

SVEA COURT OF APPEAL
Department 02

DECISION
20 September 2013

Case No.
Ö 5300-12

Division 020108

Stockholm

APPLICANT

Subway International B.V.
Address at counsel

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COUNTERPARTY

Mr. B
[INFORMATION OMITTED]

MATTER

Application for recognition and enforcement of foreign arbitral award

DECISION OF THE COURT OF APPEAL

The Court of Appeal rejects Subway International B.V.'s application that the arbitral award rendered by the International Centre for Dispute Resolution of 24 August 2011 in case No. 50 114 T 0033809 shall be recognized and enforceable in Sweden.

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MOTIONS BEFORE THE COURT OF APPEAL

Subway International B.V (Subway) has applied that the Court of Appeal shall recognize and declare an arbitral award rendered on 24 August 2011 by the International Centre for Dispute Resolution, White Plains, New York, U.S.A. (ICDR), in case No. 50 114 T 00338 09 enforceable in Sweden (appendix A). Subway has further claimed compensation for litigation costs before the Court of Appeal.

Mr. B has objected that the arbitral award is recognized and declared enforceable in Sweden.

THE PARTIES' GROUNDS

In support of their respective cases, the parties have mainly referenced the following.

Subway

The parties have agreed that the arbitration rules of UNCITRAL (version 2010) (the UNCITRAL Rules) shall apply to the arbitration proceedings. Article 2 thereof provides how communication to the parties shall be done. Mr. B has informed that communication with him shall be made via e-mail to his e-mail address. During the arbitration proceedings, ICDR and Mr. B communicated with each other via the provided e-mail addresses. On 25 January 2011, ICDR requested and received a physician's certificate via e-mail from Mr. B because he, due to illness, could not participate in the main hearing scheduled in February of 2011. During the period 31 March 2011 until 8 April 2011 several e-mails were exchanged between ICDR and Mr. B in order to schedule a new date for the main hearing. On 15 July 2011 ICDR summoned the parties to a main hearing on 5 August 2011, to be held via telephone. The main hearing was postponed and new summonses for a main

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hearing on 9 August 2011 were sent on 5 August 2011. The summonses were sent to the e-mail addresses the parties had previously used. Mr. B did not participate in the main hearing on 9 August 2011 and the arbitral award was given on 24 August of that year.

The UNCITRAL Rules provide that e-mail addresses may be used for communications if the address has been provided or approved by the party. The New York Convention does not require that the request for arbitration or other submissions must be served in compliance with the rules of civil procedures before public courts. Mr. B has read the request for arbitration and has used the relevant e-mail address on several occasions when communicating with ICDR. Mr. B has chosen not to communicate with ICDR after having cancelled two scheduled main hearings. Against this background it cannot be held that Mr. B has established that he has not been informed on the arbitration proceedings.

Mr. B

He received notification from ICDR that arbitration proceedings had been opened and was summoned to a main hearing in New York in February of 2011. He was unable to participate due to illness. He requested and was granted postponement. It was agreed that a new date for a main hearing would be set and he would be summoned. He never received a new summons or other communication from ICDR. Only in connection with Subway's application for recognition and enforcement of the arbitral award did he become aware that the case had been decided. Through the lacking communication from the arbitral tribunal – he has neither confirmed nor been served – he has not been granted the opportunity to argue his case under the relevant rules or in the sense set out in Section 54 of the Swedish Arbitration Act (SFS 1999:116).

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THE INVESTIGATION BEFORE THE COURT OF APPEAL

The Court of Appeal has held a hearing in the case, during which Mr. B was not present. Subway has referenced certain documentary evidence. The oral evidence referenced by Mr. B in the form of hearing himself has been rejected pursuant to item 5 of Section 7 of Chapter 35 of the Swedish Code of Judicial Procedure.

GROUND OF THE COURT OF APPEAL

Section 53 of the Swedish Arbitration Act provides that a foreign arbitral award based on an arbitration agreement shall be recognized and enforced in Sweden unless otherwise is provided in certain Sections of the Act. Section 54 provides that a foreign arbitral award shall not be recognized and enforced in Sweden if the party against which the arbitral award is referenced establishes that he was not properly informed on the formation of the arbitral tribunal or on the arbitration proceedings or for any other reason was unable to argue his case (second item of said Section).

As grounds for not recognizing and enforcing the relevant arbitral award in Sweden, Mr. B has referenced that he was not properly informed on the arbitration proceedings since he was not summoned to the main hearing. As set out above, it is for the party against which the arbitral award is referenced to establish the existence of a circumstance set out in Section 54, i.e. in the present case Mr. B.

In the present case, Mr. B has not objected to Subway's claim that the parties had agreed that the UNCITRAL Rules shall apply to the arbitration proceedings and the Court of Appeal will consequently hereinafter assume that they apply.

When the parties to arbitration proceedings have agreed that a specific set of arbitration rules shall apply to the proceedings, the question whether a party

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has been granted the opportunity to argue his case in the sense set out in item 2 of Section 54 of the Swedish Arbitration Act must be determined under those rules. However, an exception must be made if the protection provided by those rules is clearly insufficient from a legal security perspective (cf. Lindskog, *Skiljeförfarande*, 2nd edition, p. 1168, footnote 23 and p. 63 f.). In the present case, however, there are no reasons not to apply the agreed set of rules, and thus the review shall be made under the UNCITRAL Rules.

Article 2 of the said rules establishes that communications in arbitration proceedings can be made via e-mail provided that the communication is sent to an e-mail address that has been provided or approved by the party. Submissions and information sent to the provided or approved e-mail address shall under the same Article be deemed received by the party. The investigation provides that Mr. B in the arbitration proceedings approved that communication with him was made to a certain e-mail address.

The main hearing in the relevant arbitration proceedings was held on 9 August 2011. Initially the main hearing was scheduled to 5 August 2011, but was postponed because the arbitrator was unable to attend. The summons for the originally scheduled main hearing on 5 August 2011, dated 15 July 2011, has been referenced by Subway. Subway has also referenced an e-mail containing a new summons to the rescheduled main hearing, i.e. 9 August 2011. The e-mail establishes that it was sent to Mr. B at the approved address. There is no corresponding document establishing that the summons of 15 July 2011 has been sent to Mr. B. Even if it in the arbitral award is stated that summons have been sent in compliance with the UNCITRAL Rules, it cannot be deemed established that the summons of 15 July 2011 has been sent to Mr. B at his e-mail address. Thus, the investigation supports Mr. B's claim that he did not receive the summons of 15 July 2011. The aforementioned means that Mr. B cannot be deemed to have received any summons to a main hearing until 5 August 2011.

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A general starting point under the UNCITRAL Rules is, according to Article 17, that the parties shall be treated equally and that each of them shall be granted the opportunity to argue their respective cases at suitable stages of the proceedings. When oral hearings are held, Article 28.1 of those rules provides that the arbitral tribunal shall grant the parties “adequate advance notice of the date, time and place thereof”.

In the present case, the summons Mr. B shall be deemed to have received on 5 August 2011 provided that the main hearing had been postponed until 9 August of that year. Thus, Mr. B has been summoned to the main hearing only four days in advance. Even if relatively short notice periods are acceptable in arbitration proceedings, the Court of Appeal finds that a notice period of four days – during the summer holiday period and including a weekend – must be deemed too short for Mr. B to have received “adequate advance notice” on the main hearing. Hereby, Mr. B has not had the opportunity to argue his case as is required by item 2 of Section 54 of the Swedish Arbitration Act for the arbitral award to be recognized and enforceable in Sweden.

The aforementioned means that there are impediments to recognize and declare the relevant arbitral award enforceable in Sweden. Thus, Subway’s application for recognition and enforcement shall be rejected.

HOW TO APPEAL, see appendix B

Appeals to be submitted by 18 October 2013.

Leave for appeal is not required.

True copy

[ILLEGIBLE SIGNATURE]

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The decision has been made by: Judges of Appeal UI and DÖ, reporting
Judge of Appeal, and Deputy Associate Judge AC.