Ö 3828-20

DECISION OF THE SUPREME COURT

The Supreme Court declares that there is no immunity from enforcement in the property covered by the Enforcement Agency's foreclosure decision (paragraph 1 of the decision of the Court of Appeal).

The Supreme Court grants leave to appeal regarding the remainder of the case.

The Supreme Court revokes the decision of the Court of Appeal and refers the case back to the Court of Appeal for further proceedings.

The Court of Appeal shall decide in the matter of liability for the legal costs in the Supreme Court.

CLAIMS PRESENTED IN THE SUPREME COURT

Ascom Group SA, AS, GS and Terra Raf Trans Traiding Ltd (the investors) have requested that the Supreme Court shall uphold the district court's decision, release them from the obligation to reimburse the counterparties' costs in the district court and the Court of Appeal and order the counterparties to jointly and severally reimburse the investors for their costs in the district court and the Court of Appeal.

The Republic of Kazakhstan and the National Bank of Kazakhstan have opposed the claims made by the investors.

The parties have claimed compensation for their costs in the Supreme Court.

The Supreme Court has granted the leave to appeal set out in paragraph 9 below.

REASONING

Background

1. Following a dispute between the investors and Kazakhstan, the investors initiated arbitral proceedings administered by the Stockholm Chamber of Commerce pursuant to Article 26 of the Energy Charter Treaty. In December 2013, an arbitral award was issued according to which Kazakhstan was ordered to pay approximately USD 500 million plus interest and compensation for the legal costs of the investors.

2. Kazakhstan brought an action for annulment of the award. The Court of Appeal dismissed the action. Kazakhstan then filed applications with the Supreme Court for revocation of the appellate court’s decision, requested a new trial and asserted that grave procedural errors had been made. The Supreme Court rejected the applications.

3. Following a request by the investors for enforcement of the award, the Swedish Enforcement Authority decided on foreclosure of financial instruments in a depository, funds in a cash account and receivables linked to the instruments, all assets kept by the bank SEB (the property). The financial instruments consisted of shares in approximately thirty listed Swedish limited companies. The decisions referred to the property as belonging to Kazakhstan.

4. Kazakhstan and the National Bank appealed against the foreclosure decisions. It was asserted that the property could not be subject to enforcement, firstly because the property does not belong to Kazakhstan in the sense required for foreclosure, secondly because the instruments are not located in Sweden, and lastly because the property is subject to state immunity. In the appeal, Kazakhstan and the National Bank claimed that the property instead belonged to the National Bank. The district court rejected the appeals. The decision was appealed to the Court of Appeal.

5. Without considering the objections made by Kazakhstan's and the National Bank, that the property does not belong to Kazakhstan in the sense required for foreclosure and the property is not located in Sweden, the Court of Appeal has concluded that the property is subject to state immunity. The court has therefore changed the district court's decision and revoked the foreclosure decisions.

6. The investors have appealed against the decision of the Court of Appeal and argued that the property can be seized.

7. Kazakhstan and the National Bank have – on the same grounds as in the district court (*cf.* p. 4) – maintained that the property cannot be subject to foreclosure.

8. The investors have contested that the property is subject to immunity. They have asserted that the property belongs to Kazakhstan and not to the National Bank and that the property is used for other than government non-commercial purposes. They have further claimed that Kazakhstan in any event has forfeited the right to invoke state immunity due to abuse of rights.

The leave to appeal

9. The Supreme Court has granted leave to appeal on the question of whether the property specified in the Enforcement Authority’s foreclosure decisions is subject to immunity from enforcement. The question whether leave to appeal shall be granted to the remainder of the case has been stayed.

10. The leave to appeal means that the Supreme Court, in this decision, neither rules on the question whether the foreclosed property shall be considered as located in Sweden, nor on the question whether the property belongs to Kazakhstan as required for foreclosure pursuant to Chapter 4 Section 17 of the Enforcement Code.

The legal framework

Immunity from enforcement

11. The entitlement to state immunity is based on the principle that states are sovereign and mutually equal; a state may therefore in principle not exercise jurisdiction in respect of another state. However, in state practice, this principle has developed in a restrictive direction so that exceptions can be made for disputes related to a state's commercial or private law activities. This restrictive view, as far as immunity from jurisdiction is concerned, has been adopted by the Supreme Courte (*cf.* "Nordiska utbildningsöverenskommelsen" NJA 1999 p. 821 and "Ambassadens renoveringskostnad" NJA 2009 p. 905).

12. The fact that a State has been denied immunity from jurisdiction does not mean that it also lacks immunity from enforcement of a judgment or an arbitral award. The issue of immunity from enforcement must be assessed separately, whereby coercive measures for enforcement are considered to be more intrusive in a state's sovereignty than the mere exercise of jurisdiction. As a result, a foreign state is entitled to immunity from enforcement to a wider extent than from jurisdiction. (*Cf. e.g.* Hazel Fox and Philippa Webb, The Law of State Immunity, 3rd ed., 2015, p. 23 *et seq*.)

13. However, immunity from enforcement is not absolute. The interest of a creditor to be paid in accordance with a judgment even when the debtor is a state justifies some limitations to the entitlement to immunity (*cf.* James Crawford, Brownlie's Principles of Public International Law, 9th ed., 2019, p. 489). A prerequisite is, however, that international customary law does not hinder such considerations.

The significance of the 2004 UN Convention

14. There are no provisions in Swedish legislation on the immunity of a foreign state from enforcement here. However, Swedish courts will have to observe the immunity that follows from international customary law.

15. On 2 December 2004, the United Nations General Assembly adopted the United Nations Convention on the Jurisdictional Immunities of States and Their Property. Sweden has ratified the convention (see SÖ 2009: 32) and incorporated it into Swedish law by the Act (2009:1514) on immunity for states and their property.

16. Neither the Convention nor the act has yet entered into force. Nevertheless, the Convention may be relevant insofar as its provisions shed light on the content of international customary law (*cf.* Jurisdictional Immunities of the State, I.C.J. Reports 2012, p. 99, paragraph 66).

17. The Convention deals with issues of immunity from coercive measures in the context of court proceedings in Articles 18-21. As a general rule, no coercive measures against a state's

property may be taken unless and to the extent specified in the provisions of the conventions. Article 19 regulates state immunity from post-judgment measures of constraint. Pursuant to Article 19 (c), exemptions from immunity from enforcement may be granted if:

> … *it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.*

18. In the preparatory work of the 2009 act, it was stated that there was no unified state practice regarding restrictions to the principle of immunity from enforcement, but that the countries of the Western world had developed an approach which meant that enforcement would be permitted in property used or intended to be used for commercial purposes (*cf.* Government bill 2008/09: 204 p. 45 and 56). Article 19 (c) can be seen as an expression of this approach.

19. In "*Lidingöhuset*" [also referred to as "*Sedelmayer v Russian Federation*"] NJA 2011 p. 475 (paragraph 14), the Supreme Court stated that the Convention in this part expresses the principle now recognized by many states, that enforcement can take place at least in property used for other than state, non-commercial, purposes. The Supreme Court thereby qualified the principle by means of a demarcation against cases where enforcement must be denied. According to the court, state immunity from enforcement in property owned by a foreign state is to be observed when the state's purpose in holding the property is of a qualified nature, such as when the property is used by the state to exercise its sovereignty and similar tasks of an official nature. In this context, the court also noted Article 21 of the UN Convention regarding property of a special kind as specified therein.

20. Article 21 (1) sets forth that certain types of State property "*shall not be considered as property specifically in use or intended for use by the State for purposes other than government non-commercial purposes under Article 19*". According to Article 21.1 (c), this applies to "*property of the central bank or other monetary authority of the State*".

21. The intention behind Article 21 (1) (c) is to provide central banks and other monetary authorities with a particular protection from enforcement measures. However, the extent of this protection appears unclear in international customary law. In this context it should be noted that during the negotiations that preceded the Convention there were different views on the issue and that no clear state practice has subsequently been developed.

22. Considering the protection interest reflected in Article 21 (1) (c), the particular protection of a central bank should apply not only to property which is owned by the bank in a property law sense, but also to property otherwise under the bank's disposition.

23. It is not self-evident, however, that the particular level of protection should apply to all property owned by the central bank or under its disposition. The reason why central bank property should be entitled to a particular protection must be that a central bank conducts tasks within the area of monetary policy in a broad sense. The particular importance of monetary policy to a state´s essential functions justifies in principle absolute immunity in respect of property used within this area.

24. There is no clear support for the position that absolute immunity under international customary law also applies when it comes to property held by a central bank without any connection to the bank's monetary policy tasks. Furthermore such far-reaching entitlement to immunity does not appear to be justifiable. The particular level of protection that central banks should be entitled to should therefore be limited to property that has a clear connection with the central bank's activities in the area of monetary policy. The extent to which other property under the bank’s disposition is protected from enforcement measures should be determined in line with the principles expressed in Article 19 of the Convention.

The purpose behind a state's holding of financial assets

25. As mentioned (*cf.* paragraphs 17-19), the purpose for which the property is held is of paramount importance when applying the principles expressed in Article 19. The purpose of holding real estate and movable property is generally clear through the actual use of the property. In the *Lidingöhuset*-case, the Supreme Court therefore could examine the exception to the principle of enforcement immunity on the basis of how the foreign state used its real property when the application for enforcement of the property was made. When it comes to holdings of financial assets traded on the capital market, there is often no actual use that can form the basis for assessing the purpose behind the holding. The assessment must therefore be made in a different way.

26. There may be several purposes behind a state's fund investments in the international capital market. The funds invested are usually not immediately needed to meet government purposes. The purpose of the investment may be that the state generally wishes to secure and increase the state's assets in order to meet society's needs in the long term and to create increased prosperity in the country. The motive can also be overall macroeconomic in that the state *e.g.* considers that immediate consumption of the assets leads to undesirable effects on the country's economy. In addition, the holding of financial assets may be intended to counteract the negative effects of international events or other unforeseen circumstances. Behind a state's decision to save in financial assets abroad there may also be monetary policy considerations.

27. There can be a connection between the purpose and the chosen investment strategy. In the case of investments that in the long term are expected to generate a return for a not yet determined use, the tolerance for risk may often be higher and the requirements for liquidity

may often be lower compared to funds that the state needs in the near future for a specific purpose. In the latter case, investments in government bonds and bank accounts are generally closer at hand than investments in the stock market. The risk level and return requirement chosen can thus say something about the purpose of the holding.

28. An investor in listed shares and similar securities is indirectly exposed to the same business risks as the companies in which the investments are made. A state's primary motive for exposing itself to such risks can typically be assumed to be the same as that of other equity investors, namely better value development and higher returns than an investment that only aims to maintain the real value of the assets. If the state's motive for the investment is not more developed than that, it can generally not be regarded as an outflow of the state's sovereign actions. In order for immunity to still cover such property, it must therefore be required that, beyond such motives of an almost commercial nature, there are qualified purposes of a sovereign nature that are expressed concretely and clearly in the state's regulation of how the property is to be used. The mere fact that the state in the future will be able to use the value of the property for government activities or that the savings are intended for future generations cannot be considered to be enough.

29. A state's saving in financial assets on the international capital market may, like other government savings, serve a general macroeconomic function. However, this does not mean that saving funds shall be regarded as a sovereign activity without further ado. For this to be the case, a more concrete link between, on the one hand, the form of savings and, on the other hand, the state's monetary policy or other acts of a sovereign nature must be required.

Financial assets in a sovereign wealth fund

30. The foreclosed assets form part of the National Fund. The fund can be described as a so-called Sovereign Wealth Fund.

31. Such funds have been created by many states. There is no generally accepted definition of what a sovereign wealth fund is. In a broad sense, it is a type of investment fund – *ie.* a collection of different securities – which the state owns or which the state controls through an intermediary manager of the fund. The fund is often financed by state revenues derived from the exploitation of natural resources, by surpluses from the state's foreign exchange reserve or with income from privatizations of state property

32. The fund holdings can be divided into different portfolios based on differences in investment strategies and purposes. A common division is that between stabilization portfolios and savings portfolios. Typical of a stabilization portfolio is that it should be possible to quickly transfer the proceeds to the state budget in order to stabilize the domestic economy if necessary. In contrast, the primary function of a savings portfolio generally is to yield high long-term returns without a yet specific plan for how to use it, whereby the

liquidity requirements may generally be lower. The two portfolio types thus differ, inter alia in terms of risk tolerance (*cf.* paragraph 27). However, the two types of portfolios can be functionally linked in that proceeds from the savings portfolio may be planned to be transferred to the stabilization portfolio in preparation for use in accordance with political decisions.

33. The fact that certain securities are part of a sovereign wealth fund is not in itself decisive for the assessment of whether the securities should be subject to immunity from enforcement. The assessment shall be made in the manner previously discussed (see paragraphs 26–29).

The Kazakh National Fund

34. The National Fund was established by Kazakhstan in 2000 in accordance with a presidential decree. The purpose of the fund was said to be to ensure a stable economic development of the country, to accumulate assets for future generations and to reduce the domestic economy's dependence on external factors unfavorable to the country. The decree states that the assets of the fund are accumulated on behalf of Kazakhstan and that the president decides on the size and focus of the fund and decides on the use of the funds on the basis of proposals from the government.

35. The assets are accumulated in the National Bank, which also manages the assets in accordance with an agreement with the state (the so-called National Fund Agreement). The agreement describes the framework for the management and sets out that parts of the management may be entrusted to external managers. The mandate of the National Bank's management is also described in the Kazakh National Bank Act. The act also sets out other tasks that are commonly performed by monetary authorities.

36. According to the Kazakh Budget Act, the National Fund is financed, inter alia, by State revenues derived from the extraction of oil and natural gas, in particular tax revenues and royalties. It is also stated that the National Fund must fulfill both a stabilization function (through a stabilization portfolio) and a savings function (through a savings portfolio). The two funds apply different investment strategies.

37. The state can make withdrawals from the National Fund by transferring the proceeds to the state budget in the form of planned withdrawals or, if necessary, for a specific purpose. Articles 21.3 and 21.4 of the Budget Act have the following wording according to the translation into English that the National Bank has provided in the court proceedings:

> *21.3 National Fund of the Republic of Kazakhstan provides saving and stabilization functions. Saving function provides the accumulation of financial assets and other assets, excluding intangible assets, and the return on assets of the National Fund of the Republic of Kazakhstan in the long term with a moderate level of risk. Stabilization function is designed to maintain a sufficient level of liquidity of assets of the National*

Fund of the Republic of Kazakhstan. Part of the National Fund of the Republic of Kazakhstan, used for stabilization function is determined in the amount, necessary to provide the guaranteed transfer.

21.4 The formation and use of the National Fund of the Republic of Kazakhstan are determined by the situation in the global and domestic commodity and financial markets, the economic situation in the country and abroad, and the priorities of social and economic development while safeguarding macroeconomic and fiscal stability, and the compliance with the basic goals and objectives of the National Fund of the Republic of Kazakhstan.

The assessment in the present case

The objection regarding the connection of the fund to the National Bank

38. An initial question is whether, as Kazakhstan and the National Bank have argued, the foreclosed property is protected against enforcement measures already in accordance with the principle set out in Article 21 (1) (c) of the UN Convention.

39. The National Bank shall be considered as a central bank of the kind which, under international customary law, may enjoy particular protection against enforcement measures. What has been said about the relationship between the government of Kazakhstan and the National Bank does not lead to any other conclusion.

40. The special treatment of central bank property in terms of immunity is linked to the tasks of central banks in the field of monetary policy. A question then is whether the foreclosed property has a clear connection with the bank's central tasks in the field of monetary policy. (*Cf.* paragraphs 20–24.)

41. The property was a part of the savings portfolio of the National Fund at the time of the foreclosure. The portfolio is actively managed with an investment strategy focused on listed shares and with a relatively high risk tolerance – significantly higher than in the stabilization portfolio – in order to provide a high return. The management of the savings portfolio can basically not be considered different from other active and long-term asset management in the international capital market. In that perspective, its management thus rather appears as a normal management of an equity portfolio than as an instrument for the exercise of the National Bank's monetary policy function. Nor has it emerged that the fund otherwise has any clear connection with such a policy function; the management of the savings portfolio could just as well have been entrusted to a government body without such a function. (*Cf.* paragraph 24.)

42. With this assessment, a closer examination of the National Bank’s right to dispose over the fund becomes irrelevant (*cf.* paragraph 22).

43. Against this background, the issue of immunity may be decided in accordance with what generally applies to immunity from enforcement (*cf.* Article 19 of the UN Convention).

The objection regarding the purpose of the holdings

44. The foreclosed shares and related receivables were thus included in the savings portfolio at the time of the foreclosure. As stated above, its management does not differ from other active and long-term management of shares and similar securities in the international capital market. There was therefore a commercial ingredient in the holding of the property. The question then is whether the property nevertheless had such a concrete and clear connection to a qualified purpose of a sovereign nature that it, in spite of the commercial ingredient, is subject to immunity from enforcement.

45. What Kazakhstan and the National Bank have said about future governmental or state purposes is framed in very general terms and the presented regulation of the National Fund does not specifically express what those purposes are. Nor does it otherwise appear that before the time of foreclosure it had been decided that the foreclosed property should be used for any specified state purpose. A clear connection between the foreclosed property and a qualified purpose of a sovereign nature is therefore lacking. In this context it should be noted that long-term savings for future needs that have not yet been defined cannot be regarded as being of a sovereign nature. (*Cf.* paragraph 28.)

46. The National Fund, which includes the savings portfolio, is also intended to 'ensure macroeconomic stability'. The underlying idea seems to be that the long-term savings in the savings portfolio should create the conditions for taking budgetary stabilizing and similar measures even in the longer term. However, the link between the foreclosed property – listed shares – and this stabilization purpose must however be described as weak. The fulfillment of this purpose requires not only the realisation of the shares, but also – as the Kazakh regulation has been described in the case – that the value of what has been realised is subsequently transferred from the savings portfolio to the stabilization portfolio and, in the next step, transferred to the state budget. This link cannot be considered concrete enough to justify immunity in respect of property of the present kind (*cf.* paragraph 29).

47. Against this background, the main purpose of holding the foreclosed property at the time of foreclosure must be deemed to have been to contribute on a more general level in the long term to preserving and increasing the Kazakh state's assets for future use (*cf.* paragraph 28). Such purpose cannot be considered sufficiently qualified to be regarded as an expression of Kazakhstan's sovereign acts or acts of an official character.

48. The purpose was thus such that immunity from enforcement in the property does not apply.

Conclusion

49. The decision of the Court of Appeal shall therefore be set aside and leave to appeal be granted in the remainder of the case.

50. Since the remaining issues have not been considered by the Court of Appeal, the case must be referred to the appellate court for further proceedings. The question regarding liability for legal costs in the Supreme Court shall also be examined by the Court of Appeal (Chapter 18, Section 15, third paragraph of the Code of Judicial Procedure).