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Slovak Republic v. Achmea: When Politics Came Out to Play

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The Court of Justice of the European Union ("CJEU") is not an ordinary court but a political court, which means that it is strongly influenced in making its decisions by the political beliefs of the European Commission. The 6 March 2018 judgment of the CJEU's Grand Chamber in *Slovak Republic v. Achmea BV* is a reminder; with a preordained *weltanschauung* and political outcome, the CJEU then proceeded to forge the jurisprudential basis.

The European Commission has long maintained that investor-state arbitration is incompatible with EU law. In 2015, the European Commission initiated infringement procedures against Austria, the Netherlands, Romania, Slovakia, and Sweden, and requested them to terminate their intra-EU BITs. Some EU Member States, including Romania, Poland, Ireland and Italy, have already begun terminating their intra-EU BITs.

The European Commission has also intervened as *amicus curiae* in several investor-state arbitrations involving issues of EU law. Much to its chagrin, arbitral tribunals facing questions of EU law have routinely held that investor-state arbitration is not incompatible with EU law, and have found themselves competent to interpret questions of EU law. Two instances that come to mind are *Electrabel S.A. v. The Republic of Hungary* and *European American Investment Bank AG (Austria) v. The Slovak Republic*, where the European Commission had submitted *amicus* briefs.

Background to *Slovak Republic v. Achmea*

On 7 December 2012, a Frankfurt-sited arbitral tribunal constituted under the 1991 Netherlands-Slovakia BIT (the "BIT") found Slovakia in breach of its obligations under the BIT, and ordered Slovakia to pay damages to Achmea.

Slovakia brought an action before the Higher Regional Court of Frankfurt to set aside the award, arguing that the BIT's provision for investor-state arbitration was incompatible with EU law. The Frankfurt Court upheld the award, and Slovakia lodged an appeal to Germany's Federal Court of Justice. The Federal Court of Justice turned to the Court of Justice of the European Union ("CJEU"), requesting a preliminary ruling on whether Articles 267, 344 or 18(1) of the Treaty on the Functioning of the European Union ("TFEU") preclude investor-state arbitration under an intra-EU BIT.

Fifteen Member States weighed in; the majority in support of Slovakia's position. One of the Advocates General of the CJEU also gave a formal opinion. In his Opinion of 19 September 2017, he concluded that intra-EU BITs were compatible with EU law.

The Incompatibility

In its decision, the CJEU held that the provision for investor-state arbitration in the BIT was contrary to Articles 344 and 267 of the TFEU. It found that the investor-state arbitration mechanism threatened the effective application of EU law and was incompatible with the duty of sincere cooperation incumbent upon EU Member States in order to ensure the uniform and effective application of EU law.

The CJEU constructed its reasoning on the basis that in resolving the investment treaty dispute, the arbitral tribunal would invariably be called upon to interpret and apply EU law as part of the law and international norms in force. However, such arbitral tribunal did not qualify as a *"court or tribunal of a Member State"*, and therefore was not competent (under Article 267 of the TFEU) to request preliminary rulings on the interpretation of EU law from the CJEU.

Emphasizing what is essentially an artificial distinction, the CJEU concluded that, unlike commercial arbitration, investment treaty arbitration effectively removed matters relating to the interpretation and/or application of EU law from the jurisdiction of the domestic courts of EU Member State. Moreover, the nature of the process ensures that awards are subject only to limited judicial review by the domestic courts of EU Member States.

Accordingly, the Court held that investor-state arbitration impaired the autonomy of EU law, which is ensured by Articles 344 and 267 of the TFEU.

Having found investor-state arbitration incompatible with EU law, the CJEU did not rule on the question whether it was also incompatible with Article 18(1) of the TFEU.

The Jurisprudential Manoeuvre

The reasoning of the CJEU is fairly synthetic. *First*, an arbitral tribunal constituted under a BIT essentially rules on the substance of that particular BIT. At no point in time would it stray into the operational domain of the CJEU under Article 344.

Second, the reasoning could very easily apply to a commercial arbitration tribunal which would also not qualify as a "court or tribunal of a Member State" but could be called upon to interpret and apply EU law as it is a fundamental part of any EU Member State's domestic law. Then why the express exclusion for commercial arbitration? Moreover, arbitration as a process ensures that awards are subject only to limited judicial review by the domestic courts. Commercial arbitration awards too are subject to judicial scrutiny only on limited grounds and it is unclear whether these limited grounds, similarly defined for a better part in most domestic arbitration codes, would allow an examination of the fundamental provisions of EU law. Public policy is not an easy gateway to an extensive judicial review.

The Aftermath

The CJEU's judgment is indeed in the particular context of the provision for investor-state arbitration under the Netherlands-Slovakia BIT. But make no mistake, it will change the lay of the land.

While the judgment's analysis does not concern the substantive protections accorded under intra-EU BITs, it effectively renders the 196 intra-EU BITs currently in force impracticable. The investor-state arbitration mechanism is fundamental to a BIT, intra-EU BITs being no different. Investment treaty tribunals constituted under intra-EU BITs may not be required to decline jurisdiction as a result of the judgment, but their awards could very well be set aside or denied enforcement on grounds of incompatibility with EU law.

Even investors (with awards by tribunals sited in EU Member States) seeking enforcement outside the European Union would not be able to escape the judgment. Courts of EU Member States have to comply with the CJEU's judgment. Thus, where the courts of an EU Member State are asked to set aside awards made on the basis of an intra-EU BIT, they are likely to annul such awards. Awards set aside at the seat tend not to find much favour in enforcement courts elsewhere.

Having the tribunal sited in a non-EU State may tide over the annulment muddle, but the problems would effectively remain the same at the enforcement stage of the awards in EU States. Investors will now be forced to submit claims protected by an intra-EU BIT to the jurisdiction of the courts of their host State, essentially without the substantive protections provided under the BITs.

Investors could consider restructuring their investments in EU Member States to benefit from protection under BITs with third (non-EU) States. However, it is not inconceivable that in the future, BITs with third States might also run into similar rough weather. Any investment treaty award based on a claim that has an EU Member State as the host State can potentially get stuck in this web, the contours of which have been firmly defined by this judgment of the CJEU.

The path of multilateral treaties for intra-EU claimants may also not remain unravaged for long. The European Commission's disapproval of the investor-state arbitration mechanism of the Energy Charter Treaty (also due to purported incompatibility with EU law) is well known.

An award by an arbitral tribunal constituted under the rules of the Convention On The Settlement Of Investment Disputes Between States And Nationals Of Other States ("ICSID") is enforceable as if the award were a final judgment of a court in each Contracting State to the ICSID Convention, with no possibility for it to be set aside by a domestic court. Yet, investors may find it difficult to enforce an ICSID award in the EU due to the incompatibility of investor-state arbitration mechanism with EU law. US courts rejected the arguments of the European Commission against the enforcement of the ICSID award in *Ioan Micula, Viorel Micula and others v. Romania*, however, courts in EU Member States might not take the same view when called upon to do so.

Tour d'horizon

For EU Member States, the CJEU's finding of an incompatibility of investor-state arbitration with EU law will make revisions to their existing BITs unavoidable.

The recent weeks have seen the EU unveil the finalized draft of the investment protection agreement with Singapore and the outline of the trade deal with Mexico. Both seek to implement the EU approach to investment protection that "fundamentally reforms the old-style ISDS system" – by providing for a permanent two-tier investment court.

The future of investor-state arbitration is fast evolving, and within the European Union, CJEU's judgment has taken investor-state disputes to the doorstep of a permanent investment court, as has long been advocated by the European Commission.

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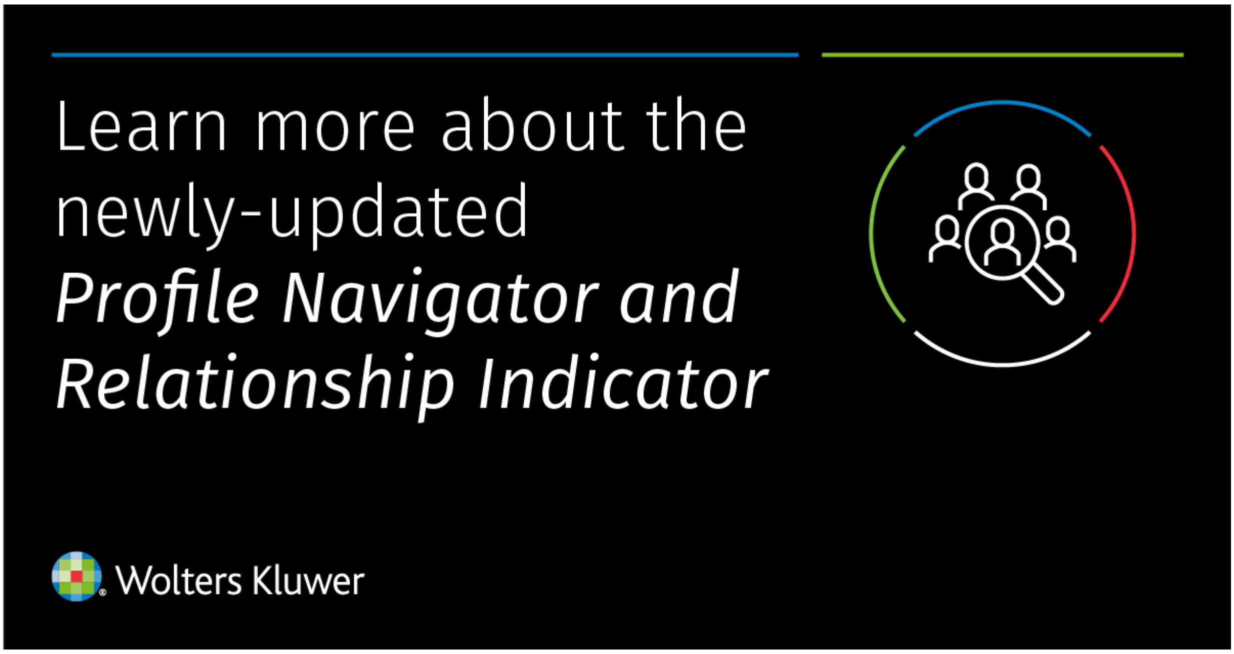

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