

Kluwer Arbitration Blog

ICCA Hong Kong 2024: Unpacking the ‘Human’ in Arbitration

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This is the second post in ICCA’s series of reports on the [ICCA 2024 Congress](#) (“Congress”), which took place in Hong Kong. This post reports on the events of Monday, 6 May 2024, the first full day of the Congress. As informed by ICCA President, [Dr Stanimir Alexandrov](#), in the opening post to this series, this year’s Congress theme is on “International Arbitration: A Human Endeavour”, with panels revolving around the issue of human experience in international arbitration.

The Opening

The Congress started with remarks by Congress and ICCA representatives, including Host Committee Co-Chair [Justin D’Agostino MH](#), ICCA President [Dr Stanimir Alexandrov](#), and ICCA Executive Director [Lise Bosman](#), the last of whom reflected on recent ICCA initiatives and announced the 2024 Guillermo Aguilar-Alvarez Memorial Prize winner, [Bálint Kovács](#). Young ICCA Co-Chairs [Eva Chan](#), [Shirin Gurdova](#), and [Rohit Baht](#) introduced Young ICCA and its various initiatives to nurture future international arbitration practitioners. ICCA Programme Committee Co-Chairs [Chiann Bao](#) and [Audley Sheppard KC](#) introduced the theme of the Congress.

This Congress’ keynote was given by [Prof Bryant G Garth](#), who—building on his previous work “Dealing in Virtue”—reflected on the human evolution of international arbitration, its epistemic community and their effect on the legitimacy of the field. In Prof Garth’s view, the growth and dissemination of international arbitration has pushed it to expand beyond the vision expressed by “grand old men” that international arbitration is meant to apply solely *lex mercatoria* to a more “technocratic” approach that focuses on the application of local laws.

Keynote commentator [Prof Chin Leng Lim](#) expanded on Prof Garth’s point, highlighting that the movement towards a more technocratic approach is inevitable, as African and Asian lawyers have grown in prominence among new generations of arbitration lawyers. On the interplay between political power and arbitration, Prof Lim observed a revival of that “grand old men” vision through the growth in criticism of adverse arbitral awards, which he considered a key cause of disillusionment in the arbitration community.

The Arbitrator and the Development of Trust Among Participants

The first plenary session of the Congress revolved around the broad theme of “The Arbitrator”. In a session moderated by Chiann Bao, speakers [Neil Kaplan CBE KC SBS](#), [V K Rajah SC](#), and Hon Justice Mimmie Chan, as well as commentators [Chris Campbell](#), [Aisha Abdallah](#) and [Elliott Geisinger](#), explored the role of adjudicators in international arbitration. More specifically, the panel focused on the differences between the expectations and activities of judges as against arbitrators, and the development of trust among participants in international arbitration.

Kaplan emphasized the importance of a tribunal showing trustworthiness, fairness and cultural sensitivity from the first meeting with the parties, as building trust is a key element in international arbitration. Rajah also underscored the importance of fairness as the “hallmark of everything” arbitrators do, especially when one party does not participate in good faith.

Justice Mimmie Chan drew on her own experience in the judiciary by highlighting that, in the judicial context, fairness is also the hallmark to steer court proceedings. Kaplan agreed, noting that his own experience as a judge had prepared him to anticipate and overcome potential problems in the context of arbitration. Nevertheless, there are relevant differences between adjudicative and arbitral functions, such as the lack of recourse to appeal and the possibility of presenting dissenting opinions.

Commentators [Chris Campbell](#) and [Aisha Abdallah](#) contributed to the discussion by drawing attention to other elements in developing trust and legitimacy. These include, in particular, delivering cost-effective, timely, and reliable decisions for clients, regardless of the dispute resolution method, as well as allowing users to play an active role in arbitral proceedings and adapting to their needs.

Biases in Arbitral Decision-Making

The first afternoon session saw delegates split into two parallel panels. In the first of these, moderator [Patricia Saiz Gonzalez](#) was joined by panelists [Prof Rachel Cahill-O’Callaghan](#), [Prof Stavros Brekoulakis](#), [Hon Judge Dominique Hascher](#), [Henry Forbes Smith KC](#), and [Sheila Ahuja](#). Speakers discussed that, while arbitrators inherently bring their predispositions into the deliberation room, they must wield their expertise to prevent these from turning into predeterminations.

Prof O’Callaghan kicked off the discussion by drawing from cognitive sciences to demonstrate how biases and predispositions are inevitable, and one set of decisions frames another. Information is filtered through values as humans look at materials more clearly if these align with their values. Prof O’Callaghan argued that, rather than controlling bias, decision-makers ought to be open to challenges and ideas to prevent their predispositions from turning into predeterminations. Prof Brekoulakis added to Prof O’Callaghan’s views by challenging the doctrine of absolute impartiality of arbitrators. He argued that party-appointed arbitrators should be expected to bring forth their own assumptions to decision-making and that the idea of absolute impartiality “flies in the face of neuroscience and psychology”.

Based on his personal experience, Judge Hascher emphasized the importance of arbitrators as cultural intermediaries, explaining that diverse backgrounds can mitigate biases during

deliberations. Ideally, arbitrators should be able to balance a predisposition toward parties with a neutral approach. Forbes Smith elaborated on this by advocating for rigorous reasoning as a tool to uphold impartiality, highlighting how it can reveal and counteract biases and errors, thereby ensuring transparency.

Ahuja argued that cognitive biases and cultural diversity should be taken into account when selecting arbitrators. Such diversity not only enhances decision-making, but also fosters a deeper understanding of cultural nuances, thereby reducing the risk of confirmation bias.

Amateur Sociologists in Arbitration

The second of the first parallel sessions in the afternoon was moderated by [Prof Julian DM Lew KC](#), who, accompanied by speakers [Prof Joshua Karton](#), [Prof Kun Fan](#), [Nudrat B Majeed](#), [Ginta Ahrel](#), and [Jonathan Wood](#), explored the complex interplay between international arbitration and various socio-educational factors across different cultures and legal systems.

Prof Karton opened the discussion by defining international arbitration as a social practice that often involves making sociological judgments, and cautioned against the use of stereotypes without rigorous analysis. Prof Fan contrasted arbitration practices in Europe with those in China, likening the former to a chess game centered on legal rights and rationality, and the latter to a tea ceremony emphasizing harmony and moral traditions.

Majeed discussed the profound impact of British colonization on Pakistan's legal culture, which disrupted traditional dispute resolution systems and introduced a still-struggling foreign legal framework. In this context, international arbitration could play a role in rescuing Pakistan's traditional restorative justice systems while also building a bridge with the Western framework under which Pakistan's current laws exist.

Ahrel explored the role of socio-economic factors and legal education in the development of a successful arbitration. She argued that a strong national arbitration system needs to be supported by legal structures and societal trust. Also reflecting on the importance of legal education, Wood discussed ways to ensure the "competency" of arbitrators. He reflected on how international training and certification programs, such as the Chartered Institute of Arbitrators', have improved the expertise of arbitrators and developed socio-legal communities of their own. He argued that this process has not only created a certain level of expertise, but also clarified expectations among those involved in arbitration.

Professional Backgrounds Shaping the Field

The second afternoon session again saw delegates split into two parallel panels. The first of these panels was led by [Evgeniya Goriatcheva](#), who guided speakers [Prof Mohamed S Abdel Wahab](#), [Prof Giorgio F Colombo](#), [Prof Won Kidane](#), [Fei Lu](#), and [Ruth Teitelbaum](#) in a discussion about the influence of personal and professional backgrounds on international arbitration.

Prof Colombo opened by addressing the tension between the push for procedural harmonization and the countervailing force of decolonization within arbitration. He criticized the field's often

rigid entry requirements, which favor a predominant style.

Prof Kidane and Teitelbaum followed by looking at specific professional practices that dominate the field. Prof Kidane focused on how cultural discrepancies can profoundly affect arbitration outcomes, referencing the [P&ID case award against Nigeria](#) as a poignant example of such an impact. Teitelbaum investigated the role of the language used in arbitration, more specifically the dominance of English, suggesting that reliance on it might inhibit the nuanced understanding necessary for effective dispute resolution. She discussed how vital concepts, when translated across cultural and linguistic divides, often lead to significant misunderstandings.

Lu offered a systemic perspective. Approaching the theme from the perspective of Chinese arbitration, Lu highlighted the one-way adaptation of Western norms by Eastern practices and the complexities introduced by linguistic and stylistic differences.

Prof Abdel Wahab sought potential solutions for these cultural impasses. He explored the nuanced role of culture in arbitration, differentiating it from individual behaviors and emphasizing the value of openness and cultural integration in shaping effective arbitrators. His suggestions were seconded by Prof Colombo, who raised the possibility of using comparative law approaches as a means to foster cultural neutrality.

Judging the New York Convention

In the second panel of the second set of parallel sessions, [Prof Andrés Jana](#) invited judges from different jurisdictions to debate the role of judicial supervision and cooperation in advancing arbitration practices. The Hon Judge Fatima Faisal Hubail, the [Hon Justice Judith Prakash](#), the [Hon Judge Xi Xiangyang](#), along with experts [Lindsay Gastrell](#), [Barton Legum](#), and [Guled Yusuf](#), emphasized the delicate balance courts must strike between support and non-interference, and delved into the complexities of interpreting and applying the New York Convention (“Convention”).

The judges collectively noted that while judicial approaches to common legal issues vary globally, the implementation of the Convention has been notably consistent. They emphasized the judiciary’s commitment to the Convention’s pro-enforcement ethos and limited scope of review while acknowledging the challenges in achieving uniform interpretation, such as judicial biases and inherent limitations within the Convention itself.

Discussants underscored the human aspects of judicial processes in upholding the Convention, lauding the unified interpretation as a significant achievement. In practice, the dynamic nature of public policy across different jurisdictions imposes on domestic courts a key role in international arbitration, which requires balancing enforcement and national autonomy.

Launch of the Second Edition of ICCA’s Guide to the Interpretation of the New York Convention and Tribute to Albert Jan van den Berg

The panel on judging the Convention was followed by the launch of the second edition of “ICCA’s Guide to the Interpretation of the 1958 New York Convention” (“Guide”). The event featured

Erica Stein welcoming participants to a celebration of Prof Albert Jan van den Berg's impact on arbitration. For over 40 years, Prof van den Berg has continuously dedicated himself to the field, fostering a deeper understanding of arbitration among practitioners and students.

Originally launched as part of Prof van den Berg's vision to improve the application and interpretation of the New York Convention, the second edition of the Guide has now been updated to incorporate recent practices in the field.

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This entry was posted on Thursday, May 9th, 2024 at 8:57 am and is filed under [Arbitrator's decision-](#)

making, Arbitrators, Bias, Culture, ICCA, ICCA Hong Kong 2024, New York Convention, sociology of international arbitration

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