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SVEA COURT OF APPEAL	**JUDGMENT**	Case No.
Department 02	20 March 2015	T 8043-13
Division 020101	Stockholm	

CLAIMANT
1. Advadis S.A. in bankruptcy
ul. Pachońskiego 5
31-223 Kraków
Poland

Representative: Mr. AB
os. Krakowiaków 17/25
31-964 Kraków
Poland

2. Mr. AB

RESPONDENT
Royal Unibrew A/S
Faxe Allé 1
4640 Faxe
Denmark

Counsel: Advokaten Klara Håstad and jur.kand. Philippe Benalal
Advokatfirman Vinge KB
P.O. Box 1703
111 87 Stockholm

MATTER
Challenge of arbitration award given in Stockholm on 29 May 2013

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JUDGMENT OF THE COURT OF APPEAL

1. The Court of Appeal rejects the motion for requesting a preliminary ruling from the European Court of Justice.

2. The Court of Appeal rejections the motions of the claimants.

3. The Court of Appeal orders Advadis S.A. in bankruptcy and Mr. AB to jointly and severally compensate Royal Unibrew A/S for its litigation costs in the amount of EUR 60,000, plus interest on the amount pursuant to Section 6 of the Swedish Interest Act from the day of the Court of Appeal's judgment 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		

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BACKGROUND

On 16 April 2005, Royal Unibrew A/S's (Royal Unibrew) subsidiary, Royal Unibrew S.p. z o.o. (RUP), completed the acquisition of a brewery business by means of an asset transfer as a going concern from Advadis S.A. In connection with the acquisition, Advadis S.A. and its majority shareholder Mr. AB provided certain warranties to Royal Unibrew. On 9 January 2009, Advadis S.A. was declared bankrupt. Hereinafter, this company is referred to as Advadis.

Following an application from the Polish bank Kredyt Bank in November of 2006, an enforcement measure seized control of one of RUP's bank accounts and a certain amount was paid to the said bank. RUP opened proceedings concerning the enforcement measure, and moved that it should be annulled, but later withdrew the motion and instead opened proceedings against Kredyt Bank before a Polish court and moved that the bank should repay the amount and also claimed compensation for costs. Ultimately, the motions were rejected.

In the relevant arbitration, which was commenced in June of 2011, Royal Unibrew maintained that Advadis and Mr. AB should, pursuant to the warranties of the transfer agreement, compensate Royal Unibrew for the amount seized and paid to Kredyt Bank plus accrued interest and costs incurred by RUP as a consequence of the payment, including the litigation costs in the process against Kredyt Bank. Royal Unibrew further maintained that Advadis and Mr. AB had breached the transfer agreement by not providing Royal Unibrew with all relevant information prior to the transfer.

On 1 June 2012, the arbitral tribunal rendered a decision on the question of its jurisdiction ("Partial Award on Jurisdiction") and on 29 May 2013 the final arbitration award was given. Through the arbitration award, Royal Unibrew's motions were granted and Advadis and Mr. AB were ordered to jointly and severally pay to Royal Unibrew PLZ 14,500,716 plus interest and compensation for certain costs.

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MOTIONS

Advadis and Mr. AB have moved that the Court of Appeal shall annul the arbitration award in its entirety.

Royal Unibrew has objected to the annulment of the arbitration award.

The parties have claimed compensation for litigation costs.

GROUNDS

Advadis and Mr. AB

As the Court of Appeal understands Advadis's and Mr. AB's case, they have ultimately maintained the following.

Question of valid arbitration agreement; item 1 of the first paragraph of Section 34 of the Swedish Arbitration Act (1999:116)

The arbitration agreement is invalid, because Advadis was declared bankrupt in 2012. Under Polish law, arbitration agreements cease to apply against a party in bankruptcy. Polish law is applicable to the consequences of the bankruptcy.

This objection is maintained solely with respect to Advadis.

Question whether the arbitral tribunal committed procedural errors; item 6 of the first paragraph of Section 34 of the Swedish Arbitration Act

The arbitral tribunal committed a procedural error by not having evaluated the evidence correctly. Through a settlement, the parties had agreed that Royal Unibrew would not be permitted to make claims against Advadis and Mr. AB for compensation for claims that were transferred in connection with the transfer of the brewery business. The amount seized at Royal Unibrew and paid to Kredyt Bank is covered by the settlement, since Royal Unibrew was aware of Advadis's liabilities to Kredyt Bank and since Royal Unibrew had withdrawn its motion to have the enforcement measure annulled. As a result,

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Royal Unibrew was not permitted to claim compensation from Advadis and Mr. AB for the claim to which the arbitration relates.

The arbitral tribunal committed a procedural error by not considering the statute of limitations that precluded Advadis's and Mr. AB's liability for the warranties, and did not even review the issue. In 2008, Royal Unibrew claimed compensation for damages from Advadis and Mr. AB. By making the claim, the relevant time period for statute of limitations was interrupted as regards compensation for damages. The arbitration did not involve compensation for damages, but rather liability under the warranties of the transfer agreement. Only in 2011 did Royal Unibrew make any claims against Advadis and Mr. AB under the warranties. Then, Royal Unibrew's claim against Advadis and Mr. AB for breach of warranty was already barred by statute of limitations.

The arbitral tribunal committed a procedural error by not thoroughly enough reviewing the available information. Royal Unibrew acquired the claims against Advadis and Mr. AB from RUP by way of an agreement in March of 2011, and by way of an addendum to the agreement in June of 2011. These agreements settle the damages arisen through Kredyt Bank's actions. The arbitration does not, however, involve compensation for damages, but rather liability for breach of warranty. Claims concerning liability for breach of warranty have thus not been transferred to Royal Unibrew. The arbitral tribunal is obliged to consider all documents submitted. The arbitration award lacks an analysis of the agreement on the transfer of the claims.

Question of whether the principle of equal treatment was not applied; item 4 of the first paragraph of Section 34 of the Swedish Arbitration Act

The principle of equal treatment was violated by the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) by not appointing any of the arbitrators proposed by Advadis and Mr. AB. At the same time, the Board of Directors appointed the arbitrator proposed by Royal Unibrew. Thereby, Advadis and Mr. AB were stripped of the right to participate in the appointment of arbitrators. Advadis and Mr. AB do not have joint interests.

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Royal Unibrew

Question of valid arbitration agreement

A valid arbitration agreement exists between the parties. Swedish law shall be applied to the consequences of Advadis undergoing bankruptcy proceedings. Under Swedish law, the arbitration agreement remains valid when a party undergoes bankruptcy proceedings.

Question whether the arbitral tribunal has committed procedural errors

The arbitral tribunal has not drawn incorrect conclusions as regards the settlement agreement. Therefore, the arbitral tribunal has not committed any procedural error, in any event none that was not caused by Advadis and Mr. AB. The error asserted by Advadis and Mr. AB in this respect could in any event only constitute an error as regards the merits, which is not subject to the Court of Appeal's review within the scope of these challenge proceedings.

The arbitral tribunal has not committed a procedural error as regards Advadis's and Mr. AB's objection on statute of limitations, at least not without it having been caused by Advadis and Mr. AB. Royal Unibrew further disputes that there is a difference between liability for breaches of warranty and liability for damages. If such a difference is deemed to exist, then it did not in any event affect the outcome. The arbitral tribunal considered the grounds and circumstances referenced by the parties, it has provided complete grounds for its conclusions and has sufficiently guided the proceedings. During the arbitration Advadis and Mr. AB did not assert that there is a difference between liability for breaches of warranty and liability for damages, as far as statute of limitations is concerned. It cannot have been for the arbitral tribunal to make such a distinction. In any event, the review of the arbitrators can only constitute an error as regards the merits of the case, which is not subject to the Court of Appeal's review within the scope of these challenge proceedings.

It is disputed that the arbitral tribunal committed any procedural error as regards the transfer of claims, at least not without it having been caused by

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Advadis and Mr. AB. The agreement on the transfer of claims provides that Royal Unibrew and RUP can make claims against Advadis and Mr. AB. The arbitral tribunal has considered the grounds and circumstances referenced by the parties and provided complete grounds for its conclusions hereon. During the arbitration, Advadis and Mr. AB did not raise any objections to the effect that the claim fell outside the scope of the transfer. The arbitral tribunal cannot be deemed obliged to investigate a possible objection, which a party has never raised. The errors asserted in this respect could not have affected the outcome of the case, and the question of against whom a claim can be made is in any event related to the merits, which is not subject to the Court of Appeal's review.

Question of whether the principle of equal treatment was not applied

The three arbitrators were appointed by the SCC in accordance with the parties' agreement, i.e. pursuant to the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC's arbitration rules) as well as those of the Swedish Arbitration Act. Since the SCC appointed all arbitrators, the principle of equal treatment was applied. The SCC was entitled to appoint all three arbitrators, including the arbitrator already appointed by Royal Unibrew. Advadis and Mr. AB do have joint interests.

THE PARTIES' FURTHER DETAILS

Advadis and Mr. AB

Question of valid arbitration agreement

Polish law is applicable to the consequences of the bankruptcy, since the parties in the arbitration agreement agreed thereon and it is financially viable. In the arbitration agreement, the parties agreed that the place of the arbitration should be Stockholm, but during the negotiations leading up to the agreement, regard was had to the fact that the bankrupt companies cannot afford costs for

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arbitration. The arbitral tribunal failed to take into consideration that Advadis was undergoing bankruptcy proceedings.

Question whether the arbitral tribunal committed procedural errors

At the time of the settlement between the parties on 7 December 2005, Royal Unibrew was aware of Advadis's debts to Kredyt Bank, and was also aware that Advadis and Mr. AB had withdrawn its appeals against the decisions upon which Kredyt Bank's application for enforcement measures against RUP was based. Royal Unibrew had, prior to the acquisition, opened an account with Kredyt Bank. Royal Unibrew had paid money into that account intended for the claims as per the decisions. In order for the transfer to be permitted, Advadis was forced to withdraw the appeals. Royal Unibrew was aware of this.

Initially, Royal Unibrew disputed Kredyt Bank's demands. Royal Unibrew maintained the objection with respect to one claim and a Polish court concluded that Royal Unibrew was not obliged to pay that claim. However, Royal Unibrew withdrew the objection with respect to the other claim and was consequently forced to pay it. The arbitration concerns the damage incurred by Royal Unibrew's acting incorrectly when it withdrew its objection against Kredyt Bank. As a result, the dispute concerns the warranties provided by Advadis and Mr. AB under the transfer agreement. It does not involve compensation for damages for something Advadis and Mr. AB have done *vis-à-vis* Royal Unibrew. In the arbitration it was stated that the claim was barred by statute of limitations, but the reasons were never specified.

Initially, the arbitration was opened against Advadis, but later Mr. AB was also included, which indicates the disorganized state of the documentation concerning the transfer of the claims. Advadis and Mr. AB considered that the objection that the claim had not been effectively and validly transferred from RUP to Royal Unibrew did not need to be mentioned in the arbitration in order to be considered by the arbitral tribunal.

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Question whether the principle of equal treatment was not applied

In the arbitration, Advadis and Mr. AB appointed to different arbitrators. Royal Unibrew appointed one arbitrator. Thereafter, the SCC appointed all three arbitrators, one of which was the arbitrator appointed by Royal Unibrew. Neither of the arbitrators proposed by Advadis and Mr. AB were appointed as arbitrator.

Mr. AB appointed one arbitrator. Advadis was of the opinion that another arbitrator was better suited to represent the Board of Directors. A dispute arose between Advadis and Mr. AB as a result of the appointment of arbitrator, and they failed to agree on an arbitrator to be appointed by them jointly. This was not done to disrupt the arbitration. At the time of the share transfer agreement, Mr. AB was a shareholder and controlled 40 percent of the shares. When the arbitration was commenced, he controlled a mere 1 percent of the shares. Mr. AB has been a director of Advadis since 2010, but he did not play a major part in the company at the time of the commencement of the arbitration. Today, he is authorized to sign on behalf of the company to a limited extent.

Royal Unibrew

Question of valid arbitration agreement

Article 15 of the Council Regulation (EC) 1346/2000 of 9 May 2000 on insolvency proceedings (the Insolvency Regulation) is applicable. The term “open proceedings” in Article 15 of the Insolvency Regulation covers arbitrations. In the arbitration, Royal Unibrew claimed compensation from Advadis and Mr. AB for funds seized by Kredyt Bank in Royal Unibrew’s account. These constitute claims in bankruptcy over which Advadis has no control, and falling under the scope of Article 15 of the Insolvency Regulation. The assessment as to whether the Article is applicable was in the arbitration preceded by a review of whether the parties had agreed on a choice of law applicable to the arbitration agreement.

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Question of whether the arbitral tribunal committed procedural errors

The parties' respective cases in the arbitration were clear. Thus, there was no reason for the arbitral tribunal to guide the proceedings more than it did. Further, it was Advadis and Mr. AB that requested the main hearing to be cancelled and that the case should be decided without a main hearing; a request that the arbitral tribunal granted. The arbitration award provides that the arbitral tribunal has considered all grounds referenced by Advadis and Mr. AB.

The claims were transferred by RUP to Royal Unibrew in order for them to remain within the group after the sale of RUP.

Question of whether the principle of equal treatment was not applied

The SCC decided on the appointment of arbitrators. Advadis and Mr. AB objected to the decisions, whereupon the SCC took a new decision in which the SCC decided that the previous decision should remain valid.

Advadis and Mr. AB have joint interests. Mr. AB has guaranteed and undertaken to fulfill the obligations under the transfer agreement and has also undertaken to fulfill the obligations of the arbitration award jointly and severally with Advadis. Further, Mr. AB has had an active role in the company, as he at the time of the transfer was the Chairman of the Board of Directors as well as shareholder in the company, and is one of the founders. Advadis and Mr. AB did not make any conflicting statements during the arbitration. Further, Mr. AB is authorized to sign on behalf of Advadis.

QUESTION OF PRELIMINARY RULING FROM THE EUROPEAN COURT OF JUSTICE

Advadis

Advadis has moved that the Court of Appeal shall request a preliminary ruling from the European Court of Justice. According to Advadis, a

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preliminary ruling is required to determine whether the parties can waive Article 15 of the Insolvency Regulation by way of a transfer agreement.

Royal Unibrew

Royal Unibrew has objected to the Court of Appeal requesting a preliminary ruling from the European Court of Justice. Royal Unibrew has maintained that the request relates to circumstances which were not referenced in the arbitration, since the parties have not agreed to waive Article 15 of the Insolvency Regulation.

THE INVESTIGATION BEFORE THE COURT OF APPEAL

The Court of Appeal has decided the case after a main hearing. Both parties have referenced documentary evidence.

GROUNDS OF THE COURT OF APPEAL

Is there a valid arbitration agreement?

Starting points for the review

Item 1 of the first paragraph of Section 34 of the Swedish Arbitration Act provides that an arbitration award shall be annulled if it is not covered by a valid arbitration agreement between the parties. If the challenging party asserts that no arbitration agreement exists, it is for the respondent, in the present case Royal Unibrew, to establish its existence. Since the arbitration was Swedish, this issue shall be settled under Swedish law, unless the parties have agreed otherwise (see Lindskog, Skiljeförfarande, 2nd ed., 2012, p. 109, 865 and 1105 f.).

The Court of Appeal's conclusion

As the Court of Appeal understands Advadis's case, the company maintains that the parties have agreed that Polish law shall be applied to the arbitration agreement, and that the arbitration agreement under Polish law has ceased to apply as a consequence of Advadis's bankruptcy.

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The arbitration award restates the following clauses of the parties' agreement.

> "9.5. This Agreement shall be governed by, and construed in accordance with, the laws of the Republic of Poland.
>
> 9.6. Any and all disputes arising out of, or relating to, this Agreement, including any disputes as to the validity of this Agreement, shall be, subject to the provisions of Polish law, providing for the exclusive jurisdiction of Polish courts, submitted for resolution to the Arbitration Institute of the Stockholm Chamber of Commerce in accordance with its rules (the 'Rules'). The arbitration shall consist of three arbitrators appointed in accordance with the Rules. The place of arbitration shall be Stockholm, Sweden, and upon request by any of the parties, the language of the arbitration shall be English."

Section 9.5 provides that the substantive laws of Poland shall govern the parties' agreement. Section 9.6 does not explicitly provide that the parties' arbitration agreement shall be governed by Polish law; that Stockholm is the place of arbitration rather indicates that Swedish law shall apply in this respect.

The Court of Appeal concludes, as the arbitral tribunal did, that Swedish law shall apply to the arbitration agreement and that it has not ceased to apply (see "Partial Award on Jurisdiction", paragraph 149 amongst others). Thus, the Court of Appeal's conclusion is that Royal Unibrew has established that the arbitration award is covered by a valid arbitration agreement between the parties.

Did the arbitral tribunal commit procedural errors?

Starting points for the review

Item 6 of the first paragraph of Section 34 of the Swedish Arbitration Act provides that an arbitration award can be annulled upon a party's challenge if procedural errors occurred that, without having been caused by a party, likely affected the outcome.

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The provision shall be applied restrictively (see Government Bill 1998/99:35 p. 148). By procedural error is meant an error concerning the actual dealing with the case, as opposed to errors in the evaluation of the merits. Errors as regards the merits relate to both incorrect evaluation of the evidence as well as incorrect application of the law.

Errors that could constitute procedural errors, on the other hand, could, for example, be to not allow a party to argue its case, to not note procedural impediments or the parties' agreements, incorrect dismissal of evidence, and to not investigate the parties' motions and objections (see Fredrik Andersson *et al.*, Arbitration in Sweden, 2011, p. 174).

The Court of Appeal's conclusion

As the Court of Appeal understands it, the errors asserted by Advadis and Mr. AB relate to the fact that the arbitral tribunal has not evaluated the available evidence correctly, that the arbitral tribunal has not investigated the parties' grounds or provided sufficient grounds, and that the arbitral tribunal has not assessed and evaluated available material sufficiently.

The arbitral tribunal's evaluation of the evidence and other material are assessments on the merits that, even if they are incorrect, do not constitute procedural errors. According to the Court of Appeal, the grounds of the arbitration award are not incomplete (cf. NJA 2009 p. 128). As regards the assertion that the arbitral tribunal has not investigated the parties' grounds, the Court of Appeal notes that the arbitration was pending for a considerable time and that the parties have had ample opportunity to argue their respective cases. The Court of Appeal's conclusion is that the arbitral tribunal has not failed to guide the proceedings in this respect. Thus, the Court of Appeal's conclusion is that no procedural error has been established that would warrant the annulment of the arbitration award.

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Was the principle of equal treatment not applied?

Starting points for the review

Item 4 of the first paragraph of Section 34 of the Swedish Arbitration Act provides that an arbitration award shall be annulled if an arbitrator has been appointed in violation of the parties' agreement or in violation of the said Act.

That the parties in arbitration shall be treated equally is a fundamental principle in Swedish as well as foreign arbitration law. The principle is deemed to include also the right to appoint arbitrators, but this right can be modified or waived by agreement. In a much commented decision, the highest court of France concluded that this right cannot be waived in advance; the arbitration award was annulled because the parties had not been equally able to influence the composition of the arbitral tribunal (decision of Cour de Cassation of 7 January 1992, in the so-called Dutco case, XVIII Yearbook Com. Arb. 140 ff.).

Article 13(4) of the SCC's arbitration rules provides the following. Where there are multiple claimants or respondents and the arbitral tribunal is to consist of more than one arbitrator, the multiple claimants, jointly, and the multiple respondents, jointly, shall appoint an equal number of arbitrators. If either side fails to make such a joint appointment, the SCC Board shall appoint the entire arbitral tribunal.

The Court of Appeal's conclusion

In the present case it is undisputed that the parties by way of the transfer agreement agreed that three arbitrators should be appointed pursuant to the SCC arbitration rules. It is also undisputed that Royal Unibrew requested the arbitration and appointed an arbitrator, that Advadis and Mr. AB appointed one arbitrator each, that the SCC subsequently appointed all arbitrators, and that one of the arbitrators appointed by the SCC was the arbitrator previously appointed by Royal Unibrew.

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The issue for the Court of Appeal to settle in this respect is whether the SCC did not comply with the principle of equal treatment by, in the situation that arose, appointing the arbitrator previously appointed by Royal Unibrew, but neither of the arbitrators appointed by Advadis or Mr. AB. In order to determine this, the Court of Appeal must first determine if the SCC appointed any of the arbitrators in violation with the parties' agreement, i.e. in breach of Article 13(4) of the arbitration rules.

Considering the underlying purpose of a system that allows arbitration – particularly that the proceedings shall lead to a swift resolution of the parties' dispute – the main rule must be that the decisions of the SCC should generally be upheld. It is possible to annul such decisions only if they must be deemed in breach of the parties' agreement or in violation of established practices, or if there are other extraordinary reasons. It is for the party who wishes that a decision shall be annulled to reference the grounds that justify the annulment.

According to the Court of Appeal, it is not evident from the wording of Article 13(4) that it is impossible for the SCC to appoint arbitrators as it did. The wording of the article does not, in the Court of Appeal's opinion, explicitly provide whom the SCC may appoint in the arisen situation. Thus, the Court of Appeal concludes that no arbitrator was appointed in violation of the parties' agreement.

Then, it remains to resolve whether the SCC's application of the parties' agreement nevertheless violated the principle of equal treatment. In the Court of Appeal's opinion, this could be the case if, for example, the party who requested the arbitration receives preferable treatment in the appointment of arbitrators and that this is clear to the SCC.

It is true that Advadis and Mr. AB have maintained that the background to them appointing different arbitrators was that there was a dispute between them on whom to appoint. However, the Court of Appeal notes that they have not further explained the reason for the disagreement. The Court's investigation has not yielded anything indicating any discord between them

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during the arbitration. Therefore, according to the Court of Appeal, it has not been established that Advadis and Mr. AB, due to an internal dispute between them, failed to jointly appoint an arbitrator. The fact that the SCC appointed the arbitrator previously appointed by Royal Unibrew can consequently not, according to the Court of Appeal, have entailed that the SCC gave Royal Unibrew preferential treatment. Thus, the Court of Appeal's conclusion is that the principle of equal treatment has not been violated and the arbitration award shall not be annulled.

The Court of Appeal's summarized conclusion as regards the annulment of the arbitration award

According to the Court of Appeal, Royal Unibrew has established that the arbitration agreement was valid against Advadis. Advadis and Mr. AB have, according to the Court of Appeal, not established that any procedural errors occurred during the arbitration. Finally, it is, according to the Court of Appeal, clear that the principle of equal treatment was not violated when the arbitrators were appointed. Because of these conclusions, the motions of the claimants shall be rejected.

Should the Court of Appeal request a preliminary ruling from the European Court of Justice?

The European Court of Justice has jurisdiction to render preliminary rulings on the interpretation of the treaties as well as the validity and interpretation of legal provisions decided by the Union's institutions, organs or offices. When such an issue arises before a court of a member state, that court may, if it considers a decision thereon necessary to be able to render its judgment, request that the European Court of Justice renders a preliminary ruling. When such an issue arises in a matter before a court in a member state, against the decision of which there is no right to appeal domestically, the court must forward the issue to the European Court of Justice (Article 267 of the Treaty on the Functioning of the European Union).

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The Court of Appeal has concluded that Polish law is not applicable to the arbitration agreement. The issue of whether the parties have agreed to waive Article 15 of the Insolvency Regulation is therefore irrelevant. Thus, Advadis's and Mr. AB's motion to request a preliminary ruling shall be rejected.

Litigation costs

The outcome of the case entails that Advadis and Mr. AB are losing parties and jointly and severally shall compensate Royal Unibrew's litigation costs. Royal Unibrew has claimed compensation for litigation costs in the amount of EUR 87,000, all comprising costs for legal counsel. Advadis and Mr. AB have left it to the Court of Appeal to assess the reasonableness of the claimed amount.

The Court of Appeal concludes that the claimed amount has not been reasonably required to protect Royal Unibrew's interests. In this, the Court of Appeal has taken into consideration that a brief oral hearing has been held and that the main hearing lasted only one day. According to the Court of Appeal, EUR 60,000 is reasonable compensation for Royal Unibrew's litigation costs.

Appeal

The case involves issues of interest for the development of case law where it is important that an appeal is reviewed by the Supreme Court. Thus, the Court of Appeal grants leave to appeal the judgment (second paragraph of Section 43 of the Swedish Arbitration Act).

HOW TO APPEAL, see appendix A

Appeals to be submitted by 17 April 2015

Leave to appeal is not required.

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The decision has been made by: Judges of Appeal KÅ, CJ, reporting Judge of Appeal, and PS (dissenting).

Dissenting opinion, see next page.

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Dissenting opinion

Judge of Appeal PS dissents in accordance with the following.

I agree with the majority, except as regards the section "The Court of Appeal's conclusion" under heading "Was the principle of equal treatment not applied?", which, in my opinion, should be worded as follows.

The issue to be settled by the Court of Appeal is, briefly, if it in this case is in compliance with the principle of equal treatment that the SCC appointed an arbitrator already appointed by one of the three parties. Formally, the SCC has appointed the entire arbitral tribunal, but the practical outcome is that the requesting party's chosen arbitrator was part of the arbitral tribunal, whereas neither of the arbitrators appointed by the respondents was part of the arbitral tribunal.

First, it can be noted that the parties by way of their arbitration agreement have agreed that the SCC's arbitration rules shall apply between them, and that neither these rules nor the Swedish Arbitration Act explicitly prevents the SCC to appoint an arbitral tribunal in the manner it did.

Thus, the SCC has, in accordance with the parties' agreement, decided an issue in the parties' arbitration. Another such decision was reviewed by the Supreme Court in NJA 2008 p. 1118, namely a decision by the SCC on the costs of an arbitration. The Supreme Court concluded that that decision could be reviewed on its merits by public courts, and then – as it must be understood – in the manner set forth in NJA 2005 p. 511. This entails the following. The starting point is that such a decision by the SCC generally shall be upheld. The decision shall be annulled only when it must be deemed in obvious violation of the parties' agreement or established practices or if there are extraordinary reasons. It is for the party who moves that the decision shall be annulled to reference the circumstances that justify the annulment.

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In my opinion, the same should apply to the now relevant SCC decision, which, as noted, entailed that only one of the parties had its choice of arbitrator satisfied.

Against that background, I conclude as follows. As already mentioned, the SCC's decision is not in breach of the SCC's arbitration rules, i.e. the parties' agreement. Advadis and Mr. AB have not asserted that the decision violates regular procedures for the appointment of arbitrators, whether it be those of the SCC or of other institutes. Then, the ultimate question is whether there are extraordinary reasons to annul SCC's decision due to violation of the principle of equal treatment. If so, the consequence would be that the arbitrators – or possibly only the arbitrator previously appointed by Royal Unibrew – would be deemed appointed by the SCC in breach of the Swedish Arbitration Act, which would be grounds to annul the arbitration award pursuant to item 4 of the first paragraph of Section 34.

In and of itself, the fact that only one party has its preference for arbitrator granted is not in breach of the principle of equal treatment. This could, for example, be the case if the requesting party appoints an arbitrator, but the counterparty does not and the District Court does so in its stead upon the request of the party requesting the arbitration (see third paragraph of Section 14 of the Swedish Arbitration Act). The fact that only Royal Unibrew had its preference for arbitrator granted could violate the principle of equal treatment if, at the time of the SCC's appointment of the arbitral tribunal, it was clear or ought to have been clear that Advadis and Mr. AB had conflicting interests as regards the merits in the arbitration. This has not been asserted by Advadis and Mr. AB. They have merely, without providing any details, maintained that they failed to agree on a joint arbitrator. They have not referenced any other circumstance that would constitute extraordinary reasons for annulling the SCC's decision. Due to the above, the SCC's decision shall not be annulled and, as a consequence, the arbitration award shall not be annulled pursuant to item 4 of the first paragraph of Section 34.