

SÖDERTÖRN DISTRICT COURT

MINUTES

10 December 2008
Bankruptcy hearing in
Huddinge

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File Index No. 16
Matter No.
K 13165-08

Time: 9:05 am – 11 am

THE COURT

Law clerk KB

MINUTES KEEPER

Law clerk FJ

PARTIES

Creditor

Consafe IT AB, 556649-5908
Box 4064
182 04 Enebyberg
Present through PE

Counsel: Advokaterna Michael Karlsson
Mannheimer Swartling Advokatbyrå AB
Box 1384
251 13 Helsingborg

Debtor

Auto Connect Sweden AB, 556631-3887
c/o Bratt
Sedelvägen 13, 3 tr
129 32 Hägersten
Present through CB

Counsel: Advokaten Jean-Jacques Zander
Eurolawyers Advokatfirma KB
Box 3549
103 69 Stockholm

MATTER

Application for bankruptcy

No procedural impediments to review the application are at hand.

Document ID 189768

Postal Address	Visiting Address	Telephone	Telefax	Opening Hours
141 84 Huddinge	Björnkullavägen 5 A	08-561 660 00 e-mail: sodertorns.tingsratt@dom.se www.sodertornstingsratt.domstol.se	08-711 05 80	Monday – Friday 8:30 am – 4 pm

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Michael Karlsson presents the creditor's motions and grounds pursuant to the bankruptcy application and its attachments, file index No. 2-5. Further, the creditor claims compensation for its litigation costs in the amount of SEK 9,504.

Jean-Jacques Zander maintains that Auto Connect Sweden AB (Auto Connect) disputes the application and motions that the District Court shall reject it. Further, the debtor claims compensation for its litigation costs in an amount to be specified later.

Michael Karlsson states that the grounds for the application is that Auto Connect is insolvent because it is incapable of paying its liabilities as they fall due and that this incapacity is not merely temporary. Auto Connect is liable for a clear, outstanding and due payment of EUR 66,000 to Consafe IT (Consafe). The liability of EUR 69,150, plus interest, was upheld through an arbitral award rendered by the Arbitration Institute of the Stockholm Chamber of Commerce on 21 October 2008. On 27 October 2008, a payment of SEK 28,000 was made by CB. Thus, the amount has been decreased accordingly and EUR 66,000 remains to be paid by Auto Connect. Auto Connect has been served a demand for payment under the second paragraph of Section 9 of Chapter 2 of the Swedish Bankruptcy Act (SFS 1987:672) and has been encouraged to make the payment. Payment has not been made and Consafe has filed a bankruptcy application within the prescribed period.

Jean Jacques Zander replies that Auto Connect is not insolvent. Auto Connect's annual report is referenced to establish that the company is not insolvent. The annual report, file index No. 13, in conjunction with the interim report of 9 December 2008, file index No. 21, establishes that the balance between assets and liabilities does not amount to insolvency. Further, reference is made to the interim report of 30 June 2008 and the auditor's report to show that Auto Connect is not insolvent, file index No. 13 and 21.

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There are arbitration proceedings ongoing between the parties. The background to the dispute is a share purchase agreement under which Auto Connect sold shares to Consafe. The purchase price was divided into a portion to be set-off and a portion to be paid in cash. The object of the dispute is the valuation of these shares. Auto Connect is of the opinion that it has a claim against Consafe based on the share purchase agreement which is by far higher than the advance payment that Consafe paid for the arbitration proceedings. Also this counterclaim is referenced as grounds for Auto Connect not being insolvent.

It is correct that a separate arbitral award was rendered on 21 October 2008, through which Auto Connect and another company was declared jointly and severally liable for the costs set out in the award. However, the liability is not clear and due, since an appeal has been submitted to the Stockholm District Court, file index No. 24. Section 41 of the Swedish Arbitration Act (SFS 1999:116) awards Auto Connect the right to appeal and the liability can as a result not be deemed clear and due. The appeal is to be reviewed by Stockholm District Court and the grounds for the appeal are, amongst other things, a procedural error since the arbitral award does not respect Section 29 of the Swedish Arbitration Act. The Act does not foresee the rendering of separate awards for litigation costs. Thus, the arbitrators' award is in breach of the Swedish Arbitration Act. Further, the award is not line with established case law. The case law of the Swedish Supreme Court provides that a party does not have the right of regress for litigation costs in ongoing arbitration proceedings, see NJA 2000 p. 273. In this case, the Supreme Court maintained that it is not permitted to demand the costs paid out while arbitration proceedings are still ongoing. For this reason the liability is not clear and due. Thus, the bankruptcy application shall be rejected.

Michael Karlsson. The liability is clear and due. The arbitral award was not rendered under the provisions of the Swedish Arbitration Act, but under the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. These rules include a provision that grants the arbitrators the right

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to render decisions on advance payments. This is exactly what arbitrators have done. This is clarified in the grounds of the arbitral award. An arbitral award does not become legally binding as a court judgment (Swedish: *laga kraft*) but is enforceable immediately. Further, the counterparty has acted as though the arbitral award is enforceable, since CB has paid SEK 28,000. If you do not consider yourself in debt, it is rare to even partially pay the debt. The provision in Section 9 Chapter 2 of the Swedish Bankruptcy Act provides that Auto Connect shall be assumed insolvent. This is to be assumed irrespective of whether the company as per, for example, 30 June 2008 was not insolvent. Further, the document submitted today relating to the financial standing of Auto Connect shall be disregarded, because it has not been signed and it is consequently not clear who drafted it or for what reasons.

Auto Connect has also admitted to being insolvent in its e-mail correspondence. The e-mail correspondence is submitted and referenced, file index No. 25a. The e-mail correspondence from CB establishes that only SEK 600 remains on Auto Connect's bank account. In any case, it is clear from the report submitted by Auto Connect that the company's cash holdings amount to only SEK 9,000. It is correct that the main arbitration proceedings concerns a liability for a company in which Consafe has acquired shares. Consafe, however, maintains that the company acquired is worth SEK 0 and that it is irrelevant for the question of whether Auto Connect shall be deemed insolvent or not, see NJA 1989 p. 428. Auto Connect has a liability towards Consafe and it has not been paid, which is the main issue of the present matter.

Jean Jacques Zander. It is not disputed that the SEK 28,000 payment was made. However, it was later attempted to stop the payment. The reason for CB making the SEK 28,000 payment was a misunderstanding between his counsel and CB. CB and the company share address, and he was distraught when he was served the demand for payment. With respect to the e-mail correspondence, this was an internal e-mail and what CB writes in the e-mail

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does not entail that the company is insolvent. On the same day, CB wrote another message to Consafe requesting it to repay the SEK 28,000.

It should be added that the arbitrators were reluctant to render the arbitral award, and on 22 October 2008, the issued a supplement to the award.

The agreement between the parties was drafted when the old rules of the Arbitration Institute of the Stockholm Chamber of Commerce applied. It is not reasonable that parties having reached an agreement in 2005 shall be bound by new rules entering into force in 2007. When the arbitration proceedings were initiated in November of 2007, the Arbitration Institute of the Stockholm Chamber of Commerce requested that each party should pay its share of the costs. Consafe paid both parties' shares because Auto Connect had declared its intention to not pay. In the correspondence with the Arbitration Institute of the Stockholm Chamber of Commerce it was on several occasions pointed out that Auto Connect objects to advance payments. Auto Connect has a monetary claim against Consafe. This is what the dispute before the arbitration institute is about.

If the District Court would find that the liability is clear and due, then the co-owners of Auto Connect and the other companies can provide security. Thus, Auto Connect needs a respite to investigate this possibility further. Consequently, Auto Connect motions for a respite until 10 January 2009.

Michael Karlsson. The arbitral award does not need to acquire legally binding force to be enforceable; the main rule is that it is enforceable immediately.

It is correct that the arbitral award contains an unimportant typo, which was corrected on 22 October 2008, see submission file index No. 17. This is however irrelevant for the bankruptcy issue. What is relevant is that the liability exists, that a demand for payment under Section 9 of Chapter 2 of the Swedish Bankruptcy Act has been made, and that Auto Connect has failed to pay this liability. Consafe has no reason to settle for security.

Consafe does not acknowledge the motion for a respite.

The District Court, following private deliberation, renders the following

DECISION

Decision

Auto Connect's motion for respite is rejected.

Grounds

The creditor has objected to the respite. In these circumstances, Section 20 of Chapter 2 of the Swedish Bankruptcy Act provides that a respite may only be granted under extraordinary circumstances. What has been referenced by Auto Connect as grounds for its motion for a respite does not amount to such extraordinary reasons required for the District Court to grant the respite, against the objections of Consafe. Thus, the motion for a respite shall be rejected.

This decision may be appealed to Svea Court of Appeal within three weeks of today, i.e. by 2 January 2009. Appeals are to be submitted to the District Court.

The parties provide their closing statements.

The District Court orders Jean Jacques Zander to submit the original of his power of attorney.

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The hearing is declared ended, and it is announced that the decision in this matter will be given by being made available at the bankruptcy department of the District Court on 19 December 2008, at 11 am.

Following the ending of the hearing, advokat Zander declared that Auto Connect claims compensation for its litigation costs in the amount of SEK 8,000.

Michael Karlsson has been contacted in respect of the claimed amount and has not had any objections.

Advokat Zander has submitted his power of attorney, file index No. 18.

Additionally, both parties have submitted documents to the District Court. However, the District Court has not found it necessary to hold a continued or new hearing in the case, and has notified the parties that the decision in the matter will be rendered on 19 December 2008, at 11 am.

Hereafter, the District Court renders the following

FINAL DECISION (to be announced on 19 December 2008, at 11 am)

Decision

1. The District Court rejects the bankruptcy application. The matter is dismissed from further dealings.
2. The District Court orders Consafe IT AB to compensate Auto Connect Sweden AB for its costs in the matter in the amount of SEK 8,000 plus interest thereon pursuant to Section 6 of the Swedish Act on Interest (SFS 1975:635) from the date of the bankruptcy decision [*sic*] until the date of payment.

Grounds

As a starting point, the District Court notes that the arbitration proceedings between the parties were initiated after January of 2007 and that the parties have not agreed otherwise than that the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) shall apply to the arbitration proceedings. These rules in their current wording shall for this reason be considered by the District Court in its decision.

The issue of dispute in the present matter is whether by agreeing that the SCC-rules shall apply to the arbitration proceedings, they can be deemed to have agreed on the right of regress on advance payments of the arbitrators' fees.

The Supreme Court has on the issue of temporary right of regress for costs for arbitration proceedings declared that it cannot, having regard to, amongst other things, what is noted in SOU 1994:81 p. 198 f. and Government Bill 1998/99:35 p. 165, unless the parties have agreed otherwise, serve any useful purpose to introduce rules on the right of regress for advances on fees by way of case law, (see NJA 2000 p. 773).

The SCC-rules include a provision that an arbitral tribunal may, upon the request of a party having made an advance payment, in a separate arbitral award order the counterparty to compensate for the advance payment (Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, Section 45 (4)). However, there is another provision that the arbitrators shall, unless the parties have agreed otherwise, upon the request of a party, determine the allocation between the parties of the costs for the arbitration proceedings. This decision shall be made having regard to the outcome of the case and other relevant circumstances, (Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, Section 43 (5)). No information that the parties have entered into such an agreement has been presented to the District Court. In the absence of an agreement

allocating the costs, the District Court finds that the final liability for these costs is and remains unclear until the arbitration proceedings has been finally decided. Against this background, the District Court finds that the provision set out in Section 45(4) of the SCC-rules, having regard to Section 43(5) of said rules, cannot be interpreted so extensively that a separate arbitral award on the allocation of the advance is an enforceable liability for the party that has paid the entire advance. The District Court finds that an order to pay as set out in the separate arbitral award is not enforceable, and cannot serve as grounds for the right to apply to the District Court to have Auto Connect declared bankrupt under the second paragraph of Section 6 of Chapter 2 of the Swedish Bankruptcy Act. Since the right to apply under said Section cannot be considered to be at hand, it is for Consafe to establish its right to apply under the third paragraph of Section 6 of Chapter 2 of the Swedish Bankruptcy Act. As the District Court has noted above, the separate arbitral award does not finally determine the allocation of the costs as between the parties. Thus, the separate arbitral award cannot be relied on for the right to submit a bankruptcy application under the third paragraph of Section 6 of Chapter 2 of the Swedish Bankruptcy Act. Consequently, the bankruptcy application shall be rejected.

Upon this outcome, Auto Connect is entitled to compensation for its costs in the matter. The claimed amount is reasonable.

HOW TO APPEAL

A party wishing to appeal this decision shall do so in writing. The appeal shall be submitted to the District Court. An appeal of the decision on bankruptcy shall have been received by the District Court within three weeks of the date of the publication of the bankruptcy in Post- och Inrikes Tidningar. Appeals on other issues shall have been received by the District Court within three weeks of the date of the announcement of the decision, i.e. by 9 January 2009. Leave to appeal is required.

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As above

[ILLEGIBLE SIGNATURE]

FJ

Minutes approved/[INITIALS]