SVEA COURT OF APPEAL
Department 02
Division 020108

JUDGMENT
13 November 2014
Stockholm

Case No.
T 1417-14

CLAIMANT
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RESPONDENT
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MATTER
Invalidity etc. of arbitral award rendered in Stockholm on 14 November 2013

JUDGMENT OF THE COURT OF APPEAL

1. The Court of Appeal rejects the motions of the claimant.

2. PAX-Design LLC is ordered to compensate Connyland AG for its litigation costs before the Court of Appeal in the amount of SEK 86,233, plus interest on the amount pursuant to Section 6 of the Swedish Interest Act from the day of the judgment of the Court of Appeal until the day of payment. Of the amount, SEK 86,025 comprises costs for legal counsel.

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BACKGROUND

On 21 March 2006, PAX-Designs LLC (PAX) and Connyland AG (Connyland) entered an agreement under which PAX sold an amusement park ride “Cobra” to Connyland. The agreement provided that PAX should deliver and install the ride.

The agreement between PAX and Connyland has been the object of two arbitration proceedings between the parties. In the first arbitration, Connyland claimed compensation for damages from PAX for delays in the delivery and defects in the property. PAX, for its part, presented certain counterclaims. In an arbitral award of 15 May 2012, PAX was ordered to pay a certain amount to Connyland.

Hereafter, PAX requested another arbitration, moving that Connyland should be ordered to return the ride to PAX. As grounds for its motion, PAX referenced that, based on a provision of the agreement (Section 7.1), the ownership to the property had not been transferred onto Connyland. The provision regulated the transfer of ownership as follows:

“The right of property to the ride shall be transferred to the Buyer after the signing of the final Acceptance Report by both Parties and transfer of the final amount.”

Connyland disputed PAX’s motion and moved, for its part, that the arbitral tribunal should affirm that Connyland was the owner of the ride. PAX disputed this motion.

The now challenged arbitral award was given in Stockholm on 14 November 2013 (Arbitration Institute of the Stockholm Chamber of Commerce case No. V 028/2012) in the second arbitration proceedings. In the arbitral award PAX’s motion was rejected and Connyland’s motion was granted. The arbitral tribunal concluded that Section 7.1 of the agreement between the parties must be registered in a certain public register in Switzerland in order to be valid. Since it had not been registered, the arbitral tribunal concluded that the provision was without effect and that Connyland had ownership title to the ride.

MOTIONS BEFORE THE COURT OF APPEAL

PAX has moved that the Court of Appeal shall declare the arbitral award invalid, or, in the alternative, annul it, except for the decisions on compensation to the arbitrators.

Connyland has disputed that the arbitral award shall be declared invalid or be annulled.

The parties have claimed compensation for litigation costs.

THE PARTIES' RESPECTIVE GROUNDS

PAX

The arbitral award obviously violates fundamental principles of law, because, by deviating from the agreed conditions for the transfer of ownership set out in the agreement, it obviously violates fundamental principles of Swedish law on the protection of property and freedom of contract (item 2 of the first paragraph of Section 33 of the Swedish Arbitration Act (1999:116)).

The arbitral tribunal exceeded its mandate since the arbitral award is based on a circumstance or legal reference that was never referenced by Connyland and that the parties agreed should fall outside the scope of the arbitral tribunal's review. The interpretation of Section 7.1 of the agreement as a "reservation of title clause" (*Sw: reservationsrättsklausul*) – which must be registered to be binding – falls outside the framing of the review as set by the parties. The excess of mandate affected the outcome of the case, or it can in any event not be excluded that it affected the outcome (item 2 of the first paragraph of Section 34 of the Swedish Arbitration Act).

A procedural error occurred through the arbitral tribunal's failure to provide the parties the opportunity to clarify their respective positions as to whether Section 7.1 constitutes a reservation of title clause and through its failure to provide the parties with the opportunity to argue the issue. The error has likely affected the outcome of the case. PAX did not contribute to the

procedural error (item 6 of the first paragraph of Section 34 of the Swedish Arbitration Act).

PAX did not refrain from objecting to the circumstances constituting the procedural error. The company was not aware of them until it received the arbitral award.

Connyland

It is disputed that the arbitral award obviously violates fundamental principles of Swedish law. The arbitral award does not violate fundamental principles of protection of property and the freedom of contract.

It is disputed that the arbitral tribunal exceeded its mandate in the manner maintained by PAX. In the arbitration, Connyland objected that Section 7.1 of the agreement between the parties should be considered as reservation of title clause. The parties did not agree that this circumstance should be outside the scope of the arbitral tribunal's review. Even if Connyland would be held to not have referenced that this constituted a reservation of title clause, the arbitral tribunal has not exceeded its mandate. This merely involved the application of a legal provision. Under the principle of *jura novit curia,* the arbitral tribunal was free to consider the issue irrespective of the references of the parties.

The arbitral tribunal has not committed a procedural error. There were no reasons for the arbitral tribunal to provide the parties the opportunity to argue their positions as to whether Section 7.1 constituted a reservation of title clause. If a procedural error occurred, PAX has contributed to it. Any possible procedural error was of such nature that it did not affect the outcome of the case.

Because PAX failed to point out the procedural error to the arbitral tribunal, PAX has lost the right to reference the error now.

THE PARTIES' FURTHER DETAILS

PAX

In Section 7.1 the parties had agreed that the ownership to the ride should be conditional upon *that* "the final Acceptance Report" had been signed and *that* the purchase price was paid. Connyland never signed the final Acceptance Report. In reference to Section 7.1 and the principle of the binding effect of agreements (*pacta sunt servanda*), PAX's position in the arbitration was that the ownership to the ride had never been transferred to Connyland. PAX maintained that this constituted a so-called suspensive condition for the ownership. The parties agreed hereon. The sole time Connyland referenced that Section 7.1 constituted a reservation of title clause was in the Statement of Defense of 1 November 2012. However, Connyland later withdrew this objection and admitted that it was a suspensive condition. In its Statement of Rejoinder of 8 February 2013, Connyland agreed that the ownership to the ride was conditional as maintained by PAX and that the conditions were suspensive. This position was confirmed by Connyland on several occasions during the arbitration. The minutes from the oral hearing provide, amongst other things, that Connyland's counsel stated that the ownership title was transferred onto Connyland in October of 2010, when the parties decided not to sign "the final Acceptance Report" and that the rationale was that Connyland considered PAX to have acted fraudulently. During the first day of the oral hearing one of the arbitrators, Dr. LG, asked the parties whether Section 7.1 had been registered in Switzerland. In this context, Connyland's counsel did not raise any objections as to the validity of the clause due to the fact that it had not been registered. Also in this context did Connyland maintain that the ownership had been transferred because PAX's fraudulent behavior prevented the suspensive conditions from being fulfilled. Connyland never reverted to the initially referenced objection that the clause constituted a reservation of title clause, which required registration under Swiss law.

Based on what Connyland stated in the arbitration, PAX had grounds to assume that Connyland did not maintain that the clause constituted a reservation of title clause, which requires registration to be valid. The arbitral tribunal ought to have followed-up on the issue, informed the parties that it

considered the issue relevant and ought to have provided the parties the opportunity to argue the matter.

The majority of the arbitral tribunal did not touch upon the mechanism for the transfer of ownership the parties had agreed. By labelling the agreed mechanism as a reservation of title clause the majority of the arbitral tribunal decided to basically not consider the mechanism for the transfer of ownership agreed upon between the parties. This violates PAX's fundamental right of protection of property. The application of Swiss property law and the requirement of registration for the transfer of ownership produces a result in violation of the fundamental principle of the parties' right to freedom of contract. The requirement of registration of a transaction in a public register for its validity between the parties is a material limitation in the freedom to enter agreements. It is a fundamental principle that such a registration is only required in relation to third parties.

Connyland

Already in its first submission in the arbitration (Statement of Defense) of 1 November 2012 did Connyland object that Section 7.1 should be considered as a reservation of title clause, which requires registration under Swiss law. As registration has not – undisputedly – been undertaken, the clause was without effect. The other circumstances referenced by Connyland were alternative to this objection. This is clear from the submission of 1 November 2012 as well as from the subsequent submission of 8 February 2013. Both the submission of 8 February 2013 and the minutes from the oral hearing provide that Connyland still maintained that the clause was invalid because of the lack of registration. It is correct that Dr. LG during the oral hearing asked the parties whether Section 7.1 had been registered in the Swiss register. Connyland's counsel's response provides that Connyland considered the clause to be a reservation of title clause and that it had not been registered as required by Swiss law. Thus, Connyland did not withdraw this objection, whether in any written submission or at the oral hearing. In the absence of a joint declaration from the parties that a specific legal provision should not be

applied, or an explicit declaration from a party that it wishes a claim to not be reviewed under the requirements of a specific provision, there are no grounds to deviate from the principle of *jura novit curia*.

The issue of the validity of Section 7.1 was brought up on several occasions during the arbitration. Since it was clear to PAX that Connyland had withdrawn the claim on the invalidity of the clause, PAX ought to have questioned the relevance of the questions posed by the arbitral tribunal.

The arbitral award does not violate fundamental principles of Swedish law. The fact that Swiss law poses certain peremptory requirements for the validity of reservation of title clauses does not violate *public policy*. It is not disputed that the parties had agreed that Swiss law should govern the agreement. Both the protection of property and the freedom of contract are limited in a number of ways under Swedish law. In any event, a possible misapplication of the applicable law does not constitute a circumstance rendering *public policy* relevant. It is not appalling that a reservation of title clause is invalid and that the ownership is transferred to the purchaser.

THE INVESTIGATION BEFORE THE COURT OF APPEAL

The parties have not referenced any evidence.

GROUNDS OF THE COURT OF APPEAL

Does the arbitral award violate public policy*?*

An arbitral award is invalid if it, or the manner in which it was reached, obviously violates fundamental principles of Swedish law (item 2 of the first paragraph of Section 33 of the Swedish Arbitration Act). This can be expressed so that the arbitral award then violates Swedish *public policy*.

The possibility of having arbitral awards declared invalid due to *public policy* under Swedish law are limited. The preparatory works of the provision provide that it is only intended to cover highly appalling cases and that it will be applicable only extremely rarely. *Public policy* has been considered to

cover arbitral awards in which fundamental principles as regards the merits or procedural matters have been set aside. Examples mentioned are arbitral awards through which somebody is ordered to perform an illegal action or that the arbitrators have settled a dispute without considering a provision of law which is peremptory for the benefit of a third party or a general public interest and that expresses a particularly important legal principle (see Government Bill 1998/99:35 p. 140 f.). Further, in doctrine it has been discussed whether in exceptional cases an arbitral award could violate *public policy* if it includes the application of law leading to unreasonable results (see Lindskog, Skiljeförfarande En kommentar, 2nd ed. 2012, p. 847 and 848).

Section 7.1 of the agreement between the parties provides that the ownership to the ride should be transferred onto the purchaser only after the signing of "the final Acceptance Report" and the transfer of the final payment. The arbitral tribunal concluded that the provision should be considered as a "reservation of title clause" (*Sw: reservationsrättskausul*). Considering that such a clause under Swiss law requires registration to be valid and that registration – undisputedly – had not been undertaken, the arbitral tribunal concluded that the clause was without effect and that ownership had been transferred to Connyland.

The Court of Appeal concludes that the requirement for registration of reservation of ownership under Swiss law cannot in and of itself be deemed to violate fundamental principles of Swedish law, whether as regards fundamental principles on the protection of property or freedom of contract. The fact that the arbitral tribunal determined that Connyland was the owner of the ride without Connyland having signed "the final Acceptance Report" can neither be deemed unacceptable, despite the parties having agreed that the ownership was subject to the condition set out in Section 7.1. Thus, the Court of Appeal concludes that the situation is not so exceptional as to constitute an application of the law that leads to unreasonable results. Therefore, the arbitral award cannot be deemed to violate *public policy*.

Did PAX lose the right to challenge the arbitral award?

The first paragraph of Section 34 of the Swedish Arbitration Act provides that an arbitral award can be annulled in certain therein stated situations. However, a party may not reference a circumstance which it, by participating in the arbitration without objection or in any other manner must be deemed to have refrained from referencing (second paragraph of Section 34 of the Swedish Arbitration Act).

Considering that which PAX has maintained before the Court of Appeal, it is natural that PAX during the arbitration was not aware of the circumstances now referenced in such a way so as to be deemed to have refrained from referencing them. Thus, PAX has not lost its right to challenge the arbitral award.

Did the arbitrators exceed their mandate?

Item 2 of the first paragraph of Section 34 of the Swedish Arbitration Act provides that an arbitral award shall be annulled if the arbitrators have exceeded their mandate. If the arbitral tribunal bases its decision on a circumstance which has not been referenced by a party, it should generally be deemed to have exceeded its mandate, albeit that certain caution should be had for the review of international disputes. The mandate can be exceeded also when the arbitral tribunal bases its decision on legal arguments that the parties have agreed shall fall outside the scope of the review (Government Bill 1998/99:35 p. 144 f.).

The arbitral tribunal concluded, as noted by the Court of Appeal above, that Section 7.1 of the agreement between the parties was to be considered as a reservation of title clause, which must be registered in a Swiss register to be valid and that the clause, since it had not been registered, was irrelevant to the question of ownership of the ride. The Court of Appeal holds that this is an issue that involves not only legal argumentation on the part of the arbitral tribunal, but also such a factual circumstance that must be referenced by a party in order to be taken into consideration. Thus, the question is whether the circumstance was referenced in the arbitration.

It is undisputed that Connyland, in the submission of 1 November 2012 (Statement of Defense), as grounds for its case referenced that Section 7.1 was to be considered a reservation of title clause, and that such a clause must be registered in a Swiss register to be valid. Then, the question is whether Connyland later in the arbitration withdrew this.

As PAX has maintained before the Court of Appeal, on several occasions in the arbitration Connyland made statements concerning the importance of Section 7.1 based on the assumption that it was actually valid. Both Connyland's submissions submitted in the arbitration and the minutes from the oral hearing provide that Connyland argued the issue that PAX had acted in such a manner that the clause could not be fulfilled and that the ownership as a result had been transferred onto Connyland. That, which Connyland maintained hereon cannot, according to the Court of Appeal, be interpreted to mean that Connyland withdrew its statement that the clause was a reservation of title clause which must be registered to be valid. Already in Connyland's submission of 1 November 2012, it is clear that Connyland referenced several circumstances in support of the opinion that ownership had been transferred onto Connyland. Even if Connyland did not in its submission of 8 February 2012 discuss the issue of the registration of the clause, Connyland clearly and unambiguously stated that it still maintained the arguments set out in the submission of 1 November 2012. Further, nothing that has been referenced concerning the oral hearing indicates, in the Court of Appeal's opinion, that Connyland would have withdrawn the objection on registration of Section 7.1. In this context the Court of Appeal notes that the so-called principle of immediacy did not apply to the arbitration. Thus, the arbitral tribunal was to base its decision not only on that which transpired at the oral hearing, but also on that which the parties had referenced in its written submissions during the arbitration.

In sum, the Court of Appeal concludes that Connyland during the arbitration cannot be deemed to have withdrawn the initially referenced circumstance that Section 7.1 constituted a reservation of title clause and that it had no effect because it had not been registered. The investigation does not support

that the parties agreed that this matter should fall outside the scope of the arbitral tribunal's review. Thus, the arbitral tribunal has not exceeded its mandate as claimed by PAX.

Did a procedural error occur?

Item 6 of the first paragraph of Section 34 of the Swedish Arbitration Act provides that an arbitral award can be annulled if a procedural error occurred, without having been caused by a party, which likely affected the outcome of the case.

The arbitration lasted for an extended period of time and the parties had ample opportunities to argue, in writing as well as orally. The investigation provides that the validity of Section 7.1 was brought up in the submissions submitted by Connyland during the arbitration as well as during the oral hearing. Therefore, the arbitral tribunal cannot be deemed to have failed to guide the proceedings properly by not providing the parties the opportunity to further clarify their positions and argue the matter. Thus, no procedural error occurred that could justify an annulment of the arbitral award.

Summary

In sum, the Court of Appeal concludes that the arbitral award does not obviously violate fundamental principles of Swedish law and that the arbitral tribunal did not exceed its mandate. Further, no procedural error justifying the annulment of the arbitral award occurred. Thus, the motions of the claimant shall be rejected.

Litigation costs

Upon this outcome PAX shall compensate Connyland for its litigation costs before the Court of Appeal. The claimed amount is reasonable.

Appeal

The judgment of the Court of Appeal may not be appealed (first sentence of the second paragraph of Section 43 of the Swedish Arbitration Act).

[ILLEGIBLE SIGNATURES]

The decision has been made by: Judges of Appeal UB, CS and AK, reporting Judge of Appeal.