SVEA COURT OF APPEAL	**JUDGMENT**	Case No.
Department 02	24 February 2012	T 6238-10
Division 020109	Stockholm	

CLAIMANT

1. Mr. RR
[INFORMATION OMITTED]

2. Mr. VR
[INFORMATION OMITTED]

3. Ukio Banko Investiciné Grupé UAB
K Donelaicio g. 60
44248 Kaunas
Lithuania

Counsel to 1-3: Advokat Kristoffer Ribbing
Al Advokater KB
Riddargatan 13 A
11451 Stockholm

RESPONDENT

Rual Trade Limited
2nd floor, #333 Waterfront Drive
P.O. Box 3339, Road Town
Tortola
British Virgin Islands

Counsel: Advokat Anders Reldén and jur.kand. Linda Kahver
White & Case Advokataktiebolag
Box 5573
11485 Stockholm

MATTER
Challenge of arbitral award etc.

CHALLENGED AWARD
Arbitral award rendered in Stockholm on 21 April 2010, under the rules of the Arbitration Institute of the Stockholm Chamber of Commerce case No. F 192/2009, see appendix A.

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JUDGMENT OF THE COURT OF APPEAL

1. The Court of Appeal disallows the oral evidence referenced by *Messrs*. RR and VR together with Ukio Banko Investiciné Grupé UAB.

2. The Court of Appeal rejects the claims of the claimants.

3. *Messrs*. RR and VR together with Ukio Banko Investiciné Grupé UAB are ordered to jointly and severally compensate Rual Trade Limited for its litigation costs before the Court of Appeal in the amount of SEK 401,700, out of which SEK 400,000 comprises costs for legal counsel, plus interest thereon 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.

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BACKGROUND

Based upon a contractual relationship arisen in 2003 between Rual Trade and Viva Trade L.L.C. an arbitral award was given on 10 February 2006. The arbitral award ordered Viva Trade L.L.C. to pay a certain amount to Rual Trade. Viva Trade L.L.C. did not meet its obligations under the arbitral award, whereupon Rual Trade sought to enforce the arbitral award in Wisconsin, USA.

In April of 2009, a settlement agreement was entered between Rual Trade on the one side, and Viva Trade L.L.C., *Messrs*. RR, VR and Ukio Banko Investiciné Grupé UAB on the other side. The settlement agreement listed the parties as follows:

> This Settlement Agreement and Mutual Release (the "Agreement") is made and entered into by and between Rual Trade Ltd. ("Rual"), Plaintiff, Viva Trade LLC ("Viva"), [RR], [VR] (collectively "the [R's]") and Ukio Bankas Investiciné Group ("UBIG"), Defendants.

With respect to the payment liability, the following was noted in Section 2.1 of the settlement agreement.

> Defendants are jointly and severally liable to pay, and agree to pay or cause to be paid to the Plaintiff, the total sum of Three Million U.S. Dollars ($3,000,000.00), to be made in two installments of Five Hundred Thousand U.S. Dollars ($500,000.00) and two installments of One Million U.S. Dollars ($1,000,000.00) to Rual.

The agreement further dealt with how disputes related to the agreement should be resolved and what law that would apply to such disputes. Section 4.1 of the agreement provides as follows.

> Any dispute, controversy or claim arising out of or in connection with this Agreement, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with the Rules for Expedited Arbitrations of the Arbitration Institute of the Stockholm Chamber of Commerce. The seat of the arbitration shall be Stockholm, Sweden. The language to be used in the arbitral proceedings shall be English. This Settlement Agreement shall be governed by the substantive law of the State of New York, without reference to choice of law rules.

Only the first installment set out in Section 2.1 was paid. As a result, Rual Trade requested expedited arbitration before the Arbitration Institute of the Stockholm Chamber of Commerce against Viva Trade L.L.C., *Messrs*. RR and VR, and Ukio Banko Investiciné Grupé UAB in November of 2009 and moved that Viva Trade L.L.C., *Messrs*. RR and VR, and Ukio Banko Investiciné Grupé UAB should be ordered to pay to Rual Trade the outstanding amounts under the settlement agreement.

The Arbitration Institute of the Stockholm Chamber of Commerce appointed Mr. E as arbitrator.

Before Viva Trade L.L.C., *Messrs*. RR and VR, and Ukio Banko Investiciné Grupé UAB had submitted their Statement of Defense, the arbitrator rendered a procedural decision (Procedural Decision No. 1). The decision provides under heading Hearing, amongst other things, the following.

> A hearing will only be held if requested by a party and deemed necessary by the Arbitrator (Article 27 SCC-Rules). Otherwise the decision will be rendered by written procedure.

In submissions Viva Trade L.L.C. admitted liability, whereas Viva Trade L.L.C., *Messrs*. RR and VR, and Ukio Banko Investiciné Grupé UAB objected to liability. In conjunction with their submissions *Messrs*. RR and VR, and Ukio Banko Investiciné Grupé UAB submitted written witness statements from *Messrs*. RR and VR as well as Ms. M (Director on Ukio Banko Investiciné Grupé UAB' Board of Directors), requested a hearing and that the individuals who had submitted written witness statements should be heard as witnesses at the hearing.

In Procedural Decision No. 4, the arbitrator rejected the respondents' request for a hearing and oral witness statements. The arbitrator provided *inter alia* the following grounds.

> (3) According to Art. 27 para. l of the Rules for Expedited Arbitrations of the Arbitration Institute of the Stockholm Chamber of Commerce (the "Rules") a hearing will be held if requested by a party and deemed necessary by the Arbitrator. However, the Arbitral Tribunal, after carefully considering the hitherto existing submissions of

> the Parties and in particular the Witness Statements ... [d]oes not think it necessary to call for an oral hearing and to summon witnesses in order to finally resolve the dispute. [—]

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MOTIONS BEFORE THE COURT OF APPEAL

Messrs. RR and VR, and Ukio Banko Investiciné Grupé UAB have moved that the Court of Appeal in the main shall declare the arbitral award invalid with respect to *Messrs*. RR and VR, and Ukio Banko Investiciné Grupé UAB. In the alternative, they have moved that the Court of Appeal shall annul the arbitral award with respect to *Messrs*. RR and VR, and Ukio Banko Investiciné Grupé UAB.

Rual Trade Limited (Rual Trade) has moved that the claimants' case shall be rejected.

The parties have claimed compensation for their litigation costs.

GROUNDS ETC.

In support of their respective cases, the parties have mainly referenced the following.

Ukio Banko *et al*.

In the main, it is maintained that the arbitral award is invalid under item 2 of the first paragraph of Section 33 of the Swedish Arbitration Act (SFS 1999:116), because the arbitrator's Procedural Decision No. 4 to disallow the request of Ukio Banko *et al*. for a hearing was obviously in breach of fundamental principles of Swedish law (*ordre public*). In the alternative, it is maintained that the arbitrator's decision to disallow a hearing comprised a procedural error, which likely affected the outcome of the case. As a result, the arbitral award shall be annulled under item 6 of the first paragraph of Section 34 of the Swedish Arbitration Act.

In his decision to not hold a hearing, the arbitrator stressed the written witness statements from *Messrs*. RR and VR and Ms. M. In the arbitral award, the arbitrator further referenced that pursuant to the laws of the State of New

York – which law the parties in the settlement agreement agreed should be the applicable law – prohibits any evidence beyond the parties' written agreement (the so-called parol evidence rule). The consequence for Ukio Banko *et al*. – who only had oral evidence available – was that they were prohibited from referencing any evidence in support of their claim that when the settlement agreement was entered, it was agreed that their liability should come into effect only upon Viva Trade L.L.C.'s bankruptcy. The manner in which the arbitrator dealt with the issue did not comply with the Rules for Expedited Arbitration of the Arbitration Institute of the Stockholm Chamber of Commerce or with ordre public.

Rual Trade

The arbitrator's decision to not hold a hearing and disallow oral evidence does not violate ordre public. Further, no procedural error has occurred. In the event a procedural error is deemed to have occurred it did not affect the outcome of the case.

The arbitrator was authorized to autonomously decide to hold a hearing or not. The parties are not entitled to request a hearing in expedited arbitration. This is to be decided solely by the arbitrator. In Procedural Decision No. 4, the arbitrator concluded that oral evidence was not required.

EVIDENCE

Ukio Banko *et al*. have requested *Messrs*. RR and VR and Ms. M to be heard as witnesses before the Court of Appeal on what they maintained in the arbitration proceedings and the circumstances surrounding the entry into of the settlement agreement to prove that if they would have been heard at a hearing in the arbitration proceedings, the outcome would have been the opposite.

Rual Trade has referenced documentary evidence.

GROUNDS OF THE COURT OF APPEAL

Ordre public and procedural error

The issues to be decided on by the Court of Appeal are mainly whether the fact that Ukio Banko *et al.* were denied a hearing in which to hear the referenced witnesses entailed that the arbitral award is obviously in breach of fundamental principles of Swedish law or at least comprised a procedural error.

Arbitration proceedings are different from court proceedings in that, amongst other things, the parties themselves choose who shall settle their dispute. The arbitrator is further not bound by the principles of concentration, immediacy and orality. The possibility to deviate from these principles means that the proceedings can be streamlined and tailored to the nature of the dispute and the wishes of the parties (see Government Bill 1998/99:35, p. 40 f.). Further, the rigidity of these principles has been softened also for civil disputes before public courts (see, amongst other things, Government Bill 2004/05:131, p. 80 ff.).

The preparatory works for the provision on invalidity of arbitral awards due to ordre public provides as examples claims based on betting or criminal activity, an arbitral award whereby a party is ordered to carry out an action that is unlawful, or arbitral awards rendered as a result of criminal activity, such as threats or bribery of an arbitrator (Government Bill 1998/99:35, p. 141 f.). Further, it is provided that the provision on ordre public is traditionally interpreted to a narrow scope in Sweden and that the provision set out in item 2 of the first paragraph of Section 33 of the Swedish Arbitration Act ought to be applied exceedingly rarely (*op. cit.*, p. 234).

As regards procedural errors, it should be noted that these relate to errors in the actual proceedings. That the arbitrator decides an issue on the merits incorrectly is consequently not a procedural error. In the event that an arbitrator has incorrectly disallowed evidence, this would comprise a procedural error subject to challenge proceedings (Lars Heuman, Skiljemannarätt, 1999, p. 586).

In the present case, the parties have through the settlement agreement – while represented by authorized representatives – agreed that possible disputes related to the settlement shall be resolved under the Expedited Rules for Arbitration of the Arbitration Institute of the Stockholm Chamber of Commerce. Article 27(1) of these rules provides that a hearing shall be held, if requested by a party and the arbitrator deems a hearing necessary. Further, the parties agreed in the settlement that the substantive laws of the State of New York shall apply to such disputes. That law provides a rule whereby, when fully applicable, no evidence other than the parties' written agreement is permissible and may be considered (the parol evidence rule). These are circumstances that were known and accepted by Ukio Banko *et al*. when they entered the settlement agreement.

When dealing with the case, the arbitrator applied the rules that the parties in the arbitration proceedings had themselves had agreed upon. The procedural rules applied by the arbitrator, as well as the manner in which he applied them, are not themselves unknown to Swedish law. Further, the Court of Appeal cannot conclude that the decision of the arbitrator to not hold a hearing or to not allow the requested witnesses breached the Rules for Expedited Arbitration of the Arbitration Institute of the Stockholm Chamber of Commerce.

Thus, the Court of Appeal finds that what transpired during the arbitration proceedings does not breach fundamental principles of Swedish law or

comprises a procedural error. Upon this conclusion, the oral evidence referenced by Ukio Banko *et al*. in the present case is irrelevant.

In sum, the Court of Appeal finds that the oral evidence shall be disallowed and the claims of the claimant rejected.

Litigation costs

Upon this outcome, *Messrs*. RR and VR, and Ukio Banko Investiciné Grupé UAB shall be ordered to jointly and severally compensate Rual Trade for its litigation costs before the Court of Appeal. Rual Trade has claimed compensation in the amount of SEK 429,000 for costs for its Swedish legal counsel and EUR 7,000 for its Russian legal counsel. Further, compensation for expenses in the amount of SEK 1,700 has been claimed. Ukio Banko *et al.* have left it to the Court of Appeal to determine the reasonableness of the claim.

The Court of Appeal finds that the total amount claimed for costs for legal counsel is somewhat high, and finds it reasonable to determine the total compensation for legal counsel to SEK 400,000. Compensation for expenses shall be for the claimed amount.

Pursuant to the second paragraph of Section 43 of the Swedish Arbitration Act the judgment of the Court of Appeal may not be appealed.

[ILLEGIBLE SIGNATURES]

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The decision has been made by: Senior Judge of Appeal CR and Judge of Appeal KÅ, reporting Judge of Appeal, and Deputy Associate Judge PC. Unanimous.