DECISION No. SÖ 1462 of the

SWEDISH SUPREME COURT

Case No.

given in Stockholm on 13 August 1979 Ö 1243-78

APPELLANT

General National Maritime Transport Company
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COUNTERPARTY

Götaverken Arendal Aktiebolag, GOTHENBURG

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MATTER

Enforcement of foreign arbitral award

APPEALED DECISION

Svea Court of Appeal, department 5, decision of 13 December 1978, decision No. 5:SÖ 75

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Decision of the Court of Appeal see Appendix

DECISION

The Supreme Court upholds the decision of the Court of Appeal that the arbitral award shall be enforceable as an unappealable judgment given by a Swedish court.

MOTIONS BEFORE THE SUPREME COURT

In its submissions the appellant has moved, in the main, that the Supreme Court shall overturn the decision of the Court of Appeal and reject the motion of the appellee on enforceability, and in the alternative, that the proceedings are stayed awaiting a final decision from France in the challenge proceedings initiated by the appellant there. In support of its motions, the appellant has referenced the same grounds as before the Court of Appeal.

The appellee has maintained that the motions should be rejected and that the decision of the Court of Appeal on the enforceability should be affirmed.

GROUNDS

Section 6 of the Act on Foreign Arbitration Agreements and Arbitral awards (SFS 1929:147) provides that foreign arbitral awards are valid in Sweden, with certain exceptions. These relate to various deficiencies with respect to procedural matters. Thus, when reviewing an application for the enforcement of a foreign arbitral award, in principle, no review of the merits of the award is undertaken.

With respect to the appellant’s grounds dealt with in items 1-3 of the decision of the Court of Appeal, there are no reasons to deviate from the view of the Court of Appeal concerning the enforceability of the arbitral award in Sweden.

As grounds in support of the objection to the enforcement of the arbitral award in Sweden, the appellant has further maintained (cf. item 4 of the

decision of the Court of Appeal): The submission of Opposition à Ordonnance d'Exequatur de Sentence Arbitrale in France entails under French law an automatic stay in the enforceability until the Tribunal de Grande Instance de Paris has ruled on the validity of the arbitral award. Under French law, the acceptance of an "opposition" by the aforementioned authority is the manner in which enforcement is suspended awaiting a ruling on specifically named grounds of invalidity. Thus, it is neither possible nor required to receive a decision in any other form. In other words, it is maintained that the arbitral award has not yet become enforceable in France and/or that the enforceability of the award has been suspended by the competent authority there. Item 5 of the first paragraph of Section 7 of the Act on Foreign Arbitration Agreements and Arbitral awards provides that the arbitral award shall not be deemed valid in Sweden in such circumstances.

The appellant has presented substantial evidence to establish that the opposition proceedings initiated before French courts entail – until otherwise ordered by the courts – that the prerequisites for enforcement are not at hand in France.

Item 5 of the first paragraph of Section 7 of the Act on Foreign Arbitration Agreements and Arbitral awards provides that a foreign arbitral award is not valid in Sweden, if the party against which the arbitral award is relied upon establishes that the award "has not yet become enforceable or otherwise not binding" on the parties in the country in which it was rendered or under the governing law of the award or that it has been annulled or that its enforceability has been suspended by a competent authority in that country. These provisions, enacted in 1971, are based on item e) of the first paragraph of Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Convention speaks explicitly only about an arbitral award that has "not yet become binding" on the parties etc. The wording "enforceable or otherwise" was added to the Act upon initiative of the Council for Legislation (Lagrådet). As is shown by the preparatory works to the Act, this was not intended to deviate from the effects of the Convention (see Government Bill 1971:131 p. 13, 69 f., and 71). The

preparatory works include unambiguous statements to the effect that the fact that it is still possible to challenge the arbitral award does not entail that it is not to be deemed binding on the parties. This meaning of the regulation has, in addition, been acknowledged by the appellant. A case of a foreign arbitral award not being binding is at hand when it can be reviewed on the merits in a second instance. The choice of the word binding has been made to grant relief to the party attempting to rely on the arbitral award. Amongst other things, the intent was to move away from the requirement of so-called double enforcement or requirements to the effect that the party relying on the arbitral award must present also a decision of enforceability from the country in which the arbitral award was rendered.

The parties have by way of the arbitration clause in the purchase agreements (Section 13) undertaken, with respect to matters submitted for arbitration, to accept the arbitral award as being final and binding. The arbitration rules of the ICC, under which rules the arbitration proceedings were carried out, provide (Article 24) that the arbitral award is final.

Against the above background, the now relevant arbitral award must be deemed, in the meaning set out in item 5 of the first paragraph of Section 7 of the Act on Foreign Arbitration Agreements and Arbitral awards, enforceable and binding on the parties in France already as of it having been rendered. The fact that the appellant subsequently has submitted an “opposition” against the arbitral award in France does not, therefore, have any effect on the now relevant matters.

As noted above, the appellant has further maintained that the opposition proceedings initiated by it under French law automatically entailed that the enforcement was prevented and suspended awaiting the relevant court’s ruling on the validity of the arbitral award. This, according to the appellant, amounts to such stay in the enforcement of the arbitral award as is set out in item 5 of the first paragraph of Section 7 of the said Act. However, both the wording of the Act and the preparatory works (Government Bill 1971:131 p. 34) indicate that the provision takes aim at cases where the foreign authority following a separate review decides to annul an already binding and

enforceable arbitral award or that the enforcement thereof shall be postponed. The appellant has not even maintained that any such decision has been given as a result of the opposition proceedings or otherwise.

Thus, the appellant has not established that such circumstances are at hand that the arbitral award under the first paragraph of Section 7 of the Act on Foreign Arbitration Agreements and Arbitral awards is not valid in Sweden. Further, no such circumstance that would render the arbitral award invalid as set out in the second paragraph of the said Section is at hand.

The appellant's alternative motion that a decision in this case shall be postponed is based on the provision set out in the second paragraph of Section 9 of the Act on Foreign Arbitration Agreements and Arbitral awards. Under the provision, the Court of Appeal may postpone its decision if the counterparty to the party requesting enforcement of an arbitral award objects that it has moved for the annulment of the arbitral award or moved for a postponement of its enforcement before such authority as mentioned in item 5 of the first paragraph of Section 7. If so requested by the claimant, the counterparty may be ordered to provide reasonable security. Also these provisions are based on the 1958 New York Convention. Whether the decision shall be postponed is left to the court to decide based on what is reasonable in the individual case.

In support of its motion for postponement, the appellant has referenced the submitted Déclaration d'Appel, the initiated opposition proceedings and the new arbitration proceedings, all in France (cf. items 4 and 5 of the decision of the Court of Appeal).

Having regard to the general aim of the New York Convention and the Act of 1971 to facilitate the enforcement of foreign arbitral awards (see Government Bill 1971:131 p. 1 and 15, cf. p. 14 and 42), such circumstances cannot be deemed at hand that the proceedings initiated by the appellant in France should postpone a decision in these enforcement proceedings.

The decision has been made by: Supreme Court Justices P., H., V., B. (dissenting) and R. (Reporting Justice)

Reporting clerk: F.