

SVEA COURT OF APPEAL
Department 02

DECISION
26 November 2013

Case No.
Ö 4821-13

Division 020103

Stockholm

CLAIMANT

Andritz Feed and Biofuel A/S
Glentevej 5
DK-6705 Esbjerg
Denmark

Counsel: Advokat Anders Bengtsson
KLA-Karlerö Liljeblad Advokatbyrå HB
P.O. Box 7330
103 90 Stockholm

COUNTERPARTY

Sadkora Energy AB, Reg. No. 556290-8391
Hamntorget 3
252 21 Helsingborg

Counsel: Advokaterna Niklas Bergdahl Jonsson och Johan Wiklund
Drottninggatan 62
252 21 Helsingborg

MATTER

Enforcement of foreign arbitral award

DECISION OF THE COURT OF APPEAL

1. The Court of Appeal rejects Sadkora Energy AB's motion that the Court of Appeal's decision shall be postponed.

2. The Court of Appeal declares that the arbitral award rendered in Copenhagen, Denmark, on 19 April 2013, in the dispute between Andritz Feed and Biofuel A/S on the one side and Sadkora Energy AB and ZAO Trustcomtrading on the other side, see appendix A, may be enforced against Sadkora Energy AB in Sweden as a final unappealable judgment given by a Swedish court.

Department 02

3. Sadkora Energy AB is ordered to compensate Andritz Feed and Biofuel A/S for its litigation costs in the amount of SEK 57,400 plus interest thereon pursuant to Section 6 of the Swedish Interest Act from the day of the decision of the Court of Appeal until the day of payment. The amount relates to costs for legal counsel.

Department 02

BACKGROUND

The Russian company TCT Trustcomtrading (Trustcom) – subsequently ZAO Trustcomtrading – on 26 September 2005 entered into a purchase agreement with the Danish company Sprout-Matador A/S (now Andritz Feed and Biofuel A/S) for the delivery and installation of a plant for the production of wood pellets in Russia. In the purchase agreement Andritz Feed and Biofuel A/S (Andritz) had retained the ownership rights to the plant until full payment had been made. Sadkora Energy AB (Sadjkora) signed a guarantee under which Sadkora guaranteed the obligations of Trustcom under the purchase agreement. During April of 2012 Andritz, Sadkora and Trustcom entered into a settlement agreement (the Arbitration Agreement) containing an arbitration clause pursuant to which disputes arising out of or in connection with the original agreement shall be settled by arbitration under the rules determined under the rules of the Danish Institute of Arbitration (DIA). A dispute arose between the parties and arbitration proceedings were opened. On 19 April 2013, an arbitral award was rendered pursuant to which Sadkora and Trustcom were ordered to jointly and severally compensate Andritz.

MOTIONS BEFORE THE COURT OF APPEAL

Andritz has moved that the arbitral award shall be declared enforceable against Sadkora in Sweden.

Sadjkora has disputed the motion. In the event that the Court of Appeal would find that nothing prevents the enforcement, Sadkora has moved that the decision shall be postponed until the question of whether the arbitral award shall be annulled has been determined by Danish courts through a judgment or decision that has become final and unappealable, or at least until Danish courts have decided on the stay of execution.

Department 02

Andritz has disputed a postponement of the decision. In the event that the Court of Appeal would stay the proceedings, Andritz has moved that Sadkora shall be ordered to provide security for its payment.

Sadkora has disputed Andritz's motion on security.

The parties have claimed compensation for their litigation costs. Sadkora has disputed Andritz's claim and has not attested any amount as reasonable in and of itself.

THE PARTIES' RESPECTIVE CASES

Sadkora has mainly objected to the application as follows. When the Arbitration Agreement was signed, Andritz withheld material circumstances by not informing Sadkora that the ownership rights had already been transferred onto Trustcom. If Sadkora had been aware of these circumstances, then it would never have entered into the Arbitration Agreement. It would be in bad faith to rely on the agreement, and as a result the arbitration clause is invalid. In any event, the provisions shall be adjusted and the arbitration clause shall be considered null and void. Sadkora's representative, Mr. V, did, after becoming aware that the ownership rights had been transferred onto Trustcom, on several occasions attempt to reach the arbitral tribunal to procure a respite in providing further submissions in the arbitration proceedings. The arbitral tribunal never responded to him, and as a result, Sadkora was not granted the opportunity to present its case before the arbitral tribunal. Sadkora has taken steps to have the arbitral award annulled by challenging it before a Danish court. Sadkora has also requested that the enforcement of the arbitral award shall be temporarily suspended by way of stay of execution.

Andritz has mainly referenced the following. Andritz has not waived the ownership retention clause, and it is in fact fully applicable. Even if Andritz would have waived the ownership retention rights, this would not have affected Sadkora's liability to pay under the arbitral award. It would not be in

Department 02

bad faith to rely on the Arbitration Agreement since it was entered between parties of equal strength that must be deemed to have had equal possibilities to assess the importance and effects of the Arbitration Agreement. It is disputed that Sadkora did not have the opportunity to present its case in the arbitration proceedings. Sadkora was aware of the arbitration proceedings but opted to not submit a Statement of Defense, despite having been contacted by the arbitrator as well as DIA on numerous occasions. There are no grounds under Danish law to annul the arbitral award. Having regard to the fact that Sadkora's actions have as sole purpose to delay the enforcement of the arbitral award, Andritz opposes a stay in the present court proceedings.

The parties have referenced documentary evidence.

GROUND OF THE COURT OF APPEAL

Firstly, the Court of Appeal must determine the issue of whether the present proceedings shall be stayed. The second paragraph of Section 58 of the Swedish Arbitration Act provides that the Court of Appeal may postpone a decision if the opposing party objects that it has applied for the annulment of the arbitral award or moved for a stay of execution with the relevant authorities in the country where the arbitral award was rendered. Sadkora has opened proceedings in Denmark challenging the arbitral award. According to information procured by the Court of Appeal from the Byret in Copenhagen, the motion for a stay of execution has yet to be tried and the case has been transferred to Sø and Handelsretten. The Court of Appeal does not have any information as to when the motion might be tried by said court. Nothing has been referenced before the Court of Appeal that would make the Court of Appeal conclude that Sadkora's motion would be granted. The Court of Appeal finds reasonable not to postpone its decision on enforcement of the award. Thus, Sadkora's motion that the decision shall be postponed shall be rejected.

Department 02

Section 54 of the Swedish Arbitration Act provides that a foreign arbitral award shall not be enforced in Sweden if the party against which the arbitral award is relied upon establishes that a circumstance listed in items 1-5 of said Section is at hand. The relevant items in the present case are items 1 and 2. Thus, the Court of Appeal is to determine whether the arbitration clause is invalid and whether Sadkora was unable to present its case in the arbitration proceedings.

The Court of Appeal finds that the referenced evidence does not lead to the conclusion that Andritz waived its ownership retention rights to the delivered plant in connection with the sale. Thus, the circumstances that according to Sadkora would form grounds for the invalidity of the Arbitration Agreement have not been established in the present case.

The investigation does not establish that there have been such deficiencies in the manner in which the arbitral tribunal dealt with the case that Sadkora has been unable to present its case in the arbitration proceedings.

Thus, the Court of Appeal finds that no such circumstance as set out in Section 54 of the Swedish Arbitration Act and that would have led to the arbitral award not being enforced to be at hand. Further, the Court of Appeal does not find any impediment to the enforcement as set out in Section 55 of the said Act to be at hand. Under these conditions, Andritz's application shall be granted.

The provisions set out in Chapter 18 of the Swedish Code of Judicial Procedure shall be applied in cases where a party claims compensation for costs in a matter on the application of a foreign arbitral award (see NJA 2001 p. 738 II). Section 1 of Chapter 18 of the Swedish Code of Judicial Procedure provides that a party, which loses a case shall compensate the counterparty for its litigation costs, unless otherwise is provided. Section 8 of Chapter 18 provides that the compensation shall fully correspond to the costs for the

Department 02

preparations and presenting the case, including costs for legal counsel, to the extent those costs have been reasonable to safeguard the interests of the party. The Court of Appeal finds that Andritz's claim is reasonable and shall be granted.

HOW TO APPEAL, see appendix B

Appeals to be submitted by 27 December 2013

Leave for appeal is not required.

[ILLEGIBLE SIGNATURES]

The decision has been made by: Judges of Appeal UI, AK, and GL, reporting Judge of Appeal.