Kluwer Arbitration Blog

The 15th IFCAI Biennial Conference in Helsinki: Finding the Right Balance to Maximise Strategic and Effective Conflict Resolution

Santtu Turunen (The Arbitration Institute of the Finland Chamber of Commerce) and Adriana Aravena-Jokelainen (The Finland Arbitration Institute (FAI)) · Thursday, July 25th, 2019 · Finland Arbitration Institute (FAI)

The 15th IFCAI Biennial Conference in Helsinki

On 23 May 2019, the Arbitration Institute of the Finland Chamber of Commerce (FAI) hosted the 15th IFCAI Biennial Conference in Helsinki. The International Federation of Commercial Arbitration Institutions (IFCAI) organises the "IFCAI Biennial Conference" every two years in cooperation with an IFCAI member arbitration institution. This year it was hosted by the FAI in lieu of the traditional Helsinki International Arbitration Day (HIAD). A record number of more than 250 participants from 26 countries and 17 international arbitral institutions attended the event.

The topic of the day was strategic and effective conflict management from the point of view of different stakeholders. The first panel focused on conflict diagnosis, conflict resolution strategies, arbitration and ADR methods for strategic and effective conflict resolution. The second panel focused on effective conduction of arbitration in the face of current challenges in the arbitration scene. The third panel addressed how to enhance the interplay between state courts and arbitral

tribunals. The final interview session offered a glimpse into the future of international arbitration and dispute resolution in an era of artificial intelligence.

First Panel: Conflict Diagnosis, Conflict Resolution Strategies and Versatile Use of ADR Mechanisms – How to Use These Tools for Strategic and Effective Conflict Resolution?

The first panel was a round table discussion moderated by Tuuli Timonen (White & Case LLP, Finland) with the participation of Carlos S. Forbes (Center for Arbitration and Mediation of the Chamber of Commerce Brazil Canada CAM-CCBC, Brazil), Ralf Lindbäck (Wärtsilä Corporation, Finland), James South (CEDR, UK) and Urs Weber-Stecher (Wenger Vieli AG, Switzerland).

Tuuli Timonen started off the discussion asking whether it is true that companies want ADR, while the arbitration community wants arbitration. The panel discussion revolved around this issue. The market conditions of supply and demand for services were the common nominator for the different issues addressed by the panel.

Ralf Lindbäck brought up that Wärtsilä Corporation is developing conflict dispute resolution strategies through collaboration. According to him, in the contemporary world, winning is about partnerships, collaboration and interconnection. Long-term contracts are a market trend and dispute resolution must be rethought. Thus, a concrete solution is to include relationship management in contracts to ensure continuous communication. In practice, this means that when a problem arises, those involved will first try to find together the root cause of the problem instead of passing on the blame and costs. He emphasised that for the benefit of the arbitration community, it would be important that the skills of arbitrators be used in a broader scope.

Carlos S. Forbes spoke about the role of arbitral institutions as enablers of amicable solutions. He suggested that arbitral institutions take an active role in promoting and developing mediation, *i.e.* developing rules and boards for mediation and having rosters of mediators. He also addressed the market conditions and pointed out that there must be a financial incentive to mediate but there is money in mediation as well. This position was supported by the rest of the panellists. It was pointed out that nobody wants to lose a profitable case, but, on the other hand, there is room for business in mediation, too. Counsel just need to be able to provide added value. The panellists agreed that lawyers have a new business opportunity in drafting settlement agreements.

Urs Weber-Stecher elaborated on the right timing for mediation in a multi-tier process. It was stated that the best time for mediation is not necessarily before arbitration and that arbitrators need to have experience and knowledge about mediation to understand the right timing for it.

James South discussed the ingredients of effective mediation. While the parties should be open-minded and understand their real interest, counsel should advise them on how to frame an offer. Counsel should be patient during the mediation and not incur in pseudo-efficiency by saving a few hours and approaching mediation like a settlement conference. Reflecting on Ralf Lindbäck's words on relationship management, South pointed out that mediation can be used not only for dispute resolution but also for relationship management.

Second Panel: Issues Giving Arbitrators a Headache when Striving for an Effective Arbitral

Process – What Are the Topical Questions?

The second panel was an interactive session moderated by Alice Fremuth-Wolf (Secretary General, Vienna International Arbitration Centre – VIAC, Austria). The speakers were Karl Hennessee (Airbus, France; ICC, France), Daniel Hochstrasser (Bär & Karrer, Switzerland), Kathleen Paisley (Ambos NBGO, Belgium), José Rosell (Independent Arbitrator, Denmark) and Ismail Selim (Cairo Regional Centre for International Commercial Arbitration – CRCICA, Egypt).

Karl Hennessee pleaded for arbitral courage as to the role to be played by arbitrators to ensure efficient and effective arbitration proceedings. He emphasised that it is essential that arbitrators be willing to take the responsibility bestowed by the parties upon them. In his view, the arbitrator's role should be something between a kindergarten teacher and an absolute dictator depending on the arbitration itself. In terms of due process, he suggested that arbitrators look at district court judges, whose decisions are overruled continuously and still life goes on.

Daniel Hochstrasser referred to the loneliness of the arbitrator in the quest for arbitration efficiency. Procedural schedules are drafted by counsel, not always in the best interest of their clients. However, it is difficult for arbitrators to interfere – in the end, it is not their process.

The panel also discussed the impact of the GDPR in arbitration. Kathleen Paisley pointed out that GDPR affects everyone involved in arbitrations. Currently, the trend moves from not caring at all to overcaring. She encouraged everybody to spend some time on the GDPR and understand it—get their arms around it and realise it is not so bad after all.

Third Panel: Interplay Between Arbitral Tribunals and State Courts during the Arbitral Proceedings – How to Find the Right Balance?

Moderated by Marieke van Hooijdonk (Allen & Overy LLP, Netherlands) and with the participation of Alexander G. Fessas (ICC, France), Gisela Knuts (Roschier Attorneys Ltd, Finland), Emilia Lundberg (Advokatfirman Lundberg & Gleiss KB, Sweden) and Joe Tirado (Garrigues UK LLP, UK) the panel focused on the interplay of arbitral tribunals and state courts.

Marieke van Hooijdonk referred to the comparison drawn by a former senior English judge who stated that the relationship between arbitration and the courts resembled a relay race. Before the case file reaches the arbitral tribunal, the baton is in the grasp of the courts. Then, the arbitral tribunal takes over the baton when it receives the case file and retains it until it renders the arbitral award. Once the arbitral award is rendered, the baton returns to the courts. In her opinion, nowadays, this relationship cannot be seen as a relay race anymore, as there is no strict line between when and where the courts and the arbitrators have the power.

Emilia Lundberg referred to the interplay between arbitral tribunals and courts as regards document production and witness examination. Nowadays court assistance is frequently requested. She stated that national courts do not want to interfere but only to assist when requested to do so.

Gisela Knuts referred to how the interplay could be further enhanced. In her view, courts should wear arbitration friendly glasses to support the work of arbitral tribunals. However, they should also be quick to deal with *mala fide* cases intended to derail arbitration proceedings. She put forward three practical measures to enhance the interplay: creating an understanding or common

ground between arbitrators and state judges, creating centers of excellence in the state courts to deal with arbitration-related issues, and to use the English language before those specific courts if the arbitration is conducted in the English language.

The panel concluded that the interplay between state courts and arbitral tribunals is not a relay race but not a partnership of equals either. There is a growing competition between arbitration, on the one hand, and court litigation on the other hand. Therefore, cooperation is needed.

Interview: What Will International Arbitration/Dispute Resolution Look Like in 10 years?

In the last conference session, Anna-Maria Tamminen (Hannes Snellman Attorneys Ltd, Helsinki) interviewed Professor Maxi Scherer (Queen Mary University of London, School of International Arbitration; Wilmer Cutler Pickering Hale and Dorr LLP, UK) on the use of artificial intelligence (AI) in arbitration and dispute resolution in general.

Maxi Scherer elaborated on technology tools enhanced with AI currently available and in use to some extent in dispute resolution (*e.g.*, AI tools to conduct legal research, AI programmes to detect outdated case law in a submission, AI interactive features for the sending of emails). She believes that AI will affect the dispute resolution industry and the arbitrator's profession fundamentally. AI will affect the legal profession by supporting and enhancing the work performed by counsel and arbitrators. For instance, through programmes estimating and monitoring the costs of the arbitration as the case goes along, programmes interpreting witness statements or translating documents instantly, AI tools helping in the drafting of submissions or of the procedural history section of the arbitral award. She further reported on studies that are dealing with legal predictive analytics—*i.e.* computer programmes developed to predict the legal outcome of cases—which poses questions as to whether AI should have a role in decision-making and if AI could replace arbitrators in the future.

Maxi Scherer was rather sceptical that AI could affect decision-making in arbitration. This is due to technical reasons related to the way AI learns, updates itself and arrives to an outcome. At the moment, AI cannot provide a reasoned decision. Further, machines are not more neutral, objective or biased free than arbitrators. AI is based on data fed by human beings, reflecting any biases in the data (data vulnerability). Accepting AI for decision-making would mean departing from a rule-based logical application and replacing it with a probabilistic analysis.

Maxi Scherer finalised the interview asserting that data is the new gold and appealed to arbitration institutions to develop systems that make use of this data for the benefit of arbitration before others do or in collaboration with them.

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Closing Remarks

Effective conflict management requires striking the right balance between the interests of different stakeholders, on the one hand, and the use of different dispute resolution mechanisms, on the other hand. It was stressed that, for arbitration to be efficient, arbitrators need to manage the arbitration effectively, while respecting that the process belongs to the parties. Further, the event brought to the fore the need for cooperation between courts and arbitral tribunals to retain arbitration's competitive edge. Finally, as for AI innovations, it was stated that they will support arbitration but not substitute decision-makers. As the context of conflict resolution changes, the strive for effectiveness continues and remains central to all methods and for all stakeholders.

The conference photos, video and materials are available under the following links:

- *photos here*
- *video here*
- *conference materials here.*

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uncover potential conflicts of interest.

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