

JUDGMENT of the
SWEDISH SUPREME COURT

Case No.

given in Stockholm on 12 May 2008

Ö 2289-05

APPELLANT

SYSTHERM INFO Spolka z ograniczona odpowiedzialnoaci
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COUNTERPARTY

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MATTER

Dismissal of case

APPEALED JUDGMENT

Judgment of Svea Court of Appeal of 4 May 2005, in case Ö 9872-04

Judgment of the Court of Appeal

see Appendix

JUDGMENT OF THE SUPREME COURT

The Supreme Court affirms the judgment of the Court of Appeal.

SYSTHERM INFO Spolka z ograniczona odpowiedzialnoaci shall compensate KORDAB International AB for its litigation costs before the Supreme Court in the amount of SEK one hundred twenty thousand (120,000), out of which SEK 95,000 comprises costs for legal counsel, plus interest according to Section 6 of the Swedish Act on Interest from the date of the Supreme Court's decision until the day of payment.

MOTIONS BEFORE THE SUPREME COURT

SYSTHERM INFO Spolka z ograniczona odpowiedzialnoaeeci has requested that the Supreme Court, by amending the decision of the Court of Appeal, annul the District Court's decision on dismissal and remand the case to the District Court to there be further dealt with.

The company has further moved to be discharged from the obligation to compensate KORDAB International AB for its litigation costs before the District Court and moved that KORDAB International AB shall be ordered to compensate the company for its litigation costs before the District Court and the Court of Appeal.

KORDAB International AB has disputed any changes to the decision of the Court of Appeal.

The parties have claimed compensation for costs incurred during the proceedings before the Supreme Court.

GROUND

On 16 April 1997, Systherm and Kordab entered into an agreement on the development, marketing and sale of, among other things, computer software. The agreement contained an arbitration clause. On 5 May 2001, Systherm initiated arbitration proceedings against Kordab in accordance with the arbitration clause. In January of 2002, the arbitrators requested that the parties should make an advance payment on the fees to the arbitrators. Both parties paid the requested amount. On 12 June 2003, the arbitrators requested a further advance payment. Systherm paid, while Kordab refused to pay, the requested advance. The arbitral tribunal granted Systherm the option to pay Kordab's portion of the advance within a certain period, under pain of the matter being dismissed if not paid. After Systherm had notified the arbitral

tribunal of its intention to not pay Kordab's part of the advance, the arbitral tribunal dismissed the case on 17 December 2003 and ordered the parties to jointly pay the fees of the arbitrators.

In April of 2004, Systherm called for a summons against Kordab in the present case. As grounds for the case, Systherm claimed that Kordab had breached the arbitration clause by not paying the extra advance payment required by the arbitrators, and Kordab was, as a consequence, liable to compensate Systherm for the damage sustained thereby. Kordab claimed that the case should be dismissed since the claimed breach of contract should be settled by arbitration in accordance with the arbitration clause. Systherm objected to this, referencing item 3 of Section 5 of the Swedish Arbitration Act (SFS 1999:116), by claiming that Kordab had lost its right to object to the jurisdiction of general courts by failing to provide acceptable collateral for the arbitrators' fees on time.

The issue before the Supreme Court is firstly if the aforementioned Section of the Swedish Arbitration Act provides, as Systherm claims, a general loss of the right to invoke an arbitration clause as a procedural impediment, or if the provision, as Kordab claims, is applicable only to the dispute in which the party failed to provide requested collateral.

The provision that a party who fails to provide requested collateral loses the right to rely on an arbitration clause as a procedural impediment was introduced by the Swedish Arbitration Act. The wording of the provision and what was stated in the government bill (Government bill 1998/1999:35 p. 165 and 216) do not preclude that failure to provide requested collateral could be deemed to be a general preclusion of the right to rely on an arbitration clause as a procedural impediment. It should, however, be noted that the wording of the clause is the same as the two other cases of loss of right to rely on an arbitration clause as a procedural impediment that are provided in the same Section (objection to request for arbitration and failure to timely appoint arbitrators). These cases were regulated already in the previous Act on

Arbitrators (SFS 1929:145). From Section 3 of that act, it was clear that the loss of right to rely on an arbitration clause was not general but specific to the dispute which had been submitted for arbitration. Further, it is clear that the intention in this respect was not to change the situation but rather to maintain the previous regulatory situation (see aforementioned government bill p. 71 and p. 216). Furthermore, there is nothing to indicate that another situation was intended in circumstances when a party fails to provide requested security.

The case that Systherm now wants to bring against Kordab before a public court is not the same as the case brought by Systherm in the arbitration proceedings. Thus, Kordab has not because of item 3 of Section 5 of the Swedish Arbitration Act lost the right to rely on the arbitration clause as a procedural impediment.

Thus, the judgment of the Court of Appeal shall be affirmed.

The litigation costs claimed by Kordab before the Supreme Court must be deemed reasonable.

The judgment has been made by: Supreme Court Justices D.V.
(Reporting Justice), A.-C. L., E.N., K.C. and L.M.
Reporting clerk: A.N.