SILICON VALLEY ARBITRATION & MEDIATION CENTER

GUIDELINES ON THE USE OF ARTIFICIAL INTELLIGENCE IN ARBITRATION

1st Edition 2024

SVAMC Guidelines on the Use of Artificial Intelligence in Arbitration

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Foreword

Since its founding, SVAMC has grown to be the voice of global technology dispute resolution through the collective efforts of SVAMC's Officers and Executive Committee, SVAMC's Tech List and the legion of its tech industry members. The publication of these general principles for the use of AI is a fitting tribute to SVAMC's tenth anniversary and its collective industriousness and dedication to promoting fairness, efficiency and transparency in arbitral proceedings.

I'd like to give special thanks to Sarah Reynolds, my predecessor as CEO, and Gary Benton, the SVAMC founder and former Chair, who initiated the SVAMC AI Guidelines project about a year ago. They recognized that the rising emergence of new AI technologies creates the critical need to harness the power of AI to positively shape the best practices for its use in domestic and international arbitration.

The seemingly daunting project was undertaken by the SVAMC Task Force and its Drafting Subcommittee, consisting of Benjamin Malek (Chair), Orlando Federico Cabrera Colorado, Elizabeth Chan, Dmitri Evseev, Marta Garcia Bel, Sofia Klot, Soham Panchamiya, and Duncan Pickard. The Drafting Subcommittee sought the broadest possible participation of experts throughout the international arbitration community, first by circulating a draft set of the AI Guidelines in August 2023 and then providing a lengthy comment period to December 2023, which was extended to February 2024. We are grateful that we received hundreds of thoughtful comments from arbitrators, corporate parties, advocates, universities, educational and arbitral institutions.

An AI Guidelines Review Committee of respected independent practitioners was established to scrutinize the draft, to review the large volume of revisions suggested during the comment period, and to submit a revised draft of the AI Guidelines for finalisation by the Drafting Subcommittee and the approval of SVAMC's Executive Committee. The AI Guidelines Review Committee worked cooperatively at a steady pace for two months. We thank the Review Committee and the Drafting Subcommittee and appreciate what they have accomplished, which is reflected in numerous substantive changes to the circulated draft.

The SVAMC AI Guidelines will be subject to continuing analysis and review to ensure that future editions adapt to the accelerating changes in the capabilities of artificial intelligence technologies.

Thanks again to all of the dedicated participants in this challenging exercise of thought leadership. We hope that the Model Clause for Inclusion in Procedural Orders will be routinely adopted within the global arbitration community.

Jonathan W. Fitch, *CEO*
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Introduction

These Guidelines on the Use of Artificial Intelligence in Arbitration (the **Guidelines**) introduce a principle-based framework for the use of artificial intelligence (**AI**) tools in arbitration at a time when such technologies are becoming increasingly powerful and popular. They are intended to assist participants in arbitrations with navigating the potential applications of AI.

These Guidelines can be used in domestic or international arbitrations and are meant to serve as a point of reference for arbitral institutions, arbitrators, parties and their representatives (including counsel), experts, and, where relevant, other participants in the arbitral process. To that end, the Guidelines provide a Model Clause that can be incorporated into procedural orders to make the Guidelines applicable to all participants involved in a particular arbitration proceeding.

The Guidelines are prefaced by preliminary provisions that clarify the scope and application of the principles contained herein. The body of the Guidelines is organised into three chapters: one chapter containing Guidelines that generally apply to all participants in the arbitration process, regardless of their role; a second chapter containing Guidelines that address specific uses of AI by parties and party representatives (including counsel); and a third chapter with Guidelines addressing particular considerations that may arise when arbitrators use AI.

In order to ensure that the Guidelines remain up-to-date with the latest advancements in technology, we make it a priority to update them frequently.

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[1] This list represents the members of the SVAMC AI Task Force as of the publication date of the guidelines. For an up-to-date list of members, visit svamc.org.

Preliminary Provisions

Application of the Guidelines

These Guidelines shall apply when and to the extent that the parties have so agreed and/or following a decision by an arbitral tribunal or an arbitral institution to adopt these Guidelines.

Definition of AI

As used in these Guidelines, the term "AI" refers to computer systems that perform tasks commonly associated with human cognition, such as understanding natural language, recognising complex semantic patterns, and generating human-like outputs.

Non-derogation of any mandatory rules

These Guidelines shall not derogate from any legal obligations, ethical duties, or rules of professional conduct, or any other binding rules applicable to the arbitration proceedings or persons participating in them.

Part I: Guidelines for All Participants in Arbitrations

GUIDELINE 1
Understanding the uses, limitations, and risks of AI applications

All participants involved in arbitration proceedings who use AI tools in preparation for or during an arbitration are responsible for familiarising themselves with the AI tool's intended uses and should adapt their use accordingly.

All participants using AI tools in connection with an arbitration should make reasonable efforts to understand each AI tool's relevant limitations, biases, and risks and, to the extent possible, mitigate them.

GUIDELINE 2
Safeguarding confidentiality

All participants in international arbitration are responsible for ensuring their use of AI tools is consistent with their obligations to safeguard confidential information (including privileged, private, secret, or otherwise protected data). They should not submit confidential information to any AI tool without appropriate vetting and authorisation.

Special attention should be paid to policies on recording, storage, and use of prompt or output histories and of any other confidential data submitted to the AI tool. Only AI tools that adequately safeguard confidentiality should be used with confidential information. Participants should assess the data use and retention policies offered by available AI tools and opt for secure solutions.

Where appropriate, participants should redact or anonymise materials submitted to an AI tool.

GUIDELINE 3
Disclosure

Disclosure that AI tools were used in connection with an arbitration is not necessary as a general matter.

Decisions regarding disclosure of the use of AI tools shall be made on a case-by-case basis taking account of the relevant circumstances, including due process and any applicable privilege.

Where appropriate, the following details may help reproduce and evaluate the output of an AI tool:

1.   the name, version, and relevant settings of the tool used;

2.   a short description of how the tool was used; and

3.   the complete prompt (including any template, additional context, and conversation thread) and associated output.

Part 2: Guidelines for Parties and Party Representatives

GUIDELINE 4
Duty of competence or diligence in the use of AI

Party representatives shall observe any applicable ethical rules or professional standards of competent or diligent representation when using AI tools in the context of an arbitration.

Parties shall review the output of any AI tool used to prepare submissions to verify it is accurate from a factual and legal standpoint. Parties and party representatives on record shall be deemed responsible for any uncorrected errors or inaccuracies in any output produced by an AI tool they use in an arbitration.

GUIDELINE 5
Respect for the integrity of the proceedings and the evidence

Parties, party representatives, and experts shall not use any forms of AI in ways that affect the integrity of the arbitration or otherwise disrupt the conduct of the proceedings.

Parties, party representatives and experts shall not use any form of AI to falsify evidence, compromise the authenticity of evidence, or otherwise mislead the arbitral tribunal and/or opposing party(ies).

Part 3: Guidelines for Arbitrators

GUIDELINE 6
Non-delegation of decision-making responsibilities

An arbitrator shall not delegate any part of their[2] personal mandate to any AI tool. This principle shall particularly apply to the arbitrator's decision-making process. The use of AI tools by arbitrators shall not replace their independent analysis of the facts, the law, and the evidence.

GUIDELINE 7
Respect for due process

An arbitrator shall not rely on AI-generated information outside the record[3] without making appropriate disclosures to the parties beforehand and, as far as practical, allowing the parties to comment on it.

Where an AI tool cannot cite sources that can be independently verified, an arbitrator shall not assume that such sources exist or are characterised accurately by the AI tool.

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[2]   The terms "their", "they", and "them" as used in these Guidelines in relation to any of the individual participants in an arbitration, are used as singular, gender-inclusive pronouns.

[3]   Some jurisdictions recognise the principle of *iura novit arbiter*, or the "arbitrator knows the law", pursuant to which arbitrators may have the authority to apply laws, case law and precedents not cited by the parties. This principle has also been applied in investment treaty cases and by the International Court of Justice. The extent of this authority may vary depending on the jurisdiction. However, this Guideline does not preclude in any way the application of the principle of *iura novit arbiter*, where appropriate.

Commentary

Preliminary Provisions

Application of the Guidelines

The Guidelines seek to establish a set of general principles for the use of AI in arbitration. Intended to guide rather than dictate, they are meant to accommodate case-specific circumstances and technological developments, promoting fairness, efficiency, and transparency in arbitral proceedings.

These Guidelines may be adopted, in whole or in part, in the arbitration agreement or by the parties and/or the tribunal at any other time subsequently, including during the course of arbitral proceedings (*see* Model Clause for Inclusion in Procedural Orders).

As applied to international arbitrations, the Guidelines acknowledge the multi-faceted and multi-jurisdictional nature of such proceedings. Given the potential for various national laws to apply—for instance, an arbitration seated in Paris, governed by Mexican law, with hearings in Hong Kong—it becomes necessary to harmonise the potentially disparate local and international standards relating to the use of AI.

Accordingly, these Guidelines do not intend to replace or override local AI laws or regulations (*see* non-derogation of any mandatory rules). Instead, they serve as a supplementary international standard that provides a common denominator for AI's ethical and effective use in international arbitrations.

Development of best practices around the use of AI in international arbitration is only beginning, and these Guidelines aim to contribute to that effort. As such, they are a tool that assists parties, arbitral tribunals, institutions and others in navigating the application of AI, with an understanding that technologies, local laws and international standards will continue to evolve.

Definition of AI

There is no single definition of AI, and even existing definitions may evolve over time. For this reason, it is essential to clarify how the term should be understood in the Guidelines.

The definition adopted is meant to be broad enough to encompass both existing and future foreseeable types of AI but not so broad as to encompass every type of computer-assisted automation tool. Rather, the definition focuses on modern technologies that tend to be more autonomous, complex, multifunctional, and probabilistic than traditional automation tools based on rule-based deterministic logic.

Modern AI systems are usually based on machine learning, a set of computer science techniques that allow machines to learn patterns and make intelligent predictions based on the data on which they have been trained. Machine learning algorithms have existed for decades and are employed behind the scenes in various technology products used by dispute resolution professionals, such as spelling and grammar

checkers, email spam filters, search engines, optical character recognition (also known as "OCR"), or machine translation.

With the advent of technological advances such as deep neural networks, large language models, and generative AI, however, it has become possible for the general public to interact with multi-purpose AI systems directly. The potential uses for AI in the field of dispute resolution have exploded, even as the risks and limitations of these tools have become more difficult to comprehend. For example, deep neural networks can learn highly complex patterns and abstractions. Still, these patterns are recorded in a largely indecipherable form even to the computer scientists who created the models. Moreover, such models generate outputs based on statistical probabilities rather than a defined set of rules.

Large language models are a type of deep neural network trained on vast amounts of textual data and capable of generating natural-sounding and plausible (but not necessarily accurate) responses to a given prompt. AI tools that can generate meaningful text, images or other types of output that appear creative and extrapolate well beyond the data the model was trained on are often referred to as generative AI. Generative AI is used in tasks such as question-answering, summarising text, and producing drafts based on a given input or instruction.

It is important to note that, while generative AI systems tend to receive the most publicity and are the most accessible to the general public, there are other equally complex types of AI, such as those powering recommendation or classification tools, sometimes known as evaluative or discriminative AI. The focus of these Guidelines is not solely on generative AI but rather on all modern types of AI tools, whether intended to perform a specific evaluation or to generate outputs that resemble human-created content (including text, sound, or visual images).

Non-derogation of any mandatory rules

This provision recognises that the use of AI tools and AI applications in arbitrations may be subject to a range of rules and regulations, whether at the domestic or international level. These include, but are not limited to, laws, domestic statutes or international treaties on the use and development of AI, domestic rules of professional conduct, ethical and professional standards, and applicable arbitration rules, all of which can indirectly impact how certain professionals can use AI tools in an arbitration setting.

These Guidelines should not be construed as detracting or derogating from any of the above-mentioned rules and regulations. To the extent that these Guidelines are incompatible with any applicable mandatory rules and regulations, the latter should prevail.

GUIDELINE 1
Understanding the uses, limitations, and risks of AI applications

Participants should make reasonable efforts to understand, at least in general terms, the functionality, limitations, and risks of the AI tools they use in preparation for or during the course of an arbitration proceeding, as well as techniques for mitigating the limitations and risks inherent in AI tools. For example, for tools that use generative AI, participants should recognise the known limitations of such tools, such as their tendency to perpetuate biases contained in the training data, their propensity to mix up or invent information to fill gaps in knowledge, and their inability to identify the true logic or sources of information used to produce a given output, as further described below.

Participants should assess the AI tool's terms of use and data handling policies to understand if the tool's data treatment is consistent with any applicable confidentiality, privacy, or data security obligations, engaging technical experts as appropriate (*see Guideline 2* and commentary thereto).

Notably, participants should be aware of the following limitations, biases, and risks that (at present) are inherent in the use of certain AI tools.

"Black-box" problem

Generative AI tools produce natural-sounding and contextually relevant text based on speech patterns and semantic abstractions learned during their training. However, these outputs are a product of infinitely complex probabilistic calculations rather than intelligible "reasoning" (the so-called "black box" problem). Despite any appearance otherwise, currently available AI tools lack self-awareness or the ability to explain their own algorithms.

In response to this problem, participants may, as far as practical, use AI tools and applications that incorporate "explainable AI" features or otherwise allow them to understand how a particular output was generated based on specific inputs. "Explainable AI" is a set of processes and methods that allows human users to comprehend how an AI system arrives at a certain output based on specific inputs. "Explainable AI" can help promote transparency, increase trust in the AI tool's accuracy, and help ensure fairness when applied in an arbitration context. However, a complete understanding of complex AI systems may be beyond the reach of non-technical individuals, and this Guideline does not impose an expectation of thorough understanding. There are also technical and cost-related limitations to explaining fully how AI systems work, especially those systems employing complex algorithms and machine learning techniques.

Quality and representativeness of the training data

Large language models and other AI tools are trained using specific datasets and parameters, and their capabilities are a function of that particular training. Even the most advanced AI tools will exhibit biases and blind spots resulting from limitations in underlying datasets and training protocols. Moreover, general-purpose AI tools may not be well-suited for tasks requiring specialised knowledge or case-specific information, unless they are fine-tuned or provided with more relevant data.

Errors or "hallucinations"

Large language models may "hallucinate" or offer incorrect but plausible-sounding responses when they lack information to provide an accurate response to a particular query. Hallucinations occur because these models use mathematical probabilities (derived from linguistic and semantic patterns in their training data) to generate a fluent and coherent response to any question. However, they typically cannot assess the accuracy of the resulting output.

Hallucinations can be reduced through various techniques such as "prompt engineering" (*i.e.* crafting the query in a manner that is more likely to generate a better response) and "retrieval-augmented generation" (*i.e.* providing the model with relevant source material together with the query), but they are difficult to eliminate completely.

Augmentation of biases

An AI tool's training data may reflect biases that can be perpetuated through the use of the tool. Participants in arbitrations should minimise the risks associated with flawed or biased predictions by exercising their own independent judgement.

This is especially important when existing biases in the data may create, exacerbate, or perpetuate any form of discrimination or profiling in the search and appointment of individuals as arbitrators, experts, counsel, or any other roles in connection with arbitrations. Biases may occur when the underrepresentation of certain groups of individuals is carried over to the training data used by the AI tool to make selections or assessments. Participants should exercise extreme caution when using any AI tool for such purposes, especially if they are unaware of how the selection or assessment algorithm works.

Using AI tools to help identify a suitable candidate for a specific role in connection with an arbitration is a particularly sensitive matter, and participants should be mindful of the impact such use may have on diversity and the fair representation of diverse individuals.[4] In summary, participants are urged to: (i) use their personal judgement to evaluate the output of these AI tools, including from a diversity standpoint; (ii) to the best of their ability, become aware of the potential biases that may underlie the AI tool's output and, to the extent possible, mitigate them; and (iii) use AI tools that control for biases.

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[4]   The term "diversity", as used in this Commentary, encompasses race, ethnicity, national origin, religion, gender, sexual orientation, gender identity, age, and ability, as well as intersections between these characteristics.

GUIDELINE 2
Safeguarding confidentiality

Different jurisdictions have their own rules on confidentiality, privilege, and secrecy of information.

Participants bound by these duties should limit themselves to using AI tools that adequately safeguard confidential information or otherwise refrain from inputting any such data into AI tools that do not guarantee confidentiality.

Some AI tools may retain information provided to them for a variety of purposes or even state that the service providers have rights to all the information that users enter. The use of these publicly available AI tools in the context of an arbitration could pose a risk of disclosing confidential information. By contrast, business-oriented or privacy-oriented AI tools and vendors may offer similar functionality but with additional safeguards for confidentiality.

Before using an AI tool, participants should assess the confidentiality policies, features, and limitations of the tool, engaging technical experts as appropriate (*see Guideline 1* and commentary thereto).

GUIDELINE 3
Disclosure

This Guideline does not impose any per se obligation to disclose the use of AI in arbitration. The use of AI is becoming increasingly common and is being incorporated into a variety of technological tools used in the context of an arbitration proceeding. In this evolving landscape, defining a set of generally applicable criteria for disclosure of AI does not seem feasible and could create more controversy than it resolves.

At the same time, the Guideline acknowledges the possibility that disclosure of the use of AI may be appropriate in some circumstances. Indeed, disclosure may be required by professional rules or more broadly to avoid misleading other participants in the arbitration process. In some circumstances, disclosure could be used as a means to mitigate concerning uses of AI that would otherwise fall under Guideline 5.

Disclosure concerning AI-related issues should, in principle, be resolved using the existing mechanisms for resolving disclosure disputes in the context of an arbitration, which, in most cases, is done by the tribunal under the procedural rules applicable to the arbitration.

Specific outputs from generative AI tools are necessarily a function of the inputs, as well as the characteristics of the AI tool itself. Accordingly, where the specific outputs of an AI tool are deemed to warrant disclosure, such disclosure should, in principle, cover the information necessary to reproduce and evaluate such output. In the case of generative AI tools, the input parameters typically include the full conversation history and additional text submitted to the AI model along with the query. The same considerations would apply, mutatis mutandis, to the use of AI tools that are not "generative" but rather evaluative, such as recommender or classification systems.

GUIDELINE 4
Duty of competence or diligence in the use of AI

Scope

This Guideline draws attention to some of the risks that may arise when party representatives delegate legal tasks (such as summarising cases, writing portions of briefs or oral submissions, or conducting legal research) to AI tools without reviewing the AI tool's output to make sure it is accurate, from a factual and legal standpoint.

As established in the Commentary to Guideline 1, certain generative AI tools may be prone to errors and hallucinations, and their output can include inaccurate legal citations or mistakes in the presentation or interpretation of facts, evidence, and legal authorities. Accordingly, this Guideline reminds party representatives (and particularly legal professionals) of their ethical and professional duty to review any work product created by, or with the help of, AI and remain responsible for inaccurate submissions made during an arbitration.

The tribunal and opposing counsel may legitimately question a party, witness, or expert as to the extent to which AI tool has been used in the preparation of a submission and the review process applied to ensure the accuracy of the output.

Guideline 4 does not impose an independent standard of review of party representatives' conduct. Rather, it contains *renvoi* to any applicable rules of professional conduct or responsibility to determine the level of diligence and reasonableness required when using AI tools. Party representatives on record will ultimately be deemed responsible for any non-compliance with this Guideline.

Consequences of non-compliance

Not all AI-induced errors are created equal. In some cases, an AI-induced error may be legitimately inadvertent, even after a reasonable review, or may be inconsequential or have no significant impact on the arbitration. In other cases, AI-induced errors and hallucinations can compromise the integrity of the proceedings, or result in a skewed presentation of the facts, the law or the evidence (*see Guideline 5.*).

The tribunal can take these factors into account when deciding how to address submissions containing AI-induced errors and inaccuracies. If a submission is found to be inaccurate as a result of the use of an AI tool, the tribunal's powers will include the ability to strike the submission, order its correction, disregard the submission, attach lower credibility to it, and draw inferences as appropriate.

GUIDELINE 5

Respect for the integrity of the proceedings and the evidence

This Guideline prohibits any use of AI that compromises the integrity of the arbitration or the authenticity of evidence. While deploying AI can enhance the efficiency of arbitration proceedings, its potential misuse may disrupt due process and corrupt an arbitral tribunal's findings.

The duty is to protect the integrity of the proceedings, not to mislead the arbitral tribunal, and not to submit false or adulterated evidence. Fraudulent behaviour and misconduct, such as submitting false documents or resorting to so-called "guerilla tactics", can occur with or without the use of AI.

Advancements in AI, however, particularly in generative AI and deep fakes, can heighten the risks of manipulated or false evidence, making it significantly easier to create fake evidence that can appear strikingly convincing to the naked eye or that can sometimes be virtually indistinguishable from authentic versions. It can also make it more costly or difficult to detect any such manipulation through forensic and other means.

This Guideline reminds parties to be aware and vigilant of these heightened risks while emphasising the importance of ensuring the fairness and integrity of the proceedings when using AI. Parties, party representatives and experts should simply not use AI tools to fabricate evidence, distort evidence, or compromise the integrity of the proceedings under any circumstances.

If the arbitral tribunal determines that a party has violated this Guideline, it may consider, in addition to any other measures available under the governing law and the applicable arbitration rules or the *lex arbitri* (such as, for example, striking the evidence from the record, or deeming it inadmissible), deriving adverse inferences, and taking the infringing party representatives' conduct into account in its allocation of the costs of the arbitration.

GUIDELINE 6

Non-delegation of decision-making responsibilities

Non-delegation of personal mandate

This Guideline underlines the critical principle that an arbitrator's mandate, especially their ultimate decision-making function, is personal and non-delegable. This Guideline does not prohibit or ban the use of AI tools by arbitrators to assist them in fulfilling their responsibility and duty to analyse the facts, arguments, evidence, and the law, and to issue a reasoned decision.

While AI tools are capable of managing information, analysing data, and predicting outcomes, they must not replace the human judgement, discretion, responsibility, and accountability inherent in an arbitrator's

role. Therefore, arbitrators must be mindful that they are not inadvertently delegating part of this personal mandate to the AI tool.

This Guideline reinforces that arbitrators need to review the output produced by any AI tool to ensure it is accurate and shall take full responsibility for any errors or inaccuracies. If an arbitrator uses a generative AI tool to assist in the analysis of the arguments or the drafting of any part of a decision or award, the arbitrator cannot simply reproduce the AI's output without making sure it adequately reflects the arbitrator's personal and independent analysis of the issues and evidence at hand.

This Guideline reminds arbitrators that, even as technology evolves, their personal responsibility in rendering decisions remains paramount. AI tools can enhance efficiency and provide insights, but the arbitrator must make the ultimate decisions, preserving the human element essential to the fairness and integrity of arbitration proceedings. The arbitral tribunal will not be released from its duty to personally review the file and/or draft any arbitral tribunal's decision. At all times, the arbitrators remain responsible for their use of AI during the arbitration.

GUIDELINE 7
Respect for due process

This Guideline focuses on the principle of due process when using AI in arbitration. It emphasises the arbitrator's duty to disclose any reliance on AI-generated outputs outside the record that influence their understanding of the case, to the extent that any outputs are used, allowing parties the opportunity to comment. This approach ensures transparency and upholds the parties' right to be heard.

At the same time, it acknowledges that disclosure requirements may vary depending on the specific AI application used.

The Guideline also stresses the arbitrator's responsibility to avoid assuming the existence of authoritative sources from AI outputs. It prompts arbitrators to evaluate the reliability of AI-derived information independently and critically. Arbitrators, like parties and party representatives, must independently and critically evaluate AI-derived information to ensure reliability.

Model Clause For Inclusion in Procedural Orders

The Tribunal and the parties agree that the Silicon Valley Arbitration & Mediation Center Guidelines on the Use of Artificial Intelligence in Arbitration (**SVAMC AI Guidelines**) shall apply as guiding principles to all participants in this arbitration proceeding.

For any questions, concerns, or suggestions regarding the Guidelines, please contact AITaskForce@svamc.org

About Silicon Valley Arbitration & Mediation Center:

SVAMC is a non-profit serving the global technology sector through educational programming and related activities. SVAMC works with leading technology companies, law firms, ADR institutions, and universities in Silicon Valley and around the globe to promote effective and efficient resolution of technology-related business disputes. Visit www.svamc.org for additional information, or contact us at info@svamc.org.