Court of Justice of the European Union
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Press and Information

Judgment in Case C-109/20
PL Holdings

EU law prohibits the conclusion by a Member State of an arbitration agreement with identical content to an invalid arbitration clause in a bilateral investment treaty between Member States

The national court is therefore obliged to set aside an arbitral award made on the basis of such an arbitration agreement.

In 2013, the voting rights of PL Holdings, a company incorporated under Luxembourg law, attached to shares it owned in a Polish bank were suspended, and it was forced to sell those shares. PL Holdings disagreed with the decision requiring it to do so, which had been taken by the Komisja Nadzoru Finansowego (Polish Financial Supervision Authority), and decided to initiate arbitration proceedings against Poland. To that end, PL Holdings, relying on the bilateral investment treaty concluded in 1987 between Belgium and Luxembourg, on the one hand, and Poland, on the other, [1] ('the BIT') submitted a request for arbitration to the arbitral tribunal stipulated in an arbitration clause in that treaty. [2]

By two arbitral awards of 28 June and 28 September 2017, the arbitral tribunal concluded that it had jurisdiction to settle the dispute at issue, declared that Poland had failed to comply with its obligations under the BIT and ordered it to pay damages to PL Holdings.

The action before the Svea hovrätt (Svea Court of Appeal, Stockholm, Sweden) in which Poland sought to have the arbitral awards set aside was dismissed. That court held, inter alia, that even though the arbitration clause in the BIT, according to which a dispute relating to that treaty must be decided by an arbitration body, is invalid, that invalidity does not prevent a Member State and an investor from another Member State from concluding an ad hoc arbitration agreement at a later stage in order to settle that dispute.

After an appeal was brought against the decision of the Court of Appeal, the Högsta domstolen (Supreme Court, Sweden) decided to seek clarification from the Court of Justice as to whether Articles 267 and 344 TFEU precluded the conclusion of an ad hoc arbitration agreement between the parties to the dispute where the content of that agreement is identical to an arbitration clause that is set out in the BIT and is contrary to EU law.

The Court, sitting in Grand Chamber formation, develops its case-law from the judgment in *Achmea* [3] and finds that EU law prohibits the conclusion by a Member State of such an arbitration clause.

Findings of the Court

In the first place, by relying on the judgment in *Achmea*, the Court confirms that the arbitration clause in the BIT, according to which an investor from one of the Member States may, in the event of a dispute concerning investments in the other Member State that concluded the BIT, bring

[1] Agreement between the Government of the Kingdom of Belgium and the Government of the Grand Duchy of Luxembourg, of the one part, and the Government of the People's Republic of Poland, of the other, concerning the reciprocal promotion and protection of investments, signed on 19 May 1987.
[2] Article 9 of the BIT.
[3] Judgment of 6 March 2018, *Achmea*, C-284/16 (see also Press Release No 26/18).

arbitration proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept, is contrary to EU law. That clause is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of EU law, ensured by the preliminary ruling procedure provided for in Article 267 TFEU. That clause is, therefore, incompatible with the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU and has an adverse effect on the autonomy of EU law enshrined, inter alia, in Article 344 TFEU.

In the second place, the Court finds that, to allow a Member State to submit a dispute which may concern the application or interpretation of EU law to an arbitral body with the same characteristics as the body referred to in such an arbitration clause that is invalid because it is contrary to EU law, by concluding an ad hoc arbitration agreement with the same content as that clause, would in fact entail a circumvention of the obligations arising for that Member State under the Treaties and, specifically, the articles referred to above.

First of all, that ad hoc arbitration agreement would produce, with regard to the dispute in the context of which it was concluded, the same effects as those resulting from the arbitration clause at issue. The fundamental reason for that arbitration agreement is precisely to replace that clause in order to maintain its effects despite that provision's being invalid.

Next, the consequences of that Member State's circumventing its obligations are no less serious because this is an isolated case. In fact, that legal approach could be adopted in a multitude of disputes which may concern the application and interpretation of EU law, thus allowing the autonomy of that law to be undermined repeatedly.

Furthermore, each request for arbitration made to a Member State, on the basis of an invalid arbitration clause, may constitute an offer of arbitration and that State could then be regarded as having accepted that offer simply because it failed to put forward specific arguments against the existence of an ad hoc arbitration agreement. That situation would have the effect of maintaining the effects of the commitment made by that Member State – which is contrary to EU law and is, therefore, invalid – to accept the jurisdiction of the arbitration body before which the matter was brought.

Lastly, it follows both from the judgment in *Achmea*, and from the principles of the primacy of EU law and of sincere cooperation, **not only that the Member States cannot undertake to remove from the judicial system of the European Union disputes which may concern the application and interpretation of EU law, but also that, where that dispute is brought before an arbitration body on the basis of an undertaking which is contrary to EU law, they are required to challenge the validity of the arbitration clause or the ad hoc arbitration agreement on the basis of which the dispute was brought before that arbitration body.** [4]

Any attempt by a Member State to remedy the invalidity of an arbitration clause by means of a contract with an investor from another Member State would run counter that obligation to challenge its validity and would thus be liable to render the actual legal basis of that contract unlawful since it would be contrary to the provisions and fundamental principles governing the EU legal order.

Consequently, the Court concludes that **the national court is obliged to set aside an arbitral award made on the basis of an arbitration agreement that infringes EU law.**

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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[4] A conclusion also confirmed by Article 7(b) of the Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union (OJ 2020 L 169, p. 1).