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RWE and Uniper: Can (German) Courts Assess the Jurisdiction of ICSID Arbitral Tribunals?

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The *Achmea* saga has taken yet another twist. In a recent communication to the Dutch Parliament, the Dutch Ministry of Economic Affairs and Climate disclosed that it initiated "*anti-arbitration*" proceedings before the German courts on 11 May 2021 to "*avert*" two ECT-based ICSID arbitrations brought against it by the German energy companies *RWE* and *Uniper* ("Communication"). According to the Communication, *RWE*'s and *Uniper*'s claims lack a legal basis in light of the 2018 CJEU ruling in *Achmea* (C-284/16, reported here and here) declaring the disputed arbitration clause in the Netherlands-Slovakia BIT incompatible with EU law. The Communication is also based on the subsequent declarations issued by 22 EU Member States (including the Netherlands and Germany) on 17 January 2019 agreeing to terminate all intra-EU BITs and supporting the European Commission's ("Commission") stance that *Achmea* applies equally to the ECT.

The CJEU and Intra-EU ECT Disputes

The latter might soon be confirmed by the CJEU. In March 2021, CJEU Advocate General ("AG") Szpunar released an opinion (C-741/19) holding that *Achmea* was applicable to intra-EU ECT arbitrations, thus siding with the Commission (see here and here). Ironically, the underlying Paris-seated ECT arbitration (*Komstroy (formerly Energoalians) v. Moldova*) does not have a direct intra-EU connection. Apart from the fact that the seat of arbitration is in France, neither the home state of claimants *Komstroy* (Ukraine), nor respondent Moldova is an EU Member State. Considering the recent tendency of EU institutions on this issue, it would not come as a particular surprise if the CJEU decided to follow AG Szpunar's recommendation.

Inadmissibility Applications before the German Courts

While details remain unclear, it is assumed that the Netherlands has invoked the "*Achmea* objection" in an application to the Higher Regional Court ("HRC") of Cologne to declare *RWE*'s and *Uniper*'s claims inadmissible pursuant to section 1032(2) of the German Code of Civil Procedure. The provision, which is not enshrined in the UNCITRAL Model Law, aims at increasing the efficiency of proceedings. It allows German courts to dismiss the admissibility of

arbitral proceedings at an early stage, i.e. pending the constitution of a tribunal. Since the application was made, the *RWE* tribunal has been constituted; the *Uniper* tribunal is not yet in place. While, strictly speaking, section 1032(2) refers to the "admissibility" of a claim, it is established court practice that this also covers the validity of an arbitration agreement, and hence a tribunal's jurisdiction. If the Netherlands' section 1032(2)-application is successful, the HRC's finding of the inadmissibility of arbitral proceedings would bind other German – and possibly European – courts.

The Netherlands' move bears similarities to an earlier section 1032(2)-application brought by Croatia in April 2020 aimed at preventing the Frankfurt-seated UNCITRAL arbitration, *Raiffeisen v. Croatia (II)*. On 11 February 2021, the HRC Frankfurt sided with Croatia and declared *Raiffeisen*'s arbitration inadmissible. In its decision, the court reasoned that the arbitration clause in the underlying Austria-Croatia BIT was invalid in view of the *Achmea* judgment, which the HRC qualified as a "landmark decision" ('*Grundsatzentscheidung*') and therefore considered significant for *all* intra-EU BITs. The court followed the reasoning of the CJEU in *Achmea* which held that the arbitration clause in dispute (Article 8 of the Netherlands-Slovakia BIT) may affect the autonomy of the EU legal system (in particular, Article 344 of the TFEU) and the consistent and uniform interpretation of EU law. So far, many investment tribunals have rejected the "*Achmea* objection", even in other disputes concerning the Austria-Croatia BIT. The recently constituted *Raiffeisen* tribunal's reaction to the HRC Frankfurt's finding will undoubtedly be keenly awaited.

The Netherland's Application and ICSID's Self-Contained Regime

The Netherlands' section 1032(2)-application is likely to trigger much doctrinal debate, considering that the *RWE* and *Uniper* arbitrations – unlike *Raiffeisen* – are conducted under the self-contained ICSID regime which expressly bars parties from turning to domestic courts under Article 26 of the ICSID Convention. Some may argue that this provision has no effect where there is no "[c]*onsent of the parties to arbitration*" in the first place. Should the HRC Cologne find the arbitration clause in the underlying ECT to be invalid, no legal basis would exist for the parties' consent to ICSID arbitration. Others strongly question the German courts' competence to decide on the admissibility of ICSID arbitrations and raise concerns over similar future attempts by states to sidestep the ICSID system. Some at least support the possibility to bring an ICSID claim in intra-EU scenarios.

Their views are reinforced by the principle of *Kompetenz-Kompetenz* enshrined in Article 44 of the ICSID Convention, which considers an ICSID tribunal "*the judge of its own competence*". In commercial arbitration only some jurisdictions and authorities go as far as to ascribe this principle a "negative" effect, precluding the parallel assessment of a tribunal's jurisdiction by national courts. Yet, the self-contained design of the ICSID system reflected in various provisions of the ICSID Convention (Articles 26, 27, 52, 53(1)) provides good arguments for an expansive understanding of the *Kompetenz-Kompetenz* of ICSID tribunals.[1)] It is thus questionable whether a German court's assessment of an ICSID tribunal's jurisdiction is compatible with Germany's public international law obligations flowing from the ICSID Convention. [2)]

Further uncertainties arise under German procedural law given that, as a result of ICSID's self-contained nature, ICSID proceedings have no arbitral "seat". Per sections 1025(2) and

1062(1)(no. 2) and (2) of the German Code of Civil Procedure, German Higher Regional Courts are competent to hear a section 1032(2)-application if the seat of the arbitration is *outside* of Germany. The HRC Cologne will have to grapple with the question of whether a "foreign seat" can be equated to the lack of an arbitral seat for purposes of the German Code of Civil Procedure.

Irrespective of the HRC Cologne's decision, the *RWE/Uniper* tribunals may draw inspiration from the *SGS v. Pakistan* tribunal. Faced with a decision by the Supreme Court of Pakistan barring the claimant from pursuing the ICSID arbitration, the *SGS* tribunal held:

> *The right to seek access to international adjudication must be respected and cannot be constrained by an order of a national court. Nor can a State plead its internal law in defence of an act that is inconsistent with its international obligations. Otherwise, a Contracting State could impede access to ICSID arbitration by operation of its own law.*

Outlook

The *RWE/Uniper* tribunals might join the long list of ICSID tribunals rejecting the "*Achmea* objection", particularly in connection with the ECT. Yet, even if successful, *RWE* and *Uniper* will have to be aware that further trouble likely awaits at the enforcement stage. One may recall the Commission's (in)famous decision in 2015, prohibiting Romania from complying with the *Micula v. Romania (I)* ICSID award in favor of the *Micula* brothers. The Commission alleged that payment by Romania would constitute state aid in contravention of EU law and thus effectively endorsed the primacy of EU law over international law. In June 2019, the General Court annulled the Commission's decision, noting that the *Micula* award could not be considered as illegal state aid, at least not the part of the compensation that covered the period pre-dating Romania's accession to the EU, and admonishing the Commission for exceeding its competence (see also here). However, with the General Court's decision currently under appeal, the CJEU's final word is yet to be spoken.[3)] Against this background, *RWE* and *Uniper* may have a similarly long road ahead of them.

Whether the developments in *Raiffeisen*, *Micula* or *Komstroy* bode ill for *RWE* and *Uniper* remains to be seen. The German courts' U-turn since *Achmea* is particularly remarkable. The HRC Frankfurt's finding in *Raiffeisen* endorsing the CJEU's *Achmea* judgment essentially reverses its original view in the (likewise Frankfurt-seated) *Achmea* arbitration that the BIT arbitration clause is compatible with EU law. The German Federal Court of Justice ('*Bundesgerichtshof*') had a similar change of heart when it set aside the *Achmea* award following the CJEU's judgment, despite initially indicating a different view in its referral request. Even the Netherlands has silently switched sides. It now seems to have become a staunch supporter of the CJEU/Commission, vehemently committed to putting an end to all intra-EU arbitrations. This stands in stark contrast to its previous position and fierce defense of the validity of the underlying BIT during the *Achmea* arbitration. The Netherlands even went as far as to intervene in the set-aside proceedings before the HRC Frankfurt as a third-party, considering that the court's decision would affect the scope of its rights and obligations under the Netherlands-Slovakia BIT.

It will be interesting to see whether the Netherlands' third-party intervention will be emulated by other states in relation to the *RWE/Uniper* proceedings before the HRC Cologne. After all, the Netherlands' section 1032-application could incentivize other states to invoke domestic law in a way that may be considered incompatible with the ICSID regime and the ICSID member states' rights and obligations. Such procedures would add another layer of complexity to the *RWE/Uniper* proceedings that would certainly be worth reporting.

References

?1 Georges R Delaume, International Centre for Settlement of Investment Disputes Arbitration and the Courts, (1983) 77 American Journal of International Law 781, 784.

?2 For a stay of national court proceedings in a similar situation, see *Mobil Oil Corporation and others v. New Zealand*, ICSID Case No. ARB/87/2, Judgment of the High Court of New Zealand, 1 July 1987, 4 ICSID Reports 117.

?3 On 1 July 2021, AG Szpunar released his opinion (C?638/19 P) in the pending appeal advising the CJEU to quash the General Court's decision based on errors in the interpretation of EU state aid law. However, AG Szpunar agreed with the General Court that the *Achmea* ruling is not applicable since the underlying *Micula* dispute pre-dated Romania's accession to the EU. See Opinion of AG Szpunar (C?638/19 P), 1 July 2021, available at: https://curia.europa.eu/juris/document/document_print.jsf?docid=243665&text=&dir=&doclang=EN&part=1&occ=first&mode=req&pageIndex=0&cid=542600.

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