THE VIEW FROM EUROPE
WHAT'S NEW IN EUROPEAN ARBITRATION?

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Recent Decisions by National Courts

ENGLAND

In a groundbreaking decision dated March 6, 2018, the European Court of Justice ("**ECJ**") ruled in *Slovak Republic v. Achmea BV* (Case C-284/16) that the arbitration clause contained in the 1991 Netherlands-Slovakia bilateral investment treaty ("**BIT**") has an adverse effect on the autonomy of EU law and is therefore incompatible with EU law. The German Federal Court of Justice had referred the issue as concerning interpretation of EU treaties to the ECJ for a preliminary ruling. This (surprise) ruling will have a significant effect on investor-state arbitration, and is one more chapter in a saga we have reported on here over the years.

Background

We had previously reported about this case numerous times, as it concerns a dispute at the intersection of EU law and arbitration (*see Dispute Resolution Journal*, August/October 2012, p. 13, *Dispute Resolution Journal*, Vol. 68 No. 3, p. 93, *Dispute Resolution Journal,* Vol. 70 No. 1, p. 116).

The case started in October 2008, when the Dutch insurance group Achmea (formally Eureko BV) commenced arbitration against Slovakia based on the BIT. Achmea claimed damages for wrongful expropriation by Slovakia's partial reversal of the liberalization of its health insurance market previously opened to private investors. An arbitral tribunal (composed of Vaughan Lowe QC, Albert Jan van den Berg and VV

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Veeder QC) was constituted according to the provisions of the BIT and pursuant to the UNCITRAL Arbitration Rules with the seat of arbitration in Frankfurt am Main.

The arbitral tribunal rejected Slovakia's argument that its accession to the EU in May 2004 terminated the BIT or rendered its arbitration clause inapplicable (Slovakia's so-called "intra-EU jurisdictional objection"), and confirmed its jurisdiction in an interim award. Slovakia then petitioned the Higher Regional Court of Frankfurt am Main to set aside the interim award on jurisdiction. However, the court confirmed the interim award on May 10, 2012, finding no conflict between EU law and the BIT. Slovakia then appealed to the German Federal Court of Justice.

In the meantime, on December 7, 2012 the arbitral tribunal awarded Achmea EUR 22 million in damages. Slovakia then petitioned the Higher Regional Court of Frankfurt am Main to set aside the award on merits. On December 18, 2014 that court dismissed Slovakia's application to set aside the award. In doing so, the court confirmed its earlier decision of May 10 2012, that the arbitration clause in the BIT was valid and did not violate EU law.

The court rejected the argument that the arbitration clause in the BIT was invalid on the basis of article 344 of the Treaty on the Function of the European Union ("**TFEU**").[1] It explained that article 344 TFEU only deals with disputes between Member States and not with proceedings concerning the relationship between Member States and investors; nor does it contain a general safeguard for the competence of the ECJ.

The court also rejected the argument that the arbitration clause in the BIT violates article 267 of the TFEU (providing that where a question is raised before any court or tribunal of a Member State regarding the interpretation of treaties, that court or tribunal may request the ECJ to give a ruling thereon). Slovakia had argued that because arbitral tribunals do not have the option of requesting guidance from the ECJ, no final check by the ECJ is possible and this would contravene EU law in such a case. However, the court explained that arbitral awards are subject to the control of state courts in any setting

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[1] This article reads: "*Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.*"

aside proceedings and state courts have the option of requesting a preliminary ruling from the ECJ. On this basis the court reasoned that arbitral proceedings are not outside the institutional and judicial framework of the EU. Thus, the Higher Regional Court of Frankfurt am Main confirmed its decision from 2012 and again rejected Slovakia's so-called intra-EU jurisdictional objection.

Slovakia appealed to the Federal Court of Justice. On appeal, the Federal Court of Justice referred questions on the compatibility with EU law of the BIT's arbitration clause to the ECJ for a preliminary ruling, thereby offering its view that the arbitration clause was not contrary to the provisions of the TFEU.

Decision

The ECJ first recalled that EU Member States are obliged to ensure uniform and consistent application of EU law. According to the ECJ, one of the keystones of the judicial system established by the EU Treaties and intended to ensure consistency and uniformity in the interpretation of EU law is the preliminary ruling procedure embodied in Article 267 TFEU.

The ECJ found that in resolving an investment treaty dispute, arbitral tribunals constituted under intra-EU BITs are called upon to interpret and apply EU law as part of the law in force in the host State and as international norms in force between the parties to the BIT. However, the ECJ held that such arbitral tribunals (such as the one constituted under Article 8 of the BIT) cannot be regarded as a court or tribunal of a Member State within the meaning of Article 267 TFEU. Consequently, the arbitral tribunal has no power to make a reference to the ECJ for a preliminary ruling, which is problematic since the arbitral tribunal may be required to interpret or apply EU law. Furthermore, the ECJ held that it was not sufficient, for the purposes of safeguarding the unity and coherence of EU law, that the courts of the law of the seat could refer a preliminary question to the ECJ during annulment or enforcement proceedings.

The ECJ reasoned that by concluding an intra-EU BIT, Member States had effectively consented to remove from the jurisdiction of their national courts certain disputes that could require the application and interpretation of EU law and, accordingly, avoid the system of judicial remedies that all Member States are obliged to establish in areas covered by EU law pursuant to Article 19(1) TFEU. In such

circumstances, the ECJ concluded that the arbitration clause contained in the BIT is incompatible with certain key principles of EU law and that it has an adverse effect on the autonomy of EU law.

Thus, the ECJ found that because arbitral tribunals constituted under intra-EU BITs may be called upon to interpret and apply EU law to rule on possible infringements of the BIT, but may not request preliminary rulings from the ECJ, and their awards are subject only to limited judicial review by EU Member State courts, investor-State arbitration under intra-EU BITs threatens the effective application of EU law.

The ECJ made clear that its ruling is limited to investor-State arbitration under intra-EU BITs. It distinguished commercial arbitration from its ruling by noting that commercial arbitration is based on the parties' consent, while investor-state arbitration derives from a treaty by Member States, and these may not agree to remove ECJ oversight.

Comment

The ECJ only ruled on the abstract question of whether investor-state arbitrations under intra-EU BITS are compatible with EU law. It did not say whether it follows from such incompatibility that the arbitral tribunal in the case was deprived of jurisdiction. It is now up to the German Federal Court of Justice to decide on the consequences of the ECJ ruling for the *Achmea* award. The Federal Court of Justice must now determine whether the ECJ's ruling means that the arbitration clause under the Netherlands-Slovakia BIT is not valid, leaving the award to be set aside as Slovakia has sought.

The ECJ's decision is in line with the longstanding opposition of the European Commission against investor-state arbitration under existing intra-EU BITs and its problematic push for bilateral or multilateral investment courts instead. The decision raises many questions, including with respect to the investor-state dispute settlement provisions within the multilateral Energy Charter Treaty ("**ECT**"). The ECJ seems to make a distinction between treaties entered into by the EU itself or only by Member States, with the idea that the EU may conclude such agreements but not Member States. The EU itself and its Member States are signatories to the ECT, but Spain is nonetheless already trying to call into question concluded ECT arbitrations on the basis of the *Achmea* decision. The decision might also be seen as opening up a can of worms with respect to such questions as "would

the EU's investment court proposals be compatible with the *Achmea* decision?" or "would a tribunal deciding disputes that arise within the context of the upcoming Brexit withdrawal agreement be compatible with the *Achmea* decision?"

The decision will in any event have serious consequences for investment arbitrations on the basis of intra-EU BITs, which may no longer be possible in the future. We are also already seeing a ripple effect: the Federal Republic of Germany has now requested the arbitral tribunal to dismiss the ICSID case brought against it under the Energy Charter Treaty by the Swedish energy company Vattenfall for lack of jurisdiction following the ECJ's *Achmea* decision. Hungary and Spain are reportedly now also invoking the *Achmea* decision in an attempt to annul intra-EU BIT awards rendered against them.

THE NETHERLANDS

In a judgment of the Dutch Supreme Court dated November 24, 2017 (*Maximov v. NLMK*, Docket No. ECLI:NL:HR:2017:2992) the Court held that, under special circumstances, a court has the discretionary power under the New York Convention to grant the recognition and enforcement of an arbitral award even if that award has been set aside.

Background

In 2011 an arbitral tribunal under the auspices of the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation (ICAC) (consisting of arbitrators Zhykin, Belykh, and Devyatkin) issued an award of 8.9 billion rubles in favor of Russian billionaire Mr. Nikolay Maximov in a dispute between him and global steel producer NLMK. The dispute related to the calculation of the purchase price under a Share Purchase Agreement between the parties. NLMK initiated setting aside proceedings against the award with the Commercial Court in Moscow. The court set the award aside on three grounds:

1. Under Russian law, the claim for the purchase price is deemed to be a corporate dispute that is not arbitrable and, therefore, must be brought before the courts.
2. The quantification of the damages was contrary to the Russian Civil Code and, consequently, contrary to Russian public policy.

3. The experts who assisted Maximov in the arbitration worked at Russian institutes where arbitrator Belykh and arbitrator Zhykin also worked. Furthermore, the experts each held higher positions at these institutes than did the arbitrators. The arbitrators failed to disclose these connections. This led the court to find that the composition of the arbitral tribunal was not in accordance with what the parties had agreed.

The Russian appellate court and the Russian Supreme Court upheld the Commercial Court's decision to set the award aside. Maximov nevertheless tried to enforce the award in foreign jurisdictions, including the Netherlands, by arguing that the decision of the Russian courts was the result of bias and an unfair trial.

In November 2011, the Amsterdam District Court found that an annulled award can only be enforced in the Netherlands "under exceptional circumstances", namely where to give effect to the judgment setting aside the award would violate Dutch public policy, for example because the judgment was rendered in improper proceedings. The court was not satisfied on the evidence that exceptional circumstances existed in this case to justify enforcement of the award.

Following an appeal by Maximov, the Amsterdam Court of Appeal decided that it required expert evidence to determine whether a fair trial in the Russian court proceedings had taken place. On consideration of the expert evidence, the court issued its judgment on September 27, 2016 upholding the first instance decision. The court found that there was insufficient evidence to support the claim that Maximov did not receive a fair trial in the Russian proceedings. Maximov appealed to the Dutch Supreme Court.

Decision

The Dutch Supreme Court confirmed the decision of the Amsterdam Court of Appeal, denying leave for recognition and enforcement of the set-aside award in the Netherlands.

Maximov argued that the Court of Appeal had erroneously disregarded that Article V(1) and V(1)(e) of the New York Convention affords the court a (broad) degree of discretion to decide whether a foreign setting aside judgment prevents enforcement of the set-aside award in the Netherlands. The Dutch Supreme Court held that the New York Convention must be interpreted on the basis of Articles 31-33 Vienna Convention on the Law of Treaties ("**Vienna Convention**").

Article 33(4) Vienna Convention requires that Article V(1) New York Convention be given the meaning which best reconciles the different authentic texts, having regard to the object and purpose of that Convention. The Court considered that the object of the Convention is the recognition and enforcement of foreign arbitral awards, whereas the purpose of the Convention is to facilitate recognition and enforcement of such awards.

The Court found on this basis that the authentic texts of Article V(1) New York Convention[2] – the meaning of which possibly differs – may best be reconciled by interpreting Article V(1) as allowing the court a certain degree of discretion to recognize or enforce a foreign arbitral award, even where one or more of the Article's grounds for refusal applies. The Court considered that since this discretion constitutes an exception to the rule in Article V(1) New York Convention, it may only be invoked under special circumstances. The Court held that Article V(1)(e) New York Convention must therefore be interpreted as meaning that the setting aside of a foreign arbitral award does not prevent the court, using its discretion, from nonetheless recognizing or enforcing the arbitral award under special circumstances. Two possible examples were named by the Court:

1. if the arbitral award was set aside on grounds that do not correspond with the grounds for refusal of Article V(1)(a)-(d) New York Convention, and those grounds are also not universally acceptable under international law; or
2. if the foreign setting-aside judgment is also not eligible for recognition in the Netherlands, on the ground that one or more of the conditions that apply to the recognition of a foreign judgment under Dutch private international law have not been fulfilled.

The Court noted that the party seeking recognition or enforcement of a foreign arbitral award that has been set aside has the burden to demonstrate circumstances that justify disregarding the grounds for refusal as set forth in Article V(1) New York Convention.

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[2] The English text states in part: "*Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that….*"

Comment

Interestingly, in the case of *Yukos Capital v. Rosneft*, the same Amsterdam Court of Appeal held in 2009 that there was evidence that the Russian court that set aside an arbitral award in that case lacked impartiality and independence. In that case, the Amsterdam Court of Appeal granted enforcement, while in this case the same court found insufficient evidence of unfair proceedings in Russia and on this basis refused enforcement. By adding the requirement of special circumstances, this decision seems to limit the use of the discretionary power of the courts in the enforcement of an arbitral award that has been set aside.

Maximov has also been unsuccessful in attempts to enforce the award in England, with the High Court of England and Wales also refusing to enforce it on July 27, 2017. The High Court found that Maximov failed to meet the heavy burden of proof that the decision of the Commercial Court in Moscow was so extreme and incorrect that no court acting in good faith could have arrived at it other than by bias. In France, however, Maximov was more successful, with enforcement being granted in 2012 by the Tribunal de Grande Instance of Paris and the Paris Court of Appeal in April 2014. This is in line with the French approach of enforcing awards that have been set aside at the seat – an approach not entirely unknown to certain U.S. courts as well (*see* the *Pemex* case[3]).

FRANCE

In a decision of the Paris Court of Appeal dated March 27, 2018 (Docket No. 16/09386), the court annulled an ICC award dismissing USD 150 million claims against a Middle Eastern branch of Audi Volkswagen because of a German arbitrator's non-disclosure of his law firm's work for Porsche, which belongs to the Volkswagen Group.

Background

In 2013 a Qatari vehicle distributor, Saad Buzwair Automotive Co ("**SBA**"), had commenced an ICC arbitration against Audi Volkswagen Middle East FZE LLC of Dubai ("**Audi Volkswagen**") seeking damages for breach of contract pertaining to the distribution of Audi

[3] *Corporacio´n Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploracio´n y Produccio´n (Pemex)*, 2013 WL 4517225 (S.D.N.Y. Aug. 27, 2013).

and Volkswagen vehicles in Qatar. The award was rendered in March 2016 by a Paris-seated tribunal of three respected German arbitrators: Wolfgang Wiegand (president), Klaus-Albrecht Gerstenmaier (appointed by SBA) and Stefan Kröll (appointed by Audi Volkswagen). The award rejected SBA's claims and ordered SBA to bear all costs.

SBA challenged the award under French law for irregularity in constitution of the arbitral tribunal. Namely, SBA alleged that arbitrator Gerstenmaier failed to declare ties between his law firm and entities of the Volkswagen Group, and that these circumstances were of a nature to give rise to reasonable doubt as to his independence and impartiality.

Decision

The court found that Gerstenmaier had failed to disclose work that was performed by his law firm, Haver & Mailänder ("**H&M**") for the Volkswagen Group during the course of the arbitration, and that these circumstances created reasonable doubt as to his independence and impartiality.

The work in question only came to light after the arbitration was over. SBA discovered that according to the 2010/2011 edition of the German lawyer directory *JUVE*, H&M had represented a consortium of three banks including Volkswagen Bank, an entity of the Volkswagen Group, in a competition dispute. Questioned by SBA, Gerstenmaier acknowledged this in a letter in May 2016 but said that he had not personally taken part in that case or been aware of it and that his firm had "*not otherwise acted or advised a Volkswagen Group company or entity, including the Porsche Group, from 2011 to the present.*"

However, in the set-aside proceedings SBA produced another entry from the 2015/2016 edition of *JUVE* mentioning H&M's representation of Porsche, an entity of the Volkswagen Group, in ongoing litigation proceedings (from 2014/2015). Audi Volkswagen responded that this information was incorrect and likely the result of an updating error by the publisher. Audi Volkswagen also produced a statement from Mr. Wandel, head of Porsche's distribution law department, dated January 2017. Mr. Wandel wrote that he had not retained H&M since he began working in the legal department of Porsche in 2008 and he was not aware of any substantial appointments of H&M by other colleagues from the legal department. He mentioned only some consulting work by H&M on an issue of banking law, which was

performed over several months in 2010 for a fee of EUR 7,520, and noted that Gerstenmaier was not involved in that work.

The Court of Appeal was unconvinced by these explanations. With respect to the statement offered by Mr. Wandel, the court noted that he is not in a situation of neutrality to Audi Volkswagen and that he did not claim to have conducted "*exhaustive research*" into whether H&M may have been hired by other divisions of the legal department; rather, he only stated that he was "*not aware of any substantial appointments*" made by his colleagues.

Audi Volkswagen's explanation that the 2015/2016 edition of *JUVE* mentioning H&M's representation of Porsche was likely the result of an updating error by the publisher was easily refuted by the fact that Porsche was not named in the previous edition.

The court found it established that in 2014/2015 Porsche, an entity of the Volkswagen Group, was a client of H&M in a matter significant enough for H&M to mention it for its entry in *JUVE* as one of the "top 5" most important cases. The court concluded that H&M's work for Porsche was conducted during the arbitration, and that it was evidently of top importance to H&M.

The court held that these circumstances would give rise to a reasonable doubt as to Gerstenmaier's independence and impartiality. The court also observed that (as Mr. Wandel revealed) H&M had been engaged by Porsche in 2010 for an issue on banking law, which even if only of minor significance, was not declared by Gerstenmaier or made public by H&M.

Finally, the court held that the fact that the award was unanimous and that the impartiality of the other arbitrators was not disputed was irrelevant, since each member of the arbitral tribunal is susceptible to being influenced by the others in the oral hearings and the deliberations.

The court therefore held that the award must be annulled and also ordered Audi Volkswagen to pay EUR 100,000 in costs.

Comment

This case is instructive for several reasons. It is notable that even experienced and respected arbitrators may fail to take necessary precautions in conducting the appropriate conflict checks or in making the necessary disclosures when accepting an arbitrator appointment. Furthermore, under French law arbitrators have an ongoing disclosure

duty for the duration of the proceedings. Once proceedings have begun, the onus is on the arbitrator to declare potential conflicts of interest as they arise, irrespective of whether that information is also publically available and easily accessible. Thus, assuming that the entry about H&M's work for Porsche in a law directory was not simply the claims of an overeager law firm marketing department, this would had to have been disclosed when it arose.