SVEA COURT OF APPEAL	**JUDGMENT**	Case No.
Department 02	8 July 2014	T 1459-13
Division 020105	Stockholm	

CLAIMANT
International Inventory Management, LLC
456 Manning Avenue
Elon
NJ 27244
USA

Counsel: Advokaten Harald Nordenson and jur. kand. Ann-Marie Haro
Setterwalls Advokatbyrå AB
P.O. Box 1050
101 39 Stockholm

RESPONDENT
Adamus HT SP. Z.o.o.
Ul. Robtnicza 3a
71-712 Szczecin
Poland

Counsel: Advokaten Sverker Bonde and jur. kand. Jenny Sverker
Advokatfirman Delphi KB
P.O. Box 1432
111 84 Stockholm

MATTER
Challenge of arbitral award

JUDGMENT OF THE COURT OF APPEAL

1. The Court of Appeal rejects the motions of the claimant.

2. The Court of Appeal orders International Inventory Management LLC to compensate Adamus HT Sp. Z.o.o. for its litigation costs in the amount of SEK 437,600, out of which SEK 435,000 comprises costs for legal counsel, and EUR 17,400, all comprising costs for legal counsel. Interest shall be paid on the amounts of SEK 437,600 and EUR 17,400 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.

Postal Address	Visiting address	Telephone	Telefax	Opening Hours
P.O. Box 2290	Birger Jarls Torg 16	08-561 670 00	08-561 675 09	Monday – Friday
103 17 Stockholm		08-561 675 00		9:00 am – 3:00 pm
		e-mail: svea.avd2@dom.se		
		www.svea.se		

BACKGROUND

Through the now relevant arbitral award, rendered by Professor CR as sole arbitrator, several claims and counterclaims based on an agreement between the parties were settled.

Adamus HT Sp. Z.o.o. (Adamus), which had requested the arbitration, had moved that International Inventory Management, LLC (IIM) should be ordered to pay a specified amount for delivered products. IIM, in its turn, had moved that Adamus should be ordered to pay a substantially higher amount, mainly related to compensation for damages for terminating the parties' agreement without cause. Through the arbitral award IIM was ordered to pay to Adamus a slightly lower amount than claimed by Adamus, whereas Adamus was not ordered to pay any amount to IIM.

MOTIONS BEFORE THE COURT OF APPEAL

IIM has moved that the Court of Appeal shall annul the arbitral award.

Peab AB has disputed the motion.

The parties have claimed compensation for their litigation costs.

THE PARTIES' RESPECTIVE CASES

Grounds

IIM

1. The arbitrator has concluded that IIM has offered Adamus's customers products that compete with those of Adamus and that IIM thereby breached

the parties' agreement, meaning that Adamus's termination of the agreement was not without cause. There are two possible interpretations of the conclusions of the arbitrator:

a) One is that Adamus was entitled to terminate because IIM had sold *competing third party products*. In this case, the arbitrator exceeded her mandate, because Adamus did not during the arbitration proceedings reference this as grounds for its right to terminate and consequently did not reference the provision on termination set out in Art. 13(1)(c).

b) The other is that Adamus was entitled to terminate because IIM had sold *competing products manufactured by itself*. In this case, the arbitrator exceeded her mandate or committed a procedural error which likely affected the outcome of the case, since the arbitrator in this case did not consider IIM's objection that IIM was entitled to sell products manufactured by itself.

2. The arbitrator has not fulfilled her obligation to guide the proceedings by not clarifying which type of sales – competing third party products or competing products manufactured by IIM – that Adamus claimed gave rise to its right to terminate. This omission constitutes a procedural error which likely affected the outcome of the arbitration.

3. The arbitrator did not render separate awards over Adamus's main case and IIM's counterclaims, but merely a "net award". Thereby, the arbitrator committed a procedural error which likely affected the outcome.

Adamus

1. a) In the arbitration proceedings, Adamus referenced that IIM sold competing third party products. If the Court of Appeal were to conclude that Adamus did not reference this circumstance, then the circumstance has

nevertheless been introduced in the arbitration proceedings. Therefore, the arbitrator did not exceed her mandate.

b) The arbitrator did consider IIM's objection. Thus, the arbitrator did not exceed her mandate or commit a procedural error which likely affected the outcome of the arbitration proceedings.

2. The arbitrator has fulfilled all her obligations. Even if this were not the case, the omission did not affect the outcome of the arbitration.

3. The arbitrator has not committed any procedural error. In any event, any possible procedural error has not affected the outcome of the arbitration.

Further details on the parties' respective cases

In support of their respective cases, the parties have mainly referenced the following.

IIM

In the arbitration proceedings, the parties presented claims and counterclaims. Adamus claimed USD 56,000 for delivered tools. IIM claimed USD 342,000 in damages, divided into 25 separate items. The most substantial item amounted to USD 278,000 as compensation for damages for termination of the parties' agreement without cause. Adamus referenced 13 grounds for why the termination had not been carried out without cause. The arbitrator failed to grasp this situation.

First challenge grounds

The following excerpts, from page 37 of the arbitral award, is vital:

"Adamus has shown that IIM competed with Adamus by offering Adamus' customers products competing with Adamus. This is a breach against the Commercial Agreement, against good business ethics and against good faith and fair dealing."

"IIM has breached the provision in Art. 13(1)(c) about selling competing products. Adamus is, consequently entitled to terminate the contract."

Thus, the arbitrator concluded that IIM had breached the agreement by selling products that competed with Adamus's products and that this entitled Adamus to terminate the agreement. However, the arbitral award does not state which type of competing products – products manufactured by itself or third party products – which the arbitrator had concluded to have been sold by IIM. In order to properly understand IIM's challenge, it is unavoidable for the Court of Appeal to interpret and determine what the arbitrator meant by the two quotes above.

If the Court of Appeal in this respect concludes that the arbitrator meant third party products, this entails that the arbitrator exceeded her mandate or committed a procedural error which likely affected the outcome, since Adamus had not referenced such sales as grounds for the termination not having been carried out without cause.

If the Court of Appeal in this respect concludes that the arbitrator meant products manufactured by IIM, this entails that the arbitrator exceeded her mandate or committed a procedural error which likely affected the outcome, since the arbitrator then failed to consider IIM's objection that the parties' agreement allowed such sales.

In its "Reply to the Statement of Defense" (p. 10), Adamus clarified that the company did not reference as grounds for the termination sales of third party products and the provision in Art. 13(1)(c) of the parties' agreement.

Adamus written closing statement, particularly the last sentence of item (j), establishes beyond any doubt that the breach of contract giving cause for termination referenced by the company was IIM's marketing and sales of replacement parts manufactured by IIM for tablet presses.

In its written closing statement IIM summarized (p. 24):

"Therefore, Respondent did not improperly compete with Claimant. It did exactly what the Agreement allowed it to do and Claimant presented no evidence that Respondent ever did what the agreement said it could not do – manufacture Punches or Dies or sell the products of a third party who was a direct competitor of Claimant. Therefore, Claimant was not justified in terminating the Agreement for this reason."

The arbitrator would have reached this conclusion if only she had limited her review to what the parties had maintained and referenced.

Second challenge grounds

The arbitrator ought to have guided the proceedings by clarifying to herself what Adamus actually meant by the expression *"IIM unjustly competed by repeatedly offering products of Adamus' competitor […] against the contracted non-competition clause in the Commercial Agreement"*. For its part, IIM understood this allegation as relating to IIM's fully permissible sales of replacement parts for tablet presses it had manufactured. It could not reasonable relate to something that IIM had never done, that is selling third party products.

If the arbitrator had fulfilled her obligation to clarify that she had properly understood the now relevant grounds for Adamus's immediate termination, she would not have concluded that *"IIM has breached the provision in Art. 13(1)(c) about selling competing products. Adamus is, consequently, entitled*

to terminate the contract." Then, IIM's claim for damages could not have been rejected.

Third challenge grounds

The outcome in the main case and in the counter-case was that the arbitrator reviewed Adamus's claims based on issued invoices versus IIM's counterclaims based on 25 separate claims. The arbitrator concluded that Adamus was entitled to USD 56,102.85 for delivered tools. IIM was awarded only a fraction of what the company had claimed, USD 11,180, which the arbitrator set off by decreasing the amount awarded to Adamus to USD 44,922.85.

Thus, the arbitrator opted for a manner of wording the award which constitutes a "net award". The error of not rendering separate awards for the main case and the counter-case has not affected the outcome in the common manner that mutual payment obligations would have been different if the error had not been committed. However, because of the chosen manner it has become impossible to move that a possible annulment should only be carried out of the counter-case.

Adamus

First challenge grounds

Already in the opening stages of the arbitration proceedings, Adamus clarified the following.

IIM *"was not going to fulfill the contract in this respect at all and to any potential clients he established relationships with, he presented only his own products or the products of other entities being competitors of Adamus."*

Thus, Adamus maintained that IIM had directly and materially breached the non-competition provision of the parties' agreement. From Adamus submission concerning IIM's counterclaims, it is clear that the main reason for Adamus's termination of the agreement was *"unjust competition with Adamus products"*. Adamus also maintained that IIM consistently had breached the agreement by marketing its own equipment. In Adamus's "Statement of Defense for Counterclaim" it was stressed *"that the breach of the noncompetition clause equalled to offering potential clients IIM:s tooling only at the expense of the claimants (Adamus) products."* In the arbitration proceedings, Adamus maintained that IIM had not only breached the agreement, but also violated *"good faith and fair dealing"*.

In the arbitration proceedings, IIM over two and a half pages fleshed out its case as to why IIM had not breached the non-competition clause. IIM concluded that Adamus maintained that sales of own products as well as third party products had been carried out and that this was in breach of the agreement. Adamus's claim in this respect is set out in item (j) on page 18 of the arbitral award and the corresponding wording in the exchange of submissions during the arbitration proceedings. IIM maintained that there was no evidence that IIM had sold third party products. Further, IIM maintained that Adamus tried to "*cloud the picture*" by maintaining that IIM was offering competing third party products.

The parties disagreed whether third party products had been sold or not, and whether sales of IIM manufactured products were partially or wholly forbidden under the agreement. IIM argued that Adamus had failed to establish that IIM had sold or tried to sell spare parts from competing third parties.

In its closing statement Adamus stressed that some items in the recitals were material and important but not fully described. Therefore, Adamus clarified

with respect to item (j) that the issue concerned IIM's unlawful sales of third party products as well as products manufactured by IIM.

In its closing statement IIM maintained that the company under the agreement was allowed to sell all its own products. Further, IIM maintained that Adamus had failed to establish that IIM had sold products manufactured by competitors of Adamus.

Second challenge grounds

From the submissions it is clear that Adamus maintained that IIM breached the non-competition clause by marketing not just third party products but also some of its own products. This was also clear from the recitals produced by the arbitrator. While drafting the recitals the arbitrator posed several questions to the parties in order to ensure that she had properly understood the parties' positions. She also invited the parties to flesh out their cases in aspects where she had not properly understood them. Thus, the arbitrator did fulfill her obligation to guide the proceedings.

Third challenge grounds

Adamus does not understand what constitutes the alleged procedural error. The arbitrator carried out a netting. It is not incorrect. The fact that the main case and the counter-case were not decided in separate awards, making a partial challenge of the award impossible, cannot be considered a procedural error.

GROUNDS OF THE COURT OF APPEAL

Both parties have referenced documentary evidence.

Challenge

IIM's first challenge grounds

In order for the challenge, as it has been framed, to be granted on the first challenge grounds referenced by IIM, then at least one of the two following circumstances must be established by the investigation.

The first circumstance includes that the arbitrator shall have found that Adamus was entitled to terminate because IIM had sold competing third party products and that Adamus did not during the arbitration proceedings reference these sales as grounds for the right to terminate.

The second circumstance includes that the arbitrator shall have found that Adamus was entitled to terminate because IIM had sold competing products that IIM itself had manufactured and that the arbitrator failed to consider IIM's objection that IIM was entitled to sell competing products manufactured by itself.

In the actual grounds to the arbitral award (p. 37), the arbitrator's conclusions on Adamus's right to terminate are set out:

"Adamus has shown that IIM competed with Adamus by offering Adamus' customers products competing with Adamus. This is a breach against the Commercial Agreement, against good business ethics and against good faith and fair dealing."

Further down on the same page in the arbitral award, the following can be found:

"IIM has breached the provision in Art. 13(1)(c) about selling competing products. Adamus is, consequently entitled to terminate the contract."

In the Court of Appeal's opinion, the first quote cannot be understood to say anything but what is explicitly said, i.e. that the arbitrator concluded that Adamus had proven that IIM competed with Adamus by offering Adamus's customers products that competed with those of Adamus. It is not possible to determine whether the arbitrator by "products" meant third party products or IIM's own products or possibly products of both kinds. The first quote, read together with the second, could – since Art. 13(1)(c) deals with termination or cancellation of the agreement because of IIM's sales of competing third party products – indicate that the arbitrator by "products" in the first sentence of the first quote meant competing third party products. It is, however, unclear how the two phrases interact. Having regard to the above, the Court of Appeal concludes that the first sentence of the first quote not necessarily entails that the arbitrator here referenced only third party products.

The recitals of the arbitral award – p. 18, item (j), first sentence – provides that Adamus has referenced as grounds for a breach of contract giving rise to the right to terminate, that *"IIM unjustly competed by repeatedly offering products of Adamus' competitor […] against the contracted non-competition clause in the Commercial Agreement."* The reference to the said clause – Art. 1 of the agreement – entails in the Court of Appeal's opinion that Adamus in this respect must be deemed to have referenced sales of third party products, since the clause takes aim at sales of this very kind. The remainder of item (j) relates to IIM's own products. IIM, for its part, according to the recitals denied that the company had unjustly competed with Adamus's products by offering third party products (p. 16, third paragraph). According to the recitals, IIM also maintained that the parties' agreement did not prohibit IIM from selling its own products. In these circumstances, the Court of Appeal finds that it is most reasonable to understand the first quote from the actual grounds of the arbitral award as covering sales of third party products as well products manufactured by IIM itself. The above description of the arbitral award's recitals cannot be understood in any other manner than that Adamus in the arbitration proceedings also referenced sales of competing third party products as entitling Adamus to terminate for breach of contract. The

investigation on how Adamus has presented its case in the arbitration proceedings, including the company's cooperation in producing the recitals, is also consistent with such a reference having been made.

IIM has maintained that the arbitrator failed to consider IIM's objection that IIM was entitled to sell competing products manufactured by itself. As noted by the Court of Appeal above, the first quote merely notes that Adamus has proven that IIM competed with Adamus by offering Adamus's customers products that competed with those of Adamus. The wording of the sentence, against the background of how the parties according to the recitals presented their cases, indicates that the arbitrator has considered sales of both competing third party products as well as IIM's own products. In the opinion of the Court of Appeal, it is true that the wording of the sentence would indicate that the arbitrator has failed to consider IIM's objection. However, it is very well possible that the first sentence of the first quote includes a consideration thereof, albeit not explicitly stated. Thus, the conclusion of the Court of Appeal is that the investigation in the present case has not established that the arbitrator failed to review IIM's objection.

Thus, the conclusion is that IIM's motion cannot be granted based on IIM's first challenge grounds.

IIM's second challenge grounds

In jurisprudence, it has been maintained that "it is clear that lacking procedural guidance nowadays, at least in some cases, can constitute a procedural error subject to challenge" (Lindskog, Skiljeförfarande, En kommentar, 2nd ed., 2012, p. 903). The responsibility for ambiguity in the parties' cases being clarified must, in the Court of Appeal's opinion, however mainly lie with the parties, and not with the arbitral tribunal. It is for the parties to decide how they wish to present their respective cases. A party who finds the counterparty's case unclear in any aspect must request a clarification

and has, if such clarification is not made, the opportunity to maintain that the ambiguity shall be for the detriment of the counterparty in some fashion.

In the now relevant arbitration proceedings the parties have presented their cases through, amongst other things, written submissions and orally at a telephone conference. Further, the arbitrator has presented several draft recitals on which the parties have commented and the arbitrator subsequently adjusted the recitals. Thus, both parties have had the opportunity to request clarifications from the counterparty if needed or to, e.g., maintain that the counterparty's motions could not be granted due to lacking clarity or specificity. Against the above background, the Court of Appeal finds that the arbitrator has not failed to sufficiently guide the proceedings as maintained by IIM.

Thus, IIM's motion cannot be granted based on the second challenge grounds.

IIM's third challenge grounds

In the arbitration proceedings, the parties had presented claims and counterclaims. In these challenge proceedings it has not been maintained that the parties, or one of them, requested how the arbitrator should deal with these claims in the operative part of the arbitral award depending on the outcome, i.e. if the operative part of the award should include separate payment obligations or merely include a "net payment obligation". Having regard hereto, the Court of Appeal concludes that the arbitrator cannot be deemed to have committed a procedural error by not rendering separate awards for Adamus's main case and IIM's counterclaims.

Thus, IIM's motion cannot be granted based on the third challenge grounds.

Summary of conclusions

The conclusions of the Court of Appeal concerning the by IIM three referenced grounds for challenge entail that IIM's motion for annulment shall be rejected.

Litigation costs

Upon this outcome, Adamus is entitled to compensation for its litigation costs. The Court of Appeal finds that the claimed amount is reasonable.

Other

There are no grounds to grant leave to appeal the judgment of the Court of Appeal; second paragraph of Section 43 of the Swedish Arbitration Act (1999:116).

The judgment of the Court of Appeal may not be appealed.

[ILLEGIBLE SIGNATURES]

The decision has been made by: Judges of Appeal UB, PS and DÖ, reporting Judge of Appeal, dissenting.

Dissenting grounds, see following page.

Dissenting grounds

Judge of Appeal DÖ dissents with respects to the grounds concerning the third challenge grounds.

IIM has maintained as follows. The arbitrator reviewed Adamus's claims based on issued invoices against IIM's counterclaims based on 25 different claims. The arbitrator concluded that Adamus was entitled to USD 56,102.85 for delivered tools. IIM was awarded a fraction of its claims, USD 11,180, which the arbitrator netted by decreasing the amount awarded to Adamus to USD 44,922.85. The arbitrator opted a way of wording the award that provides a "net result". This constitutes a procedural error.

Set offs in litigation can be carried out by the claimant presenting a declaration of set off or a motion for a set off. The difference is that the declaration of set off has immediate effect, unless the counterparty objects to the set off, whereas a motion for a set off is a procedural action entailing a request that the court shall include certain content in the judgment. The declaration of set off shall be specific enough so that the counterparty with reasonable efforts can understand to what the set off relates (Lindskog, Kvittning, 2nd ed., 1993, p. 570). If a party, instead of issuing a declaration of set off, opts to countersue to carry out the set off and presents a motion for set off, this shall include a request that the court shall in its judgment declare that the counterclaims shall be netted against each other (Ekelöf, Rättegång II, 2nd ed., p. 170).

Through the implementation of the Swedish Arbitration Act, it became possible for the respondent to lodge its own claims within the scope of the arbitration proceedings, but this is not a general right to have objections based on set offs considered, since the arbitrators have been granted the right to on a case-by-case basis decide whether there are grounds rendering such a review improper. Section 29 of the Swedish Arbitration Act provides that a claim

that is referenced for a set off shall be reviewed in the same arbitration proceedings as that of the main claim. The provision of Section 29 shall be read in the light of Section 3 of Chapter 14 of the Swedish Code of Judicial Procedure (Lindskog, Skiljeförfarande, 2nd ed., 2012, p. 783). According to this provision, countersuing cannot be made regardless of form. The motions and grounds must be set out in an application for a summons. A reference in the sense set out in Section 29 of the Swedish Arbitration Act can thus not be deemed to relate to anything but that which is set out in Section 2 of Chapter 42 of the Swedish Code of Judicial Procedure. "The original respondent must then, pursuant to the provisions on applications for a summons, present a separate motion on the judgment he requests. In other words, he must present a motion for netting which includes a specific amount. If the counterclaim exceeds the original claim, the respondent must request a judgment also for the excess amount. Without a specific motion, such a judgment is not allowed pursuant to Section 3 of Chapter 17 of the Swedish Code of Judicial Procedure" (Westberg, Domstols officalprövning, 1998, p. 387).

The arbitrator has granted IIM's counterclaim with respect to the part concerning annual sales support in an amount of USD 9,500 and also an amount admitted by Adamus of USD 1,680 for punches. For both these amounts, the arbitrator has found that IIM is entitled to set off the amounts against the amount awarded to Adamus, as of the respective dates when the payments fell due. Thus, the arbitrator concluded that Adamus was entitled to receive USD 56,102.85 from IIM for delivered products and that IIM was entitled to receive USD 9,500 as compensation for sales support and USD 1,680 for punches. The conclusion was that "Adamus is thus entitled to receive USD 44,922.85 from IIM". In my opinion, the arbitrator thereby rendered a so-called set off judgment, whereby the arbitrator executed a netting of claims.

The investigation does not support that IIM presented a declaration for set off or a motion for set off. Further, this has not been maintained by IIM. In my opinion, the arbitrator has committed a procedural error by netting the

awarded amounts. However, the error is not of such nature that it likely affected the outcome of the arbitration. Thus, in my opinion, IIM's challenge cannot be granted based on the third challenge grounds referenced by IIM.

[ILLEGIBLE SIGNATURE]