JUDGMENT of the

SWEDISH SUPREME COURT

Case No.

given in Stockholm on 20 March 2019 T 5437-17

PARTIES

Appellant and counterparty

Joint Stock Company Belgorkhimprom
17 Masherova av.
220029 Minsk
Belarus

Counsel: Attorneys FN and KÅ and Master of Laws, LL.M. WS

Appellant and counterparty

Koca Inşaat Sanayi Ihracat Anonim Şirketi
Çamlik Mah. Ikbal Cad. Dinç Sok No:31
347 70 Ümraniye, Istanbul
Turkey

Counsel: Attorney OS as well as Master of Laws, LL.M. AB and JF
Counsel: Attorney SK

MATTER

Challenge of arbitral award

APPEALED JUDGMENT

Svea Court of Appeal's judgment of 31 October 2017 in Case No. T 6247-15

SUPREME COURT
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JUDGMENT OF THE SUPREME COURT

The Supreme Court amends the judgment of the Court of Appeal such that Joint Stock Company Belgorkhimprom's challenge is rejected in its entirety.

In addition to the Court of Appeal's order, the Supreme Court orders Belgor to pay to Koca Inşaat Sanayi Ihracat Anonim Şirketi further compensation for litigation costs before the Court of Appeal in the amount of EUR 51,925, of which EUR 48,625 comprises costs for legal counsel, plus interest pursuant to Section 6 of the Interest Act as from the day of the Court of Appeal's judgment.

Belgor shall compensate Koca for its litigation costs before the Supreme Court in the amount of SEK 700,000 for costs for legal counsel, plus interest pursuant to Section 6 of the Interest Act as from the date of the Supreme Court's judgment.

MOTIONS BEFORE THE SUPREME COURT

Belgor has moved that the Supreme Court, by amendment of the Court of Appeal's judgment, shall – with exception for item (ii) of the operative part of the Court of Appeal's judgment – set aside the challenged arbitral award. Belgor has further moved that the Supreme Court shall discharge the company from the order to compensate Koca for its litigation costs before the Court of Appeal, and that Belgor shall be granted compensation for its litigation costs before the Court of Appeal.

Koca has moved that the Supreme Court shall reject Belgor's motions. In the event that Belgor's challenge would, to any extent, be granted, Koca has moved that the Supreme Court, in the main, shall set aside the Court of Appeal's judgment and remit the case to the Court of Appeal for renewed review. In the alternative, Koca has moved that the arbitral award shall be

partially set aside. Further, Koca has claimed full compensation for its litigation costs before the Court of Appeal.

The parties have disputed each other's claims and have claimed compensation for their respective litigation costs before the Supreme Court.

REASONING OF THE COURT

Background

Introduction

1. The action at issue concerns an arbitral award rendered in a dispute between the Belarussian company Joint Stock Company Belgorkhimprom (Belgor) and the Turkish company Koca Inşaat Sanayi Ihracat Anonim Şirketi (Koca).

2. In 2011, the parties entered into an agreement under which Koca was to perform certain construction and excavation works in relation to two mining shafts in Turkmenistan (the Construction Contract). The agreement contains an arbitration clause which refers to the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC's Arbitration Rules 2010). The arbitration clause is worded as follows:

> ”Any disputes, disagreements and claims between the Employer and the Contractor emerged because of or in connection with the present Contract or upon violation, termination or invalidity of the present Contract shall be finally settled by arbitration in accordance with the Arbitration Court of the Arbitration Institute of the Stockholm Chamber of Commerce.”

3. Following Belgor's termination of the agreement, Koca requested arbitration. Koca requested that Belgor should be ordered to pay almost USD

11 million for completed works, additional works, machinery and equipment plus interest. Koca further claimed compensation for lost profit in excess of USD 20 million.

4. Belgor, who disputed Koca's requests, requested for its part that Koca should be ordered to pay almost USD 10 million as compensation for defects in the completed works. Moreover, Belgor disputed that the arbitral tribunal had jurisdiction to resolve Koca's claims concerning certain additional works. According to Belgor, that part of the dispute did not fall under the scope of the arbitration clause of the Construction Contract.

5. The arbitral award was rendered on 3 April 2015. Belgor was ordered to pay over USD 9 million. Belgor's requests were rejected.

6. Following a challenge by Belgor, the Court of Appeal has set aside the arbitral award to the extent it concerned an amount of USD 2,563,669, of which USD 900,875 concerned additional works and USD 1,662,794 concerned interest.

The questions before the Supreme Court

7. The Supreme Court shall review whether the arbitral tribunal has

- in respect of the additional works, decided on an issue which was not covered by the arbitration clause,
- exceeded its mandate or committed a procedural error by not reviewing a disputed circumstance,
- committed a procedural error by not giving a party the opportunity to sufficiently argue its case, and
- committed a procedural error by giving an arbitral award, which was not based on the invoked evidence.

In respect of the additional works, did the arbitral tribunal decide on an issue which fell outside the scope of the arbitration clause?

The parties' arguments before the Supreme Court

8. Koca asserts that the additional works fell within the scope of the arbitration clause of the Construction Contract.

9. According to Belgor, the arbitral tribunal has ruled on Koca's claim for compensation for additional work, which was not covered by the arbitration clause of the Construction Contract. Therefore, the arbitral award shall be set aside pursuant to the Swedish Arbitration Act (1994:116), Section 34, paragraph 1, items 1 or 2, in the main in its entirety and, in the alternative, with respect to the portion that awards compensation for those works (USD 619,610) and interest (USD 281,265).

10. Belgor asserts that the additional work was covered by a dispute resolution clause, worded as follows:

> ”All disputes and (or) disagreements which can arise from the present Contract or in connection with it, shall first be resolved by means of negotiations on the basis of observance of interests of each Party. The claim order of settlement of arguments under the present Contract is obligatory. The Party which has received the claim shall give the well-founded answer within 10 (ten) calendar days.
>
> If the mutual agreement is not reached within 10 (ten) calendar days after receiving the written response referred to above, each of the Parties has the right to petition Minsk economic court and the laws and regulations of the Republic of Belarus shall apply to such disputes.”

11. Koca has objected that the dispute resolution clause referenced by Belgor does not exclude the arbitration clause of the Construction Contract, which covers all disputes arising out of or in connection with that agreement.

Legal starting points

12. An arbitration agreement may cover future disputes concerning a legal relationship set forth in the arbitration agreement (the Swedish Arbitration Act, Section 1, paragraph 1). By this wording, it is clarified that an arbitration agreement cannot cover any and all future disputes between the parties; it must pertain to a specific legal relationship (see Government Bill 1988/89:35 [*sic*] p. 212). The intention of this requirement is to provide the parties with the ability to foresee the consequences of the arbitration agreement.

13. The scope of an arbitration agreement is determined under customary principles for contract interpretation. The wording of arbitration agreements is often in a standardized form. As a result, there are often no specific circumstances upon which it is possible to determine a specific joint and common intention of the parties. In instances where the wording provides for differing interpretations and other relevant interpretation data give no guidance, it is natural to start with the view that the arbitration agreement should fulfill a sensible function and serve as a reasonable set of rules for the parties' respective interests (cf. the "Partner Agreement" (*Sw. Partneravtalet*) NJA 2015 p. 741, paragraph 10). In such situations, the parties must be assumed to have intended that disputes should be resolved swiftly and in one cohesive proceeding before an arbitral tribunal appointed by the parties.

14. When interpreting arbitration agreements and the Arbitration Act's term "legal relationship", the principles of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards should be considered. The convention stipulates that an agreement to arbitrate between the parties shall be recognized if it covers disputes concerning "a defined

legal relationship" (see Article II.1). The principles of the convention, which serve the purpose of ensuring uniform recognition of arbitration agreements and to facilitate the enforcement of arbitral awards, has in foreign case-law and international jurisprudence been taken to justify an expansive interpretation of the arbitration agreement, as well as the convention's concept of a "legal relationship" (cf., e.g., Gary B. Born, International Commercial Arbitration, 2nd ed., 2014, p. 1317 ff., and Howard M. Holtzmann and Joseph E. Neuhaus, A Guide to the UNCITRAL Model Law On International Commercial Arbitration, 1994, p. 259).

15. The term "legal relationship" does not only cover those rights and obligations that have been set forth in an original agreement but also subsequent legally relevant circumstances, which alter the content of the agreement, fall within the scope of the term and thereby within the applicable scope of an arbitration clause in the original agreement (see the "Settlement Agreement" (S*w. Avräkningsavtalet*) NJA 2017 p. 226, paragraph 14).

16. In other cases, the ground for a party's case could fall outside the scope of the arbitration clause (see "Concorp I" NJA 2012 p. 183, where a claim based on a loan agreement concluded prior to another agreement which incorporated an arbitration clause was deemed to fall outside the scope of the arbitration clause; cf. "Tupperware" NJA 2010 p. 734, where a prorogation clause in an agreement did not give a party's bankruptcy estate the right to bring a reimbursement claim before the prorogation court).

17. However, a ground outside the contractual relationship could be deemed to fall inside the applicable scope of the arbitration clause (see "The Road Materials" (*Sw. Vägmaterialet*) NJA 2007 p. 475, where a non-contractual ground for the requested order was deemed so closely related to the other grounds for the request that also the former ground was deemed covered by the arbitration clause).

18. The determination of whether a dispute is covered by an arbitration clause can, at times, mean that the arbitral tribunal must complete an in-depth review of the parties' relationship. In these occurrences, there is reason to assume that parties to a commercial relationship wish to have disputes within the scope of their relationship settled by one single forum, because other solutions would contain a risk of time delays, increased costs and contradicting decisions in matters that are connected (cf., amongst others, Born, *op. cit*., p. 1317 ff.).

19. When a court in a challenge proceeding is tasked with reviewing the arbitral tribunal's decision on its jurisdiction, regard should be made to the fact that, typically, it is the arbitral tribunal who is best positioned to determine the issue of its own jurisdiction. This implies that the starting point for the court's review should be that the arbitral tribunal's interpretation and evaluation of evidence is correct. (Cf. "Fruits et Légumes" NJA 2003 p. 379).

20. Based on the abovementioned starting points, it shall be reviewed in the challenge proceeding whether the challenging party has established that the arbitral tribunal has made an incorrect assessment of the scope of the arbitration agreement. If this is so, the arbitral award shall be set aside; partially, to the extent it is practically possible to allow the arbitral award to remain in parts (cf. Government Bill 1998/99:35 p. 235).

The conclusions in the action at issue

21. The arbitral tribunal concluded that its jurisdiction under the arbitration agreement should be construed under and interpreted in accordance with Swedish law (cf. the Swedish Arbitration Act, Section 48).

22. Based on the investigation in the dispute, the arbitral tribunal found that the relevant additional work had been carried out "within the contractual

framework between the Parties established by the Contract [*the Construction Contract, translator's note*]". It noted that it was undisputed that the works were connected to the works under the Construction Contract, that the works had been ordered after the termination of the Construction Contract and that the parties subsequently had established a procedure for negotiating and agreeing on how the dismantling of their agreement relationship should be carried out. Against this background, the arbitral tribunal concluded that Koca's claim in respect of the additional works was covered by the arbitration clause of the Construction Contract.

23. The arbitral tribunal further noted that it was undisputed that the additional works had been conducted under five separate agreements, which contained the dispute resolution clause invoked by Belgor. According to the arbitral tribunal, the clause gave the parties the right, but not the obligation, to refer disputes to "Minsk economic court". Thus, the clause did not exclude jurisdiction for the arbitral tribunal. The tribunal further concluded that it could reasonably be assumed that it had been the parties' joint and common intention that disputes should be resolved by one single forum. The forum they had chosen as the first alternative was arbitration under the arbitration clause of the Construction Contract, which was deemed most in line with the parties' joint and common intention.

24. What Belgor has asserted in the action at issue does not give grounds to reject the arbitral tribunal's interpretation of the parties' agreements on dispute resolution. Thus, Belgor's action in this regard shall be rejected.

Did the arbitral tribunal exceed its mandate or commit a procedural error by not reviewing a disputed circumstance?

The parties' position before the Supreme Court

25. Koca was awarded certain interest in the arbitration. Koca's claim for interest was based on the fact that interest should commence to accrue as from a specific time after the invoice date.

26. According to Belgor, the date when interest should commence to accrue was disputed between the parties. Belgor objected that interest should commence to accrue a certain time after Belgor had received the invoice ("15 calendar days after submission … of the invoice") and argued as follows. The arbitral tribunal incorrectly assumed that the parties agreed that the interest should accrue as from the invoice date and therefore failed to review Belgor's objection. Thereby, the arbitral tribunal exceeded its mandate pursuant to the Swedish Arbitration Act, Section 34, paragraph 1, item 2. The failure at the very least constituted a material procedural error pursuant to the Swedish Arbitration Act, Section 34, paragraph 1, item 6. The error was committed without having been caused by Belgor, and it likely affected the outcome of the arbitration. Therefore, the arbitral award shall be set aside, in the main in its entirety, and in the alternative to the extent it concerns interest (USD 1,662,794).

27. According to Koca, the arbitral tribunal reviewed the merits of the interest issue and concluded that the interest should accrue as from the invoice date. The arbitral tribunal has not exceeded its mandate or committed a procedural error. If it is deemed to have committed a procedural error, it did not, at any event, affect the outcome of the arbitration. If any error occurred, Belgor has caused the error.

Legal starting points

28. If a party asserts that an arbitral tribunal has incorrectly considered a factual circumstance as undisputed, the question arises whether the arbitral

tribunal has committed a procedural error (see Stefan Lindskog, *Skiljeförfarande. En Kommentar*, 2nd ed., 2012, p. 897 in footnote 180).

29. The arbitral award shall not be set aside if the challenging party is deemed to have caused the incorrect position taken by the arbitral tribunal.

30. When determining the cause, it is of importance whether the challenging party can show that it has acted in such manner to not give the arbitral tribunal reason to reach the conclusion (cf. “Red Sea” NJA 1990 p. 419). The review shall be made after an overall assessment of what transpired before the arbitral tribunal. If it is determined that the arbitral tribunal had no grounds for its position, it shall thereafter be reviewed if that misunderstanding likely affected the outcome.

31. It is not sufficient that there is a considerable possibility that the misunderstanding affected the outcome, instead it is required that there is a tangible connection between the misunderstanding and the outcome (see Government Bill 1998/99:35 p. 148). The connection shall, as far as possible and within reason, be reviewed based on the approach to the legal issue and with the other starting points the arbitral tribunal has reported in its reasoning (cf. Lars Heuman, *Skiljemannarätt*, 1999, p. 636).

32. The possibility to set aside an arbitral award has been designed based on the intention of creating a balance between the parties’ interest that, on the one hand, the arbitral award shall mean an expeditious and final resolution to the dispute and, on the other hand, the possibility of challenging a procedural error which qualitatively or quantitatively is of material importance (cf. Government Bill 1998/99:35 p. 148). The effect of a procedural error should be of some reasonable importance to the challenging party in order to be eligible for challenge. The importance should be related to the part of the

arbitral award that could be set aside (cf. Lindskog, *op. cit*., p. 891 in footnote 151).

The conclusion in the action at issue

33. In its Statement of Defense to the arbitral tribunal, Belgor objected that the interest should commence to accrue on a date which occurred a certain time after the invoice date. In this regard, the company referred to the Construction Contract, which states that the due date shall be calculated from "submission … of the invoice". The tribunal has noted Belgor's position in the arbitral award (paragraph 48) but nevertheless stated that it was undisputed that the interest should accrue as from the invoice date (paragraph 102).

34. The statement of the arbitral tribunal can be assumed to have been made by mistake or misunderstanding. Since Belgor must be deemed to have made its position clear, the arbitral tribunal has had no grounds for its understanding. Therefore, a procedural error occurred.

35. As regards the procedural error's effect, Belgor has invoked evidence aimed at one invoice in respect of a partial amount. As far as has been presented, the error's quantitative effect with respect to that invoice amounted to a few days of accrued interest. The procedural error's effect on the outcome of the arbitral award concerning the interest cannot – irrespective of whether there were one or several invoices for which there was a difference between the invoice date and the interest commencement date – have been of any reasonable importance to Belgor. Therefore, the action concerning this issue shall be rejected.

36. Upon this outcome, the Supreme Court will not review Koca's objection that the arbitral tribunal made a review of the merits of the meaning of the provision of interest of the agreement.

Did the arbitral tribunal commit a procedural error by not giving Belgor the opportunity to present its case?

The parties' position before the Supreme Court

37. Belgor has asserted that the arbitral tribunal dismissed the company's requests for an extension of time to submit an expert report and that the tribunal should appoint an independent expert. Thereby, Belgor was deprived of the opportunity to establish that Koca's works were defective. Therefore, the arbitral tribunal has committed a procedural error, which was not caused by Belgor and which affected the outcome of the arbitration.

38. According to Koca, the arbitral tribunal has not committed a procedural error. In the event that this nevertheless would be deemed the case, Belgor has caused the error through its procedural actions.

Legal starting points

39. The arbitral tribunal shall, within the framework of their conduct of the case, give the parties the opportunity to sufficiently present and argue their respective cases (see the Swedish Arbitration Act, Section 24, paragraph 1 and the SCC Arbitration Rules 2010, article 19.2). In an arbitration under the SCC Arbitration Rules 2010, the arbitral tribunal is entitled to conduct the arbitration in such manner as it considers appropriate. A provisional time table shall be established. The arbitral tribunal has mandate to decide on, amongst other things, when submissions shall be submitted including such documents that the parties wish to invoke. The tribunal and the parties should

act with care to follow the adopted provisional time table for it to be carried through. The tribunal may grant a party an extension of time if the extension is not deemed inappropriate. In that assessment, regard should be given to at what stage of the proceeding the decision will be taken, the prejudice the extension could cause the other party as well as other circumstances. (See articles 19 and 23–25 of the rules.)

40. It is the arbitral tribunal who has the best position to assess whether a request for an extension shall be granted or rejected, while considering the reasons presented by the parties. As a starting point, the decision of the arbitral tribunal should hold, unless the decision appears indefensible. In this assessment, regard should be given to the case-law which exists concerning article V 1 (b) of the New York Convention (see also “Robot Grader” NJA 2018 p. 291, particularly paragraph 15 ff.).

41. Another prerequisite for the arbitral tribunal’s conduct with a request for an extension leading to the setting aside of the arbitral award is that the challenging party did not itself cause its predicament. It is required that the party in the arbitration has invoked such circumstances which show that it was prevented from presenting and arguing its case in a timely manner and that this was due to circumstances beyond the party’s control and which the party should not have foreseen, and that undoubtedly acceptable alternatives to present and argue the case did not exist.

42. A rejection of a party’s request that the arbitral tribunal itself shall appoint an expert cannot constitute a procedural error, unless otherwise provided by the arbitration agreement.

The conclusions in the action at issue

43. On 16 May 2013, the arbitral tribunal issued a provisional time table. Belgor requested an extension of time to submit its Statement of Defense from 26 October 2013 until 5 June 2014 in order to be able to submit an expert opinion together with its Statement of Defense. The tribunal granted an extension until 1 December 2013. On 7 March 2014, the tribunal decided, after consultations with the parties, that the main hearing should be held on 10–12 September 2014.

44. On 11 July 2014, Belgor requested that it should be allowed to submit an expert opinion, this time by 15 October 2014. Koca objected to the request. The arbitral tribunal rejected Belgor's request since such an extension would require a postponement of the main hearing. Belgor was given the opportunity to submit an expert opinion by 11 August 2014, to be based on the knowledge available to the expert at said time. The arbitral tribunal stated that it would be possible to request, at a later time, to submit a supplement to the expert opinion.

45. During the main hearing, Belgor again requested to be allowed to submit an expert opinion at a later date. The arbitral tribunal rejected the request, since it would delay the proceeding without justifiable cause. The arbitral tribunal also stated that such an opinion could not have any material impact on Koca's case. According to the tribunal, the relevance of the opinion would be limited to Belgor's counterclaim. The arbitral tribunal noted that its decision would not prevent Belgor from withdrawing its counterclaim and start a new arbitration with that claim.

46. Following Belgor's request in January 2015 that the arbitral tribunal should appoint an expert to review the quality of Koca's works, and the tribunal's rejection thereof, the arbitral award was rendered on 3 April 2015.

47. With regard to what has been presented concerning the arbitral proceeding, Belgor has not established that the arbitral tribunal's dealing with the proceeding has been indefensible. Thus, the action in this respect shall be rejected.

Did the arbitral tribunal commit a procedural error by giving an arbitral award which was not based on the evidence?

48. Belgor has asserted that the arbitral tribunal granted Koca's actions, despite Koca not having presented any evidence in support of its requests for compensation for machinery and equipment. Koca has stated that evidence was invoked, and that the arbitral tribunal reviewed Belgor's objections on their merits.

49. The arbitral tribunal's assessment of questions of burden of proof and evidentiary thresholds form part of the review of the merits. Even if the arbitral tribunal had committed an error in any of these respects, it would not constitute an excess of the mandate, nor a procedural error.

50. Belgor has not established that any excess of mandate or procedural error occurred, therefore the company's actions shall be rejected also in this respect.

Litigation costs

51. Upon this outcome, Belgor shall compensate Koca for its litigation costs before the Court of Appeal.

52. Belgor shall also compensate Koca for its litigation costs before the Supreme Court.

53. When determining the reasonableness of the claimed amounts, it should be taken into account how the total costs for legal counsel are allocated on each respective party in each respective court. There are no grounds to question the amount claimed by Koca before the Court of Appeal.

54. Belgor has objected to Koca's claim for compensation before the Supreme Court, with reference to, amongst other things, the fact that the replacement of counsel has increased the costs. Belgor has also disputed that compensation shall be awarded for a certain expense. It is undisputed that Koca's costs increased as a result of the replacement of counsel. The increase in costs is not related to any circumstance on the part of Belgor. The Supreme Court finds that the compensation for cost for legal counsel before the Supreme Court reasonably shall amount to SEK 700,000. Koca's claim for compensation for expenses does not state what expenses it relates to. Therefore, the claim shall be rejected in that respect.

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The judgment has been made by: Supreme Court Justices JH, IP, LE, SJ and ER (reporting Justice)
Reporting clerk: LS