International Arbitration Experts Discuss The Impact Of Artificial Intelligence On International Arbitration

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Commentary

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Mealey's International Arbitration Report recently asked industry experts and leaders for their thoughts on the impact of artificial intelligence on international arbitration. We would like to thank the following individuals for sharing their thoughts on this important issue.

- Luis Perez, Chair, Latin America and the Caribbean Practice, Akerman, Miami
- Ryan Abbott, M.D., Esq., FCIArb, JAMS, New York
- Kiera Gans, Partner, DLA Piper LLP, New York
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- John Dellaportas, Partner, Emmet, Marvin & Martin, LLP, New York
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Mealey's: What do you think the impact of developing AI technology will be on international arbitration?

Perez: There is no question that just as AI is impacting most aspects of our life, it is bound to have an impact on international arbitration; however, the type of impact and the depth of such, have yet to be determined as AI is only at the very early stages of influencing international arbitration.

Nonetheless, we can make some educated guesses as to the kind of impact it might have as this new technology makes further incursion into the world of arbitration.

First of all, it is important to remember that arbitration, international or domestic, is a contractual creature designed to resolve disputes amongst parties. As such, the parties can determine via the contract how such arbitrations are to take place. This allows the parties to contractually determine the parameters within which AI will be allowed into the resolution of their dispute.

To my knowledge, a software program to decide international arbitrations has not yet been created, but I am certain that one, if not many, are in the works. Whether the industry will accept any such program is an issue yet to be resolved. However, since AI is proving capable of determining appropriate medical treatments, it is not a giant leap of faith to fathom dispute resolution software that might assist, if not altogether control, how a dispute will be resolved. It might be difficult as arbitrators often account for many subjective factors that cannot be entered into a program, but other non-subjective issues might be fertile ground for resolution by AI. For example, damages might be resolved by AI without consideration of subjective factors. In such matters, we are likely to see AI play a role sooner than with respect to liability issues.

Depending on the seat of the arbitration and the applicable law, it may be much easier to use AI in common law jurisdictions like the United States due to the greater availability of sources such as case law and law review articles. In fact, it could be said that in the US there is an "over-abundance" of materials

on any subject. Practitioners outside of the US might have a bit more difficulty accessing materials that could be used by AI software to generate memorials and the like.

In sum, there is no question that AI programs will make their incursion into international arbitration, however, it has yet to be decided how and to what extent this will take place.

Abbott: Developing AI technology will impact international arbitration in two fundamental ways. First, AI technology will play an increasingly important role in the substance of underlying disputes. This will include cases specifically about AI technology, such as those alleging patent infringement or trade secret misappropriation of AI-based technologies, as well as licensing disputes involving AI. As the capabilities of AI continue to improve, new sorts of legal issues are emerging for dispute resolution, such as whether the unauthorized use of copyright-protected content to train AI models is copyright infringement. There is also growing interest in whether AI-generated works can be protected by intellectual property laws, which will lead to ownership disputes between the developers, owners and users of AI systems. In some arbitrations, AI will be central to the underlying facts; in other cases, such as family and employment disputes, AI may play a more tangential role. In any case, an arbitrator's understanding of AI may be needed to cut through noise and get to the key legal issues that need resolution.

Second, AI will play an increasingly larger role in the arbitration process itself, by augmenting or even automating the role of counsel and/or the arbitrator. Attorneys and law firms are increasingly leveraging AI to assist with tasks such as document review and legal research. This can result in higher-quality work product and greater efficiency, and it can improve access for clients with limited resources. On the other hand, AI can worsen outcomes, as illustrated by the recent high-profile case of an attorney who submitted and failed to review a court filing prepared by Chat-GPT that cited nonexistent cases. In some cases, AI is even effectively replacing human arbitrators, mainly in low-value, high-volume disputes, such as those that commonly occur across e-commerce platforms such as eBay. In cases where the cost of involving a human neutral is greater than the amount in dispute, AI-

based resolution offers some compelling benefits. On the other hand, there are serious concerns about bias and unfair outcomes with AI, particularly in cases in which a human decision-maker is replaced.

Gans and Wan: With the rapid development of AI technology, much of the discussion about the impact of these new technologies has centered around the practical role that AI-powered tools can play in promoting efficiencies, reducing costs, and shortening the length of arbitrations. There is an expectation that access to AI technology may result in providing greater access to justice (*i.e.*, by leveling the playing field between parties with varying resources, for example, by making legal research cheaper), as well as in creating cost efficiencies for a process that many view as too expensive. In this regard, commentators have promoted AI as a useful tool in streamlining certain of the more data-driven components of international arbitration, including electronic discovery and legal research.

But who will regulate the use of AI technology in international arbitration? In many jurisdictions, counsel's conduct in an international arbitration is subject to obligations imposed by counsel's local bar. In light of the predicted widespread adoption of AI, however, the decentralized regulation of counsel conduct reignites concerns that inconsistencies in regulation may impair the fairness of arbitral proceedings and encourage parties to select counsel from jurisdictions with lower standards of professional conduct. If one jurisdiction permits the use of AI technology in document review or brief writing, and another does not, how do arbitration practitioners maintain a level playing field?

These concerns are compounded by the fact that local jurisdictions have begun grappling with what standards should govern the use of AI technology in the legal profession, but are already regulating these tools in different ways. For example, courts in the United States and Canada have recently been forced to address questions regarding the extent to which AI can be used in legal practice, including in the preparation of court documents. Whereas some Canadian courts have simply required that where AI technology has been used to prepare materials submitted to the courts, counsel must disclose how AI was used, one U.S. federal court recently issued a standing order

requiring counsel to certify that they did not use generative AI to draft briefs, or to otherwise be held responsible for the accuracy of their submissions under the federal rule of civil procedure governing sanctions, noting that although generative AI tools "have many uses in the law . . . legal briefing is not one of them."

So even though the accelerated adoption of AI technology raises another area of potential conflict, it also gives rise to an equally important opportunity, particularly as the technology is in its nascent stages of growth, for the international arbitration community to work together to develop common legal standards regarding the use of AI technology. Instead of relying on yet another patchwork of potentially inconsistent regulations, perhaps now is the time to promote more coordination and uniformity through a uniform code of conduct for the use of AI in international arbitration.

Hunt: International arbitration is already affected by AI through the use of predictive coding — where pattern recognition software is trained to recognise relevant documents in a dataset — to improve and simplify document production.

In its current form, AI is extremely effective at producing clear, concise chronologies and preparing simplified summaries of long documents and has the potential to dramatically reduce time needed to prepare large sections of briefs dramatically. While it faces well-publicised problems with hallucinations — plausible-sounding authorities and statements invented by predictive analysis, it is an immensely powerful tool for improving legal research and analysis.

But I want to flag three counter-intuitive (and less certain) possible effects of AI on international arbitration.

First, efficiency improvements brought about by AI may — but only may — finally break the stranglehold of hourly billing over law firm economics. If law firms can no longer justify their fees by reference to thousands of hours of young lawyers' time expended on now-automated tasks, they may turn to valuing their real value-add — analysis and strategy. They may also simply have to swallow reduced profits, with the commensurate impact on the size of the legal workforce and law's attractiveness as a career.

Second, there is another possible world. Rather than AI creating genuine efficiency, the productivity of AI is instead harnessed to produce more work product. The tendency to use technological improvements to increase workload can readily be seen in arbitration. Easy availability of electronic research tools has generally been used not to produce shorter, better briefs, but to engage in attritional warfare with briefs sprawling over hundreds of pages and masses of unnecessary authorities relied upon.

Third, AI may increase the human element in some aspects of complex disputes. A common debate is what reliance can be placed on witness evidence compared to documents. While the testimony of even the most honest witnesses can suffer from serious limitations and biases, the ability of AI to manufacture convincing videos, photographs and documents also threatens our ability to rely on documents as the gold standard of evidence. Arbitration lawyers will need the help of improved meta-data standards and an increasingly sophisticated toolkit of technical skills to identify and prove deepfake materials. But they may also need to fall back on some of their oldest skills — the adducing and examining of human evidence.

Dellaportas: *Forbes* recently published an article entitled "Artificial Intelligence Without The Right Data Is Just . . . Artificial." I believe this correctly captures the reason why artificial intelligence will be slow to have a significant impact in international arbitration. There is no doubt that AI will be transforming *litigation* in the years ahead; the available documentation and information, in terms of published and unpublished decisions, federal and state electronic court dockets, and other online sources, is almost infinite; certainly too voluminous for any human or even team of human in most cases to fully absorb. That is where AI excels—in replicating human thought patterns, but with superhuman data absorption. But arbitration remains a largely (with certain exceptions) private preserve. The massive data is just not there, at least not yet.

That has not stopped many from touting its benefits. As a sometime-practitioner in the arbitral field, I frequently receive marketing pitches by vendors to use AI to automate tasks, in particular with respect to e-discovery and legal research. These areas have already been fairly automated for years now, and Westlaw,

LexisNexis and Google, among other research tools, are already AI-infused. This process will undoubtedly accelerate. However, others have been making broader claims to the effect that AI analytics can help advocates and parties predict outcomes. There, I remain skeptical. As each and every case is different, researching arbitrator track records, whether by human or computer, tends to be a fool's errand. To the extent it is useful, such analysis is certainly not beyond the capacity of the existing human brain.

For attorney advocates, exploration, explanation and persuasion are paramount, and these skills remain, for the time being, uniquely human. As for arbitrators, at least in world of complex international disputes, the development of such skills is only heightened. While it is true that companies such as eBay have created online dispute resolution (ODR) platforms that resolve consumer disputes without human involvement, that is effective because eBay, frankly, does not care about the results on these small potato matters. Arbitrators selected to handle high-stakes disputes, by contrast, *very much so care*. I can think of few if any such arbitrators who would allow an algorithm to ever weigh in on their decision-making process. In the long run, of course, technology will advance. But for now, international arbitration remains a human driven world, and I do not see that changing in the near term.

Bates and Torres-Fowler: The rapid expansion of AI technology may be among the most consequential developments facing not only the international arbitrational community, but the legal industry as whole. Indeed, most law firms, in-house legal departments, and arbitrators around the globe are actively investigating how AI technology can be effectively and ethically used in connection with day-to-day legal practice. In fact, many suggest that the failure of individuals and companies within the legal community to fully consider and investigate the ethical use of AI risk losing competitive advantage and undermining their ability to retain talent.

While the use of AI technology within the legal industry, much less the international arbitration sector, remains quite novel, the theoretical advantages of AI should be fully considered and vetted. The potential cost savings generated by using AI to automate certain tasks which traditionally took substantial time and effort to complete are palpable. For example, AI is poised to assist counsel to identify potentially relevant and material documentary evidence, assist with document disclosure tasks, conduct legal research, analyze transcripts, and other activities that previously took countless hours to complete in a matter of minutes. In doing so, AI technology may reduce the costs associated with certain tasks attendant to conducting complex international arbitrations and, in doing so, may potentially reduce barriers to entry.

Notwithstanding these potential advantages, counsel and arbitrators must recognize that this technology is in its infancy. Indeed, while AI is a promising tool, it is currently imperfect by almost any measure.   Press reports have already identified examples of court papers prepared exclusively by AI technology that misrepresented the law based upon fictitious cases[1] and some courts in the United States have implemented rules that require counsel to disclose the use of AI to draft legal filings.[2] The same risks would be true in international arbitration matters. Even more, counsel and arbitrators both must be keen to use AI with an eye towards confidentiality—a natural hallmark of international arbitration proceedings—to ensure confidential information is does not become available to other AI users.

The legal industry and international arbitration community are presently at the forefront of rapid shift that will affect practice of law around the world. While much more is still to come, AI technology is undoubtedly here to stay and will very likely affect the customs and mores of international arbitration.

Endnotes

1.   *See, e.g.*, B. Weiser, *Here's What Happens When Your Lawyer uses ChatGPT*, N.Y. Times, May 27, 2023, https://www.nytimes.com/2023/05/27/nyregion/avianca-airline-lawsuit-chatgpt.html.

2.   *See, e.g.*, S. Merken, *Another US Judge Says Lawyers Must Disclose AI Use*, Reuters, June 8, 2023, https://www.reuters.com/legal/transactional/another-us-judge-says-lawyers-must-disclose-ai-use-2023-06-08/#:~:text=(Reuters)%20%2D%20A%20judge%20on,concerns%20related%20to%20confidential%20information. ∎