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Brussels Court of First Instance Annuls Investment Arbitration Award Allegedly for the First Time

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On 18 February 2022, the French-speaking Brussels Court of First Instance handed down a [judgment](#) in which it set aside a USD 10 million UNCITRAL [award](#) that held Poland liable for denial of justice in favor of Manchester Securities Corporation (*MSC*). This judgment allegedly marks the first time that a Belgian court has set aside an investment arbitration award.

1. Facts

In 2006, MSC, a private investment firm incorporated in New York, concluded a bond purchase agreement with Leopard, a Polish real estate developer, to fund apartment development projects around Krakow (Poland). This agreement was secured by mortgages on the development projects.

In 2007, Leopard defaulted on its bond agreement with MSC, and it eventually initiated insolvency proceedings in 2009. In the context of these insolvency proceedings, MSC attempted to recover the amounts it was owed against the value of the apartment complex.

In 2012, the Polish Supreme Court ruled that MSC's mortgage on the apartment complex was invalid and, therefore, found that MSC did not have priority over Leopard's other creditors in the bankruptcy proceedings.

In 2015, MSC filed for arbitration under Article IX, para. 3 of the [US-Poland Bilateral Investment Treaty](#) (*the US-Poland BIT*), claiming USD 15 million. The UNCITRAL arbitral tribunal (seated in Brussels and chaired by Andrés Rigo Sureda) found that the Polish courts committed a denial of justice and had breached the Fair and Equitable Treatment (*FET*) obligation contained in Article II(6) of the US-Poland BIT. It ordered Poland to pay USD 9.5 million plus interest to MSC as compensation for the damage suffered and ordered MSC to reduce its claims in the bankruptcy proceedings by the amount paid by Poland.

More specifically, the arbitral tribunal found that the Polish Supreme Court acted in a discriminatory manner by invalidating MSC's mortgage while it had not invalidated the mortgage belonging to PKO (one of Leopard's other creditors). According to the arbitral tribunal, this arbitrary and discriminatory treatment amounted to a denial of justice.

2. Set aside proceedings before Belgian courts

In 2019, Poland applied to the Brussels Court of First Instance (the *Court*) to set aside the arbitral award based on Article 1717, para. 3(b)(ii) of the Belgian Judicial Code alleging that the arbitral tribunal had misapplied the concept of denial of justice and had actually turned itself into an appellate jurisdiction for the Polish Supreme Court. According to Poland, such ruling was thus in clear violation of international public policy.

In its judgment of 18 February 2022, the Court sided with Poland and set aside the arbitral award. The Court shared Poland's position that there was no reasonable basis to conclude that

the Polish Supreme Court had discriminated against MSC and found that the arbitral tribunal's application of the concept of denial of justice violated Belgian international public policy.

More specifically, the Court started by highlighting the fact that denial of justice must be interpreted in a very restrictive way. According to the Court, a denial of justice requires a fundamental failure of the national judicial system as a whole. A simple error of law or fact committed by a national judge is therefore not sufficient to establish the existence of a denial of justice.

According to the Court, in the case at hand, the arbitral tribunal failed to meet this high standard as it did not identify any malfunctioning in the Polish judicial system as a whole. The Court also found that the arbitral tribunal failed to identify any fraudulent conduct or bad faith by the Polish Supreme Court.

In particular, the Court noted that whilst the arbitral tribunal had found that the decision by the Polish Supreme Court was discriminatory because it differed from other decisions taken by that same Supreme Court in related cases, such difference did not amount to discrimination since those decisions had been handed down several years apart and were delivered in a legal system which does not know the rule of precedent (*stare decisis*) and were in disputes with distinct purposes and in which the parties did not necessarily have the same position or the same legal arguments. Additionally, the Court found that the arbitral tribunal's examination of the distinguishing factors between different Supreme Court decisions did not provide sufficient elements to conclude that discrimination took place. On the contrary, the Court found that, by carrying out such an examination of the merits of Polish Supreme Court decisions, the arbitral tribunal effectively acted as an appeal court for the Polish Supreme Court.

Finally, the Court found that even if the Polish Supreme Court had adopted an incorrect position in the case at hand, the erroneous nature of one single judicial decision was not sufficient, in itself, to demonstrate the failure of a judicial system as a whole. In other words, even if a legal or procedural error by the Polish Supreme Court would have been established, this would not have been sufficient to establish a denial of justice.

Based on these elements, the Court concluded that the arbitral tribunal could not reasonably find that the Polish Supreme Court had adopted a manifestly discriminatory attitude towards MSC. The arbitral award was therefore set aside. Importantly, it is reported that MSC will now appeal the judgment before the Belgian Supreme Court.

3. Comment

This judgment of the Brussels Court of First Instance is interesting not only because it marks a rare example of the Belgian courts setting aside an arbitral award but also because it is allegedly the first time in which a Belgian court has set aside an investment arbitration award. With an appeal to the Belgian Supreme Court reportedly coming this first instance judgment may not be the end of the story. MSC is likely to allege that the Brussels Court of First Instance has exceeded its jurisdiction to set aside arbitral awards by effectively overturning a merits decision of the arbitral tribunal (even if the Court justified its decision on the basis of a violation of public policy).

Interestingly, the judgment delivered on 18 February 2022 does not mention the obligations of mutual trust and sincere cooperation between courts in different EU Member States under EU law. However, in the case at hand, there is a clear relationship and interaction between the judgment handed down by the Polish Supreme Court on the one hand and the follow-on set aside proceedings before the Belgian courts on the other hand. It would be interesting to see whether the obligations of mutual trust and sincere cooperation under EU law oblige the Belgian courts to adopt a ruling in line with the decisions handed down by the Polish Supreme Court and how any such EU law obligations conflict with Belgium's obligations under the New York Convention. This could potentially be a question put forward before the Belgian Supreme Court with a potential preliminary reference to the Court of Justice of the European Union.

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