Ms Gabrielle Nater-Bass (Partner, Homburger, Zurich), President of the SCAI Arbitration Court, welcomed the attendees and speakers to the SCAI Innovation Conference. She announced this year’s conference topic to be in keeping with the theme of innovation as the panels would address new approaches to the appointment of arbitrators and issues of case management. Ms Nater-Bass set the stage for the panellists by highlighting that it takes an arbitrator with the right skillset for each case to run proceedings smoothly. She also posed some of the questions to be addressed by the panellists: Are innovations, which come with the development of technology, a blessing or a curse? Are they an accelerator or are they slowing things down?

On behalf of the Organising Committee, including also Ms Sandra DeVito Bieri (Partner, Bratschi, Zurich), Dr Simon Gabriel (Partner, Gabriel Arbitration, Zurich), Dr Christian Oetiker (Partner, Vischer, Basel), Dr Urs Weber-Stecher (Partner, Wenger Vieli, Zurich), and Ms Caroline Ming (SCAI Executive Director, Geneva), Dr Diana Akikol (Partner, Abravocats, Geneva) and Ms Alexandra Johnson (Partner, Bär & Karrer, Geneva) introduced the conference topic.

Dr Akikol presented the underlying idea of the SCAI Innovation Conference to provide a forum where practitioners can interactively debate practical questions and issues. The Conference’s notion of innovation signifies reflection on current rules and practices, to identify areas calling for change, and to develop ideas for new practical solutions and approaches.

Ms Johnson foreshadowed the panels’ topics: the first panel would broach the selection of arbitrators; the second panel would discuss issues of case management by arbitrators; and the final panel, the Arbitrators’ Lounge, was announced to address and reflect on new ideas, techniques and proposals that were raised by the previous panels.
The first panel, moderated by Prof. Dr Christoph BRUNNER (Partner, PETER & PARTNERS, Bern), discussed the selection of the “ideal arbitrator”, including the utility of data-based arbitrator selection. The speakers addressed (new) arbitrator-skills on which parties place importance; diversity in the selection process; disclosure standards; and data-based arbitrator selection.

Mr Peter HOSTANSKY (Managing Counsel, HUNTSMAN CORPORATION, Basel) kicked off his presentation of “What are the (new) skills that parties look for in an arbitrator?” by observing that arbitrator selection is crucial because it is difficult to justify to internal stakeholders that an arbitration has been lost due to the possible “suboptimal choice” of an arbitrator. Mr HOSTANSKY explained that there are a few, non-exhaustive generic skills which every party looks for in an arbitrator, e.g. the command of the law, sound judgment and analytical skills; additionally, there are more particular, case-dependent skills which parties seek from arbitrators, e.g. industry knowledge and juridical open-mindedness. Mr HOSTANSKY submitted that a crucial aspect of a party’s due diligence in the arbitrator selection process is to consider arbitrators whose views align with the party’s line of arguments; who have the ability to switch between different legal cultures; and who sympathise with other cultural mindsets so that another arbitrator may follow them. Mr HOSTANSKY submitted that, when selecting a chairperson, parties should consider an arbitrator’s proactivity and firmness to enforce the procedural framework. Mr HOSTANSKY concluded by admitting that such firmness entails a delicate balancing act between guiding the parties to distil the main points in the arbitration without impeding due process and the right to be heard.

Ms Utku COŞAR (Partner, COŞAR AVUKATLIK BÜROSU, Istanbul) began her discussion of “Diversity: the new selection dogma?” by pointing to the recent controversy surrounding the AAA in response to the petition filed by Shawn Carter (aka JAY-Z) as an illustration of the inherent importance of diversity in arbitration given that its users are diverse, come from different backgrounds and must feel a part of and represented in the process. Ms COŞAR submitted that a party’s access to a diverse pool of arbitrators, as distinct from the “who and why” reasons for a party’s particular selection of an arbitrator, is a key element of party autonomy in arbitration. As to where the arbitration field is in terms of diversity, Ms COŞAR pointed to statistics of major institutions which illustrate that there has been much focus on and great achievement by SCAI and the ICC in respect of gender diversity; however, there could be greater focus on diversifying the age, ethnicity and sexual orientation of arbitrators. She remarked that the diversity gap is driven mainly by the large share (70%) of appointments made by parties who are, understandably, risk adverse. Parties or their counsel, Ms COŞAR submitted, will tend to strike a name from a list because that name is not familiar, rather than for reasons of bias. Therefore, appointments by institutions are better placed to foster diversity than party nominations.
Dr Urs Weber-Stecher (Partner, Wenger Vieli, Zurich), who presented on “Standards of disclosure – ICC Note 2019 | IBA Guidelines of 2014”, advocated for enhanced transparency in the arbitrator disclosure process. In a growing community of practitioners, who are, especially in case of the ICC, active all around the world, strict disclosure standards must be applied. That being said, more stringent standards need to be balanced against a higher risk of arbitrators being challenged because of more disclosures, the expectation of arbitrators to know when a reasonable standard of inquiry is met and when disclosure is required and, finally, the practicability of arbitration proceedings. Particularly in big arbitrations, involving large groups of companies and big law firms, it will become increasingly difficult to conduct such due diligence. In practice, this should lead to a duty to make reasonable enquiries and disclosures, as it is not the purpose of the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration of 1 January 2019 (the “ICC Note 2019”) for arbitrators to disclose any and all circumstances which have been discovered. Inspiration may be taken from the approach taken in the IBA Guidelines: robust common sense. Dr Weber-Stecher also submitted that, if a disclosure is made, bias should not be automatically inferred, and that a corresponding common-sense approach can be expected from the institution.

Prof. Dr Christoph Brunner (Partner, Peter & Partners, Bern) on “data-based arbitrator selection: a blessing or a curse?”: Prof. Brunner gave a brief overview on data-based arbitrator selection. According to the 2018 White & Case / Queen Mary International Arbitration Survey, only 57% of in-house counsel say that they have enough information regarding arbitrators. Accordingly, there is a desirability for additional sources of information other than word of mouth, internal colleagues, publicly available information or through outside counsel. Prof. Brunner distinguished basic information from sophisticated information on arbitrators, the latter including intelligence on an arbitrator’s pro-activity, black-letter approach as opposed to a tendency of being more flexible, commercially-minded or fair and equitable, which is harder to access from a data-based resource. Prof. Brunner introduced the attendees to the ASA tool, the ICC tool, the GAR ART, as well as the Arbitrator Intelligence (AI) tool. Particularly the latter provides a wealth of information with a very sophisticated approach.

Mr Benjamin Barrat (Senior Associate Knowledge Lawyer, Clifford Chance, London) gave a common law perspective on the question of “Standards of disclosure: going far enough or too far?”. Mr Barrat stressed the complexity of what should be disclosed and when. As these questions are not expressly regulated by the 1996 Arbitration Act, parties and arbitrators often follow institutions’ non-binding guidelines and case law. Mr Barrat provided an overview of recent cases in which arbitrators were found to have failed to discharge their duty of disclosure, addressing particularly Halliburton Company v Chubb Bermuda Insurance Ltd which dealt with multiple appointments in cases with overlapping subject matters and concerned an arbitrator’s failure to disclose such circumstances. Mr Barrat explained that the duty of disclosure under English law has been expanded by Halliburton; non-disclosure can be a factor in the test for bias; yet the threshold for the duty of disclosure is lower than that for the test for bias. Where there is a clear possibility that a fair-minded observer might reasonably consider there to be a lack of impartiality, a disclosure should be made. Consequently, it remains to be seen whether the number of applications for claims of non-disclosure will increase.
The second panel shifted the focus to the management of proceedings by arbitrators. **Dr Michael Lazopoulos (Partner, Lustenberger, Zurich)** moderated the topics of judicialisation of arbitration, **the Prague Rules**, due process paranoia and new technologies in arbitration.

**Ms Anna Masser** (Partner, Jones Day, Frankfurt) addressed the topic of "**The 'judicialization' of arbitration: should we make arbitration 'simpler' again?**". Ms Masser posed questions as to whether and to what extent arbitration is run too similarly to litigation; and whether one of arbitration's purported main vices, judicialisation, is actually a bad thing. According to politicians, and especially EU politicians, arbitration should rather resemble court proceedings, while the 2018 White & Case / Queen Mary International Arbitration Survey shows that 97% of respondents prefer international arbitration for the resolution of their cross-border disputes. At the same time, national commercial courts aim to gain market share from arbitration. As an especially intriguing example, Ms Masser explained the workings of the commercial court in the Netherlands which has two instances operating in English and whose judgments are enforceable in the EU. As to how arbitration can be made simpler and thus more attractive to users, Ms Masser proposed to seek to have shorter awards (shortening, in particular, the section of procedural history), shorter submissions, and a more efficient use of technology. She proposed that the arbitrators’ focus should be on better communicating with parties and managing expectations; simplifying the procedure follows automatically and should, thus, be the arbitrators’ secondary focus.

**Mr Andrey Panov** (Senior Associate, Norton Rose Fulbright, Moscow), who addressed the topic “**Do we need more pro-active arbitrators (see the proposed Prague Rules)?**”, submitted that it would be good if arbitrators could refer to something which is clearly empowering them to be more robust. It is commonplace that it is within the inherent powers of an arbitral tribunal to conduct the proceedings as it sees fit, but it should be easier for arbitrators to refer to civil traditions to impose, for instance, page limits for submissions.

Although the Prague Rules were never intended to solve all of arbitration’s problems, nor to apply in every case, their purpose is to have arbitral tribunals more proactively engaging with the parties from day one. For example, rather than issuing a pro forma Procedural Order No 1, then reading the file before the hearing, arbitral tribunals and parties are encouraged to communicate, e.g. with regard to document production requests and the examination of witnesses or experts. To this end, the Prague Rules place a burden on the counsel to inform the arbitral tribunal of the disputed facts and the key legal issues in dispute. The arbitral tribunal should then be well-placed to decide on evidentiary requests earlier in the procedure. Mr Panov concluded that the efficacy of the Prague Rules depends on the arbitrators’ skills and willingness to engage with parties early on in the arbitration.
Mr James H. Boykin (Partner, Hughes Hubbard & Reed, Washington D.C.) discussed a growing concern in international arbitration: “‘Due process paranoia’ and how to deal with it”. The term ‘due process paranoia’ traces back to the 2015 White & Case / Queen Mary International Arbitration Survey which defined the term as a perceived reluctance by arbitral tribunals to act decisively in certain situations for fear of their award being challenged on the basis of a party not having had the chance of presenting its case fully. Mr Boykin distilled three elements from such definition: first, one or more case management decisions of an arbitral tribunal that appear overly attentive to due process; second, a belief on the part of the arbitral tribunal that such a cautious stance is necessary due to the risk of not having the award enforced; and third, the assessment of such risk is misplaced. Mr Boykin noted that the source of the enforcement risk is unclear, given that no awards have been overturned in England or the US on the basis of arbitral tribunals adopting robust procedural steps. One hypothesis is that publicly available awards in investment arbitration set certain procedural expectations which have split over to commercial arbitration, a point also made by Ms Masser. Mr Boykin concluded by posing the question to the audience whether due process paranoia is real or only perceived? In similar fashion to the other panels and presentations, a lively debate ensued between participants and panellists.

Ms Dorleta Vicente (Legal Counsel, Repsol, Madrid) presented on “New technologies for arbitrators”. Ms Vicente identified three levels of technological influence in arbitration. The first level relates to supportive technology which is already widely accepted and adopted by users, e.g. emails and web-based information systems. The second level encompasses replacement technology, i.e. technologies which assume functions which were carried out by human beings in the past such as automatic transcriptions. Ms Vicente referred to the third and last level as disruptive technology which is carried by artificial intelligence and may change the face of dispute resolution as we know it. The use of technology in arbitration is accompanied by certain challenges: e.g., confidentiality, where the applied technology has to be secure; and due process, which requires equal access to technology or increasing costs. The cardinal question will be whether the decision-making function itself will be one day delegated to machines. Ms Vicente submitted that, while some areas might see law being handed down by machines, there remains a need for some human element in the decision-making process where the consequences of a decision are more wide-reaching.

THIRD PANEL
Arbitrators’ Lounge

In the final panel, and in true conformity with the conference’s title, all eyes were on the Arbitrators’ Lounge, an intergenerational panel of arbitrators composed of Dr Paolo Michele Patocchi (Partner, Patocchi & Marzolini, Geneva), Ms Deva Villanúa (Partner, Armetsto & Asociados, Madrid), Prof. Dr Nathalie Voser (Partner, Schellenberg Wittmer Ltd, Zurich) and Mr Roland Ziadé (Partner, Linklaters, Paris), and moderated by Ms Noradèle Radjai (Partner, Lalive,
Geneva), who set out to discuss the previous presentations and suggestions in an interactive and lively manner.

Reflecting on the first panel’s musings on issues of arbitrator selection and skill sets that parties look for in arbitrators, Ms RADJAI posed the question of whether the role of the chair and the party-appointed arbitrator require different skills.

DR PATOCCHI answered in the affirmative: the chair first needs to respect his or her co-arbitrators by being a good listener. Further, being chair requires a mix of procedural skills and personality or clout as he or she effectively “runs the show”. Such skills have nothing to do with how good a lawyer one is, but rather, speak to the qualities of a good case manager and diplomat. MR ZIADÉ added that it is more important for the chair to command charisma. MS VILLANÚA remarked that the most influential arbitrator is the one who is prepared to do the work; specifically so when it comes to quantum where a wing-arbitrator, who is very well prepared, may be even more influential than the presiding arbitrator. PROF. VOSER touched upon the issue of promoting the younger generation of arbitrators by proposing to encourage parties to appoint arbitrators who are less experienced. DR PATOCCHI agreed that parties should be more flexible considering younger arbitrators submitting that it is easier to do that as respondent in reaction to claimant’s proposed appointment. DR PATOCCHI further opined that older wing arbitrators should not be a reason to not appoint a younger chair person.

The panel then turned to the issue of arbitrator databases and whether they are a blessing or a curse.

DR PATOCCHI submitted that database questionnaires often put questions in absolute or general terms. For instance, when it comes to document production requests, there are cases where requests are excessive and one would limit them, but then there are occasions where the parties are very forthcoming and hardly object, and the same arbitrator may be less strict in his decision. In such circumstances, databases cannot predict with certainty how an arbitrator would decide; this ultimately depends on the case. MR ZIADÉ asked the conference participants whether they had subscribed to and used the arbitrator database tools. In view of only very few hands raised, MR ZIADÉ remarked that databases may increase the asymmetry of information between arbitration practitioners. MS VILLANÚA added that the underlying questionnaires are susceptible to certain bias depending on the circumstances in which they were answered.

The panel then broached the issue of standards of disclosure and how arbitrators should navigate the new provisions of the ICC Note 2019.

PROF. VOSER advocated for exercising a certain degree of restraint, applying the general principles of the ICC Note 2019 and one’s own judgement. Ultimately, it is important to keep the seat of the tribunal in mind as the jurisdiction at the seat has the last word. MS VILLANÚA agreed and reminded that arbitrators are the parties’ service providers and parties have a right to know about certain relationships which may cast doubt on an arbitrator’s independence. Where a party has such doubts, an arbitrator must answer in a courteous way. MS VILLANÚA noted a recent case where an arbitrator was successfully challenged because of his answer, tone and the information he withheld from the inquiring
party, despite being expressly asked about a certain relationship pertaining to such information. Mr. Ziadé agreed that it is an aggravating factor if a party has specifically asked about a certain relationship, but that sometimes the trend towards extensive disclosures goes too far.

Ms. Radjai concluded that, in the knowledge that more disclosures usually create more challenges, it remains to be seen whether the trend towards greater disclosures is actually best serving the users of arbitration.

On the issue of case management and its simplification, Prof. Voser and Dr. Patocchi submitted that most arbitrations cannot be readily simplified because they deal with complex commercial operations and technical issues. Provided that lawyers are cooperative, matters may be procedurally simplified, particularly, in the way the evidence is presented. Ms. Villanúa added that personal interactions in a conference call, where the parties and their counsel tend to act more reasonable when facing the arbitral tribunal, can be more effective in resolving issues than several exchanges of written submissions. Ms. Radjai ventured the theory that arbitration may now have the “worst” of both civil and common law worlds: long submissions and long hearings. In light of all these challenges, she concluded, on a gentle provocative tone: “It is a fascinating time to be an arbitrator!"

Joint Recording of Conclusions

In their concluding remarks, Ms. Sandra De Vito Bieri and Dr. Simon Gabriel summarised the panels’ conclusions.

Ms. De Vito Bieri echoed the previous presentations by reminding that arbitrators have a difficult mandate: to strike a balance between procedural efficiency and rendering an enforceable award. Arbitral tribunals should not be paranoid about taking robust decisions. As long as such decisions are based on the information on record and the evidence before them, arbitral proceedings will be conducted efficiently, and the parties’ autonomy is preserved. This may even lead to arbitral procedures becoming simpler again. However, there is one risk on the horizon with a stride towards more transparency and the publication of the awards: if their awards are made public, will arbitrators become more paranoid because their awards will no longer concern just the parties at hand, but also, the broader public?

Dr. Gabriel drew an analogy to the Boston shoemaker’s slogan “we offer three kind of services: good, cheap and fast, but you can pick only two: good and cheap won’t be fast; fast and good won’t be cheap and fast and cheap won’t be good”, summarising that arbitrator selection goes to the key criteria of speed, costs and skill. Measuring arbitrators in terms of the quality of their work would enhance diversity, because quality would be the ultimate measurable denominator. A reliable quality measurement for arbitrators' services does, however, not yet exist for the time being and there is thus still room for innovation.
In his final remarks, Mr Vincent Subilia (Deputy Director General, CCIG, Geneva, and Member of the SCAI Board), remarked that the 2019 SCAI Innovation Conference paid testimony to Geneva’s history as the cradle of arbitration. The third Innovation Conference also honoured SCAI’s pledge to advance diversity and innovation.

In the same vein as Dr Gabriel’s observations, Ms Caroline Ming (SCAI Executive Director, Geneva) thanked the speakers and organisers for their interventions at the conference, and SCAI for ensuring that arbitrators issue fast, good and reasonably priced awards under the Swiss Rules. She also confirmed that SCAI is notably taking into account the criteria of diversity of age, origin and gender when appointing arbitrators, but reminded the audience that the good command of the applicable law is the main criterion to ensure the quality and efficiency of arbitration. With regard to confidentiality, she confirmed that SCAI shares the audience’s preference and considers confidentiality as a valuable feature of commercial arbitration, as provided for under Article 44 of the Swiss Rules.

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This year’s SCAI Innovation Conference was attended by approximately 130 attendees.

Reported by Christopher Singer, Senior Associate, ABR Avocats, Geneva