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## Litigation - Sweden

### Supreme Court Clarifies Doctrine of Assertion in Investment Arbitration

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#### Facts

#### Decision

#### Comment

In a recent investment arbitration between Petrobart and the Kyrgyz Republic, arbitrators dismissed Petrobart's claims for lack of jurisdiction as they found that there had been no 'investment'. Under the Swedish Arbitration Act, such negative rulings on jurisdiction are made in an award and are subject to appeal in court (under Sections 27 and 36).<sup>(1)</sup> The Supreme Court recently set aside the arbitrators' ruling, finding that the tribunal should have applied the doctrine of assertion when determining jurisdiction.

#### Facts

Petrobart sought damages relying on the Law of the Kyrgyz Republic on Foreign Investments in the Kyrgyz Republic, which provides for substantive protection of investments. In the law, an 'investment dispute' is defined as any dispute between a 'foreign investor' and the Kyrgyz Republic concerning a 'foreign investment'.

The law provides that "an investment dispute between the Kyrgyz Republic and a foreign investor ... shall be settled through arbitration". It specifies that the Kyrgyz Republic shall consent to the transfer of the investment dispute for arbitration settlement by virtue of the law, and that a foreign investor's agreement may be given at the moment of application for arbitration, among other possibilities.

Stockholm was determined to be the place of arbitration. The Kyrgyz Republic objected to the jurisdiction of the arbitral tribunal, submitting that Petrobart was not a foreign investor and had not made an investment as defined in the law. The arbitrators found, among other things, that the parties were bound by the procedure for concluding an arbitration agreement as laid down in the investment law. They noted that neither party had argued that the agreement was invalid *per se*, so the crux of the matter was to determine the scope of application of the arbitration agreement.

As the arbitrators found that their jurisdiction was limited to 'investment disputes', they also required Petrobart to be a 'foreign investor' and the dispute to concern a 'foreign investment'. After an in-depth examination of the facts and evidence, they concluded that Petrobart had not made a foreign investment and so dismissed Petrobart's claims for lack of jurisdiction.

Petrobart submitted in its appeal that merely alleging that it had made an investment of the type defined in the investment law had established the tribunal's jurisdiction under the doctrine of assertion, as the allegation was not obviously unfounded. However, the Svea Court of Appeal found that the tribunal had handled the jurisdictional issue correctly, and that its finding that Petrobart had not made an investment was correct. Thus, the Svea Court of Appeal did not set aside the tribunal's jurisdictional finding.

#### Decision

The Supreme Court found that although it is an established principle of Swedish law that arbitrators shall apply the doctrine of assertion when determining their jurisdiction, there is some uncertainty concerning its content and scope.<sup>(2)</sup> The core of the doctrine was held to be that arbitrators, when ruling on their jurisdiction, shall not examine the existence of any facts which the claimant alleges establish a legal relationship that is covered by the arbitration agreement.

The court held that an evident point of departure for the doctrine is the existence of a binding arbitration

agreement, so that a party which has not concluded an agreement cannot be bound to arbitrate by way of operation of the doctrine. Likewise, it must be that the legal relationship on which the claimant relies to support the relief sought is covered by the arbitration agreement. Thus, a dispute concerning the scope of an arbitration agreement cannot be resolved by application of the doctrine of assertion.

The court found that the arbitrators should have applied the doctrine to the case at hand and should thus have determined their jurisdiction on the basis of the facts alleged by Petrobart. Therefore, the negative ruling on jurisdiction was set aside by the Supreme Court.

## Comment

Taking into account the provisions of Section 34 of the Swedish Arbitration Act on the setting aside of awards dealing with substantive issues in the absence of an arbitration agreement or falling outside the scope of an arbitration agreement, it is easy to understand and satisfactory that the Supreme Court restricted the application of the doctrine of assertion to cases where there is no dispute concerning the arbitration agreement or its scope. However, one might have expected a reasonable interpretation of the investment law's arbitration provisions to be that the existence of an 'investment' was decisive of the jurisdiction of the arbitral tribunal, despite the fact that the term 'investment' was also found in the substantive provisions of the investment law. Further, on the face of the award, the mutual expectation of the parties seems to be to that effect in the arbitration - though apparently this was not relied on in the subsequent court proceedings.

It is hard to understand why the restrictions on the application of the doctrine of assertion stated by the Supreme Court did not operate in this case. Is it not evident that the Kyrgyz Republic disputed at least the scope of the arbitration agreement in the arbitration? The application of the doctrine is understandable in cases where the claimant alleges that an investment law, treaty or main agreement which is wholly covered by an undisputed arbitration agreement entitles it to seek relief because of certain alleged facts. In such cases the examination of those facts and the assessment of their alleged relevance are related only to the merits of the case. However, where the scope of the arbitration agreement is restricted when correctly interpreted, so that an alleged fact is relevant to the question of jurisdiction, clearly the arbitrators have to examine that fact to determine whether they have jurisdiction. A separate issue is whether it may be necessary to examine additional details relating to an investment in order to deal with the substantive issues in the arbitration, for example when the details may be relevant to the exact value of an investment at the time of an expropriation and thus to the calculation of damages.

The reasons of the Supreme Court were not phrased in contract interpretation terms; the court stated merely that the arbitral tribunal should have applied the doctrine of assertion. However, the judgment should probably be understood as purporting to establish an *in dubio* (by default) rule to the effect that terms found in an arbitration clause which are also found in a governing investment law, treaty or main agreement should not be interpreted as prerequisites of the arbitral tribunal's jurisdiction unless the investment law, treaty or agreement states otherwise. The outcome in the Supreme Court seems to mean that, for jurisdictional purposes, an arbitration clause in an investment law or treaty including the term 'investment' by default has the same meaning as an arbitration clause not including the term, which is probably surprising to many practitioners in the field. An example of an arbitration clause not including the term which is wider, at least under its wording, is a clause providing that "disputes concerning the investment treaty" shall be settled by arbitration.

The question is whether the Supreme Court judgment reflects the reasonable expectations of Petrobart and the Kyrgyz Republic as to the true meaning of their arbitration agreement and the scope of the arbitrators' jurisdiction. Was not the Kyrgyz Republic's offer to arbitrate, under a reasonable interpretation of the arbitration provisions in the investment law, addressed to 'foreign investors' only; and did not that offer, when interpreted correctly, relate to disputes concerning 'investments' only? If so, did not Petrobart, when accepting that offer pursuant to the investment law by requesting arbitration, acquire a right to arbitrate disputes concerning 'investments' only?

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## Endnotes

(1) For further details on the Svea Court of Appeal's previous judgment, please see "[Court Rules on Doctrine of Assertion](#)". For further details on the application of the doctrine of assertion in courts, please see "[Court Rules on Jurisdiction under Article 5\(1\) of Brussels Convention](#)".

(2) Supreme Court judgment dated March 28 2008 in Case T 2113-06.

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