5 Coming Trends To Watch For In Intra-EU Investment Claims

By **Simon Batifort and Charlotte Fromont** (February 10, 2022)

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Ever since the 2018 Slovak Republic v. Achmea BV judgment by the Court of Justice of the European Union,[1] the arbitration of claims under intra-EU investment treaties has been one of the fastest-evolving and controversial areas of international investment law.

Following Achmea, most EU member states issued a declaration indicating that arbitration of intra-EU claims was incompatible with the Treaty on European Union and the Treaty on the Functioning of the European Union.[2]

And in May 2020, all but three of the 27 EU member states entered into an agreement in which they committed to terminate all intra-EU bilateral investment treaties, to seek the setting aside of awards rendered under such BITs, and to resist their enforcement before the courts in both EU and non-EU countries.[3]

Since then, the European Commission has initiated infringement proceedings against the member states that either did not sign or ratify the termination agreement or that did not terminate their BITs.[4]

In 2021, the main headline was the CJEU's widely anticipated decision in Republic of Moldova v. Komstroy LLC, which extended the reasoning of Achmea to intra-EU arbitration under the Energy Charter Treaty.[5]

The CJEU also clarified in 2021 in Republic of Poland v. PL Holdings that intra-EU claims cannot be brought even if the respondent state tacitly agrees to arbitrate those claims on an ad hoc basis, for example by failing to object to jurisdiction.[6]

After Achmea, PL Holdings and Komstroy, the picture is now clear: Arbitration of intra-EU claims is impermissible under the EU treaties.

But that is not the end of the story. The key questions now are: How will arbitral tribunals and national courts react when confronted with intra-EU investment claims? Will they be swayed by the CJEU's holdings, the declaration, and the termination agreement, or will they continue enabling arbitration of intra-EU claims? Will claimants be discouraged by these developments or will they keep bringing intra-EU claims before arbitral tribunals?

In this article, we address those questions by presenting five trends that we predict will unfold this year and beyond.

1. Arbitral tribunals will likely continue upholding jurisdiction in intra-EU cases.

Given the strong opposition to the arbitration of intra-EU claims expressed by the CJEU, the European Commission, and EU member states, an outside observer might assume that arbitral tribunals would think twice before upholding jurisdiction over such claims. Yet arbitral decisions so far indicate otherwise.

Following Achmea, arbitral tribunals have continued to uphold jurisdiction over intra-EU BIT

claims. Only one dissent has recognized the incompatibility of intra-EU BIT claims with the EU treaties and concluded that the EU treaties must prevail to resolve the incompatibility.[7]

So far, arbitral tribunals have also refused to apply the reasoning of Achmea to intra-EU claims under the ECT. In the 2019 Eskosol S.p.A. in liquidazione v. Italian Republic, for example, the tribunal extensively addressed the issue, but it was unmoved by either Achmea or the declaration.[8]

Will the trend reverse now after Komstroy? It does not look that way. There are early signs that tribunals will continue to uphold jurisdiction over intra-EU claims. For instance, in December 2021 and January 2022, tribunals in Kruk v. Kingdom of Spain,[9] Landesbank Badeen-Wurttemberg and others v. Kingdom of Spain[10] and Cavalum SGPS SA v. Kingdom of Spain[11] rejected requests submitted by Spain for reconsideration of the intra-EU objection.

With the mounting pressure against intra-EU investment claims, it is possible that we will finally see in coming years a tribunal render the elusive decision declining jurisdiction over such claims. But if the decisions of tribunals following Achmea are an indicator, it is more likely that the body of decisions enabling arbitration of intra-EU claims will keep growing in 2022 and beyond.

2. EU courts will consistently set aside and refuse to enforce intra-EU non-ICSID awards.

As award creditors know full well, it is one thing to obtain an award; but it is another to enforce it. When it comes to intra-EU claims, one thing is becoming clear: Courts of EU member states will not hesitate to set aside or refuse to enforce non-International Centre for Settlement of Investment Disputes awards involving intra-EU claims.

States can apply to set aside non-ICSID awards based on the intra-EU objection before the courts of the arbitral seat by relying on the grounds set forth under the law of the seat, which typically include the invalidity of the arbitration agreement and lack of jurisdiction. States can also resist enforcement by relying on the grounds set forth in the New York Convention, which include similar defenses.

Since EU courts are bound to render decisions that comply with the EU treaties, it is difficult to see how they could reject such defenses. The CJEU's holding in Achmea and Komstroy that intra-EU arbitration agreements are invalid under EU law has been considered an acte clair, with several EU courts refusing to refer preliminary rulings to the CJEU on the matter.

In the setting aside proceedings of the Greentech — now Athena — v. Italy award, for example, the Svea Court of Appeal recently withdrew its request for a preliminary ruling regarding the compatibility of the ECT arbitration clause with the EU treaties following the issuance of Komstroy.[12]

In January, the Supreme Court of Lithuania reportedly relied on the acte clair doctrine to refuse to refer to the CJEU the issue of the compatibility of the arbitration clause in the France-Lithuania BIT with the EU treaties.[13]

In PL Holdings, the CJEU stated that "it is for the national court to uphold an application which seeks the setting aside of an arbitration award made on the basis of" an intra-EU arbitration agreement.

That is exactly what the German Federal Court did in 2018 in Achmea, holding that the award had to be set aside in order to comply with the CJEU's decision. We can expect similar decisions from EU courts in other cases, including in the Greentech v. Italy case, in which the Svea Court of Appeal recently lifted the stay of the setting aside proceedings.

3. EU courts may also refuse to enforce intra-EU ICSID awards.

Unlike non-ICSID awards, EU courts cannot annul ICSID awards since annulment applications can be brought only before ICSID ad hoc committees. But can EU courts refuse to enforce ICSID awards?

This raises a question of interpretation of Article 54 of the ICSID Convention, which provides that ICSID contracting states have an obligation to recognize an award as binding and enforce the pecuniary obligations imposed by the award "as if it were a final judgment of a court in that State."

Two main approaches can be observed regarding the interpretation of Article 54. The first one is reflected in the decision of the District Court of Nacka in Sweden of January 2019 involving the Micula award.[14]

The court found that the obligation under Article 54 to enforce an ICSID award "as if it were a final judgment" did not mean that the award could automatically be enforced. Rather, the court held that the respondent State could resist enforcement of the award since "a Swedish judgment of this type, whose enforcement was in violation of EU law, could not have been enforced either" in Sweden.

The second approach is reflected in the decision of the U.K. Supreme Court of February 2020, also involving the Micula award, and rendered under the pre-Brexit regime. The court found that the obligation to treat an ICSID award as a final judgment preserved the ability to present defenses only to the execution of awards on state assets. Thus, Article 54 could not be used to invoke grounds for resisting recognition and enforcement of the award.

On Feb. 9, the European Commission referred the U.K. to the CJEU on the ground that the Supreme Court in this decision breached the EU treaties, including by failing to make a preliminary reference to the CJEU in relation with the question of the recognition and implementation of an ICSID award in the EU.[15]

The underlying issue in the Micula case before the Swedish and U.K. courts — the incompatibility of a payment under the award by Romania with EU state aid rules — is different from that addressed in the Achmea and Komstroy judgments. Yet the Swedish and U.K. decisions illustrate two paths that EU courts may take in dealing with attempts to enforce intra-EU ICSID awards. Sooner or later, the question of which of those paths is the correct one will likely make its way to the CJEU.

4. Award creditors will increasingly turn to non-EU jurisdictions.

With prospects of enforcement dwindling before EU courts, we predict that award creditors will increasingly attempt to enforce intra-EU awards in non-EU jurisdictions where respondent states have assets.

Given the decision of the U.K. Supreme Court in the Micula case mentioned above, post-Brexit U.K. may be a particularly attractive jurisdiction. As commentators have put it, the

U.K. Supreme Court in that decision "kill[ed] two birds with one stone: it emancipated [the U.K.] from the ECJ's oversight and boosted the attractivity of the U.K. and London in the eyes of worldwide award creditors."[16]

The U.S. has also proved attractive: About a dozen cases are pending before the courts of the U.S. Court of Appeals for the D.C. Circuit regarding enforcement of intra-EU awards rendered against Spain and other countries.

The prospects of such actions before non-EU courts remain uncertain. While non-EU courts have no direct obligation to comply with the EU treaties, they may still uphold the intra-EU objection, especially in non-ICSID cases where EU member states will be able to rely on the grounds for resisting enforcement under the New York Convention.

A non-EU court may well take the objection seriously, particularly if the arbitral seat is in the EU and the award has been set aside or there are ongoing setting aside proceedings. The U.S. District Court for the District of Columbia did so when it stayed the enforcement of the Novenergia v. Spain award due to the ongoing setting aside proceedings in Sweden.[17]

When it comes to ICSID cases, a non-EU court enforcing an award "as if it were a final judgment" will not be directly affected by the status of intra-EU awards under the EU treaties. Yet EU states may still attempt to present defenses, for example by relying on doctrines regarding the enforcement of final national judgments.

For instance, in Micula, the U.S. District Court for the District of Columbia considered defenses based on the act of state and foreign compulsion doctrines, rejecting them on the merits in light of the specific circumstances of the case.[18] In Australia, the Federal Court accepted to enforce the ICSID award rendered in Antin v. Spain but it is not clear from the decision whether any similar defenses were advanced.[19]

5. Companies may engage in corporate restructuring to attempt to turn themselves into non-EU claimants.

Our final prediction is that we will see companies try to circumvent the obstacles faced by intra-EU investment claims by restructuring their activities in an attempt to obtain coverage under investment treaties entered into by EU member states with third states.

Corporate structuring is a popular avenue for companies seeking to obtain coverage under investment treaties. It is likely that we will see attempts to restructure corporations to turn what would otherwise have been intra-EU claims into claims initiated by non-EU claimants.

This strategy was evoked by Tom Sikora, senior counsel of international disputes at ExxonMobil, during the 11th Investment Treaty Arbitration Conference organized by the Ministry of Finance of the Czech Republic in December 2021.[20]

Companies will need to carefully consider the implications of engaging in such corporate structuring, including the possibility that tribunals may dismiss the claims on the ground that the structuring was completed at a time when the dispute was foreseeable and therefore amounts to an abuse of process.[21]

In sum, while the arbitration of intra-EU claims is increasingly facing obstacles, it is too soon to declare it a thing of the past. Arbitral tribunals, for better or worse, are likely to keep upholding jurisdiction over such claims and to render awards against EU member states.

The focus will now turn to the enforcement of those awards, especially in non-EU jurisdictions.

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[2] Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union dated January15, 2019. Available at: https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf.

[3] Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union dated May5, 2020. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A0529(01)&from=EN.

[4] European Commission, December infringements package: key decisions dated May14, 2020. Available at: https://ec.europa.eu/commission/presscorner/detail/EN/INF_20_859; European Commission, December infringements package: key decisions dated December2, 2021. Available at: https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201.

[5] Republic of Moldova v. Komstroy LLC, C-741/19, Court of Justice of the European Union, Judgment of the Grand Chamber dated September 2, 2021. Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=245528&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1972810.

[6] Republic of Poland v. PL Holdings Sàrl, Case C-109/20, Court of Justice of the European Union, Judgment of the Grand Chamber dated October26, 2021. Available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=248141&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1973930.

[7] Theodoros Adamakopoulos and others v. Republic of Cyprus, ICSID Case No.ARB/15/49, Statement of Dissent of Professor Marcelo G. Kohen dated February 7, 2020. Available at: https://www.italaw.com/sites/default/files/case-documents/italaw11239.pdf.

[8] Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection Based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes dated May 7, 2019. Available at: https://www.italaw.com/sites/default/files/case-documents/italaw10512.pdf.

[9] Mathias Kruck and others v. Kingdom of Spain, ICSID Case No. ARB/15/23, Decision on the Respondent's Request for Reconsideration of the Tribunal's Decision dated April 19, 2021. Available at: https://www.iareporter.com/wp-content/themes/iareporter/download.php?post_id=72101.

[10] Sebastian Perry, Spain Fails to Reopen Intra-EU Objection After Komstroy (Global Arbitration Review, December6, 2021). Available at: https://globalarbitrationreview.com/spain-fails-reopen-intra-eu-objection-after-komstroy.

[11] Cavalum SGPS, S.A. v. Kingdom of Spain, ICSID Case No. ARB/15/34, Decision on the Kingdom of Spain's Request for Reconsideration dated January 10, 2022. Available at: https://www.iareporter.com/wp-content/themes/iareporter/download.php?post_id=73549.

[12] Italy v. Athena Investments A/S et al., Svea Court of Appeal, Decision not to uphold the a preliminary ruling to the CJEU and to lift stay of enforcement proceedings dated November12, 2021 (Swedish). Available at: https://www.iareporter.com/wp-content/themes/iareporter/download.php?post_id=71947.

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Available at: https://www.italaw.com/sites/default/files/case-documents/italaw10816.pdf.

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[20] See https://www.youtube.com/watch?v=WCgWlcDggHM.

[21] Emmanuel Gaillard, Abuse of Process in International Arbitration, 32(1) ICSID Review - Foreign Investment Law Journal 17 (2017). Available at: https://academic.oup.com/icsidreview/article/32/1/17/2738871?login=true.