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Brexit, the Energy Charter Treaty and Achmea: An Unexpected Ray of Light?

Richard Power (Clyde & Co.) · Monday, December 17th, 2018 · Clyde & Co.

Perhaps the one thing that is certain about the UK's departure from the European Union is that it is uncertain. It is not certain that the UK and the EU will strike a deal on their future trading relationship after the UK leaves the EU on 29 March 2019; it is not known whether the UK parliament will approve the deal governing the proposed 21-month 'transition period'; indeed, it is not certain that the UK will actually leave the EU at all, as Article 50 can arguably be revoked. Consequently, making predictions about a post-Brexit world is fraught with difficulty.

Subject to that caveat though, amongst the predictions of economic catastrophe, food and medicine shortages and social unrest, Brexit might offer an unlikely silver lining: it is possible that the UK will become the go-to offshore jurisdiction for EU companies wishing to make investments into other EU countries generally, and specifically in the energy sector.

Achmea, BITs and the ECT: where are we now?

After the decision of the Court of Justice of the EU (CJEU) in *Slovak Republic v Achmea* (Case C-284/16) the institutions of the EU and arbitral tribunals constituted under the Energy Charter Treaty (ECT) and intra-EU BITs are at loggerheads.

As far as the CJEU and the European Commission are concerned, intra-EU investor-state arbitration contravenes EU law. However, the tribunals in *Masdar Solar & Wind Cooperatief U.A. v Spain*; *Antin Infrastructure v Spain*; and *Vattenfall AB and others v Federal Republic of Germany* concluded that *Achmea* did not apply to arbitrations under the ECT, not least because the EU itself is a signatory to the ECT. *UP and CD Holding Internationale v Hungary* arrived at the same conclusion with regard to ICSID arbitrations.

All this means that future and even pending intra-EU BIT and ECT arbitrations might be stifled. While claimants can take heart from the consistent rejection of *Achmea* by arbitral tribunals, enforcement remains a real concern particularly as many disputes of this nature rely on third party funding, and funders may baulk at the exposure given the obstacles to obtaining payment of an award.

Enforcing an intra-EU BIT arbitration award in the UK

As matters stand, the UK is bound by the *Achmea* decision, and so an application to register and enforce an intra-EU BIT arbitration award in the UK would involve a balancing act between the requirements of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (enacted in Part III of the Arbitration Act 1996); or, in the case of an ICSID award, the UK's international obligations under the ICSID Convention (enacted in the Arbitration (International Investment Disputes) Act 1966 (the 1966 Act)).

- If enforcement is sought under the New York Convention, there are limited grounds on which enforcement of an award can be refused, but these include the invalidity of the arbitration agreement; the tribunal exceeding its authority; the non-arbitrabilty of the subject-matter of the award and/or enforcement being contrary to the public policy of that state in which enforcement is sought. Any of those grounds could provide the basis for an application to refuse recognition or enforcement of an intra-EU BIT award on the basis of the reasoning in *Achmea*.
- If it is an ICSID award, it is final and binding, and immune from appeal or annulment, and must be enforced as a final domestic judgement of the court of the defendant state. The court would have to balance the *Achmea* decision against a violation of the UK's international obligations.

How would an English court approach such a dilemma? English courts are generally viewed as being pro-arbitration and might enforce an award even in the face of *Achmea*-related objections. A clue to the courts' approach might be in the Court of Appeal's decision in *Viorel Micula and others v Romania and European Commission (Intervener)* ([2018] EWCA Civ 1801). In that case, the court considered an appeal of an order staying the enforcement of an ICSID award made against Romania under the Sweden-Romania BIT pending the outcome of Romania's application to the General Court of the European Union seeking an annulment of the decision. The EC had issued a decision concluding that enforcement of the award would constitute illegal state aid and since the proceedings had been commenced, the *Achmea* decision had been handed down. Romania argued that s2(1) of the 1966 Act provides that a registered award shall be of the 'same force and effect for the purposes of execution as if it had been a judgment of the High Court'; a judgment of the High Court would not be enforced if it was a breach of EU law to do so; and so the same should apply to the ICSID award.

Arden and Leggatt LJJ rejected this approach, holding that by enacting s2 of the 1966 Act, Parliament had intended to perform its international treaty obligations under the ICSID Convention; this included the obligation to enforce ICSID awards 'automatically'; and the 1966 Act could not be understood to override the UK's enforcement obligation under the ICSID Convention by requiring the court to decline to enforce a judgment contrary to EU law. There is also the question of Article 351 of the Treaty on the Functioning of the European Union (TFEU), which provides that:

> '[t]*he rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties'*.

If the courts deemed that there was a conflict between the UK's obligations under the ICSID

Convention and its EU law duties, Article 351 arguably should resolve which should take precedence. It is noted that UK signed the New York Convention and the ICSID Convention before its accession to the EEC (which became the EU).

However, the English courts' approach to this balancing act remains to be seen.

Brexit: an unexpected solution?

Against this background, Brexit might actually provide a solution for existing intra-EU ECT arbitrations.

The applicability of EU law to the UK after Brexit depends on whether the Withdrawal Agreement agreed between the UK and EU is adopted by parliament:

- If the Withdrawal Agreement is adopted: although the UK will leave the EU at the end of March 2019, the UK will continue to apply EU law for the 21-month 'transition period'. CJEU judgments made up to the end of the transition period (31 December 2020) will continue to apply to the UK.[1)]

After the end of the transition period, the UK will no longer be bound by EU law, although CJEU case law adopted before exit day will, in effect, form part of EU law which will be 'retained' by the UK in principle as part of its domestic law. UK courts, other than the Supreme Court, will continue to be bound by EU laws and court decisions made before the end of the transition period.[2)]

- If the Withdrawal Agreement is rejected and UK leaves the EU with 'no deal': There will be no transition arrangements, and from 30 March 2019 the UK will no longer be bound by EU law. CJEU case law adopted before exit day will be retained by the UK and UK courts, other than the Supreme Court, will be bound by EU laws and court decisions made before exit day.

As the tribunals in numerous post-*Achmea* ECT awards have pointed out, *Achmea* applies to intra-EU BITs and is silent on the question of its applicability to ECT, which is a multilateral treaty to which the EU itself is party. However, this question has been referred to the CJEU on Spain's application to the Svea Court of Appeal in Sweden in the context of the *Novenergia* case.[3)] If that is not decided before the exit date (i.e. 29 March 2019 with no transition period, 31 December 2020 with one), then the decision will not bind the UK. That might well provide the necessary latitude to the English courts, known for their supportive attitude towards arbitration, to adopt the same reasoning of the ECT tribunals mentioned above in rejecting *Achmea's* applicability to ECT claims.

What now?

'All we know is that we don't know', as a popular song goes, and that applies very much to Brexit. We don't know what shape Brexit will take. If a wide-ranging trade deal is agreed between the UK and the EU, it might supersede the ECT and provide for investor-state disputes to be resolved in a different manner than arbitration: certainly the EU is seeking to include a standing investor-state

court in its new trade deals. However, pursuant to Article 47(3) ECT the post-withdrawal period during which the ECT will continue to apply to pre-existing qualifying investments, commonly known as the 'sunset period', is 20 years. Thus, those investors who make qualifying investments prior to the UK withdrawing from the ECT would will still enjoy the protections of the ECT for 20 years after that date.

Moreover, even without Brexit, there is uncertainty regarding ECT claims in future. Consultation on the reform of the ECT is currently underway and it is possible that investor-state arbitration will be replaced by some other form of dispute resolution.

Consequently, making any predictions is a difficult exercise. Nevertheless, it is possible that Brexit will offer a way through the *Achmea*-arbitration stalemate for existing claimants and future investors.

References

?1 Article 85 of the Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.

?2 Sections 5 and 6 of the European Union (Withdrawal) Act 2018.

?3 *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v The Kingdom of Spain* (SCC Case No. 2015/063)

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