SVEA COURT OF APPEAL	**MINUTES**	Case Document No.
Department 02	30 September 2014 and	13
Division 020108	11 February 2015	Case No.
	Stockholm	Ö 4508-14

THE COURT
Judges of Appeal CJ, PS, reporting Judge of Appeal, and DÖ as well as Deputy Associate Judge RV

REPORTING AND KEEPER OF THE MINUTES
Court clerk MK

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MATTER
Permissibility of motion for affirmation

APPEALED DECISION
Decision by Stockholm District Court of 14 April 2014 in case No. T 7747-11, see appendix A

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The appellants are hereinafter referred to as “Interneft and the Regions”. The counterparty is hereinafter referred to as “Elf Neftegaz”.

Before the District Court, Elf Neftegaz moved that the District Court should affirm that (i) Elf Neftegaz is not bound by any arbitration agreement with Interneft and the Regions and, in the event that the District Court would conclude that Elf Neftegaz is bound by an arbitration agreement with any one of Interneft and the Regions, that (ii) the arbitrators in the arbitration proceedings UNCITRAL 019/2011 lack jurisdiction to resolve the dispute, or alternatively, that the arbitration clause of the cooperation agreement does not grant the arbitral tribunal jurisdiction to resolve the dispute.

In support of its motion (ii) Elf Neftegaz has referenced the following.

(a) The relevant agreement and arbitration clause never entered into force.
(b) In the event that an arbitration clause would be deemed to have entered into force, Interneft and the Regions are not parties to the arbitration clause.
(c) The arbitration proceedings opened by Interneft and the Regions constitute, due to their illegitimate purpose, a measure which obviously violates fundamental principles of Swedish law.
(d) The relevant arbitral tribunal was not properly formed and thus lacks jurisdiction.
(e) There is a procedural impediment to the arbitration proceedings, because Interneft and the Regions did not comply with agreed obligations prior to requesting arbitration.
(f) Interneft and the Regions did not send any request for arbitration to any authorized representative of Elf Neftegaz.

(g) The request for arbitration does not comply with the mandatory and agreed upon requirements applicable to a request for arbitration and is consequently without effect.

Interneft and the Regions moved that the District Court should dismiss Elf Neftegaz's motion for affirmation (ii).

Through the appealed decision, the District Court did not grant Interneft and the Regions' motion for dismissal.

Before the Court of Appeal, Interneft and the Regions have moved that the Court of Appeal shall grant their motion for dismissal.

Elf Neftegaz has disputed any change to the District Court's decision.

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

The parties have argued as before the District Court and provided further details.

DECISION (to be announced on 17 February 2015)

1. By amendment of the District Court's decision, the Court of Appeal dismisses Elf Neftegaz's motion (ii).

2. The Court of Appeal orders Elf Neftegaz to compensate Interneft and the Regions for their respective litigation costs before the Court of Appeal in the amount of SEK 306,090, all comprising costs for legal counsel. The amount shall accrue interest under Section 6 of the Swedish Interest Act as from the date of the Court of Appeal's decision until the day of payment.

Grounds for the decision

The Swedish Arbitration Act (1999:116), just as its predecessor, governs only arbitration proceedings based on arbitration agreements. This is set out in Section 1 of the Act. In order for arbitration proceedings to produce a valid arbitration award, there must be a valid arbitration agreement.

It is the arbitration agreement that grants jurisdiction to the arbitrators to resolve the dispute. In the absence of a valid and applicable arbitration agreement there can be no jurisdiction for the arbitrators. Having regard to, amongst other things, this fundamental importance of arbitration agreements, Swedish law permits that the existence of an arbitration agreement can be determined by a Swedish public court, irrespective of possible ongoing arbitration proceedings which have been opened based on the same arbitration agreement.

Section 2 of the Act deals with this issue. The first paragraph of that provision provides that the arbitrators may determine their own jurisdiction to resolve the dispute, but that this does not prevent a public court to review the issue. The wording of the provision implies that it is, in fact, the jurisdiction of the arbitrators that may be reviewed by the courts. However, the Court of Appeal concludes that the preparatory works clearly support that the provision governs the issue of whether the relevant arbitration agreement is valid and applicable, which, if so, would grant jurisdiction to the arbitrators. Thus, it is stated, amongst other things, (Government Bill 1998/99:35 p. 76) that: “The question of jurisdiction relates not only […] to the issue of the validity of the arbitration agreement, but also its scope and applicability to the relevant dispute.” It is further stated that a party, based on already applicable rules, at any point may open proceedings for an affirmation which would finally settle the issue of the “validity and applicability of the arbitration agreement” (Government Bill 1998/99:35 p. 77). The Court of Appeal finds that the preparatory works must be understood to mean that the intended issue is the validity and applicability of the arbitration agreement. They cannot be read to include also, for example, the issue of whether the arbitral tribunal lacks jurisdiction because it was not properly constituted. The fact that the provision does not explicitly govern the validity and applicability of the arbitration agreement is due to the provision having been worded in compliance with the terminology that has evolved in foreign jurisprudence, case law and legislation etc. Other provisions of the Swedish Arbitration Act do not support that a court may review – except within the scope of challenge proceedings under Sections 33 and 34 – whether the arbitral tribunal lacks jurisdiction due to other reasons than the absence of a valid and applicable arbitration agreement.

Thus, the Court of Appeal concludes that the issue governed by the second sentence of the first paragraph of Section 2 is only whether there exists a valid and applicable

arbitration agreement, which in turn grants jurisdiction to the arbitrators. Therefore, the provision does not grant courts the right to review a motion for affirmation as Elf Neftegaz's motion (ii).

In the Court of Appeal's opinion, the wording of the provision, read in conjunction with the preparatory works, as well as the Supreme Court's decision in NJA 2010 p. 508, further establishes beyond reasonable a doubt that the provision is a mere reminder of the possibility to open regular affirmation proceedings before public courts concerning the issue of whether there exists a valid and applicable arbitration agreement. Thus, the provision is not a provision as the one set forth in the third paragraph of Section 2 of Chapter 13 of the Swedish Code of Judicial Procedure.

Then, the question is whether Elf Neftegaz's motion (ii) may be reviewed based solely on the third paragraph of Section 2 of Chapter 13 of the Swedish Code of Judicial Procedure. On this issue, the Court of Appeal concludes as follows.

First, the provision requires that there is uncertainty about the legal relationship and that this uncertainty is detrimental to the claimant. The allegedly uncertain legal relationship must relate to the relationship between the claimant and the respondent, e.g. – as in this case – an agreement which one party asserts is applicable between them, and which the counterparty disputes. As Elf Neftegaz has framed its case, the company's motion (ii) shall be reviewed only if the court first has concluded that the company is bound by an arbitration agreement with respect to at least one of the counterparties. Thus, Elf Neftegaz's motion (ii) entails that the court, once it has established that there exists an arbitration agreement between the parties, which grants jurisdiction to the arbitrators, shall decide that the arbitrators nevertheless lack jurisdiction. Unlike the District Court, the Court of Appeal finds that such lack of jurisdiction is not a legal relationship covered by the relevant provision.

Even if this were the case, it would not, according to the Court of Appeal, be appropriate to review Elf Neftegaz's motion (ii). The reason is that one of the main purposes of the Swedish Arbitration Act is to prevent obstruction for the purpose of stalling arbitration proceedings (Government Bill 1998/99:35 p. 78). This purpose would speak against granting the respondent in an arbitration the opportunity to have the public courts review, for example, the individual arbitrators or the request for arbitration reviewed by public

courts while arbitration proceedings are ongoing. In the weighing of interests that is to be carried out when assessing the appropriateness of a motion for affirmation pursuant to the first paragraph of Section 2 of Chapter 13 of the Swedish Code of Judicial Procedure, the Court of Appeal concludes that there are compelling grounds against allowing a motion for affirmation such as the one brought by Elf Neftegaz in motion (ii).

Thus, the conclusion of the Court of Appeal is that Elf Neftegaz's first alternative motion under (ii) – for the affirmation that the arbitral tribunal in the arbitration UNCITRAL 019/2011 lacks jurisdiction to resolve the dispute – shall be dismissed.

With respect to Elf Neftegaz's second alternative motion under (ii) – for the affirmation that the arbitration clause of the cooperation agreement does not grant the arbitral tribunal in the relevant arbitration proceedings jurisdiction to resolve the dispute – the Court of Appeal concludes as follows. Elf Neftegaz has maintained that this is merely an alternative manner in which to express the same as what is maintained in the first alternative motion; the grounds for the motion are the same. Thus, according to Elf Neftegaz there is no actual difference between the two alternative motions. Against this background, the Court of Appeal concludes that there is no reason to draw other conclusions on the second alternative motion of Elf Neftegaz than with respect to the first. Therefore, also Elf Neftegaz's second alternative motion shall be dismissed.

Thus, Elf Neftegaz's motion (ii) shall be dismissed in its entirety.

Upon this outcome, Interneft and the Regions are entitled to compensation for their respective litigation costs before the Court of Appeal. The claimed amount is reasonable.

HOW TO APPEAL, see appendix B

Appeals to be submitted by 17 March 2015

MK

/minutes shown

STOCKHOLM DISTRICT COURT Department 4	**MINUTES** 14 April 2014 Decision in the absence of the parties	Case Document No. 378 Case No. T 7747-11

THE COURT
Judges HL (reporting Judge), MP and TZ

KEEPER OF THE MINUTES
Court clerk LH

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MATTER
Motion for affirmation; now question of permissibility of motion for affirmation

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The following is noted.

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Elf Neftegaz S.A. (Elf) is a French company which previously conducted prospecting activities in Russia and Kazakhstan. Elf is a member of the French Total group of companies, one of the world's biggest oil and gas groups. Elf underwent voluntary liquidation in 2005.

In 1992, a cooperation agreement was entered between Elf and the Russian company Interneft AOZT. The cooperation agreement governed intended prospecting and extraction of oil and gas in the Russian regions of Volgograd and Saratov (the Regions). The company Interneft AOZT had been incorporated by the Regions for the purpose of entering the cooperation agreement. Also the Regions signed the cooperation agreement. The entry into force of the cooperation agreement was conditional upon the fulfillment of certain conditions precedent set forth in the agreement.

The cooperation agreement contains an arbitration clause pursuant to which disputes between the parties, to the extent they cannot be resolved between the parties pursuant to certain conditions provided in the agreement, shall be resolved by ad hoc arbitration pursuant to the rules for arbitration of the United Nation Commission on International Trade Law (UNCITRAL) applicable at the time. The arbitration clause further provides that the place for possible arbitration proceedings shall be Stockholm, Sweden, and that the Arbitration Institute of the Stockholm Chamber of Commerce shall appoint the arbitrators.

In August of 2009, the company Interneft OOO and the Regions (jointly the Respondents) opened arbitration against Elf in Stockholm in reliance upon the arbitration clause of the cooperation agreement. The Respondents have maintained that Interneft OOO is to be deemed as the same company as Interneft AOZT. The arbitration (UNCITRAL 019/2011) is still ongoing.

Elf has opened the present case against the Respondents and moved that the District Court shall affirm (i) that Elf is not bound by any arbitration agreement with the Respondents, and, in the event that the District Court would conclude that Elf is bound by an arbitration agreement with any of the Respondents, (ii) that the arbitral tribunal in the dispute UNCITRAL 019/2011 lacks jurisdiction to resolve the dispute, or *alternatively*,

that the arbitration clause of the cooperation agreement does not grant the arbitral tribunal in the dispute UNCITRAL 019/2011 jurisdiction to resolve the dispute.

In support of its motion (ii), Elf has referenced the following grounds.

(a) The relevant agreement and arbitration clause never entered into force.
(b) In the event that an arbitration clause would be deemed to have entered into force, the Respondents are not parties to the arbitration clause.
(c) Due to the illegitimate purpose, the arbitration proceedings opened by the Respondents constitute a measure which obviously violates fundamental principles of Swedish law.
(d) The relevant arbitral tribunal was not properly formed and thus lacks jurisdiction.
(e) There is a procedural impediment to the arbitration proceedings, because the Respondents did not comply with agreed obligations prior to requesting arbitration.
(f) Interneft and the Regions did not send a request for arbitration to any authorized representative of Elf.
(g) The request for arbitration does not comply with the mandatory and agreed upon requirements applicable to a request for arbitration and is consequently without effect.

The Respondents, who have disputed the motions, have moved that the District Court shall dismiss Elf's motion (ii). The Respondents have further moved that the District Court shall consequently also dismiss the evidence referenced to establish the circumstances that would then be irrelevant to the case. The Respondents have further maintained that Elf's alternative motion is an unpermitted amendment to its case. In support of its motion for dismissal, the Respondents have mainly maintained the following.

Elf's motion for affirmation is not permissible under law. Section 2 of Chapter 13 of the Swedish Code of Judicial Procedure provides that motions for affirmation are only permitted concerning the continued existence of a legal relationship. Elf's motion (ii) does not at all reference any specific legal relationship between the parties, but revolves around the jurisdiction of the arbitrators *in abstracto*. The Respondents are not the

addressee of Elf's motion (ii) and the motion does not relate to any concrete legal consequence.

The court does not have jurisdiction to review the motion based on Section 2 of the Swedish Arbitration Act, since that provision only gives jurisdiction for a public court to review the issue of whether the arbitrators can base their jurisdiction on an agreement. Other than that, a party is only afterwards entitled to turn to the public courts for a review of whether an error has been committed in the arbitration, in proceedings pursuant to Sections 33, 34 and 36 of the Swedish Arbitration Act.

The first of Elf's motions for affirmation is not appropriate, because Elf's case constitutes anticipatory challenge proceedings. Elf's grounds (e)-(g) could be reviewed within the scope of challenge proceedings under item 6 of the first paragraph of Section 34 of the Swedish Arbitration Act. In order for such a motion to be granted, it is required that the error affected the outcome of the case. Since an affirmation judgment could not possibly include a review of the relevant requirement of causality, the prerequisite that the review is appropriate is not fulfilled.

Elf has maintained that the Respondents' motion for dismissal shall be rejected and has moved that the District Court shall decide that its decision, in the event that the District Court rejects the motion for dismissal, may be appealed only in conjunction with an appeal of the judgment or final decision in the case. Elf has mainly maintained as follows in support of its case.

Elf's motions are permissible. The court has jurisdiction to review the issue based on Section 2 of the Swedish Arbitration Act. The question of the jurisdiction of the arbitral tribunal is not limited only to the validity of the arbitration agreement in a narrow sense, but that the court may also review, for example, whether the relevant arbitration was opened pursuant to the provisions of the arbitration agreement.

The question of whether the arbitral tribunal has jurisdiction is a legal relationship, the existence of which can be determined by a motion for affirmation. This follows already from the wording of Section 2 of the Swedish Arbitration Act and the Supreme Court has confirmed that the jurisdiction of the arbitral tribunal is such a legal relationship at which the provision in Section 2 of Chapter 13 of the Swedish Code of Judicial Procedure takes

aim (NJA 2010 p. 508). In the event that the District Court would conclude that the issue of the arbitral tribunal's jurisdiction cannot be deemed a legal relationship between the parties, then Elf's motion shall nevertheless not be dismissed. In instances where specific legal provisions provide that motions for affirmation may be reviewed, then the applicable legal provisions shall apply, and the general requirements of Section 2 of Chapter 13 of the Swedish Code of Judicial Procedure need not be met.

Elf's case does not involve anticipatory challenge proceedings. Grounds that may be referenced in challenge proceedings may also be referenced in support of a case under Section 2 of the Swedish Arbitration Act. None of the grounds referenced by Elf relate to procedural errors or errors occurring during the proceedings which would be subject to review within the scope of challenge proceedings under item 6 of the first paragraph of Section 34 of the Swedish Arbitration Act.

Following a review of the documents in the case file, the District Court takes the following

DECISION

Grounds

Does the District Court have jurisdiction to review motion for affirmation (ii)?

Because the parties have agreed that arbitration proceedings shall take place in Sweden, the Swedish Arbitration Act is applicable. Section 2 of the Swedish Arbitration Act provides that the arbitrators may determine their own jurisdiction to resolve the dispute. Such a review does not prevent public courts from, while the arbitration is ongoing, upon the request of a party, determining whether the arbitrators have jurisdiction.

In the dispute, the Respondents have maintained that the review of jurisdiction governed by Section 2 is the question whether the arbitral tribunal has grounds in an agreement to resolve the dispute submitted to it and that public courts, while arbitration proceedings are ongoing, may not review any other objections to the jurisdiction.

Elf's grounds for its motion for affirmation include three types of objections to jurisdiction. Elf's grounds (a) and (b) are objections to jurisdiction relating to the validity

and applicability of the arbitration agreement. Elf's grounds (c) is based on the assertion that the arbitration proceedings opened by the Respondents violate fundamental principles of Swedish law. Elf's grounds (d-g) are based on lacking fulfillment of the provisions of the arbitration agreement when the arbitration was opened.

As Elf's motions have been worded, the District Court will when reviewing the claimant's case first determine whether Elf is bound by an arbitration agreement with the Respondents and within the scope of that review consider grounds (a) and possibly (b). Only in the event that the District Court would conclude that Elf is bound by an arbitration agreement with any of the Respondents will the District Court review Elf's alternative motion. The grounds that will then become relevant are (c) – (g), i.e. objections to jurisdiction based on lacking fulfillment of the provisions of the arbitration agreement when the arbitration was opened and the objection relating to the assertion that the arbitration violates fundamental principles of Swedis law. Thus, the question the District Court is tasked with resolving is whether the court under Section 2 of the Swedish Arbitration Act has jurisdiction to review this type of objections to jurisdiction.

Section 2 of the Swedish Arbitration Act provides no limitations in the possibility for a party to have the jurisdiction of the arbitral tribunal reviewed by public courts while the arbitration is still ongoing. The preparatory works to Section 2 of the Swedish Arbitration Act state that a party is not prevented from seeking court review of the question of the arbitrators' jurisdiction. It is further provided that the fact that an objection to jurisdiction may be raised within the scope of challenge proceedings does not render the object impermissible (Government Bill 1998/99:35 p. 78). However, it is understood from the preparatory works that the purpose of the provisions is to grant jurisdiction to public courts to review whether the parties are bound by an arbitration agreement and if the arbitral tribunal thus has jurisdiction to resolve the dispute. Amongst other things, it is stated that the question of jurisdiction does not only relate to the validity of the arbitration agreement, but also to its scope and applicability to the relevant dispute (Government Bill 1998/99:35 p. 76). The preparatory works do not state whether public courts have jurisdiction to review other types of objections to jurisdiction, such as whether the arbitral tribunal lacks jurisdiction because the arbitration was not opened properly. The fact that

such an objection has not been explicitly mentioned as permissible, does not according to the District Court, mean that such a court review would be ruled out.

The preparatory works provide some support that Section 2 of the Swedish Arbitration Act should be interpreted so that questions which the arbitrators may review within the scope of their jurisdiction may also be subjected to review by the public courts (Government Bill 1998/99:35 p. 76). The preparatory works provide that the arbitrators should review whether the arbitration award will become invalid due to violations of *ordre public* (Government Bill 1998/99:35 p. 214). The arbitrators ought also within the scope of their jurisdiction determine whether the arbitration was opened properly (Lindskog, Skiljeförfarande, en kommentar, 2nd ed., 2012, the commentary to Section 2 of the Swedish Arbitration Act, paragraph 4.1). This implies that Section 2 should be given a wide interpretation.

However, statements in jurisprudence support the interpretation of Section 2 of the Swedish Arbitration Act proposed by the Respondents. In jurisprudence, the review of jurisdiction under Section 2 is generally described so that public courts have jurisdiction to determine whether an arbitration agreement is valid or applicable to the relevant dispute and thus grant jurisdiction to the arbitral tribunal (see, amongst others, Heuman, Skiljemannarätt, 1999 p. 361, Kvart and Olsson, Tvistelösning genom skiljeförfarande, 3rd ed., 2012, p. 66 f, and Cars, Lagen om skiljeförfarande, 3rd ed., 2001, p. 55). Stefan Lindskog has analyzed the question whether public courts also have jurisdiction to determine whether the arbitral tribunal has jurisdiction with respect to whether the arbitration was properly opened (Lindskog, paragraphs 4.1 and 5.1). Lindskog's conclusion is that public courts have jurisdiction to review whether the arbitral tribunal has jurisdiction in relation to whether the arbitration was opened properly (Lindskog, paragraphs 4.1 and 5.1). Also Lars Heuman interprets Section 2 in this manner. In the present case, Elf has submitted a legal opinion from Heuman, in which Heuman expresses that the jurisdiction of the court to determine questions of jurisdiction should encompass all issues of impediments to review the merits and that the court thus has jurisdiction to determine, e.g., the question whether the arbitration was properly opened (legal opinion by Lars Heuman of 29 November 2013, p. 1).

The intentions behind the provision indicate that public courts should have jurisdiction to review questions of jurisdiction which relate both to the applicability of the arbitration agreement as well as other types of objections to jurisdiction. Permitting the parties to challenge jurisdiction before public courts while the arbitration is ongoing serves procedural economy. If the review of jurisdiction does not happen until after the arbitration has been completed, it could lead to additional costs. It is true that there is a risk that a wide interpretation of Section 2 of the Swedish Arbitration Act could lead to parties attempting to obstruct ongoing arbitrations by raising objections to jurisdiction. However, ongoing proceedings before public courts do not prevent the continuation of the arbitration.

Considering the above, the District Court does not find grounds to interpret Section 2 of the Swedish Arbitration Act in such a way as to limit the review carried out by public courts to only cover whether a valid and applicable arbitration agreement is at hand, but that also other types of objections to jurisdiction shall be eligible for court review.

Thus, the District Court has jurisdiction to decide on motion for affirmation (ii) pursuant to Section 2 of the Swedish Arbitration Act.

Does Elf's motion (ii) constitute an impermissible motion for affirmation under Section 2 of Chapter 13 of the Swedish Code of Judicial Procedure?

The provisions of Section 2 of Chapter 13 of the Swedish Code of Judicial Procedure are applicable also to objections to jurisdiction under Section 2 of the Swedish Arbitration Act. The third paragraph of Section 2 of Chapter 13 of the Swedish Code of Judicial Procedure provides that in the event that other legislation provides that motions for affirmation may be reviewed in certain cases, those provisions shall apply. Elf maintains that this means that objections to jurisdiction under Section 2 of the Swedish Arbitration Act do not need to fulfill the general requirements posed on motions for affirmation. The Supreme Court has recently decided the issue and stated that the provisions of the said Section on the prerequisites to lodging motions for affirmations are applicable also to cases on jurisdiction under Section 2 of the Swedish Arbitration Act (NJA 2010 p. 508).

Using this as a starting point, the District Court will turn to a review of the Respondent's objections on the permissibility of the motions for affirmation.

Section 2 of Chapter 13 of the Swedish Code of Judicial Procedure provides that the permissibility of motions for affirmation is limited. In order for such a motion to be permissible, it is required that it relates to the issue of whether or not a specific legal relationship exists. Further, it is required that there is uncertainty concerning the legal relationship and that this is detrimental to the claimant. Beyond this, it is required that the motion, taking into account the surrounding circumstances, is deemed appropriate.

In order for Elf's motion for affirmation to be permissible, it is thus required that it relates to whether a specific legal relationship exists or not. This means that it must relate to a concrete legal relationship between the parties (NJA 2007 p. 718). The case may not relate merely to purely factual circumstances. A prerequisite for the motion to relate to a legal relationship and not factual circumstances is that the motion explicitly takes aim at no less than one specific legal consequence (Fitger *et al*., the commentary to Section 2 of Chapter 13 of the Swedish Code of Judicial Procedure).

The Respondents maintain that what could constitute a legal relationship in the sense set forth in Section 2 of the Swedish Arbitration Act is whether there is a valid arbitration agreement between the parties. Further, the Respondents have maintained that Elf's motion for affirmation (ii) does not relate to the affirmation of any concrete legal relationship between them and that the motion does not specify any concrete legal consequence.

Elf's motion entails that the court shall affirm whether or not the arbitral tribunal in ongoing arbitration proceedings between the parties has jurisdiction to resolve the dispute. That this could be deemed to constitute a concrete legal relationship between the parties, albeit that the arbitral tribunal is the addressee, is supported by the aforementioned NJA 2010 p. 508. Also the wording of Section 2 of the Swedish Arbitration Act supports this interpretation.

That Elf as grounds for its motion for affirmation (ii) has referenced factual circumstances that the court may have to decide on in order to determine whether the arbitral tribunal has jurisdiction to resolve the dispute does not render the motion impermissible to the extent that the legally relevant circumstance to which they relate, that the arbitral tribunal lacks jurisdiction, relates to a specific legal consequence (cf.

Lindell, Civilprocessen, 3rd ed., 2012, p. 228). In the event that the District Court would grant Elf's motion, this would have the consequence that the arbitral tribunal lacks jurisdiction to resolve the relevant dispute between the parties. A final, unappealable judgment would be binding on the arbitral tribunal and would finally settle the issue (Government Bill 1998/99:35 p. 77, Heuman, Skiljemannarätt, p. 361 and 363). As a consequence, the arbitration must be closed. In the event that an arbitration award has already been given, the court's decision would have prejudicial effect in possible challenge proceedings (cf. Lindskog, paragraph 5.2.3). This means that the motion for affirmation relates to a specific legal consequence. Therefore, the prerequisites of Section 2 of Chapter 13 of the Swedish Code of Judicial Procedure must be deemed fulfilled.

Is the motion for affirmation (ii) appropriate?

In the present case, the Respondents have maintained that Elf's motion constitutes anticipatory challenge proceedings and is therefore not appropriate. The District Court has understood the Respondents' objection to be that Elf's case revolves around whether procedural rules have been breached, which could be the subject of proceedings under Sections 33 and 34 of the Swedish Arbitration Act, and does not relate to the affirmation of a legal relationship. The District Court has concluded that the motion does relate to the affirmation of a concrete legal relationship. The objections raised against the motion for affirmation are objections that could be raised within the scope of invalidity proceedings under Section 33 or challenge proceedings under Section 34 of the Swedish Arbitration Act. The fact that an objection could be brought in the form of future invalidity or challenge proceedings does not, however, entail that the objection cannot be brought as an objection to jurisdiction under Section 2 of the Swedish Arbitration Act (Government Bill 1998/99:35 p. 78).

The fact that raised objections could be brought in the form of invalidity or challenge proceedings could, however, entail that it would not be appropriate for the District Court to review the motion for affirmation. If the arbitration proceedings can be expected to close in the near future, then Elf could challenge the arbitration award through invalidity or challenge proceedings and the fact that the objection to jurisdiction is not reviewed now would not be detrimental to Elf. Thus, it can be questioned whether a review of the jurisdiction under Section 2 of the Swedish Arbitration Act is appropriate in such a

situation, particularly since the jurisdiction may be appealed in two instances, whereas challenge proceedings as a main rule are not subject to appeal (cf. NJA 2010 p. 508). As far as the District Court gathers, the arbitration is still ongoing and no arbitration award will be rendered in the near future. In this sense, the motion for affirmation is not inappropriate.

The Respondents have maintained that Elf's grounds (e)-(g) could be tried within the scope of challenge proceedings under item 6 of the first paragraph of Section 34 of the Swedish Arbitration Act. For such a challenge to be granted, it is required that the error affected the outcome of the case. The Respondents have maintained that the requirement that the review is appropriate is not fulfilled because an affirmation judgment could not possibly include a review of the now relevant issue of causality. Elf has objected and maintained that the grounds do not relate to procedural errors committed by the arbitral tribunal or other errors in the proceedings, but errors committed by the Respondents prior to, or in connection with, the opening of the arbitration and when the arbitral tribunal was constituted. The District Court does not share Elf's view hereon. The referenced grounds are such that they could be reviewed within the scope of challenge proceedings under item 6 of the first paragraph of Section 34 of the Swedish Arbitration Act. According to the District Court, the fact that it would be more appropriate to review some of the grounds referenced by Elf in support of its motion for affirmation within the scope of challenge proceedings does not provide sufficient support to dismiss the motion for affirmation, in light of the conclusions drawn on other grounds supporting the motion.

The Respondents have moved only that the District Court shall dismiss one of Elf's two motions for affirmation. Thus, the District Court will, irrespective of whether the now relevant motion for affirmation is dismissed or not, carry out a review of the arbitral tribunal's jurisdiction. The District Court deems it appropriate, considering that the arbitration is still ongoing, to review all objections to jurisdiction in one context.

Against the above background, the District Court concludes that Elf's motions for affirmation are appropriate for review.

Permitted adjustment of motions

During the proceedings before the District Court, Elf has adjusted its motions so that the District Court shall only review motion (ii) in the event that the District Court grants Elf's motion (i) and has presented an alternative motion (ii). The District Court concludes that this does not constitute an impermissible adjustment of the motions.

Dismissal of evidence

The District Court has concluded that Elf's motions are permissible. Therefore, the Respondents' motion for dismissal shall be rejected. Upon this outcome, there are no grounds to dismiss the evidence submitted in the case.

Decision

The District Court does not grant the Respondents' motion for dismissal of Elf's motion for affirmation (ii) and does not grant the motion to dismiss evidence.

How to appeal

A party who wishes to appeal the District Court's decision must file a grievance. The grievance must be received by the District Court within one week of the day the party was served the decision. If the party fails to do so, it loses the right to appeal the decision. If grievance is filed, the District Court shall, having regard to the circumstances, decide whether the decision may be appealed separately or only in conjunction with an appeal of the District Court's judgment or final decision in the matter.

As above

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