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Anxieties about Achmea: Dutch Interim Relief Judge Refuses to Torpedo London-seated intra-EU Arbitration

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The Amsterdam district court has recently refused to order the termination of a London-seated intra-EU investment arbitration against Poland. Whilst the outcome of the judgment is hardly surprising, the decision contains some interesting thoughts on the 'desirability' of the *Achmea* decision. This blog will discuss the current status of *Achmea* in the case law of the Court of Justice of the European Union (CJEU) and domestic courts, before providing some reflections on the reasoning of the interim relief judge in Amsterdam, whose decision is currently under appeal at the Amsterdam court of appeal whilst proceedings on the merits have also been commenced before the district court.

Achmea Unlimited?

Over the past years, the CJEU has continuously expanded its ruling in the *Achmea* case. The Court has now established that EU law is incompatible not only with investment arbitration under intra-EU BITs but also with the intra-EU application of the arbitration clause of the Energy Charter Treaty. The CJEU has also determined that this incompatibility extends to arbitrations governed by the ICSID Convention: in *Micula*, the Court ruled that as of Romania's accession to the EU, 'the system of judicial remedies provided for by the EU and FEU Treaties replaced [the BIT's] arbitration procedure' and that the consent given to that procedure by Romania 'lacked any force' as of then (see here). In *Romatsa*, the Court made explicit that the *Micula* award could not have 'any effect' and could not be enforced.

In spite of this increasingly categorical case law of the Court, it is less certain how member state courts will approach the incompatibility between EU law and intra-EU investment arbitration (and any obligations incumbent on these courts under the ICSID Convention) in the variety of circumstances in which this issue may arise. Whilst intra-EU awards have been set aside in Paris, and the enforcement of intra-EU awards has been refused in Luxembourg and Sweden, German courts have issued divergent rulings on whether intra-EU ICSID proceedings are admissible (see here and here). The recent decision of the Amsterdam interim relief judge adds to the developing canvas of domestic judgments assessing the implications of *Achmea* (see also here and here).

Poland's Request to the Amsterdam Court

The Amsterdam court rejected Poland's request to order the Dutch investor to end its arbitration against Poland, which was brought under the (meanwhile terminated) Netherlands-Poland BIT. The court noted that the relevant question was not whether the tribunal would have jurisdiction, as only the tribunal was authorised to decide on its jurisdiction at this stage. Rather, for Poland's request to succeed, it would have to demonstrate that the continuation of the proceedings by the investor would be unlawful because these proceedings were evidently frivolous.

Moreover, in the interim relief proceedings, the court would only be competent to award temporary measures. At most, the interim relief judge could order the investor to cooperate with a stay (and not termination) of the arbitration proceedings pending the conclusion of the main court proceedings on whether the continuation of the arbitration would be unlawful. The interim relief judge saw no reason to do so.

The court considered that the assessment of whether proceedings were unlawful should be made with restraint, in light of the fundamental right of access to justice (Article 6 of the ECHR – see on the potential role of the ECtHR in this context here). The court did note that the arbitration proceedings 'possibly' lacked a valid basis, in light of the *Achmea* ruling and the conclusion of the *Agreement for the Termination of BITs between Member States of the EU* which entered into force between the Netherlands and Poland after the commencement of the arbitration proceedings. For these reasons, the court considered that the BIT between the Netherlands and Poland could no longer operate as a basis for the arbitration. However, it was not certain that the tribunal would also decline jurisdiction.

In this respect, the court considered that when the investor initiated the arbitration, the Termination Agreement had not yet entered into force and the BIT's sunset clause was still applicable. Moreover, the arbitration was seated in England, where the setting aside court would not be bound by EU law. In this respect, the court referred to the UK Supreme Court's judgment in *Micula* (although this judgment was rendered when the UK was still bound by EU law – see comment here). All in all, the district court concluded that there was a 'high chance' that the tribunal would assume jurisdiction and that the set aside judge would reject a challenge based on an alleged lack of jurisdiction. Accordingly, the arbitration could not be considered frivolous, and its continuation would not be unlawful.

So far, the judgment did not contain any surprises, but the court did not stop here. The interim relief judge noted that 'within the EU, there is a lot of debate on the *Achmea* judgment and its consequences', for two reasons.

The Future of Intra-EU Arbitration Outside the EU

First, according to the court, the 'formal consequences' of the judgment had not yet 'fully crystallised'. Whilst an arbitral award issued on the basis of an intra-EU BIT would not be enforceable in member states, this would be '(possibly) different' outside the EU. This point seems accurate, as the fate of intra-EU awards in the United States (see here) shows. Courts outside the EU will not consider themselves bound by EU law, whilst they do have obligations under the ICSID Convention or the New York Convention. As one US judge held in the context of the *Micula* saga: '[a]s a party to the ICSID Convention, the United States has a compelling interest in

fulfilling its obligation … to recognize and enforce ICSID awards regardless of the actions of another state', referring to 'the ICSID Convention's expansive spirit on which many American investors rely when they seek to confirm awards in the national courts of the Convention's other member states'.

The Limits of Mutual Trust

The second point noted by district court was the current debate about the '(desirability of the) judgment's consequences'. According to the court, many doubt the CJEU's assumption that investors are sufficiently protected by EU law also without intra-EU BITs. In this respect, the court noted two developments: first, 'the problem of challenges to the independence of the Polish judiciary', and second, the intention of the EU and member states to establish an Investment Court System.

The first point, concerning the independence of the Polish judiciary, raises interesting questions. Within the EU, member states are required to presume that other member states comply with their obligations under EU law, including the obligation to ensure access to effective judicial remedies. In *Achmea*, the CJEU mentioned this principle of 'mutual trust' in order to distinguish arbitration clauses in intra-EU BITs from those in agreements concluded by the EU. The Court seemed implicitly to argue that offering investment arbitration to intra-EU investors because of perceived deficiencies in the protection provided by the judiciary of another member state is difficult to square with this principle (see on the relevance of mutual trust in the *Achmea* judgment also here). However, the mutual trust required by EU law is not absolute, which might mean that if there is genuine concern about the quality of the protection offered by the domestic courts of one member state to the investors of another, the incompatibility between EU law and investment arbitration may fade away.

The Hopes of New-style Investment Protection

The second development mentioned by the Amsterdam court is that 'apparently also the member states consider that after Achmea and the conclusion of the Termination Agreement there is a gap in the legal protection of foreign investors'. The court pointed to the conclusion of CETA and its reference to an Investment Court System as a new model for investor-state dispute settlement. The court considered that since the 'new rules of investment protection are not yet in force', investment arbitration was 'possibly' the only genuine remedy that the Dutch investor could rely on.

The court's reasoning is not entirely clear since the dispute settlement mechanisms established by CETA will not apply intra-EU. It is also unlikely that the CJEU would consider an intra-EU Investment Court System compatible with EU law, unless subject to its own supervision. Possibly, the district court considered that by including an investment protection chapter in CETA, the EU and its member states showed that they are not opposed to offering special legal protection to foreign investors. Whether all member states still think so remains to be seen. The Irish Supreme Court recently ruled that CETA's dispute settlement mechanism conflicted with the Irish Constitution because it would infringe the 'judicial sovereignty of the State'.

Conclusions

Although the CJEU has expressed increasingly clear and categorical views on intra-EU investment arbitration, the precise implications in member state courts are still not fully determined. The Amsterdam district court's decision acknowledges the continuing viability of intra-EU arbitration seated outside the EU (although recognising that enforcement within the EU is unlikely), whilst expressing some doubts as to the wisdom of the course taken by the CJEU. If the quality of judicial remedies in some member states backslides, and non-EU investors are given access to investment arbitration, the question as to whether intra-EU investors should not have similar rights becomes increasingly salient.

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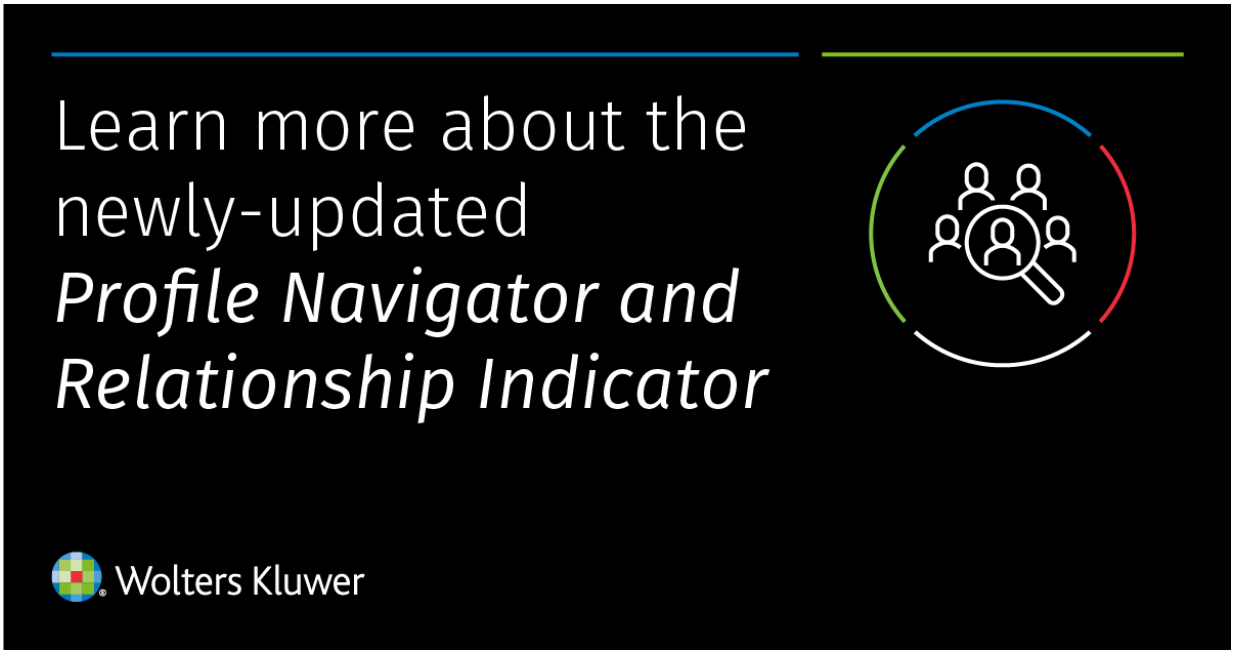

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