Kluwer Arbitration Blog

2024 PAW: ISDS Post-Achmea – Legitimacy of Investment Arbitration and the Enforcement of Arbitral Awards

Antoine Cottin (Assistant Editor for Europe), Vladislav Osykin (Laborde Law) · Thursday, March 21st, 2024

As part of Day 1 of Paris Arbitration Week ("PAW"), Laborde Law held its first PAW event of the week at the Hotel Plaza Athénée, which included two panels addressing issues related to investor-State Dispute Settlement ("ISDS"). The first panel discussed "ISDS Enforcement War Stories and Lessons", and the topic of the second panel was "The Post-Achmea Universe: Any Room Left to Intra-EU Investment Protection?". This post briefly summarises the lively discussions held that afternoon, both moderated by Gustavo Laborde (Laborde Law).

Panel 1: ISDS Enforcement War Stories and Lessons

Addressing diverse topics in relation to the enforcement of investment awards, this panel included

a stellar line-up of speakers: Alison Macdonald KC (Essex Court Chambers), Ali Al Karim (Brick Court Chambers), and Andrea Pinna (Pinna Legal). Professor George Bermann (Columbia Law School) was also attending and provided his enlightening views during the discussion.

To introduce the topic, Mr Laborde first drew a parallel with Lalive's famous proverb that "arbitration is only as good as your arbitrators", arguing that arbitration is only as good as your ability to enforce the award. Enforcement takes another dimension when it is against a State. In commercial arbitration, there is always a higher party (State) to enforce an award. However, in ISDS, there is no higher authority, and if the sovereign does not want to comply, it leaves the party with no option other than to seek enforcement in another State. Moreover, enforcing an intra-EU award within the EU is almost impossible now as it is said to breach EU law, as the Court of Justice for the European Union ("CJEU") recently ruled.

Citing two recent surveys on State compliance with adverse arbitral awards, Mr Laborde recalled that situations of non-compliance are rather common, with non-compliance rates oscillating between 50% (for most-sued States, see Gaillard/Penushliski 2020 study) and 66% (for least-sued States, see Academic Forum Working Group Paper on ISDS survey).

On the question of how one could develop a career and specialisation in the enforcement of arbitral awards, all panellists agreed that there is no specialised training course and that one often needs to learn on the job. Prof. Bermann further shared that Columbia Law School's curriculum covers the enforcement of arbitral awards.

The panel then considered whether enforcement is mostly based on general principles, or whether it remains jurisdiction-specific. Supporting the second view, Mr Pinna referred to the difference between the recognition of awards in France—where it is a mere formality to obtain a stamp—and in the UK—where there are no *ex parte* proceedings and a party bears the burden of proving that the conditions for enforcement are met. Mr Al-Karim agreed that jurisdictions have differences in their enforcement regimes. For instance, some Middle Eastern States refuse to enforce awards of interest on public policy grounds. Ms Macdonald also confirmed that each jurisdiction approaches the New York Convention and the issue of sovereign immunities differently. For example, the way a jurisdiction defines a "State" has very real implications.

Turning to a few trends and developments in the field of ISDS-awards enforcement, Mr Al-Karim first focused on the *Micula* dispute, observing that the 2024 judgement is part of the EU's wider struggle with investment arbitration. In turn, Ms Macdonald saw a trend towards more case law on sovereign immunities, and thus more divergences across different jurisdictions—a trend that Mr Pinna explained by the fact that enforcement is often multi-jurisdictional and thus the same questions arise before different courts.

Panel 2: Any Room Left for Intra-EU Investment Protection in the Post-Achmea Universe?

The second panel brought together speakers that had not simply diverse, but perhaps also irreconcilable points of view on the well-known topic of the long-running consequences of the *Achmea* judgement on investment arbitration in Europe. Professor George Bermann (Columbia Law School), Lorena Fatás Pérez (Ministry of Justice of Spain), Karl Hennessee (Airbus), Dr Anna Kozmenko (Curtis, Mallet-Prevost, Colt & Mosle), and Nicolaj Kuplewatzky (Court of Justice of the European Union) offered their insights into the legal and policy aspects of the truly divisive

issue.

Indicating that the main goal of the panel was to hear a broad range of opinions on the topic, Mr Laborde summarised chronologically the steps which led to the present intra-EU landscape: *Achmea*, the 2019 intra-EU Termination Agreement (previously discussed here and here), *Komstroy* (discussed here), *PL Holdings* (discussed here), and the 2022 and 2024 *Micula* judgements (discussed here).

What Happened Since Achmea Was Issued Six Years Ago?

Providing a view from an intra-EU investor, Mr Hennessee first summarised the reception of *Achmea* in two words: disappointment and resignation. He noted that in the post-*Achmea* world, investors have to run risk calculations based on particularities of each country's judiciary. Compared to the safety of the BITs, the risk of litigating in the local court might just be too high for the investment to happen at all.

Sharing her experience, Ms Fatás Pérez said that Spain continues to receive a few requests for arbitration from intra-EU investors. She argued that EU law was, in itself, enough to provide comfort to the investor. She also pointed out two post-*Achmea* developments which she considered positive: an increased consistency of interpretation of EU law and a decrease in the number of arbitration claims following the Termination Agreement.

Dr Kozmenko pronounced the patient to be more alive than dead, pointing to the very existence of the second panel. However, she stated that the ISDS system in Europe was definitely undergoing a change: investors consider filing less claims and there is an increased interest in settling rather than litigating. She also pondered what steps investors might take when structuring their new contributions. Would companies outside the EU become more frequently used as vehicles for investment? Would EU countries no longer be considered as favourable arbitral seats? It will be interesting to see how arbitral tribunals deal with these issues.

Prof. Bermann reproached the EU for taking a disingenuous position on intra-EU investment arbitration. He recalled that the EU Commission promoted BITs only then to cast them as "evil". He questioned what was so special about EU law to warrant disdain towards its application by private practitioners. Similarly, he could not see a way to distinguish a BIT tribunal and a CETA tribunal, criticising the CJEU's attempt at making that distinction in Opinion 1/17. Lastly, Prof. Bermann commented on Spain's recent attempts to resist the enforcement of three ECT awards before a US court (covered on the Blog here). He thought it arrogant for Spain to rely on internal EU rules to avoid paying its award debt.

Replying to Prof. Bermann's remarks, Mr Kuplewatzky drew a distinction between the CETA tribunal, which applies only CETA provisions, and an investment tribunal that often has apply the EU law. He also noted that, in its amicus brief, the US supported Spain's position. He further argued that the ban on intra-EU investment arbitration reflected the EU Member States' commitments under international law, which the latter undertook voluntarily.

Ms Fatás Pérez added that there was no arrogance in Spain resisting the enforcement in the US, considering that it was the investors who brought proceedings in the District of Columbia District Court, instead of before enforcement courts in the EU. She also noted that, in resisting the awards,

Spain was abiding by its EU obligations.

Replying to his co-panelists, Prof. Bermann again emphasised that no difference existed between the CETA tribunal and a BIT tribunal. He saw no reason for investors to pursue the enforcement of an award that they knew would be worthless before an EU Member State's court. Finally, he concluded by expressing his puzzlement at the approach that the US took in its amicus brief, finding it to be incorrect.

What Are the Most Suitable Alternatives for Intra-EU Investors to Enjoy Investment Protection?

Ms Fatás Pérez assured the audience that EU courts were a good forum to protect intra-EU investors. She stressed that countries joining the EU go through a rigorous process, ensuring, inter alia, the good quality of the judicial process. She also highlighted the need to honour the principle of mutual trust in the relations among the EU Member States (as sovereigns).

Mr Hennessee argued for a more nuanced reality, mentioning that many advisory firms evaluate the levels of political risk for various countries. According to these assessments, no EU Member State is the same; and with some courts, the risk of non-enforcement could be so high as to make the whole investment not worth it.

Mr Kuplewatzky assured his co-panelists that the CJEU was a watchful guardian of EU law, standing ready to correct any mistake that the local court may make. Prof. Bermann saw no reason for not trusting EU courts. However, he also thought that the EU needed to work on the creation of the intra-EU investment protection regime. Here, he cited the proposals made in the 2016 Non-Paper, outlining the creation of such a regime, with a specialised EU investment court being part of it. Mr Kuplewatzky then elaborated on the content of the Non-Paper proposals, stressing the suggestion to create a European multilateral investment court. Dr Kozmenko also expressed her support for the creation of a multilateral investment court, drawing similarities with the original reason for BIT arbitrations as creating a neutral forum, separate from state courts. Ms Fatás Pérez added that negotiations on the creation of a multilateral investment court would still require significant work.

Conclusion

Laborde Law's conference allowed the participants to delve into two fascinating topics on the subject of investment arbitration. The issues that the stellar panels of speakers tackled will no doubt resonate with the attendees not only in the five busy days to come but also after this year's PAW ends. As these issues concern the shape of investment arbitration's future, especially in the EU, Laborde Law plans to follow up on the questions that arose during the Day 1 panels next year.

---

subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Thursday, March 21st, 2024 at 8:42 am and is filed under Achmea, Arbitration Awards, Enforcement, International Investment Arbitration, Legitimacy, Paris Arbitration Week
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.