Investment Treaty Arbitration 2021

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Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Bangladesh, China, France, Israel, Lithuania, Mexico and Spain.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

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Intra-EU investment arbitration where are we now

Nicholas Lawn, Isabelle Van Damme and Quentin Declève
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On 29 August 2020, following ratification by Denmark and Hungary, the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union (the Termination Agreement) entered into force with little fanfare or publicity. Yet the entry into force of the Termination Agreement marks one of the most significant developments in recent years in intra-EU investment dispute resolution. If there were any lingering doubts as to the applicability of intra-EU bilateral investment treaties (BITs) following the Achmea judgment, the Termination Agreement seeks to make the position clear by terminating all intra-EU BITs between the signatory member states. While this would appear to be the final lethal blow to intra-EU investment arbitration, for the reasons discussed below, it may be too early to make such a definitive prognosis. This short article therefore looks at the current status of intra-EU investment arbitration and analyses whether intra-EU investment arbitration is really dead. Can investors continue their pending claims or bring new claims in arbitration? Can EU member states rest assured that intra-EU investment claims will no longer be successful?

Background

On 5 May 2020, 23 EU member states signed the Termination Agreement. The Termination Agreement is the latest development in a plan to end intra-EU investment arbitration and is a direct result of the judgment of the Court of Justice of the European Union (CJEU) in Slovak Republic v Achmea BV (Case C-284/16). Achmea BV, a Dutch insurer, had initiated UNCITRAL arbitration proceedings against Slovakia under the Slovakia-Netherlands BIT claiming damages for breach of the BIT. When the tribunal found in favour of Achmea, Slovakia applied to set aside the tribunal's award before the Higher Regional Court in Frankfurt (where the arbitration was seated) and then appealed to the German Federal Court of Justice (the Bundesgerichsthof) when the initial application was dismissed. In the course of these proceedings (in which the European Commission intervened in support of Slovakia), the Bundesgerichtshof made a request to the CJEU for an article 267 preliminary ruling. In considering the issues referred to it, the CJEU held that the investor-state arbitration provision contained in the Slovakia-Netherlands BIT was incompatible with EU law, which the arbitral tribunal was required to consider under the applicable law provisions of article 8(6) of the BIT. The CJEU concluded that the BIT arbitration provision deprived the CJEU of jurisdiction to interpret or apply EU law pursuant to articles 267 and 344 of the Treaty on the Functioning of the European Union (TFEU). Since the Achmea arbitral tribunal could not refer preliminary questions to the CJEU under article 267 TFEU and since any award by such tribunal would not be subject to review as to its compatibility with EU law by the CJEU, the Court held that the arbitration provision would have an adverse effect on the autonomy of EU law.

Giving effect to the Achmea judgment, the signatories to the Termination Agreement have agreed that all intra-EU BITs between them are terminated and have confirmed that all arbitration clauses within these treaties are contrary to EU law and inapplicable. As such, after the date on which the last of the parties to an intra-EU BIT became an EU member state, these clauses cannot be applied and cannot form the legal basis for arbitration proceedings. Furthermore, the provisions that extend the BIT's protection of investments made prior to the date of termination for a specified period of time (sunset clauses) are also terminated and may not produce any legal effects.

In addition to terminating all intra-EU BITs between the signatories (including their sunset clauses), the Termination Agreement also seeks to direct future outcomes for intra-EU investment disputes by reference to the date of the Achmea judgment. Although the Termination Agreement does not purport to affect concluded arbitration proceedings, it does seek to direct the course of both any new and pending arbitration proceedings. The Termination Agreement requires the signatory EU member states to inform arbitral tribunals in any new or pending arbitration proceedings of the legal consequences of the Achmea judgment, confirming that arbitration clauses in intra-EU BITs are contrary to the EU treaties, inapplicable and cannot serve as the legal basis for arbitration proceedings. The Termination Agreement also requires signatory EU member states to ask competent national courts (including those in any third countries) to set aside, annul or refrain from enforcing any awards issued on the basis of an intra-EU BIT.

In respect of pending arbitration proceedings, certain transitional measures are directed to apply. If an investor withdraws any pending arbitration proceedings, there is an option, in the six-month period from the date of entry into force of the Termination Agreement, to request a structured dialogue overseen by an impartial facilitator. Alternatively, an investor may seek to rely on domestic remedies (including those available under EU law) before national courts in the relevant member state.

In the Preamble to the Termination Agreement, the member states and the European Commission agree to intensify discussions to ensure the complete and effective protection of investments in the European Union. A public consultation to assess existing investment protection and potential improvements has already been initiated and concluded.

The end of intra-EU investment arbitration: implications for investors and states

Although the Termination Agreement was intended to deal an immediate death blow to intra-EU investment arbitration, the fate of intra-EU investment arbitration is far from sealed. There are a number of reasons for this:

Firstly, four EU member states (Austria, Finland, Ireland and Sweden) and the United Kingdom have failed to sign the Termination Agreement. Although these states may decide in the future to accede to the Termination Agreement or to terminate their intra-EU BITs unilaterally (perhaps encouraged by infringement proceedings), until they do so there are over 40 intra-EU BITs that investors would arguably be entitled to rely upon because they are not yet terminated.

Further, the Termination Agreement will only enter into force for each party 30 days after the date of deposit of such party's instrument of ratification, approval or acceptance. To the extent that states delay ratifying the Termination Agreement under applicable domestic law, their intra-EU BITs will remain in force and investors may be entitled to rely upon them to issue investment arbitration proceedings. As at the present date, subsequent to the initial ratification by Denmark and Hungary, there have only been another six further ratifications (Bulgaria, Croatia, Cyprus, Malta, Slovakia and Estonia).

In any event, the Termination Agreement expressly states that it does not apply to the Energy Charter Treaty and that the European Union and EU member states will deal with the applicability of the Energy Charter Treaty at a later stage. Again, until such time, investors may seek to bring intra-EU arbitration claims against EU member states under the Energy Charter Treaty, unless intra-EU ECT claims otherwise become prohibited. There have been a number of attempts by certain EU member states to refer this issue to the CJEU for clarification, including in the recent Komstroy case (Case C-741/19 République de Moldavie) heard by the Court in November, but the Court is yet to provide definitive clarification.

Second, even where the Termination Agreement has validly entered into force and terminates applicable BITs, there is still some uncertainty as to whether it will produce the desired effects at the jurisdictional and enforcement levels.

While it can be expected that EU member states will comply with the requirement under the Termination Agreement to explain the legal consequences of the Achmea judgment to arbitral tribunals and routinely object to jurisdiction on such basis, there is no guarantee that arbitral tribunals will accept such jurisdictional objections. Notwithstanding the series of arbitral decisions in which objections based upon the Achmea judgment have been rejected (see, for example, the recent arbitral decisions in Raiffeisen, Addiko Bank, UP and CP Holding and Vattenfall), EU member states and the Commission might be hopeful that an objection based upon the termination of the treaties under international law will be more effective in convincing arbitral tribunals. Yet it is still to be expected that investors, in particular in pending arbitration proceedings, will argue that the host state's consent cannot be unilaterally withdrawn after arbitration proceedings have been commenced. There is also likely to be a protracted debate as to whether state parties to a treaty are entitled to amend a treaty to effect the termination of the treaty's sunset clauses, with investors almost certainly claiming that such actions undermine their legitimate expectations.

Similarly, while EU member states will undoubtedly rely upon the Termination Agreement and will explain the legal consequences of the Achmea judgment to national courts at the enforcement stage, there is no certainty that all national courts (particularly those in non-EU member states) will agree to be bound and will refuse recognition and enforcement. The risk of enforcement is likely to be even greater where the award is issued under the ICSID Convention since even an EU member state will have limited grounds for refusing enforcement of an ICSID Award. These issues are currently playing out before the US courts where enforcement of a number of intra-EU awards is sought.

Conclusion

On its terms, and to the extent that each of its signatories ratifies the treaty, the Termination Agreement should effectively put an end to investment arbitration based upon intra-EU BITs other than the ECT. Investors with new claims or with pending proceedings should have little option other than to engage in the proposed 'structured dialogue' mechanism or to turn to domestic remedies before the member states' national courts.

However, since neither of these options is likely at the present time to be attractive to foreign investors, investors are unlikely to let investment arbitration die off quietly. In addition to the ECT (which is outside of the scope of the Termination Agreement), there are at least a further 40 intra-EU BITs which remain in force and unaffected by the Termination Agreement owing to certain member states refusing to sign up. EU investors with rights under these treaties are unlikely to ignore those rights in favour of the mechanisms directed by the Termination Agreement. Further, as explained above, there is no guarantee that either arbitral tribunals or national courts will agree to be bound by the Termination Agreement either in terms of jurisdiction or at the enforcement phase.

Until such time as there is clarity as to the scope and content of the investment protection regime available under EU law, EU investors are likely to continue to seek to rely on intra-EU BITs taking the risk arbitral tribunals will not apply the Termination Agreement (or the Achmea judgment) and national courts will agree to enforce intra-EU awards (particularly those issued under the ICSID Convention).

Where possible, EU investors who do not wish to take the risks associated with the effect of the Termination Agreement may decide to structure their new investments or restructure their existing investments through entities incorporated outside of the European Union to benefit from the protection of BITs between EU member states and third countries. Such investors may thereby effectively sidestep the issues and effects created by the Achmea judgment and the Termination Agreement. Prudent investors should urgently be considering the structure of their intra-EU investments prior to any dispute or disagreement arising with the host state in which they have invested.

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