Swedish Court of Appeal once again declares intra-EU investment treaty award invalid on grounds of public policy

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

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In a judgment of 27 March 2024 in *Spain v Triodos SICAV II (Case No T 15200-22)*, the Svea Court of Appeal annulled yet another intra-EU investment treaty award based on its incompatibility with Swedish public policy.

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The Svea Court of Appeal (COA) has declared invalid yet another intra-EU arbitral award rendered under the Energy Charter Treaty (ECT). The COA determined that the award was made in violation of the fundamental principles governing the EU legal system and thus was also in violation of Swedish public policy. This follows similar determinations by the COA in relation to two other arbitral awards, in which the court drew upon the judgments of the Court of Justice of the European Union (ECJ) in the *Achmea*, *Komstroy*, and *PL Holdings cases* (ECJ Judgments) (see *Legal updates, Swedish Court of Appeal annuls intra-EU investment arbitration award* and *Svea Court of Appeal annuls intra-EU ECT arbitration award, including in relation to non-EU investor and costs*).

In 2017, a Luxembourg-registered company, Triodos, initiated SCC arbitration proceedings against Spain under article 26 of the ECT. In 2022, the Stockholm-seated arbitral tribunal found Spain had breached article 10.1 of the ECT and awarded damages to Triodos.

Spain challenged the award before the COA, seeking a declaration that the award was invalid. It argued that the award violated Swedish public policy or, alternatively, that the issues determined were non-arbitrable. Relying on the ECJ Judgments, Spain argued that the award involved the application and interpretation of EU law, which falls within the exclusive competence of the ECJ. Spain also argued that the award should be set aside because there existed no valid arbitration agreement.

Referencing the rulings on intra-EU disputes in the ECJ Judgments, the COA applied the reasoning of the Swedish Supreme Court in the landmark case of *Poland vs PL Holdings (Case No T 1569-19)* (see *Legal update, Swedish Supreme Court annuls arbitral awards because of their inconsistency with Swedish public policy*). There, the Supreme Court ruled that an award arising from a dispute resolution clause in an international investment agreement between an EU member state and an investor from another member state, is incompatible with the fundamental provisions and principles governing the EU legal framework, and consequently, that of Sweden. The court clarified that such awards should be examined against the rules on invalidity concerning violations of procedural public policy.

Given this jurisprudence, the COA held that, as the award concerned an intra-EU investment, maintaining the award would be manifestly incompatible with Swedish public policy. The court, therefore, declared the arbitral award invalid and, consequently, found no reason to consider Spain's additional claims and grounds.

Case: Spain v Triodos SICAV II (Case No T 15200-22) (Svea Court of Appeal) (27 March 2024).

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