

Kluwer Arbitration Blog

The EU Termination Agreement and Sunset Clauses: No ‘Survivors’ on the (Intra-EU) Battlefield?

Valerio Letizia (Freshfields Bruckhaus Deringer) · Wednesday, June 22nd, 2022

‘Sunset’ (or ‘survival’) clauses extend the effects of the relevant investment treaty after its termination. They provide that the protection afforded by the treaty is maintained for a further period of time after termination to investments made during the lifetime of the treaty. As such, sunset clauses have an ‘entrenchment effect’ limiting the ability of States to immediately walk away from their existing treaty obligations. In the aftermath of *Achmea*, this entrenchment effect clashed with the resolute intention of (most) European Union (EU) Member States to comply with the CJEU’s ruling and bar intra-EU investment arbitration (see coverage [here](#)). Most notably, this intention was pursued through the adoption of the [Termination Agreement](#), a multilateral treaty signed on 5 May 2020 by 23 EU Member States to terminate their BITs (see coverage [here](#)).

The Termination Agreement deals with sunset clauses in two ways. First, Article 2 seeks to terminate all sunset clauses of the intra-EU BITs still in force, viz. the bilateral investment treaties (BITs) that are terminated pursuant to the agreement, providing that ‘[f]or greater certainty, Sunset Clauses [...] are terminated [...] and shall not produce legal effects’. Second, Article 3 purports to terminate the sunset clauses (possibly still in force) of previously terminated intra-EU BITs.

Will these provisions have the intended effect of barring intra-EU investor-state arbitration?

Article 2: Simultaneous Termination of BITs and Their Sunset Clauses

It is debated whether sunset clauses are triggered, and thus operate, only when a BIT is unilaterally terminated or also in case of mutual termination by both parties to a BIT, such as envisaged by the Termination Agreement. Most sunset clauses appear to limit their applicability to unilateral termination, by referring to termination caused by the notice of termination provided by one contracting party to the other (e.g. [Latvia-Sweden BIT](#)). Hence, a mutual termination would not be covered by the sunset clause, which would effectively be displaced by such termination.

However, it is unclear how sunset clauses should be interpreted when such language (limiting the applicability of the sunset clause to unilateral termination) is missing. For example, an arbitral tribunal has recently held that a sunset clause providing that the BIT shall continue to apply for a certain period in case of ‘termination’ of the agreement, without further qualification, would operate even in case of the mutual termination of the BIT, viz. termination by agreement of both contracting parties (*Bahgat v. Egypt*, para 313). In this scenario, the agreed termination of intra-EU BITs pursuant to the Termination Agreement would not, in itself, have sufficed to displace (at least some) sunset clauses. This seems to be the reason why, to avoid any arguments in this regard, Article 2 of the Termination Agreement specifically provides that ‘for greater certainty’ sunset clauses ‘shall not produce legal effects’ and ‘are terminated’.

This, however, raises a further question: Is such consensual ‘termination’ of sunset clauses permissible? Or are States somehow prevented from removing sunset clauses in this way? Here again there is room for debate.

The view supporting the power of States to remove sunset clauses is based on the general principle underlying the Vienna Convention on the Law of Treaties (VCLT) that States are the ‘masters of their treaties’ (Article 54(b)). Despite the sunset clause, States should therefore be free to immediately and completely terminate a treaty, if they so agree. This view finds some support in recent practice (e.g. *UP v. Hungary*, para 265).

On the other hand, the possibility of extinguishing sunset clauses appears to be at odds with the very purpose of these clauses, viz. to protect investors’ expectations against a sudden termination of the investment treaty. Such sudden removal can also be problematic from a rule of law and human rights perspective.

Perhaps for this reason the Czech Republic followed a two-step approach and removed the sunset clause just before terminating its BIT with [several EU Member States before *Achmea*](#), although one may wonder whether there is in fact any material difference between this and the simultaneous termination provided for in the Termination Agreement.

Article 3: Terminating Active Sunset Clauses of Prior Terminated BITs

Similar issues arise under Article 3 of the Termination Agreement, seeking to extinguish sunset clauses contained in BITs that had been terminated before the agreement. The key feature of these clauses is that they were already operating at the time of the Termination Agreement. What is the impact of the Termination Agreement in this scenario? Arguably, a distinction should be made between cases where the investor relies on the sunset clause and starts the arbitration, or otherwise accepts the offer to arbitrate contained in the relevant BIT, *before* the entry into force of the Termination Agreement, and cases where the investor seeks to do so *after* the entry into force of the Termination Agreement.

In the former cases, it may be argued that, once accepted by the investor, the offer to

arbitrate made by the State with the investment treaty becomes irrevocable. It is commonly accepted that this principle of irrevocable ‘perfected consent’ is codified in Article 25 of the ICSID Convention and may constitute a general principle of international law. Arguably, under this principle the subsequent termination of the sunset clause may not retroactively deprive an arbitral tribunal of its jurisdiction to hear the claim brought by the investor. This is in line with the position taken by arbitral tribunals after *Achmea*, the 2019 Declarations of the EU Member States and the *Komstroy* ruling. The enforcement in the EU of awards reflecting this view remains nonetheless problematic.

The answer may not be the same if the investor seeks to rely on the sunset clause after the Termination Agreement because the principle of perfected consent would not apply in this scenario. An argument may nonetheless be based on Article 70(1)(b) VLCT, which provides that the termination of a treaty ‘does not affect any right or legal situation of the parties created through the execution of the treaty prior to its termination’. It has been suggested that this rule may apply to sunset clauses and invalidate their retroactive termination. The argument has not yet been tested in practice, and some questions arise as to whether and how it may be addressed by tribunals. First, this is part of the default rule on termination set out by Article 70 VCLT, and States are free to modify this default rule pursuant to the first part of the provision ([u]nless the treaty otherwise provides or the parties otherwise agree’). Second, Article 70(1)(b) VLCT refers to the rights ‘of the parties’, which are understood as the States parties to the treaty, not individuals or companies. The position of individuals and companies is governed by a different provision, Article 43 VCLT, which stipulates that, after termination, a treaty ceases to regulate the legal situation of individuals and companies previously affected by such treaty. Furthermore, that Article 70(1)(b) VLCT relates to States and not private parties is made clear also by the ILC Commentary, which states that the provision ‘is not in any way concerned with the question of the “vested interests” of individuals’.

Given these issues, investors may seek to bypass the VCLT and invoke the doctrine of ‘vested’ (or ‘acquired’) rights under customary international law. However, this would seem to be a novel application of the principle since, under the traditional view, the principle of acquired rights has a narrow scope and no application to treaty termination. In any case, both under the VCLT and customary international law, the matter whether investors may have vested rights under sunset clauses despite the Termination Agreement may ultimately revolve around the vexed question of whether investors hold rights created by investment treaties directly, or they exercise rights belonging to their home States.

Conclusion

The Termination Agreement raises several issues concerning termination of sunset clauses. These are mostly unexplored issues that arbitral tribunals might soon have to address. First, there is the issue of whether the consensual termination of an investment treaty triggers the application of the sunset clause. The Termination Agreement appears to assume that it does not but also contains provisions aimed at

removing the effects that sunset clauses may potentially have. Second, there is the issue of whether contracting States, as masters of the treaty, can immediately eliminate the effects of a treaty despite the sunset clause included in it. This issue is particularly relevant when the clauses that States wish to neutralise already started to operate, and in particular where the investors relied on them before such neutralisation. Here, the post-*Achmea* arbitral practice may be instructive, in particular regarding the inclination of tribunals to uphold their jurisdiction to hear intra-EU investment claims despite the attacks from the EU side. Will these be the last 'survivors' on the (intra-EU) battlefield?


To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).


Profile Navigator and Relationship Indicator

Offers 6,200+ data-driven arbitrator, expert witness and counsel profiles and the ability to explore relationships of 13,500+ arbitration practitioners and experts for potential conflicts of interest.

Learn how **Kluwer Arbitration Practice Plus** can support you.

Learn more about the newly-updated *Profile Navigator and Relationship Indicator*



 Wolters Kluwer

This entry was posted on Wednesday, June 22nd, 2022 at 8:51 am and is filed under [Intra-EU BITs](#), [Intra-EU ISDS](#), [Sunset clauses](#)
You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can

leave a response, or [trackback](#) from your own site.