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Revisiting the Idea of ISDS Within the EU and an Arbitration Court: The Effect on Party Autonomy as the Main Pillar of Arbitration and the Enforceability of Arbitral Awards

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The world after the Achmea v Slovakia decision focuses on the question about the future of ISDS in relation to intra-EU BITs. At the ASIL conference on the 6 April 2018, a representative of the EU observed the decision in the *Achmea* case as one that was perhaps a natural consequence of the intricacies of the EU and its members States; of national laws and EU laws; of BITs with EU Member States; and the mechanisms available under the EU system. The current geopolitical developments that affect ISDS, the status of intra-EU BITs, and the possible establishment of a permanent arbitration court raises various questions. One of them is whether awards rendered by such courts are enforceable under the 1958 New York Convention.

The Appointment of 'Arbitrators or Adjudicators' in the Court

The EU's idea of creating a permanent court that renders awards is presented as if it were to be a permanent *arbitration court* with sitting *arbitrators* who would render *awards*. The idea of appointing those 'adjudicators' for the permanent court would potentially lead to improvements in the arbitrators' pool, such as to gender equality. To steer the entire debate of ISDS and intra-EU BITs towards a policy debate on gender equality does disservice to the fact that the international arbitration community has made it a key vocal point with many efforts ranging from institutional focus to the pledge and the *#MeToo* movement in international law. Young ICCA has been in existence for almost ten years and has opened the doors of international arbitration to many. The argument would also not be original: the debate on gender equality has often turned towards the efforts of institutions achieving such gender equality. In that light, the debate automatically shifts to the idea of institutional appointments. In most cases, arbitral institutions do not appoint co-arbitrators. The parties in arbitration appoint them. The reality of the EU's envisioned court is that the appointments of arbitrators to that court are probably sovereign appointments. And it is again necessary to remind all of the words of Fali Nariman:

> "Sovereigns are like billiard balls, they collide often but seldom do they go in the right direction."

The sovereigns appointing those arbitrators or 'adjudicators' act as respondents in those arbitration cases. To say that States are not only respondents but also treaty negotiators falls on deaf ears. So

the sovereigns appoint adjudicators who would be asked to resolve disputes based on treaties that they have negotiated? Or must one understand this premise in a different way?

Enforceable Under the New York Convention?

Would the awards rendered by those adjudicators of this court be enforceable under the New York Convention?

In 1958, the delegates shared some concerns in this regard. Article I(2) is instructive for appreciating the importance of party autonomy under the NYC: arbitrations that are of a mandatory nature do not fall under the Convention's scope.[1)]

> "It was the Czechoslovakian delegate that proposed Article I(2). The debate then focused on adding the phrase "to which parties have *voluntarily* submitted". Awards rendered by permanent arbitral bodies would only fall under the Convention if those bodies were not really court of justice – exercising compulsory jurisdiction – irrespective of whether they were called *arbitral* bodies or not. If a dispute came to a permanent arbitration court on the basis of mandatory law, then the proceedings were not arbitral but judicial in nature. The delegates agreed that the test was whether the submission was voluntary and a consequence of real freedom of contract: the autonomy of the will. The Belgian representative proposed the insertion of the word 'voluntarily' – an addition that was regarded superfluous by the other delegates – and it was ultimately not included for want of necessity."[2)]

The history reminds us of the post WW-II communist east bloc 'permanent arbitral courts'. Those awards that were rendered by such courts and other semi judicial courts were the ones that the drafters wanted to exclude from the New York Convention.

The permanent investment court would bring about several questions. First, what happens to the element of the choice? It seems that claimants in ISDS within the EU no longer have a say in the choice of arbitrators and the institution that is to administer the arbitration. Second, what is the *de facto* identity of the court? Is the court quasi judicial or not? Do EU Member States voluntarily comply and collaborate with the establishment of the court and the appointment of its adjudicators? Is the court's dispute settlement system premised on party autonomy or premised on sovereign control, and is it in effect judicial? The appointments of the permanent adjudicators of this 'permanent arbitral body or court' are not the same as appointments of international arbitrators in an investor state dispute.

The question that must be answered is whether this court renders in fact *quasi-judicial decisions*, and is comprised of State-appointed adjudicators, who sit on a permanent court which happens to have as its nomenclature – *arbitral* court?

Some historical knowledge would help the key stakeholders to make informed choices. The idea of a permanent arbitration court has been raised before in the 90s and discussed by the leading experts of international arbitration: Schwebel, Holtzmann and Nariman. And that idea was referred to as the impossible dream from the man from la Mancha in the musical Don Quixote.

> "At the LCIA Centenary Conference in London (in the year 1995) some old stalwarts – Judge Howard Holtzman and Judge Stephen Schwebel (then a Sitting Judge of the ICJ) envisaged the prospect in the 21st century of a new international Court for resolving disputes on the enforceability of arbitral awards. But these worthy gentlemen being experienced Arbitrators and men of the world they also recognized that setting up an International Court of Arbitration would be tilting at the wind mills of national sovereignty. One of them (Judge Schwebel) in his speech recalled the theme of a song of a popular film at the time "the Man from La Mancha" where the principal character Don Quixote, who is a dreamer – always dreamed, "the impossible dream". An International Court of Arbitration: Schwebel said, was like an impossible dream. Well, we are now well into the second decade of the 21st century and an International Court of Arbitral Awards continues to remain an impossible dream."

To care about the protection of foreign investment and direct investment is a false premise when the foundation of that idea of dispute resolution, i.e. party autonomy and a neutral forum that is not encapsulated by sovereign control, is torn away.

The 'awards' of this 'arbitration court' would perhaps not be enforceable under the New York Convention. Losing the New York Convention as an enforcement mechanism is something that the EU would want to avoid. The New York Convention is what makes international trade work.

> "This landmark has many virtues. It has nourished respect for binding commitments, whether they have been entered into by private parties or governments. It has inspired confidence in the rule of law. And it has helped ensure fair treatment when disputes arise over contractual rights and obligations. International trade thrives on the rule of law: without it parties are often reluctant to enter into cross border commercial transactions or make international investments.[3)]

If the objections to party-appointed arbitrators, the idea of transparency, and the idea of a centralized court within the EU seems to be paramount to investment in the EU, why one does not rely on an independent institution or organization to keep a roster of arbitrators with ample experience in investment arbitration and even expertise in EU law? The ICC is at the forefront of transparency and fair lists and roster of arbitrators, and the PCA or ICCA are both organizations that could take on a leading role in rethinking ISDIS within the EU. They would do so in a way that preserves the pillars of international arbitration that protects and encourages investment, in a way forward to blossoming trade within and beyond the EU. Whatever may be, the EU might not want to create a court that renders awards that cannot be enforced under the New York Convention, since:

> "The New York Convention perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law."[4)]

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References

?1 M.Paulsson, The 1958 New York Convention in Action (Kluwer 2016), pp. 120-121.

?2 M.Paulsson, The 1958 New York Convention in Action (Kluwer 2016), p. 121.

?3 Kofi Annan, “Opening address commemorating the successful conclusion of the 1958 United Nations Conference on International Commercial Arbitration,” in Enforcing Arbitration Awards under the New York Convention – Experience and Prospects, 1 (United Nations 1999).

?4 Michael Mustill, Arbitration: History and Background, 6 J.Intl. Arb. 43 (1989).

This entry was posted on Monday, May 21st, 2018 at 10:09 am and is filed under Achmea, Arbitration, Arbitration Awards, BIT, Enforcement, European Law, European Union, International

arbitration, Intra-EU BITs, Investment Arbitration, New York Convention
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