Kluwer Arbitration Blog

2023 Year in Review: Key Developments in Europe (Investment Arbitration)

Maria Fanou (Associate Editor) · Monday, February 26th, 2024

In line with the Blog's tradition of "year-in-review" series, this post looks back at some of the key investor-State arbitration developments that took place in Europe in 2023 as we covered them on the Blog (for relevant previous Year-in-Review coverage, see here and here). With the developments in the modernisation of the Energy Charter Treaty and, relatedly, the wave of withdrawals by the Member States of the European Union ("EU") being covered by another post in this series, this post focuses primarily on key judicial developments. It then moves to recap a couple of legislative and policy initiatives. This notably concerns initiatives taken by the EU in furtherance of its investment policy and initiatives by several states to reform their arbitration laws. Given the breadth of our coverage, inevitably the selection is by no means exhaustive.

Key Judicial Developments in the EU and the UK

The battle against intra-EU investor-State arbitration continued impetuously in 2023. There are several examples, revolving around (i) the recognition/enforcement and setting aside of (primarily but not exclusively) intra-EU awards, and (ii) applications for anti-suit injunctions in intra-EU cases.

Enforcement/Setting Aside of Intra-EU Awards Outside of the EU

One of the most significant developments in 2023 is the judgement of the English High Court (Mr Justice Fraser) in the context of seeking recognition and the enforcement of an intra-EU award in *Infrastructure Services v. the Kingdom of Spain*. In a nutshell, the English High Court was called to rule upon whether EU law (and the relevant case law of the Court of Justice of the EU ["CJEU" or "the Court"]) should prevail over the obligations of the UK under the ICSID Convention. It upheld the recognition of the intra-EU award and found 'no proper grounds' that would justify a different outcome. As Laura Rees-Evans explained, the judgement is a 'very clear, elaborately reasoned and strongly worded rejection' of the relevant CJEU rulings in Achmea and Komstroy as a 'basis for the non-enforcement of ICSID awards'. Our contributor concluded that intra-EU award holders seeking enforcement outside the EU 'have cause to be optimistic'.

In what might be viewed as a toning down of this optimism, on 9 November 2023, Advocate

General Emiliou issued an Opinion in Case C-516/22. The Advocate General proposed the CJEU find the UK in breach of EU law, since UK courts enforced an intra-EU investment award, the notorious Micula award. The judgement of the CJEU on this matter is still pending.

Anti-Suit Injunctions to Stop Intra-EU Investment Arbitration: News From Germany and the Netherlands

German courts have been at the epicenter of the intra-EU controversy from the outset (one should not forget this is where the preliminary reference request that led to Achmea originated from). They remain an important battlefield for all relevant issues.

In 2023, a provision of the German Code of Civil Procedure ("ZPO") – Section 1032 para. 2 – has offered a legal vehicle for another attempt to stop intra-EU arbitration. More specifically, the said provision (which is not after the UNCITRAL Model Law), offers a basis on which a request may be filed in court to determine the admissibility of arbitral proceedings. As we reported, in April 2022, the Higher Regional Court in Berlin ("HRC Berlin") declined Germany's request to declare an intra-EU claim against Germany as inadmissible (KG Berlin, Decision 12 SchH 6/21, concerning an intra-EU ECT ICSID case, Mainstream Renewable Power et al). This judgement of HRC Berlin was appealed in the German Federal Court (*Bundesgerichtshof – BGH*) (BGH I ZB 43/22). The hearing took place in May 2023 and the judgement was rendered in late July 2023. The BGH confirmed that the said provision of German law applies to intra-EU ICSID arbitration. As Alexander M. Wagner opined in his post, '[t]he BGH's interpretation could position § 1032(2) ZPO as a powerful tool to derail future intra-EU investment arbitration'.

In parallel, the ICSID tribunal in *Mainstream* issued a procedural order (No 8) finding that Germany's initiative to initiate the above-mentioned proceedings under Section 1032 para. 2 might be in breach of Article 26 of the ICSID Convention. In another case, the WOC Photovoltaik and Others v Spain tribunal took a firmer approach and ordered Spain to 'withdraw or discontinue with prejudice' any application or proceedings initiated before any national court (Germany in this instance) so long as the said application or proceedings had any connection with the (ICSID) arbitration.

The Amsterdam Court of Appeal took a different stance when faced with a similar issue. More specifically, it rejected a request from Poland seeking an interim order to discontinue an intra-EU (UNCITRAL) arbitration (LC Corp B.V. v Poland). The Dutch court deemed that, as the seat of arbitration was outside of the EU, it was not manifestly unsuccessful.

Intra-EU Controversy: May It Extend to Extra-EU Cases?

Shortly after Achmea, and the overarching language used by the CJEU in its ruling, warnings were voiced that the intra-EU controversy might have implications for extra-EU cases (i.e., cases based on BITs between an EU Member State and a non-EU Member State). The CJEU case law in the aftermath of Achmea (including Komstroy, and importantly, Opinion 1/17) did not offer much clarity. The question of the extra-EU implications of the intra-EU complexity remain open.

Indeed, the intra-EU objection to jurisdiction was raised before some arbitral tribunals in extra-EU

cases (see for example, *CMC v* Mozambique, an extra-EU ICSID case). In 2023, the question of compatibility of investor-State arbitration under an extra-EU BIT was raised in a case before the BGH and in the context of enforcement proceedings of the Deutsche Telekom v India (UNCITRAL) arbitral award. In a ruling rendered in October 2023, the BGH drew a clear distinction between intra- and extra-EU investment arbitration. It therefore upheld the compatibility of extra-EU BITs with EU law (further coverage on the Blog is forthcoming).

Key Policy and Legislative Developments

The EU Model Clauses for Extra-EU BITs

In late September 2023, the European Commission issued a non-paper with "Annotations to the Model Clauses for negotiation or re-negotiation of Member States' Bilateral Investment Agreements with third countries" that 'draws on the EU's approach to investment protection agreements – and on Member States' best practices'. These model clauses aim to serve as guidance for EU Member States when they negotiate (or renegotiate) their BITs with third countries (extra-EU BITs). Patricia Nacimiento, Bajar Scharaw and Jacky Lui offered an overview of these annotations and the current issues they address. They pointed out that the said Model Clauses also include arbitration as a form of investor-State dispute settlement ("ISDS"). This might reflect, as they argued, some sort of recognition that the EU Member States 'need flexibility when negotiating ISDS' under extra-EU BITs.

Signing of New FTAs and the First SIFA

In 2023, the EU continued furthering its network of agreements with different trade partners. It signed a new free trade agreement ("FTA") with New Zealand and an Advanced Framework Agreement and an Interim Trade Agreement with Chile to strengthen political cooperation and foster trade and investment. A development worthy of mention is the conclusion of a "Sustainable Investment Facilitation Agreement" (SIFA) between the EU and Angola, the first SIFA ever negotiated by the EU.

Several EU Member States Amending Their Arbitration Laws

In recent years, reforms of national arbitration laws have often been in the news, considering that states compete to improve their arbitration offering and rise in popularity as arbitration jurisdictions. 2023 was no exception: several states in Europe, including some EU Member States, either passed new arbitration laws or continued reforming their existing ones.

In February 2023, Greece introduced a new arbitration law that 'can be seen as a rather moderate version of' the 2006 UNCITRAL Model Law ("Model Law"). A couple of months later, in April, Luxembourg also passed a new law on arbitration. As our contributor, Daniela Antona, explained, this was a necessary development given that the arbitration law was outdated and thus unsuited to

the current globalised economy. In August 2023, Albania adopted its first ever arbitration law; modelled on the Model Law, this also, as our contributor noted, adds ‘certain modern elements, such as the possibility to have virtual or hybrid hearings’.

The Law Commission of England and Wales (“Law Commission”) began its review of the 1996 Arbitration Act (“EEA”) in 2021 (see here for coverage on the Blog). In late 2023, the Law Commission published its final report of the review of the EEA, as well as a draft bill outlining the proposed amendments.

In 2024, we expect this trend to continue, with Germany the next jurisdiction most likely to be in the spotlight.

Looking Forward to 2024

2023 was another busy year for those interested in arbitration developments in Europe, and notably in the interface of EU law and investor-State arbitration. In 2024, we will continue to monitor all related developments and we look forward to receiving more contributions to keep our readership updated.

This piece was prepared by the author in her capacity as an Associate Editor of the Kluwer Arbitration Blog. Linking to the Blog’s coverage is not necessarily an endorsement of the views expressed in the respective posts.

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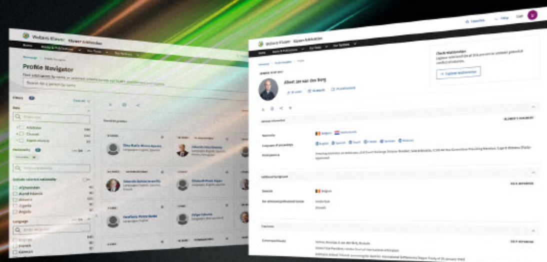

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