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EU Investor Court Greenlighted, But May Face Rough Road

By **Caroline Simson**

Law360 (May 7, 2019, 8:23 PM EDT) -- The European Court of Justice's blessing of an investment court system adds momentum to the EU's efforts to phase out ad hoc investor-state arbitration, though the bloc will likely still face challenges convincing all of its member states and non-EU nations to get on board.

The ECJ **ruled last week** that the investor court contained within the EU's trade deal with Canada is not precluded under EU law, since the pact does not give tribunals jurisdiction to interpret or apply EU law.

The court also noted that the deal properly limits tribunals' jurisdiction because it doesn't allow investors to challenge measures enacted by nations or by the EU that are in the public interest, such as food safety or environmental regulations.

The ruling allows the European Commission to forge full steam ahead not only with its plans for the bilateral investment court in the Canada pact, but also for a multilateral investment court it hopes will eventually replace the ad hoc investor-state arbitration system enshrined in the vast global network of treaties.

But that doesn't necessarily mean it's going to be smooth sailing for the bloc in those efforts from now on.

"It remains to be seen how many states are keen to follow what the European Commission considers to be the new gold standard of international investment dispute settlement," said Hogan Lovells partner Markus Burgstaller, who practices out of the firm's London office in its litigation, arbitration and employment group.

The commission has said it will no longer incorporate traditional investor-state arbitration in its trade deals, pointing to criticism that the system lacks transparency, is inconsistent and doesn't allow parties to substantively challenge awards. By contrast, the investor court is proposed to have a standing roster of 15 judges appointed in advance by nations — a means of limiting possible conflicts due to ad hoc case-by-case appointments — and an appellate mechanism.

But it has already faced resistance from other nations regarding the investor court, including Japan. Two years ago, Japan refused to incorporate an investor court in a free trade agreement with the EU. Moreover, a proposal for a multilateral investment court is only one of several being considered by a U.N. working group on investor-state arbitration reform.

It's also not a given that the Canada trade deal, known as the Comprehensive Economic and Trade Agreement, will receive the requisite ratification from each member state since the investor court didn't have universal appeal throughout the bloc. Although some elements of the deal are provisionally in force, the investor court isn't one of them.

In fact, the issue of whether the investor court was compatible with EU law was submitted to the ECJ by Belgium as a compromise, after that country's southern region of Wallonia initially refused to agree to the deal. The regional government there argued the investor court was too skewed toward global corporate interests.

"While the opinion will give momentum to the CETA initiative, ratification of CETA is still a contentious issue in the eyes of some EU member states," said Markus Perkams and Anke Sessler, both of Skadden Arps Slate Meagher & Flom LLP. "As a result, it may still be some years before the investment chapter in CETA has a practical impact for investors."

Despite these issues, it's likely that the opinion has reassured the commission of its decision to abandon the ad hoc investor state arbitration system in favor of the investor court, since the outcome of the CETA case wasn't a sure thing.

In March 2018, the ECJ issued its **decision** in a case involving the Dutch insurer Achmea BV, concluding that the arbitration clause in a Dutch-Slovak investment treaty improperly allows arbitral tribunals to interpret EU law, which only an EU court can do. The commission has made clear that it interprets the decision to apply to other intra-EU bilateral investment treaties as well, and EU member states have agreed to **terminate** these trade pacts as a result.

The Achmea decision — which "came as a shock" to the investment arbitration community and has been much criticized over the past year — could have potentially laid the groundwork to find issue with the CETA investment court as well, according to Freshfields Bruckhaus Deringer LLP's Caroline Richard, a partner in the firm's international arbitration group.

"There were legitimate concerns that CETA might also be found to be incompatible with EU law, since the rulings of the CETA investment court would ostensibly involve an examination of EU law," she said. "There was a sigh of relief in the arbitration community when the [ECJ] ... recognized the compatibility of the [investor-state dispute settlement] mechanism in CETA with EU law."

Despite these assurances that the ECJ isn't entirely opposed to investor-state dispute resolution, the court's decision in the CETA ruling does make clear that there are certain minimal standards that must be met if any kind of dispute resolution system, including a multilateral investor court, is to be compatible with EU law.

Among those is the protection of a nation's sovereign right to regulate in the public interest, and assurances that tribunals will be independent and that small and medium-sized enterprises won't be precluded from bringing a claim for financial reasons.

And, depending on how one considers the issue, that could have varying effects.

"It gives [the commission] a stronger position in negotiations: To get a deal with us that includes investor-state arbitration, this is the floor," said Isabelle Van Damme of the Brussels-based firm Van Bael & Bellis. "But it also makes the commission less flexible. ... We will have to see, especially with Japan, what they will now do."

--Editing by Orlando Lorenzo.