

# Cloaked by the Sovereign Veil: Recent Swedish Decision Applies Sovereign Immunity “Categorically”

**Kluwer Arbitration Blog**

September 10, 2020

Jake Lowther, August Ahlin (MAGNUSSON)

*Please refer to this post as: Jake Lowther, August Ahlin, ‘Cloaked by the Sovereign Veil: Recent Swedish Decision Applies Sovereign Immunity “Categorically”’, Kluwer Arbitration Blog, September 10 2020, <http://arbitrationblog.kluwerarbitration.com/2020/09/10/cloaked-by-the-sovereign-veil-recent-swedish-decision-applies-sovereign-immunity-categorically/>*

---

The latest decision in the long running investment dispute saga of Stati, Ascom and others v. Kazakhstan came in June 2020, when the Svea Court of Appeal (*Svea hovrätt*) in Sweden annulled the Swedish Enforcement Agency’s (*Kronofogden*) (EA) attachment decisions. In this case, the Court of Appeal’s decision effectively expanded the definition of property covered by sovereign immunity (previously discussed on the blog) in Sweden, to include commercial property owned by the National Bank of Kazakhstan (National Bank). The decision represents a further hurdle to the investors to enforce a USD 500 million SCC award rendered in their favour in December 2013.

## **Background**

The dispute arose following Kazakhstan’s seizure of the investors’ petroleum operations in 2010. The investors had invested more than USD 1 billion since 1999 and their businesses had become profitable by late 2008. At this point, the Kazakh government undertook a range of measures that ultimately led to the seizure and

nationalization of the investments in July 2010. The investors subsequently brought a Stockholm Chamber of Commerce arbitration under the Energy Charter Treaty (ECT), alleging inter alia breaches of the treaty protections in respect of expropriation, fair and equitable treatment, full protection and security and reasonable and non-discriminatory measures.

The arbitral tribunal found that Kazakhstan had breached the ECT's fair and equitable treatment standard and a majority of the arbitral tribunal awarded the investors USD 500 million plus interest. Kazakhstan then applied in March 2014 to the Svea Court of Appeal (being the court of first instance on such questions in Sweden) to set aside the award. This application was rejected. The investors then applied to the District Court (*Tingsrätt*) for a freezing order in respect of property belonging to Kazakhstan sufficient to cover the investors' claims.

The District Court approved the investors' application, whereupon the investors applied to the EA to attach the Kazakh government's property in respect of their claims. The EA decided on attachments of property inter alia in the form of securities in securities accounts held in a Swedish bank, claims for dividends on those securities as well as funds deposited to a cash account in the same bank.

### **Application to the District Court**

Kazakhstan requested the District Court to repeal the EA's decision, objecting that the property was not owned by Kazakhstan and alternatively that the securities were not located in Sweden, that the property was covered by state immunity and finally that enforcement would violate the *ordre public*.

With respect to sovereign immunity, the District Court considered in particular Articles 19(c) and 21.1(c) of the UN Convention on Jurisdictional Immunities of States and Their Property (2004) (Convention). It found that to benefit from sovereign immunity, it is not enough for the property in question to be held for a non-commercial purpose. Rather, the holding must be of a qualified nature, linked to the state's official functions. In July 2019, the District Court found that as the property was not reported in the National Bank's accounting and that Kazakhstan on numerous occasions had claimed reimbursement of paid withholding tax, the National Bank should not be deemed the owner of the property. Accordingly, the District Court rejected the appeal on the basis that the property attached by the EA

was not protected by state immunity.

## **Appeal to the Court of Appeal**

Kazakhstan subsequently appealed the District Court's decision to the Court of Appeal. The Court of Appeal made several observations on the "restrictive" theory of sovereign immunity, which distinguishes between sovereign acts by states and their private law acts. It noted that under customary international law, a state's commercial or private acts are typically exempt from immunity.

The Court of Appeal also noted that the Convention, although not yet in force, is largely a codification of customary international law and formed the starting point for its determination. The Court of Appeal focused on the distinction between immunity with respect to jurisdiction as opposed to immunity with respect to enforcement or constraint. Applying the applicable customary international law as expressed in the Convention, the Court of Appeal observed *inter alia* that the main rule is that a foreign state can only be subjected to enforcement measures with its consent.

The Court of Appeal noted that under the Convention, the assessment of whether property could become subject to enforcement measures should first be made based on the special rules in Article 21 and thereafter based on the general rule in Article 19. The Court of Appeal then considered Article 21.1(c) of the Convention, which exempts the property of a central bank from the exemption of sovereign immunity under Article 19(c). It found on the evidence presented that the National Bank was the owner of the relevant property subject to attachment.

The Court of Appeal then considered the "categorical" and "functional" applications of the provision. A categorical application would mean that, as the property was owned by the National Bank, it was automatically protected from enforcement measures. A functional application, on the other hand, would require that Kazakhstan in fact exercise its sovereign authority over the property in order to benefit from sovereign immunity. Considering *inter alia* the wording of the provision, the object and purpose of the Convention and the *travaux préparatoires*, the Court of Appeal held that the provision should be applied categorically. As a result, it found that the property was protected by state immunity.

The Court of Appeal also rejected the investors' arguments that Kazakhstan had lost its right to claim immunity due to an "abuse of rights". The Court found that the very purpose of immunity is to protect states and their property against legal procedures to which they do not consent. Accordingly, the EA's decision on attachment was annulled.

## **Comment**

The Court of Appeal referred to Swedish precedent, NJA 2011 s. 475, in which the Supreme Court of Sweden (*Högsta domstol*) held that immunity would be denied when the property in question was used in a commercial manner. In that case, the Russian Federation was unsuccessful in invoking sovereign immunity with respect to real estate owned and used by the Russian Trade Delegation in Sweden and by the Russian Embassy for housing, storage, archival and other purposes. The Supreme Court then found that a foreign state could not invoke immunity from the enforcement of a judgment in respect of real estate belonging to that state where (i) the property was not used to a significant extent for the official activities of the state, and (ii) the purpose of the ownership was not otherwise sufficiently qualified to protect the property from attachment, in line with Article 19(c) of the Convention.

The Court of Appeal distinguished the present case on the basis that Article 21.1(c) does not set any requirement for qualified use in respect of property owned by a central bank. In other words, there is no need to assess the functions of the property, as the category of property is sufficient to conclude whether the state is entitled to benefit from sovereign immunity. In the present case, although the use of the property was commercial, the ownership could be attributed to the National Bank and consequently classified as an exercise of state authority.

However, the Court of Appeal expressly pointed out that there may be instances where the property of a central bank cannot enjoy immunity under the Convention, such as if a central bank were to offer banking services to consumers in competition with other market actors. The Court of Appeal acknowledged that a categorical application of the Convention could lead to unreasonable outcomes and recommended that a limited scope to apply Article 21.1(c) in conjunction with the Article 21.1(b)(iii) sovereignty criterion. However, it stressed that such a limitation

would not apply in this case as the National Bank's property held within the framework of a national fund amounted to the management of the state's economy, a clear exercise of the state's authority.

The Court of Appeal's decision forms part of a broader trend towards greater immunity of foreign central banks. It represents a potential boon to both central bankers and Sweden, with the possibility of a wave of state asset restructuring to follow. Unsurprisingly, the investors have applied for leave to appeal the Court of Appeal's decision to the Supreme Court. However, the grounds on which an applicant may be granted leave to appeal to the Supreme Court are limited. In the court's assessment, the case must have precedent value or there must have been a gross procedural error. Typically, applications for leave to appeal are decided within six months. Given the comments made by the Court of Appeal, it is certainly arguable that there is sufficient interest in setting a precedent. If the Supreme Court grants the investors leave to appeal, there will no doubt be many watching to see whether the central bankers' boon gets the final green light in Sweden.