ASSOCIATION OF ARBITRATORS (SOUTHERN AFRICA) NPC

GUIDELINES ON THE USE OF ARTIFICIAL INTELLIGENCE ("AI") IN ARBITRATIONS AND ADJUDICATIONS

CONTENTS

INTRODUCTION

1.   These guidelines are intended to serve as a guide to assist Parties and Tribunals using AI in an adjudication or *ad hoc* arbitration. It does not purport to be exhaustive or to constitute legal advice.

2.   Parties and Tribunals may take decisions or take actions different from what is suggested below to suit the needs of their specific case.

DEFINITIONS

3.   "Agreement"   shall mean any agreement between the Parties governing the resolution of disputes between the Parties, including the appointment of a Tribunal and the conduct of Proceedings;

"AI"   shall mean non-human computing power capable of performing tasks traditionally requiring human cognitive functions and human intelligence, such as sequencing and collating facts, summarising such facts, reasoning, learning, problem-solving, perception, and decision-making;

"AI Tools"   shall mean any software, program, application, platform, machine learning or any other computer code conducting AI functions and includes large language models that can understand and process human language for the purposes of text generation, question answering and summarising of facts and texts;

"Party" or "Parties"   shall mean the Party or Parties to a Proceeding;

"Proceeding"   shall mean dispute resolution proceedings conducted as an adjudication or arbitration in terms of an Agreement;

"Tribunal"   shall mean any of arbitrator or adjudicator appointed in terms of the Agreement to conduct the Proceeding to resolve the Parties' dispute;

4.   Save as defined above, the words in these guidelines shall have their ordinary meaning.

REGULATORY FRAMEWORK

5.   The **Arbitration Act 42 of 1965**, the **International Arbitration Act 15 of 2017** and the 2021 edition and prior editions of the **Rules for the Conduct of Arbitrations**, published by the Association of Arbitrators (Southern Africa) NPC, make no specific reference to the use of AI in Proceedings. The Agreement in a specific case may also not make any specific reference to the use of AI.

6.   In every case, agreement should be reached between the Parties on the use of AI in Proceedings, and whether the Tribunal shall have the power to issue directives regarding the use of AI in the Proceedings.

USE OF AI IN PROCEEDINGS

7.   AI can be used in Proceedings by the Tribunal, the Parties or their representatives in a number of ways, including:

7.1.   **To analyse and compile facts:** AI can be used to extract complex and interrelated facts, summarise them and put them into chronological order;

7.2.   **To conduct research and analysis:** AI Tools can be used to search and analyse legal precedents, statutes, and arbitral awards;

7.3.   **To review and manage documentation:** AI Tools can be used to process case documents, identify relevant materials, and organise them, while highlighting inconsistencies and manipulation;

7.4.   **To speed up decision making:** AI Tools can be used to mine text and objectively identify patterns and inconsistencies to facilitate evidence and data analysis;

7.5.   **To generate text:** AI Tools can be used to draft procedural documents, summarise arguments, collate facts, arrange data in a logical sequence and assist in drafting;

7.6.   **To facilitate Proceedings:** AI Tools can be used to provide real-time and cost-effective translation or transcription of hearings.

7.7.   **To automate administrative tasks:** AI Tools can automate scheduling, communication, and other procedural tasks.

8.   AI Tools may also assist Parties by:

8.1.   **Reducing Costs:** AI automates document review and labour-intensive tasks, thereby reducing costs associated with Proceedings;

8.2.   Levelling the playing field:

8.2.1.   **Empowering Parties with less resources:** AI enables Parties with limited resources to undertake sophisticated legal analysis, expanding their capabilities;

8.2.2.   **Assisting Unrepresented Parties:** AI Tools facilitate the participation of unrepresented or underrepresented Parties;

9.   These guidelines are intended to provide Tribunals and Parties with the acceptable parameters to be employed when using AI or AI Tools in Proceedings.

CORE PRINCIPLES

10. The following principles underlie the use of AI by Tribunals and Parties in Proceedings:

    10.1. **Accountability:** Tribunals are accountable for all aspects of Proceedings including the outcome. AI Tools should not substitute human judgment and analysis;

    10.2. **Confidentiality and Security:** AI Tools present challenges to maintaining confidentiality as they collect, store, or even train on user data. Users of AI Tools must:

        10.2.1. Consider the privacy policies of AI Tools before use;

        10.2.2. Consider applicable data protection laws and the confidential nature of Proceedings when selecting AI Tools;

        10.2.3. Prefer subscription services with robust confidentiality protections;

        10.2.4. Refrain from inputting identifiable, confidential or sensitive information into public AI Tools;

        10.2.5. Verify device and access permissions for all AI Tools;

    10.3. **Transparency and Disclosure:** AI usage should be transparent to all Parties involved;

    10.4. **Fair Decision-Making:** AI supports fair decision-making, but risks bias due to reflecting training data biases. Tribunals and Parties must monitor AI outputs and verify information before relying on it.

RISKS AND CHALLENGES OF AI IMPLEMENTATION

11. The use of AI does introduce risks to Proceedings, the Tribunal and Parties. These include:

    11.1. **Confidentiality and Data Security Risks:**

        11.1.1. **Data Exposure:** AI Tools may store, access or utilise confidential information for machine learning purposes;

        11.1.2. **Complex Data Flows:** Tracking data usage and storage becomes intricate due to the multifaceted nature of AI Tools, which often employ various tools and platforms;

        11.1.3. **Cybersecurity Vulnerabilities:** AI Tools are vulnerable to hacking and phishing threats;

    11.2. **Technical Limitations and Reliability Concerns:**

        11.2.1. **Hallucinations:** AI Tools can generate factually incorrect information, including fabricated legal authorities or cases;

        11.2.2. **"Black Box" Problem:** AI Tools' decision-making processes are opaque, hindering

oversight and accountability;

11.2.3. **Bias in Outputs:** AI Tools reflect the biases present in their training data, potentially resulting in discriminatory outcomes;

11.2.4. **Accuracy Limitations:** AI Tools are challenged by nuanced legal reasoning and complex factual scenarios;

11.3. **Regulatory and Enforceability Risks:**

11.3.1. **Inconsistent Regulations:** Different jurisdictions adopt varying AI regulations, posing compliance challenges;

11.3.2. **Conflict with Mandatory Rules:** AI Tools may conflict with applicable laws, regulations, or institutional rules.

PRACTICAL GUIDELINES FOR TRIBUNALS

12.   Throughout Proceedings

12.1. **Permissibility:** Before using AI Tools in Proceedings, Tribunals should establish whether the use of AI is permissible. Tribunals should review the Agreement, consider applicable law, consult Parties if the Agreement is silent, document consensus if agreed, and ensure AI use is permissible;

12.2. **Disclosure:** The use of AI and AI Tools may be covered in the Agreement or clarified by the Tribunal with the Parties. The Tribunal, the Parties, their representatives or witnesses should consider whether it is appropriate to disclose any other use of AI and AI Tools, and the nature and extent of such use;

12.3. **Confidentiality:** Any party using AI Tools should ensure confidentiality and security is maintained throughout the Proceeding and for as long as is legally necessary thereafter. This may be achieved by:

12.3.1. Vetting providers of AI Tools thoroughly, including their privacy policies, information storage, and security measures;

12.3.2. Considering data sovereignty, including storage and processing locations;

12.3.3. Avoiding open and free AI Tools, preferring paid subscription services with enhanced privacy;

12.3.4. Anonymising information before inputting case materials;

12.3.5. Using secure AI Tools with appropriate access controls to prevent unauthorised access to confidential information;

12.3.6.   Regularly reviewing updates to the AI Tools and their terms of use such as those relating to privacy;

12.4.   **Formal agreements:** The Tribunal and Parties should consider adopting written agreements to address issues such as:

12.4.1.   Permitted uses of AI Tools;

12.4.2.   Limitations on the use of AI Tools;

12.4.3.   Disclosure obligations;

12.4.4.   Confidentiality and other safeguards;

12.4.5.   The Tribunal's rights of investigation and direction in respect to the use of AI Tools.

13.   Hearings

The Tribunal should ensure that the use of AI Tools at a hearing should not compromise the integrity of the Proceedings. This may include:

13.1.   Testing and approving AI translation systems before use;

13.2.   Using AI transcription with Party consent and verifying accuracy and confidentiality of all transcriptions;

13.3.   Ensuring equal access and technical capability for all Parties to any AI Tools used in the Proceedings including any AI Tools used for virtual meetings or document display and management.

14.   Awards

14.1.   In decision-making and award processes, the use of AI must be strictly controlled by Tribunals. Delegation of decision-making authority should be strictly prohibited; this includes delegating to AI Tools. Any AI-generated information must undergo independent verification before inclusion in decisions. Biases inherent in AI Tools must be systematically identified and mitigated. Tribunals are accountable for all aspects of awards, irrespective of the extent of AI utilisation. Comprehensive documentation should be maintained, including records of decision-making processes and AI-related activities.

14.2.   Tribunals should ensure, as far as possible, that the award will withstand challenge. To this end, consideration should be given to the extent to which AI has been used during the preparation of the award, the extent to which disclosure within the award of its use should be made, and any other aspects to demonstrate that the award is essentially the work of the Tribunal, assisted where indicated, by the use of AI Tools.