Swedish Supreme Court annuls arbitral awards because of their inconsistency with Swedish public policy

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

Legal update: case report | Published on 22-Dec-2022 | Sweden

In *Poland v PL Holdings (Case No T 1569-19) (14 December 2022)*, the Swedish Supreme Court annulled two investment treaty awards based on their incompatibility with Swedish public policy.

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The Swedish Supreme Court (SC) has annulled two awards in the investment dispute between PL Holdings Sarl (registered in Luxemburg) and the Republic of Poland.

The two awards were rendered in 2017 by a Swedish-seated arbitral tribunal, which awarded PL Holdings damages due to Poland's breaches of its obligations under a bilateral investment treaty (BIT) between Belgium and Luxembourg, on the one part, and Poland on the other part.

Poland challenged the awards before the Svea Court of Appeal, arguing that the arbitration agreement in the BIT was invalid under EU law and that the awards therefore breached public policy. PL Holdings sought to evade the ECJ's *Achmea* doctrine by maintaining that an ad hoc arbitration agreement had been formed as Poland had not timely raised its objection during the arbitration. The Court of Appeal accepted PL Holding's argument and upheld the awards. Poland appealed.

On appeal, the SC requested a preliminary ruling from the ECJ, which confirmed in its 2021 preliminary ruling that under EU law a member state cannot conclude an ad hoc arbitration agreement that enables continued arbitration proceedings initiated under an intra-EU BIT.

PL Holdings argued that the preliminary ruling was incompatible with central principles of EU law and insisted that the SC should not be bound by it. The SC acknowledged that, in special circumstances, it may depart from the ECJ's rulings, but did not find a basis for doing so here. As EU law forms part of Swedish law, upholding awards rendered in accordance with an arbitration agreement which violates the principles governing the EU legal system would violate Swedish public policy. Swedish law provides for the annulment of awards if they are clearly incompatible with basic principles of the legal order. The SC therefore declared the awards invalid, noting that merely setting them aside would not sufficiently ensure the full effectiveness of EU law.

Unlike a request to set aside an arbitral award, Swedish law sets no time limit for a request to annul an award. Therefore, this case may set a precedent prompting annulment actions also in respect of older investment treaty awards rendered in Sweden under intra-EU BITs.

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