

# The Future of Investment Law in the EU: A Practical Perspective

December 8, 2021

Almost four years after the Court of Justice of the European Union (“CJEU”)’s landmark ruling in *Achmea* that an arbitration clause in an intra-EU bilateral investment treaty was inconsistent with EU law, uncertainty continues to cloud the protection of investments in the EU. In *Komstroy v. Moldova*, as we reported here, the CJEU held that intra-EU investor-State arbitration under the Energy Charter Treaty (“ECT”) was also incompatible with EU law. Some weeks later, in *PL Holdings v. Poland*, the CJEU ruled that an equivalent *ad hoc* arbitration agreement—in that case, created by Poland’s failure to raise a jurisdictional objection in the underlying proceedings—was also incompatible with EU law.<sup>1</sup> At least one EU Member State’s courts have declared intra-EU arbitrations inadmissible for lack of an arbitration agreement,<sup>2</sup> and the European Commission has threatened infringement proceedings against Member States that have been slow to implement the treaty for the termination of bilateral investment treaties concluded between them (the “Termination Treaty”).<sup>3</sup>

At the same time, non-EU courts and arbitral tribunals have been largely unsympathetic to the CJEU’s reasoning. Arbitral tribunals, annulment committees, and non-Member State courts have overwhelmingly rejected intra-EU objections to tribunal jurisdiction and award enforcement.

Caught between these conflicting approaches, investors no doubt wonder what the future holds. While uncertainty will continue to plague this particular aspect of the EU

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<sup>1</sup> CJEU Judgment of 26 October 2021, *Republic of Poland v. PL Holdings Sàrl*, C-109/20, EU:C:2021:875, ¶¶ 47-56.

<sup>2</sup> It was reported that on 1 December 2021, the German Supreme Court upheld a lower court judgment declaring the *Raiffeisen Bank International AG and Raiffeisen Bank Austria D.D. v. Croatia* UNCITRAL arbitration to be inadmissible under *Achmea*. See German Federal Supreme Court of Justice Affirms Inadmissibility of Claims Under the Austria-Croatia BIT, Foley Hoag Press Release, 1 December 2021, available at <<https://foleyhoag.com/news-and-events/news/2021/december/german-federal-supreme-court-of-justice-affirms-inadmissibility-of-claims-under-the-austria-croatia-bit>>

<sup>3</sup> See European Commission Lodges Infringement Proceedings Against Several EU Member States for Failure to Terminate Intra-EU BITs, and Warns of Possible CJEU Case Against Sweden, IAREporter, 2 December 2021, available at <<https://www.iareporter.com/articles/european-commission-lodges-infringement-proceedings-against-several-eu-member-states-for-failure-to-terminate-intra-eu-bits-and-warns-of-possible-cjeu-case-against-sweden/>>; see also our previous update [here](#).

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investment climate for the foreseeable future, some observations on the practical implications of the *Achmea* line of decisions in the short, medium, and long term may provide helpful guidance.

**Short Term.** The impact of the *Komstroy* and *PL Holdings* decisions may be the most contained in the short term, where the immediate question for most investors is likely to be the prospect of successfully enforcing an intra-EU award outside the EU.

To date, at least 64 arbitral tribunals have rejected intra-EU objections to jurisdiction, with just two dissenting opinions.<sup>4</sup> Similarly, at least seven ICSID annulment committees have rejected intra-EU annulment grounds,<sup>5</sup> as has the Swiss Federal Tribunal in two recent set-aside proceedings.<sup>6</sup> *Achmea* also does not seem to have stemmed the tide of intra-EU claims. According to ICSID's database, over 55 intra-EU claims are pending—several of which were filed this year. While it is difficult to measure reliably the number of claims that were not brought due to *Achmea*, there have been few reported withdrawals and settlements.<sup>7</sup>

The key question for investors is therefore likely to be how easily they can enforce the resulting award against a Member State's assets outside the EU. Here, reported national court decisions are on the whole encouraging. The UK Supreme Court lifted the stay of enforcement of the ICSID award in *Micula and others v. Romania*, after finding that EU law did not displace the United Kingdom's obligations under the ICSID Convention, and the Federal Court of Australia has likewise allowed the enforcement of two intra-EU

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<sup>4</sup> Cf. *Theodoros Adamakopoulos and others v. Cyprus*, ICSID Case No. ARB/15/49, Statement of Dissent of Professor Marcelo Kohen, 3 February 2020; *Raiffeisen Bank International Ag and Raiffeisenbank Austria D.D. v. Croatia*, ICSID Case No. ARB/17/34, Decision on Respondent's Jurisdictional Objections, 30 September 2020, ¶¶ 255-258.

<sup>5</sup> See *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, 8 April 2020; *Blusun SA, Jean-Pierre Lecorcier and Michael Stein v Italy*, ICSID Case No. ARB/14/3, 13 April 2020; *Sodexo Pass International SAS v. Hungary*, ICSID Case No. ARB/14/20, 7 May 2021; *Dan Cake (Portugal) S.A. v. Hungary*, ICSID Case No. ARB/12/9, 16 July 2021; *Infrastructure Services Luxembourg S.À.R.L. And Energia Termosolar B.V. (Formerly Antin Infrastructure Services Luxembourg S.À.R.L. And Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, 30 July 2021; *UP and C.D. (Le Cheque Dejeuner) v. Hungary*, ICSID Case No. ARB/13/35, 11 August 2021; *Magyar Farming Company Ltd, Kintyre Kft, & Anicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, 16 November 2021.

<sup>6</sup> See Bundesgericht [BGer], 25 November 2020, 4A\_563/2020 (upholding the UNCITRAL arbitral award in *Vaclav Fischer v. Czech Republic*); Tribunal fédéral [TF], 23 February 2021, 4A\_187/2020 (upholding the ICSID arbitral award in *PV Investors v. Spain*).

<sup>7</sup> See, e.g., ICSID Secretary-General Discontinues Intra-EU Case Against Denmark, IAREporter, 22 November 2021, available at <<https://www.iareporter.com/articles/icsid-secretary-general-discontinues-intra-eu-case-against-denmark/>>; Croatia Settles Several Swiss Loan Arbitrations, IAREporter, 3 February 2021, available at <<https://www.iareporter.com/articles/icsid-secretary-general-discontinues-intra-eu-case-against-denmark/>>; Airbus Withdraws Treaty Claim Against Poland, Global Arbitration Review, 22 May 2018, available at <<https://www.iareporter.com/articles/icsid-secretary-general-discontinues-intra-eu-case-against-denmark/>>

ECT-based ICSID awards.<sup>8</sup> In the United States, the District Court of the District of Columbia has been more cautious—it has stayed enforcement of at least nine intra-EU awards until a set-aside or annulment decision is issued, noting that it is “loath to wade into this territory unnecessarily.”<sup>9</sup>

The prospects for enforcement have also prompted an active secondary market, which allows investors to de-risk existing claims and awards. Intra-EU awards have become akin to a class of distressed sovereign debt, offering potentially lucrative opportunities for secondary financial investors with a longer investment horizon and a greater risk appetite.

**Medium Term.** Despite the swelling countercurrent rejecting intra-EU objections, the EU is unlikely to reverse course and the risks for investors will only increase over time. In the medium term, therefore, the prudent way forward would be for investors to look for viable alternatives.

Investment structuring will play an increasingly important role. New investments should be structured, to the extent possible, so that there is an investor in the ownership chain that is protected under an extra-EU treaty. Restructuring of existing investments may also be possible, but should be carefully considered to avoid prejudicing the admissibility of any claims. In addition, investors may also consider negotiating contractual protections with the host State and, where feasible, choosing an arbitral seat outside the EU.

In-country relief may also be available, but is unlikely to be an attractive option in the medium term. Spain, for example, introduced economic incentives for investors to end claims or waive their rights to enforce arbitral awards.<sup>10</sup> The Termination Treaty also

<sup>8</sup> *Micula and others (Respondents/Cross-Appellants) v Romania (Appellant/Cross-Respondent)*, [2020] UKSC 5, 29 February 2020; *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2021] FCAFC 3, 1 February 2021; *Infrastructure Services Luxembourg S.A.R.L v Kingdom of Spain* [2021] FCAFC 112, 25 June 2021.

<sup>9</sup> *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, 1:18-cv-2254 (D.D.C. 18 Sept. 2019). See also *Infrastructure Services Luxembourg S.À.R.L. And Energia Termosolar B.V. (Formerly Antin Infrastructure Services Luxembourg S.À.R.L. And Antin Energia Termosolar B.V.) v. Kingdom of Spain*, 1:18-cv-01753 (D.D.C. 28 Aug. 2019); *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, 18-cv-01148 (D.D.C. 27 Jan. 2020); *Eiser Infrastructure Limited v. Kingdom of Spain*, 1:18-cv-1686 (D.D.C. 5 Aug. 2020); *Nextera Energy Global Holdings B.V. v. Kingdom of Spain*, 1:19-cv-1618 (D.D.C. 30 Sept. 2020); *9Ren Holding S.a.r.l. v. Kingdom of Spain*, 1:19-cv-01871 (D.D.C. 30 Sept. 2020); *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, 1:19-cv-03783 (D.D.C. 31 Mar. 2021); *Cube Infrastructure Fund SICAV and Others v. Kingdom of Spain*, 1:20-cv-01708 (D.D.C. 17 May 2021); *Infrared Environmental Infrastructure GP Limited and Others v. Kingdom of Spain*, 1:20-cv-00817 (D.D.C. 29 June 2021).

<sup>10</sup> See Royal Decree-Law 17/2019, dated 22 November, adopting urgent measures for the necessary adaptation of the remunerative parameters affecting the electricity system and addressing the process to shut down thermal power plants, BOE 23 November 2019, 129281, available at <[www.boe.es/eli/es/rdl/2019/11/22/17/dof/spa/pdf](http://www.boe.es/eli/es/rdl/2019/11/22/17/dof/spa/pdf)>

foresees a “structured dialogue” process, but only for claims that were commenced before *Achmea*. It is unclear if investors have availed themselves of these alternatives in practice. Moreover, investors may not want, or be able, to continue operating in-country after their investment has been impaired or destroyed.

Claims may also exist under domestic law and before domestic courts. However, the patchwork of legal standards in national and EU law is often a poor substitute for substantive protections in investment treaties. Member State courts may also not be a hospitable forum for investors suing the host State, as recent decisions of the European Court of Human Rights, the CJEU, and arbitral tribunals finding that Member States violated the right to a fair trial, or denied investors justice, show.<sup>11</sup>

**Long Term.** The long-term outlook is even more uncertain for investors, because the EU has closed off the avenue of intra-EU arbitration without having yet cleared an alternative path. The European Commission has participated in multilateral negotiations for modernizing the ECT, but maintains the position that “the ECT does not contain an investor-to-state arbitration mechanism applicable to investors from one EU Member State investing in another.”<sup>12</sup>

Even investors outside the EU could face the collateral consequences of these developments over the longer term. *Achmea*’s ripple effects may reach far beyond the relations between EU Member States. For example, Member States’ refusal to comply with and enforce intra-EU ICSID awards could call into question their obligations under the ICSID Convention.<sup>13</sup> Under the ECT, the EU and individual Member States must ensure that foreign investors are afforded effective means of asserting rights and enforcing claims with respect to investments.<sup>14</sup> And the CJEU’s Opinion that the

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<sup>11</sup> See *Case of Reczkowicz v. Poland*, European Court of Human Rights, App. No. 43447/19, 22 July 2021; CJEU Judgment of 6 October 2021, C-487/19, EU:C:2021:798; *Manchester Securities Corporation v. Poland*, PCA Case No. 2015-18, Award, 7 December 2018, ¶¶ 497-498; *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015, ¶¶ 145-146.

<sup>12</sup> Commission presents EU proposal for modernising Energy Charter Treaty, Press Release, 27 May 2020, available at <<https://trade.ec.europa.eu/doclib/press/index.cfm?id=2148>>. See also Negotiating Directives for the Modernisation of the Energy Charter Treaty, Doc. 10745/19, 2 July 2019, available at <<https://data.consilium.europa.eu/doc/document/ST-10745-2019-ADD-1/en/pdf>>; EU Text Proposal for the Modernisation of the ECT, available at <[https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc\\_158754.pdf](https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf)>

<sup>13</sup> See, e.g., ICSID Convention, Art. 53(1) (providing that the “award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention”), Art. 54(1) (providing that each “Contracting State shall 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 the court in that State”); and Art. 64 (providing that “[a]ny dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement.”).

<sup>14</sup> See Energy Charter Treaty, Art. 10(1).

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Comprehensive and Economic Trade Agreement between Canada and the EU (“CETA”) is compatible with EU law because it contains certain specific provisions begs the question whether treaties that do not contain such language may be affected in the future.<sup>15</sup>

Commercial arbitration could be caught in the crosshairs. The CJEU’s attempt to distinguish contract-based intra-EU arbitration from treaty-based intra-EU arbitration appears increasingly fragile. Like treaty arbitration, interested parties might argue that contractual arbitration also removes a dispute with a Member State from the EU judicial system, commercial arbitration tribunals may also be called upon to apply EU law without being able to seek a reference from EU courts, and an agreement of the disputing parties may not be a sufficient saving grace after *PL Holdings*. The gradual erosion of intra-EU treaty arbitration risks causing a landslide for EU investments more generally.

The European Commission seems to acknowledge the problem. Last year, the Commission announced a legislative initiative aimed at “clarifying and supplementing EU rules” on cross-border investment within the EU, including improving enforcement in disputes between investors and Member State governments.<sup>16</sup> Among the options for resolving such disputes are “creating an Ombudsman-like EU administrative body where investors could bring cross-border investor-to-State complaints,” and “creating a specialised investment court (modelled on the Unified Patent Court) that would deal with individual cases.”<sup>17</sup>

These reforms are still a long way off, however, and it remains to be seen whether they will provide sufficiently robust protection. They also do not solve the immediate problem of the intra-EU awards that continue to accumulate against Member States in the meantime. Over the longer term, the EU and individual Member States may need to craft a solution for resolving these claims as an asset class.

Until then, investors in the EU are left with limited options, and will need to put in place short, medium and long-term protections to minimize investment risk.

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<sup>15</sup> CJEU Opinion 1/17 of 30 April 2019, EU:C:2019:341, ¶¶ 160-161.

<sup>16</sup> See European Commission Inception Impact Assessment, Ares (2020) 2716046, 26 May 2020, pp. 2-3, available at <[https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12403-Cross-border-investment-within-the-EU-clarifying-and-supplementing-EU-rules\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12403-Cross-border-investment-within-the-EU-clarifying-and-supplementing-EU-rules_en)>

<sup>17</sup> See European Commission Inception Impact Assessment, Ares (2020) 2716046, 26 May 2020, p. 4, available at <[https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12403-Cross-border-investment-within-the-EU-clarifying-and-supplementing-EU-rules\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12403-Cross-border-investment-within-the-EU-clarifying-and-supplementing-EU-rules_en)>

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If you would like to discuss how these developments affect your business, please do not hesitate to contact us.

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