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FINAL ARBITRAL AWARD RENDERED IN 2003 IN SCC CASE 12/2002

SUBJECT MATTERS:

(1) *Prima facie* decision of jurisdiction of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Institute).
(2) The law applicable to the transfer of the arbitration agreement.
(3) Assignment of contract; validity of the arbitration clause when the assignee has not notified the remaining contract party of the assignment.

FINDINGS:

(1) The SCC Institute decided that it was not clear that it lacked jurisdiction.
(2) The validity of the transfer of the arbitration agreement was decided according to Swedish law on the basis that the arbitration had been instituted in Sweden under the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Rules).
(3) Where arbitration was initiated by an assignee of the contract at hand the respondent, as the remaining party to the contract, was not bound by the arbitration clause in the contract that it had originally signed with the assignor, since the remaining party had not been notified of the assignment before the arbitration proceedings began.

PARTIES:

Claimant: Alpha S.p.A, assignee (Italy)
Respondent: Beta Co Ltd, buyer (China)

PLACE OF ARBITRATION:

Stockholm, Sweden

LANGUAGE OF PROCEEDINGS:

English

APPLICABLE LAW:

Swedish Arbitration Act 1999

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NATIONALITY OF ARBITRATORS:

Sole Arbitrator: Swedish

AMOUNT IN DISPUTE:

EUR 148 000

ARBITRATION COSTS:

EUR 8 800

SUMMARY*

In December 1996, the Danish company Kappa Nordic A/S ("Kappa") and the two Chinese companies Beta Co Ltd ("Beta") and Gamma beverage Co Ltd ("Gamma") signed a contract ("the Contract) under which Kappa was to supply and deliver certain technical equipment for food and beverage processing.

On 17 July 2001, by a contract of assignment, Kappa assigned all rights and obligations vis-à-vis Beta and Gamma pursuant to the Contract, to Alpha S.p.A ("Alpha").

By a request for arbitration dated 7 February 2002, Alpha initiated arbitration against Beta and Gamma. Alpha claimed that Beta and Gamma had wrongfully called a guarantee under the Contract and therefore requested that the Respondents be ordered to repay the guarantee amount of USD 178 978.

Due to the unclear wording of the arbitration clause in the Contract, Alpha had suggested to the Respondents before submitting the request for arbitration that the dispute should be resolved by arbitration in Stockholm under the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Rules). This had been accepted by Beta. Gamma objected before the Institute that it did not accept to be a party to the proceedings. Alpha thereafter withdrew its request for arbitration against Gamma and the Institute dismissed the case between Alpha and Gamma in a decision dated 9 July 2002.

In its response before the Institute, Beta objected to the jurisdiction of the SCC Institute for lack of a valid arbitration agreement between Alpha and Beta.

* Editor's note: all names of the parties mentioned are fictive.

In a decision on 4 June 2002 the Institute stated that it was not clear that the Institute lacked jurisdiction over the dispute and proceeded with handling the dispute[1].

On 9 July 2002 the Institute appointed a sole arbitrator and fixed the advance on costs to EUR 22,000 to be paid by the parties with half each. When the Respondent did not pay its share, the Institute gave Alpha the opportunity to pay the missing amount, which it subsequently did[2]. The Institute thereafter referred the case to the arbitrator.

THE PROCEEDINGS BEFORE THE ARBITRATOR

The Position of the Parties

The Respondent stated that the Arbitration Agreement was included in the contract dated 18 December 1996 between Kappa and Beta and Gamma. In the Contract it was also stated: "Any amendment supplement and alteration to the terms and conditions of the present contract shall be made in written form and signed by the authorised representatives of both parties upon an agreement and shall have the same force as the contract itself". Therefore Kappa was not entitled without Beta's consent to transfer any right or obligation under the Contract to a third party.

"[Beta] has never agreed to any assignment by [Kappa] of its rights and obligations under the Contract to [Alpha] or any other party. Consequently [Alpha] has no right to commence arbitration and it is therefore claimed that the Institute should reject the Claimant's application."

The Claimant stated that "the only remaining implication of the Contract is the right to receive payment thereunder and that the transfer of the right of such a payment is effective independently of any action or approval by the debtor. Consequently the Arbitration Agreement will accompany the assignment. An assignment of this nature does not constitute any amendment, supplement or alterations to the terms and conditions of the Contract. Furthermore, although [Kappa] was formally the party to the Contract the 'real seller' was [the Claimant]."

The Claimant referred therein to various letters and faxes exchanged by the parties.

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[1] *Cf.* Article 7, Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Rules).

[2] *Cf.* Article 14, SCC Rules.

The Respondent rejoined that "it has never before the commencement of the arbitration accepted or been informed of any assignment by [Kappa] of its duties and liabilities under the Contract to another company and [Beta] has therefore maintained that it has never agreed to a transfer of the rights and liabilities of its contract party to another company whether in the [Kappa] Group or not and that it has consequently not accepted [Alpha] as a party to the Contract."

Findings of the Arbitrator

Reasons

"As the matter is thus presented before me I have primarily to deal with the question of a whether I have jurisdiction or not as arbitrator. The outcome of that question depends entirely on whether Beta is bound by the arbitration clause contained in Article 15 of the Supply Contract dated 18 December 1996 between [Beta] and [Kappa] in this action for arbitration where [Alpha] an Italian company, acts as claimant. The reason why [Alpha] nevertheless appears as claimant in this arbitration is that [Kappa] in a document called 'Assignment' dated 17 July 2001 assigned to the [the Claimant] 'all rights and obligations, interest and title vis-a vis [Beta] pursuant to the Contract without right of recourse against the Assignor'. There is nothing in the documents referred to before me that indicate that the parties to that Assignment informed [Beta] thereof. [Beta] already in its first reply to the Institute stated that it had never agreed to the Contract being assigned and therefore objected to the Institute having jurisdiction in an action instituted by [Alpha]. It is thus evident that [Beta] has never agreed to the assignment of the rights and liabilities of [Kappa] to [Alpha] or any other company. The question for me is thus to decide whether under these circumstances Beta is bound by the arbitration clause of the original contract in respect of a claim for payment by another party than the original party to the contract.

"As the dispute between the parties thus concerns a procedural question and these proceedings have been instituted in Sweden under the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, I consider that this procedural dispute is governed by Swedish law.

"In respect of the position under Swedish law in this matter [the Claimant] has referred me to the case NJA 1997 page 866[3] dealing with the question whether an arbitration clause contained in a supply agreement is binding also in relation to a party which has acquired rights under the

[3] Editor's note: The Emja-case, *see* Stockholm Arbitration Report 1999:2, p. 73.

contract. The Swedish Supreme Court ruled that the party which had acquired such rights was also bound by the arbitration clause contained in the original contract.

"The situation in this case is, however, somewhat different as [Alpha] appears as the claimant in an arbitration action against [Beta] for repayment of a certain guarantee amount which was paid to [Beta] under a guarantee provided by a bank at the request of [Kappa] as [Beta]'s contract party. It is furthermore clear that [Beta] was never notified by [Kappa] or anybody else of the assignment to [Alpha] of [Kappa]'s rights and liabilities under the contract with [Beta] until these arbitral proceedings were instituted in spite of the fact that the said assignment was signed on 17 July 2001.

"It is stated in [Section] 34 of the Swedish Act on Arbitration (*Lag 1999:116 om skiljeförfarande*) that an arbitration award may be challenged if it 'is not covered by a valid arbitration agreement between the parties'. Such challenge is to be handled by the Court of Appeal of the district in which the award was given. For arbitration awards given in Stockholm the thus competent Court of Appeal is Svea Hovrätt. Judgment by a Court of Appeal in such a matter is final and cannot be appealed against to the Supreme Court of Sweden. If an arbitration award by such an appeal comes before a Court of Appeal the documents of the case become public.

"On 25 August 2000 an arbitration award was delivered in Stockholm by the arbitrators Johan Lind, Jan Ramberg and Bertil Södermark in a dispute between Regular Capital Inc. and AB Custos. In the award the arbitrators dealt with the question of whether the respondent was bound by an arbitration clause in a contract between the respondent and another party than the claimant. The arbitrators ruled that the respondent was not bound, as it had not been notified of the assignment of the contract by the original party to the claimant before the arbitration proceedings were initiated. On appeal the Court of Appeal (Svea Hovrätt) upheld the arbitrators' ruling in that respect in a judgment dated 10 January 2003 in the case T 8032-00.[4]

"In my opinion that judgment thus states the position under Swedish law in respect of effects of assignment of a contract in relation to an arbitration clause in the contract. In the case before me it is likewise clear that [Beta] was not notified of the assignment by [Kappa] of its rights under the contract to [Alpha] before this arbitration was instituted. My conclusion is therefore that [Beta] is not bound by the arbitration clause of its contract with [Kappa] in an action by [Alpha] for arbitration and that I therefore have no jurisdiction as arbitrator in this matter.

[4] Editor's note: *see* page 98 below.

AWARD

"[Alpha]'s application for an arbitration award is dismissed.

"The Arbitration Institute of the Stockholm Chamber of Commerce has finally decided the compensation due to the Institute and to the arbitrator as follows:

…

"[Alpha] is to assume final responsibility for the compensation thus due to the Arbitrator and to the Institute.

"An appeal against the decision in this award to dismiss the arbitration application may according to Section 36[5] of the Swedish Act on Arbitration be made to Svea Hovrätt, Stockholm within three months from the day when the party received this award.

DECISION BY THE SVEA COURT OF APPEAL 10 JANUARY 2003, IN CASE T 8032-00

SUBJECT MATTER:

Assignment of contract; validity of the arbitration clause. Challenge of an award in which the Claimant's claim had been dismissed for lack of jurisdiction.

[5] Official translation of the Swedish Arbitration Act:

Section 36

An award whereby the arbitrators concluded the proceedings without ruling on the issues submitted to them for resolution may be amended, in whole or in part, upon the application of a party. An action must be brought within three months from the date upon which the party received the award or, where correction, supplementation, or interpretation has taken place in accordance with section 32, with in a period of three months from the date upon which the party received the award in its final wording. The award shall contain clear instructions as to what must be done by a party who wishes to challenge the award.

An action in accordance with the first paragraph that only concerns an issue as referred to in section 42 is permissible where the award means that the arbitrators have considered themselves to lack jurisdiction to determine the dispute. Where the award entails another matter, a party who desires to challenge the award may do so in accordance with the provisions of section 34.

FINDING:

The Court found that a valid assignment of the arbitration agreement had not taken place at the time of the Claimant's request for arbitration. By so deciding, the Court confirmed the decision of the arbitral tribunal, and consequently the Claimant's challenge of the award was dismissed.

PARTIES:

Claimant: Regular Capital Incorporated (Sweden)
Respondent: AB Custos (Sweden)

PLACE OF COURT PROCEEDINGS:

Sweden

APPLICABLE LAW:

The Swedish Arbitration Act of 1929

SUMMARY

In February 1998, the Swedish company Custos AB ("Custos") and the Hong Kong based company ASG H.K. Ltd ("HK") entered into a shareholder agreement concerning their ownership of shares in the Swedish company ASG AB ("ASG"). The shareholder agreement contained a dispute resolution clause to the effect that disputes should be settled by arbitration in Stockholm, Sweden.

In May 1998, HK transferred its shares in ASG to the Swedish company ASI, Air & Sea International AB (ASI), and in September 1998 ASI transferred the shares to Regular Capital Inc. ("Regular").

During 1999, a series of events led to that Custos sold its shares in ASG to Danzas Sweden AB ("Danzas").

On 23 June 1999, Regular initiated arbitration against Custos under the arbitration clause in the shareholder agreement, advancing claims against Custos relating to Custo's transfer of shares in ASG to Danzas.

Custos contested the jurisdiction of the arbitral tribunal and held that as between Custos and Regular, the arbitration clause in the shareholder agreement was not binding.

In its award on 25 August 2000, the arbitral tribunal, consisting of former justice Johan Lind as chairman and professor Jan Ramberg and advokat

Bertil Södermark as arbitrators, found that a valid transfer of parties in the shareholders' agreement had not taken place at the time of the request for arbitration, and Regular's claim was therefore dismissed for lack of jurisdiction.

In the opinion of the arbitrators, a transfer of parties to the shareholders' agreement could only take place if (i) the remaining party (Custos) acquired knowledge of the transfer, and (ii) the provisions in the shareholders' agreement relating to the duties of the parties concerning *inter alia* a guarantee commitment were fulfilled. The tribunal concluded that a change of parties did take place in September 1998, which meant that the request for arbitration in June 1998 did not fall under the arbitration clause in the shareholders' agreement.

Regular challenged the award before the Svea Court Appeal and requested that the Court should confirm the existence of a valid arbitration agreement between the parties. In its decision on 10 January 2003, the Court dismissed the challenge.

Excerpts below are an unofficial translation of the proceedings in the Svea Court of Appeal.

THE PROCEEDINGS BEFORE THE SVEA COURT OF APPEAL

The Position of the Parties

"Regular Capital Incorporated (Regular) has challenged an arbitral award pronounced in Stockholm on 25 August 2000 [enclosed as Appendix A] and has demanded that the Court of Appeal annul the arbitral award and

1) establish that there was a valid arbitration agreement between the parties in accordance with which the dispute issues instituted in the arbitration dispute will be settled,
2) release Regular from its liability to pay compensation for both the arbitration costs and compensation for AB Custos' (Custos) court costs, and
3) oblige Custos to pay Regular SEK 443,915, constituting the total of the arbitration costs (arbitrator's costs) contested by Regular.

"Custos contested Regular's claims."

Findings of the Court of Appeal

"Regular has in the first place alleged that the intergroup succession of parties does not require the opposing party's approval, and that Custos was

bound by the shareholders' agreement in relation to Regular, who in compliance with the regulations of the agreement has entered into the agreement. In the alternative, Regular has alleged that Custos approved the succession of parties, and that Custos had in any case permitted Regular to become a party to the shareholders' agreement through implication or passivity.

"Like the arbitral tribunal, the Court of Appeal believes that the provisions in the shareholders' agreement must be interpreted such that succession of parties within the group of companies may take place without the approval of the other party to the agreement. However, in the opinion of the Court of Appeal, such unilateral succession of parties can only be claimed against the opposing party after the latter at least has become aware of the succession. The burden of proof that a valid succession has taken place must furthermore be considered to lie with the party so claiming.

"In the opinion of the Court of Appeal, in order for Regular to validly have become a party to the shareholders' agreement without Custos' approval, it is required that both successions of parties, by which first ASI and thereafter Regular become parties to the shareholders' agreement, become known to Custos.

"The examination of the case has shown that Custos during the spring of 1999, through information in mass media and the general meeting of shareholders, was aware that Regular considered itself to be a party to the shareholders' agreement. Irrespective of the effect of this knowledge, however, nothing more has been shown than the fact that Custos, up until July 1999, was unaware that ASI considered itself to have become a party to the shareholders' agreement. ASI consequently did not with binding effect become a party to the shareholders' agreement prior to the time of the arbitration proceedings being initiated on 23 June 1999. Under these circumstances, nor could Regular have unilaterally become a party to the shareholders' agreement within that period. On these grounds, and since Regular has not shown that Custos prior to the request for arbitration in any way has given its approval to any of the successions or in any other way has become bound by the shareholders' agreement with Regular, the Court of Appeal finds that no valid arbitration agreement has existed between Regular and Custos according to which the issues instituted in the arbitration shall be settled. The arbitral tribunal has therefore not been competent to settle the dispute. Consequently, Regular's challenge shall be dismissed."

...

"In accordance with Section 43 of the [Swedish] Arbitration Act [1999], the decision of the Court of Appeal may not be appealed."

OBSERVATIONS BY JUAN CARLOS LANDROVE [1]

The award raises the following three issues:

(1) *Prima facie* decision on jurisdiction by the Arbitration Institute of the Stockholm Chamber of Commerce;
(2) The law applicable to the arbitration agreement; and
(3) The potential theories on the transfer or extension of the arbitration clause.

1. *PRIMA FACIE* DECISION ON JURISDICTION BY THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE

Each time the Arbitration Institute of the Stockholm Chamber of Commerce (the "Institute") receives a request for arbitration from a potential claimant, the Institute must proceed with a *prima facie* appraisal of whether there is a clear lack of its own competence.[2]

[1] The commentator would like to stress that he is not a Swedish law practitioner. He wishes to thank Professor Daniel Girsberger, Lucerne University School of Law, Switzerland, for his thoughtful comments on the draft.

[2] Art. 7 of the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC Rules") reads in pertinent part: "If it is clear that the SCC Institute lacks

The preliminary test consists of an examination of whether the agreement to arbitrate contains a reference to arbitrate under the SCC Rules.[3]

The decision deriving from such *prima facie* evaluation, be it positive or negative, does not go beyond the determination of the Institutes' competence towards the request that it is being submitted. In case the Institute decides not to assert jurisdiction over the case this does not automatically mean that there is no valid agreement to arbitrate at all, but merely that there is no valid agreement to arbitrate "under the SCC Rules."

It could well be that the agreement to arbitrate in question is a perfectly valid agreement to arbitrate *ad hoc*, or under the rules of another arbitration institution. Likewise, when the Institute accepts to administer the case, this does not in any way finally determine that there is a valid agreement to arbitrate between the parties, but merely that a superficial examination of the arbitration agreement does not obviously exclude the Institute's jurisdiction.

Where the Institute is confronted with an apparently pathological arbitration agreement, the Institute will assert jurisdiction so long as it is not clear that the Institute has no competence; any level of doubt, as long as there is any, suffices for the Institute to declare that its lack of competence is not clear, and refer the case to the arbitral Tribunal.[4]

Here, Alpha initiated arbitration by its request to the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC") against, *inter alia*, Beta.[5]

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jurisdiction over the dispute …, the Claimant's Request for Arbitration shall be dismissed."

[3] *See*, Edlund/Söderlund, "A Valid Agreement to Arbitrate?," Swedish and International Arbitration 1996, p. 8, 11, dealing with the similar mechanism under the 1988 version of the SCC Rules (article 10) which required the request for arbitration to be dismissed by the Institute if it was "obvious" that the Institute lacked jurisdiction. The 1999 English version of the SCC Rules uses "clear" instead of "obvious," but both Swedish versions use "*uppenbart*," *see* Magnusson, "Prima Facie Decisions on Jurisdiction," Stockholm Arbitration Report 2000:2 p. 172.

[4] Pursuant to article 15 SCC Rules, after both the registration fee (art. 6 SCC Rules) and the advance on costs (art. 14 SCC Rules) have been paid.

[5] Gamma, the other respondent involved, is voluntarily left aside because its inclusion would not bring anything to the analysis.

In its reply, Beta confined its arguments to a "Jurisdiction Objection"[6] stressing that its contracting party was Kappa. Furthermore, Beta pointed to article 15 of the original contract (the "Contract") that included the arbitration clause. Article 15 provided that any amendment of (or alteration to) the Contract should be made in writing and signed by authorised representatives of both parties.[7] Beta stressed that it had never accepted that Alpha replaced Kappa in the Contract and never signed any amendment of the Contract to that effect. Consequently, in Beta's view, Alpha had no right to initiate arbitration proceedings against it.

Alpha replied that what it had been assigned by Kappa was the right of the latter to receive a payment under the Contract, to the exclusion of any obligations of Kappa.[8] Alpha also noted that it was the "real" seller with which Beta "had dealt all along."[9]

Finally, Beta further developed its arguments on the basis of the text of the assignment from Kappa to Alpha which it construed not as a mere assignment of a right to receive a payment but of the whole of Kappa's rights and obligations, interest and title with respect to the contract with Beta.[10]

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[6] Pursuant to article 10(2) SCC Rules which reads: "If the Respondent wishes to raise any objection concerning the validity or applicability of the arbitration agreement, such objection shall be made in the Reply together with the grounds therefore." Actually, such provision leaves no other option to the respondent than to provide its full argumentation on its jurisdictional plea already at this stage; not only arguments concerning the Institute competence itself, but also those related to the arbitrator's jurisdiction.

[7] Thereby evasively referring to a possible argument that such article 15 could constitute a *pactum de non cedendo* preventing any type of assignment without Beta's prior written approval.

[8] Thus setting the ground for an argument on the transfer of the arbitration clause through assignment of a right (bilateral assignment from the assignor to the assignee, excluding the obligor's participation) which would arguably not require Beta's consent.

[9] Such mention could suggest a future argument on the extension of the arbitration clause to Alpha based on the group of companies doctrine, with the corollary necessity to examine in detail the negotiation, signing and execution of the Contract to provide a decision on jurisdiction.

[10] Thereby suggesting that the assignment was an assignment of the whole Contract (and not of a mere right deriving from the Contract), which would arguably require Beta's consent (trilateral relationship including the assignor, assignee, and obligor's participation).

The SCC rightly decided that it was not clear that it lacked jurisdiction over the dispute and proceeded with the administration of the case.[11]

In fact, the mere existence of relevant facts and documents to be respectively determined and analysed in relation to the potentially applicable theories (assignment of right, or of the Contract, extension of the clause through the group of companies doctrine) to assert jurisdiction over the parties, justifies the Institute's decision to have the arbitrator examine his own competence. To dig further into the documents would be outside of the scope of an SCC *prima facie* analysis,[12] and should be left to the in-depth analysis to be performed by the arbitral Tribunal on its own competence.[13]

Here, the claimant invoked a potentially valid theory to avail itself of an arbitration clause signed between the respondent and claimant's assignor. Moreover, *in casu*, the claimant advanced the whole costs of the proceedings since the respondent did not pay its share.[14] All the more so, in such cases the claimant should have "its day in court" and have the potential transfer or extension of the arbitration clause further assessed by the arbitrator.

Regardless of what the outcome of the decision on jurisdiction by the arbitrator will finally be, it seems better to have a claimant, with a potentially valid theory on jurisdiction, "disturbing" the respondent with a request for arbitration whose costs it fully advances, than having the same claimant (here an Italian company) having no other option than to initiate court proceedings in the country of the respondent (here a Chinese company). Finally, where the decision on jurisdiction happens to be negative, the "disturbed" respondent may request that the claimant be ordered to pay to the respondent the costs it incurred in the defence of the jurisdiction objection.[15]

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[11] Pursuant to article 7 SCC Rules *a contrario*.

[12] Especially because a discussion as to the ambiguous wording of the arbitration clause had taken place between the parties and they both finally agreed to have the dispute resolved by arbitration in Stockholm under the SCC Rules, *see* above the case excerpt at SUMMARY.

[13] Were the Institute to go too far into the analysis it could be considered to have violated the principle of Kompetenz-Kompetenz (1999 Swedish Arbitration Act, SFS 1999:116 ("1999 Act"), section 2(1) *in initio*) according to which the arbitrators are entitled to decide on their own jurisdiction.

[14] Pursuant to article 14(3) SCC Rules.

[15] Here, surprisingly, Beta had not claimed any costs, *see* above the case excerpt at The Position of the Parties *in fine*.

2. THE LAW APPLICABLE TO THE ARBITRATION AGREEMENT

Under the old Swedish Arbitration Act of 1929, which gave no guidance as to which law should be applied to the arbitration agreement in the absence of a parties' choice, the view had been expressed that the proper law of the main contract (i.e., not automatically Swedish law) was applicable to an arbitration clause where both parties to the contract were foreigners and had chosen a place in Sweden as arbitration venue.[16]

Already before the 1999 Act came into force, the trend changed based on enforcement concerns related to article V(1)(a) of the New York Convention of 1958 on Enforcement and Recognition of Foreign Arbitral Awards.[17] Arbitrators sitting in Sweden showed a legitimate concern of not being able to render enforceable awards and feared that the non-application of the law of the seat of the arbitration to the arbitration agreement could give rise to successful challenges to their arbitral awards.[18]

This trend, clearly transpired shortly before the coming into force of the 1999 Act, where its article 48 §1[19] was regularly cited to underpin the

[16] Hjerner, "Choice of Law Problems in International Arbitration with Particular Reference to Arbitration in Sweden," Swedish and International Arbitration 1982 p. 18, 24 *in fine*. *See*, however, Poudret/Besson, Droit Comparé de l'Arbitrage International (2002) p. 275, note 708; Adam, "The Effect of the Place of Arbitration on the Enforcement of the Agreement to Arbitrate," 8 Arbitration International 257, 265 (1998); and Wetter, "Salient Features of Swedish Arbitration Clauses," Swedish and International Arbitration 1983 p. 33, 35-39, who all contend the current solution derives from section 2 of the 1929 Act. One cannot but agree with Hjerner on this point since section 2 of the 1929 Act did not embrace the situation where the parties made no choice of applicable law.

[17] Art. V(1)(a) reads in pertinent part: "Recognition and enforcement of the award may be refused" if the arbitration agreement is not valid "under the law of the country where the award was made."

[18] As to the taking into account of the New York Convention of 1958 when the arbitrator examines the validity of an arbitration agreement, *see* Mayer, "The Law Applicable to the Arbitration Agreement – The Solutions Adopted by the New Swedish Arbitration Act in an International Context," Swedish and International Arbitration 1997 p. 6, 25 ff.

[19] Section 48 §1 of the 1999 Act reads: "Where an arbitration agreement has an international connection, the agreement shall be governed by the law agreed upon by the parties. Where the parties have not reached such an agreement, the arbitration agreement shall be governed by the law of the country in which, by virtue of the agreement, the proceedings have taken place or shall take place."

arbitrators decision to apply Swedish law to the arbitration agreement, although an "anticipatory" application of this rule was always excluded.[20]

With the entering into force of article 48 §1 of the 1999 Act,[21] "Swedish law" means the 1999 Act, and accordingly the arbitration agreement in an international arbitration with seat in Sweden is governed by Swedish law, absent any agreement to other rules of law between the parties.[22]

In the case being commented upon, the sole arbitrator's motivation for the application of Swedish law to the arbitration agreement was the "procedural" nature of the dispute between the parties. He took into account the fact that the proceedings had been "instituted in Sweden under the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce."

Although the end result: the application of Swedish law, may well have been correct in this case, one should favour a deeper examination of such a crucial issue.

Here, the question is dealt with by the arbitrator in a single paragraph, where section 48 §1 of the 1999 Act is not even mentioned. One ought to prefer a method under which (i) the existence of any governing law clause in the original Contract is determined, (ii) if such existence is confirmed, the accurate scope of the governing law clause should be assessed (i.e., does it merely represent a choice of substantive law, or does the intention of the parties extend its application to the arbitration agreement as well?), (iii) in case the choice was limited to the law applicable to the merits, check whether the place of arbitration as agreed by the parties[23] is located anywhere in Sweden, and finally, in the affirmative, (iv) expressly apply section 48 §1 of the 1999 Act and conclude that Swedish law applies to the arbitration agreement.

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[20] *See*, SCC Case 108/1997, Stockholm Arbitration Report 2001:1 p. 57, 60 note Walker; SCC Cases 80/1998 and 81/1998, Stockholm Arbitration Report 2002:2 p. 45, 57 note Goldberg.

[21] The 1999 Act entered into force on 1st April, 1999.

[22] *See*, SCC Case 046/1999, Stockholm Arbitration Report 2001:1 p. 73, 76 notes St. John Sutton and Magnusson; SCC Case 129/2000, Stockholm Arbitration Report 2003:1 p. 119, 123 notes Wallgren/Lindegaard and Runesson/Swahn.

[23] In case the parties did not agree on a place of arbitration, and the arbitrator or the arbitration institution determine it, "the place of arbitration is deemed to have been determined by virtue of the parties' agreement," *see* observations by Wallgren/Lindegaard on SCC Case 129/2000, Stockholm Arbitration Report 2003:1 p. 119, 130.

A thorough examination of such a crucial issue is motivated both by the fact that the arbitrator sitting in Sweden must give deference to the starting point of section 48 §1 of the 1999 Act: party autonomy,[24] and is compelled, when deciding in proceedings administered under the auspices of the Institute, to provide a reasoned award.[25]

Finally, it is a legitimate expectation of the parties to have the choice-of-law problems that are going to determine the *ratione personae* scope of the arbitration agreement, and that *in casu* lead to the dismissal of the case, carefully spelled out.

3. THE POTENTIAL THEORIES ON THE TRANSFER OR EXTENSION OF THE ARBITRATION CLAUSE[26]

Since the law applicable to the arbitration agreement is Swedish law, such law will also control the determination on the potential transfer of the arbitration clause from one party to another.[27]

In the case at stake, the task of determining who are the parties to the arbitration agreement requires a preliminary assessment of the theory through which the transfer of the arbitration agreement from Kappa to Alpha could have materialised.

The ultimate result in the award, i.e., the dismissal of the case because of lack of subjective arbitrability over the claimant, is based on a prior Swedish

[24] As to the concept of party autonomy being the starting point of section 48 §1 of the 1999 Act, *see* Hobér, "Arbitration Reform in Sweden," 17 Arbitration International 351, 355 (2001).

[25] Article 32(1) SCC Rules provides in pertinent part: "The award shall … contain an order or a declaration … as well as the reasons for it …."

[26] The theories here examined are restricted to that which the sole arbitrator considered, and to those the commentator believes the claimant could have contended, in light of the facts as stated in the case excerpt above.

[27] This issue could be a topic in itself that does not quite fit into the present observations. Besides, precious information is lacking from the case excerpt as to what was the law (or what were the rules of law) governing the merits of the dispute, and also which rules of law applied to the transfer agreement (be it an assignment, or else) between Kappa and Alpha. For a discussion on possible conflict-of-law approaches, *see* Blessing, "The Law Applicable to the Arbitration Clause," in "Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention," ICCA Congress Series No 9 (1999) pp. 168 ff., and in particular to determine the law applicable to the transfer of the arbitration agreement, *see* Fouchard, Gaillard, Goldman, On International Commercial Arbitration (1999) pp. 417ff.; Girsberger/Hausmaninger, "Assignment of Rights and Agreement to Arbitrate," 8 Arbitration International 121, 149-161 (1992).

Court of Appeal's case which, according to the sole arbitrator, characterised the issue as an assignment of contract (a), although the case at stake looked more like an assignment of right issue, and not of the whole contract (b). Moreover, the facts as summarised in the award, could have triggered arguments under two additional theories: the group of companies doctrine (c), and an agent/principal relationship (d).

(a) Assignment of the Contract

The sole arbitrator found it persuasive to consider the assignment from Kappa to Alpha as an assignment of the entire original Contract between Kappa and Beta, as Beta constantly contended throughout the proceedings.

It is true that the text of the assignment provided for an assignment of *"all rights and obligations, interest and title vis-à-vis [Beta] pursuant to the Contract without right of recourse against the assignor."*

However, Alpha was only asserting a claim for payment, which according to Alpha was *"the only remaining implication of the Contract."* Alpha referred the sole arbitrator to *MS "EMJA" Braack Schiffahrts KG v. Wärtsilä Diesel Aktiebolag* ("*EMJA*").[28]

The distinguishing of the EMJA

In *EMJA*, it was an original party to the contract that tried to have a dispute arbitrated against an assignee of a right. The arbitrator decided that *EMJA* was to be distinguished from the case at stake because here the procedural positions are inverted, Alpha, the assignee, appears as claimant (as opposed to respondent). Practically, this means that the obligor should always be able to avail itself of an arbitration clause in the original contract against the assignee, but that the contrary would not apply, so that assignment situations would create unilateral arbitration clauses only capable of being triggered by the obligor.

This is exactly what the Swedish Supreme Court held to be undesirable unless "special circumstances" existed.[29] Unfortunately, the Court gave no guidance as to what these special circumstances could be.

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[28] Case Ö 3174 / 95, Swedish Supreme Court (*Högsta Domstolen*), reported in Swedish in Nytt Juridiskt Arkiv (NJA), 1997, pp. 866 ff., published in English in Stockholm Arbitration Report 1999:2 pp. 73 ff., XXIVa ICCA Yearbook 1999 317, and in French in Revue de l'Arbitrage 1998 431, note Hansson-Lecoanet/Jarvin.

[29] *See*, *EMJA*, Stockholm Arbitration Report 1999:2 p. 73, 76. *See also*, Jurisdictional Award rendered in 1998 in SCC Cases 38/1997 and 39/1997, Judgment of the Stockholm City Court rendered in 2001 in Case T 1510-99, and Judgment of the Svea Court of

In my view, this represents a clear indication that an adjudicator (whether a judge or an arbitrator), having to decide on whether the obligor is bound by an arbitration clause invoked by the assignee, may not refuse that the arbitrator assert jurisdiction over the case unless a well debated and thoroughly analysed aspect of the case amounts to a "special circumstance." No such analysis took place in the commented award, nor in the Court of Appeal's case that constitutes its core legal basis.

The analogy with Regula v Custos

The sole arbitrator based his reasoning on a Swedish Court of Appeal's case decided within the framework of the challenge of an arbitral award rendered in *ad hoc* proceedings.[30]

In that case, AB Custos ("Custos"), the respondent, had entered into a shareholder's agreement ("SHA") with ASG. This agreement contained an arbitration clause as well as a provision which stated that none of the parties could transfer ASG shares to a third party without the other party's approval, except where such transfer was made within one of the original parties' group of companies.

Subsequently, ASG shares were transferred to ASI, and then in turn to Regular Capital, Inc. ("Regular"), the claimant. Both ASI and Regular were part of the ASG group.

At some point, Custos intended to transfer its shares in ASG to a third party, not part of the Custos' group: Danzas Sweden AB. Regular which intended to avail itself of the right of first refusal included in the SHA (to which it believed it had become a party) initiated arbitration proceedings against Custos.

Custos challenged the arbitrator's jurisdiction contending that it had not been informed of any of either of the successive transfers involving an intra-group succession of parties.

Appeal rendered in 2002 in Case T 4496-01, Stockholm Arbitration Report 2003:1 p. 273, 290, 296, 299 note Smit (a dispute over a guarantee, to which the principle of avoidance of limping agreements deriving from *EMJA* has been applied).

[30] Unreported Court of Appeal (*Svea Hovrätt*) decision of 10th January, 2003 in case No T 8032-00, *Regular Capital, Inc. v. AB Custos*. The author would like to acknowledge the help of L. Mattias Johnson in the translation from Swedish into English of relevant excerpts of this decision.

The Court of Appeal confirmed the arbitrators negative decision on jurisdiction.[31] The Court approved the findings of the arbitral Tribunal according to which the provisions in the SHA must be interpreted so that an intra-group succession of parties may take place without the approval of the other party to the SHA. The Court held further that, although formal notifications of both transfers may not have been necessary for ASI and then Regular to become successively parties to the SHA, Custos should have been aware of the sequence of both transfers. Regular had succeeded in showing that Custos was aware that Regular, at a date prior to that when the arbitration proceedings were commenced, considered itself to be a party to the SHA. But Custos only became aware that ASI had become a "transitional" party to the SHA by the initiation of the arbitration proceedings. The Court gave great deference to the argument based on the lack of information of the sequence of the transfers, from ASG to ASI, and then from ASI to Regular. Accordingly, the Court found that no valid agreement to arbitrate existed between Regular and Custos, and that the arbitral Tribunal was right in not considering itself competent.[32]

The sole arbitrator in our case retained from such Court of Appeal's case that a lack of notification of an assignment of a contract prior to the initiation of arbitration proceedings prevented the assignee to avail itself of the arbitration clause against the obligor. I must admit I fail in understanding how the *Regular v. Custos* case compares with the *Alpha v. Beta*'s fact pattern. In one case, we have an intra-group shares' transfer involving a succession of parties, in the other we have an assignment of a right.[33]

Moreover, the Court of Appeal requires a mere awareness of the transfer on behalf of the original party to the contract, not the receipt of a formal transfer notification as the sole arbitrator retains. Anyway, the initiation of arbitral proceedings by the assignee against the obligor ought to be

[31] Unpublished *ad hoc* award rendered in Stockholm by Johan Lind (Chairman), Jan Ramberg, and Bertil Södemark on 25th August, 2000.

[32] The Court of Appeal decision contains no reference to *EMJA* (*see* above note 28) and accordingly did not examine the gap in the information on the sequence of the transfers as constituting "special circumstances" in the sense of *EMJA*. The Swedish Supreme Court being a jurisdiction of a higher degree than the Court of Appeal, it is regrettable that the latter did not authorise the parties to appeal its decision to the Supreme Court pursuant to section 43(2) of the 1999 Act, because the Supreme Court could have seized the opportunity to define the "special circumstances."

[33] This assignment may well have been an intra-group assignment (*see* below note 63 and accompanying text) but this seems to be the only possible analogy on which the sole arbitrator did not base his reasoning.

considered a notification.[34] There is no difference to the detriment of the obligor, whether the obligor is notified of the assignment through the receipt of the request for arbitration, or whether the notification took place through the receipt of a letter, the day before the request for arbitration is received.

Then, the notification, or even awareness requirement, along with the awareness of the whole sequence of successive assignment, both prior to the initiation of the arbitration proceedings, seem far too formalistic, as long as there has been no detriment to the obligor, in the sense that the lack of information had no consequences on the obligor's situation (e.g. as long as the obligor does not run the risk of having to perform any duty under the original contract twice, first towards the assignor, and then again towards the assignee).

Besides, the contents of article 15 of the Contract as possibly consisting of a *pactum de non cedendo*,[35] or of a clue that the Contract was entered into on *intuitu personae* grounds is not contemplated in the award.[36]

Finally, the last paragraph of section 2 of the award confuses assignment of a contract and assignment of a right. The award states: *"In my opinion that judgment states the position under Swedish law in respect of effects of assignment of a contract in relation to an arbitration clause in the contract. In the case before me it is likewise clear that Beta was not notified of the assignment by Kappa of its rights under the contract to Alpha before this arbitration was instituted."* (Emphasis added)

(b) Assignment of a Right

The sole arbitrator held Swedish law to be applicable and by virtue of a fundamental principle of Swedish law,[37] one cannot assign more rights and obligations than what in fact it actually has.

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[34] *See*, Fouchard, Gaillard, Goldman, On International Commercial Arbitration (1999) p. 422.

[35] *See* above, note 7 and accompanying text.

[36] Although both the *pactum de non cedendo* and the *intuitu personae* arguments are those to which international arbitral practice and national courts give deference to when negating the transfer of an arbitration clause through assignment, *see* generally Fouchard, Gaillard, Goldman, On International Commercial Arbitration (1999) p. 433-434; Girsberger/Hausmaninger, "Assignment of Rights and Agreement to Arbitrate," 8 Arbitration International 121-136 (1992). The *intuitu personae* element was also held to be potentially relevant in *EMJA* (*see* above note 28 at 76), as well as the *pactum de non cedendo* element in *Bulbank* (*see* below note 49 at A-4).

[37] Embedded in art. 27 of the Swedish Statute on Debts (*Skuldebrevslagen*).

Here, strong argument could be made for the view that nothing more than the claim for repayment of a guarantee amount (which was arguably unduly paid to Beta under a guarantee provided by a bank at the request of Kappa) was at stake. Kappa's duty to set up the bank guarantee had been duly performed, and payment under the guarantee had taken place, i.e., there was no more duty to be delegated on Kappa's side. In other words, there was no more potentially "assignable" obligation left in the Contract, and consequently nothing more than the assignment of a right (as opposed to the assignment of the whole Contract) could be performed between Kappa and Alpha.

As to the issue of the transfer of an arbitration clause in case of assignment of a right deriving from the contract that includes the arbitration clause, the most recent Swedish legislative report on the question stressed that the law was not very clear on the topic of singular succession and that the legal doctrine was divided.[38]

Actually, until 1997,[39] there was no precedent on the issue of singular succession, and many commentators were in favour of the automatic transfer of the arbitration clause to the assignee along with the assigned right,[40] whereas the Governmental Expert Committee was against it,[41] or at

[38] *See*, the travaux préparatoires of the 1999 Act: Report of the Governmental Expert Committee on Arbitration relative to the new law on arbitration procedure, SOU 1994:81, p. 91; Jarvin, "La nouvelle loi suédoise sur l'arbitrage," Revue de l'Arbitrage 2000 27, 43.

[39] *EMJA* (*see* above note 28) dates back to 1997.

[40] Among commentators holding at that time that the assignee was automatically bound to arbitrate as long as he knew or could have known about the arbitration agreement included in the main contract between the original parties, there was in English language Hobér, "Party Substitution under Swedish Arbitration Law," Swedish and International Arbitration 1983 43, 47; for further comments in Swedish language *see* references cited by Weinacht, "Party Succession in Agreements to Arbitrate, Sweden Backs Down Over Practical Considerations," 14 Mealey's International Arbitration Report 55, 64 n. 18 (September 1999). Authors not agreeing to the "automatic transfer doctrine", included at that time: Heuman, Current Issues in Swedish Arbitration (1990) p. 41, 54 and cited references in Swedish language.

[41] *See*, Jarvin, "Assignment of Rights under a Contract Containing an Arbitration Clause – Assignee Bound to Arbitrate. Decision by Sweden's Supreme Court in the 'EMJA' Case," Swedish and International Arbitration 1997, p. 65, 67; Special Section, "The Draft New Swedish Arbitration Act: The 'Presentation' of June 1994," 10 Arbitration International 407, 414-415 (1994).

least did not want to include any such automatism at the statutory level and would rather leave it to the courts to decide.[42]

In *EMJA*,[43] the Swedish Supreme Court dealt with the situation where a Dutch shipyard and its subcontractor assigned to the German owners of a newly built ship (the EMJA) their rights under a supply agreement with a Swedish company, which had delivered a defective diesel engine for the ship.

Based on the assignment, the German owner sued the Swedish supplier before the Swedish court where the supplier was domiciled. The supplier, however, requested that the case be dismissed (without prejudice to the merits) because the owner (assignee) was bound by the arbitration clause originally signed by the shipyard and its subcontractors (assignors).

On appeal, the Swedish Supreme Court concluded that the interest of the debtor (the remaining original party to an arbitration clause) in having disputes settled through arbitration cannot generally be set aside via an assignment of a claim by the counter party.

The envisaged interests of the debtor were the higher degree of confidentiality existing in arbitration proceedings as compared to national court proceedings, and the specific technical expertise of a selected arbitrator as compared to a national judge.

Besides, the Court recalled a fundamental principle of Swedish private law[44] that, when a contractual right is transferred, the new creditor does not acquire a better right against the debtor than that possessed by the transferor, and applied it by analogy to the assigned arbitration clause.

The Court also examined whether there were any circumstances whereby the remaining party (debtor) would not be bound by the arbitration clause and found none. Such circumstances encompassed the risk of *déni de justice* (if the arbitrators would deny jurisdiction over the case), and the risk that the assignee would be unable to pay the costs of the arbitration proceedings.

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[42] Jarvin, "La nouvelle loi suédoise sur l'arbitrage," Revue de l'Arbitrage 2000 27, 44; Ulrichs/Akerman, "The New Swedish Arbitration Act," 10 American Review of International Arbitration 69, 79 (1999); Weinacht, "Party Succession in Agreements to Arbitrate, Sweden Backs Down Over Practical Considerations," 14 Mealey's International Arbitration Report 55, 56 (September 1999).

[43] *See* above note 28.

[44] *See* above note 37.

In examining such special circumstances, the Court showed its unwillingness to provide the debtor with a lame arbitration agreement, in the sense that a party would be entitled to rely on an arbitration clause as a bar to court proceedings but would not be compelled to arbitrate when faced with a claim by another party.

The *intuitu personae* argument, as a potential impediment to the transfer of the arbitration clause, was also examined and the Court held that personal connections were unusual in commercial contexts, and that no such strong personal ties existed in the case at stake between the original contracting parties.

It is interesting to note that the Court, in its reasoning on applicable Swedish law, pointed out that the chosen solution coincides with the dominating views in Germany and the Netherlands, where respectively the appellant and the appellee's mother company had their seat.[45]

Consequently, the Court held that the assignee was bound by the arbitration clause.

Several authors have commented upon *EMJA* stressing the lack of clarity as to the debtor's situation, because the Court did not specify which were the so-called "special circumstances" that would prevent the debtor from being bound by the assigned arbitration clause.[46] Others complain about the lack of contract law analysis as a precedent to a balancing of legal policy arguments, and recommend that future decisions refine the principles of *EMJA*.[47]

Other commentators seem to have simply adopted the Supreme Court decision without criticism because it follows their former view.[48]

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[45] *See*, Dyer, "Sweden: Arbitration and Assignment of Contract," 2 International Arbitration Law Review 3 (1999).

[46] *See*, Jarvin, "Assignment of Rights under a Contract Containing an Arbitration Clause – Assignee Bound to Arbitrate. Decision by Sweden's Supreme Court in the 'EMJA' Case," Swedish and International Arbitration 1997 p. 65, 71 ; Hansson-Lecoanet/Jarvin note in Revue de l'Arbitrage 1998 434, 437 ; Jarvin/Günther, "Zur Abtretung von Rechten aus einen Vertrag mit Schiedsklausel," 54 Betriebsberater 12, 14 (Supplement 9, 24th September, 1998).

[47] Heuman, Arbitration Law of Sweden: Practice and Procedure (2003) p. 94.

[48] *See*, Hobér/Strempel in Weigand, Practicioner's Handbook on International Arbitration (2002) p. 1005.

Almost simultaneously, another case dealing with the fate of an arbitration clause was published: *AIT v. Bulbank*.[49] This time it was the assignee who was invoking the clause against the obligor (as it is in *Alpha v. Beta*).

The arbitrators decided in favour of an automatic transfer of the arbitration clause, expressly rejecting the views of the Governmental Expert Committee as to the 1999 Act, on grounds related to the equality between the parties and fair balance of the interests of the obligor and the assignee.

The award has been challenged by Bulbank (obligor) and the case went all the way up to the Swedish Supreme Court.

The Stockholm City Court[50] had to examine the contention of Bulbank according to which there were "special circumstances" for the arbitration clause not to have accompanied the assignment of rights.[51]

The City Court considered Bulbank's arguments (related to its opposition to the transfer and to increased expenses while opposed to AIT instead of GZ) to be of a rather general nature and not corresponding to "special circumstances" which are of an "extraordinary character."[52]

AIT appealed the decision to the Svea Court of Appeal,[53] because it had lost on another ground related to a duty of confidentiality issue. At this stage, however, the assignment issue was no longer at stake. Finally, the Swedish Court of Appeal allowed Bulbank to appeal its decision to the Swedish Supreme Court,[54] but the latter entertained only one point of Bulbank's argumentation. This point was also unrelated to the transfer of the arbitration clause.

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[49] Lars Welamson (Chairman), Stefan Lindskog and Christian Nowotny, *A. I. Trade Finance Inc. v. Bulgarian Foreign Trade Bank Ltd.*, SCC award of March 5, 1997, 12 Mealey's International Arbitration Report 3ff. and section H (March 1997).

[50] *See*, Stockholm City Court (*Stockholms Tingsrätts*), 6th Department, decision of 10th September, 1998, Case No T 6-111-98, 13 Mealey's International Arbitration Report section A (November 1998).

[51] *Id.* at A-3. At the time of Bulbank's challenge, the Swedish Supreme Court decision on *EMJA* had already been published and Bulbank tried to expand on arguments which could fall under such "special circumstances" exception.

[52] *Id*. at A-6.

[53] *See*, Swedish Court of Appeal decision of 1st October, 1998, 13 Mealey's International Arbitration Report section G (December 1998).

[54] *See*, Swedish Supreme Court decision of 27th October, 2000, 15 Mealey's International Arbitration Report section B (November 2000).

Accordingly, Swedish case law on the transfer of arbitration clauses along with an assignment of rights is in line with international practice. Countries such as Austria, England, France, Germany, Switzerland, and the United States consider that the arbitration clause travels automatically with the assignment of a right.[55]

The sole arbitrator was perfectly right to distinguish *EMJA* from the case at stake because of the procedural positions of the parties (*EMJA*: arbitration clause invoked by the obligor against the assignee; *Alpha v. Beta*: arbitration clause invoked by the assignee against the obligor) but this distinction should have served the interests of *Alpha* because the awareness requirement only applies to assignee-respondent situations not to obligor-respondent ones.

Therefore, if one accepts that Alpha, in the case being commented, has not been assigned anything other than the right to claim a repayment from Beta, then the application of Swedish law, as stated in *EMJA*[56] and as elaborated in *Bulbank*,[57] should lead to an assertion of jurisdiction by the sole arbitrator in *Alpha v. Beta*.[58]

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[55] *See* generally, Lew, Mistelis, Kröll, Comparative International Commercial Arbitration (2003) pp.147-149; Poudret/Besson, Droit Comparé de l'Arbitrage International (2002) pp. 258-264; Girsberger/ Hausmaninger, "Assignment of Rights and Agreement to Arbitrate," 8 Arbitration International 121 ff. (1992). *See* e.g. for Austria: OLG Wien in EvBl 1938/474 and EvB1 1935/657; England: *Schiffahrtgesellschaft Detlev Von Appen GmbH v. Voest Alpine Intertrading GmbH, (The "Jay Bola"), [1997] 2 Lloyd's Rep. 279 C.A.*; France: Cour cass. 1ère civ. 28th May, 2002, *Cimat v. SCA*, Revue de l'Arbitrage 2003 p. 397 note Cohen; Germany: BGH, NJW 1998, 371 and 77 BGHZ 32 (1980); Switzerland: Unreported Federal Tribunal decision of 7th August, 2001 (4P.124/2001), Bulletin ASA 2002 88ff.; and the United States: *GMAC Commercial Credit LLC v. Springs Industries, Inc.*, 171 F.Supp.2d 209 (S.D.N.Y., 2001). *See* however, a recent Italian decision where the assignee was not allowed to avail itself of the arbitration clause against the obligor, absent specific consent of the latter: Cass., Sezioni uniti civili, 17th December 1998, *Soc. Sofal v. Soc. Mondo and Cogemer S.A.*, Nr. 12616, Il Foro Italiano 1999 pp. 2979-2983.

[56] *See* note 28 above, the *EMJA* holding an assignee bound when the arbitration clause is invoked by the obligor.

[57] *See* note 50 above, *Bulbank* holding an obligor bound when the arbitration clause is invoked by the assignee.

[58] In so doing, one could have noted, as the arbitrators did in *EMJA* and in *Bulbank*, that the law of the country of origin of the party resisting arbitration (here China) is favourable to the transfer of the arbitration clause through assignment of rights; *see* unreported decision of the PRC Supreme Court of 16th August, 2000 *CNIEC Henan Corp. v. Liaoning Bohai Nonferrous Metals I/E Ltd.*. *See*, Yuwu, "Arbitration Agreement: The Chinese Practice and Future Trends," 16 Mealey's International Arbitration Report 25, 33 (August 2001) and "China: Assignment of Arbitration Clause,"

Now, even assuming, as seems to be the case in *Alpha v. Beta*, that awareness or notification are necessary elements in order to validate a transfer of the arbitration agreement through assignment theories, the facts, as summarised in the award, could have triggered arguments related to the extension of the arbitration agreement to Alpha under the group of companies doctrine, and pursuant to a possible agent/principal relationship.

(c) Group of Companies Doctrine

The 1999 Act contains no provision on the *iura novit curia* principle.[59] In such case, the need for the arbitrator to explore new legal paths not presented to him by the parties is not an obligation under Swedish law.[60] Still, while reading the award one has the odd impression that there still remain stones to be turned in light of the facts presented by Alpha, notably concerning Alpha's contentions as to the fact it was the "real" seller with which Beta "had dealt all along."[61]

As already noted,[62] such mention could suggest an argument on the extension of the arbitration clause to Alpha based on the group of companies doctrine, with the corollary necessity for the arbitrator to examine in detail the negotiation, signing and execution of the Contract to provide his decision on jurisdiction.

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4 International Arbitration Law Review 11, 12 (2001); Jianlin/Yuwu, "China's New Contract Law: Implications for Arbitration," 3 International Arbitration Law Review 157, 161 (2000).

[59] The inclusion of a provision dealing with the *iura novit curia* principle in the 1999 Act was discussed, but the Swedish Government deemed it better not to set a definite approach in view of the potentially different nationalities and legal cultures of the arbitrators, counsel, and parties, *see* Jarvin, "La Nouvelle Loi Suédoise sur l'Arbitrage," Revue de l'Arbitrage 2000 p. 27, 58-59.

[60] *See* however, Kurkela, "'Jura Novit Curia' and the Burden of Education in International Arbitration – A Nordic Perspective," Bulletin ASA 2003 p. 486, 499 where the author concludes that the *iura novit curia* principle applies to international arbitrations having their seat in Sweden. *See also*, for Switzerland: Unreported Federal Tribunal Decision of 1st November, 1996 (4P.100/1996) published in Bulletin ASA 2002 p. 258, 263 where the Tribunal held that the *iura novit curia* principle applies to international arbitrations having their seat in Switzerland; for France: Derains, "Note – Cour d'appel de Paris (1re Ch. C) 13th November, 1997 – *Lemeur v. SARL Les Cités Invisibles*," Revue de l'Arbitrage 1998 p. 709, 711, where the author contends that *iura novit curia* does not apply to arbitration, and *a fortiori* also not to international arbitration.

[61] Moreover, Alpha made explicit references to "various letters and faxes exchanged by the parties" in this respect.

[62] *See* above section (1) and note 9.

There are other clues, also in the respondent contentions, which point to a possible inclusion of Kappa and Alpha within the same group of companies.[63]

Therefore, the ground was set for a discussion of the group of companies doctrine that could have been, in the eyes of the sole arbitrator, more favourable to Alpha than assignment theories. Although the arbitrator had no obligation to do it, he could have invited the parties to comment on this theory.[64]

In a country such as Sweden where the national arbitration act does not require the agreement to arbitrate to be in writing, such theory could be successfully applied to assert jurisdiction over a party that was not formally a signatory to the original contract containing the arbitration clause, but that had been so closely involved in either the negotiation, signing or execution of the original contract that the arbitration clause could be extended to it. Such doctrine is usually used by a party to the original contract as claimant against a non-signatory "would-be" respondent.[65] Views have been expressed according to which the non-signatory would be authorised to avail itself of the arbitration clause against the signatory respondent.[66]

Here, the facts, as reported in the award, are not explicit as to whether Kappa and Alpha pertain to the same group of companies, and if yes, whether there is a parent-subsidiary relationship between them. Hence, no

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[63] *See* above, the award at The Position of the Parties, last paragraph, which states in relevant part: "Beta … has never agreed to a transfer of the rights and liabilities of its contract party to another company whether in the [Kappa] Group or not …." (emphasis added).

[64] *See*, however, Heuman, Arbitration Law of Sweden: Practice and Procedure (2003) p. 326 who recalls that the *travaux préparatoires* of the 1999 Act deemed it inappropriate for an arbitrator to invite the parties to comment on legal rules which the arbitrator considers applicable but which the parties have not invoked. *See also*, for Switzerland: Unreported Federal Tribunal Decision of 30th September, 2003 (4P.100/2003) where the Tribunal set aside an arbitral award rendered on a legal theory the arbitrators applied without having offered the parties an opportunity to comment on it because that theory did not in any way relate to the arguments the parties had brought forward; Perret, "Les conclusions et leur cause juridique au regard de la règle *ne eat judex ultra petita partium*," in Etudes de droit international en l'honneur de Pierre Lalive, p. 595, 605 where the author favours such invitations by the arbitrators to the parties, although under *ultra petita* concerns.

[65] *See* the well-known French case rejecting an action to set aside an ICC award, Cour d'Appel de Paris, 21st October 1983, *Isover-Saint-Gobain v. Dow Chemical France*, Revue de l'Arbitrage 1984 pp. 98 ff. note Chapelle.

[66] Fouchard, Gaillard, Goldman, On International Commercial Arbitration (1999) p. 286 and cited references.

analysis can be efficiently performed here. One ought to simply note that there is an award, rendered under the auspices of the Institute, which applied the Swedish theory of trust to assert jurisdiction over a parent company which had held itself up as being the party implementing the contract between one of its subsidiaries and a third party.[67] The third party was deemed entitled to trust its impression that the parent company had entered into the same contract as a party. It was further held that when a parent company's conduct constitutes an acceptance of the entire contract, it included the agreement to arbitrate any dispute with the third party.

Although this case does not expressly refer to an application of the group of companies doctrine, the good faith concerns underlying the decision could pave the way for successful arguments (in future cases) based on the economic reality of a group of companies in order to assert jurisdiction over a distinct juridical entity member of that group.

(d) Agent/Principal

For the sake of exhaustiveness, one should finally mention that the facts, as presented in the award, could suggest a last alternate theory for the claimant to succeed in having the arbitrator assert jurisdiction over it: the agent/principal theory.

The same facts mentioned as being capable of underpinning the group of companies doctrine could, as well, have triggered an alternative argument from the claimant according to which Kappa was actually the agent of Alpha when it entered into the Contract with Beta.

There is one Swedish Supreme Court case supporting the view that arbitrators have jurisdiction over a case where a claimant alleges that a non-signatory respondent is actually the principal to the party who signed the contract as agent.[68]

Whereas this case dealt with the issue of whether the respondent was the "true purchaser,"[69] the approach could well be inverted and this case opens

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[67] *See*, Final Arbitral Award rendered in 2000 in SCC case 108/1997, Stockholm Arbitration Report 2001:1 pp. 57 ff.

[68] *See*, *R. Björklund, G. Frederiksson & L. Blomberg v. F. Lundqvist*, Nytt Juridiskt Arkiv (NJA) 1995 p. 500. *See also* Heuman, Arbitration Law of Sweden: Practice and Procedure (2003) p. 79 and cited references.

[69] This case was considered as being an application of the Swedish "doctrine of assertion" according to which a "dispute comes under the arbitrator's jurisdiction insofar as a party asserts that his claim is grounded on the contract with the arbitration clause." *See* Heuman, Arbitration Law of Sweden: Practice and Procedure (2003) p. 57, 79 and cited references.

the door to a competence of the arbitrators to check whether the claimant is actually the "real seller", as in *Alpha v. Beta*.[70]

4. CONCLUSION

Non-signatory parties to an agreement trying to avail themselves of the arbitration clause included in that agreement face a very difficult task. They must accurately describe how, in their view, they became privy to that agreement, and why its dispute resolution clause should apply to them. They also are confronted by the dilemma of presenting one or more theories (where applicable) to underpin their jurisdictional contentions. This latter choice is often made with the underlying common fear that presenting more than one theory would weaken their whole position. In most of the cases, only the strongest theory (in the eyes of the party availing itself of the clause) is invoked, sometimes along with a presentation of the facts that could give rise to parallel theories.

International arbitration users should be wary of not limiting themselves to a single theory where several are applicable, because, whereas it is incumbent upon the arbitrators to examine all of the issues raised, the lack of automatic applicability of the *iura novit curia* principle in international arbitrations held in Sweden will prevent a selective cherry-picking of potential issues by the arbitrator within the facts presented by the parties.

Alpha's counsel were legitimately confident that the transfer from Kappa to Alpha would be characterised as an assignment of rights and that the *EMJA*[71] principles would apply.

The arbitrator decided that *EMJA* was to be distinguished, *Regular*[72] analogised, and *Bulbank*[73] apparently not worth mentioning.[74]

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[70] Alpha asserted it was actually the real seller and adduced related evidence, *see* notes 9 and 61 above. Alpha's claim (the repayment of a supposedly unduly paid guarantee from a bank to Beta) is grounded on the Contract. Accordingly, the arbitrator could well have asserted jurisdiction on that basis.

[71] *See* above note 28.

[72] *See* above note 30.

[73] *See* above note 50.

[74] The whole *Bulbank* set of decisions (from the arbitral award up to the Swedish Supreme Court) was already reported at the date (7th February, 2002) the present arbitration was initiated. *See* above notes 49, 50, 53 and 54. Counsel for Alpha apparently did not mention *Bulbank* in their argumentation either (since no reference to *Bulbank* is included in the award). Despite not so doing, they may have fully met their burden of

Even considering the relatively small claim in dispute, the reader (and probably Alpha's representative) would have appreciated more detailed distinctions and analogies.

Hence, this award rendered on 1st April, 2003 certainly came as a naughty "poisson d'avril" to Alpha, and may have weakened its trust, as part of the international business community, in international commercial arbitration as the most desirable means to solve cross-border disputes.

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education towards the sole arbitrator in case the latter was a Swedish practitioner (*see* Kurkela, op. cit., note 60 at 494).

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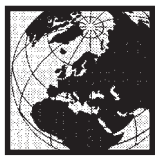

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