

# Svea Court of Appeal annuls intra-EU ECT arbitration award, including in relation to non-EU investor and costs

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

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In *Festorino Invest Limited and others v Republic of Poland (Case No T 12646-21) (20 December 2023)*, the Svea Court of Appeal annulled an intra-EU investment arbitration award, finding it incompatible with Swedish public policy. The annulment applies also to a non-EU investor, which was party to the award, and to the tribunal's decision on costs.

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The Svea Court of Appeal has annulled an intra-EU investment arbitration award, rendered under the Energy Charter Treaty (ECT), as manifestly incompatible with Swedish public policy.

The award was rendered in a Swedish-seated SCC arbitration between four EU investors and one non-EU investor, against Poland. The tribunal upheld its jurisdiction but dismissed the investors' claims on the merits.

The investors applied to Svea Court of Appeal for the award to be annulled. Their primary argument was that the award was manifestly incompatible with Swedish public policy. Poland agreed that the main part of the award was invalid. However, it argued that the award should be upheld to the extent that it dismissed the claims of the non-EU investor and ordered the unsuccessful investors to pay Poland's costs.

The Court of Appeal held that the European Court of Justice's (ECJ) decisions in the *Slowakische Republik v Achmea BV (Case C-284/16)* line of cases mandated that the ECT's arbitration clause was inapplicable in intra-EU investment disputes. The court also referenced the decision in *Poland v PL Holdings (Case No T 1569-19) (PL Holdings)* (discussed in [Legal update, Swedish Supreme Court annuls arbitral awards because of their inconsistency with Swedish public policy](#)), in which the Swedish Supreme Court held that an award rendered in conflict with the ECJ's intra-EU case law is invalid under section 33(2) of the Swedish Arbitration Act. As a result, the *Festorino* award was invalid.

The Swedish courts had not previously considered whether an intra-EU award could be held partially valid, to the extent it concerns non-EU investors. However, in keeping with *PL Holdings*, the Court of Appeal noted that the award's invalidity derived from the ECJ's ruling that arbitration clauses in intra-EU investment agreements, including the ECT, conflict with fundamental EU law principles. On this basis, the invalidity was held to extend to the entire award, including those parts of the award concerning the non-EU investor and costs.

The decision that the principle of intra-EU invalidity extends to entire awards, including vis-à-vis non-EU investors, is contentious in the context of the ECT, which includes non-EU contracting states. While ECJ jurisprudence invalidates the ECT's arbitration clause as regards intra-EU claims, it could be argued that the arbitration clause was valid as between Poland and the non-EU investor. Poland may also be disappointed that it cannot recover its costs, despite prevailing in the arbitration.

Case: [Festorino Invest Limited and others v Republic of Poland \(Case No T 12646-21\) \(Svea Court of Appeal\) \(20 December 2023\)](#).

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