DECISION of the

SWEDISH SUPREME COURT

Case No.

decided in Stockholm on 4 May 2018 Ö 3626-17

APPELLANT

Belaya Ptitsa - Kursk, 1154614000012
306800, Kursk Region
Kommunen Gorshechenskiy
Katyusin sad
Russia

APPELLANT AND COUNTERPARTY

Robot Grader AB
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MATTER

Enforcement of foreign arbitral award

APPEALED DECISION

Svea Court of Appeal's decision of 22 June 2017 in Case No. Ö 4396-16

Decision of the Court of Appeal see Appendix

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DECISION OF THE SUPREME COURT

The Supreme Court rejects the appeal of Belaya ptitsa – Kursk.

Belaya ptitsa – Kursk is ordered to compensate Robot Grader AB for its litigation costs before the Supreme Court in the amount of SEK 56,100, comprising costs for legal counsel, plus interest pursuant to Section 6 of the Swedish Interest Act as from the date of the Supreme Court's decision.

MOTIONS BEFORE THE SUPREME COURT

Belaya ptitsa – Kursk has moved that the Supreme Court shall overturn the Court of Appeal's decision and declare the arbitral award rendered on 25 March 2016 in Moscow enforceable in Sweden. The company has requested that in any event the Supreme Court should adjust the company's obligation to compensate Robot Grader AB for its litigation costs before the Court of Appeal downwards.

Robot Grader AB has disputed Belaya ptitsa – Kursk's motions and has claimed compensation for its litigation costs before the Supreme Court.

GROUNDS

What does the application at issue concern?

1. The question in the application is whether there are grounds for refusing recognition and enforcement of a foreign arbitral award in Sweden on the basis that the counterparty was not given an opportunity to present its case in the arbitration (see item 2 of Section 54 of the Swedish Arbitration Act, 1999:116).

Background

2. In 2011, the Swedish company Robot Grader entered into an agreement with the Russian company Belaya ptitsa, which provided that Robot Grader would carry out certain works at Belaya ptitsa's manufacturing plant in Russia. The agreement further provided that disputes should be resolved by the International Arbitration Court at the Chamber of Commerce of the Russian Federation (ICAC). In the event of a dispute between the parties, the ICAC arbitration rules and the Russian International Commercial Arbitration Act (ICA Act) would be applicable.

3. A dispute arose and in May 2015 and Belaya ptitsa requested arbitration. On 6 July 2015, ICAC issued a procedural order obliging Robot Grader to appoint an arbitrator within 15 days and to submit a Statement of Defense within 30 days. Robot Grader appointed an arbitrator but did not submit a Statement of Defense.

4. On 23 September 2015, the arbitral tribunal issued a summons to the main hearing scheduled for 19 November 2015. The summons encouraged Robot Grader to submit a Statement of Defense by 1 November. Robot Grader did not submit a Statement of Defense.

5. At the opening of the main hearing on 19 November 2015, the parties informed the tribunal that they intended to settle the dispute amicably. In line with the parties' joint request for the postponement of the hearing, the arbitral tribunal decided to reschedule the main hearing for 11 December 2015. When the rescheduled main hearing was about to start, the parties submitted a settlement agreement. The arbitral tribunal concluded that the agreement stipulated new obligations on the parties, and thus did not constitute a settlement of the dispute submitted for arbitration. In response, the parties requested that the main hearing should be postponed so that they could amend the wording of the agreement. The arbitral tribunal rescheduled the main hearing for 24 December 2015.

6. At the time of the main hearing on 24 December 2015, the parties informed that they had not yet completed the settlement negotiations and again requested a postponement of the main hearing. The arbitral tribunal rescheduled the main hearing for 5 February 2016.

7. At the main hearing on 5 February 2016, the parties informed the tribunal that they had failed to reach an amicable settlement. Belaya ptitsa moved that the arbitral tribunal should resolve the dispute, whereas Robot Grader requested that the main hearing should be postponed so that the company could prepare its positions on the merits.

8. The arbitral tribunal rejected Robot Grader's request for the postponement. The arbitral tribunal held that Robot Grader had received sufficient time to prepare and stressed, in particular, that the company had not yet submitted a Statement of Defense. Pursuant to the final arbitral award rendered on 25 March 2016, Robot Grader was ordered to pay EUR 324,000 as well as compensation for the arbitration costs to Belaya ptitsa.

9. Belaya ptitsa applied to Svea Court of Appeal for a declaration of enforceability of the arbitral award in Sweden. Robot Grader disputed enforceability on the grounds that the arbitral tribunal's management of the proceeding had resulted in the company not having the opportunity to present its case.

10. The Court of Appeal concluded that Robot Grader – because of the parties' settlement negotiations and that the arbitral tribunal prior to the main hearing on 5 February 2016, had not explained to the company how the dispute would be managed – had justifiable reasons to not submit a Statement of Defense and to not prepare to argue the case at the hearing. Therefore, the Court of Appeal concluded that the company had not been in a position to present its case and rejected Belaya ptitsa's application for enforcement.

11. During the time this action has been pending before the Supreme Court, Robot Grader has informed the Court that the company has not been successful in challenging the arbitral award in Russia.

Recognition and enforcement of foreign arbitral awards

12. The main rule is that foreign arbitral awards, which are based on arbitration agreements, shall be recognized and enforced in Sweden (Section 53 of the Swedish Arbitration Act). However, the arbitral award will not be enforced if the party, against whom the arbitral award is relied upon, can establish that it did not have an opportunity to present its case (item 2 of Section 54).

13. In this respect, the Swedish Arbitration Act is based on the 1958 New York Convention on recognition and enforcement of foreign arbitral awards. The Convention's purpose of facilitating enforcement should be taken into account in the interpretation of the Swedish provisions (see NJA 2003 p. 379 and NJA 2010 p. 219, paragraph 7).

14. Item 2 of Section 54 of the Swedish Arbitration Act has its counterpart in Article V(1)(b) of the New York Convention. The convention gives no further guidance on the more detailed meaning of the impediment to enforcement. Further, no guidance is available in the preparatory works to the Swedish Arbitration Act (cf. Government Bill 1971:131).

15. It is nevertheless clear that in order to refuse recognition and enforcement, there must be a deviation from the fundamental principles of legal security in international arbitration established. Thus, the parties must be guaranteed the due process of law in the proceedings before the arbitral tribunal.

16. This means that the parties must be treated equally, and the proceedings must be transparent and reasonably predictable for the parties. The basic requirement is that the parties must be given an opportunity to present their respective cases. In the so-called model law, this is expressed in a way that "each party shall be given a full opportunity of presenting his case" (see UNCITRAL Model Law on International Commercial Arbitration, 1985, Article 18) and in the UNCITRAL arbitration rules it is expressed in a way that each party in the arbitration shall be given "a reasonable opportunity of presenting its case" (see Article 17 of the UNCITRAL arbitration rules, as revised in 2010). The Swedish Arbitration Act correspondingly stipulates that the parties shall be given an opportunity to present their respective cases to the extent required, whether in writing or orally (see the first paragraph of Section 24). The requirement includes, among other things, that the parties shall be given sufficient time and opportunity to present their respective cases. What is required in the individual case is highly dependent on the circumstances in the relevant arbitration (cf., e.g., UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, p. 97 ff.).

17. In order for a party to successfully claim that it was not given an opportunity to present its case, the party must prove that this happened despite the party having participated loyally in the arbitration (cf. Article 25 of the Model Law, cf. also the third paragraph of Section 24 of the Swedish Arbitration Act).

Review of the action at issue

18. By virtue of the parties' agreement, the arbitration was governed by the ICA Act and the ICAC arbitration rules.

19. They provide that the parties shall be treated equally, that they shall be given opportunity to present their respective cases, but also that they shall comply with the arbitral tribunal's procedural orders (see, among others,

Articles 18, 24 and 25 of the ICA Act and Sections 21 and 32 of ICAC arbitration rules).

20. Robot Grader was twice encouraged to submit a Statement of Defense. The company did not comply with these procedural orders. Thus, prior to the first date of the main hearing on 19 November 2015, the arbitral tribunal had grounds to conclude that Robot Grader did not actively participate in the arbitration. At this time, there was no impediment to managing the arbitration with a view of resolving the dispute on its merits.

21. However, at the first scheduled date of the main hearing, the parties jointly informed that they intended to reach an amicable settlement and then, as well as on two further occasions, requested that the main hearing should be postponed. This changed the circumstances of the arbitration. Through their actions, the parties showed that they both worked on reaching an amicable settlement without the dispute having to be resolved by the arbitral tribunal. In that situation, there was no longer any need for Robot Grader to submit a Statement of Defense, and the arbitral tribunal never reverted to the company on this issue.

22. The arbitral award as well as the remainder of the investigation clarify that only in connection with the fourth scheduled date of the main hearing did it become clear that the parties had failed to reach an amicable settlement. Until that point, Robot Grader was justified in assuming that the dispute would not be reviewed on its merits at the hearing. When Belaya ptitsa requested at the hearing that the arbitral tribunal proceed to review the dispute, the circumstances changed again. Therefore, the arbitral tribunal ought to have given Robot Grader a reasonable respite to finally prepare its case on the merits and invoke evidence.

23. The arbitral tribunal has disregarded basic principles of due process of law in international arbitrations, which entailed that Robot Grader did not

have the opportunity to present its case. This, and also taking into account that Robot Grader has not been successful in challenging the arbitral award in Russia, means that there is an impediment preventing the recognition and enforcement of the arbitral award in Sweden.

24. There are no grounds to reach any conclusion other than that of the Court of Appeal concerning Belaya ptitsa's obligation to compensate Robot Grader for its litigation costs before the Court of Appeal. Robot Grader's claim for compensation for litigation costs before the Supreme Court is reasonable.

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[SIGNATURES]
The decision has been made by: Supreme Court Justices GT, JH, AB, LE and SJ (Reporting Justice)
Reporting clerk: KO