SUPREME COURT'S DECISION

Case no.

delivered in Stockholm on 18 November 2021

Ö 3828-20

PARTIES

Appellants

1. Ascom Group S.A.

75 A. Mateevici Street

Chisinau MD-2008

Moldavia

2. AS

3. GS

4. Terra Raf Trans Traiding Ltd

No 41 Unit 1.2.02 Block 1 Eurotowers Gibraltar

GX11 1AA

Gibraltar

Counsel for 1-4: Attorneys BGHN, GA, TI and MFA and lawyer ABW

Respondents

1. The Republic of Kazakhstan
Ministry of Finance
11 Zhenis Avenye
010000 Nur-Sultan
Kazakhstan

Counsel: Attorneys AF and LM and lawyer AJ

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

THE MATTER

Attachment

RULING APPEALED

Decision of the Svea Court of Appeal of 17 June 2020 in case ÖÄ 7709-19

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THE SUPREME COURT'S DECISION

The Supreme Court finds that there is no immunity from enforcement in the property covered by the Enforcement Agency's attachment decision (paragraph 1 of the decision of the court of appeal).

The Supreme Court grants leave to appeal regarding the remainder of the case.

The Supreme Court revokes the decision of the court of appeal and refers the case back to the court of appeal for further proceedings.

The court of appeal shall, in deciding the case, decide the matter of liability for the costs of litigation in the Supreme Court.

CLAIMS IN THE SUPREME COURT

Ascom Group SA, AS, GS and Terra Raf Trans Traiding Ltd (the investors) have claimed that the Supreme Court shall affirm the district court's decision, release them from the obligation to pay the counterparties' costs of litigation in the district court and the court of appeal and order the counterparties to jointly and severally pay the investors for their costs of litigation in the district court and the court of appeal.

The Republic of Kazakhstan and the National Bank of Kazakhstan have opposed modification of the decision of the Court of Appeal.

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

The Supreme Court has granted the leave to appeal set out in paragraph 9 below.

REASONS FOR THE DECISION

Background

1. Following a dispute between the investors and Kazakhstan, the investors initiated arbitral proceedings administered by the Stockholm

Chamber of Commerce pursuant to Article 26 of the Energy Charter Treaty[1]. In December 2013, an arbitral award was issued according to which Kazakhstan was ordered to pay approximately USD 500 million plus interest and compensation for the costs of litigation of the investors.

2. Kazakhstan brought an action for annulment of the award. The court of appeal rejected the action. Kazakhstan subsequently complained of grave procedural error and applied for relief from the judgment of the court of appeal. The Supreme Court rejected both the complaint regarding grave procedural error and the application for relief.

3. Following a request by the investors for enforcement of the award, the Enforcement Authority decided to attach financial instruments on a securities depository at the bank, SEB, funds on a cash account at SEB, and receivables linked to the instruments (the property). The securities consisted of shares in approximately thirty listed Swedish limited companies. The attachment decisions referred to the property as belonging to Kazakhstan.

4. Kazakhstan and the National Bank appealed the attachment decisions. They asserted that the property could not be subject to enforcement because the property does not belong to Kazakhstan in the sense required by statutory law for attachment because the instruments are not located in Sweden, and because the property is subject to state immunity. In the case, Kazakhstan and the National Bank claimed that the property instead belonged to the National Bank. The district court rejected the appeals. The decision was appealed to the court of appeal.

5. Without elaborating on the objections made by Kazakhstan and the National Bank that the attached property does not belong to Kazakhstan in the sense required by attachment law and the securities were not located in

[1] Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects and Final Act from the Energy Charter Conference (Swedish Treaty Series 1997:57).

Sweden, the court of appeal has concluded that the property is subject to state immunity. The court has therefore changed the district court's decision and set aside the attachment decisions.

6. The investors have appealed the decision of the court of appeal and argued that the property can be attached.

7. Kazakhstan and the National Bank have – on the same grounds as in the district court (cf. paragraph 4) – maintained that the property cannot be subject to attachment.

8. The investors have contested that the property is subject to immunity. They have asserted that the property belongs to Kazakhstan and not to the National Bank and that the property is used for other than government non-commercial purposes. They have further claimed that Kazakhstan in any event has lost the right to invoke state immunity due to abuse of rights.

The leave to appeal

9. The Supreme Court has granted leave to appeal on the question of whether the property covered by the Enforcement Authority’s attachment decisions is subject to immunity from enforcement. The question of leave to appeal regarding the remainder of the case has been stayed.

10. The leave to appeal means that the Supreme Court does not consider in this decision the question whether the attached property is to be deemed to be located in Sweden or whether the property belongs to Kazakhstan in the sense required by attachment law.

Legal bases

Immunity from enforcement

11. States' claim to immunity is based on the principle that states are sovereign and mutually equal; accordingly, in principle, they may not exercise jurisdiction in respect of another state. However, in state practice, this principle has developed in a restrictive direction such that exceptions can be made for disputes related to a state's commercial or private law activities. This limitation, as far as immunity from jurisdiction is concerned, has been applied in the case law of the Supreme Court (cf. the Nordic Education Agreement case, NJA 1999, p. 821 and the "Embassy's Renovation Costs case, NJA 2009, p. 905).

12. The fact that a state has not been granted immunity from jurisdiction does not mean that it also lacks immunity from enforcement of a judgment or an arbitral award. The issue of immunity from enforcement must be assessed separately, whereby coercive measures for enforcement are considered to be more intrusive in a state's sovereignty than the exercise of jurisdiction. As a result, a foreign state is entitled to immunity from enforcement to a more far-reaching extent than from jurisdiction. (Cf., for example, Hazel Fox and Philippa Webb, The Law of State Immunity, 3rd ed., 2015, p. 23 f.)

13. However, in addition, immunity from enforcement is not absolute. The interest of a creditor in being paid in accordance with a judgment even when the debtor is a state justifies some limitations to immunity (cf. James Crawford, Brownlie's Principles of Public International Law, 9th ed., 2019, p. 489). However, such considerations presuppose that international customary law does not raise any obstacles thereto.

The significance of the 2004 UN Convention

14. There are no provisions in Swedish legislation on the immunity of a foreign state from enforcement here. However, Swedish courts are deemed to be obliged to observe the immunity that follows from international customary law.

15. On 2 December 2004, the United Nations General Assembly adopted the United Nations Convention on the Jurisdictional Immunities of States and Their Property. Sweden has ratified the Convention (see Swedish Treaty Series 2009:32) and incorporated it into Swedish law by the Jurisdictional Immunities and Their Property Act (2009:1514).

16. Neither the Convention nor the Act has yet entered into force. Nevertheless, the Convention may be relevant insofar as its provisions shed light on the content of international customary law (cf. Jurisdictional Immunities of the State, I.C.J. Reports 2012, p. 99, paragraph 66).

17. The Convention deals with issues of immunity from coercive measures in the context of court proceedings in Articles 18-21. As a general rule, no coercive measures against a state's property may be taken other than to the extent specified in the provisions of the conventions. Article 19 regulates state immunity from post-judgment measures of constraint. Pursuant to Article 19 (c), exemptions from immunity from enforcement may be granted if:

> *... it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken*

against property that has a connection with the entity against which the proceeding was directed.[2]

18. In the preparatory works for the 2009 Act it was stated that there was no common state practice regarding restrictions on the principle of immunity from enforcement, but that the countries of the Western world had developed an approach according to which enforcement would be permitted in property used or intended to be used for commercial purposes (cf. Government Bill 2008/09:204, pp. 45 and 56). Article 19 (c) can be viewed as an expression of this approach.

19. In the Lidingöhuset case, NJA 2011, p. 475 (paragraph 14), the Supreme Court found that the Convention in this respect expresses the principle now recognized by many states that enforcement can take place at least in property used for other than state non-commercial purposes. The Supreme Court thereby qualified the principle by distinguishing it from cases in which enforcement cannot take place. According to the Court, there is an impediment due to state immunity from enforcement in property owned by a foreign state when the state's purpose in holding the property is of a qualified nature, such as when the property is used by the state to exercise its sovereignty and similar tasks of an official nature. In this context, the case also makes mention of a specific category of property stated in Article 21 of the UN Convention.

20. Article 21 (1) states that certain types of state property *"shall not be considered as property specifically in use or intended for use by the State for purposes other than government non-commercial purposes under Article 19"*. According to Article 21 (1) (c), this applies to *"property of the central bank or other monetary authority of the State"*.

[2] There is no Swedish original text of the Convention. Swedish Treaty Series 2009:32 contains a translation.

21. Article 21 (1) (c) is intended to provide central banks and other monetary authorities with special protection from enforcement measures. However, the extent of this protection appears unclear in international customary law. This applies in particular in light of the fact that, during the negotiations that preceded the Convention, there were different views on the issue and that no clear state practice has subsequently been developed.

22. Considering the protection interest reflected in Article 21 (1) (c), the special protection of a central bank should apply not only to property in respect of which the bank is the owner under civil law, but also to property otherwise at the bank's disposal.

23. It is not self-evident, however, that the special protection should apply to all property owned by the central bank or which is at its disposal. The reason why central bank property should be entitled to special protection must be deemed to be that a central bank conducts activities within the area of monetary policy in a broad sense. The great importance of monetary policy to a state’s central functions justifies what is in principle absolute immunity in respect of property used within this activity.

24. There is no clear support for the position that absolute immunity under international customary law also applies in respect of property which a central bank has at its disposal without any connection to the bank's monetary policy tasks. Furthermore, such far-reaching entitlement to immunity does not appear to be justifiable. The special level of protection to be enjoyed by central banks should therefore be limited to such property as has a clear connection with the central bank's activities in the area of monetary policy. The extent to which other property owned by or at the disposal of the bank is protected from enforcement measures should instead be determined in accordance with the principles expressed in Article 19 of the Convention.

The purpose behind a state's holding of financial assets

25. As mentioned (cf. paragraphs 17-19), the purpose for which the property is held is of paramount importance when applying the principles expressed in Article 19. The purpose of holding real estate and movable property is, as a rule, apparent from the actual use of the property. In the Lidingöhuset case, the Supreme Court could therefore examine the exception to the principle of enforcement immunity on the basis of how the foreign state used its real property when the application for enforcement on the property was made. As regards holdings of financial assets traded on the capital market, there is often an absence of actual use that can form the basis for assessing the purpose behind the holding. The assessment may therefore be made in a different way.

26. There may be several purposes behind a state's investments of funds on the international capital market. As a rule, this involves funds which are not immediately needed to serve government purposes. The purpose of the investment may be that the state generally wishes to secure and increase the state's assets in order to meet society's needs in the long term and to create increased well-being in the country. The motive can also be comprehensively macroeconomic in that the state, for example, may regard the immediate consumption of assets as leading to undesirable effects on the country's economy. In addition, the holding of financial assets may be intended to counteract the negative effects of external factors or other unforeseen circumstances. There may also be monetary policy considerations behind a state's decision to save in financial assets abroad.

27. The chosen investment strategy can reflect the purpose of the state’s investment of funds on the international capital market. In the case of investments which are expected to generate a return in the long term for an as-of-yet undetermined use, the tolerance for risk may often be greater and the requirements for liquidity may often be lower as regards funds to which the

state wishes to have access in the near future for a particular specified purpose. In the latter case, investments in government bonds and bank deposits are generally more near at hand than investments in the stock market. The risk level and return requirement chosen can thus reflect the purpose of the holding.

28. An investor in listed shares and similar securities is indirectly exposed to the same business risks as the companies in which the investments are made. A state's primary motive for exposing itself to such risks can typically be assumed to be the same as that of other equity investors, namely better value development and higher returns than an investment that only aims to secure the real value of the assets. If the state's motive for the investment is not more developed than that, it cannot generally be regarded as an outflow of the state's sovereign actions. In order for immunity to continue to apply to such property, it must therefore be required that, over and above motives which are basically of a commercial nature, there are qualified purposes of a sovereign nature that are expressed concretely and clearly in the state's regulation of how the property is to be used. The mere fact that the state will be able to use the value of the property for government activities in the future or that the savings are intended for future generations cannot be considered to be enough.

29. A state's saving in financial assets on the international capital market may, like other government saving, per se serve a general macroeconomic function. However, this does not mean, without more, that such saving is to be regarded as a sovereign activity. For this to be the case, a more concrete link between, on the one hand, the form of saving and, on the other hand, the state's monetary policy or other acts of a sovereign nature must be required.

Financial assets in a sovereign wealth fund

30. The attached assets form part of the National Fund. The fund can be characterized as a so-called *sovereign wealth fund*.

31. Such funds have been created by many states. There is no generally accepted definition of what a sovereign wealth fund is. In a broad sense, it is a type of investment fund – i.e. a collection of different securities – which the state owns or which the state controls through an intermediary manager of the fund. The fund is often financed by state revenues derived from the exploitation of natural resources, by surpluses from the state's foreign exchange reserve, or with income from privatizations of state property.

32. The fund holdings can be divided into different portfolios based on differences in investment strategies and purposes. A common division is that existing between stabilization portfolios and savings portfolios. Typical of a stabilization portfolio is that it should be possible to quickly transfer the assets to the state budget in order to stabilize the domestic economy if necessary. The primary function of a savings portfolio generally is to instead return high yields in the long-term with an as-of-yet specific plan, whereby the liquidity requirements are normally lower. The two portfolio types thus differ, inter alia, in terms of risk tolerance (cf. paragraph 27). However, the two types of portfolios can be functionally linked in that proceeds from the savings portfolio may be planned to be transferred to the stabilization portfolio for use in accordance with political decisions.

33. The fact that certain securities are part of a sovereign wealth fund is not in itself decisive for the assessment of whether the securities should be subject to immunity from enforcement. The assessment may be made in the manner previously discussed (see paragraphs 26–29).

The Kazakh National Fund

34. The National Fund was established by Kazakhstan in 2000 in accordance with a presidential decree. The purpose of the fund was said to be to ensure a stable economic development of the country, to accumulate assets for future generations and to reduce the domestic economy's dependence on

external factors unfavorable to 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 focus of the fund and decides on the use of the funds on the basis of proposals from the government.

35. The assets are accumulated in the National Bank which also has a management engagement in accordance with an agreement with the state (the so-called National Fund Agreement). The agreement states the framework for the management engagement and that parts of such management may be entrusted to external managers. The National Bank's management engagement is also described in the Kazakh National Bank Act. The Act also sets out other tasks that are commonly performed by monetary authorities.

36. According to the Kazakh Budget Act, the National Fund is financed, inter alia, by State revenues derived from the extraction of oil and natural gas, primarily tax revenues and royalties. It is also stated that the National Fund must fulfill both a stabilization function (through a stabilization portfolio) and a savings function (through a savings portfolio). The two portfolios apply different investment strategies.

37. The state can make withdrawals from the National Fund by transfers to the state budget in the form of planned withdrawals or, if necessary, for a specific purpose. Articles 21.3 and 21.4 of the Budget Act have the following wording according to the translation into English that the National Bank has provided in the case:

> *21.3 National Fund of the Republic of Kazakhstan provides saving and stabilization functions. Saving function provides the accumulation of financial assets and other assets, excluding intangible assets, and the return on assets of the National Fund of the Republic of Kazakhstan in the long term with a moderate level of risk. Stabilization function is designed to maintain a sufficient level of liquidity of assets of the*

National Fund of the Republic of Kazakhstan. Part of the National Fund of the Republic of Kazakhstan, used for stabilization function is determined in the amount, necessary to provide the guaranteed transfer.

21.4 The formation and use of the National Fund of the Republic of Kazakhstan are determined by the situation in the global and domestic commodity and financial markets, the economic situation in the country and abroad, and the priorities of social and economic development while safeguarding macroeconomic and fiscal stability, and the compliance with the basic goals and objectives of the National Fund of the Republic of Kazakhstan.

The assessment in this case

The objection regarding the connection of the National Fund to the National Bank

38. An initial question is whether, as Kazakhstan and the National Bank have argued, the attached property is protected against enforcement measures merely by virtue of the principle set out in Article 21 (1) (c) of the UN Convention.

39. The National Bank may be considered as a central bank of the kind which, under international customary law, can enjoy special protection against enforcement measures. What has been said about the relationship between the government of Kazakhstan and the National Bank does not lead to any other assessment.

40. The special treatment of central bank property in terms of immunity is linked to the activity of central banks in the area of monetary policy. A question then is whether the attached property has a clear connection with the bank's central monetary policy function. (Cf. paragraphs 20–24.)

41. The property was a part of the savings portfolio of the National Fund at the time of attachment. The portfolio is actively managed with an investment strategy focused on shares and with a relatively high tolerance for risk– significantly higher than in the stabilization portfolio – in order to provide a high return. The management of the savings portfolio can basically not be considered different from other active and long-term asset management on the international capital market. In that perspective, the management of the savings portfolio thus appears to be normal management of an equity portfolio rather than an instrument for the exercise of the National Bank's exchange and monetary policy function. Nor has it emerged that the fund otherwise has any clear connection with such a function; the management of the savings portfolio could just as well have been entrusted to a government body without such function. (Cf. paragraph 24.)

42. With this assessment, a closer examination of the National Bank’s right to dispose over the fund is irrelevant (cf. paragraph 22).

43. Against this background, the issue of immunity may be decided in accordance with what generally applies to immunity from enforcement (cf. Article 19 of the UN Convention).

The objection regarding the purpose of the holdings

44. The attached shares and related receivables were thus included in the savings portfolio at the time of the attachment. As stated above, the management of the portfolio does not differ from other active and long-term management of shares and similar securities on the international capital market. There was therefore a commercial ingredient in the holding of the property. The question then is whether the property nevertheless had such a concrete and clear connection to a qualified purpose of a sovereign nature that, in spite of the commercial ingredient, it is subject to immunity from enforcement.

45. What Kazakhstan and the National Bank have stated regarding future state purposes is framed in very general terms and the presented regulation of the National Fund does not specifically express what those purposes are. Nor has it otherwise come to light that, prior to attachment, it had been decided that the attached property should be used for any specified state purpose. A clear connection between the attached property and a qualified purpose of a sovereign nature is therefore lacking. In this context it should be noted that long-term savings for future – as-of-yet specified – needs cannot be regarded as being of a sovereign nature. (Cf. paragraph 28.)

46. The National Fund, which includes the savings portfolio, is per se also intended to "ensure macroeconomic stability". The underlying idea seems to be that the long-term savings in the savings portfolio should create the conditions for taking budgetary stabilizing and similar measures even in the future perspective. However, the link between the attached property and this stabilization purpose must, however, be described as weak. A fulfillment of this purpose requires not only the sale of the shares, but also – as the Kazakh regulation has been described in the case – that the value of what has been sold is subsequently transferred from the savings portfolio to the stabilization portfolio in order, in the next step, to be transferred to the state budget. This link cannot be considered concrete enough to justify immunity in respect of property of the present kind (cf. paragraph 29).

47. Against this background, the main purpose of the holding of the attached property at the time of attachment must be deemed to have been to contribute on a more general level in the long term to preserving and increasing the Kazakh state's assets for future use (cf. paragraph 28). Such a purpose is not considered sufficiently qualified to be regarded as an expression of Kazakhstan's sovereign acts or similar acts of an official character.

48. The purpose was thus such that immunity from enforcement in the property does not apply.

Conclusion

49. The decision of the court of appeal shall therefore be set aside and leave to appeal is granted in the remainder of the case.

50. Since the remaining issues have not been considered by the court of appeal, the case shall be referred to the court of appeal for further proceedings. The question regarding liability for costs of litigation in the Supreme Court shall be examined there (Chapter 18, Section 15, third paragraph of the Code of Judicial Procedure).

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Justices of the Supreme Court Kerstin Calissendorff, Sten Andersson, Eric M. Runesson (reporting Justice), Cecilia Renfors and Johan Danelius participated in the ruling.
Judge referee: Josefine Wendel