[*Translation*]

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PARIS COURT OF APPEAL
International Commercial Chamber

DIVISION 5 — CHAMBER 16

APRIL 19, 2022 JUDGMENT

(No **48**/2022, 14 pages)

Répertoire Général No.: **RG 20/13085 - Portalis No. 35L7-V-B7E-CCLDI**

Ruling referred to the Court: Arbitration Award rendered in Paris on March 4, 2020 (ADHOC/15/1)

APPELLANT:

REPUBLIC OF POLAND
Office of the General Counsel Urzad Prokuratorii Generalnej Rzeczypospolitej Polskiej
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Represented by Luca DE MARIA, of the Pellerin - DE MARIA - GUERRE SELARL,
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Assisted by Quentin MURON and Eduardo SILVA ROMERO, of the DECHER LLP law firm, attorneys-at-law in PARIS, Lawyer ID No. J096

RESPONDENTS:

STRABAG SE
a company incorporated under Austrian law
With Head Office in: Donau - City- Strasse - 1220 VIAN (AUSTRIA)
in person of its legal representatives;

RAIFFEISEN CENTROBANK AG
a company incorporated under Austrian law
With Head Office in: Tagetthoff Strasse 1-1015 VI (AUSTRIA);

SYRENA IMMOBILIEN HOLDING AG
a company incorporated under Austrian law
With Head Office in: Ortenburger Strasse 27 9800 Spi (AUSTRIA)
in the person of its legal representatives;

Represented by Sylvie KONG Thong, of the Dominique OLIVIER AARPI
Sylvie KONG Thong applying for the Paris Bar, Lawyer ID No. L0069
Assisted by Véronika Korom and Marianne Kecsmar, attorneys at law,
litigators at the PARIS Bar.

COMPOSITION OF THE COURT:

The case was debated on March 07, 2022 in open court, before the Court consisting of:

Mr. François ANCEL, President - Judge
Ms. Fabienne SCHALLER, Judge
Ms. Laure ALDEBERT, Judge

Court Clerk during the hearings: Ms. Najma EL FARISSI

[…]

On the Lack of Jurisdiction of the Arbitral Tribunal (Article 1520-1, Code of Civil Procedure)

34- **The Republic of Poland** submits that the Arbitral Tribunal wrongly assumed jurisdiction in rejecting the objection based on the incompatibility between EU law and the BIT arbitration clause.

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[…]

On this matter,

58. Under Article 1520, 1st, of the Code of Civil Procedure, an action for annulment is available if the court has wrongly declared itself with jurisdiction, or without jurisdiction.

59. The court hearing the annulment shall review the decision of the arbitral tribunal on its jurisdiction, whether the latter declared itself to have jurisdiction or not, by examining all the legal or factual matters enabling to assess the scope of the arbitration agreement. The position is no different where arbitrators are seized on the basis of a treaty.

On the Validity of the Arbitration Agreement

60. By preliminary ruling of March 6, 2018 in Case C-284/16 -Slowakische Republik v Achméa BV- known as "Achméa", the Court of Justice of the European Union (hereinafter "the CJEU" or "the Court") ruled that "*Article 267 and Article 344 TFEU must be interpreted as precluding a provision contained in an international agreement signed by the Member States, such as Article 8 of the Agreement, on the reciprocal encouragement and protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, pursuant to which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, file an action against that Member State with an arbitration tribunal whose jurisdiction said Member State is obliged to accept.*"

61. In other words, the CJEU found a dispute settlement clause contained in a BIT signed by the two Member States to be incompatible with EU law.

62. The CJEU reiterated the decision rendered by a preliminary ruling dated October 26, 2021 in Case C-109/20 - *Republiken Polen v PL Holdings*, and clarified the scope of that jurisprudence in the case of an *ad hoc* arbitration agreement, and ruled as follows: *"Article 267 and Article 344, TFEU, must be interpreted as opposing national legislation that allows a Member State to sign an ad hoc arbitration agreement with an investor from another Member State, making it possible to file an arbitration proceeding on the basis of an arbitration clause whose content is identical to this agreement, and present in an international agreement signed between those two Member States, but null and void on account of being incompatible with said Articles"* (emphasis added.)

63. Particularly, the Court held that the invoked *ad hoc* arbitration agreement would entail, if upheld, "*circumventing that Member State's obligations arising from the Treaties - in particular from Article 4(3) TEU as well as Article 267 and Article 344 TFEU - as interpreted by the Achméa March 6, 2018 judgment*"; the reason for such an *ad hoc* clause being, precisely, to replace the BIT's arbitration clause and to maintain the effects despite it being null and void, in breach of EU law.

64. It follows that, contrary to the Strabag companies' argument, the nullity of an *ad hoc* arbitration clause is understood as the nullity of any clause or agreement that replaces the nullity clause, while retaining the same effects, without it being possible to argue that there is lack of identity of such clauses. The fact that they have the same effects is sufficient to render them null and void, and no condition requires an analysis of whether the content is 'identical' to the arbitration offer contained in the Treaty.

65. Finally, the Court recalled the "*ex tunc*" effect of its decisions, whereby "*the interpretation given by a Court - while exercising jurisdiction conferred by Article 177, on a European Community law rule - clarifies and defines, where necessary, the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time it came into force. It follows that a rule thus interpreted may and must be applied by the court even to a legal relationship that arose, or was established, before the decision on the request for interpretation was rendered; provided that the conditions for bringing a dispute relating to the application of that rule before a court with jurisdiction are satisfied*" (CJEU *Amministrazione delle Finanze dello Stato v Denkavit Italiana SRL*, March 27, 1980.)

66. The Court concluded (§ 52) that "*any attempt by a Member State to remedy the nullity of an arbitration clause by means of a contract with an investor from another Member State would run counter to the obligation of the first Member State to challenge the validity of the arbitration clause. Thus, the Member State would be liable to render unlawful the very cause of that contract since it would be contrary to the fundamental provisions and principles governing the legal order of the European Union and referred to in Paragraph 46 of this judgment.*" Thus, the Court refers to the principle of mutual trust between Member States and the preservation of the specific nature of EU law, ensured by the preliminary ruling procedure provided by Article 267, TFEU.

67. Therefore, the Court (§ 55) considers that "*in such circumstances, it is for the national court to grant an application for annulment of an arbitration award based on an arbitration agreement which violates Article 267 and Article 344, TFEU and the principles of mutual trust, sincere cooperation and autonomy of EU law.*"

68. In the present case, Article 8 of the BIT reads: "*(1) in the event of an investment dispute between a Contracting State and an investor of the other Contracting Party, such disputes shall be settled amicably between the parties concerned if possible. If such an amicable settlement were not possible, the investor will then have to exhaust any existing domestic administrative and judicial remedies.*
2) If the dispute cannot be settled as provided by Paragraph 1 within twelve months of the written notification of the specified claims, the dispute shall be submitted at the request of a Contracting Party or the investor of the other Contracting Party to arbitration: (...)
(b) to an international arbitral tribunal, if either Contracting Party is not a signatory to the Convention for the Settlement of Investment Disputes between States and Nationals of Other States. The International Arbitral Tribunal shall be constituted on an ad hoc basis as follows: each Party shall appoint an arbitrator, and such arbitrators shall appoint a chairperson, who shall be a national of a third State. The arbitrators shall be appointed within two months of

the date on which the investor (s) notified the other Contracting Party of its intention to submit the dispute to an arbitral tribunal, and to the President within the following two months."

69. It was on the basis of said clause that the Arbitration Claimants, the Strabag companies, submitted their request for arbitration to the Republic of Poland on September 9, 2014; and that the arbitral tribunal was constituted on December 23, 2014, (Award, Paragraph 1.12) specifying "*without prejudice to the objections of the Court to the jurisdiction of the Tribunal.*" By emails of March 18 and March 20, 2015 the Parties confirmed their agreement to designate the ICSID Secretariat as the administering authority (§ 1.13), the parties also agreeing on Paris as the seat of the arbitration (1.15), the language being English (1.16.)

70. On Paragraph 1.19 of the Award the arbitrators specify: "*this arbitration must also be conducted in accordance with the Tribunal's Procedure No 1 provision dated July 9, 2015, whereby Article 8 of the Treaty was substantially supplemented by a Parties' Agreement (as described below in this Award.") In this regard, the Award recalls that "by joint letter of February 9, 2015, the Parties replied to the Tribunal's invitation, and provided the Tribunal with a draft procedural order, containing proposals for the procedural rules to govern the arbitration. The parties agreed on most of the issues but identified a limited number of contentious issues to be settled by the Tribunal."* (§ 1.26.)

71. The parties decided a break down on the issues on jurisdiction. The partial award recalls the dates on which the first briefs on jurisdiction were exchanged, on the basis of the initial request based on Article 8, BIT, and outlines (§ 1.47) that it was "*on May 5, 2017, [that] the Respondent, through the Office of the General Councilor of the Republic of Poland, notified the Tribunal its intention to raise an additional plea of lack of jurisdiction in relation to European Union ("EU") law. The Respondent referred to Case C-284/16 Slowakische Republik v Achméa BV ("Achméa"), pending before the European Union Court of Justice.*"

72. The hearing on jurisdiction was held on June 7-8, 2017. However, it was provided that the parties would be able to exchange post-hearing pleadings to rebut oral arguments raised by the other party at the hearing, and for their arguments on the new plea of Defendant's lack of jurisdiction concerning Achméa (§ 1.58.) This was done following a submission of conclusions by prosecuting attorney Wathelet dated September 19, 2017. Subsequently, the parties exchanged pleadings; and then, after the CJEU delivered its Achméa decision on March 6, 2018, the arbitral tribunal invited the parties to submit written observations on the Achméa judgment, which was done on April 16, 2018.

73. On October 15, 2018, the European Commission submitted to the Tribunal a request to intervene as a non-disputing party regarding the legal consequences of the Achméa judgment. Despite the Claimants' challenge, the Tribunal allowed the Commission to lodge a brief, without access to the procedural documents. An Amicus Curiae's pleading was lodged by the Commission on November 30, 2018.

74. The Republic of Poland requested authorization to lodge the Member States' declaration of January 15, 2019 to denounce the existing BITs, following the Achméa decision, which was authorized by the arbitral tribunal.

75. The arbitral tribunal issued a partial award on jurisdiction on March 4, 2020, stating that (§ 10.1.1) "the arbitration agreement contained in Article 8 of the Treaty, as invoked by the Claimants for that arbitration, is legally valid" and that (§ 10.1.2) "*the parties were and remain legally bound by the arbitration agreement contained in Article 8 of the Treaty*", after rejecting the objection of lack of jurisdiction raised by the Republic of Poland in relation to EU law and the Achméa judgment (§ 8.143), considering that EU law was not applicable to matters falling within the jurisdiction of the arbitral tribunal.

76. First, it follows from such enumeration that the Respondent companies are wrong to invoke an Estoppel which would prohibit Poland from arguing that the arbitral tribunal lacked jurisdiction, on the ground that the arbitration clause was incompatible with EU law, because Poland raised that argument very late at the end of the arbitration; and that from the outset Poland had accepted its individual commitment to apply the arbitration agreement based on the common will by the parties, and not on Article 8 of the BIT - whereas it is apparent from the above points that the argument of incompatibility of the arbitration clause with EU law was raised before the Achméa decision was rendered; that the argument was extensively debated by the Tribunal; and, further, from the outset, Poland had argued the lack of jurisdiction of the tribunal and required a fork in the road procedure (the Award states in Paragraph 1.12 "*without prejudice to the Respondent's objections to the jurisdiction of the Tribunal.*"

77. From the partial award it also follows, as stated above, that the partial award refers to Article 8 of the BIT in order to hold that (§ 10.1.1) "*the arbitration agreement contained in Article 8 of the Treaty, as invoked by the Claimants for that arbitration, is legally valid" and that (§ 10.1.2) "the parties were and remain legally bound by the arbitration agreement contained in Article 8 of the Treaty.*"

78. Thus, the arbitral tribunal gives effect to the arbitration clause arising from Article 8 of the Treaty.

79. It cannot therefore be argued in the present case, as held by the Strabag companies, that the parties signed a new *ad hoc* individual arbitration agreement, different from the arbitration offer contained in Article 8 of the Austria-Poland BIT, which replaces the Treaty clause, in particular by means of Procedural Order No 1 attached to the proceedings.

80. Indeed, although the parties agreed under Order No 1 to recap on the rules concerning the seat and secretariat, to submit their arbitration to ICSID Rules, as well as to lay down the powers and functions of the arbitral tribunal, the general procedural rules, the practical arbitration modalities, and service of the decision, the Order was intended to specify the procedural arbitration framework without, however, going back on the consent to arbitration arising from the arbitration offer provided in the BIT.

81. In this regard, Order No 1 underlines that the arbitral tribunal received the September 9, 2014 request, without referring to a new arbitration request, or to an arbitration agreement that is different from the agreement mentioned in the request - namely Article 8 of the BIT, and the award validates the arbitration agreement contained in Article 8 of the BIT.

82. Although Order No 1 is signed by the President of the arbitral tribunal, there is nothing to suggest that it constitutes an *ad hoc* agreement different from the arbitration clause on which the proceeding is based.

83. The Strabag companies themselves also stated that this Order "supplemented" the request for arbitration - not that it replaced it, as stated in Paragraph 1.19 of the Award ("*this arbitration must also be conducted in accordance with the Tribunal's Rules of Procedure No 1 dated July 9, 2015, whereby Article 8 of the Treaty was substantially supplemented by a Parties' Agreement*", itself referring to Paragraph 38 of Procedural Order No 1). Its 'certification' by the President's signature does not give it an independent existence.

84. Strabag is therefore wrong to maintain that Order No 1 replaced the Treaty clause and that this "individual arbitration agreement" is entirely independent of the Investor/State dispute clause in the Investment Treaty, and is perfectly valid in the light of the substantive rules of French international arbitration law, based on the common will of the parties, without any formal requirements, or in the light of the law on Treaties.

85. The Strabag companies are also wrong to argue that Article 8 of the BIT is consistent with EU law, on the grounds that not all investment arbitration clauses are automatically invalid; that CJEU judgments must be interpreted restrictively; that statements by Member States and the Commission's communication suggesting that the Achméa case-law is generalized have no binding force; and that only arbitration clauses with the same characteristics as the characteristics found by the CJEU to be incompatible with EU law must be annulled. The Strabag companies argue that those characteristics were not present in the Treaty regarding the present case, which would justify a different conclusion from the Achméa decision However, the rule laid down in the Achméa and PL Holdings decisions is clear, and requires the court to annul any clause in such a treaty which is incompatible with Article 267 and Article 344 TFEU - whether unilateral or bilateral - since any attempt to circumvent that rule is null and void and may lead to penalties, and a case-by-case assessment entailing a risk to the uniform application of Union law.

86. The fact that the clause in Article 8 of the BIT does not provide for applicable law, whereas in Achméa the Treaty provided that the tribunal had to settle a dispute by taking into account the host State's investment law - including EU law - is ineffective because the settlement mechanism in Article 8 of the BIT, and Procedural Order No 1 supplementing it, do not preclude an arbitral tribunal from being called upon to rule on the application or interpretation of Union law. The statement that "the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable, and such rules of international law and treaties as the Arbitral Tribunal considers applicable" (§116 Procedural Order No. 1) does not exclude that Union law may apply, or that the tribunal may take a decision likely to contravene Union law.

87. On the other hand, it is apparent from the Achméa decision, confirmed by the PL Holdings decision, that the CJEU ruled in general terms on the incompatibility between EU law and the BIT's clause to settle disputes between Member States, without making any distinction according to whether the clause contains a reference to applicable law.

88. The fact that Austria did not sign the Agreement "*ending Bilateral Investment Treaties between European Union Member States*" dated May 5, 2020 does not make it possible to make an exception to the Austria-Poland BIT.

89. The European Commission had formally requested Austria, by a notice setting out the reasons dated September 23, 2016, to terminate its intra-EU BITs. In a July 19, 2018 notice it stated "*after the Achméa judgment, the Commission intensified its dialogue with all the Member States, calling on them to take measures to put an end to the intra-EU BITs, given their indisputable incompatibility with EU law. The Commission will monitor progress in this regard and, if necessary, may decide to pursue infringement procedures.*" The Commission also underlined that "*national courts act as 'European Union courts, and are subject to the obligation to refuse ex officio the application of national provisions which are contrary to directly applicable EU law provisions*", which is the case for preliminary rulings of the CJEU, interpreting EU law. The Commission underlined that "*it is committed to taking firm action against infringements that hinder the achievement of key EU objectives, or that may undermine the four fundamental freedoms which are essential for investors.*"

90. The primacy of European Union law is binding on all European Union Member States, and recourse to the Vienna Convention on the Law of Treaties or, if necessary, to the substantive rule of international arbitration law in order to claim the existence of valid consent, is ineffective in this regard.

91. Therefore, the arbitral tribunal was wrong in declare itself with jurisdiction. It is not necessary to examine the plea for annulment alleging infringement of international public policy.

On the Disproportionate Nature of the Annulment of the Partial Award.

92. It should be borne in mind that the annulment of the partial award based on the arbitral tribunal's lack of jurisdiction is not intended to deprive a party of access to a court, but only of depriving a party of the possibility to submit a dispute to an arbitrator when requirements are not met.

93. Since the Court of Justice held, for the above reasons that, in the light of CJEU Jurisprudence the Tribunal was wrong in assuming jurisdiction to rule on the dispute between the parties, partial annulment of the Award is a must, without prejudice to analyzing the merits of the Investors' claims - noting that it is not for the annulment court to assess the circumstances in which the Investors may obtain the compensation they seek before national courts.

94. In this regard, the CJEU pointed out that the protection of subjective rights "must be ensured within the judicial system of Member States" and that it is for the European Commission, where appropriate, to initiate infringement proceedings against a Member State which violates the fundamental principles and values of EU law, since national courts may not judge any breach or violation.

95. Moreover, in the present case, the Commission initiated an infringement proceeding against Poland on December 22, 2021 due to serious concerns about the Polish Constitutional Tribunal

and its recent case law, which shows vigilance by European institutions for the protection of the rule of law within the European Union. It cannot be inferred from that infringement proceeding that Investors will be deprived of their right of access to a judge or that they would face a denial of justice.

96. It is therefore not necessary to rule out the annulment of the award adopted in the context of the review of the arbitral tribunal's jurisdiction on that basis.

97. The application for annulment of the award must therefore be granted on the basis of Article 1520-1 of the Code of Civil Procedure.

[…]

IV. DECISION

For the foregoing reasons, this Court:

1. Rejects Conclusions No 3, submitted by the Republic of Poland on March 1, 2022, day of the closing, for being late;

2. Annuls Arbitration Award ADHOC/15/1, rendered in Paris on March 4, 2020;

3. Orders RAIFFEISEN CENTROBANK AG, SYRENA IMMOBILIEN HOLDING AG and STRABAG SE to pay the Republic of Poland the total sum of Euros 50,000 pursuant to Article 700 of the Code of Civil Procedure;

4. Orders RAIFFEISEN CENTROBANK AG, SYRENA IMMOBILIEN HOLDING AG and STRABAG SE to pay all costs.

Court Clerk	**President**
Najma EL FARISSI	**François ANCEL**