Kluwer Arbitration Blog

Investors' Fundamental Rights Post-Achmea: Insights from the German Constitutional Court Decisions in Achmea

Laura Rees-Evans, Miglena Angelova (Fietta LLP) · Tuesday, January 7th, 2025

On 13 September 2024, the German Constitutional Court (*Bundesverfassungsgericht*, "BVG" or "the Court") published two judgments dated 23 July 2024 (available here and here, both in German), accompanied by a press release (here), rejecting as inadmissible two constitutional complaints brought by the claimant in the *Eureko (later Achmea) v Slovakia (1)* arbitration ("BVG Judgments"). While other commentators have already provided an overview of the background to and content of the BVG Judgments (e.g., here), we consider in this post the Court's approach to Achmea's fundamental rights arguments and potential implications for investors seeking protection under the European Convention on Human Rights (the "Convention" or "ECHR") as an alternative to intra-EU investment arbitration.

Origins of the BVG Judgments

The BVG Judgments essentially arise out of the Court of Justice of the European Union ("CJEU")'s (in)famous *Achmea* Judgment, finding that the arbitration clause of the Netherlands-Slovakia BIT was incompatible with EU law (see our previous coverage here). The CJEU's ruling led to the subsequent Order of the German Federal Court of Justice (*Bundesgerichtshof*, or "BGH") of 31 October 2018, setting aside the arbitral award in *Achmea v. Slovakia* ("BGH Order"). On 12 December 2018, Achmea filed a constitutional complaint before the BVG challenging the BGH Order. Achmea complained, *inter alia*, that the BGH Order had violated its fundamental rights, including the guarantee of property, freedom to practise an occupation, and the right to effective legal protection, as well as its legitimate expectations, because the BGH should not have considered itself bound by the *Achmea* Judgment.

In 2022, Achmea filed a second constitutional complaint before the BVG challenging the 2021 German Parliament Act ratifying the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union ("Termination Agreement").

On 23 July 2024, the BVG dismissed both complaints as inadmissible (see detailed analysis of each judgment in Greg Lourie's blog post here). Our comments focus on the BVG's analysis in its first judgment (Case 2 BvR 557/19) ("BVG First Judgment"), in which the Court found no violation of Achmea's fundamental rights. However, it bears emphasising at the outset that, as Lourie observes in his post, the Court found that, because of the Termination Agreement, "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 set aside the award again because the BIT ceased to exist in the meantime." The Court's fundamental rights analysis must therefore be read in this light.

The BVG's Approach to Fundamental Rights

The BVG First Judgment acknowledged that the *Achmea* Judgment effectively precludes investors from resolving intra-EU investment disputes through arbitration. However, the BVG emphasised that investors continue to have access to a legal framework that, although not specifically designed for investors, provides adequate protection of their fundamental rights. In particular, in its view, investors remain protected under the EU's multi-level legal framework, including the Treaty on the Functioning of the European Union ("TFEU") and the EU Charter of Fundamental Rights ("Charter"). The Court also pointed out that investors may bring individual complaints before the European Court of Human Rights ("ECtHR") for violation of their property rights under Article 1 Protocol No. 1 ("A1P1") to the ECHR.

However, the Court saw no violation of Achmea's right to property, arising out of the set-aside of its award, in this case. First, it recalled the notion of property under the Charter and the ECHR: it held that the Charter does not cover "mere commercial interests or expectations," and that A1P1 of the ECHR protects only final and binding arbitral awards that (i) have the same status as final court decisions under domestic law, (ii) are subject to only limited review by national courts, and (iii) cannot be examined for substantive correctness (para. 76) (referring to the ECtHR judgments in *Stran Greek v Greece* (para. 61) and *BTS Holdings v Slovakia* (paras. 47 *et seq.*)). The Court does not appear to have taken a clear view as to whether the *Achmea* award constituted a possession in these terms (unlike the BGH before it, which had found that Achmea had not been "deprived of any asset as a result of the setting aside of the arbitral award" (authors' translation) (BGH Order, para. 72)).

The BVG rejected the argument that the retroactive application of the *Achmea* Judgment violated Achmea's legitimate expectations, noting that the CJEU did not limit the temporal effects of the Judgment. The Court similarly found no breach of the principle of good faith given that, since 2006, the European Commission had consistently maintained that intra-EU BITs are incompatible with EU law and Slovakia had raised jurisdictional objections on this basis from the outset of the arbitration.

The Court also saw no issue with the BGH's refusal to seek an additional preliminary ruling from the CJEU or a preliminary ruling from the BVG on the temporal application of the *Achmea* Judgment. The Court observed in this context that Achmea had failed to demonstrate any right to investor-State arbitration under customary international law.

Perhaps the most contentious aspect of the Court's reasoning is its conclusion that, by agreeing on a dispute settlement mechanism outside of the state justice system, the parties waived their right of access to justice. In the Court's view, the agreement to settle disputes through arbitration is, at best, protected as an exercise of procedural autonomy rather than a fundamental right. The Court accordingly saw no violation of Achmea's right to effective legal protection.

Finally, the Court found no evidence that the BGH had failed to consider a potential violation of

the principle of legal security or had acted arbitrarily.

In light of the above, the BVG concluded that Achmea had not substantiated any violation of its fundamental rights.

The ECHR as an Alternative to Intra-EU Arbitration

The BVG's confidence in the availability of alternative remedies under the ECHR for intra-EU investment protection post-*Achmea* remains to be fully tested. While the ECtHR may indeed provide a forum for investors to pursue new intra-EU investment claims—as suggested by the BVG—it may not always be an attractive route for those seeking valuable (and prompt) recovery (the proceedings in *Iliria v Albania* being a case in point, see here). The requirement to exhaust domestic remedies before bringing a claim to the ECtHR presents an additional procedural hurdle. It effectively undermines the core benefit of arbitration: direct access to a neutral and independent forum for dispute resolution.

Concluding Remarks

The BVG First Judgment represents one of the first occasions on which an EU Member State Court has grappled head-on with the role of fundamental rights in proceedings impacted by the CJEU's *Achmea* Judgment (as Nardell KC and Rees-Evans observed in their post on *BTS Holding v Slovakia*, here, earlier domestic court decisions in the post-*Achmea* line have been light-touch or even silent on fundamental rights issues). However, the BVG's analysis of these questions was perhaps more limited than might have been expected, possibly on account of the decisiveness of the separate but intervening issue of the Termination Agreement. The respective relevance of fundamental rights, as against the impact of the Termination Agreement, will vary from case to case, and from jurisdiction to jurisdiction.

What the BVG did not address in its Judgment—and understandably so—is the possibility of award-holders, like Achmea itself, turning to the ECtHR for redress against Convention States whose courts have annulled or refused to recognise or enforce intra-EU arbitral awards rendered post-*Achmea*. Achmea itself may make this next move, potentially bringing to the ECtHR a claim against Germany in relation to the set-aside of its arbitral award against Slovakia under A1P1, Article 13 (the right to an effective remedy) in conjunction with A1P1 and Article 6(1) (the right to a fair trial) of the ECHR (*see e.g.*, here, here, here, and here). How the ECtHR will engage with such claims on their merits is hotly anticipated but remains to be seen.

This entry was posted on Tuesday, January 7th, 2025 at 9:07 am and is filed under Access to Justice, Achmea, Europe, European Convention on Human Rights, German Federal Constitutional Court, Germany, Intra-EU Investment Arbitration, Intra-EU ISDS, Investment Arbitration, Investor-State arbitration, ISDS
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.