SVEA COURT OF APPEAL	**JUDGMENT**	Case No.
Department 02	31 October 2017	T 6247-15
Division 020109	Stockholm	

CLAIMANT
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Belarus

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RESPONDENT
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MATTER
Challenge of arbitral award rendered in Stockholm on 3 April 2015, and correction of arbitral award rendered on 30 May 2015 in case no. 2013/043

JUDGMENT OF THE COURT OF APPEAL

1. The Court of Appeal annuls item (i) – to the extent it covers the amount of USD 2,563,669 – of the operative part of the arbitral award rendered on 3 April 2015.
2. Joint Stock Company Belgorkhimprom is ordered to compensate Koca Insaat Sanayi Ihracat Anonim Sirketi for its litigation costs in the amount of EUR 51,925, of which EUR 48,625 comprises costs for legal counsel, plus interest on the former amount pursuant to Section 6 of the Interest Act as from the date of the Court of Appeal's judgment until the date of payment.

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BACKGROUND

On 17 January 2011, Joint Stock Company Belgorkhimprom (Belgor) and Koca Insaat Sanayi Ihracat Anonim Sirketi (Koca) entered an agreement for the completion of certain construction and ground works for two mineshafts ("Construction Contract No. 17/01/2011", hereinafter the Construction Agreement). Koca was to complete the works for Belgor, who was responsible for the project in its capacity as main contractor. A third party, Trust Shakhtospectroy, was responsible for technical support and surveillance.

The Construction Agreement's Section 1, Article 12.1, contains an arbitration clause which, has the following wording.

> "[…] Any disputes, disagreements and claims between the Employer and the Contractor emerged because of or in connection with the present Contract or upon violation, termination or invalidity of the present Contract should be finally settled by arbitration in accordance with the Arbitration Court of the Arbitration institute of the Stockholm Chamber of Commerce. […]"

Koca has also carried out certain further works, including sealing a certain road surfaces and construction of installations in connection with the visit by the President of Turkmenistan.

Belgor terminated the Construction Agreement with effect as of 29 November 2012. Thereafter, the parties entered into negotiations on how payment would be reached, and to agree on what obligations that remained. The parties failed to reach an agreement and on 26 February 2013, Koca commenced arbitration at the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). On 3 April 2015, the arbitral tribunal rendered its award. A correction award was rendered on 30 May 2015. The arbitral award partially granted Koca's action against Belgor. The counterclaim submitted by Belgor was rejected in its entirety. The arbitral award further held that each party should bear its own litigation costs.

MOTIONS BEFORE THE COURT OF APPEAL

Belgor has moved that the Court of Appeal should annul the arbitral award in its entirety or alternatively for the amounts that are listed under Belgor's respective grounds below.

Koca has disputed all Belgor's motions. However, Koca has attested the accuracy of the amounts of Belgor's alternative motions.

The parties have claimed compensation for their litigation costs.

GROUNDS

Belgor

The arbitral tribunal has decided issues which were not covered by a valid arbitration agreement between the parties

The arbitral tribunal decided on Koca's claim for compensation for works which were carried out under separate service agreements, and which were not covered by the arbitration clause of the Construction Agreement. Thus, the arbitral award is not covered by a valid arbitration agreement and should be annulled pursuant to item 1 of the first paragraph of Section 34 of the Swedish Arbitration Act. Alternatively, the arbitral tribunal exceeded its mandate and the arbitral award should be annulled pursuant to item 2 of the first paragraph of Section 34 of the Swedish Arbitration Act. The arbitral award should be annulled in its entirety because the various compensation items were not separated in the operative part of the award. As a first alternative, the arbitral award should be annulled to the extent it awards compensation for additional works (USD 619,610) plus interest (USD 281,265).

The arbitral tribunal failed to review disputed circumstances

The parties did not agree on how the interest should be calculated. Belgor maintained that Koca's interest calculation was incorrect, because the interest should have accrued from the invoice date, and not from the date when Belgor received the invoice. The arbitral tribunal assumed that the parties agreed that the interest should accrue as from the invoice date and failed to review Belgor's objection. By failing to review Belgor's objection and incorrectly assuming that the parties agreed on the interest calculations, the arbitral tribunal failed to review the dispute in accordance with the parties' instructions. Thereby the arbitral tribunal exceeded its mandate pursuant to item 2 of the first paragraph of Section 34 of the Swedish Arbitration Act. In any event, the arbitral tribunal's failure to review Belgor's objection constituted a material procedural error pursuant to item 6 of the first paragraph of Section 34 of the Swedish Arbitration Act. The procedural error was committed without having been caused by Belgor and likely affected the outcome of the arbitration. The arbitral award should be annulled because of the arbitral tribunal's excess of mandate and/or material procedural

error. Therefore, the arbitral award should be annulled in its entirety as the various compensation items were not separated in the operative part of the award. Alternatively, the arbitral award should be partially annulled to the extent it deals with interest (USD 1,662,794).

The arbitral tribunal ordered Belgor to pay compensation for machinery and equipment without support from the evidence

In the arbitration, Koca asserted that the company had paid for machinery and equipment which was later transferred to Belgor. In the arbitral award, Belgor was ordered to pay USD 3,980,616.52 for the machinery and equipment, despite the fact that such compensation was not stipulated in the Construction Agreement or elsewhere. By granting the claim in this respect, despite that during the arbitration Koca did not invoke any evidence concerning the value or the ownership rights to the machinery and equipment, the arbitral tribunal committed a procedural error pursuant to item 6 of the first paragraph of Section 34 of the Swedish Arbitration Act. The procedural error was committed without having been caused by Belgor and it affected the outcome of the arbitration, because Koca could not have been awarded compensation, had the tribunal's analysis been correct. The arbitral award should be annulled due to the arbitral tribunal's procedural error. The arbitral award should be annulled in its entirety as the various compensation items have not been separated in the operative part of the award. Alternatively, the arbitral award should be annulled to the extent it relates to compensation for machinery and equipment (USD 3,980,616.52).

The arbitral tribunal rejected requests for extension and for the appointment of a non-partisan expert

The arbitral tribunal rejected Belgor's requests for time extensions, which were made to provide Belgor with sufficient time to reference technical expert witnesses, and the tribunal also rejected the request for the tribunal to appoint a non-partisan expert. Thereby, Belgor was deprived of the opportunity to establish that Koca's work was defective in respect of the construction of the walls of the mineshafts. The arbitral tribunal did not give Belgor the opportunity to argue its case, which constitutes a procedural error pursuant to item 6 of the first paragraph of Section 34 of the Swedish Arbitration Act. The procedural error occurred without having been caused by Belgor and did affect the outcome of the arbitration. Therefore, the arbitral award should be annulled. The arbitral award should be annulled in its

entirety, because the various compensation items were not separated in the operative part of the award. Alternatively, the arbitral award should be annulled to the extent it covers compensation for work carried out (USD 3,801,848), the interest for overdue payment (USD 1,381,530), withheld payments (USD 1,054,288), works carried out following delivery of Mineshaft 1 (USD 469,634) and in respect of the arbitral tribunal's rejection of Belgor's counterclaim.

Allocation of arbitration costs

The grounds of the arbitral award provide that the allocation of the arbitration costs in items (ii) and (iii) of the operative part of the award, was based on a review of all circumstances having regard to the outcome in respect of the merits. Therefore, the abovementioned items should be annulled even if the arbitral award is only partially annulled.

Koca

The arbitral award is covered by a valid arbitration agreement between the parties

The parties agreed that additional works would be covered by the arbitration clause of the Construction Agreement. In any event, such an agreement was entered into due to Belgor's passivity and implied actions. If the Court of Appeal concludes that valid service agreements were in place for the additional works, Koca maintains that the wording of the clause of the service agreements that allows for the possibility of instituting proceedings before public courts does not exclude the parties' arbitration clause set forth in the Construction Agreement, which covers all disputes arising out of the Construction Agreement.

The intention was to draft written agreements for additional works, but this never happened.

The arbitral tribunal did not fail to review any objections concerning interest

The arbitral tribunal undertook a review of the merits of the issue of interest and concluded that interest should be calculated as from the due date. The arbitral tribunal did not thereby commit a procedural error. Even if the arbitral tribunal did commit a procedural error, the error had no effect on the outcome of the arbitration. Moreover, the arbitral tribunal did not exceed its mandate. In the event that an error did occur, then Belgor caused it to occur.

The arbitral tribunal correctly concluded that Koca was entitled to compensation for machinery and equipment

During the arbitration, Koca presented evidence in support of Koca being entitled to compensation for machinery and equipment. The arbitral tribunal reviewed the merits of all invoked circumstances concerning the right to compensation for machinery and equipment and correctly concluded that Koca was entitled to such compensation.

No procedural error occurred which likely affected the outcome of the arbitration.

The arbitral tribunal did not commit any procedural error by rejecting Belgor's requests for an extension and appointment of a non-partisan expert

No procedural error subject to challenge occurred during the arbitration. If the Court of Appeal concludes otherwise, then Belgor caused the error through the manner in which it argued its case.

The allocation of arbitration costs

The order set forth in item (ii) of the operative part of the award is not connected to the outcome of the arbitration and is therefore not affected by whether the arbitral award is annulled wholly or partially.

The arbitral tribunal based its order set forth in item (iii) of the operative part of the award on the fact that both parties had been both successful, as well as unsuccessful. A partial annulment would not affect the cost allocation made by the arbitral tribunal. Only a full annulment of the arbitral award would affect the allocation.

THE PARTIES' FURTHER DETAILS

Belgor

The arbitral tribunal decided issues not covered by an arbitration agreement

Belgor and Koca entered a number of agreements in parallel to the Construction Agreement labeled service agreements. The service agreements were not addenda to the Construction Agreement, but covered other legal relationships than the Construction Agreement.

The arbitral tribunal's jurisdiction was limited to disputes arising out of the Construction Agreement. It is evident from the arbitral award that some of Koca's claims were not based on the Construction Agreement, but rather on five of the service agreements. One of the service agreements concerned works on the plant leading up to a visit by the President of Turkmenistan. The service agreements were made in writing and were exchanged between the parties, but were never signed. In the arbitration, it was undisputed between the parties that the service agreements existed. In the arbitration Koca claimed compensation for work carried out under the service agreements. Not all service agreements can be found, including the now relevant service agreements. However, all service agreements had identical wording, with the exception for the provisions concerning the relevant task and price.

During the negotiations of the Construction Agreement, the issue of dispute resolution was discussed. The parties reached a compromise which meant that disputes would be resolved by arbitration in Stockholm. This did not, however, apply to work carried out under the service agreements. The service agreements contained a provision that disputes should be resolved in Minsk, Belarus, either before public courts or by arbitration. Thus, only the Construction Agreement contained a clause on arbitration in Stockholm. After Belgor had terminated the agreement, the parties negotiated, but failed to reach a settlement. Moreover, the parties did not agree to adjust the dispute resolution clause in any respect.

The arbitral tribunal has failed to review the disputed circumstances

In the arbitration, the parties did not agree on the day interest should commence to accrue. In the arbitration, Belgor maintained that the interest should commence to accrue from the date Belgor took receipt of the invoice. Koca, on the other hand, maintained that interest should commence to accrue from the date the invoice was issued. Belgor stated its position concerning interest in writing during the exchange of submissions as well as orally during the main hearing.

Belgor's position is correctly noted in the recitals to the arbitral award. In the actual grounds of the arbitral award, however, it is incorrectly stated that the parties agree on the issue of interest. Therefore, the arbitral tribunal failed to review Belgor's objection. The error affected the outcome because it caused interest to be calculated incorrectly. This is so because Belgor received at least one invoice on a later date than the issue date. Belgor did not cause the error.

The arbitral tribunal ordered Belgor to pay compensation for machinery and equipment without support from the evidence

Koca did not invoke any evidence in support of its claim for compensation for machinery and equipment, and, moreover, had no right to such compensation under the Construction Agreement. The arbitral tribunal nevertheless awarded Koca compensation despite the lack of evidence, which is clear from the dissenting opinion.

The arbitral tribunal rejected requests for extension and appointment of a non-partisan expert

Koca was awarded compensation for works carried out in the mineshafts. One of Belgor's grounds for objection in the arbitration was that Koca's work was defective and that Koca was not entitled to compensation claimed in this respect. Koca's work was defective and the mineshafts could not be used. Defectiveness of the work was also referenced among the grounds for Belgor's claim for damages in its counterclaim.

Technical evidence was required to establish that Koca's work was defective. In order to produce such evidence, Belgor requested time extensions, but the requests were rejected.

In October 2013, Belgor requested a time extension to investigate the mineshafts and stated that an expert report could be submitted in June of 2014. However, it was impossible to investigate the mineshafts as planned because Koca's defective work had caused the mineshafts to be flooded completely. Therefore, Belgor requested a further extension in July 2014. Belgor later repeated its request in September 2014, but it was again rejected by the arbitral tribunal. In January 2015, Belgor also requested a non-partisan expert to be appointed. The arbitral tribunal rejected this request as well.

Belgor clarified why the company required more time. In order for the shafts to be investigated, they first had to be emptied of water. This required that the ground surrounding the shafts was first frozen, which would take no less than 18 months to complete.

The arbitral tribunal's rejection incorrectly states that the expert witness would be relevant only for the counterclaim. The defectiveness of works was the main issue disputed in the arbitration. It was these defects that caused Belgor to terminate the agreement. Hereby, the arbitral tribunal deprived Belgor of the opportunity to argue its case; both the opportunity to defend the main case and also to argue the counterclaim. Thus, the arbitral tribunal's error affected the outcome.

Koca

Koca won the procurement and thereafter commenced its works. Later, Belgor decided that a different technique had to be used to make the shafts, which was the reason behind Belgor's termination.

Belgor terminated the agreement unilaterally without providing any grounds for termination. In accordance with the provisions of the Construction Agreement, a "working committee" was formed to approve the completed works and to determine the parties' respective obligations. In the minutes of the committee's meeting of 28 January 2013, the contents of which the parties agreed on, the compensation Belgor was to pay to Koca was determined, amongst other things. The amounts set out in the minutes are the same amounts as awarded by the arbitral tribunal.

The arbitral award is covered by a valid arbitration agreement between the parties

On 28 November 2012, Belgor sent a draft of the final agreement between the parties as a result of termination of the Construction Agreement. The draft included an arbitration clause, which would cover all issues in the committee's final decision. On 5 December 2012, Koca sent a revised draft to Belgor. Koca appended a list of additional works, i.e. the five dealt with in the arbitral award, to the revised draft. Koca proposed that the additional works should be settled within the scope of the parties' respective obligations.

The committee met also on 18-19 December 2012. Minutes from the meeting were drafted, but never signed. Belgor has not, however, ever disputed the accuracy of the minutes. Belgor has also confirmed that this concerns works additional to the Construction Agreement.

It was the intention of the parties to produce written agreements for the now relevant additional works, but this never happened. The additional works are set forth in the minutes of the committee's meeting of 28 January 2013. The parties also agreed that these works were covered by the Construction Agreement, and thus the arbitration agreement.

The arbitral tribunal did not fail to review the objection concerning interest

In the arbitration, Koca claimed interest in accordance with the provisions of the Construction Agreement. According to the Construction Agreement, Belgor was not obliged to pay until the invoice had been approved.

In the arbitration, Koca invoked an expert report from Deloitte, and Belgor invoked an expert report from KPMG. KPMG had access to Belgor's books and the Construction Agreement. Deloitte's and KPMG's reports contain the same calculation method for interest. Both reports take into account, amongst other things, the stipulation that the obligation to pay arises only once the invoice is approved.

The arbitral tribunal's statement to the effect that the parties agreed was based on the evidence the parties themselves had submitted in the arbitration. The arbitral tribunal committed no error. If the arbitral tribunal did commit an error, it had no effect on the outcome of the arbitration. In the arbitration, Belgor asserted in respect of one invoice that it was received on 8 November 2012. However, Belgor could not have received it on 8 November 2012, because KPMG's report states that the interest on this invoice commenced to accrue on 7 November 2012. If any error occurred, then Belgor caused it.

The arbitral tribunal correctly concluded that Koca was entitled to compensation for machinery and equipment

Koca's case in these respects was based on the fact that the parties had agreed that Belgor would take over the machinery and equipment and that Belgor would pay the agreed compensation. In the arbitration, Koca invoked, among other things, minutes of the committee meetings as evidence, which is also set out in the arbitral award. The arbitral tribunal made a review based on Koca's invoked evidence and also reviewed Belgor's objection to the claim. Thus, the arbitral tribunal reviewed the merits of the issue and did not commit any procedural error which could be subject to challenge.

The arbitral tribunal did not commit a procedural error by rejecting Belgor's requests for extension and appointment of a non-partisan expert

In the arbitration, Koca maintained that Belgor could no longer invoke any defects against Koca, because Belgor had unilaterally terminated the Construction Agreement.

Only in connection with Koca requesting arbitration did Belgor claim that the work had been defective and then requested, prior to submitting a Statement of Defense, an extension for providing its statement of evidence. Hereafter, Belgor repeated its request three times. As grounds, Belgor

always referenced that the mineshafts were flooded and that the freezing process was not completed. However, Belgor gave no specific reason as to why a further extension was required.

Initially, Belgor was granted an extension until 1 December 2013. Thereafter, the arbitral tribunal rejected Belgor's request for a further extension until 29 July 2014, but at the same time it gave Belgor the opportunity to submit an expert report before 11 August 2014. However, Belgor never submitted any such expert report and gave no reason why. The arbitral tribunal's decision was entirely compliant with the rules applicable to the arbitration and to which the parties had agreed.

THE INVESTIGATION BEFORE THE COURT OF APPEAL

The case has been decided after a main hearing. At the main hearing, the parties invoked documentary as well as oral evidence. On Belgor's request, testimonies of legal director Mr. VS, attorney Ms. ON, and geotechnical engineer Mr. RW were heard. On Koca's request, testimonies of CEO Mr. CK and attorney Ms. SE were heard.

GROUNDS OF THE COURT OF APPEAL

The Court of Appeal's review of the grounds for challenge

Is the arbitral award covered by a valid arbitration agreement between the parties?

In this context, Belgor maintained that the arbitral tribunal decided on the claim for compensation for additional works, which were not covered by the arbitration clause of the Construction Agreement. If the challenging party asserts that no valid arbitration agreement covers the alleged legal relationship, it is for the respondent – Koca in the case at issue – to establish that such an agreement exists.

In the case at issue, the arbitration is governed by Swedish law and procedural issues should thus be settled according to Swedish law. According to Section 2 of the Swedish Arbitration Act, the arbitral tribunal is entitled to determine its own jurisdiction. In this determination, it is established case-law that the claims doctrine should be applied. However, the claims doctrine assumes the existence of a binding arbitration agreement. Thus, under the said doctrine, a party who has not entered into an arbitration agreement cannot be bound to arbitrate. If the existence of the arbitration agreement is in dispute, the arbitral tribunal should decide that issue as a question of jurisdiction. Correspondingly, the legal relationship that the claimant in the arbitration proceedings invokes among the grounds for a claim should be covered by the arbitration agreement. If the parties do not agree as to whether an issue is covered by the arbitration agreement, this question must be settled through dispute resolution. If the parties in the arbitration cannot agree on the scope of the arbitration agreement, that dispute cannot be settled by application of the claims doctrine. Instead, the scope must be decided as a question of jurisdiction (see, e.g., NJA 2008 p. 406).

The arbitration clause in a contract generally covers only the legal relationship governed by the contract, even if it is connected to other legal relationships. It is considered that not only the legal facts that constitute the basis of the legal relationship form part of that legal relationship, but also

subsequent legal facts altering or somehow affecting the said relationship form part thereof. This includes explicit or implied adjustments of a contractual relationship, actions in breach of a contractual obligation or failures to notify of known breaches. The determining factor as to whether an arbitration clause covers a specific action is whether the action is based on the contractual legal relationship covered by the arbitration clause (see NJA 2017 p. 266).

As regards the possibility of extending an arbitration clause to cover also other legal relationships than those intended by the arbitration clause, the Supreme Court stated in its 2017 decision as follows.

> "However, one must distinguish an instance where the invoked circumstances relate to a legal relationship covered by the arbitration clause and instances where the circumstances relate to the other legal relationship, not covered by the arbitration clause. In the former instance, the clause is applicable. As the Supreme Court stated in "Tupperware" NJA 2010 p. 734, as regards the latter instance, *the existence of a connection cannot s lead to the expansion of the clause to cover the second legal relationship in cases other than specific ones and under extraordinary circumstances* [italics here]."

The Court of Appeal concludes as follows.

Koca maintained before the Court of Appeal that the parties had agreed that the now relevant additional works should be covered by the arbitration clause of the Construction Agreement, or at least, that such an agreement came into existence because of Belgor's passivity and implied actions. Belgor disputed both these assertions.

The arbitral award provides that Koca maintained that Belgor was liable for five specific additional works set out in the arbitral award, which Belgor had ordered and Koca completed. According to Koca, these works had been carried out "within the scope of the original Contract and are confirmed by their inclusion in the acts of Delivery of the Shafts, signed on 6 December 2012, Clause 7 and 10 of the Protocol of Acceptance of Delivery of the Shafts, dated 10 December 2012, and the minutes of the working committee meetings of 18-19 December 2012 and 28 January 2013" (paragraph 40).

For its part, Belgor asserted, among other things, the following in the arbitration "[…] Additional works performed by Claimant were under five separate service contracts, unrelated to the Contract, and these service contracts do not contain arbitration clauses or any agreement to extend any other

arbitration clause to cover these contracts. Thus, any disputes related to them should be resolved in the Economic Courts of Minsk as provided for in these agreements" (paragraph 42).

Deciding on its jurisdiction, the arbitral tribunal concluded that additional works "[…] cannot be said to arise out of the Contract". However, having turned to what the arbitration agreement says on "in connection with", the arbitral tribunal concluded in its continued reasons that "In the view of the Arbitral Tribunal, the Additional Works were performed *in connection with* the Contract […]". Therefore, the arbitral tribunal's conclusion was that "[…] the claims concerning Additional Works are covered by the arbitration clause in the contract" (paragraphs 81-83). As can be gathered from the arbitral award, the arbitral tribunal thereafter concluded that "It is undisputed that the Additional Works were performed on the basis of five separate contracts which did not have arbitration clauses, but which stipulated that the Parties had the right to refer disputes to the Economic court in Minsk". Finally, the arbitral tribunal reviewed the issue of whether the reference to the Minsk court replaced the arbitration clause in the agreement and concluded based on, among other things, arguments concerning the parties' intentions that this was not the case (paragraphs 84-86).

In support of the agreement of the parties that additional works are covered by the arbitration clause in the Construction Agreement, Koca has mainly invoked the minutes of the committee meetings and the documents drafted in connection with those deliberations – Koca invoked those documents also in the arbitration. The invoked documentation does not provide any substantial support for Koca's assertion. Moreover, oral evidence also does not provide that support, alone or together with the documentary evidence. Mr. CK has stated that he participated in the first and second committee meetings. In respect of these, he has merely provided general information and has not provided any details as to whether the parties agreed that the arbitration clause would apply also to additional works. Ms. SE, who also participated in the said meetings, has indeed stated that the parties did not discuss any alternative dispute resolution to the arbitration clause. However, she did not state that the parties agreed that additional works would be covered by the arbitration clause of the Construction Agreement. Thus, Koca has not succeeded in establishing that the parties explicitly agreed that the arbitration clause would cover also the additional works. Moreover, Koca has not shown that such an agreement has been reached by way of Belgor's passivity or implied actions.

Therefore, the Court of Appeal will proceed to review whether the arbitration clause could be applicable on other grounds. First, the Court of Appeal will review the circumstances invoked by Koca in support of the assertion that additional works relate to the legal relationship covered by the

arbitration clause of the Construction Agreement or – if this is not the case – that the circumstances have a connection to the Construction Agreement of such a nature that the arbitration clause nevertheless becomes applicable.

The Court of Appeal first notes that Koca has not presented any detailed account of what the relevant additional works involved or how they were related to the Construction Agreement. Thus, the Court of Appeal is not in a position to make a more general assessment of the connection between the Construction Agreement and the additional works. Based on the available information, it can be concluded that the parties' roles are somewhat different in the Construction Agreement as compared to the additional works. This is so, because in addition to the parties to the present case there is a third party involved in the Construction Agreement. Further, additional works are based on several different order placements, of which at least one does not have an apparent connection to the Construction Agreement (the order for works because of the visit by the President of Turkmenistan). In addition, all orders were placed after Belgor had terminated the Construction Agreement (paragraph 82). The aforementioned circumstances imply that additional works are covered by later, autonomous legal relationships and not by the Construction Agreement. In view of the foregoing and in the absence of any evidence indicating the opposite, Koca cannot, against Belgor's objections, be deemed to have shown that additional works fall under the legal relationship which is governed by the arbitration clause of the Construction Agreement.

Based on Swedish case-law – at least nowadays – it is only in exceptional cases possible to extend the scope of an arbitration clause based on a connection with the legal relationship covered by the arbitration clause, and the Court of Appeal therefore concludes that it is impossible to extend the scope of the arbitration clause of the Construction Agreement to cover the relevant additional works.

The conclusions of the Court of Appeal entail that the arbitral tribunal, in respect of the compensation for the relevant additional works, decided an issue, which was not covered by a valid arbitration agreement between the parties. The Court of Appeal will revert to the issue of annulment below.

Excess of mandate and procedural error

General starting points

It is the arbitration agreement, any agreements between the parties on the proceedings and the manner in which the parties argue their respective cases that frame the arbitral tribunal's mandate. As regards the prerequisites for concluding that an error should be deemed an excess of mandate or a procedural error, the Supreme Court has stated the following in NJA 2009 p. 128.

> "The provision in item 2 of the first paragraph of Section 34 of the Swedish Arbitration Act on excesses of mandate is aimed at framing the arbitral tribunal's review of the merits of the dispute submitted for arbitration. Examples of excesses of mandate are when the arbitral tribunal goes beyond the claims of the parties and when it bases its decision on a legal fact, which has not been invoked by the parties (Government Bill 1998/99:35 p. 145; cf., among others, Lindskog, Skiljeförfarande En kommentar, 2005, p. 960 f.) […]
>
> The situation is different in respect of instructions that are aimed at how the arbitration should be carried out within the frame set up by the arbitration agreement, the claims, the invoked circumstances and the referenced evidence. If the arbitral tribunal does not comply with such instructions, this would generally constitute a procedural error under item 6 of the first paragraph of Section 34 of the Swedish Arbitration Act (see, e.g., Heuman, *op. cit.*, p. 652 f., and Lindskog, *op. cit*., 965 f.) […]"

Did the arbitral tribunal fail to review the disputed circumstances?

In this respect, Belgor has maintained that the arbitral tribunal incorrectly assumed that the parties agreed that interest should commence to accrue on the invoice date. Therefore, the arbitral tribunal failed to review Belgor's objection that interest should commence to accrue as from when Belgor took receipt of the invoice. Koca has, for its part, maintained that the arbitral tribunal reviewed the merits when determining interest.

The arbitral award states that Koca based its claim for interest on Section 1, Articles 3.19, 3.21 and 12.3 of the Construction Agreement and that the due date, and thus interest, should be the date when the invoice was provided to Belgor (the "Submission Date"). Nothing has been stated to indicate that Belgor had different legal starting points for its calculation of interest (paragraphs 45-48).

However, the expert reports invoked by both parties clarify that both Deloitte and KPMG had determined the "Due Date" based on the "Invoice Date", instead of the *Submission Date*.[1] Ms. SE has stated that the invoices were submitted to Belgor on the same date they were issued, and that there consequently was no difference between the *Invoice Date* and the *Submission Date*.

However, the arbitral award states that Belgor objected to the interest calculation made by Koca's expert (Deloitte) in its report because the interest calculation was based on the *Invoice Date* instead of the *Submission Date* (paragraph 48). The investigation has established that Belgor made this objection, *inter alia*, in connection with the submission of its own expert report (KPMG) to the arbitral tribunal, and also at the oral hearing. The invoked transcripts from the hearing provides as follows.

> "[…] So we think that in order to calculate interest K should prove the date of submission of the invoice. And we provided the Tribunal with *one exhibit evidencing that at least once this calculation was wrong* [italics here]."

In respect of the issue of whether there was any difference between the Invoice Date and the Submission Date, Belgor has invoked, as far as has been gathered, the same analysis before the Court of Appeal as before the arbitral tribunal. The invoked analysis puts emphasis on invoice CWP No:16, dated 2 November 2012, which according to a stamp on the invoice indicates that it was received (Submission Date), approved (Approval Date), or both by Belgor on 8 November 2012. Thereby the Due Date would be no earlier than 23 November 2012,[2] which is one day later than the basis for interest calculations taken by Deloitte and KPMG.

Despite the above, the arbitral tribunal has in its arbitral award obviously taken into account and based its decision on an incorrect assumption, namely that the parties agreed that interest calculation should be made based on the *Invoice Date* (paragraph 102). Thus, the arbitral tribunal has not taken Belgor's aforementioned objection into account.

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[1] Based on the Invoice Date, the due date has been determined, first by adding three business days as per Article 3.21 (Approval Date) and thereafter by adding another fifteen calendar days as per Article 3.19 (Due Date).

[2] Determined based on Approval Date + 15 calendar days. Alternatively, the calculation should be based on Submission Date + 3 business days + 15 calendar days, which means an even later due date.

The arbitral tribunal's incorrect assumption appears to be based on the agreement between the calculations of interest by Deloitte and KPMG, as far as is now relevant. Even if it could be argued that Belgor, by submitting and invoking KPMG's report without reservations, contributed to the arbitral tribunal's incorrect assumption, the analysis reveals that Belgor's position was made clear both when submitting the expert report and during the hearing. As noted above, the arbitral tribunal has in fact correctly stated Belgor's position in the recitals. The contradiction which obviously existed between the circumstances Belgor invoked in the arbitration and the circumstances upon which KPMG based its interest calculations, is something that the arbitral tribunal possibly could clarify. In any event, the arbitral tribunal was not entitled to base its decision, as it in fact did, on other circumstances than those duly invoked by Belgor.

An incorrect assumption of a due date of an invoice usually leads to incorrect interest calculations, in this case the amount of interest has become too high. This fact is confirmed by the evidence Belgor has invoked.

In sum, the Court of Appeal concludes that a procedural error which likely affected the outcome had occurred without being caused by Belgor. The Court of Appeal will revert to the issue of annulment.

Did the arbitral tribunal order Belgor to pay for machinery and equipment without support from the evidence?

Belgor has maintained that the company has been ordered to pay compensation for machinery and equipment, despite that the right to compensation was not stipulated in the Construction Agreement or elsewhere. By granting this portion of Koca's case, despite Koca not having presented any evidence concerning the ownership rights to the equipment or its value, the arbitral tribunal committed a procedural error.

Koca has maintained that the company did reference evidence in support of its claim for compensation in this respect, including minutes of the committee meetings, and that the arbitral tribunal made its analysis based on the presented evidence.

The reasons for the arbitral award clarify that the arbitral tribunal's conclusion was based on the interpretation of the contents of the Construction Agreement and that the tribunal considered the contents of other documentary evidence as well. The tribunal appears to also have taken into account such circumstances as the tribunal understood were undisputed between the parties.

The Court of Appeal concludes that the arbitral tribunal has, based on what the tribunal considered to constitute the investigation in the arbitration, provided grounds for what it considered had been established concerning, among other things, ownership rights and the value of property. The Court of Appeal is not entitled to carry out a review of the conclusions of the arbitral tribunal in this respect. Thus, there are no grounds to annul the arbitral award on the grounds of a procedural error in this respect.

Did the arbitral tribunal commit a procedural error by rejecting Belgor's requests for extension or appointment of a non-partisan expert?

Belgor has maintained that the arbitral tribunal did not grant the company the opportunity to argue its case *partly* by rejecting Belgor's requests for extension, *and partly* by rejecting Belgor's request that a non-partisan expert should be appointed. Koca has disputed that any error giving grounds for challenge occurred.

The first paragraph of Section 24 of the Swedish Arbitration Act provides that the arbitral tribunal should give the parties the opportunity to argue their cases sufficiently, in writing or orally. The arbitral tribunal should always manage the proceedings in an unbiased and impartial manner, which gives the parties equal opportunity to argue their cases reasonably (Article 19.2 of the SCC's Arbitration Rules).

The investigation has established, among other things, the following. On 24 October 2012, Belgor lodged its first request for an extension of time – until 5 June 2014. The arbitral tribunal granted an extension until 1 December 2013. On 11 July 2014, Belgor lodged another request for an extension of time – this time until November of 2014. The arbitral tribunal rejected the request on 29 July 2014 and stated that Belgor was given the opportunity to submit an expert report no later than 11 August 2014. The oral hearing was held on 10-12 September 2014. During the last day of the hearing, Belgor for the third time requested an extension of time, which was rejected on 18 September 2014. On 29 January 2015, Belgor instead requested that a non-partisan expert should be appointed. On 6 February 2015, the arbitral tribunal rejected Belgor's request and gave the following grounds.

> ”According to Respondent, testing could begin in May 2014 and take up to one month to complete. Subsequently, nine months after the first request and two months after the expected date of testing Respondent renewed its request for extension to submit an expert report. Respondent relied on the same argument, i.e. that the Shafts were not yet

> frozen and could not be tested. The Arbitral Tribunal allowed Respondent to submit an expert report, if possible, by 11 August 2014. Respondent did not submit an expert report, nor did it provide any update as to the status of the freezing of the Shafts. In fact, Respondent did not raise this issue at all until the third day of the Final Hearing, a month after the time allotted for the initial extension had expired. Since the Final Hearing, Respondent has had five additional months to conduct freezing on the Shafts and/or begin preliminary steps with Claimant to agree on testing methods."

Mr. RW has stated, among other things, that he became involved in the project early in 2014 and that the total time required to investigate the mineshafts was a year and a half, plus another 13-18 weeks thereafter.

Thus, the investigation shows that the investigations of the mineshafts were very extensive and complex, and took a long time to complete. Despite this, the investigation does not support that it would have been substantially burdensome for Belgor to keep the arbitral tribunal informed on which measures were required, the total time required, and the alternatives that would potentially be available. Moreover, Belgor appears not to have attempted to open any communication channel with the arbitral tribunal in between the rejections. In these circumstances, the arbitral tribunal cannot be held to have failed in its management of the proceeding by not granting extensions of time to Belgor or rejecting its request for the appointment of a non-partisan expert. Thus, there are no grounds for annulment of the arbitral award due to procedural errors.

Should the arbitral **award be wholly or partially annulled?**

In sum, the Court of Appeal has concluded that Belgor should be successful with two of its motions, namely, the first two. Therefore, the arbitral award should be annulled, wholly or partially (item 2 of the first paragraph of Section 34 of the Swedish Arbitration Act). Upon this outcome, Belgor has in the main moved that the arbitral award should be annulled in its entirety. Koca, for its part and upon this outcome, is of the opinion that the arbitral award should instead be annulled pursuant to Belgor's alternative motion.

Opinions in jurisprudence vary in respect of the possibility to partially annul an arbitral award.[3] According to the Court of Appeal, it is best in line with the general alignment of the Arbitration Act

[3] In support of its main motion, Belgor has referenced, among other things, Heuman's statements in *Skiljemannarätt*, 1999, p. 610. In the referenced section, another primary issue is discussed, namely whether and to what extent an excess of mandate should have affected the outcome in order to be successful grounds for challenge. See further Heuman's

to promote the finality of arbitral awards by annulling only those parts of the arbitral award that are directly covered by the grounds for annulment (Government Bill 1998/99:35 p. 43). Only if it is impossible to annul the award partially without affecting also other parts of the award, does the Court of Appeal consider it reasonable to review what other parts of the award are affected and should also be annulled.

In the action at issue, it is undisputed that the awarded compensation for additional works plus interest and other interest amounts to USD 900,875 and USD 1,662,794, i.e. separable parts of compensation awarded in item (i) of the operative part of the award. The relevant compensation is also clearly separable from other parts of the award. The analysis of other claims for compensation – which are reflected in item (iv) and parts of item (i) – was not connected to the analysis of the part that is now subject to annulment. Moreover, the arbitral tribunal's allocation of the parties' litigation costs in the arbitration – item (iii) – is not affected by this partial annulment. Partial annulment does not mean that Belgor would have been entitled to any compensation for its costs in the arbitration. Finally, the Court of Appeal notes that a party's obligation to pay an advance – item (ii) – would not be affected, either.

Thus, there are no impediments to limiting the annulment in the manner Belgor has moved in its alternative motion, namely that to the extent item (i) of the operative part of the award deals with the amount USD 2,563,669 (USD 900,875 + USD 1,662,794). The aforementioned means that Belgor's liability under item (i) of the operative part of the arbitral award is limited to USD 6,603,733.52 (USD 9,167,402.52 – USD 2,563,669).

Litigation costs

The conclusions of the Court of Appeal entail that Belgor has been successful to such an extent that Belgor should be liable for only half of Koca's litigation costs.

Koca has claimed compensation for litigation costs in the amount of EUR 103,850, of which EUR 97,250 comprises costs for legal counsel and EUR 6,600 comprises expenses.

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statements, p. 612 f., Madsen, *Commercial Arbitration in Sweden*, 2016, p. 351. Compare Lindskog's more fleshed out reasoning on partial annulments in *Skiljeförfarande, En kommentar*, Zeteo May 2016, section 8.1.

Belgor has not attested the reasonableness of the claimed amounts.

The Court of Appeal concludes that compensation should reasonably be determined as EUR 51,925, of which EUR 48,625 comprises costs for legal counsel.

APPEALS

The Court of Appeal concludes that the action at issue contains elements, where a review by the Supreme Court would be valuable for the guidance of case-law. Therefore, the Court of Appeal grants leave to appeal the judgment (second paragraph of Section 43 of the Swedish Arbitration Act).

HOW TO APPEAL, see appendix A

Appeals to be submitted by 28 November 2017

The decision has been made by: Judges of Appeal CS, MJ (reporting) and GS.