Intra-EU investment arbitration proceedings—the ECJ pronounces further on the autonomy of EU law (Poland v PL Holdings Sàrl)

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Arbitration analysis: A recent judgment of the Grand Chamber of the Court of Justice of the European Union (ECJ) held that in cases where an arbitration clause in an intra-EU Bilateral Investment Treaty (BIT) is contrary to EU law, domestic Member State law may not allow a Member State and a private party to conclude an ad hoc arbitration agreement with the same content and submit that dispute to an arbitral body with the same characteristics as that envisaged under the BIT, extending the principles established in Achmea v Slovakia (Achmea). The judgment confirms the significance of the Achmea decision and buttresses it so that it may not be circumvented by means of Member State domestic law. It also builds on the approach illustrated in another recent Grand Chamber judgment (Moldova v Komstroy) and makes it clear that Member State domestic courts are under a duty to set aside an arbitration award made on the basis of an arbitration agreement that would violate the Achmea principle. Given the narrow legal context of the case, the judgment also raises questions about the scope of the applicability of the above principle. Written by Professor Panos Koutrakos, barrister at Monckton Chambers and professor of EU Law, and Jean Monnet, professor of EU Law at City, University of London.

Poland v PL Holdings Sarl Case C-109/20

For our initial coverage of the decision, see: ECJ rules investors and EU Member States cannot circumvent Achmea by concluding separate arbitration agreements (Poland v PL Holdings SARL).

What are the practical implications of this case?

The judgment reaffirms the significance of the principle laid down in *Achmea* Case C-284/16 by extending its application to ad hoc agreements between EU Member States and investors from other EU Member States. The factual context of the judgment is narrow—it is about agreements that aim to continue arbitration proceedings initiated under an arbitration clause pursuant to an intra-EU BIT that has been deemed to be invalid in the light of *Achmea.* Its significance is highlighted by the court's refusal to limit the temporal effects of the judgment.

This the second judgment in less than two months in which theECJ has strengthened the impact of the *Achmea* principle. In *Moldova v Komstroy* Case C-741/19 , the court relied on *Achmea* in order to point out, in quite forceful terms, that Article 26(2)(c) of the Energy Charter Treaty is not applicable to arbitration proceedings between an investor of an EU Member State and another EU Member State.

The judgment is of interest to practitioners. First, it requires that EU Member States challenge the validity of an arbitration clause that would violate the principles relied upon in *Achmea* and that domestic courts set aside any arbitral award made on the basis of an arbitration agreement that contained such a clause.

Second, the judgment relies (twice) on the Agreement on the Termination of intra-EU BITs that 23 EU Member States signed in 2020 (the Agreement) . It confirms that, from the date of the accession of the above states, the arbitration clauses of the BITs referred to therein could not serve as the basis for arbitration proceedings between an investor and those Member States (para [46] of the judgment with reference to Article 4(1) of the Agreement). This is noteworthy, given the distinct reluctance of arbitral tribunals to endorse the *Achmea* principle.

Third, the question is raised about how widely the judgment is to be applied. The legal context of the case was narrow—an ad hoc arbitration agreement that would enable a Member State and an investor from another Member State to continue arbitration proceedings initiated pursuant to an invalid arbitration clause of an intra-EU BIT. Is it also applicable to other arbitration agreements between Member States and investors from other Member States? Advocate General Kokott had

argued for a wide application of *Achmea.* The judgment itself does not refer to her Opinion in relation to this issue.

What was the background?

This reference from the Swedish Supreme Court arose from a dispute between a Luxembourg company (PL Holdings) and Poland due to the fact that the former was forced by the Polish Financial Supervision Authority to sell its shares in a Polish bank. PL Holdings initiated arbitration proceedings (administered by the Arbitration Institute of the Stockholm Chamber of Commerce (SCC)) against Poland under Article 9 of the 1987 BIT between Belgium/Luxembourg and Poland. In proceedings for the annulment of the arbitral award before the seat courts, the Svea Court of Appeal had held that the arbitration clause of the intra-EU BIT was invalid in the light of *Achmea*. However, it held that a Member State and an investor from another Member State could still conclude an ad hoc arbitration agreement in respect of the same dispute, based on their common intention, as in a commercial arbitration. In fact, such an agreement had emerged in that case, as Poland had participated in the proceedings without entering a formal jurisdiction objection in accordance with domestic law. This was the question referred, on appeal, by the Supreme Court: in proceedings under an intra-EU BIT presumed to be invalid in the light of *Achmea*, may a Member States enter into an agreement with an investor from another Member State by not objecting to the arbitration clause in due time?

What did the court decide?

The judgment was about the principle first introduced in *Achmea*—an arbitration clause in an intra-EU BIT enabling an investor from a Member State to initiate proceedings pertaining to the interpretation and application of EU law against another Member State for a dispute concerning investment in the latter is contrary to EU law. The court held that this principle may not be circumvented by Member State domestic law that would enable a Member State, party to such a dispute under an intra-EU BIT, to submit that dispute to an arbitral body with the same characteristics as that envisaged under the BIT by concluding an ad hoc arbitration agreement with the same content as that deemed illegal in the light of *Achmea.*

This conclusion follows from the same principles that were relied upon in *Achmea*—to remove a dispute that may pertain to the application and interpretation of EU law from the jurisdiction of domestic courts would deprive that law the full effectiveness that the EU legal system may guarantee. Such an outcome would be contrary to the principle of mutual trust between the Member States, the preliminary reference procedure (Article 267 TFEU), the principle of sincere co-operation (Article 4(3) TEU), and the autonomy of EU law (Article 344 TFEU).

If that were not the case, the parties to the dispute would be allowed to remedy the invalidity of arbitration clause in an intra-EU BIT by means of a contract with an investor from another Member State. In fact, the primacy of EU law and the duty of sincere co-operation require that Member States challenge the validity of the arbitration clause or the ad hoc arbitration agreement in any arbitration body before which a dispute is brought.

Case details:

- Court: Court of Justice of the European Union
- Date of judgment: 26 October 2021

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