MINUTES
2020-02-04
Case presentation
In Stockholm

Case file appendix 63
Case No T 1569-19

SUPREME COURT JUSTICES

Ann-Christine Lindeblad, Svante O. Johansson (reporting justice), Dag Mattsson, Petter Asp and Stefan Reimer

REPORTING JUDGE (KEEPER OF MINUTES)

Karin Ahlstrand Oxhamre

PARTIES

Appellant and Respondent

The Republic of Poland

Ministerstwo Finansów

Ul. Switerokryska 12

00-916 Warszawa

Poland

Legal counsel: (Advokat) Martin Wallin and Julia Tavaststjerna and legal associate Lise Guterstam

Advokatbyrån Wallin & Partners AB

Blasieholmsgatan 3

111 48 Stockholm

Legal counsel: (Advokat) Anna-Maria Tamminen

Hannes Snellman Advokatbyrå AB

Box 7801

103 96 Stockholm

Appellant and Respondent

PL Holdings S.á.r.l.

c/o Mannheimer Swartling Advokatbyrå AB

Box 2235

403 14 Gothenburg

Legal counsel: (Advokat) Robing Oldenstam and David Sandberg

Mannheimer Swartling Advokatbyrå AB

Same address

Legal counsel: (Advokat) Jacob Rosell Svensson

Mannheimer Swartling Advokatbyrå AB

Box 4291

203 14 Malmö

MATTER

Invalidity, etc. of arbitral awards rendered on 28 June 2017 and 28 September 2017 in SCC case no. V 2014/163

APPEALED JUDGMENT

Judgment of Svea Court of Appeal of 22 February 2019 in case T 8538-17 and T 12033-17

The Supreme Court makes the following

DECISION

The Supreme Court decides to send a request for a preliminary ruling to the Court of Justice of the European Union as set forth in Appendix A.

The Supreme Court declares that the case shall be stayed pending the CJEU's determination.

Karin Ahlstrand Oxhamre

Presented on 4 February 2020

Delivered for dispatch on 14 February 2020

Anne Christine Lindeblad

Case no T 1569-19

Appendix A

REQUEST FOR PRELIMINARY RULING

Background

The relevant investment treaty

1. On 19 May 1987, Poland, on the one hand, and Luxembourg and Belgium, on the other hand, entered into an investment agreement (the investment agreement). The agreement entered into force on 2 August 1991.

2. Article 9 includes the following rules regarding dispute resolution:

> 1. a) Disputes between one of the Contracting Parties and an investor of the other Contracting Party shall be subject to a written notification accompanied by a detailed memorandum sent by said investor to the relevant Contracting Party.
>
> b) Within the meaning of this Article, the term ‘disputes’ refers to disputes with regard to the expropriation, nationalisation, or any other measures similarly affecting the investments, including the transfer of an investment to public ownership, placing it under public supervision, as well as any other deprivation or restriction of rights *in rem* by sovereign measures that might lead to consequences similar to those of expropriation.
>
> c) Said disputes shall, as much as possible, be settled amicably between the relevant parties.

> 2. If the dispute could not be so settled within six months from the date of the written notification specified in Paragraph 1, it shall be submitted, at the choice of the investor, to arbitration before one of the bodies indicated below:
>
> a) the Arbitration Institute of the Stockholm Chamber of Commerce;
>
> […]
>
> 5. The arbitration body should make its award on the basis of:
>
> - the national law of the Contracting Party that is a party to the dispute, in the territory of which the investment is located, including the principles of settling legal disputes;
>
> - the provisions of this Treaty;
>
> - the terms of any special agreement concerning the entity that has made the investment;
>
> - the generally accepted rules and principles of international law.
>
> 6. The arbitration awards shall be final and binding on the parties to the dispute. Each Contracting Party shall take steps to execute the awards in accordance with its national law.

3. As can be seen, disputes pursuant to the agreement shall be decided by an arbitral tribunal, applying *i.a.* the laws of the State party to the dispute and where the investment was made. The arbitral tribunal's decisions shall be final.

Factual Background of the Dispute

4. PL Holdings S.á.r.l. (PL Holdings) is a joint-stock company registered in Luxembourg under the laws of Luxembourg.

5. During 2010-2013, PL Holdings acquired shares in two Polish banks, which were merged in 2013. PL Holdings came to hold 99 percent of the shares in the new bank.

6. In July 2013, Komisja Nadzoru Finansowego, an authority under Polish law responsible for the supervision of banks and credit institutions in Poland, decided to revoke PL Holdings' voting rights for the shares in the bank, and to order the sale of these shares.

The Arbitral Proceedings between PL Holdings and Poland

7. PL Holdings initiated arbitral proceedings against Poland in Stockholm pursuant to the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. of 2010. The Parties agree that the rules of 2010 applies (SCC 2010).

8. In a request for arbitration, which was received by the arbitration institute on 28 November 2014, PL Holdings argued that Poland had breached the investment agreement by means of the Komisja Nadzoru Finansowego's decisions to revoke PL Holdings' voting rights for the shares in the bank and to order the compulsory sale of the shares. PL Holdings claimed damages from Poland and argued that the arbitral tribunal had jurisdiction pursuant to Article 9 of the investment agreement. Poland answered the request for arbitration on 30 November 2014.

9. On 7 August 2015, PL Holdings submitted a statement of claim. In its statement of defence of 13 November 2015, Poland raised an objection to the effect that PL Holdings should not be considered an investor for the purpose of the investment agreement, and that the arbitral tribunal therefore had no jurisdiction to decide the dispute.

10. In *a submission* of 27 May 2016, Poland raised an objection against the validity of the investment agreement, arguing that the investment agreement was incompatible with EU law. PL Holdings requested that Poland's objection be dismissed as it had been raised too late.

11. The arbitral tribunal decided upon Poland's objection in a partial award of 28 June 2017. The arbitral tribunal found that it had jurisdiction. In the same arbitral award, the arbitral tribunal decided that Poland had breached the investment agreement by forcing the sale of PL Holdings' shares in the Polish bank. PL Holdings was therefore entitled to damages.

12. On 28 September 2017, the arbitral tribunal rendered a final award in the same arbitral proceedings. Pursuant to the arbitral award, Poland was ordered to pay 653 639 384 Polish zloty (approximately 150 million euro) together with certain interest to PL Holdings, and to pay compensation for the company's costs of the arbitral proceedings.

The Case before the Svea Court of Appeals

Introduction

13. On 28 September 2017, Poland initiated challenge proceedings against PL Holdings with respect to both the partial award and the final award. The Svea Court of Appeals decided to join the cases.

14. Poland requested, to the extent relevant in this context, that the Svea Court of Appeals declare both the partial award and the final award invalid and, in the alternative, that the arbitral awards be set aside.

15. PL Holdings opposed Poland's requests.

Poland's case before the Court of Appeals

16. The arbitral awards concern a dispute between an investor and a member state under an investment agreement between two member states. Articles 267 and 344 of the Treaty of the Functioning of the European Union (TFEU) preclude the provision in Article 9 of the investment agreement which means that an investor in Luxembourg, if a dispute arises regarding investments made in Poland, may initiate arbitral proceedings before an arbitral tribunal, whose jurisdiction Poland is obligated to accept.

17. Article 9 of the investment treaty is incompatible with the basic principles of the Union's legal order. The provision undermines the autonomy, full effect and uniform application of EU law. Therefore, Article 9 is invalid.

18. The invalidity means that disputes between an investor and a member state under an investment agreement between two member states may not be decided by arbitrators. Arbitral awards which are based on and issued pursuant to such a provision are manifestly incompatible with the basic principles of the legal system. The arbitral awards are therefore invalid pursuant to Section 33, Paragraph 1, Item 1 and 2 of the Swedish Arbitration Act (1999:116) (the Swedish Arbitration Act).

19. Moreover, Article 9 of the investment agreement cannot form the basis for the arbitral tribunal's jurisdiction. There is thus no valid arbitration agreement between PL Holdings and Poland. The invalidity follows directly from EU law and shall be considered *ex officio* [MSA translation note: by the court on its own motion].

20. In addition, Poland has, within the time limit stipulated in Section 34, Paragraph 2 of the Swedish Arbitration Act, raised an objection against the arbitral tribunal's jurisdiction with reference to the invalidity of Article 9 of the agreement.

21. If an application of Section 34, Paragraph 2 of the Swedish Arbitration Act would result in Poland's jurisdictional objection not being considered, the provision must not be applied as it prevents the full effect of EU law.

22. Poland has not waived its right to make the objection. No new arbitration agreement has been concluded and the parties cannot be considered to have agreed on arbitration on any other basis based on Poland's actions after PL Holdings requested arbitration.

23. The principle of proportionality referred to by PL Holdings is not applicable to the circumstances of the case.

PL Holdings' grounds for objection

24. The questions decided by the arbitral tribunal is whether Poland has breached the investment agreement, if PL Holdings is entitled to compensation for this breach and, if so, the amount of the compensation. These are questions over which the parties dispose, and the parties may settle these questions amicably. The questions may therefore be decided by an arbitral tribunal.

25. Furthermore, the arbitral tribunal's assessment of the merits has not involved any questions which the parties may not settle amicably. The circumstances invoked by Poland does not mean that the arbitral awards, or the manner in which they arose, are manifestly incompatible with the basic principles of the legal system. Thus, the arbitral awards shall not be declared invalid pursuant to Section 33, Paragraph 1, Items 1 and 2 of the Swedish Arbitration Act.

26. Article 9 in the investment agreement constitutes a valid offer for arbitration, which PL Holdings has accepted by submitting a request for arbitration.

27. Under all circumstances, Poland has raised its objection regarding the validity of the arbitration agreement too late. The objection shall be assessed within the framework of Section 34, Paragraph 2, of the Swedish Arbitration Act and SCC 2010. The question of whether the arbitration agreement is incompatible with the EU treaties is not a question which may be considered *ex officio*.

28. Even if Poland's offer for arbitration included in article 9 of the investment agreement is invalid, a binding arbitration agreement has nevertheless been concluded as a result of the parties' conduct pursuant to the principles for commercial arbitration. By submitting its request for arbitration, PL Holdings submitted an offer to Poland to resolve the parties' dispute under the same terms as those set forth in Article 9 of the investment agreement. Poland has, through procedural conduct, or through its passivity, accepted PL Holdings' offer.

29. Neither the arbitral awards, *i.e.* their substantive contents or the manner in which they arose, nor the preclusion provision set forth in Section 34 Paragraph 2 of the Swedish Arbitration Act, prevents the full effect or uniform application of EU law. Furthermore, the arbitral awards do not undermine the autonomy of EU law.

30. To set aside or declare the arbitral awards invalid would affect PL Holdings in a disproportionate manner in relation to what this would achieve. Such a measure would therefore be incompatible with the EU law principle of proportionality.

The Assessment of the Court of Appeals

31. The Court of Appeals has rejected Poland's claim and, to the extent relevant for this part of the proceedings, provided, in summary, the following reasons for its decision.

32. The Court of Appeals has concluded that the principles established by the CJEU in *Achmea*, C-284/16, EU:C:2018:158, are applicable to the dispute between PL Holdings and Poland. The reasons were that the arbitral tribunal could not be considered a court of a member state and that the dispute could potentially include interpretation or application of EU law.

33. The Court of Appeals has determined that *Achmea* means that Article 9 of the BIT is invalid as between the member states. According to the Court of Appeals, the invalidity also means that the standing offer given by Poland to investors to resolve disputes under the BIT through arbitration is invalid.

34. However, according to the Court of Appeals, the invalidity has not prevented a Member State and an investor from concluding an arbitration agreement regarding the same dispute at a later stage. Under such circumstances, the arbitration agreement has its basis in the freely expressed wishes of the parties and has been concluded pursuant to the same principles which govern a commercial arbitration.

35. According to the Court of Appeals, the arbitral tribunal have determined issues which may be determined by a arbitral tribunal.. Further, the contents of the arbitral awards were not incompatible with *ordre public*. Thus, according to the Court of Appeal, there were no grounds for declaring the arbitral awards invalid pursuant to Section 33, Paragraph 1, Items 1 or 2 of the Swedish Arbitration Act.

36. Finally, the Court of Appeals has considered that Poland did not raise a timely objection against the validity of Article 9 of the BIT. Thus, Poland's objection against the validity of the arbitration agreement is precluded pursuant to Section 34, Paragraph 2, of the Swedish Arbitration Act. According to the Court of Appeals, there were thus no grounds for setting aside the arbitral awards pursuant to Section 34 of the Swedish Arbitration Act.

The Case before the Supreme Court

37. The parties have maintained their respective claims and objections before the Supreme Court and developed their respective arguments essentially in line with their respective cases before the Court of Appeals.

The Legal Rules

The Swedish Arbitration Act

38. Pursuant to Section 1 of the Swedish Arbitration Act, parties may refer to arbitration, by one or several arbitrators, disputes which the parties may settle amicably.

39. The basis for the arbitration is the arbitration agreement. The agreement is based on the parties' rights to dispose over the issues in dispute. The rule in Section 1 means that disputes in which a public interest is significantly present are excluded from the arbitrable domain. Also, specific legal provisions may provide that a dispute concerning a certain issue may not be settled by arbitration. (See Government Bill 1998/99:35 p. 49 and 234.)

40. Pursuant to Swedish law, there are no requirements governing the form for arbitration agreements. The question of whether a valid arbitration agreement has been concluded shall be determined pursuant to general rules of contract law. For example, a valid arbitration agreement can be concluded by the parties' tacit

conduct, or the passivity of one of the parties. (See Government Bill 1998/99:35 p. 67, Stefan Lindskog, Skiljeförfarande En kommentar, second edition, 2012, 1–6 §§ Section 2.1.2 and Kaj Hobér, International Commercial Arbitration in Sweden, 2011, p. 93 ff.)

41. Pursuant to Section 34 Paragraph 1 Item 1 of the Swedish Arbitration Act, an arbitral award shall, if challenged by one party, be set aside, in whole or in part, if it is not based on a valid arbitration agreement between the parties.

42. Pursuant to Section 34 Paragraph 2 of the Swedish Arbitration Act however, a party may not invoke a circumstance which it must be considered to have waived, either by participating in the proceedings without raising an objection, or in any other way. However, a party's appointment of an arbitrator shall not, in and of itself, be considered as an acceptance of the arbitral tribunal's jurisdiction to determine the issue referred to arbitration.

43. According to the preparatory works in respect of Section 34 of the Swedish Arbitration Act, a party which participates in an arbitration without immediately raising an objection against the jurisdiction of the tribunal, must, in general, be considered to have accepted the arbitral tribunal's jurisdiction to determine the dispute in question. Moreover, the absence of an objection against the validity of an arbitration agreement as such may also cause a binding arbitration agreement to arise on contractual grounds. (See Government Bill 1998/99:35 p. 236, cf. Stefan Lindskog, Skiljeförfarande En kommentar, second edition, 2012, 34 §, Section 6.1.1-6.1.7)

44. Pursuant to Section 33, Paragraph 1, Item 1 of the Swedish Arbitration Act, an arbitral award is invalid if it includes the assessment of a question that, under Swedish law, may not be decided through arbitration. Under Section 33, Paragraph 1, Item 2, an arbitral award is also invalid if the award, or the manner in which it arose, is manifestly incompatible with the basic principles of the Swedish legal system. The grounds for invalidity shall be assessed by the court ex officio.

The Rules of SCC 2010

45. Pursuant to § 4 of SCC 2010, an arbitration shall be considered to have been initiated on the day the arbitration institute receives the request for arbitration. Pursuant to § 5 of SCC 2010, the respondent shall, within the time period decided by the institute's secretariat, submit an answer to the request for arbitration. The answer shall indicate whether the respondent has any objections against the existence, validity or applicability of the arbitration agreement. However, failure to raise such objections does not prevent the respondent from, at any time until the submission of the statement of defence, raising any such objections.

46. Thereafter, the parties shall, within the time frame decided by the arbitral tribunal, submit a statement of claim and a statement of defence. The statement of defence shall, if such objections have not already been raised, include any objections regarding the existence, validity or applicability of the arbitration agreement. (See § 24 SCC 2010.)

The CJEU's judgment in *Achmea*

47. The judgment of the CJEU's judgment in *Achmea* was caused by a request for a preliminary ruling from the Bundesgerichtshof in Germany concerning a dispute between Slovakia and the Dutch company Achmea. The dispute was based on a BIT between Slovakia and the Netherlands.

48. The Bundesgerichtshof asked a number of questions to the CJEU, in order to obtain clarity regarding the issue of whether a specific provision in the BIT between Slovakia and the Netherlands was compatible with Articles 267 and 344 TFEU. The provision in the BIT, which largely corresponds to the clause in question in the case before the Supreme Court, stipulated that disputes between a member state and an investor under the BIT should be decided by an arbitral tribunal.

49. In Paragraph 60 of its judgment, the CJEU explained that Articles 267 and 344 TFEU shall be interpreted as precluding a provision in an international agreement concluded between member states, under which an investor from one member states may, in the event of a dispute concerning investments made in the other Member State, initiate proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State is obligated to accept.

50. It follows from the reasoning of the CJEU in its judgment, that a number of fundamental principles of EU law were relevant for the CJEU's decision, *inter alia* the autonomy of EU law, the importance of a uniform and coherent interpretation of EU law, the protection of individuals' rights including the right to access of courts, the principle of mutual trust between the Member States and the duty of sincere cooperation. The CJEU stated that it is the duty of the national courts, as well the CJEU, to ensure that these principles are upheld within the EU.

51. The CJEU determined that arbitration proceedings, such as those referred to in Article 8 of the BIT between Slovakia and the Netherlands, were different from commercial arbitrations, which originate from the freely expressed wishes of the parties. (See Paragraph 55 of *Achmea*.)

52. In its reasoning, the CJEU also stated that the requirements of efficiency in arbitration justifies that the review of arbitral awards conducted by the courts of the Member States is limited in scope, provided that the fundamental provisions of EU law can be made subject of a reference to the CJEU for a preliminary ruling (see Paragraph 54 of *Achmea*).

The need for a preliminary ruling

53. The question here is, what are the implications of the principles elaborated by the CJEU in *Achmea* for the outcome of the case before the Supreme Court.

54. It is clear that the provision regarding dispute resolution in the investment agreement, that is of relevance in this case before the Supreme Court, is invalid. Thus, a possible conclusion is that the standing offer to initiate arbitration proceedings, which the state can be said to have extended to an investor through the dispute resolution provision, is also invalid, considering that the offer is closely linked to the investment agreement.

55. In the case before the Supreme Court, it has also been argued that the situation in this case is different, since it is the request for arbitration that constitutes an offer. The state would then, as a result of its freely expressed wishes, expressly or tacitly, be able to accept the jurisdiction of the arbitral tribunal, in accordance with the principles explained by the CJEU with regard to commercial arbitration.

56. The Supreme Courts does not consider it to be clear, or clarified, how EU law shall be interpreted with regard to the issues that arise in this case. Therefore, there are reasons for requesting a preliminary ruling from the CJEU in order to avoid the risk of an incorrect interpretation of EU law.

Request for preliminary ruling

57. The Supreme Court request that the CJEU, by means of a preliminary ruling, answers the following question.

> Do Articles 267 and 344 TFEU, as interpreted in *Achmea*, mean that an arbitration agreement is invalid if it has been entered into by a member state and an investor – when there is an arbitration clause in an investment treaty which is invalid because the treaty was entered into between two member states – by means of the member state, after the investor has requested arbitration, as a result of its freely expressed wishes , refraining from objecting against the jurisdiction [of the tribunal]?