

CHARTERED INSTITUTE OF ARBITRATORS  
DISPUTE APPOINTMENT SERVICE CONVENTION 2017

TECHNOLOGY AND ADR

SOFTWARE AND AI DISPUTE RESOLUTION MEETS TRANSPARENCY

SKELETON NOTE

THE SOFTWARE

1. All sorts of activities are executed by utilising software rather than people and with the growth of artificial intelligence this trend will increase exponentially. Robots already do many things either wholly or by way of assistance – e.g. the Da Vinci Xi machine which surgeons use for detailed surgery – it enables greater precision and smaller incisions.
2. Online Dispute Resolution is already well established and will increase its reach into more and more complicated disputes.
3. There will be not only straightforward software programmes but also systems utilising self teaching robotic interventions. It will take time to get to very sophisticated AI – a recent attempt to establish an AI programme that was able to carry on “conversations” with lonely people proved insufficiently imaginative. Its responses were identified quite quickly as “robotic”. Accordingly humans had to be added to provide back up to the AI to give it any chance of being regarded as effective. But the Alexas of this world show the way that things will go.
4. The software or the AI will increasingly produce decisions in more and more complicated disputes.

TRANSPARENCY

5. Investment treaty arbitration came under little in the way of sustained criticism while the richer nations were not at the receiving end of claims.

But that all changed when claims against first world governments started to become common.

6. The process is seen as unaccountable and secret – “secret” being an epithet which now tends to have a negative and pejorative overtone. “Confidential” is simply a euphemism for secret.
7. In particular the treaties failed to make any or any proper provision for environmental and social factors. Attack comes from left and right. In 2008 during his campaign Obama voiced a desire to re-negotiate NAFTA possibly even to include an opt out clause for the US – like Trump his focus was the rust belt states.
8. When Trump started in on the current exercise to re-negotiate NAFTA a body of academics wrote to the White House specifically objecting to the arbitration clause which they described “an affront to domestic legal practices” or as a resident of Digby Neck (a remote corner of Nova Scotia) put it a propos of a Bilcon / Canada dispute “Nafta allows decisions to be made by people we’ve never seen in places we’ve never heard of that directly affect us”
9. Communities are likely to be exposed to more extensive arbitration processes in the coming years and similarly to the investment treaty complaints individuals are likely to complain about the nature of the process and to seek some form of remedy.

#### THE MEETING

10. Pressure for some form of transparency in all forms of dispute resolution is likely to grow. Will there be an appeal system that permits a human review? That seems counter-intuitive but may be the best solution. Or will the answer be a regulatory body - an “Ofwat” or similar for dispute resolution - to ensure that the way that the software is written or the AI is operating is fair and not loaded deliberately or accidentally by biases of one sort or another?

11. Either way, it seems that the plea of secrecy or confidentiality for intellectual property may have to be rejected in favour of more nuanced and public-friendly approaches.
12. Greater transparency in the process is – after all – no more than the application of the old saw that justice must not only be done – it must be seen to be done

#### FURTHER IN THE FUTURE

13. One interesting question is whether in the fullness of time, the decision maker in any particular situation is a “mix” of human and technology. Already people are having themselves wired up to add to their “natural” capacities. This is the world of Human Enhancement Technology. For example, it is possible to have software inserted into one’s brain that enables one to identify at anytime and anywhere where North is. In the future a retinal eye implant might enable night vision. There are plenty of other such enhancements to be had. Therefore in the future, one asks, will judges have had technological enhancements physically installed to improve their decision making? It is not an attractive prospect but it is difficult to see why not. And one would in that context want to have access to the algorithms.

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