INSIGHT

PL Holdings case: The Investor Ordered to Pay the Expropriating State's Costs, a New Consequence of *Achmea*

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Abstract: In the Swedish Supreme Court's epilogue to the *PL Holdings* case, the expropriated company lost all its claims against Poland, which had expropriated it. Applying the case law of the Court of Justice of the European Union (CJEU) on intra-European investment arbitration, the Supreme Court did not merely invalidate the *ad hoc* arbitration clause that served as the basis for the awards against Poland in 2017. Dismissing the argument of denial of justice and the weakness of the rights guarantees offered by the Polish court system to which the investor was referred, the Supreme Court also annulled the arbitration awards on the grounds of Swedish procedural public policy and ordered the investor to pay Poland's full costs. This ruling, not surprisingly, is far from the end of the *PL Holdings* case. By overturning the 2017 arbitration awards by applying CJEU case law, the Swedish Supreme Court shifts the problem by creating a denial of justice. Investors whose favourable awards are thus set aside will have to turn to the courts of the investment's host state, which is precisely what they sought to avoid by claiming arbitration based on an intra-European BIT or, as in this case, an *ad hoc* arbitration agreement. There is every reason to believe that new questions will be put to the CJEU and, in the future, to the European Court of Human Rights.

Keywords: investment law – European investment law – *Achmea* – *Komstroy* – PL Holdings – arbitration.

I. Introduction

The *Achmea* case[1] is still making news. The judgment of the Swedish Supreme Court in the *PL Holdings* case[2] is just one of the many consequences of this case law generated from scratch by the Court of Justice of the European Union (CJEU). The judgment of the CJEU in the same case,[3] on a reference from the Swedish Court,[4] left little room for manoeuvre for the Member States.

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[1] Case C-284/16 *Achmea* ECLI:EU:C:2018:158.

[2] Supreme Court of Sweden judgment of 14 December 2022 n. V 2014/163 *PL Holdings S.a.r.l. v Poland*.

[3] Case C-109/20 *PL Holdings* ECLI:EU:C:2021:875.

[4] Supreme Court of Sweden judgment of 2 April 2020 n. T 1569-19 *Poland v PL Holdings S.á.r.l.*

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At the origin of the *PL Holdings* "saga", since the case filed in 2014 before the Stockholm Chamber of Commerce (SCC) has already been the subject of nine awards and judgments of various courts and tribunals, is PL Holdings, a Luxembourg investor in Poland. Between 2010 and 2013, the company acquired 100 per cent of a Polish bank and took shares in a second bank. In 2013, the two banks were merged into a new entity, FM Bank PBP, in which the investor owned over 99 per cent of the shares. Shortly after the merger, Komisja Nadzoru Finanswego (KNF), the supervisory authority of the Polish banking market, prohibited PL Holdings from using its voting rights in FM Bank PBP and forced it to sell its shares in the bank. The investor considered this as an expropriation prohibited by art. 4 of the Poland-Belgium-Luxembourg BIT.[5] The SCC ruled in its favour in 2017.[6] Poland, however, challenged the validity of the award - as well as the September 28, 2017, interest award - before the Swedish courts on several grounds. These include the lack of arbitrability of the dispute due to the impossibility for the court to rule without interpreting EU law, even though it is not a court under art. 267 TFEU and can therefore only refer a question to the CJEU for a preliminary ruling.[7] As the arbitration clause in the BIT is, according to Poland, contrary to EU law pursuant to the intervening *Achmea* judgment,[8] the awards would also be contrary to Swedish public policy.[9]

The Court of Appeal validated the award in its entirety, holding that Union law does not preclude the conclusion of an *ad hoc* arbitration agreement to resolve an investment dispute; but the Swedish Supreme Court, seized of the matter, asked the CJEU the following question:

> "[d]o Articles 267 and 344 TFEU, as interpreted in [the judgment of 6 March 2018, Achmea], mean that an arbitration agreement is invalid if it has been concluded between a Member State and an investor - where an investment agreement contains an arbitration clause that is invalid as a result of the fact that the contract was concluded between two Member States - by virtue of the fact that the Member State, after arbitration proceedings were commenced by the investor, refrains, by the free will of the State, from raising objections as to jurisdiction?".[10]

[5] Agreement between the Government of the People's Republic of Poland, on the one hand, and the Government of the Kingdom of Belgium and the Government of the Grand Duchy of Luxembourg, on the other hand, concerning the reciprocal encouragement and protection of investments [1987].

[6] Stockholm Chamber of Commerce partial award of 28 June 2017 n. V 2014/163 *PL Holdings S.a.r.l. v Poland*.

[7] Svea Court of Appeal judgment of 22 February 2019 n. T 8538-17 *Poland v PL Holdings S.a.r.l.* paras 18-21.

[8] Among many doctrinal analyses, see J Cazala, 'L'incompatibilité avec le droit de l'Union européenne du système d'arbitrage investisseur-État contenu dans un traité bilatéral d'investissement intra-UE. A propos de l'arrêt Slowakische Republik c/ Achmea BV du 6 mars 2018 (aff. C-284/16)' (2018) RTDE 597; K Georgaki and ThN Papanastasiou, 'The Impact of Achmea on Investor-State Arbitration under Intra-EU Bits: A Treaty Law Perspective' (2019) Polish Yearbook of International Law 209.

[9] Svea Court of Appeal *Poland v PL Holdings S.a.r.*l. cit. paras 22-25.

[10] SCC *Poland v PL Holdings S.á.r.l.* cit. para. 57.

As is well known, the CJEU concluded that

> "to allow a Member State to replace an arbitration clause, included in an international agreement between Member States, by concluding an ad hoc arbitration agreement in order to make it possible to pursue arbitration proceedings initiated on the basis of that clause, would, as has been held in paragraph 47 above, amount to circumventing that Member State's obligations under the Treaties and, specifically, under Article 4(3) TEU and Articles 267 and 344 TFEU, as interpreted in the judgment of 6 March 2018, Achmea".[11]

Only one question remained (relatively) unresolved: whether awards previously rendered under such an *ad hoc* agreement should be annulled, through a retroactive application of EU case law.

This was the question put to the Swedish Supreme Court, whose positive answer is not surprising since the guidelines had been set by the CJEU (section II). This brief critical case note will show, however, that the December 2022 ruling is interesting in that it suggests some avenues for future litigation (section III). The fact remains that the situation in which the investor is placed, who finds himself ordered to compensate the expropriating State because of the case law of the CJEU, is unenviable and will certainly lead to new developments (section IV).

II. The Supreme Court's logical solution considering EU case law

PL Holdings argued from the outset that the *Achmea* judgment did not prohibit the conclusion of a new, non-BIT arbitration agreement after the commencement of a BIT-based arbitration whose arbitration clause had been neutralized as a result of the CJEU's *Achmea* case law - and its subsequent ramifications. It was precisely on the basis of a clause in an *ad hoc* agreement identical to the BIT that the SCC had thus issued the two 2017 arbitral awards challenged by Poland. Nevertheless, it follows from the CJEU's *PL Holdings* ruling that to be validated, an award must be capable of being sufficiently reviewed by national courts that may refer a question to the CJEU for a preliminary ruling - this ability being, in the Court's view, the only way to fully guarantee the application of Union law. Once placed at fault on the merits, the expropriated company - according to the 2017 arbitration awards - argued that annulling the awards arising from the CJEU's ruling would be contrary to a series of fundamental European norms.

In particular, the company invoked art. 19 TEU,[12] art. 47 of the Charter of Fundamental Rights,[13] arts 6 and 13 of the European Convention for the Protection of Human Rights and

[11] *PL Holdings* cit. para. 65.

[12] Art. 19 TEU states that "Member States shall establish such remedies as are necessary to ensure effective judicial protection in the fields covered by Union law".

[13] Art. 47 of the Charter of Fundamental Rights of the European Union states that "[e] veryone whose rights and freedoms guaranteed by Union law have been infringed has the right to an effective remedy before a court in accordance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law [...]".

Fundamental Freedoms (ECHR) relating to the right to a fair trial and the absence of discrimination, as well as art. 1 of the First Protocol to the Convention on the right to property. In short, the company's argument against the annulment of the awards was based on the fact that in this case, the expropriation of which it had been the victim - in a manner that was not questionable on the merits - could not be the subject of any effective remedy.

The solution to this difficulty was given in the *PL Holdings* judgment of the CJEU, so the reasoning of the Swedish Supreme Court is not surprising. The EU Court responded to the company's argument by stating that:

> "the protection of the subjective rights which PL Holdings derives from Union law must be ensured within the framework of the judicial system of the Member States, in this case the Polish judicial system. Therefore, even if the alleged shortcoming in the protection of those rights is established, it should be corrected within that system, if necessary, with the cooperation of the Court within the scope of its powers, without such a shortcoming justifying tolerating disregard for fundamental provisions and principles".[14]

In terms of EU law, the awards were therefore voidable, and any denial of justice arising from them could be challenged before the Polish courts.

However, the Swedish Supreme Court had to decide a more complex question of systemic relations, which the CJEU may not have thought of: what if the annulment of the awards, if it were to be pronounced on the basis of the case law of the CJEU, would violate the rights guaranteed not only by EU law but also by the ECHR? The problem is not the simplest, since in both cases, the responsibility of the State may be engaged. In the event of annulment, the State is exposed to international liability before the European Court of Human Rights (ECtHR). If the Court decides not to annul the awards, the State is exposed to liability before the CJEU. The Swedish Supreme Court has nevertheless, and quite logically, solved the problem by positioning itself primarily within the scope of the EU legal order. This can be seen as an avoidance of the difficulty. Choosing the second option and following the unsatisfactory reasoning of the CJEU is certainly a comfortable and legally reasonable choice; however, this solution raises new problems, without solving any of them.

III. The invocation of the ECHR, an option with limited effects

To resolve the difficulty posed by this systemic relationship, the Supreme Court logically relied on the *Bosphorus* case.[15] In this well-known judgment,[16] the Strasbourg Court drew on the idea of "equivalent protection" to consider that a State measure taken in execution

[14] *PL Holdings* cit. para. 68.

[15] ECtHR *Bosphorus Airways v Ireland* App. n. 45036/98 [30 June 2005].

[16] See for example K Kuhnert, 'Bosphorus Double Standards in European Human Rights Protection?' (2006) Utrecht Law Review 177; J Andriantsimbazovina, 'La Cour de Strasbourg, gardienne des droits de l'homme dans l'Union européenne ?' (2006) Revue française de droit administratif 566; JP Jacqué, 'L'arrêt Bosphorus, une jurisprudence « Solange II » de la Cour européenne des droits de l'homme ?' (2005) RTDE 749.

of international - and specifically Community - obligations should "be deemed justified if it is clear that the organization in question grants fundamental rights (this concept covering both the substantive guarantees offered and the mechanisms supposed to monitor compliance with them) protection at least equivalent to that provided by the Convention".[17] The Swedish Supreme Court, in direct application of this well-established jurisprudence, considers that a national court can only depart from the interpretation of a provision of the Union by the CJEU if its application in the case in question constitutes a serious and unequivocal violation of the rights of an individual under the ECHR.[18] It agrees with the CJEU that EU law has strengthened the rights of investors and that, on the whole, it is Poland's responsibility to comply with its fair trial obligations.[19] The awards are therefore voidable.

The Swedish Court then annulled the awards on the basis of procedural public policy, which provides that an award may not be recognized or enforced under Swedish domestic law if the manner in which it was made is manifestly incompatible with the principles of the Swedish legal system. As the EU legal order is integrated into the Swedish legal order, the Court has no difficulty in considering that the case law of the CJEU in this matter falls within the scope of fundamental legal principles of a procedural nature, and therefore that the procedural principles of Swedish law were violated by the challenged awards - and would be violated by their continuation. Both awards are therefore declared void, as their continuation is clearly incompatible with Swedish public policy.[20] In reading this reasoning, the two options open to the Court but rejected by it face their own difficulties.

The first possibility is a new preliminary question to the CJEU, this time based on art. 6(3) TEU[21] and on the Charter of Fundamental Rights. As noted, PL Holdings did not fail to point out that the application of the preliminary ruling of the CJEU would be contrary to the primary law of the Union,[22] thereby requesting a new reference for a preliminary ruling, which the Swedish Court rejected out of hand.[23] For the Supreme Court, no new question is invoked, and it is difficult to see how the Court of Justice could deviate from its jurisprudence, especially when reading the *PL Holdings* judgment of October 2021.

The second door theoretically opened – but not expressly invoked – in the present case is that of recourse to the ECtHR. For several reasons mentioned below, this option was not relevant in the present case. However, it seems that the reasoning of the Swedish court leads directly to this possibility.

[17] *Bosphorus Airways v Ireland* cit. para. 155.

[18] *PL Holdings S.a.r.l. v Poland* cit. para. 38.

[19] *Ibid*. para. 41.

[20] *Ibid*. para. 61.

[21] Art. 6(3) TEU states that "[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, form part of the law of the Union as general principles".

[22] *PL Holdings S.a.r.l. v Poland* cit. para. 34.

[23] *Ibid*. para. 44.

The possibility of such a case being referred to the ECtHR exists in theory. It is nevertheless a limited "niche". It is indeed possible that a national court of a Member State of the Union, more open to the ECtHR than others, decides that there is food for thought and departs from the *Bosphorus* jurisprudence. In this eventuality, there would be two possibilities. The first would be to put the same question to the CJEU again, from the dual perspective of the *Bosphorus* case law and primary law, since the rights guaranteed by the ECHR fall under both. The second is the new possibility to request an advisory opinion from the ECtHR. With the entry into force of Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms on 1 August 2018, the "highest courts" of the states that have ratified it[24] may indeed address to the ECtHR requests for advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined by the Convention or its protocols. A national court could therefore make use of this possibility and, potentially, create havoc within the order that the CJEU is trying to establish on the issue of the protection of intra-union investments.

It is obviously difficult to predict what the ECtHR, seized of such a request for an opinion, might decide, especially since the hypothesis is not very plausible now. Sweden has not ratified Protocol 16; a request for an opinion could, however, emerge from the French Court of Cassation, which is not hostile in principle to this procedure,[25] or from another European court accustomed to dealing with investment-related disputes. Applying mutatis mutandis its reasoning in *Nada v Switzerland*[26] or *Al-Dulimi v Switzerland*[27] - even if these cases were not advisory opinions – the ECtHR could consider that as long as the protection offered by the national system does not meet the requirements of a fair trial as guaranteed by the Convention, the State that has to deal with the annulment of the award on the basis of the CJEU's jurisprudence must itself implement a mechanism that allows for the protection of these rights.

Such a position remains implausible. Indeed, the advisory opinion would be directly aimed at the legal system of a Member State of the Union, and *a fortiori* of the Council of Europe. It seems delicate - not to say unthinkable - for the ECtHR to hold, in an advisory opinion, that a member court system does not meet the requirements of the Convention because of the application of Union law. Moreover, both above-mentioned cases remain restricted *ratione materiae*, and it is likely that the Court will seek to interpret art. 6 and the case law of the CJEU "in such a way as to coordinate their effects, while avoiding any

[24] Albania, Andorra, Armenia, Belgium, Bosnia-Herzegovina, Estonia, Finland, France, Georgia, Greece, Lithuania, Luxembourg, the Netherlands, Romania, San Marino, Slovakia, Slovenia, Ukraine.

[25] See ECtHR advisory opinion on the recognition in domestic law of a parent-child relationship between a child born of surrogate motherhood carried out abroad and the mother of intention, "request n. P16-2018-001 [10 April 2019]".

[26] ECtHR *Nada v Switzerland* App. n. 10593/08 [12 September 2012].

[27] ECtHR *Al-Dulimi and Montana Inc. Management v Switzerland* App. n. 5809/08 [21 June 2016].

conflict between them".[28] It should also be noted that in the *Al-Dulimi* case, the standard is set quite low: it was only because the applicants did not even have "at least a real opportunity to present and have examined by a court adequate evidence on the merits"[29] that a violation of art. 6 of the Convention was found. This situation seems, objectively, difficult to transpose to a Member State of the Union.

As this issue is not yet settled, however, it is likely, in our view, that this type of case in which an investor wishes to challenge the application of the *Achmea* jurisprudence from a human rights perspective will recur in the courts of the EU Member States.

IV. A (very) unfavourable solution for the investor and a case to be continued

In the present case, as a result of the Swedish Supreme Court's reasoning, the arbitration awards were annulled. The investor, in addition to having suffered an expropriation deemed unlawful, was also ordered to pay approximately 750,000 euro in procedural costs before the Swedish Court of Appeal, with interest running from 2019, as well as approximately 633,000 euro in subsequent procedural costs to Poland - with interest running from 14 December 2022, based on the complexity of the issues addressed.[30] Only Poland's claim for compensation for the work of six officials on this case was rejected.[31]

There are many reasons to question this solution. It is true that the CJEU's jurisprudence has upset the law of intra-European investments and it is difficult to hold this against the Swedish Supreme Court, which is simply applying the principle of the primacy of the European legal order. It might even be conceivable that awards made prior to the *Achmea* decision could be annulled, although we remain strongly reserved as to the solution of the *PL Holdings* decision of the CJEU on this point. The annulment of awards due to the emergence of new, less favourable case law between their issuance and their enforcement is indeed questionable, not to say very contestable. At least it is very regrettable that the CJEU does not modulate the effects of its - major - case law over time to avoid such a situation. The CJEU could indeed have decided that the *Achmea* jurisprudence would only apply for the future, in order to preserve legal certainty and the acquired rights of the parties. As many domestic courts do,[32] it could even have set a date from

[28] *Nada v Switzerland* cit. para. 170.

[29] *Al-Dulimini and Montana Inc. Management v Switzerland* cit. para. 151.

[30] *PL Holdings S.a.r.l. v Poland* cit. paras 63-64.

[31] *Ibid.* para. 64.

[32] See for example: French Constitutional Council decision of 22 September 2022 n. 2022-1010 QPC *M. Mounir S.* para. 12. The Council ruled that "[i]n this case, on the one hand, the immediate repeal of the provisions declared unconstitutional would entail manifestly excessive consequences. Consequently, the date of their repeal should be postponed to 1 September 2023. On the other hand, the measures taken before the publication of the present decision cannot be challenged on the basis of this unconstitutionality".

which its case law would apply.[33] This was not the case, with the result that the *Achmea* judgment generates highly questionable retroactive consequences.

Even considering that the damage has been done and that it is impossible not to apply retroactively the case law of the CJEU, condemning the expropriated and uncompensated investor to pay the significant costs of the expropriating State seems disproportionate to say the least. Yet this is the fate of PL Holdings in this case.

This dissatisfaction suggests that the *PL Holdings* case may be far from over. It is doubtful that the investor can be satisfied with what amounts to a denial of justice, moreover caused by the strict application of a questionable interpretation of EU law by the CJEU. There is therefore every reason to believe that PL Holdings will try to obtain redress before the Polish courts - since the case law of the CJEU does not open any other possibilities at this stage. The irony of the situation should be noted here: it is precisely to avoid national courts suspected of providing too little protection to foreign investors that the latter resort to investment arbitration, possibly hosted by recognized institutions such as the Arbitration Institute of the SCC. If, as can be assumed, the claimant company does not obtain full compensation for the expropriation it suffered before the Polish courts,[34] it will have to turn to the remaining remedies. These are few and far between and lie essentially in the ECtHR.

The Court of Strasbourg could indeed be seized by a disappointed investor in a position of denial of justice. But here again, it is not certain that the ECtHR would go against the case law of the CJEU to condemn a State whose courts, seized in application of Union law, would not offer a level of guarantee of investors' rights that is deemed satisfactory. Of course, there is no doubt that this is its main function. The jurisprudence of the ECtHR, however, suggests that it may wish to avoid ruling on the application of EU law by domestic courts. The *Bosphorus* case and its aftermath suggest that the Strasbourg Court prefers, in cases where the protection conferred by Union law is at stake, to refer to the equivalence of protection to avoid giving a ruling. Indeed, the ECtHR attaches great importance to the role and powers of the CJEU.[35] Thus, in the *Michaud* case, the ECtHR stated, in relation to the *Bosphorus* case, that:

> "this presumption of equivalent protection is intended to ensure that a State Party is not faced with a dilemma when it is obliged to rely on the legal obligations incumbent on it as a result of its membership of an international organisation which is not party to the

[33] In the same vein, C Kessedjian, 'Retour sur la décision d'abolir les traités bilatéraux entre Etats membres : une voie médiane était-elle possible?' in R Maurel (ed), *Nouveaux regards sur le droit européen des investissements* (LexisNexis 2023), forthcoming.

[34] The lack of judicial independence of Polish national courts is often denounced. See, recently, C Sanderson, 'Poland Secures Landmark Annulment of Intra-EU BIT Awards' (19 April 2022) Global Arbitration Review www.globalarbitrationreview.com.

[35] In this vein, see I Tison, 'La liberté de religion au coeur du dialogue des juges européens' (2022) L'Actualité juridique Droit Administratif 1551.

> Convention and to which it has transferred part of its sovereignty, in order to justify its actions or omissions arising from such membership vis-à-vis the Convention. It also serves to determine in which cases the Court may, in the interests of international cooperation, reduce the intensity of its supervisory role, as conferred on it by Article 19 of the Convention, with regard to observance by the States Parties of their engagements arising from the Convention. It follows from these aims that the Court will accept such an arrangement only where the rights and safeguards it protects are given protection comparable to that afforded by the Court itself".[36]

The question is therefore whether the ECtHR, when seized by an investor whose case was rejected by the Swedish and then the Polish courts, could recognise the existence of a violation of the right of a fair trial or of the right to property. As far as the Polish courts are concerned, this is not in doubt, and the investor could finally win the case, after many years of proceedings. The legal issue is more interesting if PL Holdings refuses to go to the Polish courts and takes directly Sweden to the ECtHR. The company could indeed allege a violation of its right to an effective remedy as a result of the judgment of 14 December 2022. In this situation, it is not certain that the ECtHR would decide to attack the case law of the CJEU head-on. Applying the *Michaud* jurisprudence, it could consider that the mechanism, including the possibility of a preliminary ruling, is broadly equivalent to the protection granted by the ECHR.

More generally, it follows from the judgment of 14 December 2022 that all investment arbitration awards rendered since the *Achmea* judgment - or even before? - are likely to be declared null and void. European investment law has therefore not finished making headlines.

[36] ECtHR *Michaud v France* App. n. 12323/11 [6 December 2012] para. 104.