

Company not required to withdraw investment arbitration claim despite ECJ's Achmea decision (Amsterdam District Court)

by **Practical Law Arbitration**, with **OSK Advocaten**

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In *Poland v X (ECLI:NL:RBAMS:2022:5772)*, the Amsterdam District Court ruled that a Dutch investment company was not required to withdraw an arbitration against Poland despite the European Court of Justice ruling in *Slowakische Republik v Achmea BV (Case C-284/16) (Achmea)*.

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In interim relief proceedings, the Amsterdam District Court (District Court) held that a Dutch company was not required to withdraw an investment arbitration against Poland, despite the termination of the Netherlands-Poland bilateral investment treaty (BIT) following the European EU Court of Justice (ECJ) ruling in *Slowakische Republik v Achmea BV (Case C-284/16) (Achmea)*.

The District Court ruled that it lacked jurisdiction to determine the validity of the arbitration agreement and, therefore, the tribunal's jurisdiction, which is for the tribunal to decide. A state court can only rule on the tribunal's jurisdiction in setting aside or enforcement proceedings once the tribunal has ruled on its jurisdiction in a final award. Moreover, a withdrawal of an arbitration is a permanent measure, which cannot be obtained in interim relief proceedings.

The District Court then ruled that the company was not acting unlawfully by continuing the arbitration, which was initiated before the termination of the BIT (following *Achmea*). The BIT's sunset clause provides that investment protection continues to apply for 15 years after its termination. Moreover, the seat of the arbitration was England and the English courts are not bound by EU law. The District Court referred to the UK Supreme Court decision in *Micula v Romania [2020] UKSC 5*, which allowed enforcement of an intra-EU award.

The District Court recognised that *Achmea* and its consequences are heavily debated, and that while any award in this matter will be unenforceable in the EU, the enforcement position may be different outside the EU. In addition, the court noted that doubts existed as to the ECJ's assumption in *Achmea* that, in the absence of intra-EU BITs, investors are sufficiently protected against state actions by EU law. Further, while the EU and various states are establishing free trade agreements providing for the new investment court system, those agreements have not yet entered into force. Therefore, continuing the arbitration may be the company's only current remedy.

The District Court judgment means a first win for the claimant in the arbitration. However, as the interim relief proceedings do not affect the outcome of the main proceedings with similar claims initiated by Poland before the District Court, the outcome of those proceedings and the arbitration are eagerly anticipated. Also notable is the District Court's reference to the UK Supreme Court decision in *Micula v Romania*, as the European Commission has now referred the UK to the ECJ as a result of that judgment.

Case: *Poland v X (ECLI:NL:RBAMS:2022:5772) (1 September 2022)*.

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