SVEA COURT OF APPEAL	**JUDGMENT**	Case No.
Department 02	23 October 2013	T 4487-12
Division 020103	Stockholm	

CLAIMANT

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RESPONDENT

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MATTER
Invalidity and challenge of arbitral award

RELEVANT AWARD
Arbitral award rendered in Stockholm on 20 February under the rules of the Arbitration Institute of the Stockholm Chamber of Commerce case No. V 101/2010, see appendix A

JUDGMENT OF THE COURT OF APPEAL

1. The Court of Appeal rejects the motion for a partial judgment in the case.

2. The Court of Appeal rejects the motion for a request for a preliminary ruling from the European Court of Justice.

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3. The Court of Appeal rejects the claims.

4. Systembolaget is ordered to compensate The Absolut Company Aktiebolag for its litigation costs in the amount of SEK 4,724,693 plus interest pursuant to Section 6 of the Swedish Interest Act from the day of the judgment of the Court of Appeal until the day of payment. The amount includes fees for legal counsel in the amount of SEK 3,705,000.

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BACKGROUND

V&S Vin och Sprit Aktiebolag (V&S) – now The Absolut Company AB – previously manufactured, imported and exported alcoholic beverages as well as conducted wholesale reselling of such beverages. Systembolaget Aktiebolag (Systembolaget) by law holds a monopoly on the retailing of spirits, wine and beer. General agreement provisions included in the general purchasing conditions were applicable to the delivery of beverages from V&S to Systembolaget. These provisions were supplemented by individual purchasing agreements for each product sold by V&S to Systembolaget.

Following the prosecution of individuals tied to V&S for bribery of some of Systembolaget's staff during 2001-2003, Systembolaget claimed in December of 2006 that V&S materially had breached its obligations towards Systembolaget, that a material breach of contract had occurred and that grounds for termination of the agreement, in its entirety or partially, were at hand. Systembolaget informed V&S that it intended to terminate individual purchasing agreements for several products and subsequently inform on which products that would be included in the termination. In January of 2007, Systembolaget presented a list on the products included in the terminations.

V&S did not accept Systembolaget's terminations and requested arbitration, requesting that Systembolaget be ordered to pay damages to V&S. In an arbitral award of 12 March 2008, V&S's claims were partially granted. Following Systembolaget's challenge of the arbitral award, the Court of Appeal granted the challenge and annulled the arbitral award.

Thereafter, V&S again commenced arbitration, claiming that Systembolaget should be ordered to pay to V&S damages in the amount of SEK 87,706,000 plus interest. As grounds for its claims, V&S referenced that Systembolaget had terminated the purchasing agreements with V&S without being entitled to do so under the agreements or law, and also that the terminations violated competition law. As a result, V&S was entitled to compensation for the losses caused by the terminations. Systembolaget objected that it had been entitled

to terminate the agreements and disputed that the terminations had amounted to abuse of Systembolaget's dominant position.

The arbitral tribunal found in the now challenged arbitral award that Systembolaget had been entitled to terminate the agreements under contract law principles. However, Systembolaget's actions were deemed to violate competition law requirements applicable to a super dominant company. Consequently, the arbitral tribunal held that Systembolaget had abused its dominant position, and the company was ordered to pay damages to V&S in the amount of SEK 57,000,000 plus interest.

MOTIONS BEFORE THE COURT OF APPEAL

Systembolaget has moved that the Court of Appeal shall declare the arbitral award invalid or, alternatively, annul it, with the exception of what has been ordered on the compensation to the arbitrators.

V&S has objected to the declaration of invalidity and/or the annulment of the arbitral award.

The parties have claimed compensation for their litigation costs before the Court of Appeal.

THE PARTIES' GROUNDS

Systembolaget

Systembolaget has referenced the following grounds and explained that the Court of Appeal is not bound to review them in any particular order.

Invalidity of the arbitral award

1. The arbitral award is clearly incompatible with the basic principles of Swedish law (item 2 of the first paragraph of Section 33 of the Swedish Arbitration Act (SFS 1999:116)) because

a) the arbitral award, by grossly misinterpreting provisions of competition law, has stripped Systembolaget of the right to terminate an agreement – even partially – when it has been subjected to material breaches of contract, which breaches also constituted criminal activity.

b) the arbitral award recreates a situation achieved through bribery.

2. The arbitral award shall be declared invalid under item 2 of the first paragraph of Section 33 of the Swedish Arbitration Act and the so-called Eco Swiss doctrine because

a) the arbitral award violates the competition law provisions set out in the Treaty on the Functioning of the European Union (TFEU), the violation is clear and the arbitral award sets aside or violates the TFEU's provisions on competition law (Article 102 of the TFEU).

b) the arbitral award entails that discrimination or abuse of dominant position is upheld, arises or is unavoidable, or alternatively it counteracts or renders impossible the safeguarding of non-discrimination, which means that the arbitral award sets aside or violates the TFEU's provisions on competition law (Article 102 of the TFEU) and/or the TFEU's provisions on state monopolies of commercial character (Article 37 of the TFEU).

3. The arbitral award includes the review of a matter which is not eligible for arbitration under Swedish law and shall be declared invalid under the Eco Swiss doctrine as well as item 1 of the first paragraph of Section 33 of the Swedish Arbitration Act because

a) the arbitral award violates the competition law provisions of the TFEU, the violation is clear and sets aside or violates Article 102 of the TFEU.

b) the arbitral award entails that discrimination or abuse of dominant position is upheld, arises or is unavoidable, or alternatively it counteracts or renders impossible the safeguarding of non-discrimination, which means that the arbitral award sets aside or violates the TFEU's provisions on competition law (Article 102 of the TFEU) and/or the TFEU's provisions on state monopolies of commercial character (Article 37 of the TFEU).

Annulment of the arbitral award

1. The arbitral tribunal has exceeded its mandate (item 2 of the first paragraph of Section 34 of the Swedish Arbitration Act) because

a) the arbitral tribunal has based its decision on the circumstance that termination as a sanction has an innate deficiency in that the loss incurring effects is dependent upon how long the terminated agreements would otherwise have remained valid (thus, termination is in and of itself discriminatory). This had not been referenced by V&S in the arbitration proceedings.

b) the arbitral tribunal has based its decision on the circumstance that Systembolaget has discriminated against V&S in relation to other suppliers that were the subject of agreement terminations (paragraphs 647 and 658 in the majority opinion and paragraph 14 in the dissenting opinion). V&S had not referenced this in the arbitration proceedings. V&S had explicitly limited its claims on discrimination/unequal treatment to include only comparisons to those suppliers who had not been subjected to agreement terminations. The limitation applied to V&S's claim on discrimination in its entirety.

The excess of jurisdiction has affected the outcome of the case, or it can at least not be excluded that the jurisdictional excess affected the outcome of the case.

2. The arbitral tribunal was obliged to inform the parties that the tribunal considered that the matters set out in item 1 could be relevant for the decision and should have granted the parties the opportunity to argue thereon. That the arbitral tribunal failed to do so amounts to a procedural error. The error has likely affected the outcome of the case (item 6 of the first paragraph of Section 34 of the Swedish Arbitration Act).

V&S

V&S has provided the following positions with respect to the grounds referenced by Systembolaget.

Invalidity of the arbitral award

1. The arbitral award does not obviously violate fundamental principles of Swedish law. The arbitral tribunal has not misinterpreted provisions of competition law. The arbitral award does not restore a situation created by bribery.

2. The arbitral award shall not be declared invalid under item 2 of the first paragraph of Section 33 of the Swedish Arbitration Act and the so-called Eco Swiss doctrine. The requirement that the violation is clearly incompatible set out in Section 33 applies also to whether the arbitral award violates EU law. The arbitral award does not contain any such inaccuracies so that it is clearly incompatible withthe TFEU’s provisions on competition law.

3. The arbitral award does not contain a matter which is not eligible for arbitration under Swedish law.

Annulment of the arbitral award

1. The arbitral tribunal has not exceeded its jurisdiction.

a) The arbitral tribunal has not based its decision on a circumstance which was not referenced by V&S. In the arbitration proceedings V&S maintained that the sanctions model as such was discriminatory, and that is the issue reviewed by the arbitral tribunal. The arbitral tribunal's use of the term sanction is related to Systembolaget's terminations under the sanctions model and not to the legal figure of termination as such.

b) In the arbitration proceedings V&S maintained that the sanctions model was discriminatory because of, amongst other things, the parameters used by Systembolaget to determine the scope of the terminations. In this respect, V&S's references were general. Thus, they were not limited to only a comparison with some of Systembolaget's other suppliers. Further, V&S maintained in the arbitration proceedings that the application of the sanctions model – i.e. that Systembolaget acted based on suspected criminal activity instead of final judgments – was discriminatory. This circumstance, which had also been referenced as grounds for V&S's alternative motion in the arbitration proceedings, was prior to the main hearing of the arbitration proceedings was limited to only relate to suppliers who had not been subjected to sanctions. The reason for this was that if it had not been done, there was a risk that the main hearing would have been postponed. The arbitral tribunal has based its review in accordance with V&S's references.

Even if the Court of Appeal would find that the arbitral tribunal has exceeded its jurisdiction, it has not affected the outcome of the case.

2. The procedural guidance of the arbitral tribunal has not been insufficient. In any event, a possible procedural error in this respect has not affected the outcome.

FURTHER DETAILS

Systembolaget

The arbitral tribunal found that Systembolaget under civil law was entitled to terminate the contractual relationship with V&S in its entirety. In such a situation, provisions of competition law may nevertheless impose certain limits on the scope of the terminations – because of the requirements on proportionality and equal treatment in relation to suppliers having committed similar breaches of contract, but to various degrees and scope. Systembolaget was well aware of the provisions of competition law and consequently took far reaching measures to ensure that the terminations would not risk amounting to abuse. The outcome of the deliberations was that termination in relation to V&S was only carried out of purchasing agreements corresponding to sales of merely SEK 32 million, i.e. only approximately 2.6 percent of V&S's total sales to Systembolaget. Thus, Systembolaget did consider competition law requirements of proportionality and equal treatment. The decision on how to limit the terminations was based on a thought process (the sanctions model). The rationale for introducing this model was that Systembolaget wished to establish to third parties that it had done what could be done to ensure, to the extent possible, equal treatment of its suppliers.

The purpose of competition law is to safeguard free competition for the benefit of consumers, and thus not to protect companies acting in bad faith. A condition for establishing abuse of a dominant position in this case is that the measure subject to review entails relevant competition distorting effects. Systembolaget carried out the terminations concerning V&S and three other suppliers in such a manner that neither producers nor consumers were affected. Thus, they had no effects distorting competition and consequently did not amount to abuse of dominant position. The arbitral tribunal misjudged these foundational issues on the purpose and protected subjects of competition law as well as relevant competition distorting effects. Actions

within the ordinary course of business do not amount to abuse of dominant position.

The majority of the arbitral tribunal has committed a number of other material errors in the assessment of competition law aspects. One error is the majority's starting point that suppliers who have committed bribery are protected by competition law and that they, from an equal treatment perspective, should be compared to suppliers who have not committed bribery. Another error was the majority's decision that the actions amounted to a relevant unequal treatment, despite V&S not having established actual unequal treatment, but only that Systembolaget's course of action entailed a risk of unequal treatment.

The arbitral tribunal referenced that termination as a sanction includes a risk of amounting to discrimination because the loss incurring effects depend on the duration of the agreement if not terminated. The majority uses this reasoning as grounds to establish that all terminations were unlawful and bases its decision in the award hereon. Instead, the arbitral tribunal ought to have reviewed to what extent the terminations carried out amounted to unequal treatment or was disproportionate.

In a case like the now relevant, it is the party claiming abuse of dominant position that carries the burden of proof that a company has undertaken an action that amounts to abuse and that the abuse has relevant effects distorting competition. Only if the party that references abuse has established the abuse, does the question arise whether the dominating company can show objectively acceptable grounds for the course of action. The arbitral tribunal applied these provisions incorrectly and held that V&S should merely establish that Systembolaget's actions tended to limit competition. The arbitral tribunal's reasoning concerning Systembolaget having based its terminations on suspected bribery is incorrect. Systembolaget undertook measures when the company through the publication of the criminal

investigation was granted access to concrete evidence on the actions upon which the terminations were based.

The arbitral tribunal incorrectly found that the so-called sanctions model was a sanction. The model was merely a tool to limit the terminations in a structural manner and to ensure that the same approach was used in all cases. Further, the arbitral tribunal has incorrectly concluded that Systembolaget has acted in a manner that is otherwise mainly done by public authorities.

As a consequence of its dominant position, Systembolaget is obliged to treat third parties equally and to act in a competition neutral manner. Further, Systembolaget is obliged under Article 37 of the TFEU to ensure non-discrimination. These obligations entail that Systembolaget cannot refrain from acting under civil law if the conditions for maintaining competition neutral conditions and non-discrimination are eliminated by bribery and material breaches of contract as was the case with V&S. When Systembolaget became aware of evidence of systematic bribery and breaches of contract with the purpose of granting V&S improper advantages at the expense of other suppliers, Systembolaget was obliged to carry out terminations with respect to V&S. If Systembolaget had refrained from carrying out the terminations, this would have amounted to abuse of a dominant position in violation of Article 102 of the TFEU and also entailed that Systembolaget would have failed to meet its obligations under Article 37 of the TFEU. The arbitral award entails that the civil law sanction against V&S has been voided or neutralized. The arbitral award entails that discrimination or abuse of dominant position is maintained, arises or cannot be avoided. Alternatively, the arbitral award counteracts or renders impossible safeguarding of non-discrimination.

In the so-called Eco Swiss judgment, the ECJ established that a national court faced with deciding a motion for declaring an arbitral award invalid must grant the motion if it finds that the arbitral award violates Article 101 of the TFEU, provided that the court under national law is obliged to grant an invalidity motion, which is based on the fact that fundamental principles of

national law have been violated. The judgment – which is relevant also for the application of Articles 37 and 102 of the TFEU – means that the requirement set out in Section 33 of the Swedish Arbitration Act that the violation of basic principles must be clear does not apply to arbitral awards that violate EU's competition rules.

V&S

The arbitral award is not materially incorrect on the merits. The arbitral tribunal has analyzed in-depth the relevant issues in accordance with accepted competition law principles. Actions in the ordinary course of business cannot amount to abuse of dominant position. However, the arbitral tribunal concluded that Systembolaget's course of action – i.e. the terminations of agreements applying the sanctions model – was not to be deemed as actions in the ordinary course of business. Irrespective of whether Systembolaget was entitled to carry out the relevant terminations under contract law, it is clear that a dominant company – as a consequence of its responsibility for the market stemming from competition law – must base such terminations on objective and non-discriminatory principles.

The review of whether abuse of dominant position is at hand shall be made having regard to all relevant circumstances. The sanctions model used by Systembolaget forms a central part of this review. Systembolaget based its terminations on the prosecutor's considerations on the extent of the bribery. This had the consequences noted by the arbitral tribunal, i.e. that the application of the so-called sanctions model could entail lacking equal treatment and proportionality. The arbitral tribunal explains why the maximum levels of the sanctions model limits competition. The arbitral tribunal further explains why the terminations based on the sanctions model were not neutral from a competition perspective, created entry barriers, did not entail the equal treatment of similar situations and were not proportional. Each of these conclusions is sufficient to establish abuse of dominant position. The fact that Systembolaget did not base its terminations on final

judgments but rather on the prosecutor's suspicions led to V&S being affected to a much greater extent than it ought to have been. As noted by the arbitral tribunal, this by itself amounts to discrimination in relation to other, unaffected, suppliers. The terminations were not fit for the purpose or proportional. The arbitral tribunal did not find that a dominant company cannot use the sanction of termination for material breaches of contract, but only finds the aforementioned for the relevant case, i.e. terminations based on the sanctions model.

The arbitral tribunal found, in line with established case law, that V&S carries the burden of proof that Systembolaget abused its dominant position, whereas Systembolaget must establish the possible existence of objectively acceptable grounds. Since the arbitral tribunal found that the sanctions model as such contains elements that renders the model and its application abusive, it is correct that it is for Systembolaget to establish that the model and the company's application thereof acceptable under article 102 of the TFEU and Section 7 of Chapter 2 of the Swedish Competition Act.

Systembolaget's claim that the arbitral tribunal has equated the risk of abuse with actual abuse is incorrect. The arbitral tribunal found that V&S had established that Systembolaget's terminations distorted competition. Then, it was for Systembolaget to establish the existence of objectively acceptable grounds. The risk of discrimination is sufficient to conclude that abuse is at hand. This follows directly from Article 102 of the TFEU and Section 7 of Chapter 2 of the Swedish Competition Act and has been confirmed in case law. Thus, there is no need to establish that the actions have a competition limiting affect.

Systembolaget's reasoning on the "effects of the arbitral award" is incorrect. An arbitral award that establishes that a company has abused its dominant position cannot violate Articles 102 or 37 of the TFEU.

Article 37 of the TFEU does not award state monopolies of a commercial nature the right to terminate agreements without regard to the requirements

set out in Article 102 of the TFEU. Article 37 does not form part of the fundamental principles of EU law and does consequently not fall within the scope of the Eco Swiss doctrine.

The Court of Appeal shall under Section 33 of the Swedish Arbitration Act review whether the arbitral award is clearly incompatible with basic principles of Swedish law. However, it shall not carry out a detailed review of the merits or evaluate evidence. The Eco Swiss judgment does not require such a review to be carried out. Even if the arbitral tribunal had rendered an incorrect award – even clearly incompatible – a "too strict" arbitral award does not violate the purposes upon which Article 102 of the TFEU is based. The damages awarded in the arbitral award concern previously taken actions. Further, it relates to products that were not relevant to briberies.

ISSUES ON PARTIAL JUDGMENT AND PRELIMINARY RULING FROM THE ECJ

Systembolaget

Systembolaget has moved that the Court of Appeal shall settle the motion for the declaration of the arbitral award as invalid by way of a partial judgment.

In the event that the Court of Appeal would reject Systembolaget's motion for a partial judgment or in the event that the Court of Appeal would in a partial judgment reject the motion for an invalidity declaration, Systembolaget has moved that the Court of Appeal shall consider whether a preliminary ruling by the ECJ is required to decide the case. According Systembolaget, a preliminary ruling is relevant for two aspects of the case, namely if the Court of Appeal holds doubt as to *whether* the arbitral award violates Article 102 and/or 37 of the TFEU, or further is unsure *how* the Eco Swiss ruling should be interpreted or how EU law should be interpreted with respect to whether the matter is eligible for arbitration or not. Systembolaget has proposed questions to be posed to the ECJ.

V&S

V&S has, in the event the Court of Appeal would find that the arbitral tribunal did not exceed its mandate but considers a preliminary ruling required, not objected to a partial judgment with respect to the motion for invalidity of the arbitral award. For other instances, V&S has objected to a partial judgment being rendered.

V&S has objected to the Court of Appeal requesting a preliminary ruling from the ECJ.

THE INVESTIGATION BEFORE THE COURT OF APPEAL

The parties have not referenced any evidence.

GROUNDS OF THE COURT OF APPEAL

Does the arbitral award violate ordre public?

An arbitral award is invalid if it or the manner in which was decided is clearly incompatible with basic principles of Swedish law (item 2 of the first paragraph of Section 33 of the Swedish Arbitration Act). This is usually expressed in terms of the arbitral award violating Swedish ordre public.

Swedish law takes a restrictive attitude to the possibility of having an arbitral award declared invalid due to ordre public. The preparatory works of the provision provides that it is only intended to apply to highly offensive cases and that it will be applicable exceedingly rarely. The ordre public concept has been deemed to include arbitral awards in which fundamental legal principles on the merits or of procedural matters have been breached. Examples given include arbitral awards through which a party is ordered to carry out actions that are illegal or when the arbitrators have resolved a dispute while failing to consider a peremptory legal provision for the benefit of a third party or the general public and which expresses a particularly important legal norm (see Government Bill 1998/99:35 p. 141 f. and 234). Another example is when the arbitral award violates Swedish or EU competition law. If there is no decision from the Swedish Competition Agency or a court which establishes that a certain procedure set out in an arbitral award is illegal, then it is maintained that it is only in clear cases that an arbitral award can be held to violate ordre public (see Government Bill 1998/99:35 p. 58 and 59).

The issue of whether a national court faced with deciding a motion for invalidity of an arbitral award based on ordre public, also should consider EU competition law was relevant in the ECJ's judgment of 1 January 1999, Eco Swiss Chine Time Ltd vs. Benetton International NV, case No. C-126/97 (the so-called Eco Swiss case). The ECJ noted in its ruling that Article 85 of the EC Treaty (now Article 101 of the TFEU) should be considered as such a provision that is included in the fundamental principles of a legal system. Further, the ECJ held that a national court faced with deciding a motion for

invalidity of an arbitral award must grant the motion if it considers that the arbitral award is in breach of Article 85 of the EC Treaty, provided that it according to national procedural rules must grant a motion for invalidity which is based on fundamental principles of national law having been disregarded.

The practical consequences of the ECJ's ruling are disputed in various aspects. One conclusion that can be inferred is that a Swedish court when applying the ordre public provision set out in Section 33 of the Swedish Arbitration Act shall not only take into consideration basic principles of Swedish law, but also a disregard of Article 101 of the TFEU. There is hardly any room for doubt that the principles established in the ruling shall be applied also for the provision on abuse of dominant position (Article 102 of the TFEU). Thus, when applying Section 33 of the Swedish Arbitration Act, also that Article must be considered a provision included as a basic principle of the law.

In the opinion of the Court of Appeal the Eco Swiss ruling does not, however, support the conclusion that Swedish courts must modify national procedural rules on ordre public for invalidity motions of arbitral awards. The ECJ did not in the ruling at all address the issue of how the review before the national courts should be carried out. Therefore, the starting point must be that the principles that are otherwise applicable under national rules on ordre public should be applied also when reviewing issues of disregard of EU competition law (see for example de Groot, Stockholm International Arbitration Review 2006:2 p. 217, p. 223). This implies that the requirement of clear incompatibility set out in item 2 of the first paragraph of Section 33 of the Swedish Arbitration Act applies also to these cases and that the interpretation should be restrictive (see also Svea Court of Appeal's judgment of 4 May 2005 in case No. T 6730-03).

In the present case – as opposed to the Eco Swiss case – the arbitral tribunal has not failed to apply competition law. To the contrary, it is clear that the

arbitral tribunal has carried out a very thorough competition law review based on the rules applicable in the case, i.e. Section 7 of Chapter 2 of the Swedish Competition Act and Article 102 of the TFEU. The arbitral tribunal has, referencing case law etc., considered whether Systembolaget has abused its dominant position. In the review issues such as the importance of Systembolaget's special responsibilities as a super dominant company as well as Systembolaget's choice and application of the sanctions model were considered. Further, issues of equal treatment, proportionality and burden of proof were considered. The arbitral tribunal's decision was not unanimous. Thus, even if there is room for various views on the competition law aspects relevant in the case, the Court of Appeal finds that the majority's opinion is not flawed by such material inaccuracies so it could be held to be clearly incompatible with basic principles of Swedish law or the competition law provisions of the TFEU. Through the arbitral award, Systembolaget is ordered to pay damages based on a previously taken course of actions. It does not, however, contain a prohibition for the future or an obligation to act in breach of competition law. In the opinion of the Court of Appeal the arbitral award cannot be seen to strip Systembolaget of the right to terminate to any extent. To the contrary, it is stressed in the majority's grounds that the starting point is that not even a super dominant company can be prevented from terminating an agreement if the counterparty has committed a breach giving rise to termination rights. The arbitral tribunal has merely disallowed the terminations as they were carried out in the relevant case. The arbitral award can further not be said to restore an order created by bribery, and it does not entail that discriminatory or abusive practices are upheld, arise or become unavoidable. The award does not prevent or render impossible safeguarding of non-discrimination.

In this context, the Court of Appeal also notes that a too strict interpretation of the actions taken by Systembolaget from a competition law perspective ought not to amount to a disregard of Article 102 of the TFEU. Article 3 of the Council Regulation No. 1/2003 on the implementation of the rules on

competition laid down in Articles 82 and 83 of the Treaty (the Application Regulation) provides that Member States are not prevented to within their respective territories apply stricter national rules through which a company's unilateral actions are prohibited or sanctioned.

Having regard to the aforementioned, the Court of Appeal finds that the arbitral award does not violate ordre public.

Does the arbitral award include a matter which is not eligible for arbitration under Swedish law?

An arbitral award is invalid if it includes an issue which under Swedish law may not be decided by arbitrators (item 1 of the first paragraph of Section 33 of the Swedish Arbitration Act). The third paragraph of Section 1 of the Swedish Arbitration Act provides that arbitrators may resolve issues of competition law's civil law effects between the parties. Such civil law effects include the obligation to pay damages under Section 25 of Chapter 3 of the Swedish Competition Act. Public law sanctions such as the order to cease and desist with a violation or the prohibition of a certain course of action are however not eligible for arbitration (see Government Bill 1998/99:35 p. 54 f., Lindskog, Skiljeförfarande En kommentar, 2012, p. 240 and Madsen, Skiljeförfarande i Sverige, 2005, p. 72).

Systembolaget's obligation in the arbitral award relates – in addition to the costs for the arbitration proceedings – only to damages. In the opinion of the Court of Appeal neither the operative part of the award nor the grounds imply that it relates to a public law sanction. Thus, the Court of Appeal finds that only civil law effects between the parties eligible for arbitration have been settled in the arbitration proceedings. Therefore, the arbitral award is not invalid on this ground either.

Should the Court of Appeal request a preliminary ruling?

The ECJ is authorized to provide preliminary rulings on the interpretation of the treaties, the validity and interpretation of rules issued by the institutions,

organs or offices of the union. When such an issue arises before a court in a Member State that court is allowed, if it deems a decision on the matter necessary to settle the case, to request that the ECJ renders a preliminary ruling (the first and second paragraphs of Article 267 of the TFEU).

As noted above, the Court of Appeal does not consider the arbitral award to include any such material inaccuracies or deficiencies as could make it clearly incompatible with basic principles of Swedish law or the competition law provisions of the TFEU. The Court of Appeal finds that it is not necessary to request a preliminary ruling from the ECJ, whether with respect to the contents of competition law, the interpretation of the Eco Swiss ruling or other EU law aspects. Thus, Systembolaget's motion for a preliminary ruling shall be rejected.

Did the arbitral tribunal exceed its mandate?

Item 2 of the first paragraph of Section 34 of the Swedish Arbitration Act provides that an arbitral award shall be annulled if the arbitral tribunal exceeded its mandate. With respect to arbitration proceedings between Swedish parties the starting point is the provisions and terminology of the Swedish Code of Judicial Procedure shall set the standard (see Government Bill 1998/99:35 p. 145 and 146 and Heuman, Skiljemannarätt, 1999, p. 337 f., and p. 618). This means that the mandate of the arbitrators is limited by the *concrete and legally relevant circumstances* referenced by the claimant. A concrete and legally relevant circumstance is an actual circumstance "in reality" upon which a party bases its case and that is directly relevant to the legal effect to which the party tied it. However, it does not include legal rules or legal arguments. Typically, a court – as well as an arbitral tribunal – are entitled as well as obliged to apply these also without them being referenced under the principle of *jura novit curia* (see Fitger *et al.*, Rättegångsbalken (April 2013, Zeteo), the commentary to Section 3 of Chapter 13). Thus, an arbitral tribunal does not exceed its mandate by applying a certain legal provision despite the parties not having referenced it or by presenting legal

arguments that differ from the manner in which they were presented by the parties in the arbitration proceedings.

Systembolaget has maintained that the arbitral tribunal exceeded its mandate by basing its decision upon the circumstance that termination as a sanction has an innate deficiency in that the loss incurring effects depend upon the duration of the terminated agreements if they had not been terminated. In this respect, Systembolaget has in particular stressed paragraph 667 of the arbitral award. Here, it is noted that “the terminations based on the sanctions model include the innate and virtually inescapable deficiency that the loss incurring effects are directly dependent upon how long the product is demanded by consumers and how the sales develop in the future.”

The arbitral award provides that V&S as grounds for its case maintained that, amongst other things, the sanctions model as such was discriminatory. V&S stressed that the sanctions under the sanctions model entailed that Systembolaget terminated a long-term business relationship with V&S for the products falling within the scope of the sanctions and that the measures meant that Systembolaget continually refused to purchase the products from V&S (see paragraph 315). In the opinion of the Court of Appeal, the statements referenced by Systembolaget in this respect include only conclusions and legal argumentation based on circumstances referenced by V&S. The reasoning relate to the effects of the terminations based on the sanctions model. However, no circumstances that had not been referenced have been considered in the decision. Thus, the Court of Appeal finds that the arbitral tribunal did not exceed its mandate in the manner maintained by Systembolaget.

The question then, is whether the arbitral tribunal exceeded its mandate by basing its decision on the circumstance that Systembolaget discriminated V&S as compared to other suppliers who also had their agreements terminated, despite the fact that V&S never referenced this in the arbitration proceedings.

With respect to the grounds for V&S's main motion in the arbitration proceedings – which is undisputedly the motion resolved by the arbitral tribunal – Section 4.1 of the arbitral award (heading "V&S's grounds") provides that V&S maintained that Systembolaget without being entitled to do so under the agreement or under dispositive law and in violation of competition law rules had terminated purchasing agreements with V&S. With respect to the framing of the case, Section 4.3 of the arbitral award must be considered (heading "V&S's further details on its case"). Section 4.3.7 provides that V&S maintained that the sanctions model amounted to abuse of Systembolaget's dominating position, *inter alia*, due to the parameters used by Systembolaget to determine the scope of the terminations (see paragraph 296 f.). In the event that the arbitral tribunal would find that the sanctions model was acceptable under competition law as such, V&S also maintained abuse of dominant position through Systembolaget's choice of basing the size of the sanctions on the prosecutor's criminal investigation instead of final judgments. According to V&S the effect hereof was that V&S was hit much harder than what was reasonable having regard to the alleged breach of contract. This amounted to discrimination of V&S in relation to those suppliers who were *not* subjected to Systembolaget's sanctions (see paragraph 318). In the opinion of the Court of Appeal, it is sufficiently clear that this limitation to suppliers not subjected to sanctions was made only with respect to the fact that Systembolaget based its terminations on suspected criminal activity instead of proven criminal activity set out in final judgments. With respect to the other claims of discrimination, V&S's references were general. That the limitation to suppliers not subjected to sanctions was limited in this manner is supported also by the e-mail correspondence between the parties and the arbitrators submitted prior to the main hearing.

The arbitral award provides that the arbitral tribunal – specifically on the issue of the discrepancy between suspected criminal activity and proven criminal activity in final judgments – limited its review to a comparison only to those suppliers who had not been subjected to Systembolaget's sanctions

(paragraphs 647 and 658). In other respects, the review was general, i.e. in line with what V&S had referenced. Thus, the Court of Appeal finds that the arbitral tribunal did not exceed its mandate in this respect either.

Did any procedural errors occur?

Item 6 of the first paragraph of Section 34 of the Swedish Arbitration Act provides that an arbitral award can be annulled at a party's motion thereto, if a procedural error occurred, without fault to the party, which likely affected the outcome of the case.

As noted above, the Court of Appeal finds that the arbitral tribunal through its statements on the effects of the terminations based on the sanctions model did not base its conclusions on circumstances that had not been referenced by V&S. The arbitration proceedings lasted a relatively long time period and the parties were during the preparations awarded the opportunity to argue both orally and in writing. In the opinion of the Court of Appeal, the arbitral tribunal has not insufficiently guided the proceedings by failing to award the parties the opportunity to supplement their respective cases in any way. As a result, no procedural error that could warrant the annulment of the arbitral award has occurred.

Partial judgment

Based on the conclusions reached by the Court of Appeal as set out above, there is no reason to render a partial judgment on the annulment of the arbitral award. Thus, the motion for a partial judgment shall be rejected.

Overall evaluation

In sum, the Court of Appeal has found that the arbitral award does not contain any such material inaccuracies or oversights that could entail that it is incompatible basic principles of Swedish law or the competition law of the TFEU. As a result, it does not violate ordre public. The Court of Appeal has further found that the arbitral award does not include the review of a matter that is not eligible for arbitration under Swedish law. The arbitrators have not exceeded their mandate by basing its decision on a circumstance that had not been referenced. Further, no procedural error has occurred that could warrant the annulment of the arbitral award.

Therefore, the motions of the claimant shall be rejected.

Litigation costs

Upon this outcome, Systembolaget shall be ordered to compensate V&S for its litigation costs. V&S has claimed compensation in the amount of SEK 7,516,068, out of which SEK 6,469,375 comprises costs for legal counsel. The case has involved rather extensive correspondence, and the legal issues relevant in the case have obviously warranted extensive time spent. Even having regard hereto, the Court of Appeal finds, however, that the case has not been of such nature and scope as to reasonably warrant the claimed amount for costs for legal counsel to protect the interests of V&S. In this decision, the Court of Appeal takes into consideration that the case included a rather brief oral hearing and that the main hearing lasted barely two days. V&S is reasonably compensated by the amount attested by Systembolaget, i.e. SEK 3,705,000. The compensation claimed in other respects has been attested as reasonable.

This judgment deals with such issues for which it would be important for the development of case law to have an appeal reviewed by the Supreme Court. Therefore, the Court of Appeal grants leave to appeal (second paragraph of Section 43 of the Swedish Arbitration Act).

HOW TO APPEAL, see appendix B
Appeals to be submitted by 20 November 2013

The decision has been made by: Senior Judge of Appeal KB and Judge of Appeal AK, reporting Judge of Appeal, and Associate Judge FK.