Kluwer Arbitration Blog

ICCA Edinburgh 2022: ISDS, Regional Perspectives, New Frontiers in International Arbitration and More: Some Highlights of the Second ICCA Congress Day

Daniel Boden (CMS), Fiona Menzies (Law Society of Scotland), and Patricia Taylor (DWF LLP) · Wednesday, September 21st, 2022

The second day of the ICCA Congress took place on Tuesday, September 20. Delegates gathered in the morning for the presentation of the inaugural ICCA Guillermo Aguilar-Alvarez Memorial Prize, established in honour of former ICCA Governing Board Member Guillermo Aguilar-Alvarez. Professor Stefano Azzali said a few words on the life and career of Guillermo, fondly remembered as 'Memo', and Dr. Louie Llamzon followed with an introduction to the prize, its selection committee, and its inaugural winner. Guillermo's widow and son made the trip to Edinburgh to join in the ceremony.

State of the World in 2022 – New Developments and Reform in International Investment Arbitration

Delegates then took part in the plenary session entitled 'State of the World in 2022 – New Developments and Reform in International Investment Arbitration', moderated by Jean Kalicki. She asked each panellist to reflect on key updates since the Sydney Congress in 2018.

Meg Kinnear spoke about the amendment of ICSID Rules effective since July 2022. She noted six key areas addressed in the amended Rules: time and cost of proceedings, third party funding, increased transparency, conciliation, revision of additional facility rules and standalone mediation rules. She also flagged the developing Code of Conduct for Adjudicators in Investment Arbitration. Anna Joubin-Bret then discussed the work of UNCITRAL Working Group III. She summarized four main concerns in ISDS: consistency, legitimacy, cost and duration. Encouragingly, Ms. Joubin-Bret remarked that the two pandemic years were not lost: during that time, Working Group III has developed text with reform options and there is an agreed framework which will act as a vehicle for reform by 2026. Ms. Joubin-Bret also mentioned difficulties that may lie ahead relating to institutional reform. Whilst some elements of the current proposals are far from consensus there is still time, and the architecture of these proposals is now there.

Patience Okala talked about reform taking place multilaterally and looked at developments from a Nigerian perspective. She talked about a disconnect between Nigeria's aspirations for development and the quality of treaties to meet these aspirations. Ms. Okala mentioned the importance of alignment at an international level and amendments to Nigerian legislation in this area, which is ongoing. She emphasized that substantive reform is essential and that those conversations should

be ongoing. For his part, Tom Sikora discussed his involvement with UNCITRAL Working Group III and questioned whether concerns in ISDS can be alleviated by procedural reforms. He spoke on the crisis of legitimacy and the growth of investor claims against states. He talked about proposed reforms including a multilateral investment court where member states elect judges for a nine-year term as salaried staff. This is seen as desirable from a state perspective, but it could be seen to lack legitimacy as it tilts the balance against investors. In his view, this was a political issue.

The panel concluded with a discussion around the reach of investment protection, including with respect to climate change. “Investment law is not an island” and the field must take account of what is happening around it.

The day continued with delegates splitting into three sets of parallel sessions. The morning set of sessions addressed regional themes, taking a “round-the-world trip” into current trends and issues in each region of the world.

Regional Themes I: The Americas and Europe between Constitutionalism and Populism

In this first regional session, moderator Francisco Gonzalez de Cossio, was joined by panellists Julie Bedard, Markus Burgstaller, Sir David Edward, and Eduardo Zuleta to explore the cross-regional concept of constitutionality in the context of arbitration, and the constitutionality of arbitration itself.

Judge Edward adopted a two-pronged approach to his presentation, examining: (1) legal and constitutional considerations between jurisdiction of international arbitral tribunals and transnational courts; and (2) the attitudes of the public and government to arbitration, and what has often been labelled as populism. Judge Edward also spoke to the proposal of the European Commission to develop a multilateral investment court, and stated “I haven’t found any cost benefit analysis of the proposal or quantification of what it will involve in respect of financial/human resources”.

Mr. Burgstaller observed the extent to which arbitral tribunals find themselves bound by judgments of the CJEU, the modernisation of the ECT, and noted that, with one recent exception, international arbitral tribunals in intra-EU BIT and intra-EU ECT cases have not accepted jurisdictional objections by EU member states. Ms. Bedard delivered a ‘conflict of laws’ analysis; reviewing the complex European debate on how the future of international arbitration may be shaped by quasi-constitutional questions such as those raised in the case of *Achmea*. In conclusion, Ms. Bedard remarked that “we may not know all of the answers but have come to appreciate the level of complexity that we have reached in the interaction between EU law and international arbitration”. Finally, Mr. Zuleta addressed the constitutionalism of arbitration, the fallout of sharpening political populism in Latin America, and the challenges this may pose to international arbitration. Mr. Zuleta passionately recognised that “ICCA has a legitimate voice, and a key part to play”.

Regional Themes II: Asia, Africa and the Middle East: Dynamism and Consolidation

Though Paris and London may have historically dominated the dispute resolution world as seats of arbitration, moderator Shaneen Parikh opened this panel highlighting the rise of arbitration destinations outside of Europe. Most notably, Singapore and Hong Kong have emerged as preferred arbitral institutions, rivalling the LCIA in London and the Paris-based ICC.

This panel went further than Singapore and Hong Kong, however, and opened up the floor to four panellists who described the development of arbitration in China, India, and Africa. To a certain extent, this was a whistlestop tour of these countries and regions' approaches to arbitration. Sun Wei's enumeration of the four characteristics of Chinese arbitration showed the structure with which China aims to develop both domestic and international strands of arbitration. Darius Khambata SC made a compelling pitch for India as a seat of international arbitration, highlighting its over 140 years of common law tradition and the willingness of Indian legal scholars and lawmakers to adapt the country's arbitration laws to meet the community's needs. Ndanga Kamau focused on the instruments and key parties and dispute types that shape the current arbitral landscape in Africa.

But Ms. Kamau's presentation was more than a description of arbitration with African features. She embarked from a point of lyricism and history, recounting how the Portuguese explorer Diogo Cão voyaged up the Congo River in the 15th century, making an early trade connection between Europe and Africa. The shape of that economic connection would change with colonial regimes and the legal institutions and frameworks that would, in the post-colonial era, remain or be rejected by African countries – and here, Kamau was sure to underline that the continent consists of 57 sovereign nations and that the continent and the future of arbitration there cannot be dealt with monolithically.

In the afternoon, delegates were invited to choose again between a set of parallel sessions.

The Sociology of Arbitration

There is perhaps no field that loves a dispute as much as arbitration. That this panel pitted two academics against each other to debate the sociology of arbitration therefore feels like a *mise en abyme* of the profession. But as far as abysses go, it was an instructive one, for Malcolm Langford and Florian Grisel examined in great depth the practice of double hatting in the arbitration community. To double hat is to act as both arbitrator and counsel to parties at the same time – although obviously not for the same arbitration. Langford and Grisel do not necessarily make moral judgments on the practice of wearing two hats. Rather, the dispute at hand is about whether double hatting is waxing (Grisel's view) or – through industry self-regulation – waning (Langford's stance). Armed with abundant data, critiques on methodology, and virtuous references to a seminal work by Dezalay & Garth, each scholar made a compelling case for their argument.

Most interesting in this panel though was the third perspective, offered by Janet Walker. For her, Langford and Grisel's emphasis on quantitative measures is in line with an arbitral community that is, to a certain extent, innumerate and therefore in awe of the mastery of numbers. To impress the arbitral community, talk about the community in figures. She did not encourage a total departure from the quantitative, but to consider the qualitative aspects of the industry's sociology. She covered its history, considered its debate between transparency and confidentiality, and cited instances like the ICCA Congress itself as opportunities to study and know the community from within.

Ultimately, the dispute – perhaps a quibble – was never resolved. And given that the practice of double hatting seems to be viewed by the community as more virtue than vice – the crowding out of junior talent by more established and esteemed practitioners notwithstanding – its decline or rise is probably unimportant. Critics will continue to criticise it, academics will continue to debate it, and the community's elite will continue to give patronage to the milliner.

Young Practitioners and our Future

At this session, young practitioners from various jurisdictions came together to lead discussions on six key areas in a "speed-conferencing" format. Delegates were divided into small groups to share views on the latest developments in arbitration, before coming together to report back on their discussions. The session was moderated by Yuet Min Foo and facilitated by Julian Bordaçahar, Naomi Briercliffe, Elizabeth Chan, Valentine Chessa, Arie Eernisse, Iuliana Iancu, Jonathan Lim, Melissa Ordonez, Nesreen Osman, Naomi Tarawali, Siddharth Thacker and Nhu Hoang Tran Thang. Delegates discussed six key topics: the proliferation of young entrepreneurs; AI and digital technologies; climate change and arbitration; corruption in arbitration; geographical diversity; and transparency and confidentiality.

On the proliferation of young entrepreneurs, it was felt that there is no such thing as the "right" age to launch a business (unless launching exclusively as an arbitrator, which was agreed to be too risky without prior appointments). Regarding AI and digital technologies, the group looked at this through two lenses: AI's contribution to efficiency, and the use of AI in rendering substantive decisions, the latter being more controversial. On the topic of the environment, the group agreed that disputes related to State action to combat climate change will undoubtedly increase. It discussed whether arbitration is fit for purpose, and whether it is a "force for good or evil"?

The group discussing corruption in arbitration wondered whether there was a need for regulation of arbitration. The wide consensus was no, thus favouring party autonomy. There was also a discussion on the role of soft law and the IBA guidelines, flagging the need to refer to and update these types of guidelines more regularly. In terms of geographical diversity, the group discussed the right to a diverse pool of arbitrators, some emphasizing that this was not a right but an expectation from clients. They raised the example of the arbitration involving Jay-Z and how the AAA addressed the lack of diversity in its pool of arbitrators, taking the issue seriously when raised. Finally, the group discussed transparency and confidentiality, including how different jurisdictions viewed the presumption of confidentiality in arbitration. In striking a balance between the two, there was suggestion of a middle ground where awards could be published with redactions if this would be in the public interest. Then again, others remarked that clients agree to publishing awards in principle but are generally reluctant to publish their own.

In the later part of the afternoon, the program offered to the delegates the last set of parallel sessions, looking at two types of legal frontiers: the new technological frontier, and various new substantive frontiers.

New Frontiers I: Arbitration in the Age of (Post-Pandemic) Technology

International arbitration now operates in an age of accelerating technological advancement – particularly in the post-pandemic world. Professor Fabien Gelinas, moderator, was joined by Ji En Lee, Julie Raneda, Prof. Maxi Scherer, and Kathryn Khamsi. Prof. Gelinas observed that the stabilising objective of the law has meant that it is often resistant to change. He remarked that it is now time to move away from debating "whether" the legal community will keep pace with the tech evolution, but rather, "when and how".

Mr. Lee analysed how the pandemic has altered the face of legal tech, particularly in relation to hearings, digitisation of documents, the creation of paperless environments, and business travel. Mr. Lee noted that lawyers may now be subject to additional client-scrutiny and may be required to

further justify their chosen method of working, in respect of efficiency and cost. Finally, Mr. Lee stated that existing solutions should be integrated in the first instance, rather than reinventing the wheel. Prof. Scherer explored the use of predictive tools, and the benefits to them. She noted that there are limitations to the use of AI, particularly its inability to provide satisfactory reasons – a crucial requirement of any arbitration, so that precedent can be set. In closing, she remarked: "If we accept AI-based legal decision making, we accept that we depart from known legal theory about decision making and refer to probability and statistics. Is this something that we wish for?"

Ms. Raneda focused on decentralised justice, and the main features of blockchain in practice. Ms. Raneda drew comparisons between current and potential methods of practice, and advanced the view that use of the blockchain in arbitration would make the process less cumbersome and expensive. Finally, Ms. Raneda advised that the use of the blockchain in arbitration must be firmly grounded in party autonomy. Finally, Ms. Khamsi made a case for the use of innovative data collection / analytic models. Ms. Khamsi observed that lawyers do not question the mechanisms behind more familiar tools – we only concern ourselves with the results. As such, Ms. Khamsi advocated for increased trust in new technologies, and encouraged the audience to tap into the "splendid creativity" in which we live.

New Frontiers II: The Subject Matters of the Disputes of Tomorrow

The last panel of the day looked at global issues emerging in the modern world including climate change and environmental protection, global data storage and the cloud, access to ever scarcer water resources, energy and mining transition, and human rights initiatives. The panel was moderated by Nigel Blackaby, who said a few words on the new types of disputes resulting from climate change and new technologies, and the need to balance the rights of investors with human rights and environmental factors.

De?er Boden discussed the reality and consequences of climate change, food insecurity and water scarcity, and the need to balance investment protection with public policy. There was discussion on treaties only protecting investors and the need to renegotiate, while acknowledging the fact that this will take time and that there may be an interim solution. Peter Cameron looked at what is meant by the energy transition, noting that approximately forty percent of ICISD arbitrations were related to energy. He touched on the strong public policy commitment from many governments to shift energy economies to net zero, as well as the disruption and disputes we can expect in this sector in the future, noting that the legal issues will be familiar even if the subject-matter of the dispute is new.

Next, Rodman Bundy centred his remarks on the water disputes likely to arise in the future and the balance that will need to be struck between the right to freshwater resources and the rights of investors. He spoke about the UN Watercourses Convention and settlement of disputes. Finally, Ginta Ahrel spoke about cloud computing and issues around crypto assets, AI and others. She listed the various components of this technology, including hardware, infrastructure, platforms, and applications. Services are intertwined and complex which will lead to disputes, including around the use of data, regulatory and intellectual property issues.

ICCA 2022 in Edinburgh is drawing to a close. Day 3, which wrapped up earlier this afternoon, welcomed delegates to two panels in the morning, followed by a debate on the future of ISDS and a closing keynote. A full report of the last Congress day will come tomorrow – stay tuned!

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

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.

This entry was posted on Wednesday, September 21st, 2022 at 4:37 pm and is filed under Africa, Artificial Intelligence, Asia, Climate change, ICCA, ICCA Edinburgh 2022, Legitimacy, Reform, Technology, Working Group III, Young Arbitration
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.