Kluwer Arbitration Blog

Arbitration's Age of Enlightenment? A Look Back at ICCA Edinburgh 2022

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The theme of this year's ICCA Congress was "Arbitration's Age of Enlightenment?", a reference to the Scottish Enlightenment, an age in which the old order was challenged, and new ideas led to innovation in several fields. The ICCA Programme Committee's formulation of the Congress theme as a question rather than a statement is telling: its aim was not to arrive at an answer to the theme's question *per se*, but to foster exchanges on the progress made in the field of international arbitration, as well as to provide a critical assessment of the areas in which further development is needed. In doing so, the Programme Committee sought views from inside and outside the arbitration community.

Speakers at the Congress addressed both current challenges and progress made in international arbitration today. In this post, we look back on the salient ideas proposed at ICCA Edinburgh 2022. We comment on views shared during the Congress on the areas within our field that could be improved, and arbitration's successes to date.

A Critical Assessment of International Arbitration Today

ICCA Edinburgh 2022 provided a forum to discuss the current challenges and opportunities faced by the international arbitration community. They can be categorized as challenges *within* international arbitration and those *outside* the field that nonetheless pose a risk to international arbitration. In both cases, commentators offered some solutions, which we highlight below.

Within International Arbitration

The first set of challenges described by speakers were **procedural** in nature. When asked to enumerate their 'Top 3 List' of issues in international arbitration, all three speakers on the panel entitled "Progress Made/Progress to be Made – Exploring the Way Forward" listed costs and efficiency of proceedings as a major issue to be addressed, flagging the risk of international arbitration's value proposition being severely outweighed by the increasingly prohibitive costs of the proceedings. Diamana Diawara presented the responsibility of arbitral institutions, counsel and arbitrators in acting as "cost containers" while Lucy Greenwood suggested to reframe the issue as

one of overall “efficiency”. The latter proposition stands for the expectation that all players in an arbitration will perform their roles efficiently despite conflicting interests. Finally, James Hope stressed the importance of having open and honest conversations between counsel and clients, noting that some difficult cases will inevitably require more work and, consequently, higher costs. On the flip side, he wondered whether we, the arbitration community, could be “brave enough to write less”, as lengthy submissions are a big driver of costs.

Another challenge in international arbitration today is the increasing **complexity of disputes**. Construction disputes, for example, are often categorized as complex. International arbitrations involving states and state entities are another such example, as their needs and interests may be different from purely private parties. Complexity can also arise in disputes due to external factors, such as global pandemics and disruptions to supply chains affecting contract performance. Considering this increasing complexity, speakers discussed the growing interest in **combined dispute resolution processes**, such as mediation, dispute boards and conflict avoidance boards. Wolf von Kumberg argued that from the perspective of users, results were more important than process: if mixed modes of ADR yielded better outcomes, the transition to such dispute resolution models would ultimately be driven by the end users rather than external counsel. In the same vein, Elina Mereminskaya proposed that “modern law should adopt a reflexive stance on the sociolegal problems” with which it is confronted. Arguing in favour of drawing on expertise from different fields to solve complex disputes, she proposed that juridical decision-making “must reflexively include multiple perspectives on the case; it must operate in interconnected networks of knowledge”.

Finally, ICCA President Lucy Reed made a **cautionary point** on the increasing reliance on “non-precedential precedent” in investment treaty arbitration at the expense of substantive reasoning. Drawing parallels to artificial intelligence (AI), which has been characterized by some as the “end of enlightenment”, she encouraged us not to fall into the “international arbitration version of AI” – that is, over-reliance on a string of cases to achieve an outcome without engaging with the substance of prior awards and “relating precedent to purpose”.

The second set of challenges related to the **criticisms around legitimacy** in international arbitration as a dispute resolution system. On the investment arbitration side, several panelists addressed the work on ISDS reform at the multilateral level and the recent roll-back of the intra-EU investment regime. On the first point, Tom Sikora cautioned against failing to consider the perspective of investors on the various reform proposals, as this could affect their “buy-in” later on and ultimately, the success of these reforms. Alongside multilateral reform, Patience Okala offered some suggestions on bilateral and national solutions, based on extensive reforms recently undertaken in Nigeria, namely the renegotiation of loosely drafted treaty submissions (what she identified as the “root of the matter”).

Beyond ISDS, the historic lack of **diversity** in our field was an issue that many speakers raised as contributing to the criticisms around legitimacy in international arbitration. The issue was examined under various angles. On gender diversity, Lucy Greenwood remarked that until 2014, only approximately 10% of arbitral appointments were women. She lauded the Equal Representation in Arbitration (ERA) Pledge as the driver behind more female appointments since 2016 but noted that more work was needed to increase diversity in terms of nationality, ethnicity, sexual orientation, and age.

On regional diversity, Emilia Onyema pointed out how until recently, the international arbitration

community operated “in the full knowledge of the under representation of Africans as arbitrators and counsel in international arbitration.” Progress has been made with the 2019 African Promise – built on the successful model of ERA Pledge – but there are more steps to be taken towards the inclusion of African practitioners in the international arbitration community, amongst other under-represented groups. James Hope brought up the need to improve linguistic diversity, often overlooked in arbitral practice. This is especially important, he noted, in light of an increase in multi-lingual students graduating from specialized graduate programs in international arbitration, who will hopefully “expand the international nature of arbitration.”

Outside International Arbitration

As Elina Mereminskaya noted, the legal community, and international arbitration, are part of a broader and interdependent reality. As such, they are not immune to global and political phenomena. At the outset of the Congress, Hi-Taek Shin observed the recent wave of **unilateral, protectionist, and nationalistic instances** by some key players on the international stage and questioned whether these trends had permeated the international arbitration arena, especially with respect to the recent backlash against investment treaty arbitration. In response to this observation, he recalled the original ‘promise’ of international arbitration as a “rational solution” to the desire to “exclude external factors that can stand in the way of a fair and efficient resolution of disputes.” He cautioned against losing sight of the common goal to enhance efficiency and legitimacy of the system. Doing so could invite more criticism and external intervention, to the detriment of international arbitration’s original promise.

Achievements of International Arbitration and the Way Forward

ICCA Edinburgh 2022 did not just focus on the challenges currently faced by international arbitration. It also represented an opportunity to “take stock of *achievements* and explore *ideas to adapt* to a fast-changing environment, and shape the *future* of international arbitration” (see “Invitation from the ICCA Presidency”).

Past Achievements

One of the historical achievements of international arbitration dates back to the late 19th century, as observed at the first plenary session by J. Christopher Thomas in describing how Andrew Carnegie “became a true believer in the value of **international arbitration as an alternative to recourse to arms**” thanks to the impact of the *Alabama* claims arbitration, which he regarded as “an exemplary moment in international diplomacy”. And just as arbitration served as an instrument of peace in the Alabama case, Thomas concluded, “there have been many occasions when States could have resorted to force but decided instead to pursue a more enlightened path by instead submitting their disputes to international arbitration”.

Present Virtues

Moving to more recent times, in the panel entitled "Arbitration's Printing Press: Drawing the Line Between Confidentiality and Transparency", swimming against the 'pro-transparency tide', Anke Sessler and Paula Hodges advocated for **confidentiality** as a positive feature to be retained in international commercial arbitration. Sessler stressed elements such as the parties' legitimate right to confidential proceedings – confidentiality being a strong advantage of arbitration over litigation – as well as the fact that the parties' desire for confidentiality should outweigh the public's right to information. She also observed that confidentiality does not substantially hinder the development of the law. A similar point was also raised at the first plenary session by Lucy Reed, who highlighted how publishing international commercial arbitration awards would not benefit the development of substantive commercial law, since most commercial arbitration disputes involve unique facts and one-off contractual relationships. Hodges then added that, starting from the position that arbitration results from a contractual agreement between private parties, "it does not seem reasonable to put the onus on those same parties to use their private process to facilitate [information sharing for common good] at the expense of preserving confidentiality".

International arbitration, however, is not only popular among private commercial users; its use has also increased with respect to **transactions involving states** and state entities, as Mariam Gotsiridze pointed out in the panel devoted to "Different Perspectives". Gotsiridze also emphasized the "**unparalleled support" by states to arbitration** in recent years, both as a tool to attract cross-border trade and in terms of promoting regional centres and their jurisdictions as arbitration venues.

In the immediate present, while exploring ideas to adapt international arbitration to a fast-changing environment such as the "**post-pandemic world**", in the panel entitled "New Frontiers I: Arbitration in the Age of [Post-pandemic] Technology", Ji En Lee described how, by removing "numerous psychological barriers" to the adoption of technology, the pandemic positively impacted some aspects of international arbitration proceedings. First, it led to the use of (entirely or partially) virtual hearings, which, among other things, can make arbitration less expensive, including by reducing business travel. Second, it accelerated the transition to a paperless world, with hardcopy documents creating significant logistical challenges in cross-border transactions or complex international arbitrations. Third, it introduced a "work from home" culture, which, together with the previous elements, resulted in the rise of independent practitioners and boutique firms.

Future Improvements

In the same panel, with a look at the *future* of arbitration, Kathryn Khamsi investigated the role that **AI-based technology** – and specifically the "dynamic situation" methodology – can play in establishing the merits of a claim in arbitral proceedings. Khamsi explained that this technology, fed with the necessary data, is able to reliably reproduce what happened in a certain situation as well as to determine what will occur in alternative scenarios. In international arbitration, she noted, it could answer "what-if" questions, which arise especially in relation to remedies to breach, with consequences that will change the "face" of arbitration, bringing an evolution in the types of arguments advanced.

As to the future of arbitrators, with the Enlightenment involving a cross-fertilisation across different disciplines, Bruno Guandalini proposed **training arbitrators** in bounded rationality and

debiasing techniques to ensure “better and more precise” decision-making. Building on this, Janey Milligan suggested that to have an arbitration community that is “agile and willing to review its processes and adapt with the changing landscape of the disputes market” arbitration could get **inspiration from the UK statutory adjudication in construction disputes.** This, she contented, is very efficient due to the technical focus of proceedings and industry expertise of adjudicators, as well as the expedited process and consequent reduction in fees when compared to other forms of dispute resolution.

Conclusion

In true Enlightenment fashion, speakers and delegates came together at ICCA Edinburgh 2022 to exchange ideas about international arbitration’s past, present and future. In the words of the Congress Programme Committee, “if well harnessed, this exchange of new ideas can lead to an acceleration of progress that will allow the process to meet the new challenges that come with [arbitration’s] greater role [in international dispute resolution]”. We hope the ideas presented at ICCA Edinburgh 2022 will inspire the community to address today’s most pressing issues. This will be the true measure to determine whether we’ve reached “Arbitration’s Age of Enlightenment”.

This post is not intended to serve as a comprehensive report of all Congress panels. For a full report of each Congress day, see Kluwer Arbitration’s special coverage here and the full 2022 Congress programme here.

Full recordings of the Congress panels will be shortly available on the ICCA website. All Congress papers will also be published in an upcoming volume of the ICCA Congress Series, available on KluwerArbitration.

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