PARTIES

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MATTER
Invalidity of an arbitration award

JUDGMENT OF THE COURT OF APPEAL

1. The Court of Appeal declares the arbitral award of 29 December 2022 in SCC case V 2019/126, rendered in Stockholm, to be invalid.

2. Mercuria Energy Group Limited shall compensate the Republic of Poland for the costs of the proceedings before the Court of Appeal in the amount of EUR 77,750 and SEK 2,800, plus interest on the amounts in accordance with section 6 of the Swedish

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Interest Act from the date of the Court of Appeal's judgement until payment is made. Of that sum, EUR 77 750 represents legal fees.

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BACKGROUND

The Republic of Poland (Poland) is a Member State of the European Union (EU). Mercuria Energy Group Limited (Mercuria) is a multinational energy and commodity trading company registered in the Republic of Cyprus (Cyprus). Poland, Cyprus and the EU have all signed and ratified the Energy Charter Treaty (OJ L 69, 9 March 1998).

In 2004, Mercuria acquired the shares of the Polish joint stock company J&S Energy SA (JSE). JSE's business activity was mainly the import and trade of petroleum products.

The arbitration stems from a decision of the Agencja Rezerw Materialowych (the Agency) in 2008 ordering the JSE to pay a penalty. The penalty was cancelled by the Polish Administrative Court. The Agency reimbursed the amount of the penalty paid by the JSE. The JSE considered that it was legally justified that the Authority should also pay interest on the penalty. The Authority did not share that view and informed the JSE that it did not intend pay any interest. The JSE then initiated legal proceedings before the Polish court to recover the interest amount but was unsuccessful.

On 12 September 2019, Mercuria initiated arbitration proceedings against Poland before the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), pursuant to Article 26 of the Energy Charter Treaty and the SCC Rules. As grounds for the action, Mercuria claimed that Poland had breached its obligations under the Energy Charter Treaty. The seat of the arbitration was Stockholm.

The award was rendered on 29 December 2022. The award rejected Poland's objection to the arbitral tribunal's lack of jurisdiction to deal with the dispute on the basis of EU law. The arbitral tribunal further found that Poland had breached its obligations under Article 10(1) and (12) of the Energy Charter Treaty. Poland was ordered to pay damages and

reimburse Mercuria's costs, including the costs of the arbitration.

On 6 March 2023, the Court of Appeal, following a request by Poland, decided that the continued enforcement of the arbitral award rendered between the parties may not take place until further notice.

MOTIONS BEFORE THE COURT OF APPEAL

Poland has requested that the Court of Appeal annul the arbitral award in its entirety.

Mercuria has opposed Poland's motion.

The parties have claimed compensation for legal costs.

The case has, with the consent of the parties, been decided without a main hearing.

GROUNDS PRESENTED BY THE PARTIES

Poland

Invalidity under section 33(1)(1) or (2) of the Arbitration Act

The arbitral award shall be annulled in its entirety in accordance with section 33(1)(1) of the Swedish Arbitration Act (1999:116), or alternatively in accordance with section 33(1)(2) of the Swedish Arbitration Act.

The case-law of the Court of Justice of the European Union has made it clear that Article 26 of the Energy Charter Treaty does not apply to a dispute between a Member State,

such as Poland, and an investor from another Member State, such as Mercuria, concerning an investment made by Mercuria in Poland. Therefore, no arbitration agreement could ever arise between Poland and Mercuria on the basis of Article 26.

What the Court of Justice of the European Union has expressed in its judgements means that the parties have not been able to agree, either beforehand or afterwards, that the issues in question should be resolved by arbitration. There is an indispositive procedural obstacle. The principle of the primacy and effective impact of EU law means that the obstacle that the CJEU is to be equated with an obstacle under Swedish law within the meaning 33(1)(1) of the Arbitration Act.

Furthermore, an arbitral award made on the basis of a clause such as in Article 26 of the Energy Charter Treaty may be considered to have been made unlawfully. This is because the clause is incompatible with the fundamental rules and principles governing the legal order in the Union and thus also in Sweden. Upholding the arbitral award would be manifestly incompatible with the foundations of the legal order in Sweden. Accordingly, the award shall in any event be declared invalid pursuant to section 33, first paragraph, section 2 of the Arbitration Act.

Mercuria

Invalidity under section 33(1)(1) or (2) of the Arbitration Act

The arbitral award does not include an examination of a question which, under Swedish law, may not be examined by arbitrators.

The dispute between Poland and Mercuria concerned whether Poland had breached its obligations under the Energy Charter Treaty and was therefore obliged to pay compensation to Mercuria. The issues examined in the arbitration award are arbitrable and thus arbitrable.

What the CJEU has held to be contrary to EU law in its judgments of 6 March 2018, Achmea,

C-284/16, EU:C:2018:158 and 2 September 2021, Komstroy, C-741/19, EU:C:2021:655, is not the settlement of a particular issue by arbitration, but the agreement of two EU Member States to exclude disputes which may concern the interpretation or application of EU law from the jurisdiction of national courts, and thus from the possibility of seeking a preliminary ruling. An arbitration clause in an intra EU investment agreement would be compatible with EU law if it allowed the parties to the dispute to seek substantive review in national courts. Thus, there is no obstacle per se to the settlement of disputes under intra EU investment agreements by arbitration. The conclusions of the CJEU in Achmea and Komstroy and the Court's judgment of 26 October 2021, PL Holdings, C-109/20, EU:C:2021:875 are thus not related to the issues in dispute, but are based on the position of the parties in the arbitration.

Furthermore, neither the award nor the manner in which it was made is manifestly incompatible with the public policy of Sweden.

Interpreted under international law, Article 26 of the Energy Charter Treaty is applicable to internal EU relations. The Energy Charter Treaty is an international treaty to be interpreted and applied in accordance with the provisions of the Vienna Convention. The applicability of Article 26 to the dispute and the fact that there has been an offer of arbitration from Poland to Mercuria follows directly from the wording of that provision. Furthermore, the travaux préparatoires of the Energy Charter Treaty clearly show that the Contracting Parties were aware that the Treaty would be applicable in intra-EU relations, and that the Contracting Parties agreed not to include any provision in the Treaty excluding such intra-EU relations from the scope of the Treaty.

The fact that the EU institutions are bound by international agreements concluded by the EU follows not only from international law, but also from Article 216(2) of the Treaty on the Functioning of the European Union (TFEU). Similarly, it follows from Article 3(5) of the Treaty on European Union (TEU) that the EU shall contribute to the observance of international law. The case-law of the Court of Justice of the European Union (CJEU) has confirmed that the EU is obliged to exercise its competence with due regard to

international law as a whole, including, inter alia, the provisions of the international agreements by which it is bound, and that provisions of treaties to which the EU is a party are to be interpreted in accordance with the Vienna Convention.

In Komstroy, the CJEU did not rule on the interpretation of Article 26 of the Energy Charter Treaty under international law and the Vienna Convention. Instead, the Court only commented on how the provision should be interpreted in its capacity as an EU legal act. An interpretation in conformity with EU law is completely irrelevant in terms of international law. The interpretation of Article 26 of Komstroy is thus not binding on the Court of Appeal when it interprets the provision as a treaty provision.

The assessment of whether the manner in which the arbitral award was made is contrary to public policy must be made in light of the fact that the Energy Charter Treaty is a treaty to be interpreted in accordance with public international law, and in light of the principles of Union law described above. An interpretation of Article 26 of the Energy Charter Treaty in accordance with public international law cannot therefore be contrary to EU public policy, nor does EU law require national courts to interpret national law - and thus also international law - contra legem, in order to arrive at a result that is in conformity with EU law.

That the autonomy of Union law would be undermined by interpreting and applying Union law solely as a treaty to which the EU is a party is contradicted by previous case law of the CJEU. When an arbitral tribunal applies the Energy Charter Treaty as the applicable law in an arbitration under the Treaty, the Treaty is not applied as an act of Union law, but as a treaty under international law. An arbitral tribunal constituted under the Energy Charter Treaty does not interpret or apply any other provisions of Union law when deciding the dispute. Thus, Union law cannot be interpreted or applied in arbitration proceedings under the Energy Charter Treaty.

The right to an effective remedy under Article 13 of the ECHR and the right to the protection of property under Article 1 of the First Additional Protocol to the ECHR

An annulment of the arbitral award would constitute a serious and unequivocal violation of Mercuria's right to property protection under Article 1 of the First Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (ECHR), both independently and in conjunction with Mercuria's right to an effective remedy under Article 13 ECHR. The Court of Appeal must therefore refrain from applying the CJEU's interpretation of Article 26 of the Energy Charter Treaty and EU law, as expressed in Komstroy, if such interpretation would lead to the annulment of the award.

In the award, the arbitral tribunal upheld Mercuria's claim for damages against Poland arising from Poland's breach of the Energy Charter Treaty. The award is final and binding under both Swedish law and international law. The arbitral award constitutes property in the within the meaning of Article 1 of First Additional Protocol to the ECHR. An annulment of the award would thus constitute an interference with Mercuria's property protection.

The EU law interests invoked by Poland to justify the annulment of the award are not jeopardised if the award is upheld because EU law was not the applicable law in the arbitration. An annulment would therefore not be capable of satisfying the public interests on which Poland's claim for annulment is based. Those interests cannot therefore justify an interference with the protection of property in this case.

Even if the Court of Appeal were to find that the maintenance of the award risks in some way adversely affecting the uniform interpretation or functioning of EU law, an annulment on this ground would not be proportionate. The harm that Mercuria would suffer if the award were annulled would be so serious that such a measure would be neither justified nor proportionate.

Polish courts have ruled on six different occasions that interest is due on the full amount paid by the JSA, under Polish law. In two of these judgements, the Polish Supreme

Administrative Court has clearly stated that the JSE is entitled to the interest compensation. Polish authorities have acted contrary to fundamental principles of the rule of law that judgements are final and must be faithfully executed, by obstructing and refusing to pay the debt to Mercuria's subsidiary JSE for 14 years. This behaviour has excluded other possibilities for Mercuria to obtain compensation than through the arbitral award. If the arbitral award is annulled, Mercuria would thus lose the entire compensation determined in the arbitral award.

The arbitration has been the only effective remedy that has existed, and exists, for Mercuria and the JSE to challenge the Polish administrative authorities' obstruction and to obtain compensation for the lost interest payments. An annulment of the arbitral award would thus directly result in Mercuria being left without access to an effective remedy.

No reliance can be placed on Poland's assertions regarding the JSE's and Mercuria's access effective remedies in Poland, including civil remedies. The JSE's right to interest compensation is a matter to be dealt with through the application of the Polish Tax Ordinance in administrative proceedings, not through the application of civil law provisions or through civil proceedings. An action for damages based on the cancellation of the 2008 decision to impose the penalty on the JSE would not constitute an effective remedy. It would not relate to the JSE's actual complaint, i.e. the refusal of the Polish authorities to pay statutory interest compensation under the Tax Ordinance. Nor would an action for damages based on the ECHR in Poland be an effective remedy to enforce the JSE's interest claim.

In addition, an annulment of the arbitral award with reference to the CJEU’S decision in Komstroy would constitute an amendment of the content of the Energy Charter Treaty with retroactive effect, whereby Mercuria would be deprived of its right to compensation. Such a retroactive measure requires a specific justification and raises the bar for what measures can be considered proportionate. In the present case, there are no circumstances that specifically justify the annulment of the arbitral award.

Mercuria has made a serious and substantiated complaint that an annulment of the arbitral award would constitute a violation of the protection of rights under the ECHR. Thus, the Court of Appeal cannot fail to assess that issue on the basis that it is applying EU law but must assess whether it would be disproportionate to annul the award.

Poland

The right to an effective remedy under Article 13 ECHR and the right to the protection of property under Article 1 of the First Additional Protocol to the ECHR

There are no grounds for upholding the arbitral award with reference to Mercuria's rights protection under the ECHR.

In Achmea, PL Holdings and Komstroy, the CJEU made a proportionality assessment and found that the interest of individual investors in upholding arbitral awards must be overridden. The statements of the CJEU are also applicable in the present case.

The arbitration procedure under the Energy Charter Treaty between Mercuria and Poland has not constituted an effective legal remedy for Mercuria to realise its rights. An annulment of the arbitral award does not at all constitute an interference with Mercuria's property within the meaning of the European Convention. An annulment is in any event justified and proportionate, and thus acceptable under the ECHR.

The fact that national law provides for the annulment of arbitral awards is a perfectly natural and inherently proportionate (and hence permissible under Convention law) feature of a modern state governed by the rule of law. The fact that an individual party in the specific case loses an enforcement title as a result an annulment does not mean that the annulment is unjust or disproportionate.

Mercuria's assertion that annulment of the award is not likely to fulfil the public interests referred to is unfounded. In fact, extraordinarily strong public interests are at stake.

Polish authorities have acted with due diligence towards Mercuria in handling the case. Mercuria has not exhausted the remedies available under Polish civil law. Polish law provides ample opportunities to pursue civil action for damages due to the failure of an authority to comply with a final decision. The fact that it was possible to bring a civil action under Polish law in respect of the claim was well known to the JSE. The company has on several occasions brought a civil action for damages against the Polish authority in connection with the case. However, in all cases, JSE has withdrawn its action and instead chosen to invoke arbitration under the Energy Charter Treaty.

In addition, the JSE and Mercuria have been, and continue to be, precluded from bringing an action before the Polish courts for damages against the State on the basis of the allegations made that the company's rights were not respected in the handling of its claim for compensation for interest. In addition, both an administrative court and a civil court have the power to request a preliminary ruling from the Court of Justice of the European Union, which could thus, depending on the circumstances of individual case, be given the opportunity to give guidance in relation to the existing case-law.

The EU Treaties became applicable in relation to Poland long before the dispute between the parties arose. Since then, the arbitration clause in the Energy Charter Treaty has not been applicable in the relationship between Poland and Mercuria's home state of Cyprus, although this has only been clarified in subsequent case law. The fact that an invalidity of this kind can be asserted retroactively is typical of invalidity situations. The CJEU has expressly considered and rejected a similar retroactivity defence raised by the investor in PL Holdings.

THE INVESTIGATION

The parties have invoked documentary evidence.

COURT OF APPEAL'S GROUNDS FOR JUDGEMENT

Disposition and order of review

Poland has requested that the arbitral award shall be annulled in its entirety, primarily pursuant to section 33(1)(1) of the Arbitration Act or, alternatively, pursuant to the second paragraph of the same Act. According to the first paragraph, an arbitral award shall be annulled if it involves the determination of a question which, under Swedish law, may not be decided by arbitrators. Annulment under the second paragraph requires the award or the manner in which it was made is manifestly incompatible with the public policy of the Swedish legal system.

The Court of Appeal first examines whether the decisions of the CJEU in Achmea, Komstroy and PL Holdings entail that the arbitral award is invalid because the manner in which it was made is manifestly incompatible with the public policy of Sweden (cf. NJA 2022 p. 965).

Invalidity of the award under section 33(1)(2) of the Arbitration Act

In the three preliminary rulings Achmea, Komstroy and PL Holdings, the Court of Justice of the European Union has ruled on arbitration clauses in international investment protection agreements concluded by two or more EU Member States and their compatibility with EU law.

In *Achmea*, the issue concerned an arbitration clause in an investment protection agreement between two Member States. Recognising that the preliminary ruling procedure is at the the core of the EU court system, the CJEU held that the arbitration could interpret and apply EU law but that the arbitral tribunal did not constituted a court or tribunal within the meaning of Article 267 TFEU which could for a preliminary ruling,

and that the competent national court could only exercise the limited review that follows from national law (see Achmea, paragraphs 37-53).

The CJEU further stated that by concluding a bilateral agreement, the Member States concerned had established a mechanism for resolving disputes between an investor and a Member State which could lead to those disputes being settled in a way that did not ensure the full effectiveness of EU law. According to the CJEU, the arbitration clause at issue in the agreement was not compatible with the principle of sincere cooperation and thus undermined the autonomy of EU law (see Achmea, paragraphs 56-59).

In *Komstroy*, the Court of Justice of the European Union, referring inter alia to its judgments in Achmea, ruled on the arbitration clause in Article 26(2)(c) of the Energy Charter Treaty. The Court recalled that, according to the Court's settled case-law, an international agreement may not encroach on the system of competences established by the Treaties and, consequently, on the autonomy of the legal order of the Union. The Court also noted that, since the Energy Charter Treaty is an act of the Union, the arbitration tribunal referred to in Article 26(6) has the power to interpret and even apply Union law. (See Komstroy, paragraphs 42, 49 and 50.

Thereafter, the CJEU, referring to its statements in Achmea, examined, first, whether the arbitral tribunal in question formed part the court system in France and, second, whether an award of such an arbitral tribunal was subject to review by a court capable of ensuring full compliance with EU law and, possibly, requesting a preliminary ruling from the CJEU (see Komstroy, pp. 51-60 with references to Achmea). These questions were answered in the negative.

Against this background, the CJEU held that Article 26(2)(c) of the Energy Charter Treaty must be interpreted as not applying to disputes between a Member State and an investor from another Member State concerning an investment made by the investor in the first Member State (Komstroy, p. 66).

In the subsequent decision *PL Holdings*, the CJEU has clarified that the question of whether an arbitral body's jurisdiction is valid in the present cases cannot depend on the behaviour of the parties to the dispute (cf. PL Holdings, pp. 51-56). It also follows from PL Holdings that arbitration clauses based on international investment protection agreements between Member States are contrary to some of the most fundamental principles of EU law in the EU Treaties, such as the principles of mutual trust between Member States, loyal co-operation and the autonomy of EU law (see e.g. PL Holdings, p. 46 with reference to Achmea).

In NJA 2022 p. 965, the Supreme Court stated that the aforementioned preliminary rulings of the Court of Justice of the European Union concern, in particular, the question whether Member States are able to exclude disputes concerning the application of European Union law by public authorities from the European Union's court system. Such an arbitration award between a Member State and an investor from another Member State, made on the basis of an arbitration clause in an international investment treaty, may be regarded as having been made unlawfully, since it is incompatible with the fundamental rules and principles governing the legal order of the European Union and, consequently, of Sweden. (See paragraphs 55, 59 and 60 of the judgment of the Högsta domstolen).

The arbitral award in question was made in an investment dispute between a Member State and an investor from another Member State pursuant to Article 26 of the Energy Charter Treaty. Upholding the arbitral award would thus be manifestly incompatible with the public policy of the Swedish legal system. This means that the award is invalid pursuant to section 33, first paragraph, section 2 of the Arbitration Act. In this assessment, there is no reason to examine other grounds for invalidity.

Whether annulment would be contrary to the ECHR

Mercuria has argued that an annulment of the arbitral award would constitute a serious and unequivocal violation of the company's right to property protection under Article 1 of the First Additional Protocol to the ECHR, both independently and in conjunction with

the company's right to an effective remedy under Article 13 of the ECHR. Mercuria has also argued that the Court of Appeal should therefore refrain from applying the CJEU's interpretation of Article 26 of the Energy Charter Treaty and EU law, as expressed in Achmea, Komstroy and PL Holdings.

The principle of the primacy of EU law over national law means that Swedish courts and authorities are prevented from interpreting a provision decided at EU level in a way that changes its content or effect. This means that the national court cannot deviate from the interpretation of the CJEU even if it were to make a different assessment of the legal situation, at least as long as the interpretation is within the area where decision-making power has been transferred (cf. Chapter 10, Section 6 RF).

However, Sweden also has an obligation under international law to ensure that the rights of individuals under the ECHR are not violated in individual cases in the event of a conflict with a regulation under EU law. The case law of the European Court of Human Rights shows that national courts must start from a presumption that the EU provisions interpreted in a preliminary ruling are compatible with the ECHR. However, where there is a serious and substantiated objection that there has been a manifest lack of protection of a Convention right, and where that situation cannot be remedied by European Union law, a Member State may not refrain from examining that objection solely on the ground that European Union law applies (see, for example, Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland [GC], no. 45036/98, § 165, ECHR 2005-VI, and Avotiņš v. Latvia [GC], no. 17502/07, § 116, 23 May 2016).

This means that a Swedish court may depart from the CJEU's interpretation of a Union provision only if its application in the particular case would constitute a serious and unequivocal violation of an individual's rights under European Convention (cf. NJA 2014 p. 79).

In NJA 2022, p. 965, the Supreme Court stated that the annulment of an arbitral award in an intra-EU investment dispute does not in itself deprive the parties of the right to a

judicial review or the right to a fair trial. Furthermore, the Supreme Court has emphasised, with reference to the CJEU's decision in PL Holdings, that to the extent that a national legal system suffers from such deficiencies in terms of legal certainty as had been alleged in that case, it was a matter for the national judiciary, where appropriate in cooperation with the CJEU (cf. PL Holdings, p. 68).

The Court of Appeal considers that in the present case there is no reason to deviate from the CJEU's interpretation in the three preliminary rulings Achmea, Komstroy and PL Holdings. Mercuria's claim that an annulment of the arbitral award would violate the ECHR thus does not affect the Court of Appeal's conclusions above. The arbitral award shall thus be declared invalid.

Litigation costs before the Court of Appeal

Poland's action has been upheld in full. Mercuria has argued that Poland, even at this outcome, shall reimburse the company for its legal costs or that the parties shall in any event bear their own legal costs. A party who loses the case shall, as a general rule, compensate the opposing party for legal costs (Chapter 18, Section 1 of the Code of Judicial Procedure). There is no reason to deviate from the general rule in this case, and Mercuria shall compensate Poland for its legal costs.

Mercuria has argued that the amounts claimed are reasonable in themselves. Mercuria shall therefore reimburse Poland for its legal costs in the manner set out in the judgement.

By this judgement, the Court of Appeal declares the arbitral award invalid. Thereby, the Court of Appeal's previous decision on inhibition is cancelled.

Appeals

Pursuant to section 43, second paragraph, of the Arbitration Act, the Court of Appeal's decision may only be appealed if the Court of Appeal considers it important for the administration of justice that an appeal is heard by the Supreme Court. The Court of Appeal is of the opinion that there is no reason to allow an appeal against the judgment.

The Court of Appeal's judgement may not be appealed

The judgement was delivered by Amina Lundqvist, Judge Advocate General of the Court of Appeal, and Eva Edwardsson, Judge-Rapporteur, and Carin Häckter, Judges of the Court of Appeal.