JUDGMENT OF THE SUPREME COURT

rendered in Stockholm, 9 June 2010

Case No. T 156-09

Appellant

Korsnäs Aktiebolag[…]

Counsel: Advokaterna O N and O H

Opposing Party

AB Fortum Värme […]

Counsel: Advokat B S

Matter

Challenge to an arbitral award

Appealed Decision

Judgment of Svea Court of Appeal 10 December 2008 in Case No. T 10321-06

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RULING

The Supreme Court dismisses the claim in so for as concerns appeal against the Court of Appeal's decision to dismiss [the claim in relation to compensation due to the arbitrator]. (item no 1 in the ruling of Court of Appeal).

The Supreme Court upholds the Court of Appeal's judgment in other parts.

Korsnäs shall compensate Fortum Värme for legal costs in the Supreme Court to an amount of 400 000 SEK concerning counsel's fee, together with interest in accordance with Section 6 of the Interest Act from the date of the Supreme Court's ruling until payment is made.

RELIEF SOUGHT IN THE SUPREME COURT

Korsnäs has requested that the Supreme Court grant the action presented by Kornäs in the Court of Appeal, release Korsnäs from the obligation to compensate Fortum for its legal cost in the Court of Appeal, and order Fortum to bear Korsnäs' costs of proceedings in the Court of Appeal to the amount claimed in the Court of Appeal. Korsnäs has during the proceedings in the Supreme Court withdrawn its request for reversal of the arbitral award in the part relating to compensation to the arbitrator B.N's fees.

Fortum has contested an alternation.

The parties have requested compensation for legal costs in the Supreme Court.

REASONS

1. The question in the case is whether the challenged arbitration award shall be set aside due to the existence of circumstances that could diminish the confidence in the arbitrator B. N.’s impartiality in the arbitration.

2. In support of its claim, Korsnäs has pleaded that B. N. previously has held various appointments as an arbitrator in disputes where the party has been represented by [the X law firm], the same law firm at which Fortum’s counsel in the arbitration proceedings practice. Korsnäs has furthermore invoked that B. N. before and during the arbitration proceedings failed to inform about these appointments as well as the way B. N. acted when Korsnäs after the arbitration award requested information concerning these previous appointments.

3. Section 8 of the Arbitration Act provides that an arbitrator must be impartial. If a party so requests, an arbitrator shall be discharged if there exists any circumstance which may diminish confidence in the arbitrator's impartiality. Items 1-4 of the provision set out circumstances which always should be deemed to diminish confidence in the arbitrator’s impartiality. The list is illustrative and not exhaustive (Govt. Bill 1998/99:35 p. 218). Section 9 of the Arbitration Act, imposes an obligation on the arbitrator to disclose all circumstances which, pursuant to Sections 8, might be considered to prevent him from serving as arbitrator. If an arbitrator due to any circumstance set forth in Section 8 has been unauthorized [to act as an arbitrator], the award shall be set aside upon motion of a party (Section 34, first paragraph, item 5 of the Arbitration Act).

4. The Supreme Court has in the cases NJA 1981 p. 1205 and NJA 2007 p. 841 pointed out that the disqualification rules aim to protect the objective administration of justice and that it is important that the rules are applied in such a way that an arbitrator who is covered by such a rule must not participate in the arbitral proceedings even if there is no reason to suppose that the arbitrator would be influenced by his/her relationship to one of the parties in the handling or determination of the particular case in question. The assessment of whether there are circumstances that can diminish the confidence in an arbitrator should thus be made on objective grounds. These court cases emphasize that a high standard must be set for the requirement of objectivity and impartiality when it comes to arbitrators, since flaws with respect to the evaluation of evidence or questions of law cannot lead to an arbitration award being set aside.

5. The fact that a law firm contributes to a certain arbitrator being appointed on a regular basis may give the impression that the arbitrator has ties to the law firm and can thus thereby diminish the confidence in the arbitrator’s impartiality (cf. Lindskog, Skiljeförfarande (*Arbitration*) , 2005, p.453). The number of previous appointments and their magnitude will in such case be relevant; however, an overall assessment based on the circumstances in each case must always be made.

It should then be taken into account, *inter alia* if the arbitrator has received appointments solely from the concerned law firm or from several law firms, and it should be of some importance whether one and the same lawyer or several lawyers at the firm has contributed to appointing the arbitrator.

6. When making the assessment a distinction should be made between appointments as party appointed arbitrator and as chairman in an arbitral tribunal. The chairman is usually appointed by the party appointed arbitrators (see Sections 13 and 14 of the Arbitration Act) and an appointment as chairman can therefore normally not be considered to create such ties to a certain law firm that may give rise to doubts as to the arbitrator's impartiality.

7. The witness testimony of B. N. shows the following. His particular field of practice is arbitration and he works both as counsel and as arbitrator in such proceedings. In terms of profitability the appointments as counsel are of most interest to him and as a result of his workload he is often forced to say no to appointments as arbitrator. During the period of 22 June 1995 until he was asked to take on the current appointment in 2005, he was appointed arbitrator in 112 arbitration proceedings. Twelve of these appointments were as party appointed arbitrator appointed by a party represented by counsel from [the X law firm]. During the three year period of 2002-2005, he had four arbitrator appointments, besides the case in question, where one of the parties was represented by counsel from [the X law firm]. In two of these cases, he was chairman of the arbitral tribunal. In the two remaining cases, he had been appointed by the party represented by the law firm.

8. B. N. thus has had a substantial amount of arbitration appointments and has been running an established law practice. During the period of three years preceding the current appointment as arbitrator in the dispute between Korsnäs and Fortum, B.N. has received two appointments as party appointed arbitrator where counsel for the party came from [the X law firm]. During the ten-year period preceding the current appointment, these appointments accounted for approximately ten percent of B. N.'s arbitration appointments. The number of appointments where a party was represented by counsel from [the X law firm] ranged between zero and two appointments a year. Accordingly, the greater part of his appointments as arbitrator came from other law firms. It has not been presented in the case that the appointment from [the X law firm] came from one and the same lawyer or from or only a few lawyers at the firm.

9. The above demonstrates that the appointments as arbitrator previously obtained by B. N. from a party represented by counsel from [the X law firm] do not constitute a circumstance which may diminish the confidence in B. N's impartiality in the present proceedings.

10. Korsnäs has in support of its action also invoked that B. N. failed to disclose the previous appointments received from [the X law firm].

11. The disclosure obligation is of central importance and the purpose of this obligation is, *inter alia* to settle potential disqualification issues at an early stage

of the arbitral proceedings and to reduce the risk of challenge of awards. Accordingly, it is for the person appointed as arbitrator to examine whether he/she is aware of any circumstances that might give rise to doubts as to his/her impartiality and to make necessary inquiries. The wording of the Arbitration Act – *circumstances which might be considered to prevent him from serving as arbitrator* – shows that the disclosure requirement is extensive. The fact that the person who is asked to accept an appointment as arbitrator makes the assessment that no confidence-harming circumstances are at hand does not mean that he is discharged from the obligation to disclose. (Heuman, Skiljemannarätt (*Arbitration Law*) 1999, p. 247 f. and Lindskog, *supra.* p.466 ff.).

12. The disclosure requirement is not sanctioned with any consequences for the party failing to provide required information (nor does the so called IBA-rules to which Korsnäs refers – see the judgment of the Court of Appeal – contain any such remedies) and a breach of the disclosure obligation does not itself constitute an independent cause for challenge. According to statements in the preparatory works, the fact that the arbitrator has failed to disclose a certain circumstance may, however, constitute a circumstance which, when doubtful whether bias exists or not, contributes to a decision in the affirmative [regarding lack of arbitrator's impartiality] (Govt. Bill 1998/99:35 p. 219). This statement most likely targets the situations in which the issue of impartiality is particularly difficult to assess. To attach importance to a failure to disclose, and the inherent subjective bias contained in such failure, does not appear relevant in a case such as the one at hand where the assessment shall be made on objective grounds, as opposed to addressing the risk of actual influence in the particular case at hand. The case at hand thus is not such a case to which the statement in the preparatory works refers. The fact that B. N. did not inform Korsnäs that he previously had received appointments as arbitrator where the party appointing him was represented by counsel from [the X law firm] can therefore not disqualify him.

13. The provision in Section 34 first paragraph 5 of the Arbitration Act leaves no room to consider an arbitrator's conduct after the award has been rendered as a reason for setting aside an award.

14. Hence, there is no ground for setting aside the arbitral award. The decision of the Court of Appeal shall therefore be upheld.

15. With this outcome Korsnäs is to compensate Fortum for its legal costs in the Supreme Court. Fortum has claimed compensation in the amount of SEK 550 000 for counsel fee. Korsnäs has left it to the Supreme Court to decide the reasonableness of Fortum's cost submission and argued that reasonable costs should at any rate not exceed Korsnäs' legal costs in the Supreme Court, which amount to 235 000 SEK. Given the nature and the extent of the case, Fortum is reasonable considered with a compensation of 400 000 SEK for legal fees.

[Signatures]