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Long Live the Golden Summer: Arbitration, Courts, & Colas

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LONG LIVE THE GOLDEN SUMMER: ARBITRATION, COURTS, & COLAS

2019 ANNUAL LECTURE ON INTERNATIONAL COMMERCIAL ARBITRATION
AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW
WASHINGTON, DC

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I. INTRODUCTION

I am very honored and humbled to have been chosen as this year’s speaker in the field of international commercial arbitration, not least because of the distinction of those who preceded me, a line of legal luminaries who are household names in the world of arbitration.

I willingly acknowledge that, at first sight, my subject matter, *Long Live the Golden Summer: Arbitration, Litigation, and Colas*,¹ may seem a little frivolous compared with, for example, *Commercial Arbitration under the*

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1. I would like to acknowledge and thank my colleague Trevor May for his thorough research and invaluable assistance in the preparation of my lecture.

*Scrutiny of Human Rights Courts and Investment Tribunals*² by my friend, Gabrielle Kaufmann-Kohler, or *Legal Risks for Product Liability*³ by my friend, Johnny Veeder, among the topics developed by previous lecturers. Nevertheless, I will attempt to entertain and educate you in the next hour about how colas and arbitration have a great deal in common.

As you will no doubt recall, long before the *Game of Thrones*, there was the “Game of Colas”: the so-called “Cola Wars” between Pepsi and Coca-Cola.⁴ In the over 100 years that the brands have competed head-to-head, Coca-Cola has usually prevailed. Today, Coca-Cola’s share of the cola market is almost twice that of Pepsi’s.⁵

However, in the mid-1980s, winter was coming for the “Official Soft Drink of Summer.”⁶ Coca-Cola’s market share, while still larger than Pepsi’s, was eroding.⁷ Pepsi’s growth had outpaced Coca-Cola’s for over a decade, and “by 1983, Pepsi was outselling Coca-Cola in supermarkets.”⁸

In the heat of this battle, Pepsi launched one of the most effective marketing campaigns of all time, to which Coca-Cola would respond with the “marketing blunder of the century.”⁹ In the “Pepsi Challenge,” consumers undertook a double-blind taste test of both colas. The results shocked Coca-Cola lovers: blindfolded participants preferred the taste of Pepsi.¹⁰

Under threat, Coca-Cola scrambled to fight back. It decided to fight fire

2. Gabrielle Kaufmann-Kohler, Professor, University of Geneva School of Law, Address at the American University Washington College of Law Annual Lecture on International Commercial Arbitration: Commercial Arbitration under Scrutiny of Human Rights Courts & Investment Tribunals (2011), in 29 ARB. INT’L 153, 153 (2013).

3. V.V. Veeder, Queen’s Counsel, England and Wales, Arbitrator, Address at the American University Washington College of Law Annual Lecture on International Commercial Arbitration: Arbitrators and Arbitral Institutions: Legal Risks for Product Liability? (2012), in 5 AM. U. BUS. L. REV. 335, 335 (2016).

4. Matthew Yglesias, *Sweet Sorrow: Coke Won the Cola Wars Because Great Taste Takes More than a Single Sip*, SLATE (Aug. 9, 2013, 8:15 AM), <https://slate.com/business/2013/08/pepsi-paradox-why-people-prefer-coke-even-though-pepsi-wins-in-taste-tests.html>.

5. *Id.*

6. See *History of Coca-Cola Advertising Slogans*, THE COCA-COLA COMPANY, <https://www.coca-colacompany.com/stories/coke-lore-slogans> (last visited Nov. 28, 2020) (branding Coca-Cola the “Official Soft Drink of Summer” in 1989).

7. Yglesias, *supra* note 4.

8. Yglesias, *supra* note 4.

9. *The Story of One of the Most Memorable Marketing Blunders Ever*, THE COCA-COLA COMPANY, <https://www.coca-colacompany.com/stories/coke-lore-new-coke> (last visited Nov. 28, 2020).

10. Yglesias, *supra* note 4.

with fire. Coca-Cola reformulated its storied recipe to create a sweeter flavor intended to outcompete Pepsi, as well as the original Coca-Cola, in taste tests.¹¹ The result: “New Coca-Cola,” a product designed to beat Pepsi at its own game.

It did not. Following New Coca-Cola’s release, 400,000 customers sent a tsunami of complaints to Coca-Cola, and Coca-Cola was even sued by partners in its distribution chain.¹² Aside from this collateral damage, the plan failed even more spectacularly with respect to its entire *raison d’être*: outcompeting Pepsi. During New Coca-Cola’s first month on the market, Pepsi had its fastest-ever sales growth.¹³

But why? Coca-Cola had designed a product that outperformed both Pepsi and Coca-Cola in a blind taste test. Shouldn’t that product have gone on to dominate the market? It turns out that there is a difference between what people like to taste and what people like to drink. With its taste tests, Pepsi was exploiting a cognitive loophole: in beverage taste tests, people prefer sweeter flavors.¹⁴ The pattern holds for both colas and wine,¹⁵ but that test result does not necessarily mean that people want to drink a sweeter beverage. Pepsi wins when you just take a sip, but people do not buy soft drinks just to take one sip.

Moreover, even though Pepsi was growing faster than Coca-Cola in the 1980s, Coca-Cola still had millions of loyal customers.¹⁶ Millions of loyal customers who did not want Pepsi.¹⁷ Irrespective of taste, Coca-Cola’s customers felt betrayed by the company’s decision to replace the product that had secured their loyalty in order to win over customers who had never been loyal to the brand.¹⁸

So why am I, an arbitrator from Montreal, talking about colas at an international commercial arbitration lecture in Washington? I recount the “New Coca-Cola” story to you this evening because it offers a valuable

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *See id.* (contending that blind taste tests showed participants also preferred sweeter wine).

16. *Id.*

17. *See id.* (reporting that Coca-Cola’s customers in the 1980s “weren’t looking for a new flavor”).

18. *See* Becky Little, *How the ‘Blood Feud’ Between Coke and Pepsi Escalated During the 1980s Cola Wars*, HISTORY CHANNEL, <https://www.history.com/news/cola-wars-pepsi-new-coke-failure> (last updated Mar. 12, 2020) (detailing the anger Coca-Cola customers felt toward the company when it replaced the formula).

lesson for the arbitration world.

Consider the current state of international arbitration. For decades, international arbitration has developed and improved, achieving success in new markets and on an ever-increasing scale. In 2018, parties registered a record fifty-six cases at the International Centre for Settlement of Investment Disputes (“ICSID”), a new record.¹⁹ The record year before 2018 was 2017, and the record year before 2017 was 2015.²⁰ Similarly, 2018 was also a record-breaking year for the London Court of International Arbitration (“LCIA”)²¹ and the International Chamber of Commerce (“ICC”) International Court of Arbitration.²² In 2018, in a wide-ranging survey of practitioners, academics, judges, third-party funders, government officials, expert witnesses, economists, entrepreneurs, and others, ninety-seven percent responded that “international arbitration is their preferred method” of resolving cross-border disputes.²³

Yet, for decades, we have been told that arbitration must be stopped.²⁴ Recently, the death chants have intensified. Investor-State Dispute Settlement (“ISDS”) “should be dismantled and either discarded or rebuilt from scratch.”²⁵ Gary Born warns us that “winter is coming.”²⁶

The “White Walkers”²⁷ in this dispute resolution *Game of Thrones* have

19. Int’l Ctr. for Settlement of Inv. Disps. [ICSID], *The ICSID Caseload — Statistics*, at 7, Issue 2019-1 (2019), [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1\(English\).pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1(English).pdf).

20. *Id.*

21. LONDON COURT OF INT’L ARBITRATION, 2018 ANNUAL CASEWORK REPORT 3 (2018).

22. See ICC Arbitration Figures Reveal New Record for Awards in 2018, INT’L CHAMBER OF COMMERCE (Nov. 6, 2019), <https://iccwbo.org/media-wall/news-speeches/icc-arbitration-figures-reveal-new-record-cases-awards-2018/> (announcing that 2018 had the second-highest number of ICC cases ever reported).

23. WHITE & CASE, 2018 INTERNATIONAL ARBITRATION SURVEY: THE EVOLUTION OF INTERNATIONAL ARBITRATION 2 (2018), <https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf>.

24. See Anthony Depalma, *Nafta’s Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say*, N.Y. TIMES (Mar. 11, 2001), <https://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html> (discussing opponents’ arguments against tribunal arbitration).

25. Jaroslav Kudrna & Anna Bilanová, *The New Age of the Megacase*, 13 GLOBAL ARB. REV. 14, 16 (2019).

26. Alison Ross, *Winter Is Coming: Is Arbitration’s “Long, Golden Summer” Coming to an End?* 13 GLOBAL ARB. REV. 7, 8 (2019) [hereinafter Ross, *Winter Is Coming*].

27. The “White Walkers” are one of the main antagonists in the television show *Game of Thrones* and represent a persistent threat to the Seven Kingdoms. *Game of*

mobilized, and the “New Coca-Cola” of international dispute resolution has arrived. Most notably, the Comprehensive Economic and Trade Agreement (“CETA”) between the European Union (“EU”) and Canada contains a proposal for a permanent investment court, the Investment Court System (“ICS”), which would replace traditional ad hoc party appointments with fixed-term institutional ones.²⁸ The EU has also proposed a similar mechanism for ISDS, more generally, with the Multilateral Investment Court (“MIC”).²⁹ Will the introduction of such alternatives lead to the “Red Wedding”³⁰ for seasoned arbitrators?

My answer to this existential question is *no*. I predict that arbitration’s Golden Summer will endure. The popularity of arbitration is not circumstantial or “seasonal”; rather, it stems from advantages inherent to arbitration as a process for settling disputes. Gary Born is right, there are some people who want to put an “end [to] international arbitration as we know it.”³¹ But he is also right that we can avoid the demolition of arbitration.³²

International arbitration has outlasted and will outlast its critics because it functions well. I echo the words of Stephen Jagusch, Q.C., that arbitration has “stood the test of time” and that “[i]t is here to stay.”³³ Like Coca-Cola, arbitration is confronted by challengers. Arbitration should not rest idly on its laurels. But as Coca-Cola learned the hard and painful way, our response

Thrones: Hardhome (HBO television broadcast May 31, 2015) (showing the White Walkers, an army of the undead, for the first time).

28. See *ANNEX to the CETA Joint Committee Proposal for a Council Decision on the Position to be taken on behalf of the European Union as Regards the Adoption of a Decision Setting Out the Administrative and Organisational Matters Regarding the Functioning of the Appellate Tribunal*, at 1–2, COM (2019) 457 final (Nov. 10, 2019) (proposing a fixed nine-year term for Members of the Appellate Tribunal, a decision made pursuant to Article 8.28.7 of the CETA).

29. See Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the European Union and its Member States, Rep. of the UNCITRAL in Preparation for the Thirty-Seventh Session of Working Group III, U.N. Doc. A/CN.9/WG.III/WP.159/Add.1, at 5 (Jan. 24, 2019) (proposing a nine-year non-renewable term for the Appellate Tribunal).

30. The “Red Wedding” is a key turning point in the television show *Game of Thrones* in which several protagonists are murdered, ending their storylines. *Game of Thrones: The Rains of Castamere* (HBO television broadcast June 2, 2013) (portraying a gruesome massacre that occurred in the aftermath of a wedding feast).

31. Ross, *Winter Is Coming*, *supra* note 26, at 8.

32. *Id.* at 11.

33. Alison Ross, *The Winter Denier*, GLOBAL ARB. REV. (Dec. 21, 2017), <https://globalarbitrationreview.com/article/1151943/the-winter-denier> [hereinafter Ross, *The Winter Denier*].

to challengers should not be to change what makes us successful.

I will review briefly at the outset the most recent iteration of the perpetual debate surrounding international arbitration, including calls for quasi-judicial institutions such as the MIC. I will then argue that the advantages of arbitration over alternatives, such as the MIC, lead inexorably to the conclusion that international arbitration will continue to be the premier method for resolving cross-border disputes. I will then examine the prism of future developments that confirm arbitration's enduring relevance. Finally, I will come to my conclusion that, like Coca-Cola, the arbitration community should continue to do what it has done so well for decades — providing a process that litigants like and want — and not change what we do in order to please people who never wanted us to succeed in the first place.

II. THREATS OF WINTER FOR INTERNATIONAL ARBITRATION

The debate about the merits of arbitration is not new. International arbitration has long been the object of hostility and hyperbole. The World Bank's own ICSID has often been a lightning rod for criticism. Detractors have accused the institution of bias in favor of corporations and lamented its prohibitive costs and lack of an appeal mechanism.³⁴ When Bolivia became the first member state to leave ICSID in 2007, Bolivian President Evo Morales claimed that “[t]he governments of Latin America . . . never win the cases. The multinationals always win.”³⁵

Surprisingly, even some arbitration insiders, such as Jan Paulsson and Albert Jan van den Berg, have recently joined the chorus of critics unfamiliar with the world of international arbitration. George Kahale, an otherwise outstanding, very successful litigator and a veteran of many high profile arbitrations, is now calling for ISDS's eradication.³⁶ Mr. Kahale claims that ISDS “lack[s] . . . the normal safeguards of a serious legal system,” making it “the Wild Wild West of international practice.”³⁷ Despite the consistently verified fact that states win more investment cases than they lose, Kahale insists on the old canard that the system is biased against states.³⁸ He now encourages states to “actively explore the termination of ISDS provisions,” and even claims that “ending or limiting a system . . . as dangerous as ISDS

34. See Silvia Karina Fiezzoni, *The Challenge of UNASUR Member Countries to Replace ICSID Arbitration*, 2 BEIJING L. REV. 134, 134–36, 142 (2011).

35. Naomi Klein, *Latin America's Shock Resistance*, THE NATION (Nov. 8, 2007), <https://www.thenation.com/article/archive/latin-americas-shock-resistance/>.

36. Kudrna & Bilanová, *supra* note 25, at 14.

37. *Id.*

38. *Id.*

is a good thing, even if it is done for the wrong reasons.”³⁹

While Mr. Kahale proposes no alternative to ISDS,⁴⁰ other critics envision a MIC, with permanent members and an appellate mechanism.⁴¹ This proposal is not new either; proposals for introducing appeals to ISDS have floated around without much follow-through for many years.⁴² Now the proponents of such changes seem more serious. Most notably, the EU has seized on this proposal in its confused quest to kneecap an institution that has benefitted its member states for decades.

In its submission to the United Nations Commission on International Trade Law (“UNCITRAL”) Working Group III, the EU stressed three main categories of “concerns” with investor-state dispute settlement: “(i) concerns pertaining to the lack of consistency, coherence, predictability, and correctness of arbitral decisions by ICSID tribunals . . . (ii) concerns pertaining to arbitrators, and decision makers . . . [and] (iii) concerns pertaining to cost and duration of ISDS cases.”⁴³ The EU considers these concerns “systemic” and “intertwined.”⁴⁴ In its view, they can only be alleviated by replacing ad hoc arbitral appointments with a standing court mechanism.⁴⁵ The EU went as far as declaring, in 2018, that “[f]or the EU ISDS is dead.”⁴⁶

This standing court institution would be designed antithetically to ad hoc international arbitration. It would resemble the promised but yet-to-be-delivered CETA multilateral investment tribunal and appellate mechanism.⁴⁷

39. *Id.* at 16.

40. *See id.* at 15–16 (reporting that Kahale believes that any solution would exacerbate the issues).

41. *See, e.g.*, MARC BUNGENBERG & AUGUST REINISCH, FROM BILATERAL ARBITRAL TRIBUNALS AND INVESTMENT COURTS TO A MULTILATERAL INVESTMENT COURT: OPTIONS REGARDING THE INSTITUTIONALIZATION OF INVESTOR-STATE DISPUTE RESOLUTION 197–98 (2d ed. 2019).

42. Agnieszka Zarowna, *Veeder and van den Berg on the Future of Investment Arbitration*, GLOBAL ARB. REV. (Apr. 11, 2019), <https://globalarbitrationreview.com/article/1190127/veeder-and-van-den-berg-on-the-future-of-investment-arbitration>.

43. Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the European Union and its Member States, *supra* note 29, at 2–3.

44. *Id.* at 4.

45. *Id.*

46. *A New EU Trade Agreement with Japan – Factsheet*, at 6 (July 2018), https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155684.pdf (“A new system — called the Investment Court System, with judges appointed by the two parties to the FTA and public oversight — is the EU’s agreed approach that it is pursuing from now on in its trade agreements. This is also the case with Japan.”).

47. *See* Comprehensive Economic and Trade Agreement (CETA), Can.-Eur., art. 8.29, Oct. 28, 2016, 2017 O.J. (L 11).

The EU proposes a permanent body comprised of two levels: a first instance Tribunal and an Appellate Tribunal.⁴⁸ These tribunals would be staffed with full-time adjudicators held to strict ethical and diversity requirements.⁴⁹ In sum, the EU envisions an institution that would replace arbitration.

Gary Born has observed these developments with concern and sounded the alarm. Born tells us that, like the Seven Kingdoms in *Game of Thrones*, arbitration has enjoyed a “long, golden summer.”⁵⁰ He writes that “[b]eyond the walls and bustling marketplaces” of our kingdom, however, “lies a terrifying ‘other world,’ where people are ‘predatory, not productive; preoccupied with taking, not trading.’”⁵¹ The people of this other world, he claims dramatically, “will tear down those walls, destroy everything that has been created and usher in a ‘long, brutal winter.’”⁵²

Gary Born’s *Winter Is Coming* paper aptly captures the severity of the threat posed by recent criticisms of arbitration and proposals to abolish it.⁵³ Where the analogy is imperfect, however, is that the forces conspiring against arbitration are not simply strangers “beyond the walls” of our world. George Kahale, for one, lives and practices among us and he is an outstanding advocate. In other words — like in the horror classic *When a Stranger Calls* — the call is coming from inside the house.

Fortunately, many distinguished members of the arbitration community have recently reacted vigorously to this contestation of what I refer to as “classic arbitration.” Campbell McLachlan, a renowned arbitrator from New Zealand, spoke last month of the assault on international adjudication in his keynote Lalive Lecture.⁵⁴ Campbell McLachlan referred to the “growing opposition” to “investment arbitration and . . . termination of bilateral investment treaties” as evidence of a more general “trend towards withdrawal from international adjudication.”⁵⁵

Focusing more specifically on the debate and controversy surrounding the new proposed international investment court, my friend the Honorable

48. Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the European Union and its Member States, *supra* note 29, at 4.

49. *Id.* at 5.

50. Ross, *Winter Is Coming*, *supra* note 26, at 8.

51. *Id.*

52. *Id.*

53. *Id.* at 8–10 (articulating threats to arbitration).

54. Augustin Barrier & Lea Murphy, *McLachlan: The Assault on International Adjudication*, GLOBAL ARB. REV. (Sept. 11, 2019), <https://globalarbitrationreview.com/article/1196684/mclachlan-the-assault-on-international-adjudication>.

55. *Id.*

Charles Brower has repeatedly denounced its many follies.⁵⁶ Charles Brower has strongly criticized not just the new proposal for the Court, but the entire overreaction against arbitration itself, in what he has famously coined as the “Demolition Derby.”⁵⁷ He has noted that “[t]he ‘Demolition Derby’ targeting ISDS is flourishing, doubtless confident of victory thanks to the UNCITRAL Commission’s welcoming attitude toward the EU’s relentless campaign to sell to the world its Investment Court System.”⁵⁸

I agree with Charles Brower and with Gary Born that “winter need not come.”⁵⁹ I place my confidence in arbitration’s inherent strengths, which will outlast any intemperate season. The backlash against investor-state arbitration is at least partially attributable to those who participate in arbitration but fail to proclaim its benefits.⁶⁰ To “ensure [our own] survival,” Born calls on us to “stress” the “five Es” of arbitration: “efficiency, expedition, expertise, evenhandedness, and enforceability.”⁶¹ I agree. Even well-intentioned attempts to correct perceived flaws with arbitration jeopardize these proven benefits.

III. INTERNATIONAL ARBITRATION: CONTINUING THE GOLDEN SUMMER

Arbitration has many well-known advantages. They need to be mentioned briefly even if we are all familiar with them. Arbitration is a consent-based mechanism where parties appoint a decision maker or decision makers to determine a binding resolution of their dispute. This classic formula has operated successfully for thousands of years. The Ancient Mesopotamians, Greeks, Romans, groups in Africa and India, and even merchants in Europe, of all places, all used some forms of arbitration.⁶² Such diverse usage endures today. For instance, sheiks in Iraq continue to serve as arbitrators

56. See generally Charles N. Brower & Jawad Ahmad, *From the Two-Headed Nightingale to the Fifteen-Headed Hydra: The Many Follies of the Proposed International Investment Court*, 41 *FORDHAM INT’L L. J.* 791 (2018) (criticizing the CETA proposal for an international investment court).

57. See Charles N. Brower & Jawad Ahmad, *Why the “Demolition Derby” That Seeks to Destroy Investor-State Arbitration?*, 91 *S. CALIF. L. REV.* 1139, 1141 (2018) (defining and detailing the “Demolition Derby”).

58. *Id.* at 1184.

59. Ross, *Winter Is Coming*, *supra* note 26, at 11.

60. See Zarowna, *supra* note 42 (citing “misperception” as one of the reasons for pushback to ISDS).

61. Ross, *Winter Is Coming*, *supra* note 26, at 10.

62. See GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 8–9 (2nd ed. 2014) (documenting the use of international arbitration by ancient civilizations); see also L. Yves Fortier, *Delimiting the Spheres of Judicial and Arbitral Power: “Beware, My Lord, of Jealousy”* 80 *CAN. B. REV.* 143, 145–46 (2001).

among feuding tribes.⁶³ Such widespread and longstanding use speaks to arbitration's intrinsic appeal: it takes the dispute out of the hands of those locked in disagreement and refers to neutral, respected decision makers the resolution of their conflict once and for all.

As a corollary of its basis in consent, the parties will choose their arbitrators, men or women versed in the issues underlying the dispute, and will agree on the procedure to be followed. Barring public policy concerns, the parties decide what is arbitrable. Then, they can opt for a complex, multifaceted dispute, or simply seek clarification of a single contractual provision. When the award is issued, the dispute is resolved definitely, except for very limited grounds for annulment or denial of recognition and enforcement. By virtue of the New York Convention, arbitral awards can be enforced in the vast majority of countries around the world.⁶⁴

These fundamental characteristics, which are at the heart of arbitration, have been scapegoated for perceived problems with arbitration. Most notably, critics submit that ad hoc party appointees may be biased.⁶⁵ Resolving disputes definitely, without an appellate process, may force parties to live with flawed decisions.⁶⁶ Such criticisms mistake advantages for disadvantages. These characteristics are the hallmarks of arbitration that make the process successful; they are not flaws that need correction.

I will review them briefly in turn. I commence with the appointment of arbitrators by the disputing parties which has been singled out for a variety of grievances. The EU's submission to UNCITRAL Working Group III credits party selection of arbitrators for arbitrator bias, procedural delays, and gender disparity. This is of course the principal difference between arbitration and litigation. Each party to an arbitration selects as one of his adjudicators, a person he or she knows is well versed in the many facets of the dispute. It is a feature of arbitration that presents parties with certain trade-offs that would not necessarily disappear with a standing court of arbitrators.

Proponents of a standing body claim that it would improve ISDS's perceived lack of impartiality. Their reasoning, in my view, is somewhat suspect and myopic. A standing body would supposedly "insulate decision

63. See *Rent-a-Sheikh*, *ECONOMIST*, June 1, 2019, at 44.

64. *Contracting States*, N.Y. ARB. CONVENTION, <http://www.newyorkconvention.org/countries> (last visited Nov. 28, 2020).

65. See Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the European Union and its Member States, *supra* note 29, at 9–11 (acknowledging concerns about the ad hoc party-appointment system).

66. *Cf. id.* at 9–10 (discussing the relevance of the appeal process for ensuring accuracy).

makers from ‘powerful private interest’” and eliminate the pressure to deliver awards that will encourage parties to reappoint them.⁶⁷ Whether a standing body of arbitrators is more independent than arbitrators appointed by the parties depends on one’s perspective.

It might be more accurate to say that such a body would reduce perceived, but statistically unverified, pro-investor bias. I ask, would the trade-off become a pro-state bias? As Gabrielle Kaufmann-Kohler and Michele Potestà wrote, if states make appointments to an institution, “[t]here may be an inherent risk that only or mainly ‘pro-State’ individuals [will] be selected, especially if they were to be paid by the States alone.”⁶⁸ I agree.

Are we prepared to deny disputing parties the right, associated with arbitration from time immemorial, to select decision makers with the expertise, experience, and overall DNA they consider essential for the fair resolution of their dispute and substitute women and men of a quasi-judicial institution endowed with general, as opposed to specific, qualifications? I do not think so. And let us not forget the role of the neutral chairperson appointed either by the parties themselves or by an arbitral institution. The Chair, [who generally projects immense gravitas], will, in my experience, often succeed in convincing his or her two party-appointed colleagues to join in a unanimous decision. And, if I may add, based on my experience in the noble profession of arbitration, after a few sessions as chair with my two party-appointed colleagues, I often forget which one was appointed by which party.

In other words, the system, as it exists today, works. Eliminating the appointment by parties of their adjudicators is not a guarantee that the system would be improved. And let us not forget that judges whose term would need to be fixed may also, with time, be seen to be biased. While the proposed code of conduct might be helpful to quell allegations of bias, the prohibition against double-hatting might well cause even more damage. By prohibiting judges from also acting as counsel, the development and training of the next arbitration generation, as well as the diversity within the arbitration community, risks being seriously hampered.

The EU also posits that significant delays and unreasonable costs are

67. See GABRIELLE KAUFMANN-KOHLER & MICHELE POTESTÀ, CIDS – GENEVA CENTER FOR INTERNATIONAL DISPUTE SETTLEMENT, CAN THE MAURITIUS CONVENTION SERVE AS A MODEL FOR THE REFORM OF INVESTOR-STATE ARBITRATION IN CONNECTION WITH THE INTRODUCTION OF A PERMANENT INVESTMENT TRIBUNAL OR AN APPEAL MECHANISM? 18 (2016), http://www.uncitral.org/pdf/english/commissionsessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf.

68. *Id.* at 20.

associated with arbitration. It refers in particular, in this connection, to the many challenges levied against arbitrators in recent years which, of necessity, led to a suspension of the proceedings.⁶⁹

The subject of my conference tonight is not “[a]rbitrator challenges, are they justified or not?” This could be the topic of an interesting conference or a lively panel discussion at some other time. But I do say: why criticize a party to an arbitration for ensuring that every one of his or her adjudicators is free from conflicts? Yes, there are some challenges that are driven by strategy rather than genuine concern about the independence of an arbitrator. But those ill-conceived challenges are few and far between and can be dealt with in cost awards.

Before I leave the impact of challenges on procedural delays in arbitration, I note an intriguing suggestion by Gary Born, who has proposed imposing a duty to investigate on parties.⁷⁰ Such a duty could put the onus on parties to search for challengeable conflicts or alleged indicators of bias early in the arbitration. This investigation by the parties themselves, combined with a waiver of the right to challenge when challenges are not raised in a timely manner, could be implemented on a temporary basis by one of our arbitral institutions.

What matters most is the integrity of the arbitral process. I submit that some delay is a small price to pay in order to ensure party autonomy, recognized expertise, and confirmed impartiality. Would a quasi-judicial tribunal juggling dozens, and eventually hundreds, of cases be more efficient than an arbitral panel constituted in order to decide a well-defined dispute? I doubt it. One only needs to look at the national courts in Canada or the United States to see how clogged court systems can get. I do not have a crystal ball, but I venture to say that permanent judges sitting comfortably on a bench, appointed for a fixed term without any input from the parties, would eventually become less efficient and more likely to issue decisions within timelines far more significant than those which, on average, arbitral tribunals do.

For me, delays experienced in arbitration due to challenges and the time taken to complete the constitution of tribunals are not as problematic as the EU and other critics of the present proven system make them out to be. All the more so when, on a balance sheet, they are compared to party autonomy to answer the central question: who is more qualified to adjudicate my case? Eliminating that paramount feature of classic arbitration in order to save a

69. Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the European Union and its Member States, *supra* note 29, at 11–12.

70. See BORN, *supra* note 62, at 1919.

few months of what is, by definition, a lengthy process is not a proportionate and reasonable way to address the perceived problem.

Another criticism levied against arbitration and party appointments is the alleged gender gap among arbitrators. Let me be clear. I start from the premise that although the gender gap has abated today, it has not disappeared but, there is significant and encouraging progress. The glass ceiling has been broken and a number of very competent women now sit as arbitrators. Furthermore, there are many highly qualified women lawyers climbing the ladder who will eventually qualify as very competent arbitrators. While there is still much to be done to remedy the “diversity deficit” in investment arbitration,⁷¹ I note the significant recent initiatives which promote equal representation in arbitration, such as the Pledge.⁷² Similar initiatives need to be encouraged.

Allow me nevertheless to debunk briefly the EU proposal that a standing tribunal could have built-in “selection criteria” that would ensure gender balance.⁷³ This proposal underlines a simple fact: if a standing tribunal with gender parity replaces ad hoc tribunals with party-appointed arbitrators, the gender gap in ISDS will be eliminated, at least in the disputes that end up before that tribunal.

Such a reform, however, while it could increase the *percentage* of women arbitrators, would do so at the expense of decreasing the overall *number* of women arbitrators. A standing tribunal with permanent appointees would centralize the market for arbitrators and thereby reduce the total number of arbitrators needed to administer the ever-increasing universe of arbitrations. This would limit the number of opportunities for women to serve as arbitrators. Gender parity is an essential objective, but the EU’s proposed innovation would limit, rather than increase, more opportunities for more women.

I recognize of course that there are more advantages to gender parity than simply the number of women who can be appointed as arbitrators. It may well be that having fewer women arbitrators but having some women with

71. See generally Andrea Kay Bjorklund, *The Diversity Deficit in Investment Arbitration*, EUR. J. INT’L L.: EJIL: TALK! (Apr. 4, 2019), <https://www.ejiltalk.org/the-diversity-deficit-in-investment-arbitration/> (noting the majority of the influential arbitrators are from either North America or Europe and that only two are women).

72. EQUAL REPRESENTATION IN ARBITRATION, <http://www.arbitrationpledge.com/> (last visited Nov. 28, 2020) (explaining that signatories involved in international arbitration pledge to improve the profile and representation of women in arbitration by appointing women as arbitrators).

73. See Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the European Union and its Member States, *supra* note 29, at 11.

permanent appointments on a standing tribunal may be preferable to a higher absolute number of women serving as arbitrators. One of the challenges of addressing the gender gap in arbitration is weighing these possibilities against each other. The EU proposal fails to engage with these considerations.⁷⁴

I now turn to what I consider to be the most egregious example of the strident criticism of arbitration portraying a weakness that is truly a strength. I refer to the fact that there is no appeal from the award or decision of an arbitral tribunal. We can all agree that, whatever its advantages, appeals of arbitral decisions would prolong the dispute, which the parties have submitted to arbitration.

The main argument in favor of allowing appeals in arbitration is that appeals would improve the consistency of awards. ISDS observers have raised concerns regarding “divergent interpretations of substantive standards, divergent interpretations relating to jurisdiction and admissibility, and procedural inconsistency” in awards.⁷⁵ Compounding these shortcomings is what has been referred to as ISDS’s “[l]ack of appropriate control mechanisms” that could “reverse incorrect decisions and . . . sanction incompetent arbitrators.”⁷⁶ Allowing appeals would establish a “second level of adjudication,” where mistakes could be reviewed and standard interpretations could be upheld.⁷⁷

I will accept, for the sake of argument, that appeals could improve consistency and cure manifestly incorrect decisions, although I have serious doubts that such improvements will happen. Whether an appellate process will result in awards which are more consistent will depend in large measure on whether appellate tribunals will follow precedent.⁷⁸ Will they introduce the *stare decisis* principle? Absent a unanimous decision on this front, it is

74. See Bjorklund, *supra* note 71 (explaining the arbitration system could require that all arbitrator appointments source from a roster made up of diverse individuals and could create an appellate body that is inherently diverse from the appointment of the members).

75. Comm’n on Int’l Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Sixth Session, U.N. Doc. A/CN.9/964, at 6 (2018) (noting that one factor for a difference in arbitral awards is that the rules of treaty interpretation require a tribunal to consider more than the plain meaning of the text and allow the tribunal to hear arguments with extrinsic evidence).

76. KAUFMANN-KOHLER & POTESTÀ, *supra* note 67, at 14.

77. *Id.* at 18.

78. See *id.* at 17 (explaining that a new appellate procedure would establish a per se level of consistency in the tribunals’ decisions); see also *id.* at 47 (stating that it would be more practical to limit the “*stare decisis* effect” to the specific international investment arbitration dispute).

unclear how consistency will improve.

In the arbitration system it should not be assumed that inconsistency between awards is necessarily problematic. It is a truism that different results may stem from the arbitrators' different backgrounds, experiences, or expertise. Factual matrices may be different. We all know that every dispute is unique. In my long experience as a trial lawyer and as an arbitrator, I can truly say that I have never seen two cases which were, in every respect, identical. In other words, what may be seen as a mistake today may be found tomorrow to be justified as a valid distinction that fits the unique factual matrix of a case.

Moreover, in a system of party-appointed arbitrators, divergent outcomes could result from the distinct inputs of arbitral awards, which suggests that differences between decisions reflect tailoring to unique disputes and not simply mistakes. And, let us remember that what constitutes a "mistake" in an arbitral context is very subjective. Who is to say that an appellate division which issues binding precedents will always get it right? As we all know, appellate courts are not immune from criticism for issuing blatantly incorrect rulings.⁷⁹

I submit that appeals are undesirable in the arbitral context because they undermine the finality of the award and they increase costs and delays. From time immemorial, parties who have resorted to arbitration look for finality. In the investor-state context, this is inscribed in Article 53 of the ICSID Convention, which prohibits appeals of ICSID awards.⁸⁰ If appeals are allowed, I predict that there would be a tsunami of appeals by the losing parties. To convince oneself of this prediction, one needs only to focus on the number of annulment proceedings in the ICSID system.⁸¹

And then, I call in aid of my submission the well-known, age-old philosophical principle that "what is sauce for the goose is sauce for the gander." What about the additional delays and increased costs which will certainly be associated with appeals of arbitral awards, particularly if these appeals include issues of law and fact *de novo*.

Arbitration is a dispute resolution process for settling disputes definitively.

79. See, e.g., Andrea Sachs, *The Worst Supreme Court Decisions Since 1960*, TIME (Oct. 6, 2015), <http://time.com/4056051/worst-supreme-court-decisions/> (detailing several accounts of criticism from law school professors on monumental U.S. Supreme Court decisions like *Roe v. Wade*, *Bush v. Gore*, and *Citizens United v. Federal Election Commission*).

80. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 53, Mar. 5, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966).

81. KAUFMANN-KOHLER & POTESTÀ, *supra* note 67, at 46–47.

Finality is not a bug of the system, but rather, in my estimation, one of its most attractive features. It is and should remain one of the hallmarks of arbitration. In the meantime, while critics of ISDS, often uninformed about the system, continue to vituperate and propose to do away with party-appointed arbitrators in favor of a standing body of judges, arbitration, “classic arbitration” as I call it, continues to prosper.

As I noted earlier, arbitral institutions such as the ICC, the LCIA, the American Arbitration Association, ICSID, and the Permanent Court of Arbitration are recording exponential growth in the number of arbitrations they facilitate and developing markets in Asia, such as Hong Kong and Singapore, and are asserting themselves as enthusiastic proponents of the Golden Summer. Yes, arbitration is truly booming in Asia. Hong Kong and Singapore are becoming the new London and Paris.

As some of arbitration’s longstanding beneficiaries quarrel over how well it has served them, new players have rushed to embrace arbitration’s advantages.⁸² Developing markets in Asia present auspicious opportunities for the arbitration community, and turmoil in other parts of the world legitimizes the need for impartial international dispute resolution.

I will now review briefly how Hong Kong and Singapore have bolstered arbitration in Asia, the opportunities presented by China’s entrance into the wider arbitration community, and how increasingly unstable domestic politics make arbitration more relevant and necessary than ever. Hong Kong has hosted arbitrations since 1985.⁸³ The Hong Kong International Arbitration Centre (“HKIAC”) received 521 new cases in 2018 and the disputing parties came from thirty-nine jurisdictions.⁸⁴ More than forty percent of them had no connection to Hong Kong; 5.2 percent of them had no connection to Asia.⁸⁵

Singapore, in recent years, has made a state-assisted, concerted effort to assert itself as a world-renowned capital for international dispute resolution. It has a world-class arbitration center and a growing caseload. While the Singapore International Arbitration Centre (“SIAC”) has been in operation

82. See Ross, *Winter Is Coming*, *supra* note 26, at 10 (discussing how countries like Singapore and China are making strides in the “establishment of new international commercial courts”).

83. *At a Glance*, H.K. INT’L ARB. CTR., <https://www.hkiac.org/about-us> (last visited Nov. 28, 2020).

84. *Statistics*, H.K. INT’L ARB. CTR., <https://www.hkiac.org/about-us/statistics> (last visited Nov. 28, 2020).

85. H.K. INT’L ARBITRATION CTR., ANNUAL REPORT: 2017 REFLECTIONS 9 (2017) https://www.hkiac.org/sites/default/files/annual_report/2017%20HKIAC%20Annual%20Report%203469-5010-8172%20v.1.pdf.

since 1991, its caseload has seen exponential growth in the twenty-first century.⁸⁶ The SIAC handled ninety cases in 2006.⁸⁷ Ten years later, it handled 343.⁸⁸ Singapore has been named as the ICC's top arbitral seat in Asia eight times in recent years.⁸⁹

Singapore offers disputing parties a comprehensive regime for dispute resolution. In addition to the SIAC, Singapore is home to an equivalent institution for mediation: the Singapore International Mediation Centre.⁹⁰ In 2015, Singapore established a separate division of its High Court for international commercial disputes, the Singapore International Commercial Court ("SICC").⁹¹ The latest addition to Singapore's panoply of dispute resolution options is the ICC's new case management office in Maxwell Chambers.⁹² Notably, these institutions do not compete against one another.⁹³ As the SICC has explained:

The SICC serves as a companion rather than a competitor to arbitration as it seeks to provide parties in transnational business with one more option among a suite of viable alternatives to resolve transnational commercial disputes. It enhances Singapore's share of the global legal services pie without compromising Singapore's success as a seat of international arbitration as well as the international recognition and acclaim enjoyed by the Singapore International Arbitration Centre (SIAC).⁹⁴

Statistics suggest a mutually supportive relationship between Singapore's various institutions. Since the SICC's establishment, the SIAC's caseload has grown at a most impressive rate. In both 2017 and 2018, SIAC was the

86. *About Us*, SING. INT'L ARB. CTR., <https://www.siac.org.sg/2014-11-03-13-33-43/about-us> (last visited Nov. 28, 2020).

87. *Statistics*, SING. INT'L ARB. CTR., <http://siac.org.sg/2014-11-03-13-33-43/facts-figures/statistics> (last visited Nov. 28, 2020).

88. *Id.*

89. *ICC Court Case Management Team Begins Operations in Singapore*, INT'L CHAMBER OF COMMERCE (Apr. 23, 2018), <https://iccwbo.org/media-wall/news-speeches/icc-court-case-management-team-begins-operations-singapore/>.

90. Lucy Reed, *International Dispute Resolution Courts: Retreat or Advance?*, 4 MCGILL J. DISP. RESOL. 129, 140 (2017–2018).

91. *Id.* at 132.

92. INT'L CHAMBER OF COMMERCE, *supra* note 89.

93. *See* Reed, *supra* note 90, at 140 (discussing the establishment of the SICC in Singapore); *see also Establishment of the SICC*, SING. INT'L COM. CT., <https://www.sicc.gov.sg/about-the-sicc/establishment-of-the-sicc> (last updated May 2, 2019) [hereinafter SICC, *Establishment*] (stating the SICC is more of a "companion" than "competitor" to arbitration).

94. SICC, *Establishment*, *supra* note 93.

venue for more than 400 new cases.⁹⁵ There were 271 new cases in 2015.⁹⁶ In 2018, the disputing parties came from sixty-five different jurisdictions, and so on.⁹⁷ Yes, “classic arbitration” continues to enjoy the Golden Summer.⁹⁸

This coexistence of fora and methodologies is characteristic of arbitration and an element in its success. Arbitration does not have, and has never aspired to have, a monopoly of resolving disputes. It is and has always been available as a proven option for parties who seek to avail themselves of arbitration’s recognized advantages. Disputes can be complex, and the parties’ needs are multi-dimensional. A range of dispute resolution options ensures that diverse issues and parties are served appropriately. As statistics for Hong Kong and Singapore demonstrate, many parties continue to prefer arbitration, even when other options are available.

And, what about China? Will it become a new frontier? Some indicia suggest that it is poised to become increasingly involved in the arbitration bandwagon. In 2017, the China International Economic and Trade Arbitration Commission (“CIETAC”) published new rules for investor-state arbitration.⁹⁹ The alternative venues for arbitrations subject to these rules are the CIETAC Investment Dispute Settlement Centre (“IDSC”) in Beijing, or, if the parties expressly agree, in Hong Kong (“CIETAC HK”).¹⁰⁰ This is an encouraging development.

China’s openness to arbitration is connected to its massive One Belt One Road (“OBOR”) initiative which has generated, and will continue to generate, a significant number of arbitral proceedings.¹⁰¹ The OBOR Arbitration Centre created by the Wuhan Arbitration Commission has already heard several disputes arising from OBOR projects.¹⁰²

China has announced that it intends to set up an international court for

95. SING. INT’L ARBITRATION CTR., ANNUAL REPORT 2018 14 (2018); SING. INT’L ARBITRATION CTR., ANNUAL REPORT 2017 11 (2017).

96. ANNUAL REPORT 2018, *supra* note 95, at 15; ANNUAL REPORT 2017, *supra* note 95, at 13.

97. ANNUAL REPORT 2018, *supra* note 95, at 17.

98. See SING. INT’L ARBITRATION CTR., ANNUAL REPORT 2015 14 (2015) (tabulating the number of new cases per nationality in 2015).

99. Keith M. Brandt & Michael K.H. Kan, *China*, 9 INT’L ARBITRATION REV. 121, 123 (2018).

100. *Id.* at 124.

101. See *How China Will Change the International Arbitration Field*, COLUM. L. SCH. (Feb. 27, 2018), <https://www.law.columbia.edu/news/archive/how-china-will-change-international-arbitration-field> [hereinafter *How China Will Change*].

102. See Brandt & Kan, *supra* note 99, at 124.

OBOR disputes.¹⁰³ While the Court has not yet materialized, the gigantic infrastructure facets of the OBOR project will certainly engender disputes which would be amenable to arbitration.¹⁰⁴ How will non-Chinese parties react to a court overseen by the Chinese state?¹⁰⁵ I predict that arbitration will be preferred to a Chinese court. But, either way, China's emergence as a fledging participant in investor-state dispute resolution is another encouraging development for the international arbitration community.

Before I conclude, allow me to touch briefly on recent geopolitical developments which, I submit, are either arbitration neutral or arbitration boosting. It is trite to note that some governments are becoming increasingly hostile to foreign trade. Tariffs, as you know well in this country, have been increasingly used as economic weapons of mass destruction. Perhaps counterintuitively, however, these ominous developments point to the continued relevance on, and need for, arbitration. As some governments are overtaken by political parties and leaders guided by autarkic policy agendas, the prospect of litigating in domestic courts is becoming less appealing.¹⁰⁶

I note that many domestic political developments, such as Brexit in the United Kingdom, or the continuing trade dispute between the United States and China, that impact relations between countries and give ulcers to the business community, do not have any effect on arbitration. Despite the negative impact, Brexit, whether it is hard or soft, will almost certainly have an impact on London as a financial center, and it is clear that it is unlikely to impact London as one of the most popular venues for arbitrations. Brexit will not change the United Kingdom's commitment to the New York Convention, the 1996 English Arbitration Act, or English common law that is arbitration-friendly.¹⁰⁷ Nor has it fundamentally altered "the conditions that make London central to arbitration," such as the English language and the city's wealth of legal talent.¹⁰⁸ After a hard or a soft Brexit, London may well benefit from a greater perception of neutrality in disputes involving member states of the EU. The European Court of Justice ("ECJ") decisions

103. *Id.* at 121.

104. *How China Will Change*, *supra* note 101.

105. *See* Brandt & Kan, *supra* note 99, at 125 (noting international participants' concerns with the validity of a court operating under Chinese jurisdiction).

106. *How China Will Change*, *supra* note 101.

107. Joe Liu, *Keep Calm and Arbitrate? The Impact of Political Events on International Arbitration*, WOLTERS KLUWER: KLUWER ARBITRATION BLOG (Oct. 11, 2017), <http://arbitrationblog.kluwerarbitration.com/2017/10/11/keep-calm-arbitrate-imp-act-political-events-international-arbitration/>.

108. *How China Will Change*, *supra* note 101.

criticizing arbitration may well drown in the English Channel.¹⁰⁹

Undoubtedly, however, governments seeking to undermine arbitration can do so particularly with respect to investor-state arbitration. President Trump has taken, early in his tenure, decisions that have impacted negatively the recourse to arbitration. I refer, notably, to the United States' withdrawal from the Trans-Pacific Partnership and repeal of the investor-dispute settlement provisions in the North American Free Trade Agreement ("NAFTA") in its renegotiated version, the new United States-Mexico-Canada Agreement ("USMCA").¹¹⁰ But the United States remains a pro-arbitration jurisdiction, where disputing parties have an embarrassment of riches which facilitate domestic and international arbitration, and where arbitral awards are easily enforced.¹¹¹

IV. CONCLUSION

Yes, arbitration has been challenged in recent years. Intra-EU investor-state arbitration with *Slovak Republic v. Achmea B.V.*,¹¹² and other decisions have been boxed against the ropes, but intra-European commercial arbitration is flourishing. To my knowledge, all objections to jurisdictions

109. See Liu, *supra* note 107; see also Opinion 2/15, EU-Singapore Free Trade Agreement, 2017 EUR-Lex CELEX 62015CV0002(01) (May 16, 2017) (stating that ISDS is a shared competence, with the CETA being declared a mixed agreement to be ratified by the EU and its Member States); Opinion 1/17, EU-Canada CET Agreement, 2019 EUR-Lex CELEX 62017CV0001(02) (Apr. 30, 2019) (confirming the compatibility of EU law and the Investor Court System, to be established as part of the CETA); Case C-284/16, *Slovak Republic v. Achmea B.V.*, 2018 E.C.R. 158 (ruling that the arbitration clause in the 1991 Netherlands-Slovakia bilateral investment treaty is incompatible with EU law due to the adverse effect on the EU's autonomy); Joined Cases T-694/15, T-694/15 & T-704/15, *Micula v. Comm'n*, 2019 E.C.R. 423 (ruling that the European Commission is precluded from applying EU State aid rules to pre-accession periods).

110. See *How China Will Change*, *supra* note 101.

111. See, e.g., *The US Supreme Court Confirms the United States is a Pro-Arbitration Jurisdiction*, DENTONS (Jan. 28, 2019), <https://www.dentons.com/en/insights/alerts/2019/january/28/the-us-supreme-court-confirms-the-united-states-is-a-pro-arbitration-jurisdiction> (explaining how the United States is a pro-arbitration state because the arbitration clause "delegates the decision of arbitrability to the arbitrators" and not the courts); see also Eric Tuchmann, *In an Unruly World, International Arbitration Offers a Safe Haven for Business Disputes*, CORP. COUNS. BUS. J. (Sept. 6, 2018), <https://ccbjournal.com/articles/unruly-world-international-arbitration-offers-safe-haven-business-disputes> (detailing the benefits of arbitration in resolving conflicts in international businesses transactions, particularly with rising geopolitical volatility and uncertainty).

112. *Slovak Republic v. Achmea B.V.*, 2018 E.C.R. 158 (holding that bilateral investment treaties between EU member states, such as the 1991 Netherlands-Slovakia BIT, were potentially incompatible with EU law because they permitted investors and EU member states to establish alternative dispute resolution mechanisms).

relying on *Achmea* have been rejected. As Eric Tuchmann wrote recently, “[i]n an unruly world, international arbitration offers a safe haven for business disputes.”¹¹³ The Golden Summer is going to continue and prosper. Those of us who are dedicated members of this noble profession — because, yes, arbitration is a profession — need to stand up and proclaim loudly and clearly its benefits and advantages.

Brexit, President Trump, and decisions of the ECJ are unlikely to seriously stifle arbitration. Any perception that certain jurisdictions are unfriendly to foreign businesses will simply encourage those businesses to take their capital elsewhere or to avoid domestic courts and seek out neutral fora where they can settle disputes with the assistance of impartial and skilled facilitators.

Global capitalism is dynamic and relentless. International trade and investment will continue to flourish despite attempts to restrain it.¹¹⁴ Businesses and entrepreneurs will find the best places to invest, a calculation that includes the ability to protect their investment. Arbitration has long been the safe haven for businesses confronted with international disputes, and I predict that its supporters will continue to seek out the advantages it offers over litigation.¹¹⁵

Arbitration’s success is not circumstantial. Its popularity has grown despite the criticism it faces because it is a proven and effective method for settling complex disputes that do not lend themselves well to adjudication in domestic courts. Arbitration is successful precisely because it is not like litigation. Given its track record for success, as well as increasing uncertainties and risks on our fragile planet, arbitration’s Golden Summer should continue. To ensure the continued future success of arbitration, we need not engage in reforms that could compromise its classic and characteristic strengths. As you may have guessed by now, I come to my conclusion by returning to my opening foray in colas.

Trying to make arbitration more like litigation is tantamount to making Coca-Cola taste like Pepsi. Some people will always prefer Pepsi to Coca-Cola, and that is just fine. People who prefer Pepsi can buy Pepsi. Pepsi is a successful product, and Pepsi is a very successful company. Pepsi, in some ways, is a more successful company than Coca-Cola.¹¹⁶ However, Pepsi is

113. Tuchmann, *supra* note 111.

114. Liu, *supra* note 107.

115. Tuchmann, *supra* note 111.

116. Paul R. La Monica, *Pepsi Beats Coke Thanks to Junk Food*, CNN BUSINESS (Sept. 29, 2016, 10:31 AM), <https://money.cnn.com/2016/09/29/investing/pepsi-coke-earnings-stock/index.html>.

a more successful business because it does more than sell beverages; it owns Frito-Lay, which is responsible for forty percent of its profits.¹¹⁷ Coca-Cola doesn't sell chips. Coca-Cola sells beverages; in particular, Coca-Cola sells soft drinks. The most popular soft drink in the world is Coca-Cola.¹¹⁸ The second most popular is Diet Coca-Cola.¹¹⁹ Pepsi may be better than Coca-Cola at certain things, but no one is better at making and selling cola than Coca-Cola.

Like Coca-Cola, the arbitration community should not try to replicate its competitors' products. People who want to go to court can go to court. The people whom the arbitration community serves do not want to go to court. As Gary Born has pointed out, as my friend Charles Brower has said forcefully, and as I have stressed tonight, for millennia, many people have preferred arbitration to litigation.¹²⁰ Disputing parties prefer arbitration not because it is almost like litigation, but because arbitration is different from litigation and all the better for that difference. Litigation may be preferable to arbitration for certain litigants. But arbitration should not sacrifice what it does well in order to replicate features of litigation that do not make sense in the world of arbitration.

People who want arbitration to be like litigation do not want arbitration. People who like arbitration do not want it to be like litigation. So why would we, members of the worldwide arbitration community, impose changes on the people who like what we do, for the sake of people who will never like what we do? Like Coca-Cola, we have happy and loyal customers who like our product. Let us not sell them imitation Pepsi in Coca-Cola bottles.

To the "New Coca-Cola" proponents of international dispute resolution, I say: you may be able to persuade some people that they prefer a product with a different flavor based on a mere taste test. But novelty grows old and soon tastes stale. After a while, people will not want a product that is trying to be something else. They will want the qualities and advantages that brought them to arbitration in the first place.

Coca-Cola won the Cola Wars because it stopped trying to be Pepsi. Through its "New Coca-Cola" misadventure, Coca-Cola learned what its real strengths were. Wisely, it went back to playing to those strengths instead of its competitor's. Arbitration will win the dispute resolution *Game of Thrones* if it does the same. Like Coca-Cola, when it comes to cross-border dispute

117. *Id.*

118. See Yglesias, *supra* note 4 (inferring Coca-Cola's dominant market position reflects its popularity among consumers).

119. *Id.*

120. Ross, *Winter Is Coming*, *supra* note 26.

resolution, “You Can’t Beat the Real Thing.”¹²¹

121. See THE COCA-COLA COMPANY, *supra* note 6 (1990 slogan).