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Will Achmea Trump ICSID in Germany? Bundesgerichtshof Likely to Grant "Anti-Arbitration" Declarations

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Seven years ago, Germany's Federal Court of Justice (*Bundesgerichtshof*, BGH) set off an avalanche that buried most of the European investment arbitration landscape. The BGH's order of June 3rd 2016 referred to the Court of Justice of the EU (CJEU) a long debated question: Are intra-EU investment arbitrations compatible with EU law? They are not, the CJEU famously ruled in its seminal *Achmea* judgment. A multitude of proceedings followed in *Achmea's* aftermath. Both the CJEU and national courts inside and outside the EU had to clarify what *Achmea* means in practice and how far its effects reach.

In this regard, the BGH continues to play an important role. Three weeks ago, the high court heard appeals over a particularly momentous question *Achmea* raised: Does EU law also penetrate ICSID's "self-contained" system? According to the BGH's preliminary assessment, it does. For the peculiar German procedure at the heart of the appeals – under § 1032(2) of the German Code of Civil Procedure (ZPO) – the implications might be significant. The BGH's interpretation could position § 1032(2) ZPO as a powerful tool to derail future intra-EU investment arbitrations.

Background: Caught between EU Law and Treaties

Achmea created a dilemma not only for investors but also for EU member states. The latter may have welcomed the CJEU's intervention, which potentially shields them from substantial liability. Spain alone is confronted with investment treaty claims worth roughly 8 billion Euros. Yet *Achmea* forces member states to walk a tight rope, trying to comply with conflicting norms of EU law and treaties such as the ICSID Convention.

Encouraged by the European Commission, some states reacted with tactical litigation against any attempt to initiate intra-EU investment arbitrations or to enforce investment awards. So far with scant success: The *Rechtbank Amsterdam*, a Dutch district court, recently rejected Poland's applications to enjoin intra-EU investment arbitrations seated in London.

Tactical Litigation in German State Courts

Interestingly, the German judiciary emerged as a popular forum for such procedural tactics. For instance, courts in Essen and Hamm are embroiled in an exchange of (anti-anti-)anti-enforcement injunctions with a U.S. District Court over enforcement proceedings RWE initiated in the U.S. But applications under § 1032(2) ZPO arguably gained the most prominence. As this Blog reported, § 1032(2) ZPO provides a mechanism to attack an arbitral tribunal's jurisdiction before it has constituted itself. During this phase, German courts have the authority to determine an arbitration's admissibility (*Zulässigkeit*). Should the court declare the arbitration inadmissible, any subsequent recognition and enforcement is bound to be rejected by German courts.

Whether this applies to ICSID arbitrations has been a controversial issue. The ICSID system is "self-contained", state courts play a minimal role. Only ICSID tribunals are competent to determine their jurisdiction, subject to very limited scrutiny by ICSID *ad hoc* committees. Nevertheless, Germany and the Netherlands challenged three intra-EU ICSID arbitrations with applications under § 1032(2) ZPO. The Netherlands applied to the Higher Regional Court (HRC) Cologne against German investors Uniper and RWE; Germany applied to the *Kammergericht* Berlin against Irish investor Mainstream. But the judges in Cologne and Berlin came to diametrically opposed conclusions. Whilst Cologne declared the arbitrations inadmissible, Berlin dismissed Germany's application citing ICSID's "self-contained" system. Uniper, RWE, and Germany appealed. On May 17th 2023, the BGH heard their cases, I ZB 74/22 (Uniper), I ZB 75/22 (RWE), and I ZB 43/22 (Germany).

The Hearing at the BGH

Hearings in arbitral matters are a rare occurrence before the 1st civil senate. It is also rare that they exceed the allocated time. Here, the scheduled two-hour hearing lasted almost four hours – which demonstrates the matter's importance.

At the outset, the presiding judge clarified that procedural issues would decide the disputes. In light of the CJEU's case law, the merits were clear to the court: intra-EU investment arbitrations are "inadmissible" within the meaning of § 1032(2) ZPO. As to procedure, two of § 1032(2) ZPO's requirements formed the core of the hearing: the German courts' international jurisdiction and the applications' admissibility.

International Jurisdiction under § 1025(2) ZPO

German arbitration law only applies if the arbitration's seat is in Germany. There are exceptions though: § 1032 ZPO as a whole applies even if the seat of arbitration is located abroad or not yet determined. By using the terms "abroad" and "not yet determined", the statutory language deviates from the UNCITRAL Model Law. That could be read as requiring a seat which can be localized or determined at all. ICSID arbitrations, however, are delocalized. They have no seat of arbitration.

The presiding judge recognized this conundrum. He observed that ICSID's administrative seat at the World Bank in Washington D.C. was irrelevant. A literal interpretation of § 1025(2) ZPO would thus exclude ICSID arbitrations from its scope of application. Yet the senate thought there were good arguments to construe the statute more broadly. The legislator had intended to regulate

all arbitrations when it reformed German arbitration law in 1996; there was no indication that parliament wanted to exclude ICSID proceedings. Also, the presiding judge drew a comparison to § 1062(2) ZPO, a statutory default rule for local jurisdiction. It stipulates which Higher Regional Court is competent should there be "no German seat". The senate took the view that "no German seat" would encompass arbitrations with no seat at all. Since both § 1025(2) and § 1062(2) ZPO govern the same cases, "abroad" and "not yet determined" in § 1025(2) ZPO should also be construed identically.

Admissibility of the Applications under § 1032(2) ZPO

1032(2) ZPO's admissibility was the most critical issue discussed at the hearing. EU law aside, the BGH seemed to agree that the ICSID Convention and its German ratification statute (InvStreitÜbkG) would displace § 1032(2) ZPO. Once an ICSID arbitration is registered, only ICSID tribunals are competent to assess their jurisdiction (see Artt. 36(3), 41, 53(1), 54(1) ICSID Convention). The InvStreitÜbkG implements this self-contained system as *lex specialis* vis-à-vis the German ZPO's arbitration law.

In the senate's preliminary view though, EU law changes the analysis. The presiding judge observed that the CJEU had confirmed *Achmea* multiple times; *Micula* (*European Food*) and *Romatsa* extended the reasoning to ICSID arbitrations. The senate concluded that German courts were obliged to deny intra-EU ICSID awards any effect. With regard to enforcement proceedings, there was no room for debate, said the presiding judge. He then hinted that EU law might also require courts to intervene as early as possible, even before enforcement of an award is initiated. Essentially, that is how the HRC Cologne argued.

Would Ignoring ICSID's Self-Contained System be *Contra Legem*?

These remarks indicate that the BGH is going to uphold the "anti-arbitration" declarations sought by Germany and the Netherlands. The judges only conveyed a preliminary assessment; but German courts usually stick with these.

By giving EU law precedence over ICSID's self-contained system, the BGH would concur with case law from other member states. For example, the Luxembourg *Cour de Cassation* explicitly denied enforcement of an intra-EU ICSID award in *Micula*. Yet the Luxembourg judges did not even mention ICSID's unique self-contained character in their opinion. Likewise the Lithuanian Supreme Court, which – in effect – also put EU law over the ICSID convention in *Veolia* (see Judgment of 18 January 2022 – e3K-3-121-916/22, EuZW 2022, 567, case note *Wackernagel*). A more detailed doctrinal discussion is to be expected from the BGH. One of the judges put emphasis on the primacy of EU law. This principle might prevent German courts from applying Art. 41 ICSID convention and the InvStreitÜbkG, since both contradict EU law with respect to intra-EU arbitrations. Counsel for RWE and Mainstream countered this would be *contra legem*. He likely referred to the limits of interpreting national law in conformity with EU law. (see C-122/17 – *Smith*, para. 40). But the BGH seemed reluctant to follow his reasoning. The hesitation would be justified should the judges take the view that national law cannot be construed in conformity with EU law – leaving them no choice but to disapply it. This would be in line with the European commission's understanding (see also C-187/15 – *Pöpperl*, para. 45).

Practical Implications: An Effective Tool to Assert *Achmea*?

Extending § 1032(2) ZPO's scope to ICSID proceedings possibly makes it a more attractive defence against intra-EU investment arbitrations. With assets in Germany, it is a way to establish early on that efforts to enforce into these assets will fail. § 1032(2) ZPO's relevance is less obvious regarding disputes without a connection to Germany. The presiding judge claimed a declaration would have persuasive value for other state courts. That might be so inside the EU. Whether state courts outside the EU would give deference to a German declaration of inadmissibility, is doubtful – particularly if the respective state is bound by the ICSID convention (like Australia). Any deference by arbitral tribunals would come as a surprise, too.

Additionally, the BGH indicated that German courts must refuse to enforce intra-EU ICSID awards. The judges especially invoked *Romatsa*, where the CJEU ruled that such awards can have "no effect and cannot be enforced" (para. 43). That means intra-EU investors are well-advised not to bother attempting to enforce their ICSID awards in Germany.

What's Next?

Although the BGH is Germany's highest civil court, it need not be the investors' end of the line. Once the senate has issued its final order, a constitutional complaint remains an option – Achmea B.V.'s complaint challenging the initial *Achmea* decisions is still pending at the Federal Constitutional Court. *Ultra vires* accusations against the CJEU were raised during the hearing. But the BGH denied that the CJEU's interpretation of Art. 267 TFEU was "simply not comprehensible and objectively arbitrary" (see Federal Constitutional Court, Judgment of 5 May 2020 – 2 BvR 859/15, para 118). Convincing the Federal Constitutional Court to the contrary is possible, yet a steep uphill battle.

Finally, counsel briefly discussed another referral to the CJEU. Looking at *PL Holdings* (para. 52) and *Romatsa*, however, the BGH was at a loss which questions are left unanswered. Whether a referral would even produce favourable results for the investors, is another matter. Under no illusions, their counsel conceded: "We don't want to go to Luxembourg."

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