

# SUPREME COURT'S JUDGMENT

delivered in Stockholm on 26 May 2025

Case no.  
T 555-24

## **PARTIES**

### **Appellant**

The Republic of Poland  
Ministry of Justice  
Al. Ujazdowskie 11  
00-950 Warsaw  
Poland

Counsel: Attorneys A.M. and M.W.

### **Respondent**

P.D.

Counsel: Attorneys F.N., A.L. and A.H. and lawyer F.B.

## **THE MATTER**

Invalidity of arbitral award

**RULING APPEALED**

Judgment of the Svea Court of Appeal dated 2023-12-20 in case  
T 12646-21

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**JUDGMENT**

The Supreme Court modifies the judgment of the court of appeal such that the Supreme Court declares that the award made on 30 June 2021 with correction and interpretation of 30 July 2021 in the Stockholm Chamber of Commerce Arbitration Institute case no. V 2018/098 is not invalid in so far as it pertains to the relationship between the Republic of Poland and P.D.

The Supreme Court grants leave to appeal in respect of the allocation of liability for costs of litigation incurred in the court of appeal between Poland and P.D. The Supreme Court modifies the judgment of the court of appeal also in that part and releases Poland from the obligation to compensate P.D. for costs of litigation incurred in the court of appeal and orders P.D. to compensate Poland for its costs of litigation incurred there in the amount of EUR 77,500 and PLN 84,034.77 regarding, respectively, counsel fees and VAT according to Polish tax law as well as interest in accordance with Section 6 of the Interest Act from 20 December 2023.

The Supreme Court orders P.D. to pay compensation to Poland for litigation costs incurred here in the amount of EUR 15,000 and PLN 42,800 for counsel fees and the Polish State's own work respectively as well as interest in accordance with Section 6 of the Interest Act from the date of this judgment.

## **CLAIMS IN THE SUPREME COURT**

The Republic of Poland has requested that the Supreme Court uphold the award in so far as it pertains to the relationship between Poland and P.D. Poland has further requested that the Supreme Court release Poland from the obligation to compensate P.D.'s costs of litigation incurred in the court of appeal and instead order him to compensate Poland for its costs of litigation incurred there.

P.D. has opposed modification of the judgment of the court of appeal.

The parties have requested compensation for their costs of litigation incurred in the Supreme Court.

The Supreme Court has issued the leave to appeal set forth in paragraph 4.

## **REASONS FOR THE JUDGMENT**

### **Background**

1. P.D. and an additional four investors commenced arbitration against Poland pursuant to the Energy Charter Treaty (ECT).<sup>1</sup> The other investors were based in the EU while P.D. was a citizen of and domiciled in Switzerland. The investors claimed damages against Poland on the basis of the fact that they had made investments via a jointly owned limited company, Blue Gas Holding, in the Polish energy sector which had become worthless as a consequence of certain actions on the part of the Polish State. The tribunal dismissed the investors' claims and ordered them, relative to Poland, to jointly and severally bear all costs incurred in the proceedings

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<sup>1</sup> Swedish Treaty Series 1997:57

and to compensate Poland for some of the country's own costs incurred in the proceedings.

2. ECT is an inter-governmental agreement the purpose of which is to promote cooperation within the energy sector by means of, among other things, the protection of foreign investments. A number of countries both within and outside the EU are parties to the treaty. In the event of a dispute between an investor and a Contracting Party, the investor may request that the dispute be resolved by arbitration. The investor may thereupon also choose arbitration subject to the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. The award shall be final and binding on the parties to the arbitration, and the Contracting Parties shall ensure the presence of effective mechanisms for enforcement within their respective areas (Article 26).

3. The investors brought an action in the court of appeal and requested that the award be declared invalid given that the arbitration clause in the Energy Charter Treaty is in violation of EU law. Poland claimed, among other things, that that part of the award which pertains to P.D. is not covered by the invalidity since he is not a citizen of the Union. The court of appeal has declared the award invalid in its entirety.

### **Leave to appeal and the precedential question**

4. The Supreme Court has granted leave to appeal regarding the question of whether the award is invalid in accordance with Section 33, first paragraph (2) of the Arbitration Act (1999:116) in so far as it pertains to the relationship between Poland and P.D. The question regarding leave to appeal in respect of the allocation of liability for the costs of litigation incurred in the court of appeal between these parties has been stayed. The Supreme Court has decided not to grant leave to appeal regarding the remainder of the case.

5. The precedential question in the case addresses the circumstances under which an award is to be declared invalid only in part.

### **Swedish arbitral awards and invalidity**

6. The Arbitration Act contains provisions regarding arbitrations seated in Sweden. The act is applied also to such proceedings as have an international connection (see Section 46). When an award has been delivered, it is normally final and binding and cannot be appealed. It may, however, be challenged in certain other ways. The provisions regarding enforcement of Swedish awards are found in Chapter 3, Sections 15-18 of the Enforcement Code.

7. Pursuant to Section 33 of the Arbitration Act, an award is invalid if, among other things, the award, or the manner in which it has come about, is manifestly incompatible with the basic principles of the Swedish legal system (the doctrine of public policy). A person who wishes to assert that an award is invalid may bring an action for a declaration of invalidity before the court of appeal within the jurisdiction in which the arbitration has or has had its seat (see Section 43, first paragraph). The invalidity may be asserted without limitation in time and it is to be considered irrespective of whether any party has asserted the same. No amendment of the award may take place in any manner other than by a declaration of complete or partial invalidity.

### **Dispute resolution within the framework of the ECT**

8. Pursuant to the precedents of the European Court of Justice, the provisions of the ECT regarding arbitration are not applicable to disputes between a Contracting Party who is a member of the EU and an investor from another Member State. However, the provisions are applicable in relation to third-state investors, i.e. investors from a Contracting Party who

is not a member of the EU. (*Cf.* judgment of the European Court of Justice of 2 September 2021 in the case of *Komstroy*, C-741/19, EU:C:2021:655, paras. 65 and 66.)

9. The case-law of the European Court of Justice is founded primarily on the notion that Member States should not be able to remove disputes concerning the application of EU law from the EU judicial system. The Supreme Court has found that such circumvention would violate procedural public policy. (See “Investment Agreement”, case NJA 2022, p. 965, paras. 55 and 56.)

10. It follows from the aforementioned that an award which has come about pursuant to an arbitration clause which, according to EU law, is not applicable between the parties, is invalid in accordance with Section 33, first paragraph (2) of the Arbitration Act.

### **Partial invalidity**

11. Pursuant to Section 33, second paragraph, the invalidity may apply to a certain part of an award.

12. As stated above, an award is normally final and binding. Accordingly, invalidity should not be deemed to be present to an extent greater than that which is necessary. As regards awards which have been made pursuant to the ECT, this also follows from Article 26.8 in which Sweden, as a Contracting Party, has undertaken to maintain effective mechanisms for recognition and enforcement of such awards. This view is also reflected in the New York Convention<sup>2</sup> – on which the Swedish legislation is based – and the desire expressed therein that arbitral

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<sup>2</sup> Swedish Treaty Series 1972:1

agreements are to be respected and that awards are to be recognised and enforced.

13. Against this background, the first question to be assessed is whether the ground for invalidity covers the award in its entirety or whether there are parts of the award which are not affected by the circumstance giving rise to the invalidity. This also applies when an award or the manner in which it came about violates public policy. Even if this ground for invalidity often covers the award as a whole, the ground for invalidity may pertain to a certain part of the award, e.g. a specific issue or one of several parties, while other parts of the award are not affected by the defect.

14. Where it may be observed that a certain part of the award is not affected by the ground for invalidity, the court must determine whether that part may be separated from the remainder of the award. It may be the case that that part which, in the initial assessment, cannot be deemed affected nonetheless has such a connection with the invalid part that the award as a whole is covered by the invalidity. The various parts may be severable even when no division has been made in the operative part, provided the various parts may be separated pursuant to the contents of the rest of the award.

15. The assessment of whether the parts may be separated should take place subject to the consideration of the import which a remaining part of the award would have for the possibilities of a party to obtain a new examination of that part which is declared invalid. In the event the remaining part, due to *res judicata*, would prevent a new examination, the parts should not be deemed separable. As a rule, the general Swedish principles regarding *res judicata* within civil proceedings should be applied in the assessment. However, if it is asserted that the new examination will take place in accordance with a legal regime other than the Swedish one,

there may be cause to take into account the principles of *res judicata* within that legal regime.

16. There may also be other causes why the various parts of an award are so intertwined that they cannot be regarded as separable for legal and practical reasons. An assessment must at all times – taking into account the premise that invalidity may not be deemed to exist to a greater extent than that which is necessary – be made on the basis of what is set forth in the content in the individual award.

### **Allocation of costs of arbitration**

17. The parties to an arbitration shall, unless otherwise agreed, be jointly and severally liable to pay reasonable compensation to the arbitrators for work and expenses. In a final award, the arbitrators may order the parties to pay compensation to them, together with interest. The aforementioned applies in accordance with many arbitration rules, e.g. the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. A party or an arbitrator may file an application at the district court concerning amendment of the award as regards the compensation. (*Cf.* Sections 37, 39 and 41.)

18. An action in accordance with Section 33 aiming to have an award declared invalid does not cover the issue of the right of the arbitrators to compensation. The latter question is thus addressed in separate proceedings (see Section 41). The grant of a claim of invalidity in accordance with Section 33 does not therefore affect the entitlement of the arbitrators to compensation from the parties in accordance with a decision in the award.

19. Unless otherwise agreed by the parties, the arbitrators may, upon the request of a party, order the opposing party to pay compensation for the party's costs and determine the manner in which the compensation to the



arbitrators shall be finally allocated between the parties (see Section 42). Such a decision may, but will not necessarily, be invalid on the same ground as the award in general.

20. Where an award has been declared invalid in its entirety, the invalidity also covers orders in the award regarding the liability to compensate the opposing party's costs and the final allocation between the parties of the costs of the proceedings.

21. Where the invalidity pertains to only part of the award, the court, as a rule, must determine the extent to which decisions regarding allocation of costs between the parties are covered by the invalidity. In a manner comparable to that applicable to the main matter, a determination must then be made, among other things, as to whether the rules regarding *res judicata* entail that the remaining cost decision or decisions would prevent a new examination of the issues regarding cost allocation which are covered by the invalidity.

#### **The assessment in this case**

22. By virtue of the judgment of the court of appeal, it is established that the award is invalid in accordance with Section 33, first paragraph (2) of the Arbitration Act to the extent it pertains to the relationship between Poland and the investors based within the EU since, in these respects, it has been made in violation of EU law.

23. The ground for the invalidity does not cover the relationship between Poland and P.D. since he is to be regarded as a third-state investor (see para. 8). The fact that the ground for the invalidity of the other parts of the award is related to public policy does not entail that the award need be invalid in its entirety (see para. 13).

24. The investors' damages claims were denied in the award. No examination of the quantum of the damages claims occurred. It is apparent from the award that each of the investors was a party in the arbitration, and that they brought their action based on investments which each of them had made in Poland through their respective share in a jointly owned company; this did not involve an action brought by the company. Even if the claims of the investors are not recorded in the award, their ownership share is clearly set forth in the award and is also related in certain respects to the investment projects. Against this background, it may be deemed to be apparent from the award that each investor asserted their own claim.

25. In aggregate, nothing has come to light which suggests that the other investors' possibility to obtain a new examination regarding their claims against Poland would be affected by the fact that the award is preserved in that part which pertains to the relationship between P.D. and Poland. The latter-mentioned part of the award can thus be separated from the other parts of it.

26. The aforementioned leads to the conclusion that the invalidity of the award is not to be deemed to cover the relationship between P.D. and Poland. Accordingly, the judgment of the court of appeal shall be modified in this respect.

27. According to the award, P.D. and the other investors shall be jointly and severally liable to compensate Poland for a part of the country's costs incurred and ultimately liable for compensation to the arbitrators. The fact that that obligation on the part of the other investors, by virtue of the legally binding judgment of the court of appeal, is covered by invalidity does not constitute reason to consider that the order in the cost part is invalid in any respect in relation to P.D. The modification of the judgment of the court of appeal shall thus pertain both to the main matter and the cost part.

28. With this outcome, leave to appeal shall be granted regarding the allocation of the liability for costs of litigation incurred in the court of appeal, and Poland shall be released from the obligation to compensate P.D.'s cost incurred there. Instead, P.D. shall, as the losing party, be obliged to compensate Poland's cost of litigation incurred in the court of appeal. The amount claimed by Poland, however, does not appear reasonable. Accordingly, compensation shall be adjusted in the manner set forth in the operative part. In addition, P.D. shall be obliged to compensate Poland for its cost of litigation incurred in the Supreme Court. The claim in this respect is reasonable.

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Justices of the Supreme Court Petter Asp, Eric M. Runesson, Christine Lager, Anders Perklev (reporting Justice) and Katrin Hollunger Wågnert participated in the ruling.  
Judge referee: Dennis Andreev.