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COMMENTARY ON THE PANEL "A TOUR AROUND THE ARBITRATION WORLD–COMMONALITIES AND DIVERGENCES IN A TIME OF DISRUPTION"

by J. Brian Johns

I. INTRODUCTION

At the time of the 32nd Annual ITA Workshop, the field of international dispute resolution found itself in a period of challenge and change. Recent developments in the Americas and Europe sparked questions as to the continued vitality of the investor-state dispute resolution regime. Concurrently, the health risks posed by the COVID-19 pandemic and the policies implemented by state governments to curtail the virus' spread presented significant obstacles to the conduct of arbitral hearings and portended a wave of future legal claims.

In that context, a diverse international panel of young practitioners titled "A Tour Around the Arbitration World – Commonalities and Divergences in a Time of Disruption" moderated by Marike Paulsson of the Albright Stonebridge Group and the University of Miami School of Law, attempted to predict how practice and the arbitration environment might evolve.

The panel was bifurcated into two sections. In the first half, panelists Vinicius Pereira (Campos Mello Advogados) and Sue Hyun Lim (International Division of the Korean Commercial Arbitration Board) discussed the procedural adaptions of arbitration practitioners and institutions in response to the COVID pandemic, including the proliferation of virtual hearings. The second half of the panel featured panelists Sylvia Sámano Beristain (Arbitration Center of Mexico) and Alexander Leventhal (Quinn Emmanuel Urquhart & Sullivan, LLP) who discussed regional developments in arbitration, including the European Union's recent agreement to dissolve bilateral investment treaties between member-states. Underlying each panel member's discussion was an acknowledgement that international arbitration and its practice methods must continue to adapt to the ever-changing world.

II. A PRACTITIONER'S VIEW OF VIRTUAL HEARINGS

As arbitration practitioners and provider institutions have adopted tools to facilitate remote hearings, concerns have emerged as to the security and reliability of the available virtual platforms. Mr. Pereira offered a practitioner's perspective on the advantages and pitfalls of what he believes to be the "new future" of arbitration. In doing so, he highlighted four points for consideration in conducting remote hearings: (1) security and confidentiality, (2) the ability to read body language, (3) limitations on assessing the credibility of witnesses, and (4) the reduction of costs.

Mr. Pereira acknowledged that videoconferencing platforms commonly utilized for virtual, remote hearings are vulnerable to hacking and that some instances of compromised information and attempted interference have been reported. He noted, however, that the use of technology is not a novel feature in international arbitration, as parties and arbitrators have for years used email and online document management systems to convey and store important materials, including orders and awards. Arbitration practitioners have tolerated and controlled the risks inherent to these practices in the interest of convenience and efficiency. In Mr. Pereira's view, conducting hearings remotely does not significantly increase the risks that already exist.

Mr. Pereira identified as a more significant concern the ability of counsel to read participants' body language. Though he initially framed the problem as one of witness examination, Mr. Pereira explained that it extends to counsel's ability to assess all hearing participants. He noted specifically the challenges of determining the effectiveness of questioning on the arbitrators and even the difficulty of counsel in determining the impact of a witness on their client. In Mr. Pereira's view, the significance of these challenges speaks to the need for arbitrators to recognize a right of the parties to examine some witnesses in person.

In addition to the challenges of reading body language, Mr. Pereira observed that arbitrators and counsel could easily struggle with determining the credibility of a witness when considering their testimony via videoconference. Some solutions have been proposed to address this issue, including allowing opposing counsel to send a

single representative to observe the witness during their testimony to ensure that there is no witness couching or inauthentic claims of technical malfunctions. Mr. Pereira also identified the potential for the use of a second camera to observe the area around the witness but opined that such steps might impose too greatly on the witness' privacy.

As a final point, Mr. Pereira noted that virtual hearings offer the possibility of reduced arbitration costs. He viewed this as a benefit and means of expanding the use of the dispute resolution mechanism.

III. AN INSTITUTIONAL PERSPECTIVE ON VIRTUAL HEARINGS

With countries imposing travel restrictions and a general uneasiness amongst arbitration participants to the health risks associated with in-person hearings, arbitral institutions have been required to adapt to facilitating non-traditional hearings. In her role as Secretary General of the International Division of the Korean Commercial Arbitration Board (KCAB), Sue Lim spoke on the impact of the global pandemic response on institutional arbitration and the steps taken by institutions to promote the advancement of cases when physical hearings are impractical or impossible.

Ms. Lim reported that approximately 30 cases pending before the KCAB had hearings previously scheduled to occur during the first four to five months of the pandemic. The overwhelming majority of these cases were able to move to a hearing, with only three cases canceling or indefinitely postponing their hearings. 18 cases proceeded virtually, with the consent of all parties, and ten cases proceeded with in-person hearings. Ms. Lim attributed the ability for in-person hearings to the Republic of Korea's low infection rates and robust system of contact tracing, which also allowed local courts to continue normal operations. Each of these cases also involved arbitrators located in Korea.

In those cases that did not proceed to a hearing, at least one party objected to virtual hearings. Ms. Lim explained that in one of the cases, the decision was necessitated by lockdown restrictions preventing a party from obtaining evidence necessary for their case. In another case, which Ms. Lim characterized as "a big

complex case with many fact witnesses," European arbitrators were unwilling to move forward with a hearing seated in Asia, which at the time had high infection rates. As the virus spread to Europe and the length of the delay increased, the tribunal and parties displayed more willingness to consider virtual options for advancing the case.

Ms. Lim noted that the KCAB, like many other institutions, uses lifesize®[1] as their virtual conference provider. Parties, however, are free to utilize other platforms with which they might be more familiar or comfortable. The panel members agreed that in many instances, parties will choose to utilize the conferencing system offered by the institution, which they perceive to be more neutral than those provided or organized by a case participant.

Ms. Lim also commented on the use of documents-only arbitration as an alternative to in-person hearings. In her opinion, the decision to waive a hearing and have a case decided solely on the submission of documents is influenced more by the complexity of the dispute and the need for witness examination than by limitations on the participants' ability to meet for hearings. She further opined that the decision might also be influenced by the case participants' legal tradition, as common law practitioners traditionally place greater significance on oral advocacy than civil law practitioners.

In looking to the future in which parties will again consider the method of hearing without the albatross of COVID restrictions, Ms. Lim opined that even though eliminating in-person hearings may provide cost and time benefits, the choice will inevitably be fact specific to each case. She believes that cases in which efficient resolution is vital will be more inclined to move forward with a virtual hearing. Conversely, cases in which the parties believe that a settlement is potential will be comfortable delaying resolution until a physical hearing is possible, allowing for further negotiation. Ms. Lim acknowledged that in some instances, the lack of an in-person hearing might prevent those settlements that could be achieved through party decision-makers being in proximity to one another. She noted, however, that such loss would exist only in those cases in which the party representatives capable of

[1] Lifesize, https://www.lifesize.com/en/

entering a binding agreement would be present at a hearing.

Ms. Lim concluded her remarks by discussing the Seoul Protocol on Video Conferencing in International Arbitration.[2] She noted that work on the Protocols predated the COVID-19 pandemic and was promoted by a rise in the use of videoconferencing in international arbitration, particularly among Asian parties. The Protocol are designed to provide best practices for virtual arbitration, and discussions are ongoing to revise their content to provide for situations of global lockdowns.

IV. INVESTMENT DISPUTE RESOLUTION AND GLOBAL PANDEMIC

Government policies implemented to limit the spread of the COVID-19 pandemic have unavoidably impacted business and investment. Sylvia Sámano Beristain, Secretary-General of the Arbitration Center of Mexico, spoke on the potential for disputes arising out of these restrictions and the impact of the COVID-19 pandemic on inter-state dispute settlement.

Ms. Sámano forecasted that the post-COVID period will see many disputes involving state actors. Though many might consider investor-state arbitration as the logical mechanism for resolving these cases, she expressed that each situation must be considered on a case-by-case basis. Ms. Sámano cautioned that procedural hurdles will exist, the most prevalent being the need for an applicable bilateral or multilateral investment treaty providing an arbitral mechanism. Even in those instances in which a treaty is available, parties may be subject to requirements like mandated cooling off periods that are likely to obstruct or prolong resolution. There may also be challenges in legally analyzing the intentions and appropriateness of government actions and distinguishing those policies designed to take advantage of the pandemic from those ostensibly intended for the general public's good.

Ms. Sámano also spoke on the United States-Mexico-Canada Agreement (USMCA) that came into effect on July 2, 2020. The agreement was intended to serve as a successor to the North American Free Trade Agreement (NAFTA), though Ms. Sámano

[2] Seoul Protocol on Video Conferencing in International Arbitration (2018), http://www.sidrc.org/static_root/userUpload/data/[FINAL]%20Seoul%20Protocol%20on%20Video%20Conference%20in%20International%20Arbitration.pdf.

lamented that, in many ways, it falls short of its predecessor in the protections provided to investors. Unlike Chapter 11 of NAFTA, which many practitioners consider to be a pillar of modern investor-state arbitration, Annex 14 of the USMCA provides a resolution mechanism only for disputes between the US and Mexico. Disputes between Mexico and Canada can be resolved through mechanisms under the Trans-Pacific Partnership, but no mechanism persists for resolving investment issues between the US and Canada.

Ms. Sámano also noted that the USMCA offers fewer investor protections than NAFTA. Under the new agreement, investors may only bring suits alleging a breach of most favored nation status or expropriation without compensation. Claims for breach of minimum standards of treatment and indirect expropriation are no longer available to the average investor and are limited only to investments involving enterprises of the host-state. Investors must also submit their claims to domestic courts for a period of 30 months before initiating arbitration. Ms. Sámano considered this period excessive and opined that investors are likely to view these changes negatively. Mr. Pereira also expressed concern that patterns of shifting risk away from states and eliminating protections for investors would be detrimental to foreign investment.

V. INVESTOR-STATE DEVELOPMENTS IN EUROPE

In recent months, much of the international arbitration community's focus has fallen on the obstacles caused by the COVID-19 pandemic and the likely ramifications of the policies implemented by state governments to address the global spread. Though commanding attention, these issues are only part of the mosaic of international arbitration. Mr. Leventhal of Quinn Emanuel Urquhart & Sullivan, LLP provided an update on the status of dispute resolution in Europe in the wake of the recent *Slovak Republic v Achmea* decision and the resulting policies of the European Commission.[3] In doing so, he acknowledged that the traditional model of investor-state arbitration is considerably weakened by the efforts of the European Commission

[3] Case C-284/16, Slovak Republic v Achmea BV, 2018 E.C.R. 158.

but pointed to signs for optimism for both states and investors.

The Court of Justice of the European Union's 2018 *Achmea* ruling cast a shadow over the future of treaty-based investment arbitration amongst EU member-states. In its wake, member-states committed to the termination of intra-EU bilateral investment treaties and in May 2020 entered into a formal agreement to do so. The only states to preserve their investment treaties were Austria, Ireland, Finland, and Sweden.

Though it severely limited investment arbitration in Europe, the agreement did not immediately eliminate the practice. It provides that two types of intra-EU arbitrations may continue. First, cases concluded before the *Achmea* decision may be enforced. Second, cases pending at the time of the *Achmea* decision may be resolved through an amicable dispute resolution process. The process prescribed, however, removed much of the international character of the proceedings in favor of EU law. Mr. Leventhal projected that these policies are likely to be met by investors with challenges to their validity.

Unlike many that point to *Achmea* as a catalyst for shifting policies and attitudes within Europe, Mr. Leventhan argued that a weakening of the investor-state arbitration regime, in fact, began much earlier with the 2009 Lisbon Treaty, which vested within the European Commission sole authority over external European Union trade. This was followed by initiatives aimed at weakening intra-EU investment agreements between EU member-states and lobby efforts to promote the establishment of an international investment court through UNCITRAL Working Group III.

Though the European Commission has taken a more active role in the investor-state dispute settlement, Mr. Leventhal pointed to several signs of opposing views amongst the individual member-states. Among these are those states that opted not to join the recent termination agreement and lobbying efforts by some states to exclude the Energy Charter Treaty (ECT) from that agreement. He also highlighted the German Constitutional Court's recent willingness to challenge a CJEU ruling as a

sign of states pushing back against the governing organs of the EU.[4] Though the UK is no longer a member of the EU, Mr. Leventhal opined that its decision to maintaining its bilateral investment treaties with EU member-states would make it an attractive option for those interested in investing in Europe. Finally, he acknowledged that many member-states do not appear to share the European Commission's appetite for establishing an international investment court and are likely unwilling to commit to a new multinational organ at a time of rising populist movements domestically.

VI. CONCLUSION

Unquestionably, international commercial and investment arbitration have recently experienced significant challenges and changes, largely catalyzed by government policies. The recent paring back of investor protections and arbitral remedies under the USMCA and the dissolution of intra-EU BITs evidence a growing mentality among state actors to disfavor the traditional mechanisms of dispute resolution. This approach, however, ignores the core purpose of those mechanisms—to encourage foreign direct investment and international commerce. In stripping away the protections and neutralities offered by treaty-arbitration, state and regional actors are limiting their competitiveness in the international marketplace and, ultimately, harming their own interests.

Contrary to investor-state arbitration's current trend, international commercial arbitration has largely embraced the challenges of the moment. Both practitioners and institutions have readily adapted to the constraints of state-imposed lockdowns and travel restrictions by embracing the use of virtual hearings. However, there remain valid concerns over the use of this novel technology and practitioners' ability to adapt existing practices to new environments, many of the pandemic era features—particularly those that allow for cost and time savings—are likely to persist beyond the virus' threat.

[4] BVerfG, Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15, http://www.bverfg.de/e/rs20200505_2bvr085915en.html; *see also* Michael Huertas et al., *German Federal Constitutional Court issues ultra vires verdict on ECB's bond-buying program on grounds of ultra vires*, https://www.jdsupra.com/legalnews/german-federal-constitutional-court-63761/#footnote1 (May 12, 2020).

As the international arbitration community stands at the threshold of the post-COVID, post-*Achmea* era, questions remain as to the longevity of investor-state dispute settlement and what shape future commercial matters will take. The only certainty is that the crucible of this moment will forge a new arbitration species, one that will be defined just as much by its stakeholders as by government action. Though it is not possible to vaccinate against the attitudes underlying *Achmea* or the risk of future large-scale disruptions, there is room for optimism that international arbitration will flourish in the coming years, as tools for promoting cost and time efficiency become more accepted and participants embrace adaptability.

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