Kluwer Arbitration Blog

LIDW 2024: ISDS Perspectives From the EU and the UK

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The role of the United Kingdom ("UK"), particularly London, and of the European Union ("EU") in the landscape of investment arbitration has been a central topic of discussions during the London International Dispute Week 2024 ("LIDW"). This post aims to provide a non-exhaustive account of some of the events which tackled this theme.

On the first day of LIDW, and in the context of the International Arbitration Day, the "Europe horizon scanning – a kaleidoscope session" covered recent developments in investment arbitration. The panel moderated by Dr Monique Sasson (Sasson Arbitration), was composed of Duarte G Henriques (Victoria Associates), Professors Gerard Meijer (Linklaters), Veronika Korom (Paragon Advocacy) and Stefan Kröll (DIS).

"Reimagining BITs: Recent developments in the international investment regime with a focus on the UK" was the theme of the 5 June 2024 session moderated by Sylvia Tonova (Pinsent Masons) and featured Camilla Godman (Omni Bridgeway), Graham Coop (Pinsent Masons) and Lord Guglielmo Verdirame KC (Twenty Essex). The panellists discussed how notable recent and ongoing events will affect the future of investment protection and planning.

Investor-State awards were at the epicentre of the discussion in another session taking place on the same day: "Trends in the enforcement of ICSID awards: is the UK still a hospitable jurisdiction for the enforcement of investor-State awards?". The panel was moderated by Jeff Sullivan KC (Debevoise & Plimpton LLP) and included Patrick Swain (Debevoise & Plimpton LLP), Ali Malek KC (3VB) and Sebastian Neave (J.S Held).

The special place held by London in intra-EU investment treaty disputes was the topic of the session "The role of London in respect of intra-EU investment treaty disputes: a seat and a hub for enforcement?". Moderated by Alejandro Garcia (Stewarts), the panel was composed of Judy Fu (3 Verulam Buildings), Tim Rauschning (Luther), and Professor Emilia Onyema (SOAS).

I. Is There Any Future for the ECT?

During the Europe horizon scanning session, Korom highlighted that one of the most pressing issues in relation to investment arbitration is the uncertain future of the Energy Charter Treaty

("ECT"). She pointed out that even if the European Council had recently adopted decisions confirming the EU's withdrawal from the ECT, EU Member States that remain contracting parties to the ECT will still be able to vote for the adoption of the modernised text at the 35th Energy Charter Conference next November.

During the session dedicated to London's place in intra-EU investment treaty disputes, Fu generally argued that States' withdrawal from the ECT should be seen in a wider context of the contemporary climate change context. On the other hand, Rauschning pointed out an issue with the withdrawal in the name of environmental protection. He argued that while past investors, working mainly in the fossil fuel sector, benefited from the investment protections provided by the ECT (and will continue to do so for some time due to the sunset clause), contemporary investments, including those in renewable energy, would no longer be covered.

Similar remarks were made by Graham at the 5th June event. He pointed out that while, indeed, the criticism of the ECT is based on the change of the global climate situation compared to when the ECT was agreed upon, the most recent cases under the ECT concerned renewable energy investments. Tonova explained that it is not clear as to what extent an arbitration can be initiated under the ECT's sunset clause and she discussed with Graham whether the members of the ECT, as the masters of the treaty, could remove the sunset clause from the treaty altogether (and with it the protection of the clause).

The possibility of recourse to the European Court of Human Rights ("ECtHR") was also discussed as a key resource for the enforcement of intra-EU ECT/BIT awards. Indeed, Sasson reiterated that the ECtHR had concluded in *BTS Holding, a.s. v. Slovakia* that the arbitral award constituted a "possession" to be protected under Article 1 of Protocol No. 1 to the European Convention on Human Rights (protection of property) (see Blog post here). Meijer clarified that access to the ECtHR was conditional upon the exhaustion of domestic remedies. Korom further added that one of the other conditions for the enforcement of an award was the respect of limitation periods.

II. Role of London in Investment Disputes

The panellists discussed the position of London as a favoured seat of arbitration proceedings and as a hub for enforcement in respect of intra-EU investment treaty disputes, especially in the light of the EU's backlash against investment arbitration after the *Achmea* and *Komstroy* decisions of the Court of Justice of the European Union ("CJEU").

London as a favoured seat for arbitration proceedings

The Europe horizon scanning session discussed the role of London amid the developments of the last few years with intra-EU investment disputes. Meijer highlighted that London should differentiate itself by diverging from the conservative approach of the CJEU.

Meijer notably referred to the Amsterdam Court decision in *Poland v LC Corp* where the Court refused to order a Dutch investor to withdraw a London-seated UNCITRAL arbitration against the Republic of Poland regarding a treaty-based claim based on the terminated Netherlands-Poland BIT. Poland argued that the arbitral proceedings would amount to an abuse of law and a violation

of EU law. The Dutch Court rejected the requested order on the basis that launching arbitration proceedings under a BIT outside of the EU did not constitute an abuse of procedural law.

Speakers in other sessions also discussed the application of EU law by arbitral tribunals, including the reasons for the *Achmea* ruling of the CJEU which is based on the premise that EU law should be applicable consistently by all decision-makers. This is enforced through the Member-States' courts right to request an interpretative ruling from the CJEU, the right that arbitral tribunals don't have.

Onyema criticised the EU's approach, stating that the same logic, if applied to international commercial arbitration, would make it disappear in favour of the EU state courts, while the whole system of investor-state dispute settlement was based on the assumption of distrust that a foreign investor may reasonably have toward local courts of the host-State.

Speakers also discussed potential practical implications for investment arbitration in light of the potential intra-EU objections. For instance, most BITs do not provide for the seat of arbitration. Thus, parties to non-ICSID arbitration proceedings (e.g., under UNCITRAL Rules) should be wary that fixing the seat of arbitration in an EU Member State clears the way for the respondent State to raise such an objection.

In that context, a recent Swiss Supreme Court decision (see Blog post here) was also scrutinised for not following the CJEU approach in cases where EU law was not applicable.

Kröll noted that parties with arbitration proceedings seated outside of Germany could, in principle, seek a declaration of inadmissibility of the arbitration under section 1032(2) of the German Code of Civil Procedure prior to the constitution of the tribunal. Kröll referred to the *RWE* and *Uniper* cases, where the Cologne Higher Regional Court rendered two decisions containing a declaration on the inadmissibility of the ICSID arbitral proceedings under the ECT between German investors and the Netherlands as the proceedings qualified as intra-EU investment arbitrations (*RWE* and *Uniper* court decisions).

Regarding the modernisation of the English Arbitration Act 1996 (see also discussions here), Verdirame stated that it is in support of London's important role for Investment Arbitration. One of the very recent and important additions to the new bill, that is expected to receive Royal Assent later this year, was the clarifications on the law applicable to the arbitration agreement: The act is incorporating the decision of the UK Supreme Court in *Enka v Chubb* (see discussion here) that the default rule is that the agreement is governed by the law of the seat. This, however, could lead to unintended problems for Investment Arbitration (e.g., whether the intra-EU objection is to be upheld when the seat is in the EU). Therefore, a sub-clause is now to be included that carves out the applicability of the default rule for Investment Arbitration. Further, Verdirame stressed the importance that the new bill did not fully depart from Section 67 of the Act as a de *novo review* remains possible which he considers is the right approach for the UK to remain attractive for arbitration (see discussion on Section 67 here).

London/UK as the hub for enforcement

The panellists of the 5th June session moderated by Sullivan discussed how the UK has always been a very favourable jurisdiction for arbitration: the grounds for challenging an award are

limited, the procedure for challenging an award is also favourable being *ex parte*, and the overall procedure is relatively simple (e.g., no claim form is required). In recent years, the English courts have become a favourable jurisdiction for the enforcement of investment awards, particularly intra-EU awards. This trend began after the CJEU issued a series of decisions effectively finding intra-EU awards to be incompatible with EU law (e.g., *Achmea* and *PL Holdings*), leading the EU Member States to resist enforcement. In addition, the EU Commission has issued several administrative decisions (e.g., Decision 2015/1470 of 30 March 2015) finding that payment of intra-EU awards may constitute state aid incompatible with EU law.

As a result, enforcement is being pursued not in the EU Member States but in the UK, Australia and the US, leading to an increase in cases in the UK courts, with the same litigants pursuing parallel enforcement proceedings in Australia and the US. The panellists discussed the enforcement experience in these two jurisdictions, noting that the decisions in Australia and the US may be considered by the UK courts if they are central to their decisions, but it is unlikely that EU law issues – if brought before the UK Supreme Court – will be decided on the basis of the Australian and US cases.

Turning to the recent UK decisions dealing with sovereign immunity, the decisions in *Services Luxembourg SaRL & Anor v Kingdom of Spain* and *Border Timbers Ltd v Republic of Zimbabwe* effectively confirmed the UK's arbitration hospitality. Both decisions come to the same conclusion finding that sovereign immunity does not apply, although they reach that conclusion in different ways. In *Services Luxembourg*, Fraser J looked at Section 2 and Section 9 of the State Immunity Act ("SIA") finding that: (i) the State's consent to Article 54 of the ICSID Convention was a written submission to the jurisdiction of the Court for the purpose of waiving jurisdictional immunity under Section 2 of the SIA; and (ii) Section 9 of the SIA could also apply (by effect of Section 9 a "state's adjudicative immunity is removed with respect to proceedings related to an arbitration in which it has agreed to arbitrate, including proceedings for the recognition of any resulting award", paragraph 96 of the decision). In the *Border Timbers* case, on the other hand, Dias J found that Article 54 of the ICSID Convention did not apply in relation to Section 2 and that the Court had to consider the question of jurisdiction independently in relation to Section 9 (see discussion here).

Separately, speakers pointed out that for practical reasons, London may be an attractive centre for the enforcement of intra-EU awards as many European and international companies do business here and therefore have assets against which an award creditor can enforce. This is also true from an investigative perspective, as evidenced, for example, by the amount of information that can be retrieved from UK public records.

III. Funding in Investment Arbitration

Godman explained from the funder's perspective that the funding climate has become more difficult, especially as the investors see their funds tied up for too long due to the duration of the proceedings. She expressed that funders are less hesitant to fund in the enforcement stage, while there is reluctance at the merits stage of the proceedings. Adding to the difficult funding climate, also at the enforcement stage, are recent US cases concerning the treatment of the intra-EU objection, which are currently being appealed (see discussion here).

In general, Godman explained that when it comes to enforcing awards, her experience has been that it is more successful to approach states strategically in order to reach a settlement. This approach includes soft measures, such as using diplomatic channels or involving multilateral organisations or rating agencies, as well as hard measures, such as seizing individual assets that might not have much monetary value but are valuable in terms of their visual impact.

Conclusion

Overall, the sentiment that the investment arbitration landscape is continuing to go through significant changes was present in all discussions. Such changes may arise as a response to court judgments (e.g., Achmea/Komstroy), legislative initiatives (e.g., modernisation of the English Arbitration Act) or other political decisions (e.g., withdrawal/modernisation of the ECT). While not all these developments are particularly new, they continue to give rise to new questions and important issues for debate. And as the many references to the KAB website in this conference post already indicate, readers of the KAB will always remain up-to-date.

The views expressed in this post are the personal views of the authors and do not represent those of their respective employers/affiliated organizations or their employers'/affiliated organizations' clients.

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This entry was posted on Saturday, June 8th, 2024 at 3:59 pm and is filed under Conference, ECT Modernisation, Energy Charter Treaty, England, English Arbitration Act, English courts, English Law, EU Law, Europe, European Court of Justice, LIDW 2024, UK
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