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Beyond the Horizon: Charting the Next Forty Years of Alternative Dispute Resolution

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Beyond the Horizon – Charting the next 40 Years of Alternative Dispute Resolution

*Professor Doug Jones AO**

INTRODUCTION

It is trite to remark that there have been remarkable changes since I first became involved in alternative dispute resolution ('ADR') as a young infrastructure lawyer over 40 years ago, prior to undertaking the role of international and domestic arbitrator. My field of arbitration has been transformed by the increasing number, scale and complexity of disputes. Nowadays, there are some 52 arbitral institutions members of the International Federation of Commercial Arbitration Institutions.[1] Around 70% of these institutions have been created in the last forty years,[2] and over the two decades from 1990-2010 some institutions increased their case load by over 70%.[3]

In 1965 Professor Philippe Fouchard described arbitration as: "[an] apparently rudimentary method of settling disputes, since it consists of submitting them to ordinary individuals whose only qualification is that of being chosen by the parties.[4] At the time he wrote this, only 7 years after the New York Convention entered into force, it was perhaps difficult to foresee the rapid growth of alternative dispute resolution in the last quarter of the 20th century, commensurate with the rapid globalisation of international trade. Now, however, far from being '*rudimentary'*, many of the most technically complex and high value disputes globally are resolved through arbitration and ADR. To some minds, the complexity of disputes is so great that it poses an existential threat to arbitration as the foremost method of cross-border dispute resolution, leading to drawn out procedures to deal with this complexity.[5]

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[1] 'About IFCAI,' *IFCAI Arbitration* (Web Page, accessed 20 January 2026) <https://www.ifcai-arbitration.org/>.

[2] Guy Pendell, 'The Rise and Rise of the Arbitration Institution,' *Kluwer Arbitration* (Web Page, accessed 30 November 2011) <http://kluwerarbitrationblog.com/blog/2011/11/30/the-rise-and-rise-of-the-arbitration-institution/>; Mohamed Abdel Raouf, 'Emergence of New Arbitral Centres in Asia and Africa: competition, cooperation and contribution to the rule of law' in Stavros Brekoulakis, Julian D.M. Lew, Loukas Mistelis Brekoulakis (eds) *The Evolution and Future of International Arbitration*, (Kluwer, 2016) 321.

[3] Lucy Greenwood, 'The Rise, Fall and Rise of International Arbitration: A view from 2030' (2011) 77(4) *Arbitration* 435, 436.

[4] Phillippe Fouchard, *L'Arbitrage Commercial International* (Paris: Dalloz, 1965), quoted in Redfern and Hunter, *Law & Practice of International Commercial Arbitration* (Oxford University Press, 2004), 2.

[5] See for example, Steven Seidenberg, 'International Arbitration Loses Its Grip: Are U.S. Lawyers to Blame?' (2010) 96 *American Bar Association Journal* 50.

Given the pace of these changes, it is pertinent to ask how we might chart the next forty years of development in international arbitration. I will confine my remarks on this occasion to three areas. First, the future is usefully informed by the past. The 40th anniversary of the creation of the Australian Disputes Centre ('ADC') provides a welcome occasion to consider the historical contributions of this organisation to the furtherance of ADR in Australia. Its successes suggest a few cardinal values with which we should approach the future development of ADR. Secondly, I consider the potential of generative artificial intelligence ('AI') to transform ADR. Thirdly, I look at ways in which there can, or at least should be, development of combined processes of mediation and arbitration.

I THE ADC AND THE HISTORICAL GROWTH OF ADR IN AUSTRALIA

The Australian Commercial Disputes Centre ('ACDC'), as it was then known, was established in 1986 as a not-for-profit organisation. Notably, the initiative for ADR came from within industry itself: it was not the mere plaything of lawyers. Without wishing to force parallels with the present day, there are two lessons to be drawn from the ADC's history. First, ADR stems from a real business and social need for more flexible and efficient methods of resolving both domestic and international commercial disputes. There is no doubt a tendency amongst lawyers to favour the standardisation and predictability of procedure, however the use of ADR, where such procedures may be flexibly modified, is essential to promoting access to justice, and commercial efficiency.[6] The second observation is that the ADC has helped to promote in Australia the use of facilitated decision making options, such as mediation and conciliation, in a manner complimentary to binding alternatives, such as arbitration or litigation.

The establishment of the ACDC in 1986 was spearheaded by then NSW Attorney General and Chief Justice, the Honourable Justice Terry Sheahan AO and the late the Honourable Sir Lawrence Street AC, KCMG, KStJ, QC. The crucial contribution of the ACDC was to create space in Australia for a more *commercial* understanding of ADR. Arbitration and mediation had a long history of use in family disputes.[7] There had also been for some time in New South Wales one of the worlds earliest industrial relations arbitration systems, which was the beast created by the *Conciliation and Arbitration Act 1904* and which had its heart in the Court of Conciliation and Arbitration.[8] This was created under s 51(xxxv) of the *Commonwealth Constitution,* which enabled Commonwealth Parliament to make laws with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending

[6] Doug Jones, 'Diversity of Expertise in Arbitration: The Past, Present and Future' (Ciarb Austalia Annual Lecture 2025, 14 October 2025), 16-17.
[7] Sandra Regan, 'Everything You Wanted to Know about Family Mediation in New South Wales, But Were Afraid to Ask: A Survey of Family Mediation in NSW' in Alternative Dispute Resolution Association of Australia (ed), *Exploring Family Mediation in Australia* (Family Mediation Seminar, 28 May 1988) 1, 3–4;
on mediation amongst "neighbours", see the remarks of Kirby P in *Hemmes Hermitage Pty Ltd v Abdurahman* (1991) 22 NSWLR 343, 351 (Court of Appeal).
[8] *Conciliation and Arbitration Act 1904* (Cth); David Stewart, 'Alternative Dispute Resolution in the Employment and Industrial Field' [2020] (Autumn) *Bar News* 54, 54.

beyond the limits of any one State".[9] The history of non-commercial ADR thus stretched at least as far back as federation (and in the case of indigenous ADR, far further).[10] One consequence of this early history of industrial ADR in Australia is that the notion of arbitration became influenced by the operation of quasi-judicial bodies like the Court of Conciliation and Arbitration, more formal in their proceedings than the form of ADR which members of the commercial world desired and which the ACDC envisioned in 1986.

The initiative for a more flexible and efficient form of dispute resolution than that previously offered in NSW involved significant input from the commercial community. The working committee whose proposal culminated in the establishment of the Centre was described by Sir Lawrence Street as an interdisciplinary group consisting of "judges, members of the legal profession and members of the commercial community".[11] The common thread linking this group was an understanding that genuine alternatives to traditional common law adversarial processes come closer to what parties actually hope to achieve: a timely, and cost efficient resolution that allows them to move forward with their commercial relationships. The Hon. Justice Sheahan articulated this sentiment well when he explained that ADR should be conceptualised as *Appropriate* Dispute Resolution.[12] Rather than being strictly alternative to the formal justice system, giving parties the ability to opt for more flexible and appropriate ways of resolving commercial disputes is an integral part of a modern society's toolbox for resolving disputes in a just fashion.

Against this understanding, there was, in some common law jurisdictions especially, a tendency to regard with suspicion the flexibility and innovativeness of ADR procedures. The reasons for preferring standardised procedures of giving and analysing evidence, seeking disclosure of documents, and setting out pleadings, are understandable. They offer reassurance that the procedural complexities of large matters with complex issues of fact and law are dealt with in a fair and predictable manner. The procedural dimension of arbitration was one reason why courts would historically refuse to refer entire disputes for expert determination. The point was put by WB Campbell J (as he then was) in *Honeywell Pty Ltd v Austral Motors Holdings Ltd*:

> The defendant wishes to have the decision of a judicial tribunal and not the decision merely of a person skilled in the appropriate scientific field. It is very likely in this case that the fact-finding process will be a difficult one and it is likely that there will be conflicting views and opinions of expert witnesses. In my opinion the fact-finding process will be more satisfactorily handled by a judicial officer than by a person who lacks the training, experience and skills of a trial court judge. In a complex case of this

[9] Laurence Boulle and Rachael Field, *Mediation in Australia* (LexisNexis Butterworths, 2018) 27 [1.70], 275 [9.2]; Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (LexisNexis Butterworths, 2nd ed, 2002) 4.
[10] David Spencer, "Mediating in Aboriginal Communities" (1997) 3(3) *Commercial Dispute Resolution Journal* 245, 245–6.
[11] Lawrence Street, 'Australian Commercial Disputes Centre,' [1986] (Autumn) *Bar News* 13,13.
[12] Terry Sheahan, 'Use of ADR in New South Wales and in the Land and Environment Court,' (Speech, Land and Environment Court NSW ACPEC, 3 September 2010), 1 <https://lec.nsw.gov.au/documents/speeches-and-papers/sheahan_acpect_adr.pdf>.

> sort there will be problems arising as to the admissibility of evidence and a person lacking legal training will find such matters very difficult to decide.[13]

However, as Sir Lawrence Street advocated in many papers and speeches, offering genuine alternatives that are more flexible and efficient than litigation in the courts is a necessary response to the growing complexity and pace of social life. The use of arbitration, mediation and conciliation are ways to preserve the quality of the judiciary which is "too precious to be spread too thinly."[14]

Another historical contribution of the ADC was to support the symbiotic use of mediation, conciliation and arbitration. One justification posited by Sir Lawrence was that mediation constitutes a crucial first step, which even if not successful, has value in narrowing the issues in dispute.[15] The late Honourable Andrew Rogers QC, another proponent of ADR from within the ranks of the judiciary, advocated a similar view. In 1984, his Honour gave a speech which, similarly to the present address, was tasked with predicting the state of "Dispute Resolution in the Year 2000". He prophetically noted that ADR:

> will need to be an integral part of the system of dispute resolution … any contest, in any matter, [should] be preceded by an attempt at conciliation or mediation. Only disputes which cannot be resolved by these means will then proceed to argument and so consume the scarce resources required by contentious dispute resolution. Furthermore, even after a tribunal embarks on the task of determining a dispute it should continue to search for settlement by mediation.[16]

This approach to ADR is reflected in the important role presently held by the ADC, particularly in the context of promoting mediation and conciliation in Australia and educating and accrediting ADR practitioners. The ADC offers dispute resolution clauses and guidelines, a variety of which provide for integrating mediation or conciliation with arbitration or expert determination. Furthermore, the ADC offers case management services to assist parties in appointing ADR professionals, and in taking full advantage of the different forms of ADR on offer.

To briefly conclude this overview, the establishment of the ACDC in 1986 was the result of open-mindedness to the need of commercial parties for a more cost-efficient and quick form of dispute resolution. Its founders understood that providing a genuine alternative to the court system is crucial for access to justice within a society. In the next section of this paper, I will discuss the importance of integrating generative AI into how we approach ADR. Although, the nexus between these topics may not be immediately obvious, the history of the ADC

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[13] *Honeywell Pty Ltd v Austral Motors Holdings Ltd* [1980] Qd R 355, 360 (WB Campbell J).

[14] Lawrence Street, 'The Court System and Alternative Dispute Resolution Procedures,' (1990) 1 ADRJ 5, 7 ('The Court System').

[15] 'The Court System' (n 14) 5–11; see also Robert McDougall, 'Courts and ADR: A Symbiotic Relationship, LEADR & IAMA Conference,' 7 September 2015 (Paper delivered at the LEADR &IAMA Conference), [15] <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2015%20Speeches/McDougall_20150907.pdf>.

[16] Andrew Rogers, 'Dispute Resolution in Australia in the Year 2000' (1984) 58 *Australian Law Journal* 608, 610.

demonstrates that finding flexible alternatives to traditional, curial methods of commercial dispute resolution is necessary both for commerce, as well as to support access to justice more broadly. The potential to use generative AI to deal with the growing evidential complexity of modern commercial disputes fills a similar gap. In the past 20 years, the amount of available information and data available as a result of text messages, emails, GPS tracking, and other project databases has caused an explosion in the evidential complexity of disputes. It may soon be unjust and inadequate to attempt to resolve such complex disputes using the standard evidentiary methods deployed in ADR, without the assistance of generative AI.

II USE OF ARTIFICIAL INTELLIGENCE

Since November 2022, when Chat-GPT was first released, an enormous many terabytes have been devoted to contemplating how the use of Large Language Models (LLMs) and AI might revolutionise the law. It is sometimes difficult to separate sales-pitches from the genuine possibilities and applications of AI. One hesitates to be in any way definitive given the enormous strides that AI is making on a weekly if not a daily basis.[17] However, what can already be seen in the context of AI and Dispute Resolution is the following uses:

- probabilistic legal predictions which may be of use in the early stages of consensual settlement (estimation of chance of success and quantum of damages, calculation of risk of proceeding to arbitration);
- the possibility to synthesize disputes which are so factually and technically complex they may otherwise be impossible for humans to adjudicate properly;
- managing procedural deadlines and scheduling; and
- specialised legal research – platforms like Lexis Nexis, Westlaw, and Jus Mundi now feature built-in AI research tools.

I first offer a working definition of generative AI, and specifically, Large Language Models ('LLMs'). Then, I provide an overview of ways in which AI is currently being used by ADR practitioners and by some national courts.

[17] The difficulties of attempting to predict a technology revolution which is still in its infancy should be approached with some humility. For example, from 1998-2000, a joint task-force formed by the American Bar Association devoted several hundred pages to exploring the development of a global infrastructure for jurisdiction over the internet. With the benefit of hindsight, the task-force appears to have been tilting at wind-mills. The internet and e-commerce seem to have developed in a perfectly adequate fashion without the assistance of the global legal infrastructure for which the authors of the ABA report argued: 'Achieving legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet' (2000) 55(4) *The Business Lawyer,* 1801.

A *Defining Generative Artificial Intelligence*

Some of the uncertainty surrounding the AI debate stems from poor attempts to define what LLMs and generative AI are, and how they operate.[18] There are two types of definition of generative AI. The first is technical and focusses on how the system produces outputs. The second is outcome oriented and describes what it is that generative AI can do. The second type of definition is often favoured in legal journals and in social commentary, the argument being that the technical underpinnings of AI evolve so rapidly as to make understanding them in great detail irrelevant.[19] Although achieving a perfect technical understanding of generative AI is a Sisyphean task, practitioners should command at least a working understanding of how a large language model goes from prompt to output in order to use generative AI meaningfully and ethically.

It should be noted at the outset that "AI explainability" is itself a topic of scholarly interest.[20] Certain parts of AI systems are designed to operate without human supervision or instruction. There is a very real sense in which the intermediate processes mapping input to output admits of no elaboration.

This caveat aside, a useful starting point is to explain what precisely is meant by the label, "LLM". An LLM is nothing more than a particular application of generative AI which is trained on large text datasets to predict and generate language. Since LLMs deal in natural language, they are widely seen as the most relevant type of AI for lawyers. However, it should be noted that generative AI can also be used to create, amongst other things, code, audio, visual media, and synthetic datasets. The characteristic feature of LLMs is that they use "neural networks" to predict the appropriate output. Each digital neuron takes in any number of inputs and generates a single output. As with biological neurons, it is the weighting of different inputs which determines whether the neuron is activated.[21] The output from one neuron becomes the input for another and this process may occur over many layers of neurons. When a human receives positive feedback after making a decision, the neural pathway (or dendrite) relied upon to make that decision will grow stronger. In much the same way, when an LLM "gets it right", the weighting attached to useful neurons is strengthened accordingly.

This system in modern LLMs of weighting inputs to arrive at a predictive output can be contrasted to the first generation of AI machines. These functioned like decision trees, processing data in a strictly serialized and deterministic fashion. If A, then B, if B then C. They were set up through laborious work by human experts in the field. Some systems like Deep Blue, the chess machine which beat Garry Kasparov in 1997, could outperform humans through

[18] Lord Justice Colin Birss, 'The Impact and Value of AI for IP and the Courts' (Speech, Life Sciences Patent Network European Conference, 3 December 2024), [4] <https://www.judiciary.uk/the-impact-and-value-of-ai-for-ip-and-the-courts-a-speech-by-lord-justice-birss/>.

[19] On defining AI, see Richard Susskind, 'Chapter 26: Artificial Intelligence,' in *Online Courts and the Future of Justice* (Oxford University Press, 2019) 263, 264–265.

[20] Melanie Mitchell and David C Krakauer, 'The Debate over Understanding in AI's Large Language Models' (2013) 120(13) *PNAS* e2215907120, 1; Nathan Colaner, 'Is Explainable Artificial Intelligence Intrinsically Valuable?' (2022) 37 *AI & Society* 231, 231.

[21] Michael Legg and Felicity Bell, *Artificial Intelligence and the Legal Profession* (Hart Publishing, 2020), 31.

brute-force computation. In contrast, modern LLMs engage in a statistical process: if "if a then b" occurs sixty times, and "if c then a" occurs four times, the system will calculate the relative weights of the two rules.[22] The key innovation is that LLMs are statistical, not deterministic machines. Rather than requiring a human to definitively program how the computer should move from input A to output B, an LLM can train itself using enormous amounts of data to formulate "weightings". These allow it to predict the best output.

The process by which an LLM calculates the weight to be allocated to each input is called *machine learning*. Machine learning requires that an AI system begin with randomised parameters, that it will itself iteratively rewrite in order to process information. It does this rewriting in advance of its use, in what is known as the "training" or "pre-training" stage (hence the name Chat GPT or *generative pretrained transformer*). During pretraining, the machine is fed data from which it is to detect and graph patterns. When fed with good data sets, the machine can calibrate its own parameters through a process known as back-propagation. First, there is the "feedforward stage", in which the machine proceeds from input to output according to its current parameters. Then, the machine compares its actual output with its intended output and calculates the degree of "error" between the actual and intended outputs. An intended output might take the form of "tokens" (data) which are located in the model's training data. In this way, the training data provides both the input and the intended output. Lastly, the machine modifies the current parameters in accordance with the degree of error. This process proceeds (propagates) from the "back" (output layer) to the "front" (input layer), and so rewrites the parameters in inverse order. A new set of working parameters have now been reached, and may themselves be tested in the same way.

Understanding these processes has direct implications for how we should think about and use generative AI. It is common to complain of the threat of hallucinations as something which will delay the uptake of AI until such a time when the programs may be coded better so as to eliminate them or reduce them to near zero. Readers will no doubt be familiar with cases where hallucinations have been used by unwitting counsel (*Mata v Avianca*)[23] or by unwitting arbitrators (*La Paglia*).[24] The concern is a very real one. However, once it is understood that LLMs are fundamentally predictive machines, it can be seen that hallucinations will never be fully eradicated. The capacity to generate bogus cases is inherently geared into the mechanisms of AI. Waiting for a hallucination free AI may be like waiting for Godot.

Rather than being seen as a drawback, the predictive and pattern recognising features of generative AI are precisely what make it such a powerful a tool. Therefore, I do not presently foresee AI being a wholesale replacement for knowledge of case law and statute, nor do I foresee it generating enforceable awards by performing its own legal reasoning. The most enduring use-cases for AI will be those that account for its inherent limitations. For instance, rather than replacing familiarity by a human with complex factual evidence, AI is well placed to recategorize and guide readers through otherwise impenetrably dense fact patterns. No one

[22] *Ibid* 32, quoting J Kaplan, *Artificial Intelligence, What Everyone Needs to Know* (Oxford University Press, 2016) ch 2 'The Intellectual History of Artificial Intelligence.'
[23] *Mata v. Avianca, Inc.,* 678 F. Supp. 3d 443 (2023).
[24] *Lapaglia v. Valve Corp.*, 2025 U.S. Dist. LEXIS 254991 (2025).

would presently imagine tackling a complex construction dispute without the assistance of a table of contents at the start of each set of submissions and clear headings to divide the content into useful groupings. The assistance of AI in categorizing by relevance and sorting materials may soon become just as indispensable. A similar use-case that takes into account the limitations inherent to generative AI is to deploy as an advanced search tool to jog the memory of tribunals already familiar with the dispute. Like the human judicial assistants already employed in many courts, AI could assist in rapid recall during or just before hearings, more time would thus be liberated to pursue pertinent lines of questioning.[25]

B *How is AI currently being used in ADR?*

I turn to an analysis of some current uses of AI in ADR, as well as examining some instructive examples of the use of AI by courts. At the risk of oversimplifying, it is possible to identify three broad categories of current use.

First, and most likely to perturb my colleagues is the use of AI to produce *preliminary* awards or sections thereof. Secondly, there is the use of AI as a "research assistant" and to simplify grunt technological calculation by extracting data. Thirdly, there is the use of AI as a form of client assistance/outcome prediction.

AI for drafting

Starting with the use of AI for preliminary analysis or determinations, the paradigmatic example is the release in late 2025 by the American Arbitration Association of an AI Arbitrator for use in documents only construction disputes administered by the ICDR.[26] The key feature of the ICDR's model is that it has been crafted around keeping expert human legal judgement "in the loop" throughout the process. It is proposed that:

1) Parties upload case materials and validate the AI's understanding of their submissions.
2) The AI then applies "legal reasoning" to:
    a. Present a dashboard of summaries, timelines and claims analysis; and
    b. draft awards or sections thereof with record citations.
3) A trained human arbitrator intervenes to refine and create a final decision.

The tool is presently being marketed as being suited for documents only disputes involving less complex subject matter. It is estimated that the AI arbitrator could reduce time by 25% and costs by 30-50% in eligible cases.[27] Far from detracting from or being seen as a delegation of the arbitrator's work, it is said that the capacity to summarise evidentiary materials and submissions allows an arbitrator to more ably perform the core of their task, which is to pro-

[25] Aidan Xu, 'The Use (and Abuse) of AI in Court' (Speech, IT Law Series 2025: Legal and Regulatory Issues with Artificial Intelligence, 30 July 2025), [17] <https://www.judiciary.gov.sg/news-and-resources/news/news-details/justice-aidan-xu--speech-at-the-it-law-series-2025--legal-and-regulatory-issues-with-artificial-intelligence>.

[26] See further <https://www.adr.org/press-releases/aaa-icdr-to-launch-ai-native-arbitrator-transforming-dispute-resolution/> (Web page accessed 24 January 2026).

[27] 'AAA's AI Arbitrator : a glimpse of what's next' (*Global Arbitration News,* 5 November 2025) <https://www.globalarbitrationnews.com/2025/11/05/aaas-ai-arbitrator-a-glimpse-of-whats-next/>.

actively manage the dispute, refine the issues in contention and direct the parties' further submissions to resolve the dispute as fairly and efficiently as possible. I have raised on several occasions the value of mid-stream case management conferences where the collaboration of the parties is requested to narrow the issues for final determination.[28] But this is not always an easy task. A great deal of grunt work goes into mastering the submissions months if not years before a final hearing in order to prepare an issue summary schedule. I then seek the parties' comments on the issue summary schedule. This can frequently lead to entire sub-issues being removed from contention. Thus, many hours of reading to prepare a small section of the issue summary schedule can be rendered moot if the parties later settle their differences on a particular issue. It is easy to see how a tool like that proposed by the AAA would fit seamlessly into this model of active case management. The value for parties is not in having the decision maker spend hours acquainting her or his self with aspects of the dispute which may drop out of contention in order to equip the decision maker to thoughtfully and actively manage their dispute. If that exercise can be performed in a faster and less costly fashion by an LLM it is difficult to justify doing it any other way. Used in this way, the parties have an opportunity to correct any oversights in an AI summary schedule and to point out any key areas of difference they feel have not been captured sufficiently well by the AI product.

What, then, of the final stage of the process proposed by the AAA: the drafting of a preliminary award? Many find the suggestion of AI drafting an award or a deed of settlement to be challenging. Once an award or settlement has been made, it becomes enforceable using the coercive powers of the state. There is a strong instinctive feeling that where such powers are exercised with the support of a state, human judgement, and the human capacity to appreciate values like fairness and empathy is inextricable from the justice system. Even if AI could perfectly generate the simulacrum of fairness, reservations readily abound.

However, a meaningful distinction can be drawn between making a decision on the one hand, and, on the other hand, writing the prose with which to convey that judgement.[29] It is not hard to imagine how enormous time and cost savings could be made in drafting prose without actually delegating any decision making. To prove this point, in 2023, the Honourable Lord Justice Colin Birss, then sitting at the Court of Appeal, explained how he had:

> asked ChatGPT, 'can you give me a summary of this area of law', and it gave me a paragraph. I [knew] what the answer [was] because I was about to write a paragraph that said that, but it did it for me and I put it in my judgment. It's there and it's jolly

[28] See for example: Doug Jones, 'How Tribunals Deal with Damages in International Arbitration,' (GAR Live: Damages, London Keynote paper, 30 January 2025), 16; Doug Jones, 'Jones shares Procedural Approaches After GAR-LCIA Roundtable,' (Global Arbitration Review, 6 December 2024), 4; Doug Jones and Janet Walker CM, 'Procedural Innovations on the Horizon' (Conference Paper, SCA Conference, 12 May 2024); Doug Jones, 'Flexibility in International Commercial Dispute Resolution: CIArb Singapore Annual Thought Leadership Lecture', (The International Journal of Arbitration Mediation & Dispute Management 90, no. 2 (2024)), 114–115, 122–123.

[29] Aidan Xu, 'The Use (and Abuse) of AI in Court,' [21].

> useful … All it did was a task which I was about to do and which I knew the answer to and could recognise as being acceptable.[30]

In Singapore too, the judiciary has been quick to realise the potential usefulness of AI in composing draft judgements. At a conference in July 2025,[31] the Honourable Justice Aidan Xu, Judge in Charge of Transformation and Innovation, outlined two potential use cases towards which progress is being made in Singapore. First, generative AI can assemble the relevant authorities and evidence from documents provided by the parties.[32] To the extent that it may allow for centralised and efficient document management, AI could be of considerable use in the drafting stages. Secondly, the ability to rapidly generate drafts lends itself well to so-called "red-teaming"; that is, generating drafts for different outcomes so that judges can test the strength of their own reasoning by direct comparison to the opposite point of view.[33]

AI as a research assistant

I turn to the use of generative AI to perform the grunt work of data extraction especially in technically complex disputes. At the outset, it should be recognised that complexity is not merely a threat to the cost and efficiency of dispute resolution. There are a growing number of disputes so factually dense that they are almost impossible to adjudicate fairly using the traditional tools available in ADR: digital document management, pleadings, and expert evidence. One Western Australian case involving the collapse of a government-linked conglomerate, involved a 404-day trial, 37 000 pages of written submissions and a ten thousand paragraph judgement.[34] The Chief Justice of Singapore, Sundaresh Menon, has referred to this as "the complexity problem".[35] In his Honour's opinion, this complexity may demand a shift in our philosophy of justice away from the absolutist notion that fairness uncompromisingly requires full and exhaustive determination of the facts. Instead, the complexity problem demands a more holistic view that "embraces procedures which, whilst not as thorough, are nonetheless capable of producing reasonably accurate and broadly acceptable decisions more quickly and at far lower cost".[36] I would add that ADR has a unique opportunity to be at the forefront of that philosophical adjustment by embracing AI-driven procedures for extracting and synthesizing the monstrous amount of evidence required in some disputes.

Much of the recent generative AI hype so far as the legal world is concerned has been directed at tools like *Harvey* and *Legora* which are focussed squarely on research and document drafting for contracts, memoranda of advice or document review. Unfortunately, there are to my knowledge few examples of AI being expressly trained to usefully digest expert evidence in a

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[30] Corfield, 'British judge uses 'jolly useful' ChatGPT to write ruling,' *The Telegraph* (14 September 2023) https://www.telegraph.co.uk/business/2023/09/14/british-judge-uses-jollyuseful-chatgpt-to-write-ruling/.
[31] Aidan Xu, 'The Use (and Abuse) of AI in Court.'
[32] *Ibid* [20].
[33] *Ibid* [23].
[34] *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2008) 39 WAR 1; [2008] WASC 239, [956]–[960] (Owen J).
[35] Sundaresh Menon, 'The complexification of disputes in the digital age' (2022) 30(1), *Asia Pacific Law Review* 1 < https://doi.org/10.1080/10192557.2022.2045704>.
[36] *Ibid*.

manner that might be taken seriously as a solution to the complexity problem. Creating AI accounting experts, vibration and noise experts, or simply encouraging human experts to more usefully employ AI in their respective disciplines are areas pregnant with present and future investment. One fairly rudimentary example used by the Frankfurt District Court is *Frauke*. Built by IBM, *Frauke* is being used to streamline in air passenger rights disputes by extracting case data (including flight number and delay time) from pleadings and presenting it in a synthesized manner to judges.[37] Training Language Models to deal effectively and in a specialised manner with the expert evidence which is such a common feature of ADR will be an important area for future development.

AI for outcome prediction and client advice

Finally, the ability of AI to advise clients of their rights and to provide quick outcome predictions may be particularly useful for ADR. Without pre-empting the topic addressed in the final section of this paper, the ability to provide a reasonably accurate and reasoned estimate of potential outcomes, as well as evaluation of the comparative strength of various claims, can be leveraged to facilitate settlement without facilitators or decision makers diving deeply into the water in the early stages of ADR procedures.

Quantitative Legal Prediction ('QLP') predates the recent advent of gen AI. For some time, prediction by matching present fact patterns to past scenarios has been possible through the use of data algorithms. Generative AI offers several crucial improvements. First, it might allow more accurate prediction by digesting the data of a case file in a more nuanced fashion. Secondly, it promises to provide predictions and advice in a far more accessible manner. The QLPs available before gen AI were generally required to be operated by trained individuals. Legal prediction became more or less its own sub-profession. The final crucial difference is the uptake of client-advising AIs by courts and institutions that administer dispute resolution. This can be contrasted against the more traditional use of QLPs by law firms to make their own evaluations of whether cases should be accepted and at what rates they should be undertaken.

A notable development in this regard was the announcement on 4 March that the AAA's AI Arbitration tool, to which I refer above, would be made available to *individual* parties as a "Resolution Simulator".[38] The simulator purports to evaluate the merits of claims, pressure test arguments and assist in preparing negotiation strategies by indicating how an arbitrator might frame the issues. It remains to be seen how effective such simulations or predictions will be in practice. Some clues may be provided by the use of so-called "smart courts" (智慧法院 zhihui fayuan) deployed in China, and especially in Guangzhou, Hangzhou and Beijing, which are said to encourage negotiation and settlement. If parties consent, and subject to the authority of judges to order parties back into brick-and-mortar courts, users of smart courts are provided

[37] 'Usage of Artificial Intelligence (AI) in Legal Practice' (Concluding Report of the Bilateral Legal Research Group of ELSA Ireland and ELSA United Kingdom on Usage of Artificial Intelligence (AI) in Legal Practice) 103–104.
[38] Tom Jones, 'AAA unveils AI simulation tool,' *Global Arbitration Review,* 5 March 2026.

with fully online litigation, mediation and dispute resolution for matters such as e-commerce or small loan disputes. The smart court guides users through the different stages of procedure, including e-filing and AI stenography. Risk analysis is available to potential litigants using data from the public access databases managed by the Supreme People's Court (which has been the world's largest database of judicial decisions for some time).[39] Parties can thus be directed to the outcomes rendered in similar cases early in the life-cycle of a dispute.

As of 2025, Singapore has also experimented with the use of a Gen AI designed by *Harvey* to assist self-represented litigants before Small Claims Tribunals to understand their rights and tribunal procedures. Justice Aidan Xu described the initiative as follows:

> [27] …We want to explore and test what benefits AI can provide for self-represented persons, who would face a number of challenges in navigating the justice system, as well as for the judicial officers involved, who can often have to deal with a lot of unstructured, less organised information.
>
> [28] What we have been able to get in place is translation of documents, and we hope to complete summarisation of materials shortly. Such summarisation will assist the parties in understanding each other's case, see how their own case comes together and also it will assist the tribunal magistrate in making senses of what is before him or her. We do need to make sure that the system is as accurate as possible, and we want to make sure that it is properly integrated with the tribunal case management and filing system. So it has been a good learning experience for us, and even as we continue our exploration with Harvey AI here, we are thinking of what else can be done... My personal dream is to have AI assist in presenting the case, and nudging towards settlement, but we will have to see whether we can get there, and indeed whether we should.[40]

In conclusion on generative AI the inevitability of changes in this area is clear. Whatever personal doubts lawyers may harbour about the suitability of generative AI are unlikely to be shared by commercial parties. In several addresses, the Master of the Rolls, Sir Geoffrey Voss, observed that the clients of lawyers will not ultimately be prepared to pay for what can be done without significant charge by a machine.[41] The same might be said of clients seeking to use ADR. This may require a moderation of our conception of justice as an exhaustive search for truth. Lord Denning put it that the role of the courts is "to find out the truth, and to do justice according to law".[42] However, if the cost of investigating a complex claim using traditional methods exceeds the cost of remedy, this cannot be considered just. Generative AI will undoubtedly become more accurate as time goes on, and this will be a welcome development.

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[39] Wei Gao and Lu Xu, 'Online Courts in China' (2025) 25(1) *China Review* 75, 76–81 <https://www.jstor.org/stable/10.2307/48815208>.
[40] Aidan Xu, 'The Use (and Abuse) of AI in Court' [27]–[28].
[41] Sir Geoffrey Vos, 'Justice for all, justice for the accused,' (Speech, Justice For All Series event at the Old Bailey, 4 February 2026) [8] <https://www.judiciary.uk/speech-by-the-master-of-the-rolls-justice-for-all-justice-for-the-accused/>; 'AI transforming the work of lawyers and judges' (Speech, The Manchester Law Society AI Conference 2024: Transforming the Legal Landscape, 8 March 2024) [31] < https://www.judiciary.uk/speech-by-the-master-of-the-rolls-ai-transforming-the-work-of-lawyers-and-judges/>.
[42] *Jones v National Coal Board* [1957] 2 QB 55, 63.

However, at some level, we will have to grapple with the fact that generative AI is an inherently statistical, not deterministic machine. Rather than being seen as a handbrake, the possibility for statistical thinking should be seen as an advantage well suited to the kind of justice demanded by the complexity of some modern disputes.

III HYBRID DISPUTE RESOLUTION

The other potential development I wish to address is the possibility of achieving a more symbiotic relationship between mediation and conciliation on the one hand, and arbitration and other forms of compulsorily determination on the other. In the context of both substantive and "structural" reforms, the issue of facilitated settlement in compulsory dispute resolution has been debated for many years, but there remains a gulf between the practice of facilitated settlement in the common law, and in some civil law jurisdictions, including China.

A step forward in this regard has been the growing offering by institutions of hybrid resolution clauses. There are many types of Med-Arb, Arb-Med, Arb-Med-Arb and other arrangements, the merits of which have been discussed in depth by others.[43] The topic I wish to focus on is simpler but perhaps more essential. It is the capacity of arbitrators, and judges, to encourage compromise settlements in their capacity as binding decision maker, obviating to an extent the need for third parties to act as facilitators, and the requirement for elaborate hybrid dispute resolution clauses. Despite the significant progress that has been made to harmonise international law with respect to cross-border ADR, one of the few areas in which there remains no transnational consensus is under what conditions a judge or arbitrator, charged with deciding the dispute, may promote settlement.[44]

A view prevalent in common law jurisdictions is that an arbitrator (or judge) should never don the hat of a settlement facilitator in a dispute and that to do so risks compromising the integrity of their decision making should the decision-making process need to resume if do resolution is achieved.

Firstly, some of the historical reticence in the common law is provided. Secondly, there is discussed some key examples from civil law jurisdictions of where facilitated settlement and binding decision making, have been combined to great effect. Finally, I conclude by suggesting some structural reforms which might stimulate the useful development of a symbiosis between facilitation of settlement and binding decision making.

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[43] James Carter, 'Issues Arising from Integrated Dispute Resolution Clauses' in *New Horizons in ICA and Beyond,* Albert Jan van den Berg (ed) (ICCA Congress Series No. 12, Beijing, 2004) 446, 447.

[44] Gabrielle Kaufman-Kohler, 'When Arbitrators Facilitate Settlement: Towards a Transnational Standard' (Clayton Utz/University of Sydney International Arbitration Lecture) (2009) 25(2) *Arbitration International* 187, 189 < https://doi.org/10.1093/arbitration/25.2.187>.

A *The Barriers to Hybrid ADR*

The common law has traditionally taken a fairly strict view on the need to silo offers or information exchanged in confidence as part of negotiations from the body of evidence used to resolve the merits of a dispute before a binding decision maker. One of the classic statements was given by the England and Wales Court of Appeal in the 1984 case of *Cutts v Head and Another*.[45] Explaining the reason for treating negotiations and offers as inadmissible evidence on issues of liability, Oliver LJ wrote that:

> the rule rests, at least in part, upon public policy ... and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J. in *Scott Paper Co v. Drayton Paper Works Ltd.* (1927) 44 R.P.C. 151, 156, be encouraged fully and frankly to put their cards on the table.[46]

In the history of arbitration, this is manifested by reluctance to allow an arbitrator to enter the arena with parties to promote settlement if they intend to subsequently return to arbitration, should mediation fail. The conundrum is typically referred to as wearing two hats.[47] The concern is that facilitator, be they a conciliator or mediator, by playing an active role pointing out the strengths and weaknesses of the parties' cases, and suggesting possible bases on which the matter might be settled, will have stated prima facie conclusions on the rights and liabilities of the parties before evidence has been received. Worse, they may have met with the parties privately.[48] This casts doubt whether a party has had the chance to hear the case against it and respond, if information is being exchanged in breakout rooms or in private caucuses with the mediator. Consequently, so the argument goes, if the mediator goes on to arbitrate the dispute, they may be infected by bias.

This generally suspicious approach towards the fairness of arbitrators acting as facilitators finds expression in the legislative frameworks for arbitration in several common law jurisdictions. In Australia, under the uniform *Commercial Arbitration Acts (2010)* ('CAA'), section 27D governs the power of an arbitrator to act as mediator, conciliator or other non-arbitral intermediary, and imposes an obligation for an arbitrator to obtain the written consent of all parties before returning from unsuccessful mediation to arbitration. That provision has the

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[45] [1984] WLR 349, 359–360 (Oliver LJ).
[46] *Ibid*.
[47] Haig Oghigian, 'On arbitrators acting as mediator' (2002) 68(1) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 42 <https://www.kluwerarbitration.com/document/kli-ka-amdm-68-01-005-n>.
[48] See for example Stephen Charles QC, *Commercial Arbitration in Australia* 1BC12111; David C. Elliott '*Med/Arb: Fraught with Danger or Ripe with Opportunity?*' (1996) 62 *Arbitration* 175.

unfortunate effect that one party can lock their opposing party out of returning to arbitration for strategic reasons. This is precisely what occurred in the 2018 New South Wales Supreme Court case of *Ku-ring-gai Council v Ichor Constructions Pty Ltd.*[49] On the final day of a 12 day-hearing over the delayed construction of a pool, the arbitrator spent approximately 20 minutes outlining a settlement proposal to the parties. At no point did the arbitrator meet separately with the parties, and when they shortly returned to arbitration, no objections were raised. Ichor realised during mediation that its prospects of success were lower than it had hoped. Then, not for any reason connected to the preservation of due process, but instead to frustrate proceedings and escape the risk of an adverse award, Ichor argued that the arbitration could not go any further since it had not expressly consented to recommence arbitration. A 20 minute settlement proposal which neither party objected to at the time, and during which both parties were together, set at nought a 12 day hearing.[50] A similar result was obtained in the English case of *Glencot Development & Design Co Ltd v Ben Barrett & Son (Contractors) Ltd,*[51] although in that case the arbitrator turned mediator did meet privately with the parties.

The lack of uniformity in international approach to this topic is a problem. The Model Law is silent on the extent to which an arbitrator's role may include promoting settlement, as are many institutional rules (with some notable exceptions like article 26 of the DIS rules, or article 47 of the CIETAC rules). One result of this lack of uniformity has been the creation of cumbersome hybrid dispute resolution clauses designed to side-step enforceability issues. By way of example, since 2014, the Singapore International Arbitration Centre (SIAC) and Singapore International Mediation Centre (SIMC) have jointly administered an Arb-Med-Arb protocol during which: arbitration is commenced; then immediately stayed to give way to mediation by a third party, administered by the SIMC; if this fails, arbitration may be recommenced at the SIAC.

B *Promotion of Settlement in Some Jurisdictions*

There is ample evidence in certain major Asian jurisdictions such as China and Japan, as well as Germany, and elsewhere, that the combination of arbitrator and settlement facilitator in one person is highly effective. It does not, in these jurisdictions, lead to issues of enforceability, nor is it seen as a barrier to parties laying their cards fully on the table. What is seen as a risk in common law jurisdictions of an arbitrator wearing two hats is, for example, viewed as a wasted opportunity in China if the conciliator who is aware of the needs and motivations of the parties does not subsequently become the arbitrator.[52] It is useful to pay close attention to the cultural,

[49] [2018] NSWSC 610 (McDougall J).
[50] George Pasas, 'The arbitrator as mediator: Ku-ring-gai Council v Ichor Constructions Pty Ltd [2018] NSWSC 610' (2019) 29(4) *Australasian Dispute Resolution Journal* 266, 271.
[51] [2001] EWHC Technology 15 (Humphrey-Lloyd J).
[52] Professor Neil Kaplan, quoted by Ariel Ye, 'Commentary on Integrated Disputes Resolution Systems in the PRC' in *New Horizons in ICA and Beyond,* Albert Jan van den Berg (ed) (ICCA Congress Series No. 12, Beijing, 2004) 478, 482.

institutional, and legislative frameworks that have allowed for this successful combining of the two roles.

Turning first to the People's Republic of China, the successful use of conciliation and mediation is often traced back to a cultural attitude that litigation should be used as a last resort.[53] There is undoubtedly some truth to this. In 1993, approximately 1.8 million out of a total 2.9 million civil and commercial cases filed in PRC courts were settled through court-annexed conciliation (roughly 60%).[54] That percentage has halved in more recent decades, but is still indicative of a culture in which it is more normal to trust conciliation as a method of dispute resolution, even within binding forms of dispute resolution such as court proceedings. Professor Neil Kaplan has gone so far as to argue that, unlike in the West, arbitration (or litigation) and conciliation are considered to be part of the same organic process.[55] With respect to institutional frameworks, the CIETAC Rules 2024 provide at Article 47:

> 1. Where both parties wish to conciliate, or where one party wishes to conciliate and the other party's consent has been obtained by the arbitral tribunal, the arbitral tribunal may conciliate the dispute during the arbitral proceedings.
> 2. With the consent of both parties, the arbitral tribunal may conciliate the case in a manner that it considers appropriate. The conciliation proceedings shall be kept confidential.
> 3. During the process of conciliation, the arbitral tribunal shall terminate the conciliation proceedings if either party so requests or if the arbitral tribunal considers that further conciliation efforts will be futile.
> ...
> 6. Unless otherwise agreed by the parties, where conciliation is not successful, the arbitral tribunal shall resume the arbitral proceedings and render an arbitral award. Where both parties jointly request for replacement of an arbitrator, a substitute arbitrator shall be nominated or appointed according to the same procedure applicable to the nomination or appointment of the arbitrator being replaced. The resulting additional costs shall be borne by the parties.
> 7. Where the parties wish to conciliate their dispute but do not wish to have conciliation conducted by the arbitral tribunal, CIETAC may, with the consents of both parties, assist the parties to conciliate the dispute in a manner and procedure it considers appropriate.
> 8. Where conciliation is not successful, neither party may invoke any opinion, view or statement, and any proposal or proposition expressing acceptance or opposition by either party or by the arbitral tribunal in the process of conciliation as grounds for any claim, defence or counterclaim in the subsequent arbitral proceedings, judicial proceedings, or any other proceedings.

The first three points within article 43 indicate the primacy of party autonomy: the agreement of both parties is required to license efforts at conciliation. Next, Article 43(6) allows for arbitration to continue under the same tribunal *unless otherwise agreed by the parties.* In this respect, it is the inverse of section 27D (4) in the Australian CAAs, which we saw above

[53] *Ibid*.
[54] *Ibid*.
[55] Neil Kaplan, 'Dispute Resolution in Hong Kong,' in *Resolving Disputes in the Global Marketplace. Washington D.C* (American Bar Association Section of Dispute Resolution, 1998) 118–131.

requires a tribunal to positively obtain consent from both parties to resume arbitration. Further, Article 43(6) provides an incentive for parties to accept the conciliator continuing as arbitrator since they otherwise bear the additional cost of nominating and appointing a replacement arbitrator. Finally, Article 43(8) protects the confidentiality and without prejudice nature of opinions, views, statements, proposals or propositions made during conciliation.

A similar approach can be found in Hong Kong, notwithstanding the common law history of that jurisdiction. The key legislative development in this regard was the insertion into the Hong Kong Arbitration Ordinance in 1989 of a section 2B, titled "Power of arbitrator to act as conciliator".[56] It provided:

> (1) If all parties to a reference consent in writing, and for so long as no party withdraws in writing his consent, an arbitrator or umpire may act as a conciliator
> (2) An arbitrator or umpire acting as conciliator –
> a. May communicate with the parties to the reference collectively or separately;
> b. Shall treat information obtained by him from a party to the reference as confidential, unless that party otherwise agrees or unless subsection (3) applies.
> (3) Where confidential information is obtained by an arbitrator or umpire from a party to the reference during conciliation proceedings and those proceedings terminate without the parties reaching agreement in settlement of their dispute, the arbitrator or umpire shall, before resuming the arbitration proceedings, disclose to all other parties to the reference as much of that information as he considers is material to the arbitration proceedings.
> (4) No objection shall be taken to the conduct of arbitration proceedings by an arbitrator or umpire solely on the ground that he had acted previously as a conciliator in accordance with this section.

This section is reproduced with light amendments at section 33 of the current version of the Hong Kong Arbitration ordinance in force at the time of writing. It is notable that the Hong Kong Ordinance takes an even stronger approach than the CIETAC rules to ensuring that parties do not resile from their consent to have an arbitrator mediate or conciliate their dispute: the CIETAC rules expressly permit the parties to jointly request a substitute arbitrator, whereas subsection 4 of the Ordinance provides that "no objection shall be taken" to wearing two hats.

Further, under the Hong Kong ordinance, the arbitrator/mediator is expressly empowered to communicate separately with the parties. This was the precise concern that resulted in the removal by the England and Wales Technology List of the arbitrator in *Glencot.*[57] Against the concerns articulated in that case might be posed the following two factors. First, parties arbitrating under the *lex arbitri* of Hong Kong (or any similar jurisdiction friendly to '*wearing two hats*') should be taken to have understood the risks involved in the combination of the roles

[56] 'Mediation in Hong Kong' (1994) 1(1) *Commercial Dispute Resolution Journal* 21, 21–22.
[57] *Glencot Development & Design Co Ltd v Ben Barrett & Son (Contractors) Ltd* [2001] EWHC Technology 15 (Humphrey-Lloyd J).

of arbitrator and mediator. Secondly, an interesting feature of the Hong Kong ordinance is that it requires the arbitrator to disclose as much private information as they consider material. This largely obviates concerns that the principle of *audi alteram partem* could be compromised by a party expressing its arguments or interpretation of key facts in private and without the other party present to respond.

Turning to continental Europe, arb-med is widely accepted and has been used with success in Germany in particular. Section 1053(1) of the German Code of Civil Procedure provides that if parties settle their dispute in arbitral proceedings, the arbitral tribunal "shall record the settlement in the form of an arbitral award on agreed terms" if requested by the parties. In this context, many arbitrations under the rules of the *Deutsche Institution für Schiedsgerichtsbarket* (DIS) are resolved through settlement facilitated by tribunals. To that end, Article 41 of the DIS Rules 2018 provides that "at the request of all of the parties the arbitral tribunal may record a settlement in an award by consent." Article 26 obliges an arbitral tribunal to seek "at every stage of the arbitration... to encourage an amicable settlement of the dispute or of individual disputed issues". To encourage the amicable resolution of disputes, at the first case management conference, tribunals "shall specifically discuss" with the parties "the possibility of using mediation or any other method of amicable dispute resolution to seek the amicable settlement of the dispute or of individual disputed issues."[58]

The progress that has been made in Germany towards usefully combining the roles of mediator and arbitrator traces back to legislative reforms undertaken in 1999. From 1999 onwards, concerned by the number of civil cases on the dockets, the federal legislature permitted the *Länder* to experiment with mediation as a part of court proceedings. Rather than enacting a comprehensive federal law, a provision was added to the Introductory Act to the German Civil procedure Code allowing the states to enact their own legislative schemes providing for mandatory ADR procedures as a prerequisite to court proceedings.[59] The result is that presently, in Germany, judges themselves are empowered to promote settlement between the parties.[60] A survey conducted shortly after these changes in the German courts revealed that German arbitration practitioners were vastly more supportive of arbitrators' involvement in mediation and settlement in comparison to common law respondents. In practice, members of the arbitral tribunal (especially the chairman) attempt mediation in a significant proportion of German cases.[61] As a part of the practice of promoting settlement, it is not uncommon in Germany for the arbitral tribunal to express its preliminary views on the merits of the case during mediation. In fact, Annex 3 of the DIS Rules, titled "Measures for Increasing Procedural Efficiency"

[58] *DIS Arbitration Rules 2018,* art 27.4 (iii).
[59] This was section 15a ZPOEG of the *Gesetz, betreffend die Einführung der Zivilprozessordnung* in 1999. See further Peter Tochtermann, 'Mediation in Germany: The German Mediation Act – Alternative Dispute Resolution at the Crossroads' in Klaus Hopt, Felix Steffeck (eds.), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford University Press, 2012).
[60] For example, it is not out of the ordinary for a German court to hold a pre-hearing settlement session during which the judicial officer's probe and assess the merits of the case. These sessions may even be held at the appellate stage, and can involve sending the parties to out of court dispute resolution. See further Kaufman-Kohler, 'When Arbitrators Facilitate Settlement (2009), 190.
[61] Christian Bühring-Uhle, *Arbitration and Mediation in International Business* (Kluwer Law International, 2006), 125.

recommends that the Tribunal should consider "Providing the parties with a preliminary non-binding assessment of factual or legal issues in the arbitration, provided all of the parties consent thereto". In stark contrast, two thirds of common law practitioners surveyed classified such a proposal as "inappropriate."[62]

C *A WAY FORWARD*

A shift in approach and thinking is needed to allow for the adoption of a more uniform approach to combining the roles of mediator and arbitrator.

Structurally, a balance must be struck between the concerns of common lawyers, and the clear advantages of allowing arbitrators to mediate. Acceptance of three propositions is essential for adoption of cross-border frameworks:

1) First, the combination of roles must be subject to the agreement of the parties, and ought to cease once the parties withdraw their consent. This is a common feature of all of the jurisdictions surveyed above.
2) Second, should the efforts at conciliation or mediation fail, all material facts discovered in the process should be disclosed.
3) **Unless otherwise agreed** by the parties, where conciliation or mediation is not successful, the arbitral tribunal shall resume the arbitral proceedings and render an arbitral award.

These principles could form a basis for uniform international guidelines on confidentiality and privilege when moving between arbitration and mediation, although this goal still seems aspirational. In particular, it is important that rules are drafted in such a way that minimises the opportunity for a party to be locked out of returning to arbitration for trivial reasons or as a result of the strategic calculus of the opposing side. The difference in approach between the legislation discussed in *Ichor*, and the approach taken by the Hong Kong Ordinance should be borne in mind.

There are also conceptual barriers to the uptake of arb-med. These relate in particular to the common law conception of the purpose of the mediator. The first paradigm which may need to be challenged concerns whether an arbitrator can or should ever express views on the merits. The conventional wisdom in the common law tradition is that mediators should not express an opinion on the merits. Thus, the so-called "facilitative" approach is favoured over a more "evaluative" style where the mediator/arbitrator may state their preliminary views on certain issues.[63] However, the expression of views is an essential benefit of the arbitrator as settlement facilitator. It encourages parties to focus on strong issues and not to fight to the bitter end on weaker arguments.[64] Providing a non-binding and preliminary indication of views concentrates the parties on the key issues in dispute. It is helpful not only for the prospects of settlement,

[62] Mark Goodrich, 'Arb-med: ideal solution or dangerous heresy?' (2012) 15(1) I*nternational Arbitration Law Review* 12.
[63] For a brief discussion of the role of the mediator, see Robert Butlien, 'The Singapore Convention on Mediation: A Brave New World for International Commercial Mediation' (2020) 46(1) *Brooklyn Journal of International Law* 183, 183–184.
[64] See further Arthur Marriot QC, *Report: Arbitrators and Settlement*, in *New Horizons in ICA and Beyond,* Albert Jan van den Berg (ed) (ICCA Congress Series No. 12, Beijing, 2004), 533.

but also for the efficiency of arbitration if arbitral proceedings recommence. As previously mentioned, I have found in my own practice that providing parties with an Issue Summary Schedule, concisely stating the claims and evidence put forward on each side, is invaluable for the efficient progress of a dispute. Even where the discussion of rights does not lead to a settlement, the arbitrator may achieve agreement on issues of secondary importance to the overall dispute, or where the cost of conducting evidentiary proceedings would be disproportionately large. That such a system of proactive management evaluation of arguments is both effective and just is evident from the approach taken by the judiciary in several civil law countries. In the civil law countries, the role of the judge is to actively progress the proceedings from start to finish. Upon receiving a case file, a judge will consider the proof needed, and the sort of evidence required, and request submissions from the parties accordingly. This is an iterative process, which may well include ventilation of a judge's views in an episodic fashion.

Secondly, there is a preconception that the combination of the roles of mediator and arbitrator has deleterious effects on the effectiveness of mediation, since parties may be less open about their position, and the strategic goals of their cases, if the same person may later be asked to hear those arguments as an impartial and binding arbitrator or judge. In the common law in particular, it is typical to hold private mediation caucuses with parties involving the divulging of sensitive information. However, to proceed effectively, mediation need not always involve the sharing of confidential information with the decision maker which, brought into arbitration, will have tainted them. Especially if mediators are more comfortable prioritising an evaluative approach of the parties' arguments, there is no need to mediate on the basis of commercially sensitive information which the parties prefer not to air. There is ample evidence that mediation can proceed effectively on such a basis. Approximately one quarter of arbitrations at the CIETAC are brought to an end through mediated settlement agreements.[65] Furthermore, concerns that parties may hold their cards close to their chest can be allayed by clearly impressing on the parties the value that earnest engagement with the process can bring, including by highlighting (where relevant under the applicable law) the instances where a failure to settle may impact the recovery of legal costs.

CONCLUSION

Just as the last forty years have represented developments both foreseen and unforeseen, the next forty years will follow a similar pattern. This paper identifies one area where massive change can be confidently anticipated, and one where substantial change should be encouraged. Without doubt, there will be other developments which, looking back in forty years will surprise those of you who are there to look back.

I would however like to say a few words in conclusion regarding the Australian ADR environment, both in terms of domestic and international disputes. Commercial dispute

[65] Weixia Gu, 'Hybrid Dispute Resolution beyond the Belt and Road: Toward a New Design of Chinese Arb-Med(-Arb) and Its Global Implications,' (2020) 29(1) *Washington International Law Journal* 117, 123–124.

resolution in the courts has come a long way in the last forty years, but so far as the resolution of domestic disputes is concerned courts will need to ensure that both their own procedures, and the interrelationship between those and forms of alternative dispute resolution, continue to evolve to meet the needs of the commercial community. The two topics on which this speech has focussed, generative AI and the combination of arb-med, are areas in which firm steps should be taken to overcome the inevitable conservatism of the legal profession.

So far as Australia's place in the international commercial dispute resolution environment is concerned it remains an open question as to whether Australia will succeed to take its rightful place as a regional centre for the resolution of international disputes. Australia offers unique professional skill sets and a level of political stability legally and otherwise which may not necessarily be enjoyed by other regional centres for international commercial dispute resolution whose rise in recent years has been both extraordinary and consistent with the enormous development of regional trade.

The development of Australia as a centre for international commercial dispute resolution has so far, uniquely for federations, enjoyed nationwide cooperative participation of the potentially competing geographic regions and the nationwide cooperation of ADR institutions many of whom are celebrating major milestones. One has only to note the difference of approach nationally between Australia and other major federations to see the value created by cooperation between the regions and institutions. By the same token this level of cooperation must not be taken for granted lest it diminish the capacity for Australia as a regional centre for international dispute resolution. Cooperation will cease to be of value if it is bought with the currency of inaction in the face of the changes which can already been seen in some of our nearest neighbours.

It is hoped that a proactive approach will be taken to matching, if not surpassing, the significant investments and forethought that are laying the groundwork in our regional neighbours for a more efficient approach to ADR, especially with respect to the use of generative AI and the promotion of settlement in compulsory dispute resolution.

Beyond the Horizon

Charting the Next 40 Years of Alternative Dispute Resolution

Professor Doug Jones AO

40TH ANNIVERSARY ADR CONFERENCE 2026

01

The ADC and the Historical Growth of ADR in Australia

INTERNATIONAL ADR CONFERENCE 2026

Launch of the Australian International Disputes Centre, 2010

INTERNATIONAL ADR CONFERENCE 2026

02

The Future

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Artificial Intelligence

Hybrid Dispute Resolution

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03

The Use of Artificial Intelligence

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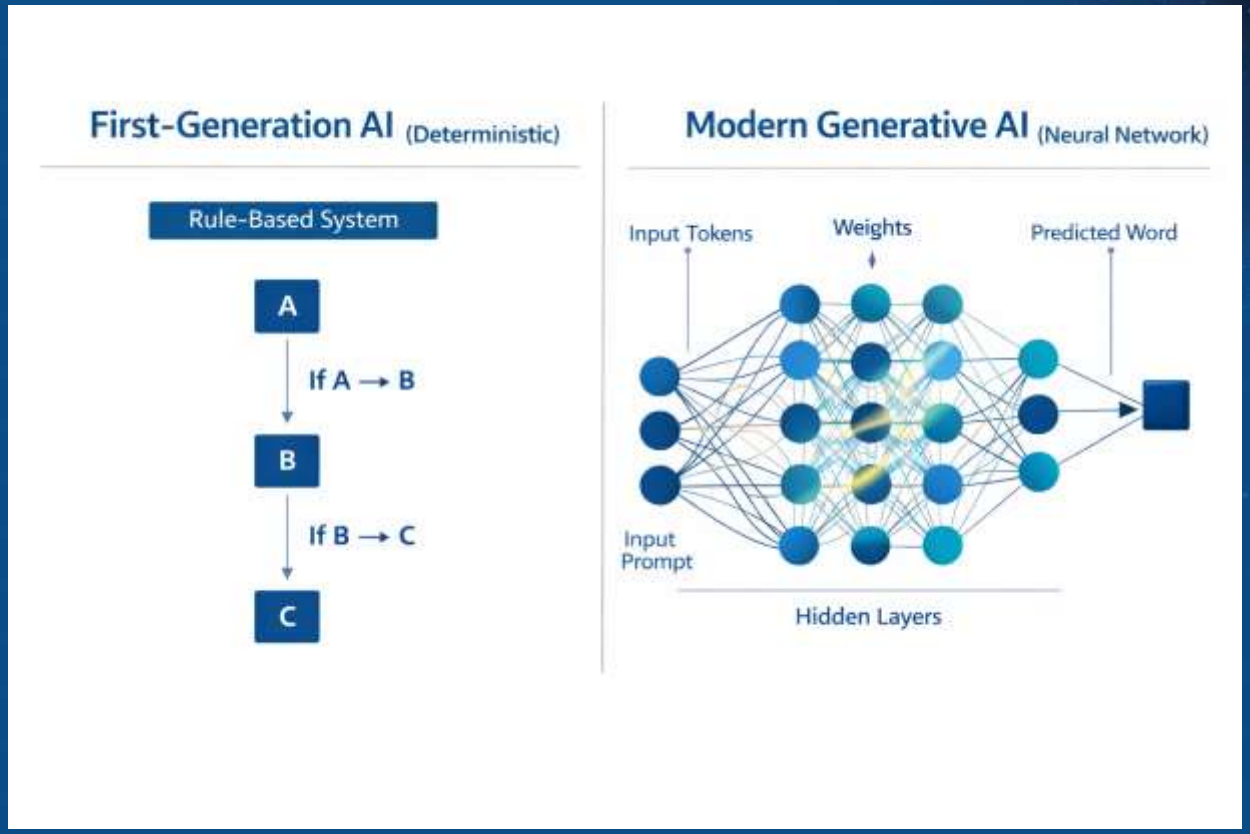
What is Generative AI?



AI in Alternative Dispute Resolution

AI for Drafting

AI as a Research Assistant

AI for Outcome Prediction and Client Advice

INTERNATIONAL ADR CONFERENCE 2026

Do we really know where AI is going?

Email

Y2K

AI

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04

Hybrid Dispute Resolution

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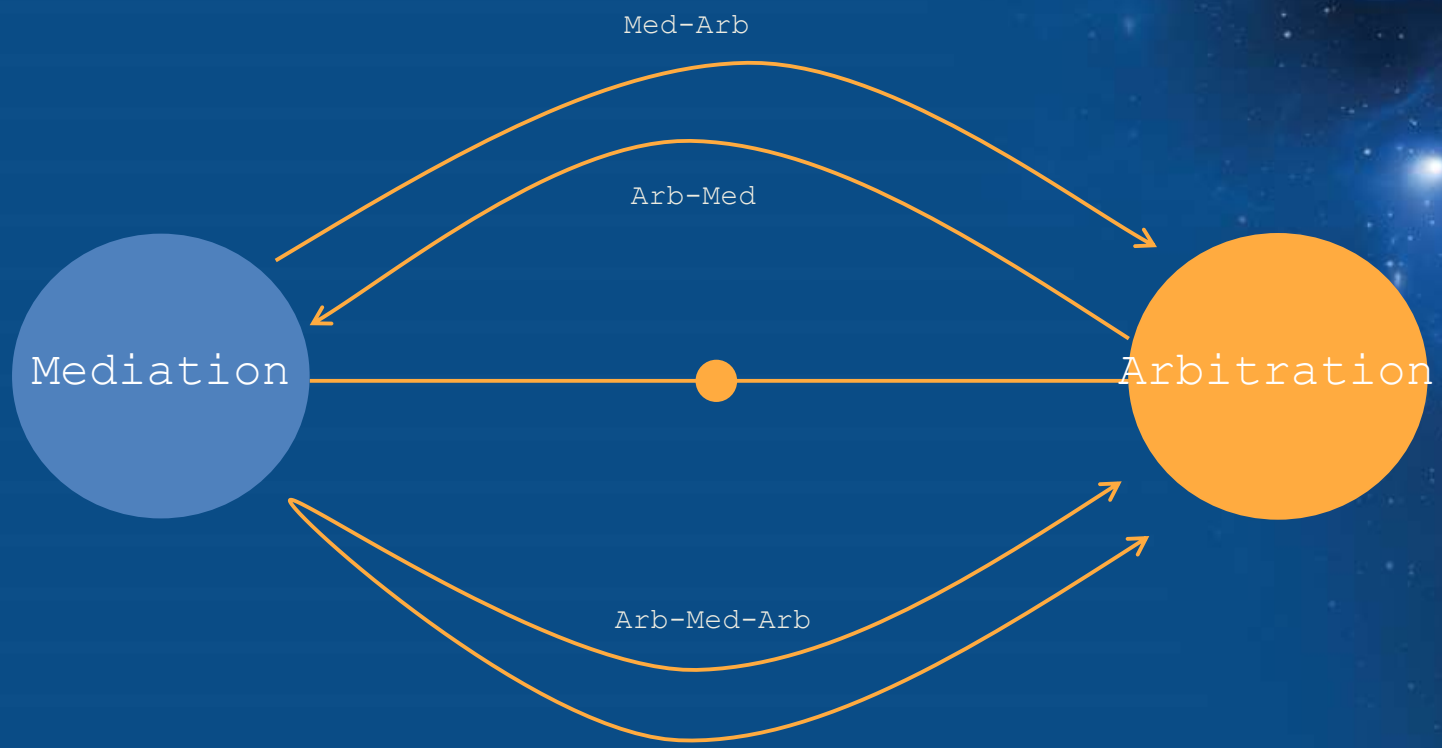
Types of Hybrid Dispute Resolution



INTERNATIONAL ADR CONFERENCE 2026

Barriers to Arbitrators Promoting Settlement

Mediator

Arbitrator

INTERNATIONAL ADR CONFERENCE 2026

Promotion in Specific Jurisdictions

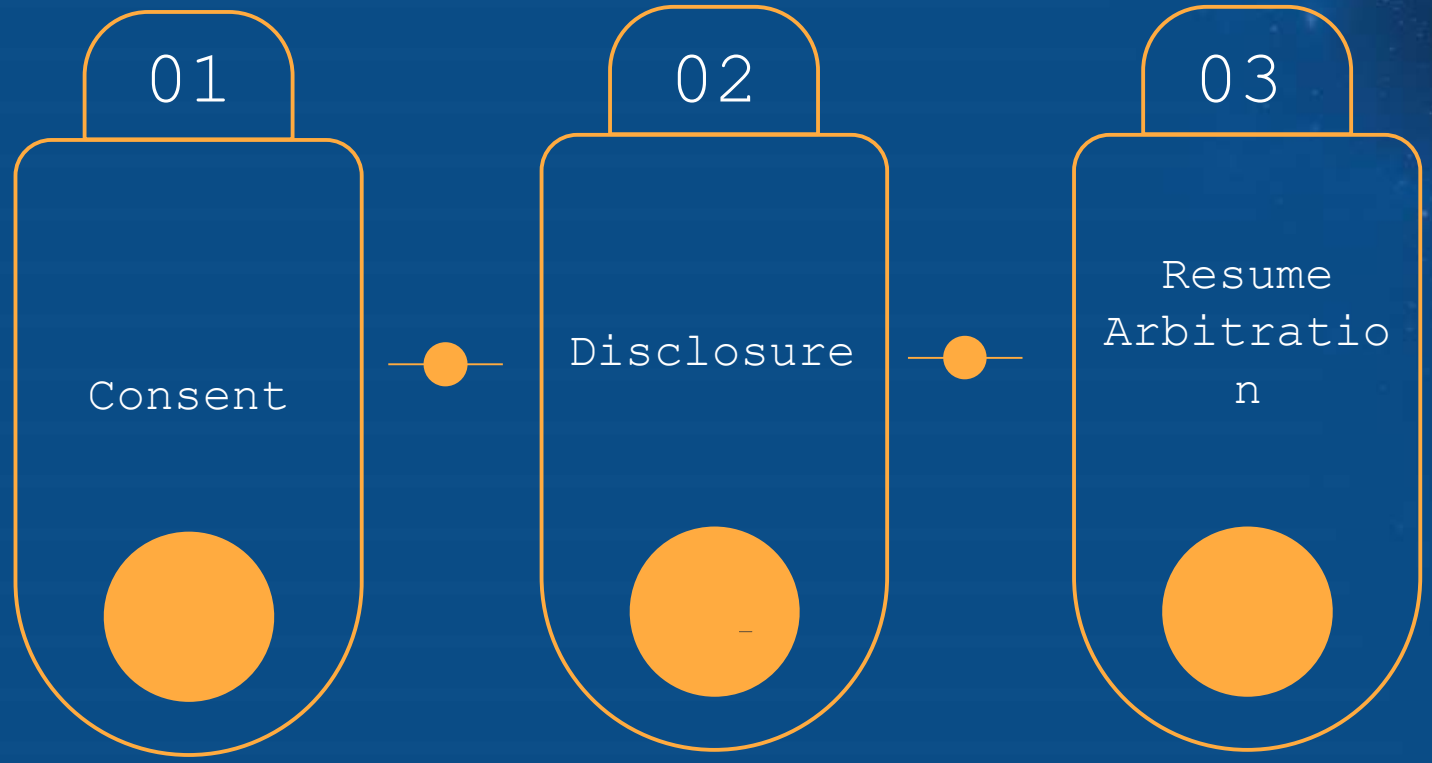
German Code of Civil Procedure Section 1053(1)

CIETAC Rules 2024 Article 47

Hong Kong Arbitration Ordinance 1989 Section 2B

INTERNATIONAL ADR CONFERENCE 2026

A Way Forward



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Conclusion

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Paper:

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