A new beginning – artificial intelligence and arbitration

By Philippe Billiet, Filip Nordlund

Artificial intelligence ["**AI**"] has been one of the most frequently discussed topics in the legal field around the world, and in the Republic of Korea ["**Korea**"], during 2017. Indeed, Sophie Nappert delivered a speech on AI and its impact on international arbitration during the 6th Asia Pacific ADR Conference in Seoul and it was a featured topic during the 25th Conference for International Association for Korean Lawyers.

AI, as a concept and technology, has been around for decades, but it was only recently it gained traction within the legal field. An AI technique called "natural language processing" has been developed and has proven to be very proficient in scanning and examining documents. This technique has created a wide range of programs that can sift through large quantities of documents, find relevant passages and analyze them with striking results. "Kira", a program that helps lawyers review contracts, reduces the time a lawyer has to spend on contract review by 20 to 60 percent. And Ross Intelligence, has developed a legal memo service that is able to answer a legal question within a day with a few paragraphs summarizing the answer in addition to a two-page explanatory memo.

Dispute resolution in general, and arbitration in particular, has long been considered outside the purview of AI. This has been partly due to the arbitration community's hesitance to introduce new procedures for the fear that it could lead to challenges in public courts at the enforcement stage, and partly due to the skillset required in and the nature of arbitration. Advocacy requires, among other things, judgment, which machines have lacked. But with the development of natural language processing, that may no longer be the case.

1. AI and Arbitration

The potential use for AI in arbitration is endless, but one the most interesting, and controversial, applications would be as an arbitrator, i.e. machine arbitration. Instead of choosing an arbitrator on the basis of nationality, technical know-how and legal expertise, parties would choose a software program. This machine would have the requisite knowledge as specified by the parties and be able to understand an argument, ascertain facts and determine the applicable law while remaining independent and impartial.

Now, the technology is not yet here, but in the not too distant future it might very well be. Computers are currently doing the job of white-collar professionals with distinction, notably the Watson computer, which can be used to diagnose lung cancer.

Understandably, the prospect of machine arbitration raises a multitude of questions. The main question being whether it would be legally possible in the current legal framework? At the outset it should be noted that the vast majority of national laws do not expressly prohibit the appointment of a machine arbitrator, however, neither do they explicitly permit it. One exception is France, where "[o]nly a natural person having full capacity to exercise his or her rights may act as an arbitrator."[1] Most national laws governing

1) Decree No. 2011-48 of 13 January 2011, Reforming the law governing arbitration, article 1450.

arbitration contain an implicit assumption that the arbitrator should be human. The English Arbitration Act 1996 deals with the situation if an arbitrator were to die and the Egyptian Arbitration Law No. 27 of 1994 provides that an arbitrator cannot be a minor, bankrupt or subject to any incapacity.

Korea, having an arbitration act largely based on 1985 UNCITRAL Model Law with amendments from the 2006 Model Law, does not contain a provision either expressly prohibiting or permitting machine arbitration. Korea's Arbitration Act art. 3.3 defines an "arbitral tribunal" as "a single arbitrator or a panel of arbitrators who conduct arbitral proceedings and make arbitral awards." Given Korea's pro-arbitration judiciary and current push to establish itself as an international arbitration hub, it is interesting to explore whether or not machine arbitration would be permissible according the rules and regulations governing arbitration in Korea.[2)]

2. Machine arbitration in Korea

Imagine two parties, Party A and Party B, entering into a contract for the sale and purchase of goods containing a dispute clause, clause 10, stipulating the following:

1. Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.
2. The governing law of the arbitration agreement shall be Korean law.
3. The number of arbitrators shall be one.
4. The sole arbitrator shall be Machine Arbitrator X.
5. The seat, or legal place, of arbitral proceedings shall be Seoul, the Republic of Korea.
6. The language to be used in the arbitral proceedings shall be English.

Eventually a dispute arises and Party A submits a request for arbitration. Party B, however, refuses to recognize the arbitration agreement and seeks to resolve the dispute in a Korean court. Party A raises a plea for the existence of an arbitration agreement and urges the court to reject Party B's action.

2.1 Would the Korean courts enforce the arbitration agreement?

The Korean Arbitration Act art. 9 holds that "[a] court before which an action is brought in a matter which is the subject of arbitration agreement shall, when the respondent raises a plea for the existence of arbitration agreement, reject the action: [p]rovided, [t]hat this shall not apply in cases where it finds that such arbitration agreement is *null and void, inoperative or incapable of being performed*" (emphasis added).

In order to address whether or not the arbitration agreement is null and void, inoperative or incapable of being performed, it must first be established that the dispute clause does in fact fall under the Korean Arbitration Act's definition of an "arbitration agreement" in art. 3.2 and fulfills the requirements in art. 8, thereby waiving the parties' right to have the issue resolved in court. Art. 3.2 defines an "arbitration agreement" as an "agreement between the parties to settle, by arbitration, all or some disputes which have already occurred or might occur in the future with regard to defined legal relationships, whether contractual or not". And art. 8 stipulates, among other things, that an arbitration agreement shall be in writing and may be in the form of an arbitration clause in a contract. The arbitration agreement, in our example, clearly fulfills the requisites laid out in art. 3.2 and in art. 8, constituting an arbitration agreement and waiving the parties' right to have their disputes resolved in court.

As for the issue of null and void and inoperative, here referring to situations that would have

2) The Promotion of Arbitration Industry Act.

compromised the validity of the contract, the answer is no. In our hypothetical example, no such situations have transpired. Regarding the capability of performing the arbitration agreement not much can be said. Assuming, as we are, that the machine arbitrator, Arbitrator X, exists and is available, the arbitration agreement should be capable of being performed.

Consequently, the answer seems to be that the Korean courts would enforce the arbitration agreement.

Party B may however refuse to honor the resulting award and seek to have the award set aside in court.

2.2 Would the Korean courts recognize and enforce the arbitral award?

Art. 38 provides that arbitral awards made in Korea shall be recognized and enforced, unless the arbitration proceedings and/or the award is in violation of art. 36(2)1 and/or 36(2)2. In our example, Subsection 36(2)1(d) and 36(2)2(b) are of particular interest.

Subsection 36(2)1(d) stipulates that an award may be set aside if "[t]he composition of the arbitral tribunal or arbitral proceedings were not in accordance with agreement of the parties, unless such agreement was *in conflict with any mandatory provision of this Act* from which the parties can not derogate, or failing such agreement, were not in accordance with this Act" (emphasis added).

The arbitration tribunal and the arbitral proceedings were, we assume, in accordance with the agreement of the parties, thereby leaving the question whether the arbitration agreement conflicted with mandatory provisions of Korean law.

As previously stated, there are no explicit statutes in Korean law prohibiting a machine arbitrator. There are, however, numerous sections that refer to arbitrators as he or she, as well as to a "person", creating a strong assumption for the arbitrator to be human. In Hong Kong, where the Arbitration Ordinance repeatedly refers to the male pronoun, there is a complimentary Interpretation and General Clauses Ordinance which provides that the masculine gender includes the feminine and neutral genders, whereby, at least on the surface, a machine could be deemed to fall under the pronoun "it", seeing as a machine arbitrator, most likely, would take the pronoun "it".[3] Alas, in Korea, no such regulation can be found. And while the Korean judiciary has, overall, adopted a pro-arbitration approach and previously interpreted the grounds for refusal narrowly, one cannot, regarding such a unique issue, predict with certainty how the courts would come down on the issue.

As for the second potential ground for refusal, subsection 36(2)2(b) regarding public policy, it states that the court may, on its own initiative, set aside an award that "is in conflict with the good morals and other forms of social order of the Republic of Korea."

Korea's courts, being arbitration-friendly, are generally reluctant to refuse enforcement of arbitral awards unless there are substantive reasons. The Supreme Court of Korea has, when deciding whether an award violates public policy, stated, inter alia, that when assessing a public policy challenge, it must take into account not only domestic perception of public policy but also the stability of international commercial transactions and that public policy is only intended to protect the most fundamental moral beliefs and social order in the enforcing country.[4] Now, whether the

3) For additional information on the potential of machine arbitration in Hong Kong, see Jack Wright Nelson, "Machine Arbitration and Machine Arbitrators", *Young ICCA Blog* (10 July 2017) < http://www.youngicca-blog.com/machine-arbitration-and-machine-arbitrators/> Accessed 14 October 2017.

4) Korean Supreme Court Dec. No. 89 Daka 20252, 10 April 1990.

Korean judiciary would consider a machine arbitration award to violate public policy is, of course, unclear.

2.3 Conclusion

It is not evident whether or not machine arbitration would be permissible under Korean law. The issues outlined above will eventually be resolved by relevant statue. Such legislation should, if possible, be comprehensive, and seek to address not only the technical side, e.g. definitions of an arbitral tribunal, but also, the public policy side, e.g. whether or not machine arbitrators is in conflict the good morals and the social order of Korea. Having machines, instead of humans, sit as arbitrators would be a radical development and should be preceded by rigorous and thoughtful analysis.

3. Summary

AI is currently in a disruption phase where legal practitioners are grappling with how AI can be implemented in the practice of law. There are bits and pieces of the legal process that can be replaced by AI but the technology to wholly replace counsel, experts and arbitrators with machines is not yet here. Human judgement and empathy will, for the foreseeable future, remain key features of arbitration, barring machines from replacing humans. Arbitration practitioners are nonetheless well advised to prepare for, and embrace, the changes that AI will bring to the arbitration scene. AI will ultimately enable arbitration practitioners to run cases better, more efficiently and, perhaps, more cost effective.

Philippe Billiet
(Billiet & Co Lawyers)

Philippe Billiet specializes in Alternative Dispute Resolution, EU law & Belgian commercial law. He is a Brussels based lawyer, arbitrator and mediator. He lectures in this field of specialisation at the Brussels VUB university and is vice-president of the Belgian Arbitration Chamber of court experts, member of the advisory board to the Brussels Diplomatic Academy and counsel to the European Freight and Logistics Leaders Forum. He is an accredited arbitrator and mediator at numerous ADR centres worldwide and intervenes in international leading cases and transactions. He is particularly known for his assistance to Sovereigns to avoid escalation and to resolve conflicts that involve economic interests (cfr. economic diplomacy). Philippe edited and published numerous articles, books and chapters on EU and ADR related topics. More information about his work can be found through the following link: https://1drv.ms/f/s!AiBaNBGfHIgnig0yr1UkKji8Cbd8. Philippe can be contacted on Philippe.Billiet@billiet-co.be

Filip Nordlund
(Hong Kong International Arbitration Centre)

Filip Nordlund is an aspiring international arbitration practitioner currently interning at the Hong Kong International Arbitration Centre in Hong Kong. He was previously an intern at the Korean Commercial Arbitration Board in Seoul and at Billiet & Co in Brussels. Filip Nordlund holds a Juristexamen (JD-equivalent) and B.Sc. from Stockholm University.