SVEA COURT OF APPEAL	**JUDGMENT**	Case No.
Department 16	1 December 2009	T4548-08
Division 1602	Stockholm	

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MATTER
Challenge proceedings with respect to arbitral award

JUDGMENT OF THE COURT OF APPEAL

1. The Court of Appeal annuls the arbitral award rendered between the parties on 12 March 2008 in its entirety.
2. V&S Vin & Sprit Aktiebolag is ordered to compensate Systembolaget Aktiebolag for its litigation costs before the Court of Appeal in the amount of SEK 3,691,404, out of which SEK 3,114,000 comprises of costs for legal counsel, plus interest thereon under Section 6 of the Swedish Act on Interest from the date of the judgment of the Court of Appeal until the date of payment.

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BACKGROUND

V&S Vin & Sprit Aktiebolag (V&S) manufactures, imports and exports alcoholic beverages, as well as operates a wholesale business of such beverages. Systembolaget holds, by law, a monopoly on the retail of liquor, wine and beer. The general conditions included in the standard terms for the delivery of beverages by V&S to Systembolaget apply between the parties. These general conditions are supplemented by separate purchase agreements for each product sold by V&S to Systembolaget.

After nine employees connected to V&S had been charged with bribery of Systembolaget personnel during 2001-2003 at a total value of approximately SEK 640,000, Systembolaget notified V&S by way of a letter of 18 December 2006 that V&S had materially breached its obligations as towards Systembolaget, that a material breach of contract had been committed, and that when a material breach of contract has been committed this constitutes grounds for whole or partial termination of the agreement. Partial termination would entail the termination of individual purchase agreements. Systembolaget stated that it intended to terminate individual purchase agreements covering a number of products and later finally determine which products would be covered and give a final notice of termination. On 24 January 2007, Systembolaget published a list of products that Systembolaget was, as from 1 March that same year, no longer willing to purchase from V&S.

V&S did not accept Systembolaget's terminations and requested arbitration before the Arbitration Institute of the Stockholm Chamber of Commerce and moved that Systembolaget should be ordered to compensate V&S SEK 74,945,000 plus interest. The arbitral tribunal (comprising of former Supreme Court Justice H.D, chairman, professor L.P., and advokaten E.E.) rendered its award on 12 March 2008. Through the award, Systembolaget was ordered to compensate V&S the amount of SEK 40,164,000 plus interest.

MOTIONS BEFORE THE COURT OF APPEAL

Systembolaget has moved that the arbitral award of 12 March 2008 shall be annulled in its entirety.

V&S has disputed Systembolaget's motion.

The parties have claimed compensation for their litigation costs.

GROUNDS REFERENCED BY THE PARTIES

Systembolaget

The arbitral tribunal has exceeded its jurisdiction in two different aspects.

Firstly, it is maintained that the arbitral tribunal has exceeded its jurisdiction by interpreting a specific provision of an agreement without that provision having been referenced for interpretation or any such interpretation argument being referenced by the parties. Further, that interpretation was in direct conflict with the parties' joint statements on the contents of the provision.

Secondly, Systembolaget maintains that the arbitral tribunal has exceeded its jurisdiction by finding that the right to terminate for cause under general principles of contract law had been waived through agreement thereon, despite the fact that V&S had not claimed that such an agreement had been reached.

Each of the aforementioned excesses of jurisdiction entail that the arbitral award should be annulled.

Systembolaget maintains that the above constitute excesses of jurisdiction under item 2 of the first paragraph of Section 34 of the Swedish Arbitration Act (SFS 1999:116) (LSF).

V&S

The arbitral tribunal has not exceeded its jurisdiction under the referenced Section. If the Court of Appeal should find that procedural errors under the referenced Section have been committed, they have nonetheless not affected the outcome of the case.

THE PARTIES' FURTHER DETAILS OF THEIR CLAIMS

The parties have provided further details on their respective claims as follows.

Systembolaget

In the arbitral award, the arbitrators partially granted the claims of V&S. the arbitral award was firstly based on the arbitrators finding that V&S was not bound by any provisions that conferred rights of termination onto Systembolaget. Secondly, the award was based on the fact that the parties had agreed to waive their otherwise applicable rights of termination in cases of material breaches of contract under general principles of contract law. In Systembolaget's view, the arbitral tribunal has in two separate ways materially exceeded its jurisdiction, each of which has independently affected the outcome of the case. The excesses consist of the fact that the arbitrators have gone beyond the circumstances referenced by the parties. In addition, the arbitral tribunal has reached an opinion, which deviated from circumstances on which the parties agreed.

Circumstances shall be referenced clearly. The background statement had been approved by the parties, and a party is not permitted to thereafter claim

that circumstances other than those in the background statement have been referenced. Earlier correspondence of the parties can only be relied on for the interpretation of such grounds as have been taken up in the finally approved background statement.

The ground for the challenge related to the general purchase conditions of 2002

The contractual relationship between the parties dates back to 1995 and was governed by the terms and conditions agreed to in that year (Terms and Conditions of 1995). This version provides, in Section 1.2, that Systembolaget is entitled to unilaterally amend the terms and conditions. By an amendment to the Terms and Conditions of 1995, Systembolaget amended the terms and conditions applicable to its suppliers (Terms and Conditions of 2002). Systembolaget's right to amend the terms and conditions was based on the provision of the Terms and Conditions of 1995. In the arbitration proceedings, Systembolaget referenced the Terms and Conditions of 2002 as the basis for the right to carry out the partial terminations against V&S as sanctions for breach of contract.

The arbitral tribunal has based its opinion on an interpretation of Section 1.2 of the Terms and Conditions of 1995 and has found that the provision had limitations to the effect that Systembolaget was not entitled to implement such contract provisions as relied on by Systembolaget. The arbitral tribunal was, however, not entitled to base its decision on such an interpretation of Section 1.2, since V&S did not claim that the provision had such a limited meaning. To the contrary, during the arbitration proceedings V&S has claimed that Systembolaget had an unimpeded right to amend the terms and conditions under said amendment clause, if it was held to be valid. The parties have agreed that this was the meaning of the amendment clause.

V&S claimed that the terminations by Systembolaget lacked legal ground because V&S was not bound by the Terms and Conditions of 2002. The

grounds referenced by V&S are found under the heading *Grounds for the motions* and the sections of interest in the present case are found in Section 31, wherein V&S maintains that the provisions relied on by Systembolaget are inapplicable, because the Terms and Conditions of 2002 are not binding on V&S. The basis for the objection of being bound by these provisions is found exclusively in this Section 31 of the arbitral award.

In providing further details for its grounds, V&S firstly claimed that Systembolaget in 2002 unilaterally implemented a new agreement, Terms and Conditions of 2002, and that these terms and conditions had not been accepted by V&S. In addition to this ground (the Not Bound By Agreement Ground), V&S referenced a second ground for invalidity which was based on Section 36 of the Swedish Contracts Act. V&S claimed that the amendment provision of Section 1.2 in the Terms and Conditions of 1995 was invalid because it was unreasonable. The invalidity entailed, according to V&S, that V&S had not become bound by the Terms and Conditions of 2002. This follows from Sections 57-81 of the arbitral award.

Systembolaget objected to V&S's Not Bound By Agreement Ground as the basis for it not being bound by the Terms and Conditions of 2002. Systembolaget maintained that it was incorrect to claim that there were two separate sets of terms and conditions. Its opinion was based on the fact that the Terms and Conditions of 1995 had been amended continually since their inception and that the amendments made in 2002 were implemented in reliance of Section 1.2 of the then applicable terms and conditions. Against the ground for invalidity based on Section 36 of the Swedish Contracts Act referenced by V&S, Systembolaget maintained that the provision was natural and necessary and that the provision could not be deemed unreasonable. (See, amongst others, Sections 206-208 and 250-253, as well as 222-228 of the arbitral award. Below, the Court of Appeal will refer to sections of the arbitral award simply by stating a number in brackets.)

The arbitral tribunal did not reach a decision on whether V&S was bound by the Terms and Conditions of 2002, but instead it only noted that it could be questioned if V&S was bound by them. The tribunal's reasoning thereafter is based on the hypothetical assumption that V&S was bound by Section 1.2 (321). The tribunal's continued reasoning entails that it exceeds the Not Bound By Agreement Ground and invalidity ground referenced by V&S by basing its award on an interpretation of the agreement. This is stated in the award (324) as follows:

> The arbitral tribunal finds that Section 1.2 of the Terms and Conditions of 1995 cannot be understood so as to grant Systembolaget complete freedom to unilaterally amend the terms and conditions to apply to new areas, and to place on the suppliers new far-reaching obligations, which the latter had no reason to take into account when accepting the Terms and Conditions of 1995. The Terms and Conditions of 2002, however, comprise conditions that must be considered new, and not merely amendments of previous provisions. For such new provisions to become part of the agreement, it must be required that they are not unilaterally implemented by Systembolaget, but rather that they have explicitly or implicitly been accepted by the suppliers.

Hereafter, the arbitrators found (325) that V&S, even if the company would be deemed to have accepted Section 1.2 of the Terms and Conditions of 1995, had not accepted that Systembolaget would have the right to unilaterally extend the scope of the Terms and Conditions by adding principally important and materially far-reaching and, for V&S, onerous clauses.

The arbitral tribunal's conclusion (327) was that the Terms and Conditions of 2002 had not been part of the agreement between Systembolaget and V&S and had as a result not become binding on the parties. Consequently, Systembolaget had not had legal grounds to terminate agreements with V&S based on Sections 20.1 and 20.4 or Section 19.2 of these Terms and Conditions.

The conclusion of the arbitral tribunal comprises an excess of jurisdiction.

V&S claimed that Section 1.2 was invalid because it imparted on Systembolaget such wide rights that it in practice granted Systembolaget the right to unilaterally amend the agreements with its suppliers (72). In the dispute, the parties agreed that this was the meaning of Section 1.2, i.e. that the provision does not impose any limitations on Systembolaget's rights to amend the agreement. The parties have not touched on the question of whether there even is a difference between "amended provisions" and "new provisions". When the tribunal made its hypothetical assumption that Section 1.2 had been accepted by V&S (321), the tribunal did not review the issue in accordance with the grounds referenced by V&S. The tribunal did not review whether the amendment provision was unreasonable or invalid for other reasons. Instead, the arbitral tribunal interpreted Section 1.2 and gave it an interpretation which directly contradicts the meaning agreed upon between Systembolaget and V&S. The amendment clause has not been referenced by V&S as grounds for the interpretation, and V&S has not referenced the interpretation as a ground for its claim.

V&S has not even used the word interpretation, adjustment or similar expressions. Further, V&S has not stated what meaning Section 1.2 would have after a possible adjustment. The procedural errors committed by the arbitral tribunal have affected the outcome of the case.

The grounds for the challenge based on general principles of contract law

The arbitral tribunal has found that there is a general principle of contract law on the right to terminate in cases of the counterparty's material breach of contract. However, the arbitral tribunal has found that this principle has been waived by way of agreement. Thus, the arbitral tribunal has found that the parties have reached a waiver agreement. This fact was, however, never referenced by V&S.

Systembolaget claimed that (37) the right to terminate as done by it is conferred by general principles of contract law, which provide a right to terminate when a material breach of contract has been committed. The grounds for this were further detailed in the subsequent sections.

Against this, V&S claimed that the right to terminate had not been present even under general principles of contract law (31, A 1.4). V&S has not presented further details on its view with respect to general principles of contract law. The objections of V&S have been based on the fact that no material breach of contract had been committed and, that as a result, there was no right to terminate.

The arbitral tribunal firstly concluded that general principles of contract law may indeed confer a right to terminate an agreement in cases of the counterparty's material breach of contract. The arbitral tribunal noted thereafter, however, that this applies only in cases where the parties have not agreed on another order. The conclusion of the arbitral tribunal reads as follows (348):

> In view of the aforementioned, there are convincing reasons to deem the Terms and Conditions of 1995 and the suppliers policy of 1999 as exhaustive with respect to how the issue of bribery shall be sanctioned between the parties. In these circumstances, there is no room to apply general principles of contract law in addition to what has been regulated by the agreement.

Thus, the arbitral tribunal has found that there is such a general principle of contract law as maintained by Systembolaget in the dispute, but that the parties have waived this principle by way of agreement. V&S has, however, not referenced any such agreement and has not met the requirements of referencing a clearly specified legal circumstance. There are no references whatsoever with respect to the execution of such an agreement, when this supposedly occurred, the contents of this agreement or which documents provide the contents of that agreement. Thus, it has been impossible for Systembolaget to respond and reach its own conclusion on this issue.

In the case, V&S did not maintain that Systembolaget and V&S had agreed that improper contacts with suppliers should be exclusively sanctioned by criminal law and that this exempted the application of general principles of contract law otherwise applicable between the parties. V&S simply maintained that the right to terminate had not arisen because no material breach of contract had been committed. However, the arbitral tribunal found that breaches of the suppliers' policy of 1999 could not be sanctioned within the scope of the agreement's provisions on breach of contract. Nonetheless, the tribunal held that the parties, through this very policy, which apparently was not part of the agreement, exhaustively had regulated how issues of bribery should be sanctioned within the scope of the purchase agreement.

Thus, the arbitral tribunal has based its decision on grounds not referenced by the parties and as a result exceeded its jurisdiction. The error has directly affected the outcome of the case.

V&S

The arbitration proceedings were extensive and covered many issues at law. The legal ground for V&S's claim was, however, not more extensive than that V&S maintained that Systembolaget had terminated a number of purchase agreements without valid legal grounds and had, as a result, become liable to compensate the damage incurred by V&S. The ground referenced by Systembolaget was the opposite; that Systembolaget had the right to terminate the agreements. During the course of the arbitration proceedings these "main grounds" were divided into "specific grounds", which were enhanced, adjusted and supplemented during the proceedings. This entails that the references now relevant are found, under the principle of "successive relevance", in several separate documents. However, V&S wishes to maintain that Systembolaget undoubtedly and in all respects understood the claims of V&S.

Systembolaget has claimed that it is the background statement that serves as the basis for which circumstances have been referenced, provided that the background statement has been approved by the parties. This is incorrect. There is no ground to consider that the parties' submissions do not constitute procedural material, unless the parties have reached an agreement to this effect.

The ground for the challenge related to the Terms and Conditions of 2002

The provision of Section 1.2 of the Terms and Conditions of 1995 is entirely clear: Systembolaget has the right to unilaterally amend the conditions. In the years immediately following the entry into force of the Terms and Conditions of 1995, Systembolaget applied the right to amend only for minor adjustments of the conditions. V&S accepted this. In connection with Systembolaget wanting to implement the Terms and Conditions of 2002, Systembolaget, however, wished to interpret a wholly new meaning into Section 1.2. In this respect, Systembolaget claimed that the right to amend conferred onto Systembolaget the right to implement an entire restructuring of the whole contractual relationship of the parties, through which the existing agreement would be replaced by an agreement that deviated structurally but also would contain materially new provisions. V&S has neither accepted Systembolaget's interpretation of the amendment provision nor the reasonableness that the provision could be implemented in this manner.

The claim that V&S has not referenced the interpretation ground

The relevant issue in this respect is whether V&S has referenced not only that Section 1.2 of the Terms and Conditions of 1995 is unreasonable solely because it confers an unimpeded right of amendment, but also that even if the provision cannot be deemed invalid as such, it cannot be implemented or

interpreted so that it grants Systembolaget the right to implement entirely new provisions.

As is clear from V&S's submissions to the arbitral tribunal during the arbitration proceedings, the distinction between amended and new provisions has been of vital importance to V&S. This is clear from, amongst other things, V&S's quoting of a letter of June 2002 from the trade organization Sprit & Vinleverantörsföreningen (SVL) to Systembolaget, in which it is questioned if a provision that confers the unilateral right to amend terms and conditions at any time at all can be valid under Swedish law. The letter further states that, even if the provision would be valid under contract law, it is highly unlikely that Systembolaget could rely on it to implement a comprehensive revision of the terms and conditions and implement a whole new agreement between the parties. Thus, SVL not only questioned the validity of the provision as such but also Systembolaget's implementation and interpretation thereof. During the arbitration proceedings, V&S was thorough in maintaining that the objections and views previously expressed by SVL concerning the Terms and Conditions of 2002 also were the views of V&S.

It is clear from the submissions to the arbitral tribunal
that V&S does not consider Section 1.2 of the Terms and Conditions of 1995 unreasonable, provided that it only grants to Systembolaget the right to make amendments of the kind implemented prior to 2002, but that the provision must be deemed unreasonable when relied upon for Systembolaget's right to unilaterally implement entirely new conditions. It ought to be clear that V&S has expressed the opinion that even if the provision is not held to be wholly invalid, it must nevertheless be deemed unreasonable to implement it so that would grant Systembolaget the right to implement entirely new provisions,
that V&S has maintained that not only the provision as such but also its implementation in connection with the proposal for new conditions must be deemed unreasonable
and that V&S consistently during the entire arbitration proceedings maintained that the Terms and Conditions of 2002 constituted an entirely new

agreement, whereas Systembolaget equally consistently maintained that the conditions merely constituted an amendment to the Terms and Conditions of 1995. In fact, this has been one of the main issues of dispute of the case.

V&S's maintaining that Section 1.2 is unreasonable entails the claim that the provision should be adjusted so as to not allow the implementation of wholly new terms and conditions. The claim authorizes the arbitral tribunal to determine that the provision has that content based on an interpretation of the provision. A claim that the application of a provision is unreasonable undoubtedly implicitly implies that the provision is not invalid as such, and it is consequently not a claim that the provision is invalid.

The claim that the arbitral tribunal has deviated from the parties' mutual understanding

The meaning of Section 1.2 of the Terms and Conditions of 1995 has in the arbitration proceedings been discussed based on Systembolaget's claim that the provision granted Systembolaget the unimpeded right to amend the agreement. This claim did not come from V&S, but rather from Systembolaget, and it was this claim with which V&S had to respond. When V&S claims that the provision is unreasonable because it grants Systembolaget the unimpeded right to amend the agreement, this is based on Systembolaget's claim. Reasonably, V&S had to argue the provision based on Systembolaget's claim. To infer from this that V&S is also of the opinion that this precludes any narrower reading of the provision is to go too far. V&S has never expressed that this was V&S's opinion. It must be added to this that V&S, in several contexts, has made it clear that even if the provision set out in Section 1.2 is not deemed invalid as such, to apply it in order to implement wholly new provisions must be deemed unreasonable. Systembolaget has confirmed that it understood this to be V&S's opinion.

The claim that there was a mutual agreement on the interpretation, as claimed by Systembolaget, is thus incorrect.

The grounds for challenge based on general principles of contract law

Systembolaget has claimed that the arbitral tribunal has found that the parties have by way of agreement waived the right to terminate the agreement based on general principles of contract law. In other words, this would relate to a specific agreement, or, as it is referred to by Systembolaget, a “waiver”.

In the arbitration proceedings, V&S claimed that the terminations were unfounded because there were no breaches of contract on the part of V&S. The terms and conditions, which Systembolaget claimed contained the conditions for the agreements terminated by Systembolaget, did not contain any such prohibition, since the Terms and Conditions of 2002 were not binding on V&S, the suppliers’ policy of 1999 was not part of the agreement, and although the Terms and Conditions of 1995 were binding on V&S, they did not prohibit actions of the kind on which Systembolaget has based its termination.

The issue of whether the breaches of contract had been material became relevant when Systembolaget referenced a termination clause in the Terms and Conditions of 2002, which provided that the offering of product samples and other perquisites should always be deemed as a material breach of contract, as well as a provision of the Terms and Conditions of 1995, which provided that termination was permitted in cases where a party had not immaterially breached its obligations under the contract.

V&S claimed that the Terms and Conditions of 2002, including the termination clause, were not binding on V&S. With respect to the Terms and Conditions of 1995, V&S accepted on principle that these were applicable, and finally acknowledged that termination under the Terms and Conditions of 1995 was permissible in cases of “not immaterial” breach of contract. This prerequisite is actually more favorable to the terminating party than the prerequisite of material breach provided by general principles of contract law.

In V&S's opinion, Systembolaget relies on two different sets of general principles of contract law, firstly a right to terminate based on attempts to manipulate an agreed upon procurement procedure (principle of breach of contract), secondly a general right to terminate based on any material breach of contract (principle of termination).

V&S maintained that, firstly, the purchasing conditions did not prohibit the relevant actions and, secondly, there was no right to terminate under general principles of contract law.

However, if the claim that there was no breach of contract was upheld by the arbitral tribunal, there would obviously be no need to determine if the breaches were material or not. And the fact of the matter is that the arbitral tribunal found that no breaches had been committed of the purchasing conditions applicable between the parties (344). Thus, the question whether the alleged breaches of contract were material or not was never determined.

Systembolaget based its objections to V&S's claim that grounds for termination were at hand, firstly, under the Terms and Conditions of 2002, secondly, under the Terms and Conditions of 1995, and, thirdly, under general principles of contract law in cases of material breach of contract.

In the arbitration proceedings, V&S discussed Systembolaget's claim that general principles of contract law provided that a breach of contract had been committed even if this was not the case under the applicable terms and conditions. V&S claimed that if it had not breached any provisions in the terms and conditions, then there was no agreed upon procurement procedure against which V&S could commit breaches. Herein lies the observation that the terms and conditions exhaustively governed the issue of what contacts were permitted and not.

The arbitral tribunal found (344) that the Terms and Conditions of 2002 were not binding upon V&S, that the suppliers' policy of 1999 was not part of the agreement, and that the Terms and Conditions of 1995 did not include any specific obligation for V&S on which Systembolaget could base its right to terminate. Thus, no breach of the terms and conditions had been committed. What was left to determine was whether a breach of contract had been committed under the general principles of contract law referenced by Systembolaget.

V&S had accepted that the termination clause of the Terms and Conditions of 1995 applied also in cases of not immaterial breaches of contract. Thus, Systembolaget's reference to general principles of contract law had become irrelevant.

Thus, the parties had in reality waived the general principles of contract law by their agreement, but not in the way that Systembolaget claims that the arbitral tribunal found. However, since an agreement actually existed, it is irrelevant whether the arbitral tribunal was to have found that the agreement had been entered into also in another way.

Hereafter, only the issue of whether Systembolaget's reference to the principle of breach of contract was founded remained to be considered by the arbitral tribunal. This is exactly what the arbitral tribunal has done. It actually considers (347 and 348) exclusively the issue of whether there were grounds for Systembolaget's claim that a breach of contract could be at hand even if a breach of the terms and conditions had not been committed.

The arbitral tribunal was faced to consider whether the same circumstances referenced by Systembolaget in reliance on the terms and conditions comprised a breach of contract based on general principles of contract law, despite the fact that these actions did not comprise a breach of any specific provision of those terms and conditions. It should be noted that Systembolaget was of the opinion that the terms and conditions did <u>not</u>

exhaustively regulate which actions were permissible. Thus, this was a claim that the arbitral tribunal had to consider.

The statement in the arbitral award (348) that the Terms and Conditions of 1995 and the suppliers' policy of 1999 shall be deemed to exhaustively regulate the sanctions in cases of bribery and that in such circumstances there is no room to apply general principles of contract law in addition to the provisions of the agreement cannot be in reference to anything else but a review of Systembolaget's claim that a breach of contract could have been committed by breaching general principles of contract law rather than the provisions of the agreement. The arbitral tribunal considered the claim that there were rules outside the agreement, which prohibited actions of the kind referenced by Systembolaget, and found that this was not the case. The conclusion comprises a direct response to the claim that the terms and conditions did not exhaustively regulate which actions were permissible.

In the arbitral award, the arbitral tribunal notes (346) that there is a general principle of contract law that confers the right to a party to terminate the agreement in cases of material breaches by the other party. The tribunal continues: "The principle applies only when the parties have not agreed otherwise." This statement could be read to imply that the tribunal had intended to consider whether the parties had waived the actual right to terminate the agreement. From the continued reasoning of the tribunal, however, it is clear that this was not the case. The tribunal does not actually state that the right to terminate had been waived but rather that Systembolaget was not entitled to terminate the agreement based on such actions as those on which it had based its termination. This was because the parties had agreed that such actions should not be sanctioned under the agreement, i.e. these actions were not prohibited by the agreement and did not constitute breach of contract.

There is a difference in waiving the right to terminate as such and agreeing the certain actions do not constitute breach of contract. The former constitutes

what Systembolaget has referred to as a waiver. In the latter case, the principle that a breach of contract could entail termination remains.

Thus, the arbitral tribunal has not concluded that a waiver agreement had been executed but merely considered whether such contacts with suppliers of the kind relevant in the dispute were permissible or not. Systembolaget has, however, not claimed that this review exceeded the jurisdiction of the arbitral tribunal. Systembolaget has further not maintained that V&S did not claim that the Terms and Conditions of 1995 and the suppliers' policy of 1999 constituted an "exhaustive regulation" between the parties.

Thus, the arbitral tribunal did not conclude that the general principle of contract law on the right of termination upon the other party's breach of contract had been waived. The tribunal did not consider this issue at all and has consequently not exceeded its jurisdiction.

Irrespective of which conclusion is drawn from the contents of the arbitral award with respect to the above, V&S claims that it has referenced the circumstances on which the tribunal has based its decision.

V&S maintained (77) that the policy of 1999 constituted a separate agreement, not connected to the purchase agreements. Breaches of the policy were not sanctioned by any agreement. V&S further claimed (58) that if Systembolaget intended for breaches of the Terms and Conditions of 1995 to entail sanctions under civil law, then this should have been worded differently and clearly, which was eventually the case in the Terms and Conditions of 2002.

The arbitral tribunal has agreed with this, when it notes (347) that if the parties agreed that civil law sanctions would apply in cases of breaches, then this should have been regulated in the applicable agreement. Thus, V&S has referenced exactly that which is noted by the arbitral tribunal.

Since the arbitral tribunal found that Systembolaget's reference to breach of contract under general principles of contract law was unfounded, then the outcome of the case could not have been affected even if the tribunal potentially would have incorrectly concluded that the parties had waived the right to terminate upon a material breach of contract provided under general principles of contract law. Without a breach of contract, the termination by Systembolaget was unfounded irrespective of which principle was applied.

Since the parties, in addition, agreed that a right to terminate was provided under the Terms and Conditions of 1995 – and on, for Systembolaget, more generous conditions than as provided under the general principle of contract law – the outcome of the case would not have been affected even if the arbitral tribunal had found that the general principle had been waived.

GROUNDS

The investigation

The Court of Appeal has decided the case after a main hearing. Documentary evidence has been referenced. Further, Systembolaget has referenced written opinions provided by Professors L.H., B.L. and J.R.

The conclusion of the Court of Appeal

Systembolaget has claimed that the arbitral tribunal has considered circumstances not referenced by the parties and that it consequently has exceeded its jurisdiction (item 2 of the first paragraph of Section 34 LSF). Thus, the issue to consider is whether V&S has referenced the circumstances on which the arbitral tribunal's conclusions were based.

It is common that the parties to arbitration proceedings are given the opportunity to review and provide notes to the draft of the arbitral tribunal's background statement. Systembolaget has claimed that after a party has

approved the background statement, it cannot claim that other circumstances have been referenced than those set out in the background statement. V&S has objected thereto, claiming that all submissions in the arbitration proceedings form part of the background material, unless the parties have agreed otherwise.

It is only natural that, after the parties have approved the background statement, it contains everything material referenced by the parties. Thereby, the predictability of the proceedings is increased and future challenge proceedings typically are avoided (cf. Heuman, Skiljemannarätt, p. 528 and Lindskog, Skiljeförfarande, En kommentar, p. 660). Generally, it must be assumed that the circumstances referenced by the parties should be found in the background statement they have approved.

Firstly, the Court of Appeal will consider the ground for challenge based on general principles of contract law.

V&S has claimed that the arbitral tribunal has not – as claimed by Systembolaget– reviewed the issue of whether the parties had waived the general right to terminate under general principles of contract law (the principle of termination). Instead, the arbitral tribunal, according to V&S, concluded that Systembolaget was not entitled to terminate the agreement based on the actions that led to the termination (principle of breach of contract). V&S has in further support of its interpretation of the arbitral tribunal's decision maintained that Systembolaget's reliance on the general right of termination under general principles of contract law had been rendered irrelevant by the fact that V&S had accepted that the termination provision of the Terms and Conditions of 1995 applied already in cases of not immaterial breaches of contract. V&S has in addition claimed that through this, the right of termination based on general principles of contract law had in fact been waived.

In the relevant sections of the arbitral award, the arbitral tribunal notes (346) that there is a general principle of contract law providing that one party's breach of contract can lead to the termination by the other party, and further that this principle applies only unless otherwise agreed by the parties. After considering the provisions of the Terms and Conditions of 1995 and the suppliers' policy of 1999, the tribunal reaches the conclusion (348), that the evidence suggests that the Terms and Conditions of 1995 and the suppliers' policy of 1999 should be deemed as an exhaustive regulation on how matters of bribery should be sanctioned.

The Court of Appeal concludes that this cannot be interpreted in any other way than a review of the whether the right to terminate under general principles of contract law had been waived by the parties through the aforementioned Terms and Conditions and suppliers' policy. The wording does not support that the sections deal with the issue of whether breaches of contract had occurred.

In its review of what V&S has referenced in support of its objections to Systembolaget's claims in this respect, the Court of Appeal will accordingly apply the above interpretation. Thus, the first issue to be considered is whether V&S has referenced that the right of termination under general principles of contract law had been waived by the parties.

It is not disputed between the parties that V&S never claimed that the parties had explicitly agreed that general principles of contract law should not be applied to the dispute. Rather, the question is whether V&S can be deemed to have maintained that the parties, through the agreement on the terms and conditions, had exhaustively regulated how matters of bribery should be sanctioned, and that in such circumstances, as noted by the arbitral tribunal, it was not possible to apply also general principles of contract law to these matters.

In the arbitration proceedings, V&S claimed that Systembolaget's terminations were unfounded because the provisions relied on by Systembolaget were not applicable. Systembolaget objected thereto (37-39) by claiming that V&S had committed breaches of contract triggering the right to terminate based on the provisions applicable between the parties, and that Systembolaget consequently had had the right to terminate under the terms and conditions, and in the alternative, under general principles of contract law, which provide that a right to terminate arises upon a party's material breach of contract. V&S objected to this by maintaining that a right to terminate under general principles of contract law had not arisen (31, A 1.4).

Viewed in context, it must be deemed clear that V&S here has clarified its position that no breaches of contract, which in addition to the right to terminate under the provisions of the purchasing conditions, could have triggered a right to terminate under general principles of contract law. It is not clear from the arbitral award that V&S provided further details on its opinions with respect to these principles.

In the present challenge proceedings, V&S has in this respect referenced two sections of the arbitral award under the heading *The further grounds of the parties*. In the first section (77), it is claimed that the policy of 1999 is a separate agreement not connected to the purchasing conditions and that it was not sanctioned under civil law; in the second section (58), V&S has stated that if Systembolaget had intended that breaches of the Terms and Conditions of 1995 could have sanctions under civil law, then this should have been worded differently and more specifically.

In the opinion of the Court of Appeal, this cannot be considered as V&S having referenced that the provisions of the Terms and Conditions of 1995 and the suppliers' policy of 1999 on sanctions under criminal law were to be considered an exhaustive regulation between the parties of the possible sanctions and that would preclude the application of general principles of

contract law. No such reference, as Systembolaget has claimed, can be considered to have been made by V&S.

V&S cannot be deemed to otherwise have claimed that the right to terminate under general principles of contract law had actually been waived.

The conclusion is that the arbitral tribunal did not have jurisdiction to base its conclusion on the reasoning about exhaustive regulations on sanctions for bribery. Hereby, the arbitral tribunal exceeded its jurisdiction.

V&S has claimed that any excess of jurisdiction has not affected the outcome of the case.

The application of the provision on excess of jurisdiction does not require, as opposed to the provision on procedural errors, that the error likely affected the outcome of the case. Nonetheless, such a requirement is deemed to exist, because, amongst other things, an arbitral award should not be annulled if it is possible to determine that the outcome would have been the same without any excess of jurisdiction by the arbitral tribunal (cf. Heuman, Skiljemannarätt, p. 609 ff.).

The arbitral tribunal had, based on its conclusion, no reason to review whether the right to terminate under general principles of contract law would have been applicable to the actions which triggered the terminations by Systembolaget. Thus, it is not possible to predict what the outcome of the case would have been. According to the Court of Appeal, it cannot be excluded that the error has affected the outcome of the case.

Thus, Systembolaget’s motion that the arbitral award shall be annulled in its entirety shall be granted.

Having reached this conclusion, it is not necessary for the Court of Appeal to review also the second ground for the challenge based on the Terms and Conditions of 2002.

As the losing party, V&S shall compensate the litigation costs of Systembolaget. V&S has accepted the claimed amount for expenses but left it to the Court of Appeal to decide whether the claimed amount for legal counsel is reasonable. The Court of Appeal finds the claimed amount reasonable.

Under the second paragraph of Section 43 of LSF, the judgment of the Court of Appeal may not be appealed.

[ILLEGIBLE SIGNATURES]

The judgment has been made by: Senior Judge of Appeal C.R., and Judges of Appeal M.E. (Reporting Judge of Appeal) and A-K.W. Unanimous.