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Proceedings from the 5th Annual Schiefelbein Global Dispute Resolution Conference

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On January 13, 2023 the Sandra Day O'Connor College of Law at Arizona State University hosted the 5th annual Schiefelbein Global Dispute Resolution Conference. Like previous iterations of this conference, the innovative program featured top lawyers, internationally recognized mediators, academics, and leaders of arbitration institutions discussing timely issues in international dispute resolution.

This year's conference was headlined by *Claudia Salomon*, President of the International Chamber of Commerce's International Court of Arbitration (Paris, France), who delivered the keynote address, entitled "Damocles Sword—A Tool to Resolve Disputes, If Used Effectively." Ms. Salomon identified business interruption as a persistent, imminent threat and an important motivator for the business community to innovate, to improve, and to engage in timely means of conflict resolution. She then posed the question: what kind of persistent and imminent threat could be used in the world of conflict resolution to motivate the parties and their lawyers to consider (or reconsider) resolving the dispute before the arbitration hearing begins? Her answer: the increased use of deadlines. Ms. Salomon noted that the biggest deadline was the arbitration hearing itself, and suggested a few more deadlines along the way in the arbitration process. She recognized that any deadline must be reasonable and give parties time to engage in negotiation, and that all parties must feel the motivational force of the deadline. Finally, she noted that all parties must have a clear understanding of what is at stake as well as the specific issues needing to be decided. Ms. Salomon's remarks appeared to imply that mediation could become an interim step in the arbitration process, which could make sense if the Singapore Convention continues to gain traction.

The Conference's first panel, Catastrophic Sovereign Events, was moderated by *Melida Hodgson* (Arnold & Porter Kaye Scholer LLP, New York, NY). The panel started with a discussion of the Russian invasion of Ukraine as an example of a catastrophic sovereign event. *Dr. Chiara Giorgetti* (University of Richmond School of Law, Richmond, VA) emphasized the importance of the Draft Articles on State Responsibility for Internationally Wrongful Acts and how it can be used to not only to stop violence but also seek reparation from the aggressors. Dr. Giorgetti and *Jeremy Sharpe* (Independent Arbitrator, Ottawa, Canada) suggested that ad hoc commissions are a quick way to compensate victims of catastrophic events and gave several examples of successful commissions, such as the Eritrea-Ethiopia Claims Commission or the US-Iran Claims Tribunal. Mr. Sharpe also pointed out that such commissions also improve diplomatic relations, deter future

law-breaking by putting a price on aggression, provide reconciliation, and closure. *Baiju Vasani* (Twenty Essex, London, UK) emphasized that using bilateral investment treaties in these instances is difficult for a number of reasons. In the case of Russia's invasion of the Crimean Peninsula in Ukraine, for example, pre-invasion investors invested under Ukrainian law not the occupier's laws – and Russia is an occupier under international law. Therefore, recourse under any pre-2014 invasion investment treaties would be against Ukraine, not Russia. Furthermore, investment treaties are a quid pro quo transaction between States, they are not like the human rights treaties where de facto control of territory provides jurisdiction without addressing issues of sovereignty. In effect, Russia's status as a non-Party to pre-invasion investment treaties in the Crimean Peninsula means that such treaties' terms cannot be applied to Russia, even for damages that Russian control may have caused. Such investors have to look to other means to recoup their losses, likely through subsequent peace agreements.

Mr. Vasani's points led to disagreements among the panelists as to who should bear the costs of catastrophic events. In the case of climate change, Mr. Vasani argued that States should compensate the investors' legitimate long-term investment expectations. *Dr. Claudia Frutos-Peterson* (Curtis, Mallet-Prevost, Colt & Mosle LLP, Washington, D.C.) and Dr. Giorgetti disagreed. Dr. Giorgetti asserted that under international law State's rights to regulate is more prominent than corporate expectations of long-term investment, pointing to the *Phillip Morris* Tribunal that determined big tobacco should have anticipated government regulations. Dr. Frutos-Peterson explained that a tribunal looking at the U.S.-Argentina bilateral investment treaty ruled that financial crises can be an essential security interest justifying state regulations. She also explained that other tribunals have ruled that States have flexibility to determine what is meant by "essential security interests" justifying regulations. The panel concluded with a discussion of bilateral investment treaties addressing catastrophic events with Dr. Frutos-Peterson noting the necessity of clear drafting to emphasize intent.

The subject of the second conference panel, moderated by *Jonathan Fitch* (Fitch Law Partners LLP, Boston, MA) was Pharma & Life Sciences Disputes. The panel started with a discussion about the arbitrability of patents. *Dr. Dorothee Schramm* (Independent Arbitrator, Geneva, Switzerland) categorized States into three groups for handling patent arbitration. The first group she referred to as "liberal countries," those where all patent disputes including patent validity, patent entitlement, and patent registry can be fully arbitrated. *Grant L. Kim,* (LimNexus LLP, San Francisco, CA) placed Hong Kong and Singapore in this group. According to Dr. Schramm, most countries belong to the second group where patent disputes are arbitrable, but the outcome is only binding between the parties. Mr. Kim identified the U.S. as being in this group. Dr. Schramm described the third group as "strict countries," either disallowing patent dispute arbitrations or placing strict restrictions on them. Mr. Kim placed China in this group. To circumvent the non-arbitrability of patents, Dr. Schramm advised drafting contracts to address such concerns.

The panel agreed that arbitration of patent claims was more beneficial than litigation. Mr. Kim touted the ability to choose arbitrators with relevant knowledge of the field and as well as reduced costs. Dr. Schramm, *Steven M. Bauer* (JAMS, Boston, MA), and *James P. Duffy IV* (Reed Smith LLP, New York, NY) all noted that companies look for faster ways to resolve their disputes and arbitration provides time savings. However, Mr. Kim cautioned that jurors tend to favor inventors, and inventors sometimes prefer litigation thinking they will have better odds than in arbitration. The panel concluded with Mr. Bauer and Mr. Duffy expressing their views on long-term collaboration agreements. Mr. Bauer and Mr. Duffy agreed that such agreements cause parties to resolve disputes quickly. Mr. Bauer advised that the ICC's rules being used in the life sciences

industry are generally from the construction industry where a similar collaborative environment exists. However, Mr. Duffy did not think the ICC Rules were completely implemented in the pharma and life sciences field just yet. Mr. Duffy advised that arbitration a better tool than litigation for emergency matters, particularly due to cost and time issues.

The day's third panel, Nontraditional International Arbitration Claims, was moderated by *Hugh Carlson* (Three Crowns LLP, Washington, D.C.) with panelists representing leading arbitration institutions, including *Claudia Salomon* (ICC International Court of Arbitration, Paris, France) and *Patrícia Kobayashi*, (Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada, São Paulo, Brazil). Each noted that technology and renewable energy disputes are becoming increasingly common within their organizations. Ms. Salomon said they present novel issues and provide unique challenges in finding qualified arbitrators. Ms. Kobayashi noted that her institution is watching how arbitrators across the world are deciding renewable disputes, so that the expectations of parties in their own proceedings might be managed. *Steven K. Andersen* (International Centre for Dispute Resolution, Los Angeles, CA) identified increased arbitration cases in the tech and life-sciences sectors. *Dr. Jacomijn van Haersolte-van Hof* (London Court of International Arbitration, London, UK) spoke of the complexity of cases involving multiple parties and emerging technologies. She agreed with Ms. Salomon that finding knowledgeable arbitrators with the right background and the requisite experience is increasingly difficult. Mr. Anderson suggested that these issues can be resolved through industry-group leadership and training. He stressed the importance of training lawyers versed in some tech sectors to learn about other fields and make themselves available to arbitrate those claims.

When asked about what the future holds, the panelists were reluctant to offer any strong predictions. They agreed that developments in technology would affect not only claims but provide important instruments aiding the arbitral process, increasing proceedings' sophistication. Additionally, Ms. Salomon predicted that more disputes with lower financial value would likely to begin using their services.

The Conference's final panel, Innovation in Investor-State Arbitration, was moderated by *Roger P. Alford* (University of Notre Dame Law School, South Bend, IN). *Martina Polasek* (International Centre for Settlement of Investment Disputes, Washington, D.C.) opened the panel's remarks specifically discussing the new ICSID rules issued in 2022 and noted that ICSID hopes the new rules will bring greater transparency to proceedings. She also discussed several specifics of the new rules' including the disclosure of third-party funding agreements and the rules' impact on the time and cost of proceedings. *Alejandro A. Escobar* (Baker Botts LLP, London, UK) discussed how arbitral tribunals have the power to prevent unfair or improper use of arbitration procedure and highlighted several recent awards that were overturned or criticized on abuse of process grounds. He stressed that tribunals need to take control of proceedings in the face of unfairness to a party, even though the conduct at issue may comport with the application of procedural rules.

David Ingle (Allen & Overy LLP, Washington, D.C.) focused on issues of inequity in international arbitration cases discussing how larger foreign investors reap the benefits of bilateral investment treaties while smaller investors lack such bargaining power. Mr. Ingle discussed the recent push towards expedited arbitration for disputes below a specific threshold and limiting the potential costs of proceedings and document production. He noted a movement towards allowing parties to negotiate the costs of proceedings amongst themselves, which may be cheaper and faster for the parties involved. *Christina L. Beharry* (Foley Hoag LLP, Washington, D.C.) pointed out that damage awards have significantly grown in the last 25 years with approximately 27% of

investment claims involving damages upwards of US$ 500 million, with 14% over one billion U.S. dollars. In response, she said States are seeking innovative ways to avoid massive damages awards against them. For example, some States have begun revising their model BITs, in particular the valuation methodologies used when calculating damages and applying commercially reasonable interest rates, a trend that she believes will continue. Ms. Beharry also pointed out an issue with consistency in awards, discussing cases where analogous fact patterns and breaches incurred different damages awards based on the differing valuation methods used by tribunals.

This entry was posted on Friday, March 10th, 2023 at 8:09 am and is filed under Arbitration, Conference, International arbitration, Investment Arbitration
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