

THE CONFLICT BETWEEN THE SWEDISH BUILDING WORKERS' UNION AS WELL AS THE SWEDISH ELECTRICIAN'S UNION AND LAVAL UN PARTNERI LTD, SÖDERFJÄRDSSKOLAN, VAXHOLM

I. THE COURSE OF EVENTS

A. The Parties

1. Laval un Partneri Ltd ("Laval") is a Latvian company with its principal offices in Riga.
2. Laval in 2001, through the wholly owned subsidiary L&P Baltic AB ("Baltic"), established in Sweden a Swedish corporation with its registered offices in Stockholm County. Baltic according to its articles of association and bylaws conducts operations consisting of repairs, renovations and construction additions of buildings as well as therewith consistent activities.
3. Baltic conducted previous operations with its own employed personnel and then had collective agreements with the Swedish Building Workers' Union ("Byggnads"). These collective agreements were of the same type as the collective agreements that Byggnads required in the dispute now at issue.
4. Baltic after a certain period ceased operations with its own employees. Instead, labour was acquired from the parent corporation and from subcontractors. It has not been possible currently to determine whether Baltic leased personnel from Laval or hired Laval as a subcontractor.
5. Baltic in any event was a wholly owned subsidiary of Laval until and including the end of 2003. This corporate group structure in accordance with information thereafter obtained has ceased. On the other hand, the same ownership structure remains within both corporations.
6. Baltic was placed into bankruptcy on the 24th of March 2004.
7. Byggnads is a labour union organising workers within the Swedish construction industry. Byggnads is organised into 31 sections. Section 1 ("Byggettan") of the

Swedish Building Workers' Union constitutes such a section within Byggnads. The number of members in Byggnads is 128,000, of which approximately 95,000 are of working age. Byggnads organises workers including carpenters, cement workers, bricklayers, floorers, construction workers and road workers as well as plumbers. Approximately 87 % of the country's construction workers are members in Byggnads.

8. The Swedish Electrician's Union (the "Electricians' Union") has approximately 26,500 members.
9. Byggnads and the Electricians' Union belong to the central labour union organisation, Landsorganisationen ("LO") in Sweden and are its fifth largest and fourth smallest labour unions respectively. LO is a national association of labour unions in Sweden and organises over 1,860,000 workers in Sweden.

B. The City of Vaxholm's procurement of the construction and building of the school

1. The work at the centre of the conflict concerns renovation and building additions to a school, Söderfjärdsskolan, in Vaxholm owned by the City of Vaxholm.
2. The work on Söderfjärdsskolan was procured by the City of Vaxholm in accordance with the regulations in the law (1992:1528) as to public procurement, based on the comparable EC directive on procurement.
3. The City of Vaxholm decided on the 27th of May 2004 to hire Baltic as contractor for the construction and building of the school.
4. Included in the Contractor Agreement signed with the City of Vaxholm was the following:
 - (i) Baltic's representative is to be Guntars Tiltins. Tiltins is also Laval's representative.
 - (ii) The Contractor Agreement for its validity requires that collective agreements be entered into with Swedish labour unions.

The agreement was signed by Gūntars Tiltins on behalf of Baltic.

From that stated above, it consequently can be seen that Baltic agreed to perform the work at issue upon the unambiguous condition that Swedish collective agreements would be applicable. Baltic fully understood the regulations contained in the Swedish collective agreement with Byggnads, as Baltic previously had been bound exactly by such a collective agreement, see Section A(3) above. Even Laval clearly understood the content in Byggnads' collective agreement as a consequence in part of the shared ownership between both corporations and in part from that fact that Tiltins was representative for both corporations. Baltic/Laval did not however live up to its obligations.

5. The work at Söderfjärdsskolan in actuality was performed by Laval's employees. The work was performed with manpower from Latvia. The Latvian employees temporarily stayed in Sweden and only in order to perform the construction work at issue.

C. Negotiations Concerning the Collective Agreement and the Blockade

1. In the month of June 2004, contact was established between Byggnads and Baltic/Laval, and negotiations were commenced as to the signing of a collective agreement. Byggettan requested that Baltic/Laval sign the typical collective agreement. The type of collective agreement signed with employers who are not members in the Swedish employers' union – Baltic/Laval is not a member in the Swedish employers' union – is referred to as an application agreement (*hängavtal*). The content of the term “application agreement” is described below in Section C(2).

Byggettan's actions in the Vaxholm case were exactly the same as in any other case in which Byggettan is to enter into an application agreement. Byggettan and the other sections of Byggnads act in exactly the same manner regardless of whether it is a question of a Swedish or non-Swedish employer, when knowledge is received that the work within Byggnads' contractual scope of agreements is to be performed by an employer lacking any collective agreement.

2. The application agreement contains a very limited number of contractual provisions and in general refers to the national agreement (Byggnads' Collective Agreement). This latter agreement has been entered into between the central em-

employers' union, Sweden's Construction Industry, and Byggnads, the central organisation on the workers' side. The provisions applicable to those parties entering into the application agreement consequently in all material aspects are consistent with Byggnads' collective agreement, which was negotiated between equal parties. This vouches for the contractual terms and conditions being balanced.

3. A number of negotiation meetings occurred between Byggettan and the representative for Baltic/Laval during the period from June – September 2004. At these negotiation meetings, it was stated that the work was to be performed by Laval and therefore the contractual discussions concerned Laval as the formal counterpart. In these negotiations, Laval focused on the level of wages. The issue of wages was pushed to its extreme at a negotiation meeting held on the 15th of September 2004. At that meeting, Laval demanded that wages be in the amount of SEK 109 per hour and Byggettan demanded SEK 145 per hour. The issue of wages is treated extensively under Section D below.
4. The contractual negotiations fell apart after the parties' meeting on the 15th of September 2004 and Byggettan requested thereafter that Byggnads decide as to the taking of industrial action against Laval for refusing to sign the application agreement. It is namely the central organisation Byggnads that has the authority to make decisions as to industrial action.

Byggnads took the decision as to industrial action, the blockade that is now at stake. In accordance with the law (1976:580) as to employment (co-determination in the workplace), the Mediation Agency – the state governmental authority with the task of mediating industrial conflicts – and Laval were given notice on the 18th and 19th of October 2004, respectively. The decided industrial actions came into force on the 2nd of November 2004. Thereafter the Electricians' Union gave notice as to sympathy actions, which came into force on the 3rd of December 2004.

Mediation before an impartial mediator from the Mediation Agency took place on the 1st of December 2004.

5. The above stated actions by Byggettan and Byggnads are typical reactions in the event an employer refuses to sign an application agreement. This is true regardless of whether the employer is a Swedish or non-Swedish company.

Even the actions of the Electricians' Union follow the normal procedures for sympathy actions. The procedures in this respect are also the same regardless of whether the employer is a Swedish or non-Swedish company.

6. As stated, the industrial action consisted of a blockade. This means that the labour union organisation encouraged its members to not perform work at Laval's workplace. No physical impediments or violence arose. The construction work continued for approximately seven weeks without any impediment from the blockade. Laval's workers went home at Christmas 2004 and did not thereafter return to the construction site.
7. The number of blockades as decided by Byggnads for the refusal to sign a collective agreement during the period from the 1st of January 2001 – 25th of October 2005 is given below:

<u>The Time Period</u>	<u>No. of Blockades,</u>	<u>of which non-Swedish companies</u>
2001-01-01 – 2001-12-31	9	0
2002-01-01 – 2002-12-31	13	4
2003-01-01 – 2003-12-31	17	7
2004-01-01 – 2004-12-31	19	10
2005-01-01 – 2005-10-21	14	4

D. The Level of Wages and Wage Increases according to Byggnads' Collective Agreement

1. Byggnads' collective agreement is structured in such a manner that performance wages are the applicable form of wages with new construction. With "new construction" are equated larger repair and renovation projects.

On the other hand, the employer and the local section concerned can instead agree to apply hourly wages also as to these types of projects.

2. The system with performance wages means that new wage agreements are agreed upon for each project of new construction. Byggnads' collective agreement prescribes that wage agreements are to be entered into between the labour union and the employer.

3. In the matter at issue, it was Laval that raised the issue of wages in connection with the negotiations as to a collective agreement. Laval consequently wished to pursue negotiations as to wages at the same time as the parties conducted negotiations as to a collective agreement.

Byggettan in this situation could have maintained that the negotiations concerning the collective agreement should be concluded first and thereafter the parties could negotiate as to wages. As Laval wished to resolve the level of wages at the same time as the collective agreement was signed, the subsequent course of events however would have been exactly the same, even if Byggettan had chosen this line (compare Section D(6) below).

4. At the wage negotiations, Byggettan was prepared to meet Laval's requirement as to hourly wages, and the wage Byggettan demanded was SEK 145 per hour. The demand was based on wage statistics for hourly wages during the first quarter of 2004 for cement workers (SEK 143.09 per hour) and carpenters (SEK 141.02 per hour) with professional certification. Added to this in accordance with the collective agreement were wage increases from and including the 1st of April 2004 of SEK 2.30 per hour.

Byggettan's wage demands in the summer of 2004 with respect to Swedish employers with hourly wages was also SEK 145 per hour. Laval and Swedish employers consequently were treated the same as to the issue of wages. However, it can be maintained on good grounds that Laval was treated more favourably than a Swedish employer. As stated above, with the construction and building of a school, performance wages and piecework contract rate at the workplace would have been the natural wage form. The average piece work contract rate the first quarter of 2004 for carpenters and cement workers was approximately SEK 160 per hour prior to the wage increase the 1st of April 2004, consequently a considerably higher wage than the requested SEK 145 per hour.

5. The City of Vaxholm and Baltic agreed on the 10th of February 2005 to terminate the contractor agreement.

A Swedish construction company using Swedish labour has completed the work. It is worth noting that the wages for these Swedish workers were approximately SEK 163 per hour and the wage form applied was hourly wages.

6. The issue of wages unfortunately has received an incorrect and altogether too large a place in the debate regarding the dispute at issue. The wages requested by Byggettan have no relevance as to Laval's refusal to enter into a collective agreement with Byggnads. Laval namely was offered unequivocally at the mediation meeting before the impartial mediator on the 1st of December, 2004, and also at the negotiations before the Swedish Labour Court on the 20th of December that same year, the opportunity to enter into a collective agreement without any connection to wage demands. Laval rejected these offers. If these offers had been accepted, the industrial actions would have immediately ceased and the no-strike rule would have been applicable. The parties thereafter could have negotiated the wages in accordance with the signed collective agreement. These negotiations would have been conducted under the no-strike rule with the prohibition as to taking industrial actions.

If the parties had not come to agreement during these wage negotiations, wages would have been assessed in accordance with the cut-off rule in Byggnads' collective agreement. The wages according to this cut-off rule at the time of the negotiations were SEK 109 per hour.

E. The Latvian Agreements

1. At no occasion during Byggettan's negotiations with Baltic/Laval prior to the 15th of September 2004 was it mentioned that an impediment existed as to signing a Swedish collective agreement based on already being bound by a Latvian collective agreement. In this context that which is stated above should be kept in mind namely that Baltic/Laval according to the contract with the City of Vaxholm had assumed responsibility for the project with the express condition that a Swedish collective agreement would be reached.
2. The first Latvian collective agreement arose on the 14th of September 2004, consequently the day before the negotiations between Laval and Byggettan fell apart. The second Latvian collective agreement was entered into the 20th of October

2004, the day after Laval had received Byggnads' notice and barely two weeks before the industrial actions would come into force.

3. The first Latvian collective agreement states that it is applicable for members in the Latvian labour union and that it only protects these members' rights and obligations (Sections 1.4 and 1.5 in the Latvian agreement dated 14th of September 2004).

A significant portion of the Latvian employees at Söderfjärdsskolan was not members in the Latvian labour union. Added to this is the fact that collective agreements normally are only applicable to operations in the country in which the collective agreement has been executed. The first Latvian collective agreement therefore entails that Laval could not cite the fact that the company already was bound by a Latvian collective agreement with regard to the Swedish operations. The purpose of alleging being bound by the Latvian collective agreement was to attempt to invoke protection according to EC legal regulations as against the requirement for a Swedish collective agreement or industrial action in order to obtain such an agreement, and thereby get the issue of the Swedish legislation's compatibility with EC law tried by the European Court of Justice.

4. The second Latvian collective agreement arose in order to cure the above stated deficiencies. This can be seen clearly from the following regulations in this collective agreement:

- (i) The agreement is to be applicable to all workers stationed abroad. This is true regardless of whether the employees are members in the Latvian labour union.
- (ii) The Latvian labour union is to constitute the exclusive representative for Laval's employees.
- (iii) Laval is prohibiting from signing other collective agreements regulating the terms and conditions for employees stationed abroad.

That stated above consequently means that the Latvian labour union prohibited Laval from signing a contract with labour unions in other countries (for example, Sweden) entailing for the employees employment terms and conditions more favourable than the Latvian agreement. It is obvious that such regulations cannot be

to the advantage of the employees and therefore exist only in order to meet Laval's interests.

5. With reference to that stated above, it is the understanding of Byggnads and the Electricians' Union that the Latvian collective agreements are a construction that has arisen only for one reason. The purpose has been to try to create a situation in order to be able to invoke EC law, asserting that it would be in conflict with these regulations to require a Swedish collective agreement or to take industrial action in order to achieve a Swedish collective agreement. The basis for Laval's argument namely is that Laval is already bound by the Latvian collective agreement. Note once again that the contract regarding Söderfjärdsskolan was received under the stated condition that a Swedish collective agreement would be reached and that no Latvian collective agreement existed when the agreement was entered into with the City of Vaxholm and when the negotiations with Byggettan were commenced and conducted.

These conclusions are also strengthened by the fact that Attorneys Anders Elmér and Martin Agell have represented Baltic/Laval since the end of the summer of 2004, during the negotiations with Byggettan. These attorneys have been and still are legal counsel for Laval also in this litigation. The efforts of these attorneys to construct a conflict situation between the Latvian and Swedish collective agreements – without any underlying anchoring in reality – are still underway, as can be seen from the attached letter dated the 18th of October, 2005, Attachment 1.

II. THE RELEVANT ISSUES IN THE CASE BEFORE THE EUROPEAN COURT OF JUSTICE

1. The case before the European Court of Justice raises a number of principal issues that differ somewhat from those issues that to-date have been the objects of the conflict before the Swedish Labour Court. It is important to understand that the role of the European Court of Justice is not to decide the case materially, but rather to give a guiding preliminary decision as to the interpretation of the underlying EC legal regulations.
2. The main issue before the European Court of Justice is whether labour unions have the right with the support of industrial action to try to encourage an employer from another member state within the EU to sign a collective agreement upon the same

terms and conditions applicable for the host country's employees, with respect to temporary work to be performed in the host member state. In addition, the issue is raised in this case whether this answer is affected by the employer already having a collective agreement in its resident country.

The case also raises a number of other principally very important EC legal issues, including:

- Will the European Court of Justice recognise the right to negotiate and the right to strike as fundamental rights?
- The interpretation of Article 137.5 EC Treaty and the division of power between the EU and the member states as to the area of employment/labour law.
- The interpretation and scope of the Directive concerning the posting of workers.
- With the application of the EC-treaty's regulations as to the freedom to provide services, is it the host country's or the country of origin's employment/labour law legislation that is applicable?
- An assessment between the EC-treaty's economic and social objectives.
- How can workers who are stationed abroad and/or leased be protected?
- Must all industrial actions which limit free movement be legitimised by individual labour unions in front of a court, and finally, in front of the European Court of Justice?
- To what extent can EU member states take measures in order to prevent wage competition and social dumping?
- Is the Swedish *Lex Britannia* compatible with EC law?
- Will the European Court of Justice, through its judgment, ensure that wage levels within the EU – as well as within the "old" and "new" member states – are maintained and improved, or will the inner market's logic and principles mean

a harmonisation of wage levels in a downward direction ("race to the bottom") and an increased competition and tension between employees, and even peoples, within the European Union?

For more information:

Advokatfirma Lindhs DLA Nordic KB

Kungsgatan 9, P.O.Box 7315, SE-103 90 Stockholm, Sweden
Tel: +46 8 701 78 00 Fax: +46 8 701 78 99 Mail: info@dlanordic.se
Web: www.dlanordic.com SE: 916629-6658