

STOCKHOLM DISTRICT COURT MINUTES
Division 605 30 April 2004
Department 6 Stockholm

Matter No.
Ä 860-04

Decision taken without oral hearing

THE COURT

Assistant Judge MW, also keeper of the minutes

PARTIES

Claimant

JSC Novokuznetsk Aluminium Plant
654000 Kemerovo Oblast
NOVOKUZNetsk
Russia

Counsel

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Respondent

Base Metal Trading S.A.
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Switzerland

Counsel:

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MATTER

Application for disqualification of arbitrator; now issue of dismissal of application

The case file is reviewed, whereupon the following is noted.

JSC Novokuznetsk Aluminium Plant (hereinafter NKAZ) has filed an application with the District Court on the disqualification of an arbitrator because of lack of impartiality under the third paragraph of Section 10 of the Swedish Arbitration Act (SFS 1999:116) (the LSF) and has moved that the District Court shall, by overturning the decision of the Arbitration Institute of the Stockholm Chamber of Commerce (hereinafter the Institute), dismiss Dr.

DK from his assignment as arbitrator. In support of its motion, NKAZ has referenced, *inter alia*, the following. In November of 2003, Base Metal Trading S.A. (hereinafter BMT) requested arbitration against NKAZ before the Institute. In its request for arbitration, BMT appointed Dr. DK as its arbitrator. NKAZ is of the opinion that certain circumstances prevent Dr. DK from fulfilling the task of being an arbitrator. In a submission to the Institute of 24 November 2003, NKAZ claimed that Dr. DK was partial and should be dismissed. In its decision of 22 December 2003, the Institute rejected NKAZ's motion for dismissal. Now, NKAZ has moved that the District Court, by overturning the decision of the Institute, shall dismiss Dr. DK from the assignment to be arbitrator.

BMT has clarified its opinion on the application, and moved that the District Court shall firstly dismiss NKAZ's application for disqualification of the arbitrator, or, in the alternative, moved that the application shall be rejected. In support of its motion for dismissal, BMT has referenced, amongst other things, the following. BMT's claims in the arbitration proceedings are based on four separate agreements, all of which include identical arbitration clauses. The arbitration clauses provide that disputes between the parties shall be submitted for arbitration administered by the Institute and that the arbitration proceedings shall be governed by the Arbitration Rules of the Institute. The Institute has, after having allowed all affected parties to provide their opinions, rejected NKAZ's motion to dismiss Dr. DK. The first sentence of the fourth paragraph of Section 18 of the Arbitration Rules of the Institute provides that "Challenges with respect to an arbitrator's impartiality shall be reviewed and finally determined by the Institute". Consequently, a challenge for disqualification because of impartiality as the one directed at Dr. DK by NKAZ shall be finally determined by the Institute. Section 11 of the LSF provides that the parties may agree that a motion for the disqualification of an arbitrator because of lack of impartiality shall be finally determined by an arbitration institute. Through such an agreement, the parties waive their right to apply to a District Court to have an arbitrator dismissed from his assignment. The Institute is such an arbitration institute as referenced in

Section 11 of the LSF. By referring to the Arbitration Rules of the Institute in the various arbitration clauses, the parties have agreed that issues of impartiality of the arbitrators shall be finally determined by the Institute. Since the Institute, in accordance with its rules has finally ruled on NKAZ's objection because of impartiality, and rejected it, the Stockholm District Court does not have jurisdiction to try NKAZ's application on the dismissal of the arbitrator Dr. DK, and the application shall therefore be dismissed.

NKAZ has objected to BMT's motion for dismissal and has moved that the District Court shall reject BMT's motion. In support hereof, NKAZ has referenced mainly the following. NKAZ attests that the parties have agreed that questions of impartiality shall be finally determined by an arbitration institute in the meaning set forth in Section 11 of the LSF. However, in NKAZ's opinion, the word "finally" of Section 11 of the LSF means only that the arbitrators are no longer authorized to consider the issue of impartiality, i.e. that the decision of the Institute is final with respect to the arbitrators. However, Section 11 of the LSF says nothing on the issue of the right to appeal to District Courts under the third paragraph of Section 10 of the LSF. It should be noted with care that Section 11 of the LSF refers only the first paragraph of Section 10 of said Act, and not to the third paragraph of Section 10. Considering the importance of not depriving parties the right to a court review on these issues, the provision in Section 11 must, *in dubio*, be interpreted to mean that the right to court review under the third paragraph of Section 10 of the LSF remains intact, also after the parties' having agreed to have the question settled by an arbitration institute. In NKAZ's opinion, therefore, NKAZ is entitled to a court review of the impartiality question even after the Institute has tried the issue. It follows from the second paragraph of Section 34 of the LSF that a party cannot challenge an arbitral award by claiming that the arbitrator was impartial if the issue has been previously tried by an arbitration institute. If NKAZ is denied to have the question of impartiality tried before a court in the present matter, then the company would be entirely cut off from the possibility to a court review of the

question, which would breach the European Convention on the Protection of Human Rights and Fundamental Freedoms.

BMT has provided its opinion on NKAZ's objection and has, in addition to the above, referenced mainly the following. NKAZ's claim that Section 11 of the LSF refers only to the first paragraph of Section 10 is not entirely correct. An agreement of the type mentioned in Section 11 entails that the question of an arbitrator's impartiality is finally determined by an arbitration institute. As a result, any reference to the third paragraph of Section 10 would be redundant, because a review of the kind foreseen by the third paragraph is precluded precisely because the parties' agreement entails that the issue will be tried finally by the arbitration institute. BMT's opinion on the interpretation of Section 11 of the LSF is supported by the preparatory works to the LSF as well as by jurisprudence. BMT's opinion on the contents of Section 11 of the LSF does not breach the European Convention. That issue was dealt with in the drafting of the LSF.

Dr. DK has submitted his opinion on NKAZ's application.

The parties have requested that the motion for dismissal of NKAZ's claim shall be decided prior to reviewing the merits of the matter.

BMT has claimed compensation for its litigation costs. NKAZ has attested that the claimed amount for litigation costs is reasonable in and of itself.

After reviewing the case file, the District Court renders the following

DECISION

Grounds

Section 8 of the LSF provides that an arbitrator, upon the application of a party, may be dismissed from his assignment if there is any circumstance that

could typically undermine the confidence in the impartiality of the arbitrator. A motion for the dismissal of an arbitrator because of lack of impartiality shall, under the first paragraph of Section 10 of the LSF, be tried by the arbitrators unless the parties have agreed that it shall be tried by someone else. If a party is discontented with a decision through which a motion has been rejected or dismissed, that party is entitled under the third paragraph of Section 10 of the LSF to apply to the District Court and move for the arbitrator's dismissal. Section 11 of the LSF, however, provides that the parties may agree that a motion under the first paragraph of Section 10 of the LSF shall be finally tried by an arbitration institute. The provision awards the parties the opportunity to decide whether issues concerning the impartiality of an arbitrator shall be finally tried by an arbitration institute instead of by a public court, and that the decision of the arbitration institute cannot be subjected to court review through a separate case, or in connection with challenge proceedings. However, it must be clearly stated, either in the parties' agreement or in the rules of the arbitration institute, that a final decision by the arbitration institute is involved (see Government Bill 1998/99:35 p. 220 f., and Bengt Olsson and Johan Kvarn, *Lagen om skiljeförfarande, En kommentar*, p. 79 f.). If a party applies to a public court in breach of the parties' agreement on a final decision by an arbitration institute, the court shall, upon the motion thereto from the other party, dismiss the application (see Lars Heuman, *Skiljemannarätt*, p. 254).

In the present matter, it is undisputed that the parties have agreed that the issue of impartiality shall be finally determined by an arbitration institute in the sense as provided by Section 11 of the LSF, and that the Institute has tried the issue of whether Dr. DK shall be dismissed from his assignment because of lack of impartiality and has rejected NKAZ's motion thereon. On the question of whether the decision of the Institute entails that the District Court does not have jurisdiction to try the same issue, the District Court finds that the question of Dr. DK's impartiality has been finally determined by the Institute as against the arbitrators, the District Court as well as third parties, and that the parties by way of agreement have precluded any subsequent court

review. The stated interpretation of Section 11 of the LSF cannot, considering what is noted in the preparatory works to the LSF on the considerations made when drafting the act, be in breach of the European Convention. Since the question has been finally determined by an arbitration institute, the District Court does not have jurisdiction to review the issue of dismissal of the arbitrator Dr. DK because of impartiality. Thus, NKAZ's application shall be dismissed.

Upon this outcome and considering the nature of the matter, NKAZ shall be ordered to compensate BMT for its litigation costs pursuant to Section 32 of the Act on Court Matters and Sections 1 and 5 of Chapter 18 of the Swedish Code of Judicial Procedure. The claimed amount is not disputed.

Decision

1. The District Court dismisses JSC Novokuznetsk Aluminium Plant's application.
2. JSC Novokuznetsk Aluminium Plant is ordered to compensate Base Metal Trading S.A. for its litigation costs in the amount of SEK seven-thousand (7,000), all comprising costs for legal counsel excluding VAT.

HOW TO APPEAL, see appendix (DV 402)

Appeals addressed to Svea Court of Appeal shall be submitted to the District Court by 21 May 2004.

[SIGNATURE]

MW