# A Brexit bonus?

*Raid Abu-Manneh, Ali Auda and Jonathan Clarke discuss a hot topic at the Paris Arbitration Week*

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This year's Paris Arbitration Week took place between 9 and 13 April and built upon its successful inaugural event of the previous year. The event provided a useful forum for practitioners and academics from around the world to discuss the key issues for international arbitration for the year ahead. It will be of no surprise that much discussion centred on the impact of Brexit to arbitration and foreign direct investment within the UK.

Equally, a great deal of energy was spent debating the Court of Justice of the European Union (the CJEU's) recent controversial decision in *Slovak Republic v Achmea BV* [2018], in which judgment was handed down on 6 March 2018, and its impact on intra-EU investment. These topics were discussed separately at length during Paris Arbitration Week, through events such as 'Brexit & arbitration: will it impact the choice of Paris or London as a seat of arbitration?'; 'London's burning: Paris s'éveille' and 'The Future of Intra-EU Investment Arbitration in the Aftermath of the *Achmea* Judgment'. However, one aspect which has seemingly evaded widespread consideration so far is the possible opportunity that the conflation of these two issues presents to the UK, as the consequences of *Achmea* may not apply to the UK post-Brexit.

## Background

Without revisiting the facts in *Achmea* at length, which will be well-known to most by now, in short the case dealt with the interpretation of a bilateral investment treaty, concluded in 1991, between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic (the BIT) in accordance with certain provisions of the Treaty on the Functioning of the European Union. Achmea BV, a Dutch insurer, set up a subsidiary in Slovakia through which it offered private sickness insurance services on the Slovak market. In 2006, Slovakia partly reversed the previous liberalisation of its health insurance market and in 2008, Achmea brought UNCITRAL arbitration proceedings, seated in Germany, against Slovakia under Art 8 of the BIT on the grounds of violation of substantive treaty standards. By the arbitral award of 7 December 2012, the arbitral tribunal found that Slovakia had violated the BIT and ordered it to pay approximately €22.1m of damages to Achmea.

Slovakia brought an action to set aside the arbitral award on jurisdictional grounds before the German courts. The case eventually went to the German Federal Court of Justice, who referred the questions on compatibility with EU law of the BIT's arbitration clause to the CJEU for a preliminary ruling.

## Judgment

In his opinion of 19 September 2017, Advocate General Wathelet submitted that EU law did not preclude the

*Alps Finance and Trade AG v Slovak Republic* (2011) Award (redacted), IIC 489, 5 March

*Levy de Levi v Republic of Peru* (2014) ICSID Case No ARB/10/17

*Phoenix Action, Ltd v The Czech Republic* (2009) ICSID Case No ARB/06/5

*Slovak Republic v Achmea BV* [2018] EUECJ C-284/16

*Venezuela Holdings BV et al v Bolivarian Republic of Venezuela* (2010) ICSID Case No ARB/07/27

application of an investor-state dispute settlement mechanism established by way of a BIT between two EU member states. The CJEU declined to follow the Advocate General's opinion and instead concluded that the jurisdiction of the arbitral tribunal referred to in Art 8 of the BIT may relate to the interpretation of EU law and therefore has an adverse effect on the autonomy of EU law.

This decision has attracted criticism from all quarters within the arbitral community, but the relative merits and shortcomings of the rationale adopted in the *Achmea* judgment are beyond the scope of this piece. Suffice it to say for our purposes that the decision by the CJEU will have an undoubted negative impact, at least in the short and medium term, on the volume of companies that opt to structure their European investments directly with another member state. This is because the *Achmea* decision has created an uncomfortable situation where the validity of intra-EU BITs is questionable at best and thus the investor protections provided for by those BITs is uncertain. For those investors that remain sceptical about the viability and credibility of pursuing remedial action before the relevant domestic courts, an alternative must be sought. Professor Schreuer sympathises with this scepticism by noting that:

> Domestic courts are organs of the State and judges are its employees... It is a sad fact that many countries lack a truly independent judiciary...

(see Christoph Schreuer, 'Do we need Investment Arbitration?', p883 in Jean E Kalicki and Anna Joubin-Bret, *Reshaping the Investor-State Dispute Settlement System Journeys for the 21st Century* (Brill, 2015)).

## Brexit

In this regard, a post-Brexit UK *may* present that unexpected alternative. Once the UK formally leaves the EU, which is scheduled to take place on 29 March 2019, the UK in theory will no longer be subject to the jurisdiction and oversight of the CJEU, subject of course to the specifics of any deal made with the EU. If this is the case, European companies could choose to structure their European investments by way of an intermediary UK subsidiary, which if set up properly and for legitimate business purposes, of which more below, could benefit from the protection afforded by the BITs that the UK is a party to with EU member states, without the CJEU's intervention and oversight. This could be a considerable advantage and may attract more arbitration to London, as it will be UK companies who will be pursuing claims.

## Legitimate business purposes

Among other considerations, caution should be adopted when structuring an investment to ensure that the structuring takes place pre-emptively, as opposed to once a dispute is in reasonable contemplation to avoid being dismissed on jurisdictional grounds. See *Phoenix Action, Ltd v The Czech Republic* [2009], *Venezuela Holdings BV et al v Bolivarian Republic of Venezuela* [2010] and *Levy de Levi v Republic of Peru* [2014]. It is also important to ensure the UK subsidiary carries out a legitimate business purpose: see *Alps Finance and Trade AG v The Slovak Republic* [2011].

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## The future

At this juncture, it should be noted that it is of course too soon to fully appreciate the scope of the *Achmea* decision and one will have to wait for further clarification from the CJEU before the ramifications can be truly appreciated. Equally, it goes without saying that the legal and political reality of a post-Brexit UK remains uncertain. Yet, subject to these variables, we submit that the conflation of these two events may just present the UK with a unique and unexpected opportunity to attract new users and investors to the UK market. This in turn could create new opportunities for the wider commercial and legal sectors as more arbitration is pursued out of London. ■