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The View from Europe: What's New in European Arbitration?

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Recent Decisions by National Courts

FRANCE

In a judgment of the Paris Court of Appeal dated June 3, 2020 (*Bolivarian Republic of Venezuela v Mr Serafin García Armas and Ms Karina García Gruber*, No. 19/03588 – 35L7-V-B7D-B7KIR), in a case remitted to it following a decision of the Supreme Court, the Court of Appeal set aside an arbitral award on the grounds that the Arbitral Tribunal had failed to consider whether the claimants were foreign nationals at the time they made their investment.

Background

Mr Serafin García Armas and his daughter Ms Karina García Grueber (the "**Garcías**") purchased shares in two Venezuelan food import and distribution companies in 2001 and 2006. At the date of the initial purchase, both

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claimants held only Venezuelan nationality, with Ms García obtaining dual Spanish nationality in 2003 and Mr García in 2004. Following a decision of the Venezuelan authorities to impose various administrative sanctions on the companies in 2010, the Garcías commenced an UNCITRAL arbitration under the 1995 bilateral investment treaty between Spain and Venezuela (the "**BIT**").

In a partial award dated December 15, 2014, the Arbitral Tribunal held that it had jurisdiction over the dispute, rejecting the argument of Venezuela that the Garcías did not meet the definition of "investors" under the BIT because they were dual nationals. The majority of the tribunal also considered that the nationality of the Garcías at the date of the investment was not relevant—the fact that the Garcías were both Spanish nationals at the date on which the alleged breach of the BIT occurred and on the date on which they commenced the arbitration was sufficient to establish jurisdiction.

Venezuela applied to the Paris Court of Appeal to set aside the award. It submitted, amongst other things, that on a proper interpretation of the BIT, an "investment" was defined as an investment made by a national of the other State party to the BIT (in this case, Spain). As well as considering whether it had jurisdiction over the Garcías *rationae personae* by virtue of their Spanish nationality, the Arbitral Tribunal should therefore also have considered whether it had jurisdiction *rationae materiae* over the investments that had allegedly been made, by considering whether they fell within the definition of an "investment" set out in the BIT. According to Venezuela, they did not, since the Garcías did not have Spanish nationality at the time of the first investment in 2001.

In a judgment dated April 25, 2017, the Paris Court of Appeal set aside the award in part, but only to the extent that it decided that the relevant investments were covered by the BIT without considering the nationality of the investors at the date when the investments were made. The Court granted an order for enforcement of the remainder of the award.

Venezuela challenged this decision before the French *Cour de cassation* (the "**Supreme Court**"), arguing that the Court of Appeal should have set aside the award in full. In a judgment of February 13, 2019, the Supreme Court noted that the conditions under which the Arbitral Tribunal had ju-

risdiction were cumulative: the Garcías had to show both that they were investors, and that their investment was protected by the BIT. Given that the second condition was not fulfilled, the Court of Appeal should not have upheld the award in part. The Supreme Court accordingly allowed the appeal and remitted the case to the Paris Court of Appeal (differently constituted).

Decision

In its judgment dated June 3, 2020, the Paris Court of Appeal set aside the Arbitral Tribunal's award in its entirety.

The Court found that Venezuela's right to seek annulment of the Award was not affected by the Garcías' withdrawal, in September 2017, of their claims relating to investments made during the period during which their Spanish nationality was contested. The Court held that a party's standing to apply to set aside an award should be judged as at the date of the set aside application. When Venezuela challenged the Award, the Garcías were pursuing their claim in respect of both the 2001 and 2006 investments. The application to set aside should be judged on this basis.

The Court of Appeal confirmed the principle that a tribunal's jurisdiction in an investment arbitration should be determined by reference to the relevant provisions of the investment treaty read in good faith and according to their ordinary meaning in the light of the investment treaty's object and purpose (as set out in Article 31 of the Vienna Convention on the Law of Treaties). Where an investment treaty provides for arbitration, as does the BIT in the present case, the jurisdiction of the tribunal derives from the State's consent to arbitrate contained in the treaty.

Relying on Article 1 of the BIT, the Court held that the BIT protects assets that are "invested" by an investor of the other contracting party. As a result, the jurisdiction *rationae materiae* of the arbitral tribunal applies only to investments that are made at the time the investor had the nationality of the other contracting party. The Court highlighted that at the time of their initial investment in 2001, it was well established that the Garcías did not have Spanish nationality. The Court considered that the jurisdictional criteria set by the BIT are cumulative and individual. In failing to consider

whether it had jurisdiction *rationae materiae* in accordance with the terms of the BIT, the Arbitral Tribunal had erred in its decision on jurisdiction.

The Paris Court of Appeal accordingly held that the Award should be set aside in its entirety. The argument that it should distinguish between the investments made before and after the Garcías obtained Spanish nationality was rejected, given that the Arbitral Tribunal had not itself done so.

Comment

This judgment is one of the early decisions of the new International Chamber of the Court of Appeal of Paris, operational since 2018, which now handles applications to set aside international arbitral awards.

In finding that the Award should be set aside in its entirety, the Court drew the logical conclusion from the judgment of the Supreme Court (although it recognized, at the same time, that the Supreme Court had annulled the first decision of the Paris Court of Appeal, thereby technically leaving both parties free to reargue the case).

As emphasized both in this judgment and by the Supreme Court, the offer to arbitrate that is set out in a BIT must be construed as a whole—it is only in the event that each of the conditions set out in the BIT are fulfilled that a claimant can accept the offer and confer on an arbitral tribunal the jurisdiction to determine the dispute. Thus, in this case, the claimants were required to demonstrate, not only that they personally fell within the definition of an "investor," but also that the Tribunal had jurisdiction over the subject matter of the dispute because it was an "investment." Once the Court determined that the second criterion was not fulfilled, it followed as a consequence that the Award as a whole had to be overturned.

GERMANY

The Munich Higher Regional Court recognized and enforced a foreign arbitral award despite ongoing set aside proceedings and pending parallel enforcement proceedings at the seat of arbitration (decision of December 20, 2019, Docket No. 34 Sch 14/18).

Background

The dispute concerned enforcement proceedings initiated by a Croatian company as claimant and applicant against a German company as respondent relating to an arbitral award rendered in Croatia under the Rules of International Arbitration of the Permanent Arbitration Court at the Croatian Chamber of Commerce. In the arbitral award, respondent was ordered to make several payments to the claimant.

After the arbitral award was rendered, the respondent challenged the arbitral award in Croatia, arguing that the Arbitral Tribunal lacked jurisdiction. The court of first instance denied to set aside the Arbitral Award. The respondent then appealed the decision of the first instance court. In the meantime, the claimant had already commenced execution proceedings in Croatia to secure its claims against the respondent.

In parallel and whilst the appeal proceedings in Croatia were still pending, the claimant requested recognition and enforcement of the arbitral award in Germany. The respondent objected to the recognition and enforcement, arguing, among other things, that the set aside proceedings in Croatia were still pending and that the claimant had initiated parallel execution proceedings in Croatia and had already secured land charges with regard to several properties in Croatia.

Decision

The Higher Regional Court of Munich (the "**Munich Court**") confirmed enforcement of the Arbitral Award.

At the outset, the Munich Court confirmed the claimant's interest in legal relief despite the fact that the respondent had already commenced execution proceedings and managed to obtain secured land charges in Croatia. The fact that the claimant had obtained secured land charges in Croatia was not sufficient for the Munich Court to refuse recognition and enforcement in Germany because securing land charges does not lead to the satisfaction of claims arising out of an arbitral award. The Munich Court stressed that until the respondent can show that the Arbitral Award has been fully satisfied, the claimant is entitled to initiate recognition and enforcement proceedings on the basis of the Arbitral Award in more than one country in order to

be able to gain access to the respondent's assets and execute the Arbitral Award in countries other than the country of origin of the Arbitral Award. At the same time, the Munich Court emphasized that this does not restrict the rights of the respondent, who can object to recognition, enforcement, and execution at any stage upon showing that the arbitral award has been fully or partially satisfied.

Turning to the respondent's argument that the recognition and enforcement proceedings should be suspended due to the pending setting aside proceedings in Croatia, the Munich Court held that the mere fact that setting aside proceedings are pending at the seat of arbitration does not require suspension of the recognition and enforcement proceedings in Germany. Rather, a suspension of the recognition and enforcement proceedings presupposes that the respondent substantiates the grounds for setting aside the arbitral award in the enforcement proceedings in Germany and shows that there are reasonable chances that the arbitral award will be set aside.

The Munich Court further observed that the respondent had failed to substantiate and show a reasonable chance that the Arbitral Award would be set aside in its country of origin. In this respect, the Munich Court held that the respondent's argument that the Arbitral Tribunal lacked jurisdiction because the claimant had forfeited its right to initiate arbitration by requesting interim enforcement measures with the Croatian courts prior to initiating arbitration was not a valid objection. The Munich Court held that respondent would have had to raise this argument during the arbitral proceedings, and consequently was precluded to raise this objection in recognition and enforcement proceedings. The Munich Court was also not convinced that requesting interim measures from state courts precludes arbitration as the principal proceedings. Additionally, the Munich Court placed emphasis on the fact that the court of first instance in Croatia had already denied the request to set aside the arbitral award. Therefore, the Munich Court found that there was no reasonable chance of success that the arbitral award would be set aside despite the pending appellate proceedings in Croatia.

Comment

The Munich Court's decision strengthens the position of successful claimants in arbitral proceedings and of respondents that have been awarded costs in an arbitral award as the decision explicitly confirms that recognition and enforcement proceedings can be conducted in parallel in several countries until the arbitral award has been fully satisfied.

At the same time, the decision of the Munich Court helpfully defines the relationship between setting aside proceedings in the country of origin of the arbitral award (*i.e.* at the seat of the arbitration) and recognition and enforcement proceedings in other countries. Whilst the Munich Court emphasized that, although enforcement proceedings may be stayed due to pending setting aside proceedings—as is provided for in Article VI of the New York Convention 1958, a stay of the enforcement proceedings presupposes a reasonable chance that the arbitral award will be set aside.

SWEDEN

In a decision of the Supreme Court of Sweden of February 4, 2020 (*Republic of Poland v. PL Holdings S.á.r.l.*, Docket No. T 1569-19), the Court requested a preliminary ruling from the Court of Justice of the European Union ("**CJEU**") on the validity of an arbitration agreement that arguably originated from Poland's acceptance of the investor's offer to arbitrate the dispute implicitly contained in the request for arbitration.

Background

PL Holdings S.á.r.l. ("**PL Holdings**"), a company registered in Luxembourg, had acquired shares in two Polish banks. After the merger of these banks, PL Holdings held 99% of the shares in the new bank. The Polish Financial Supervision Authority forced PL Holdings to sell its shares and canceled its voting rights. Following a request for arbitration, an SCC arbitral tribunal determined that Poland violated the Belgium-Luxembourg Economic Union (BLEU)-Poland BIT (the "**BIT**") and awarded PL Holdings approximately EUR 150 million in damages in August 2017.

Poland challenged the award arguing that the arbitration clause in the BIT was invalid in light of the CJEU's decision in *Achmea* (Docket No. C-284/16, ECLI:EU:C:2018:158). Poland argued that the arbitration clause was incompatible with EU law, in particular with Articles 267 and 344 of the Treaty on the Functioning of the European Union ("**TFEU**") and the principle of autonomy of EU law. PL Holdings opposed and argued that Poland's objection should be time barred pursuant to the Swedish Arbitration Act and the SCC Arbitration Rules 2010 as Poland failed to challenge the validity of the arbitration clause in the arbitration.

Poland's request to set aside the award was denied by the Svea Court of Appeal in 2019. The Svea Court of Appeal held, in accordance with the CJEU's decision in *Achmea*, that EU member states' standing offers contained in investment treaties are incompatible with EU law and therefore not binding on the respective EU member state. Nevertheless, the Svea Court of Appeal observed that the CJEU's decision in *Achmea* does not preclude EU member states to enter into arbitration agreements with foreign investors with respect to a particular dispute based on party autonomy at a later stage. Consequently, the Svea Court of Appeal considered that it is possible for a EU member state and an investor to enter into an arbitration agreement with respect to investment disputes at any time. Yet, Poland's failure to object to the validity of the arbitration agreement in a timely manner was found to be crucial in this respect. The Svea Court of Appeal also held that it was not required to request a preliminary ruling of the CJEU. Accordingly, the Svea Court of Appeal denied Poland's request.

Poland appealed this decision to the Supreme Court of Sweden.

Decision

As a starting point, the Supreme Court of Sweden considered it clear that the investor-state-dispute settlement clause in the BIT was invalid in light of the CJEU's decision in *Achmea*. Consequently, the Supreme Court of Sweden observed that Poland's standing offer to arbitrate disputes under the BIT could also be considered to be incompatible with EU law and therefore invalid.

The Supreme Court of Sweden then turned to the Svea Court of Appeal's position that EU member states are free to accept an offer by an investor to arbitrate disputes under the BIT and that Poland failed to timely object to the validity of the arbitration agreement. It held that it was unclear how EU law is to be interpreted in this respect. The Supreme Court of Sweden thus decided to request a preliminary ruling from the CJEU. In particular, the Supreme Court of Sweden asked the CJEU whether EU law renders an arbitration agreement between a EU member state and an investor invalid where an investment treaty contains an arbitration clause that is invalid due to the fact that the investment treaty was concluded between EU member states even if the EU member state refrains, by free will, from raising an objection to the jurisdiction of the arbitral tribunal.

Comment

The decision of the Svea Court of Appeal was appraised as paving a way to limiting the effects of the CJEU's decision in *Achmea* and to reviving investment treaty arbitration based on intra-EU BITs. Indeed, if arbitration agreements concluded by a EU member state and an investor to arbitrate a dispute under the BIT after the dispute arose were compatible with EU law, this could prove to be beneficial for investors that have invested in the EU. Yet, the Supreme Court of Sweden seems to be more skeptical as to whether an arbitration agreement between a EU member state and an investor is compatible with EU law (as interpreted by the CJEU in *Achmea*) even if entered into after the dispute arose. The preliminary ruling proceedings are now pending before the CJEU under Docket No. C-109/20.

It may prove difficult to persuade the CJEU that EU law does not preclude arbitration agreements between EU member states and investors as contended by the Svea Court of Appeal. The current hostile stance towards investor-state-dispute settlement in the EU might also affect the CJEU's decision in this regard.

However, even if the CJEU were to find that EU law does not preclude arbitration agreements entered into by EU member states by the free will of the EU member state, the practical relevance of such a finding could still be limited in light of the newly signed agreement to terminate intra-EU

BITs (see below). Indeed, even if the Svea Court of Appeal's position prevails, this recourse to keep intra-EU investment treaty arbitration alive still requires the existence of investment treaties in force. It may, however, provide investors succeeding in pending intra-EU investment treaty arbitration with an option to continue pursuing their claims (see below).

SWITZERLAND

On October 16, 2019, the Swiss Supreme Court rendered a decision on the independence and impartiality of a party-appointed arbitrator (Docket No. 4A_292/2019). The Court had to decide whether *ex parte* exchanges between an arbitrator and counsel who had nominated him could give rise to a lack of impartiality and independence of the arbitrator in question. The Court dismissed the application to set aside the Award by considering that *ex parte* exchanges between a party-appointed arbitrator and counsel are not always prohibited, particularly when they occur prior to the full constitution of the arbitral tribunal.

Background

The underlying dispute concerned a sales agreement between a Turkish company (party B) and a Swiss company (party A), which provided for *ad hoc* arbitration seated in Schwyz, Switzerland.

On June 19, 2018, party B applied to the competent state court at the arbitral seat (so-called *juge d'appui*) to confirm co-arbitrator C as its party-nominated arbitrator. In the same application, because party A had failed to appoint an arbitrator, party B also requested that the court appoint an arbitrator on party A's behalf. Party A objected to co-arbitrator C's appointment arguing that the fact that co-arbitrator C had been employed by party B's counsel's law firm between 2007 and 2009 impinged upon C's independence and impartiality.

By decision of November 20, 2018, the court confirmed coarbitrator C's appointment, nominated co-arbitrator D on behalf of party A and ordered the two co-arbitrators to designate a presiding arbitrator. On November 26, 2018, the two co-arbitrators agreed on E as presiding arbitrator.

At the end of procedurally complex arbitral proceedings, party B submitted its cost submission together with detailed timesheets and professional invoices in support of its cost claim. Upon reviewing this evidence, Party A took issue with a timesheet entry dated November 22, 2018, revealing that party B's counsel and co-arbitrator C had had an (undisclosed) conversation concerning the governing substantive law of the agreement on that day. Party A raised the issue with the tribunal, asserting that the private conversation had taken place without co-arbitrator D and A's counsel having been informed, and that these circumstances (further) demonstrated co-arbitrator C's lack of independence and impartiality.

Two days later, the Arbitral Tribunal (as a whole) clarified that the conversation between party B's counsel and coarbitrator C had revolved solely around the issue as to whether the sales agreement contained any choice of law clause, and that the purpose was to enable the two co-arbitrators to nominate a suitable presiding arbitrator. The arbitral tribunal also clarified that the conversation had been previously communicated to co-arbitrator D and that presiding arbitrator E was subsequently made aware of it, too.

In its Final Award of May 13, 2019, the Arbitral Tribunal found in party B's favor on the merits and maintained that there was no valid ground to disqualify co-arbitrator C for an alleged lack of independence and impartiality.

Party A subsequently applied to the Swiss Supreme Court to vacate the Final Award on grounds of the undisclosed private conversation that co-arbitrator C had had with party B's counsel. Added to the fact that co-arbitrator C had worked in the same law firm as party B's counsel between 2007 and 2009, party A argued that these elements gave rise to serious concerns as to co-arbitrator C's independence and impartiality.

Decision

The Swiss Supreme Court dismissed party A's challenge and upheld the Final Award.

The Court first set out a comprehensive review of the position under various international soft law instruments regarding conflicts of interest and procedural conduct. In so doing, it concluded that *ex parte* communications

between a party or its counsel and a party-nominated arbitrator were not *per se* excluded under any circumstances. In particular, the Court underscored that it was usual, and generally acceptable, for party representatives to contact potential arbitrators to enquire about their availability and suitability, or to discuss the selection of the presiding arbitrator.

In support of this consideration, the Court referred to the Green List of the IBA Guidelines on Conflicts of Interest (Guideline 4.4.1) which it found allows for such *ex parte* communications. It considered party A's argument that Guideline 4.4.1 of the IBA Guidelines on Conflicts of Interest provides that contacts are permitted only "*prior to appointment*" of a party-appointed arbitrator—and that thus party B's counsel contact with co-arbitrator C on November 22, 2018 (*i.e.* two days after his appointment) was improper—to be ill-conceived. In terms of the relevant point in time after which unilateral communications are prohibited, the Court found that Guideline 8 of the IBA Guidelines on Party Representation ("*prospective or appointed Party-nominated Arbitrator for the selection of the Presiding Arbitrator*") and Canon III/B.2 of the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes were a good reflection of international arbitral practice in that these guidelines do not as a rule prohibit certain contacts between a party or its counsel and an arbitrator until the full constitution of the arbitral tribunal.

Second, the Court considered that the *ex parte* communication in the instant case did not create any objective apprehension of bias, nor did it give rise to justifiable doubts as to co-arbitrator C's independence and impartiality. The private communication had taken place four days prior to the full constitution of the tribunal, and party A had failed to establish that the merits of the dispute had been discussed during that conversation. Given the short duration of the telephone conversation (which was reflected in the timesheet entry to have lasted twelve minutes in total), the Court considered it was likely that the exchange concerned the choice of a suitable president and other matters related to such choice (such as the applicable substantive law) rather than the merits of the case. The conviction of the Court was further reinforced by the fact that the appointment decision of

the court at the seat had made no reference to any governing law and that this topic was relevant for the selection of a suitable presiding arbitrator.

Comment

The outcome of this decision is to be welcomed as it is in line with customary practice in international arbitration.

Whilst the decision is a useful reminder to arbitrators and counsel that they must apply caution in the process of constituting an arbitral tribunal and maintain sufficient distance and restraint in their interactions so as to preserve independence and impartiality, it also underlines that *ex parte* communications between counsel and an appointed co-arbitrator are permitted—and even necessary—in the arbitral process to the extent such communications take place prior to the full constitution of the tribunal and are limited to issues that do not touch upon the merits of the case. In the instant case, where the discussion related to the law governing the matter, what appears to have saved the award is that it was established that the discussion overall was very short, which the Supreme Court found to be a strong indication that the discussion did not go beyond a general discussion on the governing law, rather than any discussion on the substance of the case itself. Arguably, in practice this will be a fine line, and it would appear advisable based on the Supreme Court's decision to steer clear of any discussion of the governing law in such communications unless it is necessary for the choice of the presiding arbitrator. Finally, the decision highlights the importance—just like for arbitrator interviews—of being prudent in keeping a record of the content of any *ex parte* communications between counsel and arbitrators.

The case further underscores that, with respect to the assessment of an arbitrator's independence and impartiality, the Swiss Supreme Court takes guidance from a number of soft law instruments. While the Court had already referred to the IBA Guidelines on Conflicts of Interest in numerous previous decisions, this case is the first time that it refers to the IBA Guidelines on Party Representation.

Finally, and more generally, the case is a reminder of the high hurdle faced by parties who attempt to vacate awards in Switzerland on the grounds

of lack of impartiality or independence, and the robust approach of the Supreme Court to applications of this kind. This case, as all such cases, was ultimately decided on its individual facts, as the Supreme Court confirmed that only the specific circumstances of a given case are decisive for the assessment of an arbitrator's potential lack of impartiality or independence.

Legislative Developments

EUROPEAN UNION

On May 5, 2020, out of the remaining 27 EU member states 23 EU member states have signed an agreement for the termination of intra-EU BITs (Official Journal of the European Union 2020 L 169/1) ("**Agreement**"). It will enter into force once ratified by two signatories. It also allows for provisional application. Pursuant to the Agreement's recitals, the Agreement seeks implementation of the CJEU's decision in *Achmea*. Austria, Finland, Sweden, and Ireland declined to sign the Agreement. The United Kingdom is also not a party to the Agreement as it left the EU in January 2020. The Agreement is being criticized for resting on a broad interpretation of the implications of the CJEU's decision of March 6, 2018, in *Achmea*. Nonetheless, signatories agreed to terminate all intra-EU BITs including any sunset clauses.

The Agreement, although not comprehensively, also stipulates its effect on intra-EU investment treaty arbitrations. It describes three categories of arbitrations, whereas the date of the *Achmea* Judgment plays a significant role.

First, all awards rendered on or before March 6, 2018, and where no challenge, annulment, or setting aside proceedings were pending on March 6, 2018, are in principle not affected by the Agreement.

Second, and with respect to new arbitrations, the Agreement prescribes that an investor-state arbitration clause in BITs listed in Annex A to the Agreement "*shall not serve as legal basis for New Arbitration Proceedings*" (Article 5 of the Agreement), whereas the reference date is also March 6, 2018, *i.e.* the BITs shall not serve as a basis for arbitral tribunals' jurisdic-

tion if the arbitration was or is initiated after March 6, 2018. With regards to new arbitrations, the signatory states undertook to inform arbitral tribunals of the signatory parties' understanding of the *Achmea* Judgment and to pursue annulment proceedings.

The third and last category of arbitrations are arbitrations that were pending on March 6, 2018. Also in these arbitrations, the signatory states undertook to inform arbitral tribunals of the Agreement and to challenge any awards rendered in these arbitrations or to pursue annulment proceedings. Further, Article 9 of the Agreement foresees structured dialogue proceedings to settle pending disputes. The structured dialogue proceedings are aimed at settling pending arbitrations, but require the investor to request a suspension of the pending arbitration prior to commencing the structured dialogue proceedings. This requirement, albeit coinciding with the signatory states' stances towards intra-EU investment treaty arbitration, may prove as posing an unreasonable burden on investors, especially since the Agreement does not state the consequences of failed structured dialogue proceedings, *i.e.* what shall happen where no settlement is reached. This results in uncertainty for investors.

In this context, it remains to be seen whether the CJEU approves of the Svea Court of Appeal's position in the pending preliminary judgment proceedings under Docket No. C-109/20 (see above). Indeed, should an arbitration agreement between an investor and a EU member state that has been concluded on the basis of the investor's request for arbitration be valid even if the arbitration clause in the BIT is invalid, the Agreement's effects on pending arbitrations may turn out to be limited. The Agreement's effects on pending arbitrations may be further limited if the arbitration agreement is deemed to be constituted by the mere failure of the respondent state to timely object to the arbitral tribunal's jurisdiction.

In any event, given that 23 out of 27 EU member states signed the Agreement, investors are well-advised to consider alternative means of investment protection and to assess whether their current investment structure provides for access to investment treaty arbitration outside the intra-EU context or to even consider restructuring their investments.