

SVEA COURT OF APPEAL
Department 02
Division 020102

JUDGMENT
26 May 2020
Stockholm

T 1151-19

PARTIES

Claimant

Städexia AB, 556907-4254
Öregrundsgatan 3
115 59 Stockholm

Counsel: Advokat Måns Karlsson
P.O. Box 7229
103 89 Stockholm

Respondent

Oskar Berger Pension AB, 559062-2790
c/o ERB
P.O. Box 2
178 21 Ekerö

Counsel: Advokat Stefan Walhagen
Strandvägen 7A
114 56 Stockholm

MATTER

Challenge of arbitral award rendered in Stockholm on 21 January 2019

JUDGMENT OF THE COURT OF APPEAL

1. The Court of Appeal rejects the motions of Städexia AB.
 2. Städexia AB is ordered to compensate Oskar Berger Pension AB for its litigation costs before the Court of Appeal in the amount of SEK 56,550 for costs for legal counsel plus interest according to Section 6 of the Interest Act as from the day of the Court of Appeal's ruling until the day of payment.
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BACKGROUND

On 17 June 2016, Oskar Berger Pension AB (Oskar Berger) and Städexia AB (Städexia) entered into a share purchase agreement for all shares in Vi Agerar i Stockholm AB (the share purchase agreement). Under the agreement, the shares were sold for a purchase price of SEK 8,500,000 plus certain additional compensation to be paid in the manner set forth therein. The share purchase agreement did not contain any provision on penalty interest. The share purchase agreement stipulated that any disputes arising out of the agreement should be settled by arbitration.

Thereafter, on 31 January 2017, a loan and pledge agreement was signed on behalf of Oskar Berger (in the agreement designated as Oskar Bergman Pension AB) and Städexia was signed (the loan agreement), which stipulated, amongst other things, how Städexia should pay the remainder of the purchase price for the shares in Vi Agerar i Stockholm AB as well as the applicable interest rate and penalty interest. The loan agreement stipulated that any disputes arising out of the loan agreement should be settled by public courts with Stockholm District Court as the first and final court “instead of arbitration as per the provisions of the share purchase agreement between the parties”.

After Oskar Berger had opened litigation against Städexia before Solna District Court and lodged motions based on the share purchase agreement, and Städexia had objected, amongst other things, that the dispute should be settled by arbitration, Oskar Berger withdrew its motions and the District Court dismissed the case. Following this, Oskar Berger requested arbitration. Städexia moved that the arbitral tribunal should dismiss Oskar Berger’s motions invoking the prorogation clause set forth in the loan agreement. In a decision of 20 June 2018, the arbitral tribunal found that Oskar Berger had based its motions on the share purchase agreement, which contained an arbitration clause, and that the arbitral tribunal as a result had jurisdiction to review Oskar Berger’s motions. As a consequence, the arbitral tribunal rejected Städexia’s motion for dismissal.

On 23 July 2018, the arbitral tribunal rendered a separate arbitral award through which Städexia was ordered to pay to Oskar Berger the advance on costs plus interest, which Oskar

Berger had paid to the Arbitration Institute of the Stockholm Chamber of Commerce pertaining to Stådexia's share of the advance on costs.

On 21 January 2019, the arbitral tribunal rendered the arbitral award which is subject to challenge in the present case. The award clarifies that Stådexia persisted in maintaining that Oskar Berger's motions should be dismissed as it was based on the loan agreement, which did not contain an arbitration clause, and that Oskar Berger persisted in maintaining that its motions were based on the share purchase agreement, which does contain an arbitration clause and that the arbitral tribunal therefore had jurisdiction to hear the case. In its reasons, the arbitral tribunal stated that it had jurisdiction to hear Oskar Berger's motions, with the exception of the main claim for interest, which was based on the loan agreement and not the share purchase agreement with its arbitration clause.

In the arbitral award, Oskar Berger's aforementioned interest claim was dismissed (item 1 of the operative part of the award). Further, a declaratory claim was rejected (item 2 of the operative part of the award) and Stådexia was ordered to pay to Oskar Berger an amount of SEK 2,902,670 plus interest as well as to compensate Oskar Berger for its litigation costs (items 3 and 4 of the operative part of the award). The parties were ordered to jointly and severally pay the costs for the arbitration proceeding, in which order Stådexia was ordered to ultimately bear, as between the parties, 80 percent of these costs (items 5 and 6 of the operative part of the award). Finally, the previously given separate award of 23 July 2018 was rescinded, with exception for the portion relating to interest on Stådexia's portion of the unpaid advance on costs (item 7 of the operative part of the award).

MOTIONS ETC.

Stådexia has challenged the arbitral award and moved that the Court of Appeal shall annul item 3 and the portion of item 7 of the operative part of the award, which concerns interest on Stådexia's portion of the unpaid advance on costs.

Stådexia has further moved that the Court of Appeal shall, by amendment of item 4 of the operative part of the award, discharge the company from the obligation to compensate Oskar Berger's litigation costs in the arbitration and instead order Oskar Berger to compensate

Städexia for its litigation costs in the arbitration in the amount of SEK 494,375. Finally, Städexia has moved that the Court of Appeal shall, by amendment of items 5 and 6 of the operative part of the award, discharge Städexia from the obligation to jointly and severally with Oskar Berger pay for the costs for the arbitration and ultimately, as between the parties, bear 80 percent of those costs, and instead order Oskar Berger to solely and entirely pay bear the costs for the arbitration.

Oskar Berger has disputed any annulment of or amendments to the arbitral award.

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

The Court of Appeal has, based on Section 1, Chapter 53 and item 5 of the first paragraph of Section 18, Chapter 42 of the Code of Judicial Procedure decided the case without a main hearing.

FOUNDATIONS

Städexia

Oskar Berger's specific performance claim in the arbitration was based on the loan agreement and was consequently not covered by the arbitration clause of the share purchase agreement. As a result, the arbitral tribunal did not have jurisdiction to hear the portion of the case which concerns payment liability.

In its written closing statement, Städexia lodged a motion for dismissal of Oskar Berger's case, in the event that the arbitral tribunal would conclude that the loan agreement was valid between the parties. However, the arbitral tribunal failed to decide on the motion after it concluded that the loan agreement had been concluded, which constituted a procedural error which can be assumed affected the outcome of the arbitration.

Oskar Berger

It is disputed that Oskar Berger in the arbitration had based its specific performance claim on the loan agreement. Oskar Berger's motion was based on the share purchase agreement,

which included an arbitration clause. Thus, the arbitral tribunal did have jurisdiction to hear the case to the extent it concerned payment liability.

The arbitral tribunal did not review whether the loan agreement, including the prorogation clause, was valid between the parties. Thus, the arbitral tribunal had no reason to review Städexia's motion for dismissal. The alleged procedural error thus never occurred. At any event, the error did not affect the outcome of the arbitration.

FURTHER DETAILS

Städexia

The share purchase agreement for the shares in Vi Agerar i Stockholm AB contains an arbitration clause. The loan agreement which was subsequently drafted upon Oskar Berger's initiative stipulates that disputes arising out of the agreement shall be settled by public courts, with Stockholm District Court as first and final instance, instead of arbitration as stipulated in the share purchase agreement. In the arbitration, the parties disagreed as to whether the loan agreement can be invoked against Städexia, as it had not been signed by an authorized representative. Städexia has argued that the loan agreement is not valid between the parties. The arbitral tribunal has found that this agreement had been entered into between the parties and, on the basis of the prorogation clause, dismissed the interest claim that was based on that agreement. If the arbitral tribunal had concluded that the loan agreement was not valid, this interest claim would have been rejected instead of dismissed. Further, the arbitral tribunal has rejected the alternative interest claim which was based on the provisions of the share purchase agreement under reference to the subsequent agreement between the parties concerning payment, i.e. the loan agreement. Thus, there can be no doubt that the arbitral tribunal has concluded that the loan agreement is valid between the parties.

Already when the arbitration was requested, Städexia objected that the arbitral tribunal did not have jurisdiction. The objection was rejected through a decision of 20 June 2018. Thereafter, Städexia persisted in its motion for dismissal, which was again reviewed in the arbitral award, and stated in particular that Oskar Berger's motions should be dismissed in the event that the arbitral tribunal would find that the loan agreement was binding between the parties. The

motion for dismissal was also made in light of the so-called statement doctrine (*Sw. påståendedoktrinen*), since Oskar Berger consistently argued that the loan agreement was valid.

The arbitral tribunal ought to have dismissed Oskar Berger's motion concerning payment liability, since the arbitral tribunal did not have jurisdiction to review this portion of the dispute. The wording of the prorogation clause of the loan agreement strongly implies that it has replaced the arbitration clause of the share purchase agreement in its entirety, not least by the wording "instead of arbitration". Also the reference to the existing share purchase agreement is a clear indication that the intention was to replace the arbitration clause in its entirety and that it should no longer be valid between the parties for matters concerning payment liability.

This portion of the arbitral tribunal's ruling also entails that the tribunal has assumed that the parties would have intended that future disputes should have different dispute resolution methods and fora. The wording of the loan agreement, however, contradicts this conclusion. Moreover, no delineation has been made of matters that should remain under the scope of the arbitration clause, which indicates that the purpose of the prorogation clause nominating Stockholm District Court was that it should cover all future disputes that might arise from the share transfer and concerning payment liability in relation thereto. Further, the division of disputes between different fora fills no practical function, which is evident from the ruling in the arbitral award. The conclusions of the arbitral tribunal mean that ancillary obligation to pay interest could not be reviewed in the same dispute as the main obligation to pay the purchase price, which hardly is purposeful or intentional. Oskar Berger has obviously not interpreted its own agreement in this manner, considering how the interest claim was presented. Further, the arbitral tribunal's conclusions on this issue mean that only a very small number of disputes would fall under the scope of the prorogation clause of the loan agreement.

Städexia does not share the arbitral tribunal's view that Oskar Berger had based its specific performance claim on the share purchase agreement. The claimed principal amount is directly taken from the loan agreement, following deduction of the three instalments Städexia had

paid. Oskar Berger has as grounds for its specific performance claim mainly argued on the basis of the loan agreement, which contains a specific amount. Additionally, the interest claim is in the main based on the 20 percent, which number is only found in the loan agreement. The share purchase agreement contains no provisions on interest whatsoever.

In the arbitration, Oskar Berger consistently referenced the loan agreement and the alleged effects of that agreement, e.g. that it entailed that Stådexia had waived the right to make claims on the basis of warranty breaches in the share purchase agreement. That interpretation was disputed by Stådexia and a relatively large portion of the arbitration dealt with the interpretation of the loan agreement as well as the warranty claims Stådexia had made to dispute the claim for payment. Oskar Berger has also successfully devoted time to establishing that Stådexia was bound by the loan agreement, with the exception of the prorogation clause.

In sum, it is maintained that Oskar Berger's specific performance claim is based on the loan agreement, and that the arbitral tribunal therefore did not have jurisdiction to review the portion of the dispute that concerns payment liability.

In the arbitration Stådexia on several occasions, including in its written closing statement, stated that Oskar Berger's case should be dismissed in the event that the arbitral tribunal concluded that the loan agreement was binding between the parties. During the written exchanges, Stådexia stated that it was impossible that the loan agreement could be "partially" binding, and only for certain by Oskar Berger "selected provisions". Oskar Berger did not specify which portions of the agreement that should be deemed binding and the reason why certain other portions should not be. However, the arbitral tribunal did not decide on the motion for dismissal after it had concluded that the loan agreement was binding, which by itself constitutes a procedural error which likely affected the outcome of the arbitration.

Oskar Berger

It is disputed that Oskar Berger based its case on the loan agreement. The arbitral award correctly sets forth the grounds for Oskar Berger's case.

Städexia has maintained that the arbitral tribunal ought to have dismissed Oskar Berger's motions if it concluded that the loan agreement was "binding" or "valid" between the parties. In this regard, Städexia has focused on the fact that the arbitral tribunal concluded that the agreement had "entered into" the loan agreement. The fact that the parties have "entered into" the loan agreement is not, however, the same as the parties having entered into a valid and legally binding agreement. Städexia has argued that the loan agreement is invalid. In the arbitration, Oskar Berger did not ultimately argue that the loan agreement was valid in its entirety, but only that the parties, through Städexia's implicit actions, had entered into a specific and partial agreement which covered the financial aspects of the loan agreement, namely a monthly partial repayment of the principal amount and provisions on interest, which were also set out in the loan agreement. Thus, the arbitral tribunal has not decided whether the loan agreement, including the prorogation clause, was valid between the parties. Therefore, there was no reason for the arbitral tribunal to review Städexia's motion for dismissal. Thus, the alleged procedural error has not occurred, particularly no error occurred that likely affected the outcome of the arbitration.

The determining factor for the arbitral tribunal's jurisdiction is the fact that Oskar Berger's claim for payment for the transfer of the shares was based on a legal relationship falling under the scope of the arbitration clause. The grounds for the claim were that the parties had entered into the relevant share purchase agreement and that SEK 3,076,800 remained outstanding when Städexia ceased paying the monthly payments of the purchase price. Städexia disputed the obligation to pay the claimed amount under reference to warranty breaches under the share purchase agreement. Thus, the reason for Städexia's objections concerned a legal relationship which fell under the scope of an arbitration clause – not the loan agreement.

The loan agreement merely provides a summary of the outstanding purchase price to be paid by Städexia under the share purchase agreement. It is not correct that Oskar Berger devoted efforts to establish that Städexia was bound by the loan agreement in its entirety. But, Oskar Berger has presented evidence to establish that Städexia was partially bound by the loan agreement, as concerned the financial aspects, such as the obligation to pay the purchase price under the share purchase agreement by way of monthly instalments and to pay interest at an annual rate of 15 percent. The fact that Oskar Berger has used the loan agreement as the basis

for the main interest claim does not mean that the company invoked the loan agreement, whether in its entirety or partially, as grounds for Städexia's contractual obligation to pay the purchase price set forth in the share purchase agreement.

In the review of Städexia's case, the position the company takes as concerns the validity of the loan agreement is relevant. The meaning of Städexia's case is that the arbitral tribunal in its review of its jurisdiction should have dismissed Oskar Berger's case on the grounds that the company – according to Städexia's understanding – as grounds for its case had invoked the loan agreement, which contains a prorogation clause. In this context, it should be noted that in the arbitration, it was undisputed that neither party argued that there existed between them an agreement which contained a prorogation clause. Städexia argued that the entirety of the loan agreement was invalid, whereas Oskar Berger argued for partial validity with respect to the financial aspects.

In sum, Städexia has not established that the arbitral tribunal has incorrectly assessed its jurisdiction.

THE INVESTIGATION

The parties have referenced documentary evidence.

GROUNDS OF THE COURT OF APPEAL

The question of whether the arbitral tribunal had jurisdiction to settle the dispute

In its wording prior to 1 March 2019, item 1 of the first paragraph of Section 34 of the Swedish Arbitration Act (1999:116) stipulates that an arbitral award shall be wholly or partially annulled upon the request of a party if it is not covered by a valid arbitration agreement between the parties. When determining whether a dispute is covered by an arbitration agreement between the parties, the starting point is that this, in the manner set forth in the first paragraph of Section 1 of the Swedish Arbitration Act, relates to the legal relationship set forth in the agreement. Thus, an arbitration agreement must be specific to a specific legal relationship.

The applicability of an arbitration agreement is determined by customary principles for the interpretation of agreements. In instances where the wording allows for different interpretations and other relevant interpretational data provides no guidance, it is natural to assume that the arbitration agreement shall fill a reasonable function and provide a reasonable regulation of the parties' interests. The parties must then be assumed to have intended that arisen disputes shall be resolved quickly and in one proceeding before an arbitral tribunal (see NJA 2019 p. 171 paragraph 13).

When a court in challenge proceedings shall review an arbitral tribunal's decision on jurisdiction, it should be taken into account that it is typically the arbitral tribunal that is best suited to determine the issue of its own jurisdiction. This indicates that the starting point for the court review should be that the arbitral tribunal's interpretation and evaluation of evidence are correct. Thus, the challenge proceeding shall determine whether the claimant has succeeded in establishing that the arbitral tribunal has made an incorrect assessment of the scope of the arbitration agreement. (See above referenced case, paragraphs 19 and 20.)

Initially, it can be noted that Städexia has not challenged the arbitral award as it concerns Oskar Berger's declaratory claim (item 2 of the operative part of the award). As concerns Oskar Berger's specific performance claim, the arbitral award states that the company in support of this motion has referenced that Städexia had become liable to pay the remainder of the purchase price after Städexia had acquired the relevant shares under the share purchase agreement, which contains an arbitration clause, and that the interest claimed in the main was "agreed between the parties by way of the loan agreement". Städexia argued that the loan agreement was invalid and could not be invoked against the company.

Irrespective of whether the loan agreement is binding or not for the parties, it is clear that Oskar Berger's main claim for interest was not covered by the arbitration clause of the share purchase agreement. It is true that it could appear as less useful and thus more far-fetched that the parties had intended that a future dispute between them concerning payment of the principal claim and interest arising out of the share transfer should not be resolved in one single forum. Nevertheless, the wording of the loan agreement clearly stipulates that disputes arising out of that agreement shall be resolved by public courts instead of arbitration, which is

stipulated in the share purchase agreement. Thus, it is clear that the parties intended that the prorogation clause of the loan agreement should cover only disputes arising out of the agreements set forth in that agreement.

As noted, in the arbitration Oskar Berg argued that Städexia was liable to pay the remainder of the purchase price for the shares under the share purchase agreement. The invoked legal relationship was thus based on the share purchase agreement and its arbitration clause. The arbitral tribunal has reviewed this motion on its merits, but found that it did not have jurisdiction to review the interest claim which was based on the provisions of the loan agreement, which does not contain an arbitration clause. As a result, the arbitral tribunal has dismissed Oskar Berger's motion thereon (item 1 of the operative part of the award). The Court of Appeal finds that Städexia has not referenced any circumstance that would entail that there are grounds to invalidate the arbitral tribunal's conclusions concerning the scope of the arbitration clause and the tribunal's jurisdiction to review the motions that were decided on their merits. Therefore, the arbitral award shall not be annulled on this ground.

The question whether a procedural error was made by the arbitral tribunal

In its wording prior to 1 March 2019, item 6 of the first paragraph of Section 34 of the Swedish Arbitration Act (1999:116) stipulates that an arbitral award shall be wholly or partially annulled upon the request of a party if, without it having been caused by the party, a procedural error occurred which likely affected the outcome of the arbitration. The third paragraph stipulates that a party may not invoke new grounds in support of its challenge following the expiry of the stipulated time period.

In its closing statement, and thus following the expiry of the applicable time period, Städexia has argued that the arbitral tribunal committed a procedural error because the tribunal – after it concluded that the parties had entered into the loan agreement – ought to have reviewed Städexia's motion for dismissal of Oskar Berger's case. Oskar Berger has not objected that this ground has been invoked too late and that it therefore would be precluded. Therefore, the Court of Appeal will review Städexia's arguments on this issue (see RH 2009:91).

It is evident from the arbitral award (see page 25 f.) that the arbitral tribunal reviewed the objections raised by Städexia in connection with the assertion that Oskar Berger's case should be dismissed because it was based on the loan agreement, which had no arbitration clause. Here, the arbitral tribunal concluded that it had jurisdiction to review Oskar Berger's motion, except for the main interest claim, which was based on the loan agreement and which was therefore dismissed. According to the arbitral tribunal, the remainder of Oskar Berger's specific performance claim was based on the arbitration clause of the share purchase agreement. Therefore, there was no reason for the arbitral tribunal to review whether the loan agreement had been signed by authorized representatives or not.

Städexia's motion for dismissal was made for the event that the arbitral tribunal would conclude that the loan agreement was valid between the parties. Because the arbitral tribunal did not review this issue, the arbitral tribunal had no reason to review the motion for dismissal. Thus, the alleged procedural error did not occur, and the arbitral award shall not be annulled on this ground.

Summary of conclusions

The circumstances invoked by Städexia in support for its case do not lead to the conclusion that there are grounds to annul the arbitral award in the manner moved by Städexia. Upon this conclusion, the arbitral award shall not be amended as regards litigation costs and liability for the costs for the arbitration. Thus, Städexia's motions shall be rejected.

Litigation costs before the Court of Appeal

Upon this outcome, Städexia shall compensate Oskar Berger for its litigation costs before the Court of Appeal. Städexia has not objected to the amount claimed by Oskar Berger.

Appeals

The second paragraph of Section 43 of the Swedish Arbitration Act provides that the judgment of the Court of Appeal may be appealed only if the Court finds that it is of importance for the development of case-law that an appeal is reviewed by the Supreme Court.

SVEA COURT OF APPEAL
Department 02

JUDGMENT

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The Court of Appeal finds no reason to grant leave to appeal.

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

The decision has been made by Senior Judge of Appeal PC and Judges of Appeal CJ, reporting, and CH.