GAD No.:	GAD 2024, 8	**Decision date:**	13 September 2024	**Res judicata:** No (complaint pending – BGH, I ZB 64/24)
Court:	Highest Regional Court of Bavaria (Bayerisches Oberstes Landesgericht, BayObLG)			
Case No. :	101 Sch 146/23 e Case No.(s) other instances: I ZB 64/24 (German Federal Court of Justice (BGH))			
Keywords:	Foreign arbitral award, cost decision, declaration of enforceability, recognition, invalid arbitration agreement, arbitration clause, violation of EU law, Achmea, lack of jurisdiction, objection, good faith, preliminary ruling, application and interpretation of EU law			
Key legal provisions:	Section 1061 German Code of Civil Procedure (ZPO) Articles III and V New York Convention (NYC) Articles 267 and 344 Treaty on the Functioning of the European Union (TFEU)			

With reference to the "Achmea Decision" of the European Court of Justice: No declaration of enforceability for cost decisions in arbitral awards based on arbitration agreements that are invalid under EU law

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The Highest Regional Court of Bavaria (BayObLG) dismissed an application for a declaration of enforceability of the cost decision of a foreign arbitral award and held that the cost decision was not to be recognised in Germany by order dated 13 September 2024. The lack of a valid arbitration agreement prevents the recognition and enforcement of the cost decision of the arbitral award. Under EU law, an arbitration agreement is invalid if (e.g. on the basis of an intra-EU-BIT) an arbitral tribunal is given the power to decide on the application and interpretation of EU law, as the arbitral tribunal is not entitled to request a preliminary ruling from the European Court of Justice (ECJ).

Facts

The applicant, the Czech Republic (CZE), sought recognition and a declaration of enforceability of the cost decision of an arbitral award pursuant to Section 1061 German Code of Civil Procedure (ZPO) and Article III New York Convention (NYC).

The underlying arbitration concerned investment protection claims of German special purpose entities investing in solar power plants against CZE. The respondents (formerly the claimants in the arbitration) relied on arbitration clauses in the bilateral investment treaty (BIT) between the Federal Republic of Germany and CZE as well as the Energy Charter Treaty (ECT). The parties agreed to apply the 1976 UNCITRAL Arbitration Rules and to have the arbitration administered by the Permanent Court of Arbitration in The Hague, Netherlands. The arbitral tribunal designated Geneva, Switzerland, as the place of arbitration.

During the arbitration proceedings, CZE waived its right to object to the jurisdiction of the arbitral tribunal on the grounds that the arbitration agreement is invalid under EU law.

The arbitral tribunal upheld jurisdiction but dismissed the claims on the merits and awarded costs to the CZE, which is now applying for a declaration of enforceability.

Key findings

The BayObLG based its dismissal on the absence of a validly concluded arbitration agreement. It stated that the arbitration clauses contained in the two investment agreements were contrary to the principles set forth in Articles 267 and 344 Treaty on the Functioning of the European Union (TFEU) because an intra-EU investment dispute could not be "resolved in a manner that ensures the full effectiveness of EU law".

In this regard, the BayObLG referred to the established case law of the ECJ and in particular to its decision in the case Slovak Republic v. Achmea BV dated 6 March 2018 ("Achmea Decision"). According to this decision, the validity of an arbitration clause in an investment agreement hinges on whether the arbitral tribunal has the authority to apply and interpret EU law. Specifically, the arbitral tribunal must be entitled to request a preliminary ruling under Article 267 TFEU. If this is not the case, the arbitral award must at least be subject to review by a national court with authority to request such ruling, ensuring that questions of EU law can be interpreted in preliminary procedures. This requirement does not only apply to intra-EU BITs but also to intra-EU arbitrations based on the ECT, as per the ECJ's Komstroy decision. Attempts to bypass these principles through subsequent or ad hoc arbitration agreement are likewise invalid, in line with the ECJ's PL Holdings decision.

The BayObLG held that the arbitration clauses in the two investment agreements violated Articles 267 and 344 TFEU because the arbitral tribunal was not part of a Member State's court system and thus could not seek a preliminary ruling. Judicial review by national courts, under the limited scope of Article V NYC, does not fully remedy this.

The Achmea Decision emphasised that arbitral awards rendered under invalid arbitration agreements under EU law are unenforceable. In such cases, the court reviewing enforceability has no discretion. The BayObLG found that the arbitral tribunal's cost decision was also void, as it was linked to a ruling on the merits of the case which relied on an invalid arbitration agreement.

The invalidity of the arbitration agreement could only be irrelevant under the principle of good faith if the party claiming the invalidity had originally relied on the arbitration agreement to initiate the arbitration proceedings but suddenly asserts its invalidity in the case of an unfavourable outcome of the arbitration. However, this is a rare exception and the interests of the opposing party must be more worthy of protection than those of the party claiming invalidity.

The BayObLG determined that the CZE was entitled to greater protection under the specific circumstances of the case. During the arbitration proceedings, the CZE had waived its jurisdictional objection based on the invalidity of the arbitration agreement under EU law. Furthermore, as an EU member state, the CZE, rather than the respondents, were obliged to raise the invalidity of the agreement. For the same reasons, the objection could also not be precluded.

Comment

In the present case, the BayObLG consistently applied the principles of the ECJ's Achmea Decision and thus solidified its underlying principles in Germany. Insofar, the decision provides clarity on the enforceability of cost decision contained in intra-EU arbitral award. While in an unusual twist the Achmea objection this time worked against the host state, EU investors should nevertheless be aware of the risk that German courts will consider arbitration agreements contained in intra-EU investment agreements invalid.