

AI-ORIENTED ARBITRATION: SIGNIFICANCE AND CHALLENGES

Palak Sinha*

ABSTRACT

The digital revolution has marked the wake of the twenty-first century. The use of computers became a common dominating front in almost every field. To everyone's common knowledge, the litigation process that helps resolve issues between parties is lengthy, expensive, and time-consuming. This led to the need for Alternative Dispute Resolution (ADR) and which includes processes such as arbitration, negotiation, mediation, conciliation, etc. Arbitration has become quite common, as it is essential for the redressal of corporate matters relating to private institutions or entities. It is considered an inevitable innovation that is private, has a redressal resolution nature, and is speedy as well. Thus, in this technological advent world, the question arises as to whether the rise in technologies like Artificial Intelligence (AI) would impact Arbitration's capability of redressing conflicts and issues. This research paper is primarily focusing on the introduction of technology such as AI in arbitration and its significance and challenges. The aim is to understand the pros of AI in Arbitration as well as the cons of its use in this field. The paper attempts to evaluate whether AI is suitable to be an arbitrator in the near future or not.

Keywords: Arbitration, Alternate Dispute Resolution, Technology, Artificial Intelligence.

INTRODUCTION

In 1956, the term was coined by John McCarthy, a computer scientist as “the science and engineering of making intelligent machines”¹. AI is a technology that has human capabilities and can perform functions and operate on human intelligence. Earlier, computers were just used to store data, process it and perform arithmetic and mathematical calculations now, this automatic machine is designed to understand and learn from past behavior and have a mind of its own more smartly. Today, AI is frequently used in some industries like manufacturing, advertisement, healthcare, etc. which ensures no or less room for error by minimizing human intervention. The use of the highest-level technology in these fields has proved to be

*BA LLB, FIFTH YEAR, SYMBIOSIS LAW SCHOOL, NOIDA.

¹ Prof. Christopher Manning, 'Artificial Intelligence Definitions' (Stanford University, September 2020) <<https://hai.stanford.edu/sites/default/files/2020-09/AI-Definitions-HAI.pdf>> accessed 13 June 2023.

extremely advantageous as it is efficient, has a continuous ability to perform functions, and lacks exhaustion. AI and Law at the intersection are dependent on the dedicated use of computers for legal search and purposes.

The need for instant solutions to resolve disputes and conflicts led to the integration of AI in the field of arbitration. It has impacted the over-burdened legal system positively by resolving cases in a quick, efficient, and timeless manner. Companies and corporate institutions have surely profited from the technological investments and introduction of these technologies. Thus, the first to prove and promote its success were technology giants like Microsoft and Google. It is hoped that with this rate of success, it will soon be incorporated in all sectors. This success is not however full proof, it has some loopholes and cons as well. The introduction of such advancements has led to the loss of human interaction thus, resulting in unemployment and that is deeply affecting our society. As per legislation, the Arbitration and Conciliation Act does not mandate who should be an arbitrator but, it only specifically specifies Arbitration Tribunal to be the ultimate interpreter and panel to govern arbitration conflicts and issues².

It is considered that technology has the stunning ability to outstrip human practices and tasks performed by them. Many sources for legal research like legal databases such as Westlaw, Google, and LexisNexis provide results based on AI-infused technologies and believe that technology use in arbitration reduces the cost of litigation and enhances efficiency³. The AI programs are supposed to be capable of independent learning and so considered to produce better results than that by the human arbitrators. Despite conservativeness, complexities, and conflicting debates, slowly this traditional resistance against the use of new technologies in the legal field ended or diminished. It has efficiently streamlined the administrative tasks of the arbitrators and focuses on deliberating outcomes based on constructive arguments and facts of the case. As an issue that has endless potential, AI in Arbitration sure has controversial applications and patterns that are tremendous to comprehend.

AI's ELIGIBILITY TO BE AN ARBITRATOR

The basic question raised before debating about the significance of AI-oriented Arbitration is whether it is eligible to be an Arbitrator. International Law does not specify any special

² Arbitration and Conciliation Act 1996, s 2(d).

³ Megan Turchi, 'The future of International Arbitration may not be AI' <<https://thinksetmag.com/insights/ia-future-ai>> accessed on 13 June 2023.

requirements or mandate that an arbitrator must be a human but, it surely lays down attributes and standards that are possible to be carried out by only humans⁴. As, per the national laws of some countries, only a natural person is eligible to act as an arbitrator thus, leaving no scope for AI Arbitrator in international arbitration. In a normal stance, the qualification, and standards mentioned in the national laws of the countries decide their eligibility. In most cases, it is experience or number of years practiced or special skills or expertise in the particular field of law that becomes the ultimate factor.

Arbitration is a dispute resolution mechanism that allows parties to choose for settlement of the dispute by deciding the structure and procedure of arbitration. Many countries like Finland⁵, Egypt⁶, Italy⁷, Iceland⁸, and Sweden⁹ have specific laws that only a person in capacity can act as an arbitrator and those do not include an individual who is bankrupt, minor, or incapacitated. Whereas, Section 5 of the Federal Arbitration Act of the U.S. refers term 'arbitrator' as a gender pronoun. Thus, implying that they have to be natural persons but, nothing mentions that AI will not be considered an arbitrator. This leaves the possibility for AI-oriented Arbitration in the near future unless any specific provision or law provides otherwise. Overall, arbitration facilitates party autonomy.

THE SCOPE OF ARTIFICIAL INTELLIGENCE AND LAW

The Indian Judiciary uses AI in one way or the other like Supreme Courts and High Courts have digitalized records for all case files with updates and sometimes, there might be circumstances that led to proceedings through digital devices as well. Our judicial system is based on witness testimonies and credible sources of pieces of evidence, and evaluating the two together requires interpretation and balance with justice. Although, AI is captured in small meanings of interpretations when it comes to the law like drafting contracts, maintaining legal records, legal writing, document discovery, etc. AI uses automatic programs to compute and process human data and loads of information, this can reduce the burden on the legal system as well as parties. There are many benefits of linking technology with arbitration like its effectiveness, convenience, and ability to resolve conflicts.

⁴ New York Convention on 'Recognition and Enforcement of Arbitral Awards'.

⁵ Finland Arbitration Act, Article 8.

⁶ The Law concerning Arbitration in Civil and Commercial Matters, Article 16(1).

⁷ Code of Civil Procedure Italy, Article 812.

⁸ Contractual Arbitration Act Iceland, Article 6.

⁹ Arbitration Act of Sweden, s 7.

The possible scope for AI in Arbitration could be the replacement of a human arbitrator with an AI-enabled system. It will eliminate all complexes as it will be based on the programming of algorithms. It will ensure the withdrawal of an entire process of selecting and appointing an arbitrator for each case that comes to the tribunal for settlement. However, this will be a controversial issue as a few rights to parties like the choice of arbitrator will be removed completely from the system¹⁰. Another way could be appointing a human arbitrator with the power to access an AI-enabled system to resolve disputes. This can help in reaching conclusions faster as Arbitrator would pass the award based on the analyzed documentation managed by the AI tool. It can be used as a source for expert opinion to the arbitrators as it will evaluate all evidence furnished in proceedings without any bias.

EVALUATION OF COMPUTER-BASED ARBITRATION METHOD

Over the years, computers have increasingly become a dominating part of our lives and are interwoven into our daily practices and tasks. Artificial Intelligence is considered to be the tool of the future, it is a system of intellect with capabilities and intelligence similar to that of humans. It is predicted that the complex and lengthy procedures of Arbitration will be eventually replaced by simple and efficient AI decision tools. It will help the traditional arbitration system and unload its burden. Humans tend to cause billions of disagreements or get into conflicts that escalate the rapid solution demands on the system. Though, it still doesn't answer the most widely debated question, whether an AI-based system for Arbitration will eliminate the need for humans in this system. So, AI-based Arbitrators can be beneficial and detrimental at the same time.

Certainly, the capabilities of an AI lawyer at analyzing documents and understanding court procedures cannot be undermined. It takes years to get perfection in these skills and to be able to connect facts with the law and present them before the Court convincingly. However, there is a capacity for all these tasks and skills. Yet, technology remains unclear on its accuracy rate to imitate human intelligence and functioning. Whether the machines will be able to eliminate the biased claims and defenses while connecting facts and law. As the machine can only be as smart as the quality of data it receives. After all, it is just a computer, a machine run by programs and algorithms made by humans. In such a case, it would be up to the parties to enter all relevant data and information relating to the case into the system so, that the AI Arbitrator can decide accordingly.

¹⁰ Arbitration and Conciliation Act 1996, s 11.

Arbitration is a process governed by principles of equity, natural justice, and conscience and not some rigorous set of rules. This is known as “due process” and it is unclear whether the decision by an AI-based arbitrator would justify these or not. While dealing with Arbitration, the AI may also face some issues like lack of adequate data to resolve concerns like document discovery. And, in any case, oral hearing statements would not frame a part of the AI system as it cannot hear arguments of parties like a human arbitrator. So, only if the documents contain the entire issue then, only can the AI system operate on them efficiently. Given the fact that most of the Arbitration rulings are confidential, finding the best suitable dataset for the system could be a tremendous task. In this present form, the Arbitration and Conciliation Act, of 1996 does not support an AI-based mechanism for Arbitral disputes.

BENEFITS OF AI-ORIENTED ARBITRATION

AI helps in reviewing the immeasurable amount of information in an arbitration conflict and then, aims to segregate the relevant data for the beneficial particulars of the case. It saves time and money as well as its operation is not based on human emotions but on pure logic and algorithms. It can be used for discovery and admissibility of evidence in an arbitration case and the direct coding efficiently produces documents for the case. Thus, traditional tasks performed by humans are completely replaceable with the use of AI in the field of Arbitration. There is a high level of infusion of technology advances in the legal field. It's the logic of learning that is combined with the intelligence of human thinking into a computer program. In the case of *Pyrrho Investments Ltd. Vs. MWB Property Ltd.*¹¹ the government of the U.K. allowed predictive coding for the first time, to search, discover, and sort documents according to the relevance determined by the case.

AI is based on machines which means it does not have any emotional relations or sentimental values thus, no influence or bias in decision-making while ensuring self-sufficiency in performing all tasks. It can enable the applications to schedule instant meetings to assist the parties to Arbitration. This will help the arbitrator in arranging meetings for discussing agendas like theme and venue without much interference from humans. Since, all programs and algorithms used in AI tools would be man-made thus, enlisting all possible defects and defaults can be prepared and this will guarantee no uncertainty. It can state all its features and programming terms, this guarantees the independence of the AI-based mechanism and tools used.

¹¹ *Pyrrho Investments Ltd. vs. MWB Property Ltd.* [2016] EWHC 256.

AI can also assist parties in selecting an appropriate arbitrator for each kind of conflict or depending on the nature of the dispute. These tools can also help in organizing, analyzing, researching, and summarizing the pieces of evidence presented in the Tribunal during proceedings¹². It can provide drafting suggestions after an award is passed appropriately. This will reduce the time taken for framing all documents in order and according to the award passed. Thus, using AI as a tool of Arbitration to resolve disputes has many advantages like its pattern-oriented decisions, data compilation, speed, and less time-consuming. It comes with less or no intervention of humans thus, it can be observed that it is judgement free, reduces influence or any bias possible. However, these pros have not eliminated all blockades for our judicial system.

CHALLENGES OF AI-ORIENTED ARBITRATION

The success rate of AI is undeniable but, there are several roadblocks in this journey. Like, it lacks human conscience and cannot balance justice without morals. Although it is a technological advancement that evolved with tech innovations, it is capable of being hacked. Thus, it poses a security threat to all data and information stored online on devices using these platforms. People have faith in the judicial system and its mechanism as it ensures them relief based on the balance of power and justice. The proceedings are expected to be fair, unbiased, and moral. However, machines like computers can perform functions just like humans but, they lack conscience, empathy, and faith, which makes them less reliable and untrustworthy. This security threat can lead to the fabrication of false evidence or the manipulation of evidential documents by hackers.

There could be leakage of sensitive and private information relating to the case. A single system failure can lead to an unsuccessful attempt in resolving the conflict and the entire legal system can be impacted with just a problem of internet breakdown. Its ability to protect important valuable information and data is a challenging issue for the use of AI-powered Arbitrators. Whereas, failure of the internet to access information relating to the case can aggravate situations and thus, lead to miscommunications between the parties. All of this can affect the decision in a case in so many ways possible. Computer offenses such as trojans, viruses, or software piracy are also not alien and are capable of corrupting or destroying

¹² AMLEGALS, 'AI & Its Effects on Arbitration' (Mondaq, June 2020) <<https://www.mondaq.com/india/arbitration--dispute-resolution/956956/ai--its-effects-on-arbitration>> accessed on 13 June 2023.

important case files or information relating to the case. Whereas, the question of biasness and efficiency in awards when compared to arbitration proceedings is not comparable and thus, still questionable on its patterns¹³.

The incorporation of technology as advanced as AI requires a huge investment and time as training and adjusting of entire system with a new technology is difficult. It directly impacts human employment by, replacing human beings in sectors where it is competent to do the work. It lacks flexibility and is prone to errors as the programmers designing such tools are humans. The most vital component of an Arbitration proceeding is its essential data and secrecy of valuable information relating to the case and since this intellectual technology source is just some program and a machine is responsible for taking decisions, data privacy is an issue that remains unresolved. This system lacks transparency in its mannerism and patterns, such complications can make parties lose faith in the system and not rely on such sources. It involves novel and complex legal issues, equity concerns, and public policy issues¹⁴.

AI IN ONLINE DISPUTE RESOLUTION

The concerns relating to-oriented Arbitration have deprived the scope of its usage in other aspects of Arbitration. The rapid development and technological advancement led to the discovery of an innovative way to resolve conflicts and disputes i.e. by way of technology. The possible scope of AI and Online Dispute Resolution (ODR) has never been discussed or properly addressed. The growth of Online Dispute Resolution in real terms represents a future mechanism for the resolution of arbitral disputes. ODR represents a combination of prominent arbitration techniques and modern evolving technology. AI systems can be used as a decision and knowledge support system in ODR. The intelligent interface system would directly assist parties by bridging the communication gap between humans and other computer tools. It can help in synthesizing qualitative information for the parties. This was no surprise as an introduction to technology in any field initially forms a basis by relieving humans from multi-tasking and performing several responsibilities at once.

¹³ Kathleen Paisley and Edna Sussman, 'Artificial Intelligence Challenges and Opportunities for International Arbitration' (NCIA, 2021) <<https://sussmanadr.com/wp-content/uploads/2018/12/artificial-intelligence-in-arbitration-NYSBA-spring-2018-Sussman.pdf>> accessed on 14 June 2023.

¹⁴ McCarthy Tetrault, 'Arbitration and AI-friends or foes' (McCarthy Tetrault, August 2022) <https://www.mccarthy.ca/en/insights/blogs/techlex/arbitration-and-ai-friends-or-foes?utm_source=mondaq&utm_medium=syndication&utm_term=Litigation-Mediation-Arbitration&utm_content=articleoriginal&utm_campaign=article> accessed 14 June 2023.

The incorporation of AI in ODR is a representation of the growth of technologies that offer easy access, and efficient resolution processes at a cheaper price. It can prove to be a potential interconnecting tool between developed and the loping countries. Thus, there are many reasons to believe that AI in ODR will ultimately benefit. However, leaving AI without supervision to develop parameters on its own can cause a technological drift between selective and qualitative data. The machine translation concerns relating to AI accessing justice without bias are unanswered. It is imperative to ensure that an AI-oriented system for ODR does not develop obstacles or create problems for the less affluent. Nonetheless, blind reliance on AI can prove to be detrimental. So, it must be ensured that to its effectiveness and durability, it is in compliance and access to the justice standards in any form.

CURRENT LAWS AND THE FUTURE OF AI-ORIENTED ARBITRATION

As of today, India does not have any specific codified rules or laws to govern AI-based Arbitration. There are no specific government-issued guidelines that could regulate AI per se. however, obligations for the institutions regarding the same are laid down in the Information Technology Act, 2000, and the regulations that govern the same. Though, steps like setting up a few committees that could incorporate a strategy for the formulation, implementation, and incorporation of AI-based systems into the mainstream are taken by the Ministry of Electronics and Information Technology (MEITY). Niti Aayog, the government think-tank has also issued in its report some technical advice, and policies for the central and state government, to help them welcome the participation of AI across all sectors.

The Indian government has shown interest in becoming a key participant in conversing the development of AI and helping promote its adoption and regulation at the global level. The Global Partnership on Artificial Intelligence (GPAI), is a multi-stakeholder initiative that aims to fill the gap between the theory and actual practice of AI globally. It supports unconventional and progressive research activities relating to AI practice and supports a human-centric development responsibly. The copyright protection and patenting of AI-based software and algorithms are governed by the Copyright Act, 1957, and the Patents Act, 1970 of India. The Securities and Exchange Board of India (SEBI) has developed an AI-based

system to scan stock market shows and create a database for recommendations made relating to it¹⁵.

As per Sections 10 and 11 of the Arbitration and Conciliation Act, 1996 which is the principal legislation governing Arbitration in India, the parties are given the choice to appoint arbitrators of any nationality or as agreed by them. Thus, this led to the question of whether AI-based arbitrators would come under this ambit. As, though AI Arbitrators are based on the set of data fed by humans and conform to the rules designed by the human creator. Thus, in the present form, it does imply that the Act allows non-humans to be an arbitrator as there is no specific restriction laid on this fact. However, this in itself does not mean that the appointment of any AI algorithm or program as an arbitrator would be facilitated. There may be issues relating to the lack of legal personhood granted to AI so far by the different legislations and rules laid by India to govern Arbitration.

AI can produce machine learning models to predict outcomes of pending cases, based on the facts of the case and pertinent precedents as inputs. These refined developments and predictions will surely help the future of legal practices. These can be effectively used by many law firms to plan out their litigation strategies and settlement negotiations in advance, to reduce the cumbersome process of drafting and filing in courts. Thus, AI-based automated tools and programs would not replace legal professionals however, they will improve their efficiency and competence to work out the analysis, decision-making, and various clerical tasks. AI has the potential to benefit arbitration but, there is a need to implement separate and distinct provisions under the legislation that specifically pertain to AI-based system usage in the field of Arbitration.

CONCLUSION

Under the ambit of this paper, an attempt has been made to identify various intricacies of incorporating AI in the field of Arbitration. It also suggests the scope of AI and technology in the legal field based on their advantages and analyses their disadvantages at the same time. Technological changes have always played a vital role in the development of the legal system. The functioning of AI revolves around communication, planning, reasoning, perception, and information used to manipulate and operate objects or things. Several

¹⁵ Abhishek Malhotra, 'Artificial Intelligence Comparative Guide' (Mondaq, June 2023) <<https://www.mondaq.com/india/technology/1059762/artificial-intelligence-comparative-guide>> accessed on 30 June 2023.

contributions of AI in the field of arbitration make burdensome paperwork in the legal profession comparatively uncomplicated and quick. There are many organizations and institutions like Arbilex and Arbitrator Intelligence that use Artificial Intelligence tools for legal purposes¹⁶. The advanced technology helps satisfy clients with legal consultancy services at a reasonable price. Inculcation of AI in Arbitration surely satisfies the growing trend of people choosing outside court settlement. However, AI in its present form is not advanced enough to replace humans completely in the system.

Although, there is no specific legal framework or laws relating to the use of Artificial Intelligence. Still, many machine and data advancement companies promote AI and its applications. AI is still in its capturing stage and there is potential to move from the inception towards processing the mega data created every day. From saving case data on computers to holding proceedings online, the impact of technology is undeniable. Due to its technological issues, it poses a threat to the security of valuable information and data relating to cases. However, it is almost impossible to neglect its contributions and advantages at the same time. It led to the evolution of the judiciary system and the development of the legal field in matters relating to arbitration. Thus, based on the above observations it can be concluded that incorporating AI into Arbitration is in its foundational stage and it's important to understand its limitations. It will require more steps to build upon before it becomes fully functional in all dimensions of Arbitration. Humans are necessary to appreciate and embrace the benefits that it has to offer.

Journal of Legal Research and Juridical Sciences

¹⁶ Srishti Pandey , 'Artificial Intelligence in the field of Arbitration: A rational Approach or a disruptive Myth' (Mondaq, April 2022)<<https://www.mondaq.com/india/arbitration--dispute-resolution/1186812/artificial-intelligence-in-the-field-of-arbitration-a-rational-approach-or-a-disruptive-myth>> accessed 13 June 2023.