Kluwer Arbitration Blog

# Stileks v. Moldova: A Chance to Go Back to Square One After the Preliminary Ruling of the CJEU?

Patricia Zghibarta · Tuesday, March 16th, 2021

On 15 January 2021, the United States Court of Appeals for the District of Columbia Circuit ("DC Circuit Court") handed down its decision in *LLC SPC Stileks v. Republic of Moldova, No. 19-7106 (D.C. Cir. 2021)*—a case concerning the confirmation of an arbitral award against the Republic of Moldova. The US courts confirmed the award despite set aside proceedings pending in France and an anticipated preliminary ruling by the Court of Justice of the European Union ("CJEU"). Depending on the outcome of the set aside proceedings in France, the dispute may become an interesting addition to the US case law on confirmation and enforcement of awards that were set aside at the seat of arbitration.

**Background to the Dispute**

The dispute arose in relation to an energy supply agreement under the Energy Charter Treaty ("ECT") between Moldtranselectro, a state-owned enterprise in Moldova, and the Ukrainian company Energoalliance. The transaction was completed via a company in the British Virgin Islands – Derimen. After acquiring Derimen's right to claim the debt, Energoalliance made unsuccessful attempts to recover the debt through the Moldovan courts. In 2010, Energoalliance commenced arbitral proceedings in Paris. In 2013, the Tribunal concluded that Moldova was in breach of its obligations under the ECT and had to pay the Claimant approximately US$49 million.

As a result, the Moldovan Government sought to set aside the award in the French courts (the Paris Court of Appeal), while the award creditor petitioned to confirm the arbitral award in the United States. Later on, LLC Komstroy became a successor in interest to Energoalliance. The DC District Court decided to stay proceedings pending the outcome of the case in the Paris Court of Appeal. The Court of Cassation in France vacated the decision of the Paris Court of Appeal and reinstated the award. Faced again with the remanded application to set aside the award, the Paris Court of Appeal resorted to the CJEU for a preliminary judgment on three questions, which focus on the CJEU's take on the boundaries of the term 'investment' under the ECT. Indeed, the scope of the term 'investment' under Article 1(6) of the ECT has been the core issue of the dispute. While the arbitrators appointed by Energoalliance and Moldova found that Energoalliance's right to receive payments constituted an investment under the ECT, the president of the arbitral tribunal, Dominic Pellew, disagreed. In his dissenting opinion, he concluded that the tribunal lacked jurisdiction *ratione materiae*. In his view, the right to payment arising from a contract for the supply of goods

did not constitute an 'investment' under the ECT. The CJEU hearing is scheduled for early March 2021.

In the meantime, following the decision of the Court of Cassation, the stay in the US was lifted and the DC District Court granted the petition for enforcement, which was later appealed by Moldova to the DC Circuit Court. Stileks, the assignee in bankruptcy of Komstroy, represented the company as respondent in the appeal.

**The Decision of the DC Circuit Court**

The DC Circuit Court rejected Moldova's arguments, upheld the confirmation of the award but remanded the proceedings so that the DC District Court could determine the currency in which the award should be denominated.

On the jurisdictional issue, Moldova tried to argue that the US courts generally did not have jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"). It attempted to rely on *forum non conveniens* – the common law doctrine which offers a court the discretion to stay or dismiss the case in favour of another, more appropriate, forum. In rejecting this argument, the DC Circuit Court first looked into whether the "arbitration exception" under the FSIA applied. Copies of the arbitration agreement, the arbitration award and the ECT produced by Stileks were jurisdictional facts that the court considered sufficient to prove that the arbitration exception applies in line with *Chevron Corp v. Republic of Ecuador* 795 F.3d 200 (D.C. Cir. 2015). It further concluded that Moldova conflated the standards of review under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") with the issue of jurisdiction under FSIA. The court did not analyse Moldova's argument about the tribunal's lack of jurisdiction under the ECT, as it concluded that the jurisdiction originated in Moldova joining the treaty and that it had no authority to determine what the law is because that was a question for the tribunal to deal with. Interestingly, the DC Circuit Court swiftly avoided applying the preponderance of evidence standard from *Chevron*, where the judges held that, for Ecuador to prevail in its somewhat similar jurisdictional argument, it had to prove by a preponderance of the evidence that Chevron's lawsuits did not constitute an investment under the relevant BIT.

The DC Circuit Court also rejected Moldova's assertion that the stay should not be lifted while set aside proceedings continued in France. In its analysis, the Court referred to *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.* 156 F.3d 310, 317–18 (2d Cir. 1998) and the six factors it developed to guide district courts when deciding on an adjournment motion under the New York Convention. The Court did not endorse all the factors but rather focused on the first two—the general objectives of arbitration to resolve disputes in an expeditious manner and the status of the foreign proceedings—which it considered consistent with the discretion accorded by Article VI of the New York Convention. The fact that the arbitration commenced in 2010 and that the set aside proceedings have been ongoing since late 2013 were the decisive factors that led the judges to support the district court in its decision to lift the stay.

**What can Happen after the CJEU Issues its Preliminary Ruling?**

The preliminary ruling of the CJEU could either confirm or run against the conclusion of other

arbitral tribunals, though the recent opinion of the advocate general Szpunar opts for the latter approach. For example, in *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3 (Decision on Objections to Jurisdiction) "titles to money" were found to constitute investment, and in *Petrobart Limited v. The Kyrgyz Republic, SCC Case No. 126/2003* the tribunal found that the sale of gas condensate is an investment. But what impact can the CJEU preliminary ruling have on the enforcement proceedings in the United States? Is it the case that an award that was set aside does "not exist" to be enforced (*Termorio S.a. E.s.p. and Leaseco Group, Llc, Appellants v. Electranta S.p., et al.*, 487 F.3d 928 (D.C. Cir. 2007)) or does it continue to exist despite being set aside because it never became part of the legal order of the country where it was set aside (Cour d'Appel, Paris, *The Arab Republic of Egypt v. Chromalloy Aeroservices, Inc. (U.S.)*, decision of 14 January 1997 reported in (1997) XXII Yearbook 691)?

One possible scenario is that the set aside will not have any impact and the award creditor will continue to seek Moldova's assets in the US, as confirmed by *In Re Chromalloy Aeroservices and the Arab Republic of Egypt, 939 F. Supp. 906 (D.C. Cir. 1996)* ("Chromalloy") and *Corporacion Mexicana De Mantenimiento Integral v. Pemex-Exploracion, No. 13-4022 (2d Cir. 2016)* ("Corporacion Mexicana"). *In Chromalloy, the DC District Court emphasized that giving effect to the decision of an Egyptian court nullifying an arbitral award would violate the US pro-enforcement public policy. In Pemex, brought under the* Inter?American Convention on International Commercial Arbitration *(the "Panama Convention"), the court acknowledged the discretion conferred to courts under the Panama Convention in enforcing arbitral awards annulled at the seat of arbitration but noted that giving effect to the subsequent nullification of the award would be against the US public policy and contrary to the "fundamental notions of what is decent and just" (*Corporacion Mexicana quoting *Ackermann v. Levine*, 788 F.2d 830, 841 (2d Cir. 1986)).

A second scenario would entail a relief from judgment under the Federal Rule of Civil Procedure Rule 60. Indeed, even if the decision to set aside the award is issued after the US court enforced the arbitral award, Moldova could still seek relief from judgment, following the example of *Thai-Lao Lignite (Thailand) Co v Government of the Lao People's Democratic Republic*, 997 F. Supp. 2d 214 (S.D.N.Y. 2014) ("Thai-Lao Lignite"), confirmed by the Second Circuit. In *Thai-Lao Lignite*, the district court vacated its earlier judgment enforcing the arbitral award, relying on comity and the fact that no evidence was brought to prove that the set aside proceedings in Malaysia "violated basic notions of justice." (Thai-Lao Lignite at 223, quoting Termo Rio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928, 938 (D.C. Cir. 2007)).

**Conclusion**

As noted previously on this blog, in dealing with recognition and enforcement of arbitral awards set aside at the place of arbitration US courts essentially have to choose between a pro-arbitration approach and an approach reflecting principles of international comity. Both *Pemex* and *Thai-Lao Lignite* show, however, that the standard for disregarding comity and enforcing awards set aside at the place of arbitration is high. The set aside proceedings should be accompanied by some serious violation of the pro-arbitration approach to prevail upon comity. Should the Paris Court of Appeal set aside the arbitral award issued against Moldova, it seems unlikely that the French annulment proceedings will be regarded by the US courts to have "violated basic notions of justice". As a result, the US Court of Appeals decision of 15 January 2021 may not be the end of the Energoalliance saga. The outcome of the long-awaited preliminary ruling of the CJEU and its

impact on the proceedings before the Paris Court of Appeal may be a turning point in this decade-long dispute.

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