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Can The European Union's Approach towards Intra-EU Investment Arbitration Cases Be Considered Merely a Local Standard of Annulment?

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The last decade was not easy for investment arbitration in general, but it faced particular difficulties within the European Union ('EU'). In recent years, the European Commission has pursued (with success) eradication of this form of international dispute settlement mechanism between foreign investors from one EU Member State and an EU Member State (host state), the basic premise being that the EU is an autonomous legal order with its own independent judicial system (i.e., the Court of Justice of the European Union ('CJEU')) has the final (and only) say when it comes to questions of EU law).

This blog post calls for a reflection (below) on whether the EU approach (as formulated by the European Court of Justice and followed by the European courts) should be given any deference on the international level or is rather a local anomaly.

The analysis starts with a brief explanation of the CJEU's position regarding intra-EU investment disputes which is consequently applied by the national courts in Europe (most recently the Swedish Supreme Court's decision in *PL Holdings*). What follows is an explanation of the age-old concepts of international standards of annulment ('ISA') and local standards of annulment ('LSA') in the context of Article V(1)(e) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). It concludes that the ISA and LSA distinction provides a useful conceptual support in the context of enforcement of Intra-EU non-ICSID arbitral awards.

Intra-EU Investment Arbitration Dead and Buried: Recapping the CJEU's Key Decisions

The CJEU has in a number of its decisions – *Achmea*, *Komstroy* and *PL Holdings* – confirmed the primacy of EU law and the incompatibility of intra-EU arbitration clauses with the Treaty on the Functioning of the European Union ('TFEU'). In its judgment in *Achmea*, the CJEU focused on investor-state dispute resolution provision under Article 8 of the bilateral investment treaty between the Netherlands and Slovakia (1991). The 'anti intra-EU arbitration' sentiment was then taken a step further in *Komstroy* where the CJEU discussed the (in)compatibility of the ECT international dispute resolution mechanism (Art. 26 of the ECT) with EU law. The seemingly last avenue was blocked by the CJEU decision in *PL Holdings* where – unsurprisingly – the CJEU concluded that ad-hoc arbitration agreements between an investor and host states in the EU (even if valid under applicable domestic law) were also incompatible with EU law. With that final decision, intra-EU investment arbitration is seemingly dead and buried.

On 14 December 2022, the Swedish Supreme Court followed the decision of the CJEU in *PL Holdings* and set aside an arbitral award (which was rendered by a tribunal seated in Stockholm under the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce). As reported by IAReporter:

> "*the court reasoned that arbitral awards can be set aside in Sweden for breach of public policy, which protects the Swedish legal order. EU law is part of the legal order and, for the judges, the CJEU's interpretation of EU law on the validity of intra-EU arbitral proceedings 'concern fundamental legal principles of a procedural nature'…*"

This was not the first, and certainly will not be the last, intra-EU arbitration award to be quashed in arbitrations seated in an EU Member State. In the past, intra-EU arbitration awards have already been annulled, for example by French courts in *Slot Group a.s. v. Republic of Poland* and *Strabag SE, Raiffeisen Centrobank AG, Syrena Immobilien Holding AG v. The Republic of Poland*. To provoke a discussion, one may wonder to what extent these setting-aside decisions matter on the international plane.

After all, an arbitral award does not simply die when it is set aside.

Buried alive? Enforcement of Set Aside (non-ICSID) Awards

As a general rule, non-ICSID arbitral awards are enforced globally based on the New York Convention ('NYC'). The pro-enforcement philosophy behind this treaty allows the enforcement court to intervene and refuse recognition and enforcement of foreign arbitral awards only on the basis on one of the limited grounds listed in Article V of the NYC. Importantly, even if the ground for refusal of recognition and enforcement is satisfied, the enforcement court still may have discretion in deciding whether to enforce an award (this rule varies between jurisdictions).

Article V(1)(e) of the NYC – which is relevant in the context at hand – provides that the enforcement court may refuse recognition and enforcement of arbitral award if:

> "the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

This provision is controversial and has become an 'evergreen' topic that continues to trigger academic debate. Readers may recall that over thirty years ago this discussion initially revolved (amongst others) around the distinction between the international standards of annulment (or ISA) and local standards of annulment (or LSA). In simple terms, Professor Jan Paulsson explained that:

> "The rich experience of international trade law since 1958 has taught us what an ISA is: something which falls within the scope of the first four paragraphs of Article V(1) of the New York Convention and Article 36(1)(a) of the UNCITRAL Model Law.
>
> Everything else would be an LSA, and entitled only to local effect." [1)]

The distinction advocated by Paulsson is relevant to the question whether an award deserves to benefit from the pro-arbitration bias of the NYC, which would lead to enforcement notwithstanding the award's prospective incompliance before the local courts.

Consequently, one may only wonder if the arguments currently pursued against intra-EU investment arbitration are nothing more than a local (here, regional) peculiarity (i.e. local standard of annulment) whose standing should rightly be viewed with skepticism internationally. This is perhaps particularly so in arbitrations which were already pending, or in the post-arbitration phase, before the *Achmea* judgment was even rendered.

Resurrection or 'Zombification'? The Existence of the Intra-EU Arbitral Award After It Is Rendered

It is to be seen if such a line of argumentation may prove persuasive to enforcement courts. A plethora of arguments as to why intra-EU objections should be disregarded has already been provided by a great number of investment tribunals in recent years, and can be further used before the enforcement courts around the world. The present discussion differs, however, in that it is an enforcement-centric discussion rather than the jurisdiction-centric debate conducted before tribunals.

In addition, if enforcement courts take a similar 'contractual' approach to treaty obligations and treaty-based arbitration agreements as the U.S. Supreme Court did in *BG v. Argentina* (see BITs as Contracts, and Lurking Consent Issues: BG Group v. Republic of Argentina), these courts may seek to hold State parties to their side(s) of the bargain, thus to comply with dispute resolution provisions as included in treaties, notwithstanding the position taken by the EU.

The readers may recall that the enforcement efforts are regularly opposed (by the award debtors, but also by the European Commission) on the basis of intra-EU objections. An illustrative example is the *Micula* saga, where the investor tries to enforce the ICSID award against Romania (see also Was the European Commission Right to Qualify the Micula Award as State Aid? The Question is Referred Back to the EU General Court). So far, however, the intra-EU argumentation is failing (most recently: U.S. District Court for a District of Columbia declined to overturn earlier decision to enforce the *Micula* award).

As a final, practical matter, one may wonder whether the pursuit of enforcement of a locally set aside intra-EU (non-ICSID) award would take on the characteristics of (or be any more difficult than) pursuing enforcement of intra-EU ICSID awards outside Europe. Against all odds, new intra-EU matters are being submitted, which only means that the pool of the intra-EU awards subject to enforcement will continue to grow. It is yet to be seen if the arguments pursued by the EU towards the intra-EU investment arbitration cases will be recognized by enforcement *fora* or remain the regional oddity.

References

?1 J. Paulsson, Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment, 6 Asia Pac. L. Rev. 1 1998, p.25.

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