



TECH

TECH IN ARBITRATION



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PERSPECTIVES

1. EUROPE IS LOSING CONTROL OVER ACCESS TO BATTERIES AND TECHNOLOGICAL INNOVATIONS – CHINA IS RUNNING THE SHOW BEHIND THE SCENES

In this world of constantly developing technology, it is clear that change is coming for the legal profession. Artificial intelligence (“AI”) is only one of a number of new technologies said to be threatening or revolutionising the legal industry. Lawyers attend conferences on new technology and leave more aware than ever of the challenges of AI, Online Dispute Resolution (“ODR”), GDPR, cyberattacks on law firms and even blockchain.

However, from the perspective of a forensic technology expert, the legal profession is not quite under threat. There are some interesting legal technologies arriving and some old technologies re-emerging that are worth mentioning, but, overall, jobs are safe. This is even more so the case for arbitration.

Arbitration is not the most innovative of domains in terms of technology. Investigations, litigation and regulatory breaches, by contrast, have seen significant change, but the status quo of the arbitration world seems likely to remain intact, at least in the near future.

There appears to be a certain degree of inertia in arbitration when it comes to technology. We can see this inertia with ODR, for example. ODR systems have

recently come to be regarded as game changers in arbitration for SMEs, with India, the UAE, Hong Kong and Singapore leading the charge. ODRs promise democratised, accessible, affordable, and rapid resolutions. However, such a revolution was forecast decades ago when initiatives like the Virtual Magistrate Project in 1996 and Net Case in 2005 were set to act as the catalysts for it. They had little success. That said, many disputes never make it into the formalised (and expensive) arbitration world; as such, there may yet be room for ODR to grow. For example, ODR could be useful today in small-but-frequent online transactions such as Amazon purchases. These sorts of disputes, however, are not likely to need lawyers, arbitrators or experts.

In today’s world, most of the population can easily access online tools via their mobile devices, but the arbitration sphere has very little forcing it into the cyber age. Just because there are new technological tools available, it does not mean that they should be applied to everything. For example, the powerful document review platforms that now incorporate AI, most notably used to support huge US litigation cases, are far too sophisticated for smaller disputes. Where there is a small number of documents, or where the issues are legal points or financial calculations, there is simply no need. Technological revolutions are more likely to affect industries with a high degree of simple, repetitive tasks with high volume. Google Maps, AirBnB and Uber are good examples. These services are almost the complete opposite of what is required in arbitration. There are undoubtedly elements of arbitral work that can benefit from technology, but, globally, little will change.

2. REVIEW OF TECHNOLOGIES

Away from the latest technological innovations, there is still plenty of progress being made. The continuing reduction in the use of paper is good, if humble, progress. This may not seem to be much of an advance but many lawyers and experts today still work with hard copy far more than is necessary. Better use of office management packages, increased use of document review systems, live tribunal visual aids (including live transcripts) and even the use of “new” ODR platforms are all to be expected to some degree going forward.

The use of eDiscovery-type document review platforms is slowly being adopted and becoming more prevalent. These platforms (also referred to as eRooms, virtual rooms or document databases) are now standard in litigation and investigations. As a result, legal professionals have become accustomed to using them when the volume of documents and emails warrants it. Reductions in the cost of these systems should also contribute to their increased use. The more advanced components of these tools like concept searching, email threading, and AI are crucial when managing large volumes of data. However, in arbitration, absent disclosure requirements, these platforms would at most only be used for their keyword search functionality, collaborative review and formal legal production of exhibits.

An interesting subsidiary use of document review systems may arise from the EU General Data Protection Regulations legislation. The two main impact points of



GDPR on the arbitration world are the treatment of personal data and the protection of that data. The document review tools that are used to search for documents for review can easily be used to find personal documents and emails for exclusion. This offers a potentially reasonable and defensible approach to managing the GDPR personal data risk. Online review platforms usually have tight security including controls like two-factor authentication required to gain access to the documents. Such controls are similar to the security steps required to access online banking or the additional steps users need to take when their Amazon, Facebook or Google accounts detect suspicious activity. As an aside, post GDPR, it makes sense for all of us to start treating data in the same way that banks treat credit and debt. Money needs to be kept safe and the liabilities need to be limited or disposed of. You and your clients' data needs to be locked away and old data needs to be deleted as soon as it is no longer required. Otherwise, you need to be willing to be penalised 4% of your global revenues – the maximum fine under GDPR.

3. OPPORTUNITIES AND THREATS

Unfortunately, an area of real change is in hacking. The legal world, as well as the rest of the global professional services industry, is increasingly targeted by cyberattacks. These largescale attacks are performed by nation-state actors, organised crime, or even hackers. There are now numerous examples of law firms being breached, with secrets being leaked or financial insights being exploited by governments or racketeers. This is

not new, but breaches have become more prevalent and more newsworthy. In addition, hackers are not only interested in the big players – cyber breach tools are automated and prolific. They scan and probe everywhere, searching for ways to steal and blackmail. Legal professionals must be vigilant – both for themselves and for their clients. The financial and reputational risks are high and it is reassuring to see that the ICC has recognised the threat and released a guidance paper on this topic, which provides an overview and some useful tips to protect data.

Returning to AI, there are a few other areas where it is entering into the legal sphere. One example is offered by LegalMation, which uses IBM's Watson AI engine to draft litigation response documents and claims to save 80% of the drafting time. AI may also be used to predict the results of litigation cases. One such tool claims that it is able to predict the result 70% of the time. It is important to note that AI systems need large volumes of historical information in order to predict outcomes. Most arbitrations are, by their very nature, confidential thus limiting AI's ability to replicate an arbitrator unless either (i) litigation records were used to predict arbitration outcomes or (ii) law firms or arbitration groups start to pool their award data repositories. Only after a foundation of information was pooled would it be possible to see AI being used to help inform the arbitration process. Eventually, this AI could be treated as an independent and non-binding advisor, expert or (additional) arbitrator.

If and when AI can be used in arbitration, potential alternative use cases may also be found. For parties seeking legal funding, AI could be used to predict the likelihood of success and whether the action is worth funding. A less likely scenario is the use of AI to identify outliers or patterns to reveal unfair or unprofessional conduct, for example, detecting when arbitrators have been bribed to rig a decision.

In any case, adoption of AI in the world of arbitration will be a slow process. A technological expert from IBM's Watson team claimed that they were originally throwing every scenario at AI and expecting significant results, but achieved little success. Now, the team is being more measured and pragmatic about what is possible and what to expect. The more information that goes into AI, the more effective it becomes; eventually, AI will integrate into arbitration, but not in the immediate future.

Another topic of much excitement, when talking about technology, is blockchain. However, when it comes to arbitration, its application seems somewhat limited. One potential application could be to verify arbitral awards and determine the uptake of smart contracts in the business world. In theory, blockchain could be used to add a layer of anonymisation on top of the confidentiality already built into most arbitrations; in practice, however, it would be very difficult to execute. Other areas of focus tend to be on work arising from disputes in the fledgling cryptocurrency/blockchain industry or blockchain's use in smart contracts.



4. FORENSIC TECHNOLOGY

What about forensic technology? In highly simplified terms, forensic technology is specialist IT help desk support to forensic accountants, experts, investigators and lawyers. When technical issues arise in legal matters, forensic technology experts find solutions to overcome them or to save time. For example, tools can be created that can automatically process and consolidate hundreds of spreadsheets in seconds, saving legal and financial teams countless days of manual data manipulation, which would have been both painful and prone to error. In the future, innumerable bespoke tools will be developed, either in-house or commercially. It is already possible to buy contract analysis tools or add-ins, which simplify large and/or repetitive contract consistency or anomaly checks. It is reasonable to expect an increase of backroom specialised technology support within arbitration teams.

It is likely that a new type of lawyer or a new lawyer skillset emerges in the next generation. Laws and contracts are written in a very similar fashion to the programming of code. They are both a logical sequence of IFs, THENs and EXCEPTIONs. There are already many different programming languages; the creation of a new language that allows lawyers to create smart contracts easily does not seem beyond the realms of possibility. These smart contract creation packages will have connectors to internet services such as email, online databases, banks and ODR platforms allowing them to automatically interact with real-world business triggers and actions. This introduction of technological experts

and AI into the legal community may lead to friction for the older generation, but it may also lead to innovative ways to serve clients.

When looking at the history of new technology in arbitration, it is possible to see the slow introduction of “amazing” and “revolutionary” technologies such as email, Dropbox, and video conferencing. Now, it is possible to imagine a future where construction dispute experts give evidence using virtual reality: where avatars use virtual dynamic dashboards that clearly show the critical path and the underlying drivers of a project; where a virtual rendering of the infrastructure project is shown, which grows and shrinks when the virtual timeline slides to points of interest; where arbitrators and other parties can interact with the simulations including pinching in to zoom in to see details, highlights or additional notes; and where, as one of the arbitrators, an AI engine interacts, questions and contributes to the fair, informed and wise assessment of the matters in dispute. This possibility, however, remains limited to science fiction for the time being...

