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LEGAL CHALLENGES POSED BY ARTIFICIAL INTELLIGENCE IN CONSUMER ONLINE DISPUTE RESOLUTION

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LEGAL CHALLENGES POSED BY ARTIFICIAL INTELLIGENCE IN CONSUMER ONLINE DISPUTE RESOLUTION

Vibhuti Jaswal & Shiekhar Panwar***

[Abstract: This paper undertakes a comprehensive evaluation of the implications arising from the deployment of AI in CODR proceedings, particularly focusing on its potential augmentation of arbitrators, mediators, conciliators and the regulatory landscape governing such integration. Drawing upon a doctrinal approach, the study critically analyses the capabilities of AI systems vis-à-vis human arbitrators, mediators and conciliators, emphasizing the necessity for human intervention and supervision in AI-driven CODR processes. Additionally, the paper addresses the evolving regulatory frameworks surrounding AI, highlighting their consequential impact on the practice of CODR. As jurisdictions worldwide engage in regulatory initiatives concerning AI, the paper suggests that appropriate regulations should be conducive to the objectives of CODR, emphasizing shared values such as trustworthiness. By exploring the intersection of AI technology and CODR, this research will contribute to the ongoing discourse on enhancing efficiency and productivity in legal services while offering recommendations for the effective utilization of AI in CODR settings.]

I

Introduction

The legal profession has long been perceived as an exclusive domain¹, reserved for highly skilled and uniquely qualified professionals. However, the advent of artificial intelligence (AI) is poised to reshape the landscape of legal practice and regulation. Emerging research suggests that AI adoption could lead to cost reductions and increased accessibility to legal services for consumers.² Integrating

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¹ Alan Hunt, *Marxist Theory of Law* in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 350-360 (Dennis Patterson *et. al.*, (eds.), 2010).

² Donald H. Berman *et. al.*, *The Potential of Artificial Intelligence to Help Solve the Crisis in Our Legal System*, 32 CACM 928 (1989).

AI-driven models into law firms can potentially transform their operations and profiles significantly. Legal professionals and infrastructures must adapt accordingly to fully harness the benefits of AI. This necessitates a thorough understanding of the processes required to mitigate potential risks and challenges associated with AI implementation. As AI becomes more ubiquitous, there will be a growing imperative for robust regulatory frameworks to govern its use and establish enhanced liability structures, particularly in Consumer Online Dispute Resolution.

Alternative Dispute Resolution

Alternative Dispute Resolution (“ADR”) serves as a pivotal mechanism facilitating the resolution of ongoing disputes outside the conventional courtroom setting, either through direct negotiation or with the intervention of an impartial third party. The inherent advantages of this mechanism are manifold, notably alleviating the burden on traditional judicial institutions, safeguarding the confidentiality of pertinent assets and liabilities, and providing a swift, informal platform for the expression of disputing parties' perspectives.

Recognizing the escalating strain on India's judicial system in the late 1990s, there arose a pressing need for innovative dispute resolution methods. Section 89 of the Code of Civil Procedure, 1908, emerged as a seminal response to this demand. This statutory provision empowered courts to refer parties to ADR mechanisms, marking a pivotal shift in the legal landscape. Subsequently, this statutory provision catalyzed the enactment of the Arbitration and Conciliation Act of 1996, thus formalizing and institutionalizing ADR processes within the Indian legal framework.³ Following the enactment of the Consumer Protection Act of 2019, the Department of Consumer Affairs has taken significant strides towards incorporating Information and Communication Technology (“ICT”) within the Consumer Dispute Redressal Commissions. This includes the development of the *e-daakhil* portal, aimed at streamlining the process of e-filing complaints. These proactive initiatives pave the way for integrating Online Dispute Resolution (“ODR”) practices within the consumer protection framework. By harnessing ICT tools, such initiatives have the potential to enhance accessibility and efficiency within the consumer redressal ecosystem, thereby facilitating the mainstream adoption of ODR mechanisms.

Online Dispute Resolution

The evolution of ODR continues to shape the landscape of dispute resolution mechanisms. Initially, ODR encompasses using ICT tools to facilitate the resolution of disputes, employing a spectrum of communication technologies ranging from telephones to smartphones and LED screens, along with email and messaging

³ Arbitration and Conciliation Act, 1996.

applications. The fundamental objective is to enable dispute resolution without necessitating the parties' physical presence.

However, it is imperative to recognize that ODR transcends mere electronic Alternative Dispute Resolution (“e-ADR”). In its advanced stages, ODR operates as a fourth-party intermediary, leveraging algorithmic assistance tools to help parties reach resolutions. Such technological interventions manifest in various forms, including intelligent decision support systems, sophisticated negotiation tools, automated resolution processes, and machine learning algorithms. Furthermore, ODR has the potential to offer customized dispute resolution pathways tailored to the specific needs and circumstances of the parties.⁴

Consumer Online Dispute Resolution

The term “consumer” has been defined in the United Nations Guidelines for Consumer Protection⁵ and it generally refers to a natural person, regardless of nationality, acting primarily for personal, family or household purposes. These guidelines apply to transactions involving business-to-consumer interactions, encompassing the supply of goods and services by state-owned enterprises to consumers.

Amidst the era of rapid technological advancement, the role of Consumer Online Dispute Resolution (“CODR”) platforms has gained paramount importance in efficiently addressing consumer disputes. CODR encompasses a range of mechanisms aimed at resolving disputes through electronic communications and various information and communication technologies. These mechanisms vary in their level of automation.⁶ At its simplest, CODR replicates traditional face-to-face dispute resolution through electronic mediums such as written correspondence, telephone, or videoconferencing. Some software facilitates negotiation by employing standardized communications to encourage settlement. On the other end of the spectrum, more advanced and contentious CODR mechanisms employ predictive justice, wherein algorithms analyze parties' positions and interests,

⁴ Colin Rule, *Is ODR ADR*, 3 IJODR 8 (2016).

⁵ United Nations Conference on Trade And Development, United Nations Guidelines for Consumer Protection 10 (2016) available at: https://unctad.org/system/files/official-document/ditccplpmisc2016d1_en.pdf (last visited April 06, 2024).

The Guidelines were first adopted by the General Assembly in resolution 39/248 of 16 April 1985, later expanded by the Economic and Social Council in resolution 1999/7 of 26 July 1999, and revised and adopted by the General Assembly in resolution 70/186 of 22 December 2015,

⁶ The NITI Aayog Expert Committee on ODR, *Designing the Future of Dispute Resolution: The ODR Policy Plan for India* (2021) available at: <https://www.niti.gov.in/sites/default/files/2023-03/DESIGNING%20THE%20FUTURE%20OF%20DISPUTE%20RESOLUTION%20THE%20ODR%20POLICY%20PLAN%20FOR%20INDIA.pdf> (last visited April 06, 2024).

proposing solutions based on precedent without human intervention. Recognized widely, effective CODR systems are indispensable tools for cultivating consumer trust, safeguarding consumer rights, and fostering competitive markets within national and regional economies.

Artificial Intelligence

In 1950, Alan Turing introduced a seminal assessment known as the Turing Test to evaluate a machine's ability to exhibit human-like intelligence. This test, outlined in Turing's paper "Computing Machinery and Intelligence," poses the question of whether a computer can be considered intelligent if it can emulate human responses under specific conditions. Additionally, the term "Artificial Intelligence" ("AI") was coined by emeritus Stanford Professor John McCarthy in 1955, defining it as "the science and engineering of creating intelligent machines."

A cornerstone of AI is Machine Learning ("ML"), as described by Marchant,⁷ involves computers identifying errors in their processes and self-correcting to enhance future performance, evolving into iterative problem-solving tools. It is a tool where algorithms autonomously improve through experience, utilizing statistical techniques to derive insights, identify patterns, and make predictions from data without explicit programming. This adaptive capability makes machine learning particularly effective in domains with large datasets, such as the legal field.

Another crucial aspect of AI is Natural Language Processing ("NLP"), which enables computers to understand, interpret, and generate human language, allowing users to interact with machines using natural language instead of code. In the legal realm, NLP can analyze legal texts, extract relevant information, and even draft legal documents.

AI's applications in law are vast and evolving. For example, AI streamlines document review, forecasts legal dispute resolutions, assists in legal research, and can even serve as mediators or arbitrators in dispute resolution proceedings.

Despite current applications, AI's potential in law is far-reaching. With ongoing technological advancements, AI is poised to transform legal processes in unexpected ways. Subsequent sections will explore AI's role in dispute resolution, particularly in mediation and arbitration contexts.

⁷ The SciTech Lawyer, *Artificial Intelligence and the Future of Legal Practice* by Gary E. Marchant (2017) available at: <https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2017-2018/2018-sac/written-materials/artificial-intelligence-and-the-future.authcheckdam.pdf> (last visited April 05, 2024).

II

Artificial Intelligence and Consumer Online Dispute Resolution

In the landscape of CODR, AI implementation typically falls into three primary categories: administrative, procedural, and practice-related.⁸ Administrative applications are prevalent behind the scenes, encompassing tasks such as developing marketing materials (including textual content and imagery) and automating billing and financial management processes. Procedural advancements will initially centre on establishing rules governing the arbitration of AI-related disputes, along with formulating policies and guidelines delineating permissible and impermissible uses of AI within CODR institutions. However, of paramount significance are AI applications aimed at enhancing client service and CODR outcomes, which have the potential to transform the practice of CODR fundamentally.

The Current State of Dispute Resolution

Dispute resolution, a cornerstone of the legal system, offers alternatives to litigation for parties to settle conflicts. Mediation and arbitration stand out as the primary methods. Mediation involves a neutral mediator aiding parties in reaching a mutually agreeable solution through communication and exploring options. It prioritizes flexibility and confidentiality, empowering parties to control the outcome. Arbitration, conversely, involves a neutral arbitrator making binding or non-binding decisions after hearing arguments and reviewing evidence. While arbitration is typically faster and less formal than litigation, it provides a conclusive resolution.

However, traditional dispute resolution methods face challenges. They can be time-consuming and costly and require experienced mediators or arbitrators. The success of these methods depends on the parties' willingness to negotiate genuinely. Manual tasks such as document review and scheduling meetings also contribute to time and expense.

To address these challenges, there is growing interest in leveraging technology, particularly AI, to improve dispute resolution efficiency. In the following sections, we will explore how AI is transforming mediation and arbitration practices, opening up new avenues for resolving disputes.

AI in Mediation

AI is reshaping mediation practices through innovative tools and methodologies to enhance the process. One significant avenue is AI-Assisted Communication and

⁸ 16 *Supra*.

Negotiation. Through NLP, AI can analyze party discourse, identifying patterns, emotions, and key issues. This provides mediators with valuable insights for formulating effective resolution strategies.

Additionally, AI streamlines the negotiation process by simulating scenarios, predicting outcomes, and recommending optimal strategies. This enables parties to make informed decisions and achieve mutually beneficial agreements. Another impactful application is the use of Smart Contracts powered by blockchain technology. These contracts execute and enforce terms autonomously, eliminating intermediaries and dispute-resolution mechanisms. In mediation, smart contracts can enforce settlement agreements, ensuring compliance and reducing the likelihood of future disputes.⁹

Potential Drawbacks of AI in Mediation

Incorporating AI into dispute resolution processes brings with it several potential drawbacks and challenges. These include concerns over privacy and data security, inherent bias in AI algorithms, and the need for technical expertise to navigate AI tools effectively. Biased training data can lead to unjust outcomes, emphasizing the importance of diverse and representative datasets and regular audits to detect and rectify bias.¹⁰

Transparency is another significant challenge. AI systems often operate opaquely, making it difficult to understand their decision-making process, which is essential for fairness and accountability in dispute resolution. Addressing transparency issues is crucial to upholding these principles.

Additionally, questions persist about AI's ability to replicate human judgement and interaction in mediation. Ensuring ethical and effective AI integration requires addressing these uncertainties and aligning AI practices with fairness and justice goals.

AI in Arbitration

AI is poised to revolutionize arbitration, offering new pathways for dispute resolution akin to its impact on mediation. Predictive analytics is a powerful tool in this transformation, allowing AI algorithms to analyze past arbitration cases, predict outcomes, and provide strategic insights. For instance, predictive analytics can

⁹ Pooja Choyal *et. al.*, *Navigating Peace: Harnessing Artificial Intelligence for Conflict Resolution*, 6 IRJMETS 1043 (2024).

¹⁰ Rodrigues R, *Legal and Human Rights Issues of AI: Gaps, Challenges and Vulnerabilities*, 4 JRT (2020).

assess the likelihood of success, estimate potential awards, and forecast arbitrator behaviour based on historical decisions.¹¹

Additionally, AI enhances arbitration through document review and evidence analysis. AI streamlines these processes by swiftly reviewing extensive document sets, identifying relevant information, and flagging inconsistencies. This saves time, reduces costs, and improves evidence quality.¹²

Moreover, the concept of AI arbitrators represents a ground-breaking development. While still largely theoretical, AI arbitrators have the potential to conduct proceedings, analyze evidence, and render decisions autonomously. This paradigm shift requires careful consideration of ethical and legal implications.¹³

Potential Drawbacks of AI in Arbitration

Several potential drawbacks merit consideration, encompassing privacy, data security, and the ramifications of AI-driven decision-making on procedural fairness and due process. AI systems typically necessitate substantial volumes of data to operate effectively. In dispute resolution contexts, this data may encompass sensitive and confidential information. Thus, safeguarding the privacy and security of such data emerges as a paramount ethical imperative.

III

Legal Challenges in Implementing Artificial Intelligence and Machine Learning Technologies in C-ODR

Complex and Multifaceted Nature of Disputes

Machine learning-based AI systems identify similar patterns based on the interpretations and regulations of new data. However, this approach poses a challenge in the context of dispute resolution, as legislation and regulations lack a structured format conducive to algorithmic learning and rule identification.¹⁴

¹¹ Agus, Agus *et. al.*, *The Use of Artificial Intelligence in Dispute Resolution Through Arbitration: The Potential and Challenges* 29 SASI (2023).

¹² Waqar M, *The Use of AI in Arbitral Proceedings*, 37 OSJDR 344 (2022).

¹³ Neil Sahota, *AI in International Arbitration: Reforming Justice* (Feb. 12, 2024) available at: <https://www.neilsahota.com/ai-in-international-arbitration-reforming-justice/> (last visited 06 April 2024).

¹⁴ New York State Bar Association, *Artificial Intelligence and the Future of Online Dispute Resolution* Orr, Dave & Colin Rule, (Aug. 14, 2019) available at: <https://nysba.org/NYSBA/Sections/Coursebooks/Dispute%20Resolution/2019%20Fall%20Meeting/Panel%205.pdf> (last visited 06 April 2024).

Disputes often span multiple legal domains (e.g., tort, property, insurance and family) and involve parties transcending the boundaries of nations. In such instances, human neutrals must discern relevant rules from diverse legal domains and interpret them in light of complex and contested factual scenarios. These conflicts resist the "specialization into specific case types" required to instruct AI effectively.¹⁵ Additionally, the confidentiality obligations inherent in CODR restrict access to adequately representative datasets, making it more challenging to train machine learning-based AI systems to handle complex disputes with accuracy and impartiality.

Predictive Analytics and Biases

Apprehensions regarding the accuracy, bias, and fairness of AI are paramount, particularly considering the potential repercussions of AI-driven dispute resolution outcomes on individuals' rights.

Questioning the autonomous capability of AI in resolving disputes reveals deficiencies in such systems. Deficiencies and unconventional interpretation may prove essential in establishing standards or applying rules to novel circumstances. According to the RAND Corporation, the "derivation of rules to describe such imprecise terms would be among the more technically difficult tasks in developing a comprehensive rule-based model". Determining the reasonability and enforceability of the behaviour and its outcome.¹⁶ In mediation, human mediators manage social and emotional complexities, often influenced by underlying cultural differences.¹⁷ Neutrals rely on past experiences, knowledge, and normative judgements to assess disputants' credibility.¹⁸ AI may face challenges in effectively automating the interpretive, human aspects of ADR, especially considering the presence of disputed facts in many conflicts. While certain AI-powered lie detectors show promise in assessing human credibility¹⁹, none currently offer consistent reliability. Several systems have been found to produce biased, discriminatory, or inaccurate results²⁰.

¹⁵ *Id.*

¹⁶ Mark A. Peterson & Waterman, D.A., *Models of Legal Decision Making* (RAND Corporation, 1981).

¹⁷ Schmitz, Amy J. et. al., *Researching Online Dispute Resolution to Expand Access to Justice*, SSRN (2022).

¹⁸ 28 *Supra.*

¹⁹ Shuster, Anastasia et. al., *Lie to My Face: An Electromyography Approach to the Study of Deceptive Behavior*, B&B 1-12 (2021).

²⁰ Bittle, Jake, *Lie Detectors Have Always Been Suspect: AI Has Made the Problem Worse*, MIT Technology Review (Mar. 13, 2020) available at: <https://www.technologyreview.com/2020/03/13/905323/ai-lie-detectors-polygraph-silent-talker-iborderctrl-converus-neuroid/> (last visited 06 April 2024).

Expertise

Adopting a nuanced approach to expertise is imperative, particularly in the realm of arbitrator professionals or neutrals tasked with resolving e-commerce disputes. Trained neutrals offer the optimal chance of aligning parties' "respective positions"²¹, leveraging a blend of practical and "legal expertise."²² within their framework. Similarly, when considering AI's role, emphasis is placed on employing trained AI systems equipped with knowledge specific to the contentions within a particular field. Essentially, this entails the AI's comprehensive understanding of the disputed content within its designated domain. For example, notable instances include the utilization of artificial intelligence, such as Watson, which was developed by IBM, as auxiliary support in medical settings. Reports have indicated its successful assistance to medical professionals worldwide in cancer detection, illustrating the potential efficacy of trained AI in specialized contexts.

Non-transparency in Blackbox²³

Specific AI systems, often colloquially termed "black boxes," sometimes exhibit a lack of transparency and interpretability. This implies that the rationale underlying their forecasts, suggestions, or determinations is not readily comprehensible—certainly not within a manner coherent to system users. The use of such opaque systems in legal or dispute resolution contexts can jeopardize individuals' rights to well-reasoned decisions, as well as their ability to contest and appeal those decisions, raising concerns about due process.

AI Hallucination

Hallucination in the context of generative AI refers to instances where AI models produce content that appears to be factual but contradicts the source or generates factually incorrect outputs. This phenomenon is expected in generative AI tools like ChatGPT, designed to generate text based on existing language patterns rather than ensuring factual accuracy. The goal of such systems is to replicate language rather than provide accurate information, explaining why they may "hallucinate" in certain situations.

Privacy & Confidentiality Concerns

The increasing reliance on technology and the decreasing frequency of personal interactions present novel obstacles regarding personal information, particularly

²¹ Meason, E. and Smith, G., *Non-lawyers in International Commercial Arbitration: Gathering Splinters on the Bench*, 12 NJILB 24 (1991).

²² Ha, Hong-Youl et. al., *Temporal Effects of Information from Social Networks on Online Behavior: The Role of Cognitive and Affective Trust*, 26 IR 213-235 (2016).

²³ Adadi, Amina & Berrada, Mohammed, *Peeking Inside the Black-Box: A Survey on Explainable Artificial Intelligence (XAI)*, 6 IEEEA 52138 (2018).

within dispute resolution.²⁴ These challenges encompass various risks, such as online impersonation, unauthorized disclosure of confidential information through the circulation of documents and data exchanged during CODR processes, and potential tampering with e-awards and agreements.

CODR service providers must be diligent in establishing proper data utilisation and regulatory framework. Implementation of measures such as digital signatures²⁵ and encryption of documents is imperative to ensure confidentiality and integrity throughout the dispute resolution process. These steps are essential for the sustainable integration of CODR in handling large-scale disputes. It is crucial to approach these challenges not as impediments to the integration of CODR, but rather as opportunities to reinforce the security and efficacy of the CODR platform.

Availability of Neutrals

Implementing CODR is expected to create a substantial demand for neutrals proficient in technology and the intricacies of guiding parties through the CODR process. For the promotion of CODR as a preferred dispute resolution mechanism, professionals need to be trained.

Trust Deficit in ODR Services

A significant behavioural challenge in accepting Artificial Intelligence is the lack of trust in CODR services. This distrust manifests on various fronts, ranging from scepticism towards technology to concerns about the enforceability of CODR outcomes. To foster the mainstream adoption of CODR, it is imperative to address trust-related issues comprehensively.²⁶

Similar to other emerging technologies, CODR is likely to encounter scepticism from prospective users, particularly regarding its efficacy in the absence of face-to-face communications, as well as concerns regarding privacy and confidentiality. Efforts to promote CODR must proactively address these trust-related apprehensions at all levels.²⁷

²⁴ Government Centre for Dispute Resolution, *Online dispute resolution – An introduction to online dispute resolution (ODR), and its benefits and drawbacks* by Charlotte Austin, (2017) available at: <https://www.mbie.govt.nz/assets/00ddebf604/online-dispute-resolution-report-2018.pdf> (last visited 05 April 2024).

²⁵ Esther van den Heuvel, *Online Dispute Resolution as a Solution to Cross Border e-Disputes: An Introduction to ODR*, 30 UNCITRALLL (2000) OECD.

²⁶ 36 *Supra*.

²⁷ Louise Ellen Teitz, *Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of On-Line Dispute Resolution*, 70 FLR 985 (2001).

Prominence of Legal Culture

Introducing CODR in countries where the judiciary holds greater prominence and ADR mechanisms are underutilized poses significant challenges.²⁸ Despite the known costs and delays associated with traditional court proceedings, there remains a reluctance to embrace ADR methodologies, influenced by various factors.²⁹

Proceeding further, enhancing the capacity to deliver advanced Alternative Dispute Resolution services is imperative. This strategic enhancement will facilitate a smoother transition towards CODR adoption.

Miscellaneous complexities in AI-Driven Dispute Resolution

AI grapples with multifaceted challenges in dispute resolution, encompassing legal jurisdiction lapses, language barriers, procedural intricacies, and diverging party objectives. These complexities hinder AI systems from effectively navigating the diverse legal landscape, overcoming linguistic barriers, streamlining procedural steps, and aligning with parties' objectives. Addressing these challenges necessitates a holistic approach integrating legal expertise, linguistic proficiency, procedural clarity, and adaptability to parties' preferences, ensuring equitable and effective dispute resolution outcomes.

IV

Conclusion

Growing transnational transactions and technological advancements are fuelling the demand for AI systems in dispute resolution. AI has historically served as a significant neutral in CODR, shaping legal discourse beyond mere assistance. Despite facing challenges akin to other AI applications, AI shows promise in streamlining judicial processes and potentially outperforming traditional ADR methods. Continuous monitoring and adherence to justice standards are essential to mitigate potential drawbacks. The lack of clarity in standards for AI-powered neutrals highlights the need for comprehensive legislation to govern AI-enabled CODR practices and adapt to evolving needs. Therefore, Parliament should consider enacting legislation based on the recommendations outlined in this paper.

²⁸ Judit Glavantis *et. al.*, *How Do You Mean It, CISG? Applying The CISG More "21st Century"-Way*, 4 UNCITRAL 331 (2017).

²⁹ Niti Aayog, Annual Report 2016-17, 24 (2016) available at: https://www.niti.gov.in/sites/default/files/2018-12/AnnualReport_16-17_ENGLISH.pdf (last visited 06 April 2024).