



Amsterdam

The Post-Achmea saga continues : Dutch courts consider the fate of intra-EU arbitration proceedings seated outside of the EU

On 6 March 2018, the Court of Justice of the EU (“CJEU”) delivered its judgment in *Achmea v. Slovakia* (ECLI:EU:C:2018:158). In the years after this judgment and until this date, many national courts ruled on *Achmea*-related issues. In the Netherlands, one of the latest judgments in this saga was rendered by the District Court of Amsterdam on 8 March 2023 (ECLI:NL:RBAMS:2023:1306).

In the *Achmea* judgment, the CJEU ruled that the arbitration clause contained in the Netherlands-Slovakia Bilateral Investment Treaty (“BIT”) had an adverse effect on the autonomy of, and was therefore incompatible with EU law.

This judgment had important implications for all intra-EU investment arbitrations as it increased complexity and uncertainty over the fate of arbitrations conducted pursuant to intra-EU investment treaties (whether BITs or MITs concluded between EU Member States).

In the judgment of the District Court of Amsterdam dated 8 March 2023, the court had to determine whether LC Corp B.V. (a Dutch company) could be compelled to cease pending arbitration proceedings initiated against Poland under the Netherlands-Poland BIT.

Poland argued that the pursuit of these arbitration proceedings is in violation of EU law and consists of an abuse of rights under Article 3:13 Dutch Civil Code (“DCC”) – the arbitration being “clearly futile”, as it is allegedly evident that the arbitration clause contained in the BIT is null and void in that it conflicts with EU law - and/or an unlawful act pursuant to Article 6:162 DCC.

LC Corp B.V. disputed Poland’s allegations. Referring to arbitration case law, including decisions rendered after the *Achmea* judgment, LC Corp B.V. argued that it is the arbitral tribunal that has jurisdiction to assess the validity of the arbitration clause itself. In addition, underlying the fact that the place of arbitration is London, UK, it concluded that UK courts will rule on possible set-aside proceedings. As the UK is no longer part of the EU, UK courts are consequently not bound by EU law (including the *Achmea* judgement) and the arbitration proceedings are therefore not “clearly futile”, contrary to Poland’s allegations.

The court ruled that arbitration proceedings under an intra-EU BIT, with a seat outside the EU, are not “clearly futile” under Article 3:13 DCC and that therefore the continuation of the

arbitration proceedings cannot be qualified as an abuse of rights. Poland's claims were consequently dismissed.

For any further practical support in relation to arbitrations in the Netherlands, please contact:

- **Jonathan Bakker**, Jonathan.Bakker@simmons-simmons.com
- **Eveline Fetter**, Eveline.Fetter@simmons-simmons.com.

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