Brexit: Screaming for Vengeance? Enforcing Intra-EU Arbitral Awards in the Post-Brexit UK

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Introduction

The approaching BREXIT, in conjunction with the recent Svea Court of Appeal's decision upholding largely an intra-European Union (EU) Stockholm Chamber of Commerce (SCC) award against Poland, provides the opportunity to further discuss the ramifications of the preliminary ruling by the Court of Justice of the EU (CJEU) in the *Achmea case* (Case C-284/16). The Achmea ruling has notoriously precluded intra-EU investment arbitrations because they may undermine the full effectiveness of the autonomy of EU law, ensured by Articles 267 and 344 of the TFEU. This situation begs a response to the question: Could Brexit turn the United Kingdom ("UK") into a "safe" island for enforcing the contested intra-EU awards?

The Swedish Perspective

The Svea Court of Appeal confirmed the existence of a valid arbitration agreement between PL Holding, the Luxembourgish investor, and Poland, and accordingly confirmed the ensuing SCC award. The Court reached this conclusion since Poland failed to raise – in due time during the arbitration – objections as to the validity of the arbitration agreement in article 9 of the Belgium-Luxemburg Economic Union (BLEU)-Poland BIT, which allegedly stands in contravention of EU law. By failing to

raise such an objection – which should have been raised, at the latest, in its Statement of Defense according to the applicable Stockholm Chamber of Commerce (SCC) Arbitration Rules (namely, articles 5(1)(i) and 24(2)(i)) – Poland accepted the jurisdiction of the arbitral tribunal. Without making such a timely and clear objection based on EU law, Poland was deemed to have waived this right to object as per article §34(2) of the SAA.

*A contrario sens*u, it could be argued that if a Respondent State had raised the invalidity of the arbitration agreement contravening EU law at the right procedural moment, then the ensuing award would have run the risk of being set aside. By comparison, the Swedish Court noted [fn]At page 56 (of the English translation)[/fn] that in the *Achmea v. Slovakia* arbitration – where the award was annulled by the German Supreme Court – Slovakia, indeed, raised promptly the jurisdictional objection as to the incompatibility of the arbitration agreement with EU law, thus preserving its chance to have the award annulled based on this ground before the German court. Therefore, the decision of the Swedish court reconciles with the ruling of the German court. This suggests that whenever a Respondent State raises, in due time, the incompatibility between EU law and intra-EU investment arbitrations as a jurisdictional objection, then the ensuing award will be annulled in the case the arbitral proceedings are seated in an EU Member State.

Surprisingly, neither Poland nor the Swedish Court deemed necessary to ask for a preliminary ruling from the CJEU. Interestingly, despite its rulings not being ordinarily subject to appeal, the Svea Court of Appeal granted the parties leave to appeal to the Swedish Supreme Court.

Brexit Meets Achmea

Unless the UK Parliament decides otherwise, Brexit will become effective in 31 October 2019, placing the UK outside the autonomous EU legal order. After Brexit, English courts may take distance from the approach of the EU Member States' courts, which will have to set aside intra-EU awards in order to conform with the preliminary ruling of the CJEU on Achmea. In other words, the UK may become a favorable place for seeking enforcement of the several intra-EU awards that might be on the verge of being annulled because of where they were seated.

To test this theory, it becomes worthy to examine the following points:

1) the standard of review used by English Courts in reviewing jurisdictional challenges to an investment arbitration tribunal;

2) the deference paid by English courts to the findings of investment arbitration tribunals;

3) the English courts' approach with respect to the enforcement of annulled awards (in other words their deference to foreign courts' decisions).

1) Standard of Review

Section 67 of the 1996 English Arbitration Act confers broad power upon judges to review the jurisdiction of a tribunal seated in England. English courts will re-examine the jurisdiction of arbitrators by carrying out an independent and full investigation of the arbitration agreement with the view of testing the court's conclusion against the tribunal's decision to find out whether the tribunal was indeed correct in its decision on jurisdiction.

2) Deference to Tribunals' Decisions by English Courts

Given the post-Achmea reactions by investment tribunals – which have been either to disregard or reject Achmea-based arguments – it is crucial to examine if the English courts usually pay any deference to arbitrators' decisions.

Despite the exercise of these full re-examination powers, eventually, English courts have found themselves agreeing with investment tribunals re*affirming* their jurisdiction since the very first investment award was ever challenged before English courts, which was Republic of Ecuador v Occidental Exploration.

This approach has been confirmed by a relatively recent English High Court ruling setting aside for the first time an investment treaty award, which declined jurisdiction over part of the *Griffin v Poland* arbitration. [fn]GPF GP S.à.r.l v. Republic of Poland, SCC Case No. V 2014/168[/fn] Since this SCC arbitration is seated in London, the High Court re-examined its interim jurisdictional award, the applicable BIT – coincidentally, it is the same BLEU-Poland BIT as the one underlying the challenge before the Svea Court of Appeal – and concluded that the tribunal erred in limiting the scope of its substantive jurisdiction to direct expropriation only (similarly to the Swedish Supreme Court when in 2008 it annulled the award in *Petrobart v Kyrgyz Republic* because the tribunal wrongly

declined jurisdiction).

These are all indications pointing in the direction that, should an investment award be challenged before an English court, the competent judge will tend to either uphold or even expand the tribunals' jurisdiction. By the same token, seemingly, an application for the enforcement of a foreign investment award should be easily granted, or at least not thwarted by objections limiting the scope or validity of the arbitration agreement. In this context, the next question that arises is the following: Would an English court keep the same line in case the award was annulled or ought to be annulled at its seat?

3) Deference to Foreign Courts' Decisions by English Courts

The view that international awards are not the exclusive products of the given legal system where the arbitral proceedings are anchored, coupled with the pair of discretionary "may" in Articles V(1)(e) and VI of the NY Convention, give certain leeway in enforcing a nixed award. Consequently, the enforceability of an annulled award is unpredictable. It varies depending on the jurisdiction where enforcement is sought and the ground/s on which the annulment is based. It is also not unusual that the same jurisdiction has adopted inconsistent stances.

English courts have been consistent in that they are not barred from enforcing an award by the existence of an annulment decision by the supervisory court at the seat of the arbitration. However, a high threshold has to be satisfied to warrant such enforcement. By a coordinated reading of *Yukos v Rosneft* [2014] EWHC 2188 (Comm) and *Maximov v OJSC Novolipetsky Metallurgichesky Kombinat* [2017] EWHC 1911 (Comm), a foreign award will be enforced if the home court's decision setting it aside the award was so extreme and incorrect so as to be found contrary to basic principles of honesty, natural justice and domestic public policy. This means that domestic public policy provides a benchmark for determining the enforcement of an annulled award. However, after Brexit, the English concept of public policy may drift apart from EU Member States public policies. Accordingly, English courts may not be swayed by EU-based objections and disregard them merely as "Local Standard Annulments".

A taste of this approach can be found in the way Justice Bryan refrained from addressing any Achmea-based argument in *Griffin v Poland.[fn]*[2018] EWHC 409 (Comm) at. 3[/fn] At the time when the Claimant challenged the interim

jurisdictional award, the CJEU had not ruled on Achmea yet. Still, Poland reserved any rights it may have in the context of that pending decision. On this point, Justice Bryan preferred to say nothing about whether Poland did or *did not* have any such rights.

It is worthy to recall that Griffin v Poland is an intra-EU arbitration seated in UK, an EU Member State at the time the arbitral proceedings was instituted. Therefore, this arbitration will provide the perfect opportunity to see how post-Brexit English courts will tackle Achmea-based exceptions attempting to set aside the award. G*riffin v Poland* is now pending at the liability stage (after the partial annulment of the interim award by Justice Bryan, who ordered the tribunal to re-expand its jurisdiction to also hear the Claimant's indirect expropriation and FET claims). Undoubtedly, as soon as the arbitration comes to an end, Poland will attempt to have the award set aside. It will then be that the English courts will confirm or dispel the hypothesis that the UK may become a favourable jurisdiction either for enforcing intra-EU awards or for being the seat of intra-EU arbitrations.

Conclusion

Before Brexit, English courts have always proven to be strong as well as critical supporters of the investment arbitration regime as a whole, rather than blind advocates of any findings of investment arbitration tribunals. In fact, the full standard of review gives them a totally independent stance when it comes to scrutinising the correctness of a tribunal's determination on its own jurisdiction. Moreover, English courts have not felt compelled to recognize the decision of foreign courts ordering the annulment of an award. Thanks to the flexibility recognised on this point by the New York Convention, English courts have enforced, from time to time, annulled awards based on a domestic public policy benchmark. After Brexit, English Courts most likely will keep all these features, with the sole exception that their public policy will no more be aligned with the EU. As a result, post-Brexit UK will be theoretically a suitable jurisdiction to enforce intra-EU awards.