "ADR" is an *umbrella term* and doesn't explicitly include online dispute resolution amongst its content. Further research of other states terminology on ADR, if being done, will bring a variety of mirroring umbrella definitions and finally will take us back to those mentioned above as the most illustrative.

Although Kleros' dispute resolution seemingly tends to arbitration model, the latter manifestly has the only one major similarity to the former, namely, both techniques provide an act of arbitration.<sup>8</sup>

Whilst the entire structure of international arbitration process' - composition of arbitral tribunal, jurisdiction of arbitral tribunal, conduct of arbitral proceedings, making an award and termination of proceedings – are specific and constitute a standalone, independent juridical institution rather than an opt-in system open for any kind of emerging dispute resolution methods merely resembling arbitration.

Particularly, arbitration in its essence and universal understanding has little to do with Kleros' random choice of crowdsourced jurors, crypto-incentives and conducting the procedure in a completely hands-off approach by the smart-contracts protocol.<sup>9</sup> That nevertheless, does not deprive Kleros' procedure of being compliant to substantial due process principles of international arbitration, which is going to be discussed further.

**ODR.** To be brief, one can find the only one recommendation of a legal definition of ODR – in the UNCITRAL Technical Notes on Online Dispute Resolution – "Online dispute resolution, or "ODR", is a "mechanism for resolving disputes through the use of electronic communications and other information and communication technology". The process may be implemented differently by different administrators of the process, and may evolve over time."<sup>10</sup> It also contains an another important "umbrella" specification – "ODR encompasses a broad range of approaches and forms (including but not limited to ombudsmen, complaints boards,

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<sup>8</sup> Art 2 (a)of the UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006) - "*arbitration*" means any arbitration whether or not administered by a permanent arbitral institution.

<sup>9</sup> Every step of the arbitration process (securing evidence, selecting jurors, etc.) is fully automated. Kleros does not rely on the honesty of a few individuals but on game-theoretical economic incentives. Kleros White Paper v1.0.5 (January 2018).

<sup>10</sup> Sec.V Art.24 of the UNCITRAL Technical Notes on Online Dispute Resolution (United Nations Commission on International Trade Law, New York, 2017).

negotiation, conciliation, mediation, facilitated settlement, arbitration and others), and the potential for hybrid processes comprising both online and offline elements."<sup>11</sup>

EU legislators haven't as of yet embarked on defining the ODR term. "The availability of reliable and efficient online dispute resolution (ODR) could greatly help achieve this goal." "ODR offers a simple, efficient, fast and low-cost out-of-court solution to disputes arising from online transactions."<sup>12</sup> That is all EU Regulation on consumer ODR currently states.

Same with US and UK, one can find better to say semi-official explanations rather than legal definitions of ODR. "Online dispute resolution (ODR) is regularly used in the private sector to help businesses and individuals resolve civil matters without the need of court proceedings or court appearances..."<sup>13</sup> And "Our conception of ODR is broader than that of many specialists in online dispute resolution. When we speak of ODR we are referring to the use of IT and the Internet to help resolve disputes (other than the computerization of the current court system)."<sup>14</sup>

Civil Justice Council ADR Working group while categorizing ADR techniques concluded that Online Dispute Resolution is potentially very important but given its many different forms is hard to categorize on this spectrum.<sup>15</sup>

Hence, *there is no universally accepted definition* of ODR. Indeed, since the field is evolving very quickly there is a high risk that any rigid definition would quickly become outdated. ODR is therefore often defined for what it can offer and how it functions in specific contexts (emphasis added).<sup>16</sup>

The last part of Kleros' dispute resolution conundrum is a crowdsourcing technique. There are also online processes where a number of peers or experts are invited to share in an

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<sup>11</sup> Sec.I Art.2

<sup>12</sup> Whereas (6) and (8) of the Regulation on consumer ODR (Regulation 524/2013 of 21 May 2013).

<sup>13</sup> Report on the Future of Legal Services in the United States. Commission on the Future of Legal Services, American Bar Association, 2016.

<sup>14</sup> Par.1.5 *Online Dispute Resolution For Low Value Civil Claims*, Civil Justice Council Online Dispute Resolution Advisory Group (February, 2015).

<sup>15</sup> CJC ADR Working Group Final Report (November, 2018). Uncertainty made some authors entering with the far-fetched statements claiming "whatever the mechanism and as long as information technology is used, the service offered dispute settlement is ODR", e.g. see Nazura Abdul Manap, *Online Dispute Resolution Redress Systems in Consumer Matters* (Medwell Journals, 2017).

<sup>16</sup> Pablo Cortes, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (New York, Cambridge University Press, 2018).

ODR platform their views on a particular dispute. These processes are often referred to as case appraisal and crowd-sourced dispute resolution.<sup>17</sup>

The last resort to obtain terminological clarity in this field is Dr. Dimov's Leiden University dissertation on Crowdsourced Online Dispute Resolution (CODR)<sup>18</sup>: "CODR is a term that encompasses some forms of ADR court proceedings using the Internet and crowdsourcing as parts of the dispute resolution process". Where "crowdsourcing is 'the act of a company or institution taking a function once performed by employees and outsourcing it to undefined (and generally large) network of people in the form of an open call' (as to J. Howe's definition in his '*Crowdsourcing: A Definition*', June 2006). ODR is defined by Dr. Dimov as a broad term that encompasses forms of ADR and court proceedings, which use ICT as a part of the dispute resolution process."<sup>19</sup>

This deep research adds much comprehension about crowdsourcing mechanics but unfortunately doesn't cover with CODR expression the way Kleros jurors are randomly selected without an open call at its finest, nor in anyway improve legal clarity on the subject matter.

Accordingly, the suggestion is to submit in a further research a stand-alone, *distinct definition* of Kleros dispute resolution as a unique procedure, which provides arbitration by means of fully automated process and game-theoretical economic incentives.

Herewith the Report to no extent calls for any new regulation for Kleros' procedure – a well-balanced and reasonable approach is preferable, right in the way Swiss Federal Council demonstrated in the Legal Framework for blockchain."Targeted adjustments of the well-proven framework... The Federal Council currently sees no need to fundamentally adjust the Swiss legal framework or introduce a specific new law in response to a specific technology that is still under development."<sup>20</sup>

To summarize all the aforementioned:

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<sup>17</sup> See note 16.

<sup>18</sup> Daniel Dimov, *Crowdsourced Online Dispute Resolution* (Leiden University, June, 2017).

<sup>19</sup> See note 18.

<sup>20</sup> Legal Framework for Distributed Ledger Technology and Blockchain in Switzerland. Federal Council Report (December, 2018).

- (1) ADR is an *umbrella term* encompassing out-of-court processes of dispute resolution, such as early neutral evaluation, online negotiation, mediation, arbitration, etc.;
- (2) there is no universally accepted legal definition of ODR and it is therefore often defined for what it can offer and how it functions in specific contexts, that is as an *online case-management tool* for dispute resolution process;
- (3) Kleros dispute resolution, being all in one a facilitative blockchain platform and a crypto-incentivized arbitration procedure is unique and strictly not subject to existing definitions of ADR/ODR/crowdsourced procedures and requires a *distinct definition*.

## 2.2. Applicable Regulation

What conclusions can we draw from the previous part of the Report?

- a) Case-by-case study will be appropriate in cross-border implementation of Kleros' scheme, but that study will likely not discover regulation *precisely matching* Kleros procedure in the majority of jurisdictions;
- b) Respectively, Kleros' procedure *compliance* to the substantial international due process principles and current best practices of out-of-court dispute resolution processes will have a decisive effect and serve as a cross-border override key, a universal adapter to both common and civil law jurisdictions.

*Procedure as a contract.* The author of this Report is very confident to suggest that a high level of attention should be paid to propose strong legal grounds for Kleros' blockchain based dispute resolution scheme. To consider Kleros' dispute resolution the contractually based, mutually agreed procedure ('*procedure as a contract*')<sup>21</sup> could possibly appear an option and the reliant step in this regard.

*Regulation.* EU regulatory landscape in the field of consumer redress remains extremely diverse. During the preparatory discussions of the Consumer ADR Directive, Several Member States were worried by an EU initiative potentially challenging their national Consumer ADR models. Yet the Directive did not intend to erase national differences and followed a

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<sup>21</sup> Judith Resnik, *Procedure as a Contract* (Yale Law School, 2005).

*minimum-harmonization approach* instead.<sup>22</sup> Illustrative result of such vision is the number of Competent Authorities administrating ADR throughout the EU Member States, which has already reached over 45 entities.

In EU the Consumer ADR Directive does not compel all ADR entities to be certified. However, only those certified ADR providers can be on the list of ADR entities that traders are required to inform consumers about when disputes arise, and only those entities may be included in the Online Dispute Resolution (ODR) platform.<sup>23</sup>

The ADR Directive does not make participation in ADR compulsory, but it requires all EU national governments to ensure availability of certified ADR providers (called ADR entities) that meet the procedural standards set in the directive. Although the new law does not require business to actually participate in ADR, *sector-specific laws* may create an obligation to do so. In other sectors, however, the choice of ADR/ODR rests completely in the hands of the merchants. Those merchants can choose non-certified ADR providers...<sup>24</sup>

It is also possible that some ADR providers that comply the legal requirements decide not to apply for certification and enjoy more regulatory freedom instead.<sup>25</sup> In some Member States at least, this means that non-certified ADR entities can continue to operate alongside certified ones, thus creating two-tier ADR landscape.<sup>26</sup> What is valid for non-regulated sectors, where no mandatory ADR participation was established when traders "...are required to participate in ADR process by the sectorial law or by the industry as part of their membership of a particular trade association".<sup>27</sup>

*Procedure offered.* Thus, an ADR entity accredited [or not accredited as well] by a national competent authority (and therefore accessible through the EU ODR platform) can

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<sup>22</sup> Alexandre Biard, *Towards high-quality consumer ADR: the Belgian experience* (work-in-progress/draft version (December 2018).

<sup>23</sup> Alexandre Biard, *Monitoring Consumer ADR Quality in the EU: a Critical Perspective* (European Review of Private Law, 2018).

<sup>24</sup> Pablo Cortes, *The Brave New World of Consumer Redress in the European Union in the United Kingdom* (Dispute Resolution Magazine, Spring 2016)

<sup>25</sup> Miquel, R. The implementation of the consumer ADR directive in Germany (2016) in A. Biard, *Impact of Directive 2013/11/EU on Consumer ADR quality: Evidence from France and the UK* (Journal of Consumer Policy, July 2018).

<sup>26</sup> A. Biard, *Impact of Directive 2013/11/EU on Consumer ADR quality: Evidence from France and the UK* (Journal of Consumer Policy, July 2018).

<sup>27</sup> See note 16. Pablo Cortes also provides examples of regulated sectors where the provision of ADR is often mandatory –the financial sector and some utility providers such as water, gas, electricity and telecoms.

either offer disputants the UNCITRAL's tiered procedure or a *different procedure* altogether, e.g. an ombudsman scheme. The UNCITRAL draft rules will apply by means of the contractual agreement of the parties, and only to the extent that the rules are enforceable under the relevant national law; therefore, parties cannot rely on the UNCITRAL rules to overrule mandatory consumer protection law, which coincides with the principle of legality enshrined in the ADR directive.<sup>28</sup>

*Regulative bodies.* Competent Authorities, usually several in number for each Member State according to regulated sectors where consumer ADR was made mandatory, conduct certification of ADR entities and have the authority to increase standards of certification comparing to ADR Directive.

Outside the EU these entities may be either public or private. For example, in the USA, the American Bar Association has created a task force to provide guidelines for the development of ethical ODR systems. The Association for Conflict Management has prepared a proposal for guidelines on ODR, the National Alternative Dispute Resolution Advisory Council (NADRAC) in the Australian Department of Justice commissioned a study on the accreditation of ODR in 2002, the International Mediation Institute, based in the Hague, has also developed standards for international mediation competency and provides certification for mediators.<sup>29</sup>

Interim conclusions:

- (1) UNCITRAL Technical Notes on Online Dispute Resolution have a non-binding effect on Kleros' dispute resolution process, but providing useful guidelines on a due level of procedural quality;
- (2) EU ADR/ODR regulation will have a binding effect on Kleros in case of applying for certification as an ADR entity under provisions of Member States laws. Otherwise Kleros has an opportunity to proceed providing dispute resolution as a non-certified entity, yet enjoying no entry of its services through EU ODR platform and into Competent Authorities regulated sectors of EU market;<sup>30</sup>

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<sup>28</sup> Pablo Cortes, *A New Regulatory Framework for Extra-Judicial Consumer Redress: Where We Are and How to Move Forward* (University of Leicester, School of Law, Research Paper No.13-02, 2013).

<sup>29</sup> See note 16.

<sup>30</sup> Taking into account diversity of regulated ADR sectors and provisions on consumer protection throughout EU Member States, to obtain a legal advice would be appropriate when deciding to operate in any individual jurisdiction.

- (3) Blurring regulative coordinate system entails complying with internationally recognized principles and best practices of due process to the extent that suffice consumer dispute resolution.

### **Alternative point of entry**

In accordance with Art.2 sec.2(2) of the Directive on consumer ADR the Directive shall *not apply* to procedures *before* consumer complaint handling systems operated by the trader. Only those disputes unresolved directly by an in-house traders efforts, may proceed to ADR/ODR.

Thereby a good thought should be given to arranging Kleros dispute resolution as a *part of trader's in-house complaints handling schemes*. Such a built-in system of dispute resolution, if considered valid, will allow Kleros to mitigate consumer disputes (i) on a contractual basis (ii) before escalating them to certified third parties and (iii) will rise an opportunity to develop a net of traders-users of Kleros' decentralized platform for their internal in-house dispute resolution.

### **Two 'Nota Bene' remarks**

Even finding no evident regulatory restrictions on conducting Kleros' dispute resolution process at the moment, it wouldn't be unreasonable to stay cautious and carefully navigate the pitfalls. Some of them are not manifestly linked to compliance features.

To quote an Australian author – "one of the main concerns in relation to the online court is the provision of 'legal information' by the court to the court user during the exploration stage of the online process. This is a new and foreign concept to the courts which give rise to the question: what is the distinction between 'legal information' and 'legal advice'? Is this the blurry line that ought not be walked by the courts? Some say yes, but many say no. Simply put, when you provide information that is general and factual in nature such as applicable legal principles on a subject matter, that is legal information and educational in nature. When you provide information that is tailored to the particular facts of a case, that is legal advice;"<sup>31</sup>

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<sup>31</sup> Katarina Palmgren, *Explore the use of online dispute resolution to resolve civil disputes: how to best integrate an online court into the Victorian public justice system* (Churchill Fellowship Report, 2018).

Another warning sounds from US and is worth mentioning here as well: "So far lawyer regulators have not tried to shut down computerized law via prosecution for the unauthorized practice of law. There is no guarantee this will remain true, however. State supreme courts, bar associations, and prosecutors are probably too late to reverse the progress and innovation that has occurred already, but that does not mean that they will not try... [ ] the various lawsuits against LegalZoom warn against underestimating the power of bar associations and state supreme courts. Vigilance is necessary."<sup>32</sup>

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<sup>32</sup> Benjamin H. Barton and Stephanos Bibas, *Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law* (New York, Encounter Books, 2017).

### 3. Four Layers of Principles

General principles of law must be supported by reference to positive rules of municipal or other relevant law. General principles are perhaps the ideal source of international law to guide private arbitral tribunals.<sup>33</sup>

It is almost impossible to provide an exhaustive list of all sources of international due process relevant to providing Kleros' dispute resolution. Even so, to achieve the research goal of this Report it is necessary to distill applicable international rules to Kleros' procedure by means of triage. Such a hopefully successive attempt is set as follows.

The suggestion of this Report is to conduct the examination through four distinguished layers (Table 1):

1. General principles of international due process.
2. International conventions and model laws.
3. Best practices and recommendations.
4. Laws and regulations.

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<sup>33</sup> See note 2.

**Table 1**  
**Internationally recognized, universally accepted principles of due process**

Layer 1. Scholars	
Source	Principles
Certain baseline procedural rules have thus been identified as the core of "due process"  Charles T. Kotuby Jr. and Luke A. Sobota, General principles of law and international due process: principles and norms applicable in transnational disputes (New York, Oxford University Press, 2017)	Notice (due notice of the proceedings) and Jurisdiction (jurisdiction of the court*) Judicial impartiality Judicial independence Procedural equality Right to be heard Condemnation of fraud and corruption Evidence (a litigant must produce the most trustworthy evidence to support its claim**) Burdens of proof (allegations not admitted, noticed, or presumed must be proven) Res judicata (an issue which has already been adjudicated not to be argued again***)
Interpretation of procedural fairness in crowdsourced online dispute resolution  Daniel Dimov, Crowdsourced Online Dispute Resolution (Leiden University, June, 2017)	Expertise Independence Impartiality Transparency Fair hearing (right to participate and to present its case and rebut the case of the opponent) Counterpoise (to mitigate parties' power imbalances) Ensuring a reasonable length of procedure Providing reasons Voluntary participation

Layer 2. International Treaties	
Source	Principles
Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards	Proper notice Right to present a case: - right to be heard - right to present evidence and defences Jurisdiction Non-contradiction to public policy****
Article 6 of the European Convention on Human Rights	Fairness (procedural fairness - fair trial, fair hearing) - adversarial proceedings (parties are heard, submissions are placed on an equal footing) - equality of arms (fair balance between parties) - administration of evidence (access to evidence and documents is granted) - reasoning of judicial decisions (sufficient reasoning) Public hearing (oral hearing, public decision pronouncement)

	Length of proceedings (reasonable time requirement)
<b>Layer 3. Model Laws and Best Practices</b>	
Source	Principles
ALI/UNIDROIT Principles of Transnational Civil Procedure	<p>Independence of the court and its judges  Impartiality of the court and its judges  Qualifications of the court and its judges  Jurisdiction over parties  Procedural equality of the parties  Right to engage a lawyer  Due notice  Right to be heard  Languages of proceedings, translation  Prompt rendition of justice  Structure of the proceedings (ordinarily consists of pleading, interim and final phases)  Access to information and evidence  Evidentiary privileges and immunities  Oral and written presentations  Public proceedings  Burden and standard of proof  Decision and reasoned explanation  Immediate enforceability of judgments  Appeal (appellate review should be available)  Lis pendens (avoiding concurrent litigation)  Res judicata (avoiding repetitive litigation)</p>
UNCITRAL Model Law on International Commercial Arbitration	<p>Competence of arbitral tribunal to rule on its jurisdiction  Equal treatment of the parties  Determination of rules of procedure (parties are free to agree on the procedure)  Place of arbitration (parties are free to agree on place of arbitration)  Commencement of arbitral proceedings (on the date of request to commence)  Language (parties are free to agree on free to agree on the language)  Statements of claim and defence  Hearings and written proceedings</p>
UNCITRAL Technical Notes on Online Dispute Resolution	<p>Transparency  Independence  Expertise  Consent</p>
Practice Guidelines 7: Guidelines for Arbitrators on the use of ADR procedures by Chartered Institute of Arbitrators (CIArb)	<p>Act fairly and impartially as between the parties  Give reasonable opportunity for putting a case for each party  Give reasonable opportunity for dealing with an opponent  Provide fair means for resolution matters</p>
Online Dispute Resolution Standards of Practice by the Advisory Committee of the National Centre for Technology and Dispute	<p>Accessibility  Affordability  Transparency  Fairness  Innovation and relevance  Third parties</p>

	General (promote consensual process, provide confidentiality and security)
ICODR Standards for quality Online Dispute Resolution by International Council for Online Dispute Resolution	Accessible Accountable Competent Confidential Equal Fair/Impartial/Neutral Legal Secure Transparent
Consumer Due Process Protocol Statement of Principles by National Consumer Disputes Advisory Committee, American Arbitration Association	Fundamentally fair process Access to information regarding ADR program Independent and impartial neutral; independent administration Quality and competence of neutrals Small claims Reasonable cost Reasonably convenient location Reasonable time limits Right to representation Mediation agreements to arbitrate Arbitration hearings (notice of hearing, opportunity to be heard, to present relevant evidence, confidentiality) Access to information Arbitral remedies Explanation of award
Recommended best practices for online dispute resolution service providers, American Bar Association Task Force on Ecommerce and ADR	Transparency Transparency Adequate notice to the parties Opportunity of the parties to be heard The right to be represented or to consult a legal counsel Objective decision based on the information of record Impartiality Confidentiality, privacy and information security Qualifications and responsibilities of neutrals Accountability
Guide to principles of good governance by the British and Irish Ombudsman Association	Independence Openness and transparency Accountability Integrity Clarity of purpose Effectiveness

#### Layer 4. Laws and regulations

Source	Principles
Directive on consumer ADR, Regulation on consumer ODR	Accessibility Expertise Independence Impartiality Transparency

	Effectiveness Fairness Liberty Legality Representation Data confidentiality and security
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#### Endnotes<sup>34</sup>

\* Civil law attorneys might refer to this concept as competency, whereas common law attorneys would view it as jurisdiction. At base, it is the power of the court over the parties and issues before it.

\*\* Where direct evidence is unavailable, it is a general principle of law that proof may be administered by means of circumstantial evidence.

\*\*\* Only decisions on the merits, decided after full and fair adjudication, are entitled to res judicata effect. Almost all judicial systems require a legal identity of the parties, object, and grounds between the first and the second suit before res judicata will apply.

\*\*\*\* Issues of consumer redress are considered to constitute a matter of public policy.

The observed variety maintain a stable set of universally accepted principles of due process. Evident visualization of distilled principles acquired by means of triage is shown on Picture 1.

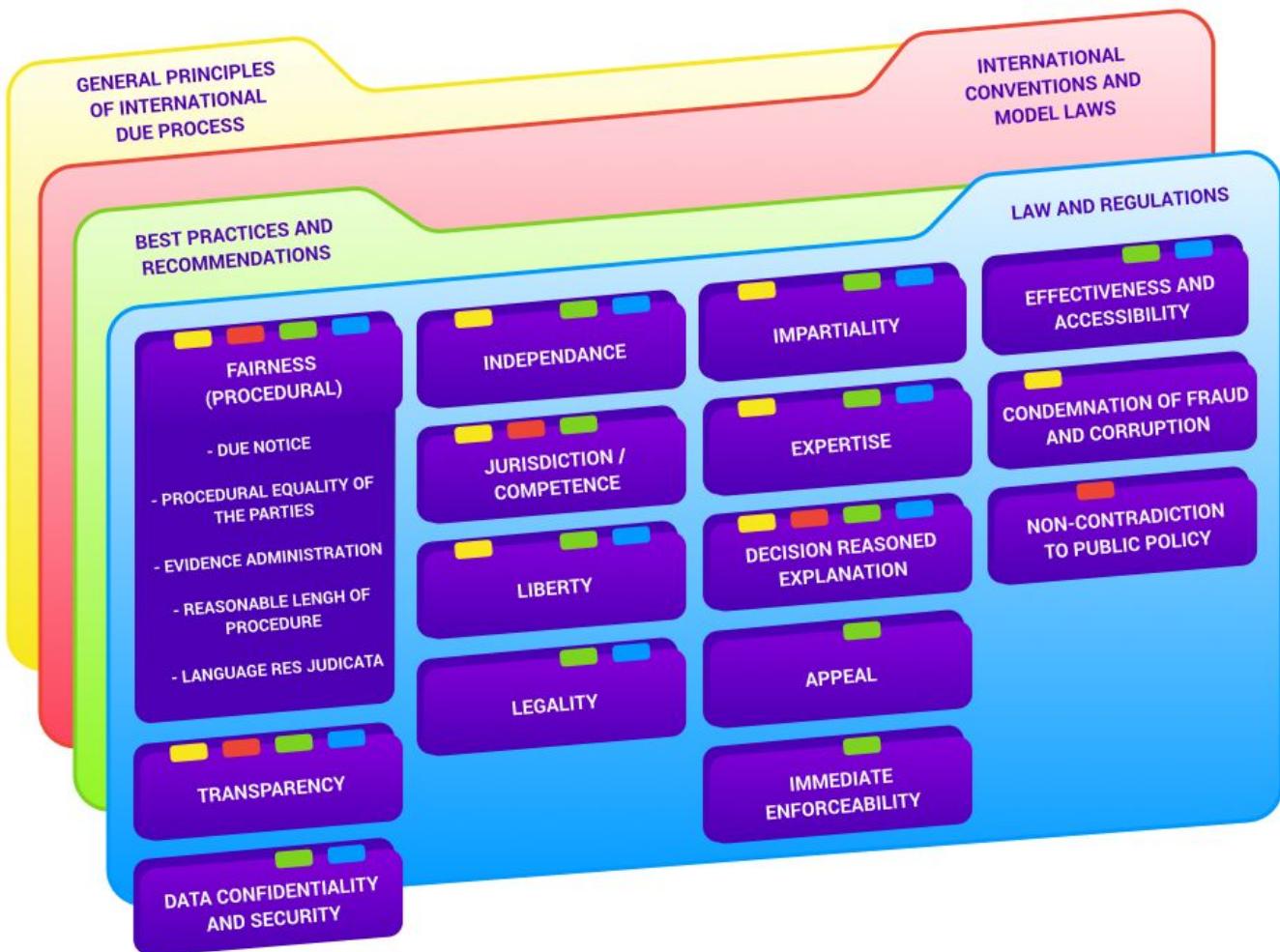
Correlation between every principle and each respective layer of regulation is depicted in a form of colored links, where the color of a link corresponds to the color of the layer.

The Picture separately provides the area of the workflow-related scope of the term 'fairness', which per se encompasses such traditional terms as right to be heard, parties procedural equality, right to provide and have access to evidence, due notice and several others.

One can then find the proof of Kleros' compliance to triaged due process principles from Table 2.

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<sup>34</sup> See note 2.



**Table 2**  
**Distilled principles and Kleros' compliance\***

1.	Independence	<p><i>Selection.</i> After candidates have self-selected specific courts and deposited their tokens, the final selection of jurors is done randomly. The probability to be drawn as a juror is proportional to the amount of deposited tokens. Theoretically, a candidate may be drawn more than once for a specific dispute (but in practice it is unlikely). The amount of times a user is drawn for a dispute (called its weight) determines the number of votes he will get in the dispute and the amount of tokens he will win or lose during the token redistribution.</p> <p><i>Voting.</i> (<i>Currently, voting is publicly viewable upon tx execution. In the next version the following 'Commit and Reveal' section will be implemented.</i></p> <p>After assessing the evidence, jurors commit their vote to one of the options. In the next version of Kleros, they will submit hash (vote, salt, address). The address is the Ethereum address of the juror, it is required in order to make the commitment of each juror different, thus preventing a juror from copying the commitment of another. When the vote is over, they will reveal {vote,salt}, and a Kleros smart contract will verify that it matches the commitment. Jurors failing to reveal their vote will be penalized. After a juror has made a commitment, his vote cannot be changed. But it will still not be visible to other jurors or to the parties. This prevents the vote of a juror from influencing the vote of other jurors. Jurors will still be able to declare that they voted in a certain way, but they will not be able provide other jurors a reason to think that what they say is true. This is an important feature for the Schelling Point to arise. If jurors knew the votes of others jurors, they could vote like them instead of voting for the Schelling Point.</p>
2.	Impartiality	<p>Jurors rule disputes in order to collect arbitration fees. They are incentivized to rule honestly because, after a dispute is over, jurors whose vote is not coherent with the group will lose some tokens, which will be redistributed to coherent jurors.</p> <p>After Kleros has reached a decision on the dispute, tokens are unfrozen and redistributed among jurors. The redistribution mechanism is inspired by the SchellingCoin mechanism, where jurors gain or lose tokens depending on whether their vote was consistent with the others jurors.</p> <p>The tokens are divided between the coherent parties proportionally to their weight. Parties are considered coherent if they voted as the majority.</p> <p>Jurors could fail to reveal their vote. To disincentivize this behaviour, the penalty for not revealing one's vote is twice as large than the penalty for voting incoherently. This incentivizes jurors to always reveal their vote.</p>
3.	Jurisdiction/Competence	<p>Kleros is an opt-in court system. Smart contracts have to designate Kleros as their arbitrator. When they opt-in, contract creators choose how many jurors and which court will rule on their contract in case a dispute occurs.</p> <p>The Kleros team is developing a number of standard contracts using Kleros as a dispute resolution mechanism.</p>

4.	Effectiveness and Accessibility	<p><i>Accessibility.</i> The Kleros platform is a decentralized application built on Ethereum and designed specially in a way to be easily accessible online.</p> <p><i>Fees.</i> In order to compensate jurors for their work and avoid an attacker from spamming the system, creating disputes and appealing requires paying arbitration fees. Each juror will be paid a fee determined by the subcourt where the dispute is solved. The arbitrable smart contract will determine which party will pay the arbitration fee. A discussion about the fee structure defined by arbitrable smart contracts will be part of future work.</p>
5.	Liberty	Kleros is an opt-in court system. Smart contracts have to designate Kleros as their arbitrator.
6.	Legality	Kleros leverages the technologies of crowdsourcing, blockchain and game theory to develop a justice system that produces true decisions in a secure and inexpensive way. To obtain a legal advice would be appropriate when deciding to operate in any individual jurisdiction.

7.	Expertise	<p>When registering as jurors, users start in the General Court and follow a path to a specific subcourt according to their skills. Each subcourt has some specific features regarding policies, session time, cost, number of drawn jury members and tokens activated. Each token holder can register in at most one subcourt of each court they have the token activated. Asking jurors to choose between subcourts incentivizes them to choose the subcourts they are the most skilled at.</p> <p>If they were able to choose every subcourt, some would choose all of them to get the maximum amount of arbitration fees from their tokens.</p>
8.	Fairness:  - Due notice, - Procedural equality of the parties, - Right to be heard, - Evidence administration, - Reasonable length of procedure, - Language, - Res judicata (an issue which has already been adjudicated not to be argued again).	<p>Kleros is a <i>decision protocol</i> for a multipurpose court system able to solve every kind of dispute. Kleros is a <i>decentralized court system</i> allowing arbitration of smart contracts by crowdsourced jurors relying on economic incentives. It is an Ethereum <i>autonomous organization</i> that works as a <i>decentralized third party</i> to arbitrate disputes in every kind of contract, from very simple to highly complex ones. Every step of the <i>arbitration process</i> (securing evidence, selecting jurors, etc.) is <i>fully automated</i>. Kleros does not rely on the honesty of a few individuals but on game-theoretical economic incentives. Smart contracts are smart enough to <i>automatically execute as programmed</i>, but not to render subjective judgments or to include elements from outside the blockchain. Each subcourt has some <i>specific features</i> regarding policies, session time, cost, number of drawn jury members and tokens activated. As Kleros protocol gains users and use cases, it will be necessary to create new subcourts, to make <i>changes</i> in subcourt policies and parameters and to <i>update</i> the platform to new versions with additional features.</p> <p><i>For a deeper discussion of these workflow-related principles See Part 5 of the Report</i></p>
9.		If a verdict is appealed, jurors on the appeal level are not paid (but they are still affected by the dispute due to token redistribution). This

	Decision reasoned explanation	incentivizes jurors to give explanations of their rulings. When proper explanations are given, parties are less likely to appeal as they have more chance to be convinced that a decision is fair.
10.	Immediate enforceability	<p>Finally, votes are aggregated and the smart contract is executed. The option with the highest amount of votes is considered as the winning one.</p> <p>Contracts will specify the options available for jurors to vote. In the WhitePaper** introductory example, options may be: "Reimburse Alice", "Give Bob one extra week to finish the website" and "Pay Bob". The smart contract will also specify the behavior of the contract after the ruling is done. In the example:</p> <ul style="list-style-type: none"> <li>• "Reimburse Alice" transfers funds to Alice's address.</li> <li>• "Give Bob one extra week to finish the website" blocks new disputes for one week and removes this option from further dispute.</li> <li>• "Pay Bob" transfers funds to Bob's address.</li> </ul>
11.	Appeal	If, after the jury has reached a decision, a party is not satisfied (because it thinks the result was unfair), it can appeal and have the dispute ruled again. Each new appeal instance will have twice the previous number of jurors plus one.
12.	Condemnation of fraud and corruption	<p>Appeals are an important mechanism against bribes. Bribing a small jury is relatively easy. But, since the victim always has the right to appeal, the attacker would have to keep bribing larger and larger juries at a steeply rising cost.</p> <p>The attacker would have to be prepared to spend an enormous amount of money to bribe jurors all the way to the General Court and would very likely lose in the end. To control the verdict of the whole court, the attacker would need to bribe token holders holding more than 50% of the pinakia in total.</p>
13.	Data confidentiality and security	<p>Solving disputes may require parties to disclose privileged information with jurors. In order to prevent outside observers from accessing this information, the natural language contracts (English or other) and the labels of the jurors voting options are not put on the blockchain. When the contract is created, the creator submits a hash (contract text, option list, salt) (where the contract text is the plain English text of the contract, option list are the labels of the options which can be voted by jurors and salt is a random number to avoid the use of rainbow tables).</p> <p>The contract creator sends [contract text, option list, salt] to each party using asymmetric encryption. This way, parties can verify that the submitted hash corresponds to what was sent to them. In case of a dispute, each party can reveal [contract text, option list, salt] to jurors which can verify that they correspond to the hash submitted. They can do so using asymmetric encryption such that only the jurors receives the text of the contract and of the options. All these steps are handled by the application users while using Kleros.</p>
14.	Transparency	Being a blockchain based platform Kleros suffice the highest transparency level of every transaction held. In addition Kleros is subject to state regulation and requirements of transparency as a dispute resolution scheme.
15.	Non-contradiction to public policy	To obtain a legal advice would be appropriate when deciding to operate in any individual jurisdiction

## Endnotes

\* acc. to Kleros White Paper v1.0.5 (January 2018)

\*\* Alice is an entrepreneur based in France. She hires Bob, a programmer from Guatemala, on a P2P freelancing platform to build a new website for her company. After they agree on a price, terms and conditions, Bob gets to work. A couple of weeks later, he delivers the product. But Alice is not satisfied. She argues that the quality of Bob's work is considerably lower than expected. Bob replies that he did exactly what was in the agreement. Alice is frustrated. She cannot hire a lawyer for a claim of just a couple hundred dollars with someone who is halfway around the world. 2 What if the contract had a clause stating that, should a dispute arise, it would be solved by a Kleros court? Kleros is a decentralized application built on Ethereum. After Bob stops answering her email, Alice taps a button that says "Send to Kleros" and fills a simple form explaining her claim.

## Interim conclusions:

- (1) Internationally recognized principles and best practices of due process have to be established in the entire Kleros' scheme to the extent that they fulfill requirements for consumer dispute resolution;
- (2) The existing Kleros' decentralized application corresponds to the following universally accepted principles of due process: independence, impartiality, jurisdiction/competence, effectiveness and accessibility, liberty, legality, expertise, fairness, decision reasoned explanation, immediate enforceability, appeal, condemnation of fraud and corruption, data confidentiality and security, transparency;
- (3) The workflow-related principles of fair process (due notice, procedural equality of the parties, right to be heard, evidence administration, reasonable length of procedure, language, res judicata) will get an additional examination in this Report by means of a workflow modeling.

# 4. Contracting Justice

## 4.1. Consumer's Reasonable Decision to Participate and Specific Acceptance

The research goal of this Report could be hardly called properly accomplished without saying a few words about the moment when a consumer enters the Kleros' dispute resolution procedure.

The US Federal Arbitration Act "declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." US law generally takes a very liberal view towards arbitration clauses without making a distinction between commercial and consumer arbitration.<sup>35</sup> A significant part of this liberal view is allowing parties, including consumers, to conclude an arbitration agreement before the dispute arises, as it is considered to be "a matter of contract".

Contrary to this "excessive use" of arbitration clause, Article 10 of the Directive on consumer ADR reads:

1. *Member States shall ensure that an agreement between a consumer and a trader to submit complaints to an ADR entity is not binding on the consumer if it was concluded before the dispute has materialised and if it has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute.*

It is required to obtain a consumer's 'reasonable decision to participate'<sup>36</sup> 'freely and knowingly'. US Alternative Dispute Resolution Act incorporates the following safeguards in consent cases (Par.654(b))<sup>37</sup>:

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<sup>35</sup> Norbert Reich, *Party Autonomy and Consumer Arbitration in Conflict: a "Trojan Horse" in the Access to Justice in the E.U. Directive 2013/11?* (Penn State Journal of Law & International Affairs, 2015).

<sup>36</sup> Recommended best practices for online dispute resolution service providers, American Bar Association Task Force on Ecommerce and ADR. From the point of view of the Bar, a consumer's decision to use an ODR Provider (or to make an online purchase taking into account of availability of an ODR mechanism) is a contract decision. A central issue in any contract decision between a vendor (the merchant or the ODR Provider or both) and a vendee (the consumer) is whether the vendee has sufficient information on which to make an informed and intelligent choice.

<sup>37</sup> 28 U.S. Code § 654.

*...establish procedures to ensure that any civil action in which arbitration by consent is allowed under subsection (a) –*

- (1) *consent to arbitration is freely and knowingly obtained; and*
- (2) *no party or attorney is prejudiced for refusing to participate in arbitration.*

The US Supreme Court has also recently elaborated once more on the language of the gateway arbitrability question: parties must make the delegation "clear and unmistakable" in their agreement.<sup>38</sup>

The directive on consumer ADR (Art.10) provides that a 'specific acceptance' by the 'in advance' 'informed' consumer must be in place:

*2. Member States shall ensure that in ADR procedures which aim at resolving the dispute by imposing a solution the solution imposed may be binding on the parties only if they were informed of its binding nature in advance and specifically accepted this. Specific acceptance by the trader is not required if national rules provide that solutions are binding on traders.*

In continuation, Norbert Reich elaborates in details on the 'specific acceptance' precise meaning:

*What does "specific acceptance" mean? Recital 43 of the Preamble to Directive 2013/11 does not provide an answer. A similar provision, however, is contained in Article 8(2) of the Draft Regulation of a Common European Sales Law (CESL), which requires an "explicit statement which is separate from the statement indicating the agreement to conclude a contract." (emphasis added) This statement may be concluded in electronic form, but the trader must notify the consumer of its binding nature on a durable medium, e.g., a mere hyperlink would not be enough. On the other hand, the statement must be clearly separated from the contract terms, if it is contained in a "term not ... individually negotiated" according to Article 3(2) of [Council] Directive 93/13 of 5 April 1993 on Unfair Terms in Consumer Contracts]. A mere button-solution, or so called "click-wrap clauses",*

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<sup>38</sup> *Schein, Inc. v. Archer and White Sales, Inc.*, 586 U.S. \_\_ (January 8, 2019).

*which are popular in U.S. licensing agreements, are not acceptable in E.U. law, which in Article 10(2) of Directive 2013/11 has set a minimum standard not to be undermined by Member States' law.*<sup>39</sup>

Some authors propose that a consumer, to express his specific acceptance, could be involved in some active process: for example, the consumer should be expected to perform some type of action, such as typing the word arbitration into a text box, to accept the terms of arbitration agreement.<sup>40</sup>

Obviously, rarely consumer's choice to participate in Kleros' dispute resolution procedure will be deemed reasonable and intelligent without prior disclosure of all of the information relevant to how procedure is running, how technology works, what outcomes could be expected.

## 4.2. Disclosure standards.

An extensive enumeration of all pieces of information to be displayed on the ADR/ODR provider's websites is listed on two highly informative resources. To start with one of them, namely, the aforementioned ABA "Recommended best practices for online dispute resolution service providers", please allow the author of this Report to pick up another quotation:

*Disclosure has an important enforcement consequence in that, under US law, if a business fails to adhere to the public disclosures that it makes concerning its services, it may, under many circumstances, be engaged in an unfair or deceptive act or practice in or affecting commerce under Section 5 of the Federal Trade Commission Act (15 U.S.C. §§ 41-58, as amended). This is also the case under the consumer protection laws of many states and non-US jurisdictions.*<sup>41</sup>

It would be impractical to comprise in this Report vast ABA disclosure recommendations. However, substantial provisions must be placed to the forefront as follows. ODR Providers should disclose the following minimum level of information:

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<sup>39</sup> See note 33.

<sup>40</sup> Anjanette H. Raymond, *Yeah, But Did You See the Gorilla? Creating and Processing an Informed Consumer in Cross-Border Online Dispute Resolution* (Harvard Negotiation Law Review, Spring 2014).

<sup>41</sup> See note 34.

A. Contact and organizational information. This includes:

1. A mailing address, including physical location, not just a post office box number;
2. E-mail address, and
3. Jurisdiction of incorporation or registration to do business.

B. Terms and conditions and disclaimers;

C. Explanation of services/ADR processes provided

1. Description of the types of services/processes provided (e.g., mediation, arbitration, early neutral evaluation, blind bidding);
2. Published rules of procedure for all services/processes provided;
3. Nature of the outcome of each service/process and its legal consequences (e.g., whether binding or non-binding on each party), and an explanation of further possible avenues of action (e.g., appeal); and
4. If the ODR Provider or an individual neutral is engaged in legal services such as client counseling and advocacy, or is affiliated with a law firm or other organization that provides such services, identify the methods employed to separate neutral services and legal services to avoid conflicts of interest

D. Affirmation that the ODR proceeding will meet basic standards of due process, including

- (1) adequate notice to the parties; (2) an opportunity for the parties to be heard; (3) the right to be represented or to consult legal counsel at any stage of the proceeding; and (4) in an arbitration, an objective decision based on the information of record.

E. Any prerequisites for accessing the service, such as membership, or geographic location such as residency in a particular country or state.

F. Any minimum value for the dispute to be submitted to the ODR provider for resolution.

Interestingly, "Recommended best practices" suggests to disclose specific information regarding current *technology*:

1. *Systems requirements (hardware and software) for using the ODR Provider's service*
2. *Any limitations on accessibility to ODR systems, such as hours of operation or specific methods of access.*

3. If they employ systems that accommodate the disputants' differences in language and culture and, if so, what these are and how they function.
4. Any specific electronic techniques offered to enhance the efficacy of ODR and, if so, what these are and how they function.
5. If they provide techniques for accessibility to persons with disabilities or with low levels of literacy, and, if so, what these are and how they function.
6. If they employ security to ensure the identity of the participants and to preserve confidentiality and privacy of the participants and, if so, what they are and how they function.
7. If they have back up and arrangements for alternative emergency access.

## B. Specific Disclosures Regarding Training in Use of Online Systems

Furthermore "Recommended best practices" includes suggestion to disclose:

All costs of the process, what portion of the cost each party will bear, and the terms of payment,

- Relationship to others concerning providing ODR services,
- Selection process of neutrals,
- Ethical standards for neutrals,
- Confidentiality Concerning Both Participants and Proceedings,
- Responsibilities, Qualifications, Accountability for Neutrals.

Consumer Due Process Protocol Statement of Principles by American Arbitration Association<sup>42</sup> reduces the aforementioned requirements to the following common denominator – consumers should be given:

- a. clear and adequate notice of the arbitration provision and its consequences, including a statement of its mandatory or optional character;
- b. reasonable access to information regarding the arbitration process, including basic distinctions between arbitration and court proceedings, related costs, and advice as to where they may obtain more complete information regarding arbitration procedures and arbitrator rosters;

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<sup>42</sup> Consumer Due Process Protocol Statement of Principles by National Consumer Disputes Advisory Committee, American Arbitration Association.

- c. *notice of the option to make use of applicable small claims court procedures as an alternative to binding arbitration in appropriate cases; and,*
- d. *a clear statement of the means by which the Consumer may exercise the option (if any) to submit disputes to arbitration or to court process.*

The next profound resource of contemporary practical ADR regulation is UK Gambling Commission's Standards and guidance for ADR providers.<sup>43</sup> The UK Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations from 2015 established the Gambling Commission as a Competent Authority for the gambling sector. This means that the Gambling Commission approves alternative dispute resolution (ADR) providers that wish to offer services to gambling consumers. The Gambling Commission's role as Competent Authority includes making sure that ADR providers continue to meet the requirements of the ADR Regulations, alongside the Gambling Commission's role as a gambling regulator to make sure that gambling is fair and open.

Sec.5.3 of the "Standards and guidance for ADR providers" outlines that the ADR Regulations require providers to provide certain information on their websites. This includes information about *processes operated*, including:

- contact details, postal and email addresses;
- a list of ADR officials, the method of their appointment and the duration of their appointment;
- a statement that the provider is approved by the relevant competent authority;
- the types of disputes it is competent to deal with, including any financial thresholds that apply;
- procedural rules of the ADR procedure it operates, including grounds for refusing a dispute;
- the language in which it is prepared to receive initial dispute submissions, and in which the procedure can be conducted;
- the principles it applies and the main considerations when seeking to resolve a dispute;
- any requirements that a party to a dispute needs to have met before the ADR procedure can begin;

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<sup>43</sup> Alternative dispute resolution (ADR) in the gambling industry one of the UK' Competent Authorities, operating in a specific sector – gambling (Gambling Commission, October 2018).

- a statement as to whether a party to a dispute can withdraw from the ADR procedure once it has started;
- any costs to parties to a dispute, including any rules on costs awarded by the body at the end of the ADR procedure;
- average length of each ADR procedure;
- the legal effect of the outcome of the ADR process, including whether the outcome is enforceable and any penalties for non-compliance with the outcome;
- a statement as to whether the ADR procedure it operates can be conducted by oral or written means, or both;
- the annual activity report as required by the ADR Regulations Schedule 3, 11(2).

As evident, both lists partially overlap. In this matter, Kleros' *website information checklist* will be useful. An example of a checklist is close at hand, provided by another UK honorable Competent Authority – Chartered Trading Standards Institute (CTSI). The author took the liberty of attaching it in full in Annex to this Report as a possible model.<sup>44</sup>

Interim conclusions:

- (1) a universally suitable solution could be that to obtain a consumer's decision to enter Kleros' scheme *after* the dispute had arose, but before dispute resolution procedure had commenced;
- (2) before procedure commences, a full-scale website *disclosure* of information about Kleros and its dispute resolution scheme must be easily available and unavoidable to consumers' overview; a website information checklist will be useful;
- (3) to certify that consumer's a reasonable decision to participate in Kleros' scheme was obtained freely and knowingly, his/her *explicit consent statement* in a clear and unmistakable language must be captured:
  - (i) it should be separate from any other consumer's statements,
  - (ii) it may be concluded in electronic form, but the Kleros platform's website must notify the consumer of its binding nature, e.g., a mere hyperlink would not be enough,
  - (iii) button-solution, or so called "click-wrap clauses", are not acceptable in E.U. law,

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<sup>44</sup> CTSI Requirements and Guidance on seeking approval as a Consumer ADR Body operating in non regulated sectors.

- (iv) the consumer should be expected to perform some type of action, such as typing the words "*Kleros' dispute resolution*" into a text box, to accept the terms of agreement.

## 5. Filing a Complaint

Filing a complaint is the first step and a condition of the further commencement of dispute resolution process. As to Sec.VI Art.33 of the UNCITRAL Technical Notes on Online Dispute Resolution, . In order that an ODR proceeding may begin, it is desirable that the claimant provide to the ODR administrator a notice containing the following information:

- (a) The name and electronic address of the claimant and of the claimant's representative (if any) authorized to act for the claimant in the ODR proceedings;
- (b) The name and electronic address of the respondent and of the respondent's representative (if any) known to the claimant;
- (c) The grounds on which the claim is made;
- (d) Any solutions proposed to resolve the dispute;
- (e) The claimant's preferred language of proceedings; and
- (f) The signature or other means of identification and authentication of the claimant and/or the claimant's representative.

Annex to Regulation on consumer ODR provides more exhaustive list of the information that has to be provided when submitting a complaint:<sup>45</sup>

- (1) Whether the complainant party is a consumer or a trader;
- (2) The name and e-mail and geographical address of the consumer;
- (3) The name and e-mail, website and geographical address of the trader;
- (4) The name and email and geographical address of the complainant party's representative, if applicable;
- (5) The language(s) of the complainant party or representative, if applicable;
- (6) The language of the respondent party, if known;
- (7) The type of good or service to which the complaint relates;
- (8) Whether the good or service was offered by the trader and ordered by the consumer on a website or by other electronic means;

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<sup>45</sup> Art.8(5) of the Regulation on consumer ODR – “only data which are *accurate, relevant and not excessive in relation to the purposes for which they are collected* shall be processed through the electronic complaint form and its attachments.” (emphasis added)

- (9) The price of the good or service purchased;
- (10) The date on which the consumer purchased the good or service;
- (11) Whether the consumer has made direct contact with the trader;
- (12) Whether the dispute is being or has previously been considered by an ADR entity or by a court;
- (13) The type of complaint;
- (14) The description of the complaint;
- (15) If the complainant party is a consumer, the ADR entities the trader is obliged to or has committed to use in accordance with Article 13(1) of Directive 2013/11/EU, if known;
- (16) If the complainant party is a trader, which ADR entity or entities the trader commits to or is obliged to use.

When (15) and (16) clauses could be irrelevant in a case of Kleros' functioning as a non-certified ADR entity, other clauses resonate to the purpose of organizing due procedure.

Complaint form can be filled in in an electronic form and submitted on a website. The complaint form shall be user-friendly and easily accessible.

## 6. 3D Workflow Model: Assembling the Elements

Let us introduce a few inputs before starting to assemble a model of Kleros' process.

ODR ought to be simple, fast and efficient, in order to be able to be used in a "real world setting", including that it should not impose costs, delays and burdens that are disproportionate to the economic value at stake.<sup>46</sup>

If such procedures are to provide a realistic alternative to a dispute going through the courts, they should aim to overcome the associated problems of cost, delay, complexity and representation. Measures guaranteeing proportionate or no costs, easier access, efficiency, the monitoring of the progression of the dispute and keeping the parties informed are necessary to ensure its effectiveness.<sup>47</sup>

The neutral [decentralized application], in exercising his or her [its] functions [under the Rules], shall conduct the ODR proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the dispute.<sup>48</sup>

To this end, our Report suggests to assemble the 3D model of both efficient and due Kleros' process of five flows of information as set forth below in a Picture 2.

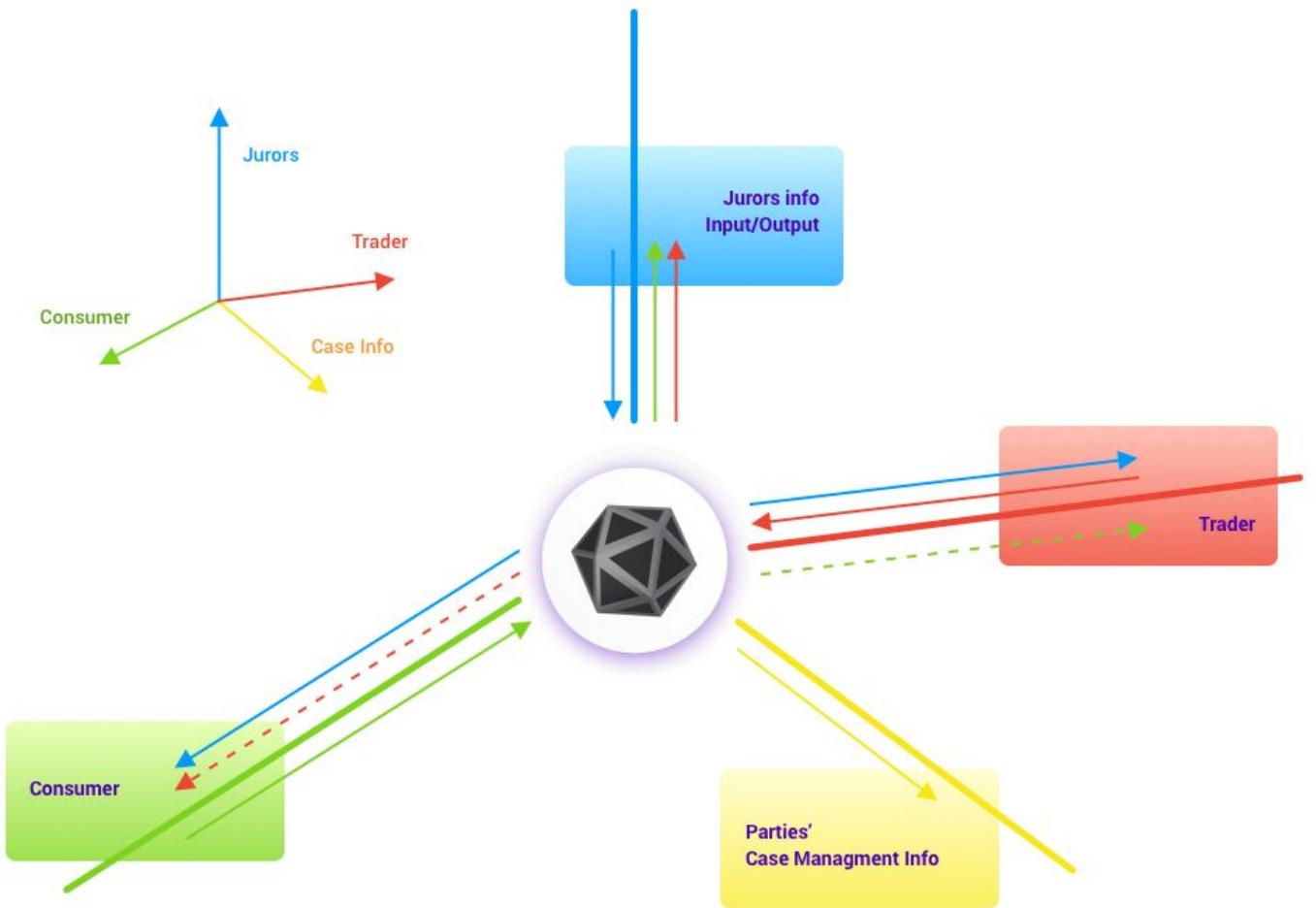
Pictures 3 to 6 illustrate the workflow, consistent respectively of submitting a complaint and evidence stage, exchange of defences, rendering a ruling and appealing. A self-enforcement stage is similar to rendering a ruling in regard to parties' same way of notification on the transactions executed.

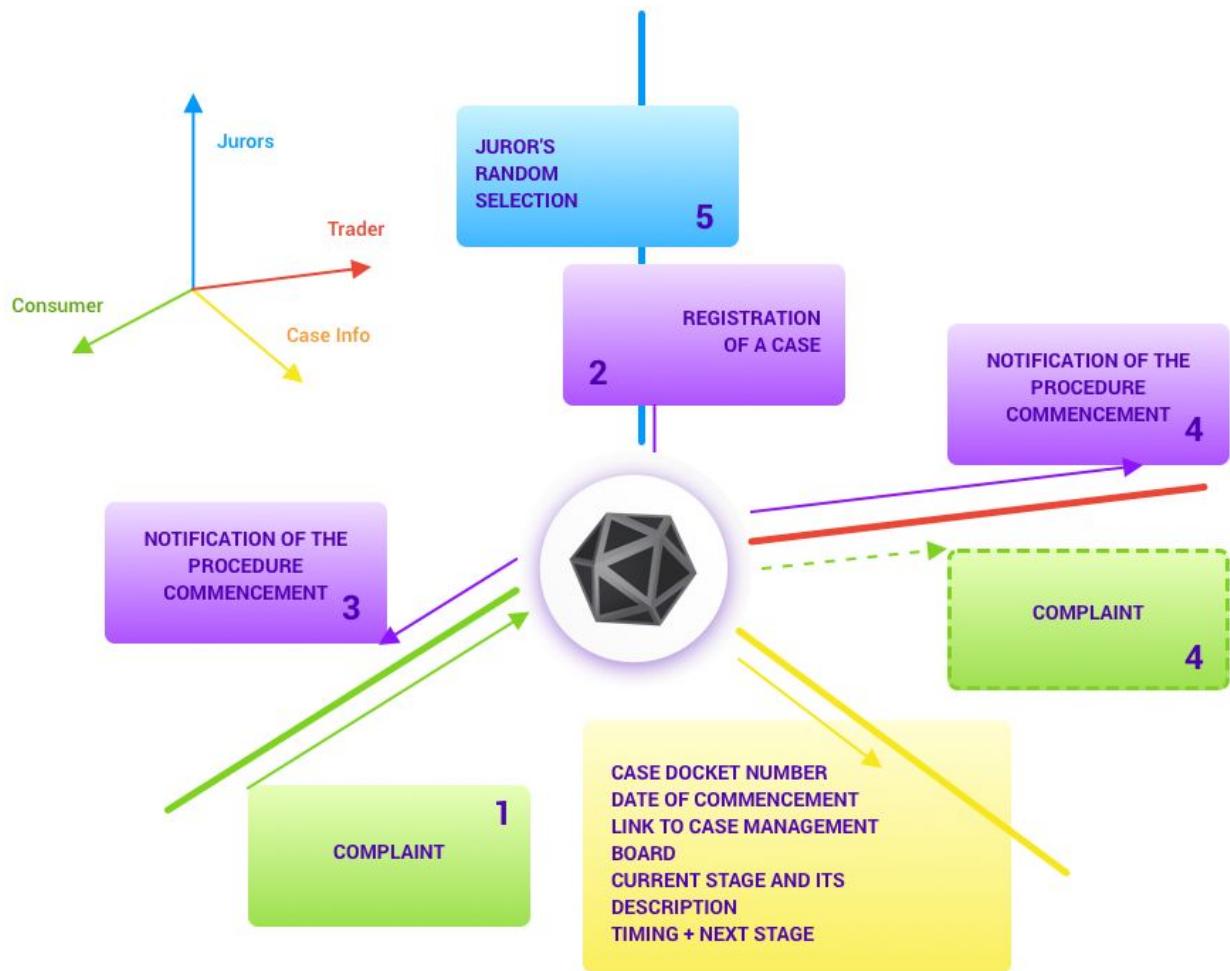
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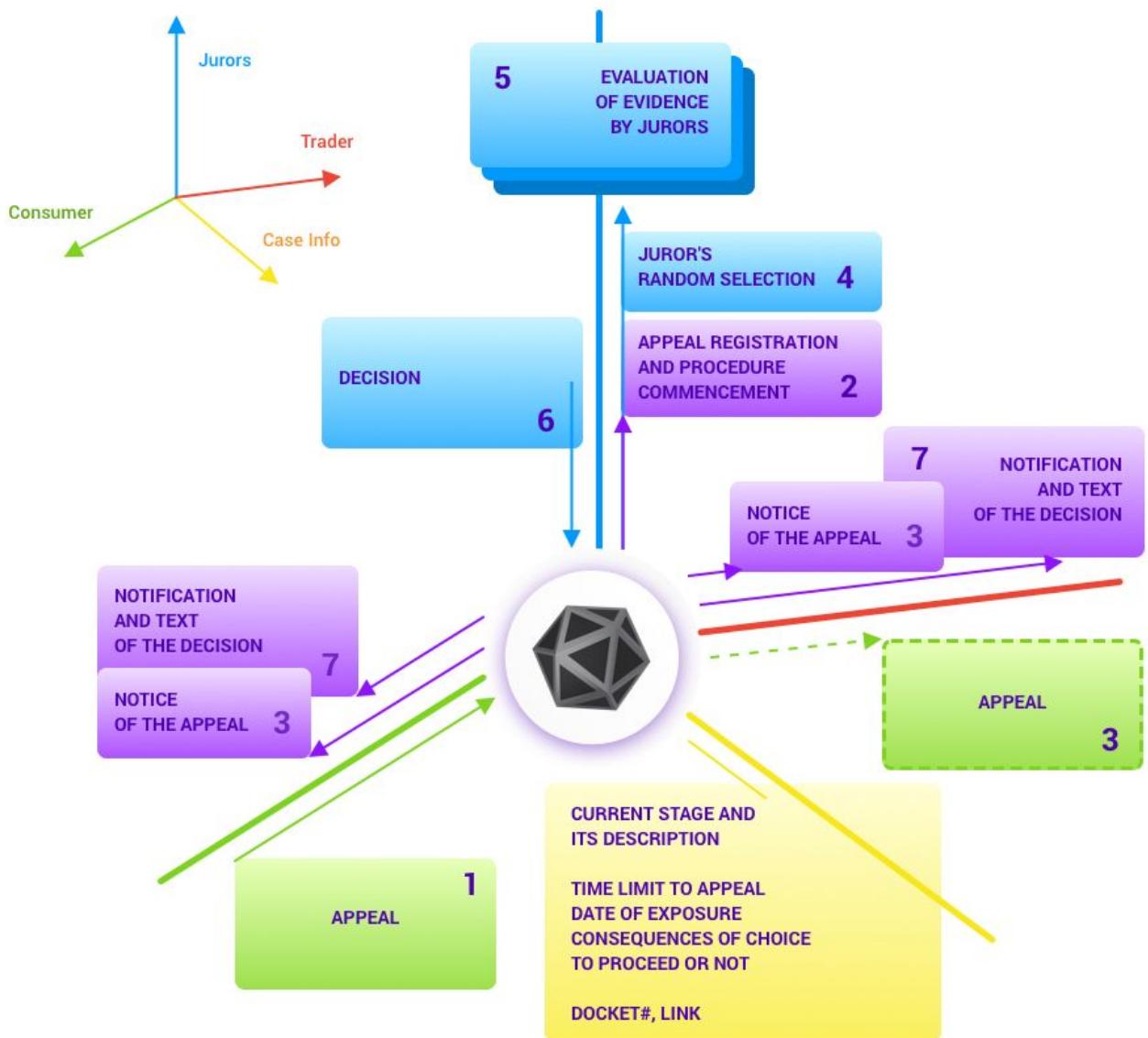
<sup>46</sup> Sec.II, Art.9 of the UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006).

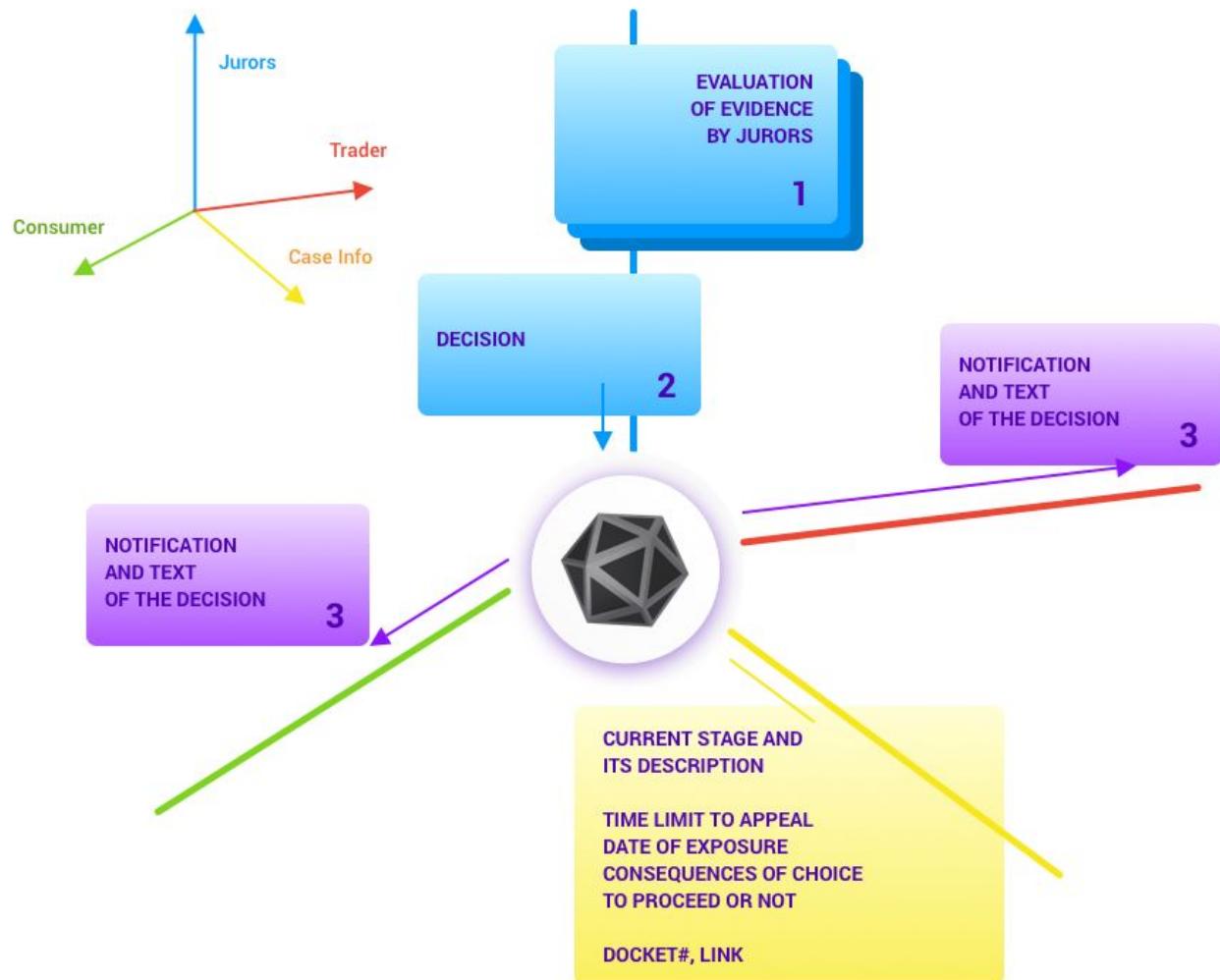
<sup>47</sup> Whereas (13) of The Commission of the European Communities Recommendation of 4 April 2001 On the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (notified under document number C(2001) 1016) (Text with EEA relevance) (2001/310/EC).

<sup>48</sup> Art.28 - Draft article 11(1 bis) of the UNCITRAL Draft Procedural Rules on Online Dispute Resolution for Cross-Border Electronic Commerce Transactions (Working Group III, Thirty-first Session, New York, 1-13 February 2015).









# Conclusion

"You need to decide if you want to spend energy getting your firm to move toward the space you want to be in. Or whether you want to be in the space you want to be in."

Private dispute resolution is a hot topic nowadays, which is discussed by different authors, including those related to blockchain theme: "More experimentally, an oracle can also be made to convey the insights of human beings or support private dispute resolution and private arbitration systems (sometimes referred to as judge-as-a-service or arbitration-as-a-service)."<sup>49</sup>

And this uneasy question of a balance between effectiveness and fairness arises every time inevitably.

As Colin Rule elaborated: "These online processes may not have all the procedural protections of a court-based process or a formal arbitration; however, for many consumers, this "rough justice" is more than adequate to meet their needs. Again, they do not care about the legal niceties. They just want to get a resolution and move on – and that is what ODR empowers them to do."<sup>50</sup> Richard Susskind goes even further: "It will also be crucial, in the pursuit of fairness, that there is no actual difference between the soundness of decisions and findings delivered online and those that flow from conventional hearings."<sup>51</sup>

To conclude, nothing would be better than to borrow a word from Ethan Katsh: "Both court-philes and ADR enthusiasts have viewed the trade-off between efficiency and fairness as inherent to dispute resolution. It may be that – in terms of access to justice – the most

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<sup>49</sup> Primavera De Filippi, Aaron Wright, *Blockchain and the Law: Rule of Code* (Harvard University Press, 2018).

<sup>50</sup> Colin Rule, Amy J. Schmitz, *Online Dispute Resolution and the Future of Consumer Protection* (American Bar Association, 2017).

<sup>51</sup> Richard Susskind, *Tomorrow's Lawyers. An Introduction to Your Future*, Second Edition (Oxford University Press, 2017).

significant contribution of ODR has to do with overcoming the trade-off between efficiency and fairness."<sup>52</sup>

A strong belief of the author of this Report is that Kleros is the unique and outstanding project and has already had a determinative impact on the future of private dispute resolution: the world of dispute resolution will never be the same.

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<sup>52</sup> Ethan Katsh, Orna Rabinovich-Einy, *Digital Justice: Technology and the Internet of disputes* (Oxford University Press, 2017).

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