SVEA COURT OF APPEAL	**JUDGMENT**	Case No.
Department 02	10 May 2012	T 10329-10 and T 10401-10
Division 0210	Stockholm	

CLAIMANT
TOO Aktubinskaya Mednaya Kompaniya
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Kazakhstan

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RESPONDENTS
1. Mincom Pty Ltd. *(T 10329-10)*
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2. Mincom Services Pty Ltd. *(T 10401-10)*
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MATTER

Challenge of arbitral award

CHALLENGED ARBITRAL AWARDS

Arbitral awards rendered in Stockholm on 20 September 2010, in arbitration proceedings 170/2009 and 102/2010 administered by the Arbitration Institute of the Stockholm Chamber of Commerce, see appendices A-B

JUDGMENT OF THE COURT OF APPEAL

1. The Court of Appeal rejects the claims of TOO Aktubinskaya Mednaya Kompaniya.

2. TOO Aktubinskaya Mednaya Kompaniya is ordered to compensate Mincom Pty Ltd.'s for its litigation costs before the Court of Appeal in the amounts of SEK 347,296 and USD 3,226, out of which SEK 342,000

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comprises costs for legal counsel, plus interest thereon pursuant to Section 6 of the Swedish Interest Act from the day of the judgment of the Court of Appeal until the day of payment.

3. TOO Aktubinskaya Mednaya Kompaniya is ordered to compensate Mincom Services Pty Ltd.'s for its litigation costs before the Court of Appeal in the amounts of SEK 347,296 and USD 3,226, out of which SEK 342,000 comprises costs for legal counsel, plus interest thereon pursuant to Section 6 of the Swedish Interest Act from the day of the judgment of the Court of Appeal until the day of payment.

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BACKGROUND

Mincom Services Pty Ltd. grants licenses to computer software and Mincom Pty Ltd. provides related consultancy services (the companies are jointly hereinafter referred to as the Mincom companies). TOO Aktubinskaya Mednaya Kompaniya (hereinafter AMK) is a mining company with its seat in Kazakhstan and is the subsidiary of JSC Russkaya Mednaya Kompaniya, with its seat in Russia. On 19 August 2008, Mincom Services Pty Ltd. and AMK entered into an agreement, the General Agreement for Software and Support Services (hereinafter GASS), while Mincom Pty Ltd. and AMK entered into an agreement, the General Agreement for Consultancy Services (hereinafter GAC). Under these agreements, AMK during the term was to be granted license to use software and receive consultancy services upon request. Attached to the GASS and the GAC are several schedules of the same date as the agreements. Following the execution of the agreements, delivery and implementation of the software was commenced. However, the cooperation was terminated. The discussions between the parties were terminated without a new agreement having been reached. The Mincom companies requested arbitration under the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce and claimed compensation for breach of contract. Through an arbitral award between Mincom Pty Ltd. and AMK of 20 September 2010 AMK was ordered to pay USD 1,161,677.77 and through another arbitral award of the same day between Mincom Services Pty Ltd. and AMK, AMK was ordered to pay USD 850,107.

MOTIONS

AMK has moved that the Court of Appeal shall annul the arbitral award between Mincom Pty Ltd. and AMK as well as the arbitral award between Mincom Services Pty Ltd. and AMK.

The Mincom companies have objected to the annulment of the arbitral awards.

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

GROUNDS

AMK

The arbitral awards are not covered by a valid arbitration clause, or, in the alternative, the arbitral tribunal has exceeded its jurisdiction, or, in the alternative, procedural errors that affected the outcome of the case have been committed, because

a) the arbitration clauses (Section 7.3 of GAC and GASS, respectively, Section 8.9 of Schedule B to GAC, Section 11.9 of Schedule B to GASS and Section 9.9 of Schedule D to GASS) are invalid since they were not covered by a joint will of the parties and contradict the prorogation clauses (Section 7.1 of GAC and GASS, respectively, Section 8.7 of Schedule B to GAC, Section 11.7 of Schedule B to GASS and Section 9.7 of Schedule D to GASS), which provide that all disputes shall be resolved by public courts,

b) the referenced arbitration clauses (Section 7.3 of GAC/GASS) are not applicable to the disputes tried by the arbitral tribunal, and

c) through the term “general arbitration clause” the arbitral tribunal has created a new arbitration clause and based its jurisdiction on this legal fact, which was never referenced by the Mincom companies.

Each of the grounds in a – c above entail that the arbitral award shall be annulled under items 1, 2 and 6 of the first paragraph of Section 34 of the Swedish Arbitration Act (SFS 1999:116) (the LSF).

The Mincom companies

The arbitral awards are covered by valid arbitration clauses. The arbitral tribunal has not created any new arbitration clause nor has it based its jurisdiction on such an agreement. Thus, the arbitral tribunal has not exceeded its jurisdiction. Moreover, no procedural error which affected the outcome of the cases has occurred.

FURTHER DETAILS FROM THE PARTIES

The parties have provided further details in support of their respective cases as follows.

AMK

The contractual relations between the parties commenced in August of 2008. Then, the parties entered into two framework agreements, so-called General Agreements as well as various other agreements on the requisition of specific software, support and consultancy services. One of the framework agreements, GASS, governed the cooperation related to software and services. The other framework agreement, GAC, governed the cooperation on consultancy services. The purpose of the framework agreements was to govern the general cooperation between the parties as well as to govern how the parties were to enter into specific agreements for software, support and consultancy services etc. Because of the financial crisis in 2008, AMK wished to postpone the implementation of the software and terminate the agreements. The parties commenced negotiations but they did not yield a new agreement, which caused the Mincom companies to request arbitration on 23 September 2009 and claimed compensation for breach of agreement.

AMK objected that the arbitral tribunal lacked jurisdiction to try the dispute because of the existence of prorogation clauses, which provide that all disputes shall be resolved by the courts in the province of Ontario, Canada. The framework agreements were drafted by the Mincom companies. The arbitration clauses and the prorogation clauses were in the draft agreements. During the negotiations AMK proposed that they should be replaced by a clause providing that all disputes should be resolved in Kazakhstan under Kazakh law. The Mincom companies objected thereto and insisted that both clauses be included. The prorogation clauses and the arbitration clauses are incompatible. There was no joint will of the parties that disputes should be resolved by arbitration. The Russian word “arbitrazh” used by the Mincom companies in the Russian language versions of the agreements means dispute resolution by public courts. Also the words used in the English language

versions of the agreements concerning governing law, dispute resolution and arbitration proceedings, such as “action”, “proceeding” etc., relate, according to the definitions of Swedish as well as English dictionaries, to court proceedings. The prorogation clauses and the arbitration clauses have the same scope, i.e. they cover all disputes and as a result the arbitration clauses cannot be applied. Moreover, the clauses were not alternative. The same incompatibilities that are found in the framework agreements can be found in the corresponding clauses of the specific agreements governing the purchases of goods and services. Thus, the arbitral award is not covered by a valid arbitration clause.

The arbitration clauses referenced by the Mincom companies in their request for arbitration do not cover the dispute tried by the arbitral tribunal. The framework agreements and the other agreements comprise five separate agreements. This is clearly provided in the agreements and the agreement mechanism set out by the agreements. The arbitration clauses of the agreements cover only disputes under the agreements in which they are set out. This is particularly evident in Section 2.1 of GASS “During the Term, Mincom will provide the Customer with the ability to purchase … as agreed and detailed in the relevant Software Requisition or Support Services Requisition”. A corresponding provision is set out in GAC. Other provisions of the framework agreements establish that these are of a general nature, e.g. “this agreement” clearly establishes that the clause relates only to the agreement in which the provision is found. Disputes relating to individual requisitions of software, support and consultancy services are not governed by the arbitration clauses of the framework agreements. Only later in the arbitration proceedings did the Mincom companies reference the arbitration clauses that are set out in the individual purchase agreements. It is, however, not permitted to expand the grounds for jurisdiction by referencing other arbitration clauses than those set out in the request for arbitration while arbitration proceedings are ongoing. By requesting arbitration referencing the arbitration clauses set out in the framework agreements, no arbitration clause that was valid for the relevant dispute concerning requisitions has been

referenced in due time. Thus, the arbitral awards are not covered by valid arbitration clauses, or in the alternative, the arbitral tribunal exceeded its jurisdiction by reviewing the motions.

The arbitral tribunal has itself created a new arbitration clause and based its jurisdiction on this arbitration clause. The conclusion of the arbitral tribunal that there is a general arbitration clause is a construction and has a different scope than the agreement actually reached by the parties. In the main, the Mincom companies referenced the arbitration clauses set out in the framework agreements and in the alternative referenced the arbitration clauses in the schedules to the agreements. Thereby, the arbitral tribunal based its decision on a legal fact that was never referenced by the Mincom companies. The arbitral tribunal did not have jurisdiction to review the dispute based on any other clause than that referenced by the Mincom companies when requesting arbitration. Unless it had acted in the described manner, the arbitral tribunal had been unable to review the motions of the Mincom companies. Thus, the arbitral awards are not covered by a valid arbitration clause, or at least a procedural error has been committed that likely affected the outcome of the case.

The Mincom companies

AMK is a mining company that mines copper. The Mincom companies are based in Australia and are in the software and software licensing business. The agreements were entered into at the end of August of 2008 and delivery was commenced. A few months thereafter, AMK announced that it was no longer interested in the services. The dispute that arose between the parties and the ensuing discussions related to the entire agreement package, and not to any individual agreement. What the Mincom companies had undertaken was to provide software through licensing and to implement that software. Thus, the agreements are connected. What the parties aimed for, and achieved, was an agreement package with a unified approach to dispute resolution.

The arbitration clause is neither invalid nor ambiguous. During the negotiations, the parties focused on arbitration, where it should take place and which law that should apply. The reference to court proceedings in Canada is a mistake. That reference should not have been included, but the agreements were drafted by "copying and pasting" from other agreements and as a result, the prorogation clause was included. What the parties negotiated was arbitration in Stockholm. AMK proposed that all disputes should be resolved in Kazakhstan under Kazakh law, but the Mincom companies objected thereto to safeguard their intellectual property rights. The discussions and e-mail exchanges following the execution of the agreements do not take aim at dispute resolution, but rather revolved around applicable law. There were no discussions on the dispute resolution clauses. The existence of alternative dispute resolution clauses does not of itself entail invalidity, since they can be alternative.

The agreements are not separate agreements. They contain provisions with essentially the same wording, in the framework agreements and in the Schedules. Because they are actually schedules to the framework agreements. For example, the Consulting Services Requisition, Schedule B to GAC, provides that it is an integral part of GAC through the wording "incorporates by reference the terms of GAC". Further support for this is found in e.g. Section 1, which provides "incorporates by reference the terms of GAC". In the framework agreements references are made to the requisitions, and those agreements, in their turn, reference the framework agreements. The fact that the parties in some instances have used the wording "separate agreement" should be attributed to the poor English skills of the parties, but that does not entail that documents in which that phrase is used are "stand-alone" agreements, because they form an integral part of the agreement package. The Russian word "arbitrazh" was used in the same meaning as the English word "arbitration". This is clear from, e.g., the heading to Section 7.3 of GAC. That the word "action" in the English language versions would indicate court proceedings is disputed. The purpose was to create a coherent agreement package. From the request for arbitration it is clear that the Mincom

companies requested arbitration referencing the arbitration clauses of the different agreements. The Mincom companies expanded on this in the statement of claim. AMK objected to this only eight months later. AMK has not been deluded on what the dispute concerned.

The arbitral tribunal has not created a new arbitration clause. The arbitral tribunal found that the agreements form integral parts of one agreement package and provide one and the same dispute resolution method and arbitration clause.

THE INVESTIGATION BEFORE THE COURT OF APPEAL

The Court of Appeal has decided the case following a main hearing. Upon the request of AMK witness statements have been heard from Natalja Rogatjeva and Alexander Zhegalin and upon the request of the Mincom companies from Nikolay Godunov and Andrei Yorsh. Documentary evidence has been referenced.

GROUNDS OF THE COURT OF APPEAL

The issue of whether the prorogation clauses render the arbitration clauses invalid

AMK has referenced as grounds for the arbitration clauses being invalid that they were not covered by any joint will of the parties and that they contradict the prorogation clauses that are also included in the agreements. According to AMK, the prorogation clauses and the arbitration clauses are contradictory because they cover all disputes and as a result, the arbitration clauses cannot be applied. In response to the Court’s question, AMK has declared by invalid is rather meant un-applicable and no ground for invalidity set out in the Swedish Contracts Act is referenced.

It is not disputed that the arbitration clauses are included in the agreements executed by the parties.

From the witness statement given by Natalja Rogatjeva, who participated in the agreement negotiations, it has been established that both the prorogation

clauses as well as the arbitration clauses were included in the draft agreements from the onset. According to her, AMK proposed that these clauses should be replaced by clauses appointing Kazakh law and Kazakh courts, but the Mincom companies did not accept this. AMK was not interested in having to engage in dispute resolution in Canada, which is what is provided under the prorogation clause. Since the Mincom companies did not accept any other solution, no change was made in comparison to the draft agreements.

Nikolay Godunov, who also participated in the agreement negotiations, declared in his witness statement that Stockholm as the seat of arbitration was accepted by AMK, that England was the primary preference of the Mincom companies, and that language and applicable law was also discussed. According to him, dispute resolution in courts was never discussed.

The witness statements cannot be interpreted in any other way than that AMK has entered into the agreements in full awareness of the contents of the now relevant provisions. That they disagree on the correct interpretation of the relevant clauses is another matter. The conclusion is that the parties' agreement includes also the arbitration clauses.

AMK's view is that the prorogation clauses and the arbitration clauses are incompatible and that the arbitration clauses as a result cannot be applied. The Mincom companies' view is that the prorogation clauses, which were included as the result of a mistake while using the "copy-and-paste technique" that is often used when drafting substantial agreements, should be disregarded or that the clauses could be alternative.

The wording of the different clauses does not indicate that the one should take precedence over the other. What the parties have referenced on the difference in meaning of various words in Russian and English does not provide a conclusion as to what the parties meant. The witness statements have also not provided any guidance on the parties' opinion on the fact that the clauses reference court proceedings as well as arbitration proceedings, and even less

so whether there was a mutual agreement on the application of the clauses. Thus, the remaining issue is whether they are objectively incompatible.

If a claimant initiates court proceedings despite the existence of an arbitration clause, the arbitration clause shall be deemed a procedural impediment only if the respondent makes a reference thereto. Thus, an arbitration clause does not render dispute resolution before courts impossible when both parties find that as the most suitable solution. So, despite the existence of an arbitration clause, there can be a valid need to regulate choice of venue and applicable law in case a dispute should be resolved by a court.

The prorogation clauses and the arbitration clauses are therefore in the view of the Court of Appeal not contradictory in such a way as to render the arbitration clauses invalid or without effect. Instead, they can be viewed as alternative. Thus, the challenge proceedings cannot be granted on this ground.

The disputes reviewed by the arbitral tribunal are not covered by the arbitration clauses of the framework agreements and the arbitral tribunal has created a new arbitration clause

Which disputes that are covered by an arbitration clause must, according to jurisprudence, be determined through interpretation of the agreement (Lindskog, Skiljeförfarande p. 198 ff., Bolding Skiljedom p. 90 ff.). General principles of interpretation apply (Lindskog, op. cit., p. 122 ff.). When several agreements are executed at the same time or close in time between the same parties, an arbitration clause is deemed to cover also ancillary agreements that are so closely related to the contractual relationship governed by the main agreement that the ancillary agreement can be deemed part thereof (Lindskog, op. cit., p. 268; cf. the Court of Appeal for Western Sweden's decision in case No. Ö 4204-04 of 10 February 2005). However, not if disputes between the parties arise concerning entirely different matters than those regulated through the agreements (NJA 2005 N 8). An addendum, which governs for example another delivery or other work tasks than what has been ordered through the main agreement, is normally not covered by the arbitration clause set out in the main agreement (Lindskog, op. cit., p. 269).

Item 2 of the second paragraph of Section 19 of the Swedish Arbitration Act (SFS 1999:116) (the LSF) provides that a request for arbitration shall include information on the issue governed by the arbitration clause that is to be reviewed by the arbitrators. In a limited way, the request for arbitration frames the arbitration proceedings. The applicable Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce provide that the request for arbitration shall include a summary of the dispute and "a copy or description of the arbitration agreement or clause under which the dispute is to be settled". With respect to the information to be available for the review of whether the relevant dispute is covered by an arbitration clause, the requirements are not very high at the stage of initiation of the arbitration proceedings. Only later, through the first submission under Section 23 of the LSF (the so-called K1), is the task of the arbitrators more clearly defined (Heuman, Skiljemannarätt, p. 314 f.).

In the present matter, the request for arbitration included both a description of the dispute and the agreements entered into between the parties as well as a statement that the references in the schedules to the framework agreements made them an integral part of the framework agreements. The arbitration clauses of the framework agreements and the schedules are set out in the request for arbitration. The arbitration clauses have the same wording, and in the opinion of the Court of Appeal, the same scope. Through the references in the agreements it is clear that it is one contractual relationship. The relevant dispute concerned AMK's obligation to pay for the license grant to the software and for consultancy services. Thus, it concerns the contractual relationship governed by the framework agreements and the requisitions viewed as a whole. In sum, the Court of Appeal finds that the referenced arbitration clauses cover the dispute tried by the arbitral tribunal. Thus, the challenge proceedings cannot be granted on this ground.

Hereafter, the Court of Appeal will review if the arbitral tribunal has created a new general arbitration clause and based its jurisdiction thereon. What the arbitral tribunal found in its review was that the dispute resolution clauses and arbitration clauses of the framework agreements were reflected also in the

relevant ancillary agreements. As a result, it was irrelevant whether the arbitration had been requested referencing the arbitration clauses of the framework agreements or the ancillary agreements. The dispute was covered by the same arbitration clause.

The question is whether the arbitral tribunal considered circumstances that had not been referenced when deciding this. From the request for arbitration it is clear that the Mincom companies already initially maintained that the requisitions formed an integral part of the framework agreements. In the opinion of the Court of Appeal it has been established that the companies did maintain that the dispute revolved around one and the same contractual relationship. Thus, the arbitral award has not been based on circumstances that were not referenced. In light of the foregoing, the Court of Appeal finds that it has not been established that procedural errors that likely affected the outcome of the case occurred. Thus, the challenge proceedings cannot be granted on this ground.

Thus, the motions of the claimant shall be rejected.

Upon this outcome, AMK shall be ordered to compensate the Mincom companies for their litigation costs before the Court of Appeal. The claimed amount is not disputed. The Mincom companies have not stated how the jointly claimed amount shall be allotted between the companies. Thus, the Court of Appeal finds that the compensation shall be split evenly between the two companies.

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Pursuant to the second paragraph of Section 43 of the Swedish Arbitration Act (SFS 1999:116), the judgment of the Court of Appeal may not be appealed.

[ILLEGIBLE SIGNATURES]

The decision has been made by: Senior Judge of Appeal K.B., and Judges of Appeal U.I. and D.Ö. (reporting Judge of Appeal). Unanimous.