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Newsletter **Special Edition**

Achmea-Earthquake – Time to Consider a Swiss Solution

On 6 March 2018, the Court of Justice of the European Union took a strong stand against intra-EU investment arbitration, ruling that the arbitration clause contained in the 1991 bilateral investment treaty between the Netherlands and the Slovak Republic was incompatible with EU law. This decision immediately sent shockwaves through the international arbitration community. What are the consequences for EU investors? And why should prudent investors consider a Swiss solution?

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The Aftermath of the Achmea Ruling – Which Way Forward?

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The judgment of the Court of Justice of the European Union ("CJEU") in the case *Slovak Republic* v. Achmea B.V. (C-284/16) has caused a major earthquake in the arbitration community. The judgment has been eagerly awaited, and since its rendering on 6 March 2018, its exact impact on intra-EU investment arbitration has been heatedly debated. Many questions remain unanswered, but one thing is for certain: Prudent investors are well advised to consider now whether their EU investments are still sufficiently protected, and how they can ensure that their investments continue to benefit from maximum treaty protection. In the aftermath of the Achmea ruling, Switzerland as an extra-EU arbitration hub with an excellent global network of investment treaties becomes even more attractive. It is now time to think about restructuring.

The Achmea Ruling in a Nutshell

The underlying matter concerned a dispute between the Dutch insurance company Achmea B.V. and the Slovak Republic, following reforms by Slovakia impacting on the health insurance market. Achmea initiated arbitration proceedings under the bilateral investment treaty ("BIT") between the Netherlands and the Slovak Republic ("NS BIT"). In 2012, the *ad hoc* tribunal seated in Frankfurt seized with the matter ordered Slovakia to pay damages in the amount of EUR 22.1 million to Achmea. In the context of the setting-aside proceedings initiated by Slovakia in Germany, the German *Bundesgerichtshof* requested a preliminary ruling from the CJEU on the compatibility of arbitration clauses contained in intra-EU BITs with the Treaty on the Functioning of the European Union ("TFEU"). Arbitration practitioners eagerly awaited the CJEU's decision, which was rendered on 6 March 2018. The CJEU ruled that the arbitration clause in Article 8 of the NS BIT was incompatible with EU law, finding that Articles 267 and 344 of the TFEU must be interpreted as precluding arbitration agreements in BITs between Member States.

The Court first recalled that the system established by the EU Treaties intends to ensure consistency and uniformity in the interpretation of EU law, and that under Article 344 of the TFEU, the Member States undertake not to submit disputes concerning the interpretation or application of the EU Treaties to any method of settlement other than provided for in the EU Treaties. The Court also noted that even if the disputes falling under Article 8 of the NS BIT relate to possible infringements of the BIT, tribunals seized with such disputes also have to take into account the law in force in the relevant contracting party, and thus EU law. According to the CJEU, given that arbitral tribunals cannot be classified as a court or tribunal of a Member State within the meaning of Article 267 TFEU and are therefore not entitled to apply to the CJEU for preliminary rulings, and that arbitral awards are only subject to limited review by national courts, Article 8 of the NS BIT had "an adverse effect on the autonomy of EU law".

The CJEU made, however, clear at [54-55] that the Achmea ruling does not extend to commercial arbitration. This exemption has been welcomed by the arbitration community, even though some commentators questioned the reasoning.

Implications of Achmea – Many Questions and Few Answers

The CJEU's decision raises numerous questions. The first that comes to mind is what will become of pending intra-EU investment arbitration proceedings? While arbitral tribunals are not directly bound by this ruling and might carry through with pending proceedings – especially when the defending State has assets available for enforcement outside of the EU – the national courts of EU Member States seized with setting-aside or enforcement applications will have to seriously consider the implications of the Achmea ruling and might refuse to give effect to such awards. And what will happen to the almost 200 intra-EU BITs currently in force, or more specifically to the procedural protection offered to investors through their arbitration clauses? The Achmea ruling does not have a direct effect on the validity of these BITs, but there has already been pressure in the past by the EU Commission on Member States to terminate their intra-EU BITs, and such pressure will surely be intensified in the post Achmea era. Very recently on 20 March 2018, the EU Council adopted directives authorising the EU Commission to negotiate a convention establishing a court for the settlement of investment disputes, further underlining the EU's determination to move away from investment arbitration towards a permanent international court. In the meantime, investors will consider very seriously whether it makes sense for them to initiate new arbitration proceedings under intra-EU BITs. Even if a tribunal were to defy the CJEU's ruling by declaring itself competent, the potential outcome of having wasted considerable time and money only to obtain an award unenforceable in the EU might be sufficient to deter many investors.

Less straightforward is the impact of the Achmea ruling on intra-EU investment arbitration proceedings under the auspices of the International Centre for Settlement of Investment Disputes ("ICSID"). Dispute resolution clauses contained in investment treaties typically provide for a choice between various mechanisms for dispute settlement, including ICSID arbitration. The ICSID Convention obliges its contracting states to enforce awards rendered by ICSID tribunals without any review "as if it were a final judgment of a court in that State" (Article 54 ICSID Convention). Is this obligation compatible with the Achmea ruling? In Achmea, the award was rendered by an *ad hoc* tribunal, but some commentators note that the broad wording of the ruling might be construed to mean that its rationale also applies to ICSID arbitration.

Finally, it is also unclear whether the Achmea ruling is intended to apply to investment treaties to which the EU itself is a contracting party, such as in the Energy Charter Treaty ("ECT"). Unlike the questions referred by the German *Bundesgerichtshof*, the ruling at [60] was not limited to BITs, but referred generally to international agreements. There is thus also uncertainty as to the fate of the numerous pending intra-EU ECT arbitrations.

The Way Forward - The Swiss Advantage

In light of the many uncertainties, EU investors with foreign investments in the EU are well advised to seriously consider whether their investments are still sufficiently protected, and whether they should restructure their investments in order to optimize investment treaty protection. Measures to obtain BIT protection taken *before* the facts leading to a dispute arise have been generally accepted as admissible by arbitral tribunals. This would entail investing through corporate structures located outside of the EU, in countries which have concluded BITs with the EU Member State(s) where their investments are located. Switzerland with the world's third largest network of international investment agreements of over 120 BITs, and its business friendly environment is a very attractive choice.

Conclusion

There is much uncertainty about how the intra-EU investment arbitration landscape will look like post Achmea, so prudent investors based in the EU may want to take proactive steps to ensure that their foreign investments within the EU still benefit from adequate treaty protection. Investors are therefore well advised to consider structuring their investments through Switzerland to benefit from maximum treaty protection.

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