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JUDGEMENT of the

SWEDISH SUPREME COURT

given in Stockholm on 30 April 2019

Case No.
T 796-18

PARTIES

Appellant

NeuroVive Pharmaceutical AB, 556595-6538
Medicon Village
223 81 Lund

Counsel: Attorneys SD, AP and SW

Counterparty

CicloMulsion AG
Karl-Seckinger-Str. 25
D-76229 Karlsruhe
Germany

Counsel: Attorney BG

MATTER

Challenge of arbitral award

APPEALED JUDGMENT

The Scania and Blekinge Court of Appeal's judgment of 12 January 2018 in Case No. T 2131-16

SUPREME COURT
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JUDGMENT OF THE SUPREME COURT

The Supreme Court rejects the appeal.

NeuroVive Pharmaceutical AB shall compensate CicloMulsion AG for litigation costs before the Supreme Court in the amount of SEK 531,899, of which SEK 510,480 are costs for legal counsel, and in the amount of EUR 20,187, plus interest as from the day of this judgment.

MOTIONS BEFORE THE SUPREME COURT

NeuroVive Pharmaceutical AB has moved that the Supreme Court, by amending the Court of Appeal's judgment, shall set aside the arbitral award with regard to items 2 a) and 5 in the award.

In addition, NeuroVive has moved that the Supreme Court rejects CicloMulsion AG's claim for compensation for litigation costs before the Court of Appeal, and instead order CicloMulsion to compensate NeuroVive for its litigation costs before the Court of Appeal.

CicloMulsion has contested NeuroVive's motions.

The parties have claimed compensation for their litigation costs before the Supreme Court.

REASONING OF THE SUPREME COURT

The questions before the Supreme Court

1. The case concerns the question whether an alleged procedural error constitutes ground to set aside an arbitral award. Especially, the relevance of the requirement that the error must have likely affected the outcome of the case.

Background

Introduction

2. In 2004, CicloMulsion and NeuroVive entered into a license agreement which granted the latter company an exclusive license to a certain

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pharmaceutical. In addition, NeuroVive had the possibility to acquire the rights of the pharmaceutical under the agreement by making a payment of a fixed sum and then pay royalties in a certain way. This purchase option was exercised by NeuroVive in 2010. The agreement contains an arbitration clause which refers to the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Arbitration Rules 2010).

3. In March 2013, CicloMulsion requested arbitration. One of the main issues in the arbitration related to the interpretation of item 4 of the license agreement, which was the item that regulated NeuroVive's obligation to pay royalties to CicloMulsion. On 25 May 2016, the arbitral tribunal rendered a partial award which, *inter alia*, dealt with that issue.

4. Both parties challenged the arbitral award. In those parts that are of interest in the Supreme Court, CicloMulsion invoked that procedural errors had been made which affected the outcome of the case and to which CicloMuslion had not contributed.

The alleged procedural error

5. During the arbitration, and after exchange of some submissions by the parties had taken place, the arbitral tribunal issued a procedural order, Procedural Order no. 10 (hereinafter "the Procedural Order"), which, *inter alia*, in item A (5) contained a position in relation to the parties' intention with item 4 of the license agreement. This position meant that CicloMulsion's right to the royalties in relation to a certain country was not conditioned by a launch of the pharmaceutical in the country.

6. Further, in item A (1) and A (7) in the Procedural Order, it was stated that the position in relation to the intention of the parties in that part was final. It was also stated that the arbitral tribunal would not deviate from the position in relation to the intention of the parties without informing the parties in

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advance and providing them with an opportunity to comment on the issue. The tribunal did however reserve the right to resume this part of the proceedings.

7. During the following exchange of submissions regarding the remaining parts of the case, NeuroVive nevertheless did touch upon the issue regarding the parties' intention in item 4 of the license agreement. CicloMulsion was given the opportunity to comment on what NeuroVive had submitted in its submission. The arbitral tribunal did not inform the parties that it considered to change its position from the Procedural Order.

8. In the partial award, which was rendered almost two years after the Procedural Order was made, the arbitral tribunal concluded that the calculation of CicloMulsion's royalties was to be based also on payments that had been made prior to a launch, but that the right to the payment was conditioned by the fact that a launch eventually was made in the countries.

9. In its challenge application, CicloMulsion claimed that the arbitral tribunal had committed a procedural error. According to the company, the arbitral tribunal had, contrary to its initial position in the Procedural Order, made the right to the royalties conditioned upon an initial launch. This had occurred without the arbitral tribunal informing the parties in advance, which, according to the company, was a violation of the procedural rule that the arbitral tribunal had decided in the Procedural Order. CicloMulsion referred to a decision by the arbitral tribunal, which was made after the partial award, in which the tribunal had expressed regret that it had not followed the rule in the Procedural Order.

The Court of Appeal's assessment

10. The Court of Appeal has found that the arbitral tribunal has deviated from its position in the Procedural Order without complying with the

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procedural steps specified by the tribunal. In doing so, CicloMulsion has been denied the right to argue its case to a reasonable extent. According to the Court of Appeal, this has constituted a procedural error which was not caused by CicloMulsion, and which likely has affected the outcome. The Court of Appeal has as a consequence of CicloMulsion's challenge set aside the arbitral award in part, specifically items 1, 2 a), 3 and 4.

NeuroVive's appeal

11. NeuroVive has – with the exception of one item in the arbitral award, item 2 a), which also according to NeuroVive's challenge application was to be set aside – appealed the judgment by the Court of Appeal in relation to those parts which approve the challenge application by CicloMulsion. NeuroVive has alleged that no procedural errors have been made in relation to the parts in question and that the prerequisites to set aside the arbitral award, in any event, are not met.

Legal starting points

12. An arbitral award shall be set aside in part or in total after a challenge application from a party, if, *inter alia*, a procedural error has occurred, without the fault of the party, which is likely to have affected the outcome (the Swedish Arbitration Act 1999:116 as read before 1 March 2019, Section 34, paragraph 1, item 6).

13. The provision has the character of a general clause and aims to capture procedural errors which should be basis for challenge. It is intended to be applied restrictively (see Government Bill 1998/99:35 p. 147 f.).

14. An arbitral tribunal has vast possibilities to adapt the conduct of an arbitration in line with the nature of the dispute and the requests by the parties. However, the proceedings must satisfy reasonable requirements of rule of law and provide the parties with adequate opportunity to argue their

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cases. Therefore, the parties must be treated in an impartial way and the proceedings must be transparent and reasonable predictable for the parties.

15. The requirement that the error must likely have affected the outcome has narrowed the scope of the provision to errors that are substantive. It is not sufficient that there is a considerable possibility that the error has affected the outcome, instead it is required that there is a tangible connection between the error and the outcome. In order for an error to be basis for a challenge, it is further presumed that it must be of reasonable importance to the challenging party. (See Government Bill 1998/99:35 p. 148 and “Belgor”, the Swedish Supreme Court’s judgment on 20 March 2019 in Case no. T 5437-17 para. 31 and 32.)

16. As a starting point, the assessment of whether the prerequisite of the error having affected the outcome is fulfilled may be made by comparing the faulty conduct with a hypothetical correct conduct. The prerequisite is met if it is likely that the outcome had been different with a correct conduct.

17. In some cases, the procedural error is of such nature that a comparison of this kind cannot be done. In the legal doctrine it has been stated that the assessment of the requirement of the error having affected the outcome should be made in different ways depending on the type of the error and that the assessment, when dealing with errors that are of a more serious art, should be made in a standardized way or that a connection is presumed (compare Lars Heuman, Skiljemannarätt, 1999, p. 637 ff. and Stefan Lindskog, Skiljeförfarande, 2nd ed. 2012, p. 890 ff.; compare also Bengt Lindell, Alternativ tvistlösning, 2000, p. 209).

18. The approach in the legal doctrine has its paragon from the application of the rules regarding procedural errors in the Swedish Code of Judicial Procedure, which may be deemed to have certain support in case law. In the case “Soyak” NJA 2009 p. 128, the Swedish Supreme Court stated that, in the

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event of a serious procedural error, consisting of the lack of legal reasoning for a decision contrary to the applicable arbitration rules, it may be presumed that the error has been significant to the outcome (compare also NJA 1965 p. 384).

19. A presumption that an error has affected the outcome may be justified by the fact that certain errors are of the kind that it is difficult to show that they have affected the outcome of the case, and at the same time they entail that it may be seriously questionable whether the proceeding has been acceptable or not. This may be the case, e.g., when there is a complete lack of reasoning for the decision, as well as when the deliberation has been conducted between two arbitrators only, or if one of the parties has not been given reasonable opportunity to argue its case (compare Lindskog, op. cit., p. 894).

20. The restrictiveness that is intended to characterize the application results in a threshold that should be relatively high, in order to apply a presumption. This means that the application of a presumption of a connection between an error and the outcome of the case cannot be done in the same extent when it is a matter concerning challenge of an arbitral award as when it concerns the meaning of a procedural error under the rules of the Swedish Code of Judicial Procedure.

The assessment in this case

The arbitral tribunal has deviated from its position in the Procedural Order

21. The position in the Procedural Order does provide some room for interpretation. However, it is clear from the memorandum which led up to the decision that the arbitral tribunal had considered three different interpretations and had decided in favor of the one which corresponds with CicloMulsion’s perception.

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> ”the Arbitral Tribunal agrees with Claimant's reading of Art. 4.1. of the LA that – in spite of the imprecise wording in the first paragraph of Art. 4.1. referring to 'a period of 15 (fifteen) years after the date of the first launch' – the Parties' true intent was to fix solely an end date for any payments to CM, but not a) to exclude payments received prior to the launch of a product or b) to condition the sharing of payments upon a future launch.”

22. The conclusions by the arbitral tribunal in the arbitral award mean that the tribunal has deviated from its position in the Procedural Order.

Deviating from the position without informing the parties in advance constitutes a procedural error

23. According to item A (7) in the Procedural Order, the arbitral tribunal would, if it found reasons to deviate from the position that had been set out in the decision, inform the parties and provide them with an opportunity to submit comments. It is undisputed that the arbitral tribunal has not informed the parties about the fact that it intended to deviate from its position in item A (5) in the Procedural Order. Merely the fact that NeuroVive has continued to argue the issue in one of its submissions after the Procedural Order, and that CicloMulsion has been given the opportunity to comment on NeuroVive's submission, cannot be considered to lead to the result that the arbitral tribunal has obeyed the order of procedure that the tribunal has decided in item A (7). Therefore, a procedural error exists.

CicloMulsion has not caused the error

24. The procedural error consists primarily of the fact that the arbitral tribunal has not informed the parties that it could have reasons to deviate from its position in the Procedural Order. CicloMulsion cannot be deemed to have been at cause for this error. The conclusion is the same if the procedural error consists of the arbitral tribunal deviating from its position in the Procedural Order when rendering the award without informing the parties in advance.

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The error has likely affected the outcome

25. The procedural error has in this case meant that CicloMulsion has been deprived of the opportunity to fully argue its case in relation to the issue at hand. However, this is not the only circumstance to consider when determining whether it is likely that the error has affected the outcome or not. Considerations must also be given to the fact that CicloMulsion, from the time of the Procedural Order until being informed by the arbitral tribunal, has been entitled to assume that issue in question would not in any way be subject to a new assessment by the arbitral tribunal. In practice, the conduct of the proceedings has meant that the arbitral tribunal has determined a question which, with respect to the development of the proceedings, could with good reasons be presumed to have been finally determined.

26. The error means that important principles of legal security have been disregarded. This, together with the fact that the investigation supports the conclusion that CicloMulsion – if the company would have known that the issue would be re-examined by the arbitral tribunal – would have further argued its case, gives reasons to presume that the error has affected the outcome.

27. Consequently, the appeal shall be rejected.

Litigation costs

28. Upon this outcome, NeuroVive shall compensate CicloMulsion for its litigation costs before the Supreme Court. The claimed amounts are reasonable.

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The judgment has been made by: Supreme Court Justices AE, A-CL, SA, PA (reporting Justice) and MB.

Reporting clerk: LS