

Swedish Court of Appeal annuls intra-EU investment arbitration award

by *Practical Law Arbitration*, with *Westerberg & Partners*

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In *Novenergia II v Spain (Case No T 4658-18) (13 December 2022)*, the Svea Court of Appeal annulled an intra-EU arbitral award under the Energy Charter Treaty for non-arbitrability of the disputed issues.

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The Svea Court of Appeal has annulled an intra-EU arbitral award under the Energy Charter Treaty (ECT) on the basis of non-arbitrability of the disputed issues. The court considered the Court of Justice of the European Union's (ECJ) jurisprudence in *Achmea*, *Komstroy* and *PL Holdings* in relation to the right of access to court and the protection of property under the European Convention for Human Rights (ECHR).

In 2018, in a Swedish-seated arbitration conducted under the SCC Arbitration Rules, an arbitral tribunal issued an award ordering Spain to pay damages to Novenergia, a company registered in Luxembourg.

Spain applied to annul the award, arguing that the arbitration agreement in article 26 of the ECT violates EU law in intra-EU disputes. Spain argued that the issues in the arbitration were non-arbitrable, or that the award violated Swedish public policy. Novenergia objected that annulment would violate the ECHR, in particular, the right of access to court, protection of property, and the proportionality principle under EU law.

Guided by ECJ rulings on intra-EU disputes, the court observed that Swedish courts may depart from ECJ precedents only in special circumstances. Citing case law laying down a presumption that EU law complies with the ECHR, it referenced the statement by the ECJ in *PL Holdings* that national courts, in symbiosis with the ECJ, are responsible for safeguarding individual rights under EU law. It would, therefore, be for Spanish courts to protect Novenergia's rights.

The court found that EU law prohibits intra-EU investors and member states from settling disputes under the ECT through arbitration, because this is seen as interfering with the autonomy of the EU legal order. The court found no reason to depart from the ECJ stance. As EU law forms part of Swedish law, the court declared the award invalid under Swedish law on the basis of non-arbitrability.

The court delivered its judgment the day before the Swedish Supreme Court's (SC) judgment in *PL Holdings v Poland*. In *PL Holdings*, the SC annulled two intra-EU awards based on violation of Swedish public policy. The court in this case cited precedents providing that non-arbitrability should be tried before public policy violations. Yet, while non-arbitrability was raised, it was not addressed by the SC in *PL Holdings*. Arguably, the context of that case was different as it concerned an ad hoc arbitration agreement formed during an ongoing arbitration.

Case: [Novenergia II v Spain \(Case No T 4658-18\) \(Svea Court of Appeal\) \(13 December 2022\)](#).

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