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Article

Another 'Bleak House'—the decision of the German Federal Supreme Court on the inadmissibility of intra-EU ICSID arbitrations

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ABSTRACT

The decision of the German Federal Supreme Court of 27 July 2023 has sparked intense discussions. Unexpectedly, the Court granted a declaration of inadmissibility of intra-EU ICSID proceedings under section 1032(2) of the German Code of Civil Procedure. The decision is of significant practical relevance and yet another push against intra-EU Investor–State Dispute Resolution. After a short introduction (i), *we will describe the legal and factual background of the decision* (ii) *and summarize the Court's reasoning* (iii). *Thereafter, we will comment on the decision* (iv) *and conclude by pointing out possible implications for future intra-EU ICSID proceedings* (v).

INTRODUCTION

Charles Dickens much acclaimed novel '*Bleak House*' tells the story of a long-standing family feud triggered by contradictory wills left by the testator. The situation is exacerbated by the malfunctioning of an opaque legal system—a contemporaneous critique of the competing

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jurisdictions of the Courts of Chancery (Equity) that operated side-by-side with the Courts of Law. The courts were tasked to deal with these conflicting wills—but remained stuck in protracted legal manoeuvring and overlapping jurisdiction. One feels rather tempted to draw parallels to the ongoing discussions and decisions of the Court of Justice of the European Union ('CJEU'), arbitral tribunals operating under investment treaties and the multitude of national courts (not only in Europe) regarding the validity of intra-EU Investor–State Dispute Resolution ('ISDS'). Some are deciding on this validity from the exclusive perspective of EU law ('CJEU'), others from the vantage point of public international law (Investment tribunals), and again others through their national legislation, often through the lens of the primacy of EU law. In sum, a colourful prism of intertwined and competing decisions which, as some authors aptly put it, '*remain to a large degree determined by mutual ignorance*'[1], resulting '*in a schism between arbitral tribunals and EU courts*'.[2]

The latest in this long line is the decision of the German Federal Supreme Court (the 'Court') of 27 July 2023, which could potentially even lead to a run on German courts to stop intra-EU investment arbitrations at an early stage. It deals with the admissibility of intra-EU investment arbitration not at the enforcement stage, but already prior to the constitution of the tribunal.

However, even before this decision of the Court, the future of ISDS in the European Union ('EU') looked uncertain. Following the CJEU decisions *Achmea*[3] and *Komstroy*[4], courts of Member States regularly set-aside awards[5] and the European Commission put pressure on Member States to follow its agenda and withdraw from intra-EU investment treaties. More and more States have given in already.[6] The silver lining was that arbitral tribunals have overwhelmingly rejected the invalidity of intra-EU arbitration clauses as stipulated by *Achmea* and specified in *Komstroy*—from the vantage point of public international law—and simply moved on.[7] Recently, the issue crossed the Atlantic, when Judge Richard J. Leon of the District Court for the District of Columbia declined to enforce an intra-EU award.[8] He held the Court did not have subject matter jurisdiction under the Foreign States Immunities Act, as Spain lacked the

[1] Richard Happ and Sebastian Wuschka, 'EU Law and Investment Arbitration: Of Cooperation, Conflict, and the EU Legal Order's Autonomy' in Stefan Kröll, Andrea K. Bjorklund and Franco Ferrari (eds), *Cambridge Compendium of International Commercial and Investment Arbitration* (Cambridge University Press 2023).

[2] Sebastian Seelmann-Eggebert, 'Too Much of a Good Thing? - The Exorbitant Scope of § 1032 (2) of the German Code of Civil Procedure' (2023) 1 SchiedsVZ 32, 34.

[3] Case C-284/16 *Slowakische Republik v Achmea BV* [2018] ECLI:EU:C:2018:158.

[4] Case C-741/19 *Republic of Moldova v Komstroy LLC* [2021] ECLI:EU:C:2021:655.

[5] *Novenergia II—Energy & Environment (SCA), SICAR, B 124550 v The Kingdom of Spain,* 2023-10-7 T 297-23, Swedish Supreme Court, para 1; *Republic of Poland Ministerstwo Finansów ul. v PL Holdings S.á.r.l.,* 2022-12-14 T 1569-19, Swedish Supreme Court, para 1; CA Paris 19 April 2022, 49/2022, para 73; CA Paris 19 April 2022, 48/2022, para 100; Luxembourg Cour de Cassation, 14 July 2022, 116/2022.

[6] France, Germany, and Poland submitted written notifications of withdrawal to the Depositary of the Energy Charter Treaty [Energy Charter Secretariat, 'Written notifications of withdrawal from the Energy Charter Treaty', <https://www.energychartertreaty.org/details/article/written-notifications-of-withdrawal-from-the-energy-charter-treaty/> accessed 13 September 2023]. Italy has already formally withdrawn in 2016. Member States announcing their intention to withdraw include Spain, the Netherlands, Belgium, Slovenia, Luxembourg, Denmark and Portugal [Global Arbitration Review, <https://globalarbitrationreview.com/search?search=withdrawal%20ect&sort=2&page=1> accessed 13 September 2023]. Additionally, 23 member states signed the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union [EUR-Lex, 'Agreement for the termination of Bilateral Investment treaties between the Member States of the European Union', <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22020A0529%2801%29> accessed 13 September 2023].

[7] So far, only the Tribunal in *Green Powers Partners K/S and SCE Solar Don Benito APS v Kingdom of Spain*, 16 June 2022, SCC Arbitration V (2016/135), Award, para 445 declined jurisdiction. The overwhelming majority of tribunals remained unbothered, eg, *1. Vattenfall AB; 2. Vattenfall GmbH; 3. Vattenfall Europe Nuclear Energy GmbH; 4. Kernkraftwerk Krümmel GmbH & Co. oHG; 5. Kernkraftwerk Brunsbüttel GmbH & Co. oHG v Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, para 232 (31 August 2018); *Landesbank Baden-Württemberg at al. v Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the 'Intra-EU' Jurisdiction Objection, paras 146 et seq. (25 February 2019); *Cube Infrastructure Fund SICAV and others v Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability, and Partial Decision on Quantum, paras 142 et seq. (19 February 2019).

[8] *Blasket Renewable Investments, LLC, v Kingdom of Spain*, No. 21-3249 (RJL), 2023 U.S. Dist. LEXIS (D.C. Circ. 29 March 2023).

capacity to make a valid offer to arbitrate under EU law. This unexpected development triggered an *amicus curiae* brief by a group of practitioners and academics in the cases *NextEra v Kingdom of Spain* and *9Ren v Kingdom of Spain* in the Court of Appeals for the District of Columbia. They urged the Court of Appeals to enforce the underlying ICSID awards against Spain so as not to '*seriously undermine the operation and legitimacy of the investor-state dispute settlement framework established by the Convention*'.[9]

THE LEGAL AND FACTUAL BACKGROUND OF THE DECISION OF THE GERMAN FEDERAL SUPREME COURT

With its decision of 27 July 2023, the German Court positioned itself on this issue by granting a declaration of inadmissibility of intra-EU ICSID proceedings under section 1032(2) German Code of Civil Procedure ('CCP').[10] In doing so, the Court not only extended the *Achmea* reasoning further; it also referred to the possibility of the judgment influencing third-state courts under the '*doctrine of comity*' (expressly citing its mention in the decision *Infrared Environmental Infrastructure GP Ltd v Kingdom of Spain*[11] before the District Court for the District of Columbia);[12] a broad hint at the ongoing proceedings at the Court of Appeals.

However, the reasoning of the Court seems inconsistent and unconvincing as it questions the very nature of the ICSID Convention as a self-contained legal system: the ICSID Convention established an exhaustive process of annulment and enforcement in articles 52, 53 ICSID. Additionally, article 41 ICSID-Convention grants tribunals the exclusive power to decide upon their jurisdiction, which is not subject to review by national courts. All signatories of the Convention are under an international law obligation to abide by this agreed process.

Factual background and procedural history

The underlying disputes arose in early 2021, when the German companies RWE and Uniper initiated two ICSID arbitrations against the Netherlands. Both were operating coal power-plants in the Netherlands. When the Netherlands legislated a coal phase-out by 2030, RWE and Uniper initiated ICSID proceedings and claimed, among other causes of action, indirect expropriation of their investments.[13]

Unrelatedly, on 13 May 2021, Irish Company Mainstream Renewable Power Ltd. ('Mainstream') also initiated ICSID proceedings against Germany. Mainstream was operating an offshore wind park. After Germany introduced new legislation relating to the renewable energy sector, Mainstream also claimed breaches of international investment law.

Both RWE and Uniper as well as Mainstream based their claims on the Energy Charter Treaty (ECT). The ECT is a multilateral (and mixed) treaty seeking to enhance energy cooperation and investments between its signatories. Importantly, it contains an investor–state dispute resolution mechanism in article 26 ECT, allowing disputes between investors and their host-states to be arbitrated, among others, under the ICSID Convention.

[9] Jus Mundi, 'Amicus Curiae Brief of international Scholars in Support of Appellee and Affirmance' (6 July 2023) 8, <https://jusmundi.com/en/document/other/en-9ren-holding-s-a-r-l-v-kingdom-of-spain-amicus-curiae-brief-of-international-scholars-in-support-of-appellee-and-affirmance-thursday-6th-july-2023> accessed 7 November 2023.

[10] BGH, Beschluss vom 27 Juli 2023—I ZB 43/22, Rn. 133.

[11] *Infrared Environmental Infrastructure GP Ltd. v Kingdom of Spain*, No. 20-817 (JDB), 2021 U.S. Dist. LEXIS 120489 (D.C. Circ. 19 June 2021).

[12] BGH (n 10) Rn. 91.

[13] *RWE AG and RWE Eemshaven Holding II BV v Kingdom of the Netherlands*, ICSID Case No. ARB/21/4, Request for Arbitration, para 48 (20 January 2021); *Uniper SE, Uniper Benelux Holding B.V., Uniper Benelux N.V. v Kingdom of the Netherlands*, ICSID Case No. ARB/21/22, Claimant's Memorial, para 375 (20 May 2022).

After registration of the proceedings at ICSID, but before the constitution of the tribunals, the Respondents applied to the competent German courts seeking a declaration of inadmissibility of the ICSID proceedings under section 1032(2) CCP. The German courts were split on whether to grant the declaration:

The Higher Regional Court of Berlin refused to grant the declaration. It viewed the ICSID Convention—in the authors' opinion: correctly—as a self-contained legal framework, which did not allow for procedural remedies other than those provided for in the Convention. Additionally, the court held that *Komstroy* did not require a domestic court to apply a provision of its domestic civil procedure to ICSID arbitrations.[14]

By contrast, the Higher Regional Court of Cologne granted the declaration. It started by recalling the primacy of EU law. According to this doctrine, Member States cannot rely on prior international agreements if they violate EU law. The Court then agreed with the Higher Regional Court of Berlin insofar as it also found the *Komstroy* decision not to address the application of domestic provisions to ICSID arbitrations. However, it found the EU law principle of *effet utile* to justify an analogous application of section 1032(2) CCP.[15]

Both decisions were appealed to the German Federal Supreme Court.

In the meantime, on 17 March 2023, Uniper withdrew its claim against the Federal Republic of Germany pursuant to article 44 ICSID.[16] The company had been severely impacted by the drop in supply of Russian gas. The withdrawal of the claim was one condition of a deal with the German government, which in turn acquired 99 % of the shares for EUR 34.5 billion.[17] RWE recently withdrew its claim as well, which is understood to have been caused by the decision of the German Federal Supreme Court.[18]

Section 1032(2) CCP as the basis for the decisions (?)

Section 1032(2) CCP is a peculiarity of domestic German arbitration law and is not based on the UNCITRAL Model Law on International Commercial Arbitration of 1985 or its amended version of 2006 (hereinafter: UNCITRAL Model law).[19] Article 8(1) UNCITRAL Model law merely provides that a court shall on request refer the parties to arbitration '*unless it finds that the agreement is null and void, inoperative or incapable of being performed*'. In 1997, Germany mostly aligned its arbitration law with the UNCITRAL Model law. However, section 1032(2) CCP was not amended. Section 1032(2) CCP reads as follows:

> *Bei Gericht kann bis zur Bildung des Schiedsgerichts Antrag auf Feststellung der Zulässigkeit oder Unzulässigkeit eines schiedsrichterlichen Verfahrens gestellt werden.*

Translated:

> *Until the arbitral tribunal has been constituted, a request may be filed with the court to have it determine the admissibility or inadmissibility of arbitral proceedings.*

[14] KG Berlin, Beschluss vom 28 April 2022—12 SchH 6/21, Rn. 24c.

[15] OLG Köln, Beschluss vom 1 September 2022—19 SchH 15/21, Rn. 33; OLG Köln, Beschluss vom 1 September 2022—19 SchH 14/21, Rn. 35.

[16] *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v Kingdom of the Netherlands*, ICSID Case No. ARB/21/22, Order of the Tribunal Taking Note of the Discontinuance of the Proceedings and Decisions on Cost, para 72 (17 March 2023).

[17] Global Arbitration Review, 'Uniper withdraws ECT claim', <https://globalarbitrationreview.com/article/uniper-withdraws-ect-claim> accessed 6 November 2023.

[18] Global Arbitration Review, 'RWE to withdraw ECT claim against Netherlands', <https://globalarbitrationreview.com/article/rwe-to-withdraw-ect-claim-against-netherlands> accessed 6 November 2023.

[19] Ulrich G. Schroeter, 'Der Antrag auf Feststellung der Zulässigkeit eines schiedsrichterlichen Verfahrens gemäß § 1032 Abs. 2 ZPO' (2004) 6 SchiedsVZ 288, 288.

Section 1032(2) CCP can be a powerful tool as it enhances the efficiency of arbitral proceedings and promotes legal certainty at a very early point.[20] Especially when confronted with ambiguous, competing, or pathological arbitration clauses and potentially protracted arbitral proceedings, the provision provides the possibility to determine the admissibility of arbitral proceedings at an early stage. As a result, section 1032(2) CCP is often used in commercial disputes.[21] It can also be relied upon for arbitral proceedings with their seat outside of Germany or where the seat has not yet been determined according to section 1025(2) CCP.[22] Importantly, German courts do not rule on the merits of the dispute under section 1032(2) CCP. They only determine the admissibility or inadmissibility of the arbitration. The competent court to issue the declaration is the Higher Regional Court at the seat of the arbitration and, if not seat is determined, the Higher Regional Court of Berlin.

Interestingly, section 1032(2) CCP has already been invoked in the past in intra-EU ISDS proceedings. On 11 February 2021, the Higher Regional Court of Frankfurt declared an arbitration between an Austrian Bank and the Republic of Croatia inadmissible under section 1032(2) CCP.[23] Importantly, however, the tribunal had its legal seat in Frankfurt and was constituted under the UNCITRAL Arbitration Rules. Relying on the *Achmea* decision of the CJEU, the Court held the arbitration agreement in the relevant Bilateral Investment Treaty ('BIT') to be invalid. As, by contrast, ICSID arbitrations do not have a legal seat, prior to the decision of the German Federal Supreme Court it was doubtful whether such a decision could also be rendered in relation to intra-EU ICSID proceedings.

A declaration issued under section 1032(2) CCP has an immediate effect on the proceedings. Not only is it binding for German courts at the annulment or enforcement stage, but it also binds the tribunal insofar as an award rendered in violation of a declaration under section 1032(2) CCP is null and void. Therefore, a negative decision under this provision is generally the end of the arbitral process.

The European Union's emerging influence on investor–State dispute settlement

Before the Maastricht Treaty and the Treaty of Rome were amended through the Treaty of Lisbon in 2007/09, competence for matters relating to Foreign Direct Investment (FDI) lay primarily with the individual Member States, with the exception of the EU also being a signatory to the ECT as part of a mixed agreement. At the time, there were many investment treaties in force between the individual Member States. These were also the basis for the numerous renewable energy arbitrations brought against Spain and the Czech Republic which led to a significant spike in the ICSID case numbers in the years 2012–18.[24] Article 206 ff. of the Treaty on the Functioning of the European Union ('TFEU') changed the dynamics: under these provisions, the organs of the EU were now exclusively competent to deal with matters relating to FDI.[25] With this transfer of competence, newer investment treaties were now negotiated at the level of the European Union. For example, both the Transatlantic Trade and Investment Partnership (TTIP) and the Comprehensive Economic and Trade Agreement (CETA) were

[20] Drucksachen [BT] 13/5274, p. 38.

[21] See, eg., BayOblG, Beschluss vom 10 Oktober 2022—101 SchH 46/22.

[22] OLG Frankfurt, Beschluss vom 2 Juni 2019—26 SchH 3/19; Monika Anders, '§ 1025 ZPO', in Monika Anders and Burkhard Gehle (eds), *Zivilprozessordnung* (Beck 2023) para. 5; Wolfgang Voit, '§ 1032 ZPO' in Hans-Joachim Musielak and Wolfgang Voit (eds), Zivilprozessordnung (Franz Vahlen 2023) para 10.

[23] OLG Frankfurt, Beschluss vom 11 February 2023—26 SchH 2/20. The decision has subsequently been upheld: BGH, Beschluss vom 17 November 2021—I ZB 16/21.

[24] ICSID, The ICSID Caseload—Statistics, Issue 1-2019, 7, The ICSID Caseload—Statistics, <https://icsid.worldbank.org/sites/default/files/publications/Caseload%20Statistics/en/ICSID%20Web%20Stats%202019-1%20%28English%29_rev.pdf> accessed November 2023.

[25] Multilateral Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007, 2702 UNTS 47938.

discussed in the European Parliament. Additionally, the CJEU also issued an advisory opinion on the compatibility of CETA with EU law.[26] However, even before that, the controversies had already begun: The European Commission started to intervene in intra-EU proceedings[27] and on 6 March 2018, the CJEU in *Achmea*[28] for the first time held an intra-EU BIT to be contrary to EU law. What followed was an unprecedented number of *amicus curiae* interventions by the European Commission in intra-EU investment arbitrations to make their case for the inadmissibility of such arbitrations.[29] Despite that, these objections were overwhelmingly rejected by arbitral tribunals[30]. Similarly, the European Commission nowadays regularly submits *amicus curiae* interventions also in enforcement proceedings abroad.[31]

The Achmea and Komstroy decisions

As established above, it was only with the *Achmea* decision that the issue of the incompatibility of ISDS with EU law really took off. As the case law of the CJEU is also quite relevant for the present decision of the court, we will shortly recap the main arguments of the *Achmea* judgment:

On 6 March 2018, the CJEU issued its decision in *Achmea*. In the underlying dispute, a Dutch insurance company formerly known as Eureko had initiated an arbitration against the Slovak Republic under article 8 of a BIT between the Netherlands and the Slovak Republic. After the tribunal ruled in favour of Eureko, which had changed its name to Achmea, the Slovak Republic applied to the German courts to set aside the award. Unsure of the validity of the arbitration agreement in article 8 of the BIT, the German Federal Supreme Court (as the final national court instance) referred the question to the CJEU for a preliminary ruling under article 267 TFEU.

The CJEU held—at that point in time still quite surprisingly[32]—the arbitration agreement in article 8 of the BIT to violate EU Law. It relied heavily on the autonomy of EU law and articles 267 and 344 of the TFEU and its exclusive jurisdiction when it comes to the interpretation of

[26] Case C-1/17 *EU-Canada CET Agreement* [2019] ECLI:EU:C:2019:341.

[27] See, eg, Italaw, 'European American Investment Bank AG (EURAM) v. Slovak Republic, European Commission Observations' (13 October 2011), <https://www.italaw.com/sites/default/files/case-documents/italaw4243_0.pdf> accessed 18 September 2023.

[28] Above (n 3).

[29] Arbitral proceedings in which the European Commission applied to file *amicus curiae* submissions include *1. Vattenfall AB*; *2. Vattenfall GmbH*; *3. Vattenfall Europe Nuclear Energy GmbH*; *4. Kernkraftwerk Krümmel GmbH & Co. oHG*; *5. Kernkraftwerk Brunsbüttel GmbH & Co. oHG v Federal Republic of Germany*, ICSID Case No. ARB/12/12; *E.ON SE, E.ON Finanzanlagen GmbH and E.ON Iberia Holding GmbH v Kingdom of Spain*, ICSID Case No. ARB/15/35; *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen, JSW Solar (zwei) GmbH & Co. KG v Czech Republic*, PCA Case No. 2014-03; *WOC Photovoltaik Portfolio GmbH & Co. KG and others v Kingdom of Spain*, ICSID Case No. ARB/22/12; *Mitsui & Co. Ltd. v Kingdom of Spain*, ICSID Case No. ARB/20/47; *VM Solar Jerez GmbH and other v Kingdom of Spain*, ICSID Case No. ARB/19/30; *Sapec, S.A. v Kingdom of Spain*, ICSID Case No. ARB/19/23; *Canepa Green Energy Opportunities I, S.à r.l. and Canepe Green Energy Opportunities Ii, S.à r.l. v Kingdom of Spain*, ICSID Case No. ARB/19/4; *European Solar Farms A/S v Kingdom of Spain*, ICSID Case No. ARB/18/45; *Itochu Corporation v Kingdom of S*pain, ICSID Case No. ARB/18/25.

[30] For the overwhelming rejections by Tribunals, see (n 79).

[31] *NextEra Energy Global Holding B.V. v Kingdom of Spain*, United States Court of Appeal for the District of Columbia Circuit, Brief for the European Commission on behalf of the European Union as *Amicus Curiae* in support of the Kingdom of Spain and reversal, 6 June 2023; *Hydro Energy v the Kingdom of Spain*, Civil Action No. 1:21-cv-02463-RJL, Brief for the European Commission on behalf of the European Union as *Amicus Curiae* in support of the Kingdom of Spain, 17 March 2022; *Eiser Infrastructure Limited v Kingdom of Spain*, Proposed Brief of the European Commission on behalf of the European Union as Amicus Curiae in support of the Kingdom of Spain, United States District Court for the District of Columbia, Civil Action No. 1:18-cv-1686, 13 March 2019; *Ioan Micula v Government of Romania,* 15-3109-cv, Brief for Amicus Curiae the Commission of the European Union in support of Defendant-Appellant, United States Court of Appeals for the Second Circuit, 4 February 2016*; Novenergia II—Energy & Environment (SCA) v Kingdom of Spain*, Civil Action No. 1:18-cv-1148, Proposed Brief of the European Commission on Behalf of the European Union as Amicus Curiae in support of the Kingdom of Spain, United States District Court for the District of Columbia, 28 February 2019; *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain,* Civil Action No. 1:18-cv-2254, Proposed Brief of the European Commission on behalf of the European Union as amicus curiae in support of the Kingdom of Spain, United States District Court for the District of Columbia, 3 May 2019.

[32] Even the Advocate General in his Opinion found no conflict of European Union law with the relevant BIT, see Case C-284/16 *Slowakische Republik v Achmea BV* [2017] ECLI:EU:C:2017:699, Opinion of Advocate General Wathelet, para 273. Additionally, the CJEU noted the German Federal Supreme Court as the referring court had doubted whether European Union Law precluded the intra-EU arbitration, Case C-284/16 *Slowakische Republik v Achmea BV* [2018] ECLI:EU:C:2018:158, paras 13-22.

EU law. Under these provisions, domestic courts may refer questions to the CJEU for a preliminary ruling and Member States undertake not to submit any disputes concerning questions of EU law to any other court. In the view of the CJEU, these articles established a judicial system to ensure the autonomy of EU law was preserved. It interpreted the procedure for a preliminary ruling to be a cornerstone of EU law as it ensured its consistent application: every court tasked with applying EU law, that was unsure of its correct interpretation, had to refer the question to the CJEU for a preliminary ruling.

The CJEU found that the tribunal must apply EU law to resolve the dispute, although its reasoning was not entirely clear. In the *Achmea* case, the governing law provisions of the Netherlands/Slovak BITs were somewhat wider than other BITs, providing that in addition to the BIT and international law, the tribunal should also apply '*the law in force of the Contracting Party concerned*' (article 8 (6) of the BIT). This, in the opinion of the CJEU, included EU law. However, on the interpretation of the TFEU by the CJEU, the tribunal was not a '*court or tribunal of the member state*' within the meaning of article 267 TFEU—although there were some good arguments to the contrary[33]. Accordingly, the CJEU held that the tribunal could not refer questions on the interpretation of EU law for a preliminary ruling but was still tasked with applying EU law. This, in the view of the CJEU, would violate articles 267 and 344 TFEU. Therefore, the CJEU held the arbitration agreement in article 8 of the BIT to violate EU law.

After the decision in *Achmea* the CJEU issued its decision in *Komstroy* on 2 September 2021. In this judgment, it extended the *Achmea* reasoning (BIT-related) to article 26 ECT; a multilateral (and mixed) investment treaty, to which the European Union itself is a contracting party. Inevitably, the decision has received much attention from academics and practitioners alike and has been subject to criticism.[34]

Nevertheless, by now, the case law from the CJEU seems to be settled. Accordingly, as mentioned above, awards rendered in intra-EU arbitrations—whether under intra-EU BITs or the ECT—are regularly declared unenforceable or set aside by courts of the Member States.[35]

THE DECISION OF THE GERMAN FEDERAL SUPREME COURT

With its decision of 27 July 2023, the Court applied the reasoning of the CJEU with a procedural twist. The Court first followed the reasoning of the Higher Regional Court of Cologne, which held section 1032(2) CCP to be applicable to intra-EU ICSID proceedings. Thereafter, the Court declared article 41(1) ICSID Convention not to be an obstacle to a declaration under section 1032(2) CCP.

Section 1032(2) CCP applied by analogy to intra-EU ICSID arbitrations

To hold section 1032(2) CCP applicable to ICSID arbitrations, the Court resorted to an analogous application of section 1025(2) CCP. The wording of section 1025(2) CCP reads:

[33] Jürgen Basedow, 'EU Law in International Arbitration: Referrals to the European Court of Justice' (2015) 32 JIA 367, 378 et seq.

[34] It is telling the CJEU in para 21 of its decision in Case C-741/19 *Republic of Moldova v Komstroy LLC* [2021] ECLI:EU:C:2021:655 stated: '*The Council of the European Union, the Hungarian, Finnish and Swedish Governments and Komstroy are, in essence, of the view that the Court does not have jurisdiction to provide answers to the questions referred because EU law is inapplicable to the dispute at issue in the main proceedings as the parties to that dispute are external to the European Union*'. For additional criticism, see, eg., Maximilian van der Beck, 'Intra-EU investment protection in the energy sector—the Komstroy decision of the ECJ', (2022) 6 ZIWR 260, 262; Björn P. Ebert and Friedrich Weyland, 'Weitere Rechtsschutzdefizite in der EU?' (2022) 1–2 RIW 20, 22; Nikos Lavranos, Adhiraj Lath and Reet Varma, 'The Meltdown of the Energy Charter Treaty (ECT): How the ECT was ruined by the EU and its Member States' (2023) 1 SchiedsVZ 38, 41.

[35] Above (n 5).

Die Bestimmungen der §§ 1032, 1033 und 1050 sind auch dann anzuwenden, wenn der Ort des schiedsrichterlichen Verfahrens im Ausland liegt oder noch nicht bestimmt ist.

Translated:

Sections 1032, 1033 and 1050 shall also apply if the seat of arbitration is abroad or has not yet been determined.

This provision broadens the scope of the German *lex arbitri* to arbitrations seated outside of Germany. ICSID arbitrations, however, do not have a legal seat.[36] Arbitral tribunals established under the ICSID Convention operate in a special, delocalized legal framework under international public law.[37] This unique feature distinguishes ICSID arbitrations from investor–state arbitrations under other institutional rules, eg, the UNCITRAL Rules or the SCC.[38] Thus, before this recent decision, it was uncertain whether section 1032(2) CCP was applicable to ICSID proceedings at all merely looking at the black letter of the German arbitration law and in particular section 1025(2) CCP. Quite to the contrary, there were practitioners and academics who advocated a restrictive interpretation in anticipation of a decision in the initiated proceedings.[39]

Concerning the intra-EU ICSID proceedings under challenge, the Court now construed an analogous application of section 1025(2) CCP. Under German law, a legal analogy requires an unintentional regulatory gap ('*Planwidrige Regelungslücke*') and comparable interests ('*Vergleichbare Interessenlage*'). The Court identified such an unintentional regulatory gap as it was unable to find any evidence that the legislator intended to exclude ICSID proceedings from the scope of the German *lex arbitri*. Even the existence of specific provisions[40] dealing with the enforcement of investment awards was not enough to convince the Court of the non-existence of a regulatory gap. The Court then turned to the requirement of a comparable interest. Under German law, demonstrating a comparable interest requires a party to prove the legislature would have come to the same conclusion if it would have been aware of the issue. The Court determined that the legislature intended German courts to have jurisdiction even in cases where the arbitration had its seat in another country. According to the Court, the intention to provide German courts with such jurisdiction was equally applicable to cases of delocalized arbitration proceedings. Thus, it reasoned there to be a comparable interest and held section 1025(2) CCP to apply by way of legal analogy.

Article 41 ICSID is no hurdle to a declaration under section 1032(2) CCP

Accordingly, the Court determined section 1032(2) CCP in principle to apply to ICSID arbitrations. Next, it turned its attention to article 41 ICSID Convention. Pursuant to article 41 (1) ICSID Convention, the tribunal shall be the judge of its own competence. This so-called

[36] Alexander J. Behlolavek, 'Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth' (2013) 1 ASAB 262, 269.

[37] Torsten Lörcher, 'ICSID-Schiedsgerichtsbarkeit', (2005) 1 SchiedsVZ 11, 20.

[38] International Centre for the Settlement of Investment Disputes, 'Comparing ICSID Convention and ICSID-Administered UNCITRAL Arbitration', <https://icsid.worldbank.org/resources/publications/comparing-icsid-convention-and-icsid-administered-uncitral-arbitration> accessed 13 September 2023.

[39] See, however, Ben Steinbrück and Justin Friedrich Krahé, 'Declaratory Relief against Post-Achmea ICSID Arbitration? German arbitral law's international reach' (2022) 8 EuZW 357, 364; a better approach is developed by Seelmann-Eggebert, above (n 2), 36 et seq.

[40] Gesetz zu dem Übereinkommen vom 18. März 1965 zur Beilegung von Investitionsstreitigkeiten zwischen Staaten und Angehörigen anderer Staaten 4. März 1969, BGBl II at 369, last amended by the Gesetz zur Neuregelung des Schiedsverfahrensrechts, 22. Dezember 1997, BGBl I, § 11, at 3236.

principle of competence-competence is a well-established cornerstone of international arbitration.[41] The Court was mindful of this principle of competence-competence and acknowledged it for all regular ICSID proceedings. Accordingly, a declaration under section 1032(2) CCP regarding ICSID proceedings remains impermissible in principle.

However, the Court then held article 41 ICSID Convention to be inapplicable in the exceptional context ('*ausnahmsweise*') of a declaration under section 1032(2) CCP in relation to intra-EU ICSID proceedings. The Court set out its reasoning by recalling the primacy of EU law. This doctrine has been well-established in the case law of the CJEU, which consistently has held the treaties of the EU to create an autonomous source of legal obligations.[42] Under EU law, those obligations take precedence over other legal obligations of the Member States, even over international ones.[43] This primacy of EU law requires the courts of the Member States to disapply national provisions if they violate EU law.[44]

Here, it is important to note that article 41 ICSID Convention, from the perspective of the German hierarchy of norms, would be considered a national law[45] (cf article 59 II of the German Constitution) which could potentially be disapplied under the doctrine of primacy of EU law. According to article 59 II, treaties relating to matters of federal legislation require the implementation by the respective bodies responsible for federal legislation (dualistic model) in the form of a federal law. Thus, within the Federal Republic of Germany, the ICSID Convention as an international treaty has the status of federal law and could therefore be subject to the doctrine of primacy of EU Law.

Bearing article 59 II of the German Constitution in mind, the Court reasoned article 41 ICSID Convention was inapplicable due to the primacy of EU law. Specifically, the Court in paragraph 70 referred to the decisions *European Food*[46] and *Romatsa*[47] of the CJEU. In those decisions, the CJEU held two intra-EU ICSID awards to be contrary to EU law. To come to this conclusion, the CJEU ruled that the underlying arbitration agreements violated articles 267 and 344 TFEU. The CJEU recognized that articles 53 and 54 ICSID established a self-contained system for annulment and enforcement of ICSID awards. However, in the opinion of the CJEU, the primacy of EU law nevertheless mandated courts of Member States to refuse enforcement. The Court considered itself bound by those decisions and reasoned it would have to deny enforcement of a subsequent award under the doctrine of primacy of EU law.

The Court then extended this reasoning to the pre-award-stage, with which section 1032(2) CCP is concerned. For this interpretation, it relied on the doctrine of *effet utile*. As established in the caselaw of the CJEU, this doctrine requires the procedural law of the Member States to not obstruct the effective use of rights of the EU.[48] Wherever one procedural provision ensures the effective use of rights, and another procedural provision hinders the effective use of rights, the provision hindering the effective use of rights must be disapplied.[49]

Under the *effet utile* doctrine, the Court held article 41 ICSID Convention to not prohibit a declaration under section 1032(2) CCP in relation to intra-EU ICSID proceedings. It recalled the effect of a declaration under section 1032(2) CCP, which is to bind German courts in later enforcement proceedings. Thus, it viewed section 1032(2) CCP as a procedural provision giving

[41] This principle is even explicitly enshrined in art. 16 of the UNCITRAL Model Law on International Commercial Arbitration.
[42] Beginning with the famous decision Case 6/46 *Costa v E.N.E.L.* [1964] E.C.R. 585.
[43] Joined cases C-402/05 P, C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] E.C.R. I-06351, paras 285 et seq.
[44] Case C-378/17 *Minister for Justice and Equality and The Commissioner of An Garda Síochána v Workplace Relations Commission* [2018] ECLI:EU:C:2018:979, para 35.
[45] BVerfG, Beschluss vom 15. Dezember 2015—2BvL 1/12.
[46] Case C-638/19 *European Commission v European Food SA and Others* [2022] ECLI:EU:C:2022:50.
[47] Case C-333/19 *Romatsa and Others* [2022] ECLI:EU:C:2022:749.
[48] Case C-505/14 *Klausner Holz Niedersachsen GmbH v Land Nordrhein-Westfalen* [2015] ECLI:EU:C:2015:742.
[49] Case C-213/89 *The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others* [1990] E.C.R. I-02433.

full effect to EU law at the earliest possible stage—a mere efficiency argument. Conversely, article 41 ICSID Convention would obstruct this effect, as it declares the Arbitral Tribunal alone to be competent to decide on its own jurisdiction with national courts only later having the ability to refuse enforcement. Consequently, article 41 ICSID Convention would hinder the effectiveness of EU law. Therefore, the Court ruled article 41 ISCID Convention to be disapplied under the doctrine of *effet utile* in relation to intra-EU ICSID proceedings. Whether the Court mixed up in its reasoning 'effectiveness' with 'efficiency' is a discussion for another article.

The Court also justified its application of the *effet utile* doctrine by referring to the decision of the CJEU in *PL Holdings*.[50] According to this decision, in the event an arbitration against a Member States is registered on grounds contrary to EU law, Member States are bound to immediately raise an objection before the tribunal or a competent court.[51] Relying on this requirement of the CJEU, the Court found its application of section 1032(2) CCP to intra-EU ICSID proceedings justified and warranted.

The German Federal Supreme Court follows the Komstroy decision by the CJEU

Having determined the applicability of section 1032(2) CCP and the non-applicability of article 41 ICSID Convention, the Court turned to the merits of the application. It started by determining the law applicable to the arbitration agreement, making use—again—of a legal analogy to article 5 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[52] (hereinafter NYC) as a legal basis. Accordingly, it held that the parties' choice determined the law applicable to the validity of the arbitration agreement. However, the Court's justification for applying the NYC by analogy is a bit unclear since the parties to the ECT are the contracting states, not the disputing parties.

The Court then assessed whether the Parties had validly agreed to an arbitration under article 26 ECT. In its examination of article 26 ECT, the Court discussed the decision of the CJEU in *Komstroy* at some length. The Court was convinced by the CJEU assertion of the '*dual nature*' of the ECT: the CJEU viewed the ECT as part of EU law and as international law at the same time. Relying on its case law, the CJEU in *Komstroy* held agreements concluded by the Council pursuant to articles 217 and 218 TFEU to be an act of institutions of the EU. Thus, as it qualified the ECT as an act of the institutions of the EU, it applied EU law to article 26 ECT. Consequently, despite the EU being a signatory to the ECT, the CJEU declared itself competent to interpret the ECT.

The Court then fully agreed with the *Komstroy* decision, which held that article 26 ECT violated EU law. It rejected any proposition the CJEU's decision in *Komstroy* was *ultra vires*. Additionally, it considered the *Komstroy* decision not to violate article 27 of the Vienna Convention of the Law on Treaties (VCLT). According to this article, a party to a treaty may not invoke its internal law to justify its failure to perform an international treaty. However, and remarkably, in the opinion of the Court, Member States were not even bound by general principles of international law if those principles violated EU law. Accordingly, it ruled that article 27 VCLT did not apply. Accordingly, the Court held article 26 ECT to violate EU law and granted the application under section 1032(2) CCP for a lack of a valid arbitration agreement.

A CRITICAL DISCUSSION

The press release of the Court's decision already triggered significant comments and summaries. Now that the Court has published its reasoning, a closer examination of the arguments is warranted and indeed raises a frown.

[50] Case C-109/20 *Republiken Polen v PL Holdings Sàrl* [2021] ECLI:EU:C:2021:875.
[51] Ibid, para 56.
[52] Article V, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 7 June 1959, 4739 UNTS 330.

The Court's problematic construction of section 1025(2) CCP

The Court's application of section 1025(2) CCP by analogy is not convincing. The Court held there to be an unintentional regulatory gap ('*Planwidrige Regelungslücke*') as, allegedly, there is no evidence the legislature wanted to exclude delocalized ICSID proceedings from the scope of the domestic CCP. However, the analysis of the Court fails to adequately consider the self-contained nature of the ICSID Convention, which is clearly codified in German arbitration law in section 1061(1) CCP and section 1064(3) CCP.

Contrary to the reasoning of the Court, there is more than sufficient evidence the legislature wanted to exclude ICSID arbitrations from the scope of the domestic CCP. The Court was even directly referred to the evidence, the so-called 'Gesetz zur Neuregelung des Schiedsverfahrensrechts [Law on the Revision of the Arbitration Law], Dec. 22, 1997, BGBl. I 3224'. The legislative materials relating to this Law contain the following passage:

> *Im Gegensatz zum Modellgesetz (…) enthält § 1025 ZPO-E keine ausdrückliche Bestimmung über den Vorrang völkerrechtlicher Verträge, da dieser Vorrang selbstverständlich ist.*[53] [Empasis added]

Translated:

> *In contrast to the Model Law (…), section 1025 of the CCP does not contain an explicit provision on the primacy of international treaties, since this primacy is self-evident.* [Empasis added]

This is clear and unambiguous proof of the legislature's intention: section 1025(2) CCP cannot lead to an application of section 1032(2) CCP in violation of Germany's international obligations. The Court does not even discuss this passage in its judgment but, in view of the plain wording of the legislative materials, it is unclear how the Court can still hold there to be no sufficient evidence of the legislature's intention.[54]

This finding is additionally unconvincing if one considers that German courts are under an obligation to interpret their domestic law in a way compatible with international law as far as possible. Germany is a signatory state to the ICSID Convention. The Court should have interpreted section 1025 CCP in accordance with the ICSID Convention, specifically article 26 ICSID. Article 26 ICSID clearly states: '*Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy*'. From this wording, it is clear Germany is under an international law obligation to follow the agreed-upon dispute resolution process in the ICSID Convention to the exclusion of domestic remedies. It can be assumed the legislature intended to comply with those obligations. The Court does not discuss this conclusion and thus fails to fulfil its duty to interpret domestic law in accordance with international law.

A different interpretation of section 1025(2) CCP was also not required by Germany's obligation as a Member State of the EU. The Court itself in paragraph 113 of its judgment acknowledged EU law had no bearing on the purely domestic procedural provisions when it stated: '(…) *whether the Respondent state (…) before the constitution of the Tribunal can declare the ICSID proceedings inadmissible under section 1032 (2) CCP is a matter of domestic procedural law and not subject to the interpretation of the CJEU*'. Thus, as European Law is irrelevant to this issue and Germany is a signatory to the ICSID Convention, the finding of a regulatory gap seems incongruent.

[53] Drucksachen [BT] 13/5274 at 31.
[54] Christian Tietje, 'Nationaler Rechtsschutz bei ICSID-Verfahren möglich' (2023) 5 SchiedsVZ 289, 305.

Additionally, the Court reasoned there to be a comparable interest. It deduced this from a supposedly similar intention of the legislature to subject delocalised ICSID proceedings to the same legislative framework as ordinary commercial arbitrations. This finding, again, runs contrary to the intent and purpose of the ICSID Convention. Holding that the legislature would also have intended a provision of the German *lex arbitri* to apply to intra-EU ICSID proceedings would result in the assumption the German legislature intended to violate international law—which plainly runs contrary to the legislative materials and would in any case be an odd approach.

Article 41 ICSID leads to the inadmissibility of a declaration under section 1032(2) CCP in any event

Even assuming the applicability of section 1032(2) CCP, the reasoning of the Court fails to convince as article 41 ICSID Convention still poses an insurmountable hurdle. In an attempt to disapply article 41 ICSID Convention, the Court refers both to the primacy of EU law and to the principle of *effet utile*. However, on closer analysis, both arguments appear not to support the disapplication of article 41 ICSID Convention.

The primacy of EU law is no obstacle to the applicability of article 41 ICSID Convention

The principle of primacy of EU law by itself at best leads only to the non-enforceability of intra-EU ICSID awards in the EU; it does not require declarations of inadmissibility during the arbitral proceedings. Viewing the issue solely from the perspective of EU law, especially considering the established case law of the CJEU, it appears likely that enforcement would have to be refused by courts of Member States. The CJEU already had the opportunity to rule on the non-compatibility of articles 53 and 54 ICSID Convention with EU law.[55] However, the CJEU has never ruled on a potential violation of EU law through article 41 ICSID Convention. Therefore, applying EU law, enforcement of intra-EU ICSID awards under articles 53 and 54 ICSID would not be possible due to the primacy of EU law. However, it is unclear how this principle would require a state court to issue a declaration of inadmissibility before any enforcement proceedings. Mere efficiency is not a legal argument.

However, from the perspective of the ICSID Convention, the doctrine of the primacy of EU law is unconvincing and no bar to enforcement. Straightforwardly, signatory states are under an international obligation to not obstruct enforcement under articles 53 and 54 ICSID. States cannot justify the breach of international law by reliance on their domestic law, which includes EU law. Accordingly, by refusing to enforce an intra-EU ICSID award, states potentially breach international law.

Due to those differences of the ICSID Convention and EU law, the Court at some point might find itself at an inconvenient crossroad. However, the Court did not need to address this conflict in the present proceedings as it only exists in relation to the enforcement of intra-EU ISCID awards. As established above, so far, the CJEU has only declared articles 53 and 54 ICSID to conflict with EU law. It has never ruled on article 41 ICSID Convention's compatibility with EU law. Consequently, the primacy of EU law in the case law of the CJEU so far only covers the enforcement of awards. Therefore, the Court would have been free to declare article 41 ICSID Convention to obstruct a declaration under section 1032(2) CCP. This interpretation would have paid respect to Germany's obligations under the ICSID Convention whilst also not violating the primacy of EU law.

[55] Case C-638/19 P *European Commission v European Food SA and Others* [2022] ECLI:EU:C:2022:50, paras 142–145; Case C-333/19 *Romatsa and Others* [2022] ECLI:EU:C:2022:749, paras 38–44.

The doctrine of effet utile does not lead to the inapplicability of article 41 ICSID Convention

It is perhaps telling that the Court was only able to construe a potential non-applicability of article 41 ICSID Convention by combining the primacy of EU law with the principle of *effet utile*. However, the Court's reasons for disapplying article 41 ICSID under the doctrine of *effet utile* are also unconvincing:

The Court states that disapplying article 41 ICSID would give effect to EU law at the earliest possible stage. Accordingly, it is supposedly called for under the principle of *effet utile*. However, not applying article 41 ICSID Convention does not give EU law effect at the earliest opportunity. Even after a declaration under section 1032(2) CCP, an intra-EU ICSID tribunal is entitled to continue the proceedings and render an award. Such an award may be enforced in third countries bound by articles 53 and 54 ICSID Convention. Whilst the award may be unenforceable in Germany, this was already the case due to the *Achmea* caselaw from the CJEU, which prohibits the enforcement of intra-EU ISDS awards. A declaration under section 1032(2) CCP does not change this status quo. Thus, it is unclear to see how disapplying article 41 ICSID Convention gives effect to EU law at the earliest stage. Therefore, not applying article 41 was simply not necessitated by the principle of *effet utile*. Furthermore, the Court's reliance on *PL Holdings*[56] to establish the inapplicability of article 41 ICSID under the principle of *effet utile* is also not convincing. As mentioned above, in *PL Holdings* the CJEU required Member States to raise objections to the jurisdiction of intra-EU ISDS Tribunals in front of the Tribunal or the competent court.[57] However, the Courts reasoning is circular: *PL Holdings* would only apply if the Court would have jurisdiction under section 1032(2) CCP. As the Court, on a proper construction of section 1025(2) CCP, does not have jurisdiction, *PL Holdings* does not apply. Therefore, the Court cannot rely on PL Holdings to establish the inapplicability of article 41 ICSID under the *effet utile* principle.

The Court opens the door for tactical litigation with its construction of section 1032(2) CCP

The implications of the decision are rather disconcerting: the reasoning of the Court adds 'another arrow to the quiver'[58] of Member States seeking to torpedo ongoing intra-EU ICSID arbitrations before German courts under section 1032(2) CCP. The potential for such danger was already convincingly shown by the Higher Regional Court of Berlin in a decision dated 10 August 2006. In this judgment, the Higher Regional Court of Berlin advocated for a restrictive interpretation of the scope of section 1032 CCP. It required there to be a minimal connection to Germany, as the decision would be '*without any further significance if it cannot at some point be enforced domestically or otherwise have a domestic connection*'.[59] It must be noted the wording of section 1032(2) CCP does not require this restrictive interpretation. However, the Higher Regional Court of Berlin rightly wanted to avoid '*proceedings for the sake of proceedings*': without any potential for subsequent annulment or enforcement proceedings in Germany, a declaration of inadmissibility under section 1032(2) CCP has no practical value.

However, in a more recent decision, the Higher Regional Court of Berlin was less reluctant to grant an application under section 1032(2) CCP. Only a hypothetical chance of subsequent enforcement proceedings in Germany apparently sufficed.[60] Before the decision of the Court,

[56] Above (n 52).
[57] Above (n 53).
[58] Seelmann-Eggebert (n 2) at 32.
[59] KG Berlin, Beschluss vom 10 August 2006—20 Sch 7/04.
[60] Seelmann-Eggebert (n 2) 34, cites the decision in n 17: '*In later proceedings, the Higher Regional Court of Berlin partially abandoned its reasoning: KG Berlin 19 July 2021, 12 1017/20, para. The decision was subsequently upheld by the German Federal Supreme Court*'.

the issue had only been raised in relation to commercial arbitrations. With a declaration under section 1032(2) CCP now possible in relation to intra-EU ICSID proceedings, Member States faced with intra-EU ICSID claims may turn to the German Courts for 'help'. This development has serious potential to hamper or delay ongoing arbitral proceedings. Indeed, in the arbitration between Uniper and the Kingdom of the Netherlands, the ICSID tribunal has already expressed '*grave concern*' regarding the Respondents request to apply to the German courts.[61]

The earlier decision of the Higher Regional Court of Berlin found approval from German scholars. They argued for an insertion of a procedural requirement of a legitimate interest ('Feststellungsinteresse' or 'Rechtsschutzbedürfnis').[62] Perhaps realizing the Higher Regional Court of Berlin in its earlier decision also pointed to the danger of creating '*proceedings for the sake of proceedings*', the Court tried to argue a declaration under section 1032(2) CCP would have factual and legal effects. However, none of the effects wished for by the Court show why a declaration under section 1032(2) CCP would be more than a waste of money and resources.

A 'ripple effect' of a decision under Section 1032(2) CCP is unnecessary and problematic

As a starting point, the Court in paragraph 91 of its decision seemingly hopes to create a ripple effect persuading other courts of Member States not to enforce intra-EU ICSID awards. The Court then expands on this rationale and urges third countries to follow suit via the '*doctrine of comity*'. It specifically even cites a case decided by the US District Court for the District of Columbia and a letter of the European Commission on the enforcement of intra-EU ICSID awards in third countries. The case from the District Court of Columbia is currently pending at the Court of Appeals. Several internationally renowned scholars and practitioners have submitted an *amicus curiae* brief urging the Court of Appeals to enforce the ICSID awards.[63]

By referring to the case from the District Court of Columbia, the Court steps into quite difficult terrain. Courts of third states are obviously not bound by EU law and thus are free to deviate from the CJEU decisions in *Achmea* and *Komstroy*. They are only bound by their own international obligations under the ICSID Convention, especially articles 53 and 54 ICSID. Importantly, refusing to enforce an ICSID award can potentially incur liability of the third state for the commission of an internationally wrongful act[64] or from investors for a claim for denial of justice under applicable investment treaties, for example, if a third party invested in a dispute by way of third-party funding or otherwise.[65]

Additionally, the ripple effect that the Court is hoping for in relation to third states seems even less desirable when considering a letter sent by the European Commission to the Dutch Ministry of Economic Affairs and Climate Policy on 22 September 2021.[66] In this letter, the EC urged the German courts to disapply the ICSID Convention, reasoning that doing otherwise

[61] *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v Kingdom of the Netherlands* , ICSID Case No. ARB/21/22, Decision on Provisional Measures, 17 February 2022, p. 2. Additionally, the Tribunal expressly noted Respondent's representatives declared a declaration by the German courts would not have any effect on the Claimant's ability to continue participating in the ICSID proceedings.

[62] Alfred Escher and Götz Reichert, 'Die subsidiäre Zuständigkeit des Kammergerichts Berlin nach § 1062 Abs. 2 a. E. ZPO: Globale Allzuständigkeit oder minimaler Inlandsbezug?' (2007) 2 SchiedsVZ 71, 75; Scholars listed by Seelmann-Eggebert (n 2), 33, n 14.

[63] JusMundi, 'Amicus Curiae Brief of International Scholars in Support of Appellee and Affirmance' (6 July 2023), <https://jusmundi.com/fr/document/pdf/other/en-9ren-holding-s-a-r-l-v-kingdom-of-spain-amicus-curiae-brief-of-international-scholars-in-support-of-appellee-and-affirmance-thursday-sixth-july-2023> accessed 13 September 2023.

[64] Aniruddha Rajput, 'Non-Compliance with Investment Arbitration Awards and State Responsibility' (2022) 37 ICSID Review 247, 250.

[65] Richard Happ, 'Aktuelle Rechtsprechung der ICSID-Schiedsgerichte' (2005) 1 SchiedsVZ 21, 23; Patrick Dumberry, 'Denial of Justice under NAFTA Article 1105: A Review of 20 Years of Case Law' (2014) 31 ASAB 246, 252.

[66] Italaw, 'Letter by the European Commission 22 September 2021', <https://www.italaw.com/cases/documents/9411> accessed 13 September 2023.

would '*enable RWE AG to opt out of the Union legal system*'.[67] How much influence this letter actually had on the interpretation of the German courts is of course a matter for speculation. However, it is certainly undesirable for Member State institutions—or indeed any institution—to exert any kind of pressure on the judiciary of third states, which are not bound by them, to refuse enforcement of intra-EU ICSID awards as well. After all, even in the most fiercely contested investment treaty cases in the past, governments have usually refrained from political interference through, for example, diplomatic channels, in the recognition that ICSID proceedings should not be politically charged.

On this issue, it is worth pointing out the evolving role of the European Commission in relation to intra-EU ISDS. As established above, in the beginning, the European Commission confined itself to filing *amicus curiae* submissions in its truest sense in arbitral proceedings. Over time, those submissions became increasingly hostile and by now, the European Commission files *amicus curiae* submissions in almost every intra-EU arbitration and even before courts of third states.[68] This development has led some tribunals and commentators to point out the EC should act as '*a friend of the court and not a friend of either party*'.[69] Those developments were summarized by the tribunal in *Electrabel v Hungary*, when it stated: '*In effect, far from exercising the traditional role of an "amicus curiae", the Commission became a second respondent more hostile to Electrabel than Hungary itself*'. [70] However, even taking this history into account, the letter to the Dutch Ministry certainly is another escalation and sheds an unfortunate light on the administration of justice in the EU.

In relation to courts of other Member States, another 'ripple effect' of the Court seems unnecessary anyway: courts of other Member States already quite routinely decline enforcement of intra-EU ICSID awards based on the decisions in *Achmea* and *Komstroy*.[71]

A decision under section 1032(2) CCP does not have any effect on ICSID proceedings

The Court then in paragraph 92 aims for a factual influence on ongoing ICSID proceedings ('*eine jedenfalls faktisch-mittelbare Auswirkung*'). As a legal basis, it cites the duty of a tribunal to render an enforceable award. While recognizing the non-binding character of a declaration under section 1032(2) CCP for an ICSID tribunal, the Court urges ICSID tribunals to consider the non-enforceability of an award in Germany.

This argument goes beyond the tribunal's duty to render an enforceable award and seems more like a back-door justification of the Court to apply section 1032(2) CCP by analogy. The actual duty of a tribunal established under the ICSID Convention does not require it to render an award that is enforceable in every single signatory jurisdiction as the tribunal must be equally conscious to perform its mandate granted under the applicable investment treaty.[72] The better view is that the tribunal has fulfilled its duty if the award is enforceable in some jurisdictions.[73] This lower threshold is better suited as in many circumstances it will be impossible to render an award enforceable in every jurisdiction or to ascertain what the applicable rules would be.[74] The duty slightly varies in commercial arbitrations, where the tribunal is usually required to render

[67] Ibid para 19.
[68] See above (n 30 and 32).
[69] *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania*, ICSID Case no. ARB/05/20, Award, para 27 (11 December 2013).
[70] *Electrabel S.A. v Hungary*, ICSID Case No. ARB/07/19, Award (25 November 2015), para 234.
[71] See decisions listed in n 5.
[72] *1. Vattenfall AB; 2. Vattenfall GmbH; 3. Vattenfall Europe Nuclear Energy GmbH; 4. Kernkraftwerk Krümmel GmbH & Co. oHG; 5. Kernkraftwerk Brunsbüttel GmbH & Co. oHG v Federal Republic of Germany* ICSID Case No. ARB/12/12, Decision on the Achmea Issue, para 230 (31 August 2018).
[73] Redfern and Hunter on International Arbitration (7th ed 2023) para 11.08.
[74] Ibid para 11.08.

an award which is at least enforceable in the jurisdiction of its seat.[75] However, even in commercial arbitrations non-enforceability in other—perhaps distant—jurisdictions does not necessarily lead to a violation of the tribunal's duty to render an enforceable award.[76] Additionally, as tribunals under the ICSID Convention are delocalised without a seat anyway, such a requirement can hardly apply to them or be an argument for the decision of the Court.

It appears then the duty of a tribunal to render an enforceable award does not oblige it to render an award enforceable in Germany. Indeed, several tribunals seem confident enough to issue intra-EU ICSID awards.[77] Furthermore, stays of enforcement proceedings pending a decision by the ICSID Annulment Committee dealing with intra-EU ICSID awards have already been lifted in third countries.[78] Therefore, as long as there appear to be promising routes to enforcement in third ICSID signatory countries, intra-EU ICSID tribunals are likely to ignore the 'factual influence' stipulated by the Court.

Tribunals do not have to consider the European Food decision of the CJEU

In another argument, the Court states intra-EU ICSID tribunals must consider the decision of the CJEU in *European Food*. Here, the Court held the enforcement of an intra-EU ICSID award to be prohibited state aid under article 107 TFEU. Such state aid could potentially lead to proceedings against the Member States under article 258 TFEU.

However, the Court does not cite a legal basis for this assertion and there does not appear to be any. Arbitral tribunals established under the ICSID Convention will decide the dispute in accordance with article 42 (1) ICSID, which allows the tribunal to decide a dispute in accordance with such rules of law as may be agreed by the parties. Those rules of law will usually be international investment treaties or general international law. However, international law prohibits the reliance of a contracting party on its internal law to negate its obligations under international law.[79] Thus, from the perspective of ICSID Tribunals, established under international law, European law forms part of the internal law of the respondents. Consequently, ICSID Tribunals are in no way bound to consider issues of European law—let alone state-aid law—and the assertion of the Court appears without any legal basis. Moreover, considering an arbitral award to constitute state aid is in any event highly disputed.[80]

Intra-EU ICSID Tribunals are not bound to consider issues of EU law

The Court in paragraph 94 then stipulates that intra-EU Tribunals sometimes consider the implications of EU law. Albeit 'sometimes' seems in fact to be an exaggeration looking at the

[75] Case No. 10623 of 7 December 2001, 1 Association Suisse de l'Arbitrage Bulletin (ASAB) 2003 82, 85 (ICC).

[76] Bundesgericht, 23 May 2012, 4A_654/2011, 3.1 and 3.4.

[77] *MOL Hungarian Oil and Gas Company Plc v Republic of Croatia*, ICSID Case No. ARB/12/32, Award, paras 468, 488 (5 July 2022); *Sevilla Beheer B.V. and others v Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the principles of Quantum, para 678 (11 February 2022); *AS PNB Banka and others v Republic of Latvia*, ICSID Case No. ARB/17/47, Decision on the Intra-EU Objection, paras 670–672 (14 May 2021); *Theodoros Adamakopoulos v Republic of Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction, para 187 (7 February 2020); *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v Italian Republic*, ICSID Case No. ARB/17/14, Decision on the Intra-EU Jurisdictional Objection, para 197 (26 June 2019).

[78] *Micula v Romania* [2020] UKSC 5 [2020] 2 All ER 637 (appeal taken from Eng.); *Kingdom of Spain v Infrastructure Services Luxembourg S.ÀR.L.* [2023] HCA 11 (23 April 2023) (Austl.).

[79] Article 27, Vienna Convention on the Law of Treaties, 23 May 1969, 1903 UNTS 18232: *'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'*. Similarly, art 3 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts states: *'The characterization of an act of a state as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the act as lawful by internal law'*.

[80] Case T-624/15 *European Food and others v Commission* [2019] ECLI:EU:T:2019:423, para. 109. Additionally, the stay on the enforcement of the award has been lifted in the UK, see *Micula v Romania* [2020] UKSC 5, [2020] 2 All ER 637, and there are similar trends in the USA, see *Micula v Romania*, No. 1:17-cv-02332, US Court of Appeals for the District of Columbia Circuit, 21 February 2023.

long line of cases that reject any application of EU law.[81] On that point it refers to the much-criticized decision[82] of the tribunal in *Green Power v Spain*—an outlier—and a recent decision on enforcement by the US District Court for the District of Columbia in *Blasket Renewable Investments v Spain*.[83]

However, both decisions are unable to support any inference about the possible influence of state court decisions on intra-EU ICSID tribunals. The non-ICSID tribunal in *Green Power v Spain* had a seat in Stockholm and was constituted under the rules of the SCC. Accordingly, it had to consider—albeit not uncontroversially—issues of EU law as part of the *lex arbitri* and was subject to potential annulment proceedings in the courts of a Member State. As established above, ICSID tribunals are not operating in the framework of a local *lex arbitri* and are only subject to annulment proceedings under the ICSID Convention. Consequently, *Green Power v Spain* is no precedent for the influence of state court decisions on intra-EU ICSID tribunals.

Referring to an award issued by a SCC tribunal is especially surprising as the Court in other parts of the decision seems aware of the differences between ICSID and other ad hoc investment arbitrations. In paragraph 64 of its decision the Court rightly differentiates the judicial supervision of usual arbitrations, citing the UNCITRAL Model law, from ICSID arbitrations. Omitting this crucial difference later in its conclusions seems at the very least inconsistent.

The decision of the US District Court for the District of Columbia in *Blasket Renewable Investments v Spain*[84] also constitutes no precedent for state court influence on intra-EU ICSID proceedings. The tribunal, which issued the underlying award, was seated in Switzerland and constituted under the UNCITRAL Rules. The tribunal did not consider itself bound by the case law of the CJEU and the award was subsequently upheld by the Swiss Federal Supreme Court.[85]

The Court cites the US District Court's decision for stating that an UNCITRAL tribunal constituted under article 26 ECT is bound by the interpretation of EU law as determined by the CJEU. However, the Court again seems to have omitted the difference between arbitrations under the UNCITRAL Rules and the ICSID Convention. ICSID tribunals are operating a-nationally and delocalized, tribunals established under the UNCITRAL Rules have a seat in a legal system. Because of this fundamental difference, the District Court's decision in *Blanket Renewable Investment v Spain* constitutes no reliable precedent for state-court influence on intra-EU ICSID arbitrations.

In any event, as the UNCITRAL tribunal in the aforementioned decision was seated outside the EU, the District Court's ruling itself is unconvincing: The UNCITRAL tribunal itself did not need to address EU law as the relevant *lex arbitri*. Instead, it was mandated to approach the ECT from the viewpoint of international law. With that in mind, the District Court's conclusion that the tribunal would be bound by the case law of the CJEU is implausible.

It appears then that the Court is unable to point to any legal influence a declaration under section 1032(2) CCP would have on an ICSID tribunal or the enforcement of the award in third countries. Accordingly, the Court should have declined to grant a declaration under section 1032(2) CCP. By still granting the declaration the Court effectively only constructed a procedural tool for the sole purpose of hampering intra-EU ICSID arbitrations at an earlier stage.

The decision leaves a sobering impression on the relevance of public international law that is afforded by the Court. With every decision (*Achmea*, *Komstroy*, the present decision) the reach

[81] See above n 79.

[82] Björn P. Ebert and Mathilde Raynal, 'SCC Case: SCC Tribunal declines jurisdiction in ECT arbitration Based on intra-EU objection in *Green Power v. Spain*' (2022) 6 SchiedsVZ 334, 343.

[83] *Blasket Renewable Investments v Spain*, Case No. Civil Case No. 21-3249, US District Court for the District of Columbia, 29 March 2023.

[84] Ibid.

[85] Bundesgericht, 23 February 2021, 4A_187/2020; *AES Solar and other (PV Investors) v Kingdom of Spain*, PCA Case No. 2012-14, Preliminary Award on Jurisdiction, 13 October 2014, paras 203–207.

of EU law is growing. International obligations are more and more superseded by the primacy of EU law. With such a broad reach of EU law, it is almost ironic the Court still refers to the '*exceptional context*' ('*ausnahmsweise*') of intra-EU ISDS. Unfortunately, it appears rather that the primacy of EU law even over international law is nowadays the new normal.

CONCLUSION

Overall, the decision of the Court is yet another step towards the demise of intra-EU ISDS through the backdoor. The Court's decision is not reconcilable with Germany's obligations under the ICSID Convention and is not necessary as a matter of EU law. The '*special context*' ('*ausnahmsweise*') of intra-EU proceedings seems enough for the Court to disapply fundamental principles of international arbitration and public international law. There are likely implications of this decision:

Restructuring investments

This decision is yet another incentive for investors to restructure investments in the EU. Channelling investments from inside the EU seems increasingly risky with now even intra-EU ICSID proceedings being under fire. In this respect, the UK or Switzerland might be nearby attractive jurisdictions, but you could also look further afield. The implications of this judicial trend seem unlikely to fulfil the European Commission's and CJEU's desiderata of an EU free of ICSID proceedings without a lot of unwanted side effects.

A run on German courts?

Applying section 1032(2) CCP to ICSID proceedings makes plainly obvious what has already been pointed out by German scholars: there exists no compelling reason to apply section 1032(2) CCP to arbitrations with no connection to Germany.[86] The Court extended section 1032(2) CCP with the sole purpose of stopping ongoing intra-EU ICSID proceedings prior to the constitution of the tribunal. It remains to be seen whether there needs to be any connection to Germany at all to invoke section 1032(2) CCP or whether there will now be a run to German courts to nip in the bud intra-EU investment arbitrations, be they ad hoc or under the ICSID Convention. Indeed, one author already concluded all MS might be able to apply to the German Courts.[87]

However, even if MS can now apply to the German courts to avoid their treaty obligations, tribunals will not be bound by a declaration under section 1032(2) CCP. It must be hoped tribunals will remain confident enough to uphold their jurisdiction nevertheless and issue awards enforceable under the ICSID Convention. Declining jurisdiction after a German court has issued a declaration under section 1032(2) CCP would seriously call into question well-established and binding principles of international law.[88]

The continued need for intra-EU investment protection

Towards the end of Charles Dickens' novel Bleak House, the character Krook dies of 'spontaneous human combustion' (a literary device to show where passionate causes may lead). Some institutions may hope for a similar fate for intra-EU ISDS—figuratively—but it can only

[86] Seelman-Eggebert (n 2) at 37.

[87] Tim Maxian Rusche, 'Abwehr rechtsmissbräuchlicher innereuropäischer Investoren-Staaten-Schiedsverfahren durch Verfahren vor deutschen Gerichten' (2021) 6 SchiedsVZ 494, 499.

[88] Already, in *WOC Photovoltaik Portfolio GmbH & Co. KG and others v Kingdom of Spain*, ICSID Case No. ARB/22/12, Decision on the Claimant's Application for Provisional Measures (3 May 2023), para 116, the Tribunal granted the Claimant's request for provisional measures and recommended Spain to withdraw with prejudice its application under section 1032(2) CCP before the Berlin Higher Regional Court.

be hoped that whatever the result will be, public international law and the rule of law more generally is not lost or disfigured on the way. It is clear that a political decision to resolve this legal deadlock is also preferable to this endless legal manoeuvring—substantively or procedurally—by European and national courts in an attempt to get rid of intra-EU investment protections through the backdoor.[89] There will be no 'spontaneous human combustion' and it is also clear from various national initiatives[90] that there is a need for continued intra-EU investment protection.[91]

From a rule of law perspective, protecting intra-EU investments solely through domestic courts applying EU law or national law does not seem sufficient. As is well known, the CJEU sentenced Poland to pay 1 million Euros per day due to its failure to repeal its more than controversial judicial reform.[92] The lack of independence of the polish judiciary has also been highlighted in a recent decision by the District Court of Amsterdam, which for this reason even doubted the desirability of the *Achmea* jurisprudence of the CJEU.[93] A similar lack of judicial independence can be observed in Hungary. The Tribunal in *Dan Cake S.A. v Hungary*[94] found a decision of the Metropolitan Court of Budapest to be a clear violation of Hungary's obligation to accord a fair and equitable treatment to the foreign investor, which even amounted to a denial of justice.

Those are alarming descriptions of the administration of justice in Member States of the EU which clearly showcase the need for adequate investment protection through independent institutions. Sadly, the German Federal Supreme Court in its decisions seems completely unbothered by those developments: '*The court has already stated, that investors are not denied effective legal protection, but rather, in view of the principle of mutual trust, effective legal protection is granted before the courts of the member states*'.[95]

[89] Richard Happ and Sebastian Wuschka (n 1) 2054.

[90] Council of the European Union, Trade Policy Committee (Services and Investment), 'Intra-EU Investment Treaties—Non-Paper from Austria, Finland, France, Germany and the Netherlands' (7 April 2016), <https://www.politico.eu/wp-content/uploads/2016/09/non-paper.pdf> accessed 21 September 2023.

[91] Emily Sipiorski, 'The Need for Intra-EU Investment Protection' in Mesut Akbaba and Giancarlo Capurro (eds), *International Challenges in Investment Law and Arbitration* (Routledge 2018).

[92] C-204/21 R *Commission v Republic of Poland* [2021] ECLI:EU:C:2021:878, para 65. The fine was later reduced to 500,000 EUR per day: C-204/21 R-RAP *Republic of Poland v Commission* [2023] ECLI:EU:C:2023:334, para 113.

[93] *Republiek Polen v LC Corp. B.V.*, C/13/721410/ HA ZA 22-614, RB Amsterdam, 18 October 2022. The judgment has been upheld by the Court of Appeal for the District of Amsterdam: Investment Arbitration Reporter, 'Amsterdam Court of Appeal rejects Poland's request for interim order to stay intra-EU arbitration', (5 September 2023), <https://www.iareporter.com/articles/amsterdam-court-of-appeal-rejects-polands-request-for-interim-order-to-stay-intra-eu-arbitration/> accessed 21 September 2023.

[94] *Dan Cake (Portugal) S.A. v Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015, paras 145–146.

[95] BGH (n 10) para 132.