TO EMBRACE OR RESIST: ADDRESSING THE ALLURE FOR ARTIFICIAL INTELLIGENCE IN ARBITRATION

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ABSTRACT

When we refer to Artificial Intelligence (AI) in International Commercial Arbitration (ICA) for this paper, it is in the context of Generative AI and its intersection with Arbitration. The purpose of the paper is to present a balanced perspective on the use of AI in ICA, highlighting both its potential benefits and the challenges that need to be addressed. It begins by acknowledging skepticism and apprehension towards AI in the legal field and simultaneously examines areas where AI can be employed in arbitration practice. Proceeds to then highlight the lack of a clear legal framework to define and govern AI arbitrators and emphasizes the need for recognition and regulation by national laws. Additionally, discusses the potential challenges in enforcing AI awards due to the absence of reasoning and reliance on unverified data and concludes with discussing the limitations of AI in complex dispute resolution cases underscoring the importance of human expertise.

Keywords: Artificial Intelligence (AI), International Commercial Arbitration (ICA), Generative AI, Arbitral Awards, AI Arbitrator, Arbitration practice

Introduction

Worthy of attention is the great level of skepticism and the apprehension of head-to-head collision with Generative AI particularly in the legal field by courts, law firms, arbitral institutions and as a result a cautious demeanor prevails when it comes to adoption of this technology[1]. From an anthropological standpoint we can observe the reason for the same being that throughout history in different jurisdictions it has been such that disputes were resolved by parties presenting their case to someone who was a trusted and respected decision maker in the society; with the form of that person constantly changing through passage of time[2]. Though the process itself has very much anchored itself in society given the opportunity for efficiency we just might as well flip the coin and turn to AI as an option.

Arbitration is for the most part is process and procedure oriented; the claims of the parties should be in writing and in a specific format, the information exchange between parties should be confidential, the hearings to be conducted either in person or virtually are all core facets of the profession. There is a reason for this elaborate process which the parties decide to bind themselves, the reason being it provides a framework to administer justice and though it may seem prima facie inefficient it allows for due process to the participating parties; a forum where claims, defenses can be asserted and heard by a neutral independent arbitrator.

Generative AI on the other hand is fast and disruptive. It can absorb, process, and analyze massive amounts of data and apply the same as per the directions given[3]. The information which it provides the user in most instances is an answer which cannot be challenged and when challenged provides with an alternate which is even difficult to challenge is unsettling. The legal profession is one which operates on genre of writing[4] which is similar across jurisdictions likewise the information such as reported judgments, principles and books are heavily relied

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[1] Tracking Generative AI: How Evolving AI Models Are Impacting Legal, Legaltech News, https://www.law.com/legaltechnews/2024/02/29/tracking-generative-ai-how-evolving-ai-models-are-impacting-legal/ (last visited April 28, 2024).

[2] Earl S. Wolaver, The Historical Background of Commercial Arbitration, 83 University of Pennsylvania Law Review and American Law Register 132 (1934), https://www.jstor.org/stable/3308189 (last visited April 28, 2024).

[3] Economic potential of generative AI | McKinsey, https://www.mckinsey.com/capabilities/mckinsey-digital/our-insights/the-economic-potential-of-generative-ai-the-next-productivity-frontier#introduction (last visited April 28, 2024).

[4] Donata Berūkštienė, LEGAL DISCOURSE RECONSIDERED: GENRES OF LEGAL TEXTS, 28 Comparative Legilinguistics 89 (2016), https://pressto.amu.edu.pl/index.php/cl/article/view/7435 (last visited April 28, 2024).

on by the practitioners and judges alike. This allows scope for the formation of Generative AI and Large Language Models specifically for this line of work as there exists a pattern[5] one which can exploit and consequently allows in reduced monotonous and time-consuming tasks such as research, drafting and review of documents.

AI Tools available for Adoption in Arbitration Practice:

There has been widespread integration of AI in Business Model from the domains which practitioners used to rely on for information for legal research. To name a few Jus-AI[6] (by Jus Mundi), Lexis+ AI[7] (by LexisNexis) and Westlaw Edge[8] (by Thomson Reuters) allow for creation of case summaries, litigation analysis and largely drafting which reduces the time spent by practitioners in repetitive tasks and allows to direct resources elsewhere which is more important in determining the outcome of a case.

ICA, especially where parties are different Nationals poses the difficulty through language barriers which significantly consumes time in translation of documents involved and as a solution DeepL[9] has been utilized to significantly speed up the process. A recent trend has emerged especially firms investing large sums of money in Predictive Analytics in which they are trying to predict not only which Judge is more likely to render a decision in which manner but what language you will give the Judge that will make him more likely to rule in one's favor. In the forthcoming section we will explore how these tools can be employed effectively in ICA.

AI in Action: Key Stages for Effective Implementation:

<u>Legal Research:</u>

Although there are several concerns about the accuracy of the AI generated legal research, growth is expected regarding the availability and access of a broader range of legal databases. It makes the entire process efficient allowing preparation of litigation reports and summaries

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[5] Peter Flach, Machine Learning: The Art and Science of Algorithms That Make Sense of Data (2012), https://www.cambridge.org/core/books/machine-learning/621D3E616DF879E494B094CC93ED36A4 (last visited April 29, 2024).

[6] Jus Mundi - Jus AI, https://jusmundi.com/en/jus-ai (last visited May 1, 2024).

[7] Lexis+ AI | AI Legal Assistant by LexisNexis, https://www.lexisnexis.com/en-us/products/lexis-plus-ai.page (last visited May 1, 2024).

[8] Westlaw Edge - A.I. Powered Legal Research, https://legal.thomsonreuters.com/en/products/westlaw-edge (last visited May 1, 2024).

[9] DeepL Translate: Accurate translator, https://www.deepl.com/translator (last visited May 5, 2024).

of precedents relied upon in speeds never experienced before. But a significant amount of caution is required when relying upon the legal research conducted by the AI tools. There have been instances where nonexistent legal precedents have been documented by the AI models[10].

Drafting Assistance:

AI can generate legal documents like contracts, agreements etc. Based upon the predefined structures and format. The practitioners can add several inputs like specific clauses or provisions in order to make it more specific and accurate[11]. Based on its machine learning model, AI can also provide terms or phrases that are included in comparable legal documents, which can be used as a basis for resolving disputes.

Generating Counterarguments:

AI could assess the arguments put forward by the other side and spot any discrepancies or imperfections in them. Additionally, it can evaluate arguments and provide potential rebuttals. For practitioners, this can be quite beneficial as it helps them prepare themselves for the counter before it is presented.

Drafting Pleadings, Awards, and Other Documents:

AI offers valuable assistance in the preparation of pleadings, arbitration awards etc. But lawyers must ensure that the information that has been shared with the AI does not breach the confidentiality of the client. The communication channels must be secured, and the AI platform being used must have privacy policies for that.

Oral Advocacy:

AI can be used to enhance oral advocacy in arbitration by providing support in language assistance, mock trial, and refining arguments. Although the legal information provided during

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[10] Vikrant Rana Gopal Nihit Nagpal,Avik, *Harnessing the Power of Artificial Intelligence in Arbitration: A Comprehensive Analysis of Indian Jurisprudence*, BAR AND BENCH - INDIAN LEGAL NEWS (2023), https://www.barandbench.com/law-firms/view-point/artificial-intelligence-arbitration-analysis-indian-jurisprudence (last visited May 4, 2024).
[11] Aditya Singh Chauhan, Future of AI in Arbitration: The Fine Line Between Fiction and Reality, Kluwer Arbitration Blog (2020), https://arbitrationblog.kluwerarbitration.com/2020/09/26/future-of-ai-in-arbitration-the-fine-line-between-fiction-and-reality/ (last visited May 4, 2024).

this assistance must be thoroughly checked to persuade the decision maker.

AI in the Bench: Assessing the Legal Framework:

The New York Convention and the UNCITRAL Model Law prescribe the due process which should be followed while appointing Arbitrators and the failure to observe the same would vitiate the award, when there exist such high stakes naturally question arises as to how one brings within the realm of appointment as it subsists today an AI Arbitrator, on what legal basis or is there an arbitral institution that permits this, and if so, under what rules, or should there even be regulations at all?

For the propositions above the answer appears rather negative that we cannot appoint an AI as an Arbitrator and call it Arbitrator under the existing legal framework. If we look at the generic definition of arbitration for instance "***an agreement to refer a dispute to a third person as arbitrator***", one may contend that this third person here may also refer to a AI and not necessarily be a human, but if we take a step back and examine the larger scheme of things especially Article 12[12] which explores the structure of bias and Independence of an Arbitrator as ground for challenge, it becomes clear that the basis for the determination of an individual's independence depends on their relationship to the parties involved in the dispute or its subject matter. If it were AI one would have to look at other variables such as the creator of the AI, the dataset upon which the AI was trained, the discussion about independence and bias would be different if it existed at all when it comes to AI.

It becomes important to reminisce at this juncture that some if not all of provisions of the Model Law assume that the arbitrator is a human being rather than an AI considering the fact that these technologies did not exist when they were implemented[13]. In some legislations it has been expressly chalked out that an Arbitrator can only be a Human, an example would be the Swedish Arbitration Act where in Section 7 an Arbitrator is defined as follows.

Section 7*: "Any person who possesses full legal capacity in regard to his or her actions and property may act as an arbitrator[14]".*

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[12] UNCITRAL Model Law on International Commercial Arbitration art. 12.
[13] However, one must note that the Term AI was coined as early as 1952 before the adoption of the New York Convention
[14] Swedish Arbitration Act (SAA) § 7.

Being so it puts an end to it in the discussion in the current legislative framework but that does not preclude the possibility that an Arbitral institution could devise a mechanism[15]; a set of rules to be incorporated in standard terms or clauses where disputes are entrusted to an AI. But this is only possible given the Arbitral institution takes upon itself the burden creating an AI software exclusive to it and such development to be made in collaboration with the developer of such AI based on a controlled set of data chosen by the institution, which is objective, because the final output innately depends on the quality of the input.

Exploring the Scope for Enforcement of Arbitral Awards by an AI Arbitrator:

We already face hurdles in enforcing awards rendered by human arbitrators, and this naturally leads to the question as to what we are really going to do with AI awards. Let us assume that we have appointed an AI arbitrator and that the Institutions have come up with relevant frameworks and accordingly have an award which has been rendered by an AI, another set of questions arise as to how does one proceed to enforce an AI award and what challenges does it pose?

It becomes pertinent that once we decide it is appropriate and desirable to have AI as Arbitrator, National Laws recognize the same. In India if we look at Section 11[16] it states that an Arbitrator can be of "***any nationality***" but how does one accord nationality to an AI? Similarly, if we look at China Article 13 states that an Arbitrator shall be a "***righteous and upright person***" thereby attaching a lot of morality with the position of the arbitrator.

If these provisions fail in recognizing AI, the whole process will turn infructuous, given once the parties go through the process of getting an award through AI and if they cannot enforce it in their country is of little to no value. It is important for awards to be reasoned awards and often if the algorithm has not been adequately trained may lead to strike at the heart of due process which might render the award unenforceable across myriad of jurisdictions.

Though an AI may be capable of dealing with the contrasting positions of the parties the reasoning adopted by AI to arrive at a decision may be unclear and be based on hallucinations[17]

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[15] Silicon Valley Arbitration and Mediation Center has formulated draft rules on use of AI in Arbitration.
[16] Indian Arbitration and Conciliation Act, 1996, § 11
[17] Artificial intelligence in arbitration: evidentiary issues and prospects, https://www.aoshearman.com/insights/artificial-intelligence-in-arbitration-evidentiary-issues-and-prospects (last visited May 5, 2024).

and this absence of reasoning or logic makes enforcement difficult.

Conclusion:

It is not as simple as saying that we can achieve better results in arbitration given that we eliminate the inherent emotional bias present in human arbitrators, AI in its present state will only allow for elimination of errors in simple cases where there might be an erroneous oversight by humans but in the realm of complex disputes which often come to arbitration as they are an outlier in some sense, the decision making process is no longer simple as it may have seemed[18].

This proposition may sound biased, but it's high time that we come to terms with this technology and accept it and employ to further enhance the practice in certain areas as pointed out above, lot of individuals especially from the lower spectrum of the society don't get any legal help for their legal problems and they therefore never get them resolved and there's a big upside opportunity here to really employ AI help in resolving their disputes. For one thing is sure that the earlier ones who adopt this ahead of the curve are the ones who are likely to stay afloat, but one can't deny given the present limitations there's still a long time to come before AI can completely take over the job of a practitioner or an arbitrator.

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[18] Henk Snijders, Arbitration and AI, from Arbitration to 'Robotration' and from Human Arbitrator to Robot, 87 Arbitration: The International Journal of Arbitration, Mediation and Dispute Management (2021), https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\AMDM\AMDM2021017.pdf (last visited May 5, 2024).