

SVEA COURT OF APPEAL
Department 02
Division 020104

JUDGMENT
16 October 2018
Stockholm

Case No.
T 6862-17

APPEALED DECISION

Stockholm District Court's judgment of 19 June 2017 in case no. T 10361-14, see appendix A

PARTIES

Appellant

Australian Media Properties Pty Ltd, 69 131 184 408
c/o Brown Charman Shaw Pty Ltd.
Att: Mrs Elizabeth Charman
P.O. Box 1905
Hornsby Westfield NSW 1635
Australia

Counsel: Mr. C

[INFORMATION OMITTED]

Counterparty

Mr. R

[INFORMATION OMITTED]

Counsel: Advokat Anders Kylhammar and jur. kand. Sara Yng
Sandart & Partners Advokatbyrå KB
P.O. Box 7131
103 87 Stockholm

MATTER

Reduction of compensation to an arbitrator

JUDGMENT OF THE COURT OF APPEAL

1. The Court of Appeal affirms the District Court's judgment.
2. Australian Media Properties Pty Ltd is ordered to compensate Mr. R for his litigation costs in the amount of SEK 331,471, of which SEK 325,160 comprises costs for legal counsel, plus interest on the first amount pursuant to Section 6 of the Interest Act (1975:635) as from the date of the Court of Appeal's judgment until the date of payment.

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Postal address	Visiting address	Telephone	Opening hours
P.O. Box 2290 103 17 Stockholm	Birger Jarls Torg 16	08-561 670 00 Telefax 08-561 675 09 e-mail: svea.avd2@dom.se www.svea.se	Monday – Friday 9 am – 4:30 pm

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3. The Court of Appeal rejects Mr. R's motion that Mr. C shall be jointly and severally liable with Australian Media Properties Pty Ltd to compensate Mr. R for his litigation costs

MOTIONS BEFORE THE COURT OF APPEAL

Australian Media Properties Pty Ltd (hereinafter AMP) has moved that the Court of Appeal shall:

- grant its motions,
- discharge AMP from the obligation to compensate Mr. R for his litigation costs before the District Court, and instead order Mr. R to compensate AMP's litigation costs before said court, and
- irrespective of the outcome in the action at issue, order Mr. R to compensate AMP for part of its litigation costs before the District Court.

Mr. R has disputed AMP's motions.

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

Mr. R has moved that the Court of Appeal shall hold AMP's counsel, Mr. C, jointly and severally liable with AMP for Mr. R's litigation costs before the Court of Appeal.

Mr. C has disputed the motion concerning joint and several liability for Mr. R's litigation costs.

THE PARTIES' RESPECTIVE CASES

The parties have referenced the same circumstances and presented substantively the same arguments as before the District Court.

THE INVESTIGATION

The Court of Appeal has evaluated the same evidence as the District Court. Certain new documentary evidence has been invoked before the Court of Appeal.

GROUND

AMP's action under Section 41 of the Swedish Arbitration Act (1999:116)

Legal starting points

Section 37 of the Swedish Arbitration Act stipulates that the parties shall jointly and severally compensate the arbitrators for their time spent and expenses, and the arbitrators may in a final award order the parties to pay the compensation. However, the first paragraph of Section 39 stipulates that the provisions of Section 37 shall not apply, in the event that the parties have agreed otherwise in a manner that is binding upon the arbitrators.

Thus, the provisions of the first paragraph of Section 39 express, amongst other things, the fact that the parties may agree with the arbitrators concerning their compensation. Also, the arbitration agreement may stipulate how the arbitrators' compensation shall be determined. It is not uncommon that the arbitration agreement refers to the rules of an arbitration institute, which may stipulate that the arbitrators' compensation shall be determined by the arbitration institute based on certain rules or principles. For example, the compensation might be connected to time spent or the value of the dispute. (See Lindskog, *Skiljeförfarande* (7 September 2018, Zeteo), the commentary to Section 39).

Section 41 of the Swedish Arbitration Act stipulates that a party or an arbitrator may challenge the arbitral award in respect of its decisions concerning compensation to the arbitrators. The Supreme Court's ruling in NJA 2008 p. 1118 clarified that the rule is applicable also to such decisions that are made by the arbitration institute, but which have in one form or another been incorporated in the arbitral award. The ruling has been subject of extensive discussions in jurisprudence. The question regarding the right to court review under Section 41 of the Swedish Arbitration Act in cases where the arbitrators' compensation has been determined by an arbitration institute has also been taken into account in the proposal for the Act to Amend the Swedish Arbitration Act which is proposed to enter into force on 1 January 2019 (see Lindskog, *Skiljeförfarande* (7 September 2018, Zeteo), the commentary to Section

41, footnote 19 included references made therein and Government Bill 2017/18:257, p. 64 f.).

A question that arises in this context is whether the court review under Section 41 of the Swedish Arbitration Act shall be different depending on whether the compensation was determined by the arbitrators themselves or the review concerns compensation that follows an agreement between the parties and the arbitrators or if it follows from a decision by an arbitration institute.

According to Mr. Lindskog, there are substantial differences between the two aforementioned situations, which should be taken into account in the review under Section 41 of the Swedish Arbitration Act. Decisions by the arbitration institute concerning compensation are, according to Mr. Lindskog, most closely related to an agreement, and thus binding between the parties, just as an agreement between them would be. According to Mr. Lindskog, the consequence is that the arbitration institute's decision should be subject to adjustment only when it would be possible under general principles of contract law, and most likely the relevant rule would be adjustment under Section 36 of the Contracts Act. In situations where the arbitrators' compensation was determined by the arbitrators themselves, the court should be entirely free to make a review of what would be reasonable. (See Lindskog, *Skiljeförfarande*, (7 September 2018, Zeteo), the commentary to Section 39, footnote 6, and Section 41, footnotes 19 and 20).

The scope of the Court of Appeal's review

In the action at issue, the parties agree that the disputed compensation to the arbitrators was decided under the rules of the SCC (see District Court's judgment, p. 12). These rules stipulate that the compensation shall be determined in accordance with their provisions on costs, which provide that the compensation to the arbitrators shall be determined based on the value of the dispute subjected to arbitration. The decision on compensation was incorporated in the operative part of the arbitral award.

AMP's motion to decrease the compensation to Mr. R determined by the arbitration institute is based mainly on the ground that Mr. R's time spent on the arbitration has been useless and represents no value, because he was disqualified to serve as

arbitrator, since there were certain specific circumstances that brought his impartiality and independence as an arbitrator into question and, further, that he failed to inform on these circumstances. Further, AMP has in support of its motions referenced that Mr. R had failed to complete the required investigations prior and during the arbitration proceeding and that he consequently did not carry out the work which he was obliged to carry out as an arbitrator, and so a right to decrease the compensation, alternatively a right to price reduction, is at hand pursuant to Section 3 of Chapter 18 of the Trade Code, or Section 36 of the Contracts Act. Finally, AMP has maintained that the compensation in any event is unreasonable because of the disqualifying grounds that were at hand, in combination with the failure to fulfill the obligation to inform, as well as Mr. R's actions following the conclusion of the arbitration. Thus, the compensation should be adjusted downwards pursuant to Section 36 of the Contracts Act.

Apart from AMP's assertion that Mr. R failed to fulfill his obligation to investigate, the company has not raised any objections to the work's quality or quantity.

The question in the action at issue is whether the compensation to Mr. R shall be decreased based on the grounds invoked by AMP.

The Court of Appeal's conclusions

Firstly, the Court of Appeal agrees with the conclusions set out by Mr. Lindskog in his commentary to the Swedish Arbitration Act, i.e. that the review under Section 41 of the Swedish Arbitration Act should be different, depending on whether it concerns compensation decided by the arbitrators themselves or if it concerns compensation based on an agreement between the parties and a decision by an arbitration institute (see Lindskog, Skiljeförfarande, (7 September 2018, Zeteo), the commentary to Section 39, footnote 6, and Section 41, footnotes 19 and 20).

The action at issue concerns the review of the compensation decided by the Arbitration Institute of the Stockholm Chamber of Commerce pursuant to the parties' agreement, through its reference to the SCC's Arbitration Rules, and whether the compensation shall be based on the value of the dispute. In situations such as the one at hand, the Court of Appeal finds that the review does not involve a general

assessment as to what constitutes reasonable compensation based on the scope and nature of the assignment, and the care and skill in which it was carried out. Instead, the Court must decide whether the grounds referenced by the claimant justify a deviation from what has been agreed concerning compensation to the arbitrators.

The Court of Appeal notes that the arbitrators rendered their arbitral award between AMP and Bonnier International Magazines AB (BIM) on 24 April 2014. Thereby, the arbitrators have completed their assignment and since AMP has not even asserted that the arbitral award would be invalid as between AMP and BIM, there is no justification for the assertion that the time spent by Mr. R in the arbitration was useless and represents no value. Thus, AMP's motion for a decrease of the compensation cannot be granted on this ground.

Due to how AMP has argued its case, the Court must also determine whether the mere establishment of the fact that there were circumstances that could call into question Mr. R's impartiality and independence could serve as grounds for a decrease of the arbitrator's compensation.

In respect to this question, the Court of Appeal notes that the Supreme Court in several rulings has stressed that the rules on disqualification serve the purpose of ensuring the objective nature of the justice system. It is imperative that the rules are applied such that a judge or arbitrator who falls under the scope of the rules is not allowed to participate in court or arbitration proceedings, even if, in the specific case, there is no reason to assume that he/she in dealing with the case or in deciding the case would allow himself to be influenced by his/her relationship to one of the parties (see NJA 1981 p. 1205, NJA 2007 p. 841 and NJA 2010 p. 317). In the said rulings, it is also stressed that the requirement of objectivity and impartiality shall be particularly high for arbitrators, because errors in the evaluation of evidence or in the application of the law cannot lead to the annulment of an arbitral award.

Thus, the rules on disqualification mainly serve the purpose of preventing a disqualified judge or arbitrator to participate at all in the court or arbitration proceeding. In the event that a disqualified judge or arbitrator did participate in the ruling, the judgment shall be set aside following appeal, or the arbitral award shall

be set aside following a challenge (see Section 27 of Chapter 50 of the Code of Judicial Procedure and item 5 of the first paragraph of Section 34 of the Swedish Arbitration Act). It does not appear to exist any legal support that the existence of circumstances that could call the arbitrator's impartiality or independence into question alone could serve as ground for decreasing the arbitrator's compensation. The same applies to the remaining assertions concerning a failure to fulfill the obligation to inform and investigate (cf. NJA 2010 p. 317, item 12).

As the Court of Appeal has noted above, AMP is bound by the compensation to the arbitrators having been decided in the manner the SCC did, i.e. based on the value of the dispute, and this obligation is similar to a contractual obligation. Then, the question is whether the arbitration institute's decision can be challenged under general principles of contract law. AMP has asserted that the compensation in any event can be adjusted based on the provisions of Section 3 of Chapter 18 of the Trade Code, alternatively Section 36 of the Contracts Act. The Court of Appeal finds that there must be strong reasons to deviate from what has been determined by way of agreement in respect of compensation to the arbitrators. The existence of circumstances that could call the arbitrator's impartiality or independence into question cannot alone serve as ground or particular reason to amend the decision of the arbitration institute.

Thus, the Court of Appeal concludes that AMP's motions cannot be granted for the above stated reasons.

Due to the above conclusion there is no reason to review the circumstances that could call into question the impartiality or independence of the arbitrator or the remainder of the flaws in Mr. R's actions during and following the arbitration that have been alleged by AMP.

In respect of litigation costs before the District Court, AMP has moved that Mr. R pursuant to Section 6 of Chapter 18 of the Code of Judicial Procedure shall be ordered to compensate a part of AMP's litigation costs before the District Court irrespective of the outcome of the action in issue. AMP has asserted that Mr. R has caused the company to incur costs by providing incorrect information on the scope of his

involvement in the so-called ice hockey link case during the proceeding before the District Court up to shortly before the main hearing. The Court of Appeal concludes, however, that the actions which AMP accuses Mr. R of are not of such nature as to justify the application of Section 6 of Chapter 18 of the Code of Judicial Procedure. Therefore, there are no grounds for allocating the litigation costs differently than as allocated by the District Court.

Thus, the District Court's judgment shall be affirmed in respect of the merits as well as in respect of the litigation costs.

Litigation costs before the Court of Appeal

Due to this conclusion AMP shall be ordered to compensate Mr. R for his litigation costs also before the Court of Appeal.

Mr. R has claimed compensation for his litigation costs in a total amount of SEK 443,410 for cost for legal counsel involving 150 hours of time spent and SEK 6,311 for expenses. In respect of the costs for legal counsel, Mr. R has particularly stressed that the amount does not cover any costs caused by the replacement of counsel before the Court of Appeal.

AMP has attested the cost for expenses but has left it for the Court of Appeal to determine the reasonableness of the claimed amount for legal counsel.

The Court of Appeal concludes that while the action at issue has not been completely straightforward, it has nevertheless been of relatively limited scope. The parties have presented and argued their respective cases substantively in the same way as before the District Court, and despite the fact that there have been preliminary issues to assess during the preparatory stages of the dispute before the Court of Appeal, the exchange of written submissions has not been particularly extensive. The main hearing in the Court of Appeal lasted one day and a half, and the evidence in the case was not particularly extensive. Even if the matter must be deemed to be of greater importance to Mr. R than the disputed amount would indicate, the Court of Appeal concludes that the number of hours – 150 – that has been spent by the legal counsel cannot be fully justified considering the scope of the case. For these reasons, the

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Court of Appeal finds that AMP shall compensate Mr. R for his litigation costs in the amount of SEK 331,471, of which the reasonable amount of SEK 325,160 shall cover costs for legal counsel.

The Court of Appeal concludes that the circumstances are not such that there are grounds to hold Mr. C jointly and severally liable with AMP to compensate Mr. R for his litigation costs pursuant to Section 7 of Chapter 18 of the Code of Judicial Procedure. Therefore, Mr. R's motion thereon shall be rejected.

HOW TO APPEAL, see appendix B

Appeals to be submitted by 13 November 2018

The decision has been made by: Senior Judge of Appeal PS, and Judges of Appeal KN (reporting), GS and HC.