SUPREME COURT OF NORWAY

O R D E R

issued on 30 March 2023 by a division of the Supreme Court composed of

Justice Bergljot Webster
Justice Wilhelm Matheson
Justice Erik Thyness
Justice Kine Steinsvik
Acting Justice Hedda Remen

HR-2023-573-A, (case no. 22-164565SIV-HRET)
Appeal against Frostating Court of Appeal's order 13 October 2022

Vik Ørsta AS	(Counsel Bjarte Reidar Aambø)
v.	
MS Amlin Insurance S.E	(Counsel Jakob Christen Christensen)

(1) Justice **Thyness:**

Issues and background

(2) The case concerns a claim for reimbursement made by an insurance company against the insurance customer's supplier. The question is whether the insurance company is bound by an arbitration agreement entered into between the insurance customer and the supplier, with the effect that the insurance company's action against the supplier must be dismissed by the courts.

(3) In 2019, Vik Ørsta AS (the supplier) delivered a breakwater to Skogn Maritime Forening AS (the association). The delivery was based on a contract entered into in April 2019. According to clause 5 of the contract, the general terms of delivery in NLM[1] 02 are an integrated part of the agreement between the parties. Section 72 of NLM 02 reads:

> "Disputes arising out of or in connection with the Agreement shall not be brought before the court, but shall be finally settled by arbitration in accordance with the law on arbitration applicable in the Contractor's country."

(4) On 13 April 2020, the breakwater was so damaged in heavy weather that it had to be condemned.

(5) The association had insured the facility with MS Amlin Insurance S.E. (the insurance company), which paid NOK 2,730,219 to the association. In connection with the settlement, the insurance company also incurred expenses of NOK 726,945 for technical and legal assistance, making total expenses of NOK 3,457,164.

(6) The insurance company sought reimbursement of its expenses asserted a subrogation claim and brought an action against the supplier on 6 April 2022. In its reply, the supplier principally argued that the action had to be dismissed as the dispute was subject to arbitration. In the alternative, the supplier asked the District Court to rule in its favour on the merits.

(7) On 13 July 2022, Trøndelag District Court issued this order:

> "1. Case no. 22-053084TVI-TTRO/TSTE is not dismissed from court.
>
> 2. Vik Ørsta AS will within two weeks of the service of this order pay NOK 75,652 including VAT, with the addition of statutory default interest from the due date until payment is made."

(8) The District Court found that the claim had not been assigned to the insurance company, but that the claim was subrogated to it based on non-statutory law.

(9) The supplier appealed to the Court of Appeal, which issued this order on 13 October 2022:

> "1. The appeal is dismissed on its merits.

[1] TN: General Conditions for the Supply and Erection of Machinery and other Mechanical, Electrical and Electronic Equipment, issued by various Nordic engineering organisations.

2. Vik Ørsta AS will pay costs of NOK 10,000 to MS Amlin Insurance S.E. within two weeks of the service of this order."

(10) The Court of Appeal based its order mainly on the same grounds as the District Court.

(11) The insurance company has appealed to the Supreme Court against the application of the law, more specifically the interpretation of section 10 subsection 2 of the Arbitration Act.

(12) On 24 November 2022, the Supreme Court's Appeals Selection Committee decided to refer the case to a division of the Supreme Court, see section 5 subsection 1 of the Courts of Justice Act, and to conduct an oral hearing in accordance with the rules applicable to appeals against judgments, see section 30-9 subsection 4 of the Dispute Act.

The parties' contentions

(13) The appellant – *Vik Ørsta AS* – contends:

(14) The claim against the supplier constitutes a legal relationship. The term includes individual rights.

(15) The association's alleged compensation claim against the supplier has been transferred to the insurance company in accordance with clause 9-1 of the insurance agreement. An "assignment" of the legal relationship has thus taken place within the meaning of section 10 subsection 2 of the Arbitration Act.

(16) Even if the Supreme Court should consider the reimbursement claim to be based on the rule on insurance companies' right of subrogation in section 4-3 cf. section 4-2 of the Compensatory Damages Act or on non-statutory customary law, the claim must be considered to derive from the association's claim. This is sufficient for the legal relationship to fall under the rule in section 10 subsection 2 of the Arbitration Act.

(17) Vik Ørsta AS has asked the Supreme Court to rule as follows:

"1. Case 22-053084TVI-TTRO/TSTE in Trøndelag District Court is dismissed from court.

2. MS Amlin Insurance S.E. is to compensate the costs of Vik Ørsta AS in the District Court, the Court of Appeal and in the Supreme Court."

(18) The respondent – *MS Amlin Insurance S.E.* – contends:

(19) The reimbursement claim is based on general legal principles, not on an agreement. Assignment of the arbitration agreement would require an expansive interpretation of section 10 subsection 2 of the Arbitration Act, as no assignment of the legal relationship has taken place.

(20) Regardless, the case at hand does not concern the entire legal relationship covered by the arbitration agreement, but a single claim. Such a limited assignment does not fall within the scope of section 10 subsection 2 of the Arbitration Act.

(21) MS Amlin Insurance S.E. asks the Supreme Court to rule as follows:

> "1. The appeal is dismissed on its merits.
>
> 2. MS Amlin Insurance S.E is awarded costs."

My opinion

The Supreme Court's jurisdiction

(22) The case concerns a second-tier appeal against an order, and the Supreme Court's jurisdiction is limited to examining the Court of Appeal's procedure and general legal interpretation of written legal rules, see the Disputes Act section 30-6 subsection 1 (b) and (c). The appeal challenges the interpretation of section 10 subsection 2 of the Arbitration Act, which falls within the scope of the Supreme Court's jurisdiction.

Starting points

(23) Disputes concerning legal relationships over which the parties have an unrestricted right of disposition may be determined by arbitration, see section 9 subsection 1 of the Arbitration Act. According to section 10 subsection 1, the parties may agree on arbitration in "disputes that have arisen and all or certain disputes that may arise … in a defined legal relationship". When a dispute is subject to arbitration, the courts must dismiss the action if a party so requests no later than in its first submission on the merits of the dispute, see section 7 subsection 1 of the Arbitration Act. The supplier in our case requested a dismissal of the action be dismissed in its response in the District Court.

(24) According to clause 5 of the contract between the supplier and the association, the General Conditions in NLM 02 are part of the contractual relationship. Clause 72 of these conditions sets out that "disputes arising out of or in connection with the Contract … shall be finally settled by arbitration". The parties agree that this means that any dispute related to the supplier's liability towards the association is subject to arbitration.

(25) The issue at hand is whether the arbitration agreement also applies when the insurance company seeks reimbursement from the supplier after having covered the association's loss for which the association itself could have claimed coverage from the supplier. This depends on an interpretation of section 10 subsection 2 of the Arbitration Act, which reads:

> "Unless otherwise agreed between the parties in the arbitration agreement, the arbitration agreement shall be deemed to be assigned together with any assignment of the legal relationship to which the arbitration agreement relates."

"Legal relationship"

(26) The insurance company contends that the term "legal relationship" only refers to legal relationships in their entirety, and not to single claims like the one we are dealing with here.

(27) I disagree. According to the notes to section 10 of the Arbitration Act in Proposition to the Odelsting no. 27 (2003–2004) page 91, the provision aims to establish that "no general agreement can be concluded under which all potential legal disputes between the parties are subject to arbitration". In other words, an arbitration agreement must draw up the framework for which disputes it covers. As I read it, "legal relationship" in section 10 subsection 2 is only used as a reference to subsection 1. Here, it is set out that an arbitration agreement may apply to "disputes that have arisen and all or certain disputes that may arise in a defined legal relationship".

(28) Consequently, section 10 subsection 2 of the Arbitration Act in our context only means that the arbitration agreement applies to potential disputes *to the extent* there is a change of parties in a legal relationship governed by the arbitration agreement. The decisive factor is whether the disputed legal relationship falls within the framework defined in the arbitration agreement.

"Assignment"

(29) The key question is whether the insurance company's reimbursement claim has been the subject of an "assignment" from the association, as the term is used in section 10 subsection 2 of the Arbitration Act.

(30) The insurance company holds that it is *not* bound by the arbitration agreement because its claim is independent and arises from general legal principles, not from an agreement. The supplier's position, on the other hand, is that the insurance company is bound by the arbitration agreement because the subrogation claim derives from the association's claim against the supplier. This applies regardless of whether the insurance company's claim arises from an agreement or general statutory or non-statutory rules on the transfer of claims – so-called *"subrogation"* or *"cessio legis"*.

(31) I take as a starting point for my further discussion that the insurance company bases its reimbursement claim against the supplier on non-statutory law.

(32) In the issue at hand, I find that no clear conclusions can be drawn as to the meaning of "assignment" in section 10 subsection 2 of the Arbitration Act. The term can be interpreted to cover any form of transfer of rights, for example by inheritance or gift. However, it may also be interpreted only to cover a contractual transfer – a "dispositive statement" – from the original contracting party. Both parties' positions thus appear to be compatible with the wording of the Act.

(33) Section 10 subsection 2 of the Arbitration Act corresponds in all material respects to section 2-2 of the legislative committee's draft in Norwegian Official Report 2001: 33 Arbitration Act page 6. While section 10 subsection 2 of the Act uses the term "*overføring*" [transfer], the term used in the committee's draft section 2-2 subsection 2 was "*overdragelse*" [also transfer]. To the extent that there is a linguistic nuance here, it must be that "*overføring*" may be perceived as a broader term than "*overdragelse*", so that the wording of the Act suggests somewhat more strongly than the committee's wording that no dispositive statement is required. However, the difference is minimal, and there are no indications in the preparatory works that the change of words was meant to imply any substantive change of the provision. This is therefore not a decisive argument.

(34) On page 59 of the report, the legislative committee explains the principle that the arbitration agreement follows the transfer:

> "Despite the disadvantage a debtor may experience by having a new counterparty in the arbitration agreement, a rule that the arbitration agreement does not follow the transfer of the legal relationship is, in the committee's view, inexpedient. This is primarily out of consideration for the remaining party. It is unreasonable that the remaining party should lose the right to have disputes resolved by arbitration because the other party transfers its position. Such a solution would reduce the effectiveness of the arbitration institute ..."

(35) What is stated here regarding transfers based on agreement shows that the fundamental purpose is to protect the remaining party, who has made it a condition that potential disputes be settled by arbitration. The provision can be viewed as an expression of the general principle that the acquirer of a right does not benefit from more favourable terms than his legal predecessor. In addition comes the effectiveness of the arbitration institute.

(36) That the term "assignment" in section 10 subsection 2 of the Arbitration Act covers more than transfers based on agreement, is evident from the legislative committee's statements on page 58 of its report on the Supreme Court ruling in Rt-1994-1024. That case concerned a housing association that had engaged a contractor, who in turn had engaged a subcontractor. The agreement between the contractor and the subcontractor contained an arbitration clause. The housing association made a claim directly against the subcontractor based on an allegation that it had taken over the contractor's claim, although it had not been assigned to the housing association. The Supreme Court's Appeals Selection Committee, which found the issue "somewhat doubtful", allowed the claim to be made in the ordinary courts. However, the legislative committee stated that the result would have been the opposite under the draft Arbitration Act, i.e. that the arbitration agreement would have been binding on the housing association.

(37) However, the situation will be different if the claim *originally* arose at the hands of a third party. An example is when an injured party claims compensation directly from the wrongdoer's insurance company under section 7-6 of the Insurance Contracts Act. Even if such a claim is closely related to the injured party's claim against the wrongdoer, it arises directly at the hands of the creditor by virtue of the statutory provision. Even if the term "assignment" is interpreted broadly, the claim can in such a situation hardly be considered "assigned" to the creditor, nor can the remaining party rely on the principle that the acquirer of a right never benefits from more favourable terms than his legal predecessor.

(38) I find support for this in the legislative committee's report, on page 58:

> "Particular issues arise when a third party asserts rights under the agreement containing an arbitration provision. Is a third party bound by the arbitration provision? It is reasonable to answer yes to this question if the legal basis for third party rights is the agreement.
>
> ….
>
> When, on the other hand, the legal basis for a third party's claim is not – at least not alone – to be sought in the agreement between others, but arises directly from law, there does not seem to be a sufficient basis for him to be bound by an arbitration clause in the agreement. This will for instance be the situation for direct claims under section 7-6 of the Insurance Contracts Act."

(39) The reservation "not alone" must be aimed at situations where it cannot be clearly established whether the claim arose in the relationship between the original contracting parties or directly at the hands of the relevant creditor.

(40) The insurance company contends that its reimbursement claim is partly rooted in the agreement between the supplier and the association and partly in non-statutory rules on subrogation. In the insurance company's view, the right is therefore not to be sought in the agreement alone.

(41) The case in Rt-1994-1024 concerned a claim based on an equally complex basis: the agreement between a main contractor and a subcontractor and the rules on direct claims. The preparatory works presuppose that the builder in such a case will be bound by the arbitration clause between the main contractor and the subcontractor. The claim is therefore deemed to arise from the agreement between the main contractor and the subcontractor. The same must apply when the new creditor, as in our case, bases its claim on the non-statutory rule that anyone performing the obligation of another person has a subrogated claim against the debtor, see Rt-1997-1029 on page 1036. The subrogated claim must then be deemed to have arisen in the original contractual relationship.

(42) Section 7-6 of the Insurance Contracts Act applies to third-party insurance and establishes that the injured party can claim compensation directly from the insurance company. The rule is closely related to the insured party's possibility to make a similar claim against the insurance company if he had settled the injured party's claim directly. The direct claim may therefore be seen as partially deriving from the injured party's claim against the insured party. However, in the preparatory works to this provision, it is emphasised that the "the insurance company's liability towards the injured party will be completely independent", see Norwegian Official Report 1987: 24 page 158. A possible arbitration clause in the relationship between the insurance company and the insured party will therefore not be binding on the injured party in the event of a direct claim against the insurance company.

(43) In summary, I interpret section 10 subsection 2 of the Arbitration Act to mean that when a claim was covered by an arbitration agreement when it arose, the arbitration agreement – unless otherwise agreed with the remaining party – will be transferred along with a change of parties, even if the change, like in our case, is based on non-statutory rules on subrogation. On the other hand, claims that have arisen at the hands of the new party on an independent basis, , such as direct claims under section 7-6 of the Insurance Contracts Act, do not fall within the scope of section 10 subsection 2 the Arbitration Act.

(44) As I interpret section 10 subsection 2 of the Arbitration Act, the claim in our case has thus been assigned to the insurance company within the meaning of the provision.

(45) Finally, I mention that the Arbitration Act is based on the UN organisation UNCITRAL's Model Law for international arbitration. The purpose of the Model Law is to contribute to the harmonisation of national rules. If there is doubt about the interpretation of the Norwegian Arbitration Act, the solution in other countries whose legislation is based on the UNCITRAL model could therefore provide guidance for the interpretation of the Arbitration Act. The Model Law in itself does not regulate the issue at hand, and the solutions used as a basis in other jurisdictions having based its legislation on the Model Law have only to a limited extent

been presented to the Supreme Court. However, the materials provided give no reason to believe that the result I have reached is contrary to international consensus.

Conclusion and costs

(46) I have concluded that the declaratory provision in section 10 subsection 2 of the Arbitration Act must be interpreted to cover individual claims, and not only complex legal relationships. I also find that reimbursement claims based on non-statutory law must be considered to be "assigned" within the meaning of section 10 subsection 2 of the Arbitration Act, so that a possible arbitration agreement that covers the claim from which the reimbursement claim is derived, is binding on the person asserting the claim.

(47) The insurance company is therefore bound by the arbitration agreement, and its action must be dismissed from court.

(48) Vik Ørsta AS is the successful party and is entitled under section 20-2 subsection 1 of the Dispute Act to have its costs fully compensated by MS Amlin Insurance S.E. The Supreme Court will determine claims for costs in the lower courts based on its own ruling in the case, see section 20-9 subsection 2.

(49) A statement of costs has been submitted to the Supreme Court of NOK 282,594, of which NOK 278,750 covers fees and NOK 3,844 covers expenses. Added to this are costs in the District Court and the Court of Appeal of NOK 275,000. Also added is a court fee of NOK 7,338. Accordingly, costs are awarded in the total amount of NOK 564,932.

(50) I vote for this

O R D E R :

1. Case 22-053084TVI-TTRO/TSTE in Trøndelag District Court is dismissed from court.

2. MS Amlin Insurance S.E. will pay to Vik Ørsta AS costs of NOK 564 932 in the District Court, the Court of Appeal and the Supreme Court within two weeks of the service of this order.

(51) Acting Justice **Remen:** I agree with Justice Thyness in all material respects and with his conclusion.

(52) Justice **Steinsvik:** Likewise.

(53) Justice **Matheson:** Likewise.

(54) Justice **Webster:** Likewise.

(55) Following the voting, the Supreme Court issued this

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