EMBRACING ARTIFICIAL INTELLIGENCE IN INTERNATIONAL ARBITRATION: TOWARDS TRANSPARENCY AND FAIRNESS

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Leonora Riesenburg and Arran Dowling-Hussey reflect on the healthy and often colourful global debate on risk mitigation in international arbitration driven by modern forms of Artificial Intelligence (AI).

In the realm of modern international arbitration, the discourse on risk mitigation fuelled by the integration of Artificial Intelligence provokes both spirited debate and reflection. While Artificial Intelligence has revolutionised processes, enhanced efficiency, and fostered impartiality in modern-day decision-making processes, its adoption presents new challenges for stakeholders and the arbitral community alike. This article delves into the imperative of regularising Artificial Intelligence's application in International Arbitration to uphold transparency, mitigate risks, and meet new age needs of international commerce turning to international arbitration for the resolution of private disputes.

Artificial Intelligence can, per the International Organisation for Standardization, be said to be 'a technical and scientific field devoted to the engineered system that generates outputs such as contents, forecasts, recommendations or decisions for a given set of human-defined objectives.' Whilst Artificial Intelligence has its roots in the work of noted British computer scientist Alan Turning and has been recognised as an academic discipline from 1956 it is arguably only since 2012 and in particular since 2021 that there has been an ' Artificial Intelligence' boom led by inter alia the initial introduction of 'Dall-E' a generative Artificial Intelligence technology that as of last summer has been revised to 'Dall-E 3' and released into the large language model Chat GPT launched is the winner of 2022. Improvements to transfer-based deep neutral networks, with generative AI systems, Generative AI or GenAI, having the ability to review, engage in fact-finding, document production, and document generation with reasoning, is a real game changer for the industry.

A 2021 study by White & Case and Queen Mary University of London indicated that 49% of arbitration practitioners never or rarely employ AI tools such as data analytics or technology-assisted document review. Studies undertaken in 2023, report a moderate increase. Following a period of initiation, the uptake is bound to increase exposition, with GenAI likely to normalised in practice.

Ensuring Transparency

Transparency serves as the bedrock of any arbitration process, ensuring that all parties involved understand the methodologies adopted in decision-making. The inherent opacity of algorithms poses a threat to transparency by potentially obscuring the reasoning behind outcomes. The arbitration community is actively engaged in initiatives to standardize the disclosure of Artificial Intelligence systems, functionalities, and data inputs. Whilst by no means an exclusive list, there is no shortage of AI tools to service. Users will be familiar with AI tools in application such as LexisNexis, DoNotPay, ExaMatch, and Ross Intelligence for legal research; Arbitrator Intelligence and BillyBot for selecting counsels, experts and arbitrators; Opus2, NDA, and Property Contract Tools for procedural automation, translating, transcribing and summarizing evidence, or even drafting compilatory parts of legal documents and arbitral awards; with AI solutions for use in the adjudication process (including the 'tools of predictive justice') being piloted and coming soon.

Parking the possibility of fully automated proceedings with AI-arbitrators, a subject that will no doubt grown in popularity in the near future, the use of AI tools in decision making processes can be problematic, with the potential for 'interference' to the adjudication process if left unchecked. Harmonising developments in AI, not least given the fast pace of change, can be challenging. The UNCITRAL Model Law, Arts. 19(1) and 19(2) accord parties the procedural autonomy to allow for the use of AI tools. There can be no compromise on transparency. In line with parties' consent, AI tools should be deployed openly and with consent, with appropriate protocols in place to assure parity is maintained and the sanctity of the process not compromised.

Mitigating Algorithmic Biases

It is suggested that algorithmic biases pose a significant risk in Artificial Intelligence driven arbitration, potentially skewing decision-making processes and undermining impartiality. Quite simply algorithmic bias arises when algorithmic driven decisions on a systematic basis cause detriment to specific groups of people. There cannot be an equitable system of Artificial Intelligence when there are algorithmic biases. For reasons of expedition, it is not possible, or necessary, to go into a full discussion of the variety of algorithmic biases that can arise. Commonly there can be issues with aggregation bias, confirmation bias, measurement bias, prejudice bias and selection bias although other types of bias can be seen. Stringent measures are necessary to identify, assess, and rectify biases within Artificial Intelligence algorithms. This has lent to the developing specialized tools for bias detection and ongoing monitoring to ensure fairness and equity in arbitration proceedings. Human involvement in the selection of arbitrators remains crucial, with a clear emphasis on ownership and responsibility for the final decision-making process, regardless of the degree to which there is future adoption of Artificial Intelligence.

Addressing Errors and Irregularities

Despite advancements, errors or irregularities in algorithmic outputs remain a concern, with potential implications for Arbitral Awards and confidence in the arbitration process. Artificial Intelligence is being deployed to scrutinise and challenge outputs generated by it; allowing for systematic sanity checks, validating Artificial Intelligence generated output, corrective measures to be implemented. Regularizing Artificial Intelligence use requires revisions to international conventions and domestic laws, accommodating instances where awards may be contested due to Artificial Intelligence related irregularities. This may necessitate specialised Tribunals or mechanisms for reviewing and setting aside awards influenced by Artificial Intelligence errors or inherent biases. It follows that at the time of writing it is unclear exactly how this risk will be managed/ corrected.

Cybersecurity and Confidentiality in International Arbitration

The proliferation of Artificial Intelligence poses heightened risks to confidential data against cyber threats and breaches, given the reliance of Artificial Intelligence systems on vast amounts of proprietary information. Fostering a trustworthy environment demands adherence to industry-leading cybersecurity standards, robust case management protocols, and regular audits of Artificial Intelligence systems for vulnerabilities. As it stands International Arbitration by its nature involves several actors from different jurisdictions and during the course of an eighteen month, or longer, process there are inherent issues with a paperless but data-heavy arbitration proceedings.

Regulatory Framework

Institutional rules and lex arbitri lack explicit frameworks for the application of AI in arbitration and sanctions for potential misuse, will need to get up to speed The Silicon Valley Arbitration and Mediation Centre addressed this lacuna with the release of draft Guidelines on Artificial Intelligence in Arbitration (SVAMC AI Guidelines) on 31 August 2023, opened for comment until 15 December 2023 for members of the public and 15 February 2024 for institutions. It remains to be seen how those guidelines will evolve following the public consultation period, and whether they will influence international arbitration community. On the other hand, the European Parliament voted in favour of regulation of AI, that will form the basis of Europe's Artificial Intelligence Act, with rules aimed at setting obligations for providers and users based on risks associated with the different AI technologies. As the EU AI Act is pending, other countries to include China and the US (amongst others) have pressed on with the AI agenda, with policy makers keen to get ahead of the curve in offering global leadership in both AI development and governance.

As Artificial Intelligence reshapes international arbitration, prioritizing ethical use, transparency, and addressing potential pitfalls are imperative. The 4-5 Gray's Inn Square Chambers quarterly webinar on October 25, 2024 will further discuss this area.

Members of 4-5 Gray's Inn Square Chambers International Arbitration Group regularly act in arbitrations as counsel, or arbitrator, and are familiar with all the issues that can arise at any point in the life of an arbitration in relation to Artificial Intelligence. Queries as to the professional availability of members of the group can be directed to Deputy Head Clerk Stephen Somerville on + 44 (0_20 7670 1545 or by email to ssomerville@4-5.co.uk. Those interested in attending the October 25, 2024 webinar on Artificial Intelligence, at which Leonora Riesenburg will speak, can also contact Stephen.

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02.04.2024