SVEA COURT OF APPEAL	**JUDGMENT**	Case No.
Department 02	30 June 2022	T 7158-20
Division 020101	Stockholm	

PARTIES

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MATTER
Invalidity and challenge of arbitral award

JUDGMENT OF THE COURT OF APPEAL

1. The Court of Appeal rejects the motions of ICA Sverige AB.

2. ICA Sverige AB is ordered to compensate Bergsala SDA AB for its litigation costs in the amount of SEK 1,139,560 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. SEK 1,135,000 of the amount concerns costs for counsel.

3. The provisions on confidentiality of the Public Access to Information and Secrecy Act (2009:400), Chapter 21, Section 1, and Chapter 36, Section 2, shall apply to personal data

as well as to information on purchase prices, add-ons and profit margins set out in a certain e-mail (case file document no. 5, p. 5), medical certificate (case file document no. 10), arbitral award (case file document no. 9), summary of value chain (case file document no. 184) and presentations (case file documents no. 204 and 205) which were submitted to the Court of Appeal at the main hearing held behind closed doors.

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BACKGROUND

Bergsala SDA AB ("Bergsala") is a company that sells lighting, media and household products. ICA Sverige AB ("ICA) operates grocery stores. In 2016, the parties entered into a framework agreement under which Bergsala was to sell products to ICA and/or other companies in the ICA group. In 2018, a dispute arose between the parties concerning product purchases.

On 13 May 2019, Bergsala requested arbitration against ICA. Bergsala moved that ICA should be ordered to pay USD 664,532.70 to Bergsala plus certain interest. On 12 March 2020, ICA filed a counterclaim and moved that Bergsala should be ordered to pay SEK 58,228,231 plus certain interest to ICA.

As grounds for its motion, Bergsala maintained, among other things, that ICA during 2017-2018 had ordered lighting products from Bergsala, that Bergsala had delivered those products but that the claimed amount remained unpaid. ICA disputed payment liability to the extent Bergsala's claim exceeded Bergsala's cost price plus four percent, or in the alternative plus 11.61 percent. ICA objected that the prices at any event were unreasonable and that the company was not liable for payment because the products were encumbered by third party patent infringement claims.

As grounds for its motion in the arbitration ICA maintained, among other things, that Bergsala by way of an improper structure had ensured that ICA during 2015-2018 had overpaid for products and that ICA had ordered and paid for substantially more products than it required. ICA maintained that Bergsala was obligated to deliver products at reasonable prices and liable to compensate ICA for the damages caused to ICA. ICA further maintained that Bergsala had acted grossly negligently and disloyally towards ICA. Bergsala disputed that the prices had been unreasonable and that Bergsala had, by way of improper or disloyal actions, caused ICA any damage.

The main hearing of the arbitration was held on 25-29 May and 1 June of 2020, in which counsel and witnesses participated remotely via video links.

The arbitral tribunal rendered its award on 11 June 2020. The arbitral award ordered ICA to pay to Bergsala the claimed amount plus interest. Bergsala was ordered to pay to ICA SEK 224,214 plus interest. The arbitral tribunal held that it had not been established that it had been agreed that the purchase prices should be limited to a certain percentage, that the prices were not unreasonable and that the quality and standard of the products were not defective. The arbitral tribunal further held, among other things, that Bergsala had not acted in such manner as to trigger liability for damages towards ICA, but that ICA was entitled to payment with respect to certain claims concerning defective goods.

MOTIONS BEFORE THE COURT OF APPEAL

ICA has moved that the Court of Appeal shall declare the arbitral award invalid or set aside the arbitral award.

Bergsala has disputed the motions.

The parties have claimed compensation for their respective litigation costs.

GROUNDS PRESENTED BY THE PARTIES

ICA

The motion that the arbitral award shall be declared invalid

The arbitral award and the manner in which it was given obviously violate fundamental principles of Swedish law (Swedish Arbitration Act (1999:116), Section 33, first paragraph, item 2).

1. ICA's right to a fair trial has been violated in the following manner:
    a. Two of the arbitrators were partial and not independent with respect to Bergsala's counsel. The Chairman and E together participated in a project named The Arbitration Alternative. They failed to inform about this, which meant that ICA was unable raise an objection for disqualification. This circumstance was discovered in November of 2020.
    b. The arbitral tribunal refused to hold an oral hearing.

c. The digital remote hearing did not guarantee the equal treatment of the parties.

2. The principle of party autonomy was disregarded through the arbitral tribunal's decision to hold a digital remote hearingand that Bergsala thereby was in a stronger position than ICA.
3. The arbitral award entails that ICA has been ordered to pay invoices based on claims that arose in violation of Swedish law and its principles. Bergsala's motion is based on a criminal structure (gross bribery crimes and gross breach of trust). The purchase agreement violates the principle of *pactum turpe*, because the enforcement of invoices based on the agreement means that Bergsala profits from a grossly criminal structure at ICA's expense. The enforcement of the arbitral award would mean that a situation established through criminal acts would be upheld and that would deplete the legitimacy of the legal system.

The motion to set aside the arbitral award

The arbitral tribunal has exceeded its mandate

The arbitral tribunal has exceeded its mandate in a manner which likely affected the outcome by basing its ruling on circumstances that had not been invoked by the parties (Swedish Arbitration Act, Section 34, first paragraph, item 3). The arbitral tribunal concluded that JL had been authorized by way of a limited power of attorney concerning product flows and product returns, but that he elsewise did not act against ICA (paragraph 83 of the arbitral award). No such limited power of attorney was ever invoked by the parties. The exceeding of the mandate determined the outcome of the arbitration.

Procedural error

The arbitral tribunal has committed procedural errors that were not caused by ICA and which separately or cumulatively likely affected the outcome of the arbitration (Swedish Arbitration Act, Section 34, first paragraph, item 7). The procedural errors were the following.

a) The arbitral tribunal refused to hold an oral hearing

The parties had chosen the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the "SCC Rules"), which stipulate that an oral hearing shall be held. On 12 May 2020, the arbitral tribunal decided – despite ICA's explicit objections – that the main hearing should be held digitally and remotely on 25-29 May and 1 June 2020. ICA argued against this format and requested that the main hearing should be held in August, without the arbitral tribunal agreeing thereto. On 18 May 2020, ICA again objected and requested that the proceeding should be postponed to facilitate an in-person main hearing. On 19 May 2020, the arbitral tribunal rejected ICA's request. On 20 May 2020 ICA objected again. The decision of the arbitral tribunal violated the right to an oral hearing (Swedish Arbitration Act, Section 24 and Article 32 (1) of the SCC Rules). The rules stipulate that the main hearing shall be held in person. The remote hearing did not fulfil the purposes of a regular, in-person main hearing.

b) The arbitration failed to fulfil due process requirements (Sw. Rättsäkerhet)

Irrespective of ICA's rights to an oral main hearing, the company has the right to a legally secure arbitration (Swedish Arbitration Act, Section 24, first paragraph, and Section 21 as well as well as Article 23, item 2 of the SCC Rules). ICA was not granted the opportunity to appropriately argue its case and present its evidence. Governmental restrictions and ICA's internal travel restriction policies made it impossible for ICA to meet its counsel and witnesses in person and ICA was thereby not able to prepare and argue its case in a manner that was legally secure. Due to COVID-19 and medical risk factors, ICA's counsel was unable to participate in any in-person hearings at the time of the main hearing. The credibility of the witnesses was of determining importance. ICA was not able to adequately question Bergsala's witnesses. The fact that in-person questioning was not facilitated likely impacted the outcome of the arbitration, since the arbitral tribunal appears to not have taken into account several vital witness statements due to their digital form. The arbitral tribunal denied ICA an additional day for the main hearing, despite ICA's need for an additional day.

The fact that Bergsala's representatives and that certain witnesses were in the same room as Bergsala's counsel while being heard constitutes a deviation from the principle of equal treatment.

c) The arbitral tribunal has failed to take into account referenced circumstances and invoked evidence

In the arbitral award, the arbitral tribunal failed to decide on the issue of negligence, disloyalty and intent as well as on JL's role in any acceptable manner; on the issue of Bergsala's liability for its sub-suppliers in any acceptable manner; on the issue of Bergsala's responsibility for verifying and for subjecting its sub-suppliers to competition; as well as on the issue of Bergsala's liability for verifying Pesita. Further, the arbitral tribunal failed to review the evidence concerning excessive pricing, information that suppliers in the industry typically apply limited add-ons, the issue of product safety, insufficient legal requirements and ICA's witnesses. Moreover, the arbitral tribunal did not review ICA's counterclaim, chief prosecutor LG's written statement and the fact that PE had acted with suspected criminal intent and that that had been important to determine the extent to which his actions were binding on ICA.

d) The arbitral award does not state the reasons upon which the award is based

The reasons of the tribunal concerning the evidence and ICA's counterclaim are so sparse that they can be equated to a situation in which no reasons have been provided. The arbitral tribunal has not dealt with certain arguments which were determining for the outcome, such as the legal aspects concerning disloyalty. Further, the arbitral tribunal has referenced almost none of ICA's witnesses. Because the dispute was complex in nature and because the credibility of the witnesses was of vital importance, it should be presumed that the lack of reasons did have impact on the outcome of the arbitration.

e) The arbitral tribunal failed to guide the proceeding

The arbitral tribunal concluded that several material issues or arguments had not been sufficiently argued or clarified (see paragraphs 63, 70, 94, 116, 128-130 and 135 of the arbitral award). However, the arbitral tribunal is responsible for guiding the proceeding and

for requesting that the parties clarify issues it deems ambiguous. With few exceptions, however, the arbitral tribunal did not request such clarifications. Thereby, the arbitral tribunal failed to appropriately guide the proceeding, which deprived ICA the opportunity to sufficiently and appropriately argue its case (Swedish Arbitration Act, Section 24, first paragraph and Section 23, item 2 of the SCC Rules). The insufficient guidance occurred without being caused by ICA and likely affected the outcome of the arbitration.

BERGSALA

The motion for declaring the arbitral award invalid

ICA's right to a fair trial has not been violated. The arbitrators were not partial or insufficiently independent of Bergsala's counsel. They did not participate in the initiative The Arbitration Alternative. There is no relationship between the people behind the initiative and the people who offered to serve as arbitrators. The initiative does not entail any form of profit sharing between the persons who have declared their willingness to serve as arbitrators and the people behind the initiative, nor does it entail that anyone would be providing services for anyone else involved in the initiative. In the event that The Arbitration Alternative shall be deemed as giving rise to any form of connection between the arbitrators and lawyers at the law firm S, the connection should be equated to a membership of an association connected to the arbitrators' line of work and that cannot serve as grounds for disqualification. The arbitral tribunal has applied the SCC Rules in its handling of the dispute.

The arbitral tribunal did not deny ICA an oral hearing and the parties were treated equally. The autonomy of the parties was not disregarded. The grounds otherwise invoked by ICA in support of invalidity are not circumstances of such nature they would be in obvious violation of fundamental principles of Swedish law. The arbitral award does not violate *ordre public* nor is it a *pactum turpe*.

The motion to set aside the arbitral award

The assertion that the arbitrators have exceeded its mandate

The arbitral tribunal has not exceeded its mandate. The starting point for JL's actions has been the undisputed statement that he, in certain limited aspects, acted on Bergsala's behalf, namely with respect to the deliveries to ICA and products returned by ICA. The legal label "limited power of attorney" does not relate to the relationship with the factory but rather the relationship between Bergsala and ICA. JL's actions concerning product flows and return of products by ICA did not impact the outcome on the merits. It is not likely that the circumstances invoked in support of excess of mandate had any impact on the outcome of the arbitration.

Alleged procedural errors

No procedural errors have occurred that likely had any impact on the outcome of the arbitration. At the time of the main hearing it was ordained, and at any event it was allowed, that main hearings in arbitration proceedings may be held using technical tools. It fell within the mandate of the arbitral tribunal to decide that the main hearing should be carried out through remote access. Taking relevant circumstances into account it must be concluded that the decision was appropriate, and at any event in no way indefensible. ICA has not been denied the right to an appropriate main hearing.

It is correct that the arbitral tribunal decided, against ICA's objections but in compliance with the time table agreed between the parties, to hold the main hearing in May/June of 2020 and that the arbitral tribunal decided to hold the main hearing remotely via video link and that ICA in response to the decision requested that the hearing should be postponed until August. The grounds invoked by ICA were insufficient grounds to prevent the hearing from being held. The fact that the main hearing was held remotely was a consequence of ICA's statement that it, as well as its counsel, did not intend to be present at the main hearing without providing valid justification. ICA could have been present, if it had wished so. In the event that the Court of Appeal would conclude that the holding of the main hearing remotely

constituted a procedural error, it was ICA that caused the main hearing to be held remotely and thereby caused the procedural error.

The arbitral tribunal's decision to hold the main hearing in accordance with the agreed time plan was appropriate, despite ICA's objections concerning the need for an additional day of hearings and access to the criminal investigation file. ICA's invoked grounds did not constitute acceptable reasons for cancelling the main hearing. At any event, the arbitral tribunal's decision was not indefensible.

The parties have been granted equal opportunity to argue their respective cases in the arbitration and the arbitration proceeding was also in all other aspects legally secure. The fact that Bergsala's witnesses were present with Bergsala's counsel did not constitute any material advantage for Bergsala. At any event, ICA has lost its right to invoke this as grounds for a potential procedural error, since ICA failed to object thereto during the arbitration. The parties were granted the opportunity to argue their respective cases and present their evidence. The technical difficulties that ICA claims to have occurred during the main hearing did not prevent ICA from arguing its case in an appropriate manner.

The arbitral tribunal took into account all circumstances and evidence relevant to the outcome of the arbitration. In the event that the Court of Appeal would conclude that this was not the case, ICA caused the procedural error by way of its ambiguous presentation of its case. In its arbitral award, the arbitral tribunal has stated its conclusion as to what had been established on the basis of what had been presented in the arbitration. The grounds for the arbitral award are not so deficient as to constitute grounds for invalidation.

The arbitral tribunal has not failed to guide the arbitration in such manner as to likely impact the outcome of the arbitration. The fact that the arbitral tribunal in its grounds, for example, stated that certain circumstances have not been explained or clarified has nothing to do with insufficient guidance of the proceeding by the arbitral tribunal. The conclusions are based on the arbitral tribunal's review of the evidence invoked in the arbitration by the parties and that cannot be subject to challenge.

DEVELOPMENT OF THE PARTIES' POSITIONS

ICA

In December of 2019, ICA notified that a rather substantial counterclaim would be submitted in the arbitration. The grounds for the counterclaim were the damage incurred by ICA. The damage was connected to a prosecution of, among others, ICA's former product manager PE for gross taking of bribes and gross criminal breach of trust. ICA lodged the counterclaim on 12 March 2020.

According to the time plan, the main hearing was to be held in May and June of 2020. Because of COVID-19, on 20 March 2020, the arbitral tribunal initiated discussions on a possible postponement of the hearing until the fall of 2020. During a telephone conference on 27 March 2020, the parties and the arbitral tribunal agreed on scheduling alternative dates for the main hearing in August of 2020. On 21 April 2020, the arbitral tribunal decided that the main hearing would be carried out in substantial reliance of remote access tools already in the month of May. ICA objected to the decision under reference to the risk of infections during the pandemic and its reluctance to participate in in-person hearings of such scope. It was difficult to arrange in-person meetings between the counsel and invoked witnesses and internal measures were made more difficult due to travel restrictions imposed by the ICA group.

On 24 April 2020, the arbitral tribunal decided to not amend its earlier decision to hold the main hearing in May and June. On 29 April 2020, ICA informed the arbitral tribunal that no one from ICA, whether its counsel, representatives or witnesses would be physically present at the main hearing.

On 12 May 2020, a preparatory meeting was held remotely during which ICA reiterated that it would be unable to be physically present at the main hearing and that hearing witnesses remotely was inappropriate. On the same day, the arbitral tribunal decided that the main hearing should be held remotely on 25-29 May and 1 June 2020.

On 14 May 2020, ICA received a notice from chief prosecutor LG in which he described how Bergsala had been a tool in PE's and JL's suspected criminal scheme and that the criminal

investigation would be completed in August of 2020. The notice caused ICA on 18 May 2020 to again request that the hearing should be postponed until August of 2020. ICA further requested that an additional day for the main hearing should be added in order to be able to present its evidence. On 19 May 2020, the arbitral tribunal rejected ICA's request. On 20 May 2020, ICA objected to the arbitral tribunal's decision.

The main hearing was held during 25-29 May and 1 June 2020 and counsel, representatives and witnesses participated remotely. ICA's counsel could, as opposed to Bergsala's, only communicate with its client and witnesses remotely. The issues were complex in nature and 21 witnesses were heard. The witness statements related to the actions of certain people with respect to certain crimes. Therefore, the credibility of the witnesses heard was of vital importance. Certain technical difficulties occurred during the main hearing.

LE and EL have participated in the initiative The Arbitration Alternative, which had been devised in cooperation with, among others, the law firm S. Partners at that law firm participated in The Arbitration Alternative. LE and EL have approved of a press release concerning that service. Moreover, there is reason to assume that they were biased when decisions were made that fell in line with the service provided by The Arbitration Alternative. ICA discovered this fact in November of 2020.

On 8 October 2021, Gothenburg District Court convicted PE of gross criminal breach of trust and gross taking of bribes. The person who had paid the bribes (JL) has strong ties to Bergsala. The prices of products sold by Bergsala to ICA were set as part of a criminal scheme. Those prices formed part of the grounds upon which Bergsala's claims in the arbitration were founded and that the arbitral tribunal granted. It is obviously in violation of fundamental principles of Swedish law to establish payment liability on the basis of an agreement which was based on bribery and criminal commissions.

Bergsala

The time plan for the arbitration was prepared jointly by the parties. The fact that ICA intended to submit a substantial counterclaim was taken into account. Bergsala was forced to accept a substantial adjustment of the time plan in relation to the six month period within

which the arbitral award shall be given under the SCC Rules. ICA specified its counterclaim only in March of 2020.

The parties agreed that the main hearing should be held in May of 2020. Only on 21 April 2020 did ICA request that the main hearing should be postponed. The invoked grounds were the importance of hearing witnesses in person and that the preparations were made more difficult due to the pandemic. On 29 April 2020, ICA's counsel informed that neither the counsel nor ICA's representatives intended to be physically present at the main hearing. In connection therewith, ICA's counsel submitted a medical certificate which did not state that he was unable to be physically present at a main hearing, but merely that it was important that he follow the recommendations of the Public Health Agency of Sweden on social distancing. That could have been accommodated at a physical hearing. During the preparatory hearing on 12 May 2020, the arbitral tribunal made clear that both parties, taking the principle of equal treatment into account, should participate remotely. ICA did not object to Bergsala's counsel participating in the hearing from the same physical location as Bergsala's witnesses.

The arbitral tribunal's decision to carry out the main hearing remotely was a direct consequence of ICA having declared that it did not intend to participate in person at the scheduled physical main hearing. ICA could have participated in a physical hearing, if it had wished to do so. ICA, however, declined this opportunity.

A mere week prior to the main hearing, ICA requested additional time for the main hearing. It has not been established that ICA has refrained from invoking any evidence as a consequence of its request being denied. The fact that ICA had not yet been provided with the criminal investigation did not constitute an impediment to the main hearing. ICA opted to argue its case while knowing that there was a risk that the file would not become publicly available before the scheduled main hearing.

The remote main hearing fulfilled all reasonable concerns with respect to due process (*Sw. Rättsäkerhet)*. Both ICA and Bergsala were granted opportunity to argue their respective cases appropriately and to present their evidence. At no point was ICA's counsel interrupted or limited. There were no substantial technical difficulties during the main hearing. All witnesses were heard without any issues. ICA was allowed to hear all invoked witnesses.

ICA's case was rejected by the arbitral tribunal mainly because it had failed to fulfill its burden of proof. The circumstances invoked by ICA in support of its challenge of the arbitral award had no impact on the outcome of the arbitration.

The legal label "limited power of attorney" used by the arbitral tribunal with respect to JL does not relate to the relationship with Pesita, but rather to the relationship between Bergsala and ICA. The arbitral tribunal's review of JL's actions concerning product flows and product returns did not affect the outcome.

As concerns the assertion that LE and EL were biased, it should be clarified that there is no assignment agreement between the individuals who had taken the initiative for The Arbitration Alternative and the persons who had offered their services as arbitrators.

Neither of the two convicted individuals in the criminal case have any connections to Bergsala. The judgment in the criminal case has no relevance for the Court of Appeal's review of the arbitral tribunal's management of the arbitration.

EVIDENCE

ICA has invoked documentary evidence in the form of, among other things, the arbitral award, e-mail correspondence during the arbitration, a medical certificate, a procedural decision given during the arbitration, a statement from a prosecutor, a judgment in a criminal case given by Gothenburg District Court of 8 October 2021, and a summary of a value chain.

THE COURT OF APPEAL'S REASONING

Introduction

First, the Court of Appeal will decide on the motion to set aside the arbitral award due to excess of mandate or procedural errors and thereafter the motion that the arbitral award shall be declared invalid.

The motion to set aside the arbitral award

Did the arbitral tribunal exceed its mandate?

An arbitral award shall be set aside, wholly or partially, upon the request of a party if the arbitrators have exceeded their mandate in a manner that likely affected the outcome of the arbitration (Swedish Arbitration Act, Section 34, first paragraph, item 3). The provision is aimed at, among other things, situations in which the arbitral tribunal based its decision on a circumstance which the parties had not referred to.

The arbitral award states that ICA during the arbitration asserted that Bergsala, JL and the company Pesita should be viewed as one entity and that Bergsala was responsible for any misconduct or other liability inducing actions that could have been taken against ICA by Pesita. The arbitral tribunal reviewed these questions in paragraphs 72-91 of the arbitral award. Paragraph 83 deals with the issue of whether JL's connection to Bergsala was of such nature that any possible criminal or improper actions on the part of JL could entail liability for Bergsala. The arbitral tribunal's conclusion was that on issues concerning product flows from China and returns of products, JL acted on Bergsala's behalf and that with respect to these matters Bergsala was liable for his actions and that, finally, he must be deemed to have held a power of attorney issued by Bergsala with respect to these matters. It was concluded that he had not otherwise acted against ICA with respect to ICA's placement of product orders.

The Court of Appeal finds it evident that the arbitral tribunal's review takes aim at ICA's assertion that JL acted in Bergsala's name and on Bergsala's behalf in his contacts with ICA (paragraph 19 of the arbitral award), and that the arbitral tribunal concluded that such a relationship had largely not been proved. The fact that the arbitral tribunal did state that it had been established that JL must be deemed to have had a power of attorney for certain limited aspects forms part of the arbitral tribunal's legal qualification of ICA's assertions on these matters. It has not been shown that the arbitral tribunal based its review on any circumstance that had not been referenced by the parties. Thus, the arbitral tribunal has not exceeded its mandate.

Did the arbitral tribunal refuse to hold an oral main hearing and did the proceeding violate due process requirements *(Sw. Rättsäkerhet)*?

The Swedish Arbitration Act, Section 24, stipulates that the arbitrators shall provide the parties opportunity to argue their respective cases in appropriate extent, in writing or orally. Prior to its final decision, an oral hearing shall be held upon the request of a party, provided that the parties have not agreed otherwise. The Swedish Arbitration Act, Section 21, stipulates that the arbitral tribunal shall manage dispute impartially, purposefully and promptly. They shall comply with the parties' agreements, unless there are impediments to doing so.

Article 23 of the SCC Rules stipulates that the arbitral tribunal may manage the arbitration proceeding in such manner as it considers appropriate, subject to the SCC Rules and the parties' agreements. The arbitral tribunal shall always manage dispute in an impartial, efficient and expeditious manner giving each party an equal and reasonable opportunity to present its case. Article 32 of the SCC Rules stipulates that a hearing shall be held if requested by a party or if the arbitral tribunal deems it appropriate.

The Swedish Arbitration Act provides no definition of the term oral hearing. The preparatory works clarify that the stipulation in Section 24 of the Swedish Arbitration Act is based on the rules set out in the Swedish Code of Judicial Procedure concerning the parties' right to a main hearing in public courts as well as the right to a fair trial set out in article 6 of the European Convention on Human Rights and Fundamental Freedoms ("ECHR"). The preparatory works highlight that questions on when the main hearing shall be held, and in what format, should be determined by the arbitrators in situations where the parties cannot agree (see Government Bill 1998/99:35 p. 110 and 111).

The Swedish Code of Judicial Procedure, Chapter 5, Section 10, stipulates that in certain circumstances the court may decide that a person who shall participate at a hearing before a court may do so remotely via sound or video connection. Thus, the Swedish Code of Judicial Procedure does not stipulate an absolute right for a party to be present in person at a hearing, but rather that the court shall determine whether or not that is required on the basis of the specific circumstances at hand.

The Swedish Arbitration Act does not have an equivalent provision. Taking into account the background and purpose of the provision in Section 24 of the Swedish Arbitration Act, it is however reasonable to interpret it as being technology neutral and that it does not in itself prohibit a person from participating via telephone or video link. The same applies to the stipulation in Article 32 of the SCC Rules (see, among others, Löf *et al*., International Arbitration in Sweden, 2021, p. 260 f., Calissendorf *et al*., Stockholm Centre for Commercial Law, Årsbok XII, p. 115 f., Ragnwaldh *et al*., A Guide to the SCC Arbitration Rules, 2020, p. 107 and 108, cf., however, Lindskog, SvJT 2021, p. 293, where a different view is expressed).

If the parties fail to agree, it must held that it falls within the mandate of the arbitral tribunal to determine whether participants in a hearing shall participate remotely via sound or video link. The fact that a party objects to such participation cannot block a decision thereon. The arbitral tribunal should, however, take the circumstances of the individual case into account in its determination of whether such remote participation is appropriate. In this review, the arbitral tribunal should take into account that the parties should have the opportunity to appropriately present their respective cases and that the dispute should be managed impartially, purposefully and promptly (Swedish Arbitration Act, Sections 21 and 24). The technical circumstances must allow for good communications. In order for the arbitral tribunal's decision to constitute a procedural error it must not, in an overall review of relevant circumstances, appear indefensible (cf. NJA 2019 p. 171, paragraph 40).

As regards the arbitral tribunal's management in this case, it has been established that the arbitral tribunal under consultation with the parties had decided on a time plan that concluded with a main hearing on 25-29 May and 1 June 2020, with additional reserve dates in August of 2020. In April, ICA requested that the main hearing should be postponed to August due to the COVID-19 pandemic. ICA argued that it was important that the witnesses be heard in person. It was further argued that the preparations had been rendered more complicated because it was difficult to arrange in-person meetings between the parties' counsel and witnesses and that other internal measures were more difficult due to, among other things, restrictions imposed by public agencies and within the ICA group. On 21 April 2020, the arbitral tribunal rejected ICA's request.

Following ICA's request for reconsideration, the arbitral tribunal decided on 24 April that no grounds had been presented that justified any amendment to the decision. On 29 April ICA informed that no one from ICA, whether its counsel, party representatives or witnesses, would be physically present but would instead participate remotely. At a video conference on 12 May, it was decided that also Bergsala would participate remotely together with its witnesses. Accordingly, the arbitral tribunal noted that the main hearing would be held remotely as a video conference and that the arbitrators would meet and participate in the video conference from the premises in Stockholm that had already been booked for the hearing.

From what has been presented before the Court of Appeal, it has been established that the arbitral tribunal's decisions meant that the main hearing scheduled in the spring of 2020 would not be postponed. The decisions did not, however, prevent the parties or witnesses to attend the premises in which the arbitral tribunal would be located during the main hearing in person. The note from 12 May on remote participation via video link was made in response to ICA's counsel's notification that ICA would attend remotely. Thus, the arbitral tribunal did not prevent ICA from attending the main hearing in person.

As concerns other aspects of the completion of the main hearing, it has been established that it involved the hearing of a high number of witnesses. The request for arbitration was submitted already in May of 2019, however, and in the spring of 2020 there was a strongly felt interest in not delaying the arbitration further. In addition, there was large uncertainty on the future developments of the pandemic. What ICA has invoked concerning its intergroup travel restrictions, the health of its counsel, or the criminal investigation into, among others, PE cannot be deemed to constitute impediments to the holding of the main hearing. Nothing has been presented to alter the conclusion that the technical circumstances were acceptable, that the parties have been heard and have been able to communicate with each other, the arbitral tribunal and the invoked witnesses. ICA's request for an additional hearing day was made at a very late stage. It has not been established that ICA was forced to refrain from presenting any particular evidence as a result of the arbitral tribunal's decision to reject ICA's request.

In sum, the Court of Appeal concludes that the arbitration observed due process. The parties have been granted opportunity to argue their respective cases to a necessary extent. The

dispute was managed impartially, purposefully and promptly. Thus, no procedural errors have occurred with respect to the above matters.

As concerns the fact that Bergsala's representatives and witnesses were in the same room as Bergsala's counsel while their witness statements were heard, the Court of Appeal notes that ICA did not raise any objection thereto during the arbitration and ICA must deemed to have waived its right to invoke that circumstance as ground for its motion to set aside the arbitral award. Thus, the right to invoke it has been precluded (Swedish Arbitration Act, Section 34, second paragraph).

Did the arbitral tribunal fail to take into account referenced circumstances and invoked evidence?

According to the Swedish Arbitration Act, Section 34, first paragraph, item 7, a procedural error might have occurred if the arbitral tribunal has failed to take into account a referenced circumstance or invoked evidence (see NJA 2019 p. 171, paragraph 25 f.).

In its arbitral award, the arbitral tribunal has concluded that Bergsala was not liable for verifying and subjecting its sub-suppliers to competition, that there was no legal possibility to hold Bergsala liable for any improper actions carried out by PE, JL or Pesita and that it had not been established that Bergsala had acted improperly against ICA. ICA's assertion that the arbitral tribunal has failed to take into account certain circumstances finds no support in the arbitral award nor elsewhere in the investigation. To the contrary, it is evident that those circumstances were considered under the headings "The contractual relationship between Bergsala and ICA" and "Is Bergsala liable for the actions of PE, JL or Pesita?". ICA's assertion that the arbitral tribunal's review was unacceptable is instead more aimed at its review of the merits, which cannot serve as legal ground for setting aside the arbitral award. It is also evident that ICA's counterclaim has been reviewed in the aspects that were relevant for the outcome of the arbitration.

As concerns ICA's assertion that the arbitral tribunal has failed to take into account certain evidence, it is evident from the arbitral award that the parties had submitted a number of written submissions during the arbitration and that during the main hearing the witnesses

invoked had been heard. It has not been established that the arbitral tribunal has failed to take into account the evidence invoked by ICA. The arbitral award sets out what had been established on various matters to the extent it was relevant for the outcome of the arbitration. The fact that the arbitral award does not contain detailed descriptions of the submissions or what the various witnesses had testified to does not constitute a procedural error.

Does the arbitral award not contain reasons?

ICA's assertions in this respect allege that the arbitral tribunal has not referenced certain arguments, including concerning alleged disloyalty, and that the arbitral tribunal has basically not referred to ICA's witnesses in the arbitral award.

As explained above, it has been established that the arbitral tribunal has presented its conclusions on what had been established by the invoked evidence, to the extent it was relevant for the outcome of the arbitration. This is true also for the alleged disloyalty. The Court of Appeal notes that the reasons of the arbitral award does not contain such deficiencies that constitute grounds for challenge (cf. NJA 2009 p. 128).

Did the arbitral tribunal fail to guide the proceeding?

As general principle for how proceedings should be guided, it can be said that the arbitral tribunal shall strive to ensure that the parties are provided with appropriate opportunity to argue their respective cases. The arbitral tribunal shall guide the proceeding so that the parties' relevant legal positions become adequately defined. For example, the motions shall be specified and the legally relevant facts referenced in support thereof shall be known. It is, however, the parties' responsibility to reference the legally relevant facts they wish that the arbitral tribunal shall take into account. Errors in the guiding of the proceeding could, at least if the error is more substantial, serve as grounds for challenge (Lindskog, Skiljeförfarande, 3rd ed., 21 § section 6.1 and 34 § section 5.2.7).

ICA's assertion that the arbitral tribunal has failed in its obligation to guide the proceeding takes aim at certain formulations in the arbitral award. For example, it is stated that ICA has not provided any details on the circumstances prior to, or in connection, with the execution of the agreement that would justify an interpretation wherein the structure was commission

based and that no detailed description had been provided as to how an agreement with the percentage asserted by ICA would have been reached (paragraphs 63 and 70 of the arbitral award). As concerns ICA's claim for recalled products it is stressed that the correspondence does not show what underlying information that had been provided or which products it concerned, that relevant employees had not been heard in the arbitration, and that the specific circumstances surrounding the purchases had not been explained during the main hearing (paragraphs 128-130). As concerns ICA's claim for repayment of cancellation fees it is stated that it is not clear whether Pesita had withheld the funds or had forwarded them (paragraph 135).

The Court of Appeal concludes that it has been established that the wording of the arbitral award describes the arbitral tribunal's evaluation of circumstances and evidence referenced by ICA during the arbitration. It has not been established that ICA's case was so ambiguous as to oblige the arbitral tribunal to strive for further clarification. Thus, no procedural error has occurred in these respects.

The motion that the arbitral award shall be declared invalid

The Swedish Arbitration Act, Section 33, first paragraph, item 2, stipulates that an arbitral award shall be deemed invalid if the arbitral award or the manner in which it was given obviously violates fundamental principles of Swedish law. The preparatory works state that the provision is intended to have a narrow scope of applicability. It shall apply only to cases that are highly improper. This would be the case if a party is obligated to carry out an action that could not be enforced under Swedish law and legal principles. It could also be the case in a dispute concerning agreements that violate proper and reasonable legal practice, such as an agreement for bribery (see Government Bill 1998/99:35 p. 232 and NJA 2005 p. 438 paragraph 12).

As concerns ICA's assertion that the purchasing agreement between the parties would constitute *pactum turpe* and that Bergsala has profited from a grossly criminal structure, it has been established that Bergsala as grounds for its motion in the arbitration had referenced that ICA during 2017-2018 had ordered products from Bergsala at certain prices agreed between the parties, that Bergsala had delivered the ordered products and that ICA had not paid in full.

After the arbitral award had been given, on 8 October 2021 PE, former product manager at ICA, was convicted of gross criminal breach of trust and gross taking of bribe by Gothenburg District Court. No representative of Bergsala was indicted in that criminal case. Nothing has been presented in the action at issue that would indicate that representatives of Bergsala were involved in or knew of the criminality that PE, among others, was convicted of. Further, it has not been established that Bergsala would have profited from any criminal structure that was connected to Bergsala's motion in the arbitration. Taking the above into account, the Court of Appeal concludes that the arbitral award cannot be viewed as being concerned with an agreement that violates proper and appropriate practice and it is not obvious that it violates fundamental principles of Swedish law.

The existence of a circumstance that may diminish confidence in an arbitrator's impartiality or independence serves as a specific ground for challenge of an arbitral award (Swedish Arbitration Act, Sections 8 and 34, first paragraph, item 6). One condition for setting aside an arbitral award is that the circumstance has been invoked within the time period during which the award is open for challenge as set out in the Swedish Arbitration Act, Section 34, third paragraph. Neither the preparatory works nor any court rulings support the idea that a party who has failed to challenge the award within the said period would be allowed to have the arbitral award declared invalid due to disqualification of an arbitrator. Such a possibility would allow for the possibility of circumventing the provisions on challenge of arbitral awards (cf. Heuman, Skiljemannarätt, 2021, p. 602 and 603, where reference is made to foreign case law that applies to very specific circumstances). In line with the above, the Court of Appeal concludes that ICA's assertion that two of the arbitrators have participated in an initiative called The Arbitration Alternative cannot, by itself, entail that the arbitral award shall be declared invalid.

As noted above, the Court of Appeal has concluded that the arbitral tribunal has not refused to hold an oral hearing and that the procedure safeguarded the equal treatment of the parties. The parties have had the opportunity to present their respective cases to an appropriate extent and the proceeding did not violate the principle of party autonomy. ICA's arguments in these respects do not entail that the arbitral award shall be declared invalid.

Summary of conclusions

In sum, the Court of Appeal has concluded that neither the arbitral award nor the manner in which it has been given violates fundamental principles of Swedish law. Thus, the arbitral award is not invalid. Further, there are no grounds to set aside the arbitral award on the basis of what ICA has asserted. ICA's motions shall therefore be rejected.

Litigation costs before the Court of Appeal

Upon this outcome, ICA shall compensate Bergsala for its litigation costs. The claimed amount is reasonable.

Other issues

As concerns the documentary evidence, the confidentiality shall remain in force for the documents enumerated in the operative part of the judgment above.

There are reasons to allow this judgment to be appealed (Swedish Arbitration Act, Section 43, second paragraph).

HOW TO APPEAL, see appendix A

Appeals to be submitted by 28 July 2022

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