

SVEA COURT OF APPEAL JUDGMENT

given in Stockholm on 29 October 2002

Case No
Ö 7192-01

APPELLANT

SwemBalt Aktiebolag, 556349-6925
Box 2040, 691 02 Karlskoga

Counsel:

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COUNTERPARTY

The Republic of Latvia
Represented by Ingrida Labucka, Minister for Justice
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Counsel:

Advokat Hans Bagner, Box 1703, 111 87 Stockholm, Sweden

MATTER

Enforcement of foreign arbitral award

JUDGMENT BY THE COURT OF APPEAL

1. Svea Court of Appeal rules, pursuant to § 53 of the Arbitration Act (1999:116), that the arbitral award between SwemBalt Aktiebolag and the Republic of Latvia given in Copenhagen on 23 October 2000 is enforceable as a conclusive decision by a Swedish court, unless, following an appeal against the judgment by the Court of Appeal, the Supreme Court should decide otherwise.

2. The Republic of Latvia shall compensate SwemBalt for its legal costs in the Court of Appeal in the sum of SEK eighty two thousand five hundred (82 500) relating to fees, plus interest pursuant to § 6 of the Interest Act (1964:635) from the date of the judgment of the Court of Appeal until the date payment is made.

BACKGROUND

In 1993, SwemBalt AB (“SwemBalt”) rebuilt a cargo ship and installed office furnishings onboard the ship. The ship was moored at a mooring in Kipsala, in the centre of Riga harbour. The ship was leased to the Latvian company SwedeBalt SIA (“SIA”), a subsidiary of SwemBalt. On 28 March 1994, the Latvian authorities had the ship towed away. The ship was never returned. By means of notification dated 24 March 1999, SwemBalt initiated an arbitration proceeding against the Republic of Latvia (“Republic”) referring to a bilateral agreement, “Agreement between the Government of the Kingdom of Sweden and the Government of the Republic of Latvia concerning the Promotion and Mutual Protection of Investments dated 10 March 1992, SÖ 1992-93” (“Agreement”). The arbitral tribunal gave a decision on 23 October 2000 in which SwemBalt's claim was upheld and the Republic was ordered to pay a certain amount to SwemBalt. The Republic requested an interpretation of the arbitral award and the arbitral tribunal issued a statement thereon on 27 November 2000. The Republic has challenged the arbitral award and initiated legal proceedings at the Danish Maritime and Commercial Court. The main hearing in this case is planned for the 12 November 2002.

MOTIONS BEFORE THE COURT OF APPEAL, ETC.

SwemBalt has moved that the Court of Appeal decides on enforcement of the arbitral award between SwemBalt and the Republic given in Copenhagen on 23 October 2000. In the event the Court of Appeal was to defer the decision in the matter, SwemBalt has requested that the Republic, pursuant to § 58 second paragraph of the Arbitration Act (1999:116) shall be ordered to provide security corresponding to the amount awarded to SwemBalt in the arbitration of USD 2 506253 plus interest according to the arbitral award of ten per cent per year as from 9 April 1999.

The Republic has primarily contested the enforcement of the arbitral award. In the alternative, the Republic has moved that the Court of Appeal shall defer its decision in the matter until the issue of the validity of the arbitral award has been determined by a Danish court through a final decision. The Republic has contested that it shall be ordered to provide security.

The parties have claimed compensation for their legal costs.

As grounds for the challenge, the Republic has primarily moved that the arbitral tribunal has exceeded its mandate, as the arbitration agreement does not cover the dispute now in question. The arbitral award is therefore not enforceable in Sweden. In the alternative, the Republic has claimed that the arbitral tribunal lacks jurisdiction because *lis pendens*, for which reason enforcement of the arbitral award shall not be effected in Sweden. Furthermore, the Republic has claimed that because of *lis pendens* has prevailed, it would be clearly inconsistent with the policy of the judicial system in Sweden to enforce the arbitral award.

As grounds for the claim for deferment, the Republic has moved that the trial of the validity of the arbitral award in a Danish court is close at hand and that there are probable reasons why the arbitral award will thereby be declared invalid. In order to avoid contradictory decisions, the Court of Appeal should not make a decision on the issue of enforcement before the issue of the validity of the arbitral award has been conclusively decided.

The Republic has otherwise stated mainly as follows.

The arbitration clause that SwemBalt referred to in the initiation of the arbitration proceeding and that constitutes the arbitration agreement between the parties is found in Article 7 of the Agreement. Article 7(1) stipulates that a dispute to be determined by an arbitral tribunal must relate to the interpretation or applicability of the Agreement. According to Article 2, the Agreement relates to "Promotion and Protection of Investments". It is the Republic's view that the ship in question does not constitute an investment in the sense of the Agreement, wherefor the arbitral tribunal had no jurisdiction to try the dispute.

According to Article 1(2), "Investment" is defined as "Equipment that according to a leasing agreement is placed at the disposal of a lessee in the territory of a party to the Agreement by a lessor who is a citizen of the other party to the Agreement or a legal entity registered in the territory of this party to the Agreement." However, in the view of the Republic, the Agreement does not cover transactions between a Swedish company and the company's subsidiary. The purpose of Article 1(2) must be deemed to be that it shall cover objects brought over to Latvia in accordance with a leasing agreement between a Swedish investor

and a Latvian counterpart. SIA is in reality not a Latvian subject but should be considered as equivalent to a Swedish investor. The Republic's view, that the Agreement does not cover transactions between a Swedish lessor and lessee that is simultaneously the lessor's wholly owned subsidiary and therefore in practice a Swedish legal subject, gains support from Article 7(4) of the Agreement. According to the article, a Latvian person whose share majority is owned by a Swedish legal entity is placed on an equal footing to a Swedish legal entity. Even if Article 7(4) deals with disputes subject to the International Centre for Settlement of Investment Disputes, the provision reflects the prevailing practice relating to inter-state relationships, i.e. that a legal entity's nationality is determined by the nationality of the subject controlling the legal entity. This is also shown in Article 1(3), where a legal entity that has its registered office in a third country but is controlled by a legal entity subject to any of the contracting countries is regarded as an investor subject to this country. As SIA is a wholly owned subsidiary of SwemBalt, a ship leased by SwemBalt to SIA cannot be deemed to constitute an investment in the sense of the Agreement. A prerequisite for the ship to be covered by the Agreement is namely that the lessee has to be a Latvian subject once it has been brought into Latvian waters. As the ship in question does not constitute an investment in the sense of the Agreement, the dispute relates to an issue that is not covered by the Agreement. The arbitral tribunal has therefore had no jurisdiction to determine the dispute.

By means of a notice dated 20 October 1996, SwemBalt initiated an arbitration proceeding against the Republic referring to the Agreement. The notice was communicated to the Swedish and Latvian Ministers for Foreign Affairs. The Republic objected that the matter was not of such a type that it could be referred to an arbitral tribunal for determination. As far as the Republic is aware, SwemBalt did not complete the initiated proceeding. The arbitration proceeding initiated in 1996 related to exactly the same matter as the arbitration proceeding initiated by SwemBalt in 1999. Considering the Republic's previously announced views and the fact that the previous proceeding had not resulted in any arbitral award that affected the Republic, it was the Republic's assessment that it did not have any reason whatsoever to participate in the new arbitration proceeding. The Republic therefore maintains that SwemBalt, by initiating the first arbitration procedure, has exhausted its opportunities to refer the same dispute to a new arbitral tribunal.

The grounds referred to by the Republic in the challenge action in progress in Copenhagen largely coincide with what the Republic has stated in the defended case. In the challenge

action, the Republic has primarily stated that the arbitral tribunal has exceeded its authority, which is a procedural error. The main hearing in the case will be held on 12 November 2002. With reference to what the Republic has stated, in the view of the Republic there is cause for the assumption that the Court will declare the arbitral award invalid. In order to avoid an enforcement decision that may be in contradiction to a declaration of invalidity of the arbitral award, and in consideration of the limited period of time that remains before the challenge action is determined, the decision by the Court of Appeal should be deferred until a conclusive judgment has been issued in Denmark.

SwemBalt has responded principally as follows.

The arbitral tribunal has considered and decided the issue of whether the arbitration agreement covers the dispute in question. In accordance with Article 35 of the UNCITRAL rules, the Republic has requested and received a separate interpretation of the arbitral award in this part. As shown in this, the dispute in question is covered by the agreement, and naturally therefore also by its provisions about arbitration. According to Article 7(2) of the current Agreement, a dispute that cannot be settled in good faith between a party to the Agreement and an investor from the other party of the Agreement shall be referred by either party to arbitration for conclusive settlement. As shown in Article 21(1) of the UNCITRAL rules, the arbitral tribunal shall determine the issue of its own competence. The arbitral tribunal has made an express decision on this issue, entailing that the arbitral tribunal has considered itself to have jurisdiction, wherefor this issue has been finally settled. The Republic did not make any representations that the arbitral tribunal was lacking jurisdiction in its first response to the arbitral tribunal.

The Republic's view that the Court of Appeal should defer its decision is clearly inconsistent with the regulations governing enforcement of a foreign arbitral award. §54 and §55 and also §5% [sic] second paragraph of the Arbitration Act are intended to entirely correspond to the provisions of the New York Convention in Articles V and VI concerning obstacles to enforcement and deferment of enforcement. The authors of the Convention have attempted to prevent such an interpretation of law as the Republic refers to in support of its grounds for claiming deferment of the enforcement. When interpreting the New York Convention, the general strivings underlying the Convention, namely to facilitate enforcement of foreign arbitral awards, should be taken into consideration. Foreign challenge actions can often not be

determined until Svea Court of Appeal has completed the enforcement assessment, and the respondent therefore has no opportunity to obstruct the enforcement by bringing an action in the country where the decision was given, in this case Denmark. This applies even if on objective grounds it appears to be clear that the challenge action will be upheld. In this case, the Republic in its challenge writ to the Danish court has in fact stated material grounds for why the arbitral award should be challenged, and for this reason it can also be regarded as excluded that the arbitral award will be declared invalid. A decision in the challenge action may be appealed against, and for this reason it is not possible to say how much time this process can be expected to take.

REASONING IN SUPPORT OF THE DECISION

According to §54 of the Arbitration Act, a foreign arbitral award is not recognised and enforced in Sweden if the party against whom it is claimed can show that circumstances as provided for in items 1-5 of the provision exist. The issue of whether the arbitration agreement covers the dispute in question is an objection against jurisdiction of procedural nature that, if upheld, may lead to the arbitral award not being enforceable in Sweden in accordance with §54 of the Arbitration Act. The fact that the arbitral tribunal – as objected by SwemBalt – has reached the view that the dispute is covered by the agreement does not mean that the issue cannot be tried during a proceeding relating to enforcement of a foreign arbitral award.

It follows from Articles 7(1) and (2) that a dispute between a party to the Agreement and an investor from the other party to the Agreement concerning the interpretation or implementation of the Agreement shall, if the dispute cannot be settled in good faith, be referred at the request of either party to arbitration for a conclusive decision. According to Article 1(3) of the Agreement, the term "investor" shall refer to any legal entity that has its registered office in the territory of either party to the Agreement. Latvia is a party to the Agreement. SwemBalt is a legal entity with registered office in Sweden, the other party to the Agreement.

In the arbitration proceeding, SwemBalt claimed that Latvia had acted in contravention of Articles 2 and 4 of the Investment Agreement, which means that the dispute has concerned the interpretation and implementation of the Agreement. In accordance with Article 7(2), the

dispute has been referred to arbitration for conclusive settlement. The arbitration agreement has therefore covered the dispute in question. The issue whether the claimed investment as such is covered by the meaning of "investment" in the definition of the Agreement is an issue that is not covered by the Court of Appeal's trial of this matter.

The circumstances claimed by the Republic with reference to the arbitral tribunal lacking jurisdiction due to *lis pendens* does not constitute an obstacle to enforcement according to §54 of the Arbitration Act. Nor has the Republic in other respects shown that any circumstance as stated in §54 paragraphs 1-5 of the Arbitration Act exists. Nor, according to §55 of the Arbitration Act, are foreign arbitral awards recognised and enforced in Sweden if the Court finds that it would be clearly incompatible with the foundations for the judicial system in Sweden to recognise or enforce the arbitral award. This provision relates to cases where the most elementary legal principles have been set aside and should entail a narrow implementation (Caxs, *Lagen om skiljeförfarande* [Arbitration Act] p. 211, Heuman, *Skiljemannarätt* [Arbitration Law], p. 749). Over and above this, it should also be taken into consideration that an arbitral award given in contradiction to the principle of *lis pendens* cannot be regarded as assailable using the rule concerning *ordre public* in § 33 second item of the Arbitration Act but should be regarded as being an optional impediment to a trial of facts to be attacked using a challenge action in accordance with § 34 of the Arbitration Act (Govt. Bill 1998/99:35 p. 236, Heuman, *ibid*, p. 653).

The circumstances in the case do not provide support for the view that it would be clearly inconsistent with the policy of the judicial system in Sweden to enforce the arbitral award. Nor is there any other reason to leave SwemBalt's application for enforcement of the arbitral award without approval.

According to §5B [*sic*] second paragraph of the Arbitration Act, the Court of Appeal may defer the decision, and, if the appellant so requests, order the counterparty to provide security against the sanction that a decision about enforcement may otherwise be given. The Supreme Court has expressed a restrictive view regarding granting deferment of enforcement of foreign arbitral awards (NJA 197? [*sic*], p. 527 and 1992 p. 733). However, the preparatory work to the Arbitration Act states that, as well as the appellant's interest in enforcement, a losing party's proper interest in having its claim against the arbitral award tried must also be taken into consideration. It should therefore be possible to grant a deferment *if* the Court finds that

the claim against the arbitral award is not intended to protract the enforcement but that the party has cause for its claim. A party referring to the provision must then show the justness of its claim against the arbitral award (Govt. Bill p. 202 f).

The Republic has initiated a challenge action in Denmark in which the grounds referred to by the Republic largely coincide with what the Republic has claimed in the case in question. In the case in question, the Republic has referred to its application for a summons against SwemBalt in the challenge action. Apart from this, the parties have not dwelt on how they stated their claims in that case.

Against the background of what has been stated before, it appears under all circumstances not probable that the Republic in any part will be successful in its challenge action. The Republic has therefore not showed any grounds for its claim against the arbitral award. Considering this, the decision in the issue of enforcement in this country of the arbitral award should not be deferred.

With this outcome in the issue of deferral of the enforcement, there are no grounds for trying the claim for providing security.

Against the background stated, the Court of Appeal finds that SwemBalt's application for enforcement of an arbitral award between SwemBalt and the Republic given in Copenhagen on 23 October 2000 shall be upheld.

A party to a case concerning enforcement of foreign arbitral awards has in practice (NJA 2001 p. 748 II) been deemed to be entitled to compensation for costs pursuant to Chapter 18 of the Code of Judicial Procedure. As the Republic is to be considered to be the losing party, the Republic shall compensate SwemBalt for legal costs incurred. The amount claimed is reasonable.

HOW TO APPEAL, see Appendix.

Any appeal should be lodged by 2002 at the latest.

The judgment was made by: Head of Division, the Court of Appeal U.E. and Judges of Appeal M.E., Reporting Justice, and K.K.

Unanimous.

Confirmed in office: