CHAPTER 2

Global Trends in Arbitration 2022: Conference Report

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The third joint biennial Conference organized by the Stockholm Centre for Commercial Law (SCCL)[1] and Oxford Institute of European and Comparative Law (IECL) took place on 2–3 June 2022 in Stockholm.

This edition of the Conference was set to highlight the latest developments and trends in international commercial arbitration in light of the experiences gained during the pandemic as well as looking at the future of investment treaty arbitration in Europe.

The Conference kicked off with the welcome addresses by André Andersson, Senior Adviser at Mannheimer Swartling and Chair of the SCCL; Ciara Kennefick, Associate Professor of Law at the University of Oxford and Research Fellow at the IECL; and Axel Calissendorff, independent arbitrator, Chair of the Organising Committee, immediate past Head of the Arbitration Research Panel at the SCCL.

§2.01 INVESTMENT TREATY ARBITRATION IN EUROPE: A CHANGING LANDSCAPE

The first session of the Conference began with the keynote addresses of Christopher Vajda, QC, Monckton Chambers, Visiting Professor at King's College, London, and previously United Kingdom (UK) Judge at the Court of Justice of the European Union (CJEU) 2012–2020, and of Robin Oldenstam, Partner at Mannheimer Swartling, Head of the firm's International Arbitration Practice, Swedish member of the International

1. In particular, the Research Panel for Arbitration and Other Forms of Dispute Resolution of the SCCL is tasked with bringing together academics, judges and practicing lawyers with a view to promoting research and education in arbitration law, both in Sweden and international legal relationships. The immediate past Head of the Research Panel was Axel Calissendorff; the current Head of the Research Panel is James Hope, Partner, Vinge.

Court of Arbitration of the International Chamber of Commerce (ICC) 2015–2021, Chair of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). The panel of the first session lined up Veronika Korom, Assistant Professor at Essec Business School, France; Crina Baltag, Associate Professor in International Arbitration, Stockholm University, board member of the Arbitration Institute of the SCC; Paschalis Paschalidis, Counsel at Arendt & Medernach, previously Référendaire at the CJEU, Associate Professor of EU law at the University of Lyon III Jean Moulin; and Lucy Reed, independent arbitrator based in New York and Hong Kong, and was moderated by Axel Calissendorff.

The first session was dedicated to investor-state arbitration, assessing the impact of the development after CJEU's *Achmea* ruling[2] and the subsequent ones upholding *Achmea,* and considering the further impacts these may have in the future. Christopher Vajda provided an overview of the CJEU case law – from *Achmea* to *Komstroy*,[3] and began his keynote by explaining that while Article 3(5) of the Treaty on the European Union (TEU) provides that the European Union (EU) 'shall contribute … to the strict observance and development of international law', the CJEU has held that this is not an absolute obligation and can be displaced where international law does not respect the basic constitutional charter of the EU, or, as known, the principle of the autonomy of EU law. The judgments in *Achmea* and *Komstroy* have created a tension between EU law and international law. For a future international commitment of the EU, Article 218(11) of the Treaty on the Functioning of the European Union (TFEU) provides a mechanism for avoiding such a tension whereby the CJEU can be asked to rule on an *ex ante* basis whether there is an incompatibility between the proposed international agreement and EU law. Robin Oldenstam's keynote focused on the tension between treaty and commercial arbitration, and, respectively, between public international law and EU law, and whether there is mutual trust at all. Robin Oldenstam highlighted that arbitral tribunals, generally, have not been persuaded to decline jurisdiction based on *Achmea* and have found no incompatibility between bilateral investment treaties (BITs) or the Energy Charter Treaty (ECT) and the TFEU as a matter of treaty interpretation. Undertaking a review of these arbitrations, Robin Oldenstam concluded on the following points: (a) *Achmea* was invoked by the respondent EU Member State in some sixty + intra-EU investment cases; (b) no arbitral tribunal has so far declined jurisdiction; (c) initially, the objection raised by the respondent Member State was dismissed as belated on procedural grounds; (d) also initially dismissed in ECT cases on the basis of *Achmea* not applying to a multilateral investment treaty where the EU itself is a party; (e) some variation in dismissals based on substantive reasoning, but certain common themes have emerged as arbitral tribunals refer to and rely on the reasonings of other arbitral tribunals.

2. *Slowakische Republik v. Achmea BV*, CJEU, Judgment of 6 March 2018, https://curia.europa.eu/juris/document/document.jsf;jsessionid=0C69D499907EEDAC556EA774CB5D8D6E?text=&docid=199968&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=213188 (last visited, 21 July 2022).
3. *République de Moldavie v. Komstroy LLC*, CJEU, Judgment of 2 September 2021, https://curia.europa.eu/juris/document/document.jsf?text=&docid=245528&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=213599 (last visited, 21 July 2022).

Veronika Korom began the panel discussion by addressing the future for arbitration investor-state disputes within the EU, looking in particular at four side developments after *Achmea:* (i) the termination of intra-EU BITs, in particular in the light of the Agreement for the termination of BITs between the Member States of the EU entered into force on 29 August 2020; (ii) the set aside proceedings against intra-EU BIT arbitral awards: recently, in *Poland v. Strabag* and *Poland v. Slot*,[4] the Paris Court of Appeal set aside two arbitral awards arising out of intra-EU BITs; (iii) the enforcement of intra-EU BIT arbitral awards, with reports on intra-EU arbitral awards being honoured by respondent EU Member States, as in *Sodexo Pass International SAS v. Hungary*;[5] and (iv) the future of intra-EU investment protection regime, which must include an alternative for the terminated intra-EU BITs, noting that the European Commission has recently launched public consultations on this matter.[6]

Crina Baltag continued the discussion by addressing the future of investment protection and arbitration in the post-Brexit UK, focusing on the relevance of the EU-UK Trade and Cooperation Agreement (TCA), as well as the EU-UK Withdrawal Agreement. Crina Baltag mentioned at the outset that the UK, in the context of CJEU's clear position on intra-EU investment arbitration, may be seen as a preferred jurisdiction for restructuring investments and for transforming intra-EU investments into extra-EU ones. In this context, the post-Brexit relation between UK and the EU is very much relevant. The TCA is a sui generis Free Trade Agreement, which was signed on 24 December 2020, and became applicable, first on a provisional basis, since the end of the transition period on 31 December 2020. The TCA contains limited substantive protections for investors from the EU and the UK and no investor-State dispute-resolution mechanism. Furthermore, the TCA contains no direct reference to the fate of the UK-EU Member States BITs, but it does refer, in its different parts, to bilateral instruments: for example, 'this Agreement and any supplementing agreement apply without prejudice to any earlier bilateral agreement between the United Kingdom … and the Union' etc. Furthermore, the topic must also be approached in the context of the UK not signing the Agreement for the termination of intra-EU BITs, which in October 2020 triggered the infringement proceedings by the European Commission against the UK.[7]

Continuing, Paschalis Paschalidis focused on the impact of the *Komstroy* ruling on the ECT and the international legal order. In doing so, Paschalis Paschalidis

4. *Republique de Pologne v. Société STRABAG SE, Société RAIFFEISEN CENTROBANK AG, and Société SYRENA IMMOBILIEN HOLDING AG*, Paris Court of Appeal, Judgment of 19 April 2022; and *Republique de Pologne v. Société CEC PRAHA and Société SLOT GROUP AS C/O M. DAVID JANOSIK*, Paris Court of Appeal, Judgment of 19 April 2022.
5. *Sodexo Pass International SAS v. Hungary*, ICSID Case No. ARB/14/20, Award of 28 January 2019.
6. European Commission, *Cross-border investment within the EU – clarifying and supplementing EU rules*, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12403-Investment-protection-and-facilitation-framework/public-consultation_en (last visited, 21 July 2022).
7. European Commission, *Intra-EU BITs: Commission calls on THE UNITED KINGDOM to terminate Bilateral Investment Treaties with EU Member States*, https://ec.europa.eu/commission/presscorner/detail/en/inf_20_1687 (last visited, 21 July 2022).

highlighted that the CJEU in *Komstroy* specifically focused on the interpretation of Article 26(2)(c) of the ECT, meaning that the other options for intra-EU disputes, i.e., the courts or administrative tribunals of the Contracting Party party to the dispute, or any previously agreed dispute settlement procedure, would still remain available post-*Komstroy*. Furthermore, the question remains whether the CJEU should interpret treaties as domestic EU acts, at the same time considering EU's obligation to 'strictly observe' international law.

Concluding the first session and the panel discussion, Lucy Reed addressed the views on investment treaty arbitration in Asia and the Americas, in the light of the intra-EU latest developments. Lucy Reed clarified at the outset that while there was considerable focus on the EU and the intra-EU investment disputes, one must be reminded that there is a world beyond Europe. However, as Lucy Reed explained, there is an increasing divergence within each of these regions, as States enter into investment treaties with an increasing variety of dispute resolution procedures and consider reform options. Nowhere is this more evident than in the United Nations Commission on International Trade Law (UNCITRAL) Working Group III (WG III).[8] At the same time, there are some glimmers of convergence between Asia and the Americas. Discussing the convergence, Lucy Reed referred to a statement made by China in WG III, introducing its position on investor-State dispute settlement (ISDS) reform:[9]

> The present investor-State dispute settlement (ISDS) mechanism plays an important role in protecting the rights and interests of foreign investors and promoting transnational investment. It also helps to build the rule of law into international investment governance and to avoid economic disputes between investors and host countries escalating into political conflicts between nations. Therefore, China believes that the ISDS mechanism is one that is generally worth maintaining.

As such, Lucy Reed explained, certain States in Asia and the Americas defend the ISDS system and do not support the creation of a Multilateral Investment Court, meaning that there may be some points of (semi-)convergence in the future of investment arbitration.

§2.02 ADEQUATE DISPUTE RESOLUTION AND THEIR INTERACTION IN INTERNATIONAL COMMERCIAL DISPUTES

The second session was devoted to 'adequate dispute resolution', which may include expert adjudication, early independent evaluation, and the use of technology in risk analysis. The session was moderated by Geneviève Helleringer, Lecturer in Law at the

8. As background, UNCITRAL WG III has identified the following concerns about ISDS: (i) inconsistency in arbitral decisions; (ii) limited mechanisms to ensure the correctness of arbitral decisions; (iii) lack of predictability; (iv) appointment of arbitrators by parties; (v) the impact of party-appointment on the impartiality and independence of arbitrators; (vi) lack of transparency; and (vii) increasing duration and costs of the procedure.
9. Possible reform of ISDS, Submission from the Government of China, 19 July 2019, https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/073/86/pdf/V1907386.pdf?OpenElement (last visited, 21 July 2022).

University of Oxford, Research Fellow of Lady Margaret Hall, Oxford, and Law Professor at Essec Business School, France. Sir Geoffrey Vos, Master of the Rolls for England and Wales, and author of a report for the EU Commission on mediation in Alternative Dispute Resolution (ADR) and in charge of designing the future of justice in the UK, gave the keynote address on the visions for a digital justice reform. Sir Geoffrey Vos emphasized that the reform of justice in the digital era must be a reform of the overall system, rather than focusing only on the judicial decision-making process. In his address, Sir Geoffrey Vos brought up the role online dispute resolution had in the past, as well as the reality of congested dockets of the UK courts, in explaining why the digitalization of justice can offer a speedy and solid solution. The second keynote address was delivered by Catherine Kessedjian, Professor at the University of Paris II (Panthéon-Assas), Deputy Secretary General of the Hague Conference on Private International Law 1996–2000 on the new developments on mediation and settlements. Catherine Kessedjian first asked the question of whether mediation, as a process, is currently in a fashionable period, ending up being used for the wrong reasons. On the same line, various concerns can be raised with respect to the mediator, as a central figure of the mediation process: should the mediator be a generalist or an expert having knowledge of the substance of the dispute? Catherine Kessedjian also highlighted the current push for mediation in the context of the ISDS reform, including training States and mediators for a sensible implementation of this dispute-resolution mechanism for investment disputes.

The panel discussion continued with Christopher Newmark, Partner at Spenser Underhill Newmark, former Chair of ICC Commission on Arbitration and ADR, addressing mediation as a dispute-resolution mechanism for the settlement of international commercial disputes. Christopher Newmark eloquently explained that every dispute has certain moments in which a settlement can be pursued successfully. Identifying the 'settlement curve', Christopher Newmark indicated that to be able to facilitate the settlement agreement by way of mediation, parties – generally including here executives, management, in-house and external counsel – should be able to reach an agreement to mediate the dispute. Few disputes would actually go through the gates of mediation, as metaphorically suggested by Christopher Newmark.

Representing the views of in-house counsel, Jonas Bengtsson, Head of Corporate Affairs at Polarium Energy Solutions, board member of the Arbitration Institute of the SC, continued the panel discussion by looking into various options available to users in commercial disputes. Jonas Bengtsson explained that there are useful dispute-resolution mechanisms, including arbitration, mediation, expert determination, adjudication, early neutral evaluation, and also tailor-made options, such as the SCC Arbitration Institute Express,[10] which allow companies to choose the adequate one for the particular type of dispute and contractual partner. Some users may have a standard approach to disputes, while others would decide on a case-by-case basis.

10. 2021 SCC Rules for Express Dispute Assessment – SCC Express, https://sccinstitute.com/media/1800129/scc-rules-for-express-dispute-assessment_20210524.pdf (last visited, 21 July 2022).

The first day of the Conference concluded with a dinner cruise aboard M/S Waxholm III, an opportunity for Róbert Spanó, President of the European Court of Human Rights, to address the audience on *Arbitration and Human Rights – Different Worlds?*. Róbert Spanó's speech emphasized that arbitration and human rights frequently, if not always, interact. In particular, it is undisputed that investors acquire property rights which are recognized and protected as fundamental rights. It is expected that competent bodies may view arbitral awards, too, as acquired property rights and endorse their protection accordingly.[11]

§2.03 THE ORAL HEARING: VISIONS FOR THE FUTURE IN LIGHT OF PANDEMIC EXPERIENCES

The third session featured topical discussions on commercial arbitration, in particular on oral hearings following the pandemic experience, and visions for the future. Moderated by Christer Danielsson, Partner at Danielsson & Nyberg, former president of the Swedish Bar Association, the session began with the keynote addresses by Hilary Heilbron QC, Barrister at Brick Court Chambers, and by Professor Loukas Mistelis, Partner at Clyde & Co, and Clive M Schmitthoff Professor of Transnational Commercial Law and Arbitration. Hilary Heilbron focused on the opportunities for a re-think of arbitral procedure following COVID-19, and highlighted the preparation for the remote hearings, also in light of the digitalization of the dispute resolution process. Hilary Heilbron emphasized the advantages of video meetings and suggested that they should take place more often and be rather used instead of writing emails to discuss various contentious issues regarding the procedure. In his keynote address, Professor Loukas Mistelis addressed the oral hearing post-pandemic and the internal lex arbitri. Professor Loukas Mistelis began by highlighting that any question pertaining to issues of procedure, including virtual hearings, must begin from the applicable lex arbitri. In doing so, Professor Loukas Mistelis explained that the concept of lex arbitri varies from jurisdiction to jurisdiction, with the example of the English courts focusing, in particular, on the relation of arbitration proceedings with the courts that may be deemed to have jurisdiction over the proceedings. However, as essential as this relation with the courts may be, such a view disregards the fact that lex arbitri has two components: the internal lex arbitri, which regulates the arbitration procedure before and within the arbitral tribunal, and the external lex arbitri, which provides the regulatory framework for arbitration proceedings in relation to courts with supervisory role on the arbitration proceedings.

In addressing the oral hearings with the vision on the future, given the lessons learned from COVID-19, the panel discussion lined up Rupert Choat QC, Barrister at Atkin Chambers, giving the international arbitrator's perspective; Kristoffer Löf, Partner and Co-Chair of the Dispute Resolution Group at Mannheimer Swartling, giving

11. *See* recently, *BTS Holding, a.s. v. Slovakia*, European Court of Human Rights, Judgment of 30 June 2022.

the counsel's perspective; Kristin Campbell-Wilson, Secretary General of the Arbitration Institute of the SCC, on the institutional perspective; and Nicolas Martinez, Stockholm International Hearing Centre, on the 'backstage' of remote arbitration hearings. The panellists were in agreement that virtual hearings were implemented quickly and effectively, with hybrid hearings now benefiting from advanced technology. Furthermore, both counsel and arbitrators have adapted their techniques in advocacy and in the organization of the hearings, respectively. Institutions, equally, have played an essential role in ensuring full digital access to proceedings by providing, as in the case of the SCC with the SCC Platform, access to the file and easy communication with the parties and the arbitral tribunal.

The Conference concluded with lunch and a guided tour of the National Museum of Art in Stockholm. The Organizing Committee, comprised of Axel Calissendorff (chair); André Andersson; Crina Baltag; Christer Danielsson; Geneviève Helleringer; James Hope, Partner and Head of international arbitration at Vinge; Daria Kozlowska Rautiainen, Senior Lecturer at Stockholm University; Anders Reldén, Partner at White & Case, Stockholm; and supported by an administrative assistant, Anna Klasson, would like to express gratitude to all speakers and attendants of the Conference for their valuable contributions.