JUDGMENT of the

SWEDISH SUPREME COURT

Case No.

given in Stockholm on 14 June 2013 Ö 2104-12

APPELLANT

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8:45 am – 12:00 am
1:15 pm – 3:00 pm

MATTER

Challenge of arbitral award

APPEALED DECISION

Judgment of Svea Court of Appeal in case No. T 9345-10

Judgment of the Court of Appeal see Appendix

JUDGMENT

The Supreme Court upholds the judgment of the Court of Appeal.

Joint Stock Company Technopromexport shall compensate Mir's Limited's litigation costs before the Supreme Court in the amount of SEK 92,000, all of which comprises costs for legal counsel, plus interest thereon under Section 6 of the Swedish Interest Act as from the day of the Supreme Court's judgment until the day of payment.

MOTIONS BEFORE THE SUPREME COURT

Joint Stock Company Technopromexport has moved that the Supreme Court shall grant its claims and discharge Technopromexport from the liability to compensate Mir's Limited for its litigation costs before the Court of Appeal, as well as to order Mir's Limited to compensate Technopromexport for its litigation costs before the Court of Appeal in the amount claimed before said court.

Mir's Limited has objected to any amendments to the judgment of the Court of Appeal.

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

GROUNDS

Background

1. On 11 June 2005, Joint Stock Company Technopromexport, a Russian company, entered into an agreement with Mir's Limited, a company registered in Afghanistan. The agreement contained an arbitration clause. After a dispute had arisen between the parties, Mir's limited requested arbitration. On 19 August 2010, the arbitral tribunal rendered an arbitral award under which Technopromexport was ordered to pay to Mir's USD 800,000 plus interest.

2. Technopromexport challenged the arbitral award and moved that the Court of Appeal should annul the award, with the exception of what had been ordered with respect to the costs for the arbitration. As grounds for the challenge Technopromexport referenced mainly the following. The arbitral award has not been rendered based upon a valid arbitration clause and should thus be annulled under item 1 of the first paragraph of Section 34 of the Swedish Arbitration Act (SFS 1999:116). Under Afghan law, Mir's is required to hold a "business license" issued by Afghan authorities. Mir's did not hold such a license at the time of the entry of the agreement. The "business license" submitted only at the time of the dispute before the Court of Appeal and which allegedly is valid as from 24 May 2004 until 4 October 2005 is incorrect. Since Mir's did not hold a "business license" when the agreement was entered, the company did not exist under Afghan law. The agreement provides that the effects thereof shall be determined under Russian law. Russian law provides that agreements entered by non-existent companies are invalid. When the agreement was entered, Technopromexport was unaware that Mir's did not hold a "business license". Technopromexport has not failed to object that the arbitration agreement was invalid. An objection as to the invalidity of the arbitration agreement was made in a submission to the arbitral tribunal of 11 March 2010.

3. Mir's objected to the challenge. As grounds for its objection, Mir's referenced mainly the following. The agreement between the parties is not invalid. The issue of the existence of Mir's shall be determined under Afghan law. When the agreement was entered in 2005, the existence of a company did not depend on a "business license" under Afghan law. Even if the agreement would be deemed invalid, the principle of separation provides that the arbitration clause shall be deemed separately from the remainder of the agreement. The arbitration clause is governed by Swedish law. In any event, Mir's in fact did hold a "business license" for the years 2004-2005. During the arbitration proceedings Mir's never maintained that Mir's lacked a "business license" when the agreement was entered or that the lack of a "business license" has the effect that no valid arbitration agreement was at hand. Thus, Technopromexport has accepted the validity of the arbitration agreement and is consequently now under the second paragraph of Section 34 of the Swedish Arbitration Act prevented to challenge the award on these grounds.

4. The Court of Appeal has rejected the claimant's claims.

5. The main issue in the present case is whether Technopromexport by participating in the arbitration proceedings without objections or otherwise must be deemed to have waived its right to maintain that no valid arbitration agreement existed between the parties.

Did the Court of Appeal in its judgment consider a circumstance that was not referenced?

6. Technopromexport has before the Supreme Court maintained that the Court of Appeal in its judgment considered the circumstance that Technopromexport failed to object to the arbitral tribunal's failure to decide on the invalidity of the arbitration agreement and that this circumstance was never referenced by Mir's. Mir's has maintained that this was referenced in its statement of defense submitted to the Court of Appeal.

7. From Mir's statement of defense it is clear that Mir's maintained that Technopromexport could have moved for a separate decision with respect to the validity of the arbitration agreement, if the company had presented a formal objection thereon. Thus, the Court of Appeal has not in its judgment considered a circumstance that had not been referenced.

Are the grounds for Technopromexport's claims precluded?

8. The second paragraph of Section 34 of the Swedish Arbitration Act provides that a party may not reference a circumstance which he, by participating in the arbitration proceedings or otherwise, must be deemed to have waived the right to reference.

9. In order for the right to reference a circumstance to be precluded it is generally required that the party was aware of the circumstance during the arbitration proceedings. Generally, it is not sufficient that the party ought to have been aware of the circumstance. However, when a party has had some evidence that a circumstance was at hand the right to reference the circumstance as grounds in challenge proceedings should not be upheld if the party knowingly neglected to investigate the circumstance further in order to not become aware of its existence. In such circumstances, the party must be deemed to have waived its rights to reference the circumstance. (Cf. Lars Heuman, Skiljemannarätt, 1999, p. 296 and Stefan Lindskog, Skiljeförfarande, 2nd ed. 2012, section V:34-6.1.)

10. For a party to successfully be able to reference that an arbitral award is not based upon a valid arbitration agreement, it is further required that the party already in the arbitration proceedings made a clear and separate objection that the arbitration agreement is invalid (see NJA 2012 p. 790, items 19 and 20). A vague expression of discontent does not have this effect. The same applies to a party's statement that another manner of dealing with the case would have been preferable (cf. Heuman, op. cit., p. 301).

11. Technopromexport has maintained that the arbitral award is not based upon a valid arbitration agreement and that it shall therefore be annulled. In the submission of 11 March 2010, which Technopromexport has referenced to support its claim that it raised the objection during the arbitration proceedings, Technopromexport maintained, amongst other things, the following:

> *After the rude answer of the Chairman of the Arbitral Tribunal to the Respondent's request to ask the Claimant to submit the financial documents, the Respondent did not dare to repeatedly bother the Chairman with the request to receive the texts of all business licenses of the company Mir's Limited. Therefore, the Respondent could not find out whether the company Mir's Limited had a business license at the time of signing the Agreement with the Respondent. However, analyzing the text of the answer of the Ministry of Commerce and Industries of Afghanistan to the enquiry of the Embassy of the Russian Federation in Afghanistan (see Exhibit R42) one can come to a conclusion that it is possible that at the time when the Agreement was signed there was no business license. The Agreement is dated 11 July 2005. Mir's Limited was established in the years 2003-2004, therefore, its first business license expired in 2004-2005. The renewed license was received on 21 June 2008.*
>
> *If there was no license, the Respondent would have an opportunity to declare the invalidity of the Agreement made between the Claimant and the Respondent, including the arbitration clause contained therein. All the above-stated have a direct relevance to understanding of the Claimant's legal status regarding which the Respondent felt a doubt in the course of the hearing analyzing the behavior of Mr. Nasir Sansab.*

12. As has been gathered by the investigation in the case, the background to Technopromexport's submission was that in connection with hearing one of Mir's representatives during the main hearing, the company had become suspicious of the representative's position and authority. According to Technopromexport the company then became aware that Mir's was required to hold a "business license" to be legally existing, which caused the company to request each of the licenses held by the company since its incorporation in

2003. Following Mir's having submitted licenses for the years 2008-2009 and 2010-2011, Technopromexport submitted the submission of 11 March 2010.

13. The submission provides that Technopromexport had such knowledge that the company ought to have suspected that such circumstances were at hand that, according to the company, entailed that no valid arbitration agreement existed between the parties. It is also clear that Technopromexport chose not to move for a decision by the arbitral tribunal to order the submission of any possible license for the period when Mir's Limited was incorporated, as well as it did not present a clear and separate objection that no valid arbitration agreement existed between the parties. Thus, Technopromexport has participated in the arbitration proceedings without objection and must thereby be deemed to have waived its right to reference the grounds as set out in the second paragraph of Section 34 of the Swedish Arbitration Act. Thus, the grounds for Technopromexport's challenge are precluded. Having reached this conclusion, Technopromexport's challenge shall be rejected and the judgment of the Court of Appeal shall be upheld.

Litigation costs

14. Upon this outcome Technopromexport shall be ordered to compensate Mir's Limited for its litigation costs before the Supreme Court. The amount claimed by Mir's Limited is reasonable.

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[ILLEGIBLE SIGNATURES]

The decision has been made by: Supreme Court Justices EN, GL, JH (Reporting Justice), AB and SOJ.
Reporting clerk: SÖ.

True copy
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