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A Procedural Perspective of Achmea: What Does Achmea Imply in Practice

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Considering what the Court of Justice of the European Union (**"ECJ")** said in its Judgment of 6 March 2018, under Case C-284/16, widely known as the **"Achmea** judgment" (**"Achmea"**), one begs the question: ***How this should be perceived in practice?*** Because, when interpreting EU law not to be compatible with BIT-based dispute resolution, or *vice versa*, there is one important issue: ***How this is to be implemented?*** *Achmea* can be read through the lenses of EU law, and through the lenses of international arbitration. The purpose of this post is to consider *Achmea* from the procedural point of view of arbitral jurisdiction and subsequent award enforcement.

Jurisdiction Stemming from an Arbitration Agreement in Conflict with *Achmea*

Let's imagine a putative arbitrator, or a panel of arbitrators. The parties to an arbitration agreement, be it incorporated within a bilateral or multilateral treaty, have appointed them, or at least a party has triggered arbitration proceedings as per the respective treaty. The tribunal (or the arbitral institution) is faced with the treaty, that grounds their jurisdiction, on one hand and with *Achmea* on the other hand, which postulates that *"TFEU must be interpreted as precluding a provision in an international agreement […], under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept"*. The treaty states on what grounds the tribunal has jurisdiction. *Achmea* provides that Treaty for the Functioning of the European Union prohibits investor-state dispute resolution between EU Member States. For the sake of the argument, let's assume *Achmea* is relevant and applicable, without delving into the discussion what is the precise scope of application and impact of *Achmea*, i.e. whether its ambit is very case specific or very wide ranging.

So, should the tribunal assume jurisdiction over the dispute or not? First of all, the tribunal should consider whether the respective treaty serves as valid basis for jurisdiction. The tribunal would either have to state that the treaty is not valid, as a matter of public international law, or proceed to consider the prerequisites for

jurisdiction under the treaty. To evaluate the validity of a treaty is not among the tasks of the arbitral tribunal deciding investor-state dispute, though. All issues of validity and termination of international treaties are governed by the Vienna Convention on the Law of Treaties 1969 (**"VCLT"**) (as per its Article 42). A tribunal or another authority may not invoke domestic law or EU law to argue that a treaty is not valid except where the VCLT's requirements are present.

Moreover, all disputes concerning a treaty would have to be settled as per the VCLT, and most likely as between the states parties to the treaty and during proceedings between these states concerning only and specifically the issue of validity/invalidity. Investor-state dispute resolution clauses are usually different from state-to-state dispute resolution clauses. Further, the VCLT contains a set of specific procedural rules how a state should act where it finds that a treaty is invalid or to terminate it, and this cannot be rendered by a tribunal constituted under an investment dispute. Hence, the arbitral tribunal faced with an investment dispute would not have the jurisdiction as a matter of procedure to rule on the validity of the treaty, and this is without going at all into the merit of the question whether the treaty is valid and enforceable after the *Achmea* judgment. The tribunal would simply lack jurisdiction to assess the issue. Hence, it would either have to accept the treaty as it is, on its face value, or decline jurisdiction. But there are no apparent reasons for the latter, so the tribunal should proceed with checking if the conditions for jurisdiction are in place.

This would entail answering to a set of questions as to whether one party is an investor; national of a state party to the treaty; there is an investment dispute, etc. All these issues do not relate to what the ECJ stated in *Achmea*. All these issues are most likely to be seen only through the prism of the respective treaty without involving the EU law, even if some domestic law of the host state should apply (e.g., on the question of what rights the investor possesses). *Achmea* would not come into play and the tribunal would not have a reason to consider its relevance to their operation at all. Hence, *Achmea* should not have impact on the tribunal's jurisdictional assessment at this stage as well.

Enforcement of an Award Rendered on an Investment Dispute Based on Intra-EU Investment Treaty

Let's imagine an investor who obtains a favourable award against an EU Member State, and that the state fails to comply with it, for one reason or another. The investor should seek enforcement.

1. The award is an ICSID award and is brought to be enforced before EU Member State authorities

Under Article 54 of the ICSID Convention, the ICSID award has the same status as a domestic judgment. There are no procedural grounds to defend against it under the ICSID Convention, including grounds as per arguments for lack of jurisdiction and invalidity of arbitration agreement.

2. The award is a non-ICSID award and is brought to be enforced before EU Member State authorities

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**"New York Convention"**) 1958 has two grounds for non-recognition that may be relevant: (i) nullity of the arbitration agreement (Article V(1)(a)), or (ii) public policy (Article V(2)(b)). The former implies invalidity of the entire treaty or at least invalidity of this respective provision of the treaty. A national authority of a EU Member State would not have the powers to declare an international treaty, wholly or partially, as null and void, for the reasons stated above. Moreover, it cannot apply its own law to make assessment of the validity of the international treaty incorporating the arbitration agreement. Article V(1)(a) requires that *"the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made"*. The national authority cannot proclaim an international treaty null and void under public international law or under its own domestic law.

Hence, the only residual basis for an *Achmea* defence is public policy. However, public policy has a substantive and procedural aspect. The ruling of the ECJ in *Achmea* has no regard for substantive considerations but procedural ones. However, the procedural aspect of public policy (e.g. lack of due process and other procedural irregularities, lack of impartiality/independence of arbitrators, etc.) should exclude issues of validity of arbitration agreement/jurisdiction as these should fall within the scope of Article V(1)(a) and not public policy defence. Therefore, it is questionable to what extent an award may be refused recognition and enforcement under the New York Convention based on arguments derived from *Achmea*, granted that the Convention is applied with due regard and without policy influence.

3. The award is enforced outside the EU

The considerations reviewed above apply here as well with one major limitation: that EU law would not be part of the forum law and therefore any interpretation of EU law should not be taken into regard by the forum authorities.

Conclusions

There remains one important question. What is the practical value of ECJ's statement in *Achmea*? It is more likely than not that it should not bereave an arbitral tribunal from its jurisdiction based on an international treaty for protection of investments. Moreover, it is difficult to say how it would affect at all the way an arbitral award is being enforced.

Then what is the procedural impact of *Achmea*? We are forced to assume that *Achmea*, given that the judgment is contrary to the Opinion by the Advocate General Wathelet, is more of a political statement. Being a political statement, it is a legal swish in the air as it says a lot on its own but does not necessarily pave a way to its pragmatic implementation. It does not say how an investor-state dispute under existing international treaties should be handled. It does not even mention the VCLT although it is common knowledge that one cannot consider validity of treaties without the background of the VCLT. The autonomous legal order argument that the ECJ relies upon is rather artificial. As the reference system of the ECJ allows that the ECJ says something as a matter of interpretation of the law, and leaves the interpretation of its

own statement to others, the *Achmea* judgment seems even more a political proclamation of what EU institutions would like the reality to be. But what reality is, is something different.

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