JUDGMENT of the

SWEDISH SUPREME COURT

Case No.

given in Stockholm on 15 October 1997 Ö 3174/95

APPELLANT

MS ”Emja” Braack Schiffahrts KG, Wegefährels 46, D-21706 DROCHTERSEN, Germany

Counsel: advokat Mikael Nordlin, Styrmansgatan 6, 114 54 STOCKHOLM

COUNTERPARTY

Wärtsilä Diesel Aktiebolag, Reg. No. 556046-9552, Box 920, 461 29 TROLLHÄTTAN

Counsel: advokat Torsten Jacobsson, Box 11025, 404 21 GÖTEBORG

MATTER

Dismissal of claim

APPEALED JUDGMENT

Court of Appeal for Western Sweden, dep. 5, judgment of 13 June 1995, in case Ö 1610/94

Judgment of Court of Appeal see Appendix

JUDGMENT OF THE SUPREME COURT

The Supreme Court does not grant the appeal.

MS ”Emja” Braack Schiffahrts KG is ordered to compensate Wärtsilä Diesel Aktiebolag for its litigation costs before the Supreme Court in the amount of SEK twenty-one-thousand five-hundred (21,500), all comprising of 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

MS ”Emja” Braack Schiffahrts KG (Emja) has moved that the Supreme Court shall grant its claim put forth before the Court of Appeal and be relieved from the order to compensate Wärtsilä Diesel Aktiebolag (Wärtsilä) for its litigation costs before the District Court and the Court of Appeal.

Wärtsilä has disputed any amendments to the judgment of the Court of Appeal and has claimed compensation for its litigation costs before the Supreme Court.

GROUNDS

A party who has been granted respite in responding to a call for a summons under Section 3 of Chapter 32 of the Swedish Code of Judicial Procedure is deemed to retain its right to raise objections under Section 2 of Chapter 34 of the Swedish Code of Judicial Procedure, cf. NJA 1973 p. 126. As found by the courts, Wärtsilä has presented its procedural impediment objection in due time.

As further relates to the question of procedural impediments, the following has been presented to the Supreme Court on the background to the dispute.

On 22 February 1989, the Dutch ship builder Scheepswerf Ferus Smit BV (Ferus) undertook, by way of a ship building agreement, to build a ship that would later be named MS Emja. On 30 January 1990, the German shipping company Emja purchased the rights and obligations as against Ferus provided under the ship building agreement by way of a Transfer Agreement, i.e. Emja purchased the ship under construction. For the building of the ship, Ferus retained another ship builder, Scheepswerf Bijlsma BV (Bijlsma), as subcontractor. Through a written agreement dated 8 February 1990, Wärtsilä undertook to deliver a diesel engine for MS Emja to Bijlsma. The agreement referenced the standard form ECE 188 with addendum Marine Equipment Addendum 1987 as well as to the standard form TP 73 E, with respect to technical personnel. Both ECE 188 and TP 73 E contain arbitration clauses. Both clauses state that Swedish law is applicable. After MS Emja had been delivered to the shipping company, it experienced difficulties with the diesel engine. In order to provide the shipping company the possibility to bring claims against Wärtsilä for these difficulties, Ferus and Bijlsma transferred their respective rights to the engine as against Wärtsilä onto the shipping company. The transfer was made through the Deed of Transfer of Assignment, dated 1 and 16 December 1993. Based on this deed, Emja has called for a summons against Wärtsilä before the Trollhättan District Court on the grounds of a defective engine. The question in the present matter is whether the arbitration clauses in ECE 188 and TP 73 E, which form part of the agreement of 8 February 1990 between Bijlsma and Wärtsilä, are binding on Emja.

If and to what extent arbitration clauses bind third parties is a highly contested issue. It is likely generally accepted that when an assignment has taken place by way of a universal succession, then the assignee is bound by the arbitration clause, with the exception of certain issues *in rem* (see Håstad in Process och Exekution, Vänbok till Robert Boman p. 177 ff.).

The present matter, however, relates to a specific assignment. The legal situation for these matters is unclear (Arbitration Report's report New Act on Arbitration, SOU 1994:81 p. 91 ff.). No legal provisions exist, and opinion in jurisprudence is divided.

The discussions have mainly revolved around whether the assignee is bound by an arbitration clause. The overwhelming majority seems to hold the opinion that this is the case, at least if the assignee was aware or should have been aware of the arbitration clause (see Dillén, Bidrag till läran om skiljeavtalet, 1933 p. 245 ff., Edlund in Svensk Juristtidning 1993 p. 905 ff., Hassler-Cars, Skiljeförfarande, 2nd ed. 1989, p. 45 ff., Hobér in Swedish and International Arbitration 1983 p. 43 ff., Håstad *op. cit.*, and Welamson, Lindskog and Nowotny in arbitration award of 5 March 1997, referenced in Mealey's International Arbitration Report, March 1997 p. 3, cf., however, Heuman in Festskrift för Sveriges Advokatsamfund, 1987 p. 229, Heuman, Current Issues in Swedish Arbitration, 1990 p. 41 ff., and Vahlén, Avtal och tolkning, 1960 p. 153 ff.). Also in the Netherlands and Germany, for example, the prevailing view appears to be that the assignee is bound by the arbitration clause. (For an international overview, see Girsberger and Hausmaninger in Arbitration International 1992 p. 121 ff.)

As grounds for the assignee becoming bound it has been stated, amongst other things, that the remaining party's position otherwise would be substantially impaired. It must be assumed that it – as well as the original counterparty – was determined to have the dispute between them resolved by arbitration. In this situation, it cannot be permitted for the original counterparty to unilaterally circumvent the arbitration clause by a transfer agreement. If the assignee does not approve of the arbitration clause, it can always refrain from acquiring the assignor's rights.

Statements to this effect have been put forth by Wärtsilä before the Supreme Court. Thus, Wärtsilä has claimed, *inter alia*, that the company incorporates the relevant standard forms in all its sales agreements. There are several

important reasons for Wärtsilä to wish that potential disputes in its business dealings should be resolved by arbitration. One reason is that disputes that arise often relate to complex technical issues, for which arbitration proceedings to a greater extent permit appointment of arbitrators with special competencies. Another reason is the fact that the sector, and particularly the field in which Wärtsilä operates, is subject to fierce competition, in particular when it comes to technical matters. Based on experience, the disputes often relate to production and construction issues for which Wärtsilä has an obvious interest in limited unwanted public exposure. Arbitration proceedings offer better options for confidentiality than litigation before public courts.

It must be assumed that it would result in a substantial impairment if the transfer to Emja of the rights under the delivery agreement would lead to disputes arising out of the agreement being tried by public courts. It should also be noted that Wärtsilä was not able to object to the transfer. What has been referenced by Wärtsilä must therefore be considered to strongly speak in favor of the arbitration clauses incorporated in the now relevant delivery agreement should apply not only in disputes between the original parties, but also bind Emja, which has assumed the rights under the agreement.

It is also a general principle of contract law, that upon an assignment of a contractual right the new creditor does not come into a more favorable position than the transferor (cf. Section 27 of the Act on Promissory Notes). The principle mainly applies to contractual objections relating to, for example, invalidity, but there are strong reasons for also applying it to arbitration clauses executed by a transferor.

As grounds for its case, Emja has stated, amongst other things, that if the arbitration clauses are held to apply to Emja, it runs a risk of *déni de justice*. What would happen if a procedural impairment is deemed to exist and Emja thereafter requests arbitration? Could Wärtsilä in this situation successfully claim that the arbitration clauses only apply between the original parties, the result of which being that Emja’s request for arbitration should be dismissed?

When it comes to the binding nature of an arbitration clause to the remaining party, it has been stated in jurisprudence that the arbitration clause has a strong personal attachment to the original parties. This would go against the view that the remaining party should be bound by the arbitration clause in relation to an assignee. Such a personal attachment would reasonably be rare in commercial relations, and would in any event not likely have existed between Wärtsilä, on the one side, and Ferus and Bijlsma, on the other.

It is the risk that the assignee is not able to pay for the arbitration costs and the possibility of an original party to escape this liability through an assignment, however, that causes concern for many scholars. This risk has been considered to favor a solution where the remaining party has the right to choose between litigation before public courts and arbitration proceedings. A relative applicability of the arbitration clause in the form of the assignee being bound but not the remaining party also, however, gives cause for concerns, as it provides the remaining party the possibility to speculate in suitable forms of dispute resolution. This would favor the remaining party being bound by the arbitration clause, unless special circumstances apply. No such special circumstances have been referenced in the present matter. The conclusion of the foregoing is that there is no reason to suspect that Emja would suffer *déni de justice*.

In light of the above, Emja shall be deemed bound by the arbitration clauses. Thus, the appeal shall be dismissed.

[ILLEGIBLE SIGNATURES]

The decision has been made by: Supreme Court Justices M., S. (Reporting Justice), T., R. and V.
Reporting clerk: T.