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Where to Go: Examining Enforcement of Intra-European Union Arbitration Awards in the United States and United Kingdom Post-Achmea

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INTRODUCTION

European nations have led the world for over half a century in protecting foreign investors through an international investment agreement called a bilateral investment treaty ("BIT").[1] Although the first BITs did not include provisions permitting investor-state arbitration, not long after, they became standard in BITs as a means of dispute settlement.[2] There are currently over 2,500 BITs in force, including almost every country worldwide.[3] Despite the widespread adoption of BITs and investor-state arbitration, neither is without criticisms.[4] Some criticisms include inconsistent and unpredictable decisions, a lack of transparency in proceedings, a lack of independence and impartiality from the arbitration tribunals, high costs for host states, and the chilling effect on host states' regulatory powers.[5] These criticisms have led to some scaling back of investor-state arbitration, and the European Union is one of the leaders in this effort.[6]

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[1] *See* RUDOLF DOLZER ET AL., PRINCIPLES OF INTERNATIONAL INVESTMENT LAW, at 2-15 (3d ed. 2022). The first BIT was concluded between Germany and Pakistan in 1959 as a part of a German strategy to protect the foreign investments of its own companies. Other European countries followed soon after with Switzerland concluding its first BIT in 1961 and France in 1972. *See id.*; *see also* Treaty for the Promotion and Protection of Investments, Ger.-Pak. BIT Nov. 25, 1959, 457 U.N.T.S. 6575 [hereinafter Ger.-Pak. BIT].

[2] *See* DOLZER ET AL, *supra* note 1, at 2-15. The first BIT to include an arbitration provision allowing dispute settlement directly between the host state and foreign investors was the Chad-Italy BIT concluded in 1969. Prior to the Chad-Italy BIT, most BITs included provisions for dispute settlement through the International Court of Justice or state-state arbitration. *See id.*; *see also* Ger.-Pak. BIT, Art. 11.

[3] *See* U.N. CONF. ON TRADE AND DEV., *IIA Navigator Update: New Treaties, In Force Dates and Terminations* (Apr. 13, 2023, https://investmentpolicy.unctad.org/news/hub/1716/20230413-iia-navigator-update-new-treaties-in-force-dates-and-terminations.

[4] *See* Marta Latek & Laura Puccio, *Investor-State Dispute Settlement (ISDS) State of Play and Prospects for Reform*, EUROPEAN PARLIAMENTARY RESEARCH SERVICE (Jan. 2015), https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/545736/EPRS_BRI%282015%29545736_EN.pdf.

[5] *See id.* Investor-state arbitration has been criticized as a "toxic mechanism" that allows foreign companies doing business in a host state to seek compensation and challenge public health, environmental, or social protection laws in host states that the companies think may harm its profits. *See id.*

[6] *See id.*; DOLZER ET AL, *supra* note 1, at 14. Issues with investor-state arbitration came to the forefront with the negotiations of recent multilateral trade agreements, such as the Comprehensive Economic Trade Agreement and the Transatlantic Trade and Investment Partnership Agreement. Some countries, like Australia, have gone as far as to announce that future BITs will not contain investor-state arbitration agreements. The European Commission has made clear that it wants to terminate all intra-European Union BITs and has taken steps to do so. *See id*.

Over the past few decades, there was a concerted effort within the European Union to end intra-European Union investor-state arbitration.[7] This effort picked up significantly after the Court of Justice of the European Union's ("CJEU") 2018 judgment in *Slovakia v. Achmea BV*.[8] In *Achmea*, the CJEU held that the arbitration provision in an intra-European Union BIT was invalid under European Union law.[9] Following the *Achmea* judgment, the European Commission rallied 23 Member States to sign an agreement to terminate 130 intra-European Union BITs.[10] In 2021, the CJEU issued its next major intra-European Union arbitration decision in *Moldova v. Komstroy LLC*.[11] In *Komstroy*, the CJEU extended *Achmea* and held that the Energy Charter Treaty ("ECT")

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[7] *See, e.g.*, Mark W. Friedman et al., *The Continued Push Against Investor-State Dispute Settlement in Europe and the Way Ahead*, DEBEVOISE & PLIMPTON, (Mar. 13, 2023), https://www.debevoise.com/-/media/files/insights/publications/2023/03/13_the-continued-push-against-investorstate.pdf?rev=42ad15c1999845d79da731dccfbdd19b&hash=0687AB36793E283D50AC0E8FBF04154C (explaining the current landscape of intra-European Union investor-state arbitration and how various Member State courts have annulled or refused to enforce intra-European Union arbitration awards); DIRECTORATE-GEN. FOR FIN. STABILITY, FIN. SERVS. AND CAP. MKTS. UNION, *EU Member States Sign an Agreement for the Termination of Intra-EU Bilateral Investment Treaties* (May 5, 2020), https://finance.ec.europa.eu/publications/eu-member-states-sign-agreement-termination-intra-eu-bilateral-investment-treaties_en (discussing the agreement reached by a plurality of European Union Member States in October 2019 to terminate intra-European Union BITs because they are incompatible with European Union law); Monika Dulian, *EU withdrawal from the Energy Charter Treaty*, EUROPEAN PARLIAMENTARY RESEARCH SERVICE (Dec. 2020), https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/754632/EPRS_BRI(2023)754632_EN.pdf (discussing the European Commission's proposal of a coordinated withdrawal from the Energy Charter Treaty in part because of concerns over the investor-state dispute settlement mechanism in the treaty that requires investor-state arbitration).

[8] *See* Cyrus Benson et al., *The Latest Chapter of the Intra-EU Investment Arbitration Saga: What It Entails for the Protection of Intra-EU Investments and Enforcement of Intra-EU Arbitral Awards*, GIBSON DUNN (Feb. 4, 2022), https://www.gibsondunn.com/wp-content/uploads/2022/02/the-latest-chapter-of-the-intra-eu-investment-arbitration-saga-what-it-entails-for-the-protection-of-intra-eu-investments-and-enforcement-of-intra-eu-arbitral-awards.pdf (discussing the latest developments intra-European Union investor-state arbitration post-*Achmea*)

[9] *See* Slovakia v. Achmea BV, Case C-284/16 (Mar. 6, 2018), ¶ 60, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016CJ0284; *see also* Benson et al., *supra* note 8.

[10] *See* Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, 2020 O.J. C63/1 [hereinafter Termination Agreement]. The 23 Member States are: Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, and Spain. Four Member States—Austria, Finland, Ireland, and Sweden—did not sign onto the agreement and BITs concluded by those Member States were not affected by the Termination Agreement. Additionally, the United Kingdom had withdrawn from the European Union prior to the conclusion of the termination agreement and therefore the United Kingdom's BITs with European Union Member States remained in force. *See* Cyrus Benson et al., *The Termination of Intra-EU Bilateral Investment Treaties and the Impact on Foreign Investment Protection in Europe*, GIBSON DUNN (Mat 13, 2020), https://www.gibsondunn.com/wp-content/uploads/2020/05/termination-of-intra-eu-bilateral-investment-treaties-and-the-impact-on-foreign-investment-protection-in-europe.pdf.

[11] *See* Moldova v. Komstroy LLC, Case C-741/19 (Sept. 2, 2021), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62019CJ0741.

arbitration provision was invalid under European Union law.[12] The final case in the *Achmea* line, *Poland v. PL Holdings Sàrl*, came in 2021.[13] In *PL Holdings*, the CJEU held that an ad hoc arbitration agreement that mirrored the arbitration agreements contained in intra-European Union BITs is also invalid under European Union law.[14] This trilogy of cases profoundly impacted the landscape of intra-European Union investor-state arbitration and led to uncertainty among investors with outstanding arbitral awards.[15]

Following the *Achmea*, *Komstroy*, and *PL Holdings* judgments, investors have had to look outside the European Union to enforce arbitration awards against Member States.[16] Two promising jurisdictions for enforcing intra-European Union arbitration awards are the United States and the United Kingdom.[17] The United States had previously been a solid venue for enforcing intra-

[12] *See id.* ¶ 66. The ECT is an international multilateral treaty aimed at promoting long-term cooperation in the energy sector. The ECT entered into force in April 1998 and has 53 signatories and contracting parties, including the European Union and every Member State, except Italy. The ECT contains an arbitration provision that allows investors submit disputes to international investor-state arbitration tribunals. *See The Energy Charter Treaty*, GLOBAL ARBITRATION REVIEW (Nov. 10, 2020), https://globalarbitrationreview.com/guide/the-guide-energy-arbitrations/4th-edition/article/the-energy-charter-treaty; *see also* The Energy Charter Treaty preamble & Art. 3, Dec. 17, 1994, 2080 U.N.T.S. 36116 [hereinafter ECT].

[13] *See* Poland v. PL Holdings Sàrl, Case C-109/20 (Oct. 26, 2021), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62020CJ0109.

[14] *See id.* ¶ 47. Ad hoc arbitration agreements are those where the parties independently, outside of any previous agreement, consent to arbitration and determine the applicable rules. *See* ANDREW TWEEDDALE & KEREN TWEEDDALE, ARBITRATION OF COMMERCIAL DISPUTES: INTERNATIONAL AND ENGLISH LAW AND PRACTICE 61 (Feb. 24, 2005).

[15] *See Intra-EU Investment Arbitration: Impact of EU Member States' Declarations in the Wake of Achmea*, ACERIS LAW LLC (June 5, 2019), https://www.acerislaw.com/intra-eu-investment-arbitration-impact-of-eu-member-states-declarations-in-the-wake-of-achmea/ (discussing uncertainty in the arbitration field following *Achmea*, *Komstroy*, and *PL Holdings*); *see also* Sherina Petit et al., *Investment protection post-Achmea*, INTERNATIONAL ARBITRATION REPORT, (Norton Rose Fulbright), May 2019, at 30-31.

[16] *See, e.g.*, Loujaine Kahalen et al., *2024 PAW: Swords and Shields—Navigating Current Trends in Enforcing Arbitral Awards*, WOLTERS KLUWER (Apr. 11, 2024), https://arbitrationblog.kluwerarbitration.com/2024/04/11/2024-paw-swords-and-shields-navigating-current-trends-in-enforcing-arbitral-awards/ (discussing how enforcement of intra-European Union arbitration awards had no chance in European Union Member States after *Achmea*); Friedman et al., *supra* note 7.

[17] *See* Kahalen et al., *supra* note 16; Nurlana Dunyamaliyeva, Enforcement of Intra-EU Investment Arbitration Awards in the UK: Achmea, Micula and Beyond (unpublished manuscript) (Apr. 26, 2021), https://dx.doi.org/10.2139/ssrn.3833339. In addition to the United States and the United Kingdom, Australia has also been seen as a possible jurisdiction for enforcement of intra-European Union arbitration awards. However, for the purposes of this paper, Australia will not be examined in detail. *See* Kahalen et al., *supra* note 16.

European Union arbitration awards.[18] However, in 2023, two judges in the District Court for the District of Columbia ("D.D.C.") issued conflicting decisions on the enforceability of intra-European Union arbitration awards, and the issue is currently pending with the Court of Appeals for the District of Columbia ("D.C. Circuit").[19] The United Kingdom has also shown to be an arbitration-friendly jurisdiction, with the United Kingdom Supreme Court ("UKSC") ruling that the lower court impermissibly granted the stay of enforcement in a longstanding enforcement proceeding, paving the way for future enforcement of arbitration awards in the United Kingdom.[20]

The root of the United States and the United Kingdom's willingness to enforce investor-state arbitration awards stems from their obligations under international treaties.[21] The two main enforcement regimes in investor-state arbitration are the International Centre for Settlement of Investment Disputes Convention ("ICSID Convention") and the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").[22] Enforcement of investor-state arbitration awards is a two-step process.[23] First, the award must be

[18] *See* Micula v. Romania, 404 F. Supp. 3d 265 (D.D.C. 2019), aff'd, 805 F. App'x 1 (D.C. Cir. 2020)
[19] *Compare* Nextera Energy Glob. Holdings B.V. v. Spain, 656 F. Supp. 3d 201, 207 (D.D.C. 2023) (rejecting the intra-European Union objection to enforcement) *and* 9REN Holding S.À.R.L. v. Spain, No. 19-CV-01871 (TSC), 2023 WL 2016933, at * 6 (D.D.C. Feb. 15, 2023) (rejecting the intra-European Union objection to enforcement), *with* Blasket Renewable Invs., LLC v. Spain, 665 F. Supp. 3d 1 (D.D.C. 2023) (considering the intra-European Union objection and denying enforcement of the arbitration award). *See* Noiana Marigo et al., *Enforcement of intra-EU Awards: Current Outlook*, FRESHFIELDS BRUCKHAUS DERINGER (May 25, 2023), https://riskandcompliance.freshfields.com/post/102ifi6/enforcement-of-intra-eu-awards-current-outlook. (discussing enforcement of intra-European Union arbitration awards in different jurisdiction outside of the European Union).
[20] *See* Micula and others v. Romania [2020] UKSC 5; *see also* Dunyamaliyeva *supra* note 13.
[21] *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention]; United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3 [hereinafter New York Convention].
[22] *See* ICSID Convention, *supra* note 21; New York Convention, *supra* note 21; *see also Enforcement of Investment Arbitration Awards*, ACERIS LAW LLC (Dec. 15, 2023), https://www.acerislaw.com/enforcement-of-investment-arbitration-awards/ [hereinafter ACERIS LAW]; Leonard Borlini & Stegano Silingardi, *Enforcement of Investment Arbitration Awards*, *in* HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY (Julien Chaisse et al. eds., 2021), 1475, 1477.
[23] *See* ACERIS LAW, *supra* note 22.

recognized and converted to a domestic judgment.[24] Second, courts enforce the according to the domestic procedure on the execution of judgments.[25]

States are limited in their ability to unilaterally deny enforcement of an arbitration award under the ICSID Convention and New York Convention.[26] In the United States, two separate federal laws govern the enforcement of investor-state arbitration awards.[27] Title 22 and Title 9 of the United States Code govern the enforcement of arbitration awards rendered under ICSID and non-ICSID arbitration tribunals, respectively.[28] Additionally, and most importantly for challenging arbitration awards against States, the Foreign Sovereign Immunities Act of 1979 ("FSIA") exempts foreign sovereigns from the jurisdiction of United States courts, with some exceptions.[29] The two relevant exceptions here are the waiver and arbitration exceptions.[30] These two exceptions are the

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[24] *See id.*

[25] *See id.* Generally, the form of the enforcement proceeding is left to the enforcing jurisdiction's domestic law. The New York Convention only adds that states may not discriminate against foreign arbitration award compared to domestic awards. *See* FRANCO FERRARI & BRIAN KING, INTERNATIONAL INVESTMENT ARBITRATION IN A NUTSHELL (1st ed. 2020); New York Convention art. IV, *supra* note 21.

[26] *See* New York Convention art. V(1), *supra* note 21; ICSID Convention art. 53, *supra* note 21. The New York Convention allows a contracting party to deny enforcement of an arbitration award for the following reasons: (1) invalidity of the agreement to arbitrate, (2) due process, (3) excess of mandate, (4) improper constitution, (5) award not yet binding or set aside, (6) non-arbitrability, and (7) public policy. *See* New York Convention art. V(1), *supra* note 21. ICSID awards are not subject to review outside of the review provided under the ICSID Convention itself. *See* ICSID Convention art. 53, *supra* note 21.

[27] *See* Cristian Gallorini, *The Termination of Intra-EU Investor-State Arbitration and the Enforceability of Intra-EU Awards in the United States District Courts*, 2022 ELTE L.J. 25, 42 (2022) (discussing how enforcement proceedings vary based on the underlying rules the arbitration was brought under, ICSID versus non-ICSID).

[28] *See* 22 U.S.C. § 1650a (2022); 9 U.S.C. §§ 1-307 (2020); *see also* Gallorini *supra* note 27, at 42. 22 U.S.C. § 1650a grants federal courts exclusive jurisdiction to enforce ICSID awards and states that ICSID arbitration awards "shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States." ICSID arbitration awards are not reviewable outside of the procedures in the ICSID convention, limiting possible challenges in national courts. *See* 22 U.S.C. § 1650a (2022). 9 U.S.C. §§ 201-208 incorporated the New York Convention into the Federal Arbitration Act and applies to non-ICSID arbitration awards. *See* 9 U.S.C. §§ 1-307 (2020); *see also* Gallorini *supra* note 27, at 42.

[29] *See* 28 U.S.C. § 1605 (2022); *see also* Gallorini *supra* note 27, at 42. It is necessary to look to the FSIA because the Title 9 and 22 are not independent sources of jurisdiction over foreign sovereigns. *See* Mobil Cerro Negro, Ltd. v. Venezuela, 863 F.3d 96, 113 (2d Cir. 2017). In addition to jurisdictional aspects, the FSIA provides that a civil action can always be brought against a foreign sovereign in the D.D.C., giving the court venue regardless of contract, presence of assets, or residency of the parties in the D.D.C. *See* 28 U.S.C. § 1605 (2022); *see also* Gallorini *supra* note 27, at 42.

[30] Gallorini, *supra* note 27, at 42-43. The waiver exception provides that states are not immune from the jurisdiction of United States Courts when "the foreign state has waived its immunity either explicitly or by implication." The arbitration exception removes the immunity of a foreign state when the proceeding is brought "to confirm an award made pursuant to such an agreement to arbitrate[.]" *See* 28 U.S.C. § 1605(a)(1) & (6).

central issue in most award enforcement proceedings currently pending in the District Courts to enforce intra-European Union arbitration awards.[31]

The State Immunity Act of 1978 ("SIA") governs the enforcement of arbitration awards involving foreign states in the United Kingdom.[32] Foreign states enjoy sovereign immunity from jurisdiction in the United Kingdom unless one of the exceptions applies.[33] Like the FSIA in the United States, the SIA included an exception to immunity for arbitration. As in the cases in the United States, the arbitration exception to the SIA was a prominent issue in the enforcement proceedings brought in United Kingdom courts.[34]

This paper examines the recent caselaw in the European Union on the enforceability of intra-European Union arbitration awards. Then, this paper compares and analyzes the judicial responses in the United States and the United Kingdom. Section I reviews the *Achmea*, *Komstroy*, and *PL Holdings* judgments from the CJEU that found intra-European Union investor-state arbitration agreements were invalid under European Union Law. Section II examines cases from the United States and the United Kingdom on the enforceability of intra-European Union investor-state arbitration awards in those states. Section III compares and analyzes the responses of courts in the United States and the United Kingdom to determine which jurisdiction is better for investors seeking to enforce intra-European Union arbitration awards. Finally, this paper concludes that the United Kingdom is a more stable jurisdiction than the United States for investors to bring enforcement proceedings against European Union Member States to enforce intra-European Union investor-state arbitration awards.

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[31] *See* Gallorini *supra* note 27, at 43 (discussing how the FSIA exceptions are the best possible avenues for foreign states to challenge intra-European Union arbitration awards in the wake of *Achmea*, *Komstroy*, and *PL Holdings*).
[32] *See* State Immunity Act 1978, c. 33 (U.K.).
[33] *See id.*
[34] *See* Micula and others v. Romania [2020] UKSC 5; Infrastructure Services Luxembourg S.À.R.L. v. Energia Thermosolar B.V., [2023] EWHC 1226 (Comm) (Eng.).

I. COURT OF JUSTICE OF THE EUROPEAN UNION CASES

Since 2018, the CJEU has issued a trilogy of judgments—*Achmea*, *Komstroy*, and *PL Holdings*—with far-reaching implications that reshaped the landscape of intra-European Union investor-state arbitration.[35] The groundbreaking judgment in *Achmea* held that the arbitration provision in an intra-European Union BIT was invalid under European Union law.[36] The holding in *Achmea* was extended in *Komstroy* to the arbitration provision in the ECT, as it applied to Member States.[37] Finally, the CJEU extended *Achmea* again in *PL Holdings* to invalidate an ad hoc agreement to arbitrate between a Member State and an investor identical to the arbitration provisions in the previously invalid BITs.[38] These three judgments made the stance of the CJEU and the broader European Union clear that intra-European Union investor-state arbitration was not compatible with European Union law.[39]

A. *Slovakia v. Achmea BV*

The first significant case to address intra-European Union arbitration provisions, *Achmea*, held that the arbitration provision in the BIT between Member States was invalid under European Union law.[40] In the domestic proceedings leading to *Achmea*, the German court, hearing a motion by Slovakia to set aside the arbitration award, requested a preliminary ruling from the CJEU on

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[35] *See* Catherine Amirfar et al., *The Future of Investment Law in the EU: A Practical Perspective*, DEBEVOISE & PLIMPTON (Dec. 8, 2021), https://www.debevoise.com/insights/publications/2021/12/the-future-of-investment-law-in-the-eu; *see also* Amina Ben Ayed, *Poland v. PL Holdings: Another Twist in the Intra-EU Investor-State Arbitration*, SQUIRE PATTON BOGGS (Dec. 14, 2021), https://larevue.squirepattonboggs.com/poland-v-pl-holdings-another-twist-in-the-intra-eu-investor-state-arbitration.html.
[36] *See Achmea*, C-284/16, ¶ 60.
[37] *See Komstroy*, C-741/29, ¶ 66.
[38] *See PL Holdings*, C-109/20, ¶ 47.
[39] *See* Benson, *supra* note 9.
[40] *See Achmea*, C-284/16, ¶¶ 2-7. In *Achmea*, the CJEU reviewed Article 8 of the BIT between The Netherlands and Czechoslovakia (succeeded in rights and obligations by Slovakia). Article 8 of the Dutch-Slovakian BIT contained a consent to arbitrate provision for both contracting States and stated that UNCITRAL arbitration rules would apply in any arbitration proceedings. *See id*.

three questions.[41] These questions asked the CJEU about the compatibility of the intra-European Union BIT arbitration provision with Articles 344, 267, and 18 TFEU.[42]

The CJEU reformulated the questions into three new questions to better guide their analysis.[43] The questions were: (1) whether Article 8 of the Dutch-Slovakian BIT requires arbitration tribunals to apply European Union law; (2) whether arbitration tribunals convened under the BIT are within the European Union's judicial system; and (3) whether arbitration tribunals' decisions could be appealed to the domestic courts of a Member State to ensure the ability to make references to the CJEU for preliminary rulings.[44]

Addressing these questions, the CJEU first turned to Article 8(6) of the BIT to determine whether arbitration tribunals must apply European Union law.[45] The CJEU found that although the arbitration tribunal here only determined whether a party breached the BIT, Article 8(6) of the BIT required the arbitration tribunal to consider both domestic and European Union law to assess the breach.[46] On the second question, the CJEU found that the arbitration tribunals were not "courts

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[41] *See id.* The appeal to the CJEU arose during proceedings to set aside the arbitration award in the German domestic courts. The Bundesgerichtshof (Federal Court of Justice) made a preliminary ruling request to the CJEU because the case involved European Union law. The German courts were the proper venue because Germany was a seat of the arbitration and therefore German law applied in the arbitration proceedings. *See id.* ¶¶ 5-23.

[42] *See id.* ¶ 23; *see also* Bjorn Arp, *Slowakische Republik (Slovak Republic) v. Achmea B.V.*, 112 AM. J. INT'l L. 466, 467 (2018). The German Federal Court of Justice asked the CJEU to answer the question separately with regards to each treaty provision, moving to the next only if the proceeding one was answered in the negative. *See Achmea*, C-284/16, ¶ 28. Article 344 TFEU is the primary source for the principle of autonomy of European Union law and precludes Member States from submitting disputes about the interpretation or application of European Union treaties to any method of settlement not provided within the Treaties. *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 344, 2012 O.J. C 326/47, at 326/194 [hereinafter TFEU]. Article 267 TFEU expands on this principle further by outline the preliminary ruling procedure which only allows courts and tribunals of Member States to submit questions to the Court of Justice. *See id.*, art. 267, at 326/164. Finally, Article 18 TFEU prohibits discrimination on the grounds of nationality. *See id.*, art. 18, at 326/56.

[43] *See Achmea*, C-284/16, ¶¶ 39-57; *see also* Arp, *supra* note 42, at 468.

[44] *See Achmea*, C-284/16, ¶¶ 39, 43, 51; *see also* Arp, *supra* note 42, at 468.

[45] *See Achmea*, C-284/16, ¶¶ 33-42. Article 8(6) of the Dutch-Slovak BIT outlined the basis of law that the tribunal must consider when deciding whether a party breached the BIT. Article 8(6) stated that the laws of the contracting parties make up that basis of law and because European Union law is considered the law of the Member States, European Union law formed part of the basis of law that the tribunal considered. *See* Treaty Between the Kingdom of the Netherlands and the Slovak Republic on the Mutual Promotion and Protection of Investments, Neth.-Slovk., Apr. 29, 1991, 1788 U.N.T.S. 301.

[46] *See Achmea*, C-284/16, ¶ 42; *see also* Arp, *supra* note 42, at 468.

or tribunals of a Member State" under Article 267 TFEU because the characteristics of the arbitration tribunals and the "exceptional nature" of its jurisdiction intentionally removed it from the judicial systems of the Member States.[47]

Similarly, in answering the third question, the CJEU found that the very nature of the arbitration tribunals removed any sort of review of an arbitral award from Member States' domestic legal systems, precluding the possibility of requesting preliminary rulings from the CJEU.[48] Given these three findings, the CJEU concluded that the BIT's arbitration provision permitted a dispute settlement method that undermined the full effectiveness of EU law.[49] It also called into question the principles of mutual trust between the Member States and sincere cooperation.[50] The CJEU ultimately held that the arbitration provision in the Dutch-Slovakian BIT was incompatible with Articles 267 and 344 TFEU and, therefore, was invalid under European Union law.[51]

When handed down, *Achmea* was a groundbreaking judgment from the CJEU that surprised many legal scholars and practitioners.[52] One group of practitioners described the

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[47] *See Achmea*, C-284/16, ¶¶ 43-49; *see also* Arp, *supra* note 42, at 468. The CJEU distinguished investor-state arbitration tribunals from such the Benelux Court of Justice because the Benelux Court was simply ensuring uniformity of common legal rules among the three Benelux states and thus still operated within those legal systems. The court also noted that it had previously distinguished treaty-based arbitration from commercial arbitration because the nature of the investor-state arbitration specifically removed the process from domestic legal systems. *See Achmea*, C-284/16, ¶¶ 43-49; *see also* Arp, *supra* note 42, at 468.

[48] *See Achmea*, C-284/16, ¶¶ 50-52; *see also* Arp, *supra* note 42, at 468. Article 8 of the BIT stated both that arbitration tribunals' decisions were final and that UNCITRAL rules apply to the arbitration, which precluded the possibility of judicial review of the tribunals' decisions. Additionally, by choosing Germany as the seat of the arbitration, the parties were limited to German national law on enforcement of arbitration awards. German law only permitted review for validity of the arbitration agreement and public policy grounds. *See Achmea*, C-284/16, ¶¶ 50-52; *see also* Arp, *supra* note 42, at 468.

[49] *See Achmea*, C-284/16, ¶¶ 55-58; *see also* Arp, *supra* note 42, at 468.

[50] *See Achmea*, C-284/16, ¶¶ 55-58; *see also* Arp, *supra* note 42, at 468.

[51] *See Achmea*, C-284/16, ¶ 60; *see also* Arp, *supra* note 42, at 468.

[52] *See, e.g.*, Laurens Ankersmit, *Achmea: The Beginning of the End of ISDS in and with Europe?*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (Apr. 24, 2018), https://www.iisd.org/itn/en/2018/04/24/achmea-the-beginning-of-the-end-for-isds-in-and-with-europe-laurens-ankersmit/ (discussing the landmark nature of the *Achmea* judgment); Jens Hillebrand Pohl, *Intra-EU Investment Arbitration after the* Achmea *Case: Legal Autonomy Bounded by Mutual Trust?*, EUR. CONST. L. REV. 767, 776-77 (Nov. 19, 2018) (discussing the questionable future of investor-state dispute settlement in the wake of *Achmea* and predicting a potential future end to intra-European Union BITs); Szilard Gaspar-Szilagyi, *Does Brexit Mean Brexit? The Enforcement of Intra-EU Investment Awards in the Post-Brexit Era*, CENT. EUR. J. COMPAR. L. 75, 76 (2022) (calling the *Achmea* judgment "shocking").

judgment as "a loud clap of thunder" and recognized the potential impact beyond just the single judgment.[53] Some also saw the judgment marking the end of intra-European Union investor-state arbitration.[54] There were also negative reactions; two scholars called the *Achmea* judgment a "dogmatic dismissal of investors' rights" and argued that the decision would facilitate undermining the rule of law in some Member States.[55] Overall, academic and practitioner reactions to the *Achmea* decision were mixed.[56] Regardless of the mixed reviews, most legal scholars and practitioners agreed that *Achmea* would cause significant changes to the landscape of intra-European Union investor-state arbitration.[57]

B. *Moldova v. Komstroy LLC*

In *Komstroy,* the CJEU answered a question that many legal scholars and practitioners asked in the wake of the *Achmea* judgment: how the CJEU would address the arbitration provision in the ECT.[58] In *Komstroy*, the CJEU took the opportunity to address the compatibility of ECT Article 26 with European Union law despite not being the topic of the French court's preliminary ruling request.[59] After quickly dispelling jurisdictional concerns, the CJEU, as it did in *Achmea*,

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[53] *See* Clement Fouchard & Marc Krestin, *The Judgment of the CJEU in Slovak Republic v. Achmea – A Loud Clap of Thunder on the Intra-EU BIT Sky!*, WOLTERS KLUWER (Mar. 7, 2018), https://arbitrationblog.kluwerarbitration.com/2018/03/07/the-judgment-of-the-cjeu-in-slovak-republic-v-achmea/ (describing the potential for the *Achmea* judgment to have a profound change on the landscape of intra-European Union investor-state arbitration).

[54] *See The Achmea Judgement of the Court of Justice of the European Union*, THE CHARTERED INSTITUTE OF ARBITRATORS (Aug. 8, 2018), https://ciarb.org/resources/features/the-achmea-judgement-of-the-court-of-justice-of-the-european-union/ [hereinafter *TCIA Achmea*] (describing the *Achmea* judgment as the end of intra-European Union arbitration).

[55] *See* Dimitry Vladimirovich Kochenov & Nikos Lavranos, *Achmea versus the Rule of Law: CJEU's Dogmatic Dismissal of Investors' Rights in Backsliding Member States of the European Union*, HAGUE J. ON THE RULE OF L. 195, 210-15 (Mar. 29, 2021) (Arguing that the judgment would deprive investors of an independent arbitrator in Member States who had a history of "backsliding the rule of law").

[56] *See id.*; *TCIA Achmea*, *supra* note 54.

[57] *See* Kochenov & Lavranos, *supra* note 55, at 210-15; *TCIA Achmea*, *supra* note 54.

[58] *See e.g.* J Robert Basedow, *The* Achmea *Judgment and the Applicability of the Energy Charter Treaty in Intra-EU Investment Arbitration*, J. OF INT'L ECON. L. 271, 275 (Jan. 31, 2020) ("Many scholars and policymakers thus believe that the ECT—much like the Dutch–Slovak BIT—is in conflict with European law").

[59] *See Komstroy*, C-741/19, ¶¶ 8-38. The underlying arbitration in *Komstroy* involved a contract dispute between a Ukrainian company (later acquired by Komstroy) and a Moldovan state-owned company for the delivery of electricity at the Ukraine-Moldova border. The investor initiated the arbitration under ECT Article 26 and under

honed in on the relationship between investor-state arbitration and the autonomy of the European Union legal order through Articles 267 and 344 TFEU.[60]

The CJEU's reasoning in *Komstroy* tracked similarly to the reasoning in *Achmea*.[61] In fact, the CJEU cited directly to its *Achmea* judgment regularly throughout the *Komstroy* judgment.[62] The CJEU began by finding that the principle of autonomy of European Union law laid down in Article 344 TFEU applied to international multilateral agreements like the ECT, not just agreements between Member States.[63] Further, to protect the autonomy of European Union law, Article 19 TEU and Article 267 TFEU frame a judicial system to secure consistent and uniform interpretations of European Union law.[64] Again, as in *Achmea*, the CJEU found that the arbitration tribunal convened under ECT Article 26 was outside the French judicial system and, therefore, not

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UNCITRAL rules. Following an arbitration award for the investor, Moldova initiated annulment proceedings in French courts. *See id.*; ECT art. 26, *supra* note 12. In his opinion, Advocate General Szpunar raised the issue of compatibility of ECT Article 26 with European Union law. *See* Opinion of Advocate General Szpunar, Republic of Moldova v. Komstroy LLC, Case C-741/29, ¶¶ 51-90, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62019CC0741; *see also* Irina Suatean, *CJEU: Intra-EU Arbitration under the ECT Is Incompatible with EU Law. Brief on CJEU's Judgment in the Case of Republic of Moldova v Komstroy*, 15 ROM. ARB. J. 133, 136 (2021).

[60] *See Achmea*, C-741-19, ¶¶ 21-38; Suatean, *supra* note 59, at 136-37. The Court found that it had jurisdiction because the ECT was signed by the European Union itself. As an act of the European Union, the European Union had an interest in uniformly interpreting the ECT, regardless of whether it applied to European Union or non-European Union cases. Additionally, the seat of the arbitration resided in a Member State and therefore European Union law was directly applicable. *See Achmea*, C-741-19, ¶¶ 21-38; Suatean, *supra* note 59, at 136-37.

[61] *Compare Komstroy*, C-741/29, ¶¶ 40-66, *with Achmea*, C-741-19, ¶¶ 31-60; *see also* Suatean, *supra* note 59, at 137.

[62] *See Komstroy*, C-741/29, ¶¶ 42-64.

[63] *See Komstroy*, C-741/29, ¶¶ 42-45. The CJEU found Article 344 TFEU applicable here because the tribunal convened under the ECT would have to consider European Union law. Therefore, regardless of whether the tribunal was convened under an agreement between Member States or via an international agreement, such a tribunal would have to respect the autonomy of the European legal order. Notably, the CJEU found that arbitration agreements under other international agreements, like the Comprehensive Economic and Trade Agreement with Canada, because they explicitly precluded tribunals from applying European Union law. *See id.*; Pascale Accaoui-Lorfing & Arnaud De Nanteuil, *Confirmation of the Incompatibility of Arbitration on the Basis of the Energy Charter Treaty with EU Law (CJEU: Republic of Moldova v Komstroy LLC)*, 2021 INT'l BUS. L.J. 811, 813 (2021); *see also* TFEU, *supra* note 42, art. 344, 2012 O.J. C326/47 326/47.

[64] *See Komstroy*, C-741/29, ¶¶ 45-46. Article 19 TEU establishes that Member State national courts and the Court of Justice have exclusive jurisdiction for interpreting European Union law. Consolidated Version of the Treaty on European Union art. 19, 2012 O.J. C 326/13, at 326/26 [hereinafter TEU post-Lisbon]. Article 267 TFEU ensures uniformity and consistency of European Union law by creating a system for dialogue between the Member State national courts and the Court of Justice, the preliminary ruling procedure. *See* TFEU, *supra* note 42, art. 344, 2012 O.J. C326/47, at 326/164.

a court or tribunal within Article 267.[65] The CJEU ultimately concluded that the arbitration provision in Article 26 of the ECT was incompatible with European Union law and, therefore, not valid for settling disputes between a Member State and an investor from a Member State.[66]

Legal scholars and practitioners had a variety of reactions to the CJEU's *Komstroy* judgment.[67] Some saw the decision as contentious and viewed it as another effort by the European Union to eliminate intra-European Union investor-state arbitration.[68] One of the significant issues that critics pointed to was the jurisdiction of the CJEU in hearing the case because the dispute was between a non-European Union investor and a non-Member State.[69] Despite that issue, the *Komstroy* judgment appeared to have taken hold in the domestic courts of the Member States, with the Paris Court of Appeals ultimately setting aside over $50 million in awards at issue in the *Komstroy* case.[70] Despite some hesitation from legal scholars and practitioners regarding the *Komstroy* judgment's expansion of *Achmea*, the decision took hold, marking another successful step in the European Union's efforts to curtail intra-European Union investor-state arbitration.[71]

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[65] *See Komstroy*, C-741/29, ¶¶ 51-53; *see also* Suatean, *supra* note 59, at 137. The CJEU again distinguished commercial arbitration agreements between investors from the investor-state arbitration at issue in *Komstroy*. The CJEU reasoned that the unique nature of the ECT meant that the contracting parties, including Member States, had specifically set up a system to remove disputes from the jurisdiction of national courts. *See Komstroy*, C-741/29, ¶¶ 51-53; *see also* Suatean, *supra* note 59, at 137.

[66] *Komstroy*, C-741/29, ¶ 66; *see also* Suatean, *supra* note 59, at 137.

[67] *See* Tilbe Birengel, *Komstroy Decision: End of an Era for Intra-EU ECT Arbitration or Not?*, THE LEGAL 500 (Oct. 26, 2021), https://www.legal500.com/developments/thought-leadership/komstroy-decision-end-of-an-era-for-intra-eu-ect-arbitration-or-not/; Peter Rosher et al., Moldova v. Komstroy *(Case C-741/19): Key Lessons and Takeaways*, REED SMITH (Sept. 16, 2021), https://www.reedsmith.com/en/perspectives/2021/09/moldova-v-komstroy-key-lessons-and-takeaways.

[68] *See* Birengel, *supra* note 67 (discussing the Paris Court of Appeal's acceptance of the CJEU's judgment in *Komstroy* and rejecting arguments for departing from the interpretation based on reactions from legal scholars).

[69] *See id.* (questioning the jurisdictional grounds for extending *Achmea* to the ECT arising from a dispute between Ukraine and a Moldovan investor).

[70] *See* Alina Leoveanu et al., *The Komstroy Saga: It Ain't Over Till It's Over*, WOLTERS KLUWER (Mar. 1, 2023).

[71] *See* id.; Birengel, *supra* note 67; Rosher et al., *supra* note 67.

C. *Poland v. PL Holdings Sàrl*

The final case in the *Achmea* line, *PL Holdings*, put further limitations on intra-European Union investor-state arbitration.[72] The CJEU held in *PL Holdings* that ad hoc agreements to arbitrate between a Member State and investor that matched the arbitration provision in a BIT that was invalid under European Union law.[73] Unlike *Achmea* and *Komstroy*, the arbitration agreement in *PL Holdings* involved neither BITs nor international agreements but an ad hoc agreement to arbitrate between a Member State and an investor.[74] Following an appeal by Poland, the Swedish Supreme Court made a preliminary ruling request to the CJEU asking the CJEU to determine whether or not European Union law permitted Member States and investors of another Member State to enter ad hoc arbitration agreements which were identical to the arbitration provisions held invalid in *Achmea*.[75]

The CJEU began its reasoning by reiterating that the arbitration provisions in intra-European Union BITs were invalid, and investors could not bring arbitration proceedings on that basis.[76] Again looking at Articles 267 and 344 TFEU, the CJEU found that the arbitration tribunal

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[72] *See, e.g.*, Ben Ayed, *supra* note 35 (describing the *PL Holdings*); Fernando Bedoya et al., *The Court of Justice Rules Against ad hoc Arbitration Agreements that are Identical to Clauses Contained in Bilateral Investment Treaties Between Member States*, PÉREZ-LLORCA 1 (Nov. 8, 2021), https://www.perezllorca.com/wp-content/uploads/2021/11/legal-briefing-cjeu-decision-in-pl-holdings-concerning-investment-arbitration-within-the-eu.pdf.

[73] *See PL Holdings*, C-109/20, 2021, ¶ 56.

[74] *Compare PL Holdings*, C-109/20, ¶ 28 (consent to arbitration based on an ad hoc arbitration agreement between the Member State and investor), *with Achmea*, C-741-19, ¶¶ 3-4 (arbitration based on a BIT signed between the host Member State and the home Member State of the investor), *and Komstroy*, C-741/29, ¶ 6 (arbitration based on an arbitration provision in the ECT, and multilateral international treaty).

[75] *See PL Holdings*, C-109/20, ¶¶ 12-33; Bedoya et al., *supra* note 72, at 1-2. The underlying arbitration was initiated on the basis of Article 9 of the Poland-Luxemburg BIT in the Stockholm Chamber of Commerce. Following the issuance of an award in favor of the investor, Poland filed for annulment in the Stockholm Court of Appeals claiming that the arbitration was based on an invalid arbitration provision, citing to the CJEU's *Achmea* judgment. The Court of Appeals ruled that consent to arbitrate was not based on the BIT, but an ad hoc arbitration agreement formed from the investor's offer to arbitrate and Poland's tacit acceptance. On further appeal, the Swedish Supreme Court stayed the proceedings to seek a preliminary ruling on the issue from the CJEU. *See PL Holdings*, C-109/20, ¶¶ 12-33; Bedoya et al., *supra* note 72, at 1-2.

[76] *See PL Holdings*, C-109/20, ¶ 35 ("Article 9 of the BIT is invalid on the ground that it undermines the autonomy, effectiveness and uniform application of EU law, and that no arbitration proceedings can validly be brought on the basis of that arbitration clause").

here was required to interpret European Union law and was not a court nor tribunal of a Member State.[77] The CJEU ultimately concluded that ad hoc agreements to arbitrate were also invalid under European Union law because to allow such an agreement would entail a circumvention of the obligations Member States have under Articles 267 and 344 TFEU.[78]

II. ENFORCEMENT OF AWARDS OUTSIDE THE EUROPEAN UNION

In the wake of the *Achmea* line of cases, European investors have sought domestic courts in the United States and the United Kingdom to enforce intra-European Union investor-state arbitration awards.[79] The caselaw in the United States has not been uniform, with some courts coming to opposite holdings due to unanswered questions at the circuit court level.[80] In the United Kingdom, the courts have been much more consistent in permitting the enforcement of arbitration awards.[81] This section discusses recent enforcement cases in the United States and the United Kingdom to show the current state of intra-European Union arbitration award enforcement in each jurisdiction.

A. UNITED STATES CASES

The first significant case to be heard by the D.D.C. after the CJEU's *Achmea* judgment was *Micula v. Romania* ("*Micula* US").[82] In *Micula* US, the investor asked the D.D.C. to confirm an ICSID arbitration award it had received against Romania over Romania's objections.[83] In

[77] *See PL Holdings*, C-109/20, ¶¶ 44-46 (following a similar reasoning to and even citing to the *Achmea* and *Komstroy* judgments); *see also* Bedoya et al., *supra* note 72, at 2.
[78] *See PL Holdings*, C-109/20, ¶ 47 (Finding that allowing investor-state arbitration agreements on the basis of ad hoc agreements with identical to provisions already deemed by the CJEU to be invalid would allow Member States to circumvent their obligations under the Treaties); *see also* Bedoya et al., *supra* note 72, at 2.
[79] *See, e.g.*, *Micula*, 404 F. Supp. 3d at 285; *Micula*, [2020] UKSC 5 at ¶ 118.
[80] *Compare Blasket*, 665 F. Supp. 3d. at 4 (holding that the court *did not* have jurisdiction to enforce the award), *with Nextera*, 656 F. Supp. 3d at 222 (holding that the court *did* have jurisdiction to enforce the award).
[81] *See Micula*, [2020] UKSC 5 at ¶ 118; *Infrastructure Services*, [2023] EWHC 1226 at ¶ 124.
[82] *See* Seung-Woon Lee, *Enforcing Intra-EU Dispute Awards in the United States After Achmea*, WOLTERS KLUWER (May 26, 2020), https://arbitrationblog.kluwerarbitration.com/2020/05/26/enforcing-intra-eu-dispute-awards-in-the-united-states-after-achmea/ (providing an overview of the *Micula* US case).
[83] *See Micula*, 404 F. Supp. 3d at 268-72; *see also* Lee, *supra* note 82. The BIT between Sweden and Romania entered force in 2003. Arbitration was initiated in 2004 before Romania acceded to the European Union in 2007.

challenging confirmation, Romania asserted various arguments, including that the arbitration provision in the Sweden-Romania BIT was invalid and unenforceable after the CJEU *Achmea* judgment.[84] In response, the investor argued that *Achmea* was "materially distinguishable" from the present case and was not controlling.[85]

The D.D.C. ultimately held that Romania failed to meet its burden to show that *Achmea* stripped United States courts of jurisdiction under the FSIA arbitration exception.[86] The D.D.C. first found that the facts of *Achmea* were materially different because all major events occurred before Romania acceded to the European Union.[87] Second, the court found that the dispute before the ICSID arbitration tribunal did not involve the interpretation or application of European Union law, a primary concern of the CJEU in *Achmea*.[88]

Ultimately, the D.D.C. in *Micula* US rejected Romania's arguments and granted the petition to confirm the arbitration award.[89] The D.C. Circuit subsequently affirmed the decision on

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Additionally, the European Commission joined Romania in challenging confirmation, appearing as amicus curiae. *See Micula*, 404 F. Supp. 3d at 268-72; *see also* Lee, *supra* note 82.

[84] *Micula*, 404 F. Supp. 3d at 276; *see also* Lee, *supra* note 82. The four main arguments that Romania asserted were: (1) lack of subject matter jurisdiction under the FSIA; (2) acts of state doctrine precluded enforcement; and (3) foreign sovereign compulsion doctrine prohibits enforcement; (4) that Romania had fully satisfied the award. Only the first argument is addressed in this paper. *Micula*, 404 F. Supp. 3d at 276; *see also* Lee, *supra* note 82.

[85] *See Micula*, 404 F. Supp. 3d at 277; *see also* Lee, *supra* note 82. The investor provided three reasons why *Achmea* was not applicable. First, in *Achmea*, the Slovakia acceded to the European Union *prior* to the initiation of arbitration proceedings whereas here Romania acceded to the EU after the proceedings commenced. Second, the arbitration in this case was under ICSID and *Achmea* was under UNCITRAL rules. *See Micula*, 404 F. Supp. 3d at 277; *see also* Lee, *supra* note 82.

[86] *See Micula*, 404 F. Supp. 3d at 279; *see also* Lee, *supra* note 82.

[87] *See Micula*, 404 F. Supp. 3d at 279; *see also* Lee, *supra* note 82. The D.D.C. put together a timeline of material effects that occurred before Romania's assentation to the European Union in 2007. (1) the Sweden-Romania BIT entered into force in 2003; (2) Romania breached the BIT in 2004-2005; (3) Micula initiated arbitration proceedings later in 2005. In *Achmea*, all of the above material events occurred after the Slovakia joined the European Union. *See Micula*, 404 F. Supp. 3d at 279; *see also* Lee *supra* note 82.

[88] *See Micula*, 404 F. Supp. 3d at 279-80; *see also* Lee, *supra* note 82. The D.D.C. examined the Final Decision of the ICSID arbitration tribunal and determined that there was no dispute that the BIT provided the primary law for settling the dispute. European Union law was only used by the tribunal as part of the "factual matrix" of the case and not as substantive law because Romania was not bound by European Union law prior to its accession. *See Micula*, 404 F. Supp. 3d at 279-80; *see also* Lee, *supra* note 82.

[89] *See Micula*, 404 F. Supp. 3d at 285; *see also* Lee, *supra* note 82.

appeal.[90] On appeal, the D.C. Circuit left open the question of whether European Union law would have impacted the case had Romania already been a member of the European Union.[91]

The next significant case before the D.D.C. was *Nextera Energy Global Holdings B.V. v. Spain*.[92] In *Nextera*, the D.D.C. addressed whether the court had jurisdiction over Spain under the FSIA arbitration exception.[93] The key issue the court had to resolve was whether there was a valid agreement to arbitrate between Spain and the investor.[94]

Spain challenged the validity of the arbitration agreement on the grounds that the arbitration provision in the ECT was invalid under the CJEU judgments in *Achmea* and *Komstroy*.[95] The D.D.C. found that *Achmea* and *Komstroy* were irrelevant in answering the jurisdiction question because the CJEU cases only affected arbitrability and did not affect the presence of an *agreement to arbitrate*.[96] The court went on, reasoning that because Spain's

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[90] *See Micula*, 404 F. Supp. 3d at 285; *Micula*, 805 F. App'x at 1; *see also* Lee, *supra* note 82. The D.D.C. also rejected Romania's three other arguments. However, those will not be discussed in this paper. *See Micula*, 404 F. Supp. 3d at 285.

[91] *See Micula*, 805 F. App'x at 1.

[92] *See Nextera*, 656 F. Supp. 3d at 206. The *Nextera* case arose from an ICSID arbitration under the ECT. The investor petitioned the D.D.C. to confirm an arbitration award against Spain and Spain subsequently filed a motion to dismiss the petition. The investor cross moved for summary judgment. *See id.*; *see also* Mark McNeill & Alexander G. Leventhal, *NextEra v. Spain: DC District Court Rekindles Hope for Enforcing Intra-EU Investor-State Awards in the US*, NATIONAL LAW JOURNAL (Mar. 7, 2023), https://www.law.com/nationallawjournal/2023/03/07/nextera-v-spain-dc-district-court-rekindles-hope-for-enforcing-intra-eu-investor-state-awards-in-the-us/ (highlighting the importance of *Nextera* because it was the first case to successfully emerge from ICSID annulment proceedings and have a ruling issued from the D.D.C.).

[93] *See Nextera*, 656 F. Supp. 3d at 209; *see also* McNeill & Leventhal, *supra* note 92. The investor argued that the court had jurisdiction over Spain under the FSIA arbitration and wavier exceptions. Spain argued that neither exception applied. The D.D.C. ultimately found jurisdiction under the arbitration exception and did not determine whether or not the waiver exception applied. *See Nextera*, 656 F. Supp. 3d at 209; *see also* McNeill & Leventhal, *supra* note 92.

[94] *See Nextera*, 656 F. Supp. 3d at 209-10. The D.D.C. looked at circuit precedent on the application of arbitration exception and determined that three conditions need to be met for the exception to apply: (1) the existence of an arbitration agreement; (2) an arbitration award; and (3) a governing treaty. The latter two conditions were not contested. *See id.* (quoting from LLC SPC Stileks v. Republic of Moldova, 985 F.3d 871, 877 (D.C. Cir. 2021)).

[95] *See Nextera*, 656 F. Supp. 3d at 210-11 (recounting the CJEU's judgments in *Achmea* and *Komstroy*).

[96] *See id.* at 212-213. The court recognized that the only other court to grapple with the *Achmea* judgment was the *Micula* US court. The court also recognized that in affirming *Micula* US, the D.C. Circuit left open the question of whether the arbitration provision was later nullified by Romania's accension to the European Union. *See id.* (citing *Stileks*, 985 F.3d at 877 and Chevron Corp. v. Ecuador, 795 F.3d 200, 205-06 (D.C. Cir. 2015)); *see also Micula*, 805 F. App'x at 1; McNeill & Leventhal, *supra* note 92.

European Union law argument did not affect the court's jurisdiction, there was no need to analyze the effects of *Achmea* and *Komstroy*.[97]

The *Nextera* court ultimately denied Spain's motion to dismiss but left Nextera's summary judgment motion to confirm the arbitration award on the docket pending appeals.[98] Although the D.D.C. did not ultimately decide on enforceability, the court's ruling on jurisdiction could pave the way for future enforcement of intra-European Union arbitration awards.[99]

The final United States case, *Blasket Renewable Invs., LLC v. Spain*, came to the opposite conclusion from the *Nextera* court and held that the D.D.C. did not have jurisdiction to confirm an intra-European Union arbitration award.[100] The underlying arbitration and procedural history in *Blasket* was similar to that in *Nextera*.[101] The *Blasket* court applied the same standard for jurisdiction under the FSIA arbitration exception as the *Nextera* court and also recognized that jurisdiction would hinge on the presence of a valid agreement to arbitrate.[102]

In assessing the agreement to arbitrate issue, the *Blasket* court began by looking to *Micula* US and interpreted *Micula* US as standing for the principle that it is for the courts, not arbitration

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[97] *See Nextera*, 656 F. Supp. 3d at 209-10 (quoting Tethyan Copper Co. Party Ltd. v. Pakistan, 590 F. Supp. 3d 262, 274 (D.D.C. 2022)). The D.D.C. found that Spain did not present any evidence or arguments sufficient to rebut the existence of an arbitration agreement and therefore failed to meet its burden of persuasion on the jurisdictional question. *See id.*

[98] *See id.* at 221-22.

[99] *See id.* at 222; McNeill & Leventhal, *supra* note 92 (discussing the impact of the *Nextera* decision on the future of intra-European Union arbitration award enforcement in United States courts). In addition to *Nextera*, the same judge, on the same day issued a near identical decision. The decision in *9REN Holding S.À.R.L. v. Kingdom of Spain* followed nearly identical reasoning to *Nextera* and also held that the court had jurisdiction. *See id.* at 222; *9REN*, 2023 WL 2016933 at *3-6.

[100] *Compare Blasket*, 665 F. Supp. 3d. at 4 (holding that the court *did not* have jurisdiction), *with Nextera*, 656 F. Supp. 3d at 222 (holding that the court *did* have jurisdiction).

[101] *See Blasket*, 665 F. Supp. 3d. at 5-8; Ben Love et al., *The Treatment of Intra-EU Treaty Awards in the United States*, BOIES SCHILLER FLEXNER 1 (Apr. 6, 2023), https://www.bsfllp.com/a/web/5147/8RaEeT/20230406-client-alert.pdf. In *Blasket*, the investor initiated ICSID arbitration against Spain under ECT Article 26. In the D.D.C., the investor petitioned to confirm the arbitration award against Spain and Spain filed a motion to dismiss. The major legal issue that the court had to resolve was whether, in the wake of *Achmea* and *Komstroy*, there was a valid basis for the D.D.C. to assert jurisdiction under the arbitration exception to the FSIA. *See Blasket*, 665 F. Supp. 3d. at 5-8.

[102] *See Blasket*, 665 F. Supp. 3d. at 8. The court recognized *Stileks* and *Chevron* to have established the rule for the FSIA arbitration exception. Additionally, Spain, as it did in *Nextera*, only contested the existence of an agreement to arbitrate. *See id.*

tribunals, to determine whether an agreement to arbitrate exists.[103] The court then looked to the CJEU judgments in *Achmea* and *Komstroy*, as well as European Union law in general, as persuasive evidence of Member States' standing to agree to arbitrate.[104] The *Blasket* court found that because of the CJEU judgments and European Union law, Spain lacked the capacity to agree to arbitrate, and therefore, none existed.[105]

For those reasons, the *Blasket* court granted Spain's motion to dismiss.[106] The *Blasket* court explicitly disagreed with the *Nextera* court, setting up the current appeal to the D.C. Circuit to determine the proper standard the D.D.C. must apply to determine whether a valid agreement to arbitrate existed.[107]

B. UNITED KINGDOM CASES

In 2020, the UKSC issued its judgment in *Micula and others v. Romania* ("*Micula* UK").[108] The issue on appeal in *Micula* UK was a stay of enforcement issued by the English Commercial Court on confirming an ICSID arbitration award stemming from the same underlying dispute as

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[103] *See id.* (citing *Micula*, 404 F. Supp. 3d at 265).
[104] *See id.* at 10-13. The court found that European Union law, as interpreted in *Achmea*, precluded Member States from entering into agreements that allowed courts or tribunals outside of European Union or Member State legal systems to interpret or apply European Union law. The court also found that *Komstroy* extended that holding to the ECT Article 26. Further, the European Commission submitted an amicus brief that the court relied on to show that the European Union treaties hold primacy over conflicting obligations from Member States. *See id.*
[105] *See id.*; Love et al, *supra* note 101, at 2 The court relied on United States law, European Union jurisprudence, and the arguments from the European Commission to come to its finding that Spain lacked legal authority to enter into the arbitration agreement in the ECT. Therefore, because Spain lacked legal authority to enter into the arbitration agreement no such agreement existed. *See Blasket*, 665 F. Supp. 3d. at 10-13; Love et al, *supra* note 101, at 2.
[106] *See Blasket*, 665 F. Supp. 3d. at 13-14; *see also* Love et al, *supra* note 101, at 2. The court quickly rejected the waiver exception argument, holding that intent to waive sovereign immunity is a requirement and the existence of an agreement to arbitrate is a prerequisite to intentionality. *See Blasket*, 665 F. Supp. 3d. at 13-14; *see also* Love et al, *supra* note 101, at 2.
[107] *See* Nick Lawn & Trajan Shipley, *Blasket: Is Enforcement of Intra-EU Awards Before US Courts at Risk?*, VAN BAEL & BELLIS (Apr. 24, 2023), https://www.vbb.com/media/Insights_Articles/21-4-2023_Blasket.pdf. The *Blasket* case is currently on appeal with oral arguments having taken place on February 28. 2024. On appeal, the D.C. Circuit is expected to resolve the conflict between the *Blasket* and *Nextera* courts. *See id.* As of April 26, 2024, the D.C. Circuit has not issued an opinion.
[108] *See Micula*, [2020] UKSC 5 at ¶ 1; *see also* Cyrus Benson et al., *UK Supreme Court Paves the Way for Enforcement of an ICSID Award in the Long-Running* Micula v Romania *Dispute*, GIBSON DUNN 1 (Feb. 21, 2020), https://www.gibsondunn.com/wp-content/uploads/2020/02/uk-supreme-court-paves-the-way-for-enforcement-of-an-icsid-award-in-the-long-running-micula-v-romania-dispute.pdf (discussing the *Micula* UK decision).

Micula US.[109] In assessing the validity of the stay, the UKSC addressed the United Kingdom's obligations under European Union law as they relate to the United Kingdom's obligations under the ICSID Convention.[110]

The UKSC began its analysis by examining Article 351 TFEU and Articles 54 and 69 of the ICSID Convention.[111] Agreeing with the investor, the UKCS found that the obligations owed to other contracting states to the ICSID Convention were pre-accession obligations under Article 351 TFEU.[112] As pre-accession obligations, they were not affected by the European Union Treaties.[113] Therefore, European Union law did not affect the United Kingdom's obligation to recognize arbitration awards issued under the ICSID Convention.[114]

The UKCS ultimately held that the stay of enforcement was "an unlawful measure in international law and unlawful in domestic law" of the United Kingdom.[115] The significant

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[109] *See Micula*, [2020] UKSC 5 at ¶¶ 3-36; *see also* Benson et al., *supra* note 108, at 1-2. As in *Micula* US, the underlying arbitration award in *Micula* UK came from a claim by the investor that Romania breached its obligations under the Sweden-Romania BIT. Following the arbitration award, the investor applied for registration of the award in the English Commercial Court as required under the Arbitration Act 1996. Prior to reaching the UKSC, the case passed through the English Commercial Court and the English Court of Appeals. The courts granted and upheld the stay, respectively. *See Micula*, [2020] UKSC 5 at ¶¶ 3-36; *see also* Benson et al., *supra* note 108, at 1-2.

[110] *See Micula*, [2020] UKSC 5 at ¶¶ 37-39; *see also* Benson et al., *supra* note 108, at 2-4. The UKSC also addressed two additional issues on appeal that are not relevant to this paper: (1) whether the decision of the General Court of the Europe to annul the European Commission's state aid ruling on the award meant that English courts were no longer required to stay the enforcement under the duty of sincere cooperation; and (2) whether an English court has authority to grant a stay of enforcement or is that incompatible with the ICSID convention. *See Micula*, [2020] UKSC 5 at ¶¶ 37-39; *see also* Benson et al., *supra* note 108, at 2-4.

[111] *See Micula*, [2020] UKSC 5 at ¶¶ 37-39; *see also* Benson et al., *supra* note 108, at 3. Article 351 TFEU states that obligations owed to third countries arising pre-accession are not affected by the European Union treaties. *See* TFEU, *supra* note 42, art. 351, 2012 O.J. C326/47, at 326/196. Article 54 of the ICSID convention outlines the duty of contracting states to recognize and enforce awards and Article 69 obliges contracting states take measures necessary to implement the ICSID Conventions. *See* ICSID Convention art. 54 & 69, *supra* note 21; *see also* Benson et al., *supra* note 108, at 3.

[112] *See Micula*, [2020] UKSC 5 at ¶¶ 101-08; *see also* Benson et al., *supra* note 108, at 3.

[113] *See Micula*, [2020] UKSC 5 at ¶¶ 101-08; *see also* Benson et al., *supra* note 108, at 3.

[114] *See Micula*, [2020] UKSC 5 at ¶¶ 101-08; *see also* Benson et al., *supra* note 108, at 3. The court found that the obligations owed under the ICSID Convention are obligations owed to all other contracting states. Therefore, obligations to non-Member States were owed under the ICSID Convention. *See Micula*, [2020] UKSC 5 at ¶ 101-08; *see also* Benson et al., *supra* note 108, at 3.

[115] *See Micula*, [2020] UKSC 5 at ¶ 118; *see also* Benson et al., *supra* note 108, at 4. Because European Union law was not applicable here, the duty of sincere co-cooperation was not applicable. The UKCS was thus obligated to uphold its obligation under the ICSID convention and found that applying the stay of enforcement under the

deference showed by the UKSC to the United Kingdom's international obligations was positive news for investors seeking avenues to enforce intra-European Union arbitration awards.[116]

In 2023, the English High Court in *Infrastructure Services* followed the UKSC's *Micula* UK reasoning and dismissed a Spanish application to set aside an order confirming an arbitration award.[117] Spain argued under state immunity that the arbitration tribunal and the United Kingdom courts lacked jurisdiction after the CJEU judgments in *Achmea* and *Komstroy*.[118] The High Court determined that state immunity hinged on a written agreement to arbitrate.[119] In making that determination, the High Court found *Micula* UK to be directly applicable.[120] The High Court found that under *Micula* UK, United Kingdom courts had no power to review an arbitration award on grounds directly addressed in the ICSID Convention, here the validity of the arbitration agreement.[121]

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circumstances in which the lower court had granted it was outside the bounds permitted by the ICSID convention. *See Micula*, [2020] UKSC 5 at ¶ 118; *see also* Benson et al., *supra* note 108, at 4.

[116] *See Micula*, [2020] UKSC 5 at ¶ 118 (lifting the stay of enforcement); Benson et al., *supra* note 108, at 4 (discussing how the *Micula* UK decision was positive news for investors); Rachael O'Grady & Havin Jagtiani, *Micula v Romania: The Next Chapter*, MAYER BROWN (Feb 18, 2020), https://www.mayerbrown.com/en/insights/publications/2020/02/micula-v-romania-the-next-chapter (discussing how the UKSC showed a "very high level of deference and respect" towards the ICSID convention).

[117] *See Infrastructure Services*, [2023] EWHC 1226 at ¶¶ 2, 161-64; *English High Court Reaffirms the Recognition of ICSID Awards in the UK*, LINKLATERS (June 21, 2023), https://www.linklaters.com/en-us/insights/blogs/arbitrationlinks/2023/june/infrastructure-services-icsid [Hereinafter Linklaters]. The underlying arbitration was conducted under ICSID rules and addressed claims that Spain violated the ECT. Prior to being heard by the English High Court, the English Commercial Court granted an order to register the award. *See Infrastructure Services*, [2023] EWHC 1226 at ¶ 2; Laura Rees-Evans, *English High Court Takes Pro-Enforcement Stance in Intra-EU ECT Award Against Spain*, WOLTERS KLUWER (Aug. 12, 2023), https://arbitrationblog.kluwerarbitration.com/2023/08/12/english-high-court-takes-pro-enforcement-stance-in-intra-eu-ect-award-against-spain/.

[118] *See Infrastructure Services*, [2023] EWHC 1226 at ¶ 4; Rees-Evans, *supra* note 117. The High Court dubbed this issue "the EU law question" and it is the question: "does TFEU Articles 267 and 344, as interpreted by the CJEU, have primacy over Article 26 of the ECT as a matter of international law?" *See Infrastructure Services*, [2023] EWHC 1226 at 44-46. Spain also argued non-disclosure as a ground for setting aside the order, however, that argument will not be discussed in this paper. *See id.* at 4; Rees-Evans, *supra* note 117.

[119] *See Infrastructure Services*, [2023] EWHC 1226 at ¶ 44.

[120] *See id.* at ¶ 72 (citing to *Micula*, [2020] UKSC 5); *see also* Rees-Evans, *supra* note 117.

[121] *See Infrastructure Services*, [2023] EWHC 1226 at ¶ 4; Rees-Evans, *supra* note 117. Jurisdiction of the tribunal is directly covered by Articles 50 to 52 of the ICSID Convention and are therefore the exclusive to be decided on an ICSID annulment application, not in domestic courts. *See Infrastructure Services*, [2023] EWHC 1226 at ¶ 78; Rees-Evans, *supra* note 117; *see also* ICSID Convention art. 50-52, *supra* note 21.

As USKC held, the High Court held that Spain could not invoke European Union law to dilute the United Kingdom's obligations under international treaties or alter the SIA interpretation.[122] For those reasons, the High Court rejected Spain's state immunity argument and concluded that the CJEU does not have unilateral power to modify the United Kingdom's international obligations.[123] *Infrastructure Services* and *Micula* UK serve as a firm rejection by the United Kingdom court of the argument that *Achmea* and its progeny were grounds for non-enforcement of intra-European Union arbitration awards in the United Kingdom.[124]

III. COMPARISON AND ANALYSIS

The cases discussed in this paper had significant implications for enforcing intra-European Union arbitration awards.[125] This section takes a comparative look at the judicial responses of the United States and the United Kingdom to intra-European Union arbitration award enforcement after the CJEU judgments in *Achmea*, *Komstroy*, and *PL Holdings*. This comparison's most natural starting point is between *Micula* US and *Micula* UK. Following the *Micula* comparison, this section analyzes the approach taken by other courts in the United States and the United Kingdom. Finally, this section briefly discusses other relevant considerations for investors when enforcing intra-European Union arbitration awards. This section concludes that the United Kingdom is the

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[122] *See Infrastructure Services*, [2023] EWHC 1226 at ¶ 86; Rees-Evans, *supra* note 117.
[123] *See Infrastructure Services*, [2023] EWHC 1226 at ¶ 124; Rees-Evans, *supra* note 117. The High Court also surveyed court rulings in Australian and United States courts to compare how those courts assessed jurisdiction over intra-European Union arbitration award enforcement. *See Infrastructure Services*, [2023] EWHC 1226 at ¶¶ 111-19. The High Court specifically referenced the D.D.C. opinions in *Nextera*, *9REN*, and *Blasket*. *See id.* at 117-18.
[124] *See* Rees-Evans, *supra* note 117; Linklaters, *supra* note 117.
[125] *See*, *e.g.*, Sushant Mahajan, *The Future of EU Investment Law*, INSTITUTE FOR TRANSNATIONAL ARBITRATION (2023), https://itainreview.org/articles/2023/vol5/issue1/the-future-of-eu-investment-law.html (discussing the impact of the *Achmea* line of CJEU judgments on the future of investor-state dispute settlement in the European Union); Mark McNeill & Alexander G. Leventhal, *'Blasket Renewable v. Spain': DC District Court Issues Conflicting Decision Regarding the Enforceability of Intra-EU Awards*, NATIONAL LAW JOURNAL (Apr. 12, 2023), https://www.law.com/nationallawjournal/2023/04/12/blasket-renewable-v-spain-dc-district-court-issues-conflicting-decision-regarding-the-enforceability-of-intra-eu-awards-398-106169/ (addressing the uncertainty in the D.D.C. created by the *Blasket* decision); Rees-Evans, *supra* note 117 (discussing the significance of the United Kingdom cases, *Micula* UK and *Infrastructure Services*).

more stable jurisdiction for investors to bring enforcement proceedings for intra-European arbitration awards.

The *Micula* US and *Micula* UK cases are valuable points of comparison because both cases addressed the enforcement of the same arbitration award before different judicial systems.[126] While both courts granted enforcement of the award, they did so on different grounds.[127] The *Micula* US court distinguished *Achmea* and, therefore, sidestepped the issue of whether or not European Union law was applicable.[128] In *Micula* UK, the UKSC directly took on the issue of European Union law and held that European Union law did not trump the United Kingdom's obligations under international law.[129]

Despite both coming to the same conclusion, the different reasonings adopted by the *Micula* US and *Micula* UK courts led to divergent outcomes among future courts addressing the issue of intra-European Union arbitration award enforcement.[130] The *Micula* UK approach likely played a significant role in many legal practitioners and scholars seeing the decision as a major investor win.[131] In contrast, those same groups found that *Micula* US led to a questionable future for investors in United States courts.[132]

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[126] *See Micula*, 404 F. Supp. 3d at 270-71; *Micula*, [2020] UKSC 5, at ¶¶ 1-27.
[127] *Compare Micula*, 404 F. Supp. 3d at 279-80, *with Micula*, [2020] UKSC 5, at ¶ 87.
[128] *See Micula*, 404 F. Supp. 3d at 279-80.
[129] *See Micula*, [2020] UKSC 5, at ¶ 87.
[130] *Compare Nextera*, 656 F. Supp. 3d at 218 (finding that *Micula* US did not address the question of the applicability of European Union law to the court's jurisdiction and found that it was not applicable) *and Blasket* 665 F. Supp. 3d at 8-9 (find that European Union law was relevant to the court's assessment of jurisdiction), *with Infrastructure Services*, [2023] EWHC 1226 at ¶ 72 (finding *Micula* UK to be directly applicable and having answered the question that Spain's immunity argument based on European Union law could not supersede the United Kingdom's obligations under the ICSID Convention).
[131] *See* Linklaters, *supra* note 117 (discussing how cases like *Micula* and *Infrastructure Services* may encourage investors to look to United Kingdom courts for enforcing intra-European Union arbitration awards).
[132] *See* Alexander A Yanos, *Intra-EU Investment Treaty Disputes in US Courts*, GLOBAL ARBITRATION REVIEW (July 29, 2022), https://globalarbitrationreview.com/review/the-arbitration-review-of-the-americas/2023/article/intra-eu-investment-treaty-disputes-in-us-courts (highlighting the ambiguities and questions left on the table in *Micula* US).

The D.D.C. split on the jurisdiction question has created uncertainty about whether investors could seek recognition of intra-European Union arbitration awards.[133] The ambiguity created by the D.C. Circuit about the applicability of European Union law to the jurisdiction question created a clear divide among D.D.C. judges.[134] The question is now back before the D.C. Circuit to resolve.[135] By leaving the question open, two judges in the D.D.C. came to different conclusions; the judge in *Nextera* found that European Union law only impacted justiciability, while the judge in *Blasket* found that European Union law was directly applicable to the assessment of the court's jurisdiction.[136] This split has left investors uncertain about their ability to enforce awards in the United States.[137] Unfortunately, more clarity will not arrive until the D.C. Circuit issues its opinion in the *Blasket* appeal.[138]

In the aftermath of *Micula* UK, the caselaw in the United Kingdom was significantly more stable than in the United States. Following *Micula* UK, the English High Court showed this stability in *Infrastructure Services* by adopting the UKSC's reasoning in *Micula* UK.[139] The High Court in *Infrastructure Services* found *Micula* UK to be directly applicable to the questions before them and applied *Micula* UK to dismiss Spain's petition to set aside the confirmation of an arbitration award.[140] The willingness of the High Court to adopt *Micula* UK, rejecting the European

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[133] *See* Mahajan, *supra* note 125; McNeill & Leventhal, *supra* note 125.
[134] *See Micula*, 805 F. App'x at 1 (citing *Micula*, 4040 F. Supp. 3d at 276-80 to explain that the question of whether the agreement to arbitrate was nullified by Romania's ascension to the European Union was not addressed because the underlying events in this case occurred before ascension).
[135] *See* Lawn & Shipley, *supra* note 107.
[136] *See Nextera*, 656 F. Supp. 3d at 212-13; *9REN*, 2023 WL 2016933 at *4-6; *Blasket*, 665 F. Supp. 3d at 8.
[137] *See* Lawn & Shipley, *supra* note 107 (concluding that after *Blasket*, investors seeking to enforce awards in the United States may face similar legal obstacles relating to European Union law).
[138] *See* Joseph D. Pizzurro et al., *U.S. Courts Disagree on Whether Spain is Immune from Enforcement of Intra-EU Arbitral Awards*, CURTIS, MALLET-PREVOST, COLT & MOSLE 3 (Apr. 18, 2023), https://d20qsj1r5k97qe.cloudfront.net/media/FSIA-Client-Alert-4.18.23.pdf?mtime=20230418101733&focal=none (concluding that if the D.C. Circuit agrees with *Blasket*, it will pave the way for European Union Member States to challenge intra-European Union arbitration award enforcement in the United States).
[139] *See Infrastructure Services*, [2023] EWHC 1226 at ¶ 72.
[140] *See id.*

Union law incompatibility argument, was a clear statement from United Kingdom courts on their willingness to uphold the United Kingdom's international obligation to enforce arbitration awards.[141]

The United States and the United Kingdom are just two possible jurisdictions investors can go to enforce intra-European Union arbitration awards. The ICSID Convention and the New York Convention obligate counteracting states to recognize and enforce arbitration awards according to their domestic law.[142] While many of these states might be potential options for investors, this paper chose to examine the United States and the United Kingdom because both represent two of the world's largest financial centers.[143] Being large financial centers means that investors looking to enforce an award may be more likely to find state assets to satisfy the award in those two countries.[144] The presence of such assets is an essential consideration for investors seeking to enforce an award because the seizure of the assets by courts is one of the primary methods investors can use to satisfy arbitration awards.[145] Beyond legal proceedings, investors can also look to satisfy awards through various out-of-court tactics.[146] With these additional factors in mind, it is the position of this paper that, under the current legal landscape, the United Kingdom is a more stable

[141] *See* Rees-Evans, *supra* note 117 (highlighting the clear statement coming out of the *Infrastructure Services* judgment); Linklaters, *supra* note 117 (discussing the encouraging outlook on United Kingdom courts for European investors).
[142] *See* New York Convention, *supra* note 21; ICSID Convention, *supra* note 21.
[143] *See* Prableen Bajpai, *The World's Leading Financial Cities*, INVESTOPEDIA (Feb. 1, 2024), https://www.investopedia.com/articles/investing/091114/worlds-top-financial-cities.asp (showing New York City and London as the two largest financial cities in the world). Another promising jurisdiction for investors is Australia. *See* Marigo et al., *supra* note 19 (discussing a recent decision from the High Court of Australia holding that Spain could not use sovereign immunity to prevent enforcement of an ICSID award).
[144] *See* Aadne M. Haga, *International Enforcement of Arbitral Awards*, WIKBORG REIN (Sept. 12, 2020), https://www.wr.no/en/news/international-enforcement-of-arbitral-awards (discussing that the first step in enforcing an arbitration award is to identify and local assets).
[145] *See id.*
[146] *See* Marigo et al, *supra* note 19 (describing out-of-court tactics that investors have taken such as approaching the International Monetary Fund and private ratings agencies to pressure them to downgrade sovereign credit ratings).

jurisdiction than the United States for investors to go to enforce intra-European Union arbitration awards after the CJEU judgments in *Achmea*, *Komstroy*, and *PL Holdings*.

CONCLUSION

The CJEU judgments in *Achmea*, *Komstroy*, and *PL Holdings* sent shockwaves through the investor-state arbitration world. Those judgments changed the landscape of investor-state arbitration in Europe and forced investors with outstanding arbitration awards to look outside the European Union for enforcement.

The first case before the CJEU, *Achmea*, addressed the compatibility of an arbitration provision in an intra-European Union BIT with Articles 267 and 344 TFEU. *Achmea* held that the arbitration provision was incompatible with European Union law and, therefore, invalid. The CJEU extended *Achmea* in *Komstroy* to invalidate the arbitration provision in the ECT, a multilateral international treaty with both Member States and non-Member States as contracting parties. The final case, *PL Holdings*, extended *Achmea* again to invalidate an ad hoc arbitration agreement between a Member State and an investor with identical provisions to the arbitration agreements contained in the previously invalidated BITs. These three judgments made it clear that investor-state arbitration in the European Union was highly suspect.

Following the CJEU judgments, investors saw courts in the United States as an option to enforce outstanding arbitration awards. The first case heard in the United States, *Micula* US, granted the investor's petition to confirm the arbitration award by finding that the European Union law issue raised in *Achmea* did not apply because the underlying facts occurred before Romania acceding to the European Union. This sidestepping of the European Union law issue led future courts, *Nextera* and *Blasket*, to reach conflicting decisions on whether the court had jurisdiction to enforce the arbitration awards. *Nextera* found jurisdiction, holding that the European Union law

issue was an issue of justiciability for the tribunal and not jurisdiction for the court. *Blasket* came to the opposite conclusion, holding that European Union law issues applied to jurisdiction and, when applied, meant that the court did not have jurisdiction. The cases in the United States have led to uncertainty for investors, at least while the appeal is pending in the D.C. Circuit.

In the United Kingdom, the courts have been much more uniform in enforcing intra-European Union arbitration awards. *Micula* UK held European Union law could not diminish the United Kingdom's pre-existing obligations under international treaties, like the ICSID Convention. The *Micula* UK court relied on Article 351 TFEU to reach this conclusion. The English High Court later applied the holding of *Micula* UK in *Infrastructure Services* to dismiss a petition to set aside confirmation of an arbitration award against Spain. The uniformity of the United Kingdom courts was a solid signal to investors of the United Kingdom's willingness to uphold international obligations and enforce intra-European Union arbitration awards. Therefore, the United Kingdom is a more stable jurisdiction than the United States for investors to bring enforcement proceedings to fulfill intra-European Union investor-state arbitration awards after the CJEU judgments in *Achmea*, *Komstroy*, and *PL Holdings*.