SVEA COURT OF APPEAL	**JUDGMENT**	Case No.
Department 02	25 August 2016	T 391-16
Division 020108	Stockholm	

CLAIMANT
AFO Entreprenader AB in bankruptcy, Reg. No. 556727-5549 ("**AFO**")
Krossgatan 30 B
162 50 Vällingby

Counsel: Jur. kand. Mr. D
Riddargatan 45
114 57 Stockholm

RESPONDENTS
Infratek Sverige AB, 556702-6934 ("**Infratek**")
P.O. Box 42002
126 12 Stockholm

Counsel: Advokaten Einar Wanhainen
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103 91 Stockholm

MATTER
Challenge of arbitration award given in Stockholm on 18 May 2015, see appendix A

JUDGMENT OF THE COURT OF APPEAL

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

2. AFO Entreprenader AB in bankruptcy is ordered to compensate Infratek Sverige AB for its litigation costs in the amount of SEK 39,790, plus interest pursuant to Section 6 of the Swedish Interest Act from the day of the Court of Appeal's judgment until the day of payment. The full amount comprises costs for legal counsel.

3. The Court of Appeal rejects Infratek Sverige AB's motion that Mr. B shall be held jointly and severally liable for its litigation costs.

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BACKGROUND

There is a valid arbitration agreement between the parties. Arbitrations shall be governed by the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, which with respect to the costs for the arbitration provide, amongst others, the following rules.

> **COSTS OF THE ARBITRATION**
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> **Article 43 Costs of the Arbitration**
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> […]
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> **Article 44 Costs incurred by a party**
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> […]
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> **Article 45 Advance on costs**
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> (1) The Board shall determine an amount to be paid by the parties as an Advance on Costs.
> (2) […]
> (3) Each party shall pay half of the Advance on Costs, unless separate advances are determined. […]
> (4) If a party fails to make a required payment, the Secretariat shall give the other party an opportunity to do so within a specified period of time. If the required payment is not made, the Board shall dismiss the case in whole or in part. If the other party makes the required payment, the Arbitral Tribunal may, at the request of such party, make a separate award for reimbursement of the payment.
> (5) […]
> (6) […]

Infratek commenced arbitration against AFO before the SCC. The SCC determined an amount for an advance on costs, to be paid by the parties in equal parts. Infratek paid the advance in its entirety and referred the dispute to the arbitral tribunal. Advokat LA was appointed as sole arbitrator. Infratek subsequently requested that the arbitral tribunal should render a separate arbitral award ordering AFO to pay its part of the advance on costs. AFO disputed liability. In the arbitral award herein challenged, the arbitral tribunal granted Infratek's motion.

MOTIONS BEFORE THE COURT OF APPEAL

AFO has, as far as can be gathered, moved that the Court of Appeal shall declare the challenged arbitration award invalid or, in the alternative, shall annul the award.

Infratek has disputed AFO's motions.

The parties have claimed compensation for their respective litigation costs. In addition, Infratek has moved that Mr. D shall be held jointly and severally liable with AFO for Infratek's litigation costs.

Mr. D has not stated his position with respect to the motion for his joint and several liability for the litigation costs.

During the review of the case before the Court of Appeal, AFO was declared bankrupt. Having been notified of these proceedings, the bankruptcy administrator has declared that the bankruptcy estate does not wish to continue the company's case.

GROUNDS ETC.

AFO

The Swedish Arbitration Act (1999:116) provides that the arbitrator may render only *one* arbitral award during the arbitration proceedings, and this should occur when the matter is decided on its merits. The arbitrator may not give intermediate awards or partial awards. Moreover, the parties may not agree thereon. By rendering an arbitral award without deciding the case on its merits, the arbitrator went beyond the scope of the law.

The Swedish Arbitration Act does not grant the arbitrator the right to require an advance on costs. An advance constitutes client funds, which can only benefit the recipient to the extent costs are incurred in the performance of the arbitrator's tasks. At the time of the separate arbitral award, the arbitrator had not yet performed his task, and thus no claim had yet arisen.

Further, the arbitral award is in breach of the SCC's Arbitration Rules. When AFO failed to pay the requested advance, it was for the SCC to dismiss the case, which was not done. The provision set forth in Article 45 (4) of the SCC's Arbitration Rules should further not be interpreted as an authorization for the arbitrator to give orders with respect to payment liability, but rather as a possibility to determine an advance amount prior to the forthcoming

arbitral award, through which the compensation to the arbitrators will be finally determined. Despite the aforementioned, the arbitrator has worded the separate arbitral award as if Infratek would have an enforceable claim against AFO.

If Article 45 (4) of the Arbitration Rules would be deemed to have the meaning that follows from the arbitral award herein challenged, it would be unreasonable pursuant to Section 36 of the Contracts Act and should be disregarded. The reason is that an arbitration agreement may not violate the provisions of the Swedish Arbitration Act. Although the Swedish Arbitration Act grants the parties the right to supplement the provisions of the Act to some extent, this does not apply to the arbitration proceedings as such. Thus, the parties may not agree that the winning party should be indebted to the potentially losing party or that a separate arbitral award should be enforceable. The relevant provision is unreasonable also as it does not protect the weaker party, in this case AFO.

Summary of the grounds

The arbitral tribunal has, in violation of the law, rendered an arbitral award despite not deciding on the merits of the case in connection therewith. In the same arbitral award, a party has been held liable for an advance on costs without any legal justification. Further, the arbitral award violates the SCC's Arbitration Rules. In the event the court would conclude otherwise, then Article 45 (4) is unreasonable pursuant to Section 36 of the Contracts Act and should be disregarded. Thus, the arbitral award violates fundamental principles of Swedish law and is consequently invalid.

The arbitrator exceeded his mandate by, without grounds in law or agreement, rendering more than one arbitral award during the arbitration proceedings. Thereby, a procedural error occurred that was not caused by AFO. The excess of mandate and the procedural error affected the outcome of the case. These grounds for challenge, both separately and together, demand that the arbitral award shall be annulled.

Infratek

Through an arbitration clause, the parties have referenced the SCC's Arbitration Rules, which thereby became applicable to the arbitration. The provisions of the Swedish Arbitration Act are optional. Thus, the parties may agree to deviate from the provisions of the Act, including provisions concerning the proceedings as such. Article 38 of the

Arbitration Rules provide that the arbitral tribunal may decide on a separate issue or part of the dispute by way of a separate arbitral award. The arbitrator rendered the relevant award based on this provision. Thereby, the arbitrator acted within his mandate. Thus, the arbitral award does not violate the law. Infratek, which paid the entirety of the advance, is moreover entitled to a separate arbitral award governing the compensation for that payment.

The parties voluntarily entered into an agreement to arbitrate pursuant to the SCC's Arbitration Rules. The Arbitration Rules were available to AFO prior to entering into the agreement. Thus, the costs were foreseeable. If a party fails to fulfill its undertaking to pay half of the advance on costs, it cannot be considered unreasonable that the counterparty is entitled to some form of recourse. Such a right, based on the Arbitration Rules, is moreover not incompatible with fundamental principles of Swedish law.

It is for a party, who wishes to retain its right to have an arbitral award annulled through challenge proceedings, to object to procedural errors and reserve its right to challenge these. AFO has lost its right to challenge already due to the fact that AFO failed to object to the alleged procedural error within a reasonable time.

Summary of the grounds

The arbitral award is covered by a valid arbitration agreement. The award is not obviously incompatible with fundamental principles of Swedish law. The Arbitration Rules are neither unreasonable nor invalid. The arbitrator neither exceeded his mandate nor did he commit any procedural error that affected the outcome of the arbitration. In addition, the challenge grounds referenced by AFO have been precluded pursuant to the second paragraph of Section 34 of the Swedish Arbitration Act and can consequently not serve as grounds for granting the challenge.

GROUNDS OF THE COURT OF APPEAL

The case has been decided without a main hearing pursuant to Section 1 of Chapter 53 and item 5 of the first paragraph of Section 18 of Chapter 42 of the Swedish Code of Judicial Procedure.

Both parties have referenced the arbitral award and the Arbitration Rules as documentary evidence in the case.

AFO has referenced as grounds, for both the motion for invalidity and annulment, that the arbitral tribunal committed an error by issuing a payment order for AFO in a separate arbitral award concerning a part of the advance on the costs for the arbitration. Prior to the Court of Appeal deciding on the merits of the case, the Court of Appeal will decide whether AFO has lost its right to reference these circumstances as grounds for its challenge.

Has AFO lost the right to reference the circumstances upon which the company has based its challenge?

In challenge proceedings, a party may not reference a circumstance which must be deemed to have waived by participating in the arbitration without objection (second paragraph of Section 34 of the Swedish Arbitration Act). A party who wishes to challenge an alleged error must in general have objected to the error already in connection with the arbitration. Otherwise, the party is deemed to have accepted the relevant circumstance (Olsson et al., *Lagen om skiljeförfarande – en kommentar* [2000], p. 147 f.).

The Court of Appeal concludes as follows.

The Court of Appeal notes that neither the separate arbitral award nor the minutes from the oral preparatory hearing provide that AFO objected to the tribunal deciding the relevant issue through a separate arbitral award. The only objection raised by AFO related to a set-off. Moreover, AFO has not before the Court of Appeal maintained that the company during the arbitration had objected to the alleged excess of mandate or the procedural error. Therefore, the Court of Appeal concludes that AFO only in its challenge has presented the now relevant objections to the arbitration. By way of this passivity, AFO must be deemed to have accepted that the tribunal dealt with the relevant disputed issue in the manner it did. Thereby, AFO has lost its right challenge the award on this ground. That portion of the case shall thus be dismissed.

Should the arbitration award be declared invalid?

In order for an arbitration award to be declared invalid, the arbitral award or the manner in which it was rendered must be clearly incompatible with fundamental principles of Swedish law (item 2 of the first paragraph of Section 33 of the Swedish Arbitration Act). Put more simply, an arbitral award is invalidated only where the circumstances under which it was

rendered are highly objectionable (cf. Lindskog in Zeteo, Skiljeförfarande [13 May 2016, Zeteo], the commentary to Section 33, section 4.2.1).

In this context, AFO has maintained that the arbitral tribunal violated the law by rendering a separate award in which the case was not decided on its merits. Further, AFO has maintained that the award violates the SCC's Arbitration Rules and, if this would be deemed not to be the case, has maintained that Article 45 (4) of the Arbitration Rules is unreasonable pursuant to Section 36 of the Contracts Act and should thus be disregarded.

The Court of Appeal concludes as follows.

It is undisputed in the case that the parties by way of the arbitration agreement have agreed that the SCC's Arbitration Rules shall apply to the arbitration. The arbitral tribunal has with explicit support in Article 45 (4) of these rules given a separate award in which it ordered AFO to pay its part of the advance on cost. The said provision does not support any other interpretation than that made by the arbitral tribunal. Further, that interpretation cannot be deemed unreasonable pursuant to Section 36 of the Contracts Act. Even if this were the case, it is not a circumstance which could render the award invalid.

The fact that the Swedish Arbitration Act lacks a provision corresponding to Article 45 (4) does not prevent the parties – as they have done – from, by way of agreement, applying the process provided by the SCC's Arbitration Rules (cf. SOU 1994:81 p. 198 f. with NJA 2000 p. 773 and the decision of Svea Court of Appeal of 11 March 2009 in case Ö 280-09). This is so due to the fact that the provisions of the Swedish Arbitration Act are largely optional. It is mainly provisions on the legal security of individuals and of the general public that are peremptory (see Lindskog, *op. cit*., Inledande bestämmelser, section 5.1.4). The Court of Appeal concludes that the relevant parts of the SCC's Arbitration Rules do not violate any interest with respect to legal security protected by the Swedish Arbitration Act. Consequently, neither the now challenged award nor the application of the law that resulted in the award violates Swedish law, much less any fundamental principle thereof. Thus, there are no grounds to declare the arbitral award invalid. Therefore, AFO's motions shall be rejected in full.

Litigation costs

Upon the aforementioned outcome, AFO shall compensate Infratek for its litigation costs. Infratek has claimed compensation in the amount of SEK 39,790, all comprising costs for legal counsel. The Court of Appeal concludes that the claimed costs are reasonable for the protection of Infratek's interests in the case. Thus, AFO shall be ordered to pay the claimed amount.

With respect to the motion for joint and several liability for Mr. D, the Court of Appeal concludes as follows. AFO's case was not obviously unfounded. Moreover, the manner in which Mr. D litigated the case cannot be deemed so discursive and ambiguous that it can be deemed to have caused Infratek additional costs. Therefore, the motion on joint and several liability shall be rejected.

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

[ILLEGIBLE SIGNATURES]

The decision has been made by: Judges of Appeal CS and MU, reporting, and Deputy Associate Judge KF.