

Compatibility of arbitration clauses in Bilateral Investment Treaties with EU law

July 2016

On 3 March 2016, the German Federal Court of Justice (**BGH**) decided ([case number I ZB 2/15](#)) to stall the proceedings by requesting a preliminary ruling from the European Court of Justice (**ECJ**) on whether the arbitration clauses in Bilateral Investment Treaties (**BIT**) between Member States are compatible with EU law.

Facts of the case

In 1992 the Slovak Republic and the Netherlands entered into a BIT. The parties agreed on a reciprocal protection of investments and on the insertion of the arbitration clause: in case of a dispute between a contracting party and an investor an arbitral court is to be competent.

Upon the accession of the Slovak Republic to the EU and the liberalising of its health insurance market for domestic and foreign providers of private health insurances, a Dutch health care insurance company entered the Slovak market. It applied for the relevant licenses to act as a private health insurer and the Slovak Republic granted these licenses. After a change of government in 2006, the new government partly reversed the liberalisation of the health insurance market. With several legislative acts, Slovakia prohibited the use of insurance brokers, the distribution of profits for health insurers and the disposition of insurance portfolios. Therefore the Dutch insurance company suffered damages and initiated the arbitration proceeding against the Slovak Republic for the breach of the BIT. In December 2012 the appointed arbitral court in Frankfurt, Germany, rendered the arbitral award ordering the Slovak Republic to pay EUR 22 million plus interest in damages.

The Slovak Republic challenged the arbitral award before the BGH arguing that the arbitration clause became void with the Slovak Republic's accession to the EU. The European Commission supported this reasoning.

Legal issues that have arisen

The arbitration clause in the BIT between the Slovak Republic and the Netherlands may be incompatible with Article 344 (exclusivity of EU dispute mechanisms), Article 267 (reference for a preliminary ruling) or Article 18 TFEU (discrimination on the grounds of nationality).

The BGH identifies no infringement of Article 344 and 267 TFEU:

Article 344 TFEU denies Member States the right to submit a dispute concerning the interpretation or application of the EU-Treaties to any court or body using any other method of settlement than the one provided for in the Treaties. According to the interpretation of the BGH, Article 344 TFEU is only applicable in disputes between Member States. Therefore it does not apply to the present case as one of the parties is a legal person. Furthermore, no EU procedure governs a claim of damages between a Member State and an investor.

Pursuant to Article 267 TFEU, the ECJ has jurisdiction to give preliminary rulings concerning the interpretation of the Treaties in order to ensure a uniform interpretation of EU law. Arbitrational courts may themselves not submit questions for preliminary rulings to the ECJ. Nevertheless, the BGH is of the opinion that Article 267 TFEU is not infringed because the parties of an

arbitration proceeding can seek judicial review of the arbitral awards before the national court which can then send a request for the preliminary ruling.

However, the BGH considers an infringement of Article 18 TFEU to be possible. Any discrimination on grounds of nationality is prohibited in the EU. If the disputed arbitration clause is to be applied, it would effectively lead to a discrimination against investors of other Member States which are prevented to conclude similar arbitration clauses.

Should an infringement of Article 18 TFEU exist, it would not – according to the BGH – lead to the revocation of the arbitration clause between the Netherlands and the Slovak Republic. Instead, other investors will be granted access to the arbitration proceedings as set out in the BIT between the Netherlands and the Slovak Republic.

With its arguments in the request for a preliminary ruling the BGH contradicts the European Commission which argues that BIT are inconsistent with EU law and therefore void.

Future prospects

The crucial issue is whether the arbitration clause constitutes an unjustified discrimination within the meaning of Article 18 TFEU. Should the ECJ come to this conclusion, the BGH would have a reason to set aside the arbitral award according to the German Code of Civil Procedure. It is important, however, to keep hold of the big picture. The ECJ – [in line with the European Commission](#) – may come to the conclusion that not only single arbitration clauses may violate EU law but that BIT in general are incompatible with EU law.

In order to avoid this type of litigations on the one hand and to secure the protection for investors on the other, Austria, Finland, France, Germany and the Netherlands published a [recommendation](#) on how to deal with intra-EU Investment Treaties in the future. They propose to terminate all existing intra-EU BITs by concluding a multi-lateral agreement among all Member States. Such agreement would secure substantive and procedural protection for Investors. But as diplomatic mills grind slowly, investors are well advised to carefully observe the outcome of the present case in which the ECJ has the opportunity to rule on the compatibility of intra-EU BIT with EU law for the first time.



Dr. Dietmar O. Reich
Lawyer
BEITEN BURKHARDT
Brussels



Dr. Theresa Ilgner
Lawyer
BEITEN BURKHARDT
Brussels

Please note

This publication cannot replace consultation with a trained legal professional.

If you no longer wish to receive this newsletter, you can unsubscribe at any time by e-mail (please send an e-mail with the heading "Unsubscribe" to Dorothea.Behler@bblaw.com) or any other declaration made to BEITEN BURKHARDT.

© BEITEN BURKHARDT Rechtsanwaltsgesellschaft mbH.

All rights reserved 2016.

Imprint

This publication is issued by
BEITEN BURKHARDT Rechtsanwaltsgesellschaft mbH
Ganghoferstrasse 33, D-80339 Munich
Registered under HR B 155350 at the Regional Court Munich /
VAT Reg. No.: DE811218811

For more information see:
www.beitenburkhardt.com/imprint

Editor in charge

Dr. Theresa Ilgner

Your Contacts

Berlin • Kurfuerstenstrasse 72-74 • 10787 Berlin
Phone: +49 30 26471-0 • Fax: +49 30 26471-123
Uwe Wellmann • Uwe.Wellmann@bblaw.com

Brussels • Avenue Louise 489 • 1050 Brussels
Phone: +32 2 6390000 • Fax: +32 2 7322353
Dietmar O. Reich • Dietmar.Reich@bblaw.com

Munich • Ganghoferstrasse 33 • 80339 Munich
Phone: +49 89 35065-1342 • Fax: +49 89 35065-123
Georg Philipp Cotta • Philipp.Cotta@bblaw.com



You will find further interesting topics and information about our experience on our website.



BEIJING • BERLIN • BRUSSELS • DUSSELDORF • FRANKFURT AM MAIN
MOSCOW • MUNICH • NUREMBERG • SHANGHAI • ST. PETERSBURG

WWW.BEITENBURKHARDT.COM