

SVEA COURT OF APPEAL
Department 02
Division 020102

JUDGMENT
20 June 2016
Stockholm

Case No.
T 6-15

CLAIMANT

Scheme Ltd, company number 8082883
Balfour House, 1st Floor
741 High Road, Finchley
London N12 0BQ,
United Kingdom

Representative: Mr. Abdelhadi Rhiti
Address as above

Counsel: Christer Reinius
c/o Scheme Ltd
P.O. Box 3053,
103 61 Stockholm

RESPONDENT

Mrs. L
[INFORMATION OMITTED]

Counsel: Advokat Erik Lindtorp and advokat Lars Sandberg
Skarp Stockholm Advokatbyrå AB
P.O. Box 7467
103 92 Stockholm

MATTER

Challenge of arbitration award without a decision on the merits (dismissal arbitration award)
rendered in Stockholm on 3 October 2014

JUDGMENT OF THE COURT OF APPEAL

1. The Court of Appeal rejects Scheme Ltd's motions for a stay of the proceedings, order of disclosure and for Mrs. L to provide a statement.
2. The Court of Appeal dismisses the oral evidence and dismisses the documentary evidence concerning the investigation in the arbitration referenced by Scheme Ltd in the present case.
3. The Court of Appeal dismisses Scheme Ltd's motion that the advance on costs in the amount of SEK 500 000 paid by Scheme Ltd to the arbitral tribunal shall be repaid.

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SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 6-15

4. The Court of Appeal rejects the motions of the claimant.

5. Scheme Ltd is ordered to compensate Mrs. L for her litigation costs in the amount of SEK 42 000, of which SEK 8 400 constitutes value added tax, plus interest pursuant to Section 6 of the Swedish Interest Act from the day of the Court of Appeal's judgment until the day of payment.

SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 6-15

BACKGROUND

Scheme Ltd (Scheme) requested arbitration against, amongst others, Mrs. L in July of 2013. The arbitral tribunal comprised arbitrators A, B and C as arbitrators, with Mr. C as chairman. At various occasions the arbitral tribunal decided that the parties should pay a total amount of SEK 1 000 000 as security for the arbitral tribunal's costs.

At a preparatory hearing before the arbitral tribunal in April of 2014, the arbitral tribunal decided that the previously provided security should be increased by SEK 400 000. The amount should be paid to the chairman by 22 April 2014. SEK 200 000 was to be paid by Scheme and the remaining SEK 200,000 was to be paid by Mrs. L. Scheme never paid its share of the additional advance on costs.

Through an arbitration award rendered on 3 October 2014, the arbitral tribunal decided to dismiss the case pursuant to Section 38 of the Swedish Arbitration Act (1999:116) on the grounds that Scheme had failed to pay the additional advance on costs of SEK 200 000. Through the arbitration award, the compensation to the arbitrators was decided. Scheme was ordered to pay the compensation to the arbitrators as well as Mrs. L's litigation costs. The arbitration award is attached hereto as **appendix A**.

The issue of the compensation to the arbitrators is currently subject to review by Stockholm District Court (in case No. T 10896-15).

MOTIONS BEFORE THE COURT OF APPEAL

Scheme has moved that the Court of Appeal shall annul or amend items 1, 4 and 7 of the operative part of the award rendered 3 October 2014 dismissing the arbitration, and that the advance on costs of SEK 500 000 paid by Scheme to the arbitral tribunal shall be repaid to Scheme.

During the administration of the present matter, Scheme has further moved for a stay of the proceedings, and that Mrs. L shall be ordered to submit receipts of the payments she has made to the arbitral tribunal (order for disclosure) and be ordered to state whether she has received any funds after the arbitral tribunal had rendered the award.

Mrs. L has disputed Scheme's motions.

SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 6-15

The parties have claimed compensation for their respective litigation costs, in which context Scheme has attested the amount claimed by Mrs. L.

The case has, 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 been decided without a main hearing.

GROUND

Scheme has referenced the following grounds in support of its case. No review of the merits of the case was made through the arbitration award. The award states that the costs of the arbitral tribunal amounted to SEK 841 463. The advance on costs already paid to the arbitral tribunal were sufficient to carry out a main hearing in the arbitration. Therefore, the arbitral tribunal's decision to dismiss the case based on Section 38 of the Swedish Arbitration Act was incorrect. There were no grounds to dismiss the case.

Mrs. L has referenced the following grounds for disputing the motions. The arbitral tribunal's decision to dismiss the case due to Scheme not having paid the required additional security was correct. The claimant's motions have no legal grounds. Scheme's case is obviously without grounds.

THE PARTIES' FURTHER DETAILS

Scheme has referenced the following in support of its case. Initially, the arbitral tribunal requested an advance of costs in the amount of SEK 200 000 to cover the costs of the arbitration. Mrs. L conducted her case in a way that expanded the dispute and made the reputability of Scheme's representatives the main focus of the case material. Therefore, the arbitral tribunal requested an additional SEK 800 000 which was to be paid in equal parts by the parties. As grounds for the additional SEK 400 000, the arbitral tribunal stated that the taking of oral evidence, requested by Scheme, would take three days and that the costs for these would amount to between SEK 150 000 and SEK 200 000. Scheme subsequently withdrew these testimonies and the case could have been decided on the documents. The award dismissing the arbitration means that the tribunal never resolved the merits of the dispute. The cost of the arbitration was substantially lower than the security received by the arbitral tribunal.

SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 6-15

Mrs. L has referenced the following in support of her case. Neither the testimonies referenced by Scheme nor the parties' testimonies referenced by her had been withdrawn at the time the arbitration award was rendered. The only thing that was withdrawn during the summer of 2014 was Scheme's motion that the evidence should be taken before a court. There are grounds to render a judgment rejecting the motions, since the claimant's motions are unfounded.

THE INVESTIGATION BEFORE THE COURT OF APPEAL

Scheme has, in addition to the evidence referenced by Mrs. L, referenced documentary evidence in the form of the investigation submitted to the arbitral tribunal by the parties. As oral evidence, Scheme has referenced a witness statement by the chairman of the arbitral tribunal.

Mrs. L has referenced the arbitration award, including its appendices, the arbitral tribunal's decision No. 1 concerning the proceedings, the arbitral tribunal's decision to reject Scheme's motion to dismiss certain evidence, an e-mail from Scheme to the arbitral tribunal on 22 July 2014 and the arbitral tribunal's account of its fees.

GROUND OF THE COURT OF APPEAL

Are the claimant's motions without legal grounds or are the claimant's motions obviously without grounds?

The Court of Appeal notes that its review does not relate to the matters submitted for the tribunal's determination, but is limited to whether the tribunal had grounds to dismiss the arbitration. Section 36 of the Swedish Arbitration Act provides that an arbitration award in which the tribunal closes the proceedings without deciding the matters submitted for arbitration may be amended, wholly or partially, upon a party's request. Thus, the claimant's motions are eligible for review by the Court of Appeal. Moreover, the motions are not obviously without grounds.

Shall the arbitration award be annulled or amended?

Section 27 of the Swedish Arbitration Act provides that the matters submitted for arbitration shall be resolved through an arbitration award. If the arbitral tribunal closes the proceedings

SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 6-15

without deciding the issues on their merits, this shall also be done by way of an arbitration award.

The preparatory works of the Swedish Arbitration Act, Government Bill 1998/99:35 p. 153, provide that an award dismissing the arbitration without deciding it on its merits may be reviewed by public courts. This review does not, however, involve a review of the actual matters submitted for arbitration.

The arbitral tribunal closed the proceedings between Scheme and Mrs. L without deciding the matters submitted for arbitration. The arbitration was thus closed through a so-called “dismissal arbitration award” pursuant to Section 36 of the Swedish Arbitration Act.

Section 38 of the said Act governs the arbitrators’ right to request security for their compensation. Section 38 provides that if a party fails to provide the requested security, within the time period determined by the arbitrators, the counterparty may provide the full amount of the required security. If the required security is not provided, the arbitrators may wholly or partially close the proceedings.

Jurisprudence on this matter clarifies that it is for each party to decide whether to pay requested security, but that a party who wishes to have the arbitration completed must accept that the arbitrators are entitled to the security they may request. If the requested security is not provided within the determined time period, the arbitrators are entitled to close the proceedings (see Lindskog, Skiljeförfarande – En kommentar, Nordstedts gula bibliotek, second edition, p. 985 and p. 987).

The Court of Appeal notes that the arbitral tribunal as grounds for closing the proceedings has stated that Scheme on several occasions had failed to provide its part, SEK 200 000, of the additional advance on costs of a total amount of SEK 400 000. The arbitral tribunal also stated that the fees and expenses including value added tax would not be less than SEK 1 400 000. The arbitral tribunal maintained that it had support both in its terms of assignment and in the Swedish Arbitration Act to close the proceedings.

The parties agree that at the time of the dismissal arbitration award they had together paid a total amount of SEK 1 200 000 to the arbitral tribunal, out of the requested SEK 1 400 000. Mrs. L had paid SEK 700 000 and Scheme had paid SEK 500 000. As mentioned above, Section 38 of the Swedish Arbitration Act provides that the arbitrators are entitled to close

SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 6-15

the proceedings if requested security is not provided. In the present case, the arbitrators deemed additional security necessary. The Court of Appeal's conclusion is that this decision is not eligible for the court's review (see Lindskog, *op. cit.*, section 4.1.2 of the commentary to Section 38 of the Swedish Arbitration Act).

As noted above, the compensation to the arbitrators is currently the subject of court review before Stockholm District Court pursuant to Section 41 of the Swedish Arbitration Act. It is the Court of Appeal's opinion that this provision exclusively governs the prerequisites for court review of the arbitrators' compensation. Thus, it is not possible to obtain such a review also within the scope of challenge proceedings.

In light of the above, the Court of Appeal concludes that the arbitral tribunal had grounds to close the arbitration proceedings pursuant to Section 38 of the Swedish Arbitration Act. Thus, there are no grounds to annul or amend the arbitration award because such grounds were not at hand.

Questions relating to the allocation of costs etc. in the arbitration

Section 42 of the Swedish Arbitration Act provides that the arbitrators, upon a party's request, may decide the allocation of the arbitrators' costs between the parties as well as the liability for the counterparty's litigation costs (Lindskog, *op. cit.*, p. 950). The second sentence of the second paragraph of Section 36 of the said Act provides that a party who wishes to challenge that decision may do so through challenge proceedings before public courts pursuant to Section 34 of the Swedish Arbitration Act.

Scheme moves to annul the tribunal's decision that Scheme shall alone be liable for the compensation to the arbitrators, and that the company shall compensate Mrs. L for her litigation costs. The Court of Appeal notes that these circumstances do not constitute grounds for challenge under Section 34 of the Swedish Arbitration Act. Thus, there are no grounds to annul or amend the arbitration award based on what Scheme has referenced in this context.

With respect to Scheme's motion that the advance on costs to the arbitrators shall be repaid, the Court of Appeal notes that there are no legal grounds to review this motion within the scope of the present proceedings, and that this motion thus shall be dismissed.

SVEA COURT OF APPEAL
Department 02

JUDGMENT

T 6-15

Summary of the conclusions of the questions concerning annulment or amendment of the arbitration award

Due to the aforementioned, there are no grounds to annul or amend the arbitration award. Therefore, the claimant's motions related thereto shall be rejected.

Reference of evidence

The parties agree on the amounts which have been paid to the arbitral tribunal. Above, the Court of Appeal has concluded that the arbitral tribunal was entitled to close the proceedings on the grounds that Scheme had failed to pay the requested security. Having regard thereto, the oral evidence as well as the documentary evidence concerning the investigation before the arbitral tribunal referenced by Scheme in the present proceedings is without relevance. Therefore, the evidence shall be dismissed pursuant to item 1 of Section 7 of Chapter 35 of the Swedish Code of Judicial Procedure.

Motion for disclosure and order to provide statement

Scheme has moved that Mrs. L shall be ordered to provide receipts of the payments she has made to the arbitral tribunal (motion for disclosure) and has stated that the documents will show that the arbitral tribunal had security in the amount of SEK 1 200 000. Since the Court of Appeal has concluded that the arbitral tribunal had grounds to dismiss the case due to failure to provide requested security, the Court of Appeal concludes that the documents cannot have any relevance as evidence and there are no grounds to grant the motion for disclosure. Therefore, the motion for disclosure shall be rejected pursuant to Sections 2 and 4 of Chapter 38 of the Swedish Code of Judicial Procedure.

In the present case, Scheme has also moved that Mrs. L shall be ordered to provide a statement whether she, after the arbitral tribunal had given its dismissal arbitration award, has received any of the funds paid to the arbitral tribunal. The Court of Appeal notes that there are no legal grounds to issue such an order. Therefore, the motion shall be rejected.

Motion for a stay of proceedings

Scheme has moved that the present proceedings shall be stayed until Scheme's motion for disclosure in the ongoing case before Stockholm District Court has been decided. In support of its motion for disclosure before the District Court, the company has referenced that the

SVEA COURT OF APPEAL **JUDGMENT**
Department 02

T 6-15

arbitral tribunal has stated that the grounds for the dismissal were that there were insufficient funds to hold the main hearing. Section 5 of Chapter 32 of the Swedish Code of Judicial Procedure provides that the court may stay the proceedings if it is of material importance that an issue subjected for review in another case is decided first. In the Court of Appeal's opinion it is not of material importance for the review of the present case that it is stayed while Stockholm District Court decides on Scheme's motion for disclosure before that court. Therefore, the motion shall be rejected.

Litigation costs

The outcome of the challenge entails that Scheme shall compensate Mrs. L for her litigation costs before the Court of Appeal. The claimed amount is not disputed.

Appeals

The Court of Appeal concludes that the case contains questions for which a review by the Supreme Court is of importance for the guidance of case law. Therefore, the Court of Appeal grants leave to appeal the judgment (see the second paragraph of Section 43 of the Swedish Arbitration Act).

HOW TO APPEAL, see appendix B.

Appeals to be submitted by 18 July 2016

[ILLEGIBLE SIGNATURES]

The decision has been made by: Judges of Appeal CJ and MU, reporting, and Deputy Associate Judge JC.