

Arbitrators in collision with competition law?
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The case of Vin & Sprit v. Systembolaget: A saga in four chapters

- ▶ Systembolaget is the Swedish alcohol monopoly
 - ▶ In 2003 there was a corruption scandal involving Systembolaget and its suppliers, among them V&S
 - ▶ Employees of certain suppliers had been prosecuted for bribery of Systembolaget's employees
 - ▶ Systembolaget asserted that V&S had materially breached its obligations under the supply agreement between the parties, and terminated the agreement
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Vin & Sprit's position:

- ▶ V&S did not accept the termination
 - ▶ In arbitration proceedings V&S moved for damages
 - ▶ The legal basis for the claim:
 - Lack of contractual basis to terminate
 - Abuse of dominant position
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Chapter 1 – First Arbitration

- ▶ Final Award 12 March 2008
 - ▶ Tribunal concluded that Systembolaget had no contractual basis to terminate
 - ▶ Competition law issues were never tried
 - ▶ Damages awarded in the amount of SEK 40 million
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Chapter 2 – First Challenge

- ▶ The award was set aside by Svea court of appeal on 1 December 2009
 - ▶ The court found that the arbitrators had exceeded their mandate by basing the award on circumstances that were not pleaded by the parties
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Chapter 3 – Second arbitration

- ▶ V & S initiated a second arbitration
 - ▶ Final award 20 February 2012
 - ▶ Tribunal concluded that Systembolaget was contractually entitled to terminate
 - ▶ But that Systembolaget had abused a dominant position
 - ▶ Damages awarded in the amount of SEK 57 million
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Chapter 4 – second challenge

- ▶ Systembolaget challenged the award on the basis that the award was contrary to competition law
 - ▶ Court of Appeal rejected the action and upheld the award
 - ▶ Appeal to the supreme court
 - ▶ Supreme court's judgment 17 June 2015
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Swedish Arbitration Act

Relevant provisions:

- ▶ Section 1
 - Disputes concerning matters in respect of which the parties may reach a settlement may ... be referred to one or several arbitrators for resolution” (first paragraph)
 - “Arbitrators may rule on the civil law effects of competition law as between the parties (third paragraph)

 - ▶ Section 33
 - An arbitral award is invalid:
 1. if it includes determination of an issue which, in accordance with Swedish law, may not be determined by arbitrators;
 2. if the arbitral award ... is manifestly incompatible with the fundamental principles of Swedish law...
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The Supreme Court's findings

- ▶ An arbitration award is invalid if it has resolved a non-arbitrable issue (section 1 of the SAA in conjunction with Section 33(1))
 - ▶ Irrelevant if the arbitrators have determined the issue correctly or not
 - ▶ Important for arbitrators to ask themselves if the issue is arbitrable
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Supreme Court 2

- ▶ Even if a certain dispute involves non-arbitrable competition law issues, a tribunal can try the dispute insofar as it relates to civil law effects arising therefrom between the parties
 - ▶ If such an award orders or upholds competition law restrictions, it may be contrary to public policy
 - ▶ Only if the award is manifestly incompatible with competition law is it invalid
 - ▶ Consequently it is relevant if the tribunal's determination was correct
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The Supreme Court's conclusion

- ▶ The question that follows is which level of tolerance a tribunal should have in unclear cases?
 - ▶ Supreme court takes a modified minimalist approach:
 - The court should determine if the tribunal's conclusions are based on an acceptable legal analysis. As long as the conclusions of the tribunal are reasonably motivated and fall within the scope of what could reasonably be concluded, the award should not be rendered invalid.
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