

BIG QUESTION

Assessing the impact of
the Singapore Convention

POLITICAL RISK

HOW FOREIGN INVESTORS
INSURE AGAINST IT

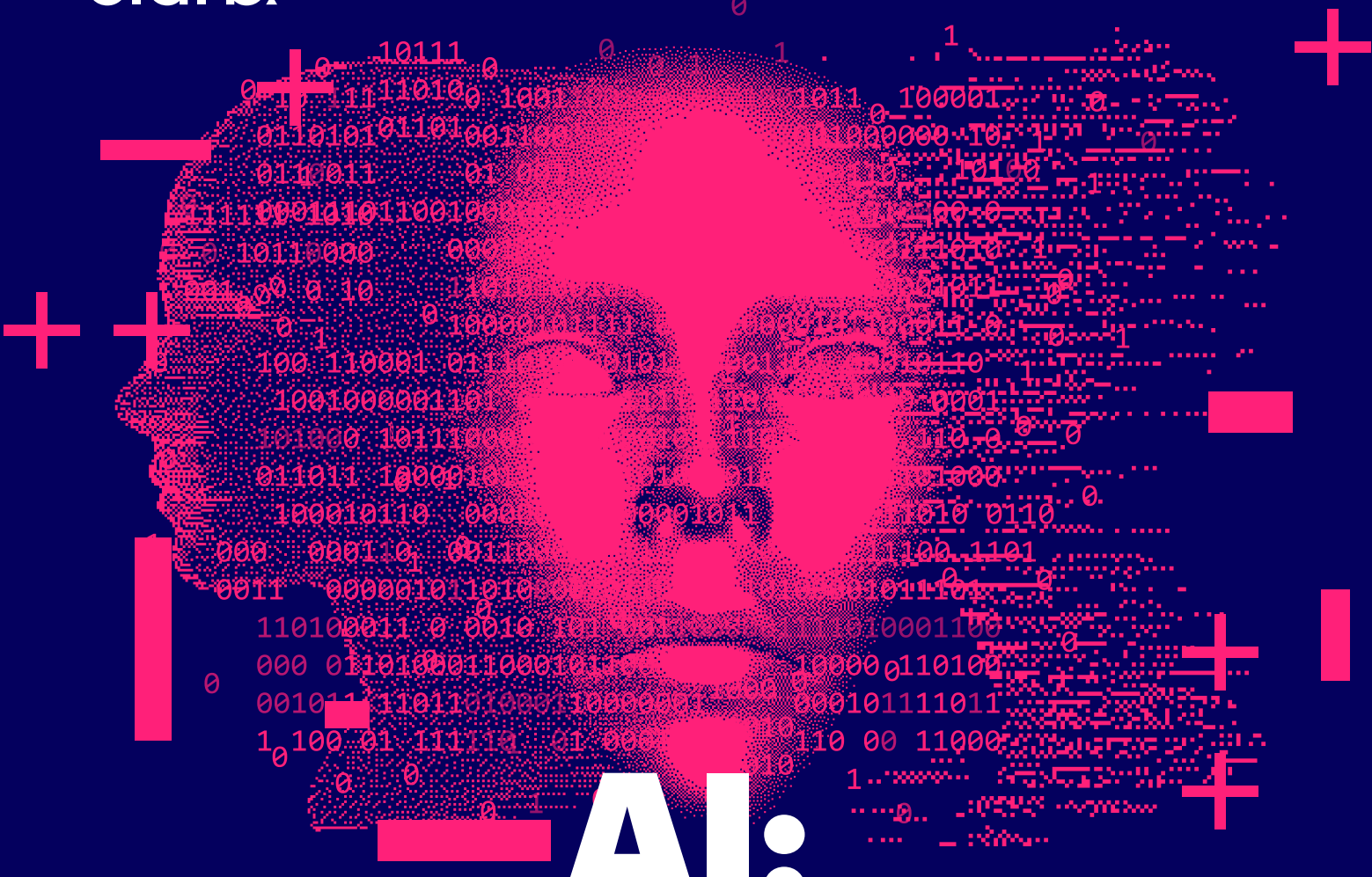
CASE NOTE

CIC LTD v
WU AND ORS

THE Resolver

ciarb.

Summer 2023 ciarb.org



AI: the end of human arbitration?

THE DAWN OF AN EXCITING NEW ERA
OR THE BEGINNING OF THE END?

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Affordable justice

I live in Jamaica, a country known for its scholars, its music and its food – and the ability to adapt adroitly to our constantly changing world. The same can be said about my region, the Caribbean, of course.

This flexible mindset is on display in the Caribbean when it comes to alternative dispute resolution (ADR) or, as I prefer to call it, appropriate dispute resolution. Appropriate because one size does not fit all in this arena.

I am a practising lawyer, so I absolutely understand the importance of litigation. But as your President, I also understand that dispute resolution can be a sharper tool and can enable us to be more surgical in our path to affordable justice.

When ADR is introduced to communities where only the wig and gown have been known hitherto, it can change lives and even save them. Mediation and restorative justice can cool tensions between rival communities and quite literally prevent bloodshed. And, crucially, it is within the financial reach of many more.

ADR is also hugely helpful in solving the disputes that often follow in the wake of natural disasters. When a typhoon, monsoon or tornado hits a poor community – one that

doesn't have the resources to bounce back or a government that can assist people properly – disputes over shortages in food and other basic requirements can turn violent. Other disputes can end up burdening an already over-burdened legal system. In Pakistan, for example, more than 2.2 million cases are waiting to be heard in the country's courts (see page 4).

In short, towns and communities in local and regional economies across the globe are yearning for the affordable justice that appropriate dispute resolution can bring. There is a reason why CiArb, the oldest private dispute resolution organisation in the world, now has more than 17,000 members across 150 jurisdictions and from all walks of life.

And there's a reason why countries are racing to sign the UNCITRAL Arbitration Rules and the Singapore Convention on Mediation (see page 12), authored by a great UN team including my dear friend George Lim. They are, if you like, the teeth of affordable justice.

John S. Bassie LLB (Hons),
LLM, C.Arb FCI Arb Dip.CI Arb



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What's on

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"The tutors were incredibly helpful, incredibly knowledgeable and certainly accessible as well. They were able to give lots of positive feedback, so it helps with your self-reflection."

Helen Hale
2021 course student

Virtual Module 1 International Arbitration

14 September 2023 **£1,190**
Book by 30 August 2023

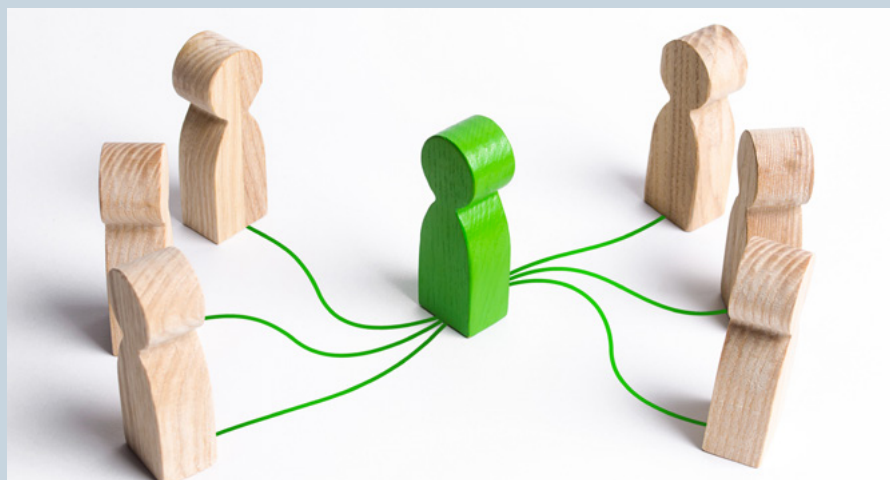
Strengthen your knowledge and understanding of international arbitration through this highly popular course.

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- Apply legislation based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law, regional arbitration law and the UNCITRAL Arbitration Rules.

"I am grateful for the insightful lectures and tutorials conducted by experts in this field. Completing this course has definitely enabled me to feel more confident and ready to pursue further steps as a young lawyer in the field of international arbitration and in alternative dispute resolution in general."

Eleni Dionysiou MCI Arb
Advocate-Legal Consultant,
Patrikios Pavlou & Associates LLC

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Separate assessment available, open entry **£72**
- **Virtual Module 1 Mediation Training & Assessment**
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Assessment 12 October **£342**
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Assessment only 30 November **£174**
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The opener

Spotlight on Pakistan

The Pakistan Branch hosted a two-day conference to discuss the 2.2 million cases waiting to be heard in the country's courts.

May's Pakistan International Disputes Weekend (PIDW) was attended by, among others, a range of legal practitioners in Pakistan and abroad, judges from the country's five high courts, representatives from international alternative dispute resolution centres and prominent figures from the construction, power and energy sectors.

Among the subjects covered at the event, attended by more than 900 participants, was whether court fees would discourage litigation in the country where sanctions already exist to counter 'frivolous litigation'. It was argued that while the measure had worked well in England and Wales, court fees would require careful calibration in Pakistan in order to protect its constitutionally guaranteed right to fair trial under Article 10A of the Constitution of Pakistan 1972.

It was also argued that integrating dispute resolution into Pakistan's legal system would require legal reform and institutional support. Replacing the Arbitration Act 1940 with a Domestic Arbitration Act 2023 was a vital first step in achieving this, it was claimed.

The benefits of mediation pre-trial were also highlighted as a way of avoiding the need to arbitrate or litigate, with the PIDW Declaration issuing the following statement: "Mediation as a pre-trial mechanism would benefit access to justice and would avoid frivolous litigation."

The Pakistan Chapter of Ciarb's Young Members Group was also launched at the event.



60-SECOND INTERVIEW

Benoit Le Bars



Benoit Le Bars is a law professor and arbitrator who was involved in drafting Ciarb's new Guideline on Multiparty Arbitration

Tell us a bit about yourself

I co-founded and am Managing Partner at Lazareff Le Bars. My expertise is in corporate law, international trade law, international contracts, energy, mining and construction. I also think it's fair to say I'm a recognised expert in institutional and ad hoc arbitral proceedings, international dispute resolution and disputes in Africa.

Our practice focuses on arbitration involving complex trade relationships between businesses, investors and states, and spans a range of jurisdictions and arbitral institutions (more than 80 countries to date). I've sat as an arbitrator in more than 200 cases and I'm a law professor in the US and a senior lecturer in France. I've written seven books on international arbitration and commercial law and more than 200 articles in law reviews.

You were involved in the launch of Ciarb's new Guideline on Multiparty Arbitration in May. Why was a fresh document necessary?

The number of multiparty arbitration cases has increased significantly in the past 15 years, mostly because of the growing number of construction and energy sector contracts and projects in emerging markets.

It has become crucial, for reasons of cost and efficiency, to offer arbitrators and arbitration practitioners solutions that protect arbitral proceedings and ensure that the awards rendered are valid and enforceable. Depending on the applicable legal system and arbitration institutions, the approach to multiparty arbitration will depend on which authority can

decide to admit or exclude a party involved in proceedings initiated by one or more parties. The main aim of these new recommendations is to provide the tools but also to prompt the right questions to be asked when a complex case arises. It is also to enable counsel to think at an early stage, when preparing a request for arbitration, about the parties they need to involve in the proceedings, to limit the risk of parallel proceedings.

"It has become crucial to offer solutions that protect arbitral proceedings"

What are the main considerations when deciding whether to pursue a multiparty route?

The first is consent. It must be ascertained if a party has expressly agreed to arbitration or accepted arbitration because of their involvement in the contract. The second is time and efficiency. Multiparty arbitration allows claimants to involve all parties and stakeholders that may have impacted the implementation or breach of a contract and solve the issues with one tribunal while protecting those respondents' due process rights. The third is enforceability. If successful, multiparty arbitration can compensate all parties involved. The guidelines offer options for parties to consider when developing an effective case strategy to match the complexity and the business environment of their dispute.



Entering the unknown

Catherine Dixon MCIArb puts artificial intelligence to the test

"Only the unknown frightens men. But once a man has faced the unknown, that terror becomes the known."

– **Antoine de Saint-Exupéry**

In May, leading figures in the development of artificial intelligence (AI) declared it could be an "extinction event" for humanity if it remains uncontrolled and unregulated. Their warning was widely reported in the press, and when I heard the news I was on a panel at the Bucharest Arbitration Days discussing the future of arbitration and dispute resolution practice: What skills will future practitioners need and how will technology, including AI, impact us? It is safe to say that there are mixed views about the impact of AI, and how it might be used, but universal agreement that it will change practice.

Since ChatGPT was released in November 2022, practitioners have been trying to analyse the future impact of AI. We have been advised that it can be used effectively for routine tasks including document analysis and production, legal research and other analytical and often administrative tasks. This will enable us to focus on decision-making that requires the consideration of nuance and an understanding of human behaviour, which, we are told, cannot (yet) be done by machines.

I thought that I would ask ChatGPT to write this article, so I asked it what impact AI will have on arbitration practice. This is what it told me:

"Artificial intelligence (AI) is rapidly transforming the legal industry, and arbitration practitioners are no exception. AI has the potential to revolutionize the way arbitration is conducted, making it faster, more efficient, and more accurate."

"One of the most significant impacts of AI on arbitration practitioners is the ability to automate routine tasks. AI-powered tools can quickly analyse large volumes of data, identify patterns, and make predictions. This can save arbitration practitioners a significant amount of time and effort, allowing them to focus on more complex tasks."

"AI can also help arbitration practitioners make more informed decisions. By analysing past cases and legal precedents, AI can provide insights into how similar cases have been resolved in the past. This can help arbitration practitioners make more accurate predictions about the outcome of a case and develop more effective strategies."

"Another way AI is impacting arbitration practitioners is through the use of virtual assistants. These AI-powered tools can help practitioners manage their workload, schedule appointments, and even draft legal documents."

"However, there are also concerns about the impact of AI on arbitration practitioners. Some worry that AI could replace human arbitrators altogether, leading to a loss of jobs and expertise. Others worry that AI could be biased or make errors, leading to unfair outcomes."

"Despite these concerns, it is clear that AI is already having a significant impact on arbitration practitioners. As AI technology continues to evolve, it is likely that we will see even more changes in the way arbitration is conducted. Ultimately, the key to success for arbitration practitioners will be to embrace these changes and find ways to leverage AI to provide better service to their clients."

Currently, based on the above, practitioners do not need to reassess their career choice as clearly the article lacks a level of sophistication, and while ChatGPT has already successfully been used in practice for routine tasks, we have not (yet) heard of an arbitration proceeding conducted with its help.

However, Ciarb's Brazil Branch successfully demonstrated how ChatGPT could be utilised in an artificial setting closely resembling real-life arbitral proceedings. The 2023 Rio de Janeiro Pre-Moot winning team competed in another round against a team fully led by ChatGPT. See page 6 for a full account including the experiment's results and a link to the recording.

In short, the team of law students undeniably performed better, but the experiment highlighted the following important points:

- First, the results required human guidance. Machine learning is one of the fundamental pillars of AI. However, like in the experiment at hand, a case file has to be presented to ChatGPT. The current technology is incapable of 'reading' the file and separating various aspects of a case on its own.
- Second, extremely heavy reliance on analytics can result in the need to check the credibility of generated results (especially case law).
- Third, for now, human emotional intelligence cannot be replaced by an artificial one. Flexibility and a personal approach are some of the reasons parties choose arbitration and other types of alternative dispute resolution to resolve their disputes.

Thus, the participants and organisers emphasised that currently the most solid finding about ChatGPT in the private dispute resolution sector is that it is here to assist but is unlikely to take over... for now at least!

So while the unknown can be frightening, it can also be exciting. To succumb to terror will surely compromise our ability to creatively exploit AI's huge potential benefits while also effectively mitigating its huge potential risks.



ABOUT THE AUTHOR

Catherine Dixon
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Accredited Mediator.



AI: the end of human arbitration?

Since its release in November, the artificial intelligence chatbot ChatGPT has become the fastest-growing app in history. Within seconds, it can pen an essay, compose a poem or summarise a report. So what does this powerful new technology mean for the world of arbitration? The dawn of an exciting new era or the end of flesh-and-blood practitioners? Ciarb's Brazil Branch conducted an experiment to find out.

Please explain the chatbot experiment you carried out?

Our Branch had the idea to have a Vis Moot demonstration round between a human team and ChatGPT. We partnered Cesar Pereira C.Arb FCIArb of Ciarb's Brazil Branch and Andre Cardoso, a tech law specialist and member of ArbTech, and secured the technical support and media partnership of Arbitration Channel.

But we did not want just any human team, so we contacted Joaquim Muniz FCIArb and the other organisers of the 2023 Rio de Janeiro Pre-Moot and agreed that the winning team would face ChatGPT right after the Pre-Moot. To avoid any interference with ChatGPT instructions, we decided that the opposing team would not comprise law students or have any direct knowledge of the Vis Moot case.

In March, we held an online round at Arbitration Channel. The Federal University of Rio de Janeiro brought forth oralists Daniel Ninio and Mariana Scofano with coaches Liz Martins and Marcelo Campelo. The other team comprised a cinema student, Sofia Milarski, and a young political scientist, Marianna Jardim, who strictly read the instructions written by ChatGPT. They were coached by a young lawyer and former mootie, Fernanda Romero, and data scientist Douglas Amorim.

The Tribunal was formed by Amb. (r.) David Huebner C.Arb FCIArb, Deputy Chair of the Ciarb Board of Trustees; Louise Barrington C.Arb FCIArb, Director of Vis East; and Sophie Nappert, founder of ArbTech.

The experiment was as close to the real thing as possible. Both teams made their initial pleadings roughly within the allocated time, answered live questions from the Tribunal and had the opportunity to make rebuttals and surrebuttals on the spot. The recording is available on YouTube at [Arbitration Channel](#).

Why did you carry it out?

ChatGPT is an artificial intelligence (AI) system based on a large language model. As a 'generative' AI system, ChatGPT can produce text in response to user queries.

When it comes to language, the effects of AI tools are direct and tangible, recognisable by a large number of people. For the same reason, it has also had an impact on law. Drafting briefs and submissions, opinions, awards, contracts or other legal instruments involves the use of natural language. A tool that manipulates language and creates logically connected texts has an undeniable impact on legal practice.

All of which means that the consequences of using AI tools that handle language and enable

the generation of legal texts are something we should examine. Mastery of the tool – the ability to make AI work efficiently and effectively – will soon be a basic requirement. In fact, there is even a new job related to this expertise: legal prompt engineer. This new reality will impact the arbitration process.

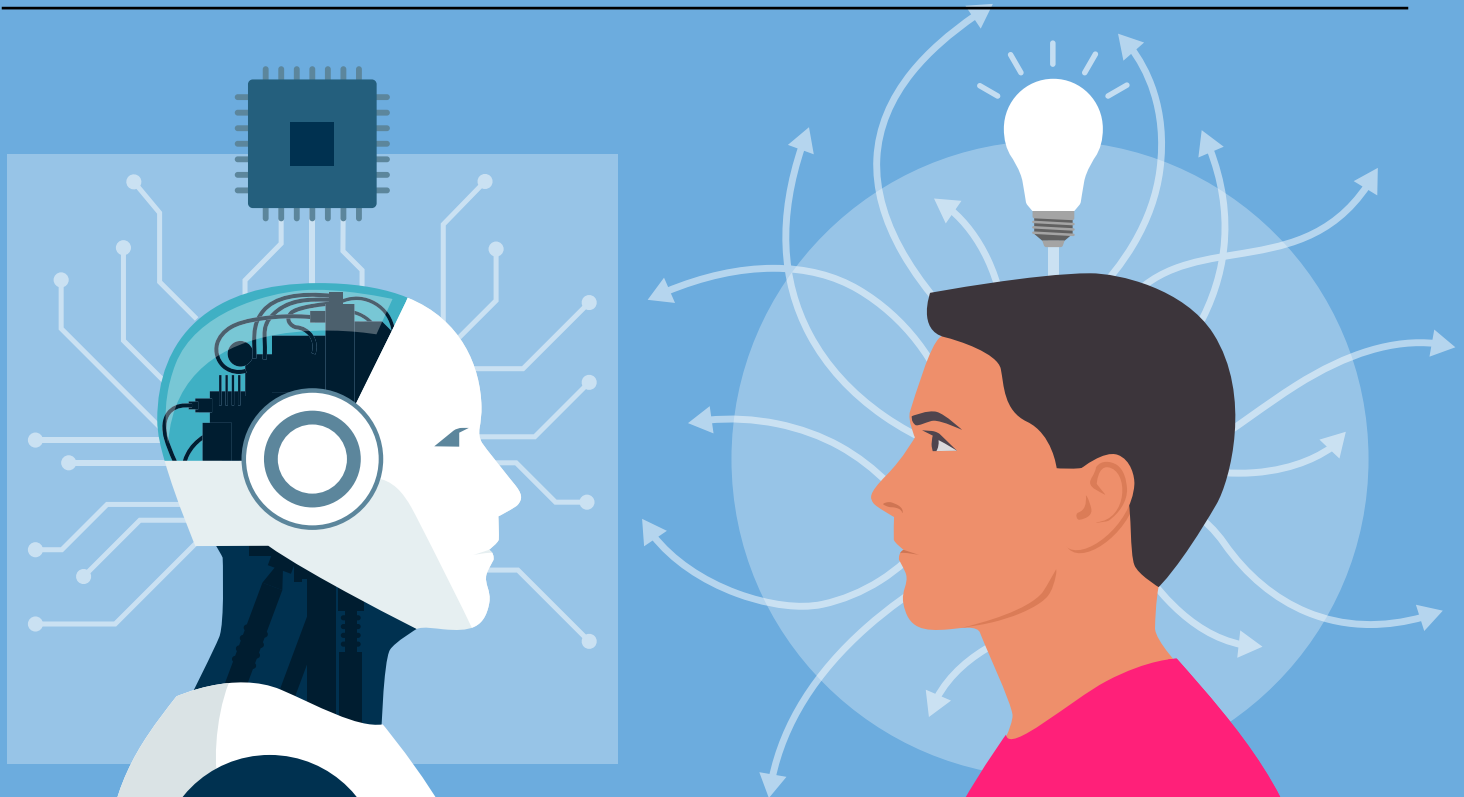
In this context, we thought it made sense to see how far we had already come. The Vis Moot competition was an obvious choice since it is structured to replicate, as much as possible, some aspects of a real-life arbitral hearing. The competition also had the advantage of being designed to allow the participants and the audience to assess the performance of the teams. It was the perfect setting to pitch a human team and ChatGPT against each other and see what would happen.

What were the findings?

ChatGPT was able to provide immediate, well-founded, structured and concise responses to all questions posed. It even surprised the Tribunal when, in a moment of frankness, it admitted that its previous argument was untenable. In all fairness, right after that it came up with a very

ChatGPT even surprised the Tribunal when, in a moment of frankness, it admitted that its previous argument was untenable





good surrebuttal to reinforce its client's position. There is no doubt the human team did better, but ChatGPT was able to produce good answers and rebuttals for a fraction of the effort expended by the human team. To win a major Pre-Moot competition, a Moot team usually has to prepare for months. It took the ChatGPT team a couple of weeks.

The success of the experiment indicates this is only the beginning of this technology. If a general-purpose AI tool has already shown promise, what might a dedicated AI tool focused on legal issues achieve? In fact, the technology used in the experiment has already been superseded: the more powerful ChatGPT 4.0 was released shortly afterwards.

Technological restrictions including word-count limits required creativity on the part of the ChatGPT coaches. For one, they had to break the Vis Moot case into sections, so ChatGPT could process them separately and handle all the relevant information. It became clear that human prompts to AI are and will remain key. You get a remarkable result but only if you ask the right questions and gradually guide the AI tool to what you need.

Another well-known feature of ChatGPT and similar models is their tendency to 'hallucinate' by creating plausible texts that are, however, not necessarily true or based in reality. It may even provide detailed references to cases or scholarly writings that simply do not exist. But is this a bad thing? Not necessarily. AI hallucination can be the foundation for creativity, and it can be a useful tool

for brainstorming or testing arguments in a dispute resolution context.

Should arbitrators be worried about being replaced by AI?

At the current stage of technological development, human traits such as flexibility, sensitivity and creativity remain fundamental to the practice of law. But the use of generative AI does raise questions about the arbitration process including issues of party equality, transparency and disclosure.

Preserving due process also raises concerns. Considering AI tools are provided by third parties, without the control of the parties or the arbitral tribunal, there may be privacy and confidentiality issues. As is the case with AI tools in general, there are also concerns around biased training models and the consequences for the responses the AI tool generates.

So, while generative AI tools are still in their infancy, dispute resolution professionals should become familiar with them so they can obtain the best results from their use. Their advent means we need a shift in the way we see the practice of arbitration.

Human traits such as flexibility, sensitivity and creativity remain fundamental to the practice of law

“No one can whistle a symphony; it takes a whole orchestra to play it”

Kabir Duggal C.Arb FCIArb and Peter Schmidt examine how international arbitration can act as a good neighbour and help the legal community promote human rights across the globe



“Saving our planet, lifting people out of poverty, advancing economic growth... these are one and the same fight. We must connect the dots between climate change, water scarcity, energy shortages, global health, food security and women’s empowerment. Solutions to one problem must be solutions for all.”

Ban Ki-moon

BACKGROUND

Safeguarding human rights, mitigating the impact of armed conflict, protecting the rule of law and preserving our planet in the face of the threat of climate change are among the most serious challenges facing the international legal community today. Against this background, international arbitration, and investor-state arbitration in particular, has become the most globally prolific method of resolving international disputes. Consequentially, it represents our first, last and sometimes only line of defence. This is reflected in the rise of disputes – the number of investor-state disputes has grown substantially.¹ For example, there were 46 publicly known claims in 2022, bringing the total number of such claims to 1,257. With this rise comes the question of whether international arbitration serves as an effective complement for these other pressing issues. This is a serious issue, for unless international

¹ This article focuses on investor-state arbitration as the cases are more readily available in the public domain. However, the general propositions stated here would apply by analogy to international commercial disputes as well.



arbitration can rise to the challenge, not only will it fail to address the needs of its constituents, it will fail to operate as an effective means of dispute resolution.

AN ONGOING PROBLEM WITH NEW URGENCY

The need to address the challenges presented to international arbitration has only been heightened as monumental global events – including the war in Ukraine and in the Caucasus region, the Covid-19 pandemic, the ever-present climate crisis and the rapid rise of artificial intelligence – seem to unfold at an increasing pace. These challenges, both new and old, shine a light on the fact that the existing international legal framework may not be fully equipped to address these issues. Although some challenges facing international arbitration are new, the tension that exists between this dispute resolution method and other areas of international law is not. As an early example, the 1987 arbitration case of *AAPL v Sri Lanka* featured the conflicting interests of a state addressing conflict within its borders against the rights of a foreign business under an investment agreement. While the majority ultimately sided with the investor – faulting Sri Lanka for failing to exercise diligence to avoid destruction of the investor’s property – the dissent chastised the majority for effectively piling on to the state’s woes, noting that under customary international law – as opposed to the investment treaty, apparently – states were not historically liable for losses caused by war or armed conflict.

There are several approaches which states can and do take to preserve some flexibility and mitigate the risk from claims brought under these treaties



ABOUT THE AUTHORS

Dr Kabir Duggal C.Arb FCI Arb is an Attorney at Arnold & Porter, focusing on international arbitration and public international law matters. In June 2023, he delivered the Roebuck Lecture on 'International Arbitration Versus Human Rights, Armed Conflict and the Environment: Why should I care?'. **Peter Schmidt** is an Associate at Arnold & Porter. His practice centres on international dispute resolution, including representing parties in investor-state and international commercial arbitration proceedings, including those conducted under the ICSID, UNCITRAL, ICDR and ICC Rules.

The international arbitration system has also frequently come into tension with the sometimes competing interests of public health and human rights. For example, the tobacco company Philip Morris raised an investor-state claim in 2010 against Uruguay’s anti-smoking legislation, which it claimed had devalued its cigarette trademarks. By finding in favour of Uruguay, the majority gave substantial deference to the government’s policy decision, enacted with the scientifically proven lethal effects of tobacco in mind, and to the national authority’s decisions when addressing a major public health problem. The dissent, on the other hand, argued that the means chosen by Uruguay were “arbitrary and disproportionate” to the claimed public health justification. The Philip Morris case, then, can be seen as highlighting how the obligations imposed by investment treaties can pose problems to governments seeking to regulate against even well-established public health challenges, as well as the difficult balancing of competing interests which tribunals regularly encounter when resolving these disputes.

A DISPROPORTIONATE BURDEN

In light of these tensions, it is also important to note how they may be felt more acutely in still-developing states, which for a number of reasons have entered into significant numbers of treaties yet often have lacked the capacity to evaluate their merits. Pakistan, the country that signed the first modern investment treaty with Germany, for example, entered into dozens of investment treaties with little to no input from its foreign, legal or financial ministries. Indeed, Makhdoom Ali Khan, former Attorney-General for Pakistan, described the signing of these treaties as photo opportunities as opposed to binding agreements with enforceable obligations. Moreover, many of these states are the most vulnerable to disruptions from conflict and climate change. Faced with a large number of treaties, disparate crises, and the desire and need to govern flexibly – as well as the objective of attracting foreign investment – these states are in a particular bind. In order for us to ensure that international arbitration remains an effective means for resolving disputes, we all have a role to play.

SO, WHAT CAN STATES DO?

With this bind in mind, what can these states do to ensure other interests, as well as international legal frameworks, are taken into account when entering these agreements? Fortunately, there are several approaches which states can and do take to preserve some flexibility and mitigate the risk from claims brought under these treaties. For example, the state can include language preserving certain rights in the preamble of the investment treaty. This language could preserve the state’s right to set legislative and regulatory priorities, or it could acknowledge the

state's desire to promote investment in a manner that is mindful of environmental and labour protections. Of course, a reliance on preamble language risks an arbitral tribunal concluding that it is superseded by the obligations contained in the body of the treaty.

States can also include so-called 'non-relaxation standards', which highlight that it is inappropriate to encourage investment of a party by relaxing health, safety or environmental measures, or by lowering labour standards. This language grants the full protection of the treaty only to investments actually made in accordance with the laws of the host state. States also have the option to include a general exception clause, which allows a state to adopt and enforce measures necessary to protect human, animal or plant life or health, or to protect and conserve the environment. In short, to ensure their investment treaty obligations properly embrace other important areas of international law, states must play an active role in the negotiation and drafting of these treaties.

WHAT CAN ARBITRATORS AND COUNSEL DO?

Once these agreements are in place, the opportunity for states to take action is often restricted. At that stage, it is the turn of investor-state tribunals to ensure human rights, environmental protection and other international legal frameworks are accommodated when adjudicating international investment disputes. As just one example, tribunals can and should consider the context surrounding each dispute deeply and holistically, making note of what important global international issues may be implicated beyond the specific dispute at hand. Tribunals can also seek and apply interpretive processes which integrate and account for other international legal frameworks in their decision-making, welcome *amici* briefs on these issues and consider them when settling disputes, and ultimately refer to other international bodies where appropriate.

By embracing the fact that the treaties themselves are not self-contained, stand-alone legal frameworks to be considered in a vacuum, but are, rather, integrated with underlying principles of international law, tribunals may give themselves sufficient leeway for judicial interpretation to take into account more than just the interests of a specific investor.

A CROSSROADS FOR INTERNATIONAL ARBITRATION

These proposed shifts in how investment agreements are drafted, perceived and interpreted provide an opportunity for international arbitration to modernise and sustain its position as a viable method of international dispute resolution amid the tensions of the present day. A holistic approach will be needed to address the large-scale problems of legitimacy facing the international arbitration system today. Investment agreements cannot be seen to serve as deterrents for states to adopt legislation properly aimed at protecting



While the tension that exists will not disappear overnight, the global community can take steps to improve the quality of the system together

human rights and the environment, or increasing labour standards: the system will simply not survive. Rather, those drafting and applying investment treaties must aim to integrate those legitimate legislative aims to allow for a balance of investment promotion with safeguarding human rights, ensuring sustainable use of natural resources and ensuring adequate workplace safety standards, among other priorities.

While the tension that exists between international arbitration and other areas of international law will not disappear overnight, the global community can take steps to improve the quality of the system together. The international arbitration community must address these serious issues which confront us today; the issues themselves are not going anywhere, but the influence of international arbitration might decline if it refuses to adapt. And the change necessary must involve everyone. As the Methodist bishop Luccock put it: "No one can whistle a symphony; it takes a whole orchestra to play it."

Mediation on the up?



Wolf von Kumberg FCI Arb explains what the Singapore Convention means for mediation and the significance of the UK's decision to sign up

When the Singapore Mediation Convention came into force on 12 September 2020, mediation was given new credibility as an international process for the resolution of disputes.

And having been an in-house lawyer involved in many cross-border disputes for international companies for more than 25 years, I felt it to be a decisive moment.

Our international contracts had included arbitration provisions for the resolution of disputes and I had also tried to include mediation provisions. But I had found a great reluctance to accept mediation in certain jurisdictions, particularly when dealing with states or state entities. They simply did not want to provide for

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mediation: in the main, either because they did not understand it or because they felt it was too ill-defined a process for state officials to be involved in.

So what exactly changed in the global mediation landscape when the Singapore Mediation Convention came into force? And what is the significance of the UK's signing it on 3 May?

The Singapore Mediation Convention – or, to give it its full title, the United Nations Convention on International Settlement Agreements Resulting from Mediation – currently has 55 signatories and it has been ratified by 10 of them. Its intent is to provide a mechanism for the enforcement of international mediation settlement agreements.

When I attempted to include a mediation provision into contracts, to enforce mediated settlement agreements, I often encountered a measure of resistance.

In my experience, when parties voluntarily agree a settlement agreement, mediated or not, they comply with it because they have had a chance to take part in its formation. Non-performance is rare. But the

Singapore Convention



Convention provides a framework for enforcement. It provides that each signatory state will enforce international mediation settlement agreements in accordance with its own rules of procedure and under the conditions of the Convention. International is defined here as when “at least two of the parties have their place of business in different States; or the State of the parties’ place of business is different from the State in which a substantial part of the obligations under the settlement agreement is performed”.

To enforce the mediated settlement a party supplies evidence to the competent authority in the state (a court) that the settlement agreement resulted from mediation. Thereafter there are only limited grounds on which the court may refuse to grant the relief sought.

Why did the UK decide to sign up? (After all, no EU member state has yet acceded to the Convention, which is curious in itself given the existence of the EU Mediation Directive and the highly proactive position the Commission has generally taken regarding mediation.)

In the consultation carried out before the signing, a number of reasons were given for supporting accession. They were outlined as follows in a report:

- to raise the profile of mediation;
- to increase the credibility of UK-based mediators;
- to maintain the UK’s position as an attractive centre for dispute resolution (including internationally);
- to signal the UK’s ambition to remain a global leader in private international law;
- to allow the UK to contribute to the interpretation



ABOUT THE AUTHOR

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of the Singapore Convention’s provisions through court judgments.

The UK Government has also emphasised the benefits of mediation and how it is integral to the UK justice system, stating that: “It is the right time for the UK to become a party... as a clear signal to our international partners that the UK is committed to maintaining and strengthening its position as a centre for dispute resolution and to promote the UK’s flourishing legal and mediation sectors.”

A significant position taken by the UK and not shared by many other signatories is this: “The Government has said it will not apply either of the reservations that are permitted under the Convention, namely: it shall not apply to settlement agreements involving governmental or state parties; it shall only apply to the extent that parties to the settlement agreement agree to apply it.”

The reasons given are: “The reputation of mediation and of the Singapore Convention will be strengthened by the UK not applying the first reservation; and that to apply the second reservation and requiring parties to opt in could be perceived to be contrary to the UK Government’s aims of promoting mediation as an effective method of dispute resolution.”

Now, implementing legislation will have to be put in place and rules of court will have to be amended. And the question of how the courts interpret the Convention and enforcement of agreements is an open one.

Of course, time will tell how the Convention will be used and interpreted in the UK, but the very fact that the UK has acceded means it will have a key role to play in the development of mediation internationally. Mediation was already becoming more professional in the jurisdiction, with consideration around the regulation of mediators, and this was the natural next step. This is something that warms the heart of a former global in-house counsel.

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Political risk insurance: a primer

Peter Ashford FCIArb explains how foreign investors seek protection against a range of host government actions

FOKKE BAARSSEN/SHUTTERSTOCK

A type of international investment insurance known as political risk insurance (PRI) has long existed to compensate foreign investors for expropriations and similar actions of a host government. A wide variety of insurance for political risk – contrasted with ordinary commercial risk – can be purchased to protect assets or other forms of investment, whether located in a single country or a portfolio of countries, from various specified risks, including expropriation, political violence and currency inconvertibility.

I am aware, for example, of an expropriation and political violence policy for a large construction company which provides insurance across 10 countries in North Africa and Asia on a maximum aggregate limit liability of \$850m. The cover provides the insured with protection against expropriatory acts which deprive the insured of its equity value in its

investment, while also indemnifying it for property damages following acts of political violence.

Very often, PRI is a prerequisite to obtaining bank, or other, finance for a project. A policy will typically provide cover for investors in the following circumstances.

EXPROPRIATION

Losses arising from government actions that reduce or eliminate ownership of, control over or rights to the insured investment. Coverage typically includes direct outright nationalisation and confiscation of tangible assets, equity shares, funds or interest in loans and loan guarantees. Coverage is usually in respect of single acts as well as for ‘creeping’ expropriation – a series of government acts that have an expropriatory effect. These may include the imposition of confiscatory taxes or forced renegotiation of contract terms.

CURRENCY INCONVERTIBILITY

Losses arising from an investor’s inability to legally convert local currency into hard currency or to transfer hard currency outside the host country where that inability results from a government action or failure to act by, for example: restrictive foreign exchange regulations; failure to approve or act on an application for hard currency; or blocking repatriation of funds. Coverage is typically not provided for depreciation or devaluation of host country currency – investors

Coverage is usually in respect of single acts as well as for ‘creeping’ expropriation – a series of government acts that have an expropriatory effect

usually enter into currency swaps or hedging agreements to manage this risk.

POLITICAL VIOLENCE

Losses or damage to tangible assets and also losses arising from business interruption caused by politically or religiously motivated acts of war or civil disturbance in the country, which typically include declared or undeclared war, revolution, insurrection, coups d'état, civil strife, sabotage and terrorism. This coverage applies to losses arising from violence directed against a host country government and may also include violence directed against foreign governments or foreign investors. As with conventional business interruption insurance, this coverage may be extended to cover temporary business interruption and contingent business interruption losses resulting from damage to specific sites not owned by the foreign investor, such as critical infrastructure.

BREACH OF CONTRACT BY HOST GOVERNMENT

Losses arising from a host government's breach or repudiation of a contract with the investor; may be extended to the contractual obligations of state-owned enterprises in certain circumstances. Coverage may require an investor to exhaust, or at least invoke for a fixed time, the dispute resolution mechanism set out in the underlying contract.

FAILURE OF SOVEREIGN FINANCIAL OBLIGATIONS

This coverage protects against losses resulting from a failure of a sovereign or state-owned enterprise to make a payment when due under an eligible unconditional financial payment obligation or guarantee. I am aware of a contractor awarded a three-year contract with a Middle Eastern government to design and build a water treatment facility. Exposed to an unstable political environment and uncertain United States Agency for International Development (USAID) financing, the client had concerns about potential payment default and the posted performance bond. PRI protected the contractor against payment default by the government buyer and against non-certification of invoices, including those financed by USAID.

Crucially, this coverage does not require the investor to obtain an arbitral award. It is applicable in situations where a financial payment obligation is unconditional.

These risks can be mitigated by comfort letters from the host government. These letters do not, however, constitute an enforceable obligation or commitment by the government to the project. In addition, in the event of a change in government, particularly in non-democratic circumstances, the new government may not follow the terms of the letter. Somewhat better are stabilisation clauses included in international investment agreements under which the government agrees not to take certain actions or to compensate investors for the costs of certain actions they take.

Private insurance may be preferable for investors in high-risk environments and may be the only alternative in countries without treaty protection for foreign investors

The use of stabilisation clauses is not without controversy – future governments may argue that the clauses were entered into under duress, and many multilateral finance institutions involved in a financing may not be comfortable with attempting to limit the scope for legislative development, particularly in the areas of environmental and social regulation.

INSURERS

PRI is offered by private insurers as well as public, state-backed investment guarantee firms such as export credit agencies and the World Bank's Multilateral Investment Guarantee Agency. Approximately two-thirds of the market is underwritten by the public market. Private insurance may, however, be preferable for investors in high-risk environments and may be the only alternative in countries without treaty protection for foreign investors. Private insurance also may be preferable for investors who cannot meet, or do not wish to subject themselves to, public insurers' social, economic or environmental conditions and possible disclosures.

BILATERAL INVESTMENT TREATIES

No discussion of PRI is complete without mentioning the possibility of investment treaty arbitration: both are methods of risk mitigation. The treaty right typically arises when a host government acts, or fails to act, in a way that arguably discriminates against, fails to ensure fair and equitable treatment of or expropriates the foreign investment. In the *Enron v Argentina* case, the claimant relied on a prior determination by the PRI insurer establishing that an expropriation had taken place. The Tribunal, however, did not accept the insurer's determination as persuasive authority on the question of whether an expropriation had occurred. The Enron Tribunal, nevertheless, held that Argentina had violated its obligations to provide Enron fair and equitable treatment.

On the other hand, insurance policies and the principles of insurance law often include the concepts of assignment and subrogation, which can lead to a right being fully transferred from the insured to the insurer, in which event the same right ought not to be exercisable by the insured at an investment treaty arbitration. In fact, in *Offshore Power v India*, the dispute over the Dabhol power plant between a US company and India turned into a state-to-state dispute between the US and India, following subrogation.



ABOUT THE AUTHOR

Peter Ashford FCI Arb is an independent arbitrator and consultant to Fox Williams, where he co-heads the international arbitration team and handles a broad range of international commercial disputes including sale and purchase contracts, distribution and logistics, pharma, natural resources and commodities.



Case note

CIC Ltd v Wu and Ors [2023] HKCFI 700

This case centres around issues of due process in arbitration and illustrates one of the rare instances in which the Hong Kong Court intervened and refused to enforce an award because the Tribunal's procedure was "seriously flawed".

THE FACTS

The arbitration was seated in Hong Kong and initiated by Canudilo International Company Ltd (CIC), a Macau-registered company. Under two sale contracts, CIC was the seller and Apennine Holdings Ltd (AHL), a Hong Kong-registered company, was the buyer. The arbitration agreement in the main contract provided that any disputes should be resolved in accordance with the Hong Kong International Arbitration Centre (HKIAC) Arbitration Rules. CIC contended that AHL defaulted on payment for the goods under the contracts, and thus AHL's guarantors, collectively referred to as 'Wu and Others (Ors)', were liable.

THE ARBITRATION

An arbitrator was appointed in December 2019 (Arbitrator 1). On CIC's application, Arbitrator 1 bifurcated the proceedings to determine (a) CIC's claims as to AHL's liability for payment, and (b) CIC's claims against the guarantors with respect to their liability.

Arbitrator 1 stated that the arbitration proceedings between CIC and the other respondents should proceed. During this time AHL had no legal representation and no

documents were filed for AHL in the arbitration. Subsequently, Arbitrator 1 issued an interim award, stating that AHL should pay CIC the sums due under the contracts, as well as the fact that this award (the 2020 Award) only involved the dispute between CIC and AHL. Arbitrator 1 additionally stated that the dispute between CIC and the guarantors would continue.

In June 2020, Arbitrator 1 received a letter from AHL's solicitors requesting an extension of time to make written submissions. Following this, Arbitrator 1 resigned, expressing that after considering the matter and the parties' positions, he could no longer continue to act in the arbitration after the issuance of the 2020 Award as to do so would "give rise to reasonable suspicion or doubt as to his impartiality".

HKIAC appointed a new arbitrator (Arbitrator 2), who gave the final award in favour of CIC.



ABOUT THE AUTHOR

Enehuwa Adagu ACI Arb is Ciarb's Policy and External Affairs Officer

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Arbitrator 2 identified that the 2020 Award was binding on AHL and the guarantors, noting that the guarantors could have made their defence submissions in relation to AHL's primary liability during the proceedings between CIC and AHL. Arbitrator 2 concluded that since the guarantors had not raised these submissions in the prior proceedings before Arbitrator 1, they were attempting to have a "second bite of the cherry", which was impermissible.

In August 2021, CIC obtained *ex parte* leave from the Hong Kong court to enforce the final award against the guarantors (the Enforcement Order). In April 2022, Wu applied to have the Enforcement Order set aside on the basis that (a) the arbitration was not conducted in accordance with the arbitration agreement and/or the agreed arbitration procedures, (b) that Wu did not have a reasonable opportunity to present their case, and (c) that enforcement of the final award would be contrary to the public policy of Hong Kong.

THE RULING

In March 2023, the High Court of Hong Kong held that it was "grossly unfair and unjust" that Arbitrator 2 determined that Wu already had the opportunity to present their evidence and make their submissions before Arbitrator 1. The Judge declared that in the circumstances, Arbitrator 2 failed to give Wu a reasonable opportunity to present their case on the binding effect of the 2020 Award. Furthermore, Wu and the other guarantors did not have an "equal opportunity" to present their case during the first part of the proceedings with AHL. The Judge observed that it was "disturbing" that Wu had not been put on

notice or given a reasonable opportunity to meet the case against them.

The Judge decided that "Arbitrator 2 had failed to consider and decide Wu's defences in an impartial and independent manner", so the arbitration had not been conducted in accordance with the arbitration agreement or procedures. Therefore, it would be contrary to the notions of justice to enforce the final award, and the violation of Wu's rights was "sufficiently serious and egregious". Consequently, the Enforcement Order was set aside.

This case demonstrates the high threshold required for the Hong Kong courts to refuse to enforce an arbitral award and confirms the limits of interim awards within Hong Kong's jurisprudence. Arbitrator 1's error was so serious that it amounted to a denial of due process. Thus, arbitration practitioners should take note of the outcome when issues arise where subsequent arbitrators within the same case re-evaluate or make further determinations on matters dealt with by a previous arbitrator. This cautionary tale is further support for the maintenance of high standards for arbitrators when it comes to ensuring due process for parties in arbitration.

Read the full judgment [here](#).

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