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Enforcing Intra-EU Dispute Awards in the United States after Achmea

Seung-Woon Lee (WilmerHale) · Tuesday, May 26th, 2020

After the Court of Justice of the European Union ("CJEU") rendered the *Achmea* decision, heated discussions on its impact ensued. Particularly, the concern raised on whether the ICSID proceeding provided for in intra-EU BITs and intra-EU disputes under the Energy Charter Treaty ("ECT") would be valid. Several arbitral tribunals and national courts have dealt with this issue and it has been discussed on this blog multiple times (e.g., here).

On 5 May 2020, a majority of the EU Member States signed an agreement for the termination of intra-EU bilateral investment treaties ("termination agreement"). A stated aim of the termination agreement is to invalidate all intra-EU investor-State arbitral proceedings. However, it explicitly states that the ECT is not covered and will be dealt with at a later stage. This agreement would not affect arbitral proceedings concluded before the *Achmea* judgment, i.e. before 6 March 2018.

Keeping this background in mind, this post will analyze two recent U.S. cases addressing the enforceability of intra-EU dispute award.

Micula v. Gov't of Romania, 2019 WL 4305533 (D.D.C.)

On 11 September 2019, the District Court of Columbia rendered its decision enforcing an ICSID award against Romania. On 19 May 2020, the US Court of Appeals for the District of Columbia affirmed the District Court's decision (here). Micula had obtained an ICSID award against Romania in 2013, but subsequentely the European Commission ordered Romania not to pay and to recover any amounts already paid in implementation or execution of the arbitral award, that would otherwise constitute an impermissible "state aid" (EU Commission Decision 2015/1470 of 30 March 2015 on State aid). Micula went ahead with enforcement procedures already in 2014.

In the United States, to enforce an arbitration award against a state, the petitioner must show that any of the exceptions under the Foreign Sovereign Immunity Act ("FSIA") applies. The courts have recognized arbitration exception under the FSIA.

Romania, relying on *Achmea*, contested the arbitration agreement under the Sweden-Romania BIT as invalid and unenforceable. This view was supported by the European Commission, in its amicus brief where the Commission argued that the *Achmea* "applies foursquare to the arbitration agreement in the Romania-Sweden BIT." In response, Micula argued that *Achmea* does not apply

because: (1) Romania acceded to EU after the ICSID proceeding commenced, whereas the Slovak Republic in *Achmea* was already part of the EU when the arbitral proceedings commenced; and (2) *Achmea* did not invoke the ICSID proceeding.

The court found that *Achmea* does not apply in this context for three reasons. First, the *Achmea*'s reasoning and purpose were to protect "the autonomy of EU law" and the same purpose and objective were not found in the present case. Unlike *Achmea*, the events leading to the current dispute occurred prior to Romania joining the EU in January 2007. The court noted that the Romania-Sweden BIT entered into force in July 2003. The revocation of the incentives took legal effect in February 2005. The ICSID proceeding commenced in July 2005. Therefore, the court found that Romania's action leading to the parties' dispute "remained outside the EU and subject, at least primarily, to its own domestic law."

Second, the ICSID tribunal did not decide "a question of EU law in a way that implicates the core rationale of *Achmea*." The court found that although the tribunal considered EU law as part of the "factual matrix" of the case, it expressly refused to decide on the question whether "any payment of compensation arising out of this Award would constitute illegal state aid under EU law and render the Award unenforceable within the EU."

Finally, the court focused on the General Court of the European Court of Justice's ruling rendered in June 2019. The General Court overruled the EU Commission Decision 2015/1470 of 30 March 2015 on State aid, where EU Commission found that the benefits provided under the Romania-Sweden BIT to Micula constitute unlawful state aid, thus violating EU law. The General Court found that *Achmea* is distinguishable stating "in the present case, the arbitral tribunal was not bound to apply EU law to events occurring prior to the accession before it, unlike the situation in the case which gave rise to the judgment of 6 March 2018, *Achmea*."

Although the court had a chance to address whether *Achmea* makes the ICSID proceeding under intra-EU BIT invalid, the court did not address this specific issue. However, the court limited the practical impact of *Achmea* by conducting a detailed analysis on whether the court has the subject matter jurisdiction to enforce final award rendered under the ICSID proceeding by virtue of intra-EU BIT. The court demonstrated that the impact of *Achmea* should be based on a case-specific analysis.

Interestingly, but outside the scope of this post, the court rejected Romania's argument on the "Act of State" and "Foreign Sovereign Compulsion" doctrines.

Novenergia II – Energy & Env't (SCA) v. Kingdom of Spain, 2020 WL 417794 (D.D.C.)

On 27 January 2020, the District Court of Columbia rendered a decision granting Spain's request to stay the enforcement proceeding until resolution of the set-aside proceedings in Sweden. The parties' dispute was brought to the Stockholm Chamber of Commerce ("SCC") proceeding by virtue of the ECT. The SCC tribunal unanimously rejected Spain's jurisdictional challenge that the intra-EU disputes under the ECT is invalid under *Achmea*. The tribunal rendered a decision in favor of the investor. On 14 May 2018, Spain sought to set aside the award in the Swedish Svea Court of Appeal. Novenergia, in turn, sought an enforcement proceeding in the District Court of Columbia on 16 May 2018. On 16 May 2018, the Swedish Svea Court of Appeal ordered to suspend the enforcement of the final award until it decides on Spain's application to set aside the

award.

Spain sought to dismiss the enforcement action alleging that the District Court of Columbia lacks subject matter jurisdiction – as Romania had argued in *Micula*. Alternatively, Spain sought to stay the proceeding until the set aside proceeding in Sweden has been completed.

Conclusively, Spain argued that the District Court of Columbia lacks jurisdiction because intra-EU disputes under the ECT are invalid pursuant to the *Achmea* doctrine. The court facing this issue, avoided rendering a determinative decision, stating instead that: "the more prudent course of action is to allow courts within the EU to first decide the issues." Thus, the court granted a stay without addressing whether intra-EU disputes under the ECT would be invalid. The court justified staying the proceeding under its inherent power and using *Europcar* Factors as guidance.

What Did the Courts Decide?

The *Micula* shows that the courts in the United States would likely find the necessary subject matter jurisdiction to go ahead with the enforcement procedure. However, two cases (*Novenergia II, Masdar Solar*) also show that the courts may order to stay the proceeding instead of addressing whether it has the subject matter jurisdiction when the set aside proceeding or ICSID appellate proceeding is pending.

Regarding a State's opposition that the intra-EU arbitral clause is invalid under a BIT or the ECT, the courts did not answer this question. Rather the court conducted a "case-specific analysis" in *Micula*. Thus, after *Micula*, it remains an open question of whether the courts will enforce an arbitral award resulting from intra-EU disputes.

Implications on Other Proceedings?

A party seeking enforcement of an arbitral award resulted from intra-EU disputes should keep in mind the following potential arguments to support their claim. First, the U.S. courts should not simply follow a State's argument that intra-EU disputes under the ECT are invalid under the infamous *Achmea* doctrine. This is because the *Achmea* decision itself did not explicitly deal with this issue, *vis-á-vis* the ECT. Additionally, in the termination agreement, Member States defer answering this issue at a later stage.

Second, the intra-EU disputes under the BIT providing ICSID proceeding initiated before the *Achmea* judgment should not be invalid. When the party initiated the arbitral proceeding, the intra-EU BIT was in effect. It would be unreasonable to retroactively make arbitral clause unenforceable.

On the other hand, the Member States would most likely rely on *Achmea* and the termination agreement. Additionally, EU Member States could elect to enter into separate termination agreement relating to the ECT, if they decide to do so (e.g., here).

Currently, there are seven cases in the District of Columbia seeking to enforce an arbitral award against Spain (e.g., here). The European Commission filed an amicus brief in these proceedings

arguing that the intra-EU disputes by virtue of the ECT are “fundamentally incompatible with EU law.” (e.g., here).

It would be highly interesting to see how the courts rule on this matter, whether they will conclusively find the enforceability of intra-EU dispute awards after *Achmea* or conduct a case-specific analysis.

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