

HOVRÄTTEN ÖVER
SKÅNE OCH BLEKINGE
Rotel 33

INKOM: 2010-08-12
MÅLNR: T 1309-10
AKTBIL: 11-12

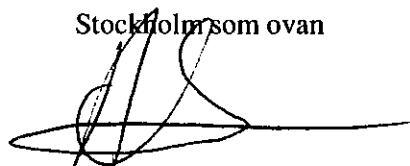
Hovrätten över Skåne och Blekinge

2010-08-11

Megaflex B.V. J. Scandstick Aktiebolag

Som ombud för Megaflex får jag med hänvisning till hovrättens föreläggande den 6 augusti 2010 (aktbilaga 10) och under protest inge kopia på efterfrågad skiljedom.

Stockholm som ovan



Anders Isgren

HOVRÄTTEN ÖVER SKÅNE OCH BLEKINGE		
Ingivare.....		
Ex...1....	2010-08-12	Bil...1....
Dbrnr...T 1309-10		
Aktbil...11.....	Rotel...33.....	
Delg. nr.....		

HOVRÄTTEN ÖVER SKÅNE OCH BLEKINGE

Dnr T 1309-10

Aktbil 12

Dolg nr

**ARBITRATION INSTITUTE OF
THE STOCKHOLM CHAMBER OF COMMERCE**
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FINAL AWARD

Place of Arbitration: Malmö

Case no: SCC V (107/2009)

Claimant: Scandstick AB
Box 22103
SE-250 23 Helsingborg
Sweden

Claimant's counsel: Advokat Krister Azellus and jur kand Emma V. Olsson
Advokatfirman Vinge KB
P.O.Box 1064
SE-251 10 Helsingborg, Sweden
Tel: +46 42 248080
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Respondent: Megaflex BV
Rootven 18
P.O.Box 653
NL-5531 MV Bladel
The Netherlands
Fax: 031 497641157

Arbitral Tribunal: Sole arbitrator: Dr. Anders Ryssdal

Award

1. DISPUTE

The present dispute concerns purchases made by Megaflex BV ("Megaflex") during 2008 and 2009 from Scandsticket AB ("Scandsticket"). The dispute concerns the payment for 16 invoices. These invoices remain unpaid, and the total due and outstanding invoices amount to EUR 169,168.12. The issue of this dispute is the payment of these due and outstanding invoices. The Respondent has not submitted a Statement of Defence. SCC expedited rules apply.

2. JURISDICTION OF THE ARBITRATOR

The jurisdiction of the Arbitrator is based on a clause in "General Conditions of Delivery" Article 15 under the heading "Dispute".

"Any dispute in respect of the origin, construction or application of the provisions of this Agreement shall be settled by arbitration with the rules of Arbitration Institute of the Stockholm Chamber of Commerce in the event that the subject matters value exceeds SEK 500,000. The Arbitration Institute of the Stockholm Chamber of Commerce's rules for simple arbitration proceedings shall be applicable in other matters."

This document ("the Contract") has not been signed by any of the parties. However, on each invoice submitted, it is stated that

"Scandsticket's General Conditions of Delivery shall be applicable in respect of the agreement in the event that aforesaid conditions are not amended by mutual agreement in writing."

The Arbitrator holds it duly established that the Respondent has therefore been aware and has accepted that the purchase has been made under the conditions set forth in the Contract. The Respondent is consequently bound by the Contract and the clause on arbitration set forth therein.

The Arbitrator's jurisdiction is based upon the arbitration clause in the Contract. The subject matter's value exceeds SEK 500,000. The SCC appointed the undersigned as sole arbitrator in its letter dated 17 August 2009, and the SCC referred the case to me by letter 21 August 2009.

Based upon this, I hold jurisdiction as arbitrator to settle the merits of the case.

3. APPLICABLE LAW

The Contract does not explicitly determine the applicable law and the Claimant has not addressed the choice of law issue. It follows from the 1980 Rome Convention on the law applicable to contractual obligations that to the extent that the law applicable to the Contract has not been chosen by the parties, the Contract shall be governed by the law of the country with which it is most closely connected. See Article 4 paragraph 1. It is stated in paragraph 2 that it shall be presumed that the Contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the Contract has at the time of conclusion of the Contract, his habitable residence, or, in the case of body corporate or unincorporate, its central administration. However, if the Contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated.

In the view of the Arbitrator, the presumption that Swedish law shall apply to this Contract is thus well supported. The Arbitrator does not find any reason to derogate from that presumption and applies Swedish law to the Contract.

4. SUMMARY OF THE PARTIES' STATEMENT

4.1 The Respondent

The Respondent has submitted no Statement of Defence or any other written material, see below.

4.2 The Claimant

The Claimant bases its claim on the fact that Respondent purchased goods from Claimant during 2008 and 2009. The dispute concerns the payment for 16 invoices no.: F0810258, F08384, F0811546, F0811588, F0900211, F0900212, F0900411, F0900539, F0900540, F0900541, F0900564, F0901235, F0901236, F0901417 as well as F0901614.

The Claimant requests that the Respondent be ordered to pay EUR 169,168.12 and interests thereon from the due date of each invoice, with an interest rate that exceeds the Swedish official reference rate with 8% units, until full payment has been made. In addition, the Claimant further requests that the Respondent be ordered to reimburse the Claimant's costs for the arbitration and for its legal representation, including all fees and costs for the Arbitrator and SCC Institute.

5. THE PROCEEDINGS

The Respondent has submitted no Statement of Defence. The SCC and the Arbitrator has given the Respondent wide opportunities to file such a statement, and has made several attempts to make contact with the Respondent.

However, neither the Arbitrator nor SCC, have succeeded in their attempts at making contact with Respondent. The following communications with Respondent have been made:

1. By letter from the SCC dated 22 June 2009, the Respondent was presented with a copy of the Request for arbitration, the arbitration rules and an information brochure. In the letter, the Respondent was requested to submit an answer to the SCC by 6 July 2009 at the latest. In the letter it was also indicated that the Respondent was to submit to the SCC a power of attorney. The letter was, according to the information submitted by the SCC, sent by DHL courier and delivered to the Respondent on 23 June 2009.
2. By letter sent by fax dated 9 July 2009, the Respondent was reminded to submit the answer, and was given an extended time limit for the submission of the answer.
3. By letter dated 29 July 2009, sent by fax, Megaflex was asked to pay advance on costs amounting to EUR 8,500. In the same communication the parties were given 30 days within which to jointly appoint an arbitrator. The parties were informed that if they failed to appoint an arbitrator by 27 August 2009, the arbitrator would be appointed by the SCC.
4. On 6 August 2009 the SCC received a letter from Claimant according to which Megaflex has not responded to any communication in relation to the arbitration, and that the parties, consequently, could not jointly appoint an arbitrator.
5. On 17 August 2009 the SCC informed Megaflex of its decision to appoint the undersigned as sole arbitrator. A copy of the letter was sent to Megaflex by fax.
6. The CV and confirmation of acceptance of the undersigned were sent to the parties by fax on 19 August 2009.
7. The following referral of the case to the Arbitrator, dated 21 August 2009, was also sent to the Respondent by fax on 31 August 2009.
8. By registered mail dated 31 August 2009, the Arbitrator proposed a time table, according to which the final award should be made by 22 February 2010. It is stated in the letter that any objections to the time table must be communicated to the Arbitrator by e-mail by 10 September 2009.
9. On 29 September 2009, the Arbitrator received an e-mail from Megaprint Netherlands B.V., according to which:

"Today I have received your letter regarding the arbitration Scandstick.

Several times we have tried to contact Scandstick regarding this case, but unfortunately without any result. We have received a statement through a Dutch debt collection company. We have sent them our problems with the paper of Scandstick including photographs, but no reaction. We have received a letter from a lawyer. Again we have send the complain with photographs, but no reaction.

All the paper is in our warehouse in Bladel ready to send it back to Scandstick. How is the procedure further."

10. This communication was forwarded to the legal counsel of the Claimant, on 8 October 2009. In the e-mail the Arbitrator raised the issue whether this communication should affect the conduct of the arbitral proceedings in the case, and Claimant's counsel was requested to provide her comments on the fact that the sender appeared to be a business enterprise with a different name and a different address from the party earlier notified as Respondent in the arbitration.

In its reply dated 19 October 2009 Scandstick requested documentation showing Megaprint's authority to act on behalf of Megaflex in the case. Scandstick also alleged that Megaflex previously had asked for a payment plan to pay the outstanding amounts in installments. In addition, Scandstick denied that its delivered products had been defective as referred to in Megaflex's statement.

11. On 21 October 2009 the Arbitrator sent an e-mail to Megaprint urging them to respond in the arbitration by submitting a written memorial. It was indicated in the e-mail that if an answer was not submitted within the time limit, this could have adverse consequences for Megaflex in the arbitration.
12. By registered mail dated 26 October 2009, also sent by fax, the Arbitrator once again urged the Respondent to comply with the 2 November deadline.
13. By e-mail dated 2 November 2009 Megaprint replied to the Arbitrator according to which "I have send you twice by mail a reaction to de arbitration to scandstick together with foto's. Why do I receive a reminder".
14. In e-mail dated 26 October 2009, Megaprint forwarded to the Arbitrator a copy of e-mails sent to Scandstick. In the e-mail dated 20 October 2009 from Megaprint to Scandstick's attorney, it is stated that:

"Hello Mrs Olsson,

I have received your fax regarding arbitration with Scandstick.

Megaprint Netherlands B.V. is not a party in this matter but I am acting on behalf of Mr. Van Wijk, director of Megaflex b.v.

In your additional memorial arbitration you state that there is not a formal complaint regarding this matter. This is not correct. The case was mentioned to Scandstick personally. After that Scandstick decided to present the case to a collector in Holland named Interim Justitia. To this file we again have mentioned our complaint in detail. After that we did not hear anything from Scandstick until we have got the message that the case in Holland was closed. After that we received a letter from a lawyer. Again we have mentioned our complaint. After that we did not hear anything about this matter until we received a letter for a arbitration.

Underneath a e-mail we have send to mr. Andersson without any reaction whatever.

In the next mail I send you the foto's we have sent to Mr. Andersson."

15. The Arbitrator sent a letter dated 11 December 2009 to Claimant's counsel, a copy of which with enclosures was sent to Megaflex. In the letter the Arbitrator stated that he had not yet received a written memorial from Respondent. The Arbitrator addressed the issues arising from the fact that he had received a number of e-mails from the company Megaprint, allegedly representing Megaflex. The Arbitrator raised four questions with Claimant:
- (I) *Could you comment on whether you are familiar with the names van Wijk, van de Ven-Beekman, the firm Megaprint or Mr. Andersson and whether your client will accept that these people are due representatives of Respondent in the present arbitration.*
- (II) *Provided that the said natural and legal persons should be considered by the arbitrator as representatives of Respondent in the present arbitration, would you require a formal power of attorney and signed statement, rather than a number of e-mails on the contents they wish to communicate to the arbitrator.*

- (iii) *Provided that the arbitrator were to take issue with the contents of the e-mails above, and provided that the arbitrator would construe these e-mails as an allegation that the goods shipped were substandard to that Respondent claims to be released from the obligation to pay, what would be your legal or factual comments to such an allegation.*
- (iv) *Provided that the e-mails above should similarly be construed to allege that Respondent claims to be free of any liability as long as Respondent stores the goods in question and notifies Claimant that Claimant should try to sell the goods to third parties, what would be your legal and factual comments?*

The Claimant was requested to revert with its comments to these issues on 18 December 2009 at latest.

- 16. On 15 December 2009 Scandstick replied to the Arbitrator's requests that (1) it could not verify whether the persons named were due representatives of Respondent; (2) it did require a formal power of attorney and a signed statement in order for Megaprint Netherlands B.V. to act on behalf of Megaflex BV in this matter, (3) the products delivered were not substandard, and that no valid evidence had been introduced to the contrary; and (4) Respondent had an obligation to pay for the goods received regardless of what it chose to do with such goods.
- 17. On 17 December 2009 the Arbitrator notified Megaflex as Respondent once again that the Respondent had not yet filed a Statement of Defence in the case, stating that the e-mails received failed to comply with the formal requirements for representation in arbitral proceedings. In the letter the Arbitrator put forward a copy of Claimant's counsel's reply letter, dated 15 December 2009, setting out their views on the topics raised by the Arbitrator. The Arbitrator summed up the Claimant's position and his own views as follows:

"As you can see from the position on my first question, they are, like me, currently completely at a loss to establish who is acting for Respondent in this arbitration, since they cannot verify that either of the names van Wijk, van de Ven-Beakman or the firm Megaprint hold any formal power of attorney to represent Respondent Megaflex.

Further, as is evident from their reply to my second question, Claimant insists that normal procedures to establish representation, and to appear, in arbitrations, be followed in the present case. This means that Respondent must file a power of attorney, signed by the authorized officers of your firm, appointing someone – a lawyer or some other person – to appear for Respondent in the arbitration. Further, the submissions you wish me to consider, should be signed by the person holding such power of attorney (or by authorized directors of the Megaflex B.V. company itself).

Finally, as you can see from Claimant's reply to my third and fourth questions, Claimant does not accept, even should Respondent have advanced such views, neither that the goods shipped are substandard or that there has been introduced any evidence in these arbitral proceedings to that effect, nor that the obligation to pay in full for the goods shipped, should be abrogated.

In sum, I now offer you a last opportunity to file a memorial, a Statement of Defence, in these arbitral proceedings if you wish me as arbitrator to take into account any response that the firm Megaflex B.V. might have to the Statement of Claim filed by Scandstick AB on 14 September in the present arbitration. We know that you have received this Statement of Claim already.

Under article 24 (2) of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, the Statement of Defence shall include the following contents:

- (i) A statement whether, and to what extent, the Respondent admits or denies the relief sought by the Claimant;*
- (ii) Any objections concerning the existence, validity or applicability of the arbitration agreement;*
- (iii) The material circumstances relied on by the Respondent;*
- (iv) Any counterclaim or set-off and the grounds on which it is based; and*

(v) Copies of documents relied upon in the Statement of Defence.

In this connection, I once again remind you that such Statement of Defence must be signed by someone duly appointed to act for the Respondent firm, or by directors of the company authorized to sign for it under Dutch law.

The final deadline for your Statement of Defence is 10 January 2010. Regardless of whether you file the required Statement of Defence or not, I shall then rule on the issue in dispute, as set out in the Statement of Claim."

This communication was sent by fax as well as pdf by e-mail to Megaprint.

18. The Arbitrator has received no reply to this request.

In sum, the Arbitrator is perfectly satisfied that Respondent has been duly informed of the Statement of Claims and the arbitration proceedings. The Arbitrator is further satisfied that the Respondent has been given wide opportunity to file a Statement of Defence.

Further, the Arbitrator notes that the SCC Rule for Expedited Arbitrations Art. 30 states that if a party fails to appear at a hearing or otherwise fails to comply with an order of the Arbitrator, such failure shall not prevent the Arbitrator from proceeding with the case nor from rendering an award.

The Arbitrator has decided that no oral hearing is necessary in this case.

Since the Respondent has been duly informed and encouraged to file a Statement of Defence within deadlines which have not been met, since the Claimant has filed its statement, the Arbitrator will now, pursuant to the rules, proceed to render the award.

6. THE ARBITRATOR'S OBSERVATIONS ON THE MERITS

The Claimant requests payment of outstanding invoices amounting to EUR 169,168.12. A list of due and outstanding invoices has been submitted, as well as a copy of each of the said invoices.

The Arbitrator bases his view of the facts of the case on the evidence validly introduced in the proceedings. There is no reason to doubt that delivery has taken place as specified in the invoices. Thus, as a starting point, the Claimant is in principle entitled to payment according to the amounts stated in the invoices, as well as penalty interest according to Article 9 of the Contract: *"If the buyer defaults in making any payments on whatsoever or makes delayed payments, Scandstick is entitled to impose penalty interest from the due date at a prevailing discount rate and including eight (8) percentage point."*

Moreover, the Arbitrator has not been presented with any evidence which may affect the legitimacy of these claims in this arbitration.

In consequence, the Arbitrator orders the Respondent to pay the outstanding invoices, amounting to EUR 169,168.12.

In addition, and with reference to the Statement of Claim, Respondent must pay penalty interests which shall be calculated based upon the prevailing Swedish official reference rate with an addition of 8 percentage point, from each due date.

7. COSTS

The Claimant has sought full reimbursement of its costs for the arbitration and for its legal representation.

The Claimant has submitted its schedule of costs on 16 February, and a copy for comments, together with a request for Respondent to file its own cost schedule was transmitted by the Arbitrator by fax to Respondent and e-mail to Megaprint on 17 February. No comments have been received within the deadline 18 February 2010.

The Stockholm Chamber of Commerce has on 17 February 2010 determined the costs of the arbitration as follows:

Fee to Anders Ryssdal	EUR 7,181
Administrative fee Stockholm Chamber of Commerce	EUR 4,607 + any VAT

As regards the VAT issue, neither the SCC nor the Arbitrator has any information on any VAT-no for the Respondent. Consequently, VAT of 25% must be added to the SCC's fee.

The Arbitrator has decided against the Respondent with respect to the claim, and has ordered the Respondent to pay the claim in full. The Arbitrator has therefore decided that Respondent shall reimburse the Claimant of all costs connected with the arbitration, and hereby orders Respondent to pay Claimant's own full costs in the amount of SEK 140,000 plus Interest and to cover the costs of the arbitration in the amount of EUR 7,181 + EUR (4,607 + VAT 1,152) = EUR 12,910.

For these reasons the Arbitrator renders the following:

AWARD

1. Megaflex B.V. is ordered to pay to Scandstick AB:

- (i) EUR 450 and interest thereon from 11 December 2008 until payment, the interest being calculated based upon the prevailing Swedish official reference rate, with the addition of eight (8) percentage points.
- (ii) EUR 10,274.21 and interest thereon from 23 January 2009 until payment, the interest being calculated based upon the applicable prevailing Swedish official reference rate, with the addition of eight (8) percentage points.
- (iii) EUR 9,870.66 and interest thereon from 29 January 2009 until payment, the interest being calculated based upon the applicable prevailing Swedish official reference rate, with the addition of eight (8) percentage points.
- (iv) EUR 14,226.24 and interest thereon from 30 January 2009 until payment, the interest being calculated based upon the applicable prevailing Swedish official reference rate, with the addition of eight (8) percentage points.
- (v) EUR 9,700.01 and interest thereon from 1 March 2009 until payment, the interest being calculated based upon the applicable prevailing Swedish official reference rate, with the addition of eight (8) percentage points.
- (vi) EUR 3,518.08 and interest thereon from 1 March 2009 until payment, the interest being calculated based upon the applicable prevailing Swedish official reference rate, with the addition of eight (8) percentage points.
- (vii) EUR 10,815.32 and interest thereon from 7 March 2009 until payment, the interest being calculated based upon the applicable prevailing Swedish official reference rate, with the addition of eight (8) percentage points, until payment is made.
- (viii) EUR 16,508.85 and interest thereon from 12 March 2009 until payment, the interest being calculated based upon the applicable prevailing Swedish official reference rate, with the addition of eight (8) percentage points.
- (ix) EUR 9,655.73 and interest thereon from 16 April 2009 until payment, the interest being calculated based upon the applicable prevailing Swedish official reference rate, with the addition of eight (8) percentage points.
- (x) EUR 10,068.52 and interest thereon from 16 April 2009 until payment, the interest being calculated based upon the applicable prevailing Swedish official reference rate, with the addition of eight (8) percentage points.
- (xi) EUR 10,880.55 and interest thereon from 16 March 2009 until payment, the interest being calculated based upon the applicable prevailing Swedish official reference rate, with the addition of eight (8) percentage points.
- (xii) EUR 10,820.64 and interest thereon from 16 March 2009 until payment, the interest being calculated based upon the applicable prevailing Swedish official reference rate, with the addition of eight (8) percentage points.

- (xiii) EUR 22,245.82 and interest thereon from 24 April 2009 until payment, the interest being calculated based upon the applicable prevailing Swedish official reference rate, with the addition of eight (8) percentage points.
- (xiv) EUR 10,227.18 and interest thereon from 9 April 2009 until payment, the interest being calculated based upon the applicable prevailing Swedish official reference rate, with the addition of eight (8) percentage points.
- (xv) EUR 9,949.59 and interest thereon from 13 April 2009 until payment, the interest being calculated based upon the applicable prevailing Swedish official reference rate, with the addition of eight (8) percentage points.
- (xvi) EUR 9,956.72 and interest thereon from 25 April 2009 until payment, the interest being calculated based upon the applicable prevailing Swedish official reference rate, with the addition of eight (8) percentage points.
2. Megaflex B.V. is ordered to pay to Scandstick AB SEK 140,000 for legal fees and internal costs with interest from the day of the Award in accordance with Section 6 of the Swedish Interest Act until payment is made.
3. The parties are jointly and severally liable to pay the arbitration costs. The arbitration costs have been determined as follows:

The fee of Anders Ryssdal amounts to EUR 7,181.

The administrative fee of the SCC amounts to EUR 4,607 plus VAT of EUR 1,152, i.e. in all EUR 5,759.

As between the parties the arbitration costs shall be borne by Megaflex BV. The arbitration costs will be drawn from the advances paid to the SCC. Megaflex BV is ordered to compensate Scandstick AB for what Scandstick AB has paid as advance in costs.

This Arbitral Award is issued in six originals, two for each party, one for the Stockholm Chamber of Commerce and one for the Arbitrator.

Under the Swedish Arbitration Act § 41 the parties to these arbitral proceedings, having lead up to an award with a determination of the arbitration fees, may within 30 days from the day that the party was made aware of the contents of the award, file a complaint with the Malmö County Court ("Malmö tingsrätt") against the fees awarded.

Date, 19 February 2010


Anders Ryssdal
Arbitrator