International Construction Disputes

Roquette / Pröstler

2022
ISBN 978-3-406-76970-2
C.H.BECK

practical experience of arbitrators in investment arbitration cases as it identifies the case count of arbitrators, *i.e.* on how many ICSID cases they have previously sat and are currently sitting (which may also be indicative of their current case load).[157]

4. Applicable law and seat of arbitration

In international arbitration, (at least) three different aspects need to be considered regarding the applicable law: (i) the law governing the substance of the dispute; (ii) the law governing the arbitration agreement; and (iii) the law governing the arbitration proceedings (see, for more details, Chapter 3.A. in mn. 31). **90**

Given that most investor-state arbitrations are based on a bilateral or multilateral investment treaty, the law governing the substance of the dispute and the law governing the arbitration agreement will in most cases be the underlying treaty provisions and general principles of international law. In deciding whether the conduct of a host state was lawful, the tribunal must resort to international law; whether the state's conduct was in compliance with its local law is not decisive.[158] **91**

Reference to international law may also be necessary to interpret the provisions of the applicable investment treaty. For example, while the applicable BIT or MIT may afford protection from expropriation to foreign investors, reference to the concept of expropriation under customary international law may be necessary to ascertain the content and scope of the relevant treaty provision. For this purpose, tribunals often resort to the *Vienna Convention on the Law of Treaties* ('the VCLT') of 1969, in particular the general rule of interpretation in Article 31 VCLT.[159] **92**

The same applies to the law governing the arbitration agreement. In particular, in determining the scope of its jurisdiction, the tribunal may be required to interpret the dispute settlement clause of the treaty for which purpose it will likely resort to the VCLT. **93**

Even though the dispute is governed by international law, national law is also likely to play a role in investment arbitration proceedings. In particular, the national law of the host state is likely to be relevant to various aspects of the dispute, *e.g.* in assessing whether an investment was made in accordance with the host state's local law, which is often a requirement for the investment to qualify as an 'investment' under the treaty. While the question whether the impugned measures by the host state giving rise to the treaty claim are compliant with local law is not decisive for the dispute, this may still be a relevant factual matter, *e.g.* in determining whether or not the investor could legitimately expect the state to act differently. The national law of the home state may also play a role, *e.g.* in determining whether the investor qualifies as a 'national' of the home state. **94**

In case the investor brings a (contractual) claim under an umbrella clause, the law governing the contract (most likely the host state's law) will play an even larger role. While the exact effect of an umbrella clause on the contractual claim is not answered unanimously among investment arbitration tribunals, most tribunals consider that the state's obligations under the contract generally remain subject to the law governing the contract.[160] **95**

With regard to the law governing the procedure of the arbitration, the considerations are similar to those in commercial arbitration (see also Chapter 3.A. in mn. 38). In **96**

[157] *Cf.* https://icsid.worldbank.org for the databases regarding arbitration and conciliation *ad hoc* committee members (last access on 31.10.2021).

[158] *Cf.* Art. 3 ILC Articles; Blackaby *et al.*, *Redfern and Hunter on International Arbitration*, mn. 8.66.

[159] *Cf.*, *e.g.*, Schreuer, *Principles of International Investment Law*, p. 28.

[160] *Cf. supra* in mn. 64.

principle, parties are free to decide on the procedure to be followed, for instance, by selecting the applicable arbitration rules. In the absence of such an agreement of the parties, the provisions of the law of the seat of arbitration, *i.e* the *lex arbitri*, will govern the conduct of the proceedings.[161] Determining the seat of arbitration will also be relevant in assessing where the award was made (and can be challenged) for the purposes of the New York Convention.[162]

97 While the above applies to investment arbitrations conducted under the UNCITRAL, ICC or SCC Rules, arbitrations conducted under the ICSID Convention do not have a legal 'seat' in the sense of determining an applicable *lex arbitri*.[163] The ICSID Convention provides a self-contained dispute resolution mechanism which is delocalised from national legal systems and excludes the involvement of national courts.[164] Thus, ICSID arbitrations are conducted exclusively pursuant to the provisions of the ICSID Convention, the ICSID Arbitration Rules and some additional administrative rules issued by ICSID such as the *ICSID Administrative and Financial Regulations* and the ICSID Institution Rules.

V. Recognition and enforcement of investment arbitration awards

98 In case the arbitral tribunal finds that the state has violated its obligations under the applicable investment protection regime, it will order the state to pay compensation or damages (as applicable) to the investor.[165] While most treaties are silent on the available remedies, it is only in rare cases that tribunals have granted specific performance, given that this is often seen as an infringement of the host state's sovereignty; in addition, it is difficult to enforce and, in most cases, simply not requested by the investor.[166]

99 Once an award has been rendered and any (potentially pursued) remedies have left the award unaffected, it has long been held that most states will voluntarily comply with the award. Among the reasons for this may be considerations such as not to deter future foreign investment or to remain eligible for financial support from the World Bank and/or the International Monetary Fund. In connection with the increase of investment arbitration proceedings in recent years, the number of states refusing to voluntarily comply with awards rendered against them and thus the number of awards requiring enforcement proceedings have likewise increased.[167] While a state's policy in this regard may well be subject to change over the years, an assessment of the state's history of (non-)compliance with investment arbitration awards as well as the availability of assets subject to enforcement in other ICSID or New York Convention Member States (as applicable) should therefore form part of the overall benefit-risk assessment to be made before the initiation of arbitration proceedings.

100 Depending on whether or not the relevant award has been rendered under the ICSID Convention, the recognition and enforcement of investment arbitration awards may differ considerably from the recognition and enforcement of their commercial arbitration counterparts. Where the investor has opted for ICSID arbitration, Article 53(1)

[161] Sicard-Mirabal/Derains, *Introduction to Investor-State Arbitration*, pp. 83–84.
[162] *Cf.* Art. I(1) NYC.
[163] *Cf.* Sicard-Mirabal/Derains, *Introduction to Investor-State Arbitration*, p. 85.
[164] *Cf.* Schreuer, *Principles of International Investment Law*, p. 238.
[165] On the distinction between compensation and damages, *cf.* Marboe, *Calculation of Compensation and Damages in International Investment Law*, mn. 203.
[166] Dizgovin, *Florida Journal of International Law* 2016, 1 (39).
[167] Gaillard/Penushliski, *State Compliance with Investment Awards*, 2021.

ICSID Convention provides that ICSID awards are not subject to any appeal or any other remedy except those provided in the Convention itself, that is either revision by the tribunal[168] or annulment of the award by an *ad hoc* Committee.[169] This means that ICSID awards are not subject to any set aside proceedings or any other review by national courts. Rather, the Contracting States of the ICSID Convention undertook to recognise and enforce ICSID awards as if they were final judgments of their own national courts.[170] ICSID awards are thus subject to immediate recognition and enforcement in the courts of the Contracting States of the ICSID Convention.[171] The New York Convention's grounds for refusal of recognition and enforcement, including, in particular, the possibility to refuse recognition in case the award is found to contravene the state's public policy, do not apply.

Conversely, investment arbitration awards which are not covered by the ICSID Convention are, just like commercial arbitration awards, subject to set aside proceedings before the national courts at the seat of arbitration.[172] Provided that the court seized is located in a Contracting State of the New York Convention, the procedure of recognition and enforcement is conducted in accordance with the Convention (see, for more details, Chapter 3.A. in mn. 144). Accordingly, in order to apply for recognition and enforcement, parties must provide the court with the arbitral award as well as the arbitration agreement.[173] If these requirements have been complied with, the court will only refuse recognition and enforcement of the award in case at least one of the grounds for refusal mentioned in Article V NYC is fulfilled, *e.g.* in case the recognition and enforcement would be contrary to the public policy of the country in which the court seized is located (see, for more details, Chapter 3.A. in mn. 144). **101**

VI. Recent developments and the future of investment arbitration

The substantial increase in the number of investor-state arbitration cases over the last decades has coincided with a number of growing concerns over the legitimacy of the system. **102**

1. Transparency in investment arbitration

One of concerns refers to the confidentiality of arbitration. While confidentiality may be essential to private parties seeking to resolve a commercial dispute, its justification is not as uncontroversial in investment arbitration, given that the assessment of the lawfulness of a state's conduct affects the state's interests as well as the state budget and may therefore be of increased interest to the general public. **103**

Recognising the need for more transparency in investment arbitration, the United Nations Commission on International Trade Law adopted the *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* ('the UNCITRAL Rules on Transparency') in 2013. They apply to investor-state arbitrations conducted under the UNCITRAL Arbitration Rules to the extent they are based on investment treaties **104**

[168] Art. 51 ICSID Convention.
[169] Art. 52 ICSID Convention.
[170] Art. 54(1) ICSID Convention.
[171] Born, *International Arbitration: Law and Practice*, p. 493.
[172] Sicard-Mirabal/Derains, *Introduction to Investor-State Arbitration*, p. 237.
[173] Art. IV NYC.

concluded on or after 1 April 2014.[174] Among other things, the UNCITRAL Rules on Transparency stipulate that certain information about the dispute be published in a repository at the outset of the proceedings,[175] that the parties' written submissions be made available to the public[176] and that hearings be public unless certain exceptions to transparency apply.[177]

105 In order to facilitate the application of the UNCITRAL Rules on Transparency also to investment treaties concluded before 1 April 2014 and to non-UNCITRAL arbitrations (which requires consent by both the investor and the host state), the *United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration* ('the Mauritius Convention on Transparency') was adopted in December 2014 and finally entered into force in October 2017.[178] However, as of October 2021, only 23 states have become signatory states and only 9 states have ratified the Mauritius Convention on Transparency, demonstrating the state's hesitance in this regard.[179]

106 Transparency also plays an increasing role in arbitrations under the ICSID Convention. Currently, ICSID publishes arbitral awards and parties' submissions on its website but only subject to the arbitrating parties' consent.[180] Increased transparency rules are among the proposals for amendments to the ICSID Arbitration Rules which are currently under consideration.[181]

107 Some of the more recent BITs, MITs and FTAs also include provisions on transparency of the arbitrations initiated to resolve disputes under these investment protection regimes.[182]

2. Intra-EU investment arbitration and enforcement of intra-EU awards in the wake of the CJEU's *Achmea* and *Komstroy* judgments

108 In addition to transparency concerns, criticism against the legitimacy of investment arbitration has surfaced most profoundly in the EU, which may also coincide with the first claims being raised against EU Member States such as Germany in connection with its exit from nuclear energy after the Fukushima incident in 2011 or Spain and Italy in connection with their withdrawal of subsidies for renewable energies in the aftermath of the financial crisis of 2008/2009.

109 Since 2015, the European Commission has been working to establish a permanent Multilateral Investment Court as an alternative to the investment arbitration regime.[183] The proposal of such a multilateral investment court is also being considered by UNCITRAL in its ongoing work on the reform of the investor-state dispute settlement system.[184]

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[174] Art. 1(1) UNCITRAL Rules on Transparency; Sicard-Mirabal/Derains, *Introduction to Investor-State Arbitration*, p. 10.

[175] Art. 2 UNCITRAL Rules on Transparency.

[176] Art. 3(1) UNCITRAL Rules on Transparency.

[177] Arts. 6, 7 UNCITRAL Rules on Transparency.

[178] Art. 2 Mauritius Convention on Transparency.

[179] *Cf.* https://treaties.un.org (last access on 31.10.2021).

[180] *Cf.* Art. 48(5) ICSID Convention; Sicard-Mirabal/Derains, *Introduction to Investor-State Arbitration*, p. 10.

[181] *Cf.*, *e.g.*, Art. 64 of the proposed ICSID Arbitration Rules in Working Paper 5 released by ICSID on 15 June 2021, available at https://icsid.worldbank.org (last access on 31.10.2021).

[182] *Cf.*, *e.g.*, Art. 22.10 US-Korea Free Trade Agreement (2012), which provides that, subject to the protection of confidential information, hearings shall generally be open to the public and written submissions shall generally be made available to the public.

[183] European Commission website, available at https://trade.ec.europa.eu (last access on 31.10.2021).

[184] UNCITRAL website, available at https://uncitral.un.org (last access on 31.10.2021).

These efforts obtained increased attention, when in March 2018, the CJEU rendered its decision in the case *Slovak Republic vs. Achmea BV*.[185] The decision, which became known as the *Achmea* judgment, concerned an award rendered under the UNCITRAL Arbitration Rules seated in Germany between the Dutch investor Achmea and Slovakia. In this judgment, the CJEU ruled that a treaty provision such as Article 8(2) of the Netherland-Slovakia BIT, under which an investor from one EU Member State may initiate investment arbitration proceedings against another Member State, is incompatible with Articles 267 and 344 of the *Treaty on the Functioning of the European Union* ('the TFEU').[186] **110**

Notably, the CJEU emphasised in its judgment that its considerations are specific to investor-state arbitration based on a treaty concluded between EU Member States and therefore cannot be applied to commercial arbitration based on an arbitration agreement between private parties.[187] Intra-EU commercial arbitration is therefore not affected by this judgment. **111**

Further to the *Achmea* judgment, on 5 May 2020, the majority of EU Member States signed the *Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union* ('the Intra-EU BIT Termination Agreement') pursuant to which all signatory states terminated the Intra-EU BITs in force between them.[188] **112**

In September 2021, the CJEU rendered a decision in *Republic of Moldova vs. Komstroy LLC,* in which it applied the *Achmea* reasoning to the *Energy Charter Treaty* ('the ECT'). Notwithstanding that the EU itself is party to the ECT, as are several non-EU Member States, the CJEU held that the arbitration clause in Article 26 ECT does not apply to disputes between a Member State of the EU and an investor from another Member State.[189] Notably, the decision was rendered as an *obiter dictum* in a dispute between two non-EU Member States (Ukraine and Moldova) for which the question of intra-EU applicability of the ECT was without relevance. **113**

Finally, in its most recent decision of 26 October 2021, the CJEU also held that a Member State may not enter into an *ad hoc* arbitration agreement with an investor from another Member State, which has the same content as the invalid arbitration clause in the bilateral investment treaty, as this would circumvent the Member State's obligations under the TFEU.[190] In other words, even if the Member State has failed to (validly) challenge the arbitral tribunal's jurisdiction in the arbitration proceedings, it cannot be considered to have tacitly accepted the investor's offer to arbitrate.[191] **114**

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[185] *Cf.* CJEU, Judgment of 6 March 2018, *Slovak Republic vs. Achmea BV*, Case C-284/16.

[186] *Ibid,* mn. 42; here the CJEU held that, first, investment arbitration tribunals may be called upon to interpret or apply EU law but, second, cannot be regarded as a "*court or tribunal of a Member State*" within the meaning of Art. 267 TFEU and are therefore not entitled to make a reference to the CJEU for a preliminary ruling on questions of EU law. Given that, third, the review of arbitral awards by State courts in the context of set aside proceedings is limited, the CJEU considered that arbitration clauses in BITs between EU Member States would prevent the disputes from being resolved in a manner that ensures the full effectiveness of EU law and therefore threaten the autonomy of the EU legal order.

[187] *Cf.* CJEU, Judgment of 6 March 2018, *Slovak Republic vs. Achmea BV*, Case C-284/16, mn. 54.

[188] Art. 1(1). The Intra-EU BIT Termination Agreement provides, *inter alia*, that arbitration clauses in intra-EU BITs cannot be relied upon to initiate new arbitration proceedings as from 6 March 2021 and mandates its signatory States to inform arbitral tribunals in pending proceedings of the legal consequences of the *Achmea* judgment as well as to ask national courts to set aside the award or to refuse its recognition and enforcement. *Cf.* Arts. 1(5) and (6), 5, 7 Intra-EU BIT Termination Agreement.

[189] CJEU, Judgment of 2 September 2021, *Republic of Moldova vs. Komstroy LLC*, Case C-741/19, mn. 66.

[190] CJEU Judgment of 26 October 2021, *Republic of Poland vs. PL Holdings*, Case C-109/20, mns 65, 70.

[191] *Cf.* CJEU Judgment of 26 October 2021, *Republic of Poland vs. PL Holdings*, Case C-109/20, mn. 36.

115 Following the CJEU's *Achmea* judgment, investment arbitration tribunals established under intra-EU BITs and the ECT were flooded with '*Achmea* objections' raised by the respondent States, arguing that the arbitration clause in the respective treaty was incompatible with EU law and therefore invalid. Up to this date, these objections have consistently been denied by investment arbitration tribunals, which in some cases provided highly detailed reasoning as to why the *Achmea* judgment did not deprive them of their jurisdiction.[192]

116 While investment arbitration tribunals may continue to uphold their jurisdiction, including after the *Komstroy* and *PL Holdings* judgments, and continue to render decisions on the merits, it is unlikely that EU Member States will voluntarily comply with these awards. Non-ICSID awards rendered in intra-EU investment arbitrations seated within the EU may be annulled by a court at the seat of arbitration and/or refused recognition and enforcement. Non-ICSID awards rendered in intra-EU arbitrations seated outside the EU are not subject to annulment by a national court within the EU but they may still be refused recognition and enforcement in EU Member States under Article V of the New York Convention. As for ICSID awards, it remains to be seen whether national courts will adhere to the state's public international law obligation to enforce an award under the ICSID Convention (without any competence to review it, *e.g.* for lack of a valid arbitration agreement or violation of public policy) or whether they will attempt to find a means of giving effect to the judgments rendered by the CJEU.

117 A route that may still be open to investors that have obtained or are about to obtain an award in an intra-EU dispute, is enforcement outside the EU. There are recent indications that, *e.g.*, courts in the United States and Australia will continue to recognise and enforce intra-EU awards.

3. Outlook: The future of investor-state dispute settlement

118 Some of the criticism raised against investment arbitration may be justified and assist in accelerating reforms in the current ISDS mechanisms, such as implementing provisions on increased transparency and increased diversity in the arbitration tribunals deciding on investor-state disputes. However, as becomes clear from the sessions of the UNCITRAL working groups considering various ISDS reform proposals, discussions on such proposals are highly controversial and reaching consensus among a larger number of states is difficult. Against this background, it is uncertain whether and, if so when, the efforts employed by the EU Commission towards establishing a multilateral investment court will be successful. Reaching common ground is proving difficult already within the EU and appears even more challenging when it comes to parties outside the EU, where arbitration is still seen as the most effective means to resolve investment disputes. Notably, however, recent free trade agreements concluded by the EU such as CETA include a provision stating that the Parties shall pursue the establishment of a multilateral investment tribunal (as well as an appellate mechanism for the resolution of investment disputes) with other trading partners.[193]

119 The CJEU's judgments rendered in *Achmea*, *Komstroy* and *PL Holdings* are limited to intra-EU investment disputes. They do not concern arbitration clauses contained in

[192] *Cf.*, *e.g.*, *UP and C.D Holding Internationale vs. Hungary*, ICSID Case No. ARB/13/35, Award (9 October 2018); *Masdar Solar & Wind Cooperatief U.A. vs. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award (16 May 2018); *Vattenfall AB and others vs. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue (31 August 2018).

[193] Art. 8.29 CETA; *cf.* also Art. 3.41 *EU-Vietnam Investment Protection Agreement* (2019).

BITs concluded between an EU Member State and a non-EU Member State (nor between two non-EU Member States), nor do they apply to ECT investment arbitrations involving non-EU Members States. For construction projects located outside the EU and/or contractors from or with a subsidiary in a non-EU Member State, investment arbitration is therefore still a viable option.

120 For intra-EU disputes, the prospects of obtaining and successfully enforcing an investment arbitration award have diminished in the wake of the CJEU judgments. In October 2021, the first intra-EU investor became known to have dropped a (construction-related) claim against another EU Member State because of the impeded prospects of success in the arbitration and enforcement. The CJEU judgments have created the need for a viable alternative for investor-state dispute settlement, in particular in the energy sector. The provision in Article 10 of the *Intra-EU BIT Termination Agreement*, pursuant to which investors should instead be entitled to resort to national courts, even if national time limits for bringing actions have expired, is unlikely to be the end of the issue.

121 As recognised by the EU Commission, "*[i]nternational investment rules and international investment dispute settlement have a role to play in encouraging and retaining investment. So, it's in the EU's interest to ensure that the resolution of investment disputes operates effectively on an international level.*"[194] Even if there may be changes to the forum of settling investment disputes in the future, international investment protection is a necessary component of our globalised economy and should continue to be a factor considered by international contractors involved in construction projects abroad.

[194] European Commission website, *cf.* https://trade.ec.europa.eu (last access on 31.10.2021).