



SCAI Innovation Conference on “Expedited Proceedings and their Limits”

Conference Report

Introduction

SCAI held its first Innovation Conference on 2 February 2017 in Geneva. Attendance was limited to 60 participants to encourage an open and interactive dialogue, and every single seat was filled by arbitration practitioners, in-house counsel and other professionals from around the world. Given the excellent feedback received from participants, SCAI will hold a second Innovation Conference next year in Zurich, again preceding the ASA Annual Conference.

The goal of the SCAI Innovation Conference was to explore ways to expedite arbitration proceedings, the limits and risks of expedited proceedings, and how traditional methods could be revamped and improved by the use of new formats. The stimulating discussion which took place during the conference demonstrates the timeliness and relevance of this important topic to the arbitration community and the users of arbitration.

Presentations and Discussion

The participants were welcomed by Ms. Gabrielle Nater-Bass, President of the SCAI Arbitration Court and partner at Homburger, whose address was followed by introductory presentations by Ms. Sandra De Vito Bieri, Member of the SCAI Arbitration Court and partner at Bratschi Wiederkehr & Buob, and Mr. Simon Gabriel, partner at Gabriel Arbitration.

Ms. De Vito Bieri and Mr. Gabriel perfectly set the tone for the conference in their presentations, highlighting the importance of innovation in order to merge traditional processes with new ideas, on the one hand, and the difficult balance to be struck between speed and practicability, on the other hand.

Moderated by Mr. Boris Vittoz, Member of the SCAI Arbitration Court and partner at CPV Partners, the first panel of the conference focused on traditional methods used to expedite arbitration proceedings, including their risks, limits and optimization. Ms. Ulrike Gantenberg, partner at Heuking Kühn Lüer Wojtek, spoke about maximum expedition and how it can be achieved at different stages of the arbitration proceedings, taking into account the preferences of those who ultimately call the shots: the users. Ms. Gantenberg concluded that, under existing rules for expedited proceedings, it is indeed possible to go through an entire arbitration in as little as three months by limiting party autonomy. However, is it advisable and is it really what the users want? Dr. Rafal Morek, partner at K&L Gates, attempted to answer that question in his presentation, focusing on potential risks of expedited arbitration, including the risk of an arbitral award being set aside due to a violation of a party's right to be heard. Dr. Morek concluded that the right speed in arbitration was one that would actually guarantee due process and hence the enforceability of an award, without giving in to the so-called “due process paranoia”.

The second panel of the conference, moderated by Mr. Jan Heiner Nedden, partner at Hanefeld Rechtsanwälte, switched the focus towards potential new formats to expedite arbitration proceedings. Mr. Heiner Kahlert, partner at Martens Rechtsanwälte, started by speaking about the use of *Ex Aequo et Bono* in order to expedite arbitration proceedings. Of course, *Ex Aequo et Bono* is by no means a new format, but Mr. Kahlert's point, which he made very convincingly, was that it can indeed be a very efficient, and perhaps often overlooked, tool to expedite proceedings. Interestingly, the moderator's informal raise-your-hand survey revealed that many of the participants had a positive experience of *Ex Aequo et Bono* procedures, both as arbitrators and as counsel. Next took the stage Ms. Heike Wollgast, Senior Legal Officer at WIPO, and described the innovative options available at WIPO to expedite proceedings, including the Fast-Track IP Dispute Resolution Procedure for Palexpo Trade Fairs, under which a final decision will be made within 24 hours. Ms. Wollgast explained that the mere existence of these rules may also have a preventive effect in that they may encourage exhibitors to find amicable settlement within the 24 hours.

The two panels left the participants with a great number of innovative ideas, as well as many challenging questions. What does the future hold? How can we make arbitration even better? Ms. Melanie van Leeuwen, partner at Derains & Gharavi, tackled these difficult questions in her lively presentation on how traditional formats can benefit from new formats and what arbitration proceedings might look like in the future. Ms. van Leeuwen discussed both procedural and technical innovations, including the dramatic improvements made in recent years with respect to online dispute resolution systems, as well as artificial intelligence systems, which are already being used in various legal sectors. As Ms. van Leeuwen explained, there will be no turning away from technological advances and the only sensible thing to do for the arbitration community is to embrace it. Those who don't will fall behind, or, even worse, be replaced by a self-learning robot. Sounds absurd? Maybe, but the world's top player in the board game "Go", who recently lost a game to a self-learning robot, might disagree.

Takeaways: Innovation Checklist

Ms. De Vito Bieri and Mr. Gabriel gave a joint conclusion at the end of the conference, where they shared with the participants what was, in their view, the main takeaway from the discussions in terms of effective, yet practicable, innovations within the framework of expedited arbitration proceedings. These takeaways were:

- Escape Clause from Expedited Proceedings: An escape clause from previously agreed expedited proceedings, to be applied by the arbitral tribunal and/or the arbitral institution upon request from a party. Such a clause would allow the parties to agree in advance on expedited proceedings, when signing their contracts, while still allowing them enough flexibility to escape from, or opt out of, such proceedings in case they become impracticable in future disputes.
- Early Guidance from the Arbitrator: More systematic early guidance by the arbitrators to the parties and their counsel of the arbitral tribunal's views regarding the most relevant substantive aspects of a particular case in order to make expedited proceedings more focused and time-efficient. Such early guidance could, for example, take place in a legal discussion between the arbitral tribunal and counsel at the first organizational conference. This idea is related to the "Reed Retreat" innovation by Ms. Lucy Reed, although the Reed Retreat does not anticipate the presence of counsel at the retreat, but only the arbitral tribunal. Of course, in expedited proceedings, there will normally be only a sole arbitrator, who will have studied the file before providing directions to the parties and counsel.

- Issues Addressed in the Arbitral Award: Input from the parties, at the start of the arbitration proceedings, so as to decide and define the issues they expect the arbitral tribunal to address in the award and how detailed they require the arbitral tribunal to be about certain aspects, such as the procedural history or summary of the facts. The parties may also want to consider deciding that the arbitral tribunal is to give a summary award, or even an oral award (summarized in written minutes) with only the dispositive section of the award issued in writing. Whatever the level of detail, the idea is that the arbitral tribunal does not spend time on chapters of the award which the parties consider are immaterial.
- Ex Aequo et bono/Commercial Considerations: Due consideration to allowing the arbitral tribunal to decide the case *ex aequo et bono*, or, based primarily on the commercial interests of the parties, to avoid lengthy submissions and pleadings on the applicable law. The parties may also decide that the applicable law shall not, in any event, be the most decisive factor for the arbitral tribunal in reaching its decision.

Ms. De Vito Bieri and Mr. Gabriel encouraged the participants to keep the conference organisers up to date of their experience, positive or negative, with any of these innovations, or any other interesting methods to expedite proceedings. The hope is that we can continue the discussion and revisit these points, and possible new innovations, next year at the 2018 SCAI Innovation Conference.

Closing remarks were given by Ms. Caroline Ming, the Executive Director and General Counsel of SCAI, who, in addition to expressing gratitude to all those who made the conference a reality, discussed some of SCAI's innovations to expedite arbitral proceedings under the Swiss Rules of International Arbitration, notably (1) the new SCAI customizable arbitration clause allowing contracting parties to agree in advance to expedite or super-expedite potential future arbitration proceedings and to opt for mediation anytime, (2) the expedited procedure that has been in place for more than 25 yearsⁱ and currently used in more than 40% of the cases submitted to the Swiss Rules, and (3) the option to use the Swiss Rules of Commercial Mediation anytime to attempt resolving quickly some or all of the issues by a mediation. Ms Ming also introduced briefly innovative new features which are currently under consideration for the upcoming revised Swiss Rules of Commercial Mediation, namely ARB-MED-ARB procedures, the issuance of certificates of mediation and the authentication of settlement agreements reached within a mediation process conducted under the Swiss Rules of Commercial Mediation. Finally, Ms. Ming closed the conference by recalling the shared goal and responsibility of all the participants, to assist parties to resolve their disputes in a fair and efficient manner.

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ⁱ The expedited procedure was already provided for under the Arbitration Rules of the Chamber of Commerce and Industry of Geneva of 1992, which were replaced by the Swiss Rules of International Arbitration in 2004.