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CJEU Extends Achmea to Ad Hoc Arbitration Agreements Identical to Intra-EU BITs' Arbitration Clause

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In the latest episode of the intra-EU investment arbitration saga, the CJEU ruled on 26 October 2021, in *Poland v. PL Holdings* (Case C-109/20), that EU Member States are precluded from concluding with investors from another EU Member State an ad hoc arbitration agreement identical to an arbitration clause of an international treaty deemed invalid under the CJEU's *Achmea* case law (Case C-284/16).

It remains to be seen whether, and if so under which circumstances, this new ruling could be extended to other arbitration agreements contained in a contract between an EU Member State and an (EU) investor with respect to a dispute involving the interpretation or application of EU law.

Meanwhile, the European Commission is working on a legislative initiative aiming at improving the protections offered to intra-EU investment under EU law. A first proposal is expected on 22 December 2021. It is, however, still unclear whether such proposal will be ambitious enough. In any case, whatever its form and content, it would require years before being effective.

Background of the case

End of 2014, the Luxembourg company PL Holdings started arbitration proceedings before the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) against Poland under the 1987 bilateral investment treaty (BIT) concluded between Belgium and Luxembourg, on the one hand, and Poland, on the other. The investor claimed to be victim of the decision of the Polish Financial Supervision Authority to suspend the voting rights attached to the shares it held in a Polish bank.

In 2015, Poland initially challenged the jurisdiction of the arbitral tribunal on the basis that PL Holdings was not an "investor" in the meaning of the BIT. In a second stage, in 2016, and a few days after the request for a preliminary ruling was lodged in *Achmea*, it also raised the fact that the arbitration clause of the BIT would be incompatible with EU law. This jurisdictional challenge was dismissed by the tribunal, which declared itself competent and ruled in two awards, rendered in 2017, that Poland breached PL Holdings' rights under the BIT.

Poland brought annulment proceedings against the two awards before the Svea Court of Appeal end of 2017. The Swedish court dismissed the action, holding that, if the arbitration clause under

the BIT was indeed invalid on the basis of the CJEU's findings in *Achmea*, such invalidity would not prevent Poland and PL Holdings from concluding an ad hoc arbitration agreement at a later stage in order to settle their dispute. The court found such an agreement in the case at hand, ruling that Poland tacitly accepted, on the basis of the applicable Swedish law, PL Holdings' offer of arbitration, by refraining from challenging in good time the jurisdiction of the arbitral tribunal. It, therefore, concluded with PL Holdings an ad hoc arbitration agreement, which was distinct, but had identical content to the arbitration clause of the BIT.

Poland appealed the case before the Swedish Supreme Court, which requested the CJEU's opinion on the compatibility of such an ad hoc agreement with Articles 267 and 344 TFEU (principle of autonomy of EU law, as interpreted by the CJEU in *Achmea* and its subsequent case law).

CJEU's ruling

The CJEU (in Grand Chamber) extended its reasoning in *Achmea* (with respect to intra-EU BITs; see Blog's coverage here) and *Komstroy* (Case C-741/19, as regards intra-EU disputes under the ECT; see this previous post) to ad hoc arbitration agreements identical to arbitration clauses of intra-EU BITs.

At the outset (§§38-42), while acknowledging that this factual question was for the referring court to decide, the CJEU casted doubts on its reasoning that Poland implicitly agreed to arbitrate as it directly challenged the jurisdiction of the arbitral tribunal (though initially on other grounds that the invalidity of the arbitration clause of the BIT under EU law).

Turning to the main question at hand, the CJEU relied on its *Achmea* case law (and the subsequent treaty of 5 May 2020 concluded by 23 Member States, including Poland, to terminate the intra-EU BIT; see this previous post) to consider that "*[t]o allow a Member State, which is a party to a dispute which may concern the application and interpretation of EU law, to submit that dispute to an arbitral body with the same characteristics as the body referred to in an invalid arbitration clause contained in an international agreement such as the [BIT], by concluding an ad hoc arbitration agreement with the same content as that clause, would in fact entail a circumvention of the obligations arising for that Member State under the Treaties*" (§47). The CJEU also relied on the *Achmea* precedent to dismiss the investor's request for a limitation of the temporal effects of the Court's judgment to arbitration proceedings initiated after the same, considering that its decision in *PL Holdings* was based on factors already set out in this precedent (§§64-66).

The main remaining question is whether this new ruling could be extended to other types of arbitration agreements contained in contracts between Member States and (EU) investors with respect to disputes involving the application and interpretation EU law, and if so under which circumstances. In *Achmea*, the Court drew a distinction between investment and commercial arbitration, on the basis that "*[w]hile 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, and hence from the system of judicial remedies [under EU law], disputes which may concern the application or interpretation of EU law*" (§55). In *PL Holdings*, the CJEU stressed that "*as regards, first, the alleged impact that the present judgment might have on the arbitration agreements concluded by the Member States for various types of contract, the interpretation of EU law provided in the present judgment refers only to ad hoc arbitration*

agreements concluded in circumstances such as those at issue in the main proceedings" (§67). However, it also indicated that, even if the dispute at hand was an isolated case, "*the legal approach envisaged by PL Holdings could be adopted in a multitude of disputes which may concern the application and interpretation of EU law, thus allowing the autonomy of that law to be undermined repeatedly*" (§49).

European Commission's review of investment protection under EU law

Against the background of the gradual dismantling of intra-EU investment arbitration, the EU institutions, however, have not turned a complete deaf ear to the EU investors' concerns and the paradox created by the fact that extra-EU investment may be more effectively protected than intra-EU investment (since the CJEU confirmed – in Opinion 1/17, in the context of CETA – the validity of the investment court system provided for under some of the investment and trade agreement concluded by the EU with third states (see more in previous posts, here and here)).

Conscious, among others, of the vast sums of money which will be required for the EU's strategic priorities (in particular the European Green Deal and the Digital Single Market) and the "*momentum created by the termination of the intra-EU BITs*", the Commission is indeed working towards a comprehensive policy on intra-EU investments with the aim of better protecting and facilitating EU cross-border investment (see here). Following a 2020 public consultation, the Commission is considering making a new legislative proposal concerning the intra-EU investment system on 22 December 2021 (see here). The Commission contemplates, among others, setting out specific investors' substantive rights in a new EU instrument, setting up an intra-EU investment court (similar to the EU's proposal for a Multilateral Investment Court currently discussed at UNCITRAL), as well as extending and improving the "Solvit" mediation mechanism (on the latter, see Commissioner Mairead McGuinness' EuroCommerce Policy Talk on "Finance and investment: driving green recovery and investment").

However, any such proposal would require years to be adopted and implemented and, if ambitious enough, is likely to face political stumbling blocks. It also remains to be seen whether it will have sufficient "teeth" to ensure a proper deterrent effect and effective investment protection. This would be especially the case if the proposal were to focus on substantive protections rather than procedural remedies, at a time where the rule of law, the independence of the judiciary and the supremacy of EU law is under threat in certain EU Member States, including Poland (see e.g. here). Indeed, it is currently primarily up to domestic courts to ensure the enforcement of EU law (see also the CJEU's comment at §68 of the ruling), as investors do not have direct access to the CJEU. Instead, investors must convince the Commission to start infringement proceedings and/or request domestic courts to make a preliminary reference to the CJEU (see more in this previous post).

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