Kluwer Arbitration Blog

Svea Court of Appeal's Judgment of 9 June 2009 – When parties are deemed to have agreed on the cessation of an agreement to arbitrate

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Introduction

If a party during arbitral proceedings withdraws its claim and the other party does not exercise its right to request an award in respect of the withdrawn claim, it has been suggested in Swedish legal doctrine that the parties, under certain circumstances, may have implicitly agreed that the arbitration agreement shall cease to be effective.

In a recently reported case, Håkan Hederstierna v. Handelshögskolan i Stockholm, No. T 9424-07 (9 June 2009), the Svea Court of Appeal concluded that the parties had not agreed that the arbitration agreement should cease to be effective. Since the agreement to arbitrate was still effective, an arbitral tribunal was competent to adjudicate the dispute.

Background

Håkan Hederstierna worked for the Stockholm School of Economics (SSE) from 1987 to 2003. His employment contract included an arbitration clause. Following the termination of his employment, the parties disagreed on the extent to which Hederstierna was entitled to various benefits.

Arbitration was initiated (Arbitration No. 1) and Hederstierna submitted a number of prayers for relief. Hederstierna's prayers for relief included requests for the Tribunal to order the SSE to pay vacation compensation, pension premiums and other compensation. Initially, Hederstierna's prayers for relief also included additional requests that the Tribunal order SSE to pay termination compensation and to declare that Hederstierna was entitled to a number of additional pension benefits. At a later stage of the arbitration, however, Hederstierna withdrew the additional requests. Following the withdrawal, the SSE did not exercise its right pursuant to Section 28 of the Swedish Act on Arbitration to request that the Tribunal issue an award regarding the withdrawn requests. Moreover, the withdrawn requests were not written off by the Tribunal. The Tribunal rendered its award on 22 June 2006 in which it ordered SSE to pay some, but not all, of the compensation requested by Hederstierna.

In December 2006, Hederstierna initiated a second arbitration (Arbitration No. 2) in which he requested the Tribunal (which included two of the three arbitrators who had adjudicated Arbitration No. 1) to order SSE to make certain payments. The requests submitted by Hederstierna

in essence corresponded to the additional requests initially submitted but later withdrawn by Hederstierna in Arbitration No. 1. However, in an award dated 27 September 2007 the Tribunal concluded that, as a result of Hederstierna's conduct in the original proceedings, the SSE was justified in believing that the withdrawal of the additional requests was final and that the agreement to arbitrate therefore had ceased to be effective with respect to those requests. The Tribunal reasoned that an agreement to arbitrate may very well change due to the parties' conduct and thus cease to exist. The question whether the parties had agreed that the agreement to arbitrate was no longer effective should be determined on the basis of the circumstances specific to the case. The Tribunal stated that where there is no clarification from the party withdrawing its request, there needed to be "particular circumstances" at hand in order for the other party (in this case SSE) to justifiably believe that the agreement to arbitrate was no longer effective.

The Tribunal then proceeded to investigate whether there were such "particular circumstances". In this regard, the Tribunal considered that Arbitration No. 1 was extensive and that there were a number of different requests which were grounded on various provisions in the employment contract and related documents. Arbitration No. 1 contained several requests and this gave the impression that the dispute concerned the final resolution of the employment relationship. The withdrawn requests seemed to be of secondary importance in the dispute. Moreover, the Tribunal took into consideration the manner in which Hederstierna had structured and modified his requests during the proceedings of Arbitration No. 1. In a number of submissions, Hederstierna did not elaborate on his position or the legal grounds for the additional requests. Following Hederstierna's engagement of a new counsel, the additional requests were withdrawn in his sixth submission without further clarification. In light of the above, it was reasonable for SSE to assume that the additional requests were permanently settled and would thus not reappear in the dispute. The Tribunal considered that SSE's decision to refrain from requesting the issuance of an award on the withdrawn requests was comprehensible, given Hederstierna's conduct in the arbitration. The Tribunal concluded that SSE was justified in concluding that the agreement to arbitrate ceased to be effective in relation to the additional requests and that the arbitrators (appointed in Arbitration No. 2) lacked jurisdiction to adjudicate the dispute. Hederstierna was, however, not prevented from submitting his claims to a competent court.

The arbitration agreement was thus deemed to be no longer in force between the parties in relation to the requests submitted to the Tribunal by Hederstierna in Arbitration No. 2. Hederstierna's prayers for relief were dismissed.

Proceedings before the Svea Court of Appeal

Hederstierna challenged the award and requested that the Court of Appeal declare that arbitrators were competent to adjudicate the requests submitted in Arbitration No. 2. In essence, Hederstierna submitted that the parties had not made any agreement implying that the agreement to arbitrate had been altered. The withdrawal of the additional requests could not have given SSE justified reason to believe that the withdrawal was made on a permanent basis. The agreement to arbitrate therefore remained in effect in respect of Hederstierna's withdrawn requests.

The SSE argued that an agreement to arbitrate may cease to be effective for a number of reasons. In this case, the withdrawal of the additional requests was presented concurrently with Hederstierna's full presentation of the remaining requests and an almost complete statement of evidence. SSE recognized that Hederstierna had narrowed the proceedings to the issues relevant for the resolution of the employment agreement. It was evident that Hederstierna, possibly following

the advice of his newly appointed counsel who was a specialist in employment law, withdrew such requests since they were not well founded. SSE's understanding that the withdrawal was final was reinforced by the fact that prior to the withdrawal Hederstierna had considered narrowing the additional requests. The withdrawn requests (amounting to SEK 18 million according to Hederstierna) furthermore seemed of secondary importance in relation to the total claimed amount of SEK 130 million. There thus were no good reasons why the SSE should have asked the Tribunal to issue an award on the withdrawn requests which, in any event, were so undefined as to make it difficult for the Tribunal to formulate an award. Finally, such a request would have been unreasonable considering that Hederstierna had requested that the SSE be ordered to pay for all costs of the arbitration. In conclusion, the SSE asserted that the agreement to arbitrate was no longer effective and that an arbitral tribunal was not competent to adjudicate the dispute. The SSE also pointed out that Hederstierna had initiated Arbitration No. 2 on the assumption that he would not take any financial risk as the Tribunal in Arbitration No. 1 had concluded that there was an agreement which entailed that SSE should pay for all costs, regardless of the outcome of the arbitration.

The Svea Court of Appeal's judgment

The Svea Court of Appeal (the "Court") initially concluded that SSE had not requested that an award be issued regarding the withdrawn requests and that Hederstierna therefore was entitled to submit those claims again. The Court had to rule on whether Hederstierna was entitled to rely on the agreement to arbitrate or if he had to submit his claims to a competent court of law.

Referring to writings of Justice Lindskog and Professor Heuman, the Court stated that, where one party has withdrawn a request and the other party has not used its right to request the issuance of an award, the relevant circumstances must be considered in determining whether the agreement to arbitrate is still effective.

While clarifying that a withdrawal of requests in itself does not suffice to render an agreement to arbitrate ineffective, the Court also stated that the circumstances relied on by SSE neither could give SSE justified reason to believe that Hederstierna's withdrawal was final nor could they constitute sufficient grounds to conclude that the agreement to arbitrate ceased to be effective. If the SSE was of the opinion that the agreement to arbitrate could have been rendered ineffective, the SSE should have requested Hederstierna to clarify his position, even more so as the SSE did not exercise its right pursuant to Section 28 of the Swedish Act on Arbitration. The Court thus concluded that arbitrators were competent to adjudicate the withdrawn requests and consequently annulled the award issued in Arbitration No. 2. SSE has appealed to the Supreme Court.

By Bengt Åke Johnsson and Markus Ribbing

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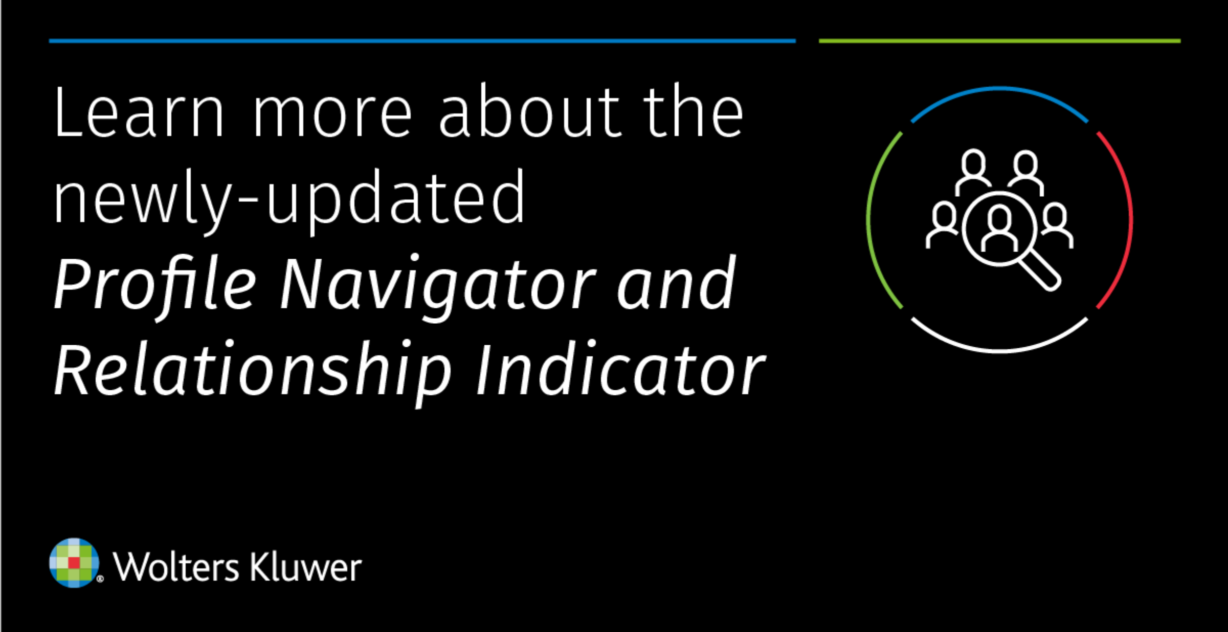

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