SVEA COURT OF APPEAL	**DECISION**	Case No.
Department 02	22 November 2013	Ö 3912-13
Division 020109	Stockholm	

CLAIMANT
Subway International B.V.

Counsel: Advokat Patrick Andersson
Advokataktiebolaget Nordic Law
P.O. Box 5043
402 21 Gothenburg

COUNTERPARTY
Mr. E
[*INFORMATION OMITTED*]

Counsel: jur. kand. Jonas Stjernquist
ED Juristbyrå AB
Brunnsgränd 4
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MATTER
Application for recognition and enforcement of foreign arbitral award

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DECISION OF THE COURT OF APPEAL

1. The Court of Appeal rejects Subway International B.V.'s application that the arbitral award rendered by the International Centre for Dispute Resolution of 14 August 2012 in its case No. 50 114 T 00184 12 shall be recognized and declared enforceable in Sweden.

2. Subway International B.V. is ordered to compensate Mr. E for his litigation costs before the Court of Appeal in the amount of SEK 9,936, all comprising costs for legal counsel. Subway International B.V. shall pay interest thereon pursuant to Section 6 of the Swedish Interest Act from the day of the decision of the Court of Appeal until the day of payment.

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MOTIONS BEFORE THE COURT OF APPEAL

Subway International B.V. (Subway) has moved that the Court of Appeal shall recognize and declare an arbitral award rendered on 14 August 2012 by the International Centre for Dispute Resolution, New York, USA (ICDR), in case No. 50 114 T 00184 12, enforceable in Sweden (appendix A).

Mr. E has objected to the motion that the arbitral award shall be recognized and declared enforceable in Sweden.

The parties have claimed compensation for their litigation costs before the Court of Appeal.

THE PARTIES' RESPECTIVE CASES

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

Subway

The parties have agreed that the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) shall apply to the arbitration proceedings. Subway and Mr. E have entered into a franchise agreement, which governs how the communication between Subway and Mr. E shall be carried out. On 10 April 2012, 23 May 2102, 8 June 2012 and 26 June 2012 ICDR dispatched letters to Subway and Mr. E containing information on, amongst other things, potential arbitrators, whom had been appointed as arbitrators, summons to an oral preparatory meeting and that the case would be decided without a main hearing. These letters were sent to Mr. E by e-mail, and mail through Federal Express and in one case as a recommended letter through the United States Postal Service. On 15 August 2012, ICDR sent out a letter informing the parties that an arbitral award had been rendered in the case, which was to be sent to the parties in the manner described in the letter. The letter was sent to Mr. E by e-mail and by mail through Federal Express. On 10 September 2012 Subway submitted an application to have the arbitral award affirmed by the United States District Court for the District of Connecticut. During these proceedings, documents

were sent to Mr. E through Federal Express. Receipt of the letters were signed for by named individuals in the reception at the restaurant on Hornsgatan, however not by Mr. E. One of the people who have signed for the letters is Mr. E's wife.

Subway has sent the relevant information to Mr. E at the restaurant on Hornsgatan 127 in Stockholm in the manner set out in the agreement. It must be deemed Mr. E's responsibility to check the post in the restaurant. The material referenced by Subway shows that Mr. E has been informed on the arbitration proceedings and has been afforded the right to present his case.

Mr. E

He has not been aware of the arbitration proceedings. He has not received any of the documents, which Subway claims have been sent to him. None of the letters have been received by him. The letters which have been signed for in the reception have not been forwarded to him.

THE INVESTIGATION

Subway has referenced documentary evidence.

THE GROUNDS OF THE COURT OF APPEAL

Section 53 of the Swedish Arbitration Act (SFS 1999:116) provides that a foreign arbitral award which is based on an arbitration agreement is recognized and enforced in Sweden unless otherwise provided by certain provisions set out in the Act. Section 54 of the said Act provides that a foreign arbitral award is not recognized or enforced in Sweden if the party against which the arbitral award is relied upon shows that he was not properly informed on the appointment of arbitrators or on the arbitration proceedings or for other reason was unable to present his case (item 2 of the said provision).

Mr. E has as grounds that the arbitral award should not be recognized and be enforced in Sweden maintained that he has not been informed on the arbitration proceedings.

Subway has referenced provisions of the franchise agreement between the parties. Section 11 of the franchise agreement provides, amongst other things, that the parties shall communicate in writing and that communications shall be sent in certain manners. However, Subway has not even maintained that it has sent a request for arbitration to Mr. E. To the contrary, Subway has maintained that ICDR has sent documents to Mr. E during the arbitration proceedings and it has referenced, amongst others, these documents, Federal Express receipts that it has received shipping orders, evidence of a recommended letter maintained to have been sent through the United States Postal Service with Mr. E as addressee as well as receipts of letters sent to Mr. E's restaurant following the arbitral award. Subway has further maintained that the parties agreed that UNCITRAL's rules for arbitration shall apply. Mr. E has not objected to this statement and the Court of Appeal will base its decision on that the UNCITRAL provisions are applicable to the arbitration proceedings relevant in the present case.

With respect to UNCITRAL's provisions on communication, its Article 2 (in the wording as in force at the time of the agreement) provides that a communication is deemed as received if it has been physically delivered to the addressee at his home address, his place of business or his e-mail address. If none of the above can be found following reasonable investigation, delivery may be made to the latest known address. A delivery is deemed as received on the day it was delivered.

In NJA 2010 p. 219, the Supreme Court was faced with a matter on recognition and enforcement of a foreign arbitral award and had to decide whether a party had been properly informed on the arbitration proceedings. In that case the Supreme Court noted that the provisions on recognition and enforcement of the Swedish Arbitration Act and the New York Convention should be interpreted against the background of the general aim to facilitate recognition and enforcement of foreign arbitral awards set out in the Convention. Further, the Supreme Court noted, *inter alia*, the following. With respect to communication on the very opening of arbitration proceedings, a general requirement that the communication has actually reached the

addressee must be met. If it is not clear from the arbitral award or from any other source that the communication has reached the addressee or if the counterparty during proceedings for recognition and enforcement can present evidence that gives rise to considerable doubt as to whether he did receive the communication, then in normal situations it must be held that recognition and enforcement is impossible under item 2 of Section 54 of the Swedish Arbitration Act. However, if it is nevertheless clear that the counterparty has been able to present its case, the situation is different.

From the above, the Court of Appeal infers that high standards must be met for notifications on the opening of arbitration proceedings. The starting point is that it is the addressee's interest of receiving the summons that is most important. Those are also the considerations upon which Article 2 of UNCITRAL was based. The drafters considered that if this were not the case, the provision would not be compatible with the 1958 New York Convention (Travaux préparatoires: UNCITRAL Arbitration Rules [1976] A/CN.9/9/C.2/SR.2, 15 April 1976).

The relevant arbitral award does not provide that a notice of the opening of arbitration proceedings has been received by Mr. E. Thus, the Court of Appeal must investigate whether Mr. E has nevertheless been able to present his case in the arbitration proceedings. Here, the Court of Appeal shall take into consideration all relevant circumstances (cf. Lindskog, Skiljelagen (Zeteo, 1 March 2012), the commentary to Section 54).

It is clear that the documents claimed to have been sent to Mr. E have been sent via e-mail. However, it is not clear to which e-mail address they were sent and Subway has not referenced any of these e-mails. The Federal Express receipts establish that Federal Express has received documents to deliver, but not how they were to be delivered or if they have been delivered. The confirmation of receipt for the recommended letter claimed to have been sent through the United States Postal Service has been signed by the sender but not by the recipient and there is no information that the delivery was handed over for delivery by mail.

Thus, the investigation in the case does not include any confirmation of receipt signed by Mr. E and there is no information from Federal Express or the United States Postal Service that the delivery has reached the addressee. This raises the issue whether the fact that three deliveries from ICDR has unquestionably been sent to the addressee's correct address shall be accepted as proof of the addressee having received them. This general issue was dealt with by the Supreme Court in NJA 2007 p. 157. The issue involved the interruption of time for statute of limitations and the Supreme Court initially noted that high standards for the evidence must be met in these cases and that the fact that it has been established or was undisputed that certain letters were sent to the debtor cannot generally be taken as proof that the addressee actually received the letters, although the sending of the letters in itself is strong evidence that they actually reached the addressee. In the relevant case, the Supreme Court concluded that if the creditor had sent several letters, the possibility that not at least one of those reached the addressee must be deemed negligible, unless particular circumstances in support thereof are at hand. Therefore, it was found that the time for statute of limitations had been extended.

The three letters relevant in the present case were sent in a time span of two and a half months from New York, USA, to Stockholm. Considering the high standards with respect to evidence, the Court of Appeal finds that this involves so few letters that only evidence in support of the dispatch cannot be accepted as proof of receipt by the addressee. In sum, the investigation in the case does not establish that the letters in the arbitration proceedings have been received by Mr. E, and as a result Mr. E has not been able to present his case in the arbitration proceedings. That letters following the arbitral award can be deemed as received by Mr. E does not affect this conclusion.

The above means that there are impediments to recognize and enforce the relevant arbitral award in Sweden. Thus, Subway's application for recognition and enforcement shall be rejected.

Upon this outcome, Subway shall be ordered to compensate Mr. E for his litigation costs (NJA 2001 p. 738). The claimed compensation must be deemed reasonable.

HOW TO APPEAL, see appendix B.
Appeals to be submitted by 20 December 2012
Leave to appeal is not required.

[ILLEGIBLE SIGNATURES]

The decision has been made by: Senior Judge of Appeal KB, and Judges of Appeal DÖ and GL, reporting Judge of Appeal.