Transcript of THE SUPREME COURT'S COLLECTION OF JUDGMENTS

SUPREME COURT JUDGMENT

rendered Thursday, January 28, 2016

Case 142/2014

(Section 2)

Taewoong Inc.

(Attorney Michael Clemmensen)

vs.

AH Industries A/S

(Attorney Jakob B. Sørensen)

In the former instance, the judgment was rendered by the Western High Court, Section 9, on June 4, 2014.

The case was heard by nine judges: Lene Pagter Kristensen, Niels Grubbe, Marianne Højgaard Pedersen, Poul Dahl Jensen, Vibeke Rønne, Michael Rekling, Lars Hjortnæs, Kurt Rasmussen og Lars Apostoli.

Claim

The appellant, Taewoong Inc., has reiterated its claim.

The defendant, AH Industries A/S, has argued the validity.

Legal Basis

The Arbitration Act includes the following provisions:

> "*Article 4:* In disputes which are to be resolved by arbitration, no court shall intervene except where so provided in this Act.
>
> *Article 18:* The parties shall be treated with equality and each party shall be given a full opportunity of presenting his or her case.
>
> *Article 19:* The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(Para. 2) Failing such agreement, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Article 28: (…)

(Para. 3) - The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.

Article 37: Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with subsections (2)-(4). (…)

(Para. 2) - An arbitral award may be set aside only if:

1) the party making the application furnishes proof that:

   a) a party to the arbitration agreement was, under the law of the country in which that party was domiciled at the time of conclusion of the contract, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under Danish law,

   b) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his or her case,

   c) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, or

   d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or with this Act, or

2) the court finds that:

   a) the subject-matter of the dispute is not capable of settlement by arbitration, or

   b) the award is manifestly contrary to the public policy of this country."

The draft bill of the Arbitration Act was submitted to Parliament on 16 March 2005. The general explanatory notes (Folketingstidende 2004-05 Appendix A draft bill no. 127, pp. 5254-5285) explain, inter alia:

"*1.* Scope and background

(...)

A new, modern Danish Arbitration Act is expected to help Denmark to become a more attractive forum for international arbitration for the benefit of the Danish business sector. It is therefore important that the new Arbitration Act follows the current international standards. The draft bill is in

this context based on the United Nations Commission on International Trade Law (UNCITRAL's) Model Law on International Commercial Arbitration of 1985, which has formed the basis for national legislation on arbitration in a large number of countries, including Norway and Sweden.

(...)

1.2. In spring 2003, the Ministry of Justice has received from the Danish Bar and Law Society a report on the arbitration rules with proposals for a reform of the Arbitration Act.

(...)

The Ministry of Justice requested in January 2004 the Administration of Justice Committee to give an opinion on the Danish Bar and Law Society's report on the reform of the Arbitration Act.

The Administration of Justice Committee issued in August 2004 an opinion on the report. (...)

The draft bill is based on the UNCITRAL's Model Law on international commercial arbitration and is also prepared taking into account the Danish Bar and Law Society's report and the Administration of Justice Committee's opinion on the Danish Bar and Law Society's report.

(...)

2. Applicable law

(...)

2.2. Arbitration Act provisions

(...)

2.2.6. Arbitral award's annulment

(...)

2.2.6.4. If an arbitral award is, in whole or in part, contrary to public policy, it shall be set aside, see Article 7 Para. 4 of the Arbitration Act. According to the *travaux préparatoires*, an arbitral award can be set aside if it contains an unacceptable breach of the fundamental principles of justice. The draft bill does not provide the setting aside of the award for breach of any mandatory (binding) rule under Danish law, but only for breach of public policy (ordre public).

(...)

5. The bill's wording

(...)

5.12. Setting aside of the arbitral award

5.12.1. It follows from the Danish Bar and Law Society's report that Article 7 of the current Arbitration Act on the annulment of the arbitral award should have been wholly maintained, but the working group finds necessary to modify it for three reasons.

Firstly, it is unclear whether the Article 7 of the Act is exhaustive. This gives, in the working group's assessment, an unfortunate legal situation, since the parties, at worst, can not rely on the arbitral award even if the award or the arbitral tribunal's conduct of the proceedings do not seem to be contrary to the specific grounds for annulment provided for in Article 7.

The working group believes it is crucial that an arbitration act indicate exhaustive grounds for annulment.

Secondly, the grounds for annulment and the structure chosen in Article 7 of the Arbitration Act do not correspond fully with Article 34 of the UNCITRAL Model Law or with Article V of the New York Convention. The working group believes that it would be appropriate, in the same way as in the Model Law, to distinguish between the annulment which can be subject to review by the courts of their own motion, and the annulment which can only be reviewed if a party invokes the applicable grounds. Furthermore, it would be appropriate that the grounds for annulment be wholly consistent with the internationally recognized grounds for annulment in the Model Law.

(...)

5.12.3. The Ministry of Justice agrees that the provisions of the Arbitration Act on the setting aside of Danish arbitral awards should be based on the UNCITRAL Model Law.

The Arbitration Act's enumeration of the grounds for annulment should therefore be exhaustive and the grounds for annulment should be similar in form and content to the grounds for annulment as included in the Model Law. Those grounds should also correspond to the grounds to refuse recognition or enforcement of foreign arbitral awards which are mentioned in the New York Convention, and there should therefore also be harmony between the validity of the Danish arbitral awards and their recognition and enforcement in the other states that have acceded to the New York Convention."

The commentary to Article 37 of the draft bill states, between others (op.cit., pp. 5324-5326):

"To Article 37

The provisions deal with the setting aside of the Danish arbitral awards. The provisions correspond to Article 34 of the Model Law.

(…)

The provisions can not be derogated from by agreement.

Para. 1 states that an award may be set aside by the courts in accordance with Para. 2-4. The proposed rules on this matter are thus exhaustive. Further, it should be emphasized that the courts can not make a substantive revision of the arbitral award. The courts can not therefore set aside an arbitral award on the grounds that the arbitral tribunal has applied the law incorrectly or has incorrectly interpreted the facts of the case. From this prohibition of a substantive review should be however exempted exceptional cases where there is such an exceedingly serious mistake made by

the arbitral tribunal, that the arbitral award is manifestly incompatible with the domestic legal system (ordre public), see Para. 2, no. 2 (b).

(…)

Para. 2 lists the specific grounds for annulment. That list is, as mentioned, exhaustive. The list is identical to the corresponding list of grounds for annulment in the Model Law, and coincides also closely to the proposed reasons for refusing the recognition and enforcement of arbitral awards, see Article 39, which in turn is based on Article V of the New York Convention, see Para. 3.1.2.4 of the commentary to the draft bill.

No. 1 lists the grounds for annulment which can only be raised by the parties (annulment by request). Those grounds can only be applied by the courts at the request of a party, and the burden of proving that such ground for annulment exists weighs on the party requesting that the arbitral award is set aside.

(...)

Point (b) applies to cases where the party applying for the setting aside of the arbitral award, did not get proper notice of the appointment of an arbitrator or of the conduct of the arbitral proceedings or for other reasons was unable to present its case.

Point (b) includes in particular the violation of the fundamental principles of justice relating to the possibility to familiarize oneself with the substance of the case (access for all parties to evidence and documents) and to the possibility to respond to the claims and allegations alleged by the opposing party (adversarial proceedings). The arbitral award shall be set aside if it is rendered without respecting those fundamental principles of justice.

What is decisive is whether the arbitral award is rendered without having given the party requesting the annulment of the arbitral award, the proper possibility to present its case. Even if mistakes have been made in the arbitration proceedings by not notifying a party of an oral hearing or of the written materials of the case, the arbitral award is not set aside, if the party subsequently received the information *and* had the possibility to present its case before the arbitral award was rendered.

(...)

Point (d) concerns the composition of the arbitral tribunal and the arbitration proceedings. Point (d) implies that the arbitral award may be set aside if the composition of the arbitral tribunal or the arbitration proceedings were not in accordance with the parties' agreement or the Arbitration Act.

(...)

The provisions of the Arbitration Act on arbitration proceedings, see Article 5, are, as a starting point, declaratory. The rules in Article 18 on the equal treatment of the parties and on the possibility to present one’s case are however mandatory. With respect to the parties’ possibility to present their case, please refer to the comments to point (b) above. With respect to the equal treatment, if the parties, in violation of Article 18, were not treated equally in the arbitration proceedings, the arbitral

award shall be set aside. In this case, there shall be conducted an assessment of all the circumstances of the entire arbitration.

(...)

No. 2 lists the grounds for annulment which are not at the disposal of the parties (mandatory annulment) and which the courts can raise ex officio.

(...)

Point (b) concerns the case where the arbitral award is manifestly incompatible with the domestic legal system (ordre public). In concerns a narrow exception. However, if there is a manifest violation of public policy and if the judicial proceedings for the annulment of the arbitral award are conducted within the time limit set under paragraph 4, then the arbitral award shall be set aside. This applies whether or not the party who has brought the legal proceedings for the annulment of the arbitral award argued with reference to inconsistency with public policy. "

The question of annulment of an arbitral award for violation of ordre public on the grounds that the award is not in accordance with EU competition law, had been examined, among other things, in the case C-126/97 (Eco Swiss) which was decided by the ECJ in its judgment of 1 June 1999. The judgment states, among others:

"31. By its second question, which is best examined first, the referring court is asking essentially whether a national court to which application is made for annulment of an arbitral award must grant such an application where, in its view, that award is in fact contrary to Article 85 [= Art. 81] of the Treaty although, under domestic procedural rules, it may grant such an application only on a limited number of grounds, one of them being inconsistency with public policy, which, according to the applicable national law, is not generally to be invoked on the sole ground that, because of the terms or the enforcement of an arbitral award, effect will not be given to a prohibition laid down by domestic competition law.

(...)

35. Next, it is in the interest of efficient arbitration proceedings that review of arbitral awards should be limited in scope and that annulment of or refusal to recognize an award should be possible only in exceptional circumstances.

36. However, according to Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC), Article 81 of the Treaty constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market. The importance of such a provision led the framers of the Treaty to provide expressly, in Article 81(2) of the Treaty, that any agreements or decisions prohibited pursuant to that article are to be automatically void.

37. It follows that where its domestic rules of procedure require a national court to grant an application for annulment of an arbitral award where such an application is founded on failure to

observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 81(1) of the Treaty.

38. That conclusion is not affected by the fact that the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, which has been ratified by all the Member States, provides that recognition and enforcement of an arbitral award may be refused only on certain specific grounds, namely where the award does not fall within the terms of the submission to arbitration or goes beyond its scope, where the award is not binding on the parties or where recognition or enforcement of the award would be contrary to the public policy of the country where such recognition and enforcement are sought (Article V(l)(c) and (e) and 11(b) of the New York Convention).

39. For the reasons stated in paragraph 36 above, the provisions of Article 81 of the Treaty may be regarded as a matter of public policy within the meaning of the New York Convention.

(...)

41. The answer to be given to the second question must therefore be that a national court to which application is made for annulment of an arbitral award must grant that application if it considers that the award in question is in fact contrary to Article 81 of the Treaty, where its domestic rules of procedure require it to grant an application for annulment founded on failure to observe national rules of public policy."

By judgement of 24 April 2015, the Supreme Court rejected a request for referral to the EU Court of Justice on a question about the depth of the national courts' review of whether an arbitral award is contrary to Article 101 of the TFEU.

The Supreme Court's reasoning and decision

The case concerns whether the arbitral award of 18 March 2011 shall be set aside.

Prohibition of a "substantive review"

Article 37 of the Arbitration Act contains an exhaustive list of the circumstances which may justify the annulment of an arbitral award. It appears from the wording and *travaux préparatoires* of the provisions that the courts can not make a substantive review of an arbitral award. Thus, the courts can not - apart from the below mentioned extraordinary cases where it exists a manifest violation of public policy – set aside an arbitral award on the ground that the arbitral tribunal applied the law incorrectly or has misjudged the facts of the case.

Fundamental principles of justice, etc.

Following Article 37 Para. 2, no. 1 (b) of the Arbitration Act, an arbitral award shall be set aside if the arbitral tribunal has dealt with the case in such a way that a party has been unable to present its case. The *travaux préparatoires* show that the provision refers in particular to the case where there has been a breach of fundamental principles of justice relating, inter alia, to the possibility to defend oneself against the allegations and submissions raised by the opposing party (adversarial principle).

Following Article 37 Para. 2, no. 1 (d), an arbitral award shall also be set aside if the arbitration proceedings did not comply with the arbitration agreement or the Arbitration Act. The *travaux préparatoires* show that in that case, an assessment of all the circumstances of the entire arbitration shall be conducted.

The arbitral award sentenced Taewoong Inc. to pay 20 millions DKK to AH Industries A/S as compensation for the damages causes by the breach of warranties under the parties' distribution agreement.

Taewoong argues that the arbitral tribunal has awarded AH Industries more than claimed and has based its decision on allegations that were not raised; thereby depriving Taewoong of the possibility to state its views on issues that the arbitral tribunal considered essential – in violation of the fundamental principles of justice, inter alia the adversarial principle. The arbitral award shall therefore be set aside as per Article 37 Para. 2, no. 1 (b) of the Arbitration Act.

It is also Taewoong's view that the arbitral tribunal has made a decision on the payment of compensation of 20 millions DKK on the basis of equity, even if the parties had not given the authorization thereto, see Article 28 Para. 3 of the Arbitration Act; the arbitral award shall therefore also be set aside as per Article 37 Para. 2, no. 1 (d) of the Arbitration Act.

The Supreme Court does not find established that the arbitral tribunal's interpretation of the distribution agreement is beyond the scope of the claims and allegations that AH Industries has risen (see Para. 271 and 281-284 of the arbitral award) and finds that Taewoong has gotten the opportunity to present its case. The Supreme Court does not find established either that the arbitral tribunal's determination of the amount in compensation that Taewoong shall pay to AH Industries for breach of contract is beyond the scope of the estimate of losses that AH Industries has submitted, and finds that Taewoong also got the opportunity to present its case during the arbitration proceedings. According to the arbitral award's reasoning (see Para. 405 of the arbitral award), the compensation of 20 millions DKK is based on the discretionary determination of the arbitral tribunal assessing the evidence of the damage which Taewoong's breach of the distribution agreement has inflicted to AH Industries. The determination of the compensation is not the result of equity and was therefore not in breach of Article 28 Para. 3 of the Arbitration Act

Subsequently the Supreme Court assesses that Taewoong has been able to present its case and that the arbitrators did not breach the fundamental principles of justice. The arbitral tribunal has not breached the arbitration agreement or the provisions of the Arbitration Act on the conduct of the proceedings either. The arbitral award shall therefore not be set aside due to Article 37 Para. 2, no. 1 (b) or (d) of the Arbitration Act.

Ordre public

It follows from the *travaux préparatoires* of Article 37 Para. 2, no. 2 (b) of the Arbitration Act that the rule is a narrow exception to the prohibition of a substantive review and that an award may be set aside pursuant to this rule only in exceptional cases where there are such extraordinarily serious mistakes from the arbitral tribunal side, that the arbitral award is manifestly incompatible with the domestic legal system (ordre public). It is not sufficient in itself that the arbitral award is contrary to public policy.

It is Taewoong's opinion that the distribution agreement was in breach of EU competition law since the agreement, as interpreted by the arbitral tribunal, led to an obligation of information from Taewoong's side

and to a privileged position for AH Industries with regard to certain customers in the territory. The arbitral award enforcing the agreement is therefore in breach of Article 101 TFEU and is thus contrary to Danish public policy. Consequently, the arbitral award shall be set aside as per Article 37 Para. 2, no. 2 (b) of the Arbitration Act.

By judgment of 1 June 1999 in Case 126/97 (Eco Swiss), the European Court of Justice held that, to the extent a national court must decide under its national rules on a claim to set aside an arbitral award on the ground that the domestic public policy is violated, the court shall grant such claim also when it is based on infringement of the then EC Treaty Article 81 (now Article 101 TFEU).

As mentioned in Article 37 Para. 2, no. 2 (b), it is decisive under Danish law that there has been such extraordinarily serious mistakes that the arbitral award is manifestly incompatible with the domestic legal system (ordre public).

The arbitral tribunal has ruled on whether the distribution agreement, as interpreted by the arbitral tribunal, is contrary to EU competition law. The arbitral tribunal interpreted the agreement as meaning that it involved a partnership where both parties undertook some obligations and got some rights, including Taewoong's duty to inform AH Industries on orders received and to respect AH Industries' privileged position in relation to customers developed by AH Industries for Taewoong, which limited Taewoong's rights to benefit from AH Industries' distribution work without offering AH Industries a reasonable compensation. It was the arbitral tribunal's analysis of such obligations that they do not conflict with EU competition law (see Para. 401 of the arbitral award).

The Supreme Court finds that there is no basis for concluding that the arbitral tribunal, in its assessment, has committed such extraordinarily serious mistakes, that the arbitral award is manifestly incompatible with the domestic legal system (ordre public). The Supreme Court therefore finds that the conditions for setting aside the arbitral award as per Article 37 Para. 2, no. 2 (b) of the Arbitration Act are not satisfied.

The Supreme Court hereby dismisses the appeal.

Decide and award:

The judgment of the High Court is upheld.

For the costs of the Supreme Court proceedings, Taewoong Inc. shall pay DKK 500,000 to AH Industries A/S.

The sentenced costs shall be paid within 14 days after the rendering of the Supreme Court judgment and with interests calculated according to Article 8 a) of the Interest Act.

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Certified as accurate

The Supreme Court, 28 January 2016.

Kirsten Lohmann

Office Clerk