Is an Arbitration Institute Decision on Arbitrators' Fees Final?

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The Stockholm District Court and the Svea Court of Appeal have held that the right to bring an action against an award under Section 41 of the Arbitration Act applied to a determination of arbitration costs by the Arbitration Institute of the Stockholm Chamber of Commerce which was included in the award. The case is pending before the Supreme Court.

Facts

Section 41 of the act provides that a party may bring an action against an award with regard to the payment of arbitrators' fees within three months. However, the preparatory works to the act contain statements to the effect that this provision does not apply where the compensation has not been set by the arbitrators.(1)

As regards arbitrators' fees, an award is enforceable under Chapter 3, Article 15 of the Enforcement Code where the time period for bringing an action against the award has expired.

Against this background, Article 39 of the 1999 Rules of the Arbitration Institute of the Stockholm Chamber of Commerce provides that the arbitrators' fees shall be set by the institute in a final manner. This is also provided for in Article 43 of the recently adopted 2007 rules.

In the case at hand a party brought an action against the arbitrators before the Stockholm District Court under Section 41 of the act, seeking a reduction of the arbitrators' fees. The award had been made under the 1999 rules. However, the agreement to arbitrate was entered into using a German translation of the rules; the wording "finally" was not found in the relevant sentence of Article 39 of the translation.

The arbitrators argued that the case was inadmissible.

Decisions

On February 18 2005 the district court rejected the arbitrators' motion to dismiss the case without further hearing.(2) The court stated that in light of the preparatory works, Section 41 applied to a determination that was not made by the arbitrators, but was included in the award, thereby rendering the determination enforceable under the Enforcement Code. The court held that any other interpretation would deprive the parties of their fundamental right to judicial review.

The arbitrators appealed. On September 25 2006 the Svea Court of Appeal confirmed the district court's ruling.(3) However, unlike the district court, the court of appeal stated that the preparatory works seemingly assumed that Section 41 did not apply to a determination that was not made by the arbitrators, irrespective of whether the determination was included in the award. The court held that Section 41 applied to the case at hand because the award could be understood as containing a payment obligation that was enforceable under the code.

Further, the court held that the parties had not given the institute the task of setting the arbitrators' fees in a final manner, as the wording "finally" was not contained in Article 39 of the translated rules. Therefore, the parties had not agreed to waive the right to bring an action against the award with regard to the arbitrators' fees.

Comment

Parties must have a right to court review of a determination made by the arbitrators concerning their own fees. From a conceptual point of view, the arbitrators' determination of their own fees cannot be considered as an award. However, since the parties have a right to court review, the code expressly provides that the determination of the arbitrators' fees contained in the award is enforceable, provided that a court review is not pending or possible. Where the determination of the arbitrators' fees is not made by the arbitrators themselves (eg, is made by an arbitration institute), the situation is different; it would not be fundamentally unfair if such a determination were not subject to court review on the merits. Whether such a determination should be subject to challenge in case of procedural irregularities is another question which was not raised before the courts in the case at hand.

The court of appeal decision implies that parties are free to decide that an arbitration institute will determine the arbitrators' fees in a final manner, thereby rendering a review on the merits impossible. The Supreme Court is expected to share this view.(4) With respect to the issue of whether the parties had agreed not to bring an action in court regarding the institute's determination, the courts did not consider Article 36 of the 1999 rules (corresponding to Article 40 of the 2007 rules), which provides that an award is "final and binding". Arguably, under Article 36 the determination of the institute included in the award was final even though it was not expressly stated in the German translation of Article 39 that the arbitrators' fee should be set by the institute in a final manner. Whether such an argument was raised is not apparent from the decisions.

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Endnotes

(1) Government Bill 1998/99:35, pages 169 and 241.

(2) Case T 14504-3.

(3) Case Ö 1952-05.

(4) Case Ö 4277-06.

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