Svea Court of Appeal, Case T 10321-06 (10 December 2008)

RULING OF THE COURT OF APPEAL

1. The Court of Appeal rejects Korsnäs' request that the arbitration award shall be set aside in so far as it concerns payment of compensation to B.N..

2. The Court of Appeal denies Korsnäs' action in the other parts.

3. Korsnäs shall compensate Fortum for legal costs in the Court of Appeal to an amount of SEK 615 142, whereof SEK 615 000 relates to counsel's fee, together with interest in accordance with Section 6 of the Interest Act from the date of the Court of Appeal's ruling until payment is made.

BACKGROUND TO THE DISPUTE

On 29 September 2006, an arbitration award was issued in Stockholm following a dispute between Fortum and Korsnäs. In the arbitration proceedings, Fortum was represented by counsel from [the X law firm]. In May/June 2005, Fortum appointed the lawyer B. N as arbitrator. Korsnäs appointed the lawyer L.S as arbitrator. The arbitrators so appointed jointly appointed judge I.P as the third arbitrator and Chairman of the tribunal.

RELIEF SOUGHT IN THE COURT OF APPEAL

Korsnäs has requested that the Court of Appeal set aside the arbitration award issued on 29 September 2006, in substance as well as with respect to costs and compensation to B.N. (items 1-3 and 4 b in the [award]).

Fortum has contested Korsnäs' requests.

Both parties have claimed compensation for legal costs in the Court of Appeal.

LEGAL GROUNDS FOR THE CLAIMS

Korsnäs

There have been circumstances that could diminish the confidence in arbitrator B.N.'s impartiality. The arbitration award shall therefore be set aside (cf. Section 8, first paragraph, and Section 34, first paragraph, item 5 of the Arbitration Act). Since the compensation paid to B.N. has been of no use for Korsnäs, the arbitration award shall be annulled also in respect of compensation to B.N..

Fortum

No circumstances exist which could diminish the confidence in B.N.'s impartiality. There is therefore no reason to set aside the arbitral award. If the Court of Appeal finds that the award shall be set aside, it is left to the court to determine whether such

annulment of the award also can apply to the part of the arbitral award which relates to the determination of the compensation to B G.H N.

THE PARTIES' PLEADING OF THE CASE

The parties have presented the following arguments in support of their respective cases.

Korsnäs

During a period of three years up until May/June 2005 when he was appointed arbitrator in the dispute between Fortum and Korsnäs, B.N. has had 25 appointments as an arbitrator. In five of these arbitrations, one of the parties has been represented by counsel from [THE X LAW FIRM], *i.e.* the law firm which represented Fortum in the arbitration proceedings. Besides the appointment as party appointed arbitrator in the dispute between Fortum and Korsnäs, B.N. has been appointed arbitrator by parties represented by [THE X LAW FIRM] on two other occasions. In addition, he has been appointed as chairman of the tribunal by arbitrators appointed by parties represented by [THE X LAW FIRM], whereby [THE X LAW FIRM] indirectly could influence the appointment of B G. H. N as chairman of the tribunal. In accordance with the IBA Guidelines on Conflicts of Interest in International Arbitration (the "IBA Rules"), which reflects an international standard in this area, this constitutes circumstances that might reduce the confidence in the arbitrator's impartiality. Section 8, second paragraph of the Arbitration Act provides that already a circumstance which could undermine the confidence of the arbitrator's impartiality is sufficient to constitute disqualification. Applying an objective approach, already the five named arbitration appointments constitute circumstances that typically diminish the confidence in B.N.'s impartiality.

Moreover, and although Section 9 of the Arbitration Act and the IBA Rules provide that an arbitrator has an obligation to disclose all circumstances which might be considered to prevent him from serving as arbitrator. B. N failed to inform Korsnäs about these appointments before and during the arbitration, B.N. has through his actions deprived Korsnäs of the opportunity to challenge him as an arbitrator, which in itself diminishes the confidence in his impartiality. B.N.'s failure to inform Korsnäs about his ties to [THE X LAW FIRM] constitutes a further circumstance which shows that he was not impartial.

Subsequent to the rendering of the award it came to Korsnäs' attention that B.N. in the recent years possibly had received several appointments as arbitrator by [THE X LAW FIRM]. Korsnäs therefore contacted B.N. and asked for details about these appointments. B.N.'s response was to some extent evasive and limited to an incorrect period. Moreover, B.N. refused to provide further information relevant for the assessment of the impartiality issue. B.N.'s behavior in this respect constitutes a further additional circumstance which objectively questions B.N.'s impartiality.

Finally, Korsnäs invokes that B.N. during a ten year period has had an unknown number of additional appointments as an arbitrator, which have originated from his contacts with [THE X LAW FIRM]. By way of example, in September 2001, *i.e.* three years and eight months before he was appointed arbitrator in the dispute in question, he was appointed as arbitrator by a party which was represented by counsel from [THE X LAW

FIRM]. Also these appointments are invoked in support of the assertion of B.N.'s lack of impartiality.

Fortum

It is correct that B.N. during the last three years prior to the appointment as arbitrator in the dispute between Fortum and Korsnäs had 25 arbitrator appointments. Besides the current dispute, counsel from [THE X LAW FIRM] participated in five of these arbitrations. In one of these cases, B.N. was appointed by the adverse party to the party represented by counsel from [THE X LAW FIRM] and, in two cases, he was appointed by parties represented by counsel from [THE X LAW FIRM]. In two cases he was appointed chairman of the tribunal by the party appointed arbitrators. The two appointments as chairman are not relevant since appointments as chairman of the tribunal cannot constitute a disqualifying circumstance. B.N. is therefore not to be disqualified according to the IBA Rules, which are not binding but can serve as guidance when determining whether an arbitrator is disqualified or not.

On 4 October 2005, *i.e.* after the rendering of the award, B.N. received a number of questions from O.N. regarding his previous appointments as arbitrator. B.N. did not refuse to answer O.N's questions but provided the information he felt was relevant.

Fortum does not know how many arbitration appointments B.N. received during the ten years prior to his appointment as arbitrator in the dispute between Fortum and Korsnäs. However, not only the number of appointments as party appointed arbitrator should be considered. In the overall assessment which shall be made, it must also be taken into consideration that B.N. had not been dependent on appointments by parties represented by counsels from [THE X LAW FIRM]. The conclusion is therefore that there have not been any circumstances that could diminish the confidence in B.G. H. N's impartiality, and he has therefore not been required to inform Korsnäs about his previous arbitrator appointments.

EVIDENCE

In the Court of Appeal witness examinations have been held with B G. H. N and professor E.N at the request of Korsnäs and with professor emeritus J.R at the request of Fortum.

REASONS

An action regarding payment of compensation to an arbitrator shall be brought in the District Court and directed against the concerned arbitrator (cf. Section 41 of the Arbitration Act). The request made by Korsnäs concerning the compensation to B. N is therefore not admissible in this case. Korsnäs request must therefore be rejected in this part.

According to Section 8, first paragraph of the Arbitration Act, an arbitrator must be impartial. The second paragraph of Section 8 sets out typical examples of circumstances which always should be deemed to diminish confidence in the arbitrator's impartiality. Section 9 provides that a person who is asked to accept an appointment as arbitrator

shall immediately inform the parties and the other arbitrators about all circumstances which, pursuant to Section 8, might be considered to prevent him or her from serving as arbitrator. If an arbitrator is unauthorized due to any circumstance set forth in Section 8, the arbitration award shall according to Section 34, first paragraph, item 5, be wholly or partially set aside upon application of a party. The same applies if an arbitrator has not met the basic requirement set out in Section 7, that he or she possesses full legal capacity in regard to his or her actions and his or her property.

The Swedish Arbitration Act thus rests on the principle that all arbitrators, also the party appointed, shall be impartial. Since flaws with respect to the evaluation of evidence or questions of law cannot lead to an arbitration award being set aside, a high standard is set for the requirement of arbitrators' objectivity and impartiality. This means that if there in a certain case exists a circumstance that typically means that an arbitrator cannot be considered as impartial, the arbitrator must not participate in the arbitral proceedings even if there is no reason to suppose that the arbitrator in fact would be influenced by his/her relationship to one of the parties in the handling or determination of the particular case in question.

The requirement that an arbitrator objectively must be impartial is not affected by the fact that the arbitration proceedings have come to an end and that the award already has been rendered. If the circumstance which diminishes the confidence in the arbitrator's impartiality becomes known only after the rendering of the award, the arbitration award may be set aside after a challenge, despite the fact that there is no support for the conclusion that the arbitrator has acted partially in the arbitration.

Provisions with essentially the same meaning as the ones mentioned in the foregoing can be found in, *inter alia* the IBA Rules, to which Korsnäs refers. These rules, as well as other domestic and international arbitration rules, serve as important guidelines for counsel and arbitrators and have also some relevance as background material when the Court of Appeal now is trying the case applying the provisions of the Arbitration Act.

Korsnäs has especially referred to article 3.3.7 of the IBA Rules. This provision, read together with other provisions in the IBA Rules, illustrate that the fact that an arbitrator over the past three years has received more than three appointments from the same counsel or the same law firm, may, from the parties' point of view, give rise to a justified concern with respect to the arbitrator's impartiality or independence. The arbitrator is therefore obligated to inform the parties in case such a situation occurs. The IBA Rules also provides (cf. section II article 5) that the situation that an arbitrator has neglected to inform the parties about the existence of a circumstance which could disqualify the arbitrator, does not in the subsequent determination of the matter in itself lead to the conclusion that the arbitrator has not been impartial. Only the circumstances he or she has omitted to disclose may lead to such conclusion. In addition, it could be mentioned that it follows from the IBA Rules (cf. section II articles 6 and 7) that the three year period is approximate and that an arbitrator has no obligation to inform the parties about appointments falling outside this time frame.

Primarily, Korsnäs has argued that B. N during a period of three years up until May/June 2005, when he was appointed as arbitrator in the dispute between Fortum and Korsnäs, had five arbitrator appointments where one of the parties was represented by

counsel from [THE X LAW FIRM] and that as a result, and with the application of the principles stated in the IBA-Rules, there existed circumstances which typically can diminish the confidence in B.N.'s impartiality. Fortum has confirmed B.N's five appointments in question but objected that the two appointments as chairman and the appointment as arbitrator in the dispute between Fortum and Korsnäs are not relevant for the assessment which now shall be made.

A condition for an arbitral award to be set aside under Section 34, first paragraph, item 5 of the Arbitration Act, is that the arbitrator *has been* disqualified**.** It follows that the question whether B.N. is to be disqualified in the dispute between Fortum and Korsnäs should be considered only taking into account the arbitrator appointments held prior to the appointment as arbitrator in this dispute.

The arbitrator who is appointed chairman of the tribunal is, with certain exceptions (cf. Section 15 of the Arbitration Act), appointed by the two party appointed arbitrators. Although a party appointed arbitrator usually allow the party who appointed him or her to comment on the suggested chairman and that the parties therefore in practice may have some influence on the matter, it cannot in the Court of Appeal's opinion be relevant to consider previous appointments as chairman of the tribunal when assessing whether or not an arbitrator has been impartial.

The starting point when assessing the issue of impartiality is therefore that B.N. during the three years period leading up to the appointment as arbitrator in the dispute between Korsnäs and Fortum on two occasions has been appointed as arbitrator by a party represented by counsel from [THE X LAW FIRM]. Since the IBA Rules provides that an arbitrator during the given period has to have been appointed more than three times, *i.e.* at least four times, by the same counsel or law firm to be considered impartial, B.N. cannot with reference to these rules be considered prevented from serving as an arbitrator in the arbitration between Korsnäs and Fortum.

Korsnäs has furthermore argued that B.N's omission, in violation of Section 9 of the Arbitration Act, to inform the parties about his ties to [THE X LAW FIRM] constitute an additional factor which shows that he was not impartial. Korsnäs has also referred to B.N.'s behavior in connection with the questions raised by Korsnäs' counsel concerning his previous appointments as arbitrator after the arbitral award was rendered.

As previously stated, a condition for setting aside an arbitral award pursuant to Section 34, first paragraph, item 5 of the Arbitration Act is that the arbitrator was disqualified due to any circumstance set out in Section 7 or 8. It follows by the wording of the Section that neither circumstances which has occurred subsequent to the announcement of the arbitral award nor a breach of the disclosure obligation set out in Section 9 of the Arbitration Act may lead to the award being set aside due to the reason that the arbitrator was disqualified.

Finally, Korsnäs has in support of its allegation of B.N.'s lack of impartiality invoked that he during the ten year period preceding his appointment as arbitrator in the dispute between Korsnäs and Fortum has had an unknown number of additional appointments as arbitrator which have ultimately been results of his contacts with [THE X LAW FIRM].

B.N. has explained that he during the period of 22 June 1995–29 September 2006 had 114 appointments as party appointed arbitrator, one of which is the appointment in the arbitration between Korsnäs and Fortum and one is an appointment which was received in 2006, *i.e.* after the point in time he was appointed as arbitrator in the dispute in question. B.N. has thus had 112 appointments as arbitrator during the ten year period prior to the arbitration now in question. Out of the 114 appointments accounted for by B.N., 13 have originated from a party represented by a counsel from [THE X LAW FIRM], including the appointment as arbitrator in the dispute between Fortum and Korsnäs. The starting point for the determination is thus that B.N. during the relevant ten year period have had 112 appointments as arbitrator and that twelve of these have come from by a party represented by counsel from [THE X LAW FIRM].

There are good reasons to suspect that an arbitrator, who regularly receives appointments by parties represented by counsel from one and the same law firm, in his/her fulfillment of his/her appointment not always manages to disregard his/her own economic interest in acquiring future appointments from this law firm. The fact that a certain law firm often contributes to an arbitrator being appointed may therefore diminish the confidence in this arbitrator's independency. The number of appointments from a party represented by counsel from one and the same law firm can, however, not alone be decisive for the question whether an arbitrator was disqualified to participate in the arbitration. The issue whether there have existed any circumstances which may have diminished the confidence in the arbitrator's impartiality shall instead be determined based on an overall assessment taking all relevant circumstances into consideration. When making this assessment it may be taken into consideration for example whether the arbitrator has received appointments exclusively from the law firm in question and whether the appointments he has received from that law firm constitute a major or a minor part of his arbitrator engagements. Whether it is the same lawyer which has contributed to these appointments is also of relevance (cf. Stefan Lindskog, Skiljeförfarande. En kommentar (*Arbitration – A Commentary*), p. 453 note 68).

B.N. has stated the following in relation to his professional work. He is a partner of the [Law Firm] and is head of the firm's litigation department. The firm has 15 partners and the profits are shared between all the partners. His special field of practice is arbitration and he works both as counsel and as arbitrator in these proceedings. In terms of profitability the appointments as counsel are the most attractive. He regularly receives appointments as arbitrator from different lawyers at app. ten large law firms, of which [THE X LAW FIRM] is one. However, he does not feel dependent on any particular law firm. Due to his work load, he must often reject arbitrator appointments.

During the relevant ten years period, a significant part, close to ten percent, of B.N.'s appointments as party appointed arbitrator has had connections to counsel from [THE X LAW FIRM]. The major part of his appointments has, however, originated from other law firms. When it comes to the appointments with connection to [THE X LAW FIRM] it has not transpired that the same lawyer, or only a few lawyers, at [THE X LAW FIRM] have represented the parties appointing him as arbitrator. It is also of significance that according to the information provided by B.N., he has seemingly not in a proper sense been economically dependent on receiving appointments as arbitrator by the parties which have been represented by counsel from [THE X LAW FIRM]. In light of the above, the Court of Appeal finds that, based on an overall assessment, there has

objectively been no circumstances that may have diminished the confidence in B.N.'s impartiality. Korsnäs' action shall therefore be denied.

[costs]

The Court of Appeal is of the view that the challenge of the award gives rise to issues which are of importance as a matter of precedent and that the appeal be considered by the Supreme Court. The Court of Appeal therefore grants leave to appeal the judgment (cf. Section 43 of the Arbitration Act).