THE SUPREME COURT OF SWEDEN

DECISION

Case no.

Ö 4227-06

announced in Stockholm on 3 December 2008

APPELLANTS

1. KH

2. SK

3. WM

Representative for 1-3: Counsel HB

Representative for 1-3 Counsel HF

OPPOSING PARTY

Soyak International Construction & Investment Inc.
Büyükdere Caddei No. 38
Mecidiyeköy
TR-80290 Istanbul
Turkey

Representative: Counsel SJ

CASE

Dismissal of claim

THE SUPREME COURT OF SWEDEN	Postal address	Tel. +44 (0)8 561 666 00	Hours of Business
Riddarhustorget 8	Box 2066 103 12 Stockholm Sweden	Fax. +44 (0)8 561 666 86 E-mail: hogsta domstolen@dom.se www.hogstadomstolen.se	08:45-12:00 13:15-15:00

ORDER UNDER APPEAL

Decision of the Svea Court of Appeal of 25 September 2006 in case Ö 1952-05

———

DECISION OF THE SUPREME COURT OF SWEDEN

The Supreme Court of Sweden rejects the appeal.

KH, SK and WM shall jointly reimburse Soyak International Construction & Investment Inc for litigation costs in the Supreme Court of Sweden to the sum of EUR 10,000 or corresponding sum in SEK in accordance with the applicable rate on the date of payment, in respect of representation fee, in addition to interest in accordance with 6 § of the Interest Rates Act from the date of the Supreme Court's decision until payment is made.

CLAIM IN THE SUPREME COURT OF SWEDEN

KH, SK and WM have requested that the Supreme Court of Sweden by amending the decision of the Court of Appeal shall reject the claim brought by Soyak International Construction & Investment Inc. They have further requested exemption from the liability for reimbursement of litigation costs in the court of appeal and for their own litigation costs in the district court and the court of appeal.

Soyak has appealed against amendment.

The parties have requested reimbursement of litigation costs in the Supreme Court of Sweden.

REASON

On the basis of an agreement between Soyak and Hochtief AG an arbitration procedure was carried out in accordance with the regulations of the Arbitration Institute of the Stockholm Chamber of Commerce. These regulations contain provisions on the costs. § 39 of the then applicable regulations of 1 April 1999 shows that the costs of the procedure comprising arbitration fees, administrative charges to the institute as well as remuneration to arbitrators and the institute for costs are ultimately decided by the institute. In accordance with § 40 the parties are jointly liable for payment of the costs. The board of arbitration decides on the distribution of liability between the parties for the costs with regard to the outcome of the case and other circumstances. According to § 32 paragraph 6 of the regulations the costs of the procedure and their distribution between the parties shall be established in the judicial settlement or other decision through which the procedure is concluded.

On 12 June 2003, the arbitrators KH, SK and WM notified a decision on the arbitration procedure. In the judgement the following was prescribed under point 2 (in Swedish translation): *The costs of the arbitration procedure which were decided by the Arbitration Institute of the Stockholm Chamber of Commerce were decided at EUR 208,400.48 and SEK 59,612.00, shall be paid by the parties, half each.* In the judicial settlement it was noted that the party who wished to make an objection to the compensation to the arbitrators could within three months from the date on which the party was notified of the judgement, appeal at the Stockholm District Court.

Soyak has appealed at the district court against the judgement and requested that the

arbitrators' fees shall be reduced and that the arbitrators shall be obliged to give a certain amount to the company. In support of his right to appeal Soyak has referred to 41 § the law (1999:116) on arbitration.

KH, SK and WM have requested that Soyak's appeal should be rejected and as a basis for this maintained in part, that 41 § the law on arbitration is not applicable as the compensation decision was arrived at by someone other than the arbitrators and in part that the institute's compensation decision is binding for the parties and therefore cannot be reviewed by the court on material grounds.

According to 37 § of the law on arbitration the parties shall jointly make reasonable reimbursement to the arbitrators, and the arbitrators may in a final judicial settlement put the parties under an obligation to pay the compensation to them. However, the provisions in 37 § do not apply if anything else has been decided jointly by the parties in such a way that is binding for the arbitrators (39 § first paragraph). In 41 § it is prescribed that a party or an arbitrator may bring a case through the district court against the judicial settlement on reimbursement to the arbitrators and that such an appeal by the party shall be brought within three months from the day the party was notified of the judgement. It is further prescribed that the judicial settlement shall comprise a clear reference on what a party wishing to appeal against the judgement in this part shall do. According to 43 § third paragraph such an appeal shall be taken up by the district court at the place of the arbitration procedure.

In the preliminary work it was cited that the provision in 41 § the law on arbitration is aimed at decisions on compensation that the arbitrators themselves have made and that, in cases where a decision on compensation to the arbitrators has been made by an authority other than the arbitrators and included in the judgement, this decision is not included in

the decision. As examples cases where the arbitration procedure is administered by the International Chamber of Commerce in Paris (ICC). According to the preliminary work this did not need to be expressly made clear in the text of the law. (Prop. 1998/99:35 p. 169 and 241 as well as SOU 1994:81 p. 301.)

The preliminary statements cannot add to the effect that a party who is dissatisfied with the size of the compensation should be fully prevented from having the matter tried in court with the result that such an appeal should be rejected. The starting point is that a decision taken by a third party concerning a legal relationship with the support of conditions in the parties' agreement can be subjected to court examination in accordance with applicable provisions of civil law (see NJA 2001 pa. 511; cf. Lindskog, Skiljeförfarande En kommentar (Arbitration Procedure a Commentary), 2005, p. 1069 note 6). In case 41 § the law on arbitration should not be applicable to the dispute, this does not therefore result in the parties loosing the right to appeal against the arbitrators in court with regard to their compensation.

If the statement in the preliminaries to 41 § the law on arbitration is fully applied to the word, it would thus mean that the compensation decision that was taken into the judgement but that was brought by some authority other than the arbitrators should not be able to gain judgement. The compensation issue should thus be able to be subjected to an examination by a court without time limit. Furthermore, a party should be forced to carry out the processes at the different courts in which the arbitrators are domiciled. It cannot be assumed that the purpose of the statement should result in such an order. The reasons that bear up the preclusion provision in 41 § and the forum provision in 43 § are to a similar degree applicable to compensation decisions taken into a judicial settlement whether they are brought by an arbitration institute or by the arbitrators themselves.

It can further be noted that, according to 37 § second paragraph, of the law on arbitration, the arbitrators may in final settlement, put the parties under an obligation to pay the compensation to them with interest. In the decision no exceptions are made for decisions taken by the arbitration institute. The arbitrators could also be interested in achieving enforceability when the compensation decision has been taken by an institute, as the security which would normally be put in place could be proved to be insufficient. On the basis of that which is stated above on the possibility of material examination of a third party decision it cannot however, be accepted that a compensation decision taken in judicial settlement but brought by an arbitration institute should be enforceable in accordance with chapter 3. 15 § the enforcement code, without the parties previously being able to appeal against the decision within a given time.

In view of the stated and for the occurrence of a variety of demarcation problems the discussed preliminary statements should not prevent 41 § the law on arbitration being interpreted in accordance with the wording, so that the paragraph , like 37 § the second paragraph, applies to all decisions on compensation to the arbitrators that, in one form or another, have been included in the judicial settlement's judgement. A condition is that this represents the whole compensation decision or that in the judgement there is a clear reference to the compensation decision in question, whereby the amounts as such do not need to be included in the judgement.

In the present case the arbitrators, in the judgement regarding the costs, have referred to the decision of the institute. Therefore, the claim brought by Soyak shall not be rejected on the basis that 41 § the law on arbitration is not applicable.

Of that which has previously been stated it follows that KH's, SK's and WM's objection that Soyak, with binding force, has refrained from having the compensation decision adjudicated by the court is not of the nature to be examined as an issue on inadmissibility but constitutes a part of the case upon which it is up to the district court to take a position.

_____

_____ _____ _____

_____ _____

In the decision the following have participated: Johan Munck, Dag Victor, Torny Håstad, Ella Nyström (arbiter) and Lena Moore
Referee responsible for preparation of the case: Jonas Härkönen