

# Does Brexit mean Brexit? The enforcement of intra-EU investment awards in the post-Brexit era

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SZILÁRD GÁSPÁR-SZILÁGYI<sup>1</sup>

## Does Brexit Mean Brexit? The Enforcement of Intra-EU Investment Awards in the Post-Brexit Era

- **ABSTRACT:** *This article uses an analytical approach in order to dissect the major legal issues concerning the enforcement of intra-EU awards post-Brexit. The outcomes of the enforcement cases will depend on the country where enforcement is sought (EU Member States, the UK, and other third countries), the applicable legal regime pursuant to which enforcement is sought (the New York Convention or the ICSID Convention), various temporal factors (whether certain key moments in the arbitral proceedings occurred before or after the end of the Brexit transition period), and whether the intra-EU cases are based on intra-EU BITs or the ECT, or both. Due to this complexity, there is no easy answer as to how the various issues arising from the post-Brexit enforcement of intra-EU awards should be solved. This is most unfortunate as it creates uncertainty for investors, host States, and national courts of enforcement alike.*
- **KEYWORDS:** Intra-EU arbitration, ISDS, enforcement and recognition, Brexit, BITs, ECT, *Micula v. Romania*.

### 1. Introduction

Following the Lisbon amendments to art. 207 TFEU, the EU has become an active player in international investment law. However, the EU's new competences over foreign direct investment have resulted in a decade long process of trials and errors, as well as complex legal questions.<sup>2</sup> A lot of this complexity stems from the different categories into which EU and Member State bilateral investment treaties (BITs) and

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2 For an overview until 2018 see Gáspár-Szilágyi, 2018c.



other investment agreements can be classified, as well as the relationship between investment treaty arbitration (ITA) and the autonomy of the EU legal order.<sup>3</sup>

This tangled legal landscape has resulted in a number of important developments in a short amount of time. First, the EU adopted the Grandfathering Regulation of 2012<sup>4</sup> in order to safeguard the continued existence and conclusion of Member State BITs with third countries. Then, in *Opinion 2/15*<sup>5</sup> – on the conclusion of the EU-Singapore Free Trade Agreement – the Court of Justice of the EU (Court of Justice/CJEU) clarified the competences the EU and its Member States have over the new generation EU trade agreements. This was followed by *Achmea*<sup>6</sup> in 2018, which came as a shock to many investors, the CJEU having concluded that provisions on investor-state dispute settlement (ISDS) found in intra-EU agreements, such as the provisions under the Netherlands-Czech Republic and Slovakia BIT, are incompatible with EU law. Following this seminal case, most – but not all – EU Member States signed an agreement to terminate their intra-EU BITs.<sup>7</sup> Nevertheless, investment tribunals whose jurisdiction had been challenged on the grounds of *Achmea* proceeded to side-line the CJEU's arguments, upholding their jurisdiction.<sup>8</sup>

This was followed by *Opinion 1/17*<sup>9</sup> in which the Court of Justice decided that the EU's Investment Court System under the EU-Canada Comprehensive Economic and Trade Agreement (CETA) is compatible with EU law. Furthermore, the EU Commission is pursuing the creation of a Multilateral Investment Court<sup>10</sup> and the EU has adopted a regulation on the screening of third country investments into sensitive sectors of the economy.<sup>11</sup>

The adventure, however, is not over as exemplified by two, very recent judgments of the Court of Justice. First, on 2 September 2021 the Grand Chamber in *Moldova v. Komstroy LLC*,<sup>12</sup> a case which involved an extra-EU BIT and not an intra-EU BIT, has

3 See Contartese and Andenas, 2019; Gáspár-Szilágyi, 2018b; Melikyan, 2021; Gáspár-Szilágyi, 2021; Öberg, 2020.

4 Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ L 351/40. For a commentary see Lavranos, 2013.

5 CJEU, *Opinion 2/15, EU-Singapore FTA* [2017] EU:C:2017:376.

6 CJEU, *Slowakische Republik v. Achmea BV* [2018] EU:C:2018:158. For commentaries see Öberg, 2020; Scheu and Nikolov, 2020; Contartese and Andenas, 2019; Gáspár-Szilágyi and Usynin, 2019.

7 Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union (2020), OJ 169/1. 23 out of the 27 EU Member States have signed the agreement. For a commentary see Lavranos 2020.

8 See Gáspár-Szilágyi and Usynin, 2019, pp. 35–45.

9 CJEU, *Opinion 1/17, CETA Investment Court System* [2019] EU:C:2019:341. For a commentary see Gordon, 2020.

10 See UNCITRAL, 2021.

11 Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union OJ 79/1. For a very extensive commentary see Hindelang and Moberg, 2021.

12 CJEU, *C-741/19, Republic of Moldova v. Komstroy LLC* [2021] EU:C:2021:655. For a commentary see Fouchard and Thieffry, 2021.

more or less sealed the fate of the Energy Charter Treaty (ECT) in an intra-EU setting.<sup>13</sup> Then, on 26 October 2021 the Grand Chamber, building on its *Achmea* judgment, held in *Poland v. PL Holdings*<sup>14</sup> that national legislation, which would permit the circumvention of *Achmea*, by allowing a Member State to conclude with an investor an *ad hoc* arbitration agreement that is identical in terms to an arbitration clause in an intra-EU BIT, is also precluded by arts. 267 and 344 TFEU. If the above legal hurdles were not enough, the effects of Brexit on the enforcement of intra-EU investment awards also poses significant challenges. This article will focus on this latter issue.

As is well known, Brexit has resulted, is resulting, and will result in numerous practical and legal hurdles. Among these, one can mention the issues surrounding the Northern Ireland Protocol, the impact on trade-flows between the EU and the UK, the status of EU and UK citizens,<sup>15</sup> and the disentangling of international agreements to which the UK was a party to via its EU membership.<sup>16</sup> One issue, however, which has been neglected during the Brexit negotiations, in the Withdrawal Agreement, and in the new Trade and Cooperation Agreement (TCA) is the status of arbitral awards delivered under intra-EU BITs and their enforcement following Brexit. I have alluded to this problem three years ago,<sup>17</sup> and some practitioners and academics have touched upon some of the issues arising from this legally very complex situation.<sup>18</sup> Therefore, my purpose here is to go one step further, and discuss in detail the impact of Brexit on the enforcement of intra-EU investment awards.

The question is not just theoretically intriguing, but also practically very relevant for the UK, the EU, Hungary, and investors. According to the newest data available on the UNCTAD Investment Policy Hub, BITs concluded by the UK have been relied on in 91 investment treaty arbitrations, of which 90 were brought by UK investors against other states.<sup>19</sup> Of these cases, a total of 23 are cases against EU Member States, including Spain, Hungary, Latvia, Romania, the Czech Republic, Italy, and Poland. Several of them are still pending, such as a number of cases against Spain (the Spanish Solar cases)<sup>20</sup> and the highly disputed case of *Gabriel Resources v. Romania*.<sup>21</sup> Very recently, the

13 For an older analysis on the effects of *Achmea* on the ECT see Arif, 2019.

14 CJEU, C-109/20, *Republiken Polen v. PL Holdings Sàrl* [2021] EU:C:2021:875; AG Kokott, *Opinion in Case C-109/20, Republic of Poland v. PL Holding Sàrl* [2021] EU:C:2021:321; for a commentary of the AG's Opinion, see de Boeck, 2021.

15 CJEU, Case C-709/20, *CG v. Department for Communities in Northern Ireland* [2021] ECLI:EU:C:2021:602. For a commentary see, Garner, 2021.

16 See Wessel, 2018.

17 Gáspár-Szilágyi, 2018a.

18 See Stanič, 2021; Lavranos, 2021, pp. 5-8; Florou, 2019.

19 Investment Policy Hub, 2021.

20 *FREIF Eurowind v. Spain*, SCC Case No. 2017/060, pending; *Aharon Naftali Biram, Gilatz Spain SL, Redmill Holdings Ltd and Sun-Flower Olmeda GmbH v. Kingdom of Spain*, ICSID Case No. ARB/16/17, pending.

21 *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania*, ICSID Case No. ARB/15/31, pending. The case is heavily disputed in Romania as the project would involve the demolition of a historic village and the creation of a cyanide lake to help with the extraction of gold.

arbitral tribunal in the *Magyar Farming*<sup>22</sup> case concluded that Hungary had breached the expropriation provisions of the UK-Hungary BIT of 1986. Since the case was commenced in 2017 and the award was rendered in 2019, prior to the end of the Brexit transitional period, when the UK was still bound by its EU law obligations, the enforcement of the award will raise several legal questions.

In light of the above, in this article I will follow an analytical approach to dissect the major legal issues concerning the enforcement of intra-EU awards post-Brexit. I believe that in this case it is better to take an analytical approach and not a normative one, since there are no clear legal answers<sup>23</sup> to some of the legal issues raised; the outcomes to some of the questions depend on several variables that I will discuss in this paper.

Following the Introduction, in Part 2, I will provide a brief overview of the two enforcement regimes of arbitral awards in international investment law, highlighting the effects the *Achmea* judgment had and has on the enforcement of intra-EU awards. Then, in Part 3, I will look at whether the UK's Withdrawal Agreement, the 2018 UK Withdrawal Act, and the new TCA provide us with any guidance on this issue. Part 4 develops the analytical part of this article and discusses several categories of variables that can influence the outcomes of enforcement proceedings. These variables are (a) whether the enforcement of intra-EU awards is sought in the UK, in the EU, or in a third country; (b) whether enforcement is sought pursuant to the New York Convention or the ICSID Convention, as the two different legal regimes affect whether a national court can refuse the enforcement of an award;<sup>24</sup> (c) whether certain key moments in the arbitral proceedings occurred before or after the end of the Brexit transitional period on 31 December 2020; and (d) whether the case was rendered under an intra-EU BIT or the ECT. The last part of the article is reserved for concluding remarks.

## 2. A few words about the enforcement of investment awards

International investment law is often praised (and criticized by opponents of the system) for having one of the best enforcement mechanisms of any system of international law.<sup>25</sup> When it comes to the enforcement of ITA awards there are several points of a general nature that need to be highlighted and several which are specific to the post-*Achmea* reality.

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22 *Inicia Zrt, Kintyre Kft and Magyar Farming Company Ltd v. Hungary*, ICSID Case No. ARB/17/27.

23 Scheu and Nikolov also argue that there is no simple 'yes-or-no' rule to the enforcement of intra-EU awards after *Achmea*, see Scheu and Nikolov 2020, p. 274.

24 In this paper I will focus on enforcement proceedings and not set-aside proceedings. The latter raises an interesting theoretical question. There is a chance that a non-ICSID, intra-EU award would be set aside by the national court of an EU Member State citing the award's incompatibility with EU law under *Achmea*, but a UK court might still go ahead and enforce the award in the UK.

25 Choukroune and Nedumpara, 2022, pp. 622–623. One of the most outspoken critics is Gus van Harten. For a critique of the investment law system, see van Harten, 2013.

Looking at some of the more general points, as is well known, ITA is a de-centralized system in which *ad hoc* tribunals are set up for each individual case. There are several international rules, and conventions, which govern the setting-up of arbitral tribunals, the conduct of proceedings, and the enforcement of the awards. Among these one could name the ICSID Convention, the ICSID Arbitration and Additional Facility Rules, or the UNCITRAL Arbitration Rules. The cases are most often conducted under the auspices of an arbitral institution, such as the Centre for the Settlement of Investment Disputes in Washington, the Stockholm Chamber of Commerce (SCC) or the Permanent Court of Arbitration (PCA). The most important difference in ITA is between ICSID and non-ICSID cases. This difference becomes especially important at the enforcement stage, when the ICSID Convention governs the enforcement of ICSID awards, but the enforcement of non-ICSID awards will be carried out pursuant to the New York Convention.<sup>26</sup>

In case of ICSID arbitrations, the ICSID Convention governs the enforcement of awards. Pursuant to art. 53(1) of the ICSID Convention, the arbitral award is binding on the contracting parties and shall not be subject to any form of appeal or review, except those provided for in the Convention. Furthermore, art. 54(1) of the Convention obliges the contracting parties to recognize the awards as binding and to enforce the pecuniary obligations, as if the awards were a final judgment of their courts. In other words, under the ICSID Convention national courts *cannot* review awards rendered pursuant to the ICSID Convention and must enforce them as final judgments of their own courts. In case one of the disputing parties is not satisfied with an award they can launch ICSID Annulment Proceedings under the limited grounds found in art. 52 of the Convention. On the other hand, in the case of non-ICSID arbitrations, an investor will seek recognition and enforcement pursuant to the New York Convention. Art. V of the New York Convention allows the courts where enforcement is sought to review the arbitral awards under a limited list of grounds, which mainly pertain to the validity of the arbitration agreement, the arbitrability of the issue (art. V.2(a) New York Convention), and fundamental issues affecting the conduct of the arbitral proceedings. Para. 2(b) of art. V also allows the local courts to refuse enforcement if the recognition or enforcement of the award would go counter to the public policy of the country where enforcement is sought.

Thus, in the simplest of terms, ICSID awards cannot be reviewed by the national courts where enforcement is sought, whilst non-ICSID awards can be reviewed by them under a limited set of grounds. However, things are not as simple as they seem.

Firstly, academic literature<sup>27</sup> and national court cases dealing with the enforcement of ITA awards make a difference between the enforcement or recognition of the award, on the one hand, and the actual *execution* of the award, on the other.<sup>28</sup> The first situation refers to the local courts' recognition of ITA awards as their own. This in most

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26 Sornarajah, 2021, pp. 379–415; Choukroune and Nedumpara, 2022, pp. 595–643.

27 Bjorklund et. al., 2021; Bohmer, 2016, pp. 240 and 246.

28 *Eiser Infrastructure Ltd v. Kingdom of Spain* [2020] FCA 157, NSD 601 and 602 of 2019.

cases is not problematic. However, the execution of the award, the actual freezing of the assets of another sovereign state within the territory of the executing country, is not a straightforward matter. For example, in the recent *Eiser v. Spain*<sup>29</sup> case before the Federal Court of Australia, in which the investor sought the enforcement of an award against Spain in Australia, the Australian court argued that the Australian Foreign States Immunities Act did not cover the recognition and enforcement of the award. Therefore, the intra-EU ICSID award could be enforced. Nevertheless, the Act *did* provide Spain with immunity from execution.<sup>30</sup> Thus, Spain's accounts could not be frozen. This difference between recognition/enforcement and execution is very problematic for the execution of ICSID awards when the laws of the place of enforcement make such a difference and include provisions on foreign state immunity. Furthermore, we do not yet possess any comprehensive data on the amounts of damages the investors actually manage to recover from the losing states.<sup>31</sup>

Secondly, even if the ICSID obligations are binding on 26 out of the 27 EU Member States (except Poland, which is not a party to the ICSID Convention), the enforcement of intra-EU ICSID awards will be met by the competing EU obligations of the Member States. As is well known, the CJEU held in *Achmea* that ITA provisions found in intra-EU BITs are precluded by arts. 267 and 344 TFEU. Thus, Member States cannot enforce such awards in the EU, creating a conflict between their international investment law obligations and their EU law ones. For example, in a more recent case before the Constitutional Court of Romania, the Romanian Court decided that the country's EU obligations prevailed over the competing international obligations under the ICSID Convention.<sup>32</sup>

The effects of *Achmea*, however, are not restricted to the investor-State arbitration clauses of intra-EU BITs. As mentioned in the Introduction, in the very recent *Moldova v. Komstroy* case the Grand Chamber has sealed the fate of the ECT's application to intra-EU disputes. Even though the preliminary reference to the Court of Justice from the Paris Court of Appeals concerned the interpretation of the term 'investment' under the ECT in an extra-EU case where the seat of arbitration was in an EU country, the Grand Chamber held in para. 41 of the judgment that 'it cannot be inferred that [art. 26(2)(c) of the ECT, providing for ISDS] also applies to a dispute between an operator from one Member State and another Member State.' In other words, the ISDS provisions of the ECT would not apply in an intra-EU setting.

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29 Ibid. I would like to thank Dr. Maxim Usynin for pointing out that in the 1980s the Paris Cour d'Appel denied the execution of four awards, with the seat of arbitration in France.

30 For a commentary see Gáspár-Szilágyi and Usynin, 2020, pp. 298–301.

31 In the upcoming years a research project at the PluriCourts Centre of Excellence, University of Oslo will look at the issue of compliance in international investment disputes. See PluriCourts, *New research project at PluriCourts: 'Compliance Politics in International Investment Disputes'* [Online]. Available at: <https://www.jus.uio.no/pluricourts/english/news-and-events/news/2021/240621-new-project-copiid.html> (Accessed: 28 July 2021).

32 Constitutional Court of Romania (*Curtea Constituțională a României*), Decision No 887 of 15 December 2015 ('Micula and European Foods').

In another very recent case, *Poland v. PL Holdings*, the Grand Chamber was faced with a reference from the Supreme Court of Sweden concerning the compatibility with EU law of an *ad hoc* arbitration agreement between a Member State and an investor from another Member State, the terms of which would be identical to the arbitration provisions of an intra-EU BIT. The Grand Chamber concluded, following its earlier reasoning in *Achmea*, that arts. 344 and 267 TFEU preclude national legislation allowing for such *ad hoc* arbitration, as otherwise the effects of *Achmea* could be easily circumvented.<sup>33</sup> We will return to these issues in Part 4.2 of the article. For now, it is important to understand that from the perspective of the CJEU the following are incompatible with EU law: investor-state arbitration clauses found in intra-EU BITs, the ISDS provisions of the ECT, and even *ad hoc* arbitration agreements between EU Member States and investors from other EU Member States that contain clauses identical to those found in intra-EU BITs.

As mentioned in the Introduction, the enforcement of intra-EU awards is not only a theoretical discussion, but it is a question with far reaching practical implications. For example, the *Magyar Farming* award, decided against Hungary under the ICSID Convention, will need to be enforced at one point in time if the Hungarian authorities do not comply with the award. Furthermore, there are several pending intra-EU BIT and ECT cases against Spain and Italy that involve UK investors.<sup>34</sup> It is also highly likely that following Brexit, and with the newest developments in *Komstroy* and *PL Holdings*, forum shopping will increase. EU investors with investments in other EU states will try to restructure their investments in such a way as to benefit from BITs concluded between the UK and EU Member States, which are now extra-EU BITs, and to benefit from the ECT in an extra-EU setting. This could then result in an increase of cases brought by UK investors against EU Member States.

### 3. Nothing in the Withdrawal Agreement or the new Trade Agreement?

The UK's relationship with the EU is governed by two sets of international agreements. First, there is the Withdrawal Agreement (WA), in which the terms of the 'divorce' between the two parties were laid down. Second, there is the Trade and Cooperation Agreement (TCA), in which the conditions for the 'new relationship' were included. Neither of the agreements include any provisions on intra-EU BITs or the enforcement of awards rendered under them.<sup>35</sup> Nonetheless, there are some provisions, which are important for our discussion in Part 4.

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33 CJEU, C-109/20, *Republiken Polen v. PL Holdings Sàrl* [2021] EU:C:2021:875, para. 47.

34 See fn. 19 above.

35 There are some provisions of the TCA that refer to investment protection standards after the end of the transition period. See Schwedt et al., 2021.



### ■ 1. *The Withdrawal Agreement and the UK Withdrawal Act 2018*

There are some provisions of the WA and of the 2018 UK Withdrawal Act transposing the WA into the UK legal system (UK Withdrawal Act<sup>36</sup>), which are potentially important for our discussion. However, the reader should be aware that some of the provisions of the WA and of the UK Withdrawal Act discussed in this section are not as clear cut as they might seem, and they raise separate issues of their own.

Disentangling the four-and-a-half-decade long relationship between the UK and the EU is not an easy task. Art. 4(1) of the WA provides that the provisions of the WA and of EU law made applicable by it ('retained law' under the UK Withdrawal Agreement) shall produce the same legal effects as they do in the EU and its Member States, allowing individuals to rely on them directly if they meet the conditions for direct effect. Art. 4(2) of the WA then obliges the UK to 'ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to *disapply* [emphasis added] inconsistent or incompatible domestic provisions, through domestic primary legislation'. One could call the latter provision the primacy or supremacy clause of the WA. Being a dualist country, the UK implemented the WA through the Withdrawal Act of 2018, which in sec. 5 (read together with sec. 25.4(a) of the 2020 Withdrawal Act) specifies that supremacy will only apply to law enacted before the 'exit day' (31 December 2021, 11 p.m.),<sup>37</sup> but not to law enacted afterwards. What exactly is meant by 'supremacy' in the UK Withdrawal Acts is beyond the scope of this article.<sup>38</sup> What matters is that the *Achmea* judgment meets the temporal requirement of the WA and of the Withdrawal Act as it was delivered before the end of the transition period. However, does the CJEU's judgment form part of the 'retained' EU law that has primacy over conflicting UK laws?

This question is mainly answered in the UK Withdrawal Act of 2018 with the caveat that there is ongoing academic discussion on the exact boundaries of what EU laws are part of the 'retained law'.<sup>39</sup> Whilst CJEU case-law delivered before the end of the transitional period is part of the retained law, sec. 6(4) of the 2018 Withdrawal Act mentions that the UK Supreme Court is *not* bound by any retained EU case-law.<sup>40</sup> This is quite important, as it means that the UK Supreme Court (UKSC) can diverge from the CJEU's application and interpretation of EU law delivered prior to the end of the transitional period, making part of the WA's and the Withdrawal Act's supremacy clause meaningless. In other words, under the UK Withdrawal Act the UKSC can depart for example from the *Achmea* judgment in an enforcement case involving an award based on an intra-EU BIT. As we shall see in Part 4.1, in 2020 the UKSC did not mention *Achmea* when it decided that the *Micula* award against Romania should be enforced.

36 There is also the UK Withdrawal Act of 2020, which complements the 2018 Withdrawal Act. Available at <https://www.legislation.gov.uk/ukpga/2020/1/contents> (Accessed: 28 July 2021).

37 sec. 20(1) of the 2018 Withdrawal Act.

38 See Kilford, 2021.

39 See Williams, 2020.

40 The text of the 2018 Withdrawal Act is available at <https://www.legislation.gov.uk/ukpga/2018/16/> (Accessed: 28 July 2021).

The WA also includes provisions on the legal treatment of CJEU cases involving the UK and preliminary references from UK courts or tribunals, which commenced or were made during the transitional period or soon after. Art. 86 of the WA provides that the CJEU shall continue to have jurisdiction in cases brought against or by the UK before the end of the transitional period of 31 December 2020<sup>41</sup> and shall continue to have jurisdiction to give preliminary rulings on requests from UK courts and tribunals made before the end of that period. In other words, the CJEU has jurisdiction for example over a preliminary reference made by a UK court concerning the enforcement of an intra-EU award, provided it was made prior to the end of the transitional period.<sup>42</sup> An example of the application of art. 86 of the WA in practice is the recently decided CJEU case of *CG v. The Department of Communities in Northern Ireland*,<sup>43</sup> in which the CJEU was asked to decide on whether a pre-settled EU citizen in Northern Ireland could receive social benefits.

Art. 87 of the WA also allows the Commission to bring infringement proceedings pursuant to art. 258 TFEU against the UK, up to 4 years after the end of the transition period, for breaches of the EU Treaties or certain parts of the WA. Very importantly, pursuant to art. 89 of the WA, judgments and orders of the CJEU handed down before the end of the transitional period as well as those handed down after the end of that period in proceedings brought under the afore-mentioned arts. 86 and 87 shall have binding force in the UK. Furthermore, pursuant to art. 4(5) of the WA, the UK judicial and administrative authorities ‘shall have due regard’ to the relevant CJEU cases handed down after the end of the transitional period when applying and interpreting the WA. However, as argued by Stanič, some of these provisions have been watered down in the internal UK acts transposing the WA into UK law.<sup>44</sup>

## ■ 2. *The Trade and Cooperation Agreement*

The TCA between the EU and the UK entered into force on 31 May 2021.<sup>45</sup> The agreement includes a chapter on services and investment (Title II, Chapter 1) and one on investment liberalization (Title II, Chapter 1). These chapters provide definitions of various terms, such as ‘investor’ and ‘investment’, and include provisions on national treatment and MFN treatment. However, they do not include investor-state dispute settlement and fall short of provisions regularly included in BITs.

The TCA is also silent on intra-EU BITs and the enforcement of intra-EU awards. Art. 2(1) of the TCA allows the contracting parties to conclude future bilateral agreements in order to supplement the TCA’s existing chapters covering investments. Whether this would include anything on intra-EU BITs is to be seen. Furthermore, the

41 See art. 126 of the Withdrawal Agreement (WA).

42 The author is not aware of UK courts making such preliminary references on the question of enforcement of intra-EU awards.

43 See CJEU, Case C-709/20, *CG v Department for Communities in Northern Ireland* [2021] ECLI:EU:C:2021:602, paras. 48 and 49.

44 Stanič, 2021.

45 European Commission, 2021a.

TCA in art. 8 also sets up – among others – a Trade Specialized Committee for Services, Investment, and Digital Trade to address matters relating to services, investment, and digital trade arising *under* the agreement. This means, that it is unlikely that this specialized committee would be competent to address matters relating to the enforcement of intra-EU arbitral awards, as these are not matters covered by the TCA.

In conclusion, both the WA and the TCA, as well as the 2018 UK Withdrawal Act, are silent on the enforcement of intra-EU arbitral awards. However, art. 86 of the WA could have resulted in the CJEU deciding on a preliminary reference from a UK court concerning the enforcement of intra-EU arbitral awards. Furthermore, it is important to note that under the UK Withdrawal Act, the UK Supreme Court is not bound by retained CJEU case-law, which allows it to depart from *Achmea*.

#### 4. A Matrix of issues

As mentioned in the Introduction, an analytical approach is to be favoured over a normative one. It is hard to say how some of the issues arising from the enforcement of intra-EU arbitral awards should be decided, since there are a handful of variables that can influence their outcome. We can group these variables into several categories, based on the questions we ask (*see* Figure 1).

No.	Variable	Possibilities	
1.	Country of Enforcement	a.	In the UK
		b.	In an EU Member State
		b.	In a third country
2.	Enforcement Regime	a.	ICSID Convention
		b.	New York Convention
3.	Temporal	a.	Before end of transition period
		b.	After end of transition period
4.	ECT	a.	Intra-EU
		b.	Extra-EU

Fig. 1. The multiple variables affecting the enforcement of intra-EU awards

Firstly, in which country is the investor seeking the enforcement of an intra-EU award? Are they seeking enforcement in the UK, an EU Member State, or in a third country? We should name this the *country of enforcement variable*. Secondly, under which legal regime is the investor seeking the enforcement of the intra-EU award? Pursuant to the ICSID Convention or the New York Convention? We can call this the *enforcement regime variable*.

Thirdly, there is also a *temporal variable*. For the purposes of this article, I will simplify this variable as it can have further ramifications, which will side-line

the main objective of the article to provide an analytical map for the enforcement of intra-EU awards post-Brexit. ITA proceedings on average last for approx. 4 years<sup>46</sup> and have several key moments: the moment the investor brings the claim, the moment the tribunal decides on its jurisdiction (either in the main award or in a separate award on jurisdiction if they decide to bifurcate the case), and the moment the final award is delivered. As mentioned in the Introduction, there are several pending investment arbitrations that were initiated under BITs concluded between the UK and EU Member States. Some of these cases were brought before the end of the Brexit transitional period, when the BITs under which the arbitrations were initiated were still intra-EU BITs. This poses serious questions concerning the jurisdiction of these tribunals since the proceedings were technically brought under intra-EU BITs, but a fundamental change of circumstances occurred (Brexit), making them extra-EU BITs. Even if the arbitral tribunals were to uphold their jurisdiction, EU Member State courts could possibly deny the future enforcement of the resulting awards if they were to consider that the cases were brought under intra-EU BITs, making their enforcement run counter to *Achmea*. For the purposes of this article, whether the arbitration was commenced before or after the ‘exit day’ is the most important temporal variable.<sup>47</sup> I also acknowledge that ITA tribunals have in rare cases denied jurisdiction, even after the jurisdiction stage was concluded, when the parties brought arguments that affected the very existence of the BITs in question.<sup>48</sup>

Fourthly, after *Komstroy* the Court of Justice will not allow the enforcement of ECT awards in an intra-EU setting. One could call this the *ECT variable*. The following sections are organised according to the country of enforcement variable and for each section, we will discuss the other variables as well.

### ■ 1. Enforcing intra-EU awards in the UK

To say that the legal rules surrounding the enforcement of intra-EU arbitral awards in the UK post-Brexit are tangled is an understatement. With reference to the discussion in Part 3, let us first untangle the rules and discuss how they *should* apply. Then let us turn to the 2020 enforcement case of the infamous *Micula* award before the UK Supreme Court (UKSC)<sup>49</sup> and see how the rules were actually applied in the UK.

46 Sinclair, 2009. He concluded that the 115 ICSID cases he analysed took on average 3.63 years to conclude; Kim, 2014. Kim’s analysis has concluded that ITA cases on average took 4.1 years to conclude.

47 I would like to thank Dr. Maxim Usynin for the extensive conversations we had over this matter, which helped me discuss the temporal variable in a more accessible way to the reader.

48 See for example *Oded Besserglik v. Republic of Mozambique*, ICSID Case No. ARB(AF)/14/2, Award (28 Oct 2019) in which Mozambique argued several years after the initiation of the arbitral proceedings that in fact the South Africa-Mozambique BIT never entered into force because Mozambique failed to notify South Africa that it had ratified the BIT. A frustrated arbitral tribunal in the end declined its jurisdiction. For a commentary see Gáspár-Szilágyi and Usynin, 2021, pp. 286–289.

49 *Micula and others v. Romania*, [2020] UKSC 5, 19 February 2020, Available at: <https://www.supremecourt.uk/cases/uksc-2018-0177.html> (Accessed: 28 July 2021). For a commentary see Florou 2019, pp. 84–87.

As mentioned in Part 3, the CJEU's case-law prior to the end of the transitional period forms part of the 'retained law' in the UK, which under the WA and the Withdrawal Act has supremacy over conflicting UK laws. However, sec. 6(4) of the UK Withdrawal Act mentions that the UKSC is not bound by the retained CJEU case-law. This is important as under UK law the Supreme Court can diverge from *Achmea*, but under the Withdrawal Agreement any UK rules that are in conflict with retained EU law should be disapplied. In other words, from the perspective of the WA *Achmea* should be followed by UK courts, but from the perspective of the UK Withdrawal Act, the Supreme Court can depart from *Achmea*.

Even if we were to follow the rules of the WA and not the UK Withdrawal Act, there is nothing in the WA on the post-Brexit enforcement of intra-EU awards. Thus, one would need to be careful in how certain temporal aspects are factored in. Firstly, was the intra-EU arbitration initiated *before* or *after* the transitional period? Secondly, is/was the *enforcement* of the intra-EU award sought before a UK court *before* or *after* the end of the transitional period?

After the end of the transitional period the UK is no longer an EU Member State. Thus, any arbitrations that were initiated under a UK-EU Member State BIT following this date would not constitute intra-EU arbitrations and the enforcement of the resulting awards should be allowed under both the ICSID and NY Conventions. On the other hand, if the arbitration commenced *before* the end of the transitional period, then it should be considered an intra-EU arbitration. Thus, *Achmea* should be binding, and the enforcement should be stopped. Then again, in this second scenario, there is still the question of when the enforcement is sought? If the arbitration started prior to the end of the transitional period, but enforcement is sought *after* the end of the period, *Achmea* should still function as retained EU law. If the arbitration was initiated prior to the end of the transitional period and the enforcement was sought *before* the end of that period, then *Achmea* was still part of the UK's EU law obligations. In other words, in the *Micula* case – an arbitration that was initiated and concluded well before the end of the transitional period and its enforcement was sought prior to the end of that period – the UK Supreme Court should have given priority to the *Achmea* judgment and not enforce the award. However, this is not what happened.

In a unanimous decision, the UKSC decided on 19 February 2020 that the *Micula v. Romania* intra-EU arbitral award *will* be enforced in the UK. The Supreme Court argued that the UK became a signatory to the ICSID Convention prior to the UK's EU membership and that there was no conflict between the UK's ICSID obligations and EU law under art. 351 TFEU.<sup>50</sup> Furthermore, it held that arts. 53 and 54 of the ICSID Convention imposed on the UK obligations which it owed to all ICSID members, not just EU Member States. The Court of Appeal in this case decided to stay the enforcement of the *Micula* award as there was an EU Commission Decision forbidding its enforcement due to the damages representing illegal state aid and because the case before the EU's

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<sup>50</sup> *Micula and others v. Romania*, [2020] UKSC 5, para. 97 and beyond.

General Court concerning the validity of the Commission Decision was under appeal before the Court of Justice. The Supreme Court, however, did not agree with this conclusion, citing the UK's obligations under arts. 53 and 54 of the ICSID Convention and held that the EU Treaties did not have any relevant effect.<sup>51</sup>

However, the UKSC's judgment is questionable in light of *Achmea*. The judgment did not take proper account of the UK's diverging EU and international law obligations under art. 351 TFEU prior to the end of the transition period. Whilst art. 351 TFEU allows for the continued existence of international agreements concluded by Member States prior to their accession to the EU (as is the UK's case with the ICSID Convention), Member States must ensure that there are no incompatibilities between those agreements and EU law. Following *Achmea* we know that there is such an incompatibility between investor-state arbitration provisions found in intra-EU BITs and the autonomy of the EU legal order. Thus, awards rendered pursuant to intra-EU BITs cannot be enforced within the EU legal order. This means that the ICSID obligation pursuant to which such an intra-EU award should be enforced could not trump the primacy of this EU obligation within the EU legal order. However, the UKSC did not see it this way.

It is interesting to note that nowhere in its judgment does the UKSC mention the existence of *Achmea* and the conflict between intra-EU BITs and EU law, which is very problematic. This cannot be ascribed to the UKSC not knowing about *Achmea*, since *Achmea* was delivered in 2018 whilst the appeal before the UKSC was registered a year later in 2019. However, it might be due to the lower courts not discussing *Achmea*, as the original enforcement cases before the lower courts – that were subsequently appealed – were brought prior to the delivery of the *Achmea* judgment. Nevertheless, it is somewhat perplexing that none of the disputing parties brought up the *Achmea* issue when the Court of Appeals case was appealed to the UKSC. Given how the UKSC concluded that there is no conflict between the EU obligations and the international obligations of Member States; and given how UKSC judgments have the value of precedent, it is most likely that in the UK all intra-EU awards will be enforced pursuant to the ICSID Convention, regardless of when the arbitration was initiated or when the enforcement of the award is sought.

However, there is still the question of enforcement pursuant to the New York Convention, to which the UK became a party (1975) after its accession to the European Communities (1973). Stanič argues that because of this, the UKSC's argument in *Micula* cannot be applied by analogy to the enforcement of intra-EU (both the ECT and BIT) awards under the New York Convention and there is considerable room for uncertainty.<sup>52</sup> However, I would argue that if the intra-EU arbitration started prior to the end of the transitional period, *Achmea* would need to prevail because the UK at that time was still a member of the EU. Then again, in light of the UKSC's judgment in *Micula*, it is doubtful whether UK courts would impede the enforcement of intra-EU awards under the New York Convention, arguing that *Achmea* formed part of the country's

51 *Micula and others v. Romania*, [2020] UKSC 5, paras. 86-87.

52 Stanič, 2021.

public policy pursuant to *Eco Swiss* (see Part 4.2). On the other hand, if the arbitration commenced after the transitional period, then at that moment in time the UK is not an EU member anymore and the enforcement of the intra-EU, non-ICSID award, should be carried out.

Lastly, there is the issue of forum shopping and a potential restructuring of intra-EU investments so as to benefit from the protections offered by BITs concluded by the UK with EU Member States. Pursuant to Brexit, the previous intra-EU BITs between the UK and 12 EU Member States<sup>53</sup> will operate as extra-EU BITs, even if the Commission has very recently sent a Reasoned Opinion to the UK to terminate its BITs with EU Member States. The Commission argues that in 2019 the UK declared that it would terminate them. However, the UK never signed the termination agreement.<sup>54</sup> Furthermore, following *Komstroy*, many EU firms wishing to benefit from the protections of the ECT might also want to restructure their operations in order to benefit from the UK's now extra-EU membership to the ECT. Such investment restructurings would raise concerns of forum shopping. For example, questions of jurisdiction *rationae temporis* would arise, if the restructuring occurred before or after the contested State measures, as well as questions of abuse of process.<sup>55</sup> The detailed analysis of such issues is beyond the scope of this article.

## ■ 2. Enforcing the awards in EU Member States

Enforcing intra-EU awards in EU Member States should be quite straightforward: *Achmea* precludes their enforcement. Furthermore, as we have seen, *Komstroy* precludes the enforcement of ECT awards in an intra-EU setting and *PL Holdings* even precludes the enforcement of awards based on *ad hoc* arbitration agreements between Member States and an EU investor, if those clauses are identical to ISDS clauses found in intra-EU BITs. However, there are some problematic areas.

Firstly, if we look at the *enforcement regime* variable, two situations need to be distinguished as they will affect the legal reasoning national courts can use. In the 26 EU Member States that are contracting parties to the ICSID Convention, if investors are seeking the enforcement of an intra-EU award rendered under the ICSID Convention, the national courts are faced with two competing obligations. On the one hand, there is their international obligation to enforce ICSID awards as if they were final judgments of their own. On the other hand, there are also the competing EU law obligations of these Member States within the EU legal order.

Many of the newer EU Member States have contracted into their EU law obligations after they had become parties to the ICSID Convention and to the now intra-EU BITs. From the perspective of EU law, under art. 351 TFEU such pre-accession agreements are not affected by EU law, provided they are compatible with it. Otherwise, the

53 With Bulgaria, Croatia, Czechia, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, and Slovenia. See Schwedt et al., 2021.

54 European Commission, 2021b.

55 See Wehland, 2020.

Member States must do everything possible to remove such incompatibilities, even by terminating the agreements.<sup>56</sup> In *Achmea* the CJEU held that such an incompatibility existed.<sup>57</sup> We have seen that 22 Member States are taking steps to terminate their intra-EU BITs to remove the incompatibilities, and that the Romanian Constitutional Court gave priority to the country's EU law obligations over its ICSID obligations. Thus, national courts will need to base their reasoning on art. 351 TFEU, the primacy of EU law over existing, conflicting international obligations, and the *Achmea* judgment in order not to face potential infringement proceedings. Nevertheless, in *PL Holdings* the Svea Court of Appeal was not willing to apply *Achmea* to *ad hoc* arbitration agreements.<sup>58</sup> Furthermore, in the *Micula* case, given the numerous enforcement cases launched by the investors, the Romanian authorities in the end decided to pay the damages to the investors, even though they are technically precluded to do so by EU law.<sup>59</sup>

In case the enforcement is sought under the New York Convention, then national courts would not have to resort to art. 351 TFEU and the primacy of EU law over national law. Art. V.1 of the Convention includes the public policy exception,<sup>60</sup> under which national courts could refuse to enforce the non-ICSID intra-EU awards. Following the CJEU's judgment in *Eco Swiss*, a strong argument can be made that Member State public policy also includes their EU law obligations.<sup>61</sup>

Secondly, there is also the *temporal variable*. This is important for cases brought under a UK-EU Member State BIT. In such a case, if the investor initiated the arbitration before the end of the transition period, an EU national court could argue that the UK was still bound by its EU law obligations, among which are those pursuant to *Achmea*. Thus, an arbitration that was initiated before the end of the transitional period pursuant to a UK-EU Member State BIT could not be enforced in an EU Member State. However, if the arbitration was brought under a UK-EU Member State BIT after the end of the transitional period, the resulting award should not be considered an intra-EU award anymore.

Thirdly, there is also the issue of whether the award was rendered pursuant to an intra-EU BIT or the ECT. Sometimes, they can be rendered under both, but those situations should be assimilated to those in which the award is rendered pursuant to only an intra-EU BIT. After *Komstroy* we can safely assume that the above-mentioned arguments for the enforcement of intra-EU awards can also be used for the enforcement of intra-EU ECT awards.

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56 CJEU, Joined Cases 209 to 213/84, *Criminal Proceedings Against Lucas Asjes and Others* [1986] ECLI:EU:C:1986:188; CJEU, Case C-62/98, *Commission v. Portugal* [2000] ECLI:EU:C:2000:358.

57 CJEU judgments in most cases clarify the law retroactively.

58 CJEU, C-109/20, *Republiken Polen v. PL Holdings Sàrl* [2021] EU:C:2021:875, paras. 29-30.

59 Costea, 2019.

60 See also Scheu and Nikolov, 2020, p. 270.

61 CJEU, Case C-126/97, *Eco Swiss v. Benetton International NV* [1999] ECLI:EU:C:1999:269. For a more detailed discussion of the possible impediments under Article V of the New York Convention, see Stanič, 2021.



### ■ 3. Enforcing the awards in third states

The enforcement of intra-EU awards in third states, whether awards rendered pursuant to UK-EU Member State BITs or pursuant to present intra-EU BITs, whether the arbitrations started before or after the end of the UK's transitional period, and whether the ECT was involved, might be a more straightforward matter. So far, we have some evidence from US courts when it comes to the enforcement of intra-EU awards.<sup>62</sup> Furthermore, as previously mentioned, there is also the difficulty of enforcing such awards if local state immunity laws exist (as seen in the Australian enforcement case) that allow for the enforcement of the awards but preclude their execution.

If enforcement is sought in an ICSID country for an ICSID award, then the case should be fairly clear. Under the ICSID Convention national courts *cannot* review ICSID awards and must treat them as final. Third country courts are not bound by EU law, and they should carry out their obligations pursuant to the ICSID Convention. Even in such a clear case, the actual enforcement cases in practice are not always straight forward as exemplified by some of the recent enforcement cases in the US in which the losing EU Member States and the Commission brought EU-law based arguments against the enforcement of ICSID awards.<sup>63</sup>

On the other hand, if enforcement is sought under the New York Convention, there is some room for the third country courts to review the intra-EU award. As mentioned in Part 2, there are several grounds under which the courts where enforcement is sought could refuse to recognise and enforce the award. Art.V.1(a) of the New York Convention mentions the invalidity of the agreement 'under the law to which the parties have subjected it' or under 'the law of the country where the award was made'. As to the first ground, the applicable law to an investor-state arbitration will often depend on the exact wording of the underlying BIT and whether this includes only the BIT, or other domestic and international rules applicable between the parties. As we have noted in a different article,<sup>64</sup> most ITA tribunals view EU law not as domestic law, but international law applicable between the parties and depending on the wording of the underlying BIT, EU law is treated either as law or fact. However, so far, no ITA tribunal has declined its jurisdiction following objections based on EU law and it is doubtful that a domestic court of enforcement outside of the EU will find that the underlying agreement to arbitrate is invalid pursuant to EU law objections. Looking at the second situation, the invalidity of the agreement under the law of the country where the award was made, if the arbitral tribunal had its seat in an EU Member State, then normally *Achmea* should preclude the existence of the agreement to arbitrate. However, if the seat of arbitration was outside of the EU, it is doubtful whether *Achmea* will matter to a non-EU court.

62 See USDC for the District of Columbia, *Novenergia II v. Kingdom of Spain* Civil Action No. 1:18-cv-1148 in which the investor is seeking to confirm an arbitral award against Spain; US District Court for the District of Columbia, *Viorel Micula v. The Government of Romania*, Civil No 1:14-cv-00600, Decision on the Claimant's Motion to confirm the ICSID Award.

63 Ibid.

64 Gáspár-Szilágyi and Usynin, 2019, pp. 33–42.

There are two more grounds of refusal under art. V.2 of the New York Convention that could possibly be used by an EU Member State challenging the recognition and enforcement of an intra-EU award in a third country: (a) the subject matter of the difference is not capable of being settled via arbitration (lack of arbitrability), and (b) recognition and enforcement would go against the enforcing country's public policy. As regards the lack of arbitrability, once again it will depend on how the third country court views *Achmea* and the role of EU law in the arbitration. Since the intra-EU BITs are yet to be terminated and not all Member States are willing to terminate them, it is once again doubtful that a third country court would conclude that a validly concluded international investment agreement did not give rise to a valid dispute which can be subject to arbitration. Concerning the public policy ground of refusal, as mentioned, this can most likely be used before EU Member States courts pursuant to *Eco Swiss*. However, in non-EU countries there does not seem to be any public policy ground upon which an intra-EU award could be challenged. As seen with the Australian enforcement case of *Eiser v. Spain*, EU Member States might not have to pay damages if they are immune from execution under the third country's national laws.

In conclusion, the enforcement and recognition of intra-EU awards in third countries (excluding EU Member States and the UK) will most probably move forward under both the ICSID and New York Conventions. However, the presence of national sovereign immunity rules in the country of enforcement might shield EU Member States from the execution of their assets.

## 5. Conclusions

The purpose of this article was to highlight and discuss the various issues surrounding the enforcement of intra-EU arbitral awards in the post-*Achmea* and post-Brexit world. Instead of a normative approach, I preferred to use an analytical approach, due to the complexity of the topic and the multiple variables involved. Because of this complexity there is no clear answer as to how the various issues should be solved. The outcomes of the enforcement cases will depend on the country where enforcement is sought (EU Member States, the UK, or other third countries), on the legal regime pursuant to which enforcement is sought (the New York Convention or the ICSID Convention), various temporal factors (whether certain key moments in the arbitral proceedings occurred before or after the end of the Brexit transition period), and whether we are dealing with intra-EU cases pursuant to intra-EU BITs or the ECT.

This tangled outcome is most unfortunate as it creates uncertainty for both investors and host States. Furthermore, it puts courts in the countries of enforcement in the difficult position of deciding whether they should honour their own international obligations pursuant to the ICSID and the New York Conventions, or whether they should take into account the 'internal' EU law obligations of EU Member States. The *Micula* case is a prime example of how the outcome will differ depending on where

enforcement is sought. The Romanian Constitutional Court gave priority to Romania's EU law obligations over its ICSID obligations; the EU General Court's judgment (under appeal) was not favourable to the Commission's decision on qualifying the damages as stated aid; the Romanian Government after years of protracted enforcement cases on several continents decided to pay the damages to the investors; and the UK Supreme Court decided that Romania's international obligations had to be carried out and found no conflict between the UK's ICSID and EU law obligations.

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