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Slovak Republic v. Achmea: A Disproportionate Judgment?

John P Gaffney (Al Tamimi & Company) · Friday, September 14th, 2018

Introduction

The judgment of the Court of Justice of the European Union (**CJEU**) in Case C-284/16, Slovak Republic v. Achmea B.V. (**Achmea**) has attracted much comment in many fora, including the Kluwer Arbitration Blog (See e.g., articles authored by Florian Stefan, Clement Fouchard and Marc Krestin, and Vivek Kapoor). This is not surprising. The CJEU held that the arbitration clause contained in Article 8 of the 1991 Netherlands-Slovakia BIT (**BIT**) is incompatible with EU law, a holding that has significant consequences for intra-EU investment arbitration.

Criticism of the Achmea judgment may have been dismissed by some as the griping of a self-interested international arbitral community (See e.g., Peter Nikitin, "The CJEU's Achmea Judgment: Getting Through the Five Stages of Grief", (2018)), but in this article I question whether it constitutes a violation of EU law, on the basis that it violates the principle of proportionality set forth in the Treaty on European Union, and whether its validity may thus be called into question by EU Member State courts.

The Principle of Proportionality and the Conferral of Competence and under EU Law

Article 1 of Protocol (No 2) to the Treaty on the Functioning of the European Union (TFEU)) on the application of the principles of subsidiarity and proportionality provides:

> "Each institution shall ensure constant respect for the principles of subsidiarity and proportionality, as laid down in Article 5 of the Treaty on European Union."

Articles 5(1) and 5(2) of the Treaty on European Union (**TEU**) provide:

> "1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

> 2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."

While Article 5(4) of the TEU provides:

> "4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties."
>
> The EU's Summaries of EU legislation explains that "…the principle of proportionality regulates the exercise of powers by the [EU]. It seeks to set actions taken by EU institutions within specified bounds…the action of the EU must be limited to what is necessary to achieve the objectives of the Treaties. In other words, the content and form of the action must be in keeping with the aim pursued."

Thus, the principle of proportionality ought to regulate the exercise of judicial powers by the CJEU.

Applying the Principle of Proportionality to the Achmea Judgment

If the CJEU is required to "ensure constant respect" for the principle of proportionality in the performance of its judicial functions, the question arises whether its judgment in Achmea could be considered to have violated that principle.

The CJEU held that a arbitral tribunal established under Article 8 of the BIT is not part of the judicial system of the EU and since it is provided for by an agreement concluded by Member States (and not by the EU) it is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties ensured by the preliminary ruling mechanism provided for in Article 267 TFEU. In the CJEU's view, it is not therefore compatible with the principle of sincere cooperation, thus having an adverse effect on the autonomy of EU law (CJEU judgment).

The CJEU judgment sharply contrasts with the carefully reasoned Opinion of Advocate General Wathelet, in which he proposed that the BIT's arbitration clause is compatible with the preliminary ruling mechanism (and neither constituted discrimination on grounds of nationality nor undermine either the allocation of powers fixed by the Treaties or the autonomy of the EU legal system) (Opinion of Advocate General Wathelet).

In the context of this article, the AG's observations on the alleged systemic risk of intra-EU BITs to the uniformity and effectiveness of EU law are notable:

> "44. I would add that the systemic risk which, according to the Commission, intra-EU BITs represent to the uniformity and effectiveness of EU law is greatly exaggerated. UNCTAD's statistics show that out of 62 intra-EU arbitral proceedings which, over a period of several decades, have been closed, the investors have been successful in only 10 cases, representing 16.1% of those 62 cases, a rate significantly below the 26.9% of 'victories' for investors at the global level.
>
> 45. The arbitral tribunals have to a large extent allowed the Commission to intervene in arbitrations and to my knowledge in none of those 10 cases was the arbitral tribunal required to review the validity of acts of the Union or the compatibility of acts of the Member States with EU law. In their written observations, several Member States and the Commission have mentioned only a single example, namely the arbitration Ioan Micula and Others v Romania (ICSID Case No ARB/05/20), which resulted in an arbitral award that was allegedly incompatible with EU law. Even though that example is in my view not relevant in the present case, the fact that there is only a single example reinforces my opinion that the fear expressed by certain Member States and the Commission of a systemic risk created by intra-EU BITs is greatly exaggerated." (Footnotes omitted)

Advocate General Wathelet arguably would appear to have been mindful that the CJEU's judgement ought not to "exceed what is necessary to achieve the objectives of the Treaties". In other words, the CJEU's judgment ought to be that necessary for achieving the desired objectives and proportionate to any adverse consequences. He demonstrated, among other things, how arbitral tribunals established under Article 8 of the BIT could be considered as part of the judicial system of the EU – an outcome that was arguably the least invasive of the freedom of action of both EU Member States and intra-EU investors, as well as providing for appropriate judicial dialogue – but one that the CJEU ignored.

Could the Achmea judgment thus be considered disproportionate in circumstances where:

- the alleged systemic risk posed by intra-EU investment arbitration to the uniformity and effectiveness of EU law appears to be very low,
- Advocate General Wathelet demonstrated an effective and reasonable alternative to the CJEU's holding that arbitration under such BITs has an adverse effect on the autonomy of EU law, and
- it has dramatically damaging consequences for intra-EU investment arbitration?

Potential Consequences for Intra-EU Arbitration if the Achmea Judgment is Disproportionate

The CJEU judgment cannot be set aside, since it is not subject to judicial review by a higher court. However, it might be ignored.

It is possible that a Member State court – faced with a challenge to an intra-EU investment arbitration award – could decline to give effect to the Achmea judgment where it held that the CJEU exceeded the competence conferred on it by the EU Treaties in the exercise of its judicial functions in that case.

As noted, earlier, Article 5(2) of the TEU provides:

> "…the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."

In other words, it is possible that a Member State court could hold that the Achmea judgment was *ultra vires* the competence(s) conferred on it by the Member States. The chances of that occurring, however, would appear to be low. As one commentator has observed:

> "Declaring an act to be ultra vires always implies a defect in the act. It would also imply a reproach to the European level and especially to the ECJ. Moreover, the reproach of an ultra vires-act would also concern the validity and/or application of European law in all other Member States, as an act cannot be ultra vires only in the bipolar relationship between one Member State and the EU. This is hence a frontal attack on (European) judge-made European law."[1)]

Nonetheless, in a decision of 5 July 1967, the German Constitutional Tribunal (**BVerfG**):

> "emphasised a central role for the "act of assent" to the founding treaties…Later commentators likened this central role to that of a bridge between EC law and national law, in that – in the German view – the act of assent functions as the decisive 'order to give legal effect' (*Rechtsanwendungsbefehl*) to European law. […] The BVerfG hinted, though, at constitutional limitations on the transfer of public authority rights (*Übertragung von Hoheitsrechten*) to the EC in the context of the German constitution's guarantee of fundamental rights." (Ibid.)

And in a judgment concerning an alleged discriminatory pension scheme in the Czech Republic, the Czech Constitutional Court (**CCC**) held that in its judgment in Case C-399/09 Landtová the CJEU acted *ultra vires* and subsequently gave Czech national law precedence over EU law, albeit in a heavily criticized judgment.[2)] It is notable that in its judgment, the CCC referred to the BVerfG's earlier judgment to support its ruling.

Conclusion

Hence, there remains the possibility – admittedly remote – of a Member State court finding that the CJEU acted *ultra vires* in violating the principle of proportionality in its Achmea judgment and thus giving precedence to national law in the enforcement of intra-EU arbitral awards over the CJEU's judgment. Given the stakes, and with so many extant intra-EU investment arbitrations in play, one cannot rule out the possibility of this scenario presenting itself sooner rather than later.

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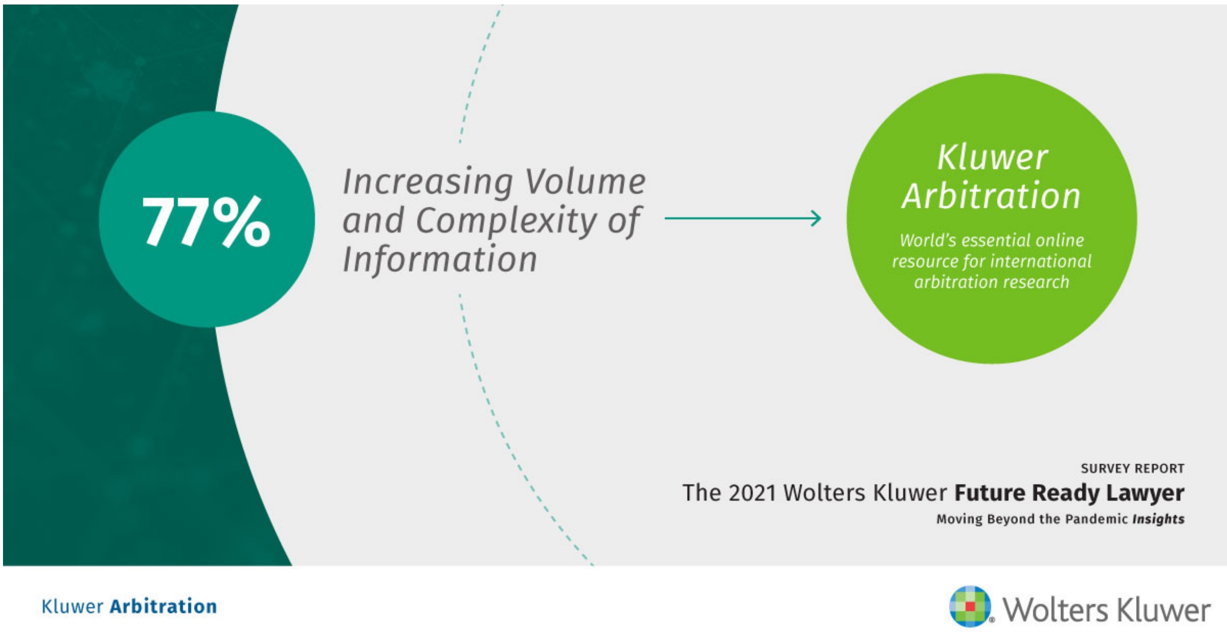

References

↑1 F. Mayer, "The European Constitution and the Courts Adjudicating European constitutional law in a multilevel system", Jean Monnet Working Paper 9/03.

↑2 *See*, e.g., Jan Komarek: Playing With Matches: The Czech Constitutional Court's Ultra Vires Revolution.

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