Kluwer Arbitration Blog

Embracing the Human in Arbitration: A Look Back at ICCA Hong Kong 2024

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One month after the conclusion of the 26th ICCA Congress, we look back and reflect on this remarkable event in the narrative around international arbitration. This ICCA Congress had as its theme “International Arbitration: A Human Endeavour,” which highlighted arbitration as a human activity and the importance of arbitration in human society.

The opening keynote by Bryan Garth set the tone for the Congress. Referring to his seminal book (*Dealing in Virtue*, 1994), Garth discussed the role and importance of people in developing arbitration. He noted that arbitration was historically dictated by a select group of “Grand Old Men” whose personal reputations granted them power over the practice and development of arbitration. Opposing these “Grand Old Men” were the so-called “Technocrats,” a new generation of technical experts whose credentials were grounded in their activities in the field. This generational shift, argued Garth, ultimately expanded the horizons of the field towards its previously selective borders.

The evolution of ICCA Congresses over the years illustrates the point made by Garth. The first ICCA Congress with recorded participants was held in Rotterdam in 1966, painting a picture of exclusivity and limited access. Membership of a small ICCA Council was by invitation only. The 1966 Congress had 131 participants, predominantly from Western Europe, with only three attendees from outside this region—one from Yugoslavia, one from the USA, and one from Romania. The Congress was then organized in the format of commission meetings that debated behind closed doors.

Fast forward to 2024, and the contrast is striking. The 26th ICCA Congress was the largest ever, with over 1,400 registrants from more than 80 countries. This diverse group included members of ICCA’s current membership of over 1,000 individuals and many others from the broader arbitration community. There was also a notable shift towards inclusivity, with speakers reflecting the commitments in the IBA Arbitration Committee-ICCA Conference Diversity Checklist, discussions conducted openly, and the upcoming publication of discussions in the ICCA Congress Series, to be distributed to participants in 2025, ensuring accessibility and ongoing dialogue.

Over the course of three days, the diverse group of participants engaged in lively discussions about the intersection of humanity and arbitration.

1. **Towards a Human-Centred Arbitration**

As emphasized by ICCA President Stanimir Alexandrov in his opening remarks, one of the core questions explored by this ICCA Congress was how human elements—convictions, biases, education, culture, language, and geopolitical background—affect international arbitration. This Congress programme challenged the traditional belief that international arbitration, or other forms of dispute resolution, are or should be purely rational processes. Instead, there was a push towards accepting and embracing the subjectivity inherent in human nature and processes as a vital part of arbitration.

In an early panel, Stavros Brekoulakis and Anna Howard drew from their empirical research among arbitrators to debate conventional notions of rationality and impartiality in arbitration. They argued that rather than striving for an unrealistic standard of universal impartiality, we should focus on what can be reasonably expected from arbitrators in specific contexts.

Brekoulakis's and Howard's relativist perspective was shared by other speakers who challenged the traditional view of the arbitrator's role, questioning whether their primary focus should be on delivering justice or resolving disputes efficiently. Kun Fan discussed how ideas of justice and efficiency may vary with context. She showed how expectations surrounding arbitrators can vary depending on the cultural, social, geographical, and political contexts in which disputes occur.

David Rivkin discussed the arbitrators' role in shaping arbitral procedures to suit human needs. He advocated for arbitrators to use arbitration's inherent flexibility, rather than sticking to templates. In his view, arbitrators should lean into their humanity and evaluate the needs of those involved in the process—parties, counsel, experts, and arbitrators themselves—to tailor procedures to suit those needs.

For instance, tailoring procedures may involve using a language other than English in proceedings. Samaa Haridi questioned the idea that the use of English levels the playing field in arbitration, followed by May Tai who commented that there is an issue of fairness when parties are expected to arbitrate in their non-native language, which may justify the use of languages other than English in proceedings. In a similar vein, Kevin Kim noted that it may sometimes be impossible to provide an accurate and complete translation of legal concepts during proceedings, and argued in favor of having the "courage" to explain legal principles that might not be familiar to the arbitrator rather than settling for the closest equivalent principle.

A tailor-made procedure to better suit human needs also presupposes access to justice, with costs being one of the main areas of concern. Crina Baltag and Rodrigo Garcia da Fonseca noted that there is a tension between the right of an impecunious party to access justice through arbitration (possibly before national courts, where legal aid is available) and the right of the other party to resolve the dispute through arbitration, as contractually agreed. However, arbitration participants can play their part in reducing costs, making arbitration more accessible.

The adaptability of dispute resolution procedures to human needs also implies openness to new techniques. Catherine Amirfar drew attention to the use of innovative mechanisms, such as conciliation commissions, to tackle climate issues under public international law. Martin Doe elaborated on how such innovative mechanisms can address technical and procedural challenges that cannot be resolved through conventional procedures.

2. **Navigating the Human Elements in Arbitration**

The ICCA Hong Kong 2024 conference also explored how to navigate the human elements that influence arbitration. Mark Friedman explained that humans are influenced in their decision-making by the need for "cognitive comfort" (i.e., the need to experience pleasure and avoid pain), as well as by emotional, physiological, and cognitive limitations. Emi Rowse (Igusa) noted that international arbitration can create an adversarial environment that negatively impacts participants' psychological well-being. She explained that, in addition to external psychological adversities – including stress and anxiety during proceedings; and cognitive biases and emotions in decision-making – lawyers may also face internal adversities such as perfectionism and imposter syndrome. She cautioned that these factors should be considered when evaluating how to effectively conduct and manage arbitrations.

Beyond human psychology and wellbeing, human subjectivities also extend to, for example, culture. In this respect, Won Kidane argued that cultural miscommunication has a more profound impact on our interactions than race, religion, and politics. And that arbitral cases may go "profusely wrong when there is a cultural mismatch between the tribunal and the case that it is supposed to decide."

So how can lawyers navigate these human characteristics to operate effectively? Joshua Karton described this navigation process as a form of "amateur sociology." Lawyers engage in an almost intuitive assessment of arbitrators—their backgrounds, cultural influences, and personal biases—to try to anticipate expectations and respond accordingly. This requires more than just knowing the law to understand how human factors might influence outcomes. Lawyers therefore become adept at reading between the lines, anticipating behaviours, and strategically navigating the complexities surrounding each case.

A solution that was consistently raised as key to making arbitration more welcoming to human subjectivities was to make it more transparent and predictable. Advocating for transparency also as a tool to improve trust among those involved in arbitral proceedings, Chris Campbell introduced the idea of "Arbitral Foresight" as a way of tackling insecurities caused by uncertainty regarding arbitrators' personal opinions in cases. The proposed procedure would consist of arbitral tribunals providing preliminary, anonymous perspectives on disputed issues with party consent. This foresight aims to help parties make informed decisions at the earliest possible stage, enhancing the efficiency and effectiveness of the arbitration process.

Jonathan Wood highlighted the use of professional qualification standards recognized by the international community, as benchmarks. These may include qualifications and training for arbitrators such as the ones provided by CIArb to ensure a common language and understanding between arbitrators and parties.

International standards were also invoked regarding civility and behaviour in proceedings. Abby Cohen Smutny referred to the ICCA Guidelines on Standards of Practice in International Arbitration as establishing principles of courtesy, civility, decorum, and respect that all participants in international arbitrations should be expected to observe. Respect, alongside greater dialogue and empathy, was also raised by Gourab Banerji as key to navigate the cultural divides inherent to the diverse parties involved in international arbitrations.

3. **Enhancing Human Capabilities**

Speakers discussed the balance between the need for efficiency and speed in proceedings and the

limitations of the human mind and cognition. Amanda Lee emphasized the notion of practitioners being the main resources in international arbitration and how demands for increasing efficiency and timeliness press beyond the limits of such a resource.

Technology could play a huge part in tackling these challenges. For example, Winnie Tam provided an example of use of artificial intelligence drawn from her practice as an independent arbitrator. By using technology to organize information, automate routine and repetitive tasks, and creating templates, arbitrators are free to focus their (very) human skills and judgment on the more complex aspects of cases. Along the same lines, Christopher Bogart also highlighted the use of predictive analytics to anticipate a case outcome from past case history and accordingly devise a strategy most efficiently.

In his closing keynote, Richard Susskind echoed other speakers regarding the potential impact of technology on international arbitration. Drawing from his 30 years of experience with artificial intelligence, Susskind noted that today's rapid technological advancements could drive genuine innovation, fostering new environments for dispute resolution. While we may not entirely understand these technological developments now, they hold the promise of transforming legal work beyond conventional practices.

The videos from the ICCA Congress 2024 Hong Kong will be soon available in the ICCA website. Conference papers will be published in the next Volume of the ICCA Congress Series, to be provided free of charge to Congress delegates and available on the Kluwer Arbitration website.

This concludes *Kluwer Arbitration Blog*'s coverage of ICCA Hong Kong 2024. See the remainder of our coverage here.

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