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Latest trends in intra-EU investor-state arbitration – a "strange animal" soon to be extinct?

Dispute Resolution Newsletter

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1. Introduction

The future of investor-state arbitration between EU investors and EU Member States ("**intra-EU investment arbitration**") remains uncertain.[2] This has become particularly evident in light of the EU Commission's efforts to abolish intra-EU investment arbitration, coupled with the growing number of judgments by the Court of Justice of the European Union ("**CJEU**") declaring the underlying arbitrations incompatible with EU law (*Achmea*, *Komstroy* and *PL Holdings*).[3] In the *Achmea* decision, the CJEU found an intra-EU investment arbitration under the bilateral investment treaty ("**BIT**") at issue incompatible with the principle of primacy and autonomy of EU law under Articles 267 and 344 of the Treaty on the Functioning of the EU ("**TFEU**").[4] In *Komstroy*, the CJEU expanded its *Achmea* reasoning to intra-EU investment arbitrations under the Energy Charter Treaty ("**ECT**").[5] The *PL Holdings* judgment further expanded the *Achmea* doctrine to intra-EU investment arbitrations based on an *ad hoc* arbitration agreement.

The above-mentioned CJEU judgments concern only arbitrations which have not been conducted under the auspices of the International Centre for Settlement of Investment Disputes ("**ICSID**"). The self-contained ICSID regime has its own mechanism for reviewing awards and precludes access to domestic courts.[6] For this reason, investors often prefer to bring an ICSID arbitration (which is not tied to any arbitral seat and thus, to scrutiny by a domestic court), where the underlying BIT or multilateral treaty provides for such an option.

[1] A Japanese version of this newsletter will be published in due course.

[2] Currently, the ECT has 53 signatories and contracting parties, including Japan. These are listed here.

[3] CJEU Judgment of 6 March 2018, *Slovak Republic v. Achmea B.V.*, C-284/16; CJEU Judgment of 2 September 2021, *Republic of Moldova v. Komstroy*, C-741/19; CJEU Judgment of 26 October 2021, *Republic of Poland v. PL Holdings Sàrl*, C-109/20.

[4] Following the *Achmea* judgment, 23 EU Member States agreed to terminate their intra-EU BITs. See here.

[5] Ironically, the *Komstroy* ECT arbitration does not have a direct intra-EU connection other than being seated in France. Neither the claimants' home state (Ukraine) nor respondent Moldova are an EU Member State.

[6] Article 26 of the ICSID Convention stipulates: "*Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy* […]". See *Markert/Doernenburg*, RWE and Uniper: Can (German) Courts Assess the Jurisdiction of ICSID Arbitral Tribunals?, Kluwer Arbitration Blog, 11 July 2021, available here.

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The *Achmea*, *Komstroy* and *PL Holdings* arbitrations, however, were all seated in EU Member States,[7] making the respective courts competent to hear the set-aside proceedings, and to seek preliminary rulings from the CJEU on the intra-EU legal question. That said, arbitral tribunals have so far overwhelmingly rejected the view that the CJEU's decision in *Achmea* would affect their jurisdiction over intra-EU investment arbitrations, irrespective of whether these concern ICSID or non-ICSID arbitrations.

Two recent developments in the ECT context might, however, accelerate the demise of intra-EU investment arbitrations:

- *Green Power et al. v. Spain*: The first-known award in a Stockholm-seated ECT arbitration to uphold a host state's intra-EU objection and recognize the primacy of EU law.
- ECT reform: The draft amended ECT expressly excluding intra-EU investment arbitration and narrowing the scope of investment protection and investor-state arbitration.

Section 2 of this newsletter summarizes the *Green Power* tribunal's reasoning behind its award. Section 3 highlights the most salient aspects of the ECT reform, and Section 4 considers what these developments mean for Japanese companies with operations in the EU.

2. *Green Power et al. v. Spain* award

To date, tribunals have consistently displayed a high degree of skepticism towards the EU's and CJEU's ambition to abolish intra-EU investment arbitrations and assumed jurisdiction over such disputes. In a landmark award dated 16 June 2022, the *Green Power* tribunal unanimously broke with this arbitral practice and declined to hear an ECT claim brought by two Danish investors against Spain. Relying on the CJEU's *Achmea* and *Komstroy* judgments, the tribunal held that EU law precluded ECT arbitrations and invalidated Spain's consent.[8]

The crux of the dispute was whether Spain validly consented to arbitrate pursuant to Article 26(3)(a) of the ECT, which reads:

> *(3)(a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration* […] *in accordance with the provisions of this Article.* (emphasis added)

Despite acknowledging that Spain's consent was unconditional on its face, the tribunal considered Article 26 of the ECT to be only "the starting point". Given the "complexities of this case", it felt compelled to also analyze the validity of Spain's consent under EU law.[9] To the tribunal, the following aspects could not be overlooked:

- The arbitration was not conducted on the basis of the ICSID Convention but under the rules of the Arbitration Institute of the Stockholm Chamber of Commerce ("**SCC**") and seated in Stockholm, Sweden.

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[7] Frankfurt am Main, Germany (*Achmea*); Paris, France (*Komstroy*); Stockholm, Sweden (*PL Holdings*).

[8] *Green Power Partners K/S SCE and SCE Solar Don Benito APS v. Spain* ("**Green Power et al. v. Spain**"), SCC Case No. V 2016/135, Award, 16 June 2022. The tribunal was composed by Prof. Hans van Houtte (Chairperson), Dr. Inka Hanefeld (Claimants' co-arbitrator), Prof. Jorge E. Viñuales (Respondent's co-arbitrator).

[9] *Green Power et al. v. Spain*, SCC Case No. V 2016/135, Award, 16 June 2022, paras. 335-341, 343-344 and 346.

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- The parties and arbitral seat involved EU Member States (i.e., Denmark, Spain and Sweden).
- The case involved EU state aid issues, much like in the *Achmea* judgment.
- Denmark and Spain had accepted the EU's intra-EU policy, including the primacy of EU law, and EU's exclusive competence over state aid questions.
- Swedish law recognizes the primacy of EU law over its domestic law.

The tribunal then proceeded to examine Article 26 of the ECT (i) in its context as well as in light of its object and purpose, and (ii) by "applying the relevant norms of EU law".[10]

a. Interpretation of the context and object and purpose

Turning to the context of Article 26 of the ECT, the tribunal highlighted that the ECT recognizes the EU law's relevance by allowing states which are party to a Regional Economic Integration Organization ("**REIO**"), such as the EU, to enter into "a network of special legal relations" granting each other "special benefits" (Article 25 of the ECT) and to transfer competence over certain matters to such REIO (Articles 1(1)-(3) of the ECT).[11] This would be evidenced by the EU's exclusive competence in state aid matters and in resolving EU law questions.

The tribunal also considered Denmark's and Spain's declarations at the time of the conclusion of the ECT as an acceptance of the CJEU's continued competence to resolve intra-EU issues, which meant that their consent to arbitrate was not unconditional in the sense of Article 26 of the ECT.[12] Equally, the parties' declarations following the *Achmea* judgment would evidence their shared understanding that Article 26 of the ECT "ha[d] to be disapplied" for intra-EU investment arbitrations.[13]

Unable to draw any certain conclusions from the ECT's object and purpose, the tribunal opined that an examination of the relevant EU law would be necessary.[14]

b. Application of the relevant EU law norms

In the second part of its reasoning, the tribunal delved into an analysis of the CJEU's *Achmea* and *Komstroy* judgments and the principles of "autonomy and primacy of the EU legal order". In its view, EU law applied both as a matter of international law and Swedish law, the latter being the law of the arbitral seat.[15]

According to the tribunal, the CJEU in *Achmea* confirmed that Articles 267 and 344 of the TFEU render an offer to arbitrate in an intra-EU dispute inapplicable. The tribunal agreed that this was necessary to ensure consistency and uniformity in the interpretation of EU law. In its view, this rationale also applied to ECT cases, considering that the CJEU's reasoning in *Achmea* was not limited to BITs but referred to arbitration offers "in

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[10] *Green Power et al. v. Spain*, SCC Case No. V 2016/135, Award, 16 June 2022, paras. 347-412 and 413-478.

[11] *Green Power et al. v. Spain*, SCC Case No. V 2016/135, Award, 16 June 2022, paras. 350-355.

[12] *Green Power et al. v. Spain*, SCC Case No. V 2016/135, Award, 16 June 2022, paras. 356-363.

[13] *Green Power et al. v. Spain*, SCC Case No. V 2016/135, Award, 16 June 2022, para. 371.

[14] *Green Power et al. v. Spain*, SCC Case No. V 2016/135, Award, 16 June 2022, para. 412.

[15] *Green Power et al. v. Spain*, SCC Case No. V 2016/135, Award, 16 June 2022, paras. 413-414.

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an international agreement", as reconfirmed in the CJEU's *Komstroy* judgment.[16] Similarly, the *Green Power* tribunal stressed that Articles 107 and 108 of the TFEU precluded arbitral tribunals from ruling on state aid matters which were subject to the EU Commission's exclusive competence. However, irrespective of whether such matters were at issue, the *Achmea* judgment had to be applied to guarantee the consistent and uniform interpretation of EU law.[17]

Next, the tribunal briefly addressed other arbitral rulings, either by dismissing their reasoning or distinguishing them as ICSID arbitrations.[18] Notably, the tribunal observed that had the claimants in the present case opted for an ICSID arbitration, instead of an SCC arbitration (which they could have), EU law questions would "not [have] arise[n] in the same manner" given the limited scope of review and lack of an arbitral seat in ICSID arbitrations.[19] Accordingly, the tribunal concluded that to ignore EU law would amount to "overstepping its powers under the ECT".[20]

In a final step, the tribunal addressed the conflict between Article 26 of the ECT and EU law and qualified EU law as a *lex superior.* However, it did not address the claimants' argument that Article 16(2) of the ECT resolves any potential conflicts and stipulates that the ECT will remain unaffected by a prior or subsequent agreement. To the tribunal, there were "no grounds" to assume that the ECT had an overriding character. Consequently, the tribunal held that Spain's offer to arbitrate had been invalidated by application of the principle of primacy of EU law, as reconfirmed in *Komstroy*, and declined its jurisdiction.[21]

The award of the *Green Power* tribunal has been criticized as an attempt to disapply Article 26(3)(a) of the ECT despite its plain wording and the special procedures for treaty modification. It has been stressed that it is not for a tribunal or court to remedy a conflict between the ECT and EU law by way of interpretation; rather, such a result would require an amendment of the ECT by its contracting parties.[22] Such amendment, however, might soon become reality.

3. ECT reform

On 24 June 2022, following a five-year negotiation and only a few days after the *Green Power* award, the Energy Charter Secretariat ("**Secretariat**") announced the ECT contracting parties' agreement in principle on

[16] *Green Power et al. v. Spain*, SCC Case No. V 2016/135, Award, 16 June 2022, paras. 418-426, 429-436 and 438.

[17] *Green Power et al. v. Spain* ,SCC Case No. V 2016/135, Award, 16 June 2022, paras. 427-428.

[18] *Green Power et al. v. Spain* ,SCC Case No. V 2016/135, Award, 16 June 2022, paras. 429 and 437-441.

[19] *Green Power et al. v. Spain*, SCC Case No. V 2016/135, Award, 16 June 2022, paras. 161-162 and 441.

[20] *Green Power et al. v. Spain*, SCC Case No. V 2016/135, Award, 16 June 2022, para. 454.

[21] *Green Power et al. v. Spain*, SCC Case No. V 2016/135, Award, 16 June 2022, paras. 456 and 468-470. Despite dismissing all claims, the tribunal split the arbitration costs equally among the parties (i.e., 25% for each claimant and 50% for Spain). In doing so, the tribunal acknowledged that there was nothing to suggest that the claims lacked any reasonable grounds with respect to jurisdiction or merits, or that they were frivolous.

[22] See e.g. *Daniel Müller*, EU Law And Arbitration Under International Investment Instruments: The Surprising Award In Green Power v. Spain, Jus Mundi, 28 June 2022.

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a modernized ECT.[23] The reform process was initiated in 2018. The ECT has long been considered outdated and criticized for insufficiently protecting the host states' right to regulate public policy matters and for favoring investors. To remedy this, the contracting parties to the ECT have been renegotiating leaner investment protections and investor-state arbitration provisions. Separately, some ECT contracting states, including the EU and its Member States, threatened their withdrawal from the ECT unless it was made 'greener' and promoted mainly 'clean' renewable energy.

Some of the key changes to the ECT include:[24]

- An EU-driven option to agree on the exclusion of investor-state arbitration for contracting states of the ECT that are also members of a REIO (point 6). So far the EU is the only REIO of the ECT, so the exclusion only affects EU Member States, in line with the CJEU's *Komstroy* judgment;
- An optional exclusion of existing and future fossil fuel investments, thus precluding claims by the fossil fuels sector against host states (point 1, pillar 2);[25] and
- A narrower definition of covered investors and investments and more restrictive investment protection and provisions highlighting host states' right to regulate.

With this, the EU has achieved another important milestone in its battle against intra-EU investment arbitration, at least under the ECT.

4. Outlook

It remains to be seen what the future of intra-EU investment arbitration will hold. For the time being, tribunals may well consider the *Green Power* case an outlier and continue to adjudicate intra-EU disputes. Investors also may try to avoid EU Member State courts by seating an arbitration or finding enforceable assets outside the EU, or opting for ICSID arbitrations.[26] However, EU Member State courts may be increasingly reluctant to enforce intra-EU awards, particularly once the amended ECT enters into force. Similarly, ICSID arbitrations may cease to be a safe heaven for investors, as the recent proceedings in the *Uniper* and *RWE* intra-EU investment arbitrations have exemplified.

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[23] Energy Charter Secretariat, CCDEC 2022 10 GEN, Decision of the Energy Charter Conference, Subject: Public Communication explaining the main changes contained in the agreement in principle, Finalisation of the negotiations on the Modernisation of the Energy Charter Treaty, 24 June 2022. For a general overview of the ECT reform process, see *Bohmer*, Breaking: Parties reach agreement in principle on modernizing Energy Charter Treaty, including carve-outs for fossil fuels and intra-EU disputes, stricter definitions and standards of protection, and application of 2014 UNCITRAL Rules on transparency, IAReporter, 24 June 2022.

[24] The text of the agreement in principle is not yet public and will be communicated to the contracting parties by 22 August 2022 for adoption by the Energy Charter Conference on 22 November 2022. The ECT will enter into force 90 days after ratification by three-fourths of the contracting parties.

[25] The EU and UK have already opted into this carve-out. For existing investments, such carve-out would become effective after 10 years from the entry into force of the relevant provisions. For new investments made after 15 August 2023, such carve-outs would in principle apply as of that date.

[26] In fact, the *Green Power* tribunal itself acknowledged that an investor of an ECT contracting party of a non-EU Member State could sue an EU Member State, the EU or another ECT contracting party under the ECT. It also clarified that the intra-EU issue would not have arisen in the context of an ICSID arbitration. *Green Power et al. v. Spain*, SCC Case No. V 2016/135, Award, 16 June 2022, paras. 375, 161-162 and 441. See also fn. 19 above.

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Following the Netherland's decision to phase out coal-produced energy by 2030, two German energy companies, RWE and Uniper, filed ICSID claims under the ECT.[27] This prompted the Netherlands to initiate parallel proceedings before the German courts to halt both arbitrations due to their intra-EU nature.[28] RWE and Uniper, in turn, attempted to force the Netherlands to withdraw from the parallel proceedings given the self-contained nature of the ICSID regime.[29] At the same time, only the *RWE* tribunal is likely to adjudicate on this procedural conundrum. This is because Uniper has reportedly agreed to withdraw its intra-EU investment arbitration soon in exchange for a bail-out by the German Government.[30] As both the *RWE* and *Uniper* cases show, intra-EU investment arbitration faces an uncertain future, even if initiated in reliance on the ICSID Convention.

Against this background, Japanese companies with operations in the EU may want to contemplate their options, including restructuring their investments and other means of securing continued treaty protection. Our international disputes practice with substantial expertise in investor-state arbitration and in many jurisdictions will continue to report on the topic. For further assistance and an introduction to our team, please feel free to contact us anytime.

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[27] *RWE AG and RWE Eemshaven Holding II BV v. The Netherlands*, ICSID Case No. ARB/21/4; *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. The Netherlands*, ICSID Case No. ARB/21/22. See also *Markert*/*Doernenburg*, RWE and Uniper: Can (German) Courts Assess the Jurisdiction of ICSID Arbitral Tribunals?, Kluwer Arbitration Blog, 11 July 2021, available here.

[28] *Bohmer*, The Netherlands seeks anti-arbitration ruling from German courts with respect to two ECT-based ICSID proceedings, IAReporter, 17 May 2022.

[29] *Bohmer*, Uniper seeks to halt anti-arbitration proceedings before German courts by requesting provisional measures from newly-constituted ICSID tribunal, IAReporter, 6 December 2021. *Bohmer*, [Updated] German anti-arbitration proceedings prompt another provisional measures request at ICSID, IAReporter, 2 May 2022. See fn. 6 above.

[30] As the largest European buyer of Russian gas, Uniper had been severely hit by the ongoing Russian-Ukraine war and the reduced gas supplies. The bail-out would inject fresh credit into Uniper. *Ballantyne*, Uniper to withdraw ECT claim as part of German bailout, Global Arbitration Review, 25 July 2022. See announcement on Uniper website (in English) here. According to the website of ICSID, Uniper and Spain agreed to suspend proceedings between 29 July 2022 and 2 September 2022, see here.

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