Kluwer Arbitration Blog

Highlights from CanArb Week 2021: The 2021 ICC Canada Conference – Leaning into the Future

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As part of Canadian Arbitration Week, the 2021 ICC Canada Conference, titled *Leaning into the Future*, was designed to facilitate critical thinking and debate on several important topics in international arbitration. The focus of the conference was decidedly post-pandemic, exploring fault lines and cleavages in the system of international arbitration as we know it today, potential developments in arbitration as artificial intelligence becomes more familiar and trusted to deliver a fair process capable of fair outcomes, and additional regulation of third party funding to address conflicts and other concerns.

The Guardians of the Arbitral Universe

The first conference session, a panel discussion titled *Guardians of the Arbitral Universe*, was moderated by Martin Doe, Senior Legal Counsel with the Permanent Court of Arbitration. Four panelists, Alexander Fessas, Secretary General of the ICC International Court of Arbitration, Dr Patricia Shaughnessy, Professor at Stockholm University, Tina Cicchetti, Independent Arbitrator, and George Vlavianos, partner with DLA Piper LLP in Doha, explored the role of arbitral institutions in ensuring the integrity of arbitration as a global system of justice.

The topic was inspired by an address delivered by Alexis Mourre, former President of the ICC International Court of Arbitration, at the 2019 GAR Live conference in Istanbul. Mourre's address was preceded by a warning issued five years earlier by Sundaresh Menon at ICCA 2012, that our industry needed to get its house in order, to self-regulate or be regulated, and a further omen from Gary Born who proclaimed the "sky is falling". The panelists considered and debated several questions within this universe: Is arbitration a transnational system of justice? What are the most pressing threats to the system? What role do arbitral institutions play in that system – do they serve as its backbone? To what degree does the robustness of this "backbone" shape the legitimacy and predictability of international arbitration?

A deeper question emerged in the dialectic among the panelists. That is, whether there exists a common understanding of international arbitration or a common *mis*understanding of international arbitration. Is there an absence of a true transnational ethos? There are threats to be sure – regionalism and parochialism – but perhaps a system nevertheless does exist? There may be types

of disputes for which arbitration may need new solutions, as exemplified by the collapse of supply chains during the pandemic. As to what the path forward might be, there is a lot that arbitral institutions can do in terms of capacity-building and enhancing transparency, such as through the publication of awards. A counterpoint to this may be that published awards could be used as persuasive authorities by counsel, which may recreate a common-law litigation-style system.

Dialing the dialogue back from the perspective of seeking to expand the system, perhaps it is in attempting to reach everyone that international arbitration reaches no one. Perhaps it is arbitral institutions doing everything and anything that is causing a real crisis of trust and credibility with users. This has led some stakeholders and States to call for an increase of the regulatory supervision to ensure that arbitral institutions are in fact credible, have integrity, and result in delivering effective service to users. The issue may be a common misunderstanding of international arbitration: everyone thinks that arbitration can solve their problem, regardless of what the problem is. Is it wise to "collect" labour disputes, class actions, consumer problems, non-business disputes, and to some extent investor-state disputes, and bring all into one large universe or forcing into a small planet?

As an apropos segue into the next segment of the conference, the panel also recounted the late Emmanuel Gaillard's Freshfields lecture on the sociology of arbitration, which presented on one chart the stakeholders in arbitration, all revolving around the users at its center. To properly guard this galaxy, perhaps the focus ought to be on the users, keeping in mind that the value for them is an enforceable outcome. Institutions are the face of arbitration to the users and they shoulder the responsibility to ensure that arbitration lives up to the promises made to the users.

Fireside Chat with Claudia Salomon

Following the opening panel, Stephen Drymer, a partner with Woods LLP, hosted the new President of the ICC International Court of Arbitration, Claudia Salomon, in a fireside chat. Ms Salomon spoke about the role of the ICC historically and today, as well as some of her core initiatives.

Ms Salomon recalled that the ICC was established roughly a century ago with a view to promoting peace and prosperity through global trade, and that an efficient dispute resolution mechanism was necessary to facilitate trade. Today, the ICC aims to ensure that its dispute resolution services meet the needs of global business, but also small and medium enterprises and micro-medium enterprises.

Under Ms Salomon's predecessor, the ICC Court reached gender parity in 2015. Prior to 2015, only 10% of the Court's membership was female. Today, the ICC Court is the most diverse in its history, with 195 members from 125 countries, more women than men, and more court members from African countries than ever before. The next step among the ICC's diversity initiatives, under Ms Salomon's leadership, is to create a taskforce on disability and inclusion.

Ms Salomon also spoke about her goal to reengage with users. Technology can greatly assist in facilitating this for those with busy schedules and who may need or want to be involved in some parts of a proceeding but not others. This ties directly into ensuring that the ICC remains at the forefront of meeting the needs of global business.

Debate #1: Our Brave New World – the 'Artificial Arbitrator'

The first debate focused on artificial intelligence (**AI**) and considered whether AI is capable of achieving the same or better dispute outcomes than human decision-making. Sarah McEachern, partner with Borden Ladner Gervais LLP, moderated a debate between Sophie Nappert, Arbitrator, 3 Verulam Buildings, and Todd Wetmore, partner with Three Crowns.

While one view is that AI reduces the bias in human decision-making, can biases really be eliminated altogether through AI? Algorithms are coded by humans, ergo human bias infiltrates algorithms. Yet, human judgment is also chronically unreliable: take the example of parole board decisions, which have been found to vary depending on whether a case is heard before or after lunch. AI promises to solve the frailty of human judgment, as exemplified by the algorithm called Prometea, which has been applied by prosecutors in Buenos Aires for years.

Some also believe that an erosion of user trust will eventually lead to the demise of artificial adjudication. Parties will not trust the system if they do not know the decision-makers. While the inner-workings of an arbitrator's mind will never fully be known, how could one ever "know" the entirety behind the AI programming?

AI adjudication would require parties to jettison everything they hold dear about the process today – no advocacy, no advocates, no process whereby a tribunal could be persuaded. This would be replaced by an antiseptic process of decision-making – data would be generated and collected for a data specialist to feed into a computer. Ultimately, AI adjudication may well be our future for certain types of disputes. Simple and binary disputes lend themselves more easily to an AI adjudicator than complex and non-binary disputes.

Audience polling before and after the debate showed an increase in those audience members responding "no" to the proposition that AI cannot remove decision maker's bias, and "yes" to the proposition that AI will erode user confidence in arbitration.

Debate #2: Third Party Funding – 'Show me the Money Trail'

The second debate focused on whether the issues associated with third party funding in international arbitration have been adequately dealt with through our current rules framework, or whether greater normativity is required. Geoff Moysa, Investment manager and legal Counsel with OmniBridgeway, moderated this debate between Andrea Bjorklund, Professor at McGill University Faculty of Law, and Wesley Pang, partner at Eversheds Sutherland.

This debate proceeded more as a discussion than a formal debate. A key focus of the discussion was the question of what is third party funding. Different jurisdictions have different levels of sophistication and familiarity with third party funding, and have different visions for the appropriate regulatory framework. These differences can and do lead to forum shopping (which is not necessarily a negative as it is allowing the parties choice).

There appears to be consensus on the potential need for disclosure in respect of a claimant's ability to cover adverse costs in light of the risk of a funder overextending funding. It also appears to be non-controversial that there are legitimate issues around disclosure for conflicts purposes, and who controls the process at settlement.

Apart from the need (or lack thereof) for greater State regulation applicable to third party funding, the debaters considered whether arbitral tribunals have the power to regulate third party funding. There remains a debate as to whether the older rules are sufficient in their generality, or whether there is a need for newer more specialized and particularized rules. A further complication arises in that the latter potentially imply that the former are deficient and therefore arbitrators are bereft of powers to regulate third party funding in the absence of applicable State regulation.

Polls issued before and after the debate revealed that some members of the audience were persuaded that existing rules and regulations applicable to third party funding are adequate, and that the only reason for regulating third party funding is to manage arbitrator conflicts and adverse costs.

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The conference brought together Canadian practitioners from around the world and saw a lively discussion in the chat feature throughout. In keeping with its theme, it did indeed lean into the future on a number of topics in international arbitration and for the international arbitration community as a whole.

Other posts covering CanArbWeek can be found here.

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