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Could the Strasbourg Court be a Trump Card in the Enforcement of Arbitration Awards in Intra-EU ECT Disputes?

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The aftermath of Achmea

Since the judgment of the Court of Justice of the European Union (CJEU) in **Achmea**, defending EU Member States and the European Commission have questioned the validity of the application of the investment arbitration clause in the Energy Charter Treaty (ECT) to intra-EU disputes. Although the motions to challenge jurisdiction on the basis of Achmea have proved until now **unsuccessful**, defending Member States keep on trying to have intra-EU ECT arbitration awards set aside and to oppose enforcement in non-EU States.

Even if it has not ruled yet on the extension of Achmea to ECT arbitration, CJEU, being part of the EU institutional system, is likely to be more willing to arguments on the predominance of EU law over international law. If that were the case, the courts of EU Member States would be bound to follow the CJEU's position and set aside the awards or oppose their recognition in the EU. Chances for recognition and enforcement outside the EU under the New York Convention would be seriously impaired because the prevailing practice in many States is to deny recognition if the award is set aside in the State of origin, as in Switzerland, or to recognise the annulment decision on the basis of international comity unless it is contrary to fundamental notions of justice, as in the **United States** or **England**. However, ICSID arbitration, one of the options afforded in article 26.4 of the ECT, may provide the claimant with other alternatives for enforcement within the EU.

The arbitration award as a possession in the case law of the ECtHR

All EU Member States have ratified the European Convention on Human Rights (ECHR), whose article 1 of Protocol 1 requires the protection of property. Several judgments of the European Court of Human Rights in Strasbourg (ECtHR) recognised that an arbitration award is a possession subject to protection under article 1 of Protocol I.

In the case **Stran Greek Refineries and Stratis Andreadis**, an arbitration award was annulled by the Greek Supreme Court after several ups and downs, including approval of a law that annulled the arbitration agreement and the award, a judgment of the Greek Constitutional Court against such a law and a last-minute change of opinion of the Supreme Court originally opposed to annulment. In order to be protected as a possession, the ECtHR required the claimant to ascertain that the

arbitration award had given rise to a debt in its favour that was sufficiently established to be enforceable. The ECtHR considered the award as a possession because it was final and binding in its own words and, according to Greek arbitration law, it was final and enforceable. Even if it could have been repealed, it had already been confirmed in first and second instance. The new legislation enacted by the Government to leave the agreement and award without effect provoked a change of position in the Supreme Court, which was considered an interference by the State in breach of article I of Protocol I.

In the case **Regent Company**, ECtHR also established that an award of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine was a possession. Such award had been declared enforceable by the Ukrainian jurisdiction, but enforcement had been abandoned after the insolvency of the debtor, a Governmental entity. The ECtHR took into account that the arbitration was governed by specific Ukrainian law which treated the award as equivalent to an enforceable court judgment. Furthermore, the claimant, assignee of the award, had been specifically recognised as debtor by the Ukrainian courts in the procedure initiated for the enforcement of the arbitration award.

An award of the Foreign Trade Arbitration Court of the Yugoslav Chamber of Commerce was considered a possession by the ECtHR in the case **Kin-Stib and Majki?**. The award had been partially enforced and some amounts had been paid by the debtor. However, the repossession of a casino ordered by the award had not been executed despite several orders and fines imposed by the Serbian jurisdiction, which subsequently abandoned full enforcement efforts due to insolvency of the debtor. The Serbian courts had also denied the request of annulment of the award and the reopening of annulment procedures. The ECtHR considered that the claim in the award had been sufficiently be established to be enforceable as the own Serbian jurisdiction had ordered the execution of the award in its entirety, partially enforced the award and taken some measures against the debtor to attempt full enforcement.

In all three cases, through its own legislation on the finality and enforceability of the awards and by judicial measures ordering the enforcement of the award, the State had recognised that the award contained a debt or claim that should be enforced, thus a right or possession that should be protected under article 1 of Protocol 1of the ECHR.

An ICSID ECT arbitration award is sufficiently established to be enforceable

In the case of ICSID arbitration, as the annulment procedure is not carried out by a national jurisdiction but undertaken by an *ad hoc* committee according to article 52 of the ICSID Convention, there cannot be interference by jurisdiction of Member States in the set aside of the arbitration award. Such committee is not bound by Achmea or by the CJEU's interpretation on the validity of submission to arbitration of intra-EU disputes under article 26 of the ECT. This committee is only bound by applicable international law and may reach a different conclusion on the interaction of ICSID Convention, ECT, the Vienna Convention on the Law of Treaties and EU law.

If the intra-EU ECT award is confirmed by the *ad hoc* committee, EU Member States and the EU itself, having ratified the ECT, would be bound to ensure the effective enforcement of such ICSID arbitration award. Under article 26.8 of ECT, "*The awards of arbitration, […], shall be final and*

binding upon the parties to the dispute. […] Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards"). Moreover, in accordance with article 54.1 of the ICSID Convention, "*Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State*".

Any ICSID ECT arbitration award, even in disputes between EU Member States, has been recognised by those States as being enforceable, without need of further recognition and being equivalent to a court judgment. Following the criteria established by the ECtHR in the above case law, there seems to be sufficient grounds to consider that ICSID ECT arbitration awards are sufficiently established as enforceable and, therefore, the debt recognised in such awards is a possession that may benefit from the protection of Article 1 of Protocol I of the ECHR.

Review of interference with ICSID intra-EU ECT awards by the ECtHR

If, as we contend, ICSID intra-EU ECT arbitration awards are possessions protected by the ECHR, successful claimants in these awards could request enforcement in any EU Member State where assets of the defending Member State may be found. Failure to enforce such award based on Achmea or other arguments of EU law could be considered as an infringement of the human right to property of the claimant, who could file a claim and seek compensation before the ECtHR.

Although is not free of encumbrances, including the requirement to exhaust all domestic remedies or sovereign immunity from execution, the Strasbourg venue could have certain advantages. The ECtHR is likely to be at least more neutral and cautious in the application of EU law over the international obligations voluntarily assumed in the ECT by EU Member States and the EU itself. It would be an opportunity for ECtHR to dispense poetic justice after the **CJEU's opinion** against the accession of EU to the European Convention on Human Rights. This option would also be open to enforcement in certain non-EU countries, such as Switzerland or more recently the United Kingdom, that have ratified the ECHR. It would be arguable whether this option would be available in case of opposition by EU Member States to enforcement of ICSID awards in third States that have not ratified the ECHR.

Conclusion

These thoughts may be idle talk if the CJEU finally supports the validity of submission to arbitration of intra-EU disputes under article 26.4 of ECT, if ICSID ad hoc committees take a contrary view or if relevant States, such as the United States, Switzerland, the United Kingdom or Australia, recognise and enforce intra-EU ECT arbitration awards. Otherwise, a complaint before the ECtHR under article 1 of Protocol 1 of the ECHR could serve as a last bullet to attempt enforcement of intra-EU ECT awards within the EU. In any case, it seems important that the EU learns that the assumption of international powers over international trade, including investment arbitration, although desirable, comes with the inherent burden of international obligations and liability.

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