Kluwer Arbitration Blog

Nipping Intra-EU BIT Arbitrations in the Bud: The Republic of Poland v. LC Corp B.V.

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In a recent decision (the "**Decision**"), the Amsterdam Court of Appeal (*Gerechtshof Amsterdam*) (the "Court") ordered the claimant in an UNCITRAL arbitration brought against Poland under an intra-EU Bilateral Investment Treaty ("**BIT**") to cooperate in terminating an arbitration, subject to a hefty daily penalty.

Although there have been many court decisions addressing the enforcement of intra-EU BIT awards, this is the first known case where a court actively injuncts a claimant from pursuing such an award in the first place.

The Decision is not only the culmination of the EU's decade-long crusade against intra-EU BIT arbitrations (by nipping in the proverbial bud the last-resort tactic of seeking to have the seat of the arbitration outside the EU so as to shield the arbitration from the consequences of the *Achmea*-jurisprudence), it may also have wider implications beyond the intra-EU BIT realm.

Background

This dispute is rooted in an (at the time ongoing) investment treaty arbitration brought in December 2020 by LC Corp B.V. ("**LC Corp**"), a Netherlands-based investment company, against the Republic of Poland ("**Poland**") under the 1992 Poland-Netherlands BIT.

The Arbitral Tribunal chose London as the seat of the arbitration pursuant to an application by LC Corp.

Poland argued that the arbitration was incompatible with EU law, particularly following the Court of Justice of the European Union's ("**CJEU**") 2018 *Achmea* judgment (CJEU Case C-284/16).

As previously reported, *Achmea* established the principle that arbitration clauses in intra-EU BITs are contrary to EU law.

In its subsequent ruling in *PL Holdings v. Poland* (CJEU Case C-109/20), the CJEU further held that Member States cannot circumvent the *Achmea*-prohibition by entering into *ad hoc* arbitration agreements with investors from other Member States (as previously reported).

Following *Achmea*, Poland terminated the Poland-Netherlands BIT in July 2018.

This BIT contained a sunset clause protecting investments made before the termination of the BIT for a further 15 years post-termination.

In December 2018, Poland issued a declaration confirming the applicability of this sunset clause.

In 2019, the EU Member States issued a declaration declaring all intra-EU BITs "inapplicable," including their sunset clauses, and the Netherlands subsequently declared the Poland-Netherlands BIT terminated. In May 2020, 23 out of the 27 Member States (including Poland and the Netherlands) signed a Termination Agreement to terminate all their intra-EU BITs, and specifically provided that sunset clauses in those BITs "shall not produce legal effects."

This Termination Agreement entered into force in 2021.

First Instance Decision

In its judgment of 8 March 2023, the Amsterdam District Court rejected Poland's request to order LC Corp to discontinue the arbitration, considering that previous jurisprudence shows that such proceedings are not futile (and thus not an abuse of rights), as some arbitral tribunals and domestic courts in enforcement or annulment proceedings have, in similar circumstances, held that such arbitral tribunals do have jurisdiction and that their awards can be enforceable (albeit outside the EU). This decision was in line with a decision of the Amsterdam interim relief judge on the same issue, as reported here.

Arguments on Appeal

In its appeal, Poland alleged: (i) the incompatibility of the arbitration with EU law (which was not disputed by LC Corp), and (ii) LC Corp's legal duty under Dutch law to take steps to discontinue the arbitration.

LC Corp contended that the Arbitral Tribunal should decide on its own jurisdiction based on the principle of *Kompetenz-Kompetenz* and that the Dutch courts should not interfere. It also alleged that the UK courts as court of the seat of the arbitration are the only competent state courts.

The Decision

The Court overturned the first instance judgment, considering that the relevant criterion was whether or not there was an obligation incumbent on LC Corp to cooperate with the discontinuance of the arbitration. It found that there was such an obligation under the general Dutch law of obligations.

The Court considered that, pursuant to the various declarations of the Contracting States in 2019, both the standing offer to arbitrate and the sunset clause in the BIT had lapsed. It thus found that Poland's 2018 declaration regarding the sunset clause had been rendered obsolete.

It further found that LC Corp was duly aware (or at least should have been aware) that Poland "did not want this kind of arbitration" at the time of initiating the arbitration in 2020 (Decision, para. 4.15). Moreover, the Court found that LC Corp purposefully tried to circumvent EU law by having the seat outside the EU. This conduct resulted in the need for Poland to defend itself and run the risk of sanctions by the EU for unlawful state aid if a potential award would ever be enforced.

The Court also found that:

- there was no discrimination between intra-EU and extra-EU investors, as they do not find themselves in the same situation; and
- there is no right to static regulation under international law, and thus the contracting parties were at liberty to change or declare the BIT invalid (considering that the case does not concern a specific arbitration agreement with the investor in question which could only be amended with the latter's consent, i.e., *ad hoc* arbitration agreements).

The Court further dismissed the argument that the preclusion of arbitration would leave LC Corp without adequate legal protection. It found that upon Poland's accession to the EU, the legal protection to be afforded by the national (Polish) court replaced that of arbitration provided for in the BIT. In the Court's opinion, any complaints as to the functioning of the Polish courts must be addressed within the EU law system of judicial protection (with reference to *PL Holdings*, para. 68) and, insofar as it concerns violations of the European Convention on Human Rights and its protocols ("ECHR"), this may (also) be addressed by a complaint to the European Court of Human Rights ("ECtHR").

Consequently, LC Corp's actions were considered tortuous, resulting in a legal obligation to cooperate in discontinuing the arbitration. The Court thus ordered LC Corp to submit a joint application to the Arbitral Tribunal to discontinue the arbitration, subject to a daily penalty of EUR 100,000, with a maximum of EUR 10 million.

Implications of the Decision

Since *Achmea*, the framework for intra-EU BIT arbitrations has been practically eroded.

Initially, there was room for maneuvering as:

- most arbitral tribunals rejected jurisdictional objections raised by respondent States on the basis of international law, in particular the Vienna Convention on the Law of Treaties ("VCLT"); and
- enforcement of intra-EU awards has still proven possible outside the EU (e.g., in the USA, UK, Switzerland, and Australia).

However, the Decision seeks to plug those holes, and—unfortunately—in the view of the authors, does so quite effectively.

Critics of the *Achmea* case law insist that this undermines the integrity of the international legal order as BITs, including their arbitration clauses and sunset clauses, were binding international agreements under the VCLT, which cannot be unilaterally invalidated, especially not retroactively.

These complaints continue to fall on deaf ears, however, as is apparent from the Decision, with the

Court casually brushing off LC Corp's arguments under international law.

The reasoning of the Court entails that the contracting States had reached an agreement to terminate the BIT and its sunset clause by way of their 2019 declaration, hence prior to the commencement of the arbitration in 2020. This means that the standing offer to arbitrate had lapsed, and no arbitration agreement could come into being when the arbitration was initiated in 2020.

This reasoning is questionable to say the least, given that the Termination Agreement that formally terminated the BIT and the sunset clause contained therein only entered into force with respect to the Netherlands and Poland in March and April 2021, respectively, and thus after the commencement of the arbitration (for more on this debate, see here).

Interestingly, the Court does leave an opening for *ad hoc* arbitration agreements—even though such a reading would seem contrary to the *PL Holdings* jurisprudence.

Further criticism is directed at the effectiveness of forcing investors to rely solely on national courts for investor protection. This is particularly worrying given the significant backsliding of the rule of law in several EU Member States over the past few years (as established by the very EU institutions (see here and here) that sought and succeeded in abolishing the formerly robust system of investment protection under intra-EU BITs). These concerns stem from (perceived) undue political pressure and influence exerted on domestic court judges. Investor protection within the EU is under threat like never before. This is concerning considering the volatile geo-political age that we have entered into with wars becoming routine, be it trade wars, cyber wars, or armed conflicts.

The fact that a final remedy for European investors exists, in the form of an application to the CJEU or ECtHR (as noted in the Decision), provides little consolation. It remains to be seen whether these routes will actually be viable and render an effective result, not just from a procedural, but also from a substantive point of view.

A final, unrelated consideration goes to the costs of the arbitration as a result of this Decision. In circumstances where a claimant is effectively forced to withdraw its claim, it would be interesting to understand how an arbitral tribunal apportions the costs, and whether such a decision on costs would subsequently be enforceable. In a recent decision rejecting enforcement of an intra-EU arbitral award, the German Supreme Court held that the State could not enforce an award of costs against the claimants as no valid arbitration agreement existed in the first place (BGH, sAz. I ZB 64/24). In the case at issue, however, the circumstances may be different, considering that the Court has established that LC Corp acted wrongfully by pursuing the arbitration.

Conclusion

This case marks a significant legal development.

Although intra-EU BIT arbitrations are undeniably slowly phasing out, this is another warning shot to any (potential) claimants of still ongoing, or contemplated, intra-EU BIT arbitrations that the EU courts mean business and are not afraid to impose crippling penalties to coerce compliance.

Forthwith, outside of the ICSID system, investors from EU Member States who feel unjustly treated by other EU Member States have no other realistic options than embarking on the long journey through the courts of the host State of the investment to, hopefully, obtain a fair trial and decision, under the (remote) supervision of the CJEU and/or the ECtHR (see here and here for more on this).

Dutch courts have historically been reluctant to issue anti-arbitration injunctions, consistent with the Netherlands' pro-arbitration stance. However, this Decision paves the slippery slope to politically motivated anti-arbitration injunctions, potentially even in fields beyond intra-EU BIT arbitrations.

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