

Kluwer Arbitration Blog

Highlights from the 2023 ICC Canada Conference: Navigating the Road Ahead

Timothy Hughes (Timothy Hughes Arbitration) and Stephanie Clark, Andrea Korajlija (Osler, Hoskin & Harcourt LLP) · Saturday, November 11th, 2023

Over two hundred registrants convened on the historic trading floor of the Toronto Stock Exchange on October 19 for the [ICC Canada](#) Conference to explore forces and technologies driving change in the practice of international dispute resolution. The conference kicked-off with [Myriam Seers'](#) (ICC Canada Chair, Agora) introduction to a video address from [Claudia Salomon](#) (President of the ICC Court of Arbitration) celebrating the ICC Court's centenary anniversary. Conference co-chair [Sara Nadeau-Seguín](#) (Teynier-Pic) set the tone for the day, noting the appropriateness of the stock exchange as a venue for the trading of ideas.

Keynote: Reimagining a Legal World Transformed by Artificial Intelligence

Introduced by conference co-chair [Alexandra Mitretodis](#) (Fasken Martineau Dumoulin), John Weigelt (Microsoft Canada) delivered a stirring call to responsibly embrace, explore, and use emerging AI technologies. Noting that Bill Gates has called Generative AI only the second truly revolutionary technology in his lifetime, Mr. Weigelt outlined six principles for the responsible use of AI technologies:



These principles infuse the three pillars that underpin Microsoft’s approach to developing and implementing AI, including established technologies like search and spellcheck, as well as emerging generative AI tools:

1. internal structures and tools,
2. the needs of its partners and customers, and
3. education and assistance of civil society.

Mr. Weigelt explained that the democratization of AI tools through consumer experiences like ChatGPT is rapidly making it relevant across the full spectrum of organizational functions. Mr. Weigelt asserted that all work uses, or will use, AI augmentation. Today, that includes wayfinding apps, search, and spellcheck. And far more capable “co-pilot” technologies are already in development or being deployed. Next generation tools will include Microsoft Office integrations enabling, for example, natural language instructions to create presentations, or to organize and interrogate data in Excel. AI augmentation use cases in the legal field include visual (text recognition and summarization, reasoning tools to organize unstructured data) and audible (automated notetaking, real-time machine translation). But there is a crisis of trust in AI tools, and Canada lags the rest of the world in AI usage. Mr. Weigelt acknowledged the limitations of AI; it cannot replace critical thinking or inquisitiveness. Nevertheless, Mr. Weigelt encouraged the dispute resolution community to explore, try, and understand GenAI tools – and their capabilities, limitations, and possibilities – with caution and curiosity.

Tour d’Horizon

Next, [Dina Prokic](#) (Woods LLP), as moderator of the following session, guided a tour of developments from across the world. [Tafadzwa Pasipanodya](#) (Foley Hoag) described legislative reform across Africa, Asia, and the Middle East, including a [refreshed arbitration act in Nigeria](#) and [law reform in Sierra Leone](#) following its accession to the New York Convention. Nigeria’s new act innovates an arbitral review tribunal as a distinct forum for award review on tight timelines, permits third party funding, and empowers tribunals to directly decide arbitrator challenges. Moving to Asia, she described reforms in India to make it a more attractive seat, and in Japan to accelerate award enforcement. In the Middle East, institutions in [Dubai](#), [Bahrain](#), Saudi Arabia, and Oman have revised their rules, with the Saudi Centre for Commercial Arbitration [implementing a Court](#) to provide administrative support and award scrutiny.

[Gabriela Alvarez-Avila](#) (DLA Piper) noted developments in Latin America, starting with [legislative reform in Mexico](#) to liberalize the scope of matters that can be arbitrated. The legislature in Brazil is [considering Bill 3293 to impose strict arbitrator disclosure requirements](#). A court in Sao Paulo recently set aside an award due to the non-disclosure of past relationships with a party. [This decision](#) departs from international practice on the parties’ duty to investigate, and in finding that non-disclosure, alone, was sufficient to justify set-aside. Elsewhere, she noted a surge of nine investor-state cases filed against Honduras in 2023, as well as 10 “legacy” NAFTA cases filed against Mexico, bringing the total number of cases pending against Mexico to 19.

Providing an update on developments in Europe, [Isabelle Michou](#) (Quinn Emmanuel) noted that many eyes are on the [UK Law Commission’s consultations](#) on reform of the Arbitration Act 1996. Another hot topic is the impact of *Achmea*, *Komstroy*, and the treaty terminating intra-EU BITs.

Ms. Michou noted that for pending cases, there is an emerging practice whereby national courts will disregard *Achmea* at the pre-award state – e.g., by refusing anti-arbitration injunctions – but give effect to it at the post-award stage.

[Ian A. Laird](#) (Crowell) provided the view from North America, including the expiration of the window to file “legacy” claims under NAFTA on June 30, 2023. The implementation of the USMCA (also known as CUSMA or T-MEC) significantly changes the landscape of investor-state dispute resolution in North America, eliminating investor-state arbitration between the US and Canada, and narrowing it with respect to investors in Mexico. In addition, the US Congress is considering reforms to limit pre-dispute agreements to arbitrate certain matters, including consumer and antitrust claims.

Roundtable Discussions

Delegates next split into five breakout groups, which then delivered reports to the plenary session.

The first group, which focused on E-Discovery and Machine Learning, was facilitated by [Peter Sanford](#) (Deloitte) and [Lauren Tomasich](#) (Osler Hoskin & Harcourt). Noting risks and concerns about the implementation of AI tools, the facilitators guided the participants through an interactive exercise leading to a deeper understanding of how AI “thinks”. The key takeaways included how AI-powered machine learning can assist with e-discovery in arbitrations.

The second group discussed liability and valuation issues in ESG disputes, with the guidance of [Gigi Cantalupo](#) (Secretariat), [Eddie Tobis](#) (Secretariat), and [T. Ryan Lax](#) (Torys). Key takeaways included the need to collaborate closely with instructed experts to consider the direct and indirect effects of ESG issues on valuation questions, as these issues are becoming increasingly more important. Those effects could include adjustments to discount rates, risks around cash flow and profitability projections, and the need to unpack ESG risks from others. The group concluded that parties may wish to present multiple valuations based on different assumptions.

The third group, which was led by [Laura Connor Smith](#), [Mark Funk](#), and [Nader Akkaoui](#), all of HKA, looked at damages in mining and infrastructure arbitration. The moderators noted that in ICSID mining cases, successful claimants typically are awarded around 1/3 of the claimed amount. With respect to infrastructure disputes, they reported that scope or design changes account for most delay damages claims.

The fourth group, which was guided by [Sophie Nappert](#) (3VB) and [Yassine Alaoui](#) (Teynier-Pic), considered changing roles for arbitrators and counsel in blockchain, crypto and cyber disputes. The discussion developed important but unanswered questions, including: (1) the adequacy and effectiveness of courts and tribunals to the challenge of locating and preserving crypto assets, (2) the incompatibility of the values that underpin legal institutions (centralization of authority) and crypto or Web3 proponents (decentralized, distributed authority and community trust), and (3) the difficulty of translating asset values from one system to the other.

Finally, the fifth group convened around diversity, inclusion, and the elimination of bias, moderated by Justice Chidinma B. Thompson (of the Court of King’s Bench of Alberta, and as of the time of the conference, a Partner of Borden Ladner Gervais) and [Joshua Karton](#) (Queen’s University). This group discussed how the arbitration bar lags the legal profession generally in the

process of diversification. Stepping back, the group considered what defines “success” in this context, noting that diversity is a process, not a goal. They reported that what is needed next is not a revolution of statistics, but of hearts and minds.

Users Speak

Three corporate counsel provided tips and advice for counsel in a discussion moderated by [Joanne Luu](#) (Burnet Duckworth & Palmer). The panelists included F. Teresa Garcia-Reyes (Baker Hughes), [Jeremy Chan](#) (Westport Fuel Systems), and Christopher Yang (Algonquin Power & Utilities Corp.). The discussion developed several themes that define “good counsel” from a client’s perspective, including that great counsel:

1. understand a client’s business, culture, and people;
2. take an ego-less approach to what defines success in an engagement; and
3. adapt to varying levels of internal dispute management knowledge across different organizations.

Accessibility of counsel was a key consideration, as well as project management to ensure that key information – particularly around progress toward milestones and financial metrics – is available at counsel’s fingertips. On arbitrator selection, the panel placed significant trust in the recommendations of counsel, while also emphasizing the desire for arbitrators that have the availability and resources to give the dispute due attention. The panel also emphasized that external counsel should be alive to the significance of the relationships between the client and its stakeholders, customers, and suppliers when considering desired outcomes of a dispute.

Debates

[Eric Morgan](#) (Kushneryk Morgan LLP) next moderated two debates between [Rahat Godil](#) (Fasken Martineau Dumoulin) and [Vasuda Sinha](#) (Freshfields Bruckhaus Deringer). The first centred on arbitration as a solution to access to justice. The debaters sparred over the nature of justice, the causes of concern, and the appropriateness of arbitration to the challenges of court congestion. In the second, the debaters addressed whether AI technologies should replace the jobs of counsel and arbitrators. While the results were inconclusive across these thorny issues, the audience indicated broad support for being replaced by AI, so long as they still get paid.

ESG Game Show

The last formal program of the day was an energizing and creative game show in the style of Jeopardy! [Jessica Crow](#) (Arbitra International / University of Cambridge) led contestants [Martin J. Valasek](#) (Bennett Jones), [Jocelyn Turnbull Wallace](#) (McCarthy Tetrault), and [Mark Luz](#) (Trade Law Bureau, Global Affairs Canada). The topics included “Scary Science”, “New Class of Action”, “Name that Instrument”, and “Duly Diligent”. While no score was kept, the lively presentation breezed through notable developments in climate law and policy, including emerging opportunities and risks for businesses and governments. Perhaps most notable is the request for an [advisory opinion from the International Court of Justice](#) on the obligations of States in respect of

climate change, registered on March 29, 2023.

Conclusion

Craig Chiasson (ICC Canada Vice Chair, Borden Ladner Gervais) brought the conference to a close, capping a day of invigorating exchange. The ICC Canada Conference bookended a week of international arbitration programming in Toronto, including the events of **CanArb Week 2023**. Mr. Chiasson announced that the committee looks forward to welcoming delegates for next year's conference in Vancouver, British Columbia, on October 10, 2024.

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