

SVEA COURT OF APPEAL
Department 2
Division 0211

Judgment
7 October 2011
Stockholm

Case No.
T6798-10

CLAIMANT

Moscow City Golf Club OOO
Ul. Dovshenko, 1
119590 Moscow
Russia

Counsel: Advokaten Fredrik Norburg
Riddargatan 7A
114 35 Stockholm

RESPONDENT

Nordea Bank AB, 516406-0120
Hamngatan 10
105 71 Stockholm

Counsel: Advokaten Christer Söderlund
Box 1703
111 87 Stockholm

MATTER

Action on invalidity and challenge proceedings with respect arbitral award

CHALLENGED AWARD

Arbitral award given in Stockholm on 11 May 2010 by the Arbitration
Institute of the Stockholm Chamber of Commerce, Case No. V 168/2008, see
Appendix A

JUDGMENT OF THE COURT OF APPEAL

1. The Court of Appeal dismisses the claim of the Claimant.
 2. The Court of Appeal orders the Moscow City Golf Club OOO to
compensate Nordea Bank AB for its litigation costs covering costs for
legal counsel before the Court of Appeal in the amount of SEK 300,000
plus interest pursuant to Section 6 of the Interest Act from the day of the
judgment of the Court of Appeal until the date of payment.
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BACKGROUND

Moscow City Golf Club OOO (City Golf) is a Russian company that operates a golf club in Moscow. Previously, the golf club was operated by City Golf's predecessor, a Russian joint-venture, which was founded by, amongst others, Swedish founders in what was then the Soviet Union during the 1980's, under the name Tumba Golf Club Moscow (Tumba JV).

Nordea Bank AB is a leading bank in the Nordic countries. The bank's current structure is the result of a series of mergers of several banks, including the formerly state owned Post- och Kreditbanken (PK-Banken), which, following a merger in 1990, was renamed Nordbanken.

On 24 January 1990, a loan agreement was signed between Tumba JV and PK-Banken. The loan agreement contained an arbitration clause, which provided that all disputes with respect to the agreement should be submitted for resolution by arbitration under the rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

Under the loan agreement, Tumba JV borrowed SEK 22 million from Nordbanken to construct a golf course in Moscow. Further, a construction contract was entered into between Tumba JV and the international construction firm NCC International AB (NCC), under which NCC undertook to construct the golf course. Payments for the construction were to be made as the construction works progressed. In practice, these payments were to be made by Tumba JV's approving partial payments of the borrowed amount directly from PK-Banken to NCC.

On 19 December 1998, Nordea requested that arbitration proceedings be initiated and claimed a certain capital amount as well as accrued interest on said amount, all under the loan agreement. City Golf disputed the claim, objecting that the loan agreement breached then applicable Soviet peremptory currency law and that, as a consequence, the dispute was not arbitrable.

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The Arbitration Institute of the Stockholm Chamber of Commerce resolved that the arbitration proceedings should take place in Stockholm and appointed Mr. J.M.H. as sole arbitrator. During the proceedings, the arbitrator approved a claim to request Nordea to produce certain documents, which the bank was assumed to hold pertaining to a USD 200,000 payment made in 1992, as well as a discrepancy in the escrow account of 30 December 1996 (arbitral award p. 29). It was noted in the arbitral award that Nordea had submitted documents explaining the payment and providing explanations with respect to the discrepancy.

In the arbitral award of 11 May 2010, the arbitrator held, among other things, that City Golf had not shown that the loan agreement breached then applicable peremptory Soviet or Russian currency law (arbitral award p. 162) and City Golf was ordered to pay a certain capital amount and interest as well as to compensate costs.

MOTIONS BEFORE THE COURT OF APPEAL

City Golf has moved that the Court of Appeal declares the arbitral award invalid, or, in the alternative, that the Court of Appeal annuls the arbitral award.

Nordea has disputed the claim.

The parties have claimed compensation for litigation costs before the Court of Appeal.

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GROUND

City Golf

Invalidity

The arbitral award includes a ruling on a matter that is subject to peremptory currency law, sanctioned by criminal law. Thus, the matter is not arbitrable, and the arbitral award shall be declared invalid under item 1 of the first paragraph of Section 33 of the Swedish Arbitration Act (SFS 1999:116) (the LSF).

Annulment

The arbitral award has not been awarded based upon a valid arbitration clause since the clause breached peremptory currency law, sanctioned by criminal law. Thus, the arbitral award shall be annulled under item 1 of the first paragraph of Section 34 of the LSF.

In the arbitration proceedings, City Golf claimed that the arbitration clause was invalid as it breached peremptory currency law, sanctioned by criminal law. The arbitrator incorrectly omitted to try whether the arbitration clause was invalid. The omission affected the outcome of the case since Nordea's claim should rightfully have been dismissed. Thus, the arbitral award shall be annulled under item 6 of the first paragraph of Section 34 of the LSF.

City Golf claimed in the proceedings that Nordea failed to produce certain documents pursuant to a decision by the arbitrator and that the arbitrator should have considered this to City Golf's benefit and Nordea's detriment when evaluating the evidence in the case. The arbitrator incorrectly failed to consider the circumstances referred to by City Golf, and as a result failed to consider Nordea's failure to produce documents as requested by the arbitrator. The failure affected the outcome of the case since the arbitrator,

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upon having evaluated all evidence in the case, would not have deemed it shown that Nordea had a claim against City Golf, or at least not in the claimed amount. As a result also of the preceding, the arbitral award shall be annulled under item 6 of the first paragraph of Section 34 of the LSF.

Nordea

The arbitral award shall not be deemed invalid, nor shall it be annulled, based on the grounds for the claims provided by City Golf.

Invalidity

The matter tried in the arbitration proceedings – whether a party is liable to make a payment under a loan agreement – is arbitrable.

Annulment

The arbitral award is based on a valid arbitration clause.

Nordea has complied with the request to produce documents and City Golf's objection that the arbitration clause is invalid was tried by the arbitrator.

THE PARTIES' ELABORATION ON THE GROUNDS

In further elaborating their respective grounds, the parties have invoked mainly the following circumstances.

City Golf

The loan agreement was unique when the parties entered into it in the beginning of the 1990's, and they took a particular risk when they agreed upon an arbitration clause. Strict currency legislation, which were peremptory

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public regulations, was at that time applicable in Sweden as well as in the Soviet Union. Cross border money transfers without public authority approval were not permitted, and it was not permitted to decrease claims or allow for delays in payments. With respect to Sweden, this was provided under the following currency legislation: the Currency Act (SFS 1939:350) and the Currency Regulation (SFS 1959:264). These regulations were sanctioned by criminal law, and forfeitures could be applied. It follows from general principles of law, that agreements in breach of these Swedish regulations are invalid. In the Soviet Union, the invalidity was provided explicitly by law.

The parties were not able to avoid or agree on the invalidity of the main agreement. The currency legislation was peremptory, i.e. the parties could neither in advance nor after a dispute had arisen decide the fate of the loan agreement. The agreement was not eligible for out-of-court settlement. In other words, disputes under the loan agreement were not arbitrable. As a result, all disputes arising with respect to the loan agreement are “concretely not amenable to out-of-court settlements” and not arbitrable. This renders the arbitration clause invalid. While the validity of the arbitration clause shall be tried separately, this does not prevent the same invalidity grounds from being applied to the agreement as a whole, as well as to the arbitration clause.

The relevant time for which the test of arbitrable shall be made – at least with respect to invalidity – is the date of entering into of the arbitration clause.

City Golf claimed that the arbitration clause was invalid during the arbitration proceedings as it breached peremptory currency law, sanctioned by criminal law. The arbitrator, however, tried this claim only in respect to the validity of the loan agreement, but incorrectly failed to try this in respect to the arbitration clause. The failure affected the outcome, as Nordea’s claim should rightfully have been dismissed. Even if City Golf did not expand in detail on applicable Swedish law during the arbitration proceedings, it is now entitled to do so in the challenge proceedings. The *jura novit curia* principle applies

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in arbitration proceedings, at least when it comes to procedural law. Thus, the arbitrator had not only to try whether the arbitration clause was invalid under peremptory Soviet currency law, sanctioned by criminal law, but also if this were the case under corresponding Swedish law.

After 19 years, City Golf was not in possession of documents to support its claims when Nordea initiated arbitration proceedings based on the loan agreement. Nordea had not calculated the interest correctly and a certain part of the capital amount had been paid. Despite the expressed claim thereto, the arbitrator failed to infer any negative conclusions with respect to Nordea's failure to produce documents upon the arbitrator's request. The circumstances concerning evidence was unbalanced, and this constitutes a procedural error that affected the outcome since the arbitrator would have concluded that it had not been shown that Nordea had a claim against City Golf if he had evaluated all evidence.

Nordea

Nordea has lent City Golf money, some of which has not been repaid. The arbitral award has ordered City Golf to repay the outstanding amount plus accrued interest, as well as compensation for litigation costs.

The matter that was tried by the arbitral tribunal – whether a party is liable to pay under a loan agreement – is clearly arbitrable. The loan agreement did not breach Swedish peremptory law, sanctioned by criminal law, nor did it breach then applicable Soviet law. Despite the fact that peremptory political-economical legislation need not be considered, the arbitrator did consider Soviet law. Thus, these have been taken into consideration.

The arbitration clause is governed by Swedish law and under Swedish law the clause is valid. Under the principle of severability, the test whether an arbitration clause is valid shall be tried separately. Even if the main

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agreement is invalid, this has no effect on the validity of an arbitration clause. Under then applicable Soviet law, the arbitration clause is valid. The currency legislation is not relevant with respect to the arbitration clause.

As is evident from the arbitral award, City Golf raised no objection with respect to the lack of a valid arbitration clause in the arbitration proceedings. And if this were the case, the arbitrator must be deemed to have concluded that a valid arbitration clause was at hand; through the arbitrator having discussed the appointment of the arbitral tribunal, he has clarified that a valid arbitration clause is at hand.

Nordea has fulfilled its obligation to produce documents pursuant to the arbitrator's request as far as possible and has also submitted explanations thereto. Even if this were not deemed to be the case, this does not entail that procedural error has been committed, nor can it be assumed that such a circumstance would have affected the outcome of the case. Inaccurate evaluation of evidence by an arbitrator does not constitute grounds for challenge proceedings.

THE GROUNDS FOR THE DECISION OF THE COURT OF APPEAL

The Examination

The Court of Appeal has decided the case after a main hearing. Upon City Golf's request, *Messrs. A.M. and D.C.* have been heard as witnesses. The parties have relied on written evidence.

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The decision of the Court of Appeal

Invalidity

The arbitration proceedings have undisputedly and in accordance with the arbitration clause taken place in Stockholm and Swedish law governs the arbitration clause. Thus, the question whether the dispute is arbitrable shall be tried under Swedish law. Grounds for invalidity are only relevant for matters that are not arbitrable under Swedish law.

City Golf has claimed that the peremptory Swedish and Soviet currency legislation applicable at the time of entering into the agreement puts the dispute within the scope of peremptory law, and that the arbitrator, as a result, has tried matters that fall outside the scope of matters amenable to out-of-court settlements.

The first paragraph of Section 1 of the LSF states that only such matters as are amenable to out-of-court settlements are arbitrable.

Item 1 of the first paragraph of Section 33 of the same act provides that an arbitral award is invalid if it rules on matters that are not arbitrable (lack of arbitrability) under Swedish law. The fact that there are peremptory rules in a certain field does not, however, automatically entail that disputes in this field are not arbitrable. With respect to international disputes that involve foreign law, it must be decided on a case-by-case basis whether the foreign applicable law is of such nature that a settlement of the dispute before a Swedish court would not be accepted. If the foreign legislation is of an economical-political nature, it is often the case that there are no reasons to let the foreign law affect the possibility of an amicable settlement in Sweden and thus the arbitrability under Swedish law. This view is in line with international tendencies to accept that an international dispute is resolved by arbitration even if a similar

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national dispute would fall outside the scope of matters eligible for arbitration (see government bill 1998/99:35 p. 49 f.).

Firstly, the Court of Appeal holds that the relevant time for ruling on whether the dispute is arbitrable is the time of entry into the loan agreement, i.e. 24 January 1990. The parties should already at the time of entry into the agreement be able to foresee the consequences of the agreement, at least with respect to invalidity (Lindskog, Skiljeförfarande. En kommentar, p. 241).

At the time of entry into the loan agreement, there was peremptory currency legislation, sanctioned by criminal law, in force in Sweden as well as in the Soviet Union.

The Currency Act and Regulation applicable at the time in Sweden provided restrictions on transferring money and securities both into, and out of, Sweden. The same applied to purchases and sales of foreign currencies and foreign claims. There were, however, no restrictions with respect to a Swedish legal entity lending money to a foreign legal entity, which in turn undertook to repay that money. Thus, the currency legislation did not restrict the permissibility of legal obligations under a loan agreement as such; the restrictions applied to the forms of execution of payments across borders.

Section 10 of the Currency Regulation provided that a Swedish creditor prohibited to, in order to circumvent the currency regulations, sell or purchase goods at prices that deviated from regular market prices or take other actions with a similar purpose. Further, it was not permitted to enter into agreements on other means of payment than standard means, unless trade practices provided otherwise.

The Court of Appeal holds that the parties' claim and debt under the agreement cannot be deemed to fall within the scope of peremptory law so as to render their obligations outside the scope of out-of-court settlements. Thus,

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with respect to this, the parties could settle out of court. The matter tried by the arbitration tribunal is whether there is a debt or not and not how the payment should be executed. Thus, the dispute is arbitrable. Having the preceding in regard, the claim for invalidity shall be dismissed.

Annulment

With respect to preclusion, the Court of Appeal finds that City Golf, during the arbitration proceedings in the “Statement of Rejoinder”, dated 30 October 2009, Section 4.3.8, made a clear objection on the validity of the arbitration clause. The Section is worded as follows.

In accordance with the applicable mandatory rules of Soviet and Russian foreign-exchange legislation, which are applicable in this case with a glance of the Rome Convention and Rome I Regulation, the Loan Agreement thus has been invalid as from its execution (including, *inter alia*, the provisions concerning applicable law and arbitration clause).

This taken into account, the Claimant’s request for relief against the Respondent in this arbitration should be treated with due regard for the fact that the Respondent and the Claimant do not have and have never had any contractual relationship. The Claimant, therefore, is to bear the burden of proving the existence and the essence of the relations and the transactions between the Respondent, the Claimant and NCC taking into account that the Loan Agreement and the Amendments are null and void.

Thus, the Court of Appeal holds that the objection is not precluded.

Under the principle of separability provided by Section 3 of the LSF, the validity of the arbitration clause shall be tried separately, irrespective of whether any grounds for invalidity of the agreement as a whole is at hand.

What has been claimed with respect to peremptory currency law has not, as noted above, led the Court of Appeal to find that the matter tried by the arbitration tribunal was a matter actually falling outside the scope of out-of-court settlements. This does not preclude, however, that grounds for invalidity of a part of the main agreement may have been provided under Soviet or Swedish law. Notwithstanding the preceding, no grounds for invalidity have

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been raised with respect to the arbitration clause, other than the fact that the dispute falls outside the scope of out-of-court settlements because of the peremptory currency legislation.

Therefore, the Court of Appeal finds that it has not been shown that the arbitration clause was invalid. Thus, the challenge cannot be granted based on item 6 of the first paragraph of Section 34 of the LSF.

On the matter of procedural errors and annulment based on item 6 of the first paragraph of Section 34 of the LSF, the Court of Appeal notes that the arbitrator, as far as set out in the award, has not tried the objection of invalidity of the arbitration clause. On the contrary, the arbitrator states (the arbitral award, p. 106) that the “Respondent has not challenged the right of the Parties to have agreed to SCC arbitration in the Loan Agreement [...]”. Thus, the objection raised by City Golf in Section 4.3.8 of the “Statement of Rejoinder” appears to have been overlooked by the arbitrator. The Court of Appeal finds this to be a procedural error. However, since the Court of Appeal has deemed the arbitration clause to be valid, the procedural error that occurred in the arbitration proceedings cannot be deemed to have affected the outcome thereof.

With respect to the arbitrator’s request that Nordea produce documents, the arbitral award clearly states how this was done, that Nordea has provided explanations and that City Golf has motioned that this should be considered to Nordea’s detriment when evaluating the evidence. The Court of Appeal notes that Swedish law provides for free evaluation of evidence and that the arbitrator is obliged only to state what has been established in the case. Thus, no procedural error has occurred in this respect.

In summary, the Court of Appeal finds that the dispute in the challenge proceedings is arbitrable and is governed by a valid arbitration clause between the parties, and that no procedural errors that have affected the

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outcome of the case have been committed. Thus, City Golf's claim shall be dismissed.

Litigation costs

Having regard to the foregoing, City Golf shall compensate Nordea for its litigation costs before the Court of Appeal. The claimed amount is not disputed.

Possibility of appeal

The Court of Appeal finds that the present case contains issues that are relevant as a matter of precedent to be decided on by the Swedish Supreme Court. Consequently, the Court of Appeal permits the judgment to be appealed (second paragraph of Section 43 of the LSF).

HOW TO APPEAL, see Appendix B

Appeals to be submitted by 4 November 2011.

The decision has been made by: Judges of Appeal K.Å., U.I. and A.-K.W. (Reporting Judge of Appeal). Unanimous.