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2018 In Review: The Achmea Decision and Its Reverberations in the World of Arbitration

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Very rarely would a single arbitration-related decision produce as significant an impact as the judgment of the Court of Justice of European Union ("EU" and "CJEU" respectively) in the *Achmea* case did during 2018. We should not doubt that *Achmea* will remain a cornerstone issue in the world of arbitration for a long period of time. This post attempt to summarize the *Achmea* debate thus far.

What the CJEU Reasoned in *Achmea*?

The CJEU succinctly ruled on a number of issues that were important for the supremacy of EU law and, indirectly, the role of EU institutions. The investment treaty arbitration system ("ITA") had long been, if not rejected, at least not heartily welcomed by the EU. The clash could have been foreseen and cracks appeared long ago before *Achmea*, especially in the context of the *Micula* case against Romania. So, an *Achmea* judgment was something inevitable – it had to come to the scene.

However, the actual decision did not say much. It approached the issue of clash/overlap between ITA and EU law from the standpoint of EU law. In para 33, the CJEU reiterated the autonomy and supremacy of EU law. In para 34, the CJEU stressed the mutual trust between EU Member States. In para 42, the CJEU considered that an arbitral tribunal may have to apply EU law to questions such as freedoms provided in the Treaty on the Functioning of the European Union. According to para 54, the outcome of commercial arbitration may be subject to review by Member State courts for the purpose of enforcement. In para 56-58, the CJEU reasoned that the effectiveness of EU law may be undermined as EU-related disputes are referred to bodies that are outside the EU jurisdiction. Hence, concluded the Court, the Netherlands-Slovakia BIT in particular, is not compatible with EU law.

What Achmea Was Silent About?

The CJEU did not usher a word regarding the Vienna Convention on the Law of Treaties ("VCLT"), although it is the international treaty governing the conclusion, interpretation, validity and invalidity of treaties. Neither did it mention the New York Convention, although it is the treaty governing the *Achmea* judgment. This left a number of questions unanswered.

Firstly, if EU law precludes ITA, what happens with the ITA itself, *i.e.*, does it make it invalid altogether? However, the invalidity of international treaties is regulated by the VCLT, yet, the

CJEU did not refer to it. Moreover, if EU law precludes ISDS, what happens with the arbitration clause? How should it be treated in the course of attempted enforcement or setting aside of the arbitral award – as invalid? On what grounds of invalidity?

The next line of questions concerns the scope of the *Achmea* decision. What is the ambit of *Achmea*, *i.e.*, does it encompass all ITA, or should it be read only *strictu sensu* regarding the particular dispute under the Netherlands-Slovakia BIT? Does *Achmea* refer to all BITs, if it is read expansively, or should be even wider and encapsulate also multilateral agreements such as the Energy Charter Treaty ("ECT"), which is the basis for a significant number of arbitration proceedings? How does *Achmea* sit with ICSID arbitration, as the ICSID system is based on a multilateral treaty? Should there be any difference between an EU-seated tribunal that is bound by the CJEU and EU law, and a non-EU-seated one? In other words, how far does the *Achmea* go – from being a specific and idiosyncratic ruling to a global condemnation on ITA in the way it currently is?

The questions posed would in effect delimit the perimeter of *Achmea* – and its ultimate significance. As these questions were not answered by the CJEU, we can expect that the answers will be given by other stake-holders in the near future: states, EU Member States, institutions like ICSID, EU institutions, national courts of EU Member States and non-EU Member States alike, investors, and others. These questions are the tidal wave, and the reality of investor-State relations and disputes is the shoreline this wave has been hitting since Achmea appeared on the stage.

Achmea's Aftermath: Tribunals and National Courts about Achmea

Achmea has already been interpreted and reflected upon by a number of stakeholders.

Firstly, the ITA tribunals.

In *Masdar Solar v. Spain* (ICSID Case No. ARB/14/1), the tribunal considered that *Achmea* decision is merely silent on the relevance of ECT. It can be inferred that the tribunal deemed *Achmea* not applicable to multilateral agreements like ECT.

Another tribunal, in *UP and C.D Holding Internationale v. Hungary* (ICSID Case No. ARB/13/35) where a BIT is applicable, considered that *Achmea* cannot excuse non-compliance with public international law. It can be inferred that the tribunal reasoned that issues of EU law should not stand against treaty obligations of States and an ITA tribunal applies the particular treaty at hand, without regard of other legal regimes such as EU law.

The most comprehensive ruling of an ITA tribunal thus far is in the *Vattenfall v. Germany* (ICSID Case No. ARB/12/12) case. First, the tribunal rejected application of Art. 31 of VCLT as the tribunal accepted that EU law is not part of general international law and cannot constitute principles applicable as between the parties. The tribunal's primary purpose was that the treaty at hand is applied without reading into it other laws/agreements/international obligations. Moreover, the ECT could even be assumed as a later concluded treaty (*lex posterior*) or a special regime (*lex specilis*). On whichever of these grounds, the tribunal unflaggingly assumed that the Achmea decision is not relevant to ECT-based cases. Moreover, Art. 16 of the ECT should be directly applied to preclude the relevance of other international agreements/obligations. Further, the more favourable regime to an investor is the ECT in terms of dispute resolution, so the tribunal accepted EU law should not be overriding the ECT.

However, the EU Commission took a different view. In its 19 July 2018 Communication, the Commission not only cited the *Achmea* judgment, but took the position that it should be extended to multilateral agreements such as the Energy Charter Treaty: *"The Achmea judgment is also relevant for the investor-State arbitration mechanism established in Article 26 of the Energy Charter Treaty as regards intra-EU relations. This provision, if interpreted correctly, does not provide for an investor-State arbitration clause applicable between investors from a Member States of the EU and another Member States of the EU. Given the primacy of Union law, that clause, if interpreted as applying intra-EU, is incompatible with EU primary law and thus inapplicable. Indeed, the reasoning of the Court in Achmea applies equally to the intra-EU application of such a clause which, just like the clauses of intra-EU BITs, opens the possibility of submitting those disputes to a body which is not part of the judicial system of the EU. The fact that the EU is also a party to the Energy Charter Treaty does not affect this conclusion: the participation of the EU in that Treaty has only created rights and obligations between the EU and third countries and has not affected the relations between the EU Member States."*

Finally, it is worth mentioning that a number of national courts reviewed *Achmea* thus far.

The German court reviewing the application for setting aside of the *Achmea* award took CJEU's words verbatim and set aside the *Achmea* award. The German court accepted that EU law precludes arbitration and the tribunal seated in Germany did not have jurisdiction to render award. The EU obligations did obstruct Slovakia to provide relevant consent for validity of arbitration.

The issue remains in flux: Currently, a plea to this extent is pending in two courts – in Sweden, and in New York. In the context of an action to set aside the award under the *Novenergia v Spain* award in Swedish courts, Spain requested that the court seeks preliminary ruling from the CJEU with focus on ECT. The same award is also resisted in US courts, as in the court of District of Columbia Spain has put forward *Achmea* opposition as well.

Where Do We Go from Here?

Achmea has two potential outcomes – either to dramatically change the world of ITA, or to have very limited impact and gradually fade away. It seems that *Achmea* is and will be an important factor in the world of arbitration. Arbitral tribunals apparently struggle to restrict its significance and find a way to pass it by. However, the *Achmea* decision is the flag that the EU Commission needed to reinvigorate its campaign against intra-EU ITA. The EU Commission is currently very active to request participation in pending ITA cases and the Commission, along with states, raises *Achmea*-based challenge to the jurisdiction of arbitral tribunals. The matter had reached national courts, too – inside and outside the EU. Hence, *Achmea* reminds us once more of the ancient curse of living in interesting times.

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