CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 31737/96
by Osmo SUOVANIEMI and others
against Finland

The European Court of Human Rights (Fourth Section) sitting on 23 February 1999 as a Chamber composed of

Mr J.A. Pastor Ridruejo, *President*,
Mr M. Pellonpää,
Mr I. Cabral Barreto,
Mr V. Butkevych,
Mrs N. Vajić,
Mr J. Hedigan,
Mrs S. Botoucharova, *Judges*,

with Mr V. Berger, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 8 March 1996 by Osmo SUOVANIEMI and others against Finland and registered on 4 June 1996 under file no. 31737/96;

Having regard to the report provided for in Rule 49 of the Rules of Court;

Having deliberated;

Decides as follows:

THE FACTS

The first applicant was born in 1943 and is a Doctor of Medicine and Surgery by profession. The other applicants are the family members of the first applicant. They were born in 1944, 1964, 1978 and 1981 respectively. All the applicants have Finnish nationality and reside at Helsinki, Finland. Before the Court they are represented by Mr Matti Oksala, a lawyer practising in Helsinki.

The facts of the case, as submitted by the applicants and as they emerge from the domestic decisions, may be summarised as follows.

Until the summer of 1986 the applicants had a controlling ownership of about 90 per cent of the shares and voting rights of a Finnish high-tech company, L., and through that company also of a Finnish joint venture company, E. The first applicant is the founder of these companies.

In the beginning of 1986 L. had difficulties in liquidity due to rapid growth of the company, intensive investments into research and development. A bank, S., offered the first applicant financing by arranging a public convertible bond, by which the amount of the shareholders could be increased as a preliminary measure in order to have L. listed as a public company in the Helsinki Stock Market.

On 23 May 1986 an agreement was signed between the applicants and S. According to this agreement, the applicants sold a considerable amount of L.'s shares to S. and S. engaged to arrange a convertible bond worth of FIM 99,000,000 which, according to the applicants, was to be offered for sale to the public. According to the applicants S. also agreed to arrange additional financing of FIM 78,000,000 to L., if needed. It was also agreed that a new Board of Directors should be elected. In this Board of Directors, consisting of four Directors, the Chairman and one member should be accepted by S. The Board of Directors would elect an outsider to act as a managing Director to the company. As a result of these arrangements S. and entities dependent on it became, according to the arbitral award mentioned below, the majority shareholder in L.

The agreement included a separate clause concerning the status of the first applicant as the founder of the companies. This clause guaranteed that the first applicant's expertise should be used and that he would maintain his position as a member of L.'s Board of Directors, Chairman of E.'s Board of Directors and E.'s managing director. On the other hand, the applicants and two holding companies owned by them agreed to sell ten per cent of L.'s shares to S.

After the agreement was signed, the first applicant was allegedly accused of having given wrong information concerning the financial situation of L. He accepted S.'s decision to nominate a new managing director. Ninety per cent of L.'s convertible bonds were subscribed by S., instead of the public as, according to the applicants, was planned before.

According to the applicants, S. started in August and September 1986 insisting that the first applicant should sell the majority of his shares to S. The first applicant refused to do so.

On 14 October 1986 the first applicant sold more of L.'s shares to S. He also agreed to give up some of the rights guaranteed to him by the agreement signed on 23 May 1986.

In 1987 company F. (which owned part of the joint venture company E.) tried, against the first applicant's wish, to terminate the joint venture agreement. In these negotiations F. was represented by M., a lawyer practising in Helsinki.

On 5 August 1988 the applicants instituted arbitration proceedings against S. in connection with disputes which had arisen from the above-mentioned agreements. The applicants appointed A., a professor of civil law, as their arbitrator. S. appointed M., an attorney-at-law (who had represented company F in 1987 as mentioned above), as it's arbitrator. Both arbitrators appointed R., an attorney-at-law, as the third, presiding, arbitrator. All the arbitrators accepted their appointments and in turn appointed H. as the legal secretary of the arbitral tribunal.

The applicants claimed FIM 750,000,000 for damages from S. There were twelve oral hearings held before the arbitrators and several witnesses were heard.

On 26 October 1988 the applicants' submitted to the arbitrators a letter challenging M. as an arbitrator as he had acted, and possibly still did, as a legal counsel of F. This was disputed by M. who announced that he had no such tasks which would endanger his impartiality as an arbitrator. He was, however, willing to leave his tasks as an arbitrator if his impartiality was questioned. Due to this announcement, the applicants then explicitly approved that M. could continue as an arbitrator.

Later the applicants had allegedly found a letter, dated 24 November 1987, which stated that F. had acted on the basis of the legal advice given by M. (who had acted as F's legal counsel at the time) when F. had sought to terminate the joint venture agreement concerning E. The question of M.'s partiality was not, however, raised again before the arbitrators.

The arbitrators rejected all the applicants' claims on 2 September 1991 by a majority of two to one. A. dissented.

In his letter of 20 November 1991 to the applicants' counsel, the chairman of the arbitrators, R., wrote as follows (translation):

> "In the above-mentioned matter I enclose copies of ... for the use of our client, S., ..."

The applicants, dissatisfied with the arbitral award, requested the Helsinki District Court (*käräjäoikeus, tingsrätt)* to quash it on the basis of lack of impartiality and procedural errors, claiming, *inter alia,* that M. had acted as a legal counsel to the first applicant's counterpart in previous proceedings and that R. had shown bias in the way he conducted the proceedings.

According to Section 23 of the Arbitration Act in force at the relevant time (*laki välimiesmenettelystä, lag om skiljeförfarande 46/1928)*, the arbitral award can be quashed on the request of a party who has lost the arbitration, *inter alia,* if an arbitrator has previously acted as a counsel or otherwise represented or given advice to one of the parties to the case, or given a statement as a witness or as a specialist in the case, and if the requesting party has learned about the alleged bias only after the arbitral award was given. The arbitral award can

also be quashed if such a request was rejected by the arbitrators during the arbitration proceedings.

The above-mentioned letter, dated 24 November 1987, was submitted as evidence regarding the impartiality of M. The bank argued that the letter was sent to the first applicant in 1987, and that the first applicant had known about the facts referred to already before the arbitration proceedings had began. S. also argued that the first applicant had not been a party to the proceedings referred to in the letter. As far as the alleged bias of R. was concerned, A. was heard before the District Court as a witness. In his witness statement he told that he had already during the arbitration pointed out to the Chairman of the arbitrators that he, i.e. R., had acted as if he was S.'s legal counsel and that he had favoured S. by choosing arguments in favour of it. In A.'s opinion the arbitration proceedings had not been impartial as R. had decided already beforehand to dismiss the action and, after that, had searched for the arguments in favour of the dismissal. The bank argued that it was no reason to question the impartiality of an arbitrator, if the reasons given by him were not supported by another arbitrator. It is normal that all the arbitrators or judges do not approve all the reasoning given by the majority.

Also H. was heard as a witness. He stated, *inter alia*, that all the arbitrators were provided an opportunity to express themselves in the deliberations and that the arguments put forward by A. had influenced the reasoning of the award.

The applicants' request was rejected by the Helsinki District Court on 26 July 1993. The District Court found that there were reasons to challenge the impartiality of M. under the Finnish Arbitration Act but as the applicants had been aware of his role as a counsel of F. and had approved him as an arbitrator, they had failed to raise the challenge timely and, in accordance with the Finnish Arbitration Act, had lost their right to raise the issue again. The District Court found also that all the arbitrators had had their opportunity to express their views in all of the issues raised during the proceedings. The fact that not all the arguments of A. were approved by the majority of the arbitrators did not disclose any misconduct on the part of the presiding arbitrator.

The applicants appealed to the Helsinki Court of Appeal (*hovioikeus, hovrätt)* which, on 26 January 1996, upheld the District Court's decision.

On 12 September 1995 the Supreme Court (*korkein oikeus, högsta domstolen)* refused the applicants leave to appeal.

COMPLAINTS

The applicants complain that their right to a fair hearing by an independent and impartial tribunal established by law as guaranteed by Article 6 § 1 of the Convention was violated since the national courts upheld an arbitral award which had been given by arbitrators of whom two allegedly lacked impartiality. According to the applicants, arbitrator M. had lacked objective impartiality on the ground of his work made in favour of company F., whereas the conduct of the presiding arbitrator R. showed that he lacked both objective and subjective impartiality.

THE LAW

The applicants complain of a violation of Article 6 § 1 of the Convention in that two of the arbitrators in the arbitration proceedings at issue had lacked independence and impartiality, and that the national courts had upheld an arbitral award regardless of that.

Article 6 § 1 of the Convention reads, as far as relevant, as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal ..."

The Court first notes that although the applicants complain about the decisions of Finnish courts, the underlying proceedings, in connection with which the alleged violations of impartiality took place, were arbitration proceedings. As the arbitration was based on voluntary agreements between the parties, there was an explicit renunciation by them of a procedure before an ordinary court.

According to the Convention organs' established case-law, the waiver of a right guaranteed by the Convention - insofar as it is permissible - must be established in an unequivocal manner (see, Eur. Court HR, Oberschlick v. Austria judgment of 23 May 1991, Series A no. 204, p. 23, §51, and Pfeifer and Plankl v. Austria judgment of 25 February 1992, Series A no. 227, p. 16, § 37). Moreover, in the case of procedural rights a waiver, in order to be effective for Convention purposes, requires minimum guarantees commensurate to its importance.

There is no doubt that a voluntary waiver of court proceedings in favour of arbitration is in principle acceptable from the point of view of Article 6 (cf. No. 8588/79 and 8589/79 Bramelid and Malmström v. Sweden, Dec. 12 December 1983, D.R. 38, p. 38). Even so, such a waiver should not necessarily be considered to amount to a waiver of all the rights under Article 6. As indicated by the cases cited in the previous paragraph, an unequivocal waiver of Convention rights is valid only insofar as such waiver is "permissible". Waiver may be permissible with regard to certain rights but not with regard to certain others. A distinction may have to be made even between different rights guaranteed by Article 6. Thus, in the light of the case-law it is clear that the right to a public hearing can be validly waived even in court proceedings (see, Eur.Court H.R., Håkansson and Sturesson v. Sweden judgment of 21 February 1990, Series A no. 171, pp. 20-21, §§ 66-67). The same applies, *a fortiori,* to arbitration proceedings, one of the very purposes of which is often to avoid publicity. On the other hand, the question whether the fundamental right to an impartial judge can be waived at all, was left open in the Pfeifer and Plankl v. Austria case, as in any case in the circumstances of that case there was no unequivocal waiver.

In the present case and insofar as concerns arbitrator M., the Court considers that the waiver made during the arbitration proceedings was unequivocal within the meaning of the case-law cited. Not only was the submission to arbitration voluntary but, in addition, during the proceedings before the arbitrators the applicants clearly abstained from pursuing their challenge against arbitrator M. In this respect the Court takes note of the decision of the Helsinki District Court of 26 July 1993 according to which, on the one hand, there were reasons to challenge the impartiality of M. under the Finnish Arbitration Act but, on the other hand, the applicants had lost their right to invoke his lack of impartiality as a ground for having the arbitral award quashed, since they had approved him as an arbitrator despite their

being aware of the grounds for challenging him. The Court has no reason to question the findings of the domestic court in either respect. In other words, the impartiality of one of the arbitrators was open to doubt under domestic law but the applicants unequivocally accepted this state of affairs in the course of the arbitration proceedings. Unlike in the Pfeifer and Plankl case the Court therefore has to decide whether the right to an impartial judge within the meaning of Article 6 could be irreversibly waived by the applicants and, correspondingly, whether the refusal to quash the arbitral award on the basis of the lack of impartiality was compatible with Article 6.

In deciding this question the Court limits itself to the particular circumstances of the present case, which concerned arbitral proceedings. In doing this it takes account also of the applicable legislative framework for arbitration proceedings and the control exercised by the domestic courts within that framework (cf, No. 28101/95, Nordström-Janzon and Nordström-Lehtinen v. the Netherlands, Dec. 27 November 1996, D.R. 87-A, pp. 115-116).

The Court considers that the Contracting States enjoy considerable discretion in regulating the question on which grounds an arbitral award should be quashed, since the quashing of an already rendered award will often mean that a long and costly arbitral procedure will become useless and that considerable work and expense must be invested in new proceedings (see also the above-mentioned Nordström-Janzon case, p. 116). In view of this the finding of the Finnish court based on Finnish law that by approving M. as an arbitrator despite the doubt, of which the applicants were aware, about his objective impartiality within the meaning of the relevant Finnish legislation does not appear arbitrary or unreasonable. Moreover, considering that throughout the arbitration the applicants were represented by counsel, the waiver was accompanied by sufficient guarantees commensurate to its importance. The Court furthermore notes that in the proceedings before the national courts the applicants had ample opportunity to advance their arguments, inter alia, concerning the circumstances in which the waiver took place during the arbitration proceedings. Without having to decide whether a similar waiver would be valid in the context of purely judicial proceedings the Court comes to the conclusion that in the circumstances of the present case concerning arbitral proceedings the applicants' waiver of their right to an impartial judge should be regarded as effective for Convention purposes. Therefore the refusal of the Finnish courts to quash the arbitral award on the ground of M.'s participation in those proceedings does not disclose any appearance of a violation of Article 6 of the Convention.

The applicants also allege that Article 6 was violated on the ground of the bias allegedly shown by the presiding arbitrator R. According to the applicants the way in which R. conducted the proceedings and his other behaviour disclosed that he was both subjectively and objectively partial.

In this respect the Court notes that the Helsinki District Court, after having heard witnesses, concluded that the evidence presented did not disclose any misconduct on the part of the presiding arbitrator. The Court finds no reason to question this finding of the domestic court. Consequently, there is no appearance of a violation of Article 6 on this ground either.

It follows that the application must be rejected as being manifestly ill-founded within the meaning of Article 35 § 3 of the Convention.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

Vincent Berger
Registrar

José Antonio Pastor Ridruejo
President