

After the CJEU's Achmea Ruling – What Does the Future Hold for Intra-EU Disputes?

The CJEU's Achmea ruling will set the tone for future debate on intra-EU disputes. Its impact on pending arbitrations will be the investors' primary concern.

On 6 March 2018, the CJEU rendered a landmark ruling in the Achmea case (C-284/16) in which it held that dispute settlement provisions in intra-EU BITs, which provide for arbitration between investors of one Member State against another Member State in case of a dispute concerning an investment, are incompatible with EU law. In a nutshell, the CJEU found that investor-state arbitration in intra-EU BITs is not compatible with the principle of sincere cooperation enshrined in Article 344 TFEU because arbitral tribunals are not entitled to make a reference to the CJEU for a preliminary ruling on the interpretation or application of EU law under Article 267 TFEU. The CJEU reasoned that, together with the limited review of arbitral awards by national courts, this prevents disputes from being resolved in a manner that ensures the full effectiveness of EU law.

The decision came as a surprise, at least after the Advocate General in that case had taken the opposite view in his opinion last September following the position taken by the German Federal Court of Justice (BGH) in its request for a preliminary ruling and by several Member States in statements submitted during the proceedings before the CJEU.

Impact on pending arbitration and set-aside proceedings

The request for a preliminary ruling submitted by the BGH concerned a set-aside application from Slovakia against an arbitral award rendered by a tribunal seated in Frankfurt am Main, Germany, in favor of the Dutch investor Achmea. As an immediate consequence of the CJEU ruling, it can be expected that the BGH will set aside the Achmea award on the grounds that Slovakia did not validly consent to arbitration and that therefore no valid arbitration agreement existed between the parties to the dispute (even though it became clear in the BGH's request for a preliminary ruling that it does not share the CJEU's opinion).

But what does this mean for the pending arbitrations under intra-EU BITs as well as awards rendered under intra-EU BITs, which have not yet been enforced? The operative part of the CJEU's ruling is not restricted to Article 8 of the Netherlands-Slovakia BIT, which formed the basis of the Achmea dispute, but more generally refers to provisions in an international agreement concluded between Member States, *such as* Article 8, in which the investor from one Member State can bring arbitral proceedings against the other Member State. Read on the face of its operative part, the ruling may raise questions as to the validity of the dispute settlement provisions in all 196 intra-EU BITs which are still in force to date.

No room for argument for intra-EU investors?

Does that mean that there is no room for argument for the claimants in pending arbitrations and potential set-aside proceedings? Not necessarily. Tribunals may decide that their jurisdiction under the relevant intra-EU BIT, which is a question of international law, derives from the terms of the BIT and may thus disregard the CJEU ruling, which interprets and applies EU law. In addition, despite the broad wording of the operative part of the ruling, the reasoning of the CJEU takes into account various specific aspects of Article 8 of the Netherlands-Slovakia BIT, which may not be present in dispute resolution provisions of other BITs. For example, Article 8(6) explicitly provides that the tribunal shall take into account, inter alia, the law of the host State as well as other relevant agreements between the Contracting Parties. According to the CJEU, these are the two gateways through which EU law comes into play. Pursuant to Article 8(5), the tribunal may also determine its own procedure under the UNCITRAL Rules, including the seat of the arbitration, which in turn determines the applicable law under which the award will ultimately be subject to review by national courts.

It can be expected that the claimants in pending arbitrations and set-aside proceedings will attempt to distinguish the dispute settlement provision in their BIT from Article 8 and argue that the reasoning of the CJEU therefore does not affect the validity of the arbitration agreement they concluded with the Member State by initiating arbitration proceedings.

Impact on arbitration proceedings under the ECT?

Does the ruling of the CJEU also have an impact on the considerable number of pending arbitrations under the ECT? This will be subject to an intense debate. In its ruling, the CJEU explicitly stressed the competence of the EU to conclude international agreements, which "necessarily entail the power to submit to the decisions of a court" as regards the interpretation or application of these agreements, provided that the autonomy of EU law is respected. This could be interpreted as an indication that the ECT, which has also been signed by the EU as a party, was not meant to be affected by this ruling.

At the same time, the operative part does not explicitly refer to BITs (as opposed to the question posed in the request for a preliminary ruling) but more generally to "international agreements". In addition, the concerns expressed by the CJEU about arbitration as a dispute settlement mechanism could well be considered applicable to the ECT as well. It is therefore far from certain whether tribunals in intra-EU disputes will continue to uphold their jurisdiction in the light of the CJEU ruling.

Effect on jurisprudence concerning commercial arbitrations?

Does the CJEU ruling also affect the validity of arbitration agreements between commercial parties? The CJEU has declared Article 8 of the Netherlands-Slovakia BIT incompatible with EU law because it excludes the jurisdiction of national courts and, through the procedure provided in Article 267 of the TFEU, the CJEU itself to rule on the questions involving EU law that may arise in the context of the investment dispute. Apart from a finding that arbitral tribunals themselves are not entitled to make a reference to the Court for a preliminary ruling, the Court considers that the review of the arbitral award by a national court of the Member State in the context of set-aside proceedings is not sufficient. As is the case under German law, this review is often limited and does not allow for a reconsideration on the merits of the case, with the narrow exception of violations against public policy.

The CJEU explicitly noted that, in its *Eco Swiss* ruling of 1999, it had accepted such limited review in the context of commercial arbitration, provided that the fundamental provisions of EU law can be examined in the course of that review. This can be ensured, including under German law, through the application of the public-policy exception. In the context of investment arbitration, however, the CJEU has now taken a stricter view, based on the argument that commercial proceedings derive from arbitration agreements between the parties while investment treaty proceedings are based on a treaty between the Member States themselves.

While this indicates that the CJEU has not changed its view about arbitration agreements in commercial arbitration, the question remains whether the argument justifies the distinction drawn between commercial and investment treaty arbitration. If the fundamental provisions of EU law can be sufficiently protected through the public policy exception in commercial arbitration, one could ask whether the same should not apply to investment treaty arbitration. Investment treaty tribunals are primarily called to decide a dispute under the treaty and the principles of international law and only secondarily, if at all, take into account the national law of the host State, including EU law.

Quo vadis from here?

The CJEU ruling will give rise to a renewed and more intensive debate on the challenges raised by respondents to the jurisdiction of arbitral tribunals in intra-EU disputes. The EU Commission, which has regularly intervened in these disputes as *amicus curiae*, will also argue with renewed force that intra-EU BITs and also intra-EU disputes under the ECT are incompatible with EU law and that the arbitral tribunals in these disputes lack jurisdiction.

It can also be expected that the next request for a preliminary ruling, this time concerning an award rendered under Article 26 of the ECT, will be filed shortly. Perhaps, the case *Novener-*

gia v. Spain in which a tribunal with its seat in Stockholm recently rendered an award in favor of the investor from Luxembourg, will be that test-case.

It remains to be seen whether arbitral tribunals will indeed start declining jurisdiction and, if so, what this would mean for the investors. In particular where, as is the case with Article 8 of the Netherlands-Slovakia BIT, the dispute settlement provision of the treaty does not provide for recourse to national courts, does that mean that investors no longer have any means to enforce the substantive rights and protections their investments have been granted under the BIT? It would give cause for concern should the CJEU's ruling result in limiting the procedural means of these intra-EU investors to seeking recourse through diplomatic protection. From an investment policy perspective, that would place non-EU investors benefiting of investment treaty protection in the EU in a far more advantageous position than EU investors.

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