ACHMEA: WHERE DO WE STAND NOW?

In the wake of the Achmea decision by the Court of Justice of the European Union, its potential impact on over 200 intra-EU bilateral investment treaties remains unknown. But could the decision have an impact in relation to commercial arbitration as well? GAR editor Alison Ross went to a conference at Christ Church, Oxford, to find out.

According to John Cartwright, senior law tutor at Christ Church and director of the Oxford Institute of European and Comparative Law, the event, which looked at the interplay between the New York Convention and European Union law on 23 March was "a birthday party" as the New York Convention turns 60 in June this year, with none of the signs of "decrepitude" often associated with this age.

However, the "party" quickly took on a sombre tone, with the former president of the UK Supreme Court Lord Neuberger comparing current uncertainties with Alice's adventures in books written by Charles Dodgson (Lewis Carroll) while he was a don at Christ Church.

"We are stepping through the looking glass, possibly into Wonderland, with the threat of trade war coupled with Brexit looking set to undermine the movement towards internationalism and globalism that we have seen since World War II," Neuberger said – although he suggested technology would prevent the full return to isolationism US President Donald Trump apparently seeks.

Leading arbitrator John Beechey, who chaired the event, drew specific attention to developments regarding investor–state dispute settlement (ISDS) in the EU and their potential spillover effect on international commercial arbitration.

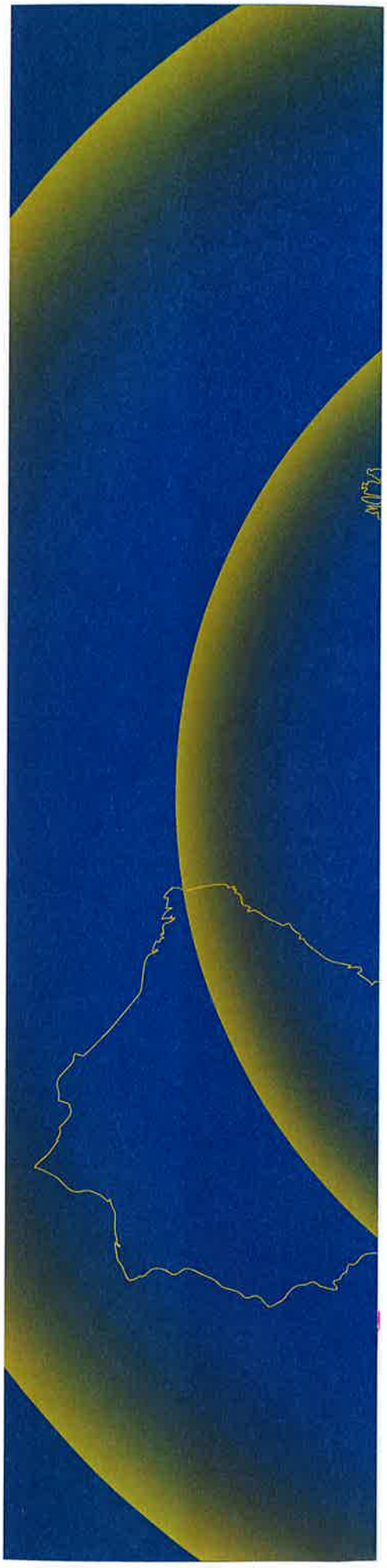
He noted the EU Council's recent publication of a mandate for talks to establish a multilateral EU investment court of tenured, salaried judges, over which only the EU and the state with which it was entering a bilateral treaty (BIT) would have a say.

He also noted the still-fresh ruling of the Court of Justice of the European Union (CJEU) in the dispute between Achmea and the Slovak Republic, which was published on 6 March. The court's ruling departed from the opinion of Advocate General Wathelet and went beyond the bilateral investment treaty in issue such that, as a general proposition, ISDS clauses in all intra-EU BITs were deemed to be incompatible with EU law, he said.

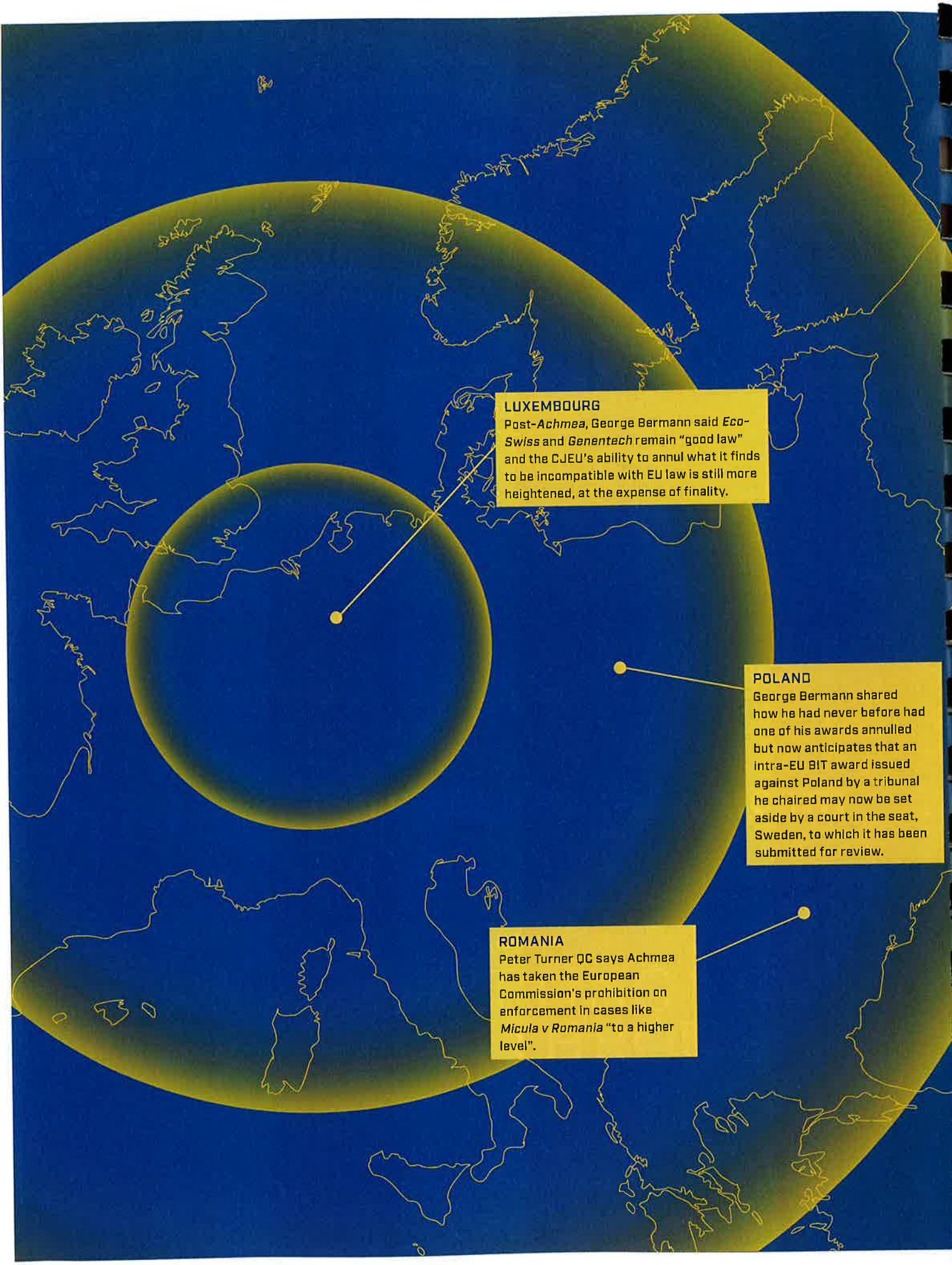
For George Bermann, Jean Monnet professor of EU law at Columbia Law School and a member of the law faculty at Sciences Po in Paris, these developments marked a huge departure. He said he had lectured on the relationship between EU law and international arbitration, two "vital, vibrant and comity-based international legal regimes", for 37 years, without ever imagining that they "would come into this kind of conflict".

Bermann also put a personal spin on the effect of the *Achmea* decision, telling how he had never before had one of his awards annulled, but now anticipates that an intra-EU BIT award issued against Poland by a tribunal he chaired with two other "fine arbitrators" [Julian Lew QC and Michael Schneider] may be set aside by a court in the seat, Sweden, to which it has been submitted for review.

"Before *Achmea*, I had little fear that it would be annulled," Bermann said. "But post-*Achmea*,



BACKGROUND ILLUSTRATION: ISTOCK.COM/ICONEER


LUXEMBOURG
Post-*Achmea*, George Bermann said *Eco-Swiss* and *Genentech* remain "good law" and the CJEU's ability to annul what it finds to be incompatible with EU law is still more heightened, at the expense of finality.
POLAND
George Bermann shared how he had never before had one of his awards annulled but now anticipates that an intra-EU BIT award issued against Poland by a tribunal he chaired may now be set aside by a court in the seat, Sweden, to which it has been submitted for review.
ROMANIA
Peter Turner QC says Achmea has taken the European Commission's prohibition on enforcement in cases like *Micula v Romania* "to a higher level".

the Stockholm court may feel its hands are bound."

ACHMEA AND ISDS

Although the day-long conference covered a range of topics including anti-suit injunctions, issue estoppel, res judicata and damages, it was discussion of *Achmea* that dominated.

With respect to ISDS, delegates agreed that there was little chance that the CJEU's judgment would prove not to be directly transposable to BITs other than the Netherlands–Slovakia BIT or binding on future investment tribunals.

Nor was there much hope that *Achmea* would only impact UNCITRAL and other non-ICSID awards through the public policy exception to recognition and enforcement under the New York Convention, while ICSID awards would be "immune" given the ICSID Convention's self-contained enforcement system.

Among the speakers were Veronika Korom of Bredin Prat and ESSEC Business School in Paris. She addressed *Achmea* in light of her recent experience of taking on the European Commission in the CJEU, challenging its 2015 declaration that an ICSID award in favour of the Micula brothers against Romania was illegal state aid and should not be paid.

Korom argued that now that ISDS clauses in intra-EU BITs have been held to be incompatible with EU law there is a "good chance" that all intra-EU BIT awards, whether governed by UNCITRAL, ICSID or other rules, would be considered by the European Commission to be illegal state aid under Article 107(1) of the Treaty of the Functioning of the European Union.

"In other words, without a valid legal basis, an intra-EU award would constitute an illegal advantage payable from state resources and favouring a certain undertaking, which is prohibited by the treaty," she explained. "As such, the award would be unenforceable inside and outside the EU. If enforcement were obtained outside, the sums would eventually be recovered by the investor from the respondent member state."

If member states do raise the state aid defence to avoid paying awards and the European Commission uses its powers to block payment, as it did in the *Micula* case, she said *Achmea* "could have more far reaching consequences than one might expect and could effectively put an end to intra-EU investment treaty arbitration, irrespective of whether it is conducted under UNCITRAL or ICSID rules".

Peter Turner QC of Freshfields Bruckhaus Deringer in Paris, who acted for the claimant in *Eastern Sugar v the Czech Republic*, the first case to raise the compatibility of intra-EU BITs with the Treaty on the Functioning of the European Union, and whose firm acted for Romania in the *Micula* arbitration, gave a similar analysis. *Achmea* has taken the European Commission's prohibition on enforcement in *Micula* "to a higher level", he said.

"With this ruling from the CJEU, how can investment treaty awards be enforced in the EU, when the Commission, acting as both judge and jury, has said that arbitration clauses in intra-EU BITs are contrary to European law?"

Turner also joked that he and other conference delegates had started a book on the chances of Bermann's award against Poland being upheld, warning "the odds are not good".

COMMERCIAL ARBITRATION TOO?

Though the most clear and obvious impact of *Achmea* is on treaty-based investor–state cases, delegates at Christ Church also considered its possible effect on international commercial arbitration in light of the CJEU's 1999 ruling in *Eco-Swiss v Benetton*, which effectively puts EU law on an equal level with public policy and makes possible annulment or denial of enforcement of any form of award if it is breached.

As Bermann explained, the CJEU was at pains in *Achmea* to make a distinction between investment treaty and commercial arbitration and asserted that what it said on the incompatibility of intra-EU BITs and EU law would not apply to the latter.

He pointed to paragraphs 54 and 55 of the ruling, which say in the English translation, "it is true that, in relation to commercial arbitration, the court has held that the requirement of efficient arbitration proceedings justify the review of arbitral awards by the courts of the member states being limited in scope, provided that the fundamental provisions of EU law can be examined in the course of that review, and, if necessary, be the subject of a reference to the court for a preliminary ruling . . . ."

"However, arbitration proceedings such as those referred to in article 8 of [the Netherlands–Slovakia BIT considered in *Achmea*] are different from commercial arbitration proceedings. While the latter originate in the freely expressed wishes of the parties, the former derive from a treaty by which member states agree to remove from the jurisdiction of their own courts . . . disputes which may concern the application or interpretation of EU law. In those circumstances, the considerations set out in the preceding paragraph relating to commercial arbitration cannot be applied to [investor–state] arbitration proceedings such as those referred to in article 8 of the BIT."

But Bermann said he did not take "much comfort" in the ostensible carve-out as the *Eco-Swiss* case – which made public policy a "far bigger wildcard" in the EU than elsewhere – is "still there to be reckoned with".

This case, he explained, arose from a Netherlands-seated award based on a breach of contract which the losing side, Benetton, sought to annul on the basis that it was illegal under EU competition law, even though it had never raised this defence in the arbitration.

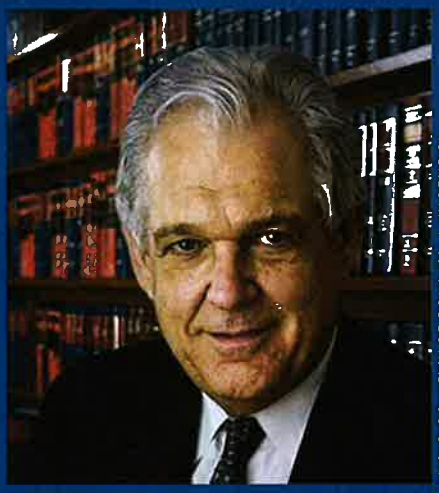
The Dutch court considering the matter made a reference to the CJEU, which held – before a delegation of US Supreme Court judges who were visiting that day – that member state courts were bound as a matter of EU law to annul or refuse to enforce awards that did not take account of EU competition law.

"Before *Eco-Swiss*, public policy was a restricted universe of values and policies that were decidedly well chosen. Afterwards, its reach became much more expansive than we had been accustomed to thinking and there was a lack of clarity over where law ends and public policy begins," he said.

The effect of *Eco-Swiss* was exacerbated by the CJEU's 2015 ruling in *Genentech*, which held that if an arbitral tribunal misapplies EU law in relation to claims (rather than simply not addressing it all, as in *Eco-Swiss*) it is the duty of an EU national court to make a full, de novo merits review "without regard to comity", Bermann continued.

Post-*Achmea*, he said *Eco-Swiss* and *Genentech* remain "good law" and the CJEU's ability to annul what it finds to be incompatible with EU law is still more heightened, at the expense of finality.

JOHN BEECHEY



GEORGE BERMANN

PHOTO COURTESY OF COLUMBIA LAW SCHOOL

VERONIKA KOROM

PHOTO COURTESY OF BREDIN PRAT

PETER TURNER QC

PHOTO COURTESY OF FRESHFIELDS BRUCKHAUS DERINGER

ANGELINE WELSH

PHOTO COURTESY OF MATRIX CHAMBERS

Though the most clear and obvious impact of *Achmea* is on treaty-based investor–state cases, delegates at Christ Church also considered its possible effect on international commercial arbitration.

A similar argument was advanced by Rolf Trittmann of Freshfields Bruckhaus Deringer in Frankfurt, who argued that the distinction made between investor–state and commercial arbitration in *Achmea* was weak and that to avoid problems, parties may be well advised to choose commercial arbitration seats outside the EU, for example in Switzerland or in the UK post-Brexit.

Turner, Trittmann's colleague at Freshfields, provided a third endorsement for the view that *Achmea* could bite on commercial awards, saying that the CJEU had "blithely and obviously wrongly" ruled that it would not do so without taking into account *Eco-Swiss*.

He also declared himself "a fan" of Advocate General Wathelet of the CJEU, whose preliminary opinion that intra-EU ISDS clauses were not incompatible with EU law in *Achmea* was disregarded by the court in its final ruling. Wathelet also got it right in *Genentech*, he said.

Turner added that: "Arbitrators have the right to get the law wrong and often do, but there's a line between getting the law wrong and breaching international public policy."

A SILVER LINING?

Angeline Welsh, a barrister at Matrix Chambers in London, was yet another who thought *Achmea* could apply to commercial awards dealing with EU law issues – while making what Bermann called "a helpful distinction".

The CJEU's analysis was heavily dependent on the party to the arbitration agreement being a member state, finding that such a party could not conclude an agreement to resolve disputes relating to the EU outside the EU judicial system, Welsh said. While the court said this analysis applied to intra-EU BITs and not commercial arbitration agreements, she argued it could apply to commercial arbitration agreements to which a member state is a party.

But Welsh noted there may be different bases for challenging awards dealing with EU law. "The *Achmea* case raised a jurisdictional objection, regarding the validity of the arbitration agreement. In those circumstances, an enforcing court will typically perform a de novo review, which gives it far greater latitude to set the award aside," she said.

"Where validity of the arbitration is not in issue, because for example EU law forms part of the substance of the dispute, there is a question as to on what grounds the enforcing court could set the award aside."

Welsh went on to highlight the traditional approach to allegations of illegality when considering the "public policy exception" in the context of enforcement. In 1999, the English Court of Appeal in *Westacre* looked at whether the tribunal had considered the allegations, and held that, in absence of due process problems, it should accept its findings.

In recent proceedings in which she acted before the Caribbean Court of Justice, seeking the enforcement of awards won by BCB Holdings and Belize Bank against Belize, Welsh said there was a move away from this approach, with the court instead asking whether the illegality was of such a nature that it raised a fundamental illegality justifying a de novo review.

Welsh also noted the high threshold for courts in the US to refuse to enforce awards on the grounds of public policy – demonstrated by their upholding of awards that have been denied enforcement in *Belize*.

Notwithstanding the different tests applied, the higher threshold applied in public policy cases offers "comfort" that where EU law issues are raised in commercial arbitration with non-member state actors, they are less likely to raise issues regarding the jurisdiction of the tribunal and therefore far less likely to warrant de novo review, Welsh argued. This makes such awards easier to enforce.

TIMELINE

7 DECEMBER 2012

An arbitral tribunal of Vaughan Lowe QC (chair), VV Veeder QC and Albert Jan van den Berg issue a final award ordering Slovakia to pay €22.1 million plus interest to Achmea. In an earlier partial award, the panel rejects Slovakia's jurisdictional objection that its accession to the European Union had rendered the BIT's arbitration mechanism incompatible with EU law.

3 MARCH 2016

Following an appeal by Slovakia, the German Federal Court of Justice decides to seek a preliminary ruling from the ECJ in view of the numerous other BITs in force between member states containing similar investor-state arbitration clauses.

19 SEPTEMBER 2017

Advocate General Melchior Wathelet issues a non-binding opinion advising that the ISDS provisions in the Netherlands-Slovakia BIT are compatible with EU law.

"However, the problem with intra-EU awards post-*Achmea* is that they raise jurisdictional issues which afford enforcing courts greater scope to reconsider issues arising."

THE FUTURE?

According to the EU, we are in a "transition", heading towards a time when intra-EU BITs will cease to be and the European Commission will sign BITs with countries outside the EU that will apply to the bloc as a whole, Bermann told the conference.

"When we move to this brave new world in which the EU itself is a treaty partner, to what extent will it be able to assert the primacy of EU law and the autonomy of the EU legal system? At that point, the EU will become subject to the Vienna Convention of the Law of Treaties, which makes clear that treaty parties may not interpose internal law as defence to treaty obligations."

There was also discussion of the future should the proposed EU investment court come into existence and whether this could spell the end for the role of the New York Convention in European investor–state cases – because (in Bermann's words) "what emerges from the court will not be arbitration awards."

A further question concerns the role of the national courts of the EU faced with a judgment of the investment court, he said. "Should the investment court do violence to EU law, how then should the national courts respond? Will the judgment of the investment court be final?"

But perhaps this is not the worst we have to fear. Sophie Nappert of 3 Verulam Buildings took the visions of the future a step further with a discussion of the future role that artificial intelligence could play in arbitration and whether the notion of public policy under Article V of the New York Convention would have to be reconsidered "with the advent of robot-assisted justice".

The conference was held in honour of Cartwright ahead of his retirement later this year and organised by Andreas von Goldbeck, an arbitrator and lecturer on international arbitration and EU law at Oxford.

Speaking to GAR afterwards, von Goldbeck said: "Because of the court's focus in *Achmea*on the autonomy of the EU legal order, the ruling casts a shadow over the future of international arbitration in Europe generally. This conference – the first of its kind at Oxford – brought together world-renowned arbitrators, judges and academics and was a much needed and important contribution to a debate that we will continue to have for the foreseeable future. As John Beechey said, the main concern is the potential spillover effect on international commercial arbitration."

Beechey told GAR that while international commercial arbitration is generally in robust good health, "the 'smoke signals' from Brussels are properly matters of concern, not least because some of the most vocal critics in the ranks of the European Parliament and the Commission – and the lobbyists to whom they listen and defer – are not interested in informed debate and tar all arbitration with the same brush."

"The discussion has become increasingly politicised – indeed, the *Achmea* decision has been presented by an eminent jurist present at the conference as an exercise in 'dogma' by the CJEU," Beechey said. "The European Commission has already demonstrated scant respect for international treaties signed between member states. If it were ever to come to regard the New York Convention, too, as 'just another treaty,' the ramifications would be significant."

31 MAY 2018

Spain asks the Svea Court of Appeal in Stockholm to seek a preliminary ruling from the European Court of Justice on the compatibility of the Energy Charter Treaty with EU law in the wake of Achmea. The court also grants a request to stay enforcement of a €53 million SCC award against the state while proceedings to set the award aside are pending.

6 MARCH 2018

The European Court of Justice hands down its long-awaited decision in the Achmea v Slovakia case, concluding that investor-state arbitration clauses such as that contained in the Netherlands-Slovakia bilateral investment treaty are incompatible with EU law.

19 JULY 2018

The European Commission issues a communication stating that investors cannot invoke arbitration under intra-EU bilateral investment treaties or the Energy Charter Treaty for intra-EU disputes.