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February 4, 2022

THE LATEST CHAPTER OF THE INTRA-EU INVESTMENT ARBITRATION SAGA: WHAT IT ENTAILS FOR THE PROTECTION OF INTRA-EU INVESTMENTS AND ENFORCEMENT OF INTRA-EU ARBITRAL AWARDS

To Our Clients and Friends:

Since 6 March 2018, the EU institutions have been sending EU investors a clear message regarding the protection of their investments within the EU under so-called 'intra-EU' bilateral investment treaties (**BITs**), as well as now the Energy Charter Treaty (the **ECT**).

As we have reported here, the Court of Justice of the European Union (the **CJEU**) concluded in *Achmea B.V. (formerly known as Eureko B.V.) v Slovakia* that EU investors could not have recourse to arbitration under a BIT between two EU Member States. The CJEU held that arbitration under intra-EU BITs was contrary to EU law. Following *Achmea*, and a call from the European Commission (the **Commission**), twenty-three EU Member States signed an agreement purporting to terminate approximately 130 intra-EU BITs on 5 May 2020 (the **Termination Agreement**), as we reported here. The door remained open as to whether the ruling in *Achmea* would be extended to the ECT.

On 2 September 2021 came the CJEU's decision in *Republic of Moldova v Komstroy* (reported on here). Adopting the policy views expressed by the Commission, and broadening the scope of its findings in *Achmea*, the CJEU determined that intra-EU arbitration (*i.e.,* between an EU investor and an EU Member State) under the ECT is also incompatible with EU law.

On 26 October 2021, the CJEU went even further in its decision in *Republic of Poland v PL Holdings S.à.r.l.*[1] (***PL Holdings***). The CJEU ruled that EU Member States are precluded from entering into *ad hoc* arbitration agreements with EU-based investors, where such agreements would replicate the content of an arbitration agreement in a BIT between EU Member States.

Finally, and most recently, on 25 January 2022, the CJEU overturned a decision by the General Court in *Micula v Romania*[2] (***Micula***) that had quashed a Commission State aid ruling from 2015 declaring payment of compensation to claimants as per their ICSID award unlawful State aid and ordering recovery of amounts paid to them. Contrary to the General Court's decision, in CJEU's view, EU State aid rules can be triggered at the time of payment of an arbitral award even though all the State measures that the ICSID award compensated the claimants for were taken before Romania's accession to the EU. The CJEU also held (*inter alia*) that any consent that may have been given by an EU Member State to arbitration pre-accession lacks any force, to the effect that the system of judicial remedies provided for by the EU and the Treaty on the Functioning of the EU (the **TFEU**) replace the arbitration procedures upon accession to the EU.

These last two developments in the intra-EU arbitration saga, which we address further below, raise yet further alarm bells for EU investors who may have contemplated relying on existing intra-EU BITs as a

means of protecting their investments within the EU, or are looking to enforce intra-EU arbitral awards that pre-date *Achmea*. That is: despite the unanimous stance of over 50 investment arbitration tribunals so far[3] which consider *Achmea* not to be a bar to their jurisdiction under international law to hear treaty claims and award compensation for investors' injuries, the European Courts and the Commission are actively taking steps to weaken that protection, at least as a matter of EU law. Hence, investors need to think carefully about how to structure (or restructure) their investments to maximise treaty protection and ensure successful enforcement of any favourable arbitral awards with an EU connection.

PL Holdings: An intra-EU arbitration agreement found in a BIT and replicated as an ad hoc agreement between the investor and a Member State is invalid under EU law

Background

PL Holdings (a Luxembourg entity) brought arbitration proceedings against Poland under the BIT between the Belgium-Luxembourg Economic Union (BLEU) and Poland after a Polish regulator ordered the compulsory sale of its interests in a Polish bank. The seat of the arbitration was Stockholm, and the case was administered by the Stockholm Chamber of Commerce. The tribunal concluded in 2017 that Poland had expropriated PL Holdings' investment and ordered damages.

In September 2017, Poland brought set-aside proceedings before the Swedish courts, arguing that the arbitration clause in the Poland-BLEU BIT was incompatible with EU law post-*Achmea*.

In 2019, the Swedish Court of Appeal accepted that, in light of *Achmea*, the arbitration agreement in the BIT was indeed invalid. However, the court held that this invalidity did not prevent an EU Member State and an EU investor from concluding an *ad hoc* arbitration agreement at a later date to resolve the same dispute. The court relied on the awkward distinction made in *Achmea* (and also *Komstroy*) between commercial arbitration and investment treaty arbitration, which we reported on before—namely, that commercial arbitration "*originate*[s] *in the freely expressed wishes of the parties* [concerned]" (in contrast to investment arbitrations, which do not).[4] In the court's view, Poland tacitly accepted PL Holding's offer to arbitrate by failing to raise an objection based on *Achmea* earlier on in the proceedings, thus creating an *ad hoc* arbitration agreement between Poland and PL Holdings under Swedish law, as the law of the seat. This was said to be derived from the parties' common intention to resolve the dispute in the same manner as a commercial arbitration agreement.

Poland appealed to the Swedish Supreme Court, which resulted in a preliminary ruling from the CJEU on the following question: whether Articles 267 and 344 of the TFEU as interpreted in *Achmea* mean that an intra-EU arbitration agreement (concluded between two Member States) is invalid even if a Member State (by free will) refrains from raising objections to jurisdiction after arbitration proceedings were commenced by the investor.

The CJEU's ruling

The CJEU ruled that it is: "[a]*ny attempt by a Member State to remedy the invalidity of an arbitration clause by means of a contract with an investor from another Member State would run counter to the first Member State's obligation to challenge the validity of the arbitration clause*".[5] In those circumstances,

the Court added, it was for the national court to uphold an application seeking to set aside an arbitration award made on the basis of an arbitration agreement infringing Articles 267 and 344 TFEU and the principles of mutual trust, sincere cooperation and autonomy of EU law.[6]

Like in *Achmea*, the CJEU underscored that an agreement to remove from the jurisdiction of their own courts disputes which may concern the application or interpretation of EU law may prevent those disputes from being resolved in a manner that guarantees the full effectiveness of EU law.[7] In the CJEU's view, any *ad hoc* arbitration agreement, on the same terms as the investment treaty, would have the same effect, meaning that 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*".[8]

The CJEU also said, it follows from *Achmea*, the principles of the primacy of EU law and of sincere cooperation, that EU Member States not only may not undertake to remove disputes from the EU judicial system, but also that, where there is a *PL Holdings*-type situation, they are required to challenge, before the competent arbitration body or the court, the validity of the arbitration clause or the *ad hoc* arbitration agreement. This is further confirmed in Article 7(b) of the Termination Agreement which states that Contracting Parties "*shall*"—where they are party to judicial proceedings concerned an arbitral award issued on the basis of a BIT—"*ask the competent national court, including in any third country, as the case may be, to set the arbitral award aside, annul it or to refrain from recognising and enforcing it*".[9] According to the CJEU, that rule is also applicable *mutatis mutandis* in a *PL Holdings*-type scenario.[10] In effect, therefore, this requirement to challenge jurisdiction represents a deemed challenge that will be interpreted as having effect at any further stage of the arbitral process, including enforcement of any ultimate award.

The latest development in Micula: a further delay to enforcement by reviving the Commission's State aid decision; and Achmea is relevant for assessing the case

Background

The *Micula* saga has now been running for over fifteen years. The ICSID arbitration proceedings commenced in 2005, prior to Romania's accession to the EU, whereby the Micula brothers argued (and the ICSID tribunal agreed) that Romania had impaired the Micula brothers' investments by repealing certain economic incentives with a view to eliminate measures that could constitute State aid shortly before its accession to the EU. In 2013, the same ICSID tribunal ordered Romania to pay EUR 178 million in compensation.

Romania partially paid the ICSID award. In 2015, however, the Commission ruled that such payment constituted unlawful State aid, precluding Romania from making further payments and ordering recovery of amounts already paid. In short, it is the Commission's view that payment of the award would re-establish the situation in which the Micula brothers would have found themselves had the relevant incentives not been repealed by Romania, and that this constituted operating State aid.

In June 2019,[11] post-*Achmea*, the General Court quashed the Commission's ruling on the basis that all events relating to the incentive took place *before* Romania's accession to the EU in 2007, and the

right to receive compensation arose at the time Romania repealed the incentives in 2005 and the ICSID award was intended to compensate the revocation of the incentive retroactively. The right to receive compensation arose, therefore, when Romania repealed the incentive. As EU State aid rules were not applicable in Romania pre-accession, the Commission could not exercise powers conferred to it under those rules.[12] Moreover, the Court found that payment of the compensation after accession is irrelevant in that context, because those payments made in 2014 represent the enforcement of a right which arose in 2005.[13]

In that respect, the General Court could avoid discussing the relationship between EU law and intra-EU investment arbitration, given that "*in the present case, the arbitral tribunal was not bound to apply EU law to events occurring prior to the accession before it, unlike the situation in the case which gave rise to the judgment* [in Achmea]".[14]

Undeterred, the Commission then filed an appeal before the CJEU in August 2019. Not altogether surprisingly, Spain—the respondent State in over 50 ECT cases involving the removal of renewables incentives—filed a cross-appeal supported by the Commission (the **Cross-Appeal**). Spain (and the Commission) claimed that the award breached the EU principle of mutual trust and autonomy of EU law as interpreted in *Achmea*. In parallel, the Micula brothers sought to enforce the ICSID award following the General Court's decision, including before the courts of England and Wales, as previously reported on here.

The opinion of Advocate General Szpunar and the decision of the CJEU

Notably, in July 2021, Advocate General (**AG**) Szpunar to the CJEU opined that the Cross-Appeal must be dismissed on the basis that *Achmea* could not be applied in arbitration proceedings initiated pursuant to Sweden-Romania BIT concluded *before* Romania's accession to the EU, and when those proceedings were still pending at the time of that accession.[15] Yet, when it came to analysing the Commission's competence regarding the application of EU State aid rules, the AG suggested that the alleged aid should be deemed granted at a time when Romania was required to pay that compensation, *i.e.* after the issuance of the arbitral award, at the time of its implementation by Romania.[16] As the time of award payment post-dated Romania's accession to the EU, EU law was indeed applicable to that measure and the Commission was competent to make the ruling it did.

The dispute then reached the CJEU:

1. As to the question of when the alleged aid measure should be deemed granted, the Court agreed with AG Szpunar and held that EU State aid rules were applicable to the compensation paid by Romania and therefore upheld the competence of the Commission.

2. As to the relevance of *Achmea*, because the CJEU had already concluded to overturn the General Court's decision as per the first question, the CJEU thought it was not necessary for it to rule on the Cross-Appeal.[17] The CJEU did state, however, that the General Court had erred in considering that *Achmea* was irrelevant.[18] Indeed, since the compensation sought by the Micula brothers did not relate exclusively to the damage allegedly suffered before Romania's accession in 2007 (as the relevant period for such damage extended until 2009), the arbitral

> proceedings could not be considered as completely confined to the pre-accession period. As such, "*with effect from Romania's accession to the European Union, the system of judicial remedies provided for by the EU and FEU Treaties replaced that arbitration procedure, the consent given to that effect by Romania, from that time onwards, lacked any force*".[19]

The case will now be remanded to the General Court which will determine: (i) whether the Commission was right to consider that the compensation granted by the ICSID award did constitute incompatible State aid; and (ii) the relevance of *Achmea*. In that respect, whilst this decision is highly fact specific, it does signal further issues for any EU investor looking to enforce intra-EU arbitral awards within the EU where the Commission may invoke *Achmea* arguments in the State aid context. In fact, even if an EU investor tries to enforce a favourable award outside the EU, there is now a risk that the Commission may require the Member State to recover amounts paid which it concludes constitute incompatible State aid.

In that vein for example, the Commission recently announced its investigation into the arbitral award in *Infrastructure Services v Spain* in July 2021,[20] which it considers, on a preliminary view, constitutes State aid.[21]

What options do investors with investments in the EU have in light of these developments?

The decisions in *PL Holdings* and *Micula* have slightly different ramifications for EU investors, even though both underscore that the CJEU is not going to step away from its original stance in *Achmea*. Although investment treaty tribunals that have ruled on the impact of *Achmea* on investor-State arbitration so far remain unanimously adamant that Member State consent to arbitration in intra-EU investment treaties is valid under international law,[22] both cases demonstrate the hostile position that the EU has taken towards investor protection. Hence, EU-based investors should consider structuring (or restructuring, depending on whether there is a dispute already on the horizon) their investments via non-EU Member State entities (such as through the UK post-Brexit) in order to secure the benefit of investment treaties.

Further, in the event a dispute does arise in an intra-EU context, investors may consider opting for arbitration procedures which would allow a non-EU Member State to be designated as the seat of the arbitration, thus limiting the scope for the potential application of EU law.

From an enforcement perspective, investors with existing or planned EU-investments should also consider whether the EU Member State that hosts the investment has assets in non-EU Member States whose courts reliably enforce arbitral awards and would not necessarily consider themselves bound by CJEU rulings and Commission's jurisdiction.

As regards *PL Holdings* specifically, the decision has other practical implications which require careful consideration by investors depending on their circumstances. For example:

1. National courts of EU Member States will now be expected to interpret their national legislation so that no *Achmea*-style arbitration clause is upheld to be valid. In other words, the CJEU and national courts may (in effect) overrule basic principles of domestic arbitration law regarding what a binding arbitration agreement looks like.

2. On its face, the reasoning in *PL Holdings* could, theoretically, be extended to commercial contracts with States or State Owned Enterprises whereby the arbitration clause effectively replicates the provisions in an investment treaty. However, the judgment does not appear aimed at, for example, concession agreements or other types investor-State direct contractual arrangements. If, say, a *PL Holdings*-based challenge were to arise in the context of a private commercial agreement between an EU Member State and an EU investor, and a preliminary reference was made to CJEU, it is likely that the Court would be inclined *not* to extend the reach of *Achmea* to commercial arbitration agreements, following the artificial distinction it drew between commercial and investment arbitration agreements in *Achmea* and *Komstroy*.

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[1] *See* Judgment of the Court (Grand Chamber), Case C-109/20, *Republiken Polen (Republic of Poland) v PL Holdings S.à.r.l.*, ECLI:EU:C:2021:875, 26 October 2021, available here.

[2] *See* Judgment of the Court (Grand Chamber), Case C-638/19 P, *Viorel Micula and others v Romania*, ECLI:EU:C:2022:50, 25 January 2022, available here.

[3] As of the time of publication, we are aware of at least 76 investment treaty tribunals that have considered the intra-EU objection and all have unanimously rejected it (whether under intra-EU BITs or the ECT). At least 50 of these 76 tribunals have rejected the intra-EU objection specifically founded on the basis of CJEU's *Achmea* decision.

[4] Judgment of the Court (Grand Chamber), Case C-284/16, *Slowakische Republik (Slovak Republic) v Achmea BV*, ECLI:EU:C:2018:158, 6 March 2018, ¶ 55 ; *see further* our client alerts on *Achmea* (available here) and *Komstroy* (available here).

[5] Judgment of the Court (Grand Chamber), Case C-109/20, *Republiken Polen (Republic of Poland) v PL Holdings S.à.r.l.*, ECLI:EU:C:2021:875, 26 October 2021, ¶ 54.

[6] *Id.*, *see* ¶ 55.

[7] *Id.*, *see* ¶¶ 44-47.

[8] *Id.*, ¶ 49.

[9] *See* Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, 5 May 2020, Article 7(b).

[10] Judgment of the Court (Grand Chamber), Case C-109/20, *Republiken Polen (Republic of Poland) v PL Holdings S.à.r.l.*, ECLI:EU:C:2021:875, 26 October 2021, *see* ¶ 53.

[11] *See* Judgment of the General Court (Second Chamber), Cases T-624/15, T-694/15 and T-704/15, *Viorel Micula and others v European Commission*, ECLI:EU:T:2019:423, 18 June 2019, available here.

[12] *Id.*, ¶ 79.

[13] *Id.*, ¶ 80.

[14] *Id.*, ¶ 87.

[15] Opinion of Advocate General Szpunar, Case C-638/19 P, *European Commission v Viorel Micula and others*, 1 July 2021, ¶ 107.

[16] There are, in other words, two ways that the Commission can assess the Award under the State aid rules: (i) either the Award is assessed by considering the underlying reason for the payment of the damages; or (ii) the Award is assessed in isolation, *i.e.*, on a standalone basis as *ad hoc* aid.

[17] *See* Judgment of the Court (Grand Chamber), Case C-638/19 P, *Viorel Micula and others v Romania*, ECLI:EU:C:2022:50, 25 January 2022, ¶ 148.

[18] *Id.*, *see* ¶ 137.

[19] *Id.*, ¶ 145 (emphasis added).

[20] *See Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v Kingdom of Spain*, ICSID Case No. ARB/13/31.

[21] *See* European Commission Press Release, *State aid: Commission opens in-depth investigation into arbitration award in favour of Antin to be paid by Spain*, available here: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3783.

[22] *See* fn.3 above.

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