Kluwer Arbitration Blog

Washington Arbitration Week: Is the EU a Recalcitrant Entity?

Daniela-Olivia Ghicajanu, Fredrik Lindmark and Jose Antonio Rivas (Xtrategy LLP) · Monday, February 21st, 2022

The Second Edition of the Washington Arbitration Week (WAW) took place from 29 November to 3 December 2021, hosting 16 panels. This post discusses the key issues raised in the panel called 'Is the EU a Recalcitrant Entity? The Case of Domestic and Regional Judicial Decisions Non-Compliant with Investment Awards'.

Gene Burd (Fisher Broyles) moderated the panel, which comprised both practitioners and scholars, featuring Guido Carducci (Carducci Arbitration), Nikos Lavranos (NL-Investmentconsulting), Alvaro Galindo (Carmingniani Perez Abogados) and Jose Antonio Rivas, SJD (Xtrategy LLP/Georgetown Law).

The CJEU's Perspective on Intra-EU ISDS

Carducci walked the audience through the events prior to the preliminary ruling of the Court of Justice of the EU (CJEU) in *Komstroy*. In particular, Carducci referred to (i) the *Achmea* ruling from March 2018 when the CJEU declared intra-EU ISDS clauses incompatible with EU law; (ii) the 2019 political declarations through which some EU Member States announced their intention to terminate intra-EU BITs, and (iii) the adoption of the Agreement to terminate the intra-EU BITs' sunset clauses effective May 2020.

In this legal and political context, in 2019, the CJEU added its Opinion 1/17 in which it ruled the ISDS clause in the EU-Canada Comprehensive Economic and Trade Agreement (CETA) was compatible with EU law because it was in the context of an extra-EU trade and investment agreement. In October 2021, in *PL Holdings*, the CJEU ruled that an arbitration agreement between an investor from an EU Member State and another EU Member State, based on an ISDS clause inserted in an intra-EU BIT, was incompatible with EU law. To date, the most recent decision expressing the EU judiciary's position towards investment arbitration came in the *Komstroy* preliminary ruling concerning an ECT dispute between a Ukrainian investor incorporated in BVI and Moldova. The CJEU, interpreted the ECT provisions without referring to the Vienna Convention on the Law of Treaties (VCLT), and concluded the ECT dispute settlement provisions are contrary to EU law when the case at issue is an intra-EU dispute. The CJEU extended its *Achmea* reasoning to intra-EU ECT cases, ignoring (i) the ECT is a multilateral treaty (ii) to which almost all EU Member States, including the EU (as an entity) are signatories. Carducci also remarked the CJEU ruling in *Komstroy* impacts exclusively the EU Member States

and their domestic courts, which must comply with the ruling as it is part of EU law. Therefore, when an ECT dispute is also an intra-EU dispute, the CJEU treats the ECT dispute similar to an intra-EU BIT.

The Komstroy Judgement or the Achmea of the ECT

Lavranos argued that from a public international law (PIL) perspective, the CJEU acted *ultra vires* in *Komstroy*. He considered *Komstroy* as an example of extraterritorial application of EU law, and criticized CJEU's simplistic approach, which treated a multilateral treaty the same as an intra-EU BIT when, in fact, *Komstroy* really concerned an extra-EU dispute; neither Ukraine, nor Moldova are EU Member States. Although, *de facto* the ECT might seem like a bundle of bilateral treaties, *de jure* it continues to be a multilateral investment treaty. The CJEU failed to explain the dual nature of the ECT: a PIL treaty which, only for EU purposes, could be considered as a set of norms integrated in the EU legal system. In *Komstroy* the CJEU also failed to mention the only EU link in the dispute was the ad-hoc arbitration's seat, *i.e.* Paris. Otherwise this was an entirely extra-EU dispute. With its ruling in *Komstroy*, the CJEU created more uncertainties for non-EU investors who now should avoid an EU seat because they would risk their awards being set aside. Considering the ongoing modernization process of the ECT, the *Komstroy* ruling only added uncertainty about the ECT, its membership and the future role of the EU and its Member States. Lavranos remarked that as of now, an ECT arbitration proceeding under other rules than ICSID, and with a seat in the EU, would most likely risk being annulled and/or not being enforced. Therefore, the safest option seems to be ICSID arbitration. However, Lavranos reminded the audience of the *Micula* saga in which the enforcement of an ICSID award was considered contrary to EU law (details concerning the CJEU here). Ironically, after *Komstroy*, for purposes of investment awards enforcement within the EU, even non-EU ECT signatories would be confronted with the principles of autonomy and supremacy of EU law.

The EU and CJEU in *Komstroy*: Déjà-vu of Recalcitrant Policy against International Awards

The extra-EU effects of the *Komstroy* and *Achmea* rulings have not yet been seen in other parts of the world confronted with investment arbitration proceedings. Galindo considered the potential effects of these two rulings on the Court of Justice of the Andean Community (CJAC). The CJAC allowed arbitral tribunals to file interpretation requests if such a tribunal would have to apply Andean community law. However, the current adversity towards investment arbitration in the EU, is not new for Latin America. The CJEU's move is reminiscent of Ecuador's recalcitrant policy fifteen years ago, when Ecuador ended up withdrawing from the ICSID Convention. Interestingly, Ecuador has rejoined the ICSID Convention in 2021. The current Ecuadorian administration not only supported the re-accession to the ICSID Convention but endorsed a new arbitration law in Ecuador, and the negotiation of new BITs and trade agreements with the US, Mexico and different Caribbean countries. The shift against investment arbitration of the EU's judicial body and the EU itself might impact how Latin America's regional courts and other parts of the world consider investment arbitration in the future.

The EU as a Disruptor of the International Rule of Law?

The panel ended with Rivas' remarks. Rivas argued that the EU and the CJEU should respect the international rule of law, instead of stubbornly resisting investment arbitration awards. Rivas relied on Simon Chesterman's definition of international rule of law in the Max Planck Encyclopedia of PIL: "[A]n international rule of law would include consistent application of international law to states and other entities, including respecting the decision of international tribunals." He argued the *Komstroy* dispute should be analyzed not only from the CJEU's perspective, but also from the perspective of the courts at the seat of arbitration, *i.e.* the French courts. The French Court of Cassation, in its decision dated 28 March 2018, quashed the judgment of the Paris Court of Appeal (CoA) annulling the *Komstroy* Award. Moreover, contrary to the CJEU, the French Court of Cassation considered the Paris CoA erred in its reasoning by adding inexistent criteria to determine the existence of "investment" under the ECT. The Cassation Court sent back the case to the Paris CoA, stating it acted *ultra vires* by adding elements which were not included by the ECT drafters in the definition of "investment". In the second proceedings, the CoA sent three preliminary questions to the ECJ. Rivas opined the CJEU erred in its reasoning by including some elements, such as those characteristics of an investment provided in the Salini test, which derived from ICSID jurisprudence, while *Komstroy* was an ad-hoc arbitration under the UNCITRAL Rules. Additionally, he remarked, the *Komstroy* Award has not been annulled yet by the French courts and therefore, it currently stands.

Additionally, in the United States, in its Opinion dated 16 November 2021, the District Court for the District of Columbia denied Moldova's motion that the proceedings in the US be stayed until French courts decide on the annulment of the award. The US Court reasoned the CJEU preliminary ruling would not, with absolute certainty, lead to the annulment of the arbitral award. Previously, the District Court and the Court of Appeals for the District of Columbia allowed the enforcement of arbitral awards which were annulled at the seat of arbitration, as in *Commissa v Pemex* (2008), The Micula brothers in the Micula saga were also successful in having their ICSID award entered into judgment before the Court of Appeals for the District of Columbia Circuit. However, the same courts in the District of Columbia refused the enforcement of the arbitral award annulled by the Malaysian courts in *Thai-Lao Lignite Co., Ltd v Government of the Lao People's Democratic Republic* (2009). The US District Court did not refer to *Commissa or Thai-Lao*. Instead, it relied on *Europcar Italia, S.p.A. v. Maiellano Tours, Inc*. and denied a stay by concluding that the lengthy proceedings in France have no obvious conclusion in sight.

Conclusion

The active policy of the EU against ISDS, and the decisions of the CJEU concerning investment treaties have immense ramifications both within and outside the EU territory. Countries in other continents are currently monitoring the rulings of the CJEU and how the EU and its Member States approach the *Komstroy* decision's implementation. This could easily lead to dangerous State behaviour in the rest of the world. After all, if the EU refuses to comply with its international obligations, non-EU countries may be tempted to similarly disrespect PIL.

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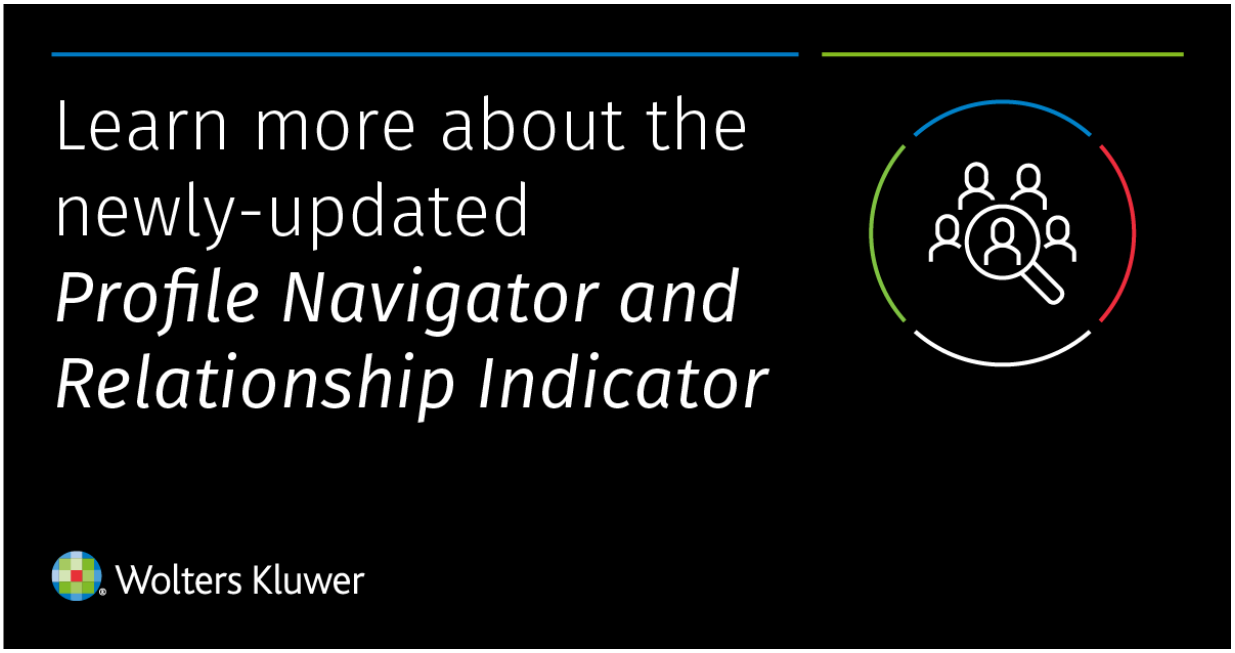

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