SVEA COURT OF APPEAL	**JUDGMENT**	Case No.
Department 02	23 January 2015	T 2454-14
Division 020106	Stockholm	

CLAIMANT
The Government of the Russian Federation
c/o Federal Customs Office of the Russian Federation
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Russia

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RESPONDENT
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MATTER
Challenge of arbitral award rendered in Stockholm on 21 October 2013

JUDGMENT OF THE COURT OF APPEAL

1. The Court of Appeal rejects the motions of the claimant.

2. The Government of the Russian Federation is ordered to compensate I.M. Badprim S.R.L. for its litigation costs in the amounts of SEK 852,957 (out of which SEK 840,000 comprises costs for legal counsel), EUR 16,858 (out of which EUR 9,310 comprises costs for legal counsel) and USD 29,236. The Government of the Russian Federation is ordered to pay interest on each of the above amounts pursuant to Section 6 of the Swedish Interest Act from this day until the day of payment.

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BACKGROUND

I.M. Badprim S.R.L (Badprim) is a Moldovan company with operations in the construction and contracting sectors. On 18 July 2007, the company and the Federal Customs Office of the Russian Federation (the Customs Office) entered a turn-key contracting agreement for the design and construction of the border crossing post Mamonovo – Grzechotki, on the border between Russia and Poland. The agreement was entered within the scope of the European Union's (the EU) program on technical assistance to developing countries – *TACIS Cross-Border Cooperation Programme* (the TACIS program) - and was financed in its entirety by funds provided by the EU. The agreement was signed by Badprim as lead contractor, the Customs Office as client and the then Commission of the European Economic Community (the Commission) as financier. The agreement provides as follows as regards arbitration.

(Annex B to the agreement)

Arbitration rules	Cl. 66 of the SC	International Chamber of Commerce (ICC), Paris
Court of Arbitration	Cl. 66 of the SC	Chamber of Commerce and Industry, Stockholm, Sweden
Number of Arbitrators	Cl. 66 of the SC	Three (3)
Language of arbitration	Cl. 66 of the SC	English, official and Russian unofficial translation
Place of arbitration	Cl. 66 of the SC	Stockholm, Sweden

(Clause 66 of Annex C to the agreement)

Arbitration
Unless settled amicably [*sic!*], any dispute in respect of which the DAB´s decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by

both Parties a dispute between the Contracting Authority and the Contractor shall be referred to the Court of Arbitration of the Chamber of Commerce and Industry in Stockholm.

(Clause 66 of Annex C to the agreement)

The agreement was preceded by a number of agreements on principles. In July of 1997 the Commission and the Government of the Russian Federation (the Government) entered an agreement called “General Rules Applicable to the Technical Assistance of the European Communities” (the General Rules), which served as a framework for the cooperation within the TACIS program. The General Rules provided that the specific conditions for measures taken within the scope of the program would be set out in a separate agreement called “Financing Memorandum”.

Further, in July of 2003, the governments of the Russian Federation and Poland entered a bilateral agreement concerning the reconstruction of certain roads. The purpose was to establish a European highway standard connection between the Polish city of Elblag and the Russian city of Kaliningrad. Concurrently, the parties agreed that border crossing posts should be constructed in connection to the highway and agreed to investigate the possibilities of seeking financing for the project from the Commission.

Finally, in January of 2007, the Government and the Commission entered an agreement called “Memorandum of Understanding for Tacis Funding of Design and Construction of the Mamonovo-Grzechotki Border Crossing Post on the Russian-Polish Border” (the Financing Memorandum). The agreement provided, amongst other things, the conditions for the Commission’s financing of the construction of the border crossing post and set out a general framework for how the construction should be procured.

On 8 November 2010, Badprim requested arbitration against the Customs Office and the Government, claiming compensation for work performed, taxes and fees, plus interest. The Request for Arbitration was based on the agreement of 18 July 2007 between the company and the Customs Office.

The Government objected to the jurisdiction of the arbitral tribunal. In a document called “Decision on Jurisdiction” of 6 July 2012, the arbitral

tribunal concluded, however, that it had jurisdiction to review Badprim's claims on the Government.

Through a final arbitral award of 21 October 2013, Badprim's claims against the Customs Office were rejected, and the Government was ordered to pay to Badprim an amount in excess of EUR 1.8 million plus compensation for certain expenses and interest.

MOTIONS BEFORE THE COURT OF APPEAL

The Government has moved that the Court of Appeal shall annul the arbitral award, except for the decisions on compensation to the arbitrators and the arbitration institute.

Badprim has disputed the Government's motion.

The parties have claimed compensation for litigation costs.

THE PARTIES' RESPECTIVE GROUNDS

The Government

Under Russian law, the Customs Office is a separate legal entity. The Customs Office, and not the Government, is party to the agreement with Badprim. Thus, the arbitral award is not based on a valid arbitration agreement between the parties (item 1 of the first paragraph of Section 34 of the Swedish Arbitration Act (1999:116)).

In the event that the Court of Appeal would conclude that the Government is a party to the arbitration agreement with Badprim, it is in any event unenforceable and thus invalid (item 1 of the first paragraph of Section 34 of the Swedish Arbitration Act). This is so, because the parties have agreed that the arbitration should be administered by the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), but under the rules of arbitration of the International Chamber of Commerce (ICC), which is not doable in practice. The SCC lacks both the required organizational structure as well as experience to carry out the most vital tasks under the arbitration rules of the

ICC. Among these are the appointment of arbitrators based on ICC's national committees, the confirmation of arbitrators based on the experience of their performance in other ICC arbitrations, confirmation of "Terms of Reference" and scrutiny of arbitral awards.

In any event, the arbitral tribunal has, by failure to apply ICC's rules of arbitration in accordance with the parties' agreement, disregarded a joint instruction from the parties, which also constitutes grounds for annulment (items 2 or 6 of the first paragraph of Section 34 of the Swedish Arbitration Act).

Badprim

Russian law provides that the Customs Office always acts on behalf of the Government. Thus, the Government is bound by the arbitration agreement between the Customs Office and Badprim. In the event that the Court of Appeal would conclude that the Customs Office acts on its own behalf, the Government is nevertheless bound by the arbitration agreement, because the Customs Office entered the agreement on the Government's behalf. In any event, the Government is financially liable for the Customs Office, which entails that the Government is bound by the arbitration agreement between the Customs Office and Badprim.

The fact that the parties agreed that the proceedings should be administered by SCC but under the rules of arbitration of ICC does not entail that the arbitration agreement is invalid. Thus, there is a valid arbitration agreement between the parties. Further, the arbitral tribunal cannot be deemed to have disregarded – by adapting ICC's rules of arbitration to apply to the organization of SCC – a joint instruction by the parties.

THE PARTIES' FURTHER DETAILS

The Government

As regards the legal status of the Customs Office, Russian law provides in Section 11 of Regulation 459 of 26 July 2006 that the Customs Office is a

separate legal entity. Section 5 of the Regulation provides that the Customs Office has certain authority within its scope of operations. Thus, the Customs Office may order the construction of border crossing posts and other facilities. The construction of border crossing posts is thus a task that falls within the scope of the operations of the Customs Office. That the Customs Office is a separate legal entity is confirmed also by the referenced legal opinion provided by Professor BK as well as from decisions by Russian courts.

The Government is a party only to the agreements General Rules and Financing Memorandum, but not to the final agreement with Badprim. Sections 5 and 16.1 of the General Rules provide that all disputes between the parties shall be settled through negotiations and not by arbitration. Further, Section 5 of the bilateral agreement between the Russian Federation and Poland provides that the parties agreed that they are not liable for the obligations undertaken by third party legal entities within the project.

As regards the Financing Memorandum, the following should be noted. Section 25 provides that the Customs Office and the winners of the procurements would enter agreements based on the standard form agreements produced by the Commission. Section 27 provides that the Customs Office, in its capacity as “Beneficiary”, should establish a steering group, which in fact was established. The steering committee did not, however, include any participants than those of the Customs Office. The Financing Memorandum defines the Customs Office as “contracting authority”. The agreement further provides that the Customs Office has, by use of its own funds, produced a new technical systems design. Appendix 2 to the Financing Memorandum provides that the Customs Office has also financed certain other work within the scope of the project. The above supports the notion that the Customs Office, first and foremost, acted on its own behalf. Section 9 provides that the Customs Office would be responsible for the administration of the border crossing post after its construction. It is true that the Financing Memorandum was signed by the Customs Office on the Government’s behalf. The fact that

the Customs Office in this case acted on the Government's behalf was based on an authorization set out in instruction 1828-R of 28 December 2006.

In its decision on jurisdiction, the arbitral tribunal attributed importance to some provisions of the General Rules and the Financing Memorandum. In this respect, however, the arbitral tribunal based its decision on documents in the Russian language. This entailed that the definitions in the arbitral tribunal's decision deviate from the definitions of the English language versions of the General Rules and the Financing Memorandum. For example, the arbitral tribunal incorrectly called the Customs Office "Recipient" instead of "Beneficiary".

As regards the arbitration agreement, the parties agreed that the arbitration should be administered by the SCC, but be governed by the rules of arbitration of the ICC. However, it is not possible to apply these rules within the scope of an arbitration administered by the SCC, and as a consequence the arbitration agreement is not enforceable. Against this background, the arbitration agreement must be deemed invalid. In a letter of 14 June 2011, the SCC informed that its Board of Directors had concluded that it was not obvious that the institute lacked jurisdiction to resolve the dispute. Concurrently, the parties were informed that the SCC accepted to administer the dispute, provided, however, that the parties agreed to authorize the SCC to adapt ICC's rules of arbitration to SCC's organization. No such authorization was ever granted by the Government. Further, the reasoning of the SCC expresses a hypothetical will of the parties that in fact never existed. Through resolutions by the Board of Directors of the SCC and the arbitral tribunal the parties have been forced into an arbitration which they in fact never agreed to. As regards the actual arbitration proceedings themselves, it is true that the SCC has carried out some of the tasks that would normally be for the ICC to carry out. However, the tasks were not carried out in a satisfying manner. For example, in the review of the arbitral award certain calculation errors were not discovered.

Badprim

As regards the legal status of the Customs Office, it is true that Section 11 of the 2006 Regulation provides that the Customs Office is a separate legal entity. It is not, however, provided what this actually means. The legal opinion provided by Dr. IVR provides that the Customs Office does not act as a separate legal entity, but merely as an institution, the purpose of which is to manage the customs affairs of the Russian Federation. The Russian Civil Code provides that federal executive bodies, such as the Customs Office, always acts on behalf of the Russian Federation. Thus, all actions taken by the Customs Office shall be deemed as an expression of the federal executive power and by definition bind the Government. Therefore, the Government is a party to the agreement between the Customs Office and Badprim. In any event, the legal status of the Customs Office entails that the Government is financially liable for the Customs Office. This financial liability means that the Government, under Swedish law, is bound by the arbitration agreement between the Customs Office and Badprim.

The recitals to the General Rules provide that the Government, not the Customs Office, is the recipient of the EU's assistance within the TACIS program. Section 7.2 of the appendix to the agreement further provides that the Government has authorized the Customs Office to enter agreements on its behalf within the scope of the program. That the Customs Office has been authorized to manage the affairs of the Government in the project is further confirmed by article 2.4 of the bilateral agreement between the Russian Federation and Poland.

The Russian language version of the Financing Memorandum contains a clarification in Section 5. The said Section provides that the Customs Office is authorized to enter the final agreement concerning the construction of the border crossing post on the Government's behalf. However, the clarification is not set out in the English language version of the Financing Memorandum. It is, however, set out in the draft agreement attached to the Government's instruction No. 1828-R of 28 December 2006.

Section 20 of the Financing Memorandum provides that the procedure to submit offers was to be administered in accordance with the practical guidelines and with use of the standard form agreements produced by the Commission. Thus, an agreement package existed already at the time when the Financing Memorandum was produced. The arbitration clause set out in the agreement between Badprim and the Customs Office is identical to the arbitration clause set out in the draft agreement provided by the Commission.

In September of 2009, Badprim and the Customs Office entered another agreement in order to be able to finalize the construction of the border crossing post. Also this agreement falls within the scope of the TACIS program. In the recitals to that agreement, it is clarified that it is the Government that is the party to the agreement. That the Government was always a party to the agreement with Badprim is further supported by certain correspondence between the Customs Office and Badprim, as well as between the Commission and the Government.

As regards the arbitration clause, Badprim always had the intention of avoiding the risk of having to litigate against the Government before Russian courts. Further, the parties have clearly agreed that disputes should be solved by arbitration before the SCC. Against this background, the arbitration clause has been interpreted, both by the SCC and the arbitral tribunal, in a manner so as to make it enforceable in practice. This has meant that the SCC has carried out some of the measures that are particular to the rules of arbitration of the ICC and that would otherwise have been carried out by that institute’s administration, e.g. Terms of Reference have been confirmed and the arbitral award has been reviewed. When determining the validity of the arbitration clause, the fact that it was the Government through the Customs Office that provided that the final agreement must be taken into consideration. Thus, the Government was the party with the most opportunity to affect the final wording of the arbitration clause and must therefore accept the risk that ICC’s rules of arbitration might be applied in another manner than what was intended.

THE INVESTIGATION BEFORE THE COURT OF APPEAL

The case has been decided following a main hearing. At the Government's request, Professor BK has been heard as a witness. At Badprim's request, Dr. IVR has been heard as a witness.

Both parties have referenced documentary evidence.

GROUNDS OF THE COURT OF APPEAL

Is the arbitral award covered by an arbitration agreement between Badprim and the Government?

Item 1 of the first paragraph of Section 34 of the Swedish Arbitration Act provides that an arbitral award shall be annulled if it is not covered by a valid arbitration agreement between the parties. If the challenging party maintains that there is no arbitration agreement, it is for the respondent to establish this fact, i.e. Badprim in this case (see Lindskog, Skiljeförfarande, 2nd ed., 2012, p. 865). On this issue, the following has been established as regards what transpired prior to the entry of the agreement.

Badprim and the Customs Office have been listed as parties to the relevant contracting agreement. Thus, it is clear that the Government has not explicitly been named a party to the agreement in which the arbitration clause is set out. The question is whether the Government nevertheless is bound by the agreement – and thereby the arbitration clause – because the Customs Office has acted on its behalf.

The recitals to the General Rules commence by stating that the Russian Federation is the recipient of the Commission's assistance within the TACIS program. Article 7 of the appendix to the General Rules provide further details on how agreements on so-called technical assistance should be entered. Item 2 of the said article provides that agreements should be produced, negotiated and agreed by the Commission or, when so provided in

the Financing Memorandum, by the recipient of the assistance – i.e. the Russian Federation – or the authority designated by the recipient's government and that acted on its behalf, following the Commission's approval.

The Financing Memorandum includes provisions on, amongst other things, how the construction of the border crossing post should be procured. The recitals to the Financing Memorandum provide that it has been produced in accordance with the guidelines previously agreed between the Government and the Commission in the General Rules. The definitions of the Financing Memorandum provide that the Customs Office shall be considered as the contracting authority ("The Contracting Authority"), as well as beneficiary ("Beneficiary"). By contracting authority is meant in the definition the legal entity that enters an agreement with the winning bidder pursuant to the procedure set forth in the Financing Memorandum. In Section 5 of the Financing Memorandum, the Russian Federation and the Customs Office declare themselves willing to undertake the project and have the border crossing post constructed. In the case it is undisputed that the Russian language version of the Financing Memorandum, which also is official, in this provision includes a clarification that the Customs Office in its capacity as contracting authority should be deemed as "an organ empowered to sign the Contract".

As regards the procurement procedure, Sections 20, 24 and 25 of the Financing Memorandum provide that the Commission should be responsible for the procurement and produce the final agreement. This should be done in accordance with the procedures and standard form agreements previously produced by the Commission. Section 26 of the Financing Memorandum provides that the winning bidder should enter the final agreement with the beneficiary, i.e. the Customs Office. The last Section further provides that the Customs Office also in the final agreement should be designated as "contracting authority". This, in fact, is the designation for the Customs Office in the final agreement with Badprim.

In sum, the Court of Appeal finds that the starting point in the General Rules, entered between the Commission and the Government, was that the Government was the recipient of the Commissions assistance and that agreements on technical assistance should be entered by the Commission, the Government or an authority acting on the Government's behalf. The Financing Memorandum – to which the Commission and the Government are parties – further provides that the agreement was reached in accordance with that which had previously been agreed in the General Rules and that the Customs Office is designated as "contracting party". Section 5 of the Russian language version of the Financing Memorandum clarifies that the Customs Office should be deemed as an organ empowered to enter the final agreement.

Against the above, the Court of Appeal concludes that it was the Government's intention that the Customs Office would act on its behalf. The fact that this was not explicitly set out in the Government's instruction of 28 December 2006 does not lead to any other conclusion. The Government has not produced any evidence supporting the conclusion that the final agreement between the Customs Office and Badprim was entered in any other manner than as set forth in the General Rules and the Financing Memorandum. It is further undisputed that when the Financing Memorandum was entered, there was a complete draft agreement produced by the Commission. Thus, the Government have been in a position to read the agreement, and thereby the arbitration clause, prior to the Customs Office entering the final agreement with Badprim. According to Dr. IVR, the Customs Office is a federal executive body under the Government; within its scope of operations, the Customs Office acts – just as the Government – on behalf of the Russian Federation.

Therefore, the Government must be deemed a party to the agreement. Thus, the arbitral award is covered by the arbitration agreement.

Is the arbitration agreement invalid or did the arbitral tribunal disregard a joint instruction from the parties?

If an arbitration agreement in some respect provides a self-contradicting or otherwise ambiguous procedure, which is not practicably doable, the general principle is that the agreement should, to the extent possible, be interpreted in line with the parties' basic intentions with the arbitration agreement, i.e. that disputes between the parties should be settled by arbitration. This could entail that the court will disregard a contradicting provision if it is clear that the remainder of the arbitration agreement otherwise represents the parties' actual intentions. In some particular instances the natural order could, however, be to disregard the arbitration agreement in its entirety (Redfern and Hunter, On International Arbitration, 5th ed., p. 146, Lindskog, *op. cit.*, p. 145 and Heuman, Skiljemannarätt, p. 138).

The arbitration clause of the relevant agreement between the Government and Badprim provides that the parties have agreed that the SCC shall be the "Court of Arbitration", i.e. to administer an arbitration between them. Further, it provides that the rules of arbitration of the ICC shall be applicable. It is undisputed that the SCC lacks the required organizational structure to administer an arbitration fully compliant with ICC's rules. Thus, in this respect the arbitration agreement can be deemed contradictory. The question then is what effect this has on the validity of the agreement.

It is undisputed that the arbitration clause in the final agreement between the Government and Badprim is identical to the arbitration clause in the draft agreement provided by the Commission and which was drafted in accordance with the Commission's "Practical Guide to contract procedures for EC external actions". Thus, it is clear that the arbitration clause was not subject to separate negotiations between the parties. Further, nothing has been presented indicating that there was a particular purpose of applying ICC's rules of arbitration to the proceedings, despite the parties concurrently appointing the SCC as the arbitration institute. Further, nothing has been presented that would indicate that the Government – which provided the final agreement and

to some extent held a superior position in the agreement relationship – has informed Badprim on the unusual provisions, or that the Government viewed the applicability of ICC's rules of arbitration of determining importance for the validity of the arbitration agreement.

Having regard to the above, the Court of Appeal concludes that the agreement between the parties must be understood so that the main purpose was that possible disputes between the parties would be resolved by arbitration and that the purpose was that the arbitration should take place in Stockholm before the SCC. It is undisputed that the SCC agreed to and also did administer the arbitration. Thus, it is clear that the arbitration agreement was enforceable. Under these circumstances, the Court of Appeal finds that the arbitration clause is not invalid. The arbitral tribunal cannot be deemed to have disregarded a joint instructions from the parties by adapting ICC's rules of arbitration to the organization of the SCC.

Thus, the motions of the claimant shall be rejected.

Litigation costs

Upon this outcome the Government shall compensate Badprim for its litigation costs before the Court of Appeal. The claimed amount is reasonable.

The judgment contains issues important for the development of case law to be reviewed by the Supreme Court. Thus, the Court of Appeal grants leave to appeal the judgment (Section 43 of the Swedish Arbitration Act).

HOW TO APPEAL, see appendix B

Appeals to be submitted by 20 February 2015.

Leave to appeal is not required.

[ILLEGIBLE SIGNATURES]

The decision has been made by: Judges of Appeal CS, AK, reporting Judge of Appeal, and PS (dissenting).

DISSENTING OPINION

Judge of Appeal PS dissents, in accordance with the following.

Is the arbitral award covered by an arbitration agreement between Badprim and the Government?

As noted by the majority, it is for the respondent to establish that a challenged arbitral award is covered by a valid arbitration agreement between the parties, if the claimant maintains otherwise. In cases, as in the present case, where the claimant is not explicitly listed as a party to the written agreement in which the arbitration clause is set out, there must, in my opinion, be very solid evidence to find it proven that the claimant is nevertheless a party to the agreement. The investigation in this case, particularly as regards the legal status of the Customs Office under Russian law, does not in my opinion establish that that the Government is a party to the arbitration agreement. Thus, my conclusion is that Badprim has failed to establish that the arbitral award is covered by a valid arbitration agreement between the parties. Therefore, I wish to annul the arbitral award.

In the minority on this issue, I revert to the subsequent issue.

Is the arbitration agreement invalid or did the arbitral tribunal disregard a joint instruction from the parties?

As regards this issue, I reach the same conclusion as the majority, but for the following reasons.

The issue can be described as follows. Is an arbitration agreement invalid merely because it provides that an arbitration shall take place under the rules of one arbitration institute, but should be administered by another institute?

At first, an affirmative answer appears obvious, mainly for the following reason. The rules of one arbitration institute – which by way of incorporation becomes agreed between the parties – typically provide that it is specifically that institute (or body within the institute) that shall take measures, assess and

decide on various issues. Thus, already the wording of the rules would render it impossible that another arbitration institute could apply them; only the ICC can do that which is provided by ICC's rules.

However, in my opinion on arbitration agreements of the present nature it must be deemed of determining importance that the parties have actually agreed on arbitration and in such a manner that one arbitration institute should apply the rules of another arbitration institute. If the other arbitration institute does so as well as is possible, then the result is that the parties have achieved that, on which they agreed. Then, it ought not to be possible to complain that various measures, assessments and decisions by the administering arbitration institute may not have been exactly as they would have been if they had been applied by the arbitration institute that devised them.

Thus, in my opinion, an arbitration agreement is not invalid merely because it provides that arbitration shall take place by application of the arbitration rules of one arbitration institute, but be administered by another arbitration institute. Another conclusion might be reached in the event that one arbitration institute has refused to apply the rules devised by another arbitration institute.

In the present case the SCC has administered the arbitration. Initially, the SCC maintained that would do so based on the parties jointly authorizing the institute to adapt ICC's rules to the organization of the SCC. Even if – which the Government has maintained – the SCC never received such authorization, such an authorization must be deemed included in the arbitration agreement, since it in practice provides that the SCC should apply ICC's rules, which obviously requires an adaption of those rules, not least to the effect that the SCC will take those measures the rules provide that the ICC should take.

The Government has also maintained that the aforementioned is a joint instruction from the parties, which was disregarded and that the arbitral tribunal thereby exceeded its jurisdiction. That, which the Government has maintained in this respect should be reviewed in the same manner as the

above; thus, the arbitral tribunal has not exceeded its jurisdiction granted by the arbitration agreement.

In all other aspects, I agree with the majority.