JUDGMENT of the

SWEDISH SUPREME COURT

Case No.

given in Stockholm on 27 June 2000 T 12-99

APPELLANT

B.H., having the firm Institut für Farbe, Postfach 10, D-74389 CLEEBRONN, Germany

Counsel: advokat Einar Wanhainen, Box 7418, 103 91 STOCKHOLM

COUNTERPARTY

Skandinaviska Färginstitutet Aktiebolag, 556045-5288,
Box 49022, 100 28 STOCKHOLM

Counsel: advokat Henrik Carlström, Nybrogatan 3,
114 34 STOCKHOLM

MATTER

Challenge proceedings with respect to arbitral award

APPEALED DECISION

Svea Court of Appeal, dep. 1, judgment of 2 December 1998, in case T 219-98

Judgment of the Court of Appeal see Appendix

JUDGMENT

The Supreme Court confirms the judgment of the Court of Appeal.

B.H. is ordered to compensate Skandinaviska Färginstitutet Aktiebolag for its litigation costs before the Supreme Court in the amount of SEK thirty-five-thousand (35,000), all comprising of costs for legal counsel, plus interest according to Section 6 of the Swedish Act on Interest from the date of the Supreme Court's judgment until the day of payment.

MOTIONS BEFORE THE SUPREME COURT

B.H. has moved that the Supreme Court shall annul the arbitral award, discharge her from the order to compensate Skandinaviska Färginstitutet Aktiebolag (SFI) its litigation costs before the District Court and the Court of Appeal, and shall order SFI to compensate her for her litigation costs before the District Court and the Court of Appeal.

SFI has disputed any amendments to the judgment of the Court of Appeal.

The parties have claimed compensation for the litigation costs before the Supreme Court.

GROUNDS

On 4 January 1996, B.H., having the firm Institut für Farbe, entered into an agreement to the effect that she was to sell SFI's products in Germany. Section 34 of the agreement provided that disputes between the parties arising out of the agreement should be resolved by arbitration under the Swedish Arbitration Act and be governed by Swedish law.

After a dispute had arisen between the parties, SFI requested arbitration in writing on 9 March 1995 and moved, as far as is now relevant, that B.H.

should be ordered to pay to SFI SEK 311,102 plus interest. The claim, which was later reduced to SEK 309,719 plus interest, related to unpaid invoices for products delivered by SFI to B.H.

B.H. acknowledged SFI's monetary claim, but objected to the case brought by SFI by claiming that she held a counterclaim exceeding the claimed amount, which related to lost profits as a consequence of SFI's having, in breach of the agreement between the parties, established a direct presence on the German market through a subsidiary.

SFI moved that the set-off defense should be dismissed because it, albeit governed by the arbitration clause, did not fall within the scope of the arbitration proceedings as framed by the request for arbitration.

In a decision rendered on 30 September 1996, the arbitral tribunal dismissed the set-off defense, stating that the arbitral tribunal did not have jurisdiction to try it, since it related to a matter for which SFI had not requested an arbitral award in its request for arbitration, and that the arbitration proceedings could not be expanded to also include the set-off defense against the will of SFI.

Thereafter, B.H. moved that she should be entitled to withhold the claimed amount as collateral for her claims, a right of retention. On 10 March 1997, the arbitral tribunal dismissed the claim.

In the arbitral award rendered on 26 May 1997, the arbitral tribunal ordered B.H. to pay to SFI SEK 309 719 plus interest.

B.H. has based her challenge proceedings on the claim that the arbitral tribunal incorrectly dismissed her set-off defense and her right to withhold the claimed amount as collateral for her claims, and that these errors have affected the outcome of the case.

SFI has denied that errors occurred in the arbitral tribunal's handling of the case, and also claimed that if any errors did occur, B.H. is liable for the errors.

The present dispute shall be tried under the Swedish Arbitration Act (SFS 1929:145) (SML). This act, as well as the new Swedish Arbitration Act (SFS 1999:116), grants the arbitrators and the parties substantial freedom to handle each case as is best suited for that particular case. As a result, neither the SML nor the new act contain detailed procedural rules, and the provisions of the Swedish Code of Judicial Procedure only have limited analogous applicability.

Section 11 of the SML provides that arbitration proceedings are initiated by a party requesting arbitration through notifying the counterparty on the issue(s) for which it requests an arbitral award. The arbitrators may also try other matters that the parties mutually agree to have tried by them.

SML does not contain provisions on counterclaims, set-off defenses or adjustments to claims. This was considered a deficiency, and so Section 23 of the new act provides that the plaintiff in the arbitration proceedings is entitled to present new claims in the proceedings, and the defendant is entitled to present its own claims therein, provided that the arbitrators do not, having regard to the timing of when the claim was put forth or other circumstances, find it inconvenient to try them.

Thus, the key question is whether the SML, despite the fact that this act does not contain any explicit provision thereon, can be deemed to grant plaintiffs (*sic*) the right to have a set-off defense tried against the will of defendants (*sic*). A first condition for this is that the set-off defense falls within the scope of the arbitration clause. If this is the case, there are in general strong reasons to allow the defendant's set-off defense, because the defendant might otherwise, in cases where the plaintiff wins the case, be ordered to pay an amount that it would normally not be liable to pay because of a counterclaim.

Many scholars have taken a positive stance with respect to allowing set-off defenses, while others have granted more weight to the will of the plaintiff or deemed the legal situation unclear (see, amongst others, Hassler, Skiljeförfarande, 1989, p. 105 f., Nordenson in the Stockholm Chamber of Commerce's publication Swedish and international arbitration, 1984, p. 13, and in the same chamber's publication Svensk och internationell skiljedom, 1986, p. 12, and Ramberg in the same publication, 1988, p. 29). The new act provides that the defendant shall be allowed to present its own claims, provided they fall within the scope of the arbitration clause, but neither therein is there a general right to have set-off defenses tried, because arbitrators have been granted the freedom to try the convenience of allowing these defenses on a case by case basis.

Because the SML does not contain a provision on the right to put forth set-off defenses, and because there is no already existing guiding case law or even a clear united view in the jurisprudence, the dismissal of B.H.'s set-off defense cannot be deemed such an error that should lead to annulment under item 4 of the first paragraph of Section 21 of the SML.

[ILLEGIBLE SIGNATURES]

The decision has been made by: Supreme Court Justices S., D., L., W. (Reporting Justice) and L.
Reporting clerk: T.