European law and investment treaties

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Introduction

On 6 March 2018, the Court of Justice of the European Union (CJEU) gave its decision in *Slovak Republic v Achmea BV* (*Achmea*),[1] finding that the arbitration clause contained in the relevant intra-EU bilateral investment treaty (BIT) (Netherlands-Slovakia) was incompatible with EU law. This decision, which departed from the (non-binding) opinion of Advocate General Wathelet, sent shock waves through the arbitration community and was contrary to the decisions of several arbitral tribunals, which had generally rejected the member states' jurisdiction challenges brought in intra-EU BIT cases. Although some commentators initially thought (and possibly hoped) that the effect of the decision in *Achmea* was limited to the particular clause of the BIT in question, the CJEU has since confirmed that the same reasoning also applies to intra-EU ECT arbitrations[2] as well as to ad hoc arbitration agreements, where these have the same content as an invalid arbitration clause contained in a BIT.[3]

The EU member states have since declared all intra-EU investor-state arbitration clauses to be contrary to EU law and proceeded to terminate the relevant intra-EU BITs. The EU has also withdrawn from the Energy Charter Treaty (ECT),[4] and both the EU and its member states have declared that the investor-state dispute settlement provisions set out in article 26 of the ECT do not apply to intra-EU disputes.

The arbitral tribunals' responses to the CJEU's decisions have been inconsistent. However, what is clear is that winning in an intra-EU arbitration is but the first step, and successful investors will likely face challenges both at the seat and at the place of enforcement before an award is eventually satisfied. In fact, EU member states are now required to challenge arbitral awards before the relevant national courts, including those of third, non-EU, countries, and the national courts of EU member states are required to uphold applications to set aside arbitral awards made on the basis of an arbitration agreement that infringes EU law.

Separate issues may also arise as a result of the EU's rules on state aid, which are not addressed in this chapter.

CJEU decisions

The decision in Achmea: arbitration agreements in intra-EU BITs are incompatible with EU law

In *Achmea*, the Slovak Republic argued that the tribunal, seated in Frankfurt, lacked jurisdiction, as article 8 of the Netherlands-Slovakia BIT was incompatible with EU law. That argument was rejected by both the tribunal and several German national courts. Eventually, the Slovak Republic appealed to the German

Federal Court of Justice (BGH), which made a request for a preliminary ruling under article 267 of the Treaty on the Functioning of the European Union (TFEU) to the CJEU.

In its decision, the CJEU highlighted the importance of the autonomy of EU law and its uniform application throughout all member states. The starting point for the Court's reasoning was article 344 of the TFEU, which provides that "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein." The CJEU explained that (1) no international agreement can affect the autonomy of the EU legal system,[5] (2) EU member states are required to ensure the full application and respect of EU law in all member states,[6] and (3) the preliminary ruling procedure provided for in article 267 of the TFEU is the keystone of the EU's judicial system and seeks to secure the uniform interpretation and consistent application of EU law.[7]

The CJEU then held that an arbitral tribunal constituted under an arbitration agreement contained in an intra-EU BIT may have to interpret and apply EU law when ruling on possible infringements of the BIT (particularly the provisions concerning the fundamental freedoms, including the freedom of establishment and the free movement of capital),[8] despite the fact that such a tribunal does not form part of the EU judicial system, as it is not a court or tribunal of a member state,[9] and is not therefore entitled to make a reference to the CJEU for a preliminary ruling under article 267 of the TFEU.[10] The CJEU further observed that arbitral tribunals determine their own procedure, in particular by choosing their seat, that their awards are final and that any review of an award by a national court is limited. As such, the BIT provided for a dispute resolution mechanism that did not ensure the uniform interpretation and application of EU law.[11] As a result, the Court concluded that the arbitration agreement set out in article 8 of the BIT was incompatible with EU law.[12]

The decision in *Achmea* came as a great shock and threw the validity of arbitration clauses contained in other intra-EU BITs into question. Several arbitral tribunals had previously rejected similar jurisdictional objections brought by EU member states in respect of disputes under intra-EU BITs and the ECT.[13]

Ten months after the decision in *Achmea*, EU member states issued a declaration recognising the consequences of the decision.[14] On 5 May 2020, they signed the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, which declares all intra-EU investor-state arbitration clauses contrary to the treaties and terminates the relevant BITs (set out in Annex A) (the Termination Agreement). In addition, article 7 of the Agreement requires member states that are party to pending or new intra-EU BIT arbitral proceedings to inform the relevant tribunal of the decision in *Achmea* and its legal effect, and ask the competent national court, including in any third country, to set aside any arbitral award issued on the basis of an intra-EU BIT, annul it or to refrain from recognising and enforcing it. The agreement entered into force on 29 August 2020.[15]

The decision in Komstroy: the extension of Achmea to intra-EU ECT arbitrations

In *Republic of Moldova v Komstroy LLC* (*Komstroy*), the CJEU applied the *Achmea* decision and held that article 26 of the ECT was not applicable to intra-EU disputes. Just as in *Achmea*, the decision in *Komstroy* (which was not in fact an intra-EU dispute) originated from a request for a preliminary ruling, this time by the Paris Court of Appeal, Paris being the seat of the arbitration.

The CJEU followed its reasoning in *Achmea*. The Court again stressed the fact that article 344 of the TFEU required member states not to submit a dispute involving the interpretation or application of EU law to any dispute resolution method other than those provided for in the treaties. It repeated that it was for the national courts and tribunals of EU member states to ensure the full application of EU law[16] and that the preliminary ruling procedure was the keystone of the EU judicial system, with the objective of securing the uniform interpretation of EU law, thereby ensuring its consistency, full effect and autonomy.[17]

The CJEU similarly found that an arbitral tribunal appointed pursuant to article 26 of the ECT is required to interpret and apply EU law[18] (having noted that the ECT itself forms part of EU law),[19] yet sits outside the EU judicial system and cannot therefore make a reference to the CJEU for a preliminary ruling.[20] ECT tribunals also determine their own procedural rules[21] and give awards that are final and binding and subject to only limited judicial review by the national courts.[22] The CJEU therefore concluded that the arbitration agreement set out in article 26 of the ECT was not "applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State".[23]

Following the decision in *Komstroy*, the EU Council formally decided in 2024 to withdraw the EU from the ECT.[24] In addition, both the EU and its member states confirmed that the investor-state dispute settlement provisions under article 26 of the ECT do not apply to intra-EU disputes and that the ECT's sunset clause (which provides that the ECT's provisions continue to apply for 20 years after a contracting party withdraws) is of no effect.[25]

The decision in PL Holdings: intra-EU ad hoc arbitration agreements are invalid

In *Republiken Polen v PL Holdings Sàrl* (*PL Holdings*), the CJEU held, following a request for a preliminary ruling made by the Swedish Supreme Court, that an ad hoc arbitration agreement between a member state and an EU-based investor is invalid where its content is identical to an invalid arbitration clause contained in an intra-EU BIT.[26] Parties cannot therefore avoid the problem presented by an invalid intra-EU BIT arbitration clause by entering into an ad hoc arbitration agreement where the effect of such a clause would be the same and thus "entail a circumvention of the obligations arising for that Member State under the Treaties and, specifically, under Article 4(3) TEU and Articles 267 and 344 TFEU".[27] Ad hoc agreements cannot be used as a "workaround" to avoid the legal consequences caused by the decision in *Achmea*, and member states must challenge, before that arbitration body or before the court with jurisdiction, the validity of the arbitration clause or the ad hoc arbitration agreement[28] as well as the resulting arbitral award, and resist its enforcement.[29] Finally, the CJEU added that national courts of EU member states must uphold an application to set aside an arbitration award made on the basis of an arbitration agreement infringing articles 267 and 344 of the TFEU and the principles of mutual trust, sincere cooperation and autonomy of EU law.[30]

Enforcement

Enforcement within the EU

The response from arbitral tribunals to the CJEU's decisions has been inconsistent; while some have accepted the intra-EU jurisdictional objection based on the *Achmea* line of cases,[31] most appear to have rejected it, arguing, among other things, that they are not bound by EU law and that the CJEU's decisions do not therefore affect their jurisdiction.[32] Although this may well be correct as a matter of international law, winning in the arbitration is only half the battle, and successful investors will likely face challenges at both the seat and the place of enforcement, whether these are situated within or outside the EU.

As set out above, article 7 of the Termination Agreement requires member states to challenge arbitral awards before the relevant national courts, including those of third, non-EU, countries. In addition, the CJEU has expressly held that national courts of EU member states are required to uphold applications to set aside arbitral awards made on the basis of an arbitration agreement infringing EU law.[33] As a result, an investor that was successful in an arbitration will still encounter the same problem either as a result of a challenge to the award brought by an EU member state or when seeking to enforce an award in an EU member state (eg if the relevant state's assets are located there). The following examples are instructive:

- The Swedish Court of Appeal granted Spain's application to annul an ECT award given by a Swedish-seated Stockholm Chamber of Commerce (SCC) tribunal on the basis that EU law, which forms part of Swedish law, prohibits EU member states and investors from settling disputes under the ECT through arbitration.[34]

- Similarly, the Swedish Supreme Court granted Poland's annulment application in respect of two awards rendered by a different Swedish-seated arbitral tribunal as member states cannot conclude an ad hoc arbitration agreement that would allow arbitration proceedings initiated under an intra-EU BIT to continue.[35]
- The German BGH refused to enforce a costs order given in favour of a respondent state in an ECT arbitration, finding that safeguarding the primacy of EU law required that awards accepting jurisdiction in violation of EU law be given no effect and cannot be enforced under any circumstances.[36]
- The Luxembourg Supreme Court refused to enforce an International Centre for Settlement of Investment Disputes (ICSID) award against Romania, considering that it was bound by EU law and the decision in *Achmea*, and therefore upheld Romania's intra-EU jurisdictional objection.[37]

Next to challenges at the seat and at the place of enforcement, companies incorporated in an EU member state may also be ordered to discontinue an arbitration by their home court. In *Poland v LC Corp*,[38] the Amsterdam Court of Appeal found that LC Corp, a Dutch-incorporated holding company, had acted unlawfully by pursuing an arbitration under the Netherlands-Poland BIT, seated in London. The Court held that it had jurisdiction on the basis of article 4 of the Recast Brussels Regulation (Regulation (EU) No. 1215/2012) because LC Corp was incorporated in the Netherlands, despite the fact that the arbitration was seated in England and the tribunal was competent to decide its own jurisdiction. The Dutch Court of Appeal instead held that the question of whether LC Corp acted unlawfully by pursuing the arbitration was a separate question under Dutch law, which Dutch courts could determine, and the company was ordered to discontinue the arbitration and to pay a (daily) penalty for non-compliance.

As a result, it is clear that within the EU, recognition and enforcement efforts of intra-EU BIT, ECT and ad hoc arbitral awards will be met with resistance by both the member states and the national courts, which may turn success in the arbitration into a pyrrhic victory.

Enforcement outside the EU

The position is different when the arbitral seat is located and enforcement is pursued in non-EU jurisdictions (which now includes the United Kingdom). Here, EU law constraints do not directly apply. However, this option only presents a useful alternative if an EU member state's assets are located in a non-EU jurisdiction (and as the decision in *Poland v LC Corp* shows, an EU-based investor may still face an adverse judgment from its home court and there is a clear risk of irreconcilable judgments).

Recent decisions from a number of non-EU jurisdictions illustrate this approach:

- In the United States, the US Court of Appeals for the District of Columbia has held that district courts have jurisdiction to confirm arbitration awards given against EU member states,[39] reversing the decision of the district court,[40] which had declined to enforce an ECT award against Spain because of the *Achmea* line of cases. Following the Court of Appeals' decision, a US District Court enforced an ECT ICSID award against Spain.[41]
- The Australian courts appear to have adopted the same approach, and the Federal Court of Australia found four intra-EU ICSID awards rendered against Spain under the ECT enforceable.[42]
- The Swiss Supreme Court has similarly rejected challenges mounted by EU member states based on the CJEU's decision in *Komstroy* in respect of awards made by a Swiss-seated tribunal against Spain, arguing, among other things, that unlike a court of an EU member state, a Swiss court is not bound by the decision in *Komstroy* when determining whether a tribunal had jurisdiction.[43]
- The High Court of England and Wales also dismissed Spain's application to overturn an order registering an ICSID award made against it based on the *Achmea* argument, stating that in the United

Kingdom, EU law does not trump the obligations of state parties under the ICSID Convention.[44]

The above examples all involved ICSID awards, and the relevant courts emphasised the autonomous, treaty-based character of the ICSID enforcement obligation. By contrast, non-ICSID awards are generally enforced under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, where the public policy exception to enforcement may potentially leave greater scope for *Achmea*-related comity arguments.

The impact on ICSID and commercial arbitrations

The CJEU's decisions in *Achmea*, *Komstroy* and *PL Holdings* only ruled that arbitration agreements contained in intra-EU BITs, ad hoc arbitration agreements with the same content and effect, and intra-EU arbitrations brought under the ECT are incompatible with EU law. They do not expressly provide that the same reasoning also applies to ICSID or commercial arbitrations.[45]

As mentioned above, the Luxembourg Supreme Court refused to enforce an ICSID award against Romania, considering that it was bound by the decision in *Achmea* and that EU law had primacy over the obligations set out in the ICSID Convention.[46]

In July 2023, the German BGH held that the national courts of EU member states have the power to declare intra-EU ICSID arbitrations inadmissible,[47] noting that the CJEU had not differentiated between the different arbitral options offered by the ECT, which included ICSID arbitration, in addition to ad hoc arbitration under the United Nations Commission on International Trade Law or SCC rules.[48] The BGH held that despite the fact that ICSID arbitration is a closed system with its own procedural rules,[49] which completely excludes the review of an ICSID award by the domestic courts,[50] judicial review of an ICSID award in an intra-EU investor-state situation is mandatory when seeking enforcement before an EU national court.[51] Following the CJEU's reasoning in *Achmea*, the BGH held that an ICSID tribunal may need to interpret and apply EU law,[52] although it does not belong to the EU judicial system and is not entitled to make a request for a preliminary ruling,[53] concluding that as a result, an ICSID award was not subject to sufficient review by a court of a member state with regard to its compatibility with EU law.[54] Echoing the CJEU's decisions, the BGH held that "domestic courts must disapply an arbitral award that is incompatible with EU law and, consequently, must not enforce it under any circumstances"[55] and found the intra-EU ICSID arbitration to be inadmissible.[56]

The Greek Supreme Administrative Court similarly applied the CJEU's reasoning on intra-EU investment treaty arbitrations to an arbitration clause contained in a concession contract between an investor and the Greek state, and thus to a commercial arbitration.[57]

These decisions are indicative of the direction of travel and should not come as a surprise. The CJEU has sought to draw a distinction between investment and contract-based arbitration.[58] However, it appears difficult to reconcile any preferential treatment for ICSID or commercial arbitrations with EU member states' obligation under article 344 of the TFEU not to submit disputes concerning the interpretation or application of the treaties to any method of settlement other than those provided for therein. Instead, such an approach would allow parties to circumvent intra-EU BIT prohibition. In *PL Holdings*, the CJEU had already held that:

> Any attempt by a Member State to remedy the invalidity of an arbitration clause by *means of a contract* with an investor from another Member State *would run counter to* the first Member State's obligation to challenge the validity of the arbitration clause and would thus be liable to render the actual legal basis of that contract unlawful since it would be contrary to the provisions and fundamental principles governing the EU legal order referred to in paragraph 46 above.[59]

Arbitral tribunals, whatever the rules under which they are constituted and operate, cannot rely on the preliminary ruling mechanism set out in article 267 of the TFEU. As a result, there is a risk that the full effect and consistent application of EU law will not be guaranteed, and the decisions of the BGH and the Greek Supreme Administrative Court show that there is a real risk that the arbitral award, whatever its nature, will be annulled, set aside or not enforced by national EU member state courts.

As a result, it is clear that neither ICSID nor commercial arbitral awards are insulated from the *Achmea* line of cases, and national courts are generally competent to decide on the admissibility of intra-EU arbitrations.

EU dispute resolution reform

The EU's preference seems to be to replace ad hoc investor-state arbitration with a permanent court model. Most of the recent free trade agreements concluded by the EU (including with Canada under the EU-Canada Comprehensive Economic and Trade Agreement (CETA), the EU-Singapore Free Trade Agreement and the EU-Vietnam Free Trade Agreement) provide for an investment court system (ICS). Under this system, investor disputes may be submitted to a permanent and institutionalised court, whose members (subject to strict independence and impartiality requirements) are appointed in advance by the states that are party to the relevant treaty, and whose decisions are subject to an appellate body. The CJEU has held that the ICS provided for in the CETA was compatible with EU law.[60]

The EU aims to ultimately replace the bilateral investment courts of each free trade agreement with a single multilateral investment court.[61]

Conclusion

Intra-EU investment arbitration is unlikely to remain the primary dispute resolution mechanism for aggrieved investors. Instead, dispute resolution mechanisms that are compliant with EU law (eg, exclusive jurisdiction of a particular member state or, where available, ICS) should be considered. If arbitration remains the preferred dispute resolution method, consideration should be given as to whether the investment can be structured using corporate vehicles situated outside the EU. Selecting a non-EU seat would also be advisable. However, EU member states are still likely to invoke *Achmea* as a basis for public policy or comity arguments and enforcement is likely to be achievable only against state assets located outside the EU. Similarly, where awards have already been rendered, priority should be given to non-EU enforcement, provided that real attachable assets are available.

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