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2018-2019 YOUNG ITA WRITING COMPETITION AND AWARD: "NEW VOICES IN INTERNATIONAL ARBITRATION" FINALIST

KEEPING UP WITH LEGAL TECHNOLOGY: THE IMPACT OF THE USE OF PREDICTIVE JUSTICE TOOLS ON AN ARBITRATOR'S IMPARTIALITY AND INDEPENDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION

by Shervie Maramot

I. INTRODUCTION

An arbitrator's independence and impartiality are the cornerstone of international commercial arbitration.[1] In recent years, the rise of third-party funding has called into question an arbitrator's impartiality and independence, especially because of the dual role of arbitrators today. For example, an arbitrator can be, and is usually, acting in his or her own capacity as an arbitrator, and as an employee or a partner of a legal practice.[2]

Questions as to the extent of this well-respected duty in international commercial arbitration have received some clarification by way of the updated 2014 IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines),[3] and legislation and rules clarifying this duty as enacted by leading seats of arbitration in Asia, such as Hong Kong and Singapore.[4] The International Council for Commercial

[1] *See* STEFAN KRÖLL, JULIAN D.M. LEW & LOUKAS A. MISTELIS, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 11-4 (2003); SAM LUTTRELL, BIAS CHALLENGES IN INTERNATIONAL ARBITRATION: THE NEED FOR A "REAL DANGER" TEST 19 (2009).

[2] The ICCA-Queen Mary Task Force, International Council for Commercial Arbitration and Queen Mary University of London, Report on Third-Party Funding (2018) [hereinafter ICCA-Queen Mary Report on Third-Party Funding], *available at* https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf.

[3] IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard 6 (2014), *available at* https://www.ibanet.org/Document/Default.aspx? DocumentUid=e2fe5e72-eb14-4bba-b10d-d33dafee8918.

[4] *See*, *e.g.*, Hong Kong Arbitration Ordinance ch 690, part 10A, *available at*

Arbitration (ICCA) and the Queen Mary University of London also made a report on third-party funding in April 2018.[5]

The development of international commercial arbitration in more recent years, however, is not confined to existing and increasingly-used trade practices such as third-party funding. A significant question mark rests with the exponential growth of technology cementing itself into the legal profession.[6] Some predictive justice tools are being developed and marketed to third-party funders,[7] and astoundingly, there are records of predictive justice tools being used in cases by decision-makers.[8]

Predictive justice tools are designed to be impartial and independent.[9] Yet, would an arbitrator that uses a predictive tool on the subject matter of the case be impartial, if finding the opposite for the case as to what the technology had suggested? If an arbitrator's decision reflects the same as a predictive justice tool, does it render an arbitrator susceptible to contests as to his or her independence? Could the use of predictive justice tools by third-party funders or parties also affect an arbitrator's duty?

This paper aims to discuss the use of predictive justice tools in international commercial arbitration. Firstly, it will focus on the effects on an arbitrator's usage of predictive tools and how it affects his or her impartiality and independence. Secondly, it will examine the duty of a third-party funder or a party that uses predictive tools in the context of an arbitrator's impartiality and independence.

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https://www.elegislation.gov.hk/hk/cap609; Singapore Legal Profession (Professional Conduct) (Amendment) Rules 2017, *available at* https://sso.agc.gov.sg/sL-supp/s69-2017/.

[5] ICCA-Queen Mary Report on Third-Party Funding, *supra* note 2.

[6] ICC Commission Report, Information Technology in International Arbitration (2017), *available at* https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-information-technology-in-international-arbitration-icc-arbitration-adr-commission.pdf.

[7] *Predictive justice: when algorithms pervade the law*, Paris Innovation Review (June 9, 2017), *available at* http://parisinnovationreview.com/articles-en/predictive-justice-when-algorithms-pervade-the-law.

[8] State of Wisconsin v. Loomis, 881 N.W.2d 749 (Wis. 2016), cert. denied, 137 S.Ct. 2290 (2017).

[9] Carin Devins et al., *The Law and Big Data*, 27 CORNELL J.L. & PUB. POL'Y 357, 365 (2017).

Finally, the necessity of regulating the use of predictive tools within international commercial arbitration will be explored.

II. EMERGING USE OF PREDICTIVE TOOLS IN INTERNATIONAL COMMERCIAL ARBITRATION

A. *Predictive Tools*

Any reference to *predictive justice tools* in this paper means: any mechanism and associated algorithms that utilise predictive analytics or artificial intelligence or machine learning to predict the result of any given dispute, or any associated information.

It is important to note that the technology discussed in this paper is not a product of science fiction and is already in existence. One of the most significant emerging technology products in international commercial arbitration is Dispute Resolution Data. The company shares a partnership with arbitral institutions that provide arbitration-specific data analytics from 136 nations worldwide. Notably, the product is spearheaded by a previous American Arbitration Association (AAA) head and is supported by experts globally.[10]

Other ventures engage in data mining aimed at uncovering patterns from decision-makers' rulings to location-based outcomes on cases and can even reveal connections of individuals involved in a matter.[11]

Supporters of predictive justice tools voice greater transparency and strengthening the consistency of case law with the aim to enhance the objectivity of judicial decisions and thereby reduce the risk of bias and error.[12]

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[10] Karen Maxwell, *Computer says no: data analytics in arbitration*, THOMSON REUTERS PRACTICAL LAW ARB. BLOG (Feb. 9, 2018), *available at* http://arbitrationblog.practicallaw.com/computer-says-no-data-analytics-in-arbitration/; *see also* Dispute Resolution Data, *available at* http://www.disputeresolutiondata.com/.

[11] Jnana Settle, *Predictive Analytics in the Legal Industry: 10 Companies to Know in 2018*, DISRUPTOR DAILY, *available at* https://www.disruptordaily.com/predictive-analytics-legal-industry-10-companies-know-2018/.

[12] Council of Europe, European Commisson for the Efficiency of Justice, Guidelines on how to drive change towards Cyberjustice (2017), at 51, *available at* https://edoc.coe.int/en/module/ec_addformat/download?cle=21e8cadba9839cd22bc295

III. THE USE OF PREDICTIVE JUSTICE TOOLS BY AN ARBITRATOR

There is a dual requirement for arbitrators to remain independent and impartial in international commercial arbitration.[13] This duty begins from his or her nomination and lasts throughout the entirety of an arbitral proceeding.[14]

Impartiality refers to the absence of bias,[15] while independence refers to an arbitrator's freedom to come to a decision on the subject matter without influence from any other party.[16] Deemed as a cornerstone of international commercial arbitration, impartiality and independence of decision-makers preserve public confidence in a fair outcome in proceedings.

The use of predictive justice tools, however, puts into question an arbitrator's ability to remain both impartial and independent. Take for example an arbitrator that uses a predictive justice tool to come to a decision in a proceeding. A predictive justice tool may find in favour of one party through analysing the outcomes of similar cases, or an arbitrator's own prior findings for specific cases. Should an arbitrator find similarly to the result chosen by the predictive justice tool used, it may implicate two inferences. First, an arbitrator may not be biased because his or her decision is supported by the outcome predicted by a tool designed to be objective. Even in this case, an arbitrator may still not fulfil the dual requirement of independence and impartiality as it may imply a lack of independence in coming to a decision assisted by a predictive justice tool. Second, and contrary to the first inference, an arbitrator may be biased because it may indicate an arbitrator's fixed disposition in the matter given his or her prior decisions in similar cases.

97866632e3&k=6e69f056a495f510c36bcf01d3efd3e7.

[13] KRÖLL ET AL., *supra* note 1, at 11-5.

[14] *See* UNCITRAL Arbitration Rules (1976), arts. 11, 12.

[15] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1776-1777 (2nd ed. 2014).

[16] JONAS VON GOELER, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION AND ITS IMPACT ON PROCEDURE 256 (2016).

On one hand, the use of predictive justice tools can provide greater transparency that commentators and scholars have long been encouraging.[17] This trend is evident from the 2014 overhaul of IBA Guidelines that is designed to be reflective of best practices given today's landscape. On the other hand, it's use may prevent the fulfilment of an arbitrator's duty to be independent and impartial.

There is no known international regulation governing the use of predictive tools by arbitrators, parties or third-party funders. The use of predictive tools, however, is emerging and establishing itself, especially in Europe. The Council of Europe comprising 47 countries are engaged in debates in the reform of the function of judicial systems through the use of predictive justice and artificial intelligence.[18]

As a logical consequence, the use of predictive tools will influence the already increasing number of challenges brought forward against arbitrators, the duty to make disclosures, and the duty to perform investigations in relation to potential or actual conflicts.

A. *Challenges to Arbitrators*

There are particular difficulties in challenging arbitrators. One of the most pressing difficulties is the standard to be used in determining the challenge and whether an arbitrator should recuse from or be disqualified from serving on an arbitral tribunal.

1. Lack of Independence

An arbitrator may be challenged on whether he or she has relationships that can affect his or her capacity as an arbitrator.[19] A reasonable standard test is used to assess an arbitrator's independence.[20]

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[17] *See, e.g.*, Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 U. KAN. L. REV. 1301 (2006).

[18] Stéphane Leyenberger, *Justice of the future: predictive justice and artificial intelligence*, 16 CEPEJ NEWSLETTER (2018), *available at* https://rm.coe.int/newsletter-no-16-august-2018-en-justice-of-the-future/16808d00c8.

[19] VON GOELER, *supra* note 16, at 253-255, 266-78.

[20] BORN, *supra* note 15, at 1762-1782.

2. Partiality

Partiality, on the other hand, requires a more subjective examination into an arbitrator's mind.[21] Jurisdictions around the world adopt different standards of bias in determining the challenge of an arbitrator.[22] A challenging party may prefer a challenge based on a standard that merely requires an *apprehension of bias* in order to preserve the integrity of the arbitral tribunal.[23] On the other hand, a non-challenging party may prefer a challenge to be decided on a standard for bias such as *a real possibility of bias* to give way to commercial reality.[24]

There are also examples of when a country applies differing standards of bias within its own jurisdictions. For example, the United States does not have a singular standard for partiality.[25] The Second Circuit requires *evident partiality*, whereas the Ninth Circuit adopted a lower threshold of an *impression of possible bias*.[26] In England and Australia, there has been a movement from applying the lower threshold of a *reasonable appearance of bias*, to the *real danger* or *real possibility of bias* in recent

[21] *Id.* at 1775-1776.

[22] *See generally* SAM LUTTRELL, BIAS CHALLENGES IN INTERNATIONAL ARBITRATION: THE NEED FOR A "REAL DANGER" TEST (2009).

[23] R v. Sussex Justices, Ex parte McCarthy, [1924] 1 KB 256, [1923] All ER Rep 233; IBA Guidelines, *supra* note 3, at Explanation to General Standard 2(b); *see also* Country X v. Co. Q, Challenge Decision of 11 January 1995, ICCA Yearbook Commercial Arbitration, Volume XXII (1997); Gallo v. Government of Canada, Permanent Court of Arbitration, Decision on the Challenge to Mr J Christopher Thomas QC, ¶ 19 (Oct. 14, 2009), *available at* https://www.italaw.com/sites/default/files/case-documents/ita0352.pdf.

[24] ASM Shipping Ltd v. TTMI Ltd of England, [2006] 1 Lloyd's Rep 375; LCIA Court Decisions on Challenges to Arbitrators, Case Reference No UN3490, Oct. 21, 2005; A v. B & X [2011] EWHC (Comm) 2345.

[25] Gary Born, *The Different Meanings of an Arbitrator's "Evident Partiality" Under U.S. Law*, THOMSON REUTERS PRACTICAL LAW ARB. BLOG (Mar. 20, 2013), *available at* http://arbitrationblog.kluwerarbitration.com/2013/03/20/the-different-meanings -of-an-arbitrators-evident-partiality-under-u-s-law/.

[26] *See, e.g.*, Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Ben. Funds, 748 F.2d 79, 82 (2d Cir. 1984); Schmitz v. Zilveti, 20 F.3d 1043, 1046 (9th Cir. 1994).

years.[27] Many arbitration laws and civil law jurisdictions apply a *justifiable doubts of bias* ('justifiable doubts') test.[28]

Notably, there is some blurring between the *real possibility of bias* test and the *justifiable doubts* test.[29] For example, the English arbitration legislation applies a *justifiable doubts* test, but the removal of an arbitrator is assessed based on the real possibility of bias.[30] Similarly, a leading UNCITRAL rules Challenge Decision that applies a justifiable doubts test still requires that doubts be so serious to warrant a removal of an arbitrator.[31] Another way of reconciling the two different standards in the context of the English arbitration legislation and the UNCITRAL rules is that a challenge to an arbitrator requires justifiable doubts but that removal requires a more serious threshold.

The different standards of bias reflect the tension between a party's right to appoint its own arbitrator, and the commercial reality of a small business community of arbitrators within it. This tension emphasises that there is a thin line between a party's rightful preference for an expert arbitrator and the preservation of the integrity of an arbitral tribunal. For example, a party may choose an expert of many years in the field that is in dispute to ensure that their side to the dispute is given adequate voice, and consideration by the tribunal.[32] According to a leading commentator, to require complete impartiality is to deny an arbitrator the benefit and insight of his or her experiences, as well as human decision-making.[33] The danger

[27] LUTTRELL, *supra* note 24, at 164-173.

[28] *See* Seung-Woon Lee, *Arbitrator's Evident Partiality: Current U.S. Standards and Possible Solutions Based on Comparative Reviews*, 9 ARB. L. REV. 159 (2017).

[29] BORN, *supra* note 15, at 1778; *see also* LCIA Challenge Decisions, *supra* note 23; KAREL DAELE, CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION 243 (2012).

[30] Arbitration Act 1996 (UK) c 23, s 24(1)(a).

[31] *Country X v. Co. Q*, *supra* note 22; DAVID CARON & LEE CAPLAN, THE UNCITRAL ARBITRATION RULES: A COMMENTARY 208 (2nd ed. 2013).

[32] James Crawford, *The Ideal Arbitrator: Does One Size Fit All*, 32 AM. U. INT'L L. REV. 1003 (2017); CARON ET AL., *supra* note 31 at 209.

[33] CATHERINE A. ROGERS, ETHICS IN INTERNATIONAL ARBITRATION 313-315 (2014).

to an arbitrator, however, is exhibiting a predetermined view on the dispute without full consideration of its merits.

Gary Born has argued that there has been an increase in challenges since the IBA Guidelines were first adopted in 2004.[34] This finding provides a possible indication that challenges are increasingly being used as a tactic in international commercial arbitration, or that business environments are shifting in a way that significantly affects international commercial arbitration. It is also possible that these indications combined with the lack of consensus between arbitration users as to a prevailing standard of challenges is at the heart of the issue.

The rise of third-party funding is an example of a business environment shift in recent years that has had a profound effect on international commercial arbitration. It highlighted the lack of consensus on a prevailing standard of challenges, and renewed discussions on the possible use of challenges as an expensive delay tactic in arbitration.[35] While some sort of understanding has been achieved through the increasing preference for arbitrators and parties to make disclosures,[36] the business environment is once again shifting.

The emergence of predictive justice tools within the legal profession is another business environment shift that will undoubtedly affect international commercial arbitration. As exemplified earlier in this paper, the effect of the mere use of predictive justice tools puts into question an arbitrator's impartiality and independence even more directly than third-party funding. It is not far-fetched to conclude that an arbitrator's use of predictive justice tools can result in more challenges, thereby putting into question the trust placed by users of arbitration within the institution of arbitration itself.

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[34] BORN, *supra* note 15, at 1859.

[35] ICCA-Queen Mary Report on Third-Party Funding, *supra* note 2; *see also* CARON ET AL., *supra* note 31, at 271-272; BORN, *supra* note 15, at 1916; Mark Baker & Lucy Greenwood, *Are Challenges Overused in International Arbitration?*, 13 J. INT'L ARB. 101-102 (2013).

[36] ICCA-Queen Mary Report on Third-Party Funding, *supra* note 2; IBA Guidelines, *supra* note 3.

Loomis v. Wisconsin[37] highlights the possible impact of using a predictive justice tool on a party's right to due process and a fair proceeding. Although this case originated in a criminal law context, the concept of fairness is inherently entrenched in all legal proceedings. As a result, it confers inferences as to how predictive justice tools can affect international commercial arbitration.

In *Loomis*, the applicant sought to have the Wisconsin Supreme Court ruling in *State v. Loomis* to be overturned on the basis of a breach of due process. A risk-assessment software was used by a judge who cited the software's finding in sentencing. The court noted that proper use of the assessment does not violate due process.[38] The United States Supreme Court declined to hear the petition.[39]

At first glance, the use of a predictive justice tool in *State v. Loomis* raises questions as to a decision-maker's independence. Did the court employ its own legal expertise in coming to the decision or did it rely on more than its own expertise? As mentioned earlier in this paper, an objective test is applied in determining whether an arbitrator is lacking independence in international commercial arbitration.[40] With the use of predictive justice tools there may be cases, however, where an arbitrator's intention in using predictive tools will be relevant, and a subjective inquiry into the mind of an arbitrator may be required. The timing of use may also be a factor to consider.

There may be arbitrators that use predictive justice tools out of mere curiosity but using predictive justice tools before coming to a decision may bring to question an arbitrator's impartiality and independence. There may also be arbitrators that use predictive justice tools to strengthen the conclusion they have come to, but if the predictive justice tool produces a different outcome than what an arbitrator originally determined, an arbitrator's impartiality and independence may still be open to

[37] Loomis v. Wisconsin, U.S. Supreme Court, Case No. 2015AP157-CR (2017), *available at* https://www.supremecourt.gov/docketfiles/16-6387.htm.

[38] *State of Wisconsin v. Loomis*, *supra* note 8.

[39] *Loomis*, *supra* note 38.

[40] BORN, *supra* note 15, at 1775-1777.

challenge. Finally, there can be arbitrators like the decision-maker in *State v. Loomis* who use predictive justice tools to come to a decision. As an arbitrator's degree of dependence on using a predictive justice tool in coming to a decision increases, the more likely he or she will be challenged.

B. *What is an Arbitrator's Duty to Make Disclosures?*

The duty of arbitrators to disclose circumstances that may give rise to doubts as to his or her impartiality and independence underpins the requirement of arbitrators to remain impartial and independent.[41]

Disclosure is a requirement whenever circumstances may give rise to doubts as to an arbitrator's impartiality or independence.[42] It enables parties to challenge arbitrators to preserve the integrity of an arbitral tribunal should there be any circumstances that will put into question an arbitrator's impartiality or independence.

C. *Does an Arbitrator have a Duty to Investigate Conflicts?*

Just as disclosure is inherently linked to a challenge of an arbitrator, investigations are linked to making the necessary disclosures relating to actual or potential conflicts to an arbitrator's impartiality or independence.

While there have been cases where an arbitrator's failure to investigate conflicts has not given rise to a successful challenge,[43] there is now an internationally accepted recommendation that an arbitrator need to at least turn his or her mind to a conflict.[44] According to the IBA Guidelines, the failure to investigate conflicts is not a

[41] DAELE, *supra* note 29, at 54; Cour d'Appel de Paris [Paris Court of Appeal], Apr. 12, 2016, JP & Avax v. Tecnimont; Burcu Osmanoğlu, *Third-Party Funding in International Commercial Arbitration and Arbitrator Conflict of Interest*, 32(3) KLUWER L. INT'L 325 (2015).

[42] *See e.g.*, UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments, art. 11.

[43] ConocoPhillips Co. et al. v. Bolivarian Republis of Venezuela, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (Feb. 27, 2012); s*ee also* IBA Guidelines, *supra* note 3.

[44] *See JP & Avax v. Tecnimont*, *supra* note 42; *see also* IBA Guidelines, *supra* note 3, at General Standard 7(d).

determinative factor in removing an arbitrator, but it is a factor to consider in a challenge. From a practical standpoint, however, a failure to investigate can lead to a failure to make proper and necessary disclosures that can ultimately result in the disqualification of an arbitrator.[45]

1. How far does a duty to investigate conflicts extend?

Regarding the use of predictive justice tools, a question then arises as to whether an arbitrator has a duty to investigate the use of predictive justice tools by his or her nominating party, and any third-party funder involved with his or her nominating party.

The IBA Guidelines does not excuse the lack of knowledge of an arbitrator in relation to potential or actual conflicts.[46] Inquiries made by an arbitrator, however, is confined within reasonableness,[47] as it is accepted that an arbitrator's perspective has limitations.[48] It becomes increasingly difficult in a scenario where an arbitrator turns his or her mind to the possible conflict of an involved third-party funder's use of predictive justice tools as third-party funding details are inherently confidential. An arbitrator who prudently makes inquiries may therefore not necessarily become privy to the use of predictive justice tools by his or her nominating party or any third-party funder that is involved.

Should an arbitrator obtain information as to the use of predictive justice tools by his or her nominating party or an involved third-party funder, disclosures are not necessarily required. Take for example an arbitrator who has knowledge about the use of a predictive tool by his or her nominating party. This does not automatically place doubts as to the arbitrator's impartiality or independence, unless the arbitrator also has knowledge of the determination put forward by any predictive justice tool utilised. If an arbitrator was to make an investigation only on the use of predictive

[45] *See JP & Avax v. Tecnimont*, *supra* note 42.

[46] IBA Guidelines, *supra* note 3, at General Standard 7(d).

[47] KRÖLL ET AL, *supra* note 1, at 268.

[48] VON GOELER, supra note 16, at 5.

justice tools but not on the outcome produced by such tools, an arbitrator may not need to make a disclosure. An arbitrator, however, may still invite a challenge by shutting his or her eyes as to the possible conflict arising from the determination of predictive justice tools.[49] This places an arbitrator in a lose-lose situation in which doubts may emerge whether present disclosure and investigation requirements are fulfilled or not.

IV. THE USE OF PREDICTIVE TOOLS BY PARTIES AND THIRD-PARTY FUNDERS

As far as this author is aware, there is currently no obligation on third-party funders to disclose how they conduct their business even if it can directly or indirectly result in doubts as to an arbitrator's impartiality or independence.

There is, however, a recommendation for a nominating party to inform an arbitrator, the arbitral tribunal and other parties and arbitration institutions of relationships that may result in conflict.[50] In addition, leading seats of arbitration such as Singapore and Hong Kong have incorporated disclosure obligations in their respective legislation or professional conduct rules, affirming the international preference for disclosure.[51] Notably, the Legal Profession (Professional Conduct) Rules 2017 requires lawyers involved in the relevant proceeding to disclose the existence of funding arrangements, while the Hong Kong Arbitration Ordinance requires parties to make disclosures. These regulations do not, however, extend to the use of predictive justice tools, and instead refer to relationships or otherwise focus on funding arrangements. It appears, therefore, that there is no requirement or recommendation to disclose an emerging use of predictive justice tools that, concerningly, can impact an arbitrator's duty to remain impartial and independent more directly than third-party funding could.

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[49] STEWART ABERCROMBIE BAKER & MARK DAVID DAVIS, THE UNCITRAL ARBITRATION RULES IN PRACTICE: THE EXPERIENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL 50 (2012).

[50] IBA Guidelines, *supra* note 3, at General Standards 7(a), 7(b).

[51] Singapore Legal Profession Rules, *supra* note 4; Hong Kong Arbitration Ordinance, *supra* note 4.

Pursuant to a recommended wide-reading of the IBA Guidelines,[52] if the term "relationships" can somehow encompass a licensing agreement or any other agreement that allows a party the use of predictive justice tools, then parties' use or knowledge of use may fall under the ambits of the current disclosure framework. The expansion of the term "relationship," in the IBA Guidelines however, may still be inadequate to provide a guidance in the use of predictive justice tools because "relationships" typically refer to connections between one legal person to another, or other business entities.[53]

A. *Predictive Justice Tools and its Impact on Disclosure Obligations*

As a result of technology pinpointing the most appropriate decision-maker to preside over an arbitration as a result of relevant historical awards made,[54] international commercial arbitration may witness an increase in repeat appointments.

Repeat appointments may be rendered an issue because a challenging party "may be concerned about the real motives behind the repetition."[55] On the other hand, repeat appointments are usually a result of an arbitrator's qualities and experience in the field that makes an arbitrator desirable without giving rise to dependence or partiality.[56] Repeat appointments are ideally assessed on a two-tiered basis.[57] Firstly, quantitatively through the number of appointments made within a specific period of time, and secondly, qualitatively through the factors that led to the repeat appointments.

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[52] IBA Guidelines, *supra* note 3, at General Standards 19, 20.

[53] *See* BORN, *supra* note 15 at 1767-1776, 1834-1850.

[54] *See* SETTLE, *supra* note 11.

[55] ALFONSO GOMEZ-ACEBO, PARTY-APPOINTED ARBITRATORS IN INTERNATIONAL COMMERCIAL ARBITRATION 114, 5-44 (2016).

[56] BORN, *supra* note 15, at 1882.

[57] JAN PAULSSON & GEORGIOS PETROCHILOS, UNCITRAL ARBITRATION 80 (2017); Will Sheng & Wilson Koh, *Think Quality and Not Quantity: Repeat Appointments and Arbitrator Challenges*, 34(4) J. INT'L ARB. 711 (2017). *See also* Cofely Ltd. v. Anthony Bingham & Knowles Ltd [2016] EWHC 240.

The IBA Guidelines propose that a quantitative approach does not necessarily result in disqualification, but is still assessed on a case-by-case basis.[58] There are a number of cases that are able to assist in determining a quantitative threshold, but such thresholds remain different from one case to another.[59] Some can be distinguished on available facts,[60] but with others, only excerpts are available from otherwise confidential proceedings.[61]

Repeat appointments were at issue in the case of *CC/Devas v. India.*[62] The challenged arbitrator was recused because the arbitrator cited his own previous standing in cases he has sat in as the president of those arbitral tribunals. The use of predictive justice tools that specialise in pinpointing the most appropriate arbitrator based on an arbitrator's historical findings in similar cases can therefore prove problematic. The distinguishing difference between an arbitrator who cites his or her own standing in previous cases and a predictive justice tool is that in the former, an arbitrator expressly confirms the previous standing. Is there, however, a material difference between the two?

Before the advent of predictive justice tools, parties were able to choose the most suitable arbitrator through previous dealings with that arbitrator, or through word of mouth in the business community that arbitrators operate in.[63] After all, the freedom of parties to select their own arbitrator is seen as one of the greatest strengths of arbitration.[64] This manual determination of an appropriate arbitrator may not be any

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[58] IBA Guidelines, *supra* note 3, at General Standards 19, 6.

[59] BORN, *supra* note 15, at 1881-1882.

[60] CC Devas (Mauritius) Ltd., Devas Employees Mauritius Private Ltd. & Telecom Devas Mauritius Ltd. v. The Republic of India, Permanent Court of Arbitration, Decision on the Respondent's Challenge to the Hon. Marc Lalonde and Prof. Francisco Orrego Vicuña, ¶¶ 21, 36, 38, 45, 56, 61 (Sept. 30, 2013), *available at* https://www.italaw.com/sites/default/files/case-documents/italaw3161.pdf.pdf.

[61] BORN, *supra* note 15, at 1881-1882.

[62] *CC/Devas v. India*, *supra* note 61.

[63] UGO DRAETTA, BEHIND THE SCENES IN INTERNATIONAL ARBITRATION 103 (2011).

[64] ROGERS, *supra* note 33, at 323.

different to what a predictive justice tool may conclude. The use of predictive justice tools, just as similarly as an arbitrator that cites his or her previous standing, however, can be an irrefutable indication of partiality that causes tension with fairness in arbitration. In international commercial arbitration, it is accepted that justice must not only be done, but also seen to be done.[65]

The use of predictive justice tools should not be disregarded as it can be beneficial in encouraging transparency within international commercial arbitration. There is presently no prevailing standard in deciding on the recusal of arbitrators, and data analytics may bring the community of international commercial arbitration closer to determining a more unified standard. It may also have the consequential benefit of widening the pool of arbitrators that has traditionally been considered as small.

V. THE NEED FOR REGULATION ON THE USE OF PREDICTIVE JUSTICE TOOLS

In December 2018, the Council of Europe adopted the first European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems ("Ethical Charter").[66] The primary aim of the Ethical Charter is to improve the efficiency and quality of the judicial system while respecting fundamental individual rights, including ensuring impartiality.[67]

The balance that the Ethical Charter tries to strike within national judicial processes should also be adopted within the use of predictive justice tools in international commercial arbitration. While it is important to discuss the impact that predictive justice tools can have on international commercial arbitration, it is just as crucial to examine the present capabilities of such technology to determine the extent of regulation necessary to prevent hindrances to commercial reality.

A. *Predictive Justice Tools Have no Added Effect into Decision-Making*

[65] *Sussex*, supra note 22, at 259.

[66] Council of Europe, European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems (2018), *available at* https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c.

[67] *Id.* at 9.

The French Ministry of Justice deployed test projects to determine whether technology by a French start-up, Predictice, could benefit the courts.[68] Predictice uses data analytics to assess historical litigation data in order to provide predictive insight in current cases. The French State's magistrates, however, found that the software did not presently provide additional value to their decision-making capabilities.

In relation to an arbitrator's impartiality and independence, the case study conducted by the French Ministry of Justice is evidence that the use of predictive justice tools does not necessarily materially affect decision-making in the present. As a result, the use of predictive justice tools should not automatically result in doubts as to an arbitrator's impartiality or independence. Predictice, however, is one technology out of the many that is undergoing continuous development. The finding of the French Ministry of Justice portrays the need to scrutinise not only the intention behind the use of a predictive technology and the timing of the use of such technology, but also the aims of the technology that has been used.

B. *Predictive Justice Tools Carry Forward Bias*

It has been contended that nominated arbitrators can act as legal translators, sympathetic to the arguments of his or her nominating party,[69] and that they are not expected to be completely impartial.[70] Even if this kind of flexibility on impartiality is permitted to honour the parties' right to select their own arbitrator, there are notable issues that can be addressed. For example, the lack of gender diversity in international commercial arbitration. Assessing historical data through predictive justice tools may carry forward the permitted impartiality of arbitrators, albeit to the

[68] *French Magistrates See 'No Additional Value' in Predictive Legal AI*, ARTIFICIAL LAWYER, Oct. 13, 2017, *available at* https://www.artificiallawyer.com/2017/10/13/french-justice-ministry-sees-no-additional-value-in-predictive-legal-ai/.

[69] CRAWFORD, *supra* note 32, at 1003.

[70] ROGERS, *supra* note 33, at 323.

exclusion of a wider perspective brought about by gender diversity that is currently lacking in international commercial arbitration.[71]

Ultimately, and in reference to the earlier discussion on repeat appointments, predictive justice tools may provide clarity as to when repeat appointments breach an arbitrator's duty to remain impartial and independent. As a result, it may encourage more gender-diverse appointments that will lengthen the current short-list of expert arbitrators available to arbitration users.

C. *The Present Legal Environment*

The Ethical Charter that has recently been adopted is a useful and necessary reminder of the importance of using such technology to encourage efficiency and transparency while upholding impartiality and fairness.

Existing frameworks within international commercial arbitration that attempt to address conflicts to an arbitrator's impartiality and independence, or on the use of predictive justice tools in the legal profession are, however, presently inadequate in light of emerging technologies. As predictive justice tools continue to develop, and as the international commercial arbitration community increasingly adopts such technology, clearer standards are required on its use by arbitrators, parties and any involved third-party funders.

Predictive justice tools are not created equal. Some are created to assist, and some are created to confer judgments just like human decision-makers do but faster. The development of regulations should consider an overhaul of (1) the method by which independence is assessed and (2) disclosure obligations for both arbitrators and parties.

1. The Method by which Independence is Assessed

The present method of assessing independence through relationships require expansion into all external influences to an arbitrator. With the emergence of

[71] F. Peter Phillips, *Diversity in ADR: More Difficult to Accomplish Than First Thought*, 15(3) DISPUTE RESOLUTION MAGAZINE 14 (2009); F. Peter Phillips, *It Remains a White Male Game*, Intenational Inst. for Conflict Prevention & Resolution, Nov. 27, 2006, *available at* http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/90/categoryId/86/It-RemainsA-White-Male-Game-NLJ.aspx.

predictive justice tools, factors that can influence an arbitrator's decision-making now extend beyond traditional relationships with legal persons and other business entities.

Now that law firms are beginning to develop their own technology,[72] a wider-reading of "relationships" pursuant to the IBA Guidelines would be inadequate. The technology would remain in-house with no relationship to refer to. A possible solution is to refer to "connections" instead of "relationships" as it can encompass a broader definition that includes a connection or a link between a user and the technology through the act of using predictive justice tools.

The present objective assessment of independence may become more akin to the way impartiality is assessed. While impartiality is assessed subjectively by peering into the mind of an arbitrator, it is also examined objectively based on observable indications of partiality.[73]

The type of predictive justice tool and its intended legal solution, together with the arbitrator's intention of using such technology and the timing of use of that technology, are factors that will require consideration. This proposed assessment extends beyond looking at factual connections and delves into a subjective assessment into the mind of an arbitrator through observable indications of a connection through the usage of predictive justice tools. Notably, this is similar to the way impartiality is now assessed.

Although the distinction between impartiality and independence has been given weight,[74] the advent of predictive justice tools and its impact may result in a standard assessment that involves both subjective and objective elements.

2. Disclosure Obligations for both Arbitrators and Parties

Arbitrators may face a lose-lose situation where they may be found in conflict by having knowledge of the determinisation of a predictive justice tool on the outcome

[72] Reena Sengupta, *Lawyers are finally converts to technology*, THE FINANCIAL TIMES, Oct. 6, 2016, *available at* https://www.ft.com/content/c00f6598-83f3-11e6-8897-2359a58ac7a5.

[73] BORN, *supra* note 15, at 1776-1777.

[74] *Id.*

of a proceeding they are involved in, or by investigating a nominating party's use of predictive justice tools but not the outcome determined by the technology.

Rogers argues, however, that more transparency in arbitration through disclosures may result in an initial increase in challenges followed eventually by a decrease in challenges as standards of recusing arbitrators become clearer.[75] While challenges can delay arbitral proceedings and impose unnecessary costs,[76] delay is not seen as an insurmountable barrier in upholding an impartial and independent tribunal.[77] In encouraging disclosures, the expansion of "independence" to "connections" that can encompass the use of predictive justice tools is also beneficial to disclosure standards that presently refer to "relationships."[78] Nevertheless, the quickly evolving nature of technology may require new standards each time it progresses, creating the possibility of a constant stream of challenges that address the evolving functionality of predictive justice tools.

VI. CONCLUSION

As technology progresses and entrenches itself in international commercial arbitration, the current frameworks that uphold procedural fairness need to correspondingly develop. To maintain existing frameworks as they are presently is to invite a new grey area for arbitrators and parties as to the extent of investigation and disclosure necessary in order to fulfil their duties.

The international commercial arbitration community is likely to benefit from first standardising thresholds in the challenge of arbitrators to prepare itself for potential changes in the way an arbitrator's impartiality and independence is assessed. These potential changes may also lead to another standardisation by harmonising the tests that evaluate an arbitrator's impartiality and independence.

As the new Ethical Charter emphasises, the adoption of legal technology is to ultimately encourage efficiency and transparency while maintaining impartiality and

[75] *See* ROGERS, *supra* note 17.

[76] BORN, *supra* note 15, at 1916.

[77] KRÖLL ET AL., *supra* note 1, at 10-52.

[78] *See, e.g.*, IBA Guidelines, *supra* note 3.

fairness in decision-making. Embracing predictive justice tools may just provide a prevailing standard in challenges to an arbitrator's impartiality and independence, and perhaps even encourage a more diverse pool of arbitrators that will contribute a wider perspective to the community of international commercial arbitration.

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