

Alexander & Partner successfully represents the Republic of Croatia in application proceedings pursuant to Section 1032 (2) ZPO before the Higher Regional Court of Frankfurt am Main

The Higher Regional Court of Frankfurt am Main (“OLG”) is the first European court to declare the decision of the Court of Justice of the European Union (“CJEU”) in the *Slovakia v. Achmea* case to be a landmark decision with significance for all intra-EU BITs

Alexander & Partner Rechtsanwaelte mbB, led by Oliver Alexander and Dr. Philipp Stompfe, LL.M. (London), successfully represented the Republic of Croatia (“Croatia”) in an application procedure pursuant to Section 1032 (2) of the German Code of Civil Procedure (“ZPO”) against an Austrian and Croatian bank (“Banks”) before the Higher Regional Court of Frankfurt am Main (“OLG”).

Croatia challenged the admissibility of an UNCITRAL arbitration based on Article 9(2) of the Austria-Croatia BIT, which was initiated by the Banks, with an application under Section 1032(2) ZPO, arguing that Article 9(2) of the Austria-Croatia BIT was incompatible with Union law.¹

By decision dated 11 February 2021, the OLG granted Croatia's application in full.²

In its decision, the OLG held that there was no valid arbitration agreement between the parties, as Article 9(2) of the Austria-Croatia BIT was contrary to the legal principles set out in the *Achmea* judgment of the CJEU³.

In its decision, the OLG expressly emphasized that the CJEU's decision in *Achmea* was to be understood as a decision of principle and acquired significance for all intra-EU BITs without restrictions to an individual case.

¹ All substantive statements presented in this press release refer to the press information of the OLG dated 15 February 2021, No. 10/2021.

² OLG Frankfurt am Main, Decision dated 11 February 2021, Case No. 26 SchH 2/20.

³ CJEU, Judgement dated 6 March 2018 – C-284/16 – *Achmea*.

According to the OLG, the referral of an investment dispute between EU Member States to an arbitral tribunal impairs the autonomy of Union law, if Union law may be affected by the decision of the arbitral tribunal; in such cases, an arbitration agreement is invalid.

With reference to the CJEU's decision in *Achmea*, the OLG specifically states that an international agreement between EU Member States must not affect the "autonomy of the Union's legal order and its judicial system, which serves to ensure consistency and uniformity in the interpretation of Union law". Within this court system, it is up to the national courts and the CJEU to ensure the full application of Union law. In this context, the so-called preliminary ruling procedure plays a key role in ensuring the uniform interpretation of Union law. Pursuant to Article 267 TFEU, national courts submit questions to the CJEU in connection with the interpretation of Union law.

The autonomy of Union law is affected by an arbitration clause contained in a BIT between EU Member States, if the arbitral tribunal has to decide on disputes which may relate to the interpretation or application of Union law and the possibility of a preliminary reference to the CJEU is not guaranteed. The possible involvement of Union law should therefore be understood comprehensively.

“With this decision, the OLG has made it unequivocally clear that the Achmea decision applies in full to all BITs between EU member states, irrespective of the concrete form of the applicable dispute resolution and choice of law clause”, Dr. Stompfe and Oliver Alexander conclude.

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