

SVEA COURT OF APPEAL
Department 02
Division 020107

JUDGMENT
13 February 2015
Stockholm

Case No.
T 4037-13

CLAIMANT

1. Storm Real Estate ASA
Dronning Mauds gade 3
Postboks, 1357 Vika
Oslo
Norway

2. Tiberton Yard Ltd
Karasisaki 6, City House
P.C. 3032
Limassol
Cyprus

Counsel to 1 and 2: Advokat Jonas Benedictsson and advokat Anders Nilsson
Baker & McKenzie Advokatbyrå KB
P.O. Box 180
101 23 Stockholm

RESPONDENT

Russian Real Estate Investment Company AB (publ), Reg. No. 556653-9705
Hovslagargatan 5 B
111 48 Stockholm

Counsel: Advokat Hans Dahlberg Kolga and jur. kand. Filippa Sjöstedt
Setterwalls Advokatbyrå AB
P.O. Box 1050
101 39 Stockholm

MATTER

Challenge of arbitration award given in Stockholm on 12 March 2013, see
appendix A

JUDGMENT OF THE COURT OF APPEAL

1. The Court of Appeal rejects the motions of the claimant.
2. The Court of Appeal orders Storm Real Estate ASA and Tiberton Yard Ltd to jointly and severally compensate Russian Real Estate Investment Company AB for its litigation costs in the amount of SEK 140,000, all of which comprises costs for legal counsel, plus interest on the above amount pursuant

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to Section 6 of the Swedish Interest Act from the day of the Court of Appeal's
judgment until the day of payment.

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BACKGROUND

The present arbitral award rejected a claim for damages by Storm Real Estate ASA (Storm) against Russian Real Estate Investment Company AB (publ) (Ruric). The arbitral award also settled other issues. The arbitrator ordered Storm and Tiberton Yard Ltd (Tiberton), a subsidiary of Storm that was also party to the arbitration, to compensate Ruric's arbitration costs and ordered Storm and Tiberton to pay for the costs of the arbitration.

In the arbitration, Storm asserted that Ruric had breached an addendum agreement (Addendum Agreement SA2) both by asserting the position as creditor in relation to ZAO Grifon (Grifon) – a subsidiary of Tiberton, and indirect subsidiary of Storm – and also by commencing litigation against Grifon in Russia, claiming payment for debt that Ruric had transferred onto Tiberton. According to Storm, the breaches of contract made Ruric liable for damages to Storm.

The dispute is further detailed in the arbitral award, a Swedish translation of which has been provided by Storm and Tiberton and is attached hereto as appendix A.

MOTIONS

Storm and Tiberton have moved the Court of Appeal shall annul items 3, 4 and 6 of the operative part of the arbitral award.

Ruric disputes the motion.

The parties claim compensation for litigation costs.

FOUNDATIONS

Storm and Tiberton

The arbitrator has exceeded his mandate. In the alternative, procedural errors occurred, that were not caused by Storm or Tiberton, and that likely affected the outcome. The arbitrator based the award on legally relevant circumstances

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which had not been referenced in the proceedings, or rejected legally relevant circumstances that the respondent through its actions should be deemed to have accepted. Alternatively, the arbitrator, by neglecting to guide the proceedings, failed to inform the parties how the arbitrator had understood their respective cases. This affected item 3 of the operative part of the award, which was thus decided incorrectly. Further, as a consequence of the arbitrator's exceeding his mandate and/or procedural errors, the cost allocation in items 4 and 6 is incorrect. Therefore, the aforementioned items of the operative part of the arbitration award shall be annulled.

In his review, the arbitrator assumed that the issue of breach of contract, and as a consequence, liability for damages as such, was subject of dispute before the arbitrator, despite Ruric not having raised objections to that effect. In the alternative, it must be held that Ruric should be deemed, through its actions, to have accepted the assertion on breach of contract, and yet the arbitrator nevertheless reviewed the claim and concluded that breach of contract had not been committed. In this manner, the arbitrator exceeded his mandate by deciding issues that were not referenced by the parties, or alternatively, the arbitrator committed a procedural error by neglecting to inform the parties how he understood their respective cases. The procedural error constitutes grounds for challenge since it directly affected item 3 of the operative part of the arbitral award.

The excess of mandate or the procedural error also directly affected the cost allocation; both Storm and Tiberton were ordered to compensate Ruric under item 4 and were held liable, as between the parties, for the arbitration costs under item 6. Tiberton was ordered to compensate litigation costs and costs for the arbitration despite its case being successful.

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Ruric

The arbitrator has not exceeded his mandate, and no procedural errors occurred that likely affected the outcome of the case. The arbitrator did not base his decision on legally relevant circumstances that were not referenced in the proceedings, and he did not reject legally relevant circumstances that the respondent through its actions should be deemed to have accepted. Neither has the arbitrator neglected to inform the parties on how he understood their respective cases.

The arbitrator reviewed only those issues against which Ruric had raised objections. Thus, the arbitrator did not consider legally relevant circumstances that had not been referenced in the proceedings, and he did go beyond the boundaries of the case before him. Thus, the arbitrator has not exceeded his mandate. Further, it is clear that even if the arbitrator would have exceeded his mandate as alleged, it did not affect the outcome of the arbitration. If the arbitral award, despite its wording, should be interpreted as maintained by Storm and Tiberton, the arbitrator nevertheless concluded that Storm, against Ruric's objection, had failed to establish causality between the breach of Addendum Agreement SA2 and Storm's alleged damage. Thus, the outcome was not affected by the alleged excess of mandate.

The arbitrator considered Ruric's objections as they were presented by Ruric. Thus, there is no difference between how the arbitrator understood the case and how it was presented by Ruric. Consequently, the arbitrator did not neglect to inform Storm and Tiberton of any issue or circumstance. Thus, the arbitrator has not committed any procedural errors.

In any event, the outcome of the arbitration was not affected by the alleged procedural error. Storm failed to explain, and prove, any connection between Addendum Agreement SA2 and the Russian litigation. This fundamental flaw in Storm's case would not have been cured by additional procedural guidance by the arbitrator.

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THE PARTIES' FURTHER DETAILS

Storm and Tiberton

In the arbitration, Storm asserted both that Ruric had breached Addendum Agreement SA2 – i.e. the agreement pursuant to which Ruric transferred claims to Tiberton – by maintaining that it was a creditor in relation to the company Grifon and by commencing litigation against Grifon demanding payment for the transferred debt, and that Ruric thereby had become liable for damages to Storm. Further, Storm maintained that it had suffered a loss as a direct result of the breach of contract and that Ruric was liable for a specific amount. This is evident from the arbitral award, paragraphs 32-35.

To this, Ruric objected that Storm was not entitled to compensation for damages from Ruric, since Storm had not incurred any damage through Ruric's commencing litigation against Grifon. Ruric also maintained that Storm had no grounds or obligation to incur costs related to Ruric's commencing litigation against Grifon. This is set forth in the arbitral award, paragraphs 42-44.

Ruric did not, however, object to the actual grounds for liability, i.e. Storm's assertion that Ruric had breached the agreement with Storm by commencing litigation against Grifon. Ruric also did not object to liability as such. Consequently, nothing hereon is mentioned in the arbitral award, paragraphs 42-44.

In other words, Ruric objected to Storm's claims on causality and the amount of the alleged damage, but it did not object to the claim that a breach of contract occurred and not to liability as such.

Despite the aforementioned, the arbitrator considered the latter issues, which is evident from paragraph 64 of the arbitral award:

“In the arbitrator's opinion, Storm has not explained in what way Ruric's actions constituted a breach of the agreement with Storm. Storm has not referenced a specific provision of the SA2 which entitles Storm

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to damages from Ruric based thereon. The mere fact that Storm is a party to SA2 and (voluntarily) has incurred costs for ZAO Grifon's defense against Ruric does not give Storm any direct right to damages from Ruric under SA2 [underlined by Storm and Tiberton].”

The arbitrator's reasoning in paragraph 64 is based on an objection that Ruric never raised, i.e. that Storm was required to reference other circumstances for the alleged breach of contract despite Ruric not having objected to the assertion and/or that Storm, as a party to Addendum Agreement SA2 would not be entitled (in and of itself) to bring damages claims against Ruric. Instead, the arbitrator ought to have initially noted that Ruric had committed a breach of contract by, in bad faith, commencing litigation based on loan agreements that it had sold, and to which it consequently had no rights.

The arbitrator's analysis resulted in the main part of the claim for compensation for damages lodged by Storm being rejected.

Further, the arbitrator failed, by neglectful guidance of the proceedings, to inform the parties that he had understood the case so that he would consider whether a breach of contract had occurred entitling Storm to claim compensation for damages. The arbitrator did not inform hereon during the oral hearing.

Ruric

In the arbitration proceedings, Ruric objected to Storm and Tiberton's case on several alternative grounds, and principally maintained that Addendum Agreement SA2 had been finally settled through a settlement agreement which fell outside the scope of the arbitration. In the event that the arbitration would conclude otherwise, Ruric objected that (i) Storm was not entitled to claim damages from Ruric, because Storm was not a party to the Russian litigation, and that Storm had not incurred any damages as a result of the litigation. Further, Ruric objected that (ii) Storm lacked both the obligation and any reason to incur costs on Grifon's behalf. Ruric also objected (iii) that there was no connection between Ruric's actions and Storm's alleged

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damages and (iv) against the amount of the damages, since Storm and Tiberton had not limited its alleged damage.

It is clear that issue tried by the arbitrator is whether Storm was entitled to claim compensation for damages against Ruric against the background that a third party had been sued in Russia, and no other issue. Thus, the arbitrator did not consider whether a breach of contract had occurred as a separate issue, but merely whether a breach of contract entitling Storm to damages had occurred.

In the grounds, paragraph 62, the arbitrator identified the first issue as follows:

“The question is whether Ruric’s actions constitutes a breach of SA2 entitling Storm to compensation for the costs incurred by assisting ZAO Grifon in the litigation.”

Already at the onset, the arbitrator concluded that the issue is whether *Storm* is entitled to compensation for Grifon’s costs due to breach of contract, all in accordance with Ruric’s objections. The issue should not be interpreted as the arbitrator having intended to determine whether a breach of contract occurred, but is coupled with Ruric’s objection that a breach of Addendum Agreement SA2 in any event would not entitle Storm to claim compensation for cost for Grifon’s defense in the litigation in Russia, to which Storm was not a party.

That the review did not only involve a breach of Addendum Agreement SA2 as a separate circumstance is further supported by the arbitrator’s account of the background, set forth in paragraph 16:

“The main issues to be resolved by the arbitrator are (i) whether Ruric’s opening litigation against ZAO Grifon in August of 2012 for the purpose of claiming payment under one of the Loan Agreements constitutes a breach of SA2 giving Storm the right to compensation for damages from Ruric ...” [Ruric’s underline]

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The arbitrator did not consider whether a breach of contract occurred, but whether *Storm* could be entitled to compensation for damages from Ruric because of a breach of Addendum Agreement SA2, which corresponds to Ruric's objection. Also, the wording of the other quotes referenced by Storm and Tiberton clearly provide that the arbitrator only decided whether *Storm* was entitled to claim compensation from Ruric under Addendum Agreement SA2. The arbitrator's focus was not the breach of contract as such. It is incorrect that the arbitrator rejected the assertion that a breach of contract occurred; the arbitrator did not decide on whether a breach of contract as such had occurred.

GROUND

The case has been decided without a main hearing.

Both parties have referenced the arbitral award as documentary evidence. Storm and Tiberton have referenced a legal opinion from Prof. BL.

The Court of Appeal's assessment

The parties' respective cases in the arbitration concerning Storm's claim for compensation for damages for litigation costs in Russia can be summed up as follows. Storm maintained that Ruric had committed a breach of contract causing damages to Storm. Ruric *inter alia* objected that it had not committed a breach of contract which caused Storm to incur damages, but Ruric did not admit or deny whether it had committed a breach of contract as such.

In paragraph 62 of the arbitral award, the arbitrator identifies the issue to be settled, namely whether Ruric's actual actions – which appear to have been virtually undisputed in the arbitration – constituted a breach of contract giving Storm the right to compensation from Ruric. In paragraph 67 the arbitrator sets out his conclusion that this was not the case. Paragraphs 63-66 set out an overall review of the identified issue. In paragraph 64, the arbitrator states that Storm has not “explained in what way Ruric's actions constitute a breach of contract against Storm” and that Storm had not “referenced any specific

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provision [of the agreement] which would entitle Storm to compensation for damages.” The arbitrator’s statement does not, in the Court of Appeal’s opinion, mean that the arbitrator rejected or questioned whether the alleged breach of contract had been committed. This appears to merely be a statement on the framing of Storm’s case in this respect. Thus, the Court of Appeal concludes that the arbitrator did not decide whether or not the alleged breach of contract had occurred. Instead, the arbitrator made his statement in the context of his determination of whether Storm’s alleged damages had been caused by the breach of contract alleged by Storm, which lead to the conclusion that the evidence presented did not prove Storm’s assertions. Having regard to the fact that Ruric did not deny (but did also not admit) that it had committed the alleged breach of contract, but did in fact object that it had not committed a breach of contract that would entitle Storm to compensation for damages, then the arbitrator’s conclusion and review appear appropriate and well within the mandate. Thus, the Court of Appeal concludes that the arbitrator did not exceed his mandate.

Since the Court of Appeal has concluded that the arbitrator did not determine whether Ruric had committed the alleged breach of contract as such, no procedural error as asserted by Storm and Tiberton could have occurred.

In sum, the Court of Appeal has concluded that the arbitrator did not exceed his mandate and no procedural error occurred. Thus, the motion of the claimants shall be rejected.

Litigation costs

Upon this outcome Storm and Tiberton shall compensate Ruric for its litigation costs. The claimed amount is reasonable.

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Other

There are no grounds to grant leave to appeal the Court of Appeal's judgment (second paragraph of Section 43 of the Swedish Arbitration Act).

The judgment of the Court of Appeal may not be appealed.

[ILLEGIBLE SIGNATURES]

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