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Beyond Achmea: Recent EU Precedents and Emerging Tensions in Arbitration

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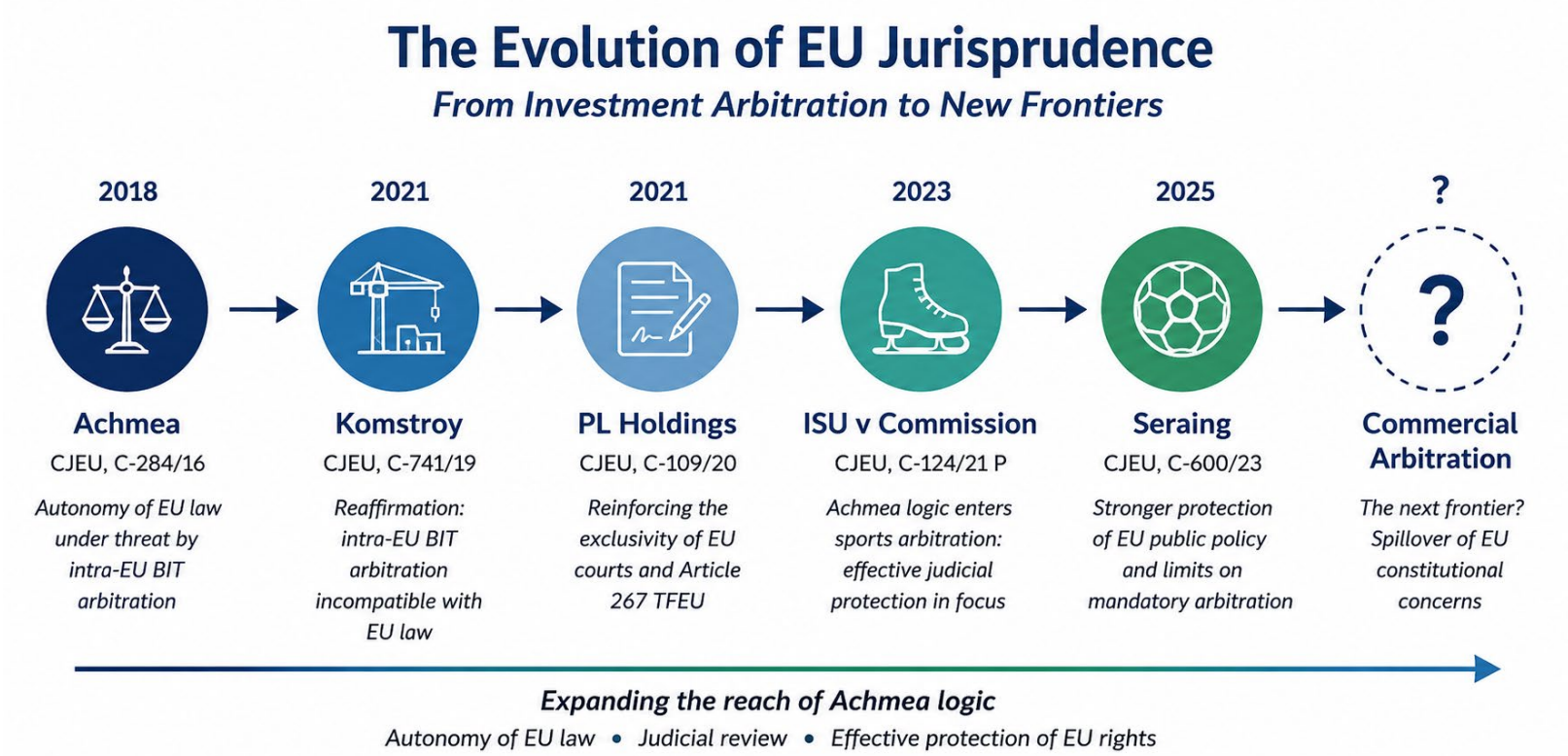
CYPRUS ARBITRATION DAY

INTRODUCTION

Achmea may no longer be limited to ISDS



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From BITs to ECT
C-741/19 Republic of Moldova v. Komstroy

- ECT based intra-EU arbitrations are contrary to EU law

- CJEU extended *Achmea* noting that:

  - Arbitral Tribunals constituted under Article 26(6) ECT are required to interpret, and even apply, EU law;
  - Such tribunals are not located within the judicial system of the EU and cannot be regarded as a court or tribunal of a Member State within the meaning of Article 267 TFEU, and
  - Awards rendered pursuant to Article 26 ECT are not subject to review by a court of a Member State capable of ensuring full compliance with EU law **and** ensuring questions of EU law may be submitted to the CJEU if needed.

- CJEU moved from bilateral treaties toward multilateral treaty arbitration.

- Concern is structural rather than treaty specific.

From BITs to ECT
C-741/19 Republic of Moldova v. Komstroy

"...the exercise of the European Union's competence in international matters cannot extend to permitting, in an international agreement, a provision according to which a dispute between an investor of one Member State and another Member State concerning EU law may be removed from the judicial system of the European Union such that the full effectiveness of that law is not guaranteed."

"Such a possibility would, as the Court held in [...] Achmea[...] ***call into question the preservation of the autonomy and of the particular nature of the law established by the Treaties****, ensured in particular by the preliminary ruling procedure provided for in Article 267 TFEU."*

"It is true that, ***in relation to commercial arbitration****, the Court has held that the requirements of efficient arbitration proceedings justify the review of arbitral awards by the courts of the Member States being limited in scope,* ***provided that the fundamental provisions of EU law can be examined in the course of that review and they can, if necessary, be the subject of a reference to the Court for a preliminary ruling****..."*

C-109/20 PL Holdings v Poland

- Moving from invalidating a treaty clause to policing functional equivalents
- **Core issue:** Could a MS cure the incompatibility found in *Achmea* by entering into an ad hoc arbitration agreement after the dispute arose?
- CJEU rules that Articles 267 and 344 TFEU precluded national legislation that allows MS to conclude ad hoc arbitration agreements with an investor from another MS, where the content of such agreement is identical to that of the invalid arbitration clause contained in a BIT.
- Even consensual arbitration agreements cannot bypass EU constitutional requirements where they replicate invalid intra-EU investment arbitration.

C-109/20 PL Holdings v Poland

"47. To allow a Member State, which is a party to a dispute which may concern the application and interpretation of EU law, to submit that dispute to an arbitral body with the same characteristics as the body referred to in an invalid arbitration clause contained in an international agreement such as the one referred to in paragraph 44 above, by concluding an ad hoc arbitration agreement with the same content as that clause, ***would in fact entail a circumvention of the obligations arising for that Member State under the Treaties and, specifically, under Article 4(3) TEU and Articles 267 and 344 TFEU, as interpreted in the judgment of 6 March 2018, Achmea (C-284/16, EU:C:2018:158).***"

"52. Lastly, it follows both from the judgment of 6 March 2018, Achmea (C-284/16, EU:C:2018:158), and from the ***principles of the primacy of EU law and of sincere cooperation****, not only that the Member States cannot undertake to remove from the judicial system of the European Union disputes which may concern the application and interpretation of EU law, but also that, where such a dispute is brought before an arbitration body on the basis of an undertaking which is contrary to EU law,* ***they are required to challenge, before that arbitration body or before the court with jurisdiction, the validity of the arbitration clause or the ad hoc arbitration agreement on the basis of which the dispute was brought before that arbitration bo****dy."*

C-124/21 – International Skating Union v European Commission

- Spillover into another arbitration ecosystem; bridge between investment arbitration and sports arbitration

- **Core issue:** Whether ISU rules requiring disputes to go to CAS arbitration restricted competition contrary to EU law.

- CJEU upheld the Commission's findings that the ISU rules infringed EU competition law

- Concerns:
  - CAS Arbitration effectively mandatory, seated outside EU (Switzerland) and subject only to limited Swiss judicial review
  - EU competition rights may not receive sufficient protection

- CJEU stresses that decisions affecting EU rights must remain subject to adequate judicial review

- Reasoning strongly mirrors Achmea

C-124/21 – International Skating Union v European Commission

"…rules such as the prior authorisation and eligibility rules must be subject to effective judicial review…"

"It must be held, on the contrary, that some of those findings, ***such as those relating to the lack of possibility of subjecting CAS awards to judicial review to ensure compliance with the provisions of public policy of EU law, if necessary using the procedure laid down in Article 267 TFEU, are correct,*** *and others, such as those to the effect that the arbitration mechanism at issue in the present case is, in practice, imposed unilaterally by the ISU on athletes,* ***reflect those of the European Court of Human Rights in that regard*** *(ECtHR, 2 October 2018, Mutu and Pechstein v. Switzerland, CE:ECHR:2018:1002JUD004057510, §§ 109 to 115).*

C-600/23 Royal Football Club Seraing v FIFA

- **Core issue:** Whether mandatory sports arbitration and the effects of CAS awards are compatible with EU law guarantees of judicial protection

- Does the principle of effective judicial protection preclude the *res judicata* effects of CAS awards?

- CJEU: for an award to have *res judicata* status, it must have been effectively scrutinised for possible violations of EU *ordre public*.

- Individuals not prevented from having recourse to arbitration, so long as it remains **possible** for the individuals concerned by the arbitration award to obtain a review, by a court or tribunal of a Member State, as to whether the award is consistent with the principles and provisions which form part of EU public polic.

C-600/23 Royal Football Club Seraing v FIFA

- Freedom of movement for workers, freedom to provide services and free movement of capital form part of EU public policy

- Arbitration mechanisms employed by sports associations like FIFA are, in effect, unilaterally imposed on athletes and clubs through the associations' rules.

- Sports associations **must put in place an arbitration mechanism that is subject to a direct legal remedy within the EU** or possibility to obtain effective judicial review from any court or tribunal of MS

- Courts and tribunals **must carry out review for compliance with EU public policy & be able to draw appropriate legal conclusions were there is infringement**

- Courts and tribunals **must be able to grant interim measures** which ensure full effectiveness of judgment to be given on the merits

UEFA introducing Dublin as an alternative seat of arbitration for CAS proceedings beginning July 1, 2026

What about commercial arbitration?
C-126/97 Eco Swiss China Time Ltd v Benetton International NV

- **EU competition law forms part of EU public policy** and may justify annulment review of arbitration awards.

- Where fundamental rules of EU public policy are applicable, the EU legal order requires a degree of oversight by Member State Courts.

"37. It follows that where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 85(1) of the Treaty.
[...]
39. For the reasons stated in paragraph 36 above, the provisions of Article 85 of the Treaty may be regarded as a matter of public policy within the meaning of the New York Convention."

Spillover Risks for Commercial Arbitration?

Why spillover may be possible	Why commercial arbitration may survive
• Emphasis on EU public policy • Strong insistence on judicial review • Suspicion toward arbitral systems outside of EU control • Expanding concept of “effective judicial protection”	• Usually genuinely consensual • National courts remain involved at enforcement / set aside stage • CJEU has differentiated commercial arbitration see *Eco Swiss, Komstroy* • No blanket anti-arbitration position

THANK YOU

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