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Taking a Close Look at Today's Arbitral Process and Who Pays for It: A Report from Helsinki International Arbitration Day 2017 (I)

Heidi Merikalla-Teir (The Arbitration Institute of the Finland Chamber of Commerce (FAI)) and Mika Savola (Hannes Snellman) · Wednesday, June 7th, 2017 · Finland Arbitration Institute (FAI)

Helsinki International Arbitration Day (HIAD) is an annual arbitration conference organized by the Arbitration Institute of the Finland Chamber of Commerce (FAI). It was held for the sixth time in Helsinki on 18 May 2017. This year, the event was organized with the support of the ICC International Court of Arbitration and the ICC Finland, and it attracted some 250 legal practitioners from approximately 20 countries to hear presentations and exchange views under the general heading "*Taking a Close Look at Today's Arbitral Process and Who Pays for It*". The topic of the conference was chosen mainly for two reasons: first, to shed light on the different practices applied by different arbitral institutions in the administration of their cases; and second, to discuss the various methods used, and potential best practices to be found, in the allocation of the costs of arbitration by international arbitral tribunals.

Recent Developments at the FAI and the ICC

The conference was opened by the welcoming remarks of the FAI Secretary General, Ms Heidi Merikalla-Teir, and the Executive Director of the ICC Finland, Mr Timo Vuori. They noted the growing international case load of the FAI, which shows that also non-Finnish users of arbitration have come to trust FAI proceedings as a reliable and efficient means to resolve cross-border commercial disputes. It is also evidence of the increasing popularity of Finland as a trustworthy venue for international arbitration, a trend that will probably continue as Finland stands to benefit from its status as a modern society with an advanced legal system and highly educated lawyers, coupled with a top ranking in the global anti-corruption indexes.

The floor was then given to Mr Alexis Mourre, President of the ICC International Court of Arbitration (ICC). In his keynote, Mr Mourre provided an overview of the challenges that international commercial arbitration faces today, and elaborated on the new policies that the ICC has implemented in response to these issues over the past couple of years. They include, among other things, the launch of expedited rules for small-value claims; the increase of transparency through reasoning of the ICC Court's decisions and publication of arbitrators' names; the emphasis put on the ethics in arbitration through guidance note on disclosure and rules on the conduct in arbitration; the increase in efficiency by shortening time-limits for the establishment of Terms of Reference and by introducing specific sanctions for delays; and finally, certain additional services, such as the ICC Secretariat's role in the administration of so-called "sealed offers".

In his comments on the keynote, the Chair of the FAI Board, Mr Mika Savola, discussed what some of the new ICC policies might mean from the viewpoint of the FAI. As an introductory remark, Mr Savola reminded that when drafting the current FAI Arbitration Rules which came into force in 2013, the ICC Arbitration Rules of 2012 served as a source of inspiration in many respects, especially in relation to the provisions governing multi-contract and multi-party arbitration. Further, Mr Savola praised two of the ICC's recent policy changes as particularly innovative. First, the fact that the ICC Court is now willing to provide reasons for its decisions on challenge and replacement of arbitrators, *prima facie* jurisdiction and consolidation of arbitrations upon any party's request is a groundbreaking move that resonates well with the users of international arbitration and should therefore be carefully considered also by other arbitral institutions. Second, Mr Savola gave credit to the ICC Secretariat for starting to administer "sealed offers" (as explained in para. 193 to 195 of the *"Note to parties and arbitral tribunals on the conduct of the arbitration under the ICC Rules of Arbitration"* dated 1 March 2017). In his view, this new practice will not only promote amicable settlements of disputes but also serve to reduce the overall costs of arbitration and give the parties and arbitral tribunals a valuable tool to increase the quality of cost decisions in ICC arbitrations. Consequently, other arbitration institutions too would be well-advised to consider adopting similar practices in proceedings governed by their respective rules.

Role of Arbitral Institutions in the Arbitral Process

Mr Savola's remarks were followed by an interview and discussion on the topic of *"How Does the ICC Arbitral Process Work in Practice"* by and between Ms Inka Hanefeld, partner at Hanefeld Rechtsanwälte and Vice-President of the ICC Court, and Ms Maria Hauser-Morel, Counsel at the ICC Secretariat. The lively dialogue demonstrated the particularities of case administration during the lifespan of an ICC arbitration, as well as the level of monitoring and scrutiny exercised by the Secretariat and the Court at various stages of the ICC proceedings.

In the next session, the focus shifted to the comparison of case management at five well-known arbitration institutes. The topic was addressed by a prominent and geographically dispersed panel moderated by Ms Carita Wallgren-Lindholm, founding partner at Lindholm Wallgren Attorneys and member for Finland at the ICC Court, under the heading *"How Active Is and Should the Role of an Arbitral Institution and its Secretariat be in the Arbitral Process Vis-à-Vis the Arbitral Tribunal and the Parties?"*. The speakers included Ms Heidi Merikalla-Teir, Secretary General of the FAI (Finland); Mr Alexander Fessas, Managing Counsel and Secretary General elect of the ICC (France); Ms Annette Magnusson, Secretary General of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) (Sweden); Mr Philipp Habegger, partner at HABEGGER Arbitration and former President of the Arbitration Court of the Swiss Chambers' Arbitration Institution (SCAI) (Switzerland); and Ms Ulrike Gantenberg, partner at Heuking Kühn Lüer Wojtek and member of the Board of Directors of German Institution of Arbitration (DIS) (Germany).

First, the panel discussed the varying intensity at which different arbitral institutions monitor the arbitral process under their rules, e.g., in areas such as the fixing of advances on costs, deciding on challenges to arbitrators, and scrutiny of arbitral awards. It was noted that the ICC appears to be most closely involved in all the practical aspects of arbitral proceedings (with the exception of issues related to value-added tax, see below), and it is the only institute that exercises full-fledged scrutiny of awards rendered under its auspices. By comparison, the panelists positioned the FAI and the SCC "in the middle of the scale" in terms of the intensity of monitoring, since both of them

only request the arbitral tribunal to submit certain types of documents to the institute and do not require the tribunal to share with the Secretariat everything about the proceedings; however, in contrast to the SCC, the FAI Board also reviews each FAI award once it has been issued with a view to collecting information on the arbitrator performance that is crucial for potential future appointments. The DIS and the SCAI, in turn, were placed at the lower end of the scale with respect to their level of engagement in the arbitral process. The DIS, in particular, vests the arbitral tribunal with exceptionally broad powers e.g. in deciding on challenges raised against the arbitrator(s) and in fixing the arbitral tribunal's own fees, although these features may be subject to change as a result of the DIS Rules revision process that is currently underway.

As to the “geographical coverage” of different arbitral institutions, the panelists noted that while a mere 20% of the cases administered by the SCAI included a Swiss party, there was at least one German party involved in more than 75% of the cases administered by the DIS. Also the FAI and the SCC were viewed mostly as regional players, though with an increasing number of international cases administered under their rules. The ICC was unanimously considered as the only truly global actor among the various arbitration institutes.

The panel also addressed the extent to which different institutes provide services in questions related to value-added tax (VAT) in connection with the fixing of the advances on costs and determining the final costs of the arbitration. It was noted that while the ICC does not strictly speaking administer VAT issues, it does provide a VAT fund account service, thereby offering parties the assurance of having a neutral depository keep the monies until they become payable to the arbitrator(s), and arbitrators the convenience of having an institution administer this financial aspect of the proceedings on their behalf. In contrast, both the FAI and the SCC go further in the administration of VAT issues. This is done already at the outset of the arbitration so that, when calculating advances on costs, the FAI and the SCC take into consideration any potential VAT that may ultimately have to be added to any arbitrator's fee, and the likely amount of VAT will then be included in the advances on costs to be fixed by the institute. (to be continued)

The next Helsinki International Arbitration Day will be held on 24 May 2018 (more information will be available [here](#)). If you wish to look back at HIAD 2017, you can watch videos from the event [here](#) and photos [here](#).

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