

## BRIEFLY NOTED

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### JUDICIAL AND SIMILAR PROCEEDINGS

#### 1. **Case C-109/20 Poland v. PL Holdings (Court of Justice of the European Union – October 26, 2021)**

<<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62020CJ0109&qid=1635345162301&from=EN>>

On October 26, 2021, the Court of Justice of the European Union (CJEU) issued its judgment in Case C-109/20 *Poland v. PL Holdings*. The case concerned an arbitral award issued in favor of PL Holdings against Poland. The arbitration clause which served as the basis for resolving the parties' dispute is contained in a 2017 bilateral investment treaty between Poland and the Belgium-Luxembourg Economic Union (BLEU BIT). One year after the award was made, the CJEU ruled in *Achmea* that intra-EU investor-state arbitration clauses in treaties between EU member states are incompatible with EU law. The Court conversely held that commercial arbitration was compatible with EU law because it is an expression of the will of the parties, rather than a consequence of a treaty between states. Poland used *Achmea* to argue against the arbitral tribunal's jurisdiction, but the objection was **considered** by the Arbitration Institute of the Stockholm Chamber of Commerce to have been registered too late and Poland was ordered to pay damages to PL Holdings. Poland then brought an action before the Svea Court of Appeal (Svea hovrätt) to set aside the award, based on the invalidity under EU law of the arbitration clause in the BLEU BIT. Though the Swedish court accepted that, based on *Achmea*, the clause was invalid, it held that Poland's late objection to the jurisdiction of the tribunal and subsequent arbitration with PL Holdings meant that an ad hoc arbitration agreement had been established between the parties that was not precluded by *Achmea* and thus, the Court denied Poland's request to set aside the award. Poland appealed to the Supreme Court of Sweden (Högsta domstolen), which requested a preliminary ruling from the CJEU as to whether "**Articles 267 and 344 TFEU** precluded the conclusion of an ad hoc arbitration agreement between the parties to the dispute where the content of that agreement is identical to an arbitration clause that is set out in the BIT and is contrary to EU law." The CJEU answered this question in the affirmative.

The CJEU reasoned that the ad hoc arbitration agreement would result in the same effects as the invalid arbitration clause. The CJEU explained "not only [can the Member States not] undertake to remove from the judicial system of the European Union disputes which may concern the application and interpretation of EU law, but also ... where that dispute is brought before an arbitration body on the basis of an undertaking which is contrary to EU law, they are required to challenge the validity of the arbitration clause or the ad hoc arbitration agreement on the basis of which the dispute was brought before that arbitration body." The Court concluded that "the national court is obliged to set aside an arbitral award made on the basis of an arbitration agreement that infringes EU law." This matter of arbitration clauses in contracts between EU member states and EU investors is yet to be addressed by the Court, though Advocate General Kokott hinted in her **opinion** in this case that such a difference in treatment would be unlikely.

#### 2. **Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb") (Situation in Darfur, Sudan) (International Criminal Court Appeals Chamber – November 1, 2022)**

<[https://www.icc-cpi.int/CourtRecords/CR2021\\_09905.PDF](https://www.icc-cpi.int/CourtRecords/CR2021_09905.PDF)>

On November 1, 2021, the Appeals Chamber of the International Criminal Court rejected Mr. Ali Abd-Al-Rahman's appeal against the Pre-Trial Chamber II decision on jurisdiction of May 17, 2021. The Abd-Al-Rahman concerns the trial of Mr. Abd-Al-Rahman for "31 counts of war crimes and crimes against humanity allegedly committed between August 2003 and at least April 2004 in Darfur, Sudan." The Appeals Chamber's decision addressed four grounds of appeal. According to an ICC **press release**, the Appeals Chamber rejected the defense's grounds of appeal by stating that there was "no error in the reasons given by the Pre-Trial Chamber defining a 'situation' before the Court," and that "the non-funding by the United Nations of the activities of the Court arising from a referral by the Security Council does not invalidate the UNSC resolution 1593."

In reference to the principle of legality, the Appeals Chamber found that the referral of the Situation in Darfur, Sudan took place in the wake of serious violations of human rights and humanitarian law that were criminalised under international law at the time.”

**3. Case T-612/17 Google LLC v. European Commission (European Union General Court – November 10, 2021)**

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=249001&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=39732132>

On November 10, 2021, the General Court of the European Union (EUGC) dismissed, in Case T-612/17, Google’s action against the Commission’s finding that “Google abused its dominant position by favouring its own comparison shopping service over competing comparison shopping services,” and upheld the fine imposed on Google. According to a EUGC [press release](#), on June 27, 2017, the Commission found in [Case AT.39740](#) that Google, by favoring its own comparison shopping service over competing comparison services, “abused its dominant position on the market for online general search services,” and, imposed a pecuniary penalty of £2.42 billion on Google. Google and Alphabet (Google’s parent company) brought an action against the decision. The EUGC dismissed, for the most part, the action by recognizing “the anticompetitive nature of the practice at issue,” confirming the Commission’s decision on harmful effects of Google’s practice on competition, and ruling out “any objective justifications for Google’s conduct.” On the other hand, the EUGC annulled the infringement decision in respect of the general search services market by considering that “the Commission did not establish that Google’s conduct had had – even potentially – anticompetitive effects on the market.” However, the EUGC, by stating that a partial annulment has no impact on the fine, confirmed the pecuniary penalty amount imposed on Google.

**4. Case C-479/21 PPU Governor of Cloverhill Prison (Court of Justice of the European Union – November 16, 2021)**

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=249323&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=42053763>

On November 16, 2021, the Court of Justice of the European Union (CJEU) ruled, in the Case C-479/21 PPU *Governor of Cloverhill Prison*, that [Withdrawal Agreement](#) provisions “concerning the European arrest warrant regime with respect to the United Kingdom” and the [EU-UK Trade and Cooperation Agreement](#) (TCA) provision “concerning the new surrender mechanism” are binding on Ireland. According to a CJEU [press release](#), the case concerned two fugitives arrested in Ireland who contested their extradition to the UK. The case eventually reached the Irish Supreme Court, which referred the case to the CJEU to determine whether the relevant provisions in the Withdrawal Agreement and the TCA are binding on Ireland, particularly in light of Protocol No. 21 (see page 295 [here](#)), which permits Ireland to choose whether to opt in to, inter alia, the European arrest warrant regime and surrender mechanism provisions.

As per the withdrawal agreement, during the transition period (February 1, 2020 – December 31, 2020) the European Arrest Warrant (EAW) legislation applies between the UK and EU. After the end of the transition period, if a fugitive arrested on the basis of the EAW law is arrested before the end of the transition period, the EAW framework applies; after the end of the transition period, the TCA provisions apply. In the case, which concerned extradition from Ireland to the UK, both fugitives’ arrests warrants were issued during the transition period. However, one of the fugitives was arrested during the transition period, whereas the other fugitive was arrested after the end of the transition period.

The CJEU examined the legal basis of both the withdrawal agreement and the TCA, and ruled that the provisions of both treaties are binding on Ireland. First with regard to the withdrawal agreement, the CJEU explained that the conclusion of the withdrawal agreement by the EU is solely based on the [Article 50\(2\) TEU](#), and as a result, Protocol 21 does not apply. Therefore, the CJEU concluded that as per the Withdrawal Agreement, the EU law, including the Framework Decision on the EAW, applies in the UK during the transition period. Second, with regards to the TCA, the CJEU explained that the legal basis of the TCA is solely [Article 217](#)

TFEU, and as a result, Protocol 21 does not apply. The CJEU concluded that as per Article 217 TFEU the EU is competent to include provisions, including those regarding the AFSJ, in the TCA, and such provisions are binding on Ireland.

#### RESOLUTIONS, DECLARATIONS, AND OTHER DOCUMENTS

##### 1. **Cooperation Agreement between the Office of the Prosecutor of the International Criminal Court and the Government of Colombia (October 28, 2021)**

<<https://www.icc-cpi.int/itemsDocuments/20211028-OTP-COL-Cooperation-Agreement-ENG.pdf>>

On October 28, 2021, the Prosecutor of the International Criminal Court (ICC) concluded a Cooperation Agreement with Colombia. According to an ICC [press release](#), the agreement renewed “the commitment of the Office to Colombia’s national accountability processes.” The Office of the Prosecutor determined that Colombia actively investigates and prosecutes Rome Statute crimes, and, in light of this, the preliminary examination must be closed. The agreement is based on the complementary principle under the Rome Statute which states that the ICC only complements domestic courts’ efforts, and that the court will step in only when the state is not willing or is unable to prosecute. Under the agreement, Colombia undertakes to continue to protect and fund its existing constitutional and legislative frameworks, as well as ensure the independence of these systems their independence. The Office of the Prosecutor undertakes, inter alia, to support Colombia’s accountability efforts and assist with efforts to raise awareness about the ICC among the Colombian legal profession.

##### 2. **Iran Atrocities Tribunal Begins Hearings (November 10, 2021)**

<<https://abantribunal.com/2021/11/09/tribunal/>>

On November 10, 2021, the [Iran Atrocities Tribunal](#) (also known as the Aban Tribunal) began its Public Hearings in London “to investigate the killing and wounding of thousands of innocent protesters in Iran in 2019.” According to a Tribunal [press release](#), it will assess whether the crimes allegedly committed by individuals such as the Supreme Leader Ali Khamanei and President Ebrahim Raisi constitute crimes against humanity. The Tribunal panel will hear 45 witnesses and will investigate [133 Iranian Government Officials’](#) roles in international crimes during the 2019 protests. The 2019 protests broke out after the Iranian Government’s introduction of a 200 per cent spike in fuel prices. According to the press release, “government forces responded to the protests with extreme brutality and violence.” The Tribunal was established by a group of human rights advocates on the protests’ anniversary to investigate the international crimes committed during the 2019 protests.