Stockholm den 8 juli 2020

Till

Högsta domstolen

APPEAL AND APPLICATION FOR LEAVE TO APPEAL

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Överklagat avgörande:	Svea hovrätts beslut den 17 juni 2020 i mål nr ÖÄ 7709-19
Saken:	Utmätning, fråga om verkställighet

As an agent for Anatolie Stati and others, hereinafter **Investors**, we hereby submit the following appeal and request for leave to appeal.

INTRODUCTION

1. On June 17, 2020, Svea Court of Appeal decided to amend the Nacka District Court's decision and set aside the decision of the Crown Prosecutor's Office regarding the foreclosure of

   – listed securities on a securities depository in the Scandinavian Enskilda Bank (SEB),

   – assets attributable to the securities - dividend, sales proceeds from subscription rights and repayment of Swedish coupon tax - and

   – cash in a bank account linked to the securities deposit (together "**the Property**").

2. During 2018, the Crown Prosecutor's Office sold the foreclosed securities in 33 listed Swedish large companies and deposited the sales proceeds on another authority belonging to the account. The total value of the property is approx. SEK 780 million.

3. The Republic of Kazakhstan ("**Kazakhstan**"), as the debtor, and the National Bank of Kazakhstan ("**the National Bank**"), as a third party, appealed against the foreclosure decisions and requested that the foreclosures be revoked because

   - the forged property does not belong to Kazakhstan,
   - the securities are not available in Sweden as well
   - the property is covered by State immunity under Articles 19 (c) and 21 (1) (c) of the United Nations Convention on the immunity of States and their property (the "**State Immunity Convention**").

   Investors disputed that enforcement barriers existed, arguing that Kazakhstan has in any case lost the right to invoke state immunity through its abuse of rights.

4. The Supreme Court chose to examine only the issue of property enjoying state immunity and assumed that the applicable international customary law corresponds to the wording of Article 21 (1) (c) of the State Immunity Convention, which provides for immunity for property belonging to a central bank or other monetary policy authority in the state. In this examination, the High Court made the assumption that the securities are in Sweden and that the forged property belongs to Kazakhstan in the meaning of the extension bar.

5. In interpreting the scope of the provision, the High Court applied the principles of treaty interpretation in the Vienna Convention on the Law of Treaties (1969) (the "Vienna Convention"). The High Court concluded that the Property must not be forfeited because it belongs to Danmarks Nationalbank within the meaning of Article 21 (1) (c) and thus is subject to state immunity. Finally, the High Court found that abuse of rights cannot affect the state's right to invoke

state immunity.

MOTIONS

6. Investors request that the Supreme Court

   i) grant leave to appeal;

   ii) by amending the decision of the Court of Appeal, establishes the decision of the District Court;

   iii) releases Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. from the obligation to reimburse the legal costs of Kazakhstan and Danmarks Nationalbank to the District Court and the Court of Appeal, and

   iv) order Kazakhstan and Danmarks Nationalbank to jointly and severally pay compensation for the costs incurred by Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. in the District Court and the Court of Appeal and in the Supreme Court in an amount to be stated later.

BASES

7. The property belongs to the debtor Kazakhstan and is located in Sweden. It can therefore be measured for Kazakhstan's debts.

8. There are no barriers to enforcement. The property does not enjoy state immunity as it does not belong to Danmarks Nationalbank, is not used in the context of monetary policy and has a commercial purpose.

9. Kazakhstan has in any case lost the right to invoke state immunity through its abuse of rights.

BACKGROUND

10. On the basis of the enforcement procedure, an arbitration award was issued on December 19, 2013 in the Stockholm Chamber of Commerce Arbitration Institute's (SCC) case No. V (116/2010). The Arbitral Tribunal found that Kazakhstan breached its "fair and equitable treatment" commitments in the Energy Charter Treaty (ECT) and therefore awarded Investors over USD 500 million, plus interest, in compensation.[1]

11. Kazakhstan has, without success, attempted to challenge the arbitration award twice through an action for damages and invalidity before the Svea Court of Appeal (cases Nos. T 2675-14 and T 12462-19). Kazakhstan has also tried to challenge the Svea Court of Appeal's judgment in the first complaint case by applying for a ruling and later also rescission. The present case is the fourth case before the Supreme Court with essentially the same position as a party.[2]

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[1] Skiljedomens värde per idag uppgår till nästan 543 miljoner USD. Kazakstan har inte erlagt någon betalning trots sitt åtagande i artikel 26(8) ECT: "*Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards*".

[2] Se Högsta domstolens beslut i domvilloklagan (mål nr Ö 613-17), Högsta domstolens beslut i anledning av Kazakstans begäran om inhibition (mål nr Ö 2096-18) och Kazakstans resningsansökan (mål nr Ö 1888-20).

12. In August 2017, the Investors applied for an interim decision on attachment to the Stockholm District Court which granted the requested action and in January 2018 announced a final decision whereby the attachment was determined (Case No. T 10498-17). Kazakhstan has been obliged to reimburse Investors' legal costs both in the first case and the invalidity case (Svea Court case No. T 2675-14) and in the district court case (Stockholm District Court case number T 10498-17). Kazakhstan has not made any payment. It can be added that since the end of 2014, Investors have had serious financial difficulties, mainly due to Kazakhstan's expropriation of Investors' crude oil and gas investments in the country and complete refusal to comply with their obligations under the Arbitration. This and other legal processes are financed by third parties.

REASONS FOR GRANTING LEAVE TO APPEAL

13. Investors believe that it is important for the management of the legal application that the Supreme Court examines the issue of whether, under current customary law, the assets of a commercial nature and purpose handled - but not owned - by a central bank should be exempted from foreclosure State immunity? To the extent that management is to be sought in the State Immunity Convention, the question arises as to its correct interpretation under the Vienna Convention.

Lack of legal guidance in Sweden

14. Sweden lacks the applicable general legislation relating to the issue of state immunity. There is also no general and current international agreement in the field of state immunity. In 2004, the United Nations General Assembly adopted the State Immunity Convention but it has not yet entered into force. Therefore, at international level, state immunity is still governed by international customary law.

15. Sweden has ratified the State Immunity Convention. When the Convention comes into force, it will be incorporated into Swedish law by the Act (2009: 1514) on the immunity of states and their property. However, the preparatory work to the law that has not yet come into force provides a very limited guide to the scope of state immunity in property of the kind at issue in the case.

16. It is unclear to what extent Article 21 (1) (c) of the State Immunity Convention expresses the customary law in force.[3] During the preparation of the Convention text, the Nordic countries, including Sweden, expressed objections to the claim that all kinds of central bank property should be protected from enforcement measures. Instead, they suggested that state immunity should only include property used for monetary policy purposes.[4]

[3] Se hovrättens beslut, s. 13 samt Ulf Linderfalks sakkunnigutlåtande, s. 11 (uab 156).
[4] Yearbook of the International Law Commission 1988 Vol II Part 1, s. 119 (uab 262).

17. The scope of state immunity under Article 21 (1) (c), which provides for immunity for property belonging to a central bank or other monetary policy authority in the state, has not previously been tested in Sweden.

18. In NJA 2011, p. 475 (Lidingöhuset), the Supreme Court examined questions of enforcement in the immovable property of a foreign state and then applied international law on diplomatic immunity and a different provision of the Convention (Article 19 (c)) than that which is relevant in this matter. Prior to that, the issue of state immunity against enforcement has been tried in NJA 1942, p 65 (the city boats). In recent decades, however, customary law has developed in a restrictive direction, which means that a state's commercial or private law action is, as a rule, exempted from the right to immunity, which has also been confirmed in NJA 2011 p. 475.

19. Similarly, Swedish doctrine statements regarding interpretation of Article 21 of the State Immunity Convention are lacking. The existing Swedish doctrinal statements have mainly come about as a result of the Supreme Court's decision in NJA 2011, p. 475 and concerns the application of Article 19 (c) in the light of diplomatic immunity.

20. Investors consider that there is also a need for a guiding statement from the Supreme Court regarding treaty interpretation in accordance with the principles of the Vienna Convention. Questions about treaty interpretation almost always arise in cases before Swedish courts arising from the so-called. the investment arbitration procedures between individual investors and states and which are preferably about the arbitration / invalidity of arbitration or the jurisdiction of the arbitration panel.[5] There are no previous indicative statements from the Supreme Court regarding the application of the Treaty interpretation rules of the Vienna Convention.

21. Guidance from the Supreme Court on the issue of the scope of the state immunity is thus important from a legal policy point of view.

Lack of legal guidance abroad

22. Even in an international perspective, there is no precedent for interpreting Article 21 (1) (c) of the State Immunity Convention.

[5] Se till exempel, Svea hovrätts mål nr T 2675-14 (Republiken Kazakstan mot Stati m.fl.), Högsta domstolens mål nr T 2113-06 (Republiken Kirgizistan mot Petrobart), Svea hovrätts mål nr T 10060-10 (Ryska Federationen mot RosInvestCo), Svea hovrätts mål nr T 9128-14 (Ryska Federationen mot Renta 4 m.fl.), Svea hovrätts mål nr T 6582-16 (Cem Uzan mot Republiken Turkiet), Svea hovrätts mål nr T 8735-01 (Tjeckiska Republiken mot CME), Svea hovrätts mål nr T 4658-18 (Konungariket Spanien mot Novenergia), Svea hovrätts mål nr T 4236-19 (Republiken Italien mot CEF Energia).

23. In the present case, the parties have set out a few decisions from England [6] and the United States [7] which puts different views on the scope of state immunity with regard to central banks' funds. However, it should be noted that both countries have their own statutes for state immunity which were adopted long before the establishment of the State Immunity Convention.

24. A number of parallel enforcement proceedings are also currently underway between Investors and Kazakhstan in other European jurisdictions and in the United States, where Kazakhstan invokes state immunity as an obstacle to foreclosure. A similar question concerning the interpretation of Article 21 (1) (c) of the State Immunity Convention is, for example, subject to review by the Belgian courts. The foreclosure case in Sweden is, in the order of instance, before the case in Belgium and other jurisdictions, which is why the Supreme Court's ruling will have significance as a guide for the courts in other countries as well.

25. The interpretation and scope of Article 21 (1) (c) have been the subject of some discussion in the doctrine of international law, but opinions differ, inter alia: a. whether the provision is to be applied categorically or functionally (see the Court of Appeal's decision p. 14).

26. The question of the scope of the provision has recently become particularly relevant in view of the development of state wealth funds, so-called Sovereign Wealth Funds (SWF). These SWFs are generally described as commercial investors who act to achieve purely financial goals instead of having a political agenda.[8]

27. The forged property is part of the Kazakh National Fund (the National Fund of the Republic of Kazakhstan) managed by the National Bank. It is uncontested in the case that the National Fund is a SWF. It is also undisputed that the National Fund is not a legal person, but a wealth asset.

28. The fact that some states, often with significant natural resources, increasingly choose to invest their surplus assets in listed equities around the world is a fairly new phenomenon that was neither envisaged nor discussed at the UN Commission on Human Rights Convention's work on the State Immunity Convention in 1978-1991. Against this background, there is also a strong general interest in obtaining a guiding precedent.

DEVELOPMENT OF THE GROUNDS FOR APPEAL

29. As mentioned above, it is unclear whether Article 21 (1) (c) reflects current customary law. The Court of Appeal also notes that state practice diverges between views on the one hand

[6] På s. 24 i beslutet hänvisar hovrätten till det engelska rättsfallet AIG Capital Partners, Inc, & Anr v Kazakhstan (National Bank of Kazakhstan intervening) från 2005 som är ett förstainstansavgörande som inte överklagades på grund av förlikning.

[7] Avseende avgöranden i USA se t.ex. Ingrid Wuerths rättsutlåtande av den 15 januari 2020, s. 9, (hab 105, Investerarnas Bilaga S-86).

[8] Ingrid Wuerths rättsutlåtande av den 15 januari 2020, s. 7 f, (hab 105, Investerarnas Bilaga S-86).

that all central bank property enjoys immunity by virtue of its nature and, on the other hand, that central bank property must be treated as any other state property in immunity. Therefore, the High Court finds that a closer examination of international customary law is required in the application of the provision (p. 13). However, the High Court subsequently limits its examination to whether the categorical or functional application finds support in the Convention text or the preliminary works. The High Court has not done any more in-depth examination of state practice.

30. Investors are of the opinion that the current customary law has not been clarified to the extent that it can be said with certainty that Article 21 (1) (c) in all its parts corresponds to a rule in international customary law. The view is also supported by the expert professor Ulf Linderfalk and professor Ingrid Wuerth.[9]

31. In the event that Article 21 (1) (c) is considered to be in conformity with customary law, the Investors' position is that the provision be interpreted in accordance with the Treaty interpretation rules of the Vienna Convention. There is reason to question the High Court's interpretation of Article 21 (1) (c) of the State Immunity Convention with the application of the Vienna Convention.

32. In a previous decision, Svea Court of Appeal stated that under the general rule of interpretation in Article 31 of the Vienna Convention, a treaty must be interpreted honestly and in accordance with the common sense of the expression of the treaty, seen in its context and in the light of its purpose and purpose. The starting point for the interpretation is always the wording of the treaty. If the wording is clear, it will also be the end point of the interpretation. The purpose and purpose of a treaty is not an independent means of interpretation, but a part of the interpretation operation to be carried out in accordance with Article 31 in order to understand the common sense of the treaty (see Case No T 9128-14, p. 4).

33. The parties to this case do not agree on the meaning of the term "property of the central bank" in Article 21 (1) (c). According to the Investors, the provision only covers the property of the central bank, while Kazakhstan and the National Bank are of the opinion that the provision also covers property that a central bank manages, owns or controls.

34. The Court of First Instance first finds that the term 'property of' has not been defined in the Convention, but to indicate what is unclear in the wording of the term. The High Court then seeks guidance from an annex to the Convention containing a statement on the interpretation of another term used in Article 19 ("property that has a connection with the entity"). The High Court bases this statement on the basis

[9] Se Ulf Linderfalks sakkunnigutlåtande, s. 11 (uab 156) och Ingrid Wuerths rättsutlåtande av den 15 januari 2020 s. 5 (hab 105).

the conclusion that any property that a central bank owns, manages, possesses or Controls may be considered to be covered by the term 'property of' in Article 21 (1) (c).

35. The investors are of the opinion that the High Court has departed from the wording of the provision and extended its scope without support in the Convention. It may be added that analogous application of the statement in the annex to the Convention on the interpretation of the expression in Article 19 cannot be made already because the purpose of the addition in Article 19 (c) is to extend its scope, ie to permit enforcement even in property. which has only a connection with the debtor. However, the purpose of Article 21 is the opposite, namely, to exempt certain specific categories of State property.

36. With the court's interpretation, all property with which a central bank is involved is protected by state immunity, which leads to unreasonable consequences and allows abuse of the rules on state immunity. This is also why the Court of Appeal concludes that "it cannot be ruled out that property, even though it belongs to a central bank, cannot be subject to immunity under the provision of Article 21 (1) (c)" (p. 23 f.). Investors are of the opinion that if Article 21 (1) (c) is interpreted according to the wording and the scope is thus limited to central bank property, such boundary drawing problems will be considerably simpler and fewer.

37. The Court's continued considerations as to whether Article 21 (1) (c) should be applied categorically or functionally are therefore based on an erroneous assumption of the scope of the provision.

38. It may also be noted that the High Court appears to have misinterpreted statements contained in the bill to the law incorporating the Convention and in NJA 2011 p. 475 regarding Article 21. The High Court considers that they support the categorical application of the provision.[10] According to the Investors, the reported statements promptly support the view that the provision should be interpreted in accordance with its wording because they speak of "the nature of the property" and "property of special kind".

39. Furthermore, it is clear from the bill, with reference to the preparatory work to the Convention, that the purpose of the provision was to provide certain categories of property with special protection and that it was considered necessary in the light of the

[10] Hovrättens beslut, s. 22: "Vad beträffar svenska rättskällor anges i propositionen till den lag som inkorporerar konventionen att bestämmelsen i artikel 21 innebär att egendomen "Genom själva sin natur bör […] anses användas eller vara avsedd att användas enbart för statliga syften utan några som helst kommersiella ändamål." (prop. 2008/09:204, s. 82). I rättsfallet NJA 2011 s. 475 hänförde sig Högsta domstolen till bestämmelsen i artikel 21 när den behandlade frågan om vad som ska anses utgöra ett egendomsinnehav för ett statligt icke-kommersiellt ändamål enligt artikel 19 (c). Högsta domstolen anförde att "Hinder på grund av statsimmunitet […] bör emellertid anses föreligga om ändamålet med innehavet av egendomen är av ett kvalificerat slag […] eller då egendomen är av sådant särskilt slag som anges i artikel 21 i 2004 års FN-konvention." [Vår understykning.]

of the fact that in the case law of some states there were approvals for claims for coercive measures against e.g. foreign bank accounts or central bank assets.[11]

40. It is clear from Danmarks Nationalbank's annual report (uab 235, p. 135) that the National Fund's assets (and thus also the forged property) do not form part of Danmarks Nationalbank's assets. The Forged Property does not form part of Kazakhstan's gold or currency reserve, nor is the Property used by the National Bank for monetary policy purposes.

41. In addition, the National Bank's own witness, Aliya Moldabekova, confirmed in a hearing before the District Court that the Property is part of the National Fund's savings portfolio, whose sole purpose is to achieve value increase. To achieve this, the assets of the savings portfolio have been handed over for active management to some of the host's largest asset managers, such as HSBC, State Street, JP Morgan, UBS and Mitsubishi.

42. This is, among other things, why the Investors consider that the Court of Appeal's conclusion that Danmarks Nationalbank's management of the National Fund can be equated with the management of the state's economy and thus constitutes sovereign exercise (p. 24), is incorrect.

43. Danmarks Nationalbank's position with the Property, which according to the High Court is to be regarded as belonging to the Bank, has been purely formal. The National Fund itself belongs to Kazakhstan. Danmarks Nationalbank's management has consisted of engaging, on behalf of Kazakhstan, the Bank of New York Mellon to manage the current fund property and, in consultation with Kazakhstan, to engage the aforementioned professional asset managers to decide on its management through the purchase and sale of securities to create the best return.

44. In conclusion, it can be added that the Stockholm District Court, the Crown Court and the Nacka District Court have all found that the foreclosed Property is located in Sweden and belongs to Kazakhstan in the meaning of the Extension Bar. Contrary to the Court of Appeal, they found that the foreclosure is not hindered by state immunity because the foreclosed property consists of assets that are commercial both by nature and purpose. The property is not used and is not intended to be used for the state's high-ranking act. It is also not a property of Danmarks Nationalbank and is therefore not covered by state immunity.

45. The investors invoke the circumstances and grounds relied on in the district court and the High Court and intend to further develop their case after the Supreme Court has made a decision on a trial permit.

[11] Prop. 2008/09:204 s. 82.

PROOF M.M.

46. Investors invoke the evidence relied on in the district court and the High Court, see consolidated evidentiary information in Appendix 10 of the High Court.

47. Finally, investors would like to emphasize in particular that the ongoing enforcement cases are extremely burdensome for the Investors' economy, which has since been very strained as a result of Kazakhstan's expropriation. For the Investors, of which two are private individuals, it is therefore important that the Supreme Court handle this matter urgently.

Som ovan

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