

DECISION of the
SWEDISH SUPREME COURT

rendered in Stockholm on 21 April 2016

Case No.
Ö 1429-15

APPELLANT

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MATTER

Dismissal of motion

APPEALED DECISION

Svea Court of Appeal, decision of 17 February 2015 in Case No. Ö 4508-14

The decision of the Court of Appeal

see Appendix

DECISION OF THE SUPREME COURT

By amending the decision of the Court of Appeal, the Supreme Court affirms the decision of the District Court.

By amending the decision of the Court of Appeal also with respect to litigation costs, the Supreme Court discharges Elf Neftegaz S.A. from the liability to compensate litigation costs before the Court of Appeal, and orders Interneft OOO, Region Saratov and Region Volgograd of the Russian Federation to compensate Elf Neftegaz S.A. for its litigation costs before the Court of Appeal in the amount of SEK 500,000, all comprising costs for legal counsel. The amount shall accrue interest pursuant to Section 6 of the Interest Act as from 17 February 2015 until the day of payment.

The Supreme Court orders Interneft OOO, Region Saratov and Region Volgograd to compensate Elf Neftegaz S.A. for its litigation costs before the

Supreme Court in the amount of SEK 413,000, all comprising costs for legal counsel. The amount shall accrue interest pursuant to Section 6 of the Interest Act as from the day of the Supreme Court's decision until the day of payment.

MOTIONS BEFORE THE SUPREME COURT

Elf Neftegaz S.A. has moved that the Supreme Court shall reject the motion for dismissal lodged by Interneft OOO, Region Saratov and Region Volgograd, and discharge the company from the obligation to compensate the litigation costs of the counterparties before the Court of Appeal and instead order the counterparties to compensate the company for its litigation costs before the Court of Appeal.

Interneft and the Regions have disputed any amendment to the decision of the Court of Appeal.

The parties have claimed compensation for their respective litigation costs before the Supreme Court.

GROUND

Background

1. In 1992, a cooperation agreement was entered between the French company Elf Neftegaz S.A. and the Russian company Interneft AOZT (the latter being the same company as the party to this proceeding, according to the parties before the Supreme Court). The cooperation agreement related to the intended prospecting and extraction of oil and gas in the Saratov and Volgograd Regions of the Russian Federation. The Regions also signed the cooperation agreement.

2. According to an arbitration clause set forth in the cooperation agreement, any disputes between the parties should be resolved by arbitration pursuant to the current applicable arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL). The clause provides that the seat of arbitration should be Stockholm and that the Arbitration Institute of the Stockholm Chamber of Commerce is to appoint the arbitral tribunal. With reference to this arbitration clause, Interneft and the Regions initiated arbitration proceedings against Elf in August of 2009. The proceedings remain open.
3. In May of 2011, Elf initiated court proceedings against Interneft and the Regions, and moved that the District Court should affirm (i) that Elf was not bound by any arbitration agreement with Interneft and the Regions and, if Elf was considered bound by such an agreement with any of the parties, (ii) that the arbitral tribunal lacked jurisdiction to resolve the dispute, or alternatively, that the arbitration clause of the cooperation agreement does not grant the arbitral tribunal in the arbitration proceedings jurisdiction to resolve the dispute.
4. Interneft and the Regions moved that the District Court should dismiss the motion for affirmation (ii).
5. In support of its motion (ii), Elf referenced the following grounds.
 - a) The relevant agreement and arbitration clause never entered into force.
 - b) In the event that an arbitration clause is deemed to have entered into force, Interneft and the Regions are not parties to the arbitration clause.

- c) The arbitration proceedings initiated by Interneft and the Regions constitute, having regard to the illegitimate purpose thereof, a measure which obviously violates fundamental principles of Swedish law.
 - d) The relevant arbitral tribunal was not properly formed and thus lacks jurisdiction.
 - e) There is a procedural impediment to the arbitration proceedings, because Interneft and the Regions did not comply with agreed obligations prior to requesting arbitration.
 - f) Interneft and the Regions did not send any request for arbitration to any authorized representative of Elf Neftegaz.
 - g) The request for arbitration does not comply with the mandatory and agreed upon requirements applicable to a request for arbitration and is consequently without effect.
6. The District Court rejected the motion for dismissal. The Court of Appeal amended the District Court's decision and dismissed the motion for affirmation (ii). According to the Court of Appeal, the review of the arbitral tribunal's jurisdiction can only relate to the issue of whether there exists a valid and applicable arbitration agreement.

The issues before the Supreme Court

7. Section 2 of the Swedish Arbitration Act (1999:116) provides that an arbitral tribunal's jurisdiction to resolve a dispute may, while the proceedings remain open, be reviewed by the arbitral tribunal itself as well as by public courts. The present case relates to the scope of the arbitral tribunal's and the public courts' review of the jurisdiction as well as the prerequisites for a motion for affirmation relating to the jurisdiction of an arbitral tribunal.

Review of the jurisdiction of the arbitral tribunal

8. Thus, Section 2 of the Swedish Arbitration Act provides that while arbitration proceedings remain open, both the arbitral tribunal as well as public courts may review the jurisdiction of the arbitral tribunal.

The Section is worded as follows.

The arbitrators may review their own jurisdiction to resolve the dispute. This does not prevent public courts from, upon the request of a party, reviewing the issue. The arbitrators may continue the arbitration proceedings while awaiting the decision of the court.

Even if the arbitrators in a decision during the arbitration proceedings have concluded that they have jurisdiction, this decision is not binding. With respect to opening proceedings against an arbitration award which contains a decision on jurisdiction the provisions of Sections 34 and 36 apply.

9. Section 34 of the Swedish Arbitration Act contains provisions on challenges of arbitration awards. It provides, amongst other things, that an arbitration award shall be annulled if it is not covered by a valid arbitration agreement between the parties.
10. Section 36 of the Swedish Arbitration Act provides that an arbitration award which entails that the arbitral tribunal has closed the proceedings without resolving the issues submitted for resolution may be wholly or partially amended upon the request of a party. Such a case shall be heard by the Court of Appeal within the territory of which the arbitration proceedings took place (the first paragraph of Section 43).
11. In general, the provisions on review of the jurisdiction are relevant only upon the motion of a party. However, in some cases the arbitral tribunal is obliged to review its jurisdiction upon its own initiative. This relates mainly to such jurisdictional deficiencies that may lead to an arbitration award not being valid (see Section 33 of the Swedish Arbitration Act).

12. If the arbitral tribunal in its review concludes that it has jurisdiction to resolve the relevant dispute, a decision thereon is given during the course of the arbitration proceedings. However, if the arbitral tribunal concludes that it lacks jurisdiction, wholly or partially, the arbitration proceedings shall be wholly or partially closed through an arbitration award. As noted above, such an arbitration award can be challenged under Section 36 of the Swedish Arbitration Act.

The scope of the arbitral tribunal's review of jurisdiction

13. That, which the arbitral tribunal shall review is, according to Section 2 of the Swedish Arbitration Act, "its own jurisdiction to resolve the dispute". An application of the provision according to its wording implies that the review covers all aspects of the arbitral tribunal's jurisdiction.
14. The preparatory works of the provision does not go into any details as regards the scope of the review of the jurisdiction. It mentions that the arbitral tribunal may review an objection that the arbitration agreement is invalid, or that it is not applicable to the dispute, or that the dispute is not eligible for arbitration (Government Bill 1998/99:35 p. 76 and p. 213 f.). It is clear that these are examples of issues that fall within the scope of the jurisdiction review, and not an exhaustive enumeration. Thus, the preparatory works do not provide any actual guidance with respect to the more detailed scope of the jurisdiction review.
15. Considering the aforementioned, and considering that it does not appear rational to have the jurisdiction review limited to only certain issues, the provision in Section 2 of the Swedish Arbitration Act should be interpreted to mean that the scope of the jurisdiction review covers all issues relating to the jurisdiction of the arbitral tribunal.

16. This means that issues concerning the jurisdiction of the arbitral tribunal – such as whether the parties are bound by an arbitration agreement, whether the dispute is eligible for arbitration and the existence of procedural impediments – fall within the scope of the jurisdictional review. Further, issues concerning the quorum of the arbitral tribunal fall within the scope. Such issues include, for example, whether the arbitration proceedings were initiated correctly, whether the correct number of arbitrators were appointed, or whether arbitrators with the right qualifications were appointed.

Court review of the arbitral tribunal's jurisdiction

17. As noted above, the first paragraph of Section 2 of the Swedish Arbitration Act provides that the arbitral tribunal's right to review its own jurisdiction does not prevent public courts from reviewing the issue upon a party's request.
18. The most obvious interpretation of this provision is that the jurisdictional issues that can be considered by the court are the same as those that can be considered by the arbitral tribunal. Thus, the wording of the provision would imply that the scope of the arbitral tribunal's and the court's jurisdictional review is intended to be identical.
19. In arbitration proceedings in general, it is of substantial value that the fundamental issue of the arbitral tribunal's jurisdiction to resolve the dispute is settled early in the proceedings. This is true regardless of which jurisdictional issue that is the subject of disagreement. There are obvious procedural-economic advantages of ensuring that all jurisdictional issues can be settled through one court review, instead of having uncertainty remain throughout the proceedings and which could potentially result in a challenge of the arbitration award.

20. In addition, it should be noted that in cases where the arbitral tribunal has concluded that it does not have jurisdiction and thus closed the arbitration proceedings by way of an arbitration award, a party may submit the validity of the arbitral tribunal's conclusion for court review under Section 36 of the Swedish Arbitration Act. It appears as an unwarranted discrepancy that some issues of jurisdiction could be reviewed within the scope of such proceedings but not within the scope of proceedings under Section 2.
21. Considering the above, the provision in Section 2 of the Swedish Arbitration Act should be interpreted so that the scope of the court's jurisdictional review is commensurate with that of the arbitral tribunal.

Prerequisites for court review

22. A party wishing to have the arbitral tribunal's jurisdiction reviewed under Section 2 of the Swedish Arbitration Act may bring a motion for affirmation under Section 2 of Chapter 13 of the Swedish Code of Judicial Procedure. Then, the prerequisites of that provision must be met. This requires that uncertainty surrounds a certain legal relationship and that this uncertainty is detrimental to the claimant. Further, the wording implies that the court has discretion to decide whether it is appropriate to review the matter.
23. The review of jurisdiction takes aim at determining whether the prerequisites have been met for the parties to be bound by an arbitration agreement concerning a specific issue. The outcome of such a review is that it is finally determined whether the parties are bound to have the dispute resolved by arbitration. Thus, this involves determining the existence of a legal relationship in the sense set forth

in Section 2 of Chapter 13 of the Swedish Code of Judicial Procedure.
(Cf. NJA 2010 p. 508 item 9.)

The review in the present case

24. In accordance with the above, the District Court has jurisdiction to review the matters covered by Elf's motion for affirmation (ii). The motion meets the requirements set forth in Section 2 of Chapter 13 of the Swedish Code of Judicial Procedure.
25. Therefore, the Court of Appeal's decision shall be amended and the District Court's decision shall be affirmed.
26. Upon this outcome, Interneft and the Regions shall be ordered to compensate Elf for its litigation costs before the Court of Appeal and the Supreme Court. The claimed amounts are reasonable.

[ILLEGIBLE SIGNATURES]

The decision has been made by: Supreme Court Justices SL, ACL, GL, AE
(Reporting Justice) and SA.

Reporting clerk: ES