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4 International Arbitration Cases To Watch In 2018

By **Caroline Simson**

Law360, New York (January 1, 2018, 3:04 PM EST) -- International arbitration attorneys will be keeping a close eye on the proceedings involving former Yukos shareholders as they continue their fight to revive their historic awards totaling $50 billion against Russia, a case that invokes a policy dispute over investment treaties signed by two European nations, and other disputes that could affect the arbitration landscape for years to come.

Yukos Proceedings Continue

In April 2016, a Dutch court stunned the international arbitration world when it overturned the record-breaking $50 billion in awards issued to former shareholders of Yukos Oil Co. by the Permanent Court of Arbitration in 2014 following Russia's dismantling of the oil giant.

More than a year and a half later, proceedings in the Netherlands to revive the awards continue to captivate arbitration lawyers — not just because the amount of the awards is so massive, but also because the circumstances surrounding the case are so unusual.

"This case never disappoints," said Skadden Arps Slate Meagher & Flom LLP partner Timothy G. Nelson.

On one side, Russia alleges that Yukos bosses bribed Russian officials and that the tribunal secretary drafted key portions of the award. The country also claims that the former Yukos shareholders are controlled by Russian oligarchs who have improperly asserted their claim under an international treaty.

Meanwhile, the former shareholders grabbed their share of the headlines in 2017 by trying to get a U.S. court to allow them to subpoena Baker Botts for information relating to Russia's alleged manipulation of certain Armenian court judgments — information they wanted to use in the Dutch appeal. They also sought similar relief from a California court for another former Russia attorney.

At the same time, the former shareholders continued efforts throughout the world in 2017 to enforce the now-annulled awards, though many of these efforts have been abandoned or put on hold as they focus their efforts on the Dutch appeal, where a decision could very well be forthcoming in 2018.

"[The Yukos case] is an interesting example of a historic award which thus far has proven not to be worth the paper it's written on," said Charles C. Adams Jr., the worldwide head of Orrick Herrington & Sutcliffe LLP's international arbitration practice group. "Ultimately the end product of international

arbitration has to be an award which is converted into money, and any obstacle or impediment to that process is noteworthy because it diminishes to one degree or another the appeal of the process itself."

D.C. Court Could Consider Issue of Intra-EU BITs

An International Centre for Settlement of Investment Disputes tribunal issued a decision in December 2013 awarding approximately $250 million to two Swedish food industry investors, brothers Viorel and Ioan Micula, in a long-running dispute with Romania over revoked economic incentives. The award has remained unpaid as enforcement efforts have languished for years, slowed by numerous obstacles.

One of those is the fact that the European Commission has gotten involved in the case, issuing a decision in March 2015 stating that if Romania pays the award, the country would be in violation of European Union competition law. The argument came about because the dispute arose under a so-called intra-EU bilateral investment treaty, an instrument the commission argues has been superseded by EU law.

Meanwhile, enforcement efforts in the U.S. have been plagued by procedural issues. In October, the Second Circuit dismissed the Miculas' enforcement petition, concluding that the brothers hadn't properly served Romania because they had filed a summary ex parte proceeding.

Now the Miculas have launched a new proceeding in Washington, D.C., to enforce the award, potentially setting the stage for the district court to weigh the commission's arguments that the award violates EU law. Concurrently, there are proceedings before Europe's highest court — two initiated by the brothers and another unrelated case — in which that court is expected to weigh in on the issue of intra-EU BITs.

Should the European Court of Justice side with the commission and determine that these treaties are not legal, the question of whether to enforce an arbitral award that arose under one of these BITs could come before the D.C. court.

"It would be a novel issue before U.S. courts," said Squire Patton Boggs partner Stephen P. Anway. "In the context of an ICSID award, it would raise an interesting question about whether such a decision from the ECJ would be a ground under which a U.S. court could refuse recognition and enforcement of an intra-EU BIT award, given that ICSID is a relatively self-contained system."

ICSID Tribunal Set to Weigh Bribery Allegations

In a case lodged against two state-owned Bangladeshi oil and gas companies by a subsidiary of Canadian oil and natural gas exploration and production company Niko Resources Ltd., an ICSID tribunal is set to evaluate whether the claim can proceed in the face of allegations that the underlying contracts were procured through bribery.

The claim, filed in 2010, relates in part to payments allegedly owed under a gas purchase and sales agreement between the government entities and Niko Resources Bangladesh Ltd., which had been enlisted by Bangladesh to develop certain gas fields in the country.

The tribunal decided in 2014 that one of the state-owned companies, Bangladesh Oil Gas and Mineral Corp., or Petrobangla, owed Niko around $25 million as well as 140 million Bangladeshi taka (approximately $1.7 million), plus more in interest — a decision that was affirmed in subsequent

decisions issued in 2015 and 2016.

Nevertheless, allegations from the Bangladeshi state-owned entities that the underlying agreements have been tainted by corruption continue to loom over the proceedings. These entities claim that a joint venture agreement between Niko and Bangladesh Petroleum Exploration & Production Co. Ltd., or Bapex, and the subsequent gas purchase and sales agreement those companies signed with Petrobangla had been obtained through bribery and that they aren't valid.

If true, that would mean Niko isn't entitled to relief through international arbitration, they say.

The tribunal decided in 2016 to give priority to these allegations, saying they were "[m]indful of their responsibility for upholding international public policy."

More and more, states are alleging that investments are tainted by corruption as a defense to investment treaty claims, arguing that acts of corruption preclude the claims from going forward. This decision could provide more insight into how tribunals handle such a defense, according to Caroline Richard of Freshfields Bruckhaus Deringer LLP.

She noted that there is an ethical tension in dismissing an otherwise viable claim that has been tainted by corruption, in effect rewarding a country for engaging in bribery and corruption alongside a claimant. That tension is discernible in the case law.

"This is still a new area of investment law ... and the analysis on this is still emerging, so it will be interesting to see with Niko whether this tribunal continues to draw a distinction with respect to the timing and the effect of any acts of bribery or corruption," she said.

More Decisions Expected in the 'Solar Cases'

Although the number of cases lodged with ICSID has been steadily increasing on average since the late 1990s, 2015 still marked a banner year for the institution. That year, a record-high 52 cases were filed.

But there was a reason for that: Out of those 52 new cases, 15 of them were filed against Spain. The vast majority of those cases involved claims stemming from changes made to the regulatory regime governing renewable energy subsidies.

More specifically, the claims focus on whether states can change the regulatory scheme governing subsidies in the renewable energy sector if it draws in more investors than the state can afford. That issue raised in these so-called "solar cases" is an important one in general for international arbitration, according to Joe Profaizer, the head of Paul Hastings LLP's international arbitration practice.

"This is a critical issue in investor-state arbitration because it requires a tribunal to balance the reasonable investment-backed expectations of a foreign investor against a host state's right to change and control its regulatory regime," he said.

And it's not just Spain that's been targeted by energy investors; similar claims have also been lodged against the Czech Republic and Italy.

As a result, the outcome of these cases is being closely watched not only by lawyers in the international arbitration space, but also by nations that might be considering the impact of potential investment

treaty claims.

"The cases against Spain mark one of the first major international controversies over a state's policies regarding the shift from carbon-based energy to solar," said Skadden Arps Slate Meagher & Flom LLP partner Gregory A. Litt. "Given the large number of claims, these cases will raise awareness among other states and investors about the potential for state action to be challenged through investor-state arbitration."

Three decisions have been issued thus far in cases involving Spain — two in 2016 that decided in Spain's favor, and one in mid-2017 in which an ICSID tribunal awarded more than €128 million (approximately $151 million) to London-based asset manager EISER Infrastructure Ltd. and its affiliate, Energia Solar Luxembourg SARL.

Other decisions are expected throughout 2018.

--Editing by Rebecca Flanagan and Catherine Sum.