

SWEDISH SUPREME COURT JUDGMENT

given in Stockholm on 16 April 2010

Case No
Ö 13-09

APPELLANT

Lenmorniiproekt OAO
Mezhevoy Kanal 3, korp 2
RU-198035 St Petersburg
Russia

Counsel: Advokat TI and NH, LLB

COUNTERPARTY

Arne Larsson & Partner Leasing Aktiebolag, 556429-4071
Patron Haralds väg 6
181 31 Lidingö

Counsel: Advokat MH

MATTER

Recognition and enforcement of foreign arbitral award

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APPEALED JUDGMENT

Judgment of Svea Court of Appeal on 4 December 2008 in the case Ö 1438-07

JUDGMENT OF THE SUPREME COURT

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

Lenmorniproekt OAO shall pay compensation to Arne Larsson & Partner Leasing Aktiebolag for legal costs in the Supreme Court of SEK 78 000, relating to fees for counsel, plus interest pursuant to Section 6 of the Interest Act from the date of the decision of the Supreme Court until the date payment is made.

MOTIONS BEFORE THE SUPREME COURT

Lenmorniproekt OAO has moved that the Supreme Court shall uphold the application for recognition and enforcement of the arbitral award between the parties given on 27 April 2004 by the International Commercial Arbitration Tribunal at the Russian Federation's Chamber of Commerce and Industry.

Lenmorniproekt OAO has also moved that the Supreme Court shall release Lenmorniproekt from the obligation to pay compensation for legal costs in the Court of Appeal and instead award Lenmorniproekt compensation for legal costs in the Court of Appeal.

Arne Larsson & Partner Leasing AB has opposed any change.

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

GROUNDINGS

1. Lenmorniioproekt OAO (Lenmornii) has applied for the arbitral award to be recognised and enforced in Sweden. Arne Larsson & Partner Leasing AB (ALPL) has claimed that the application shall be rejected, as ALPL learnt of the arbitration proceeding and the arbitral award only after execution was applied for by Lenmornii.

2. The primary rule is that a foreign arbitral award based on an arbitration proceeding shall be recognised and enforced in Sweden (Section 53 of the Arbitration Act, 1999:116). However, this does not apply if the party against which the arbitral award is claimed can show that the party has not been properly informed of the appointment of an arbitrator or the arbitration proceeding or for some other reason has not been able to state its claim (Section 54, paragraph 2 of the same Act).

3. In this part, the Arbitration Act refers back to the New York Convention from 1958 relating to recognition and enforcement of foreign arbitral awards (in particular Article V). In conjunction with the Convention being incorporated into Swedish law, the legislator commented on the burden of proof resting on the party claiming that there is an obstacle to recognition and enforcement of the kind now in question. It was then emphasised that the party, contrary to custom, shall show that the other party – i.e. the party calling for the arbitration proceeding – has not fulfilled an obligation to

inform or similar. The assessment was that the burden of proof should therefore not be stringent (Govt. Bill 1971:131 pp. 37 and 39). The legal grounds entail that it is also important how the issue of notification has been handled in the arbitral award (see NJA 1989 C 22).

4. The arbitration dispute was in this case determined without ALPL participating in the proceeding. According to the award, the arbitral tribunal found that ALPL had received Lenmornii's summons as this had been sent to an address at Strandvägen in Stockholm. The tribunal established that ALPL had this address according to both the summons and the parties' agreement. The arbitral tribunal also found support for the receipt in a notification of service submitted in the dispute; however, a subpoena sent to the same address had been returned with notice that the addressee was not at the address stated.

5. In the current case, it has emerged that ALPL had changed its address to Patron Haralds Väg in Lidingö and had left the premises in Strandvägen before the arbitration proceeding was initiated by Lenmornii. In line with what the Court of Appeal has found, the investigation must be deemed to show that the summons and other documents in the arbitration proceeding were not delivered to any authorised representative of ALPL and that the documents had not reached the company in any other way either.

6. However, Lenmornii has claimed that ALPL must still be deemed to have received notification of the arbitration proceeding, *inter alia*, on the grounds that ALPL did not inform Lenmornii or the arbitration tribunal of the change of address.

7. The regulations governing recognition and enforcement of arbitral awards

laid down in the Arbitration Act and the New York Convention should be interpreted against the background of the general goal to facilitate enforcement expressed in the Convention (see NJA 2003 p. 379 with references).

8. That which is stated in the Convention about "proper" notification does not, however, give any more detailed guidance regarding the requirements to be set for a notification of an arbitration proceeding. Nevertheless, stringent requirements must be set in relation to a notification relating to the fundamental circumstance that arbitration is to be initiated (the summons). From the point of view of the rule of law, it is not acceptable that an arbitral award is recognised and enforced against a party that has not been informed of the arbitration proceeding or was even been able to know that it is in progress. When it comes to the notification in question, a general requirement that it shall have reached the counterparty should therefore be maintained. Lenmornii's claim regarding the counterparty's obligation to report its new address lacks any bearing on the situation that the counterparty has not learned that an arbitration proceeding has started.

9. If it is not shown in the arbitral award or otherwise that the counterparty has received the notification or if the counterparty in a case relating to recognition and enforcement of the arbitral award can submit a report that raises considerable doubt as to whether the counterparty has received the notification, an obstacle to recognition and enforcement would normally be deemed to exist in accordance with Section 54 paragraph 2 of the Arbitration Act. On the other hand, if it emerges that the counterparty nevertheless has been able to make its claim in the arbitration proceeding, the matter is different.

10. Against the background now stated, and in view of what has emerged in the case, ALPL must be deemed to have shown that the company has not been given proper

notification of the arbitration proceeding. An obstacle to the recognition and enforcement of the arbitral award therefore exists. The judgment of the Court of Appeal shall therefore be upheld.

The judgment was made by: Supreme Court Justices G.L., K.C., P.V., G.T. (Reporting Justice) and L.M.

Reporting Clerk: K.T.