The Three Hottest Energy Arbitrations of 2017

Kluwer Arbitration Blog
January 4, 2018

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Please refer tot his post as: Marine de Bailleul, 'The Three Hottest Energy Arbitrations of 2017', Kluwer Arbitration Blog, January 4 2018, http://arbitrationblog.kluwerarbitration.com/2018/01/04/three-hottest-energy-arbitrations-2017/

2017 has witnessed a boom in the number of international arbitrations in the energy sector. This is no surprise. Indeed, at the end of 2016, ICSID's caseload-statistics reported that 42% of cases administered by ICSID arose from the energy sector, which was more than any other sector. As anticipated, this rise has continued throughout 2017. Today, energy is the industry where international arbitration is perceived as the preferred mechanism of dispute resolution, together with construction. The Energy Charter Treaty ("ECT") is the most frequently invoked international investment agreement.

This popularity is explained by the crucial role played by sources of energy in today's economies: the world is hungry for oil and for gas. These are the most important sources of energy and meet almost all global energy needs. Demand of, and investment in, sources of energy, are flourishing. Foreign investment became crucial to afford states the possibility of exploring and developing their energy resources, especially where states do not otherwise have the capital to do so.

In this piece, I examine three landmark energy arbitrations that shook up the international arbitration community in 2017. In my view, these are the hottest energy arbitrations of the year. Here's why.

1. Hot because unattainable: June 2017, Yukos faces additional hurdles to enforce the award

That the shareholders in defunct Russian oil giant Yukos Oil Company ("Yukos") won the largest arbitration award ever against Russia will be no news to you. On 18 July 2014, an arbitral tribunal sitting in The Hague held unanimously that Russia breached its international obligations under the ECT by destroying Yukos and unlawfully expropriating its assets for political reasons. The mammoth award was final, binding, and enforceable in 150 states under the New York Convention. However, Yukos faced several challenges in its efforts to collect on the USD 50 billion award. Below I set out some of these challenges, the latest of which occurred in June 2017.

First, in April 2016, the District Court of The Hague overturned the award on the basis of the tribunal's decision on its jurisdiction, finding that Russia had not bindingly agreed to provisionally apply the ECT under article 45 of the ECT. Indeed Russia signed the ECT but never ratified it, because it found that the dispute resolution through arbitration at article 26 of the ECT was at odds with the Russian Constitution.

Second, when Yukos commenced its enforcement efforts by attempting to seize Russia's assets abroad and freezing Russian bank accounts, including the accounts of Russian space agency

Roscosmos, several national courts opposed the seizures in their respective jurisdictions. For instance, a Paris court invalidated the seizures related to Paris enforcement proceedings in June 2016, on the grounds that Roscosmos was a separate legal entity which could not be held accountable for debts owed by Russia.

Third, in June 2017, a Belgian court similarly unfroze Russian assets and lifted all attachments on Russian-owned real estate and bank accounts in Brussels, on the basis that Yukos lacked a valid enforceable title for the attachments. A 2015 amendment to the Belgian Judicial Code made it more difficult for creditors to attach the assets of sovereign states, including by imposing stricter conditions for the attachment; France passed a similar law in 2016.

Fourth, and this is the latest and ultimate obstacle in Yukos' enforcement efforts, the Paris Court of Appeal confirmed in June 2017 the release of the seizures of Roscosmos' assets and accounts. It rejected Yukos' appeal and affirmed the lower court's ruling that Roscosmos was not an emanation of the Russian state, but instead a separate legal entity not liable for Russia's debt in the USD 50 billion award. All in all, the Paris Court of Appeal held that the seized funds did not belong to Russia and, as such, lifted attachments on funds held by French satellite launch company Arianespace. Andrea Pinna, counsel to Russia in the Paris enforcement proceedings, noted that *"this is the ninth legal decision along these lines. Not once have the oligarchs succeeded with their arguments brought before French courts for the seizure of assets of Russian public corporations"*.

The bottom line is that Yukos is facing continuous hurdles in attempting to collect on the award costs. Targeting Russian and French commercial interests in connection with the European space cooperation is proving a difficult task, and Yukos may have to look at other avenues for enforcement. It could also appeal the latest decisions before the *Cour de Cassation* and seek to renew the attachments.

2. Hot because feisty: June 2017, Total defeats a multi-billion arbitration claim

After an eight-year UNCITRAL dispute with Russian provinces Volgograd and Saratov and with Russian company OOO Interneft over a 1992 oil and gas exploration and production agreement, former Total subsidiary Elf Neftegaz has prevailed in the arbitration by having all claims thrown out on 19 June 2017.

In the arbitration, the parties disagreed on the applicability and effective date of their contract. The agreement, aimed at the development of oil fields in Volgograd and Saratov, was concluded weeks after the collapse of the Soviet Union. The parties were at odds over whether the contract had taken effect, though it was common ground that no oil and gas exploration or production ever occurred. Indeed, Elf Neftegaz argued that it was forced to abandon the project following the claimants' resistance: Russia implemented federal regulations that were contrary to the contract and sought greater autonomy in the provinces. Other points in dispute concerned: (i) the legal regime applicable in the Soviet Union; (ii) the changing legal and political landscape when the Russian Federation came to light; (iii) whether the claims in the arbitration were time-barred; and (iv) whether the provinces had authority to enter into the 1992 agreement.

More importantly, the amount in dispute is what makes Total's successful defense particularly noteworthy: the claimants sued Total for USD 22 billion in damages. Total managed to defeat this sizeable arbitration claim, thereby avoiding what would have been one of the largest UNCITRAL awards ever. What is more, the claimants failed to challenge the arbitral award in the Swedish court within the required deadline; therefore, the award is now final and binding. This constitutes another hot arbitration outcome in the energy sector.

3. Hot because harmonious: December 2017, ConocoPhillips and Ecuador settle their dispute

On 4 December 2017, ConocoPhillips and Ecuador agreed to the terms of a settlement under an ICSID arbitration award issued last February. In December 2012, an ICSID panel issued a decision on liability holding Ecuador liable under the USA-Ecuador BIT for unlawful expropriation of the company's assets in the country – two significant oil blocks. The arbitral tribunal then issued an award on damages in February 2017, ordering Ecuador to pay USD 380 million to ConocoPhillips' subsidiary Burlington Resources, by way of compensation for the 2009 confiscation. Ecuador then applied to annul the award, and in August 2017 an ICSID Annulment Committee lifted the stay of enforcement of the award, rejecting the state's argument that payment of the award costs should be postponed due to financial pressures.

Under the settlement agreement, ConocoPhillips will receive USD 337 million from Ecuador. The energy giant has already received USD 75 million from the state in December 2017, and expects to collect the balance by April. The parties have also agreed to an offset for the decision awarding Ecuador USD 42 million on its counterclaims, of which Burlington Resources is entitled to an extra USD 24 million through a third-party contribution to the payment.

The settlement is a positive development, not only because it allowed the parties to resolve their nine-year controversy constructively, in terms which are mutually satisfactory, but also because it contributes to the effectiveness and legitimacy of the arbitral process. Indeed as stated by Ecuador's attorney general's office, the state will stick by its *"commitment to fulfilling its international obligations"*. Put simply, Ecuador will pay the agreed sum to ConocoPhillips. This is an encouraging outcome, especially in light of the recent trend of hostility towards the arbitral process as shown by several states in the Latin American region. By way of example, as discussed in a previous article, Venezuela adopted a stance of non-compliance and opposition to the multiple awards rendered against it in recent years. Venezuela multiplied its annulment requests against such awards, and its cumulative debt at ICSID grew sharply. It is therefore promising to witness countries such as Ecuador engaging in a mutually agreeable resolution of their dispute instead of repeatedly avoiding payment, even if Ecuador has noted that it disagrees with the award findings.

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To put it in a nutshell, the energy sector has clearly emerged as a trendy sector in which to use international arbitration as a tool for resolving disputes. The importance and complexity of the issues at stake, the prominence of the parties involved, and the size of the claims, all partake of the popularity of energy arbitration. It remains to be seen whether 2018 will be taking a step in the same direction…

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