

SVEA COURT OF APPEAL
Department 02
Division 020104

MINUTES
9 March 2016
Report in Stockholm

Case Document No. 15
Case No. Ö 8635-15

THE COURT

Judge of Appeal UB, former Judge of Appeal ME and Deputy Associate Judge KF,
reporting

REPORTING AND KEEPER OF THE MINUTES

The reporting Judge

APPELANT

Mr. IS

[INFORMATION OMITTED]

Counsel: Jur. kand. Ulf Wiestål
c/o Juristfirman Wiestål AB
Strandvägen 7 B
114 56 Stockholm

COUNTERPARTY

Mr. SM

[INFORMATION OMITTED]

Counsel: Advokat Johan Svahn
Lundblad Svahn Advokatbyrå KB
P.O. Box 55623
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MATTER

Procedural impediment due to arbitration clause

APPEALED DECISION

Decision of Attunda District Court of 17 September 2015 in case No. T 3832-15

Through the appealed decision, the District Court dismissed the respondent's, Mr. IS, objection based on set-off, due to a procedural impediment in the form of an arbitration agreement referenced by Mr. SM.

Mr. IS has moved that the Court of Appeal shall annul the decision of the District Court and remand the case to the District Court for renewed review. He has also claimed compensation for his litigation costs before the Court of Appeal.

In support of his appeal, Mr. IS has maintained mainly as follows. The parties and the two other owners of SND Nordic AB had reached an oral agreement that owners who had paid advances from private funds to cover costs and expenses on behalf of the company should

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SVEA COURT OF APPEAL
Department 02

MINUTES

Ö 8635-15

be compensated out of the private funds of the remaining owners. The agreement does not constitute an ancillary or addendum agreement to the shareholders' agreement, and one part of the agreement was that the arbitration clause of the shareholders' agreement would not apply to disputes concerning expenses covered by the owners' private funds. Mr. IS has contributed private funds to the company in its start-up phase and should not be forced into arbitration proceedings to which he has not agreed. In the event that the Court of Appeal would conclude that the oral agreement falls within the scope of the arbitration clause, there are grounds to adjust it pursuant to Section 36 of the Contracts Act.

Mr. IS has moved that the Court of Appeal shall hold an oral hearing and has, in addition to documentary evidence, referenced oral evidence in the form of testimonies by himself and the witnesses Messrs. JL and JS.

Mr. SM has objected to any amendment of the District Court's decision and has claimed compensation for his litigation costs before the Court of Appeal. He has also objected to the Court of Appeal holding an oral hearing and that oral evidence is heard.

Mr. SM has referenced mainly the same circumstances as before the District Court and added, amongst other things, the following. The arbitration clause forms part of an ordinary shareholders' agreement. The agreement relates to commercial affairs and Mr. IS is not a weaker party. Section 10.2 of the shareholders' agreement explicitly states that that the parties may, under the agreement, agree on ways to finance the company. Agreements on the financing of the company thus falls within the scope of the shareholders' agreement. It is disputed that the parties have agreed that certain payments relating to the shareholding would fall outside the scope of the arbitration clause. Further, Section 23.2 of the shareholders' agreement provides that addenda to the agreement shall be made in writing. There are no grounds to adjust the agreement under Section 36 of the Contracts Act.

Following a report on the case, the Court of Appeal takes the following

DECISION (to be given on 23 March 2016)

1. The Court of Appeal dismisses the oral evidence, in the form of testimonies from himself and Messrs. JL and JS, referenced by Mr. IS.
2. The Court of Appeal rejects the appeal.

3. Mr. IS shall compensate Mr. SM's litigation costs before the Court of Appeal in the amount of SEK 44,375. The entire amount comprises costs for legal counsel. Mr. IS shall also pay interest on the amount pursuant to Section 6 of the Interest Act as from the day of the Court of Appeal's decision until the day of payment.

Grounds for the decision

Section 17 a of Chapter 10 of the Swedish Code of Judicial Procedure and Section 4 of the Swedish Arbitration Act (1999:116) provide that a court may not, upon the objection of a party, review a dispute which according to an arbitration agreement should be resolved by arbitration.

The provisions on arbitration agreements constituting a procedural impediment apply also to a respondent's objection based on a set-off, if the claim for set-off, but not the main claim, falls under the scope of the arbitration agreement (cf. NJA 2013 p. 477).

As the District Court has already noted, Mr. SM has objected in due time by referencing the arbitration agreement. Thus, the decision whether the counterclaim should be dismissed turns on whether the alleged counterclaim falls under the scope of the arbitration agreement.

The Court of Appeal agrees with the District Court's conclusion that the alleged oral agreement on the financing of the company by the owners covering equal parts of expenses paid from private funds is so closely connected to the shareholders' agreement that it falls under the scope thereof (cf. NJA 2007 p. 475 and NJA 2008 p. 120).

With respect to Mr. IS's objection that the parties had orally agreed that the arbitration clause of the shareholders' agreement shall not apply to certain cases, it should be noted that Section 23.2 of the shareholders' agreement provides that amendments and addenda to the agreement must be made in writing and signed by the parties in order to be binding. An alleged oral agreement cannot against this background entail that a dispute falling under the scope of the arbitration clause shall be exempted therefrom, at least not without the consent of all parties.

In the absence of a written agreement that the arbitration clause shall not apply to certain cases, and since Mr. SM does not agree to any deviation therefrom, the Court of Appeal

SVEA COURT OF APPEAL **MINUTES**
Department 02

Ö 8635-15

concludes that the oral evidence referenced by Mr. IS would serve no purpose (item 3 of Section 7 of Chapter 35 of the Swedish Code of Judicial Procedure). Thus, the oral evidence referenced by Mr. IS shall be dismissed. Upon this outcome, it is not necessary to hold an oral hearing before the Court of Appeal to complete the investigation in the case.

Finally, the Court of Appeal notes that nothing has been referenced that would indicate that the matter would not relate to business matters and that the arbitration agreement was entered into between equal parties. There are no grounds to adjust the agreement based on Section 36 of the Contracts Act.

In light of the above the appeal shall be rejected.

As the winning party, Mr. SM is entitled to compensation for his litigation costs. The reasonableness of the claimed amount has been accepted by Mr. IS.

HOW TO APPEAL, see appendix A

Appeals to be submitted by 20 April 2016

[ILLEGIBLE SIGNATURE]

KF

Minutes reviewed/ *[ILLEGIBLE SIGNATURE]*