President's Message

The State Giveth and the State Taketh Away[1]

Arbitration exists by leave of the states. Of course, parties can solve their dispute with the help of a third person without the consent of a state, but only to the extent that they do so voluntarily and execute the award voluntarily. Blacklisting in a narrow industry or a close-knit community always helps to nudge the losing party into complying. But that is not what we dispute resolution lawyers are usually confronted with.

In the end, arbitration is as effective as the states allow it to be. There, an interesting observation may be made. It may be anecdotal, but it may also herald a groundswell: arbitration is on the defence from where it hailed, but still gaining ground in the former periphery for arbitration. It is not only business that is moving east, but also arbitration.

First the good news: China, India, Japan.

China may have more arbitration cases than any other jurisdictions (mostly domestic, though) but its arbitration act is rather restrictive. This is about to change, though. In July 2021, the Justice Ministry published a draft amendment, freeing arbitration of many of its previous restrictions.[2]

In the past, India was an arbitration desert, with Indian parties mostly looking for a foreign oasis, often Singapore. Over last few years, however, India woke up, taking deliberate steps to become more arbitration friendly.

Likewise, Japan is opening up its hitherto rather closed and correspondingly small arbitration industry and is now also offering state-of-the-art facilities with a lot of government support.

For the bad news we have to look closer, or more precisely to the European Union. There, the Court of Justice of the European Union (CJEU) notoriously chose to gut intra-EU investment arbitration.[3] It probably took a hint from the investment-arbitration bashing by the European Commission. In the UNCITRAL Working Group III on ISDS reform the Commission is

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1 Inspired by Book of Job 1:21.

2 See GAR Report: China publishes draft revised law, GAR 9 August 2021.

3 CJEU Case C-284/16, 6 March 2018, *Slovak Republic v. Achmea BV*. See also CJEU Case C-741/19, 2 September 2021, *Republic of Moldova v. Komstroy LLC*; CJEU Case C-109/20, 26 October 2021, *Republiken Polen v. PL Holdings Sàrl*.

trying hard to replace or at least curtail arbitration, so far thankfully with rather limited success.[4]

In July, the German *Bundesgerichtshof* took this anti-arbitration stance to heart and disallowed even ICSID arbitration in intra-EU cases.[5] This comes on top of the generally uneasy relationship between overly formalistic and dogmatic German courts and arbitration. (The silver lining on these clouds is the recently initiated revision of the German arbitration law that should curb some of the excesses.)

So far, so well known. No need to spill more ink over spilled milk. What is new and even more worrisome is another spilling: the spilling over of the anti-ISDS-fury to commercial arbitration. What had long been feared has come to pass: a European state court declared *Achmea* & Co. also applicable to commercial arbitration. On 9 February 2022, the Greek Council of State as supreme administrative court ruled that an LCIA arbitral award was not binding for lack of jurisdiction to hear a case concerning EU law.[6] The case concerned a state contract, i.e. a commercial contract between a state and a private party – the natural link between investment treaty cases and typical commercial cases and also the expected conduit for *Achmea* thinking. Hopefully this decision remains an outlier.

Somewhat less in the limelight but also worrying is a notable shift of the French judiciary. Famous for decades for its strong support of arbitration, the French courts are now taking a closer look, including addressing new issues and taking their own evidence, and they do not seem to always like what they see.

What does all of this tell us? First and foremost, it means that Switzerland must avoid any infection by the EU virus. So far, the judiciary, the Government, the Parliament, and the practitioners remain immune. *Pourvu que ça dure*, as they would say in Geneva. Secondly, we need to shout from the rooftops that Switzerland is not in the EU. It remains a blissed oasis in a parching EU.

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4 See, e.g., *Possible reform of investor-State dispute settlement (ISDS). Submission from the European Union*, UNCITRAL WG III doc. A/CN.9/WG.III/WP.145, 12 December 2017.

5 Bundesgerichtshof, 27 July 2023, I ZB 43/22, I ZB 74/22, I ZB 75/22.

6 Council of State, case no. 246/2022. POLLY EFSTRATIADI & EVANTHIA KASIORA, The *Achmea* ripple effect: Greek Conseil d'Etat finds that a commercial arbitral tribunal has no jurisdiction to deal with matters of EU law, Cahiers de l'Arbitrage, 2023/1, 111 et seqq.

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