Litigation- Sweden

Court of Appeal Rules on Arbitrator's Impartiality

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It is commonplace in all jurisdictions that arbitrators must be impartial. This is expressly provided for in Section 8 of the Swedish Arbitration Act. Section 8 also provides that, if a party so requests, an arbitrator shall be discharged if there are any circumstances which may reduce confidence in the arbitrator's impartiality. As is the case in other jurisdictions, Section 9 of the Arbitration Act further provides that a person who is asked to accept an appointment as arbitrator shall disclose all circumstances which might prevent him or her from serving as arbitrator pursuant to, among other things, Section 8.

In a judgment dated May 2006 the Svea Court of Appeal found that an arbitrator who shared offices with and was a consultant for a law firm that had a continuous client relationship with the group of companies to which one of the parties belonged, could not be regarded as partial. The court found that the arbitrator should have disclosed not only that he shared offices with and was a consultant for the law firm (which he did disclose), but also that there was such a relationship between the law firm and the group of companies in question (which he did not disclose). However, failure to disclose this information did not in itself affect the arbitrator's impartiality. The court of appeal granted leave to appeal and the case is pending before the Supreme Court.

Facts

In 1993 Mr Anders Jilkén was employed by Swedish company Ericsson AB. In 2002 Ericsson terminated Jilkén's employment and a dispute followed. Jilkén requested arbitration in accordance with the parties' arbitration agreement. Pursuant to Section 13 of the Arbitration Act, Jilkén and Ericsson appointed one arbitrator each. These arbitrators then appointed a former Supreme Court justice, Mr Johan Lind, as the third arbitrator and chairman of the panel.

The award was made in Stockholm in June 2004. Jilkén's claims were dismissed and he was directed to pay Ericsson's costs for arbitration.

In September 2004 Jilkén challenged the award in the Svea Court of Appeal. He claimed

that the award should be set aside under Section 34 of the act because of the chairman's lack of impartiality and sought an interim order preventing the enforcement of the award. Jilkén submitted that, after the conclusion of the arbitral proceedings, he had become aware that, among other things, the law firm with which the chairman shared offices normally represented Ericsson or the group of companies to which Ericsson belonged. Jilkén submitted that these circumstances were such as to reduce confidence in the arbitrator's impartiality within the meaning of Section 8. Jilkén further argued that, pursuant to Section 9, the chairman should have disclosed that the group of companies in question was a client of the law firm, and that failure to do so was in itself a circumstance which may reduce confidence in the arbitrator's impartiality under Section 8.

Decision

In a decision dated October 4 2004 the court of appeal issued an interim order preventing the enforcement of the award. However, in its final judgment dated May 5 2006 the court dismissed Jilkén's claim to set aside the award and lifted the interim ban on the enforcement of the award.[(1)]

The court found that there were no circumstances which may reduce confidence in the chairman's impartiality under Section 8; this finding was preceded by an extensive in-depth analysis of the relationship between the chairman and the law firm in question, including the contractual consultancy relationship. The court further found that the chairman had not fulfilled his obligation to disclose circumstances which might be considered to prevent him from serving as arbitrator (ie, the fact that the group of companies was a client of the law firm). However, the court found that, in the case at hand, failure to disclose that fact did not in itself constitute a circumstance which may reduce confidence in the chairman's impartiality.

The court granted leave to appeal pursuant to Section 43 of the act, as the case was significant as a matter of precedent.

Comment

The outcome of the case before the court of appeal expresses a liberal view on the issue of whether an arbitrator should be regarded as partial. The court stated that such determination must be based on objective facts; whether the arbitrator acted impartially *de facto* was irrelevant. The court stressed that the chairman's activities as an arbitrator (in the case at hand and in other arbitrations) were distinct from his activities as a consultant and that the chairman was not an employee or a partner of the law firm.

In a May 2005 non-unanimous decision (which was mentioned by the court of appeal), the Disciplinary Board of the Bar Association found that the chairman should not have accepted the appointment as arbitrator. The decision of the Supreme Court will be interesting; it is not unlikely that the court will find that the law firm's relationship with the group of companies may reduce confidence in the chairman's impartiality. It will also be interesting to see whether the Supreme Court will analyze the relationship between the chairman and the law firm as thoroughly as the court of appeal - that is, whether the Supreme Court will take into account the fact that the details of the relationship were (probably) not accessible to Jilkén as a party to the arbitration. If the Supreme Court finds

that the chairman was partial, it will also have to consider Ericsson's argument that Jilkén is precluded from challenging the impartiality of the chairman (and thus the award) on such grounds, based on Jilkén's previous knowledge of the relevant circumstances.

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Endnotes

(1) Case T 6875-04.

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