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International Arbitration Experts Discuss Recent Court Decisions

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Commentary

International Arbitration Experts Discuss Recent Court Decisions

Mealey's International Arbitration Report recently asked industry experts and leaders for their thoughts on recent court decisions in the European Union. We would like to thank the following individuals for sharing their thoughts on this important issue.

- Sonja Heppner, Trainee Solicitor, William Fry on behalf of Arbitration Ireland, Dublin
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Mealey's: What is your view on recent court decisions (Slovak Republic v. Achmea B.V., Case C-284/16, ECJ, Republic of Moldova v. Komstroy LLC, No. C-741/19, ECJ, Republic of Poland v. PL Holdings Sàrl, No. C-109/20, ECJ, and Ioan Micula, et al. v. Government of Romania, No. 17-2332, D. D.C., 2021 U.S. Dist. LEXIS 215066) holding that the European Union prohibits intra-EU arbitration, and do these cases create a conflict between EU law and international law?

Heppner: With its findings in *Achmea*, *Komstroy* and *PL Holdings* the Court of Justice of European Union (CJEU) identified a conflict between EU law and specific provisions in intra-EU bilateral investment treaties (BITs) and the Energy Charter Treaty that allow for intra-EU investor-state arbitration in which arbitrators apply EU law. 'Intra-EU investor-state arbitration' refers to a dispute between a Member State and an investor of another Member State.

That is not the same thing as saying that there is a conflict between EU law and substantive international investment law. Substantive international investment law continues to exist in parallel to EU law. The CJEU clarified this when attaching its stamp of approval to the investment court system (ICS) proposed under the Canada-European Union Comprehensive Economic and Trade Agreement (CETA). The ICS, when implemented, will exist outside the EU judicial system with no jurisdiction to apply rules of EU law other than the provisions of CETA as interpreted in accordance with the Vienna Convention on the Law of Treaties and other rules and principles of international law applicable between the parties, including relevant arbitral jurisprudence on international investment law.

Whilst the CJEU's findings in both *Achmea* and *Komstroy* are logical as they follow its prior jurisprudence on the principles of autonomy, consistency, uniformity and primacy of EU law, *PL Holdings* fits in less well. In that case, the CJEU held that a Member State cannot validly circumvent the invalidity of an arbitration clause in an intra-EU BIT by freely concluding an ad hoc arbitration agreement that is identical to the BIT. Though in itself unsurprising, *PL Holdings* not only dramatically weakens party autonomy in the EU but also raises unsettling questions about how long the CJEU might still leave commercial arbitration intact, defined in *Komstroy* as originating in the freely expressed wishes of the parties concerned as opposed to being treaty-based.

Cheng: On March 6, 2018, the Court of Justice of the European Union (**CJEU**) concluded in *Slovak Republic v. Achmea* (***Achmea***) that arbitration clauses in intra-EU bilateral investment treaties (**BITs**) are incompatible with EU law. More recently, on

September 2, 2021, the CJEU ruled in *Moldova v. Komstroy* (***Komstroy***) that intra-EU arbitration under the Energy Charter Treaty (**ECT**) is also incompatible with EU law. In our opinion, neither decision creates a conflict between EU law and international law, and arbitral tribunals are not bound by them.

First, in an arbitration under an intra-EU BIT, the basis of the tribunal's jurisdiction is the relevant BIT and Article 25 of the ICSID Convention (if it is an ICSID arbitration). The *Achmea* decision, which in our view has also a series of shortcomings, cannot have any effect on the existence and validity of intra-EU BITs under international law. The CJEU has a mandate to interpret EU law but does not have a mandate to make authoritative findings on the state of public international law.

A closer reading of the *Achmea* decision confirms this: the CJEU in *Achmea* established solely that the dispute settlement system in the Netherlands-Slovakia BIT was *not in conformity with EU law*. For a 'EU-law incompatibility' to be removed, Member States need to act under international law, by either amending or terminating the BITs at issue. On May 5, 2020, 23 EU Member States signed an agreement purporting to terminate their intra-EU BITs but, as of today, at least seven Member States have not removed their intra-EU BITs from their legal orders. In our opinion, even after this termination agreement, an investor in an ongoing intra-EU arbitration could argue that the host State consented to arbitration in the BIT, and that consent cannot be unilaterally withdrawn after the investor has initiated arbitration proceedings.

In any event, as long as the intra-EU BIT in question remains applicable, arbitration tribunals should interpret the BIT under Article 31 of the Vienna Convention on the Law of Treaties (VCLT), and can reject *Achmea*-based objections to their jurisdiction. Also, when enforcement of an award resulting from an intra-EU arbitration is sought in a non-EU country, the competent domestic courts are not bound by *Achmea* or any other CJEU decisions.

Second, the ECT does not exclude intra-EU disputes, and that should not change in light of the *Komstroy* decision. An interpretation of the dispute settlement mechanism in Article 26 ECT under the VCLT leads to the conclusion that the provisions of EU law are not relevant to the question of jurisdiction under the ECT. The *Komstroy* decision cannot modify the express terms of the ECT itself. Furthermore, if there were any conflict between the ECT and EU law as regards the permissibility of intra-EU arbitration under the ECT, such conflict would be governed by Article 16 ECT, which gives precedence to the ECT over EU law.

Our conclusions are in line with the more than 53 investment tribunals that have ruled so far on the impact of the *Achmea* and *Komstroy* decisions on ISDS arbitration, and held that Member State consent to arbitration in intra-EU investment treaties is valid under international law.

Even if arbitrators sitting in intra-EU arbitrations can still reject *Komstroy* and/or *Achmea* based objections, the CJEU's decisions inevitably create legal uncertainty for intra-EU investors. EU investors planning an investment in another Member State should consider structuring their investments through non-EU Member States (such as the UK, Switzerland, or the United States), and ensure that any subsequent arbitration proceedings are seated in a non-EU Member State—ensuring enforcement of any favourable arbitral awards.

Laird: EU law is ultimately international law — it emanates from treaties between sovereign States, principally the Treaty on the Functioning of the European Union (TFEU). It is also, as often the case for international law, incorporated into the domestic law of its Member States. Meanwhile, there also exists a network of bilateral investment treaties (BITs) and multilateral treaties such as the Energy Charter Treaty in which many Member States of the EU have agreed to international law guarantees for foreign investors, and offer to those investors international arbitration of disputes about breach of those guarantees. Since 2015, when the European Commission ordered[1] Romania not to pay the *Micula*[2] arbitration award, the apparatus of the EU has challenged the continuing applicability of BIT arbitration in intra-EU relations. In 2018 in *Achmea* the Court of Justice of the EU found that arbitration offers in intra-EU BITs are incompatible with EU law.[3]

In *Achmea*, the Court of Justice considered the compatibility of the 1991 Dutch-Slovak BIT purely from

the perspective of the terms of the TFEU. The BIT had been in force since 1991, and Slovakia became a member of the EU in 2004. This situation is typical — many Eastern European countries first entered into BITs in the 1990s, and then later joined the EU. In particular, the Court of Justice found that the pre-existing bilateral agreement for arbitration of investor disputes did not comply with the EU's internal treaty interpretation mechanism for EU Court of Justice jurisdiction under article 267 TFEU and Member States' "undertak[ing] not to submit a dispute concerning the interpretation or application of the [EU] Treaties to any method of settlement other than those provided for therein" under article 344 TFEU. In September 2021, in *Komstroy*,[4] the ECJ extended the *Achmea* reasoning to the arbitration offer in the Energy Charter Treaty, which in recent years has been a vehicle for many intra-EU investor disputes in the solar industry against Spain, Italy and Czechia (member States of both the ECT and EU).

But there are general international law principles for analyzing which treaties and international law obligations should prevail where treaties clash: they were set out in the Vienna Convention on the Law of Treaties (VCLT) in 1969. Among those principles are that when two treaties cover the same subject matter, the newer treaty will ordinarily be deemed to prevail (Articles 30 and 59 VCLT).

BIT arbitral tribunals have typically dismissed *Achmea* in favor of the public international law question of whether the BITs and EU treaties deal with the "same subject matter" within the meaning of VCLT articles 30 and 59. Such was the case of the *Strabag* award,[5] which understood this to require that the treaties be of identical scope. Absent that precise overlap, tribunals have taken the view in public international law that arbitration offers in BITs continue to stand — whatever the internal EU law view of those offers is. This is indeed the correct approach, although given the primacy of EU law for domestic law and the fact of the *Achmea* judgment, it is impossible to imagine an EU domestic court enforcing an intra-EU BIT award going forward in any event.

Since the *Komstroy* ruling, ECT arbitral tribunals such as *Sevilla Beheer*[6] have dismissed it as not even the active ruling of the Court, but an aside driven by the intervention of Member States Poland, Germany and Italy which have become increasingly hostile to BIT arbitration. Indeed, practically this clash between EU law and public international law principles is soon to be over. In May 2020 a majority of EU Member States entered a plurilateral agreement to cancel their intra-EU BITs.[7] And the European Commission has begun infringement proceedings against Member States which did not take part in that treaty.[8]

Endnotes for Laird

1. Commission Decision (EU) 2015/1470 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania – Arbitral award Micula v Romania of 11 December 2013. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.232.01.0043.01.ENG&toc=OJ:L:2015:232:TOC

2. *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRI, SC Multipack SRL v Romania*, ICSID Case No. ARB/05/20, Final Award dated 11 December 2013.

3. Judgment of the Court of Justice, Grand Chamber, of 6 March 2018, *Slovak Republic v Achmea BV*, Case C 284/16. Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=199968&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3093417

4. Judgment of the Court of Justice, Grand Chamber, of 21 September 2021, *Moldova v Komstroy*, C-741/19. Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=245528&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=3340473

5. *Strabag et al. v. Poland*, ICSID Case No. AD-HOC/15/1, Partial Award on Jurisdiction dated 4 March 2020.

6. *Sevilla Beheer et al. v. Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum dated 11 February 2022.

7. The agreement is available at: https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/200505-bilateral-investment-treaties-agreement_en.pdf

8. European Commission, *May infringements package: key decisions*, Infringement Decisions, 14 May 2020. Available at: https://ec.europa.eu/commission/presscorner/detail/en/INF_20_859.

Kaye: *Achmea* left widespread uncertainty and speculation in its wake, particularly with regard to its scope and application. It was a matter of time before the Court of Justice of the European Union (the "**CJEU**") rendered decisions clarifying these uncertainties and furthering its aim to end intra-EU arbitrations. Yet despite *Achmea* and the 2020 termination treaty (signed by 23 Member States), non-EU courts, arbitral tribunals, and annulment committees have, for the most part, rejected the CJEU's reasoning,[1] and specifically in relation to the Energy Charter Treaty (the "**ECT**"), have predominantly come to a diametrically opposed conclusion to that of the CJEU's recent decisions.[2]

The decisions in *Komstroy* and *PL Holdings* clarified that intra-EU investor-State arbitration under the ECT and *ad hoc* arbitration agreements between EU investors and EU Member States are both incompatible with EU law. The CJEU also went a step further and instructed EU Member States to actively challenge intra-EU arbitration proceedings and to refuse to recognise and enforce any resulting awards.

While these decisions provide some clarification, they generate further uncertainty and increase the void in investment protection for EU investors. Inevitably, it is increasingly risky for EU investors to bring intra-EU claims (although they continue to do so), especially in light of possible enforcement difficulties. Due to the enforcement obligations in the ICSID Convention and the self-contained ICSID mechanism it remains to be seen how these recent decisions will play out.[3]

While it is early days, initial indications suggest widespread scepticism and disagreement from the international community. A number of investment tribunals have already rejected jurisdictional objections based on *Komstroy*. For example, the tribunal in *Landesbank Baden-Württemberg et al. v. Spain* refused Spain's request to re-open its decision on jurisdiction in light of *Komstroy*.[4] The tribunal found that its decision was *res judicata*, but, even if it weren't, *Komstroy* (which merely represented a new "fact"[5]) would not have altered its findings. Furthermore, the relevant part of the CJEU's judgment was *obiter dicta* and thus binding on no one.[6]

The tribunal in *Infracapital et al. v. Spain* came to a similar conclusion,[7] observing that the CJEU appeared to have found that an ECT investor-state tribunal "must apply EU law simply because the EU has signed the ECT."[8] The tribunal, however, determined that EU law, and more specifically *Komstroy*, was irrelevant to the question of its jurisdiction, which was instead governed by "international law, and not principles of sub-systems of international law such as EU treaties."[9]

Finally, in a further case against Spain, an ICSID tribunal recently found Spain liable under the ECT rejecting its jurisdictional challenges (based on *Achmea* and *Komstroy*). With respect to *Komstroy*, as well as deeming the CJEU's comments *obiter*,[10] the tribunal found that it was empowered to rule on its own jurisdiction and CJEU case law was "not binding."[11] In any event, the tribunal still did not find the CJEU's ruling "persuasive," as it failed to provide any analysis of the relevant ECT clause "from the perspective of international law."[12] While the ECT is part of the legal order of the EU, both the ECT and EU law are "part of the international legal order" and there was no evidence suggesting Spain's reading of the ECT was supported by the other contracting parties.[13]

Therefore, in conclusion, early indications suggest continued scepticism regarding the CJEU's recent decisions and its willingness to interpret an international treaty like the ECT. Nevertheless, EU investors should take heed and carefully consider their options including structuring investments via non-EU member states, such as the UK, since these decisions are unlikely to be the end of the EU's attempts to bring intra-EU disputes before the EU courts.

Endnotes for Kaye

1. *See*, *e.g.*, investment tribunals have predominantly rejected intra-EU jurisdictional objections: *A11Y LTD. v. Czech Republic*, ICSID Case No. UNCT/15/1, Decision on Jurisdiction, 9 February 2017; *AS PNB Banka, Grigory Guselnikov and others v. Republic of Latvia*, ICSID Case No. ARB/17/47, Decision on the Intra-EU Objection, 14 July 2021; *Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/37, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU

Acquis, 12 June 2020; *Strabag SE, Raiffeisen Centrobank AG, Syrena Immobilien Holding AG v. The Republic of Poland*, ICSID Case No. ADHOC/15/1, Partial Award on Jurisdiction, 4 March 2020. A similar approach has been adopted in annulment proceedings: *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, 8 April 2020; *Blusun SA, Jean-Pierre Lecorcier and Michael Stein v. Italy*, ICSID Case No. ARB/14/3, 13 April 2020; *Sodexo Pass International SAS v. Hungary*, ICSID Case No. ARB/14/20, 7 May 2021; *Dan Cake (Portugal) S.A. v. Hungary*, ICSID Case No. ARB/12/9, 16 July 2021; *Infrastructure Services Luxembourg S.À.R.L. And Energia Termosolar B.V. (Formerly Antin Infrastructure Services Luxembourg S.À.R.L. And Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, 30 July 2021; *UP and C.D. (Le Cheque Dejeuner) v. Hungary*, ICSID Case No. ARB/13/35, 11 August 2021; *Magyar Farming Company Ltd, Kintyre Kft, & Anicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, 16 November 2021. The Swiss Federal Tribunal rejected two recent set-aside proceedings: Bundesgericht [BGer], 25 November 2020, 4A_563/2020 (upholding the UNCITRAL arbitral award in *Vaclav Fischer v. Czech Republic*); Tribunal fédéral [TF], 23 February 2021, 4A_187/2020 (upholding the ICSID arbitral award in *PV Investors v. Spain*).

2. In the wake of *Achmea*, there was widespread speculation as to whether it extended to multilateral treaties such as the ECT. Arbitral tribunals predominantly rejected Achmea-based objections in intra-EU ECT cases. For example, *see*, *Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021; *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Principles of Quantum, 12 March 2019; *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017; *Landesbank Baden-Württemberg, HSH Nordbank AG, Landesbank Hessen-Thüringen Girozentrale and Norddeutsche Landesbank-Girozentrale v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection, 25 February 2019; *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic*, ICSID Case No. ARB/16/5, Award, 14 September 2020. *See also* paras. 5-7 below.

3. The UK Supreme Court recently lifted the stay of enforcement of the ICSID award in *Micula and others v. Romania*, finding that EU law did not displace the UK's obligations under the ICSID Convention. *Micula and others (Respondents/Cross-Appellants) v Romania* (Appellant/Cross-Respondent), [2020] UKSC 5, 29 February 2020; *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2021] FCAFC 3, 1 February 2021. The European Commission has subsequently announced that it has launched infringement proceedings against the UK in respect of this decision. https://ec.europa.eu/commission/presscorner/detail/en/IP_22_802 (last accessed 3 Feb. 2022).

4. The tribunal had previously rejected Spain's *Achmea* objection finding that it was not contrary to EU law for Member States to make offers to arbitrate to EU investors under the ECT, and that even if the EU did prohibit such an offer, it must accord priority to the ECT rather than EU law. *Landesbank Baden-Württemberg, HSH Nordbank AG, Landesbank Hessen-Thüringen Girozentrale and Norddeutsche Landesbank-Girozentrale v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection, 25 February 2019, ¶¶ 160, 164.

5. While the decision itself is yet to be made public, Global Arbitration Review reported a number of details and excerpts with respect to the tribunal's analysis and findings. https://globalarbitrationreview.com/spain-fails-re-open-intra-eu-objection-after-komstroy (last accessed 2 Feb. 2022).

6. By contrast Lithuania's Supreme Court ruled that a suit against Veolia, a French environmental services group, could proceed despite ongoing ICSID proceedings. Basing its conclusions on the CJEU's decisions in *Achmea*, *Komstroy* and *PL Holdings*, the Court found that invest-

ment arbitrations between EU investors and EU Member States were not possible and that the arbitration clause in the France-Lithuania BIT, the legal basis for the ICSID claim, "became invalid" when Lithuania acceded to the EU in 2004. Since the ICSID proceedings were invalid, there was no bar to court proceedings. Nevertheless, the case was subsequently thrown out by Lithuania's Vilnius Regional Court which found it had no jurisdiction over Veolia, and instead Lithuania must bring the claim before the French courts.

7. *Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Respondent's Request for Reconsideration Regarding the Intra-EU Objection and the Merits, 1 Feb. 2022.
8. *Id.*, ¶ 106.
9. *Id.*, ¶¶ 107, 116.
10. *Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 Feb. 2022.
11. *Id.*, ¶ 668.
12. *Id.*, ¶ 669.
13. *Id.*, ¶¶ 669-670. ■

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