JUDGMENT of the

SWEDISH SUPREME COURT

Case No.

given in Stockholm on 31 March 2009 T 4387-07

APPELLANT

Soyak International Construction & Investment Inc.

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COUNTERPARTY

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MATTER

Challenge proceedings with respect to arbitral award

APPEALED JUDGMENT

Judgment of Svea Court of Appeal of 16 October 2007, in case T 6398-03

Judgment of the Court of Appeal see Appendix

JUDGMENT

The Supreme Court affirms the judgment of the Court of Appeal.

Soyak International Construction & Investment Inc. shall compensate Hochtief AG for its litigation costs before the Supreme Court in the amount of SEK three-hundred-seventy-eight-thousand nine-hundred-sixty-one (378,961), out of which SEK 303,810 comprises costs for legal counsel, plus interest according to Section 6 of the Swedish Act on Interest from the date of the Supreme Court's judgment until the day of payment.

MOTIONS BEFORE THE SUPREME COURT

Soyak International Construction & Investment Inc. has requested that the Supreme Court grant the company's claim brought before the Court of Appeal, discharge it from the obligation to compensate Hochtief AG for its litigation costs before the Court of Appeal, and order Hochtief to compensate Soyak for its litigation costs before the Court of Appeal.

Hochtief has disputed any changes to the judgment of the Court of Appeal.

The parties have claimed compensation for costs incurred during the proceedings before the Supreme Court.

REASONS

After a dispute concerning construction works in Moscow had arisen between the parties, the dispute was, in accordance with the parties' agreement thereon, submitted for arbitration according to the rules of the Arbitration Institute of the Stockholm Chamber of Commerce. These rules provide that an arbitral award shall include reasonsreasons for the award. Soyak has challenged the resulting arbitral award and moved that it shall be wholly or partially annulled on the reasons that the arbitral tribunal has largely omitted to provide reasonsreasons, or that the reasonsreasons provided were insufficient or contradictory.

Soyak has claimed that the alleged error constitutes an excess of jurisdiction under item 2 of the first paragraph of Section 34 of the Swedish Arbitration Act (SFS 1999:116) (LSF). Hochtief has claimed that if the alleged breach occurred, to which Hochtief objects, it constitutes a procedural error under item 6 of the same paragraph.

The provision in item 2 of the first paragraph of Section 34 of the LSF on exceeding jurisdiction aims at regulating the scope of what should be tried on

the merits in the matter to be tried by the arbitral tribunal. One example of exceeding jurisdiction is that the arbitral tribunal has gone beyond the claims of the parties; another is that it bases its decision on a legal ground not referenced by the parties (government bill 1998/99:35 p. 145; cf., *inter alia*, Lindskog, Skiljeförfarande En kommentar, 2005, p. 960 f.).

The parties can also, through other means than claims and references, limit the scope of the jurisdiction of the arbitral tribunal. For example, they may limit the scope of the arbitration proceedings to cover only the application of a certain legal provision or by other means limit the scope of the proceedings. Section 21 of the LSF provides that the arbitral tribunal shall comply with the instructions of the parties, unless there are procedural impediments that prevent it from doing so. If the arbitral tribunal disregards such a limiting instruction from the parties, the jurisdiction of the arbitral tribunal would generally have been exceeded (government bill 1998/99:35 p. 146, cf., *inter alia*, Heuman, Skiljemannarätt, 1999, p. 616).

It is another matter, however, with respect to instructions that govern how the arbitration proceedings shall be carried out within the framework set out by claims, referenced circumstances and submitted evidence. If the arbitral tribunal would not comply with such instructions, a procedural error would generally have been committed under item 6 of the first paragraph Section 34 of the LSF (see for example Heuman, *op. cit.*, p. 652 f., and Lindskog, *op. cit.*, p. 965 f.). This applies also to deviations from the parties' instructions with respect to reasons to be given in the arbitral award (see Heuman, *op. cit.*, p. 510 f. and 641 f., and Lindskog, *op. cit.*, p. 961 f. and 966).

Thus, if the instructions of the parties have been disregarded as claimed by Soyak, this does not mean that the arbitral tribunal has exceeded its jurisdiction under item 2 of the first paragraph of Section 34 of the LSF, but rather has committed a procedural error under item 6 of the same paragraph.

Provided that the parties have agreed that the arbitral award shall include reasons, what standard the reasons of the arbitral award should meet must be established.

There can be various causes as to why an arbitration clause provides that an arbitral award shall include reasons. The parties may also, where more precise instructions on what the reasons shall include are lacking, have more or less far-reaching expectations on the explanations of the arbitral tribunal's reasoning. A separation must be made, however, between what the parties reasonably or not expect from the reasons for the award and, on the one hand, what constitutes good practice among arbitrators in this respect and, on the other, whether the reasons provided by the arbitrators are so lacking as to constitute grounds for challenge proceedings.

Providing sufficient legal reasons in an arbitral award is a guardian of the rule of law, as it forces the arbitrators to analyze the legal issues and submitted evidence. However, when it comes to challenge proceedings, the interest of having complete reasons for the award must be weighed against the interest of ensuring the finality of the arbitral award. Challenge proceedings do not grant grounds for a test of the merits of the arbitral tribunal's conclusions. As a result of the foregoing, and having regard to the difficulties with respect to scope that a qualitative review of the reasons would cause, only a total lack of reasons, or reasons that are so lacking that they can be equated to a total lack of reasons, can constitute a procedural error. Should such a material procedural error be at hand, it could also be presumed that the lack of reasons have affected the outcome of the case.

In the present matter, Soyak's objections relate to matters of evidence, and, in sum, Soyak has claimed that it cannot be established from the provided reasons whether the arbitral tribunal has considered and evaluated the evidence submitted by Soyak and that the description of the parties' arguments in the reasons is superficial. In this respect, a comparison can be made with the requirements on a Swedish court to provide reasons, which

shall contain a statement on what has been shown in the case (item 5 of the first paragraph of Section 7 of Chapter 17 of the Code of Judicial Procedure) but not necessarily a statement as to on what the court has based its conclusion, even if this is often desirable (NJA II 1943 p. 210 f., see also, in respect of Danish and Norwegian law, where the acts, as opposed to the LSF, provide that arbitral awards shall contain reasons, Juul and Thommesen, Voldgiftsret, 2nd ed., 2007, p. 235 f., and Kolrud *et al.*, Lov om voldgift, Kommentarutgave, 2007, p. 219 f.).

From the investigation in the present matter, nothing has been shown but that the arbitral tribunal has stated what it had found to be shown, for all disputed issues, and they were numerous, based on what had transpired during the arbitration proceedings. Having regard to the preceding, the reasons for the arbitral award cannot be deemed to be so defective as to give grounds for challenge proceedings.

Thus, the judgment of the Court of Appeal shall be affirmed.

The decision has been made by: Supreme Court Justices J.M., T.H., E.N, K.C. and S.L. (Reporting Justice)
Reporting clerk: K.N.