Case C-109/20

Request for a preliminary ruling

Date lodged:

27 February 2020

Referring court:

Högsta domstolen (Sweden)

Date of the decision to refer:

4 February 2020

Appellant and cross-respondent

Republic of Poland

Appellant and cross-respondent

PL Holdings S.à.r.l.

[...]

PARTIES

Appellant and cross-respondent

Republic of Poland

Ministerstwo Finansów

[...] Warsaw

Poland

[...] Stockholm

[**OR. 2**]

[...]

Appellant and cross-respondent

PL Holdings S.à.r.l.

[...] Gothenberg

[...]

MATTER

Invalidity etc. as regards the arbitration awards delivered on 28 June 2017 and 28 September 2017 [...]

[**OR. 3**]

The Högsta domstolen (Supreme Court, Sweden) makes the following

ORDER

The Högsta domstolen (Supreme Court) hereby decides to request a preliminary ruling from the Court of Justice of the European Union in accordance with **Annex A** to these minutes.

[...]

Delivered on 2020-02-04

[...]

[**OR. 4**]

ANNEX A [...]

MINUTES [...]

REFERENCE FOR A PRELIMINARY RULING

Background

The investment contract at issue

1. On 19 May 1987, Poland, of the one part, and Luxembourg and Belgium, of the other, entered into an investment contract (‘the investment contract’). The contract entered into force on 2 August 1991.

2. Article 9 [of the contract] lays down the following rules for the settlement of disputes.

‘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 [**OR. 5**] 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 is apparent from the above, disputes arising from the contract are thus to be settled by an arbitration tribunal with the application of, inter alia, the law of the State which is party to the dispute and in which the investment was made. The decisions of the arbitration tribunal is to be final.

Background to the dispute

4. PL Holdings S.à.r.l. (PL Holdings) is a limited company registered in Luxembourg and subject to Luxembourg law.

5. Between 2010 and 2013, PL Holdings acquired shares in two Polish banks which merged in 2013. PL Holdings eventually held more than 99% of the shares in the new bank. [**OR. 6**]

6. In July 2013, Komisja Nadzoru Finansowego, an authority under Polish law which is responsible for supervising banks and credit institutions in Poland, decided to revoke PL Holdings' voting rights in that bank and forced their sale.

Arbitration proceedings between PL Holdings and Poland

7. PL Holdings brought arbitration proceedings against Poland in Stockholm, under the arbitration rules of the Arbitration Institute of the Stockholm Chamber of Commerce ('SCC'). It is common ground between the parties that it is the 2010 rules which are to apply (SCC 2010).

8. In a letter of formal notice sent to the Arbitration Institute on 28 November 2014, PL Holdings stated that Poland had breached the investment contract by Komisja Nadzoru Finansowegos's decision to cancel PL Holdings' voting rights of the shares in the bank and to force their sale. PL Holdings claimed damages from Poland, relying on Article 9 of the investment contract as the basis for the arbitration tribunal having jurisdiction. Poland responded to that letter of formal notice on 30 November 2014.

9. On 7 August 2015 PL Holdings filed an action. In its defence, which it lodged on 13 November 2015, Poland claimed that PL Holdings could not be regarded as an investor within the meaning of the investment contract and that, consequently, the arbitration tribunal did not have jurisdiction to hear the case.

10. By a submission of 27 May 2016, Poland challenged the validity of the arbitration agreement on the ground that the investment contract did not comply with EU law. PL Holdings requested that Poland's objection be rejected as having been made out of time.

11. The arbitration tribunal took a position on Poland's objection in a separate arbitration award of 28 June 2017. The arbitration tribunal held that it had jurisdiction. In the same arbitration award, the arbitration tribunal found that Poland had breached the investment contract [**OR. 7**] by forcing the sale of PL Holdings' shareholding in the Polish bank. PL Holdings was therefore entitled to damages.

12. On 28 September 2017, the arbitration tribunal made a final award in those arbitration proceedings. The arbitration award ordered Poland to pay the sum of 653 639 384 Polish zlotys (approximately EUR 150 million), together with an

amount of interest, to PL Holdings and to pay the company's costs of the arbitration proceedings.

The case before the hovrätten (Court of Appeal)

Introduction

13. On 28 September 2017, Poland brought actions against PL Holdings in respect of both the special arbitration award and the final award. The hovrätten (Court of Appeal) decided to deal with the actions together.

14. Poland claimed, in so far as is relevant here, that the hovrätten (Court of Appeal) should, principally, declare both the special arbitration award and the final award invalid and, in the alternative, that the arbitration award should be annulled.

15. PL Holding contested Poland's claim.

Poland's appeal before the hovrätten (Court of Appeal)

16. The arbitration awards concern a dispute between an investor and a Member State in the context of an investment contract between two Member States. Articles 267 and 344 of the Treaty on the Functioning of the European Union (TFEU) preclude the rule laid down in Article 9 of the contract which allows a Luxembourg investor, in the event of a dispute concerning investments in Poland, to bring proceedings against Poland before an arbitration tribunal, the competence of which that Member State is obliged to accept.

17. Article 9 of the investment contract is contrary to the foundations of the EU legal order. That provision undermines the autonomy, effectiveness and uniform application of EU law. Article 9 is therefore invalid. [**OR. 8**]

18. The consequence of that invalidity is that disputes between an investor and a Member State under an investment contract between two Member States may not be decided by arbitrators. Arbitration awards based and made on the basis of such a provision are manifestly contrary to the legal order. The arbitration awards are therefore invalid under points 1 and 2 of the first subparagraph of Paragraph 33 of the lagen (1999:116) om skiljeförfarande (skiljeförfarandelagen; the Law on arbitration proceedings; 'the SFL').

19. Article 9 of the investment contract also cannot provide a basis for the arbitration tribunal having jurisdiction. There is therefore no valid arbitration agreement between PL Holdings and Poland. The invalidity is a direct consequence of EU law and must be raised of the Court's own motion.

20. In addition, within the period laid down in the second subparagraph of Paragraph 34 of the SFL, Poland challenged the jurisdiction of the arbitration tribunal, on the basis of the invalidity of Article 9 of the contract.

21. If the application of the second subparagraph of Paragraph 34 of the SFL were to lead to Poland's plea of lack of jurisdiction being inadmissible, that provision would have to be disapplied, as it would impede the full effectiveness of EU law.

22. Poland has not waived its right to challenge that point. In addition, Poland's conduct following PL Holding's bringing of arbitration proceedings cannot have created any new arbitration agreement or given rise to arbitration between the parties on any other basis.

23. The principle of proportionality relied upon by PL Holding is not applicable to the facts of the present case.

PL Holding's pleas in law

24. The questions which were decided by the arbitration tribunal are whether Poland has breached the investment contract, whether PL Holding is entitled to compensation for that breach of contract and, if so, in what amount. Those are questions over which the parties have control and on which they are capable of reaching a settlement. The questions may therefore be decided by an arbitration tribunal. [**OR. 9**]

25. Nor did the arbitration tribunal's examination of the matter involve any questions on which the parties are incapable of reaching a settlement. The facts on which Poland relied do not mean that the arbitration awards or the manner in which they were arrived at is incompatible with the legal order. Consequently, the arbitration awards should not be declared invalid pursuant to points 1 and 2 of the first paragraph of Paragraph 33 of the SFL.

26. Article 9 of the investment contract is a valid proposal of arbitration proceedings which PL Holdings accepted by using the arbitration proceedings.

27. In any event, Poland was out of time in challenging the validity of the arbitration agreement. The objection will be examined in the context of the second subparagraph of Paragraph 34 of the SFL and SCC 2010. The question of whether the arbitration agreement is contrary to the Treaties is not a question to be raised of the Court's own motion.

28. In the event that the arbitration proposal made by Poland in Article 9 of the investment contract is invalid, there is nevertheless a binding arbitration agreement which has arisen from the fact that the conduct of the parties is in accordance with the principles of commercial arbitration. By initiating arbitration proceedings, PL Holdings made a proposal to Poland to settle the dispute between the parties on the same conditions as those set out in Article 9 of the investment contract. By its collusive conduct, or by inertia, Poland accepted PL Holding's proposal.

29. Neither the arbitration awards, that is to say, their substantive content or the way in which they were made, nor the time-bar rules laid down in the second

subparagraph of Paragraph 34 of the SFL impede the full effect and uniform application of EU law. Nor do the arbitration awards undermine the autonomy of EU law.

30. The rescission or annulment of the arbitration awards would have an effect on PL Holding disproportionate to what those measures would achieve. Such a procedure would therefore run counter to the EU law principle of proportionality. [**OR. 10**]

Findings of the hovrätten (Court of Appeal)

31. The hovrätten (Court of Appeal) has dismissed Poland's action and, in summary, given the following grounds for its position, so far as material here.

32. The hovrätten (Court of Appeal) has noted that the principles identified by the Court of Justice in *Achmea* (C-284/16, EU:C:2018:158) were applicable to the dispute between PL Holdings and Poland. That flows from the fact that the arbitration tribunal cannot be regarded as a court or tribunal of a Member State and that the dispute might concern the interpretation or application of EU law.

33. The hovrätten (Court of Appeal) held that the judgment in *Achmea* has the effect of rendering Article 9 of the investment contract invalid in respect of relations between Member States. According to that court, the invalidity also means that the standing proposal made by Poland to investors that disputes arising from the investment contract are to be decided by an arbitration tribunal is void.

34. However, according to the hovrätten (Court of Appeal), the invalidity did not prevent a Member State and an investor from concluding an arbitration agreement in respect of the same dispute at a later stage. In such a case, that arbitration agreement is one which is based on the common intention of the parties and concluded in accordance with the same principles as commercial arbitration proceedings.

35. The hovrätten (Court of Appeal) held that the arbitration awards included an examination of issues which may be decided by an arbitration tribunal. Nor is the content of the arbitration awards contrary to the legal order. There was therefore no ground on which to annul those awards on the basis of points 1 or 2 of the first subparagraph of Paragraph 33 of the SFL.

36. Lastly, the hovrätten (Court of Appeal) took the view that Poland's challenge to the validity of Article 9 of the investment contract was made out of time. The objection raised by Poland to the validity of the arbitration agreement is therefore time-barred under the second subparagraph of Paragraph 34 of the SFL. There was therefore no ground on which to annul the arbitration awards on the basis of Paragraph 34 of the SFL. [**OR. 11**]

The case before the Högsta domstolen (Supreme Court)

37. The parties maintained their respective claims and defences before the Högsta domstolen (Supreme Court) and developed the arguments on appeal, in essence, in the same way as before the Court of Appeal.

The legal regime

The SFL

38. Under Paragraph 1 of the SFL, disputes which the parties may be able to settle may be submitted by agreement to the decision of one or more arbitrators.

39. Arbitration proceedings are to be based on the arbitration agreement. The agreement is based on the parties' entitlement to reach a settlement concerning the subject-matter of the dispute. Paragraph 1 [of the SFL] provides that disputes in which public interest is more marked are to be excluded from arbitration. It may also follow from specific legislative provisions that a dispute on a particular issue may not be submitted to arbitration. [...]

40. Under Swedish law, the conclusion of an arbitration agreement is not subject to any condition as to form. The question of whether or not a valid arbitration agreement has been concluded must be assessed in the light of the general rules of contract law. A valid arbitration agreement may result, for example, from the collusive conduct of the parties or the inertia of one of the parties. [...]

41. Under point 1 of the first subparagraph of Paragraph 34 of the SFL, an arbitration award on appeal by a party is to be annulled, in whole or in part, if it is not covered by a valid arbitration agreement between the parties.

42. In accordance with the second subparagraph of Paragraph 34 of the SFL, however, it follows that a party is not entitled to rely on a fact which he or she, by participating in [**OR. 12**] the proceedings without objection, or by any other conduct, may be regarded as having refrained from raising. However, merely by the fact that the parties appointed the arbitrator, he or she is not to be regarded as having accepted the arbitrators' jurisdiction to rule upon the question referred.

43. It is apparent from the *travaux préparatoires* for Paragraph 34 of the SFL that it may be presumed, in general, that a party which participates in the proceedings, without raising any objection to the jurisdiction of the arbitration tribunal at the outset, has accepted its jurisdiction to settle the dispute. The absence of any challenge to the validity of an arbitration agreement is also regarded as being capable of having the effect of binding the parties to arbitration on contractual grounds. [...]

44. In accordance with point 1 of the first subparagraph of Paragraph 33 of the SFL, an arbitration award is to be void if it involves the examination of a question

which, under Swedish law, may not be decided by arbitrators. Under point 2 of the first subparagraph of Paragraph 33, an arbitration award is also to be invalid if the manner or manners in which it was arrived at are manifestly incompatible with the Swedish legal order. The court must raise the grounds of invalidity of its own motion.

The SCC 2010 rules

45. Under Article 4 of the SCC 2010, arbitration proceedings are deemed to commence on the day on which the SCC receives the request for arbitration. Under Article 5 of the SCC 2010, the respondent must submit an answer to the request for arbitration within the time-limit set by the secretariat of the SCC. The answer must state, inter alia, whether the respondent has any objections concerning the existence, validity or applicability of the arbitration agreement. However, failure to raise such objections does not preclude the respondent from raising such objections subsequently, at any time up to and including the submission of the statement of defence.

46. The parties shall then submit, within the period prescribed by the arbitration tribunal, written details of the claim or defence respectively. If not previously stated, the defence is to contain any objections to the existence, validity or applicability of the arbitration agreement. (see Article 24 of the SCC 2010) [**OR. 13**]

The judgment of the Court of Justice in Achmea

47. The judgment of the Court of Justice in *Achmea* was the result of a request for a preliminary ruling from the Bundesgerichtshof (Federal Court of Justice) in Germany in proceedings between Slovakia and the Dutch company, Achmea. The dispute arose from an investment contract concluded between Slovakia and the Netherlands.

48. The Bundesgerichtshof (Federal Court of Justice) referred a number of questions to the Court of Justice in order to clarify whether a provision of the contract concluded between Slovakia and the Netherlands was compatible with Articles 267 and 344 TFEU. The clause, which largely corresponds to the clause at issue in the proceedings before the Högsta domstolen (Supreme Court), stated that disputes arising from the contract, between a Member State and an investor, would be brought before an arbitration tribunal for a ruling.

49. The Court of Justice held, in paragraph 60 of that judgment, that Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitration tribunal whose jurisdiction that Member State has undertaken to accept.

50. It may be inferred from the reasoning of the judgment that a number of fundamental principles of EU law were relevant to the position adopted by the Court, including the autonomy and characteristics of EU law; the importance of a uniform and consistent interpretation of EU law; the protection of the rights of individuals, including the right of access to the courts; mutual trust between the Member States and the principle of cooperation in good faith. The Court stated that it is for both the national courts and the Court of Justice to ensure that those principles are observed within the European Union.

51. The Court of Justice stated that the arbitration proceedings envisaged in Article 8 of the investment contract between Slovakia and the Netherlands differed from [**OR. 14**] commercial arbitration proceedings which are based on the common intention of the parties (see *Achmea*, paragraph 55).

52. In that reasoning, it was also stated that the requirements of efficient arbitration proceedings justify the review of commercial arbitration proceedings by the courts of the Member States being limited in scope, provided that the fundamental provisions of EU law can be examined in the context of a reference by the national court to the Court of Justice for a preliminary ruling (see *Achmea*, paragraph 54).

The need for a preliminary ruling

53. The question that arises is one of the relevance of the principles developed by the Court in *Achmea*, to the outcome of the proceedings before the Högsta domstolen (Supreme Court).

54. It is established that the provision relating to the settlement of disputes contained in the investment contract at issue in the proceedings before the Högsta domstolen (Supreme Court) is invalid. A possible conclusion is therefore that the standing proposal to commence arbitration proceedings which the State may be deemed to have made to an investor by the dispute settlement provision is also invalid, since the proposal is closely linked to the investment contract.

55. It was also argued in the proceedings before the Högsta domstolen (Supreme Court) that the situation here is different in that the proposal is constituted by the commencement of the procedure. The State could then accept, of its free will, expressly or tacitly, the jurisdiction in accordance with the principles identified by the Court of Justice which apply to commercial arbitration.

56. The Högsta domstolen (Supreme Court) considers that the manner in which EU law is to be interpreted as regards the questions arising in the case is not clear and has not been clarified. There are therefore grounds for requesting a preliminary ruling from the Court of Justice in order to avoid the risk of a misinterpretation of EU law. [**OR. 15**]

Request for a preliminary ruling

57. The Högsta domstolen (Supreme Court) requests the Court of Justice, by a preliminary ruling, to answer the following question.

> Do Articles 267 and 344 TFEU, as interpreted in *Achmea*, mean that an arbitration agreement is invalid if it has been concluded between a Member State and an investor – where an investment agreement contains an arbitration clause that is invalid as a result of the fact that the contract was concluded between two Member States – [despite the fact that] the Member State, after arbitration proceedings were commenced by the investor, refrains, by the free will of the State, from raising objections as to jurisdiction?