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SILICON VALLEY ARBITRATION AND MEDIATION CENTER

GUIDELINES ON THE USE OF ARTIFICIAL INTELLIGENCE IN ARBITRATION

Consultation Draft 31 August 2023

CONSULTATION FORM

Please return no later than 30 September 2023

All stakeholders, including arbitral institutions, are invited to use this form to comment separately on each chapter of the draft Guidelines. Your feedback is extremely valuable to us and we thank you for taking the time to review. Once you have completed the form, please upload it via our consultation portal at https://arbi-city.typeform.com/ai-guidelines. Alternatively, you can forward your form as an attachment to aitaskforce@svamc.org along with contact information below:

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*List your organisation only if the comments are made on behalf of an organisation.

Comments on the Guidelines OVERALL
The structure of the draft Guidelines being based on the personal scope of the application of the different rules appears appropriate as a matter of principle. It particularly makes sense to distinguish the position of the parties/counsel/other stakeholders involved in the proceedings (e.g. witnesses and party-appointed experts) from the position of the arbitrators/arbitral tribunal. However, this distinction should not be made when the same rules would need to be applied to all stakeholders. In this respect, one may wonder why Guideline 4 shall apply only to the parties and to the party representatives. Guidelines 4 provides in particular that "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". This principle should apply to all stakeholders involved in an arbitration with respect to their formal submissions made in the arbitral proceedings (see suggested general rules below). This is in essence what results from Guideline 7 applicable to arbitrators about which the Commentary states that Guideline 7 "prompts arbitrators to evaluate the reliability of AI-derived information independently and critically".

From a structural perspective, it would appear appropriate to centralize all the rules that would apply only to arbitrators in one dedicated chapter. This would mean that para. 3 (Option A) and paras 3-1 and 3-2 (Option B) of Guideline 3 could be moved to Guideline 6 (subject to comments about these provisions in the comments to Guideline 3 below).

On this basis, one could consider that the use of AI tools in international arbitration could be governed by the following general rules:

1. Any person involved in the arbitration proceedings that uses an AI tool must be aware of the risks of such use (breach of confidentiality, cyberattacks, bias, inaccuracies/hallucinations, violation of personal data protection, etc.) and shall be accountable in case of occurrence of these risks.
2. Any person involved in the arbitration proceedings that uses an AI tool to draft documents* that shall be filed in the arbitration proceedings (and that will consequently be on the record) is responsible for any factual or legal inaccuracy contained in these documents and shall be accountable for this pursuant to principle 1 above.

   *One could go beyond "documents" in order to cover other types of submissions e.g. video recordings, audio recordings, etc.
3. Any person [except the Parties**] who submits a document in the arbitration proceedings (that will consequently be on the record)*** shall disclose that such document has been partly (or totally) generated by AI.

   **The exclusion clarifies that briefs submitted by the Parties shall not be covered by this rule which shall apply e.g. to witnesses (for witness statements) and to party-appointed or tribunal-appointed experts.

   ***This does not apply to pre-existing documents that were not created for the purpose of being submitted in the arbitration proceedings.

4. The arbitral tribunal shall disclose to the parties at the beginning of the proceedings its intention to use AI tools in the proceedings and provide all relevant information to the parties for this purpose. [This obligation shall not apply to procedural documents for the creation of which AI tools have been used by the arbitral aribunal (e.g. procedural rules, procedural orders, procedural calendars)]. The use of AI tools by the arbitral tribunal is subject to the approval by the parties. The arbitral tribunal shall proceed in the same way as described above if it plans to use AI tools at a later stage in the course of the arbitral proceedings (e.g. for rendering a partial award or the final award).
5. If the parties have approved the use of AI tools by the arbitral tribunal (see 4 above), the arbitral tribunal shall disclose to the parties in the course of the proceedings when the arbitral tribunal uses AI tools and identify the parts of the substantive document(s) that have been drafted by any AI tools, as well as any substantive analysis that the arbitral tribunal has used AI tools for, and the way how the AI tools have been used in the context.

Comments on INTRODUCTION	

Comments on PRELIMINARY PROVISIONS	
Application of the Guidelines	
Definition of AI	
Non-derogation of any mandatory rules	

Chapter 1. General Guidelines
Comments/edits to Guideline 1. Understanding the uses, limitations and risks of AI applications
Comments/edits to Guideline 2. Safeguarding confidentiality

It would be appropriate to make a specific reference to personal data and to regulations protecting personal data to the extent that they are applicable (knowing for instance that the EU General Data Protection Regulation (GDPR) has a broad extra-territorial reach).

Comments/edits to Guideline 3. Disclosure and protection of records

The Drafting Subcommittee has produced two alternative drafts of most provisions of this Guideline for consideration. The key substantive differences between Options A and B are highlighted for convenience in the PDF. In your comments, we kindly ask that you indicate a preference for Option A or Option B along with any other comments or suggestions you wish to make.

Neither Option A nor Option B provide for a bright line rule that defines precisely under what circumstances the use of AI must be disclosed in arbitration proceedings. These rules may consequently prove difficult to apply in practice: both options rely on the criterion of the potential impact / material impact that the use of the AI tool could have on the proceedings / on its outcome (this is what Option B provides, it being noted that it will practically not be possible to predict the impact of the use of an AI tool on the *outcome* of the arbitration proceedings if the outcome means the success or the failure of a given claim). Assessing the (material) impact of the use of AI tools will prove to be quite challenging.

Another approach that could be easier to implement could be to invite the Parties and, more importantly, the other stakeholders involved in the proceedings on whom the arbitral tribunal may rely in order to decide the dispute (particularly party-appointed experts for their expert reports and witnesses for their witness statements) to disclose whether the written submissions that they have formally filed in the arbitration proceedings have been (partly) drafted by AI tools. One cannot conceive (at this stage) that their submissions could be fully drafted by AI. For witnesses, such full delegation to AI would be in conflict with the basic expectations that witnesses shall be at the source of their witness statements. See e.g. The Accuracy of Fact Witness Memory in International Arbitration, ICC Commission on Arbitration and ADR, Paris (2020), para. 5.24, suggesting that, if feasible, the witness shall draft the first draft of his/her witness statement).

This could apply particularly or potentially exclusively to submissions made by other stakeholders beyond the parties i.e. witnesses and party-appointed or tribunal-appointed experts (see general comments above).

By way of example, the disclosure to be made by a party-appointed expert about the use of AI tools in the drafting of his/her report could materialize in an additional statement that could be made in the report. See e.g. art. 5 para. 2(g) of the IBA Rules on the Taking of Evidence in Internatinoal Arbitration, IBA Council, Version 17 December 2020, requesting that the expert report shall contain "an affirmation of his or her genuine belief in the opinions expressed in the Expert Report".

One could refrain from any obligation of disclosure in case of AI tools in the submissions made by the Parties given that the Parties / their counsel remain responsible for the factual and the legal accuracy of the facts and of the legal arguments respectively that they make in their submissions. See e.g. with respect to the legal arguments and legal sources: Standing Order for Civil Cases before Magistrate Judge Fuentes, 31 March 2023, p. 2 (Dist. Ct. N.D. Ill.), ("Just as the Court did before the advent of AI as a tool for legal research and drafting, the Court will continue to presume that the Rule 11 certification is a representation by filers, as living, breathing, thinking human beings, that they themselves have read and analyzed all cited authorities to ensure that such authorities actually exist and that the filings comply with Rule 11(b)(2)").

One could consider that imposing to the parties and to the other stakeholders a more extensive obligation to disclose whether and how they have used AI tools internally (i.e. without submission of these AI-generated documents in the file/on the record) in preparation of their case and of their submissions so that such use would not be visible in the submissions themselves could constitute an undue interference in the parties' business secrets and in their confidential arbitration strategies. For instance, one could imagine that an AI tool could be usefully put to use in order to prepare a witness / a party-appointed expert for cross-examination by prompting potential questions / issues that could arise in the cross-examination (this is one of the illustrations used in the Draft Guidelines).

In this respect, the use of AI tools should not necessarily call for a different treatment by comparison to the reliance of parties on undisclosed "shadow" third party advisors, consultants and experts and even on undisclosed IT tools for building their case in arbitration proceedings. From this perspective, one should consider the risk of "AI fishing expeditions" that could be initiated by a party that would submit a request for AI disclosure to the arbitral tribunal in order to obtain confidential information about the AI-tool supposedly used by the other party (as provided under Option A and Option B).

Comment about para. 4-3 Option A: it does not seem necessary to address this issue to the extent that it has no direct link with the arbitration proceedings given that it only relates to the interactions between the parties and their counsel/advisors.

Chapter 2. Guidelines for Parties and Party Representatives

Comments/edits to GUIDELINE 4. Duty of competence or diligence in the use of AI

Comments/edits to GUIDELINE 5. Respect for the integrity of the proceedings and evidence

One may wonder whether there is a need for specific rules for addressing what could appear as a new bottle for an old wine / a new form of an old issue: fake / falsified evidence. One could imagine that this could apply beyond parties and party representatives to include witnesses and experts. The potential sanctions in case of an AI-generated deep fake would be the ones applicable to non-AI generated fake evidence and would depend on the applicable laws and rules.

Chapter 3. Guidelines for Arbitrators and Tribunals

Comments/edits to GUIDELINE 6. Non-delegation of decision-making responsibilities

The issue shows analogies with the mission of administrative secretaries which could consequently serve as a source of inspiration (with appropriate adaptations). See Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, International Court of Arbitration, 1 January 2021, para. 223 : "Under no circumstances may the arbitral tribunal delegate its decision-making functions to an administrative secretary or rely on an administrative secretary to perform on its behalf any of the essential duties of an arbitrator. Likewise, the tasks entrusted to an administrative secretary, such as the preparation of written notes or memoranda, will not release the arbitral tribunal from its duty to personally review the file and/or draft itself any arbitral tribunal's decision".

In the interest of transparency and of preservation of the necessary trust that the parties and the other stakeholders must have in the arbitrators and in the integrity of the arbitral proceedings, one could conceive that the arbitrators shall disclose *in advance* whether and to what extent they plan to use AI tools for the management of the proceedings by analogy to what is expected from arbitral tribunals before the appointment of administrative secretaries. See Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, International Court of Arbitration, 1

January 2021, para. 220: "There is no formal process for the appointment of an administrative secretary. However, before any steps are taken to appoint an administrative secretary, the arbitral tribunal must inform the parties of its intention to do so. For this purpose, the arbitral tribunal must submit to the parties the proposed administrative secretary's curriculum vitae, together with a declaration of independence and impartiality, an undertaking on the part of the administrative secretary to act in accordance with the present Note and an undertaking on the part of the arbitral tribunal to ensure that this obligation on the part of the administrative secretary are met".

The arbitrators should identify the AI tool that they plan to use and provide all relevant information to the parties about the measures that shall be taken against all relevant risks (see general comments above) so that the parties can validate the choice of the AI tool and understand the measures that shall be taken by the arbitral tribunal for this purpose. In this respect, one can connect this issue with the obligation of arbitral tribunals to address the issues of data protection and of cybersecurity with the parties at the beginning of the arbitral proceedings. See e.g. art. 2 para. 2(e) of the IBA Rules on the Taking of Evidence in Internatinoal Arbitration, IBA Council, Version 17 December 2020 (consultation of the parties on evidentiary issues – NB the use of AI tools would not necessarily be limited to evidentiary issues, e.g. drafting of procedural / substantive documents of the arbitral proceedings).

The obligation of transparency imposed on the arbitral tribunal shall apply if the arbitral tribunal plans to use AI tools in the proceedings. It shall also apply already if (only) one of the arbitrators (specifically the chairperson) plans to use AI tools in the proceedings.

The obligation of transparency relating to the use of AI tools that shall be imposed on arbitral tribunals should apply in two steps (see general comments above):

1. Disclosure of the arbitral tribunal to the parties at the beginning of the proceedings about the plan of the arbitral tribunal to use AI tools in the proceedings subject to approval by the parties
2. If the parties have approved the use of AI tools by the arbitral tribunal, disclosure of the arbitral tribunal to the parties in the course of the proceedings when the arbitral tribunal uses the AI tool and identification of the parts of the substantive document(s) that have been drafted by the AI tool, as well as any substantive analysis that the tribunal has carried out with AI tools.

In this respect, it is adequate that the arbitral tribunal shall disclose not only the name of the AI tool, but also the version and the settings of the tool used and the way how the tool was used. This could

facilitate the identification of the risks of biased or discriminatory results which could be detected through such a complete proactive disclosure. See EU Guide on the use of Artificial Intelligence-based tools by lawyers and law firms in the EU, European Lawyers Foundation, The Hague (2022), § 7.2.2, p. 45. Use of any AI by the arbitrators should be declared even if it does not constitute a delegation of the personal mandate. Details such as in Guideline 4 Option A para. 1-3 should be given, so that the AI results are reproduceable. Should a particular tool or database be found to produce discriminatory or biased results, such a disclosure would allow its use to be known to the parties such that they could challenge the findings of the arbitral tribunal that would be made based on these AI tools.
The obligation of disclosure that would be imposed on arbitrators should not affect the secrecy of the deliberation process.
One could imagine that within the arbitral tribunal (e.g. in a 3 member arbitral tribunal) each arbitrator shall disclose internally to his/her co-arbitrators the use of an AI-tool that such arbitrator would have made (or that he/she would plan to make) and that could be relevant in the deliberation process.

Comments/edits to GUIDELINE 7. Respect for due process

One can wonder whether there is a need to impose a specific obligation of disclosure to arbitrators if they want to rely on AI-generated new legal sources that would not be on the record if such obligation would not exist for non AI-generated legal sources that would not be on the record. The question is whether it is necessary to apply a different procedural treatment depending on whether the new source about which the parties should be heard has been generated by AI or not. One does not necessarily see the justification for such a different treatment.

The issue of fake legal news / fake legal sources which is the issue which is addressed in para. 2 of Guidelines 7 does not relate to “respect for due process” but rather relates to the general obligation of the parties to check the accuracy of AI-generated output and to the obligation to be accountable for this (see the general comments above).

The obligations imposed on arbitrators to verify independently the legal sources identified by AI tools should also apply to the parties / their counsel / the party-appointed legal experts (see general comments above – this is a transversal issue applicable to all concerned stakeholders in the arbitration proceedings).

Comments on ANNEX A. Examples of compliant and non-compliant uses of AI in arbitrations

For each Guideline, this section offers a few practical examples of both compliant and non-compliant uses of AI in international arbitration. These instances are not exhaustive but illustrative, encouraging thoughtful use of AI while ensuring the principles of fairness, integrity, and equality are preserved in arbitration proceedings. Ultimately, whether the use of AI in international arbitration in a given case is appropriate or not will need to be determined on a case-by-case basis.

Please add below any comment or edit you may have on the Annex.

One may wonder to what extent it is necessary to impose specific AI-related obligations on the parties if they submit pleadings or written submissions "without checking the accuracy of their output from a factual or legal standpoint" or "without verifying whether the AI's output may contain any errors" (examples of "non-compliant" uses for Guideline 4). These examples can show that it does not appear necessarily justified to create an AI-rule for a pre-AI problem: parties and counsel are responsible to check the factual and legal accuracy of their submissions and briefs irrespective of the potential use of AI tools even if the risks can be increased by such use. They are already "sanctioned" in the sense that inaccurate factual or legal statements will not be considered by the arbitral tribunal. A different example of a non-compliant use could be the one resulting from a submission filed by a third party (witness statement, expert report) that may have a higher evidentiary value and that could consequently require a higher degree of transparency that would consequently require to disclose the use of AI in the generation of the given submission (witness statement, expert report).

COMMENTS ON ANNEX B. Model Clause for inclusion in Procedural Orders