Krombach: The Final Curtain

Readers of this blog may be interested to learn that the well-known (and, in many ways, quite depressing) *Krombach/Bamberski* saga appears to have finally found its conclusion with a decision by the European Court of Human Rights (*Krombach v France*, App no 67521/14) that was given yesterday.

Krombach – who, after having been convicted for killing his stepdaughter, had successfully resisted the enforcement of the French civil judgment in Germany (Case C-7/98 *Krombach*) and, equally successfully, appealed the criminal sentence (*Krombach v France*, App no 29731/96), before he had famously been kidnapped, brought to France, and convicted a second time – had brought a new complaint with regard to this second judgment. He had argued that his conviction in France violated the principle of *ne bis in idem* (as guaranteed in Art 4 of Protocol No 7) since he had previously been acquitted in Germany with regard to the same event.

Yesterday, the Court declared this application inadmissible as Art 4 of Protocol No 7, according to both its wording and the Court's previous case law, 'only concerned "courts in the same State"' (see the English Press Release).

> *[35.] … [L]a Cour constate que cette thèse [du requérant] se heurte aux termes mêmes de l'article 4 du Protocole no 7, qui renvoient expressément au « même État » partie à la Convention plutôt qu'à tout État partie à la Convention. …*
>
> *[36.] La Cour a ainsi jugé avec constance que l'article 4 du Protocole no 7 ne visait que les « juridictions du même État » et ne faisait donc pas obstacle à ce qu'une personne soit poursuivie ou punie pénalement par les juridictions d'un État partie à la Convention en raison d'une infraction pour laquelle elle avait été acquittée ou condamnée par un jugement définitif dans un autre État partie … .*

It also pointed out that 'the fact that France and Germany were members of the European Union did not affect the applicability of Article 4 of Protocol No. 7' (ibid).

> *[38.] La Cour estime par ailleurs que la circonstance que la France et*

> *l'Allemagne sont membres de l'Union Européenne et que le droit de l'Union européenne donne au principe ne bis in idem une dimension trans-étatique à l'échelle de l'Union européenne … est sans incidence sur la question de l'applicabilité de l'article 4 du Protocole no 7 en l'espèce.*

The Strasbourg Court thus appears to have added the final chapter to a case that has occupied the courts in Germany, France, and Luxembourg for almost 35 years, raising some pertinent questions as to mutual trust and judicial corporation in the process.

Cross-border Human Rights and Environmental Damages Litigation in Europe: Recent Case Law in the UK

Over the last few years, litigation in European courts against gross human rights violations and widespread environmental disasters has intensified. Recent case law shows that victims domiciled in third States often attempt to sue the local subsidiary and/or its parent company in Europe, which corresponds to the place where the latter is seated. In light of this, national courts of the EU have been asked to determine whether the parent company located in a Member State may serve as an anchor defendant for claims against its subsidiary – sometimes with success, sometimes not:

For example, in *Okpabi & Ors v Royal Dutch Shell Plc & Anor*, the English High Court, Queen's Bench Division, by its Technology and Construction Court, decided that it had no international jurisdiction to hear claims in tort against the Nigerian subsidiary (SPDC) of Royal Dutch Shell (RDC) in connection with environmental and health damages due to oil pollution in the context of the group's oil production in Nigeria. To be more specific, Justice Fraser concluded

that the Court lacked jurisdiction over the action, inasmuch as the European parent company did not owe a duty of care towards the claimants following the test established in *Caparo Industries Plc v Dickman*. Under the Caparo-test, a duty of care exists where the damage was foreseeable for the (anchor) defendant; imposing a duty of care on it must be fair, just, and reasonable; and finally, there is a certain proximity between the parent company and its subsidiary, which shows that the first exercises a sufficient control over the latter.

On 14 February 2018, the Court of Appeal validated the first instance Court's reasoning by rejecting the claimants appeal (the judgment is available here). In a majority opinion (Justice Sales dissenting), the second instance Court confirmed that the victims' claims had no prospect of success. Nevertheless, Justice Simon provided a different assessment of the proximity requirement: after analysing the corporate documents of the parent company, he observed that RDS had established standardised policies among the Shell group. According to the Court, however, this did not demonstrate that RDS actually exercised control over the subsidiary. At paragraph 89 of the judgment, Justice Simon states that it is "important to distinguish between a parent company which controls, or shares control of, the material operations on the one hand, and a parent company which issues mandatory policies and standards which are intended to apply throughout a group of companies (…). The issuing of mandatory policies plainly cannot mean that a parent has taken control of the operations of a subsidiary (…) such as to give rise to a duty of care". Therefore, the Court of Appeal set a relatively high jurisdictional threshold that will be difficult for claimants to pass in the future.

Conversely, in *Lungowe v Vedanta*, a case that involved a claim against a parent company (Vedanta) seated in the UK and its foreign subsidiary for the pollution of the Kafue River in Zambia, as well as the adverse consequences of such an occurrence on the local population, the Court of Appeal concluded that there was a real issue to be tried against the parent company. Moreover, the Court considered that the subsidiary was a necessary and proper party to claim and that England and Wales was the proper place in which to bring the claims. Apparently, this case involved greater proximity between the parent company and its subsidiary compared to *Okpabi*. In particular, the fact that Vedanta hold 80% of its subsidiary' shares played an important role. The same can be said as regards the degree of control of Vedanta's board over the activities of the subsidiary (see the analysis of Sir Geoffrey Vos at paragraph 197 of the *Okpabi* appeal).

Unsatisfied with the current landscape, some States adopted –or are in the process of adopting– legislations that establish or reinforce the duty of care or vigilance of parent companies directly towards victims. In particular, France adopted the Duty of Vigilance Law in 2017, according to which parent companies of a certain size have a legal obligation to establish a vigilance plan (*plan de vigilance*) in order to prevent human rights violations. The failure to implement such a plan will incur the liability of parent companies for damages that a well-executed plan could have avoided. In Switzerland, a proposal of amendment of the Constitution was recently launched, the goal of which consists in reinforcing the protection of human rights by imposing a duty of due diligence on companies domiciled in Switzerland. Notably, the text establishes that the obligations designated by the proposed amendment will subsist even where conflict of law rules designate a different law than the Swiss one (overriding mandatory provision). Finally, some other States, such as Germany, propose voluntary measures through the adoption of a National Action Plan, as this was suggested by the EU in its CSR Strategy.

For further thoughts see Matthias Weller / Alexia Pato, "Local Parents as 'Anchor Defendants' in European Courts for Claims against Their Foreign Subsidiaries in Human Rights and Environmental Damages Litigation: Recent Case Law and Legislative Trends" forthcoming in Uniform Law Review 2018, Issue 2, preprint available at SSRN.

Draft Withdrawal Agreement, Continued

It is not quite orthodox to follow on oneself's post, but I decided to make it as a short answer to some emails I got since yesterday. I do not know why Article 63 has not been agreed upon, although if I had to bet I would say: too complicated a provision. There is much too much in there, in a much too synthetic form; *per se* this does not necessarily lead to a bad outcome , but here… it looks like, rather. Just an example: Article 63 refers sometimes to provisions, some other to

Chapters, and some to complete Regulations. Does it mean that "provisions regarding jurisdiction" are just the grounds for jurisdiction, without the *lis pendens* rules (for instance), although they are in the same Chapter of Brussels I bis?

One may also wonder why a separate rule on the assessment of the legal force of agreements of jurisdiction or choice of court agreements concluded before the end of the transition period in civil and commercial matters (Regulation 1215/2912) and maintenance (Regulation 4/2009): does the reference to "provisions regarding jurisdiction" not cover them already? Indeed, it may just be a reminder for the sake of clarity; but taken literally it could lead to some weird conclusions, such as the Brussels I Regulation taken preference over the 2005 Hague Convention "in the United Kingdom, as well as in the Member States in situations involving the United Kingdom", whatever these may be. Of course I do not believe this is correct.

At any rate, for me the most complicated issue lies with the Draft Withdrawal Agreement provisions regarding time. As I already explained yesterday, according to Article 168 "Parts Two and Three, with the exception of Articles 17a, 30(1), 40, and 92(1), as well as Title I of Part Six and Articles 162, 163 and 164, shall apply as from the end of the transition period", fixed for December 31st, 2020 (Article 121). In the meantime, ex Article 122, Union Law applies, in its entirety (for no exception is made affecting Title VI of Part Three). What are the consequences? Following an email exchange with Prof. Heredia, Universidad Autónoma de Madrid, let's imagine the case of independent territorial insolvency proceedings – Article 3.2 Regulation 2015/848: if opened before December 31st, 2020, they shall be subject to the Insolvency Regulation. If main proceedings are opened before that date as well, the territorial independent proceedings shall become secondary insolvency proceedings – Article 3.4 Insolvency Regulation. If the main proceedings happen to be opened on January 2nd, 2021, they shall not – Article 63.4 c) combined with Article 168 Draft Withdrawal Agreement (I am still discussing Articles 122 and 168 with Prof. Heredia).

Another not so easy task is to explain Article 63.1 in the light of Articles 122 and 168. The assessment of jurisdiction for a contractual claim filed before the end of the transition period will be made according to Union Law, if jurisdiction is contested or examined *ex officio* before December 31st, 2020; and according to the provisions regarding jurisdiction of Regulation 1215/2012 (or the applicable

one, depending on the subject matter, see Article 63.1 b, c, d) Draft Withdrawal Agreement, if it -the assessment- happens later. Here my question would be, what situations does the author of the Draft have in mind? Does Article 63.1 set up a kind of *perpetuatio iurisdictionis* rule, so as to ensure that the same rules will apply when jurisdiction is contested at the first instance before the end of the transition period, and on appeal afterwards (or even only afterwards, where it is possible)? Or is it a rule to be applied at the stage of recognition and enforcement where the application therefor is presented after the end of the transition period (but wouldn't this fall under the scope of Article 63.3)?

That is all for now – was not a short answer, after all, and certainly not the end of it.

(Addenda: as for the UK, on 13 July 2017, the Government introduced the Withdrawal Bill to the House of Commons. On 17 January 2018, the Bill was given a Third Reading and passed through the House of Commons. Full text of the Bill as introduced and further versions of the Bill as it is reprinted to incorporate amendments (proposals for change) made during its passage through Parliament are available here. The Bill aims at converting existing direct EU law, including EU regulations and directly effective decisions, as it applies in the UK at the date of exit, into domestic law.)

Draft Withdrawal Agreement 19 March 2018: Still a Way to Go

Today, the European Union and the United Kingdom have reached an agreement on the transition period for Brexit: from March 29 of next year, date of disconnection, until December 31, 2020. The news are of course available in the press, and the Draft Withdrawal Agreement of 19 March 2018 has already been published… coloured: In green, the text is agreed at negotiators' level and will only be subject to technical legal revisions in the coming weeks. In yellow, the text is agreed on the policy objective but drafting changes or clarifications are

still required. In white, the text corresponds to text proposed by the Union on which discussions are ongoing as no agreement has yet been found. For ongoing judicial cooperation in civil and commercial matters (Title VI of Part III, to be applied from December 31, 2020: see Art. 168), this actually means that subject to "technical legal revisions", the following has been accepted:

- Art. 62: The EU and the UK are in accordance as to the application by the latter (no need to mention the MS for obvious reasons) of the Rome I and Rome II regulations to contracts concluded before the end of the transition period, and in respect of events giving rise to damage, and which occurred before the end of the transition period.
- Art. 64: There is also agreement as to the handling of ongoing cooperation procedures, whereby requests for service abroad, the taking of evidence and in the frame of the European Judicial Network are meant.
- Art. 65: There is agreement as well as to the way Council Directive 2003/8/EC (legal aid), Directive 2008/52/EC on certain aspects of mediation in civil and commercial matter, and Council Directive 2004/80/EC (relating to compensation to crime victims) will apply after the transition period.

Conversely, no agreement has been found regarding Art. 63, i.e., how to deal with jurisdiction, recognition and enforcement of judicial decisions, and related cooperation between central authorities (but whatever is agreed will also be valid in respect of the provisions of Regulation (EU) No 1215/2012 as applicable by virtue of the agreement between the European Community and the Kingdom of Denmark, see Art. 65.2, in green).

In the light of this it may be not really worth to start the analysis of the Title as a whole: Art. 63 happens to be the less clear provision. Some puzzling expressions such as "as well as in the Member States in situations involving the United Kingdom" are common to approved texts, but may change in the course of the technical legal revision. So, let's wait and see.

NoA: Another relevant provision agreed upon – in green- is Art. 124, Specific arrangements relating to the Union's external action. Title X of Part III, on pending cases and new cases before the CJEU, remains in white.

And: On the Draft of February 28, 2018 see P. Franzina's entry here. The Draft

was transmitted to the Council (Article 50) and the Brexit Steering Group of the European Parliament; the resulting text was sent to the UK and made public on March 15.

Religious Conversion and Custody – Important New Decision by the Malaysian Federal Court

A saga that has kept Malaysians engaged for years has finally founds its conclusion. A woman, named (rather improbably, at least for European observers) Indira Gandhi, was fighting with her ex husband over custody. The ex-husband had converted to Islam and had extended the conversion to their three children, with the consequence that the Syariah courts gave him sole custody. What followed was a whole series of court decisions by civil courts on the one hand and Syariah courts on the other, focusing mainly on the jurisdictional question which set of courts gets to decide matters of religious status and which law—Islamic law or civil law—determines the question. The Malaysian Federal Court now quashed the conversion as regards the children, thereby claiming, at least for children, a priority of the Constitution and the jurisdiction of civil courts.

Although the case is mostly discussed in the context of religious freedom and (civil) judicial review, it also raises core issues of conflict of laws. Malaysia is a country with an interpersonal legal system, which leaves jurisdiction over certain matters of Islamic law to the Syariah courts. Indira Gandhi's ex-husband here used this system, effectively, for a form of forum shopping: converting to Islam enabled him, ostentatiously, to opt into a system more favorable to his own

situation. The background, from the perspective of conflict of laws, is that the decisive connecting factor, namely a person's religion, is open to manipulation in a way in which other connecting factors are not. According to Article 121 of the Federal Constitution, the civil courts have no jurisdiction over matters of the Syariah Courts. On the other hand, Art. 12(4) of the Constitution provides that a minor's religion is determined by his parent or guardian, a provision the Syariah Courts neglected here. Letting the Constitution trump leads to a desirable result in this case, but it does not, by itself, resolve the underlying conflict-of-laws issues. Here, as in comparable situations, the doctrinal problem appears to lie first in the issue of unilateral determination of personal status and second in a conflation of issues of jurisdiction and applicable law.

The case is *Indira Gandhi v. Pengarah Jabatan Agama Islam Perak u.a.,* [2018] 1 LNS 86 (Federal Court of Malaysia); it is available here. A short summary is here, another one, including a useful timeline of events, is here. For a very helpful analysis of the case and its background and implications by Jaclyn L. Neo, focusing especially on questions of jurisdiction and judicial review, see here. A longer discussion by Dian A.H. Shah focuses also on two other cases and more broadly on the issues of religious freedom: Dian A.H. Shah, *Religion, conversions, and custody: battles in the Malaysian appellate courts*, in Law and Society in Malaysia: Pluralism, Religion and Ethnicity (Andrew Harding/Dian A.H. Shah eds., 2018). The affair is also discussed in Yvonne Tew's article '*Stealth Theocracy*,' which is forthcoming with the Virginia Journal of International Law.

Mutual trust and judicial cooperation in the EU's external relations – the blind spot in the

EU's Foreign Trade and Private International Law policy?

Further to the splendid conference How European is European Private International Law? at Berlin on 2 and 3 March 2018, I would like to add some thoughts on an issue that was briefly raised by our fellow editor Pietro Franzina in his truly excellent conference presentation on "The relationship between EU and international Private International Law instruments". Pietro rightly observed an "increased activity on the external side", meaning primarily the EU's PIL activities on the level of the Hague Conference.

At the same time, there seems to be still a blind spot for the EU's Private International Law policy when it comes to the design of the EU's Free Trade Agreements (FTAs). Although there is an increasingly large number of such agreements and although "trade is no longer just about trade" (DG Trade) but additionally about exchange or even export of values such as "sustainability", human rights, labour and environmental standards and the rule of law, there seems to be no policy by DG Trade to include in its many FTAs a Chapter on judicial cooperation with the EU's respective external trade partners.

To my knowledge there are only the following recent exceptions: The Association Agreements with Georgia and Moldova. Both Agreements entered into force on 1 July 2016.

Article 21 (Georgia) and Article 20 (Moldova) provide:

"Legal cooperation: 1. The Parties agree to develop judicial cooperation in civil and commercial matters as regards the negotiation, ratification and implementation of multilateral conventions on civil judicial cooperation and, in particular, the conventions of the Hague Conference on Private International Law in the field of international legal cooperation and litigation as well as the protection of children."

Article 24 of the Association Agreement of 29 May 2014 with the Ukraine reads slightly differently:

"Legal cooperation: 1. The Parties agree to further develop judicial cooperation in

civil and criminal matters, making full use of the relevant international and bilateral instruments and based on the principles of legal certainty and the right to a fair trial.2. The Parties agree to facilitate further EU-Ukraine judicial cooperation in civil matters on the basis of the applicable multilateral legal instruments, especially the Conventions of the Hague Conference on Private International Law in the field of international Legal Cooperation and Litigation as well as the Protection of Children."

All other FTAs, even those currently under (re-) negotiation, do not take into account the need for the management of trust in the judicial cooperation of the trade partners in their deepened and integrated trade relations. Rather, foreign trade law and PIL seem to have remained separate worlds, although the business transactions that are to take place and increase within these trade relations obviously rely heavily on both areas of the law.

Some thoughts on why there is no integrated approach to foreign trade and PIL in the EU, why this is a deficiency that should be taken care of and how this could possibly be done are offered here.

How European is European Private International Law? – Impressions from Berlin

Written by Tobias Lutzi, DPhil Candidate and Stipendiary Lecturer at the University of Oxford

Last weekend, more than a hundred scholars of private international law followed the invitation of Jürgen Basedow, Jan von Hein, Eva-Maria Kieninger, and Giesela Rühl to discuss the 'Europeanness' of European private international law. Despite the adverse weather conditions, only a small number of participants from the UK – whose presence was missed all the more dearly – were unable to make it to Berlin. Thus, the *Goethe-Saal* of the Max Planck Society's

Harnack House was packed, and so was the conference programme, which spanned over two full days.

It was kicked off by Andreas Stein (European Commission) and Johannes Christian Wichard (German Ministry of Justice), who underlined both the accomplishments of and the challenges for European private international law in their respective welcome addresses. The programme then proceeded from a closer look at the sources of European private international law (and their relationship with other international instruments and the domestic laws of the member states) to an analysis of its application in the courts of the member states (including the ascertainment of foreign law) to a discussion of the 'Europeanness' of academic discourse and legal education within the EU and outside of it (with a focus on the political dimension of EU private international law).

All presentations provided ample food for thought, as was evidenced by the lively discussions that followed each panel. They highlighted a number of interesting tendencies, such as the remaining 'piecemeal character' of the field, the ambiguities caused by an ever-increasing number of recitals in European instruments, the regrettable absence of private international law from the legal curriculum in many EU member states, and a certain convergence of academic styles, not least through the growing adoption of German-style commentaries and the emergence of English as the undisputed *lingua franca* of the field. One of the more contentious issues discussed was the possible creation of a general instrument of private international law (think: Rome 0 Regulation), or even a complete codification, with numerous participants pointing towards its potential for more coherence, clarity, and 'teachability' of European private international law – while others urged more caution.

The most prominent theme of the two days, though, seemed to be the observation that the emergence of a distinctly European scholarship of private international law should be both welcomed and fostered. The idea of creating an association that could provide an institutional framework for further dialogue between European scholars, practitioners, and other stakeholders in private international law was mentioned more than once – and received almost unanimous support during the round table discussion that concluded the conference. It was fitting, then, that the conference included the official launch of the Encyclopedia of Private International Law, many authors of which were present in Berlin. This truly Herculean project, just as the conference itself, is testimony to how fruitful

such dialogue can be.

This one is next: the Netherlands Commercial Court!

By Georgia Antonopoulou, Erlis Themeli, and Xandra Kramer, Erasmus University Rotterdam (PhD candidate, postdoc researcher and PI ERC project Building EU Civil Justice)

Following up on our previous post, asking which international commercial court would be established next, the adoption of the proposal for the Netherlands Commercial Court by the House of Representatives (*Tweede Kamer*) today answers the question. It will still have to pass the Senate (*Eerste Kamer*), but this should only be a matter of time. The Netherlands Commercial Court (NCC) is expected to open its doors on 1 July 2018 or shortly after.

The NCC is a specialized court established to meet the growing need for efficient dispute resolution in cross-border civil and commercial cases. This court is established as a special chamber of the Amsterdam District Court and of the Amsterdam Court of Appeal. Key features are that proceedings will take place in the English language, and before a panel of judges selected for their wide expertise in international commercial litigation and their English language skills.

To accommodate the demand for efficient court proceedings in these cases a special set of rules of procedure has been developed. The draft Rules of Procedure NCC can be consulted here in English and in Dutch. It goes without saying that the court is equipped with the necessary court technology.

The Netherlands prides itself on having one of the most efficient court systems in the world, as is also indicated in the Rule of Law Index – in the 2017-2018 Report it was ranked first in Civil Justice, and 5th in overall performance. The establishment of the NCC should also be understood from this perspective. According to the website of the Dutch judiciary, the NCC distinguishes itself by its

pragmatic approach and active case management, allowing it to handle complex cases within short timeframes, and on the basis of fixed fees.

To be continued…

A European Law Reading of Achmea

Written by Prof. Burkhard Hess, Max Planck Institute Luxembourg.

An interesting perspective concerning the *Achmea* judgment of the ECJ[1] relates to the way how the Court addresses investment arbitration from the perspective of European Union law. This paper takes up the judgment from this perspective. There is no doubt that *Achmea* will disappoint many in the arbitration world who might read it paragraph by paragraph while looking for a comprehensive line of arguments. Obviously, some paragraphs of the judgment are short (maybe because they were shortened during the deliberations) and it is much more the outcome than the line of arguments that counts. However, as many judgments of the ECJ, it is important to read the decision in context. In this respect, there are several issues to be highlighted here:

First, the judgment clearly does not correspond to the arguments of the German Federal Court (BGH) which referred the case to Luxembourg. Obviously, the BGH expected that the ECJ would state that intra EU-investment arbitration was compatible with Union law. The BGH's reference to the ECJ argued in favor of the compatibility of intra EU BIT with Union law.[2] In this respect, the *Achmea* judgment is unusual, as the ECJ normally takes up positively at least some parts of the questions referred to it and the arguments supporting them. In contrast, the conclusion of AG Wathelet were much closer to the questions asked in the preliminary reference.

Second, the Court did not follow the conclusions of Advocate General Wathelet.[3] As the AG had pushed his arguments very much unilaterally in a (pro-arbitration)

direction, he obviously provoked a firm resistance on the side of the Court. In the *Achmea* judgment, there is no single reference to the conclusions of the AG[4] – this is unusual and telling, too.

Third, the basic line of arguments developed by the ECJ is mainly found in paras 31 – 37 of the judgment. Here, the Court sets the tone at a foundational level: the Grand Chamber refers to basic constitutional principles of the Union (primacy of Union law, effective implementation of EU law by the courts of the Member States, mutual trust and shared values). In this respect, it is telling that each paragraph quotes Opinion 2/13[5] which is one of the most important (and politically strongest) decisions of the Court on the autonomy of the EU legal order and the role of the Court itself being the last and sole instance for the interpretation of EU law.[6] *Achmea* is primarily about the primacy of Union law in international dispute settlement and only in the second place about investment arbitration. *Mox Plant*[7] has been reinforced and a red line (regarding concurrent dispute settlement mechanisms) has been drawn.

Although I don't repeat here the line of arguments developed by the Grand Chamber, I would like to invite every reader to compare the judgment with the Conclusions of AG Wathelet. In order to understand a judgment of the ECJ, one has to compare it with the Conclusions of the AG – also in cases where the Court does (exceptionally) not follow the AG. In his Conclusions, AG Wathelet had tried to integrate investment arbitration into Union law and (at the same time) to preserve the supremacy of investment arbitration over EU law even in cases where only intra EU relationships were at stake. Or – to put it the other way around: For the ECJ, the option of investors to become quasi-international law subjects and to deviate of mandatory EU law by resorting to investment arbitration could not be a valuable option – especially as their home states (being EU Member States) are not permitted to escape from mandatory Union law by resorting to public international law and affiliated dispute resolution mechanisms. Therefore, from a perspective of EU law the judgment does not come as a surprise.

Finally, this judgment is not only about investment arbitration, its ambition goes obviously further: If one looks at para 57 the perspective obviously includes future dispute settlement regimes under public international law and their relationship to the adjudicative function of the Court. One has to be aware that Brexit and the future dispute resolution regime regarding the Withdrawal Treaty

is in the mindset of the Court. In this respect the wording of paragraph 57 seems to me to be telling. It states:

"It is true that, according to settled case-law of the Court, an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, *provided that the autonomy of the EU and its legal order is respected*[8]."

Against this background of European Union law, the *Achmea* judgment appears less surprising than the first reactions of the "arbitration world" might have implied. Furthermore, the (contradictory[9]) statement in paras 54 and 55 should be read as a sign that the far reaching consequences with regard to investment arbitration do not apply to commercial arbitration (*Eco Swiss*[10] and *Mostaza Claro*[11] are explicitely maintained).[12] Finally, it is time to start a discussion about the procedural and the substantive position of individuals in investment arbitration in the framework of Union law. As a matter of principle, EU investors should not expect to get a better legal position as their respective home State would get in the context of EU law. Investment arbitration does not change their status within the Union. In this respect, *Achmea* is simply clarifying a truism. And, as a side effect, the disturbing *Micula* story should now come to an end, too.[13]

Footnotes

[1] ECJ, 3/6/2018, case C-284/16, *Slovak Republic v. Achmea BV*, EU:C:2018:158.

[2] BGH, 3/3/2016, ECLI:DE:BGH:2016:030316BIZB2.15.0

[3] Conclusions of 9/19/2017, EU:C:2017:699. The same outcome had occured in case C-536/13, *Gazprom*, EU:C:2015:316, which was also related to investment arbitration.

[4] The Court only addresses the issue whether the hearing should be reopened because some Member States had officially expressed their discomfort with the AG's Conclusions, ECJ, 3/6/2018, case C-284/16, *Amchea*, EU:C:2018:158, paras

24-30.

[5] ECJ, 12/18/2014, Opinion 2/13 (*Accession of the EU to the ECHR*), EU:C:2014:2454.

[6] For the political connotations of Opinion 2/13, cf. *Halberstam*, "'It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and a Way Forward." German L.J. 16, no. 1 (2015): 105 ff.

[7] ECJ, 5/30/2015, case C-459/03 *Commission v Ireland,* EU:C:2006:345.

[8] Highlighted by B.Hess.

[9] Both, commercial and investment arbitration are primarily based on the consent of the litigants, see *Hess*, The Private Public Divide in International Dispute Settlement, RdC 388 (2018), para 121 – in print

[10] ECJ, 6/1/1999, case C?126/97, *Eco Swiss*, EU:C:1999:269.

[11] ECJ, 10/26/2006, case C?168/05, *Mostaza Claro*, EU:C:2006:675.

[12] It is interesting to note that the concerns of the ECJ (paras 50 ss) regarding the intervention of investment arbitration by courts of EU Member States did not apply to the case at hand as German arbitration law permits a review of the award (section 1059 ZPO). The concerns expressed relate to investment arbitration which operates outside of the NYC without any review of the award by state court, especially in the context of articles 54 and 55 ICSID Convention.

[13] According to the ECJ's decision in *Achmea*, the arbitration agreement in the *Micula* case must be considered as void under EU law. However, Micula was given by an ICSID arbitral tribunal and, therefore, there is no recognition procedure open up a review by state courts of the arbitral award, see articles 54 and 55 ICSID Convention.

CJEU on the compatibility with EU law of an arbitration clause in an Intra-EU BIT – Case C-284/16 (Slovak Republic v Achmea BV)

Written by Stephan Walter, Research Fellow at the Research Center for Transnational Commercial Dispute Resolution (TCDR), EBS Law School, Wiesbaden, Germany

Today, the CJEU has rendered its judgement in Slovak Republic v Achmea BV (Case C-284/16). The case concerned the compatibility with EU law of a dispute clause in an Intra-EU Bilateral Investment Treaty (BIT) between the Netherlands and the Slovak Republic which grants an investor the right to bring proceedings against the host state (in casu: the Slovak Republic) before an arbitration tribunal. In concrete terms, the German Federal Court of Justice referred the following three questions to the CJEU (reported here):

> *Does Article 344 TFEU preclude the application of a provision in a bilateral investment protection agreement between Member States of the European Union (a so-called BIT internal to the European Union) under which an investor of a contracting State, in the event of a dispute concerning investments in the other contracting State, may bring proceedings against the latter State before an arbitration tribunal, where the investment protection agreement was concluded before one of the contracting States acceded to the European Union but the arbitration proceedings are not to be brought until after that date?*
>
> *If Question 1 is to be answered in the negative:*
>
> *Does Article 267 TFEU preclude the application of such a provision?*
>
> *If Questions 1 and 2 are to be answered in the negative:*
>
> *Does the first paragraph of Article 18 TFEU preclude the application of such a provision under the circumstances described in Question 1?*

In his Opinion, Advocate General Wathelet answered all three questions in the negative and therefore affirmed the EU law compatibility of such a provision. Most notably (and rather surprisingly for many legal commentators), he concluded that the BIT's arbitration system did not fall outside the scope of the preliminary ruling mechanism of Article 267 TFEU. Hence, an arbitral tribunal established under the BIT was in his opinion eligible to refer questions on the interpretation of EU law to the CJEU.

The CJEU did not follow the Opinion of the Advocate General and held:

> *Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.*

The Court based this finding on a violation of Article 267 TFEU, Article 344 TFEU and Article 19 paragraph 1 subparagraph 2 TEU. An arbitral tribunal established under the BIT is in the Court's opinion an exception to the jurisdiction of the courts of the contracting states of the BIT. Thus, it does not form part of the judicial system of the Netherlands or Slovakia (para. 45) and cannot be classified as a court or tribunal "of a Member State" within the meaning of Article 267 TFEU (para. 46 et seq.). Consequently, it has no power to make a reference to the Court for a preliminary ruling (para. 49). A subsequent review of the award by a court of a Member State (which could refer questions on the interpretation of EU law to the CJEU) is not enough to safeguard the autonomy of EU law since such a review may be limited by the national law of the Member State concerned (para. 53). Unlike in commercial arbitration proceedings such a limited scope of review does not suffice in the case of investment arbitration proceedings because these arbitration proceedings do not originate in the freely expressed wishes of the parties. They derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which Article 19 paragraph 1 subparagraph 2 TEU requires them to establish in the fields covered by EU law, disputes which may concern the

application or interpretation of EU law (para. 55).

As the Court already found a violation of the provision with regard to the questions 1 and 2 it did not have to address the third question.

The judgement can be found here.