JUDGMENT of the

SWEDISH SUPREME COURT

Case No.

rendered in Stockholm on 17 June 2015 T 5767-13

APPELLANT AND COUNTERPARTY

Systembolaget Aktiebolag, Reg. No. 556059-9473

103 84 Stockholm

Counsel: Advokat Jacob Melander and advokat Joakim Sundbom

Advokatfirman Hammarskiöld & Co AB

P.O. Box 2278

103 17 Stockholm

APPELLANT AND COUNTERPARTY

The Absolut Company Aktiebolag, Reg. No. 556015-0178

117 97 Stockholm

Counsel: Advokat Mattias Göransson, advokat Tommy Pettersson and Azadeh Razani

Mannheimer Swartling Advokatbyrå AB

P.O. Box 1711

111 87 Stockholm

Counsel: Advokat Johan Coyet

Advokatfirman Coyet & Co

Östermalmsgatan 97

114 59 Stockholm

SUPREME COURT
Riddarhustorget 8

Postal address
P.O. Box 2066
103 22 Stockholm

Telephone 08-561 666 00
Fax 08-561 666 86
E-mail:
hogsta-domstolen@dom.se
www.hogstadomstolen.se

Opening hours
8:45 am – 12 pm
1:15 am – 3 pm

MATTER

Invalidity and challenge of arbitration award etc.

APPEALED DECISION

Svea Court of Appeal, judgment of 23 October 2013 in Case No. T 4487-12

The judgment of the Court of Appeal see Appendix

JUDGMENT

The Supreme Court rejects Systembolaget AB's motion that the Supreme Court should request a preliminary ruling from the European Court of Justice (ECJ).

The Supreme Court rejects the appeals of both parties and affirms the judgment of the Court of Appeal.

Systembolaget AB is ordered to compensate the Absolut Company AB for its litigation costs before the Supreme Court in the amount of SEK 1,878,902, of which SEK 1,876,980 comprises costs for legal counsel. Interest pursuant to Section 6 of the Swedish Interest Act shall accrue on the amount as from the day of the Supreme Court's judgment.

The Absolut Company AB is ordered to compensate Systembolaget for its litigation costs before the Supreme Court in the amount of SEK 350,000, all of which comprises costs for legal counsel. Interest pursuant to Section 6 of the Swedish Interest Act shall accrue on the amount as from the day of the Supreme Court's judgment.

MOTIONS BEFORE THE SUPREME COURT

Systembolaget has moved that the Supreme Court shall grant the company's motions before the Court of Appeal. Systembolaget has further moved that

the company shall be discharged from the obligation to compensate The Absolut Company for its litigation costs before the Court of Appeal and that The Absolut Company shall be ordered to compensate Systembolaget's litigation costs before the Court of Appeal.

The Absolut Company has disputed any amendments to the judgment of the Court of Appeal and has moved, for its part, that Systembolaget shall be ordered to compensate The Absolut Company for its litigation costs before the Court of Appeal in the full amount claimed there.

Systembolaget has disputed The Absolut Company's claim for compensation for litigation costs before the Court of Appeal.

Systembolaget has moved that the Supreme Court shall request a preliminary ruling from the ECJ, which The Absolut Company has disputed.

The parties have claimed compensation for litigation costs before the Supreme Court.

GROUNDS

Background

1. Systembolaget has, under law, a monopoly in Sweden for the retail of liquor, wine and beer with a high alcohol content. After some of the employees of suppliers to Systembolaget, including some at V&S Vin & Sprit Aktiebolag (now The Absolut Company, hereinafter V&S), were prosecuted for bribery of Systembolaget's employees, Systembolaget asserted that V&S had materially breached its obligations and partially terminated the agreement between the parties, with the effect that V&S would not be allowed to deliver certain products. The scope of the termination was determined based on the seriousness of the breach of contract, pursuant to a so-called sanctions model devised by Systembolaget. Corresponding measures were taken also *vis-à-vis* other suppliers.

2. V&S did not accept Systembolaget's termination and in arbitration proceedings moved that Systembolaget should be ordered to compensate

certain losses. V&S argued that Systembolaget had terminated the purchasing agreements without grounds in the agreement or in law, and that Systembolaget's application of the sanctions model constituted abuse of dominant position. The abuse of the dominant position comprised, according to V&S, *that* Systembolaget had unilaterally forced unreasonable terms and conditions on V&S and other suppliers, *that* Systembolaget had refused to purchase without objectively appropriate grounds, *and that* Systembolaget had discriminated against V&S and other suppliers.

3. The arbitral tribunal concluded in the now challenged arbitration award that Systembolaget was in fact entitled to terminate the agreement with V&S in the manner it did under civil law. However, Systembolaget was deemed to have violated certain competition law provisions concerning super-dominant entities. Therefore, Systembolaget was ordered to compensate V&S for its losses.

4. Systembolaget opened proceedings against V&S before the Court of Appeal moving that the arbitration award should be declared invalid or be annulled and moved that the Court of Appeal should request a preliminary ruling from the ECJ. In sum, the motion for invalidity was based on the assertions *that* the arbitration award did not have jurisdiction to decide on the relevant competition law aspects of the dispute, *that* the arbitration award entailed that the effects of the bribery crimes were upheld, *and that* the arbitration award violated competition law. Systembolaget also argued that the award should be set aside on the grounds *that* the arbitral tribunal had exceeded its mandate by deciding on circumstances not referenced by V&S, *and that* failure to guide the proceedings constituted a procedural error.

5. The Court of Appeal rejected the motion for a preliminary ruling and rejected Systembolaget's other motions. Systembolaget was ordered to compensate V&S's litigation costs, albeit not the entirety of the amount claimed by V&S.

6. Systembolaget's case before the Supreme Court involves the same issues as before the Court of Appeal. The case before the Supreme Court also

involves the Court of Appeal's decision to not award the entirety of the litigation costs claimed by V&S.

Competition law issues of the arbitration

7. In the arbitration, V&S asserted that Systembolaget had abused its dominant position when the company through a partial termination had refused future purchases of certain products. Provisions on abuse of dominant position are set out in Chapter 2, Section 7 of the Competition Act (2008:579) and in Article 102 of the Treaty on the Functioning of the European Union (TFEU). The legal effects of the provisions are largely identical, with the exception of the criterion of the internal market, which is a prerequisite for the application of the EU provision; that this prerequisite is fulfilled is undisputed.

8. In the arbitration, V&S was successful in its assertions regarding violations of competition law. It is now for the Supreme Court to decide whether the arbitral tribunal went beyond the limits set by competition law. Systembolaget's competition law arguments raise two questions: First, whether that which in the present case has been labeled "excessive application" of the rules on abuse of dominant position violates competition law; and second, whether Systembolaget as a super-dominant entity had an obligation to act against the suppliers, and, if it did, whether the arbitration award violates competition law by preventing Systembolaget from fulfilling that obligation.

The relationship between competition law and arbitration law

9. The first paragraph of Section 1 of the Swedish Arbitration Act (1999:116) provides that a dispute concerning matters on which the parties reach a settlement can also be resolved by arbitration. The provision should be read in conjunction with item 1 of the first paragraph of Section 33, which provides that an arbitration award is invalid if it has resolved a non-arbitrable issue. It is irrelevant whether or not the arbitral tribunal decided the nonarbitrable issue correctly.

10. The third paragraph of Section 1 of the Swedish Arbitration Act provides that an arbitral tribunal may decide on the civil law effects of competition law between the parties. The provision becomes relevant to the validity of an arbitration award only when the subject of the arbitration is nonarbitrable at the time when the arbitration award was rendered. If the parties may settle the issue at that time, the issue is arbitrable under the first paragraph of said provision. Then, it should be noted that civil law sanctions related to an action which is in violation of competition law in general may be settled by the parties, provided that the settlement does not affect the parties' future relationship. An example is a claim for compensation for damages due to alleged breaches of contract (see NJA 2013 p. 1017 paragraph 16).

11. Thus, the fact that the parties may not settle a dispute involving competition law does not necessarily mean that an arbitral tribunal lacks jurisdiction, as long as the dispute involves the civil law effects of the competition law issue. This raises the question, however, of what happens if the arbitration award prescribes a course of action that violates competition law in such a manner that the parties would not be free enter binding agreements thereon. The preparatory works of the Swedish Arbitration Act provide that this situation falls under the scope of item 2 of the first paragraph of Section 33. That provision provides, among other things, that an arbitration award is invalid if it is obviously in violation of fundamental principles of Swedish law or public policy. Thus, as opposed to what applies under item 1 of the same paragraph for other situations involving peremptory provisions, the validity of the arbitration award could thus depend on the accuracy of the arbitral tribunal's conclusions. However, this does not clarify the levels of tolerance applicable to incorrect conclusions from the arbitral tribunal.

12. The provision on invalidity set out in item 2 of the first paragraph of Section 33 of the Swedish Arbitration Act should be understood in the light of the invalidity provision set out in item 1 of the first paragraph of Section 33. The latter provision, read in conjunction with the first paragraph of Section 1, provides that matters that the parties may not settle are not arbitrable (not taking into account what might follow from the third paragraph of Section 1).

Thus, the invalidity provision set out in item 2 of the first paragraph of Section 33 is only relevant when a matter which is, in and of itself, eligible for arbitration has been decided in a manner which violates public policy. This fact, and also taking into account the importance of arbitration awards being binding and valid, is the rationale for the requirement for the violation of public policy being obvious. Examples of situations meeting these strict criteria are disputes involving agreements which violate established practices, e.g. agreements on bribery. However, the provision is applicable also to other situations, and even if it should be applied restrictively, the constituent parts of what should be held as obvious must be decided based on the nature and importance of the interest which would be protected through the invalidity of the arbitration award.

13. The upholding of the peremptory provisions of competition law is in and of itself important. With regard to the Act's requirement that the public policy must be obvious, it must be considered that a dispute involving an agreement which entails that a party is obliged to violate competition law is not eligible for arbitration. An arbitration award whereby such a dispute has been resolved would be invalid, if it is reviewed under item 1 of the first paragraph of Section 33 of the Arbitration Act. This implies that the restrictiveness that should generally be used when applying the invalidity provision in item 2 should not be upheld when an arbitration award's compliance with peremptory competition law provisions is questioned.

14. The preparatory works of the Swedish Arbitration Act indicate that an arbitration award is invalid under the public policy provision if it prescribes a course of action that has been prohibited by the Competition Authority or a public court. If no such ruling exists, however, it is likely only in obvious cases that an arbitration award could be held invalid due to breaches of competition law resulting in a violation of public policy (Government Bill 1998/99:35 p. 58 f.). The statement appears aimed at the level of certainty with which the issue can be determined and not at the seriousness of the violation of competition law. This approach appears necessary in order to ensure that competition law has the intended reach.

15. Thus, if the prevailing legal position, or policy, with regard to a particular issue of competition law is settled, either directly through legislation or through jurisprudence, an arbitration award in violation of this policy is always invalid. However, this should not deprive a court of a certain flexibility, for reasons of proportionality, when deciding a case on invalidity to disregard a lesser breach of competition law.

16. However, if the issue of competition law cannot be considered settled, the review for invalidity purposes should be aimed at whether the arbitral tribunal's conclusions are based on an acceptable legal analysis, rather than whether these conclusions correspond to those of the court. As long as the conclusions of the arbitral tribunal are reasonably motivated and fall within the scope of what could reasonably be concluded, then they cannot be considered as violating public policy in a way that would render the arbitration award invalid.

17. This means that a court, in order to be in a position to determine whether an arbitration award should be deemed invalid due to peremptory competition law provisions, must undertake a certain review of the merits of the arbitral tribunal's decision on the competition law issues. However, the review should generally relate only to the tribunal's legal reasoning, and thus not re-evaluate the tribunal's evidential findings, unless particular reasons exist to do so.

EU competition law and the so-called Eco Swiss Doctrine

18. The conclusions above apply in cases where only domestic competition law applies, e.g. where the internal market criterion is not fulfilled in cases of alleged abuses of dominant position. With respect to the peremptory provisions of EU competition law, there are additional considerations.

19. In the so-called Eco Swiss Case (C-126/97, REG, EU:C:1999:269), the ECJ held (paragraph 37) that to the extent a national court under its own procedural law must grant a motion for annulment of an arbitration award on public policy grounds, it should also grant such a motion if the prohibition currently set out in Article 101 TEUF has been violated. (Cf. paragraph 41, in

which the phrase “to the extent” is not set out.) The judgment in the Eco Swiss Case does not as such relate to the provisions currently set out in Article 102, but Article 101 is closely related to Article 102, and the ECJ has stated that the provisions of both articles constitute fundamental principles of EU law and are essential for the proper functioning of the internal market (see *Manfredi*, C-295/04-C-298/04, REG, EU:C:2006:461, paragraph 31, and *Telia-Sonera*, C-52/09, REG, EU:C:2011:83, paragraph 21). It must thus be assumed that also Article 102 is covered by the principle set forth in the Eco Swiss Case.

20. Based on our reasoning with regard to domestic competition law (see paragraphs 15-17 above), the above entails that, if the EU competition law situation has been settled, then an arbitration award that upholds or prescribes a course of action in violation of the settled legal situation must be invalid. It is, however, unclear what applies when the legal situation under EU law is uncertain.

21. Under the principle of national autonomy for procedural law, the Eco Swiss Case could be interpreted to mean that when the situation under EU competition law is uncertain, then an arbitration award is invalid only if the tribunal’s conclusions are not reasonably grounded or accurate (cf. paragraph 16 above). It is, however, not certain that such an interpretation is acceptable from the point of view of EU law. This is mainly due to the so-called principle of equality, which provides that national procedural law may not discriminate against EU law, and due to the principle of efficacy, under which national procedural law may not render it impossible or unreasonably difficult to exercise the rights flowing from EU law (cf. e.g. *Asturcom*, C-40/08, REG, EU:C:2009:615 paragraph 38).

22. In Sweden, an arbitration award concerning a nonarbitrable issue is invalid (see paragraph 9). The provision set forth in the third paragraph of Section 1 of the Swedish Arbitration Act on disputes involving competition law forms an exception (see paragraph 13). Thus, this is not a generally applicable principle of procedural law, but rather an exception applicable only to certain competition law disputes. It could be questioned whether such a

specific procedural law provision is the relevant comparison for a review under the equality principle, particularly as the relevant domestic law is based on EU law and the provision in the third paragraph of Section 1 may appear targeted at EU law. It could further be questioned whether a regulation under which only clear violations of competition law can be subject to court action complies with the principle of efficacy.

23. One manner of ensuring that Swedish arbitration law provisions concerning competition law are applied in compliance with the principles of equality and efficacy, is to request a preliminary ruling on EU substantive competition law. Thereafter, the preliminary ruling could serve as the basis for the court's review of in cases where it is uncertain whether an arbitration award is invalid due to violation of EU law. The general loyalty principle set forth in Article 4.3 of the Treaty on the European Union implies such an obligation. In the event that the dispute had been reviewed by a public court, it would have been required to request a preliminary ruling to the extent EU law was ambiguous, and ensuring compliance with EU law is no less important when the dispute of the parties is submitted for arbitration. The parties' choice of dispute resolution should not affect the issue of whether a preliminary ruling should be requested or not.

24. If a question regarding interpretation of EU treaties or regulations arises before the Supreme Court and the court considers that a preliminary ruling is required to decide the issue, then the court is obliged to request that the ECJ shall render a preliminary ruling (Article 267 TFEU). For such an obligation to apply, the question must be *relevant*, i.e. the answer to the question affects the outcome of the case. Exception from this rule applies in cases where the ECJ has ruled on the question or a similar question, *acte éclairé*, or if the correct application of EU law is obvious, *acte clair* (cf. the ECJ's ruling in *CILFIT*, C-283/81, REG, EU:C:1982:335).

25. It has not been settled whether there is an obligation to request a preliminary ruling when it uncertain whether an arbitration award violates peremptory EU competition law provisions. According to the so-called CILFIT criteria (see paragraph 25) *[sic!]*, however, there is no obligation to

request a preliminary ruling when it is obvious that a disputed arbitration award does not violate EU competition law.

26. Consequently, whether a preliminary ruling is required will depend, as regards the objections against excessive application and obligation to act, on how the arbitral tribunal's conclusions relate to EU competition law.

27. The situation is different with respect to Systembolaget's objection that the arbitral tribunal lacked jurisdiction. This question must be answered under Swedish procedural law. It is not necessary to request a preliminary ruling in this respect. It is evident from the third paragraph of Section 1 of the Swedish Arbitration Act that Swedish procedural law provides jurisdiction also where the arbitral tribunal resolved issues over which the parties were not allowed to settle (see paragraph 11).

The question of excessive application

28. Systembolaget maintains that the compensation awarded by the arbitral tribunal constitutes unlawful excessive application of competition law. However, the provisions of Section 7 of Chapter 2 of the Competition Act and Article 102 of the TFEU, cannot be understood in such a way that they would not only prohibit abuses of dominant positions but also provide an upper limit to the sanctions that follow from such abuses. This would imply that if Systembolaget through contract had undertaken to pay the amounts it has been ordered to pay under the arbitration award, then the agreement would not have been subject to challenge under competition law even if the correct conclusion would have been that no liability for damages was at hand (provided, however, that the payments could not be considered as contributions, but this exception can in this context be disregarded). Even if the arbitral tribunal's application of the law is incorrect, in the sense that it was not based on the provisions on prohibition against abuses of dominant positions, the arbitration award is still not rendered invalid.

29. The conclusion appears obvious. Thus, it is not necessary to request a preliminary ruling from the ECJ in order to determine whether the arbitration award is invalid on these grounds or not.

The objection against the obligation to act

30. Systembolaget also maintains that the arbitration award violates competition law because it prevented Systembolaget to fulfill its obligation to act, based on Article 37 of the TFEU, in order to uphold competition neutrality with respect to other suppliers which had not acted improperly.

31. Irrespective of Systembolaget's potential obligation to act in a non-discriminatory matter – which would comprise an obligation to act because of the bribery – Systembolaget was obliged to comply with the provisions of Article 102 of the TFEU. If the arbitration award entails that Systembolaget must comply with an excessive application of the provision, then this was caused by the arbitral tribunal having reached such incorrect conclusions with respect to the merits that Systembolaget must accept (cf. the Eco Swiss ruling, paragraph 35). Such incorrect conclusions – if they are at hand – are indeed financially cumbersome, but the arbitration award does not prevent Systembolaget from taking other actions due to the bribery. Thus, the arbitration award does not prevent Systembolaget from taking actions, if such an obligations would exist under Article 37.

32. The conclusion appears obvious. Thus, there are no grounds for requesting a preliminary ruling in this respect in order to determine whether the arbitration award is invalid on these grounds.

Other grounds for the challenge of the arbitration award

33. Systembolaget's other arguments in support for its claim that the arbitration award should be declared invalid does not lead the Supreme Court to any conclusions other than those of the Court of Appeal.

Conclusions

34. It must be held obvious that the competition law conclusions of the arbitral tribunal do not violate peremptory EU competition law provisions. Therefore, there is no need to request a preliminary ruling in order to decide on Systembolaget's invalidity claims.

35. Systembolaget's other arguments do not constitute grounds for invalidity of the arbitration award. Therefore, Systembolaget's appeal shall be rejected and the judgment of the Court of Appeal is affirmed.

Litigation costs before the Court of Appeal

36. The Supreme Court's conclusion does not differ from that of the Court of Appeal's with respect to compensation for litigation costs before the Court of Appeal. Thus, V&S's appeal shall be rejected and the judgment of the Court of Appeal is affirmed also in this respect.

Litigation costs before the Supreme Court

37. Systembolaget shall compensate V&S's litigation costs before the Supreme Court to the extent they relate to the invalidity and challenge of the arbitration award, whereas V&S shall compensate Systembolaget for its litigation costs to the extent they relate to litigation costs before the Court of Appeal.

38. V&S has not divided its costs before the Supreme Court on the main issue and the litigation cost issue, respectively. It must be assumed that the absolute majority of the time spent related to the main issue. Therefore, V&S shall be awarded compensation at 90 percent of its costs for legal counsel before the Supreme Court. The claimed amount must be deemed reasonable.

39. Systembolaget has claimed compensation for its work on the litigation cost issue in the amount of SEK 658,000. However, the litigation cost issue has not been of such nature or scope that the claimed amount has reasonably been required to protect the interests of Systembolaget. Systembolaget must be deemed reasonably compensated by an amount of SEK 350,000 for costs for legal counsel.

_____

[ILLEGIBLE SIGNATURES]

The decision has been made by: Supreme Court Justices SL, EN, GL, IP (Reporting Justice) and SOJ.

Reporting clerk: JH