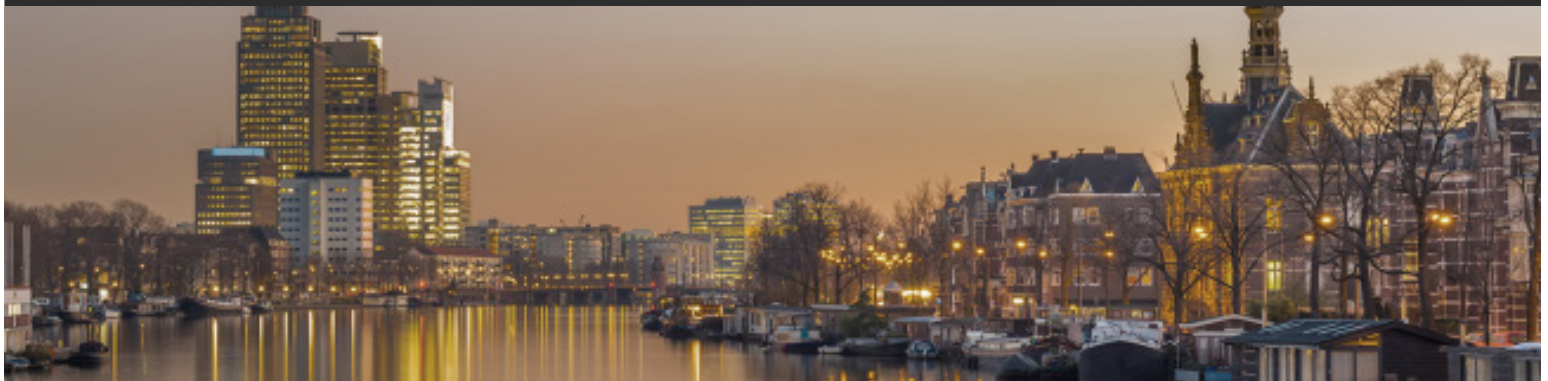


Alert | Arbitration & Mediation



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Arbitration Clause in Intra-EU BIT not Compatible with EU Law

The European Court of Justice (ECJ) has ruled that arbitration in the application of international agreements or treaties concluded between Member States is an infringement of European Union law (EU law). **This decision** focused specifically on the Intra-EU Bilateral Investment Treaty (BIT). A BIT is a trade agreement that regulates the conditions for direct foreign investments by companies and citizens from one country to another. BITs typically provide that disputes between a contracting state and an investor of the other contracting state must be settled amicably or, if this is not possible, submitted to an arbitration tribunal.

The case concerned a dispute between the Dutch health insurer Achmea and the Slovak government. Achmea alleged damage when the Slovak government partially reversed liberalization of the health care market. The insurer then started an arbitration procedure with an appeal to the BIT between the Netherlands and Slovakia (then Czechoslovakia).

In 2012, the arbitration tribunal found that Slovakia had indeed violated the BIT and ordered the country to pay compensation of approximately EUR 22,1 million to Achmea. Thereafter, Slovakia brought an action before the German court to set aside the arbitral verdict. The country argued that the arbitration clause is in conflict with EU regulations, on which the Bundesgerichtshof (the highest court in Germany) referred questions to the ECJ for preliminary rulings.

The ECJ considered that when deciding a case under a BIT, the arbitral tribunal must take into account not only the BIT's provisions, but also the law of the contracting state that is a party to the dispute, and other relevant agreements between the two contracting states. Therefore the ECJ found that the arbitral tribunal may be called on to interpret and apply EU law if Member States concluded a BIT.

According to the ECJ, an arbitral tribunal constituted on the basis of an Intra-EU BIT cannot be classified as a court or tribunal 'of a Member State' within the meaning of Article 267 TFEU, with the arbitral tribunal not being able to request a preliminary ruling on interpretation of EU law from the ECJ.

Where the decision of the arbitral tribunal is to be final and binding upon the parties to the dispute, a full judicial review of the law to be applied is not possible. However, the arbitral award issued under a BIT, as with any arbitral award, could be reviewed by the competent general courts of Germany. Such courts could request a preliminary ruling, but only to the extent permitted by national laws. The ECJ stressed that the German law applicable to the case only provided for a limited judicial review of the award.

In relation to commercial arbitration in general, the ECJ previously accepted that the requirements of efficient arbitration justify the limited review of arbitral awards by the courts of the Member States. However, this should not apply for arbitral proceedings like the one referred to the relevant BIT, as that proceeding is based on a treaty where EU Member States agreed to remove from the jurisdiction of their own courts possible disputes that could involve application or interpretation of EU law. Such a dispute resolution could prevent EU law from being applied effectively. Therefore the application or interpretation of EU law cannot be withdrawn from the jurisdiction of their Member State's own courts.

The advocate-general, the highest advisor of the ECJ, advised otherwise. He was of the opinion that arbitration clauses provide companies with broader protection than EU law, but the ECJ did not agree. According to the ECJ, the arbitration clause in the BIT detracts from the principle of mutual trust between Member States under Union law. It is therefore not compatible with the principle of loyal cooperation between Member States; only a court that falls under the judicial system of the Union can guarantee the full effect of EU law.

The ruling has consequences for 196 treaties between EU Member States, with similar provisions on arbitration. As a result of the ruling of the ECJ, those arbitration clauses are not compatible with EU law, so national judges will have to settle disputes arising from those treaties.

Key Takeaways

As a result of the ECJ ruling, conflicts between EU based foreign private investors and Member States may not be settled through arbitration proceedings, but only by national courts with full access to the European courts.

Additionally, conflicts arising from other treaties between EU Member States will have to be settled by a national court.

The consequences for the arbitration clauses in trade agreements between the EU and non-EU countries are still unclear.

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