Swedish Courts invalidate intra-EU investment awards in landmark cases (PL Holdings v the Republic of Poland, Novenergia v the Kingdom of Spain)

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Arbitration analysis: The Svea Court of Appeal (Court of Appeal) and the Swedish Supreme Court (Supreme Court) rendered two separate but related landmark cases on 13 and 14 December 2022, declaring two intra-EU investment arbitration awards invalid as the awards contradict fundamental principles of EU law. The Supreme Court declared an intra-EU investment award invalid as it violated procedural ordre public (public policy). According to the Supreme Court, this applies regardless if the award is based on an ad hoc arbitration agreement or if the arbitration agreement is derived from a Bilateral Investment Treaty (BIT). The Court of Appeal found that an award under the Energy Charter Treaty (ECT) lacks arbitrability and the investment award in question was therefore declared invalid.

The cases are of particular importance in Sweden, since the provision on invalidity in the Swedish Arbitration Act (SAA) has no limitation in time. The judgments may therefore come to open up a floodgate of challenges against any intra-EU investment award which has been rendered in arbitration where the seat is Sweden and where the SAA is applicable. Written by Andreas Johard, partner at Hammarskiöld law firm, Stockholm, Sweden, and Adam Runestam, associate at Hammarskiöld. Andreas Johard was previously part of the teams representing the Kingdom of Spain and the Republic of Poland in the cases accounted for in this article.

Republic of Poland v PL Holdings, Supreme Court; and *Kingdom of Spain v Novenergia*, Court of Appeal.

What are the practical implications of this case?

The judgments from the Swedish Courts follow the *Achmea,* Case C-284/16 and *Komstroy,* Case C-741/19 judgments from the Court of Justice, which clearly states that intra-EU investment arbitration contradicts fundamental principles of the EU law. The Supreme Court found that the *PL Holdings v Poland* award violated procedural ordre public (public policy), entailing that arbitral awards rendered in intra-EU investment arbitrations under a BIT are invalid. The Court of Appeal found that such awards lack arbitrability and must be declared invalid, even though the arbitration agreement is derived from a multilateral investment treaty such as the ECT.

The provision on invalidity in the SAA provides that an award is invalid without limitation in time (ex tunc), with no deadline on when awards can be challenged. Accordingly, intra-EU investment awards which have been rendered in arbitration where the seat is Sweden can presumably be challenged regardless of when the awards were rendered. In light hereof, the judgments accounted for in this article may come to open a floodgate of challenges against intra-EU awards in Sweden.

With respect to intra-EU investment arbitrations seated in countries outside of the EU, such as ICSID disputes, it is still uncertain how such awards will be regarded. It is likely that the Court of Justice's findings in *Achmea* and subsequent case law also apply to ICSID disputes (which has been implied by the Court of Justice in *Micula,* Case C-284/16), and it remains to be seen how an ICSID award can be recognized and enforced in the EU despite being considered valid outside of the EU.

What was the background?

The Court of Appeal's judgment (Spain v Novenergia)

Novenergia, a Luxembourg fund investing in solar energy, had prevailed against Spain in arbitration under the ECT, whereby the arbitral tribunal found that Spain had violated the Fair and Equitable Treatment (FET) provisions. Spain was ordered to pay approximately €53m to Novenergia. The seat of arbitration was Stockholm, Sweden. Following the then recent *Achmea* judgment from the Court of Justice, Spain challenged the award at the Court of Appeal in Stockholm, Sweden, on the basis that the award contradicted fundamental EU law principles and that the Tribunal had lacked jurisdiction to adjudicate the dispute.

The Supreme Court's judgment (Poland v PL Holdings)

PL Holdings, a Luxembourg fund company, had prevailed against Poland in an arbitration under a BIT, whereby the arbitral tribunal found that Poland had violated the FET provisions in the BIT. Poland was ordered to pay approximately EUR 150m to PL Holdings. The seat of arbitration was Stockholm, Sweden. Following the *Achmea* judgment, Poland challenged the award at the Court of Appeal, which concluded that the original arbitration agreement derived from the BIT was invalid since it is not compatible with fundamental principles of EU law to settle intra-EU investment disputes in arbitration. However, the Court of Appeal erroneously concluded that the parties had concluded an ad hoc arbitration agreement ex post by participating in the arbitration proceedings. The case was appealed to the Supreme Court.

What did the courts decide?

The Court of Appeal's judgment (Novenergia v Spain)

On 13 December 2022, the Court of Appeal declared the arbitration award invalid. The Court of Appeal stated that it follows from Court of Justice case law (namely the *Achmea,* Case C-284/16, *Komstroy,* Case C-741/19 and *PL Holdings,* Case C-109/20 judgments) that it is not compatible with fundamental principles of EU law to settle intra-EU investment treaty disputes by arbitration. In light hereof, the Court of Appeal concluded that intra-EU investment awards do not satisfy the requirement of arbitrability pursuant to section 33, first paragraph, first item of the SAA, why such awards must be declared invalid. The Court of Appeal concluded that there is in principle no room to depart from this conclusion.

The Supreme Court's judgment (PL Holdings v Poland)

The Supreme Court referred a question to the Court of Justice under Article 267 of the Treaty of the Functioning of the European Union, seeking clarification of whether the findings in *Achmea* also applied to a situation where the parties had entered into an ad hoc arbitration agreement. The Court of Justice concluded in a preliminary ruling that the principles stated in *Achmea* also apply to ad hoc arbitration agreements. Based on the Court of Justice's preliminary ruling, the Supreme Court declared the award invalid as it contradicts procedural ordre public (public policy) pursuant to section 33, First paragraph, Second item of the SAA. In its reasoning, the Supreme Court emphasises that national courts in EU Member States are obliged to adhere to the Court of Justice's preliminary rulings. The Supreme Court reiterated the Court of Justice's statements in the applicable Court of Justice case law, entailing that intra-EU investor-State arbitration is not compatible with fundamental principles of EU law.

Case details:

- Court: Svea Court of Appeal
- Judges: Ulrika Beergrehn, Annika Malm (reporting judge), and Eva Edwardsson
- Date of judgment: 13 December 2022

- Court: Swedish Supreme Court
- Judges: Gudmund Toijer, Svante O Johansson (reporting judge), Dag Mattson, Malin Bonthron, and Cecilia Renfors
- Date of judgment: 14 December 2022