Kluwer Arbitration Blog

ICCA Edinburgh 2022: Enlightenment, Adaptation, Classics Revisited and More: A Round-Up of the First ICCA Congress Day

Daniel Boden (CMS), Davide D'Aleo (Scottish Arbitration Centre), and Patricia Taylor (DWF LLP) · Tuesday, September 20th, 2022

The first full day of the ICCA Congress took place on Monday, September 19. Delegates gathered early in the morning for a keynote speech by Louise Arbour, former Canadian diplomat, Justice of the Supreme Court of Canada, High Commissioner for Refugees, Chief Prosecutor for the Yugoslavia and Rwanda Tribunals and current Senior Counsel at BLG. Ms. Arbour spoke of international arbitration from an outward perspective as an instrument of justice, which 'participates in the larger enterprise of social stability, progress, prosperity and peace'.

After the morning's welcome session, the Congress programming was paused to enable delegates to watch the official State funeral of H.M. Queen Elizabeth II.

Arbitration's Age of Enlightenment … and Adaptation?

The Congress resumed with the first plenary of the Congress entitled 'Arbitration's Age of Enlightenment… and Adaptation?', moderated by Loretta Malintoppi. The plenary addressed a variety of topics, namely the historic roots of international arbitration, the modern day impact of artificial intelligence on arbitration, and the submission of States to international arbitration. J. Christopher Thomas began by recounting a brief history of Andrew Carnegie's contribution of significant funds for the Peace Palace that would later house the Permanent Court Arbitration, with a grander vision for the peaceful resolution of international disputes, a concept that resonates strongly in recent times.

Then, Professor Hi-Taek Shin commented on a wave of 'nationalistic, protectionist and unilateral policies' and questioned how international arbitration would fare in these circumstances, noting that international arbitration is premised on neutral, efficient and fair dispute resolution and, by default, seeks to be the opposite of what recent trends have reflected. Yet international arbitration itself is facing a legitimacy crisis, which Carole Malinvaud addressed, suggesting that the concept of procedural *loyauté* can be developed to act as a remedy for the new wave of legitimacy crises facing international arbitration. Broadly speaking, *loyauté* could be viewed as an all-encompassing term to capture due process, fairness, equality of arms, and so on. Its application could be as broad as its definition, spanning the entire arbitration procedure, but she cautioned against falling into 'due process paranoia'.

Finally, Lucy Reed posed the question: 'AI vs. IA: End of Enlightenment?'. She focused on the probable ability of AI to solve problems without the involvement or understanding of humans, and explored how excessive reliance on precedents in international arbitration (IA), without the application of genuine reasoning, can be seen as a low-tech and low-value type of AI.

Progress Made / Progress to be Made – Exploring the Ways Forward

In the first panel of the afternoon, entitled 'Progress Made / Progress to be Made – Exploring the Ways Forward' moderated by Professor Susan Franck, speakers assessed the current state of arbitration in the modern age and the fundamental challenges it will face in the world of tomorrow. Diamana Diawara, Lucy Greenwood and James Hope shared their personal list of "Top 3" issues in international arbitration where change would provide a vital benefit to practitioners and parties alike. The panel arrived at a collective list of challenges facing the discipline. These were (1) costs and efficiency, (2) the environment, and (3) legal culture and equality. The panellists also identified opportunities to implement the change needed to face these challenges.

In general, parties (i.e., clients) want (or say they want) an efficient dispute resolution process delivered at a reasonably low price. Meeting this demand, though not always easy or possible in complex or highly escalated disputes, is how arbitration practitioners stay relevant and desired by clients, according to Diamana Diawara. Some suggested methods to temper costs were to have junior-led teams for price-sensitive parties, keep pleadings short and filings small, eliminate unnecessary fees, and encourage parties to settle wherever possible.

Just as the impact of climate change on arbitration has increased over the past decade, Lucy Greenwood noted that we must be aware of the impact of arbitration on climate change. Here, virtual and paperless hearings and filings can help the industry do its part to avoid contributing to the climate crisis. Though in-person hearings will sometimes still be preferred, arbitration's carbon footprint can be greatly reduced simply by flying less and printing less.

The arbitration community has seen an increase in women appointed as arbitrators, but there are still gains to be made in diversity and inclusion, notably along ethnic and geographic lines. The historical skew towards male, white, western arbitrators has an economic impact as it may prevent talent from developing outside of established arbitration centres and hamper parties' faith in the system. Though constrained by party choice and the paramount concern for quality, institutions should advocate for greater diversity in arbitral appointments, perhaps even including clauses addressing diversity in their rules.

Acknowledging that implementing changes in these areas will be difficult, incremental, and sometime more up to the requests of the parties than the will of arbitration practitioners, Mr. Hope concluded the panel's comments citing the Serenity Prayer, attributed to the Lutheran theologian Reinhold Niebuhr (1892–1971):

God, grant me the serenity to accept the things I cannot change,

the courage to change the things I can,

and the wisdom to know the difference.

Once Upon a Time in International Arbitration I: Three Classics Revisited

The afternoon then saw delegates split into two sets of parallel sessions. The first of these sets focused on revisiting the past and examining it through modern-day lenses.

Panel 2 was entitled 'Once Upon a Time in International Arbitration I: Three Classics Revisited'. The panel moderator, Galina Zukova, encouraged the panellists to discuss why three cases, *Barcelona Traction*, *Abu Dhabi Oil*, and *Mitsubishi Motors*, have earned 'classic' status, and to analyse how each one may be decided today.

Dr. Nagla Nassar examined the *Abu Dhabi Oil* judgment. Dr. Nassar reviewed the evolution of the judgment's relevance – and the advancements in the arbitration field since it was decided in the 1950s. Most poignantly, Dr. Nassar observed that the decision sought to establish fairness, and posed the following question to the audience: "are we expected to strive for fairness and justice, or be guided by a strict need to apply the law?"

Professor Jan Paulsson explored the *Barcelona Traction* case, analysing the impact of the judgment on the protection of foreign investment, and the risks posed by the objective to potentially resurrect the judgment, which has since been overturned. Professor Paulsson implored the critics who wish to prohibit shareholder claims "to point to awards which have resulted in unjust enrichment to the claimants" and expressed little sympathy towards those who want the *Barcelona Traction* case to overrule shareholder claims, warning that this will discourage foreign investment.

Finally, Professor George Bermann provided an overview of the *Mitsubishi Motors* case. Professor Bermann advised that the decision does not mention the relevant agreement's choice of law clause (Swiss), but rather, states that "if this dispute falls within the scope of the arbitration agreement, then it is arbitrable, and is to be decided under the law from which the claim arose" which in that case, was U.S. antitrust law. As a corollary to this point, Professor Bermann queried whether today's tribunals could take the same approach: where parties have selected their choice of law, can a tribunal apply a law alternative to the parties' choice? Finally, Professor Bermann analysed the "second look principle", and whether it is a benefit to arbitration for courts to reserve the right to review an arbitral decision, in order to analyse whether the right decision was reached.

Once Upon a Time in International Arbitration II: State Responsibility – Then and Now

Panel 3, moderated by Stephen Drymer, and titled 'Once Upon a Time in International Arbitration II: State Responsibility – Then and Now' explored an interesting interaction between the ILC's Articles on State Responsibility and investment arbitration. The panel consisted of Judge Bruno Simma, Professor Christian J. Tams, and Chester Brown. The panellists observed that the ILC Articles have always centred upon inter-state relationships and issues, but there has been a growing trend for investment arbitrations to refer to them. Indeed, it was mentioned that 219 references were noted in publicly-available awards. Concerns have been raised in the past on investment arbitrations being able to correctly apply international law, and cases such as *UPS v Canada* provide a clear signal that the arbitration community is in fact moving in the right direction. From what may have appeared to be a disharmony between public international law and investment law decisions and arbitrations, panellists remarked that the relationship is shifting towards a more synergic and harmonious one.

Arbitration's Printing Press

In the later part of the afternoon, delegates were invited to choose between the second set of parallel sessions.

Panel 4 was entitled ‘Arbitration’s Printing Press’. Moderated by Ziad Obeid, the panel was composed of Paula Hodges KC, Lilit Nagapetyan (winner of the Young ICCA Essay Competition) Anke Sessier, Mallory Silberman, and Caroline Simson. Ms. Hodges explored the history of privacy in arbitration, noting that it rested at the forefront of parties’ objectives at the commencement of the arbitration-age. She expressed that, in her view, this objective remains, and is supported by 87% of respondents to a recent study, who confirmed that confidentiality is of key importance to them. The discussion progressed on matters of party autonomy, company reputation, heightening the chances of settlement, the risk of copycat claims and exposing trade secrets. Ms. Nagapetyan analysed the concept of legitimacy, and the foundational question of whose interest confidentiality serves.

As the former General Counsel of a large company, Dr. Sessler answered Mr. Obeid’s question as to whether businesspeople assume that arbitration equals confidentiality as the default position. Dr. Sessler noted that confidentiality clauses are often entered into, and that there exists a notion that privacy is synonymous with the arbitration process. Ms. Simson explored the benefits of increased transparency, including the public interest, predictability, heightened accountability, and legitimacy. In contrast, Ms. Silberman advanced the idea that we cannot debate transparency. She suggested that it was now time to strike this topic from conference agendas arguing that the issue of access was up to the parties or tribunal, not conference delegates. Ms. Silberman observed that there was already extensive information available to the public, and that we are in fact attempting to debate a narrow issue – whether or not parties’ pleadings should be published (an issue that can be resolved to service both parties).

Post Pandemic Dispute Resolution Toolbox

Last but not least, Panel 5, entitled ‘Post Pandemic Dispute Resolution Toolbox’ and moderated by Lindy Patterson KC, delved into the future and optimisation of the international dispute resolution process, structured around five questions: (1) Has the ADR toolbox changed as a result of the pandemic or other factors?; (2) Is the use of mixed-mode DR processes the way ahead?; (3) What can you do upfront at the beginning of the contractual relationship to facilitate mixed-mode DR?; (4) How can stakeholders (neutrals, parties, outside counsel and institutions) best assist and when? (5) What about innovation – new tools?

With these questions in mind, the discussion centred on different models and approaches that could be used when managing disputes. Wolf von Kumberg was a proponent of a mixed-mode approach, wherein a mediation process would run in tandem with an arbitration. The idea is that instead of letting arbitration be seen as the ineluctable result of an escalating conflict, by running it in parallel with a mediation, the option of settlement via mediator is a more present option; should mediation fail, the parties will already have a jumpstart on arbitral proceedings, so no time will be wasted moving from mediation to arbitration.

Elina Mereminskaya suggested that “knowledge-based tools”, which include interdisciplinary, dispute-preventative approaches to projects need to be part of the ADR toolbox. An example of a knowledge-based dispute resolution mechanism is the Technical Panel for the concessions of public works that exists under Chilean law, which must be composed of two lawyers, two engineer, and an economist. In the course of operating a concession, disputes first go through the Panel, which offers a recommendation, which can be accepted by the parties or rejected should they wish to resort to arbitration.

The principle at the heart of such ADR tools was summed up by Justice Joyce Aluoch: Parties want a decision quickly and effectively. If a mixed-mode approach or recourse, knowledge-based tools, or simply encouraging the uptake of mediation over arbitration works for them, then that solution is fit for purpose.

On Day 2, which is now ongoing, delegates can expect another busy day of interesting panels and side events. Panels will touch upon ISDS reform, regional perspectives from all corners of the globe, the sociology of arbitration, and panels on young practitioners, technological innovations, and the subject-matters of the disputes of tomorrow.

Follow along and see all of *Kluwer Arbitration Blog*'s coverage of ICCA Edinburgh 2022 here.

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