JUDGMENT of the

SWEDISH SUPREME COURT

Case No.

given in Stockholm on *d.o.* March 2008 T 2113-06

APPELLANT
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MATTER
Challenge proceedings with respect to arbitral award

APPEALED JUDGMENT

Judgment of Svea Court of Appeal of 13 April 2006, in case T 3739-03

Judgment of the Court of Appeal see Appendix

JUDGMENT

The Supreme Court amends the judgment of the Court of Appeal so as to

- annul the first and third items of the arbitral award of 13 February 2003 between Petrobart Ltd. and the Republic of Kyrgyzstan, and
- discharge Petrobart Ltd. from the obligation to compensate the Republic of Kyrgyzstan its litigation costs before the Court of Appeal and orders the Republic of Kyrgyzstan to compensate Petrobart Ltd. for its litigation costs before the Court of Appeal in the amount of SEK one-hundred-ninety-two-thousand five-hundred (192,500), out of which SEK 180,000 comprises costs for legal counsel and SEK 12,500 comprises expenses, plus interest according to Section 6 of the Swedish Act on Interest from 13 April 2006 until the day of payment.

The Republic of Kyrgyzstan shall compensate Petrobart Ltd. for its litigation costs before the Supreme Court in the amount of SEK sixty-five-thousand (65,000), all of which comprises costs for legal counsel, plus interest according to Section 6 of the Swedish Act on Interest from the date of the Supreme Court’s judgment until the day of payment.

MOTIONS BEFORE THE SUPREME COURT

Petrobart has moved that the Supreme Court grant the company’s claim brought before the Court of Appeal, discharge it from the obligation to compensate the Republic for its litigation costs before the Court of Appeal, and order the Republic to compensate Petrobart for its litigation costs before the Court of Appeal.

The Republic has disputed any changes to the judgment of the Court of Appeal.

The parties have claimed compensation for costs incurred during the proceedings before the Supreme Court.

GROUNDS

The claims of the parties

The parties have referenced grounds and elaborated thereon as done before the Court of Appeal.

Petrobart has appealed the arbitral award referencing Section 36 of the Swedish Arbitration Act (SFS 1999:116). Thus, the appeal must be deemed to not include the second item of the arbitral award, which deals with compensation to the arbitrators; appeals with respect to compensation to arbitrators must be made under Section 41 of the Swedish Arbitration Act before a District Court.

Section 36 of the Swedish Arbitration Act provides that Petrobart had to appeal the arbitral award within three months of the date it was notified of the award. Within this period, Petrobart only claimed that the arbitral award should be annulled.

When an arbitral award is appealed under Section 36 of the Swedish Arbitration Act, the appeal should – as is the case for challenge proceedings under Section 34 of the same act (cf. Heuman, Skiljemannarätt, p. 594 and Lindskog, Skiljeförfarande, p. 991 and 1104) – under normal circumstances be deemed to include all parts of the award that can be appealed under Section 36. In accordance with the preceding, Petrobart’s claim for annulment

is deemed to include the third item of the judgment set out in the arbitral award.

With respect to the costs for the arbitration proceedings, Petrobart has moved that not only shall the ruling in the award thereon be annulled, but also that the ruling shall be replaced by a ruling with a different allocation of the costs between the parties. Moreover, Petrobart has made a claim with respect to the parties' liability to compensate the arbitrators.

These claims have, however, been raised after the three-month period set forth in the first paragraph of Section 36 of the Swedish Arbitration Act had lapsed and can consequently not be tried. Thus, there is no reason to try whether the claims could have been tried if made within the relevant time.

As found by the Court of Appeal, the claims thereon raised by Petrobart shall be dismissed.

Is a legitimate interest to appeal at hand?

The Republic has claimed that what could be tried in arbitration proceedings that might be initiated if the relevant arbitral award is annulled has already been tried in subsequent arbitration proceedings, which were unsuccessfully challenged. That arbitral award would therefore bar further proceedings with respect to Petrobart's claims for payment.

On the Republic's view, an annulment of the decision on dismissal in the relevant arbitral award would be pointless. It can therefore be questioned whether Petrobart has a legitimate interest in an annulment. The consequence of no such interest being established is that grounds for dismissal of Petrobart's case would be present (see NJA 2006 p. 101).

However, it has not been sufficiently shown that the later arbitral award would prevent proceedings with respect to Petrobart's claim for compensation

against the Republic. Thus, sufficient grounds for dismissing Petrobart's claim, based on a lack of legitimate interest, have not been established.

The jurisdiction of the arbitral tribunal

The relevant arbitration proceedings are governed by Swedish law. Thus, procedural issues shall be resolved under Swedish law, although the arbitration proceedings involve foreign law.

Section 2 of the Swedish Arbitration Act provides that the arbitral tribunal is permitted to decide on its own jurisdiction. An established principle under Swedish law with respect to such matters is that the arbitrators shall apply the doctrine of assertions. However, it is not entirely clear what this doctrine entails nor how far-reaching it is (See Welamsson in Svensk Juristtidning 1964, p. 278 ff., Heuman, *op. cit.*, p. 75 ff. and Lindskog, *op. cit.*, p. 199 f. including further references therein).

The essence of the doctrine of assertions is that the arbitral tribunal shall not, when deciding on its jurisdiction, assess the existence of the grounds that a claimant claims are covered by a legal relationship within the scope of an arbitration agreement. When deciding on the jurisdiction, the arbitral tribunal shall assume that these grounds are present.

One obvious starting point for the doctrine of assertions is that a valid arbitration agreement exists. A party who has not entered into an arbitration agreement cannot be forced into arbitration proceedings as a result of applying the doctrine. If it is disputed whether a valid arbitration agreement exists, the arbitral tribunal shall try this matter when deciding on its jurisdiction.

Similarly, the grounds that the claimant references in support of its claim shall fall within the scope of the arbitration agreement, either because it is undisputed or has been legally established. So, if the parties are in

disagreement on the scope of the arbitration agreement, the disagreement cannot be solved by application of the doctrine of assertions; the scope must be determined when deciding on the jurisdiction.

The doctrine of assertions must be deemed to apply equally when the arbitration proceedings, as in the present matter, are based on law as when based on an agreement (cf. case law with respect to jurisdiction of special tribunals, for example NJA 1973 p. 1 and NJA 1984 p. 705).

When the arbitral tribunal in the present matter tried its jurisdiction, it tried on the merits the issue of whether Petrobart had “made a foreign investment within the meaning of the Foreign Investment Law”. The arbitral tribunal has found that this was not the case and has concluded that it did not have jurisdiction. Consequently, the tribunal dismissed Petrobart’s case.

It follows from the preceding that the arbitral tribunal did not apply the doctrine of assertions, which it rightfully should have. If the tribunal would have applied the doctrine, it would have based its decision on jurisdiction on the grounds referenced by Petrobart. Thus, it was incorrect to dismiss the case brought by Petrobart based on the fact that these grounds had not been established.

Therefore, Petrobart’s claim that the first and third items of the arbitral award shall be annulled shall be approved.

Litigation costs

Petrobart is in large part the winning party. Therefore, Petrobart shall be discharged from compensating the Republic for its litigation costs before the Court of Appeal, and the Republic shall be ordered to compensate Petrobart for its litigation costs before the Court of Appeal, as well as the Supreme Court.

The decision has been made by: Supreme Court Justices D.V, S.B. (dissenting), T.H., A.-C. L. (dissenting) and S. L. (Reporting Justice, dissenting, separate opinion)
Reporting clerk: C. T.