Kluwer Arbitration Blog

The Present and Near Future of New Technologies in Arbitration: If not Us, Who? If not Now, When?

Pratyush Panjwani (Hanotiau & van den Berg) · Friday, April 27th, 2018

With the focus of the arbitral community being taken over by the recent discourse surrounding an important branch of international arbitration, i.e., investor state dispute settlement, after the 6 March 2018 Judgment of the Court of Justice of the European Union in Case C-284/16, *Slowakische Republik v Achmea BV*, there may be a risk today, more than ever, of overseeing what the seemingly distant future holds for international arbitration practitioners. Indeed, a singularly unwavering concentration on the "present" of arbitration practice, without adequate focus on its "future", is, to a certain extent, emblematic of the issues that have ended up afflicting arbitration practice. However, while the present is sitting the test of time, it is even more critical now to have one eye focused on, and prepared for, the future of this dispute resolution mechanism.

With this aim in mind, on 23 February 2018, the *Club Español de Arbitraje*, Belgium Chapter ("**CEA**") organized its Third Annual Conference, hosted and sponsored by Stibbe and FTI Consulting, relating to the topic of "The present and near future of new technologies in arbitration". The Conference held itself true to the (almost prognostic) words of Mr. Alexis Mourre, which were quoted by Mr. Mathieu Maes during his introductory remarks at the Conference, whereby he alerted us to the fact that "[t]here may be no more relevant topic [today] than this one for the future of dispute resolution". Indeed, the increasing relevance of this topic has been alluded to by many others recently, including in a post highlighting the 10 hot topics for discussion in arbitration for the year 2018. This hypothesis was afforded credence by the variety of participants that the CEA's Conference saw, on both sides of the panel, ranging from arbitration practitioners, enthusiasts and aspirants to representatives from arbitral institutions and the community of technical experts, particularly from the field of data science.

The keynote address, titled "Algocracy in Arbitration", was delivered by **Ms. Sophie Nappert**, who has been a vocal embracer of the impact of new technologies on arbitration.[1)] The term ("algocracy"), she explained, was a derivative of two terms, i.e., "algorithm" and "democracy". Ms. Nappert took us through various ongoing developments being conducted in the field of artificial intelligence ("**AI**"), which, together with the internet, has created a democratic playing field for humans to operate and interact with technology. She spoke about how AI will soon leave a lasting impact on arbitration as a field of practice by introducing algorithmic decision making

using machine learning software, which may possibly even reduce the work force involved in arbitration today. According to Ms. Nappert, the only aspect where human judgment still trumps algorithmic decision making is the more intangible values such as empathy, compassion and fairness. In light of this, she called upon the arbitration community to realize the opportunity that AI offers us to win back the trust in fellow humans, while simultaneously embracing the advancements in technology and keeping pace with them.

This speech created the perfect platform for the two panels of speakers that followed, with the first one focusing more on the present technologies being used in arbitration and the second one highlighting potential future technologies that may have an impact.

The **first panel**, moderated by Ms. Dodo Chochitaichvili and Mr. Maxime Berlingin (Fieldfisher), saw speeches from Ms. Erica Stein (Dechert LLP, Brussels), Mr. Matthew Buckle (Norton Rose Fulbright, London), Dr. Franz Stirnimann Fuentes (Froriep, Geneva) and Mr. Alexander Fessas (ICC Paris). Ms. Stein discussed how consent to arbitrate in today's day and age can be given by and through digital means, such as by email correspondence, and whether and how such consent is recognized within the regime of Article II of the New York Convention 1958. She was followed by Mr. Buckle who advocated for a case-by-case approach in relation to admissibility of hacked information and documents as evidence in arbitration, taking us through various jurisprudential approaches in relation to this threshold question that touches upon parties' good faith conduct. Thereafter, Mr. Fessas addressed the current use of technology in institutionally administered arbitration, and suggested that it is the need of the hour for arbitrators to polish their technological skillset with the ready help of arbitral institutions, while at the same time maintaining the parties' fundamental expectations from arbitration and thus not using very costly and complicated technologies.

Lastly, Dr. Stirnimann's particularly interesting presentation addressed the issue of confidentiality in the digital age, speaking about how confidentiality today has evolved from interpersonal confidentiality to technological confidentiality. In this regard, he suggested that as arbitration practitioners it is incumbent upon us to be aware of potential security hacks, of which law firms are often targets, establish security protocols at workspaces and train staff to this effect, and ensure a minimum level of virus protection. The concerns and the potential solutions highlighted by Dr. Stirnimann are extremely relevant in today's day and age, given that the inclination to access, and the very accessibility, of metadata in legal documents, has been on the rise over the past few years, as law firms gain technological advancements. Notably, the concept of "metadata" has been succinctly explained in the ICC Commission's on Managing E-Document Production, which described metadata in the following terms:

"'Metadata' is, literally, data about (electronically stored) data. Documents or files created on a computer will typically contain embedded information that is not readily apparent on the screen view of a file or in a printed version of the document or file. This secondary "metadata" is information about the electronic document or file that describes its characteristics, origins, or usage."[2)]

This discussion initiated during the first session made for the perfect ingredients that helped the

second panel create a sumptuous amount of food for thought for the audience in order to comprehend and further explore the relationship between humans and technology.

The **second panel**, moderated by Mr. José Rafael Mata Dona and Ms. Niuscha Bassiri (Hanotiau & van den Berg), saw a more futuristic expedition into technological innovations undertaken by Mr. Erik Schäfer (Cohausz & Florack, Düsseldorf), Mr. Charles Raffin (Hardwicke, London), Dr. (Dr.) Meloria Meschi (FTI Consulting, Paris) and Mr. Mohamed S. Abdel Wahab (Zulficar & Partners, Cairo). Mr. Schäfer, taking a leaf from the recent ICC Report on Information Technology and International Arbitration, by the Commission co-chaired by him, discussed various technological innovations in recent years and their potential impact on arbitration in the near future. Touching upon aspects of AI that Ms. Nappert referenced, such as decision making through machine learning and portals for contract formation, Mr. Schäfer called upon practitioners, especially arbitral institutions, to take the lead in familiarizing themselves and the users of arbitration with these innovations. Thereafter, Mr. Raffin harmonized his speech with the discussions initiated by Dr. Stirnimann. He spoke about protection and acquisition of electronic evidence, taking us through the basics of the components of electronically stored information, such as metadata, and indicating avenues that can help protect such information from requests in document production procedures or otherwise.

Mr. Raffin was followed by Dr. Meschi, the only data scientist on the panel. Dr. Meschi took the discussion on AI further by explaining the basics of machine learning and data mining. Interestingly, it was the data scientist on the panel that urged our legal minds to realize the importance of human empathy, by propositioning that while the software may be readily available and easy to use, it’s worth ultimately depends on the human behind the software. Mr. Wahab took on from this and concluded the discussions by highlighting the necessity of being techno-literate in today’s day and age, and the need to bridge the gap between AI and international arbitration, by acquainting oneself with technology.

With this exciting thought of embracing human empathy while simultaneously befriending technological advancements, the CEA’s Conference undoubtedly offered many practical insights as to the steps that need to be taken by the arbitral community in order to match pace with technology. Together with such insights, there was also a palpable sense of hope for a more nuanced and technologically sustainable future, which was most appropriately evidenced in the Star Trek quote that Ms. Nappert used to conclude her speech, albeit in reference to the practice of international arbitration – may it “live long and prosper”!

The views expressed in this article are solely the personal views of the author and in no way reflect the views of Hanotiau & van den Berg.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

References

?1 Sophie Nappert and Paul Cohen, *Case Study: The Practitioner's Perspective*, in Maud Piers, Christian Aschauerp (eds), Arbitration in the Digital Age: The Brave New World of Arbitration (CUP 2018), p. 126

?2 Cf. 4.8. Typical examples of metadata include editing changes or comments made to the document over time, the document's author or the date and time of its creation etc.

This entry was posted on Friday, April 27th, 2018 at 9:19 am and is filed under Arbitration, Belgium, Document Exchange, International arbitration, Technology, Uncategorized
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.