2nd SCAI Innovation Conference
“Arbitrating the Future”
Zurich, 1 February 2018

Conference Report

Introduction
More than 85 arbitration practitioners from around 14 countries attended the 2nd SCAI Innovation Conference in Zurich preceding the ASA Annual Conference.

The purpose of this SCAI Innovation Conference was to explore the issues relating to future claims and damages and how to address them from both the perspectives of arbitral tribunals and counsel. The subject triggered stimulating and lively discussions, and proved its relevance.

Presentation and Discussion
Ms Gabrielle Nater-Bass, President of the SCAI Arbitration Court and Partner at Homburger, opened the conference with her welcoming address. In their introductory presentations, Mr Simon Gabriel, Partner at Gabriel Arbitration AG, and Ms Sandra De Vito Bieri, Member of the SCAI Arbitration Court and Partner at Bratschi AG, perfectly set the tone for the conference, highlighting the importance of innovation in order to merge traditional processes with new ideas, on the one hand, and how to address the difficulties faced by the parties, arbitrators and counsel with regard to future claims and damage, on the other hand.

Ms Diana Akikol, Partner at ABR Attorneys at Law, moderated the first panel on arbitrating future claims. Ms Akikol started off with practical examples in which a party may have an interest in bringing a future claim or requesting future relief, stating that there is no one-size-fits-all solution for dealing with such claims. Mr Markus Schifferl, Partner at zeller.partners, spoke on dealing with claims that have not yet fallen due. He laid out possible reactions of an arbitral tribunal in a hypothetical case. He concluded that the arbitral tribunal should first consider whether the hypothetical future fact is likely to occur and, if the claim is unlikely to occur, that claim should then be discarded preliminarily. Second, the arbitral tribunal should also probably consider whether rendering an award at such an early stage serves a useful purpose or not. Ms Kathleen Paisley, Partner at Ambos Law, focused on how to deal with future relief; specifically on whether the arbitrator can retain jurisdiction after granting specific performance and ways to enforce future claims/reliefs without overstepping the arbitrator’s powers. Ms Paisley discussed ways for the arbitrator to involve the parties in the consideration of the potential relief available, including the possibility of nominating a “special master” to monitor compliance in complex cases, prior to analysing whether the arbitral award would be enforceable. A lively discussion then took place between the audience and the members of the panel about how best to avoid multiple proceedings. The various ideas and conclusions expressed during this discussion are summed up below in the joint conclusions part.

Mr Tobias Zuberbühler, Partner at Lustenberger, moderated the second panel, which switched the focus towards arbitrating future damages. Mr Zuberbühler explained that “calculating future damages is a speculative exercise and it is expensive work”. 
Mr Thierry Senechal, Managing Director at Finance for Impact, reflected on how to deal with the quantum evidence on damages and concluded with three key messages: (1) make sure you understand the concepts of Net Present Value and of Economic Value Creation; (2) plan in advance to get the best evidence; and (3) try to lock down some definitions and parameters at the contractual stage between the parties regarding the methods used for evaluating the quantum of damage. Ms Niuscha Bassiri, Partner at Hanotiau & van den Berg, addressed the issues of the early appointment and the role of experts. Three options can be considered. The first approach is to let the parties and their experts submit their report and analyse what they come up with. This may entail the risk that the tribunal mix-matches the opposing experts’ methodologies without giving the parties the right to comment on the tribunal’s own methodology so developed. A second possibility is for the arbitral tribunal to appoint the same experts as those appointed by the parties, but without the interference of the parties, and ask them to directly report to the arbitral tribunal. A third option to resolve such issues is for the arbitral tribunal to appoint itself its own expert and to decide itself on the evaluation method to be used. Ms Bassiri suggested that the best way to resolve these issues is by the co-engagement of the parties’ experts instead of appointing a tribunal-only expert. The animated debate that followed, explored new ideas on how best to avoid costly expert battles. These ideas are summed up below in the joint recording of conclusions part.

Mr Martin Bernet, Partner at Bernet Arbitration / Dispute Management, moderated an open discussion with the audience, during which he highlighted that the arbitral tribunal, while analysing future claims, might have to limit itself because it cannot neglect or go beyond the boundaries established by law.

Ms Caroline Ming, Executive Director and General Counsel of SCAI, delivered the closing remarks. Ms Ming first expressed her gratitude to all the participants for their very lively participation and creativity, but also to all the people involved in organizing the SCAI Innovation Conference and those making it possible by sponsoring it. She then recalled that the shared goal and responsibility of all the participants to the conference is to assist the parties to resolve their disputes in a fair and efficient manner.

Conclusion

In their joint recording of ideas and conclusions, Ms Caroline Ming, Ms De Vito Bieri, and Mr Gabriel put together the essential takeaways as follows:

- Multiple proceedings should be avoided.
- Instead, the parties can attempt to keep the arbitral tribunal seated by requesting a suspension of the proceedings until all further issues arise so that the same arbitral tribunal can deal with all the issues after the constitution of the tribunal. It is understood that partial awards can be required.
- The parties could also attempt reaching an agreement on the resolution process for future claims, agreeing for instance to appoint again the same arbitral tribunal for all future claims, or to select an auditor, some form of a dispute board, a mediator, a case manager or some other form of “special master”, who would be in charge of all or a select number of issues.
- Arbitrators must remember that their duty is not only to render an enforceable award but also to resolve the dispute.
- Arbitral Institutions should reflect on whether new additional rules may help addressing the issue of future claims more adequately. It was recalled that currently, Article 15(7) and (8) of the Swiss Rules of International Arbitration provide that all participants shall act in good faith and make every effort to contribute to the efficient conduct of the proceedings, to avoid unnecessary costs and delays, and that arbitral tribunals may take steps to facilitate the settlement of the dispute. The Swiss Rules
of Commercial Mediation may also be used anytime during the arbitration process. It was suggested that new rules could provide that arbitral tribunals may be “resuscitated” or kept standing in certain circumstances.

- The resolution of serial damage should be foreseen and agreed upon by the parties in their contracts, in particular in long-term contracts.
- Parties should think about all the various potential damages when drafting a contract and, ideally, should agree on valuation methods at the drafting stage.
- Arbitral tribunals should think about quantum at an early stage of the arbitration and discuss it with the parties during a procedural meeting. The valuation method(s) and methodology must be chosen at the outset (if not already specified in the contract) and the collection of relevant evidence shall be planned during the first procedural conference, even in case of bifurcation of the proceedings.
- Parties should consider asking the arbitral tribunal to appoint one single expert instead of themselves hiring a plurality of experts. This will enhance efficiency and save costs. Article 27 of the Swiss Rules of International Arbitration also allows the arbitral tribunal to decide to appoint their own experts after consultation with the parties.
- The choice of the right expert(s) with the right expertise is of paramount importance.
- Party-appointed experts should be reminded of their duty of independence and impartiality.
- Experts should use models that are not excessively complex and must make their reports accessible and understandable by arbitrators. The use of an excessive volume of data must be avoided whenever possible.
- Parties must remember that they bear the burden of allegation and of proof.
- It could prove useful to have party-appointed experts turned into tribunal-appointed experts.
- Parties could be denied access to the expert joint meeting (provided the IBA Guidelines on the Taking of Evidence do not apply).
- When multiple experts are hired, they should be asked to agree at the outset on the methodology, then do their own calculations, meet, discuss, and issue a joint report on the points they agree on and separate reports on points of disagreement only.
- Arbitrators must try to understand the calculation without calculating themselves. If they do not understand the calculation properly, they should not hesitate to revert to the parties and experts. Arbitrators should educate themselves in order to understand the basic concepts of valuation.

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Given the excellent feedback received from all sides about our innovation conferences, SCAI will hold a 3rd Innovation Conference on 31 January 2019 again in Geneva, and once again preceding the ASA Annual Conference. For more details, please click here.

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