

International
Arbitration Focus Team:



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Arbitration clauses in intra-EU BITs are not compatible with EU law: a momentous decision by the European Court of Justice

On 6 March 2018, in Slovakia v. Achmea the European Court of Justice ruled that the arbitration clause in the 1991 bilateral investment treaty (“BIT”) between the Netherlands and Slovakia is not compatible with EU law.

The underlying dispute arose from a Slovak Republic prohibition on distribution of profits generated by the supply of certain insurance services. In an award dated 7 December 2012, an investment treaty arbitral tribunal held that Slovakia had violated the BIT and ordered it to pay Achmea approximately Euro 22.1 million. Slovakia applied to the German courts to set aside the award. The German Federal Court of Justice asked the ECJ to determine whether the contested arbitration clause is compatible with EU law. The ECJ’s Advocate General issued an opinion (Sept. 2017) stating that the BIT is compatible with EU law. The ECJ has now disagreed.

In summary, according to the ECJ:

- an international agreement cannot affect the allocation of powers fixed by EU Treaties or the autonomy of the EU legal system, which has primacy over the laws of the Member States;
- this principle is endorsed by Article 344 TFEU, under which the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties;
- the arbitral tribunal cannot be regarded as a court or tribunal ‘of a Member State’ within the meaning of Article 267 of the TFEU; hence, it has no power to seek a preliminary ruling from the ECJ to ensure a uniform interpretation of EU law;
- the BIT cannot ensure that the disputes will be decided by a court within the judicial system of the EU, only such a court being able to ensure the full effectiveness of EU law;
- it follows that the arbitration clause in the BIT has an adverse effect on the autonomy of EU law, which therefore is incompatible with EU law.



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Although the judgment refers only to this particular BIT, its broad wording suggests that the arbitration clauses in many other intra-EU BITs (at present, nearly 200) are affected. This may jeopardise the protection of investors' rights in arbitration against States within the EU. Although the impact of this controversial decision is not yet clear, the number of disputes brought by the investors before arbitral tribunals seated in the EU will likely decline. Moreover, this ruling casts uncertainty over arbitral awards already issued but not yet enforced.

The immediate takeaway is that investors will need to be very cautious about bringing a claim in arbitration under intra-EU BITs. In a forthcoming client alert, we will consider further the potential implications of Slovakia v Achmea.