PARTIES

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MATTER
Validity etc., relating to arbitral awards issued 28 June 2017 and 28 Sept. 2017, and revised 24 November 2017 in Arbitration Institute of the Stockholm Chamber of Commerce (SCC) case no. V 2014/163.

See next page for the judgment of the Court of Appeal.

JUDGMENT OF THE COURT OF APPEAL

1. The Court of Appeal rejects the Republic of Poland's claim regarding inadmissibility of circumstances.

2. The Court of Appeal sets aside paragraph 64 B of the ruling in the arbitral award of 28 September 2017.

3. The Court of Appeal rejects the Republic of Poland’s action in all other parts.

4. The Court of Appeal ruling of 13 June 2018 regarding stay of enforcement shall no longer apply.

5. The Republic of Poland shall compensate PL Holdings S.á.r.l. for their litigation costs in the amount of EUR 538,696 and pay interest in the amount as per section6 of the Swedish Interest Act from the date of this judgment until payment is made. This amount includes EUR 500,114 in attorney fees.

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Contents

1 BACKGROUND

On 19 May 1987, the Republic of Poland as one party and Luxembourg and Belgium jointly as the other party entered into an investment treaty (the investment treaty). The investment treaty entered into force 2 August 1991. The investment treaty contains a dispute resolution provision whereby investors in any of the States party to the treaty have the right to initiate arbitral proceedings against the other State, in accordance with three different options, which includes the Arbitration Institute of the Stockholm Chamber of Commerce.

PL Holdings S.à.r.l. (PL Holdings) is a limited liability company registered in Luxembourg and incorporated under Luxembourg law. PL Holdings is wholly-owned by Abris CEE Mid-Market Fund L.P, which is a subsidiary of Abris Capital Partners Fund I. From 2010 to 2013, PL Holdings acquired shares in two Polish banks that merged in 2013, forming a new entity in which PL Holdings owned over 99 per cent of shares.

On 26 November 2014, PL Holdings initiated arbitral proceedings against Poland in accordance with the SCC rules. The seat of arbitration was Stockholm, Sweden. PL Holdings claimed that Poland had violated its obligations under the investment treaty by expropriating PL Holdings' assets in Poland. According to PL Holdings, the Polish supervisory authority had, in violation of the investment treaty, decided to suspend PL Holdings' voting rights for shares in the bank and by forcing sale of the shares. Considering the above, PL Holdings claimed damages from Poland.

On 28 June 2017, the arbitral tribunal issued a separate arbitral award in which the arbitral tribunal determined that Poland had violated its obligations under the investment treaty by expropriating PL Holdings' shareholding in the bank, and, subsequently, that PL Holdings was entitled to damages. In the ruling, however, the arbitral tribunal did not award any damages to PL Holdings. Instead, it reopened the arbitration proceedings regarding the amount of damages.

On 28 September 2017, the arbitral tribunal rendered their final arbitral award in the same arbitral proceedings. The final arbitral award ordered Poland to pay damages to PL Holdings in the amount of 653 639 384 Polish zloty (approx. SEK 1.5 billion), plus interest and compensation for

costs.

On 28 September 2017, Poland filed an action against PL Holdings regarding the separate arbitral award and 27 December 2017 regarding the final arbitral award. The cases have been handled jointly in the Court of Appeal after a decision made on 4 May 2018.

On 13 June 2018, the Court of Appeal decided to stay the enforcement of the final arbitral award until further notice (inhibition).

2 CLAIMS AND ARGUMENTS

Case T 8538-17 (invalidity and challenge of the separate arbitral award issued 28 June 2017)
Poland has claimed that the Court of Appeal shall:

(i) First, declare the separate arbitral award invalid.

(ii) Second, set aside the separate arbitral award in its entirety.

(iii) Third, set aside the separate arbitral award as regards item B in the ruling.

Case T 12033-17 (invalidity and challenge to the final arbitral award issued 28 September 2017)
Poland has claimed that the Court of Appeal shall:

(i) First, declare the final arbitral award invalid.

(ii) Second, set aside the final arbitral award in its entirety.

(iii) Third, set aside the final arbitral award as regards item 64 B in the ruling, as to pre-award interest.

Poland has also argued that the Court of Appeal shall dismiss the circumstances that the obligation to arbitrate has arisen due to a new arbitration agreement between the parties, and that the arbitral tribunal would have had jurisdiction to determine the dispute on any grounds other than article 9 of the investment treaty.

PL Holdings has opposed Poland's claims.

The parties have claimed compensation for litigation costs.

3 GROUNDS

3.1 THE REPUBLIC OF POLAND

3.1.1 Grounds for invalidity A.1 - Question whether the dispute is arbitrable

The arbitral awards refer to a dispute between an investor (*i.e.* PL Holdings) and an EU Member State (*i.e.* Poland) under an intra-EU investment protection treaty between Poland, Luxembourg and Belgium.

Articles 267 and 344 of the Treaty on the Functioning of the European Union (TFEU) preclude the provision in article 9 of the investment treaty since, in the event of a dispute regarding investments in Poland, investors in Luxembourg may initiate arbitral proceedings against Poland before an arbitral tribunal, which jurisdiction Poland is obligated to accept. According to article 344 TFEU, a Member State is obligated to resolve disputes in accordance with the provisions of the EU treaties and must comply with article 267 TFEU when resolving disputes within the EU. An arbitral tribunal does not constitute a court within the European Union's judicial system as defined in Article 267 TFEU and is therefore not authorized to request a preliminary ruling under article 267 TFEU. Intra-EU investment disputes that are determined by an arbitral tribunal under article 9 of the investment treaty, prevent the full effectiveness and uniform application of EU law. Article 9 of the investment treaty does not provide any possibility to request a preliminary ruling, and therefore undermines the autonomy of EU law. Disputes between an investor and an EU Member State under an intra-EU bilateral investment protection treaty must therefore not be determined by arbitrators.

The arbitral awards relevant for this case have involved determination of issues relating to an intra-EU bilateral investment protection treaty and therefore may not be determined by arbitrators. The public interest requires ensuring the full effectiveness of EU law and that the autonomy of EU law is not undermined. Intra- EU investment disputes may therefore not be determined by arbitrators. The dispute between PL Holdings and Poland is therefore not arbitrable and the arbitral awards issued by the arbitral tribunal are invalid.

Whether the arbitration tribunal found that EU law is in fact applicable in the arbitration or not, or whether EU law has been interpreted or applied in the arbitration . If the Court of Appeal finds it relevant whether EU law has been interpreted or applied, or at least could have been interpreted or applied, in this arbitration, Poland claims that EU law both could have been, and *de facto* has been, interpreted or applied in the arbitration between PL Holdings and Poland.

3.1.2 Grounds for invalidity A.2 - Question whether the arbitral awards are manifestly incompatible with Swedish ordre public.

The arbitral awards refer to a dispute between an investor (*i.e.* PL Holdings) and an EU Member State (*i.e.* Poland) under an intra-EU investment protection treaty between Poland, Luxembourg and Belgium.

Articles 267 and 344 of the Treaty on the Functioning of the European Union (TFEU) preclude the provision in article 9 of the investment treaty since, in the event of a dispute regarding investments in Poland, investors in Luxembourg may initiate arbitral proceedings against Poland before an arbitral tribunal, which jurisdiction Poland is obligated to accept. According to article 344 TFEU, a Member State is obligated to resolve disputes in accordance with the provisions of the EU treaties and must comply with article 267 TFEU when resolving disputes within the EU. An arbitral tribunal does not constitute a court within the European Union's judicial system as defined in Article 267 TFEU and is therefore not authorized to request a preliminary ruling under article 267 TFEU. Intra-EU investment disputes that are determined by an arbitral tribunal under article 9 of the investment treaty, prevent the full effectiveness and uniform application of EU law. Article 9 of the investment treaty does not provide any possibility to request a preliminary ruling, and therefore undermines the autonomy of EU law. Disputes between an investor and an EU Member State under an intra-EU bilateral investment protection treaty must therefore not be determined by arbitrators.

It is of public interest that the autonomy of EU law is not undermined, and that the full effectiveness of EU law is ensured. . Intra-EU investment disputes may therefore not be determined by arbitrators. Therefore, such arbitration clause that is incorporated in article 9 of the investment treaty, is contrary to the foundation of the EU legal system and thereby the Swedish

legal system. Arbitral awards based on and issued pursuant to such an arbitration clause, are, consequently, manifestly incompatible with the foundation of the legal system. Therefore, the arbitral awards issued by the arbitral tribunal in the arbitration between PL Holdings and Poland, as well as the manner in which the arbitral awards arose, are manifestly incompatible with Swedish ordre public, and therefore invalid.

Whether the arbitration tribunal found that EU law is in fact applicable in the arbitration or not, or whether EU law has been interpreted or applied in the arbitration . If the Court of Appeal finds it relevant whether EU law has been interpreted or applied, or at least could have been interpreted or applied, in this arbitration, Poland claims that EU law both could have been, and *de facto* has been, interpreted or applied in the arbitration between PL Holdings and Poland.

3.1.3 Grounds for challenge A - Question whether a valid arbitration agreement exists

The arbitral awards refer to a dispute between an investor (i.e. PL Holdings) and an EU Member State (i.e. Poland) under an intra-EU investment protection treaty between Poland, on the one hand, and Luxembourg and Belgium, on the other hand.

The arbitral awards refer to a dispute between an investor (*i.e.* PL Holdings) and an EU Member State (*i.e.* Poland) under an intra-EU investment protection treaty between Poland, Luxembourg and Belgium.

Articles 267 and 344 of the Treaty on the Functioning of the European Union (TFEU) preclude the provision in article 9 of the investment treaty since, in the event of a dispute regarding investments in Poland, investors in Luxembourg may initiate arbitral proceedings against Poland before an arbitral tribunal, which jurisdiction Poland is obligated to accept. According to article 344 TFEU, a Member State is obligated to resolve disputes in accordance with the provisions of the EU treaties and must comply with article 267 TFEU when resolving disputes within the EU. An arbitral tribunal does not constitute a court within the European Union's judicial system as defined in Article 267 TFEU and is therefore not authorized to request a preliminary ruling under article 267 TFEU. Intra-EU investment disputes that are determined by an arbitral tribunal under article 9 of the investment treaty, prevent the full effectiveness and uniform application of EU

law. Article 9 of the investment treaty does not provide any possibility to request a preliminary ruling, and therefore undermines the autonomy of EU law. Disputes between an investor and an EU Member State under an intra-EU bilateral investment protection treaty must therefore not be determined by arbitrators.

First, article 9 of the investment treaty is invalid because the provision is contrary to articles 267 and 344 TFEU. It can therefore not constitute grounds for the jurisdiction of the arbitral tribunal. Therefore, since Poland's accession to the EU in 2004, there has not been any standing offer regarding dispute resolution through arbitration, or, in any case, such an offer has been invalid. There is thus no valid arbitration agreement between PL Holdings and Poland. In the alternative, if the Court of Appeal finds that article 9 of the investment treaty is valid, it may not, for the same reasons, be applied. PL Holdings cannot therefore invoke such a provision.

Whether the arbitration tribunal found that EU law is in fact applicable in the arbitration or not, or whether EU law has been interpreted or applied in the arbitration is irrelevant. If the Court of Appeal finds it relevant whether EU law has been interpreted or applied, or at least could have been interpreted or applied, in this arbitration, Poland claims that EU law both could have been, and *de facto* has been, interpreted or applied in the arbitration between PL Holdings and Poland.

The Court of Appeal shall, *ex officio*, consider the question whether an arbitration agreement is contrary to the EU treaties. The parties in the arbitration cannot address the question whether Member States may conclude arbitration agreements that is contrary to EU treaties.

If the effect of an application of section 34, second paragraph, of the Swedish Arbitration Act (the SAA) (Sw. *lagen (1999: 116) om skiljeförfarande*) it that the question of the arbitration agreement's validity cannot be reviewed by the court, the provision is contrary to the principle of the full effectiveness of the EU law. This means that the provision must not be applied.

Poland disputes that it has participated in the arbitral proceedings without objecting that the arbitral tribunal lacks jurisdiction to determine the dispute on the ground that article 9 of the investment treaty is contrary to articles 267 and 344 of the TFEU. Poland raised the objection in its *Statement of Rejoinder* and has not waived its objection.

Additionally, Poland stated in its *Reply to Request for Arbitration* that Poland will object against the arbitral tribunal's jurisdiction. Thereafter, in *Statement of Defence* Poland claimed that the arbitral tribunal did not have jurisdiction to determine the dispute because PL Holdings was not an investor in the meaning of the investment treaty. The fact that Poland only raised an objection to the arbitration tribunal's jurisdiction on this ground does not mean that Poland participated in the proceedings without objection, or that Poland can be considered to have waived its objection regarding invalidity of the arbitration agreement on other grounds. Poland disputes that Poland, as an EU member state, it can be considered to have waived tis objection that the arbitration clause is contrary to the EU treaties.

When Poland submitted its *Statement of Rejoinder*, Poland was not bound by article 24 of the SCC rules or section 34, second paragraph of the SAA, since there was no valid arbitration agreement and no other arbitration agreement had been reached between the parties. Therefore, Poland's objection concerning the validity of the arbitration agreement could never have been precluded.

In the separate arbitral award (paragraphs 306-307), the arbitral tribunal has expressly refrained from dismissing the jurisdiction objection. Instead, the tribunal addressed the objection and rejected it. Because the arbitral tribunal, in the separate arbitral award, has made an assessment on the merits of Poland's jurisdictional objection, the fact that Poland did not raise the relevant objection until it was presented in its second submission in the proceedings, has in any event been remedied and any preclusion limit has been interrupted by the arbitral tribunal's actions.

In addition to the fact that the arbitral tribunal thus assessed Poland's jurisdictional objection on the merits and thereby interrupted any preclusion limit for the objection, PL Holdings has also – at least implicitly – accepted this, by not protesting or otherwise objecting to the arbitral tribunal's assessment on the merits of the jurisdictional objection.

It is disputed that an arbitration agreement arose through PL Holding's request [for arbitration] and Poland's alleged implicit acquiescence. Poland has never acted in such a way that it could be considered bound by any new arbitration agreement. In order for a new arbitration agreement to arise, Poland must explicitly confirm the agreement. A State cannot enter into an implicit agreement.

Already in the *Reply to Request for Arbitration* Poland stated that it will raise an objection against the arbitral tribunal's jurisdiction. In the *Statement of Defence*, Poland objected against the jurisdiction of the arbitral tribunal. In the *Statement of Rejoinder*, Poland raised another objection against the arbitration tribunal's jurisdiction. Therefore, Poland can never have concluded any arbitration agreement through implicit acquiescence. The fact that Poland, in the *Statement of Defence*, raised a different objection to the jurisdiction of the arbitral tribunal, does not mean that Poland – with a caveat regarding the objection that had already been presented – entered into a new arbitration agreement with PL Holdings. Furthermore, Poland's counsel in the arbitration was not authorized to conclude any new arbitration agreement on behalf of Poland.

PL Holdings' assertion regarding an obligation to arbitrate based on a new agreement was never raised during the arbitral proceedings and was never examined by the arbitral tribunal. During the arbitration proceedings, PL Holdings therefore did not claim that the arbitral tribunal would have jurisdiction to determine the dispute on any basis other than the arbitration clause in the investment treaty. Since these circumstances were not subject to review during the arbitral proceedings, the circumstances must be dismissed. Alternatively, PL Holdings' claim in this part should be rejected on the merits. In any event, the Court of Appeal must declare the arbitration awards invalid or annulled on the grounds set out above, because such an arbitration agreement is contrary to Articles 267 and 344 of the TFEU.

3.1.4 Response to the objection regarding the principle of proportionality

The principle of proportionality is not applicable. As per sections 33 and 34 of the SAA there is no basis for assessing proportionality in any way. Furthermore, a proportionality assessment would not result in the arbitral awards not being declared invalid or being set aside. It is further disputed that PL Holdings has exhausted the legal possibilities in Poland.

Also, the allegations that Poland is not a State based on the rule of law, are disputed. PL Holdings' claims in this part are groundless.

3.1.5 Grounds for challenge B – Handling of Kluza's expert opinion

During the arbitral proceedings, the parties made an agreement regarding the handling of evidence by expert witnesses. The agreement is presented in item VI.B.6 in Procedural Order (PO) 1. The agreement provided that the arbitral tribunal should ignore an expert opinion if the expert failed to appear at the final hearing, unless this was due to exceptional circumstances.

During the arbitral proceedings, PL Holdings presented an expert opinion issued by Dr. Stanislaw Kluza. On 2 June 2016, Poland requested to cross-examine Kluza. However, Kluza did not appear at the final hearing, whereby cross-examination was not held. Kluza's absence was not due to exceptional circumstances.

The arbitral tribunal did not ignore Kluza's expert opinion in accordance with the parties' agreement in item VI.B.6 in PO 1, but rather referenced that opinion and used information in it as a basis for their conclusions in the separate arbitral award (see items 85, 258, 260, 377, 378, 387, 389, and 390 in the separate arbitral award). By not ignoring Kluza's opinion, the arbitral tribunal has exceeded its mandate. The fact that the arbitral tribunal did not ignore Kluza's expert opinion, but instead referenced it to use information it contained as basis for their conclusions in the separate arbitral award is also a procedural error that likely impacted the outcome of the case.

The arbitral tribunal's handling was also in error since the arbitral tribunal failed to notify the parties prior to issuing the separate arbitral award, that they did not intend to ignore Kluza's expert opinion. Poland was thereby deprived the opportunity to present their arguments relating to the parts that the opinion concerned, which probably influenced the outcome of the case.

Poland has not been obligated to make the assurances that Kluza and PL Holdings requested. The arbitral tribunal assured Kluza that he did not need to answer questions that could give rise to a conflict of interest. The arbitral tribunal has also not requested that Poland issue such assurances. Poland can therefore never have been contributory to the arbitral tribunal's procedural error.

It is denied that Poland should be considered to have waived its right to invoke that the arbitral tribunal exceeded its mandate and/or committed procedural error. Poland maintained that Kluza

should be examined in the hearing, alternatively that the statement should be left without consideration, and also argued after the hearing in Poland's *Post-Hearing Brief* that the arbitral tribunal should ignore Kluza's expert opinion. Poland has also not accepted that the inability to examine Kluza could be compensated by Poland instead being allowed to question other witnesses regarding Kluza's opinion.

3.1.6 Grounds for challenge C – Ruling in the separate arbitral award

The arbitral tribunal issued a separate arbitral award on 28 June 2017. Item B in the ruling in the separate arbitral award does not correspond in any way to any of the claims in the case. Item B in the ruling in the separate arbitral award does not clarify which issue the arbitral tribunal has determined by the separate award. The ruling in item B, except from the first sentence, is also so unclearly and incompletely formulated that its meaning cannot be understood. The ruling cannot be understood without reading the reasoning. The reasoning is not a part of the ruling.

The arbitral tribunal has thereby exceeded its mandate or committed a procedural error that likely impacted the outcome of the case.

It is denied that Poland should be deemed to have waived its right to invoke that the arbitral tribunal exceeded its mandate and/or committed procedural error. Poland has challenged the separate arbitral award within due time and can thereby never have lost its right to invoke these circumstances.

3.1.7 Grounds for challenge D – The arbitral tribunal's decision to issue the separate arbitral award and the reopening of the arbitral proceedings

Neither party had requested the arbitral tribunal to issue a separate arbitral award. The parties had concluded their respective cases in their entirety during the final hearing and in their *Post-Hearing Briefs*. The arbitral tribunal closed the arbitral proceedings on 9 November 2016 in accordance with section 34 in the 2010 SCC rules (the SCC rules). The arbitral tribunal should thereafter issue the final arbitral award in accordance with what had been agreed in item E in PO 1.

However, the arbitral tribunal decided, on its own initiative and without prior communication with the parties, to issue a separate arbitral award on 28 June 2017 instead of issuing a final arbitral award.

The arbitral tribunal decided at the same time, on its own initiative and without prior communication with the parties, to reopen the arbitral proceedings through PO 17 which was issued the same day as the separate arbitral award was issued, *i.e.* on 28 June 2017.

The above actions of the arbitral tribunal constitute an excess of its mandate.

The arbitral tribunal's decision to issue the separate arbitral award and reopen the arbitral proceedings constitutes a procedural error. These actions by the arbitral tribunal provided PL Holdings the opportunity to submit additional evidence and documentation relating to the calculation of damages. The arbitral tribunal's actions have therefore likely impacted the outcome of the case.

It is denied that Poland should be deemed to have waived its right to claim that the arbitral tribunal exceeded its mandate and/or committed procedural error. Poland has challenged the separate arbitral award within due time and can thereby never have lost its right to invoke these circumstances. Poland has also, on 25 July 2017, objected against the arbitral tribunal's actions, which provided PL Holdings the opportunity to submit additional evidence and documentation relating to the calculation of damages.

3.1.8 Grounds for challenge E – Instructions to the party-appointed experts

The arbitral tribunal has on its own initiative, without prior communication with the parties or the parties' participation, introduced new evidence and circumstances during the period after issuing its separate arbitral award.

In PO 17, issued 28 June 2017, the arbitral tribunal requested that the party-appointed experts should calculate and determine the amount of damages in accordance with the arbitral tribunal's instructions and the separate arbitral award. Following their instructions in PO 17 and the separate arbitration award. The instructions that the arbitral tribunal provided were, however, incomplete and required individual assessments by the experts, that the experts should agree on

certain questions, and also required supplemental information from the arbitral tribunal to enable the calculation of the amount of damages.

In PO 19, on 25 July 2017, the arbitral tribunal has requested the party-appointed experts to submit supplemental statements regarding the so called 'Tier 1 Capital Requirement', which would also be prepared in accordance with instructions from the arbitral tribunal and without involvement or influence by the parties' respective counsel. The arbitral tribunal has assigned to the experts to determine the amount of damages. The evidence and the documents that the experts have prepared constitute new circumstances and new evidence that were not invoked by the parties. The reopening of the arbitral proceedings did not involve an opportunity to present new circumstances.

With these actions, the arbitral tribunal has exceeded its mandate and/or committed a procedural error that likely impacted the outcome of the case.

It is denied that Poland should be deemed to have waived its right to claim that the arbitral tribunal exceeded its mandate and/or committed procedural error. Poland retained the right to protest PO17 in writing to the arbitral tribunal on 21 July 2017, and completed the protest in writing on 25 July 2017. Poland stated then that Poland protested against, among other things, PO 17 and the decisions made therein regarding that the experts would submit new and supplemented reports on damages on which the parties were not permitted to comment.

3.1.9 Grounds for challenge F – Supplementation regarding 'pre-award interest'

On 28 July 2017, PL Holdings submitted a request that the arbitral tribunal issue an additional award regarding pre-award interest. PL Holdings did not present any claim for pre-award interest before the proceedings were concluded on 9 November 2016 and the separate arbitral award was issued. The reopening of the arbitral proceedings did not include an opportunity to present new claims.

The arbitral tribunal has, contrary to section 42 in the SCC rules, supplemented the ruling in the separate arbitral award with additions relating to pre-award interest even though no such claims were presented by PL Holdings before the separate arbitral award was issued, and it has failed to

issue the additional arbitral award within 60 days from PL Holding's request, since the arbitral tribunal did not issue the additional arbitral award until the final arbitral award on 28 September 2017, which was two days late.

PL Holdings requested that the arbitral tribunal would award PL Holdings pre-award interest in an additional arbitral award. Despite this, the arbitral tribunal awarded PL Holdings interest in the final arbitral award in accordance with the request and under section 42 of the SCC rules. The Court of Appeal can thereby not determine whether the arbitral tribunal had the opportunity to award PL Holdings interest on any other grounds and in any other way but through an additional award.

With these actions, the arbitral tribunal exceeded its mandate and/or committed a procedural error that likely impacted the outcome of the case.

It is denied that Poland should be deemed to have waived its right to claim that the arbitral tribunal exceeded its mandate and/or committed procedural error. Poland has challenged the separate arbitral award within time limits and can thereby never have lost the right to invoke these circumstances.

3.1.10 Grounds for challenge G– Supplementation regarding 'Tier 1 Capital Requirement'

During the party-appointed experts' joint calculation of the amount of damages in accordance with PO 17, the experts presented a joint request to the arbitral tribunal regarding supplementation of the separate arbitral award concerning 'Tier 1 Capital Requirement' (that is how the regulatory requirements for banks' primary capital ratio should be considered in the damages calculation).

'Tier 1 Capital Requirement' was not included in the instructions issued by the arbitral tribunal to the experts for calculation of the damages amount in PO 17 and the separate arbitral award. It was not possible to calculate the amount of damages without knowing the value of the variable 'Tier 1 Capital Requirement.'

The arbitral tribunal exceeded its mandate and committed a procedural error which likely impacted the outcome of the case by supplementing the separate arbitral award with an addition regarding how the 'Tier 1 Capital Requirement' should be considered when calculating the damages. The supplementation was also done in a formally incorrect manner, since the arbitral tribunal issued PO 20 instead of issuing an additional arbitral award in accordance with section 42 of the SCC rules. Thus, the supplementation of the separate arbitral award was not made until the final arbitral award was issued. Moreover, the supplementation was made more than 60 days after the request for additional arbitral award, *i.e.* without observing the applicable time limit provided in section 42 of the SCC rules. The time limit shall be deemed to have started when the party-appointed experts submitted their joint request for supplemental, *i.e.* 20 July 2017. It is denied that Poland should be deemed to have waived its right to claim that the arbitral tribunal exceeded its mandate and/or committed procedural error. Poland retained the right to protest against PO 17 in writing to the arbitral tribunal on 21 July 2017, and completed the protest in writing on 25 July 2017. There, Poland stated they protested against, among other things, PO 17 and the decisions made therein, that the experts would submit new and supplemented reports on damages. which the parties were not permitted to comment on.

3.1.11 Grounds for challenge H – Final hearings and examination of experts

On 11 August 2017 the party-appointed experts submitted to the arbitration tribunal their joint expert statement regarding calculation of the damages amount.

On 25 July 2017, Poland requested hearings to be held where Poland would be provided the opportunity to examine and cross-examine the party-appointed experts regarding the damages amount. The arbitral tribunal denied Poland's request in PO 21 on 9 August 2017. On 11 August 2017, Poland again requested the arbitral tribunal to hold a hearing. The arbitral tribunal denied Poland's request in PO 23 on 9 August 2017. Poland made a request on 29 August 2017. The arbitral tribunal denied Poland's request in PO 25 on 31 August 2017.

Poland was therefore denied the opportunity to examine and cross-examine the experts appointed by the parties regarding the amount of damages and could not bring the arbitral tribunal's attention to the assumptions the experts had made in their joint expert statement of 11 August 2017.

With these actions, the arbitral tribunal exceeded its mandate and/or committed a procedural error that likely impacted the outcome of the case.

It is denied that Poland should be deemed to have waived its right to claim that the arbitral tribunal exceeded its mandate and/or committed procedural error. As indicated above, Poland has protested as of 25 July, 11 August and 29 August 2017.

3.1.12 Grounds for challenge are claimed independently and jointly

The exceeding of mandate and procedural errors which are claimed are each independently reason to set aside the arbitral awards. In any event, they are invoked as jointly be reasons to set aside the arbitral awards.

3.2 PL HOLDINGS

3.2.1 Grounds for invalidity A.1 – Question whether the dispute is arbitrable

The arbitral awards shall not be declared invalid as they do not result in a violation of any protective public interest.

The circumstances that Poland has invoked do not mean that the dispute between PL Holdings and Poland could not be determined by arbitrators.

The issues that have been determined by the arbitrators are whether Poland has breached the investment treaty, whether PL Holdings was entitled to compensation for this breach, and if so in what amount. These are issues which the parties can settle by agreement. These issues may therefore be determined by arbitrators.

The arbitral tribunal's assessment on the merits has also not included any issues which the parties could not settle between themselves. In case it would be deemed relevant, the arbitral tribunal has not applied EU law in its determination on the merits. The rules that the arbitral tribunal had to apply was outside the harmonized fields, *i.e.* the arbitral tribunal had no reason to apply EU law.

3.2.2 Grounds for invalidity A.2 – Question whether the arbitral awards are manifestly incompatible with the Swedish ordre public

The arbitral awards shall not be declared invalid as they do not result in any violation of a protective public interest.

The circumstances that Poland has invoked do not mean that the arbitral awards or the manner in which they arose are manifestly incompatible with Swedish ordre public.

he arbitral awards, the substantial findings therein, or the manner in which they arose, therefore do not preclude the full effectiveness and uniform application of EU law since the arbitral tribunal's substantive determination was not based on, and is not contrary to, EU law.

The arbitral awards, the substantial findings therein or the manner in which they arose are not incompatible with Swedish ordre public. In case it would be deemed relevant, the arbitral tribunal has not applied EU law in its substantive determination. The rules that the arbitral tribunal had to apply were outside the harmonized field, *i.e.* the arbitral tribunal had no reason to apply EU law.

3.2.3 Grounds for challenge A – Question whether a valid arbitration agreement exists

Poland is precluded from invoking the circumstances in grounds for challenge A
Poland is precluded from arguing that the arbitral awards are not covered by a valid arbitration agreement since they have participated in the proceedings without raising an objection, or shall otherwise be deemed to have waived any right to do so. Poland has participated in the proceedings by (i) appointing counsel and arbitrator, (ii) agreeing with PL Holdings on the rules and principles for the proceedings, (iii) participating in the proceedings, and (iv) presenting its substantive claims in its *Reply to Request for Arbitration* and *Statement of Defence* , all without raising any objection. Poland has also expressly confirmed that the arbitral tribunal has jurisdiction to determine the dispute in the event PL Holdings could be considered an investor in accordance with the investment treaty. The arbitral tribunal found that PL Holdings should be considered an investor in accordance with the investment treaty. Poland has also, after submitting its *Statement of Defence,* expressly confirmed that it would not raise any further objections

against the jurisdiction of the arbitral tribunal.

According to the applicable rules, Poland was obligated to raise an objection against the alleged invalidity of the arbitration agreement no later than in its *Statement of Defence*, which Poland did not do.

he question whether the arbitration agreement is contrary to the EU treaties is not a question that the Court of Appeal should consider ex officio. The question whether Poland and PL Holdings could agree to settling the relevant dispute through arbitration is an issue within the party autonomy. Poland's objection that the arbitration agreement is invalid on the grounds that article 9 of the investment treaty is incompatible with the EU treaties is an issue that shall be assessed within the scope of section 34 LSF and the SCC rules. Swedish law is applicable to the arbitration agreement and the arbitral proceedings since Sweden has been the seat of the arbitration. The SCC rules are applicable since the parties agreed on this.

The fact that the arbitral tribunal assessed the objection raised by Poland, that the arbitration was not covered by a valid arbitration agreement (and which Poland presented late), is not binding for the Court of Appeal and does not mean that preclusion did not occur.

During the arbitral proceedings, PL Holdings raised an objection that Poland's objection, that the arbitration was not covered by a valid arbitration agreement, was raised too late. PL Holding has not been obligated to raise an objection against the fact that the arbitral tribunal did reject, rather than dismiss, this objection, which Poland raised too late.

Provision in section 34, second paragraph of the SAA does not preclude the impact and full effectiveness of EU law

The impact and full effectiveness of EU law could be effectively ensured since Poland has had the sufficient opportunities to argue that the arbitration was not covered by a valid arbitration agreement during the arbitral proceedings, by presenting such an objection in its *Reply to Request for Arbitration* or *Statement of Defence*. If Poland had, no later than in its *Statement of Defence*, objected that the arbitration was not covered by a valid arbitration agreement, the Court of Appeal could have assessed this issue. Also, Poland has had the opportunity to initiate a separate claim in accordance with section 2 of the SAA. Section 34, second paragraph of the SAA has

therefore not meant that it has been practically impossible or unreasonably difficult for Poland to argue that the arbitration agreement was invalid under EU law.

The arbitration has been covered by a valid arbitration agreement

Poland has not made a notification of termination regarding either the investment treaty or its article 9. Neither have they ceased to apply due to Poland's accession to the EU. In any case, the investment treaty between Poland and Luxembourg entered into force on 30 June 2004 when Luxembourg ratified the treaties, that is after Poland's accession to the EU on 31 May 2004.

Article 9 in the investment treaty constitutes a valid offer to arbitrate that PL Holdings has accepted by initiating arbitration. A valid arbitration agreement between Poland and PL Holdings was thereby concluded. The circumstances that Poland invokes do not make the offer invalid. The fact that EU law precludes such provisions as article 9 in the investment treaty does not mean that the investment treaty or the offer is invalid.

The fact that individual disputes between investors and EU Member States are determined through arbitration does not preclude the full effectiveness and uniform application of EU law.

In the event that Poland's offer regarding arbitration proceedings in article 9 of the investment treaty was invalid, a binding arbitration agreement has still been concluded based on the actions of the parties. By initiating arbitration, PL Holdings has made an offer to Poland to determine the parties' dispute in accordance with the same terms as provided in article 9 of the investment treaty. Through their implicit conduct Poland has accepted that offer. Poland's implicit accept consists of appointing counsel and an arbitrator and directly or through the counsel, (i) agree with PL Holdings on the rules and principles for the proceedings, (ii) participate in the proceedings, and (iii) presenting their substantive claims in its *Reply to Request for Arbitration* and *Statement of Defence* -- all without raising any objection. arbitral tribunal had jurisdiction to determine the dispute in the event PL Holdings could be considered an investor in accordance with the investment treaty. It is undisputed that PL Holdings was to be considered an investor in accordance with the investment treaty. After submitting its *Statement of Defence,* Poland expressly confirmed that Poland would not raise any further objections regarding the jurisdiction of the arbitral tribunal.

If the offer in article 9 has lost its binding effect, Poland has not been obligated to accept the jurisdiction of the arbitral tribunal, but would have been able to raise an objection up until its *Statement of Defence.* The parties' arbitration agreement is thereby a valid expression of the party autonomy. In case it would be deemed relevant for the assessment of the arbitration agreement, the arbitral tribunal has not applied EU law in their substantive determination. The rules that the arbitral tribunal had to apply are outside the harmonized fields, that is, the arbitral tribunal had no reason to apply EU law.

3.2.4 Objection against the grounds for invalidity and grounds for challenge A – invalidating or setting aside the awards would violate the principle of proportionality

Setting aside or declaring the arbitral awards invalid would violate the principle of proportionality. The principle of proportionality is generally applicable and has direct effect. Balancing interests for the purpose of the principle of proportionality in this case involves the fact that, in the event the arbitral awards would be set aside or declared invalid, there are well founded reasons to believe that PL Holdings would be exposed to a concrete risk of being deprived access to an effective judicial remedy in Poland. There are no realistic alternatives to arbitration in the case. The judicial system in Poland has significant faults in terms of legal certainty, and the independence of the Polish judiciary system is severely jeopardized. Thus, PL Holdings would in practise be deprived the opportunity to have its case heard. At the same time, PL Holdings and its investors would incur serious damage and would be deprived of significant economic investments, time spent, and costs incurred by the company, all in good faith. On the other hand, there is the purely abstract interest of upholding EU law, as Poland argues based on the Achmea ruling (case C-284/16, EU:C:2018:158).

It should also be considered that it is Poland, not PL Holdings, who has entered into the investment treaty and accepted to submit itself to the arbitration in compliance with article 9 therein. It is, therefore, Poland who has possibly committed a potential breach of its obligations under the EU treaty as per the Achmea ruling. Poland's claim in this case aims exclusively at transferring the consequence of its own treaty violation to a private company and its investors, thereby avoiding liability for damages for a confirmed illegal expropriation. It would be both

disproportionate and legally offensive if Poland was allowed to benefit from its own treaty violation in this way.

In light of the above, it would be disproportionate to set aside or invalidate the arbitral awards as it would affect PL Holdings to an extent that is disproportionate in relation to what would be achieved by setting aside or invalidating the awards.

3.2.5 Grounds for challenge B – Handling of the Kluza expert opinion

Poland is, due to preclusion, prevented from invoking the circumstances in grounds for challenge B

Poland has no right to invoke the argument that the arbitral awards are subject to a valid arbitration agreement since Poland participated in the proceedings without raising this objection, or shall otherwise be considered to have waived its right to make this argument. Poland has participated without objecting against the arbitral tribunal's notification that Kluza's potential absence might result in a reduction of the evidentiary value of his opinion. Poland has, after the separate arbitral award was rendered, participated in the proceedings without objecting against that the arbitral tribunal's allowing and considering Kluza's opinion. Poland and PL Holdings have agreed to that Poland would be permitted to ask questions to other witnesses as compensation for Kluza's absence.

Poland is precluded from invoking, as grounds for challenge, that the arbitral tribunal, prior to the separate arbitral award, failed to notify the parties that it did not intend to ignore Kluza's opinion since Poland has participated in the proceedings without raising an objection, or shall otherwise be considered to have waived its right to make this argument. Poland has participated in the arbitral proceedings after the completion of the proceedings and after the separate arbitral award was rendered, without raising an objection. Neither has Poland requested the arbitral tribunal should issue any separate decision prior to the separate arbitral award.

Throughout the arbitral proceedings, Poland has been obligated to raise, without delay, an objection against the allowing on the record, and the consideration of, Kluza's opinion, as well as the timing for the decision, violated the applicable rules of the proceedings, which Poland has failed to do.

The arbitral tribunal has not exceeded its mandate nor committed any procedural error
It is correct that the parties, during the arbitral proceedings, agreed made an agreement as reflected in item VI.B.6 in PO 1. It is also correct that Kluza was absent from the hearing and that the arbitral tribunal allowed on the record and considered his opinion.

The agreement in VI.B.6 in PO 1 meant that the arbitral tribunal had the discretionary authority to determine if such exceptional circumstances existed that an expert opinion would not be dismissed despite the expert not being present for a cross-examination. The interpretation and application of the regulation has, as per the parties' agreement, been up to the arbitral tribunal.

Kluza's absence from the cross-examination was due to a conflict of interest, which constituted an exceptional circumstance. The arbitral tribunal has interpreted and applied VI.B.6 in PO 1 by allowing Kluza's opinion, as the arbitral tribunal found that exceptional circumstances existed.

On the arbitral tribunal's suggestion, the parties agreed during the proceedings that Poland would be compensated for not being able to cross-examine Kluza by being allowed to ask questions regarding the contents of Kluza's opinion to other witnesses and experts.

The arbitral tribunal has only taken Kluza's opinion into consideration with regard to the proportionality assessment. Kluza's opinion was not decisive for the outcome of the proportionality assessment. Therefore, the fact that the arbitral tribunal considered Kluza's opinion did not likely affect the outcome of the arbitration.

The arbitral tribunal informed Poland that it would probably consider Kluza's opinion. Poland had the opportunity to provide rebuttal evidence. Thus, the time for the arbitral tribunal's decision to allow Kluza's opinion has therefore not likely affected the outcome of the arbitration.

Despite direct requests from Kluza to do so, Poland failed to confirm that Poland wished to cross-examine him, which Kluza stated as a prerequisite for his attendance. Furthermore, and despite PL Holding's request to do so, has Poland provided the requested assurances to Kluza that Poland would not invoke a conflict of interest, or otherwise have his participation cause negative consequences for him or the bank where he worked. Thus, the alleged procedural error was not without Poland's contribution.

3.2.6 Grounds for challenge C – Ruling in the separate arbitral award

Poland is, due to preclusion, prevented from invoking the circumstances in grounds for challenge C

Poland does not have the right to invoke that item B in the ruling is alleged to not correspond to a claim in the case, that it is alleged to not identity the issue the arbitral tribunal has determined in the separate arbitral award, or that the ruling is alleged to be so unclear and incompletely formulated that its meaning cannot be understood, as grounds for challenge, since Poland has participated in the proceedings after the separate arbitral award without raising an objection, or otherwise should be deemed to have waived its right to make this argument. Poland has not used the opportunities for correcting and interpreting the award offered, and has not otherwise raised an objection that the meaning of the ruling could not be understood.

Throughout the arbitral proceedings, Poland has been obligated to raise, without delay, any objection that the arbitral tribunal's determination in a specific issue violated the applicable rules in the proceedings, which Poland has not done.

The arbitral tribunal has not exceeded its mandate or committed any procedural error.
he arbitral tribunal had, as provided in the SAA and the SCC rules, the right to decide on a separate question, or a question of significance for the dispute, which the tribunal has done. The arbitral tribunal itself has the right to formulate the question that will be decided upon. The arbitral tribunal has not issued a ruling regarding anything other than what has been claimed.

The arbitral tribunal has, in item B of its ruling, decided the issue of whether PL Holdings was entitled to damages and ruled in its favour. The issue regarding the amount of damages was not determined in the separate arbitral award. The arbitral tribunal decided that the amount of damages would be decided in the final arbitral award.

The arbitral tribunal decided that the damages should be calculated in accordance with the principles and values set forth in the reasoning. This does not mean that the ruling is incomplete or unclear. The arbitral tribunal also referred to a procedural decision in PO 17. This was not part of the ruling in the separate arbitral award and does not mean that the ruling was incomplete or unclear. Considering the above, the statements set forth after the first sentence in item 650 B of

the separate arbitral award, explaining how damages should be calculated, constituted a procedural decision, that is the arbitral tribunal did not detach itself from the issue in this part. The ruling is not unclear. Even if the ruling would need to be read in conjunction with the reasoning, this does not constitute an error.

The alleged excess of mandate or procedural error has not likely affected the outcome of the case.

3.2.7 Grounds for challenge D – The arbitral tribunal's decision to issue a separate arbitral award and reopen the arbitral proceedings

Poland is, due to preclusion, prevented from invoking the circumstances in grounds for challenge D

Poland does not have the right to invoke, as ground for challenge, that the arbitral tribunal, on its own initiative and without prior communication, issued a separate arbitral award instead of a final arbitral award, and reopened the proceedings ,since Poland participated in the proceedings after the separate arbitral award without raising an objection, or should otherwise be deemed to have waived its right to make this argument. Poland did not object against the SCC's decision to extend the time limit for rendering the final arbitral award to 29 September 2017, or against that the arbitral tribunal, on its own initiative and without prior communication with the parties, (i) did not issue a final arbitral award on 30 June 2017, (ii) issued a separate arbitral award on 28 June 2017, and (iii) reopened the arbitral proceedings in PO 17. Poland has expressly confirmed that the arbitral tribunal had the right to initiate and process a separate part of the arbitration after rendering a separate arbitral award to determine the amount of damages.

During the arbitral proceedings, Poland has been obligated to, without delay, raise any objection that this violated the rules applicable in the arbitral proceedings, that the arbitral tribunal, on its own initiative and without prior communication, issued a separate arbitral award, instead of a final arbitral award, and reopened the arbitral proceedings. Poland has failed to do so.

The arbitral tribunal did not exceed its mandate or commit any procedural error

The arbitral tribunal has, in accordance with the SCC rules as the parties agreed, had the right to, without prior communication with the parties and on its own initiative, issue a separate arbitral award.

The arbitral tribunal has, in accordance with the SCC rules agreed by the parties, had the right to, without prior communication with the parties and at its own initiative, reopen the arbitral proceedings.

The arbitral tribunal has not provided PL Holdings opportunity to submit additional evidence or documentation relating to the calculation of damages. Neither has PL Holdings submitted any new evidence or documentation for the calculation of damages after the separate arbitral award.

3.2.8 Grounds for challenge E – Instructions to the party-appointed experts

Poland is, due to preclusion, prevented from invoking the circumstances in grounds for challenge E

Poland is precluded from invoking the circumstances stated in grounds for challenge E since Poland has participated in the proceedings after the separate arbitral award without raising an objection, or otherwise should be deemed to have waived its right to make this argument. Poland has not objected against that: (i) the arbitral tribunal requested the party-appointed experts to calculate and allegedly determine the amount of damages, (ii) the instructions provided by the arbitral tribunal were alleged to be incomplete and requiring assessments by the experts, that the experts should agree on certain questions, and that the instructions required supplemental information from the arbitral tribunal, (iii) that the arbitral tribunal requested the experts to submit supplemental opinions regarding ‘Tier 1 Capital Requirement’ without the involvement or influence of the counsels.

Poland has, without objecting: (i) instructed its expert to, together with PL Holdings’ expert, perform the calculation of PL Holdings’ damages, (ii) forwarded the experts’ joint request for supplemental information regarding ‘Tier 1 Capital Requirement’ and (iii) forwarded the experts’ joint calculation of the damages to the arbitral tribunal. Poland has neither objected against the arbitral tribunal's decision to instruct the experts to consider the effects of ‘Tier 1 Capital Requirement’ in their calculation.

The arbitral tribunal did not exceed its mandate or commit any procedural error

The arbitral tribunal's instructions to the experts have required the participation of the parties. The parties have participated without objection. The arbitral tribunal has not introduced any new

evidence in the case.

The arbitral tribunal has, in PO 17, requested that the party-appointed experts should try to agree on the amount of damages on the basis of the arbitral tribunal's decision regarding the factors in the joint valuation model, which the arbitral tribunal had the right to do under the rules applicable for the proceedings.

The fact that the experts informed the arbitral tribunal that also 'Tier 1 Capital Requirement' should be considered in the calculation, but that the experts disagreed on how, was in compliance with the rules applicable for the proceedings. The fact that the arbitral tribunal requested the experts to elaborate on the reasons for their disagreement was also in accordance with the applicable rules. The fact that the arbitral tribunal, in a procedural decision in PO 20, instructed the experts to consider the effect of 'Tier 1 Capital Requirement' was in accordance with the rules applicable to the proceedings.

The fact that the experts' calculation required certain limited individual assessments did not mean that the arbitral tribunal's instructions violated the rules applicable for the proceedings.

Every issue which the arbitral tribunal requested the experts to agree on, or explain their reasons for disagreement, were within the framework of the experts' opinions. No new evidence or new circumstances were introduced in the case by the experts' joint calculation of damages.

The arbitral tribunal has not requested the party-appointed experts to determine the amount of damages and the experts have not done so. The arbitral tribunal itself has determined the amount of damages in the final arbitral award. The arbitral tribunal conducted a final assessment of, and decided upon, all of the issues which the arbitral tribunal requested the experts to jointly try to agree upon, in the final arbitral award.

Poland has instructed its expert to conduct the joint calculation in compliance with the arbitral tribunal's instructions. Thus, the alleged procedural error did not occur without Poland's contribution, and, in any event, it probably did not influence the outcome of the case.

3.2.9 Grounds for challenge F – Supplement regarding 'pre-award interest'

The arbitral tribunal did not exceed its mandate or commit any procedural error
PL Holdings has from the outset of the arbitral proceedings in its *Statement of Claim* invoked an alternative calculation of the amount of damages which included pre-award interest, and clarified that pre-award interest was included in the amount claimed by PL Holdings.

Throughout the proceedings, PL Holdings has made clear that PL Holdings requested pre-award interest. In its final statement, PL Holdings advanced a claim for a principal amount expressly based on a calculation that included pre-award interest, and the claimed amount did include pre-award interest up to October 2016, which the arbitral tribunal was requested to update as per the date of the arbitral award.

The arbitral tribunal has not supplemented its ruling in the separate arbitral award with pre-award interest. The arbitral tribunal has determined the issue concerning pre-award interest in the final arbitral award.

It is, however, correct that the arbitral tribunal did not issue an additional arbitral award according to section 42 of the SCC rules. This does not constitute an excess of mandate or a procedural error. In any case, this did not likely affect the outcome of the case.

3.2.10 Grounds for challenge G– Supplemental regarding 'Tier 1 Capital Requirement'

Poland is, due to preclusion, prevented from invoking the circumstances in grounds for challenge G
Poland is precluded to invoke, as grounds for challenge, that the experts presented a joint request for supplemental information regarding the instructions for the calculation with regard to 'Tier 1 Capital Requirement' or that the arbitral tribunal in its procedural decision instructed the experts to consider 'Tier 1 Capital Requirement' in a specific manner in the joint calculation, since Poland has participated in the proceedings without raising any objections or otherwise shall be deemed to have waived its right to invoke this argument.

Poland has, without raising any objections: (i) instructed its expert to, together with PL Holdings' expert, perform the calculation of PL Holdings' damages, (ii) forwarded the experts' joint request for supplementation regarding 'Tier 1 Capital Requirement', and (iii) forwarded the experts' joint calculation of damages including 'Tier 1 Capital Requirement' to the arbitral tribunal. Poland has not raised any objections as to the arbitral tribunal's decision in PO 20 to instruct the experts to consider the effects of 'Tier 1 Capital Requirement' in their calculation.

Throughout the proceedings, Poland has been obligated to, without any delay, raise any objections to the effect that the arbitral tribunal's conduct and the experts handling of 'Tier 1 Capital Requirement' violated the rules applicable in the proceedings, which Poland failed to do.

The arbitral tribunal did not exceed its mandate or commit any procedural error
he arbitral tribunal did not determine the issue of the amount of damages in the separate arbitral award. The fact that the arbitral tribunal in its procedural decision instructed the experts to consider 'Tier 1 Capital Requirement', in addition to the factors described in the opinion of the separate arbitral award, does not mean that the separate arbitral award was supplemented.

The fact that the arbitral tribunal instructed the experts to also consider the effect of 'Tier 1 Capital Requirement' in its procedural decision in PO 20 does not mean that it exceeded its mandate or committed any procedural error. PO 20 does not constitute a final assessment of the effects of 'Tier 1 Capital Requirement', but is only an instruction to the experts.

The arbitral tribunal determined the issue of the amount of damages in its final arbitral award, which then included the effect of 'Tier 1 Capital Requirement'. The arbitral tribunal has not, in its final arbitral award, been prevented from considering factors regarding the calculation of damages other than those indicated in the reasoning in the separate arbitral award.

Poland has instructed its expert to conduct the joint calculation and has forwarded the experts' joint request for supplementation of 'Tier 1 Capital Requirement'. Thus, the alleged procedural error was not without Poland's contribution. In any case, it has not likely affected the outcome of the case.

3.2.11 Grounds for challenge H – Final hearings and examination of experts

Poland is, due to preclusion, prevented from invoking the circumstances in grounds for challenge H

Poland is precluded from invoking the argument that no further hearings or new examinations of the experts were held as grounds for challenge, since Poland participated in the proceedings without raising an objection, or by recognising that a legally binding assessment of the merits was made, must be deemed to have waived its right to make this argument.

In PO 17, the arbitral tribunal decided only to hold a new hearing, or to hear the experts again, if the experts did not agree on the final calculation of the damages and if the arbitral tribunal, in addition, deemed an additional hearing necessary. Poland participated in the proceedings for almost a month without raising an objection against this procedural decision and without requesting a new hearing. Poland must therefore be deemed to have accepted that a new hearing, or new examinations with the experts, would only be held if the experts did not agree on the final calculation.

Throughout the arbitral proceedings, Poland has been obligated to, without delay, raise any objection to the effect that the arbitral tribunal's decision regarding the prerequisites for holding a new hearing or new examinations violated the rules applicable for the proceedings, which Poland has failed to do.

The arbitral tribunal did not exceed its mandate or commit any procedural error

Poland has not been prevented from submitting a statement regarding the experts' joint calculation of the damages or the result of the calculation. In PO 20, PO 21 and PO 23, the arbitral tribunal expressly provided the parties an opportunity to submit statements regarding the experts' joint calculation and Poland has been able to present its comments on the performance and result of the experts' work. Poland has also before this been free to submit statements on the experts' joint calculation. Poland has refrained from submitting any statements. Thus, Poland has to the extent necessary, had the opportunity to make its arguments. The arbitral tribunal's decision not to arrange a new hearing or new examinations with the party-appointed experts, therefore, does not mean that the tribunal exceeded its mandate or that it committed a procedural error.

FPO 17 and the tribunal's reasoning in the separate arbitral award, indicate that the arbitral tribunal encouraged the experts to agree on certain limited issues to which the arbitral tribunal itself had not provided answers. It was also evident in the experts' joint calculation that certain assumptions agreed between the experts had been made in these regards. Poland has not submitted these circumstances before the arbitral tribunal as basis for holding new examinations with the experts or a new hearing. Neither has Poland submitted any other circumstances before the arbitral tribunal as basis for holding new examinations or a new hearing. Therefore, the arbitral tribunal's decision not to hold a new hearing or new examinations with the party-appointed experts does not mean that the tribunal exceeded its mandate or committed a procedural error. The alleged errors have, in any case, not occurred without Poland's contribution.

The fact that Poland was not provided the opportunity to cross-examine the experts has, in any case, not likely affected the outcome of the case. The experts agreed on how the damages should be valued in accordance with the arbitral tribunal's instructions and there were no differences of opinions. The arbitral tribunal had, therefore, probably determined that the size of the damages would be the same amount, regardless of whether the experts, in examinations, would have had described in further detail their agreed assumptions.

4 THE EVIDENCE

The parties have referred to extensive written evidence. At Poland's request, witness examinations were held with Andrew Caldwell, Poland's appointed expert during the arbitral proceedings.

5 REASONING OF THE COURT

5.1 Disposition of the Court of Appeal's Opinion, etc.

The Court of Appeal initially concludes that the submissions of Poland do not constitute grounds for dismissing any of PL Holdings' referenced circumstances. Poland's claim for inadmissibility is therefore rejected.

In section 5.2, the Court of Appeal considers the questions whether the arbitral awards are invalid on the ground that the dispute was not arbitrable, or on the ground that the arbitral awards – or the manner in which the arbitral awards arose– are in conflict with the Swedish ordre public. In connection herewith, the question whether the arbitral awards shall be set aside on the ground that no valid arbitration agreement existed between the parties is also considered. The matter at hand therefore involves the issues in the case linked to the ruling of the Court of Justice of the European Union (CJEU) in the Achmea case (case C-284/16, EU:C:2018:158, hereafter the "Achmea ruling"), *i.e*. Poland's legal grounds for invalidity and grounds for challenge A.

The other legal grounds for challenge Poland has submitted are considered in section 5.3.

Litigation costs are considered in the last part of the reasoning of the court.

5.2 Legal grounds for invalidity and grounds for challenge A – Question of the invalidity or setting aside of arbitral awards on the grounds that they are not subject to a valid arbitration agreement.

5.2.1 Introduction

Summary of the parties' positions regarding legal grounds for invalidity and grounds for challenge A

In summary, Poland has invoked the following. The arbitral awards shall be declared invalid or be set aside as a result of the Achmea ruling. A number of circumstances lead to the invalidity of the arbitral awards based on two different rules of law. The first is that the arbitral awards involve rulings on issues that may not be determined by arbitrators, and the second is that the arbitral

awards, or the manners in which they arose, are manifestly incompatible with Swedish ordre public. Alternatively, the arbitral awards shall be set aside as they are not based on a valid arbitration agreement. The Court of Appeal shall, ex officio, consider the question whether an arbitration agreement conflicts with the EU treaties. Thus, the parties in the arbitration cannot dispose of the question whether Member States may enter into arbitration agreements that conflict with the EU treaties.

In summary, PL Holdings has made the following objections. There are no grounds for declaring the arbitral awards invalid. The questions dealt with in the arbitral awards are matters in respect of which the parties may reach a settlement and may therefore be determined by arbitrators. The circumstances Poland invokes do not mean that the arbitral awards, or the manners in which they arose, are manifestly incompatible with the Swedish ordre public. As to Poland's assertion that the arbitration awards are not covered by a valid arbitration agreement, Poland has participated in the proceedings without objection or acted in a manner resulting in that Poland shall be considered to have waived its right to object that no valid arbitration agreement exists. Poland was obligated to present an objection regarding the validity of the arbitration agreement no later than in its *Statement of Defence*, which Poland did not do. Furthermore, the arbitral proceedings were covered by a valid arbitration agreement between the parties.

In the following, the Court of Appeal will first set out the applicable provisions of the Swedish Arbitration Act (SAA) (1999:116) relevant to the legal grounds for invalidity and grounds for challenge A. Thereafter, the Court will consider the Achmea ruling, and the conclusions that the Court of Appeal draws from said ruling that are relevant for the above-mentioned grounds. Then, the Court of Appeal will determine the issues relevant to these parts of the case.

5.2.2 The legal framework set out in the Swedish Arbitration Act (SAA) etc.

Provisions regulating when arbitral awards are invalid are stated in section 33 SAA.

Section 33, first paragraph, item 1 of the SAA states that an arbitral award is invalid if it includes a determination of an issue which, in accordance with Swedish law, may not be determined by arbitrators. This is sometimes expressed as the issue under review not being arbitrable. The issues that can be determined by arbitrators are regulated in section1, first paragraph of the SAA. This

provision stipulates that a dispute concerning a matter in respect of which the parties may reach a settlement may be determined through arbitration. (See also NJA 2012 p. 790 item 8 and NJA 2015 p. 438 item 9.)

Section 33, first paragraph item 2 of the SAA states that an arbitral award is invalid if the award, or the manner in which it arose, are manifestly incompatible with the Swedish ordre public. Swedish law takes a restrictive position regarding the possibility to declare an arbitral award invalid under this provision. The preparatory works state that it is intended to apply only in very objectionable cases and that it is therefore very rarely applied. Arbitral awards where basic legal principles of material or procedural nature have been disregarded or where the arbitral tribunal has determined a dispute without considering a rule of law that is mandatory for the benefit of a third party or a public interest, and which expresses a particularly important legal standard have been considered to conflict with ordre public (see Govt. bill 1998/99:35 pp. 140f. and 234, and NJA 2015 p. 438, Heuman, Skiljemannarätt, 1999, p. 600 and Lindskog, Comments to section 33 of the SAA, section 4.2.1, Zeteo 07/09/2018).

Furthermore, a basic point of departure is that EU law forms a part of the Swedish legal system. As regards the application of a national regulation stipulating that an arbitral award shall be set aside if it is found to conflict with ordre public, the CJEU has ruled that the then applicable article 85.1 in the TFEU, which stipulated that agreements or decisions restricting competition were illegal and therefore invalid, was a basic regulation which was indispensable to the functioning of the single market. According to the CJEU, this meant that if a national court had procedural rules whereby an arbitral award would be declared invalid on grounds that it conflicted with ordre public, the court would also uphold such a claim on grounds that the prohibition in article 85.1 in the TFEU would have been infringed (Eco Swiss, C-126/97, EU:C:1999:269, items 36 and 37).

In a later ruling, the CJEU has repeated the rule that a national court having the above-mentioned procedural rules for declaring arbitral awards invalid shall also uphold a claim based on the fact that rules of Community law that refer to ordre public have been disregarded. In this ruling, the CJEU determined that the 1993 Council Directive On Unfair Terms in Consumer Contracts shall be interpreted to mean that a national court in a case concerning challenge of an arbitral award

shall determine whether the arbitration agreement is invalid and set aside the arbitral award, even when the consumer failed to invoke the invalidity of the arbitration agreement in the arbitral proceedings, but rather did so only in when challenging the award.

The CJEU, *inter alia*, noted that considering the importance of protecting consumers, a mandatory rule against unreasonable terms had been introduced with the purpose to create balance between the contractual parties and that the public interest behind the Directive's protection for consumers was of such nature and scope that it justified imposing an obligation on national courts to, ex officio, determine whether a contract term is unreasonable and thereby compensate for an imbalance between consumers and business operators (Mostaza Claro, C-168/05, EU:C:2006:675, points 35–39).

Section 34 of the SAA contains rules regarding situations in which an arbitral award can be set aside after challenge.

Section 34, first paragraph, item 1 of the SAA provides that an arbitral award shall be set aside, either wholly or in part, upon motion of a party, if it is not covered by a valid arbitration agreement between the parties. An agreement is normally concluded in writing, most often by way of an arbitration clause included in a contract. However, an arbitration agreement can also, as per general principles of contract law, be entered into in other ways, as by implicit conduct (see for example Lindskog, Arbitral Proceedings, Zeteo 2018-09-07, section 2.1.2).

Section 34, second paragraph of the SAA provides that a party does not have the right to invoke a circumstance that it, by participating in the proceedings without objection or in any other way, may be deemed to have waived. The wording of the Act also specifies that the mere act of a party appointing an arbitrator cannot be considered to manifest its acceptance of the arbitral tribunal's jurisdiction over the dispute concerned. The provision means that a party must be active and object against the measures and decisions which it is dissatisfied with to retain the right to later on invoke these as grounds for challenging the arbitral award. This provision only applies relating to grounds for challenge, *i.e.* the grounds specified in section 34, first paragraph of the SAA. For grounds for invalidity as per § 33 LSF, there is no preclusion rule.

In section 5.3.1 below, the Court of Appeal revisits the rules regarding the grounds for challenge relevant to this case.

5.2.3 Significance of the Achmea ruling for consideration in this case

The Achmea ruling

The Court of Justice of the European Union (CJEU) ruling in the Achmea case resulted from the request for a preliminary ruling by the German Bundesgerichtshof – i.e. the German Federal Court - the highest judicial instance for disputes and criminal cases. Slovakia had filed an action in German courts against a Dutch company, Achmea BV, to set aside an arbitral award. The dispute originated with Achmea BV, through a subsidiary, providing private sickness insurance services on the Slovak market. Achmea BV claimed that Slovakia had implemented legislative measures that harmed the company. Achmea BV therefore initiated arbitral proceedings in which it claimed damages from Slovakia. The arbitral award required Slovakia to pay damages to Achmea BV. The dispute was determined through arbitration on the basis of an investment treaty entered in the 1990s between the Netherlands and a number of EU Member States. Through its accession to the EU, Slovakia also became party to this investment treaty. Article 8 of the investment treaty contained a dispute resolution provision that, *inter alia*, provided that investors from any of the Contracting States had the right to initiate arbitral proceedings against another Contracting State in regard to any dispute that arose relating to their investments in such Contracting State. Therefore, in its capacity as such an investor, the Dutch company Achmea BV, initiated arbitration proceedings against the Contracting State Slovakia.

In the arbitration, Slovakia objected that the arbitral tribunal lacked jurisdiction since the arbitration clause was incompatible with EU law due to Slovakia's accession to the EU, but this objection was rejected by the arbitral tribunal. The arbitral tribunal ruled on the jurisdiction issue in a separate award, where it determined that the arbitral tribunal had jurisdiction.

After the final arbitral award, Slovakia filed action for setting aside the arbitral award before German courts, which rejected the challenge. Slovakia appealed this ruling to the Bundesgerichtshof, which decided to request a preliminary ruling from the CJEU. The CJEU answered the questions of the German court by concluding that articles 267 and 344 TFEU shall be interpreted to preclude such provisions in an international agreement between Member States under which an investor in one Member State, when a dispute arises regarding its investment in a second Member State, may initiate arbitral proceedings against the second Member State, where

the tribunal's jurisdiction must be accepted by that Member State (Achmea ruling, item 60).

In its reasoning, the CJEU stated that, with the aim of safeguarding the particular character and autonomy of the Union's legal system, a court system has been established to ensure consistent and uniform application of EU law. Further, the CJEU stated that the core of the judicial system lays in the procedures for preliminary rulings, which are designed to ensure consistency and uniformity in the interpretation of EU law and thereby its consistency, its full effect and autonomy, as well as the particular nature of the law established by the Treaties (Achmea ruling, items 35 and 37).

The CJEU first determined whether the disputes determined by the arbitral tribunal could involve the interpretation or application of EU law. The CJEU stated in this part of the ruling that EU law constituted part of the law in force in every Member State that an arbitral tribunal might be called to interpret or apply, in particular provisions concerning the fundamental freedoms, including the freedom of establishment and free movement of capital. (Achmea ruling, items 38, 41, and 42). The CJEU then considered whether the arbitral tribunal could be regarded as a court in a Member State within the meaning of article 267 TFEU. The CJEU found that this was not the case and that the arbitral tribunal was therefore not entitled to request preliminary rulings from the CJEU. (Achmea ruling, items 43, 46, and 49). Under these circumstances, there was according to the CJEU an additional question as to whether an arbitral award made by the arbitral tribunal is subject to review by a court of a Member State, thereby ensuring that questions of EU law can be submitted to the CJEU by means of a request for preliminary ruling. The CJEU found that the review of the arbitral award that the German courts could carry out was limited to determining, *inter alia*, the validity of the arbitration agreement and ordre public in connection with recognition or enforcement of the arbitral award. (Achmea ruling, items 50, and 53).

Furthermore, the CJEU noted that the court in previous rulings regarding commercial disputes had determined that the requirements relating to the efficiency of arbitral proceedings justified that the review conducted by Member States' courts was limited, provided that fundamental EU regulations could be considered in such review, and when appropriate, become the subject of a request to the CJEU for a preliminary ruling (Achmea ruling, item 54, with reference to the Eco Swiss ruling, items 35, 36 and 40, and the Mostaza Claro ruling, items 34–39).

The CJEU noted, however, that there was a difference between arbitral proceedings referred to in article 8 of the treaty and commercial arbitration proceedings. Commercial arbitral proceedings were based on party autonomy , while the arbitral proceedings referred to in article 8 derive from a treaty through which the Member States had agreed to remove disputes that may involve the application or interpretation of EU law from the jurisdiction of their own courts, and thereby from the system of judicial remedies that they were required to establish in fields covered by EU law (Achmea ruling, item 55).

The CJEU held that the Member States that were parties to article 8 in the treaty, by entering into that treaty had established a mechanism for resolving disputes between an investor and a Member State which could mean that those disputes were resolved in a manner that failed to ensure the full effectiveness of EU law, even when these disputes could involve interpretation or application of EU law (Achmea ruling, item 56). The CJEU court therefore concluded that articles 267 and 344 TFEU shall be interpreted so as to preclude such provisions in an international agreement between Member States under which an investor in one Member State, if a dispute arises regarding its investment in a second Member State, may initiate arbitral proceedings against the second Member State, in which that Member State is obligated to accept the tribunal's jurisdiction (Achmea ruling, item 60).

After the national proceedings were resumed, the Bundesgerichtshof set aside the arbitral award in the dispute between Slovakia and Achmea on the grounds that the no arbitration agreement between the parties existed (ruling 31 October 2018, I ZB 2/15).

Comparison to the circumstances in this case
Article 9 of the investment treaty relevant for this case includes a dispute resolution provision regulating the settlement of disputes between a contracting member state, which is Poland in this case, and an investor from another contracting member state , which in this case is PL Holdings from Luxembourg.

This provision calls for dispute resolution using arbitration in accordance with one of three options, including the Arbitration Institute of the Stockholm Chamber of Commerce. The investor has the right to choose any of these options. Furthermore, article 9 provides that the arbitral award shall be final and binding between the disputing parties, and that the States which are parties to the investment treaty undertake to enforce any such arbitral award in accordance with their national laws.

Thus, the dispute resolution provision in article 9 has in relevant parts the same contents as the dispute resolution provision in article 8 of the investment treaty applicable in the Achmea ruling. Both of the dispute resolution provisions stipulate a right for investors from one Member State party to the investment treaty to initiate arbitration against another Member State party to the investment treaty before an arbitral tribunal whose jurisdiction the other Member State has to accept. In both cases the investment treaty, which contains the dispute resolution provision, is concluded between two EU Member States. In both cases a Member State undertakes to accept that a dispute between an investor and another Member State is resolved through arbitration.

In the aspects described here, the circumstances in this case are, in all material aspects, the same as in the Achmea ruling.

However, in the Achmea case, Slovakia, raised an objection already in their statement of defence to the effect that the arbitral tribunal did not have jurisdiction to hear the case since the arbitration clause was incompatible with EU law after Slovakia's accession to the EU. In comparison with the circumstances in this case, Poland did, in fact, object to the jurisdiction of the arbitral tribunal in the statement of defence, but based on different grounds. Only later in the proceedings did Poland object that the dispute resolution provision violated EU law. The Court of Appeal will return to the implications of this below.

Implications of the Achmea ruling for consideration in this case

The parties have presented different views on the impact of the Achmea ruling. Expressed in simpler terms, Poland's view is that a direct consequence of the Achmea ruling is that the arbitral awards under consideration are invalid, or should otherwise be set aside since no valid arbitration agreement exists, due to violation of articles 267 and 344 TFEU. PL Holdings, on the other hand, argues that the Achmea ruling has a significantly more limited scope of application. According to PL Holdings, the ruling is directed towards EU Member States and means that the Member States may not enter into investment treaties with arbitration clauses of the type in question, and, where applicable, may be obligated to terminate such treaties. The Achmea ruling, according to PL Holdings, does not mean that an arbitration agreement between an individual investor and a Member State is invalid.

The Achmea ruling concerns the validity of the treaty between the Member States that includes a dispute resolution mechanism such as article 9 in this case. In its ruling, the CJEU clarified that articles 267 and 344 TFEU preclude such a dispute resolution agreement between the Member States. This cannot be understood in any other way than that the dispute resolution agreement is invalid as between the Member States. Since the dispute resolution agreement is designed so as to provide a standing offer from one Member State to investors of other Member States that are parties to the dispute resolution agreement, the consequence must be that this standing offer from a Member State to investors is also not valid.

In the Achmea ruling, the CJEU also clearly differentiated between on the one hand, what the CJEU considers to be commercial arbitration, and on the other hand, arbitration brought under the dispute resolution agreement in the investment treaty. The CJEU held, with reference to previous case law, that regarding commercial arbitration, the court has ruled that the requirements relating to the efficiency of arbitration justifies the limited review of arbitral awards conducted by Member States' courts. The CJEU held that this requires that fundamental EU regulations can be considered at such review and, when appropriate, be made subject of a request for a preliminary ruling (Achmea ruling, item 54, with references to the rulings in Eco Swiss, items 35, 36 and 40, and Mostaza Claro, items 34–39).

In its further reasoning, the CJEU stated that these considerations could, however, not be applied to arbitral proceedings provided for in article 8 of the investment treaty in the Achmea case. The reason for this was, according to the court, that commercial arbitration derives from party autonomy, while the arbitration referred to in article 8 derive from a treaty between the Member States whereby the Member States had agreed to remove disputes that could involve the application or interpretation of EU law from the jurisdiction of their own courts, and thereby from the judicial system which the Member States are required to establish in fields covered by EU law. (Achmea ruling, item 55)

The CJEU concluded that, through these treaties, the Member States had established a mechanism for resolving disputes between an investor and a Member State which could result in those disputes being determined in a manner that does not ensure the full effectiveness of EU law, despite the fact that these disputes could involve interpretation or application of EU law

(Achmea ruling, item 56). The CJEU concluded that what the TFEU precludes is this type of dispute resolution agreement *between Member States* where an investor in one Member State could initiate arbitral proceedings against a second Member State before an arbitral tribunal *whose jurisdiction this Member State was under obligation to accept* (emphasis by the Court of Appeal).

Thus, the Achmea ruling clarifies that the assessment of the CJEU relates to the mechanism for dispute resolution in article 8 of the investment treaty which is binding upon the Member States that are parties to the treaty. It is this type of established system as between Member States that the CJEU found violates the TFEU. The dispute resolution mechanism in article 8 in the investment treaty differed from a conventional arbitration agreement (referred to by the CJEU as 'commercial arbitration) that derives from party autonomy, *i.e.* where one party enters into an arbitration agreement directly with the other party designated to be a party in subsequent arbitral proceedings. It follows that the CJEU's ruling does not mean that an arbitration agreement between an investor and a Member State in a specific case violates the TFEU. To the contrary – where there is joint expression of party autonomy– there is no impediment against arbitration, provided that fundamental EU regulations can be considered within the limited review available to the Member States' court systems, and, when appropriate, can be made subject of a request to the CJEU for a preliminary ruling (see Achmea ruling, item 54), *i.e.* as regards Swedish courts, the review of whether an arbitral award is invalid or challengeable in accordance with the SAA.

The conclusion from the Achmea ruling is therefore that articles 267 and 344 TFEU would not as such preclude Poland and PL Holdings from entering into an arbitration agreement and participating in arbitral proceedings regarding an investment-related dispute. What the TFEU precludes is that Member States conclude agreements with each other meaning that one Member State is obligated to accept subsequent arbitral proceeding with an investor and that the Member States thereby establish a system where they have excluded disputes from the possibility of requesting a preliminary ruling, even though the disputes may involve interpretation and application of EU law. Since the TFEU thus does not preclude arbitration agreements between a Member State and an investor in a particular case, a Member State is, based on party autonomy, free – even though the Member State is not bound by a standing offer as such as that in article 8 of the Achmea case or article 9 in this case –to enter into an arbitration agreement with an

investor regarding the same dispute at a later stage, *e.g.* when the investor has initiated arbitral proceedings. An arbitration agreement and arbitral proceedings between, on the one hand, an investor from a Member State and, on the other hand, a Member State, is therefore as such not in violation of the TFEU.

5.2.4 Common questions for the continuous assessment

A first requirement for the Achmea ruling to have relevance for the continuous assessment of the grounds for invalidity and grounds for challenge A is that the dispute before the arbitral tribunal related to, or could relate to, interpretation or application of EU law (Achmea ruling, item 39). The parties have different opinions on whether this was the case or not. Poland has argued that the arbitral tribunal could have, and actually did, apply EU law, while PL Holdings argued that the arbitral tribunal's assessment did not involve issues harmonised within the EU and therefore did not involve EU law.

The evidence shows that the arbitral tribunal has, *inter alia*, assessed whether certain measures undertaken by the Polish supervisory authority regarding PL Holdings' shares in a Polish bank violated the investment treaty and if Poland therefore is liable to pay damages to PL Holdings. Based on the evidence brought in the case, the dispute concerned banking law which is harmonised within the EU. Investment disputes of this nature typically also involve the fundamental freedoms of the EU, including the freedom of establishment and the free movement of capital (Achmea ruling, item 42). On the basis hereof, the Court of Appeal considers that the dispute between PL Holdings and Poland at least could have related to the interpretation or application of EU law.

The Court of Appeal also notes that the arbitral tribunal is not considered to be a court in a Member State within the meaning of article 267 TFEU, and therefore cannot request a preliminary ruling from the CJEU (*cf.* Achmea ruling item 49).

On the basis hereof, the Court of Appeal proceeds its assessment of whether the arbitral awards are invalid or, alternatively, shall be set aside.

5.2.5 Invalidity due to lack of arbitrability

In summary, Poland has argued the following. The relevant arbitral awards have involved assessments of issues under an intra-EU investment protection treaty that may not be determined by arbitrators. It is of public interest that the autonomy of EU law is not undermined, and that the full effectiveness of EU law is ensured. Therefore, intra-EU investment disputes must not be determined by arbitrators. This means that the dispute between PL Holdings and Poland is not arbitrable and that the arbitral awards rendered by the arbitral tribunal are invalid.

In summary, PL Holdings has made the following objections. The circumstances invoked by Poland do not mean that the dispute could not be determined by arbitrators. The parties have been able to reach a settlement comprising the issues in dispute.

The Court of Appeal makes the following assessment.

The prerequisite for an issue to be able to be determined by arbitrators is, as explained above, according to section 1, first paragraph of the SAA that the parties can agree to settle the issue in question. The assessment of whether a certain issue is arbitrable or not shall therefore relate to the substantive disputed issues in the arbitral proceedings.

The substantive disputed issues in question were whether Poland had breached the investment treaty, if Poland was liable to pay compensation for such a breach of contract, and if so, with what amount. It has not even been asserted that the disputed matters are legally mandatory by nature. Rather, this involved questions of breach of contract and liability for compensation which the parties were able to settle. The arbitral awards have therefore concerned assessment of issues that can be determined by arbitrators. (*cf.* NJA 2012 p. 790 and NJA 2015 p. 438.) What Poland has submitted, therefore, does not constitute grounds for declaring the arbitral awards invalid as per section 33, first paragraph 1 of the SAA.

5.2.6 Invalidity due to the arbitral awards or the manner in which they arose being manifestly incompatible with Swedish ordre public.

Summary of the parties' arguments

In summary, Poland has argued the following. It is of public interest that the autonomy of EU law is not undermined, and that the full effectiveness of EU law is ensured. Intra-EU investment disputes must therefore not be determined by arbitrators. An arbitration clause such as the clause in article 9 is contrary to the foundations of the EU legal system and thereby also the Swedish legal system. Arbitral awards which are based on and issued pursuant to such an arbitration clause, are therefore manifestly incompatible with ordre public. The arbitral awards in the arbitration in question, as well as the manner in which they arose, are therefore clearly incompatible with Swedish ordre public and are invalid.

In summary, PL Holdings have objected that the circumstances invoked by Poland do not mean that the arbitral awards or the manner in which they arose are manifestly incompatible with Swedish ordre public.

Detailed review of two rulings by the CJEU on ordre public

As described above, (section 5.2.2) the CJEU determined the following in the Eco-Swiss ruling. Regarding the application of a national provision stipulating that an arbitral award shall be annulled if it is found to be contrary to the ordre public, the provision in article 85.1 in the TFEU (which stipulated that agreements or decisions restricting competition were illegal and therefore invalid) was a fundamental provision which was indispensable for the functioning of the single market. Accordingly, if a national court has procedural rules requiring that an arbitral award shall be declared invalid if it was found to be contrary to ordre public, the national court shall also grant such a relief on the grounds that the competition law prohibition in article 85.1 of the TFEU was infringed. (See Eco Swiss, items 36 and 37.)

As accounted for above the CJEU in a later ruling, the Mostaza Claro ruling, addressed the issue whether provisions concerning invalidity of unconscionable contract terms in a consumer protection directive were of such nature that the invalidity of an arbitration agreement between a consumer and a business should be reviewed by a national court, despite the fact that the

consumer had failed to invoke such invalidity during the arbitral proceeding. In its ruling the CJEU stated that the national court had determined that the relevant arbitration clause between the consumer and the business was to be considered unconscionable. The court noted that the purpose of the directive was to safeguard consumer protection in view of the risk that consumers were unaware of their rights or had difficulty exercising their rights. Therefore, the directive's protection covers cases where a consumer had concluded an unreasonable contract term but failed to invoke that the term was unreasonable either because the consumer was not aware of it or because it was reluctant to do so for costs reasons.

With reference to the Eco Swiss ruling, the CJEU stated that it had already determined that, to the extent a national court, as a result of its internal procedural rules, shall grant a request for annulment of an arbitral award on the grounds that it constitutes a violation of national rules relating to ordre public, it shall also grant such requests which are based on Community law rules of this kind that have been violated. Then, the CJEU stated that the provision in the consumer rights directive providing that unconscionable contract terms were not binding upon consumers was a mandatory regulation that, considering that one party was at a disadvantage, was designed for the purpose of creating a balance between the contracting parties. The purpose of the directive to strengthen consumer protection further meant that the directive constituted a fundamental measure indispensable to the EU in fulfilling its purpose. The public interest upon which the directive’s protection for consumers was based was, according to the CJEU, also so strong – of such nature and extent – that it justified imposing an obligation on national courts to, ex officio – *i.e.* regardless of whether the consumer had failed to invoke the invalidity of the arbitration agreement in the arbitral proceedings – assess whether the arbitration agreement was unconscionable within the scope of the challenge proceeding.

The CJEU thus concluded that the consumer rights directive should be interpreted to the effect that a national court, called upon for a challenge of an arbitral award, shall consider whether the arbitration agreement is invalid and set aside the arbitral award if the arbitration agreement contains an unconscionable contract term, even if the consumer did not raise an objection regarding invalidity of the arbitration agreement during the arbitral proceedings. (Mostaza Claro ruling, especially items 28–31 and 35–39).

The reasoning of the Court of Appeal

The question is whether the circumstances in the current case are comparable to the circumstances of the Eco Swiss ruling or the Mostaza Claro ruling or – if that is not the case – if there still is legal basis for ruling that the contents of the arbitral awards or the manner in which they arose mean that they should be declared invalid for being manifestly incompatible with Swedish ordre public as per section 33, first paragraph, item 2 of the SAA.

Firstly, as regards the question of whether the arbitration awards' substantive contents, equivalent to the Eco Swiss ruling, infringe a fundamental EU regulation which is indispensable for the functioning of the EU and therefore manifestly incompatible with ordre public, the Court of Appeal declares the following. The circumstances invoked by Poland cannot, as a matter of law, result in the substantive contents of the arbitral awards being contrary to fundamental EU law. Even if the arbitral awards would be based on an arbitration clause which was manifestly incompatible with ordre public, it does not follow that the contents of the arbitral awards are incompatible with ordre public. The arbitral awards shall therefore not be declared invalid as being manifestly incompatible with Swedish ordre public.

The question is then if the manner in which the arbitral awards arose mean that they are manifestly incompatible with Swedish ordre public. As it has been made clear, Poland essentially argues that the awards are based on an arbitration clause as that contained in article 9, and which prevents the full effectiveness and uniform application of EU law and which undermines the autonomy of EU law.

As already stated by the Court of Appeal, it can be concluded from the Achmea ruling that the CJEU distinguished between what the court refers to as commercial arbitration based on the party autonomy, and a mechanism for resolving disputes between Member States where an investor in a Member State may initiate arbitral proceedings against another Member State before an arbitral tribunal whose jurisdiction that Member State is obligated to accept. The Court of Appeal has already noted that this does not prevent Member States, in individual cases, from entering into an arbitration agreement with an investor, *i.e.* based on an expression of party autonomy.

As opposed to the circumstances in the Mostaza Claro ruling, it is therefore not a question of Member States having to ensure that mandatory EU law protecting a weaker party shall be given

effect and invalidate an arbitral award based on an invalid arbitration agreement as per the mandatory EU law. Instead, according to the Achmea ruling, the Member States must not create a system which results in disputes being resolved in a manner which does not ensure the full effectiveness of EU law. That an investor in a specific case has relied on a Member State and participated in an arbitration is therefore not comparable to the circumstances in the Mostaza Claro ruling. It also means that no such imbalance exists between the parties in this case that the Court of Appeal, ex officio, must consider, *i.e.* regardless of whether Poland raised an objection in the arbitration in question within the correct timeframe regarding the validity of the arbitration agreement (*cf.* the Mostaza Claro ruling, item 38). Instead, the CJEU's findings in the Mostaza Claro ruling along with the same court's findings in the Achmea ruling, leads to the conclusion that the arbitral awards in question, even if based on article 9 (which is not valid between Member States), have not arisen in a manner which is manifestly incompatible with Swedish ordre public.

The arbitral awards are therefore not invalid under section 33 of the SAA.

The next issue to assess is therefore whether the arbitral awards shall be set aside under section 34, first paragraph, item 1 of the SAA on the grounds that they are not covered by a valid arbitration agreement.

5.2.7 Setting aside due to the arbitral awards not being covered by a valid arbitration agreement

Summary of the parties' arguments
In summary, Poland has argued the following. There is no valid arbitration agreement since article 9 is invalid, as it violates articles 267 and 344 of the TFEU. The article therefore cannot form basis for the jurisdiction of the arbitral tribunal. Therefore, there is no valid arbitration agreement between Poland and PL Holdings, or, in any event article 9 cannot be applied.

In summary, PL Holdings has raised the following objections. Poland is precluded from invoking that the arbitral awards are not covered by a valid arbitration agreement since Poland has participated in the proceeding without raising this objection or shall otherwise be considered to have waived this objection. Under the applicable rules for the proceedings, Poland was obligated

to raise an objection concerning the alleged invalidity of the arbitration agreement no later than in its *Statement of Defence*, which Poland did not do. In addition, Poland's offer in article 9 also constitutes a valid offer to arbitrate. A valid arbitration agreement was concluded when PL Holding accepted the offer by initiating the arbitral proceedings. If Poland's offer was invalid, a binding arbitration agreement has nevertheless been concluded since PL Holdings submitted an offer by initiating arbitral proceedings which Poland then accepted through their implicit conduct – by appointing counsel etc.– without raising any objection. If the offer in article 9 lost its binding effect, Poland has not been obligated to accept the jurisdiction of the arbitral tribunal, but would instead have been able to raise its objection up to and including in its *Statement of Defence.*

Poland has, in summary, submitted the following arguments in response to the objections raised by PL Holdings. The Court of Appeal shall, ex officio, consider the question whether an arbitration agreement is contrary to the EU treaties. If an application of the preclusion provision in section 34, second paragraph of the SAA would mean that the validity of the arbitration agreement cannot be assessed by the Court of Appeal, the provision is contrary to the full effectiveness of EU law, and would therefore be inapplicable. In the arbitral proceedings, PL Holdings has not argued that the arbitral tribunal would have jurisdiction on any grounds other than the investment treaty. An arbitration agreement has not been concluded through PL Holdings initiation and Poland's alleged implicit conduct. It is required that Poland explicitly has confirmed the agreement. A State cannot enter into an implicit agreement. The individuals representing Poland did not have the authority to enter into a new arbitration agreement on behalf of the State. Under all circumstances, the Court of Appeal shall set aside the arbitral awards since such an arbitration agreement would also be contrary to articles 267 and 344 of the TFEU. Poland has also made a jurisdictional objection within the required time. Furthermore, the fact that Poland raised this jurisdictional objection only in its second submission in the arbitral proceedings was in any event remedied by the arbitral tribunal considering that jurisdictional objection. PL Holdings has also – at least implicitly – agreed that this was remedied by not raising any objections against the arbitral tribunal considering the jurisdictional objection.

The reasoning of the Court of Appeal

First, the Court of Appeal will assess the question of whether Poland's objection against the validity of the arbitration agreement can be subject of preclusion under section 34, second paragraph of the SAA and – if that is the case – the objection is precluded.

In the previous section, the Court of Appeal concluded that there is no such imbalance between the parties in this case that the Court, ex officio, must consider the validity of the arbitration agreement, *i.e.* regardless of whether Poland has raised an objection regarding the validity of the arbitration agreement in the relevant arbitral proceedings within due time (*cf.* the Mostaza Claro ruling, item 38). Instead, the Court of Appeal has found that the CJEU's findings in the Mostaza Claro ruling together with the same court's findings in the Achmea ruling leads to the conclusion that the arbitral awards in question, even if based on article 9 (which is not valid between Member States), have not arisen in a manner which is manifestly incompatible with Swedish ordre public. Also, the Court of Appeal has already stated that the conclusions of the CJEU's findings in the Achmea ruling mean that there is nothing preventing a Member State from entering into an arbitration agreement with an investor in a specific case, *i.e.* based on party autonomy.

The Court of Appeal further finds that there are no grounds for Poland's argument that a State would be prevented from entering into an agreement implicitly by conduct. A State can, in the same way as any other legal entity, act through authorized representatives and enter into agreements in various ways. The Court of Appeal finds that Poland's objections to in these respects are unfounded and have no impact on the issue of applicability of the preclusion provision set forth in section 34 second paragraph of the SAA. (*cf.* Hobér, International Commercial Arbitration in Sweden, 2011, p. 10 f.)

Thus, nothing has prevented Poland and PL Holdings from expressly or implicitly entering into an arbitration agreement regarding the relevant dispute. This leads to the conclusion that Poland and PL Holdings – as opposed to the circumstances in the Mostaza Claro ruling – can at any time enter into a valid arbitration agreement. The very purpose of the application of the preclusion provision to the question of the validity of an arbitration agreement is to ensure that a party claiming that an agreement is invalid shall make clear its position at an early stage so as to allow

the other party to elsewise rely on the agreement, presuming a valid arbitration agreement was possible to conclude. And as found here, the circumstances were such that Poland and PL Holdings were able to enter into an arbitration agreement for determining the disputed issues. Thus, the fact that article 9 of the investment treaty was invalid, does not mean that there is anything preventing the application of the preclusion provision in section 34, second paragraph of the SAA in this case.

Poland has objected that the Court of Appeal may still not apply the preclusion provision in section 34, second paragraph of the SAA since this would then prevent the full effectiveness of EU law.

The Court of Appeal notes that national courts are obligated to provide effective protection of the rights provided for by EU law. In accordance with the principle of procedural autonomy, according to established legal precedent from the CJEU, it is for the domestic legal system of each Member State, in accordance with the principle of procedural autonomy, to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law (see the CJEU's rulings in these and other cases, Rewe, 33/76, EU:C:1976:188, and Van Schijndel, C- 430/93 and C-431/93, EU:C:1995:441, and Impact, C-268/06, EU:C:2008:223). The principle of procedural autonomy is limited, however, in that the procedural rules designed to safeguard the rights which an individual derive from EU law may not be less beneficial than those regarding similar actions based on national law (the principle of equivalence) or are designed in a way whereby, in practice, it becomes impossible or unreasonably difficult to exercise the rights provided under EU law (principle of effectiveness) (see Rewe, 33/76, EU:C:1976:188 and Tarsia, C-69/14, EU:C:2015:662, with references).

The principle of procedural autonomy therefore means that the rules expressed in the SAA regarding procedures for actions for invalidity and setting aside of arbitral awards shall be applied. What Poland argues can best be understood as a legal argument that the principle of effectiveness should prevent application of section 34, second paragraph of the SAA. According to the Court of Appeal there is, however, no reason to conclude that an application of the provision in section 34, second paragraph of the SAA would conflict with either the principle of equivalence or effectiveness. Therefore, there are no grounds to disregard this provision for these reasons.

The Court of Appeal shall also determine whether Poland raised its objection that the arbitration agreement was invalid within due time.

Section 34, second paragraph, of the SAA states that a party does not have the right to invoke a circumstance if the party, by participating in the proceedings without objecting, or in any other way, can be considered to have waived its right to make such objection, but that the party solely by appointing an arbitrator cannot be found to have accepted the arbitral tribunal's jurisdiction to determine the dispute in question. The preparatory works concerning the provision show that it may generally be presumed that a party which participates in a proceeding without immediately objecting to the arbitral tribunal's jurisdiction has accepted its jurisdiction to determine the dispute (Govt. bill 1998/99:45 p. 236. See also Heuman, Skiljemannarätt, 1999, p. 289 f., Lindskog, Zeteo 2018-09-07, comments to 34 section of the SAA, section 6.1.6 and Olsson et.al., *Lagen om skiljeförfarande – En kommentar* (The Arbitration Act, A Commentary), p. 148).

Section 21 of the SAA provides that the arbitral tribunal, in the procedure, shall follow what the parties have decided, unless it is prevented from doing so. The Court of Appeal notes that the evidence in this case shows that the parties had agreed that the SCC rules were applicable for the proceedings. The SCC rules detail when a jurisdictional objection shall be made. Section 5 (1) requires the Answer to a Request for arbitration to include objections regarding the existence of an arbitration agreement, its validity, or applicability.

Failure to raise such objections, however, does not prevent the respondent from raising such objections later, at any time up to when it submits it Statement of Defence. Furthermore, section 24 (2) of the SCC rules states that the respondent , within the time specified by the arbitral tribunal, shall submit its Statement of Defence, which, unless previously submitted, shall include *inter alia* any objections regarding the existence of an arbitration agreement, its validity, or applicability. This leads to the conclusion that Poland was obligated to object to the arbitration agreement's validity no later than in its Statement of Defence.

With respect to the question of how the parties acted and what statements they made during the arbitration proceedings, the evidence shows the following.

PL Holdings initiated the arbitral proceeding against Poland through its request for arbitration which was submitted to the Arbitration Institute of the Stockholm Chamber of Commerce on 28 November 2014. In paragraphs 44 and 45, PL Holdings referred to the fact PL Holdings is a Luxembourg based company, that Poland and Luxembourg are bound by the investment treaty and that article 9 to this treaty entitles PL Holdings to refer disputes to arbitration.

Poland stated in its answer (paragraph 15) to the Institute on 30 December 2014 that Poland, in accordance with article 5.1 (i) of the 2010 SCC rules, intended to submit objections and arguments concerning the question of jurisdiction in its Statement of Defence, including the question of validity and/or applicability of the arbitration clause that PL Holdings had referred to in its request for arbitration.

In its *Statement of Claim* of 7 August 2015, PL Holdings elaborated on the question of jurisdiction (paragraphs 305-326) and argued, among other things, that Poland through the investment treaty had consented to the arbitration and that PL Holdings was to be considered as an ‘investor’ within the meaning of the treaty.

In its *Statement of Defence* of 13 November 2015, Poland objected that PL Holdings should not be considered an investor within the meaning of the investment treaty and that the arbitral tribunal therefore had no jurisdiction to determine the dispute (item 3 A). No other grounds regarding the arbitral tribunal’s lack of jurisdiction were raised. In its Statement of Defence, Poland further argued that the arbitral tribunal had jurisdiction to consider disputes between Poland and an investor from Luxembourg (paragraph 18).

The question of jurisdiction was thereafter also referred to in email correspondence between the legal counsels. On 17 December 2015, PL Holdings’ legal counsel wrote that the company intended to make a submission regarding the jurisdictional objection that Poland had raised. In its response of 4 January 2016, Poland's legal counsel stated that Poland objected to PL Holdings being allowed to submit comments as late as PL Holding had proposed, and further stated that Poland did not intend to present any jurisdictional objections in the *Statement of Rejoinder*.

However, the separate arbitral award (paragraphs 51 and 301-306) indicates that Poland, in the *Statement of Rejoinder* on 27 May 2016 did make an objection regarding the arbitral tribunal's lack of jurisdiction, on the grounds that the investment treaty was invalid as it violated EU law.

In a written submission to the arbitral tribunal on 6 June 2016 as a response to Poland's objection, PL Holdings argued that Poland did not have the right, at this stage of the proceedings, to raise a new jurisdictional objection and requested that the arbitral tribunal reject the objection. PL Holdings further argued that it would both the SCC rules and general principles of arbitration law would be violated if the objection was allowed.

The arbitral tribunal considered this objection in the separate award. The tribunal stated, among other things, that the objection had been presented at a late stage of the proceedings and that nothing preventing its dismissal since it could have been raised at an earlier stage. However, the tribunal found that the objection should not be dismissed and chose to assess the merits of the objection (paragraphs 306 and 307). The arbitral tribunal concluded that it had jurisdiction and therefore rejected the objection (paragraph 317).

Poland's objection regarding the arbitral tribunal's lack of jurisdiction on the ground that article 9 of the investment treaty was invalid since it was contrary to EU law, and that no valid arbitration agreement therefore existed, should therefore, as per section 5 (1) and section 24 (2) (i) of the SCC rules, have been made no later than in the *Statement of Defence.* However, as indicated above, Poland did not submit this objection until the *Statement of Rejoinder* on 27 May 2016.

Poland's jurisdictional objection in its *Statement of Defence* referred only to the arbitral tribunal's lack of jurisdiction on the grounds that PL Holdings should not be considered an investor within the meaning of the investment treaty and therefore had no right to initiate arbitral proceedings. The jurisdictional objection based on EU law regarding the invalidity of the arbitration agreement was not mentioned. For a party to successfully allege that an arbitral award is not covered by a valid arbitration agreement, it must have submitted a clear and specific objection concerning the validity of the arbitration agreement in the arbitral proceeding (see NJA 2012 p. 790 items 19–20 and NJA 2013 p. 578 item 10). This means that a party must clearly indicate the grounds on which it is objecting to the arbitration tribunal's jurisdiction. Therefore, the fact that Poland previously submitted a jurisdictional objection on other grounds, does not mean that Poland shall

be deemed to have made a timely objection regarding the validity of the arbitration agreement. Thus, the objection regarding the validity of the arbitration agreement was not timely. It was first made in the *Statement of Rejoinder*, that is, more than six months too late. Poland must therefore be considered to have waived its right to raise the objection (Section34, second paragraph of the SAA).

The circumstance that the arbitral tribunal considered the objection on the merits in the separate award, even though it could have been dismissed, does not mean that the preclusion period has been remedied as Poland has argued. The arbitral tribunal's review, therefore, has no impact on the question of preclusion. (*Cf.* to NJA 2012 p. 790 and NJA 2013 p. 578.) The Court of Appeal further finds that Poland's objection to the effect that Poland is not bound by the time limits since, according to Poland, there is no valid arbitration agreement, is unfounded. This follows from the very purpose of the preclusion provision.

The Court of Appeal also notes that the German Federal Court (Bundesgerichtshof), after having received the preliminary ruling from the CJEU in the Achmea ruling in the decision of 31 October 2018 in the case between Slovakia and Achmea, took into account that Slovakia, when the arbitration was initiated, had objected against the arbitral tribunal’s jurisdiction on grounds that the arbitration clause was incompatible with EU law, and that the objection had been maintained throughout the proceedings. The Court found that this meant that Slovakia had not acted in a manner whereby Achmea had reason to believe that Slovakia had accepted the existence of a valid arbitration agreement (paragraph 58). The Court pointed out that it had no relevance if Slovakia, in a dispute with another investor, would waive their objection that the arbitration clause was invalid, since it is permissible to have different strategies in different disputes (paragraph 57).

Even if German and Swedish law differs in certain regards, the German ruling supports the conclusion that it is relevant for the question of the validity of the arbitration agreement whether an objection based on EU law was timely submitted.

The Court of Appeal therefore concludes that Poland raised its objection that no valid arbitration agreement existed in an untimely manner, and that this objection is therefore precluded, *i.e.* Poland must be considered to have waived its right to raise the objection as per section 34, second paragraph of the SAA.

5.2.8 The need for a preliminary ruling by the Court of Justice of the European Union

The Court of Appeal has provided the parties the opportunity to comment on the question of whether the Court should request a preliminary ruling from the CJEU. Neither party has deemed that there is any such uncertainty requiring a request for a preliminary ruling, but as is clear from the above, the parties have drawn different conclusions from the Achmea ruling.

In the assessments the Court of Appeal has made above regarding the implications of the Achmea ruling and of applicable EU law in general, the Court of Appeal has not identified any such interpretation issue resulting in the need for the Court of Appeal to request a preliminary ruling from the CJEU in order for the Court of Appeal to be able to rule in this matter.

5.3 Other grounds for setting aside

5.3.1 Legal bases

An arbitral award can, according to section 34, first paragraph item 2 of the SAA, be set aside after a challenge if the arbitral tribunal has issued an award after the expiration of the period the parties agreed upon, or if the tribunal has otherwise exceeded its mandate. According to the first paragraph item 6 in the same regulation an arbitral award can also be set aside if, without the fault of the parties, an error otherwise has occurred in the proceedings which likely affected its outcome.

As already indicated, section 34, second paragraph of the SAA provides that a party does not have the right to invoke a circumstance which the party by taking part in the proceedings without any objection, or in any other way can be considered to have waived.

The mandate of the arbitral tribunal is governed by the arbitration agreement, any agreements between the parties regarding the proceedings and the parties' claims in the arbitral proceedings. At times it can be difficult to determine the exact meaning of the term mandate and if certain procedural errors should be assessed under the provision in item 2 or if they should be adjudicated under the general clause in item 6 which aims at other procedural errors (see

Heuman, a.a., p. 605 f. and Lindskog, Arbitral proceedings, Zeteo, comment to section 34, section 4.2.3). The difference have significance since procedural errors under item 6 should only lead to annulment of the arbitral award if the error has likely affected the outcome of the case, while the requirement of affecting the outcome does not exist in the provision for excess of mandate. In NJA 2009 p. 128, the Supreme Court of Sweden summarised when such an error should be considered to constitute an excess of mandate or a procedural error. The Court stated the following.

> The provision in section 34, first paragraph 2 of the SAA on excess of mandates refers to the framework for the arbitral tribunal's substantive review of the submitted issue. One example of excess of mandate is that the arbitral tribunal went beyond the parties' claims, another is that it bases its decision on an operative fact which has not been invoked (Govt. bill. 1998/99:35 p. 145; cf., among others, Lindskog, Arbitral proceedings A comment, 2005, p. 960 f.).
>
> The parties can limit the scope of review of the arbitral tribunal also in other ways than through their claims and statements. For example, they can limit the review of the arbitral tribunal to concern the application of a specific section of law or in another limiting manner dispose of the proceedings. Section 21 of the SAA provides that the arbitral tribunal then shall adhere to what the parties have agreed, unless there is some objection against it. If such limiting instruction from the parties are disregarded, the tribunal should, as a rule, be considered to have exceeded its mandate (a. Govt. Bill p. 146, cf., among others, Heuman, Skiljemannarätt, 1999, p. 616).
>
> There is a difference regarding instructions which aim at determining how the proceedings shall be conducted within the framework which follows from the arbitral agreement, claims, circumstances invoked, and evidence submitted. If the arbitral tribunal does not adhere to such an instruction, it is normally considered a procedural error as per section 34, first paragraph 6 of the SAA (see for example, Heuman, a.a. p. 652 f. and Lindskog, a.a. p. 965 f.). This also applies to a deviation from the parties' instructions as to the reasoning of the arbitral award (see Heuman, a.a. p. 510 f. and p. 641 f. and Lindskog, a.a. p. 961 f. and 966).

It is common that an arbitral tribunal in a 'Procedural Order' (PO) decides on various procedural questions and the detailed form of the arbitral proceeding. In many cases, a PO does not reflect an agreement between parties which provides a framework for the mandate of the arbitral tribunal, but is instead a procedural decision made by the arbitral tribunal within the framework of its mandate (cf. Born, International Commercial Arbitration, vol. 2, 2014, p. 2230).

5.3.2 Grounds for challenge B – Expert opinion of Kluza

Summary of the parties' arguments etc.

During the arbitral proceedings, PL Holdings referred to an expert opinion by Stanislaw Kluza. Poland requested that an examination should be held with him during the hearing. However, no such examination was held with Kluza, as he did not appear at the hearing.

In summary, Poland argues the following. The arbitral tribunal exceeded its mandate and committed procedural errors that has likely affected the outcome of the proceeding by – contrary to the agreed rules applicable to the proceeding – not disregarding the Kluza statement, and rather, referring to it, adding information from the statement as basis for the conclusions in the separate arbitral award. The arbitration tribunal also committed a procedural error when , prior to rendering the separate award, it failed to notify the parties that the tribunal did not intend to disregard the expert opinion of Kluza. The error has likely affected the outcome of the proceeding, as Poland was denied the opportunity to peruse its case with regard to the portions to which the opinion referred.

In summary, PL Holdings has raised the following objections. Poland's right to invoke this ground for challenge is precluded. The arbitral tribunal has acted in accordance with applicable rules for the proceedings and have therefore neither exceeded its mandate nor committed a procedural error. Any possible error was at least partly caused by Poland, and any such error did not affect the outcome of the proceedings. It is attested that the arbitral tribunal allowed and considered Kluza's opinion in when examining the case.

Firstly, the Court of Appeal assess the question of whether the arbitral tribunal’s handling of the opinion of Kluza can be considered an error, that is, whether it exceeded the mandate or committed a procedural error.

Regulations regarding presentation of evidence

According to section 21 of the SAA arbitrators shall conduct the proceedings in an impartial, practical, and timely manner. It shall act in accordance with what the parties have decided unless it is otherwise prevented from doing so. Section 25 of the SAA provides evidentiary rules for the arbitral proceeding which mean that normally, the parties are responsible for the providing of evidence. There are no rules regarding assessment of evidence in the SAA. Statements in the legal jurisprudence hold that the parties can agree upon, amongst other, rules for the assessment of evidence (Lindskog, comment to section 25 of the SAA, section 4.6.3, Zeteo 07/09/2018).

In section 28 of the SCC rules, there are rules for witnesses and experts appointed by the parties. These provide that witness statements and opinions by experts appointed by the parties may be submitted as signed written statements. Witnesses and experts, whose witness statements or

expert opinions are invoked by a party, shall be present during the proceeding to be heard, unless the parties have agreed otherwise.

The regulation therefore provides significant leeway for the parties to agree on amongst other procedures for how evidence presented by experts is to be handled.

Written communications etc. regarding examination with Kluza
The following is evident from the examination in the case.

In PO 1 from 6 May 2015 the arbitral tribunal made several decisions, after consulting the parties, with regard to procedural questions, including what rules that would apply to evidence provided by witnesses and experts. The decision meant that a party could examine an expert the party itself had called and that the other party could also request to cross-examine the expert called by the first party(item B.3). If neither party requested examination of an expert, the opinion of this expert would be used as evidence and the evaluation of that evidence was left to the arbitral tribunal to determine in its discretion (item B.5). In case where a person which was intended to be cross-examined failed to appear at the hearing, a special rule would apply (item B.6) which reads as follows:

> ”Subject to the discretion of the Tribunal, if a witness or expert is called for cross-examination but fails to appear at the hearing, his or her written statement or expert opinion shall be disregarded, save in exceptional circumstances justifying the non-appearance. In the event of such exceptional circumstances, the Tribunal may exceptionally decide that such witness is to be examined by videoconference.”

Poland requested in a letter to the arbitral tribunal on 2 June 2016 that cross-examination should be held with, among others, Kluza. PL Holdings argued in a letter to the arbitral tribunal on 10 June that Kluza recently had been appointed chairman in a Polish bank owned by the Polish state and also stood under its supervision and therefore, a conflict of interest existed preventing him from giving a free and objective testimony. Poland replied to the letter on 16 June, arguing that there was no impediment to Kluza being heard at the hearing, and that the alleged conflict of interest had not been clarified. Poland also pointed out that, if no examination with Kluza was held, Poland would request that the arbitral tribunal should disregard his written statement.

Further written communications were sent on the following day. In a letter to the arbitral tribunal, PL Holdings maintained its position and argued that the necessary prerequisites for allowing Kluza's written statement were fulfilled. Poland stated in its written response to PL Holdings' request that PL Holdings should confirm its position and that the arbitral tribunal should disregard Kluza's statement if he did not appear at the hearing, and that Poland would otherwise need to request a decision on the issue from the arbitral tribunal.

On 19 June 2016 Poland argued in a letter to the arbitral tribunal that PL Holdings had not stated that Kluza would be prevented from being heard, and that there were no 'exceptional circumstance' constituting cause for his absence. Poland therefore requested the arbitral tribunal to disregard Kluza's written of Kluza, if he failed to appear at the hearing. In PO 11 on 23 June, the arbitral tribunal requested PL Holdings to ensure that Kluza would appear at the hearing, and gave assurances that he would not be required to answer any questions that may be subject to a conflict of interest. Through PO 12 on 23 June, the arbitral tribunal granted PL Holdings an extension until 1 July to provide an answer to whether Kluza would be present at the hearing or not.

On 1 July 2016, Kluza sent a letter to the Polish Ministry of Finance in which he pointed out the risk of a conflict of interest. On 4 July, Poland forwarded the letter to the chairman of the arbitral tribunal, stating that Poland did not intend to reply to Kluza's letter, and that Poland maintained its position presented in previous statements. On the same day, PL Holdings requested in an e-mail a confirmation from Poland that the examination of Kluza would not result in negative consequences for him.

In PO 13 on 6 July 2016, the arbitral tribunal stated that the question of whether there was a conflict of interest for Kluza were to be assessed separately for each issue in question, and that in such circumstances, he would have to explain the nature of the conflict of interest, which the parties would have an opportunity to comment on. The arbitral tribunal further stated that if Kluza refused to answer a question that the tribunal considered him unencumbered to answer, the arbitral tribunal could reduce the evidentiary value of the information he provided on the issue in question. Finally, the arbitral tribunal explained that if Kluza – despite the form of the examination decided by the tribunal– still did not appear for examination, the arbitral tribunal would reduce the evidentiary value of the information he provided on a global basis.

On 9 July 2016, PL Holdings notified the arbitral tribunal that Kluza had stated that he intended to appear, which was also confirmed during the first day of the hearing on 11 July. However, on the fifth (second to last) day of the hearing, PL Holdings informed that Kluza did not intend to appear at the hearing. The issue was discussed under the direction of the arbitral tribunal, which suggested that the parties should be given an opportunity to question other witnesses regarding the contents of Kluza's statement, which the parties, according to what was recorded in the transcript, accepted. During the hearing, the arbitral tribunal did not make any decision on whether Kluza's absence might impact the evidentiary value of his statement, instead leaving the parties an opportunity to submit comments separately. In their *Post-Hearing Briefs*, both parties submitted comments on the issue of whether the arbitral tribunal should disregard Kluza's statement.

The reasoning of the Court of Appeal

The parties agree that they agreed on the handling of witnesses and experts as reflected in PO 1. The rule in item B.6 meant that the arbitral tribunal would disregard an expert opinion, if the expert did not appear at the hearing he or she had been called to attend for cross-examination. However, this did not apply if there were exceptional circumstances justifying the person's absence. According to the Court of Appeal, it is clear from item B.6 that the arbitral tribunal shall determine if such exceptional circumstances referred to in the rule are at hand.

The parties also agree that the arbitral tribunal in the separate arbitral award considered Kluza's expert opinion. Even if it is not explicitly stated in the arbitral award, or otherwise apparent from the evidence, the Court of Appeal finds that this must be understood as showing that the arbitral tribunal actually did find that such exceptional circumstances existed that justified Kluza not appearing at the hearing. The issue of whether the arbitral tribunal's assessment that such exceptional circumstances existed is valid is not an issue which the Court of Appeal can review within the framework of the challenge proceeding, since the parties in PO 1 have agreed that this assessment was up to the arbitral tribunal to perform.

The agreement in item B.6 does not include the issue of what evidentiary value the arbitration tribunal give to an expert opinion, if the arbitral tribunal has considered valid reasons exist for the expert failing to appear. According to the Court of Appeal it is most likely that the intention was

that the tribunal would handle any such statement under the same rule which applies when an expert statement was invoked but neither party requested an examination of the expert (PO 1 item B 5). In such a situation it is stipulated that the arbitral tribunal may, as it see fit, determine the evidentiary value of the statement. This conclusion is also clearly supported by the fact that the arbitral tribunal, in PO 13, stated that if Kluza was absent, they *might* reduce the evidentiary value of his statements on a global basis (emphasis by the Court of Appeal).

Therefore, there has been no impediment to the arbitral tribunal allowing Kluza's expert statement as evidence in the case and bestow upon it the evidentiary value considered appropriate by the arbitral tribunal.

Furthermore, Poland has argued that the arbitral tribunal should have notified the parties that the tribunal did not intend to disregard Kluza's statement. The Court of Appeal note that the issue of the examination of Kluza and the handling of his expert opinion was subject to extensive correspondence between the parties as well as measures from the arbitral tribunal for approximately a month prior to the hearing. The matter was also raised during the hearing. No decision was made by the arbitral tribunal as to how Kluza's statement should be assessed. On the one hand, the arbitral tribunal did notify the parties that the evidentiary value of Kluza's statement might be affected if he was absent, but the arbitral tribunal did not decide on how the opinion would be assessed. After the conclusion of the hearing, the issue of whether Kluza's statement would be considered at all, and if so, what value it had, was left open.

According to the Court of Appeal there is no support, in the SAA, the SCC rules or the procedural rules the parties agreed upon, for the notion that the arbitral tribunal was obligated to, either by a separate decision or otherwise, provide any notification prior to rendering the separate arbitral award regarding the evidentiary value of Kluza's statement. This conclusion is also supported by the circumstance that both parties in their final statements submitted comments on whether the arbitral tribunal should disregard Kluza's statement or not.

The arbitral tribunal has therefore neither exceeded its mandate nor committed any procedural errors as Poland has claimed. With this finding there is no reason to review PL Holding's objections on error or preclusion.

5.3.3 Grounds for challenge C and D – the separate arbitral award and the decision to reopen the arbitral proceedings

Summary of the parties' claims etc.
In summary, Poland has argued as follows. The arbitral tribunal exceeded its mandate and committed procedural errors by, without first communicating with the parties, issuing a separate arbitral award instead of a final arbitral award, and reopening the arbitral proceedings (grounds for challenge D), and, by handling incorrectly the operative part of the judgment, item B, of the separate arbitral award (grounds for challenge C). The errors have likely affected the outcome of the case.

PL Holdings has disputed the claims that the tribunal exceeded its mandate or that procedural errors occurred as argued by Poland, and has, in summary, objected that Poland's grounds for challenge are precluded.

First, the Court of Appeal considers the grounds for challenge D.

Rules regarding separate arbitral awards etc.
The SAA, the SCC rules and any agreements between the parties regarding the proceedings are important when assessing the grounds for challenge D.

According to section 21 of the SAA the arbitrators shall, while handling the dispute, act in accordance with the decisions of the parties insofar as there is no impediment thereto. An arbitral tribunal shall therefore follow the joint instructions of the parties, under the condition that they do not disregard the principles of legal certainty. Statements in the legal jurisprudence hold that arbitral tribunals should never make material decisions in a procedural issue without first consulting the parties. (Lindskog, comment to section 21 of the SAA, section 4.2.3, Zeteo 07/09/2018.)

According to section 29 of the SAA provides that a part of the dispute, or a certain issue of significance to the assessment of a dispute, may be resolved by a separate arbitral award, unless both parties oppose to this. The opportunity for an arbitral tribunal to make a separate award, similar to what the Code of Judicial Procedure refers to as an intermediate judgement, has been

motivated primarily with reference to reasons of procedural economy. According to the preparatory works, there should be at least equal opportunity to make an intermediate ruling in an arbitral proceeding as in a court proceeding. Furthermore, it is stated that an individual party should not be able to prevent an arbitral tribunal from reviewing the case in accordance with good procedural economy. This is the reason why the arbitral tribunal is able issue a separate arbitral award despite one party's objection. If both parties oppose a separate arbitral award, the arbitral tribunal must however adhere to this. (Govt. Bill 1998/99:35 p. 131 f.)

According to statements in legal jurisprudence, the parties' views should be obtained on the issue of whether a determination by a separate arbitral award should be rendered, and the parties should submit statements regarding appropriate themes for a separate arbitral award. There is no equivalent in the SAA to the requirements of chapter 17 section 5 of the Swedish Code of Judicial Procedure regarding which issues may be resolved by intermediary judgement. (Heuman, Skiljemannarätt, 1999, p. 540 and 544.)

Section 19 of the SCC rules provides that the arbitral tribunal may conduct the arbitral proceedings as the tribunal sees fit, subject to the arbitration rules and the agreement of the parties.

Section 34 of the SCC rules provides that the arbitral tribunal shall declare the arbitration proceedings concluded once it considers that the parties have been provided, to a reasonable extent, opportunity to argue their claims. Further, it states that the arbitral tribunal, prior to rendering a final arbitral award, may resume the arbitral proceedings at their own initiative or at the request of a party, where special circumstances are at hand.

§Section 38 of the SCC rules provide that the arbitral tribunal may determine a specific issue or part of a dispute in a separate arbitral award. The relevant rule does not contain any equivalent to the amendment in section 29 of the SAA which stipulates that a separate award may not be issued if both parties objection to a part of the dispute or a certain issue being resolved this way. However, the principle of party autonomy has been considered to require that the equivalent to this amendment also applies to proceedings pursuant to the SCC rules. (Cf. Lindskog, comment to section 29 of the SAA, section 4.1.1, Zeteo 2018-09-07 and Franke et.al., International Arbitration in Sweden, p. 215, note 292.)

The conclusion, therefore, is that the arbitral tribunal shall obtain the parties' views prior to deciding to resolve a dispute through a separate award and that the arbitral tribunal is prevented from issuing a separate arbitral award if both parties are opposed thereto.

Examination

PO 1 of 6 May 2015 contained a time-schedule for the arbitral proceedings and certain rules governing the proceedings. The introduction to PO 1 stated that the intent was to establish a basic framework for the proceedings and that both parties had been consulted. Under the heading 'Miscellaneous', item C, it was stated that the arbitral tribunal could, as it saw fit, set and modify time limits, but only after consulting the parties. Item E 'Rendition of award' in the schedule provided that the arbitral award should be issued within 6 months, starting at the later of either the completion of the hearing, or the submission of *Post-Hearing Briefs.*

The parties' *Post-Hearing Briefs* were submitted to the arbitral tribunal on 14 October 2016. On 9 November 2016, the arbitral tribunal declared the arbitral proceeding closed, in accordance with section 34 of the SCC rules. On March 2017 the SCC's board of directors decided, after a request from the arbitral tribunal, on an extension of the final arbitral award to 30 June 2017. The separate arbitral award was issued on 28 June 2017. After issuing the separate arbitral award, the SCC board of directors, at their own initiative, extended the date for issuing the final arbitral award to 29 September 2017, with reference to the separate arbitral award and PO 17.

The situation during spring of 2017 was therefore as follows. The arbitral proceedings had been closed on 9 November 2016 after the hearing during the summer 2016 and *Post-Hearing Briefs* in October 2016. What remained then, according to the arbitral tribunal's communication to the parties on 9 November 2016, was for Poland to be provided an opportunity to submit a document and comments on this and for PL Holdings to be provided an opportunity to submit a statement no later than 28 November 2016. Thereafter the parties were to submit their statements of cost and statements regarding the counterparty's statement no later than 20 December 2016. In this communication, the arbitral tribunal noted that it did not wish to delay the award and that the arbitral award would be issued on 15 April 2017 (six months after the *Post-Hearing Briefs*). In item 80 of the separate arbitral award it is stated that the parties submitted their statements of cost and comments as per the arbitration tribunal's request.

The reasoning of the Court of Appeal as to whether the arbitral tribunal committed any error

The arbitral proceedings were, both formally and in practice, concluded in December 2016. As described above, section 34 of the SCC rules provides the arbitral tribunal an opportunity, despite the proceedings being closed, to reopen the proceedings at their own initiative under special circumstances. Instead of reopening the proceedings and providing the parties an opportunity to submit statements on the issue of a separate award, the arbitral tribunal issued, without prior communication with the parties, a separate arbitral award and reopened the arbitral proceeding in connection thereto.

The reasons for the arbitral tribunal's actions are stated in items 550 and 551 of the separate arbitral awards. It is evident from this that the arbitral tribunal considered that the number of variables involved in performing the calculations, the exceptional complexity of the formulas, and the necessity of avoiding errors in such a calculation meant that the parties' experts should be provided an opportunity to jointly conduct the calculation of the damages Poland was to pay. According to the arbitral tribunal, these circumstances also justified the reopening of the proceedings to a limited extent, in order to evaluate PL Holdings' shareholding in the bank and calculate the company's loss. The calculations were to be made in accordance with the rules set forth in PO 17, and be based on the factors the arbitral tribunal had decided on in the separate arbitral award.

But, as is evident from the description above, there is no basis in the SCC rules for providing the arbitral tribunal a larger scope to act contrary to the parties' wishes than what follows from section 29 of the SAA. It would be contrary to the general principle of party autonomy, on which both the SAA and SCC's arbitration rules are predicated. As the Court of Appeal has already stated, the regulations which the arbitral tribunal was obligated to apply meant they could not issue a separate award without prior communication with the parties. In addition to the separate arbitral award having come as a surprise to the parties, the arbitral tribunal could not have known whether both parties would oppose certain issues being resolved through a separate arbitral award. The parties was neither given an opportunity to submit comments on what the separate arbitral award would include.

The arbitral tribunal therefore committed an error by issuing a separate arbitral award without first providing the parties an opportunity to submit statements. However, the arbitral tribunal had, as has

been shown, the right to decide to reopen the arbitral proceedings as per section 34 of the SCC rules. The decision to reopen the arbitral proceedings therefore does not constitute an error that can result in the arbitral award being set aside.

The question is whether the error that the arbitral tribunal committed when it failed to provide the parties an opportunity to submit statements on the issue of a separate arbitral award shall be considered an excess of mandate or a procedural error.

The reasoning of the Court of Appeal regarding exceeding of mandate or procedural error
Exceeding a mandate presupposes that the arbitral tribunal overstepped the boundaries of its mandate, as determined by the parties. Examples of situations in which a mandate has been exceeded include an arbitral tribunal ruling on something that had not been claimed or basing its ruling on circumstances that had not been invoked (see section 5.3.1 above).

In the case at hand, the arbitral tribunal has disregarded rules which applies to the proceedings by issuing a separate award without first obtaining the parties' position in this regard. The matters that were resolved through this separate arbitral award – the issue of breach of contract and liability for damages – however, are within the scope of what had been claimed in the case. Therefore, issuing the separate arbitral award does not mean that the arbitral tribunal exceeded the scope of the substantive review of the issues submitted to the tribunal (cf. NJA 2009 p. 128). The error that did occur is therefore not of such nature that it should be considered as the tribunal exceeding its mandate.

The error the arbitral tribunal committed is instead considered a procedural error. (Cf. NJA 2009 p. 128 and Heuman, Skiljemannarätt, 1999, p. 621 and Lindskog, comment to section 34 of the SAA, section 4.2.3, Zeteo 07/09/2018.)

The Court of Appeal's assessment of the impact on the outcome
Regarding the issue of whether the procedural error likely affected the outcome of the case, Poland has argued that PL Holdings, due to the arbitral tribunal's action, was afforded an opportunity to submit further evidence and documentation for its calculation of damages.

What the Court of Appeal must assess is whether the procedural error identified by the Court, that is, that the arbitral tribunal issued a separate arbitral award without first communicating with the parties, likely affected the outcome of the case *i.e.* the ruling in the final arbitral award.

Admittedly it is evident from the evidence that the separate arbitral award resulted in PL Holdings being provided an opportunity to submit further calculations as the basis for determining the amount of damages. But there is no investigation suggesting that it is likely that PL Holdings would not have been provided this opportunity had the parties been able to submit statements prior to the arbitral tribunal's decision to issue the separate arbitral award. Significant to this assessment is the fact that the arbitral tribunal would have had the opportunity to issue a separate arbitral award unless both parties opposed it. And there is no evidence suggesting that both parties would likely have opposed a separate arbitral award if the arbitral tribunal had provided the parties an opportunity to submit comments on the issue. Further, it was the reopening of the proceedings that enabled PL Holdings to submit further calculations and – as the Court of Appeal already has noted – the arbitral tribunal did have the right to reopen the arbitral proceedings as per section 34 of the SCC rules.

The Court of Appeal's conclusion is therefore that Poland has not satisfactorily shown that the procedural error affected the outcome of the case.

With this as a starting point, it is not necessary for the Court of Appeal to review PL Holdings' objection regarding preclusion. But, since the Court of Appeal has found that an error was committed, the Court still finds it appropriate to consider the issue.

The question of whether Poland has lost the right to invoke the procedural error
PL Holdings has argued that Poland's right to invoke what they argued as grounds for challenge D is precluded. In summary, PL Holdings has argued that Poland participated in the arbitral proceedings after the separate arbitral award was rendered, that Poland did not object to the SCC's decision to extend the time limit for the issuing the final arbitral award, nor did it object to the arbitral tribunal's other measures, and that Poland expressly confirmed that the arbitral tribunal had the right to initiate a special stage of the arbitral proceedings in the period after the separate arbitral award in order to determine the amount of damages to be paid.

In summary, Poland has argued that it has challenged the separate arbitral award in a timely manner, and that Poland, in a letter on 25 July 2017 to the arbitral tribunal, objected to the arbitral tribunal's actions allowing PL Holdings to submit further evidence and documentation for the calculation of the damages.

As has already been stated, a party, as provided in section 34, second paragraph of the SAA, does not have the right to invoke a circumstance that the party, by taking part in proceedings without objection, or in any other way can be considered to have waived. Section 31 of the SCC rules provides that a party who, during the arbitral proceedings has failed, without delay, to object to a failure to adhere to the SCC rules or other rules governing the proceedings, shall be considered to have waived the right to invoke such an error.

As described above, the arbitral proceedings continued after the separate arbitral award was rendered. The Court of Appeal finds that the fact that Poland challenged the separate arbitral award in a timely manner has no significance for the issue of whether the circumstances which Poland has advanced as grounds for challenge, and which the Court of Appeal has found constitutes a procedural error – *i.e.* to issue a separate arbitral award without first communicating with the parties – is precluded. What shall be examined instead is whether Poland has participated in the continued proceedings without raising an objection, or in any other way can be considered to have waived any argument that the arbitral tribunal was in error, by issuing a separate arbitral award without prior communication with the parties.

It has been established that Poland participated in the arbitral proceeding after the separate arbitral award was rendered, including by giving its expert instructions in accordance with the arbitral tribunal's instructions in PO 17. Furthermore, the evidence shows the following. In the letter of 25 July 2017, Poland argued *inter alia* that PO 17 and PO 18 conflicted with SAA and requested the parties be able to submit further submissions regarding the calculation of damages and that a hearing should be held. The separate arbitral award was mentioned in item 3 of the letter, in conjunction with Poland's objections to the arbitral tribunal's decision to assign the calculation of damages to the experts and the reformulation of the claim. In item 3, Poland stated its opinion that the arbitral tribunal's action was inappropriate and could constitute an excess of its mandate. In item 10, Poland stated that the arbitral tribunal's right to initiate a stage of the

arbitral proceeding with the aim of determining the amount of damages was not being questioned, but that Poland found it unacceptable that the arbitral tribunal did not allow the parties to participate in the proceedings other than as middlemen for the experts and at the same time introduced new circumstances relevant for the merits of the case.

In the letter of 25 July 2017, Poland did not raise an objection to the arbitral tribunal's issuance of a separate arbitral award without prior communication with the parties. Poland's objections instead concerned the arbitral tribunal's handling of the arbitral proceedings after 28 June 2017. After 28 June 2017, that is, after the separate arbitral award was rendered and the proceedings were reopened, Poland did not object to the rendering of a separate arbitral award without prior communication with the parties. Poland can, therefore, be considered to have waived the right to invoke the error.

The Court of Appeal, therefore, concludes that Poland's challenge action under all circumstances is precluded in relation to the circumstance that the arbitral tribunal rendered a separate arbitral award without prior communication with the parties.

The ruling in the separate arbitral award

In summary, Poland argues that item B in the ruling of the separate arbitral award (item 650) in no part corresponds to any of the claims in the case, that the issue determined is not identified, that the ruling on this point, other than the first sentence, is so unclear and incompletely formulated that its meaning cannot be understood, and that the ruling cannot be understood without reading the reasoning of the award.

In summary, PL Holdings has objected that the arbitral tribunal has not issued a ruling regarding anything else than what has been claimed, that the ruling is not incomplete or unclear, that what the arbitral tribunal expressed after the first sentence in item B involved a procedural decision, and that even if the ruling would need to be read together with the reasoning of the award, it is not an error. PL Holdings has also objected that what Poland has argued is precluded since it has participated in the proceedings after the rendering of the separate arbitral award without raising an objection, or that Poland shall be considered to have waived the right to invoke these alleged errors.

Section 27 first paragraph of the SAA provides that questions submitted to the arbitral tribunal shall be decided by the arbitral award. Other decisions that are not included in the arbitral award shall be, as provided in the third paragraph, considered decisions. The SCC rules do not include any rules that contradict this.

In item 650 A of the ruling in the separate arbitral award, it is established that Poland violated the BIT by expropriating PL Holdings shareholding in the bank in which PL Holdings had invested. As stated in item 650 B, PL Holdings has the right to damages due to the contractual breach. The same item also states that the amount of damages shall be determined based on certain values detailed in the ruling, that the calculation shall be made jointly by the parties' experts in accordance with the description detailed in PO 17 and that the amount calculated shall be included in the final arbitral award.

The Court of Appeal makes the following assessment.

The Court of Appeal finds the following regarding Poland's claims that item B does not correspond to any of the claims brought in the case. PL Holdings' claim included, as noted in item 24 of the separate arbitral award, a request that the arbitral tribunal should find that Poland had breached a specific article in the investment treaty and that Poland should be required to pay damages in an amount no less than a specified amount, plus interest and compensation for costs incurred in the arbitral proceedings.

In their separate arbitral award, the arbitral tribunal found, in the first section of item B, that PL Holdings was entitled to compensation for damages. To this extent the ruling corresponds to what has been claimed.

Regarding Poland's other assertions relating to the awards, the Court of Appeal finds that the arbitral tribunal had not determined PL Holdings' pecuniary claim, but rather, in the second section of item B, issued certain instructions as to how the damages should be calculated. The arbitral tribunal referred to their providing the starting points for establishing the calculation, such as the method to be applied, the business plan to use, the adjustments and deductions to make, discount rates, and similar items. The arbitral tribunal also referred to PO 17 which includes instructions for the continuous proceedings. According to the Court of Appeal, the

second section in item B must be understood as a decision that provides the framework for the further proceedings, while what the arbitral tribunal has considered substantively is expressed in their reasoning. In the Court of Appeal's opinion, the second section of item B cannot be seen as a substantive determination, but rather a procedural decision that is not unclear or incomplete. It does not constitute an error that the arbitral tribunal refers in their decision to the substantive findings it arrived at in their reasoning. That this decision was made in the separate arbitral award does not change the legal meaning of the decision (cf. Lindskog, comments to 27 § LSF §§ 2.2.1 and 3.2, Zeteo 2018-09- 07).

Regarding the ruling in the separate arbitral award, the issues argued by Poland therefore do not constituted an excess of mandate or a procedural error. With this assessment, there is no reason to examine PL Holdings' objection regarding preclusion.

5.3.4 Grounds for challenge E – Instructions to the experts appointed by the parties

In summary, Poland has argued the following. The arbitral tribunal introduced new evidence and new opinions during the period after rendering the separate arbitral award at their own initiative and without prior communication with the parties, nor their participation. The arbitral tribunal requested that the party appointed experts should calculate the amount of damages and allowed the experts to determine the amount of damages. The arbitral tribunal instructed the experts in PO 17 and in the separate award. These instructions were incomplete resulting in that the experts had to make their own assessments and agree on certain issues, and also request supplemental information from the arbitral tribunal. The arbitral tribunal ordered the experts to provide supplemental opinions related to 'Tier 1 Capital Requirements' to be prepared as per the arbitral tribunal's instructions without involving the parties' legal counsels. With these actions, the arbitral tribunal exceeded its mandate or made a procedural error that likely affected the outcome of the case.

In summary, PL Holdings has argued as follows. The instructions from the arbitral tribunal to the experts required the assistance of the parties and the parties assisted without objecting. The arbitral tribunal did not introduce any new evidence or new circumstances to the case. The arbitral tribunal acted in accordance with the rules applicable to the proceedings. The arbitral

tribunal determined the amount of damages on its own in the final arbitral award. The alleged errors are precluded in all circumstances, and they have not occurred without the contribution of Poland and are not likely to have affected the outcome of the case.

The evidence shows the following.

The arbitral tribunal requested in PO 17 that the legal counsels should provide their respective experts with the instructions the tribunal had determined as to how the damages should be calculated, and to instruct them to provide a joint calculation regarding the factors on which the separate award was based. The arbitral tribunal emphasized that only the values specified by the tribunal in the separate award should be used in the calculation. The legal counsels were asked not to influence the experts in their work. The experts were to request jointly any clarification needed directly from the arbitration tribunal. When the experts had completed their calculation, the results were to be provided to the legal counsels who, after reviewing these together, would submit them to the arbitral tribunal. The arbitral tribunal also stated that a final arbitral award would reflect the experts' joint calculation and that the tribunal intended to determine the issues which the experts might not have agreed on. If necessary, further opinions from the experts would be obtained and a hearing would be held with the legal counsels and the experts.

The experts were instructed in accordance with the request of the arbitral tribunal and started their work on the calculation. They requested certain supplemental information.

As explained above, in the section concerning the grounds for challenge C and D, Poland participated in the continuous proceedings as was determined by the arbitral tribunal in the separate arbitral award and in PO 17.

The arbitral tribunal issued PO 19 on 25 July 2017. There, the arbitral tribunal explained that the experts were not in agreement on the percentage to use for 'Tier 1 Capital Requirements' and had therefore jointly requested a decision from the arbitration tribunal. In PO 19, the arbitral tribunal requested the experts to submit their separate opinions providing their reasoning for their different views, and explaining why the other expert was incorrect. These opinions would, according to the arbitral tribunal, be made without involving the legal counsels and without preceding communication with the other expert.

The experts submitted their opinions in late July 2017, as requested by the arbitral tribunal. In PO 20 of 8 August 2017, the arbitral tribunal decided the percentages relating to 'Tier 1 Capital Requirements' that would be used for the experts' calculations. In PO 20, it was noted that none of the parties had made any comments regarding the expert opinions.

The Court of Appeal makes the following assessment.

As to the manner which the arbitral tribunal has chosen to conduct the reinstated proceedings, it was already indicated in the separate award and PO 17 that the experts would submit a joint calculation and that there was an opportunity for the experts to, if necessary, request clarifications from the arbitral tribunal.

In PO 17 it is evident that the results were to be delivered to the legal counsels who would send them to the arbitral tribunal, which made it possible for the counsels to make comments. In PO 20 it was stated that the experts' final calculation would be sent to the legal counsels, who were granted opportunity to submit comments in connection with submitting the calculation to the arbitral tribunal. The arbitral tribunal repeated this in PO 21 of 9 August 2017 and in PO 23 of 25 August 2017, and set the deadline for leaving any comments as of the 29 August 2017. According to the Court of Appeal, it is thereby clear that the parties had the opportunity to comment on the results of the experts' calculation in writing, and thus that the actions of the arbitral tribunal were not taken without the participation of the parties.

Regarding Poland's arguments concerning the actions of the arbitral tribunal relating to the 'Tier 1 Capital Requirement', the Court of Appeal makes the following assessment. The evidence shows that the experts had considered the issue regarding 'Tier 1 Capital Requirement' in expert opinions that were submitted before the separate award. In the separate award it has been noted that they had not agreed on the issue (item 526). In the experts' written request, dated 20 July 2017, it is evident that the experts jointly turned to the arbitral tribunal for clarification, since they had agreed that it was necessary that the values for 'Tier 1 Capital Requirement' was included in the calculation. The supplementary opinions from each of the experts which the arbitral tribunal requested thereafter would, according to what is presented in PO 19 and PO 20, clarify how each of the experts had come to its understanding and what each of them thought of the other expert's approach. This means that the purpose was to give the arbitral tribunal a better basis to decide before the arbitral tribunal would determine which percentage to use.

Certainly, the arbitral tribunal requested the supplementary opinions on its own initiative, but the question concerning 'Tier 1 Capital Requirement' had, as explained above, been considered at an earlier stage in the proceedings. Thus, each of the parties had had the opportunity to present its view. Therefore, the measure to request supplementary opinions does not mean that the arbitral tribunal has allowed the experts to determine the damages, or that new evidence or new circumstances were introduced on the initiative of the arbitral tribunal.

In conclusion, the Court of Appeal's assessment is therefore that each of the parties had the opportunity to present their respective cases to the extent required in accordance with section 24 of the SAA and section 19 of the SCC rules, since they could submit written comments on the documents submitted to the arbitral tribunal by the experts and as they were offered to comment on the experts' final calculation. Thus, the arbitral tribunal did not act without the parties' involvement, neither did it introduce new evidence in the manner argued by Poland. The arbitral tribunal's handling of the case did not mean that the tribunal left it to the experts to determine the amount of damages. The amount of damages was determined by the arbitral tribunal in the final arbitral award. Neither did the arbitral tribunal's actions concerning the instructions to the experts appointed by the parties otherwise implicate that the arbitral tribunal exceeded its mandate or that any procedural errors was made, as Poland has argued.

With these conclusions, there is no reason to assess the questions regarding preclusion, negligence or the implications on the outcome.

5.3.5 Grounds for challenge F – Supplemental relating to 'pre-award interest'

Summary of the parties' claims

In summary, Poland argues the following. The arbitral tribunal exceeded its mandate or committed a procedural error in the final arbitral award by awarding PL Holdings interest for the period from the date of calculating damages to the date of the final arbitral award (pre-award interest). The arbitral tribunal supplemented the separate arbitral award with an amendment regarding pre-award interest, even though PL Holdings had not made any claim for such prior to the separate arbitral award. On 28 July 2017, PL Holdings submitted a request to the arbitration tribunal for an additional award regarding pre-award interest. However, the arbitral tribunal failed

to render the additional award within the time limit specified in section 42 of the SCC rules. Instead, the arbitral tribunal did not render the additional award regarding pre-award interest until the final arbitral award on 28 September 2017, *i.e.* two days too late.

In summary, PL Holdings has objected that the company's claims from the introduction of the arbitral proceedings included pre-award interest, and that the arbitral tribunal did not supplement the ruling in the separate arbitral award but determined the question in the final arbitral award.

Rules on additional arbitral awards

According to section 43 of the SCC rules , a party may request an additional arbitral award within 30 days of receiving the arbitral award. If the arbitral tribunal considers the request to be well-founded, then the arbitral tribunal shall, as provided in the provision, make an additional arbitral award within 60 days of receiving the request. If it is considered necessary, SCC’s board may extend the time limit.

Section 32 SAA provides that an arbitral tribunal may decide to correct or supplement an arbitration award, also if the arbitral tribunal by oversight has not resolved an issue that should have been decided in the arbitral award. The time limit is 30 days from when the award was rendered if the supplement is made at the initiative of the arbitral tribunal. If a party requests such supplement, the request shall be submitted within 30 days from receiving notification of the award and a decision on the request shall be announced within another 30 days. The supplement shall be made within 60 days. The arbitral tribunal may not decide to extend the time limits, but the parties can agree as between themselves to such an extension. (See Lindskog, comments to section 32 of the SAA, section 5.3.3, Zeteo 07/09/2018 and Govt. bill 1998/99:35 p. 233) The arbitral tribunal's mandate ends as of the expiration of the time limit (*cf.* Lindskog, comment to section 32 LSF, section 6.2.2 and note 69, Zeteo 07/09/2018).

Section 34, first paragraph, item 2 of the SAA provides that an arbitral award rendered belatedly shall be considered exceeding the mandate and such an arbitral award shall be set aside. This also applies if the delay is marginal, as the mandate ends once the time limit expires. (See also Heuman, Skiljemannarätt, 1999, p. 627.)

The Evidence

In the separate arbitral award, it was noted that PL Holdings had not claimed any pre-award interest (see items 269 and 643). In PO 19 of 25 July 2017, the arbitral tribunal again noted that PL Holdings had not presented any claims for interest and that the experts' opinion on it was not required.

On 28 July 2017, PL Holdings requested an additional arbitral award regarding pre-award interest, in accordance with section 42 of the SCC rules. In PO 24 of 29 August 2017, the arbitral tribunal's chairman raised issues regarding PL Holdings' request. The chairman found in PO 24 that PL Holding had claimed pre-award interest, that the separate arbitral award had been made under the assumption that no such claim existed, and that the issue had therefore not been assessed, that an additional arbitral award could be issued to assess the issue, and that the issue was not *res judicata*. Under the heading 'Grant or Denial of Claimant´s Request' it was held that the arbitral tribunal had concluded that the parties should be provided an opportunity to submit statements regarding the issue of PL Holdings' right to pre-award interest for the specific period to which the claim referred.

On 1 September 2017, Poland protested against both the contents of PO 24 and the short time the parties were provided to submit statements, and requested an extension for the submission of their statement. On the same day, the arbitration tribunal's chairman issued PO 26, where Poland's request for an extension was denied. In PO 26 reference was made to section 42 of the SCC rules and that the arbitral tribunal had 60 days to assess a request for an additional arbitral award, and it was stated that the arbitral tribunal had assessed the issue of pre-award interest in PO 24, especially if the issue could be taken up for review. The arbitral tribunal's chairman also held that PO 24 had been issued in a timely manner.

Poland protested against PO 26 and against the arbitral tribunal's handling of the issue of pre-award interest in written communications on 5 and 6 September 2017.

In the final arbitral award, issued on 28 September 2017, the arbitral tribunal considered the issue of pre-award interest in items 32-51. In the award, item 64 B, PL Holdings was granted such interest at a specific rate. The arbitral tribunal stated that it was obligated to assess the issue regarding pre-award interest, and that the purpose of the provision concerning additional arbitral

awards is for an arbitral tribunal to be able to rule on claims that, due to mistakes, oversight, or other reasons, have not been considered. The arbitral tribunal referred to the SCC rules, even though indicating section 48 instead of section 42 (item 39).

The arbitral tribunal did not touch on the issue of the time limit for making an additional arbitral award.

The reasoning of the Court of Appeal

PO 24, dated 29 August 2017, and item 32 in the final arbitration award, provide that the arbitral tribunal was of the opinion that PL Holdings had claimed pre-award interest prior to the separate arbitral award, but that the arbitral tribunal, despite this, had stated in the separate arbitral award that no such claim had been presented (see items 269 and 643 of the separate arbitral award). The arbitral tribunal's assessment that PL Holdings had legitimately claimed such interest is a part of the arbitral tribunal’s assessment of the merits which cannot be reviewed within the framework of a challenge proceeding. The arbitration tribunal has therefore not exceeded PL Holding’s claim in the case by determining the issue of pre-award interest.

Regarding the issue of whether the arbitral tribunal rendered the additional award on pre-award interest too late, the Court of Appeal makes the following assessment.

The separate arbitral award did not cover pre-award interest. PO 24, PO 26, and the final arbitral award indicate that the issue of pre-award interest would be determined in an additional arbitral award, that is, as an addition to the separate arbitral award.

The evidence shows that PL Holdings submitted the request for an additional arbitral award on 28 July 2017 (see item 13 of the final arbitration award). According to section 42 of the SCC rules, the arbitral tribunal would thereafter issue an additional arbitral award regarding pre-award interest no later than 26 September 2017.

However, the issue of pre-award interest was not determined in an additional arbitral award, but was determined in the final award dated 28 September 2017. This means that the arbitral tribunal made its ruling regarding the addition two days late, and thereby exceeded its mandate for this part (see section 34, first paragraph, item 2 of the SAA).

Since the arbitral tribunal exceeded its mandate, item 64 B of the ruling in the final arbitral award shall be set aside.

5.3.6 Grounds for challenge G – Supplement regarding 'Tier 1 Capital Requirement'

Summary of the parties' claims etc.

In summary, Poland has argued the following. It was not possible to calculate the amount of damages without knowing the value of the variable 'Tier 1 Capital Requirement.' Despite this, 'Tier 1 Capital Requirement' was missing from the separate arbitral award and also from the instructions in PO 17 (which was issued the same day as the separate arbitral award).The arbitral tribunal exceeded its mandate and committed a procedural error which likely affected the outcome of the case by subsequently supplementing the separate arbitral award with an amendment regarding how the 'Tier 1 Capital Requirement' should be considered when calculating the damages. Furthermore, the supplement was made in a procedurally incorrect manner in a decision in PO 20 rather than in an additional arbitral award. The supplement was therefore not made until the final arbitral award. This means that the supplement was issued too late. The time limit shall be counted from when the request for an additional arbitral award was submitted, that is, from the experts' joint request for supplement 20 July 2017.

In summary, PL Holdings has raised the following objections. Poland does not have the right to invoke the alleged errors as Poland participated in the proceedings without objection, or shall otherwise be considered to have waived the right to invoke the errors. The arbitral tribunal's mandate was not exceeded, nor were any procedural errors committed. The arbitral tribunal did not determine the issue regarding the amount of damages in the separate arbitral award. The circumstance that the arbitral tribunal in its procedural decision in PO 20 instructed the experts to consider 'Tier 1 Capital Requirement,' does not mean the separate arbitral award was supplemented and does not constitute a procedural error or an excess of mandate. PO 20 did not constitute a final determination of the effect of 'Tier 1 Capital Requirement.' The arbitral tribunal determined the issue regarding the amount of damages in its final arbitral award, which by then included the effect of 'Tier 1 Capital Requirement.' The arbitral tribunal was not, in the final award, precluded from considering other factors in the calculation of damages than those

indicated in the ruling of the separate arbitral award. The alleged procedural error did not occur without the contributory fault of Poland, and either way, it did not likely affect the outcome of the case.

In summary, Poland has raised the following objections. Poland cannot be considered to have waived the argument that the arbitral tribunal exceeded its mandate and committed procedural errors. Poland protested against PO 17 in written communications dated 21 and 25 July 2017. Poland stated that it protested against, among other things, PO 17 and the decisions made therein; that the experts would submit new and supplemented reports of damages.

First, the Court of Appeal assesses the question of whether the arbitral tribunal has committed any errors and how such an error in that case should be assessed.

The evidence
The separate arbitral award indicates that the amount of damages would be determined on the basis of what the arbitral tribunal laid down in the separate arbitral award regarding method and factors, and specific values for these factors (see separate arbitral award item 650 B, second sentence). However, the separate arbitral award contained no statements from the arbitral tribunal regarding calculation values for 'Tier 1 Capital Requirement.' In the procedural order which the arbitral tribunal issued on the same day as the separate arbitral award (PO 17) the arbitral tribunal stated that the experts could jointly request clarifications or supplementations from the arbitral tribunal if they deemed it necessary.

In accordance herewith, the experts requested supplement from the arbitral tribunal for values for 'Tier 1 Capital Requirement.'

However, in PO 19 of 25 July 2017, the arbitral tribunal, as described above, requested the experts would each submit their own opinion regarding 'Tier 1 Capital Requirement.' The experts each submitted their own opinions on 27 and 28 July 2017 in accordance with the arbitral tribunal request. Thereafter, the arbitral tribunal issued PO 20 on 8 August 2017. There, the arbitral tribunal stated the percentages for the 'Tier 1 Capital Requirement' which the experts should use in their calculations of the damages. Similarly, to other POs, PO 20 was signed by the arbitral tribunal's chairman.

The reasoning of the Court of Appeal

The arbitral tribunal did not determine the issue concerning the amount of damages in the separate arbitral award. The ruling in the separate arbitral award (item 650 B), the reasoning (items 547 - 642), and PO 17 all show that the arbitral tribunal's intention in the separate arbitral award was to determine all factors to be included in the calculation of the amount of damages. Despite this, the calculation values for 'Tier 1 Capital Requirement' were missing from the separate arbitral award. At the same time, the arbitral tribunal in PO 17 posited that clarifications and additions might be necessary anyway, and that such could be requested by the experts. Nothing prevented the arbitral tribunal from notifying the experts of such calculation values during the ongoing proceedings, as the determining of the values constituted a part of the final determination of the amount of damages. It therefore did not require an additional arbitral award. The arbitral tribunal's decision in PO 20, therefore, was within the framework of the existing mandate and did not constitute a procedural error.

Considering this conclusion, the Court of Appeal finds it unnecessary to assess PL Holdings' objection regarding preclusion etc.

5.3.7 Grounds for challenge H – Final hearings and examination of experts

Summary of the parties' claims

In summary, Poland argues the following. The arbitral tribunal has acted incorrectly by denying Poland's request for a new hearing. Poland was thereby denied the opportunity to examine and cross-examine the experts appointed by the parties regarding the amount of damages, and could not bring the arbitral tribunal's attention to the assumptions the experts had made in their joint expert opinion. The arbitral tribunal thereby exceeded its mandate or committed a procedural error that probably affected the outcome of the case.

In summary, PL Holdings has raised the following objections. Due to preclusion, Poland is prevented from invoking the above circumstances. The arbitral tribunal has not exceeded its mandate or committed any procedural error. Poland has not been prevented from submitting a statement regarding the experts' joint calculation of damages or the result of the calculation. Poland has therefore, to the extent necessary, had an opportunity to pursue its claim. What Poland

argued during the arbitral proceedings did not justify a new examination or a new hearing. If the arbitral tribunal committed a procedural error, it did not occur without Poland's contribution, nor has it affected the outcome of the case.

The evidence

In PO 17, the arbitral tribunal described the procedure for the experts' further participation in the arbitral proceedings after rendering the separate arbitral award. The arbitral tribunal stated that, if necessary, the tribunal would obtain further opinions from the experts and, if needed, hold further hearings with legal counsels and experts.

On 25 July 2017, that is, before the experts submitted their joint opinion to the arbitral tribunal, Poland requested that a hearing should be held to provide Poland an opportunity to examine and cross-examine the experts regarding the amount of damages. In PO 20 of 8 August, the arbitral tribunal provided the parties an opportunity to submit their comments on the experts' calculations. In PO 21 of 9 August, the arbitral tribunal denied Poland's request for hearing and reminded them of the opportunity to submit comments to the arbitral tribunal. On 11 and 29 August, Poland again requested the arbitral tribunal to hold a hearing. The arbitral tribunal denied Poland's request in PO 25 of 31 August. The arbitral tribunal stated in that decision, among other things, that Poland had not submitted any comments regarding the experts' opinion which justified an examination of the experts.

The reasoning of the Court of Appeal

The arbitral tribunal's decision in PO 17 did not mean that there was an unconditional right for one party to initiate a hearing in order to examine the experts when they had submitted their joint opinion. Such a hearing would only be held if considered necessary. As a hearing had already been held, at which the issues regarding damages had already been considered and the experts had been heard, no right to a hearing existed as per section 24 of the SAA. The arbitral tribunal could, therefore, determine the prerequisites for holding further hearings as was done in PO 17. It has, therefore, fallen on the arbitral tribunal to determine if it was necessary to hold further hearings or not. As described above, the arbitral tribunal provided several opportunities for Poland to submit comments regarding the experts' calculations. Poland has, therefore, had an opportunity to pursue its claim to the required extent.

The arbitral tribunal's decision to deny Poland's request for a further hearing is therefore in compliance with the rules applicable to the proceedings and constitutes neither an excess of mandate nor a procedural error. With this finding there is no reason to review PL Holding's other objections.

5.4 Litigation costs

The outcome of the case means that Poland's claims are, for the most part, rejected. Poland is successful only as concerns one item in the final arbitral award being set aside, that is, item 64 B in the final arbitral award through which PL Holdings was awarded compensation for what is referred to as pre-award interest (grounds for challenge F). In determining the allocation of litigation costs, however, this part of the case cannot be considered to have limited significance. As the costs of the different parts of the case cannot be individually separated, the liability for compensation for litigation costs should be determined in such a manner that PL Holdings is awarded partial compensation for litigation costs (NJA 2018 p. 667 section 17). Only considering the amount in the final arbitral award, the item set aside is equivalent to approximately one-sixth of the total awarded amount. The allocation of litigation costs should therefore, in the Court of Appeal's opinion, be made so that Poland shall compensate two-thirds of PL Holding's litigation costs (*cf.* Welamson in SvJT 1989 p. 530 f.).

PL Holdings has claimed compensation for litigation costs in the amount of EUR 944,178.57. The claimed amount is allocated as follows.

–	EUR 698,927.83	Attorney fees for legal counsels provided by Mannheimer Swartling Advokatbyrå AB
–	EUR 21,946.94	PL Holdings' own work (17,589) and expenses (4,357.94)
–	EUR 188,814.79	Other legal counsel by Fietta International (of which fees constitute 147,787.50 and 1,437.49 are expenses related to appearing at the main proceeding) and Linklaters Warsaw (41 589,80)
–	EUR 9,680.73	Fees to professor Torbjörn Andersson who prepared a legal opinion
–	EUR 12,539.30	Translation costs
–	EUR 3,086.03	Costs of travel and accommodation etc.
–	EUR 9,182.95	Costs of interpreter, interpreting equipment, sourcing publicly available documentation.

Poland has accepted an amount equivalent to Poland's own attorney fees – EUR 750,171 – as reasonable for PL Holdings' total attorney fees, that is, fees to Mannheimer Swartling Advokatbyrå AB and the costs of legal counsels by Fietta International and Linklaters Warsaw. Otherwise, Poland has left it to the Court of Appeal to determine the validity of the claim for litigation costs.

The case has been extensive and included complicated legal issues. Even taking this into consideration, it is the assessment of the Court of Appeal that PL Holdings' total claim of compensation for attorney fees of EUR 887,742.62, appears to be notably high. Therefore, the claimed compensation cannot be considered reasonable, in its entirety, to preserve PL Holding's rights. Reasonable compensation for attorney fees cannot be considered to exceed the sum attested by Poland. Regarding PL Holdings' other claimed amounts, the Court of Appeal assesses them as being reasonable.

Compensation, after rounding up, therefore totals EUR 808,044 (750,171+21,946.94+

1,437.49+9,680.73+12,539.30+3,086.03+9,182.95). As stated above, Poland shall compensate PL Holdings for two-thirds of this sum, that is, EUR 538,696.

5.5 Summary

The Court of Appeal has concluded that the arbitral awards are not invalid, since the dispute which the arbitral awards concerned was arbitrable and since neither the arbitral awards nor the manner in which they arose was incompatible with Swedish ordre public. The Court of Appeal has further concluded that the arbitral awards shall not be set aside on the grounds that they were not covered by a valid arbitration agreement between the parties, as Poland did not raise any objection in this regard within in due time in the arbitral proceedings.

However, the Court of Appeal has concluded that a minor part of the final arbitral award shall be set aside as the arbitral tribunal made an addition to the separate arbitral award too late. The arbitral tribunal, therefore, exceeded its mandate to this extent. The part of the arbitral award that shall be set aside is the item in the final arbitral award referring to what is referred to as "pre-award interest" (item 64 B in the ruling).

Regarding the other grounds for challenge that Poland has invoked, the Court of Appeal has concluded that the arbitral tribunal in one instance committed a procedural error. The error meant that the arbitral tribunal, without first communicating with the parties, issued a separate arbitral award. But, the Court of Appeal finds that the error shall not result in the setting aside of the arbitral awards, since Poland has not made it probable that the error affected the outcome of the case. This means that the arbitral awards are upheld regarding the damages of PLN 653,639,384 (equivalent to approximately SEK 1.5 billion) that the arbitral tribunal obligated Poland to pay PL Holding, but that a certain part of what was awarded in interest, or "pre-award interest," is set aside (equivalent to approximately SEK 200 million).

As Poland is only successful to a minor degree, and PL Holdings is successful to a larger degree, Poland shall compensate PL Holdings for litigation costs of EUR 538,696.

5.6 The question whether the judgment may be appealed

The Court of Appeal finds that the case involves issues for which it is important to the uniform application of law that an appeal can be reviewed by the Supreme Court. The Court of Appeal therefore allows the judgment to be appealed (section 43, second paragraph of the SAA).

6 HOW TO APPEAL

Instructions for appeal are set forth in Appendix A.

Appeal to be submitted no later than 22 March 2019.

Participants in the ruling were Senior Judge of Appeal Christine Lager and Judge of Appeal Kajsa Bergkvist and Göran Söderström, reporting judge.

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Appendix

How to appeal the Court of Appeal ruling

The party wishing to appeal the Court of Appeal's ruling shall do so in writing to the Supreme Court of Sweden. However, the appeal shall be sent or submitted to the Court of Appeal.

Time limit for appealing

The appeal shall be received by the Court of Appeal no later than the date stated at the end of the Court of Appeal ruling.

Decisions on detention, restrictions under Chap. 24 § 5a of the Swedish Code of Judicial Procedure or travel bans have no time limit for appeal.

If the appeal has been received in a timely manner, the Court of Appeal submits the appeal and all documentation pertaining to the case on to the Supreme Court of Sweden.

Content of the appeal

The appeal shall include information regarding:

1. Claimant's name, address, and telephone number,
2. the ruling appealed (name of the Court of Appeal and section with date of the ruling and case number),
3. The changes to the ruling made by the claimant,
4. Reasons the claimant submits for changing the ruling, and
5. The evidence the claimant invokes and what each evidence submission will be used to prove.

Simplified notification

If the case is appealed, the Supreme Court of Sweden may utilise simplified notification for sending documentation in the case, on the condition the recipient then, or previously, has received information regarding such notification.

Additional information

For additional information regarding the judicial process in the Supreme Court of Sweden, seewww.hogstadomstolen.se
www.domstol.se

Translation Declaration

The Kalinauskas Translation Agency has translated the judgment of the Svea Court of Appeal in Sweden from Swedish into English. The agency hereby declares that the English translation of the Svea Court of Appeal judgment is, to the best of its knowledge, a true and faithful rendering of the original Swedish text.

This translation has been prepared by Deane Goltermann, a Swedish-English translator.