

Court of Appeal Partially Sets Aside Award

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An arbitration award has been partially set aside by the Svea Court of Appeal following an application based on the arbitrators' excess of mandate. The court permitted its judgment to be appealed. The judgment of the Supreme Court is pending.

Facts

The events in the United States of September 11 2001, when terrorists took control of four airplanes, constitute the background to the arbitration. The airplane that flew into the northern tower of the World Trade Centre in New York (American Airlines flight number AA11) departed the same morning from Logan Airport in Boston. Globe Aviation Services was in charge of the security check of the passengers and luggage for this flight. Globe Aviation Services is a subsidiary of the Swedish company Securitas AB. A number of legal proceedings have been initiated in the United States against Globe Aviation Services and other companies in the Securitas group for alleged defective security checks.

The Swedish insurance company If Skadeförsäkring AB had insured the Securitas group in 2001. The insurance agreement contained an exception for war and warlike events. The Securitas group made a request for arbitration in March 2003, seeking, among other things, a declaration that the damage caused by the events of September 11 2001 was not the result of war or warlike events, and that the insurance therefore covered the potential liability for damage of Globe Aviation Services.

If Skadeförsäkring AB argued, among other things, that the insurance did not cover Globe Aviation Services and its activities since Securitas had informed If Skadeförsäkring AB of plans to sell Globe Aviation Services before the insurance agreement was entered into, but had failed to inform If Skadeförsäkring AB of the fact that those plans did not result in any sale. Alternatively If Skadeförsäkring AB argued that, had it been aware of the actual facts regarding Globe Aviation Services, it would have fixed the insurance premium differently (ie, at a larger amount) and/or would have arranged different reinsurance coverage. If Skadeförsäkring AB alleged that it was therefore entitled to an adjustment of any amount

payable to the Securitas group under the insurance.

If Skadeförsäkring AB also sought declarations. In the event that the arbitrators found that it had any liability under the insurance, If Skadeförsäkring AB sought a declaration that, under certain provisions of the Swedish Insurance Act:

"To the extent that it will later be found that, with knowledge of the relevant facts regarding Globe Aviation Services and its airport control business, If Skadeförsäkring AB would have fixed the insurance premium differently or would have arranged different reinsurance coverage, it is thus entitled to adjustment".

The arbitrators' findings included the following:

- The insurance covered Globe Aviation Services and its activities;
- The events of September 11 2001 did not constitute war or warlike events within the meaning of the insurance agreement;
- Securitas had not fulfilled its obligation to inform If Skadeförsäkring AB of the fact that Globe Aviation Services was not sold; and
- This had resulted in a too low insurance premium, which entitled If Skadeförsäkring AB to an adjustment of its liability under the insurance.

Furthermore, the arbitrators found that If Skadeförsäkring AB had not proved that Securitas's breach of its information obligation had resulted in any different reinsurance coverage, and If Skadeförsäkring AB was therefore not entitled to any further adjustment of its liability on this ground. The arbitrators awarded declarations accordingly.

If Skadeförsäkring AB challenged the award, claiming that the Svea Court of Appeal should set the award aside to the extent that it concerned the issue of adjustment due to If Skadeförsäkring AB's reinsurance coverage. If Skadeförsäkring AB argued, among other things, that the arbitrators had exceeded their mandate, since the issue of whether its reinsurance coverage had changed as a result of Securitas's breach of its information obligation should not have been tried within the arbitration (according to the relief sought by If Skadeförsäkring AB, as well as to an agreement between the parties). If Skadeförsäkring AB had thus not submitted any evidence in the arbitration on the issue of whether different reinsurance coverage would have been arranged if it had been duly informed. Securitas argued, among other things, that there had been no excess of mandate, since no agreement had been concluded and only the issue of quantum of any adjustment due to a different reinsurance coverage fell outside the scope of the relief sought by If Skadeförsäkring AB (not the issue of whether If Skadeförsäkring AB would have arranged a different reinsurance coverage if it had been aware of the relevant facts regarding Globe Aviation Services).

Decision

The Svea Court of Appeal stated that the relief sought was limited.⁽¹⁾ After oral testimonies given by the chairman of the arbitrators and by one of If Skadeförsäkring AB's counsel in the arbitration, the court found that If Skadeförsäkring AB had not proved that any

agreement relating to the mandate of the arbitrators had been concluded. The court then interpreted the relief sought by If Skadeförsäkring AB and concluded that the arbitrators had tried the very issue regarding the reinsurance coverage that fell outside the scope of the relief sought. Therefore, this constituted an excess of mandate.

Under Section 34 of the Arbitration Act, an award can be partially or wholly set aside due to excess of mandate, among other things. However, the act is silent on the issue of which alternative should be chosen. In accordance with the general principle of the act (ie, to promote the definite character of awards), the court stated that only the parts that are directly affected by the excess of mandate should be set aside. In the case at hand, the court found it possible to set the award aside partially. The court subsequently granted leave to appeal.

Comment

There are some issues of interest in this case - in particular, the issue of under which circumstances an award may be partially set aside - that the Supreme Court will hopefully address in its judgment.

The Svea Court of Appeal stated that the parties may limit the mandate of the arbitrators by agreement. However, the evidence in this case (eg, the testimonies) did not support a finding that such an agreement existed. Instead, the court reached its conclusion after interpreting the relief sought by If Skadeförsäkring AB; the court was not convinced by Securitas's argument that only the issue of quantum (ie, the size of any adjustment) fell outside the scope of the relief sought. The opinion of the Supreme Court remains to be seen.

When considering to what extent a claimant can define the scope of the arbitrators' mandate by the relief sought, it must be kept in mind that, in the case at hand, only a declaration was sought. The aim of the relief sought was not to order the respondent to make any payment or to fulfil specific performances.

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Endnotes

(1) Case T 8016-04, November 3 2005.

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