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JUDGMENT of the

SWEDISH SUPREME COURT

Case No.

given in Stockholm on 30 September 2003 Ö 3390-01

I

APPELLANT

Kalle Bellander i Stockholm AB, Reg. No. 556516-0149, Box 2095, 114 03 RÖNNINGE

Counsel: Advokat Henrik Wollsén, Box 7315, 103 90 STOCKHOLM

COUNTERPARTY

Planavergne S.A., Fontanes, FR-46230 LALBENQUE, France

Counsel: Advokat Magnus G. Graner, Box 14240, 104 40 STOCKHOLM

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APPELLANT

Planavergne S.A.

Counsel: Advokat Magnus G. Graner

COUNTERPARTY

Kalle Bellander i Stockholm AB

Counsel: Advokat Henrik Wollsén

MATTER

I. Application for enforcement of arbitral award. II. Litigation costs

APPEALED JUDGMENT

Svea Court of Appeal, dep. 8, judgment of 7 September 2001, in case Ö 4645-99

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Judgment of the Court of Appeal see Appendix

JUDGMENT OF THE SUPREME COURT

The Supreme Court dismisses the appeal of Kalle Bergander i Stockholm AB.

The Supreme Court amends the judgment of the Court of Appeal so that Kalle Bergander i Stockholm AB is ordered to compensate Planavergne S.A. for its litigation costs before the Court of Appeal partly in the amount of SEK fifty-one-thousand (51,000) comprising of for legal counsel and partly in the amount corresponding to FFR three-thousand (3,000) comprising of expenses, plus interest according to Section 6 of the Swedish Act on Interest as from 7 September 2001 until the day of payment.

Kalle Bergander i Stockholm AB is ordered to compensate Planavergne S.A. for its litigation costs before the Supreme Court in the amount of SEK eleven-thousand two-hundred-twenty (11,220), comprising of costs for legal counsel, plus interest according to Section 6 of the Swedish Act on Interest from the date of the Supreme Court's decision until the day of payment.

MOTIONS

Kalle Bergander i Stockholm AB (Bergander) has moved that the Supreme Court annuls the judgment of the Court of Appeal and remands the case to the Court of Appeal, and, in the alternative, that the Supreme Court dismisses the claim of Planavergne.

Bergander has further claimed compensation for its litigation costs before the Court of Appeal with the amount claimed before it.

Planavergne has motioned that Bergander shall be ordered to compensate it litigation costs before the Court of Appeal.

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The parties have disputed the counterparty's respective claims.

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

GROUNDS

In an arbitral award given on 1 July 1997, the arbitral tribunal Chambre Arbitrale Internationale pour les Fruits et Légumes in Strasbourg ordered Bergander to pay to the French company Planavergne FFR 64,170, plus interest on part of that amount. Svea Court of Appeal has upon a request by Planavergne declared the award, except with respect to certain unspecified costs, enforceable in Sweden.

Bergander has in the enforcement action claimed that it does not have a contractual relationship with Planavergne, at least not one that comprises an arbitration clause involving the relevant arbitral tribunal, that the company was not properly served any notice of the hearing, and was not otherwise given the opportunity to present its case during the arbitration proceedings.

The arbitral tribunal has in its award noted that the parties were summoned to a hearing at the tribunal's premises in Bonn on 27 May 1997 by registered mail on 29 April 1997. Bergander has not objected to this statement, and no other circumstances at hand indicate that Bergander was not awarded the opportunity to present its case.

Thus, the issue at hand is whether Bergander can be deemed to have agreed with Planavergne that disputes arising out of the agreement should be tried by the arbitral tribunal in Strasbourg, and whether the arbitral tribunal as a result thereof had jurisdiction to try the case. The burden of proof therefor lies with Planavergne (first paragraph of Section 58 of the Swedish Arbitration Act (SFS 1999:116)).

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Planavergne has referenced the contents of the arbitral award in support of its claim.

The arbitral tribunal has rendered its decision based on documents, which were not all available to the Supreme Court. According to the arbitral tribunal, the file shows that the relevant deal was struck on the basis of the terms of sale Code of practices for fresh edible fruit and vegetables in national and international trade (COFREUROP), which included an arbitration clause awarding jurisdiction to the now relevant arbitral tribunal, and that the arbitral tribunal consequently had jurisdiction to try the case.

Bergander, on the other hand, has in the enforcement matter referenced certain documents in support of the claim that the parties had not entered into any arbitration clause.

The provisions of the Swedish Arbitration Act on enforcement of foreign arbitral awards, and of the underlying so-called New York Convention, should be interpreted considering the general aim to facilitate enforcement that is set out in the Convention (cf. NJA 1979 p. 527 and 1992 p. 733 and Heuman, Skiljemannarätt, 1999 p. 729). Generally, the arbitral tribunal must be deemed to be best positioned to try its own jurisdiction. In this case, it must also be considered that the question whether an arbitration clause has been entered into should be tried under French law. In view of the foregoing, and of what has been clarified about the present case, it is reasonable in the enforcement matter to assume that the interpretation and evaluation of evidence made by the arbitral tribunal on the basis of the documentation available to it with respect to jurisdiction is correct.

To refuse enforcement in spite of this, the burden must be on Bergander to show that the ruling of the arbitral tribunal was incorrect in this respect. The investigation referenced by Bergander in the enforcement matter shows that Bergander in connection with the deal has not wanted to admit to any contractual relationship with Planavergne. This, however, does not lead to the

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conclusion that the ruling of the arbitral tribunal on the issue of its jurisdiction, which was in part made based on other documentation, was incorrect.

No other impediment with respect to enforcement has been raised. Thus, the appeal of Bergander shall be dismissed.

The Court of Appeal has dismissed the parties' claims for compensation for their litigation costs. The Supreme Court has now, in the case NJA 2001 p. 738 II, decided that parties can be awarded compensation for litigation costs in matters involving enforcement of foreign arbitral awards. The part of the case that Planavergne lost in the Court of Appeal must be deemed insignificant, compared to the main case. As a result, Bergander shall be ordered to compensate Planavergne for its litigation costs. Planavergne has claimed compensation in the amount of SEK 51,000 for costs for legal counsel, FFR 3,000 for translation of the arbitral award, and FFR 29,526.49 for costs for the French attorney Michel Givry. Bergander has objected to this claim, and claiming in its turn that the costs for the latter relate to the arbitration proceedings and shall not be compensated in the enforcement matter.

Planavergne must be deemed to be fairly compensated, having regard to the extent of the case before the Court of Appeal, by the amount, excluding expenses, corresponding to the amount claimed for fees by the Swedish counsel.

[ILLEGIBLE SIGNATURES]

The decision has been made by: Supreme Court Justices S., T., L., E.N., and W. (Reporting Justice)
Reporting clerk: T.

True copy:

[ILLEGIBLE SIGNATURE]