

SVEA COURT OF APPEAL
Department 04
Division 0410

FINAL DECISION
16 January 2023

Matter No.
ÖÄ 13682-21

APPEALED DECISION

Nacka District Court's final decision of 5 July 2019 in case no. 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 appendix A

PARTIES

Claimants

1. The Republic of Kazakhstan
c/o Ministry of Finance
11 Zhenis Avenue
010000, Nur-Sultan
Kazakhstan

Counsel: Advokat Fredrik Ringquist and advokat Malin Berggren as well as associate Julia Fermbäck
Mannheimer Swartling Advokatbyrå AB
P.O. Box 1711
111 87 Stockholm

Counsel: Advokat Alexander Foerster
Birger Jarlsgatan 2
114 34 Stockholm

2. The National Bank of Kazakhstan
21 Koktem-3
050040, Almaty
Kazakhstan

Counsel: Advokat Karl Guterstam, advokat Linda Landén and advokat Magnus Nygren as well as associate Stina Isaksson
Sandart & Partners Advokatbyrå KB
P.O. Box 7131
103 87 Stockholm

Counterparties

1. Ascom Group S.A.
75 A. Mateevici Street
Chisinau, MD-2008
Moldova

2. Anatolie Stati
20 Dragomirna Street
Chisinau, MD-2008

Document ID 1886879

Postal address
P.O. Box 2290
103 17 Stockholm

Visiting address
Birger Jarls Torg 16

Telephone
08-561 670 00
Telefax
08-561 675 09
e-mail: svea.avd2@dom.se
www.svea.se

Opening hours
Monday – Friday
9 am – 4:30 pm

Moldova
3. Gabriel Stati
1A Ghiocilor Street
Chisinau, MD-2008
Moldova

4. Terra Raf Trans Traiding Ltd
No 41 Unit 1.2.02 Block 1 Eurotowers Gibraltar
GX11 1 AA
Gibraltar

Counsel to 1–4: Advokat Ginta Ahrel, advokat Therése Isaksson and advokat Bo G. H. Nilsson as well as associate Tom Sundin Westerberg & Partners Advokatbyrå AB
P.O. Box 3101
103 62 Stockholm

MATTER
Enforcement

DECISION OF THE COURT OF APPEAL

1. The Court of Appeal rejects the appeals.
2. The Republic of Kazakhstan and The National Bank of Kazakhstan are ordered to jointly and severally compensate Ascom Group S.A, Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd for their litigation costs 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 comprises costs for legal counsel, in the Court of Appeal's case no. ÖÄ 7709-19,
 - b) SEK 3,993,672, USD 35,730, EUR 14,400 and GBP 360, of which SEK 3,977,660 comprises costs for legal counsel, in the Supreme Court's case no. Ö 3828-20,
 - c) SEK 4,440,744.51 and GBP 75,075.51, of which SEK 4,402,160.00 comprises costs for legal counsel, in the Court of Appeal's case no. ÖÄ 13682-21, and
 - d) interest on the above amounts pursuant to Section 6 of the Interest Act as from the day of the Court of Appeal's decision until the day of payment.

BACKGROUND

After a dispute had arisen between and among Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Trading Ltd (the “Investors”) and The Republic of Kazakhstan (“Kazakhstan”), the Investors requested arbitration before the Stockholm Chamber of Commerce pursuant to article 26 of the Energy Charter Treaty. In December of 2013, an arbitral award was given under which Kazakhstan was ordered to pay to the Investors approximately USD 500 million plus interest as well as compensation for the Investors’ litigation costs.

Kazakhstan challenged the arbitral award and moved that it should be declared invalid. As grounds for its challenge, Kazakhstan claimed, among other things, that the arbitral award and the manner in which it was given violated *ordre public*. Through a judgment of 9 December 2016 in case no. T 2675-14, the Court of Appeal rejected Kazakhstan’s challenge.

Thereafter, Kazakhstan appealed claiming that a grave procedural error had occurred (SWE: *domvilla*) and applied for a new trial (SWE: *resning*). The Supreme Court rejected the appeal based on grave procedural error as well as the application for a new trial in its case no. Ö 613-17.

Kazakhstan opened up new litigation in which it again challenged the arbitral award as well as moved that it should be declared invalid on the grounds that the manner in which the arbitral award was given had violated *ordre public*, among other things. In its decision of 9 March 2020 in case no. T 12462-19 the Court of Appeal held that a procedural impediment prevented the Court of Appeal from hearing the case as the subject matter was the same as in the earlier challenge, and consequently dismissed Kazakhstan’s challenge.

Thereafter, Kazakhstan has again applied for a new trial, which the Supreme Court rejected in case no. Ö 1888-20.

After the Investors had requested enforcement of the arbitral award, the Swedish Enforcement Agency decided to seize securities in a securities account with SEB, funds in a bank account with SEB as well as claims attached to the securities. The securities comprised shares in approximately thirty publicly traded Swedish limited liability companies. The enforcement decisions were made on the basis that the property had been deemed to belong to Kazakhstan.

Kazakhstan and the National Bank of Kazakhstan (the “National Bank”) have appealed the enforcement decisions. They maintained that there were impediments to the enforcement of the arbitral award, because from an enforcement perspective the property did not belong to Kazakhstan, because the securities were not located in Sweden, and because the property was covered by state immunity. In the said case, Kazakhstan and the National Bank had maintained that the property instead belonged to the National Bank. The District Court rejected the appeals in its decision on 5 July 2019 in case no. Ä 2453-18. The decision has been appealed to the Court of Appeal.

On 17 June 2020, the Court of Appeal decided in case no. ÖÄ 7709-19 to annul the Enforcement Agency’s enforcement decisions because the property was covered by state immunity and could not be seized.

In its decision of 18 November 2021 in case no. Ö 3828-20, the Supreme Court has ruled that no immunity against enforcement is in place and has annulled the Court of Appeal’s decision, and further remanded the case back to the Court of Appeal for further dealing.

MOTIONS AND POSITIONS

Kazakhstan and the National Bank have moved that the Court of Appeal shall annul the enforcements falling within the scope of the appealed decisions, discharge them from the liability to compensate the Investors for their litigation costs before the District Court and instead order the Investors to compensate their litigation costs before that Court.

The Investors have disputed the motions.

The parties have claimed compensation for their litigation costs before the Court of Appeal and the Supreme Court. The Investors have further moved that Kazakhstan, irrespective of the outcome in the case at issue, shall be ordered to compensate them in the amount of SEK 475,900 for their work on aspects of the issue of *ordre public*.

GROUNDS

Kazakhstan and the National Bank

Kazakhstan and the National Bank have objected that an impediment to the enforcement of the property covered by the appealed decision is at hand. As grounds for the objection, they have argued that the property does not belong to Kazakhstan and that the securities are not located in Sweden. In addition to the aforementioned, they have before the Court of Appeal argued that enforcement would violate *ordre public*.

The Investors

The Investors have disputed that any impediment to enforcement is at hand on any of the grounds invoked by Kazakhstan and the National Bank.

THE INVESTIGATION

Through a decision of 28 October 2022, the Court of Appeal dismissed evidence invoked by Kazakhstan and the National Bank in support for its ground that enforcement violates *ordre public*.

The Parties have invoked certain new evidence before the Court of Appeal in the form of legal opinions and rulings from foreign courts. Beyond the said, the investigation before the Court of Appeal is largely identical to that before the District Court.

GROUNDS FOR THE COURT OF APPEAL'S DECISION

The property is located in Sweden

The seized property comprises nominee registered shares, issued by CSD-registered companies registered in Sweden, and the shares of which are kept under the Central Securities Depositories and Financial Instruments Accounts Act (SWE: *lag om värdepapperscentraler och kontoföring av finansiella instrument*, 1998:1479) (the "Act"). They are accounted for by the Swedish central securities depository Euroclear. Euroclear has granted SEB the right in Sweden, as the securities accounting institute, to make registrations in the registry for its own securities as well as for those of third parties, as well as the right to be registered as the nominee for the shares. Bank of New York Mellon ("BNY") has been registered as nominee in SEB's register. The shares are listed for trade on the Swedish market.

Further, the property comprises liquid assets attached to the securities resulting from dividend payments, sales of options, repayments of withholding tax and cash deposited to a bank account with SEB in Sweden.

In its investigation, the Enforcement Agency has been able to locate the property to SEB and has been able to identify and specify the shares as registered to the address "BNYMSANV RE ANVLON RE MINISTRY OF BNYM, POBEDA AVENUE, ASTANA 10000, KAZAKSTAN" in the aforementioned securities account with account number 01-100261060. The remaining assets have been tied to the aforementioned bank account, with account number 5555 85 062 45.

Through what has been set out above, it has been established that the property is located in Sweden and not with BNY in London, which Kazakhstan and the National Bank have argued. Therefore, the Enforcement Agency has been authorized to make the decisions relevant in the action at issue.

Swedish law is applicable

Chapter 5, Section 3 of the Financial Instruments Trading Act (SWE: *lag om handel med finansiella instrument*, 1991:980) sets out a rule concerning which national laws that shall be applied to effects *in rem* in cases of, among other things, the transfer of dematerialised financial instruments. Contractual issues that could arise in connection with a transfer do not fall within the scope of the provision (see Government Bill 1999/2000:18 p. 96 f. and Government Bill 2004/05:30 p. 90).

The question of whether or not Kazakhstan is the owner of the property is a contractual issue. The fact that the National Bank has argued that the bank is the owner of the property does not trigger applicability of the said provision.

As has been noted above, the property is located in Sweden and consequently Swedish law shall apply.

It has been established that the property belongs to Kazakhstan

Chapter 4, Section 17 of the Enforcement Code stipulates that movable property may be seized if it has been established that the property belongs to the debtor.

The applicant bears the burden of proof for establishing that the property belongs to the debtor.

The property has been identified at SEB

The relevant shares have been registered in a securities account (01-100261060) with SEB. Upon Euroclear's request, and in accordance with the rules set out in Chapter 3, Section 12 of the Act, SEB has provided information on the shareholders for whose shares SEB is the nominee as well as the number and type of shares owned by each individual shareholder. The information has been collated in Euroclear's public

nominee records. The nominee record for Handelsbanken states that “BNYMSANV RE ANVLON RE MINISTRY OF BNYM, POBEDA AVENUE, ASTANA 10000, KAZAKSTAN” is the owner of a certain number of shares. The address belongs to the Ministry of Finance of Kazakhstan.

The nominee record for SEB states, with respect to all shares in the securities account, “BNYMSANV RE SANVLON RE MINISTRY OF FINANCE OF THE REPUBLIC OF KAZAKHSTAN”.

Thus it is entirely clear that SEB has managed the shares on BNY’s behalf, with Kazakhstan as the shareholder, and there has been no intermixture of the registered securities in the securities account (01-100261060) and other funds in the bank account (5555 85 062 45).

The assets in the National Fund are owned by Kazakhstan

The fact that the seized property belongs to the National Fund has previously been asserted by Kazakhstan and the National Bank. Also the Supreme Court has in its ruling concluded this to be the case, see p. 41. Thus, it has been established that the seized property formed part of the National Fund.

The National Fund was incorporated by Kazakhstan in the year 2000 pursuant to Presidential Decree no. 402. The purpose of the fund was stated to be, among other things, to secure a stable economic development for the country. The decree stipulated that the assets of the fund should accumulate for the benefit of Kazakhstan and that the President should have authority to determine the size and focus of the fund and also determine the use of the funds on the basis of proposals from the government.

The assets in the fund accumulate in the National Bank, which is tasked with managing the fund pursuant to a management agreement (the so-called National Fund Agreement). The agreement sets out the frame of the management assignment and article 2.2 stipulates that the National Bank shall transfer funds to the government

within ten business days from receipt of instructions thereon from the government. Article 7.4 sets out that the National Fund Agreement can only be terminated by the President.

The Kazakh budget act clarifies that the National Fund is financed by state income from the extraction of oil and natural gas as well as through tax revenue and royalties, and articles 21.3 and 21.4 stipulate that the state may withdraw funds from the National Fund by way of transfer to the state budget in the form of planned withdrawals or in case of need for specific purposes.

The annual report of the National Bank shows that the assets in the National Fund have not been taken up as assets in its balance sheet.

Thus, it is clear that the ownership rights to the assets in the National Fund belong to Kazakhstan and that the National Bank has only managed the fund. The fact that Kazakhstan and the National Bank have labelled the National Fund Agreement as “Trust Management” does not affect this conclusion.

BNY and SEB have only managed the property

Articles 2 a) and 2 b) of the Global Custody Agreement between the National Bank and BNY state that the National Bank has given BNY the assignment to act as custodian of securities of a certain number and type.

The agreement between BNY and SEB has not been submitted in the action at issue, but nothing has been presented that would contradict that SEB’s assignment from BNY corresponds to BNY’s assignment from the National Bank.

In line with the above, SEB has, in accordance with the provisions set out in Chapter 3, Section 12 of the Act, provided Euroclear with information on the shareholders whose shares the bank managed. The witness statement by Catharina Buresten has further clarified that SEB received this information from BNY.

The above shows that the property that has been localized to accounts with SEB in Sweden, and which has been identified and specified, has merely been managed by BNY and SEB, and the ownership rights have not been transferred onto neither BNY nor SEB.

Other circumstances also point to Kazakhstan's ownership of the property

Other circumstances that point to Kazakhstan's ownership of the shares is that Kazakhstan's Ministry of Finance has provided BNY with a power of attorney to exercise on Kazakhstan's behalf all rights that typically benefit a shareholder, such as vote and demand repayment of withholding tax as per applicable double taxation treaties. The Swedish Tax Agency has to that point on 41 occasions granted Kazakhstan the right to repayment of withholding tax during 2016-2018. Further, the Kazakhstan Ministry of Finance has been registered in AB Electrolux's share register as the owner of 0.7% of the share capital in that company.

All of the above circumstances show clearly that Kazakhstan is the owner of the property.

Executing the seizure decisions does not violate *ordre public*

Finally, Kazakhstan and the National Bank have argued that execution of the enforcement decisions cannot be allowed pursuant to Chapter 3, Section 21 of the Enforcement Code because it would violate *ordre public*, since the arbitral award was obtained through fraud. The circumstances referenced by Kazakhstan and the National Bank in this respect are the same as those examined in the earlier challenge and annulment cases. There is no reason to make a different assessment now. Thus, there is no impediment to enforcement on this ground. The fact that courts in other countries may have reached a different conclusion does not impact the said assessment.

Summary of conclusions

The seized property is located in Sweden and Kazakhstan is the owner of the property.
No other impediment to enforcement is at hand.

Kazakhstan's and the National Bank's appeal shall therefore be rejected.

Litigation costs

There are grounds to apply the provisions of Chapter 18 of the Code of Judicial Procedure to the action at issue, in accordance with Section 32 of the Act on Court Matters (SWE: *lag om domstolsärenden*, 1996:242).

In view of the outcome in the appealed matters, Kazakhstan and the National Bank shall be ordered to jointly and severally compensate the Investors for their litigation costs before the Court of Appeal and the Supreme Court. In view of the scope of the dispute, the claimed amounts appear reasonable.

HOW TO APPEAL, see appendix B

Appeals to be submitted by 6 February 2023

The decision has been made by Judges of Appeal Sven Johannisson and Pernilla Swärd (reporting), and co-opted Judge of Appeal Katarina Fabian as well as appointed Associate Judge Boel Hilding Berggren.