Kluwer Arbitration Blog

The Komstroy Saga: It Ain't Over Till It's Over

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On 10 January 2023, the Paris Court of Appeal ("**Paris CoA**") set aside the 50+ million USD UNCITRAL award rendered in the dispute between Komstroy (before Energoalians LLC, and now Stileks Scientific and Production Firm LLC ("**Stileks**")) and the Republic of Moldova. The referring court applied the ruling rendered by the Court of Justice of the European Union ("**CJEU**") on 2 September 2021 ("**Komstroy ruling**") regarding the interpretation of articles 1(6) and 26(1) of the Energy Charter Treaty ("**ECT**"). Despite scholars' vivid reactions and warnings about the excesses of the CJEU interpreting a multilateral treaty in an extra-EU dispute, the recent decision by the Paris CoA rejected any possibility of departing from the interpretation settled by the CJEU.

Three weeks before, on 21 December 2022, the U.S. Court of Appeals for the District of Columbia ("**DC CoA**") confirmed a decision by the U.S. District Court for the District of Columbia ("**DC District Court**"), denying a stay of the enforcement proceedings of the award. However, following the developments in France, it is likely that Moldova will renew its motion to stay before U.S. courts.

As the award reaches its 10-year anniversary, and the saga seems to near its end, this blogpost explores the possible outcomes and repercussions of the proceedings by analysing the most recent decisions taken by the Paris CoA and the DC CoA.

The Komstroy Saga

The intricate background of the case has already been discussed in this blog (see here, here, and here). By way of brief recap:

On 23 October 2013, an UNCITRAL Tribunal considered Moldova to be in breach of its obligations under the ECT and ordered it to pay an amount around 50 million USD plus interest. The decision was not unanimous as the president of the tribunal issued a dissenting opinion concluding that the tribunal lacked jurisdiction *ratione materiae* as the claimant's rights under an energy supply agreement could not be considered an "*investment*" under articles 1(6) and 26(1) of the ECT.

After an initial decision by the Paris CoA in 2016 setting aside the award, which was later quashed

by the French Cour de Cassation ("**Cass**") in 2018, the matter returned to the Paris CoA. Addressed earlier in this blog, and described as an attempt to "*pass the buck*" or as a "*sign of resistance*" against the correction by the Cass, the Paris CoA decided to refer three questions to the CJEU regarding the disputed interpretation of "*investment*" under the ECT for a preliminary ruling. Considering that the ECT was entered into by the European Union ("**EU**") and its member states, the Paris CoA considered it an act adopted by the institutions of the EU and, therefore, subject to the CJEU's jurisdiction.

The CJEU faced no obstacle in accepting jurisdiction despite the fact that the proceedings were completely extra-EU, with the exception of Paris being the seat of the arbitration. Highlighting the need to prevent future divergences in the interpretation of instruments that could be applied in an EU context, the CJEU settled the interpretation of "*investment*" under the ECT for the purposes of the dispute. Additionally, as has been widely reported, the CJEU clarified that its reasoning in the Achmea ruling regarding the intra-EU objection extended to the ECT.

The referral by the Paris CoA and the intervention of the CJEU to the proceedings in this case remains subject to contentious debate.

The 2023 Decision by the Paris CoA

Stileks attempted to convince the Paris CoA not to follow the Komstroy ruling arguing, *inter alia*, that EU law was not applicable. However, this proved an unsuccessful attempt. Caught in the middle of the snowball effect, triggered by its own referral to the CJEU, the Paris CoA obediently applied the Komstroy ruling, thereby rejecting Stileks's arguments.

The Paris CoA's main findings were twofold:

- **The binding nature of the CJEU's interpretation of the notion of investment under the ECT.**

First, the Paris CoA reaffirmed that the CJEU's interpretation of the notion of investment is binding, even for extra-EU disputes. It further considered Stileks's position to be defective because:

1. the CJEU did not distinguish between the application of the ECT as an EU law and public international law instrument for the purposes of its interpretation;
2. the definition of "*investment"* for the purposes of articles 1(6) and 26(1) of the ECT applied equally to investors from EU and non-EU states which are parties to the treaty;
3. no evidence was presented with regards to an unequivocal definition of "*investment"* under the ECT contrary to the one established by the CJEU in the Komstroy ruling and the dissenting opinion in the award supported that it is still an undefined matter;
4. even if it was not explicitly referred to in the Komstroy ruling, the CJEU complied with the rules of interpretation under article 31 of the Vienna Convention on the Law of Treaties ("**Vienna Convention**"), reaching to the same conclusion as the Advocate General Szpunar who expressly referred to the Convention in its opinion;
5. the CJEU's interpretation did not introduce further requirements to the definition of "*investment"* under the ECT; and
6. finally, regarding Stileks's argument that the CJEU did not have access to all the facts of the

dispute, the Paris CoA clarified that the CJEU had access to the award, which comprehensively described the relevant facts of the dispute, and to the underlying contracts, this being enough to rule on the referred questions.

- **Annulling the award does not infringe article 1 of Protocol No. 1 of the European Convention on Human Rights ("ECHR").**

Stileks additionally invoked the recent ruling by the European Court of Human Rights in BTS Holding v. Slovakia to argue that the annulment of a final and binding award would infringe Stileks's rights under article 1 of the Protocol No. 1 of the ECHR. Again, to no avail, the Paris CoA rejected any infringement of fundamental rights as in the case of Stileks's award, French courts were competent to annul the award as the courts of the seat. Therefore, the Paris CoA distinguished the BTS Holding decision which referred to the non-enforcement of an award under the New York Convention.

Enforcement Proceedings in the U.S. – What Is the State of Play?

Confirmation proceedings pursuant to the New York Convention commenced in the DC District Court in 2014. After initial motion practice, the parties agreed in 2016 to stay the proceedings pending the resolution of the appeal before the Cass. Following the decision by the Cass in 2018, the DC District Court lifted the stay, confirmed the award and entered judgment in 2019. In its decision, which, as relevant here, was later confirmed by the DC CoA in January 2021, the DC District Court rejected all of Moldova's defences as addressed earlier in this blog.

Following the Komstroy ruling in 2021 (and later negotiations regarding the currency for payment of any judgment), Moldova again moved for a stay of proceedings (after an initial stay in 2016) based on the pending application before the Paris CoA to vacate the award on account of the Komstroy ruling. The DC District Court considered six discretionary factors in deciding to deny the stay, which decision was again affirmed by the DC CoA in December 2022. In particular, the DC District Court noted that the status of the foreign proceeding and the estimated time for resolution weighed against a stay, as the proceedings had been commenced in Paris in 2013 and could be expected to last several more years. In addition, the DC District Court observed that the Komstroy ruling was at odds with the decision of the Cass with respect to jurisdiction and concluded that "[i]*n light of the fact that the Court of Cassation has already ruled against Moldova once, the Court sees no reason to further stay these proceedings*." (*LLC SPC Stileks v. Republic of Mold.*, 14-cv-01921 (CRC) (D.D.C. Nov. 16, 2021), pp.7)

Game, Set and Match?

In France, Stileks has the option to appeal (again) before the Cass. However, a reversal in favour of Stileks would be rather extraordinary. On the other side of the pond, assuming that the Paris CoA decision is appealed to the Cass, one would expect that Moldova will renew its motion to stay to the DC District Court. However, in view of the DC District Court's analysis denying the prior motion to stay, it seems unlikely that the DC District Court would agree to impose a stay in the current circumstances.

Furthermore, should the Paris CoA decision not be appealed, or later affirmed by the Cass, upon a subsequent application by Moldova pursuant to article V(1)(e) of the New York Convention, it is likely that the DC District Court would annul the award. In non-ICSID arbitrations and pursuant to article V(1)(e) of the Convention, the DC District Court has some discretion to decline to enforce an award if the award has been nullified by the competent courts of the seat. However, the DC CoA has constrained that discretion. For example, in *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 929, 938 (D.C. Cir. 2007), it held that when a "*competent foreign court* [in Colombia] *has nullified a foreign arbitration award, United States courts should not go behind that decision absent extraordinary circumstances.*" The DC CoA also noted in that case that the "*matter is a peculiarly Colombian affair*," involving Colombian parties to a contract to be performed in Colombia and governed by Colombian law (*TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 929, 939 (D.C. Cir. 2007)).

Likewise, in Getma International v. Republic of Guinea, 862 F.3d 45, 47 (2017), the DC CoA held that to disregard the annulment of an award, the court "*would need to find the CCJA's* [competent foreign court] *annulment of the award to be repugnant to the United States' most fundamental notions of morality and justice*", which it noted was a "*stringent standard*."

Practitioners will be well advised to closely follow the outcome of Stileks's enforcement proceedings as it will shed light on to what extent US courts will show deference to the EU position as settled by the Komstroy ruling.

While the US courts have previously allowed the possibility to enforce awards which were annulled in other jurisdictions, including at the seat of the arbitration, such enforcement in the case at hand will effectively negate the Komstroy ruling. Should the US courts annul the award, one may wonder whether they can still be considered as a valid alternative away from the recent interventions by the CJEU in international investment law and arbitration outside the EU borders and, in particular, the EU legal order.

Irrespective of the outcome, the position of the US courts will fuel the ongoing debate about whether the EU will lose its dominant position as an arbitration hub and will influence the alternatives available to investors.

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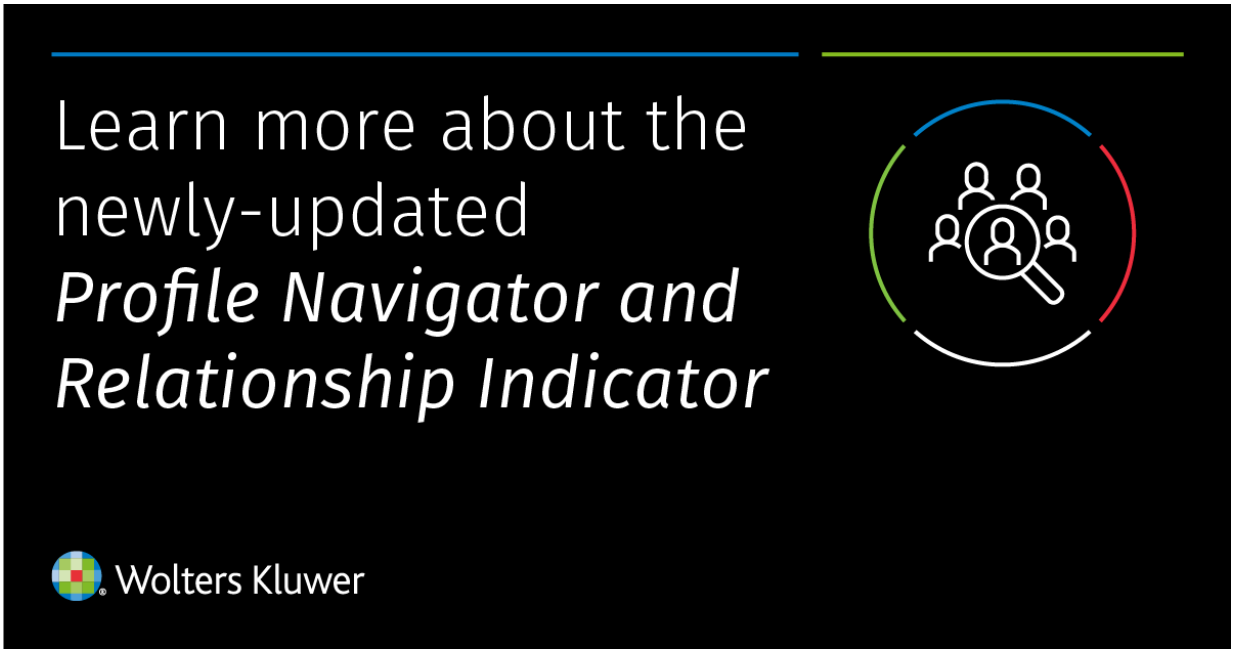

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