SVEA COURT OF APPEAL	**JUDGMENT**	Case No.
Department 02	18 May 2018	T 82-16
Division 020102	Stockholm	

PLAINTIFF
1. Seventhsun Holdings Limited, HE 139917
Esperidon 12, 4th Floor
1087 Nicosia
Cyprus

2. Jevelinia Limited, HE 191887
Address as above

3. Aventon Limited, HE 193551
Address as above

4. Stanorode Limited, HE 181170
Address as above

5. Wildoro Limited, HE 191903
Address as above

Counsel to 1–5: Advokat Jonas Wetterfors and jur. kand. Ponthus Andersson
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103 90 Stockholm

RESPONDENT
The Republic of Poland
Prokuratoria Generalna Skarbu Panstwa
Glowny Urzad Prokuratorii Generalnej Skarbu Panstwa
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Poland

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MATTER
Challenge of arbitral award

Judgement of the Court of Appeal, see following page.

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JUDGMENT OF THE COURT OF APPEAL

1. The Court of Appeal rejects the Republic of Poland's motion for dismissal.

2. The Court of Appeal rejects Seventhsun Holdings Limited's, Jevelinia Limited's, Aventon Limited's, Stanorode Limited's and Wildoro Limited's action.

3. Seventhsun Holdings Limited, Jevelinia Limited, Aventon Limited, Stanorode Limited and Wildoro Limited shall, jointly and severally, compensate the Republic of Poland for its litigation costs in the amount of EUR 18,819.90 and pay interest in the amount as per Section 6 of the Interest Act (1975:635) from the date of the Court of Appeal's judgment until payment is made.

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BACKGROUND

A bilateral investment treaty applies between the Republic of Poland and the Republic of Cyprus: Agreement between the Republic of Poland and the Republic of Cyprus for the Promotion and Reciprocal Protection of Investments of 4 June 1992 (the Investment Treaty).

During the years 2004–2007, Seventhsun Holdings Limited, Jevelinia Limited, Aventon Limited, Stanorode Limited and Wildoro Limited (hereinafter collectively referred to as the Companies) acquired a total of 62.13 percent of the Polish steel company Huta Pokoj SA (Huta Pokoj). Ever since 2007, there have been criminal and civil proceedings against the Companies and their representatives in Poland. Within the framework of these proceedings, several decisions of coercive measures have been issued, including arrest warrants of the four representatives of the Companies, decisions to seize the Companies' shares in Huta Pokoj, the suspension of one of the Directors of Huta Pokoj, Mr. B, as well as a decision that no dividends may be paid from Huta Pokoj to the Companies. Further, the Companies have been prohibited from participating in the general meetings of the shareholders in Huta Pokoj.

In October 2012, the Companies requested arbitration against the Republic of Poland and sought the relief that the arbitral tribunal should affirm that the Companies were the owners of the relevant shares in Huta Pokoj, that the Republic of Poland should be ordered to pay damages plus interest for breach of the Investment Treaty and bear the costs of the proceedings. The Companies asserted that the Republic of Poland had failed to protect their investment in Huta Pokoj and that the Republic of Poland had, in a direct way, expropriated their shares in Huta Pokoj without providing fair and just compensation. Further, the Companies sought compensation for lost dividends from Huta Pokoj.

In the main, the Republic of Poland objected that the Companies were not entitled to request arbitration, since they did not meet certain requirements set out in article 9 of the Investment Treaty. As a first alternative, the Republic of Poland disputed

the relief sought by the Companies and asserted that the Companies were not the rightful owners of the shares in Huta Pokoj.

The arbitral tribunal (Messrs. S, H and N) decided to determine whether the requirements of article 9 of the Investment Treaty had been met, if the Companies had an "investment" and if they were to be deemed as "investors" according to the Investment Treaty and whether the Republic of Poland had had breached its obligation to protect the Companies' investments and instead had expropriated the investments through a partial arbitral award (the Partial Award). In the Partial Award rendered 13 October 2015, the arbitral tribunal found that it had jurisdiction over the dispute and that it had not been proved that the Republic of Poland had breached the Investment Treaty. Hence, the arbitral tribunal dismissed the Companies' claim for damages.

Through a final award rendered 4 January 2016 (the Final Award), the arbitral tribunal decided on the allocation of the costs of the arbitration.

The place of the arbitration was Stockholm, and the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce applied to the dispute. The arbitral tribunal comprised of [*sic*]

MOTIONS ETC.

The Companies have requested that the Court of Appeal shall declare the Partial Award invalid or, alternatively, set aside, the said award. The Companies have further requested that the Court of Appeal shall declare items (a) and (c) of the final paragraph of the Final Award invalid or, alternatively, set aside said items. Both arbitral awards were rendered in case no. SCC V 2012/138.

The Republic of Poland has opposed the Companies' requests. In respect of the Final Award, the Republic of Poland has requested that the Companies' motion shall be dismissed.

The Companies have opposed the Republic of Poland's request for dismissal.

The parties have claimed compensation for their litigation costs.

Pursuant to Chapter 53, Section 1 and Chapter 42, Section 18, item 5 of the first paragraph of the Code of Judicial Procedure, the action at issue has been decided without an oral hearing.

THE PARTIES' ARGUMENTS ON THE MOTION FOR DISMISSAL

The Republic of Poland

A challenge of an arbitral award must be made through a Challenge Application. The Companies have not initiated the proceedings with respect to the Final Award through a Challenge Application. Instead, on 5 January 2016 the Companies submitted a document named "supplement". Since the challenge in respect of the invalidity or setting aside of the Final Award has not been appropriately brought to the Court, the challenge shall be dismissed.

The fact that the Final Award was rendered after the submission to the Court of Appeal of the Challenge Application concerning the Partial Award, and that the Companies in the supplement of 5 January 2016 have invoked the same circumstances as in the original Challenge Application, do not mean that the Court can disregard the formal requirements applicable to challenges of arbitral awards.

The Partial Award and the Final Award are two separate judgments. Even if a challenge could be brought by other means than through the submission of a Challenge Application, it cannot be done in a proceeding concerning an entirely different arbitral award. The rules on adjustment of cases set out in Section 3 of Chapter 13 of the Code of Judicial Procedure do not allow two separate cases to be consolidated in this informal manner. Consolidation of cases rather fall under the provisions of Chapter 14 of the Code of Judicial Procedure.

The Companies

There are no grounds to dismiss the motion to set aside the Final Award, since no unpermitted amendment of the action pursuant to Section 3 of Chapter 13 of the Code of Judicial Procedure has occurred. The Companies stated, already in the

Challenge Application, that they might later bring a motion for adjustment or setting aside of the Final Award. The Final Award was rendered on 4 January 2016, and the Companies supplemented their case on 5 January 2016 such that it also included the Final Award. The relevant circumstances had already been invoked, which means that no amendment to the Companies' action has occurred.

Moreover, the Final Award is a circumstance which has become known only after the submission of the Challenge Application. The motion concerning the Final Award is based substantively on the same grounds as the motion concerning the Partial Award. If there are grounds to declare invalid or set aside a partial award, then, for the same reasons, there are grounds to set aside the party's obligation to compensate the counterparty's costs.

THE PARTIES' GROUNDS WITH RESPECT TO INVALIDITY AND SETTING ASIDE OF THE AWARDS

The Companies

The arbitral awards shall be declared invalid, alternatively be set aside, since they obviously violate fundamental principles of Swedish law, and in part because the arbitral tribunal has committed procedural errors that affected the outcome of the arbitration (item 2 of the first paragraph of Section 33 and item 6 of the first paragraph of Section 34 of the Swedish Arbitration Act (1999:116), respectively). The companies did not cause the procedural errors to occur. Moreover, the Companies have not waived its right to invoke these circumstances.

The procedural errors consisted of that the arbitral tribunal incorrectly rejected the Companies' motion for discovery and at the same time it rejected the Companies' case against the Republic of Poland for breaches of the Investment Treaty on the grounds that the Companies had not presented any evidence concerning the legality or illegality of the measures that had been carried out. Through the arbitral tribunal's decision to reject the Companies' motion for discovery, the Companies were not granted appropriate opportunity to argue their case or present evidence. The Companies were denied access to the evidence, which according to the Republic of Poland position, served as the basis for the legality of the far-reaching

and long-lasting measures of constraint against the Companies, while at the same time the burden of proof for establishing that the measures of constraint were illegal under Polish or international law was placed upon the Companies. The Companies did not cause the procedural errors as they requested that the Republic of Poland should present evidence to establish the legality of the measures. To do what the arbitral tribunal did, i.e. place the burden of proof that the measures of constraint taken by the Republic of Poland were unlawful – something that the arbitral tribunal must have realized that the Companies could not completely fulfill – and instead base its conclusions on the opinion presented by the Republic of Poland concerning the legality of the measures of constraint, does not meet the requirements of rule of law and the right to a fair trial that are stipulated by the Swedish legal system. Therefore, the arbitral awards violate Swedish *ordre public*.

The Republic of Poland

The arbitral awards do not violate fundamental principles of the Swedish legal system. The arbitral tribunal did not commit any procedural errors. Even if the arbitral tribunal did commit such procedural errors, they may not be invoked as grounds for invalidity or setting aside of the arbitral awards since the errors in no way violate fundamental principles of the Swedish legal system pursuant to item 2 of the first paragraph of Section 33 of the Swedish Arbitration Act. Moreover, the alleged procedural errors did not affect the outcome of the arbitration. Even if a procedural error did occur, which could be challenged pursuant to item 6 of the first paragraph of Section 34 of the Swedish Arbitration Act, the Companies did not raise appropriate objections against the errors during the arbitration. Thus, they have lost the right to invoke the errors.

THE PARTIES' FURTHER DETAILS

The Companies

Errors with respect to the motion for discovery and with respect to evidence

The arbitral tribunal rejected the Companies' motion for discovery and at the same time placed the burden of proof for the legality of the measures of constraint carried

out in Poland on the Companies, which violates the principle of securing evidence. The fact that this is unreasonable is evident from the arbitral tribunal's decision of 25 September 2014 in respect of discovery of the prosecutor's decision concerning shares (Procedural Order No 13, item C3). The arbitral tribunal rejected the motion on the ground that the Companies had failed to establish that they did not have access to the requested document. The Companies could not possibly lead this into evidence, which nevertheless was the arbitral tribunal's opinion. Further, the arbitral tribunal disallowed oral testimony via video link with Mr. B, who on several occasions was claimed to have access to certain documents.

It ought to be alien to the Swedish legal system that the party moving for discovery must prove that it does not have access to the requested document. The result of the arbitral tribunal's actions was that the Companies were denied access to evidence concerning the legality of the measures of constraint, while they at the same time had the burden of proof to establish that the measures were unlawful. The Companies were denied appropriate opportunity to argue their case and thereby did not have a fair trial. Thus, the arbitral tribunal's approach violates fundamental principles of law – Swedish as well as international. The Republic of Poland did not even present any arguments to the effect that the severe measures of constraint (which should be equated to a *de facto* expropriation) which were carried out, were justified from a public interest.

It is questioned whether all the decisions which the Republic of Poland asserts have been lawfully taken actually exist, at least in written form. It was undisputed in the arbitration that measures of constraint had been taken concerning the relevant Huta Pokoj shares, which, in practice, deprived the Companies all possibilities to exercise their rights in Huta Pokoj. The Companies were the party who at least submitted some form of evidence as regards the legality of the measures of constraint, namely a legal opinion and testimony by Mr. Michael Miedzinski, an expert on Polish law, who was also the Companies' counsel, including the opportunity for the Republic of Poland to conduct a cross-examination. As its sole piece of evidence, the Republic of Poland produced a translation of dubious quality of a letter or memorandum drafted by the Polish prosecutor's office about the decisions taken by local prosecutors and the measures of constraint that had been

carried out. The translation was made by the Republic of Poland's own counsel and did not qualify as a written witness statement pursuant to the provisions of Procedural Order No. 2. Despite the Companies' objections to these issues and that no representative of the Polish prosecutor's office was heard as a witness, it appears that the arbitral tribunal accepted the document. The Companies invoked a written witness statement from Mr. B, given under oath. However, he was not heard at the main hearing in Stockholm, as the Republic of Poland had made it clear to the Companies that the Republic of Poland would, if he turned up in Stockholm, have him arrested on site through Interpol and would be extradited to Poland. His testimony could have been taken via video link. Finally, the Republic of Poland refrained from cross-examining Mr. B.

When determining whether a procedural error has occurred, the Court of Appeal shall take into account, although it is not brought as a separate ground to the fact that a procedural error occurred, that the arbitral tribunal refrained from determining the issue of the ownership to the shares, although this was part of the matter that should be decided through the Partial Award. Instead, the arbitral tribunal moved directly to the issue of whether the Investment Treaty had been breached. The arbitral tribunal concluded that no such breach had been established, since the Companies had not invoked any evidence to show that the measures of constraint were unlawful.

The Companies are not prohibited from invoking that procedural errors occurred

As regards the motion for invalidity due to the arbitral award being in violation of *ordre public*, no objection during the arbitration was required. Further, the Companies are not prohibited from asserting that procedural errors occurred at this stage, since they invoked their right to argue their case and their right to submit evidence etc. by bringing a motion for discovery, requesting oral testimony and requesting that the issue of ownership should be determined etc. The Companies further dispute that a rejected motion for discovery is a decision that would require an objection. At any event, the Companies objected to the decision on discovery during the arbitration through a letter to the arbitral tribunal on 14 November 2014.

The Republic of Poland

The Companies have not identified any specific fundamental principle of the Swedish legal system that would have been violated nor have they explained the manner in which the arbitral tribunal would have violated it. The arbitral awards were rendered in an appropriate manner. They contain substantial reasoning, are understandable and complete. The arbitral tribunal have explained the procedural rules and applicable law and has described the history of the arbitral proceedings, the parties' positions and arguments. All procedural decisions taken during the arbitration complied with the Procedural Orders that had been adopted under consultation with the parties. It is not correct that the Companies were not given the opportunity to argue their case or present evidence. The objections raised by the Companies cannot even be put before the Court of Appeal, as public courts cannot review whether the arbitral tribunal made a correct assessment of the factual and legal circumstances of the dispute.

Errors in respect of the motion for discovery and evidentiary issues

The objection concerning the arbitral tribunal's decision to place the burden of proof on the Companies in respect of the assertion that the Republic of Poland having breached provisions of the Investment Treaty is obviously unfounded. The arbitral tribunal placed the burden of proof pursuant to the generally accepted rule that the claimant must establish the circumstances it invokes to support its case.

As regards the objection that the arbitral tribunal based its decision on the prosecutor's preliminary investigation report, it is clear from the Partial Award that the Companies never questioned the description, or the translation, of the preliminary investigation report submitted by the Republic of Poland. Also the objection that the testimony of the prosecutor was not heard during the hearing is unfounded, since none of the parties requested him to witness at the hearing.

In the Procedural Orders that were decided during the arbitration, the arbitral tribunal set out the manner and in which form the parties were allowed to request documents from the counterparty and set out the rules, which the arbitral tribunal would apply when reviewing such request. The reasoning of the decisions through

which the arbitral tribunal rejected the Companies' request for documentation show, amongst other things, that the Companies already had access to some of the requested documents through their counsel, Mr. B, and that the Companies at any event had not shown that they did not have access to the documents. Further, for some of the requests, the Companies had not specified which documents were requested or which circumstances that would be established through the requested documents. The arbitral tribunal's decisions were compliant with the rules governing the arbitration.

In compliance with established practice in arbitration, the arbitral tribunal decided that witnesses should submit written witness statements and that any possible oral testimony would be carried out in the form of cross-examinations. During the hearing, testimony would only be heard orally from such witnesses that the counterparty had requested to cross-examine. Mr. B had submitted a written witness statement, and the Republic of Poland did not request to cross-examine him, which was the reason that he did not give oral testimony in the arbitration. Irrespective of the above, it is not correct that the Republic of Poland had threatened to arrest Mr. B if he had been present at the main hearing.

The main purpose of the arbitration was to determine whether the Companies had shown that the Republic of Poland had issued unlawful decisions or had in other, unlawful, ways breached its obligations under the Investment Treaty. The arbitral tribunal concluded correctly, and this issue was undisputed between the parties in the arbitration, that it was possible to make this assessment without the findings in the court proceedings that were ongoing in Poland and which were aimed at settling the issue of the ownership of the Huta Pokoj shares. The arbitral tribunal did not review the issue of the ownership of the Huta Pokoj shares, since the Republic of Poland had not breached the provisions of the Investment Treaty even if the shares would have been owned by the Companies.

The Companies have lost the right to invoke the procedural errors

Even if, which the Republic of Poland disputes, there would have occurred procedural errors which likely affected the outcome of the arbitration, the

Companies may not invoke these errors in the present challenge proceeding, because no objections were raised during the arbitration. Therefore, the Companies have lost the right to invoke them. The Companies' letter dated 14 November 2014 does not mean that the Companies objected to the arbitral tribunal's decision on the motions for discovery, as the letter rather concerned the submission of other documents.

THE EVIDENCE

Both parties have referred to written evidence.

REASONING OF THE COURT

The Republic of Poland's motion for dismissal

A party who wishes to challenge an arbitral award shall do so through submitting a Challenge Application – i.e. by an application for a summons – to the Court of Appeal, within the jurisdiction of which the arbitration took place. The Challenge Application shall be submitted within three months from the day upon which the party received the arbitral award. After this time limit, the party may not invoke new grounds for its challenge. (Sections 36 and 43 of the Swedish Arbitration Act).

The Court of Appeal shall handle the case pursuant to the Code of Judicial Procedure's rules applicable to actions amenable to out-of-court settlement (Section 1 of Chapter 53 of the Code of Judicial Procedure). This means, amongst other things, that the Court of Appeal shall in general issue a summons for the defendant to reply to the Challenge Application. A challenge which concerns two separate arbitral awards shall, in the view of the Code of Judicial Procedure, be treated as two separate actions, but there is nothing that prevent them from being handled jointly.

The case file shows that the Companies challenged the Partial Award by a Challenge Application dated 4 January 2016, and which was received by the Court of Appeal on 5 January 2016. In the Challenge Application, the Companies stated that they might possibly later revert with a motion that a not yet given final arbitral award should be declared invalid or set aside in respect of its allocation of costs. On

the same day, 5 January 2016, the Companies submitted a document to the Court of Appeal which was named "supplement", in which the Companies moved that the Final Award should be declared invalid or set aside. In the document, the Companies referenced the same circumstances, grounds and evidence that had been invoked for the challenge of the Partial Award.

The Court of Appeal notes that the Companies already in the Challenge Application concerning the Partial Award had noted that the Companies might challenge also the Final Award and that this was done on the very day that the Challenge Application was submitted to the Court of Appeal, i.e. before any measures had been taken in the action. The Court of Appeal finds that the Companies thereby must be considered to have appropriately challenged the Partial Award and the Final Award. The subsequent procedural measures decided by the Court of Appeal have been based on this conclusion. Following the Companies having submitted certain supplements, the Court of Appeal on 5 April 2016 decided to summon the Republic of Poland to submit a written Statement of Reply. The summon covered the Partial Award as well as the Final Award.

In view of the foregoing, there are no grounds to dismiss the Companies' motions in respect of the Final Award. Therefore, the Republic of Poland's motion for dismissal shall be rejected.

Invalidity of the arbitral awards due to ordre public

Item 2 of the first paragraph of Section 33 stipulates that an arbitral award is invalid if it, or the manner in which it was given, obviously violates fundamental principles of the Swedish legal system (*ordre public*). The Swedish legal system has a restrictive view on the possibility of having an arbitral award declared invalid based on this rule. The preparatory works for the provision state that it is intended to cover only highly improper situations and as a result will be applicable very rarely. The *ordre public* concept has been considered to cover arbitral awards through which fundamental principles of substantive or procedural law have been disregarded or through which the arbitral tribunal has decided a dispute without taking into account mandatory legal rules for the benefit of third parties or a public

interest, and which rules express particularly significant legal norms (see Government Bill 1998/99:35 p. 140 f., and Svea Court of Appeal's judgments of 19 February 2016 in case no. T 5296-14, 9 December 2016 in case no. T 2675-14 and 26 February 2018 in case no. 6582-16).

In sum, the Companies have as grounds for their challenge stated that the arbitral tribunal has committed procedural errors by incorrectly rejecting the Companies' motion for discovery concerning certain documents, that the Companies as a consequence thereof were unable to present the evidence required and that the arbitral tribunal, despite this, placed the burden of proof for the illegality of the Republic of Poland's measures upon the Companies. The Court of Appeal concludes that even if the said circumstances would be at hand, they are not of such grave nature that the arbitral awards or the manner in which they arose could be considered to be clearly incompatible with fundamental principles of the Swedish legal system. Thus, the Companies' motion that the arbitral awards shall be declared invalid shall be rejected.

Setting aside of the arbitral awards due to procedural errors

Item 6 of the first paragraph of Section 34 stipulates that an arbitral award can be set aside following challenge if a procedural error occurred in the arbitration, without having been caused by the parties, and which error likely affected the outcome. However, the second paragraph stipulates that a party may not invoke a circumstance that the party must be deemed to have waived by participating in the arbitration without raising objections or otherwise must be deemed to have accepted. Thus, the latter provision clarifies that a party in an arbitration must be active during the proceeding and raise objections to circumstances and procedural measures to which the party objects in order to not lose the right to challenge (see, amongst others, Heuman, *Skiljemannarätt*, 1999, p. 287 f.).

As stated above, the Companies have asserted that the arbitral tribunal committed procedural errors by, amongst other things, incorrectly rejecting the Companies' motion for discovery concerning certain documents, and that this error affected the outcome of the arbitration. As mentioned in the preceding paragraph, it is required

that the Companies objected to the decision during the arbitration in order for the Companies to be entitled to invoke the alleged procedural error in this challenge proceeding. What the Companies have stated concerning their requests to be permitted to argue their case and the procedural actions they took cannot, according to the Court of Appeal, be understood as that the Companies objected to the decision. The Companies have also asserted that they in any event objected to the decision through a letter sent to the arbitral tribunal on 14 November 2014. The Court of Appeal notes that the letter deals with other issues than the alleged procedural error, and that the letter does not contain any statement that could be understood as an objection to the arbitral tribunal's decision to reject the Companies' motion for discovery.

Thus, the Companies have not objected to the alleged procedural error during the arbitration, and they may therefore not invoke it. Already for this reason shall the Companies' motion for setting aside of the arbitral awards be rejected.

Litigation costs

Upon this outcome, the Companies shall be considered as the losing party. The fact that the Republic of Poland's motion for dismissal has been rejected does not alter this fact (see NJA 2016 p. 87). Therefore, the Companies shall be ordered to jointly compensate the Republic of Poland's litigation costs. The claimed amount is reasonable.

Appeals

The second paragraph of Section 43 of the Swedish Arbitration Act provides that the judgment of the Court of Appeal may be appealed only if the Court finds that it is of importance for the development of case-law that an appeal is reviewed by the Swedish Supreme Court. The Court of Appeal finds no reason to grant leave to appeal.

The judgment of the Court of Appeal may not be appealed.

Participants in the judgment were Judges of Appeal UB, GS (reporting judge) and AE.