



CONTESTED DECISION

Nacka District Court's final decision 2019-07-05 in cases Ä 6686-17, Ä 6620-18, Ä 6339-18, Ä 4354-18, Ä 4353-18, Ä 2544-18, Ä 1977-18, Ä 1976-18, Ä 1859-18, Ä 1857-18, Ä 1223-18, Ä 1222-18, Ä 1221-18 and Ä 2543-18, see Annex A

PARTER

Complainant

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Counterparties

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2. Anatolia States
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3. Gabriel States
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4. Terra Raf Trans Traiding Ltd
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ISSUE
Foreclosure

DECISION OF THE COURT OF APPEAL

1. The Court of Appeal rejects the appeals.
 2. Orders the Republic of Kazakhstan and the National Bank of Kazakhstan jointly and severally to pay the costs incurred by Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd., in the amounts of
 - a) SEK 5,043,614.92, GBP 7,539.84 and USD 114,877.50, of which SEK 5 014 120 relates to the legal fees, in case ÖÄ 7709-19 of the Court of Appeal,
 - b) SEK 3 993 672, USD 35 730, EUR 14 400 and GPB 360, of which SEK 3 977 660 relates to legal fees, in Supreme Court case Ö 3828-20,
 - c) SEK 4 440 744,51 and GBP 71 075,51, of which SEK 4 402 160,00 relates to legal fees, in Case ÖÄ 13682-21 of the Court of Appeal, and
 - d) interest on the sums in accordance with Section 6 of the Interest Act from the date of the Court of Appeal's decision until payment is made.
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BACKGROUND

Following a dispute between Ascom Group S.A., Anatoile Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd (the Investors) and the Republic of Kazakhstan (Kazakhstan), the Investors invoked arbitration before the Stockholm Chamber of Commerce under Article 26 of the Energy Charter Treaty (ECT). In December 2013, an arbitration award was rendered ordering Kazakhstan to pay approximately USD 500 million plus interest and reimbursement of the Investors' legal costs.

Kazakhstan challenged the arbitration award and requested that it be declared null and void. In support of their action, Kazakhstan argued, inter alia, that the arbitral award and the manner in which it was made were contrary to public policy. By judgment of 9 December 2016 in Case T 2675-14, the Court of Appeal dismissed Kazakhstan's action.

Kazakhstan subsequently complained of miscarriage of justice and applied for a reversal of the Court of Appeal's judgment. The Supreme Court rejected both the appeal for a miscarriage of justice and the application for leave to appeal in case no. Ö 613- 17.

Kazakhstan brought a new action for annulment of the arbitration award, arguing, inter alia, that the award was contrary to public policy.

In its decision of 9 March 2020 in case T 12462-19, the Court of Appeal found that there was a procedural impediment as the matter was the same as in the earlier complaint, and therefore dismissed Kazakstan's action.

Kazakhstan has subsequently re-applied for a stay, which was rejected by the Supreme Court in Case No Ö 1888-20.

After the Investors requested enforcement of the arbitration award, the Enforcement Authority ordered the attachment of securities held in a securities deposit account at SEB, funds in a cash account at SEB and claims related to the securities. The securities consisted of shares in some thirty listed Swedish companies. The attachment orders were made on the grounds that the property was considered to belong to Kazakhstan.

Kazakhstan and the National Bank of Kazakhstan (National Bank) appealed against the attachment decisions. They argued that the enforcement of the award was precluded because the property did not belong to Kazakhstan for the purposes of attachment law, because the securities were not located in Sweden and because the property was covered by State immunity. Kazakhstan and the National Bank argued in the case that the property belonged instead to the National Bank. The District Court dismissed the appeals in a decision of 5 July 2019 in case no Ä 2453-18. The decision was appealed to the Court of Appeal.

The Court of Appeal decided on 17 June 2020 in case no ÖÄ 7709-19 to annul the enforcement authority's decision on attachment as the property was covered by state immunity and could not be attached.

The Supreme Court, in its decision of 18 November 2021 in Case No Ö 3828-20, declared that there was no immunity from enforcement and set aside the decision of the Court of Appeal and referred the case back to the Court of Appeal for further proceedings.

CLAIMS AND APPROACH

Kazakhstan and the National Bank have requested the Court of Appeal to set aside the attachments contained in the contested orders, to relieve them of the obligation to pay the Investors' costs in the District Court and to order the Investors to pay their costs therein instead.

The investors have opposed the amendments.

The parties have applied for reimbursement of their costs in the Court of Appeal and the Supreme Court. The investors have further requested that, irrespective of the outcome of the case, Kazakhstan should be ordered to pay them SEK 475 900 for their work in the public policy part.

GROUND

Kazakhstan and the National Bank

Kazakhstan and the National Bank have objected that there is an obstacle to the seizure of the property seized under the contested decisions. In support of their objection, they submit that the property does not belong to Kazakhstan and that the securities are not located in Sweden. In addition to the above, Kazakhstan has also argued before the Court of Appeal that enforcement is contrary to public policy.

Investors

The investors have contested the existence of an impediment to enforcement on any of the grounds put forward by Kazakhstan and the National Bank.

THE INVESTIGATION

By order of 28 October 2022, the Court of Appeal rejected the evidence adduced by Kazakhstan and the National Bank in support of their objection that enforcement was contrary to public policy.

In the Court of Appeal, the parties have relied on certain new evidence in the form of legal opinions and statements from foreign courts. In addition, the investigation is essentially the same as in the District Court.

THE REASONS FOR THE COURT OF APPEAL'S DECISION

The property is located in Sweden

The property seized consists of nominee-registered shares issued by voting companies registered in Sweden and whose shares are held in an account in accordance with the Act (1998:1479) on Central Securities Depositories and the Holding of Financial Instruments in Accounts (Kontoföringslagen). They are held in an account with the Swedish Central Securities Depository

Euroclear. Euroclear has granted SEB in Sweden the right to take registration measures on its own behalf and on behalf of others and the right to be registered as nominee for the shares. The Bank of New York Mellon (BNY) is registered as nominee in SEB's register. The shares are admitted to trading on the Swedish market.

The property further consists of cash assets related to the securities in the form of dividends, sales proceeds from subscription rights, coupon tax refunds and cash in a cash account with SEB in Sweden linked to the securities deposit.

In its investigation, the Enforcement Authority has been able to locate the property to SEB and identify and specify the shares which were registered with the address "BNYMSANV RE ANVLON RE MINISTRY OF BNYM, POBEDA AVENUE, ASTANA 10000, KAZAKSTAN" at the above-mentioned securities depository with account number 01-100261060. Other assets could be linked to the above-mentioned cash account with account number 5555 85 062 45.

It has now been established that the property is located in Sweden and not at BNYM in London, as claimed by Kazakhstan and the National Bank. The Crown Prosecution Service has therefore also been empowered to take the decisions in question.

Swedish law shall apply

Chapter 5, Section 3 of the Financial Instruments Trading Act (1991:980) sets out a rule on which country's law is applicable to the effects in rem that may arise, inter alia, from the transfer of dematerialised financial instruments. The provision does not cover legal issues relating to bonds in connection with a transfer (see prop. 1999/2000:18 p. 96 et seq. and prop. 2004/05:30 p. 90).

The question of whether Kazakhstan owns the property in question is a question of law of obligations. The fact that the National Bank has claimed that it is the owner of the property does not mean that the provision in question is applicable.

As previously stated, the property is located in Sweden and Swedish law is therefore applicable.

It appears that the property belongs to Kazakhstan

According to Chapter 4, Section 17 of the Enforcement Code, movable property may be attached if it is clear that the property belongs to the debtor.

The burden of proving that the property belongs to the debtor is on the applicant.

The property has been identified at SEB

The shares in question have been registered in a custody account (01-100261060) with SEB. At the request of Euroclear, and in accordance with the regulation contained in Chapter 3, Section 12 of the Account Processing Act, SEB has provided information on the shareholders whose shares SEB manages and the number of shares of various types held by each shareholder. The information has been compiled in Euroclear's public nominee lists. The list of nominees of Handelsbanken lists "BNYMSANV RE ANVLON RE MINISTRY OF BNYM, POBEDA AVENUE, ASTANA 10000, KAZAKSTAN" as the owner of a certain number of shares. The address belongs to the Kazakh Ministry of Finance.

The account description at SEB for all securities in the securities account is "BNYMSANV RE SANVLON RE MINISTRY OF FINANCE OF THE REPUBLIC OF KAZAKHSTAN".

It is therefore clear that SEB managed the shares on behalf of BNY, with Kazakhstan as shareholder, and there is therefore no confusion between the securities held in the securities account (01-100261060) and the other assets held in the cash account (5555 85 062 45).

Assets of the National Fund are owned by Kazakhstan

The inclusion of the seized assets in the National Fund has previously been claimed by Kazakhstan and the National Bank. The Supreme Court has also in its decision, p. 41,

concluded that this is the case. It has therefore been established that the seized property was part of the National Fund.

The National Fund was established by Kazakhstan in 2000 in accordance with Presidential Decree No. 402. The purpose of the Fund was stated to be, inter alia, to ensure stable economic development in the country. The Decree states that the assets of the Fund are accumulated on behalf of Kazakhstan and that the President decides on the size and direction of the Fund and decides on the use of the funds on the basis of proposals from the Government.

The assets of the Fund are accumulated in the National Bank, which also has a fiduciary mandate under an agreement with the government (the so-called National Fund Agreement). The Agreement sets out the framework for the fiduciary mandate and Article 2(2) states that the National Bank shall transfer money to the government within ten working days of receiving instructions to do so from the government. Article 7(4) states that the National Fund Agreement can only be terminated by decision of the President.

The Kazakh Budget Law states that the National Fund is financed, inter alia, by state revenues derived from oil and natural gas extraction, tax revenues and royalties, and Articles 21(3) and 21(4) state that the state may make withdrawals from the National Fund by transfer to the state budget in the form of planned withdrawals or when necessary for specific purposes.

The National Bank's annual accounts show that the assets of the National Fund have not been recorded as an asset of the National Bank.

Thus, it appears that the ownership of the assets of the National Fund belongs to Kazakhstan and that the National Bank has only managed the Fund. The fact that Kazakhstan and the National Bank referred to the National Fund Agreement as "Trust management" does not affect this assessment.

BNY and SEB have only managed the property

The National Bank's Global Custody Agreement with BNY, Articles 2(a) and 2(b), states that the National Bank has entrusted BNY with the task of acting as custodian of securities of a certain type and number.

The agreement between BNY and SEB has not been presented in the case but nothing else has emerged other than that SEB had a fiduciary relationship similar to the one BNY had with the National Bank.

In line with this, SEB has, in accordance with the provision of Chapter 3, Section 12 of the Account Management Act, provided Euroclear with information on the shareholders whose shares it managed. It also emerged from the hearing of Catharina Buresten that SEB in turn received this information from BNY.

It appears from this that the property that has been traced to accounts held with SEB in Sweden and identified and specified has been managed only by BNY and SEB and that the ownership has not been transferred to either BNY or SEB.

Other circumstances also indicate that Kazakhstan is the owner of the property

Other circumstances indicating that Kazakhstan is the owner of the shares are that the Minister of Finance of Kazakhstan has authorised BNY to exercise on behalf of Kazakhstan all the rights normally accorded to a shareholder, such as voting rights and the right to claim reimbursement of coupon tax in accordance with the applicable tax treaties. The tax authorities have also granted Kazakhstan the right to repayment of coupon tax paid on 41 occasions in 2016-2018. Furthermore, in the list of shareholders of AB Electrolux, the Ministry of Finance of Kazakhstan has been registered as a shareholder of 0.7% of the shareholding.

All of these facts strongly indicate that Kazakhstan is the owner of the property.

It is not contrary to public policy to enforce attachment orders

Finally, Kazakhstan and the National Bank claim that the enforcement of the arbitral award may not take place under Chapter 3, Section 21 of the Code of Execution because it would be contrary to public policy since the arbitral award was obtained by fraud. The facts relied on by Kazakhstan and the National Bank in this respect are the same as those examined in the earlier actions for annulment and nullity. There is no reason to make a different assessment now. There is therefore no obstacle to enforcement on this ground. The fact that courts in other countries may have come to a different conclusion does not affect this assessment.

Summary conclusions

The seized property is located in Sweden and Kazakhstan is the owner of the property. There is no other obstacle to enforcement.

The appeal by Kazakhstan and the National Bank must therefore be dismissed.

Legal costs

In this case, it is appropriate to apply the provisions on costs in Chapter 18 of the Code of Judicial Procedure, in accordance with Paragraph 32 of the Act (1996:242) on court cases.

In view of the outcome of the cases, Kazakhstan and the National Bank are ordered to jointly and severally pay the Investors' costs in the Court of Appeal and in the Supreme Court. In view of the scope of the dispute, the amounts claimed appear to be reasonable.

HOW TO APPEAL, see Annex B Appeals
by 2023-02-06

Judges Sven Johannisson and Pernilla Svärd, Judges-Rapporteur, and Katarina Fabian,
Assistant Judge, and Boel Hilding Berggren, Acting Assistant Judge.