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End of the Road: German Constitutional Court Closes Achmea Chapter

Greg Lourie (Schellenberg Wittmer) · Tuesday, November 12th, 2024

On March 6, 2018, the Court of Justice of the European Union ("CJEU") delivered its (in)famous *Achmea* judgment (Case C-284/16), which subsequently became synonymous with the demise of investor-state arbitration in bilateral investment treaties between Member States of the European Union ("intra-EU BITs"). In this decision, the CJEU concluded that investor-state arbitration clauses in intra-EU BITs are incompatible with EU law, in particular with Articles 267 and 344 of the Treaty on the Functioning of the European Union ("TFEU") and the principle of sincere cooperation. The main concern of the CJEU was that, although investor-state tribunals may be called upon to interpret and decide on EU law, they are not Member State courts within the meaning of Article 267 TFEU. Consequently, they cannot avail themselves of the preliminary reference procedure through which the CJEU ensures the coherence and uniform application of EU law.

Ironically, the case leading to the *Achmea* judgment was referred to the CJEU by the German Federal Court of Justice ("BGH") in 2016 precisely by way of a preliminary reference procedure under Article 267 TFEU, when it was seized with the setting aside proceedings against the arbitral award in *Achmea B.V. v. Slovak Republic* (PCA Case No. 2008-13).

Following the judgment of the CJEU, the BGH set aside the award in October 2018. The BGH held that, following the *Achmea* judgment, the arbitration clause in the Netherlands-Slovak Republic BIT must be considered invalid. Therefore, there was no consent to arbitrate disputes arising out of the BIT. Achmea challenged the BGH's decision by way of constitutional complaint with the German Federal Constitutional Court ("BVG").

In addition, Achmea filed a separate constitutional complaint against the Act of Approval to the Agreement on the Termination of Bilateral Investment Treaties between the Member States of the European Union ("Act" and "Termination Agreement", respectively), pursuant to which most EU Member States agreed in May 2020 to terminate their intra-EU BITs with retroactive effect (see previous coverage on the Blog here and here).

On July 23, 2024, the BVG dismissed both complaints, although the full text of the decisions was not made available until September 2024 (see 2 BvR 557/19 and 2 BvR 141/22).

Achmea's Complaint Against the BGH Decisions (2 BvR 557/19)

Achmea's main arguments against the BGH Decisions were that (i) by following the CJEU's interpretation of the invalidity of intra-EU BITs, the BGH violated Achmea's fundamental rights under the German constitution, the so-called *Basic Law*, including the right to property, the right to freedom of occupation, and access to justice; and (ii) the CJEU exceeded its powers under the TFEU and thus acted *ultra vires* in invalidating investor-state arbitration clauses in intra-EU BITs. In this respect, Achmea argued that the CJEU's interpretation of Articles 267 and 344 was arbitrary and untenable.

The BVG, however, dismissed Achmea's complaint for a different reason. According to the BVG, Achmea had failed to demonstrate a protected legal interest in a merits judgment. Since the BGH had annulled the Achmea award in 2018, the factual and legal circumstances had changed significantly with the entry into force of the Termination Agreement, which terminated the Netherlands-Slovak Republic BIT with retroactive effect. Therefore, even if the BVG were to uphold Achmea's constitutional complaint and remit the case to the BGH, the result would be no different. The BGH would have to apply the law as in force on the day of the last oral hearing, and thus, even if it had erred in setting aside Achmea's award, the BGH would have to set aside the award again because the BIT ceased to exist in the meantime.

The BVG observed that Achmea had not raised this point in the present complaint and there would seem to be a good reason for the omission. Achmea appears to have anticipated the BVG's reasoning and therefore filed the parallel constitutional complaint against the Act. There, Achmea explained that its complaint was motivated by the fact that if it were successful with its principal complaint, the BGH would still annul the arbitral award as a consequence of the Termination Agreement. Thus, Achmea would seem to have accepted that in order to succeed, it had to prevail on both constitutional complaints. The BVG noted the interdependence of the two complaints and reiterated the main reasoning from the parallel proceedings against the Act in this decision.

Although the BVG found that the constitutional complaint should be dismissed on this ground alone, it nevertheless analyzed whether the BGH's decision implementing the CJEU's *Achmea* judgment was compatible with the Basic Law. The BVG recalled that the standard for the limited review of acts of the CJEU and other EU bodies has been firmly established in its previous case law. The BVG accepts the primacy of EU law over the Basic Law as long as (i) the CJEU decision in question is not *ultra vires*, i.e. does not exceed the competences that Germany has delegated to the EU under Article 23 of the Basic Law, and (ii) the CJEU generally ensures that the level of protection under EU law is comparable to the basic rights under German constitutional law.

With regard to (i), the BVG noted that the CJEU enjoys broad discretion in interpreting EU law and that it would be incompatible with the primacy of EU law if every national court assumed the power to overrule and disregard the decisions of the CJEU if it disagreed with them. For a decision of the CJEU to be *ultra vires*, such a decision would have to be completely arbitrary and contrary to generally accepted principles of legal methodology. Applying this standard, the BVG found that Achmea's complaint was primarily based on its own interpretation of Articles 267 and 344 TFEU, but there was nothing to suggest that the *Achmea* judgment was arbitrary or the CJEU's reasoning untenable. On the contrary, the judgment was based on the overarching objective of ensuring the uniform application of EU law, a position that has been consistently advocated by the EU Commission and the CJEU over the years, and is all the more applicable here because the subject matter of investment arbitrations in intra-EU BITs will often also fall within the scope of EU

fundamental freedoms.

As to (ii), the BVG found that Achmea had already failed to demonstrate that the standard of protection of fundamental rights guaranteed by the CJEU had fallen below the core principles enshrined in the fundamental rights of the Basic Law. According to the BVG's jurisprudence, this in itself renders constitutional complaints based on German fundamental rights inadmissible.

To the extent that Achmea's complaint is measured against the standards of the Charter of Fundamental Rights of the European Union, the BVG also found no violation of Achmea's rights. With respect to Achmea's right to property, the BVG noted that while an arbitral award can be considered "property", it is well established that the recognition of arbitral awards may be subjected to limitations. Under German procedural law, the implementation of mandatory EU law, as interpreted by the CJEU, is such an exception, which is incorporated through the setting aside procedure in Section 1059 of the German Code of Civil Procedure. The annulment of the arbitral award was also not a violation of Achmea's legitimate expectations, as Achmea could not reasonably rely on the validity of the arbitral award in light of the EU Commission's clear position on the validity of intra-EU BITs since 2006.

The BVG also noted that it was unclear how the validity of an arbitration agreement could affect Achmea's right to freedom of occupation, which primarily protects the right to choose and pursue a professional activity of one's choice.

Finally, with respect to access to justice, the BVG noted that the deprivation of access to investor-state arbitration does not leave Achmea without access to justice. Achmea can seek access to the Slovak domestic courts – which it had done successfully – and to other avenues such as the ECHR. The BVG also questioned whether investor-state arbitration, as an additional means of dispute resolution agreed upon by the parties, can be considered an element of access to justice. According to the BVG, it could at best be part of the right to freedom of contract, which, however, Achmea did not invoke.

Achmea's Complaint Against the Law Approving the Termination Agreement (2 BvR 141/22)

In its separate complaint against the Act, Achmea raised essentially the same arguments against Germany's accession to the Termination Agreement.

In a much shorter decision, the BVG dismissed the complaint, holding that Germany's Act of Approval could not affect Achmea's rights. The BVG noted that the Termination Agreement does not require the consent of all Member States to enter into force but becomes effective between two Member States when they ratify the Agreement. Thus, Germany's accession to the Termination Agreement was irrelevant for the legal force of the Netherlands-Slovak Republic BIT, which was terminated when both states ratified the agreement.

Conclusions

The rulings of the BVG hardly come as a surprise. Following the threshold established in the

BVG's previous jurisprudence, in particular the *Maastricht* and *Lisbon* decisions regarding the review of *ultra vires* acts of EU institutions and the *Solange II* decision regarding the review of such acts against the fundamental rights in the Basic Law, it was unlikely that Achmea would have been able to establish a sufficiently serious violation of constitutional law or that the BVG would have deviated from its line of jurisprudence. One of the noteworthy elements of the BVG's decision is that, although it addresses the issue of Achmea's legitimate expectations, the BVG appears to have carefully avoided examining whether a retroactive termination of the BIT's arbitration clause by the CJEU—or, as the case may be, of the entire BIT through the Termination Agreement—was legally permissible. One could argue that this would have been primarily of academic value, given the BVG's observation that Achmea's legitimate expectations had been sufficiently taken into account by the BGH in deciding whether there were grounds to depart from the CJEU's jurisprudence. But it is, at the very least, a missed opportunity to contribute to the development of international law.

As for the *Achmea* saga, the German chapter is likely to be closed as the BVG expressly held that the decision is final and not subject to appeal.

This entry was posted on Tuesday, November 12th, 2024 at 8:05 am and is filed under Achmea, EU Law, German Federal Constitutional Court, International Investment Arbitration, International Investment Law, Intra-EU BITs, Intra-EU Investment Arbitration, Intra-EU ISDS, Investment Arbitration, ISDS
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