

JUDGMENT of the
SWEDISH SUPREME COURT

Case No.

given in Stockholm on 29 December 2000

T 5119-99

APPELLANT

3S Swedish Special Supplier Aktiebolag, Reg. No. 556377-2226,

Kristinelundsgatan 1, 411 37 GÖTEBORG

Counsel: advokat Carl-Einar Mellander, Västra Hamngatan 12, 411 17

GÖTEBORG

COUNTERPARTY

Sky Park Aktiebolag, 556456-4606, Grev Turegatan 19, 114 38

STOCKHOLM

Counsel: advokat Mats Hugoson, Box 5747, 114 87 STOCKHOLM

MATTER

Monetary claim

APPEALED JUDGMENT

Svea Court of Appeal, dep. 1, judgment of 11 November 1999, in case T

5807-99

JUDGMENT

The Supreme Court confirms the judgment of the Court of Appeal.

3S Swedish Special Supplier Aktiebolag is ordered to compensate Sky Park Aktiebolag for its litigation costs before the Supreme Court in the amount of SEK nine-thousand (9,000), all comprising of costs for legal counsel, plus interest according to Section 6 of the Swedish Act on Interest from the date of the Supreme Court's judgment until the day of payment.

MOTIONS BEFORE THE SUPREME COURT

3S Swedish Special Supplier Aktiebolag (3S) has moved that the Supreme Court shall grant the claims put forth by it before the Court of Appeal.

Sky Park Aktiebolag (Sky Park) has disputed any amendments to the judgment of the Court of Appeal.

The parties have claimed compensation for the litigation costs before the Supreme Court.

GROUND

After the arbitrators in arbitration proceedings ongoing between the parties requested the parties to pay an advance on the fees to the arbitral tribunal, 3S paid its share whereas Sky Park declared its intention to not make any advance payment. 3S subsequently paid also Sky Park's share.

The issue in the present matter is whether Sky Park shall be ordered, while the arbitration proceedings are ongoing, to compensate 3S for paying half of the advance (*sic*). The parties agree that public courts have jurisdiction to try the matter.

The issue at hand has not been resolved in law, whether in the older Swedish Arbitration Act (SFS 1929:145), applicable to the present case, or in the new Swedish Arbitration Act (SFS 1999:116).

3S has argued that the arbitration clause comprises of the obligation for each party to loyally cooperate to ensure that the arbitration proceedings take place and that a party's failure to provide an advance on arbitrators' fees constitutes a breach of contract, which entails liability to forthwith hold harmless the party who has been forced to provide the advance in its stead.

The question of whether a party, as in the current situation, is entitled to immediately claim a right of regress against the other party cannot be determined without considering the rules on the parties' liability for the fees to the arbitrators, i.e. the costs for the arbitration proceedings, and their obligation as against the arbitrators to provide advances as requested.

Unless the parties have agreed otherwise, they are jointly and severally liable for the costs of the arbitration proceedings. In the arbitral award the arbitrators are entitled, unless the parties have agreed otherwise, to finally determine how the fees shall be borne by the parties. (See Sections 23 and 24 of the Act of 1929 and Sections 37, 39 and 42 of the Act of 1999.) The joint and several liability as against the arbitrators could lead to the winning party having to pay the full cost, if the losing party lacks the funds to pay. Thus, a party must already at the time of execution of an arbitration clause consider the possibility of the counterparty being or becoming insolvent (c.f. SOU 1994:81 p. 198 and Government bill 1998/99:35 p. 164 f.).

As previously established by case law, now codified in Section 38 of the Act of 1999, the arbitrators are entitled to request collateral for the fees. An advance of the fees, as in the present case, is one possible form of such collateral. The sanction for failure to comply with a request for provision of an advance is that the arbitrators may, wholly or partially, dismiss the arbitration proceedings. The parties have not objected to the arbitrators' claim

to have that authority in the relevant arbitration proceedings. However, there is no obligation as against the arbitrators to make payments, based on which the arbitrators may rely on the enforcement agencies.

If a party fails to provide its part of an advance, the counterparty's rights are protected by the right to, if it so chooses, provide the whole of the advance, or instead of continuing the arbitration proceedings, make a call for a summons before a public court. The party is not entitled to turn to the public courts with claims that the failing party shall be ordered to provide its part of an advance to the arbitrators (c.f. with respect to the right to put forth a claim NJA 1984 p. 215).

The party who has provided a larger portion than its share of the costs has a right of regress against the counterparty. A winning party that has provided its share of an advance consequently has the right to claim the paid amount from the losing party, whereas a losing party which has provided the entire advance does not have the right to claim any amount whatsoever. The final allocation of the costs for the proceedings as between the parties is however uncertain until the dispute has been finally resolved.

The issue in the present matter is whether the party that has provided the entire advance shall have a temporary right of regress for half of the advance, which can be exercised irrespective of how the final allocation of the costs for the arbitration proceedings is eventually determined through the arbitral award.

Such a right of regress would, however, not be without problems. Firstly, it should be noted that it would not be compatible with the fact that a party is not, as against the arbitrators, actually liable to make the payment. A temporary right of regress would also give rise to technical complications from a legal perspective, since several enforcement titles could be issued for the same amount, as well as with respect to the provisions for collateral not provided in the form of advance payments. The issue was also considered in

the preparatory works to the Act of 1999. The Arbitration Report stated in this respect that, on the one hand, it could be useful for a party that has provided the entire advance to acquire an enforcement title that would force the counterparty to pay its share of the advance and that it would be possible to grant the arbitrators the right to render a separate award on these matters, but that, on the other hand, several complications arise when considering the precise wording of these provisions and that the issue did not warrant a lengthy and complicated regulation. Thus, the Arbitration Report refrained from proposing provisions granting a party such a right. (See SOU 1994:81 p. 19 ff., c.f. Government Bill 1998/99:35 p. 165.) In view of the foregoing, it cannot be considered suitable to introduce, by way of case law, a provision on right of temporary regress unless simultaneously also solving the various problems such a right would entail.

Having regard to the foregoing, a party that has provided the entire advance requested by the arbitrators cannot be deemed to have the right of regress against the counterparty while arbitration proceedings are still ongoing, unless the parties have agreed otherwise.

Thus, the judgment of the Court of Appeal shall be confirmed.

[ILLEGIBLE SIGNATURES]

The decision has been made by: Supreme Court Justices G. (dissenting), K,
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