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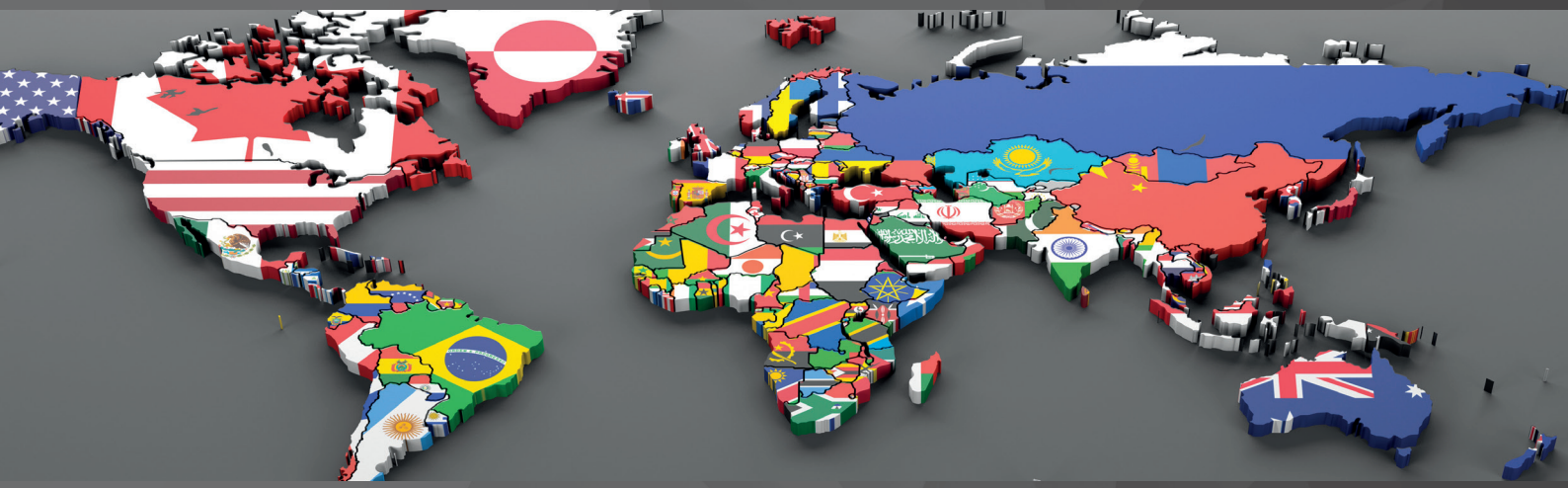

Investor-State Arbitration 2021

A practical cross-border insight into investor-state arbitration law

Third Edition

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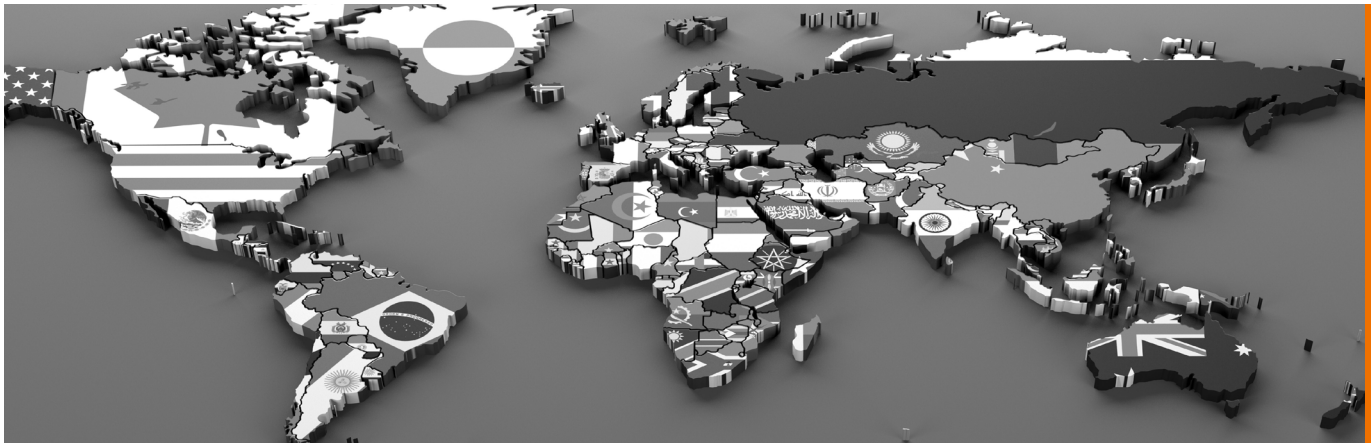

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Third Edition

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Expert Chapters

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From the Publisher

Dear Reader,

Welcome to the third edition of *ICLG – Investor-State Arbitration*, published by Global Legal Group.

This publication provides corporate counsel and international practitioners with comprehensive jurisdiction-by-jurisdiction guidance to investor-state arbitration laws and regulations around the world, and is also available at www.iclg.com.

This year, four expert chapters cover the collection of investor-state awards, the impact of EU law on ISDS, investor protection post-*Achmea* and post-Brexit, and an overview of EU investment protection.

The question and answer chapters, which in this edition cover 15 jurisdictions, provide detailed answers to common questions raised by professionals dealing with investor-state arbitration law.

As always, this publication has been written by leading investor-state arbitration lawyers and industry specialists, for whose invaluable contributions the editors and publishers are extremely grateful.

Global Legal Group would also like to extend special thanks to contributing editors Dominic Roughton and Kenneth Beale for their leadership, support and expertise in bringing this project to fruition.

Rory Smith
Consulting Group Publisher
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How to Maximise Investor Protection Post-*Achmea* and Post-Brexit

E&A Law Limited

Ana Stanič

§1.01 Introduction

In the wake of the Court of Justice of the European Union's (CJEU) decision in *Slowakische Republik (Slovak Republic) v. Achmea* (*Achmea*),[1] there is considerable uncertainty as to the enforceability of investment treaty arbitral awards. This chapter discusses: (a) the grounds for the refusal of enforcement of arbitral awards rendered pursuant to intra-EU Bilateral Investment Treaties (BITs) and the Energy Charter Treaty (ECT),[2] which are likely to be invoked post-*Achmea*; (b) the different approaches taken to date by courts of enforcement when faced with such claims, with particular regard to those of England, Sweden, Switzerland and the USA; and (c) the steps investors ought to consider taking to maximise investment protection post-*Achmea* including in view of Brexit.

§1.02 Implications of the CJEU's Decision in *Achmea*

In *Achmea*, the CJEU declared the investor-State dispute resolution (ISDS) provision in intra-EU BITs as incompatible with European Union (EU) law and *ipso facto* invalid. Shortly thereafter, the European Commission proclaimed that '[a]s a consequence national courts are under the obligation to annul any arbitral award rendered on … basis [of such dispute resolution clauses] and to refuse to enforce it'.[3] It asserted in the same communication that national courts were under a similar obligation not to enforce arbitral awards rendered in respect of intra-EU ECT claims.[4]

Given that roughly 20 per cent of the 900 investor-State disputes known to be pending worldwide as of December 2018 were intra-EU cases, and of those, almost half were brought under the ECT, understanding the implications of *Achmea* on the enforcement of any awards rendered post-*Achmea* is of considerable importance both for investors and host States.[5] The first step in doing so is to understand the temporal effect of *Achmea* on any such awards under EU and international investment law.

The European Commission has argued that *Achmea* has the effect of rendering ISDS provisions in an intra-EU BIT inapplicable as from the date on which the last of the parties thereto became a member of the EU.[6] In other words, on this view *Achmea* retroactively invalidates all ISDS provisions contained in intra-EU BITs at the latest from 1 January 2007; that is, the date that Romania and Bulgaria joined the EU.[7]

It is clear from the CJEU's case law that it considers itself as the guarantor of the uniformity of interpretation of EU law pursuant to Article 177 Treaty on the Functioning of the European Union (TFEU),[8] and its judgments as binding *erga omnes*.[9] The retroactive effect of its decisions was clarified in paragraph 16 of *Amministrazione Delle Finanza dello Stato v. Denkavit Italiana Srl*,[10] where the CJEU explained that:

> 'in the exercise of the jurisdiction conferred upon it by Article 177, the court of justice … clarifies and defines where necessary the meaning and scope of [a rule of community law] as it must be or ought to have been understood and applied from the time of its coming into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions enabling an action relating to the application of that rule to be brought before the courts having jurisdiction, are satisfied.'[11]

In subsequent judgments, including *Kühne & Heitz*,[12] *Kapferer v. Schlanck*[13] and *Kempter*,[14] the CJEU made clear that the duty of sincere cooperation under Article 4(3) Treaty of the EU (TEU) requires national courts and administrative bodies of EU Member States to reopen decisions which had become final and binding if they were based on an interpretation of EU law which proved to be incorrect in the light of a subsequent judgment of the CJEU. In cases such as *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*[15] and *Amministrazione delle finanze dello Stato*,[16] the Court clarified that only in exceptional circumstances are national courts permitted not to give retroactive effect to CJEU judgments on the grounds of legal certainty and *res judicata*. Furthermore, it has made clear that the ability to limit the retroactive effect of subsequent decisions of the CJEU and/or the European Commission is further circumscribed when such decisions concern fundamental principles of EU law, such as competition law and state aid.

Presumably, in an attempt to reflect the above-mentioned CJEU case law and to provide legal certainty, the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the EU dated 5 May 2020[17] (Intra-BIT Termination Agreement) seeks to clarify the temporal effect of *Achmea* under EU law. In particular: (i) Article 6(1) thereof provides that all intra-EU arbitrations concluded before the CJEU issued its judgment in *Achmea* on 6 March 2018 are valid; (ii) Article 8 provides that investors who have commenced intra-EU BIT arbitrations before 6 March 2018 but which are still ongoing have an option to enter into a structural dialogue to settle such arbitrations; and (iii) Article 4(1) provides that all arbitral proceedings initiated in respect of intra-EU BITs after 6 March 2018 are null and void.[18]

How courts of enforcement will approach the questions, *inter alia*, of the temporal effect of *Achmea*, whether the analogy with exceptional circumstances as per *Gabrielle Defrenne* can be invoked in respect of a particular arbitral award, and/or the enforceability of provisions of the Intra-EU BIT Termination Agreement in respect of arbitral awards which predate its entry into force, is far from clear. It is possible that courts of enforcement, particularly

those not located in the EU, will not consider themselves bound by the terms of the Intra-EU BIT Termination Agreement especially in respect of disputes arising prior to the entry into force of such agreement, albeit EU Member States have *inter se* terminated sunset clauses thereunder. The decision of the arbitral tribunal in *UP and another v. Hungary*[19] may also serve as an indication of how a court, in particular one located outside the EU, will approach the question of the temporal effect of *Achmea* when presented with an enforcement case. In paragraph 265 of its award, the tribunal noted that 'even … assuming that' *Achmea* had the effect of 'retroactively terminat[ing] as of 1 May 2004' the France-Hungary BIT, such BIT 'would still remain in force for a period of 20 years as a result of the' sunset clause contained in Article 12(2) thereof.[20]

§1.03 Implications of *Achmea* on Enforcement of Intra-EU ECT Arbitral Awards and Investment Treaty Arbitral Awards More Generally

The second step in unravelling the implications of *Achmea* on the enforcement of investment treaty awards is to examine whether *Achmea* invalidates the ISDS clause in Article 26 of the ECT as concerns intra-EU investments, both as a matter of EU law and international law. Even under EU law there is, at present, much uncertainty on this point with different countries in the EU taking different views. In particular, the European Commission and the 22 EU Member States which signed the Declaration on the Legal Consequences of the *Achmea* Judgment and on Investment Protection of 15 January 2019 argue that such clause is 'incompatible with the Treaties' and thus must be disapplied.[21] Finland, Luxembourg, Malta, Slovenia and Sweden adopted a more circumspect position on the issue in their separate Declaration on the Enforcement of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union of 16 January 2019, noting that '[i]t would be inappropriate, in the absence of a specific judgment on this matter, to express views as regards the compatibility with Union law of the intra-EU application of the Energy Charter Treaty'.[22] Hungary, presumably in view of the ongoing International Centre for Settlement of Investment Disputes (ICSID) case which MOL (the state-owned energy company) has brought under the ECT against Croatia,[23] has declared in its Declaration of the Representative of the Government of Hungary on the legal consequences of the Judgment of the Court of Justice in *Achmea* and on investment protection in the European Union of 16 January 2019 that *Achmea* concerns only intra-EU BITs and not any pending or future intra-EU ECT claims.[24]

Those in favour of the narrow reading of *Achmea*[25] point to paragraph 60 thereof in which the CJEU said that 'Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, *such as* Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept'.[26]

The European Commission, on the other hand, has argued that the reasoning of the CJEU in *Achmea* 'equally applies to' intra-EU ECT investor-State disputes.[27] It has also argued that the 'fact that the EU is also a party to the Energy Charter Treaty does not affect this conclusion: the participation of the EU in that Treaty has only created rights and obligations between the EU and third countries and has not affected the relations between the EU Member States'.[28]

With preliminary references having been sought from the CJEU pursuant to Article 267 TFEU on the issue of the validity of intra-EU ISDS clauses in the ECT in a number of cases both in Belgium and Sweden, it will not be long before the CJEU's decision on this point will be known. It is very likely that the CJEU will find that under EU law, intra-EU ECT disputes are incompatible with Article 344 TFEU, the autonomy of EU law and the principle of sincere cooperation as set out in Article 4(3) TEU.[29] The inherent difficulty the CJEU has with any attempt by EU Member States *inter se* to remove any disputes between them 'from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law' is clear from its case law.[30]

However, for the reasons discussed in Section §1.02, it is unlikely that courts of the place of enforcement of arbitral awards, and for that matter of the seat of such awards, will consider themselves bound to follow the reasoning of the CJEU in case of arbitral awards rendered in respect of intra-EU ECT claims, especially those located outside the EU. As discussed in Section §1.05, the question of the enforceability of arbitral awards in respect of intra-EU investments based on the ECT is presently before US courts and such awards are being challenged before, *inter alia*, the Swedish courts.

§1.04 Grounds for Challenging the Enforcement of Intra-EU Investment Treaty Awards

This Section discusses the grounds which are likely to be invoked to challenge enforcement of intra-EU BIT investment treaty arbitral awards post-*Achmea*, within or outside the EU. The relevant grounds for challenging enforcement will depend on whether such arbitral awards were rendered under the auspices of the ICSID Convention[31] or whether enforcement is being sought under the New York Convention.[32] As Section §1.05 reveals, much turns on whether an award is rendered under the auspices of the ICSID or not.

[A] Enforcement of New York Convention arbitral awards

Since almost all countries in the world are signatories to the New York Convention and all countries of the EU are signatories thereto, typically awards are enforced pursuant to its terms.[33] The following three grounds for refusing enforcement are of particular relevance regarding enforcement of intra-EU awards: (i) Article V(1)(a), which gives courts where enforcement is sought discretion to refuse the recognition and enforcement of an award if the arbitration agreement 'is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made'; (ii) Article V(2)(a), which gives such courts *ex officio* discretion to refuse enforcement if the 'subject matter of the difference is not capable of settlement by arbitration under the law of that country'; and (iii) Article V(2)(b), which gives such courts *ex officio* discretion also to refuse enforcement of an award if they find that such an award would be 'contrary to the public policy of that country'.

[1] Invalidity of the arbitration agreement

Whether an arbitral award based on an intra-EU BIT will be refused enforcement pursuant to Article V(1)(a) will depend on whether (i) it was rendered in an EU Member State, and (ii) even

more importantly, the country in which enforcement is sought. This is because EU law will have to be found to govern the validity of the intra-EU ISDS provision on account of EU law being either the 'law to which the parties have subjected it' or 'the law of the country where the award was made'. Accordingly, in case of an arbitral award which was not rendered in an EU Member State, the fact that the ISDS provision is invalid under EU law is highly unlikely to be a basis for refusing enforcement under the New York Convention.

Further and importantly, even in situations where the arbitral award is rendered in an EU Member State, enforcement will only be refused if the court where enforcement is sought finds that there is no indication that the parties agreed that a law other than EU law governs the question of the validity of the ISDS provision. On this point, the approach adopted by courts of enforcement is likely to vary from country to country. In the UK, for example, the fact that an ISDS provision is contained within a BIT or ECT is likely to be considered by the courts as an indication that international law rather than EU law was intended by the parties to govern its validity.[34] Whereas in countries that adopt a pro-arbitration approach to the question of validity, such as Switzerland, the court of enforcement will deem such a provision valid if it complies with the requirements concerning the validity of the most favourable of the following laws: (i) the law which the parties chose to govern it; (ii) the law governing the dispute; or (iii) Swiss law.[35]

[2] Lack of arbitrability

Pursuant to Article V(2)(a) of the New York Convention, courts of the countries of enforcement have an *ex officio* discretion to refuse enforcement for lack of arbitrability. It is expected that States challenging the enforcement of intra-EU investment arbitral awards will seek to argue, as many have argued in the underlying arbitration proceedings giving rise to such awards,[36] that post-*Achmea* issues in dispute in investor-State intra-EU arbitrations are no longer capable of settlement by arbitration.

However, there is nothing in the CJEU's reasoning in *Achmea* to support such an assertion. As the Svea Court of Appeal held in its judgment dated 22 February 2019, it does not follow from *Achmea* that a breach of, for example, the right to fair and equitable treatment (being the subject matter in dispute) is *per se* non-arbitrable. As the CJEU makes clear in paragraph 56 thereof, it is the fact that investment treaty arbitrations may not be subject to the same mechanisms for review as international commercial arbitrations, which it argues ensures the 'full effectiveness of EU law', that concerns it rather than the affording by a State of a right to fair and equitable treatment to an investor *per se*.[37]

[3] Contrary to public policy

Of the three grounds for refusing enforcement, refusal on account of an award being 'contrary to the public policy of that country' as per Article V(2)(b) of the New York Convention is the most important. In paragraph 54 of *Achmea*, the CJEU emphasised the importance of the courts of EU Member States being able to refuse the enforcement of arbitral awards on account of EU public policy in ensuring the effectiveness of EU law, and expressly referred to its rulings in *Eco Swiss*[38] and *Mostaza Claro*.[39]

The extremely broad scope of EU public policy is revealed by a review of the CJEU cases. By way of example, in *Eco Swiss*, the European Court of Justice (the ECJ, as the CJEU was known then) held that Articles 101 and 102 TFEU, which prohibit cartel agreements and abuses of dominant position, are fundamental provisions of EU law and form part of its *ordre public*.[40] In *Mostaza Claro*, the ECJ held that provisions in a directive protecting consumers from unfair terms were fundamental for the 'accomplishment of the tasks entrusted to the Community and, in particular, to raising the standard of living and the quality of life in its territory'.[41] In *Ingmar*, the ECJ held that indemnity provisions in a directive concerning commercial agents were mandatory.[42] Further, and importantly for the discussion in Section §1.05 below, in *Klausner* the ECJ held that state aid is also a fundamental principle of EU law.[43]

In this regard, it should also be noted that the European Commission has repeatedly asserted that arbitral awards pursuant to which compensation is awarded to investors 'on the basis that Spain has modified the premium economic scheme by the notified scheme would constitute in and of itself State aid'.[44] Accordingly, it argues, since under the TFEU only it has the power to approve state aid, such awards are void for breach of EU state aid rules. In paragraph 103 of *European Food SA and Others v. European Commission* ('*Micula General Court Decision*'), the General Court of the CJEU seems to accept the European Commission's argument that arbitral awards can *per se* be state aid 'if it has the effect of compensating for the withdrawal of unlawful or incompatible aid', albeit annulling the Commission's State Aid Decision on *ratione temporis* grounds.[45] With this decision of the General Court now on appeal, the conclusive view of the CJEU on whether an arbitral award can *per se* be state aid will be known shortly.

As is described in Section §1.05 below, the courts of Sweden, England and Switzerland have already had to tackle the question of whether an arbitral award rendered pursuant to an arbitral clause which is incompatible with EU law is contrary to public policy even if the issue was raised in proceedings involving a challenge to the arbitral awards rather than to enforce them. In particular, for example, in *PL Holdings v. Poland*, the Svea Court of Appeal drew a distinction between *Eco Swiss* and *Mostaza Claro*, which it argued concern situations where the substantive content of the award infringed fundamental rules of EU law, and the case before it, where the arbitral agreement on which the award was based infringed fundamental rules of EU law. The court held that '[e]ven if the arbitral awards would be based on an arbitration clause which was manifestly incompatible with *ordre public*, it does not follow that the contents of the arbitral awards are incompatible with *ordre public*'. Having found that Poland had failed to raise the objections regarding the validity of the investor-State intra-EU dispute resolution provision on time, it held that the arbitral award in that case did not 'arise in a manner which is manifestly incompatible with Swedish *ordre public*'. In other words, it distinguished the case before it from *Achmea* and rejected the request to set aside the award.

[B] Enforcement of ICSID arbitral awards

The ICSID Convention has its own self-contained mechanism for the review of arbitral awards rendered under its auspices. In particular, Article 52(1) provides that a request for annulment may be made by either party on the following five grounds: '(a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or that the award has failed to state the reasons on which it is based'.[46] Article 52(3) provides that an *ad hoc* Annulment Committee of three persons is to be appointed to hear a request for annulment, and paragraph (5) thereof provides such Committee with the power to stay enforcement of the award pending its decision. Article 53(1) makes it clear that ICSID awards 'shall not be subject to any appeal or to any other remedy except those provided for in this Convention'. Consequently, no proceedings can be commenced to set aside an ICSID award in the country where the proceedings were held as

such arbitrations are regarded as 'delocalised'. In addition, and importantly, Article 54(1) of the ICSID Convention obliges '[e]ach Contracting State [to] recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State', and Article 54(3) provides that '[e]xecution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought'. Accordingly, all states signatories to the ICSID Convention, which includes all EU Member States except Poland,[47] are obliged to enforce ICSID arbitral awards as if they were a final judgment of their own national courts. Furthermore, the second sentence of Article 53(1) obliges each State party to 'abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention'. As per Article 55, sovereign immunity from execution is the only ground for a refusal of enforcement of award.

§1.05 The Approaches Taken by Courts of Enforcement to Date

This Section discusses the approaches to date of courts in England, Sweden, Switzerland and the USA to the enforcement of intra-EU arbitral awards post *Achmea*.

[A] Enforcement in English courts

In its unanimous decision in the *Micula and others v. Romania*[48] case, the UK Supreme Court on 19 February 2020 made clear that ICSID arbitral awards rendered by tribunals established pursuant to intra-EU BITs will be enforced in the UK. Having carefully reviewed the obligations of EU Member States under Articles 351 TFEU and 4(3) TEU, the Supreme Court noted that (i) the UK had become a signatory to the ICSID Convention before it joined the European Communities (as the EU was known in 1973), (ii) the obligations imposed on the UK pursuant to Articles 53 and 54 of the ICSID Convention (as discussed in Section §1.04 above) regarding the enforcement of arbitral awards were owed by the UK to all signatories thereto and thus also to States which are not parties to the EU, and (iii) '[A]rticle 351 TFEU has the effect that any obligation on the UK courts to give effect to a decision such as the Commission Decision pursuant to the duty of sincere co-operation which might arise under the Treaties in other circumstances does not arise in this case'. Accordingly, the Supreme Court concluded that that intra-EU BIT and ECT ICSID arbitral awards will be enforced in the UK post-*Achmea* even in circumstances where such awards breach EU rules on state aid.

However, since the UK joined the EU on 1 January 1973 and thus, before it ratified the New York Convention on 24 September 1975, the Supreme Court's reasoning cannot be applied by analogy to ensure that New York Convention arbitral awards, whether pursuant to a BIT or ECT, are enforced in analogous circumstances. Accordingly, there is some uncertainty regarding the enforcement of New York Convention intra-EU investment treaty awards post-Brexit, in particular when such awards are set to be contrary to the EU's public policy.

What is clear as of the time of writing is that as from 1 January 2021 (being the date on which the transition period ends), English courts will no longer be bound by a duty of sincere cooperation as per Article 4(3) TEU, nor will they be entitled to seek a preliminary ruling from the CJEU as per Article 267 TFEU. Instead, English courts will have to enforce arbitral awards which raise questions of EU law by reference to the terms of the European Union (Withdrawal Agreement) Act 2020[49] and the provisions of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (the Withdrawal Agreement).[50]

In particular, Article 89 of the Withdrawal Agreement provides that the 'judgments and orders of the Court of Justice of the European Union handed down before the end of the transition period … shall have binding force in their entirety on and in the United Kingdom'. In addition, Article 4(5) of the Withdrawal Agreement provides that '[i]n the interpretation and application of this Agreement, the United Kingdom's judicial and administrative authorities shall have due regard to relevant case law of the Court of Justice of the European Union handed down after the end of the transition period'.

Giving effect to these provisions of the Withdrawal Agreement in domestic law, Section 6(1) European Union (Withdrawal Agreement) Act 2018, as amended by the Withdrawal Act 2020, provides that English courts are 'not bound by any principles laid down, or any decisions made, on or after exit day by the European Court', Section 6(2) provides that courts 'may have regard to anything done on or after exit day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal', and Section 6(4) clarifies that the Supreme Court is not bound by any retained EU case law.

The obligation of the courts in respect of EU law as in force as at the end of the transition period is further watered down in Section 26(5)(A) European Union (Withdrawal Agreement) Act 2020[51] (which entered into force on 23 January 2020), which gives the British government the power to adopt regulations: (i) to provide for, *inter alia*, the 'extent … and circumstances in which, a relevant court or relevant tribunal is not to be bound by retained EU case law'; (ii) 'to prescribe the test which a relevant court or relevant tribunal must apply in deciding whether to depart from any retained EU case law'; or (iii) to lay down the considerations which such courts or tribunals should consider relevant in deciding whether to depart from EU case law.

It may well be that this uncertainty will be addressed in the agreement on the future arrangements between the EU and UK that is currently being negotiated.

[B] Sweden

There are six cases presently before the Swedish courts in which the implications of *Achmea* are being considered. The decision of the Svea Court of Appeal in *PL Holdings v. Poland* was discussed in Section §1.02 as it may be indicative of the approach that other courts in and outside the EU may take when considering grounds for refusing enforcement under the New York Convention.

At the time of writing, the *Micula v. Romania* case is pending after the Swedish Enforcement Authority refused enforcement of the ICSID arbitral award in *Ioan Micula, Viorel Micula et al v. Romania*[52] on 23 January 2019, invoking the duty of sincere cooperation obligation under Article 4.3 TEU.[53] This case is now before the Svea Court of Appeal with the stay of enforcement in place awaiting the decision of the CJEU on appeal of the *Micula General Court Decision*. It will be interesting to see whether the reasoning of the Swedish courts will differ from that of the UK Supreme Court in the above discussed *Micula* case since, like the UK, Sweden signed up to the ICSID Convention before it joined the EU.

[C] The USA

At present, there are more than six enforcement cases pending before the US courts in which the implications of *Achmea* are being considered. To date, only the District Court for the District of Columbia (DCC) has rendered a decision in *Micula v. Government of Romania*.[54] Importantly, in this case the DCC held that: (i) EU law is a question of fact; (ii) the concerns about the primacy of EU law which drove the CJEU to invalidate the ISDS provision in *Achmea* are distinguishable from the facts and circumstances in the *Micula* case before it; (iii) the *Micula Award* concerned actions by the Romanian state which preceded its accession to the EU; and (iv) finally, and crucially, it was precluded from refusing to enforce ICSID awards on the grounds of invalidity of an arbitration agreement. Since this case settled in the end, it is too early to predict with certainty the approach US courts will take to the enforcement of investment treaty arbitral awards post-*Achmea*. However, it is likely that, at least, in the case of ICSID intra-EU awards, these will be enforced by US courts.

[D] Switzerland

At present, there is no case before Swiss courts where the enforcement of intra-EU arbitral awards rendered outside Switzerland is being sought, raising *Achmea*-type arguments. However, there are a number of cases in which such awards are being challenged before Swiss courts as the seat of the arbitral proceedings. In view of Article 178(2) Federal Statute on Private International Law (PILA), it is unlikely that the Swiss courts will set aside an award rendered in Switzerland or refuse to enforce an award rendered outside the EU on account of the ISDS provision being invalid under EU law, be it in respect of intra-EU BITs or ECT claims. It is likely that the Swiss courts will take the same view even in cases of enforcement of arbitral awards rendered in the EU. Arguments regarding non-arbitrability and public policy are likely also to prove unsuccessful in view of Articles 177(2) and 190(2)(e) PILA. In this regard, it is particularly important to bear in mind the way in which public policy is defined under Swiss law as including 'essential and widely recognised values which should, according to the concepts prevailing in Switzerland, constitute the foundation of every legal order'.[55]

§1.05 Securing Maximum Investor Protection Post-*Achmea*

Achmea has been cited as a reason by numerous investors for withdrawing intra-EU BIT investment treaty claims.[56] However, many other investors seem undeterred by *Achmea*. Set out below are seven steps which investors may wish to take to secure maximum investment protection for their investments going forward:

1. Structure investments in an EU Member State via companies located in non-EU countries which have BITs with such Member State or are a party to the ECT.
2. Insert stabilisation clauses in agreements being entered into with the host EU Member State and/or state-owned companies.
3. Provide for the seat of the arbitral proceedings to be outside the EU. Whereas investors to date often gave preference to resolving such disputes before the Stockholm Chamber of Commerce over ICSID, ensuring that arbitral awards are, as far as possible, insulated from the impact of EU law operating as the law of the seat is key in the post-*Achmea* world. Going forward, countries such as the UK post-Brexit and Switzerland are likely to be preferred as seats for investment treaty arbitrations over EU Member States.
4. In case of a dispute, commence arbitral proceedings under the auspices of ICSID.
5. Enforce the arbitral award outside the EU where possible.
6. Where possible, bring claims under the ECT rather than BIT.
7. In agreements with EU Member States or its state-owned companies, provide for a law other than their own to be the governing law of the contract or, at the very least, expressly provide for the law governing the arbitration agreement set out in such contract not to be the law of an EU Member State.

Endnotes

1. Case C-284/15 *Slowakische Republik (Slovak Republic) v. Achmea BV*, EU:C:2018:158.
2. The Energy Charter Treaty, Lisbon, in force on 16 April 1998, 2080 UNTS 100 (p. 95).
3. Communication from the Commission to the European Parliament and the Council: Protection of Intra-EU Investment, COM (2018) 547 final, 19 July 2018, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018DC0547&from=EN, accessed 19 October 2020.
4. This issue is discussed in Section §1.03 of this chapter.
5. United Nations Conference on Trade and Development (UNCTAD), *IIA Issues Note, Fact Sheet on Intra-European Union Investor-State Arbitration Cases*, 2 (United Nations, December 2018).
6. The text of the agreement is available at: https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/200505-bilateral-investment-treaties-agreement_en.pdf, accessed 19 October 2020. Interestingly Austria, Ireland, Finland, Sweden, and the UK have not signed the agreement. The agreement entered into force on 27 September 2020. As of 19 October 2020, only two countries have ratified the agreement (Denmark and Hungary). For further detail *see*: https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2019049&DocLanguage=en, accessed 19 October 2020.
7. The same argument was made by Hungary but by reference to the date Hungary joined the EU in *UP and another v. Hungary*, but was rejected by the tribunal: *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, award of 9 October 2018.
8. The text of the consolidated version of the TFEU is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT, accessed 19 October 2020.
9. *See* joined Cases C-46/93 and C-48/93, *Brasserie de Pêcheur and Factortame*, Judgment of the Court of 5 March 1996, (1996) ECR I-01029, at para. 57; *Amministrazione delle Finanze dello Stato v. Denkavit Italiana* Srl, para. 16; Case 66/80, *International Chemical Corporation v. Amministrazione delle finance dello Stato*, Judgment of the Court of 13 May 1981 (1981) ECR 1191, at paras 13 and 14. *See also* Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials*, 478 (6th ed., Oxford University Press, 2015). The importance attached to earlier rulings is reflected and reinforced by Article 99 of the Rules of Procedure of the Court of Justice of 25 September 2012, which provides that 'where

a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may … decide to rule by reasoned order', that is, by simply reiterating its previous ruling. *See* Consolidated version of the Rules of Procedure of the Court of Justice of 25 September 2012, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf, accessed 19 October 2020.

10. *Ibid.*
11. *Ibid.*
12. Case C-453/00, *Kühne & Heitz NV v. Produktschap voor Pluimvee en Eieren*, [2004] ECR I-00837, Judgment of the Court of 13 January 2004.
13. Case C-234/04, *Rosmarie Kapferer v. Schlank & Schick GmbH*, [2006] ECR I-2585, Judgment of the Court of 16 March 2006 (*Kapferer*).
14. Case C-2/06, *Willy Kempter KG v. Hauptzollamt Hamburg-Jonas*, [2008] ECR I-00411, Judgment of the Court of 12 February 2008.
15. Case 43–75, *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*, [1976] ECR 455, Judgment of the Court of 8 April 1976 (*Gabrielle Defrenne*).
16. Case 84/78, *Ditta Angelo Tomadini Snc v. Amministrazione delle finanze dello Stato*, [1979] ECR 01801, Judgment of the Court of 16 May 1979 (*Angelo Tomadini*).
17. Agreement for the termination of bilateral investment treaties between the EU Member States, 5 May 2020 (Intra-BIT Termination Agreement), available at: https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/200505-bilateral-investment-treaties-agreement_en.pdf, accessed 19 October 2020.
18. *See supra* n. 4.
19. *See supra* n. 7.
20. *Ibid.*
21. Declaration of the Member States of 15 January 2019 on the Legal Consequences of the *Achmea* Judgment and on Investment Protection, available at: https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf, accessed 19 October 2020.
22. Declaration of the Representatives of the Governments of the Member States of 16 January on the Enforcement of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, available at: https://www.regeringen.se/48ee19/contentassets/d759689c0c804a9ea7af6b2de7320128/achmea-declaration.pdf, accessed 19 October 2020.
23. *MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia*, ICSID Case No. ARB/13/32.
24. Declaration of the Representative of the Government of Hungary, of 16 January 2019 on the legal consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, available at: https://2015-2019.kormany.hu/download/5/1b/81000/Hungarys%20Declaration%20on%20Achmea.pdf, accessed 19 October 2020.
25. Some commentators point to para. 58 of *Achmea* to suggest an even narrower reading of it on account of the very specific wording of Article 8 of the Dutch-Slovak BIT under which EU law was part of the applicable law to the dispute, which they note is not included in the majority of intra-EU BITs. *See* Gordon Blanke, *Trends in International Energy Arbitration: Can ECT Claims be Arbitrated? Some Initial Considerations in the Light of the CJEU's Ruling in Achmea*, 37(1) ASA Bulletin 40, 46 (2019).
26. Emphasis added. Para. 60 of *Achmea*. *See also* Gordon Blanke, *The Achmea Issue and ECT Claims: Where do Things Stand?*, Practical Law Arbitration (11 January 2019), available at: http://arbitrationblog.practicallaw.com/the-achmea-issue-and-ect-claims-where-do-things-stand/, accessed 19 October 2020.
27. *See supra* n. 3.
28. In fact, the European Commission has asserted in an *amicus curiae* brief it submitted in March 2019, in enforcement proceedings before the D.C. District Court in the USA in *Eiser v. Spain*, that it is the official EU position that the CJEU's ruling also applied to intra-EU arbitral proceedings based on the ECT.
29. The text of the Consolidated version of the Treaty on European Union, Official Journal C 326, 26 October 2012, available at: data.europa.eu/eli/treaty/teu_2012/oj, accessed 19 October 2020.
30. See para. 55 of *Achmea* as well as Case C-266/03, *Commission v. Luxembourg*, para. 60, Judgment of the Court of 2 June 2005 (2005) ECRI-04805; Case C-433/03, *Commission v. Germany*, para. 66, Judgment of the Court (Second Chamber) of 14 July 2005 (2005) ECR I-06985 (together these two cases are known as '*Internal Waterways*'); Case C-246/07, *European Commission v. Kingdom of Sweden*, Judgment of the Court of 20 April 2010 (2010) ECR I-03317 (*PFOS*); and *Opinion 2/13*, Opinion of the Court (Full Court), 18 December 2014, ECLI:EU:C:2014:2454.
31. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, entered into force on 14 October 1966, UNTS vol. 575 of 1966, 159–235.
32. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, entered into force on 7 June 1959, UNTS vol. 330 of 1959, 3–82.
33. For a list of States parties to the New York Convention *see* http://www.newyorkconvention.org/countries, accessed 19 October 2020.
34. Applying by analogy the reasoning adopted by English courts in cases where there is no express choice of the law governing the arbitration agreement, the law governing the host contract is regarded as the law governing the validity of the arbitration agreement. *Kabab-Ji S.A.L (Lebanon) v. Kout Food Group (Kuwait)* [2020] EWCA Civ 6, available at: https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2020/6.html, accessed 19 October 2020.
35. In particular, Article 178(2) of the PILA provides that 'an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law'.
36. *See* for example: *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Spain*, ICSID Case No. ARB/13/36, Final Award of 4 May 2017 ('*Eiser v. Spain*'); *Eureko B.V. v. Republic of Poland*, Partial Award of 19 August 2005; and *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22. Similar arguments were raised unsuccessfully by Poland in the Svea Court of Appeal in Sweden in *PL Holdings v. Poland* as a ground for setting aside the award.
37. As Hess notes in his article, the decision of the CJEU seems 'contradictory' since the effectiveness of EU law was in fact guaranteed in the very case before it. Since the seat of the

investment treaty arbitration was in Germany, the German court was able to seek a preliminary opinion of the CJEU pursuant to Article 267 TFEU and the award was declared invalid. According to Hess, the CJEU rendered a decision by reference to a hypothetical case which was actually not before it, its concerns being directed at investment treaty arbitrations which are not subject to review by national courts pursuant to the New York Convention and, in particular, in respect of those conducted pursuant to the ICSID Convention. *See* Burkhard Hess, *The Fate of Investment Dispute Resolution After the Achmea Decision of the European Court of Justice*, 3 MPILux Research Paper 1 (2018).

38. Case C-126/97, *Eco Swiss China Time Ltd v. Benetton International NV.* (1999) ECR I-03055, Judgment of the Court of 1 June 1999 ('*Eco Swiss*').
39. Case C-168/05, *Elisa María Mostaza Claro v. Centro Móvil Milenium SL.*, Judgment of the Court of 26 October 2006, paras 35–39 (2006) ECR I-10421 ('*Mostaza Claro*').
40. In particular, the ECJ noted in para. 36 that '… Article 85 … constitutes a fundamental provision which is essential … for the functioning of the internal market' and concluded in para. 39 that consequently it was 'a matter of public policy within the meaning of the New York Convention'.
41. *See* para. 37 of *Mostaza Claro, supra* n. 28. *See also* Case C-40/08, *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira*, Judgment of the Court of 6 October 2009 (2009) ECR I-09579.
42. Case C-381/98, *Ingmar GB Ltd v. Eaton Leonard Technologies Inc.*, Judgment of the Court of 9 November 2000 (2000) ECR I-09305.
43. Case C-505/14, *Klausner Holz Niedersachsen v. Land Nordrhein-Westfalen* (2015), not published, Judgment of the Court of 11 November 2015 ('*Klausner*'). In particular, *see* para. 45 in which the ECJ held that '… it must be concluded that a national rule which prevents the national court from drawing all the consequences of a breach of the third sentence of Article 108(3) TFEU because of a decision of a national court, which is *res judicata*, given in a dispute which does not have the same subject-matter and which did not concern the State aid characteristics of the contracts at issue must be regarded as being incompatible with the principle of effectiveness. A significant obstacle to the effective application of EU law and, in particular, a principle as fundamental as that of the control of State aid cannot be justified either by the principle of *res judicata* or by the principle of legal certainty'.
44. *See* para. 165 of European Commission, State aid SA.40348 (2015/NN) – Spain: Support for electricity generation from renewable energy sources, cogeneration and waste, C(2017) 7384 final, 10 November 2017, available at: https://ec.europa.eu/competition/state_aid/cases/258770/258770_1945237_333_2.pdf, accessed 19 October 2020.
45. Joined Cases T-624/15, T-694/15 and T-704/15, *European Food SA and Others v. European Commission* (2019) ECLI:EU:T:2019:423, Judgment of the General Court of 18 June 2019. Since the statement of the General Court in para. 103 is *obiter dictum*, it is hoped that the CJEU will clarify this point now that the case is on appeal.
46. *ICSID Convention, Regulation and Rules*, International Centre for Settlement of Investment Disputes, ICSID/15, April 2006, available at: https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf.
47. It should be noted that the European Union is not a party to the ICSID Convention. Given the CJEU's reasoning in *Opinion 2/13*, the EU cannot ever become a party to the ICSID Convention. The CJEU reiterated its reasoning in April 2019 in *Opinion 1/17*, available at: http://curia.europa.eu/juris/document/document.jsf?docid=213502&doclang=EN, accessed 19 October 2020.
48. [2020] UKSC 5.
49. European Union (Withdrawal Agreement) Act 2020, available at: http://www.legislation.gov.uk/ukpga/2020/1/pdfs/ukpga_20200001_en.pdf, accessed 19 October 2020.
50. Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 19 October 2019, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840655/Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf, accessed 19 October 2020.
51. *Ibid.*
52. *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania* [I], ICSID Case No. ARB/05/20, available at: https://www.italaw.com/cases/697, accessed 19 October 2020.
53. Svea Court of Appeal, Case number OA 1657-19.
54. No. 17-CV-02332 (APM), 2019 WL 4305533 (DDC, 11 September 2019).
55. *Ibid.*
56. Lacey Yong, '*Airbus Withdraws Treaty Claim Against Poland*', *Global Arbitration Review* (22 May 2018), available at: https://globalarbitrationreview.com/article/1169853/airbus-withdraws-treaty-claim-against-poland, accessed 19 October 2020.

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