Kluwer Arbitration Blog

2021 in Review: Key Investment-Arbitration Developments in Europe

Maria Fanou (Assistant Editor) · Monday, January 24th, 2022

Looking back on 2021, one realizes that for those interested in the intersection between EU law and investment arbitration, it was a busy year. As part of our customary "year-in-review" series, this post offers a brief overview of the key investment arbitration-related developments in Europe and their coverage on the Blog. I have grouped these developments in two parts. First, the post focuses on the key judicial developments, notably judgements rendered by the Court of Justice of the EU (CJEU or the Court) and by EU domestic courts. Second, the post highlights the policy initiatives taken by the European Commission at both intra- and extra-EU levels.

Investment Arbitration-related Judicial Developments: Highlights from the Case Law of the CJEU and the EU Domestic Courts

Since the CJEU rendered its landmark judgment in *Achmea* (see coverage on the Blog here), all eyes were on the potential reach of the ruling to intra-EU disputes under the ECT. The debates have been intense and everyone anticipated that the authoritative answer would come, eventually, from Luxembourg. This abstract anticipation for an answer was concretized in March 2021, when a preliminary ruling raising precisely the issue of intra-EU applicability of the ECT was sent to the Court (C-155/21, *Athena Investments e.a., pending*). However, the answer came perhaps sooner than expected in a different preliminary reference case. It was in *Moldova v Komstroy (formerly known as Energoalians)* (C-741/19) that the Court chose to examine the intra-EU applicability of Article 26(2)(c) of the ECT and the compatibility of the investor-State dispute settlement (ISDS) mechanism provided therein with EU law. In the Blog, several posts covered the various phases and angles of the *Komstroy* saga.

One of the first developments we covered was the confirmation of the *Komstroy* arbitral award in the United States. About the same time as one of our contributors was wondering what could happen after the CJEU's ruling, the Opinion of Advocate General Szpunar was delivered. The Opinion inspired mixed critiques. Several contributors questioned the competence of the Court to examine the intra-EU applicability of the ECT in the context of this particular preliminary reference request

that was limited to the notion of investment under Article 16(1) of the ECT. Such doubts on the competence of the Court were cast irrespectively of the authors' views on the controversial issue of intra-EU applicability of the ECT or the substantive issue of the definition of investment.

Indicatively, some contributors argued in favour of the transposability of *Achmea* to intra-EU ECT Arbitration but also underlined the Court's lack of competence to rule on this matter in Komstroy. Others emphasized that the facts of this case were "completely unconnected with EU law" and the "CJEU superimposed itself on the ECT". Another commentator looked at the negotiating history of the ECT underlining the lack of a disconnection clause in the ECT despite the EU's original demand for one.

The Court rendered its judgment in September 2021. It ruled that Article 26(2)(c) ECT must be interpreted as inapplicable to intra-EU disputes, and that the acquisition of a claim arising from an electricity supply contract does not constitute an 'investment' within the meaning of Articles 1(6) and Article 26(1) of the ECT. As two of our contributors noted, this was a restrictive interpretation of the notion of protected investment.

About a month after the Court rendered its judgment in *Komstroy*, its ruling in another much-awaited case, Case C-109/20 (*PL Holdings*), came out. In *PL Holdings*, the Court found that an EU Member State is precluded from replacing an arbitration clause, included in an intra-EU international agreement, by concluding an *ad hoc* arbitration agreement in order to make it possible to pursue arbitration proceedings based on that clause. A different approach would circumvent that EU Member State's obligations under the EU Treaties as interpreted in *Achmea* (para 65 of the Court's judgement in *PL Holdings*).

Looking forward, it is certain that discussions on the implications of the CJEU judgements in both *PL Holdings* and *Komstroy* will continue into 2022. In addition, there are several other developments that are to be expected. For example, the modernization process of the ECT is ongoing, and Belgium's request for an Opinion from the CJEU on the intra-European application of the arbitration provisions of the future modernised Energy Charter Treaty is still pending.

2021 (like almost every year since 2014) was also marked by another episode of the Micula saga. The CJEU has pending (C-638/19) before it the European Commission's request to annul the General Court's judgement, which was rendered in 2018 and annulled the European Commission's 2015-decision (see also here). In July 2021, AG Spuznar's Opinion in C-638/19 was published. AG Spuznar opined that the General Court's judgment under appeal should be set aside. We are all waiting for the CJEU's ruling in *Micula* (expected in January 2022) with great interest.

Time will show how much room for intra-EU ECT cases or non-treaty-based investment arbitration cases is left in the EU (to quote another contributor and her comment on AG Kokott's Opinion in PL Holdings). A determining factor will naturally be the stance of enforcement courts inside and outside of the EU. In that regard, two developments that we covered are worthy to mention. In May 2021, as two of our

contributors reported, the Dutch Ministry of Economic Affairs and Climate initiated "anti-arbitration" proceedings before the German courts to "avert" two ECT-based ICSID arbitrations brought against it by two German energy companies in light of the Achmea ruling. In November 2021, the German Supreme Court (*Bundesgerichtshof* – the referring court in *Achmea*) rejected an appeal against the Higher Regional Court Frankfurt upholding essentially an action brought by Croatia pursuant Article 1032(2) of the German Code of Civil Procedure and declaring the arbitral proceedings inadmissible (stay tuned for a post authored by Hanno Wehland, soon to be published on the Blog).

Policy Developments

At the intra-EU level, in light of the above developments on the judicial front, the pressing question is what the future holds for intra-EU investment protection. In addition to a communication published shortly after *Achmea*, the Commission intends to take action to safeguard cross-border investment within the EU. To this effect, in 2020 it launched a public consultation inviting stakeholders to "express their views on the identification of issues related to investment protection and facilitation cross border within the European Union and on the best way to improve the intra-EU investment environment". The Commission did not adopt a proposal for a regulation in the fourth quarter of 2021, as was its original expectation. We therefore eagerly await this development in 2022.

At the extra-EU level, the EU has emerged as a significant actor in the investment field. Notably, the idea to establish a Multilateral Investment Court (MIC) (see also coverage on the Blog here) to replace traditional ad hoc ISDS (in the form of investor-State arbitration) was introduced by the EU. The EU managed to introduce this idea in the context of bilateral negotiations with its various trade partners. Subsequently, it became part of the global reform agenda and keeps being discussed under the auspices of UNCITRAL Working Group III.

The EU is "committed to open trading relations" with China. The EU and China reached an agreement in principle on investment in December 2020 (the EU-China Comprehensive Agreement on Investment (CAI)). Nevertheless, in May 2021, the European Parliament decided to suspend CAI, in list of the tensions in the political relationship of the two parties. Our contributors examined the key investment protection provisions of the agreement and its potential impact on future investment claims. Notably, China's position on the establishment of a permanent court does not seem to fully align with the position of the EU.

Looking forward to 2022, we could predict with relative certainty that, if 2021 kept us all busy, 2022 will not disappoint us, either. So, stay tuned for further coverage of developments concerning the relationship between ISDS and EU law on this Blog!

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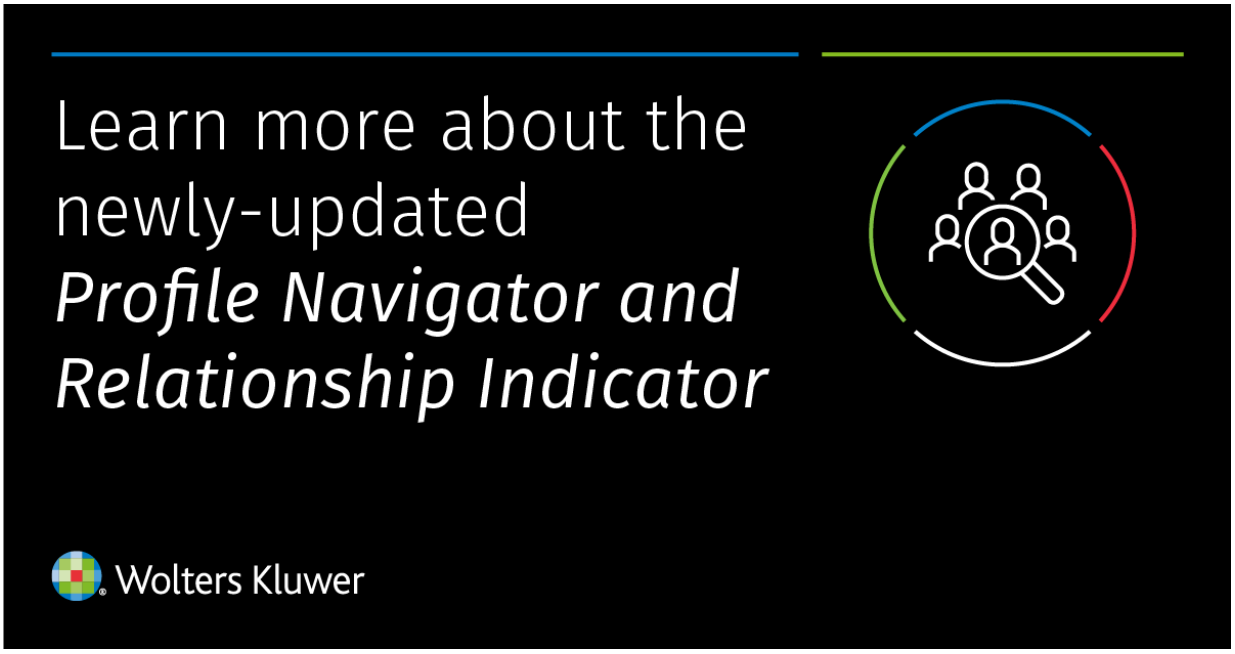

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