Kluwer Arbitration Blog

2022 in Review: Looking Back on Investor-State Arbitration-Related Developments in the EU

Maria Fanou (Associate Editor) · Monday, February 13th, 2023

In our 2021 in Review post, we predicted that 2022 would not disappoint; it would be another busy year with several investment arbitration-related developments in the European Union (EU). In line with the Blog's traditional "year-in-review" series, this post is the moment of truth for our prediction. In what follows, I will offer an overview of the developments that marked 2022 as we covered them in the Blog. These developments are primarily judicial, and are presented in three subsections, beginning with (I) the Court of Justice of the EU (CJEU) and (II) the domestic courts of EU Member States. The overview of the judicial developments is followed by (III) a recap of policy developments, notably in relation to the EU-Canada Comprehensive Trade Agreement (CETA).

I. Developments from Luxembourg

2022 kicked off with another tile in the mosaic of the Micula saga, the judgment rendered by the CJEU in Case C-638/19. This case concerned the request for annulment submitted by the European Commission against the judgement of the General Court of the EU (GCEU) in Cases T-624/15, T-694/15 and T-704/15 Micula and Others v Commission. The GCEU had annulled the European Commission's decision (Commission Decision (EU) 2015/1470 on state aid SA.38517 (2014/C)) from March 2015 when the Commission had found that the payment of the compensation awarded by the ICSID tribunal in Micula would constitute illegal state aid. The CJEU overturned the General Court's judgement, finding that EU state aid law applied *ratione temporis* and that its ruling in Achmea was applicable. In light of this finding, the case was referred back to the GCEU and is still pending.

Meanwhile, later in 2022, the Tenth Chamber of the CJEU issued an order in response to a preliminary reference request sent by the Court of Appeal of Brussels (*Cour d'appel de Bruxelles*) (Case C-333/19), which was deciding upon the enforcement of the Micula award. According to the said order, a court of an EU Member State ruling on the enforcement of the Micula award, which was the subject of the abovementioned Commission Decision, has an EU law obligation to "set aside that award" (an ICSID award in this instance) and may not in any case proceed with its enforcement in order to enable its beneficiaries to obtain the payment of damages which it awarded them.

Another development from CJEU case law we covered concerned Opinion 1/20. Here, the Court was asked to opine on the compatibility of intra-EU investor-state arbitration under a modernised text of the Energy Charter Treaty (ECT) with EU law. The CJEU (Fourth Chamber) declared the request premature and thus inadmissible. The CJEU did not 'waste' the opportunity to reinstate its obiter dictum in Komstroy (C-741/19). The Court's Opinion was rendered on 16 June 2022, only a few days before the conclusion of the ECT modernisation discussions and, coincidentally, the same day that an arbitral tribunal upheld for the first time the intra-EU objection to jurisdiction in Green Power v Spain (see also here). Our contributors, Fedderica Paddeu and Christian J. Tams, discussed the tribunal's reasoning, shedding light on why they deemed it problematic, although they agreed that the tribunal was correct in rejecting jurisdiction under Article 26(3)(a). These judicial developments were coupled with the criticism of the modernised ECT and the resulting wave of withdrawals.

II. EU Domestic Courts… It's Their Move: Berlin, Cologne, Vilnius and Amsterdam Calling

Although the debates begin in Luxembourg, the issues are always settled in the EU domestic courts in terms of how much deference to the CJEU they are prepared to show. German courts attracted our attention. In April 2022, the Higher Regional Court Berlin (HRC Berlin) declined Germany's request to declare an intra-EU claim against Germany as inadmissible (KG Berlin, Decision 12 SchH 6/21 of 28 April 2022, concerning ICSID Case No. ARB/21/26, Mainstream et al.). Germany's request was based on Section 1032 para. 2 of the German Code of Civil Procedure (ZPO), i.e. the provision in German law by which a request may be filed in court to determine the admissibility of arbitral proceedings. As explained by our contributors, the HRC Berlin took into consideration the specific features of the ICSID Convention and the self-contained ICSID regime. In light of these features and Germany's obligations stemming from the ICSID Convention, the court affirmed the ICSID tribunal's 'Kompetenz-Kompetenz' to decide upon its own jurisdiction. As Halonen and Eichorn explained, the German court found 'itself in the middle of a Venn diagram where on the one side is a circle in which reside decisions on procedural issues relating to the supervision of arbitration proceedings. On the other side is a circle for ICSID arbitrations. Only where these two circles overlap does an investor have a chance of escaping the impact of Achmea and Komstroy before an EU Member State court'. This judgement of the HRC Berlin is under appeal, and the final word of the German Federal Court of Justice (*Bundesgerichtshof – BGH*) is eagerly anticipated.

A few months later, another German court, this time the Higher Regional Court of Cologne (HRC Cologne), had its own take on Section 1032 para. 2 ZPO and the controversial issue of whether it applies to ICSID proceedings. The HRC Cologne declared two ECT-based ICSID arbitrations (RWE and Uniper) inadmissible. Our contributors, Lars Markert and Anne-Marie Doernenburg, juxtaposed this ruling with the one laid down by the HRC Berlin and highlighted the divide between the two approaches: public international law on the one hand (HRC Berlin) and the primacy of EU law on the other (HRC Cologne).

The Lithuanian Supreme Court (SC) was also called to decide upon Achmea's reach in an ICSID arbitration based on the 1992 France-Lithuania Bilateral Investment Treaty (BIT) (Civil case No. e3K-3-121-916/2022, 18 January 2022). This case concerned Lithuania's initiative to withdraw its counterclaim against the investors and claimants in the ICSID Case Veolia Environnement S.A. and Others v. Republic of Lithuania (ICSID Case No. ARB/16/3) and instead bring a separate

claim before the Lithuanian domestic courts. As reported by our contributor, the Lithuanian SC found that intra-EU BITs concluded by Lithuania stopped including a valid offer to arbitrate after its accession (1 May 2004). In the absence of a valid arbitration agreement, nothing prevented Lithuania from seeking recourse to its domestic courts. In its reasoning, the Lithuanian SC relied on several CJEU judgements, including those in Achmea, Komstroy and PL Holdings.

Finally, we covered the Amsterdam district court's refusal to order the termination of London-seated intra-EU investor-state arbitration. As discussed in the Blog, the Dutch court interestingly highlighted the debate that is ongoing within the EU in relation to the consequences of the CJEU's ruling in Achmea which, in its view, are not yet 'fully crystallized'. The Dutch court seemed to acknowledge that there is a future for intra-EU arbitrations seated outside the EU, while it also based its assessment of the lawfulness of the interim relief proceedings on Article 6 of the European Convention on Human Rights (ECHR), hinting of the potentially growing role that the ECHR and the European Court of Human Rights (ECtHR) might play in the future. In a related vein, the ECtHR's judgment in BTS Holding v Slovakia sparked discussions on the role of the ECtHR in the future enforcement of arbitral awards. Our contributors, Gordon Nardell and Lisa Rees, shed some light on this judgment predicting as 'highly likely' that one of the set-aside and enforcement proceedings arising out of intra-EU arbitration awards would 'end up in the ECtHR in some form'.

III. CETA: Some Judicial and Policy News

Another domestic court in an EU Member State, the Irish SC, also made it into the headlines. In its Costello v Government of Ireland judgement rendered in November 2022, the Irish SC ruled that the Irish Constitution precludes the Government from ratifying CETA. According to the Irish SC, in order to ratify, a referendum would be required or there would need to be a change in Ireland's arbitration legislation with the aim of providing supervision of the CETA tribunal's awards at the enforcement stage. This certainly means another delay to CETA's ratification and, as discussed in the Blog, might also be a precursor to a court challenge to a future ratification by Ireland of the reformed ECT.

The Costello judgement was not the only CETA-related development that marked the final quarter of 2022. In September 2022, the European Commission and the Federal Government of Germany agreed upon a new draft text of CETA with more precise definitions of certain provisions included in its investment chapter (Chapter 8), including indirect expropriation and fair and equitable treatment standards (FET) 'to ensure that the parties can regulate in the framework of climate, energy and health policies' (see the Press release). As Yueming Yan commented, the Draft Decision 'partially addresse[d] the existing ambiguities and [brought] in new ones'.

Conclusion

The developments discussed confirm the prediction we dared to make in 2022, which did indeed turn out to be an interesting year. In 2023, we will continue to monitor all related developments and look forward to receiving more contributions to keep our community of readers up to date.

This piece was prepared by the author in her capacity as a Senior Assistant Editor of the Kluwer Arbitration Blog. Linking to Blog's coverage is not an endorsement of the views expressed in the respective posts. The author expresses her views in a purely personal capacity.

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This entry was posted on Monday, February 13th, 2023 at 8:09 am and is filed under 2022 in Review
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