SWEDISH SUPREME COURT

JUDGMENT

Case No
T 2448-06

given in Stockholm on 19 November 2007

APPEALED JUDGMENT
Judgement of Svea Court of Appeal on 5 May 2006 in the case T 6875-04

APPELLANT
A.J.

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COUNTERPARTY
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MATTER
Challenge to arbitral award

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JUDGMENT BY THE SUPREME COURT

In a reversal of the judgment of the Court of Appeal in the main part, the Supreme Court sets aside the arbitral award given between the parties on 7 June 2004.

In a reversal also of the judgment of the Court of Appeal concerning legal costs, the Supreme Court releases A.J. from the liability to compensate Ericsson AB for legal costs in the Court of Appeal and orders Ericsson AB to compensate A.J. for legal costs in the Court of Appeal of SEK three hundred and forty seven thousand (347 000), of which SEK 245 000 relates to fees

for counsel, plus interest pursuant to § 6 of the Interest Act from 5 May 2006 until the date payment is made.

Ericsson AB shall compensate A.J. for legal costs in the Supreme Court of SEK four hundred and eighty seven thousand five hundred (487 500), of which SEK 425 000 relates to fees for counsel, plus interest pursuant to § 6 of the Interest Act from the date of the judgment of the Supreme Court until the date payment is made.

MOTIONS BEFORE THE SUPREME COURT

A.J. has moved that the Supreme Court uphold the claim he made in the Court of Appeal in the main part, release him from the obligation to compensate Ericsson AB for legal costs in the Court of Appeal and order Ericsson AB to pay compensation for his legal costs in the Court of Appeal.

Ericsson has objected to any reversal.

The parties have claimed compensation for their legal costs in the Supreme Court.

The Supreme Court has obtained a statement from the Arbitration Institute of the Stockholm Chamber of Commerce.

REASONING IN SUPPORT OF THE JUDGMENT

The issue in the case is whether the challenged arbitral award shall be set aside because circumstances have prevailed that could have shaken the trust in arbitrator J.L.'s impartiality. § 8 of the Arbitration Act (1999:116) provides that an arbitrator shall be impartial. At the request of a party, an arbitrator shall be removed from his assignment if there is any circumstance that may shake the trust in the arbitrator's impartiality. Items 1-4 of the provision list circumstances that should always be deemed to shake the trust in the arbitrator's impartiality. The list is intended to be exemplary and not exhaustive (see Govt. Bill 1998/99:35 p. 85 and p. 218). § 9 requires an arbitrator to disclose circumstances to the parties that can be thought to prevent him from acting as arbitrator pursuant to § 8.

If an arbitrator, due to any circumstance stated in § 8, has no authority, the arbitral award shall, following a challenge, be entirely or partly set aside at the request of a party (§ 34 first paragraph 5).

However, the right to invoke such a circumstance may be lost if the party can be deemed to have waived its right to establish its claim, for example by participating in the proceeding without objection, or if more than fifteen days have passed from the time the party learned about the circumstance (§ 34 second paragraph and § 10 first paragraph).

In the preparatory work to the 1999 Act, the importance of arbitration disputes often having international associations is emphasised. During the formulation of the Swedish legislation, it was considered important for each separate issue to take into account the provisions of the model for the legislation, a law governing international arbitration proceedings worked out by the UN's commercial law commission, UNCITRAL, the so-called model legislation. In relation to the provisions governing bias, it was stated that it was natural to pay special consideration to the corresponding provisions in the Code of Judicial Procedure. It was not considered necessary to make special mention of the fact that the arbitrator shall be impartial, which is stated in the model legislation, as this was covered by the wording chosen. It was further stated in the preparatory work that it might be possible that a lawyer is not deemed to be biased according to § 8, but that the circumstances could yet be such that it would be contrary to good legal practice to undertake or keep an assignment as arbitrator in a certain dispute. It was particularly emphasised that a lawyer, according to the rules for good legal practice, should not be able to invoke the fact that a party has refrained from claiming grounds for bias. (Govt. Bill 1998/99:35 p. 44 ff , p. 82 f and p. 218.)

In many countries there are international arbitration institutes that have their own regulatory frameworks for their operation. In the case, reference has been made *inter alia* to the International Chamber of Commerce (ICC) based in Paris and the Arbitration Institute of the Stockholm Chamber of Commerce based in Stockholm. The regulatory frameworks for the above-mentioned arbitration institutes include rules about bias with principally the same content as the fundamental rule governing impartiality in the Swedish Arbitration Act (see for example the current regulations for the Arbitration Institute of the Stockholm Chamber of Commerce, § 17, which states that an arbitrator shall be impartial and independent). Furthermore, in this case, guidelines issued by the International Bar Association (IBA)

relating to conflicts of interests within international arbitration law have also been invoked. Although the trial of the case shall be done on the basis of the provisions in the Arbitration Act, there may be reason to also look at the implementation of regulatory frameworks and guidelines of the type now mentioned against the background of similar regulations and the frequently occurring international features in the operation.

As a general starting point, the statements by the Supreme Court in the case NJA 1981 p. 1205 still have force. These stated that the bias rules are intended to protect objective handling in the administration of justice and that it is important that the rules are implemented in such a way that a judge or arbitrator covered by such a rule may not participate in court or arbitration proceedings, even if in the individual case there is no reason to assume that he would permit himself to be influenced by his relationship to one party during the handling of or decision-making in the case. According to the Supreme Court, not least for arbitrators must the requirement for objectivity and impartiality be set high, as any error relating to the evaluation of evidence or the implementation of the law cannot lead to an arbitral award being set aside.

A.J. has claimed that circumstances existed that may shake the trust in the impartiality of J.L. According to A.J., these circumstances are that J.L. at the time of the arbitration proceeding was firmly linked to Mannheimer Swartling Advokatbyrå as a consultant with the task of providing legal advice to the lawyers of the firm and that Mannheimer Swartling Advokatbyrå had significant legal assignments from the Ericsson Group, of which Ericsson AB, which was A.J.'s counterparty in the arbitration proceeding, is a part. J.L. has assisted the Ericsson Group by means of two legal opinions. According to A.J., a relationship damaging to trust has existed between the arbitrator and one party to the arbitration proceeding, through the relationship of both to the law firm. In any case, J.L. had a duty to disclose the client relationship between Mannheimer Swartling Advokatbyrå and the Ericsson Group and of his own assistance to the Ericsson Group by means of legal opinions. The failure to disclose the client relationship independently, or in conjunction with the other circumstances, leads to the conclusion that J.L. had no authority.

Ericsson AB has primarily objected that A.J. has lost the right to refer to the circumstances stated by means of a challenge, as these were known to him or at least to his counsel during

the proceeding. In the alternative, the company has denied that circumstances exist that could shake the trust in J.L.'s impartiality and that J.L. has neglected his duty to disclosed.

A.J. has denied that he or his counsel had knowledge during the proceeding that the Ericsson Group was a client of the law firm. In support of him gaining such knowledge only after the arbitral award was given, AJ has referred to recordings of interviews under oath in the Court of Appeal with him and a witness interview with Advokat J.T., who was A.J. 's counsel during the arbitration proceeding.

Against the evidence brought by A.J., the Supreme Court finds that Ericsson AB has not shown that A.J. had any earlier knowledge than he has himself claimed of the circumstances he referred to as grounds for his challenge. A.J. is therefore entitled to refer to the circumstances.

The following emerges from the investigation about J.L.'s relationship with Mannheimer Swartling Advokatbyrå.

J L worked part time as a consultant for the firm. According to Ericsson AB, the contractual relationship was probably an employment relationship, even if the agreement was designated as a consultancy agreement. The work consisted mainly of providing legal advice to the other lawyers at the firm and writing legal opinions. Among these were legal opinions given to companies in the Ericsson Group. On the other hand, he did not have any client contact himself. He received a fixed fee that amounted to just short of 20 per cent of his total income. On the firm's website, he was presented as a staff member of the firm with the title of consultant, and in the list of members of the Swedish Bar Association, he was listed as assistant lawyer at the firm. His office was on the firm's premises. J.L. kept the arbitration activities separate from the activities at the law firm, but to some extent he used the firm's meeting rooms and office resources for the arbitration activities. The law firm was recompensed for the cost of this. The parties to the current arbitration proceeding have received letters from J.L. written on letterhead paper with the name of the law firm.

In a decision relating to J.L.'s principal, the disciplinary committee of the Swedish Bar Association has stated that J.L. was employed by the law firm and that he for reasons of legal ethics should have turned down the assignment as arbitrator.

In a statement to the Supreme Court, the Arbitration Institute of the Stockholm Chamber of Commerce has stated that if the Institute had had to make a decision in a matter such as the current one, it is highly probable that the Institute, in making the assessment according to its own rules, would have found that bias existed. In the opinion of the Institute, in this context there is no reason to differentiate between partners in a law firm and lawyers employed by the law firm. There is also no reason to assess the degree of involvement in the activities of the law firm on the part of the lawyer, once it has been determined that the lawyer is linked to the law firm, as is the case here. The fact that the lawyer's arbitration activities were in some way said to be separate from the law firm's activities also lacks importance for the assessment. The statement shows that the Institute's assessment of whether bias exists in an individual case is made against the background of, *inter alia,* Swedish and international practice in courts and arbitration institutes. The IBA's guidelines also constitute an important supporting document. The Institute has in particular pointed out that the circumstance that an arbitrator's law firm has a significant commercial relationship to any of the parties is listed as a circumstance that is grounds for bias in these guidelines. The Institute has also accounted for some of its own decisions on issues of bias (see, *inter alia,* Stockholm Arbitration Report 2002:1 p. 39 ff.).

The Ericsson Group was a client of Mannheimer Swartling Advokatbyrå.

The starting point for the assessment should be that Ericsson AB in this context is placed on an equal footing with the Ericsson Group. The assessment whether circumstances have existed that could shake the trust in J.L.'s impartiality shall, as previously shown, be made on objective grounds and not by concentrating on the risk that J.L. might allow himself to be influenced by the law firm's client relationship with the Ericsson Group in the individual case. J.L. must be regarded as having been employed by the law firm, albeit part time, and with an income on which he was not financially dependent. What has emerged about his working conditions, tasks and position at the law firm does not mean that in the current circumstances he should be regarded in any way other than the other lawyers employed by the law firm.

According to the rules for good legal practice, a lawyer is obliged to observe faithfulness and loyalty vis-à-vis the client (§ 18 in Guidelines for good legal practice). A lawyer is obliged to turn down an assignment offered if he himself, any assistant lawyer employed by him or a lawyer who is his employer or partner or with whom he has a joint office organisation in the

case or in another case that may be of importance to the execution of the assignment offered, represents or himself has a personal or financial interest that is contradictory to that of the principal. Likewise, a lawyer is obliged to turn down an assignment if any other circumstance exists that would clearly constitute an obstacle for the lawyer to independently uphold the principal's interests (§ 14 of the rules).

The investigation shows that the assignment from the Ericsson Group was important to Mannheimer Swartling Advokatbyrå. The assignment, which was emphasised in the firm's marketing, generated considerable income for the firm. In a letter from A.C, who was then a lawyer at Mannheimer Swartling Advokatbyrå, he turned down representing a person in a dispute against an Ericsson company, whereby he primarily referred to the firm having had considerable assignments from the Group for a large number of years.

What is stated, together with the statement from the disciplinary committee of the Swedish Bar Association, gives every reason to draw the conclusion that the client relationship to the Ericsson Group was such that the law firm's partners and employed lawyers, and thus also J.L., were prevented for reasons of legal ethics from accepting both assignments from a counterparty to the Ericsson Group and also assignments as arbitrator in a dispute to which a company in the Group was a party (see Cars, *Lagen om skiljeförfarande, En kommentar* [Arbitration Law, A Commentary], 3rd edition 2001, p. 79 note 272).

The issue in the case is, however, whether J.L. lacked authority as arbitrator due to the provisions of § 8 of the Arbitration Act. It is not disputed that none of the circumstances specifically mentioned in Items 1-4 of the provision exist. At least, when as in the case in question, the relationship between the law firm and the client is of commercial importance to the law firm, it must be deemed that the interest and loyalty ties between the partners and employed lawyers of the law firm on the one hand and the client on the other hand is such a circumstance that may shake the trust in the impartiality of an arbitrator employed by the law firm, when the client is part of the arbitration proceeding (see Lindskog, *Skiljeförfarande* [Arbitration Proceedings] 2005, p. 453 note 63). Such a standpoint has support from the IBA's guidelines and from the practice of the Arbitration Institute of the Stockholm Chamber of Commerce.

A relationship damaging to trust must be deemed to exist even if the arbitrator has not himself had direct client contact with the party, the arbitration activities have been carried out separately from the lawyer activities, or if the arbitration dispute has related to issues other than such as the client assignment normally included.

Against this background, and with an objective view, circumstances have prevailed that could shake the trust in the impartiality of J.L.

Because J.L. had no authority, the challenged arbitral award shall be set aside in its entirety.

With this outcome, Ericsson AB shall compensate A.J. for legal costs in the Court of Appeal and the Supreme Court. The amount claimed relating to costs in the Court of Appeal has been confirmed by the company. The compensation claimed by A.J. relating to costs in the Supreme Court is deemed to be reasonable.

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The decision was made by: Supreme Court Justices S.B., A.-C.L., E.N. (Reporting Justice), P.V. and A.S.

Reporting Clerk: A.F.