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Court	Amsterdam District Court
Judgment Date	01-09-2022
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Case number	C/13/720363 / KG ZA 22-636
Practice areas	Private international
law Particulars	First instance - sole
judge	

Provisional relief proceedings

Summary

Provisional relief proceedings, does a company act unlawfully vis-a-vis a State by continuing, outside the EU, arbitration proceedings that it had initiated on the basis of an intra-EU investment treaty, which had been terminated in the meantime? The provisional relief judge considers that is not the case. Consequences of the Achmea judgment.

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Judgment

judgment

AMSTERDAM DISTRICT COURT

Private law division, civil provisional relief judge

case number / roll number: C/13/720363 / KG ZA 22-636 EAM/LO

Provisional relief judgment of 1 September 2022

In the matter of

Public law legal entity
THE REPUBLIC OF POLAND,
having its seat in Warsaw (Poland),
claimant by summons of 25 July 2022,
attorney: mr. M.W. Scheltema of The Hague,

against:

the private limited liability company (besloten vennootschap)
[defendant] B.V.,
established in [seat], defendant,
attorney: mr. M. van de Hel-Koedoot in Amsterdam.

The Parties shall hereinafter be referred to as the Republic and [defendant].

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1 Procedural background

1.1 At the hearing of 18 August 2022, the Republic explained the claims as described in the summons. [Defendant] put forward a defence, including based on a counter-submission filed earlier. Both parties submitted exhibits and skeleton arguments.

1.2 The following were present at the hearing:

for the Republic: [name 1] , general counsel, assisted by mr. C.G. Verburg, mr. S.H.G Cnossen, mr. M.W. Scheltema, [name 2] (student-intern) and C.M. Pennings, English language interpreter;

for [defendant] :

[name 4] , director, M. Krysztoporka, Polish attorney, assisted by mr. M. van de Hel-Koedoot, mr. P. Fritschy and mr. M. Slimmen.

1.3 Judgment is of today's date

2 Factual background

2.1. [Defendant] is an investment company established in the Netherlands with shares in various companies in Poland engaged in financial activities, which are part of [group name]. Founder of [group name] is [name 5], who is also the ultimate beneficial owner of [defendant].

2.2. [Defendant] and the Republic have a dispute concerning [defendant's] investments in Poland, and measures imposed by the Republic on various entities. [defendant] claims that the Polish authorities treated its investments in an unfair, inequitable and discriminatory manner, and that there was an expropriation. Accordingly, on 2 December 2020 [defendant] initiated arbitration proceedings against the Republic. Those proceedings are conducted on the basis of the United Nations Commission on International Trade Law (UNCITRAL) 1976 [Rules]. The arbitral tribunal established London, England, United Kingdom, as the place of the arbitration.

2.3. There was an investment treaty - also known as an IPO (investment protection agreement) or BIT (bilateral investment treaty) - in force between the Republic and the Netherlands. The purpose

was to promote investment flows between the contracting states by providing better (legal) protection for foreign investors. For this reason, Article 8 of the treaty contains a so-called 'ISDS clause' ('investor-state dispute settlement'). The mechanism works such that the ISDS clause is an open offer by the State (in this case the Republic) to submit a dispute concerning a violation of the substantive protections in the IPO for settlement by arbitration. The foreign investor (in this case [defendant]), can accept that offer at any time, after which an 'arbitration agreement' is concluded.

2.4. In the so-called Achmea judgment, the Court of Justice of the European Union (CJEU of 6 March 2018, case C-284/16 ECLI:EU:C:2018:158) ruled (in summary) that Articles 267 and 344 of the Treaty on the Functioning of the European Union (TFEU) preclude ISDS clauses because such clauses create the possibility for an arbitral tribunal to rule on the interpretation and application of EU law without the possibility for the CJEU to review or revise such decisions.

2.5. Following the Achmea judgment, the EU Member States, including the Netherlands and the Republic, terminated the intra-EU BITs applicable between them. Poland terminated the BIT on 19 July 2018 and on 30 January 2019, the Netherlands confirmed that the BIT between the Republic and the Netherlands had terminated with effect from 2 January 2019.

2.6. Article 13(3) of the BIT contains a so-called sunset clause and is worded as follows:

"3) in respect of investments made before the date of the termination of this Agreement the foregoing Articles thereof shall continue to be effective for a further period of 15 years from that date."

2.7. As a result of the Achmea judgment, EU member states concluded a termination treaty, also known as the "Termination Agreement", which terminates the bilateral investment treaties listed in the annexes and also terminates the sunset clauses. For the Netherlands, the Termination Treaty entered into force on 31 March 2021 and for the Republic on 4 April 2021. Among other things, the Termination Agreement provides the following.

ARTICLE 2.

Termination of Bilateral Investment Treaties

1. Bilateral Investment Treaties listed in Annex A are terminated according to the terms set out in this Agreement.

2. For greater certainty, Sunset Clauses of Bilateral Investment Treaties listed in Annex A are terminated in accordance with paragraph 1 of this Article and shall not produce legal effects.

ARTICLE 3

Termination of possible effects of Sunset Clauses

Sunset Clauses of Bilateral Investment Treaties listed in Annex B are terminated by this Agreement and shall not produce legal effects, in accordance with the terms set out in this Agreement. (...)

ARTICLE 7

Duties of the Contracting Parties concerning Pending Arbitration Proceedings and New Arbitration Proceedings

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Where the Contracting Parties are parties to Bilateral Investment Treaties on the basis of which Pending Arbitration Proceedings or New Arbitration Proceedings were initiated, they shall:

a) inform, in cooperation with each other and on the basis of the statement in Annex C, arbitral tribunals about the legal consequences of the Achmea judgment as described in Article 4; and

b) where they are party to judicial proceedings concerning an arbitral award issued on the basis of a Bilateral Investment Treaty, ask the competent national court, including in any third country, as the case may be, to set the arbitral award aside, annul it or to refrain from recognising and enforcing it.

...

2.8. On 9 August 2022, the Republic brought principal proceedings before this court against [defendant] with claims to the same effect as those put forward in these provisional relief proceedings.

3 The dispute

3.1. In summary, the Republic requests a provisionally enforceable judgment ordering:

primarily:

I. [Defendant] to cooperate in submitting a joint request to the arbitral tribunal for the termination of the Arbitration Proceedings;

subsidiarily:

II. [Defendant] to cooperate in submitting a joint application to the arbitral tribunal for a stay of the Arbitration Proceedings proceedings until final judgment is rendered in the principal proceedings;

in either case:

III. to declare that no valid agreement to arbitrate has been concluded between [defendant] and the Republic;

IV. to order a penalty of € 1,000,000 per day that [defendant] fails to comply with the relief requested under I and II;

V. order [defendant] to pay the costs of the proceedings with statutory interest;

VI. order [defendant] to pay the ancillary costs and statutory interest.

3.2. [defendant] objects.

3.3. To the extent relevant, the parties' positions are discussed in more detail below.

4 The court's assessment

4.1. The Republic argues that [defendant] is acting unlawfully by continuing the arbitration proceedings, because there a valid arbitration agreement is absent, those proceedings are contrary to EU law and (therefore) manifestly without prospect of success.

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Competent court

4.2. The court with competence to rule on the validity of the arbitration agreement and thus on the arbitral tribunal's jurisdiction is the arbitral tribunal itself. This principle of *Kompetenz-Kompetenz* is enshrined in section 30 of the UK Arbitration Act, the formal arbitration law applicable to this arbitration. Article 21 of the UNCITRAL Rules 1976 applicable to the arbitration also provides that an arbitral tribunal shall have jurisdiction to rule on its own jurisdiction. In the Netherlands, this principle is laid down in Article 1052 of the Code of Civil Procedure (Rv). Only when the arbitral tribunal made a ruling on this issue and such ruling resulted in a final award may the national state court eventually make a judgment in annulment or enforcement proceedings. In this case, that would be the English court, in its capacity as the court of the place of the arbitration.

4.3. The Republic argues that the Dutch provisional relief judge has jurisdiction on the basis of Article 99 Rv, in combination with articles 1074 and 1074a read jointly with Article 1074d Rv. However, these provisions do not confer the power to rule on the validity of the arbitration agreement. Moreover, those articles concern interim and protective measures and thus do not confer jurisdiction in an action for the withdrawal of the arbitration proceedings. In the present proceedings, therefore, the question is not whether the arbitral tribunal has jurisdiction, but whether the lack of jurisdiction of the arbitral tribunal is so obvious that the proceedings are, in advance, so entirely without prospect of success that [defendant] acts unlawfully by knowingly continuing the arbitration. The second question is then whether pending the outcome the principal proceedings brought before this court [defendant] should, in provisional relief proceedings, be ordered to terminate the arbitration. As stated above, based on Article 1074 et seq Rv, the Dutch provisional relief judge is only competent to order interim measures. The primary claim therefore cannot be allowed, given that allowing it would have the nature of a final decision. In any event, declaratory judgment as requested by the Republic under III, is not an issue for provisional relief proceedings. What remains is the subsidiary claim to order [defendant] to cooperate in the stay of the arbitration proceedings until the jurisdiction of the arbitral tribunal has been decided in the principal proceedings.

Unlawfulness

4.4. The basis on which the Republic founds this claim is that [defendant] is acting unlawfully by continuing the proceedings. As the Supreme Court ruled in its judgment of 6 April 2012,[1] given the right of access to justice that is also guaranteed by Article 6 of the ECHR, it is appropriate to exercise restraint when finding an abuse of process or an unlawful act comprised in the initiation of legal proceedings. Abuse of process or unlawful conduct would only exist if, in view of the manifestly unmeritorious nature of the claim, such claim should not have been brought in view of the relevant interests of the other party.

4.5. On the other hand, the Republic referred to the obligation of the Dutch court, as an organ of the State, to make full use of the discretion afforded to it by Dutch arbitration law to interpret and apply domestic law in conformity with EU law.[2] According to the Republic, the consequence of this is that the Dutch court, as the only potentially competent EU court, must intervene in the arbitration proceedings which are contrary to EU law.

4.6. The arbitration proceedings possibly lack valid basis. Based on the Achmea judgment and following the entry into force of the Termination Treaty, an intra-EU BIT can no longer serve as a basis for arbitration proceedings. However, it is not a foregone conclusion that the arbitral tribunal will, for that reason, decline jurisdiction.

The following considerations apply in that regard. When [defendant] initiated the proceedings, the Termination Treaty had not yet entered into force. At that time, the sunset clause was still applicable, and there was thus a basis for the arbitration.

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4.7. Further, it is also relevant that the arbitral tribunal in these arbitration proceedings is not seated in the European Union. The only court before which annulment proceedings can be conducted (the English court) is thus not bound by EU law. This means that an arbitral award in this case will not, without more, be annulled for lack of jurisdiction. In the intra-EU investment arbitration in Micula v Romania, the British Supreme Court ruled that the arbitral award could be enforced.[3] There is therefore a probability - indeed, potentially, a high one - that the arbitral tribunal will rule that it has jurisdiction and that, in the event of an arbitral award unfavourable to the Republic, any annulment action on the grounds of lack of jurisdiction will be dismissed.

4.8. Based on the foregoing, it can be concluded that [defendant]'s arbitration claim is not manifestly without prospect of success. In addition, there is much debate within the EU about the Achmea judgment and its consequences. Firstly, the formal consequences have not yet crystallised. For example, any arbitral award in this case will not be enforceable in EU countries due to conflict with EU law. However, that may well be different for enforcement of arbitral awards rendered by an arbitral tribunal outside the EU, as in this case. Secondly, there is debate about the (desirability of the) consequences of the judgment. Although at the time of the Achmea judgment, the CJEU ruled based on the assumption that investors are adequately protected by EU law against government action by EU Member States even without intra-EU BITs, many appear to doubt this.[4] In this regard, the problem of attacks on the independence of the Polish judiciary is expressly mentioned. Apparently, the Member States are also of the opinion that the Achmea judgment and the Termination Treaty have created a gap in the legal protection that must be filled. Meanwhile, Canada, the EU and all EU countries individually have concluded the CETA treaty, which, among other things, provides for the resolution of disputes between foreign investors and states (or the EU) by setting up an Investment Court System. The new rules investment protection are, at present, not yet in force.[5] This means that the arbitration proceedings may be the only real form of legal protection that [defendant] can invoke. Furthermore, given that, for the reasons set out at para 4.7 above, the arbitration proceedings are not manifestly without prospect of success [defendant] cannot be said to act unlawfully by trying to pursue its claims in arbitration proceedings outside the EU. The state court in general, and the provisional relief judge in particular, must exercise restraint when intervening in pending arbitration proceedings;[6] based on the foregoing, the court thus sees no basis to suspend the arbitration pending the decision in the principal proceedings, even apart from the fact that the Republic has failed to sufficiently demonstrate the urgency of its interest in the claim being granted. The general interest in avoiding costly and time-consuming principal proceedings, which is, in principle, in the interest of any party, is insufficient in this regard.

4.9. The Republic shall, as the losing party, be ordered to pay the costs of the proceedings. The costs on the part of [defendant] are estimated at:

- court fee € 676,00
- attorneys' fees 1.016,00

Total € 1.692,00

4.10. The ancillary costs shall be allocated in the manner stated in the decision.

5 The decision

The provisional relief judge

5.1. rejects the requested relief, orders the Republic to pay the costs of the proceedings to date assessed on the part of [defendant] at € 1,692.00, plus statutory interest on that amount with effect from fourteen days after this judgment until the day of full payment,

5.2. orders the Republic to pay the costs incurred after this judgment, estimated at € 163 in attorneys' fees, to be increased by € 85 and the costs of the writ of service in the event that this judgment is served, plus statutory interest thereon with effect from fourteen days after the service of this judgment until payment,

5.3. declares these costs orders provisionally enforceable.

This judgment was issued by mr. E.A. Messer, provisional relief judge, assisted by mr. L. Oostinga, registrar, and pronounced in public on 1 September 2022.[7]

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[1] HR 6 April 2012, ECLI:NL:HR:2012:BV7828

[2] CJEU 10 April 1984, Case C-14/83, ECLI:EU:C:1984:153

[3] SC 19 February 2020 [2020] UKSC 5.

[4] See, e.g., *eschouwingen naar aanleiding van het Achmea-arrest van het Hof van Justitie EU [Considerations following the Achmea judgment of the EU Court of Justice]* by M.C. van Leyenhorst, TvA 2019/65 under 24.

[5] See, e.g., *De rechtspraak van het Hof van Justitie over investeringsarbitrage onder intra EU- en extra-EU-investeringsverdragen [The case law of the Court of Justice on investment arbitration under intra-EU and extra-EU investment treaties]*, by Q. Declève and I. Van Damme, SEW number 12, December 2020.

[6] Article 5 UNCITRAL 1976

[7] type: LO coll: MV
