Putting the Artificial Intelligence in Alternative Dispute Resolution: How AI Rules Will Become ADR Rules

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Abstract

This article argues that the evolving regulatory and governance environment for artificial intelligence (AI) will significantly impact alternative dispute resolution (ADR). Very recently, AI regulation has emerged as a pressing international policy issue, with jurisdictions engaging in a sort of regulatory arms race. In the same way that existing ADR regulations impact the use of AI in ADR, so too will new AI regulations impact ADR, among other reasons, because ADR is already utilizing AI and will increasingly utilize AI in the future. Appropriate AI regulations should thus benefit ADR, as the regulatory approaches in both fields share many of the same goals and values, such as promoting trustworthiness.

Keywords: artificial intelligence; online dispute resolution; alternative dispute resolution; regulation; governance; trustworthiness; transparency; fairness; diversity; explainability.

[A] INTRODUCTION

The last year has witnessed a proliferation in the development and use of artificial intelligence (AI). ChatGPT, a chatbot developed by OpenAI, was recently recognized as the fastest-growing consumer application in internet history, acquiring 100 million users between December 2022 and January 2023 (Gordon 2023). In February 2023, Columbian Judge Juan Manuel Padilla García posed several legal questions to ChatGPT, including the chatbot's replies alongside his own ruling (2023) to "extend

the arguments of the adopted decision" (Rose 2023).[1] Following extensive online debate, Judge García remarked that while ChatGPT and other technology programs should not be used to replace judges, they can improve the efficiency of judicial proceedings by aiding in document drafting and performing other secretarial tasks: "by asking questions to the application, we do not stop being judges, thinking beings", he said (Taylor 2023). Ironically, when asked by journalists abouts its role in the judicial system, ChatGPT itself appeared more reluctant than Judge García, responding, "Judges should not use ChatGPT when ruling on legal cases … It is not a substitute for the knowledge, expertise and judgment of a human judge" (Taylor 2023). If the swift uptake of ChatGPT for legal support is any indication, there will soon be a greater influx of AI systems in legal and alternative dispute resolution (ADR).

[B] BACKGROUND ON AIDR

Nearly 70 years after the term "artificial intelligence" was coined, it lacks a generally accepted definition. The struggle to achieve consensus on the definition of AI is symbolic of a larger struggle to achieve consensus on appropriate AI regulatory and governance frameworks. We define AI as an algorithm or machine capable of completing tasks that would otherwise require cognition (Abbott 2020, 22). This definition centres on AI's functionality rather than the specific way it is programmed, because the law should focus on regulating AI behaviour (Abbott 2020).

Recent improvements in AI capabilities are due in large part to increases in the availability of on-demand, voluminous and complex (structured and unstructured) datasets, or 'Big Data', along with advancements in software designs and computing power. Many of the recent and most prominent breakthroughs in AI have relied on machine learning, a particular sub-discipline of computer science that operates by using statistical methods to make classifications or predictions. However, in the ADR context, from the 1970s until recently, AI models were largely rule-based or expert systems, requiring developers to foresee and manually code all potential inputs and outputs relevant to a given dispute. For example, one early ADR system utilizing AI (AIDR), developed by the RAND Corporation in the 1970s and 1980s to support California product liability settlements, modelled human litigators' and insurance adjusters'

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[1]   Judge García asked several questions, including, "Is an autistic minor exonerated from paying fees for their therapies?" and "Has the jurisprudence of the constitutional court made favorable decisions in similar cases?" The chatbot responded correctly: "Yes, this is correct. According to the regulations in Colombia, minors diagnosed with autism are exempt from paying fees for their therapies."

decision-making processes for a series of hypothetical disputes. The if-then (input-output) rules mirrored a person's mental linking of facts and conclusions, chained together by legal rules (Waterman & Peterson 1981). The AI documented its reasoning in a decision tree, adjusting course in response to new or altered facts, and ultimately providing visual evidence of how it reached its conclusion (Waterman & Peterson 1981). Affirming the technical sophistication needed to build a system capable of handling even relatively straightforward disputes in a narrowly defined area with known parameters, the RAND prototype required several thousand if-then rules (Waterman & Peterson 1981). Relatively large-scale consumer e-commerce systems, such as eBay's and PayPal's dispute resolution systems from the early 2000s, operated in a similar rule-based fashion.

AIDR systems[2] have come a long way since these applications, and demand has increased recently due to the Covid-19 pandemic that restricted travel and face-to-face interaction, leading practitioners to leverage online dispute resolution (ODR) systems incorporating some degree of AI in document-sharing, video-conferencing and case-intake technologies (Orr & Rule 2019; Rickard 2021). Some AIDR systems also help facilitate or independently manage legal research, negotiation, settlement, document drafting and decision support (Zeleznikow 2021).

There has been continued debate about whether and how best to regulate ADR and AIDR (eg command-and-control regulations, self-regulation, trust marks, clearing houses), and no specific regulatory approach or centralized enforcement authority[3] has emerged (Liyanage 2013). This landscape has led some to conclude that there is little to no regulation, authority, standards or monitoring, making ADR an "informal system" (Menkel-Meadow 2013) and a "largely unregulated industry" operating behind closed doors (Dore 2006; Hensler 2017). Commentators point to the absence of agreed-upon and enforceable qualification and licensing requirements, responsibilities and obligations, and behavioural standards for neutrals (Rolph & Ors 1996; Menkel-Meadow 1997; Hensler 2017),[4] procedural safeguards of adjudication (Roberts 1993)

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[2]   "AI systems" refers to the entirety of the AI lifecycle, including the models, composed of algorithms and data, as well as the human, social, and industry context or ecosystem the AI operates in or impacts.

[3]   There is "no national or centralised form of 'regulation' of dispute resolution in the US" (Menkel-Meadow 2013).
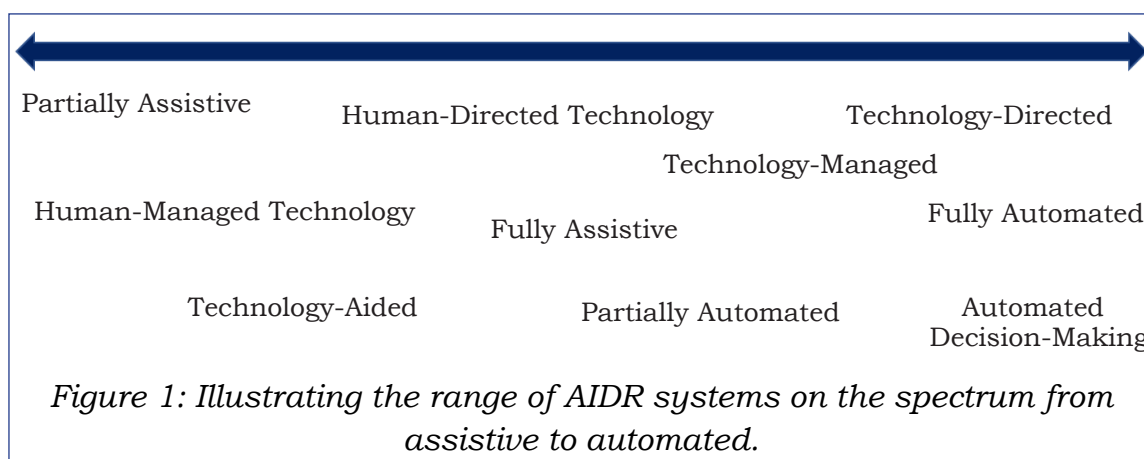
[4]   "ADR itself is arguably a low governance field because in most countries practitioners are unlicensed and the field is largely unregulated ... Standardization or regulation of any sort has generally only applied to practitioners seeking to practice in official or public frameworks, such as professional organizations and courts, which require certain standards of certain practitioners, in particular for those practitioners involved in courtconnected mediation" (Ebner & Zeleznikow 2016).

and judicial review except in limited instances of neutral misconduct (Dore 2006). Where private and court ADR rules of practice and ethics exist, some argue that the "breadth, reach and enforcement mechanisms for an ethics of ADR become highly pluralistic, substantively conflictual and procedurally cumbersome" (Menkel-Meadow 1997).[5] The absence of formal procedural and institutional safeguards and enforcement mechanisms has led some to question the quality of ADR in the absence of regulation (Rolph & Ors 1996).

While ADR is not regulated in the same way or to the same extent as conventional litigation or legal practice, there are a host of laws that apply to ADR despite not being ADR-specific, such as professional standards that apply to advocates and neutrals licensed to practise law and working in ADR, or data protection laws that govern the use of certain information in ADR proceedings. These rules may conversely apply to the use and development of AI systems *in* ADR, and there are some existing and emerging institutional governance and regulatory mechanisms that set standards and expectations specifically for AIDR systems' design, development and deployment.

Classifications, Applications and Impacts

How AI impacts ADR processes, disputants and the role of the third-party negotiator, mediator or arbitrator (the "neutral") depends, among other things, on the technology used, tasks executed and the level of human oversight and intervention. It is helpful to consider AIDR systems as existing on a spectrum (see Figure 1).

Figure 1: Illustrating the range of AIDR systems on the spectrum from assistive to automated.

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5 "Governmental and other organizations in the United States are regulating ADR and TPs [third parties], but the common regulatory approach is formalistic at best; mediators are subject to one set of regulations, arbitrators another, and many of these rules apply only to court-attached procedures" (Silver 1996).

Assistive technologies, which can support, inform or make recommendations to neutrals, account for one end of this spectrum. These technologies can expedite and improve ADR outcomes by eliminating administrative and procedural impediments (eg document management and drafting, communications, calendaring, travel) and equipping neutrals with the informational resources (eg advanced legal research) that they need to make accurate, informed decisions. Assistive technologies are being leveraged in real time. Harvey, a large language model-based platform, is assisting attorneys with contract analysis, due diligence, litigation and regulatory compliance in several languages (Allen & Overy 2023). The system is reportedly providing faster, improved and cost-effective recommendations and predictions that attorneys can review and verify (Allen & Overy 2023). Applied to ADR, such a system could simplify and supplement the time- and resource-intensive aspects of neutrals' work and help satisfy various procedural requirements, such as by providing oral and written communications to disputants or decreasing costs for human translators by providing first-pass translations.

The benefits offered by assistive technologies can accrue to disputants, who may utilize ADR over traditional litigation due to its relative efficiency, affordability and reliability (Carneiro & Ors 2014). Assistive AIDR is therefore well equipped to satisfy ADR's core objective to provide disputants with a fair, efficient and economical resolution process (United Nations Commission on International Trade Law (UNCITRAL) Model Law 2006). Since neutrals retain control over the dispute resolution process and sole authority over case outcomes, there is broad support in the ADR literature for expanding the use and development of AI that assists or enables neutrals in performing their work in line with generally accepted ADR values (Zeleznikow 2021).

Automative technologies, which occupy the other end of this spectrum, can partially or fully automate discrete tasks and, in some narrow instances, even replace neutrals. Some applications include automated negotiation, settlement, award and resolution plan drafting, and decision-making. CoCounsel, released in March 2023, claims to be the world's first-ever AI legal assistant (Casetext 2023). Users can delegate "substantive, complex work" (paras 5-7) to the system, including legal research, document and contract analysis, and deposition preparation (Casetext 2023). Proponents of automative technologies note that, insofar as AI can detect correlative patterns in large datasets with a speed, scale and precision that often outpaces human ability, it could study previous disputes and apply core features, rules and insights to future matters.

Equipped with these insights, neutrals could improve the accuracy[6] of their decisions (Barysė & Sarel 2023). Or, with AIDR systems independently resolving minor, straightforward disputes, neutrals could focus their time on more complex matters.

Automated systems can also improve access to justice for self-represented litigants by offering real-time, inexpensive legal advice and explanation (de la Rosa & Zeleznikow 2021). Providing potential disputants with an accurate forecasted case outcome empowers underrepresented parties to make informed decisions about whether to pursue ADR altogether, helping alleviate long-standing concerns about ADR favouring disputants with more power and resources (Miller 2022). Studies have also found that some individuals have an easier time confiding in an AIDR system than a human neutral, either because there is a greater degree of anonymity or because AI systems offer no (overt) feelings of judgment or bias against identity traits (Orr & Rule 2019).[7] ADR participants are often concerned about neutral bias and may select, for example, neutrals whose nationalities differ from disputants' to promote impartiality (UNCITRAL Mediation Rules 2021). ADR participants may similarly view AI as less likely to be partial to a particular disputant or dispute domain, regardless of whether that is a correct perception. Disclosure requirements vary greatly between jurisdictions,[8] which some commentators say prevents parties from easily or inexpensively accessing information about neutral misconduct or conflicts necessary to make an informed selection (Silver 1996; Dore 2006). Lacking any outward personal, financial or professional interests, a well-trained and explainable AI system could operate as an uninterested neutral.

Most existing automative systems are unable to perform significant tasks independently or without any human oversight, however (McKendrick & Thurai 2022). Many commentators have noted this "implementation gap between those technologies which are proposed and predicted within the field, and those which have been realized" (Alessa 2022, 324). Moreover, despite automative technologies' potential benefit to disputants and neutrals, there are significant costs and risks associated with the adoption of automative ADR technologies, as we

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[6] For example, in 2017, an AI system developed by researchers at Cambridge University performed with greater accuracy (87%) than a group of 100 experienced lawyers (62%) when predicting the outcomes of 775 financial ombudsman cases (Tashea 2017).

[7] Some scholars are exploring whether automated decision-making can de-bias judges (Chen 2019, as cited in Barysė and Sarel 2023).

[8] California has the most comprehensive disclosure requirement in the US, requiring disclosure of a third party's past ADR work "to inform the disputants of a pattern of bias within an industry or substantive dispute" (Silver 1996).

consider further below (Orr & Rule 2019; Rajendra & Thuraisingam 2021).[9] In contrast to assistive technologies, automative technologies face greater scepticism because their outputs can be used to determine ADR case outcomes with little to no human oversight.

Many systems occupy the space between these two ends of the AIDR spectrum. For example, British Columbia's Civil Resolution Tribunal (CRT), an AI expert system, independently performs case intake, management and communications and provides disputants with a negotiation forum.[10] However, if disputants are unwilling or unable to reach an agreement in an automated environment, the CRT will notify a human tribunal member, who will then oversee the duration of the resolution process. Other systems, such as SmartSettle, an AI negotiation tool, can independently arrive at a compromise between disputants and provide a recommended settlement to a human neutral.[11] The neutral may agree with the recommendation and provide it to the disputants, or overrule it and make their own mediator's proposal. A system's position on the AIDR spectrum is therefore not solely determined by its design and capabilities, but also how and for what purpose(s) the technology is used by parties and neutrals. Still, given the impact that even partially assistive AI systems can have in dispute resolution, it may be useful to think of AI as taking on an active "fourth party" role in the ADR process (Katch & Rifkin 2001, as cited in Carneiro & Ors 2014), and of AI developers as a "fifth party" due to their discretion in setting AI's rules and logic and supplying its training data (Lodder 2006, as cited in Carneiro & Ors 2014). Acknowledging AI and its developers as active participants in the ADR process is critical to understanding the technical, procedural and normative impacts of AI involvement.

Challenges and Risks for AIDR

AIDR systems based on machine learning can operate by detecting correlative patterns in data, developing rules based on this analysis, and applying those rules to new data. Unfortunately, this presents a weakness in the dispute resolution context, as laws and rules do not provide "the kind of structure that can easily help an algorithm learn and identify patterns and rules" (Orr & Rule 2019, 9-10). Conflicts sometimes involve

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[9] Some automated negotiation support systems, which "do not automate the negotiation process but provide IT support for complex negotiations, leaving the control over the negotiation process with the human negotiators", are viewed as a limited exception (Schoop & Ors 2003, as cited in Zeleznikow 2021).

[10] Civil Resolution Tribunal, 'Societies and Cooperative Associations'.

[11] See Smartsettle Infinity.

multiple areas of law (eg tort, property, insurance, family) and concern disputants located across international borders. In these cases, human neutrals must identify relevant rules from disparate areas of law (and perhaps legal systems) and interpret them against complex and disputed fact sets. Conflicts of this nature do not lend themselves to "specialization into specific case types" necessary for instructing AI (Orr & Rule 2019, 10). Add to this a dearth of sufficiently representative datasets due to ADR confidentiality obligations, and it is even more difficult to train a machine learning-based AI system to successfully navigate a complex dispute without error and unfair bias.

Further calling into question AI's ability to independently resolve disputes are capabilities lacking in such systems. Novel analysis and interpretation may be required to determine standards or the application of rules to new facts. Whether behaviour was "reasonable" or an outcome "foreseeable" can depend entirely on subtle differences in context.[12] Mediation, for example, often requires human neutrals to navigate social and emotional issues, sometimes with underlying cultural differences (Schmitz & Ors 2022). To assess disputants' reliability, neutrals regularly depend on previous experiences, knowledge and normative judgements (Waterman & Peterson 1981). AI may not be well equipped to successfully automate the interpretive, human aspects of ADR, especially because disputed facts are an inherent feature of many conflicts. While some AI-powered lie detectors are better at discerning human credibility than people (Shuster & Ors 2021), no existing system can do this reliably, and several have been found to produce biased, discriminatory or otherwise inaccurate results (Bittle 2020; Lomas 2021).

Concerns about AI accuracy, bias and fairness are significant given the impact that AIDR outcomes can have on individuals' rights. Some AI systems, colloquially referred to as "black boxes", can lack transparency and explainability, meaning the logic according to which they make predictions, recommendations or decisions is not explainable—at least not in ways that make sense to system users. The use of such opaque systems in legal or dispute resolution settings can undermine individuals' right to a reasoned decision, as well as their right to challenge and appeal from a decision, raising due process concerns.

For all these reasons, some critics conclude that "machine-made justice" by *automative* technologies should never replace existing dispute resolution processes by humans. They contend that technology can

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[12] 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" (Waterman & Peterson 1981, 18).

neither substitute human reasoning and common sense nor achieve fairness and justice in the ADR context (Condlin 2017). Others are open to automation on a more limited basis, for certain high-volume, low-value disputes, or those with relatively limited grounds for factual disputes and developed bodies of law, such as certain traffic violations.

[C] EXISTING RULES AND STANDARDS FOR AIDR

Even in the absence of AIDR-specific rules and standards, rules and standards that apply generally to ADR also apply specifically to AIDR. For instance, for over 50 years, the UNCITRAL has published conventions, model laws and rules for international commercial trade law. The Model Law on International Commercial Arbitration (amended in 2006), aimed at developing harmonized international economic relations, has been adopted in over 119 jurisdictions. While the Model Law is directed at states, the UNCITRAL Arbitration (revised in 2010) Rules and UNCITRAL Mediation (2021) Rules are rule sets that disputants can agree to use in their ADR proceeding. While not the only set of ADR standards, the UNCITRAL rules offer a globally accepted benchmark used by professional associations, chambers of commerce and arbitral institutions.[13]

Though not drafted with AI in mind, several UNCITRAL arbitration rules apply to AIDR, including requirements that neutrals must disclose any conflicts of interest or biases undermining their impartiality or independence; treat parties equally and provide reasonable opportunities to present their cases; conduct hearings fairly and efficiently without unnecessary delay and expense; determine the admissibility, relevance and weight of evidence presented by disputants; and state the reasoning upon which the award is based (UNCITRAL 2010).

In 2016, UNCITRAL articulated four principles that should underlie any ODR process—fairness, transparency, due process and accountability—and emphasized that existing ADR rules and standards, including confidentiality, due process, independence, neutrality and impartiality, apply equally to ODR (2016). UNCITRAL's Expedited Arbitration Rules further affirm that technology uses are also subject to fair proceedings rules, stating that neutrals should give disputants "an opportunity to express their views on the use of such technological means and consider the overall circumstances of the case, including whether such technological means are at the disposal of the parties" (2021, 52).

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[13] UNCITRAL, 'Technical Assistance and Coordination.'

The frameworks governing the ethical conduct of arbitrators (American Bar Association (ABA) 2004) and mediators (American Arbitration Association, & Ors 2005) also articulate agreed-upon expectations and best practices for neutrals' obligations. In addition to those articulated by UNCITRAL, several other ABA principles also apply to AIDR, including prohibitions on neutrals acting with more or less authority than provided by the agreement of parties or in a manner inconsistent with applicable procedures and rules; requiring that decisions be made independently and insulated from "outside pressure, public clamor, and fear of criticism or self-interest" (ABA 2004, 4); and prohibiting non-accurate or untruthful advertisements or the promotion of services and abilities related to arbitration in a manner likely to mislead. In 2022, the ABA's Dispute Resolution ODR Task Force developed a set of guiding principles for ODR and thus, AIDR, namely that the process should be; accessible, accountable, competent, confidential, equal, fair, impartial, legal, secure and transparent (2022), adding additional considerations for court-connected ADR systems.

[D] THE EMERGING GLOBAL AI REGULATORY LANDSCAPE AND ITS APPLICABILITY TO AIDR

The AI regulatory landscape is extensive, dynamic and fragmented.[14] We focus here on approaches taken by the European Union (EU), United Kingdom (UK) and United States (US), but many other jurisdictions are also active in this area.[15] By encouraging the responsible use of trustworthy technology, or that which is fair, safe and consistent with human and civil rights, these approaches attempt to address and mitigate many of the challenges and concerns associated with AI previously discussed.

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[14] For a representative list of global AI regulatory initiatives from governments, international organizations, and civil society, see OECD Policy Observatory.

[15] For example, Singapore was the first Asian country to publish a Model AI Governance Framework (Infocomm Media Development Authority 2019) and the first country to launch an AI Governance Testing Framework and Toolkit ("AI Verify") (Infocomm Media Development Authority 2022); Canada was the first country to directly regulate federal government use of AI (Directive on Automated Decision-Making 2019); Japan was the first country to raise, as an official policy matter, the need to create AI development and implementation standards (Iida 2021).

European Union: AI System Risk Classification and Product Liability Laws

The EU Artificial Intelligence Act (AI Act), proposed in 2021 and pending potential enactment, would make the EU the first large jurisdiction to specifically regulate AI. The AI Act seeks to regulate systems that pose a potential risk to fundamental rights or human wellbeing and categorizes AI use cases along four risk tiers: minimal, limited, high and unacceptable (European Commission 2022). System developers' and users' documentation, disclosure and transparency obligations correspond with the risk levels, ranging from voluntary to obligatory. The Act considers the use of AI technologies in the administration of justice, or "applying the law to a concrete set of facts", as a high-risk application subject to the following mandatory requirements before systems can be released on the market (European Commission 2022, 41, para 40):

> *High risk* – Risk assessment and mitigation systems, high quality datasets, activity logging to promote traceability, appropriate levels of human oversight, and high levels of robustness, security, and accuracy.

The EU's proposed amendments to its product liability laws (European Commission 2022) will complement the AI Act by ensuring providers and manufacturers of AI or AI-enabled systems that are defective, cause physical injury, property damage, or data loss or privacy breach are liable to compensate injured parties (European Commission 2022). These rules apply broadly to both new and existing hardware and software products, and manufacturers will be responsible for harms resulting from changes or software updates that they make to products already on the market (European Commission 2022). Cited forms of compensable harm include discrimination by AI recruitment software or the onset of a health condition caused by an innovative medical device.

AIDR Systems and Automated Decision-Making

Affirming that the EU considers AI in ADR high risk, in 2018, the European Commission for the Efficiency of Justice (CEPEJ) adopted five ethical principles for the use of AI in judicial systems, including ODR: (1) respect for fundamental rights; (2) non-discrimination; (3) quality and security; (4) transparency, impartiality and fairness; and (5) "under user control" (CEPEJ 2018). While the CEPEJ acknowledged that AIDR could significantly improve access to justice (2018, 44), it believes users

and deployers should assess the appropriateness[16] and degree of AI's integration in the dispute resolution process to ensure that transparency, neutrality and loyalty requirements are being upheld (CEPEJ 2018). To this end, the CEPEJ asserts that technology applications must not undermine the following rights guaranteed in all civil, commercial and administrative proceedings: access to a court; adversarial principle;[17] equality of arms; impartiality and independence of judges; and right to counsel (2018).

With respect to automated ODR systems, the CEPEJ references section 22 of Europe's data protection law, the General Data Protection Regulation (GDPR), which allows persons "to refuse to be the subject of a decision based exclusively on automated processing" when the automated decision is not required by law and entitles them to decisions made by human decision-makers (2018). Beyond the right to *object*, both the EU GDPR and UK Data Protection Act 2018 also confer on data subjects the rights to be *informed* about the existence and use of automated decision systems and to *access* meaningful information about the systems' underlying logic and potential consequences (UK Parliament 2018). Data subjects who explicitly consent to decisions based solely on automated processing possess a right to obtain an explanation of the system's decision (UK Parliament 2018). According to the UK Information Commissioner's Office, explainability statements containing the following explanations must accompany automated decision systems released for use, namely: rationale, responsibility, data, fairness, safety and performance, and impact (2020). These statements help address concerns around black-box systems and provide disputants with the greater ability to challenge an automated decision with legal effect.

The EU GDPR and UK Data Protection Act protect the personal information of all citizens and residents regardless of whether they are physically present in those territories (GDPR 2018, article 3). This means that organizations operating outside the territories but processing the information of EU or UK citizens and residents, monitoring their behaviour or offering them goods and services, nonetheless, must comply with the GDPR. Individuals protected under these laws could foreseeably opt out or require explainability statements of automated decisions that are part of AIDR processes outside of Western Europe. Even if an automative AI system is not legally required to adhere to GDPR because,

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[16] The use of AI in a low-value e-commerce dispute poses less risk of serious harm than its use in divorce proceedings or allocation of health care resources, for instance (CEPEJ 2018, 44).

[17] "An adversary system resolves disputes by presenting conflicting views of fact and law to an impartial and relatively passive arbiter, who decides which side wins what" (Freedman 1998, 1).

for example, it only processes the data of US citizens residing in the US, GDPR has become a *de facto* standard for international organizations because of the significant technical complexity and costs of having systems operate in compliance with (sometimes conflicting) rules in different jurisdictions. To lessen this burden and enable systems to be used across jurisdictions, it is preferable for AIDR systems to abide by a single data protection standard.

The ability to opt-out of ADR processes that use automative technologies and request a dispute be overseen by a human neutral is a governance mechanism also being considered in the US. In October 2022, the White House's Office of Science and Technology Policy (OSTP) released its "Blueprint for an AI Bill of Rights". Focused on high-risk automated technology systems, the Blueprint advances[18] five key principles[19] that mirror or expand on those found in many other AI governance frameworks (White House OSTP 2022). It identifies judicial and ADR processes as requiring more stringent safeguards and protections, which might include (a) the ability to opt-out of ADR processes involving automated technologies; (b) access to an explanation of how the system operates and why it arrived at its resolution, so parties can challenge or appeal the decision; and (c) comprehensive privacy-preserving security measures for systems that use, process or extract sensitive data about individuals (White House OSTP 2022). Some US state privacy laws, including those in California (2018), Colorado (2021), Virginia (2023) and Connecticut (2022), now codify residents' rights to opt-out of automated decision-making technologies in certain contexts and to receive meaningful information about AI decision logic. Therefore, like the EU and UK, the US is also emphasizing that, in high-risk areas, the logic and intent underlying AI system outputs should be understandable to consumers.

Non-Regulatory AIDR Governance

AI governance is not purely a matter of regulatory compliance; a wide range of non-binding best practices and standards also exist. The ABA, for instance, notes it is critical to incorporate a broad range of ADR practitioners and stakeholders' input into ODR system design and development (ABA (Dispute Resolution ODR Task Force) 2022). In the absence of close collaboration between system developers and an

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[18] "The Blueprint for an AI Bill of Rights is non-binding and does not constitute U.S. government policy. It does not supersede, modify, or direct an interpretation of any existing statute, regulation, policy, or international instrument" (White House OSTP 2022, 2).

[19] Safe and effective systems; algorithmic discrimination protections; data privacy; notice and explanation; and alternative options.

implementing organization, the former will have discretion in determining the model's design, training data and underlying logic, thereby influencing the system's outputs. If collaboration in the design phase is not possible, organizations procuring systems from external developers should take steps to assess and mitigate any gaps between the developer's and the user's needs, such as by articulating clear values, objectives and key performance indicators for systems, and performing impact assessments before and continuously after implementation (National Center for State Courts nd; ABA 2022). Offering guidance for designers, developers, providers, practitioners and users, the ABA lists the following criteria among those it uses to describe accountable, secure, equal, and transparent ODR systems (2022):

⬦ uses data security technologies and practices that meet industry standards for information technology;

⬦ indicates whether they comply with relevant governmental and non-governmental guidelines on transparency and fairness of AI systems;

⬦ includes metrics used to assess system performance, including the accuracy of those metrics;

⬦ regularly audited for compliance and to evaluate whether the system is meeting articulated goals;

⬦ provides at least the same confidentiality and privacy as does offline dispute resolution;

⬦ does not provide any user with a systemic advantage.

The ABA maintains that these provisions supplement "applicable technical standards or the legal and ethical principles that apply in face-to-face dispute resolution processes", such as due process and self-determination (2022, 2).

In 2019, the UK became the first jurisdiction to pilot public sector AI procurement guidelines (World Economic Forum 2019), seeking to encourage the adoption and use of responsible AI by the public sector and, by extension, private businesses designing AI systems for government use. Given that ADR processes deal with sensitive personal information and decisions need to be explainable, the following procurement principles are especially relevant for AIDR: enabling algorithms' internal and external interpretability to establish accountability and contestability; appropriate confidentiality, trade-secret protection and data-privacy practices; and clearly defined data-sharing agreements with vendors (World Economic Forum 2019).

The procurement of robust and secure AI systems is likewise encouraged in the US. In January 2023, the National Institute of Standards and Technology (NIST) published the first official draft of its AI Risk Management Framework (RMF), a voluntary framework intended to encourage the development, deployment and use of responsible and trustworthy technology.[20] Relevant for the entire spectrum of AIDR systems, the RMF notes that human baseline metrics must be established for AI applications that augment or replace human activity (NIST 2023). It also recommends that organizations using external developer software, hardware and data ensure that their risk tolerances align with those of the developer, so as not to introduce any unanticipated risks (NIST 2023).

[E] HOW AI RULES WILL BECOME ADR RULES

AI and ADR are both regulated through rules that apply to more general areas, such as privacy and advertising practices (Atleson 2023). Likewise, ADR rules, such as requirements for conflicts disclosures, apply to AI used in ADR. So too will the emerging body of AI rules apply to ADR. AI is already part of ODR and many ADR processes, whether it is doing something relatively simple on the assistive end of the spectrum like enabling video conferencing and scheduling, or something closer to the automative end. Recent advances in AI combined with the Covid-19 pandemic accelerated the adoption of AIDR, but AIDR adoption will continue to increase as AI capabilities continue to improve. Even very traditional ADR systems will face competitive pressures to incorporate AI. Just as traditional legal practitioners will face increased competition from legal practitioners augmented by AI, or in some cases using automated systems, traditional ADR providers and processes will face increased competition from AIDR systems. At some point, it is likely that all ADR will be AIDR. As this transition accelerates, AI rules will increasingly apply to ADR.

For instance, the European Parliament has suggested that deployers of AI systems are in control of risks and have corresponding liability for AI-generated harms (Committee on Legal Affairs 2020). ADR practitioners may thus be liable for harms caused by AI systems they adopt in ways they would not be liable for similar harms they cause directly. For example, an ADR provider may have liability for using an AI system that is ultimately proven to have a systemic racial bias, as has been alleged against systems used by some judges to make bail determinations (Larson & Ors 2016). While human neutrals can have liability for racially motivated behaviour,

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[20] Valid and reliable; safe, secure and resilient; accountable and transparent; explainable and interpretable; privacy-enhanced; and fair with harmful bias managed.

a neutral cannot be interrogated about biases in the same manner as an AI system. A human neutral is exceptionally unlikely to admit to racial bias, or may have an unconscious bias, but either way is likely to justify an award in a reasoned decision based on permissible criteria. Even if it is possible to detect a potential bias through aggregating and analysing enough of a neutral's publicly available arbitration awards, or a judge's for that matter, such a finding is unlikely to be adequate grounds for challenging a particular award's validity. In the case of a biased human neutral, all of whose awards rule against disputants of a particular race, it will thus be very difficult to prove that such an outcome is not coincidental. By contrast, some AI systems can be evaluated directly to prove the existence of bias if such a statistical finding emerges. AIDR systems revealed to be operating with errors or unfair biases will then need to be reprogrammed or decommissioned, providing another ADR accountability mechanism. Human neutrals on the other hand are very rarely disciplined or held accountable for errors or unfair biases (Silver 1996; Dore 2006). Similar liability considerations may apply under product liability rules for AIDR systems, such that some harms caused by AI systems in the ADR context would not entail liability had they been caused by a person. One effect of this enhanced liability may be greater attention to system designs of AIDR processes.

Even non-binding regulations may have a similar effect. For instance, while the UNCITRAL and ABA rules and guidelines affirm neutrals should treat parties equally and fairly, neither claims they should not provide users with a "systemic advantage" like that of the ABA ODR standards (2022). Though not defined, systemic advantage in AIDR likely includes technology-based advantages. Technology access and comfort shape the dynamics of disputants in relation to each other and the neutral. Parties using video-conferencing software may perform differently depending on their backgrounds and environment, video quality and internet connections. These technical factors can have small to large impacts on the ADR process and ultimate resolution. For example, they can play a role in advocates' abilities to present their arguments and neutrals' perceptions of parties' professionalism and reliability. As these standards become part of ADR, it may result in heightened obligations for neutrals to level the playing field.

[F] CONCLUDING THOUGHTS

Appropriate AI regulations should benefit ADR because these regulations seek to achieve goals and values that exist in both fields, such as promoting trustworthiness, fairness and diversity. To the extent that AI systems

will be held to higher standards than human neutrals, such as greater explainability and transparency standards, AI rules may help solve some of the long-felt needs in ADR governance.

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