LONDON INTERNATIONAL ARBITRATION COLLOQUIUM 2023: STATE SOVEREIGNTY AND IMMUNITY IN COMMERCIAL ARBITRATION

Conference Report

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The London International Arbitration Colloquium 2023 was held at the International Dispute Resolution Centre (IDRC) in London on 25th September 2023, involving a full day of events where 'State Sovereignty and Immunity in Commercial Arbitration' was exhaustively discussed. The one-day Colloquium was jointly organised by the Asia International Arbitration Centre (AIAC) and SOAS University of London Arbitration and Dispute Resolution Centre (SADRC). IDRC and the Government of Malaysia were the hosts of the event. Dr Amel Makhlouf, the days Master of Ceremonies, acknowledged that the conference illustrated the fruitful collaboration and strong alliance of the conference organisers and hosts. This, she added, had created an environment to enable the sharing of ideas and insights with leading dispute practitioners from around the world.

Welcoming Remarks and the Keynote Address

Participants and attendees of the conference were warmly welcomed by Professor Emilia Onyema, the Director of SADRC. She reiterated that the conference aims were to critically interrogate the issues arising from the high profile multi-billion dollar 'Sulu-case' as well as other disputes that were ongoing. To her delight, the Government of Malaysia, which had recently secured significant judgements from the Paris Court of Appeal and Hague Court of Appeal, were open to the engagement on the pertinent issues without an analysis of the case itself.

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The Minister in the Prime Minister's Department (Law and Institutional Reform), Malaysia, the Honourable Dato' Sri Azalina Othman Said, in the Keynote Address echoed Professor Onyema's opening remarks in that the conference would shed light on proper arbitration practices according to the rule of law. Her Excellency highlighted the 'Sulu case' opens an avenue for a discussion on the review of the conduct of arbitrators and the oversight of third-party litigation funders. To end the address, Her Excellency exuded confidence that the panel discussions will explore good principles of global arbitration process, litigation funding and other legal methods that are relevant in promoting state sovereignty.

Panel Sessions

Three panel sessions held in the daylong conference covered jurisdictional challenges in investment arbitration, the impact of investment claims on states and their sovereignty and territorial integrity, and the role of third-party funding in access to justice.

Panel 1: International Arbitration and State Sovereignty

Panel Moderator	Dato' Firoz Hussein Bin Ahmad Jamaluddin
Panellists	Professor Catherine A. Rogers
	Mr Gordon Nardell KC
	Dr Brendan Plant

Dato' Jamaluddin expertly moderated the discussion from the first panel which aimed to address various issues relating to international arbitration and state sovereignty in light of the 'Sulu arbitrations' and subsequent 'Sulu cases'. Dr Plant started the session by providing the historical background of the case that he found not only 'unusual' but also 'fascinating' and 'provocative'. One of the important factors that both Dr Plant and Mr Nardell KC emphasised was that one of the parties to the dispute, Malaysia, is a sovereign. This impacts the necessity of consent to any form of binding dispute settlement and the entitlement to immunity. An interesting question was posed on how exactly to deal with defunct dispute resolution mechanisms in historic agreements involving sovereigns given the agreements' potential impact long after the event. It

was agreed that there could be a difference between viewing the 'Sulu case' from the perspective of Public International Law which would hinge on consent vis-à-vis International Arbitration which would be grounded on resolving the dispute between the parties.

Professor Rogers progressed the discussion and highlighted how the powers of arbitrators have expanded greatly over time through principles such as *Kompetenz Kompetenz* which allows arbitrators to rule on their own jurisdiction. As it relates to the 'Sulu case', Professor Rogers and Mr Nardell KC offered slightly differing views on the reasoning of the Court of Appeal in the judgement by the Hague Court. Mr Nardell KC agreed with the court's reasoning as the Spanish court was annulling its own order appointing the arbitrator that it found to be defective. On the other hand, Professor Rogers opined that even where a court disagrees with its own appointment of an arbitrator, it does not necessarily mean that an arbitrator should be removed.

Ethical considerations were also discussed as international arbitration rests on the integrity of the arbitrator. As such, it is important to constantly make ethical considerations clear to all parties involved in the arbitral process. The panel discussion concluded by investigating whether there are truly any tangible differences between arbitrators and judges with the responses ranging from there being many differences between them to the view that arbitrators are in effect 'super judges'.

Panel 2: Third-Party Funding in International Arbitration and a Review of R (on the application of PACCAR Inc and others) (Appellants) v. Competition Appeal Tribunal and Others (Respondents) [2023] UKSC 28: Its Impacts and the Way Forward[1]

Panel Moderator	Mr Hussein Haeri
Panellists	Professor Victoria Shannon Sahani
	Mr Stephen Fietta KC
	Ms Camilla Godman

[1] *R (on the application of PACCAR Inc and others) (Appellants) v. Competition Appeal Tribunal and Others (Respondents)* [2023] UKSC 28.

The second panel session was aimed at examining a myriad of issues related to third-party funding in international arbitration. Appropriately, Professor Sahani began with an introduction to third party funding stating that although third-party funders commonly provide the funding for profit, there are other reasons why funding would be provided. These include the funder seeking a certain outcome in the case, for political reasons or other reasons that would not necessarily relate to profit. Ms Godman proceeded to highlight the framework for third-party funding where she confirmed that most of the funding is economic related which can be used at any stage of the arbitral proceeding. In addition, she noted that third-party funding is non-recourse meaning that the funder takes on the payment of the fees as well as adverse costs in unsuccessful cases. Given the risk involved in third-party funding, the terms are documented in a litigation funding agreement which funders tend to enter if their assessment deems the case to have a 65% or more chance of success. This offered a good transition into the *PACCAR* case where Mr Fietta KC detailed the proceedings and judgement. He noted that the judgment had the likely effect of rendering majority of third-party funding agreements in England and Wales unenforceable especially those where the funder's remuneration had been calculated by reference to a percentage or multiples of the damages recovered.

The panel agreed that the *PACCAR* case was not a bad judgement *per se*, but it had unintended consequences which the Association of Litigation Funders are working closely with the Ministry of Justice to resolve. Mr Haeri, moved the discussion onto reforms and the future of third-party funding. He pointed to the expensive nature of litigation and arbitration leading to third-party funding from a commercial perspective.

The Panel agreed that there was need for greater regulation of third-party funding providers, not to outlaw it but to find a balance of the competing interests. In terms of the future, it was suggested that there could be an increase in non-profit funding especially in investor-state and state-state arbitration, the creation of a secondary market, and increased third-party funding of defences to claims.

Panel 3: Impact on Investment Claims on States and Investors

Panel Moderator	Professor Martin W. Lau
Panellists	Mr Baiju Vasani
	Professor Steven P. Finizio
	Ms Angeline Welsh KC

Panel 3 tackled some of the impacts on investment claims on states and investors with a particular focus on the relationships between the investor, the home state and host state as well as how investment claims can be better managed. In exploring the impact of investment claims on the investors and states, Ms Welsh KC pointed out that there had been a significant increase in investor treaty claims. This has coincided with the rise of investment treaties being signed and increased cross border capital flows. States nonetheless had started using investment treaties to strike a balance between economic development and providing reassurance to investors that their investments will be dealt with in a secure manner.

Mr Vasani in sharing the wider impact of the relationship between the home state and the host state was emphatic that if indeed ISDS was working well, then there should be no negative impact on the relationship. The reasoning behind his observation is that ISDS is designed to depoliticise investment disputes. He also noted that from his experience, home states when called upon in ISDS cases to make *amicus* submissions tend to usually align more with the host state rather than the investor that is affiliated with the home state. This is because the home state will in most instances take the same position as the host state in ISDS cases where the home state finds itself as the respondent. One other interesting aspect of the relationship between host states and home states is where the two states are in conflict and the BIT which was initially meant for mutual prosperity is used as a tool of aggression or defence. Changing international relations and political tensions could therefore lead to a difference in the reliance of a BIT between the home and host states.

Is the ISDS system ripe for reform? Professor Finizio addressed this question primarily focusing on the creation of an advisory centre to assist low income and developing states through knowledge and best practice sharing as well as assisting in

representing the states in proceedings. He noted that although this would be an excellent step forward especially in attaining a level playing field for low income and developing states, he cautioned that there had been failed attempts to put together similar regional centres in different parts of the world. High operating costs of the centres had stifled the previous plans of implementing the desired reform and may do the same to the proposed advisory centre.

The Panel in its concluding remarks agreed that solving the issue of costs borne by states and investors involved in ISDS would be a positive step in creating a level playing field.

Closing Remarks

The Conference closed with a short address by the Honourable Dato' Seri Diraja Dr Zambry Abd Kadir, the Minister of Foreign Affairs, Malaysia. His Excellency lauded the Colloquium for attracting several participants and interest going beyond the legal fraternity. He noted that the conference had interrogated the issues of sovereignty, territorial integrity and the rule of law. As a representative of Government, His Excellency affirmed that Malaysia still believes in arbitration as an important dispute resolution mechanism. This, the Minister stated, is evidenced by hosting the AIAC, a global dispute resolution institution within the Asian region. In conclusion, His Excellency noted that it is only through continued deliberations between governments, international organisations and the international arbitration community that arbitration can retain its legitimacy and effectiveness.

The AIAC and SADRC jointly committed to continue such deliberations, teaching and research activities through a Memorandum of Understanding that was earlier signed on 21st September 2023.