

## **Court Rules on Doctrine of Assertion**

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A company submitted a lawsuit to the Svea Court of Appeal, claiming that the court should set aside an arbitral award in which the arbitrators had dismissed the arbitration for lack of jurisdiction without ruling on the remaining issues submitted to them. The company claimed that the arbitral tribunal should have found that it had jurisdiction, as it was obliged to apply the doctrine of assertion. The court concluded that the mere allegation by a party - in this case an allegation that the claimant had an investment covered by the arbitration provision contained in the Law of the Kyrgyz Republic on Foreign Investments - is not enough as a basis for jurisdiction for arbitral tribunals. Accordingly, the court confirmed that the arbitral tribunal correctly dismissed the arbitration after examining the allegation as to whether the claimant had an investment. The case has been appealed to the Supreme Court.

### **Facts**

In 1998 Petrobart Limited, a company registered in Gibraltar, concluded a contract for the supply of gas with a state joint stock company in the Kyrgyz Republic called Kyrgyzgazmunaizat (KGM). KGM failed to pay for deliveries. As a result, Petrobart took legal action against KGM. In December 1998 Petrobart obtained a favourable judgment for payment; however, before the judgment was executed, KGM was declared bankrupt. Petrobart then submitted a request for arbitration against the Kyrgyz Republic in 2000, requesting, among other things, that the arbitral tribunal declare that it had jurisdiction to try the claim and order the republic to pay compensatory damages to Petrobart.

In the arbitration, Petrobart relied on the Kyrgyz Law on Foreign Investments in the Kyrgyz Republic, which provides protection for foreign investors and foreign investments. Under the law, an investor can initiate arbitration concerning investment disputes against the republic. Petrobart submitted that it was an investor with an investment in the republic as defined in the law and that the republic had failed to fulfil its obligations under the law. Petrobart claimed that, according to the Swedish procedural doctrine of assertion, the allegation that it had an investment in the republic - as defined in the Foreign Investment Law - was a sufficient basis for the arbitrators to be competent to try the case. However,

the arbitral tribunal found that Petrobart did not have an investment within the meaning of the law and thus the arbitral tribunal did not have jurisdiction to try Petrobart's claims. Thus, in 2003 the arbitral tribunal dismissed the arbitration without further hearing.

## **Decision**

The Svea Court of Appeal confirmed the arbitral tribunal's ruling on April 13 2006.<sup>(1)</sup> The court first noted that the arbitrators unquestionably had the power to rule on their own jurisdiction and that the well-established principle of *Kompetenz-Kompetenz* has been confirmed by law in Section 2 of the Arbitration Act. The court then noted that in this case the arbitral tribunal had to determine whether the prerequisites for arbitration proceedings provided for in a certain law were fulfilled, and not whether an arbitration agreement was valid or applicable. Consequently, according to the court, it was necessary for the arbitral tribunal to determine whether it had jurisdiction based on the prerequisites found in that law. The issue of whether Petrobart had an investment as defined in the Foreign Investment Law thus became decisive.

The court further stated that, in the arbitral proceedings, the republic had denied that Petrobart had an investment as defined in the Foreign Investment Law. It was for the arbitral tribunal to decide whether Petrobart had such an investment. This was a question of jurisdiction and not a question to be decided on the merits of the dispute. When deciding this issue, an allegation by a party was not sufficient. Neither could such allegation fulfil the legal prerequisites that stipulate when a dispute is arbitrable. Thus, the arbitral tribunal had handled the issue of its jurisdiction correctly.

The court then determined whether the arbitral tribunal's finding that Petrobart did not have an investment within the meaning of the Foreign Investment Law was correct. The court came to the same conclusion as the arbitrators and agreed that Petrobart's request for arbitration should be dismissed for lack of jurisdiction.

## **Comment**

A previous case had dealt with the applicability of the doctrine of assertion in courts (for further details please see "[Court Rules on Jurisdiction under Article 5\(1\) of Brussels Convention](#)"). In this case the same factual circumstances were relevant to both the jurisdictional issue before the court and the merits of the case ('facts of double relevance'). In this case the Supreme Court<sup>(2)</sup> held that courts, when determining the issue of jurisdiction in cases involving facts of double relevance, must accept the circumstances alleged by the plaintiff, provided that these are not obviously unfounded - which is an application of the doctrine of assertion. Strong arguments support the conclusion that arbitrators should not apply the principle of facts of double relevance when determining the question of their competence. Thus, the arbitrators in the arbitration between Petrobart and the Kyrgyz Republic were procedurally right - as found by the Svea Court of Appeal - when they examined the allegation that there was an investment in order to decide the jurisdictional issue.

The findings of the Svea Court of Appeal are of general interest to the issue of whether the doctrine of assertion is applicable to arbitration. They are also of great interest to disputes concerning bilateral investment treaties, since the arbitration provision of the Foreign

Investment Law is similar to the corresponding arbitration clauses of many bilateral investment treaties. These clauses also often provide that the dispute in question shall concern an 'investment', as defined in the respective bilateral investment treaty. However, in certain bilateral investment treaties, the corresponding arbitration clause does not provide that the dispute shall concern an investment. For instance, the bilateral investment treaty between Latvia and Sweden contains an arbitration clause in Article 7(1) that covers "any dispute between one of the contracting parties and an investor of the other contracting party concerning the interpretation or application of this agreement". Like other bilateral investment treaties, this treaty contains a definition of the term 'investor' in Article 1, as well as a definition of the term 'investment'. Where the word 'investment' is not found in the arbitration clause, the issue of whether there is an investment will most probably not be considered a jurisdictional issue pursuant to the Supreme Court decision on the bilateral investment treaty between Latvia and Sweden in *SwemBalt*.<sup>(3)</sup>

It would be surprising if the Supreme Court does not share the opinion of the Svea Court of Appeal - that is, that the investment issue must be regarded as a jurisdictional issue under the Foreign Investment Law and that the doctrine of assertion should not apply in the arbitration.

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## Endnotes

- (1) Case T 3739-03.
- (2) Case Ö 4286-02.
- (3) NJA 2002 C s 62 (Ö 4303-02).

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