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# CHALLENGES TO AN INTERNATIONAL ARBITRATION AWARD

by Lionel M. Schooler

## I. INTRODUCTION

The United States Court of Appeals for the Tenth Circuit recently decided *Baker Hughes Services International, LLC v. Joshi Technologies International, Inc.*<sup>1</sup> This decision serves as a reminder of the scope of the subject matter jurisdiction of an American federal court to evaluate a challenge to an arbitral award in an international arbitration proceeding conducted under the auspices of the New York Convention.<sup>2</sup> It also highlights the boundaries within which such a challenge must be evaluated.

## II. BACKGROUND FACTS

The *Baker Hughes Servs. Int'l* court characterized the underlying contractual dispute as straightforward.<sup>3</sup> The parties to the agreement were Baker Hughes Services International, Inc. (“Baker Hughes”), and a consortium (known as the “Consortio Pesago”) consisting of Joshi Technologies International, Inc. (“Joshi”) and its partner, Campo Puma Oriente S.A (“Campo”) (collectively, the “Consortium”).<sup>4</sup> Baker Hughes was contractually obligated to provide goods and services in connection with the Consortium’s development of oil and gas interests in Ecuador.<sup>5</sup> The agreement in question contained an arbitration clause requiring resolution of any dispute through the Arbitration and Mediation Center of the Ecuadorian-American Chamber of Commerce.<sup>6</sup>

Baker Hughes was determined to have timely provided the goods and services requested, but no one in the Consortium paid for these.<sup>7</sup> Baker Hughes then

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<sup>1</sup> *Baker Hughes Servs. Int'l, LLC v. Joshi Techs. Int'l, Inc.*, 73 F.4th 1139 (10th Cir. 2023).

<sup>2</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards [hereinafter “New York Convention”], June 10, 1958, 330 U.N.T.S. 38, 7 I.L.M. 1046.

<sup>3</sup> *Baker Hughes Servs. Int'l*, 73 F.4th at 1143.

<sup>4</sup> *Id.* at 1142–43; *Baker Hughes Servs. Int'l, LLC v. Joshi Techs. Int'l, Inc.*, No. 20-CV-626-TCK-SH, 2021 WL 4005596 at \*3 (N.D. Okla. Sept. 2, 2021), *aff'd*, 73 F.4th 1139 (10th Cir. 2023).

<sup>5</sup> *Baker Hughes Servs. Int'l*, 73 F.4th at 1143.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*



submitted a claim to the arbitral authority in Ecuador specified above to recover the amount due.<sup>8</sup> An arbitrator was appointed.<sup>9</sup> The arbitrator then considered the documents and evidence and issued an award in favor of Baker Hughes.<sup>10</sup>

Pursuant to the New York Convention, Baker Hughes then moved to confirm the award in the United States District Court for the Northern District of Oklahoma.<sup>11</sup> Joshi challenged the jurisdiction of that court to consider the matter, and also moved to vacate the award, contending in part that it was not bound by the terms of the agreement.<sup>12</sup> Holding that such matters were substantive matters resolved by the arbitral authority, the District Court rejected those challenges and confirmed the award.<sup>13</sup>

### III. JURISDICTIONAL CHALLENGE

On appeal, the *Baker Hughes Servs. Int'l* court first addressed the jurisdictional issue raised by Joshi, focusing upon the procedural requirements for confirmation contained in Article IV of the New York Convention, as well as the substantive requirements under the New York Convention.<sup>14</sup> Article IV generally requires submission of a duly authenticated award, together with the original agreement.<sup>15</sup> Article IV further requires that if the award is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement is required to produce a certified translation of the documents into such language.<sup>16</sup>

In invoking Article IV as support for its jurisdictional challenge, Joshi contended that while the original award had been rendered by the arbitrator in Spanish, Baker

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 1143–44.

<sup>11</sup> *Baker Hughes Servs. Int'l*, 2021 WL 4005596 at \*3.

<sup>12</sup> *Id.* at \*2–3.

<sup>13</sup> *Id.* at \*5.

<sup>14</sup> *Baker Hughes Servs. Int'l*, 73 F.4th at 1143.

<sup>15</sup> New York Convention, *supra* note 2, at art. IV.

<sup>16</sup> *Id.*



Hughes had only provided English translations of the agreement and the award to the district court in Oklahoma.<sup>17</sup>

The *Baker Hughes Servs. Int'l* court rejected this jurisdictional challenge, declining to ascribe jurisdictional relevance to Article IV.<sup>18</sup> Instead, the court focused upon 9 U.S.C. § 203 as the Congressional pronouncement vesting federal courts with jurisdiction for matters “falling under the Convention.”<sup>19</sup> It then turned to 9 U.S.C. § 202 for Congress’ definition of that phrase, and determined that section 202 allocates subject matter jurisdiction to a matter arising out of a commercial legal relationship in situations involving disputes between a U.S. citizen and a citizen of another country, where performance of the agreement occurs abroad.<sup>20</sup>

Applying these provisions, the court decided that nothing in the Congressional standard imposed any jurisdictional requirement on a federal court arising from the New York Convention’s procedural rules.<sup>21</sup> It therefore held that Article IV contained no jurisdictional component disqualifying the lower court from evaluating the merits of the award.<sup>22</sup>

#### IV. AGREEMENT TO ARBITRATE

The *Baker Hughes Servs. Int'l* court next focused upon Joshi’s contention that the district court erred by deferring to the arbitrator’s conclusion that the Parties had agreed to arbitrate their dispute.<sup>23</sup> Joshi’s challenge here was that no valid arbitration agreement ever existed between Baker Hughes and Joshi because neither of them had signed the document containing the arbitration clause.<sup>24</sup>

To review this contention, the court turned to the enumerated defenses contained in the New York Convention, initially noting that an award challenger (such

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<sup>17</sup> *Baker Hughes Servs. Int'l*, 73 F.4th at 1144–45.

<sup>18</sup> *Id.* at 1145.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 1146.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*



as Joshi) bears a heavy burden because such defenses are construed “narrowly to encourage recognition and enforcement of commercial arbitration agreements in international contracts.”<sup>25</sup> The court then focused upon the specific defense identified in Article V(2)(a) raised here, which allows a court to refuse to recognize a foreign arbitral award if the subject matter of the dispute is not capable of settlement by arbitration under the law of the country where enforcement is sought.<sup>26</sup>

The court first acknowledged that Joshi itself did not sign the agreement in question.<sup>27</sup> The court nevertheless noted that Campo—the other entity that compromised the Consortium—signed the agreement on behalf of the Consortium (i.e., on behalf of both Campo and Joshi).<sup>28</sup> Reviewing the facts underlying the relationship between Joshi, Campo, and the Consortium, the court determined that Campo and Joshi had agreed in writing to be jointly responsible for all obligations under the agreement.<sup>29</sup> It, therefore, rejected the Article V(2)(a) defense invoked by Joshi.<sup>30</sup>

#### V. PROPER IDENTIFICATION OF ENTITY IN THE AWARD

Further, the court rejected Joshi’s objection that an incorrect entity was awarded the amount in question, premised upon the assertion that the agreement referred to Baker Hughes, Inc., whereas the award referred to Baker Hughes, LLC.<sup>31</sup> Acknowledging that the party pursuing arbitration had been identified in two different ways, the court nevertheless focused upon the reality of the transaction, that is, the undisputed fact that the Consortium had willingly accepted goods and services from the supplier and then refused to pay for them.<sup>32</sup> It declined to allow Joshi to prevail on the claim that the Consortium had never formed a binding

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 1146–47.

<sup>27</sup> *Id.* at 1147.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* (noting that “[Joshi]’s name does not have to appear on the [agreement] for it to bind [Joshi]”).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 1147–48.

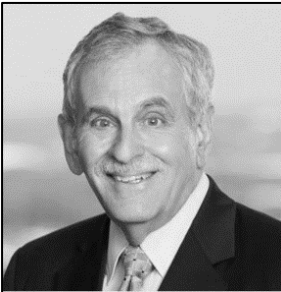




agreement with the named Baker Hughes entity, determining that the dispute in question was, per the explicit requirements of applicable law, capable of settlement under American law.<sup>33</sup> It further held that the district court had no power to correct any mistake in the name of the appropriate party by the Ecuadorian arbitrator.<sup>34</sup> To the court, an arbitrator's mistake, even manifest disregard of controlling law, could not provide a basis for a domestic court to set aside a foreign jurisdiction's award.<sup>35</sup>

## VI. CONCLUSION

The decision in *Baker Hughes Servs. Int'l* highlights the importance of proper drafting of an agreement containing an arbitration clause. It further highlights the need for practitioners to focus carefully upon contractual requirements and available award support and defenses under the New York Convention when enforcing or responding to claims arising from arbitration agreements involving transactions within the scope of the New York Convention.



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<sup>33</sup> *Id.* at 1148.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* There were two ancillary rulings by the *Baker Hughes Servs. Int'l* court having to do with the award of attorney's fees and interest to Baker Hughes as the prevailing party. *Id.* Based on the explicit wording in the agreement authorizing recovery of professional legal fees, the Court determined that the fee award would be affirmed. *Id.* at 1148-49. However, the Court vacated the award of interest to Baker Hughes to permit the district court to re-calculate the appropriate amount based upon the applicable rate. *Id.* at 1149.

# HACKED E-EVIDENCE IN ARBITRATION: ADMISSIBILITY & INFORMATION SECURITY

by Rania Alnaber

## I. INTRODUCTION

In a world that is becoming e-dominant, the existence of electronically stored information (“e-evidence”) is greater than ever before. Issues concerning e-evidence and information/cyber-security have taken the limelight in the arbitration field in recent years. In particular, the issue of how to deal with illegally obtained e-evidence (including manipulation of evidence itself) lies at the forefront of the list of concerns. In the quest for guidance on how to deal with such evidence, this article explores three related questions: (i) What is special about e-evidence? (ii) How should arbitral tribunals deal with illegally obtained e-evidence? (iii) How should information/cyber-security be implemented in arbitration?

## II. WHAT IS SO SPECIAL ABOUT E-EVIDENCE?

A key feature of e-evidence is its dynamic and changeable nature. Unlike physical documents, e-evidence can be easily modified (even without human intervention), and it may be hard to detect such modification without computer forensics.<sup>1</sup> This can call into question the authenticity of e-evidence, especially illegally obtained evidence.

Cybersecurity is therefore essential to maintain the integrity of the arbitration process. Cases show that “often the importance of the evidence has overshadowed the illegality of its source.”<sup>2</sup> Accordingly, the process of preserving and securing e-information is essential to avoid having modified evidence used against the data

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<sup>1</sup> The Sedona Conference, *The Sedona Principles Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 211 (2018). The Sedona Conference is a non-partisan and non-profit charitable institute that conducts legal studies. These principles are based on legal precedents from Federal and prevailing state cases in the U.S., offering guidance on the best practice when dealing with e-evidence in courts.

<sup>2</sup> Nitya Jain, *Can an Arbitral Tribunal Admit Evidence Obtained through a Cyber-Attack?*, KLUWER ARB. BLOG (Jan. 27, 2019), <http://arbitrationblog.kluwerarbitration.com/2019/01/27/can-an-arbitral-tribunal-admit-evidence-obtained-through-a-cyber-attack/>.



holder. As further illustrated below, this is a multi-layered process that includes not just the parties who should prepare for electronic discovery by securing their data in the first place but also everyone involved in the arbitral proceeding, including the arbitrators and arbitral institutions.

### III. ADMISSIBILITY OF E-EVIDENCE

E-evidence and cybersecurity are not foreign concepts in arbitration. Several protocols and institutional rules have recently been issued dealing with e-disclosure, flagging the need for cybersecurity measures, although without much detail.<sup>3</sup> Two main issues take precedence when it comes to e-evidence: (a) how to deal with illegally obtained or hacked e-evidence, and (b) how to safeguard e-evidence's authenticity.

While arbitral tribunals have already been confronted with illegally obtained evidence—ranging from the use of WikiLeaks documents,<sup>4</sup> to hacked emails,<sup>5</sup> to even “dumpster diving” where one party trespassed on the other party's trash room<sup>6</sup>—they have been hesitant to treat all such documents as “illegally obtained,” which may preclude their admissibility. Illegal obtainment of evidence can also raise more serious questions about the authenticity of the evidence itself, such as whether it was tampered with and which party bears the burden of proving the legality of the evidence.

All of this leads to the ultimate questions: should illegally obtained e-evidence be admissible? And if so, how can tribunals ensure its authenticity? To answer these questions, publicly available investment arbitration cases and national court cases provide some guidance.

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<sup>3</sup> Chartered Institute of Arbitrators (CI Arb) Protocol for E-Disclosure in International Arbitration [hereinafter CI Arb Protocol]; Swiss Rules for International Arbitration, Art. 19(2) (2021); London Court of International Arbitration (LCIA) Arbitration Rules, Art. 30(5) (2020).

<sup>4</sup> See, e.g., *ConocoPhillips Co. v. Venezuela*, ICSID Case No. ARB/07/30, Decision on Respondent's Request for Reconsideration (2014).

<sup>5</sup> See, e.g., Cosmo Sanderson, *Brazilian Pulp Award Leads to Cyber Hack Challenge*, GAR (Apr. 12, 2021), <https://globalarbitrationreview.com/article/brazilian-pulp-award-leads-cyber-hack-challenge>.

<sup>6</sup> See, e.g., *Methanex Corp. v. United States*, UNCITRAL, Final Award (Aug. 3, 2005).



### A. *Illegally Obtained Evidence*

Generally speaking, arbitrators have broad powers to determine the admissibility of evidence.<sup>7</sup> While no institutional rule exists addressing the admissibility of illegally obtained evidence, the principle of “good faith” provides guidance. This principle is evident in one of the most important “soft laws” in this field: the IBA Rules on the Taking of Evidence in International Arbitration provide that “the taking of evidence shall be conducted on the principles that each party shall act in good faith.”<sup>8</sup> The IBA Rules further state that “the arbitral tribunal may, at the request of a Party or on its own motion, exclude evidence obtained illegally.”<sup>9</sup> Nevertheless, neither the IBA Rules nor the relevant commentary define “*illegality*”, and the IBA Rules are not binding unless the parties agree to them.

National approaches are no more helpful and may even leave one’s head spinning. A survey covering twenty-seven national jurisdictions representing all five U.N. Regional Groups failed to identify a unified approach regarding the admissibility of illegally obtained evidence.<sup>10</sup> The survey identifies two separate approaches to the treatment of illegally obtained evidence: first, either generally admissible or inadmissible or second, a middle approach which balances the interests of both parties. Despite the nonexistence of a general rule of admissibility, guiding rules can be deduced from publicly available investment arbitration cases which arbitrators may follow in other forms of arbitration.<sup>11</sup>

The general rule dictates that the burden of proof lies with the party alleging illegality of the submitted evidence (*actori incumbit probatio*); if proved, the burden

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<sup>7</sup> See, e.g., UNCITRAL Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006, art. 19(2); International Centre for Settlement of Investment Disputes (ICSID) Arbitration (Additional Facility) Rules (Apr. 2006), art. 41(1); Singapore International Arbitration Centre (SIAC) Rules (2016), art. 19(2).

<sup>8</sup> International Bar Association Rules on the Taking of Evidence in International Arbitration (2020), Preamble.

<sup>9</sup> *Id.* art. 9(3).

<sup>10</sup> Sara Fallah, *The Admissibility of Unlawfully Obtained Evidence before International Courts and Tribunals*, 19(2) L. AND PRAC. INT’L COURTS AND TRIBUNALS 147, 167 (2020).

<sup>11</sup> Peter Ashford, *The Admissibility of Illegally Obtained Evidence in ARBITRATION: THE INTERNATIONAL JOURNAL OF ARBITRATION, MEDIATION AND DISPUTE MANAGEMENT*, 5 (Stavros Brekoulakis ed., Vol 85 Issue 4, Sweet & Maxwell 2019) 384.



shifts to the other party.<sup>12</sup> Arbitrators, however, have gone beyond this basic rule to apply a balancing exercise based on two principles: (i) the clean hands doctrine, and (ii) the materiality of the evidence. This multi-layered approach respects the principle of good faith and “procedural fairness and equality” between the parties.<sup>13</sup>

The clean hands doctrine dictates that if evidence is obtained through the unlawful conduct of a *third disinterested party*, the evidence is *prima facie* admissible. Put another way, a party may not benefit from its own unlawful conduct by having the evidence obtained unlawfully. This was the holding in two investment cases where the parties submitted WikiLeaks cables. In *Yukos v. Russia*, the tribunal admitted the cables without questioning their admissibility.<sup>14</sup> In *ConocoPhillips v. Venezuela*, the tribunal refused to admit the cables because the documents had been submitted late in the procedure. Professor Abi-Saab dissented explaining that arbitrators should not be willing to turn a blind eye to such “glaring evidence” despite being unlawfully obtained by a third party, *especially if admitting the evidence is in the interest of justice*.<sup>15</sup>

In *Methanex v. United States*, the claimant attempted to rely on documents found through “dumpster diving.” Interestingly, the tribunal considered such documents inadmissible but focused on the second prong of the test: materiality of the evidence.<sup>16</sup> Nevertheless, when privileged documents are in question, tribunals have followed a strict approach by totally excluding them irrespective of whether they were illegally obtained by the party relying on them or by a third party.<sup>17</sup>

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<sup>12</sup> *Methanex*, at ¶ 55.

<sup>13</sup> Alice Stocker & Désirée Prantl, et al., *Chapter II: The Arbitrator and the Arbitration Procedure, Cybersecurity in International Arbitration Hacked Evidence Turns Fancy Buzz Words into Real Threat*, in *AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION* 27,50 (Christian Klausegger and Peter Klein, et al. eds.,2022).

<sup>14</sup> *Yukos Universal Ltd. v. Russian Federation*, PCA Case No. AA 227, Final Award (July 18, 2014) (the tribunal relied on WikiLeaks cables without addressing the admissibility of such evidence).

<sup>15</sup> *ConocoPhillips* ¶¶ 64, 66–67.

<sup>16</sup> *Methanex*, ¶ 56.

<sup>17</sup> *Libananco Holdings Co. v. Republic of Turkey*, ICSID Case No ARB/06/8, Preliminary Issues (June 23, 2008); *Caratube Int'l Oil Co. LLP v. Republic of Kazakhstan*, ICSID Case No ARB/08/12, Final Award (Sep. 27, 2017).



The nature of illegality cannot be ignored, but reasonably balanced. As each case will have its own unique facts, there is *no strict rule for admissibility* of illegally obtained evidence. No arbitral tribunal or court wants to issue a decision based on wrong facts because it simply ignored this type of evidence. On the other hand, accepting such evidence despite its immateriality is unwise, as this will incentivize future unlawful activity by the parties. Hence, tribunals need to consider both the clean hands doctrine and materiality of the evidence when confronted with issues of illegally obtained evidence. Moreover, tribunals can deal with the illegal obtainment of evidence by awarding something similar to “cost sanctions” against the party who obtained those evidence, as courts sometimes do.<sup>18</sup>

#### B. Authenticity

The authenticity of the e-evidence is a more serious concern. Suspicions about the authenticity of evidence can be raised alone or in addition to the objection of illegal obtainment of evidence. The latter scenario occurred in *EDF v. Romania* where the claimant submitted an audio recording of a meeting with a member of the Romania Prime Ministry to prove their claim. The tribunal found that the recording was illegally obtained, but its holding about the authenticity of the recording is worth noting,

Considering that today’s sophisticated technology may permit easy manipulation of audio recordings, *proven authenticity is in fact an essential condition for the admissibility of this kind of evidence . . . . An obvious condition for the admissibility of evidence is its reliability and authenticity. It would be a waste of time and money to admit evidence that is not and cannot be authenticated.*<sup>19</sup>

While this is absolutely correct, tribunals need to be realistic and not put the stick in the wheels. Tribunals are handling e-evidence more than ever before, so extensively authenticating every piece of e-evidence will be a waste of time and money. As the U.S. District Court for the District of Columbia puts it, emails, as an example of electronic method of communication, are now the prominent method of

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<sup>18</sup> See, e.g., *Imerman v. Imerman* [2010] EWHC 64 (Fam).

<sup>19</sup> *EDF (Services) Ltd. v. Republic of Romania*, ICSID Case No ARB/05/13, Procedural Order No. 3, at 29 (Aug. 29, 2008) (emphasis added).



communication in the professional world.<sup>20</sup> Hence, “absent specific evidence showing alteration, . . . the Court [should not] exclude any embedded emails because of the *mere possibility* that [alteration] can be done.”<sup>21</sup>

Case law shows that there is no strict rule when considering the authenticity of e-evidence. In *R v. Mawji*, a claimant submitted evidence that the accused emailed him a death threat.<sup>22</sup> The accused objected to the email’s admission before it was authenticated. The court concluded that there was no need to test the authenticity of the email because all other evidence already admitted at trial supported the content of the email. In another case, however, the court had to check the metadata of the emails and hire an electronic evidence specialist to confirm the authenticity of emails and that they were not forged, as claimed by one of the parties.<sup>23</sup> This needed to be done because there was no additional evidence to support the authenticity of the emails. These cases show that the authentication process need not be over complicated when circumstantial evidence exists.

Procedural controls can also provide strong circumstantial evidence of the integrity and authenticity of the evidence. In *Lorraine v. Markel*, the U.S. District Court for the District of Maryland stated that a witness can “provide factual specificity about the process by which electronic evidence is created, acquired, maintained, and preserved without alteration or change.”<sup>24</sup> While the court was referring to the relevant national law regarding authentication, the principle can apply in all cases.

In sum, a *general* checklist of testing the admissibility of such evidence may be found, but question of admissibility is far from a straightforward one. Illegally obtained evidence and authenticity are two serious questions that need to be addressed on a case-by-case basis. Benjamin Franklin’s famous advice stands right

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<sup>20</sup> United States v. Safavian 435 F.Supp.2d 36, 41 (D.D.C. 2006).

<sup>21</sup> *Id.*

<sup>22</sup> *R v. Mawji*, [2003] EWCA Crim 3067.

<sup>23</sup> *Greene v. Associated Newspaper* [2005] QB 972.

<sup>24</sup> *Lorraine v. Markel*, 241 F.R.D. 534, 545 (D. Md. 2007).



here: “an ounce of prevention is worth a pound of cure.” To avoid such critical questions of admissibility and undesired outcomes, it is worth considering information security in the first place.

#### IV. INFORMATION SECURITY AND ARBITRATION

Information security (including cybersecurity) is important to guarantee the integrity of arbitration proceedings. The ICCA-NYC Bar-CPR Cybersecurity Protocol for International Arbitration<sup>25</sup> and IBA Cybersecurity Guidelines<sup>26</sup> are the most prominent soft laws that address information security in the legal and arbitration fields. The former aims to “provide a framework to determine reasonable information security measures for individual arbitration matters,”<sup>27</sup> while the latter provides law firms and practitioners with guidance on technological measures regarding safety of data in general. As demonstrated below, information security is not a one-shot solution; a holistic approach is needed because information security threats are possible pre-, during, and post-arbitration.

First, parties need to be immune, to the most practical extent possible, from information security risks. Hence, it is essential for lawyers to understand the importance of their role even before any arbitration starts in raising their client’s information security awareness to ensure that their data is secured and does not surprisingly appear in the hands of their opponents in the future.

Further as a precautionary step to be done before appointing the tribunal, it may be advisable to send to potential arbitrators a cybersecurity checklist to be confident that a tech savvy arbitrator will be appointed, especially if the arbitration process will be held virtually or depend heavily on e-communication and the submission of e-evidence. Early consideration can also be given to the evidentiary status of hacked

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<sup>25</sup> International Council for Commercial Arbitration, the New York City Bar Association and International Institute for Conflict Prevention Protocol on Cybersecurity in International Arbitration (2020) [hereinafter ICCA-NYC Bar-CPR Protocol].

<sup>26</sup> International Bar Association’s (IBA) Cybersecurity Guidelines (2018).

<sup>27</sup> ICCA-NYC Bar-CPR Protocol, *supra* note 25, at xi.





e-evidence in addition to any special information/cybersecurity arrangements for the arbitration process itself.<sup>28</sup>

As for the arbitration process, the ICCA-NYC Bar-CPR Cybersecurity Protocol covers the arbitration proceedings and post-arbitration retention and destruction matters, and offers a three-step approach to tackle information security in a reasonable and cost-efficient manner: (i) risk analysis, (ii) implementation, and (iii) modifying information security measures as needed. As an initial matter, the risk profile of the arbitration needs to be determined so that the parties and the tribunal can adopt the most appropriate measures. These need not break the bank but need to be sufficient and reasonable. According to the Protocol, the parties and tribunal need to follow the required measures (e.g. access controls, encryption, and physical security) to avoid any security gaps.

Notably, the Protocol does not state the role of each participant in implementing the measures. But it goes without saying that *everyone* involved in the arbitration process (the parties, arbitrators, and arbitration institution) needs to be involved or else imposed measures likely will be useless. In fact, arbitrators should police the application of the measures to avoid any security threats during the proceedings to avoid surprises and delays.

## V. CONCLUSION

Illegally obtained evidence raises more issues than just whether it should be admissible. It can induce endless enforcement paranoia which arbitrators usually take into consideration during the proceedings. Both admissibility and inadmissibility of such evidence can give rise to concerns regarding whether the award can be challenged or set aside. It is by human nature that one cannot un-see what has been seen and arbitrators are not immune from this. Even if illegally obtained evidence is declared inadmissible, it is hard to be sure that an arbitrator has actually disregarded from what they saw. This is a strong reason why information measures should be

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<sup>28</sup> See Katrien Baetens, *Cyber Hack Challenges in International Arbitration*, LINKLATERS (Apr. 22, 2021), <https://www.linklaters.com/en/insights/blogs/arbitrationlinks/2021/april/cyber-hack-challenges-in-arbitration>; CIArb Protocol, at Art. 1.



taken by the parties during their normal course of business and way before any arbitration process. Further, the arbitration proceeding itself is not more immune from information security risks, especially cyber threats. Hence, failure to adapt to the continuously developing tech-world and implement needed information security measures may jeopardize the attractiveness of arbitration as a convenient method of resolving disputes.

As discussed above, there is no strict rule on the admissibility of illegally obtained evidence. Literature, soft law, arbitration rules, and case law show that questions of admissibility should be considered on a case-by-case basis. It is up to the arbitral tribunal to decide the admissibility of illegally obtained evidence; in addressing this matter, a thorough, well-reasoned award is key to avoid annulment. Whether arbitration rules should address this matter is questionable. Fairness of procedures however necessitate flexible rules rather than ridged ones.



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# GOVERNMENT BLOCKING OF SOCIAL MEDIA PLATFORMS AS EXPROPRIATION OF CONTRACTUAL RIGHTS

by Aram Aghababyan

## I. INTRODUCTION

Browsing social media has become an integral part of our daily life. With the average person in 2023 spending two hours and 30 minutes online and with 4.76 billion users worldwide,<sup>1</sup> social media platforms have grown to penetrate even the most remote areas of the globe. Today, Facebook, YouTube, TikTok, Instagram, WhatsApp, and Spotify are among the most popular applications used worldwide.<sup>2</sup> According to a 2023 study, the average number of social media accounts for one person is 6.7,<sup>3</sup> and 300 hours of video are uploaded on YouTube every single minute.<sup>4</sup>

Historically, the contents of traditional media such as newspapers, films, television, and radio, were controlled by states or large corporations. Only the privileged few were able to create, publish, or telecast media content. With the advent of the internet and services such email, wikis, blogs, and YouTube, this monopoly ended, providing leeway for everyone to create, publish, and share their content. As the famous YouTube slogan “broadcast yourself!” suggests, anyone with an internet connection became a broadcaster of their own media content.

Nowadays, businesses and governments rely heavily on social media to interact with each other, advertise their products, and services, communicate with the public, provide public services, and even advance their political campaigns.<sup>5</sup> The U.S.

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<sup>1</sup> Deyan Georgiev, *How Much Time Do People Spend on Social Media in 2024?*, TECHJURY (Jan. 3, 2024), <https://techjury.net/blog/time-spent-on-social-media/#gref/>.

<sup>2</sup> See David Curry, *Most Popular Apps (2024)*, BUSINESS OF APPS (Jan. 30, 2024), <https://www.businessofapps.com/data/most-popular-apps/>.

<sup>3</sup> Brian Dean, *Social Network Usage & Growth Statistics*, BACKLINKO (Feb. 21, 2024), <https://backlinko.com/social-media-users/>.

<sup>4</sup> Danny Donchev, *40+ Mind Blowing YouTube Facts, Figures and Statistics – 2024*, FORTUNELORDS (Feb. 27, 2024), <https://fortunelords.com/youtube-statistics/>.

<sup>5</sup> See, e.g., Knowledge at Wharton Podcast, *How Social Media is Shaping Political Campaigns*, KNOWLEDGE AT WHARTON (Aug. 17, 2020), <https://knowledge.wharton.upenn.edu/podcast/knowledge-at-wharton-podcast/how-social-media-is-shaping-political-campaigns/>.



Supreme Court in 2017 classified social media platforms as “principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.”<sup>6</sup>

In parallel, the need to regulate social media platforms has been growing as rapidly. During the past decade, initiatives for regulation have been coming from the European Union, U.S. politicians, and privacy activists.<sup>7</sup> While those initiatives were coming from countries that adopted ideologically democratic attitudes towards open cyberspace and internet freedom,<sup>8</sup> other countries like China,<sup>9</sup> Russia, North Korea, and Nigeria<sup>10</sup> tend to perceive internet freedom as a threat and are inclined to apply restrictive ideologies.<sup>11</sup> While referring to this divide between democratic and restrictive approaches toward the internet, Clyde Crews framed the phenomenon as “splinternet.”<sup>12</sup>

Countries blocking social media platforms belong to restrictive ideology groups. As social media platforms are powerful tools to share public opinions, repressive governments, where critiques of the ruling elite and military are subject to censorship, have a hard time censoring the decentralized social media content. A much simpler solution is to block the platform in its entirety and eliminate the problem itself. When blocking social media platforms, countries provide

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<sup>6</sup> *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017).

<sup>7</sup> See generally Alex Rochefort, *Regulating Social Media Platforms: A Comparative Policy Analysis*, 25 *COMMUN. L. & POLY.* 225 (2020).

<sup>8</sup> Ron Deibert, *Authoritarianism Goes Global: Cyberspace Under Siege*, 26 *J. DEMOCRACY* 64, 65 (2020).

<sup>9</sup> See Guangchao Charles Feng & Steve Zhongshi Guo, *Tracing the Route of China’s Internet Censorship: An Empirical Study*, 30 *TELEMATICS & INFORMATICS* 335 (2013).

<sup>10</sup> Stanislav Budnitsky & Lianrui Jia, *Branding Internet Sovereignty: Digital Media & the Chinese–Russian Cyberalliance*, 21 *EUR. J. CULTURAL STUD.* 594 (2018).

<sup>11</sup> See Anders Henriksen, *The End of the Road for the UN GGE Process: The Future Regulation of Cyberspace*, 5 *J. CYBERSECURITY* 1, 5 (2019).

<sup>12</sup> L.S., *What Is the “Splinternet”?*, *THE ECONOMIST* (Nov. 22, 2016), <https://www.economist.com/the-economist-explains/2016/11/22/what-is-the-splinternet/>.



controversial and vague reasons, ranging from the impossibility of censorship to unstable political situations, and protection of public morals.<sup>13</sup>

Where the blocking of the social media platform can be in conformity with the local laws and regulations, it can nevertheless violate international obligations enshrined in international investment agreements (“IIA”). Therefore, this paper examines whether blocking social media platforms in the host economy would violate protections against expropriation in IIAs and whether social media companies can resort to investor-state dispute settlement (ISDS) to address the platform blockings. This paper does not examine the physical assets of social media companies and focuses merely on the virtual presence of social media companies in host economies.

The article will first examine the characteristics and business models of social media platforms. Then, it will define what constitutes a governmental ban/blocking of social media platforms by delving into the types and methods presently employed. The paper will then break down the virtual assets of social media companies and will assess those towards the coverage scope of IIAs and the International Centre for Settlement of Investment Disputes (ICSID) Convention. By identifying the possibly-to-be-affected assets of social media companies in case of government blocking, the paper will then observe the “admission,” “establishment,” “legality,” “economic contribution,” and “territoriality” requirements provided in IIAs. After determining the expropriation as the most likely-to-be-breached protection, the paper will concentrate on discussing the government blocking of social media platforms as an expropriation of contractual rights. Finally, the paper will observe any possible host state defenses that can be invoked against ISDS claims to arise out of the government’s ban/blocking of social media platforms.

In this paper, the author argues that the government’s blocking of social media platforms *can* amount to an indirect expropriation of contractual rights and that there exists a fair chance for social media companies to overcome the jurisdictional stage of a possible ISDS case. In doing so, the paper will analyze the existing IIAs and

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<sup>13</sup> Ekaterina Shireeva et al., *Blocking Social Media. Reasoning and Legal Grounds*, in *DIGITAL TRANSFORMATION & GLOBAL SOCIETY* 139, 139 (Daniel A. Alexandrov et al., eds., 2017).



draw extensively on identifying cases in ISDS jurisprudence, including the Iran-US claims tribunal, WTO, ICJ, and PCIJ decisions supporting its position.

It is important to note that the paper does not intend to portray the current ISDS system as efficiently equipped to deal with government blocking of social media platforms. There are conflicting awards addressing the issues of territoriality, the contribution of assets/money, contribution to the economic development of the host state, admissibility, legality requirements, and the issues connected with intangible assets. Therefore, it is not the intention to analyze where the prevailing view of the investment tribunals on the issues to be discussed stands. Instead, the paper intends to prove that there exists a chance/possibility that the investment tribunals will exercise their jurisdiction over the social media company disputes and will rule that the blocking of the relevant social media companies would amount to an indirect expropriation of the claimant's contractual rights.

## II. SOCIAL MEDIA COMPANIES: STRUCTURE AND BUSINESS MODEL

As social media platforms are free to use, many mistakenly presume that the data generated by the platforms is of no value.<sup>14</sup> In fact, YouTube, Facebook, TikTok, and others are profit driven commercial platforms.

Social media companies collect data from the users that join their platform, and the data generated by them has a huge monetary value. social media platforms primarily generate profit based on targeted advertisements, which target the audience based on the user's personal data. Social media users are a huge audience, and businesses, politicians, and even traditional media companies spend enormous financial resources to advertise their products and services to them or to advance their political campaigns with them.<sup>15</sup>

An excerpt from the November 2007 Facebook user agreement provides:

By posting User Content to any part of the Site, you automatically grant, and you represent and warrant that you have the right to grant, to the Company

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<sup>14</sup> Tama Leaver, *The Social Media Contradiction: Data Mining and Digital Death*, 16 M/C J. (2013), <https://journal.media-culture.org.au/index.php/mcjournal/article/view/625>.

<sup>15</sup> Grace Manthey, *Presidential Campaigns Set New Records for Social Media Ad Spending*, ABC7 LOS ANGELES (Oct. 29, 2020), <https://abc7.com/presidential-race-campaign-spending-trump-political-ads-biden/7452228/>.



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Although these kinds of agreements have become a rarity, the main business model of social media companies remains to collect and repackage the gathered data into trends and patterns for the later use and extraction of profit. Personal data collected by social media companies has become a new commodity. Social media platforms are new goldmines where the mineral that is being extracted is the user data. To provide some metrics, the annual worldwide average revenue per user (“ARPU”) of META was reported to be US\$29.25 during the 2019 period,<sup>17</sup> which sheds some light on why its market capitalization was US\$720 billion in August 2020.<sup>18</sup>

While for social media platforms, the primary way of generating profit remains advertisement, some platforms rely on a mix of income stream methods. One such combination of income methods is to sell subscriptions in exchange for premium features (YouTube/LinkedIn).

In short, social media platforms evolve rapidly, and it is impossible to categorize or discuss all of the types as they introduce new features with every new release. What is essential is that social media platforms grow their user base and penetrate new digital economies rapidly without the need to have a physical footprint in the foreign economy.

#### A. *Defining the Social Media Company Ban/Blocking*

What does banning a tech company entail? Governments can employ a wide array of tools and techniques to block the social media platform's access. Such techniques include but are not limited to: blocking the specific domain name; blocking the IP

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<sup>16</sup> *Terms of Use*, FACEBOOK (Dec. 13, 2006), <http://www.facebook.com/terms.php> [<https://web.archive.org/web/20070210022156/http://www.facebook.com/terms.php>].

<sup>17</sup> Facebook, Inc., Annual Report (Form 10-K), at 48 (Jan. 29, 2020).

<sup>18</sup> Trefis Team, *Facebook Added Over \$350 Billion in Value Since 2016. Can It Repeat?*, FORBES (Aug. 5, 2020), <https://www.forbes.com/sites/greatspeculations/2020/08/05/facebook-added-over-350-billion-in-value-since-2016-can-it-repeat/?sh=482832617f4d/>.



address; or else requesting the search engines to remove specific content from search results. Governments use their powers to order internet service providers (“ISP”) to restrict access to particular websites. For the purpose of this analysis, inaccessibility is an essential and necessary component for the measure to be considered a ban.

The blocking of the service can be classified as national, local or inner.<sup>19</sup> With national blocking, one or all social media platforms become inaccessible from anywhere in the country. North Korea's isolation from the internet and China's great firewall fall into this category.<sup>20</sup> Local blocking refers to either when the service is blocked partially in some cities/regions or when one or several ISPs block the service, but it remains accessible through others. An example is the 2015 Tajikistan social media ban, where five ISPs blocked social media platforms, but the access was possible through others.<sup>21</sup> Inner blocking occurs when the company or organization blocks access to internet services, including social media platforms for its employees. Such blocking is common practice in universities and companies and is driven by productivity concerns. As inner blocking is done by private organizations and has a limited effect on the accessibility of the service (the social media platform could be accessed outside the organization network), this type of blocking falls outside the scope of this analysis.

The duration of the blocking is also of significance. Investment tribunals consider the duration of expropriatory measures together with the intent and effect caused.<sup>22</sup> Tribunals also consider the “duration and intensity of the economic deprivation suffered by the investor” when examining the measure.<sup>23</sup> For the reasons mentioned

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<sup>19</sup> Shireeva et al., *supra* note 13, at 142.

<sup>20</sup> See Harsh Taneja & Angela Xiao Wu, *Does the Great Firewall Really Isolate the Chinese? Integrating Access Blockage with Cultural Factors to Explain Web User Behavior*, 30 INFO. SOC'Y 297, 297 (2014).

<sup>21</sup> Megan Eaves, *Access to Social Media Sites Blocked in Tajikistan*, LONELY PLANET (Aug. 26, 2015), <https://www.lonelyplanet.com/news/access-to-social-media-sites-blocked-in-tajikistan>.

<sup>22</sup> *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Award, ¶¶ 308–322 (July 14, 2006).

<sup>23</sup> *Telenor Mobile Commc'ns A.S. v. Hungary*, ICSID Case No. ARB/04/15, Award, ¶ 70 (Sept. 13, 2006); see also *LG&E Energy Corp. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, ¶¶ 189–193 (Oct. 3, 2006).





above, short-term site-blocking causing minor economic consequences for the social media company are unlikely to constitute violation of IIAs.

#### B. *Defining the Banning Measures*

Recently, Instagram and Facebook were banned by the Russian courts for “carrying out extremist activities.”<sup>24</sup> In 2020, TikTok was banned in India in accordance with the decision of the Ministry of Electronics and Information Technology under section 69A of India’s Information Technology Act by invoking the grounds of security of state and public order.<sup>25</sup> Likewise, for failing to remove offensive content, access to YouTube was blocked for 1000 days in 2015 by the Pakistan Telecommunication Authority, following an order of the Supreme Court of Pakistan.<sup>26</sup>

Remarkably, cases have been recorded where no formal regulation or decision has been adopted when blocking access to the social media platform. For example, in 2021, the Attorney General of Nigeria announced the indefinite ban of Twitter<sup>27</sup> in an oral statement. Such ban was in violation of Nigeria’s laws and constitution.<sup>28</sup> Similarly, the Armenian government adopted no official announcement or regulation when blocking access to the TikTok platform for 43 days during the 2020 military conflict.<sup>29</sup>

When governments fail to adopt specific regulations or acknowledge their role in blocking access to internet platforms, tribunals may interpret this as a breach of due

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<sup>24</sup> Pjotr Sauer, *Russia Bans Facebook and Instagram under “Extremism” Law*, GUARDIAN (Mar. 21, 2022), <https://www.theguardian.com/world/2022/mar/21/russia-bans-facebook-and-instagram-under-extremism-law>.

<sup>25</sup> Press Release, Ministry of Electronics & IT, Government Blocks 118 Mobile Apps Which are Prejudicial to Sovereignty and Integrity of India, Defence of India, Security of State and Public Order (Sept. 2, 2020), <https://www.pib.gov.in/PressReleasePage.aspx?PRID=1650669>.

<sup>26</sup> Hassan Belal Zaidi & Iftikhar A. Khan, “No Solution But to Persist with YouTube Ban,” DAWN (Feb. 7, 2015), <https://www.dawn.com/news/1162061/>.

<sup>27</sup> Twitter, originally known for its microblogging service, has recently evolved into “X.”

<sup>28</sup> Akinola Akintayo, *Nigeria’s Decision to Ban Twitter Has No Legal Basis. Here’s Why*, CONVERSATION (June 24, 2021), <https://theconversation.com/nigerias-decision-to-ban-twitter-has-no-legal-basis-heres-why-163023>.

<sup>29</sup> TikTok Restricted in Azerbaijan and Armenia amid Clashes over Nagorno-Karabakh, NETBLOCKS (Sept. 14, 2022), <https://netblocks.org/reports/tiktok-restricted-in-azerbaijan-and-armenia-amid-clashes-over-nagorno-karabakh-3An4pky2>.



process obligations in either the context of expropriation (See the decision in *AIG Capital Partners v. Kazakhstan*)<sup>30</sup> or fair and equitable treatment (“FET”) (see in *Cairn Energy v. India*).<sup>31</sup> Additionally, when governments do not announce or conceal the fact that they blocked access to the platform, issues of attribution under customary international law of state responsibility could arise.<sup>32</sup>

### III. SOCIAL MEDIA COMPANIES AND THE DEFINITION OF “INVESTMENT”

Before discussing possible violations of IIA protection standards, it is of paramount importance to understand whether the assets of social media companies qualify as “investments” at all and thereby benefit from IIA protections. The existence of a covered investment is a procedural prerequisite for resorting to dispute settlement provisions of an IIA and for the tribunal’s jurisdiction.<sup>33</sup>

There is no generally agreed definition of “investment” and therefore the coverage of IIAs varies from treaty to treaty.<sup>34</sup> Some early IIAs, like the first-ever concluded bilateral investment treaty (“BIT”) between Germany and Pakistan, cover only capital investments in the form of “foreign exchange, goods, property rights, patents, and technical knowledge.”<sup>35</sup> In subsequent treaties, states often agreed on a more expansive and detailed list of investments to be covered. New generation IIAs typically contain a defined list of assets that could qualify as “investments” and benefit from the protection of the treaties. These “investments” vary from concessions and debt instruments to intellectual property rights (“IPR”), and contractual rights.<sup>36</sup>

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<sup>30</sup> *AIG Cap. Partners, Inc. v. Kazakhstan*, ICSID Case No. ARB/01/6, Award, ¶ 10.5.1 (Oct. 7, 2003).

<sup>31</sup> *Cairn Energy PLC v. India*, PCA Case No. 2016-07, Final Award, ¶ 1722 (Dec. 21, 2020).

<sup>32</sup> Simon Olleson, *Attribution in Investment Treaty Arbitration*, 31 ICSID REV. - FOREIGN INV. L. J. 457, 472 (2016).

<sup>33</sup> ZACHARY DOUGLAS, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* 162 (2009).

<sup>34</sup> Christoph Schreuer, *Investments, International Protection*, in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW 1, 37 (2013).

<sup>35</sup> Treaty Between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, art. 8.1, Nov. 25, 1959, 457 U.N.T.S. 23 [hereinafter Germany-Pakistan BIT].

<sup>36</sup> See Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, art. 1, Apr. 20, 2012, <https://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> [hereinafter U.S. Model BIT].



As the great majority of the IIAs were signed between prior to the existence of either the digital economy or social media companies, they were typically drafted with physical assets and traditional services in mind, and do not address the specificities of digitalization or specifically consider forms of innovative investments.<sup>37</sup>

For that reason, though 98% of IIAs contain a defined list of “investments,”<sup>38</sup> definitions covering digital platforms are hardly ever found. However, where the list of covered “investments” contains no express reference to digital platforms, certain assets of social media companies may still fall under the defined list of “investments.” Alternatively, the digital platforms/assets could still fall under the broad-asset-based definitions of IIAs,<sup>39</sup> such as “every kind of asset,” or “every kind of economic interest,” which leave broad room for interpretation to include undefined and possibly innovative types of assets.<sup>40</sup>

A. *Assets of Social Media Companies as “Investments”*

Though social media platforms possess both tangible and intangible assets, given tangible assets are already extensively analyzed in scholarship and the controversies arising thereof are well established, this analysis focuses on intangible assets. Such intangible assets forming part of social media companies include patents, trademarks, trade secrets, know-how, contractual rights, equity, and data.<sup>41</sup>

The first and only instance where a technology platform initiated an ISDS claim is that of Uber’s dispute notice issued against Columbia. The notice of dispute listed

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<sup>37</sup> U.N. CONF. ON TRADE & DEV. (UNCTAD), *WORLD INVESTMENT REPORT 2017: INVESTMENT & THE DIGITAL ECONOMY* 158 (2017).

<sup>38</sup> Dafina Atanasova, *Definition of Investment*, JUS MUNDI WIKI NOTES (Dec. 27, 2023), <https://jusmundi.com/en/document/wiki/en-definition-of-investment/>.

<sup>39</sup> JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* 177 (2d ed. 2015).

<sup>40</sup> Enikő Horváth & Severin Klinkmüller, *The Concept of “Investment” in the Digital Economy: The Case of Social Media Companies*, 20 *J. WORLD INVEST. & TRADE* 577, 590 (2019).

<sup>41</sup> See Matthew R. Dardenne, *Testing the Jurisdictional Limits of the International Investment Regime: The Blocking of Social Media and Internet Censorship*, 40 *DENV. J. INT’L L. & POL’Y* 400, 409 (2012).



what Uber asserted to be protected “investments” of the company submitted under the 2012 U.S.-Colombia Trade Promotion Agreement,<sup>42</sup> including:

“intellectual property rights,” including the right to license and use the Uber Platform, including the Uber applications, websites, content, and products, as well as the Uber trademark and associated goodwill, in Colombia; and . . . “intangible . . . property rights,” including the network of contacts between Uber (through a subsidiary) and Uber riders and Driver Partners, as applicable, to access and use the Uber Platform in Colombia.<sup>43</sup>

Uber’s assets in many respects are similar to the intangible assets of social media platforms. In this case, Uber had a limited physical presence in Columbia.<sup>44</sup> What is surprising is that Uber listed the network of contacts between Uber, riders, and driver-partners as part of the affected investments by Columbia’s measure, which required “telecommunication companies in Colombia to suspend transmissions, data storage, and access to the Uber Platform in Colombia.”<sup>45</sup>

One can draw parallels between the ban of Uber in Columbia and the blocking of social media companies. While the case was eventually settled without reaching the adjudication stage, it shows that ISDS could be a powerful method of addressing the ban of digital platforms.

#### B. *Contractual Rights as “Investments”*

Whether the end-license user agreements (“User Agreements”) fall under the protection of IIAs will depend on the definition of “investment” incorporated in the respective IIAs. Formulations used in the IIAs can vary from treaty to treaty: some treaties expressly mention contractual rights<sup>46</sup> whereas others contain formulations

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<sup>42</sup> United States–Colombia Trade Promotion Agreement, Nov. 22, 2006.

<sup>43</sup> Uber Technologies, Inc. v. Colombia, Notice of Dispute under the United States–Colombia Trade Promotion Agreement, Dec. 30, 2019, <https://www.italaw.com/sites/default/files/case-documents/italaw11118.pdf>.

<sup>44</sup> *Id.* at 2.

<sup>45</sup> *Id.*

<sup>46</sup> See, e.g., Treaty Between the Government of the United States of America and the Government of the Republic of El Salvador Concerning the Encouragement and Reciprocal Protection of Investment, art. 1(d)(iii), Mar. 10, 1999.



like “claims to money,”<sup>47</sup> “claim to performance,” and “right to future income,”<sup>48</sup> each of which can be interpreted to cover contractual rights. Most notably, the treaty entered into between Denmark and Slovenia in 1999 mentions “claims to money and claims to performance pursuant to contract having an economic value” as a covered investment.<sup>49</sup> Analyzing all different types of provisions found in IIAs, Dolzer and Schreuer concluded that “practically all investment treaties state that contracts are covered by the term ‘investment.’”<sup>50</sup>

While contractual rights continue to be listed in IIAs, a rising trend is to limit the scope of investment and leave out mere “[c]ommercial contracts for the sale of property or services by a national or enterprise in the territory of a Contracting Party.”<sup>51</sup> This approach, which originated in NAFTA<sup>52</sup> and has been relied upon by tribunals,<sup>53</sup> was identically imported to subsequently concluded IIAs in order to narrow the scope of their application.<sup>54</sup> However, the approach to exclude mere contractual rights is by no means used in all IIAs concluded after 1992 and is non-existent in IIAs concluded prior to 1992. The latter provides broad leeway to consider User Agreements with social media platforms to fall under the definition of the “investment.”

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<sup>47</sup> See, e.g., Agreement Between the Republic of Chile and the Republic of South Africa for the Reciprocal Promotion and Protection of Investments, art. 1(2)(c), Nov. 12, 1998.

<sup>48</sup> See, e.g., Agreement Between the Republic of Turkey and the Republic of Tunisia Concerning the Reciprocal Promotion and Protection of Investments, art. 1, May 29, 1991.

<sup>49</sup> Agreement Between the Government of the Republic of Slovenia and the Government of the Kingdom of Denmark Concerning the Promotion and Reciprocal Protection of Investments, art. 1(1)(iii), May 12, 1999.

<sup>50</sup> RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 69 (2d ed. 2012).

<sup>51</sup> Agreement on the Promotion and the Protection of Investments Between the Kingdom of Spain and the United Mexican States, art. 1(2)(i), June 23, 1995.

<sup>52</sup> North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993).

<sup>53</sup> Bayview Irrigation Dist. v. Mexico, ICSID Case No. ARB(AF)/05/1, Final Award, ¶ 104 (June 19, 2007); Apotex Inc. v. United States of America, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, ¶ 239 (June 14, 2013).

<sup>54</sup> David A. Gantz, *Increasing Host State Regulatory Flexibility in Defending Investor-State Disputes: The Evolution of U.S. Approaches from NAFTA to the TPP*, 50 INT'L LAW. 231 (2017).



When interpreting IIAs, tribunals have arrived at conflicting conclusions. Where tribunals like that in *Alps Finance and Trade AG v. Slovakia*<sup>55</sup> were against commercial contracts being classified as investments without certain qualities like duration, contribution, and risk<sup>56</sup>, others were inclined otherwise. In *Tidewater v. Venezuela*, the tribunal found that “investment is capable of including . . . tangible and intangible assets, including contractual rights”, and thereby held that the scope of the IIA protection could be extended to include contractual rights.<sup>57</sup>

When discussing social media user agreements, it is essential to address those in totality and not in isolation. Thus, for example, some social media platforms have penetrated foreign digital economies in a way that the entire population has contracted to use the social media platform. This should be observed distantly from the mere commercial or service contracts, especially given the enormous underlying value of those commercial contracts in totality.

A notable development towards considering the contracts in totality as “investments” is the award in *EMV v. Czech Republic*,<sup>58</sup> in which the tribunal ruled that contracts presented by the claimant were investments<sup>59</sup> under the Belgium Luxembourg Economic Union–Czech Republic BIT.<sup>60</sup> A similar type of reasoning was employed by the *Mytilineos v. Serbia*<sup>61</sup> tribunal, which referred to the combined effect of nine contracts and found that they could constitute “investments”<sup>62</sup> under the broad asset-based definition of the Greece–Serbia BIT (1997).<sup>63</sup> Therefore, it is

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<sup>55</sup> *Alps Finance & Trade AG v. Slovakia*, UNCITRAL, Award (Mar. 5, 2011).

<sup>56</sup> *Id.* ¶¶ 103–106.

<sup>57</sup> *Tidewater Investment SRL v. Venezuela*, ICSID Case No. ARB/10/5, Award, ¶ 118 (Mar. 13, 2015).

<sup>58</sup> *European Media Ventures SA v. Czech Republic*, UNCITRAL, Partial Award on Liability (July 8, 2009).

<sup>59</sup> *Id.* ¶ 40.

<sup>60</sup> Agreement Between the Belgium–Luxembourg Economic Union and Czechoslovak Socialist Republic Concerning the Promotion and the Reciprocal Protection of Investments, Apr. 24, 1989.

<sup>61</sup> *Mytilineos Holdings SA v. Serbia & Montenegro (I)*, UNCITRAL, Partial Award on Jurisdiction (Sept. 8, 2006).

<sup>62</sup> *Id.* ¶¶ 125, 136.

<sup>63</sup> Agreement Between the Government of the Hellenic Republic and the Federal Government of the Federal Republic of Yugoslavia on the Reciprocal Promotion and Protection of Investments, June 25, 1997.



possible that the tribunals in the case of a hypothetical dispute will look at the user agreements with the social media companies in totality rather than in isolation.

In their 2018 article, Enikő Horváth and Severin Klinkmüller note that “the user agreements could be terminated within a matter of several clicks [by users themselves] and do not involve long-term commitments by either party.”<sup>64</sup> However, it will be erroneous to presume that millions, or even billions, of users would want to terminate their contracts because the state adopts a regulation to block the operation of the platform. That said, if terminated/made ineffective by a state itself, the user agreements will become subject to interference by a third, uninvolved party (the state regulation). Such measures will interfere with the rights and obligations of the parties to the contract and can potentially violate protections enshrined in respective IIAs.

#### IV. ADDITIONAL JURISDICTIONAL REQUIREMENTS

##### A. Territoriality

social media companies’ assets need to meet certain additional requirements to qualify as an “investment” under IIAs. The place where those assets are held will be decisive since the IIAs are limited in their application to only the specified and mutually agreed-on territory. Many IIAs explicitly refer to “investments made in the territory in the definition of investment. Territorial requirements could be spotted in the applicability of the dispute settlement provisions as well. By way of an example, the Energy Charter Treaty dispute settlement provisions limit the possible disputes to be submitted for international arbitration to the investments made “in the Area of the [Contracting Party]”.<sup>65</sup>

Other IIAs, like the Argentina–U.S. BIT, contain separate provisions providing a definition of territory.<sup>66</sup> Those define territory as the territory of a contracting

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<sup>64</sup> E.g., Horváth & Klinkmüller, *supra* note 40.

<sup>65</sup> Energy Charter Treaty, art. 26.1, Dec. 17, 1994, 2080 U.N.T.S. 100 [hereinafter ECT].

<sup>66</sup> Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, art. I(1)(f), Nov. 14, 1991, 31 I.L.M. 124 (1992) [hereinafter Argentina–U.S. BIT].



party,”<sup>67</sup> “some part of the territory,”<sup>68</sup> or outside the land territory of the state extending to the ‘exclusive economic zone,’<sup>69</sup> and even any “part of the sea upon which sovereignty/jurisdiction is exercised.”<sup>70</sup>

Fewer others, like the Spain-Morocco BIT, contain no specific provision on the definition of the term territory.<sup>71</sup> It is important to note that where parties do not specify the territorial scope in the IIA and nor can such intention be inferred from the IIA, the treaty applies in respect of the state’s entire territory pursuant to Article 29 of the Vienna Convention on the Law of Treaties (“VCLT”), which provides, “[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.”<sup>72</sup>

While with tangible assets, the territoriality requirement is easily ascertainable,<sup>73</sup> things become complicated with mixed or purely intangible assets. With mixed types of assets, the investment operation as a whole is considered. Tribunals referred to the “sufficient portion”<sup>74</sup> of an investment or the general unity of an investment operation<sup>75</sup> to be located in the host state’s territory when addressing the territorial nexus of IIAs.

The borders and definition of territory become even more complicated when it comes to assets of an intangible nature. While defining the scope of protected

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<sup>67</sup> E.g., Agreement Between the Swiss Federal Council and the Government of the Republic of Armenia on the Promotion and Reciprocal Protection of Investments, art. 1(4), Nov. 19, 1998.

<sup>68</sup> E.g., Agreement Between the Government of the Federal Republic of Germany and the Palestine Liberation Organization for the Benefit of the Palestinian Authority Concerning the Encouragement and Reciprocal Protection of Investments, art. 1(4)(b), July 10, 2000.

<sup>69</sup> Agreement Between the Macedonian Government and the Spanish Government on the Promotion and Reciprocal Protection of Investments, art. 1(4)(a), June 20, 2005.

<sup>70</sup> *Id.* art. 1(4)(b).

<sup>71</sup> Spain and Morocco Agreement on the Promotion and Mutual Protection of Investments, Sept. 27, 1989, 1669 U.N.T.S. 209.

<sup>72</sup> Vienna Convention on the Law of Treaties, art. 29, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

<sup>73</sup> *Micula v. Romania (I)*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, ¶¶ 125-127 (Sept. 24, 2008).

<sup>74</sup> E.g., *SGS Société Générale de Surveillance S.A. v. Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, ¶ 117 (Feb. 12, 2010).

<sup>75</sup> E.g., *Ceskoslovenska Obchodni Banka, A.S. v. Slovakia*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, ¶ 72 (May 24, 1999).





investments, many IIAs refer to “intangible” forms of assets. The first-ever concluded BIT between Germany and Pakistan in 1959 already lists some forms of IPRs.<sup>76</sup> Intellectual property rights, know-how, goodwill, rights to perform the commercial activity, titles to money or to any performance having an economic value, and contracts, are regularly listed as part of covered investments in the overwhelming majority of IIAs.<sup>77</sup>

As subjecting abstract and borderless assets, like contracts, IPRs, and know-how, to the state’s territory makes little sense, tribunals have identified separate criteria to link intangible assets to a host state’s territory.<sup>78</sup> The *Abaclat v. Argentina* decision serves as a significant breakthrough from the onerous territorial requirements and offers a solution that can be applied for social media companies’ intangible assets. Deciding on a claim submitted by around 60,000 bondholders (as separate claimants), the majority of the tribunal found:

that the determination of the place of the investment firstly depends on the nature of such investment. With regard to an investment of a purely financial nature, the relevant criteria cannot be the same as those applying to an investment consisting of business operations and/or involving manpower and property. With regard to investments of a purely financial nature, the relevant criteria should be where and/or for the benefit of whom the funds are ultimately used, and not the place where the funds were paid out or transferred.<sup>79</sup>

When discussing the *Abaclat* decision, it is important to mention that the *Abaclat* jurisdictional and admissibility decision was a matter of controversy and generated a lengthy dissent by Professor George Abi-Saab,<sup>80</sup> in which he specifically addressed the findings of the tribunal on the territorial scope of the Argentina-U.S. BIT. Notably, Abi-Saab argued that the territorial link is inherent in Article 25 of the ICSID

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<sup>76</sup> E.g., Germany-Pakistan BIT, *supra* note 35, art 8.1.

<sup>77</sup> Simon Klopschinski et al., *Intellectual Property as Investment*, in *THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS UNDER INTERNATIONAL INVESTMENT LAW* 143-146 (2023).

<sup>78</sup> *Id.*

<sup>79</sup> *Abaclat v. Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 374 (Aug. 4, 2011).

<sup>80</sup> See *Abaclat*, Dissenting Opinion of Professor Georges Abi-Saab (Aug. 4, 2011).



Convention, despite the lack of such wording in it.<sup>81</sup> This view is also supported by Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States referring to the flow of investment in the territory as the “primary purpose of the Convention”.<sup>82</sup> For the aforementioned reasons, intangible assets will have additional difficulties qualifying as “investments” in the host state’s territory under the ICSID convention.

Similarly, in *Nova Scotia Power v. Venezuela (II)*, the contractual rights to coal were at stake, which had no actual physical presence in the Venezuelan territory. There the tribunal found:

[t]he contractual rights to coal under the Confirmation Letters are properly characterized as an intangible asset. The coal to be purchased was located in Venezuela, but NSPI carried out no physical in-country activities in connection with this and had no established, physical, in-country presence. . . . A contractual right by its very nature has no fixed abode in the physical sense, for it is intangible. However, a lack of physical presence is not per se fatal to meeting the territoriality requirement . . .<sup>83</sup>

The tribunal also pointed out that the appropriate criteria for understanding whether the contractual rights could be considered investments is the benefit to the host state concerned. To borrow the tribunal’s words, “[the] ‘benefit’ does not necessarily have to be economic development, a highly subjective element.”<sup>84</sup> In other instances hedging agreements and promissory notes were qualified as investments, in *Deutsche Bank v. Sri Lanka*,<sup>85</sup> and *Fedax v. Venezuela*,<sup>86</sup> respectively.

Accordingly, if generating an economic benefit for the host state, intangible assets such as contracts, IP rights, and others can be localized to the host state’s territory without the need to have any on-the-ground physical presence.

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<sup>81</sup> *Id.* ¶ 74.

<sup>82</sup> Int’l Bank for Reconstruction & Dev., *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, ¶ 12 (Mar. 18, 1965) [hereinafter ICSID Report].

<sup>83</sup> *Nova Scotia Power Inc. v. Venezuela (II)*, ICSID Case No. ARB(AF)/11/1, Excerpts of Award, ¶ 130 (Apr. 30, 2014).

<sup>84</sup> *Id.*

<sup>85</sup> *Deutsche Bank AG v. Sri Lanka*, ICSID Case No. ARB/09/2, Award, ¶ 14 (Oct. 31, 2012).

<sup>86</sup> *Fedax N.V. v. Venezuela*, ICSID Case No. ARB/96/3, Award, ¶ 29 (Mar. 9, 1998).



## B. Contribution of Money and Assets

When defining the ordinary meaning of investment under the VCLT,<sup>87</sup> ICSID and non-ICSID tribunals have identified and followed criteria referred to as the *Salini* criteria.<sup>88</sup> The contribution of money or assets is one of the requirements of the *Salini* criteria. This consideration is of particular importance when it comes to intangible assets of social media companies.

According to the *Poštová banka and Istrokapital v. Greece* tribunal, “[a]n investment, in the economic sense, is linked with a process of creation of value.”<sup>89</sup> Notably, the *Abaclat* tribunal referred to the created value of the investment while discussing investments with no physical presence in the host country. Ruling that the purchase of security entitlements is a contribution of capital, the tribunal also found that “the only requirement regarding the contribution is that it be apt to create the value that is protected under the BIT.”<sup>90</sup>

Keeping the types of assets of social media companies in mind, it is important to mention that the contribution of capital is not only limited to the contribution of financial resources but can take different forms. As identified by the *Deutsche Bank v. Sri Lanka* tribunal, “[a] contribution can take any form. It is not limited to financial terms but also includes know-how, equipment, personnel[,] and services.”<sup>91</sup> Additionally, in the *L.E.S.I. v. Algeria* tribunal’s words, “the investor [should] commit some expenditure, in whatever form, in order to pursue an economic objective.”<sup>92</sup>

As social media platforms provide services to 58.11% of the world population, it will be difficult to argue before the arbitral tribunal that social media companies have not provided services to the host economy. social media services are heavily relied upon by the businesses who chose to market their products/services. As earlier

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<sup>87</sup> E.g., VCLT, *supra* note 72, art. 31(1).

<sup>88</sup> See *Salini Costruttori S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 16, 2001), 42 I.L.M. 609 (2003).

<sup>89</sup> *Poštová Banka, A.S. v. Greece*, ICSID Case No. ARB/13/8, Award, ¶ 361 (Apr. 9, 2015).

<sup>90</sup> *Abaclat*, Decision on Jurisdiction and Admissibility, ¶ 365.

<sup>91</sup> *Deutsche Bank*, Award, ¶ 297.

<sup>92</sup> *L.E.S.I., S.p.A. v. Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction, ¶ 72 (July 12, 2006).



discussed, heads of states, ministries, and other government officials themselves are heavy users of social media when it comes to communicating with the public.<sup>93</sup>

It is worth mentioning that the tribunals have not defined any minimum amount of expenditures to meet the contribution requirements and limited themselves to formulations like “significant”<sup>94</sup> or “substantial”<sup>95</sup> contributions. The *Phoenix Action v. Czech Republic* tribunal went even further to find that even nominal price “is not a bar to a finding that there exists an investment”.<sup>96</sup> social media companies spend enormous amounts to offer their services in new markets. According to the Macrotrends.com data, Facebook’s expenditure for a period of 12 months as of March 31, 2021, was USD 56.243 billion,<sup>97</sup> USD 3.858 billion for Twitter<sup>98</sup>, and USD \$2.252 billion for Pinterest.<sup>99</sup>

The expenditures of social media companies associated with the host economy include but are not limited to (1) expert costs to conduct market research targeting the host economy; (2) marketing and sales expenses aimed at the host economy; (3) server and technology maintenance expenses for every additional user and their uploaded content; (4) translation expenses to have the platform accessible in the local language of the host country; (5) increased expense of content moderators to address the unwanted content uploaded from the host country; and (6) local trademark and patent registration expenses.<sup>100</sup> Hence, with social media companies, ISDS tribunals

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<sup>93</sup> Arthur Mickoleit, *Social Media Use by Governments: A Policy Primer to Discuss Trends, Identify Policy Opportunities and Guide Decision Makers* 44 (OECD, Working Paper on Public Governance No. 26, 2014).

<sup>94</sup> *RSM Prod. Corp. v. Grenada*, ICSID Case No. ARB/05/14, Award, ¶ 240 (Mar. 13, 2009).

<sup>95</sup> *Strabag SE v. Libya*, ICSID Case No. ARB(AF)/15/1, Award, ¶ 132 (June 29, 2020).

<sup>96</sup> *Phoenix Action, Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, ¶ 119 (Apr. 15, 2009).

<sup>97</sup> *Meta Platforms Operating Expenses 2010–2023* | META, Macrotrends, <https://www.macrotrends.net/stocks/charts/META/meta-platforms/operating-expenses> (last visited Feb. 29, 2024).

<sup>98</sup> *Twitter, Inc. Revenue 2013–2022* | TWTR, Macrotrends, <https://www.macrotrends.net/stocks/delisted/TWTR/twitter/revenue> (last visited Feb. 29, 2024).

<sup>99</sup> *Pinterest Operating Expenses 2018–2023* | PINS, Macrotrends, <https://www.macrotrends.net/stocks/charts/PINS/pinterest/operating-expenses> (last visited Feb. 29, 2024).

<sup>100</sup> See, e.g., Facebook Inc., Annual Report, *supra* note 17, at 61.



would have no difficulties identifying substantial or significant expenditures directed towards the host economy to pursue economic objectives.

C. *Contribution to the Development of the Host State's Economy*

Tribunals have considered the contribution to the development of the host state's economy as an additional requirement for the identification of an investment. Such requirements can be found in the preambles of IIAs<sup>101</sup> and the ICSID Convention.<sup>102</sup> Tribunals have found that such contribution should be "substantial,"<sup>103</sup> and that "serv[ing] the public interests"<sup>104</sup> meets that requirement. Thus, for similar reasons as discussed in the previous section, it will be plausible to argue that social media companies contribute to the host state's development by serving the public interests.

D. *Admission, Establishment, and Legality Requirements*

There is no customary obligation under general international law for states to admit foreign investments. Each state is free to decide its internal rules for admission and establishment of investments. The states can choose to admit all kinds of investments or limit admission to certain types of investments or sectors.<sup>105</sup> As indicated by Dolzer and Schreuer, the admission requirement refers to the "right of entry" of the investment. In contrast, the right of establishment refers to the conditions under which the investor "is allowed to carry out its business during the period of the investment."<sup>106</sup>

While the formulation of admission requirement provisions in IIAs can have implications on states' obligations to amend their inner legislation, that rarely happens.<sup>107</sup> Many treaties refer to admission requirements providing that those must

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<sup>101</sup> See, e.g., U.S. Model BIT, *supra* note 36.

<sup>102</sup> See Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Preamble, Mar. 18, 1965, 575 U.N.T.S. 159.

<sup>103</sup> Malaysian Hist. Salvors SDN v. Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶ 143 (May 17, 2007).

<sup>104</sup> *Salini*, Decision on Jurisdiction, ¶ 57.

<sup>105</sup> See DOLZER & SCHREUER, *supra* note 50, at 88.

<sup>106</sup> *Id.* at 92.

<sup>107</sup> *Id.* at 94.



be “in accordance with [local] legislation,”<sup>108</sup> thus creating no obligation for the contracting state to amend its inner legislation. Other treaties containing admission requirements provide lists that either include or exclude specific sectors from admission. It is worth mentioning that unfavorable admission or establishment requirements could be trumped by the operation of national treatment (“NT”) and most favored nation (“MFN”) clauses if incorporated in the relevant IIAs.<sup>109</sup>

While social media companies operate in cyberspace and care little about the admission and establishment requirements, those still play a deciding role. What is essential with admission requirements is that non-compliance with those might limit the state’s scope of consent and the investor’s right to resort to ISDS.<sup>110</sup>

As social media platforms are unique and operate anywhere where the internet is accessible, they do not bother establishing a physical presence in host economies, needless to say, undergoing the lengthy admission and establishment procedures existent under local legislations. Thus, their operation in the host economy can run against local laws and regulations unless the local legislation allows it. Therefore, the virtual operation of social media companies raises issues regarding the legality of the investments.

Requirements of legality can be found under the definition of investments or elsewhere in the IIA.<sup>111</sup> The definition of investments under the Germany-Philippines BIT provides for admission, acceptance, or establishment of investments “in accordance with the respective laws and regulations of either Contracting State.”<sup>112</sup> Similarly, many IIAs extend their coverage to investments made “in accordance with [the contracting state’s] laws and regulations” without referring to the admission and

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<sup>108</sup> Federal Ministry for Economics and Technology, *German Model Treaty 2008*, art. 2.1 (2008), <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2865/download>.

<sup>109</sup> See e.g., DOLZER & SCHREUER, *supra* note 50.

<sup>110</sup> *Id.* at 96.

<sup>111</sup> *Id.* at 92.

<sup>112</sup> Agreement Between the Federal Republic of Germany and the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments, art. 1(1), Apr. 18, 1997.



establishment.<sup>113</sup> While both examples require investments to be made in accordance with the laws and regulations of the host state, the legality requirement is distant from admission requirements.<sup>114</sup> The legality requirement is broad and relates to all possible cases of illegality, whereas the admission requirements refer to the legality of pre-approval,<sup>115</sup> necessary permissions,<sup>116</sup> or admission prerequisites.<sup>117</sup>

Not all IIAs contain express legality requirements when it comes to defending the scope of covered investments.<sup>118</sup> Absent such requirements, the illegality of the investment serves no bar at least for the jurisdiction of the tribunal.<sup>119</sup>

As social media companies typically do not attempt to register their platforms in host countries, it might be difficult to argue that an unregistered platform operating solely on the internet meets the admission requirements provided that such requirements exist under the host country's legislation. Nevertheless, it is worth mentioning that investment arbitration tribunals have considered that only severe<sup>120</sup> and non-trivial<sup>121</sup> violations could meet the illegality bar.<sup>122</sup> Therefore, if there are no express investment policies against social media platforms, the illegality requirement will not be met.<sup>123</sup>

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<sup>113</sup> Agreement Between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the United Arab Emirates for the Promotion and Reciprocal Protection of Investments, art. 1(1)(d), June 16, 2019.

<sup>114</sup> See Michael Polkinghorne & Sven-Michael Volkmer, *The Legality Requirement in Investment Arbitration*, 34 J. INT'L ARB. 149, 149-150 (2018).

<sup>115</sup> See *Öztaş Constr., Constr. Materials Trading Inc. v. Libya*, ICC Case No. 21603/ZF/AYZ, Final Award, ¶ 115 (June 14, 2018).

<sup>116</sup> See *Cengiz İnşaat Sanayi ve Ticaret A.S v. Libya*, ICC Case No. 21537/ZF/AYZ, Award, ¶ 293 (Nov. 17, 2018).

<sup>117</sup> See, e.g., *Deutsche Bank*, Award, ¶ 300.

<sup>118</sup> See, e.g., ECT, *supra* note 65, art. 1.6.

<sup>119</sup> See *Ascom Group S.A. v. Kazakhstan*, SCC Case No. 116/2010, Award, ¶ 812 (Dec. 19, 2013).

<sup>120</sup> E.g., *Energoalians LLC v. Moldova*, UNCITRAL, Award, ¶ 261 (Oct. 23, 2013).

<sup>121</sup> E.g., *Quiborax S.A. v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, ¶ 266 (Sept. 27, 2012).

<sup>122</sup> E.g., *Olympic Ent. Grp. AS v. Ukraine*, PCA Case No. 2019-18, Award, ¶ 60 (Apr. 15, 2021).

<sup>123</sup> See *Tethyan Copper Co. v. Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, ¶ 1445 (Nov. 10, 2017).



What is crucial in the context of this article is that the state's failure to prosecute the unlawful situation estops the state from invoking an illegality objection in front of the tribunal. Numerous tribunals have supported this view. In *Desert Line v. Yemen*<sup>124</sup> the tribunal found that, "the host state which has for some time tolerated a legal situation is thereafter precluded from insisting later, against the investor, that the situation was unlawful from the beginning."<sup>125</sup>

Similarly, in *Railroad Development v. Guatemala*, the tribunal pointed out the non-objection by the government to the unlawful situation and concluded that it would be against the principles of fairness to accept the jurisdictional objection on the grounds of unlawfulness.<sup>126</sup> The *Mabco v. Kosovo* tribunal adopted the same approach, stating that illegality cannot be raised as a jurisdictional defense if the state was aware of it and raised no objections.<sup>127</sup> Therefore, an illegality of jurisdictional objection cannot be raised if (1) the state was aware of the unlawful situation, and (2) the state did not object to the existence of an unlawful situation.

The operation of social media companies will likely meet both of the above criteria. First, it would be absurd to argue that the government did not know about the illegal operation of the social media platform as all the information is readily accessible on the internet. Second, states did not object to the situation of unlawfulness created by the operation of social media platforms, and—which is more important—state officials themselves heavily rely on social media. As already discussed, heads of state and government officials are everyday users of social media platforms in their official capacity,<sup>128</sup> and they use social media platforms as their primary channel of communication with the public.<sup>129</sup>

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<sup>124</sup> *Desert Line Projects LLC v. Yemen*, ICSID Case No. ARB/05/17, Award ¶ 105 (Feb. 6, 2008).

<sup>125</sup> See DOLZER & SCHREUER, *supra* note 50, at 94; *Desert Line*, Award, ¶¶ 97-110.

<sup>126</sup> *R.R. Dev. Corp. v. Guatemala*, ICSID Case No. ARB/07/23, Award, ¶ 82 (June 29, 2012).

<sup>127</sup> *Mabco Constrs. SA v. Kosovo*, ICSID Case No. ARB/17/25, Decision on Jurisdiction, ¶ 409 (Oct. 30, 2020).

<sup>128</sup> See, e.g., Zhaoyin Feng, *China and Twitter: The Year China Got Louder on Social Media*, BBC (Dec. 29, 2019), <https://www.bbc.com/news/world-asia-china-50832915/>.

<sup>129</sup> Stacy Jo Dixon, *World Leaders with the Most Twitter Followers as of June 2020*, STATISTA (Apr. 28, 2022), <https://www.statista.com/statistics/281375/heads-of-state-with-the-most-twitter-followers/>.





## V. BANNING SOCIAL MEDIA COMPANIES AS EXPROPRIATION

Protections against both direct and indirect expropriation can be found in virtually all IIAs.<sup>130</sup> However, in practice, states rarely directly expropriate the property as it will create an unfavorable image and hurt the country's investment climate.<sup>131</sup> As pointed out by the *Metalclad* tribunal:

measures equivalent to expropriation include covert or incidental interference with the use of property which has the effect of depriving the owner of . . . the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.<sup>132</sup>

As customary international law does not per se preclude states from expropriating alien property,<sup>133</sup> one of the criteria for any expropriation to be lawful is the payment of or a reasonable offer to pay compensation.<sup>134</sup> At the time of writing, the author is unaware of any cases where the government has paid or offered to pay compensation after blocking a social media platform. For those reasons, the study will exclude the discussion of the lawfulness of expropriation from its scope. Similarly, the article will leave out the discussion of regulatory powers of host states in relation to expropriation, since it is highly fact-dependent, and it will be speculative to try to define a universal formula addressing all social media platform blocking cases.

### A. Expropriation of Contractual Rights

As the main business of social media platforms is to collect data from their users, they require the users to enter into user agreements with the social media platform they are registering with. Some platforms go even further and provide that such user agreements also apply to the users who have not registered with the platform but have nevertheless used it.<sup>135</sup> User agreements are periodically updated and adjusted

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<sup>130</sup> See DOLZER & SCHREUER, *supra* note 50, at 89.

<sup>131</sup> See Christoph H. Schreuer, *The Concept of Expropriation under the ETC and other Investment Protection Treaties*, TRANSNAT'L DISP. MGMT., Nov. 2005, <https://www.transnational-dispute-management.com/article.asp?key=596>.

<sup>132</sup> *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, ¶ 103 (Aug. 30, 2000).

<sup>133</sup> See DOLZER & SCHREUER, *supra* note 50, at 100.

<sup>134</sup> *Rusoro Mining Ltd. v. Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, ¶ 407 (Aug. 22, 2016).

<sup>135</sup> See *Terms of Service*, TIKTOK, <https://www.tiktok.com/legal/page/us/terms-of-service/en> (last accessed Feb. 29, 2024) [hereinafter *TikTok U.S. ToS*].



to the needs of specific countries and regions where the user is located. The courts in the U.S. have determined that user agreements are valid and enforceable<sup>136</sup> and create a proper balance between the parties' rights and obligations.<sup>137</sup> social media platforms extract their profit by relying on such agreements, in the case of Facebook, resulting in a profit of approximately USD 30 *per user*. Hence, it should be discussed whether the ban of the social media platform in a foreign country could amount to an indirect expropriation.

The terms of use of TikTok (U.S.) provide, “[b]y accessing or using our Services, you confirm that you can form a binding contract with TikTok, that you accept these Terms and that you agree to comply with them.”<sup>138</sup>

Agreements like this are widespread, and users of the platform validly consent and are bound by these obligations stipulated therein. As discussed in the preceding chapters, the contractual rights could constitute investments under certain IIAs. By blocking the social media platforms, a state interferes with the user agreements of social media companies and users to the extent that they deprive the agreements of any value.

The expropriation of contractual rights has been considered possible by the Permanent Court of International Justice (PCIJ) in *Certain German Interests in Polish Upper Silesia* case where the court found that by taking possession of the Chorzow factory, the respondent expropriated the contractual rights of the company.<sup>139</sup> Similarly, Iran–US claims tribunal in *Amoco International Finance Corp v. Iran* case found that, “[e]xpropriation, . . . may extend to any right which can be the object of a commercial transaction, i.e., freely sold and bought, and thus has a monetary value.”<sup>140</sup>

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<sup>136</sup> See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450–53 (7th Cir. 1996).

<sup>137</sup> Perry Viscounty et al., *Social Networking and the Law: Virtual Social Communities Are Creating Real Legal Issues*, 18 *BUS. L. TODAY* 58, 59-60 (2009).

<sup>138</sup> TikTok U.S. ToS, *supra* note 135.

<sup>139</sup> See *Certain German Interests in Polish Upper Silesia* (Ger. v. Pol.), Judgment, 1926 P.C.I.J. (ser. A) No. 7, at 44 (May 25).

<sup>140</sup> *Amoco Int’l Fin. Corp. v. Iran*, 15 Iran-U.S. Cl. Trib. Rep. 189, ¶ 108 (1987).



In the *Siemens v. Argentina*, the tribunal analyzed Germany-Argentina BIT, and concluded that contractual rights in terms of the Treaty may be expropriated.<sup>141</sup> While referring to the contract between the state and the investor, the tribunal observed that the state could incur international responsibility if it used its “superior governmental power” to interfere with the contract execution.<sup>142</sup>

The tribunal in *EMV v. Czech Republic* found that “the rights contained in a contract between an investor and another private party are capable of being expropriated by the State.”<sup>143</sup> Nevertheless, the tribunal emphasized that the state would expropriate the contractual obligations if it substantially amended or terminated contracts between two private parties.

Likewise, in another ICSID case, *L.E.S.I. v. Libya*, the tribunal found that the contractual rights could be indirectly expropriated where the expropriation “can result from a substantial loss of contractual rights.”<sup>144</sup> In *Saipem v. Bangladesh* tribunal found that the contractual rights arising out of ICC arbitration award are capable of being expropriated.<sup>145</sup> Other tribunals found that contractual rights fall under the broad concept of expropriation<sup>146</sup> and in some cases form an integral part of investments can be expropriated<sup>147</sup>

If these decisions are projected on the scenario of a government blocking social media platforms, there is a likely chance that the tribunals will consider user agreements as being capable of expropriation. As social media platforms heavily rely on user agreements to operate and derive substantial profit from such user agreements, those should be considered an integral part of their investment. When blocking the social media platforms, governments exercise their superior powers by

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<sup>141</sup> *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award, ¶ 267 (Jan. 17, 2007).

<sup>142</sup> *Id.* ¶¶ 253, 258.

<sup>143</sup> *European Media Ventures*, Partial Award on Liability, ¶ 84.

<sup>144</sup> *L.E.S.I.*, Decision on Jurisdiction, ¶ 131.

<sup>145</sup> See *Saipem S.p.A. v. Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, ¶¶ 127-128 (Mar. 21, 2007).

<sup>146</sup> See, e.g., *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan*, ICSID Case No. ARB/03/29, Award, ¶ 441 (Aug. 27, 2009).

<sup>147</sup> See *Caratube Int'l Oil Co. v. Kazakhstan (II)*, ICSID Case No. ARB/13/13, Award, ¶ 822 (Sept. 27, 2017).



ordering ISPs to suspend the operation of the social media platforms. They interfere substantially with the contractual rights of social media companies by depriving them of the possibility to extract user data and generate profit from the sales. Therefore, there is a likely prospect that ISDS tribunals will consider the user agreements being expropriated by the State.

## VI. POSSIBLE HOST STATE DEFENSES

Social media companies are increasingly becoming subject to interference by state regulatory authorities. The recent TikTok ban in India and Pakistan, as well as the ban on Telegram in Russia and Indonesia are prime examples of such severe interference. When blocking<sup>148</sup> or threatening to block<sup>149</sup> the operation of a social media platform in its entirety, it has become standard practice to refer to national security concerns,<sup>150</sup> protection of public morals,<sup>151</sup> “unstable political situation[s],”<sup>152</sup> and the “violation of the inviolability of private life.”<sup>153</sup> Recently, Nigeria indefinitely suspended the operation of Twitter, and issued a statement: “Micro-blogging site was being used to undermine ‘Nigeria’s corporate existence’ through the spreading of fake news that [had] ‘violent consequences.’”<sup>154</sup>

While States can provide justifications for blocking social media platforms including, in some cases, based on internal laws and regulations, blocking measures should still be assessed having in mind the host state’s international obligations

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<sup>148</sup> See Rajesh Roy & Shan Li, *India Bans TikTok, Dozens of Other Chinese Apps after Border Clash*, WALL ST. J. (June 30, 2020), <https://www.wsj.com/articles/india-blocks-dozens-of-chinese-apps-including-tiktok-following-border-clash-11593447321/>.

<sup>149</sup> See Tali Arbel et al., *US Bans WeChat, TikTok from App Stores, Threatens Shutdowns*, AP NEWS (Sept. 18, 2020), <https://apnews.com/article/donald-trump-us-news-ap-top-news-international-news-technology-a439ead01b75fc958c722daf40f9307c/>.

<sup>150</sup> See Himanshu Singh Rajpurohit & Tilak Dangi, *Is India’s Ban on TikTok and other Apps Justified by the WTO National Security Exception?*, REGULATING FOR GLOBALIZATION (Oct. 27, 2020), <https://regulatingforglobalization.com/2020/10/27/is-indias-ban-on-tiktok-and-other-apps-justified-by-the-wto-national-security-exception/>.

<sup>151</sup> See Declan Walsh, *Pakistan Lifts Facebook Ban but ‘Blasphemous’ Pages Stay Hidden*, GUARDIAN (May 31, 2010), <https://www.theguardian.com/world/2010/may/31/pakistan-lifts-facebook-ban/>.

<sup>152</sup> Shireeva et al., *supra* note 13, at 144.

<sup>153</sup> *Id.*

<sup>154</sup> ABC Sunday Extra, *Nigeria’s Twitter Ban*, ABC AUSTRALIA (June 27, 2021), <https://www.abc.net.au/radionational/programs/sundayextra/nigerias-twitter-ban/13410424/>.



governed by public international law. As states cannot invoke their domestic law as a justification for their otherwise wrongful conduct under international law, a thorough examination of possible defenses under general international law will be necessary.<sup>155</sup>

A. *Necessity as a Defense*

Where a necessity defense can be included in IIAs,<sup>156</sup> it also forms part of general international law.<sup>157</sup> Necessity provisions found in IIAs provide a more detailed definition referring to the situations of “public order,” “restoration of international peace or security,” and “essential security interests.”<sup>158</sup> Observing the analogy between treaty provisions and customary international law, the annulment committee in *CMS v. Argentina*, distinguished the two approaches. The committee found that the IIA provision refers to “the conditions under which the treaty [might] apply.”<sup>159</sup> In contrast, Article 25 of the International Law Commission’s Articles on State Responsibility excludes the application of the defense “unless certain stringent conditions are met.”<sup>160</sup> Additionally, it is worth noting that states themselves need to bear the burden of proof when invoking the necessity defense.<sup>161</sup>

When it comes to necessity as a ground for precluding the wrongfulness of the conduct under general international law, states need to be aware that necessity defense will be accepted in exceptional situations only.<sup>162</sup> In the words of the *Gabčíkovo–Nagymaros* judgment in *Hungary v. Slovakia*, (1) an “essential interest” of the state must be at stake, (2) such interest must be threatened by “grave and imminent peril” (3) the wrongful act must be “the only means” of safeguarding the

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<sup>155</sup> Int’l L. Comm’n, *Responsibility of States for Internationally Wrongful Acts*, art. 3, U.N. Doc. A/RES/56/83 (2002) [hereinafter *ILC Articles*].

<sup>156</sup> See e.g., *Argentina–U.S. BIT*, *supra* note 66, art. XI.

<sup>157</sup> See *ILC Articles*, *supra* note 155, art. 25.

<sup>158</sup> See e.g., *Argentina–U.S. BIT*, *supra* note 66, art. XI.

<sup>159</sup> *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Decision of the Ad hoc Committee on Argentina’s Application for Annulment, ¶ 129 (Sept. 25, 2007).

<sup>160</sup> *Id.*

<sup>161</sup> See *Unión Fenosa Gas, S.A. v. Egypt*, ICSID Case No. ARB/14/4, Award, ¶ 8.38 (Aug. 31, 2018).

<sup>162</sup> See *Gabčíkovo–Nagymaros Project (Hung. v. Slov.)*, Judgment, 1997 I.C.J. 7, ¶ 51 (Sept. 25).



interest and (4) the state itself must not have contributed to the wrongful act in question.<sup>163</sup>

As the defense of necessity existing both in IIAs and under customary international law has a high bar, most cases of government blocking of social media platforms will fall below that threshold. Reasons such as the protection of public morals or disagreement with the platform's content would fall short of the necessity defense. However, social media platform blocking connected with military conflicts or the spread of violence may meet the bar of the necessity defense, depending on the circumstances.

#### B. *National Security Exception as a Defense*

It has been a long-standing practice for states to rely on their national security interests when acting in violation of the General Agreement on Tariffs and Trade (GATT).<sup>164</sup> Article XXI of the GATT provides, “[n]othing in this Agreement shall be construed to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests.”<sup>165</sup>

The national security exception clauses were later “imported” into other international economic treaties, including many IIAs.<sup>166</sup> Unlike GATT Article XXI—which has only recently been interpreted by a tribunal<sup>167</sup>—the security exception clauses enshrined in investment treaties were a subject of controversial scholarly debate and interpretation. As rightly observed by Sebastián Blanco and Alexander Pehl, “[t]he race between the interpretation of national security clauses and treaty modifications keeps the arbitrators entertained and investors undecided.”<sup>168</sup>

National security clauses enshrined in IIAs operate as exceptions, allowing states to adopt measures that would have been otherwise inconsistent with their treaty

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<sup>163</sup> *Id.* ¶ 52.

<sup>164</sup> General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

<sup>165</sup> *Id.* art. XXI(a) (emphasis added).

<sup>166</sup> SEBASTIÁN MANTILLO BLANCO & ALEXANDER PEHL, NATIONAL SECURITY EXCEPTIONS IN INTERNATIONAL TRADE AND INVESTMENT AGREEMENTS: JUSTICIABILITY AND STANDARDS OF REVIEW 2 (2020).

<sup>167</sup> Panel Report, *Russia – Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019).

<sup>168</sup> MANTILLO BLANCO & PEHL, *supra* note 166.



obligations under the respective IIA. Starting as early as 1959, references to national security exceptions could be spotted in IIAs.<sup>169</sup> The national security exception clauses could be included as carve-outs addressing only certain treatment standards<sup>170</sup> or as a free-standing provision in the IIAs.<sup>171</sup>

The formulation of the clause plays a deciding role. The GATT provision already cited above uses the “*it considers*” formulation, which allows the state to judge itself on the existence of the essential security interest. In contrast, in investment arbitration, many clauses do not include the self-judging “*it considers*” or “*it determines to be*” formulations. As of 2020, there were no instances recorded where the arbitral tribunal ruled on “*it considers*” formulation clauses concerning IIAs.<sup>172</sup> Instead, when referring to the Article XI of the “famous” Argentina-U.S. BIT,<sup>173</sup> tribunals ruled that “national security exception” clauses are not self-judging,<sup>174</sup> unless the treaty explicitly provides so.<sup>175</sup> The tribunals also observed that while states have some degree of deference when assessing the “essential security interest” situations, such deference is not unlimited.<sup>176</sup>

Accordingly, in the case of a hypothetical dispute arising out of the blocking of an social media platform, the wording of an IIA will play an essential role. If the national security exception clause has an “*it considers*” type formulation, it will be in principle possible for the state to argue that the blocking of the social media platform is done to protect their essential security interest. In alternative scenarios, such an argument may not stand as the scrutinizing of the measure at hand to decide whether the

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<sup>169</sup> See e.g., Germany-Pakistan BIT, *supra* note 35, Protocol Point 2.

<sup>170</sup> See e.g., *id.* art. 3(3).

<sup>171</sup> See e.g., Argentina-U.S. BIT, *supra* note 66, art. XI.

<sup>172</sup> See MANTILLO BLANCO & PEHL, *supra* note 166, at 43.

<sup>173</sup> Argentina-U.S. BIT, *supra* note 66, art. XI.

<sup>174</sup> See, e.g., CC/Devas (Mauritius) Ltd. v. India, PCA Case No. 2013-09, Dissenting Opinion of Arbitrator David R. Haigh, ¶ 79 (July 25, 2016); see also Shin-yi Peng, *Cybersecurity Threats and the WTO National Security Exceptions*, 18 J. INT'L ECON. L. 449 (2015).

<sup>175</sup> Mobil Expl. & Dev. Arg. Inc. Suc. Arg. v. Argentina, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, ¶ 1037 (Apr. 10, 2013).

<sup>176</sup> Deutsche Telekom AG v. India, PCA Case No. 2014-10, Interim Award, ¶ 235 (Dec. 13, 2017).



measure was adopted to aid the state's essential security interest or not will fall within the jurisdiction of the tribunal.

## VII. CONCLUSION

Social media companies with only a virtual presence in host economies will face a plethora of jurisdictional and procedural hurdles when submitting an ISDS claim. Importantly, they will need to first prove that intangible assets such as user agreements constitute covered investments within the meaning of the relevant IIA and, if relevant, the ICSID convention. They will also have to present additional evidence supporting that their investments have met the admission, establishment, and legality requirements present in IIAs and customary international law. However, as demonstrated above, social media companies will have little difficulty in conquering this stage due to their widespread nature.

Perhaps, the most controversial of all for social media companies will be to meet the territoriality requirements of the IIAs given their virtual presence in the host economy. However, even in light of the numerous cases attaching great importance to the territorial link, it was still possible to identify decisions that give little importance or disregard the territoriality requirements when it concerns intangible assets such as contractual rights. Tribunals supporting the latter, the milder territoriality approach still ask that the company's operation involves a contribution of assets or the investment to contribute to the development of the host state's economy. As presented above, social media companies will have no difficulty submitting evidence supporting the latter.

Turning to the discussion of expropriation, social media companies' likely-to-be-expropriated assets are user agreements, which become ineffective and deprived of value once the government interferes and bans the operation of the platform. As ISDS and international law tribunals have recognized the possibility of commercial contracts to be expropriated in a number of cases, if the jurisdictional and procedural requirements are met, social media companies have a realistic chance to successfully argue an expropriation claim arising out of the social media ban.





As for the host states, it will be impractical to resort to national security and necessity defenses to get the claims dismissed, as the bar of meeting those is extremely high. The social media blockings that occur for “veiled” reasons of censorship will likely fall short of the necessity or national security exception defenses’ requirements.

To conclude, on the one hand, we have a rapidly evolving digital economy disregarding the borders and disrupting the traditional conceptions of territoriality in international law, and on the other hand, the IIA framework is perplexed in notions of territoriality and brick and mortar businesses. The advent of the internet and digital services’ industry continues to prove the impracticability of such an approach, threatening to leave out the internet industry from the IIA protections. Despite these difficulties, even under the current ISDS framework, social media companies have a realistic chance of success if they resort to ISDS in case of social media platform blocking by governments.



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# INTERNATIONAL COMMERCIAL ARBITRATION & TECHNOLOGY: AN AUTHORS' INTERVIEW WITH GENERATIVE ARTIFICIAL INTELLIGENCE

by Dr. Piotr Wiliński & Dr. Maciej Durbas

## I. INTRODUCTION

It has been stated that generative artificial intelligence “is not yet accurate enough to provide legal information directly to laypeople.”<sup>1</sup> On the other hand, many sources label the introduction of generative AI as a milestone in the legal profession and international commercial arbitration.<sup>2</sup> The authors of this paper took the task to conduct an “interview” with the generative AI to assess what it “thinks” about its newfound role in international commercial arbitration.

The quotation marks are deliberate. The “AI revolution” of 2022–2023 refers to the emergence of generative AI software, i.e., large language models (“LLM”) that could generate new data (in particular text) based on generative models.<sup>3</sup> The authors share the opinion that generative AI should not be compared with artificial general intelligence,<sup>4</sup> i.e., software or machine that could accomplish any unspecific task that human beings could perform or even surpass human performance.<sup>5</sup> Hence, one could not “talk” or “interview” generative AI software. Nor could such software share “its views” on a given subject. Accordingly, one could only input data to software

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<sup>1</sup> Jinzhe Tan et al., *ChatGPT as an Artificial Lawyer?*, in AI4AJ 2023, Workshop on Artificial Intelligence for Access to Justice 7 (L. Karl Branting, ed., 2023), CEUR WORKSHOP PROCEEDINGS, <https://ceur-ws.org/Vol-3435/short2.pdf>.

<sup>2</sup> See, e.g., Claire Morel de Westgaver, *Canvassing Views on AI in IA: The Rise of Machine Learning*, KLUWER ARBITRATION BLOG (July 12, 2023), <https://arbitrationblog.kluwerarbitration.com/2023/07/12/canvassing-views-on-ai-in-ia-the-rise-of-machine-learning>.

<sup>3</sup> See Erik Brynjolfsson et al., *Generative AI at Work* 1 n.1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31161 2023).

<sup>4</sup> See, e.g., Andrzej Kisielewicz, *Bajki o sztucznej inteligencji i prawdziwe zagrożenia* [Fairy tales of AI and real threats], WSZYSTKO CO NAJWAŻNIEJSZE (July 18, 2023), <https://wszystkoconajwazniejsze.pl/andrzej-kisielewicz-bajki-o-sztucznej-inteligencji-i-prawdziwe-zagrozenia/>.

<sup>5</sup> Sam S. Adams et al., *Mapping the Landscape of Human-Level Artificial General Intelligence*, AI MAG., Spring 2012, at 25, 26.



(i.e., an interview question) and obtain other data in return (i.e., generative AI's answer).

## II. METHODOLOGY

For the purposes of producing a scholarly article, conducting a semi-structured interview with generative AI requires adopting scientific discipline and acknowledging certain limitations. The basic rules and choices followed in this article will be explained below.

This paper builds upon the authors' prior research, resulting in the book chapter related to a phenomenon of technology and its influence on international arbitration that was released a few months prior to a global boom of generative AI.<sup>6</sup> Additionally, the authors presented and discussed their initial reflections on the influence of generative AI on international arbitration during an academic seminar organized by Radboud University in Nijmegen on May 19, 2023.

The authors have not involved the use of generative AI in the main body of this article, including the methodology section as well as conclusions. Any answer provided by generative AI is clearly indicated as such.

The authors selected two independent generative AI tools, namely: (i) ChatGPT 4.0 (paid option) and (ii) Google Bard (free). The authors considered that testing the content of the questions and answers is sufficiently done with the help of at least two generative AI entities.

The authors decided to test three working hypotheses:

- a. Generative AI is a tool that is not ready to make independent decisions in the arbitral process.
- b. The data provided by generative AI based on the same question may vary,

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<sup>6</sup> See generally Piotr Wilinski & Maciej Durbas, *Data Mining, Text Analytics and International Commercial Arbitration*, in *INTERNATIONAL ARBITRATION AND TECHNOLOGY* (Pietro Ortolani et al. eds., 2021).



- c. Generative AI may “hallucinate,” i.e., give answers confidently that are not justified in the training data provided to the AI,<sup>7</sup> and these “hallucinations” also refer to the issues of international arbitration.

To test these hypotheses, the authors prepared a list of ten main questions with further sub-questions corresponding to initial reflections in their previous research and works and related to the conduct of counsels and arbitrators in international arbitration and the use of AI in the proceedings. The authors asked questions one by one.

The authors prompted the AI generators to test working hypotheses and match the paper’s word limit. The authors aimed at asking only general questions and omitted any leading ones.

The authors then compared and reproduced the answers in the appendix to this paper. Finally, they were able to test the working hypotheses.

The authors understand that from a statistical perspective, one should consider interviewing more AI generators or sample more answers. However, given that the exercise in question is not a strictly scientific experiment, but more of a cognitive curiosity, they decided to limit themselves to the methodology in question. In any event, they are aware of possible criticism and constructive feedback.

### III. THE QUESTION SET

An arbitration lawyer interviews you on how artificial intelligence (“AI”) can be used in the international arbitration process. Give a concise and easy-to-follow answer to all the following questions (no more than 200 words).

- A. *General questions about the possible use of data mining, text analytics, or generative AI tools in international arbitration*
1. Is there any legal or soft-law framework for using data mining, text analytics, or generative AI tools in international commercial arbitration?
  2. How could general principles of arbitration shape the use of these tools in arbitration?

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<sup>7</sup> See Sai Anirudh Athaluri et al., *Exploring the Boundaries of Reality: Investigating the Phenomenon of Artificial Intelligence Hallucination in Scientific Writing Through ChatGPT References*, 15 CUREUS 1 (2023).



3. Should there be any law or at least soft-law regulation of using these tools in international commercial arbitration? What should be the regulators' aim?
  4. Should the use of data mining, text analytics, or generative AI tools be allowed at all? If so, should its users disclose this fact?
  5. Is there enough data in international arbitration for data mining, text analytics, or generative AI tools to present data that the stakeholders could use?
  6. Is there enough data from international commercial arbitration compared to international treaty arbitration?
  7. Is the data comparable when the awards are rendered in a different form and structure, in different languages, and under different rules?
  8. What are the ethical considerations when using data mining, text analytics, or generative AI tools in international arbitration?
  9. Should stakeholders in arbitration be concerned when they input sensitive data to data mining, text analytics, or generative AI tools?
  10. Could AI make the decisions for stakeholders in arbitration (parties, counsel, and arbitrators)?
- B. *Detailed questions about the possible use of data mining, text analytics, or generative AI tools in international arbitration*
1. Could parties use data mining, text analytics, or generative AI tools to select the arbitral seat or arbitral rules for their dispute?
  2. Would you be able to propose an arbitral seat or set of rules for a given dispute based on your training data and data input by a given stakeholder?
  3. Could parties use data mining, text analytics, or generative AI tools to draft an arbitration clause either from the beginning or by amending an existing template?
  4. Would you be able to draft an arbitration clause for a given dispute based on your training data and data input by a given stakeholder?
  5. Could stakeholders in arbitration use data mining, text analytics, or generative AI tools to assess a potential conflict of interest between either counsel and a party or an arbitrator with parties, counsel, experts, or other arbitrators?



Soft-law documents that refer to conflict of interest often use vague terms like “significant interest in a party,” “regularly advises,” “close relationship,” “significant commercial relationship,” “related issue,” “significant fees or other revenues,” “regular basis.” Do you think that generative AI could replace a human in assessing whether a given situation qualifies under vague terms?

6. Could parties use data mining, text analytics, or generative AI tools to select an arbitrator for their dispute?

Would these tools consider that arbitrators might change their mind or have rendered an award because of the particular circumstances of the case or do not entirely agree with every word drafted by their co-arbitrators?

7. Could parties (or e.g., litigation financiers) use data mining, text analytics, or generative AI tools to assess the chances of winning a case in international arbitration?

What documents or information would the parties need to deliver for the AI to be able to do so?

How would AI tackle the use of vague legal definitions (e.g., “foreseeable,” “fault,” “reasonable”)? Does the understanding of these vague terms and their application to a given case vary significantly depending on a given case, its facts and applicable law?

8. Could arbitrators use data mining, text analytics, or generative AI tools to examine the evidence in international arbitration or in drafting awards or other documents?
9. Could parties use data mining, text analytics, or generative AI tools to draft more persuasive submissions in arbitration?
10. Could arbitral institutions use data mining, text analytics, or generative AI tools to critically scrutinize an arbitral award?

#### **IV. CONVERSATION NO. 1: CHATGPT 4.0**



An arbitration lawyer interviews you on how AI can be used in the international arbitration process. Give a concise and easy-to-follow answer to all the following questions (no more than 200 words).

A. *General questions about the possible use of data mining, text analytics, or generative AI tools in international arbitration*

1. Is there any legal or soft-law framework for using data mining, text analytics, or generative AI tools in international commercial arbitration?

As of my last update in September 2021, there isn't a universally recognized legal or soft-law framework specifically tailored for the use of AI, data mining, text analytics, or generative AI tools in the context of international commercial arbitration. However, several principles of international arbitration, such as the duty to act fairly and impartially and to treat parties with equality, would apply to the use of any tool or method in the arbitration process, including AI.

That said, various international arbitration institutions and bodies have begun exploring and commenting on the use of technology in the process. The ICCA-IBA Joint Task Force on Data Protection in International Arbitration, for example, has published a roadmap on data protection. While this doesn't focus on AI specifically, it does touch upon technological advancements.

It's worth noting that the adoption and integration of AI tools would have to respect the confidentiality of proceedings, the protection of personal data, and the general principles of procedural fairness. As the field evolves, it's plausible that more specific guidelines or frameworks might emerge to address these new technological dimensions in arbitration.

2. How could general principles of arbitration shape the use of these tools in arbitration?

**Equality and Fair Treatment:** All parties must be given an equal opportunity to benefit from AI tools. If one party employs AI for analysis, the other should be made aware and possibly given access to similar tools. It ensures that neither side gains an unfair advantage, upholding the essence of equal treatment.

**Impartiality and Independence:** AI models can have inherent biases based on their training data. It's crucial that any AI tool used doesn't favor one party over the



other. Transparent methodologies and possibly third-party validations can ensure the neutrality of AI outputs.

**Confidentiality:** Arbitral proceedings often require confidentiality. AI tools need to be secure, with robust measures against unauthorized access or data breaches. They should also not store sensitive information beyond the duration of the process.

**Transparency:** While AI's operations might be complex, its application in arbitration should be transparent. Both parties should be informed about how and why a particular AI tool is being used, ensuring there are no “black box” operations.

**Procedural Efficiency:** AI can analyze vast datasets quickly, which could expedite certain stages of arbitration. However, speed shouldn't compromise accuracy or fairness.

**Right to be Heard:** If AI is utilized, especially in evidence evaluation, parties must have the chance to challenge or question its outputs. It safeguards the principle that all parties have a voice in the process.

In summary, while AI offers promising advancements for arbitration, its implementation should always respect the fundamental principles that make arbitration fair and just.

3. Should there be any law or at least soft-law regulation of using these tools in international commercial arbitration? What should be the regulators' aim?

Yes, given the increasing influence and potential implications of AI tools, there should be at least soft-law regulations for their use in international commercial arbitration. Soft-law instruments, like guidelines or best practices, can offer a flexible yet structured approach to integrating AI into arbitration.

**Regulators' Aim:** The primary aim should be to ensure:

**Fairness and Equity:** AI tools should be accessible and understandable to both parties. Any AI application must be transparent and free from biases, ensuring equal treatment of parties.

**Maintaining Confidentiality:** Regulations should enforce robust data protection and security measures, safeguarding the confidential nature of arbitral proceedings.





**Transparency and Understandability:** Parties should be informed about AI's role, how it operates, and its implications. This ensures the process remains transparent and the outcomes are trustworthy.

**Enhancing Procedural Efficiency:** AI's potential in expediting processes, like document review or data analysis, should be harnessed without compromising the quality of the arbitration.

**Ethical Use:** Guidelines should promote ethical considerations, addressing concerns like potential misuse, ensuring AI tools align with the overarching principles of arbitration.

In essence, any regulation should strike a balance between leveraging the benefits of AI and preserving the core principles of arbitration, ensuring justice, fairness, and efficiency in the process.

4. Should the use of data mining, text analytics, or generative AI tools be allowed at all? If so, should its users disclose this fact?

**Should AI Tools be Allowed?:** Yes, AI tools like data mining and text analytics can offer significant advantages in international arbitration. They can enhance efficiency, particularly in tasks like document review, evidence analysis, and identifying patterns in large datasets. However, the usage should always prioritize the fairness, integrity, and transparency of the arbitration process.

**Disclosure of AI Tool Usage:** It's advisable to disclose the use of AI tools in arbitration for several reasons:

**Transparency and Trust:** Arbitration relies on the trust and confidence of its stakeholders. Disclosing the use of AI tools can foster transparency, ensuring parties are aware of how evidence or arguments are being processed.

**Equality:** Disclosure ensures both parties are on an equal footing. If one party employs AI tools, the other should have the opportunity to understand, challenge, or potentially utilize similar tools.

**Integrity of the Process:** AI's outputs, especially from generative tools, can be influenced by their training data and algorithms. Disclosing their usage allows parties to question or validate these outputs, preserving the process's integrity.



In essence, while the advantages of AI tools are evident, their usage should be disclosed to maintain the core principles of transparency, fairness, and trust in international arbitration.

5. Is there enough data in international arbitration for data mining, text analytics, or generative AI tools to present data that the stakeholders could use?

International arbitration, by its nature, is often confidential, which can limit the amount of publicly available data. However, within individual proceedings, significant amounts of data, such as case documents, evidentiary submissions, and transcripts, may accumulate.

There are some repositories and databases, especially from major arbitration institutions, that provide redacted awards, decisions, or other relevant materials. Additionally, legal databases and publications, though not exhaustive, contain collections of arbitral awards and related literature.

For stakeholders within a specific arbitration, the volume of data generated could be substantial and suitable for data mining or text analytics. For example, AI tools can be employed to review large sets of documents, identifying patterns, key terms, or relevant passages.

However, for generative AI tools that require vast datasets to generate new content or predict outcomes, the confidentiality and relatively fragmented nature of international arbitration data might present challenges.

In conclusion, while there may be enough data within specific proceedings for data analysis or text mining, the broader application of generative AI tools in predicting trends or outcomes in international arbitration might require more comprehensive data sets, which are currently limited by confidentiality and the decentralized nature of the field.

6. Is there enough data from international commercial arbitration compared to international treaty arbitration?

International commercial arbitration and international treaty arbitration (often investor-state dispute settlement or ISDS) both produce significant amounts of data. However, there are notable differences in their availability:

**Confidentiality and Transparency:**

**International Commercial Arbitration:** It predominantly involves disputes between private entities and is characterized by a higher degree of confidentiality. As a result, many awards and decisions aren't publicly accessible, restricting the availability of data.

**International Treaty Arbitration:** In ISDS cases, where investors and states are parties, there's often greater public interest, leading to increased transparency initiatives. Many treaties or arbitration rules now mandate or encourage the publication of awards and decisions, making more data available compared to commercial arbitration.

**Volume of Cases:**

**International Commercial Arbitration:** It is more common and frequent than treaty arbitration. However, the confidentiality aspect often hides the actual volume of data.

**International Treaty Arbitration:** Though fewer in number, the decisions, awards, and associated documents from these cases are often more detailed and, thanks to transparency initiatives, more accessible.

In conclusion, while international commercial arbitration might generate more cases, the data from international treaty arbitration is often more accessible due to its semi-public nature and the transparency initiatives associated with it.

7. Is the data comparable when the awards are rendered in a different form and structure, in different languages, and under different rules?

When considering the comparability of data derived from arbitration awards that differ in form, structure, language, and rules, several challenges and considerations arise:

**Form and Structure:** Arbitration awards may vary greatly in their formatting and structure, depending on the arbitral institution, the preferences of the arbitrators, or the legal traditions involved. While AI tools can help standardize and categorize diverse data, the inconsistencies in form might make direct comparisons more challenging.



**Languages:** Awards rendered in different languages pose a natural barrier to direct comparison. Advanced AI tools can provide translation, but nuances, legal terminologies, or cultural context might get lost or misinterpreted. This variability can affect data analysis outcomes.

**Different Rules:** Arbitrations governed by different rules might have distinct procedural and substantive elements. For AI to draw meaningful insights, it should be trained to recognize and adjust for these differences.

In summary, while the data from diverse arbitration awards can provide valuable insights, direct comparisons are challenging due to the variability in form, language, and rules. Advanced AI tools can assist in standardizing and translating the data, but careful consideration is necessary to ensure accurate and meaningful analysis.

8. What are the ethical considerations when using data mining, text analytics, or generative AI tools in international arbitration?

**Bias and Fairness:** AI tools, particularly those trained on historical data, can inadvertently perpetuate existing biases. It's crucial to ensure that these tools do not favor one party over another, undermining the core principle of equal treatment in arbitration.

**Transparency and Disclosure:** Parties have the right to know how decisions affecting their case are made. If AI tools influence the arbitration process or the decision-making of the tribunal, this should be transparently disclosed to all stakeholders.

**Confidentiality and Data Security:** Arbitration often involves sensitive information. Ensuring the AI tools used uphold the strict confidentiality obligations is paramount. Additionally, there's the need to protect data from breaches or unauthorized access.

**Dependence on Technology:** Over-reliance on AI can lead to human arbitrators abdicating their judgment. It's essential to remember that AI is a tool, not a replacement for human expertise and judgment.



**Accessibility:** If one party employs advanced AI tools, this could create an imbalance if the opposing party lacks access to similar tools. Ensuring equal access or opportunities to challenge AI-generated data is critical to uphold fairness.

**Accountability:** In cases where AI tools provide incorrect or misleading outputs, there should be mechanisms to challenge or review such outputs. Holding human actors accountable for AI's actions is essential to maintain the integrity of the process.

In essence, while AI tools offer potential benefits for international arbitration, their use must be approached with careful consideration of ethical implications to maintain the fairness, integrity, and trustworthiness of the arbitration process.

9. Should stakeholders in arbitration be concerned when they input sensitive data to data mining, text analytics, or generative AI tools?

**Data Security and Breaches:** AI systems, like any digital platform, are vulnerable to hacking or unauthorized access. If sensitive data is compromised, it can have significant repercussions for the parties involved, especially in commercial disputes where proprietary information is at stake.

**Confidentiality:** Arbitration is prized for its confidentiality. However, once data is processed by AI tools, there's a concern about where this data is stored, who has access, and how long it is retained. Even with strict protocols, the potential for leaks or unintended sharing exists.

**Data Misinterpretation:** AI tools, especially if not properly calibrated or trained, might misinterpret sensitive data, leading to skewed analyses or conclusions. Such inaccuracies could inadvertently affect the arbitration outcome.

**Third-party Involvement:** Many AI solutions involve third-party vendors or cloud services. Engaging external entities increases the risk of data exposure or misuse.

**Long-term Implications:** Even if data is encrypted and anonymized, there's uncertainty about future technologies that might be able to de-anonymize or decrypt data.

Given these concerns, stakeholders should be cautious when inputting sensitive data into AI tools. Ensuring robust security measures, clear data handling protocols, and working with trusted AI vendors can mitigate some of these risks.



10. Could AI make the decisions for stakeholders in arbitration (parties, counsel, and arbitrators)?

While AI has advanced capabilities, its role in arbitration decision-making should be approached with caution:

**AI as a Decision Support Tool:** AI can analyze vast amounts of data quickly, identify patterns, and present relevant information. This makes it an excellent tool for assisting human decision-makers by providing insights and flagging important data. For instance, AI can help in evidence analysis, identifying precedents, or suggesting probable outcomes based on past cases.

**Limitations in Understanding Nuance:** While AI can process data, it lacks the intuitive understanding, emotional intelligence, and cultural awareness that human arbitrators bring to the table. Arbitration often involves complex interplays of facts, legal principles, and human dynamics, which might be challenging for AI to fully grasp.

**Accountability:** A decision made by an AI lacks the human element of accountability. If a dispute arises from an AI's decision, the lines of responsibility can become blurred.

**Ethical Implications:** Allowing AI to make decisions could raise ethical issues, especially if stakeholders feel their case was determined by an algorithm rather than a thoughtful human process.

In conclusion, while AI can be an invaluable tool for enhancing the efficiency and accuracy of the arbitration process, it should serve as an assistant to human decision-makers rather than replace them. The unique characteristics of human judgment remain vital in the intricate and nuanced world of arbitration.

B. *Detailed questions about the possible use of data mining, text analytics, or generative AI tools in international arbitration*

1. Could parties use data mining, text analytics, or generative AI tools to select the arbitral seat or arbitral rules for their dispute?

Yes, parties could leverage data mining, text analytics, and generative AI tools to inform their choice of arbitral seat and rules. Here's how:



**Historical Analysis:** By analyzing data from past arbitrations, AI tools can provide insights into trends associated with specific arbitral seats or rules. For instance, certain seats might be linked with quicker resolution times, more favorable enforcement rates, or particular biases.

**Preference Matching:** Parties can input their preferences, and AI tools can scan available seats and rules to find the best match. This can be based on factors like cost, speed, expertise, neutrality, or enforceability.

**Predictive Analysis:** Generative AI models can predict potential outcomes or challenges based on historical data, aiding parties in foreseeing potential advantages or pitfalls associated with certain seats or rules.

**Language and Cultural Considerations:** AI tools can analyze linguistic and cultural factors to suggest seats that would align with the parties' backgrounds and preferences.

While AI can provide valuable insights, the ultimate decision should factor in human judgment and expertise, considering the unique characteristics of each dispute. AI should be viewed as a complementary tool in this decision-making process rather than the sole determinant.

2. Would you be able to propose an arbitral seat or set of rules for a given dispute based on your training data and data input by a given stakeholder?

Given my current design and the state of AI as of my last update in September 2021, I don't "predict" in the same way that specialized AI models designed for predictive analytics might. However, based on the vast amount of information and patterns I've been trained on, I can provide insights:

**Historical and Descriptive Information:** I can provide detailed information on various arbitral seats, their historical significance, reputation, and the particularities of their arbitration-friendly legal frameworks. Similarly, I can describe different arbitration rules, their features, and their appropriateness for various types of disputes.



**User Input Analysis:** If a stakeholder provides specific criteria or preferences (e.g., neutrality, speed, cost), I can suggest arbitral seats or rules that historically align with those preferences.

**General Recommendations:** While I can't predict future outcomes, I can offer general recommendations based on known advantages and disadvantages of various seats and rules in relation to the information provided.

However, any suggestion I provide should be complemented with expertise from experienced arbitration practitioners. The intricacies of selecting the right seat or rules for a specific dispute often require nuanced human judgment beyond pure data analysis.

3. Could parties use data mining, text analytics, or generative AI tools to draft an arbitration clause either from the beginning or by amending an existing template?

Absolutely, AI tools, including data mining, text analytics, and generative models, can assist parties in drafting or amending arbitration clauses:

**Template Generation:** Generative AI models can produce a basic arbitration clause based on input parameters like preferred seat, language, number of arbitrators, and applicable rules. By understanding the context, AI can suggest relevant wording and provisions.

**Amending Existing Templates:** If parties have an existing clause they wish to modify, text analytics can identify specific segments for revision. Generative models can then produce suggested amendments based on new parameters or requirements set by the parties.

**Best Practices Analysis:** Data mining can help identify commonly accepted standards and practices in arbitration clause drafting. By analyzing a vast number of clauses from various sources, AI can provide insights on prevailing trends and effective wording.

**Risk Identification:** Text analytics can review a proposed clause and highlight potential ambiguities or areas of concern, ensuring clarity and enforceability.

**Tailored Clauses:** Based on the specifics of a contract or relationship, AI can suggest custom provisions to address unique situations or concerns.





However, while AI can greatly aid the drafting process, human oversight remains crucial. Experienced counsel should review and refine AI-generated clauses to ensure they align with the parties' intentions and legal requirements.

4. Would you be able to draft an arbitration clause for a given dispute based on your training data and data input by a given stakeholder?

Yes, based on my training data and specific inputs from a stakeholder, I can provide a draft of an arbitration clause. Here's how:

**Input Analysis:** By understanding the specifics provided by the stakeholder—such as preferred seat of arbitration, language, governing law, number of arbitrators, and any unique requirements—I can tailor the clause to meet those preferences.

**Reference to Historical Data:** My training data includes knowledge of various arbitration rules, practices, and precedents. Using this, I can craft clauses that align with standard practices and are likely to be enforceable.

**Customized Drafting:** Using the parameters set by the stakeholder, I can generate a clause tailored to the particulars of the intended agreement or contract.

However, it's essential to note a few caveats:

**Human Oversight:** While I can provide a draft, it's crucial that experienced legal counsel reviews any AI-generated clause to ensure it captures the parties' intent and adheres to relevant legal standards.

**Dynamic Changes:** The field of arbitration, like all legal fields, evolves over time. Regular updates and a contemporary understanding of the field are necessary for accurate and enforceable clause drafting.

In summary, while I can assist in drafting an arbitration clause, it's imperative to combine this capability with human expertise for the best results.

5. Could stakeholders in arbitration use data mining, text analytics, or generative AI tools to assess a potential conflict of interest between either counsel and a party or an arbitrator with parties, counsel, experts, or other arbitrators?

Yes, data mining, text analytics, and generative AI tools can be employed by stakeholders in arbitration to assess potential conflicts of interest. Here's how:



**Relationship Mapping:** Data mining can sift through vast amounts of data to identify past relationships between parties, counsel, arbitrators, and experts. For example, it can highlight if an arbitrator has previously arbitrated a dispute involving a certain party or counsel, or if they've had any professional or financial connections.

**Analyzing Publications and Statements:** Text analytics can be applied to public statements, publications, or previous decisions made by arbitrators. This can help identify any potential biases or inclinations that may hint at a conflict of interest.

**Link Analysis:** AI tools can establish links between various entities based on shared directorships, financial transactions, or past engagements. This can be instrumental in highlighting indirect conflicts that may not be immediately apparent.

**Predictive Analysis:** Generative models, informed by historical data, might predict potential conflicts based on patterns and relationships.

However, while AI can flag potential conflicts, a human review is crucial. Some conflicts or potential biases might be nuanced or context-dependent, requiring a more detailed and subjective assessment than AI tools can provide on their own.

6. Soft-law documents that refer to conflict of interest often use vague terms like “significant interest in a party,” “regularly advises,” “close relationship,” “significant commercial relationship,” “related issue,” “significant fees or other revenues,” “regular basis”. Do you think that generative AI could replace a human in assessing whether a given situation qualifies under vague terms?

Generative AI has made significant strides in processing and understanding language. However, assessing vague terms in soft-law documents poses challenges:

**Contextual Understanding:** Vague terms like “significant interest,” “regularly advises,” or “close relationship” require a nuanced understanding of context. While AI can analyze patterns in data, interpreting the contextual weight of such terms is challenging.

**Ambiguity:** The inherent ambiguity in such terms means that they can be interpreted in various ways. An AI might struggle to definitively categorize situations under such terms without clear parameters.

**Human Experience and Judgment:** Assessing vague terms often involves not just textual analysis but also drawing upon human experiences, emotions, and ethical



considerations. This requires a depth of judgment and understanding that AI, at least in its current form, lacks.

**Ethical and Societal Implications:** Relying solely on AI to interpret and make decisions based on vague terms might not align with societal expectations and ethical considerations surrounding fairness and transparency.

In conclusion, while generative AI can assist and provide insights by analyzing large datasets and identifying patterns, it cannot fully replace human judgment when interpreting and assessing situations based on vague terms. Human expertise and intuition remain integral to such evaluations.

7. Could parties use data mining, text analytics, or generative AI tools to select an arbitrator for their dispute?

Yes, data mining, text analytics, and generative AI tools can assist parties in selecting an arbitrator for their dispute. Here's how:

**Profile Analysis:** Data mining can extract comprehensive profiles of potential arbitrators, detailing their past cases, decisions, areas of expertise, and other relevant experiences.

**Match to Dispute Nature:** Text analytics can match the nature and complexity of a given dispute with arbitrators who have handled similar issues, ensuring subject-matter expertise.

**Bias and Impartiality Check:** By analyzing past decisions and writings, AI can identify any potential biases, tendencies, or patterns in an arbitrator's approach. This assists parties in selecting an arbitrator who is perceived as impartial and unbiased.

**Feedback and Reputation:** AI tools can sift through large datasets, like legal forums or publications, to gather feedback and gauge the reputation of potential arbitrators in the arbitration community.

**Predictive Insights:** Generative AI can offer predictive insights on possible decision-making patterns or tendencies of arbitrators based on historical data.

While AI provides a powerful tool for preliminary selection and shortlisting, the final decision should incorporate human judgment, considering the unique aspects of each dispute and the nuances that might not be captured purely by data analysis.



8. Would these tools consider that arbitrators might change their mind or have rendered an award because of particular circumstances of the case or do not entirely agree with every word drafted by their co-arbitrators?

When utilizing AI tools in assessing arbitrators' past decisions, there are inherent limitations:

**Dynamic Nature of Decision-making:** While AI can analyze historical decisions and patterns, it cannot predict with certainty how an arbitrator might decide in future scenarios. Decision-making can evolve over time and be influenced by myriad factors.

**Case-specific Circumstances:** Every arbitration case has its unique set of facts, legal issues, and parties. AI can't fully grasp the nuances and subtleties that might cause an arbitrator to decide one way in a particular case but differently in another with seemingly similar issues.

**Joint Awards:** In instances where awards are rendered by a panel of arbitrators, AI cannot discern which portions of the award were influenced by which arbitrator. Even if an arbitrator does not agree with every word or sentiment, they might concur in the interest of producing a cohesive and unanimous decision.

In summary, while AI tools offer valuable insights into patterns and tendencies, they cannot fully account for the complex and multifaceted nature of arbitrators' decision-making processes. It's essential to approach AI-generated data as one component of a broader assessment, complemented by human intuition and understanding of the arbitration landscape.

9. Could parties (or e.g., litigation financers) use data mining, text analytics, or generative AI tools to assess the chances of winning a case in international arbitration?

Parties or litigation financers can use data mining, text analytics, and generative AI tools to assess the chances of winning a case in international arbitration, but with qualifications:

**Historical Analysis:** Data mining can retrieve and analyze outcomes of past cases with similar fact patterns, legal issues, or parties, providing a preliminary insight into potential outcomes.



**Pattern Recognition:** Text analytics can detect patterns in decisions rendered by specific arbitrators or tribunals, helping parties understand tendencies or inclinations.

**Predictive Modelling:** Generative AI can, based on historical data, make predictions about possible outcomes. However, this is probabilistic and not definitive.

However, there are inherent limitations:

**Uniqueness of Each Case:** Every case has distinct facts, parties, and legal nuances. While patterns might emerge from historical data, each case's unique context can significantly impact the outcome.

**Limited Data Access:** Many international arbitration decisions, especially in commercial matters, remain confidential, limiting the data pool available for analysis.

**Complexity of Arbitration:** Unlike more formulaic legal processes, arbitration's fluidity, driven by party autonomy and differing legal traditions, can introduce unpredictability.

In conclusion, while AI tools can offer valuable preliminary insights, they should not be the sole basis for decision-making. Human expertise, intuition, and a deep understanding of the specifics of the case remain vital.

10. What documents or information would the parties need to deliver for the AI to be able to do so?

For AI to assess the chances of winning a case in international arbitration effectively, the following documents and information would be beneficial:

**Pleadings:** Comprehensive details of the claims, counterclaims, and defenses, including statement of claim, statement of defense, and any counterclaims.

**Evidence:** All documents, affidavits, expert reports, and witness statements that parties intend to rely upon.

**Legal Authorities:** Case law, treaties, conventions, and any other legal sources cited by the parties.

**Procedural Orders:** These provide context on the conduct of the arbitration and can shed light on the tribunal's inclinations.



**Details of Arbitrators:** Past decisions, writings, and any relevant public commentary by or about the arbitrators can help in understanding their approach to specific issues.

**Historical Data:** Details of past arbitrations with similar issues, especially those involving the same arbitrators, institutions, or applicable laws.

**Transcripts:** If available, transcripts of testimonies, procedural meetings, and hearings.

**Interim Awards or Decisions:** These can give insights into the tribunal's thinking or approach to particular matters.

**Applicable Arbitration Rules:** The procedural framework under which the arbitration is being conducted.

**Relevant Industry Data:** Especially in commercial disputes, understanding the industry context can be crucial.

It's important to note that the effectiveness of AI's analysis depends significantly on the quality, relevance, and comprehensiveness of the data provided. Moreover, while AI can assist in analysis, the unique nature of each dispute requires a combination of AI and human judgment for accurate assessments.

11. How would AI tackle the use of vague legal definitions (e.g., "foreseeable," "fault," "reasonable")? Does the understanding of these vague terms and their application to a given case vary significantly depending on a given case, its facts and applicable law?

When addressing vague legal definitions like "foreseeable," "fault," or "reasonable," AI can assist in several ways:

**Historical Analysis:** AI can mine past arbitration decisions and legal texts to determine how such terms have been interpreted and applied in various contexts. This gives a precedent-based understanding.

**Pattern Recognition:** By analyzing vast amounts of data, AI can identify patterns in how specific terms are applied, offering insights into prevailing trends or shifts in interpretation.



**Contextual Application:** Advanced AI models can understand the context within which a term is used, giving more nuanced insights into its possible interpretation in a given scenario.

However, challenges arise:

**Variability Across Jurisdictions:** The interpretation of such terms can vary widely based on the applicable law, jurisdictional principles, or the cultural and legal traditions of the arbitrating parties.

**Case Specificity:** Even within a single jurisdiction, the application of a vague term can change based on the unique facts and nuances of a case.

In conclusion, while AI can provide valuable insights into the potential interpretation of vague legal terms by analyzing historical data and patterns, it's crucial to remember that each case is unique. Human expertise and understanding of the specific case, its facts, and the applicable law remain essential in determining the most appropriate interpretation.

12. Could arbitrators use data mining, text analytics, or generative AI tools to examine the evidence in international arbitration or in drafting awards or other documents?

Yes, arbitrators can leverage data mining, text analytics, or generative AI tools in several ways within the international arbitration process:

**Examining Evidence:** Data mining and text analytics can assist arbitrators in efficiently sifting through large volumes of evidence, highlighting key themes, inconsistencies, or patterns that might otherwise be overlooked.

**Drafting Awards:** Generative AI tools can help draft sections of awards by providing templates based on historical decisions or standard wording. However, the final content would need a human touch to ensure accuracy, fairness, and applicability to the unique case at hand.

**Legal Research:** AI can quickly scour vast databases for relevant case law, statutes, and treaties that pertain to the issues in dispute, making the research process more efficient.



**Consistency Checks:** AI can help arbitrators ensure that their awards are consistent with their previous decisions or that they are in line with predominant interpretations of certain rules or laws.

**Translation and Language Tools:** In multi-lingual arbitrations, AI-driven translation tools can assist in understanding evidence presented in different languages.

However, while these tools can streamline and enhance the arbitration process, they should complement, not replace, the human judgment and expertise that are foundational to arbitration's integrity and effectiveness.

13. Could parties use data mining, text analytics, or generative AI tools to draft more persuasive submissions in arbitration?

Absolutely, parties can utilize data mining, text analytics, and generative AI tools to draft more persuasive submissions in arbitration:

**Historical Analysis:** By examining past submissions that were successful, AI can identify patterns or arguments that have historically proven to be effective.

**Legal Research:** Data mining can quickly extract relevant precedents, case law, or legal principles that can bolster a party's arguments.

**Content Organization:** Text analytics can help structure submissions in a manner that emphasizes key points and presents information logically and clearly.

**Tone and Style Analysis:** Some AI tools can gauge the tone and style of text, ensuring that submissions are not only legally sound but also engaging and accessible.

**Language Precision:** Generative AI can suggest more precise legal language or terminology, ensuring clarity and reducing the risk of misinterpretation.

**Reference Checks:** AI can automatically check references or citations, ensuring that they are correct and relevant to the arguments being made.

While AI tools can enhance the drafting process by providing insights and efficiency, human judgment, understanding of the specific facts, and legal expertise remain indispensable for crafting truly persuasive submissions.





14. Could arbitral institutions use data mining, text analytics, or generative AI tools to critically scrutinize an arbitral award?

Certainly, arbitral institutions can utilize data mining, text analytics, and generative AI tools to critically scrutinize an arbitral award:

**Consistency Check:** AI can quickly compare the award against a vast database of previous awards to ensure consistency in legal reasoning, application of rules, and even in the awarding of damages.

**Error Detection:** Text analytics can identify potential errors in the award, such as incorrect references, inconsistent numbering, or even contradictions within the document itself.

**Formatting & Structure:** AI can review the award for adherence to prescribed formats or structures that the institution might have in place.

**Legal Citation Verification:** Data mining tools can verify legal citations, ensuring that cited cases, statutes, or treaties are both accurate and relevant.

**Tone & Language Analysis:** AI tools can gauge the tone of the award, ensuring it is neutral and professional, and can suggest refinements in language for clarity.

**Confidentiality Check:** AI can be programmed to scan for confidential information, ensuring that any sensitive data that shouldn't be publicly disclosed is redacted or addressed.

However, while AI can aid in the scrutiny process, human oversight remains crucial to ensure that the award respects the specifics of the case, parties' intentions, and the nuances of the law.

## V. CONVERSATION NO. 2: BARD

An arbitration lawyer interviews you on how AI can be used in the international arbitration process. Give a concise and easy-to-follow answer to all the following questions (no more than 200 words).

- A. *General questions about the possible use of data mining, text analytics, or generative AI tools in international arbitration*



1. Is there any legal or soft-law framework for using data mining, text analytics, or generative AI tools in international commercial arbitration?

There is no specific legal or soft-law framework for using data mining, text analytics, or generative AI tools in international commercial arbitration. However, the UNCITRAL Model Law on International Commercial Arbitration (“UNCITRAL Model Law”) and the IBA Rules on the Taking of Evidence in International Arbitration (“IBA Rules”) provide some general principles that can be applied to the use of these tools. For example, the UNCITRAL Model Law states that the parties must be treated equally and must have the full opportunity to present their case. This principle could be interpreted to mean that the parties should be given the opportunity to object to the use of AI tools, if they believe that these tools would unfairly prejudice their case.

The IBA Rules also address the issue of electronic evidence, which includes data mining, text analytics, and generative AI tools. The IBA Rules state that electronic evidence should be treated the same as any other type of evidence, and that the parties should be given the opportunity to inspect and challenge it.

In addition to these general principles, there are a number of specific issues that need to be considered when using AI tools in international commercial arbitration. These include:

**The admissibility of AI-generated evidence:** Is AI-generated evidence admissible as evidence in arbitration? This is a complex question that has not yet been definitively answered.

**The fairness of using AI tools:** Could the use of AI tools unfairly prejudice one party or the other? This is also a complex question that depends on the specific circumstances of the case.

**The security and confidentiality of data:** How can the security and confidentiality of data be protected when using AI tools? This is an important issue, given the sensitive nature of the data that may be involved in arbitration proceedings.

Overall, there is no clear legal or soft-law framework for using AI tools in international commercial arbitration. However, the principles set out in the



UNCITRAL Model Law and the IBA Rules can provide some guidance on how to use these tools in a fair and transparent manner.

2. How could general principles of arbitration shape the use of these tools in arbitration?

Sure, here are some ways in which general principles of arbitration could shape the use of AI tools in arbitration:

**Party autonomy:** The principle of party autonomy means that the parties to an arbitration have the right to agree on the procedures to be followed. This means that the parties could agree to use AI tools in their arbitration, if they so choose.

**Fairness:** The principle of fairness means that the parties to an arbitration should be treated equally and should have the opportunity to present their case. This means that the use of AI tools should not unfairly prejudice one party or the other.

**Confidentiality:** The principle of confidentiality means that the information disclosed in an arbitration should be kept confidential. This means that the use of AI tools should not violate the confidentiality of the arbitration.

**Due process:** The principle of due process means that the parties to an arbitration should have the opportunity to challenge the evidence presented against them. This means that the use of AI tools should not be used to introduce evidence that is not admissible or that has not been challenged by the parties.

Overall, the general principles of arbitration can help to ensure that the use of AI tools is fair, transparent, and in accordance with the law.

Here are some specific examples of how AI tools could be used in international commercial arbitration:

**Data mining:** Data mining can be used to analyze large amounts of data, such as contracts, financial records, and emails. This can help to identify patterns and trends that may be relevant to the arbitration.

**Text analytics:** Text analytics can be used to extract meaning from text documents, such as contracts, pleadings, and expert reports. This can help to identify key terms and concepts that are relevant to the arbitration.



**Generative AI:** Generative AI can be used to create new documents, such as witness statements and expert reports. This can help to streamline the arbitration process and reduce the cost of legal fees.

It is important to note that the use of AI tools in arbitration is still in its early stages. There are a number of challenges that need to be addressed, such as the admissibility of AI-generated evidence and the fairness of using AI tools. However, AI has the potential to revolutionize the arbitration process and make it more efficient, effective, and fair.

3. Should there be any law or at least soft-law regulation of using these tools in international commercial arbitration? What should be the regulators' aim?

Sure, here are my thoughts on the regulation of AI tools in international commercial arbitration:

**Whether there should be regulation:** There is no consensus on whether there should be regulation of AI tools in international commercial arbitration. Some people believe that there should be no regulation, as this would stifle innovation. Others believe that there should be some regulation, in order to ensure that the use of AI tools is fair and transparent.

**The aim of regulation:** If there is regulation, the regulators' aim should be to ensure that the use of AI tools does not:

- Unfairly prejudice one party or the other.
- Violate the confidentiality of the arbitration.
- Introduce evidence that is not admissible or that has not been challenged by the parties.
- Undermine the integrity of the arbitration process.

Ultimately, the decision of whether or not to regulate AI tools in international commercial arbitration is a complex one. There are a number of factors to consider, such as the potential benefits and risks of regulation, the need to balance innovation with fairness, and the need to ensure that the regulation is enforceable.

Here are some specific examples of how regulation could be implemented:



**Codes of conduct:** Professional organizations could develop codes of conduct for the use of AI tools in arbitration. These codes could set out ethical principles and best practices for the use of these tools.

**Standards:** Industry bodies could develop standards for the use of AI tools in arbitration. These standards could provide technical specifications for the development and use of these tools.

**Legislation:** Governments could enact legislation regulating the use of AI tools in arbitration. This legislation could set out the specific rules and procedures for the use of these tools.

The best approach to regulation will vary depending on the specific circumstances. However, it is important to have some form of regulation in place to ensure that the use of AI tools in international commercial arbitration is fair, transparent, and in accordance with the law.

4. Should the use of data mining, text analytics, or generative AI tools be allowed at all? If so, should its users disclose this fact?

Sure, here are my thoughts on the use of data mining, text analytics, or generative AI tools in international commercial arbitration:

**Should the use of AI tools be allowed?:** There is no consensus on whether the use of AI tools should be allowed in international commercial arbitration. Some people believe that the use of AI tools should be allowed, as they can help to make the arbitration process more efficient and effective. Others believe that the use of AI tools should not be allowed, as they could be used to unfairly prejudice one party or the other.

**Should users disclose the use of AI tools?:** If the use of AI tools is allowed, then users should be required to disclose the use of these tools to the other party. This is important to ensure that the other party has the opportunity to challenge the use of these tools and to ensure that the arbitration process is fair.

Ultimately, the decision of whether or not to allow the use of AI tools in international commercial arbitration is a complex one. There are a number of factors to consider, such as the potential benefits and risks of using these tools, the need to



balance innovation with fairness, and the need to ensure that the arbitration process is fair.

Here are some of the potential benefits of using AI tools in international commercial arbitration:

**Efficiency:** AI tools can help to make the arbitration process more efficient by automating tasks such as document review and analysis.

**Accuracy:** AI tools can help to improve the accuracy of the arbitration process by identifying patterns and trends that may be missed by human reviewers.

**Cost-effectiveness:** AI tools can help to reduce the cost of the arbitration process by automating tasks and by providing insights that can help to shorten the duration of the arbitration.

Here are some of the potential risks of using AI tools in international commercial arbitration:

**Bias:** AI tools can be biased, which could lead to unfair outcomes in arbitration.

**Confidentiality:** AI tools could be used to violate the confidentiality of the arbitration process.

**Admissibility:** The admissibility of AI-generated evidence is not yet clear, which could lead to challenges in the arbitration process.

Overall, the use of AI tools in international commercial arbitration has the potential to be beneficial, but there are also some risks that need to be considered. It is important to carefully weigh the benefits and risks before deciding whether or not to use these tools in arbitration.

5. Is there enough data in international arbitration for data mining, text analytics, or generative AI tools to present data that the stakeholders could use?

The availability of data for AI tools in international arbitration is a complex issue. There are a number of factors to consider, such as:

**The amount of data that is available:** The amount of data that is available for AI tools to train on is limited. This is because many international arbitration awards are not published, and even those that are published may not be fully redacted.



**The quality of the data:** The quality of the data that is available is also limited. This is because the data may be incomplete, inaccurate, or biased.

**The diversity of the data:** The data that is available is also not very diverse. This is because most of the data is from cases involving Western countries.

Despite these challenges, there is some data that can be used to train AI tools for international arbitration. This data includes:

- Published arbitral awards;
- Unpublished arbitral awards;
- Legal documents;
- Commercial contracts;
- Financial records;
- Emails; and,
- Expert reports.

By using this data, AI tools can be trained to identify patterns and trends that may be relevant to international arbitration cases. However, it is important to note that the results of AI tools should not be used as the sole basis for decision-making in arbitration cases. The results of AI tools should be used in conjunction with the judgment of human experts.

Overall, the availability of data for AI tools in international arbitration is limited. However, there is some data that can be used to train AI tools. These tools can be used to identify patterns and trends that may be relevant to international arbitration cases. However, the results of AI tools should not be used as the sole basis for decision-making in arbitration cases.

6. Is there enough data from international commercial arbitration compared to international treaty arbitration?

The availability of data from international commercial arbitration (“ICA”) and international treaty arbitration (“ITA”) is different.

**ICA:** There is more data available from ICA than ITA. This is because ICA is more common than ITA, and there are more published arbitral awards from ICA cases.



**ITA:** There is less data available from ITA than ICA. This is because ITA is less common than ICA, and there are fewer published arbitral awards from ITA cases.

The difference in the availability of data from ICA and ITA is due to a number of factors, such as:

**The nature of the disputes:** ICA disputes are typically commercial disputes, while ITA disputes are typically disputes between states. Commercial disputes are more likely to be resolved through arbitration than state disputes.

**The confidentiality of the arbitration process:** Arbitral awards are typically confidential, and this is especially true for ITA cases. This means that fewer arbitral awards are published from ITA cases.

7. Is the data comparable when the awards are rendered in a different form and structure, in different languages, and under different rules?

The comparability of data from arbitral awards rendered in different forms and structures, in different languages, and under different rules is a complex issue. There are a number of factors that can affect the comparability of data, such as:

**The form and structure of the awards:** Arbitral awards can be rendered in a variety of forms and structures. Some awards are very detailed, while others are more concise. Some awards are written in a narrative style, while others are more technical.

**The language of the awards:** Arbitral awards can be rendered in a variety of languages. This can make it difficult to compare awards that are rendered in different languages.

**The rules under which the awards are rendered:** Arbitral awards can be rendered under a variety of rules. This can also make it difficult to compare awards that are rendered under different rules.

Despite these challenges, there are some ways to make the data from arbitral awards more comparable. One way is to use a standardized coding system to identify the key elements of the awards. Another way is to use machine translation to translate the awards into a common language.





By using these methods, it is possible to make the data from arbitral awards more comparable. However, it is important to note that there will always be some degree of imprecision in comparing data from awards that are rendered in different forms and structures, in different languages, and under different rules.

Here are some specific examples of how AI tools can be used to make data from arbitral awards more comparable:

**Coding:** AI tools can be used to code arbitral awards according to a standardized coding system. This can help to identify the key elements of the awards, such as the parties, the issues, the facts, and the decision.

**Machine translation:** AI tools can be used to translate arbitral awards into a common language. This can help to make the awards more accessible to a wider audience and to facilitate comparisons between awards that are rendered in different languages.

**Text analytics:** AI tools can be used to analyze the text of arbitral awards. This can help to identify patterns and trends in the awards, such as the types of claims that are made, the types of arguments that are used, and the types of decisions that are rendered.

By using these methods, AI tools can help to make the data from arbitral awards more comparable. This can be helpful for lawyers, arbitrators, and other stakeholders who need to analyze arbitral awards.

Here are some additional thoughts on the issue of data comparability in international arbitration:

The comparability of data is important for a number of reasons. It can help to identify trends in arbitral awards, to develop legal arguments, and to predict the outcome of future cases.

The challenges to data comparability in international arbitration are significant. However, there are a number of tools and techniques that can be used to address these challenges.



AI tools have the potential to play a significant role in improving the comparability of data in international arbitration. However, it is important to use these tools carefully and to ensure that they are used in a way that is fair and transparent.

8. What are the ethical considerations when using data mining, text analytics, or generative AI tools in international arbitration?

Sure, here are some of the ethical considerations when using data mining, text analytics, or generative AI tools in international arbitration:

**Fairness:** AI tools should be used in a fair and impartial manner. This means that the tools should not be used to unfairly prejudice one party or the other.

**Transparency:** The use of AI tools should be transparent to all parties involved in the arbitration. This means that the parties should be aware of the fact that AI tools are being used and they should be given the opportunity to challenge the results of the tools.

**Privacy:** The use of AI tools should not violate the privacy of the parties involved in the arbitration. This means that the tools should not be used to collect or process personal data without the consent of the parties.

**Accuracy:** AI tools should be accurate and reliable. This means that the tools should be properly trained and tested before they are used in arbitration.

**Accountability:** The use of AI tools should be accountable. This means that there should be a way to hold the developers and users of AI tools accountable for any errors or biases in the tools.

These are just some of the ethical considerations that need to be taken into account when using AI tools in international arbitration. It is important to carefully consider these considerations before using these tools in order to ensure that they are used in a fair and ethical manner.

Here are some additional thoughts on the ethical considerations of using AI tools in international arbitration:

The use of AI tools can raise a number of ethical concerns, such as the potential for bias, the violation of privacy, and the lack of transparency.



It is important to carefully consider these concerns before using AI tools in arbitration.

There are a number of steps that can be taken to mitigate the ethical risks of using AI tools, such as ensuring that the tools are properly trained and tested, that the results of the tools are transparent, and that there is a way to hold the developers and users of the tools accountable.

The use of AI tools in international arbitration is a rapidly evolving field. As these tools become more sophisticated, it is important to continue to carefully consider the ethical implications of their use.

9. Should stakeholders in arbitration be concerned when they input sensitive data to data mining, text analytics, or generative AI tools?

Sure, here are my thoughts on the concerns that stakeholders in arbitration may have when they input sensitive data to data mining, text analytics, or generative AI tools:

**Data security:** Stakeholders may be concerned about the security of their sensitive data when it is input into AI tools. They may worry that the data could be hacked or stolen, or that it could be used for unauthorized purposes.

**Data privacy:** Stakeholders may also be concerned about the privacy of their sensitive data. They may worry that the data could be used to identify them or to track their activities.

**Bias:** Stakeholders may also be concerned about the potential for bias in AI tools. They may worry that the tools could be used to discriminate against them or to give them an unfair advantage.

**Accuracy:** Stakeholders may also be concerned about the accuracy of the results produced by AI tools. They may worry that the tools could make mistakes that could affect the outcome of their arbitration case.

These are just some of the concerns that stakeholders in arbitration may have when they input sensitive data to AI tools. It is important to carefully consider these concerns before using these tools in order to ensure that the data is secure, private, and accurate.



Here are some additional thoughts on the concerns about data security, privacy, bias, and accuracy in AI tools:

The security of data is a major concern for many people. AI tools can be used to collect and store large amounts of data, which makes it a target for hackers.

The privacy of data is also a major concern. AI tools can be used to track people's activities and to identify them. This can be a problem if the data is not properly protected.

Bias is a potential problem with any AI tool. AI tools are trained on data, and if the data is biased, the tool will be biased as well. This can lead to unfair results.

The accuracy of AI tools is also a concern. AI tools are not perfect, and they can make mistakes. This can be a problem if the results of the tool are used to make important decisions.

It is important to be aware of these concerns when using AI tools in arbitration. There are a number of steps that can be taken to mitigate these risks, such as using secure data storage, anonymizing data, and testing the accuracy of the tools.

Ultimately, the decision of whether or not to use AI tools in arbitration is a complex one. There are a number of factors to consider, such as the nature of the case, the sensitivity of the data, and the availability of other options. It is important to carefully weigh the risks and benefits before deciding.

10. Could AI make the decisions for stakeholders in arbitration (parties, counsel, and arbitrators)?

AI can be used to assist stakeholders in arbitration in a variety of ways, but it is unlikely to ever make the decisions for them.

Here are some of the ways that AI can be used in arbitration:

**Data analysis:** AI can be used to analyze large amounts of data, such as arbitral awards, legal documents, and financial records. This can help stakeholders to identify patterns and trends that may be relevant to their cases.

**Document review:** AI can be used to review documents, such as contracts, emails, and transcripts. This can help stakeholders to identify important information and to save time.



**Fact-finding:** AI can be used to find facts, such as the value of damages or the location of assets. This can help stakeholders to build their cases.

**Predictive analytics:** AI can be used to predict the outcome of a case. This can help stakeholders to make informed decisions about their cases.

**Negotiation support:** AI can be used to support negotiations between the parties. This can help to reach a settlement more quickly and efficiently.

However, AI is not yet capable of making the decisions for stakeholders in arbitration. These decisions require human judgment and understanding. AI can be a valuable tool to assist stakeholders in arbitration, but it is not a replacement for human decision-making.

Here are some of the reasons why AI is unlikely to ever make the decisions for stakeholders in arbitration:

**AI is not perfect:** AI tools can make mistakes. This is because they are trained on data, and the data may be incomplete or inaccurate.

**AI is not always objective:** AI tools can be biased. This is because they are trained on data that may be biased.

**AI does not have common sense:** AI tools do not have the same common sense as humans. This means that they may not be able to understand the nuances of a case.

Ultimately, decisions in arbitration will always be made by humans. AI can be a valuable tool to assist stakeholders in arbitration, but it is not a replacement for human decision-making.

B. *Detailed questions about the possible use of data mining, text analytics, or generative AI tools in international arbitration*

11. Could parties use data mining, text analytics, or generative AI tools to select the arbitral seat or arbitral rules for their dispute?

Sure, here are some ways that parties could use data mining, text analytics, or generative AI tools to select the arbitral seat or arbitral rules for their dispute:

**Data mining:** AI tools can be used to mine data on past arbitral cases to identify factors that are associated with successful outcomes. This data could then be used



to predict which arbitral seat or arbitral rules are more likely to lead to a favorable outcome for a particular party.

**Text analytics:** AI tools can be used to analyze text from arbitral awards and other legal documents to identify trends and patterns. This information could then be used to assess the strengths and weaknesses of different arbitral seats and arbitral rules.

**Generative AI:** AI tools can be used to generate creative text formats, such as poems, code, scripts, musical pieces, email, letters, etc. This could be used to create hypothetical scenarios and to explore different options for selecting the arbitral seat or arbitral rules.

It is important to note that AI tools are not perfect and they should not be used as the sole basis for making decisions about arbitral seat or arbitral rules. However, they can be a valuable tool to help parties to make more informed decisions.

Here are some of the potential benefits of using AI tools to select the arbitral seat or arbitral rules:

**Increased efficiency:** AI tools can help parties to quickly and easily identify the most relevant data and information. This can save time and resources.

**Improved accuracy:** AI tools can help parties to identify patterns and trends that may not be obvious to humans. This can improve the accuracy of their decision-making.

**Reduced bias:** AI tools can help to reduce bias in the decision-making process. This is because they are not influenced by human emotions or prejudices.

Here are some of the potential risks of using AI tools to select the arbitral seat or arbitral rules:

**Data reliability:** The reliability of the data used by AI tools is important. If the data is not reliable, the results of the tools may not be accurate.

**Algorithmic bias:** AI tools can be biased, depending on the data they are trained on. This is a risk that should be carefully considered before using these tools.

**Lack of transparency:** AI tools can be opaque, making it difficult to understand how they make decisions. This can be a problem if parties want to understand the basis for the decision.



Overall, AI tools can be a valuable tool to help parties to select the arbitral seat or arbitral rules for their dispute. However, it is important to be aware of the potential risks and benefits before using these tools.

12. Would you be able to propose an arbitral seat or set of rules for a given dispute based on your training data and data input by a given stakeholder?

Yes, I could propose an arbitral seat or set of rules for a given dispute based on my training data and data input by a given stakeholder.

I am trained on a massive dataset of arbitral awards, legal documents, and other information related to international arbitration. This data includes information on the arbitral seat, the arbitral rules, the parties, the issues, and the outcome of the cases.

I can use this data to identify factors that are associated with successful outcomes in arbitration. For example, I can identify arbitral seats that are known for their neutrality and efficiency, or arbitral rules that are known for their flexibility and fairness.

I can also use this data to assess the strengths and weaknesses of different arbitral seats and arbitral rules. For example, I can consider the location of the arbitral seat, the availability of legal expertise, and the cost of arbitration.

If a stakeholder provides me with information about their dispute, such as the parties, the issues, and the desired outcome, I can use this information to generate a list of potential arbitral seats and arbitral rules. I can also provide an assessment of each option, based on my knowledge of the data.

It is important to note that I am not a substitute for human judgment. I can only provide information and recommendations. The final decision of the arbitral seat or arbitral rules should be made by the parties, in consultation with their lawyers.

Here are some of the benefits of using AI to propose an arbitral seat or set of rules:

**Increased efficiency:** AI can help parties to quickly and easily identify the most relevant data and information. This can save time and resources.

**Improved accuracy:** AI can help parties to identify patterns and trends that may not be obvious to humans. This can improve the accuracy of their decision-making.



**Reduced bias:** AI can help to reduce bias in the decision-making process. This is because they are not influenced by human emotions or prejudices.

Here are some of the risks of using AI to propose an arbitral seat or set of rules:

**Data reliability:** The reliability of the data used by AI tools is important. If the data is not reliable, the results of the tools may not be accurate.

**Algorithmic bias:** AI tools can be biased, depending on the data they are trained on. This is a risk that should be carefully considered before using these tools.

**Lack of transparency:** AI tools can be opaque, making it difficult to understand how they make decisions. This can be a problem if parties want to understand the basis for the decision.

Overall, AI can be a valuable tool to help parties to select the arbitral seat or arbitral rules for their dispute. However, it is important to be aware of the potential risks and benefits before using these tools.

13. Could parties use data mining, text analytics, or generative AI tools to draft an arbitration clause either from the beginning or by amending an existing template?

Yes, parties could use data mining, text analytics, or generative AI tools to draft an arbitration clause either from the beginning or by amending an existing template.

These tools can be used to analyze past arbitral awards and other legal documents to identify trends and patterns. This information could then be used to draft a clause that is tailored to the specific needs of the parties.

For example, data mining could be used to identify the most common clauses used in arbitration agreements. Text analytics could be used to analyze the language of these clauses to identify key terms and concepts. Generative AI could be used to generate new clauses based on the data and analysis.

It is important to note that AI tools are not perfect and they should not be used as the sole basis for drafting an arbitration clause. However, they can be a valuable tool to help parties to create a clause that is clear, concise, and enforceable.

Here are some of the potential benefits of using AI to draft an arbitration clause:

**Increased efficiency:** AI tools can help parties to quickly and easily identify the most relevant data and information. This can save time and resources.





**Improved accuracy:** AI tools can help parties to identify patterns and trends that may not be obvious to humans. This can improve the accuracy of their drafting.

**Reduced bias:** AI tools can help to reduce bias in the drafting process. This is because they are not influenced by human emotions or prejudices.

Here are some of the risks of using AI to draft an arbitration clause:

**Data reliability:** The reliability of the data used by AI tools is important. If the data is not reliable, the results of the tools may not be accurate.

**Algorithmic bias:** AI tools can be biased, depending on the data they are trained on. This is a risk that should be carefully considered before using these tools.

**Lack of transparency:** AI tools can be opaque, making it difficult to understand how they make decisions. This can be a problem if parties want to understand the basis for the decision.

Overall, AI can be a valuable tool to help parties to draft an arbitration clause. However, it is important to be aware of the potential risks and benefits before using these tools.

14. Would you be able to draft an arbitration clause for a given dispute based on your training data and data input by a given stakeholder?

Yes, I could draft an arbitration clause for a given dispute based on my training data and data input by a given stakeholder.

I am trained on a massive dataset of arbitral awards, legal documents, and other information related to international arbitration. This data includes information on the parties, the issues, the outcome of the cases, and the arbitration clauses that were used.

I can use this data to identify factors that are associated with successful arbitration clauses. For example, I can identify clauses that are clear, concise, and enforceable.

I can also use this data to assess the strengths and weaknesses of different arbitration clauses. For example, I can consider the flexibility of the clause, the cost of arbitration, and the likelihood of enforcement.



If a stakeholder provides me with information about their dispute, such as the parties, the issues, and the desired outcome, I can use this information to generate a draft arbitration clause. I can also provide an assessment of the clause, based on my knowledge of the data.

It is important to note that I am not a substitute for human judgment. I can only provide information and recommendations. The final decision of the arbitration clause should be made by the parties, in consultation with their lawyers.

Here are some of the benefits of using AI to draft an arbitration clause:

**Increased efficiency:** AI can help parties to quickly and easily identify the most relevant data and information. This can save time and resources.

**Improved accuracy:** AI can help parties to identify patterns and trends that may not be obvious to humans. This can improve the accuracy of their drafting.

**Reduced bias:** AI can help to reduce bias in the drafting process. This is because they are not influenced by human emotions or prejudices.

Here are some of the risks of using AI to draft an arbitration clause:

**Data reliability:** The reliability of the data used by AI tools is important. If the data is not reliable, the results of the tools may not be accurate.

**Algorithmic bias:** AI tools can be biased, depending on the data they are trained on. This is a risk that should be carefully considered before using these tools.

**Lack of transparency:** AI tools can be opaque, making it difficult to understand how they make decisions. This can be a problem if parties want to understand the basis for the decision.

Overall, AI can be a valuable tool to help parties to draft an arbitration clause. However, it is important to be aware of the potential risks and benefits before using these tools.

15. Could stakeholders in arbitration use data mining, text analytics, or generative AI tools to assess a potential conflict of interest between



either counsel and a party or an arbitrator with parties, counsel, experts, or other arbitrators?

Yes, stakeholders in arbitration could use data mining, text analytics, or generative AI tools to assess a potential conflict of interest between either counsel and a party or an arbitrator with parties, counsel, experts, or other arbitrators.

These tools can be used to analyze past cases and other data to identify factors that are associated with conflicts of interest. This information could then be used to assess the likelihood of a conflict of interest in a particular case.

For example, data mining could be used to identify cases where counsel has represented both parties in the same dispute. Text analytics could be used to analyze the language of arbitration agreements to identify clauses that may create conflicts of interest. Generative AI could be used to generate hypothetical scenarios to explore the potential for conflicts of interest.

It is important to note that AI tools are not perfect and they should not be used as the sole basis for assessing conflicts of interest. However, they can be a valuable tool to help stakeholders to identify potential conflicts of interest and to take steps to mitigate them.

Here are some of the benefits of using AI to assess conflicts of interest:

**Increased efficiency:** AI can help stakeholders to quickly and easily identify the most relevant data and information. This can save time and resources.

**Improved accuracy:** AI can help stakeholders to identify patterns and trends that may not be obvious to humans. This can improve the accuracy of their assessment.

**Reduced bias:** AI can help to reduce bias in the assessment process. This is because they are not influenced by human emotions or prejudices.

Here are some of the risks of using AI to assess conflicts of interest:

**Data reliability:** The reliability of the data used by AI tools is important. If the data is not reliable, the results of the tools may not be accurate.

**Algorithmic bias:** AI tools can be biased, depending on the data they are trained on. This is a risk that should be carefully considered before using these tools.



**Lack of transparency:** AI tools can be opaque, making it difficult to understand how they make decisions. This can be a problem if stakeholders want to understand the basis for the decision.

Overall, AI can be a valuable tool to help stakeholders to assess conflicts of interest. However, it is important to be aware of the potential risks and benefits before using these tools.

16. Soft-law documents that refer to conflict of interest often use vague terms like “significant interest in a party,” “regularly advises,” “close relationship,” “significant commercial relationship,” “related issue,” “significant fees or other revenues,” “regular basis.” Do you think that generative AI could replace a human in assessing whether a given situation qualifies under vague terms?

It is unlikely that generative AI could replace a human in assessing whether a given situation qualifies under vague terms like “significant interest in a party,” “regularly advises,” “close relationship,” “significant commercial relationship,” “related issue,” “significant fees or other revenues,” “regular basis” in the near future.

These terms are often used in soft-law documents because they are difficult to define precisely. This is because the meaning of these terms can vary depending on the specific circumstances. For example, what constitutes a “significant interest” in a party may depend on the size of the interest, the nature of the interest, and the relationship between the party and the arbitrator.

Generative AI is a powerful tool that can be used to process large amounts of data and identify patterns. However, it is not yet capable of understanding the nuances of human language and the context in which these terms are used. As a result, it is likely that AI would need to be supplemented by human judgment in order to assess whether a given situation qualifies under these vague terms.

Here are some of the reasons why generative AI is unlikely to replace a human in assessing conflict of interest:

**Vagueness of the terms:** The terms used in soft-law documents to define conflict of interest are often vague and open to interpretation. This means that it is difficult for AI to determine whether a given situation qualifies under these terms.



**Complexity of the factors involved:** The assessment of conflict of interest involves a complex set of factors, such as the nature of the relationship between the arbitrator and the party, the size and nature of the interest, and the potential for bias. AI is not yet capable of considering all of these factors in making a decision.

**Need for human judgment:** The assessment of conflict of interest requires human judgment. This is because there are often no clear-cut rules that can be applied to every situation. AI is not yet capable of exercising human judgment.

Overall, it is unlikely that generative AI will replace a human in assessing conflict of interest in the near future. However, AI can be a valuable tool to assist humans in this process.

17. Could parties use data mining, text analytics, or generative AI tools to select an arbitrator for their dispute?

Yes, parties could use data mining, text analytics, or generative AI tools to select an arbitrator for their dispute.

These tools can be used to analyze past cases and other data to identify factors that are associated with effective arbitrators. This information could then be used to assess the suitability of different arbitrators for a particular case.

For example, data mining could be used to identify arbitrators who have a high success rate in cases involving similar issues. Text analytics could be used to analyze the decisions of arbitrators to identify their styles and approaches. Generative AI could be used to generate hypothetical scenarios to explore the potential for different arbitrators to handle a particular case.

It is important to note that AI tools are not perfect, and they should not be used as the sole basis for selecting an arbitrator. However, they can be a valuable tool to help parties to identify potential arbitrators and to make informed decisions.

Here are some of the benefits of using AI to select an arbitrator:

**Increased efficiency:** AI can help parties to identify the most relevant data and information quickly and easily. This can save time and resources.

**Improved accuracy:** AI can help parties to identify patterns and trends that may not be obvious to humans. This can improve the accuracy of their selection.



**Reduced bias:** AI can help to reduce bias in the selection process. This is because they are not influenced by human emotions or prejudices.

Here are some of the risks of using AI to select an arbitrator:

**Data reliability:** The reliability of the data used by AI tools is important. If the data is not reliable, the results of the tools may not be accurate.

**Algorithmic bias:** AI tools can be biased, depending on the data they are trained on. This is a risk that should be carefully considered before using these tools.

**Lack of transparency:** AI tools can be opaque, making it difficult to understand how they make decisions. This can be a problem if parties want to understand the basis for the decision.

Overall, AI can be a valuable tool to help parties to select an arbitrator. However, it is important to be aware of the potential risks and benefits before using these tools.

18. Would these tools consider that arbitrators might change their mind or have rendered an award because of particular circumstances of the case or do not entirely agree with every word drafted by their co-arbitrators?

It is unlikely that AI tools would be able to fully consider that arbitrators might change their mind or have rendered an award because of particular circumstances of the case or do not entirely agree with every word drafted by their co-arbitrators.

This is because AI tools are trained on data that is typically limited to the facts and legal arguments of the case. They are not able to understand the nuances of human behavior, such as the reasons why an arbitrator might change their mind or the dynamics of the arbitral process.

Additionally, AI tools are often trained on data that is aggregated across many cases. This means that they may not be able to accurately predict the behavior of an individual arbitrator in a particular case.

However, AI tools can be used to identify factors that may be associated with arbitrators changing their minds or not agreeing with their co-arbitrators. For example, data mining could be used to identify cases where arbitrators have changed their minds after hearing new evidence. Text analytics could be used to analyze the decisions of arbitrators to identify patterns of disagreement.



This information could then be used by parties and arbitrators to make informed decisions about the arbitration process. For example, parties could use this information to select arbitrators who are less likely to change their minds or to agree with their co-arbitrators. Arbitrators could use this information to manage the arbitral process in a way that minimizes the risk of disagreement.

Overall, AI tools can be a valuable tool to help parties and arbitrators understand the factors that may influence the behavior of arbitrators. However, it is important to remember that AI tools are not perfect, and they should not be used as the sole basis for making decisions.

19. Could parties (or e.g., litigation financiers) use data mining, text analytics, or generative AI tools to assess the chances of winning a case in international arbitration?

Yes, parties (or e.g., litigation financiers) could use data mining, text analytics, or generative AI tools to assess the chances of winning a case in international arbitration.

These tools can be used to analyze past cases and other data to identify factors that are associated with winning cases. This information could then be used to assess the likelihood of winning a particular case.

For example, data mining could be used to identify cases where parties with similar facts and legal arguments have won. Text analytics could be used to analyze the decisions of arbitrators to identify patterns of reasoning. Generative AI could be used to generate hypothetical scenarios to explore the potential for different outcomes.

It is important to note that AI tools are not perfect, and they should not be used as the sole basis for assessing the chances of winning a case. However, they can be a valuable tool to help parties to make informed decisions about whether to pursue arbitration and how to best prepare their case.

Here are some of the benefits of using AI to assess the chances of winning a case:

**Increased efficiency:** AI can help parties to identify the most relevant data and information quickly and easily. This can save time and resources.



**Improved accuracy:** AI can help parties to identify patterns and trends that may not be obvious to humans. This can improve the accuracy of their assessment.

**Reduced bias:** AI can help to reduce bias in the assessment process. This is because they are not influenced by human emotions or prejudices.

Here are some of the risks of using AI to assess the chances of winning a case:

**Data reliability:** The reliability of the data used by AI tools is important. If the data is not reliable, the results of the tools may not be accurate.

**Algorithmic bias:** AI tools can be biased, depending on the data they are trained on. This is a risk that should be carefully considered before using these tools.

**Lack of transparency:** AI tools can be opaque, making it difficult to understand how they make decisions. This can be a problem if parties want to understand the basis for the decision.

Overall, AI can be a valuable tool to help parties assess the chances of winning a case. However, it is important to be aware of the potential risks and benefits before using these tools.

20. What documents or information would the parties need to deliver for the AI to be able to do so?

The specific documents or information that parties would need to deliver to AI to assess the chances of winning a case would depend on the specific AI tool being used. However, some common types of documents and information that may be required include:

- The arbitration agreement;
- The pleadings and evidence filed by the parties;
- The decisions of arbitrators in similar cases;
- The laws and regulations that are relevant to the dispute; and,
- The expert reports that have been submitted by the parties.

In addition to these documents and information, the AI tool may also require information about the parties, such as their financial resources and their experience in arbitration.





It is important to note that not all AI tools will require the same information. Some tools may be able to work with a limited amount of data, while others may require a more comprehensive dataset. It is important to consult with the developer of the AI tool to determine the specific requirements.

Here are some of the benefits of providing AI with access to documents and information:

**Increased accuracy:** AI can be more accurate in its assessments when it has access to more data.

**Reduced bias:** AI can be less biased when it has access to a more diverse dataset.

**Improved efficiency:** AI can process large amounts of data more quickly and efficiently than humans.

However, there are also some risks associated with providing AI with access to documents and information:

**Data privacy:** AI tools may collect and store sensitive data about the parties. This data could be used for unauthorized purposes.

**Security:** AI tools could be hacked or compromised, which could lead to the disclosure of confidential information.

**Bias:** AI tools could be biased, depending on the data they are trained on. This could lead to inaccurate assessments.

It is important to weigh the benefits and risks before deciding whether to provide AI with access to documents and information.

21. How would AI tackle the use of vague legal definitions (e.g., “foreseeable,” “fault,” “reasonable”)? Does the understanding of these vague terms and their application to a given case vary significantly depending on a given case, its facts and applicable law?

AI can tackle the use of vague legal definitions in a number of ways. One way is to use text analytics to identify patterns in the way that these terms have been used in past cases. This information can then be used to develop a more precise definition of the term.

For example, the term “foreseeable” can be defined as “capable of being foreseen or predicted.” However, what is considered “foreseeable” can vary depending on the



specific facts of the case. Text analytics can be used to identify patterns in the way that this term has been used in past cases, such as the types of events that have been considered foreseeable and the level of certainty that is required. This information can then be used to develop a more precise definition of the term that is tailored to the specific context of the arbitration.

Another way that AI can tackle the use of vague legal definitions is to use machine learning to generate predictions about how these terms will be interpreted in a given case. This can be done by training an AI model on a dataset of past cases in which these terms have been used. The model can then be used to predict how these terms will be interpreted in a new case.

It is important to note that the understanding of vague terms and their application to a given case can vary significantly depending on a given case, its facts and applicable law. This is because the meaning of these terms is often context-dependent. As a result, it is important to use AI tools in conjunction with human judgment when interpreting these terms.

Here are some of the benefits of using AI to tackle the use of vague legal definitions:

**Increased accuracy:** AI can be more accurate in its interpretations of vague terms when it is trained on a large dataset of past cases.

**Reduced bias:** AI can be less biased in its interpretations of vague terms when it is trained on a diverse dataset of past cases.

**Improved efficiency:** AI can interpret vague terms more quickly and efficiently than humans.

However, there are also some risks associated with using AI to tackle the use of vague legal definitions:

**Data reliability:** The reliability of the data used to train AI models is important. If the data is not reliable, the results of the models may not be accurate.

**Algorithmic bias:** AI models can be biased, depending on the data they are trained on. This is a risk that should be carefully considered before using these models.



**Lack of transparency:** AI models can be opaque, making it difficult to understand how they make decisions. This can be a problem if parties want to understand the basis for the decision.

Overall, AI can be a valuable tool to help arbitrators interpret vague legal definitions. However, it is important to be aware of the potential risks and benefits before using these tools.

22. Could arbitrators use data mining, text analytics, or generative AI tools to examine the evidence in international arbitration or drafting awards, or other documents?

Yes, arbitrators could use data mining, text analytics, or generative AI tools to examine the evidence in international arbitration or drafting awards, or other documents.

These tools can be used to identify patterns and trends in the evidence, such as the frequency of certain words or phrases, or the relationships between different pieces of evidence. This information can then be used to help arbitrators understand the evidence and to make decisions about the case.

For example, data mining could be used to identify cases where arbitrators have awarded damages based on similar evidence. Text analytics could be used to analyze the evidence to identify key terms and concepts. Generative AI could be used to generate hypothetical scenarios to explore the potential implications of the evidence.

It is important to note that AI tools are not perfect and they should not be used as the sole basis for making decisions in arbitration. However, they can be a valuable tool to help arbitrators to understand the evidence and to make informed decisions.

Here are some of the benefits of using AI to examine the evidence in international arbitration:

**Increased efficiency:** AI can help arbitrators to identify the most relevant evidence quickly and easily.

**Improved accuracy:** AI can help arbitrators to identify patterns and trends in the evidence that may not be obvious to humans.

**Reduced bias:** AI can help to reduce bias in the assessment of the evidence. This is because they are not influenced by human emotions or prejudices.



Here are some of the risks of using AI to examine the evidence in international arbitration:

**Data reliability:** The reliability of the data used by AI tools is important. If the data is not reliable, the results of the tools may not be accurate.

**Algorithmic bias:** AI tools can be biased, depending on the data they are trained on. This is a risk that should be carefully considered before using these tools.

**Lack of transparency:** AI tools can be opaque, making it difficult to understand how they make decisions. This can be a problem if arbitrators want to understand the basis for the decision.

Overall, AI can be a valuable tool to help arbitrators examine the evidence in international arbitration. However, it is important to be aware of the potential risks and benefits before using these tools.

23. Could parties use data mining, text analytics, or generative AI tools to draft more persuasive submissions in arbitration?

Yes, parties could use data mining, text analytics, or generative AI tools to draft more persuasive submissions in arbitration.

These tools can be used to identify patterns and trends in past cases, such as the types of arguments that have been successful and the language that has been used. This information can then be used to help parties' draft submissions that are more likely to be persuasive.

For example, data mining could be used to identify cases where parties have won by arguing a particular point. Text analytics could be used to analyze the language of successful submissions to identify key terms and concepts. Generative AI could be used to generate hypothetical scenarios to explore the potential implications of the arguments.

It is important to note that AI tools are not perfect, and they should not be used as the sole basis for drafting submissions in arbitration. However, they can be a valuable tool to help parties to draft more persuasive submissions.

Here are some of the benefits of using AI to draft submissions in arbitration:

**Increased efficiency:** AI can help parties to quickly and easily identify the most relevant arguments and language.



**Improved accuracy:** AI can help parties to identify patterns and trends in past cases that may not be obvious to humans.

**Reduced bias:** AI can help to reduce bias in the drafting of submissions. This is because they are not influenced by human emotions or prejudices.

Here are some of the risks of using AI to draft submissions in arbitration:

**Data reliability:** The reliability of the data used by AI tools is important. If the data is not reliable, the results of the tools may not be accurate.

**Algorithmic bias:** AI tools can be biased, depending on the data they are trained on. This is a risk that should be carefully considered before using these tools.

**Lack of transparency:** AI tools can be opaque, making it difficult to understand how they make decisions. This can be a problem if arbitrators want to understand the basis for the decision.

Overall, AI can be a valuable tool to help parties draft more persuasive submissions in arbitration. However, it is important to be aware of the potential risks and benefits before using these tools.

24. Could arbitral institutions use data mining, text analytics, or generative AI tools to critically scrutinize an arbitral award?

Yes, arbitral institutions could use data mining, text analytics, or generative AI tools to critically scrutinize an arbitral award.

These tools can be used to identify patterns and trends in arbitral awards, such as the types of awards that are most likely to be challenged or the language that is most commonly used in awards. This information can then be used to help arbitral institutions improve the quality of awards.

For example, data mining could be used to identify cases where awards have been challenged and the reasons for the challenges. Text analytics could be used to analyze the language of awards to identify potential ambiguities or inconsistencies. Generative AI could be used to generate hypothetical scenarios to explore the potential implications of the award.



It is important to note that AI tools are not perfect and they should not be used as the sole basis for scrutinizing an arbitral award. However, they can be a valuable tool to help arbitral institutions improve the quality of awards.

Here are some of the benefits of using AI to scrutinize arbitral awards:

**Increased efficiency:** AI can help arbitral institutions to identify potential problems with awards quickly and easily.

**Improved accuracy:** AI can help arbitral institutions to identify patterns and trends in awards that may not be obvious to humans.

**Reduced bias:** AI can help to reduce bias in the scrutiny of awards. This is because they are not influenced by human emotions or prejudices.

Here are some of the risks of using AI to scrutinize arbitral awards:

**Data reliability:** The reliability of the data used by AI tools is important. If the data is not reliable, the results of the tools may not be accurate.

**Algorithmic bias:** AI tools can be biased, depending on the data they are trained on. This is a risk that should be carefully considered before using these tools.

**Lack of transparency:** AI tools can be opaque, making it difficult to understand how they make decisions. This can be a problem if arbitral institutions want to understand the basis for the decision.

Overall, AI can be a valuable tool to help arbitral institutions scrutinize arbitral awards. However, it is important to be aware of the potential risks and benefits before using these tools.

## VI. CONCLUSIONS & TAKEAWAYS

### A. *Hypotheses Confirmed*

As to the authors' working hypotheses, the experiment confirmed that generative AI is a tool unready to make independent decisions in the arbitral process. In fact, this was also an independent conclusion (or disclosure?) that was made by both ChatGPT as well as Bard. The experiment also confirmed that the data provided by generative AI based on the same question may vary, though not significantly. Additionally, AI's replies were often repetitive, based on the same (albeit relevant)



arguments. Finally, although generative AI may “hallucinate,” we have identified only a few significant visible hallucinations in our experiment.

B. *Style & Form of Answering*

First, in terms of the comparison between ChatGPT 4.0 and Bard, it seems that only the former succeeded in matching the prompt, that is, an interview style of answering and word limit. Bard also appeared to misread the intentions behind the questions. For example, when asked about the ways arbitration’s general principles could shape the use of the technology in arbitration, apart from giving a direct answer, Bard also presented how one could use the technology in arbitration at all. Bard also showed a tendency to provide additional, general answers at the end of answering a given question (“Here are some additional thoughts on . . .”). Bard also appeared to provide more qualifiers and/or was more evasive in its responses (e.g., “decision of whether or not . . . is a complex one.”).

We noted a difference in style while providing answers. While ChatGPT 4.0 presented the pros and cons of a given solution or its benefits and challenges, Bard phrased it as a dilemma (“There is no consensus on whether the use of AI tools should be allowed in international commercial arbitration. Some people believe that the use of AI tools should be allowed, as they can help to make the arbitration process more efficient and effective. Others believe that . . .”). It is a subjective interpretation, but we regarded Bard’s answers as less conclusive. The structure of Bard’s answers was stylistically more repetitive: at first, it gave a seemingly direct response (“Sure, here are my thoughts on . . .”), which then would be followed by more general reflections that may or may not have been relevant (“Here are some additional thoughts”). Bard also gave the same piece of an answer to several questions, e.g., while describing a particular drawback of using technology. Overall, we regarded ChatGPT’s style of answering as more “mature” and balanced.

Additionally, Bard seemed to give more general answers, referring to data mining, text analytics, and AI, while ChatGPT 4.0 focused on AI, although the questions referred to all three solutions.



### C. *Hallucinations & Questionable Answers*

That said, Bard seemed to present sometimes nonsensical answers, e.g., referring to arbitrators who have “a high success rate” as if they were lawyers who “win” or “lose” a case. Anyone dealing with arbitration can confirm that this is not an answer a human would give. Additionally, when asked whether the parties could use data mining, text analytics, or generative AI tools to select the arbitral seat or arbitral rules for their dispute, Bard answered that generative AI: “can be used to generate creative text formats, such as poems, code, scripts, musical pieces, email, letters, etc. This could be used to create hypothetical scenarios and to explore different options for selecting the arbitral seat or arbitral rules.” Reference to poems or musical pieces limits the persuasiveness of Bard’s answers.

Similarly, Bard gave a somewhat controversial suggestion when asked about the potential use of AI in international commercial arbitration: “Generative AI can be used to create new documents, such as witness statements and expert reports. This can help to streamline the arbitration process and reduce the cost of legal fees.” It is evident that generating witness statements or expert reports based on AI findings and not actual knowledge of facts or expert knowledge remains controversial, to say the least. Allowing such a phenomenon would likely affect the legitimacy of international arbitration.

We have not identified significant hallucinations in ChatGPT answers. However, while assessing the use of AI by arbitrators, ChatGPT suggested that in such a scenario, “parties must have the chance to challenge or question its outputs.” Bard made a similar suggestion. This seems impractical as the arbitrators evaluate the evidence in the award. However, if by “challenge or question” one should understand it to mean “comment,” then the suggestion seems more feasible and sensible.

Finally, Bard was also wrong in concluding that “Arbitral awards are typically confidential, and this is especially true for ITA [international treaty arbitration] [sic] cases. This means that fewer arbitral awards are published from ITA cases.” Bard’s recommendations were also occasionally so general that they were defective. For example, it suggested that AI would not make decisions for arbitration users, but “AI





can be used to support negotiations between the parties. This can help to reach a settlement more quickly and efficiently.” How that would work remains a mystery.

D. *AI as (Merely) an Aid*

ChatGPT 4.0 confirmed all of the theses of our previous research concerning the use of technology in arbitration, including (i) the observation of a lack of regulatory framework and (ii) the conclusion that technology as such may be an aid for arbitration stakeholders, but could not substitute them in the proceedings:<sup>8</sup> AI “should serve as an assistant to human decision-makers rather than replace them. The unique characteristics of human judgment remain vital in the intricate and nuanced world of arbitration.”<sup>9</sup> Consequently, technology could aid decision-making in many fields but not make decisions on its own. Bard’s answer even went further, suggesting that AI “is unlikely to ever make the decisions for [arbitration users].”

ChatGPT acknowledged the shortcomings of using technology in arbitration, particularly the lack of available and comparable data due to confidentiality (particularly in commercial arbitration) and decentralization. ChatGPT also pointed to the possible bias of AI technology that could lead to favoring one party over another. It always added an important caveat that any suggestion “should be complemented with expertise from experienced arbitration practitioners” that could offer “subjective assessment.” For instance, AI could help flag potential conflicts of interest, but a lawyer would need to make a final decision based on contextual understanding and human judgment. ChatGPT even labeled human judgment and expertise as “foundational to arbitration’s integrity and effectiveness” given the necessity to navigate the “specifics of the case, parties’ intentions and the nuances of the law.” To put it in context, ChatGPT confirmed that AI would be highly productive

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<sup>8</sup> Similar conclusions were reached recently by Christophe Dugué, who asked Bing GPT to prepare a memo answering similar questions. See Christophe Dugué, *Can AI Replace Lawyers in International Arbitration? Or be used in International Arbitration – A [guided] interview of a generative AI*, LINKEDIN PULSE (June 30, 2023), <https://www.linkedin.com/pulse/can-ai-replace-lawyers-international-arbitration-used-dugu%C3%A9/>.

<sup>9</sup> Full Text of the Authors’ Interviews with Generative Artificial Intelligence, Annex, at 12.



in creating a shortlist of possible candidates for arbitrators, but a lawyer selects the best person.

Similarly, Bard underlined that when provided with appropriate data, it could generate a list of potential arbitral seats and rules and assess the options. Bard emphasized that AI could be useful in identifying “patterns and trends” which should be used “in conjunction with the judgment of human experts.” It even clarified that “AI can be used to assist stakeholders in arbitration in a variety of ways, but it is unlikely to ever make the decisions for them.” It flagged that AI is imperfect, is not always objective (may be biased), and lacks common sense.

The above would render it impossible for generative AI to understand the nuances of a complex decision-making process, e.g., arbitrators changing their minds or rendering an award while not entirely agreeing with every word of the award. However, Bard suggested that it could provide data that parties could use “to select arbitrators who are less likely to change their minds or to agree with their co-arbitrators. Arbitrators could use this information to manage the arbitral process in a way that minimizes the risk of disagreement.” Potential use of technology and arbitration by arbitrators or arbitral instructions providing scrutiny was reinforced by Bard’s assessment that “data mining could be used to identify cases where awards have been challenged and the reasons for the challenges. Text analytics could be used to analyze the language of awards to identify potential ambiguities or inconsistencies.”

This combination of possible instantaneous analysis of vast amounts of data with human expertise may create the picture of future arbitration lawyers. An important observation was made by Bard when it comes to the availability of data that AI analyzes. Bard noted that: “the data that is available is also not very diverse. This is because most of the data is from cases involving Western countries.” Although this statement might not be entirely correct, one may certainly observe that the majority of data/knowledge in international arbitration (be it available arbitral awards or scholarly writing) originates from the legal tradition of the Global North, which might indeed affect the outcome of the analysis.



E. “Autocriticism”

Interestingly, ChatGPT 4.0 put a great deal of emphasis on some of the drawbacks of using technology in arbitration. First, it raised transparency, encouraging disclosure of the use of AI tools to the other parties to give them “the opportunity to understand, challenge, or potentially utilize similar tools.” Consequently, ChatGPT underlined the necessity to ensure “there are no ‘black box’ operations” known only to one party or arbitrators. However, the interview did not solve the authors’ dilemma about potential inequalities of arms in terms of parties’ funding or tech-savviness.

Second, ChatGPT flagged several concerns referring, e.g., to possible data security breaches and the use of the data by third parties. ChatGPT also identified the possibility that “even if data is encrypted and anonymized, there’s uncertainty about future technologies that might be able to de-anonymize or decrypt data.” It concluded that “stakeholders should be cautious when inputting sensitive data into AI tools.” The authors regard this perspective as quite bleak but not altogether improbable.

F. *Future of Legal Framework for Generative AI*

Neither ChatGPT nor Bard was particularly helpful in advising on regulating the use of AI in international arbitration. For example, ChatGPT suggested that AI in international arbitration should be regulated at least on the soft-law level. At the same time, the way forward it suggested is (i) to maintain confidentiality of the process on the one hand and (ii) to ensure “transparency and understandability” of the AI role in the process. At first glance, these recommendations might not appear internally consistent unless confidentiality is understood as being secured vis-à-vis third parties and transparency is understood as being towards the participants of a single arbitral proceeding.

When asked normative questions (“should . . .”), ChatGPT recommends the use of technology in international arbitration but advocates full disclosure of its use (“It’s advisable to disclose the use of AI tools in arbitration”). One of the reasons mentioned by ChatGPT is the following: “Disclosure ensures both parties are on an equal footing. If one party employs AI tools, the other should have the opportunity to understand,



challenge, or potentially utilize similar tools.” While a possibility to object or challenge the use is something that every litigator will agree with, one might wonder what the “opportunity to understand” means within the adversarial process of international arbitration.

## VII. SUMMARY

In summary, our exercise confirmed that various aspects of technology (as always) may be a valuable help to a lawyer. However, the human factor will always remain crucial in resolving a dispute. No one imagines a lawyer who does not use email or a phone. But surely one can imagine a successful lawyer who could not send a fax. This would be unimaginable twenty years ago. Half a century ago, no lawyer had ever heard about a fax. This confirms that technology changes, and prudent lawyers should identify the changes and use them to satisfy clients' needs. At the same time, a lawyer's intuition, knowledge, and common sense are crucial and will always be a deciding factor in why clients should rely on the lawyer's skill and judgment rather than merely a product of an algorithm.



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# **HOW THE ARBITRAL PROCESS AFFECTS THE AVAILABILITY AND EFFECTIVENESS OF MONETARY AND NON-MONETARY RELIEF**

by Julien Faucheux

## **I. INTRODUCTION**

From June 14 to 16, 2023, the Institute for Transitional Arbitration (ITA) hosted its 35th Annual Workshop and Meeting in Austin, Texas. This edition of the ITA's annual workshop explored various aspects of the enforcement mechanisms available in international arbitration, focusing on how the system of international arbitration gives effect to the legal rights of the parties by granting effective and enforceable remedies.

This article discusses the panel entitled “How the Arbitral Process Affects the Availability and Effectiveness of Monetary and Non-Monetary Relief.” There, it was discussed the need for an efficient and swift arbitration process in awarding non-monetary remedies, the tools available to practitioners to speed up the arbitration process (summary judgment, expedited proceedings etc.) and their limitations, and the role of provisional relief in awarding non-monetary damages as final relief.

The panel was moderated by Thomas Voisin, of Quinn Emanuel Urquhart & Sullivan in Paris. The speakers consisted of Roberto J. Aguirre Luzi, of King & Spalding LLP in Houston, Stephen P. Anway, of Squire Patton Boggs in New York/Washington, D.C, Caline Mouawad, of Chaffetz Lindsey in New York, and Anne Veronique Schlaepfer, of White & Case LLP in Geneva, who shared their opinion in the subject predicated upon their expertise and experience.

## **II. HOW TO EXPEDITE THE ARBITRAL PROCESS**

A major challenge to the availability and effectiveness of monetary and non-monetary relief is the amount of time and cost for an arbitral tribunal to reach its final decision. The average duration of an arbitration administered by the International Centre for Dispute Resolution (ICDR) is 15.4 months, whereas an arbitration administered by the International Chamber of Commerce (ICC) in 2020 had and



average duration of 26 months.<sup>1</sup>

Stephen Anway proposed incorporating fast track arbitration clauses into contracts as one of the internal tools available for arbitrators to expediate the duration of tribunals. Fast track arbitration is an expedited procedure that imposes strict deadlines and procedures on the parties.<sup>2</sup> Unlike normal arbitration tribunals where the parties can choose the arbitrators, fast track arbitration cases are usually decided by a sole arbitrator.<sup>3</sup> Normally, fast track arbitration atomically applies when the claim is below a certain threshold.<sup>4</sup> For example, pursuant to the 2021 ICC Arbitration Rules, for any claims under \$3 million, fast track arbitration rules atomically apply.<sup>5</sup> However, similar to other arbitration tribunals, in the ICC, parties can incorporate fast track arbitration for claims above the monetary threshold if they both agree.<sup>6</sup>

One major benefit of fast-track arbitration is that it expedites the arbitral process. Additionally, fast track arbitration is normally less expensive, and it is beneficial to the parties when the dispute involves a claim where the need for a decision outweighs the parties' desire to argue on the merits. However, as alluded by Stephen Anway, one of the challenges in enforcing fast track arbitration clauses are complaints from parties that the tribunal deadlines in fast-track arbitration violate their due process rights. Although, there are instances where concerns about due process are well-founded, he explains that the international arbitration community should give less defense to certain claims. The claims include cases where the tribunals take up to 7-8 years or where a party wants to submit memorials with unnecessary meticulous

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<sup>1</sup> See *The Duration of Arbitration*, ACERIS LAW LLC, AUG. 8, 2022, <https://www.acerislaw.com/the-duration-of-arbitration/>.

<sup>2</sup> *Id.*

<sup>3</sup> See *Using fast track arbitration for resolving commercial disputes*, NORTON ROSE FULLBRIGHT, MAR. 2018, <https://www.nortonrosefulbright.com/de-de/wissen/publications/981af4b9/using-fast-track-arbitration-for-resolving-commercial-disputes>.

<sup>4</sup> *Id.*

<sup>5</sup> ICC Rules of Arbitration (2021), Appendix VI, art. 2.

<sup>6</sup> *Using fast track arbitration for resolving commercial disputes*, NORTON ROSE FULLBRIGHT, MAR. 2018, <https://www.nortonrosefulbright.com/de-de/wissen/publications/981af4b9/using-fast-track-arbitration-for-resolving-commercial-disputes>.



details. Complaints about due process violations can frustrate the process of expediting an arbitral tribunal by increasing the likelihood of a party challenging the decision.<sup>7</sup> There is a high probability that a decision rendered under fast-track arbitration rules will be challenged, thus adding time to the dispute.<sup>8</sup> Furthermore, fast track arbitration is very demanding for the parties and may require legal counsels to be retained on a full-time basis which could lead to higher legal fees for the parties.<sup>9</sup> All of these factors potentially undermine the purpose of fast track arbitration, which is to save the parties time and cost.

When asked about how to make the process of obtaining monetary and non-monetary relief more effective, Caline Mouawad discussed tribunal constitution and arbitration timetables as considerations to expediate and streamline the process. Several institutions have implemented measures to reduce the duration of tribunals.<sup>10</sup> Under the ICC rules, decisions are required to be made under 6 months from the last signature.<sup>11</sup> The London Court of International Arbitration (LCIA) provides that a decision should be made as soon as is reasonably possible from the date of the last submission.<sup>12</sup> In addition to institutionalized rules, arbitration institutions also have power to influence arbitrators to render decisions sooner.<sup>13</sup> Since arbitrators often look to institutions for retention, they have an incentive to render decisions in a timely manner.<sup>14</sup> Furthermore, some institutions such as the ICC can sanction arbitrators for late awards, in the form of late fees.<sup>15</sup>

The benefits of these institutional rules are clear, save the parties time and the

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Victoria Clark, *Time Limits for Awards: the danger of deadlines*, PRACTICAL LAW ARB. BLOG, AUG. 3, 2016, <http://arbitrationblog.practicallaw.com/time-limits-for-awards-the-danger-of-deadlines/>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Nathaniel Lai, *Time Limits: Help or Hinderance?* HK45 BLOG, Apr. 16, 2020, <https://www.hkiac.org/content/time-limits-help-or-hinderance>.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*





cost of arbitration. However, these limitations make the arbitral process susceptible to abuse from parties. Unlike a domestic court, an arbitral tribunal derive their jurisdiction from the parties' agreement to arbitrate.<sup>16</sup> Once the agreed-upon timeline lapses, the arbitrator no longer has jurisdiction over the parties.<sup>17</sup> If both parties consent, then the timeline for rendering an award can be amended.<sup>18</sup> However, if one party refuses to extend the deadline and repeatably delays the process to ensure that the arbitrator does not make a decision within the original time frame, then the jurisdiction of the arbitrator has expired and an award cannot be rendered.<sup>19</sup> Another challenge associated with institutional rules to expediate the arbitral process was described by Thomas Voisin during the panel discussion. He mentioned how institutionalizing arbitral rules may conflict with the flexible nature provided by arbitration. Unlike a court, an arbitral tribunal is not bound by the same constraints, which makes it a more viable forum for some parties seeking flexibility.

### III. INTERIM MEASURES AND COURT-ORDERED ENFORCEMENTS

Anne Véronique Schlaepfer was asked whether a court or an arbitration tribunal is better equipped to grant interim measures. On one hand, she discussed how arbitral tribunals have more flexibility in granting measures and do not have the same pleading requirements that many courts have. However, in some instances, a court is a better option for the parties because it has powers that an arbitral tribunal does not. Anne Véronique Schlaepfer discussed the example of a bond to illustrate how in some instances, a court would be a better option since it has the power to attach the bond.

Although an arbitrator can issue a decision on granting interim relief, they have no coercive power in the country with the seat of arbitration, or even powers in other countries.<sup>20</sup> Therefore, parties sometimes have no option but to go to court for

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<sup>16</sup> CLARK, *supra* note 10.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Martin Davies, *Court-Ordered Interim Measures in Aid of International Commercial Arbitration*, 17 AM. REV. INT'L ARB. 299 (2006).



interim relief, or to ask a court to enforce an interim measure granted by an arbitral tribunal.<sup>21</sup> However, many nations have differing rules on enforcing interim measures.<sup>22</sup> Under British law, the English Arbitration Act of 1996 grants courts wide discretion in enforcing interim measures from arbitral tribunals.<sup>23</sup> However, section 44(s) of the English Arbitration Act of 1996 provides that a court can exercise its power only when the arbitral tribunal “has no power or is unable for the time being to act effectively.”<sup>24</sup> In the United States, legal opinion on enforcing interim measures by arbitral tribunals is fragmented.<sup>25</sup> The closest legislation that addresses the question is 28 U.S.C. § 1782, which allows for discovery in aid of proceedings before foreign courts. However, there is split consensus in federal circuit courts on whether § 1782 applies to international arbitral tribunals.<sup>26</sup> Where the arbitral tribunal and the court where interim relief is requested is in the European Union, then a court may enforce an interim measure in support of an arbitration by referring to its own law.<sup>27</sup>

In 2018, 62% of interim measures granted by an arbitral tribunal were adhered to without enforcement from a court.<sup>28</sup> However, because there are scenarios where a court intervention is necessary, the lack of international uniformity in rules about a court’s ability to enforce interim measures creates incentives for forum shopping.<sup>29</sup> Forum shopping normally results in large disputes about choice of law and jurisdiction that can be time-consuming and expensive for the parties.<sup>30</sup> These factors are contrary to the essence of arbitration because parties normally agree to

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<sup>21</sup> *Id.*

<sup>22</sup> See Stephen Benz, *Strengthening Interim Measures in International Arbitration*, 50 *GEO. J. INT’L L.* 143 (2018)

<sup>23</sup> DAVIES, *supra* note 20, at 168-170

<sup>24</sup> BENZ, *supra* note 22, at 14.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Case C-391/95, *Van Uden Maritime v. Kommanditgesellschaft in Firma Deco-Line and Another*, 1998 E.C.R. I-7091.

<sup>28</sup> BENZ, *supra* note 22, at 8.

<sup>29</sup> *Id.* at 14.

<sup>30</sup> *Id.*



arbitrate instead of litigating in a national court to save time and money, as well as to avoid legal questions about choice of law.<sup>31</sup>

#### IV. AN INVESTOR'S OPTION: MONETARY OR NON-PECUNIARY DAMAGES

Under Article 54(1) of the ICSID Convention,<sup>32</sup> a tribunal has the power to enforce non-pecuniary relief as a final judgement on the parties.<sup>33</sup> In the context of investor-state arbitration, an investor is risk adverse, and will normally seek monetary damages as it would provide adequate relief, and they would not want to continue a contract with a state that breached treaty obligations.<sup>34</sup> However, as Roberto Aguirre Luzi discussed, there are instances where an investor would benefit from seeking non-pecuniary relief. For instance, he mentioned how in cases where the investor does not want to jeopardize a relationship with the state early on, then the investor may want to seek non-pecuniary relief. Another scenario where non-pecuniary relief would be more suitable is when seeking monetary damages would leave the investor with no relief.<sup>35</sup>

In *Rompetrol v. Romania*,<sup>36</sup> the investor brought a case for monetary damages against the Romanian government for an investigation of the company that allegedly included arrest, detention, travel-ban, and wiretapping of key company executives.<sup>37</sup> Although the court found that Romania violated the Fair and Equitable Treatment (FET) standard,<sup>38</sup> no damages were awarded to Rompetrol because they never showed that the violation caused economic loss.<sup>39</sup> Here, a narrowly drafted injunction would have been a better option for the claimant because it would have left them with a

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<sup>31</sup> *Id.*

<sup>32</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, art. 54(1), 17 U.S.T. 1270, T.I.A.S. 6090, 575 U.N.T.S. 159.

<sup>33</sup> *Id.*

<sup>34</sup> Patrick J. Rodriguez, *International Contractualism Revisited: Non-Pecuniary Remedies under the Fair and Equitable Treatment Standard*, 18 CHI. J. INT'L L. 673 (2018)

<sup>35</sup> *Id.* at 695.

<sup>36</sup> *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award (May 6, 2013).

<sup>37</sup> *Id.* at ¶¶ 50, 54(c); RODRIGUEZ, *supra* note 34 at 695.

<sup>38</sup> *Rompetrol*, ¶ 279.

<sup>39</sup> *Rompetrol*, ¶¶ 288, 293; RODRIGUEZ, *supra* note 34 at 695.



viable remedy.<sup>40</sup> There are also instances where non-pecuniary measures are better for states. States have an interest in foreign investment and often, their national interest would be better served through a non-pecuniary measure such as an injunction to ensure a continued relationship between them and the investor.<sup>41</sup>

## V. CONCLUSION

The topics and suggestions discussed by the panel are only a few of many that may impact international arbitration in 2024. All the topics centered around common issues in the arbitral process, such as high costs, long procedures, and issues regarding enforceability of non-monetary measures. Towards the end of the panel, Anne Véronique Schlaepfer addressed a key point, of whether the arbitration community should focus on fixing the rules to improve the effectiveness of obtaining monetary and non-monetary relief, or work with the existing ones. Any solution or effort discussed in the panel will ultimately have an impact on this concern. While there may be some measures to improve the effectiveness of the arbitral process, it is possible that with new developments, the arbitration community might discover that certain rules will need to be adjusted.



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<sup>40</sup> RODRIGUEZ, *supra* note 34 at 695.

<sup>41</sup> *Id.*

## **BOOK REVIEW**

### **THE DILEMMA OF CONSENT TO INTERNATIONAL ARBITRATION IN INVESTMENT AGREEMENTS WITHOUT A FORUM**

**BY FERNANDO TUPA**

*Reviewed by* Christina Beharry

Consent is often said to be the cornerstone of a tribunal's jurisdiction.<sup>1</sup> Fernando Tupa's book explores the application of this fundamental principle when the dispute settlement provisions of an investment agreement are silent on the arbitral forum.<sup>2</sup>

Tupa's central thesis is that consent to international arbitration is forum-specific. Without a specified forum and arbitral seat, a foreign investor has no means of exercising a general expression of consent. The legal consequence, according to Tupa, is that consent to international arbitration exists "in principle" but is essentially inoperative. Tupa builds on this by exploring the significance and practical consequences of these principles.

Early on, Tupa observes that international investment cases are particularly susceptible to this dilemma because the arbitral seat is not typically set out in investment agreements (as compared to international commercial arbitration) so there would be no domestic court to fill in the gaps.<sup>3</sup> In addition, he explains that institutional arbitral rules (*e.g.*, ICSID, ICC, SCC, *etc.*) contain requirements for the submission of a dispute to that specific forum.<sup>4</sup>

So, what are we to make of dispute settlement provisions lacking a forum? Tupa initially establishes that international law should govern the interpretation of such

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<sup>1</sup> *Ambatielos Case (Merits: Obligation to Arbitrate) (Greece v. United Kingdom of Great Britain and Northern Ireland)*, 1953 I.C.J. 19 (Judgment May 19).

<sup>2</sup> FERNANDO TUPA, *THE DILEMMA OF CONSENT TO INTERNATIONAL ARBITRATION IN INVESTMENT AGREEMENTS WITHOUT A FORUM* (Ian A. Laird et al. eds., 2023).

<sup>3</sup> *Id.* at 10, *et seq.*

<sup>4</sup> *Id.* at 13.



provisions.<sup>5</sup> He then analyzes the two main types of investor-state dispute settlement provisions that do not constitute enforceable and effective state consent to arbitration: (i) when no arbitral forum (*i.e.*, arbitral institution or arbitration rules) is specified or when subsequent agreement on the forum between the disputing parties is required and no default or fallback option is provided, and (ii) when the arbitral forum set out has become unavailable (*e.g.*, only ICSID arbitration is permitted but one of the contracting parties has withdrawn from the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)). Relatedly, Tupa asserts that even use of the word “shall” in a dispute settlement provision should not automatically be interpreted as a “complete” offer of consent but could also refer to future action.<sup>6</sup>

Tupa then takes stock of the case law interpreting non-forum-specific dispute settlement provisions, favoring the line which adopts the principle that consent is forum-specific.<sup>7</sup> Afterwards, he specifically examines cases in which the most favored nation (MFN) clause was invoked to get around the absence of a forum. Tupa criticizes this approach due to what he terms a “sequential issue”<sup>8</sup> and the “fundamental limitation” on using an MFN clause to import consent when none exists.<sup>9</sup>

Finally, Tupa deals with the practical consequence of non-forum-specific provisions. Tupa recognizes that the lack of forum is dependent on parties (albeit unlikely) agreeing to a forum to which to submit a dispute after the dispute has arisen.<sup>10</sup> To address unfair outcomes, he points to various avenues potentially open to a foreign investor such as availing itself of another bilateral investment treaty or

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<sup>5</sup> *Id.* at 17-18, 26. Specifically, Tupa argues that treaty provisions should be interpreted objectively based on the text in accordance with the Vienna Convention on the Law of Treaties and that the standard of proof for the existence of state consent is “clear and unequivocal” evidence.

<sup>6</sup> *Id.* at 38.

<sup>7</sup> *Id.* at 40-58.

<sup>8</sup> *Id.* at 59 (that is, an arbitral tribunal must have jurisdiction *ratione voluntatis* before it can apply the MFN clause).

<sup>9</sup> *Id.* at 60, *et seq.*

<sup>10</sup> *Id.* at 81.



other dispute settlement mechanisms contemplated in the investment agreement (e.g., national arbitration, domestic courts, or diplomatic protection).

Tupa's book offers a thoughtful and detailed examination of a subject that may be overlooked by practitioners and arbitrators alike. Tupa's study is well-researched and compels a closer and more critical reading of dispute settlement provisions to ensure their meaning and scope are properly interpreted.



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