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DECISION OF THE SUPREME COURT OF SWEDEN

rendered in Stockholm on 12 November 2010

Case No. Ö 2301-09

APPELLANT

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RESPONDENT

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THE MATTER

Admissibility of a declaratory action regarding the arbitrators' jurisdiction

THE APPEALED DECISION

Decision of the Svea Court of Appeal dated 16 April 2009 in case No. Ö 9773-08

The Court of Appeal's decision, see Attachment

DECISION OF THE SUPREME COURT

The Supreme Court declares that there is sufficient connection to the Swedish legal system, that Swedish courts have jurisdiction and further that the prerequisites are otherwise met with regard to the declaratory action initiated by the Russian Federation.

The Supreme Court rejects the motion to refer the case to the Court of Justice of the European Union for a preliminary ruling.

The Supreme Court does not grant leave of appeal for those parts of the appeal where the proceedings have been stayed.

Therefore, the decision of the Svea Court of Appeal shall remain in force.

RELIEF SOUGHT BEFORE THE SUPREME COURT

RosInvestCo UK Ltd has requested that the Supreme Court dismiss the action initiated by the Russian Federation and order the Russian Federation to compensate RosInvestCo for its trial costs in the District Court, the Court of Appeal and the Supreme Court.

The Russian Federation has opposed any change of the decision of the Court of Appeal.

The Supreme Court has granted leave of appeal with regard to the issue whether there is sufficient connection to the Swedish legal system and thus whether Swedish courts have jurisdiction (cf. RH 2005:1) and with regard to the issue whether the prerequisites for a declaratory action are met (cf Government bill 1998/99:35 p. 77 and Ch. 13, Section. 2 of the Swedish Procedural Code). The proceedings concerning the issue whether leave of appeal shall be granted for the remaining issues have been stayed.

REASONS

1. RosinvestCo is a UK company which owns 7 million shares in the Russian company Yukos. In 2004 the Russian State enforced a sale of the shares in a subsidiary of Yukos and at the same time seized other Yukos' assets in order to secure the Russian State's tax claims against the company. The United Kingdom and Northern Ireland on the one hand and the Russian Federation on the other hand have concluded a bilateral investment treaty (BIT) which gives investors the possibility of initiating arbitration against the host country for possible breaches by such country of its obligations under international law. In 2005 RosinvestCo commenced arbitral proceedings against the Russian Federation under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce. During the proceedings the parties agreed on Stockholm as the seat of arbitration. In 2007 the arbitral tribunal rendered an "Award on Jurisdiction", according to which the tribunal found itself to have jurisdiction over the dispute. The Russian Federation then filed a complaint against RosinvestCo seeking a declaration that the tribunal was not competent to

adjudicated the dispute. RosinvestCo on the other hand requested the Russian Federation's action to be dismissed.

Connection to the Swedish legal system and jurisdiction of the Swedish courts

2. The first issue to be resolved is whether there is sufficient connection to the Swedish legal system and whether the Swedish courts have jurisdiction to try the case. International arbitration law embodies the principle of party autonomy, according to which the parties may agree on the applicable procedural law (*lex arbitri*) for their proceedings. The choice of the applicable procedural law normally results from the selection of the place (the seat) of the arbitration.
3. As far as Swedish law is concerned, Section 47 of the Swedish Arbitration Act (1999:116) stipulates that arbitral proceedings in accordance with the Act may be commenced in Sweden if the arbitration agreement provides that the proceedings shall take place in Sweden. Pursuant to Section 46, the Act applies to arbitral proceedings which take place in Sweden even where the dispute has an international connection. Also in such proceedings, Swedish courts may be called upon to appoint arbitrators, hear witnesses under oath, rule on arbitrators' fees and hear challenge and invalidation claims in respect of arbitral awards. Under Section 48 the law agreed by the parties shall apply to the arbitration agreement; failing such agreement, the law of the country where the proceedings, according to the parties' agreement, have taken place or shall take place shall apply. According to Section 22 of the Act, the place of arbitration is determined by the parties and otherwise by the arbitrators. It is additionally provided that the arbitrators may hold hearings in other locations in Sweden or abroad, unless the parties have agreed otherwise.
4. Thus, it follows that where the parties have agreed that the proceedings shall take place in Sweden, it is irrelevant if the parties or the arbitrators have decided to hold hearings in other countries, if the arbitrators are not from Sweden, if their duties have been carried out in another country or if the dispute concerns a contract which otherwise has no connection to Sweden (see Patricia Shaughnessy, *The Right of the Parties to Determine the Place of an International Commercial Arbitration*,

Stockholm International Arbitration Review 2005:2, p. 264 et seq., and Christer Söderlund in the same journal, p. 275 et seq., concerning the case RH 2005:1).

5. Under Section 34 of the Act, a Swedish arbitral award may be challenged in Swedish courts, *i.a.* if the award is not covered by the arbitration agreement. Parties who have no connection to Sweden may, however, limit this possibility (see Section 51 of the Act). Under Section 2, paragraph 1, the arbitrators may rule on their own jurisdiction to decide the dispute. Such a ruling does not, however, prevent a court, at the request of a party during the arbitral proceedings, from ruling on the jurisdictional issue. The court's decision on the matter will have legal force and be binding on the arbitrators (Government bill 1998/99 p. 35, p. 77). The second paragraph of this provision states that a decision by the arbitrators' to the effect that they are competent to try the case is not binding and that the issue of jurisdiction may also come under review in a challenge action against the award.
6. Since RosInvestCo and the Russian Federation have agreed that the arbitral proceedings shall take place in Sweden, the Swedish Arbitration Act is applicable. Consequently, Swedish courts are competent to rule on the arbitrators' jurisdiction and as to whether there is sufficient connection to the Swedish legal system.
7. The first issue for which leave of appeal has been granted is to be answered in accordance with the above.

The prerequisites for a declaratory action

8. The second issue to be determined is whether the prerequisites for a declaratory action of the present kind are met. As stated above, Section 2, paragraph 1, second sentence of the Act, allows a party to apply to a court for a ruling on the arbitrators' jurisdiction during the arbitration proceedings; such an action does not prevent the arbitrators from continuing the arbitral proceedings pending the determination by the court.

9. Section 2 of the Act does not limit the possibility for a party to have the scope of the jurisdiction according to the arbitration agreement determined during the course of the arbitration proceedings. However, Ch. 2, Section 13 of the Swedish Procedural Code, with its general provisions on admissibility of declaratory claims, must be deemed to be applicable also to an action concerning lack of jurisdiction under Section 2 of the Arbitration Act. Under Ch. 2, Section 13 of the Swedish Procedural Code, a declaratory claim is admissible if there is uncertainty regarding the legal relationship - i.e. in this case whether the tribunal has jurisdiction - and such uncertainty is detrimental to the plaintiff. This provision is non-mandatory, which means that the court determines whether the action is admissible.

10. As a rule, uncertainty regarding the legal relationship is demonstrated already by the fact that the parties disagree on the scope of the arbitrators' jurisdiction. If the issue on jurisdiction is not resolved before the arbitration proceedings have been concluded and the costs have accumulated, this can be of detriment. Whereas a request for a declaratory action under Section 2 of the Act is to be initiated in the District Court and may be appealed to the Court of Appeal and the Supreme Court under general procedural rules, a challenge action under Section 34 shall be brought in the Court of Appeal as first instance, with a certain limitation in the right of appeal. Therefore, it can be argued that an action concerning lack of jurisdiction in a particular dispute under Section 2 of the Act is appropriate and admissible, if the case cannot be expected to be finally adjudicated at a time which for instance will result in significant cost savings in the arbitral proceedings.

11. The *travaux préparatoires* concerning Section 2 of the Act discuss the situation where the arbitral award is challenged before the jurisdictional issue has been finally decided by the courts (Government bill 1998/99:35, p. 77 et seq.). It is stated that the Court of Appeal should stay the challenge proceedings until the jurisdictional issue has been decided in the initial court proceedings (see also Lindskog, *Arbitration Proceedings, a Commentary*, 2005 p. 299 et Seq.). Thus, the starting point according to the *travaux préparatoires* is that an action concerning lack of jurisdiction is admissible even if the arbitration proceedings will continue and the award will be rendered prior to the final resolution of the issue on jurisdiction.

12. Considering what has just been stated, a party should – in a case such as the present - be entitled to initiate an action under Section 2 of the Arbitration Act concerning the arbitrators' jurisdiction prior to the issuance of an arbitral award, at least in situations where the award may not reasonably be expected in the near future.
13. In the current case the arbitrators ruled on their jurisdiction in an “Award on Jurisdiction”. This is not an arbitral award which can be challenged under Section 34 of the Arbitration Act. In the Swedish terminology it is a decision on jurisdiction during an ongoing arbitration (cf. Section 27, paragraph 3 of the Act). Soon after the decision was rendered, and long before the final award was expected, the Russian Federation initiated a declaratory action concerning the jurisdictional issues. Thus, the Russian Federation's action meets not only the requirement of uncertainty as to the jurisdiction of the arbitrators, but also the requirement of detrimental effect. Furthermore, it cannot be deemed inappropriate to admit the action.
14. The second issue for which leave of appeal has been granted is to be answered according to the above.

The issue concerning leave to appeal with respect to the remaining issues

15. Next, the Supreme Court will determine whether leave of appeal should be granted in respect of the remaining issues in the case.
16. RosInvestCo has argued that the Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels I Regulation) is applicable to the Russian Federation's request for a declaratory judgment, and has requested that the matter be referred to the Court of Justice of the European Union for a preliminary ruling. According to its Section 1.2 d), the Brussels I Regulation does not apply to arbitrations. This rule and the corresponding provision in the Brussels Convention have been interpreted by the Court of Justice of the European Union (see, e.g., judgments of 25 July 1991 in case C-190/89, *March Rich*, REG 1991, p. I-3855, of

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17 November 1998 in case C-391/95, Van Uden, REG 1998, p. I-7091, and of 10 February 2009 in case C-185/07, Allianz, REG 2009, p. I-00683). It is evident that the exception mentioned above is also applicable to a claim for a declaratory judgement on the jurisdiction of an arbitral tribunal in an ongoing dispute. Thus, there is no reason to request any preliminary ruling.

17. The Supreme Court finds no reason to grant leave of appeal in those parts of this case where the proceedings have been stayed.

Decided by: Supreme Court Justices Torgny Håstad, Kerstin Calissendorff, Per Virdesten, Lena Moore and Johnny Herre (reporting Judge).

Reporting clerk: Ralf Järtelius