# Kluwer Arbitration Blog

## ‘Arbitration for the Next Generation’ – Challenges and Opportunities Discussed at the Dutch Arbitration Day 2024

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On 7 June 2024, the Dutch Arbitration Association (“DAA”) held its annual conference (the Dutch Arbitration Day “DAD”). Themed “Arbitration for the Next Generation”, this year’s edition highlighted the challenges and opportunities in future arbitral disputes faced by the next generation of arbitrators and practitioners.

### Tomorrow Must be a Better Day

In his keynote speech, Hamid Gharavi (Derains & Gharavi) praised the achievements of the previous generation of arbitration practitioners, including but not limited to the elaboration and ratifications of the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Award (“New York Convention”) and the Convention on the Settlement of Investment Disputes between States and National of Other States (“ICSID Convention”).

Gharavi however noted that, in comparison, the current generation had not yet contributed much to the advancement of international arbitration and had resorted on certain issues to damaging conduct, such as arbitrator misconduct and the general slippage of the arbitration process. Gharavi gave examples of arbitrators insufficiently prepared, disregarding disclosure and impartiality obligations, and rendering awards with excessive delays. He also mentioned counsel’s practice of submitting briefs accompanied by an unnecessary large number of expert and witness statements. Gharavi urged the current generation to unlearn these practices that are wrongly considered the proper norm, encouraging them to remedy the areas of dysfunction, so that tomorrow be a better day.

### Arbitration as a Force for Good

The first panel consisting of Irina Buga (De Brauw Blackstone Westbroek), Merryl Lawry-White (Debevoise & Plimpton), Marc Krestin (Fieldfisher), Guillaume Croisant (Linklaters), and Jorian Hamster (DLA Piper) discussed how arbitration must adapt to meet the demands of a rapidly evolving legal landscape, now that states and businesses come under greater scrutiny for their environmental, social and governance (“ESG”) practices (or the lack thereof). The ‘rise in legislation’, including the EU Corporate Sustainability Reporting Directive and the EU Corporate

Sustainability Due Diligence Directive (see here for previous coverage), impose new duties and potential liabilities on businesses. Landmark climate change disputes, such as the European Court of Human Right's ruling in *KlimaSeniorinnen v Switzerland* (see here for previous coverage) – highlight the dynamic nature of ESG litigation and its expansion into the arbitration sphere, such as investment arbitrations concerning environmental issues. Besides climate change disputes, arbitral tribunals may increasingly face issues of greenwashing, fraud, value chain liability, and contractual disputes.

The panel also discussed the practical implications of ESG provisions in contracts. Lawry-White highlighted the International Bar Association's ("IBA") report on the use of ESG contractual obligations and related disputes, and the prevalence of contractual obligations related to human rights, labour, and environmental laws. Where contracts contain arbitration agreements, parties (*e.g.*, suppliers and demanders) may litigate their disputes over non-compliance with ESG-provisions before an arbitral tribunal. Using arbitration to resolve ESG disputes has already prompted discussions about party consent, see here for previous coverage.

Hamster expressed scepticism about the effectiveness of ESG provisions in bilateral investment treaties ("BITs"), considering that the "Global South" would face the imposition of Western norms. How effective is arbitration in solving ESG-related disputes, when BITs are rather asymmetrical and render counterclaims by host States arduous (see here for previous coverage)? Besides, there is an inherent risk of inconsistent arbitration outcomes and "unfair policy intervention" as arbitral tribunals interpret national laws differently, leading to varying results across countries.

The discussion concluded by focusing on the future of dispute resolution, emphasising the need for arbitration to become more (i) accessible (*e.g.*, through third party funding), (ii) transparent (*e.g.*, publishing awards to ensure access to arbitral precedents), (iii) and impartial (*e.g.*, focusing on educating arbitrators so that they have "the right moral compass", particularly in the context of ESG disputes involving public interests and (vulnerable) individuals).

**The Next Generation of Arbitration Rules**

In the last decade, major arbitration institutions have amended their arbitration rules. This development was discussed in the second panel, led by Marieke Schaink (A&O Shearman). Korinna von Trotha (Swiss Arbitration Association "ASA") highlighted how arbitral institutions are moving towards the homogenisation of rules. This has led to the creation of specialised institutions and rules, such as those for corporate law disputes in Switzerland and the Netherlands, which cater to specific sectors like finance (P.R.I.M.E. Finance), art (the Court of Arbitration for Art), and aviation (the Hague Court of Arbitration for Aviation). Camilla Perera-de Wit (Netherlands Arbitration Institution "NAI") and Robin Oldenstam (Arbitration Institute of the Stockholm Chamber of Commerce "SCC") discussed the need for specialised arbitration, emphasising the importance of detailed rules and the expertise of arbitrators in technical fields. They also touched on the potential pitfalls of niche communities becoming insular, with Oldenstam warning against the risk of "little businesses with large egos". However, Von Trotha countered that small communities have their advantages, with quicker recognition of an arbitrator's reputation ensuring impartiality and independence. The debate centred on whether arbitration rules should be proactive or reactive, with the audience showing a strong preference for a proactive approach.

The discussion concluded with a focus on diversity and inclusion, where Perera-de Wit highlighted the NAI's efforts to track and report on gender diversity in appointments and the new approach of consulting with institutions for co-arbitrator appointments to ensure a diverse pool of arbitrators. Von Trotha also mentioned the ASA's diversity mission statement, which aims for gender parity at conferences and in appointments.

**The Next Generation of Technology in Arbitration**

The panel, moderated by Lútsen de Vries (Staunch), and consisting of Juliette Asso-Richard (Lalive), Niek Peters (Legaltree), and Rutger Potter (deBreij) explored how AI can assist counsel and arbitrators in the various stages of arbitration proceedings. More specifically, the panel discussed how AI can enhance the arbitration process by assisting lawyers and arbitrators with tasks such as selecting arbitrators, finding evidence, and drafting awards. The potential benefits of AI in arbitration practice, such as the processing of evidence, are discussed more extensively in the previous coverage here.

However, AI also presents challenges. For instance, arbitrators may encounter issues related to data protection, privacy, and the principle of equality of arms. The panel also acknowledged the limitations and risks of AI, such as data scarcity, privacy issues, and reliability concerns.

Furthermore, the panel examined the use of virtual reality ("VR") and augmented reality ("AR") in arbitral hearings. They noted that VR and AR can be costly, complex, and raise questions of confidentiality, reliability, and influence. They argued that VR and AR can be helpful in construction arbitrations, where they can visualise technical details. However, they also emphasised, just as with the use of AI, the need for safeguards in the use of VR and AR, especially to ensure the truthfulness and fairness of the evidence presented. Moreover, as with AI, the panel recommended that arbitrators should have an open discussion with the parties about the use of these new technologies and their implications for the arbitral process.

In conclusion, the panel recognised significant potential for AI tools to be utilised by both arbitrators and counsel, as long as the arbitration community implements safeguards to ensure the proper application of arbitration law principles in practice. The arbitration community has already issued guidance and protocols on virtual hearings (*e.g.*, the International Chamber of Commerce ("ICC") Checklist for a Protocol on Virtual Hearings). However, the full implications of these technological advancements have yet to be fully understood.

**Workshops for the Next Generation**

Besides the panel discussions, the DAD also featured four (interactive) workshops that explored various aspects of arbitration practice:

- Workshop A 'Picking the next generation of arbitrators', explored strategies for appointing upcoming arbitrators. The panel recommended that aspiring arbitrators gain relevant experience by serving as a secretary at the NAI, publishing journal articles, and taking courses offered by the NAI to qualify for inclusion on the arbitrators' list.
- Workshop B 'Re-imagining the use of expert evidence', explored innovative approaches to

utilising expert evidence, such as establishing a technical framework with representatives from both parties in a collaborative setting. This method engaged technical experts from both sides to streamline the case by addressing irrelevant details before advancing to the substantive legal arguments.

- Workshop C ‘Ensuring a diverse next generation of practitioners’ proposed actionable ideas for promoting diversity, such as collecting diversity data in arbitration, initiating client dialogues on diversity benefits, implementing reverse mentoring in law firms, and expanding networks to challenge comfort zones in daily practice.
- Finally, the workshop D ‘The future of international asset recovery’ contributed to broader discussions, emphasising the challenges in enforcing arbitration awards. The speakers underscored the significance of international networks and associations, suggesting the creation of a supranational system as a potential solution.

  All in all, these workshops provided valuable insights into contemporary and future arbitration practices and strategies.

**Conclusion**

The future of arbitration can be shaped by integrating ESG factors and AI, and by prioritising diversity, accessibility, and transparency. This will help ensure that arbitration remains a preferred dispute resolution mechanism, while arbitrators remain prepared, professional, unbiased, and diligent, in line with Gharavi’s suggestion.

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