

The Benefits and Challenges to Having Artificial Intelligence in Alternative Dispute Resolution

Zafira Hudani¹

In this article, the author explains that there are benefits and challenges that arise in relation to using artificial intelligence in the area of alternative dispute resolution. The author defines the concepts of alternative dispute resolution and the different types of artificial intelligence and concludes that the implementation of artificial intelligence can provide efficiency but must be regulated to provide a practical service.

In the area of alternative dispute resolution (ADR) conflicts are viewed or examined in different ways. With the evolution of technology comes increased flexibility that has removed the necessity for physically being present in the location where a mediation or arbitration takes place with platforms like Zoom and Microsoft Teams.² The newest challenge to providing dispute resolution services is the addition of artificial intelligence (AI). AI is a tool. As with any new technology there are benefits and challenges. The benefits of AI can include a simplification of gathering data and an increase in efficiency for the process as a whole. In contrast, the challenges may include legal and ethical concerns. Some concerns may include the autonomy of

¹ The author is a New York–licensed attorney, a registered mediator and an arbitrator in Georgia. The author may be contacted at zafirahudani@gmail.com.

² N. Darwazeh & C. Delchiaro, *The Pros and Cons of Virtual Hearings in International Arbitration*, Lexology (Mar. 15, 2024), <https://www.lexology.com/library/detail.aspx?g=12cba806-bda7-40bd-a14c-d42b0c9ba83d>.

the parties, the transparency of the process, and enforceability of a decision that is obtained because of the dispute resolution process.

Alternative Dispute Resolution

Alternative dispute resolution is a phrase used to describe the process of resolving conflicts without going to court.³ There are two main types of ADR that are commonly used.

The first is mediation. Mediation is the process in which a third party assists the parties to a conflict in negotiations with the goal of achieving a solution that is acceptable to all parties involved.⁴

The second is arbitration. Arbitration is a method in which the parties select or appoint a group of individuals, usually with expertise in a particular field to assist in the resolution of the conflict between the parties.⁵

Both ADR processes share the principles of neutrality, impartiality, and confidentiality.

The Benefits of AI

Before embarking on assessing the benefits and challenges of AI, it is crucial to define it. AI has been described as the “theory and development of computer systems able to perform tasks normally requiring human intelligence, such as visual perception, speech recognition, decision-making, and translation between languages.”⁶ According to the National Artificial Intelligence Act of 2020, AI has been described as “a machine-based system that

³ What Is ADR? https://ww2.nycourts.gov/ip/adr/What_Is_ADR.shtml.

⁴ Overview of Arbitration & Mediation, <https://www.finra.org/arbitration-mediation/about/arbitration-vs-mediation>.

⁵ Id.

⁶ B. Marr, The Key Definitions of Artificial Intelligence (AI) That Explain Its Importance, *Forbes* (Feb. 14, 2018), <https://www.forbes.com/>

can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments. Artificial intelligence systems use machine and human-based inputs to:

1. Perceive real and virtual environments;
2. Abstract such perceptions into models through analysis in an automated manner; and
3. Use model inference to formulate options for information or action.”⁷

The concept of AI can be further explained by dividing it into three different types of AI. Assisted intelligence enhances the work completed by a human being,⁸ augmented intelligence enables humans to accomplish a task that would not otherwise be possible,⁹ and automated intelligence describes a situation in which a task can be completely performed by AI.¹⁰

AI can be used as a tool to assist in the ADR process. For example, augmented intelligence can increase efficiency by having the ability to analyze large quantities of data. Automated intelligence may have the ability to efficiently conduct administrative tasks that will presumably reduce the time and cost associated with those tasks. In addition, AI may be able to help translate data if an interpreter is not available.¹¹

sites/bernardmarr/2018/02/14/the-key-definitions-of-artificial-intelligence-ai-that-explain-its-importance/?sh=11ccbdcf4f5d.

⁷ 15 U.S.C. § 9401: Definitions, [https://uscode.house.gov/view.xhtml?req=\(title:15%20section:9401%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:15%20section:9401%20edition:prelim)).

⁸ K. Höne & Diplo Foundation, *Mediation and Artificial Intelligence: Notes on the Future of International Conflict Resolution* (Nov. 2019), <https://www.diplomacy.edu/resource/mediation-and-artificial-intelligence-notes-on-the-future-of-international-conflict-resolution/>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ C. Salger & S. Weisheit, *Artificial Intelligence (AI) in Mediation—ChatGPT as Mediator 4.0*, *Mediate.com* (July 5, 2023), <https://mediate.com/artificial-intelligence-ai-in-mediation-chatgpt-as-mediator-4-0/>.

Challenges of AI

AI has both legal and ethical challenges. The first is that most countries have found it difficult to establish a regulatory framework to address the challenges that AI has or has the potential to create.¹² However, at this time countries around the globe have drafts of bills and other regulations to address the potential legal issues that can arise with respect to AI.¹³

In the United States, the executive order on the safe, secure, and trustworthy development and use of AI (Executive Order) highlights safety, security, supporting those in the workforce, protecting privacy and the civil rights of individuals.¹⁴ In contrast to the Executive Order, the European Union has been the first to create a comprehensive legal framework designed to assist in overcoming the challenges of AI. The Artificial Intelligence Act (the Act) has the goal of creating a framework that prohibits AI from creating illegal content.¹⁵ The Act defines AI and classifies AI systems into different categories, which include prohibited systems (i.e., if used for social scoring), high risk systems (i.e., using AI in biometric surveillance systems), and minimal risk systems (i.e., a chatbot).¹⁶

¹² In the United States, legislation has been introduced in Congress to address the management of the risks associated with AI. The legislation, S.3205, is titled Federal Artificial Intelligence Risk Management Act of 2023.

¹³ See Global AI Law and Policy Tracker, IAPP Research and Insights, (2024), https://iapp.org/media/pdf/resource_center/global_ai_law_policy_tracker.pdf.

¹⁴ B.M. Neill, J.D. Hallmark, R.J. Jackson & D. Diasio, Key Takeaways from the Biden Administration Executive Order on AI (Oct. 31, 2023), https://www.ey.com/en_us/public-policy/key-takeaways-from-the-biden-administration-executive-order-on-ai.

¹⁵ M. Seavy, The New Legal Guardrails in Artificial Intelligence, Licensing International (Mar. 20, 2024), https://licensinginternational.org/news/the-new-legal-guardrails-in-artificial-intelligence/?mc_cid=e0e4afce2a&mc_eid=844dd96b41.

¹⁶ EYGM Limited, Political Agreement Reached on the EU Artificial Intelligence Act (Dec. 10, 2023), https://assets.ey.com/content/dam/ey-sites/ey-com/en_us/topics/ai/ey-eu-ai-act-political-agreement-overview-10-december-2023.pdf.

The second and perhaps most important issue include platforms that use AI that are not accurate.¹⁷ For example, “ChatGPT and other intelligent chatbots have no process to determine the difference between how the world is and how it is not.”¹⁸ In addition, it has been found that ChatGPT “lacks the ability to truly understand the complexity of human language and conversation.”¹⁹ In practice this means that the predictions or information given by AI do not consider the effect the dispute may have on a party’s day-to-day living. This concept is codified in “Article 92 of The German Grundgesetz (The German Basic Law) provides that the judicial power and core functions of the judiciary are entrusted (anvertraut) to judges and individuals.”²⁰

The third legal issue involves the principle of confidentiality. Confidentiality means that no information will be disclosed unless the party who provides the information agrees to share it. In addition, confidentiality prohibits the parties to mediation or arbitration from disclosing information gained through the process. It is possible that this prohibition can be waived, but keeping information confidential is seen as a benefit to ADR. This is because it may allow for increased transparency between the parties that may not have been possible otherwise.

Confidentiality plays a major role in situations involving data privacy. Therefore, it is recommended that when providing information to a system with AI capabilities, individuals must keep the following in mind: “keep sensitive and personal data to a minimum, make the processing of personal data transparent

¹⁷ Elizaveta A. Gromova, Daniel Brantes Ferreira & Ildar R. Begishev, ChatGPT and Other Intelligent Chatbots: Legal, Ethical and Dispute Resolution Concerns, *Revista Brasileira De Alternative Resolution* (2023), <https://rbadr.emnuvens.com.br/rbadr/article/view/213>.

¹⁸ *Id.*

¹⁹ Irene Solaiman & Christy Dennison, Process for Adapting Language Models to Society (PALMS) with Values-Targeted Datasets, <https://proceedings.neurips.cc/paper/2021/file/2e855f9489df0712b4bd8ea9e2848c5a-Paper.pdf>.

²⁰ Sophia Henrich & Florian Pötzlberger, AI and Arbitration: The German Perspective, *Lexology* (Feb. 15, 2024), <https://www.lexology.com/library/detail.aspx?g=of9ce6a8-b1f8-4231-94ea-5acbf88d67e2>.

to those whose data is used, ensure that the use of the personal data is legitimate and proportionate, encrypt data that is stored, restrict access to data to only those who are directly involved, destroy the data when the purpose for which it was collected is no longer applicable and keep sensitive data on secure internal servers or if available, reliable external hosts.”²¹ These challenges create an additional layer of complexity to the ADR process and requires those mediators and arbitrators to be knowledgeable about AI and be transparent with the parties in disclosing the risks associated with using AI.²²

In the area of ADR, it is common for individual countries to become members of a treaty or convention in order to ensure the enforceability of an agreement reached by the parties through the ADR process the parties choose. Examples include the Singapore Convention on Mediation and the New York Convention on the Recognition and Enforcement of Arbitral Awards 1958 (the New York Convention).

The issue of enforceability of a decision that has been reached using AI is an additional concern. As mentioned above, the lack of uniform rules to regulate AI may cause issues with the enforceability of settlement agreements or arbitral awards. A practical example of this can be seen in the New York Convention, which has an exception in Article V, Section 2b, for the enforcement of the arbitral award on the grounds of public policy. This may be a basis for refusing to enforce an arbitral award if it is found to go against the public policy of the seat of arbitration.²³ In the future, there may be a similar convention related to the use of AI in the area of ADR.

The ethical issues surrounding the ADR process involve the principles of neutrality and impartiality. Neutrality means that the mediator should not let his or her personal beliefs become a factor in the ADR process.²⁴ This is because the parties generally choose ADR in order to have more control over the

²¹ Höne, *supra* note 8.

²² *Id.*

²³ Henrich & Pötzlberger, *supra* note 20.

²⁴ CIARB, What Is Meant by Neutrality in Mediation (Jan. 16, 2019), <https://www.ciarb.org/news/what-is-meant-by-neutrality-in-mediation/>.

decision-making process. At the same time, a mediator is also supposed to be impartial. This means that the mediator should not favor one party over the other based on a party's personal characteristics or beliefs, economic status, or other factors.²⁵

These ethical principles may be called into question with the use of AI. For example, it is known that the data that is available via ChatGPT is based on the data that has been put into the database that it uses.²⁶ Therefore, AI functions on the basis of the information humans input. Taking this into account, it is almost inevitable that the result given by AI that is bias will create an outcome that is biased as well. For this reason, the use of AI could increase biases in decision-making.²⁷

The concepts of neutrality and partiality are indeed of great importance. However, it is crucial to note that at this time AI is driven by humans. The cornerstone of ADR is party autonomy. Party autonomy is a concept that means that parties are the primary decision makers in this process. The mediator/arbitrator is seen as a third party that guides the parties through the process. The mediator/arbitrator has no decision-making authority. The existence of AI is best seen as a mechanism to assist the parties in the process. Therefore, it should not be seen as a replacement for critical thinking.

The benefits of ADR include that it is a relatively fast process compared to traditional litigation. The neutrality and impartiality of the mediator/arbitrator is also an advantage as the parties to the dispute are the primary decision makers. The principle of confidentiality provides the parties with the knowledge that the information shared during the process will not be made public. AI adds benefits to the ADR process that include but are not limited to increased efficiency and the ability to sort through large amounts of data. The challenges include the legality of using AI and the impact AI will have on the neutrality, impartiality, and confidentiality of the ADR process as a whole.

²⁵ Ethical Standards for Arbitrators & Neutral Evaluators, https://ww2.nycourts.gov/courts/comdiv/ny/ADR_ethicsforarbitrators.shtml#:~:text=1,the%20arbitrator%20or%20neutral%20evaluator.

²⁶ Gromova et al., *supra* note 17.

²⁷ Höne, *supra* note 8.