
ARTIFICIAL INTELLIGENCE ARBITRATOR: A SOLUTION TO ARBITRAL BIAS?

Shubham Saini, National Law University Delhi

ABSTRACT

In recent times, Artificial intelligence (AI) has been permeable in almost every industry. The legal industry is no different. Researchers have wondered if Artificial intelligence can replace an arbitrator as a solution to the problem of arbitral bias. As we can witness that several countries have also started testing AI in arbitration proceedings. In theory this idea seems excellent as the common perception about AI is that it is free of stereotypes and bias, and cannot let prejudice slip into its direction. However, if we see the mechanism of AI, it has been found that the AI is only as unbiased as the one who is writing its algorithms upon which such programs are trained. This research aims to delve into the existing regulatory frameworks, and examine whether they can effectively govern AI powered arbitrator and see if such idea can be truly an antidote to arbitral bias. This research will further try to explain how there is a need for human arbitrators, and why delegating complete responsibility is a bad idea. Unlike the existing literature, this research paper will try to focus on AI powered arbitrators and belief that they can fight arbitral bias. It will also look into the aspect that whether the Indian regulatory framework allows for the appointment of AI powered arbitrators.

Key words: Artificial intelligence, arbitral bias, algorithms.

INTRODUCTION

As we look from the initial aspect legal tech has recently created popularity in the legal industry. A wide variety of applications have been developed in this arena to assist practitioners in streamlining human operations. As AI has abated the increase of legal popularity¹. Indeed, it was stated by Professor Roger Brown words “As technology disrupts society further, regulators turn away from the rules in favor of technological solutions or where historic regulatory objectives are simply taken care of by automation². Hence, automation here refers to the offspring of artificial intelligence. So, indeed the statement tries to convey us that as technology upgrades many regulatory duties and the utmost responsibilities can be given to AI. The few of such instance can be gathered from as to a solution is developed by AI to increase reviewing of documents (such as contracts and others). Indeed, these all development have seen a huge demand from the industry that is inspiring a whole bundle of legal tech solutions in the areas of legal research, access to justice and predicting the case outcome.

The Artificial intelligence does not limit itself here but also the area of Alternative dispute resolution has been experimented with these. A first and the foremost example of this is that a software is developed which is knowledge-based AI is used in Egypt to resolve construction disputes. The operation of this software can give a most suitable resolution technique, that to by referring on the nature of the parties, the evidence and the relation between parties³.

Latest of such innovation can be seen as it also utilizes Artificial intelligence in the field of online dispute resolution. These systems are tagged as expert system because they use rule-based algorithms that give the leeway to the program to make decisions based on the information it has received from the aggrieved and other party. Another such example is Rechtwijzer in Netherlands it is basically used in divorce cases. So, its functioning hugely depends upon the information given by the parties and their connection before presenting options depending on the answers. So, indeed from the above discussion that this algorithmic based machinery can predict outcomes and give resolution it makes us stand before a

¹ Aditya Singh Chauhan, Future of AI in Arbitration: The fine line between fiction and reality (Kluwer arbitration blog 26 September 2020), available at <http://arbitrationblog.kluwarbitration.com/2020/09/26/future-of-ai-in-arbitration-the-fine-line-between-fiction-and-reality/>

² Roger Brownsword, Law and Technology: Two modes of disruption, Three legal Mind sets and the big picture of regulatory responsibilities (2018) 14 Indian journal of law and technology

³ Tania Sourdin and Richard Cornes, Do judges Need to be Human? Available at, https://link.springer.com/chapter/10.1007/978-981-13-1023-2_4

fundamental question that whether such AI based arbitrators can replace human arbitrators or not. Indeed, there is still a doubt on the replacement of AI arbitrators that is due to its highly confidential, commercial and international arbitration nature.

As it can be hypothetically assumed that if such AI arbitrator is made it raises a significant question “Whether AI arbitrator is better the human one and are they be allowed to replace? The answer of this question is given by many of the literature in the sense that AI arbitrator will provide a better impartial resolution. Which indeed can altogether take away with the problem of arbitral bias.⁴

As the independence and impartiality of an arbitrator are indispensable to an arbitration proceeding. As it is one of the aspects of principle of natural justice. That in the form of “*nemo judex sua causa*” that means nobody can be judge in his own case. Insofar as when partiality or prejudice is in the middle of the way of an arbitrator act, it is known as arbitral bias. As by finding the contention of arbitral bias rising, many jurisdictions across the world including India have taken measures to deal with the issue. Indeed, following this there are increasing chances and attempts to delegate the entire process to AI, that is indeed one of the notions. The notion of providing this AI machinery with the power to take legal decision that will directly affect the human life must be deeply examined and should be put to scrutiny before implementation.

REGULATORY FRAMEWORK

A. A Brief Primer on Arbitral Bias

As to start with a reference is made to a hefty debate of party appointed arbitrators being biased this debate was seen in the work of Jan Paulson in 2010.⁵ The arguments raised by him included that the arbitrators appointed by parties is a moral hazard in international commercial arbitration as it grievously undermines the concept of impartiality in arbitration. Now lifting us to the main purpose of arbitration as the name suggest alternative dispute resolution so, in order to became truly a alternative of litigation, the rule of natural justice, namely *nemo judex sua causa* must be applied in every sense. Hence, the concept of arbitral bias can be explained as

⁴ Mel Andrew Schwing , Don't rage against the machine: Why AI may be the cure for moral hazard of party appointments?

⁵ AI could be critical tool to help save the planet (2019) available at, <https://www.theguardian.com/ai-for-earth/2019/apr/30/ai-tech-sustainable-planet>

the situation in which an arbitrator is prejudiced towards a party instead of being independent and impartial, these are the two requirements of a fair arbitration proceeding.

As we can refer from the Indian jurisprudence, looking into the history of recent amendments, it is of great significance to see that the lawmakers have worked towards solving this problem of arbitral bias⁶. As we can refer from the arbitration and conciliation (Amendment) act, 2015. It gives a significance to the aspects such as impartiality and independence, as the fifth schedule also refers to the grounds on which an arbitrator's independence and impartiality can be questioned therefore the awards that passed can also be challenged under section 12 of the act⁷. As in TRF Ltd v. Energo Engg. Projects Ltd. A three-judge bench of supreme court strengthen the statutory mandate of an independent unbiased neutral arbitrator.

The objective behind the development and the application of artificial intelligence system is to make life easier and more efficient for humans and thus one of the primary requirements is to perform equitably.⁸ This premise serves as an impetus for the argument of inclusion of AI into arbitration. However, the requirement is being pursued relentlessly the result so far do not work out in AI's favor.

B. Enhanced Adjudication Services: Appointment of AI powered Arbitrators

To significantly understanding the enhanced adjudication services. It indeed can be taken from the international developments. As In 2017 study, Katz and others user data from US Supreme court judgements to apply to a machine learning software that is involve in the prediction of legal decision making. After learning from the given data base the algorithm is applied to the outside data and it does predict two things:

1. Whether the court would affirm or reverse ruling
2. How each justice would vote.

The accuracy in such prediction was about 70% which is more than its successor but the 30% lag is too wide that it would not allow this machinery to replace it with AI. Now accordingly such model is not used to provide resolution but it's just only prediction. But indeed, the main contention against AI in litigation is that they do not possess the emotional intelligence that is required by judges in these scenarios.

⁶ Arbitration and conciliation (amendment) act 2015 (Act 3 of 2016)

⁷ Ibid

⁸ Ayanna Howard and Jason Bornstein, Trust and bias in Robots (2019) 107 American scientist 86.

Now coming to the regulatory framework part as firstly by considering the international commercial arbitration as the appointment of AI machinery as an arbitrator is not expressly prohibited by any of the amended international arbitrations. As the convention on the recognition and enforcement of arbitral awards (i.e. New York convention) refers to arbitrators in two articles, Article I(2) and Art V(1)(b)⁹ but by plain reading this does not mandate that the arbitrators should be human beings. In accordance every term and statement pertaining to the arbitration agreement legality solely refers to the submission of a dispute to the arbitrators, Parties accordingly may appoint a single arbitrator or a panel arbitrator. according to the definition of “arbitral tribunal” the referring of these matters and appointing machine learning arbitrators would be all legal.

Secondly, now considering the legality of appointment of artificial arbitrator under Indian jurisprudence. So as per Section 11(1) of the arbitration and conciliation act, 1996 state that “A person of any nationality may be an arbitrator”. So as per this AI does not qualify as a legal person. Therefore, the inclusion of AI powered arbitrator as a substitute to human arbitrators is not under the purview of Indian legislation at present. But indeed, there is always chance for the amendment to the legislation in such a way AI powered by arbitrator.

ARGUMENTS AGAINST AI POWERED ARBITRATORS

At present there are only few areas where computer system has been given the power to undertake the philosophical jobs of decision making in legal arena. As to the jargon used by Lodder and Thiessen such a system which is idea to undertake such jobs are termed as Strong agent. Strong agent is defined as one which enjoys the quality of autonomy, social ability, reactivity, pro activeness and etc. So, hereby this research paper took a strong stance that if artificial intelligence system is to ever replace the roles of traditional arbitrators, then these qualities are to be there.

So, going to the reality the system that have been already placed are no means a strong agent they lack all the above-mentioned qualities to make decision itself. Such agents are at play and have been employed in the arbitration process in the following way:

- For the search and selection of arbitrators and mediators based on facts¹⁰

⁹ The convention on the recognition and enforcement of foreign arbitral awards (signed 10 june 1958) 330 UNITS 38(1959)

¹⁰ Arbitral Intelligence available at <https://arbitratorintelligence.com/> accessed 23 March 2022

- For the minute administrative work
- For organizing, sorting and managements of documents
- Help assisting in Legal research

As the above objective of strong agent have not been fulfilled, there are calls for AI being given decision making powers for the sake of efficiency and objectivity. Indeed, the utilization of AI in any form other than a supportive or assistive one is undesirable as argued below:

A. Because They are Black box that cannot be judged monitor or corrected

A black box is a system that can be observed by means of its inputs and outputs, however its inner operations remain unknown. The inner working of the observers. Current AI system face this problem and because of this problem and AI system returns an output that cannot be objectivity termed as free and fair.¹¹ The issue arises as the machine learning operate through the past data. So, what if the past data is itself biased?

As Human life ha historically been regulated through processes our social teachings, civil liberties and also most endeavors are built around instructions and processes, but we have the power to challenge these processes through appeals, question and other tools, an AI system does not allow this. Thus, the utilization of AI system goes against the ethics of justice.

B. Because They can perpetuate human biases

AI Systems have been popularized as objective and reasonable decision makers that unlike humans can not fall prey to fatigue, biasness and indecisiveness. Albeit the notion of an unbiased AI is adream that has not been achieved yet, and will not be achieved soon because of a simple issue. Most decision-making AI make is based on algorithms. These algorithms analyze past data and use it to predict what a human would do in a novel situation. Indeed, two of such main problem is identified with the working of AI:

1. A lack of data available
2. If the data being is tainted and if the algorithms placed are inherently contains arbitral biasness.

C. Because they interpret letter of law without the spirit of law

As we all know rule of law is an essential principle of any democracy. To propagate rule of law it is indeed notion that there is to be an objective judiciary. However, the rule of law is

¹¹ Riccardo Guidotti, Anna Monreale and dini pedreschi, The AI black box explanation problem (Kdnuggets) available at, <https://www.thinkautomation.com/bots-and-ai/the-ai-black-box-problem/>

fundamentally based on four pillars of justice, and such justice requires application and interpretation of the law to best suit the condition and thus rule of law prefers spirit of law.

The inbuilt notion that judges should be indifferent to citizens, they serve no good. While an indifferent judge will be best party to dispose the case efficiently. As justice follows the spirit of law and not just the rule of law. Hence, the law is incredibly abstract and human concept, to have machine learning understand the nuance and technicalities of law is an impossible feat, no matter how far the technology develops.

Hence, replacing any form of judicial authority, be it a court based one or ADR based one, AI cannot be allowed to replace the role of human beings.

D. Because they require substantial amount of Data:

For a predictive decision-making AI system to make a decision, a large amount of data needs to be saved into it. The quantity and quality of data given to an arbitrator, like with other AI systems, will have a significant impact on its efficiency. However, in terms of arbitration, especially international and commercial arbitration such huge quantities of data cannot be found this is because arbitration by its very nature is a private process.

CONCLUSION

At the current stage, it seems replacing human arbitrators with AI arbitrators will do more harm than good. Indeed, AI can make the process smoother, faster and more organized. Albeit there are various issues that raise several issues that can suppress the essence of arbitration altogether. This is true to the very aspect that arbitral bias exists in human arbitrators as well but there is still a chance for improvement, transparency and accountability these features are indeed missing from AI.

Any technology that can lessen the burden of courts and lawyers is a welcome one. However, it is important to keep a balance between fairness and apparent profit replacing human arbitrators with AI powered ones that can make enforceable decision would open a pandora box that the legal framework of the country is not yet adept to deal with it. For example, an arbitral award given by AI arbitrators can be challenged on the grounds of public policy¹² given

¹² Cathey O'Neil, could an arbitral award rendered by AI system be recognized or enforced?

that the award is not given by natural persons. Or the impartiality can be questioned due to data and algorithmic based function of these AI.

The hurdles that stand in the way are regulation of AI technology, accountability of the creator, the enforceability of awards, right to explanation and a lot of other hurdles stand in way of AI based arbitrators.