President's Message

Lessons from Echternach

Yes, it is a place, not a person, and no, I've never been there either. To the best of my knowledge, Echternach is a quaint old town in the quaint old Grand Duchy of Luxembourg. Its main claim to fame is the yearly Dance (or Hopping) Procession. The form of this peculiar procession changed over the centuries. At least at some point in time it seems to have consisted in taking two steps forward and one step back. The procession does eventually reach the church, but along the way spectators might have had doubts whether it will ever succeed.

The Dance Procession made it onto the UNESCO List of the Intangible Cultural Heritage of Humanity. And rightly so. It stands as a metaphor for many if not most human activities. There is progress (granted, some readers might look at the estate of the environment and have their doubts), but it seems inescapably hampered by intermittent regressions.

Arbitration is no different. It may not seem so. The last decades, particularly since the adoption of the 1958 New York Convention, the 1965 ICSID Convention, and the 1985 UNCITRAL Model Law, have witnessed an incredible and unparalleled boom of arbitration all over the world. But success brings its own problems.

A case in point is investor-state dispute settlement. The explosion of ISDS cases led to a backlash not just in diplomatic circles, but even on the streets. One day, I was approached in another quaint old town, somewhere in Saxony, by an NGO activist rhetorically asking me: "You, too, are against arbitration, aren't you?" I smiled and said, "No". He stood there dumbstruck and I strolled on.

Political sentiments count. How else to explain the notorious *Achmea* decision by the European Court of Justice that is seated in Luxembourg, just a few kilometers away from Echternach?[1] To deprive EU companies of the benefits of investment treaty arbitration and force them to go to the local courts if EU law is involved as if EU law was some sort of Holy Grail only the initiated judges may administer? And the irony of forcing the Dutch insurance company Achmea to turn to the Slovak courts for reprieve against arguably expropriating measures of the Slovak Government! Each year the EU Commission itself publishes the EU Justice Scoreboard. Figure 46 of the

[1] ECJ Case C-284/16, 6 March 2018, *Slovak Republic v. Achmea BV*; *see* ASA Board Message – The Cost of *Achmea*, ASA Bulletin 3/2018, 553 *et seqq*.

2020 edition exposes that few Slovak companies perceive their own courts to be independent: "*very good*" barely registers, "*fairly good*" keeps hovering around 10-15%, leaving Slovakia languishing at the bottom of the ranking. Now imagine being a foreign company…

Unimpressed by its own statistics and its own previous insistence on the availability of arbitration for ISDS, the EU Commission keeps spreading the gospel that only state-appointed judges are good judges, disparaging private arbitrators at every opportunity. Granted, some ISDS reform is necessary. There are too many abuses of the system. But you don't throw the baby out with the bathwater just to avoid a few abusive cases.

Just across the border to the east of Echternach, another court took a step back, too. The Superior Court of Frankfort, no less, opined in an *obiter dictum* that there is much to suggest that an award accompanied by a dissenting opinion is in breach of public policy.[2] I agree that dissenting opinions are a nuisance. But why punish the award of the majority for a practice that is quite well established in international arbitration even though more so in some legal cultures than in others? If anything, it is education by truncheon.

Maybe distance from Echternach helps. In Austria, the Supreme Court recently held that online hearings do not infringe upon the right to be heard and are fundamentally innocuous ("*grundsätzliche Unbedenklichkeit*").[3] The Austrian Supreme Court thus swiftly dismissed a challenge against the arbitral tribunal within a mere six weeks. Well done!

What does it mean for Switzerland? With the revised 12th Chapter of the Private International Law Act (the Swiss *lex arbitri*) and the increased role of ASA in Swiss arbitration in general and the Swiss Rules in particular, Switzerland has taken two strides forward. We now must make sure that we do not take a step back in the course of the implementation. Let's leave Echternach in Luxembourg. And, yes, one day I want to go there and watch how they take their time but ultimately do reach the church.

FELIX DASSER

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2 Oberlandesgericht Frankfurt 16 January 2020, case no. 26 Sch 14/18; *see* DANIEL HOCHSTRASSER/PREDRAG SUNARIC, *Dissenting Opinion* – Weder Ärgernis noch Torheit, SchiedsVZ 2021, 35 *et seqq*.

3 Austrian Oberster Gerichtshof 23 July 2020, case no. 18 ONc 3/20s.

SAVE THE DATE

Dreiländer-Konferenz 2021, Zurich
3 September 2021

ASA General Meeting & Conference 2021, Bern
17 September 2021

For more information see www.arbitration-ch.org