NACKA DISTRICT COURT **MINUTES**

5 July 2019
Administered in Nacka

Case no.
Ä 6686-17, case document no. 93
Ä 1221-18, case document no. 4
Ä 1222-18, case document no. 4
Ä 1223-18, case document no. 4
Ä 1857-18, case document no. 6
Ä 1859-18, case document no. 79
Ä 1976-18, case document no. 45
Ä 1977-18, case document no. 45
Ä 2543-18, case document no. 300
Ä 2544-18, case document no. 6
Ä 4353-18, case document no.7
Ä 4354-18, case document no. 7
Ä 6339-18, case document no. 76
Ä 6620-18, case document no. 64

Administration in the absence of the parties

THE COURT
Senior Judge Thomas Strömgren, reporting, Judge Björn Malmqvist and
Assistant Judge Mikael Grenefalk

KEEPER OF THE MINUTES
Drafting Lawyer Gustav Sandler

PARTIES

Appellant
1. The Republic of Kazakhstan
Address at counsel

Counsel: *Advokat* Alexander Foerster and jur. kand. Ludwig Metz
Mannheimer Swartling Advokatbyrå AB
P.O. Box 1711
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2. The National Bank of Kazakhstan
Address at counsel

Address	Visiting address	Telephone	Telefax	Opening hours
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Counsel: *Advokat* Marcus Axelryd, *advokat* Karl Guterstam, *advokat* Karl Lindelöw
and associate Magnus Nygren
Frank Advokatbyrå AB
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103 87 Stockholm

Counterparties
1. Ascom Group S.A.
Address at counsel

2. Anatolie Stati
Address at counsel

3. Gabriel Stati
Address at counsel

4. Terra Raf Trans Traiding Ltd.
Address at counsel

Counsel to 1–4: *Advokat* Bo G H Nilsson, *advokat* Therese Isaksson, *advokat* Ginta Ahrel and associate Kristians Goldsteins
Westerberg & Partners Advokatbyrå
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101 39 Stockholm

MATTER
Attachment etc.

APPEALED DECISIONS
Decisions of the Swedish Enforcement Agency of 6, 11, and 20 September and 5 October 2017 in case no. U-24881-17/0103, decisions of 1 November 2017, no. 12174654207 and no. 12174652920, of 14 November 2017 no. 12174759568, of 19 February 2018 no. 1218367322, decisions of 12 April 2018 no. 12181150496, no. 12181151544 and no. 12181151692, of 12 June 2018 no. 12183170427, of 18 June 2018 no. 12183207427 and of 20 September 2018 no. 12184059371

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Following a review of the documents on file and what has otherwise transpired in the proceeding, the Court renders the following

DECISION

1. The District Court dismisses the matters from further action with respect to the decisions on enforcement of sequestration.

2. In all other respects, the District Court rejects the appeals.

3. The Republic of Kazakhstan and The National Bank of Kazakhstan are ordered to jointly and severally reimburse Ascom Group S.A., Mr. Anatolie Stati, Mr. Gabriel Stati and Terra Raf Trans Traiding Ltd. for their litigation costs in the amount of SEK 1,411,466, of which SEK 1,250,000 comprises costs for legal counsel, plus interest on the first amount pursuant to Section 6 of the Swedish Interest Act as from the day of the District Court's decision until the day of payment.

4. The Republic of Kazakhstan is also ordered to reimburse Ascom Group S.A., Mr. Anatolie Stati, Mr. Gabriel Stati and Terra Raf Trans Traiding Ltd. for their litigation costs in the amounts of SEK 5,998,665 for costs for legal counsel and USD 77,532.24, of which USD 60,428.25 comprises costs for legal counsel, plus interests on the first two amounts pursuant to Section 6 of the Swedish Interest Act as from the day of the District Court's decision until the day of payment.

MOTIONS ETC.

The Republic of Kazakhstan ("Kazakhstan") and The National Bank of Kazakhstan (the "Central Bank") have requested that the District Court repeal the decisions of the Enforcement Agency.

Ascom Group S.A., Mr. Anatolie Stati, Mr. Gabriel Stati and Terra Raf Trans Traiding Ltd. (the "Investors") have objected to amending the decisions of the Enforcement Agency.

The parties have claimed compensation for their respective litigation costs before the District Court.

REASONS FOR THE DECISION

Background etc.

After a dispute had arisen between the Investors and Kazakhstan, the Investors requested arbitration before the Stockholm Chamber of Commerce. The arbitral award was rendered in December 2013. Pursuant to the arbitral award, Kazakhstan was ordered to pay to the Investors just under USD 500 million plus interest as well as to reimburse their cost.

Kazakhstan challenged the validity of the arbitral award before Svea Court of Appeal. In 2016, the Court of Appeal rejected the challenge and ordered Kazakhstan to reimburse the Investors' litigation cost.

Upon the Investors' request, on 21 August 2017 Stockholm District Court gave an interim decision on sequestration of such Kazakh property that could be presumed to cover the Investors' claim under the arbitral award in the event of an attachment of the said Kazakh property. The District Court gave its final decision in the said matter in January 2018 and confirmed the sequestration, and ordered Kazakhstan to reimburse the Investors' litigation cost.

After the Investors had applied for enforcement of the sequestration and for attachment to cover their claims under the decisions of the courts, the Enforcement Agency directed enforcement measures against, *inter alia*, a claim against SEB for a certain number of shares in various Swedish listed companies, funds deposited into a bank account linked to the securities account as well as claims against the Swedish Tax Agency concerning paid withholding tax, which the Agency, in response to relevant applications, had decided to reimburse.

Undisputed circumstances

On 23 August 2000, by way of Presidential Decree no. 402, the President of Kazakhstan decided to establish The National Fund of the Republic of Kazakhstan (the "National Fund") and tasked the Central Bank with the management of the National Fund. The Central Bank's management of the fund is

governed by, *inter alia*, Presidential Decrees no. 402 and 543, Kazakhstan's budget law as well as an agreement between Kazakhstan and the Central Bank (the "National Fund Agreement"). Under the National Fund Agreement the Central Bank may either hold the funds in its own name, or transfer funds and the responsibility for their investment management to third-party managers. Where the funds are invested is decided by investment advisers, so-called Asset Managers, connected to the Central Bank. Some of the funds of the National Fund have been transferred by the Central Bank to the external manager The Bank of New York Mellon ("BNY"). This was done within the scope of an agreement entered into by them, named Global Custody Agreement (the "GCA"). The agreement entails that BNY executes investments, e.g. acquires securities in a specific jurisdiction, as per the decisions of the Asset Managers. BNY has entered into a custody agreement with SEB for the securities acquired by BNY. For this purpose, BNY has opened a securities account and a bank account connected to the securities account with SEB. The securities subjected to the attachment have been acquired by BNY within the scope of the GCA and they have been registered by SEB in the securities account.

Legal grounds

As legal grounds for the appeals, Kazakhstan and the Central Bank have invoked, *inter alia*, that the property does not belong to the debtor, that the property is protected by state immunity under the principles set forth in articles 19 (c) and 21 1. (c) of the UN Convention on Jurisdictional Immunities of States and Their Property (the "Convention") and that measures of constraint may not be executed with respect to the securities because they cannot be deemed located in Sweden.

As grounds for their position, the Investors have stated, *inter alia*, that the evidence establishes that the property belongs to Kazakhstan, that the property is not covered by state immunity under any of the articles invoked, that measures of constraint may be executed with respect to the securities because they must be deemed located in Sweden and that Kazakhstan at any event has lost its right to invoke state immunity because of its abuse of rights.

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The conclusions of the District Court

The securities are located in Sweden and Swedish law shall be applied in rem

The securities comprise shares (registered for nominee ownership) in Swedish Central Securities Depository ("CSD") companies. An account provision has been made with respect to the shares in accordance with the Swedish Financial Instruments Accounts Act (SFS 1998:1479). Euroclear keeps the CSD register and has authorized SEB, in its capacity as the banking institution keeping the accounts, to execute registration measures on its own and third parties' behalf, as well as authorized SEB to be registered as nominee of the securities. BNY is registered as nominee in a register kept by SEB, i.e. a "sub-nominee".

The Swedish Act on Trading of Financial Instruments (SFS 1991:980), Chapter 5, Section 3, sets forth a choice of law provision applicable to transfers, pledges and other dispositions concerning dematerialised financial instruments. When a purchaser's right to the instruments has been registered in accordance with the statutory provisions, the law of the country where the register is kept shall be applied. The choice of law provision is, however, limited to aspects *in rem* of a transaction, i.e. the legal effects with respect to third parties. Thus, contractual issues following from the transaction are not covered by the provision (see Government Bill 1999/2000:18 p. 96 *et seq*.). Such financial instruments should therefore, with respect to issues *in rem*, be viewed as property located in the country where the register is kept (see Government Bill 1999/2000:18 p. 95 *et seq.* and Michael Bogdan, *Svensk internationell privat- och processrätt*, 8th ed., p. 278).

It follows from the above, that with respect to issues *in rem*, the securities shall be deemed located in Sweden and that Swedish law shall be applied as regards issues *in rem*. Thus, there is nothing preventing enforcement measures against the securities on the ground that the securities are not located in Sweden. As a result, the Enforcement Agency had jurisdiction to take the relevant decisions.

It has been established that the property belongs to Kazakhstan

The appellants have asserted that the property belongs to BNY and have argued, *inter alia*, that BNY has acquired the property within the scope of the GCA and that this agreement entails that the Central Bank

merely has a claim against BNY for the value of the property. As regards Kazakhstan's right to the property, the appellants have argued that Kazakhstan in turn has a claim against the Central Bank, which constitutes the National Fund. According to the appellants, however, Kazakhstan is not the owner of the property included in the National Fund. They have further argued that Kazakhstan cannot be deemed as the owner to the securities in Sweden, because Kazakhstan lacks the right to dispose of them.

It has been established that BNY is the holder of the relevant accounts with SEB and that the accounts have been used by BNY to manage securities which BNY has acquired on behalf of another party. Further, it is undisputed that BNY had acquired the securities which were registered in the securities account within the scope of the GCA. Moreover, it has been established that the funds attached in the bank account were comprised in part of dividends and other yields from securities which BNY had acquired within the scope of the GCA, and in part of funds which the Swedish Tax Agency had reimbursed following its decisions to grant Kazakhstan reimbursement of paid withholding tax. These decisions were made on the basis of applications in which Kazakhstan, through its Ministry of Finance, has been set out as the beneficial owner of the property. The evidence establishes that Kazakhstan's Minister of Finance has authorized BNY on behalf of Kazakhstan to, *inter alia*, apply for reimbursement of withholding tax. BNY, in turn, has entered into an agreement with SEB on submitting such applications to the Tax Agency on the basis of information provided by BNY.

The District Court notes that the appellants previously asserted that the property is owned by the Central Bank and that they in a relatively late stage of this proceeding, with no further explanation, have changed their position with respect to the issue of the ownership to the property. The assertion that BNY is the owner of the property is not supported by the evidence. Instead, the evidence forcefully implies that Kazakhstan, through its Ministry of Finance, is the actual owner of the property, not least due to the fact that Kazakhstan's Minister of Finance has granted BNY a power of attorney to exercise on behalf of Kazakhstan all rights which a shareholder normally has, such as exercising its voting rights and applying for reimbursement of paid withholding tax as per the applicable tax treaty. It is not likely that the power of attorney was granted for any other reason than that Kazakhstan is the owner of the property. In all other aspects, the District Court agrees with the conclusions of the Enforcement Agency concerning the ownership to the property.

As regards the claims for reimbursement of withholding tax, it could be added that already the fact that the Tax Agency has granted Kazakhstan the right to reimbursement means that the property (the claims) belongs to Kazakhstan.

There is no impediment to enforcement due to state immunity

The appellants have, in the event that the District Court would conclude that the property does belong to Kazakhstan in the sense of the Enforcement Code, argued that the property is included in the National Fund, which has a distinct non-commercial purpose, and belongs to the Central Bank in the sense of the Convention, meaning that the property is protected against measures of constraint on the basis of state immunity under the principles codified in articles 19 (c) and 21 1. (c) of the Convention. They have further argued *inter alia* the following. Article 21 1. (c) explicitly states that property which belongs to a country's central bank shall not be deemed as such property which the state specifically uses or intends to use for other than non-commercial purposes. As a result, the property is in any event immune against measures of constraint. Whether the property is used for monetary purposes is irrelevant, since no such qualifier has been set forth in the article.

The Convention was adopted by the UN General Assembly on 2 December 2004. To a large extent – but not entirely – it is a codification of customary law. In several aspects it constitutes a compromise between the opinions of different states. In 2009, The Swedish parliament accepted the government's proposal (Government Bill 2008/09:204 *Immunities of States and their Property*) that Sweden is to ratify the Convention and that it should be implemented in Swedish law by way of incorporation. The Convention, just as the Act (SFS 2009:1514) on Immunities of States and their Property, has not yet entered into force.

The Supreme Court has in the case NJA 2011 p. 475 stated, *inter alia*, the following on how the Convention is to be viewed under Swedish law. The Convention must be deemed to express the principle, by now recognized by many states, that enforcement may be ordered against at least certain property belonging to a state, namely property used for other than government non-commercial purposes (see article 19 (c)). In contexts such as the instant one, the wording must be taken to mean that immunity may be invoked at least for property which is used for a state's official functions. On the other hand, the wording should not be taken to mean that immunity prohibits measures of constraint already because the relevant property is owned by a state and used for a non-commercial purpose. However, measures of

constraint with respect to property owned by a foreign state should be barred when the purpose of the holding of the property is of a certain qualified nature, such as when the property is used to exercise the state's *acta jure imperii* and similar functions of official nature or when the property is of such specific nature as listed in article 21 of the Convention.

As stated above, the District Court has concluded that the property which has now been attached belongs to Kazakhstan in the sense of the Enforcement Code. In the view of the District Court, the property is also Kazakhstan's in the sense of article 19 of the Convention. Thus, what is set forth in this article applies as such. The aforementioned case NJA 2011 p. 475 must be taken to imply, however, that immunity requires that the property is not only used or intended for use for non-commercial purposes, but also that the purpose of the holding of the property is of a certain qualified nature. Amongst other things, the fact that the assets of the fund have not been reported in the Central Bank's accounting contradicts, in the view of the District Court, that – aside from the fact that the property belongs to Kazakhstan in the sense of the Enforcement Code – the property should be deemed to belong to the bank in the sense of article 21 1. (c). Other factors supporting the same conclusion are the structure of the procedure applying to decisions on dispositions of the funds in the fund, that the Central Bank has received commissions for its management of the fund, that Kazakhstan through its Ministry of Finance has granted BNY a power of attorney to exercise all rights which a shareholder normally has and that Kazakhstan on numerous occasions has claimed reimbursement of paid withholding tax. On the contrary, no circumstances which conclusively support the opposite have surfaced. In sum, the District Court concludes that the appellants have not established that the purpose of the holding of the property is of such qualified nature by belonging to the Central Bank under the Convention or otherwise. None of the circumstances invoked by the appellants entail that the property is immune against measures of constraint.

Summary of conclusions on the merits

The arguments and references made by Kazakhstan and the Central Bank in support of their appeals do not prompt the District Court to reach any other conclusions than those reached by the Enforcement Agency. Therefore, the appeals shall be rejected.

The Enforcement Agency's decision on enforcement of the sequestration has lost its practical and legal relevance through the Agency's decisions on attachment of the same property. Therefore, in these respects, the matters shall be dismissed from further action.

Litigation costs

Pursuant to the provisions of Section 32 of the Act on Court Matters (SFS 1996:242), there are grounds to apply the provisions on litigation costs of the Code of Judicial Procedure, Chapter 18.

In view of the outcome, Kazakhstan and the Central Bank shall be ordered to reimburse the Investors' litigation costs.

The Investors have claimed reimbursement in the amounts of SEK 7,410,131 and USD 77,532.24. Of the amount claimed in Swedish kronor SEK 7,248,665 relates to costs for legal counsel and SEK 161,466 relates to expenses. Of the amount claimed in US dollars USD 60,428.25 relates to costs for legal counsel from the law firm King & Spalding and USD 17,103.99 relates to expenses incurred by King & Spalding in its assistance to the legal counsel in the action at issue.

Kazakhstan has conceded that the claimed amounts are reasonable, and shall therefore be ordered to reimburse the Investors' litigation costs in the claimed amounts.

The Central Bank has left to the District Court to determine whether the claimed amounts are reasonable.

On that issue, the District Court concludes as follows.

First, as regards the compensation claimed for legal counsel, the District Court notes that the cost submission contains no specification of the number of hours spent, nor any details concerning the work performed. The claimed amount appears high, also when taking into account that the matter has involved complicated issues. Reasonable compensation for the work required to protect the Investors' interests in these matters does not exceed SEK 1,250,000.

As regards the amount claimed for expenses in Swedish kronor, there is no reason to question these costs. The amount, SEK 161,466, does not exceed what must be deemed as reasonable.

The amount claimed for costs incurred by King & Spalding relate to costs that have not been necessary to protect the interests of the Investors. In this determination, the District Court particularly takes into account that the Investors at the hearings before the Court have been represented by counsel who speak Swedish. For the same reason, the cost for legal counsel from the law firm King & Spalding does not appear necessary to protect the interests of the Investors. Consequently, the Central Bank shall not be ordered to reimburse for these costs.

In sum, the Central Bank shall be ordered to reimburse the Investors for their litigation costs in the total amount of SEK 1,411,466, plus interest as per the provisions of the District Court's decision above.

HOW TO APPEAL, see appendix 1
An appeal – addressed to the Svea Court of Appeal – shall have been received by the District Court by 26 July 2019. Leave to appeal is required.

Gustav Sandler
Minutes shown/