Kluwer Arbitration Blog

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Loukas A. Mistelis (School of International Arbitration, Queen Mary University of London (QMUL)) and Nikos Lavranos (NL-Investmentconsulting) · Sunday, April 21st, 2024

We are delighted to present the first issue of the ninth volume of the *European Investment Law and Arbitration Review* (*EILA Rev*). Regular readers will notice four significant changes: *First*, there is a new cover; *second*, there is a new publisher – we are delighted to work with Kluwer on this and the fact that not only the *Review* is now published by the leading arbitration publisher but also that all back issues and indeed all new issues are now available on: www.kluwerabitration.com; and *third*, as of 2024 there will be two issues annually, one published in the spring and one published in the autumn; *fourth*, we are now able to offer online pre-publication of approved submissions within a few weeks of approval.

When we launched *EILA Rev* in 2016 we set out to address a very wide range of issues at the cross-roads of *European* investment law and investment treaty law. It was the time when the European Union (EU), and most significantly, the European Commission assumed a more active role in shaping policy and rules. We identified a distinct gap in scholarship since there was no open and coherent debate. In the context of the so-called legitimacy crisis of Investor-State Dispute Settlement (ISDS), commentators appear to take extremely opposing polar positions. One group proposed the immediate end of ISDS (effectively, investment treaty arbitration) and return to state courts or the creation of a new permanent multilateral international court. The other group suggested enhancements and more pronounced checks and balances of the existing arbitration system. Many were keen to forecast the end of ISDS in the short term or at least the gradual phase-out of investment treaty arbitration. While the latter group has indeed contributed to an orderly improvement of the ISDS processes with focus on ethics, transparency and efficiency, the former group has forced terminations of several treaties and the triggering of sunset clauses with rather little tangible outcomes.

UNCITRAL launched Working Group III in 2017 with a significant and wide-reaching mandate to explore procedural and quasi-procedural reforms of ISDS and has recorded progress in some areas such as the Code of Conduct for adjudicators and arbitrators. ICSID adopted modernized rules for arbitration and mediation and continues to record large numbers of new cases. The Energy Charter Treaty (ECT) completed the drafting a modernized treaty to deal with various (procedural and substantive) ISDS related concerns and environmental concerns about climate change. Instead of a vote on the new modernized treaty, four EU Member States announced their withdrawals (France, effective 8 December 2023; Germany, effective 21 December 2023, Poland: effective 29 December 2023; and Luxembourg effective 17 June 2024) with the inevitable risk that the new

treaty (which, *inter alia*, restricts protection of fossil fuel investment and effectively excludes jurisdiction over intra-EU disputes), may never enter into force, allowing the original treaty to apply for the next twenty years pursuant to the ECT sunset clause (Article 47(3)).

Our readers are undoubtedly familiar about the key European development which prompted all these reforms. In 2018 the Court of Justice of the European Union (CJEU) issued the *Achmea* judgment, in which it declared the incompatibility of investor-state arbitration clauses in BITs between EU Member States with EU law. The CJEU subsequently issued two further decisions that widened the scope of *Achmea* to also cover the ECT and ad hoc investment arbitration agreements (*Komstroy* and *PL Holdings*). Since the *Achmea* judgment, however, at least seventy investment tribunals had to decide on their jurisdiction because of objections raised by a party seeking to persuade the tribunal to decline jurisdiction and follow the *Achmea* decision. Of course, there are also few tribunals such as the tribunal in *Green Power v. Spain* which have sustained the *Achmea* objection and declined jurisdiction.

Moreover, the application of the *Achmea*, *Komstroy*, and *PL Holdings* judgments by the courts of several Member States has jeopardized the enforcement of awards issued in intra-EU disputes within the EU. This is not merely a European issue. There are also several attempts to enforce intra-EU awards in the United States and courts in the US will be issuing judgments in 2024. There are also similar cases in the UK and Australia.

Further to this legal, but also ideological debate, the world is experiencing the war ('Russian special military operation') in Ukraine, now in its third year, with ongoing human loss and environmental destruction ('ecocide'), rise in energy prices, the slowing down of the energy transition is slowing down. To this we have to add the Israel-Hamas conflict, which has triggered not only deaths on both sides but human displacement and living conditions that can only be described as humanitarian crisis and which may even fall within the scope of the Genocide Convention as has been also indicated by the International Court of Justice (ICJ) in its provisional measures Order of 26 January 2024. The international arbitration community is acutely aware of human rights, ESG and rule of law concerns and increasingly addresses related questions in the course of arbitral proceedings.

This issue of *EILA Rev* is reflective of the state of affairs in the world and Europe. In this respect, this issue starts with one of our new features, a chronicle written by Nikos Lavranos (one of the Co-Editors-in-Chief of this *Review*) and showcasing some of the most significant recent developments in European investment law and arbitration.

The first article by Nicolò Andreotti focuses on the interaction between human rights and investment protection and the role of the European Court of Human Rights (ECtHR) in the enforcement of intra-EU BITs within the EU: a significant part of the discussion relates to the *Bosporus* presumption developed by the ECtHR. Paschalis Paschalidis has written the second article on the 2019 BLEU Model BIT, which reflects a vision of the future of investment protection within the EU and would no doubt have significant impact on future treaty drafting. Then, Fahira Brodlija provides an insightful report on the work of UNCITRAL's Working Group III and how the work has evolved into a series of building blocks of ISDS reform. Next, Oleksii Izotov casts some light on the innovative issue, the use of investment arbitration to resolve disputes between (foreign) religious organizations and host states; a significant part of the discussion has relevance and resonance in the context of the war in Ukraine. In the final piece in the articles section, Julia Hildebrandt addresses the role of ISDS for third party investors impacted by EU sanctions against

Russia, a highly topical issue which no doubt will be further addressed in years to come. It is yet another piece which looks at the aftermath of the Russian military operations in Ukraine and the sanctions introduced by a number of states as well as international organizations.

The case-note section starts with a note by Joseph Dyke on Spain's failed attempt in the English Commercial Court to set aside the registration of the intra-EU ECT ICSID award in *Infrastructure Services Luxembourg and another v. Kingdom of Spain*. Eva-Maria Wettstein and Lisa Schöttmer review the German Federal Court's declaration of the inadmissibility of intra-EU investor-state ICSID arbitration, confirming the BGH's position of the supremacy of EU law, even over other international law obligations.

The EFILA focus section includes the annual EFILA lecture given by Robert Spano. His main question is whether the refusal by a national court of an EU Member State to recognize and/or enforce a valid claim in the form of a final intra-EU arbitration award may infringe the right to the peaceful enjoyment of possessions, guaranteed by Article 1 of Protocol No. 1 of the European Convention Human Rights (ECHR). Robert Spano sets out the approach the ECtHR may take in addressing this question and the interaction between EU Member States' obligations under the ECHR, EU law and the ICSID Convention.

Finally, the book review section covers two reviews written by Nikos Lavranos: the book edited by Samuel Wordsworth and Marie Veeder, which collected selected writings and contributions of the late VV Veeder and the seventh edition of Redfern and Hunter on International Arbitration by Nigel Blackaby, Constantine Partasides and Alan Redfern.

This is yet another rich issue with a very diverse group of contributors from around the world and manifests why the Review has attracted so much attention, not only by scholars but also from national courts and arbitral tribunals.

We wish to express our wonderful editorial team, led by the Co-Managing Editors Trisha Mitra and Samuel Pape who are supported by our editors Mark McCloskey, Maria Fanou and Szilard Gaspar-Szilagyi and our Editorial Board.

Last, but not least, we are also indebted to Vincent Verschoor and Gwen de Vries of Kluwer Law International for their support and enthusiasm in developing and producing this *Review* and making the transition to Kluwer so smooth.

In order to ensure that each issue we produce is substantial and intriguing, we invite unpublished, high-quality submissions (both long and short articles as well as case notes) that fall within the scope of the *Review*. The Call for Papers and the house style requirements are published on the *Review*'s website, https://efila.org/eila-review/

Finally, the *Review* is inviting submissions for the Essay Competition until 1 September. All information regarding the 2024 Essay Competition is published on the *Review*'s website, https://efila.org/essay-competition/.

Prof. Loukas Mistelis, Co-Editor-in-Chief

Prof. Nikos Lavranos, Co-Editor-in-Chief

E-mail: eilarev@efila.org

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