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JUDGMENT of the
SWEDISH SUPREME COURT

given in Stockholm on 23 November 2012

Case No.
T 4982-11

APPELLANT

Moscow City Golf Club OOO
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Russia

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COUNTERPARTY

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MATTER

Invalidity and challenge proceedings with respect to arbitral award

APPEALED DECISION

Svea Court of Appeal, judgment of 10 October 2011 in Case No. T 6798-10

Judgment of the Court of Appeal see Appendix

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JUDGMENT

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

Moscow City Golf Club OOO is ordered to compensate Nordea Bank AB for its litigation costs before the Supreme Court in the amount of SEK 292,000, plus interest thereon pursuant to Section 6 of the Swedish Interest Act. The compensation relates to costs for legal counsel.

MOTIONS BEFORE THE SUPREME COURT

Moscow City Golf Club OOO has moved that the Supreme Court shall grant City Golf's claims before the Court of Appeal, both as regards the merits as well as litigation costs, and discharge it from the liability to Nordea Bank AB's litigation costs before that court.

Nordea Bank AB has disputed any changes to the judgment of the Court of Appeal.

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

GROUNDS

The issues of dispute before the Supreme Court

1. City Golf has presented a case for the invalidity or annulment of an arbitral award rendered on 11 May 2010, which provided that City Golf should pay a capital amount plus interest and compensation for costs to Nordea. The arbitration dispute had arisen out of a loan agreement from January of 1990. It provided that Swedish law governed the loan agreement and that disputes should be resolved under the Arbitration

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Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

2. The issues of dispute in the present matter revolve mainly around the questions of whether peremptory rules of law apply to the loan agreement and whether these rules would then prohibit the dispute to be resolved by arbitration. City Golf has maintained that the loan agreement breached the then applicable peremptory currency legislation of Sweden as well as that of the Soviet Union. Further, according to City Golf, the loan agreement is in breach of now applicable Russian peremptory currency legislation.

3. City Golf has further maintained that two procedural errors were committed during the arbitration proceedings. One error was allegedly that the arbitrator did not try an objection that the arbitration clause was invalid, which according to City Golf affected the outcome of the case. City Golf has further maintained that the arbitrator committed a procedural error by not considering Nordea’s failure to produce documentary evidence as requested by the arbitrator when he evaluated the evidence.

4. Nordea’s position is that there are no grounds to consider the arbitral award invalid or to have it annulled.

Legal provisions on invalidity of arbitral awards and on the annulment of arbitral awards etc.

5. Item 1 of the first paragraph of Section 33 of the Swedish Arbitration Act (SFS 1999:116) provides that an arbitral award is invalid if it has ruled on a matter, which is non-arbitrable under Swedish law. Further, Section 34 provides that the arbitral award following challenge proceedings shall be wholly or partially annulled if it is not based on a valid arbitration agreement between the parties (item 1 of the first paragraph). In addition to the specific grounds for challenge proceedings set out in Section 34, it further provides that the arbitral award shall be annulled if procedural

errors were committed (item 6 of the first paragraph). In the latter case, the arbitral award may be annulled only if the error was not caused by the challenging party and that the error likely affected the outcome of the case. In challenge proceedings, it is further provided that a party is not entitled to rely on a circumstance, which the party by participating in the arbitration proceedings without objections or otherwise must be deemed to have accepted (the second paragraph of Section 34).

6. When considering arbitration agreements with international connections, the laws of the jurisdiction agreed by the parties shall govern the agreement. If the parties have not reached such an agreement, the laws of where the arbitration proceedings take place or will take place shall govern the agreement (Section 48 of the Swedish Arbitration Act). In the present case, the arbitration proceedings have pursuant to the parties' agreement been held in Stockholm, and as a result Swedish law is applicable to the arbitration agreement.

Invalidity of arbitral awards – the matter shall be eligible for out-of-court settlements

7. The issue of whether the arbitral award exceeds what under Swedish law can be settled by arbitration and consequently is invalid, is based on City Golf's claim that the underlying loan agreement breached Swedish and foreign peremptory legislation and still is in breach of foreign peremptory legislation. Therefore, there is reason to touch upon which disputes that are arbitrable under Swedish law.

8. The main rule provides that a dispute may be settled by one or more arbitrators if it relates to "matters on which the parties may reach out-of-court settlements" (first paragraph of Section 1 of the Swedish Arbitration Act). This provision is based on the idea that the parties shall be free to decide on the matter themselves and that the arbitration proceedings shall fall within the scope of where it is possible to reach agreements

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(Government Bill 1998/99:35, p. 49 f.). Thus, the arbitral award should not exceed that, on which the parties could have legally validly reached an out-of-court settlement. However, within these boundaries, the parties are rather free to decide on the proceedings.

9. The limitation to cases eligible for out-of-court settlements is linked to the wording of the Swedish Code of Judicial Procedure that “the action [is] such that it may be settled out-of-court”, or in other words, connected to actions amenable to out-of-court settlements and that it is such matters that may resolved by arbitration. This limitation is, however, not always sufficient to determine if an issue is what is commonly referred to as arbitrable (Government Bill 1998/99:35 p. 48 f.). Thus, disputes are not always entirely arbitrable or non-arbitrable. A dispute amenable to out-of-court settlements could include non-arbitrable elements, and include the application of peremptory rules of law.

10. That a field of law includes peremptory provisions does not, however, automatically imply that issues within that field of law are exempt from settlement by arbitration. The issue to be resolved also in these situations is whether the dispute is amenable to out-of-court settlement. If the peremptory provisions do not prevent the parties from reaching a settlement, then the dispute may be resolved by arbitration (Government Bill 1998/99:35, p. 49 and Stefan Lindskog, Skiljeförfarande, 2nd ed. 2012, p. 225).

11. For an arbitral award to be deemed invalid, it must be required that the peremptory element is of some importance. Not least in long term contractual relations it can have far-reaching consequences if the parties’ contractual relations are disturbed. Thus, it must be required that the interests of society or of a third party are more concretely involved. (Cf. SOU 1994:81 p. 182, Government Bill 1998/99:35 p. 49, Lars Heuman, Skiljemannarätt, 1999, p. 156, Lars Heuman, Arbitration Law of Sweden: Practice and Procedure, 2003, p. 139, Lindskog, op. cit. p. 111 and Gustaf Möller in Festskrift tillägnad Curt Olsson, 1989, p. 257).

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12. One further question is how to apply the requirement that the dispute is amenable for out-of-court settlement, when the peremptory element is material provisions of foreign law. It is hardly possible to formulate one overreaching principle applicable to the evaluation of the importance of all possible foreign rules. Instead, the starting point for the evaluation must be whether the foreign rules express an interest limited to the foreign state, or whether there is also a Swedish interest in upholding those rules. If there is no such Swedish interest, the foreign peremptory rules can normally not have an effect on the possibility to settle out-of-court and consequently not prevent that the dispute is resolved by arbitration in Sweden. As noted in the preparatory works to the Swedish Arbitration Act, this view is in line with the international development entailing that an international dispute may be resolved by arbitration, even if a corresponding domestic dispute could not have been resolved in the same matter (Government Bill 1998/99:35 p. 50).

13. The effects of the foreign rules thus vary, depending of their kind and purpose as well as the interest they serve to protect. Thus, there can be differences between different fields of law. The economical-political rules of foreign states are typically of such nature that they do not affect the possibility for out-of-court settlements in Sweden. To the extent the foreign rules shall affect the eligibility of a dispute for arbitration, then also other factors can be considered, such as whether the material rules take aim at the rights to reach out-of-court settlements. (Cf. Government Bill 1998/99:35 p. 49 f., Michael Bogdan, Svensk internationell privat- och processrätt, 7th ed. 2008, p. 86 ff., Heuman, Skiljemannarätt, p. 701 ff., Lindskog, op. cit. p. 232, Lennart Pålsson, Romkonventionen – tillämplig lag för avtalsförpliktelser, 1998, p. 120 ff., and NJA 1961 p. 145).

When the dispute must be amenable to out-of-court settlement

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14. One issue, which as a result of City Golf's framing of the case is relevant, is at what point in time the dispute must be amenable to out-of-court settlement. In the present case, the arbitration clause is included in a loan agreement entered into in 1990. At that time, there was currency legislation in Sweden as well as in the Soviet Union. When the arbitration proceedings were carried out, that legislation had ceased to apply. However, according to City Golf, there was Russian currency legislation at that time, which should have been taken into consideration when the arbitrator resolved the dispute.

15. The issue of the relevant point in time includes several aspects that are only marginally relevant to the present case. It could at least in part depend on how the individual arbitration clause is worded and on other circumstances specific to the case. In the present case, the arbitration clause does not take aim at an already existing dispute, but at future disputes that may arise out of the loan agreement. When deciding whether an arbitral award is invalid, the determining factor must be whether the parties could have reached an out-of-court settlement at the time when the dispute was resolved, irrespective of whether the arbitration clause could be deemed in breach of peremptory legislation when it was entered into. (Cf. Heuman, Skiljemannarätt, p. 157, Lindskog, op. cit. p. 229 f., and Möller, op. cit. p. 259.)

The arbitral award is not invalid in the present case

16. In the present case, the arbitral award provides that City Golf has a liability to pay a certain amount to Nordea based on the loan agreement. According to the parties' agreement, Swedish law governs the loan agreement. The dispute related to the liability to make the payment as such, and is thus amenable to out-of-court settlement. When the arbitral award was rendered, there was no Swedish peremptory currency legislation; as held by the Court of Appeal, the previously applicable regulations cannot be assumed to have taken aim at the liability as such,

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but rather at the forms for cross border payments. The foreign currency regulations – former or current – referenced in the case, are not of such nature as to affect the parties' rights to settle out-of-court in Sweden.

17. Thus, the arbitral award is not invalid based on what has been referenced in the case.

The question of whether the arbitral award shall be annulled

18. City Golf has motioned that the arbitral award shall be annulled because it was not based on a valid arbitration clause and because the arbitrator did not review City Golf's objection thereon during the arbitration proceedings.

19. One initial question is whether City Golf presented any objection to the arbitrator that the arbitration clause was invalid on this ground. Such an objection takes aim at the legal possibility to at all carry out the arbitration proceedings. Thus, it is important that the party presents its objection in a clear manner already during the arbitration proceedings. Otherwise, the question could be untried in those proceedings, which in its turn could lead the situation where it, potentially following substantive arbitration proceedings, remains unclear whether the arbitral award will be upheld or not. If the party has not already during arbitration proceedings presented a clear objection that the arbitration clause is invalid, that party as a consequence may not rely on the same objection in challenge proceedings (second paragraph of Section 34 of the Swedish Arbitration Act, cf. item 5 above and Heuman, Skiljemannarätt, p. 301).

20. In the present case, City Golf has, amongst other things, referenced one of its lengthy submissions in the arbitration proceedings. The paragraph of the submission which is now relevant forms part of a longer section dealing with the validity of the loan agreement, an issue which must be kept separate from the validity of the arbitration clause (cf. Section 3 of

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the Swedish Arbitration Act). The relevant paragraph has the following wording:

> "4.3.8. In accordance with the applicable mandatory rules of Soviet and Russian foreign-exchange legislation, which are applicable in this case with a glance to the Rome Convention and Rome I Regulation, the Loan Agreement thus has been invalid as from its execution (including *inter alia* the provisions concerning the applicable law and arbitration clause).
> This taken into account, the Claimant's requests 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 never have 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."

As far as has been established in the present case, City Golf has not in any other manner during the arbitration proceedings touched upon the issue that now forms the basis for its claim that a procedural error has been committed in this respect. What is stated within the parenthesis cannot against this background be considered as a clear and specific objection that also the arbitration clause is invalid.

21. For this reason, City Golf is not entitled to base its challenge proceedings on the claim that the arbitration clause is invalid.

22. Thus, City Golf did not during the arbitration proceedings present a clear objection that the arbitration clause was invalid. Already this conclusion entails that no procedural of the claimed nature was committed, i.e. that the arbitrator failed to consider an objection that the arbitration clause was invalid.

23. Further, City Golf has not established any other grounds for the annulment of the arbitral award.

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Conclusion

24. Thus, City Golf's motions for invalidity and annulment shall be rejected and the judgment of the Court of Appeal shall be upheld.

25. Upon this outcome, City Golf shall be ordered to compensate Nordea for its litigation costs before the Court of Appeal. The claimed amount is considered reasonable.

[ILLEGIBLE SIGNATURES]

The decision has been made by: Supreme Court Justices E.N., G.T. (Reporting Justice), A.B., I.P., and L.E.
Reporting clerk: Y.S.