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German Supreme Court Confirms Intra-EU BIT Does Not Give Access to Investor-State Arbitration in Light of CJEU's Achmea Decision

Hanno Wehland (Lenz & Staehelin) · Wednesday, February 9th, 2022

The extent to which different dispute resolution fora are willing to pay deference to the Court of Justice of the EU's ("CJEU") seminal (and controversial) *Achmea* decision is being closely observed by investors and States alike. [1)] As far as the German court system is concerned, a recent decision of the German Supreme Court (*Bundesgerichtshof*) (I ZB 16/21, 17.11.2021, published in December 2021), confirms (if anybody had doubts in this regard) that *Achmea* will effectively be treated as a bar to any further arbitral proceedings based on intra-EU BITs and that any such proceedings seated in Germany are therefore extremely unlikely to succeed.

Procedural background

The decision relates to an arbitration initiated in February 2020 under the UNCITRAL Arbitration Rules by an Austrian and a Croatian bank, Raiffeisen Bank International and Raiffeisen Bank Austria, against Croatia based on the 1997 Agreement between the Republic of Austria and the Republic of Croatia for the Promotion and Protection of Investments (the "Austria-Croatia BIT") in connection with certain changes made to Croatian insolvency law. [2)] While Croatia objected to the initiation of the proceedings, arguing that the investor-State dispute resolution mechanism in Art. 9 of the Austria-Croatia BIT was inapplicable for being incompatible with EU law, it accepted the investors' proposal for Frankfurt to be fixed as the seat of the arbitration. However, before a full tribunal was constituted, Croatia started proceedings before the Higher Regional Court (*Oberlandesgericht*) Frankfurt based on Article 1032 para. 2 of the German Code of Civil Procedure, which allows parties "*[u]p to the constitution of the arbitral tribunal … [to] apply to the courts for a declaration regarding the admissibility or inadmissibility of arbitral proceedings.*"

In February 2021, the Higher Regional Court held that the arbitration was indeed inadmissible due to the lack of a valid arbitration agreement between the parties, as the arbitration mechanism in Art. 9 of the Austria-Croatia BIT was incompatible with EU law and could therefore not be applied. The investors appealed this decision to the

German Supreme Court.

The Supreme Court's decision

In a decision dated 17 November 2021, the German Supreme Court rejected the appeal and essentially confirmed the findings of the Higher Regional Court. Specifically, the Supreme Court held that disputes submitted to arbitration pursuant to Art. 9 of the Austria-Croatia BIT could involve the interpretation or application of EU law, notwithstanding the fact that the wording of that treaty was different from that of the Slovakia-Netherlands BIT at issue in the *Achmea* proceedings. [3)] Referring to the CJEU's findings in *Achmea* and its subsequent decisions in *Komstroy* and *PL Holdings*, the Supreme Court pointed out that a clause in an agreement between Member States providing for investor-State arbitration was invalid not only if it jeopardized the CJEU's monopoly on rendering binding interpretations of EU law, but already if it removed disputes that potentially concerned the application or interpretation of EU law from the jurisdiction of the courts of the Member States, thus failing to guarantee the full effectiveness of EU law in breach of the principles of mutual trust and sincere cooperation between them.

The Supreme Court also gave short shrift to the investors' argument that severe deficiencies in the Croatian judiciary exceptionally justified departing from the principle of mutual trust, stating that, based on the CJEU's jurisprudence, even if the courts of a Member State were not in a position to guarantee the full effectiveness of EU law, neither would an arbitral tribunal. Finally, the Supreme Court concurred with the Higher Regional Court's view that the case did not raise any questions regarding the interpretation of EU law that had not already been answered through the CJEU's jurisprudence, thus dispensing with the need to refer the matter for a preliminary ruling to the CJEU.

Assessment and outlook

To anybody familiar with the German legal system, the Supreme Court's decision will not come as a surprise. True, the Court had expressed sympathies for the view that intra-EU arbitration was compatible with EU law before the *Achmea* decision was rendered. As readers will remember, the CJEU's decision in *Achmea* was based on a request for a preliminary ruling by the German Supreme Court in setting-aside proceedings against an award rendered in another Frankfurt-seated arbitration. In those earlier proceedings, both the Higher Regional Court Frankfurt and the Supreme Court initially took the view that there was no incompatibility between intra-EU BITs and EU law.

This notwithstanding, following the final decision of the German Supreme Court in the *Achmea* dispute, there could hardly be any doubt that the Court would also consider itself bound by the CJEU's findings in any post-*Achmea* proceedings. [4)] It also seemed clear that those findings would be regarded as pertinent not just with regard to the

Slovakia-Netherlands BIT, but in relation to any intra-EU BIT with the characteristics identified by the CJEU in the *Achmea* decision. [5] Under the circumstances (and in the light of the CJEU's *acte clair* doctrine), there was indeed little leeway for the German courts to reach a different conclusion.

At the same time, the decision again highlights the potential relevance of the unusual provision that is Article 1032 para. 2 of the German Code of Civil Procedure in that it allows German courts to review the admissibility of arbitral proceedings at the very beginning of an arbitration. While the decision is unlikely to endear investors (or tribunals in intra-EU treaty-based arbitrations for that matter) to the idea of selecting a German seat, the German courts may well have to address similar issues again before too long.

Specifically, the Netherlands are currently testing the scope of Article 1032 para. 2 in German court proceedings relating to two ECT-based intra-EU arbitrations brought against them (see here). While these proceedings are conducted based on the (de-localized) regime of the ICSID Convention and thus do not have a seat in Germany,[6] the Netherlands argue that Article 1032 para. 2 applies irrespective of the existence of a German seat.[7]In a similar vein, a representative of the European Commission recently authored a journal article arguing that "*in principle all EU Member States, if they are sued by an investor from another EU Member State, can file a claim for a declaration regarding the non-existence of a valid arbitration agreement*" in the German courts based on Art. 1032 para. 2 of the German Code of Civil Procedure.[8]

If the German courts were to accept this position, thus potentially expanding their review to *any* intra-EU treaty-based arbitrations, the already complex debate about the impact of EU law on such proceedings and who should have the last word in this regard would undoubtedly further intensify. [9]

Decisions in those proceedings can be expected in the coming months. Watch this space.

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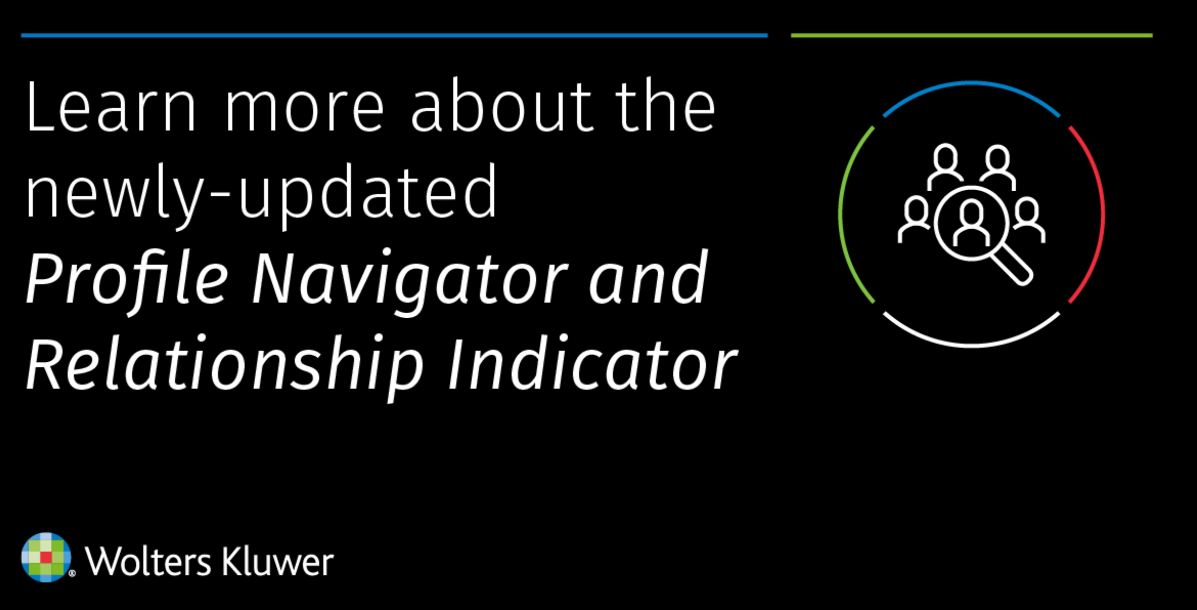

References

↑1 Not to mention the European Commission, which has sought to make itself heard in numerous proceedings relating to intra-EU treaty arbitration outside the courts of the EU Member States as an *amicus curiae*.

↑2 The arbitration appears to be unrelated to separate proceedings initiated by the same investors against Croatia in 2017 under the ICSID Convention (ICSID Case No. ARB/17/34).

↑3 Article 11(2) of the Austria-Croatia BIT explicitly provides that "[t]he Contracting Parties are not bound by the present Agreement insofar as it is incompatible with the legal acquis of the European Union (EU) in force at any given time." The Slovakia-Netherlands BIT does not contain any corresponding provision.

↑4 While Achmea is currently seeking to challenge the Supreme Court's decision before the German Constitutional Court on the basis that the CJEU acted *ultra vires* when rendering its decision, that challenge could not have an impact on the Supreme Court's findings as long as it remains undecided.

↑5 See Judgment of the CJEU of 6 March 2018 in Case C-284/16, *Slovak Republic v Achmea BV*, para. 60.

↑6 *Uniper SE, Uniper Benelux Holding BV and Uniper Benelux NV v the Netherlands*, ICSID Case No. ARB/21/22, and *RWE AG and RWE Eemshaven Holding II BV v the Netherlands*, ICSID Case No. ARB/21/4.

↑7 The investors in the *Uniper* proceedings appear to have responded by requesting the ICSID tribunal to issue an injunction against the Netherlands ordering the State to withdraw the German court proceedings, see article of iareporter.com of 6 December 2021.

↑**8** See T. Rusche, in: IPRax 2021, pp. 494-502, at p. 499 (the author states that the article reflects his personal opinion and should not be attributed to the European Commission).

↑**9** On the relationship between the ICSID Convention and EU law see H. Wehland, 17 J.W.T.I. (2016), pp. 942-963, at p. 960.

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