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Artificial Wisdom or Automated Folly? Practical Considerations for Arbitration Practitioners to Address the AI Conundrum

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The number of ways artificial intelligence (AI) can be leveraged in the arbitration process for time and cost efficiencies is growing daily, along with the scope of challenges AI may present. In this article, we outline some of the uses contemplated by arbitration constituents, highlight potential risks associated with its use, and focus on procedural and legal matters that parties, arbitrators and administering institutions may wish to consider given the new realities that AI presents.

Most of us have already explored AI technology by submitting queries to online AI platforms. Early in the arbitration process, parties can run searches using various AI-powered tools to identify arbitrators with specific attributes or to gather information about a potential arbitrator's experience. Throughout the process, AI can be used to research cases and legal trends, and, more generally, to gather information that could support a party's position and arguments.

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AI can be leveraged for e-discovery, document review and even to find, extrapolate and summarize key sections from opinions and pleadings. Basically, AI can play the role of an assistant, paralegal or junior lawyer in identifying and compiling specific information. Although many may still be reluctant to turn to AI to draft complete documents, AI tools can be used to prepare initial drafts or portions of legal submissions and arguments and even arbitral awards.

Nefarious uses of AI must also be considered: AI can be used not only to gather evidence but

also to manipulate evidence or even generate false evidence (e.g., by making subtle changes to key documents or creating deepfake photos or videos). These are just some examples of how AI can come into play in the arbitral process.

As people become more accustomed to the use of AI technology, and the technology continues to improve and evolve in novel ways, we should expect more widespread adoption of AI by all stakeholders in the arbitral process.

The key concerns related to AI-generated information are also increasingly well-known. These include: (i) bias and fairness issues caused by the data used to develop AI models, which reflect human biases and preconceptions, and (ii) accuracy issues, including "hallucinations," which are misleading or wholly inaccurate responses provided by AI systems.

These issues are being addressed by the relevant platforms but have not been entirely solved to date.The risk of biased, imperfect or plainly wrong output remains significant. The need to maintain the integrity of the data and the trustworthiness of AI outputs go hand in hand.

Another concern relates to confidentiality. Information shared with AI platforms, especially publiclyavailable systems, is not always kept confidential by the platform provider.

Some AI systems may use information provided as user input to "train" and improve the systems themselves, which could result in the provided information being returned, in various forms, to other users. Cybersecurity threats could also jeopardize the private nature of data stored by proprietary AI platforms.

Arbitration constituents are faced with a conundrum with which many professionals are grappling: how to balance the promise of AI as a game-changing tool that can lead to substantial time and cost efficiencies against the significant risks it presents.

There are several steps that should be considered to mitigate such risks:

Disclosures. From the onset, parties should consider stipulating if, and how, AI may be used in the arbitral process by both parties and arbitrators. It may be appropriate to require that parties disclose whether AI was used to prepare pleadings or gather evidence.

The parties may also require arbitrators to disclose, or obtain the parties' approval prior to, any use of AI for any part of their work (similar to the way arbitrators are required to disclose the use of tribunal secretaries).

Given how prevalent the use of AI has become, a discussion of the parameters around the use of AI merits attention early in the arbitral process and could be documented in a first procedural order.

It may even be useful to periodically update the discussions and positions taken over the course of an arbitration proceeding since the technology evolves quickly and may impact the use of AI during the arbitration lifecycle.

Protections on Information Sharing and Confidentiality. To mitigate the risk of information leakage, parties may want to agree on the specific data protection and sharing attributes, restrictions and protections that AI platforms must have to permit their use at any point in the arbitration process.

The terms governing the use of and access to such AI platforms, or how and where such platforms store, use or process information, may need to be reviewed and approved.

Generally, the guidelines around the use of AI systems should, for example, not permit

providing confidential information to an AI system that uses such information to improve (or "train") AI systems, or that would otherwise be retained by the system and be provided or otherwise made available to third parties (including other users of the AI system).

Further, it may be wise to limit not only the type of AI platforms that can be leveraged but also the type of information that can be shared with a platform or the use that the platform may make of such information.

Parties should also consider ensuring that their confidentiality stipulations address the use of AI specifically, and that the applicable language is tailored to prevent the sharing of confidential information with specific (or all) AI platforms.

Arbitrators should also take note of the risks involved in sharing case information with an AI platform. More generally, arbitrators, parties and administering institutions may want to revise procedural rules to ensure that they govern the use of AI by all constituents.

Parties may also want to agree on AI-specific security protocols that would need to be followed when using AI platforms, which could mirror the current security protocols that parties generally agree to. For example, frameworks such as the ICCA-NYC Bar-CPR Cybersecurity Protocol for International Arbitration can be supplemented to address AI-specific concerns.

Regulations. Regulations around use of AI are evolving quickly, but many use cases are currently unregulated.The EU has enacted the EU AI Act to regulate the use of AI in EU Member States.It came into force on August 1, 2024, but its rules will generally take effect from February 2025 through August 2026.

The EU AI Act, which takes a risk-based approach, mandates increasing levels of restrictions and oversight as the risk presented by the regulated AI systems increases. One category of AI systems classified as "high risk" by the EU AI Act are AI systems "intended for the administration of justice," which, under to the Act, include "AI systems … used by alternative dispute resolution bodies."

While the Act's provisions with respect to "high-risk" AI systems are not yet in effect, and have not yet been applied by EU Member States, the EU AI Act appears to specifically regulate the use of AI systems by arbitration administering institutions.

We should expect other AI regulatory regimes to be passed across the globe in due course. Arbitration constituents will need to comply with the jurisdictional AI laws that apply to them.

Enforcement. For international disputes, arbitration constituents will have to scrutinize any new AI laws that are enacted and consider issues they may raise. If parties are subject to different legal regimes governing use of AI based on their place of business and one regime is more restrictive than the other, then due process, and thus enforcement, concerns arise.

Parties and arbitrators will likely want to address this issue early in the arbitration process, or even in the relevant dispute resolution agreements, to ensure equitable treatment of the parties and avoid any enforcement concerns.

More generally, as new regulations arise, all arbitration constituents will want to consider restrictions on the use of AI in courts that may impact the arbitration process and the enforceability of an arbitral award.They will need to scrutinize the AI regulatory scheme of the seat of

the arbitration as well as that of the jurisdictions where the arbitral award will be enforced.

Evidence Authentication Requirements. Using AI tools to gather, compile and analyze evidence should not be problematic in and of itself if the proper guardrails and review processes are implemented. However, the risk related to the misuse of AI can nonetheless be significant.

Although the ability to manipulate evidence is not new, manipulation or generation of evidence by AI can be significantly more difficult to detect.

Parties and arbitrators may not have the tools to conclusively determine that evidence has been manipulated or generated using AI. They may therefore want to agree on certain evidentiary rules and requirements with respect to evidence (digital or otherwise).

Such rules and requirements may include permitting expert testimony to address any suspicions or allegations around AI-generated evidence and requiring the parties who wish to submit forms of evidence particularly susceptible to AI-based manipulation to present evidence of authenticity.

Education on AI Usage. To optimize the benefits of AI use and minimize its risks, all arbitration constituents will want to ensure that they and their teams are appropriately trained on how to use AI and on its limitations and associated risks. This includes, for example, training on effective ways to formulate queries, and on appropriate and inappropriate uses of AI systems in the gathering of evidence, submission of documents, legal research, or formulating awards.

Training can also provide guidance with respect to tools to safeguard confidential information or with respect to appropriate oversight and scrutiny measures to mitigate the risk of biases and hallucinations.

Arbitration parties, arbitrators and administering institutions can all benefit from AI so long as its risks and limitations are fully understood and appropriately addressed. The use of AI should be reviewed throughout the arbitration process by all constituents.

Arbitrators and parties will want to consider stipulating the permitted uses and agreeing on protocols for its use in the first procedural order. They may also want to consider revisiting the matter as new AI regulations take effect or when there are key developments in AI technology that may affect its impact an ongoing arbitration process.

In due course, we should expect regulators to enact more AI-specific legislation and arbitration centers to provide additional guidance and rules on the use of AI by both arbitrators and arbitration parties. All constituents will need to develop and agree on a framework that leverages the cost and time efficiencies AI tools can provide while minimizing the associated risks.

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