Kluwer Arbitration Blog

Shaping the Future of International Arbitration: A Report from Helsinki International Arbitration Day 2018

Heidi Merikalla-Teir (The Arbitration Institute of the Finland Chamber of Commerce (FAI)) · Wednesday, June 20th, 2018 · Finland Arbitration Institute (FAI)

Helsinki International Arbitration Day (HIAD) is an arbitration conference organised by the Arbitration Institute of the Finland Chamber of Commerce (FAI). Since its inception in 2012, HIAD is held every year in the city of Helsinki bringing together legal practitioners from Finland and abroad to hear from top experts about the latest developments in international arbitration and mediation. Already in its seventh edition, this year's event, held on 24 May 2018, was attended by some 200 delegates from 16 countries.

Welcome remarks

Petra Kiurunen (FAI Board Chair) and Heidi Merikalla-Teir (FAI Secretary General) opened the event with an outline of the conference topics—public-private arbitration, transparency, technology, sports arbitration and the users' perspective—examined during the conference from non-conventional angles to shed new insights into the shaping of international commercial arbitration.

Petra Kiurunen asked whether there is anything new under the sun if we think about hot topics in international arbitration. She noted that even though international arbitration can perhaps be said to have matured, to have certain best practices that are followed to a large extent regardless of the seat, there is at the same time an increasing trend that we see in almost all aspects of life: nothing survives in a bubble. Instead, influences come, and need to be considered from various directions.

Heidi Merikalla-Teir referred to the results of the 2018 Queen Mary/White & Case survey, where a great majority of the respondents identified arbitral institutions as best placed to influence the evolution of international arbitration. However, she said, it is the users—in-house counsel and business people in different sectors—who should be listened to and allowed to take the driver's seat in the shaping of the future of international arbitration.

Keynote address

Catherine A. Rogers (Penn State Law, USA / Queen Mary University of London, UK), delivered the conference's keynote address. Rogers said that, in international arbitration, the starting point of the shaping process—the one that the shapers of the future of international arbitration must preserve and deal with—is a truly exceptional mechanism that like the "fly of the bumblebee" is

unique and counter-intuitive. Despite lacking the conventional features of traditional adjudication, international arbitration works better than national courts to resolve international disputes and is being increasingly asked to do so—by some estimates, over 10,000 disputes are resolved annually through international arbitration worldwide, Rogers said. This is the result of international arbitration's evolutionary advances—an evolution that requires an active intervention from all custodians of the continuous success of international arbitration in the face of new challenges, Rogers concluded.

Panel: "Public-Private Arbitration – How to Strike the Right Balance Between Public Interests and Private Proceedings?"

A panel of four speakers—Stavros Brekoulakis (Queen Mary University of London, UK), Robert Lambert (Clifford Chance, UK), Eva Storskrubb (Roschier, Sweden), and Galina Zukova (Bélot Malan & Associés, France)—moderated by Patrizia Netal (KNOETZL, Austria), discussed about public-private arbitration in their respective jurisdictions.

Brekoulakis explained the rise of public-private arbitrations involving states or state entities in the last decade as a result of two concurrent developments: 1) the collapse of the doctrine of non-arbitrability of disputes involving public interest or public policy, and 2) ideological and economic forces that combined to massive privatisation programmes in the 80's and 90's. Nowadays, many of the standard contractual forms that are used for concessions and infrastructure projects contain arbitration as a default provision. A further rise in public-private arbitrations is foreseen for the future, e.g., in connection with the "One Belt, One Road" initiative.

Zukova added that, in some jurisdictions, it is also important to consider disputes with a public interest component involving private parties, e.g., in France, in road construction concessions involving a contractor and subcontractor.

Storskrubb addressed the concepts of public policy and public interest. From a Nordic perspective, she said, public policy or *'ordre public'* is an outer boundary of arbitration. In Finland and Sweden, *'what is manifestly in breach of the fundamental principles of the legal order'* is quite a high threshold, which is why it is quite rare to refuse the recognition of an arbitral award on this basis. Public interest, for its part, is a broader concept.

The panellists further discussed about how to capture the public interest in the contract or with some laws that go beyond the contract, such as mandatory laws or rules. Lambert told the audience about the "e-Borders case", which served to illustrate these issues, generating an interesting debate on how to better align these contracts with the public interest.

Interview: "Can Some Characteristics of Sports Arbitration be Adopted to International Commercial Arbitration?"

Interviewed by Markus Manninen (Hannes Snellman Attorneys Ltd, Finland), Professor Richard McLaren (University of Western Ontario, Canada) addressed the main features of sports arbitration, some of which could or should be used in commercial arbitration.

McLaren mentioned that commercial arbitration gave birth to sports arbitration and addressed some of its features, many of which can be found in in commercial arbitration as well, like the role of arbitral institutions, the composition of arbitral tribunals, the appointment of arbitrators, the use of (tactical) challenges in arbitrations. However, he also mentioned that, in sports arbitrations,

there was a greater transparency due to the nature of sports disputes (frequently parties want their names concealed), control of costs and general speediness.

On speediness, McLaren explained that sports arbitrations are generally speedy, which is made possible by the quality of parties' counsel: experienced, specialised and cooperative, and by procedural features: usually one round of briefs, short time frames with limited or no room for extensions—the latter because of the ripple effects of some decisions, and cases done on the papers without a hearing.

Speech: "Users' Perspective on the Future of International Arbitration"

Michael Mcllwrath (GE Oil & Gas, Italy) quoted Yogi Berra's 'Future ain't what it used to be' to refer to arbitration's golden age in the ever-evolving arbitration scene.

McIlwrath emphasised that it has become clear, e.g., at the Global Pound Conference, that it is the users of arbitration who will most likely drive change in arbitration. He proposed to look at the drivers of the market over the next years, i.a., the current generation of young arbitration practitioners and third-party funders; the latter ones, according to McIlwrath, will be the super users of arbitration in the future.

Further, McIlwrath made some interesting predictions for the next 5, 10 and 20-25 years and encouraged everyone to enjoy the golden age of arbitration while it is possible.

Panel discussion: "How to Embrace the Disruption in International Arbitration?

The last panel session—moderated by Riikka Koulu (University of Helsinki, Finland) and including speakers Michael Lind (Tyler Technologies, Inc., UK), Clemens Heusch (Nokia, Germany), Catherine A. Rogers (Penn State Law, USA, and Queen Mary University of London, UK), and Meera Sivanathan (Dottir Attorneys, Finland)—focused on disruptive digital technologies and overall trends that might become influential and how the arbitration community should react to them.

Koulu presented the Legal Tech Lab, a research hub at the University of Helsinki's Faculty of Law focusing on digitalisation of the legal practice. According to their research, there is a discrepancy between the hype around technology and lawyers' everyday use of only basic tools, such as Google, Word and e-mail.

Lind spoke about online dispute resolution (ODR), originally applied to small cases and progressively used in more complex cases. Technology allows, e.g., the scheduling of arbitrators/adjudicators to these cases, which are conducted efficiently through a platform.

Sivanathan presented the FAI Arbitration Process flowchart—a legal design project carried out in close cooperation between the FAI, law firm Dottir and design agency Hellon. The flowchart aims to provide arbitration users with a one-stop tool to quickly understand the whole arbitration process.

Rogers gave a presentation on "Arbitrator Intelligence (AI)", a project aiming to promote transparency, fairness and accountability in the selection of international arbitrators by increasing and equalizing access to critical information on arbitrators and their decision making. The collection of information on arbitrator case management and decision-making is conducted through

the feedback questionnaire “Arbitrator Intelligence Questionnaire” (AIQ), which is open for all parties, counsel, and third-party funders to fill in after the conclusion of an arbitration in which they are involved.

Heusch commented on the use of new technologies in arbitration and shared his views on their benefits and impacts from the point of view of the different stakeholders.

Closing remarks

Petra Kiurunen thanked the key note speaker, the moderators, the speakers, and the HIAD Partners, and invited all participants to the next year’s conference to be held in Helsinki on **23 May 2019** under the umbrella of the International Federation of Commercial Arbitration Institutions (IFCAI): the 15th IFCAI Biennial Conference.

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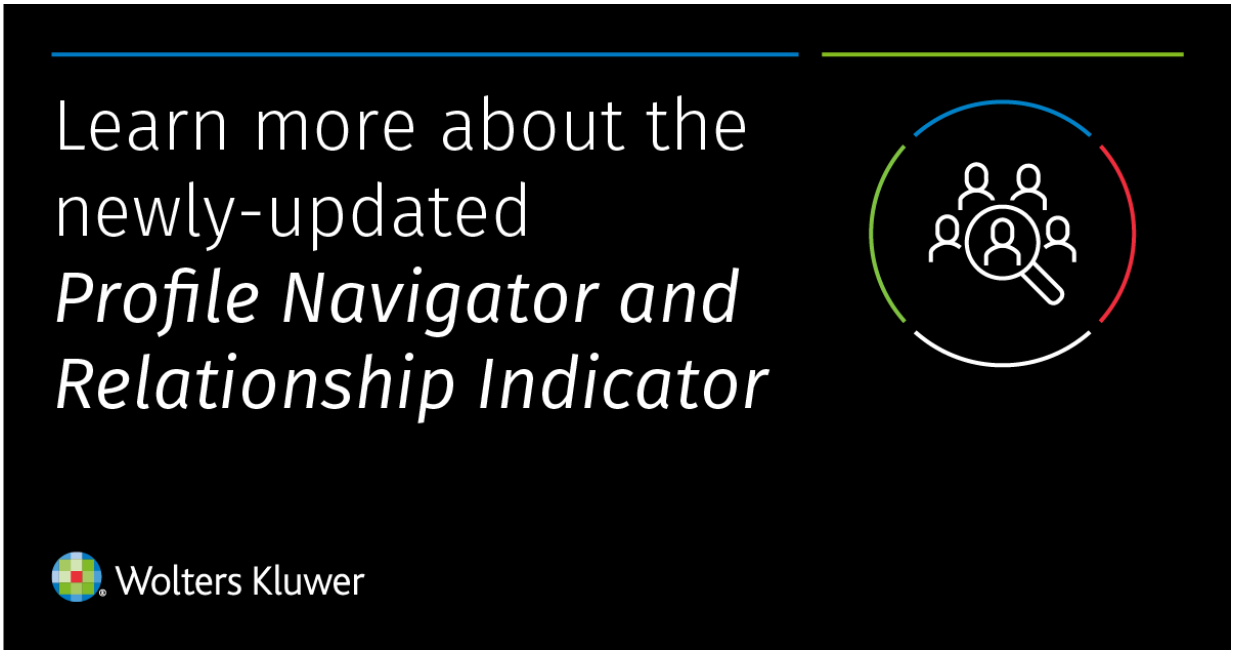

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