

SVEA COURT OF APPEAL
Department 02
Division 020106

JUDGMENT
9 March 2017
Stockholm

Case No.
T 1968-16

CLAIMANT

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RESPONDENTS

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MATTER

Challenge of arbitration award rendered in Stockholm on 11 December 2015

JUDGMENT OF THE COURT OF APPEAL

1. The Court of Appeal rejects the claimant's motions.
2. City Säkerhet is ordered to compensate SafeTeam for its litigation costs in the amount of SEK 104 200, of which SEK 100 000 comprises costs for legal counsel, plus interest on the amount pursuant to Section 6 of the Swedish Interest Act from the day of the Court of Appeal's judgment until the day of payment.

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BACKGROUND

On 23 January 2008, City Säkerhet i Stockholm AB (City Säkerhet) and SafeTeam i Sverige AB (SafeTeam) entered into an agreement called "Franchise Agreement". The agreement provided that City Säkerhet could enter into agreements with end customers for the provision of security systems pursuant to SafeTeam's concept. In these cases, City Säkerhet provided the delivery to the end customer but the agreement was entered into in the name of SafeTeam. When an agreement with an end customer had been initiated by City Säkerhet, the company was, as a rule, entitled to compensation from SafeTeam in an amount corresponding to the amount paid by the end customer to SafeTeam less a certain commission due to SafeTeam.

On 27 March 2015, City Säkerhet commenced arbitration against SafeTeam before the Arbitration Institute of the Stockholm Chamber of Commerce (arbitration case No. V [2015/041]). Advokat MJ was appointed as sole arbitrator.

In the arbitration, City Säkerhet claimed compensation for certain deliveries and reimbursement of amounts paid by City Säkerhet to SafeTeam for costs for legal counsel incurred by SafeTeam in relation to a dispute with the customer Mr. A.

SafeTeam admitted liability for deliveries carried out by City Säkerhet, but disputed liability to reimburse the amount concerning costs for legal counsel in the dispute with Mr. A. SafeTeam further objected that it had a counterclaim eligible for set-off against City Säkerhet in an amount exceeding the amount claimed by City Säkerhet. The counterclaim related to SafeTeam's costs for legal counsel in the dispute with Mr. A which had not been paid by City Säkerhet as well as compensation for damages and compensation for the litigation costs, which SafeTeam had been ordered to pay to Mr. A as a result of the dispute.

The arbitration award was rendered on 11 December 2015. The arbitrator concluded, *inter alia*, that City Säkerhet was contractually entitled to instruct SafeTeam to initiate debt collection proceedings for a disputed customer claim and refer the dispute to public courts if the dispute related to an agreement initiated by City Säkerhet and under which the compensation, less the commission to SafeTeam, benefited City Säkerhet. In such cases, SafeTeam was entitled to

compensation from City Säkerhet for collection and litigation costs incurred as a result of the dispute. Against this background, the arbitrator concluded that SafeTeam was entitled to compensation for its litigation costs in the dispute with Mr. A as well as for the amount for which it was held liable in the dispute with Mr. A. Since SafeTeam upon this outcome had a counterclaim against City Säkerhet eligible for set-off, which exceeded the amount claimed by City Säkerhet, the arbitrator rejected City Säkerhet's action.

MOTIONS ETC.

City Säkerhet has moved that the Court of Appeal shall annul the arbitration award in its entirety.

SafeTeam has disputed City Säkerhet's motion.

The parties have claimed compensation for their litigation costs.

The case has been decided without a main hearing.

THE PARTIES' GROUNDS

City Säkerhet

In analysing whether the parties' agreement should be supplemented with an obligation for City Säkerhet to compensate SafeTeam for its collection and litigation costs in the dispute with Mr. A, the arbitrator applied by analogy Sections 4, 14 and 27 of the Act on Commissions (*SW: kommissionslagen* (2009:865)). In the arbitration, SafeTeam had never referenced or even mentioned the provisions set forth in the Act on Commissions. Moreover, SafeTeam had not discussed the relevant provisions. The requirements of Sections 4, 14 and 27 constitute legally relevant circumstances upon which the arbitrator was not entitled to base his decision without them having been referenced by SafeTeam. By basing his conclusions on circumstances which had not been referenced by SafeTeam the arbitrator exceeded his mandate. Therefore, the arbitration award shall be annulled pursuant to item 2 of the first paragraph of Section 34 of the Arbitration Act (1999:116).

Prior to rendering his decision, the arbitrator failed to inform the parties that he considered taking the provisions of the Act on Commissions into consideration and applying them analogously. The requirement that the arbitrator shall offer the parties the opportunity to present its arguments prior to deciding the dispute is even more stringent when an analogous application is being considered. Any analogous application of the law entails considerable difficulty for the parties, prior to the decision having been given, to predict such an application and make its arguments concerning the applicability of the provision. This failure of the arbitrator constitutes a procedural error which likely affected the outcome of the arbitration. Therefore, the arbitration award shall be annulled pursuant to item 6 of the first paragraph of Section 34 of the Arbitration Act.

SafeTeam

The arbitrator concluded, as SafeTeam had argued, that the agreement should be supplemented with an obligation for City Säkerhet to compensate SafeTeam for its collection and litigation costs in the dispute with Mr. A. He based this conclusion both on an analogous application of the Act on Commissions *and* on an analysis of what would be a reasonable and prudent interpretation of the contract. This involves a legal assessment of the referenced legal facts. Thus, the arbitrator has not considered any circumstance which had not been referenced by SafeTeam in his conclusion. Therefore, he has not exceeded his mandate.

The arbitrator was entitled and obliged to apply the provisions of the Act on Commissions irrespective of whether they had been referenced by a party. The failure of the arbitrator to inform the parties in advance of the provisions of the law upon which he intended to base his decision does therefore not constitute any excess of his mandate. Even if the failure would constitute a procedural error, it has likely not affected the outcome of the arbitration, since the arbitrator found support for his conclusions on the contents of the agreement through his interpretation thereof.

THE INVESTIGATION

SafeTeam has referenced certain documentary evidence. City Säkerhet has not referenced any evidence.

GROUNDS

General starting points

Item 2 of the first paragraph of Section 34 of the Arbitration Act provides that an arbitration award shall be annulled if the arbitrators have exceeded their mandate. The arbitrators shall be deemed to have exceeded their mandate if they have based their decision on a circumstance which had not been referenced by a party. Thus, the starting point is that the arbitrators are obliged to resolve the dispute based on the circumstances (legal facts) that the parties have referenced in support of their respective cases (see Government Bill 1998/99:35 p. 145). However, pursuant to the principle of *jura novit curia*, the arbitrators are not bound by the parties' legal arguments, but are free to decide which provisions of the law that apply based on the referenced legal facts. Thus, the arbitrators shall not be considered to have exceeded their mandate if they applied a provision of the law to the circumstances referenced by the parties in support of their respective cases, even if neither of the parties had referenced the relevant legal provision (see Government Bill 1998/99:35 p. 145 f.).

If the arbitrators consider applying a legal provision that has not been referenced by either party, reasons may exist for the arbitrator to bring this to the parties' attention within the framework of procedural guidance, so as to avoid surprises (see Government Bill 1998/99:35 p. 120 and 146). The question whether insufficient procedural guidance could constitute grounds for challenge has been discussed in the jurisprudence. It has been argued that a party that was caught off guard as a result of insufficient procedural guidance should be allowed to challenge the arbitration award on the grounds that a procedural error occurred which, pursuant to item 6 of the first paragraph of Section 34 of the Arbitration Act should entail the annulment of the arbitration award, if the procedural error likely affected the outcome of the arbitration (see Lindskog, Skiljeförfarande. En kommentar, Zeteo,

May 2016, the commentary to Section 34, section 5.2.7). The arbitration award should only be annulled if the challenging party justifiably argues that it was not given a proper opportunity to argue its position in respect of the applicability of the relevant provision (see Lindskog, *op. cit.*, the commentary to Section 34, section 5.2.7 and footnote 215, cf. Heuman, *Skiljemannarätt*, 1999, p. 341).

Did the arbitrator exceed his mandate?

First, the Court of Appeal will decide whether the arbitrator exceeded his mandate by considering legal facts that had not been referenced by SafeTeam.

The arbitration concerned, *inter alia*, what the agreement provided with respect to litigation costs incurred by SafeTeam in a dispute relating to a contract entered into in SafeTeam's name, but which had been initiated and carried out by City Säkerhet.

According to the arbitration award, SafeTeam maintained that the parties' agreement, by way of supplementation, provided that SafeTeam was entitled to compensation for litigation costs incurred to protect the interests of City Säkerhet, and where City Säkerhet had decided to open collection and to open litigation.

The Court of Appeal concludes that City Säkerhet has not shown that the arbitrator based his conclusion that the agreement should be supplemented on any legal facts other than those referenced by SafeTeam in support of its case. The fact that the arbitrator has applied by analogy the provisions of the Act on Commissions does not mean that the arbitrator exceeded his mandate. It is irrelevant whether the parties had presented arguments concerning the provisions or not. Thus, the arbitrator has not exceeded his mandate.

Did a procedural error occur?

The Court of Appeal will now proceed to determine whether the arbitrator failed to properly guide the proceedings by not informing the parties that he might supplement their agreement with an analogous application of the Act on Commissions.

As previously stated, SafeTeam maintained that the agreement should be supplemented in a certain manner. It is evident from the arbitration award that City Säkerhet's position was that such supplementation should not be made. The Court of Appeal concludes that City Säkerhet in the arbitration had the opportunity to argue its position on the supplementation of the agreement. The Court of Appeal further notes that it is commonplace, when an explicit provision is not set forth in an agreement, that supplementation is made by way of analogous application of dispositive legal provisions (see, e.g., NJA 1999 p. 629). In consideration hereof, the Court of Appeal concludes that City Säkerhet cannot have been caught off guard by the arbitrator's analogous application of the Act on Commissions, even if SafeTeam had not referenced the relevant provisions. Therefore, the arbitrator cannot be deemed to have failed to properly guide the proceedings. Thus, no procedural error has occurred.

In view of the foregoing, the claimant's motions shall be rejected.

Litigation costs

Upon this outcome, City Säkerhet shall be ordered to compensate SafeTeam for its litigation costs. SafeTeam has claimed compensation in the amount of SEK 128 400, of which SEK 120 000 concerns costs for legal counsel, and SEK 8 400 concerns time spent. City Säkerhet has attested the amount SEK 60 000 for legal counsel as reasonable as such.

The Court of Appeal has decided the case without a main hearing. The parties' exchange of written submissions and the referenced evidence has been rather limited. In view of the foregoing, the amount for legal counsel claimed by SafeTeam appears too high. SafeTeam's argument that it has incurred additional work because it was represented by other counsel in the arbitration does make the claimed amount reasonable. Taking into account the limited scope of the case, the amount claimed for SafeTeam's time spent cannot be deemed justified to protect its interests. The Court of Appeal concludes that a reasonable compensation amount is SEK 100 000 for legal counsel and SEK 4 200 for time spent.

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Appeals

The second paragraph of Section 43 of the Swedish Arbitration Act provides that the judgment of the Court of Appeal may be appealed only if the Court finds that it is of importance for the development of case-law that an appeal is reviewed by the Supreme Court. The Court of Appeal finds no reason to grant leave to appeal.

The judgment of the Court of Appeal may not be appealed.

The decision has been made by: Senior Judge of Appeal PC, and Judges of Appeal KB (reporting) and KN.