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Arbitrator as a deployer of an AI system

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Summary

This article discusses the implications of the European Union's (EU) new Artificial Intelligence Act (AI Act) on arbitrators who use AI systems in commercial arbitrations conducted in accordance with the Finnish Arbitration Act (967/1992) or the Arbitration Rules of the Finland Chamber of Commerce (FAI Rules). It finds that arbitrators using AI systems in this context are considered as deployers under the AI Act. Should the deployed AI systems be classified as high-risk, the AI Act imposes particular obligations on the arbitrators. The article explores what is meant with high-risk AI systems, and what are the main obligations associated with the use of such systems. Finally, it briefly addresses potential consequences of non-compliance with these obligations. The article is intended to spark discussion on this topical matter and offer some insights into how arbitrators can navigate the forthcoming regulatory landscape.[1]

1. Introduction

Artificial intelligence is not a new issue, although current public discussion may sometimes give that impression. English mathematician *Alan Turing* mentioned computer intelligence already in 1947.[2] Turing's technical report "Intelligent Machinery" published a year later is widely regarded as the first manifesto for artificial intelligence.[3] Since then, numerous machine learning and artificial intelligence applications have been created that have become part of our everyday lives nearly unnoticed.

Lawyers have not been at the forefront of embracing this technological development. For example in the field of dispute resolution, application of artificial intelligence to support professional activities has become a topic of discussion only towards the end of the 2010s.[4] One reason for this may be the traditional "law as a craft" thinking, which *Brett G. Scharffs* aptly describes in his article from 2001.[5] Scharffs compares the practice of law, and especially judicial decision-making, with other craft traditions, arguing that there is

[1] This article was originally drafted in English. The Finnish version was prepared with the help of artificial intelligence and finalized by the author. *[Author's note in the English translation: This translation is based on the Finnish version published in Defensor Legis.]*
[2] *B. Jack Copeland* (ed.), The Essential Turing. Oxford University Press 2004, p. 2. See 'Lecture on the Automatic Computing Engine' on pp. 378-394.
[3] *Copeland* 2004, p. 2 and p. 401. Cited report, pp. 410-432.
[4] The former Dean of the Faculty of Law at the University of Helsinki, Professor *Kimmo Nuotio*, wrote as late as in 2018: "'Law and digitalisation' is becoming a catch-word in the legal circles and sounds like future". *Riikka Koulu – Jenni Hakkarainen* (eds), Law and Digitalization: Rethinking Legal Services. Legal Tech Lab 2018, p. 11. As this was the case with digitalisation in general, it can be concluded that there was still a long way to go before AI systems would be considered as a normal part of our daily work.
[5] *Brett G. Scharffs*, Law as a Craft. Vanderbilt Law Review 54 (2243) 2001, introduction, pp. 2247-2250.

something very personal and case-specific in all of them. According to Scharffs, judicial decision-making, like other craft traditions, requires not only talent and skill, but also experience and a sense of situation. It is work that is made by hand, one at a time.[6] Actual or perceived dependence on technology, automation of tasks, and the ideal of mass production, which are often associated with the use of artificial intelligence in economic activities, do not fit well with this narrative.

However, change has begun. It started in the early 2020s, when the global Covid-19 pandemic forced even the most traditional lawyers to do things in a new way. State borders were closed, human contact was restricted and, as a result, court and arbitration hearings were cancelled. In an instant, the physical dimension had become a threat and the digital dimension an opportunity, if not a necessity. A new page in history was turned at the latest in November 2022, when San Francisco-based *OpenAI* launched ChatGPT, the first large language model and generative AI offered to the public free of charge. Overnight, artificial intelligence was on everyone's agenda.

The promise of technology that enables anyone to become significantly better and more efficient at their work is appealing. In the field of arbitration, some commentators have even seen the use of AI as a way to reinstate confidence in the entire arbitration system by enhancing its legitimacy, fairness, and efficiency.[7] It is, however, easy to see also the opposite happening. Much will depend on how issues related to the use of AI in arbitration will be addressed in the near future: whether it will happen transparently and by inspiring trust among users, or by sidelining or avoiding some of the key questions and by operating in the grey area.

Technology companies have recognized the notable business potential associated with the current change in mindsets and are working non-stop in both product development and marketing to increase the use of AI in dispute resolution. Platforms such as Harvey, Leya, Lexis+ AI, Jus AI, CoCounsel, and Westlaw Edge leverage AI to review and analyse legal texts, such as contracts and pleadings, and to produce legal text. Platforms like TrialView and Uncover promise to simplify document management and hearing arrangements for large cases.[8] Thanks to advanced AI-based speech recognition and speech conversion technologies, the recording of, e.g., witness interviews and hearings is also becoming increasingly automated. And there is no need to go even into such specialized AI systems: Microsoft Copilot, integrated into MS Office tools, already makes generative AI part of many lawyers' everyday work. The possibilities for what can be done with different AI-based tools seem endless. However, first experiments with AI systems that are still in the development phase can also be discouraging. User interfaces are not yet very intuitive, so the use of artificial intelligence is a new

[6] *Scharffs* 2001, executive summary.
[7] *Myriam Gicquello*, Artificial Intelligence in International Arbitration. In *Thomas Schultz – Federico Ortino* (eds), Oxford Handbook of International Arbitration. Oxford University Press 2020, chapter 25, pp. 591-616. See especially pp. 594-595.
[8] The author of this article has not used all the systems listed herein, so there may be inaccuracies in the characterizations. Interested readers are encouraged to contact the providers of these systems for accurate, up-to-date information.

skill that needs to be learned separately. At first, this will take time, although the expectation was that using these tools will right away speed up our work.

In July-September 2023, *FTI Consulting* conducted an online survey among arbitrators, mediators and other dispute resolution professionals to find out what they generally think about the impact of AI on dispute resolution.[9] More than 100 lawyers from around the world responded to the survey. Based on the results, dispute resolution lawyers generally believe that AI can improve access to justice and transform legal and professional services in the future. So far, however, lawyers are generally unfamiliar with AI tools. Only 46 percent of respondents said they have used AI in dispute resolution — and even then, concentrating on less sophisticated tasks, such as e-discovery, document drafting and review. Many respondents estimated that they would increase the use of AI in the next three years, but only a few responded that their company is planning significant investments in AI technology. The survey also raised concerns about the accuracy and consistency of AI-generated outputs. Only 40 percent of those who had used AI in dispute resolution found the experience satisfactory.

Just when the situation might be about to change and the use of AI in dispute resolution, including arbitration, is becoming more common, there is new regulation on the way that will have a significant impact on such use. The EU has adopted a new Artificial Intelligence Act.[10] It is expected to enter into force in summer 2024 and be mainly applicable from 2026-2027 onwards.

In the following, I will first give a brief overview of how the AI Act came into being from a perspective that I, as a dispute resolution practitioner acting both as counsel and arbitrator, consider relevant for others acting in similar roles. I will then take a closer look at the role of arbitrators utilizing AI systems in their work, from the viewpoint of the new regulation. I propose that an arbitrator who uses an AI system in the context of arbitration is a deployer within the meaning of the AI Act. Furthermore, I will argue that, depending on the AI system in question and its use cases, the AI Act may impose significant new obligations on the arbitrator using the AI system. As stated above, I will focus my analysis on commercial arbitrations conducted in

[9] *FTI Consulting*, The Power of AI: Navigating the Paradigm Shift in Dispute Resolution Services, p. 2. Https://www.fticonsulting.com/-/media/files/insights/reports/2023/nov/power-ai-navigating-paradigm-shift-dispute-resolution-services.pdf.

[10] Council of the European Union press release on 21 May 2024, https://www.consilium.europa.eu/en/press/press-releases/2024/05/21/artificial-intelligence-ai-act-council-gives-final-green-light-to-the-first-worldwide-rules-on-ai/. At the time of writing this article, the latest available version of the AI Act was the one adopted by the European Parliament on 13 March 2024 and corrected by the Parliament approximately one month later in accordance with Rule 241 of its Rules of Procedure, see https://www.europarl.europa.eu/doceo/document/TA-9-2024-0138-FNL-COR01_EN.pdf. The Council appears to have adopted the text in this form. By 23 May 2024, when this article went to press, the final text was not yet published in the Official Journal of the European Union. According to the Council's press release, the final text was expected to be published in the Official Journal within short. The reader is encouraged to consult the final text once it is published. *[Author's note in the English translation: The signed version of the AI Act was released on 13 June 2024 and published in the Official Journal on 12 July 2024. At least to the extent quoted in this article, the language of the regulation has remained unchanged compared to the version used in the drafting of this article.]*

accordance with the Finnish Arbitration Act and FAI Rules. However, my conclusions are applicable also more broadly to arbitrators providing similar services in the EU under other laws and institutional rules. I will exclude from my analysis issues concerning confidentiality, data protection and data security, which arbitrators using AI systems in arbitrations shall naturally also consider.

2. Background to the regulation of AI in the EU

In April 2018, the European Commission (Commission) published a communication titled "Artificial Intelligence for Europe".[11] In this significant policy document, the Commission noted that artificial intelligence is already part of our lives across various sectors, from energy to education and financial services to construction, with countless more examples to emerge over the next decade that we cannot yet imagine. The Commission compared the transformation power of AI to inventions such as steam engine and electricity,[12] stressing that the stakes could not be higher: the way we will approach AI now will define the world we live in in the near future. The Commission outlined that the EU should aim at being a global leader in the development and adoption of ethical and trustworthy AI technologies in order to reliably harness the vast power of AI at the service of human progress.[13] The Commission considered that for reaching this objective it is essential to increase public and private investment in AI, prepare for socio-economic changes brought about by this development and create an appropriate legal framework to govern AI.

A few months later, the Commission set up an independent High-Level Expert Group on AI to advise the Commission on the implementation of its AI strategy.[14] In April 2019, the High-Level Expert Group issued "Ethics guidelines for trustworthy AI",[15] which lists seven key requirements that AI systems shall meet to be considered trustworthy. These are 1) human agency and oversight, 2) technical robustness and safety, 3) privacy and data governance, 4) transparency, 5) diversity, non-discrimination and fairness, 6) societal and environmental well-being, and 7) accountability. The guidelines are recommended for all arbitrators who use any AI kind of systems in their work.

[11] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, "Artificial Intelligence for Europe". Brussels, 25.4.2018, COM(2018) 237 final.

[12] A similarly apt analogy was made by *Jean-Remi De Maistre*, CEO of Jus Mundi, at his company's event "Transforming Legal Tech with Gen AI: An Exclusive Unveiling" in Hong Kong on 5 May 2024. *De Maistre* noted more or less that so that AI is like nuclear power – it is something really great and powerful, but having it does not mean that you have a working nuclear power plant. In my view, this illustrates well how the mere existence of AI will not get us far. How well we can harness this power depends a lot on what kind of systems are built around it, and how those systems will be used.

[13] Commission Communication "Artificial Intelligence for Europe", pp. 1-3.

[14] Https://digital-strategy.ec.europa.eu/en/policies/expert-group-ai.

[15] Independent High-Level Expert Group on Artificial Intelligence set up by the European Commission, "Ethics guidelines for trustworthy AI", https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai.

In February 2020, the Commission published two key documents. One was “A European strategy for data”, which envisioned the EU as "a leading role model for a society empowered by data to make better decisions – in business and the public sector".[16] The second was “White Paper on Artificial Intelligence – A European approach to excellence and trust”,[17] in which the Commission further developed its AI strategy and concluded that, in the face of fierce global competition, a solid European regulatory and investment oriented approach is needed with the dual objective of promoting the uptake of AI, while at the same time addressing the specific risks related to the use of this new technology.[18]

In the White Paper, the European Commission underlined the importance of developing AI that is aligned with European values. The Commission mentioned, among others, the right to an effective judicial remedy and a fair trial.[19] These values play a key role also in arbitration. The Commission is correct when stating that human decision-making is never immune to mistakes and biases. However, when combined with AI, such mistakes and biases can have a much greater impact than without the involvement of AI.[20] The specific characteristics of many AI technologies, such as opacity (the so-called “black box” effect), unpredictability and autonomous behaviour, make it much more difficult to understand how a decision made with the help of AI was ultimately made and whether all relevant rules were followed.[21]

As regards different regulatory options, the Commission stated that the new regulatory framework for AI needs to be sufficiently effective to achieve its objectives, but it must not be overly prescriptive in such a way as to impose a disproportionate administrative burden in particular on smaller operators. To strike the right balance, the Commission proposed a risk-based approach: the higher the risk associated with the use of an AI system, the stricter the rules for it. The Commission also proposed that an AI system should generally be considered high-risk if both the sector in which the AI system is used and the intended use case present significant risks, in particular with regard to safety, consumer rights and the protection of fundamental rights.

The relevant sectors would be comprehensively listed in the new regulatory framework. It would then remain to be assessed on a case-by-case basis whether an AI system was used in those sectors in such a way that it was likely to pose significant risks to protected rights. Therefore, not all use of AI in these sectors necessarily

[16] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "A European strategy for data". Brussels, 19.2.2020, COM(2020) 66 final, p. 2.
[17] European Commission’s White Paper on “Artificial Intelligence – A European approach to excellence and trust”. Brussels, 19.2.2020, COM(2020) 65 final.
[18] Ibid., p. 2.
[19] Ibid., p. 11.
[20] It is often suggested that AI can also help prevent human errors. See e.g., *Oskari Paasikivi - Johanna Tuohino - Juli Mansnérus - Jukka Lång*, Tekoälyn käyttömahdollisuudet julkisella sektorilla. Oikeudelliset reunaehdot ja kansainvälinen vertailu. (Freely translated: Possibilities to use AI in the public sector. Legal constraints and international comparison. Sitra reports 206, 2022, p. 12 and p. 21. See https://media.sitra.fi/app/uploads/2022/03/tekoalyn-kayttomahdollisuudet-julkisella-sektorilla-sitran-selvityksia-206.pdf (in Finnish).
[21] European Commission’s White Paper on Artificial Intelligence, p. 12.

involves a significant risk. The Commission gives an example: whilst healthcare generally may well be a relevant sector, a flaw in the appointment scheduling system in a hospital will normally not pose risks of such significance as to justify legislative intervention. Similar examples can be found also in the administration of justice. According to the Commission, the assessment of the level of risk of a given use should be based, above all, on the impact on the affected parties. AI systems that produce legal or similarly significant effects on the rights of individuals or companies may, for instance, be considered high-risk. [22]

In the White Paper, the European Commission considered that in the new regulatory framework, each obligation shall be addressed to that actor in the AI system value chain that is best placed to address the risks that the system may pose. In principle, the developer is often best placed to address risks arising during the development phase of an AI system, while its ability to manage risks during the use phase may be limited. In such cases, it may be justified to address the relevant obligations to the actor deploying the AI system.[23] In the next section, I will explain how in commercial arbitration this may mean, in my view, the arbitrator resolving the case.

In April 2021, the European Commission unveiled its proposal for a new Artificial Intelligence Act.[24] The proposal provoked a lot of debate both within the EU institutions and in public and led to lengthy negotiations between the representatives of the Commission, the European Parliament and the Council. In February 2024, the EU legislators finally reached a political agreement on the matter. The AI Act was adopted by the European Parliament in March 2024 and endorsed by the Council in May 2024. The act will soon be published in the Official Journal of the European Union, and it will enter into force on the 20th day following its publication. It will mainly apply 24 months after its entry into force, with the exception of Chapters I and II, i.e., general provisions and provisions on prohibited AI practices, that will apply six months after the entry into force, and Article 6(1), the classification rules for high-risk AI systems and corresponding obligations, that will apply 36 months after the entry into force. Certain obligations regarding general-purpose AI systems and public authorities will become applicable 12 months after the entry into force of the AI Act. The AI Act is by nature EU Regulation, so it is binding in its entirety and directly applicable throughout the EU.

[Author's note in the English translation: The AI Act was signed on 13 June 2024 and published in the Official Journal of the European Union on 12 July 2024. It entered into force on 1 August 2024. It shall apply from

[22] Ibid., p. 17.
[23] Ibid., p. 22.
[24] Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legal acts. Brussels, 21.4.2021, COM(2021) 206 final. 2021/0106 (COD).

2 August 2026, with certain exceptions that shall apply from 2 February 2025, from 2 August 2025, and from 2 August 2027, see Article 113 of the AI Act.]

3. Arbitrator's role and responsibilities under the AI Act

3.1 Arbitrator as a deployer

The scope of application of the AI Act is very broad. It applies to operators offering AI systems or products or services utilizing those in the EU quite widely.[25] *AI system* is defined as "a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments".[26] *General-purpose AI system* is defined as "an AI system which is based on a general-purpose AI model and which has the capability to serve a variety of purposes, both for direct use as well as for integration in other AI systems".[27] *General-purpose AI model* means "an AI model, including where such an AI model is trained with a large amount of data using self-supervision at scale, that displays significant generality and is capable of competently performing a wide range of distinct tasks regardless of the way the model is placed on the market and that can be integrated into a variety of downstream systems or applications, except AI models that are used for research, development or prototyping activities before they are placed on the market".[28]

The AI Act imposes obligations on a wide range of operators in the AI system value chain, especially on providers and deployers of AI systems. *Provider* means "a natural or legal person, public authority, agency or other body that develops an AI system or a general-purpose AI model or that has an AI system or a general-purpose AI model developed and places it on the market or puts the AI system into service under its own name or trademark, whether for payment or free of charge".[29] *Deployer* means "a natural or legal person, public authority, agency or other body using an AI system under its authority except where the AI system is used in the course of a personal non-professional activity".[30]

[25] AI Act, Article 2. This Article also includes a list of sectors that are excluded from the scope of application.
[26] AI Act, Article 3(1).
[27] AI Act, Article 3(66).
[28] AI Act, Article 3(63).
[29] AI Act, Article 3(3). As arbitrators rarely develop AI systems or place them on the market, I will not elaborate in this article and what it would mean in an arbitration if an arbitrator was considered as a provider of an AI system. However, this scenario is not fully out of question, so each arbitrator shall assess their own role under the AI Act on a case-by-case basis and act in accordance with such obligations that are relevant in each case.
[30] AI Act, Article 3(4).

In my view, if an arbitral tribunal uses an AI system in a commercial arbitration conducted under the Finnish Arbitration Act or the FAI Rules, deployer's obligations under the AI Act (that will be discussed below) are triggered. Therefore, it becomes essential to determine which specific actor in the arbitration – one or several – is subject to these obligations. The analysis shall begin by looking at what different options are at hand in these situations. In institutional arbitrations, such as those conducted in accordance with the FAI Rules, the actors include the arbitration institute administering the procedure, the arbitral tribunal appointed to the case, and where applicable its secretary, the parties and their counsel. In *ad hoc* arbitrations, the actors are otherwise the same as above, except for the arbitration institute that generally has no role in these cases. In both scenarios, the arbitrators are often lawyers employed by law firms, self-employed practitioners acting as independent arbitrators, experts in specific sectors or, for example, academics. In order to define which actor is the deployer under the AI Act, it is essential to assess *under whose authority* the AI system is used.

In my view, the most meaningful conclusion is that when an arbitral tribunal uses an AI system in commercial arbitration, that inevitably happens under the arbitral tribunal's authority. Consequently, the arbitral tribunal shall be considered as the deployer under the AI Act, with the following clarifications. Where the arbitral tribunal consists of a sole arbitrator, that sole arbitrator shall be the deployer. Where the arbitral tribunal consists of a panel of three arbitrators, it is natural to consider that all three arbitrators are acting as deployers, unless they have shared duties and responsibilities related to this in a different way. Ultimately, the role of the chairperson may be emphasized here.

I have discussed this view with a number of fellow arbitration practitioners in Finland, Sweden, Norway, Denmark, Germany, Austria and Switzerland, and received both support and opposition for the view. That is one of the reasons for writing this article – more discussion on this topic is needed. On a high level, it appears that this view is most often supported by those who are already familiar with the contents of the AI Act and opposed by those who have not yet had the opportunity to study the new regulation in more detail. In the latter group, some have strongly argued that an arbitrator cannot be considered as a deployer. According to them, deployer should be the arbitration institute that administers the arbitration, as the institute is in a better position to assume new responsibilities than individual arbitrators. Others have suggested that deployer could be the law firm that employes the arbitrator. After all, the assumption is that the arbitrator will use the AI systems subscribed to by his or her law firm. Some argue that deployer's obligations should lie with the parties to the arbitration who, in accordance with the principle of party autonomy, ultimately decide on the practicalities of the process and how they want their dispute to be resolved. These options are, in my view, open to criticism. I will explain my view in the following.

Firstly, the arbitrator mandate is highly personal in nature. This generally recognized principle is reflected, among other things, in the Finland Arbitration Institute's (FAI) Note on the Use of a Secretary. According to

it, “The mandate of an arbitrator is personal. By accepting appointment, an arbitrator undertakes not to delegate the mandate to any other person, including any tribunal-appointed secretary. An arbitrator may under no circumstances rely on a secretary to perform any essential duties of an arbitrator”.[31] In my view, ensuring that only compliant, reliable and ethical AI systems are used in the arbitration in a way that promotes and protects the fundamental rights of the parties is such an essential task that it cannot be delegated to anyone, including the secretary. Even if it is the secretary who actually uses the AI system, the use shall still happen under the authority of the arbitrator. Furthermore, neither the arbitration institute nor the law firm employing the arbitrator or the parties to the case are in a position to oversee the arbitrator's use of an AI system in such a way that would justify a different assessment.

Secondly, it should be noted that not all arbitrations are administered by arbitration institutes and not all arbitrators are employed by law firms. It is difficult to see convincing grounds to interpret the AI Act differently depending on whether an AI system is used in an institutional arbitration by an arbitrator working in a law firm or, for example, in an *ad hoc* arbitration by an arbitrator who is a university professor.

As said, further discussion on this topic is needed. Guidance from the European Commission on these issues would also be welcome. In this article, I will adopt the view that when an arbitrator uses an AI system in commercial arbitration, he or she is a deployer within the meaning of the AI Act.

3.2. Use of a high-risk AI system in arbitration

The purpose of the AI Act is to promote the uptake of human-centric and trustworthy AI in a well-functioning internal market, to ensure protection of health, safety and fundamental rights from the harmful effects of AI systems, and to support innovation in the EU.[32] The AI Act establishes: (a) harmonised rules for the placing on the market, putting into service and the use of AI systems in the EU, (b) prohibitions of certain AI practices, (c) specific requirements for high-risk AI systems and obligations for operators of such systems, (d) harmonised transparency rules for certain AI systems, (e) harmonised rules for the placing on the market of general-purpose AI models, (f) rules on market monitoring, market surveillance, governance and enforcement, and (g) measures to support innovation, with a particular focus on SMEs, including start-ups.[33]

The AI Act adopts the risk-based approach proposed in the European Commission's White Paper in 2020, which differentiates between AI systems based on their assumed level of risk and imposes obligations

[31] The FAI’s Note on the Use of a Secretary 2024, Section 3. See https://arbitration.fi/wp-content/uploads/note-on-the-use-of-secretary-2024.pdf.
[32] AI Act, Article 1(1).
[33] AI Act, Article 1(2).

accordingly.[34] The different options include prohibited risk, high-risk, and not high-risk. AI systems with unbearable risks will be prohibited.[35] High-risk AI systems will be subject to specific requirements and obligations.[36] Not high-risk AI systems are allowed without specific requirements, but operators are encouraged to adopt codes of conduct on the basis of which they voluntarily apply certain requirements associated with high-risk AI systems.[37] I would assess that an arbitrator's use of an AI system in arbitration may easily fall into the high-risk category, when taking into account both the sector in question (i.e., administration of justice) and the possible use cases of AI systems in arbitrations.

According to recital 48 of the AI Act, when classifying an AI system as high-risk, particular importance shall be attached to the adverse impact that the use of the system may have on fundamental rights protected by the Charter of Fundamental Rights of the European Union. Such rights include the right to an effective remedy and to a fair trial.[38] Recital 61 of the AI Act further specifies that certain AI systems intended for the administration of justice should be classified as high-risk, considering their potentially significant impact on democracy, the rule of law, individual freedoms and the right to an effective remedy and to a fair trial. The recital states that "to address the risks of potential biases, errors and opacity, it is appropriate to qualify as high-risk AI systems intended to be used by a judicial authority or on its behalf to assist judicial authorities in researching and interpreting facts and the law and in applying the law to a concrete set of facts. AI systems intended to be used by alternative dispute resolution bodies for those purposes should also be considered to be high-risk when the outcomes of the alternative dispute resolution proceedings produce legal effects for the parties". In my view, arbitral tribunals constituted in accordance with the Finnish Arbitration Act and the FAI Rules are clearly alternative dispute resolution bodies within the meaning of this recital, the decisions of which undoubtedly produce legal effects for the parties.[39]

Recital 61 goes on to say that "the use of AI tools can support the decision-making power of judges or judicial independence, but should not replace it: the final decision-making must remain a human-driven activity". This articulates the objective of ensuring that that AI systems shall not undermine human autonomy, let alone replace humans as decision-makers, as has sometimes been suggested.[40] From the outset, the EU legislator has clearly taken the view that the goal of trustworthy, ethical and human-centric AI can only be

[34] AI Act, Recital 26.
[35] AI Act, Article 5.
[36] AI Act, Chapter III.
[37] AI Act, Article 95.
[38] Charter of Fundamental Rights of the European Union, Article 47.
[39] Other views have been expressed as well. Associate Professor *Béatrice Schütte* stated in a panel discussion held in connection with the Nordic Arbitration Day in Helsinki on 26 April 2024 that is open to interpretation whether this also covers arbitration.
[40] *Tania Sourdin*, Judge V Robot? Artificial Intelligence And Judicial Decision-Making. UNSW Law Journal Volume 41(4) 2018, pp. 1114-1115.

achieved by ensuring that humans are involved whenever high-risk AI systems are used.[41] This view can be supported.

The rules on classification of high-risk AI systems are contained in Article 6 of the AI Act. According to Article 6(1), AI systems that are intended to be used as a safety component of a product or that are themselves a product covered by the EU harmonisation legislation listed in Annex I to the AI Act, and which are subject to a third-party conformity assessment pursuant to legislation listed in Annex I, are to be considered high-risk AI systems. Article 6(2) complements this by stating that also AI systems referred to in Annex III shall be considered high-risk. Annex III designates eight sectors in which certain listed AI systems are considered high-risk. One of the sectors is "Administration of justice and democratic processes" and there are two types of AI systems listed under it. One concerns AI systems that are "intended to be used for influencing the outcome of an election or referendum or the voting behaviour of natural persons". The other concerns "AI systems intended to be used by a judicial authority or on their behalf to assist a judicial authority in researching and interpreting facts and the law and in applying the law to a concrete set of facts, or to be used in a similar way in alternative dispute resolution". This, in my view, is very relevant in arbitrations.

This classification is not without exceptions. Recital 61 of the AI Act states that "The classification of AI systems as high-risk should not, however, extend to AI systems intended for purely ancillary administrative activities that do not affect the actual administration of justice in individual cases, such as anonymisation or pseudonymisation of judicial decisions, documents or data, communication between personnel, administrative tasks." The reason for this exception is that such activities are unlikely to pose a significant risk of an infringement of fundamental rights and may therefore be subject to less stringent regulation. The exception is included in Article 6(3) of the AI Act that stipulates that "By derogation from paragraph 2, an AI system referred to in Annex III shall not be considered to be high-risk where it does not pose a significant risk of harm to the health, safety or fundamental rights of natural persons, including by not materially influencing the outcome of decision making".[42] This is stipulated to be the case if any of the following conditions are met: the purpose of an AI-system is (a) to perform a narrow procedural task, (b) to improve the result of a previously completed human activity, (c) to detect decision-making patterns or deviations from prior decision-making patterns and is not meant to replace or influence the previously completed human assessment without proper human review, or (d) to perform a preparatory task to an assessment relevant for the purposes of the use cases listed in Annex III.

[41] European Commission's White Paper on Artificial Intelligence, p. 21.
[42] AI Act, Article 6(3).

I believe that these exceptions will be welcomed by arbitrators. At the same time, they will inevitably give rise to questions of interpretation. When does an arbitrator use an AI system to research and interpret the facts and law of a case and to apply the law to the facts, so that it constitutes a high-risk use case? When is an AI system used so clearly only for administrative purposes that it can be reliably excluded that such use could affect the outcome of the arbitrator's decision-making? There are no easy answers to these questions.

Possible answers can be analyzed, for example, in relation to a typical AI system currently offered to Finnish lawyers, including dispute resolution practitioners, that can be used to search for information on legislation and case law. In addition, the system allows one to “discuss” with documents, such as pleadings, uploaded to the platform, to ask questions about them and to prepare summaries, tables and translations. It seems that when an arbitrator searches legal sources with the help of an AI system like this, that could be assessed as a high-risk use case. The most advanced AI systems may not hallucinate legislation or case law, but following some opaque logic they choose what to show to the arbitrator and what not. It seems difficult to conclude that this could possibly not influence, to any extent, the arbitrator's decision-making in any scenario. One can also ask for what other purpose an arbitrator would, in the course of arbitration, search for legal sources if not to support his or her decision-making. The same applies to analysis and other processing of the parties' pleadings, exhibits and, for example, witness statements, such as preparing summaries or tables of those, using an AI system.

Arbitrators should not have to translate case documents themselves, but parties to the arbitration should be responsible for providing necessary translations. However, if such a need were to arise, arbitrators should be cautious with translating case documents with the help of AI, especially as regards the most relevant material. As we know, the language used and even the individual choice of words can play a very important role in arbitration.[43] I have translated this article back and forth between Finnish and English with AI, and I have noticed that even the most advanced AI systems do not for the time being produce very high-quality results. When translating, an AI system may not be consistent, but it may use several variations of words even when translating the same terminology throughout the document. An AI system may also, among other things, rephrase even direct quotations from the source material it has at its disposal. In my view, the terminology used in arbitration should not be left at the discretion of an AI system. In particular, an arbitrator should not do so. In addition to translations, the language considerations also apply to situations where an arbitrator would draft an arbitral award using an AI system.

[43] See on the topic of language *E. Rainbow Willard*, Where Language, Identity, and Advocacy Meet: Explicit and Implicit Code-Switching in International Arbitration Hearings. I have read a pre-release version of this article. The final version will be published later in The ICCA Congress Series No. 22. For more information, go to https://www.arbitration-icca.org/icca-congress-series.

What, then, could be not high-risk use of an AI system in arbitration? The examples in recital 61 of the AI Act do not provide very concrete answers to this question. Luckily, at the Council's initiative, Article 6(5) of the AI Act stipulates that the European Commission shall, no later than 18 months from the date of entry into force of the AI Act, provide guidelines specifying the practical implementation of Article 6 together with a comprehensive list of practical examples of use cases of AI systems that are high-risk and not high-risk.[44] Therefore, arbitrators will get more detailed guidance on this subject before the deployers' obligations will become applicable.

3.3. Requirements for high-risk AI systems

According to Article 8 of the AI Act, high-risk AI systems shall comply with the requirements set out in Chapter III, Section 2 of the Regulation. In practice, these requirements target providers of high-risk AI systems that are responsible for developing the systems.[45] In this section, I will briefly describe these requirements, as they form the basis for the obligations of deployers discussed in the next section. The arbitrator acting as a deployer should know what he or she should expect and require from the high-risk AI system he or she is using.

According to Article 9 of the AI Act, for high-risk AI systems, a risk management system shall be established, implemented, documented and maintained. The risk management system shall be understood as an iterative process that continues as planned throughout the lifecycle of high-risk AI systems. The risk management system shall be regularly reviewed and updated. The key idea is that known, and reasonably foreseeable risks associated with high-risk AI systems are identified, analysed and subject to risk management measures that eliminate or at least reasonably mitigate those risks. The risk management measures shall be such that after their application the residual risks are considered to be at an acceptable level.

According to Article 10 of the AI Act, high-risk AI systems shall be developed on the basis of training, validation and testing data sets that meet certain quality requirements. According to Article 11 of the AI Act, technical documentation of high-risk AI systems shall be drawn up before they are placed on the market or put into service and shall be kept up to date. The technical documentation shall demonstrate that the high-risk AI system complies with the applicable requirements. According to Article 12 of the AI Act, high-risk AI systems shall technically allow for the automatic recording of events, i.e., logs, throughout the lifecycle of the system. Article 13 of the AI Act requires high-risk AI systems to be designed and developed in such a way as to ensure that their operation is sufficiently transparent to enable deployers to interpret and use the system's outputs

[44] AI Act, Article 6(5). *[Author's note in the English translation: The guidelines shall be provided no later than on 2 February 2026, whereas the deployers' obligations shall apply from 2 August 2027.]*
[45] AI Act, Article 16(1)(a).

appropriately. High-risk AI systems shall be accompanied by instructions for use, in digital or other form, providing concise, complete, correct and clear information that is relevant, accessible and understandable to deployers. The instructions for use shall specify, inter alia, the intended use of the system.

According to Article 14 of the AI Act, high-risk AI systems shall be designed and developed in such a way that natural persons can effectively oversee them while they are in use. This aims to prevent or minimise, inter alia, risks to fundamental rights that may emerge when a high-risk AI system is used either for its intended purpose or under conditions of reasonably foreseeable misuse. According to Article 15 of the AI Act, high-risk AI systems shall be designed and developed in such a way that they achieve an appropriate level of accuracy, robustness, and cybersecurity, and perform consistently in this regard throughout their lifecycle.[46]

Articles 16 to 22 of Chapter III, Section 3 of the AI Act impose additional obligations on providers of high-risk AI systems. Article 23 of the AI Act imposes obligations on importers and Article 24 on distributors. These provisions will not be discussed here in more detail.

3.4. Main obligations of deployers of high-risk AI systems

The obligations of deployers of high-risk AI systems are laid down in Article 26 of the AI Act. Article 26(1) of the AI Act requires deployers to take appropriate technical and organisational measures to ensure that they use high-risk AI systems in accordance with the instructions for use accompanying them. Article 26(2) provides that deployers shall ensure that oversight of high-risk AI systems is entrusted to natural persons who have the necessary competence, training and authority, as well as the necessary support. In commercial arbitrations, where deployers are ultimately the individuals acting as arbitrators, it seems that an appropriate way to discharge these obligations is that the arbitrators using high-risk AI-systems familiarise themselves with relevant instructions for use and ensure that those are followed, and that they also assume responsibility for the required human oversight of such AI systems themselves. As stated above, the person in charge of human oversight shall have "necessary authority". It is questionable whether in an arbitration anyone other than the arbitrators, such as an administrative secretary, can be regarded as having such authority.

According to Article 26(4) of the AI Act, to the extent the deployer controls the input data of a high-risk AI system, it shall ensure that the input data is relevant and sufficiently representative for the intended purpose of the AI system. Input data is defined in Article 3(33) of the AI Act as "data provided to or directly acquired by an AI system on the basis of which the system produces an output". In the context of arbitration, this paragraph may become relevant for example in a situation where an arbitrator deploys an AI system into

[46] Article 13 of the AI Act includes an obligation for providers to provide deployers with information on these topics.

which he or she feeds the data to be used to train the system. The paragraph may also become relevant in a large scale dispute where the arbitrator implements an AI-based document management system where he or she uploads the case file for analysis, and from which he or she then draws conclusions when resolving the case. In such a situation, if the arbitrator downloaded wrong documents, or omitted to upload some relevant documents, that could potentially distort the analysis carried out with the help of the AI system and be considered as contrary to Article 26(4) of the AI Act.

Article 26(5) of the AI Act concerns notification obligations of the deployer. It requires deployers to monitor the operation of high-risk AI systems in accordance with their instructions for use and, where relevant, to inform the provider of certain events.[47] Where deployers consider that the use of high-risk AI systems in accordance with the instructions for use may lead to the AI systems presenting certain risks they shall, without undue delay, inform the provider or distributor and the competent market surveillance authority accordingly and suspend the use of such systems.[48] Serious incidents detected by deployers shall be immediately reported to relevant parties. In the context of arbitration, this means, at the very least, that arbitrators using high-risk AI systems need to understand how the systems are intended to work in order to detect potential deviations in a timely manner and to react appropriately.

According to Article 26(6) of the AI Act, deployers of high-risk AI systems shall keep the logs automatically generated by the AI systems to the extent that the logs are under their control, for a period of time appropriate to the intended purpose of the AI system, and in any event for at least six months, unless otherwise provided by law. Arbitrators who use high-risk AI systems in arbitration proceedings shall thus agree on the keeping of the logs with the provider. If an arbitrator uses an AI system subscribed to by a third party, such as the law firm that employs him or her, it is recommended to discuss the matter with that third party that can further agree on the matter with the provider.

In accordance with Article 26(9) of the AI Act, deployers of high-risk AI systems shall, where applicable, use the information provided to them by the provider in accordance with Article 13 of the AI Act when complying with an obligation to carry out a data protection impact assessment in accordance with Article 35 of Regulation (EU) 2016/679[49] or Article 27 of Directive (EU) 2016/680.[50]

[47] See reference to Article 72 of the AI Act regarding post-market monitoring.
[48] See reference to Article 79(1) of the AI Act that provides for a procedure for dealing with AI systems that present a risk, as defined.
[49] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance). OJ L 119, 4.5.2016, p. 1–88.
[50] Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or

According to Article 26(11) of the AI Act, deployers of high-risk AI systems referred to in Annex III that make decisions or assist in making decisions relating to natural persons shall inform the natural persons that they are subject to the use of the high-risk AI system. In an arbitration, such notice to the parties may be appropriate in order to respect the parties' rights, regardless of whether they are natural or legal persons.

According to Article 26(12) of the AI Act, deployers shall cooperate with relevant competent authorities in any action the authorities take in relation to the high-risk AI systems in order to implement the AI Act. The authorities will have a lot to do in this regard, so it remains to be seen what this will mean in practice for the deployers.

3.5 Briefly on potential consequences of non-compliance

Failure to comply with the deployer's obligations under the AI Act may have a wide range of consequences for the deployer. Here are a few examples.

According to Article 86 of the AI Act, any person subject to a decision which is taken by the deployer on the basis of the output from a high-risk AI system listed in Annex III, which produces legal effects or similarly significantly affects that person in a way that they consider to have an adverse impact on, inter alia, their fundamental rights, shall have the right to obtain from the deployer clear and meaningful explanations of the role of the AI system in the decision-making procedure. If the deployer fails to provide satisfactory explanations, the affected person may lodge a complaint with the competent market surveillance authority, which may impose penalties on the deployer. Penalties are equally possible for breaches of other obligations under the AI Act.

The AI Act leaves the details of the penalties and other enforcement measures at the discretion of Member States, however so that they must be effective, proportionate and dissuasive.[51] The AI Act also sets out some more specific guidelines on penalties, for example that non-compliance with the deployers' obligations included in Article 26 of the AI Act shall be subject to administrative fines of up to EUR 15 million or, if the offender is an undertaking, up to 3 percent of its total worldwide annual turnover in the preceding financial year, whichever is higher.[52]

In Finland, civil law claims are not resolved together with administrative penalties but shall be brought before competent courts in accordance with applicable rules of civil procedure. In this context, one can mention the

prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA. OJ L 119, 4.5.2016, p. 89–131.

[51] AI Act, Article 99(1).

[52] AI Act, Article 99(4).

European Commission's proposals for AI Liability Directive[53] and for a new Product Liability Directive,[54] which are intended to complement the AI Act and each other, with the aim of harmonising the enforcement of AI-related civil claims in the EU. These will not be discussed here in more detail.

Moreover, if an arbitrator was found to have acted contrary to his or her obligations related to the deployment of a high-risk AI system in arbitration, this could, under Finnish law, potentially be argued to constitute grounds for setting aside the arbitral award issued by that arbitrator. The grounds invoked could include, for example, that the arbitrator has exceeded his or her mandate or denied the parties an opportunity to present their case when deploying a high-risk AI system in the arbitration contrary to the AI Act.

One could write a separate article about the consequences of non-compliance with the AI Act, but at this point, these very brief remarks shall suffice to underline the importance of familiarising oneself with the AI Act and ensuring compliance with it, to the extent applicable.

4. Conclusion

This article offers a high-level overview of an extensive new subject matter of which we currently know very little. We may have the final wording of the AI Act in our hands, but the world and AI technologies will have changed many times before the AI Act is actually applicable. Therefore, this article does not even attempt to give comprehensive answers to all open questions. Instead, it seeks to draw attention to the fact that the AI Act is relevant also to arbitrators.

In summary, I argue that when an arbitrator uses an AI system in arbitration proceedings conducted in accordance with the Finnish Arbitration Act or the FAI Rules, he or she is considered as a deployer within the meaning of the AI Act. If the purpose of using the AI system is to help the arbitrator to research and interpret the facts and law of the case and to apply the law to the concrete facts, this is as a main rule considered a high-risk use case that triggers a number of obligations on the arbitrator. Although the AI Act will not be applicable in this respect until a few years from now, it is recommended that arbitrators familiarise themselves with the AI Act already now. This will allow arbitrators to adopt such practices in their use of AI systems that are not only future-proof but also ethically sustainable, already at this stage.

[53] Proposal for a Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive). Brussels, 28.9.2022, COM(2022) 496 final.
[54] Proposal for a Directive of the European Parliament and of the Council on liability for defective products. Brussels, 28.9.2022, COM(2022) 495 final, 2022/0302(COD).

There are also other ways to prepare for the new regulation. For example, several arbitration institutes have started to examine whether the use of AI systems in the arbitrations they administer could be included in their arbitration rules or addressed some other way.[55] One of the first institutes to take concrete action is the *Silicon Valley Arbitration and Mediation Center* (SVAMC), which has in April 2024 published guidelines on the use of AI in arbitrations (SVAMC Guidelines).[56] According to the SVAMC Guidelines, an arbitrator may not delegate all or part of his or her personal mandate to an AI system. In addition, the arbitrator may not rely on AI-generated material without reserving the parties an opportunity to comment on it. The arbitrator shall also verify the sources presented by an AI system.[57]

In my view, guidance by arbitration institutes would be welcome. While it is clear that arbitrators shall abide by the law, whether or not this is expressly provided for in the applicable arbitration rules or guidelines, it should be borne in mind that we are now on the verge of a transformation comparable to the invention of steam engine or electricity. The most fundamental European values, such as the rule of law and respect for fundamental rights, are at stake. Any support that individual arbitrators can get, including from institutes, is surely welcome. At the same time, compliance with the new obligations shall be ensured also in *ad hoc* proceedings. Perhaps professional associations and bodies such as the *Finnish Bar Association* may take an active role in this regard. Providers of AI systems can support deployers in complying with their obligations under the AI Act for example by providing information on the matter.

While we wait for the entry into force and applicability of the AI Act, I encourage all arbitrators interested in using AI systems in arbitrations, in the spirit of transparency and party autonomy, to address this issue openly with the parties to the arbitration already now, for example in the first Case Management Conference and in Procedural Order no. 1. This will contribute to ensuring that all participants in the arbitration agree on the AI systems and their use cases permitted in the procedure, and unintentional infringements of the parties' rights are avoided.

[55] *Payel Chatterjee - Aman Singhania - Yuvraj Singh Sharma*, Technology and artificial intelligence: Reengineering arbitration in the new world. International Bar Association Arbitration Committee articles (2023). See https://www.ibanet.org/tchnology-and-artificial-intelligence-reengineering-arbitration-in-the-new-world.
[56] Guidelines on the use of Artificial Intelligence in Arbitration, https://svamc.org/wp-content/uploads/SVAMC-AI-Guidelines-First-Edition.pdf.
[57] See sections 6 and 7 of the SVAMC Guidelines.