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Session theme:
Forun selection after Brexit:
anti suit or anti arbitration?

Transcription of Proceedings

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Mr. Abhileen Chaturvedi: Good Evening everyone. Wish you a very good evening to all the audience members who are joining in from India. Good afternoon and good morning to audience from different parts of the world. We welcome you to day 4, session four of MCIA ADR Week. The topic of the session is Forum selection after Brexit: anti suit or anti-arbitration. We have on the panel with us, Lord Peter Goldsmith. Lord Peter Goldsmith is the London Co-Managing Partner and Chair of European and Asian litigation in Debevoise and Plimpton. Lord Goldsmith served as UK's Attorney General from 2001 to 2007, acting as Chief Legal Advisor to the government on matters of domestic, European and international law. Next, we have on the panel is Mr. Patrick Taylor. Patrick is a London and Paris based partner in Debevoise International Dispute Resolution practice, and Co-Chair of the Africa practice group at Debevoise and Plimpton. His practice focuses on commercial and investment treaty arbitration and he acts regularly for Indian parties and international parties with disputes in India and Africa. We also have on the panel Ms. Priya Mehra. Priya has been the General Counsel of Indigo since February 2017. Prior to moving in-house as General Counsel at Indigo, Priya has had extensive experience in private practice with law firms, such as Gibson Dunn, and Jones Day and AZB & Partners. Her practice areas include mergers and acquisitions, private equity transactions, government privatizations, capital markets and general corporate advice. We also have on the panel, Mr.

Shreyas Jayasimha, founding partner Aarna Law. Shreyas is an advocate, arbitrator and trained mediator based in India and is the founding partner of Aarna law a boutique counsel-led international and domestic dispute resolution practice. Shreyas has represented the Republic of India in significant investor treaty arbitrations, and has also co-founded Simha Law at Maxwell Chambers, Singapore. Last, we have Ms. Shreya Aren, the moderator of this session. Shreya is a senior associate at Debevoise and Plimpton international dispute resolution group based in the London office. Her practice focuses on international, commercial and investment treaty arbitrations. She has acted for corporate and state clients, including a number of Indian clients under both institutional, as well as ad-hoc arbitration rules. Without much ado I request Shreya to take it forward. I thank Debevoise and Plimpton for hosting this session and this session is being transcribed for all our audience. Thank you. Over to you Shreya.

Ms. Shreya Aren: Thanks very much for the kind introduction Abhileen. Good evening, and good afternoon to everyone. We're delighted to have you join us today. I'm Shreya and it's my pleasure to moderate this brilliant panel we have today to discuss all things, Brexit. There is certainly a push towards and pull against arbitration that we're observing in Europe.

While where certain jurisdictions including, like United Kingdom are keen to be seen pro-arbitration, at the same time, the European Union has been cracking down on investment treaties. Similarly, for some time we've observed tensions in India when it comes to arbitration, with both pro and anti-arbitration forces at work. So, our discussion today, we'll delve into some of these. If you have any questions, please do feel free to put them in the chat box and we'll try and come to them towards the end of the session. Without further ado, let's hear from our stellar panelists. My first question is for you, Peter. Now that we are a few months into Brexit, how do you think it has impacted if at all London as an arbitration hub?

Mr. Peter Goldsmith: Well Shreya, thank you very much. I hope I'm audible. Can I say this Debevoise is delighted to be participating in this panel. This is not the first time that we've worked with MCIA. Last time of course we were able to do it in place, actually physically in Mumbai. I wish we could, again, I hope we will be able to, again, sooner. Our friendship is great and our relationship is strong and I hope that will very much continue. So Shreya the question Brexit, is obviously been a huge political issue in the United Kingdom and in England. For those who don't know, I, continue to be a member of the House of Lords to Legislation, the Upper House of our Parliament. In that capacity have been very much

involved with the changes which took place with Brexit of which the effect on arbitration and litigation is of course only one. But turning to arbitration first of all, the one thing I think one can say is that, is that arbitral proceedings, the enforcement of Arbitral awards in the UK is actually going to remain largely untouched as a result of Brexit. That's because the basis upon which arbitration takes place and then awards are enforced is not governed by any European Law. It's not governed for example, by the treaty of Rome, which is the practically principle founding treaty of the European Union. It's governed by the New York Convention to which lots and lots of different countries belong. Now, there are some implications of it and we'll deal with some of those, when you get to the questions, including particularly from Patrick in relation to intra EU cases. But the success of London as an arbitral seat is likely not to be affected. It's not due to our membership of the EU at all. It's probably due to the fact that proceedings are disposed of efficiently. We have an independent and impartial legal system which supports arbitration. And the English judges are non-interventionist when it comes to arbitration. That wasn't always the case, but they've now become non interventionists. We have been through a journey, which the Indian courts are going through a bit more slowly to recognize the autonomy of arbitration and to leave arbitrators and arbitral parties to reach their agreements and get on with their work. The fact is that London

and partly for that reason, and partly because English law is such a popular system of law for contracting parties. England has become a very, very successful arbitration centre, state of the art arbitration infrastructure. We've got actually now two purpose-built arbitration centres in London. There was one and then another one came along precisely to meet the increased demand. There are chambers and lawyers with specialist knowledge in arbitration, who hold themselves out as being able experts to deal with that. All of that I think will continue. So, what has, what has Brexit done? Well, first of all, we can see from the statistics that the popularity of London as an arbitral centre hasn't reduced. In something called the 2018 Queen Mary International Arbitration survey. That's a survey which is run by Queen Mary college, part of the university of London, with a great particular interest in arbitration. They run surveys including on which arbitration centres are the most popular and why. In 2018 London emerged as the most popular. In 2019 statistics for the ICC London came out as the most popular and the London Court of International Arbitration, the LCIA showed a record number of cases referred to it in 2019, nearly 25% increase over the figures in 2018. So, all of these figures point towards the continuing popularity of London as a seat. But something else that's worth mentioning. Because as Shreya mentioned, as you mentioned in your introductory remarks, the EU has actually shown itself to be quite anti-arbitration and not to favour

arbitration in different ways. We may come onto some of that. But London will now be released from some of the constraints that membership of the EU imposed on us in the arbitration field. I think that will help London to gain even greater strength in the arbitration field. It may well, therefore I think it will outshine its European counterparts in the sphere of arbitration. If we look finally at the last and the important treaty that was reached between the European Union and the UK, anyone who followed this would have noticed, how it was 23:59, one minute to midnight, before the deal was actually done. Classic I'm afraid for the European Union. This was the final deal that was done. The trade cooperation agreement reached between the EU and the UK. Agreed by the UK, actually, it's still not been ratified by the European Union, though that will no doubt happen soon. That's going to govern the trade relationship between the EU and the UK, but it says nothing about arbitration. I think we need to come at some point to talk about what that means in relation to the regulation of arbitration, which until now have been done by something many of you will know called the Brussels regulation. So, Shreya long answer, but I think I'll stop at that point, turn it back to you.

Ms. Shreya Aren: Yeah. Thank you so much Peter. That's very helpful. And Patrick what do you think, although it's still early days, have you experienced any impact of Brexit on

London when it comes to arbitration? Patrick, you're on mute. Sorry.

Mr. Patrick Taylor: It's been, it's been over a year of lock down. I've been in this room every day, pretty much since, for 365 days, but I still forgot about the mute button, to unmute the button. In any event it's very nice to be here with you all. Thank you very much for allowing us to participate in this week. Look, I agree with everything that Peter has just said. I'm conscious of the facts, that I have one foot in our Paris office and one foot in our London office. So, I'm conscious about, not seeking, I don't think it's a zero-sum game. I don't, I think that London is likely to keep its position as one of the favourite seats of arbitration. But I'm particularly looking forward to hearing Priya and Shreyas's perspectives on their impressions of how London is doing, how brand London is doing after Brexit. Because one of the things that I have heard, anecdotal evidence of is that people outside of the UK have been touting Brexit as a reason not to put London as a seat of arbitration in their contracts if you are a European party. Now let's just say I do about 75% of my cases are seated outside of England. I have no particular reason to say that, England is or London is to be preferred to anywhere else. I do think that those that argue that London as a result of Brexit, there's no longer a good place to seat one's arbitrations. Rather taking advantage of the situation

based on wishful thinking rather than facts. Because for all the reasons that Peter mentioned, I think London remains a very attractive seat of arbitration and will continue to be that. In any instance, don't forget that the attractiveness and popularity of English law as the governing law of a contract often suggests London is a good seat, given the supervisory function of the English courts over a London seated arbitration. So, I hope that, its popularity will continue. It's got every reason to continue and we just need to wait and see. If there are any impacts on the number of arbitrations in the years to come, which is of course, when you would expect to see impacts following changes in contractual practice since Brexit was announced in 2016.

Ms. Shreya Aren: Great. Thanks so much, Patrick. That's a great segway because turning to you then Priya. What is your impression as an observer in a jurisdiction, which is not the EU, not the UK, what is your perception of Brexit's impact on, as Patrick said, brand London as an arbitration hub?

Ms. Priya Mehra: Yeah. Thanks for that Shreya and thanks for having me on the panel. But, so it's interesting because actually the way I look at it and I mean I know Patrick mentioned that there's some kind of touting, but I don't see that at all, at least from my perspective of where we are. So as an organization, I mean, without speaking specifically

about Indigo, but over the years of any practice, we've always sort of seen England, I mean arbitration and seeing the English courts being impartial. I mean, it's something that drives people to still have English law and arbitration as the choice of arbitration on the contracts. I mean, we have it in most of our commercial contracts internationally, with a lot of the leasing companies. I mean, everyone's comfortable with the jurisdiction. That's just to say, as to where it was. And how does Brexit change it. I actually don't, I haven't seen any change in the thinking or any change in how we would be reviewing any of our commercial contracts or generally how we sort of perceive the impact. I don't see a negative that I see from what Peter also mentioned. There is a positive point to it, right? I mean, the fact that you can't, that you, the last thing you want is to choose a forum as a dispute resolution in a contract and then live with this fear that you may actually, it may actually get stopped in another jurisdiction because of existing law, which I know we will come to as this conversation moves on. I actually think. A) there's no change. B) if there is a change, it's actually more of the positive for people like us who actually still are doing commercial contracts. I mean, in the last year, we actually took like 40 aircraft deliveries and all of them have English law and English seated arbitration, I mean, England seated arbitration. I haven't seen in fact negative, at all, with the Brexit impact. And for us, it continues to be one of the

places we are most comfortable to choose for any dispute resolution.

Ms. Shreya Aren: Great, thank you. That I'm sure that will be reassuring to a lot of London arbitration practitioners. So, Peter, this question is for you. If we think about commercial arbitration, London arbitration practitioners have touted that one of the advantages of Brexit is the ability of English courts to grant anti-suit injunctions against proceedings in EU Courts. Why is that something that would be impacted by Brexit?

Mr. Peter Goldsmith: Well, let me, let me deal with that. Let me just say one other thing first, because I agree with you that, it was very reassuring to hear what Priya had to say about English arbitration. It was also very reassuring to hear if I heard correctly that Indigo took 40 planes new planes last year. For those of us that are hoping to travel again, if a major airline is getting new planes, that gives me confidence that I will be able to travel to somewhere at some stage in the future. So well done to Indigo I had say. But turning to your, to your question, Shreya. I mean, let me just, I think I need to set off a little bit of context about this and I apologize to all those who know this already. English courts have always seen the possibility of granting anti-suit injunctions to restrain parties from proceeding in a

court, which is contrary to an agreement that they have made. The classic is we've agreed exclusive jurisdiction. We have agreed exclusive forum. For a long time, the English courts have said, well, if you promised to do that and you go somewhere else, you can't. If it's the English court you come to, they will stay the proceedings. If it's a foreign court, they may well grant an injunction. The same principle then applied to people who agreed to arbitrate. As long as the arbitration clause was enforceable, as long as it was unconditional, then they would grant injunctions, subject to other conditions being present to prevent you from proceeding in the wrong place. Interestingly, I mean, there's even a case, which actually was a case that we at Debevoise did, I personally argued the case. I confess that given that we came second in the case, as I prefer to call it, rather than saying that we lost. A case called Ust-Kamenogorsk. Which actually said that the principle, the principle that such an injunction should be granted, like even if an arbitration had not been started. In other words, if just so long as there was an agreement to arbitrate that would be sufficient to get this principle of stopping people from proceeding in court when they'd agreed to arbitrate. So that's the background to it. Then the next stage is how does this then apply Pre-Brexit? So, before Brexit, they started to develop a jurisprudence, which caused a problem about that. Now this, again, apologies for saying things that you will know. But jurisdiction between

the courts of European countries was governed by the Brussels regulation. Originally the Brussels Convention became a regulation and that identified the rules which would determine which courts should take jurisdiction over cases. That also affected how he went about enforcing those judgements. So, it's an allocation of responsibility. In that context, there came a time when it was said that you couldn't then English courts couldn't have anti-suit injunctions, because that went against the principles of the Brussels regulation, which determined the allocation of responsibility. That meant that even if there was an arbitration agreement, you could find that wasn't enforced because of the way that the Brussels regulation operates it. Now, there's been quite a lot of jurisprudence, about this. This is, this was determined in a case called West tankers. I'll come back to what actually happened about it, but the decision was confirmed, by the English Courts. And while we were members of the European Union that decision had to be binding in the English Courts. So anti-suit injunction in favour of arbitration could not be granted by the English courts. Since Brexit on the other hand, that would have changed because we're no longer bound since Brexit by decisions of the European Court. And we're not bound actually by the Brussels regulation either, except in cases which commenced before the departure. There is another Convention, we probably need to say a word about that called, the Lugano Convention, which is a slightly second-class cousin

of the Brussels regulation. We've been talking about why it's second class, if need be, but that would regulate relations with the EU countries. It's a Convention which was brought in, which was agreed in order to take account of, the AFTA countries, the countries which are in Europe, but not out of the European Union. We've indicated that we want to ratify and join the Lugano Convention. Three of the States involved have said they're in favour of that. But the European Union and Denmark have not yet said that they agree to it. If they do agree then Britain will become part of this Lugano Convention mechanism. But, at the moment that's not the position. So, what will happen, given that we're no longer bound strictly by EU law, the Court of Appeal and the Supreme Court, the United Kingdom Supreme Court could decide to depart from the West tankers case. Haven't yet done it. Hasn't yet arisen. The consequence of that long answer to a short question, apologies for that is that we could well find that anti suit injunctions would become possible again in a way that they had not been under the principles being applicable today. That's why people are saying we could get back to anti-suit injunctions once we've got out of, now that we've got out of the European union.

Ms. Shreya Aren: Great, thanks so much, Peter. You mentioned the Lugano convention and let's pick up on that little bit, because I'm sure the attendees would be interested to hear;

how that is different from the Brussels regulation and what impact that would have if the UK eventually does exceed to it?

Mr. Peter Goldsmith: Yeah. I describe it perhaps a little bit unfairly as a second class version of the Brussels regulation. It didn't start off that way. It started off essentially as the same as the Brussels regulation, but applicable to these non-EU States; Iceland, Denmark, Norway, in particular. And, over time though people have noticed that the Brussels regulation wasn't perfect it had an inflexibility about it, that created issues. One of the most important was this, under the Brussels regulation, as I'm sure all your participants will know, you have to sue only in accordance with the jurisdiction rules that are set out in the Brussels regulation. The most important of those is that you have to sue a company generally, where the company is incorporated or an individual, where that individual is domiciled. And secondly, if you've got a choice, then the place where the proceedings are started first is the place which has precedence. Now, one of the problems with that is it didn't actually give any flexibility. For example, where you've agreed exclusive jurisdiction agreements. That gave rise to something called the Italian torpedo, which was not as many will think, a sandwich. Though it sounds excellent sandwich if that’s what it was. But the Italian torpedo was a way of actually by starting proceedings in one place, stopping the

more natural proceedings were being brought in another place. Now that caused a lot of controversy, a lot of debate, a lot of academics' statements, a lot of attempts to reverse it through jury, through jurisprudence cases. In the event, what happened was that the participants in the Brussels regulation agreed to change the Brussels regulation. They introduced something called the recast Brussels regulation and that deals with some of these issues, including in particular, the Italian torpedo. But again, long answer to get to the main point, the Lugano Convention doesn't have that. The Lugano convention remains in the original form that it was and hasn't had these in modifications and we would say improvements. One would still find those difficulties that's the principle difference between the Lugano and Brussels.

Ms. Shreya Aren: Thanks so much. Basically, the UK would be reverting back to an earlier position in time, while the recast has, had already made those revisions.

Mr. Peter Goldsmith: Indeed. Exactly.

Ms. Shreya Aren: So then turning to India on this subject and Shreyas is an expert here. What is the approach of Indian courts to anti-suit injunctions? And has it evolved over time, as India has tried to position itself as a pro arbitration jurisdiction?

Mr. Shreyas Jayasimha: Thank you Shreya. And may I say thank you to Peter and Patrick as well. And Debevoise for having me participate at MCIA. The two parts of your question are actually distinct. That is to say that the power to grant anti-suit injunctions is far wider than the universe of arbitration itself. The anti-suit injunction power is that is granted to a court in the context of India, in so far as it really is a common law right. And so there may be situations, for example, of forum non convenience, or where the proper contractually legal forum is not approached, where another court which is approached incorrectly might have to intervene or the correct court will have to issue an anti-suit injunction in so far as the approach to the incorrect court has been made. This is a power that is much wider than the universe of arbitration, as I said. Most recently, for example, in the context of, IP decisions there was a decision of the Wuhan court. It's nice to hear Wuhan outside the context of the pandemic. And, there was also a move to the, to the Delhi Courts, in that matter. Nothing to do with arbitration, just to demonstrate the point that anti-suit injunctions are a live matter, an important part of a court's jurisdiction. In fact, in that case an anti-suit injunction had been obtained from courts in Wuhan. And what was sought to be applied for in India was anti-anti-suit injunction. And so, for those who enjoy private international law, you will have,

Doctrines as of Renvoi, where the applicable law bounces when you apply a different law that has been agreed. And you may have double Renvoi, when the applicable law bounces back. And so, in the context of anti-suit injunctions, you've had situations where, not only a plain vanilla anti-suit injunction is been applied for but also situations where anti-anti-suit injunctions have been seen. The main case in India that people do continue to refer to when it comes to anti-suit injunctions, remains the case of Modi Entertainment. Of course, there's also been many after that but it continues to be cited very widely. And observing that in certain situations where the defendant against whom the injunction sought is amenable to the personal jurisdiction of the court. If the injunction is declined then the ends of justice would be defeated and the sub injustice will be perpetuated. And being tempered by the principle of comity, and that is to not that these injunctions will not be granted merely for the asking. Anti-suit injunctions have certainly been the very area for Indian courts to interact with international litigation. In the context of arbitration law, I'll wait for your further question to comment further.

Ms. Shreya Aren: Thanks, Shreyas. Right on cue here is the question, when it comes to anti-arbitration injunctions there have been instances of Indian courts granting those. How does

that fit within India's pro arbitration approach?

Mr. Shreyas Jayasimha: Again, the word anti-arbitration injunction, Peter will remember has been worn as a badge of honour by many arbitrators who bravely march on in several jurisdictions where there may be an anti-arbitration injunction issued. Because the injunction is typically issued against the party, the party to the arbitration, who is then injuncted from proceeding with the arbitration per se. So, they proceed with the arbitration, contrary to the injunction at their peril. Very rarely, do you see the orders actually being passed against the arbitrators although there are some of those war stories internationally. But usually when the anti-arbitration injunctions are granted, they are granted in so far as the party is concerned. So, the arbitration does. For example, if the arbitration is seated outside of India, may choose to disregard the order, which is in fact not being passed against them personally. So, you have of course, earlier seen decisions that be it in commercial or in these treaty arbitrations, where you've seen some courts issue anti-arbitration injunctions. But now the debate has become, I would say more nuanced, a dusting of decision, which was actually unreported in the law reports for many years, the decision of the early 2000's, it got reported only much later. The three judge that is a full bench decision of the court, had quite clearly said that anti arbitration injunctions are

certainly not to be looked at easily at all by any account. And that is because of the principle of competence-competence. Whatever those objections are, the objections can be surely put to the tribunal and the tribunal can form its view. Now this decision has not always been cited in other matters. So, the decision that I'm now referring to is Kvaerner Cementation, ultimately reported in 2012. Now, the most recent decision of December, for example, the Delhi Courts. As again, had occasion to apply this principle of anti-arbitration injunction but the facts were a little different, in the sense that it involved a dispute relating to a trust deed. The question of arbitrability of trust disputes also came into play. And so, while a single judge had initially refused the anti-arbitration injunction citing Kvaerner Cementation that the Division Bench did distinguish it, to say that if it pertains to a subject matter that is clearly not arbitrable then injunction would be granted. But my view in this, Shreya is that of incorrigible optimist. As Peter said the long-term trajectory is certainly positive. And so, whatever these minor speed bumps that are raised, I'm fairly confident that the international business community should not be unduly perturbed by Indian courts suddenly showing unwarranted anti-suit or anti- arbitration injunctions.

Ms. Shreya Aren: That's good to hear. So, turning then to London in the same context, Peter. Given London's longstanding

position as a leading arbitration seat, are anti-arbitration injunctions granted by English courts? I mean, we shouldn't be put off by the name, as Shreyas has mentioned, but just to get your view on how English courts have treated this?

Mr. Peter Goldsmith: Sure. They can be and they are from time to time. Of course, there are, this will arise in circumstances where somebody comes to the English court and says, please stop this arbitration which is taking place. The English Court does have power to do that. The basic power comes from Section 37, of what we now call the Senior Act, Senior Courts Act. That's actually exactly the same provision that allows it to stop in other courts. So, Section 37 can stop, could be used to stop arbitration and it could be used to stop a court proceeding. The English court will normally only intervene if it is the, if it's the seat for the relevant arbitration, but it's possible that it could arise in other cases. I mean, one case, a case called, Whitefish Julius. The English Court of Appeal refused to grant an injunction to stop an arbitrator from holding a hearing in Switzerland, to examine its own jurisdiction, because it would have infringed the principles of the law of international arbitration. But the Court of Appeal didn't entirely rule out the possibility of an English Court granting anti-arbitration injunction and said it could be justified in exceptional circumstances. So, so that has happened. The court, the site, the case that is

cited most frequently for the proposition that you can do that even where you can't say that that is in breach of an agreement. There's is a case called Claxton Engineering and TXM Olaj. Now that was the case in which the argument was that, wasn't still not the arbitration was in breach of an agreement like an exclusive jurisdiction agreement. It was because it was vexatious or oppressive to bring the arbitration. Now that's a different test. For example, for the test, whether it's, for a stay when you're judging between two competing jurisdictions, it's quite a strong test, vexatious and oppressive. But the court in that case did say, that you could grant an injunction against an arbitration, where it was vexatious or oppressive, and didn't limit the circumstances. Interestingly, the judge was Mr. Justice Hamlin, who's now a member of the United Kingdom Supreme Court. So that decision, if it came up to the top court, the Supreme Court for consideration, I suppose, would be likely to find favour at least with one member of the Supreme Court. There were one cannot guarantee with judges, as we all know that, their fellows will take the same view, as he does. So, so the answer is, yes. Indeed! Anti -arbitration injunctions can be granted whether it's an exclusive jurisdiction clause in favour of some different tribunals with different methods of dispute resolution. But it may also be capable of being granted where it would be vexatious and oppressive to do so.

Ms. Shreya Aren: Thank you. Priya turning to you then and we're really privileged to have that kind of perspective on our panel today from the arbitration user's perspective. What is your view of these kinds of injunctions and is this something you've had to grapple with before?

Ms. Priya Mehra: So, firstly, let me start by saying, fortunately not, we haven't had to grapple with it at all. But I think generally at least from an Indian court perspective and as Shreyas mentioned, this is something that, I mean, it's slow, right? It's not that you, that we see a lot of it. It's not something that, is, you know, something that's very common, but I think what worries maybe from an in-house or company perspective is the unpredictability of the whole thing, right? That what could happen and being a sort of equitable remedy, each case will be looked at independently, right? So, an injunction being an equitable remedy, it won't be something that applied to a particular case will apply on your case. So, while we haven't had to grapple with it, I think this is just the fear, the shear unpredictability of the applicability of such an anti-suit and anti-arbitration injunction that could affect you. It does worry you. But not to say that it's very common. So fortunately, it's not something you've had to deal with it or deal with a lot.

Ms. Shreya Aren: Great. Thank you. Just because we're going to turn to investment treaty next. I have, there's a question, Peter, which if you don't mind, I'll address to you on, commercial arbitration before we change topics. On the Arbitration Act of 1996, and whether that has been affected at all in legislation or in practice by EU Law? I think you mentioned one of the points of anti-suit injunctions, but is there any other way?

Mr. Peter Goldsmith: No, the Act itself, I don't think has been, nor will be, the act pretty much follows, not absolutely, but pretty much follows the model law, the UNCITRAL Model Law. It's now pretty much in line with modern arbitral practice in many countries in the world and it's worked pretty well. There are some bits and pieces where it doesn't quite follow the model law, but pretty much does. I think that's helped very much the process of arbitration in the UK be respected very, very widely. I mean, the most important point that's what I made already was that the English courts used to be quite interventionist. And they used to intervene to say, well, no. We don't think there should be arbitration. They would find a reason why they can stay, the matter could proceed in court. As I mentioned that, I mean, those who practice in this field in India have seen the same thing happening and the development of that principle. But the 1996 Act, essentially crystallized a position of non-

intervention by other courts except in circumstances where they were actually supporting the arbitral process. So, you can go to a court to get help, to get a witness's evidence or something of that sort, enforcement of the rights but generally being this court wouldn't intervene into the area which the arbitrators had been given by the arbitration agreement. Now none of that is changing as a result of Brexit. None of that will change as a result of Brexit. There are certain issues in terms of practice which will change. I think the most important one is the field we've been discussing, which is the availability of anti-suit injunctions, which used to be very common, which West Tankers stopped. It stopped people from getting anti-suit injunctions saying there's another court which has got exclusive jurisdiction. So please don't allow this case to proceed. That would happen in English courts too. You bring a case in the English court in breach of an exclusive jurisdiction agreement. But if in fact that was bringing to an English court was in accordance with the Brussel regulation criteria, then you will be able to stop it. Now that's changed or may have changed as I was explaining before. As a result of our leaving the EU and no longer be bound by the decisions of the Court of Justice of the European Union legibly, the West Tankers decision. That would have changed, at least it's capable of changing now, because the English courts are no longer bound by those decisions. But I can't immediately think of any other area where the

Arbitration Act itself that's been affected by Brexit. May be Patrick has something in mind.

Mr. Patrick Taylor: Well, there's one other aspect, which is a practical aspect. I think that may be impacted by Brexit. Obviously, the enforcement of awards under our Act had to take into account EU law. Given that EU law was in many respects, those new, the Supreme law for the UK, until Brexit. And under EU law and the UK Swiss decision, it was possible to challenge an award for breach of European or European public policy. After Brexit that the only public policy that you'll be to rely upon to challenge the enforcement of an award in England will be English public policy. And so, in terms of reach in of EU law around issues of enforcement, there may be practical differences in the application of our Act.

Ms. Shreya Aren: Right. Thank you so much for that. So then turning to…

Mr. Shreyas Jayasimha: Shreya, before you move on, can I just do a quick plug for the excellent article that Peter and Patrick have authored in NLUJ Review, which is also available on SCC so some of the listeners interested on that on exactly this topic of Brexit, its implication and arbitration.

Mr. Peter Goldsmith: Thank you for that. Thank you Shreyas. If I could find the link, we could put it in the chat box, but I can't. Maybe someone else can.

Ms. Shreya Aren: I'll try and find it. Then, turning to the investment treaty front Patrick. How is the negotiation of investment treaties by the UK likely to be impacted by Brexit?

Mr. Patrick Taylor: I think the US is at least for now reveling in its new found freedom. It is now as free as India is to chart its own course on free trade agreements and investment protections. Under the development of EU Law over the last 10 years, the EU has made or what I think is fair to describe as a land grab over responsibility for investment protection for European investors. And in on the context of that land grab, there has become, there has emerged a very significant or for a long time there was a very significance power struggle between Intra EU BITs, between the power of European States to negotiate free trade agreements and investment protections and the authority of the European Union to enter into such agreements on behalf of the entire European area. After Brexit, the most immediate result is that the UK is now free to chart its own course. It's free to negotiate the free trade agreements that it would like to. And indeed, it has made that a priority, falling out of the single largest trading block in the world in overnight does, it was always

likely to mean that, crafting new free trade agreements with other partners across the world was going to become a priority. That is certainly at a policy level what we've been seeing. The UK has listed the Us, Australia and New Zealand, as priorities for this. No doubt, because it thinks that certain level of convergence in the laws and the rules and objectives would mean that those could be agreed perhaps a little faster than with other jurisdictions. It has already signed a free trade agreement with Japan, the UK - Japan Comprehensive Economic Partnership Agreement, the CEPA, which was signed in October of last year. One thing that's unclear at the moment is the extent to which these free trade agreements will also cover investor protections. The CEPA does not provide for investor state dispute settlements, which some people have complained about. But although we don't have the same level of vitriol in the UK at the moment about ISDS as there is within the European Union. It is an issue that is bounded around as a political issue. And that opposes parties who are anti globalist and who consider still, and still tout the line, that's investor state dispute settlements and investor protections are a means for companies to essentially hold the sword of Damocles over states. And to ensure that they are treated differently to others and they have their cases decided in front of secret courts. That's something that you hear a lot, that mistrust of the investor state system. Means that it seems to be a bit of a lottery at the moment

where as to whether your free trade agreements will contain investor protections. If they do, what are they going to look like. And even if they do and they are actually effective protections, are you going to get the investor state dispute settlement mechanisms that would allow investors to enforce those. As I'm sure everyone listening today will know the genius of the bilateral investment treaty system is that although these treaties are signed between States, they give individual investors a cause of action and a means of enforcing rights granted to them under these treaties. And the same, the jury is out as to where, how highly the UK is going to prioritize investor state dispute settlement and investor protections in its, agreements. The CEPA doesn't contain one. But anecdotal evidence that we're hearing is that the discussions with the US, Australia and New Zealand for the time being at least are encompassing investor protections as well as general trade arrangements and contemplating investor state dispute settlements. Now that can change very quickly. We'll have to see where we come out but it is interesting to know that for the time being at least those remain on the table. Now in order to understand though also how the nature of the new found freedom that we enjoy. I think it's helpful to understand what the debate has been within the European Union and the nature of the restrictions that have emerged within the EU that we are now freeing ourselves from. If you'll forgive me, I'll just delve very briefly into the

history of the Achmea saga, which no doubt most people have heard about the Achmea decision, although it may not in all instances be clear, what's the scope of the Achmea decision is because to some Achmea was a decision limited to the impacts of the Dutch Slovak treaty and to others, Achmea spells arguably the beginning of the end of even commercial arbitration within the European Union. So, in March 2018, the Court of Justice of the European Union, held that a clause contained in the bilateral investment treaty between the Netherlands and Slovakia was incompatible with EU norm, specifically the arbitration provision. And the reasoning of the CJEU was that because the arbitral tribunal appointed under that arbitration provision was not part of the Dutch or Slovak judicial system, it essentially sat outside of the jurisdiction and the oversight of the European Court system. One of the founding principles of European law was the, of the European legal framework was that, European law is absolutely Supreme within the context of the European Union. And that only the CJEU and the European courts were competent to decide questions of European law. So, allowing a tribunal sitting outside of the European league in order to determine a dispute between European parties that could impinge or involve or relate to certain European laws, offended the CJEU and they said offended European laws as a whole and therefore they struck down the validity of the arbitration provision as a matter of the EU Law. The debate came, that decision came, I

should say, in the context also of a war that was being waged by the European Commission against Intra-EU bilateral investment treaties, which was really, which really come to a head as a result of an investment treaty case involving Romania. Where the investors actually arguably Romanian origin brothers who had taken up Swedish nationality brought investment claim against Romania for their investments in Romania and under the Swedish Romania BIT, and essentially argued that their investments have been expropriated, as a result of the withdrawal of European subsidies. The European Commission took the view that this was actually a deliberate attack on EU Law that prevented state aid of European companies. A direct clash between the European Law and an investment protection. So, the European commission banned Romania for actually paying out under the awards and said it would be contrary to EU Law. So that war was waging in the background whilst the CJEU handed down the decision in Achmea. And since Achmea that war has continued, and the, in almost every single Intra-EU investment case that you have now, the European union intervenes in order to argue that the tribunal lacks jurisdiction as a result of Achmea. As I say to some people Achmea is limited just to the Dutch Slovakia bilateral investment treaty but the argument has expanded. So that it should apply logically to all Intra EU investment treaties. And now that it should also apply to the Energy Charter Treaty. Interestingly though, the European Union itself is a

signatory in its own name to the European Charter Treaty. There's a reference now from Swedish Courts to the CJEU as to whether the Energy Charter Treaty is also the arbitration provision in the Energy Charter Treaty is also contrary to EU Law. The role of Achmea and decision of Achmea may be applied to strike down the arbitration provision in the Energy Charter Treaty, which would also be a very major step. As I said, some even argue that there's no logic to the idea that this should be limited only to investment tribunals. Because even a private commercial arbitration tribunal arguably sets outside, could be seated in a say it could be seated in the country outside of the European Union, but deciding European law issues between European parties. There's nothing that prevents two European parties from agreeing to seat their arbitration in India and under the auspices of the MCIA or in Singapore under the auspices of SIAC and to be governed by French law. There is a question mark as to how far the European Union is going to reach to try and limits the rights of parties to escape the jurisdiction of that court. That's a, quite a long story as to how we get here. But as a result of this the European Union has forced European States to sign what's colloquial referred to as the cancellation treaty. It was signed last year or came into force last year. The cancellation treaty essentially says, that all Intra EU BITS are no longer valid. They were, they've all been cancelled. Moreover, that their sunset provisions are no longer

effective. Which means the sunset provision, as many of you will know is that, if you've got an investment and the treaty is cancelled, and then if you have a dispute about that investment arising out of actions that come and appear in say 5 or 10 years after the cancellation of the treaty, you are still entitled to bring a claim under the treaty. Those are cancelled as well and therefore your rights ceased overnight. It's to be seen what will actually happen with the cases that are currently on foot and still on foot that arose before that treaty was became effective and indeed being cases starting now in front of ICSID Tribunal, which are not seated in any particular jurisdiction, as you might know and what the impacts of the cancellation treaty will be on this. So, the war goes on. Thankfully for the UK we now sit outside of that. We have I think 12 or 13 investment treaties with European States. Those investment treaties would allow claims to be brought. They're not likely to be attacked or rather their validity is no longer likely to be affected by the actions of the European Union, European Commission, with a one footnote to that worth noting is that, the European Union is bringing enforcement action against the UK for its failure to ratify the cancellation treaty before it left the European Union at the end of 2019. And it's, sorry at the end of 2020. And it's, yet to be seen what the consequences of that will be and that enforcement action currently though is ongoing. Current remedy is that one might see, supposedly would be financial because

it's hard to see otherwise how the UK can be forced to cancel treaties that are no longer subject to the jurisdiction of the European Union. Anyway, so the bottom line and I think the takeaway is that for the UK, Brexit has been a good thing for its investment treaty network. The UK is now probably a more attractive base for investors thinking of investing in certain Eastern European States because you can benefit from the protections of the treaties without fear of overreach from the European Union.

Ms. Shreya Aren: Thanks Patrick. So that looks like..

Mr. Peter Goldsmith: Can I just?

Ms. Shreya Aren: Of course, Peter. Go ahead.

Mr. Peter Goldsmith: Just want to add just one little footnote, because Patrick rightly refers to the argument that had been run very hard in the context of Brexit. Those who are proposing Brexit that this would free the United Kingdom to enter into its own free trade deals and apparently it does, actually, the effect of that in terms of treaties which contain investment protection provisions is yet unclear. I only mentioned this because I happen to be the Chairman of the House of Lords Treaties Committee, international agreements committee. Our job is to scrutinize new international

agreements entered into by the United Kingdom. So, as we're the Upper House, and that's what we do. There's another committee in the House of Common that does the similar job, and we work actually quite closely together. But there haven't been any new treaties containing new investment protections yet. Most of the agreements are what we call continuity agreements or rollover agreements. The Japanese one is a bit different. We haven't yet gotten agreement with new agreement with Australia or New Zealand or the United States. Which are countries where we will actually see this debate about whether the strong argument to civil society that they don't want to see any investment protection will be countered by that of investors who say we want the protection that actually this provides. Patrick's quite right, that we don't, we've got that freedom, but how it's going actually to be used is yet to be seen. Thanks for letting me to say that.

Ms. Shreya Aren: Thank you, Peter. One of the obviously important trade relationships is between India and UK. There was an India-UK BIT, which I believe was the first BIT that India entered into and that was unilaterally terminated in 2017 by India. So Shreyas, is there any hope for another BIT between UK and India in the short to medium term?

Mr. Shreyas Jayasimha: No. It strays into political speculations. I don't know, is all I can say. But Peter did

refer to and so did Patrick to the sunset provisions. So, while it is correct to say that India has terminated several treaties, including this one, the sunset provisions continue to apply for a specified period of time. And those provisions are there precisely to deal with the hesitations, the negotiating elbow room that States do require to deal with either the issue of popular sentiment or of their business interests, indeed the Host state concerns and to synthesize their concerns into negotiating positions. So, no doubt out of this churn there will emerge a new set of mutually agreed perhaps, obligations. But, as of now, India does have a Model BIT. If there have been only a couple of Countries with which India has been able to successfully conclude negotiations on that basis. As long as that Model remains the current Model, I don't think there will be a vastly different negotiating approach by India with any country, be it, the UK or any other ones. So, I, given the views expressed on the Indian Model by some of the other parties the position seems to be further away than immediately achieving an agreed instrument. But as they say, maturely a treaty or any agreement is in essence, a disagreement reduced into writing. There are ways in which lawyers and negotiators can adequately capture the concerns of different state parties and put it into an agreement which denotes the areas or scopes of disagreement. Now when and whether that would happen in the UK India context, Nostradamus isn't around.

Ms. Shreya Aren: Great. Thank you so much Shreyas. I guess we remain cautiously optimistic on that front as well. This has been a great discussion, but unfortunately, we've run out of time. So, we haven't been able to take some of the questions that were asked. But I would really like to thank all our panelists, Patrick, Peter, Priya, Shreyas for indulging us in this really interesting conversation.

Mr. Shreyas Jayasimha: Thank you Shreya very much.

Ms. Priya Mehra: Thank you.

Mr. Abhileen Chautervedi: I thank on behalf of MCIA, I thank all the panelist for what has been a really interesting session. It's great to learn that the faith in London as the seat of arbitration doesn't stand shaken in a post-Brexit era. Thank your Shreyas for your views on anti-suit and anti-arbitration injunctions, for underscoring the distinctions there and for citing examples from elsewhere around the world. Thank you Priya for providing us with the stakeholder's perspective on a post-Brexit era. I'm sure a practitioner in London would be elated to learn that the new 40 new aircraft agreements have London as the preferred seat. Thank you, Shreya, for stitching it all of this together. They were, views on both commercial and investment treaty arbitrations, and you have conducted those sessions very well and we thank

you for that. Thank you to all our audience for remaining with us on this Friday evening. We hope to see you tomorrow at 10:00 AM. At 10:00 AM, we have the session starting on the day five and the topic for tomorrow is just, I'm so sorry for this. The topic for tomorrow is, ODR: Bridging Distances for Dispute Resolution. We look forward to welcoming you for tomorrow session. And thank you so much from all of us.