INTERNATIONAL ARBITRATION, *QUO VADIS*? (ARBITRATION AND MIND PANDEMICS)

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I. PANDEMICS IN HISTORICAL PERSPECTIVE: THE PANDEMICS OF THE MIND

Where is international arbitration going, *quo vadis*? Since this is a question in Latin, let's start with some Roman history.

Procopius (500 AD/ (†) circa 562 AD) was a legal advisor to Belisarius, a general of Emperor Justinian, who reigned over the Eastern Roman Empire.[1] He also was a prominent historian who, in parallel to writing the official history of the Empire, wrote what he called *The Secret History*, a chronicle not for the eyes of the Emperor or his entourage. In this book, Procopius describes the greed and cruelty of Justinian and the dissolute life of his wife, Theodora, and others close to ruling circles in Byzantium (after Constantinople and now Istanbul), the then Eastern Roman Empire capital.[2]

Procopius's book is not limited to describing the autocratic rule of Justinian (who reigned between 527 and 562 AD) and the moral decadence of those close to him, but also refers to the murderous pandemic that ravaged his empire in 541–542 AD.[3] This pandemic, probably a forerunner of the Black Death in the Middle Ages, accounted for perhaps millions of deaths, exterminated around forty percent of Byzantium's population, and had successive comebacks until approximately 700 AD.[4] The terrible plague did not spare anyone, irrespective of rank or wealth, and decimated the Roman legions protecting Byzantium and the Empire.[5]

Recently, it has been persuasively argued that the pandemic was the decisive blow sounding the death knell to Byzantium and the Eastern Roman Empire, or at least precipitated their demise, since it destroyed the Empire's economy, sowed death and despair in its population, and left its frontiers exposed to the onslaught of foreign enemies anxious to plunder Byzantium's riches.[6]

However, Justinian is better remembered not for his corruption and autocratic rule, but by his compilation of Roman law through the *Corpus Iuris Civilis*,[7] preserving the glorious legacy of Roman jurists for posterity despite the autocratic influence of Justinian in the compilation to assert his monopoly on law-

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[1] G.A. Williamson, *Introduction* to PROCOPIUS, THE SECRET HISTORY 24–25 (1981).

[2] *See* PROCOPIUS, THE SECRET HISTORY 68–113, 176–91 (1981).

[3] PROCOPIUS, *supra* note 2, at 56; G.A. Williamson, *supra* note 1, at 25–26.

[4] KYLE HARPER, THE FATE OF ROME 220–44 (2017).

[5] *Id.* at 244–45.

[6] *Id.* at 162–63.

[7] *Corpus Iuris Civilis*, Cambridge University Press (Cambridge Library Collection, Classics, Latin language original) 2014.

making and legal interpretation.[8] Nevertheless, the influence of Justinian's *Corpus* in both the common law and continental law systems is still noticeable today.

Thus, the pandemic that destroyed lives and wealth could not annihilate the activity of the mind in the elaboration of the rule of law; nor the patient and conscientious work of Justinian's jurists under the leadership of Tribonian[9] and their lasting contributions to the progress and development of the law.

Nevertheless, the operation of the mind is not always immune to a different type of pandemic. Pandemics are not only a menace to the lives of human beings, empires, or economic systems; but also, more difficult to grasp in the aggregate of their negative impacts, pandemics perversely influence human conduct, thus endangering cultural and ethical values on which human civilized existence is based. It is the mind that primarily suffers from this latter type of pandemic. Its virus easily propagates itself when human ideas and ensuing conduct are vitiated by irrational impulses or sheer ignorance.

History—be it the history of pandemics destroying human life or the history of pandemics of the mind undermining the basis of human civilized existence—again and again proves that failure to cauterize pandemics early leads to disaster and unimaginable human suffering.

The rule of law—a cultural creation fashioning human conduct—is not free from the risks of this second type of pandemic.

II. ARE THERE MIND PANDEMICS AFFECTING INTERNATIONAL ARBITRATION?

Against this backdrop, if we turn now our eyes to the field of international arbitration, we shall see that different and qualified voices have sent alarm signals by pointing to certain relatively recent and unfavorable developments concerning its role and operation.

We cannot so far equate the facts prompting such developments with a pandemic or perhaps even with a disease, but it would be reckless to ignore them nor not to send warning signals before the virus becomes widespread or out of control.

For example, Judge James Crawford draws attention to certain aspects of investment dispute resolution mechanisms reflecting policies originated in the European Union, which may conspire against the neutrality or diverse cultural and

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[8] JOHN P. DAWSON, ORACLES OF THE LAW 122–23 (1968).

[9] Tribonian was a notable Byzantine jurist and advisor, who supervised the revision of the legal code of the Byzantine Empire, or *Corpus Iuris Civilis*, during the reign of Emperor Justinian. T. HONORÉ, TRIBONIAN (Duckworth, 1996).

expert background expected from adjudicators deciding investment disputes. [10] Judge Crawford centers his analysis in part on provisions of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union.[11]

According to CETA Article 8.27, the decision of investment disputes is entrusted to a permanent tribunal composed of fifteen members elected for five-year terms renewable once (five Canadian nationals, five nationals from EU countries, and five from third countries).[12] All tribunal members are appointed by the CETA Joint Committee, the members of which are in turn appointed pursuant to CETA Article 26.1 by the CETA member States.[13]

Pursuant to CETA Article 8.28,[14] all members of CETA's Appellate Tribunal are also appointed by the CETA Joint Committee.[15] Crawford points out that the fact that these tribunals shall only be composed of State-appointed individuals may compromise their independence.[16]

Also, sociologically speaking, State-appointed persons to investment tribunals are often present or former government lawyers, prominent present or former State counsel or judges, which might conspire not only against the neutrality of decision makers but also against legal knowledge diversity needed for the resolution of investment cases. Investment disputes require not only individuals—not infrequently coming from academia—well-versed in public international law

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[10] James Crawford, *The Ideal Arbitrator: Does One Size Fit All?*, 32 AM. U. INT'L L. REV. 1003, 1004 (2018).

[11] *Id*. at 1014.

[12] *See* Comprehensive Economic and Trade Agreement art. 8.27, Can.-E.U., Oct. 30, 2016, O.J. (L 11) 23 [hereinafter CETA].

[13] *See* CETA, *supra* note 12, at art. 26.1.

[14] *See* CETA, *supra* note 12, at art. 8.28.

[15] The Kingdom of Belgium requested the opinion of the European Court of Justice on the compatibility of CETA Chapter Eight Section F on resolution of investment disputes between investors and states within the European Union Treaties. In its Opinion 1/17 on April 30, 2019, the European Court of Justice held that CETA Chapter Eight Section F "*is compatible with EU primary law*." Case C-1/17, EU-Can. CET Agreement, ECLI:EU:C:2019:34, ¶ 245 (Apr. 30, 2019) (emphasis added). At the time of writing this paper, CETA had been ratified by fourteen countries (including Canada, which has completed the ratification process). The thirteen EU Member States having ratified CETA are Austria, Croatia, Czechia, Denmark, Estonia, Finland, Latvia, Lithuania, Malta, Portugal, Spain, Sweden, and the United Kingdom. The European Parliament approved CETA on February 15, 2017 by 408 votes to 254, with 33 abstentions. *CETA: MEPs Back EU-Canada Trade Agreement*, EUROPEAN PARLIAMENT: NEWS (Feb. 15, 2017, 12:41 PM), https://www.europarl.europa.eu/news/en/press-room/20170209IPR61728/ceta-meps-back-eu-canada-trade-agreement. The dispute resolution system regarding foreign investment claims, including CETA's appellate tribunal, will become effective upon full ratification of CETA. *Commission Presents Procedural Proposals for the Investment Court System in CETA*, EUROPEAN COMMISSION (Oct. 11, 2019), https://trade.ec.europa.eu/doclib/press/index.cfm?id=2070.

[16] Crawford, *supra* note 10, at 1021–22.

but also practitioners with expertise in commercial and economic legal issues as well as procedural case management skills. However, the requirement under Article 8.27 (4) of CETA, privileging the composition of CETA tribunals with public international law experts, would exclude arbitrators with experience in commercial arbitration and public law.[17] In investment cases, the cross-fertilization of international, general business, and commercial law experience and case management skills positively contributes to the quality and evenhandedness of the dispute resolution process and its outcome.[18] As summarized by Crawford, "Investor-State arbitration is a relatively new phenomenon and, like all goods and services, it benefits from a free market of competing ideas. The investment court proposal risks marginalizing valuable ideas from different systems of law."[19]

Crawford also criticizes CETA Article 8.31 (3),[20] allowing the States to recommend agreed interpretations of CETA provisions binding on CETA tribunals even in respect of ongoing cases. He points out the risk that CETA Tribunal members will prefer legal principles familiar or favorable to States, which may also conspire against impartiality safeguards, like disclosure requirements, found in every set of arbitration procedural rules.[21]

By addressing issues similar to some of those raised by Crawford, Charles Brower and Jawad Ahmad have also voiced concerns in a recent article about the politicization of the appointment process under State influence for these tribunals and mention it as an example of State efforts to "repossess" investor-state arbitration.[22]

Further, considering Crawford's remarks concerning CETA, one wonders if decisions of these tribunals may qualify as arbitral awards that are enforceable, for example, under legal regimes such as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[23] However, CETA Article 8.41 (5)[24] provides that these tribunals' awards

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[17] CETA, *supra* note 12, at art. 8.27 (4).

[18] Crawford, *supra* note 10, at 1016–21. This balanced evaluation of the real situation should be contrasted with those opinions automatically characterizing arbitral tribunals as "biased*"* because "an arbitrator serving in one of these tribunals is likely to be an international commercial lawyer who may serve as 'judge' one day and return as corporate counsel the next." Bill Waren, *Sen. Warren Speaks out Against TPP*, FRIENDS EARTH ACTION (Apr. 28, 2015), http://foeaction.org/blog/sen-warren-tpp. In fact, most of investment arbitration tribunals are composed of professionals who exclusively arbitrate cases or seldom serve as counsel.

[19] Crawford, *supra* note 10, at 1021.

[20] CETA, *supra* note 12.

[21] Crawford, *supra* note 10, at 1021.

[22] Charles 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, 793–98 (2018).

[23] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, 21.3 U.S.T. 2517.

[24] *See* CETA, *supra* note 12.

fulfill such Convention's Article 1 requirement regarding commerciality of the transaction giving rise to the dispute.[25] It seems that the very drafters of CETA were aware of this issue, since CETA Article 8.41 (4) provides that "[e]xecution of the award shall be governed by the laws concerning the execution of judgments or awards in force where the execution is sought."[26]

According to this Article, if not "awards," these tribunals' decisions may still qualify as court judgments in national enforcement jurisdictions, i.e. in scenarios in which the New York Convention, exclusively dealing with arbitral awards, does not apply.[27] Thus, if in doubt about the "commerciality" of CETA awards, they could still be enforced as judgments.

Be that as it may, CETA Article 8.41 (4) highlights the ambiguous nature of the determinations of these tribunals. Since international arbitration is indisputably based on the free selection of the members of the arbitral tribunal by the parties, and that such a fundamental right in arbitration is denied to the private investor under the CETA regime, it becomes more than doubtful that awards of these tribunals may be characterized as arbitral awards qualifying as such, *inter alia*, under the New York Convention, irrespective of whether the subject-matter of investment disputes are characterized as commercial. Is it possible to rule that an award or sentence is an arbitral award by an arbitrary command or *ukase* when the very constitution of the tribunal at stake is inimical to the most fundamental notions defining what arbitration is?

In any event, CETA tribunals are a hybrid creation which, at the end of the day, is closer to a judicial adjudication system than to arbitration and, for that reason, they and their determinations cannot be safely branded as "arbitration tribunals" or "arbitral awards."

In his recent lecture at Washington College of Law's Center on International Commercial Arbitration, Yves Fortier addresses some of the concerns regarding CETA and EU initiatives.[28] These initiatives were subject to James Crawford's

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> When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. I (3), 1958, 21.3 U.S.T. 2517.

[26] CETA, *supra* note 12, at 70.

[27] *Id.*

[28] The Honorable L. Yves Fortier, PC, CC, OQ, *Long Live the Golden Summer: Arbitration Courts, & Colas 2019 Annual Lecture on International Commercial Arbitration American University Washington College of Law, DC,* 9 AM. U. BUS. L. REV. 313 (2020).

analysis in his lecture,[29] but Fortier expands his considerations beyond the area of international investment dispute settlement by also addressing some of these issues from the perspective of international commercial arbitration.

Yves Fortier raises his voice against those who predict or advocate the demise of international arbitration to resolve investment disputes or attempts to transform arbitration into a hybrid, depriving arbitration of some of its basic characteristics that account for its universal success and relentless expansion and acceptance.[30] Like Crawford, Fortier points out that the impartiality and independence of permanent dispute resolution bodies, all of whose members are appointed by the State parties to the dispute, are questionable.[31]

Specifically, Fortier refers to attempts to: (a) weaken the finality of arbitral awards by subjecting them to means of recourse on the merits (present already in the CETA provisions but advocated more generally by some in the field of commercial arbitration) and (b) substitute permanent courts or tribunals for arbitral tribunals constituted by the will of the parties, already adopted by CETA.[32] In this latter respect, there is some proximity with proposals in the area of international commercial arbitration (also criticized by Fortier) to have all the members of arbitral tribunals appointed by arbitral institutions rather than by the parties to the dispute, which of course would deprive the parties of their fundamental right to participate in the constitution of the arbitral tribunal.[33] However, the CETA regime is even more alien to the basic principle that arbitration is premised on party autonomy, since it provides that only the State party appoints those who will decide the dispute.[34]

Nevertheless, the common denominator of such ideas is the notion that the independence and impartiality of international arbitrators are suspect or that the reliability of their findings and legal analysis is questionable. Although as far as the CETA appeal mechanism is concerned, the distrust for final arbitral determinations is exclusively presented in the garb of allegations that an appeal tribunal would improve the consistency of awards or cure manifestly wrong decisions.[35]

In the area of investment disputes, provisions such as those found in the CETA dispute settlement mechanisms[36] respond to the idea that arbitral determinations have traditionally favored the private party rather than the State. However, as Fortier points out, such views are not supported by statistics of cases won or lost by the State.[37] As far as appeals are concerned, and as Fortier emphasizes, there

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[29] *See generally* Crawford, *supra* note 10.
[30] Fortier lecture, *supra* note 28 at 316–18.
[31] *Id.* at 322.
[32] *Id*. at 327–28.
[33] *Id.* at 322–23.
[34] CETA, *supra* note 12, at art. 8.27, 8.28; Fortier lecture, *supra* note 28, at 317, 319.
[35] Fortier lecture, *supra* note 28, at 316–20.
[36] See CETA, *supra*, note 12.
[37] Fortier lecture, *supra* note 28, at 322–25.

is no guarantee that consistency will be assured at the appeal level absent adherence to the *stare decisis* principle, which is neither provided for in CETA's text nor is it a given in different proposals to subject commercial awards to review by a "superior" arbitral tribunal.[38]

Further, the fact that different cases raising similar issues may be decided differently is—as Fortier indicates—normally the consequence of different fact and legal patterns requiring tailor-made solutions.[39] On the other hand, experience shows that appellate courts also make mistakes.[40] One of the virtues of arbitration, ensuring its enduring success, is precisely the diversity of arbitral solutions adapted to the various factual and legal backgrounds giving rise to the dispute. On the other hand, finality has been one of the traditional advantages of arbitral adjudication attracting arbitration users and, as Fortier asserts, there is no valid reason for it not to remain one of the hallmarks of arbitration.[41]

Finally, removing the right of any party to participate in the constitution of the arbitral tribunal, either in the field of investment or of commercial arbitration, conspires against one of the most fundamental bases of arbitration: the ability to name at least one of the persons who shall adjudicate the dispute.[42]

In his recent speech delivered on the occasion of his admission as member to the Spanish *Real Academia de Jurisprudencia y Legislación*, Bernardo Cremades also points to developments raising similar concerns.[43] Cremades looks at some of the criticisms raised against international arbitration, questioning its ability to provide solutions for commercial and economic disputes based on the rule of law.[44] His reply is that arbitration in the present globalized world is the right dispute resolution mechanism to address and resolve such disputes by application of the rule of law in ways adapted to the particular characteristics of this kind of dispute arising out in a globalized context.[45] A reason for this is that international arbitral adjudication is premised on the elaboration of procedural and substantive legal solutions for such disputes from a perspective to be differentiated from the mental approach of jurists only used to dealing with disputes within the boundaries of their national jurisdiction.[46]

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[38] *Id.* at 326–27.

[39] *Id.* at 322.

[40] *Id.*

[41] *Id.*

[42] *Id.* at 322.

[43] Bernardo M. Cremades, Speech at Real Academia de Jurisprudencia y Legislación: *El Arbitraje Internacional en la Encrucijada de la Critica* (Mar.19, 2018).

[44] *Id.*

[45] *Id.*

[46] *Id.*

In that connection, Cremades refers to the seminal contribution of the 1869–1872 Alabama Claims ad-hoc arbitration[47] in which the arbitral tribunal, including British and U.S. arbitrators, resolved a dispute alleging a British violation of the laws of neutrality by repairing in Great Britain ships utilized in the Secession War to destroy commercial ships of the North. Cremades points out that the ensuing award against Great Britain, then the most powerful nation in the World, not only put an end to this dispute but opened the path to the cooperation between Great Britain and the USA that is still present today.[48] The Alabama arbitration eloquently shows the role played by international arbitration since its first developments in providing solutions specifically adapted to international disputes (which of course is not the same if the resolution of these kinds of disputes were rooted in a parochial setting), as well as in restoring a peaceful environment for the future interaction between the parties once the dispute has been settled.

Cremades then addresses the political and ideological sources of many of the attacks against international arbitration for the settlement of investment disputes.[49] He indicates that such attacks respond to precipitated and demagogic attempts originated from the European Union questioning arbitral decision-making in connection with investment disputes.[50] Cremades contends that rather than specifically going to the root of the problem apparently prompting such attacks, which is the open-textured nature of the substantive protection provisions in investment protection treaties, the attacks are primarily targeted at the supposed lack of neutrality of the arbitral dispute resolution system in such treaties viewed with the distorted lens of political and ideological agendas.[51]

Cremades situates the origin of these attacks on international arbitration in the nationalistic trends in the Americas, Europe, and Asia since the inception of the twenty-first century, having the effect of undermining legal instruments seeking to fashion global solutions for global problems.[52] It is within the context of this paradoxical political situation—since the exacerbation of nationalism runs against the solution of global problems from a global perspective in a world irreversibly globalized—that anti-arbitration attacks need to be understood and dealt with.[53]

Cremades points out that this general trend accounts for the European Union/Canada CETA treaty investment dispute resolution provisions mentioned above.[54] According to Cremades, the European Union's bureaucratic efforts to set up permanent tribunals to resolve investment disputes has been echoed by a

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47 Text of this decision in G. Wetter I The International Arbitral Process 48–56 (1979).
48 Cremades, *supra* note 43, at 27.
49 *Id.* at 98–100.
50 *Id.* at 112.
51 *Id.* at 52.
52 *Id.* at 109–11.
53 *Id.* at 93–96.
54 *Id.* at 116.

politicization of exchanges regarding foreign investment international dispute resolution at the level of serious technical institutions such as the United Nations Commission for International Trade Law (UNCITRAL).[55] Such developments have disrupted the consensus normally reached during the last fifty years in the elaboration of model rules in international arbitration and international trade and economic matters, which have been generally free from political or ideological constraints.[56]

Brower and Ahmad also point out in their paper to unequivocal signs of politicization in the July 2017 UNCITRAL Working Group III meeting addressing ISDS reform premised on the creation of multilateral permanent adjudicatory bodies for the decision of investment disputes.[57]

As Cremades properly states, these developments and political maneuverings are witnessed with perplexity by practitioners and adjudicators actually involved in the determination of commercial and economic disputes through international arbitration.[58] These actors are surprised to see their dispute settling activity, based on the identification and application of the rule of law, considered instead from the perspective of competing ideologies or political agendas.[59]

III. CLOSING THOUGHTS

The following thoughts are prompted by the above considerations.

Misinformation about the role of international arbitration or preconceived ideological or irrational visions of how the arbitration process actually works or should work—sometimes disseminated by the non-specialized media—are major components of negative attitudes regarding international arbitration.

An eloquent example is the experience recounted by Crawford during his lecture at the Washington College of Law mentioned before.[60] He was one of the three members of the Arbitral Tribunal that decided Philip Morris's BIT claims against Uruguay.[61] When the members of the Arbitral Tribunal were appointed

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[55] *Id.* at 116.

[56] Cremades, *supra* note 43, at 96.

[57] Brower & Ahmad, *supra* note 22, at 812–14.

[58] Cremades, *supra* note 43, at 115.

[59] *Id.*

[60] From my notes when listening to the Washington College of Law Crawford lecture, which was the basis for his article. James Crawford, *The Ideal Arbitrator: Does One Size Fit All?*, 32 AM. U. INT'L L. REV. 1003, 1004 (2018).

[61] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, (July 8,

(and before the case was heard), certain English press proclaimed that this was another example of a biased tribunal that would decide the case in favor of the investors and to the detriment of the powers of the State to regulate tobacco consumption in order to protect the health of its population. But when the Arbitral Tribunal rendered its final award in favor of Uruguay, the same press, without rectifying its former negative views about the Arbitral Tribunal's integrity, said that, after all, no other solution was possible since the case made by Uruguay was so strong that the arbitrators did not have any option but to decide in favor of Uruguay.

The clear implication is that arbitral adjudication is always unreliable, even when the arbitrators get it right.

Part of the problem is that, semantically, the term "arbitration" has different meanings depending on the role of arbitration and the specific scenario in which it is called to operate. Failure to understand such role and scenario may lead the unaware to reach wrong conclusions as to the usefulness and virtues of arbitration. For example, it is not appropriate to extend to international arbitration criticisms addressed to the actual or assumed role that arbitration has or may have in strictly domestic contexts or in connection with consumer protection, labor contracts, or labor disputes.[62]

Another part of the problem, also mentioned by Cremades but worthy of being emphasized again, is extending to arbitration criticisms actually aimed at the standards of substantive protection provided in BITs.[63] As set forth in a seminal article by Guillermo Aguilar Alvarez and William "Rusty" Park, although in matter of such standards, "[c]larification and adjustment may be in order . . . it would be fundamentally unsound to call into question the use of neutral binding arbitration itself as the preferred means for resolving cross-border investment disputes."[64]

Not infrequently, public criticism of international arbitration originates in the frustration felt by those who are on the losing end in arbitration cases they were

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2016), ICSID final arbitral award by an arbitral tribunal composed of Piero Bernardini, Gary Born (dissenting in part) and James Crawford.

[62] *See generally* Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES: BEWARE THE FINE PRINT (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html (explanatory parenthetical); *see also* Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System'*, N.Y. TIMES: BEWARE THE FINE PRINT (Nov. 1, 2015), https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html (despite the incendiary titles, the authors exclusively deal with arbitration of labor or consumer disputes in a domestic USA setting, i.e, totally unrelated to arbitration of international commercial, economic or investment disputes involving the sophisticated players usually participating in the resolution of such disputes).

[63] Cremades, *supra* note 43, at 118.

[64] Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365, 398 (2003).

a party to. When I was ICC Court Secretary General, I remember meeting with a disgruntled and important California businessman claiming for the modification of the ICC arbitration rules in order to create an appeal body for reviewing arbitral awards on the merits. It was not difficult to realize that he was not aiming at the general improvement of the ICC arbitral adjudication process but, rather, at voicing his own personal discomfort because he was not the winning party in an arbitral case in which he was involved, without objectively detailing the flaws in the procedure or in the arbitral decision-making process supposedly accounting for his failure to win.

Although the examples given so far are essentially in the area of investment arbitration, one should not underestimate other negative expressions in the commercial arbitration field. These are signs of a wider trend, surprisingly reaching out even to national jurisdictions historically favorable to international arbitration, according to which the traditional role of arbitration in the elaboration of specific solutions tailor-made to the particular characteristics of the case at stake, without *stare decisis* constraints and with minimum review of arbitral determinations, is questioned.

The controversial nature of some of these trends is significantly confirmed by the fact that they may be subject to pendular oscillations.

An illustration of this is the 2016 lecture delivered by the Lord Chief Justice of England and Wales.[65] After criticizing the test for granting appeals against arbitral awards under Section 69 of the 1996 Arbitration Act for England, Wales, and Northern Ireland (1996 Act), the lecturer advocated for recovering the elaboration of the Common Law to the court system, that may be undermined by arbitral decisions on commercial matters maintained confidential and shielded from court review or court determination.[66] Perhaps not without nostalgia for the much more extended powers vested in the judiciary to settle legal issues under the special, case-stated mechanism provided for in the 1950 Act, the lecturer centers his criticism on the test set forth in Section 69 of the Arbitration Act and the application of the determination of preliminary point of law mechanism under Section 45 of the 1996 Act.[67] In his own words:

> My view is clear. In retrospect the U.K. went too far in 1979 and again in 1996 in favouring the perceived advantages for arbitration as a means of dispute resolution in London over the development of the common law; the time is right to look again at the

[65] The Right Hon. The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, The Bailii Lecture 2016: Developing Commercial Law Through the Courts: Rebalancing the Relationship Between the Courts and Arbitration (Mar. 9, 2016), para. 48, at 17, judiciary.uk/wp-content/uploads/2016/lcj-bailli-lecture-20160309.pdf.

[66] *Id.* para. 5 at 2.

[67] *Id.* at ¶¶ 19–23.

> balance. There is also a need to examine whether . . . to waive arbitration in cases where there were significant points of general interest and to appreciate that not only would their own dispute, in the right case involving legal issues, be better determined in a court but, more importantly, the wider interests of their industry and of the common law in general would be much better served by more issues being resolved in court and the law thus developed and clarified. [68]

However, in his lecture on May 1, 2018, his successor had a much more balanced approach in regard to similar issues.[69] After indicating that he "part[ed] company" in respect of his predecessor's view that the gateway for appeals against arbitral determinations should be widened[70] (he also warned against involving in a "zero-sum" game in which a so-called gain for arbitration means corresponding loss for the courts and vice versa), Lord Justice Gross stated that "I am afraid that I simply do not see the relationship between the courts and arbitration in these terms."[71]

In this vein, he emphasized the importance assigned to private autonomy and choice on which arbitration thrives.[72] In unequivocal terms, he asserted that "analytically, those who choose private dispute resolution wish to resolve their disputes; that is their legitimate individual free choice and it is a matter of party autonomy. They owe no duty, moral, legal or otherwise, to encourage (and fund) appeals so as to develop the law."[73] In consonance with such objective, he characterized controls under Section 69 of the 1996 Act, as a "tolerant and light touch statutory supervisory regime."[74]

He also situated the issues raised by Lord Chief Justice Thomas in a context both attuned to the advantages of international commercial arbitration, free from asphyxiating controls by the courts, and the wider interests of preserving London as an international arbitration center underlying the passing of the 1996 Act:

> Pulling the threads together, I do not see the courts and arbitration as engaged in a competition for work. I see the strength of Legal UK augmented by a strong court reinforcing thriving London ar-

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[68] *Id.* at para. 48.

[69] Lord Justice Peter Gross, The Jonathan Hirst QC Commercial Law Lecture: Courts and Arbitration (May 1, 2018), https://www.judiciary.uk/wp-content/uploads/2018/05/speech-by-lj-gross-hirst-lecture-distribution-may-2018.pdf.

[70] *Id.* at para. 21.

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.* at para. 6.

> bitration, with London arbitration in turn increasing the attractions of English Law and thus, ultimately, the English Courts. As I have said before, this is a mutually supportive relationship. The strength of one supports the strength of the other and *vice versa*. The attractions of arbitration will not be enhanced by some sort of UDI from State Courts. [75]

Finally, he concluded that:

> [T]he place of international arbitration in global dispute resolution is secure. At its most basic, it fills the essential need of providing a neutral forum, with appropriate expertise, for the resolution of international commercial disputes, without requiring either party to agree to the other's court jurisdiction. From the vantage point of Legal UK, the preservation and strengthening of London's world-leading position as an arbitration centre or hub, is a matter of the highest importance.[76]

It is of course desirable that the pendulum stops there: gusts of fresh air such as this are always welcome and reassuring.

Nevertheless, this is not necessarily always the case, particularly when some of the developments described so far are prompted by broader political or ideological considerations which become more patent in the area of international dispute resolution of investment disputes, as identified in Cremades's paper.[77] Some of such developments are intertwined with the expansion of nationalistic or hyper-nationalistic political trends in the world, not infrequently led by authoritarian governments.

Indeed, an exacerbation of these trends could become a pandemic menace to arbitration itself, international or domestic, and not just to investment arbitration. Such would have been the case if dictatorial regimes, such as those in fascist Italy and in Nazi Germany, premised on the notion of *totaler Staat* (totalitarian State),[78] which did not leave any room for the expression of human individuality,

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[75] *Id.* at para. 22 (citations omitted).

[76] Lord Justice Peter Gross, The Jonathan Hirst QC Commercial Law Lecture: Courts and Arbitration (May 1, 2018), at para. 35.

[77] Cremades, *supra* note 43, at 109–16.

[78] HANS KELSEN, GENERAL THEORY OF LAW AND STATE 303 (Ander Wedberg trans., Harvard Univ. Press ed. 1945).

including consent-based arbitration, or a foreign policy based on a peaceful approach to international relations[79] prevailed.[80] Democracy and arbitration go together. As Cremades underlines in his paper, the arrival of democracy in Spain brought about the end of State jurisdictional monopoly and opened the doors to arbitration as an expression of the free will of the parties.[81]

The situation today is not the one in Italy and Germany in the 1923–1945 period. However, looking back to history is always worthwhile lest history repeats itself.

Further, there is room for optimism.

Quoting from Gary Born, Fortier concludes at the end of his paper that the survival of arbitration depends on its five "E's": "efficiency, expedition, expertise, even-handedness, and enforceability."[82] These benefits, present today, account for international arbitration's undisputed success.

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[79] Such was already the foreign policy atmosphere present in the pre-Second World War years, with reverberations adverse to international means of dispute resolution, including international arbitration. As eloquently described in a 1938 book on the history of the International Chamber of Commerce and its contributions to world peace with words resonating still today:

> The significance of breakdowns in the sphere of foreign policy is more difficult to estimate than that of ordinary political breakdowns, due to the multiplicity and vast spread of the affected interests. Common action having collapsed, the parties resume their individual freedom of action. The failure of collective action foreshadows self-help, with or without mutual consent.

GEORGE RIDGEWAY, MERCHANTS OF PEACE 372–73 (Columbia Univ. Press 1938) [hereinafter RIDGEWAY].

[80] Nevertheless, despite those negative developments, the resilience of international commercial arbitration should be noted, as proven by the history of the International Court of Arbitration of the International Chamber of Commerce (ICC Court) headquartered in Paris, France. The President of the ICC Court during the war period was a Swedish national, Algot Bagge. Between 1940 and 1943 there were two ICC Courts, one sitting in Stockholm and the other in Paris, although all claims were filed in Stockholm. Between 1943 and 1945, the ICC Court merged into one, but kept holding meetings in both capitals. During the war period, nineteen international cases were registered, including a 1941 case involving French and German parties. The first session during the war period was held on April 18, 1940 in Stockholm. The cases discussed by the ICC Court in that session involved parties from Italy, Germany, Switzerland, Austria, and Belgium (photocopies of correspondence and records from archives at the ICC Court Paris headquarters on file with the author). Thus, parties of the then two fascist countries accepted international arbitration. Already during the interregnum between the two World Wars the International Chamber of Commerce made substantive efforts to maintain World peace through, *inter alia*, its ICC Court international commercial dispute resolution services aimed at overcoming the "ominous times" and the "successive crises of the postwar period" announcing the Second World War. RIDGEWAY, *supra* note 79, at 317–31.

[81] Cremades, *supra* note 43, at 12–13.

[82] *See* Yves Fortier, International Arbitrator and Former Permanent Representative of Canada to the United Nations, Long Live the Golden Summer: Arbitration, Litigation, and Cola, 2019 Annual Lecture at American University Washington College of Law Center on International Arbitration (Oct. 19, 2019), https://www.wcl.american.edu/impact/initiatives-

As Fortier also says, "Even well-intentioned attempts to correct perceived flaws with arbitration jeopardize these proven benefits."[83]

It is to be hoped that such attempts, well intentioned or not, many of which seem to echo prejudice or ideological or political interests, will go away without lasting damaging effects for international arbitration and the rule of law.

Paraphrasing Pierre Lalive,[84] let us not mistake the passing breezes of fashion for the lasting winds of change.

programs/international/news/international-arbitrator-yves-fortier-discusses-the-challenges-for-investment-arbitration, at 12–14. This is a reference to the transcript of the recorded version of the lecture not included in the text of the article referred to in note 28 above.

[83] *Id.* at 33–34.

[84] From my notes from the oral participation of Pierre Lalive in a seminar held in Geneva, Switzerland in 1999 under the auspices of the ICC International Commercial Arbitration on the then new ICC Arbitration Rules of 1998.