Keeping Intra-EU ISDS Alive: The Supreme Court of Sweden Requests Preliminary Ruling from the CJEU on Validity of Arbitration Agreement in Light of Achmea Decision

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Readers of the Kluwer Arbitration Blog will be very familiar with the drama surrounding the European Union's (EU) pushback against intra-EU investor-state dispute settlement (ISDS) as contained in intra-EU bilateral investment treaties (BITs) and in particular the "clap of thunder" *Achmea* (C-284/16) judgment (on this blog see, *e.g*. here). According to the Court of Justice of the European Union (CJEU), ISDS under intra-EU BITs such as the Netherlands-Slovakia BIT in *Achmea* is contrary to EU law because it creates a parallel jurisdiction to the EU's domestic courts, which may impair the consistency, full effect and autonomy of EU Law (*Achmea*, ss 35-60). Following *Achmea*, the European Commission's Communication COM(2018)547/2 of 19 July 2018 and the Declarations of the Representatives of the Governments of the Member States of 15 and 16 January

2019 on the legal consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union suggest that, with the exception of the multilateral Energy Charter Treaty, intra-EU ISDS is dead and buried (on this blog see, *e.g.*, here). However, in February 2020 on appeal from the Svea Court of Appeal, the Supreme Court of Sweden (HD) kept intra-EU ISDS on life support, requesting a preliminary ruling from the CJEU on the validity of an arbitration agreement in light of the *Achmea* decision in the matter of *Republic of Poland v. PL Holdings S.à.r.l.* (Case No. T 1569-19).

Background and Procedural History

The Belgium-Luxembourg Economic Union (BLEU)-Poland BIT (1987) entered into force in 1991 with the purpose of promoting foreign direct investment between the signatories. According to Art 9(2) of the BIT, disputes between an investor and one of the contracting states would be submitted to arbitration at the choice of the investor. The investor, PL Holdings, is a company registered in Luxembourg that had acquired shares in two Polish banks. In 2013, the banks merged and following the merger, the investor owned 99% of the shares in the new bank. In July 2013, the Polish Financial Supervision Authority (KNF) decided to cancel PL Holding's voting rights for its shares in the bank and to forcibly sell them. PL Holdings submitted a request for arbitration against Poland in 2014, arguing that its investment had been expropriated in violation of the BIT.

In 2017, the Arbitral Tribunal in PL Holdings S.à.r.l. v. Republic of Poland (SCC Case No V 2014/163) (Case Report available here) awarded the investor approximately EUR 150 million in damages plus interest and costs after determining that Poland violated the BLEU-Poland BIT (1987). Poland challenged the award on the basis that the arbitration clause contained in the BLEU-Poland BIT was contrary to EU law, following the *Achmea* (C-284/16) position that arbitration under intra-EU BITs is invalid because it does not comply with EU law. Specifically, Art. 267 and 344 Treaty on the Functioning of the European Union (TFEU) and the principle of autonomy of EU law. The investor rejected this argument. It argued that the subject matter was capable of settlement by arbitration and not incompatible with the legal order of the EU. Additionally, it argued that Poland's objection as to the validity of the arbitration agreement should be time barred in accordance with the *Swedish Arbitration Act* and the SCC Rules 2010.

In 2019, the Svea Court of Appeal dismissed Poland's challenge to the award (Case No. T 8538-17; T 12033-17). According to the Svea Court of Appeal, the decision in *Achmea* precludes EU member states from concluding agreements that obligate an EU member state to accept subsequent arbitral proceeding with an investor under a system that excludes disputing parties from "the possibility of requesting a preliminary ruling, even though the disputes may involve interpretation and application of EU law". However, this obligation does not mean that the TFEU precludes arbitration agreements between an EU member state and an investor in a particular case based on party autonomy. Even though the EU member state is not bound by a standing offer contained in an intra-EU BIT, it is "free" to enter into an arbitration agreement with an investor regarding the same dispute at a later stage.

The Supreme Court asks for a preliminary ruling

Poland appealed the decision to the HD which in turn decided to stay the proceedings and request a preliminary ruling from the CJEU on the validity of the arbitration under Art. 267 and 344 TFEU (Request).

The HD considered it clear that the dispute settlement clause contained in the BIT was invalid under EU law. It then referred to the possible conclusion that the standing offer contained in the BIT for an investor to commence arbitration was then also invalid. However, it also considered the position advanced by the Svea Court of Appeal, that PL Holding's request for arbitration could constitute an offer to the host state to accept jurisdiction in accordance with the principles set out by the CJEU in respect to party autonomy commercial arbitration.

Ultimately, the HD considered it unclear how EU law should be interpreted in the instant case. To avoid the risk of misinterpretation of EU law, the HD decided to request a preliminary ruling from the CJEU for clarification as to whether an arbitration agreement between an EU member state and an investor is invalid under EU law due to an invalid arbitration clause contained in an intra-EU BIT if the member state freely accepts the investor's request for arbitration and refrains from objecting to the jurisdiction.

Comment

If the CJEU finds that the principles of commercial arbitration – including party autonomy – apply in cases where EU member states party to intra-EU BITs freely accept an EU investor's offer to arbitrate and do not object to jurisdiction in a timely manner, it could in part revive intra-EU ISDS. A limited intra-EU ISDS based on party autonomy would no doubt help to reduce uncertainty for investors facing fresh objections as to the validity of their arbitration, while also offer greater flexibility for states in resolving investment disputes.

For the Svea Court of Appeal, the fact that Poland did not object to the validity of the arbitration in a timely manner was critical. Yet the long shadow of *Achmea* was sufficient to muddy the waters for the HD. Given the current standing of ISDS among the general public in Europe alongside the perceived risk to the autonomy of EU law, it may prove difficult to persuade the CJEU that this is the legally correct outcome. Against the politically-charged backdrop of the intra-EU ISDS debate, many investment arbitration practitioners (and activists) will be keenly awaiting the CJEU's preliminary ruling.