

SVEA COURT OF APPEAL
Department 02
Division 020102

JUDGMENT
27 October 2014
Stockholm

Case No.
T 4525-13

CLAIMANT

Ittur Rydebäck AB, Reg. No. 556672-9397
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253 54 Mörarp

Counsel: Advokaten Christian Rasmusson
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RESPONDENT

Södra Timber Aktiebolag, Reg. No. 556004-5998
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MATTER

Challenge of arbitral award made in Stockholm on 7 February 2013

JUDGMENT OF THE COURT OF APPEAL

1. The Court of Appeal rejects the motions of the claimant.
2. Ittur Rydebäck AB is ordered to compensate Södra Timber AB for its litigation costs before the Court of Appeal in the amount of SEK 71,000, plus interest pursuant to Section 6 of the Swedish Interest Act from the day of the judgment of the Court of Appeal until the day of payment. The full amount comprises costs for legal counsel.

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BACKGROUND

On 2 September 2009, Ittur AB and Södra Timber Aktiebolag (Södra Timber) entered into a share purchase agreement through which Södra Timber acquired a parent company, and thereby indirectly six subsidiaries (the acquired companies are hereinafter collectively referred to as Trivselhusgruppen). At the same time, Ittur AB and Södra Timber entered into an agreement granting Ittur AB an option to buy back Trivselhusgruppen. On 17 September 2009, the parties entered into an adjusted option agreement. The latter granted Ittur AB an option to acquire all shares in Trivselhusgruppen from Södra Timber subject to the terms and conditions set out in the so-called contract note. On 15 November 2010, Ittur AB exercised its option. However, the buy-back was never completed. Based hereon, Ittur AB considered it had a claim for compensation for damages against Södra Timber.

Ittur Redibo AB (Ittur Redibo), which had acquired Ittur AB's claim for damages, commenced arbitration proceedings against Södra Timber and moved that the arbitral tribunal should order Södra Timber to pay certain damages because Södra Timber had caused Ittur AB losses by, amongst other things, having provided Ittur AB with unclear and misleading information on certain financial issues, having refused to provide information thereon, having refused to complete the purchase agreement arisen between the parties upon the exercise of the option, and, without cause, having terminated the option agreement, the contract note and the purchase agreement. Södra Timber disputed Ittur Redibo's motions.

The arbitral tribunal, comprised of arbitrators Senior Judge of Appeal GK, chairman, professor JK, and advokat KD, in its arbitral award of 7 February 2013 rejected Ittur Redibo's motions.

Ittur Rydebäck AB (Ittur Rydebäck) has acquired Ittur Redibo's claim for damages.

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MOTIONS ETC.

Ittur Rydebäck has moved that the Court of Appeal shall annul the arbitral award, except for the decisions on allocation of arbitration costs.

Södra Timber has disputed that the arbitral award shall be annulled.

The parties have claimed compensation for litigation costs.

Pursuant to Section 1 of Chapter 53 and item 5 of the first paragraph of Section 18 of Chapter 42 of the Swedish Code of Judicial Procedure the Court of Appeal has decided the case without a main hearing.

THE PARTIES' RESPECTIVE GROUNDS

Ittur Rydebäck

Ittur Rydebäck has maintained that the arbitral tribunal exceeded its mandate and that, without them being caused by Ittur Rydebäck, procedural errors occurred which likely affected the outcome of the challenge proceedings (*sic!*). Ittur Rydebäck has, as far as can be gathered, referenced the following circumstances in support of its challenge.

The arbitral tribunal's review of inadequate provision of information

The arbitral tribunal failed to consider Ittur Redibo's referenced grounds that Södra Timber's provision of information had caused that financing of the buy-back could not be fully finalized and that definitive consent from SEB and Sagax AB could not be procured. Further, the arbitral tribunal did not consider Ittur Redibo's referenced grounds on inadequate provision of information in relation to the SEK 139 million credit. Instead, the arbitral tribunal added circumstances which had not been references by attaching legal importance to information in a letter that had not been referenced to have such importance. Further, the arbitral tribunal disregarded the information provided by Ittur Redibo's witness MK.

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The arbitral tribunal's interpretation of the option agreement

Despite that Södra Timber did not reference any alternative interpretation of the option agreement, the arbitral tribunal concluded that there was no support in the wording "liquidity needs due to operating losses" of the agreement to mean earnings losses in the manner maintained by Ittur Redibo. The arbitral tribunal considered the witness MJ's information as referenced circumstances, which was incorrect since they had not been referenced.

When interpreting the option agreement, the arbitral tribunal did not apply the principle of ambiguity despite that Ittur Redibo had been made to sign provisions negotiated between Södra Timber and Danske Bank. Further, the arbitral tribunal used not referenced interpretation data by considering the fact that Ittur Redibo, pursuant to the contract note, would be responsible to procure that possible shareholder contributions that had increased equity, would be repaid, in support of its conclusion.

When making its interpretation, the arbitral tribunal incorrectly ignored the evidence presented by Ittur Redibo concerning the parties' intent on the contents of the agreement.

The arbitral tribunal's review of claims based on the share purchase agreement

The arbitral tribunal concluded in favor of Södra Timber's claim of SEK 2,221,000 for not referenced or not established warranty defects, but not in favor of Ittur Redibo's counterclaim of SEK 2,500,000 despite the fact that both claims were based on the same share purchase agreement and that both parties referenced only the share purchase agreement, and that it should have been for Södra Timber to establish a continued right to withhold the SEK 2,500,000 constituting its counterclaim.

The arbitral tribunal concluded that "...the issue of payment of the adjusted purchase price had been a non-prioritized issue, which had not had been deemed relevant if the conditions for buy-back had otherwise been at hand"

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(p. 62 of the arbitral award) and thus based its conclusion on circumstances that had not been referenced.

Further, the arbitral tribunal neglected to consider Ittur Redibo's statement and referenced evidence on a settlement of all relations under the share purchase agreement.

The arbitral tribunal's review of the right to withhold

The arbitral tribunal disregarded that Ittur Redibo had maintained that referenced circumstances on the right to withhold were relevant for the application of Section 61 of the Sale of Goods Act.

The arbitral tribunal's review of the losses

The arbitral tribunal did not consider Öhrlings PriceWaterhouseCooper AB's statements or Ittur Redibo's other referenced evidence on the losses maintained in the case.

Södra Timber

Södra Timber has provided the following position on Ittur Rydebäck's challenge.

The arbitral tribunal has not exceeded its mandate and has not committed any procedural errors. If the Court of Appeal would conclude that a procedural error did occur, it has not affected the outcome of the case.

The arbitral tribunal considered the grounds referenced by Ittur Redibo. That the parties' cases are not fully restated in the grounds of the arbitral award does not constitute an error or challenge grounds.

All evidence referenced in the case was considered by the arbitral tribunal. Incorrect evaluation of evidence does not constitute grounds for challenge.

THE PARTIES' FURTHER DETAILS ON THEIR RESPECTIVE CASES

Ittur Rydebäck

The arbitral tribunal's review of inadequate provision of information

As regards inadequate provision of information, the arbitral tribunal stated, amongst other things, that Södra Timber had responded to the requests for information made by Ittur Rydebäck and that the information provided substantively corresponded to the documents requested. The arbitral tribunal did note that on some occasions minor inaccuracies were at hand, but that these inaccuracies had been discovered and corrected before the option was exercised. In this context, the arbitral tribunal disregarded the information provided by Ittur Redibo's witness MK. Further, the arbitral tribunal did not consider the entirely fundamental issues of how the provision of information from Södra Timber had caused that the financing of the buy-back could not be completed in its entirety and whether this incurred liability in the event that the financing Ittur AB had managed to procure was deemed insufficient. As an offshoot the arbitral tribunal did not consider the fact that the lack of such financing negatively affected the possibility of procuring consents from the lender SEB and the property owner Sagax AB in connection with the completion.

As regards inadequate provision of information the arbitral tribunal should also have considered, amongst other things, whether Södra Timber had become liable by not until 3 December 2010 inform that a credit of SEK 139 million fell due for repayment on 15 December 2010. This late information made it impossible to procure consent to the buy-back from SEB. The arbitral tribunal did not consider this, but instead held that the parties "agreed that the repayment of the pledge to SEB was matter between SEB and Ittur". Neither party in the arbitration maintained that such agreement existed. Further, neither party referenced these letters in a legally relevant manner as regards the issue of whether or not Södra Timber's omission rendered it liable for

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losses. Thereby, the arbitral tribunal considered circumstances not referenced by the parties.

The arbitral tribunal's interpretation of the option agreement

The contract note provides that in conjunction with the buy-back certain loans would be repaid on the completion date. The leverage in Trivselhusgruppen had increased substantially following Södra Timber's takeover. The main rule under the option agreement was that Södra Timber was not allowed to increase the leverage. However, an exception was provided in the option agreement for "liquidity needs due to operating losses" which could be covered by increased leverage. The contract note provided that Ittur AB on the completion date would repay only loans that that had been provided in compliance with the option agreement. Ittur Redibo maintained that the increased leverage only to a very small extent had been caused by operating losses, something that was confirmed by CL's witness statement and was also made clear by the documents submitted in the arbitration.

In its arbitral award, the arbitral tribunal concluded that there was no support in the wording that "liquidity needs due to operating losses" related to earnings losses. The arbitral tribunal provided no conclusion on the correct meaning of the agreement. However, it is clear that the increased leverage in was accepted its entirety. Either the arbitral tribunal disregarded the wording "liquidity needs due to operating losses" or the arbitral tribunal concluded that this means something other than accounting or earnings losses, although the referenced e-mails from the negotiations mentioned "losses" as grounds for the permitted borrowing. Södra Timber did not in the arbitration reference any alternative interpretation. Thus, the arbitral award appears to include an interpretation that was not maintained by Södra Timber.

The arbitral tribunal did not apply the principle of ambiguity, despite Ittur AB being made to sign provisions negotiated between Södra Timber and Danske Bank. The arbitral award incorrectly states that the information provided by Södra Timber's witness MJ is the only oral evidence presented in the arbitration on the parties' possible intentions during the agreement

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negotiations. Through JH's witness statement referenced by Ittur Redibo it was made clear how he and thereby Ittur AB understood the wording "liquidity needs due to operating losses", i.e. that it related to liquidity needs due to earnings losses and not liquidity needs in general. Also Ittur Redibo's witnesses MaKn and MK were heard on this issue. As Ittur Redibo also presented oral evidence on this issue it is obvious that the arbitral tribunal neglected it. The arbitral tribunal considered MJ's statements during his witness statement as referenced circumstances, which is incorrect since the circumstances had not been referenced in the arbitration.

Further, the arbitral tribunal held that the conclusion on permitted borrowing is supported by the fact that Ittur AB under the contract note would be obliged to procure that possible shareholder contributions that had increased the equity would be repaid. This had not, however, been referenced as interpretation data concerning the contract note or the phrase "liquidity needs due to operating losses" in the option agreement.

The arbitral tribunal's review of claims based on the share purchase agreement

In the arbitration Södra Timber claimed to have a claim of SEK 2,221,000 against Ittur AB for warranty breaches that were not referenced or established in the case. For its part, Ittur Redibo claimed in this respect to have a counterclaim of SEK 2,500,000 for a portion of the purchase price withheld by Södra Timber. Both claims were based on the contents of a share purchase agreement. The arbitral tribunal found support only for Södra Timber's claim, despite that both parties merely referenced wordings in the share purchase agreement and despite the fact that it should have been for Södra Timber to establish that it was entitled to continue to withhold the SEK 2,500,000. Further, Ittur Redibo maintained that all relations concerning the share purchase agreement had been settled in October of 2010 and referenced evidence hereon.

The arbitral tribunal did not consider the evidence referenced by Ittur Redibo that the parties had entered a settlement concerning the share purchase

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agreement. Instead, the arbitral tribunal stated that in this respect “[I]t must be assumed that the issue of payment of adjusted purchase price had been a non-prioritized issue, which had not had been deemed relevant if the conditions for buy-back had otherwise been at hand.” Neither party had maintained that the payment of the adjusted purchase price and the fact that it had not been disputed was irrelevant in the manner maintained by the arbitral tribunal.

The arbitral tribunal’s review of the right to withhold

In the arbitral award the arbitral tribunal incorrectly stated that Ittur Redibo in the arbitration based its right to withhold on Section 49 of the Sale of Goods Act. The right to withhold was actually explicitly based on Section 61 and the second paragraph of Section 49 of the Sale of Goods Act. The arbitral tribunal appears to maintain that Ittur AB did not have the right to withhold because the contract note included a provision on the consequences in the event Ittur AB failed to fulfill its obligations. The provision on consequences of delays should not be allowed to affect the existence of the right to withhold. The right to withhold deals with the right to withhold an obligation to, amongst other things, avoid sanctions based on delays. Thus, the arbitral tribunal disregarded that Ittur Redibo maintained that the referenced circumstances were relevant for the application of Section 61 of the Sale of Goods Act and therefore did not consider that, which had been referenced.

The arbitral tribunal’s review of the losses

The arbitral tribunal held that Ittur Redibo had failed to establish that Ittur AB had lost any additional value, i.e. the difference between the purchase price and the value of Trivselhusgruppen. The arbitral tribunal dismissed the appraisal performed by PwC and which was the sole appraisal presented in the case. The rationale was that the arbitral tribunal did not accept PwC’s assumptions on price increases and volume as well as volume growth. The price increases were not accepted, despite PwC’s explanations during witness statements, but it remains unclear why. Volume growth was not accepted due to the fact that the index Trähusbarometern and the Swedish National Board of Housing, Building and Planning’s index did not support PwC’s

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assumptions, despite the fact that Södra Timber's expert witness, HL, had stated that no relevance should be attached to Trähusbarometern and that Trivselhusgruppen's annual report for 2010 was very positive. Further, the arbitral tribunal misunderstood PwC's relative appraisal as well as its purpose. It is especially clear that the arbitral tribunal disregarded PwC's comments in the opinion of 12 October 2012, since the arbitral tribunal refers to the opinion in the singular and determined forms.

Because the arbitral tribunal did not accept PwC's opinion, it considered itself authorized to make a fair value appraisal of Trivselhusgruppen. The arbitral tribunal noted that Trivselhusgruppen was basically obliged to enter into liquidation when Södra Timber took over the group in 2009. The arbitral tribunal stated that there was no other prospective purchaser in September of 2009, despite the fact that a witness had stated he was prepared to purchase the group in June of 2009 based on an appraisal of SEK 200 million. For some reason the arbitral tribunal decided to make its appraisal based on September of 2009. The arbitral tribunal disregarded witness statements that the "Södra group" itself had valued just the trademark Trivselhus at SEK 123 million, but deemed a sweeping witness statement claiming that Södra Timber had tried and failed to sell Trivselhusgruppen important. The arbitral tribunal also disregarded that the parties valued Trivselhusgruppen to SEK 800 million and that "Södra companies" then acquired ten percent of the shares for SEK 40 million. Thus, the arbitral tribunal did not at all consider the referenced evidence.

Södra Timber

The arbitral award includes a recital of Ittur Redibo's grounds and its statement of facts. The recital was specifically approved by Ittur Redibo. That the parties' respective cases are not fully recounted in the grounds of the arbitral award does not constitute an error or grounds for challenge. Witness statements do not need to be recounted in the grounds. It is, however, clear from the arbitral award that the arbitral tribunal has considered Ittur Redibo's referenced grounds.

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The arbitral tribunal states which witnesses that were heard. It is undisputed that all evidence referenced in the case was appropriately heard by the arbitral tribunal. The arbitral tribunal considered the oral evidence but concluded that Ittur Redibo had failed to establish its claims.

Ittur Redibo's statement that inadequate information was provided is incomprehensible. Södra Timber's view in the arbitration was throughout that Ittur AB had, as one of two options, to produce a consent from SEB concerning credit and security with SEB. The arbitral tribunal did not state that the parties had entered an agreement in November of 2010, but that the documents presented in the case provide that the parties then agreed on a factual circumstance, namely that it was for Ittur AB to take measures *vis-à-vis* SEB. That the parties agreed is clear from the two letters referenced as documentary evidence in the arbitration.

The arbitral tribunal considered Ittur Redibo's statement that Ittur AB had incurred financial losses but concluded that Ittur Redibo had failed to establish any. This means that the outcome of the arbitration would have been the same irrespective of how the arbitral tribunal had decided and dealt with all the other issues referenced by Ittur Redibo in the arbitration and by Ittur Rydebäck before the Court of Appeal. Ittur Redibo's case would have been rejected and Ittur Rydebäck's challenge shall also be rejected.

THE INVESTIGATION BEFORE THE COURT OF APPEAL

The parties have referenced documentary evidence.

FOUNDATIONS OF THE COURT OF APPEAL

The challenge of the arbitral award

The grounds for challenge referenced by Ittur Rydebäck

Ittur Rydebäck's case in the Court of Appeal takes aim at having the arbitral award annulled because of excess of mandate or procedural errors in the

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arbitration affecting the outcome of the case and that were not caused by Ittur Redibo.

The grounds referenced by Ittur Rydebäck in support of its challenge involve, firstly, that the arbitral tribunal failed to consider all the circumstances referenced by Ittur Redibo in the arbitration, and that the arbitral tribunal considered circumstances that had not been referenced in its decision.

In addition, Ittur Rydebäck has, concerning the arbitral tribunal's interpretation of the option agreement, objected against the arbitral tribunal's failure to interpret the agreement in the manner proposed by Ittur Redibo despite Södra Timber not having proposed an alternative interpretation, that the arbitral tribunal did not apply a particular rule of interpretation and that the arbitral tribunal relied upon interpretation data which had not been referenced.

Ittur Rydebäck has also, concerning the claims based on the share purchase agreement, referenced the fact that the arbitral tribunal did not find support for Ittur Redibo's counterclaim of SEK 2,500,000 despite that Södra Timber, which had the burden of proof, did not present any evidence.

Further, Ittur Rydebäck has maintained that the arbitral tribunal disregarded that circumstances concerning the right to withhold were relevant also to the application of Section 61 of the Sale of Goods Act.

Finally, Ittur Rydebäck has referenced that the arbitral tribunal disregarded, or failed to consider, evidence referenced by Ittur Rydebäck (*sic!*) in the arbitration.

The conclusion of the Court of Appeal

In arbitrations, the starting point is that the arbitral tribunal is bound to make its decision based on the circumstances referenced by the parties (see Government Bill 1998/99:35 p. 143). If the arbitral tribunal bases its decision on a circumstance which has not been referenced it should generally be deemed to have exceeded its mandate, albeit that certain caution should be

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observed in international disputes (Government Bill 1998/99:35 p. 144). In this respect a circumstance is a factual circumstance with immediate relevance for the legal effect, i.e. a legally relevant circumstance. Facts of evidence, on the other hand, need not be referenced in the same manner as legally relevant circumstances (see Lindskog, *Skiljeförfarande*, En kommentar, 2nd ed., p. 722 f.).

The Court of Appeal notes that the now relevant arbitral award includes an account of both the parties' cases in the arbitration as well as a relatively exhaustive account of the arbitral tribunal's considerations of the disputed issues. Not in any of the instances referenced by Ittur Rydebäck has the Court of Appeal been able to find support for the claims that the arbitral tribunal has based its decisions on circumstances, i.e. legally relevant circumstances, which had not been referenced or has neglected to consider any circumstance referenced in the arbitration.

The Court of Appeal's conclusion above includes also the portion of Ittur Rydebäck's challenge concerning the arbitral tribunal's interpretation of the option agreement. The interpretation data against which Ittur Rydebäck has objected against the arbitral tribunal using for the interpretation of the agreement – the fact that Ittur AB under the contract note would be obliged to procure that certain, possible shareholder contributions were repaid – does not in fact constitute a legally relevant circumstance. The arbitral tribunal had to interpret a certain wording in the option agreement in order to determine what had been agreed between the parties in this respect. In this, the agreement document is a fact of evidence, and the interpretation data used by the arbitral tribunal is to be deemed as a supporting fact to assist in determining the meaning of the wording of the agreement (cf. Ekelöf and Boman, *Rättegång* 4, 6th ed., 2004, p. 212). There was nothing to prevent the arbitral tribunal to use this in the interpretation of the agreement in the manner it did. Further, the Court of Appeal finds that the investigation presented in the present case has not established that the arbitral tribunal decided on an interpretation of the agreement which was inconsistent with that which had been maintained by Södra Timber.

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That which has been referenced by Ittur Rydebäck on the arbitral tribunal's failure, when interpreting the agreement, to apply a certain rule of interpretation to the arbitral tribunal's conclusion on Södra Timber's counterclaim of SEK 2,500,000 and to Ittur AB's right to withhold, involve only the arbitral tribunal's conclusions on the merits of the case and can thus not constitute excess of mandate or procedural errors.

Finally, as regards the issue of whether the arbitral tribunal disregarded, or failed to consider, certain evidence referenced by Ittur Redibo in the arbitration, the Court of Appeal notes that the evidence – and this is undisputed between the parties – was presented to the arbitral tribunal. The fact that an arbitral tribunal in its review and evaluation of the evidence does not attach relevance to, or even chooses to disregard, certain evidence forms part of the decisions on the merits and can thus not constitute excess of mandate or procedural errors.

The decision to be reached based on the Court of Appeal's conclusions above on the grounds for challenge referenced by Ittur Rydebäck is that Ittur Rydebäck's challenge shall be rejected.

Litigation costs

Upon this outcome Ittur Rydebäck shall compensate Södra Timber for its litigation costs. The reasonableness of the claimed amount is not disputed.

Appeal

There are no grounds to grant leave for appeal of the Court of Appeal's judgment, second paragraph of Section 43 of the Swedish Arbitration Act (1999:116).

The Court of Appeal's judgment may not be appealed.

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[ILLEGIBLE SIGNATURES]

The decision has been made by: Senior Judge of Appeal CL, and Judges of Appeal UB, reporting Judge of Appeal, and PS.