

SVEA COURT OF APPEAL
Department 02
Division 020108

JUDGMENT
30 May 2017
Stockholm

Case No. 65
T 6335-16

CLAIMANT

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RESPONDENTS

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MATTER

Challenge of arbitration award given in Stockholm on 22 June 2016, as corrected on the same day

JUDGMENT OF THE COURT OF APPEAL

1. The Court of Appeal rejects the claimant's action.
2. BTH Bygg Aktiebolag is ordered to compensate Surmonte Invest AB for its litigation costs in the amount of SEK 74,640, all comprising 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

BTH Bygg Aktiebolag (BTH) is a construction company, and a member of a group of companies, with Unikaboxen AB (Unikaboxen) as parent company. Unikaboxen is owned by Messrs. L and N. Surmonte Invest AB (Surmonte) is a consultancy owned by Mr. S.

In November of 2013, BTH and Surmonte entered into a consulting agreement stating that Mr. S would serve as BTH's managing director. On 3 August 2015, Surmonte terminated the consulting agreement with effect as of 31 December 2015. Thereafter, the parties entered negotiations for the purpose of reaching an agreement for the forms of the cooperation for the remainder of the agreement period. The parties disagreed on Surmonte's obligation to perform services and BTH's obligation to make payments under the consulting agreement for the remainder of the agreement period. The parties failed to reach an agreement. Surmonte terminated the consulting agreement with immediate effect on 3 November 2015 following BTH having suspended its payments under the agreement.

In February of 2016, Surmonte commenced expedited arbitration proceedings against BTH claiming, amongst other things, payment under the consulting agreement as well as compensation for losses. BTH disputed liability and moved, for its part, that Surmonte should be ordered to reimburse a certain amount. Surmonte disputed BTH's motion. The arbitration rules of the Arbitration Institute of the Stockholm Chamber of Commerce applied to the arbitration. Senior Judge W served as sole arbitrator.

The arbitral tribunal rendered its arbitration award on 22 June 2016, and provided a correction on the same day in case No. F (2016/018).

MOTIONS ETC.

BTH has moved that the Court of Appeal shall annul items 1a, 1b, 3, 5 and 6 of the operative part of the arbitration award.

Surmonte has disputed the annulment of any part of the arbitration award.

The parties have claimed compensation for their litigation costs.

The case has been decided without a main hearing 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 PARTIES' GROUNDS

BTH

The circumstance that the parties at the meeting on 17 August 2015 agreed that Mr. S would be relieved of his duties was not referenced by either party in the arbitration. The arbitral tribunal, which concluded that an agreement had been reached on 17 August 2015, thus based its decision on a circumstance which had never been referenced by a party. Thereby, the arbitral tribunal exceeded its mandate, item 2 of the first paragraph of Section 34 of the Arbitration Act (1999:116).

The arbitral tribunal's excess of its mandate has entailed, first, that BTH was deprived of the opportunity to argue its position as to whether the parties had reached an agreement and, second, that the arbitral tribunal did not review the issue of whether BTH was permitted to unilaterally revoke its notice to relieve Mr. S of his duties. The arbitral tribunal's excess of its mandate directly affected the outcome of the arbitration such that BTH lost the portion of the arbitration which concerned the right to remuneration and compensation for losses during the notice period, and also in respect of the litigation costs and the allocation of costs for the arbitration.

Surmonte

The arbitral tribunal did not base its decision on any circumstance which had not been referenced by a party. First, the arbitral tribunal noted that BTH at the meeting on 17 August 2015 completely relieved Mr. S of his duties. Thereafter, the arbitral tribunal noted in its review of the issue of whether BTH had revoked its relief of

Mr. S of his duties that the parties had reached an agreement on this issue. The arbitral tribunal's interpretation and conclusion is the legal review by the arbitral tribunal of the circumstances which had been referenced in the arbitration. That an agreement had been reached was the arbitral tribunal's legal labelling in the circumstances. Thus, the arbitral tribunal did not exceed its mandate.

In the event that the Court of Appeal would conclude that the arbitral tribunal based its decision on a circumstance which had not been referenced, this nevertheless did not affect the outcome of the arbitration. Irrespective of whether the arbitral tribunal had labelled its legal reasoning as an agreement or that Mr. S did not object to BTH's notification on the relief of his duties, and that the remainder of the provisions of the consulting agreement would continue to apply unless otherwise agreed, the outcome of the arbitration would have been the same. Further, BTH has not been deprived of the opportunity to argue the issue of the unilateral revocation of the relief of Mr. S of his duties, since that circumstance was raised as an alternative objection by BTH in the arbitration.

THE PARTIES' FURTHER GROUNDS

BTH

In the arbitration, BTH was of the opinion that Mr. S had been relieved of his appointment as managing director, but that he should remain at the full time disposal of BTH for the remainder of the agreement period. Surmonte, on the other hand, argued that Mr. S had been relieved of his duties and was not obliged to perform any services for BTH during the remainder of the agreement period. BTH objected that if the notice on 17 August 2015 should be deemed as a relief of duty, then this had been revoked per the e-mail of 27 August 2015.

In its request for arbitration, Surmonte argued that the owners of BTH at the meeting on 17 August 2015 had relieved Mr. S of all his duties with immediate effect and that such an action is legally binding, and not subject to unilateral revocation.

In Surmonte's second submission in the arbitration, it argued that by relieving Mr. S of his duties BTH had put itself in a certain position, and that the message to Mr. S was that he was relieved of all his duties. In this submission, Surmonte did not provide any grounds for why a revocation of a notice that someone has been relieved of his duties in the relevant situation would not be possible.

In its statement of evidence, Surmonte informed that the witness statement of Mr. S would establish that BTH's representatives had unilaterally relieved him of all his duties with immediate effect at the meeting on 17 August 2015. Surmonte referenced the e-mail which was sent to employees of BTH on 17 August 2015 as evidence to establish the same circumstances as Mr. S's witness statement.

In its opening statement, Surmonte again asserted that a unilateral relief of duty cannot be revoked, and added that any revocation would have required a mutual agreement. In its closing statement, Surmonte argued that the statement at the meeting on 17 August 2015 constituted an unconditional relief of duties.

Thereafter, Surmonte presented arguments concerning basic contract law and the concepts of offer and acceptance and stated that BTH by its actions and written statements had relieved Mr. S of his duties. In addition, Surmonte argued that the e-mail to its employees of 17 August 2015 had been prepared prior to the meeting and that this should be deemed to constitute an offer and that Mr. S by accepting it had bound BTH to the offer.

On page 6 of the arbitration award, the arbitral tribunal has stated Surmonte's grounds as follows: *BTH relieved Mr. S of all his duties with immediate effect on 17 August 2015. BTH's notice and its actions and Mr. S's acceptance thereof entail that the parties have reached an agreement on this day to the effect that Mr. S was relieved of his duties. Further, the actions can be deemed as a notice from BTH, which is a binding unilateral legal action which cannot be revoked.*

The arbitral tribunal's account of Surmonte's grounds in the arbitration award does not coincide with the grounds and circumstances Surmonte had referenced and stated in its submissions or at the main hearing. BTH understood Surmonte's arguments concerning offer and acceptance as legal arguments, and not as

circumstances being referenced by Surmonte. Even if Surmonte is deemed to have referenced the reasoning concerning offer and acceptance in the arbitration, this was entirely and exclusively related to the e-mail of 17 August 2015. Moreover, Surmonte has not provided any account for when such an agreement was asserted to have been reached.

Further, the arbitral tribunal has incorrectly on page 19 of the arbitration award stated that Surmonte had maintained that the parties on 17 August 2015 had reached an agreement to the effect that Mr. S had been relieved of his duties or that BTH had unilaterally decided so.

Surmonte

With respect to the parties' references at the main hearing on 17 May 2016, Surmonte in its closing statement argued the legally binding nature of a party's actions and drew parallels to both the Swedish Contracts Act and the Employment Protection Act. Surmonte's argument was that an offeror by his implicit actions becomes unilaterally bound to agreements of certain contents already by the counterparty's receipt of the offer. In this respect, Surmonte highlighted that the binding effect – the agreement – arises as of the recipient's acceptance – in this case by Mr. S's acceptance of the relief of his duties.

On page 21 of the arbitration award, the arbitral tribunal concluded that BTH at the meeting on 17 August 2015 had relieved Mr. S of all his duties. Thereafter, the arbitral tribunal on page 22 of the arbitration award reviewed BTH's objection that it in any event had revoked its notice on 27 August 2015. Here, the arbitral tribunal concluded that the parties would have had to reach a new agreement concerning the relief of Mr. S of his duties in order to not be bound by the existing agreement which provided that he had been relieved.

BTH has not been deprived of the opportunity to argue the issue of a unilateral revocation of the relief of duty. In its first submission in the arbitration, BTH argued that in the event that the notice of 17 August 2015 should be understood as a relief of duties, there are no grounds that such a notice could not be unilaterally

revoked. This is recounted on page 17 under heading “*Further details on BTH’s grounds*” of the arbitration award.

THE INVESTIGATION

The parties have not referenced any evidence.

FOUNDATIONS

General starting points

An arbitration award shall be annulled if the arbitrators have exceeded their mandate (item 2 of the first paragraph of Section 34 of the Arbitration Act). 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) which the parties have referenced in support of their respective cases (see Government Bill 1998/99:35 p. 145).

Did the arbitral tribunal exceed its mandate?

BTH has maintained that the arbitral tribunal’s conclusions in the arbitration award were based on the circumstance that the parties at the meeting on 17 August 2015 had reached an agreement to the effect that Mr. S was relieved of his duties and that this circumstance had not been referenced. In addition, BTH has maintained that the arbitral tribunal incorrectly stated in the arbitral award that Surmonte had referenced this as grounds for its action. Surmonte has disputed that the arbitral tribunal based its decision on any circumstance which had not been referenced by the parties.

In general, it is the challenging party who bears the burden of proof for the circumstances serving as grounds for its challenge (Heuman, *Skiljemannarätt*, 1999, p. 591). Thus, BTH bears the burden to establish that the relevant circumstance – that the parties agreed to relieve Mr. S of his duties on 17 August 2015 – had not been referenced by Surmonte in the arbitration and that the arbitral tribunal

incorrectly stated in the arbitration award that the circumstance had in fact been referenced by Surmonte.

The Court of Appeal concludes that BTH's statements and references concerning how Surmonte argued its case during the preparatory stages of the arbitration as such could indicate that the relevant circumstance had not been referenced.

However, the Court of Appeal notes that there was a main hearing in the arbitration and that it has been noted on page 6 of the arbitration award that Surmonte as grounds for its case has referenced that "BTH's notice and actions and Mr. S's acceptance thereof entailed that the parties on that day agreed that Mr. S had been relieved of his duties". BTH has not, against Surmonte's denial, referenced any evidence before the Court of Appeal in support of its assertion that the circumstance was never referenced in the arbitration and has thus failed to establish that the circumstance had not been referenced. Upon this conclusion, the Court of Appeal must proceed based on what has been stated in the arbitration award concerning Surmonte's case in the arbitration. Therefore, the Court of Appeal must also conclude that it has not been established that the arbitral tribunal exceeded its mandate. Thus, BTH's motion is rejected.

Litigation costs

Upon this outcome, BTH is ordered to compensate Surmonte for its litigation costs. The claimed amount is reasonable.

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: Judges of Appeal UB, KN (reporting) and GS.