Why the Swedish court decision in PL Holdings is consistent with Achmea

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Stockholm (Credit: istockphoto)

A Swedish court recently upheld two intra-EU BIT awards, rejecting arguments by Poland based on the European Court of Justice's decision in Achmea and Swedish public policy. Stephen Fietta QC of Fietta in London, who represented the investor in the arbitration, and Robin Oldenstam of Mannheimer Swartling in Stockholm, who acted as its counsel before the Swedish court, explain how the decision relied on long-established rules of Swedish arbitration law and was consistent with the Achmea judgment.

On 22 February, the Svea Court of Appeal mostly upheld two arbitral awards rendered in 2016 in favour of a Luxembourg investor, PL Holdings, against Poland. The awards, rendered under the 2010 rules of the Arbitration Institute of the Stockholm Chamber of Commerce, found that Poland had expropriated PL Holdings' investments in two (subsequently merged) banks, contrary to the Luxembourg-Poland bilateral investment treaty, and ordered Poland to pay substantial compensation. In its 90-page judgment, the court rejected all but one of Poland's challenges to the awards. In doing so, the court confirmed the vast majority of the compensation payable by Poland following its violation of the intra-EU BIT.

This is the first time that an EU domestic court has decided a challenge against an intra-EU BIT award since the judgment of the Court of Justice of the European Union (CJEU) in *Achmea v Slovakia* and the German Federal Court of Justice's subsequent annulment of the underlying award in *Achmea*. On the face of it, the Svea court's rejection of Poland's challenge (which, in many respects, echoed Slovakia's challenge in *Achmea*) may appear hard to reconcile with *Achmea*. In fact, as we show below, the Swedish court went to great lengths to explain how its refusal to annul the *PL Holdings* awards was well-founded under Swedish law and entirely compatible with the CJEU's *Achmea* judgment. In particular, Poland's failure to raise any

timely objection during the arbitration as regards the existence of a valid arbitration agreement was a distinguishing feature, which had fundamental ramifications both under the CJEU's judgment and under Swedish law.

Poland's challenge before the Swedish court

The challenge proceedings before the Svea court were initiated in 2016 with Poland invoking several different grounds under Swedish law for invalidating or setting aside the awards, based on the CJEU's *Achmea* ruling. Poland argued that as an effect of the *Achmea* ruling, the awards were contrary to public policy and that the subject matter of the dispute between PL Holdings and Poland was non-arbitrable, which under Swedish law would signify that the awards were invalid. In addition, Poland argued that the awards should be set aside because Poland's consent to arbitration in article 9 of the BIT was invalid and that, as a result, there was no valid arbitration agreement between the parties. Poland also argued that any Swedish procedural rules that would preclude Poland from making an objection regarding the validity of the arbitration agreement in the challenge proceedings could not be applied, as a result of *Achmea*.

The Svea court's assessment of *Achmea*

Before addressing Poland's challenges, the Svea court undertook a detailed assessment of the *Achmea* ruling and its significance for the present case. It noted the distinction drawn by the CJEU between commercial arbitration proceedings originating in party autonomy, that is, the joint will of the parties to the dispute; and BIT arbitration founded upon EU member states' mutual agreement to remove disputes that may involve the application or interpretation of EU law from the jurisdiction of EU courts.

The court observed that the investor-state dispute resolution clause at article 9 of the Luxembourg-Poland BIT had, in all relevant respects, "the same legal content" as article 8 of the Netherlands-Slovakia BIT, at issue in *Achmea*. In that sense, the circumstances of this case were "in all material respects, the same as in the *Achmea* ruling".

However, the court noted that the facts of the *PL Holdings* case were markedly different. In particular, in the *Achmea* arbitration (which pre-dated the *PL Holdings* arbitration by several years), Slovakia had consistently objected to the tribunal's jurisdiction on the basis that the arbitration clause under the Netherlands-Slovakia BIT was irreconcilable with EU law after Slovakia's accession to the EU. Slovakia had lodged its objection already in its statement of defence. By contrast, Poland had not raised any objection to the existence of an arbitration agreement in its statement of defence. Instead, it had done so only later in the proceeding. The court would return to the significance of this later in its judgment. However, for the purposes of *Achmea*, it was clear that the CJEU had found that, where a joint expression of the parties' will exists (as in the case of commercial arbitration, and as the Swedish court would find existed here in light of Poland's conduct), an arbitral proceeding is not precluded under EU law so long as the application of basic EU regulations is overseen by a supervising court. Such supervision would be ensured here by way of the Swedish courts' ability to annul any award that violated Swedish public policy.

The court went on to consider the significance of *Achmea* in the case between Poland and PL Holdings and concluded that the CJEU's ruling is aimed at the validity of agreements between member states which contain a dispute resolution mechanism such as the one in article 9 of the Poland-Luxembourg BIT. The CJEU's ruling, the Svea court stated, could not be understood in any other way than resulting in the invalidity of the dispute resolution agreement between the member states. As a consequence, the standing offer to arbitrate disputes under the BIT, directed against investors, is also invalid, the court concluded. The court then went on to consider what effects such invalidity would have for the awards challenged by Poland.

Poland's *Achmea* objections rejected

Having assessed the implications of the *Achmea* ruling for the present case, the Svea court addressed Poland's arguments as to invalidity of the arbitral awards.

The first question assessed by the court concerned non-arbitrability. Pursuant to the Swedish Arbitration Act, an arbitral award is invalid if it includes a determination of issues which the parties, as a matter of law, may not settle by agreement (non-arbitrability). In less than a page, the court dismissed Poland's assertion that the subject matter of intra-EU investment protection is not arbitrable. The court explained that the subject matter

of the arbitration was whether Poland had violated the investment treaty and whether Poland, as a result, was liable to pay damages, and in what amount. The court said that such questions of breach of contract and liability for damages were capable of settlement by agreement.

The Svea court then assessed Poland's assertion that the arbitral awards, or the manner in which they arose, were contrary to Swedish public policy and thus invalid. Pursuant to the Swedish Arbitration Act, an arbitral award is invalid either if the award in substance, or if the proceedings resulting in the award, are contrary to public policy. As a starting point, the court explained that Swedish law is very restrictive as regards public policy. The provision is intended only for offensive violations of truly fundamental provisions of law and is very rarely applied. Only awards where such fundamental principles of law have been violated, or where a tribunal has ignored compulsory provisions safeguarding the interest of third parties or the public interest, may be considered to violate public policy.

The Svea court referred to two rulings by the CJEU addressing public policy challenges to arbitral awards, *Eco Swiss* and *Mostaza Claro*. With regard to the *Eco Swiss* case, the Svea court said that the former article 85.1 of the Rome Treaty (article 101 TFEU on competition) constituted a fundamental provision indispensable for the functioning of the internal market. If a national court, according to its own national procedural rules, had to invalidate an arbitral award on the basis of this being contrary to national public policy, the court also had to invalidate an arbitral award that was contrary to article 85.1 of the Rome Treaty.

The Swedish court then referred to the CJEU's reasoning in *Mostaza Claro*, which related to the directive concerning unfair terms in consumer contracts. According to the CJEU's ruling, the directive should be interpreted to the effect that a national court had to assess, on its own motion, whether an arbitration agreement in a consumer contract should be considered unconscionable and, consequently, if the resulting arbitral award should be invalidated, regardless of whether the consumer raised an objection regarding the invalidity of the arbitration agreement during the arbitral proceedings.

As regards *Eco Swiss*, the court found that the circumstances invoked by Poland could not, as a matter of law, lead to the arbitral awards being considered contrary to public policy. It was not relevant whether the awards were based on an arbitration agreement that was contrary to public policy.

With regard to the manner in which the arbitral awards arose, the Svea court explained that the distinction between commercial arbitration and BIT arbitration did not prevent member states from concluding arbitration agreements in individual cases, provided that it was based on party autonomy, that is, the joint expression of will of the disputing parties. Unlike the situation addressed by the CJEU in *Mostaza Claro*, the present case did not involve questions of consumer protection. As Poland could not be considered a "weaker party", and since PL Holdings had relied on the lack of a timely objection by Poland when participating in the proceedings, the manner in which the arbitral awards arose could not be considered contrary to public policy.

The court then considered Poland's argument that the awards should be set aside due to the lack of a valid arbitration agreement. The court stated that under the EU law principle of national procedural autonomy, the effects of *Achmea* should be considered within the framework of the Swedish Arbitration Act, including its section 34, which precludes a party from challenging an arbitral award based on circumstances that were not raised in a timely manner during the arbitration. According to the court, there was no reason to conclude that an application of section 34 would conflict with the EU law principles of equivalence or effectiveness.

The court observed that under Swedish law, arbitration agreements can be concluded in writing or otherwise, including by way of implicit conduct. It observed that a state can, through its authorised representatives, enter into arbitration agreements, in the same way as other legal entities. Poland and PL Holdings – unlike the consumers in *Mostaza Claro* – could therefore enter into a valid arbitration agreement at any time after the dispute arose. The very purpose of the rule of preclusion under section 34, the Svea court stated, is to ensure that a party claiming the invalidity of an arbitration agreement must make an objection to that effect early during the arbitral proceedings. In the absence of such an objection, the other party could rely on the existence of such an agreement.

The Svea court explained that the preparatory works to the Swedish Arbitration Act showed that "the general presumption is that a party who participates in a proceeding without immediately objecting to the arbitral tribunal's jurisdiction has accepted their jurisdiction to determine the dispute". Here, pursuant to the SCC

Rules, it was clear that Poland had been obligated to object to the arbitration agreement's validity no later than its statement of defence during the arbitration. The court observed that Poland had failed to do so. On the contrary, in its statement of defence, Poland had explicitly acknowledged that the tribunal had jurisdiction to consider disputes between Poland and an investor from Luxembourg.

The court further observed that Poland had (contrary even to assurances it had given after its statement of defence) raised the new EU law-based objection to jurisdiction only in its statement of rejoinder. The court noted that Poland had raised its objection more than six months late, with the result that Poland must be considered to have refrained from objecting to the existence of an arbitration agreement for the purposes of section 34 of the Swedish Arbitration Act. The fact that the arbitral tribunal had, despite PL Holdings' protest, decided to consider (and reject) the new objection on the substance, notwithstanding the tribunal finding it untimely, could not remedy this preclusion under Swedish law.

The court observed that Poland's failure to raise a timely objection to the existence of an arbitration agreement contrasted with Slovakia's conduct in the (earlier) *Achmea* arbitration. It noted that the German Federal Court of Justice found that Slovakia had made a timely objection in that arbitration that the arbitration clause in the BIT violated EU law. It noted that the German court had specifically recognised that Slovakia had not acted in a manner that might give Achmea reason to expect that the state had accepted the existence of a valid arbitration agreement. Therefore, the German court's ruling supported the Svea court's conclusion that Poland could be precluded from arguing the absence of a valid arbitration agreement because of its failure to object in a timely manner during the arbitration.

In conclusion, the Svea court stated that Poland was precluded from challenging the awards due to the invalidity of the arbitration agreement and that the awards could not be set aside on this ground.

Long-established rules consistent with *Achmea*

As can be seen from the above summary, the Svea Court's conclusions and reasoning in rejecting Poland's challenges to the *PL Holdings* award complied with both fundamental rules of Swedish arbitration law and the CJEU's holdings in the *Achmea* case. It is notable that both the Svea court (in its judgment) and each of the parties during the Svea court proceeding considered that no issue of EU law or its interpretation arose out of Poland's challenge, such as to require a preliminary ruling of the CJEU. In other words, the applicable rules of Swedish and EU law were found to be clear.

At the heart of the Svea court's reasoning is the fact that, as the CJEU confirmed in *Achmea*, nothing in EU law precludes arbitration as a form of dispute resolution where it is based on party autonomy and the joint expression of the disputing parties' will, and so long as any arbitral findings related to "fundamental EU regulations" can be overseen via the supervisory jurisdiction of EU courts. In the present case, as a matter of Swedish law, Poland had expressed its agreement to arbitrate when it decided not to raise any objection based upon EU law and the absence of a valid arbitration agreement in its statement of defence. When it made that decision, there is no question of Poland having been a "weaker party", nor of it being ignorant of its potential objection, because the case post-dated the *Achmea* arbitration and Poland was represented by a major European law firm (as well as its own General Counsel's Office). Having decided not to object, Poland was precluded from raising any such objection later. Importantly, as a matter of Swedish law, the ultimate basis of Poland's arbitral consent was not the investor-state dispute resolution clause in the BIT, but Poland's conduct in the arbitration.

This aspect of the Svea court's judgment is particularly welcome. Not only did it safeguard the rights of PL Holdings, a substantial and bone fide investor in Poland's banking sector that had relied on Poland's expression of consent in the arbitration and dedicated significant time, cost and other resources in pursuit of its claims. It also safeguards the counterparties to countless other arbitration agreements entered by commercial entities with state organs throughout the EU. As the Svea court observed, nothing in the Treaty on the Functioning of the European Union precludes an EU member state from entering into an arbitration agreement with an investor in any given case.

The Svea Court of Appeal's judgment is available in Swedish and in an English translation courtesy of the authors. Poland and PL Holdings have both appealed the judgment to the Swedish Supreme Court, which has stayed enforcement of the award while it considers the appeal.