TDM

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Transnational Dispute Management

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English translation of the Svea Court Petrobart decision - JUDGMENT Case no. T 5208-05

About TDM

TDM (Transnational Dispute Management): Focusing on recent developments in the area of Investment arbitration and Dispute Management, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting.

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Our aim is for TDM to become the hub of a global professional and academic network. Therefore we invite all those with an interest in Investment arbitration and Dispute Management to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

Please contact **Editor-in-Chief** Thomas Wälde at twwalde@aol.com if you would like to participate in this global network: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an TDM-focused republication), but rather concise comments from the author's professional 'workshop'.

TDM is linked to **OGEMID**, the principal internet information & discussion forum in the area of oil, gas, energy, mining, infrastructure and investment disputes moderated by Thomas Wälde.

Unofficial translation

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The matter

Challenge of arbitration award

Decision of the Court of Appeal (*Sw: Hovrätten*)

1. The claim to overturn the arbitral award is denied by the Court of Appeal

2. The Republic of Kirgizstan shall reimburse Petrobart Limited for its costs in the Court of Appeal. This cost is SEK 450 000, whereof SEK 420 000 is related to costs for representatives, and interest calculated according to 6 § the interest act (*Sw. räntelagen*) will be added to this sum for the period between the day of the judgement to the day payment is effectuated.

Background

Petrobart Limited (Petrobart), which is an association registered in Gibraltar, did 1998 enter into an agreement regarding supply of condensed gas with Kyrgyzgazmunaizat Joint Stock Company (KGM), which is one of the Republic of Kirgizstan (the Republic) government controlled associations. Petrobart delivered according to the agreement but did not get paid. Therefore Petrobart sued KMG in a local court in Kirgizstan and Petrobart's claim was granted by the local court. However, before the judgement was executed KGM was declared bankrupt

In 2000 Petrobart initiated an arbitration against the Republic according to UNCITRAL's rules. Petrobart motioned that the arbitral tribunal should claim to have jurisdiction over the Republic and also that the Republic should reimburse Petrobart according to the gas agreement. Petrobart invoked the Kyrgyz "Foreign Investment Law". The Republic disputed Petrobart's claims as well as Petrobart's jurisdiction and claimed that that the Arbitral Tribunal did not have competence to rule in the dispute between the parties. The claim was dismissed in an arbitration award passed in Stockholm February 13 2003. The ground for the dismissal was the lack of authority for the Arbitral Tribunal to decide the matter. The Tribunal stated that Petrobart had not made a foreign investment in the meaning of the Kyrgyz "Foreign Investment Law". Petrobart appealed the decision and claimed that the Svea Court of Appeal (SW: Svea hovrätt) should revoke the award. In a judgement passed April 13 2006 the Svea Court of Appeal dismissed the Claimant's case (case no 3739-03). The Court of Appeal's judgement has been appealed against and is yet to become final.

In September 2003 Petrobart initiated a new arbitration procedure against the Republic and this time the legal support for the claim was an international treaty, "The Energy Charter Treaty" (ECT). The Republic did again contest Petrobart's jurisdiction. The arbitration procedure was this time governed by the rules of the Arbitration Institute of the Stockholm Chamber of Commerce. TheTribunal - ex Justice of the Supreme Court Hans Danelius, Professor Ove Bring and the Belgian Attorney Jeroen Smets - gave its ruling in Stockholm Mars 29 2005. In the Award the Arbitral Tribunal granted Petrobart's claim and compelled the Republic to pay to Petrobart compensation exceeding one million USD plus interest.

Claims

The Republic has claimed that the Court of Appeal shall overturn the arbitration award of 29 Mars 2005.

Petrobart has denied the Republic's claim.

The parties have claimed compensation for their legal costs in the Court of Appeal.

Legal grounds for the action

The parties have invoked the following ground for their action.

The Republic

1. The award is not covered by a valid arbitration agreement between the parties (34 § first paragraph in the Swedish arbitration act (*Sw. lagen om skiljeförfarande*) (LSG).

2. During the handling of the case by the Arbitral Tribunal there have been administrative errors, that the Republic has not been responsible for, which have plausibly affected the outcome of the decision since the Tribunal did not try its authority even though the this was questioned by the Republic (34 § first paragraph 6 LSF).

Petrobart

1. The award is covered by a valid arbitration agreement between the parties.

2. There have been no faults or errors in the handling of the arbitration by the Tribunal. However, if administrative errors occurred these have not affected the outcome of the arbitrary ruling.

Pleading of the action

The Republic

During the arbitration the parties agreed that the case would be decided without a main hearing, that the Tribunal would formulate questions to the parties and also that the parties would have the right to hand in one statement in respect of the other party's answer to these questions. The Republic stated an answer, to one of the questions formulated by the Tribunal, regarding an opinion delivered by Professor Adnan Amkhan on behalf of Petrobart. The opinion by the Professor stated that Petrobart was an investor making investments in the meaning covered by the ECT. However, the content of the answer by the Republic said that the ECT did not cover Petrobart because of the fact that Great Britain whom is responsible for Gibraltar's contact with other states had not ratified the Treaty on behalf of Gibraltar, even though Great Britain earlier provisionally had approved that the Treaty would include Gibraltar. The Republic did also request the Tribunal to ask the secretariat of the ECT if the treaty was applicable in regards to Gibraltar. The Tribunal declined the Republics request and rendered the arbitrary decision the 29 Mars 2005.

When a question arises concerning the authority of an Arbitral Tribunal; the Tribunal must critically investigate the ground for that question. The Republic shall not have to participate in an arbitration to which it did not consent. By the ratification of the ECT the Republic only agreed to an arbitration agreement with investors from other signatory states. Gibraltar is not a signatory state. This circumstance has been invoked before the Arbitral Tribunal in appropriate order but the Tribunal did not bother to investigate the question and therefore it omitted to investigate its own authority. The circumstances accounted for constitutes an administrative error which should cause the arbitrary decision to be quashed.

Thus, the Republic claims that the arbitrary ruling is not covered by a valid arbitrary agreement between the parties and this follows from the fact that Gibraltar is not a part to the ECT. Furthermore, the Republic claims that the arbitrary ruling does not fall under a valid arbitrary agreement since Petrobart is not an investor making investments in the meaning of the ECT.

The ECT does not cover Gibraltar

When Great Britain provisionally ratified the ECT December 17 1994 it was declared that the ratification would apply to Great Britain, Northern Ireland and Gibraltar. Great Britain did its final ratification of the treaty December 13 1996 on behalf of Great Britain, Northern Ireland, the Bailiwick of Jersey and Isle of Man. The final ratification made by Great Britain did not include Gibraltar. The ECT entered into force April 16 1998.

On one hand it is obvious that Gibraltar is included by the ratification made by Great Britain wherever the ratification does not include any territorial statement and on the other hand it is clear that Gibraltar is not included if a ratification by Great Britain set out certain territories, as

in this case, when the ratification concerns Great Britain, Northern Ireland, the Bailiwick of Jersey and Isle of Man.

The Republic asserted before the Arbitral Tribunal that it lacked the authority to judge because the provisionally application of the ECT; the treaty expired December 13th 1996 and under all circumstances and at the latest 1998. The Arbitral Tribunal did however consider itself to have the authority to try the case. Thus, the Tribunal regarded the ECT as still being applicable to Gibraltar even after Great Britain final ratification (the arbitration award page 60 ff).

Great Britain made extensive parliamentary measurements to enable ratification of the ECT on behalf of the Bailiwick of Jersey and Isle of Man. If Great Britain would also have wanted the ECT to be applicable in regards to Gibraltar it would have been an easy procedure to add the words "and for Gibraltar".

The Arbitral Tribunal allege that Great Britain would have had to make some form of positive measure during the time of the ratification to assure that Gibraltar shall no longer be covered by the temporary application of the ECT. To enable this conclusion the Tribunal has wrongly added a prerequisite to article 45 (1) that is not mentioned in the Treaty. The provisionally application ceased in regards to Gibraltar when the ECT came into force for Great Britain. No active statement from Great Britain was needed. Furthermore, the Treaty must be in force both when the investment was made as well as when the dispute is pendent.

Petrobart has alleged that there were political reasons that led Great Britain to not explicitly ratify the ECT on behalf of Gibraltar in 1996. There are however no reasons for Great Britain to not explicitly include Gibraltar in the provisionally ratification 1994 and thereafter be prevented from doing the same in 1996. Furthermore, Great Britain has during 1997 and thereafter ratified a large number of international treaties on behalf of Gibraltar.

The fact that Gibraltar is not included in the ECT has been stated in the judicial doctrine, the arbitration has in this part also been strongly criticized.

The term investment

The Arbitral Tribunal, referring (arbitration award page 72) to article 1 (6)(f) and 1 (5) in ECT, concludes that the sale of condensed gas shall be considered a "activity in the Energy Sector" and that the sale- and purchase-agreement therefore shall be considered to be an investment under the meaning expressed in the ECT.

This conclusion is wrong and has been criticised. Evident from newspaper articles, contracts as the one discussed here shall not be included under the applicability of the ECT. Petrobart is therefore not an investor making investments under the ECT.

Petrobart

Alleged administrative error

In November 2004 the parties received the questions from the Arbitral Tribunal and during the same time the Republic was given an opportunity to comment one of Petrobars invoked opinions by Professor Adnan Amkhan, who was the previous head of the legal department at ECT's secretary. In the answer by the Republic it was expressed for the first time an assertion claiming that Petrobart, since the association was registered in Gibraltar, was not protected under the ECT. It should be noted that that this was not an answer to any question that the Arbitral Tribunal had asked and that the question had not been treated in Adnan Amkhans opinion. Furthermore, the Republic did in the answer suggest to the Arbitral Tribunal that it should ask the secretary at ECT if the Treaty included investors registered in Gibraltar. TheTribunal considered this but turned down the proposal. Also, the secretary would not have been able to answer the question since it does not have the authority to do so.

The Arbitral Tribunal has made no administrative error. If one would admit that there have been an administrative error in the tribunal's handling if the matter (which is denied), this have in no respect affected the outcome of the case.

The arbitration was covered by a valid arbitration agreement

The ECT was signed by i.a. the Republic and Great Britain on December 17th 1994. The treaty contains a provision, article 45 (1), stating that the Treaty shall be applicable to signatory states when the initial signing occurs. This means that the treaty can be applicable long before its final ratification. The relevant part of the article 45 (1) states: "Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory --".

In case a signatory state does not wish the ECT to be applicable between the signing and the ratification the state must give a special declaration in this matter, which follows from article 45 (2)(a).

In connection with the signing of the ECT by Great Britain it was made clear that also Gibraltar was covered by the provisions while awaiting the final ratification. According to the ECT the provisionally application can only terminate in two ways: by ratification (by which the provisional application is replaced by a permanent one) or by giving a specific deposition instrument declaring that the state in question does not intend to ratify the Treaty.

Great Britain ratified the ECT December 13 1996. In the ratification instrument Gibraltar was not mentioned. The consequence of the ratification was therefore that the ECT entered into

final force in respect to Great Britain while Gibraltar also hereinafter was covered by the provisional application while awaiting final ratification. This was a consequence of the fact that a specific declaration in regards to Gibraltar had not been made.

In the light of this it can be concluded that Petrobart in its capacity as an association registered in Gibraltar was covered by the ECT and therefore also had the right to claim arbitration against a signatory state according to arbitration clause stated in article 26. The Arbitral Tribunal has exhaustively accounted for its judgment regarding the application of ECT in regards to Gibraltar. In that judgment theTribunal concluded that ECT still shall be applicable provisionally in regards to Gibraltar.

The investment term

It follows from Article 1 (6) (f) in the ECT that an investment should be understood as assets including i.a. "any right conferred by law or contract or by virtue of any license and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector". In Article 1 (5) "Economic Activity in the Energy Sector" is defined as (with an exception not applicable here) i.a: "sale of Energy Materials and Products". Therefore, the Arbitral Tribunal did correctly consider the investment to fall under the scope of the Treaty.

Reasoning of the Court of Appeal

The Investigation

The Court of Appeal has decided the case after main hearing. On the request of Petrobart Hans Danelius, Ove Bring and Adnan Amkhan have been heard as witnesses. On request of the Republic Professor Nicolas Angelet has been heard as a witness. Written evidence has been invoked.

Opinion of the Court of Appeal

Is Gibraltar covered by the ECT?

If follows from the ECT Article 45 that the preliminary or provisional application of the Treaty can be terminated if the signatory state in written form declares that it does not intent to ratify the Treaty. If this is not done the provisional application normally terminates by ratification. As declared by the Arbitral Tribunal, rules regarding the situation when the provisional and the final application do not have the same territorial scope are missing in the Treaty. The Treaty must therefore be interpreted on this point.

Since the Treaty does not expressively mention whether the provisional application of the Treaty in regards to Gibraltar should terminate under the present circumstances it could have been expected that Great Britain would expressively have stated if it wanted Gibraltar not to be covered under the Treaty. This has however not been done by Great Britain. This circumstance confirms according to the Court of Appeal what is also revealed in the investigation; which is that Great Britain could not have had such intentions; instead it is probable that there have been political reasons to not expressively mention Gibraltar in the ratification document from 1998.

By reference to what has been said above the Court of Appeal finds, just like the Arbitral Tribunal, that the provisional application of the ECT still applies to Gibraltar. Thus, a valid arbitration agreement existed when the gas agreement was concluded between the parties and when Petrobart initiated the arbitration.

The term investment

It follows from the investigation that the term *investment* can have different meaning in different international contexts. The meaning of the term as defined in the ECT has a wide scope of application. It is evident from the testimony given by Adnan Amkhans that when the ECT was negotiated it was an explicit intention to give investment a broad application.

The Court of Appeal finds, as well as the Arbitral Tribunal, that the definitions in Article 1 (6) and 1 (5) in the ECT must be interpreted as including the investment made by Petrobart. Thus, it can not be claimed that the arbitration award is not covered by a valid arbitration agreement between the parties.

Administrative error

The Republic has also claimed that the Arbitral Tribunal did not try its own competence when the Republic questioned if Gibraltar was covered by the ECT and furthermore that the Tribunal should have, as the Republic had petitioned for, acquired a statement from the ECT secretariat.

As for the question concerning the acquiring of a statement from the secretary of ECT, it is evident from Adnan Amkhan's testimony, that if the secretariat had been questioned it would not have given a statement, this was a judgement the Arbitral Tribunal also did. The decision to deny the petition from the Republic could therefore not have been an administrative error.

It follows from the arbitration award that the Tribunal did thoroughly try the objection made by the Republic regarding the lack of authority because of the alleged ground that Gibraltar was not covered by the ECT. There has been no administrative error in this respect.

Conclusion, costs

The Court of Appeal has found no ground invoked by the Republic that would render into quash of the arbitration award. The Claimant's case will therefore not be granted.

Thus, the Republic shall reimburse Pertobarts litigation costs in the Court of Appeal. The requested amount is considered as reasonable.

The judgment by the Court of Appeal can according to 43 § second paragraph not be appealed.

In the judgment the participating judges of appeal have been Lars Dirke, Per Eklund and Måns Edling, referent. Unanimously.