SVEA COURT OF APPEAL
Division 02
Section 020101

JUDGEMENT
19 December 2019
Stockholm

Case no.
T 7929-17

PLAINTIFF
Coraline Limited
Arch. Makariou III, 95
Neocleous House
CY-3030 Limasol
Cyprus

Counsel: Attorneys-at-Law James Hope and Niklas Berntorp
Advokatfirman Vinge KB
Box 1703
111 87 Stockholm

Assisted by Anthony Bitar and Giorgina Petrova

RESPONDENT
Walter Höft
c/o T2C Steuerberatungsgesellschaft mbH
Herrengraben 31
D-20459
Hamburg
Germany

Counsel: Attorneys-at-Law Christoffer Monell and Arvid Eklann
Mannheimer Swartling Advokatbyrå AB
Box 2235
403 14 Gothenburg

Assisted by: Carsten Grau, Rechtsanwalt and Solicitor
L2C Rechtsanwälte Wirtschaftspräfer Steuerberater
Herrengraben 31
D-20459 Hamburg
Germany

THE MATTER
Challenge of the arbitral award rendered in Stockholm on 13 June 2017

COURT OF APPEAL'S JUDGEMENT

1. The Court of Appeal rejects Walter Höft's motion for dismissal of the new circumstances in support of Coraline Limited's claim.

Postal address	Visiting address	Pbone	Fax	Office hours
Box 2290	Birger Jarls Torg 16	+46-8-561 670 00	+46-8-21 93 27	Monday-Friday
SE- I03 17 Stockholm		+46-8-561 675 00		9:00 a.m.-4:30 p.m.
		E-mail: svea.hovratt@dom.se		
		www.svea.se		

2. The Court of Appeal rejects Coraline Limited's action.

3. Coraline Limited shall compensate Walter Höft for its litigation costs in an amount of EUR 541,184, of which EUR 388,209 pertains to legal fees, including interest on the first-mentioned amount in accordance with Section 6 of the Swedish Interest Act from the date of the Court of Appeal's judgement until payment is made.

BACKGROUND

During the period February 2015 until June 2017, arbitration proceedings (case SCC V 2015/012) were under way between the Cypriot company Coraline Limited (Coraline) and Walter Höft. Through the arbitral award rendered on 13 June 2017, Coraline was obliged to pay EUR 9.2 million including interest and litigation costs to Walter Höft.

Walter Höft's action was based on an agreement (the Loan Agreement) between the parties according to which Walter Höft was asserted to have personally lent EUR 12.66 million to Coraline, which Walter Höft claimed should be repaid in the arbitration proceedings. According to Coraline, the Loan Agreement was part of an extensive fraud arrangement through which Walter Höft and Anna Brinkmann, among others, caused Coraline to transfer significant amounts through companies in different countries to the detriment of Coraline and its owner.

The Loan Agreement contains two clauses regarding the settlement of potential disputes between the parties, Article 6 and 9.

Article 9 in the Loan Agreement is worded as follows:

> "This agreement shall be governed by and interpreted in accordance with the laws of Cyprus and the parties hereby agree that all actions or proceedings arising hereunder, or in connection with this agreement shall be bought in first instance before the competent court in Nicosia, Cyprus."

Article 6 in the Loan Agreement is worded as follows:

> "All disputes and differences which may arise out of the present Agreement or in connection with the same are to be settled by parties in an amicable way to the maximum possible extent.
>
> Should the parties fail to reach an agreement a case shall be submitted, without recourse to courts of law, to the International arbitration court in Stockholm in accordance with the rules for procedure of the said court.

The award of the arbitration court shall be final and binding upon both the parties."

MOTIONS, ETC.

Coraline moved that the Court of Appeal should set aside the arbitral award rendered on 13 June 2017.

Walter Höft rejected the setting aside of the arbitral award. In addition, after the main proceedings, Walter Höft moved for dismissal of a circumstance newly cited by Coraline in support of the company' s action.

Coraline contested the motion for dismissal.

The parties moved for compensation for litigation costs.

ISSUE OF REJECTION OF A NEWLY CITED CIRCUMSTANCE.

Walter Höft stated the following, among other things. During the closing remarks in the court proceedings, Coraline asserted that the parties in the arbitration proceedings had reached a separate agreement with the implication that the arbitral tribunal had been given a special mandate to decide not only on Coraline's objections, but also on the legal rules that the company based its objections on. According to Coraline, this specially formulated assignment would mean that a failure on the part of the arbitral tribunal to decide on a cited legal rule would entail an excess of mandate, or a procedural error.

Coraline stated the following, among other things. There is no new challenge ground to reject. It was included in the arbitrators' mandate to also review cited dispositive facts with regards to the objection to a sham agreement. Coraline only developed its legal argumentation in a customary way regarding the already cited third challenge ground and responded to Walter Höft's assertions in this part.

Court of Appeal's assessment

According to the Court of Appeal, what has been stated cannot be assessed as new circumstances regarding a separate agreement for the arbitral tribunal. The Court of Appeal therefore finds that the motion for dismissal shall be denied.

THE PARTIES' GROUNDS

3.1 Coraline

3.1.1 The arbitral tribunal' s jurisdiction

The arbitral award is not covered by a valid arbitration agreement. The arbitral tribunal did not have jurisdiction to decide the dispute because the parties had agreed on exclusive jurisdiction for a Cypriot court and because there was not a valid agreement between the parties that unequivocally stipulated that the parties chose to resolve disputes through arbitration proceedings instead of in court. Firstly, the arbitral tribunal lacked jurisdiction under Cypriot law and secondly, under Swedish law. The arbitral award shall therefore be set aside pursuant to Section 34 Paragraph 1 Item 1 of the Swedish Arbitration Act (1999:116).

3.1.2 Cross-examination questions

Without Coraline's culpability, the arbitral tribunal committed procedural errors that probably impacted the outcome of the dispute. The arbitral tribunal incorrectly refused Coraline the opportunity during the final hearing to ask cross-examination questions to Walter Höft's witnesses. The arbitral tribunal also did not apply agreed rules and regulations during the arbitration proceedings. The arbitral award shall therefore be set aside pursuant to Section 34 Paragraph 1 item 6 of the Swedish Arbitration Act.

3.1.3 Objection toa sham agreement

Without Coraline's culpability, the arbitral tribunal failed to review one of Coraline's objections, namely that the Loan Agreement was a sham agreement. This constitutes an excess of mandate or a procedural error that probably impacted the outcome. The

arbitral award shall therefore be set aside pursuant to Section 34 Paragraph I Item 2 or 6 of the Swedish Arbitration Act.

3.2 Walter Höft

3.2.1 The arbitral tribunal' s jurisdiction

It is contested that the arbitral award was not covered by a valid arbitration agreement between the parties. The validity of the arbitration clause shall be assessed under Swedish law. At the time the loan agreement was entered into, the parties had the shared intention that disputes between them would be resolved through arbitration proceedings. According to Swedish law, the joint will of the parties shall take precedence regardless of the wording of the agreement. Even if the arbitration clause' s validity were to be assessed under Cypriot law, the arbitration clause shall be considered valid.

3.2.2 Cross-examination questions

It is contested that the arbitral tribunal's decision to not allow Coraline to ask questions regarding the so-called Hard Sun transaction s during the c ross-examination ns with Walter Höft's witnesses Anna Brinkmann and Elpida Papastylianou constitutes a procedural error, which probably affected the outcome of the case without the culpability of a party. The arbitral tribunal had the right to reject these questions both according to agreed rules and under Swedish law.

Even if the arbitral tribunal's decision would be considered incorrect, Coraline contributed to the inception of the potential procedural error by failing to announce in advance the evidentiary theme regarding which Coraline intended to examine the witnesses. The alleged procedural error in any case probably did not have an impact on the outcome of the case. The arbitral tribunal did not consider that it had jurisdiction to review the legal condition that the rejected questions concerned.

Coraline had a possibility to question the witness' credibility in other ways, including question regarding other matters, and the witnesses would have refused to answer the questions even if they had been allowed.

3.2.3 Objection toa sham agreement

It is contested that the arbitral tribunal did not review all of Coraline' s objections, including the objection that the loan agreement constituted a sham agreement. The arbitral tribunal stated that it reviewed all of Coraline' s objections. In addition, in the reasoning, the arbitral tribunal explicitly analyzed the circumstances that formed the basis of Coraline's objection regarding a sham agreement.

Even if the Court of Appeal were to deem that the arbitral tribunal has not reviewed the objection to a sham agreement, this challenge ground overlaps other objections that the arbitral tribunal did review. The objection would thereby not have been successful. In any case, a failure to address legal objections is not an error eligible for challenge.

DEVELOPMENT OF THE ACTION

4.1 Coraline

4.1.1 The arbitral tribunal's jurisdiction

On 3 February 2015, more than three months after Coraline brought the action against Walter Höft in a Cypriot court, Walter Höft requested arbitration at the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). In the answer to the Request for Arbitration, Coraline disputed both that there was a valid arbitration agreement between the parties and Walter Höft' s claim. After correspondence and negotiation in the matter, the arbitral tribunal rendered a decision whereby the tribunal declared it to have jurisdiction to review the dispute. Coraline immediately objected to the decision and maintained that the arbitral tribunal lacked jurisdiction. This took place, among other things, through a submission to the arbitral tribunal on 13 November 2015 with a copy to Walter Höft's counsel.

4.1.1.1 The Loan Agreement 's dispute resolution clauses

The Loan agreement contains two clauses, Article 6 and 9, that states how a possible dispute between the parties shall be resolved. These clauses together constitute the Loan Agreement's procedural provisions while the other clauses are of a material nature.

According to Article 9, the parties have agreed that the Nicosia court has exclusive jurisdiction to decide "all actions or proceedings arising hereunder, or in connection with this agreement". At the same time, Article 6 states that all disputes that cannot be resolved in good faith shall be referred to "the International arbitration court in Stockholm".

There are thereby two clauses in the Loan Agreement that take aim at the choice of dispute resolution form and they are inconsistent with each other. There is thus no arbitration agreement that unequivocally contractually removes the right to a court proceeding since the Loan Agreement's dispute resolution clauses explicitly stipulate that the Nicosia court shall review the dispute. In such a case, it is necessary to fall back on the main rule that the dispute shall be decided in court.

The separability principle to which Walter Höft referred is, however, only applicable when a binding arbitration agreement has been entered into. In the review of whether such a binding agreement has been entered into, all circumstances are relevant and shall be taken into account, which means that both the Loan Agreement in its whole and other circumstances in the case constitute a basis in the review of whether an arbitration agreement has been entered into. Even when applying the separability principle already when reviewing whether a binding arbitration agreement has been entered into, such an interpretation would mean that both Article 6 and 9, in the Loan Agreement's procedural provisions, shall be taken into account.

4.1.1.2 Law applicable to the dispute resolution clauses

Article 9 explicitly prescribes that Cypriot law is applicable. However, Article 6 contains no provision on 1aw applicable to either the dispute resolution clauses or the

Loan Agreement. The parties have thus, without exception, agreed that the Loan Agreement shall be governed by and interpreted in accordance with Cypriot law.

The arbitration proceedings have an international connection since neither of the parties are Swedish. Consequently, the law that the parties have agreed on shall apply to the arbitration agreement. The Loan Agreement's choice of law is Cypriot law according to Article 9. According to Cypriot law, the choice of law shall be applied to the entire Loan Agreement including Article 6 and 9. Cypriot law shall thereby be applied in the interpretation of the alleged arbitration agreement in Article 6.

The aforementioned separability principle does not mean that the parties' intention was anything other than that the explicit agreement on Cypriot law should apply to the Loan Agreement in its entirety. The Articles 6 and 9 shall thereby be interpreted together.

The circumstances in the case have a limited connection to Sweden while the connection to Cyprus is strong. The parties have no connection to Sweden at all, but a strong connection to Cyprus.

The parties did not agree that the arbitration proceedings shall take place in Stockholm. Article 6 does not contain any agreement that Stockholm shall be the seat of a potential arbitration proceedings. The circumstance that an institute is physically located in a certain place does not entail an agreement on the seat of the arbitration proceedings.

If the parties have neither reached an agreement on law applicable to the alleged arbitration agreement nor an agreement on the seat of the arbitration proceedings, applicable law should instead be determined according to Swedish international private law and thus the principle of the closest connection.

4.1.1.3 Th arbitral tribunal lacked jurisdiction according to Cypriot law

The question whether an arbitral tribunal or Cypriot court, according to Cypriot law, has jurisdiction to review disputes associated with the Loan Agreement has

already been reviewed by the Nicosia court. In a decision on 19 July 2016, the court found that it had jurisdiction to review the dispute in accordance with the Loan Agreement and Cypriot law, despite Walter Höft 's objection regarding the alleged arbitration Agreement in Article 6 in the Loan Agreement and the on-going arbitration proceedings at the time.

The Nicosia court's decision shall form the basis of the conclusion that the arbitral tribunal did not have jurisdiction to review the dispute. The rulings, both judgements and decisions, from other European courts shall be recognized in Sweden without any special proceedings. In this context, what has been stated regarding the assessment according to Swedish law shall also be taken into account.

4.1.1.4 The arbitral tribunal lacked jurisdiction according to Swedish law

If Swedish law is to be applied to the alleged arbitration agreement in Article 6, the parties nonetheless have not, according to Swedish law, entered into a valid arbitration agreement that grants the arbitral tribunal jurisdiction.

From the wording of Articles 6 and 9, it is apparent that the parties did not contractually remove the right to a court proceeding. Since Article 9 clearly states that the Nicosia court has exclusive jurisdiction to review disputes associated with the Loan Agreement, Article 6 cannot be considered to fulfil the requirements for entering into an arbitration agreement.

Since Article 6 and 9 are inconsistent with each other, it is not enough to assess in isolation whether the alleged arbitration clause refers to arbitration proceedings. Instead, the joint parties' intent - as stated in the applicable contractual provisions as a whole - must be examined in order to confirm if the right to court review has been removed by agreement. This is also applicable when both parties do not refer to an arbitration agreement upon entering the agreement, when it is a so-called "battle of the forms".

According to Coraline, the parties agreed that disputes associated with the Loan Agreement shall be reviewed by the Nicosia court, which among other things is indicated by the circumstance that Coraline brought the action before the court prior to Walter Höft initiated the arbitration proceedings.

In addition, it is apparent from a supplemental agreement to the Loan Agreement (the Supplemental Agreement) signed by Walter Höft, that there was only one combined choice of law and prorogation clause that refers to the Nicosia court's exclusive jurisdiction and is identical to Article 9 of the Loan Agreement. The Supplemental Agreement has no reference to arbitration proceedings. Even if the Supplemental Agreement never entered into effect since Coraline did not sign it, the parties' intentions were, however, that disputes between the parties shall be resolved through arbitration proceedings.

Walter Höft has referred to so-called choice of law clauses being permissible. However, in this case the parties did not reach any agreement that disputes under the Loan Agreement in certain specially indicated cases shall be resolved through arbitration proceedings, but in other cases through court proceedings.

4.1.2 Cross -examination questions

4.1.2.1 Introduction

During the final hearing, the arbitral tribunal refused Coraline the opportunity to ask cross-examination questions to Walter Höft's witnesses Anna Brinkmann and Elpida Papastylianou on the grounds that the questions did not pertain to the content in the witness statements. The arbitral tribunal's decision constitutes a serio us procedural error on the following three independent grounds: (1) The cross- examination questions were not unrelated to the witness statements, (2) the Arbitral tribunal's decision conflicted with the Swedish Arbitration Act and the IBA rules and (3) the Arbitral Tribunal's decision conflicted with Swedish procedural rules and principles.

4.1.2.2 The cross-examination questions were not unrelated to the witness statements

The arbitral tribunal's decision to not permit Coraline' s cross-examination questions "was based on the questions not being considered to relate to the content of the witness statements, which Coraline contests.

In his challenge, Walter Höft incorrectly asserted that the so-called Hard Sun transactions had not been touched upon in the witness statements.

In her witness statement, Anna Brinkmann among other *things* stated the following:

(a) "I know Dr. Walter Höft personally since about 1990 and bad and have various business relations with him."

(b) "I confirm the correctness of the facts stated in the Reply Submissions, the Explanatory Submissions on Further Evidence, the Claimant's Further Points, and Dr. Höft's witness statements as far as they describe events that are within my knowledge. ln particular, I confirm the correctness of the descriptions of the various meetings at which T was present."

In its decision, the arbitral tribunal stated:

> . the purpose of the cross-examination also explains why questions may be put within a wide framework in order to illuminate what has been said in the course of the direct examination. These, to me, are important words. This illuminates what has been said, in the course of the direct examination."

During the cross-examination with Anna Brinkmann, Coraline intended to address and "illuminator among other things, what she stated in her first and second witness statement regarding (I) her "various business relations" with Walter Höft, (2) "the correctness of the facts stated" in Walter Höft's submissions and witness attestation "as far as they describe events that are within [Anna Brinkmann's] knowledge" and (3)"the correctness of the descriptions of the various meetings at which [Anna Brinkmann] was present".

Several of Walter Höft's submissions in the arbitration proceedings contained detailed accounts about the Hard Sun transactions, including the submissions that in Anna Brinkmann's witness statement are called "Reply Submissions", "Explanatory Submissions on Further Evidence" and "Claimant's Further Points".

Anna Brinkmann confirmed in her second witness attestation that all information, i.e. including the information on the Hard Sun transactions, was correct to the best of her knowledge. It has thus been of importance for Coraline to ask cross- examination questions regarding this.

Anna Brinkmann was also present at meetings where the Hard Sun transactions were discussed. In her second witness statement, she confirmed that the description of the meetings was correct. It is apparent from the arbitral award that Anna Brinkmann's testimony regarding the meetings was important to establish whether or not it was likely that Walter Höft tried to deceive Coraline. It has thereby been of importance for Coraline to ask cross-examination questions regarding this.

In her witness statement, Elpida Papastylianou stated among other things that she was a representative for Coraline from 10 September 2009 to 26 August 2014. It has therefore been important for Coraline to ask her cross-examination questions about her assignments as a representative and the transactions that took place during that period. Coraline intended to address and shed light on the transactions that Coraline was involved in when Elpida Papastylianou was a representative and the extent to which she was aware of the Hard Sun transactions.

The arbitral tribunal decided not to review the Hard Sun transactions, but this does not mean that the cross-examination questions regarding the transactions lacked significance in the case. On the contrary, the arbitral tribunal confirmed during the arbitration proceedings that cited circumstances concerning the transactions were very probably of significance to the substantive assessment.

Walter Höft's assertion that the arbitral tribunal only refused a few cross-examination questions that clearly fell outside the scope of the witness statements

and that the tribunal during Anna Brinkmann's cross-examination only rejected two questions is an incorrect portrayal of what happened. During the cross-examination with Anna Brinkmann, Walter Höft's counsel protested early on and asserted, among other things, that Coraline should not be permitted to ask Anna Brinkmann the following two questions.

(a) Whether or not there were "a number of things that were missing in the accounts, including an agreement for services received by Hard Sun".
(b) Whether or not Anna Brinkmann "knew about transactions and payments between Coraline and Hard Sun".

The arbitral tribunal thereafter decided to make a decision on each cross- examination question separately to determine its permissibility upon objection. Despite this, the tribunal then decided that Coraline - in addition to the questions that were refused after Coraline asked the questions - would not be permitted to ask any further questions in this respect.

4.1.2.3 The arbitral tribunal's decision conflicted with the Swedish Arbitration Act and the IBA rules

The parties agreed that "IBA Rules on the Taking of Evidence in International Arbitration 2010" (the IBA rules) would be applicable in the arbitration proceedings. The arbitral tribunal noted this in Procedural Order No 3 on 19 May 2015.

The IBA rules being applied to the arbitration proceedings means that the Code of Judicial Procedure's rules and public Swedish procedural principles shall not be applied in evidence-related issues, insofar as they are not compulsory.

In the issue of the arbitral tribunal's possibility to refuse a party the opportunity to ask cross-examination questions, there are no compulsory provisions in Swedish law that conflict with the IBA rules. It is therefore the IBA rules that determine if cross- examination questions may be refused. According to Article 8(3)(b) of the IBA rules, the parties are given an explicit right to hold cross-examinations.

The arbitral tribunal's possibility under the IBA rules to refuse questions according to the IBA rules or to refuse evidence is presented by Article 8.2 and 9.2 in the rules. The assertion that a cross-examination question does not fall within the scope of a witness statement is not grounds for refusal. Neither Walter Höft nor the arbitral tribunal asserted that Coraline's questions would conflict with these provisions.

The arbitral tribunal also does not appear to have tried to base its decision to refuse the cross-examination questions on grounds pursuant to the IBA rules, but instead disregarded the IBA rules and tried to base the decision on alleged principles based on the Swedish Code of Judicial Procedure. The arbitral tribunal restricting Coraline's right to cross-examine Walter Höft's witnesses without support in the IBA rules entails a serious violation of fundamental due process principles.

Coraline's cross-examination questions aimed to check the credibility of the witnesses Anna Brinkmann's and Elpida Papastylianou's statements with the intention of weakening or eliminating the evidentiary value of their accounts, which is the actual purpose of cross-examination questions. In order to ask the cross-examination questions Coraline wanted to ask Walter Höft's witnesses, Coraline did not need to cite Walter Höft' s witnesses or otherwise in advance announce what questions they intended to ask. Coraline's cross-examination questions did not constitute any actions in conflict with the IBA rules and the arbitral tribunal also did not state this as grounds for its decision.

4.1.2.4 The arbitral tribunal's decision conflicted with Swedish procedural rules

The arbitral tribunal's decision to refuse Coraline the opportunity to ask Walter Höft's witnesses cross-examination questions has no support in any Swedish procedural rules.

The arbitral tribunal stated that cross-examination questions could be refused if they did not pertain to the content in a witness statement, but there is no such restriction or refusal possibility in the Swedish Arbitration Act. In such a situation, the arbitral tribunal in international arbitration proceedings shall not apply the rules on production of evidence that apply according to domestic law. Especially not, as in the case at hand, when the parties have agreed that the IBA rules shall be applied to the proceeding.

Even if the issue regarding the refused cross-examination were to be decided according to Swedish rules on court proceedings, the arbitral tribunal's decision would nonetheless have been procedurally incorrect and lacked support.

According to Swedish law, it is permitted during cross-examination to ask questions outside the evidence theme for the purpose of disproving the stated evidence theme or calling into question the witness' credibility or the reliability of the statement. Consequently, according to Swedish law, a court or arbitral tribunal does not have the right to prohibit a party from asking a question based on it being considered to be outside the evidence theme.

Coraline's cross-examination questions had support in the witness statements, but even if this had not been the case, the arbitral tribunal's decision to not permit the cross-examination questions would have been procedurally incorrect according to Swedish law.

4.1.2.5 Coraline objected to the incorrect decision

Coraline objected to the arbitral tribunal's decision during the final hearing and in a submission on 4 September 2016 that was sent to the arbitral tribunal and Walter Höft's counsel.

4.1.2.6 Coraline did not contribute to the inception of the arbitral tribunal's error

Coraline' s purpose with the cross-examination questions was not to verify statements that formed the basis of Coraline's action. Instead, through the cross-examination questions Coraline intended to check and question the witnesses' credibility and the extent to which their statements were truthful.

Walter Höft asserts that Anna Brinkmann and Elpida Papastylianou would be examined regarding issues attributable to the "entering of the Loan Agreement, the decision on dividends and the No Payment Addendum". The witness statements were, however, not restricted to only these circumstances, but had been formulated so that they would also verify more circumstances, including the truthfulness of Walter Höft's statements, the accuracy of Walter Höft's portrayal of the meetings they participated in and that Elpida Papastylianou was a director for Coraline since 2009. It was regarding these circumstances that Coraline intended to ask cross-examination questions.

The scope for the testimonies was broad and the witness statements were to verify a large number of circumstances. Coraline therefore had the right to ask questions regarding the same.

4.1.2.7 The procedural error probably impacted the outcome

The procedural error that the arbitral tribunal committed was serious and there is therefore a presumption that the error impacted the outcome of the case.

Anna Brinkmann and Elpida Papastylianou played a central role as Walter Höft's witnesses and the arbitral tribunal considered that their statements appeared correct and that they were of significance to the arbitral tribunal's assessment of the disputed issues. If the arbitral tribunal had not refused Coraline the opportunity to ask cross-examination questions, it is likely that the arbitral tribunal would have come to different conclusions in the issues that affected the outcome of the case. The arbitral award indicates that the decision to refuse cross-examination questions did not impact the outcome of the case because the Hard Sun transactions were not substantively reviewed. This statement is incorrect, however, since Coraline's questions were of significance to review the credibility and reliability of the witnesses and their inclination to participate in actions to the detriment of Coraline.

It is contested that the issues concerning the Hard Sun transactions were irrelevant since the arbitral tribunal decided not to review the Hard Sun defense. The arbitral tribunal finding that it did not have jurisdiction to review Coraline's offset objection linked to the Hard Sun transactions does not mean that all cross-examination questions that have a link to the company Hard Sun or the circumstances surrounding the Hard Sun transactions are irrelevant to the impact on the outcome of the case. The arbitral tribunal instead considered that the Hard Sun transactions were interlinked to the matter in the dispute.

Walter Höft asserted that the decision to refuse certain cross-examination questions did not mean that Coraline lacked the possibility to check and call into question the witnesses' credibility and the truthfulness of their testimony. Coraline being given the opportunity to ask different questions is, however, not of significance and cannot replace the need to ask the questions at hand.

The assertion that the arbitral tribunal did not rely on Anna Brinkmann's or Elpida Papastylianou's testimony in any of the disputed issues that affected the outcome of the case is incorrect. In addition to this, it can be added that Anna Brinkmann and Elpida Papastylianou were the only of Walter Höft's witnesses that could confirm or deny Walter Höf't's account of circumstances that made up the core of the dispute.

Anna Brinkmann and Elpida Papastylianou would nonetheless not have answered the questions, according to Walter Höft. It is not possible to disregard the central aspect of clarifying the grounds on which a witness refuses to answer questions, which also influences the arbitral tribunal's possibilities to draw conclusions from a witness' refusal to answer questions. However, since both of the witnesses refused to provide any reason why they refused to answer Coraline's, and even the arbitral tribunal's, questions, the arbitral tribunal cannot apply Article 9.6 in the IBA rules and draw negative conclusions from the witness' refusal.

Walter Höft lastly objected that if Coraline had been able to ask the cross-examination questions, they would have constituted repetitions that the arbitral tribunal could have refused under Article 8.2 of the IBA rules. This objection lacks grounds and is contested in light of what has been described above.

4.1.3 Objection to a sham agreement

Coraline invoked five independent challenge grounds during the arbitration proceedings. The third of these objections was that the Loan Agreement was invalid according to Cypriot law since it was a sham agreement (" The Loan Agreements and No Payment Addendum area sham and thus void"). Coraline invoked and developed this objection in the response, subsequent submission (so-called rejoinder) and at the final hearing.

If the arbitral tribunal had reviewed Coraline's objection, it is likely that it would have impacted the outcome of the case. Coraline had cited extensive evidence in support of its objection. If the arbitral tribunal had reviewed the objection, it is likely that it would not have come to the conclusion that the Loan Agreement was valid, which would have led to Walter Höft's claim being denied.

Coraline's objections were also repeated by the arbitral tribunal in the first part of the arbitral award that presents Coraline's objections (Paragraph 108) as per the following:

> "(l.) The No Payment Addendum is void or incapable of performance, because the Claimant is not the legal owner of the shares.
>
> (2.) The No Payment Addendum and the Loan are unenforceable by the Claimant by operation of ex turpi causa or pactum turpe.
>
> (3.) The Loan Agreement and the No Payment Addendum are shams and therefore unenforceable.

(4.) The declaration of dividend, the No Payment Addendum, and Loan are void as they were entered into in breach of fiduciary duty with the Claimant's knowledge."

The arbitral tribunal reviews the first objection in the arbitral award's paragraph ll0 and forward. The arbitral tribunal reviews the second objection in paragraph 149 and forward. The fourth point is very briefly touched upon in paragraph 215. The third point, that the Loan Agreement is a sham agreement, is not addressed at all in the arbitral award, however. Nor has the arbitral tribunal taken into account or reviewed the circumstances cited in support of this objection.

It is contested that the arbitral tribunal addressed Coraline's objection regarding a sham agreement and thereby did not approve Coraline's alleged dispositive facts that were cited in support of the objection in paragraph 148 in the arbitral award.

In paragraphs 138-148 of the arbitral award, the arbitral tribunal addresses the ground that, since Walter Höft was not a shareholder in Coraline and accordingly did not have a right to dividend, the "No Payment Addendum" was invalid on the basis of mistake and/or total failure of consideration. In more detail, it is addressed in paragraphs 138-147 whether or not the "No Payment Addendum" was invalid due to a mistake and in paragraph 148, it was addressed whether or not the "No Payment Addendum" was invalid due to total failure of consideration. However, the ground is not addressed that, since the Loan Agreement was a sham agreement and the parties had a common intention that conflicted with the agreement's apparent wording, the Loan Agreement was invalid and the "No Payment Addendum" was therefore also invalid due to a total failure of consideration.

It is contested that the arbitral tribunal should have indirectly not approved of the evidence that Coraline cited in support of its objection regarding a sham agreement by not using Boris Lokshin's statements as grounds for the arrangement being "fictitous" and " purely on paper".

The arbitral tribunal's comment is not related to the objection regarding a sham agreement since Boris Lokshin was not a party to the Loan Agreement. Boris Lokshin's statements pertain to what was said during a meeting on 17 April 2012 between himself, Semyon Vainshtock and Walter Höft. The evidence is relevant to show how Walter Höft justified his fraud arrangement towards Semyon Vainshtock more than five months after the Loan Agreement was entered into. The arbitral tribunal deciding on certain evidence regarding what happened during a meeting more than five months after the Loan Agreement was entered into is irrelevant to the objection regarding a sham agreement.

It can be added that the arbitral tribunal in paragraphs 164-184 of the arbitral award addresses the issue of whether or not an entirely different agreement- the Securities Loan Agreement dated 6 May 2005 (designated "SLA") - constitutes a "sham" under German law. This further clarifies that the arbitral tribunal entirely refrained from reviewing Coraline's argument that the Loan Agreement, dated 31 October 2011, was a "sham" according to Cypriot law.

If the arbitral tribunal had reviewed Coraline's objection, it is likely that it would have impacted the outcome of the case. Coraline had cited extensive evidence in support of its objection. If the arbitral tribunal had reviewed the objection, it is likely that it would not have arrived at the conclusion that the Loan Agreement was valid, which would have led to Walter Höft's claim being denied.

4.2 Walter Höft

4.2.1 The arbitral tribunal's jurisdiction

Since there is no explicit choice of law regarding the arbitration clause, the choice of law issue shall be decided in accordance with the law of the country in which the arbitration proceedings take place, i.e. According to Swedish law.

The arbitral tribunal' s decision in the jurisdiction issue provides guidance regarding the interpretation of Article 6 and 9 of the Loan Agreement. In the jurisdiction decision, the arbitral tribunal established that the validity of Article 6

of the Loan Agreement shall be assessed according to Swedish law since the seat of the arbitration proceedings was Sweden. The arbitral tribunal then confirmed that the wording of Article 6 in accordance with Swedish practice constitutes a valid arbitration agreement.

The arbitral tribunal subsequently reviewed if the parties, through Article 9, had appointed the courts in Cyprus as having jurisdiction. The arbitral tribunal confirmed that Article 9 shall be interpreted according to Cypriot law (which is based on English law) and referred to the principle of preference for arbitration and the expansive interpretation of the arbitration agreement' s scope that takes place under English law. The arbitral tribunal concluded that Article 9 cannot be interpreted in such a way that it excludes review through arbitration proceedings. This reasoning agrees with both Swedish and Cypriot case law.

4.2.1.1. Swedish law is applicable to the arbitration agreement

It is attested that the issue of applicable law for the arbitration agreement shall be assessed according to Section 48 of the Swedish Arbitration Act. However, it is contested that the first sentence of the paragraph shall be interpreted such that the parties' choice of law for the Loan Agreement as a whole shall also pertain to the arbitration agreement in the Loan Agreement. Applicable law for Article 6 of the Loan Agreement shall instead be assessed in accordance with Paragraph 1 Sentence 2 of Section 48 of the Swedish Arbitration Act.

The provision in Section 48 of the Swedish Arbitration Act shall be read together with Section 3 of the same act that codifies the separation principle, meaning that the arbitration clause shall be considered to constitute a separate agreement when the validity of the clause is reviewed. The choice of law for the arbitration agreement is separate from the choice of law that applies to the main agreement.

Walter Höft and Coraline chose that Cypriot law shall be applicable to the Loan Agreement. That choice of law does not encompass the arbitration agreement in Article 6. The arbitration proceedings had their seat in Sweden. Coraline and Walter

Höft did not make any special choice of law for the arbitration agreement, which is why Swedish law shall be applied to the arbitration agreement in Article 6.

Coraline applied Cypriot law to determine if the choice of law covers the arbitration agreement. This reasoning is only relevant if Cypriot law was applicable to the arbitration proceedings or to the arbitration agreement. Section 46 of the Swedish Arbitration Act states that the law is applicable to all arbitration proceedings that took place in Sweden. Pursuant to Cypriot law, the choice of law for the main agreement can accordingly not be extended to the arbitration agreement regardless of that.

4.2.1.2. The arbitration agreement is valid according to Swedish law

The issue of whether the arbitration agreement is valid under Swedish law shall be assessed based on the joint will of the parties that in the case at hand has been that disputes shall be resolved through arbitration.

The Loan Agreement was signed by Walter Höft and Coraline's representative at the time Elpida Papastylianou. Walter Höft has maintained that the will of the parties was that disputes regarding the Loan Agreement should be resolved through arbitration. Elpida Papastylianou confirmed that this was the parties' joint will in her witness statement in the arbitration proceedings.

That this was the joint will of the parties is also apparent from the headings of the two agreement provisions. Article 6 has the heading "Arbitration" and Article 9 "Governing Law", which indicates that the parties' will was that any disputes would be resolved through arbitration.

The subsequent circumstances that Coraline refers to are irrelevant for the assessment of the validity of the arbitration agreement.

The fact that Coraline chose to first bring action in court in Nicosia is not crucial to the interpretation of the arbitration clause. To begin with, the generally worded summons application that the proceeding was initiated with contained no reference to the Loan Agreement, but rather the action was supplemented in this respect only

at a later date. Coraline's action in the court in Nicosia is also based on a number of circumstances that are not connected to the Loan Agreement and are directed at a number of parties other than Walter Höft. Coraline' s action accordingly could nonetheless not have been decided through arbitration under the Loan Agreement.

The will of the parties is undertaken by a company's representative. When the action was brought in the court in Nicosia, Elpida Papastylianou was no longer a representative for Coraline, which is why Coraline's new representatives may have been unaware of the will of the parties that existed at the time the agreement was entered into.

The supplemental agreement to the Loan Agreement was prepared unilaterally by Coraline's Cypriot counsel and never became effective between the parties. The fact that Walter Höft for a time was prepared to accept a supplement that gave a Cypriot court jurisdiction has no significance to his will or intention upon entering the Loan Agreement.

It is contested that the circumstances in the case are the same as in a so-called “battle of forms". Both Walter Höft and Coraline signed the Loan Agreement of which Article 6 is part of and are thereby bound by the clause. The parties also had a joint perception that disputes should be resolved through arbitration. Also, in the application of the same principles that apply to the assessment of " battle of forms" situations, it is thereby clear that the arbitration agreement is valid and binding.

4.2.1.3 The arbitration agreement is also valid if the joint will of the parties is not enough

It is contested that Swedish law sets high requirements on an arbitration agreement, except for the fact that it must refer to arbitration proceedings. Article 6 of the Loan Agreement distinctly clarifies the parties' will that any disputes shall be resolved through arbitration.

An arbitration agreement can be valid under Swedish law even if it does not rule out jurisdiction fora public court. So-called right of choice clauses through which

a party is given an opportunity to choose between public court and arbitration are also accepted. This does not mean that the arbitration agreement becomes invalid. The trend in international arbitration practice is the same.

4.2.1.4 The arbitration agreement is also valid under Cypriot law

It is contested that the arbitral tribunal did not have jurisdiction to decide the dispute according to Cypriot law. The court in Nicosia did not draw the conclusion that the arbitration agreement is invalid under Cypriot law or that the arbitral tribunal did not have jurisdiction to review the dispute. On the contrary, the court in Nicosia stated that the arbitration proceedings in Sweden could lead to a final and binding judgement regardless of the case in the court in Nicosia. It is thereby contested that the decision from the court in Nicosia is of relevance.

4.2.1.5 The decision by the court in Nicosia is not binding for the Court of Appeal

The decision by the court in Nicosia has not gained legal force and it would also still not be recognized and enforced in Sweden. Coraline brought the action in Nicosia in 2014, which means that Article 1.2(d) of the 2001 Brussels I Regulation is applicable to issues concerning arbitration proceedings. This provision means that a decision regarding the binding effect of arbitration that is rendered by the courts in one Member State is not covered by the system with automatic recognition. The decision from the court in Nicosia thereby lacks legal effect.

4.2.2 Cross-examination questions

Coraline's challenge ground is unfounded. Firstly, since the questions that were asked during the cross-examination were clearly outside the scope of the witness statements because neither Anna Brinkmann nor Elpida Papastylianou touched on any circumstances surrounding the Hard Sun clauses. Secondly, since the arbitration tribunal exercised its assessment within the framework of the IBA rules when it did not permit the questions and this decision was consistent with both the IBA rules and Swedish law. Moreover, Coraline was culpable to any procedural error and the error nonetheless probably did not affect the outcome of the case.

4.2.2.1 The provision regarding procedural error shall be applied restrictively

It is contested that Section 34 Paragraph 1 Item 6 of the Swedish Arbitration Act is applicable in the issue. This provision shall be interpreted restrictively, and arbitral awards shall be able to be set aside with support of this provision only in exceptional cases. This applies particularly when alleged procedural error consists of the arbitral tribunal refusing evidence on the grounds of deficient evidentiary significance.

In paragraph 42 of the arbitral award, the arbitral tribunal already took into account Coraline's objection regarding procedural error and drew the conclusion that the refusal decision probably had no impact on the outcome of the case.

The arbitral tribunal has not refused witnesses or other evidence that Coraline cited, but rather only refused Coraline the opportunity to ask a few cross- examination questions of Anna Brinkmann and Elpida Papastylianou. Since the purpose of the cross-examination is not to introduce new evidence, but rather to call int a question the credibility of the counter-party' s witnesses, the arbitral tribunal's decision to restrict the cross-examination cannot be considered to be a serious procedural error according to Section 34 Paragraph 1 Item 6 of the Swedish Arbitration Act.

4.2.2.2 Only a few cross-examination questions that were outside the scope of the witness statements were refused

Neither Anna Brinkmann or Elpida Papastylianou touched on the Hard Sun transactions or circumstances surrounding them in their witness statements that were submitted in the arbitration proceedings. Nor were the transactions touched on in their testimonies at the final hearing. All questions during the cross-examination that concerned the transactions fell outside the scope of the witness statements.

Coraline has tried to circumvent this fact through their assertion that the questions that would be asked Anna Brinkmann during the cross-examination would have shed

light on more general issues that had been touched upon in her witness statement. The same applies to Elpida Papastylianou. However, Coraline has been permitted to ask a large number of questions to shed light on this, which is apparent from the transcript from the cross-examination with Anna Brinkmann and Elpida Papastylianou. In addition, Coraline was permitted to ask a number of questions that were directly related to the Hard Sun transactions.

It is contested that the arbitral tribunal made a general decision to not permit questions concerning the Hard Sun transactions. The arbitral tribunal instead evaluated the individual questions that Walter Höft objected to and then permitted the questions that the arbitral tribunal found justifiable. Coraline's counsel did for example ask Anna Brinkmann about the company PFCS and about a meeting on 9-11 September 2009 where Anna Brinkman was present and at which the Hard Sun transactions were discussed. The arbitral tribunal permitted these questions, and others, despite objections from Walter Höft.

4.2.2.3 The arbitral tribunal only refused two questions during the cross-examination with Anna Brinkmann.

The first question that was rejected was a detailed question about why a payment between PFCS and Hard Sun had been taken up as a settlement of an intra-Group transaction. The arbitral tribunal accepted Walter Höft's objection that the question was too far from the general statement in the witness statement that Anna Brinkmann had had business relationships with Walter Höft.

The second question was if Anna Brinkmann had known what services Coraline had paid Hard Sun for, which was asked after a number of questions about Hard Sun that Anna Brinkmann had refused to answer. The arbitral tribunal refused the question since it not only touched on an issue that fell outside the scope of the witness statement, but since the question also could not be justified in reference to checking the witness' credibility when the question was a repetition. On the grounds of this, Coraline's counsel assumed that the arbitral tribunal would find that further

questions would be repetitions, which is why the counsel shifted to ask other questions in the cross-examination.

Regarding the cross-examination with Elpida Papastylianou, the arbitral tribunal refused Coraline the opportunity to ask questions about two documents that were attributable to Hard Sun and PFCS since they were considered to be weakly linked to the reference in her witness statement that she had been a representative for Coraline. The arbitral tribunal stated that such questions would not be permitted if Coraline could not show any actual connection between Hard Sun and Elpida Papastylianou's witness statement.

4.2.2.4 The IBA rules provide the arbitral tribunal extensive assessment latitude

Walter Höft testified that the parties agreed to apply the IBA rules to the arbitration proceedings. Walter Höft contested that the arbitral tribunal's decision to refuse certain cross-examination questions conflicted with the JBA rules.

The IBA rules are not a steadfast regulatory framework, but rather an aid in the flexible arbitration proceedings, which is stated by the Preamble Item 2 of the rules. Even if the IBA rules were to be considered binding according to Section 21 of the Swedish Arbitration Act, the rules provide the arbitral tribunal an extensive assessment latitude when it comes to evidence issues. The arbitral tribunal observed the IBA rules in the arbitration proceedings between Walter Höft and Coraline.

Since the IBA rules do not provide any clear guidance regarding the permitted scope of cross-examination questions, the arbitral tribunal was entitled to decide on the issue according to Articles 1.4 and 1.5 of the IBA rules in the manner it deemed fit in the arbitration proceedings, which had their seat in Sweden. The arbitral tribunal accordingly acted within the framework of the IBA rules when it relied on its jurisdiction to determine the permitted scope of the cross-examination according to Swedish practice.

4.2.2.5 The arbitral tribunal's decision complies with the IBA rules and Swedish law

It is contested that the IBA rules and the Swedish Arbitration Act, lacking an explicit provision regarding cross-examination scope, do not set any restriction regarding how far cross-examination questions may deviate from the main examination or witness statements.

If the IBA rules were unclear or silent, the arbitral tribunal had the right to take guidance from the IBA rules' general principles or rely on its jurisdiction to assess what is suitable in the individual arbitration proceeding.

Coraline had not cited Anna Brinkmann or Elpida Papastylianou as witnesses or informed the arbitral tribunal that Coraline wanted to rely on their knowledge of the Hard Sun transactions. Coraline instead tried to surprise Walter Höft and the witnesses with questions regarding this during the cross-examination even though they did not touch upon this in their witness statements. The IBA rules and Swedish practice set an explicit prohibition on such surprises. The arbitral tribunal followed these principles during the cross-examinations with Anna Brinkmann and Elpida Papastylianou. The arbitral tribunal thereby allowed very broad limits for Coraline's cross-examination.

4.2.2.6 Coraline was culpable lo the potential procedural error

Coraline did not cite Anna Brinkmann and Elpida Papastylianou as witnesses or otherwise notify that Coraline intended to rely on their knowledge of the Hard Sun transactions as evidence, even though Coraline now asserts that the questions were of central significance to the outcome of the arbitration proceedings. As the arbitral tribunal confirmed, it is possible for both parties to cite the same evidence. If Coraline had acted in good faith and was open about the conditions that the company intended to verify, no discussion would have arisen whether there were close enough ties between the questions and the witness statements.

During the arbitration proceedings, Coraline also did not show the manner in which the refused questions would have identified any contradictions in Anna Brinkmann' s and Elpida Papastylianou's witness statements. Through the witness statements, Coraline was aware of what Anna Brinkmann and Elpida Papastylianou would be interviewed about, which was the circumstances that took place in 2011. If Coraline had chosen to undermine their testimony with questions about the Hard Sun transactions that took place in 2009, Coraline would have needed to verify how these questions were relevant. The arbitral tribunal gave Coraline the opportunity to show a connection, which Coraline did not do. Since Coraline did not declare the purpose of the questions or since Coraline did not prepare other questions to be able to achieve the intended results, Coraline was thereby culpable for the potential procedural error.

4.2.2.7 The decision had no probable impact on the outcome of the case

It is contested that the arbitral tribunal's decision to refuse some cross- examination questions was of such a serious nature that there is a presumption that the decision affected the outcome of the case. Firstly, Section 34 Paragraph I Item 6 of the Swedish Arbitration Act shall be interpreted restrictively when alleged procedural error consists of the arbitral tribunal refusing evidence as being insignificant. The refused questions regarding the Hard Sun transactions were clearly irrelevant since the arbitral tribunal decided not to review Coraline's objection regarding Hard Sun due to deficient jurisdiction. In the arbitral award, the arbitral tribunal confirmed that the refused cross-examination questions had no impact on the arbitral tribunal's decision.

Coraline has tried to circumvent the fact that the arbitral tribunal did not review the Hard Sun objection by referring to Procedural Order No 10 that the arbitral tribunal rendered during the arbitration proceedings. The arbitral tribunal has in this Procedural Order, which was rendered more than one year before the arbitral award, denied Walter Höft's motion for a separate decision in the matter of the arbitral tribunal's jurisdiction to review the objection regarding Hard Sun.

If the arbitral tribunal bad subsequently found itself to have jurisdiction to review the Hard Sun objection, the questions would have been significant to the outcome of the arbitration proceedings. But since the arbitral tribunal ultimately did not find itself to have jurisdiction, it also stated in the arbitral award that questions regarding Hard Sun had no impact on the outcome of the case. This statement in the non-binding Procedural Order No 10 therefore had no significance to the assessment of the relevance of the refused questions.

It is contested that the refused cross-examination questions entailed that Coraline did not have an opportunity to check and question the witnesses' credibility and reliability since the arbitral tribunal limited Coraline's opportunity to ask questions during the cross-examination.

Thirdly, the arbitral tribunal did not rely on Anna Brinkmann's or Elpida Papastylianou's testimony in the disputed issues that affected the outcome of the case. The arbitral tribunal made five references to Anna Brinkmann's testimony and four references to Elpida Papastylianou's testimony. The references concerned incontrovertible details, confirmed Coraline's witnesses' statements or concerned events that the arbitral tribunal considered verified by other evidence. None of these objections had any significance to the outcome of the case.

It is contested that the arbitral tribunal confirmed that Simon Vainshtock's testimony was not credible faced with Anna Brinkmann's testimony. The arbitral award states that the arbitral tribunal weighed Simon Vainshtock's testimony against Walter Höft's, not Anna Brinkmann's. In addition, the arbitral tribunal decided the dispute to a large extent on recorded conversations from a meeting between Walter Höft, Simon Vainshtock and Boris Lokshin. The arbitral tribunal was very cautious in the assessment in relation to Anna Brinkmann's testimony.
Anna Brinkmann and Elpida Papastylianou would nonetheless not have answered the cross-examination questions regarding the Hard Sun transactions even if such questions had been allowed. Both of the witnesses had objected to such questions before the

witness examinations through reference to the civil procedure that Coraline was conducting against them in the Nicosia court regarding the Hard Sun transactions.

If the arbitral tribunal had allowed all cross-examination questions, Anna Brinkmann and Elpida Papastylianou would have answered them with "no comment" and the questions could then just as well have been disallowed with support of the IBA rules since they constituted repetitions. The arbitral tribunal could also have drawn the conclusion that the answers to the questions were detrimental to Walter Höft due to the witnesses' refusal to answer. Entirely regardless, such conclusions would probably not have affected the outcome of the case since the arbitral tribunal did not review the matter that the questions concerned, i.e. the Hard Sun transactions.

4.2.3 The arbitral tribunal reviewed all of Coraline's objections

Is contested that the arbitral tribunal failed to review all of Coraline's objections since the arbitral tribunal stated in the arbitral award that it reviewed all objections and since the arbitral tribunal in its reasoning discussed the dispositive facts on which the objection of a sham agreement was based. The objection in any case overlaps with Coraline's other challenge grounds that the arbitral tribunal incontrovertibly took into account, which means that the objection would not have been successful.

In addition, it is contested that the arbitral tribunal's alleged failure shall be assessed according to Section 34 Paragraph l Item 2 of the Swedish Arbitration Act and it is instead asserted that it shall be assessed according to Item 6. However, even if the issue were to be reviewed according to Item 2, the failure is required to have probably affected the outcome of the case.

4.2.3.1 The arbitral tribunal confirmed that it took into account all objections

It is contested that there is a presumption of procedural error if an objection is not mentioned in the reasoning. The circumstances in the arbitration proceedings do not provide support for such a presumption since the arbitral tribunal in the introduction to the reasoning explicitly confirmed that it investigated, considered and analyzed all of Coraline's objections.

4.2.3.2 The arbitral tribunal presented an account of the dispositive facts that Coraline's objection was based on

Coraline's conclusion that the objection regarding a sham agreement was not presented in the arbitral award's reasoning cannot be drawn solely on the grounds that the arbitral tribunal did not use the word *"sham"* as such or otherwise referred to Cypriot rules regarding sham agreements.

The supplemental agreement, *No Payment Addendum,* was based on Coraline having a claim against Walter Höft through the Loan Agreement, while Walter Höft had a claim against Coraline through the dividend. These claims, which amounted to equal amounts, were then offset against each other through the *No Payment Addendum.*

Coraline's objection regarding a sham agreement in the arbitration proceedings was based on the assertion that Walter Höft and Coraline had the joint intention that the Loan Agreement would not entail the legal rights and obligations stated in the agreement. According to Coraline, Walter Höft had never had the intention or funds to transfer the loan amount stated in the Loan Agreement to Coraline. Coraline accordingly asserted that the Loan Agreement was a fictitious agreement that had been entered into to give the appearance that Walter Höft had a payment obligation towards Coraline even though neither of the parties intended to push this through. The alleged consequence was that Coraline did not have any claim through the Loan Agreement, which Coraline could offset through the No Payment Addendum. Thereof, it should follow that *"the No Payment Addendum was void due toa total failure of consideration."*

The arbitral tribunal explicitly disapproved of these alleged dispositive facts in paragraph 148 of the arbitral award. This paragraph begins with an explicit reference to Coraline' s reasoning *"that the No Payment Addendum is void by reason of a total failure of consideration",* i.e. the ultimate objection that the Loan Agreement is a sham agreement. The arbitral tribunal then disapproved of the assertion that the parties had a joint intention that disagreed with the agreement's apparent wording by confirming that both parties intended for Walter Höft' s right to dividend to constitute the consideration according to the *No Payment Addendum.* In this paragraph, it is

further clarified that Coraline's assertion that Walter Höft never had the intention or ability to pay the equivalent amount to Coraline is incorrect since the requirement on dividend was what Walter Höft *"as the Lender provided as the consideration"* and it was *"a valuable right in the eyes of contract law"*.

Since Walter Höft was found to have an obligation towards Coraline in accordance with the wording of the Loan Agreement, the arbitral tribunal also reviewed the objection regarding a sham agreement and confirmed that the addendum was valid.

Paragraph 148 of the arbitral award is found under the heading *"The No Payment Addendum is void or incapable of performance because the Claimant is not the legal owner of the shares"*. Even if the placement of this paragraph under the relevant heading may be questioned, it is nonetheless clear from its contents that it addresses another challenge ground than the one stated in the heading in question. This can be read according to the following.

In the previous paragraph 147, the arbitral tribunal disapproved of Coraline's objection that the "No Payment Addendum" was invalid because Walter Höft was not the registered owner of the shares in Coraline by stating that *"[It follows that the Respondent's case cannot succeed"*. In the subsequent paragraph 148, the arbitral tribunal refers to another objection by stating that *"[t]his is also fatal ta the Respondent's argument that the No Payment Addendum is void by reason of total failure of consideration"*. The decision to address both challenge grounds in one context has clearly been motivated by the arbitral tribunal finding that its conclusion in relation to the first objection (that the "No Payment Addendum" would be invalid on the basis that Dr. Höft was not the registered owner of the shares) also ruled out approval of the objection regarding a sham agreement (that the "No Payment Addendum" would be invalid due toa total failure of consideration). Since the Loan Agreement was deemed to constitute a substantive consideration, it cannot have constituted a sham agreement.

The arbitral tribunal also indirectly disapproved of the evidence that Coraline cited in support of its objection regarding a sham agreement. The arbitral tribunal states in the arbitral award paragraph 190 the following regarding Coraline's witness: "Mr *Loshkin's explanation in his second witness statement that he understood the dividends and loans as "fictitious" and purely "on paper" does not lend any strength to the Respondent's case*". The reference to "paper transactions" concerns Coraline's assertion that the parties' intention was never to pay any capita! amount according to the Loan Agreement.

4.2.3.3 The objection regarding a sham agreement overlaps with other reasoning that had been reviewed by the arbitral tribunal

If the Court of Appeal were to interpret the aforementioned quotes above differently, the arbitral tribunal nonetheless considered similar assertions. By disapproving these similar assertions, it is logically impossible that the tribunal could have reached the conclusion that the Loan Agreement was a sham agreement.

The necessary requirement for the arbitral tribunal to be able to draw the conclusion that the Loan Agreement was a sham agreement and that the "No Payment Addendum" accordingly was invalid due to a failure of consideration is that Coraline did not have any substantive claim on Walter Höft to receive the loan amount according to the Loan Agreement.

However, in paragraph 148 of the arbitral award, the arbitral tribunal confirmed that the parties intended for Walter Höft's right to dividend would constitute consideration and that he actually used the right to disbursement of the dividend as consideration to Coraline according to the "No Payment Addendum". This means that the arbitral tribunal confirmed that Walter Höft had an obligation to pay the loan amount to Coraline (or the opposite, that Coraline had a claim on Walter Höft to receive the loan amount) under the Loan Agreement and that Walter Höft acted in accordance therewith by providing a consideration to Coraline in the form of offset against the right to dividend. There is accordingly no grounds for the conclusion that the Loan Agreement should be considered to constitute a sham agreement.

INVESTIGATION

Upon request by Coraline, interviews were held with the party expert Menelaos Kyprianou.

Walter Höft was interviewed under oath at his own request. In addition, at his request, the witness Elpida Papastylianou and the party expert Andrew Demetriou were interviewed.

Both parties referred to various parts of the arbitral award and cited a large number of written documents.

FINDINGS

Arbitral tribunals' jurisdiction

According to Section 46 of the Swedish Arbitration Act, the law is applicable to the arbitration proceedings that take place in Sweden even if the dispute has international ties. Stockholm was the seat for the relevant arbitration proceedings and the Swedish Arbitration Act is thereby applicable. Considering that the arbitration proceedings were initiated before 1 March 2019, the law according to Item 2 in the transitional provisions shall be applied in their older wording.

Section 34 Paragraph 1 Item 1 of the Swedish Arbitration Act states that an arbitral award shall be set aside if it is not covered by a valid arbitration agreement between the parties. In a courts review of an arbitral tribunal's assessment in the jurisdiction issue, it should be taken into account that it is normally the arbitration tribunal that has the best conditions to review the issue of its own jurisdiction and that this supports the position that the premise in the court's assessment should be that the arbitral tribunal's interpretation and evidence evaluation is correct (compare NJA 2019 p.171).

According to Coraline, the arbitral award is not covered by a valid arbitration agreement and the arbitral tribunal did not have jurisdiction to decide the dispute

because the parties, through the prorogation clause in Article 9 of the Loan Agreement, had agreed on exclusive jurisdiction for a Cypriot court and because there was not a valid agreement between the parties that unequivocally stipulated that the parties chose to resolve disputes through arbitration proceedings instead of in court. Coraline thereby asserted that the arbitral tribunal lacked jurisdiction primarily according to Cypriot law and secondarily according to Swedish law.

Walter Höft on the other hand contested that the arbitral award was not covered by a valid arbitration agreement and asserted that the validity of the arbitration clause in Article 6 of the Loan Agreement shall be assessed according to Swedish law. In addition, he objected that the parties at the time the Loan Agreement was entered into had the joint intention that disputes between them should be resolved through arbitration and that the joint will of the parties according to Swedish law shall take precedence regardless of the wording of the agreement. Even if the arbitration clause's validity were to be assessed under Cypriot law, the arbitration clause shall be considered valid according to Walter Höft.

With regard to the issue of law applicable to the alleged arbitration agreement, the arbitral tribunal deemed that Swedish law was applicable and found that Article 6 of the Loan Agreement constituted a valid and binding arbitration agreement. In connection with this, the arbitral tribunal stated that the arbitration clause does not exempt any special issues from arbitration ("The arbitration clause in the present case does not exclude any particular grievances from arbitration.").

It can initially be confirmed that the Loan Agreement states Walter Höft and Coraline Limited as parties and is dated 31 October 2011. It is signed by Walter Höft and by Elpida Papastylianou in her capacity as "Director" in Coraline. The agreement is of a limited scope (3 pages) and contains only nine articles, of which Articles 6 and 9 are of particular interest in this case.

The content of Article 6 is divided into two paragraphs, both of which address how the parties shall resolve conflicts due to the agreement. The initial first paragraph

encourages the parties to reach solutions in mutual understanding. While the second paragraph regulates how disputes shall be resolved if mutual understanding solutions cannot be achieved ("a case shall be submitted, without recourse to courts of law, to the International arbitration court in Stockholm in accordance with the rules for procedure of the said court").

Pursuant to Section 3 of the Swedish Arbitration Act, an arbitration agreement shall be considered a separate agreement in the jurisdiction review when it constitutes a part of another agreement (see Government bill 1998/99 p. 193). The arbitration clause in Article 6 is a part of the Loan Agreement but shall accordingly be viewed as a separate agreement in the assessment of its validity.

If the parties have not agreed on a choice of law for the arbitration agreement, pursuant to Section 48 of the Swedish Arbitration Act the law of the forum country shall be applied. A choice of law agreement must pertain to the arbitration agreement in particular in order to regulate the issue of applicable law for the arbitration agreement. The parties must accordingly explicitly state this. A regulation on applicable law for the main agreement accordingly does not concern the arbitration agreement (compare Lars Heuman, Skiljemannarätt [Arbitration Law], 1999, p.697 f., and Stefan Lindskog, Skiljeförfarande, En kommentar [Arbitration Proceedings, A Commentary], JUNO, 2018, VIII - 48 - 4.1.2).

The only provision in the Loan Agreement that contains any form of choice of law is Article 9. The content of this article consists of one single sentence of which the first part refers to Cypriot law, which in itself corresponds to the heading "Governing Law". While the second part refers to court review at "the competent court in Nicosia". The reference to Cypriot law in this article does not specifically address the arbitration agreement. The formulation of the provision appears to most closely regulate a choice of law for the main agreement. There is thereby no choice of law agreement in the Loan Agreement that pertains specifically to applicable law for the arbitration agreement.

According to the arbitral tribunal's decision, the parties were in agreement during the arbitration proceedings that the relationship between Articles 6

and 9 would be assessed according to Cypriot law ("the Parties agree that the relationship between clause 6 and clause 9 is to be determined with the application of Cypriot law"). However, in the assessment of the Court of Appeal, the parties' position during the proceeding in question cannot be considered to entail that the parties agreed on a choice of law for the arbitration agreement. Instead, it appears only to be an issue of assessing the relationship between the content of the two different articles in the Loan Agreement.

In these conditions, the Court of Appeal finds that the forum country's law, pursuant to Section 48 of the Swedish Arbitration Act, shall be applied to the arbitration agreement, i.e. Swedish law.

In the opinion of the Court of Appeal, Article 6 of the Loan Agreement, with its heading "Arbitration", is formulated in such a way that it according to Swedish law must be considered to contain an arbitration agreement ("all disputes and differences shall be submitted, without recourse to courts of law, to the International arbitration court in Stockholm"). The reference to "the International arbitration court in Stockholm" does not give reason to perceive that it would refer to anything other than the Stockholm Chamber of Commerce's Arbitration Institute.

In terms of the area of application for an arbitration agreement, it is determined according to customary principles for contract interpretation. Arbitration agreements are often formulated based on standards and there are therefore rarely clues to discern in the individual case a specific party intention. If the wording provides room for different interpretations and other relevant interpretation data does not provide guidance, it is natural to assume that the arbitration agreement shall fill a reasonable function and constitute a reasonable regulation of the parties' interests (compare NJA 2015 p. 741 and NJA 2019 p.171). In this context, the principle should also be mentioned of contractual interpretation expressed in Ace Capital Ltd v CMS Energy Corp.,([2008] 2 CLC 318, p. 70), Christopher Clarke, "the principle that the contract must be read as a whole and every effort should be made to give effect to all of its clauses".

In accordance with what has already been mentioned, besides a reference to Cypriot law, Article 9 also contains a text regarding court review ("that all actions or proceedings arising hereunder or in connection with this agreement shall be bought in first instance before the competent court in Nicosia, Cyprus"). However, the content of Article 9 does not provide any guidance for the interpretation of the arbitration clause in Article 9.

Walter Höft and Elpida Papastylianou have stated that the draft agreement was prepared by the audit firm PwC and that an arbitration clause was introduced by Elpida Papastylianou because Walter Höft wanted there to be a provision in the Loan Agreement that disputes would be resolved through arbitration. Both have also explained that the text about a Cypriot court in Article 9 then remained as an oversight. Walter Höft's information must in itself be assessed with caution as a result of his own involvement in the circumstances concerned. However, that Elpida Papastylianou testified that it was a matter of oversight means, in the Court of Appeal's opinion, that one cannot disregard this explanation.

In a collective assessment, the Court of Appeal finds that it is established that there was a joint party intention that disputes regarding the Loan Agreement would be resolved through arbitration and that a valid arbitration agreement came about between the parties that did not contain any special restrictions. There is thereby no reason to disapprove the arbitral tribunal's assessment of the parties' agreement regarding dispute resolution. The arbitral award shall thereby not be set aside on this ground.

Cross-examination questions

According to Coraline, the arbitral tribunal incorrectly refused the company the opportunity during the final hearing to ask cross-examination questions of Walter Höft's witnesses about the so-called Hard Sun transactions and the tribunal also did not apply agreed rules and regulations for the arbitration proceedings. Walter Höft has for his part contested this.

The arbitrators shall according to Section 24 of the Swedish Arbitration Act give the parties opportunity to conduct their action orally and in writing to every necessary extent. In addition, a party has an absolute right to adequately be permitted to develop

their action and be able to respond to the counterparty's action (see Stefan Lindskog, Skiljeförfarande, En kommentar [Arbitration Proceedings, A Commentary], JUNO, 2018, III - 24 - 3.1 and 24 - 4.1.2).

It is incontrovertible in the case that the IBA rules should be applied in the arbitration proceedings. Likewise, that it concerns the arbitral tribunal's handling of the witness examinations with Anna Brinkmann and Elpida Papastylianou.

The IBA rules contain, among other things, a regulation of the parties' evidence and examination of interview persons. An arbitral tribunal is permitted under the rules to refuse examination questions that, among other things, can be considered irrelevant, immaterial or repetitive (Article 8.2).

The investigation indicates that Coraline was permitted to ask the witnesses cross-examination questions even regarding the Hard Sun transactions. However, it is apparent that the arbitral tribunal deemed that certain questions would not be permitted regarding these transactions. There is, however, nothing in the investigation that indicates a general prohibition to asking questions, but rather that each question asked was assessed individually, according to what the investigation shows. The counsel also had the possibility of reformulating the questions and also asking questions regarding the credibility of the witnesses' statements. Insofar as has come forth, the arbitral tribunal strived to provide the party counsel the opportunity to ask the questions the counsel wanted to ask but exercised its possibility to not permit questions that the tribunal deemed to be irrelevant.

The Court of Appeal finds in summary that it is not shown either that the arbitral tribunal's refusal of cross-examination questions overstepped what the IBA rules allowed and what the parties agreed on or that agreed rules were incorrectly applied. It is thereby not shown that the arbitral tribunal committed any procedural error.

The objection regarding a sham agreement

Coraline asserted that the arbitral tribunal failed to review the company's objection that the Loan Agreement was a sham agreement, which was contested by Walter Höft.

When it comes to which requirements can be placed on the reasoning, a challenge claim does not provide room for a substantive review of the arbitral tribunal's decisions. On this basis and since a qualitative assessment of the reasoning would give rise to major demarcation difficulties, only a complete lack of reasoning, or reasoning that in the circumstances must be considered to be so incomplete that it is tantamount to being absent entirely, can mean that a procedural error exists (See NJA 2009, p. 128).

The arbitral tribunal has presented the reasoning in section VI of the arbitral award. Coraline's five objections are also found in four points (paragraph I08). The arbitral tribunal's considerations are divided into two headings with associated subheadings. It is indisputable that Coraline's first objection was addressed under the first main heading and that the objections under points 2 and 4 were addressed under the second main heading. It can be noted that the content under the second main heading is significantly more extensive than under the first main heading.

The arbitral tribunal began this section by describing that the dispute pertains to a large number of circumstances and objections and that the evidence is also extensive. The arbitral tribunal also points out that the tribunal reviewed everything that was cited, but at the same time emphasizes that it can be difficult in the reasoning to present an account of all considerations in all parts in consideration of the case's scope.

Coraline's first objection (point 1) that is addressed under the section's first main heading pertains to the agreement designated " the No Payment Addendum" and the circumstance that invalidity was asserted, etc. as a result of Walter Höft not being the owner of the shares concerned. In this part, the arbitral tribunal found that the agreement in question was valid.

The arbitral tribunal's conclusion under the second main heading was, among other things, that the Loan Agreement was also a valid agreement. It can be noted that all of Coraline' s objections under points 2-4 included assertion of some form of underlying criminal action. It can be described such that the intention of the Loan Agreement was to be something different than what the document showed.

The arbitral tribunal's reasoning in this second part is very extensive. It is indicated by the reasoning that the review also addressed the underlying business activities that existed between the parties, finances and other agreements, such as the SLA, which was also asserted to be a "sham". According to the reasoning, the arbitral tribunal found that the agreements in question were valid between the parties, that there were actual considerations under the legal documents and that no grounds for invalidity had been shown. What the tribunal reviewed in this context is expressed among other things by the text "for the application of ex turni causa or pactum turpe, or allow the conclusion that the Claimant defrauded Mr Vainshtock." (paragraph 199).

According to the Court of Appeal's assessment, the arbitral award's reasoning encompassed all of the objections that were put forth by Coraline. The arbitral tribunal's initial statement that the arbitral tribunal reviewed everything gives the impression that the tribunal wanted to emphasize that the review covered everything that the parties cited in the case. In terms of what had been cited in support of the objections according to items 2 and 4, it cannot be understood in any other way than that it also has a connection to and significance to what had been cited in support of the objection according to point 3. From the wording of the reasoning under the second section, it is apparent that it is gathered and jointly formulated for all objections according to points 2-4. The tribunal's argumentation and conclusions in the reasoning that there were valid and applicable agreements meant, among other things, that the Loan Agreement also was not considered to be a sham agreement. The arbitral tribunal also made assessments regarding "the directors" actions and if there were actions that conflicted with the interests of the company.

In a collective assessment of all circumstances, the Court of Appeal finds that it is not shown that the arbitral tribunal failed to review the company's objection that the Loan Agreement was a sham agreement. It is accordingly not shown that there was any excess of mandate or procedural error.

Summary

Considering the Court of Appeal's assessment, Coraline's claim shall thereby be denied.

Litigation costs

Upon this outcome, Coraline shall compensate Walter Höft for his litigation costs in the Court of Appeal. Coraline has left it to the Court of Appeal to review the reasonableness of the claimed amount.

The Court of Appeal confirms that Walter Höft as the respondent in the case had to relate to Coraline's action and litigation. The arbitration proceedings in question were extensive and concerned several legal issues. Swedish, Cypriot and English law became relevant in the case. Party experts were cited by both parties. In a comparison with the total litigation cost claimed that Coraline submitted to the Court of Appeal, the amount claimed by Walter Höft is less than half. In a collective assessment, the Court of Appeal finds that the claimed compensation for litigation costs may be considered reasonable.

Appeal

According to Section 43, Paragraph 2 of the Swedish Arbitration Act, the Court of Appeal's judgement may only be appealed if the court considers it to be of importance as a matter of precedence that the appeal be considered by the Supreme Court.

The Court of Appeal considers that there is no reason to permit this decision to be appeal.

The Court of Appeal's ruling cannot be appealed.

Head of Division of the Court of Appeal Per Carlson and Judges of Appeal Maj Johansson (referee) and Magnus Ulriksson participated in this ruling.