DECISION of the

SWEDISH SUPREME COURT

Case No.

issued in Stockholm on 2 January 2003 Ö 3504-01

APPELLANT

Bankruptcy estate of Svenska Kreditförsäkringsaktiebolaget,
c/o Wistrands Advokatbyrå Stockholm KB, Box 70393, 107 24
STOCKHOLM
Deputies: Advokat Stefan Lindskog and advokat Lars-Olof Svensson, address as above

COUNTERPARTIES

Unione Italiana di Riassicurazione S.p.A., *et al.*, see Appendix 1
Counsel for all: Advokat Stefan Bessman, Box 5719, 114 87 STOCKHOLM and advokat Lars Boman, Box 3299, 103 66 STOCKHOLM

MATTER

Objection with respect to arbitration proceedings

APPEALED DECISION

Svea Court of Appeal, dep. 1, decision of 20 September 2001, in case Ö 5537-01

Decision of the Court of Appeal see Appendix 2

[UNOFFICIAL TRANSLATION. PLEASE CHECK AGAINST ORIGINAL.]

DECISION OF THE SUPREME COURT

The Supreme Court dismisses the appeal.

The bankruptcy estate of Svenska Kreditförsäkringsaktiebolaget is ordered to compensate the counterparties for their litigation costs, each in the amount of SEK seven-thousand eight-hundred (7,800), all comprising costs for legal counsel, plus interest according to Section 6 of the Swedish Act on Interest from the date of the Supreme Court's decision until the day of payment.

MOTIONS BEFORE THE SUPREME COURT

The bankruptcy estate has moved that the Supreme Court shall dismiss the objection of the counterparties that their rights in the bankruptcy shall be determined by arbitration proceedings.

The counterparties have disputed any amendments to the decision of the Court of Appeal.

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

GROUNDS

Svenska Kreditförsäkringsaktiebolaget (Svenska Kredit) was founded in 1928. It ran an extensive credit insurance operation. The company's commitments were largely reinsured with other international insurance companies. The agreements between Svenska Kredit and the reinsurers who are parties to the present case contain a clause providing that disputes shall be settled by arbitration.

After Svenska Kredit was declared bankrupt in October 1992, a large number of reinsurers claimed money from the bankruptcy estate. These claims related

to repayments of advance payments made under the reinsurance policies upon Svenska Kredit experiencing insurance events. The reinsurers claimed that the advance payments made under the reinsurance policies were not binding, or that Svenska Kredit at least was liable to pay damages for breach of contract. The bankruptcy estate of Svenska Kredit, on the other hand, claimed that the reinsurers were liable to make further payments under the reinsurance policies, but that these had been withheld by the reinsurers.

In 1995, arbitration proceedings were initiated between the bankruptcy estate and certain main reinsurers. On 11 November 1998, a fundamental intermediate arbitral award was rendered, which provided that these reinsurers were cleared from a substantial portion of their liability and were awarded substantial amounts. The arbitral award was challenged, but remains unchanged because the Supreme Court decided on 24 October 2000 to not grant leave to appeal (T 2270-00).

The bankruptcy estate requested arbitration against the remaining reinsurers on 6 December 1995, to avoid the matter becoming barred by statute of limitations, referencing the arbitration clauses of the reinsurance policies. On 12 December 1995, an agreement was entered into between the bankruptcy estate and the remaining reinsurers under which all parties waived the right to raise objections based on references to statute of limitations with respect to claims not already barred at that time. Section 4 of the agreement provided that the parties recognized the counterparty’s continued right to request arbitration under the reinsurance policies by giving 21 days’ notice. The arbitration proceedings between the parties were dismissed as a result.

After the remaining reinsurers had claimed amounts in the bankruptcy, based on the liability the reinsurers were deemed to have with respect to various risks as provided by the arbitral award between the main reinsurers and the bankruptcy estate, the bankruptcy estate objected that the arbitral award was not binding as against the remaining reinsurers. These subsequently claimed that their claims on the bankruptcy estate should be determined to amounts

that could be finally determined by arbitration proceedings between them and the bankruptcy estate. As main ground for the claim, the remaining reinsurers referenced that the parties had agreed to arbitration by way of the agreement on 12 December 1995, as a second ground, that the bankruptcy estate is bound by the debtor's agreements on arbitration entered into prior to the bankruptcy, and as a final ground, if the bankruptcy estate would be deemed to have the option to chose the manner in which the case should be tried on the merits, that the bankruptcy estate has not within a reasonable time following the reinsurers' references to the arbitration clauses maintained that they should not be deemed applicable, but has instead acted as if they were applicable.

The bankruptcy estate has objected that the creditors' rights in the bankruptcy shall be tried by the court in the bankruptcy objections proceedings.

The District Court held that the issue of whether the bankruptcy estate in the claims procedure is bound by the referenced arbitration clauses shall be decided in an intermediary decision. This is the issue to be decided by the Supreme Court.

The Supreme Court shall firstly try the second ground referenced by the reinsurers.

The deciding factor for whether other creditors in the bankruptcy must respect arbitration clauses entered into by the debtor prior to the bankruptcy has been deemed to be whether a postulated agreement through which the parties directly regulated the issue to be decided by the arbitration proceedings (i.e. agreed on the outcome of the case), would have been binding in relation to the other creditors (cf. NJA 1993 p. 641).

Consequently, it is an established principle that other creditors in the bankruptcy are not bound by agreements with respect to rights *in rem*, such as special priority rights, preferential rights and recovery in bankruptcy (cf. NJA

1902 p. 282, 1922 p. 285, 1925 p. 557, 1926 p. 109 and 1931 p. 647). The same applies with respect to unlawful distributions of profits, which are to be recovered under Section 5 of Chapter 5 of the Swedish Companies Act (NJA 1993 p. 641).

With respect to the binding effect as between the parties in contractual relationships, there is a decision by the Supreme Court in a plenary sitting, NJA 1913 p. 191. The case involved a construction agreement containing an arbitration clause. Following the contractor's bankruptcy, the developer requested arbitration to establish whether the contractor was in the developer's debt. The administrator appointed an arbitrator. The arbitral tribunal found that the contractor was indebted towards the developer to a certain amount. Two creditors in the bankruptcy claimed in the bankruptcy objection proceedings that the arbitral award was invalid, since it was rendered by arbitrators appointed after the bankruptcy. The Supreme Court found that the developer's claim in the bankruptcy should be upheld in the amount, which the arbitral award stated that the contractor owed the developer. In the grounds it was noted that the claim brought by the developer in the bankruptcy was based on an agreement which included an arbitration clause, and that no other circumstance had been referenced which could affect validity of the arbitral award.

The Supreme Court was not unanimous. In one dissenting opinion (signed by several Supreme Court Justices) it was noted that the arbitral award must be deemed invalid, because the two objecting creditors had not been able to affect neither the composition of the arbitral tribunal, nor otherwise defend their rights as creditors in the bankruptcy. In a further clarification of this opinion, Supreme Court Justice v.S. stated that arbitration clauses, which are autonomous in relation to other parts of an agreement, should not replace the order for trying debts provided by the Swedish Bankruptcy Act, since bankruptcy proceedings are not just proceedings between the debtor and each creditor, but also proceedings between all of the creditors.

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The Supreme Court has referenced the general principle established through the case of 1913 in other case law, NJA 1993 p. 641 and 1997 p. 866. See also for example Welamson, Konkursrätt, 1961 p. 298 and Walin & Palmer, Konkurslagen, p. 712.

In the present case, the bankruptcy estate has presented several legal arguments as to why the case of 1913 should no longer be applicable (cf. Lindskog, Lagen om handelsbolag och enkla bolag, 2001, p. 736 footnote 29).

Initially, it should be noted that no substantial changes have been enacted through the bankruptcy acts of 1921 and 1987, as compared to the bankruptcy act of 1862, which was applied in the plenary sitting case of 1913.

The bankruptcy estate's main argument against the possibility to determine the rights of a creditor in a bankruptcy by way of arbitration, when an arbitration clause has been agreed prior to the bankruptcy, coincides with what was noted by Supreme Court Justice v.S. in his dissenting opinion to the plenary sitting case of 1913. The argument can appear specious. The bankruptcy receiver is not authorized to decide on a dispute so as to bind creditors in the bankruptcy in the bankruptcy objection proceedings, and so a settlement with respect to a debt is binding only if all present at a settlement hearing, or in other contexts all parties whose rights are dependent on a settlement, are in favor of the settlement (see second sentence of the third paragraph of Section 13 and Section 17 of Chapter 9 of the Swedish Bankruptcy Act). Thus, a creditor is entitled to independently dispute a claim against the bankruptcy estate. From this it is possible to infer that bankruptcy objection proceedings are not amenable to out of court settlements in the sense required by Section 1 of the Swedish Arbitration Act (SFS 1999:116).

However, creditors in a bankruptcy are bound by judgments or arbitral awards given prior to the bankruptcy with respect to a claim, except in cases where objections are based solely on bankruptcy law, such as recovery under

Section 5 of Chapter 4 of the Swedish Bankruptcy Act or in cases where the right to make claims in the bankruptcy is lacking under Sections 1 or 2 of Chapter 5 of the Swedish Bankruptcy Act (cf. Welamson, Konkursätt, 1961, p. 288 ff.). Other creditors cannot successfully object to the effects of such a judgment in the bankruptcy proceedings, by claiming that he was unable to intervene in the proceedings. Against this background, it does not appear controversial that an arbitration clause entered into prior to the bankruptcy would bind creditors in a bankruptcy regarding the right to make claims therein, even if the creditors in the bankruptcy would not be eligible to independently defend their rights in those arbitration proceedings. It is, however, noteworthy that not only the bankruptcy estate (second paragraph of Section 9 of Chapter 3 of the Swedish Bankruptcy Act), but also other creditors in a bankruptcy are deemed to have the right to independently intervene in court proceedings involving the debtor with respect to a claim that can be brought in the bankruptcy (see Welamson, *op. cit.*, p. 295). The issue whether a creditor in a bankruptcy has the right to intervene is not regulated in the Swedish Arbitration Act, but it cannot be ruled out that a creditor in a bankruptcy would have the corresponding right to intervene in arbitration proceedings. In the alternative, the arbitral award could be deemed to not be binding in the bankruptcy, if a creditor in the bankruptcy, who had requested to intervene in the arbitration proceedings, had been denied to do so by the other creditor. In this case, however, there is no reason to determine the individual creditors' right to intervene, since at a settlement hearing all creditors in the bankruptcy – according to what the reinsurers have stated without objections – have granted the administrator the authority to enter into settlements with respect to the claims.

The opinion that the debtor's arbitration clauses bind the creditors in the bankruptcy in contractual matters as between the parties is consistent with the provision in the fourth sentence of the first paragraph of Section 16 of Chapter 9 of the Swedish Bankruptcy Act. It provides that if any creditor's right is dependent of the outcome of a particular trial, the court shall determine that creditor's right in the amount that might be the result of a

judgment in that case. (See also NJA II 1974 p. 696 ff. on the Act on Judicial Procedure in Employment Disputes (SFS 1974:371).)

In light of the above, and since what has otherwise been referenced by the bankruptcy estate provides no reason to deviate from the case decided in plenary sitting, the creditors in the bankruptcy are bound by the arbitration clauses entered into by Svenska Kredit prior to the bankruptcy.

[ILLEGIBLE SIGNATURES]

The decision has been made by: Supreme Court Justices M., L., R., H., (Reporting Justice) and E.N.
Reporting clerk: T.

True copy:

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