SVEA COURT OF APPEAL | **MINUTES** | Case Document No. 32
Department 16 | 30 May 2005 | Case No. T 9059-03
Report in Stockholm | Division 1603

THE COURT
Senior Judge of Appeal UE, Judge of Appeal PE, reporting Judge of Appeal, and Associate Judge IK

REPORTING CLERK AND KEEPER OF THE MINUTES
Drafting lawyer ES

CLAIMANT
Mr. N
[INFORMATION OMITTED]

Counsel: Advokat Paulo Fohlin and advokat Jonas Rosengren
P.O. Box 11025, 404 21 Gothenburg

RESPONDENT
Czech Republic
Ministry of Transportation and Telecommunications
Nabr. I. Svobody 12, 110 15 Prague 1
Czech Republic

Counsel: Advokat Dag Wersen
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MATTER
Challenge of arbitration award pursuant to Section 36 of the Swedish Arbitration Act (1999:116)

The reporting clerk notes the following.

An investment protection agreement has been entered between the Czech Republic and the United Kingdom (the Agreement). Section 8(1) of the Agreement has the following wording.

> Disputes between an investor of one Contracting Party and the other Contracting Party concerning an obligation of the latter under Articles 2 (3), 4, 5 and 6 of this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of four months from written notification of a claim, be submitted to arbitration under paragraph (2) below if either party to the dispute so wishes.

Mr. N moved that an arbitral tribunal should affirm that he was entitled to compensation from the Czech Republic pursuant to the principles set forth in

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Article 5(1) of the Agreement. He maintained that the Republic by way of its actions had deprived him of his right to compensation or to what he was otherwise entitled under the Agreement for investments covered by the Agreement (Article 1). In support of his motion he asserted that the Czech Republic had violated Articles 2(2), 2(3), 3(1), 3(2) and 5(1) of the Agreement. He referenced certain Articles (Articles 2(2), 3(1) and 3(2)), which are not mentioned in Article 8(1), and asserted that as soon as arbitration proceedings have been properly opened all obligations of a state under the Agreement can serve as grounds for a claim for compensation under the Agreement.

In the main, the Czech Republic moved that Mr. N's case should be dismissed, since he had not made an investment in the Czech Republic; this was a prerequisite for the arbitral tribunal's jurisdiction. The Czech Republic also moved that Mr. N's claim should be dismissed as regards the parts that related to Articles not mentioned in Article 8(1).

In an arbitration award rendered on 9 September 2003, the arbitral tribunal rejected Mr. N's claim. Under the heading Preliminary Issues, the arbitral tribunal states that the question whether Mr. N was an investor having made an investment in the sense set forth in Article 1 of the Agreement would be reviewed as part of the review of the merits of the case and not as a preliminary issue concerning jurisdiction and that the part of his case which was based on Articles 2(2), 3(1) and 3(2) did not fall under the scope of Article 8(1) and must consequently be dismissed. Under the heading Conclusion, the arbitral tribunal notes that Mr. N's rights did not constitute an investment and that his claims based on Articles 2(3) and 5(1) consequently must be rejected.

Mr. N has applied for a summons against the Czech Republic and in the main moved that the Court of Appeal shall, pursuant to Section 36 of the Swedish Arbitration Act, affirm that his rights constituted an investment under Article 1 of the Agreement and that he is consequently entitled to have his claims against the Czech Republic for breaches of the Agreement reviewed on their merits under Article 8 of the Agreement, and that the disputes concerning the Czech Republic's

obligations under Articles 2(2), 3(1) and 3(2) are covered by his right to arbitration under Article 8. In the alternative, he has moved that the Court of Appeal shall annul the arbitration award. He has moved that the Court of Appeal shall amend the decision on the liability for the costs for the arbitration so that the Czech Republic is ordered to compensate him for his costs for the arbitration and that the Court of Appeal shall affirm that the Czech Republic, as between the parties, shall be liable for the costs for the arbitral tribunal, as well as the fees and costs for the Arbitration Institute of the Stockholm Chamber of Commerce.

The Czech Republic has, as far as is now relevant, moved that Mr. N's case shall be dismissed and has claimed compensation for its litigation costs before the Court of Appeal.

Mr. N has disputed the motion for dismissal.

The case is reported with respect to whether Mr. N's case shall be dismissed, after which the Court of Appeal takes the following

DECISION (to be given on 26 August 2005)

Decision

1. The Court of Appeal dismisses Mr. N's case.

2. Mr. N is ordered to compensate the Czech Republic for its litigation in the amounts of SEK five-hundred-ninety-thousand (590,000) and CZK nine-hundred-sixty-one-thousand-seven-hundred-twelve (961,712), out of which SEK 590,000 and CZK 893,000 comprises costs for legal counsel and CZK 68,712 expenses, plus interest on the amounts pursuant to Section 6 of the Swedish Interest Act (1975:635) from the day of this decision until the day of payment.

3. Pursuant to the second paragraph of Section 43 of the Swedish Arbitration Act the decision of the Court of Appeal may not be appealed.

Grounds

Mr. N has mainly maintained as follows.

He has made an investment in the Czech Republic pursuant to the Agreement. The arbitral tribunal should have reviewed the issue of whether the Czech Republic's actions constituted a breach of the Agreement, but merely reviewed whether he had made an investment. Thus, the arbitral tribunal has not reviewed the issues subjected to it for review.

The question of whether Mr. N has made an investment in the sense of the Agreement has direct bearing for the jurisdiction of the arbitral tribunal and is thus eligible for review by the Court of Appeal. It is irrelevant whether the arbitral tribunal considers itself having merely reviewed its jurisdiction or if it also considers itself having reviewed the issues of the dispute on their merits. The arbitral tribunal has declared itself not having jurisdiction to review the dispute and that decision can be subjected to court review pursuant to Section 36 of the Swedish Arbitration Act.

In its decision, the arbitral tribunal stated that Mr. N's case is "dismissed". The term "dismiss" is often translated into Swedish using the term "avvisa". The term was used in this meaning also during the arbitration. The question is whether the arbitral tribunal *de facto* merely reviewed its jurisdiction or if it also reviewed the case on its merits. How the conclusion was labeled in the decision is of less importance.

Since Mr. N still asserts that he held an investment in the sense of the Agreement, he has an interest in having it affirmed that an arbitral tribunal pursuant to Article 8(1) of the Agreement has jurisdiction to review, amongst other things, his assertions that the Czech Republic violated Articles 2(2), 3(1) and 3(2).

If the Czech Republic's assertions are correct, this should nevertheless not lead to the dismissal of Mr. N's case.

The Czech Republic has maintained mainly as follows.

The Court of Appeal has no legal grounds to affirm a legal relationship or issue a declaration in the manner moved by Mr. N in the main. Upon its review of the merits, the arbitral tribunal has concluded that Mr. N is not an investor and, further, has not made an investment in the sense of the Agreement. The arbitral tribunal has rejected Mr. N's case on its merits, and has thus not merely reviewed its jurisdiction to resolve the dispute. The arbitrators did not close the proceedings without reviewing the issues subjected to their review. Section 36 is not applicable to the present situation. Thus, Mr. N's case shall be dismissed.

However, the arbitral tribunal did consider itself to lack jurisdiction to review Mr. N's case and dismissed it to the extent it was based on Articles 2(2), 3(1) and 3(2). Mr. N has clarified that the Articles were not autonomous grounds for his case in the arbitration. Further, the issue whether Mr. N was an investor who had made an investment was of deciding importance also in this respect. Thus, Mr. N's case would have been rejected by the arbitrators if it had been subjected to their review.

Through the arbitration award, the arbitral tribunal has in a legally binding decision not subject to appeal determined that Mr. N is not entitled to compensation from the Czech Republic under the principles set forth in Article 5(1) of the Agreement, since Mr. N's motion, as worded by him, was rejected in its entirety. If the arbitral tribunal's decision on dismissal of Mr. N's case to the extent it was based on Articles 2(2), 3(1) and 3(2) of the Agreement would be annulled and Mr. N would open a new arbitration against the Czech Republic, that case would be dismissed as *res judicata* due to the existing arbitration award. This means that Mr. N's case is pointless for any future review and should be dismissed.

Conclusion of the Court of Appeal

Review of arbitration awards with respect to dismissal or writing off

Section 36 of the Swedish Arbitration Act provides that an arbitration award providing that the arbitrators closed the proceedings without reviewing the issues subjected to their review may be amended in its entirety or partially by a court upon the application of a party.

The provision in Section 36 came into existence through the Swedish Arbitration Act and has no counterpart in the arbitration act of 1929. The preparatory works state that the provision is based on case law, pursuant to which the rules on challenges could be analogously applied to an arbitral tribunal's decision to close the proceedings without resolving the dispute. The new provision entails that such arbitration awards that contain decisions on so-called writing off or dismissal of the dispute can be reviewed by public courts (see Government Bill 1998/99:35 p. 154 f. and SOU 1994:81 p. 187 f.).

Applicable scope of the provision

The Swedish Arbitration Act provides how an arbitral tribunal's decisions shall be labeled. In the event that an arbitral tribunal closes the proceedings, irrespective of whether it is done by way of a review of the merits or a procedural action, the decision shall be labeled as an arbitration award pursuant to Section 27 of the Swedish Arbitration Act. Other decisions, which are not set out in an arbitration award, shall be labeled as decisions. The applicable scope of a review under Section 36 of the Swedish Arbitration Act is, according to the wording of the provision, limited to such cases in which the arbitrators have closed the proceedings without resolving the issues subjected for their review. A decision taken during the proceedings on the dismissal of a part of the dispute can be impugned only through a challenge of the final arbitration award (see Government Bill 1998/99:35 p. 238).

What decision have the arbitrators taken on the merits and procedurally, respectively?

It is clear that the arbitral tribunal considered it of deciding importance whether Mr. N was to be deemed an investor having made an investment pursuant to Article 1 of the Agreement. The arbitral tribunal stated that this issue would be reviewed on its merits, which it also did. The fact that Mr. N's case was rejected through the use in item 1 of the operative part of the award of the somewhat ambiguous term "dismissed" is irrelevant, when the context establishes that the arbitral tribunal has reviewed the merits and also finally decided on the merits.

It is equally clear that the arbitral tribunal explicitly dismissed (through the use of the term "rejected") Mr. N's case to the extent it was based on Articles 2(2), 3(1) and 3(2) of the Agreement. The arbitral tribunal's decision on this issue was not expressed in a decision labeled as a decision or in the operative part of the arbitration award. This means that the decision on this issue has the form of a conclusion set out in the grounds of the arbitration award.

Can a decision in an arbitration award to partially dismiss a case be challenged based on Section 36 of the Swedish Arbitration Act?

Complications on the application of the law can arise in connection with an arbitral tribunal's decision to partially dismiss a party's case. The complications are not limited to whether the decision shall be challenged pursuant to Sections 34 or 36 of the Swedish Arbitration Act, but also whether the arbitration proceedings are closed by way of the decision (cf. Svea Court of Appeal's decision of 17 February 2004 in case No. T 3226-03).

Mr. N's case against the arbitration award is based solely on Section 36 of the Swedish Arbitration Act. The arbitration was closed through the arbitration award. The Court of Appeal concludes that the arbitral tribunal's decision to dismiss a part of Mr. N's case is so closely connected to the overreaching issue of whether an investment in the sense of the Agreement was at hand or not – an issue decided by the arbitral tribunal on its merits – that a challenge pursuant to Section 36 of the Swedish Arbitration Act concerning the decision on partial dismissal cannot be allowed.

Summary, litigation costs, appeal

In sum, the Court of Appeal concludes that the arbitrators did not close the proceedings without reviewing the issues submitted to them. Thus, Section 36 of the Swedish Arbitration Act is not applicable. Therefore, Mr. N's application for a summons shall be dismissed.

Upon this outcome, Mr. N shall compensate the Czech Republic for its litigation costs. The claimed amount must be deemed reasonable.

The Court of Appeal does not find grounds to allow an appeal of the decision to the Supreme Court.

As above

[SIGNATURE]

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Minutes shown/

[ILLEGIBLE SIGNATURES]