May 2024

Newsletter No. 204

Swiss Supreme Court upholds intra-EU award:

The Swiss Supreme Court confirmed jurisdiction of a Swiss-seated tribunal in an intra-EU investment arbitration. This decision comes amidst an ongoing legal battle in various jurisdictions over the admissibility of intra-EU investor-State arbitration. The decision has gained much attention in arbitration circles and beyond.

walderwyss attorneys at law

Swiss landmark decision on the admissibility of intra-EU investment arbitration

By Michael Feit
Dr. iur., LL.M., Attorney at Law
Partner
Direct phone: +41 58 658 55 08
michael.feit@walderwyss.com

and Francesca Borio
MLaw, Attorney at Law
Senior Associate
Direct phone: +41 58 658 57 61
francesca.borio@walderwyss.com

The legal and political backdrop – or the "crusade" of the EU against investment arbitration

In March 2018, the Court of Justice of the European Union (**CJEU**) decided in *Slovak Republic v. Achmea B.V.* that the arbitration clause contained in the bilateral investment treaty (**BIT**) between the Netherlands and Slovakia was incompatible with EU law. This judgment steered EU law into collision course with investment arbitration.

In May 2020, 23 EU member states signed the Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union (**Termination Agreement**), by which all intra-EU BITs between the signatories were terminated. In the Termination Agreement, the signatories confirmed that intra-EU BIT arbitration clauses were "contrary to the EU Treaties and thus inapplicable".

The CJEU rendered further judgments confirming the incompatibility of intra-EU investment arbitration clauses with EU law, namely *Republic of Moldova v. Komstroy LLC* in September 2021 (regarding the Energy Charter Treaty (**ECT**)), *Republic of Poland v. PL Holdings Sàrl* in October 2021 (regarding *ad hoc* arbitration), and the *DA v. Romatsa et al.* decision in September 2022 (regarding the unenforceability of the *Ioan Micula, Viorel Micula et al. v. Romania* ICSID award).

In April 2024, the European Parliament voted for a withdrawal of the EU from the ECT.

Most recently, Spain (the appellant before the Swiss Supreme Court (**Court**)) announced in May 2024 in the State Official Gazette its withdrawal from the ECT. This decision was taken after investors had initiated numerous arbitrations against Spain in relation to its renewable energy reforms.

The Swiss landmark decision

By decision 4A_244/2023 dated 3 April 2024, the Court upheld jurisdiction of a Swiss seated *ad hoc* arbitral tribunal over a claim brought by a French investor against Spain under the ECT.

In the arbitration proceeding, Spain objected that the tribunal lacked jurisdiction to hear a claim between an investor from an EU member state and an EU member state. The tribunal dismissed the objection, and Spain filed a set-aside application before the Court.

In its introductory remarks, the Court commented that for several years now, EU bodies had been waging a "crusade against international arbitration" regarding intra-EU disputes. The Court did not mince words in its decision.

The Court noted that state courts outside of the EU have no obligation to adhere to EU law. Therefore, decisions rendered by the CJEU, and thus also the *Komstroy* judgement, are not binding on a Swiss court deciding on a set-aside application against an award rendered by a Swiss seated tribunal.

The Court further stated that it generally accepts the opinion expressed by the supreme court of the state that enacted

the foreign law in question. However, the Court is more reluctant to do so when the question arises whether the rules adopted by a community of states, such as the EU, take precedence over rights deriving from a multilateral treaty, such as the ECT. In case of a conflict between these rules, the community of states may be tempted, as in *Komstroy*, to assert the primacy of its own law over that of the multilateral treaty.

Following a detailed analysis, the Court concluded that the unconditional consent given by Spain in the arbitration clause contained in Article 26 ECT did not exclude intra-EU disputes.

The Court also rejected the notion that there was a conflict between Article 26 ECT and EU law. The Court was not convinced by the reasoning given in *Komstroy*, noting that it was essentially, if not exclusively, based on the requirement to preserve the autonomy of EU law, without taking any account of international law or the rules of interpretation of treaties.

The Court continued that even if Article 26 ECT were incompatible with EU law, nothing under public international law would suggest that EU law should take precedence over the ECT.

In conclusion, the Court dismissed the set-aside application.

Recent trends and the impact of the decision

Without being exhaustive, the following trends can be observed inside and outside of the EU:

Arbitral tribunals routinely **confirm their jurisdiction in intra-EU disputes**. By way of example, in the ICSID arbitration *Adria Group B.V. and Adria Group Holding B.V. v. Croatia*, the tribunal rejected in October 2023 Croatia's objection that it lacked jurisdiction to hear the investors' claims arising out of the Croatia-Netherlands BIT. The notable exception to the rule constitutes *Green Power Partners K/S and SCE Solar Don Benito APS v. Spain*, in which the tribunal declined its jurisdiction under the ECT because it was an intra-EU dispute.

State courts within the EU are expected to **deny the existence of a valid arbitration agreement** in intra-EU disputes. In Germany, for example, a party can prior to the constitution of the tribunal request a state court to declare the arbitration proceedings inadmissible. On that basis, and upon application by Croatia, the Higher Regional Court of Frankfurt declared a German-seated UNCITRAL arbitration brought by Austrian investors under the Austria-Croatia BIT inadmissible.

Pursuant to the German Supreme Court, a party can even file such an application against ICSID arbitrations brought under the ECT. In line therewith, German courts declared the ICSID arbitrations *Mainstream Renewable Power Ltd and others v. Germany, Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Netherlands* and *RWE AG and RWE Eemshaven Holding II BV v. Netherlands* inadmissible.

Similarly, state courts within the EU have **set aside awards** on intra-EU grounds (such as in the matters *Triodos SICAV II v. Spain, Norvenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Spain* and *PL Holdings* in Sweden) and have **refused to enforce** intra-EU ICSID awards (such as in the matter *Micula* in Luxemburg and Sweden).

However, when **enforcement actions are brought outside of the EU, EU state courts tend not to interfere**. By way of illustration, the Landgericht Essen **dismissed** in April 2024 Spain's request for an **anti-enforcement injunction** to prevent the enforcement of the intra-EU ICSID award in *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Spain* in the United States, holding that no obligation exists under the CJEU case law to resist enforcement of ICSID awards outside of the EU.

State courts outside of the EU **generally allow enforcement of intra-EU awards**, even though there are some uncertainties.

In recognition and enforcement proceedings of an ICSID award under the ECT in the United Kingdom, the High Court ruled in *Infrastructure Services and Energia Termosolar B.V. v. Spain* that the EU Treaties and the *Achmea* and *Komstroy* judgments do not trump pre-existing treaty obligations under the ICSID Convention. Therefore, EU law does not constitute a legal basis to refuse the enforcement of ICSID awards.

In the United States, two district judges rendered opposing decisions with regard to Spain's request to dismiss the investors' petitions to enforce awards based on the case law of the CJEU. One district court judge rejected Spain's intra-EU objection with regard to the two ICSID awards *9REN Holding S.À.R.L. v. Spain* and *NextEra Energy Global Holdings B.V. v. Spain*. In contrast thereto, the other district court judge dismissed the petition to enforce the award rendered by an *ad hoc* Geneva seated UNCITRAL tribunal in *Blasket Renewable Investments LLC v. Spain*. The three enforcement proceedings are currently pending before the DC Circuit Court of Appeals.

In this context, what is the potential **impact** of the Court's decision? A number of commentators criticized the CJEU for limiting its analysis to EU law. The Court, however, conducted a broader international law assessment and its decision has been widely lauded as well-reasoned. State courts outside of the EU

faced with set-aside and enforcement requests might, therefore, take guidance by the decision of the Court. The decision could, thus, further tip the scale in favor of upholding jurisdiction and enforcement.

Conclusion

Within the EU, intra-EU disputes face, as some commentators noted, a hostile environment. Outside of the EU, however, the recent decision of the Court confirms the trend that intra-EU investment arbitrations are viewed as valid and enforceable. EU investors are, therefore, well advised to place the seat of the arbitration and to seek enforcement in a non-EU state. To increase protection, however, investors should consider taking proactive steps by structuring their investments within the EU through a non-EU state. Switzerland with its leading investment protection network is an excellent choice.