



ARBITRATION AGREEMENTS

New Agreement Between EU Member States: Is This the (Definite) End of Intra-EU Investment Arbitration?

BY ALICJA SZCZESNIAK AND ALEKSANDRA ZANOWSKA - MAY 19, 2020 - 7 MINS READ



For several years there has been turmoil within the EU around the potential termination of bilateral investment treaties ("**BITs**") concluded between EU member states, which peaked upon the issuance of the judgment in the case between Slovakia and Achmea by the CJEU on 6 March 2018.^[1] In this judgment the CJEU examined the arbitration clause concluded in the Netherlands-Czechoslovakia BIT, and came to the conclusion that this clause was not in line with EU law. While this conclusion has been criticized, in particular in light of the international law on treaties, and there are doubts as to the relevance of this judgment to other BITs, the CJEU judgment opened a new chapter in the intra-EU saga. Following this judgment several member states and the European Commission took steps in order to ensure the termination of intra-EU BITs and the discontinuation of arbitral proceedings conducted on their basis. The most recent act is the conclusion of a plurilateral agreement.

On 5 May 2020, twenty three Member States of the European Union concluded the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union ("**Agreement**").^[2] This Agreement is perceived by its signatories^[3] and the European Commission^[4] as an implementation of the Achmea Judgment and is aimed at the termination of the FDI protection included in the intra-EU BITs.

The Agreement

The Agreement addresses both the issue of termination of the intra-EU BITs and sets out a scheme to be followed by the signatories with regard to the arbitration proceedings conducted on the basis of the terminated BITs. It also reiterates that the signatories should consider arbitration clauses included in the intra-EU BITs to be incompatible with EU law, and thus inapplicable from the time both parties were EU Member States.

With regard to termination of the BITs, the Agreement stipulates that all BITs and sunset clauses in force after the unilateral termination of the BITs shall be terminated and are ineffective as soon as the Agreement enters into force for both parties to the relevant BIT.

With regard to arbitration proceedings conducted on the basis of the BITs, the Agreement provides for different rules depending on the status of the proceedings on the date of issuance of the Achmea Judgment.

Nevertheless, the main aim of all these provisions is to terminate all pending arbitration proceedings, as well as proceedings for the enforcement of awards issued under intra-EU BITs. The Agreement sets out the rules and conditions for negotiations with investors, and also provides for court proceedings in local state courts as an alternative way to resolve the disputes. However, there are limitations as to the grounds for such claims. Further, all these procedures require either waiving claims under the relevant BITs or at least suspending the arbitration proceedings.

The Agreement is not yet in force, and shall become effective within 30 days after at least two signatories conclude the necessary procedures for its ratification, approval or acceptance. For each of the signatories, the date of entry into force will depend on the date they deposit the necessary confirmations of ratification approval or acceptance of this Agreement.

Commentary

The first question that arises in light of the Agreement is whether this is a definite end to all intra-EU BITs and investment arbitration within the EU. The answer is no.

With regard to the termination of the intra-EU BITs listed in the Agreement, such a termination should be considered effective, as long as both parties to the BIT complete its ratification, approval or acceptance. This conclusion is in line with Article 54 (b) of the Vienna Convention on the Law of Treaties. A similar conclusion may be reached with regard to the termination of the sunset clauses in case of a prior unilateral termination of a BIT. Thus, after the entry into force of this Agreement, the BITs concluded between its parties shall be terminated in full.

However, not all EU member states are currently a party to the Agreement. For now, Austria, Finland, and Sweden will not be subject to the provisions included in the Agreement.^[5] Thus, the BITs concluded by these states with other EU members shall be unaffected by the Agreement, and investors from these three states and those states themselves will still be subject to the applicable BITs.

Furthermore, as explicitly provided in the Agreement, it does not address the Energy Charter Treaty (ECT) and arbitration proceedings under this treaty.^[6] Thus, for now, investors pursuing claims under the ECT, irrespective of their nationality will be able to pursue claims for a breach of the ECT.

This confirms that investment arbitration within the EU is not yet entirely put to rest.

Secondly, given the approach in the Agreement to new, pending and concluded arbitrations, the question is whether the states can – by means of such an agreement – withdraw from already accepted offers to arbitrate. The answer is not clear from the terms of the Agreement, or international law.

First of all, there is a strong argument to be made that the termination of a BIT does not affect the rights already exercised by an investor. In other words, it is not clear that a state can nullify rights that have already been granted to a third party (investor). After a state accepts the offer to arbitrate, an agreement to arbitrate binds the investor and the accepting state. Whether the Agreement can, under international law, nullify a binding arbitration agreement is uncertain.

In this respect, the Agreement only reiterates the states' argument that relevant offers to arbitrate were withdrawn implicitly upon the accession of states to the EU, and therefore such offers were never really "accepted" in claims brought by investors in one EU state against another EU state. Time will tell whether this provision of the Agreement has any effect on the approach to the issue.

Indeed, one may argue that the Agreement itself supports the view that the arbitration clauses remain in force. Otherwise, there would be no need for requiring the investors to *refrain* from commencing new arbitrations in order to be able to pursue claims in national courts.^[7]

The final question is whether the Agreement offers any meaningful alternative mechanism to investment arbitration. Yet again, there is no clear answer.

The Agreement indeed provides for pursuing claims in local courts. While these provisions generously provide for the renewal of time limits, the proposal itself seems unlikely to be chosen by the investors.

Firstly, there may be doubts as to the impartiality of local courts in respect to claims made by foreign investors against that courts' state, especially given that the EU has already questioned the judicial system of some EU countries.^[8] This is why BITs provided for the neutral forum of arbitration.

Secondly, the Agreement obliges the investor in such a case to pursue claims for breach of EU law or local law (with exclusion of any BIT provisions), in accordance with the law of the host State. However, claims for breach of EU law or local law could have been pursued, even without the Agreement, and secondly, such claims are rarely a concern of investment arbitration tribunals, as in most cases investment claims are based solely the breach of the relevant BIT.

As stated in the introduction, the Agreement is yet another step taken by the states in order to put a stop to investment arbitration within the EU. The only logical reason for such perseverance and the method of achieving this aim is that the states do not wish to provide such protection to FDIs anymore, which should be taken into account by all future investors.

^[1] *Achmea Judgment*, CJEU, Case C-284/16.

^[2] Available at

https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/200505-bilateral-investment-treaties-agreement_en.pdf

^[3] Agreement, recital 4, page 5 and Article 7

^[4] Communication of the European Commission of 5 May 2020, available at

https://ec.europa.eu/info/files/200505-bilateral-investment-treaties-agreement_en

^[5] Although Ireland is also not a signatory to the Agreement, it is not a party to any intra-EU BITs that would be in force.

^[6] Agreement, recital 10, page 7.

^[7] Agreement, Article 10.

[8] In particular Poland and Hungary, see: <https://www.europarl.europa.eu/news/en/press-room/20200109IPR69907/rule-of-law-in-poland-and-hungary-has-worsened>.

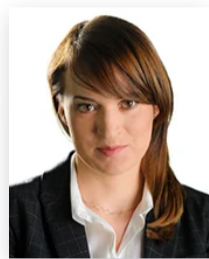
CATEGORIES:

ARBITRATION AGREEMENTS

EUROPE

INTERNATIONAL INVESTMENT

POLAND



Alicja Szczesniak

Alicja Szczesniak is a senior associate at Baker McKenzie in Warsaw. She specializes in civil law, civil litigation and arbitration proceedings. Alicja Szczesniak is vastly experienced in advising clients in construction projects, mainly in the energy and infrastructure sectors. She has been a leading counsel in numerous complex litigation matters. Alicja Szczesniak can be reached at Alicja.Szczesnia@bakermckenzie.com and + 48 22 4453163.



Aleksandra Żanowska

Aleksandra Żanowska is a senior associate in Baker McKenzie's Warsaw office and a member of the Firm's Global Dispute Resolution Practice Group. She specializes in arbitration, in particular investment arbitration. In addition, she represents clients in complex litigations, including IP disputes. She holds an LL.M. from Harvard Law School. In 2022, she was seconded to the arbitration team in Baker McKenzie's London office.



PREV POST

A Practical Global Guide: Arbitration of M&A Transactions

by EDWARD POULTON AND JOHN LEADLEY - 1 MIN READ



NEXT POST

English Court of Appeal provides much needed clarity on the proper law of an arbitration agreement – victory for the curial law

by DOGAN GULTUTAN - 10 MINS READ

Related Posts

International Arbitration Yearbook 2023-2024 – now available!

FEBRUARY 27, 2024

Swiss Federal Supreme Court affirms ICSID tribunal's restrictive rationale in upholding China's jurisdictional objection

FEBRUARY 26, 2024

Hope for the Litigation Funding Industry?

FEBRUARY 13, 2024

Subscribe to our monthly newsletter

Subscribe to this blog by email

SUBMIT

Related Websites

[GLOBAL COMPLIANCE NEWS](#)

[GLOBAL LITIGATION NEWS](#)

[B&M PRACTICE OVERVIEW INTERNATIONAL ARBITRATION](#)



**Arbitration
Events Calendar**



**International
Arbitration Yearbook**



Comparative Chart of International Arbitration Rules

DISPUTES CLAUSE FINDER



Global Attorney-Client Privilege Guide

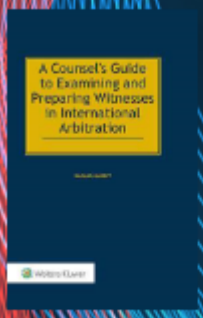
Other Publications



**International Arbitration
10x10: 100 Facts an in-
house counsel needs to
know**

**Authors: Jörg Risse, Heiko
Haller, Ragnar Harbst,
Jürgen Schramke.**

ORDER HERE



A Counsel's Guide to Examining and Preparing Witnesses in International Arbitration

Autor: Ragnar Harbst.

ORDER HERE



International Arbitration Checklists

Editors: Grant Hanessian, Lawrence Newmann.

ORDER HERE



The Complete (but unofficial) Guide to the Willem C. Vis International Commercial Arbitration Moot

Authors: Jörg Risse, Markus Altenkirch, Ragnar Harbst, Anette Keilmann, Lisa Reiser.

ORDER HERE

Archives

Select Month

