GÖTA COURT OF APPEAL Department 3 Division 35	**DECISION** 8 September 2014 Jönköping	Case No. Ö 775-14

APPEALED DECISION
Final decision of Kalmar District Court of 10 February 2014 in case T 1040-13, see appendix A

APPELANT
PM
[INFORMATION OMITTED]

Counsel: advokaten Henry Oscarson, Thure Röings gata 2, 252 25 Helsingborg

COUNTERPARTY
KLS Ugglarps AB, Reg No. 556740-8439, Asbjärsvägen 38, 231 96 Trelleborg

Counsel: advokaterna Marc Tullgren och Jens Skogler, P.O. Box 4501, 203 20 Malmö

MATTER
Dismissal

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DECISION OF THE COURT OF APPEAL

By reversing the decision of the District Court in its entirety, the Court of Appeal remands the case back to the District Court for recommenced review.

It is for the District Court, following the resumption of the case, to determine the liability of either party to compensate the counterparty's litigation costs before the Court of Appeal.

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MOTIONS BEFORE THE COURT OF APPEAL

PM has moved that the Court of Appeal shall annul the District Court's decision in its entirety and remand the case to the District Court for recommenced review.

KLS Ugglarps AB has objected to amending the District Court's decision.

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

GROUNDS OF THE COURT OF APPEAL

The parties have referenced the same circumstances and evidence before the Court of Appeal as before the District Court. The witness statements taken before the District Court have been played back with audio and video before the Court of Appeal.

Section 17a of Chapter 10 of the Swedish Code of Judicial Procedure and Section 4 of the Swedish Arbitration Act (1999:116) provide that a court, against the objections of a party, may not review a matter which shall be reviewed by arbitrators.

The issue in the present case is, firstly, whether a valid arbitration agreement has at all been entered between the parties. A party who has not entered into an arbitration agreement cannot be bound to seek recourse before an arbitral tribunal (cf., amongst others, case NJA 2008 p. 406 and Lindskog, Skiljeförfarande. En kommentar, 2nd ed., I 6.1.2).

PM has maintained that the documented with heading "Delivery agreement for pigs to be slaughtered 2011," in which the arbitration clause is set out, does not constitute an agreement, but merely a unilateral confirmation from his side that the company Öresundsgrisen AB held the required certification to raise pigs for slaughter. In the event that the Court of Appeal would conclude that this document is to be deemed a delivery agreement, PM has maintained that the agreement is not binding between the parties, since it has

not been signed representatives of KLS Ugglarps AB and that the agreement requires that it is signed by both parties in order to be binding.

Concerning the issue of how to legally label the document in which the arbitration clause is set out, it can be noted that the document covers many more issues than just the issue of certification for the raising of pigs for slaughter. Against this background, and for reasons stated by the District Court, the arbitration clause must be deemed to be set out in an agreement document. However, the document provides that it must be signed by both parties in order for it to enter into effect (see agreement document, Section 2). No copy of the agreement, which has been signed by both parties, has been presented in the case, whether in original, certified copy or other copy. In addition hereto, JA's and PM's witness statements on the issue of whether the agreement document was signed by both parties are contradictory and that the former's statement that this was the case is only vaguely substantiated. That the parties agreed to backdate the agreement document in a certain manner is not a circumstance that, in and of itself, supports that it was signed by both parties. In sum, the oral evidence has not established that the agreement document was signed by both parties. Further, the oral evidence has not established that the parties, despite the provision on the agreement having to be signed, would have applied the agreement in such a manner so as to render it binding between the parties.

In light of the above, the Court of Appeal finds that KLS Ugglarps AB has not established that there is a binding arbitration clause covering the claimant's case. Therefore, there are no grounds to dismiss PM's case. As a result, the District Court's decision shall be set aside in its entirety and the case be remanded to the District Court for recommenced review.

The issue of compensation for litigation costs before the Court of Appeal shall, pursuant to the third paragraph of Section 15 of Chapter 18 of the Swedish Code of Judicial Procedure, be determined by the District Court when making its final decision in the case after it having been resumed.

HOW TO APPEAL, see appendix B

Appeals to be submitted by 10 October 2014

The decision has been made by Senior Judge of Appeal CR, Judges of Appeal UJ and JJ (reporting Judge of Appeal) as well as Deputy Associate Judge SA.

The Court of Appeal's decision is unanimous.

KALMAR DISTRICT COURT	**FINAL DECISION**	Case No.
Department 3	10 February 2014	T 1040-13
	Given in Kalmar	

PARTIES

Claimant
PM
[INFORMATION OMITTED]

Counsel: advokaten Henry Oscarson
Thure Röings gata 2
252 25 Helsingborg

Respondent
KLS Ugglarps AB, Reg. No. 556740-8439
Asbjärsvägen 38
231 96 Trelleborg

Representative: JA
[INFORMATION OMITTED]

Counsel: advokaterna Marc Tullgren
P.O. Box 4501
203 20 Malmö

MATTER
Compensation for the raising of pigs for slaughter; now question of procedural impediment

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DECISION OF THE DISTRICT COURT

1. The claimant's case is dismissed.
2. PM shall compensate KLS Ugglarps AB for its litigation costs in the amount of SEK 149,950, all comprising costs for legal counsel, plus interest thereon pursuant to Section 6 of the Swedish Interest Act (1975:635) as from 10 February 2010 until the day of payment.

BACKGROUND

On 22 May 2012, Öresundsgrisen AB (hereinafter Öresundsgrisen) applied for an injunction against KLS Ugglarps AB (hereinafter Ugglarps) to pay outstanding compensation for the raising of pigs for slaughter in the amount of SEK 10,023,665, plus interest at a rate of 13 percent as from 21 May 2012 until the day of payment. After Öresundsgrisen had been declared bankrupt, the claim was transferred onto PM, the former authorized representative of Öresundsgrisen.

After having acceded to the case as claimant, PM decreased the amount of the claim to SEK 8,018,932, plus interest thereon pursuant to Section 6 of the Swedish Interest Act as from 22 February 2013 until the day of payment.

After Ugglarps had disputed the claim, the case was forwarded to the District Court for review.

In its Statement of Defense, Ugglarps moved that the District Court shall dismiss the case because of an arbitration clause included in the agreement entered between Öresundsgrisen and Ugglarps. The clause is binding also on PM after having taken over Öresundsgrisen's claim. The District Court has decided to decide on the issue of procedural impediment.

MOTIONS; those now relevant

Ugglarps has moved that the District Court shall dismiss the case and as grounds in support for its motion has referenced mainly the following: Ugglarps is a wholly owned subsidiary of Danish Crown, and operates slaughter houses in Ugglarp and Kalmar. At the time relevant in the present case, Öresundsgrisen raised pigs for slaughter at several production facilities. During 2008, Öresundsgrisen and Ugglarps entered several agreements under which Ugglarps was to deliver piglets to be raised by Öresundsgrisen. They should be raised by Öresundsgrisen and subsequently be delivered to Ugglarps for slaughter. Separate agreements were entered for each of Öresundsgrisen's production facilities. After the first agreements were

entered, the parties have complied with the provisions thereof as regards compensation etc. and payments have been made in compliance with the agreements.

In 2010, an addendum was entered on the conditions for compensation. As Ugglarps wished to have the same conditions with all its suppliers, it entered into new delivery agreements with 200-300 suppliers. Section E of the agreement of 2011 provides that the agreement replaces previous agreements on pigs for slaughter. Section D provides that disputes shall be settled by arbitration under the Swedish Arbitration Act (1999:116). PM signed the agreement on behalf of Öresundsgrisen, who at the time was the authorized representative of the company. PM has read and approved all the conditions.

As grounds for its motion, Ugglarps maintains that PM was aware of and is bound by the arbitration clause, which constitutes a procedural impediment.

PM has disputed that a procedural impediment is at hand and in support of its case has maintained mainly as follows: PM has for a long time had extensive knowledge of the business sector and a cooperation was initiated in 2007/2008 between Öresundsgrisen and Ugglarps, through which several agreements, both written and oral, were entered. Compensation should be paid based on the agreement, and in additional a personal commission should be paid. During the term there was a cooperation with Svenskt Foder. In 2010, an agreement was entered to formalize the earlier agreements. The background to the drafting of the agreement of 2011 was a meat scandal in 2009, when activists had revealed poor conditions in the meat industry. In light thereof, slaughter houses introduced mandatory certifications for its suppliers. In order to fulfill the requirements of the certification and avoid becoming banned from supplying, the suppliers had to show that it had carried out an internal audit pursuant to *Svenska Bönders Miljöhusesyn*. The sole purpose of the agreement document produced in 2011 was to oblige suppliers to provide assurance that the internal audit had been carried out. During the summer of 2011, PM was made aware that his credits and food deliveries would be cancelled unless he signed the agreement. He met with

the then managing director of Ugglarps, JA, and signed the agreement. The agreement provides that the agreement enters into force one month after having been signed by both parties. When PM signed the agreement, it had not been signed by any Ugglarps representative, and PM has not been provided with any copy showing that it has been signed. As grounds for his motion, PM, in the main maintains that the relevant agreement document was not intended to be an agreement, but merely a unilateral confirmation that a certain certification had been attained. If the document is nevertheless deemed to be an agreement, PM maintains that it has not entered into force, since it has not been signed by both parties as provided in the agreement. In the event that the District Court would conclude that the arbitration clause is valid, he maintains that it cannot be applicable to claims that became due for payment prior to the arbitration agreement was entered.

Ugglarps has referenced delivery agreement for slaughter pigs, addendum to the delivery agreement and delivery agreement for slaughter pigs 2011 as documentary evidence.

PM has referenced delivery agreement for slaughter pigs 2011 and an article for basic certification of pigs as documentary evidence.

PM and JA have been heard as witness upon the request of the respective party.

Heard as a witness upon his own request, PM has maintained as previously during the presentation of his case, with the following additions: Öresundsgrisen was, at the time when the cooperation with Ugglarps commenced, one of the biggest pig producers in Sweden, and supplied a large portion of the pigs for slaughtered delivered to Ugglarps. In order to provide Öresundsgrisen with the substantial liquidity required to raise the pigs, Öresundsgrisen and Ugglarps cooperated with Svenska Foder [*TRANSLATOR NOTE: The Swedish text uses both "Svenskt Foder" and "Svenska Foder"*] that supplied feed required for raising the pigs. When Öresundsgrisen struggled with liquidity it could be granted credits by Svenskt Foder. The agreements on delivery of pigs for slaughter of 2008 was applied between the

parties. The addendum to the existing delivery agreements entered in 2010 was made to formalize the agreement when a new managing director took office at Ugglarps. The document called Agreement on delivery of pigs for slaughter from 2011 was mainly aimed at establishing uniformity to ensure that all parties acted correctly. The purpose of the agreements was that the parties would be able to counter attacks from animal rights activists by introducing certifications and internal audits for the entire industry. In 2010, Ugglarps failed to make full payment under the agreement to Öresundsgrisen, which was admitted by Ugglarps when pointed out by Öresundsgrisen. In connection therewith, Ugglarps encouraged Svenska Foder to grant Öresundsgrisen extra credit, which it did. In July of 2011, Svenska Foder however ceased offering credit and Öresundsgrisen was forced to pay for each feed delivery in advance. Ugglarps was then in a rush to ensure that each agreement between Öresundsgrisen and Ugglarps complied with legal and industry requirements in the event that Öresundsgrisen would become bankrupt. In August – September of 2011, he was contacted by JA who wanted him to sign the now relevant document. He met him in a parking lot in Fleninge in September of 2011 and there he signed a document called Agreement on delivery of pigs for slaughter 2011. It was he who filled out place, date and the text for parties and ticked boxes that indicated the number of approved pigs for slaughter per production facility etc. He understood all parts of the document and noted that it included several pages. When he was uncertain what date to fill in, he asked JA, whereupon he answered that it was best to ante-date it so it would cover all of 2011. Thereafter, JA took the agreements and he has not seen them since. He acquired the claim relevant to the present case from the bankruptcy administrator by agreement in January of 2013.

When hear as witness upon the request of Ugglarps, JA has maintained as maintained by Ugglarps in the presentation of its case, with the following additions: He was the managing director of Ugglarps between 2009 and 31 December 2013. When he was the managing director, the relationship between Ugglarps and PM functioned well and they met at least once per

month. Öresundsgrisen was Ugglarps biggest supplier of pigs for slaughter and the cooperation continued almost until Öresundsgrisen was declared bankrupt. He has seen the agreements from 2008 and 2010. In his opinion, Öresundsgrisen received full payment during the time these agreements applied. Animal rights activists filmed the conditions at Swedish and possibly foreign pig farms in 2009. The livestock industry became nervous and the customers worried. As a result, the companies decided to introduce party certification of all major suppliers of pigs, and this was subsequently a requirement in the general terms and conditions. The thing called internal audit in the delivery agreements of 2011 was not, however, to be equated therewith. The purpose of the delivery agreements of 2011 was to replace the existing agreements of differing conditions and to establish unified provisions in the contracts with all pig suppliers. The agreements of 2008 and 2010 were to be replaced by the agreement of 2011, which PM understood. PM had no questions on the contents when he signed it. He and PM signed the agreement, but he cannot recall the exact time and place. He knows that PM received an original signed by both parties. They agreed that the agreements would be effective during the entirety of 2011, which is why they ante-dated the agreements to 1 January 2011. Following the signing of the 2011 agreement, the parties have complied with its provisions on payments etc. They did not read the general terms and conditions thoroughly when signing the agreement, but the use of arbitration is customary in the industry and arbitration clauses are generally included in the industry's general terms and conditions. The agreements of 2008 and 2010 between Ugglarps and Öresundsgrisen did not include arbitration clauses, but they were not standard form agreements. The reason that the agreements of 2011 included a provision on when they entered into effect was that these types of agreements are generally not signed at meetings with both parties present, but is rather sent by mail to the suppliers for signing. Hereafter, the suppliers would forward the signed copies to Ugglarps. However, he and PM agreed that the agreements from 2011 would apply as from 1 January 2011. The arbitration clause was not discussed when the agreements were entered, but PM worked as a consultant for other farmers at LRF Konsult, so he was well aware of

similar terms and conditions in the industry. There was no rush in signing the agreements of 2011.

In the event that the case is dismissed Ugglarps has claimed compensation for its litigation costs in the amount of SEK 149,950, all comprising costs for legal counsel. PM has attested an amount of SEK 80,000 as reasonable.

GROUNDS

PM has as the main objection against Ugglarps motion for dismissal maintained that this is not to be deemed as an agreement but as a unilateral confirmation by him that certification has been achieved. This claim has been vehemently disputed by JA, who has explained that the internal audit referred to in the agreement is something entirely different than certification. PM bears the burden to prove that the document called Agreement on delivery of pigs for slaughter is in fact not an agreement. The District Court concludes that PM has not, based on the evidence presented, established that the document, despite its name, is not a contract or agreement.

PM has further maintained that the agreement has not entered into effect between the parties, since it has not been signed by both parties as provided in the agreement. PM has attested that he has signed the agreement, but maintained that he never received a signed original from the counterparty. JA has provided information consistent with that of PM as regards the events that transpired when the parties met to sign the agreement, except concerning the issue of whether both parties signed the agreement. Through PM's and JA's statements it has been established that the question of the entry into force of the agreement was discussed between the parties and that PM wrote the date 1 January 2011 on the agreement documents. JA has also stated that he is certain that both parties signed the agreement at this time. Irrespective of whether the agreement was signed by both parties at the time, the District Court concludes that what has been established concerning the discussion between PM and JA on the date for the entry into force of the agreement shows that the parties agreed on when the agreement should enter into force.

Finally, as grounds for his case PM has maintained that the arbitration clause does not cover claims arisen prior to the time when the agreement in which the arbitration clause is included was entered. As regards this objection, the District Court notes that the agreement provides that it replaces previous agreements between the parties. The District Court concludes that the arbitration clause, through this wording, has come to cover also preceding dealings between the parties.

In light of the above, the District Court finds that it has been established that the agreement from 2011 has entered into effect between the parties Öresundsgrisen and Ugglarps. Since PM was well aware of the contents of the agreement when he acquired the claim from the bankruptcy estate of Öresundsgrisen, the agreement and its arbitration clause is binding also in relation to him. As the arbitration clause constitutes a procedural impediment to review PM's case, the case shall be dismissed.

Upon this outcome PM is liable to compensate Ugglarps' litigation costs in the present case. Nothing has been presented to call into question the reasonableness of the amount claimed by Ugglarp.

HOW TO APPEAL, see appendix 1 (DV 406)

Appeals, addressed to Göta Court of Appeal, shall have been submitted to the District Court by 3 March 2014. Leave to appeal is required.

KA CH MH