COURT OF APPEAL FOR WESTERN SWEDEN Department 2 Division 23	**JUDGMENT** 24 September 2014 Gothenburg	Case No. T 2290-13

APPELLANT
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MATTER
Application for amendment of arbitral award pursuant to Section 36 of the Swedish Arbitration Act (1999:116)

RELEVANT ARBITRAL AWARD
Arbitral award rendered in Gothenburg on 13 January 2013, under the Rules for Expedited Arbitrations of the Arbitration Institute of the Stockholm Chamber of Commerce.

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JUDGMENT OF THE COURT OF APPEAL

1. The Court of Appeal dismisses Greenextreme AB's case before the Court of Appeal.

2. The Court of Appeal amends the arbitral award rendered between the parties on 13 January 2013 so that Greenextreme AB is ordered to compensate Hulta Vind AB for costs in the arbitration proceedings in the amount of SEK 238,238, out of which SEK 183,000 comprises costs for legal counsel, plus interest thereon pursuant to Section 6 of the Swedish Interest Act (1975:635) from 14 January 2013 until payment is made.

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3. The Court of Appeal orders Greenextreme AB to compensate Hulta Vind AB its litigation costs before the Court of Appeal in the amount of SEK 144,000, all comprising costs for legal counsel, plus interest thereon pursuant to Section 6 of the Swedish Interest Act from 24 September 2014 until payment is made.

BACKGROUND

On 11 June 2010 Hulta Vind AB (Hulta Vind) and Greenextreme AB (Greenextreme) entered an agreement (the Agreement) pursuant to which Hulta Vind was to purchase a wind turbine from Greenextreme. The purchase included, amongst other things, delivery and installation of the wind turbine. The standard form agreement ABA 99, which includes an arbitration clause, was attached to the Agreement. Greenextreme had purchased the wind turbine from the manufacturer Vestas Northern Europe AB (Vestas) and a dispute later arouse concerning who should pay for service and maintenance carried out by Vestas on the wind turbine. This issue was not explicitly governed by the Agreement.

In June of 2012 Greenextreme commenced arbitration against Hulta Vind under the arbitration clause and requested that Hulta Vind should be ordered to pay for the aforementioned costs plus interest; Hulta Vind disputed the motion. The parties also lodged motions concerning the costs for the arbitration proceedings. The arbitral award was rendered on 13 January 2013, and through which the arbitrator concluded that he lacked jurisdiction to try the case.

At the time of the arbitral award Hulta Vind had not specified its claim for compensation and on the day following the arbitral award it requested supplementation of the arbitral award with compensation for costs or, alternatively, that an additional arbitral award should be made. The arbitrator, however, decided not to grant Hulta Vind’s request.

Hereafter, Hulta Vind has applied to have the arbitral award amended.

After expiry of the period to challenge the arbitral award before a Court of Appeal, Greenextreme opened proceedings against Hulta Vind before Skaraborg District Court. Those proceedings have been stayed, awaiting the Court of Appeal’s decision in the present case.

MOTIONS BEFORE THE COURT OF APPEAL

Hulta Vind has, as ultimately decided, moved as follows.

In the main, Hulta Vind has moved that the Court of Appeal shall award it compensation for costs in the arbitration in the amount of SEK 238,238 plus interest thereon pursuant to Section 6 of the Swedish Interest Act from 14 January 2013 until payment is made.

In the alternative – in the event that the Court of Appeal does not grant the main motion – Hulta Vind has moved that the Court of Appeal shall annul the arbitrator's decision to close the proceedings without considering the merits of Greenextreme's motion based on the main grounds, and that the Court of Appeal shall remand the case to the arbitrator for further consideration.

Greenextreme has disputed Hulta Vind's motions and for its part moved that the Court of Appeal shall amend the arbitrator's decision and affirm that the entirety of Greenextreme's case can be tried within the scope of the arbitration.

Hulta Vind has disputed Greenextreme's motion before the Court of Appeal.

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

The case has been decided without a main hearing.

GROUNDS ETC.

Hulta Vind

The arbitrator has not limited his review to the matters of dispute in the case and has not complied with Article 34 of the Rules for Expedited Arbitration 2010 on how to close arbitration proceedings. Thus, the arbitrator ought to have granted Hulta Vind's request for supplementation of the arbitral award or an additional arbitral award and have tried Hulta Vind's specified motions

for compensation for costs in the arbitration proceedings, which were presented in due time. The Court of Appeal should, irrespective of how the case was managed, upon a party's motion review the issue of compensation for Hulta Vind's costs in the arbitration proceedings. As the arbitrator has dismissed Greenextreme's case, Hulta Vind shall be granted full compensation for its costs in the arbitration proceedings.

In the event that the Court of Appeal would find that the arbitrator has dealt with the case correctly procedurally with respect to the issue of supplementation/additional arbitral award, the Court of Appeal shall amend the arbitral award so that it annuls the arbitrator's decision to close the proceedings without reviewing the merits of Greenextreme's motion based on the written agreement between the parties. The arbitrator has incorrectly declared himself lacking jurisdiction for the aspects where Greenextreme's case was based on the agreement. Hulta Vind has had a legitimate interest in having this issue settled through arbitration and, moreover, did not object thereto.

The Court of Appeal is prevented from annulling the entirety of the arbitral award in line with Greenextreme's motion, since the motion was presented after the period to challenge expired. In any event, the motion shall be rejected because the grounds upon which it is based were referenced after the expiry of the challenge period.

In the event the Court of Appeal concludes that it can consider Greenextreme's motion or allows Greenextreme to reference the said grounds, then Hulta Vind disputes that oral agreements concerning service fall within the scope of the written agreement.

Greenextreme

The order in which Hulta Vind has stated that the Court of Appeal shall review the motions cannot be adhered to since the issue of jurisdiction and related questions must be decided first. The issue of costs can only be tried by

the Court of Appeal if the arbitrator lacks jurisdiction to try the dispute. Moreover, it is not possible for the Court of Appeal to remand the dispute to the arbitrator.

No procedural errors occurred in dealing with the cost issues and the conclusion is also factually correct, and consequently Hulta Vind's motion in this respect shall be rejected. Hulta Vind's position on Greenextreme's motion that the arbitrator should review his jurisdiction does not affect the scope of the review. The parties were granted the opportunity to, and did, provide their opinions prior to the decision on jurisdiction. Thus, Hulta Vind had the opportunity to specify its claim for compensation.

The company has had the right to present motions and grounds before the Court of Appeal as has been done. When reviewing the validity of the arbitration clause the Court of Appeal is not limited to Hulta Vind's motion. After the Court of Appeal summoned the respondent to respond to the claimant's case, the respondent is not bound by any procedural limitations.

With respect to the applicability of the arbitration clause to Greenextreme's case, the company in the main maintains that Hulta Vind objected to the jurisdiction of the arbitrator too late. The objection should have been presented no later than in the submission named S1, in which Hulta Vind objected that an oral agreement cannot, due to the requirement of written form, constitute an addendum to the agreement. In the alternative, the company maintains that the arbitration clause covers the entirety of Greenextreme's case, since the parties' agreement on service and maintenance shall be viewed as a consequence of the parties' agreement on the purchase, delivery and installation of the wind turbine.

GROUNDS OF THE COURT OF APPEAL

The investigation in the Court of Appeal

The parties have referenced documentary evidence.

The permissibility of Greenextreme's case in the Court of Appeal

Section 36 of the Swedish Arbitration Act provides that an arbitral award that entails that the arbitrator has closed the proceedings without reviewing the issues submitted to arbitration may be amended upon the motion of a party and that proceedings thereon must be opened within three months of the day the party received the arbitral award in its final wording. Greenextreme has presented its motions after the said period to challenge expired. The commentary to the Swedish Arbitration Act provides that a party ought to, after the expiry of the challenge period, be allowed to reference new grounds to the extent allowed by the provisions of Chapter 13 of the Swedish Code of Judicial Procedure. This conclusion is, however, and as noted by the author himself, not obvious (see Lindskog, Skiljeförfarande – En kommentar (1 May 2014, Zeteo), the commentary to Section 36 of the Swedish Arbitration Act, 4.2.1 and footnote 16). Having regard to the wording of the aforementioned provision, this ought to relate to the party who opted to apply for amendment of the arbitral award. In any event, it cannot be deemed permitted for the party who opted not to apply for such amendment of the arbitral award to, after the expiry of the challenge period, present motions of its own concerning issues of dismissal (cf. cases NJA 1996 p. 751 and NJA 2008 p. 740). In light hereof, Greenextreme's motions before the Court of Appeal shall be dismissed.

The order in which the Court of Appeal shall review the issues of dispute

Hulta Vind has, as it ultimately framed its case, in the main presented a motion only concerning the costs in the arbitration proceedings. It can be noted that Hulta Vind already in its appeal presented this motion and that there is nothing preventing Hulta Vind from changing the order of its motions later in the proceedings. Hulta Vind's case must be understood so that it for the purposes of the Court of Appeal's review of its main motion accepts the arbitrator's conclusion that he lacked jurisdiction. There is nothing preventing Hulta Vind to take this position procedurally. Having regard to the Swedish procedural law principle that the parties frame the case before the court, the

Court of Appeal finds that the review shall be carried out in the order set by the claimant.

Hulta Vind's right to compensation for costs in the arbitration proceedings

The parties agree that Hulta Vind presented a claim for compensation for its costs in the arbitration proceedings, but that it didn't specify its claim before they were closed. The arbitrator's decision to not supplement the arbitral award or render an additional arbitral award is not eligible for appeal as such (see Lindskog, Skiljeförfarande – En kommentar (1 May 2014, Zeteo), the commentary to Section 32 of the Swedish Arbitration Act, Section 5.1.2). However, how the case was dealt with procedurally is eligible for appeal in the manner undertaken by Hulta Vind. The commentary to the Swedish Arbitration Act provides that errors in the conduct of the arbitration ought to be reviewed under the same principles that apply to procedural errors in public courts and that the provision set out in Section 28 of Chapter 50 of the Swedish Code of Judicial Procedure ought to be analogously applicable, implying that the Court of Appeal can rectify errors (see Lindskog, Skiljeförfarande – En kommentar (1 May 2014, Zeteo), the commentary to Section 36 of the Swedish Arbitration Act, Section 4.2.2 including footnotes 19 and 20).

The Court of Appeal concludes that it must have been clear to the arbitrator that Hulta Vind had not understood that the proceedings would be closed through the arbitrator's review of the jurisdiction. The arbitrator's failure to inform Hulta Vind thereon led to Hulta Vind not being compensated for its costs in the arbitration. Hulta Vind is entitled to such compensation, and so the arbitral award shall be amended in this aspect.

Hulta Vind's claim for compensation has not been disputed by Greenextreme. Interest shall be paid in accordance with the claim.

Litigation costs

As the losing party, Greenextreme shall be ordered to compensate Hulta Vind for its litigation costs before the Court of Appeal. Greenextreme has left it to the Court of Appeal to assess the reasonableness of the claimed amount, but objected that it appears as if Hulta Vind has opened the present proceedings in order to delay a review of the merits and that this should affect the allocation of litigation costs.

Because Hulta Vind was not awarded compensation for its costs in the arbitration, Hulta Vind has had justified grounds to apply for amendment of the arbitral award. As the case was finally framed, the main motion concerned compensation for the said costs. In light thereof, and because the compensation claimed by Hulta Vind is deemed reasonable, Greenextreme shall be ordered to compensate Hulta Vind for its litigation costs in accordance with the claim plus interest.

Appeal

The Court of Appeal finds that the present case involves issues where it is important for the development of case law that an appeal is reviewed by the Supreme Court. Therefore, the Court of Appeal grants leave to appeal (second paragraph of Section 43 of the Swedish Arbitration Act).

APPEAL, see appendix B

Appeals to be submitted by 22 October 2014

The decision has been made by Judges of Appeal IB, MM and CH, reporting Judge of Appeal.