Kluwer Arbitration Blog

9th EFILA Annual Conference: New Frontiers in International Investment Arbitration

Aarya Dixit, Leticia Diehl Tomkowski (Clifford Chance) · Monday, May 27th, 2024

On 25 April 2024, the European Federation for Investment Law and Arbitration ("EFILA") held its 9th Annual Conference at Clifford Chance in Frankfurt. The conference was opened by the Chair of the Executive Board of EFILA, Mirjam van de Hel (NautaDutilh) who underscored the importance of discussing the impact of geopolitical uncertainties on international arbitration and emphasized Germany's pivotal role in shaping intra-European Union ("EU") investment arbitrations through its domestic court proceedings. Dr Moritz Keller (Clifford Chance) also offered welcome remarks suggesting a potential need to reform investment arbitration to address the emerging new frontiers. This blog post captures some of the highlights of the discussions.

Foreign Direct Investments in Times of Geopolitical Uncertainty?

The introductory session of the conference featured Olga Hamama (Clifford Chance), Lucia Raimanova (A&O Shearman), and Laura Rees-Evans (Fietta).

Hamama led a discussion regarding Russia's annexation of Crimea and the Donbas region in 2014, outlining the solid ground it created for claiming damages and compensation, and noted that similar claims have emerged following the Russia-Ukraine war in 2022. Hamama discussed awards such as *Oschadbank v Russia* and *JSC CB PrivatBank v Russia*, analyzing Russia's jurisdictional objections, such as whether Russia exercised effective control over Ukrainian territories and whether Russia's actions amounted to annexation rather than mere occupation. She highlighted the narrow language of the Russia-Ukraine Bilateral Investment Treaty ("BIT") potentially barring a tribunal from deciding on expropriation and considered whether Most-Favoured Nation ("MFN") clauses could overcome such narrowly-worded clauses. Lastly, she discussed the Register of Damages for Ukraine as an alternative for investors to bring claims against Russia.

Raimanova then highlighted how the Paris Agreement along with the Russia-Ukraine war have pushed countries to reduce their reliance on fossil fuels leading to the energy transition in European countries and other countries across the globe, which could bring a wave of renewable cases. She added that changing perception towards nuclear energy could conceivably bring new investments in that sector and potential disputes.

Rees-Evans concluded the discussion by highlighting that Energy Charter Treaty ("ECT") withdrawals, increased Foreign Direct Investment ("FDI") screenings, and terminations of BITs, can lead to pessimism indicating a shift from multilateralism to nationalism; however, despite the terminations and withdrawals, she argued that investment arbitration is not dead. Her reasons for this conclusion were manifold: the new authorization of BITs for Hungary; the shift to clean energy and the need to attract investments in the renewables sector; sunset clauses in the ECT (Article 47(3) of the ECT) and BITs; and the increased membership of the International Centre for Settlement of Investment Disputes ("ICSID") in recent years.

Domestic Courts and the Review of Awards: Recent Trends

The first panel of the conference featured Dr Maria Fogdestam Agius (Westerberg & Partners Advokatbyrå AB), Georg Scherpf (Clyde & Co), Dr Alfred Siwy (Zeiler, Floyd Zadkovich), and Dr Paschalis Paschalidis (Arendt).

Agius began the discussion highlighting the double-edged sword of domestic court review, explaining its role in ensuring arbitration's integrity while also noting the potential for abuse. Agius then highlighted recently published empirical research by Westerberg in collaboration with other Nordic law firms on challenging arbitral awards in the Nordics and noted a preview of forthcoming empirical research focused on ISDS, to be released in May 2024. The research revealed that, in the last two decades, 22 challenges to investment awards seated in Sweden were identified, predominantly under the Stockholm Chamber of Commerce Arbitration Rules. Agius noted longer resolution times for investment award challenges than commercial ones, with parallel proceedings extending the timeframe. Of the 22 challenges, 13 have been resolved, with six resulting in set-aside or annulment.

Moving forward, Scherpf delved into the decision of the German Federal Court of Justice of 27 July 2023, which declared an intra-EU ICSID proceeding inadmissible before the constitution of the Tribunal under section 1032(2) of the German Code of Civil Procedure. He argued that the decision (analyzed in detail here) has further contributed to the demise of intra-EU ISDS, being at odds with Germany's international commitments under Article 41 of the ICSID Convention and the rule of law. It also, in his view, misapplied EU law by going beyond the Court of Justice of the EU decisions in *Achmea* and *Komstroy* whilst confusing the "effective application" of EU law (*effet utile*) with mere "efficiency", thus paving the way for a declaration of inadmissibility already at the outset of the proceedings as opposed to a later refusal at the enforcement stage. He also reflected on the possible implications of the decision, including further incentives for investors to restructure their investments, a likely run on German courts to challenge intra-EU proceedings without – or only with a "hypothetical" – nexus to Germany, and the chance of other countries following suit.

Siwy then discussed court decisions concerning intra-EU arbitral awards post-*Achmea*, exploring, *inter alia*, the case of *Poland v LC Corp BV* – an UNCITRAL arbitration seated in London. LC Corp was authorized to proceed with its intra-EU investment arbitration, as Poland failed to have the arbitration withdrawn or suspended by the Dutch court. He highlighted the Amsterdam District Court's findings noting that the arbitration was not manifestly without any chance of success since the tribunal was seated outside the EU, and thus LC Corp's claim could not be considered an abuse of process under Dutch law. His analysis also touched upon the UK Supreme Court's ("UKSC")

reasoning on enforcing intra-EU ICSID awards, as seen in the *Micula v Romania (1)* case.

Paschalidis rounded off the panel contributions, exploring, among other points, the stance of the Luxembourg Court of Cassation in the *Viorel Micula* case, which overturned an appellate court ruling that had upheld the enforcement of the award. According to the Luxembourg Court of Cassation, Romania had in fact never waived its jurisdictional immunity. Paschalidis addressed potential flaws in the Cassation Court's reasoning arguing that it had undermined the rules on state immunity by implicitly accepting that the decisive moment to determine if a state has waved its jurisdictional immunity is not when the arbitration agreement was formed, but when enforcement is sought.

Geopolitical Uncertainties and Their Impact on Arbitration

The second panel featured Dr Richard Happ (Luther), Dr Patricia Nacimiento (Herbert Smith Freehills), Kevin Huber (Lalive), and Henry Smith (Risk Control).

Happ highlighted the process of quantifying damages in investment arbitration, by comparing two assets in the actual scenario and the but-for scenario in comparable or similar situations. He classified geopolitical risks as "unknown unknowns" and contended that their inclusion in damage assessments poses a dilemma as they fall neither under normal market risks nor under political risks. Happ then discussed the various methods used to quantify damages such as the scenario analysis, real options valuation, market approach, and the Monte Carlo method.

Nacimiento then discussed the effects of sanctions on arbitration proceedings and the enforceability of arbitral awards. She explained that sanctions regimes are part of a country's public policy, and awards in breach of sanctions regimes are unenforceable. She also discussed the applications for anti-suit injunctions ("ASIs") brought against RusChemAlliance (a summary of one of the most recent decisions rendered by the UKSC in *UniCredit Bank GmbH v RusCemAlliance* can be found here; the full decision yet to be released) and highlighted the importance of ASIs as a tool to enforce arbitration agreements.

Huber went on to shed light on how geopolitical uncertainties can impact individuals' ability to participate in proceedings, lead to suspension of proceedings, the resignation of counsel, witness intimidation and refusal to testify, increased costs due to the suspension of proceedings and counsel changes, delays due to the suspension of proceedings, and changes in strategy when witnesses back out.

Lastly, Smith explained that a scenario analysis helps to minimize geopolitical risks when making an investment in a country. He gave examples of important considerations when trying to establish a breach of an investment protection regime by a host State, including understanding the various kinds of licenses required, the procedure to acquire them, whether public tender practices follow the legal norm, due diligence on the corporate records of the assets, internal decision making of the government and government bodies, etc.

Concluding Remarks

Following the discussions, Yael Hollander de Groot (Wolters Kluwer) unveiled the first issue of the ninth volume of the *European Investment Law and Arbitration Review* ("EILAR") ("Review"), now published by Wolters Kluwer (previous coverage available here). She then discussed the latest innovations of Kluwer Arbitration, along with a teaser about Kluwer's AI-enhanced platform set to streamline the legal research process.

Prof Dr Nikos Lavranos (Secretary General of EFILA) then awarded Daniel Pap the first prize in the 2023 EFILA Young Practitioners and Scholars Essay Competition for his essay.

Finally, he offered some closing remarks stressing, *inter alia*, that ISDS and BITs are very much alive and remain valuable instruments amidst current geopolitical tensions.

There is an open call for the EILAR 2024 Young Practitioners and Scholars Essay Competition.

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