Kluwer Arbitration Blog

Swiss Supreme Court Upholds Arbitral Award in Favor of Investors Against the Czech Republic

Christine Moehler (Pestalozzi) · Monday, November 4th, 2024

Over the last decade, the Czech Republic has defeated several treaty claims that were brought by investors following reforms in the Czech solar power sector. The state's winning streak ended in June 2024, when the Swiss Supreme Court upheld an arbitral award ordering the Czech Republic to pay over 350 million Czech koruna (15 million US dollars) to a group of European investors. In its Decision 4A_66/2024, the Swiss Supreme Court rejected the state's argument that the tribunal lacked jurisdiction and dismissed its allegation that the tribunal had violated the state's right to be heard. Among its jurisdictional objections, the state invoked the ruling of the Court of Justice of the EU (CJEU) in the *Achmea* case and claimed that this ruling precluded its consent to the arbitration clause in the applicable investment treaty.

Both the tribunal and the Swiss Supreme Court declared the state's objection based on the *Achmea* case to be inadmissible, on account of its timing. This post examines their rulings, which provide interesting insights into the risks presented by ongoing legal debates that may, if decided by a court during the arbitral proceedings, affect the arbitral tribunal's jurisdiction.

Background of the Case

The arbitration in question was initiated in May 2013 by Dutch-registered Natland Investment Group and related companies (Natland) against the Czech Republic. The dispute had arisen over reforms enacted by the state to reduce incentives to invest in its photovoltaic sector. In the preceding years, the arrival of low-cost solar panels and other circumstances had made these investments soar. Starting in 2009 therefore, the state successively withdrew support measures for photovoltaic installations and introduced new taxation rules—to the displeasure of many investors, including Natland, who claimed damages in the amount of at least 1.8 billion Czech koruna (78 million US dollars) for breach of applicable international treaties. The arbitration was seated in Geneva and governed by the 1976 UNCITRAL Rules.

From the outset, the state claimed that the tribunal lacked jurisdiction over the matter. In a partial award rendered on 20 December 2017, the tribunal confirmed its jurisdiction over some claims and denied it for others. In the same partial award, the tribunal found that the state was—in principle—liable for certain treaty breaches.

The state challenged the partial award before the Swiss Supreme Court, but without success (Decision 4A_80/2018 of 7 February 2020). While the challenge proceedings were still ongoing, the CJEU handed down its ruling in the *Achmea* case. In this now-famous case, the CJEU held that clauses in bilateral investment agreements between EU countries that allow an investor from an EU country to bring an arbitration claim against another EU country are not compatible with EU law (C-284/16, para. 60). Effectively, the ruling precluded arbitration clauses in intra-EU investment treaties.

However, the Swiss Supreme Court did not take the *Achmea* ruling into account for the challenge proceedings because—as the state admitted—the ruling post-dated the contested partial award of December 2017 (Decision 4A_80/2018 consideration 2.4.1 *et seq*.).

The state then raised the *Achmea* objection in the arbitration proceedings, which resumed after the Swiss Supreme Court had dismissed the challenge against the partial award.

The tribunal, like the Swiss Supreme Court, declared the *Achmea* objection inadmissible. In an interim decision of July 2021, the tribunal found that the objection was belated because it was raised long after the state submitted its statement of defense, the cut-off point for jurisdictional objections stipulated by Article 21(3) of the 1976 UNCITRAL Rules. The tribunal reasoned that, when the statement of defense was submitted in 2015, the debate over the validity of arbitration clauses in intra-EU investment treaties was already ongoing. It concluded that the state could have raised the intra-EU objection earlier or reserved its right to do so later, once the *Achmea* judgment was rendered. The tribunal rejected the state's argument that the *Achmea* ruling was a new "fact" that justified a new plea for lack of jurisdiction.

The tribunal rendered its final award on 15 December 2023, and ordered the state to pay over 350 million Czech koruna (15 million US dollars) plus interest to Natland for losses caused by treaty breaches.

The Czech Republic sought to annul both the partial award of 20 December 2017 and the final award of 15 December 2023. In its judgment of 13 June 2024, the Swiss Supreme Court denied the challenge, rejecting the state's argument that the tribunal lacked jurisdiction and the allegation that the tribunal had violated the state's right to be heard.

Considerations of the Swiss Supreme Court on the Grounds for Annulment

In its ruling, the Swiss Supreme Court held that the final award could not be challenged for **lack of jurisdiction** because those issues had already been dealt with in the partial award of 2017 and the interim decision of 2021.

As mentioned, the state challenged the partial award of 2017 without success. The Swiss Supreme Court held that the interim decision of 2021, in which the tribunal had declared the *Achmea* objection inadmissible, could have been challenged at the time, but was not (Decision 4A_66/2024 consideration 4.2). The Swiss Supreme Court rejected the state's argument that the interim decision was merely a provisional one and that the tribunal had "reaffirmed its jurisdiction" in the final award of 2023. Consequently, the Swiss Supreme Court did not hear the *Achmea* objection in the challenge proceedings.

The Swiss Supreme Court also rejected the state's claim that the tribunal had violated its **right to be heard**. Specifically, the state argued that, when it was found liable in the partial award of December 2017, the tribunal had not considered the state's arguments regarding the precedence of European law over the relevant investment protection agreements. The Swiss Supreme Court disagreed with this allegation and held that the tribunal was not obligated to deal with each argument in detail (Decision 4A_66/2024 consideration 5.3).

Comment

While the case did not delve into the *Achmea* ruling, it does highlight the difficulties of submitting jurisdictional pleas based on court judgments. In particular, it cannot be assumed that a new judgement will be considered a new circumstance that will justify a new plea. That was made clear by the tribunal when it held, in its interim decision of 2021, that the *Achmea* ruling was of a legal rather than factual nature. Because the legal debate over intra-EU arbitration provisions had begun long before the *Achmea* ruling, the tribunal argued, the corresponding objection could have been raised earlier. This means that a party willing to raise a jurisdictional objection must keep abreast of ongoing legal proceedings and either raise the plea immediately or at least reserve its right to do so later, once a potentially relevant judgement is rendered.

Even if the Swiss Supreme Court had heard the *Achmea* objection in this case, it is doubtful whether it would have been successful. That is suggested by a landmark decision which the Swiss Supreme Court rendered in April 2024 (Decision 4A_244/2023). In this decision, the Swiss Supreme Court made it clear that it would not be joining "the crusade" that EU bodies were waging against investment arbitration, as evidenced by the *Achmea* and *Komstroy* decisions (see also previous coverage on the Blog here). Specifically, the Swiss Supreme Court held that such decisions handed down by the CJEU were not binding on a national court called upon to rule on an appeal against an award made by an arbitral tribunal sitting in Switzerland (Decision 4A_244/2023 consideration 7.6.5). In doing so, the Swiss Supreme Court confirmed that Swiss-seated tribunals have jurisdiction over intra-EU investments claims. Therefore, Swiss-seated tribunals are a good option for such claims, at least for what is left of international arbitration based on intra-EU investment treaties (see also previous coverage on the Blog here).
